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The Demise of the Emergency Doctrine of Procedural Due Process: Mackey v. Montrym

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The Demise of the Emergency Doctrine of Procedural Due Process: *Mackey v. Montrym* [1]—Under the Massachusetts automobile implied consent law,[2] a motorist arrested for drunken driving is required to take a breathalyzer test when requested to do so by an arresting police officer. The statute provides that if upon such arrest the driver refuses a police officer's request to take a breathalyzer test, his license shall be summarily suspended for ninety days. The Registrar of Motor Vehicles has no discretion in ordering suspension once he has received the arresting officer's report of the incident.[3] Upon surrendering his license, however, a driver is entitled to an immediate hearing before the Registrar,[4] but the Massachusetts statute contains no provision for notifying the licensee that such a hearing is available.

Appellee Donald Montrym's license was suspended pursuant to this statute.[5] Prior to suspension of Montrym's license, however, a state court dis-

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[1] 443 U.S. 1 (1979).

[2] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979). This section provides in relevant part:

> Whoever operates a motor vehicle upon any [public] way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor . . . . If the person arrested refuses to submit to such test or analysis, after having been informed that his license . . . to operate motor vehicles . . . shall be suspended for a period of ninety days for such refusal, . . . the police officer before whom such refusal was made shall immediately prepare a written report of such refusal . . . . Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person . . . for a period of ninety days.

Id.

[3] *Id.*

[4] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(g) (West Supp. 1979) provides that

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

Id.

[5] Appellee Donald Montrym was arrested on May 15, 1976, for driving under the influence of intoxicating liquor and driving to endanger, after his vehicle was involved in a collision in Massachusetts at about 8:15 P.M. At the police station, Montrym refused to take a breathalyzer test when requested to do so at about 8:45 P.M. He later argued that he had not been advised by the police officer of the summary suspension penalty that would attach if he refused. Twenty minutes later, after consulting with his lawyer, Montrym sought to retract his refusal, but the officers declined his request. They relied on the portion of the statute which states that once a person has refused to take the test "no such test or analysis shall be made but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal." MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979). The officer made the required report and forwarded it to the Registrar. 443 U.S. at 5.

missed the complaint brought against appellee for driving under the influence of intoxicating liquor.[6] Dismissal apparently was predicated on the officer's refusal to administer the breathalyzer test after appellee had sought to retract his initial refusal.[7] Appellee's attorney immediately wrote the Registrar informing him of the dismissal of the charge but failed to enclose a certified copy of the court's order.[8] The Registrar formally suspended appellee's license, which was surrendered on the following day.[9] Appellee did not exercise his right to a hearing before the Registrar but filed for an immediate administrative appeal and, through his counsel, demanded return of his license.

Appellee then chose to forego the administrative appeal and instead brought a class action suit in the United States district court.[10] Montrym claimed that the Massachusetts statute was unconstitutional on its face for failing to provide a hearing prior to suspension in accordance with due process requirements. The district court granted appellee's motion for pretrial summary judgment on the basis of stipulated facts.[11] Relying on the Supreme Court's decision in *Bell v. Burson*,[12] the district court declared the statute unconstitutional on its face for violating the due process clause.[13] The court concluded that the fourteenth amendment guaranteed Montrym some form of pre-suspension hearing.[14] On motion of the Registrar, the court reconsidered its opinion in the light of *Dixon v. Love*,[15] a Supreme Court decision which in the interim had upheld the constitutionality of an Illinois statute authorizing the summary suspension of a driver's license prior to an evidentiary hearing. Distinguishing *Love* on several grounds, the court denied the Registrar's motion to reconsider the denial of his prior motions for a stay and modification of judgment.[16]

On direct appeal, in a five to four decision, the United States Supreme Court reversed the district court and HELD: a state's interest in promoting public safety on its highways without undue administrative or fiscal burden outweighs a driver's substantial interest in the continued possession and use of

