A CONSTITUTIONAL ANALYSIS OF OHIO'S NEW DRUNK DRIVING LAW

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Ohio's recently revised DUI law faces a wide variety of challenges on constitutional grounds. Professors Gifford and Friedman describe these constitutional arguments and evaluate their merit by considering both broader constitutional principles and persuasive precedents in jurisdictions with similar statutes. In addition to their analysis of the statute's constitutionality, Professors Gifford and Friedman explore other constitutional issues likely to arise from the enforcement of the statute including ones concerning the implied consent provision, breath tests and the use of motions in limine by defendants in drunk driving prosecutions.

I. INTRODUCTION

PROBABLY no other Ohio statute, civil or criminal, will be challenged on constitutional grounds as often during the next year or two as Ohio's new DUI law.[1] Because of the widespread social acceptability of drinking and driving, many people who would never consider committing most criminal offenses will find themselves prosecuted for driving while intoxicated. The severe consequences for these defendants,[2] including a mandatory jail term,[3] suggest that

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1. *See* OHIO REV. CODE ANN. §§ 4511.19 & 4511.191 (Page Supp. 1982) (effective Mar. 16, 1983). The statutory violation is properly referred to as "driving while intoxicated or drugged." *Id.* In the interests of brevity and clarity, the statute will be referred to as the "DUI law," a common abbreviation for a statute prohibiting driving under the influence of alcohol or drugs.

2. Section 4507.16 provides for mandatory suspension or revocation of license. Section 4507.16 provides for assessment of "points" which eventually may lead to an additional suspension or revocation of license. Section 4509.31 provides for suspension of license and registration for designated offenders unless the defendant gives proof of financial responsibility. Section 4511.99 provides for fines and mandatory imprisonment; *see infra* note 3.

they will be represented by counsel and that their attorneys will challenge the statute on all arguable grounds including constitutional ones.

This article presents a comprehensive constitutional analysis of Ohio's new DUI statute, including consideration of the constitutionality of the statute's various provisions,[4] as well as other constitutional issues that will arise under the statute.[5] Constitutional challenges to the new statute are intuitively appealing because the new DUI law contains many provisions which are unusual in the criminal law.[6] These more stringent provisions are the Ohio legislature's response to the perception that Ohio's former DUI law[7] was not sufficient to combat the risk to public safety caused by drinking drivers. For example, under the prior law, in order to prove intoxication the state generally relied upon a combination of the law enforcement officer's observations of the defendant's driving, the defendant's performance on physical coordination tests, and a presumption of intoxication (often poorly understood by the jury) if breath-testing devices showed that the defendant's blood alcohol concentration exceeded .10% as measured by weight.[8] Experienced defense attor-

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3. Section 4511.99(A)(1) provides that if the offender has *not* been convicted of a DUI offense within five years of the current offense, he shall be sentenced to a term of imprisonment of not less than three consecutive days or 72 consecutive hours, nor more than six months.

Section 4511.99(A)(2) provides that if the offender has been convicted of a DUI offense within five years of the current offense, he shall be sentenced to a term of imprisonment of not less than 10 consecutive days nor more than six months.

Section 4511.99(A)(3) provides that if the offender has been convicted of *more than one* DUI offense within five years of the current offense, he shall be sentenced to a term of not less than 30 consecutive days nor more than one year.

Section 4511.99(A)(5) provides that no court shall suspend the three, ten or thirty consecutive days of imprisonment required to be imposed under the statute.

4. *See infra* notes 24-122 & 131-45 and accompanying text.

5. *See infra* notes 123-30 & 146-92 and accompanying text.

6. Under the new law, it is a crime to drive when the defendant's blood alcohol concentration exceeds a certain level. The statute does not contain, however, any requirement that the defendant's driving ability be impaired. *See* § 4511.19(A)(2); *see also infra* notes 24-31 & 65 and accompanying text. Other unusual provisions of the new law include § 4511.191(E) (providing for "seizure" of defendant's license at time of arrest); § 4511.191(D) (establishing procedure for pretrial suspension of driver's license); § 4507.99(B) (mandatory jail sentence even though the offense is traffic offense); and §§ 4511.99(A)(2), (3) & § 4507.16(B)(2), (3) (enhanced punishment for repeat offenders).

7. OHIO REV. CODE ANN. §§ 4511.19 & 4511.191 (Page 1975).

8. *Id.*

neys frequently persuaded jurors, who could imagine themselves in the defendant's situation, that the officer's observations were "subjective" and that the defendant should be acquitted. The Ohio legislature's response has been to make it *per se* a crime to drive when the concentration of alcohol in the defendant's blood, breath or urine exceeds a specified level.[9] These *per se* provisions, however, are arguably unconstitutional, particularly on the grounds that defendants are not given fair notice of when their conduct becomes illegal because most defendants do not know when their blood alcohol concentration exceeds .10%.[10] Section II of this article discusses constitutional challenges to the *per se* provisions of the statute.[11]

Ohio's new DUI statute also provides for the "seizure" of the defendant's license at the time of his arrest,[12] and for a pre-trial suspension of the defendant's license under certain conditions.[13] These provisions pose serious procedural due process issues which will be discussed in Section III.[14] Further, the statute continues to provide that all Ohio drivers have impliedly consented to blood, breath or urine tests for alcohol or drugs,[15] and the constitutional issues arising from the implied consent provision will be described in Section IV.[16] Finally, Section V[17] discusses the constitutionality of the repeat offender provisions of the DUI statute[18] and includes consideration of whether offenses committed prior to the effective date of the statute[19] constitutionally can be used to enhance the defendant's punishment.[20]

Following this analysis of the constitutionality of the new DUI provisions, this article will consider two other constitutional issues which have arisen under Ohio's previous DUI statute and which will

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9. OHIO REV. CODE ANN. § 4511.19(A)(2)-(4) (Page Supp. 1982).

10. *See infra* notes 32-34 & 46-55 and accompanying text.

11. *See infra* note 24-90 and accompanying text.

12. *See* § 4511.191(E).

13. *See* § 4511.191(D).

14. *See infra* notes 91-122 and accompanying text.

15. § 4511.191(A).

16. *See infra* notes 123-30 and accompanying text.

17. *See infra* notes 131-45 and accompanying text.

18. §§ 4507.16(B)(2), (3) (license suspension or revocation) & §§ 4511.99(A)(2), (3) (imprisonment & fine).

19. The effective date of the new law is March 16, 1983.

20. *See infra* notes 141-45 and accompanying text.

become more acute under the new law.[21] Section VI will consider whether the defendant's rights under the due process clause of the fourteenth amendment require the prosecutor to preserve a sample of the defendant's breath for later independent testing by defense experts.[22] Section VII will explore the use of the motion in limine as a procedural device to raise fourth amendment claims in drunk driving cases.[23]

II. CONSTITUTIONALITY OF THE STATUTE'S *Per Se* SECTIONS

A. Constitutional Challenges Under the "Void For Vagueness" Doctrine

As amended, Section 4511.19 of the Ohio Revised Code makes it a violation of law to operate a motor vehicle not only if the defendant "is under the influence of alcohol or any drug of abuse or combination of alcohol and any drug of abuse,"[24] but also if the concentration of alcohol in the defendant's bloodstream exceeds .10% as measured by weight,[25] or if there is a corresponding concentration of alcohol in the defendant's breath[26] or urine.[27] Under the old statute, a finding of .10% blood alcohol content by weight merely created a rebuttable presumption of intoxication.[28] The new statute provides that a .10% blood alcohol concentration *is itself an element* of the statute in lieu of being "under the influence of alcohol."[29] In the

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21. *See infra* notes 146-94 and accompanying text.

22. *See infra* notes 146-75 and accompanying text.

23. *See infra* notes 176-94 and accompanying text.

24. § 4511.19(A)(1).

25. § 4511.19(A)(2).

26. Section 4511.19(A)(3) provides: "(A) No person shall operate any vehicle, streetcar, or trackless trolley within this state if any of the following apply . . . . (3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath."

27. Section 4511.19(A)(4) provides: "(A) No person shall operate any vehicle, streetcar, or trackless trolley within this state if any of the following apply. . . . (4) The person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred millimeters of his urine."

28. *See* former § 4511.19(B).

29. § 4511.19(A)(2). A number of other jurisdictions have previously adopted laws making it a violation to drive a vehicle when the defendant's blood alcohol concentration exceeds a stated concentration, usually .10% blood alcohol concentration as measured by weight. *See, e.g.*, ALA. CODE § 32-5A-191 (Supp. 1981); ALASKA STAT. § 28.35.030 (Supp. 1981); CAL. VEH. CODE § 23152 (Deering 1980); DEL. CODE ANN. tit. 21, § 4177 (1974); FLA. STAT. ANN. § 322.262 (West Supp. 1982); MINN. STAT. ANN. §

alternative, the state may prove *as an element* that the defendant had .10% grams by weight of alcohol per 210 liters of breath,[30] or a corresponding concentration of alcohol in his urine.[31]

These sections of the new statute which make it a crime for someone to drive when the alcohol content of his blood, breath or urine exceeds a specified level, may arguably be unconstitutional under the "void for vagueness" doctrine. The due process clause of the fourteenth amendment makes unconstitutional any statute which "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[32] Defendants in other jurisdictions have argued that DUI statutes similar to Ohio's are unconstitutionally vague because consumers of alcoholic beverages are unable to determine how much alcohol a driver may consume before his alcohol blood level makes it unlawful for him to drive.[33] Few individuals are aware of when their blood alcohol level surpasses .10%, particularly because one's blood alcohol level will be affected by a wide variety of factors including an individual's weight, the time elapsed since the drinking began, any consumption of food and the type of alcohol consumed.[34] A California court recently held

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169.121 (West 1979); MO. ANN. STAT. § 577.020 (Vernon 1979); NEB. REV. STAT. § 39-669.08 (Supp. 1980); N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1981-1982); N.C. GEN. STAT. § 20-138 (Supp. 1981); OR. REV. STAT. § 487-540 (1981); S.D. CODIFIED LAWS ANN. § 32-23-1 (1976); UTAH CODE ANN. § 41-6-44 (Supp. 1981); VT. STAT. ANN. tit. 23, § 1201 (Supp. 1981); WASH. REV. CODE ANN. § 46.61.504 (1970) & Supp. 1982).

30. § 4511.19(A)(3).

31. § 4511.19(A)(4). By making the concentration of alcohol in the defendant's breath or urine an alternative element of the offense, as opposed to being only a method for proving blood alcohol content, the Ohio legislature precluded defendants from arguing that commonly used breath and urine tests do not accurately measure the alcohol content in the defendant's blood. For examples of arguments used by defendants under the previous statute to contend that breath or urine tests did not accurately measure blood alcohol content, see R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 22.05-.07 & § 25.01-.02 (3d ed. 1982); W. FRAJOLA, DEFENDING DRINKING DRIVERS 22-28 & 45-48 (1980).

32. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)); *see also* Kolender v. Lawson, 103 S. Ct. 1855, 1858 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); State v. Dorso, 4 Ohio St. 3d 60, 61, 446 N.W.2d 449, 450 (1983); State v. Young, 62 Ohio St. 2d 370-72, 406 N.E.2d 499, 501 (1980).

