

## **SB 285: DISTRACTED DRIVING PROPONENT TESTIMONY, 5-27-20**

Chairman Manning, Vice Chairman Brenner, Ranking Member Maharath, and members of the Senate Local Government, Public Safety, and Veterans Affairs Committee, I am here on behalf of all the victims we know about, all those we don't know about, and all those who don't want to become victims. I strongly support SB 285 to more effectively restrict and deter the dangerous behavior of driving under the influence of electronics (DUIE).

I am a victim of a fatal crash in 2000 caused by a driver using his phone. I have spent the last 18 years educating myself on this problem and the various solutions offered or tried.

Two of the most important provisions of this bill are that it provides primary enforcement and expands restrictions beyond just texting.

Primary enforcement has several benefits. It allows law enforcement to stop distracted drivers *before* they cause harm. It increases the certainty of a penalty, which research shows is a stronger deterrent even than what the penalty actually is. It makes Ohio eligible to apply for federal funds to assist with enforcement. And, it will give us more complete and accurate data on the scope of this problem.

Extending beyond the single behavior of texting is so important because e-devices have so many tempting functions now that people can shop, watch or make videos, play games, etc.--and they do!

If I told you everything I want you to know about this problem and this proposed solution, I would take way more than my fair share of hearing time. I am attaching some pertinent information that you can read later, including selective enforcement, statistics, and the fear of the "slippery slope."

I want to focus on penalties. In our crash, the driver of one victim car is permanently partially disabled. The driver of the other victim car, my husband John, died after six weeks in ICU. I had life-threatening complications from my injuries (in fact I had to be resuscitated once), missed four months of work, am still being treated for PTSD, and recently had to resume physical therapy for one of my injuries. With lung involvement, I am at greater risk of a more serious case if I should contract the coronavirus. As we learn more about the long-term effects of brain injury, I worry about my future.

For all this, our offender was charged at the scene with ACDA. The prosecutor rejected my request to revise the charges to *at least* vehicular manslaughter when the crash report was updated to show John's death. Therefore, our offender mailed in his \$75 fine.

You see the same signs I do as we drive in Ohio: \$500 fine for littering. Does this mean a fast food wrapper tossed out a car window is more important than John's life? That's what it feels like.

This bill will provide incremental penalties for repeat offenses. We do this with other traffic violations; why haven't we been doing it with DUIE?

This bill will also provide increased penalties based on the amount of harm caused. The benefit of this is two-fold. One, it tells the offender and future possible offenders that we as a society consider this to be seriously wrong behavior. Two, it provides better justice to the victims, also by saying we consider this unacceptable behavior. In 20 years, I have never gotten any kind of official acknowledgement from the state that what happened to my family and me was serious and unacceptable. Another of my

attachments provides more information about penalties.

SB 285 also specifies that distracted driving is a strict liability offense. This is important because it means intent doesn't need to be proven. Too often, I hear the argument against stronger penalties as "the driver didn't *intend* to crash by using his phone." I agree that a driver doesn't get into his car saying to himself, "I think I'll use my phone and crash." The part of this that gets overlooked is that too many drivers also don't get into their cars saying to themselves, "I think I'll put my phone away to be sure I don't crash." In other words, they don't intend to crash but they also don't intend *not to crash*.

There are four parts of this bill I think we all need some discussion and clarification on before you move on to a vote.

**I.** The governor said he wants to align distracted driving penalties with DUI penalties. This is completely justified because research shows the cognitive impairment of the two behaviors is essentially the same. And, both offenses are—to a degree—voluntary behaviors.

The two additions to the section about not causing death [2903.06(A)(1)] cover e-distraction and other distractions. However, when we get to the sections on aggravated vehicular homicide and assault, which are felonies, those two new subsections are not included. A drunk driver causing death or serious injury is charged with a felony. The bill language seems to say a distracted driver causing that much harm won't be.

**II.** The bill adds two more offenses for which a distracted driver might get an additional fine. This section [4511.991] was enacted two years ago. It was well-intended but because it keeps e-distraction as a secondary offense and allows, but does not require, all or only some of the other fine, it is an idle threat and idle threats rarely change behavior.

