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WISCONSIN'S NEW ADMINISTRATIVE SUSPENSION STATUTE: FIRST THE PUNISHMENT, THEN THE TRIAL*

I. INTRODUCTION

Driving while under the influence of an intoxicant is deplorable, antisocial, dangerous behavior which the legislature can — and should — penalize severely.¹ “The legislature has [acted] . . . in a continuing effort to keep drivers who are under the influence of intoxicants off the highway. It reflects the public’s attitude and belief that such drivers are a sinister hazard”²

The national and local press have provided much information on the indignant public reaction to people who are driving under the influence³ on our nation’s highways.⁴ Groups such as Mothers Against Drunk Drivers have become national in scope.⁵ Consequently, most states, including Wisconsin, have revised their laws dealing with the impaired driver.⁶

According to the National Highway Traffic Safety Administration, “[i]n excess of fifty percent of all drivers killed each year have blood alcohol concentrations higher than the legally recognized limit, 0.1%.”⁷ An average 25,000 Americans per year lose their lives in alcohol-related traffic acci-

* On December 6, 1988, Federal Judge Joseph P. Stadtmueller issued a preliminary injunction against enforcement of Wisconsin’s administrative suspension statute holding the law unconstitutional. Judge Stadtmueller’s decision was based on the lack of a meaningful pre-suspension hearing and post-suspension hearing. On December 13, 1988, Wisconsin Governor Tommy G. Thompson announced that the State Department of Transportation will issue an emergency rule to continue enforcement of the law. The emergency rule will be effective for 150 days.

1. *State v. Caibaiosai*, 122 Wis. 2d 587, 601, 363 N.W.2d 574, 581 (1985) (Abrahamson, J., dissenting).

2. *Id.* at 601, 363 N.W.2d at 581 (Majority Opinion).

3. Driving while “under the influence” indicates driving with a blood alcohol concentration (BAC) equal to or exceeding statutory limits. The statutory limit in Wisconsin is 0.1% or more of alcohol in a person’s blood or 0.1 gram or more of alcohol in 210 liters of a person’s breath. WIS. ADMIN. CODE § 113.02(1) [Trans] 190-1 (Dec. 1987). The purpose of this section is to establish the Department of Transportation’s administrative interpretation of WIS. STAT. § 343.305(8) (1985-86).

4. Watts, *The Drinking-Driving Problem: Assessing Some Proposed Solutions*, 48 POPULAR GOV’T 20 (1983).

5. *Id.* MADD is an acronym for Mothers Against Drunk Drivers. *Id.*

6. The term “impaired driver” is used to connote driving while under the influence. T. HAMMER, R. KALAL, R. KINDSCHI & J. McNALLY, *TRAFFIC LAW AND PRACTICE IN WISCONSIN* (1987) [hereinafter T. Hammer].

7. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN. U.S. DEP’T OF TRANSP. DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY RELATED LEGISLATION (1983).

dents and more than 650,000 are injured.⁸ The need for the United States Congress as well as the state legislatures to respond to this problem is clear. The legislatures have reacted by enacting an array of laws that punish impaired drivers⁹ and deter others from drinking and driving.¹⁰

Recently, Wisconsin responded by enacting a statute for the administrative suspension of a driver's license.¹¹ The statute applies to drivers accused of refusing to take the chemical test under the implied consent law,¹² or to drivers who submit to the test and have a blood alcohol concentration of 0.1% or more.¹³ This new statute places in issue whether the driver's constitutional right to procedural due process is violated by the administrative suspension of the driver's license.¹⁴ Since the driver has no meaningful opportunity to be heard, the driver is deprived of property without due process.

This Comment begins by developing a historical perspective for the enactment of the administrative suspension statute.¹⁵ It then discusses the purpose and specific provisions of the administrative suspension statute.¹⁶ In addition, the constitutionality of the statute is examined. This Comment concludes by urging that the administrative suspension of a driver's license is an infringement on the individual's constitutional right to due process, and suggests some alternative solutions to the current statute.

8. *Id.* Also, some estimates place the annual economic loss from these accidents at \$24 billion for actual damages alone. *Id.*

9. The acronym OMVWI refers to operating under the influence of an intoxicant or drug. The cases and other literature also include designations such as DUI, DWI, OAI, OAWI, and OWI. See T. HAMMER, *supra* note 6, at 5-10 n.14.

10. Adelman, *Introduction*, 69 MARQ. L. REV. 159 (1986).

11. WIS. STAT. § 343.305 (1985-86), *affected by* 1987 Wis. Act 3. The title of this statute is: "Tests for Intoxication; Administrative Suspension and Court-Ordered Revocation" (effective Jan. 1, 1988).

12. WIS. STAT. § 343.305(2) (1985-86).

13. WIS. STAT. § 343.305(7) (1985-86).

14. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V; "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

15. See *infra* notes 17-26 and accompanying text.

16. See *infra* notes 27-50 and accompanying text.

II. HISTORICAL PERSPECTIVE

A. *A History of Wisconsin's Impaired Driver Statutes Including the Implied Consent Laws*

In 1911, the state legislature enacted Wisconsin's first statute addressing the impaired driver.¹⁷ The relevant laws have been consistently altered since 1911. In 1981, there was a significant alteration of the existing impaired driver statute,¹⁸ and in 1985, there was another modification of the statute.¹⁹ The current revisions of the statute have been effective since January 1, 1988.²⁰

The 1981 revision of the impaired driving laws was prompted by several legislative purposes which have been a pervasive theme in the subsequent revisions as well.²¹ The purposes include: providing maximum safety for all users of the highways of this state; deterring the operation of a motor vehicle by persons who have a blood alcohol concentration of 0.1% or more; and denying the operation of a motor vehicle to such persons.²² In the legislature's attempt to effectuate these purposes, particularly the need to enhance the statute's deterrent value, each revision has resulted in a stricter statute. Additionally, this purpose was most significant in the enactment of Wisconsin's administrative suspension statute.

The implied consent law applies to all persons who operate motor vehicles on Wisconsin highways, and are deemed by that activity to have implicitly consented to chemical testing under the statute:²³

Any person who drives or operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence . . . of alcohol . . . when requested to do

17. "[N]o intoxicated person shall operate, ride or drive any automobile, motor cycle or other similar motor vehicle along or upon any public highway of this state." WIS. STAT. § 1636-49 (1911).

18. 1981 Wis. Laws 20, *amended by* 1981 Wis. Laws 184.

19. 1985 Wis. Act 337.

