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A Sober Approach to Drugged Driving: Oklahoma's HB 1441 and the Role of Courts

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COMMENTS

A Sober Approach to Drugged Driving: Oklahoma's HB 1441 and the Role of Courts

I. Introduction

In May of 2013, the Oklahoma legislature passed and the Governor signed into law House Bill 1441 (HB 1441), which made various amendments to Oklahoma's statutes concerning driving under the influence of an intoxicating substance (DUI).[1] Most notably, HB 1441 expanded DUI liability to include anyone who has in her body any amount of a Schedule I chemical or controlled substance *or its metabolite*.[2] While a few outside commentators have dismissed this reform as an Oklahoman anomaly,[3] in fact, many states have DUI laws concerning illicit metabolites.[4] In most states, these laws elicit strong opposition from legal commentators.[5] In Oklahoma too, the law has been met with some outrage.[6] Resistance to

1. H.B. 1441, 54th Leg., 1st Sess. (Okla. 2013) (codified at 47 OKLA. STAT. § 11-902 (Supp. 2013)).

2. 47 OKLA. STAT. § 11-902(A)(3).

3. *E.g.*, Nicci Francis, *Past Pot Use Can Bring DUI Charges in Oklahoma*, EXAMINER (June 21, 2013, 1:54 PM), http://www.examiner.com/article/past-pot-use-can-bring-dui-charges-oklahoma ("Chalk it up to one of those strange Oklahoma laws. . . .").

4. *See, e.g.*, ARIZ. REV. STAT. § 28-1381(A)(1) (2012), *repealed by* Arizona *ex rel.* Montgomery v. Harris, 346 P.3d 984 (Ariz. 2014); GA. CODE ANN. § 40-6-391(a)(2) (West 2008); IND. CODE ANN. § 9-30-5-1(c) (West 2012); MINN. STAT. ANN. § 169A.20(7) (West 2009) (excluding marijuana metabolites); NEV. REV. STAT. ANN. § 484C.110(3)(c), (e), (h) (West 2012), *amended by* S.144, 78th Leg., Reg. Sess. (Nev. 2015) (limited to specific amounts of certain metabolites); N.C. GEN. STAT. ANN. § 20-138.1 (West 2006); OHIO REV. CODE ANN. § 4511.19(G)(1) (West Supp. 2013) (limited to specific amounts of certain metabolites), *repealed by* State v. Klembus, 2014-Ohio-3227, 17 N.E.3d 603.

5. *See, e.g.*, Charles R. Cordova, Jr., Note, *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 NEV. L.J. 570, 575 (2007); Darron J. Hubbard, *Narcotics on Illinois's Roadways: Drugged Driving's Ill Effects After* Martin, 62 DEPAUL L. REV. 591, 604 (2013); Matthew C. Rappold, *Criminal Law—Evidence of Inactive Drug Metabolites in DUI Cases: Using a Proximate Cause Analysis to Fill the Evidentiary Gap Between Prior Drug Use and Driving Under the Influence*, 32 U. ARK. LITTLE ROCK L. REV. 535, 537 (2010); Joshua C. Snow, *The Unconstitutional Prosecution of Controlled Substance Metabolites Under Utah Code § 41-6A-517*, 2013 UTAH L. REV. ONLAW 195, 202.

6. *See, e.g.*, Francis, *supra* note 3; Paul Armentano, *Oklahoma Becomes Third State This Year to Approve Unscientific Per Se Limits for Cannabis*, NORML BLOG (June 11, 2013) http://blog.norml.org/2013/06/11/oklahoma-becomes-third-state-this-year-to-approve-unscientific-per-se-limits-for-cannabis/; Alex Bischoff, *High Road: Oklahoma's New Marijuana Law*, THIS LAND PRESS (July 23, 2013), http://thislandpress.com/roundups/high-

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"drugged-driving laws" arises because, as courts have acknowledged, the metabolites of many illegal substances—particularly cocaine and marijuana—remain detectable in a user's bodily fluids long after the intoxicating effect of those substances dissipates.[7] This means that liability for "driving under the influence" can attach to an individual who is actually unimpaired while behind the wheel. This seems an inappropriate result—one that divorces punishment from criminal culpability—as the following hypothetical example of enforcement illustrates:[8]

A college student at the University of Oklahoma takes a spring break ski trip to Colorado. Having never tried marijuana but knowing the state recently legalized its use,[9] she smokes some with friends. She does not enjoy the experience and decides that her first experiment with drugs will be her last.

Weeks later, back in Norman, the same student is involved in an automobile collision and is taken unconscious to the hospital. As is routine in such cases, the hospital runs a screening of her blood for intoxicating substances. When they arrive at the hospital, the student's parents are relieved to hear that she has sustained only minor injuries. However, they

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road-oklahomas-new-marijuana-law/ (citing public outrage); James M. Wirth, *Everybody Is Guilty Under Oklahoma's Zero-Tolerance Metabolite DUI-D Law*, TULSA ATTORNEY BLOG (Oct. 2, 2013), http://www.wirthlawoffice.com/tulsa-attorney-blog/2013/10/everybody-guilty-oklahomas-zero-tolerance-metabolite-dui-d-law.

7. Estrich v. State, 995 So. 2d 613, 616 (Fla. Dist. Ct. App. 2008) (accepting expert testimony that "marijuana metabolite in the defendant's blood sample likely would not have affected [defendant]"); Commonwealth v. Hutchins, 42 A.3d 302, 308 (Pa. Super. Ct. 2012) (finding "[t]hat metabolite is a waste product of marijuana," not evidence of active marijuana and "fails to establish that Appellant was under the influence"); Commonwealth v. DiPanfilo, 993 A.2d 1262, 1267 (Pa. Super. Ct. 2010) ("[T]he presence of metabolites only showed that Appellant consumed marijuana some time in the past."). *But see* State v. Hammonds, 968 P.2d 601, 603 (Ariz. Ct. App. 1998) (finding that many drugs will appear in metabolic form when inactive and that the inactive form would not cause impairment); Head v. State, 693 S.E.2d 845, 848 (Ga. Ct. App. 2010) (finding that cocaine "metabolite in one's blood 'is not indicative of any impairment because it is the after-effect'" of consumption); Commonwealth v. Etchison, 916 A.2d 1169, 1173 (Pa. Super. Ct. 2007) (acknowledging Appellant's argument that the government's witness testified that marijuana metabolites in the bloodstream "are not an indication of present impairment").

8. It is worth noting that some variation of this hypothetical is presented by several commenters on drugged-driving laws. *See, e.g.*, Hubbard, *supra* note 5, at 591; Rappold, *supra* note 5, at 535; Snow, *supra* note 5, at 195.

9. Niraj Chokshi, *Marijuana Sales Commence in Colorado for Recreational Use*, WASH. POST, Jan. 1, 2014, http://www.washingtonpost.com/politics/marijuana-sales-commence-in-colorado-for-recreational-use/2014/01/01/977040d0-7320-11e3-8b3f-b1666705ca3b_story.html.

are shocked when they learn that tests discovered tetrahydrocannabinol, a metabolite of marijuana,[10] in their daughter's blood and that she has been charged with a DUI.

Believing that such a scenario is unacceptable, several legal scholars argue that metabolite-specific drugged-driving laws run afoul of one or more constitutional principles.[11] Those charged under similar laws in other states have occasionally challenged these laws as unconstitutional.[12] These challenges have been largely unsuccessful.[13] Nevertheless, some have also suggested Oklahoma's law should be challenged.[14] This Comment considers the constitutional viability of HB 1441. Each part of this Comment analyzes a different constitutional challenge either proposed by opponents of drugged-driving laws, or, in many cases, tested before the courts of other states that have such laws. An analysis of each of the potential challenges to drugged-driving laws ultimately suggests Oklahoma courts are highly unlikely to invalidate HB 1441.

Part II of this Comment analyzes the constitutional doctrine of overbreadth, considering whether HB 1441 reaches beyond its legitimate sweep to substantially interfere with constitutionally protected activity. Part III analyzes the void-for-vagueness doctrine, asking whether the language of HB 1441 is so ambiguous as to be constitutionally inadequate. Part IV considers an equal protection challenge. Part V reviews the Oklahoma Constitution's prohibition on special laws, inquiring into whether HB 1441 might violate the requirement that laws in the state be general in their operation. Part VI considers a potential Eighth Amendment challenge that cites U.S. Supreme Court precedent to argue that HB 1441 impermissibly creates a status offense with no concern for actual criminal conduct. Part VII concludes that, while each of these hypothetical challenges bring to light in their own way the imprudence of HB 1441, Oklahoma courts are likely without basis to invalidate the Act. Ultimately, although HB 1441 probably offends basic notions of criminal justice premised on moral

10. Marilyn A. Huestis, John M. Mitchell & Edward J. Cone, *Detection Times of Marijuana Metabolites in Urine by Immunosay and GC-MS*, 19 J. ANALYTICAL TOXICOLOGY 443, 444 (1995).

11. Cordova, Jr., *supra* note 5, at 581-83; Hubbard, *supra* note 5, at 608-09; Snow, *supra* note 5, at 209.

12. *See, e.g.*, *Hammonds*, 968 P.2d at 602; State v. Phillip, 873 P.2d 706, 707 (Ariz. Ct. App. 1994); *Head*, 693 S.E.2d at 846; Williams v. State, 50 P.3d 1116, 1118 (Nev. 2002); State v. Whalen, 991 N.E.2d 733, 740 (Ohio Ct. App. 2013); *Etchison*, 916 A.2d at 1171.