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[6] *Id.*
[7] *Id.* at 5-6.
[8] *Id.* at 6.
[9] *Id.* at 6-7.
[10] *Id.* at 8.
[11] Montrym v. Panora, 429 F. Supp. 393, 400 (D. Mass. 1977).
[12] 402 U.S. 535 (1971). See text at note 33 *infra*.
[13] Montrym v. Panora, 429 F. Supp. 393, 400 (D. Mass. 1977).
[14] *Id.* at 399.
[15] 431 U.S. 105 (1977). See text at note 39 *infra*.
[16] Montrym v. Panora, 438 F. Supp. 1157, 1161 (D. Mass. 1977). The majority distinguished *Love* on three grounds. First, it found the private interest at stake under the Massachusetts scheme greater than that in *Love*, because the Massachusetts statute fails to provide for any form of emergency relief. Second, it saw a much greater risk of error under the Massachusetts procedures than under Illinois law which bases suspension on a record of fully adjudicated criminal convictions. Finally, the majority concluded that the Massachusetts statute does not enhance highway safety to the extent that the Illinois statute does, because it removes from the road only those drivers who refuse to take the breathalyzer test, not those who take the test and fail it. *Id.* at 1159-61. The dissenting judge thought that *Love* controlled. *Id.* at 1161.

his driver's license and justifies the summary suspension of the license of an alleged drunken driver pending a prompt post-deprivation hearing.[17] Employing the balancing test set forth in *Mathews v. Eldridge*,[18] the Court further held that a state's suspension procedures must reasonably guard against an erroneous deprivation of a protectible property interest.[19] The Court nevertheless found the requirement of a corroborated police affidavit to be a sufficiently reliable safeguard against a possible erroneous deprivation[20] and upheld the Massachusetts statute.[21] In contrast to the majority, the four dissenting justices concluded that the state's interests were not sufficiently compelling to justify establishing an exception to the traditional requirement of a hearing before a state may act finally to deprive a person of a protectible property interest.[22]

In *Montrym* the Supreme Court has taken a significant step toward limiting the traditional due process requirement of pre-deprivation hearings when property interests are at stake.[23] By upholding the Massachusetts scheme of summary license suspensions, the Court has replaced its due process require-

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[17] Mackey v. Montrym, 433 U.S. 1, 19 (1979).

[18] 424 U.S. 319, 335 (1976).

[19] 433 U.S. at 13.

[20] *Id.* at 14.

[21] *Id.* at 19.

[22] *Id.* at 21-22. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[23] In 1978, at the time the appeal was taken, twelve states in addition to Massachusetts provided for license suspensions without a prior hearing. Six of these had not been subject to constitutional challenge:

> ALA. CODE § 32-6-16 (1975); ALASKA STAT. § 28.35.031 (1975); IOWA CODE ANN. § 321.137-138 (West Supp. 1976); MISS. CODE ANN. § 63-11-21 to 23 (1972); MONT. REV. CODES ANN. § 32.2142.1-2 (Supp. 1972); R.I. GEN. LAWS § 31-27-2.1 (1969).

Four statutes had been upheld by state court decisions:

> MO. ANN. STAT. § 564.441 (Vernon) (upheld, Jones v. Schaffner, 509 S.W.2d 72 (Mo. 1974)); N.H. REV. STAT. ANN. § 262-A-69e (Supp. 1972) (upheld, Daneault v. Clarke, 113 N.H. 481, 309 A.2d 884 (1973)); N.M. STAT. ANN. § 64-22-2.12 (1953) (upheld, In re McCain, 84 N.M. 657, 506 P.2d 1204 (1973)); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1972) (upheld, Ballou v. Kelly, 12 Misc. 2d 178, 176 N.Y.S.2d 1005 (1958)).

Two such statutes had been indirectly affirmed by state supreme courts:

> DEL. CODE tit. 21, § 2742 (1974) (Broughton v. Warren, 281 A.2d 625 (Del. Ch. 1971)); ME. REV. STAT. tit. 29, § 1312(2) (Supp. 1976) (Opinion of the Justices, 255 A.2d 643 (Me. 1969)).

