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CONSTITUTIONAL LAW—MASSACHUSETTS STATUTE IMPOSING A DIFFERENT PENALTY FOR JURY CONVICTIONS UPHELD AS NOT VIOLATIVE OF DUE PROCESS OR EQUAL PROTECTION—Commonwealth v. LeRoy, 1978 Mass. Avd. Sh. 2376, 380 N.E. 2d 128

Richard D. Haley Jr.

CONSTITUTIONAL LAW—MASSACHUSETTS STATUTE IMPOSING A DIFFERENT PENALTY FOR JURY CONVICTIONS UPHELD AS NOT VIOLATIVE OF DUE PROCESS OR EQUAL PROTECTION—*Commonwealth v. LeRoy*, 1978 Mass. Adv. Sh. 2376, 380 N.E. 2d 128.

At a de novo trial before a jury of six,[1] Frederick LeRoy was convicted under a Massachusetts statute of operating a motor vehicle while under the influence of intoxicating liquor.[2] Section 24 provides that upon a "conviction" for operating a motor vehicle while under the influence of intoxicating liquor, the defendant's driver's license is to be revoked for one year.[3] LeRoy sought to avoid losing his license after the jury returned its verdict by moving for an alternative disposition pursuant to section 24E. Under this statute, the case is continued without finding, no "conviction"

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1. *See* MASS. GEN. LAWS ANN. ch. 218, § 27A (West Supp. 1978).

2. MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1978).

The statute provides:

> (1)(a) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor . . . 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. . . .
>
> (b) A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who shall revoke immediately the license or the right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate.
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> (c) The registrar, after having revoked the license or the right to operate of any person under the preceding paragraph of this section, shall not issue a new license or reinstate the right to operate to such person, except in his discretion if the prosecution of such person has terminated in favor of the defendant . . . until one year after the date of revocation following a conviction of any violation of said paragraph. . . .
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> (d) For the purposes of subdivision (1) of this section, a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file, and a license may be revoked under paragraph (b) hereof notwithstanding the pendency of a prosecution upon appeal or otherwise after such a conviction. Where there has been more than one conviction in the same prosecution, the date of the first conviction shall be deemed to be the date of conviction under paragraph (c) hereof.
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> . . . .

Id.

3. *Id.* § 24(1)(c).

is recorded, and the defendant's driver's license is not revoked.[4] The district court judge denied this motion and stated that because of the jury verdict of guilty, he had no authority to continue the case without a finding under section 24E.[5] The judge noted, however, that he would allow the motion if it were a jury waived proceeding.[6]

On appeal to the Massachusetts Supreme Judicial Court,[7] LeRoy contended that the district court judge had the authority to continue the case without a finding under section 24E for persons convicted by a jury of driving while intoxicated. He argued that a plain reading of section 24 indicates that a jury verdict does not necessarily constitute a "conviction" that would automatically man-

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4. The statute provides:

> The provisions of section 24D and this section shall apply to persons convicted or charged with operating a motor vehicle while under the influence of intoxicating liquor. The provisions of this section shall not apply where notice from the registrar of intention to suspend or revoke a person's license or right to operate is pending prior to the date of complaint on the offense before the court nor to cases, where under paragraph (c) of subdivision (1) of section twenty-four, the violation is determined to have caused a death.
>
> In order to qualify for a disposition under this section such person shall, in the judgment of the court, have cooperated fully with the investigation as described in section twenty-four D and shall be and have been in full compliance with such order as the court may have made for a one year term of probation as provided therein, including participation in such driver alcohol education programs, alcohol treatment or alcohol treatment and rehabilitation programs as the court may have ordered.
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> Nothing in this section shall be construed to prevent the exercise by a court of its authority under law to make any other disposition of a case of operating under the influence of intoxicating liquor.
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> Where a person has been charged with operating a motor vehicle under the influence of intoxicating liquor, and where the case has been continued without a finding and such person has been placed on probation with his consent and where such person is qualified for disposition under this section, a hearing shall be held by the court at any time after sixty days but not later than ninety days from the date where the case has been continued without a finding to review such person's compliance with the program ordered as a condition of probation and to determine whether dismissal of the charge is warranted.
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> . . . .
>
> Where an order of probation has been revoked by the court, the court shall forthwith so notify the registrar in writing and the registrar shall forthwith revoke said person's operators license or right to operate which was restored under this section and without further hearing.

Id. § 24E (West Supp. 1978).

5. Commonwealth v. LeRoy, 1978 Mass. Adv. Sh. 2376, 2377, 380 N.E.2d 128, 129.

6. Brief for Appellant at 3.

7. Commonwealth v. LeRoy, 1978 Mass. Adv. Sh. 2376, 380 N.E. 2d 128.

date disposition under that section to the exclusion of an alternative disposition under section 24E.[8] He further argued that if the judge lacked the authority to order section 24E disposition, then the statutory scheme as set forth in sections 24 and 24E denied a defendant the equal protection of the law and infringed on his right to trial by jury.[9] LeRoy maintained that revocation of one's driver's license imposed a greater penalty on defendants tried by a jury than that imposed on defendants tried by a judge and thus constituted an impermissible infringement on the right to trial by jury. The Massachusetts Supreme Judicial Court upheld the district court judge's interpretation of his authority under sections 24 and 24E and rejected the constitutional violations alleged in *Commonwealth v. LeRoy*.[10]

I. BACKGROUND

Sections 24, 24D, and 24E establish a statutory scheme for the adjudication and sentencing of persons charged with the crime of driving while intoxicated. Although interrelated, each section was enacted at a different time and with a different legislative purpose. Attempting to accomodate various policy considerations,[11] the legislature added sections 24D and 24E to the original section

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8. *See* note 2 *supra*. Before a defendant's license is revoked pursuant to section 24(1)(b), the defendant must be "convicted" of driving while intoxicated. The statute defines the word "conviction" in section 24(1)(d) as constituting a plea of guilty or nolo contendere or an adjudication of guilty by a court of competent jurisdiction. The definition does not specifically mention a jury verdict as constituting a "conviction". The defendant argued that the judge, in his discretion, could choose not to adjudge the defendant guilty by withholding entry of the jury verdict of guilt into the court records. Instead, the judge could continue the case without a finding and require the defendant to enter the driver alcohol education program pursuant to section 24E. If the defendant violated the terms and conditions of the program, the judge could then enter the verdict of guilty and sentence the defendant pursuant to section 24(1)(a). If the defendant successfully completed the program then the judge could dismiss the case and the jury verdict would not be entered into the defendant's criminal record. Brief for Appellant at 5-7.

9. Brief for Appellant at 11.

10. 1978 Mass. Adv. Sh. 2376, 380 N.E. 2d 128. The constitutional challenge presented in *LeRoy* has resurfaced recently in federal court. In March, 1979, U.S. District Court Judge Walter Jay Skinner allowed a "Temporary Restraining Order" prohibiting Norfolk County District Attorney William Delahunt from prosecuting a man, accused of driving while intoxicated, MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1978), in the six man jury session in the Wrentham District Court. The defendant, Alan R. Gronroos, Jr., claims the same constitutional infringement as claimed in *LeRoy*. In granting the injunctive relief, Judge Skinner noted "that the plaintiff has a likelihood of success on the merits." Massachusetts Lawyers Weekly, April 2, 1979, at 1, col. 1. A hearing on the merits of the case is now pending. *Id.*

11. *See* text accompanying notes 18-19 and 26-27 *infra*.

defining the crime of driving while intoxicated. The *LeRoy* decision represents the first judicial interpretation of the scope and content of these additions in the context of a constitutional challenge.