13. *See Hammonds*, 968 P.2d at 606; *Phillips*, 873 P.2d at 710; *Head*, 693 S.E.2d at 846; *Williams*, 50 P.3d at 1121-22; *Etchison*, 916 A.2d at 1174.

14. *See, e.g.*, Francis, *supra* note 3.

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culpability and authorizes untenable practical consequences, Oklahomans' hope for repeal lies not with the courts, but with the same legislature that recently enacted the law.

II. Overbreadth

Some academics have proposed,[15] and some state courts have considered,[16] overbreadth challenges to laws like HB 1441. Those challenging a legislative enactment as overbroad do so by illustrating "some aggregate number of unconstitutional applications of an otherwise valid rule of law."[17] In the drugged-driving context, "the crux" of the overbreadth argument is that "the presence of metabolites of marijuana and/or other prohibited drugs in one's bloodstream does not correlate to impairment and as such is not rationally related to [a] DUI statute's purpose of preventing unsafe drivers from driving."[18]

Some state court judges have sympathized with this position. Pennsylvania Supreme Court Justice Bender, dissenting in *Commonwealth v. Etchison*, argued that his state's statute[19]—very similar in language to Oklahoma's—was invalid as overbroad.[20] For Justice Bender, "punishing mere presence in one's blood of metabolites of Schedule I drugs, without proof of impairment . . . goes too far."[21] The majority was not persuaded.[22] For reasons explained below, Oklahoma courts are also unlikely to accept an overbreadth challenge to HB 1441.

A. Traditional Overbreadth Challenges: Requirement of Constitutional Protection

An overbreadth challenge typically arises when a criminal statute affects speech or conduct that is arguably protected by the First Amendment.[23] In fact, Justice Scalia, writing for the Court in *Virginia v. Hicks*, suggested that

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15. *See, e.g.*, Cordova, Jr., *supra* note 5, at 575-76.

16. *See, e.g.*, *Whalen*, 991 N.E.2d at 743; *Etchison*, 916 A.2d at 1173; *Williams*, 50 P.3d at 1123; *Phillips*, 873 P.2d at 708-09.

17. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 363 (1998).

18. *Etchison*, 916 A.2d at 1176 (Bender, J., concurring and dissenting).

19. 75 PA. CONS. STAT. ANN. § 3802 (West 2006), *invalidated by* Commonwealth v. Duda, 923 A.2d 1138 (Pa. 2007).

20. 916 A.2d at 1176.

21. *Id.* at 1178.

22. *Id.* at 1170-74.

23. *See, e.g.*, Virginia v Hicks, 539 U.S. 113, 124 (2003).

"[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech."[24] Some state courts have adhered to this practice as well.[25] Because there is no apparent precedent on the question, it is unclear whether Oklahoma courts would accept an overbreadth challenge outside of the First Amendment context. However, it is clear that Oklahoma courts would require, at minimum, that such claims allege that the disputed law restricts some form of constitutionally protected conduct or activity.[26] The Oklahoma Supreme Court has formulated the rule this way: "[a] statute . . . is overbroad if it prohibits constitutionally protected conduct as well as conduct that states can constitutionally restrict."[27] Accordingly, when a Tulsa County District Court invalidated as overbroad a statute that allowed the seizure of alcohol from violators of the state's "open saloon law," the Oklahoma Supreme Court reversed the district court's decision.[28] The court held that overbreadth analysis was inapposite because no "constitutionally protected activity" was at issue.[29]

Justice Bender suggests in his *Commonwealth v. Etchison* dissent that courts have applied the overbreadth doctrine when no constitutional rights are at stake.[30] To support this argument, Justice Bender cites two cases.[31] The first is *Commonwealth v. Barud*, a Pennsylvania Supreme Court case that invalidated a statute punishing operation of a vehicle if a test taken within three hours after driving revealed a blood alcohol content of .10% or greater.[32] There, the court reasoned that the statute was overbroad because a test taken three hours after driving would not indicate whether the accused's blood alcohol content was above the legal limit while she was

24. *Id.*

25. *E.g.*, State v. Whalen, 991 N.E.2d 738, 743 (Ohio Ct. App. 2013).

26. *See, e.g.*, Conchito v. City of Tulsa, 1974 OK CR 82, ¶ 6, 521 P.2d 1384, 1386, 1974 ("The overbreadth doctrine is founded upon the principle of substantive due process which forbids governments to prohibit certain freedoms guaranteed by the Constitution."); *see also* Allen v. City of Oklahoma City, 1998 OK CR 42, ¶ 5, 965 P.2d 387, 389 n.7 ("The overbreadth doctrine evolved from the need to protect certain freedoms guaranteed by the Constitution from governmental intrusion.").

27. *In re* Initiative Petition No. 341, 1990 OK 53, ¶ 5, 796 P.2d 267, 269.

28. Okla. Alcoholic Beverage Control Bd. v. Parkhill Rests., Inc., 1983 OK 77, ¶ 8, 669 P.2d 265, 269.

29. *Id.*

30. *See, e.g.*, 916 A.2d 1169, 1178 (Bender, J., concurring and dissenting).

31. *Id.*

32. 681 A.2d 162, 162 (Pa. 1996).

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behind the wheel.[33] Essentially, the statute went farther than simply penalizing drunk driving by also punishing those who were sober while driving but, for whatever reason, drunk three hours later. Justice Bender reads artfully into the *Barud* court's holding that "the statute sweeps unnecessarily broadly into activity which has not been declared unlawful in this Commonwealth."[34] Cleverly, he distinguishes the claim that some activity has not been declared *unlawful* from the claim that such activity is *constitutionally protected*, justifying this distinction by juxtaposing an earlier decision that used the language of constitutionality in finding no right to drive after consuming alcohol.[35]

To the extent that Justice Bender is right—that the Pennsylvania court applied the overbreadth doctrine while deliberately avoiding a holding on constitutional grounds—a review of the case law suggests that such a decision is anomalous and against the weight of authority outside that jurisdiction. The only case that Justice Bender cites outside of Pennsylvania is *Stanley v. Georgia*.[36] In that case, the United States Supreme Court struck down a Georgia law making it a crime to knowingly possess obscene material.[37] As Justice Bender observes, the Court did note that the First Amendment has never been held to protect obscene material.[38] However, the Court took great care to distinguish previous decisions that concerned mailing or selling obscene materials from the instant case in which mere possession of the material was at issue.[39] The Court found that previous cases denied the First Amendment's protection to "certain public actions" with respect to obscenity, but that none spoke to the question of solely private possession of obscene material.[40]

Far from disregarding the question of constitutional protection, then, the *Stanley* Court based its decision to invalidate the Georgia law on the First Amendment's broad guarantee of the "right to receive information and ideas" and the Fourteenth Amendment's protection from "unwanted governmental intrusions into one's privacy."[41] In order to appreciate the extent of the *Stanley* Court's commitment to the Constitution—and to rebut

33. *Id.* at 166.
34. *Id.*
35. *Etchison*, 916 A.2d at 1178.
36. *Id.*
37. Stanley v. Georgia, 394 U.S. 557, 568 (1969).
38. *Etchison*, 916 A.2d at 1178 (citing *Stanley*, 394 U.S. at 560)).
39. *Stanley*, 394 U.S. at 560-64.
40. *Id.*
41. *Id.* at 564.

Justice Bender's assertion that the Court "applied the overbreadth principle to activity that did not enjoy a specific constitutional protection"[42]—it is necessary to quote the Court's decision at length:

> These are the rights that appellant is asserting in the case before us . . . the right to read or observe what he pleases . . . to satisfy his intellectual and emotional needs in the privacy of his own home . . . to be free from state inquiry into the contents of his library. . . . [M]ere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[43]

Justice Bender's analysis seems to ignore the Court's central and explicit holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[44] Moreover, to the extent that any court applying overbreadth analysis has disregarded the question of whether the activity restricted by the disputed law is constitutionally protected, there are no apparent examples in Oklahoma.

B. Modern Overbreadth Challenges: Substantial Interference

In a landmark overbreadth case that, interestingly, arose out of Oklahoma law, the United States Supreme Court further refined overbreadth analysis. In *Broadrick v. Oklahoma*, the Court upheld an Oklahoma statute regulating the political activities of certain state employees and in so doing increased the burden of a petitioner alleging overbreadth.[45] There, the statute in question was written so broadly as to prohibit an official from even indirectly soliciting contributions for political purposes or participating in the management of the affairs of any political party or candidate.[46] Appellants who challenged the law argued that such

42. *Etchison*, 916 A.2d at 1178.
43. *Stanley*, 394 U.S. at 565.
44. *Id.* at 568.
45. 413 U.S. 601, 602 (1973).
46. *Id.* at 605-06.

