


January 2005

Revoke First, Ask Questions Later: Challenging Minnesota's Unconstitutional Pre-hearing Revocation Scheme

Jeffrey S. Sheridan

Erika Burkhardt Booth

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Law Enforcement and Corrections Commons](#), [Legislation Commons](#), [State and Local Government Law Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Sheridan, Jeffrey S. and Booth, Erika Burkhardt (2005) "Revoke First, Ask Questions Later: Challenging Minnesota's Unconstitutional Pre-hearing Revocation Scheme," *William Mitchell Law Review*: Vol. 31: Iss. 4, Article 5.
Available at: <http://open.mitchellhamline.edu/wmlr/vol31/iss4/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**REVOKE FIRST, ASK QUESTIONS LATER:
CHALLENGING MINNESOTA’S UNCONSTITUTIONAL
PRE-HEARING REVOCATION SCHEME**

Jeffrey S. Sheridan[†] and Erika Burkhardt Booth^{††}

I. INTRODUCTION..... 1462

II. THE IMPLIED CONSENT LAW..... 1463

A. *Language of Implied Consent* 1463

B. *Purpose of Implied Consent*..... 1464

C. *Implied Consent Procedure*..... 1466

1. *Authorization for the Test*..... 1466

2. *Administration of the Test*..... 1467

3. *Penalties for Test Failure or Refusal*..... 1468

4. *Review Options and Procedures*..... 1469

III. FEDERAL PRE-HEARING REVOCATION DECISIONS..... 1471

A. *Bell v. Burson* 1472

B. *Mackey v. Montrym*..... 1473

C. *Barry v. Barchi*..... 1474

IV. MINNESOTA PRE-HEARING REVOCATION..... 1476

A. *Pre-Hearing Revocation and Heddan v. Dirkswager* 1476

B. *Statutory Revisions and Davis v. Commissioner of Public Safety*..... 1478

C. *Further Statutory Revisions*..... 1479

V. THE CURRENT CONSTITUTIONAL CHALLENGE: *FEDZIUK V. COMMISSIONER OF PUBLIC SAFETY*..... 1480

A. *Facts*..... 1480

B. *The Argument for Declaring Pre-Hearing Revocations Unconstitutional*..... 1481

† Mr. Sheridan is a shareholder at Strandemo, Sheridan & Dulas, P.A. in Eagan, Minnesota. He represents Ms. Fedziuk in her challenge of Minnesota’s pre-hearing revocation scheme.

†† J.D. Candidate 2005, William Mitchell College of Law; B.S., North Central University 1998, *summa cum laude*. Ms. Booth expresses appreciation to Guy Booth for his unfailing support and patience. She is an employee of Strandemo, Sheridan & Dulas, P.A.

1. <i>Non-Emergency Situation</i>	1481
2. <i>Changes in the Private Interest</i>	1482
a. <i>Availability of Prompt Post-Revocation Review</i>	1482
b. <i>Other Factors Not Present at the Time of Heddan and Davis</i>	1482
3. <i>Changes in the Risk of Erroneous Deprivation</i>	1483
4. <i>Changes in the State's Interest Since Heddan</i>	1484
C. <i>The District Court Decision</i>	1484
VI. CONCLUSION	1487

I. INTRODUCTION

The United States Constitution¹ and the Minnesota State Constitution² prohibit the deprivation of life, liberty, or property at the hands of the government without due process of law. While a license to drive is not a right, the United States Supreme Court and the Minnesota Supreme Court have concluded that “[a] license to drive is an important property interest.”³ “Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.”⁴ In Minnesota, drivers who either refuse to submit to a test of their alcohol content or who test over the limit⁵ have their driver’s licenses revoked by the peace officer who handled their arrest.⁶ This process, known as a pre-hearing revocation, allows for this revocation without any finding by a court of law. The law allowing this practice is the implied consent law.⁷

This analysis of the constitutionality of Minnesota’s pre-hearing revocation scheme begins by explaining the mechanics of Minnesota’s implied consent statute.⁸ Because the United States Supreme Court has established minimum procedural due process

1. U.S. CONST. amend. XIV.

2. MINN. CONST. art. I, § 7.

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

4. *Id.*

5. “It is a crime for any person to drive . . . any motor vehicle . . . when the person’s [blood alcohol content] is .10 or more.” MINN. STAT. § 169A.20 subd. 1(5) (2004). In August of 2005 the limit will be lowered to .08. 2004 Minn. Laws 283.

6. MINN. STAT. § 169A.52, subd. 3 (2004).

7. *Id.* § 169A.51.

8. *Infra* part II.

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1463

protections that must be afforded drivers, this backdrop is examined.⁹ After considering the federal standards for procedural due process, the numerous changes to Minnesota's implied consent statute will be addressed.¹⁰ Next, the current challenge will be discussed, including the factual basis for the challenge, the arguments for the statute's unconstitutionality, and the district court's decision.¹¹ Finally, this note will conclude that, given the dramatic increase in the private interest at stake and the complete lack of any procedural due process protections, Minnesota's current pre-hearing revocation scheme is unconstitutional.¹²

II. THE IMPLIED CONSENT LAW

A. *Language of Implied Consent*

Drivers arrested for drunk driving are subject to two separate penalty schemes. There are criminal penalties associated with "driving while impaired" (DWI).¹³ The DWI laws make it *illegal per se* to operate a motor vehicle if a person has an alcohol concentration at or above a particular level.¹⁴ Alcohol concentration can be measured by a breath test,¹⁵ urine test,¹⁶ or blood test.¹⁷ In addition to criminal penalties, a driver arrested for drunk driving is subject to the penalties provided for in the implied consent statute. The implied consent statute is civil in nature, and therefore imposes a separate and distinct set of penalties or consequences upon the driver.¹⁸ Because there are two systems, the driver is subject to two proceedings; the implied consent proceeding only deals with the civil penalty, the revocation of the

9. *Infra* part III.

10. *Infra* part IV.

11. *Infra* part V.

12. *Infra* part VI.

13. MINN. STAT. § 169A.01 (2004).

14. *Id.* § 169A.20, subd. 1(5).

15. *Id.* § 169A.51, subd. 3. When a breath test is used, the measure is "the number of grams per 210 liters of breath." *Id.* § 169A.03, subd. 2(2).

16. *Id.* § 169A.51, subd. 3. In a urine test, "[a]lcohol concentration' means . . . the number of grams of alcohol per 67 milliliters . . ." *Id.* § 169A.03, subd. 2(3).

17. *Id.* § 169A.51, subd. 3. "Alcohol concentration' means the number of grams of alcohol per 100 milliliters of blood." *Id.* § 169A.03, subd. 2(1).