Further, 4511.991 covers many—but not all—traffic offenses. This makes implementing the law confusing. An additional confusion with .991 is that the possible extra fine is imposed by a judge. Per Traffic Rule 13 and 2929.21(D), not all traffic offenses go to court. I have attached information on this, too.

**III.** Why would operating/holding/supporting an e-device be an "unclassified misdemeanor"? What I was able to learn about unclassified misdemeanors is that a) they are generally minor offenses and b) the penalty is left to the judge unless that statute prescribes the penalty. The bill does prescribe penalties [4511.204(E)] so why is it necessary to use the term "unclassified" when that implies less seriousness than this bill is intended to imply?

**IV.** The bill keeps the provision [4511.204(D)] requiring the Dept. of Public Safety to report annual citation numbers to the General Assembly. When I made a public records request to the GA for that report, what I got was the usual crash-statistics report. Even if it had included citation numbers, they would have been so skewed as to be misleading. In most of Ohio, few e-distracted drivers are stopped, mostly because police are not allowed to stop them for that behavior. With few stops, we have few citations—far, far fewer than the number of e-distracted drivers actually sharing the roads with us and endangering us.

And, current law and the bill make no provisions for follow-up action based on the report. If the report shows we're not getting a reduction in e-distracted driving, what will be done to correct that, and who will do it? We collect vast amounts of statistics on DUI and when they don't show the desired results, the law is amended. How many times have we amended the DUI laws?

Please don't let my questions make it seem that I am not in full support of this bill; I am! I have been working toward a bill with these kinds of provisions for 18 years. But, because it's taken so long,

I want us to be as sure as we can possibly be that we have it as right as we can get it.

Thank you for your attention. I would be happy to answer any questions.

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## **RACIAL PROFILING CONCERNS RE: DISTRACTED DRIVING PRIMARY ENFORCEMENT**

*Researched & summarized by Sharon Montgomery,  
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### **OHIO**

Using a variety of search terms and opening a variety of web pages, I found no evidence of any specific action by OHIO ACLU or OHIO NAACP to research or oppose primary enforcement of DD laws. This is not to say they support primary enforcement; this is only to say that they don't appear to have taken any specific action.

From the beginning of 2011 through Feb. 6, 2020, there have been only three bills introduced in the Ohio General Assembly to address the problem of racial profiling in any traffic stops. Each proposed specific solutions; none made it out of committee. Two were sponsored by Sen. Sandra Williams, who is a member of the Black Caucus and was, at least in 2018, an ex-officio member of the Ohio Collaborative Community-Police Advisory Board.

While ACLU, NAACP, and the GA share the concern of many of us about "driving while black," this lack of specific action by any of them on the specific topic of a possible increase in profiling with primary enforcement of distracted driving laws seems to indicate a low level of concern.

### **OTHER STATES**

The ACLU in several states (CO, FL, IA, IL, MA, MI, NE, & SC that I found) have taken a public stand against primary enforcement based on the fear of increased profiling. I couldn't find evidence that they based this fear on collected data. They cited studies showing racial disproportionality in traffic stops in general but not as that relates to primary enforcement and/or distracted driving specifically.

Michigan ACLU also opposes increasing DD penalties because the extra revenue "may incentivize over-policing and increase racial profiling as well as overly burden low income individuals."

Two states have recently (FL HB 107, RC 316.305(5) effective 7-1-19; MA HB 4203, RC 90-63(A), effective late Feb. 2020) upgraded their distracted driving laws with provisions for data collection/analysis/reporting to identify and mitigate profiling.

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Virginia SB 160, introduced 1-23-20, has an extensive provision for data collection/analysis/reporting to address both racial profiling as well as effectiveness of the upgraded law itself. A year earlier, the VA Legislative Black Caucus supported the pending senate bill (which was enacted) because it addressed their profiling concerns. **The bill was signed by the governor on 3-31-20 and takes effect 1-1-21.**

## **THE RESEARCH**

One of--or THE--leading researchers on this is Prof. David Harris of the Univ. of Pittsburgh's School of Law. He has a number of publications on the general subject of racial profiling in traffic stops.