33. *See, e.g.*, Roberts v. State, 329 So. 2d 296, 297 (Fla. 1976); Greaves v. State, 528 P.2d 805, 808 (Utah 1974); State v. Franco, 96 Wash. 2d 816, 824, 639 F.2d 1320, 1324 (1982).

34. *See* R. ERWIN, *supra* note 31, at § 15.01-.04.

California's DUI law unconstitutional on a vagueness rationale.[35]

Both the United States Supreme Court and the Ohio Supreme Court have failed to articulate a clear and workable test of when a statute is so lacking in certainty and notice as to be unconstitutionally vague. Indeed, several decades ago, the United States Supreme Court admitted that "the precise point of differentiation in some instances is not easy of statement."[36] More recently, the Court has noted that in many cases "the question is close."[37]

Nevertheless, there are three identifiable rationales behind the prohibition against vague statutes,[38] and understanding these factors is useful in determining whether any particular statute, such as a DUI statute, is unconstitutional. First, individuals of ordinary intelligence are entitled to fair warning as to what conduct is prohibited by a statute so that they have a reasonable opportunity to act accordingly.[39] Second, vague laws allow and invite discriminatory enforcement because they do not provide standards for those who ap-

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35. People v. Alfaro, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983); *contra* Burg v. Municipal Court, 144 Cal. App. 3d 169, 192 Cal. Rptr. 531 (1983); Roberts v. State, 329 So. 2d 296 (Fla. 1976); Greaves v. State, 528 P.2d 805 (Utah 1974); State v. Franco, 96 Wash. 2d 816, 639 P.2d 1320 (1982). In *Alfaro*, the California Court of Appeals in the First District stated that "[t]he grave problem we perceive in the law is, however, that potential violators are given no rational means of measuring the relative level of alcohol consumption which the statute forbids, and that in some cases no such means are reasonably accessible." 143 Cal. App. 3d at 532-33, 192 Cal. Rptr. at 181.

The Ohio appellate courts avoided any "notice" problems under Ohio's previous "driving while under the influence of alcohol" statute, § 4511.19, by requiring that the " 'influence' effect some deprivation of clearness of intellect and control which one would otherwise possess." State v. Hardy, 28 Ohio St. 2d 89, 91-92, 276 N.E.2d 247, 250 (1971). The alleged flaw in the new statute is that it is based solely on blood "alcohol consumption which cannot be identified by those who violate its provisions." People v. Alfaro, 143 Cal. App. 3d 528, 532, 192 Cal. Rptr. 178, 181 (1983).

36. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

37. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). *Compare* Coates v. Cincinnati, 402 U.S. 611 (1971) (statute making it offense for three or more persons to assemble and conduct themselves in an annoying manner held unconstitutional) *with* Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding anti-noise ordinance) and State v. Dorso, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983) (upholding anti-noise ordinance).

38. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

39. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

ply them.[40] Third, where a vague criminal statute arguably prohibits conduct protected by the first amendment, it may inhibit the exercise of those freedoms.[41] Recently, the United States Supreme Court acknowledged that the Court considers the second rationale to be the most important of the three:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the most important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[42]

Application of the second and third rationales underlying the "void for vagueness" doctrine to Ohio's DUI statute does not suggest any constitutional infirmity in the statute. The statute prohibits certain quantified and specific levels of alcohol concentration in the defendant's body.[43] Thus, the statute offers precise guidelines for law enforcement officers, and opportunities for discriminatory enforcement of the statute are minimized.[44] Further, Ohio's drunk driving law

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40. *See, e.g.*, Kolender v. Lawson, 103 S. Ct. 1855, 1958 (1983); Smith v. Goguen, 415 U.S. 566, 575 (1974); Papachristou v City of Jacksonville, 405 U.S. 156, 162 (1972); Columbus v. New. 1 Ohio St. 3d 221, 225, 438 N.E.2d 1155, 1158 (1982).

41. *See, e.g.*, Kolender v. Lawson, 103 S. Ct. 1855, 1859 (1983); Smith v. Goguen, 415 U.S. 566, 572 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 165-66 (1972). The "void for vagueness" doctrine therefore overlaps with and is similar to the "overbreadth" doctrine. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 720-22 (1978). A statute is unconstitutional "on its face" if it prohibits not only activity which the legislature may constitutionally prohibit, but also activities that constitute an exercise of constitutional rights. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing is void on its face because the prohibition covers picketing protected by the first amendment). The courts require a greater degree of specificity in a statute when first amendment rights are involved than in other contexts. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 573 (1974).

42. Kolendar v. Lawson, 103 S. Ct. 1855, 1858 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

43. § 4511.19(A)(2)-(4).

44. In People v. Alfaro, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983), the California Court of Appeals for the First District arguably reached a contrary conclusion. The court, relying in part on the potential for discriminatory enforcement, struck down a similar California statute. The court stated, in part, "we find in section 23152, subdivision (b) no guidelines governing the discretion of law enforcement officers in determining whether a subject detained for reasons unrelated to his driving ability should be subjected to chemical testing." 143 Cal. App. 3d At 535 n.5, 192 Cal. Rptr. at 182 n.5. The Ohio statute does provide such a guideline by requiring the police officer to have "reasonable grounds to believe the person to have been driving a

does not impinge upon any constitutionally sensitive areas.[45]

The only viable argument based upon the "void for vagueness" doctrine is that the statute does not provide fair notice to drivers as to when their conduct becomes criminal, because they are not aware when their blood alcohol content exceeds .10%.[46] Recently, the California Court of Appeals for the First District declared a similar California statute unconstitutional and explained its decision by stating:

> Here, we are not concerned with laws which *forbid* driving a motor vehicle after some alcoholic ingestion; instead we deal with a law which allows persons to drink and drive, but gives no reasonably ascertainable means of knowing when such conduct becomes "criminal."[47]

The argument that the statute is unconstitutional has a certain intuitive appeal. With most criminal statutes, defendants easily rec-

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motor vehicle upon the public highways in this state while under the influence of alcohol." *See* § 4511.191(A). Although a somewhat vague guideline, this statutory subsection is no more vague than similar criteria routinely employed by police officers in making arrests or undertaking searches. Further, any error in judgment by the law enforcement officer will largely be corrected if the suspect takes an alcohol test and the result is less than .10% blood alcohol content. The officer's exercise of discretion leads only to the rather minimal intrusion of taking a breath, urine or blood test. Presumably, the driver who has "passed the test" would either be released or charged with a lesser offense accurately reflecting the conduct for which the officer originally stopped the driver, such as reckless operation. *See* § 4511.20.

45. In Papachristou v. City of Jacksonville, 405 U.S. 156 (1971), the United States Supreme Court struck down a vagrancy ordinance as unconstitutional, and in doing so, it rhapsodized eloquently about the virtues of "wandering" and "strolling" which arguably were forbidden by the ordinance under certain conditions. Justice Douglas stated:

> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. The amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocated silence.
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> They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.

Id. at 164. Fortunately neither the Supreme Court, American poets nor American philosophers have extolled the virtues of drunk driving.

46. *See supra* notes 33-35 and accompanying text.

47. People v. Alfaro, 143 Cal. App. 3d 528, 534, 192 Cal. Rptr. 178, 182 (1983). Shortly thereafter, a separate division of the same appellate court reached a contrary conclusion. *See* Burg v. Municipal Court, 144 Cal. App. 3d 169, 192 Cal. Rptr. 531 (1983).

ognize whether they are, or are not, violating the prohibition. Furthermore, the sense that the statute is unfairly vague results in part from the reality that many citizens do drink and drive, and therefore may either be violating the statute or may be coming close to the line separating lawful conduct from illegal conduct. The Ohio Supreme Court, however, recently upheld an ordinance attacked on "void for vagueness" grounds under similar conditions. In *State v. Dorso*[48] the court considered a "Loud Music Noises" ordinance which made it unlawful to play music or to amplify sound "in such a manner as to disturb the peace and quiet of the neighborhood, having due regard for the proximity of places of residence, hospitals or other residential institutions and to any other conditions affected by such noises."[49] Despite the apparent lack of a strict demarcation between legal and illegal activity, and the obvious impact of the first amendment,[50] the Ohio Supreme Court upheld the statute.

The argument that Ohio's DUI law is unconstitutional because it does not provide drivers with fair notice of when their conduct becomes criminal, while not frivolous, should be rejected. The "person of common intelligence" is given the constitutionally required notice of a potential violation of the statute in two ways. First, the potential defendant is aware of the possibility of acting illegally whenever he or she has anything to drink containing alcohol except in minimal quantities, and proceeds to drive; and second, most potential defendants will be aware of the illegality of their conduct when their mental and physical conditions are impaired by the consumption of alcohol and they proceed to drive. In rejecting a "void for vagueness" attack on a similar statute, the Utah Supreme Court stated:

> We can see no reason why a person of ordinary intelligence would have any difficulty in understanding that if he has drunk anything containing alcohol, and particularly any substantial amount thereof, he should not attempt to drive or take control of a motor vehicle.[51]

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48. 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983).

49. *Id.* at 60-61, 446 N.E.2d at 450.

50. *See supra* note 41 and accompanying text.

51. Greaves v. State, 528 P.2d 805, 808 (Utah 1974). Other cases rejecting the "void for vagueness" challenge to statutes making it a crime to drive when the defendant's blood alcohol content exceeds a specified level include Burg v. Municipal Court, 144 Cal. App. 3d 169, 173-74; 192 Cal. Rptr. 531, 533-34 (1983); Roberts v. State, 329 So. 2d 296, 297 (Fla. 1976) & State v. Franco, 96 Wash. 2d 816, 824-25, 639 P.2d 1320, 1324 (1982).

Of course, it is true that the Ohio statute does not "forbid driving a motor vehicle after some alcoholic ingestion."[52] Once the defendant combines drinking and driving, however, it is reasonable to place the burden on the defendant to decide when his drinking exceeds the legal limit.[53] The United States Supreme Court has indicated that a statute is not unconstitutionally vague simply because it is difficult to determine whether certain marginal offenses fall within the statutory language.[54]

The *per se* sections of the Ohio drunk driving statute are also constitutional because there is nothing about the statute itself which prevents drivers from determining when they are violating its provisions. The language is not ambiguous or vague. The constitutional attack relies upon the fact that most drivers do not know precisely when their blood alcohol content exceeds .10%. Yet there are means available for the driver to determine when he meets or is likely to meet the threshold level. In upholding the constitutionality of the *per se* provisions of Washington's DUI statute, the Washington Supreme Court relied, in part, upon the existence of charts that were available showing the number of drinks necessary to produce the requisite level of blood alcohol content.[55] Increasingly, bars are purchasing breath-testing devices for the use of their patrons; nothing prevents consumers of alcoholic beverages from purchasing similar machines for their own use. "Word of mouth" communication is likely to inform many drivers who consume alcoholic beverages of threshold limits. The argument that drivers do not have notice of when they violate the statute unless there is a breath-testing machine readily available is analytically parallel to the argument that a driver cannot be arrested for speeding when his speedometer is broken.

In addressing constitutional challenges to the DUI law, Ohio ap-

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52. People v. Alfaro, 143 Cal. App. 3d 528, 534, 192 Cal. Rptr. 178, 182 (1983).