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language could be construed to proscribe clearly protected activities such as wearing political buttons or displaying bumper stickers.[47]

Despite these concerns, the *Broadrick* Court characterized the overbreadth doctrine as "strong medicine," which should be used "sparingly and only as a last resort."[48] The doctrine's function, according to the Court, "attenuates" as the nature of the conduct that it forbids the state to regulate approaches "the scope of otherwise valid criminal laws that reflect legitimate state interests."[49] The Court acknowledged that such laws, broadly construed, might deter protected expressions.[50] However, as the probability of a law interfering with protected activity decreases, the Court reasoned, "there comes a point where that effect—at best a prediction—cannot, with confidence, justify . . . prohibiting a State from enforcing [a] statute against conduct that is admittedly within its power to proscribe."[51] Therefore, "particularly where conduct and not merely speech is involved," the Court held "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[52]

This requirement—that a statute *substantially* interfere with constitutionally protected activity in order to be considered overbroad—is a stubborn one. When considering an overbreadth challenge, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail."[53] Moreover, when slight or potential overbreadth is suspected, the court must consider whether there is a viable interpretation of the statute that would confine it to permissible application.[54] When this limiting construction is available, the court will prefer this interpretation to that which renders the law invalid.[55]

Oklahoma courts take this approach as well, especially where criminal statutes are at issue.[56] The Oklahoma Court of Criminal Appeals has held that "[w]here an act is readily subject to a narrowing construction which

47. *Id.* at 609-10.
48. *Id.* at 613.
49. *Id.* at 615.
50. *Id.*
51. *Id.*
52. *Id.*
53. Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 494 (1981).
54. *See, e.g.*, Conchito v. City of Tulsa, 1974 OK CR 82, ¶ 5, 521 P.2d 1384, 1386.
55. *Conchito*, ¶ 10, 521 P.2d at 1387; *see also Broadrick*, 413 U.S. at 615-16.
56. Gilbert v. State, 1988 OK CR 268, ¶ 7, 765 P.2d 1208, 1210.

would avoid violation of the overbreadth doctrine, then that narrow construction should be applied and the act should be upheld against a facial challenge."[57] Because a limiting construction is to be considered, a court must consider any ambiguity in a statute's language.[58] "To this extent, the vagueness of a law affects overbreadth analysis."[59] The vagueness doctrine will be considered in Part III. Presently, it suffices to say that the courts are only interested in overbreadth challenges to the most offensive statutes. Such statutes must, at a minimum, *substantially interfere* with a zone of *constitutionally protected* activity.

C. State Applications of Overbreadth to Drugged-Driving Laws

These formulations of the law bode poorly for those who would challenge drugged-driving statutes as overbroad. It is perhaps not surprising then that the few courts to consider these challenges have been categorically dismissive. For example, the Supreme Court of Nevada hardly began its overbreadth analysis before summarily concluding that the state's DUI metabolite law affected no constitutionally protected conduct and so the argument was without merit.[60] Similarly, in *Etchison*, the majority wasted little time on the overbreadth question, finding that Pennsylvania's law punished no constitutionally protected activity.[61] Ohio and Arizona courts have assigned such challenges even less credibility, holding that the overbreadth doctrine applies only to First Amendment grievances and that none were presented by metabolite laws in those jurisdictions.[62] In no state did the court make it past the first question of overbreadth analysis—whether the challenged law reaches substantially into constitutionally protected conduct. The challenge ended there.

D. Overbreadth Challenge to HB 1441: Unlikely to Prevail

Opponents of Oklahoma's HB 1441 have little reason to suppose that Oklahoma courts would analyze an overbreadth challenge any differently from others. The first task of the court would be to inquire as to whether the law overreaches to substantially interfere with constitutionally protected

57. *Id.*

58. Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 n.6 (1981).

59. *Id.*

60. Williams v. State, 50 P.3d 1116, 1123-24 (Nev. 2002).

61. Commonwealth v. Etchison, 916 A.2d 1169, 1173 (Pa. Super. Ct. 2007).

62. State v. Whalen, 991 N.E.2d 738, 743 (Ohio Ct. App. 2013); State v. Phillips, 873 P.2d 706, 709 (Ariz. Ct. App. 1994).

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conduct. As other courts have recognized, there is neither a constitutional right to use illicit drugs nor to drive.[63] In fact, the statute's reference to Schedule I controlled substances and its provision for license revocation[64] suggest unequivocally that the consumption of such substances is not only unprotected but also illegal and that driving is a revocable privilege.

The Court of Criminal Appeals has articulated the most lenient, if anomalous, phrasings of the overbreadth rule in Oklahoma. In *Hayes v. Municipal Court*, where that court invalidated an anti-loitering statute enacted by Oklahoma City,[65] the court announced in its syllabus that "[o]verbroad legislation is constitutionally defective if it extends state criminal authority beyond the proper reach of government into the protected private area."[66] Here again, however, the term "protected private area" was given meaning by its comparison to those areas *constitutionally* subject to state regulation.[67] Because schedule I substances are within the state's regulatory power, this version of the rule offers no more hope for a prospective challenge to HB 1441. Another liberal phrasing of the rule stated by the Court of Criminal Appeals in upholding the Securities Act provided that "[a]n Act is unconstitutionally overbroad only if it proscribes illegal as well as legal conduct."[68] Again, this version is of no use to Oklahomans opposing HB 1441 as the conduct with which the law interferes—the consumption of illicit drugs—is not legal; it is, in fact, criminal.

E. Concluding Overbreadth: Various "What Ifs" and the Substantiality Requirement

Returning to the dissent in *Etchison*, Justice Bender remained convinced, notwithstanding the weight of authority, that a Pennsylvania law holding a driver with metabolites in his system criminally liable under the state's DUI statute is unconstitutionally overbroad.[69] In coming to this conclusion, Justice Bender was especially concerned that "marijuana can appear in one's system without the unlawful usage of marijuana and through both

63. *See, e.g.*, *Etchison*, 916 A.2d at 1173; *Williams*, 50 P.3d at 1120.

64. 47 OKLA. STAT. § 11-902 (Supp. 2013).

65. 1971 OK CR 274, ¶ 33, 487 P.2d 974, 981.

66. *Id.* ¶ 19, 487 P.2d at 979 (holding the Oklahoma City ordinance to be overbroad "as it invades protected freedoms and punishes conduct which in no way impinges on the rights or interests of others).

67. *Id.* ¶¶ 22-23, 487 P.2d at 978-79.

68. Armstrong v. State, 1991 OK CR 34, ¶ 20, 811 P.2d 593, 598.

69. Commonwealth v. Etchison, 916 A.2d 1169, 1178 (Pa. Super. Ct. 2007).

voluntary and involuntary consumption," citing myriad hypothetical examples ranging from legal use in a jurisdiction that allows for marijuana consumption to police officers being secretly dosed by fast food employees.[70]

While Justice Bender's hypotheticals are undoubtedly concerning, they likely do not warrant overbreadth consideration. A law that punishes an individual for simply having a substance in her system—without requiring evidence that she knowingly ingested it or behaved irresponsibly while under its influence—invites the imagining of various unjust applications. However, citing the *Broadrick* Court's reasoning that predictable but improbable scenarios of overreach are not sufficiently substantial to warrant the invalidation of a law in its entirety, courts have largely been consistent in dismissing overbreadth challenges premised on such fanciful speculation.[71] For example, in *Sabri v. United States*, the Supreme Court noted that overbreadth challenges reliant on hypothetical scenarios not before the court are "especially to be discouraged" because "they invite judgments on fact-poor records" and require a "departure from the norms of adjudication" in "relaxing familiar requirements of standing."[72]

In courts affecting Oklahomans most regularly, the sentiment has been the same. The Tenth Circuit has rejected hypothetical reasoning noting that "courts are not 'roving commissions assigned to pass judgment on the validity of the nations laws,' but instead address only specific 'cases' and 'controversies.'"[73] Moreover, the Oklahoma Supreme Court echoed this sentiment when upholding the constitutionality of a ban on cockfighting in the state.[74] The court noted that, "even if it may be susceptible of some improper applications . . . this reach is incidental and insubstantial in relation to the legitimate purpose."[75] Indeed, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[76]

Thus, while opponents to HB 1441 make a persuasive case that the statute ought to have been written more precisely—for example to exclude

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70. *Id.* at 1177.

71. *E.g.*, Sabri v. United States, 541 U.S. 600, 609-10 (2004).

72. *Id.* at 609.

73. Ward v. Utah, 398 F.3d 1239, 1246 (10th Cir. 2005) (quoting Citizens Concerned for Separation of Church & State v. City & Cnty. of Denver, 628 F.2d 1289, 1295 (10th Cir. 1980)).

74. Edmonson v. Pearce, 2004 OK 23, ¶ 49, 91 P.3d 605, 630.

75. *Id.* ¶ 60, 91 P.3d at 633.

76. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

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non-active metabolites or require a showing that the metabolite detected was impairing at the time of driving—these arguments are unlikely to persuade judges. In *Members of City Council v. Taxpayers for Vincent*, the United States Supreme Court acknowledged the plausibility of alternatives to the disputed ordinance that "would have had a less severe effect," noting that even when "[p]lausible public policy arguments" point to a wiser formulation of the statute, "it by no means follows that it is therefore constitutionally mandated."[77] These observations considered, "the crux"[78] of the overbreadth argument, as relied on by Justice Bender, seems to get it wrong.

III. Vagueness

"A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague. . . ."[79] The Supreme Court has long recognized that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[80] It appears, however, that some confusion exists among courts about the constitutional basis for the vagueness doctrine. For example, in *Armstrong v. State*, the Oklahoma Court of Criminal Appeals apparently based its analysis on due process considerations.[81] In another case, however, the United States Supreme Court rejected an Oklahoma court's vagueness analysis because "it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment."[82] However, these differing constitutional justifications share a reliance on a basic principle. Specifically, "statutes creating criminal offenses must be drawn in language sufficient to apprise the public of exactly what conduct

77. *Id.* at 815-16.

78. Commonwealth v. Etchison, 916 A.2d 1169, 1176 (Pa. Super. Ct. 2007).

79. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).

80. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

81. 1991 OK CR 34, ¶ 20, 811 P.2d 593, 598; *see also* Ohio v. Whalen, 991 N.E.2d 738, 742 (Ohio Ct. App. 2013) ("The vagueness doctrine, which is premised on the Due Process Clause of the Fifth and Fourteenth Amendments, requires a statute to give fair notice of offending conduct.").

82. Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

is forbidden"[83] and to "furnish[] a reasonably definite and ascertainable standard of guilt."[84] Holding the legislature to this standard is necessary to ensure "'government by clearly defined laws'" as opposed to "the moment-to-moment opinions of a policeman on his beat.'"[85]

Perhaps the most oft-cited rule for guiding vagueness analysis is that handed down by the United States Supreme Court in *Connally v. General Construction Co.*[86] In that case, the Court announced that a statute is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[87] In accordance with this rule, Oklahoma courts have required "that an enactment be voided for vagueness if its prohibitions are not clearly defined."[88]

While the rule may seem simple, there are two classes of "ordinary [people]" the law concerns and therefore at least two independent reasons for invalidating a vague statute. One reason concerns notice for those whom the law affects. That is, a statute is void for vagueness "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[89] The other reason concerns guidelines for enforcement on behalf of those who must apply the law.[90] Accordingly, a statute is void for vagueness "if it authorizes or even encourages arbitrary and discriminatory enforcement."[91] The United States Supreme Court seems to believe that "the more important aspect of the 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

83. Hayes v. Municipal Court of Oklahoma City, 1971 OK CR 274, ¶ 6, 487 P.2d 974, 976.

84. Herndon v Lowry, 301 U.S. 242, 255 (1937).

85. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965) (quoting Cox v. Louisiana, 379 U.S. 536, 579 (1965)).

86. 269 U.S. 385 (1926).

87. *Id.* at 391.

88. Pegg v. State, 1983 OK CR 26, ¶ 4, 659 P.2d 370, 372.

89. Hill v. Colorado, 530 U.S. 703, 732 (2000).

90. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); Broadrick v. Oklahoma, 413 U.S. 601, 607 (1972) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)) (asking whether the statute in question "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it").

91. *Hill*, 530 U.S. at 732.

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enforcement.'"[92] Oklahoma apparently shares that view.[93] That said, "[o]bjections to vagueness . . . rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."[94] Finally, as with overbreadth, "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."[95]

A. Vagueness and Standing

The vagueness doctrine also raises interesting questions of standing. That is, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[96] There may be an exception to this rule in the event that First Amendment freedoms are at stake,[97] but otherwise, a court will, at the very least, "examine the complainant's conduct before analyzing other hypothetical applications of the law."[98] This tendency comports with the *Broadrick* Court's insistence that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."[99] Moreover, the Supreme Court has demonstrated a willingness to reverse the decisions of a lower court when that court's vagueness analysis does not comply with these instructions.[100]

This rule of standing likely presents problems for the most probable defendant in an Oklahoma drugged-driving case. It is reasonable to assume that the typical defendant in such a case intentionally consumed illegal drugs within some reasonably recent time prior to driving. This can be assumed, first, because only a few Schedule I substances produce metabolites that linger for weeks.[101] Second, those with metabolites in their

92. *Kolender*, 461 U.S. at 358 (internal citations omitted).

93. Edmonson v. Pearce, 2004 OK 23, ¶ 48, 91 P.3d 605, 630.

94. Maynard v. Cartwright, 486 U.S. 356, 361 (1988).

95. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

96. *Id.* at 495.

97. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 550 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1972).

98. *Village of Hoffman Estates*, 455 U.S. at 495.

99. *Broadrick*, 413 U.S. at 610.

100. *See, e.g.*, *Village of Hoffman Estates*, 455 U.S. at 495-96.

101. Commonwealth v. Hutchins, 42 A.3d 302, 308 (Pa. Super. Ct. 2012); Commonwealth v. DiPanfilo, 993 A.2d 1262, 1266-67 (Pa. Super. Ct. 2010); Head v. State, 693 S.E.2d 845, 847-48 (Ga. Ct. App. 2010); Estrich v. State, 995 So.2d 613, 616-17 (Fla.

system at the time of driving are, presumably, more likely than the average person to be regular users. Finally, in the typical case, some behavior on the part of the defendant presumably aroused the suspicion of police officers prompting them to test the defendant's bodily fluids. It is fair to assume, then, that the average defendant will be actually impaired at the time of arrest. Consequently, arguments about the vagueness of the law will likely rely on hypothetical defendants—for example, those that only ingested illegal substances long before the time of their arrest or, perhaps less likely, those who did so involuntarily. The court would probably not consider these hypothetical applications so long as the facts before it reveal a driver who voluntarily ingests drugs regularly or did so at some time not too long before operating a vehicle.

As such, the court would likely find, similar to the *Broadrick* Court, that uncertainties concerning how and when the statute might create confusion "ha[ve] little relevance . . . where [a defendant's] conduct falls squarely within the 'hard core' of the statute's proscriptions."[102] As in *United States v. Wurzbach*, where the Supreme Court found that the statute in question unambiguously applied to the facts before it, an Oklahoma court is likely to hold that "[t]he objection to uncertainty . . . need not trouble us now. . . . [I]f there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns."[103]

B. HB 1441: Void for Vagueness?

Should standing be satisfied, several questions, as articulated by the Oklahoma Court of Criminal Appeals in *Lock v. Falkenstine*, would guide an Oklahoma court's vagueness analysis:

- "Is the Statute clear and explicit?"
- "Is it certain?"
- "Can a man of ordinary intelligence understand it?"
- "Does it deceive the common mind?"
- "Does a person of ordinary intelligence know when the Statute is being violated?"
- "Can the Court judicially determine the Legislative intent?"[104]

Dist. Ct. App. 2008); Commonwealth v. Etchison, 916 A.2d 1169, 1173 (Pa. Super. Ct. 2007); State v. Hammonds, 968 P.2d 601, 603 (Ariz. Ct. App. 1998).

102. *Broadrick*, 413 U.S. at 608 (internal quotations omitted).

103. United States v. Wurzbach, 280 U.S. 396, 399 (1930).

104. 1963 OK CR 32, ¶ 12, 380 P.2d 278, 282.

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As with the overbreadth doctrine, courts also rely on interpretive guidelines that effectively err on the side of a statute's constitutionality.[105] *Broadrick* can be interpreted as a directive that, noting inherent "'limitations in the English language,'" courts must be reasonable in construing statutory language rather than capitulate when "'prohibitions may not satisfy those intent on finding fault at any cost.'"[106] Thus, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'"[107] Oklahoma courts have also recognized that "a statute which regulates a substantial number of situations validly or covers a whole range of easily identifiable and constitutionally proscribable conduct should not be held invalid on its face."[108]

Before applying the vagueness questions articulated in *Falkenstine* to Oklahoma's drugged-driving law, it may be useful to review the language of HB 1441. The bill added to the list of those persons punishable for operating a motor vehicle on public roadways anyone who

> [h]as any amount of a Schedule I chemical or controlled substance, as defined in Section 2–204 of Title 63 of the Oklahoma Statutes, or one of its metabolites or analogs in the person's blood, saliva, urine or any other bodily fluid at the time of a test of such person's blood, saliva, urine or any other bodily fluid administered within two (2) hours after the arrest of such person[.][109]

This statute seems clear and explicit. Any person who, via specified methods, tests positive for a Schedule I substance or its metabolites within two hours of an arrest for driving under the influence, will be found guilty of that offense. There is little uncertainty here: the language is not deceptive and the intent of the legislature is evident—to criminalize the operation of a motor vehicle by those potentially impaired by illegal substances. When an

105. *E.g.*, Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934) ("[I]f any state of facts reasonably can be conceived that would sustain [the challenged legislation], there is a presumption of the existence of that state of facts . . . .").

106. *Broadrick*, 413 U.S. at 608 (quoting United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973)).

107. Hill v. Colorado, 530 U.S. 703, 733 (2000) (quoting United States v. Raines, 362 U.S. 17, 23 (1960)).

108. Pegg v. State, 1983 OK CR 26, ¶ 6, 659 P.2d 370, 373 (citation omitted).

109. 2013 Okla. Sess. Law § 11-902(3); H.B. 1441, 54th Leg., 1st Sess. (Okla. 2013).

Ohio court considered similar statutory language, it decided that "[t]here is nothing vague, unclear, or indefinite about the statute."[110]

Moreover, the law as written does not apparently lend itself to arbitrary and discriminatory enforcement. In fact, assuming the accuracy of drug testing procedures that detect metabolites, one could argue that the law eliminates the possibility of such enforcement by ensuring that only those who actually have metabolites in their system are prosecuted. The same Ohio court came to this conclusion, finding that "the statutory scheme discourages arbitrary and discriminatory enforcement by setting precise metabolite levels at which driving is prohibited."[111]

Still, opponents of the measure may argue that that the language is sufficiently ambiguous that a person of ordinary intelligence either cannot understand it or know when it is being violated. One can imagine this argument taking two forms. First, a challenger may allege textual ambiguity—that the term "metabolite" is neither statutorily defined nor so common that the ordinary person can be sure as to its meaning. The second argument might allege functional ambiguity: because of basic unfamiliarity with metabolism and in the absence of obvious impairment, one who uses drugs cannot know when she is legally able to drive and when doing so would violate the law. These arguments will be considered in turn.