The three federal courts which had had occasion to deal with the constitutionality of such statutes have struck them down as a denial of due process:

> Chavez v. Campbell, 397 F. Supp. 1285 (D. Ariz. 1973), striking ARIZ. REV. STAT. § 28-691; Stone v. Kentucky Dep't of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974), striking KY. REV. STAT. § 186.565; Holland v. Parker, 469 F.2d 1013 (8th Cir. 1972) (S. Dak.), striking S.D. COMPILED LAWS ANN. § 32-23-10.

Following Schmerber v. California, 384 U.S. 757 (1966), such statutes would most likely be held as not violative of the right against self-incrimination and the right against unlawful searches and seizures.

ment of a pre-deprivation hearing in all but emergency circumstances with an approach which requires a pre-deprivation hearing only when the private interests at stake outweigh those interests advanced by the state. The *Eldridge* balancing of interests test,[24] originally adopted by the Court to determine merely the type of pre-deprivation hearing required in a given circumstance, is now used to determine whether a hearing is required at all.

Cases in which the Court has used this approach[25] suggest that a state no longer need assert traditional emergency circumstances to justify the omission of a pre-deprivation hearing. While these cases have involved only suspensions of state licenses, the substantiality test now employed suggests that a private individual will have difficulty asserting a property interest of sufficient weight to compel such a hearing. Furthermore, in the absence of a prior hearing, the Court requires only that the pre-deprivation procedures provide minimal safeguards to insure against the possibility of erroneous deprivations. These safeguards need not include an opportunity for response by the individual faced with immediate deprivation. Thus, while the Court does require a prompt post-deprivation hearing when summary procedures are used, *Montrym* nevertheless will increase the possibility of erroneous deprivations of property by refusing to require adequate pre-deprivation safeguards against state error.

This casenote will examine how the Court in *Montrym* applied the *Eldridge* three-pronged test to determine whether a hearing is required prior to suspending a driver's license. It will first explain the components of the *Eldridge* test and review the driver's license cases which recently have come before the Court. The reasoning employed by the majority and dissenting opinions in *Montrym* will then be examined. After a brief discussion of procedural due process requirements as they existed prior to *Montrym*, the *Montrym* opinion will be analyzed in the light of these requirements. It will be suggested that *Montrym* demonstrates that the Court has modified substantially the traditional due process requirements of notice and an opportunity to be heard prior to the deprivation of property. Finally, this casenote will suggest that a pre-deprivation hearing could be provided without unduly burdening the attainment of legitimate state objectives.

I. *Mathews v. Eldridge* and the Drivers' License Cases

The three-pronged balancing test employed by the Court in *Montrym* was first articulated fully in *Mathews v. Eldridge*.[26] The Court developed the test to determine the requirements of due process when a state seeks to deprive a person of a protectible property interest. In *Eldridge*, the Court considered whether the due process clause requires that a recipient of Social Security benefits be given the opportunity for an evidentiary hearing prior to the termination of such benefits. Justice Powell, writing for the majority, recognized

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[24] 424 U.S. 319, 335 (1976).

[25] *See, e.g.*, Barry v. Barchi, 443 U.S. 55 (1979); Dixon v. Love, 431 U.S. 105 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

[26] 424 U.S. 319 (1976).

at the outset the recipient's property interest in such benefits.[27] He also acknowledged that prior rulings of the Court required that notice and some meaningful opportunity for response be provided to a recipient before a state may finally terminate such an interest.[28] Having recognized a protectible property interest, Justice Powell then considered the nature of the hearing that due process would require. In so doing he formulated a test to determine the type of hearing necessary and to evaluate the administrative procedures provided by statute.[29] The test sets forth three factors for consideration:

> 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.[30]

These factors were then weighed to test the sufficiency of the procedures used to terminate the payment of Social Security benefits.