53. *See* People v. Perkins, 126 Cal. App. 3d Supp. 12, 179 Cal. Rptr. 431 (1981); *contra* People v. Alfaro, 143 Cal. 3d 528, 533, 192 Cal. Rptr. 178, 181 (1983).

54. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 575-79 (1973) (Hatch Act provision against federal employees taking "active part in political management or in political campaigns" not unconstitutionally vague); United States v. National Dairy Products Corp., 372 U.S. 29, 32-36 (1963) (Robinson-Patman Act provision against selling goods at "unreasonably low prices for purpose of destroying competition" not unconstitutionally vague); United States v. Petrillo, 332 U.S. 1, 6-7 (1947) (Communications Act provision against forcing broadcasting licensee to hire persons "in excess of number of employees needed" not unconstitutionally vague).

55. State v. Franco, 96 Wash. 2d 816, 825, 639 P.2d 1320, 1324 (1982).

pellate courts will also be influenced by two axioms of constitutional construction. First, all legislative enactments enjoy a presumption of constitutionality,[56] and the courts will construe the statute in a manner making it constitutional if at all possible.[57] Second, a defendant arguing that the statute is "void for vagueness" must show that the statute is vague as it applies to his own conduct, without regard to whether it is vague as applied to other defendants.[58] Therefore, if a defendant knows or should know that he is in violation of the law because he is "under the influence of alcohol"[59] and his driving ability is impaired,[60] he does not have standing to assert that the statute is vague as applied to other defendants who may have a .10% blood alcohol content but whose driving is not impaired. Thus, most defendants who will attempt to challenge the constitutionality of Ohio's drunk driving law probably do not have the standing to do so.

The *per se* sections of Ohio's drunk driving law appear to be constitutional when challenged on "void for vagueness" due process grounds, although a contrary conclusion is tenable.[61] The Supreme Court recently recognized that the most important concern at stake

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56. State v. Dorso, 4 Ohio St. 3d at 61, 446 N.E.2d at 450; Benevolent Ass'n v. Parma, 61 Ohio St. 2d 375, 377, 402 N.E.2d 519, 521 (1980).

57. *See* State v. Dorso, 4 Ohio St. 3d at 61, 446 N.E.2d at 450; State v. Sinito, 43 Ohio St. 2d 98, 101, 330 N.E.2d 896, 898 (1975). Section 1.47 of the Ohio Revised Code provides, in pertinent part, that "[i]n enacting a statute it is presumed that . . . [c]ompliance with the constitutions of the state and the United States is intended . . . ."

58. *See* Parker v. Levy, 417 U.S. 733, 756 (1974). In *Parker*, the defendant was an officer prosecuted under various sections of the Uniform Code of Military Justice for urging black enlisted men to refuse to obey orders to go to Vietnam. *Id.* at 736-37. The Court held that although there might be marginal applications of the sections under which defendant was prosecuted that would be unconstitutional, that the defendant's conduct was clearly not protected by the first amendment. *Id.* at 760-61. However, some statutes may be vague in all of their applications because they provide no "ascertainable standard for inclusion or exclusion." *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 578 (1974); Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Also, when a statute impinges upon first amendment rights, defendants are given more latitude to raise the rights of third parties. *See* Kolender v. Lawson, 103 S. Ct. 1855, 1859 n.8 (1983); Gooding v. Wilson, 405 U.S. 518, 521 (1972); *see also* L. TRIBE, *supra* note 41.

59. *See* OHIO REV. CODE ANN. § 4511.19(A)(1) (Page Supp. 1982).

60. *See* State v. Hardy, 28 Ohio St. 2d 89, 91-92, 276 N.E.2d 247, 250 (1971); *see also supra* note 35.

61. *See* People v. Alfaro, 143 Cal. App. 3d 528, 531-32, 192 Cal. Rptr. 178, 180 (1983).

with the vagueness doctrine is the requirement that the statute provide law enforcement officers with guidelines to avoid discriminatory enforcement,[62] and the precise levels of blood alcohol content outlawed by the statute certainly do that. The other primary concern behind the vagueness doctrine is the need for potential defendants to have fair warning of what conduct is prohibited. Although this issue is a closer question, the DUI statute notifies defendants that when they drive after consuming significant quantities of alcohol, and certainly when their driving ability is impaired, they are in violation of the law.[63]

B. Constitutional Challenges Based Upon Limits To the State's Police Power

Comparable provisions of DUI statutes have been attacked in other jurisdictions on the grounds that they are not a valid exercise of the state's police powers, but such attacks have been uniformly unsuccessful.[64] The defendants' argument is that without a statutory requirement that driving ability be impaired, the statute prohibits conduct that may pose no actual threat to public health, safety or welfare justifying the exercise of the state's police power.[65]

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62. *See* Kolender v. Lawson, 103 S. Ct. 1855, 1858 (1983); Smith v. Goguen, 415 U.S. 566, 574 (1972); *see also supra* note 42 and accompanying text.

63. *See supra* notes 51-54 and accompanying text.

64. *See, e.g.*, Coxe v. State, 281 A.2d 606, 607 (Del. 1971); Robert v. State, 329 So. 2d 296, 297 (Fla. 1976); State v. Basinger, 30 N.C. App. 45, 48, 226 S.E.2d 216, 218 (1976).

65. Defendants making this argument should be given some encouragement by the Ohio Supreme Court's decision in State v. Hardy, 28 Ohio St. 2d 89, 276 N.E.2d 247 (1971) in which the court construed Ohio's previous DUI statute to require a finding that the defendant's consumption of alcohol had deprived him of "clearness of intellect and control which one would otherwise possess." *Id.* at 91-92, 276 N.E.2d at 250. The Court suggested that such a construction was required to avoid constitutional problems:

> In instructing a jury concerning the statutory meaning of "under the influence of alcohol" it is not sufficient to charge a jury that the alcohol drunk by the defendant need have caused only *some* influence on him. Such a charge would include and make actionable such influences as the miniscule alteration of an accused's heart beat, breathing rate, perspiration, salivation—or even humor and good spirits. None of those, alone, would necessarily adversely affect a person's physical or mental capabilities. *A conviction satisfying such a vague standard could only have a remote relationship to the intended purpose of the statute, which we believe was enacted to protect persons and property from drivers whose physical and mental ability to act and react are altered from the normal because of the consumption of alcohol. A criminal statute*

Generally the Ohio Supreme Court appears to utilize a two-prong test in determining whether a statute is a legitimate exercise of the state's police power.[66] First, does the challenged statute have as its purpose an objective which promotes the public health, safety and welfare?[67] Second, do the means of regulation chosen by the legislature rationally relate to the evil the statute or ordinance is intended to combat?[68] In answering both of these questions, the act of the legislature is entitled to a strong presumption of constitutionality.[69]

The Ohio Supreme Court's response to this constitutional challenge to Ohio's DUI law probably is predicted most accurately by the Court's earlier decision in *State v. Saurman.*[70] In *Saurman,* the defendants challenged an Ohio statute[71] which prohibited the shining of lights from any vehicle into woods or fields for the purpose of spotlighting any animal. They argued that the statute was not rationally related to the protection of wild game because a violation could occur even though the violator was not hunting.[72] The defendants' argument in *Saurman* is analogous to the suggestion that the DUI statute is unconstitutional without a requirement of impaired driving.[73] The Ohio Supreme Court recognized that some individuals convicted of shining lights would not pose any threat of harm to animals, but nevertheless upheld the constitutionality of the statute:

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must be applied so as to have a reasonable relationship to its purpose in order to fit within constitutional requirements of due process of law.

Id. at 91, 276 N.E.2d at 249-50 (emphasis added).

66. *See, e.g.,* Cincinnati v. Kelley, 47 Ohio St. 2d 94, 97, 351 N.E.2d 85, 87 (1976); Dragelevich v. Youngstown, 176 Ohio St. 23, 197 N.E.2d 334, 338 (1964); Froelich v. Cleveland, 99 Ohio St. 376, 391, 124 N.E. 212, 216 (1919).

67. Hilton v. Toledo, 62 Ohio St. 2d 394, 396, 405 N.E.2d 1047, 1049 (1980); Canton v. Whitman, 44 Ohio St. 2d 62, 65, 337 N.E.2d 766, 769 (1975); Columbus Auction House, Inc. v. State, 69 Ohio App. 2d 1, 5, 429 N.E.2d 1073, 1076 (1980).

68. State v. Saurman, 64 Ohio St. 2d 137, 132, 142, 413 N.E.2d 1197, 1201 (1980); Cincinnati v. Kelley, 47 Ohio St. 2d 94, 97, 351 N.E.2d 85, 87 (1976).

69. State v. Saurman, 64 Ohio St. 2d at 138-39, 413 N.E.2d at 1199; State v. Renalist, Inc., 56 Ohio St. 2d 276, 278, 383 N.E.2d 892, 894 (1978).

70. 64 Ohio St. 2d 137, 413 N.E.2d 1197 (1980).

71. OHIO REV. CODE ANN. § 1533.161 (Page 1976).

72. 64 Ohio St. 2d at 139, 413 N.E.2d at 1199.

73. Upon closer analysis, the parallel is even more striking. Just as the prior Ohio drunk driving statute was interpreted to require a finding of impaired driving ability, *see* State v. Hardy, 28 Ohio St. 2d 89, 91-92, 276 N.E.2d 247, 250 (1971), the previous "jacklighting" statute required the defendant to be in possession of a hunting implement. *See* 1969 Ohio Laws 1964. This requirement was removed by amendment in 1972. *See* 1972 Ohio Laws 2296.

> This law does prohibit the legitimate viewing of wild game from automobiles by way of artificial light by many citizens who would not take undue advantage of such a privilege. However, it is also a fact that laws must be enacted to prevent the excesses of a few, even though such laws have the effect of denying certain otherwise lawful activity of the majority.
>
> *There is a reasonable basis for the General Assembly to determine that the elimination of all spotlighting of wild game from vehicles would be in the best interests and furtherance of the protection of the wild animals of this state.*[74]

Despite the Ohio Supreme Court's earlier dicta in *State v. Hardy*[75] it is extremely unlikely that Ohio's new DUI statute will be struck down as unconstitutional on the grounds that it does not rationally further a legitimate state objective. The drunk driving statute has as its purpose the protection of drivers who use the state's highways and roads. Therefore, the legislature might reasonably conclude that preventing individuals whose blood alcohol exceeds .10% from driving furthers the safety of drivers. The era when courts would substitute their own judgment for that of the legislature in areas where explicit constitutional rights are not at stake has long since passed.[76]

C. The Statute as an Unconstitutional "Conclusive Presumption"

Several commentators have suggested that DUI laws such as Ohio's that make it a crime to drive when one's blood alcohol con-

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74. 64 Ohio St. 2d at 141, 423 N.E.2d at 1200-01 (emphasis added). As is the case of the new drunk driving law the amended "jacklighting" statute was deemed necessary to deal with offenders:

> From a review of the progression of this legislation, it becomes apparent that the General Assembly concluded that increasingly stringent measures were needed to curtail the shining of artificial lights into the woodlands at night in order to spot wild game. It is also apparent that there were problems of enforcement of R.D. 1533.161 prior to the complete banning of the shining of lights into the woodlands from an automobile for the purpose of spotting wild animals. Further the enforcement of the statute must have provided many difficult problems for the game protector in determining whether those persons in moving vehicles, shining lights into the woods, had hunting implements in their possession. Finally, it is also quite conceivable that persons were taking advantage of the opportunity to lawfully spotlight wild animals from their vehicles, and were unlawfully killing these animals.