In 1999, he did a national study for ACLU which looked at the history and recommended solutions.

- Recommendation #2 was to pass HR 118, Traffic Stops Statistics Study Act, in the 105<sup>th</sup> Congress.
- Recommendation #3 was for each state legislature to enact laws allowing traffic enforcement to be monitored. N. Carolina was the first to do so, April 21, 1999.
- Recommendation #5 was for the 50 largest cities to voluntarily collect data. *(Two of the three Ohio bills called for data collection.)*

His report also noted that the ACLU of Northern CA had created a toll-free hotline for reporting discriminatory stops. The number was given in radio ads and on billboards, among other ways.

On 2-3-20, I e-mailed Prof. Harris asking if:

- Any of his publications address DD primary enforcement specifically.
- He knows of any studies in states with primary enforcement.
- He knows of any effective "no profiling" laws.
- He knows of any effective bias training programs.

I have not gotten a reply so far.

## **POLICIES & TRAINING**

All three Ohio bills called for profiling training, as does the Ohio Collaborative Community-Police Advisory Board.

I was unable to find this kind of training in the course catalog for the Ohio Peace Officer Training Academy so I have asked the OPOT Commission for help in finding the title(s) and description(s) of such courses.

A number of bills call for agency policies, which some (I don't know how many) law enforcement agencies have established.

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## **RACIAL PROFILING AND PRIMARY-ENFORCEMENT TRAFFIC LAWS**

A concern often raised when efforts are made to make a distracted-driving law with primary enforcement, for the purpose of allowing offenders to be stopped BEFORE they can cause harm, is racial profiling.

It is a legitimate concern that "driving while black" exists. However, not allowing a preven-tive law for one of the (if not THE) most dangerous non-driving behaviors that drivers do will not solve the profiling problem. **We don't solve one problem by ignoring another.**

It is **important to know**

- There have been bills introduced in the Ohio General Assembly to address the profiling problem. Most recently, SB 84 was introduced in the 132<sup>nd</sup> GA. These bills have not progressed to floor votes. The legislators and citizens who are truly concerned about profiling need to give strong support to
  - ↳ bills of this kind, and
  - ↳ bills to amend drug laws, which have been shown to be at the root of the proliferation of racially discriminatory traffic stops, and
  - ↳ bill provisions to collect demographic data on traffic stops (which would also give us valuable insight into any age or gender groups that might be more prone to commit certain violations, so we can address that aspect of those violations.)
- Some of the previous bills on distracted driving in the Ohio GA have been sponsored by members of the Black Caucus.
- Several studies\* have analyzed pedestrian deaths and discovered that African Amer-ican and Latino pedestrians are more likely to die from being hit by vehicles than white pedestrians. A distracted driving law that allows law enforcement to stop offenders BEFORE they cause harm will help protect the same people who are subject to discrim-inatory profiling.

\* 1) *study in Las Vegas by UNLV community health sciences professor, reported in Las Vegas Sun 3-22-17*

2) *study in Portland OR <2017, referenced in Las Vegas Sun 3-22-17*

3) *"The New York City Pedestrian Safety Study & Action Plan," 2010, NYC DOT*

4) *Campos-Outcalt et al., 2003*

5) *Surface Transportation Policy Project, 2002, in California*

6) *Los Angeles Times survey, reported 11-28-99*

7) *Washington Post survey, reported 8-27-99*

8) *Kim & Palmisano, reported in Pediatric Emergency Care, 1992 vol. 8, issue 4*

## DISTRACTED DRIVING STATISTICS

SB 285 is the 30<sup>th</sup> bill in the Ohio General Assembly addressing distracted driving, the first being in 1997. A common and logical question among legislators has been and still is some form of “What do the numbers show?”

Legislators want to know the scope of the problem and the effectiveness of existing laws to address the problem.