1. Textual Ambiguity

A challenger might argue that the statute is ambiguous in its use of the term "metabolite." Undeniably, HB 1441 does not define the term.[112] Under such circumstances, the court will look for definitions of the term provided by other statutes.[113] Metabolite is not defined elsewhere in the Oklahoma statutes either, though it is used in the state's Standards for Workplace Drug and Alcohol Testing Act in the definition of the word "drug."[114] When a term is not defined anywhere in the statutes, Oklahoma courts recognize the "common rule of statutory construction that words in a statute are to be understood in their ordinary sense."[115] Were the case to reach it, the Tenth

110. State v. Whalen, 2013-Ohio-1861, 991 N.E.2d 738, 742.

111. *Id.* at 743.

112. 2013 Okla. Sess. Law ch. 393; H.B. 1441, 54th Leg., 1st Sess. (Okla. 2013).

113. 25 OKLA. STAT. § 2 (2011) ("Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.").

114. 40 OKLA. STAT. § 552 (2011).

115. Gilbert v. State, 1988 OK CR 268, ¶ 5, 765 P.2d 1208, 1210.

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Circuit would adopt the same interpretation, as it will "interpret state laws according to state rules of statutory construction."[116]

Considering this rule of commonsensical interpretation alongside the *Broadrick* Court's directive of reasonableness,[117] an Oklahoma court is unlikely to find HB 1441's use of the term "metabolite" problematic.[118] In *Armstrong*, the Oklahoma Court of Criminal Appeals was satisfied that various securities terms[119] that may be unfamiliar to the ordinary person uninitiated with financial instruments were "clearly stated and understandable by an ordinary person in a commercial context."[120] Metabolite is defined by the *American Heritage Dictionary* as "a substance produced by metabolism."[121] The Oklahoma courts would likely reason that the ordinary person using drugs should be sufficiently familiar with drug use to understand that traces of those drugs will remain detectable after the period of their immediate impairment. An Oklahoma court would likely decide, like the Ohio Supreme Court, that "[a] person of ordinary intelligence is certainly capable of understanding the meaning of a marihuana metabolite and that driving with the proscribed levels of such a metabolite in one's system is prohibited."[122]

2. Functional Ambiguity

A slightly more sophisticated argument stressing the vagueness of HB 1441 might propose that it fails to put a reasonable person on notice of when she is in violation of the law. Different drugs produce different metabolites that remain testable for different periods of time.[123] A user's relative experience with the substance, body size and weight, diet, and exercise habits—as well as the relative potency of the substance consumed—can all affect the pace at which the body metabolizes a drug

116. Ward v. Utah, 398 F.3d 1239, 1248 (10th Cir. 2005); *accord*, Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1190 (10th Cir. 2000); Phelps v. Hamilton, 59 F.3d 1058, 1071 n.23 (10th Cir. 1995).

117. *Supra* Part III.B. (discussing the reasonableness directive in the *Broadrick* Court's analysis).

118. Williams v. State, 50 P.3d 1116, 1123 (Nev. 2002) (noting the ordinary meaning of the term metabolite and a drug user's likely familiarity and coming to this same conclusion).

119. Armstrong v. State, 1991 OK CR 34, ¶ 18, 811 P.2d 593, 598 (including "security," "broker/dealer," "issuer," and "investment advisor").

120. *Id.* ¶ 20, 811 P.2d at 598.

121. AMERICAN HERITAGE DICTIONARY 1105 (5th ed. 2011).

122. State v. Whalen, 2013-Ohio-1861, 991 N.E.2d 738, 742-43 (Ohio. Ct. App. 2013).

123. MAYO CLINIC, *Approximate Detection Times Table*, http://www.mayomedical laboratories.com/test-info/drug-book/viewall.html (last updated Jan. 2011).

and how long the metabolites remain testable.[124] As such, a person who uses drugs will be uncertain about whether and when she may legally operate a vehicle.

This is a logically persuasive argument. It is the argument that was presented by the Appellant in *Commonwealth v. Etchison*.[125] It is probably also what Michigan Supreme Court Justice Cavanagh had in mind in his dissent in *People v. Derror*.[126] There, he observed that a law prohibiting the operation of a motor vehicle with any amount of a controlled substance in one's body offered

> no guidance to an ordinary person about *when* he can legally drive given the scientific testimony that 11–carboxy–THC can easily be found in a person's system for *weeks* after marijuana was ingested. . . . This lacks any sort of guidance to give a person fair notice of when he can legally drive a car.[127]

This concern, however, again presents the issue of whether the conduct that may be unnecessarily chilled is of the sort that the court is interested in protecting. The admonition of the *Village of Hoffman Estates* Court is relevant here: "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."[128] Again, the consumption of illegal drugs is not the sort of activity the court concerns itself to protect. The *Whalen* court was satisfied with this reasoning, noting that Ohio law prohibits the possession or use of marijuana[129] in any amount.[130] Given this prohibition, the court concluded that "[c]ertainly, one who has consumed marihuana is on fair notice that metabolites may remain in his system."[131]

An Oklahoma court is likely to hold similarly. HB 1441 prohibits driving with metabolites of Schedule I substances in one's system. As was the case

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124. Daniel A. Hussar, *Overview of Response to Drugs*, MERCK MANUAL: CONSUMER VERSION, http://www.merckmanuals.com/home/drugs/factors-affecting-response-to-drugs/overview-of-response-to-drugs (last visited July 14, 2015).

125. 916 A.2d 1169, 1173 (Pa. Super. Ct. 2007).

126. 715 N.W.2d 822, 836-37 (Mich. 2006), *overruled by* People v. Feezel, 783 N.W.2d 67 (Mich. 2010).

127. *Id.* at 843 (Cavanaugh, J., dissenting).

128. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

129. The metabolite in question was a derivative of marijuana. State v. Whalen, 2013-Ohio-1861, 991 N.E.2d 738, 743.

130. *Id.*

131. *Id.*

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in Ohio, Oklahoma law prohibits the possession or use of these substances in any amount.[132] Oklahoma courts would probably hold that, whatever the uncertainty surrounding the timeframe during which metabolites remain detectable, all are on notice that driving after consuming illegal drugs puts one at risk of a DUI conviction. Essentially, the court would likely reason that those who operate a motor vehicle after consuming illegal substances do so at their own peril.

The fear that one who has ingested drugs does not know when she can legally drive may be amplified by the possibility that one might ingest a controlled substance unwittingly and hence not know of the presence of illegal metabolites in her body. Certainly, courts have acknowledged that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[133] However, this reasoning is not reversible. That is, although "when a statute might otherwise be vague, a scienter requirement mitigates the vagueness and makes the statute constitutional. . . . [T]his does not imply . . . that any statute lacking a scienter requirement is necessarily vague."[134] Simply put, "a scienter requirement is not necessary to make the statute constitutional."[135]

Ultimately, however difficult it may be to decipher the practical effect of HB 1441, the statutory language established thereby seems to clearly meet the liberal constitutional threshold of exactness. When similar statutory language was at issue, the Arizona Court of Appeals dismissed a vagueness challenge, finding that "[n]one of the statute's terms defy common understanding, and its interpretation is not dependent on the judgment of police officers or prosecutors."[136] Considering the Supreme Court's instruction to interpret reasonably, the requirement that a void statute be impermissible in all of its applications, the Court's concern for the constitutionality of the activity that might be disturbed, and the reasonable certainty with which the meaning of the statutory language can be derived, it seems very unlikely that an Oklahoma court would strike down the HB 1441 amendment as unconstitutionally vague. Oklahoma would probably

132. 63 OKLA. STAT. §§ 2-101, 2-204, 2-401 (2011).

133. Murphy v. Matheson, 742 F.2d 564, 570 (10th Cir. 1984); *see also* Screws v. United States, 325 U.S. 91, 101 (1945) (plurality opinion) ("[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.").

134. Ward v. Utah, 398 F.3d 1239, 1252 (10th Cir. 2005).

135. *Id.*

136. State v. Phillips, 873 P.2d 706, 709 (Ariz. Ct. App. 1994).

decide along lines similar to the Supreme Court in *United States v. Petrillo*, where, in upholding the Communications Act of 1934, the Court noted that "the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."[137]

IV. Equal Protection

A. Classification

Some have challenged drugged-driving laws similar to Oklahoma's on equal protection grounds.[138] In considering an equal protection challenge, a court must first determine the impacted class and whether that class is suspect.[139] When the law in question establishes a "suspect classification," strict scrutiny is appropriate.[140] A quasi-suspect class can trigger intermediate scrutiny.[141] When no such factors are present, the court will apply rational basis review, asking whether the measure in question is rationally related to a legitimate government purpose.[142]

When equal protection challenges have been brought against laws criminalizing driving with metabolites in one's system, some courts have passed on the question, finding there to be no classification at all.[143] These courts conclude that drugged-driving laws treat everyone equally—any driver who tests positive for illicit metabolites is liable for driving under the influence.[144] Some have argued, however, that laws like Oklahoma's have the effect of discriminating between drivers who are unimpaired by the metabolites in their system from those who are legitimately impaired.[145] Moreover, the law seems to at least classify drivers with metabolites in their system as distinguished from those without.[146]

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137. 332 U.S. 1, 7-8 (1947).

138. *E.g.*, Commonwealth v. Etchison, 916 A.2d 1169, 1173 (Pa. Super. Ct. 2007); Love v. State, 517 S.E.2d 53, 55 (Ga. 1999); *Phillips*, 873 P.2d at 709.

139. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985).

140. *Id.* at 440.

141. *Id.* at 440-43.

142. *Id.* at 440-42.

143. *Etchison*, 916 A.2d at 1174; *Love*, 517 S.E.2d at 55-56.

