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Mackey v. Montrym: Clarification on a Matter of Timing

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Mackey v. Montrym: Clarification on a Matter of Timing

The United States Supreme Court, in Mackey v. Montrum, held that Massachusetts "implied consent" statute, which allowed summary suspension of driver's licenses, was constitutional in the face of a procedural due process challenge. In so doing, the Court reversed the district court case of Montrym v. Panora ruling that the statute was unconstitutional and distinguishable from the holding in the case of Dixon v. Love. The Court in Love had upheld the constitutionality of driver's license summary suspension procedures. The Mackey Court held that the distinguishing factors employed by the district court were not constitutionally determinative. The author undertakes a study of the history of procedural due process and the timing of hearings and focuses on the procedural aspects as they apply to summary driver's license revocation or suspension laws. In summary, the author indicates that the Court's judicial "housekeeping" will result in more consistent rulings on the constitutionality of summary driver's license revocation or suspension schemes while also facilitating a more consistent method of procedural due process analysis.

I. INTRODUCTION

In *Mackey v. Montrym*[1] the United States Supreme Court reviewed on appeal the ruling of the case of *Montrym v. Panora*[2] made by the United States District Court for the District of Massachusetts. The *Panora* case held that a summary suspension of one's driver's license under an automobile "implied consent" statute[3] violated the due process clause of the fourteenth amendment.

II. FACTS OF THE CASE

Donald Montrym was involved in an automobile collision at 8:15 p.m. on May 15, 1976 in Acton, Massachusetts. The police officer

1. 99 S. Ct. 2612 (1979).

2. 438 F. Supp. 1157 (D. Mass. 1977). This was a second opinion denying reconsideration of an earlier case bearing the names of the same parties. Aside from the facts of the case, as discussed in text accompanying notes 4-21 *infra*, all references to *Montrym v. Panora* shall hereinafter apply to *this* second opinion.

3. In general, these laws provide that anyone possessing a driver's license and operating a vehicle on the state highways has given tacit consent to be tested for blood-alcohol content should he or she ever be arrested for drunk driving. Discussion of the "implied consent" statute in this article does *not* refer to implied consent laws which establish the basis for state "long-arm" jurisdiction for service of process. *See generally* Hunvald & Zimring, *Whatever Happened to Implied Consent? A Sounding*, 33 MO. L. REV. 323, 324 (1968).

at the scene of the accident was of the opinion that Montrym was drunk,[4] and arrested him for driving under the influence of intoxicating liquor.[5] Once at the police station, Montrym refused a request to take a "breathalyzer" examination.[6] Under the direction of a Massachusetts statute, the officers immediately prepared a report indicating that Montrym refused to take the test.[7] Later, upon the arrival of his attorney, Montrym requested to take the test but was denied the opportunity to do so. The officer's report was subsequently forwarded to the Registrar of Motor Vehicles for certification.[8] The Registrar then, acting under statutory direction, summarily suspended Montrym's driver's license for 90 days.[9] This suspension was made despite the fact that the state court had acquitted Montrym of the drunk driving charges.[10]

Montrym's attorney twice requested the Registrar to return the

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4. 99 S. Ct. at 2614. The officer's report provided this description of Montrym: "glassy eyes, unsteady on his feet, slurring his speech, and emitting a strong alcoholic odor from his person."

5. Montrym was also charged with "driving to endanger" and driving without a registration. *Id.*

6. A "breathalyzer" is a machine into which the arrested motorist exhales and,

> a known amount of aveolar breath is trapped in a cylinder. A piston then forces the breath sample into a test ampoule containing a dichromate solution. The oxidation of any alcohol in the solution causes a color change in the test ampoule which is measured by comparing it to a standard ampoule. A photovoltaic cell is mounted behind each ampoule and a light bulb on a moveable rack is located between them. As the color of the test ampoule fades, the light moves toward the standard ampoule. The machine then measures the distance the light has moved and calibrates it into a blood-alcohol percentage. This light must be balanced before the test is begun in order to achieve accurate results.

Gottlieb, *The South Carolina Implied Consent Law: The "Breathalyzer and the Bar,"* S. CAR. L. REV. 195, 198 (1970).

7. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976) provides in part: "If the person arrested refuses to submit to a breathalyzer test . . . the officer before whom such refusal was made *shall immediately* prepare a written report of such refusal" (emphasis added).

8. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976) also required:

> Such written report of refusal shall be endorsed by a third person who shall have witnessed such refusal. Each such report shall be . . . sworn to under the penalties of perjury by the police officer before whom such refusal was made. Each such report shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle . . . while under the influence of intoxicating liquor and shall state that such person had refused to submit to such chemical test . . . when requested by such police officer to do so. Each such report shall be endorsed by the police chief . . . or by the person authorized by him and shall be sent forthwith to the registrar.

9. *Id.* "Upon receipt of such report, the registrar *shall* suspend any license or permit to operate motor vehicles . . . in the Commonwealth . . . for a period of ninety days" (emphasis added). Note that the registrar has no discretionary authority under this section of the statute.

10. 99 S. Ct. at 2615. The apparent basis for the acquittal on the drunk driving charge was that the police failed to give Montrym the breathalyzer test when he later requested it. Although not mentioned in the case, the lack of evidence [the

license but both requests were denied.[11] Thereafter, Montrym bypassed[12] his immediate post-suspension hearing[13] and administrative appeal and brought a class action suit before a three judge district court, claiming that the Massachusetts implied consent statute was unconstitutional "on its face" and "as applied" to this case. Montrym's contention was that the summary procedure of the statute violated procedural due process because there was no hearing *prior* to the suspension. In this case of *Montrym v. Panora*,[14] the district court relied on *Bell v. Burson*[15] and concluded[16] that Montrym was entitled to "some sort of presuspension hearing."[17] *Panora* additionally held that the Massachusetts implied consent statute was unconstitutional "on its face" as violative of the due process clause of the fourteenth

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results of a breathalyzer test which are admissible as evidence under section 24(1)(e)] of drunk driving may have contributed to the state court acquittal.

11. 99 S. Ct. at 2615, 2616. Montrym's attorney, however, did not include the state court order dismissing the drunk driving charges in the request. MASS. GEN. LAWS ANN. ch. 90, § 24(2)(c) (West Supp. 1976) states that such an order would statutorily permit the Registrar to return the license to the acquitted motorist. The Court noted "had Montrym enclosed a copy of the order dismissing the drunk driving charge, the entire matter might well have been disposed of." 99 S. Ct. at 2616.

12. A possible explanation for the failure to pursue the administrative remedy is that "one may not retain the benefits of [an] Act while attacking the constitutionality of one of its important provisions." Fahey v. Malone, 332 U.S. 245, 255 (1947). *Cf.*, Mackey v. Montrym, 99 S. Ct. at 2626 (where the dissent suggests the failure of the police or Registrar to notify Montrym of his administrative remedies was the reason for the bypass).

13. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(q) (West Supp. 1976), provides:

> Any person whose license, permit or right to operate has been suspended under paragraph (f) shall be entitled to a hearing before the registrar *which shall be limited to the following issues*: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor . . . (2) was such person placed under arrest, and (3) did such person refuse to submit to such test or analysis. If, after such a hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate the . . . license (emphasis added).

14. 429 F. Supp. 393 (D. Mass. 1977). *See also* note 2 *supra*.

15. 402 U.S. 535 (1971). In this case the Court ruled that a presuspension hearing was necessary to determine the probability of judgment being rendered against an uninsured motorist. Since the goal of the statute was to make sure there was a source of funds from which a judgment could be satisfied, the determination of the hearing would indicate whether the necessary bond had to be posted in order to avoid suspension. *Id.* at 542.