Section 24 defines the elements of the crime of operating a motor vehicle while under the influence of intoxicating liquor and provides for the punishment of persons convicted of the offense.[12] For the purposes of section 24, the term "conviction" is defined in the following language:

> [A] person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file. . . .[13]

Included within the terms of the statute is the provision requiring the Registrar of Motor Vehicles to revoke the license for one year of any person convicted of the crime.[14] The statute also establishes a maximum penalty of $1,000, or imprisonment for two years, or both.[15] These severe penalties are presumably intended for the purpose of punishment and deterrence in an area of legitimate public concern.[16]

Section 24D establishes a program of driver alcohol education for persons convicted of or charged with the offense of driving while intoxicated.[17] The legislative intent in enacting section 24D was to provide assistance and counseling for those persons suffering from alcohol abuse who are arrested for drunk driving.[18] This pro-

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12. *See* note 2 *supra*.
13. *Id.*
14. *Id.*
15. *Id.*
16. Approximately fifty percent of the estimated fifty thousand annual motor vehicle accident deaths are caused by drunk drivers. For an extensive survey of these statistics and the correlation between alcohol and driving fatalities *see* UNITED STATES DEP'T OF TRANSP., 90th CONG., 2d SESS., ALCOHOL AND HIGHWAY SAFETY REPORT (Comm. Print 1968).
17. The statute provides in pertinent part:

> Any person convicted of or charged with operating a motor vehicle while under the influence of intoxicating liquor may, if he consents, be placed on probation for one year and shall, as a condition of probation, be assigned to a driver alcohol education program as provided herein and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both as provided herein. Such order of probation shall be in addition to any penalties imposed . . . as a condition for any suspension of sentence.

MASS. GEN. LAWS ANN. ch. 90, § 24D (West Supp. 1978).
18. *See* SPECIAL COMMISSION PROVIDING FOR AN INVESTIGATION AND STUDY RELATIVE TO THE PENALTY FOR DRIVING UNDER THE INFLUENCE OF INTOXICAT-

gram identifies potential or actual alcoholics and offers them rehabilitation treatment rather than punishment.[19] The legislation creates a driver alcohol education program as a condition of probation for a defendant who needs professional counseling for an alcohol related offense.[20]

Section 24E[21] provides an alternative to the mandatory license revocation provision of section 24.[22] Under this section, the court is empowered to continue the case without a finding and to assign the defendant to the driver alcohol education program as established by section 24D.[23] If the case is continued without a finding, then no "conviction" is reported to the Registrar and the defendant's operator's license is not revoked.[24] If the defendant, however, fails to abide by the terms of the driver alcohol education program, the court is required to notify the Registrar. When the Registrar receives this notification, the Registrar must revoke the defendant's license for one year.[25]

Section 24E is intended to provide the appropriate incentive to offenders to enter and successfully complete the driver alcohol education program under section 24D.[26] The section is also designed to alleviate the hardship imposed on those first time offenders who must have their driver's license to conduct their trade, business or employment.[27] These goals are served by providing an alternative sentence and procedure to the mandatory license revocation provision of section 24.[28]

II. THE LEROY CASE

The *LeRoy* decision mandates that when a jury convicts a defendant of driving while intoxicated, the defendant must be sen-

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ING LIQUOR, REPORT, MASS. H.R. REP. NO. 6163, 168 GEN. COURT, 2d SESS. (1974) [hereinafter cited as SPECIAL COMMISSION]. *See also* Note, *The Chronic Alcoholic: Treatment v. Punishment*, 3 SUFFOLK L. REV. 406 (1969).

19. *See* J. FIELDING & E. BLACKER, A REPORT TO THE GOVERNOR AND THE GENERAL COURT ON THE DRIVER ALCOHOL EDUCATION PROGRAM (June 1978) (prepared by the Mass. Dept. of Pub. Health, Div. of Alcoholism).

20. This legislation is motivated partly by a realization that the traditional approach to the problem is ineffective. *See* note 19 *supra* at 11.

21. 1975 Mass. Acts ch. 505, § 2.

22. *See* 32 J. NOLAN, MASSACHUSETTS PRACTICE § 557, at 367-68 (1976).

23. *Id.*

24. *See* note 19 *supra* at 5.

25. *See* note 4 *supra*.

26. *See* SPECIAL COMMISSION, *supra* note 18, at 7.

27. *See* Mass. S. 588, 168 Gen. Court, 2nd Sess. (1974). *See also* Mass. H.R. Res. 5563, 168 Gen. Court, 2nd Sess. (1974).

28. *See* Mass. H.R. 4927, Mass. H.R. 4923, Mass. H.R. 4739, Mass. H.R. 4124, & Mass. H.R. 3966, 168 Gen. Court, 2nd Sess. (1974).

tenced according to section 24. It precludes an alternative disposition under section 24E. LeRoy challenged the trial court's interpretation of the inapplicability of section 24E as an erroneous reading of the statutory language and legislative intent.[29] Moreover, LeRoy contended that the trial court's interpretation infringed on his federal and state constitutional right to a trial by jury[30] and denied him equal protection.[31] The Massachusetts Supreme Judicial Court affirmed the trial court decision and rejected LeRoy's allegations of constitutional infirmity.

In challenging the trial court's construction of sections 24 and 24E, LeRoy adopted a literal meaning approach to statutory interpretation.[32] He argued that a jury verdict of guilty did not necessarily satisfy the definition of "conviction" under section 24, and, therefore, it did not require section 24 disposition as opposed to section 24E disposition.[33] Since the language of section 24(1)(d) reads "adjudged guilty by a Court of competent jurisdiction . . .," LeRoy maintained that the court may elect not to enter the jury finding of guilt and continue the case without a finding pursuant to section 24E without violating the language of section 24.[34] The *LeRoy* court interpreted "conviction," as defined in section 24(1)(d), to include a jury verdict returned against the accused, although the language of that section does not specifically so read.[35]

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29. Brief for Appellant at 5.

30. Defendant relied on the sixth amendment of the United States Constitution as applied to the states through the fourteenth amendment of the United States Constitution and on Part 1, Article XII of the Massachusetts Constitution which guarantee the right to trial by jury. Brief for Appellant at 10-11.

31. U.S. CONST. amend. XIV.

32. The plain meaning rule of statutory interpretation was formulated in United States v. Missouri Pac. R.R., 278 U.S. 269 (1929) wherein the Court observed, "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *Id.* at 278. For a critique of the plain meaning rule see Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). A discussion of various other approaches to statutory interpretation appears in Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1 (1954).

33. *See* note 8 *supra* and accompanying text.

34. *Id.*

35. *See* note 2 *supra*. The court defines "conviction" as the "confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes . . . guilt." 1978 Mass. Adv. Sh. at 2378 n.1, 380 N.E.2d at 129 n.1 (quoting from Commonwealth v. Lockwood, 109 Mass. 323, 325 (1872)) (additional citations omitted). The court compared this language with the statutory language contained in section 24(1)(d) and found the two were substantially in accord.