Id., 413 N.E.2d at 1200.

75. 28 Ohio St. 3d 89, 276 N.E.2d 248 (1971).

76. *See generally* L. TRIBE, *supra* note 41, at 432-35, 564-72.

centration exceeds a certain level are unconstitutional because they create an "irrebutable" or "conclusive" presumption.[77] Such a presumption, it is argued, is unconstitutional because it relieves the prosecution from the burden of proving every element of the crime beyond a reasonable doubt[78] and because it deprives the defendant of his right to a jury trial.[79] The *per se* provisions of Ohio's revised DUI law are sometimes erroneously referred to as "conclusive" presumptions[80] because they are contrasted with the prior Ohio law which provided for a rebuttable presumption of intoxication when the driver's blood alcohol content as measured by weight exceeded .10%.[81]

If, in fact, the provisions of the law constituted a "conclusive presumption," that statute would be unconstitutional.[82] In *Sandstrom v. Montana*[83] the defendant was charged with "deliberate homicide" in that he did "purposely or knowingly" cause the victim's death. The trial court instructed the jury that "a person intends the ordinary consequences of his voluntary acts," despite de-

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77. *See* Thompson, *The Constitutionality of Chemical Test Presumption of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 333-36 (1983); Comment, *Washington's New DWI Statute: Does Due Process Mandate Preservation of Breathalyzer Ampoules?*, 16 GONZ. L. REV. 357, 361-63 (1981)[hereinafter cited as Comment, *Washington's New DWI Statute*]; Comment, *Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?*, 10 PEPPERDINE L. REV. 91, 123-25 (1982)[hereinafter cited as Comment, *Under the Influence*].

78. The defendant's due process right to have his guilt proved beyond a reasonable doubt was recognized in In re Winship, 397 U.S. 358, 364 (1970). The argument that a drunk driving statute like Ohio's violated this right was rejected by the Delaware Supreme Court in Coxe v. State, 281 A.2d 606, 607 (1971).

79. Comment, *Washington's New DWI Statute*, *supra* note 77, at 362; *cf.*, Sandstrom v. Montana, 442 U.S. 510, 521-24 (1979) (jury instruction, in criminal case involving issue of intent, that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," held violative of fourteenth amendment due process); Morissette v. United States, 342 U.S. 246, 274-75 (1952) (a conclusive presumption conflicts with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime). The sixth amendment affords criminal defendants the right to a trial by an impartial jury, and under the fourteenth amendment this right applies to trials in state courts. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

80. *See* Comment, *Under the Influence*, *supra* note 77, at 123-25.

81. *See* OHIO REV. CODE ANN. § 4511.19(B) (Page 1975).

82. *See* Sandstrom v. Montana, 442 U.S. at 521-23; United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978); Morissette v. United States, 342 U.S. 246, 275 (1952).

83. 442 U.S. 510 (1979).

fense counsel's objections that the instruction shifted the burden of proof to the defendant to rebut the element of "purpose."[84] The United States Supreme Court reversed the defendant's conviction because it found that the jurors might have concluded that the court had instructed them to find "purpose" or "knowledge" solely from the fact that the defendant killed the victim. By taking the issue of intent away from the jury, the trial court deprived the defendant of his right to a jury trial and his presumption of innocence.[85]

Commentators who argue that the *per se* provisions of DUI laws are unconstitutional view the statute as providing that when the jury finds that a driving defendant had a blood alcohol concentration of greater than .10%, the jury is to conclusively presume the defendant is "under the influence of alcohol."[86] This analysis is incorrect. A jury finding that the defendant's blood alcohol concentration exceeds .10% does not, under Ohio law, create a conclusive presumption that the defendant is guilty of driving under the influence of alcohol under Section 4511.19(A)(1) of the Ohio Revised Code. Rather, a blood alcohol concentration of .10% is itself an element for an offense charged under Sections 4511.19(A)(2), 4511(A)(3) or 4511.19(A)(4), which provide for separate and distinct ways of proving a violation.[87] It is within the legislature's power to make it a criminal offense to drive when blood alcohol content levels exceed stated concentrations without a separate element that the defendant

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84. *Id.* at 512-13.

85. *Id.* at 523-24.

86. *See* Thompson, *supra* note 77, at 333-36; Comment, *Under the Influence, supra* note 77, at 123-25; Comment, *Washington's New DWI Statute, supra* note 77, at 361-63.

87. *See supra* note 82. One commentator argues that a similar Nebraska statute creates not a *per se* law but rather a conclusive presumption of impaired driving ability. *See* Thompson, *supra* note 77, at 334. According to Mr. Thompson:

> In *State v. Weidner,* 192 Neb. 161, 219 N.W.2d 742 (1974), the Supreme Court of Nebraska considered a statutory scheme which made it against the law to operate a motor vehicle while either (1) under the influence of alcohol; (2) under the influence of any drug; or (3) having a BAC of 0.10 percent or greater. The Nebraska court concluded that this scheme did not create three separate offenses, but rather a single offense which resulted from one of three conditions. The court found that the Nebraska Legislature "intended that having ten-hundredths of one percent or more by weight of alcohol in the body fluid appreciably impairs the ability to operate a motor vehicle." Given this reasoning, it appears that Nebraska Legislature has created not a *per se* law but rather a conclusive presumption of impaired driving ability.

Id. (footnotes omitted).

be "under the influence of alcohol."[88] The evil addressed by the Supreme Court's "conclusive presumption" cases[89] is that the trial court has removed from jury consideration one of the elements which the legislature included, explicitly or implicitly, within its statutory definition of a crime. When the legislature, rather than a trial court, eliminates an element of a crime, it is not a "conclusive presumption" but rather a different rule of law.[90] As such, it is not subject to constitutional attack on the grounds that it is a "conclusive presumption."

III. Seizure and Pre-trial Suspension of Driver's License

An important goal of the legislature in enacting Ohio's new DUI law was to remove potentially dangerous drivers from the road as quickly as possible.[91] However, significant constitutional constraints surround the procedures for revoking driving privileges. It seems well settled that even when the revocation of a "privilege" is involved, the due process clause imposes some restrictions upon the exercise of governmental power.[92] Indeed the Supreme Court has held that the suspension of a driver's license involves important interests of the licensee, so that a driver's license may not be taken away without the procedural due process required by the fourteenth amendment.[93]

Acknowledging that some due process is required whenever a

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88. *See* Ohio Rev. Code Ann. § 4511.19(A)(2)-(4) (Page Supp. 1982).

89. *See supra* note 82.

90. In Coxe v. State, 281 A.2d 606 (Del. 1971), the Delaware Supreme Court addressed "a conclusive presumption" attack on Delaware" *per se* statute and rejected the constitutional challenge. The court stated:

> The statute provides for no presumption of guilty, but instead provides that any person having the specified blood alcohol concentration "shall be guilty." To establish guilt, the State must prove only that the defendant was in physical control of the vehicle, and that a proper and timely test showed the required percentage of alcohol concentrated in the defendant's system.

Id. at 607. *See also* State v. Torrey, 32 Or. App. 439, 574 P.2d 1138 (1978).

91. *See* Weisenberger, *Ohio's New "Drunk Driving" Law*, 55 Ohio St. B. A. Rep. 2210, 2219 (1982).

92. Sherbert v. Verner, 374 U.S. 398 (1963); *but cf.* Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that the due process clause does not preclude the government from conditioning the receipt of funds on their not being used to pay for medically necessary abortions even though the government chooses to subsidize other medically necessary treatment for indigents).

93. Bell v. Burson, 402 U.S. 535 (1971).

driver's license is taken away, however, does not resolve the question of appropriate procedures. It instead leads to the next question, "what process is due to protect against an erroneous deprivation of [the driver's property] interest [in this driver's license]?"[94] Traditionally this has been determined by using the three-factor *Mathews v. Eldridge*[95] test. The courts must consider

> (1) the nature of the private interest being affected,
> (2) the risk of an erroneous deprivation of that interest through use of existing procedures and the probable value of additional safeguards; and
> (3) the state's interest in the summary procedures and the burdens that would result from the substitute procedures sought.[96]

In driver's license suspension, the United States Supreme Court has determined that an opportunity for a hearing on all elements essential to the license suspension decision is required.[97] Nevertheless, the hearing need not take place before suspension. At least in cases where the basis for suspension is unlikely to be subject to substantial factual dispute,[98] a prompt post-termination hearing provides all the process that is due.[99]

The new DUI statute provides first for the possibility of license "seizure" at the time of arrest, and second for a "pretrial suspension" of the license within five days after citation or arrest. Different procedures are required by each of the two provisions.

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94. Mackey v. Montrym, 443 U.S. 1, 10 (1979).

95. 424 U.S. 319 (1976).

96. *Id.* at 335. *See generally* Jackson, *Risk of Error Analysis,* 14 U. TOL. L. REV. 1 (1982).

97. Bell v. Burson, 402 U.S. 535, 541 (1971).

98. Whether the Mathews v. Eldridge test is to be applied on a case-by-case basis or more generally to all cases raising similar type of factual questions is unclear. *Compare* Lassiter v. Department of Social Services, 452 U.S. 18, 31-32 (1981) (to determine whether fundamental fairness under the due process clause requires appointment of counsel to parents in a parental status termination proceeding, the factors of Mathews v. Eldridge must, in each case, be weighed against the presumption that indigent litigants have a right to counsel only when their physical liberty is at stake) *with* Santosky v. Kramer, 455 U.S. 745, 757 (1982) (the amount of process due in parental rights termination cases requires balancing of the Mathews v. Eldridge factors, but this balancing must be done in view of a standard of proof "calibrated in advance").

99. Mackey v. Montrym, 443 U.S. 1, 11-12 (1979); Dixon v. Love, 431 U.S. 105, 113 (1977).

Ohio Revised Code Section 4511.191(E) provides that if a driver fails the chemical test or refuses to submit to this test, the arresting officer "shall seize the Ohio or out-of-state operator's . . . license . . . of the arrested person and immediately forward it to the court in which the arrested person is to appear." There is no opportunity for a hearing of any kind on the seizure until the trial on the merits of the charge. Under Ohio's Speedy Trial Act,[100] this hearing could be as long as ninety days after the arrest. This probably does not amount to a "prompt" post-termination hearing. The procedure approved in *Dixon v. Love* required a hearing to be held within twenty days after the licensee's request.[101]

Nonetheless, this hearing delay does not necessarily invalidate the seizure provision because, in Ohio, seizure would appear to have no effect on the driver's *right* to drive. The only relevant provision of Ohio law is Ohio Revised Code Section 4507.35, which merely requires the driver to produce satisfactory proof to police or persons involved in a collision that he is in fact licensed when he does not have his license in his possession. Seizure does not, in itself, suspend or revoke the driver's license, and at least so long as police issue a receipt that can be used as proof of the existence of the seized license, no protected interest of the driver has been infringed.