18. DONALD H. NICHOLS, *THE DRINKING DRIVER IN MINNESOTA* § 3.01 (5th ed. 2004).

driver's license.¹⁹ While these criminal and civil systems have become intertwined, the Minnesota Supreme Court has held that the significant civil implied consent penalties "[do] not render the implied consent law punitive."²⁰

Drunk driving statutes, both civil and criminal, use specialized terms. These terms vary between the states. Minnesota has a civil system based on implied consent.²¹ "Implied consent" technically refers to the consent that every driver of a motor vehicle gives to the state to be tested for alcohol or controlled or hazardous substances in exchange for being granted a license to operate a motor vehicle.²² The term "implied consent" is used by practitioners when referring to Minnesota's administrative license revocation process.²³ To avoid confusion, Minnesota's administrative license revocation scheme will be referred to as "implied consent." A revocation under that scheme will be referred to as an "administrative revocation."

B. Purpose of Implied Consent

The purpose of implied consent laws is to reduce the incidence of drunk driving and the corresponding threat thereby caused to public safety. According to the National Highway Traffic Safety Administration (NHTSA), administrative license revocation laws serve two purposes.²⁴ First, they allow for swift revocation of the driver's license.²⁵ Second, they are a "successful deterrent."²⁶ "Studies have indicated that administrative per se license suspension is . . . perceived by drivers as having the highest severity, certainty, and swiftness of all DUI sanctions, including jail and fines, thereby increasing the deterrence."²⁷ The deterrent effect is

19. *Id.*

20. *Id.* (citing *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 380 (Minn. 1993)). The *Davis* court specifically considered the amount of the license revocation fee, which was \$250.00 in 1993. *Id.* The current license revocation fee is \$680.00. In addition, the civil penalty can now be used to enhance criminal offenses. See discussion *infra* parts IV.B., V.B.2.b.

21. MINN. STAT. § 169A.51, subd. 1 (2004).

22. *Id.*

23. *Administrative License Revocation*, 2 TRAFFIC SAFETY FACTS 1 (Mar. 2004), available at <http://www.nhtsa.dot.gov/people/injury/new-Fact-Sheet03/fact-sheet04/laws-ALR.pdf> (last visited on April 14, 2005).

24. *Id.*

25. *Id.*

26. *Id.*

27. Kerry G. Wangberg, *Administrative Driver's License Suspension*, ARIZ. LAWYER,

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1465

linked to the publicity of the law, so that drivers know and understand the consequences of their actions.²⁸ As of December 2003, forty-one states had “some form of administrative license revocation.”²⁹

Mothers Against Drunk Driving (MADD) rates every state on various factors surrounding its DWI laws.³⁰ One of the nine factors considered is “administrative measures.”³¹ According to MADD, “[r]esearch and experience have shown that a system of progressively severe administrative penalties . . . deters individuals from driving after drinking and affect repeat offenders.”³² These administrative penalties include administrative license revocation, “which protects the public by removing offenders from the highways as quickly as possible.”³³ In Minnesota, after drivers have had their licenses administratively revoked, they receive a seven-day temporary permit to “get their affairs in order.”³⁴ Accordingly, a driver who qualifies for an administrative revocation is not immediately “off the streets.” In 2002, MADD gave Minnesota an overall grade of B- in its report.³⁵ Minnesota’s grade for administrative measures, however, was a B+.³⁶ Minnesota’s implied consent law is listed as a strength.³⁷ According to MADD, the

Dec. 1988, at 29.

28. *Administrative License Revocation*, *supra* note 23, at 2.

29. *Id.* These states include Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

30. MADD, *Rating the States* (2002), at [http://www.madd.org/docs/rts2002/rts section1.pdf](http://www.madd.org/docs/rts2002/rts%20section1.pdf) (last visited on April 14, 2005).

31. *Id.* The other factors are 1) state political leadership; 2) alcohol content testing; 3) state law enforcement programs; 4) underage drinking and drinking and driving control; 5) victim’s issues; 6) criminal justice system; 7) resource allocation; and 8) innovative state programs. *Id.*

32. *Id.*

33. *Id.* Other administrative measures include a .08 blood alcohol content limit, vehicle sanctions, mandatory assessment, primary seat belt laws, and lower alcohol limits for convicted offenders. *Id.* Vehicle sanctions include “alcohol ignition interlock devices, impoundment, confiscation, and forfeiture.” *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* Other administrative strengths include: license plate confiscations, vehicle impoundment/immobilizations, vehicle confiscation/forfeiture, and the fact that refusing an alcohol content test is a crime. *Id.*

implied consent law is strong because a “[r]equest for [an administrative license revocation] hearing does not delay license suspension.”³⁸ In addition, an administrative suspension counts as a prior DWI offense.³⁹

C. *Implied Consent Procedure*

1. *Authorization for the Test*

Every driver who operates a motor vehicle⁴⁰ in Minnesota consents to testing for “determining the presence of alcohol, controlled substances, or hazardous substances.”⁴¹ There are three means of testing: blood, breath, or urine.⁴² A peace officer can require a driver to take such a test if two criteria are met. First, the peace officer must have “probable cause to believe the person was driving, operating, or in physical control of a motor vehicle” while impaired.⁴³ Second, one of the following four factors must be present: (1) a lawful arrest for driving while impaired;⁴⁴ (2) an accident that caused death, personal injury, or property damage;⁴⁵ (3) a refusal of a preliminary screening test;⁴⁶ or (4) the preliminary screening test yielded a result above 0.10.⁴⁷

When a peace officer gives an implied consent test, she must inform the driver that Minnesota law requires submission to the test.⁴⁸ The peace officer must explain why Minnesota requires the test.⁴⁹ The peace officer must tell the driver that refusal to take the test is a crime.⁵⁰ The peace officer must inform the driver that if

38. *Id.*

39. *Id.*

40. “Motor Vehicle” means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires. The term includes motorboats in operation and off-road recreational vehicles, but does not include a vehicle moved solely by human power.” MINN. STAT. § 169A.03, subd. 15 (2004). This article will focus on automobiles.

41. *Id.* § 169A.51, subd. 1(a).

42. *Id.*

43. *Id.*, subd. 1(b).

44. *Id.*, subd. 1(b)(1).

45. *Id.*, subd. 1(b)(2).

46. *Id.*, subd. 1(b)(3).

47. *Id.*, subd. 1(b)(4) (to be amended 2005). On August 1, 2005, the limit will decrease to 0.08. *Id.*

48. *Id.*, subd. 2(1).

49. *Id.*, subd. 2(1)(i)–(iii); *see infra* part II.A.