Thus, the court decided that a defendant tried by a jury is subject to the provision of section 24 which would automatically revoke his license, while a defendant tried by a judge may keep his license under section 24E disposition. The court concluded that LeRoy's proposed construction was a major policy change which must be addressed to the legislature.[36]

The court next considered the alleged constitutional violations arising from its interpretation of the statute. Relying upon the Equal Protection Clause of the fourteenth amendment, LeRoy argued that there is no rational basis for distinguishing between those persons who are tried by a jury and, therefore, deemed ineligible for alternative disposition under section 24E, and those persons who are tried by a judge and deemed eligible for the alternative disposition.[37] In rejecting this equal protection challenge, the court reasoned that there is no constitutional right that alternative disposition be available to all.[38] Furthermore, the court stated that the statute did not create an invidious classification merely because a more severe sentence might be accorded to those persons who exercise their right to trial by jury.[39] Therefore, equal protection did not require a construction of sections 24 and 24E different from the construction given by the court.[40]

Although the court summarily disposed of the equal protection issue, it gave greater attention to the allegation that the statute infringed on the right to trial by jury.[41] LeRoy stressed that if section 24E disposition is available only for those persons tried by a judge, the statute inhibited the assertion of his right to trial by jury.[42] Referring to decisions which have upheld the practice of

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The legislature may, of course, define the terms of the statute as it sees fit. The legal meaning of the word "conviction," however, has not always had this characterization. For the purposes of affecting a witness's credibility, the word "conviction" is defined as "a final judgment and sentence of the court conclusively establishing . . . guilt . . . [And] merely showing a verdict of guilty or placing a defendant on probation does not satisfy the statute." Commonwealth v. Hersey, 324 Mass. 196, 205, 85 N.E.2d 447, 453 (1949) (citing MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1959)).

36. 1978 Mass. Adv. Sh. at 2381, 380 N.E.2d at 131.

37. Brief for Appellant at 11.

38. 1978 Mass. Adv. Sh. at 2379, 380 N.E.2d at 130. *See* Healey v. First Dist. Court of Bristol, 367 Mass. 909, 327 N.E.2d 894 (1975).

39. *Id. See* North Carolina v. Pearce, 395 U.S. 711, 722-23 (1969). *See also* Brady v. United States, 397 U.S. 742 (1970).

40. For an analysis of equal protection under the circumstances of *LeRoy see* note 129 *infra* and accompanying text.

41. *See* note 30 *supra*.

42. Brief for Appellant at 6.

plea bargaining, the court analogized plea bargaining with the statutory scheme under sections 24 and 24E.[43] The court observed: "The possibility that a greater penalty will result from a jury trial than from entry of a guilty plea has not been found to infringe impermissibly on the right to a jury trial."[44] In addition, the court reasoned: "Not all government imposed choices in the criminal process which discourage the exercise of rights are impermissible."[45] The court concluded that the choice imposed on defendants charged with drunk driving falls within the realm of allowable governmental conduct.

III. ANALYSIS

A. *Statutory Construction*

In its construction of sections 24 and 24E, the *LeRoy* court made no reference to the first sentence of section 24E. That sentence creates ambiguity about the scope of section 24E. The section begins by stating, "The provisions of section 24D and this section shall apply to persons *convicted or charged* with operating a motor vehicle while under the influence of intoxicating liquor."[46] The remainder of the section then states, "Where a person has been charged with operating a motor vehicle while under the influence . . . and where the case has been continued without a finding. . . ," the person may be placed on probation for one year and shall participate in the driver alcohol education program as set forth in section 24D.[47] Apparently, section 24E applies to persons *convicted* of the offense, yet a "continuance without a finding" is traditionally granted before conviction.[48] Therefore, section 24E is

43. The court did not explicitly make reference to plea bargaining in its decision. The cases which the court cited and the principles upon which those cases relied deal, however, with situations in which plea bargaining is an issue. *See* 1978 Mass. Adv. Sh. at 2380, 380 N.E.2d at 130 (citing Santobello v. New York, 404 U.S. 257 (1971); Bordenkircher v. Hayes, 434 U.S. 357, *rehearing denied*, 435 U.S. 918 (1978); Brady v. United States, 397 U.S. 742 (1970)).

44. 1978 Mass. Adv. Sh. at 2380, 380 N.E.2d at 130. *See* Santobello v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970). *See also* Bordenkircher v. Hayes, 434 U.S. 357, *rehearing denied*, 435 U.S. 918 (1978); Commonwealth v. Simpson, 1976 Mass. Adv. Sh. 981, 991-92, 345 N.E.2d 899.

45. 1978 Mass. Adv. Sh. at 2380, 380 N.E.2d at 130. Chaffin v. Stynchcombe, 412 U.S. 17, 29-35 (1973). *See* Gavin v. Commonwealth, 367 Mass. 331, 327 N.E.2d 707 (1975); Mann v. Commonwealth, 359 Mass. 661, 271 N.E.2d 331 (1971); Walsh v. Commonwealth, 358 Mass. 193, 260 N.E.2d 911 (1970).

46. *See* note 4 *supra*. (emphasis added).

47. *Id.*

48. There is no statutory authority for the judicial practice of a "continuance

ambiguous as to its applicability to convicted offenders.

The court overlooked this ambiguity and held that a continuance without a finding could not be granted after a jury conviction.[49] Referring to the paragraph of section 24E which empowers the court to continue the case without a finding, the court noted that only the word "charged" immediately precedes the language providing for the continuance. Thus, the court reasoned that only those defendants who are charged but not convicted could have their case continued without a finding under section 24E. The effect of the court's reasoning is that the section 24E alternative disposition is limited to defendants who choose a jury-waived proceeding.[50]

In interpreting section 24E, the *LeRoy* court takes too narrow a view of the scope of the word "charged". The fact that the fourth paragraph of section 24E uses the word "charged" and does not read "or convicted" does not preclude application of section 24E to convicted offenders. Any person convicted of drunk driving must first have been "charged" with the offense. The word "charged" merely refers to a condition which must occur before other judicial procedures follow. Those procedures may culminate in an admission, a jury-waived procedure, or a proceeding where the defendant decides to be tried by a jury. Thus, the word "charged," in the context of the statute, does not compel a finding that section 24E is limited to admissions or jury-waived trials.

In light of the statutory ambiguity,[51] doubt is cast on the

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without a finding." 30 K. SMITH, MASSACHUSETTS PRACTICE § 728, at 350 (1976). The practice has been upheld as constitutional provided the judge records his findings of fact and the reasons for the continuance. Commonwealth v. Brandano, 359 Mass. 332, 337, 269 N.E.2d 84, 88 (1971). The continuance is usually granted upon a plea of not guilty and before trial but the court may insist on a plea of guilty before granting the continuance. 30 K. Smith, *supra* at 351. If a case is continued without a finding then the court may dismiss it after some time. *Id.* at 350. The usual condition for granting the continuance is that the person charged with a crime be placed on probation on such terms as the court deems proper. *See* MASS. GEN. LAWS ANN. ch. 276, § 87 (West Supp. 1979). *See also* 30 K. Smith, *supra* § 728, at 254 (Supp. 1978).