16. In a two to one opinion, 429 F. Supp. 393 (D. Mass. 1977).

17. Since the opinion was in memorandum form, the majority did not elaborate on what type, or form, of hearing was necessary. *Id.* at 393.

amendment due to the lack of such presuspension hearing.[18] The court thus directed the Registrar to return Montrym's license.

The Registrar subsequently appealed to the district court for stay and modification of its judgment but the request was denied. After the United States Supreme Court handed down the decision of *Dixon v. Love*,[19] where a procedure resulting in the summary suspension of drivers' licenses was held constitutional on procedural due process grounds, the Registrar moved for reconsideration of his previous appeal. In the second opinion of *Montrym v. Panora*[20] the district court distinguished the *Love* decision and once again denied the appeal. Thereafter, the Registrar appealed to the United States Supreme Court where the appeal was granted upon probable jurisdiction.[21]

A. Issue Presented

Is a summary suspension[22] procedure constitutional under procedural due process grounds if there is a provision in the statutory scheme that furnishes an *immediate* post suspension review of the facts which warranted the suspension? The *Mackey* Court[23] answered this question in the affirmative.

B. Background

Having assumed the role of the ultimate interpreter of the Constitution,[24] the United States Supreme Court has frequently been implored to test various executive, legislative, and administrative acts against the fourteenth amendment due process clause.[25] However, the inexact nature of the term "due process"[26] and the

18. The District Court, having held the statute unconstitutional "on its face," thereafter precluded from appellate consideration, the merits of an "as applied" constitutional attack on the Massachusetts law. *See* note 156 *infra*, and accompanying text.

19. 431 U.S. 105 (1977).

20. 438 F. Supp. 1157 (D. Mass. 1977). *See also* note 2 *supra*.

21. Mackey v. Montrym, 435 U.S. 967 (1978).

22. The term "summary" hereinafter denotes no prior hearing.

23. The *Mackey* Court majority was comprised of five justices: Mr. Chief Justice Burger and Justices Powell, Blackmun, Rehnquist and White. The dissent was comprised of four justices: Stewart, Brennan, Marshall and Stevens. The Chief Justice wrote the opinion for the majority while Mr. Justice Stewart authored the dissenting opinion.

24. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

25. The fourteenth amendment states in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

26. " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." Hannah v. Larche, 363 U.S. 420, 442 (1960).

"interests" it was designed to protect,[27] has often made the Court's work more difficult.[28] The methods of analysis utilized by the Court when confronted with the constitutionally required "opportunity to be heard," or hearing,[29] have been particularly suspect in a procedural due process context.

In an effort to create a predictable and fair[30] procedural due process "formula" concerning hearings, the Court has followed two paths. The earlier path involved an analysis of what constituted the appropriate *form* of a hearing.[31] Since 1969, the second path regarding when a hearing was mandated, or the question of *timing*, became of prime importance to the Court.[32] It was along this second path of timing which the Court addressed the procedural due process issues in *Mackey*.

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27. Saphire, *Specifying Due Process Values: Towards a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 112 (1978) [hereinafter cited as *Due Process Values*].

28. "The amount of attention which the Court has given to the [procedural] due process question has produced a wealth of conflicting viewpoints. . ." Simet, *The Right to a Predeprivation Hearing Under the Due Process Clause—Constitutional Priorities and a Suggested Method for Making Decisions*, 11 CREIGHTON L. REV. 1201, 1202 (1978) [hereinafter cited as *Predeprivation Hearing*].

29. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

30. *Due Process Values*, *supra* note 27, at 113. Subrin and Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 453, 454 (1974) [hereinafter *Notice and Right to be Heard*].

31. The issue of *form* of a hearing, whether the hearing should be conducted along the lines of a full scale trial or a mere informal conversation, is beyond the scope of this article. For an excellent analysis of the formality aspects of a procedural due process hearing *see* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270-71 (1975).

32. The Court's interest in the *timing* aspect of the due process hearing has been evident since 1969, when it enunciated the prior hearing rule in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Since then there has been a proliferation of cases dealing with this issue. *See, e.g.* Dixon v. Love, 431 U.S. 105 (1977); Montayne v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 251 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Fuentes v. Shevin, 407 U.S. 67 (1974); Weinberger v. Hymson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Morrisey v. Brewer, 408 U.S. 471 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970). *See also Predeprivation Hearing*, note 28 *supra*.

III. THE PRIOR HEARING RULE AND ITS EXCEPTION

The origin of the requirement that a hearing precede the deprivation of a constitutionally protected interest[33] in an administrative law context can be found in *Mullane v. Central Hanover Trust Co.*[34] This case stated that a "meaningful opportunity to be heard" was a fundamental requisite of due process of law.[35] The required hearing, as articulated in *Mullane*, was subsequently employed as the basis for the Supreme Court's ruling in *Sniadach v. Family Finance Corp.*, stating that a hearing must be given *prior* to the deprivation of a person's constitutionally protected interests.[36] However, the Court rejected an unqualified right to prior hearing by stating in *Sniadach*, that a "summary procedure may well meet the requirements of due process in extraordinary [emergency] situations. . . ."[37]

In 1970 the Court confirmed the viability of the *Sniadach* prior hearing rule and emergency exception in *Goldberg v. Kelly*.[38] However, in *Goldberg*, Mr. Justice Brennan, in writing for the majority, enunciated an "approach" within the context of the prior hearing rule for deciding the constitutionality of summary welfare payment termination procedures by the state. This "approach" involved a process of balancing the interests of the parties in a case. Against the "justified desire to protect public funds must be weighed the individual's overpowering need . . . not to be wrongfully deprived of assistance."[39]

The case of *Bell v. Burson*[40] undoubtedly signalled the heyday of the prior hearing rule. The "interest" involved in *Bell*, a driver's license, was, in the eyes of the majority, not as important to a person as were the wages or welfare payments respectively at stake in *Sniadach* and *Goldberg*. Nonetheless, the Court

33. The first task of the Court's procedural due process analysis is to determine whether the interest being deprived falls under fourteenth amendment protection. Since "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment," Mathews v. Eldridge, 424 U.S. 319, 331 (1976), a determination by the Court that the interest is not constitutionally protected obviates the need for a procedural due process discussion. For purposes of this article the property interest at stake is a driver's license, the *nature* of which has been deemed to fall under the purview of constitutional protection. Bell v. Burson, 402 U.S. 535, 539 (1971). *See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

34. 339 U.S. 306 (1950).

35. *Id.* at 314.

36. 395 U.S. 337 (1969). This case held that a prejudgment wage garnishment procedure violated procedural due process.

37. *Id.* at 339. *See also* Boddie v. Connecticut, 401 U.S. 371, 378-79 (1970).

38. 397 U.S. 254 (1970).

39. 397 U.S. at 261.

40. 402 U.S. 535 (1971). *See* note 15 *supra*.

stated that unless there was an emergency at hand, due process required a hearing prior to the deprivation of the driver's license.[41]

The prior hearing rule was augmented by *Boddie v. Connecticut*.[42] The *Boddie* majority held that a statute, which required payment of court fees and costs incident to divorce proceedings, effectively foreclosed women who were on welfare from access to a judicial hearing and was thus unconstitutional. The *Boddie* majority, while reiterating the role of a prior hearing as a fundamental aspect of due process, also stated that the *balancing* of the interests of the parties *pertained solely to questions of the form of a hearing*, not to questions of the timing of the hearing.[43]

The subsequent case of *Fuentes v. Shevin*[44] extended the prior hearing rule to relatively small property interests subject to summary replevin procedures.[45] *Fuentes* also confirmed *Boddie* stat-

41. "[I]t is fundamental that *except in emergency situations* due process requires . . . 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." 402 U.S. at 542. This is the embodiment of the emergency (or "extraordinary situations," Boddie v. Connecticut, 401 U.S. 371, 379 (1970)) exception where a prior hearing would *not* be constitutionally mandated. The latter case of Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972) further elaborates the exception:

> Only in a few limited situations has this Court allowed outright seizure without opportunity for 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.