20. 1987 Wis. Act 3. The provisions of 1987 Wis. Act 3 have effective dates of March 1, 1987 and January 1, 1988. 1987 Wis. Laws 30. The focus of this Comment is on the administrative suspension provisions effective January 1, 1988.

21. 1981 Wis. Laws 20, § 2051(13), *amended by* 1981 Wis. Laws 184, § 10.

22. *Id.* Other purposes include encouraging vigorous prosecution of those who operated motor vehicles with a BAC of 0.1% or more, and promoting driver improvement. *Id.*

23. See T. HAMMER, *supra* note 6, at 5-8. This law applies to all persons who drive on Wisconsin highways; it is not limited to Wisconsin residents or those with a Wisconsin license. *Id.*

so by a law enforcement officer under [the provisions of the implied consent statute].²⁴

The underlying purpose of the implied consent law is to obtain the blood alcohol concentration of the impaired driver for evidence to prosecute the driver.²⁵ In an effort to gather this evidence, the consent referred to is not optional, "but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways."²⁶

B. The Enactment of Wisconsin's Administrative Suspension Statute

1. The Purpose of Wisconsin's Administrative Suspension Statute

The administrative suspension statute represents the legislature's attempt to rectify the problems associated with the former impaired driving legislation. Most importantly, the statute is intended to strengthen the state's methods of dealing with the problem of drinking and driving.²⁷ The previous legislation included a system of judicial revocation for driving with a blood alcohol concentration of 0.1% or more which was replaced by a system of administrative action against the driver's license.²⁸ In an attempt to restore the incentives for submitting to testing, the penalties for an unlawful refusal were increased in relation to the penalties for the impaired driving offenses.²⁹

The administrative suspension statute was enacted to correct the deficiencies of the former statute³⁰ and refine the law's effectiveness and deter-

24. WIS. STAT. § 343.305(1) (1985-86), *affected by* 1987 Wis. Act 3. The Wisconsin Supreme Court has indicated that subsection (1) of this implied consent statute declares the legislative policy that those who drive, consent to chemical testing. *State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300, 305 (1986). The remainder of the statute consists of the procedures to be used for the implementation of this policy. *Id.* Wisconsin's first implied consent statute was 1969 Wis. Laws 383 § 4 (1969).

25. *Nordness*, 128 Wis. 2d at 33, 381 N.W.2d at 307; see Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L.J. 99 (1980) (citing to implied consent laws of all fifty states).

26. *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (1980); see also 4 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 33.01 (3d ed. 1985) (discussion of theories of national implied consent legislation).

27. See T. HAMMER, *supra* note 6, at 4-9; see also Hancock & Maassen, *Wisconsin's New Drinking Age and Drunk Driving Law*, 59 WIS. BAR BULL. 9 (Sept. 1986).

28. See 1987 Wis. Act 3.

29. *Id.* Before January 1, 1987, a first implied consent refusal required court-ordered suspension for six months. WIS. STAT. § 343.305(9) (1983-84). As of March 1, 1987, a first chemical test refusal in a five-year period requires a one-year revocation of the driver's operating privileges. WIS. STAT. § 343.305(9)(b)(2) (1987).

30. See 1985 Wis. Act 337.

rent value.³¹ In terms of the implied consent law, the legislation, as noted below, created an incentive to comply with the law and take the chemical test even if taking the test resulted in a conviction.³² Although the administrative suspension statute substantially revised the state's impaired driving law, the legislature did not alter the overall purpose of the impaired driving law.³³

2. The Provisions of the Administrative Suspension Statute and Their Impact on Wisconsin Law

The Wisconsin administrative suspension statute repealed the pretrial revocation for high chemical test results as of March 1, 1987. This judicial revocation was based on drivers having a blood alcohol concentration level of 0.2% or higher.³⁴ The pretrial revocation provision was repealed for judicial efficiency since it would have added 10,000 new circuit court cases a year to the criminal justice system.³⁵

If a person is arrested for drunken driving, he or she is required to take a blood, breath, or urine test under the implied consent provisions of Wisconsin law.³⁶ Since January 1, 1988, if the driver submits to the test and the driver's blood alcohol concentration is 0.1% or higher, the officer will seize the driver's license and issue a notice of suspension.³⁷ The notice of suspension serves as a temporary driver's license and is valid for thirty days.³⁸

Thereafter, the driver has ten working days to request a review of the suspension by the Department of Transportation.³⁹ If no review is requested, the suspension will take effect thirty days after the arrest and will

31. 1987 Wis. Act 3; *see also* WISCONSIN DEP'T OF TRANSP., ANALYSIS OF 1987 WISCONSIN ACT 3 (1987) [hereinafter ACT 3 ANALYSIS]. One of the most serious problems associated with Act 337 was the incentive it created for people arrested for drunken driving to refuse the chemical test because only the penalties for drunken driving were increased. The refusal penalties were not increased. ACT 3 ANALYSIS, at 1.

32. *See* ACT 3 ANALYSIS, *supra* note 31, at 2. Compare the penalties for a driver's first chemical test refusal (one to two year revocation) with those for a driver's first operation under the influence (six to nine month suspension). *Id.* at 12.

33. *See supra* notes 21-22 and accompanying text.

34. *See* ACT 3 ANALYSIS, *supra* note 31, at 3.

35. *Id.* Since March 1, 1987, the criminal offense of aggravated drunken driving is eliminated. Under Act 337, this offense was committed by a person who operated a motor vehicle with a BAC of 0.2% or higher. *Id.*

36. WIS. STAT. § 343.305(2) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

37. WIS. STAT. § 343.305(7) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

38. WIS. STAT. § 343.305(8)(a) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

39. WIS. STAT. § 343.305(8)(b)1 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. In some counties, the request for a review is to the office of the commissioner of transportation. *Id.* The person may request a review using a form that will be provided at the time of the arrest. *Id.*

remain in effect for six months. The driver will be immediately eligible to apply for an occupational license.⁴⁰

If a hearing is requested, it will be held in the county where the offense occurred or at the nearest Department of Transportation facility. The issues at the administrative hearing are limited to the following:

1. The correct identity of the person;
2. Whether the person was informed of the options regarding the tests;
3. Whether the person had a blood alcohol concentration of 0.1% or more at the time the offense allegedly occurred;
4. Whether one or more tests were administered in accordance with the law;
5. Whether, if one or more tests were administered in accordance with the law, each of the test results indicate the person had a blood alcohol concentration of 0.1% or more;
6. Whether probable cause existed for the arrest.⁴¹