50. MINN. STAT. § 169A.51, subd. 2(2) (2004).

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1467

she has probable cause to believe that “the criminal vehicular homicide and injury laws” have been violated, “a test will be taken with or without the person’s consent.”⁵¹ Finally, the peace officer must tell the driver that she has a limited time to contact an attorney before making the decision about testing.⁵²

The peace officer decides which type of test is used.⁵³ However, if the driver refuses to take a blood or urine test, that person must be offered an alternative test.⁵⁴ If a driver passes the breath test, a blood or urine test can be required “if there is probable cause to believe that: (1) there is impairment by a controlled substance or hazardous substance that is not subject to testing by a breath test; or (2) a controlled substance listed in schedule I or II . . . is present”⁵⁵ If a person is “incapable of refusal,” a test may be given.⁵⁶

2. Administration of the Test

The preferred method of testing is breath testing.⁵⁷ When a peace officer brings a suspected drunk driver in for a breath test, she must follow a very specific procedure.⁵⁸ The driver must be observed for at least fifteen minutes before she is given the test.⁵⁹ This observation ensures that any alcohol stored in the mouth and nasal passages dissipates.⁶⁰ After the observation period is completed, the peace officer performs the breath test.⁶¹

The statute requires the use of an “approved breath-testing instrument.”⁶² Minnesota uses the Intoxilyzer Model 5000.⁶³ “The

51. *Id.*, subd. 2(3).

52. *Id.*, subd. 2(4). The “right is limited to the extent that it cannot unreasonably delay administration of the test.” *Id.*

53. *Id.*, subd. 3 (to be amended 2005).

54. *Id.*

55. *Id.*

56. *Id.*, subd. 6.

57. The peace officer can decide to use a blood or urine test instead. *Id.* at subd. 3. If the driver refuses a blood or urine test, they must be offered an alternative test. *Id.*

58. NICHOLS, *supra* note 18, § 9.06.

59. *Id.*

60. *Id.* “The lining of the mouth and nasal passages stores alcohol for some time after a person consumes alcohol. Normal processes eliminate residual mouth alcohol within fifteen minutes.” *Id.*

61. *Id.*

62. MINN. STAT. § 169A.51, subd. 5 (2004). The instrument must be “an infrared or other approved breath-testing instrument” *Id.* at subd. 5(a). The test must consist of three parts: “one adequate breath-sample analysis, one control

Intoxilyzer Model 5000 is . . . considered to be the state-of-the-art means to measure breath samples.”⁶⁴ Before administering the test, the peace officer inserts “a new mouthpiece into the breath tube.”⁶⁵ After starting the Intoxilyzer, “the subject has four (4) minutes to deliver an adequate breath sample.”⁶⁶ The driver is then instructed “to take a deep breath and exhale into the mouthpiece of the instrument.”⁶⁷ A tone sounds when the driver blows into the instrument; the driver is instructed to continue blowing until the tone stops.⁶⁸ “The instrument checks minimum flow rate, sample volume, and level slope of the sample. To meet these criteria, it may be necessary to have the driver continue to blow for about seven seconds.”⁶⁹ If the driver does not provide an adequate sample within four minutes of the start of the test, a message stating “insufficient sample” will appear on the instrument.⁷⁰ Providing an insufficient sample is considered refusal.⁷¹

3. Penalties for Test Failure or Refusal

The penalties for refusing to take or failing an implied consent test are severe.⁷² If the driver refuses to take the test, but the peace officer has probable cause to believe the driver was involved in a vehicular homicide, “a test may be required and obtained despite the person’s refusal.”⁷³

If a driver refuses to take an implied consent test and the peace officer certifies “that there existed probable cause to believe the person had been driving, operating, or in physical control of a

analysis, and a second, adequate breath-sample analysis.” *Id.*

63. Nichols, *supra* note 18, § 9.01.

64. *Id.* § 9.05.

65. OPERATOR’S MANUAL, INTOXILYZER 5000 3–4 (1999).

66. Nichols, *supra* note 18, § 9.02.

67. OPERATOR’S MANUAL, INTOXILYZER 5000 3–4 (1999).

68. *Id.*

69. *Id.*

70. *Id.*

71. MINN. STAT. § 169A.51, subd. 5; *Anderson v. Comm’r of Pub. Safety*, 441 N.W.2d 126, 128 (Minn. Ct. App. 1989).

72. Test failure includes: (1) “an alcohol concentration of 0.10 or more; (2) an alcohol concentration of 0.04 or more, if the person was driving, operating, or in physical control of a commercial motor vehicle at the time of the violation; or (3) the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols.” MINN. STAT. § 169A.52, subd. 2 (2004). Effective August 1, 2005, an alcohol concentration of 0.08 or more will constitute test failure. *Id.*

73. *Id.*, subd. 1.

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1469

motor vehicle . . .” while impaired, the individual’s driver’s license will be revoked for one year.⁷⁴ The revocation period for a test failure varies based on several factors.⁷⁵ The base revocation, for drivers with no prior incidents and no enhancing factors, is ninety days.⁷⁶ If the driver is under twenty-one years old, their license is revoked for six months.⁷⁷ If the driver has a “qualified prior impaired driving incident” in the previous ten years, the revocation period is 180 days.⁷⁸ Finally, if the driver’s alcohol content is 0.20 or greater, each revocation period is doubled.⁷⁹

When a driver refuses to take an alcohol content test or fails the test, the peace officer has the authorization to immediately revoke the individual’s driver’s license.⁸⁰ After revocation, drivers are issued a seven-day temporary license to “get their affairs in order.”⁸¹ If it is the driver’s first offense, the driver may request a limited license (work permit) after fifteen days.⁸²

4. Review Options and Procedures

A driver may challenge her revocation in two ways. First, a driver can request an administrative review.⁸³ Second, the driver can request judicial review.⁸⁴ The request for an administrative review “has no effect upon the availability of judicial review”⁸⁵ An administrative review can be requested at any time during the revocation period.⁸⁶ After an administrative review has been requested, the commissioner has fifteen days to respond in

74. *Id.*, subd. 3(a).

75. *Id.*, subd. 4(a).

76. *Id.*, subd. 4(a)(1).

77. *Id.*, subd. 4(a)(2).

78. *Id.* at subd. 4(a)(3). A “[q]ualified prior impaired driving incident” includes prior impaired driving convictions and prior impaired driving-related losses of license.” *Id.* § 169A.03, subd. 22.

79. *Id.*, subd. 4(a)(4). For example, if a driver who was under twenty-one had a blood alcohol content of 0.20 or more, their revocation period would be one year. *See id.*, subd. 4. A driver with no ‘qualified prior impaired driving incidents’ within the past ten years who tested above a 0.20 would have their license revoked for 180 days. *See id.*

80. *Id.*, subsd. 6, 7; *see infra* part II.B.

81. MINN. STAT. § 169A.52, subd. 6(c)(2), 7(c)(2) (2004).

82. *Id.* § 171.30.

83. *Id.* § 169A.53, subd. 1(a).

84. *Id.*, subd. 2.

85. *Id.*, subd. 1(b).