Cases often cited as authority and illustration of the emergency exception are: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure of misbranded food supplement); Fahey v. Malone, 332 U.S. 245, 255 (1947) (summary procedure where conservation takes over savings and loan association management); Yakus v. United States, 321 U.S. 414 (1944) (adoption of wartime price regulations); Phillips v. Comm'r., 283 U.S. 589 (1931) (summary tax preserving creditors rights); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (summary seizure of food unfit for human consumption). *See* note 37 *supra*.

42. 401 U.S. 371 (1970).

43. The formality and procedural requisites for the hearing can vary, *depending upon the importance of the interests involved* and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest (emphasis added).

401 U.S. at 378, 379.

44. 407 U.S. 73 (1972).

45. The "property" interests at stake in *Fuentes* were a variety of household

ing that there would be no balancing of interests concerning determination of the timing of a hearing.[46]

Thus, in 1971, the question of timing of hearings under procedural due process was clear. A hearing prior to the deprivation of a constitutionally protected interest was required. Unless there was an emergency present, variance from the prior hearing rule would sound the death knell for a state summary procedure. It was also clear from *Boddie* and *Fuentes*, that despite the *Goldberg* statement to the contrary, the balancing of interests would not be employed in assessing the constitutionality of a given procedure's timing of a hearing.

IV. The Erosion of the Prior Hearing Rule

The prior hearing rule suffered its initial setback in the case of *Mitchell v. W. T. Grant Co.*[47] where the Court upheld a summary sequestration statute.[48] The Court distinguished *Mitchell* from *Fuentes* on several grounds, notably on the presence of a neutral magistrate.[49] In *Mitchell*, the summary procedure was upheld on grounds that were clearly not an emergency.[50] More importantly, the interests of the litigants were balanced in a determination of a timing issue.[51] Such a pronouncement was a clear departure from the *Sniadach* prior hearing rule, the emergency exception, and the *Boddie* and *Fuentes* refusal to balance interests in timing questions.[52]

The departure advanced in *Mitchell* was confirmed in *Fusari v. Steinberg*[53] where the Court noted that the interests of the par-

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goods (a gas stove and a stereophonic phonograph) purchased under a conditional sales contract.

46. 407 U.S. at 82, 90 n.21.

47. 416 U.S. 600 (1973).

48. "Sequestration" (under Louisiana civil law) is a device used to resolve disputed title to property while at the same time to protect the property from deterioration, waste, or conversion. 416 U.S. at 605.

49. The specific differences between the two cases were that in *Mitchell* a writ was issued upon a verified petition and reviewed by a judge. In *Fuentes* a clerk reviewed the petition and issued the replevin order. Also, the *Mitchell* procedure provided that the person from whom the property was seized could have the writ dissolved if the creditor failed to show payment default. *Id.* at 606.

50. *Compare* the property interests at stake in *Mitchell*; a refrigerator, stove, and stereo, 416 U.S. at 601, *with* those interests associated with the emergency exception. *See* note 41 *supra*.

51. "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." 416 U.S. at 604.

52. *See* notes 36, 43, 46 *supra*, and accompanying text. *See generally Notice and Right to be Heard, supra* note 30, at 470 n.107 (The author notes that a change in the membership of the Court *circa* the determination of *Mitchell* might have been the reason for the turnabout from the *Fuentes* decision).

53. 419 U.S. 379 (1974).

ties, as well as the sufficiency of the hearing process, were subject to balancing analysis.[54] However, the subsequent case of *Goss v. Lopez*[55] explicitly rejected the balancing approach in *timing* questions.[56] Furthermore, *Goss* adhered to the prior hearing rule and its emergency exception.[57] Thus, the *Goss* decision evidenced a return to the rules of *Sniadach, Boddie*, and *Fuentes*.

After the *Goss* decision, criticism of the Court's inconsistent handling of procedural due process issues ensued.[58] The Court seemingly advanced two lines of due process jurisprudence. The first line adhered to the prior hearing rule and its emergency exception. The second line required that *some* type of hearing be given, prior to *or* after the deprivation, that could lead to a reinstatement of the interest.[59] In 1976 the Supreme Court addressed this anomaly, by expressly adopting a balancing approach and letting the most important interest in the balance determine when a prior hearing was necessary, in the case of *Mathews v. Eldridge*.[60]

V. THE *ELDRIDGE* BALANCE AND DRIVER'S LICENSES

Noted as a major "reformation" of prior case law,[61] *Mathews v. Eldridge* outlined the criteria for determining whether a prior

54. *Id.* at 389. However, in this case the record failed to disclose the operation of the review process. Without such information the Court could not employ its balancing approach.

55. 419 U.S. 565 (1975).

56. "It also appears from our cases that the timing and content of *notice* and the *nature* [form] of the hearing will depend on the appropriate accommodation of the competing interests involved" (emphasis added). *Id.* at 579.

57. [I]t follows that as a general rule notice and hearing should precede removal of the student from school . . . Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school . . . the necessary notice and rudimentary hearing should follow as soon as practicable . . .

Id. at 582, 583.

58. "Moreover, in those cases in which the Court has attempted to define due process values, it has generally done so in an ambiguous and unsatisfactory fasion, . . . especially in recent years [there has been a lack of] . . . symmetry, continuity, and principled content." *Due Process Values, supra* note 27, at 113. *See also Predeprivation Hearing, supra* note 28, at 1201 nn.2 & 3.

59. Mashaw, *Calculus for Administrative Adjudication*, 44 U. CHI. L. REV. 28, 36, 37 (1976).

60. 424 U.S. 319 (1976).

61. *Predeprivation Hearing, supra* note 28, at 1218. *But see* Board of Curators v. Horowitz, 435 U.S. 78, 99-100 (1978) (Marshall, J., concurring in part, dissenting in part). Mr. Justice Marshall views *Eldridge* as a summary of prior procedural due process decisions.

hearing was necessitated, based on the weight of "three distinct factors." Mr. Justice Powell, who wrote for the majority, cited these factors as:

> [F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures 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.[62]

Noticeably absent in the *Eldridge* decision was any mention of the prior hearing rule or its emergency exception.

The *Eldridge* case was concerned with the procedures involved in the termination of disability insurance benefits. However, the Court quickly demonstrated in *Dixon v. Love*[63] that the *Eldridge* balancing test could also be utilized in the context of summary revocations of drivers' licenses.

In *Love*, the Court upheld an Illinois statute which authorized the Secretary of State of Illinois to summarily suspend or revoke a driver's license if the driver accumulated three traffic convictions within a twelve month period.[64] The Court utilized the *Eldridge* test and determined, despite the *Bell v. Burson* directive to the contrary,[65] that summary revocation of a driver's license did not necessarily involve a denial of procedural due process.

The *Love* majority initially noted that there were two aspects of a driver's license which must be considered in assessing the "weight"[66] of the private interest. The first was the inability of the driver to be "made entirely whole if his suspension or revoca-

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62. 424 U.S. at 335.

63. 431 U.S. 105 (1977).

64. The statute involved in *Love* provided in part:

> A person who has been convicted of three (3) or more offenses against traffic regulations . . . occurr[ing] within a twelve (12) month period may be suspended as follows:

Number of Points	Action
20 to 44	Suspension up to 2 months
45 to 74	Suspension up to 3 months
75 to 89	Suspension up to 6 months
90 to 99	Suspension up to 9 months
100 to 109	Suspension up to 12 months
Over 110	Revocation for not less than 12 months

431 U.S. at 108 n.4. *Compare* this statute and its 12 month suspension *with* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976) and its three month suspension period. *See* note 9 *supra*.