At the hearing, a driver may present evidence and may be represented by counsel. The driver may submit written arguments limited to the above issues as long as the arguments are in lieu of the driver's personal appearance.⁴² "The arresting officer need not appear, but the hearing officer must [possess] a copy of the officer's report and the results of the chemical tests."⁴³

Since January 1, 1988, a breath test under the statute consists of the analysis of two separate breath samples. A failure to provide two adequate samples constitutes a refusal.⁴⁴ The current statute provides for two breath samples in order to improve the validity and reliability of the breath test as a measure of blood alcohol concentration.⁴⁵

When a hearing is requested, it must be held within thirty days of the arrest. If a driver is dissatisfied with the results of the review, he or she may request a court review by a judge or a full-time court commissioner. How-

40. WIS. STAT. § 343.305(8)(d) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. The fee for reinstating a license after a suspension or revocation has been increased to \$50.00. Wis. Act 3 sec. 15. Also, the penalty for a second impaired driving offense is a twelve to eighteen month revocation; the penalty for a third impaired driving offense is a twenty-four to thirty-six month revocation. WIS. STAT. § 343.305(10)(b)4 (1985-86).

41. WIS. STAT. § 343.305(8)(b)2 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

42. WIS. ADMIN. CODE § 113 [Trans] 190 (Dec. 1987).

43. WIS. STAT. § 343.305(8)(b)1 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

44. WIS. STAT. § 343.305(6)(c) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. The intoxilyzer 5000 is used in Wisconsin to perform the breath test. See ACT 3 ANALYSIS, *supra* note 31, at 7.

45. Wis. Admin. Reg. No. 384, at 32 (Dec. 31, 1987).

ever, a request for a court review will not stay the suspension.⁴⁶ If a driver is found not guilty of the drunken driving charge, the suspension will be vacated and the driver's record will be purged of the suspension.⁴⁷

A notice of revocation will be issued for any driver who refuses to submit to the chemical test.⁴⁸ Once the officer seizes the driver's license, a receipt is issued which serves as a thirty day temporary license. If the driver requests a hearing within ten days of the revocation, the circuit court will have jurisdiction over the hearing.⁴⁹ If no review is requested, the revocation will take effect thirty days after the arrest and will remain in effect for one year. After a thirty day waiting period, the driver will be eligible to apply for an occupational license.⁵⁰

III. THE CONSTITUTIONALITY OF WISCONSIN'S ADMINISTRATIVE SUSPENSION STATUTE

Since possession of a driver's license is a property interest protected by the notice and hearing guarantees of due process,⁵¹ Wisconsin Statute section 343.305 must comply with these due process requirements. The due process analysis for administrative license suspension requires an examination of two issues, both of which are next addressed by this Comment. The first issue which must be examined is whether the interest in question is protected under the Constitution. Secondly, it is necessary to analyze what procedural protections must be accorded to an individual possessing the interest against an erroneous deprivation.⁵² If such an interest is constitutionally protected, procedural safeguards must exist.

46. WIS. STAT. § 343.305(8)(c)4 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. The review may be conducted with the trial or sentencing for the underlying offense or a petition for prompt review may be filed to expedite the process. WIS. STAT. § 343.305(8)(c)(1) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

47. WIS. STAT. § 343.23 (1985-86), *affected by* 1987 Wis. Act 3 sec. 16(g).

48. WIS. STAT. § 343.305(9)(a) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

49. WIS. STAT. § 343.305(9)(b), (c) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. The scope of the hearing will be limited to the issues in paragraph 9(a)5. WIS. STAT. § 343.305(9)(c) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

50. WIS. STAT. § 343.305(10)(b) (1985-86), *affected by* 1987 Wis. Act 3 sec. 29. The penalty for a second chemical test refusal is a two-year revocation, and the penalty for a third or more chemical test refusal is a three-year revocation (within a five year period). *Id.*

51. Milroy, *North Carolina's License Revocation for Drunk Drivers: Minor Inconvenience or Unconstitutional Deprivation?*, 62 N.C.L. REV. 1149 (1984). The fourteenth amendment guarantees an individual the due process protections of notice and hearing before being deprived of an important property interest. U.S. CONST. amend. XIV.

52. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

A leading United States Supreme Court case in this area, *Mackey v. Montrym*,⁵³ utilizes a "balancing of competing interests" test to determine when the revocation of a driver's license without a prior hearing is constitutional.⁵⁴ However, in *Bell v. Burson*,⁵⁵ the Court held that unless an emergency exists, a pre-suspension hearing must always be held before deprivation of an important property interest.⁵⁶

A. A Driver's License Is an Interest to Be Protected

The entitlement to due process protection has been historically governed by the distinction between a right and a privilege.⁵⁷ A privilege is not a constitutional right to be protected.⁵⁸ "[T]he Warren Court, in the late 1950's and 1960's, moved away from a focus on the actions of government to . . . the nature of the interest asserted by the individual."⁵⁹ Consequently, the Warren Court repudiated the right-privilege dichotomy, which laid the foundation for the Court's recognition of the property interest involved.⁶⁰

In *Bell v. Burson*,⁶¹ the Supreme Court recognized that a driver's license, once granted, is property within the meaning of the fourteenth amendment and cannot be taken away in violation of the relevant requirements of procedural due process.⁶² The *Bell* Court stated that the method of attaining possession is irrelevant to the protection guaranteed.⁶³

Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural Due Process required by the Fourteenth

53. 443 U.S. 1 (1979).

54. *Id.* at 5.

55. 402 U.S. 535 (1971).

56. *Id.* at 537.

57. Case Comment, *Cleveland Bd. of Educ. v. Loudermill: Procedural Due Process Protection for Public Employees*, 47 OHIO ST. L.J. 1115 (1986).

58. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

59. See Case Comment, *supra* note 57, at 1117.

60. *Id.* After the Court's repudiation of the right-privilege dichotomy, the Court dealt with the issue of which due process protections a state must comply with before it may constitutionally infringe on the liberty and property interests of individuals. *Id.* See *Graham v. Richardson*, 403 U.S. 365 (1971) for a discussion by Justice Blackmun of the end of the right-privilege dichotomy; see also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

61. 402 U.S. 535 (1971).

62. See Reese & Borgel, *Summary Suspension of Drunken Drivers' Licenses — A Preliminary Constitutional Inquiry*, 35 ADMIN. L. REV. 313 (1983).

63. *Bell*, 402 U.S. at 539.

Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."⁶⁴

In *Board of Regents v. Roth*,⁶⁵ the United States Supreme Court recognized a property interest in continued public employment.⁶⁶ Justice Stewart noted that:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.⁶⁷ To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.⁶⁸

Thus, the *Bell* Court determined that a driver's license is an entitlement,⁶⁹ which is a protected property interest in a governmental grant of permission or monetary support.⁷⁰

In *Mackey v. Montrym*,⁷¹ the Court found that the "suspension of a driver's license for statutorily defined cause implicates a protectible prop-

64. *Id.* (citation omitted); see also *Dixon v. Love*, 431 U.S. 105, 110 n.7 (1977). The Court's recognition of the property interest involved was also evident in cases involving: continued public employment (*Board of Regents v. Roth*, 408 U.S. 564 (1972)); parole revocation (*Morrissey v. Brewer*, 408 U.S. 471 (1972)); seizure of goods under a writ of replevin (*Fuentes v. Shevin*, 407 U.S. 67 (1972)); and termination of welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970)).

65. 408 U.S. 564 (1972).

66. *Id.* at 578. This case is cited to demonstrate the Court's movement away from the right-privilege dichotomy to a consideration of the interest involved; see also *Perry v. Sindermann*, 408 U.S. 593 (1972).

67. *Board of Regents*, 408 U.S. at 577.

68. *Id.* The Court found that Roth's property interest in his job was created and controlled by his contract of employment and by the governing Wisconsin statutes.

69. *Bell*, 402 U.S. at 539. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* (3d ed. 1986) (discussion of entitlements).

70. The entitlement theory dispensed with the right-privilege distinction; see Note, *Automatic Imposition of No-Work Conditions on Bonds in Deportation Proceedings: An Abuse of Discretion and Due Process*, 52 *FORDHAM L. REV.* 1009, 1020-21 (1984); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

71. 443 U.S. 1 (1979).

erty interest.”⁷² The *Mackey* Court also recognized that the right to continued possession of a driver's license is a protected property interest within the meaning of the Constitution. In an opinion letter from the Office of the Attorney General of Wisconsin, Donald J. Hanaway stated that the driver's license is a constitutionally protected interest, which prevents removal without due process.⁷³ Clearly then, a driver's license is a property interest to be constitutionally protected. The remaining question is what procedural protections must be accorded to the individual against an erroneous deprivation of that property interest.⁷⁴

B. The Due Process Afforded to the Holder of a Driver's License

The question of constitutionality focuses on the procedural protections that must be afforded to the driver.⁷⁵ Furthermore, it must be determined whether the procedural due process requirements of notice and hearing are satisfied by Wisconsin's administrative suspension statute.⁷⁶

1. The *Bell - Fuentes* Test

In *Bell v. Burson*, the Supreme Court determined the constitutionality of Georgia's Motor Vehicle Safety Responsibility Act.⁷⁷ This statute allowed the automatic suspension of the license of any uninsured motorist involved in an accident, irrespective of fault, unless he or she posted security to cover

72. *Id.* at 10. For further discussion of a driver's license as a property interest, see *Illinois v. Batchelder*, 463 U.S. 1112 (1983) (revocation of driver's license for refusing to take a breath-analysis test); *Dixon v. Love*, 431 U.S. 105 (1977) (revocation of driver's license for repeated traffic violations); *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963) (suspension of driver's license for failing to post security under Financial Responsibility Act); *McConville v. Alexis*, 97 Cal. App. 3d 593, 159 Cal. Rptr. 49 (1979) (revocation of driver's license for failing to comply with implied consent statute); *Bureau of Traffic Safety v. Quinlan*, 47 Pa. Commw. 214, 408 A.2d 173 (1979) (suspension of driver's license for refusing to take a breathalyzer test); *Berberian v. Lussier*, 87 R.I. 226, 139 A.2d 869 (1958) (suspension of driver's license for failing to deposit security under Financial Responsibility Act); *Jordan v. Roberts*, 161 W. Va. 750, 246 S.E.2d 259 (1978) (suspension of driver's license for refusing to take breathalyzer test); *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) (revocation of driver's license for implied consent refusal); *Best v. State*, 99 Wis. 2d 495, 299 N.W.2d 604 (1980) (suspension of driver's license for accumulation of demerit points for traffic violations under WIS. STAT. ANN. § 343.085(c), 343.32(2)(a) (West Supp. 1988)).

73. 2-88 Op. Wis. Att'y Gen. 6 (Jan. 11, 1988); see also *Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986) (revocation of driver's license for statutorily defined purpose is a protected property interest which implicates due process protections).

74. *Mackey*, 443 U.S. at 10; *Bell*, 402 U.S. at 539-40.

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

76. See *Milroy*, *supra* note 51, at 1150-51.

77. *Bell v. Burson*, 402 U.S. 535 (1971). The statute in question was the Georgia Motor Vehicle Safety Responsibility Act, GA. CODE ANN. § 92A-601 (1958).

the amount of damages.⁷⁸ The Georgia statute provided an administrative hearing before the suspension, but limited the issues that could be raised in the summary proceeding.⁷⁹ The Court held that the statute violated the fourteenth amendment by failing to afford the petitioner a prior hearing on liability.⁸⁰ The Court stated that "except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."⁸¹

The Supreme Court in *Bell* did not answer the question of what constitutes an emergency sufficient enough to dispense with the required guarantees of notice and the opportunity to be heard.⁸² In *Fuentes v. Shevin*,⁸³ however, the Court did just that.⁸⁴ The Court established three requirements for a seizure of property to fall within the "emergency exception" to the due process requirement of a prior hearing:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.⁸⁵

Utilizing the *Fuentes* analysis, the courts have undertaken to assess the constitutionality of pre-trial driver's license revocation for failure to comply with implied consent laws.⁸⁶ Applying the *Fuentes* test, courts have held

78. *Bell*, 402 U.S. at 535-37.

79. *Id.* at 537-38. The issue of fault could not be raised and the only allowable evidence during the administrative hearing was, "(a) [whether] the petitioner or his vehicle [was] involved in the accident; (b) [whether] petitioner complied with the provisions of the Law as provided; or (c) [whether] petitioner [came] within any of the exceptions of the Law." *Id.*

80. *Id.* at 543.

81. *Id.* at 542 (quoting *Opp Cotton Mills v. Administration*, 312 U.S. 126, 152 (1941)); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (determines the standard for a "meaningful" hearing under the due process clause).