86. *Id.*, subd. 1(a).

writing.⁸⁷

A request for judicial review must be made within thirty days of the driver receiving “a notice and order of revocation or disqualification”⁸⁸ This time limit is jurisdictional; if the request is not served and filed within thirty days, the court cannot hear the petition.⁸⁹ The commissioner does not have to respond to the petition and is not charged court fees.⁹⁰

According to the implied consent statute, judicial reviews are limited to ten issues: (1) “did the peace officer have probable cause to believe the person was driving . . . a motor vehicle . . . in violation of section 169A.20 . . . ?”; (2) was the driver legally placed under arrest for the violation?; (3) was there an accident causing property damage or physical injury, including death?; (4) did the driver refuse the preliminary breath test?; (5) were the alcohol concentration test results over the limit (0.10)?; (6) was the driver informed of their rights and consequences of “taking or refusing the test . . . ?”; (7) did the driver refuse to take the alcohol concentration test?; (8) did the results of the alcohol concentration test show an alcohol concentration over 0.10 or “the presence of a controlled substance listed in schedule I or II . . . ?”; (9) if a commercial vehicle was involved, were the results of the alcohol concentration test over 0.04?; and (10) “[w]as the testing method used valid and reliable and were the test results accurately evaluated?”⁹¹ After the judicial review, the court must either sustain or rescind the revocation.⁹² The decision of the judge may be appealed through the rules of appellate procedure.⁹³

An implied consent revocation qualifies as a prior impaired driving incident.⁹⁴ When calculating civil and criminal penalties for DWIs, a qualified prior impaired driving incident within the past ten years is an aggravating factor.⁹⁵ Accordingly, an implied

87. *Id.*

88. *Id.*, subd. 2(a).

89. *See, e.g.,* Plocher v. Comm’r of Pub. Safety, 681 N.W.2d 698, 701 (Minn. Ct. App. 2004) (citing McShane v. Comm’r of Pub. Safety, 377 N.W.2d 479, 481 (Minn. Ct. App. 1985) *rev. denied* Jan. 23, 1986) (stating that “[t]imely filing is a jurisdictional requirement.”).

90. MINN. STAT. § 169A.53, subd. 2(a) (2004).

91. *Id.*, subd. 3(b).

92. *Id.*, subd. 3(e).

93. *Id.*, subd. 3(f).

94. *Id.* § 169A.03, subd. 22.

95. *See id.* § 169A.20–275.

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1471

consent revocation can be used to enhance the criminal penalties for subsequent DWIs.

In 2001, the Minnesota Court of Appeals held that judicial review of an implied consent revocation will collaterally estop the state from relitigating any issue decided against it in the implied consent hearing.⁹⁶ The court held that collateral estoppel applied when three facts were present: (1) the issues are identical; (2) there is a final judgment on the merits; and (3) the parties are in privity.⁹⁷ The issues in an implied consent hearing and the criminal case are necessarily identical.⁹⁸ In addition, the judge at the implied consent hearing issues a final judgment on the merits.⁹⁹ Finally, the court of appeals held that the attorney general's office (who litigates the implied consent hearings) and the city attorneys (who prosecute the DWI) were in privity with each other.¹⁰⁰ The court held that, if notice of the implied consent hearing was given to the prosecuting attorney, the state would be estopped from relitigating any matter that was decided against it at that hearing.¹⁰¹ Because issues surrounding probable cause were often litigated at implied consent hearings, the application of collateral estoppel would have resulted in the dismissal of criminal cases where there had been a finding of lack of probable cause at the companion implied consent hearing. However, in 2002, the Minnesota legislature legislatively overruled the court of appeals and added a clause to the implied consent statute stating that "[t]he civil hearing . . . shall not give rise to an estoppel on any issues arising from the same set of circumstances in any criminal prosecution."¹⁰²

III. FEDERAL PRE-HEARING REVOCATION DECISIONS

While implied consent revocations are widely used and serve valid purposes, the revocation of a driver's license without the benefit of a judicial hearing raises procedural due process

96. State v. Victorsen, 627 N.W.2d 655 (Minn. Ct. App. 2001).

97. *Id.* at 660.

98. *Id.* at 662.

99. *Id.*

100. *See id.* at 661–62.

101. *Id.* at 664. Because of the difference in evidentiary rules and the burden of proof, a criminal defendant is not collaterally estopped from challenging the issue determined in the implied consent hearing at the subsequent criminal trial. *Id.* at 662 n.1.

102. MINN. STAT. § 169A.53, subd. 3(g) (2004).

concerns. Accordingly, pre-hearing revocation schemes have been challenged on both a federal and state level. The federal decisions establish the minimum level of procedural due process that must be afforded drivers under the United States Constitution. Each state must afford at least that much protection, but may offer greater protection under the law or constitution of the individual state.

A. *Bell v. Burson*¹⁰³

In 1971, the Supreme Court considered a Georgia pre-hearing suspension scheme involving the suspension of driver's licenses for uninsured motorists involved in motor vehicle accidents.¹⁰⁴ Such drivers would have their licenses suspended unless they posted "security to cover the amount of damages claimed by aggrieved parties in reports of the accident."¹⁰⁵

While the Court recognized that a driver's license is a privilege, the Court stated that

[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.¹⁰⁶

The Court also stated that "[a] procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case."¹⁰⁷ Accordingly, the *Bell* court held that

[w]hile 'many controversies have raged about [sic] the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.¹⁰⁸

The Supreme Court concluded that Georgia could not revoke

103. 402 U.S. 535 (1971).

104. *Id.* at 536.

105. *Id.*

106. *Id.* at 539.

107. *Id.* at 540.

108. *Id.* at 542 (internal citations omitted).

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1473

licenses of uninsured drivers involved in motor vehicle accidents without first having a hearing to determine if “there [was] a reasonable possibility of a judgment being rendered against him as a result of the accident.”¹⁰⁹

B. Mackey v. Montrym¹¹⁰

The Supreme Court considered Massachusetts’ implied consent pre-hearing revocation scheme in 1978.¹¹¹ Drivers who refused to take an alcohol concentration test had their licenses revoked for ninety days.¹¹² A driver whose license was revoked could obtain an immediate hearing before the Registrar, who was responsible for implementing the revocations.¹¹³ This hearing included all issues relevant to the basis of the revocation.¹¹⁴

When evaluating this pre-hearing revocation scheme, the Court used the due process balancing test laid out in *Mathews v. Eldridge*.¹¹⁵ The test requires the balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the 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.¹¹⁶

109. *Id.*

110. 443 U.S. 1 (1979).

111. *See id.*

112. *Id.* at 4.

113. *Id.* at 7.

114. *Id.*

115. *Id.* at 10. *Mathews v. Eldridge* is the seminal procedural due process case laying out the balancing test used to determine if the requirement of procedural due process has been met. The issue in *Mathews* was “whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.” *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976). *Mathews* specifically states that “some form of hearing is required before an individual is finally deprived of a property interest,” and holds that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *Mathews* also recognizes that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

116. *Id.* (quoting *Mathews*, 424 U.S. at 335).