65. *See* note 15 *supra*.

66. The term "weight" in the context of the *Eldridge* test appears to signify the importance of the interest at stake. Naturally, in a weighing process, the objects weighed must have some weight. *See* Mackey v. Montrym, 99 S. Ct. at 2617, 2618. The search for the weight of the interest follows the determination of the "nature" of the interest (whether it is worthy of constitutional protection). *See* note 33 *supra*.

tion [was] later vacated."[67] A comparison to the private interest in *Eldridge*, where a disability payment recipient could be "made whole" (by receiving back payments due to him) illustrated this point. The second aspect discussed was that one's private interest in a driver's license was not as significant as was a private interest that provided a means of subsistence.[68] A comparison to the private interest in *Goldberg* (a pre-*Eldridge* case), where social insurance payments were the means of subsistence, illustrated this point. The majority seemed to include a third consideration, the presence of a "special hardship provision" which could be used to stay a suspension or revocation for commercial drivers who had to drive to earn a living, in the private interest analysis.[69] Thus, it appeared that *three* aspects of a driver's license, the "making whole" retroactive compensation, the subsistence needs fulfilled by the private interest, *and* the special hardship provision, figured in the *Love* Court's determination that the "weight" of a private interest in a driver's license was "not . . . great."[70]

The risk of erroneous deprivation of the driver's license in *Love* was similarly deemed "not great" because the procedures involved were "largely automatic," or in other words, non-discretionary.[71] Also considered was the fact that the initiating force of the suspension was three traffic convictions. Since the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the secretary's decision was based,"[72] the risk of an erroneous initial factual determination was held as minimal. Furthermore, the Court held that an al-

67. 431 U.S. at 113. Later discussion of "retroactive compensation" specifically alludes to this "making whole" consideration.

68. *Id.*

69. Since the *Love* Court made no explanatory demarcation between the discussion of the special hardship provision and the other two criteria used in assessment of the private interest, the use of the hardship provision in such assessment would seem in order.

70. The use of the conclusionary terms "not great," "substantial," "great," "insubstantial" merely reflects the particular *Eldridge* factor's position among the other *Eldridge* factors. The Court has yet to devise a qualitative assignment of each factor's importance in a case. Therefore, since the label given the particular *Eldridge* factor is relative, a survey of *all* the factors is necessary to discern the most important interest in the case.

71. 431 U.S. at 113.

72. *Id.* at 113, 114. In this case the driver was *not* contesting the convictions or the factual basis for the suspension. He was, in the view of the majority, only asking for a presuspension hearing so he could plead for leniency.

ternative procedure (a prior hearing), even though it might make the driver "feel that he had received more attention,"[73] would nonetheless be useless "in reducing the number of erroneous deprivations."[74]

Finally, the government interest in *Love* was given "great weight"[75] based on two considerations. The first was simply "administrative efficiency."[76] The second, and "[f]ar more substantial" interest was in "safety on the roads and highways" by "prompt removal of a safety hazard."[77]

Accordingly, under the *Love* decision and *Eldridge* analysis, the legal community was informed that summary driver's license suspension or revocation procedures aimed at highway safety could withstand a procedural due process challenge.

In 1977, in *Montrym v. Panora*,[78] a three judge district court[79] held that a hearing was required prior to the suspension of a driver's license under an automobile implied consent statute.[80] In this case the majority placed great weight upon the fact that the Massachusetts statutory scheme, as compared to the Illinois statute in *Love*, did not have a special provision for hardship cases.[81] The district court majority believed that the presence of such a provision was crucial in the Supreme Court's determination that the driver's private interest in *Love* was minimal.[82] Accordingly, the district court held that the *absence* of such a provision rendered Montrym's private interest greater weight than that at stake in *Love*.

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73. *Id.* at 114. The majority asserts that such an effect would have no value in this area. However, such an effect might have value in other considerations of procedural due process analysis. *Cf.*, *Notice and Right to be Heard, supra* note 30, at 453, 454 (This article asserts that recognition of a person's dignity is inherent in a hearing, when one is offered. Such recognition of dignity promotes legitimacy in the action taken and the hearing makes the individual feel "that justice has been done." But when there is no hearing, such recognition cannot be made and the feeling that an injustice has been done prevails).

74. 431 U.S. at 114.

75. Since the other two factors, under *Eldridge* analysis were held as "not great," the government interest prevails as the most important interest at stake in *Love*. *See* note 70 *supra*.

76. 431 U.S. at 114.

77. The *Love* Court points out that this "factor" fully distinguishes this case from the ruling in Bell v. Burson, 402 U.S. at 540, where the purpose of that statute was to make sure there was a source from which judgments from accident suits could be paid. *Id.* at 114, 115. *See* note 15 *supra*.

78. 438 F. Supp. 1157 (D. Mass. 1977). *See* note 2 *supra*.

79. In a two to one majority.

80. *See* note 3 *supra*.

81. *See* note 69 *supra*. But the *Panora* court took the analysis of the special hardship provision one step further by noting that the *Love* Court held the presence of such a provision "a controlling factor" in the *Love* decision. 438 F. Supp. at 1159.

82. 438 F. Supp. at 1159.

The *Panora* court, in its analysis of the risk of erroneous deprivation, held there was less risk in the Illinois procedure of *Love* than there was in the Massachusetts procedure. The lack of judicial hearings and convictions as conditions precedent for the suspension,[83] and that the factual basis used to initiate the suspension[84] were not "objectively ascertainable," were cited as the reasons why the risk of error in *Panora* was greater than the risk in *Love*.

Finally, the district court, in its analysis of the government interest, held that the Massachusetts implied consent statute would be amenable to a prior hearing provision.[85] Basically stated, the rationale for this conclusion was that since there was a "gap" between the time of the arrest of a drunk driver and the time of his conviction (when he was removed from the highways), this "gap" might as well be filled by the safeguard of a presuspension hearing for one who refused to take the breathalyzer test. In this regard, the *Panora* court held a prior hearing would not delay, and hence "offend" the state interest in safe highways.[86]

At this juncture it appeared that *Panora* was an inroad on the *Love* decision. As long as a summary driver's license suspension or revocation procedure, under *Eldridge* analysis, (1) did not have a special hardship provision, (2) did not have either a judicial hearing or objectively ascertainable facts which initiated the summary procedure, and (3) had an amenability for a prior hearing, then *Panora* indicated such a procedure would be unconstitutional. A bare Supreme Court majority took the opportunity to show the *Panora* court how wrong their analysis of *Love* was in the case of *Mackey v. Montrym*.[87]

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83. *Id.* at 1160.

84. There were three factual bases used to initiate the suspension in which the *Panora* court, and later in which the *Mackey* majority recognized: (1) an arrest for drunk driving; (2) probable cause that the motorist was intoxicated while driving; and (3) a refusal to take the breathalyzer test. *Id.* at 1160 n.3. A reading of the Massachusetts law confirms this recognition. *See* notes 8 and 13 *supra*. The *Panora* court suggests, however, that the subsequent request by Montrym to take the test nullified the refusal and in this regard the factual bases were not, as the *Love* decision demanded, "objectively ascertainable." 438 F. Supp. at 1160, 1161.

85. 438 F. Supp. at 1161.

86. *Id.*

87. 99 S. Ct. 2612 (1979).