49. 1978 Mass. Adv. Sh. at 2379, 380 N.E.2d at 131.

50. Where a defendant chooses to admit to the charge or elects a jury-waived trial, the judge, in his discretion, can opt to continue the case without a finding before pronouncing the defendant guilty. Typically, the court will find sufficient facts for a finding of guilty and continue the case on that basis. Technically, the defendant has not been convicted because the court has not declared the defendant guilty. Thus, the defendant is still only charged with the offense and not yet formally convicted. This procedure has been limited to jury-waived proceedings because the judge is both the trier of fact and the sentencing authority in such proceedings. Observations of the author in Springfield District Court, Springfield, Massachusetts.

51. *See* text accompanying notes 46-48 *supra*.

court's determination that alternative disposition under section 24E is unavailable to those defendants convicted by a jury of driving while intoxicated. Where statutory language is unclear, resort to legislative history is necessary to ascertain legislative intent.[52] An inquiry into the legislative history of section 24E contains little evidence of an intent to exclude persons convicted by a jury from its coverage.

The alternative sentencing scheme of section 24E originated pursuant to the recommendations of a special commission.[53] This commission was established to investigate and study two problems of legislative concern. First, the commission considered the establishment of a driver retraining and alcohol rehabilitation program.[54] Second, the commission considered legislation which would allow for early reinstatement of the driver's license for persons convicted of driving while intoxicated.[55] The commission's report led to the enactment of sections 24D and 24E in July, 1974.[56] This Act represented the first version of the two sections.

Under the 1974 version of sections 24D and 24E, persons convicted of driving while intoxicated could obtain early reinstatement of driving privileges if they sucessfully completed the driver alcohol education program.[57] Significantly, the provisions of this statute applied whether conviction was obtained with or without a jury. The statute, however, made no provision for the person whose case had been continued without a finding to enter the driver alcohol education program. In addition, the statute still required the revocation of one's driver's license for a period of at least sixty days.[58]

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52. *See, e.g.*, Commissioner v. Bilder, 369 U.S. 499 (1962); United States v. American Trucking Ass'ns, 310 U.S. 534 (1940). *See also* Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 10-11 (1939).

53. The Special Commission was established by virtue of 1973 Mass. Resolves ch. 130. In May of 1974, the Special Commission made its report to the House of Representatives recommending the establishment of a driver alcohol education program and the enactment of legislation to provide for early, conditional reinstatement of the driving privilege for persons convicted of driving while intoxicated. SPECIAL COMMISSION *supra* note 18. In June of 1974, the Special Commission was charged with the additional responsibility of considering 13 Senate and House documents which called for legislation to alleviate the hardship imposed on first time offenders who lose their license as a result of a conviction of driving while intoxicated. 1974 Mass. Resolves ch. 47.

54. 1973 Mass. Resolves ch. 130.

55. *Id.*

56. 1974 Mass. Acts ch. 647.

57. *Id.*

58. *Id.*

Subsequent legislation was introduced to expand the class of persons eligible for the driver alcohol education program and to further amend the loss of license provision by allowing the defendant to retain his license subject to the discretion of the court.[59]

In June 1975, a new draft of sections 24D and 24E was proposed.[60] This second version of sections 24D and 24E covered those persons "convicted or charged" with the offense of driving while intoxicated.[61] Initially, the draft merely added a provision for the inclusion of those persons whose case had been continued without a finding.[62] Later, however, the proposed bill was again amended, and it eliminated those phrases which provided for early reinstatement of an operator's license after conviction.[63] This final version was enacted,[64] and it represents the current sections 24D and 24E.[65]

The deletion of the language providing for early reinstatement of a driver's license after conviction causes some confusion over the application of section 24E to convicted offenders. The elimination of this language and the inclusion of the provision allowing for the continuance without a finding served the express legislative purpose of permitting defendants to enter the driver alcohol education program without suffering even temporary loss of license.[66] The elimination of this language, however, also raises the issue of

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59. Mass. S. 984, 169 Gen. Court, 1st Sess. (1975).

60. Mass. H.R. 6365, 169 Gen. Court, 1st Sess. (1975). This bill was reported favorably by the Committee on the Judiciary. [1975] 2 Mass. J.H.R. 2222.

61. *Id.*

62. *Compare* Mass. H.R. 6365, 169 Gen. Court, 1st Sess. (1975) *with* 1974 Mass. Acts ch. 647. H.R. 6365 states:

> Where a person has been placed on probation and is qualified for disposition under this section and *revocation of a license* or right to operate has taken effect *for the conviction of operating under the influence of intoxicating liquor* or where the case has been continued without a finding, a hearing shall be held by the court at any time after sixty days but not later than ninety days from the date of said revocation or where the case has been continued without a finding to review such person's compliance with the program ordered as a condition of probation and *to determine whether early reinstatement of said operator's license*, or right to operate or dismissal of the charge is warranted.

Id. (emphasis added).

63. Mass. H.R. 6412, 169 Gen. Court 1st Sess. (1975). This new draft eliminated the language of H.R. 6365 which referred to "revocation of a license. . . for the conviction of operating under the influence of intoxicating liquor . . . to determine whether early reinstatement of said operator's license. . . ." *Id. See* note 62 *supra*.

64. 1975 Mass. Acts ch. 505.

65. *See* notes 4 and 17 *supra*.

66. *See* text accompanying notes 55 and 59 *supra*.

whether persons convicted of the offense would be eligible for section 24E disposition. The problem arises because a continuance without a finding is traditionally granted before a conviction in a jury-waived proceeding.[67]

The *LeRoy* court resolved the issue of the scope of section 24E by adhering to the traditional use of a continuance without a finding and interpreting section 24E accordingly. Yet the legislative history demonstrates that the exclusive purpose in enacting section 24E was to mollify the harshness of the mandatory license revocation provision of section 24. The first version of section 24E achieved this end without discriminating between jury and jury-waived proceedings.[68] The second version of section 24E retained the language of the first version in stating that its provisions applied to persons "convicted or charged".[69] This latter version differed from its predecessor only insofar as it deleted the reinstatement of license provision and included the provision allowing for a continuance without a finding. The change in language is explainable solely in terms of the express legislative intent,[70] and to imply a further deviation from the policy of the first verson is speculative. Like the first version, the second version of section 24E was intended to apply to defendants at *any* stage of the judicial proceeding with the court retaining the discretion to determine whether the defendant is an appropriate subject for such disposition.[71] By permitting a continuance without a finding after conviction by a jury, the defendant is still required to attend the driver alcohol education program but is not required to relinquish his license. Under these circumstances, the legislative intent is ful-

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

68. *See* text accompanying notes 57-58 *supra*.

69. *See* text accompanying note 61 *supra*.

70. The language providing for reinstatement of license after conviction was no longer needed because a continuance without a finding results in the license not being revoked in the first instance. This specific change in language further mitigates the harshness of the mandatory license revocation provision of section 24(1)(b) and thus comports with the express legislative intent in amending the first version of section 24E.