82. See *Milroy*, *supra* note 51, at 1151. Frequent emergency situations include the protection of national security during wartime, the protection of the public against economic injury, and the protection of the public health from unsafe food and drugs; see also *Reese & Borgel*, *supra* note 62, at 318.

83. 407 U.S. 67 (1972).

84. *Fuentes* addressed state laws that authorized a pre-hearing seizure of property upon the ex parte application of any individual claiming a right to that property. *Id.* at 69.

85. *Id.* at 91.

86. See *Milroy*, *supra* note 51, at 1151; see also *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973).

that the license revocation is not related to an emergency and thus is unconstitutional under *Bell*.⁸⁷

In *Holland v. Parker*,⁸⁸ the District Court of South Dakota applied *Fuentes* to the state's implied consent law and found an important governmental and public interest in keeping drunken drivers off the roads, as well as a special need for very prompt action.⁸⁹ Furthermore, the person who initiated the seizure was a government official, a law enforcement officer.⁹⁰

Although the statute met the *Fuentes* criteria, the *Holland* court found the statute unconstitutional under *Bell*. The court held that the summary procedure did not fall within the emergency exception since only those drivers who refused the chemical test, and not those who failed the test, had their licenses revoked.⁹¹ Thus, the summary revocation was not related directly to the state's need to keep drunken drivers off the road.

2. The *Mackey* - *Mathews* Test

In *Mackey v. Montrym*,⁹² the Supreme Court utilized a different analysis in holding an implied consent statute constitutional. Under the Massachusetts statute in issue, a driver's license was automatically suspended for ninety days if the driver refused to take a breath analysis test.⁹³ The statute, similar to the Wisconsin statute, provided for a hearing before a state official at any time after the license was suspended, but provided no procedure for a pre-suspension hearing.⁹⁴

The Court stated that "the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from [*Bell*]."⁹⁵ The Court assumed the case fell within the emergency exception and therefore, the requirement of a pre-suspension hearing was negated.⁹⁶ However, the *Mackey* Court did not analyze the Massachusetts statute under the three-prong *Fuentes* test. Rather, the

87. See Milroy, *supra* note 51, at 1152.

88. 354 F. Supp. 196 (D.S.D. 1973).

89. *Holland*, 354 F. Supp. at 202.

90. *Id.*

91. *Id.*

92. 443 U.S. 1 (1979).

93. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1983). This statute has subsequently been amended to provide for 120 days of suspension.

94. *Id.* at § 24(1)(g); see also WIS. STAT. § 343.305(8)(b) (1985-86), affected by 1987 Wis. Act 3. This specific provision of the Massachusetts statute is similar to the Wisconsin statute. The statutes differ because the Wisconsin statute applies to drivers who refuse to comply with the implied consent law and those who do comply, but have a BAC of 0.1% or more. *Id.*

95. *Mackey*, 443 U.S. at 17. The Court based the distinction on the fact that *Bell* concerned revocation for failure to post security, which was not a threat to public safety. *Id.*

96. *Id.* at 18.

Court applied the "balancing of interests" test from *Mathews v. Eldridge*⁹⁷ to ascertain whether the procedure comported with due process.⁹⁸

In *Mathews*, the Court determined that the due process analysis requires a balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹⁹

The *Mackey* Court's application of the *Mathews* test to the Massachusetts statute recognized the importance of the private interest of "continued possession and use of the license pending the outcome of the hearing."¹⁰⁰

The balancing of the private interest against the governmental interest was weighed by three additional factors established by the *Mackey* Court: the duration of the revocation; the availability of hardship relief; and the availability of prompt post-revocation review.¹⁰¹ The Court found the implied consent statute was constitutional. In other words, the substantial private interest was outweighed by the government's interest in preserving the safety of the highways.¹⁰² The availability of prompt post-revocation review to protect against an erroneous deprivation tipped the scale in favor of the state's interest.¹⁰³

97. 424 U.S. 319 (1976).

98. *Mackey*, 443 U.S. at 10. The *Mathews* case involved the termination of disability benefits. The Court balanced the governmental and private interests and held that an evidentiary hearing is not required to terminate disability payments, and the administrative procedures set out in the Social Security Act comport with due process. *Id.*, 424 U.S. at 335, 349.

99. *Id.* at 335; see also *Goldberg v. Kelly*, 397 U.S. 254 (1970) (dealing with the termination of welfare benefits without any pre-termination hearing).

100. *Mackey*, 443 U.S. at 11. In *Dixon v. Love*, 431 U.S. 105, 113 (1977), the Court held that the interest in a driver's license is a substantial one, since the state cannot make a driver whole for any personal inconvenience and economic hardship caused by a delay in redressing an erroneous suspension.

101. *Mackey*, 443 U.S. at 12.

102. *Id.* at 18-19. The government's interest in highway safety was achieved by removing drunken drivers from roads. *Id.* at 18.

103. *Id.* at 13. For the second prong of the *Mathews* test, the Court stated, "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible property or 'liberty' interest be so comprehensive as to preclude any possibility of error." *Id.*

Justice Stewart, in his dissent, however, believed that *Bell* mandated a pre-suspension hearing in *Mackey*,¹⁰⁴ since the pre-suspension hearing requirement is negated only in an emergency. Furthermore, Justice Stewart determined that the Massachusetts statute was not in response to an emergency situation.¹⁰⁵ Justice Stewart stated that "when adjudicative facts are involved, when no valid governmental interest would demonstrably be diserved by delay, and when full retroactive relief cannot be provided, an after-the-fact evidentiary hearing on a critical issue is not constitutionally sufficient."¹⁰⁶ Thus, the dissent concluded that the *Bell-Fuentes* test was more appropriate than the *Mackey-Mathews* test.

3. Application to the Wisconsin Administrative Suspension Statute

The Supreme Court has not determined the constitutionality of an implied consent statute that suspends licenses both for refusing to take a chemical test and for failing the test.¹⁰⁷ The Minnesota Supreme Court in *Heddan v. Dirkswager*,¹⁰⁸ however, addressed this question. The Minnesota implied consent statute required a ninety day suspension for failing a chemical test with a blood alcohol concentration of 0.1% or more, and a six month suspension for refusing to take the test.¹⁰⁹ The Minnesota statute is similar to the Wisconsin statute, except the penalties for implied consent refusal in Wisconsin are more severe.¹¹⁰

The State Court in *Heddan* followed the *Mackey v. Montrym* analysis in holding that the Minnesota statute was constitutional.¹¹¹ The *Heddan* court stated that "drunken drivers pose a severe threat to the health and

104. *Id.* at 19-30 (Stewart, J., dissenting). Justices Brennan, Marshall and Stevens joined in Justice Stewart's dissent.