VI. THE *MACKEY* RATIONALE

The majority[88] of the Court paid particular attention to the Massachusetts implied consent statute[89] in deciding whether a prior hearing was constitutionally mandated. The growing popularity of these statutes in other states indicates the intent of state legislators to stem the tide of increasing numbers of traffic fatalities attributable to drunk drivers. Judicial support for these types of statutes is also evidenced by the fact that these statutes have generally withstood constitutional attacks on various grounds.[90] Thus, with a great deal of constitutional law supporting the statute, the *Mackey* Court applied the *Eldridge* test to a procedure akin to that of *Love*. The Court held, as it did in *Love*, that the summary nature of the procedure did not violate procedural due process dictates of the fourteenth amendment.

The Court, after considering a few prefatory matters,[91] went into a detailed comparison of the *Eldridge* balancing factors between the *Love* decision and the *Panora* decision. Organizational clarity demands that each factor be given separate consideration.

A. The Private Interest

Although some critics assail this interest as the low priority in *Eldridge* analysis,[92] the *Mackey* Court went into a detailed analysis of Montrym's private interest. The Court first noted, based on *Bell* and *Love* that the "nature" of a driver's license was that of a constitutionally protected property interest. Then the Court sought determination of the "weight" of Montrym's private interest. Such a determination was based on two factors. The first

88. *See* note 3 *supra*.

89. *Id.*

90. *See generally* 2 ERWIN, DEFENSE OF DRUNK DRIVING CASES 33-5 to 33-13 (1979). This text cites numerous constitutional attacks on implied consent laws including the right against self-incrimination, substantive due process, procedural due process, bill of attainder, ex post facto laws, equal protection, invasion of right of privacy, and that the law constituted an impermissible burden upon interstate commerce, which have all failed [hereinafter cited as ERWIN].

91. The Court noted, based on *Bell* and *Love*, that the motorist's interest in his driver's license is a constitutionally protected property interest. 99 S. Ct. at 2617. *See* note 33 *supra*.

92. *See* TRIBE, CONSTITUTIONAL LAW 541-42 (1978) (The author submits that the advent of the *Eldridge* test has caused a break in tradition in which the private interest appears to be losing its once favored status in procedural due process jurisprudence). *See also* Reich, *The New Property*, 73 YALE L.J. 773, 776-77 (1964) (noting that there is a "fundamental fallacy" in thinking that courts treat the individual interest as affecting only the party to the case. In fact, the courts are acutely aware of the public interest (or harm) involved in every decision. So even though the public interest is no justification for the erosion of freedom, the usual result, where the individual interest is balanced against the public interest, is that the latter almost always prevails).

was the "making whole" possibility of retroactive compensation which, as in *Love*, was deemed non-existent concerning the deprivation of a driver's license.[93] The Court's assessment of this factor followed the rationale of *Love* and similarly held that the preclusion of retroactive compensation rendered Montrym's interest "substantial" in nature.[94]

The second factor considered by the majority was the length of the deprivation of the driver's license prior to the hearing. In their assessment of this factor, the majority held that Montrym's interest was "less substantial" than the driver's in *Love* because Montrym could get a "walk-in" *immediate* hearing.[95] The driver in *Love* had to wait at least twenty days for his hearing.[96]

The *Mackey* majority concluded its analysis of Montrym's interest by specifically addressing the *Panora* court's consideration of the special hardship provision as a controlling factor in the *Love* decision.[97] Mr. Chief Justice Burger made it quite clear that the presence or absence of a "special hardship provision" was "in no sense a controlling factor"[98] in the determination of the "weight" of a driver's private interest. The Chief Justice stated that the importance the *Panora* court attached to the hardship provision was unfounded because the motorist who wanted to use this provision could only do so *after* the deprivation of the driver's license.[99] Thus, such a provision could not halt a deprivation prior to the hearing, but rather, only make it a shorter deprivation.[100]

Accordingly, since the absence of the special hardship provision

93. 99 S. Ct. at 2617, 2618. *See* note 67 *supra*, and accompanying text.

94. *See* note 70 *supra*.

95. 99 S. Ct. at 2618. *Contra*, 99 S. Ct. 2626 (The dissent notes that in practice the hearing is *not* immediate). *See* notes 147 and 148 and accompanying text, *infra*.

96. 431 U.S. at 109, 110. Query whether the majority's preoccupation with the "immediate hearing" was necessary. Inasmuch as a twenty day period before the hearing was constitutionally permitted in *Love*, it may be argued that a shorter waiting period would not be unconstitutional.

97. *See* notes 69 and 81 *supra*.

98. 99 S. Ct. at 2618.

99. This aspect of the hardship provision was readily ascertainable to the *Panora* majority had they considered the *Love* Court's statement "that these [the hardship provision] statutory provisions contemplate relief *only after* the initial decision to suspend or revoke is made. . . ." Dixon v. Love, 431 U.S. 105, 114 n.10 (1977). *See id.* at 109 n.7.

100. Taken in regard of the Court's position that a wrong cannot be done even if it can be later undone, Stanley v. Illinois, 405 U.S. 645, 647 (1972), the "dismissal" of the hardship provision is understandable. Since the hardship provision only became operative *after* the initial fact determination and the deprivation, its equivalence with a prior hearing was unfounded.

was of no consequence in the assessment of the weight of a motorist's private interest, Montrym's interest could not be given any greater weight than the driver's interest in *Love*. This conclusion portends the end result of *Love* where the government interest was ultimately accorded the greatest weight.[101]

B. The Risk of Erroneous Deprivation

The Court initiated its analysis of the risk of erroneous deprivation by cautioning that procedural due process is aimed at *minimizing*, not eradicating the risk of error[102] and that something less than an evidentiary hearing is sufficient prior to adverse administrative action.[103] After this pronouncement, the majority indicated it would examine the pre-deprivation procedures, which were far less protective than would be a prior evidentiary or non-evidentiary hearing, to ascertain if those procedures were "a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be."[104]

The first point of analysis was directed at the three facts needed to initiate the ninety day suspension: probable cause, an arrest for drunk driving, and a refusal to take a breathalyzer test.[105]

Even though these facts did not pass under judicial scrutiny as did the suspension-initiating convictions in *Love*, the Court held that these three facts were objective in nature[106] and easily ascertainable to a police officer who was "trained" in observation of these facts.[107]

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101. The majority opinion was rather obvious in this regard. "Neither the nature nor the weight of the private interest involved in this case compels a result contrary to that reached in *Love*." 99 S. Ct. at 2618.

102. The function of legal process . . . is to *minimize* the risk of erroneous deprivation. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need, the quantum and the quality of the process due in a particular situation depends upon the need to serve the purpose of *minimizing the risk of error* (emphasis added).

Greenholtz v. Nebraska Penal Inmates, 99 S. Ct. 2100, 2106 (1979).

103. 99 S. Ct. at 2618. *Love* states the same proposition at the conclusion of the private interest analysis. 431 U.S. at 113.

104. 99 S. Ct. at 2619.

105. *See* notes 8, 13, and 84 *supra*.

106. The "objectivity" discussed by the Court means that the presence or absence of the suspension initiating facts is indisputable; either the motorist refused to take the test when so requested or he did not. *Cf*, the *Panora* view on this matter. *See* note 84 *supra* (where the District Court held that the fact of refusal was not so objectively ascertainable). *See* 438 F. Supp. at 1160, 1161).

107. Since a policeman is usually trained in drunk driving detection, his observations and accumulated experience make him "well suited for the role the statute accords him . . ." 99 S. Ct. at 2619. The Court's analysis of the "initial fact" re-

A purported issue of the police officer's failure to notify Montrym of the consequences of a failure to take the breathalyzer was dismissed from the majority's consideration altogether.[108] The consideration of whether a breathalyzer test could be given after a refusal was similarly dismissed. The majority found that a situation involving a request to take the test *after* a refusal was a question of law, and not one of the "objective facts" needed to initiate the suspension[109] as *Panora* and the dissent suggested.