After balancing the interests involved and the procedures used, Justice Powell concluded that a full hearing was not necessary. The majority found that since discontinuance of benefits rested on a sharply focused and easily documented medical assessment, and since the recipient had full access to all the information relied upon by the state as well as an opportunity to respond before a final decision was made, due process did not require a more elaborate hearing procedure than that provided by the agency involved.[31]

Prior to *Mackey v. Montrym,* the Supreme Court had twice considered the state's right to deprive a private citizen of his driver's license without a prior hearing.[32] In *Bell v. Burson,*[33] the Court established that a driver has a protectible property interest in his driver's license which cannot be denied without the procedural due process required by the fourteenth amendment.[34] Georgia's Motor Vehicle Safety Responsibility Act required that the license of an uninsured motorist involved in an accident be suspended unless the motorist posted security to cover the amount of the damages claimed by aggrieved parties.[35] An administrative hearing was conducted prior to the suspension, but it excluded any assessment of the motorist's fault in the accident. The Court held that since potential liability was an important factor under the scheme, the state could not, consistent with due process, exclude consideration of fault from its prior hearing.[36] The Court, however, declined to require a

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[27] *Id.* at 332.
[28] *Id.* at 335.
[29] *Id.*
[30] *Id.* at 335.
[31] *Id.* at 345-46.
[32] Dixon v. Love, 431 U.S. 105 (1977); Bell v. Burson, 402 U.S. 535 (1971).
[33] 402 U.S. 535 (1971).
[34] *Id.* at 539.
[35] *Id.* at 535-36.
[36] *Id.* at 541.

full adjudication of the question of liability.[37] While recognizing the existence of an emergency exception to due process requirements, the Court nonetheless held that this situation did not present such an emergency.[38]

After *Burson,* the Court in *Dixon v. Love*[39] upheld an Illinois statute which mandates license suspension without a prior hearing for a driver who has accumulated a record of three traffic violations within a twelve-month period.[40] The Court acknowledged the driver's protectible property interest but nevertheless concluded that due process does not require a hearing prior to suspension. Employing the *Mathews v. Eldridge* balancing test, the Court found that a state's interest in highway safety sufficiently outweighs a driver's interest in his license to justify the initial summary process.[41] The Court noted that each of the prior convictions concerned in such a case have been fully adjudicated and that additional procedures would therefore be unlikely to have a significant value in reducing the number of erroneous deprivations.[42] It noted further that the statute contains a special provision for hardship cases and for holders of commercial licenses.[43] Consequently, the Court found that where the interests of the state outweigh those of the individual, and where sufficient procedural safeguards are available, a person's license can be suspended without a prior hearing. It is against the background of these cases that the Court decided *Montrym.*

II. The *Montrym* Decision

A. *The Majority's Rationale*

In approaching the due process issue in *Montrym,* Chief Justice Burger, writing for the majority, accepted the initial premise that a driver's license is a protectible property interest.[44] Having done this, he then attempted to de-

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[37] *Id.* at 540.

[38] *Id.* at 542.

[39] 431 U.S. 105 (1977).

[40] The Illinois statute authorizes suspension or revocation where a licensee:

> [h]as been convicted of not less than 3 offenses against traffic regulations governing the movement of vehicles . . . committed within any 12 month period so as to indicate the disrespect for traffic laws and a disregard for the safety of other persons on the highways; conviction upon 3 charges of violation of Section 11-601 of this Act committed within a period of 12 months shall be deemed grounds for the revocation or suspension of a license or permit under this Section . . . .

Ill. Rev. Stat. ch. 95½, § 6-206(a)(2) (Smith-Hurd 1979).

> Upon suspending or revoking the license . . . the Secretary of State shall immediately notify such person in writing of the order revoking or suspending the license or permit.

Id. § 6-206(c)(1).

[41] 431 U.S. at 115 (1977).

[42] *Id.* at 113-14.

[43] *Id.* at 113.

[44] 443 U.S. at 10.