144. *Etchison*, 916 A.2d at 1174; *Love*, 517 S.E.2d at 55-56.

145. *Etchison*, 916 A.2d at 1173; *Love*, 517 S.E.2d at 55; State v. Phillips, 873 P.2d 706, 709-10 (Ariz. Ct. App. 1994).

146. 47 OKLA. STAT. § 11-902(A)(3).

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While there may be room to question whether HB 1441 classifies at all, there can be little doubt that any class it does establish is not a suspect one. In considering whether a legislative classification is suspect, courts will consider whether members of the class suffer from significant disabilities, are historically subject to discriminatory treatment, or relegated to political powerlessness in a majoritarian society.[147] Courts may also ask whether the defining characteristic of the group in question is relevant to its members' ability to participate in society and whether that trait is immutable.[148] Unimpaired drugged drivers exhibit none of these "traditional indicia of suspectness."[149] In fact, those classes that have been recognized by the Court as suspect are relatively few and are only sure to include race, national origin, and religion.[150] It is exceedingly difficult to imagine an argument that effectively construes HB 1441 as facially classifying in any of these ways.

B. Rational Basis

In the absence of a suspect class, the appropriate level of scrutiny is rational basis.[151] Other states have analyzed drugged-driving challenges accordingly.[152] The relevant question is whether HB 1441's inclusion of metabolites is rationally related to a legitimate government purpose. There can be little question that the government purpose motivating HB 1441 is a legitimate one. While the legislative record is inconclusive, surely, the legislature was largely motivated by a concern for safety on public roadways. As such, a viable equal protection challenge is likely limited to question the rational relationship prong, arguing that there is no rational relationship between the inclusion of metabolites in the statute and the government's legitimate purpose. Appellants in other states have usually argued their case this way.[153]

While rational basis is a relatively easy test for the state to satisfy, courts certainly do not end their analysis once they arrive at this level of scrutiny. When a Texas city refused to grant a zoning permit to a group home for the

147. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

148. Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973).

149. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

150. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

151. City of Cleburne v. Cleburn Living Ctr., 473 U.S. 432, 439-42 (1985).

152. *E.g.*, Commonwealth v. Etchsion, 916 A.2d 1169, 1173 (Pa. Super Ct. 2007); Williams v. State, 50 P.3d 1116, 1120 (Nev. 2002); State v. Hammonds, 968 P.2d 601, 604 (Ariz. Ct. App. 1998).

153. *E.g.*, *Hammonds*, 968 P.2d at 604.

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mentally handicapped, the Court applied the rational basis test to strike down their decision.[154] The court found no rational relationship between the city's decision to block the permit and any legitimate city interest, deciding that the decision rested instead on "irrational prejudice."[155]

C. HB 1441: A Rational Basis

HB 1441, however, is likely to pass the rational basis test. First, Oklahoma courts will probably find that the statute's inclusion of metabolites is rationally related to the state's legitimate interest in roadway safety. Opponents of drugged-driving laws may argue that, because metabolites do not evidence impairment, there is no rational relationship between their criminalization and the legislative purpose of safe driving. However, state courts have mostly followed Arizona's example in holding that the potential danger that those who have ingested illegal substances pose to other drivers is sufficiently grave to justify slightly over-inclusive statutory responses.[156] After all, the presence of even an inactive metabolite certainly does evidence prior drug use and, even if it does not evidence current impairment, it certainly does not demonstrate that the driver was *not* impaired.[157]

Furthermore, "a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data."[158] The Court of Appeals in Arizona, therefore, found that "the legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great."[159] The Supreme Court of Georgia also reasoned in upholding that state's drugged-driving law that "the legislature has made it easier for persons to

154. *City of Cleburne*, 473 U.S. at 448-50.

155. *Id.* at 450.

156. *E.g.*, *Hammonds*, 968 P.2d at 604; *see also Williams*, 50 P.3d at 1121; Love v. State, 517 S.E.2d 53, 56-57 (Ga. 1999); State v. Phillips, 873 P.2d 706, 709-10 (Ariz. Ct. App. 1994).

157. State *ex rel.* Montgomery v. Harris *ex rel.* Cnty. Of Maricopa, 301 P.3d 580, 582-83 (Ariz. Ct. App. 2013), *vacated on other grounds by* 322 P.3d 160 (2014); *Hammonds*, 968 P.2d at 604 ("[T]he presence of an inactive and nonimpairing metabolite of an illicit drug in a driver's urine does not necessarily mean that there is no active component of that drug present in the driver's blood."); *Phillips*, 873 P.2d at 710 ("[T]here can be no meaningful quantification because of the dangers inherent in the drugs themselves and in the lack of potency predictability.").

158. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

159. State v. Phillips, 873 P.2d 706, 710 (Ariz. Ct. App. 1994).

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'understand and accept that they are legally unable to drive if they consume virtually any amount of [marijuana].'"[160]

Courts are commonly deferential in this regard. "In seeking to protect the life and health of its citizenry, the legislature cannot be required to forego an effective prophylactic measure simply because it may be somewhat imprecise."[161] Therefore, Oklahoma courts would likely reason that "[p]roviding for stiffer penalties . . . regardless of whether [the] influence impaired the driver, is certainly rationally related to the goal of discouraging people from driving under the influence."[162]

Moreover, the court need not solely consider the relationship of the measure to the goal of the particular legislative enactment in which it is included. That is to say, roadway safety need not be the only government interest with which the court concerns itself. Instead, the court may ask if the disputed measure furthers *any* legitimate purpose.[163] An enactment "must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[164] The court could thus easily find that HB 1441's inclusion of metabolites is rationally related to a legitimate government interest in deterring drug use altogether. The Arizona Court of Appeals reasoned in this way in upholding the constitutionality of a similarly worded statute.[165] The court held that "generally deterring illegal drug use" is a legitimate state interest and that this provided rational basis for the operation of the law beyond the obvious purpose of keeping roadways safe.[166]

These observations suggest that Oklahoma courts would be unlikely to strike down HB 1441 under the equal protection clause. First, the law may not classify at all drivers are subject to the same treatment under the law. Second, an equal protection challenge would be analyzed under the rational basis test. Courts would very likely conclude there exists a rational basis for Oklahoma's decision to prohibit driving with proscribed substances in one's system.

160. *Love*, 517 S.E.2d at 57 (quoting Barnett v. State, 510 S.E.2d 527, 528 (Ga. 1999)).
161. *Hammonds*, 968 P.2d at 604.
162. Commonwealth v. Lamonda, 52 A.3d 365, 370 (Pa. Super. Ct. 2012).
163. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993).
164. *Id.* at 313.
165. *Hammonds*, 968 P.2d at 604-05.
166. *Id.* at 605.

V. Special Laws

Oklahoma law generally prohibits a statute from applying only to an arbitrarily selected part of the population. Article 5, section 46 of the Oklahoma Constitution provides, in pertinent part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law: . . . . *Regulating the practice* or jurisdiction of, *or changing the rules of evidence in judicial proceedings or inquiry before the courts*, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate.[167]

Furthermore, section 59 of the same article provides that "[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."[168]

A. Special Laws: An Analytical Framework

In general terms, a law "'is special if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.'"[169] In more specific terms, special laws "apply to less than the whole of a class of persons, entities or things standing upon the same footing or in substantially the same situation or circumstances, and hence do not have a uniform operation."[170]

Oklahoma courts have long been averse to laws of this kind. In fact, the prohibition of special laws in Oklahoma courts traces back prior to statehood. In 1886, the United States Congress subjected Oklahoma Territory to a law that enacted language very similar to that which found its

167. OKLA. CONST. art. V, § 46 (emphasis added).

168. OKLA. CONST. art. V, § 59.

169. Oklahoma City v. Griffin, 1965 OK 76, ¶ 3, 403 P.2d 463, 467 (quoting Serve Yourself Gasoline Stations Ass'n v. Brock, 249 P.2d 545, 549 (Cal. 1952)).

170. Fenimore v. State *ex rel.* Comm'rs of Land Office, 1948 OK 93, ¶ 9, 194 P.2d 852, 854.

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way into the state's constitution.[171] Courts have since recognized the "vice" of special laws in that they "create preference and establish inequality. They apply to persons, things, and places possessed of certain qualities or situations and exclude from their effect other persons, things, or places which are not dissimilar in this respect."[172]

Of course, sections 46 and 59 of article 5 are not identical. Section 46 lists specific legislative areas in which special laws are categorically impermissible.[173] Section 59 provides that general laws should be preferred to special laws any time the former can be adequately tailored to suit the same purposes.[174] "[S]ection 46 is an unequivocal mandate"—any special law in the enumerated areas is invalid.[175] Accordingly, "[t]he single question for testing a statute's compliance with section 46 is whether the statute is a general law or a special law."[176]

As for section 59 challenges, courts have developed a three-prong test for review. This test asks (1) whether the law is general or special; (2) if it is special, whether a general law would satisfy the same purpose; and (3) whether the special nature of the law "is reasonably and substantially related to [] valid legislative objective[s]."[177]

Thus, whether it is challenged under section 46 or 59, a central question facing any court that hears such a challenge will be whether HB 1441 is in fact a special law. In 1937, the Oklahoma Supreme Court noted that a general law must operate uniformly as applied to all similarly situated persons under its operation.[178] By contrast, "[a] special law is one which relates to . . . particular persons or things of a class, or which operates on or over a portion of a class instead of all of the class."[179]

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171. Guthrie Daily Leader v. Cameron, 1895 OK 71, ¶¶ 24-25, 41 P. 635, 638. For further historical understanding of Oklahoma's special law prohibition, see Territory v. School Dist. No. 83, 1901 OK 22, 64 P. 241.