There are statistics, but unfortunately, they are incomplete and thus can be misleading, depending on how they are used.

“Scope of the problem” statistics are incomplete for a number of reasons:

- Under-counted violations:
  - ↘ In Ohio, most law enforcement officers are not allowed to stop distracted drivers unless they commit another traffic violation.
  - ↘ When drivers are stopped, they are not always cited for either offense but given a warning, instead.
  - ↘ When they are cited, the form allows more than one violation to be noted but DD isn’t always noted.
- Under-counted crashes:
  - ↘ Crash reports have a box to indicate any of nine kinds of distractions. That box is not always used. Police worry about being able to prove distraction if the driver challenges that in court.
  - ↘ Prosecutors in different counties apparently have somewhat differing criteria for proof, making it especially difficult for highway patrol officers to report distraction.
- Under-counted fatalities:
  - ↘ The National Highway Traffic Safety Administration’s Fatality Analysis Reporting System counts only deaths within 30 days of the crash. Medical science can keep seriously-injured victims alive longer than that before they actually die.
  - ↘ Ohio’s review of fatal crash reports does not extend to investigating the cause of the crash.

“Effectiveness” statistics are not completely reliable because:

- States use different terminology for DD offenses. One state’s compilation of DD violations and crashes will not necessarily compare “apples to apples” with another state’s.
- Evaluating effectiveness depends on having before and after numbers to compare. “Before” numbers are sketchy at best: before it was against the law, it wasn’t counted
- Numbers of distracted drivers on the road reflect only the number of drivers stopped. These numbers vary among states with primary enforcement depending on the level of enforcement.
- State crash reports can differ in the specific data elements included.
- Prosecution numbers differ from citation numbers because DD charges, like other violations considered “minor,” are sometimes (often?) dropped to focus on the more serious and/or more provable charges.

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It is generally safe to use statistics to show a **trend**, but we need to be careful of

drawing specific conclusions from the numbers.

What we really need to do is address the reasons that the statistics are less meaningful than we need.

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*(\*from looking at statistics, looking at the source documents,  
and talking to law enforcement and prosecutors)*

## **“SLIPPERY SLOPE” LEGISLATION**

In regulating behavior, it can be challenging to determine where to draw the line along the danger continuum of similar behaviors.

Because so many things can distract a driver, this challenge applies to distracted driving laws. Legislators and citizens worry that if one class of behaviors is restricted, will the next class down on the “slope” be the next to be restricted, and where does this stop?

With distracted driving, there are two major categories of distraction: avoidable and unavoidable. A driver can’t avoid be distracted by, for instance, a child getting sick in the back seat. I am unaware of any safety organization or legislature that has dealt with this distinction.

Within the avoidable distractions, the continuum runs from minimal cognitive distraction to dangerous cognitive impairment.

The argument that we can’t outlaw all driving distractions is valid. It is also true that we can—and should—learn which have the highest level of cognitive impairment and deal with those.

The popular description of distracted driving—that it is manual, visual, and cognitive—is in my opinion a bit misleading. Discussion of manual is often accompanied by the admonition to keep both hands on the steering wheel. This overlooks two important facts: people with physical limitations drive safely with one hand, and people with manual transmission don’t always have two hands on the wheel.

Discussion of visual overlooks the fact that “seeing” and “looking” are not the same. There have been several fascinating tests of this. If your eyes are turned in the direction of an object or action you can be said to be “looking” at that. But, if your brain is too busy with something else, it can’t process the optic nerve’s signal and you have not “seen” it.

With cognitive impairment being the most critical, we need to look at the length of time the brain is diverted and how much of and which parts of the brain are diverted. We now have functional MRIs that let us watch a person’s brain while it attends to tasks. We now know that the interaction involved in much of the ways people use e-devices is particularly distracting. The user has to both process the information being provided and formulate a response.

We have more than enough scientific evidence by now to know that e-device use is at the top of the scale of driver cognitive distraction. Therefore, that behavior is a reasonable place to draw the line.