A separate line of due process cases dealing with termination of government employment has developed a mode of analysis to determine whether or not a protectible property interest is at stake at all. *See, e.g.,* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972);

termine what process was due in order to prevent an erroneous deprivation of that interest.[45] As had the district court,[46] the Supreme Court sought its answer in the balancing test developed earlier in *Matthews v. Eldridge*.[47] In contrast to the lower court, however, the Supreme Court found the facts before it to be indistinguishable from those of *Dixon v. Love* and, therefore, concluded that a pre-suspension hearing was not necessary to satisfy due process requirements.[48]

The Court first examined the private interest at stake in *Montrym*. Acknowledging that a person's interest in the continued possession and use of his license to drive is a substantial one, the Court nevertheless found it less substantial than the interest involved in *Love*. Under the Massachusetts statute, suspension occurs for a maximum of ninety days, while the Illinois scheme permits suspension for up to a year.[49] Additionally, the Court noted that while a provision for hardship relief exists in the Illinois statute, it is available only after the driver's license has been suspended and the driver has demonstrated his eligibility for such relief.[50] An ordinary post-suspension hearing does not have to be granted for twenty days,[51] while a Massachusetts driver is entitled to a hearing before the Registrar immediately upon suspension.[52] Thus, the Court ruled that the district court was in error in failing to

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Board of Regents v. Roth, 408 U.S. 564 (1972). According to the analysis of these cases, a protected property interest exists only to the extent that it has been granted protection by the applicable statute. "[T]he sufficiency of [a] claim of entitlement must be decided by reference to state law." 426 U.S. at 344 (footnote omitted). Speaking for the Court in Arnett v. Kennedy, Justice Rehnquist declared that "[w]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet." 416 U.S. at 153-154. At least one scholar has remarked upon the Court's preference for avoiding the "balancing" approach by using the *Arnett* analysis to find that there is no property interest for the due process clause to protect. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 29 n.5 (1976). The Court might well have adopted a similar mode of analysis here were it not for the fact that prior to its development the Court had already declared a driver's license to be a protected property interest. Bell v. Burson, 402 U.S. 535, 539 (1971).

[45] 443 U.S. at 10.

[46] Montrym v. Panora, 429 F. Supp. 393, 398-400 (D. Mass. 1977).

[47] 424 U.S. 319, 335 (1976). See text at note 30 *supra*.

[48] 443 U.S. at 11.

[49] *Id.*

[50] *Id.* at 12. The Illinois statute provides that in limited circumstances a person whose license is suspended or revoked may obtain a restricted permit for commercial use or in case of hardship by submitting to the Secretary of State an affidavit setting forth facts establishing his eligibility for relief. Dixon v. Love, 431 U.S. 105, 110 n.7 (1977).

[51] *Id.* at 109-10.

[52] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(g) (West Supp. 1979). While the law itself merely provides that a person whose license is suspended "shall be entitled to a hearing before the registrar . . . ," the parties stipulated that the hearing would be available the moment the driver surrenders his license. 443 U.S. at 7-8 n.5. The Registrar represented that a decision could be obtained within one or two days of the receipt of the suspension notice. *Id.*

consider the relative length of suspension periods and the timeliness of post-suspension review in assessing the weight of the private interest involved.[53]

The Court moved next to the second step of the *Eldridge* test by considering the likelihood that an erroneous deprivation might result from the procedure used.[54] Chief Justice Burger emphasized that the Court's construction of the due process clause had never required that the procedures used to guard against erroneous deprivations be perfectly error-free.[55] Additionally, when prompt post-deprivation review is available to correct administrative errors, the Court generally has required only that the pre-deprivation process provide a reasonably reliable basis for concluding that the facts justifying the official action are as the government official warrants them to be.[56] As a result, the majority found that the procedures called for in the Massachusetts statute are sufficiently reliable to meet this standard.

The Court equated the criteria required under the Massachusetts summary suspension law with the objective facts relied upon in *Love*.[57] The Illinois statute at issue in *Love* calls for license suspension after a driver has been convicted of three traffic violations in one year.[58] Under the Massachusetts statute, cause for license suspension arises if the driver has been arrested for driving while under the influence of an intoxicant, if there is probable cause for arrest, and if the driver refuses to take a breathalyzer test. Such refusal must be witnessed by a third person.[59] Thus, the Court ruled that the district court had overstated the risk of error in the statute's reliance on the affidavit of a law-enforcement officer. It emphasized that such an officer is well-suited by his training as an observer and investigator to make the determination required of him.[60] It also pointed out that the arresting officer would ordinarily have provided the driver with an informal opportunity to tell his side of the story.[61] The Court added that since the officer is personally subject to civil liability for unlawful arrest, he has every incentive to report the facts accurately and truthfully.[62]

While finding the arresting officer well-suited to make the determination required under the Massachusetts statute, the Court acknowledged that a material clerical error or deficiency could exist in his report. Chief Justice Burger saw little value, however, in the pre-suspension non-evidentiary hearing contemplated by the district court.[63] He found that as the statute is cur-

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[53] 433 U.S. at 12. The district court on rehearing had emphasized the lack of provision for emergency relief in the Massachusetts statute. Montrym v. Panora, 438 F. Supp. 1157, 1159 (D. Mass. 1977).