105. *Id.* at 20. Justice Stewart stated that the suspension penalty is "imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breath-analysis tests." *Id.*

106. *Id.* at 21-22; see also *Goldberg v. Kelly*, 397 U.S. 254 (1970) where the Court held that a post-deprivation hearing for welfare benefits without an evidentiary hearing before the termination did not comport with due process.

107. See WIS. STAT. ANN. § 343.305 (West Supp. 1988). In *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), the Wisconsin Supreme Court decided an evidentiary issue under Wisconsin's implied consent law but stated, "this case on its facts does not present the issue of . . . license revocation . . . [for] defendant's refusal. We neither consider nor decide that issue." *Id.* at 48 n.2, 403 N.W.2d at 430 n.2.

108. 336 N.W.2d 54 (Minn. 1983).

109. MINN. STAT. ANN. §§ 169.123 (West Supp. 1983). The statute also provided a temporary seven day license upon revocation and established a post-suspension administrative review. *Id.*

110. WIS. STAT. § 343.305(10) (1985-86). The penalty for a refusal in Wisconsin is one year compared to the six month suspension in Minnesota.

111. *Heddan*, 336 N.W.2d at 59-65.

safety of the citizens of Minnesota. The compelling interest in highway safety justifies . . . making a revocation effective pending the outcome of the prompt post-suspension hearing."¹¹²

To determine the constitutionality of § 343.305 of the Wisconsin Statutes, the Wisconsin courts will inevitably apply the *Mackey* test in conformity with the *Heddan* precedent.¹¹³ However, the *Mackey* Court erroneously utilized the balancing of interests test established in *Mathews v. Eldridge*.¹¹⁴ The Supreme Court, in *Bell v. Burson*, stated that due process requires a pre-suspension hearing except in emergency situations.¹¹⁵ Based on *Bell*, the *Mackey* Court should have applied the *Fuentes* test in analyzing the constitutionality of the pre-hearing revocation under the Massachusetts implied consent law.

The administrative suspension of Wisconsin Statutes § 343.305 is unconstitutional under *Bell* since it is not in response to an emergency. Under the first prong of the *Fuentes* test, license revocation without a prior hearing is justifiable only if it is "directly necessary to secure an important governmental or general public interest."¹¹⁶ Under the second prong, there must be a "special need for very prompt action" which is accomplished by the revocation.¹¹⁷ Although Wisconsin has an important interest in protecting its citizens from drunken drivers,¹¹⁸ the administrative license suspension of § 343.305 goes beyond what is "directly necessary" to effectuate that interest.

Under the *Fuentes* test, the Wisconsin driver's license suspension can only be sustained as a "directly necessary" response to an emergency or as a "special need for very prompt action"¹¹⁹ if it is assumed that these individuals would drive drunk during the suspension period. The possibility that the driver may be removed from the road by arrest and held until the driver

112. *Id.* at 63.

113. In *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986), the Wisconsin Supreme Court utilized the *Mackey-Mathews* test in analyzing the defendant's challenge to the implied consent law.

114. See *supra* notes 97-98 and accompanying text.

115. 402 U.S. 535 (1971).

116. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

117. *Id.*

118. See, e.g., *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987) (intent of legislature in implied consent law was to facilitate gathering of evidence against drunken drivers to remove them from state's highways); see also *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986); *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983); *City of Madison v. Bardwell*, 83 Wis. 2d 891, 266 N.W.2d 618 (1978).

119. *Fuentes*, 407 U.S. at 91.

is sober enough to drive, demonstrates that the suspension is not "necessary and justified" by the need for prompt action.¹²⁰

The arrest itself serves to protect the government's interest in public safety by immediately removing drunken drivers from the state's highways. The Wisconsin statute goes far beyond its governmental interest. Thus, the administrative suspension under the Wisconsin statute is not "directly necessary" to maintain the safety of Wisconsin's roads, and the statute fails under the *Bell-Fuentes* test.

In *Mackey*, Justice Stewart's criticism of the Massachusetts statute applies to the Wisconsin statute as well. Justice Stewart stated that "[t]he suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breath-analysis tests."¹²¹ There is a justifiable governmental interest in maintaining safe roads as well as an equally strong purpose among the legislators and the public to punish drunken driving offenders.¹²² Clearly, the punishment of drunken drivers was as important an impetus behind the enactment of the Wisconsin statute as the protection of the citizens of the state.¹²³

The impaired driver penalties in § 343.305 of the Wisconsin Statutes supports this argument based on the *Holland* rationale. In *Holland v. Parker*,¹²⁴ although the statute met the *Fuentes* criteria,¹²⁵ the statute was held unconstitutional since it did not respond to an emergency. The court's holding in *Holland* was based on the fact that the statute applied only to those drivers who refused the chemical test, and not to those who failed the test. Similarly, the penalties in the Wisconsin statute for an implied consent refusal are substantially more severe than the penalties for failing the test.¹²⁶

120. *Id.*

121. *Mackey*, 443 U.S. at 20 (1979) (Stewart, J., dissenting).

122. See Milroy, *supra* note 51, at 1155. See, e.g., *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986) (implied consent law is designed to secure convictions and get drunken drivers off the highways); *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983) (purpose of implied consent law is to obtain evidence to improve rate of convictions so those who drive drunk will be punished).

123. See ACT 3 ANALYSIS, *supra* note 31, at 2. "The Legislature wanted to make it clear that . . . a driver is better off to comply with the law and take the [chemical] test than to refuse, . . . even if taking the test results in a conviction." *Id.*

124. 354 F. Supp. 196 (D.S.D. 1973).

125. *Id.* at 202; see *supra* notes 88-91 and accompanying text.

126. See *supra* note 31 and accompanying text. Also, the driver who refuses to take the test under the implied consent law must wait for thirty days to apply for an occupational license, whereas the driver who agrees to take the test and is charged with an impaired driver offense is

Clearly, "[t]he [Wisconsin] suspension penalty itself is concededly imposed not as an emergency measure . . . but as a sanction to induce drivers to submit to breath-analysis tests."¹²⁷ Further, "the critical fact that triggers the suspension is noncooperation with the police, not drunken driving."¹²⁸ Therefore, the punishment of the drunken driving offender is not a legitimate governmental purpose to support a license revocation without the due process guarantee of a prior hearing under the *Bell-Fuentes* emergency rule or the *Mackey-Mathews* balancing test.