71. Letter received from Representative Paul White dated November 14, 1978 (on file with *Western New England Law Review*). At the time of the enactment of section 24E, Mr. White sponsored the legislation which resulted in its enactment. In his letter, Mr. White states that it was the legislative intent that the judge be given broad latitude in determining who would be an appropriate subject for section 24E disposition. More important, it was also the legislative intent that section 24E disposition would be available at any stage of the judicial proceeding. *Id.*

filled.[72] The *LeRoy* decision thwarts the full realization of that intent by restricting the scope and application of section 24E.[73]

B. *Constitutional Questions*

The central constitutional issue considered in *LeRoy* is whether a greater penalty could be imposed on the defendant solely because he chose to exercise his sixth amendment right to trial by jury. The *LeRoy* court held that neither due process nor equal protection precludes imposing a harsher sentence for those persons tried by a jury than those persons tried by a judge. The court, however, fails to note that due process prohibits the pursuit of legitimate state objectives at the expense of an unnecessary infringement of basic constitutional rights.[74] Furthermore, the court gives insufficient attention to the question of whether due process is violated when the result of the state action is to deter the exercise of constitutional rights.[75]

Application of due process analysis to *LeRoy* requires the resolution of two threshhold questions: (1) Whether revocation of one's license is "punishment" for the purpose of due process;[76] and (2) whether the crime of driving while intoxicated is a serious offense for the purpose of a federal constitutional right to trial by jury. If either of these two questions was answered negatively, LeRoy could not complain of an infringement of his right to trial by jury either because no greater "punishment" is being imposed after a jury conviction or because he has no federal constitutional right to trial by jury in the first instance. Though there exists some authority to the contrary,[77] the majority position considers revocation of a driver's license as constituting "punishment" for the purpose of due

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72. That intent, as expressed by the Special Commission report, is to avoid the hardship imposed on first time offenders who are unable to drive as a result of a conviction for drunk driving. *See* note 53 *supra* and accompanying text.

73. In restricting section 24E disposition to those persons tried by a judge and disallowing its application to those persons tried by a jury, an entire class of defendants are excluded from the benefits of the legislation. As a consequence, a first time offender of the drunk driving law must relinquish a constitutional right to obtain the benefit of a statutory enactment. The full utility of section 24E is thereby weakened.

74. United States v. Jackson, 390 U.S. 570 (1968).

75. *See* text accompanying notes 98-127 *infra*.

76. The issue may focus on whether revocation of a drivers license is the deprivation of a right or a privilege. In either case, a punishment is imposed regardless of whether the interest be deemed a right or a privilege. *See* Bell v. Burson, 402 U.S. 535 (1971).

77. Smith v. State, 17 Md. App. 217, 301 A.2d 54 (1973).

process protection.[78] Aside from this judicial pronouncement, defendants consider license revocation as the most severe of all possible punishment for the offense excluding actual incarceration.[79] With respect to the defendant's sixth amendment right of trial by jury, the right applies only to those offenses punishable by a maximum term of at least sixth months in prison and a $500 fine.[80] Since the crime of operating a motor vehicle while under the influence of intoxicating liquor is punishable by a maximum term of at least two years in prison and a $1,000 fine,[81] the offense qualifies as one for which a federal constitutional right to trial by jury attaches. Consequently, the contention that the *LeRoy* court's interpretation of section 24 and 24E violates due process does not fail because of preliminary considerations.

The United States Supreme Court has held that due process violations arise when a statutory scheme needlessly deters the exercise of a constitutional right.[82] In a decision not discussed by the *LeRoy* court, the Supreme Court set forth a standard of judicial review for an alternative sentencing scheme. In *United States v. Jackson*,[83] the Court considered the section of the Federal Kidnapping Act[84] which provided that the death penalty could be imposed only upon a jury verdict.[85] In that case, the defendant contended that this greater penalty was only possible if he elected to go to trial. The threat of greater penalty, therefore, discouraged the exercise of his sixth amendment right. The Court agreed and invalidated the greater penalty provision by stating: "Whatever might be

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78. Bell v. Burson, 402 U.S. 535 (1971); Rothweiler v. Superior Court of Pima County, 100 Ariz. 37, 410 P.2d 479 (1966).

79. Little, *A Theory and Empirical Study of What Deters Drinking Drivers, If, When and Why*, 23 AD. L. REV. 23, 51 (1971).

80. Sixth amendment right to trial by jury applies in criminal cases only to "serious" offenses and the maximum sentence imposed by statute is controlling. Duncan v. Louisiana, 391 U.S. 145 (1968). In contrast, "petty" offenses not subject to trial by jury are those punishable by a maximum term of six months in prison and a $500 fine. *Id.* at 161.

81. Under section 24(1)(a) a person convicted thereunder is subject to a maximum penalty of not more than one thousand dollars or by imprisonment for not more than two years or both. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a) (West Supp. 1978). *See* note 2 *supra*.

82. *See* United States v. Jackson, 390 U.S. 570 (1968).

83. *Id.*

84. 18 U.S.C. § 1201 (1976).

85. The legislative purpose in enacting the provision was not to discourage the exercise of the right to trial by jury. The intent was merely to make the jury rather than the judge the arbiter of the death sentence. United States v. Jackson, 390 U.S. 570, 576 (1968).

said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether the effect is unnecessary and therefore excessive."[86] Although the defendant in *LeRoy* is faced with losing his license rather than losing his life, the same underlying principle promulgated in *Jackson* applies in reference to the application of section 24E. If section 24E is not intended to discourage the exercise of the right to trial by jury,[87] any resulting discouragement of the right to trial by jury from the operation of the statute is unnecessary and therefore excessive. Moreover, alternative methods are available to achieve the statute's objectives without needlessly chilling the exercise of a basic constitutional right. In the *Jackson* Court's view, the availability of alternatives is decisive.[88]

An alternative suggested by the defendant in *LeRoy* meets the objective of section 24E[89] without infringing on the defendant's right to trial by jury.[90] By allowing the court to continue the case without a finding after a verdict of guilty, the defendant's license is not revoked and a greater penalty is not necessarily imposed as a result of the exercise of a constitutional right. If, however, the defendant violates the terms of his probation as set forth under section 24E then his license is revoked and the court may enter its finding. This procedure channels offenders into the driver alcohol education program and provides an incentive for them to successfully participate in the program. At the same time, it protects the state's interest in rehabilitating or punishing violators of the drunk driving law.[91]

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86. *Id.* at 582. The view adopted in *Jackson* is not without legal precedent. *See* Garrity v. New Jersey, 385 U.S. 493 (1967); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). Nor is this view without its supporters in the field of legal commentary. *See* Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 19-25 (1970).

87. It is argued that the legislative intent in enacting section 24E was not to discourage the exercise of the right to trial by jury. *See* text accompanying notes 53-73 *supra*.

88. United States v. Jackson, 390 U.S. 570, 582-83 (1968).

89. First time offenders are channeled into the alcohol educational program without even temporary loss of license. *See* note 53 and accompanying text *supra*.

90. *See* text accompanying notes 130 and 131 *infra*.