[54] 443 U.S. at 13-17.

[55] *Id.* at 13.

[56] *Id.*

[57] *Id.*

[58] Dixon v. Love, 431 U.S. 105, 108 n.3 (1977).

[59] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979). See note 2 *supra*.

[60] 443 U.S. at 14.

[61] *Id.*

[62] *Id.*

[63] Montrym v. Panora, 429 F. Supp. 393, 399 (D. Mass. 1977).

rently written the Registrar's scrutiny of the officer's report for errors filled essentially the same function as would a hearing.[64] The Registrar would note any errors or deficiencies; if he found the report materially defective he would have no power to suspend the license.[65] Thus, the Court concluded that the hearing proposed by the district court would not add to the procedural safeguards already available.

The Court also found that such a hearing would not resolve any factual disputes. First, the Court thought it unlikely that genuine factual disputes would frequently arise.[66] Chief Justice Burger noted that Montrym's alleged factual dispute was a legal one, namely whether the state court's finding that the police later refused to administer the breathalyzer test was binding on the Registrar as a matter of collateral estoppel.[67] Second, the Court pointed out that if there were factual disputes, alerting the Registrar of their existence would be pointless. Since all that Montrym sought was available immediately following suspension,[68] and since the procedures provided by the state contained reasonable safeguards against erroneous deprivation, the Court found no reason to require a pre-suspension evidentiary hearing.[69] Additionally, the *Montrym* Court did not think the Massachusetts legislature's refusal to allow a pre-suspension evidentiary hearing irrational.[70] It pointed out further that since the statute gives the Registrar no discretion to stay a license suspension pending the outcome of an evidentiary hearing, it would be futile to bring factual disputes before him prior to suspension.[71]

Having found the statutory procedures reasonable in their avoidance of an erroneous deprivation of a protectible property interest, the Court addressed the last elements of the *Eldridge* test—the governmental function involved. In so doing the Court evaluated the state interests served by the summary procedures used in light of the possible administrative and fiscal burdens which might arise from the use of the substitute procedures sought. The Court noted that it has traditionally granted states substantial leeway in adopting summary procedures to protect public health and safety.[72] It has permitted summary seizures of property to protect public health or safety in situations where delay would have defeated the government's objective.[73] It found that the Massachusetts statute, like that in *Love*, is primarily concerned with preserving highway safety. Thus, the Court concluded, as it did in *Love*, that the state's interest in removing drunken drivers from the road justified summary deprivation.[74]

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[64] 443 U.S. at 16.

[65] *Id.*

[66] *Id.* at 14. The Court based this assumption on the fact that Montrym did not dispute his arrest or the probable cause for his arrest. *Id.*

[67] *Id.* at 14-15.

[68] *Id.* at 15.

[69] *Id.* at 17.

[70] *Id.*

[71] *Id.* at 16.

[72] *Id.* at 17. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[73] 433 U.S. at 17-18. *But see* 407 U.S. 67, 91 (1972).

[74] 433 U.S. at 19.

The Court determined that the summary procedure of the implied consent statute serves this important state interest in three ways: the threat of summary sanction serves as a deterrent to drunk driving; it provides a strong inducement to take the breathalyzer test and thus furthers the state's interest in obtaining reliable evidence for use in subsequent criminal proceedings; and the prompt removal of drivers who refuse to take the test contributes to the safety of the highways.[75] The Court found the summary and automatic character of the suspension sanction to be critical in attaining these legitimate objectives.