172. Sch. Dist. No. 85 v. Sch. Dist. No. 71, 1928 OK 689, ¶ 4, 276 P. 186, 186, *superseded on other grounds by* OKLA. CONST. art. 10, § 5 (noting the inequality of special laws in the syllabus).

173. OKLA. CONST. art. V, § 46.

174. OKLA. CONST. art. V, § 59.

175. Lafalier v. Lead-Impacted Communities Relocation Assistance Trust, 2010 OK 48, ¶ 26, 237 P.3d 181, 192; *accord* EOG Res. Mktg., Inc. v. Bd. Of Equalization, 2008 OK 95, ¶ 24, 196 P.3d 511, 522; Zeier v. Zimmer, Inc., 2006 OK 98, ¶ 7, 152 P.3d 861, 865.

176. *Lafalier*, ¶ 26, 237 P.3d at 192.

177. *E.g.*, *id.* ¶¶ 33-35, 237 P.3d at 194-95; *EOG Res. Mktg.*, ¶¶ 19-20, 196 P.3d at 521.

178. *In re* Annexation of Reno Quartermaster Depot Military Reservation, 1937 OK 391, ¶¶ 12-14, 69 P.2d 659, 661.

179. *Id.*

Before further considering the applicability of the special laws prohibition to HB 1441, it is worth noting an important guideline for courts reviewing special laws challenges: Similar to previously discussed constitutional challenges, Oklahoma courts recognize a presumption in favor of the constitutionality of a law challenged as special.[180] Accordingly, when a statute is susceptible to multiple meanings, the duty of the court is to give it that construction that avoids constitutional defect.[181] More importantly, this rule requires that a law be upheld unless it is "clearly, palpably, and plainly inconsistent with the Constitution."[182] The presumption of constitutionality casts a "heavy burden" on those making a special laws challenge.[183] The court must indulge every presumption in favor of constitutionality.[184]

B. The Inapplicability of Section 46

As explained, section 46 categorically prohibits the enactment of special laws in certain areas of legislative concern.[185] Regulating the practice of courts and changing the rules of evidence used by courts are both enumerated areas.[186] A clever opponent of HB 1441 might argue that the Act regulates the practices of courts and changes their rules of evidence by eliminating the traditional requirement that the state demonstrate actual impairment for DUI liability. This argument is unlikely to prevail. Oklahoma already imposes per se liability for driving under the influence of alcohol, punishing any driver with a blood-alcohol concentration of .08 or higher without regard to actual impairment.[187] It would be untenable, then, to contend that HB 1441's creation of per se liability for drugged driving uniquely changes the rules of evidence or regulates the practice of courts.

Moreover, to the extent that a court was persuaded that HB 1441 does fall within the purview of section 46, it would still have to resolve the question of whether the Act constitutes a special law. As such, the

180. Bishop v. City of Tulsa, 1922 OK CR 144, ¶ 14, 209 P. 228, 229; Kinney v. Bd. of Cnty. Comm'rs, 1995 OK CIV APP 49, ¶ 6, 894 P.2d 444, 446.

181. State *ex rel.* Macy v. Bd. of Cnty. Comm'rs of Oklahoma, 1999 OK 53, ¶ 16, 986 P.2d 1130, 1139.

182. *Lafalier*, ¶ 15, 237 P.3d at 188.

183. Thomas v. Henry, 2011 OK 53, ¶ 8, 260 P.3d 1251, 1254.

184. *Id.*

185. *Lafalier*, 2010 OK 46, ¶ 26, 237 P.3d at 192; EOG Res. Mktg., Inc. v. Bd. of Equalization, 2008 OK 95, ¶ 18, 196 P.3d 511, 526; Zeier v. Zimmer, Inc., 2006 OK 98, ¶ 7, 152 P.3d 861, 865.

186. *See supra* note 185.

187. 47 OKLA. STAT. § 11-902(A)(1) (Supp. 2013).

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following discussion of whether HB 1441 qualifies as a special law within the meaning of the Oklahoma Constitution is relevant to section 46 as well.

C. A Framework for Section 59

Assessing HB 1441 for compliance with section 59 requires ascertaining, first, whether it is a special or general law. In 1924, the Oklahoma Supreme Court explained the distinction: "[A] statute relating to persons or things as a class is a general law, but one relating to particular persons or things of a class is special."[188] More specifically, a law is special if it treats differently part of a class of similarly situated persons.[189] Therefore, "[t]o determine whether or not a statute is general or specific, courts will look to the statute to ascertain whether it will operate uniformly upon all the persons and parts of the state that are brought within the relation and circumstances provided by it."[190]

In recent years, the Oklahoma Supreme Court has had occasion to consider the special laws prohibition in twice invalidating efforts by state lawmakers to elevate pleading requirements for medical malpractice plaintiffs.[191] The language of the modern court largely mirrors that of its predecessors:

> A special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law. A law is special if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.[192]

Moreover, in the context of laws that affect the courts, as HB 1441 arguably does, the court has held that the Oklahoma Constitution demands "procedure be symmetrical and apply equally across the board."[193]

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188. City of Sapulpa v. Land, 1924 OK 92, ¶ 24, 223 P. 640, 643; *accord* Grable v. Childers, 1936 OK 273, ¶ 6, 56 P.2d 357, 360.

189. *Thomas*, ¶ 13, 260 P.3d at 1256; Arrow Trucking Co. v. Jimenez, 2010 OK CIV APP 9, ¶ 18, 231 P.3d 741, 747.

190. Burks v. Walker, 1909 OK 317, ¶ 23, 109 P. 544, 549.

191. Wall v. Marouk, 2013 OK 36, 302 P.3d 775; Zeier v. Zimmer Inc., 2006 OK 98, 152 P.3d 861.

192. *Marouk*, ¶ 5, 302 P.3d at 779.

193. *Zeier*, ¶ 13, 152 P.3d at 867.

1. Classification and Legitimacy

It is tempting to read these formulations of the law to prohibit any classification among persons that the law affects. This reading, however, would obscure the court's emphasis on those persons "similarly situated,"[194] defined as those who "stand in precisely the same relation to the subject of the law."[195] Indeed, it is not essential that a law be so universal in its application as to operate the same on all persons in the state.[196] Rather, a law may have local application, so long as it operates equally "upon all the subjects within the class for which it was adopted."[197] Put differently, the Oklahoma Constitution does not prohibit the legislature from making any classification; it prohibits only a classification that is "capricious or arbitrary."[198]

This clarifies the task facing courts considering a special laws challenge to HB 1441. For these courts, "[t]he most important factor in determining whether a law is special or general is the basis of the classification contained in it."[199] Classification "is the grouping of things because they agree with one another in certain particulars and differ from other things in those same particulars."[200] Thus, the legitimacy of a classification will depend on the things or persons—the class—involved.[201]

The next step is to determine whether the basis for classification is legitimate. The Oklahoma Supreme Court has provided that in order for a classification to be permissible, "there must be some distinctive characteristic warranting different treatment and that furnishes a practical and reasonable basis for discrimination."[202] Conversely, a classification is arbitrary and capricious if it divides a natural, homogenous class and treats some members differently from others.[203] Attentive to this distinction, the Oklahoma Court of Civil Appeals recently upheld a provision of the Worker's Compensation Act that provided for differential treatment for

194. Grable v. Childers, 1936 OK 273, ¶ 6, 56 P.2d 357, 360.

195. *Marouk*, ¶ 5, 302 P.3d at 779.

196. Wilkinson v. Hale, 1939 OK 11, ¶ 10, 86 P.2d 305, 307.

197. Burks v. Walker, 1909 OK 317, ¶ 23, 109 P. 544, 549.

198. *Id.*; *accord* Tulsa Exposition & Fair Corp. v. Bd. Of Cnty. Comm'rs, 1970 OK 67, ¶ 9, 468 P.2d 501, 505; Haas v. Holloman, 1958 OK 174, ¶ 18, 327 P.2d 655, 656.

199. Kinney v. Bd. of Cnty. Comm'rs, 1995 OK CIV APP 49, ¶ 7, 894 P.2d 444, 447.

200. Anderson v. Walker, 1958 OK 297, ¶ 15, 333 P.2d 570, 574.

201. *Id.*

202. Grant v. Goodyear Tire & Rubber Co., 2000 OK 41, ¶ 10, 5 P.3d 594, 598; *accord* EOG Res. Mktg., Inc. v. Bd. of Equalization, 2008 OK 95, ¶ 20, 196 P.3d 511, 521; *Kinney*, ¶ 6, 894 P.2d at 447.

203. *Anderson*, ¶ 15, 333 P.2d at 574.

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persons with soft-tissue injuries on the basis of whether a physician had recommended corrective surgery for their injury.[204] The court concluded that whether or not surgery is recommended for a soft tissue injury is the kind of distinctive characteristic that reasonably warrants discrimination.[205] Similarly, the Oklahoma Court of Criminal Appeals upheld an early version of the state's prohibition on the possession of narcotics that carved out an exception for pharmacists.[206] In both cases, the court was satisfied that the classification established by the legislature was not arbitrary or capricious.