Accordingly, the *Mackey* Court corrected the *Panora* interpretation of *Love*'s requirement of "something less than a prior evidentiary hearing."[110] However, the correction to the requirement of a prior judicial hearing, carried the implication that objective criteria, which formed the basis for the license suspension, would obviate the need for any prior hearing whatsoever.[111] In this regard, *Mackey* limited the scope of *Love*'s analysis of the risk of erroneous deprivation by focusing on the objectivity of the initiating facts and *not* the processes used (hearings) to arrive at those facts. Under this analysis the majority concluded that the risk of erroneous deprivation in the Massachusetts statutory scheme was, as in *Love*, minimal.

1. Alternative Procedures Inquiry

Montrym vigorously argued that a clerical error would eradicate any precautionary measure in the summary procedure. In response to this argument, the majority compared the practical use-

ported in *Mackey* is consistent with other Supreme Court decisions. *See, e.g.*, Barry v. Barchi, 99 S. Ct. 2642, 2649 (1979); Mathews v. Eldridge, 424 U.S. at 343 (1976).

108. The majority defers to the police officers on this issue. The officer's affidavit, which was sworn under oath and carried criminal and civil sanctions for false or erroneous statements, MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976), asserted that Montrym was given the required prior warning. 99 S. Ct. at 2614 n.1, 2619. *But see* note 135 *infra*, and accompanying text.

109. Indeed, the statute says nothing about a request to take the breathalyzer test *after* a refusal. But the tenor of the statute lends itself to an interpretation that the first response to the request, be it willingness or refusal to take the test, is determinative. *See* note 7 *supra*.

110. *See* note 103 *supra*. By showing that the facts used to initiate the suspension did not have to be judicially scrutinized in order to be "objective."

111. In the entire sequence, from arrest until suspension, the only allusion to a "hearing" of any form was the motorist's informal chat with the arresting officer. 99 S. Ct. 2619. In this regard there is something *significantly* less than the prior evidentiary hearing suggested in *Love*. *See* note 103 *supra*. *See also Goss v. Lopez*, 419 U.S. 565 (1975) (where the Court promotes the same sort of rudimentary prior hearing).

fulness of a prior non-evidentiary hearing against the functions and duties allocated by the statute which would confront a clerical error situation.

The majority called attention to the nature of the Registrar's province in the statutory scheme. It was initially noted that if the clerical error was "material"[112] the Registrar would detect it in his determination of whether the report or affidavit complied with the law.[113]

Secondly, the non-discretionary nature of the Registrar's suspension power was considered. If the report fulfilled the statutory criteria,[114] the Registrar could not stay the suspension.[115] Conversely, if the report, due to material clerical error, did not comply with the statute, the Registrar could not suspend the license.[116] Therefore, under these circumstances a prior hearing would not serve a worthwhile purpose inasmuch as the report was either sufficient or insufficient to initiate the suspension. Thus, the majority felt that such sufficiency in the Massachusetts procedure could be ascertained by the Registrar alone.[117] Therefore, as in *Love*, a prior hearing was not deemed an advisable or necessary alternative.

C. The Government Interest

The *Mackey* Court's treatment of the Massachusetts interest followed the deferential line of analysis employed by the Court in

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112. Meaning "if the [police] report does not comply with the [three] requirements. . . ." MASS. GEN. LAWS ANN. ch. 90, § 24(1)(g) (West Supp. 1976).

113. "[I]f errors are genuine and material they already will have been noted by the Registrar in the *ordinary course* of his review of the report" (emphasis added). 99 S. Ct. at 2620. Note that the Court places reliance on the "ordinary case" that comes before the Registrar, "this independent review by a detached public officer should suffice in the *ordinary case*. . . ." (emphasis added). 99 S. Ct. at 2620. The *Mackey* case does not appear to be the ordinary case contemplated by the Massachusetts legislature. However, the Court might easily evade the argument that the *Mackey* case was extraordinary and that the Registrar was ill-equipped to review the report alone. Reference to Mathews v. Eldridge, 424 U.S. at 344, shows the futility of the aforementioned argument: "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, *not the rare exceptions*" (emphasis added).

114. *See* notes 8, 13 and 84 *supra*.

115. The Registrar has no such discretion without a lower court order acquitting the motorist of the drunk driving charge. *Compare* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976) *and* note 9 *supra, with* MASS. GEN. LAWS ANN. ch. 90, § 24(2)(c) (West Supp. 1976) *and* note 11 *supra*.

116. *Id.*

117. 99 S. Ct. at 2620. The Court also noted that a nonevidentiary prior hearing would be useless because the Registrar would have to hear a case with no record of the facts at his disposal. Thus, the character of such a hearing would be akin to a swearing contest with no proof to show the Registrar who was asserting the truth.

Love.[118] The simple fact that the Massachusetts statute had the same interest as did the Illinois statute in *Love*, namely safety on the roads, explains the Court's apparent predisposition to give this interest paramount weight in the *Eldridge* balance. Since the *Love* "safety on the roads" interest was held to be the most weighty from among the *Eldridge* factors, the *same* interest should, again, be accorded the greatest weight in *Mackey*.[119]

1. Alternative Procedures Inquiry

The *Mackey* Court went a step further in their analysis of the government interest than did the *Love* Court. In *Mackey*, the majority isolated three goals served by the summary nature of the implied consent statute. The first was that the summary suspension served as a "deterrent to drunk driving."[120] The second and main goal, as applied in *Mackey*, was that suspension served as an inducement[121] to take the breathalyzer test so the state would have "reliable and relevant evidence for use in subsequent proceedings."[122] The third, and least plausible goal, was that the summary suspension promptly removed drunk drivers from the road.[123] Despite the tenuous relationship of the "deterrence" and

118. The Court's deference towards the government interests in *Love* and *Mackey* is evidenced by the acceptance of the goals of the state statutes without the same critical analysis utilized in the personal interest and risk of erroneous deprivation assessments. This deference is traceable even to the roots of the *Eldridge* test where the Court stated "substantial weight must be given to the good faith judgment of the individuals charged by Congress with the administration of the social welfare system." Mathews v. Eldridge, 424 U.S. 319, 349 (1976). *See* TRIBE, CONSTITUTIONAL LAW 542 (1978).

119. 99 S. Ct. at 2621.

120. The Court stated that the summary nature of the statute served as a "deterrent." 99 S. Ct. at 2621. Query whether the three month suspension was the real deterrent.

121. The dissent views the statute as coercion. 99 S. Ct. at 2625.

122. The evidentiary purpose of the statute is *the* reason for its acceptance in this case. The *Mackey* Court clearly states "A state plainly has the right to offer incentives for taking a test that provides the *most reliable form of evidence* of intoxication for use in subsequent proceedings (emphasis added)." 99 S. Ct. at 2621. *See also* Hunvald and Zimring, *Whatever Happened to Implied Consent? A Sounding*, 33 MO. L. REV. 323, 367 (1968),

> One of the major purposes of the implied consent law is to compel persons arrested for drunk driving to submit to the [here a blood test] test, and thus provide convincing evidence of their intoxication. With this evidence, convictions are supposed to be more certain in those cases where the test indicates intoxication.

See note 10 *supra*.

123. As stated by the dissent, the statute really did not promptly remove drunk

"prompt removal" goals to the government interest in *Mackey*,[124] the Court held the summary nature of the statute was "critical" to the attainment of the three goals. The Court stated that the imposition of an alternative procedure, namely a prior hearing, would substantially undermine the state interest in public safety on the roads. The rationale for this conclusion was that a presuspension hearing would serve as an incentive not to take the breathalyzer, as a dilatory tactic, and that it would pose a "substantial fiscal and administrative burden on the [state]."[125] Accordingly, the government interest in *Mackey* was held not amenable to an alternative prior hearing.