The Court recognized that the private interest in a driver's license was substantial because a driver cannot be made "whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension [sic] review procedures."¹¹⁷ However, the Court noted that the private interest was satisfied because the driver could request an immediate hearing.¹¹⁸

When considering the risk of erroneous deprivation, the *Montrym* court held "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error."¹¹⁹ In this case, the possibility of an error could be quickly corrected because of the availability of an immediate hearing.¹²⁰

The state's interest was the preservation of safety on the public highways.¹²¹ The majority found a pre-hearing revocation scheme serves this interest in three ways.¹²² First, it serves as a sanction.¹²³ Second, it encourages drivers to take the alcohol content test.¹²⁴ Finally, drunken drivers are promptly removed from the roads.¹²⁵

After balancing these factors, the Court held that the pre-hearing revocation scheme satisfied the requirements of procedural due process.¹²⁶ This decision was largely predicated on the availability of an immediate hearing before the Registrar.¹²⁷

C. *Barry v. Barchi*¹²⁸

The Supreme Court decided another pre-hearing suspension case on the very same day as *Montrym*. While *Montrym* was a sharply divided five-to-four decision, the Court unanimously agreed in *Barchi* that a New York horse trainer's license suspension law was unconstitutional solely because it permitted pre-hearing suspension

117. *Id.* at 11 (citing *Dixon v. Love*, 431 U.S. 105, 113 (1977)).

118. *Id.* at 12.

119. *Id.* at 13.

120. *Id.*

121. *Id.* at 17.

122. *Id.* at 18.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 19.

127. *Id.* at 18-19.

128. 433 U.S. 55 (1979).

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1475

of a trainer's license without prompt post-suspension review.¹²⁹

In *Barchi*, the Court reviewed a law that allowed for the immediate suspension of a horse trainer's license if a horse from her stable was found to have been drugged at the time of a race.¹³⁰ The law created a rebuttable presumption that the trainer was involved in the drugging or at least negligent in not preventing it.¹³¹ The law provided for a hearing on the suspension, but did not permit the suspension to be stayed pending the hearing or provide for when the hearing must be held.¹³² It also permitted the hearing board thirty days after the hearing to render its decision.¹³³

The Court applied the *Mathews* due process test and found that the state had a compelling government interest in "assuring the integrity of the racing carried out under its auspices."¹³⁴ The Court also recognized the "substantial interest" a trainer has in avoiding a suspension.¹³⁵ Finally, the Court determined that even though the risk of erroneous deprivation in the procedures used to test the horse was "not beyond error," they were "sufficiently reliable to satisfy constitutional requirements."¹³⁶ Following this analysis, the Court held that the State was entitled to impose the pre-hearing suspension.¹³⁷

However, the Court struck down the law because it provided no mechanism to ensure that a hearing would be held "at a meaningful time and in a meaningful manner."¹³⁸ The Court noted that the law "neither on its face nor as applied in this case, assured a prompt disposition of the outstanding issues between Barchi and the State."¹³⁹ Particularly troubling to the Court was the fact that it was as "likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed."¹⁴⁰ The Court held that, despite the State's compelling interest in securing a pre-

129. *Id.* at 68.

130. *Id.* at 59.

131. *Id.*

132. *Id.*

133. *Id.* at 60.

134. *Id.* at 64.

135. *Id.*

136. *Id.* at 65.

137. *Id.* at 66.

138. *Id.* (citing *Armstrong*, 380 U.S. at 552).

139. *Id.*

140. *Id.*

hearing suspension, “once suspension has been imposed, the trainer’s interest in a speedy resolution becomes paramount.”¹⁴¹

IV. MINNESOTA PRE-HEARING REVOCATION

A. *Pre-Hearing Revocation and Heddan v. Dirkswager*¹⁴²

Prior to 1982, Minnesota had a post-hearing revocation scheme.¹⁴³ The arresting officer issued a notice and order of proposed revocation, and the driver received a thirty-day temporary license.¹⁴⁴ The driver then had thirty days to request a judicial hearing.¹⁴⁵ If the driver requested a judicial hearing, the revocation was stayed until the court ruled against the driver.¹⁴⁶ If the driver did not petition for judicial review, the revocation period began at the end of the thirty-day period.¹⁴⁷ “This system resulted in approximately one request for judicial review out of every three implied consent violations reported.”¹⁴⁸ In 1981, there were “10,500 requests for judicial review.”¹⁴⁹ Only 326 of these “drivers were able to avoid license revocation.”¹⁵⁰

In 1982, the Minnesota legislature made substantial changes to the implied consent laws.¹⁵¹ These changes were aimed at reducing “the time lapse between an implied consent violation and the imposition of license revocation.”¹⁵² To this end, a pre-hearing license revocation scheme was enacted.¹⁵³ In addition, the thirty-day temporary license was replaced with a seven-day temporary license.¹⁵⁴ The driver still had thirty days to petition for judicial review.¹⁵⁵ After the driver petitioned for judicial review, a hearing

141. *Id.*

142. 336 N.W.2d 54 (Minn. 1983), *superseded by statute on other grounds, as discussed in* Hamilton v. Comm’r of Pub. Safety, 600 N.W.2d 720 (Minn. 1999).

143. MINN. STAT. § 169.123, subd. 5a (1980) (repealed 2000).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Heddan v. Dirkswager, 336 N.W.2d 54, 57 (Minn. 1983).

149. *Id.*

150. *Id.*

151. MINN. STAT. § 169.123 (1982) (repealed 2000); *see also Heddan*, 336 N.W.2d at 57.

152. *Heddan*, 336 N.W.2d at 57.

153. MINN. STAT. § 169.123, subd. 4 (2004); *Heddan*, 336 N.W.2d at 57.

154. *Id.* § 169.123, subd. 5a(c)(1); *Heddan*, 336 N.W.2d at 57.

155. *Id.* § 169.123, subd. 5(c)(a); *Heddan*, 336 N.W.2d at 58.

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1477

had to be held at the earliest practicable date, and in no event later than sixty days after the filing of the petition.¹⁵⁶ However, the revocation was no longer stayed while the judicial review was pending.¹⁵⁷

Minnesota's original pre-hearing revocation scheme was challenged in *Heddan v. Dirkswager*.¹⁵⁸ Heddan involved a consolidated appeal of three drivers who had unsuccessfully challenged their license revocations and the constitutionality of the new implied consent law in a declaratory judgment action.¹⁵⁹

The supreme court upheld the revocations and held that the pre-hearing revocation scheme did not violate due process.¹⁶⁰ In reaching this determination, the court recognized that "[a] license to drive is an important property interest"¹⁶¹ and "that some form of hearing [was] required before an individual is finally deprived of a property interest."¹⁶² The court stated "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' 'Due process is flexible and calls for such procedural protections as the particular situation demands.'"¹⁶³

The court relied on the United States Supreme Court's review of Massachusetts's implied consent law in *Mackey v. Montrym*¹⁶⁴ and applied the *Mathews*¹⁶⁵ due process balancing test, weighing three factors: 1) the private interest affected; 2) the risk of erroneous deprivation through the procedures used and the probable value of substitute procedural safeguards; and 3) the government's interest, including the function involved and the administrative burdens of additional or substituted procedural requirements.¹⁶⁶

When evaluating the weight to be accorded to the private interest, the court considered 1) the duration of the revocation; 2) the availability of hardship relief; and 3) the availability of prompt

156. *Id.* § 169.123, subd. 6; *Heddan*, 336 N.W.2d at 58.