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This is analogous to driving while drinking. Alcohol and many other drugs impair the brain more than caffeine so we don’t allow drivers to be under the influence of the drugs we know to be most impairing, but we do allow drivers to drink coffee or colas before or during driving.

Many non-driving behaviors take mere seconds. In the early days of phoning while driving, studies showed that a phone conversation could last several minutes. A study by the Univ. of Rhode Island in 2002 and another by the Univ. of Sydney and the Insurance Institute for Highway Safety ca. 2005 determined that the cognitive distraction can last as long as 10 minutes after the conversation ends. We often hear, now, of 27 seconds for that lingering distraction. That was in the Univ. of Utah's 2015 study for the AAA Foundation for Traffic Safety on using voice commands for in-car tech or e-devices brought into the car.

In the early days of the 5-1-1 systems\*, Arizona's system was studied and found to take up to 10 minutes to get through all the options, menus, and pages to the information the driver wants.

These systems assume that drivers will use them only before starting to drive. With large number of drivers using e-devices while driving and the fact that the whole purpose of these systems is to get real-time information, I think that assumption is invalid for too many drivers.

I think there is enough logic and evidence to support restricting the most mentally impairing, avoidable, non-driving behaviors without fear of "going down the slippery slope" to the very brief, barely-cognitive behaviors.

\*ODOT's system is called OHGO. The Ohio Association of Regional Councils funds and operates a system called Gohio.

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## **LAW VIOLATION PENALTIES: PURPOSES AND EFFECTS**

### PURPOSES

DETERRENCE: Reduction in the likelihood of repeat offense(s). "...detering the offender and others from future crime..."<sup>A</sup>

EXPRESSIVE: Expression of societal disapproval of the behavior.

JUSTICE: 1) Victim perception that the negative impact on the offender is proportionate to the negative impact on the victim. "...commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim..."<sup>B & D</sup>

2) Victim's recovery. "The extent to which victims' experiences are...validated or invalidated by their...social milieu may have an important effect on their individual psychological adaptation."<sup>9</sup> "The term social here...includes...significant persons (e.g., local authorities...)..."<sup>10</sup>

PROTECTION: Reduction in the likelihood of additional victims. "...protect the public from future crime by the offender and others..."<sup>A & C</sup>

PUNISHMENT: "...punish the offender..."<sup>A & C</sup>

REHABILITATION: Change in the offender's behavior from offending to not-offending. "...rehabilitating the offender..."<sup>A & C</sup>

RESTITUTION: "...making restitution to the victim of the offense, the public, or the victim and the public."<sup>A & C</sup>

## EFFECTS

**"Research underscores...that...it is the certainty of being caught that deters a person from committing a crime."**<sup>1</sup>

**"Certainty of being caught is a vastly more powerful deterrent than the punishment."**<sup>5</sup>

**"Increasing drivers' perceptions that they are at risk of being caught speeding may improve the effectiveness of speeding law enforcement."**<sup>4</sup>

**"We pursue [deterrence] by establishing penalties...harsh enough—and the prospect of their being imposed clear enough—to outweigh the potential gains from the criminal activity."**<sup>7</sup>

WARNINGS/Deterrence: Limited effectiveness.<sup>5</sup>

CITATIONS/Deterrence: More effective than written warning.<sup>5</sup>

COMMUNITY SERVICE [Not able to find any research.]

RETRAINING/RE-EDUCATION [Not able to find any research.]

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FINES/Deterrence: Combined with points, stronger emotion thus stronger intention to change behavior.<sup>3</sup>

POINTS/Deterrence: Combined with points, stronger emotion thus stronger intention to change behavior.<sup>3</sup>

RESTITUTION/Deterrence: Lower recidivism rates than custody.<sup>6</sup>

CUSTODY (ankle bracelet, house arrest, supervised probation, jail, prison)

Deterrence: Ineffective & possibly counterproductive<sup>1</sup>

Protection: Effective<sup>1</sup>

Punishment: Effective<sup>1</sup>

INCREASED PENALTIES/Deterrence: Generally ineffective<sup>1,2</sup> More effective when original penalty was very low level.<sup>3</sup>