Furthermore, in a direct reply to the *Panora* decision, *Mackey* states that it does not matter that safety on the roads could be "served as well in other ways."[126] Realistically, a state, acting under its police powers, does not have to cure all "evils" posed by the drunk driver.[127] Thus, the existence of the anomalous fact that the drunk driver who takes the test stays on the road while a sober driver who refuses to take the test is removed, was of no consequence to the weight of the statute or its amenability to a prior hearing.[128]

Accordingly, *Mackey* held, as was previously held in *Love*, that the "safety on the roads" government interest still outweighed the private interest in a driver's license and the risk of erroneous deprivation in a nondiscretionary summary revocation or suspension procedure. This being the case, a prior hearing was not constitutionally required and the Massachusetts implied consent statute was valid. Thus, with the analysis of *Love* "corrected" by *Mackey*, the *Panora* decision was reversed and remanded.

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drivers from the road because a wholly inebriated motorist who took the test would not lose his license until after a conviction. 99 S. Ct. at 2625.

124. *Cf.* Dixon v. Love, 431 U.S. 105, 114-15 (1977) (the notations of "deterrence" and "prompt removal" goals, though having a tenuous relationship to the purpose of the statute in *Mackey*, have a very close relationship to the reckless driver statute in *Love*. In this regard, the three goals of the *Mackey* case may be a broad pronouncement of road safety law rationales. Accordingly, the fact that one rationale bears a close relationship would be enough to sustain the validity of the road safety law).

125. The majority did not state any supporting facts or figures to reach this conclusion. *See* note 118 *supra*. Since the apparent reason for the Massachusett's law's validity was evidentiary, the Court could have pointed to the need for evidence in drunk driving cases as a casualty of a prior hearing requirement. An example was available in the very facts of this case, namely, the lower state court dismissal of the drunk driving charge against Montrym because no breathalyzer test was given. 99 S. Ct. at 2615. *See* note 10 *supra*.

126. 99 S. Ct. at 2621.

127. *Id.*

128. *Id.*

VII. THE DISSENT

If the majority's opinion in *Mackey* can be analogized as judicial housekeeping, the dissenting justices[129] have noticed and tripped over a few inconsistencies which have been proverbially "swept under the rug" by the housekeeper. The dissent attacked five points of the majority's opinion while concurrently stating their agreement with the *Panora* decision.

The first line of attack was a reiteration of the prior hearing rule and the emergency exception arguments of pre-*Eldridge* cases. The dissent noted that since there was no prior hearing and, based on *Bell*,[130] no emergency situation present, the Massachusetts procedure was unconstitutional.[131] The justices did not consider the *Love* decision dispositive of such a conclusion.[132]

The second point the dissent raised was that facts used to initiate the suspension were not objective. However, in arriving at this conclusion, the dissent substituted one fact in place of another which was considered both by *Panora* and the majority. Previously, the three suspension initiating facts were noted as: probable cause for an arrest, the arrest for drunk driving, and a refusal to take the breathalyzer test.[133] The dissent recognized the probable cause and refusal criteria, but added that a "*proper* request by the officer that the driver submit to a breathalyzer test" (emphasis added), must be made.[134] The "proper request" in this case was, in the dissent's view, notice to Montrym that a refusal to take the breathalyzer would precipitate a ninety day suspension of his license. Since there was a discrepency whether the officers did give Montrym proper notice,[135] this evidenced a

129. Associate Justices Stewart, Brennan, Marshall, and Stevens.

130. The dissent held *Bell* as the controlling case on all driver's license suspensions or revocations. They did not consider the distinguishing goals of the statutes involved in *Bell, Love*, and *Mackey*. *See* note 77 *supra*, and accompanying text.

131. The dissent's analysis in this argument refers consistently to the pre-*Eldridge* cases and the prior hearing rule and emergency exception. Mr. Justice Marshall's view in *Horowitz* that *Eldridge* represented a "summary" of prior procedural due process cases might explain this mode of analysis. *See* note 61 *supra*.

132. The discussion of *Love* in this argument centered on the fact that the motorist had not contested the factual basis for his license revocation, 99 S. Ct. at 2623. *See* note 72 *supra*. This raises the question of why the *Panora* court insisted that the request after the refusal nullified the initial refusal when Montrym *did not deny* that he refused the test. 99 S. Ct. at 2614 n.1. *See* note 84 *supra*.

133. *See* note 8, 13, and 84 *supra*.

134. 99 S. Ct. at 2623.

135. 99 S. Ct. at 2614 n.1, 2619. *See also* 99 S. Ct. at 2617 n.6 (the Court did not

need for a presuspension hearing. However, this analysis was rather tenuous inasmuch as the Massachusetts statute required the reporting of probable cause, arrest for drunk driving, and refusal to take the test in the report submitted to the registrar.[136] Furthermore, the question about "proper requests" had been previously resolved in favor of the police officers having given such notice.[137]

The third ground of attack, which was related to the aforementioned issue of proper notice, was that the credibility given to the officer reporting the operative facts was too great. The dissent suggests that the initial deprivation[138] in this case was not prompted by the same "exigencies of law enforcement" which, in other cases, permitted such initial deprivation[139] But the dissent seemed to forget that courts have traditionally deferred to a police officer's initial perception of the facts of a case until the time of a hearing.[140] In this regard, the credibility given to the officer was only as much as he or she traditionally possessed. Furthermore, the dissent did not even consider the fact that the officers would be subject to civil and criminal sanctions for a misleading or erroneous report. In sum, this credibility argument did little to

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really have to address this notice argument because it was not framed in the pleadings nor decided by the District Court).

136. *See* note 13 *supra*. A question prevails based on an assumption that the notice argument was properly in front of the Court in *Mackey*. Specifically, since the fact of notice is not one of the contestable facts presentable to the Registrar under the Massachusetts law, what recourse would the motorist have? MASS. GEN. LAWS ANN. ch. 90, § 28 (West Supp. 1976) provides that the suspended motorist, after a hearing and adverse ruling by the Registrar, may appeal that ruling to a Board of Appeal, which may, after a hearing, affirm or rescind the suspension. But *the suspension stays in effect* until overturned by the Board. Thus the motorist is still without his license. After the Board's decision, if adverse, the motorist could seek judicial review of that decision. MASS. GEN. LAWS ANN. ch. 30A, § 14 (West Supp. 1976). Had Montrym framed this issue in the pleadings, he would have stood on very good ground to show that his effective hearing would have taken *greater* than the twenty days as permitted in *Love*. *See* note 96 *supra*.

137. 99 S. Ct. 2614 n.1. *See* note 135 *supra*.

138. The suspension before a hearing was convened.

139. This point is debatable. Since the goal of the statute in this case was to obtain evidence (that was dissipating through passage of time), it can be compared to the exigencies of law enforcement in preserving such evidence. *See* Chimel v. California, 395 U.S. 752 (1969).

140. Although the Fourth Amendment specifically proscribes "seizure" of a person without probable cause, the risk that police will act unreasonably in arresting a suspect is not thought to require an advance determination of the facts . . . Despite the distinct possibility that the police officer may improperly assess the facts and thus unconstitutionally deprive an individual of liberty, we declined to depart from the traditional rule by which the officer's perception is subjected to judicial scrutiny *only after the fact* (emphasis added).

Ingraham v. Wright, 430 U.S. 651, 679-80 (1977).

subtract from the majority's conclusion that the risk of erroneous deprivation was minimal.