In addition to finding that a pre-suspension hearing would hinder the state's interest in preserving highway safety, the Court found that such a hearing would impose substantial administrative and fiscal burdens as well.[76] The existence of a pre-suspension hearing process would likely encourage drivers to refuse the breathalyzer test and demand a hearing as a dilatory tactic, thereby resulting in a sharp increase in the number of hearings. Finally, such an increase would considerably add to the cost and effort required by the state.[77] Thus, Chief Justice Burger found the state's compelling interest in highway safety and its interest in avoiding undue administrative and fiscal burdens sufficient justification for summary suspension of a license pending the outcome of a prompt post-deprivation hearing.[78] The dissent in contrast concluded that the state interests advanced did not meet the Court's previously articulated emergency exception to the requirement of a pre-deprivation hearing.

B. *The Dissent's Rationale*

The dissenting opinion[79] emphasized prior decisions of the Court[80] which construed procedural due process to include a presumptive requirement of notice and a meaningful opportunity to be heard prior to a state's final deprivation of a person's property.[81] It emphasized that where a deprivation is irreversible, as is the case with the suspension of a driver's license, the requirement of some kind of hearing is all the more important.[82] The dissent noted the Court's prior ruling in *Bell v. Burson,* which held that except in emergency situations the state must afford a prior hearing before a driver's license may be suspended.[83] It conceded that the dimensions of a prior hearing could vary with the nature of the case, the interests affected, and the prompt availability of adequate post-deprivation procedures.[84] It insisted,

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[75] *Id.* at 18.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 19.
[79] The opinion was written by Justice Stewart and joined by Justices Brennan, Marshall, and Stevens.
[80] Fuentes v. Shevin, 407 U.S. 67 (1972); Boddie v. Connecticut, 401 U.S. 371 (1970); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).
[81] 433 U.S. at 20.
[82] *Id.* at 21.
[83] 402 U.S. 535, 542 (1970).
[84] 433 U.S. at 21.

nevertheless, that absent an emergency situation, a post-deprivation evidentiary hearing was not constitutionally sufficient.[85]

The dissent also argued that *Dixon v. Love* was not controlling.[86] It noted first that the appellee in *Love* had not contested the factual basis for his license revocation or the procedures which followed.[87] Rather, the only issue before the Court in *Love* was appellee's right to a leniency hearing in advance of revocation.[88] For this reason, the dissent stated that *Love* established no broad exception to the normal presumption in favor of a prior hearing.[89] Furthermore, the dissent regarded the suspension procedures provided under the Massachusetts statute as less reliable than those which formed the basis of revocation in the Illinois statute involved in *Love*.[90] It pointed out that license revocation in Illinois was premised on a record of fully adjudicated convictions for traffic violations.[91] Under the Massachusetts statute, however, license suspension is based solely on the affidavit of a police officer that the driver had been arrested for drunken driving and has refused to take a breathalyzer test. The dissent argued that the official records of criminal convictions relied upon in *Love* could not be equated with the unchallenged observations of a police officer.[92] The dissent concluded that the revocation scheme upheld by the Court in *Love* did not support the majority's approval of the Massachusetts statute.

Nor did the dissent believe that the interests advanced by the state justify *ex parte* action by the state in this instance.[93] While recognizing that protecting the public from unsafe drivers was a significant state interest, the dissent argued that precedents for *ex parte* action have not turned simply on the significance of the governmental interest asserted.[94] Rather they have relied upon the extent to which that interest will be frustrated by the delay necessitated by a prior hearing.[95] The dissent found that in this situation the statute does nothing to remove drunken drivers from the road. The motorist who takes the breathalyzer test and fails may keep his driver's license, a result which the dissent found wholly at odds with the notion that summary suspension upon refusal to take the test serves any emergency purpose.[96] The dissent argued that suspension was premised not on intoxication but on noncooperation with the police.[97] Thus, the dissent concluded that since there

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[85] *Id.* at 21-22.

[86] *Id.* at 22. See text at note 39 *supra.* All of the justices partaking in the dissent had either concurred with the majority or written concurring opinions in *Dixon v. Love.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 24.