In addition, under the *Mackey-Mathews* test, the private interest of "continued possession and use of [the] license pending the outcome of the hearing" is balanced against the government's interest in maintaining safe highways.¹²⁹ This private interest is important, and the balance may support the pre-hearing revocation if sufficient remedies exist to protect the private interest involved.¹³⁰

Proponents asserting the constitutionality of the Wisconsin statute will argue that the statute does in fact protect the private interest of the driver in his or her license. For example, the proponents will assert that upon seizure of the driver's license, the driver is issued a notice of suspension,¹³¹ which serves as a temporary driver's license for thirty days until the suspension takes effect.¹³² They will also contend that the driver may request a post-suspension review (post-deprivation hearing) by the Department of Transportation,¹³³ and if the driver is not satisfied with the results of the review, he or she may request a court review.¹³⁴ Finally, they will argue that the driver is eligible to apply for an occupational license.¹³⁵

These apparent "protections" are merely a facade for the unconstitutionality of the statute under the fifth and fourteenth amendments, which prevent a state from taking private property without due process. Beside the fact that the driver is deprived of an important property interest without

immediately eligible to apply for an occupational license; see also WIS. STAT. § 343.305 (1985-86), affected by 1987 Wis. Act 3.

127. *Mackey*, 443 U.S. at 20 (1979) (Stewart, J., dissenting).

128. *Id.*

129. *Id.*

130. See Milroy, *supra* note 51, at 1156.

131. WIS. STAT. § 343.305(8)(a) (1985-86), affected by 1987 Wis. Act 3 sec. 29.

132. *Id.*

133. WIS. STAT. § 343.305(8)(b)1 (1985-86), affected by 1987 Wis. Act 3 sec. 29; see also WISCONSIN DEP'T OF TRANSP., 1988 REVISIONS TO WISCONSIN'S OMVWI LAW: THE SYSTEM OF ADMINISTRATIVE SUSPENSION (1987) [hereinafter 1988 REVISIONS].

134. WIS. STAT. § 343.305(8)(c)4 (1985-86), affected by 1987 Wis. Act 3 sec. 29.

135. For failure of the chemical test under the implied consent law, see WIS. STAT. § 343.305(8)(d) (1985-86). For an implied consent refusal, see WIS. STAT. § 343.305(10)(b) (1985-86).

a pre-deprivation hearing, the post-deprivation hearing is unconstitutional. The lack of a meaningful post-deprivation hearing¹³⁶ is evident for a number of reasons. First, the hearing is limited to the factual issues articulated in the statute,¹³⁷ based on documentary evidence consisting of the officer's report and the results of the chemical test.¹³⁸ Second, the Wisconsin statute does not require the arresting officer to appear at the hearing, even though the defendant "may present evidence and may be represented by counsel."¹³⁹

The defendant's post-deprivation hearing forces the driver to protect an important property interest without the right to confrontation or cross-examination of his accuser, the police officer.¹⁴⁰ Thus, a determination of one of the issues under the statute, such as whether there was probable cause for the arrest or whether the defendant was informed of the options regarding the chemical tests, is resolved by the officer's report.¹⁴¹ The absence of the arresting officer at the hearing and the lack of the opportunity to cross-examine the officer does not afford the driver a fair hearing. Therefore, the post-deprivation hearing is not constitutional.

A third reason the post-deprivation hearing is not constitutionally adequate is that a request for a court review by the defendant does not stay the suspension.¹⁴² Finally, the defendant is entitled to submit a written argument limited to the issues in the statute *only* if the driver waives his or her personal appearance at the hearing.¹⁴³

The legislative intent behind the enactment of these provisions of the statute was to assure an efficient, swift judicial process.¹⁴⁴ However, promoting efficiency for the Wisconsin judiciary, rather than insuring against an erroneous deprivation of property, is not a reason to violate due process.

136. Due Process requires the opportunity for a "meaningful" hearing. *See, e.g.,* *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

137. WIS. STAT. § 343.305(8)(b)2 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29.

138. WIS. STAT. § 343.305(8)(b)1 (1985-86).

139. *Id.*

140. The right to confrontation and cross-examination is necessary for an adequate and constitutional hearing. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Justice Stewart, in his dissenting opinion, stated "a 'meaningful hearing' before an impartial decisionmaker would require the presence of the officer who filed the report, the attesting officer, and any witnesses the driver might wish to call." *Mackey v. Montrym*, 443 U.S. 1, 28 (1979) (Stewart, J., dissenting).

141. WIS. STAT. § 343.305(8)(b)2 (1985-86), *affected by* 1987 Wis. Act 3 sec. 29; *see supra* note 41 and accompanying text.

142. WIS. STAT. § 343.305(8)(c)4 (1985-86).

143. WIS. ADMIN. CODE § 113.04(6) [Trans] 190-3 (Dec. 1987).

144. *See* 1988 REVISIONS, *supra* note 133.

The driver should be able to provide the hearing examiner with some written material before the hearing to inform the examiner of complex, disputed issues. Consequently, it would be more efficient to present issues to the hearing examiner before the hearing, thus affording the defendant a more meaningful hearing.

Based on the importance of the affected private interests, Wisconsin's post-deprivation hearing does not create a constitutional balance in favor of the state. Furthermore, the specific provisions of § 343.305 of the Wisconsin Statutes do not afford the defendant a meaningful hearing. A hearing that permits the state to suspend a driver's license by documentary evidence, without a fair opportunity to rebut the evidence, is tantamount to no hearing at all. Thus, § 343.305 is an unconstitutional deprivation of private property by the state.

IV. PROBLEMS AND SUGGESTED ALTERNATIVES TO THE CURRENT WISCONSIN STATUTE

The new Wisconsin administrative suspension shifts the focus of the impaired driving statute away from removing drunken drivers from the roads and directs it toward removing drivers who merely refuse to take a chemical test. In short, we have devolved from a society where the law is governed by reason, to one which is wholly governed by the law.

The elements of due process consist of affording the defendant a speedy trial with an impartial jury and informing the defendant of the accusation. Also, due process includes confronting adverse witnesses, presenting witnesses in one's favor, and having the assistance of counsel.¹⁴⁵ These elements are not to be diminished by the legislature for purposes of judicial convenience or for easing the fiscal and administrative burdens of government.¹⁴⁶

Notably, the absence of a pre-deprivation hearing and the insufficiency of the post-deprivation hearing are inadequate substitutes for due process as defined in the United States Constitution and the Wisconsin Constitution.¹⁴⁷ The post-deprivation hearing is inadequate because the defendant is denied the opportunity of confrontation and cross-examination of adverse witnesses or other exculpatory evidence. Due process is a constitutionally guaranteed right, which should not be tampered with by the legislatures or the courts.

145. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

146. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

147. WIS. CONST. art. I, § 8.

The balancing test under *Mackey v. Montrym* and *Mathews v. Eldridge*, by which the courts determine due process, is described as the government's interest in removing drunken drivers from the road. The government's interest should be in the prevention of drunken driving, rather than in removing from the road those who never should have gotten there in the first place. An effective solution to the drinking-driving problem belongs at the tavern door before the driver even enters his or her car.

In the criminal justice system, experts contend that prohibited conduct is deterred by a fear of apprehension, swiftness and certainty of conviction, and severity of the punishment.¹⁴⁸ The concepts of law and deterrence are inevitable considerations for proposing potential solutions to the problem of drinking drivers. Perhaps more importantly than the deterrent effect of the law, however, is the social pressure from family, employers, neighbors, and members of peer groups.¹⁴⁹

One solution to the problem of driving while under the influence of alcohol is to increase the fear of apprehension.¹⁵⁰ The implementation of this solution may be accomplished by various channels including the state's educational system and media. Besides publicizing the changes in the enforcement of the impaired driver statute, the newspapers could publish the names of persons convicted of impaired driving.¹⁵¹ Because of the public's indignation toward the impaired-driving offender, the publication of offenders' names in the newspapers will increase the fear of humiliation and disgrace to the public, serving as an effective deterrent.

A second solution is to reduce the punishment to moderate levels for first offenders and identify the repeat offenders.¹⁵² The elimination of severe penalties for first-time offenders, and the imposition of severe penalties for repeat offenders will enhance the present system. This solution is effective because it would serve as a deterrent for convicted impaired drivers. Also, out-of-state and federal convictions for impaired-driving offenses should count as prior convictions for repeat offenders. In addition, all arrests for impaired driving should be reported on the driver's record.¹⁵³

148. Watts, *The Drinking-Driving Problem: Assessing Some Proposed Solutions*, 48 *POPULAR Gov't* 20, 23 (1983).

149. *Id.* at 23.

150. *Id.* at 25. Watts suggested that all drivers in moving violations or crashes be chemically tested for alcohol. However, this also raises constitutional questions as to the use of routine alcohol screening. *Id.*

151. *Id.* at 26. The benefits of public education and information are long-term improvements. Also, education can change attitudes and ingrained beliefs.

152. *Id.* at 27.

153. *Id.*

A third solution is to use alcohol treatment programs for repeat offenders as an additional mandatory requirement, rather than as an alternative to the impaired driving penalty.¹⁵⁴ This solution may have long-term advantages, especially for the chronic alcoholic. A program where a repeat offender is able to render community service as "restitution" for impaired driving in place of a mandatory jail sentence, would be rehabilitative for the individual and more efficient for the state. For first-time offenders, the alternative of community service is a better option to modify the inherent harshness of the current law.¹⁵⁵

Also, a driver arrested for a second impaired driving offense or a first offense with a blood alcohol concentration of 0.2% or more, should be screened as a potential alcoholic.¹⁵⁶ The individual's referral to a local alcohol treatment center makes more sense than sending the individual to jail or suspending the individual's driver's license. The administrative suspension of the driver's license of an alcoholic has insufficient deterrent value, especially for the habitual offender, who will simply drive without a license. Thus, for the state to properly deal with this problem, the Wisconsin Legislature must address effective measures to deal with the alcoholic, repeat offender.¹⁵⁷

Further, there is a strong argument that managers of "drinking establishments" have a responsibility to prevent intoxicated patrons from driving. For example, the installation of chemical testing devices in local bars would assist an individual in discovering his or her blood alcohol concentration before driving on the state's roads. This solution would potentially reduce the number of drunken drivers. Many metropolitan areas battle the incidence of impaired driving by a cooperative effort between bars and taxicab companies, where an intoxicated patron is provided a free ride home.¹⁵⁸ Also, many bars will provide free soda to their customers who are "designated drivers."

Finally, it has been stated that "the single most effective thing . . . to cut down on deaths and injuries caused by the drinking driver [would be] to pass an enforceable mandatory seat-belt law."¹⁵⁹ As a result of Wisconsin's

154. *Id.*

155. *Id.* at 28.

156. *Id.* at 29.

157. WIS. STAT. § 343.305(8) (1985-86). The state's current system of a twelve to eighteen month revocation for a second impaired driver offense and a twenty-four to thirty-six month revocation for a third impaired driver offense will not be effective for the alcoholic repeat offender.

158. This program is utilized in Milwaukee, Wisconsin during Christmas and New Year's by local bars and taxi services. The program is entitled "Operation Life Ride."

159. See *supra* note 148, at 35. Wisconsin implemented a mandatory seat-belt law effective December 1, 1987. 1987 Wis. Act 132.

mandatory seat-belt law, there will be a decrease in the number of deaths and injuries due to the drunken driver. The safety of the public is an underlying purpose of § 343.305 of the Wisconsin Statutes. This purpose will be accomplished by the mandatory seat-belt law, irrespective of the administrative license suspension statute. Thus, by going beyond mere deterrence and focusing on the saving of lives, an indirect approach,¹⁶⁰ there are additional solutions to the problems of drunken driving.

V. CONCLUSION

On a cost-benefit basis, the indirect approach to the drinking driver is more effective than attempts to increase deterrence.¹⁶¹ Although no single solution will solve the problem of the drinking driver, a well-designed, imaginative program with a combination of the many solutions suggested above would be well worth the state's efforts. Clearly, the state's implementation of the administrative license suspension statute alone will not effectively deal with the problem of the drinking driver.

Beyond the inadequacy of Wisconsin's administrative license suspension statute, the statute infringes on drivers' constitutional right of due process. The unavailability of a pre-deprivation hearing, and the lack of a meaningful post-deprivation hearing, deprive drivers of property without due process. Thus, the current statute should be completely abrogated. The state legislature should focus on the indirect solutions to the problem of the impaired driver rather than concentrate on enacting statutes with maximum deterrent value.

SHELLY M. PRINCIPE

160. ROSS, *DETERRING THE DRINKING DRIVER* (1982).

161. *Id.*