91. The defendant subject to section 24E disposition is required to attend the driver alcohol education program as established by section 24D. *See* note 4 *supra*. As established, the program consists of at least eight two hour sessions where attendance is mandatory. *See* MASS. COMM'R OF PROBATION, GUIDELINES FOR DRIVER ALCOHOL EDUCATION PROGRAM 10 (1975). Eligibility requirements include a $200

A statute similar to the alternative the defendant is suggesting already exists on the federal level.[92] Under federal law, a person convicted for the first time for possession of a controlled substance may be placed on probation and have his case continued without a finding.[93] The court is empowered to dismiss the charge if the defendant successfully completes his probationary terms.[94] Significantly, the statute applies at any stage of the judicial proceeding, including adjudication after a jury verdict of guilt.[95] As such, the statute exacts no price for a person's insistence on a trial.

The *LeRoy* court had the option of requiring an alternative other than that offered by the defendant. It could have declared the current statutory scheme unconstitutional as an unnecessary infringement on the right to trial by jury.[96] The legislature would then be obligated to adopt more appropriate means to achieve its objectives. Under one proposed alternative,[97] a person convicted of drunk driving would be subject to the penalties as provided by law. The defendant's driver's license, however, need not be revoked if he consents to participate in the driver alcohol education program. This provision would apply regardless of the manner in which the conviction was obtained. Consequently, this proposed legislation would not require the court to continue the case without a finding to invoke the license saving provision. The advantage of such a proposal is that neither the interests of the state nor the interests of the individual are jeopardized.

The foregoing constitutional analysis is premised on the deter-

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fee which can only be avoided upon a showing of indigency. MASS GEN. LAWS ANN. ch. 90, § 24D (West Supp. 1978).

92. 21 U.S.C. § 844 (1976).

93. *Id.*

94. *Id.*

95. *Id.* The pertinent provisions of the statute, in this regard, read as follows:

> If any person . . . is found guilty of a violation . . . of this section *after trial or upon a plea of guilty*, the court may, *without entering a judgment of guilty* . . . place him on probation. . . . If during the period of his probation such person does not violate any of the conditions of the probation, then . . . the court shall discharge such person and dismiss the charges against him.

21 U.S.C. § 844(b)(1) (1976) (emphasis added).

96. *See* text accompanying note 86-88 *supra*.

97. Legislation is currently pending which adopts the alternative suggested. Mass. H.R. 1823, 170 Gen. Court, 2nd Sess. (1978). Under a statutory enactment similar to the one proposed here, drug addicts are sent to the treatment programs only after conviction. CONN. GEN. STAT. ANN. § 19-485(a), 19-498(a) (West 1977). "Connecticut judges and prosecutors consider the post plea or conviction route to treatment preferable to allowing diversion in lieu of prosecution." Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 686 (1972).

mination that the legislature is seeking other objectives than to deter the assertion of a constitutional right in enacting section 24E. Notwithstanding this analysis, the *LeRoy* decision upheld an interpretation of a statutory scheme which imposed a greater penalty as the result of the exercise of the sixth amendment right to trial by jury and analogized the statutory scheme to plea bargaining.[98] In so doing, the court is necessarily imputing an intent on the part of the legislature to inhibit the exercise of a constitutional right.[99] The question becomes whether the state may constitutionally impose harsher sentences for this purpose.

The authority cited by the *LeRoy* court to support its decision reflects the judiciary's ambivalence about state practices which discourage the assertion of constitutional or statutory rights. On one side of the issue, the decisions of *Brady v. United States*[100] and *Bordenkircher v. Hayes*[101] assert that the state may impose risks of greater punishment to dissuade a defendant from invoking constitutional rights.[102] On the other side of the issue, the decisions of *North Carolina v. Pearce*[103] and *Chaffin v. Stynchcombe*[104] enunciate principles that contradict the *Brady-Bordenkircher* result. Yet the *LeRoy* court cited each decision to uphold its interpretation of the statutory scheme under sections 24 and 24E. Therefore, these four decisions and the principles they represent are crucial to a proper determination of the constitutional viability of the court's interpretation of section 24E.

In *Pearce*, the United States Supreme Court delineated the extent to which the constitution limits the imposition of harsher sentences after conviction upon retrial.[105] The decision held that the Equal Protection Clause does not absolutely impose a bar to a more severe sentence upon reconviction—a proposition cited by the *LeRoy* court to support its decision.[106] The Court, however,

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98. *See* note 43 *supra*.

99. *See* text accompanying notes 111-13 *infra*.

100. 397 U.S. 742 (1970).

101. 434 U.S. 357, *rehearing denied*, 435 U.S. 918 (1978).

102. Both of these decisions refer to plea bargaining as a constitutionally legitimate practice while recognizing that it is often used to deter a defendant from proceeding to trial by jury. 434 U.S. at 363. *See* 397 U.S. at 751.

103. 395 U.S. 711 (1969).

104. 412 U.S. 17 (1973).

105. The defendant had his original conviction set aside on appeal on the ground that an involuntary confession had unconstitutionally been admitted in evidence. He was later retired and reconvicted and received a harsher sentence than the one imposed in the original trial. 395 U.S. at 713.

106. 395 U.S. at 723. The failure of the *Pearce* court to find an equal protection

also stated, "[I]mposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be no less a violation of due process of law."[107] Where a greater penalty is motivated by "vindictiveness," the rights of the defendant are violated.[108] "Vindictiveness" is defined by the Court as consisting of a retaliatory motive on the part of the state to penalize those who choose to exercise statutory or constitutional rights.[109] If "vindictiveness" is present, the portion of the greater sentence attributable to that motive is unconstitutional and void.[110]

The *Pearce* directive against vindictive sentencing is overlooked by the *LeRoy* court. In interpreting section 24E, the court upheld different sentencing for persons tried by a jury and persons tried by a judge. In recognizing that the risk of a greater punishment may discourage the exercise of the right to trial by jury,[111]

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violation has not been without criticism. In referring to the decision one author writes, "This case again reflects the Court's lack of concern for quantitative differences in sentencing possibilities." Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. L. REV. 29, 44-45 n.97.

The *LeRoy* court is incorrect in using the equal protection analysis of *Pearce* to reject the equal protection challenge posed by LeRoy. Although the *Pearce* Court held that equal protection does not absolutely impose a bar to a more severe sentence upon reconviction, the Court reached this result by reasoning that the defendant after reconviction may also receive a "shorter sentence . . . than the one originally imposed." 395 U.S. at 722. Thus, the mere possibility a more severe sentence would result from invoking the right to appeal did not infringe on that right. *Id.* In contrast, LeRoy could not receive a shorter sentence for exercising his right to trial by jury. His license is automatically revoked. This fact distinguishes the equal protection analysis of *Pearce* from the circumstances present in *LeRoy*.

107. 395 U.S. at 724. Though states are not required to establish avenues of appellate review, "once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* (citing Ribaldi v. Yeager, 384 U.S. 305, 310-11 (1966)).

108. 395 U.S. at 725.

109. *Id.* at 723-25. To assure that a "vindictive" motive is not present where a judge imposes a harsher sentence, the *Pearce* court wrote:

> whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

110. *Id.*

111. The court wrote, "[N]ot all government imposed choices in the criminal process which discourage the exercise of rights are impermissible." 1978 Mass. Adv. Sh. at 2380, 380 N.E.2d at 130 (citing Chaffin v. Stynchcombe, 412 U.S. 17, 29-35 (1973)). The court cited this language in response to LeRoy's assertion that different

the court is implicitly accepting the vindictive motive. Clearly, the legislature had some motive in enacting section 24E. If the motive was not to discourage the assertion of the right to trial by jury, a statute which operates to discourage the assertion of this right creates the same "needless chill" that the *Jackson* Court prohibited.[112] Yet the *LeRoy* court did not review the case in terms of *Jackson*. Instead, it looked to the practice of plea bargaining where greater sentences are often recommended to deter the defendant from proceeding to trial by jury.[113] The court's analogy suggests an acceptance of vindictive sentencing which is a practice thoroughly condemned by the *Pearce* decision.