The fourth ground of attack centered on the tenuous relationship between the summary procedure and the desire to promptly remove drunk drivers from the road.[141] The dissent, as well as the *Panora* majority, pointed out that a drunk driver who took the breathalyzer would not get a ninety day suspension.[142] Thus, the purported target of the implied consent law, the drunk driver, was not removed from the road until convicted. If the "prompt removal" goal was the sole reason for the existence of the statute, the dissent would be on solid ground in their criticism. However, the majority clearly stated that the *need for convincing evidence* was the main goal of the statute.[143] In this regard, the dissent's criticism, although valid on the "prompt removal" rationale, is off-center of the real purpose of the Massachusetts statute.

Finally, the fifth and most plausible ground of attack employed by the dissent was that, despite the majority's claims to the contrary, the "walk-in" hearing was, in reality, not immediate.[144] Since it took time to marshal witnesses and prepare an argument for the hearing, the dissent observed that the "walk-in procedure provide[d] little more than a right to request the scheduling of a later hearing."[145] This fact, coupled with the infirmities of a "lame duck" Registrar who had no discretion to stay a suspension, effectively operated to preclude the motorist from any "prompt post-suspension relief."[146] Thus, the dissent believed a prior hearing was constitutionally mandated.

The defect of this criticism lies in the oversight of the realities of a hearing. Rarely is a hearing held immediately after the deprivation of an interest. Even if this were the case, it would do the

141. 99 S. Ct. at 2625.

142. *Id.* However, once the driver is convicted of drunk driving, he "shall be punished by a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years, or both such fine and imprisonment." MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a) (West Supp. 1976). Thus, in the long run, the drunk who takes the test and walks out that day will suffer greater loss than would the recipient of the ninety day suspension. It passes without mention that the convicted motorist has a longer than ninety day wait until he gets his license returned to him. *See* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(c) (West Supp. 1976).

143. *See* note 122 *supra*.

144. 99 S. Ct. at 2626.

145. *Id.*

146. *Id.*

motorist little good to walk in and present an *ad hoc* argument to the Registrar. If a literally "immediate" hearing was required this might work as a disservice to the motorist because he would not have time to prepare his argument or attend the hearing.[147] In this regard, the dissent's criticism of the lack of an "immediate" hearing, while valid in theory, is not persuasive in practice.

Therefore, while making noteworthy criticism based on theoretical application of broad procedural due process concepts, the dissent has ignored the realities of law enforcement and drunk driving and has overlooked the true evidentiary purpose of the Massachusetts statute. A dismissal of the points raised by the dissent would do a grave injustice. A five to four decision, similar to *Mackey*, in no way indicates the infallibility of the majority opinion. At least for the present, with the present majority of *Mackey* intact,[148] it appears that, under *Eldridge* analysis, the *Love* decision will serve as a guide for the constitutional procedural safeguards necessary for the survival of a summary driver's license suspension or revocation procedure.

VIII. Impact of *Mackey*

There are several implications from the *Mackey* decision worthy of recognition. The most obvious is that the *Eldridge* test is reaffirmed as the proper mode of analysis for resolving procedural due process issues. Equally obvious is that the *Love* decision is applicable to a variety of road safety laws. But in the confirmation of the *Love* decision, the *Mackey* Court has shown a deferential posture towards state legislative schemes aimed at promoting road safety.[149]

Additionally, *Mackey* listed three broad rationales, which, if in some manner[150] serve to promote road safety, would legitimize the summary revocation of a driver's license. Since these rationales: deterrence, inducement, and removal of dangerous drivers

147. If the motorist was *required* to appear before the Registrar *immediately* after suspension, such motorist would have little time to present whatever forceful case he had. Furthermore, what about the motorist who has an unbreakable out of town (or state) engagement? A required immediate hearing might well result in no hearing at all. Since all that due process requires is that one has an "opportunity to be heard," Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), if the motorist cannot appear immediately, then he cannot appear at all; despite the fact that he was afforded the "opportunity."

148. *See* note 23 *supra*.

149. *See* notes 90 and 92 *supra*.

150. If the "deterrence" and "prompt removal" rationales can work in *Mackey*, then they can work anywhere. The relationship between the statute and the goal need not be logically "close" at all. *See* note 124 *supra*.

from the road, "worked" (albeit tenuously) in *Mackey*, it appears that they could be applied in any driver's license situation.

In a broader context, *Mackey* illustrates that the *Eldridge* balancing test has not provided such a clarifying impact on procedural due process analysis.[151] When the *Panora* court made its ruling, the decision of *Dixon v. Love* was already "on the books" and held, under *Eldridge* analysis, that summary revocation of a driver's license was constitutional on procedural due process grounds. But the *Panora* court arrived at a conclusion, under *Eldridge* analysis, which was contrary to the purported intention of the Supreme Court. Consideration of the fact that *Mackey* was decided by a closely divided Court evidences the conclusion that the *Eldridge* test has not provided the curative remedy to inconsistent handling of procedural due process issues. Therefore, at least for the present, *Mackey* tells the legal community that the Supreme Court will keep a watchful eye on the use of the *Eldridge* test while nurturing its viability in constitutional law analysis.

As for the proponents of implied consent statutes, *Mackey* provides one more ground of constitutional support for the implied consent law. In this regard, it presently appears that a federal constitutional attack on the implied consent law would bear little fruit for such a costly effort.[152]

IX. CONCLUSION

The invariable consequence of a positive development portends the presence of a negative event. In *Mackey* the positive development was a "correction" aimed at consistency in procedural due process analysis. However, this was small consolation for the economic hardship that faced Montrym. As stated in the briefs of counsel, Montrym needed the license to drive his car which was his means of employment.[153] One could speculate on a different result in *Mackey* had this case been before the Court prior to the

151. The Court has been called on to standardize *Eldridge* analysis in other factual settings. *See, e.g.*, Bd. of Curators v. Horowitz, 435 U.S. 78 (1978) (dismissal from medical school compared with *Goss* suspension from secondary school); Hortonville Joint School Dist. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) (dismissal from job compared with Morrisey v. Brewer, 408 U.S. 471 (1972)).

152. The procedural due process sanction of *Mackey* can thusly be added to the long list of cases supporting such a law. *See* ERWIN note 90 *supra*.

153. Brief for Appellee at 9, 10, Mackey v. Montrym, 99 S. Ct. 2612 (1979).

Love decision. Unfortunately for Montrym, the Court majority chose to confirm, not reconsider, the proposition that summary revocation or suspension of a driver's license was constitutionally permissible.

Critics have asserted that the Court, rather than seeking a procedural due process test which places a high priority on human values, dignity or individualized circumstances, has sought just the opposite.[154] A superficial reading of the *Mackey* decision would do little to dispel such criticism. However, reference to footnote six in the majority opinion[155] indicates that individualized consideration is not beyond the scope of the Court's analysis. Mr. Chief Justice Burger stated that the Court was precluded from discussing *Mackey* on an "as applied" basis[156] because the *Panora* court never discussed it. In making such a statement, the Chief Justice might be hinting that a narrowly drawn "as applied" constitutional attack might have resulted in a ruling in favor of Montrym. If this is the case, and the Supreme Court takes the opportunity to consider an "as applied" attack that evidences some recognition of "individualized circumstances," the *Eldridge* test could very well produce consistent rulings and gain acceptability greater than that illustrated in *Mackey v. Montrym.*

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154. *See generally Due Process Values, supra* note 27, at 125; TRIBE, CONSTITUTIONAL LAW 542 (1978); *Notice and the Right to be Heard, supra* note 30, at 453.

155. Because the District Court held the statute unconstitutional on its face and granted classwide relief, it never reached the "as applied" challenge raised in Montrym's complaint; nor do we. The validity of that challenge . . . must be determined by the District Court on remand . . ."

99 S. Ct. at 2617 n.6. *See also* 99 S. Ct. at 2627 n.7.

156. *Id.*