This conclusion is supported by the recent Supreme Court decision in *Illinois v. Batchelder.*[102] In *Batchelder,* the defendant had challenged the stopping of his automobile and the detaining of its occupants as an improper "seizure" because the police officer did not recite in his affidavit the specific circumstances which gave him a reasonable belief that defendant was driving while intoxicated. The Supreme Court rejected all due process challenges to the "seizure," stating that the "right to a hearing *before* [a driver] may be deprived of his license . . . accords him all, and probably more, of the process than the Federal Constitution assures."[103]

A number of other states, however, require a driver to have his license in his possession at all times when driving. Seizing a license in Ohio does effectively revoke driving privileges in such states without the opportunity for a hearing. Thus, for example, a Michigan driver whose license is seized by Ohio authorities could not thereaf-

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100. OHIO REV. CODE ANN. § 2945.71-2945.73 (Page 1982).

101. 431 U.S. 105, 109 (1977).

102. 103 S. Ct. 3513 (1983).

103. *Id.* at 3517.

ter legally drive in his home state.[104]

The equal protection clause of the fourteenth amendment not only requires that like things be treated alike, but in some cases requires that persons who are differently situated must be treated differently.[105] If this principle is applied to drivers licensed by foreign states, it may be necessary to create some sort of "constructive seizure" process so that driving rights are not totally revoked in the foreign state without a hearing. Thus, stamping or affixing a statement to the foreign license indicating that it has been seized by Ohio authorities, and then returning it to the driver, may be an acceptable alternative.

Somewhat more troublesome is the fact that Ohio-licensed drivers will also presumably be precluded from driving in other states which require license possession. It may be argued that insofar as the driver is merely prevented from driving into other states for recreational purposes, he is not being deprived of an interest that is sufficiently important to require a prompt hearing. Precedent under the interstate privileges and immunities clause supports such a position.[106] Where the driver can demonstrate that he must commute into the foreign state in order to earn his livelihood, the constructive seizure process suggested for foreign-license drivers may be required.[107]

Section 4511.191(K) provides for a pretrial suspension of a driver's license by the court or referee at the defendant's initial appearance, which shall be held within five days of the citation or arrest. The suspension will be imposed if the driver failed the chemical test or refused to submit to it, and if, in addition, the court or referee determines that one of the following five aggravating circum-

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104. *See* MICH. COMP. LAWS ANN. § 257.311 (1977) (MICH. STAT. ANN. § 9.2011 (Callaghan 1981)). A Michigan Attorney General's Opinion indicates that the Michigan statute is violated when a driver does not have his license in his possession because it is on deposit with a court as a condition of probation. Mich. Op. Att'y Gen. No. 4454 124 (1970).

105. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) which stand for the proposition that indigents must be treated differently than non-indigents in some situations.

106. *See* Zobel v. Williams, 457 U.S. 55, 76 (1981) (O'Connor, J., concurring); Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978); Hicklin v. Orbeck, 437 U.S. 518 (1978).

107. In Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 388 (1978), Justice Blackmun distinguished the discrimination permitted in the case before the court from that prohibited in earlier cases on the ground that the challengers before the court could not claim that they "were deprived of a means of livelihood."

stances was present:

(1) a prior DUI conviction,[108]
(2) the driver's license was already suspended or revoked at the time of arrest,
(3) death or serious physical harm to another person was caused,[109]
(4) driver failed to appear for his initial appearance, or
(5) his continued driving will be a threat to public safety.

The major constitutional concern under section 4511.191(K) is whether the pre-license suspension hearing is adequate to provide due process.[110] *Bell v. Burson*[111] would seem to require that all evidence relevant to the suspension determination must be able to be introduced at the hearing. The new Ohio statute is ambiguous as to what evidence may be presented at this pretrial hearing. The language of the statute suggests that the drafters may have anticipated that the defenses which could be asserted at the pretrial hearing would be limited.

In particular, Section 4511.191(K) provides that the pretrial license suspension will terminate if the trial court, upon motion, determines by a preponderance of the evidence that there was no probable cause for the driver's arrest. This section seems to contemplate that such a motion would be made in a later separate proceeding, because the license suspension may be made by a referee but

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108. The prior convictions covered are those under OHIO REV. CODE ANN. § 4511.19 (Page 1982) (driving under the influence of alcohol or drugs) or under a municipal ordinance prohibiting driving while under the influence of alcohol.

109. OHIO REV. CODE ANN. § 2901-01(E) (Page 1982) defines "serious physical harm to persons" to mean any of the following:

(1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
(2) Any physical harm which carries a substantial risk of death;
(3) Any physical harm which involves some permanent incapacity;
(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;
(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

110. License suspension for refusing to take a chemical test is constitutionally permissible if an adequate hearing is provided. South Dakota v. Neville, 103 S. Ct. 916 (1983); Mackey v. Montrym, 433 U.S. 1 (1979).

111. 402 U.S. 535, 541-42 (1971).

the lack of probable cause finding may be made only by the court. This procedure would of course still meet due process requirements because the motion procedure would provide a prompt post-termination hearing.[112] The due process concern arises only to the extent that this language is read to suggest that other kinds of defenses relevant to the suspension cannot be raised at the pretrial suspension hearing. This, coupled with the absence of a similar motion procedure to obtain a prompt hearing on relevant issues other than lack of probable cause, would create due process problems.

Section 4511.191(K) also requires that the pretrial suspension hearing he held within five days of citation or arrest. If a hearing is held so quickly that the driver has no time to prepare his defense, due process is violated.[113] It is likely that in most cases the five day limit will not pose constitutional problems. In *Lindsey v. Normet*[114] the Supreme Court upheld an Oregon provision requiring a trial within two to six days in tenant eviction cases. Under the provision at issue in *Lindsey*, however, a continuance was possible if the tenant posted bond for accruing rent. Also the court emphasized that the factual issues involved in eviction cases are simple. Generally the issues are whether there has been a failure to pay rent, whether the tenants are in possession, and whether they have received proper notice to leave the premises.[115] The court suggested that such a short period for trial might violate due process in other particular applications where the issues involved were more complex.[116]

Most of the factual questions presented in pretrial suspension hearings under Section 4511.191(K) involve simple factual questions. In some cases, however, the issue of the presence of aggravating circumstances may be more complex. Whether the driver caused "serious physical harm" to another person,[117] or whether the defendant's continued driving "will be a threat to public safety" may pose more difficult evidentiary questions. In such cases, due process demands may require that the court grant an extension of time for the defendant to prepare for the hearing.

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112. Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977).

113. Roller v. Holly, 176 U.S. 398 (1900).

114. 405 U.S. 56 (1972).

115. *Id.* at 64-65.

116. *Id.* at 65. *Cf. id.* at 84-85 (Douglas, J., dissenting) (arguing that such a summary procedure, apparently regardless of the complexity of the issues involved, is violative of due process because it is tantamount to a denial of notice and opportunity to defend).

117. *See supra* note 19.

Finally, the issue arises as to whether the pretrial suspension proceedings under Section 4511.191(K) are criminal or civil in nature. The Ohio Supreme Court in *State v. Starnes*[118] held that proceedings under the prior version of Ohio Revised Code Section 4511.191(F) permitting suspension of a driver's license by the Registrar of Motor Vehicles for failure to take a chemical test were civil in nature. Arguably, pretrial suspension under the new law is different because such suspension can only take place if the driver has been charged with a criminal violation of Section 4511.19.

If the pretrial suspension hearing is part of a criminal process, the question becomes whether the prerequisites for suspension must be proved under the "beyond a reasonable doubt" standard, and whether there is a constitutional right (state[119] or federal[120]) to a trial by jury on the license suspension issue. The purpose of the pretrial suspension hearing is to protect society from a potentially dangerous driver pending final determination of his guilt or innocence on criminal charges. It would appear that this infringement of liberty or property interests pendente lite, whether or not characterized as part of a criminal proceeding, ought not to trigger the right to a jury trial or an enhanced burden of proof. The pretrial suspension provisions to protect society are closely analogous to statutes permitting pretrial detention of a person charged with a dangerous crime in order to assure the safety of the community.[121] Determinations under such statutes do not require the full trappings of a criminal trial such as proof beyond a reasonable doubt and a trial by jury.[122]

IV. Implied Consent Statutes and the Consequences of Refusing Chemical Tests

Ohio Revised Code Section 4511.191 continues and expands Ohio's implied consent law, imputing consent to blood, breath, or urine tests for alcohol or drugs to any person who operates a motor

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118. 21 Ohio St. 2d 38, 254 N.E.2d 675 (1970).

119. Ohio Const. art. I, § 5.

120. U.S. Const. amend VII; Duncan v. Louisiana, 391 U.S. 145 (1968).

121. *See, e.g.*, D.C. Code Ann. § 23-1322 (1981) (setting forth guidelines under which a judicial officer may order pretrial detention of certain offenders charged with dangerous or violent crimes).

122. *See* DeVeau v. United States, 454 A.2d 1308 (D.C. 1982), *cert. denied*, 103 S. Ct. 1781 (1983); United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

vehicle on Ohio's public highways. Refusal to take such a test is a ground for license suspension by the Registrar of Motor Vehicles,[123] and for pretrial suspension of license if coupled with other aggravating factors.[124] In addition, in *City of Westerville v. Cunningham*,[125] the Ohio Supreme Court held that the admission into evidence of a driver's refusal to take a chemical test may have probative value on the question of whether he was intoxicated at the time of such refusal, and that the admission of this into evidence does not violate defendant's privilege against self-incrimination.

The United States Supreme Court has upheld the constitutionality of all of these practices. In *Schmerber v. California*,[126] the Court held that taking of an alcohol blood test over defendant's objection did not violate his fifth amendment privilege against self-incrimination. *Mackey v. Montrym*[127] upheld the suspension of a driver's license for refusal to take a breath test, so long as a prompt post-suspension hearing was provided. *South Dakota v. Neville*[128] held that since a person could be required to take a chemical test, admitting into evidence the person's refusal to take such a test does not offend the fifth amendment.[129] Indeed, in *Neville*, the driver was not specifically warned that his refusal could be introduced into evidence. The Court held that the refusal was still admissible, so long as he was not misled into thinking that his refusal was without legal consequences.

To conclude, there seems to be strong constitutional support for Ohio's implied consent provisions. Moreover, there appear to be no major constitutional problems with the consequences imposed upon defendants who refuse to submit to chemical tests.[130]

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123. OHIO REV. CODE ANN. § 4511.191(D) (Page 1982).

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

125. 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968).

126. 384 U.S. 757 (1966).

127. 443 U.S. 1 (1979).

128. 103 S. Ct. 916 (1983).

129. *See generally* Crump, *The Admission of Chemical Test Refusals After* State v. Neville: *Drunk Drivers Cannot Take the Fifth*, 59 N.D.L. REV. 349 (1983).

130. A number of student commentators have also written on the constitutionality of implied consent statutes in recent years. *See* Comment, *Constitutionality of Illinois' New Implied Consent Statute*, 15 J. MAR. 479 (1982); Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L.J. 99 (1980); Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980).