Following the proscription against "vindictive" sentencing, the *Styncombe* Court considered the charge that the threat of a harsher reconviction sentence, for whatever reason, chilled the exercise of constitutional rights.[114] The United States Supreme Court held that the constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[115] Thus, the mere "possibility of vindictiveness" did not render the choice of whether to appeal a conviction and seek a new trial so difficult as to unconstitutionally infringe on that choice.[116] Nevertheless, the Court recognized that "it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercise their right to appeal. . . ."[117] The issue is whether the mere possibility of "vindictiveness" in sentencing is enough to invoke the *Pearce* rationale.[118] *Stynchcombe*, therefore,

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sentencing requirements for defendants tried by a jury and defendants tried by a judge infringed on the right to trial by jury.

112. *See* text accompanying note 107 *supra*.

113. *See* notes 43 and 102 *supra* and accompanying text.

114. The defendant had his original conviction set aside because of an erroneous jury instruction. On retrial, the defendant was again convicted and the jury recommended a greater sentence than the one imposed in the original trial. 412 U.S. at 18-21. The defendant contended that harsher sentences on retrial are impermissible, even if vindictiveness plays no role, because they have a "chilling effect" on the defendant's right to appeal his original conviction. *Id.* at 29.

115. *Id.* at 30.

116. *Id.* at 25-26. The Court was persuaded by the fact that the jury in the second trial was unlikely to be aware of the prior sentence and therefore consciously increase the sentence for the purpose of punishing the defendant for his successful appeal. *Id.*

117. *Id.* at 24.

118. The dissenting opinions of Justices Douglas, Stewart, Brennan and Marshall, all stress the proposition that the mere possibility of vindictiveness is enough

did not disturb the *Pearce* directive against greater punishment in retaliation for the exercise of constitutional rights.

The defendant in *LeRoy* was not faced with the mere possibility of "vindictiveness" but with the certainty of "vindictiveness," because the "vindictiveness" is institutionalized in the statutory scheme. The only distinction between those defendants tried by a judge who are eligible for section 24E disposition and those defendants tried by a jury who are ineligible for section 24E disposition is the assertion of the sixth amendment. Consequently, the risk of a more severe punishment is necessarily greater for defendants who proceed to trial by jury. The *LeRoy* court missed this vital distinction and instead focused on the general proposition that the possibility of a harsher sentence did not burden the right to trial by jury.

Both *Pearce* and *Stynchcombe* relied upon principles promulgated in *Jackson* in formulating the sanction against "vindictive" sentencing. There the Court stated that imposition of punishment "penalizing those who choose to exercise [constitutional rights] . . . would be patently unconstitutional."[119] Nevertheless, subsequent cases have limited the reach of this principle. In *Brady*, the United States Supreme Court adopted the proposition that a guilty plea is not invalid because it was motivated by a desire to accept the probability or certainty of a lesser penalty.[120] The Court, however, qualified this language by writing, "We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."[121] It seems, therefore, that *Brady* did not fully abrogate the prohibition against "vindictive" sentencing.[122]

The *Pearce* preclusion of "vindictive" sentencing is severely undermined in *Bordenkircher*. Here, the United States Supreme Court sustained the conviction of a defendant who pleaded guilty after the state prosecutor threatened to reindict the defendant on more serious charges if he proceeded to trial on the original

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to "chill" the exercise of a constitutional right rendering the statutory scheme unconstitutional. *Id.* at 35-46.

119. 390 U.S. at 581.

120. 397 U.S. at 751. *But see* United States v. Jackson, 390 U.S. 570 (1968). *See also* Parker v. North Carolina, 397 U.S. 790, 799 (1970) (Brennan, J., dissenting).

121. 397 U.S. at 751 n.8.

122. The dissenting opinion of Justices Brennan, Douglas, and Marshall pointed out that the majority opinion undermines the rationale on which *Jackson* was decided. 412 U.S. at 35-46.

charges.[123] Though a vindictive motive was clearly established, the Court nonetheless wrote that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right not to plead guilty."[124] *Jackson*, *Pearce*, and *Stynchcombe* were distinguished on the basis that "in the 'give and take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[125] The four dissenting Justices pointed out that *Jackson* and *Pearce* are clear in their directive that "if the only objective of a state practice is to discourage the assertion of a constitutional right it is 'patently unconstitutional.' "[126]

As indicated, there are competing lines of authority about whether it is constitutional to implement harsher penalties to discourage a defendant from asserting constitutional rights. *Brady* and *Bordenkircher* allow state action to inhibit the assertion of the right to trial by jury in the context of plea bargaining. *Jackson* and *Pearce* prohibit any state action intended to impose a greater penalty in retaliation for the assertion of a constitutional right. Of the two positions, the *LeRoy* court aligns itself with the former. The wisdom of this alignment is unclear.[127]

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123. Under the circumstances of this case, there is no question of "vindictiveness." The prosecutor admitted that his sole reason for telling the defendant that he would indict the defendant on more serious charges if the defendant did not plead guilty was to deter the defendant from exercising his right to trial by jury. 434 U.S. at 361 n.7.

124. 434 U.S. at 364.

125. *Id.* at 363.

126. *Id.* at 372 (Powell, J., dissenting). The *Pearce* decision broadens the language of *Jackson* by invalidating that part of the increased sentence represented by the "vindictive" motive. The state may not avoid the rule in *Jackson* by asserting that vindictiveness is not its sole purpose. If the state action "chills" the exercise of a constitutional right and this is the intended effect then the state cannot immunize itself by claiming it had other legitimate purposes as well. Were such an argument accepted, *Jackson* and *Pearce* would be meaningless.

127. From the standpoint of fairness and constitutional principle, state action to discourage the exercise of the sixth amendment right to trial by jury has considerable ramifications. For an extensive analysis of the fundamental nature of the sixth amendment right to trial by jury see Duncan v. Louisiana, 391 U.S. 145 (1968).

Where a defendant is persuaded not to proceed to trial by jury certain consequences follow which bypass elementary constitutional safeguards. A plea of guilty constitutes a waiver of not only the right to trial by jury but also the right to remain silent, Malloy v. Hogan, 378 U.S. 1 (1964); to present one's witnesses in one's defense, Washington v. Texas, 388 U.S. 14 (1967); to confront one's accusers, Pointer v. Texas, 380 U.S. 400 (1965); and to be convicted of proof beyond all reasonable

The *LeRoy* court upheld its interpretation of sections 24 and 24E because the court considered the statutory scheme to be similar to plea bargaining. Yet the court's analogy is misplaced. First, under plea bargaining, the defendant is faced with the possibility of a more severe sentence on conviction by a jury since the prosecutor can merely recommend the sentence to be imposed. Contrarily, under the statutory scheme, the defendant will certainly face a more severe sentence upon conviction by a jury because the judge's only alternative is to revoke his license. Second, under plea bargaining, the prosecutor is the agent by which the plea is induced whereas under the statutory scheme the statute itself is the agent by which the plea is induced. The prosecutor need not offer any concession to the defendant to induce his plea and the "give and

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doubt. By tolerating the practice of plea bargaining, values of administrative convenience and efficiency take precedence over fundamental constitutional values, yet the Constitution makes no provision that considerations of administration are to assume such a dominant role. *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1405 (1970). Furthermore, the responsibility of the prosecutor does not require that he be satisfied of the defendant's guilt beyond a reasonable doubt. *See* Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 151 (1970). And finally, the encouragement of repentance through threat of greater punishment for refusal to do so undermines not only the sincerity of that contrition but weakens the popular notion of innocence until proven guilty.