157. *Id.* § 169.123, subd. 5c(c); *Heddan*, 336 N.W.2d at 57.

158. *See Heddan*, 336 N.W.2d at 55. *Heddan* involved the consolidation of three plaintiffs: Milo Heddan, Paul Lundberg, and Craig Miller. *Id.*

159. *Id.*

160. *Id.* at 63.

161. *Id.* at 58 (citing *Bell*, 402 U.S. at 539).

162. *Id.* at 59 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)).

163. *Id.* at 59 (citations omitted).

164. *See infra* part III.B.

165. 424 U.S. 319 (1976); *see* note 115.

166. *Heddan*, 336 N.W.2d at 59.

post-revocation review.¹⁶⁷ The supreme court held that, while the risk of erroneous deprivation was higher under Minnesota law than the Massachusetts scheme, due to its ability to revoke for test failures, rather than just refusals, this risk was not so heightened as to destroy the balance of the test.¹⁶⁸ The court also held that the public and governmental interests were served through the pre-hearing suspension scheme.¹⁶⁹ According to the court, the pre-hearing suspension scheme provided a means to deter motorists from driving under the influence, allowed for the swift removal of impaired drivers from the road and diminished the likelihood that motorists will seek a hearing, thereby conserving judicial resources.¹⁷⁰ Finally, the court held that the individual's interest was adequately protected in three ways.¹⁷¹ First, the revocation period had a relatively short duration.¹⁷² Second, there was the immediate availability of hardship relief.¹⁷³ Finally, the individual could take advantage of prompt post-revocation relief.¹⁷⁴

*B. Statutory Revisions and Davis v. Commissioner of Public Safety*¹⁷⁵

In 1992, the legislature amended the implied consent law. Under the new statute, a first time offender whose license was revoked under the implied consent statute had to wait fifteen days for a limited license (work permit).¹⁷⁶ If the driver had a prior revocation and failed the test, the waiting period for a limited license (work permit) was ninety days.¹⁷⁷ A driver with a prior revocation who refused to take the test had a waiting period of 180 days.¹⁷⁸

The 1992 revisions survived a constitutional challenge in 1994

167. *Id.* at 63.

168. *Id.* at 62.

169. *Id.* at 63.

170. *Id.*

171. *Id.* at 60.

172. *Id.* The revocation period was six months for test refusal and ninety days for test failure. *Id.*

173. *Id.* Every individual received a seven-day temporary license and was immediately eligible for a limited license (work permit). *Id.*

174. *Id.* A hearing must be "conducted at the earliest practicable date, and in any event no later than sixty (60) days following the filing of petition for review." *Id.* The decision from the hearing had to be filed within fifteen days. *Id.*

175. 517 N.W.2d 901 (1994).

176. See MINN. STAT. § 171.30, subd. 2(a) (1992).

177. *Id.*

178. *Id.*

in *Davis v. Commissioner of Public Safety*.¹⁷⁹ The *Davis* court noted that despite the fact that “limited” or hardship licenses were no longer immediately available, it was not “prepared at this time to conclude that the legislation in question violates either federal or state due process guarantees.”¹⁸⁰ The supreme court noted, however, that it was “troubled by the lack of immediate hardship relief for first time offenders.”¹⁸¹ When issuing its decision, the *Davis* court echoed the Supreme Court’s concern about the pre-hearing revocation scheme, stating that “a court cannot undo an erroneous revocation,” because in such a case “full retroactive relief cannot be provided by a court,” and “even a day’s loss of a driver’s license can inflict grave injury upon a person.”¹⁸²

C. Further Statutory Revisions

In 1998, the Minnesota Legislature further revised the implied consent statute. Prior to 1998, having an alcohol-related revocation on a driver’s record carried some negative impact. However, under the 1998 revisions, implied consent revocations are treated as the functional equivalent of a criminal conviction for every purpose under the impaired driving code. Where the statute previously referred to “prior convictions” for purposes of penalty enhancement and collateral consequences, the statute now refers to “prior qualified impaired-driving incidents.”¹⁸³ That term is defined to include not only convictions but also “prior impaired-driving related losses of license.”¹⁸⁴

The most recent statutory changes were enacted during the 2003 Special Session.¹⁸⁵ In that amendment, the legislature deleted the speedy hearing requirement. The sentence “[t]he hearing must be held at the earliest practicable date, and in any event no later than sixty (60) days following the filing of the petition for review” was removed from section 169A.53, subdivision 3(a).¹⁸⁶ In

179. 517 N.W.2d 901 (1994).

180. *Id.* at 905. The court also addressed the constitutionality of the implied consent advisory. *Id.* at 904. “While [the court was] troubled by the deficiencies of the current advisory, [they were] unwilling at this time to say that the advisory violates procedural due process under the Minnesota Constitution.” *Id.*

181. *Id.* at 905.

182. *Id.* (quoting *Montrym*, 443 U.S. at 11, 21, 30 (Stewart, J., dissenting)).

183. MINN. STAT. § 169A.03, subd. 22 (2004).

184. *Id.* §169A.03, subds. 21–22.

185. *See id.* § 169A.53, subd. 3.

186. *Id.* § 169A.53, subd. 3(a).

addition, the requirement that an order be entered within fourteen days after the implied consent hearing was removed.¹⁸⁷

V. THE CURRENT CONSTITUTIONAL CHALLENGE: *FEDZIUK V. COMMISSIONER OF PUBLIC SAFETY*¹⁸⁸

A. *Facts*

Patricia Fedziuk has been prescribed the drug Adderall, a medication commonly used to treat depression and attention deficit hyperactivity disorder.¹⁸⁹ Adderall contains amphetamine and is a Schedule II controlled substance.¹⁹⁰

On October 23, 2003, Ms. Fedziuk was pulled over on the suspicion of drunk driving. After performing a series of field sobriety tests, the peace officer administered a preliminary breath test. This test indicated that there was no alcohol in Ms. Fedziuk's breath. Despite this fact, Ms. Fedziuk was arrested and taken to the police station. At the police station, Ms. Fedziuk consented to a blood test. The blood test later revealed the presence of amphetamine. Based on this finding, the commissioner of public safety issued a notice and order of revocation for ninety days, beginning April 3, 2004.¹⁹¹

Ms. Fedziuk's attorney requested an administrative and judicial review of the revocation.¹⁹² This request included a copy of a letter from Ms. Fedziuk's doctor, stating that Ms. Fedziuk had been prescribed a medication containing amphetamine.¹⁹³ The request for administrative rescission of the revocation was denied.¹⁹⁴ Ms. Fedziuk then filed a separate action for declaratory judgment to have Minnesota's pre-hearing revocation scheme declared unconstitutional.¹⁹⁵ Ms. Fedziuk also petitioned for judicial review,

187. *Id.* § 169A.54, subd. 3(c). The deleted sentence read "[t]he court shall file its order within fourteen (14) days following the hearing." *Id.*

188. *Fedziuk v. Commissioner of Public Safety* is currently being considered by the Minnesota Supreme Court. Oral arguments were heard on March 7, 2005.