These precedents suggest that a court's analysis will be primarily concerned with whether a statutory classification bears a reasonable relationship to its legislative objective.[207] Similarly, the Oklahoma Supreme Court has suggested that "[w]ere the Legislature to distinguish between red-haired men and blackhaired men," that classification would likely be invalidated as it has only an arbitrary relation to the purpose of *any* legislative effort.[208] To the extent that the relationship between legislative classification and purpose is at issue, special laws inquiry is somewhat similar to equal protection analysis.[209] Thus, the question concerning HB 1441 is, first, whether it classifies, and, if so, whether that classification is arbitrary or reasonably relates to the purpose of the legislature in drafting the Act.

2. HB 1441: a Legitimate Classification

HB 1441 probably "classifies" within the meaning of sections 46 and 59. It divides the natural class of "drivers" to treat differently those members of the class that test positive for illicit metabolites. However, Oklahoma courts are likely to find that this classification is rationally related to legislative purpose and, as such, not arbitrary or capricious.

First, courts are likely to accept the argument that the inclusion of metabolites is rationally related to roadway safety.[210] After all, the presence of these metabolites does not demonstrate non-impairment even if it is not direct evidence of impairment.[211] Furthermore, the legislature is allowed

204. Arrow Trucking Co. v. Jimenez, 2012 OK CIV APP 9, ¶ 21, 231 P.3d 741, 747-48.

205. *Id.* ¶ 19-21, 231 P.3d at 747-48.

206. Carr v. State, 1923 OK CR 334, 220 P. 479 (1923).

207. *See* Williams v. Starr, 1975 OK CIV APP 13, ¶ 4, 534 P.2d 29, 30 (finding that plaintiff must show that "there exists no legitimate relationship between the objective of the legislation and the restrictive classification employed").

208. *Anderson*, ¶ 15, 333 P.2d at 574.

209. Jones v. Integris Baptist Med. Ctr., 2008 OK CIV APP 14, ¶ 12, 178 P.3d 191, 196.

210. *See supra* Part III.C.

211. *See supra* note 157 and accompanying text.

substantial deference in making policy determinations, such as the determination that any evidence of drug ingestion is too dangerous to be permitted.[212] Conducting a special laws analysis, the Supreme Court of Oklahoma recently noted that "[i]t is not the role of this Court to question the desirability, wisdom, or logic of a valid statutory classification."[213]

This deferential treatment of legislative classification, in concert with the directive to indulge every presumption in favor of the statute's constitutionality,[214] suggests courts would probably decide that HB 1441 is a legitimate classification. A court would probably find the class of drivers with metabolites in their system present an elevated risk of roadway hazard and as such do not sit in exactly the same relation to the law as do those without such metabolites—like the recommendation of surgery for soft-tissue damage,[215] the presence of metabolites establishes a reasonable basis for discrimination. As such, HB 1441's classification is not arbitrary or capricious.

The caution exercised by the Oklahoma Supreme Court in striking down medical malpractice reform is worth considering here:

> In construing the constitutionality of a statute, we are not authorized to consider its propriety, wisdom, or practicability as a working proposition. Those questions are clearly and definitely established by our fundamental law to a certainty as functions of the legislative department. We uphold the legislative enactment unless the statute is clearly, palpably and plainly inconsistent with the constitution.[216]

Similarly, while HB 1441 may be an unwise and unscientific approach to drugged—driving, its wisdom is not a justiciable question for courts. Because the legislative class established by the law bears a reasonable relationship to its goal—safety on Oklahoma roads—and because that classification is neither arbitrary nor capricious, HB 1441 is not plainly and palpably inconsistent with the Oklahoma Constitution and is likely to survive a special laws challenge.

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212. *See supra* note 161-162 and accompanying text.
213. EOG Res. Mktg., Inc. v. Bd. of Equalization, 2008 OK 95, ¶ 20, 196 P.3d 511, 521.
214. *See supra* notes 180-184 and accompanying text.
215. Arrow Trucking Co. v. Jimenez, 2012 OK CIV APP 9, ¶ 21, 231 P.3d 741, 747-48.
216. Zeier v. Zimmer Inc., 2006 OK 98, ¶ 12, 152 P.3d 861, 866.

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VI. Eighth Amendment

Opponents of drugged-driving laws have also made the case that the laws violate the Eighth Amendment's Cruel and Unusual Punishment Clause. While Eighth Amendment challenges traditionally concern the severity of a punishment imposed for criminal behavior, the Supreme Court recognized in *Robinson v. California* that the Cruel and Unusual Punishment Clause also prohibits criminal laws that punish a "status" as opposed to an act.[217] In *Robinson*, the Court struck down a California law that established criminal liability for narcotics addiction.[218] The Court's decision was heavily influenced by its finding that addiction is a disease.[219] Therefore, the Court held, "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment."[220]

One might draw analogies between HB 1441 and the California law invalidated in *Robinson*. Oklahoma's drugged-driving law would adversely affect drug addicts to the extent that they are more likely to test positive for illegal metabolites at any given time. Moreover, Oklahoma's law implicates some activity that may have occurred outside the state, as in the case of someone who ingested marijuana in a jurisdiction that permits it. Thus, some argue that a law like Oklahoma's, by criminalizing driving with metabolites long after impairment, "contributes to punishing status as a user, not protecting safety, a premise that was expressly found to be unconstitutional by the Supreme Court."[221]

Applying the *Robinson* doctrine to drugged-driving laws, however, requires examining the Supreme Court's attempt at clarifying that doctrine. In *Powell v. Texas*, the Court revisited *Robinson*, considering whether a "chronic alcoholic" could be constitutionally convicted of a Texas law prohibiting public intoxication.[222] The trial court had not allowed the defendant to claim that his alcoholism rendered his drunken appearance in public "not of his own volition."[223]

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217. 370 U.S. 660, 667 (1962).

218. *Id.*

219. *Id.*

220. *Id.*

221. Aaron J. Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren't on Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 KAN. J.L. & PUB. POL'Y 557, 574 (2004).

222. 392 U.S. 514 (1968).

223. *Id.* at 517.

The *Powell* court was not convinced that alcoholism was a medical disease.[224] It was also not persuaded by Powell's argument that his compulsion to drink overwhelmed his ability to rationally choose to refrain.[225] This suggests that a challenge to HB 1441 would probably fail if premised, like Powell's challenge, on the argument that addiction undermines the ability of the defendant to choose whether or not to drive. Moreover, this argument would be untenable in a drugged-driving challenge. Simply put, it would be illogical for a defendant to argue simultaneously that the metabolite in her system did not impair her ability to drive *and* that the effect of her substance use so impaired her decision-making abilities as to prevent her from making a rational choice. In at least this way, the argument that metabolite laws reach too far cuts both ways.

More importantly, though, the *Powell* decision further clarified the *Robinson* Court's rule against status offenses in a way that renders irrelevant the argument that one did not "choose" to drive. The *Powell* Court determined that what was missing from the California law at issue in *Robinson* was an actus reus: "[t]he entire thrust of *Robinson*'s interpretation . . . is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing."[226] By contrast, the Court insisted, the Cruel and Unusual Punishment Clause "does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"[227] The Oklahoma Court of Criminal Appeals summarized the *Robinson* rule: "[a] person should be convicted only for what he does, not for what he is."[228]

Were it challenged under the Eighth Amendment, Oklahoma's law would likely survive. In such a challenge, the court would probably conclude the law punishes the act of driving with metabolites in one's system, rather than any particular driver's status as an addict or drug user. Thus, HB 1441 contains an actus reus—operating a motor vehicle while illicit metabolites are present in one's bodily fluids. An Oklahoma court would likely decide along lines similar to those in the *Powell* decision: Oklahoma "has not sought to punish a mere status, as California did in *Robinson*. . . . Rather, it has imposed . . . a criminal sanction for public

224. *Id.* at 521-22.
225. *Id.* at 524-26.
226. *Id.* at 533.
227. *Id.*
228. Profit v. City of Tulsa, 1980 OK CR 77, ¶ 6, 617 P.2d 250, 251.

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behavior which may create substantial health and safety hazards, both for appellant and for members of the general public."[229]

VII. Conclusion

By creating criminal liability for "driving under the influence" without regard to whether evidence of guilt actually demonstrates impairment, HB 1441 disregards the moral culpability of an offender. This dismays many observers because it divorces criminal law from one of its most central justifications—that criminal prosecution should be brought against behavior that society deems morally blameworthy.[230] This criticism, however, is insufficient ground for courts—under the restraint of doctrinal restrictions informed by deference to the legislature—to invalidate the law.

While HB 1441 may seemingly overreach by authorizing punishment for driving under the influence of marijuana of someone who was not actually impaired while behind the wheel, an overbreadth challenge to the law *Because the language of the law gives fair notice of what conduct it proscribes and avoids arbitrary and discriminatory enforcement, a vagueness challenge is also unlikely to prevail. Furthermore, because HB 1441's classificatory scheme is rationally related to legitimate state interests, an equal protection challenge would probably fail. Similarly, this reasonable relationship between the law's classification and legislative purpose would probably prevent the success of a special laws challenge. Finally, HB 1441 criminalizes a particular act—driving while "under the influence" of schedule I metabolites—compliant with the Supreme Court's Eighth Amendment jurisprudence and so a challenge of that kind is also unlikely to succeed.

Ultimately, opponents of HB 1441 will not likely find remedy in the courts. Instead, their hope for repeal or reform of the law probably lies with the legislature. This is discouraging—the only hope for correcting what strikes many as a patent legislative injustice is in the hands of the very same lawmakers who enacted the bill little more than two years ago.

Blake Johnson

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229. *Powell*, 392 U.S. at 532.

230. *See, e.g.*, Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124-29 (1988).