V. CONSTITUTIONALITY OF THE REPEAT OFFENDER PROVISIONS

Ohio's DUI law mandates stiffer penalties for repeat offenders than it does for first offenders. First offenders are sentenced to a minimum of three consecutive days actual incarceration,[131] second offenders are sentenced to a minimum of ten consecutive days incarceration,[132] and third offenders are sentenced to not less than thirty consecutive days nor more than one year actual incarceration.[133] In addition, both the mandatory minimum and the maximum length of license suspensions are greater for repeat offenders.[134]

Statutes providing enhanced punishment for habitual and repeat offenders repeatedly have been held constitutional when attacked on a variety of grounds including double jeopardy,[135] due process[136] and equal protection.[137] It is also well established that the ex post facto

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131. OHIO REV. CODE ANN. § 4511.99(A)(1) (Page Supp. 1982); *see also* § 4511.99(A)(5) (no court may suspend the sentence of three consecutive days of imprisonment).

132. Section 4511.99(A)(2); *see also* § 4511.99(A)(5) (no court may suspend the sentence of 10 consecutive days of imprisonment).

133. Section 4511.99(A)(3); *see also* § 4511.99(A)(5) (no court may suspend the sentence of 30 consecutive days of imprisonment).

134. Section 4507.16(B) provides for mandatory license suspension following a DUI conviction. Licenses of first offenders will be suspended for a period of not less than 60 days nor more than three years, § 4507.16(B)(1); those of second offenders for a period of not less than 120 days nor more than five years, § 4507.16(B)(2); and licenses of third offenders for a period of not less than 180 days nor more than 10 years, § 4507.16(B)(3). The court must impose the minimum suspension period and may not "suspend" the suspension. § 4507.16(F).

135. *See* Spencer v. Texas, 385 U.S. 554, 560 (1967); Gryger v. Burke, 334 U.S. 728, 732 (1948); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Maloney v. Maxwell, 174 Ohio St. 84, 85, 186 N.E.2d 728, 730 (1962). The *Gryger* Court stated that the enhanced penalty is not "viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." 334 U.S. at 732. *See also* Annot., 2 A.L.R. 4th 619 (1980).

136. *See* Spencer v. Texas, 385 U.S. 554, 560 (1967); Maloney v. Maxwell, 174 Ohio St. 84, 85, 186 N.E.2d 728, 729 (1962).

137. *See* McDonald v. Massachusetts, 180 U.S. 311, 313 (1901). Maloney v. Maxwell, 174 Ohio St. 84, 85, 186 N.E.2d 728, 729 (1962); *cf.* United States v. Batchelder, 442 U.S. 114, 123-25 (1979) (when an act violates more than one criminal repeat offender statute, the Equal Protection clause does not prohibit the prosecutor from choosing to charge the defendant under the statute with the greater penalty unless the charge is based upon an unjustifiable standard such as race, religion, or other arbitrary classification).

clause of the United States Constitution[138] does not prevent the state from using convictions which occurred prior to the effective date of a statute to classify the defendant as a repeat offender in order to enhance his punishment.[139] According to the United States Supreme Court, the ex post facto clause is not violated because "the punishment is for the crime only, but is the heavier if [the defendant] is a habitual criminal."[140]

There is, however, an important constitutional limitation on the use of prior convictions to increase the defendant's sentence. In *Baldasar v. Illinois*[141] the United States Supreme Court held that an uncounseled misdemeanor conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.[142] If it can be shown, however, that the defendant waived his right to counsel in the previous case, the prior

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138. U.S. CONST. art. I, § 9.

139. *See* Gryger v. Burke, 334 U.S. 728, 732 (1947); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901); Smith v. United States, 312 F.2d 119, 121 (10th Cir. 1963).

140. McDonald v. Massachusetts, 180 U.S. 311, 312 (1901).

141. 446 U.S. 222 (1980). In United States v. Tucker, 404 U.S. 443, 448-49 (1971), the Supreme Court held that it was improper for a trial court judge to consider two prior convictions of the defendant, which were obtained without counsel in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), in imposing sentence; *see also* Burgett v. Texas, 389 U.S. 109, 114-15 (1967).

142. 446 U.S. at 224. Arguably, the use of uncounselled prior convictions to enhance the defendant's sentence under Ohio's drunk driving law is distinguishable from *Baldasar* because *Baldasar* involved the use of uncounselled prior convictions to raise a misdemeanor to a felony while Ohio's drunk driving law only increases the penalties and the crime remains a misdemeanor. It is unlikely, however, that this difference will be regarded as distinguishing the drunk driving penalties. In sixth amendment right to counsel cases, the courts have not drawn the lines between misdemeanors and felonies, but rather have applied the right to counsel to all cases involving "the actual deprivation of a person's liberty." Argersinger v. Hamlin, 407 U.S. 25 (1972). *See* State v. Nordstrom, 331 N.W.2d 901, 904-05 (Minn. 1983).

Recently, the Seventh Circuit Court of Appeals held that when a state treats an offender's first DUI offense as a civil infraction, that a determination of violation in the initial offense may be used to enhance the punishment for subsequent criminal offenses underthe same statute even if the defendant was not represented by counsel during the first offense. *See* Schindler v. Clerk of Circuit Court, 33 CRIM. L. REP. (BNA) 2500 (7th Cir., Aug. 22, 1983). The court reasoned that "the civil adjudication had the effect of specifically putting Schindler on notice that he was a highrisk individual, that the State had a public policy against driving while intoxicated, and that future violations would subject him to criminal sanctions. Thus, when petitioner was sentenced as a third offender, it was not an attempt to 'punish' him for his first offense and uncounselled trial." *Id.* at 2501. According to the court, the use of increased punishment is predicated on the defendant's role as an adjudicated offender, not on the reliability of the civil proceedings.

conviction can be used for penalty enhancement.[143] The state has the burden of proof to show that the defendant "knowingly and intelligently"[144] relinquished its right to counsel; and, of course, such a waiver will not be presumed from a silent record.[145] Therefore, before prior drunk driving convictions can be used to increase the defendant's penalty under Ohio's DUI law, the state must prove either that the defendant was represented by counsel or that he knowingly and intelligently waived his right to counsel.

VI. A Constitutional Right to the Preservation of a Breath Sample?

Defendants under the new Ohio drunk driving law are likely to assert that they have a due process right to have a separate breath sample taken and preserved for subsequent testing by defense experts. Courts in several other jurisdictions have recognized such a right.[146] A couple of Ohio courts previously ruled, however, that the defendant was not deprived of due process rights when the testing ampoule used in an earlier breath-testing machine, the breathalyzer, was not preserved and turned over to the defendant.[147]

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143. Faretta v. California, 422 U.S. 806, 835 (1974).

144. Edwards v. Arizona, 451 U.S. 477, 482 (1980). The Supreme Court stated:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused."

Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); *see also* State v. Chase, 55 Ohio St. 2d 237, 245, 378 N.E.2d 1064, 1069-70 (1978) (waiver of right to counsel is ineffective unless made knowingly and intelligently).

145. *See* Burgett v. Texas, 389 U.S 109, 114-15 (1967). Similarly, in Sand v. Estelle, 551 P.2d 49 (5th Cir.), *cert. denied,* 434 U.S. 1076 (1977), the Fifth Circuit Court of Appeals held that a prior conviction could not be used for penalty enhancement absent proof that the defendant had voluntarily waived counsel. *Id.* at 50.

146. *See* Baca v. Smith, 124 Ariz. 353, 604 P.2d 617 (1980); People v. Trombetta, 141 Cal. App. 3d 400, 190 Cal. Reptr. 319 (1983); Garcia v. District Court, 197 Colo. 38, 589 P.2d 914 (1979); *contra* People v. Miller, 52 Cal. App. 3d 66, 125 Cal. Rptr. 341 (1975).

147. *See* State v. Watson, 48 Ohio App. 2d 110, 355 N.E.2d 883 (1975); State v. Gross, 45 Ohio Misc. 1, 340 N.E.2d 441 (1975); *accord* Edwards v. Oklahoma, 429 F. Supp. 668, 671 (W.D. Okla. 1976); People v. Stark, 73 Mich. App. 332, 336-38, 251 N.W.2d 574, 576-77 (1977); State v. Schutt, 116 N.H. 495, 497, 363 A.2d 406, 407-08 (1976); State v. Bryan, 133 N.J. Super. 369, 373-74, 336 A.2d 511, 513-14 (1974); Edwards v. State, 544 F.2d 60, 64 (Okla. Crim. App. 1975); State v. Canaday, 90 Wash. 2d 808, 814, 585 P.2d 1185, 1190 (1978); *contra* Lauderdale v. State, 548 P.2d 376,

In *Brady v. Maryland*,[148] the United States Supreme Court held that the government had violated the defendant's right to due process when it failed to disclose to him exculpatory evidence within its possession.[149] To apply the *Brady* holding to the question of whether the government has any obligation to preserve a breath sample from the defendant required consideration of two separate issues. First, does the government have an affirmative obligation to preserve evidence for inspection by the defendant, or is it only obligated to turn over to the defendant evidence in its possession at the time that the defendant requests discovery?[150] Second, is a separate breath sample preserved for the defendant material evidence that is likely to create a reasonable doubt of guilt that would otherwise not exist?[151] Practically speaking, the two issues are usually intertwined when considered by the prosecutor and the court. If the evidence has been lost or destroyed, or is otherwise not in existence either at

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380-83 (Alaska 1976); People v. Hitch, 12 Cal. 3d 641, 649-54, 517 P.2d 361, 367-70, 117 Cal. Rptr. 9, 15-18 (1974); State v. Michener, 25 Or. App. 523, ___, 550 P.2d 449, 452-54 (1976).

The California Court of Appeals in the First District explained how the intoxilyzer and breathalyzer operate:

> Prior to any test, the [intoxilyzer] device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air . . .; to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level . . . . After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol . . . . the breathalyzer operates on a completely different principle . . . . To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution.

People v. Trombetta, 141 Cal. App. 3d 400, 403-04, 190 Cal. Rptr. 319, 321 (1983) (citations omitted); *see also* R. ERWIN, *supra* note 31, at §§ 22.0.1-.10 (breathalyzer) & §§ 24A.00-.10 (intoxilyzer).

148. 373 U.S. 83 (1963).

149. Under *Brady*, if the accused requests specified information which is favorable to his case and the prosecutor suppresses such evidence, then due process is violated "where the evidence is material to guilty or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

150. *See* United States v. Bryant, 439 F.2d 642, 650-53 (D.C. Cir. 1971); *see also generally* Comment, *Judicial Response to Government Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542-65 (1972) and *infra* notes 153-57 and accompanying text.

151. *See* United States v. Agurs, 427 U.S. 97, 112-14 (1975); *see also infra* notes 158-68 and accompanying text.

the time that it is requested by the defendant or at the time that a court is reviewing the government's denial of the defendant's request for discovery, it is much more difficult for the prosecutor or the court to determine whether the evidence is material.[152]

The defendant's argument that when the state tests the defendant's breath it must preserve a comparable breath sample[153] is based on earlier cases in which the courts have found a violation of due process rights when law enforcement agents lose or destroy notes or tape recordings of witnesses' statements.[154] In *United States v. Bryant*[155] the Circuit Court of Appeals for the District of Columbia stated that in deciding whether there was a due process violation when the government "lost" evidence that would otherwise have been discoverable, "the burden of proof would be on the government to show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation."[156] Arguably, this rationale requires the government to establish procedures to routinely preserve the breath samples of defendants. Just because the primary breath sample no longer exists at the time of the defendant's discovery request is no excuse for the failure to produce this evidence. There are devices available which could be used to preserve a defendant's breath sample at a reasonable cost.[157]

The second obstacle to be overcome by a defendant claiming a

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152. *See* United States v. Bryant, 439 F.2d at 648.