189. Amended Findings of Fact, Conclusions of Law, Order for Judgment, Order Certifying Question to Court of Appeals and Judgment at 2, *Fedziuk v. Comm'r of Pub. Safety, Dakota County Dist. Court, No. C6-04-7458* (Minn. Nov. 22, 2004) [hereinafter AMENDED ORDER].

190. *Id.*

191. *Id.* at 1.

192. *Id.* at 2.

193. *Id.*

194. *Id.*

195. *Id.*

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1481

which was scheduled for hearing on June 1, 2004.¹⁹⁶ On May 27, 2004, the commissioner of public safety decided to rescind Ms. Fedziuk's revocation.¹⁹⁷ However, Ms. Fedziuk's driver's license was listed as "restricted" until June 11, 2004.¹⁹⁸ Ms. Fedziuk's driver's license was revoked for a total of sixty-nine days.¹⁹⁹

B. The Argument for Declaring Pre-Hearing Revocations Unconstitutional

1. Non-Emergency Situation

While *Bell v. Burson*²⁰⁰ is most often cited for the proposition that a driver's license is an important interest entitled to constitutional due process protection, the Supreme Court also stated that "except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."²⁰¹

Emergency situations have been generally defined as situations where "swift action is necessary to protect public health, safety, revenue, or the integrity of public institutions."²⁰² According to the Supreme Court, an emergency situation existed when mislabeled drugs were being sold to the public.²⁰³ This emergency justified a pre-hearing seizure of drugs from store shelves.²⁰⁴ The immediate seizure and destruction of diseased poultry was justified as an emergency because it was necessary to prevent the diseased meat from entering the food chain.²⁰⁵ Finally, the Supreme Court found that an emergency justified the imposition of a federally appointed conservator without the need for a prior hearing in the case of financial abuses by bank management.²⁰⁶

196. *Id.* at 3.

197. *Id.*

198. *Id.*

199. *Id.*

200. 402 U.S. 535 (1971).

201. *Id.* at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

202. *Monthym*, 443 U.S. at 22 n.1 (Stewart, J., dissenting).

203. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 601 (1950).

204. *Id.*

205. *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 320–21 (1908).

206. *Fahey v. Mallonee*, 332 U.S. 245, 252–54 (1947).

The immediate revocation of a driver's license for testing over the legal limit or refusing to test is not such an emergency. Indeed, the Supreme Court conceded that the immediate revocation was not imposed as an emergency measure, but rather as a sanction to induce drivers to submit to testing.²⁰⁷ It would have been difficult to find otherwise, as Massachusetts did not revoke a license at all if the driver submitted to the test and failed. Accordingly, drivers who were demonstrably drunk were not subject to a pre-hearing revocation. The inebriated driver would be permitted to continue driving and endangering the public, while the safe—but uncooperative—driver would be banned.

Minnesota's system also demonstrates the non-emergency status of the pre-hearing revocation scheme. In Minnesota, all drivers, whether they refuse to test or test more than twice the legal limit, are given a seven-day temporary license before the revocation goes into effect.²⁰⁸ Since a driver poses the greatest threat to public safety at or near the time the person is demonstrably impaired, it is illogical to argue that permitting the person to drive for seven additional days is designed to protect the public from an "emergency."

2. *Changes in the Private Interest*

a. *Availability of Prompt Post-Revocation Review*

During the May 2003 Special Session, the legislature took its latest swipe at the implied consent statute and removed the provision requiring "prompt judicial review." District courts are no longer required to hold the implied consent hearings within sixty days of the filing for a petition for review.²⁰⁹ In addition, district courts are no longer required to file their orders within fourteen days following the hearing.²¹⁰

b. *Other Factors Not Present at the Time of Heddan and Davis*

Another factor that weighs heavily in this analysis is the fact that the significance of the implied consent blemish has increased

207. *Montrym*, 443 U.S. at 20 (Stewart, J., dissenting).

208. MINN. STAT. § 169A.52, subd. 7 (2004).

209. *Id.* § 169A.53, subd. 3(a).

210. *Id.*

astronomically since both *Heddan* and *Davis* were decided. In 1983 and 1992, an alcohol-related revocation on a driver's record had a negative impact. But despite the societal stigma, it was nothing more than a temporarily forfeited property interest. However, due to 1998 statutory amendments, an implied consent revocation is now considered the functional equivalent of a criminal conviction for every purpose under the impaired driving code.²¹¹ A prior implied consent revocation can now be used to enhance the level of a subsequent criminal offense from a misdemeanor to a gross misdemeanor—or even a felony.²¹² This is true even if the driver was acquitted of the criminal offense that gave rise to the revocation.²¹³ Under Minnesota's current scheme, if a person had his or her license revoked on three prior occasions within the previous ten years, but had never been convicted, that person would be subject to a felony prosecution, just as though they had been convicted. In addition, prior revocations alone (without companion convictions) are used as a basis for applying mandatory minimum criminal penalties,²¹⁴ for revoking the license plates on every vehicle owned individually or jointly,²¹⁵ and as a basis for forfeiting a person's motor vehicle to the police.²¹⁶

3. *Changes in the Risk of Erroneous Deprivation*

The risk of erroneous deprivation element has shifted the *Mathews* balance toward a need for greater due process protections for the driver. Although today's breath testing instruments are as reliable as those used in the early 1980s, the interests at stake were substantially lower at that time.

Another change since *Heddan* is the availability of affirmative defenses.²¹⁷ The impaired driving code has added at least three affirmative defenses. First, it is an affirmative defense that the test failure was the result of "post-driving consumption."²¹⁸ Second, test failure because of the use of prescription drugs is an affirmative

211. See *infra* part IV.C.

212. MINN. STAT. § 169A.53, subd. 3(a) (2004).

213. *Id.*

214. *Id.* §§ 169A.275, .276.

215. *Id.* § 169A.60.

216. *Id.* § 169A.63

217. See *id.* §§ 169A.53, subd. 3(c), 169A.46, subds. 1,2.

218. *Id.* §§ 169A.53, subd. 3(c), 169A.46, subd. 1.

defense.²¹⁹ Finally, there is an affirmative defense available for “reasonable refusal.”²²⁰ Although the statute recognizes these defenses, the State acts in spite of them. For example, it is the practice of the Department of Public Safety to revoke all drivers’ licenses who test positive for a Schedule I or Schedule II controlled substance without inquiring whether the person had a prescription for the drug involved.²²¹ Drivers who have these defenses available will always suffer an erroneous revocation that will remain in effect until the driver obtains a judicial hearing on the merits. Because the requirement that the hearing take place swiftly has been removed from the statute, it is unlikely that a driver who has one of these defenses will have an opportunity to present it until they have suffered their full revocation.