An excellent survey of the constitutional arguments in opposition to plea bargaining is found in Judge Levin's concurring opinion in People v. Byrd, 12 Mich. App. 186, 194, 162 N.W.2d 777, 780 (1968).

The justification for state action designed to discourage trial by jury rests largely on the need for judicial economy. Current prosecutorial and judicial resources are inadequate to support the system if jury trial were the primary mode of adjudication. Approximately ninety percent of all federal and state convictions are obtained by way of guilty pleas. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). *See* Santobello v. New York, 404 U.S. 257, 261 (1971). The expeditious disposition of criminal charges serves to lessen the period of pre-trial confinement, protect the public from those offenders who are likely to continue their criminal activity until incarcerated, and enhance the effectiveness of rehabilitative and deterrence value of imprisonment. *Id.* The practice may also result in an optimum sentence from the perspective of both defense counsel and the prosecutor. Nagel & Neef, *The Impact of Plea Bargaining on the Judicial Process*, 62 A.B.A.J. 1020 (1976).

Concomitant with the judicial economy argument, two other justifications for plea bargaining are often suggested. First, given the procedural safeguards accompanying a trial and the high standard of proof, the potential that some guilty persons will be acquited is high. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031-41 (1975). Second, participation by the defendant in determining the nature and degree of his punishment with some certainty alleviates apprehension and may further legitimize the process under which his freedom is restrained. *See* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 576 (1977).

take" of plea negotiations is absent.[128] In short, plea bargaining presupposes that the ultimate sentence the defendant is to receive is negotiable. The penalty under section 24, as interpreted by the court, however, is not negotiable. If the defendant is convicted by a jury then his license is revoked. To the extent that plea bargaining has become institutionalized, this statutory framework and its judicial construction gives the practice the imprimatur of legislative enactment.[129]

The differences between plea bargaining and the statutory scheme create additional pressure to foresake a trial by jury for those defendants charged with driving while intoxicated. As pointed out, under plea bargaining, the defendant is always faced with the possibility, however remote it may be, that the court will not follow the recommendations of the prosecutor. By contrast, the court has no such option with respect to the license revocation provision in view of the *LeRoy* court's construction of sections 24 and 24E. Since most defendants regard the license revocation provision as the most severe of all possible sentences for the offense except for actual incarceration,[130] the risk associated with a jury conviction will serve undoubtedly to dissuade a defendant from insisting on a trial by jury.[131]

If the statutory scheme is not analogous to plea bargaining and if defendants forego their right to trial by jury through fear of a

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128. It is the "give and take" of plea negotiations that the *Bordenkircher* court used to distinguish the fact of that case from the decision in *Jackson*. 434 U.S. at 363. *See* text accompanying note 125 *supra*.

129. Because the legislation, as interpreted by the court, imposes a greater sentence for those persons tried by a jury, the defendant has no one with which to bargain. The legislature has established different treatment for two classes of persons based on the invocation of a constitutional right. The defendant maintained that there is no rational basis for affording section 24E disposition to one group, those persons who are tried before a judge, and denying this alternative disposition to another group, those persons who are tried by a jury. Brief for the Appellant at 11, Commonwealth v. LeRoy, 1978 Mass. Adv. Sh. 2376, 380 N.E.2d 128. The court responded by stating "[t]here is no constitutional equal protection right that such a method of disposition be available to all." *Id.* at 2379, 380 N.E.2d at 130. However, it avoids the issue to say that alternative disposition under section 24E is not constitutionally mandated. While the legislature may not be required to provide defendants with a certain benefit or privilege, it may not grant that benefit on conditions requiring the defendant to relinquish a constitutional right. *See* Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

130. Little, *A Theory and Empirical Study of What Deters Drinking Drivers, If, When and Why*, 23 AD. L. REV. 23, 51 (1971). *See also* Little, *Administration of Justice in Drunk Driving Cases*, 58 A.B.A.J. 950, 952 (1972).

131. *See* note 19 *supra*.

greater penalty, *Jackson* and *Pearce* suggest a due process violation. Such a violation is also apparent under the *Stynchcombe* rationale because the "vindictiveness" is not a mere possibility but a certainty. In other words, under the *LeRoy* court's interpretation of the statutes, the legislature has mandated that a greater penalty be imposed on those persons who are convicted by a jury than those persons who either admit to the charge or accept a jury-waived adjudication. If this result was intended, then *Pearce* and *Stynchombe* condemn it. If this result was unintended, then *Jackson* requires alternatives. In either case, an infringement of an elementary constitutional right is realized.

IV. CONCLUSION

The *LeRoy* court was clearly unreceptive to the defendant's allegations of unfairness and unconstitutionality of the judicial construction of sections 24 and 24E even though there exists both authority and reasoning in support of his position. This reluctance to delve into the issues raised by *LeRoy* is explained partially by the court's perception of the nature of the crime. Traditionally, the person arrested for drunk driving, though not convicted, has been afforded less constitutional protection than more culpable offenders.[132] In addition, the judiciary has shown its disapproval of constitutional challenges to sentencing classifications.[133] The underlying reason for the *LeRoy* decision, however, is the judicial acquiescence in an administrative procedure which makes the consequences of a jury verdict far less palatable than either the admission of guilt or the waiver of trial by jury. For the sake of administrative convenience, basic constitutional safeguards are relegated to secondary status.

The *LeRoy* decision is but one example of the judicial insensitivity to a defendant's call for unfettered access to fundamental constitutional guarantees. The impact of the decision is important not only for its lack of insight but also for its effect on popular perceptions of the criminal justice system. If a typical citizen is to become involved in this system, chances are that it will be in connection with a motor vehicle offense. As one author notes, "The way justice is dispensed in these cases will have much to do with shaping general conceptions of what the system of justice in this

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132. *See* Erwin, *There is no Danger of a Fair Trial in a Drunk Driving Case*, 51 CAL. ST. B. J. 214 (1976).

133. *See* Berger, *supra* note 106, at 46.

country is really like."[134] Most people who are arrested for drunk driving feel that the incident will cause them to lose the respect of family and friends, and also will damage their reputation at work.[135] The law should not inhibit the opportunity for these people to fully vindicate themselves for the purpose of administrative convenience.

Richard D. Haley, Jr.

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134. Little, *An Empirical Description of the Administration of Justice in Drunk Driving Cases*, 7 L. SOC'Y REV. 473, 474 (1972).

135. Little, *supra* note 130, at 49.