153. *See* People v. Trombetta, 141 Cal. App. 3d at 406, 190 Cal. Rptr. at 322-23.

154. See United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976); *contra* United States v. Augenblick, 393 U.S. 348 (1969); United States v. Johnston, 543 F.2d 55 (8th Cir. 1976); Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1976); United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975).

155. 439 F.2d 642 (D.C. Cir. 1971).

156. *Id.* at 652. The court declined to apply the standard to the case before it, and instead remanded the case to the trial court to "weigh the degree of negligence or bad faith involved, the importance of the evidence lost and the degree of guilt adduced at trial . . . ." *Id.* at 653.

157. The *Trombetta* court referred to two devices available on the market which can be used to preserve a breath sample: an "indium" tube and a "silica gel" tube. 141 Ca. App. 3d at 406, 190 Cal. Rptr. at 323. The testimony in *Baca v. Smith* established that a breath sample could be preserved at the cost of 10¢ per test. The cost of the breath collection could be charged to the defendant explicitly, or implicitly by a corresponding increase in the defendant's fine if the defendant is convicted. *See* Baca v. Smith, 124 Ariz. 353, 357, 604 P.2d 617, 620 (1980).

right to the preservation of the breath sample is to show that a preserved breath sample would be "material" to his case. In *United States v. Agurs*[158] the United States Supreme Court held that a defendant's due process rights are violated when the prosecutor fails to disclose evidence which would create a reasonable doubt that otherwise did not exist regarding the defendant's guilt.[159] The Court further directed that when appellate courts decide this question following trial, it "must be evaluated in the context of the entire record,"[160] but that prosecutors should "resolve doubtful questions in favor of the disclosure of evidence."[161]

The inconsistency among court opinions as to whether breath samples or breathalyzer test ampoules must be preserved for defendants appears to be affected significantly by the courts' evaluation of the materiality of the preserved breath sample or of a second breath test. Courts which believe the retesting is unlikely to aid the defendant typically do not require preservation of the breath sample or breathalyzer ampoule;[162] those which believe that retesting may more than occasionally uncover an error in the government's first test often require preservation of the evidence.[163]

Two changes in Ohio's enforcement of its DUI law in recent years suggest opposite results regarding the materiality of a preserved breath sample. First, the enactment of the *per se* provisions of the statute[164] greatly increase the importance of the test results.[165] A test result now does much more than create a rebuttable presumption; it may be the only important item of evidence if the

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158. 427 U.S. 97, 112 (1976).

159. *Id.*

160. *Id.*

161. *Id.* at 108.

162. *See* People v. Stark, 73 Mich. App. 332, 338, 251 N.W.2d 574, 576 (1977) (expert testimony revealed significant variation in only 2% of ampoule retestings); *see also,* People v. Godbout, 42 Ill. App. 3d 1001, 1005-06, 356 N.E.2d 865, 870 (1976); State v. Canaday, 90 Wash. 2d 808, 814, 585 P.2d 1185, 1190 (1978).

163. *See, e.g.,* Lauderdale v. State, 548 P.2d 376, 381 (Alaska 1976); State v. Michener, 25 Or. App. 523, ___, 550, P.2d 449, 452 (1976).

164. *See* OHIO REV. CODE ANN. § 4511.19(A)(2)-(4) (Page Supp. 1982); *see also supra* note 24-31 and accompanying text.

165. At least one court has relied heavily upon the existence of other evidence of "intoxication" in holding that the failure to preserve a breathalyzer test ampoule did not deprive the defendant of due process because the preserved ampoule would not have yielded material evidence. *See* Edwards v. Oklahoma, 429 F. Supp. 668, 671 (W.D. Okla. 1976).

defendant admits driving the vehicle.[166] Accordingly, the defense argument that a preserved breath sample is "material" is greatly increased.[167] Conversely, the second change in the enforcement of Ohio's DUI statute makes the preserved breath sample less material. The widespread replacement of "breathalyzer" breath-analyzing machines with intoxilyzer units is widely acknowledged to have reduced the margin of instrument error and the possibility of operator error.[168] The likelihood of a subsequent test yielding a different result is less with the intoxilyzer. Thus, the preservation of a breath sample is less likely to constitute "material" evidence that could raise a reasonable doubt as to the conviction.

Other provisions of the Ohio DUI statute may suggest that the failure to preserve a breath sample is not a due process violation. For example, Section 4511.19(B) reads in part:

> The person tested may have a physician, a registered nurse or a qualified technician or chemist of his own choosing administer a chemical test or tests in addition to any administered at the direction of a police officer, and shall be so advised. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a police officer.

This provision may be interpreted by the courts as allowing the defendant to waive his right to the preservation of a breath sample for independent testing.[169] It is doubtful, however, that the defendant who has been drinking at two o'clock in the morning will be able to

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166. *See* § 4511.19(A)(2)-(4).

167. Another commentator argues that the State of Washington's enactment of a *"per se"* statute is cause to reevaluate the Washington Supreme Court's decision in State v. Canady, 90 Wash. 2d 808, 585 P.2d 1185 (1978), where the court found no due process violation in the determination of breathalyzer test ampoules. *See* Comment, *Washington's New DWI Statute: Does Due Process Mandate Preservation of Breathalyzer Ampoules?*, 16 GONZ. L. REV. 361-62 (1981).

168. *See* R. ERWIN, *supra* note 31, at § 22.03, for a description of the possibility of an inaccurate result with the breathalyzer; and *id.* at § 24.06.10, for a similar analysis of intoxilyzer inaccuracies. Recently, however, law enforcement agencies became aware that police radio transmissions can yield inaccurate results with the intoxilyzer unless additional precautions are taken. *See The Drunk Driver: Where Do We Go From Here?*, 69 A.B.A.J. 1201, 1202 (1983).

169. *See, e.g.*, State v. Bryan, 133 N.J. Super. 369, 373-74, 336 A.2d 511, 514 (1974) where the Superior Court of New Jersey alluded to a similar New Jersey provision in an opinion holding that there is no due process right to the preservation of breathalyzer test ampoules.

meet the United States Supreme Court's requirements for an efficacious relinquishment of his rights to discovery.[170]

Even though there are strong arguments that the defendant should be entitled to preservation of a breath sample, it appears likely that the Ohio courts will hold that there is no constitutional right to have a breath sample preserved. Not even Ohio Rule of Criminal Procedure 16,[171] a broad discovery rule, compels the government to preserve scientific test samples for independent analysis by defendants or their experts.[172] The United States Supreme Court has stated the government's failure to turn over the evidence no longer in its possession may sometimes be a denial of discovery rights granted by statute, but that such cases are generally not "worthy candidate(s) for consideration at the constitutional level."[173] The Ohio court have previously rejected defendants' claims that breathalyzer ampoules should be preserved,[174] and in any given case it is unlikely that breath retesting would suggest the defendant's innocence. Therefore, failure to preserve breath samples will probably not be viewed by the Ohio courts as resulting in a "constitutionally unfair trial . . . where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is . . . a spectacle . . . or trial by ordeal."[175]

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170. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). The Court held that a waiver of constitutional right requires "an intentional relinquishment or abandonment of a *known* right or privilege." *Id.* at 464. Determination of whether there is an effective waiver turns upon "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Id.*

171. OHIO R. CRIM. P. 16.

172. OHIO R. CRIM. P. 16(B)(1)(d) does provide the defendant with the results of scientific tests:

> Upon prosecution of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of . . . scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

173. United States v. Augenblick, 393 U.S. 348, 356 (1969).

174. *See* State v. Watson, 48 Ohio App. 2d 110, 335 N.E.2d 883 (1975); State v. Gross, 45 Ohio Misc. 1, 340 N.E.2d 441 (1975).

175. United States v. Augenblick, 393 U.S. 348, 356 (1969).

VII. Raising Probable Cause Issues: The Role of the Motion In Limine

Breath test results which follow a constitutionally invalid arrest may be excluded from evidence on both constitutional and statutory grounds. As in other criminal cases, a defendant may move to suppress the breath test evidence on the grounds that because the arrest was constitutionally invalid, the state is precluded from using the breath test evidence obtained as a direct or indirect result of the unlawful test.[176] Such motions, more often than not, will contend that there was not probable cause for the law enforcement agent to make the arrest.[177]

Motions to suppress alleging a lack of probable cause may play a more important role following the enactment of the *per se* provisions than they did before the passage of such provisions. Prior to the revisions to Ohio's statute, law enforcement officers were careful to record their observations of a defendant's driving behavior because they were required to prove "impaired driving" at trial.[178] If law enforcement officers arrest drivers more quickly and cavalierly under the new Ohio law, as they may be inclined to do because there is no longer a need to prove impaired driving, or if they fail to carefully record their observations of driving behavior, defendants may win more motions to suppress for lack of probable cause than previously.

Breath test results which follow a constitutionally invalid arrest may also be excluded on statutory grounds. Section 4511.19(B) of the Ohio Revised Code explicitly provides that a chemical analysis of the defendant's blood, breath or urine is admissible evidence, but also provides that "such bodily substance shall be analyzed in accordance with the methods approved by the director of health . . . ."[179] The Ohio Supreme Court, under the prior statute, repeatedly held

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176. *See* City of Oregon v. Szakovits, 32 Ohio St. 2d 271, 274, 291 N.E.2d 742, 744 (1972). Under the exclusionary rule, *see* Mapp v. Ohio, 367 U.S. 643 (1961), the state is constitutionally prohibited from using any evidence obtained as a direct or indirect result of the unlawful arrest. *See* Dunaway v. New York, 442 U.S. 200, 217 (1979); Davis v. Mississippi, 394 U.S. 721 (1969); Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Marlin, 471 F.2d 764 (7th Cir. 1972); City of Oregon v. Szakovits, 32 Ohio St. 2d 271, 274, 291 N.E.2d 742, 744 (1972).

177. The fourth amendment's prohibition against unreasonable seizures requires that all arrests be based on probable cause. *See* Dunaway v. New York, 442 U.S. 200, 212 (1979); United States v. Marlin, 471 F.2d 764, 766 (7th Cir. 1972).

178. *See* State v. Hardy, 28 Ohio St. 2d 89, 91-92, 276 N.E.2d 247, 250 (1971).