4. *Changes in the State’s Interest Since Heddan*

The public and governmental interest has remained the same since *Heddan*. Drunk drivers posed a severe threat to the health and safety of the public in 1983 and continue to do so.

In *Heddan*, the Minnesota Supreme Court noted that approximately 33,000 licenses were revoked under the implied consent law in 1981.²²² According to Department of Public Safety statistics, that number was 32,800 in 1999, 33,329 in 2000, 32,074 in 2001, 31,911 in 2002, and 30,991 in 2003.²²³ These numbers indicate that the state’s interest in promoting public safety has remained basically the same under both the 1981 post-hearing revocation scheme and the current pre-hearing revocation scheme.

C. *The District Court Decision*

In addition to requesting administrative and judicial review, Ms. Fedziuk brought a separate action for “declaratory judgment to declare Minnesota’s pre-hearing implied consent revocation scheme unconstitutional.”²²⁴ On November 22, 2004, the district court entered its Amended Findings of Fact, Conclusions of Law,

219. *Id.* § 169A.46, subd. 2.

220. *Id.* § 169A.53, subd. 3(c).

221. *Id.* § 169A.20, subd. 1(7).

222. *Heddan*, 336 N.W.2d at 57.

223. Minnesota Department of Public Safety, IMPAIRED DRIVING INCIDENTS ON RECORD 14 (2003), at www.dps.state.mn.us/OTS/crashdata/2003%20Impaired%20Facts/IDF03GIncidentVer10.pdf (last visited on April 14, 2005).

224. AMENDED ORDER, *supra* note 189, at 2.

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1485

Order for Judgment, and Order Certifying Question to Court of Appeals & Judgment. The Order declares the scheme unconstitutional; however, it allowed the state to enforce the statute pending the appellate court's decision.²²⁵ The Order certified two questions to the Minnesota Court of Appeals as important and doubtful:

A. Does Minnesota's implied consent scheme of pre-hearing revocation offend a driver's state and/or federal constitutional guarantees of due process of law?

B. Is the 1980 version of the implied consent law revived by the declaration that the current implied consent law is unconstitutional? If not, what version, if any, is revived if the current law is struck down?²²⁶

The district court judge attached a memorandum, outlining the district court's reasoning.²²⁷ The Order lays out the numerous statutory revisions since the supreme court considered the pre-hearing revocation scheme in *Heddan*.²²⁸ The Order next applies the *Mathews* due process balancing test and weighs the three factors relevant to the private interest: 1) the duration of the revocation; 2) the availability of hardship relief; and 3) the availability of prompt post-revocation review.²²⁹

The Order states that "revocation periods have risen dramatically since *Heddan*."²³⁰ In 1982, when *Heddan* was decided, a driver's license "would be revoked for a period of ninety (90) days if the driver tested at 0.10 or more."²³¹ If the driver refused to take

225. *Id.* at 4–5.

226. *Id.* The commissioner of public safety filed a motion for expedited review. The Minnesota Supreme Court subsequently took the case from the court of appeals before the latter court heard oral arguments in the matter. Oral arguments were heard at the Supreme Court on March 7, 2005.

227. *See id.* at 8–15. The memorandum first addresses the issues of standing and mootness. *Id.* at 7. The district court concluded that the issue was not moot because it was "capable of repetition but will inevitably escape review." *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)). The court also found that Ms. Fedzuik had standing even though she had not exhausted other remedies available to her at law because exhaustion of these remedies is not required under Minnesota's declaratory judgment statute. *Id.* at 8; *see* MINN. STAT. § 555.01 (2004). The district court did not address whether there was an emergency situation that justified pre-hearing revocations.

228. AMENDED ORDER, *supra* note 189, at 8–11; *see* discussion *supra* part IV.

229. AMENDED ORDER, *supra* note 189, at 8.

230. *Id.* at 12.

231. *Id.*

the test, the revocation was 180 days.²³² Today, the revocation period for test refusal is one year, double the revocation period of 1982.²³³ First time offenders who are under twenty-one years old will have their licenses revoked for six months.²³⁴ A driver with a prior revocation within ten years who tests over 0.10 is subject to a 180-day revocation.²³⁵ The only drivers who receive a ninety-day revocation are first time offenders who test over 0.10 and are older than twenty-one.²³⁶ If the driver tests at 0.20 or more, all the revocation periods double.²³⁷

The most recent statutory change was the removal of the requirement of “prompt judicial review.”²³⁸ The district court found that

[t]he specific language deleted by the 2003 legislature was the basis for the *Heddan* court’s holding that the *Mackey v. Montrym* “prompt post-revocation review” element had been met. The elimination of this critical due process component, in combination with the elimination of immediate hardship relief, has eviscerated the heart of the due process protections found to save the prehearing revocation scheme in *Heddan*.²³⁹

Finally, the court discussed the change in the availability of hardship relief.²⁴⁰ The district court noted that, in 1982, “a driver was immediately eligible for ‘hardship relief’ in the form of a limited license (work permit).”²⁴¹ The 1992 amendments delayed this availability for fifteen days for first time offenders.²⁴² A driver with a prior offense now has to wait ninety days for a work permit.²⁴³ A driver with a prior offense who refuses to take an implied consent test is not eligible for a work permit until 180 days after the revocation period.²⁴⁴ These amendments had been approved by

232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 11.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

2005]

REVOKE FIRST, ASK QUESTIONS LATER

1487

the supreme court in *Davis*.²⁴⁵ However, the district court noted that the *Davis* court had trepidations about the trend of statutory amendments.²⁴⁶ The district court judge stated that “[a]lthough the [*Davis*] court ultimately upheld the statute, it sent a clear message to the legislature that it had pushed as far as the constitution would bear.”²⁴⁷

VI. CONCLUSION

The license revocations of *Heddan*'s day no longer resemble those of today. The Minnesota legislature has dramatically revised the implied consent statute and removed the very protections that the *Heddan* court relied on for the statute's constitutionality. Minnesota drivers no longer have the right to prompt review of their license revocations. In addition, the risk of erroneous deprivation has increased because of the availability of affirmative defenses. Finally, the private interests involved in a driver's license revocation have increased dramatically because a license revocation can now be used to enhance *criminal* charges and penalties. And yet, while the stakes associated with the revocation have dramatically increased, the due process protections afforded to drivers have steadily declined. If the Minnesota legislature wants to increase the civil penalties of an implied consent revocation to be identical to a criminal conviction, the procedural due process protections afforded to drivers must be greater, not less, than the protections that were afforded when the stakes were lower. The enhanced private interest is no longer adequately protected and clearly outweighs the public interest. This enhanced private interest, combined with the removal of the provision providing prompt post-revocation review, tips the scales of *Mathews* and mandates greater procedural due process protection. *Fedzuik* provides the Minnesota Supreme Court with the opportunity to act on their warnings to the legislature that continued erosion of the procedural due process provided to drivers in the implied consent arena will render the statute unconstitutional.

245. *Id.*

246. *Id.*

247. *Id.*