## APPLIED TO OHIO TRAFFIC VIOLATIONS

ORC 2929.21(D): "Divisions (A) & (B)...shall not apply to any offense that is disposed of by a traffic violations bureau of any court pursuant to Traffic Rule 13 and shall not apply to any...minor misdemeanor that is disposed of without a court appearance"

Traffic Rule 13(B) Authority of violations bureau

"...The following traffic offenses shall not be processed by a traffic violations bureau: (1) Indictable offenses; (2) Operating a motor vehicle while under the influence of alcohol or any drug of abuse; (3) Leaving the scene of an accident; (4) Driving while under suspension or revocation of a driver's or commercial driver's license when jail is a possible penalty; (5) Driving without being licensed to drive when jail is a possible penalty; (6) A third moving traffic offense within a twelve-month period when jail is a possible penalty; (7) Failure to stop and remain standing upon meeting or overtaking a school bus stopped on the highway for the purpose of receiving or discharging a school child; (8) Willfully eluding or fleeing a police officer; (9) Drag racing.

If we continue to allow distracted drivers to be charged with a minor misdemeanor, unless they contest the charge, there is no trial. With no trial, there is no sentencing. With no sentencing there is no

- victim impact statement; the offender is more comfortably insulated from the effects of his behavior and the judge can't make the penalty commensurate with the impact.
- possibility of restitution. This also insulates the offender and adds financial victimization to physical and psychological victimization.

### SOURCES

<sup>A</sup>ORC 2929.11(A) Purposes of felony sentencing

<sup>B</sup>ORC 2929.11(B) Purposes of felony sentencing

<sup>C</sup>ORC 2929.21(A) Purposes of misdemeanor sentencing

<sup>D</sup>ORC 2929.21(B) Purposes of misdemeanor sentencing

<sup>1</sup>"Five Things About Deterrence" - US DOJ, Office of Justice Programs, Nat'l Institute of Justice, undated; from "Deterrence in the 21<sup>st</sup> Century" - Daniel Nagin, Carnegie Mellon, 2013

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<sup>2</sup>"The Specific Deterrent Effect of Higher Fines on Drink-Driving Offenders" - abstract of article in *The British Journal of Criminology*" Sept. 2011

<sup>3</sup>"The effect of severity and type of traffic penalties on car drivers' emotions, perceptions of fairness, and behavioural intentions" - SWOV Institute for Road Safety Research, The Hague, the Netherlands, 2013

<sup>4</sup>"Do speeding tickets reduce the likelihood of receiving subsequent speeding tickets? A longitudinal study of speeding violators in MD" in *Traffic Injury Prevention*, 3-8-07

<sup>5</sup>"An Evaluation of the Effectiveness of Police Written Warnings as a Deterrent to Traffic Law Violations in Tucson AZ", 1968 thesis by Glenn Louis Fitts

<sup>6</sup>Vermont Juvenile Court Diversion Program study reported in “Restitution” by Christopher Bright, Prison Fellowship International’s Centre for Justice & Reconciliation, 2019

<sup>7</sup>“Restitution, Punishment, and Debts to Society” - Richard Dagger, chapter in *Victims, Offenders, and Alternative Sanctions*,” Joe Hudson & Burt Galaway, ed., 1980

<sup>8</sup>“The Expressive Function of Punishment,” in *Doing and Deserving*, ed. Joel Feinberg, Princeton Univ. Press, 1970

<sup>9</sup>Cordova, Cunningham, Carlson, and Andrykowski, 2001, in “Social Acknowledgement as a Victim or Survivor: A Scale to Measure a Recovery Factor of PTSD” - Andreas Maercker and Julia Muller, Univ. of Zurich Dept. of Psychology, 2004

<sup>10</sup>“Social Acknowledgement as a Victim or Survivor: A Scale to Measure a Recovery Factor of PTSD” - Andreas Maercker and Julia Muller, Univ. of Zurich Dept. of Psychology, 2004

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