179. Ohio Rev. Code Ann. § 4511.19(B) (Page Supp. 1982).

that in order for the breath test results to be admissible, the test must have been conducted in accordance with the provisions of the statute and the department of health regulations.[180] If the prescribed procedures are followed, the statute provides that the test results are competent evidence. If the prescribed procedures are not followed, however, then scientific evidence must be introduced to establish that both the scientific theory used in the breath test and the breath-testing instrument itself have been generally accepted within scientific circles.[181]

The statutory provisions, therefore, provide an alternative argument for the exclusion of evidence obtained subsequent to a constitutionally invalid arrest. Unless there is a constitutionally valid arrest, the statutory provisions which provide for the defendant's implied consent to take an alcohol breath test, the admissibility of the test results, and the presumption of intoxication arising from the test results do not come into play.[182]

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180. *See* State v. Steele, 52 Ohio St. 2d 187, 188-89, 370 N.E.2d 740, 741 (1977); Cincinnati v. Sand, 43 Ohio St. 2d 79, 85, 330 N.E.2d 908, 911 (1975); *see also* State v. Miracle, 33 Ohio App. 2d 289, 294 N.E.2d 903, 906-07 (1973); *but see* Barber v. Curry, 40 Ohio App. 2d 346, 351, 319 N.E.2d 367, 371 (1974) (failure to comply with statute does not prevent admission of test result, but merely precludes use of test results to establish presumption of intoxication under prior law).

181. *See* State v. Ezoto, 116 Ohio App. 1, 3, 186 N.E.2d 206, 208 (1961); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *see also* Barber v. Curry, 40 Ohio App. 2d 346, 351, 319 N.E.2d 367, 371 (1974) (if the statutory and regulatory provisions are not followed, chemical tests must be properly qualified by evidence laying a foundation for their admission).

182. *See* State v. Risner, 55 Ohio App. 2d 77, 379 N.E.2d 262, 265 (1977); *see also* City of Oregon v. Szakovits, 32 Ohio St. 2d 271, 274, 291 N.E.2d 742, 744 (1972). In *Risner,* the Court of Appeals explained that:

> [T]here has been no arrest unless same is made in the manner provided by law. The arrest gives rise to the implied consent, which gives rise to the test, which gives rise to the presumption. The presumption cannot exist or have any probative value independently of a valid arrest. Thus, it is unlike the situation normally dealt with in motions to suppress, where the evidence sought to be suppressed had probative value independently of the illegality of the manner in which it has been obtained.

Id. at 80-81, 379 N.E.2d at 265. The Ohio Supreme Court's decision in Kettering v. Hollen, 64 Ohio St. 2d 232, 416 N.E.2d 598 (1980) does not suggest a contrary conclusion. In *Kettering,* the court refused to apply an exclusionary rule to preclude the admission of the testimony of an officer who made an extraterritorial warrantless arrest even though the arrest was unauthorized under state statutory provisions. The court held that "the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights." *Id.* at 235, 416 N.E.2d at 600. Unlike the situation in *Kettering,* the rationale for excluding the evidence in drunk driving cases which violates § 4511.19 or

Because breath tests following a constitutionally invalid arrest are also excluded by statute, defense attorneys have a second weapon in their arsenal to be used to exclude the admission of such test results. This weapon is a motion in limine, which the Franklin County Court of Appeals described in *Riverside Methodist Hospital Association v. Guthrie*[183] as having two different purposes:

> (1) as the equivalent of a motion to suppress evidence, which is either not competent or improper because of an unusual circumstance; and (2) as a means of raising objection to an area of inquiry to prevent prejudicial questions and statements until the admissibility of the questionable evidence can be determined during the course of the trial.[184]

The first use of motion in limine "can serve the same purpose as a motion to suppress evidence where the evidence either is not competent or is improper."[185] In effect, the motion in limine is a pretrial objection to the admission of incompetent evidence.

The courts have stated that the court's pretrial evidentiary ruling on a motion in limine is never final until the trial is complete because the ruling "does not determine the admissibility of the evidence to which it is directed," but rather "is only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible."[186] As a practical matter, however, it appears unlikely that an Ohio court would find at a pretrial hearing that breath test results were incompetent evidence because there was not a valid arrest or because the test was given more than two hours following the alleged driving violation,[187]

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the department of health regulations is not to deter police misconduct by excluding otherwise competent and probative evidence. *See* Mapp v. Ohio, 367 U.S. 643, 656, 659 (1961); Stone v. Powell, 428 U.S. 465, 485-96 (1976) (dictum); United States v. Brown, 663 F.2d 229, 233 (D.C. Cir. 1981) (Wilkey, J., concurring). Rather, the evidence is not competent and admissible evidence in the first instance unless law enforcement officers follow the statutory provisions and the department of health regulations. *See supra* notes 179-81 and accompanying text.

183. 3 Ohio App. 3d 308, 444 N.E.2d 1358 (1982).

184. *Id.* at 310, 444 N.E.2d at 1361; *see also* State v. Spahr, 47 Ohio App. 2d 221, 353 N.E.2d 624 (1976).

185. 3 Ohio App. 3d at 310, 444 N.E.2d at 1361.

186. *See id.*

187. *See* § 4511.19(B).

and then reverse this result at trial.[188] It is important to recognize, however, that the treatment of a motion in limine is almost exclusively within the discretion of the court,[189] and the trial court may elect not to consider the defendant's objections to the competency of the breath test results prior to trial and instead rule on their admissibility when it becomes necessary at trial. Presumably, though, it will be the trial court's advantage to make a preliminary ruling on the admissibility of the all important breath tests prior to the beginning of trial and the seating of the jury.

The motion in limine serves several useful functions for the defense attorney. In terms of excluding breath test results following a constitutionally invalid arrest, the advantage of the motion in limine is that it need not be filed within the time limits prescribed for motions to suppress under Ohio Traffic Rule 11(C).[190] The corresponding disadvantage is that the burden of proof is always on the defendant with the motion in limine,[191] while the prosecution bears the burden of persuasion on a motion to suppress in warrantless drunk driving arrests.[192]

Regardless of whether the grounds for exclusion of the breath tests are exclusively statutory or are the "bootstrapped" constitutional arguments,[193] the motion in limine allows the defense attorney to know in advance of trial whether the state's critical evidence is

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188. The *Riverside* court made a substantial understatement when it said that "[w]hile a motion *in limine* is a most useful procedural device, it is frequently misused and misunderstood." 3 Ohio App. 3d at 310, 444 N.E.2d at 1361. Consider, for example, the unreported opinion in State v. Brown, No. WD 80-50 (Wood Cnty. Ct. App., June 19, 1981). In that case, the Wood County Court of Appeals referred to a pretrial hearing on whether the provisions of § 4511.19 and the department of health regulations had been complied with as "a suppression hearing" and suggested that the trial court had been erroneous in calling it "a hearing on a motion *in limine*." *Id.* at 13. In view of the analysis presented here, it appears that the trial court judge was correct in his terminology and the Court of Appeals was in error.

189. *See* Riverside Methodist Hosp. Ass'n v. Guthrie, 3 Ohio App. 3d at 310, 444 N.E.2d at 1361; State v. Spahr, 47 Ohio App. 2d 221, 224, 353 N.E.2d 624, 626-27 (1976).

190. Motions to suppress on constitutional grounds must be made within 35 days following arraignment or seven days prior to trial, whichever occurs first. Ohio Traffic R. 11(C).

191. Adomeit v. Baltimore, 39 Ohio App. 2d 97, 103, 316 N.E.2d 469, 475 (1974).

192. *See* Lego v. Twomey, 404 U.S. 477 (1972). In *Lego*, the Supreme Court held that when the admissibility of a confession was challenged on constitutional grounds because it was allegedly involuntary, that the prosecution must prove by a preponderance of the evidence that the confession was voluntary. *Id.* at 482-84.

193. *See supra* notes 176-92 and accompanying text.

admissible so that the client can be intelligently informed about any available plea bargaining options. In most drunk driving cases filed under the *per se* sections of the statute[194] the granting of the motion in limine will probably lead to a dismissal of the charge.

VIII. CONCLUSION

In enacting Ohio's new DUI statute, the legislature has attempted to expand police power to speedily remove drunk drivers from the road and to impose sanctions upon them. While numerous colorable constitutional questions are raised by the new legislation, by and large the legislation appears to be constitutional. Nevertheless, the constitutionality of some sections may depend on the manner in which they are interpreted and applied by law enforcement officials. Thus, as suggested at the outset of this article, the effect of the new law which is perhaps the easiest to predict is that it will engender numerous constitutional challenges in the coming years.

ADDENDUM

Since this article first went to the printer, various courts have decided a number of important cases dealing with constitutional issues arising from DUI statutes. The purpose of this addendum is to direct the reader to at least some of these recent opinions.

The California Supreme Court recently upheld the California DUI statute against claims that the legislation was void for vagueness and beyond the scope of the state's police power.[195] Similarly, the Arizona Supreme Court rejected a void for vagueness challenge directed at that state's DUI statute.[196] In Ohio itself, several municipal courts already have entertained and rejected void for vagueness attacks on the new Ohio law.[197]

Recent decisions also have rejected other constitutional attacks on *per se* provisions of DUI statutes. The Illinois Supreme Court has held that under their state's DUI statute, the separate offense of operating a motor vehicle with a blood alcohol concentration in ex-

194. *See* § 4511.19(A)(2)-(4).

195. Burg v. Municipal Court, 34 Crim. L. Rep. (BNA) 2269 (Dec. 22, 1983). *See also supra* text accompanying notes 24-76.

196. Fuenning v. Superior Court, 34 Crim. L. Rep. (BNA) 2270 (Dec. 15, 1983). *See also supra* text accompanying notes 24-63.

197. State v. Keister, 8 Ohio Misc. 2d 1, 455 N.E.2d 1370 (1983); State v. Vannata, 8 Ohio Misc. 2d 22 (1983). *See also supra* text accompanying notes 24-63.

cess of 10% does not violate due process by shifting the burden of proof to the defendant.[198] Similarly, in the Arizona Supreme Court case previously mentioned, the court declared that the *per se* provision in the Arizona statute did not create an unconstitutional presumption of guilt.[199] In addition, one Ohio municipal court had held that the *per se* provision in the Ohio statute does not constitute an unconstitutional "conclusive presumption" of being under the influence.[200]

The issue of whether Ohio's pretrial license suspension procedure comports with due process has been considered by at least one Ohio municipal court.[201] Observing that the statute is "silent on a number of important issues,"[202] the court nevertheless found that in the case before it the suspect had been accorded adequate process.

In *McCarty v. Herdman*,[203] the Sixth Circuit, in a decision which may have major ramifications for the enforcement of the new Ohio law, has determined that Miranda warnings must be given in all custodial arrest situations, including those in which the offense under investigation is a misdemeanor traffic offense. The United States Supreme Court, however, has granted certiorari in *McCarty*.[204]

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198. People v. Ziltz, ___ Ill. 2d ___, 445 N.E.2d 70 (1983). *See also supra* text accompanying notes 77-90.

199. Fuenning v. Superior Court, 34 Crim. L. Rep. (BNA) 2270 (Dec. 15, 1983). *See also supra* text accompanying notes 77-90.

200. State v. Vannata, 8 Ohio Misc. 2d 22 (1983). *See also supra* text accompanying notes 77-90.

201. Dayton v. Rutledge, 7 Ohio Misc. 2d 14, 454 N.E.2d 611 (1983). *See also supra* text accompanying notes 91-122.

202. Dayton v. Rutledge, 7 Ohio Misc. 2d 14, 16, 454 N.E.2d 611, 613 (1983).

203. 716 F.2d 361 (1983).

204. Berkemer v. McCarty, 52 U.S.L.W. 3427 (U.S. Nov. 29, 1983) (No. 83-710).