[93] *Id.* at 25.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 26.

[97] *Id.*

was no emergency present, due process required the state to provide a hearing prior to suspending a driver's license.

In addition to concluding that due process requires a prior hearing, the dissent disagreed with the Court's conclusion that a prompt post-suspension hearing is available.[98] First, it pointed out that the suspension notice does not mention the right to an immediate "walk-in" hearing.[99] Second, it argued that a meaningful hearing to resolve a factual dispute would require days to assemble witnesses and the attesting officer.[100] Thus, the dissent found post-suspension safeguards insufficiently prompt to comport with due process requirements previously articulated by the Court.

III. The Decision in Perspective

In order to place the *Montrym* decision in proper perspective, it is necessary to review procedural due process requirements as they existed prior to *Montrym*. The Supreme Court has interpreted the due process clause of the fourteenth amendment to require that absent a compelling emergency, notice and an opportunity to be heard must be provided prior to the government's seizure of a person's property.[101] The Court has established that due process requires at a minimum that deprivations of protected property interests must be preceded by notice and an opportunity for a hearing "appropriate to the nature of the case."[102] The Court has further held that the opportunity for such a hearing be provided "at a meaningful time and in a meaningful manner."[103] In *Fuentes v. Shevin*[104] the Court insisted that even a temporary deprivation is not exempt from the requirement of a prior hearing,[105] even though the property could shortly thereafter be returned to its owner.[106] The Court maintained that the "Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property . . ." and held that while the length and consequent severity of a deprivation could be weighed in determining the appropriate form of a hearing, they are not determinative of the basic right to a prior hearing.[107] Thus, a hearing must be granted at a time when the deprivation can still be prevented.[108]

Since due process normally requires notice and a hearing prior to a deprivation of property, the more difficult task for the Court has been the determination of what kind of hearing is required in a given situation. The Court has acknowledged that a procedural rule which would satisfy due pro-

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[98] *Id.* at 27.

[99] *Id.*

[100] *Id.* at 28.

[101] Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[102] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

[103] Armstrong v. Manzo, 380 U.S. 545, 552 (1965). *See generally* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

[104] 407 U.S. 67 (1972).

[105] *Id.* at 86.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 81.

cess in one context might not satisfy procedural due process in another.[109] In considering such interests as the retention of welfare benefits, the Court in *Goldberg v. Kelly*[110] required a full evidentiary hearing prior to deprivation of those benefits.[111] In *Bell v. Burson,*[112] however, where the interest involved was retention of a driver's license, the Court was willing to tolerate a greater risk of error and required only that the pre-revocation hearing involve a probable cause determination short of adjudicating the question of liability.[113] In both instances the Court reached its holding by weighing the interests of the parties affected in order to determine the requirements of due process appropriate to the case.[114]

While the Supreme Court generally has required that deprivations of property must be preceded by the opportunity for a hearing, there have been emergency situations in which the Court has found justification for postponing the requirements of notice and the opportunity to be heard. In these situations an imminent threat to public health or welfare has existed and delay would have rendered state efforts to remove the threat ineffectual. In *North American Cold Storage v. Chicago,*[115] for example, the Court upheld summary seizures of contaminated food, reasoning that a city's duty to safeguard the lives and health of its inhabitants necessitated the prompt action taken to deal with the emergency. The Court noted that the property owner was entitled to a hearing after the seizure and could sue for damages for wrongful deprivation.[116] Following a similar rationale, the Court has also upheld the summary seizure of misbranded drugs.[117]

The Court has permitted *ex parte* seizures of property to avert bank failure[118] and to further the national war effort.[119] In *Fahey v. Mallonee*[120] it upheld a statute which permitted the government, upon receipt of allegations of mismanagement by a bank's officers, to appoint a conservator of the bank's assets.[121] Noting banking's long history of government regulation and the delicate nature of the banking business, the Court found the preservation of the bank's credit during an investigation to be impossible without the state's summary application of supervisory authority.[122] Using a similar rationale, the Court also has upheld the wartime seizure of securities believed to be property of enemy aliens,[123] reasoning that, as long as adequate provisions

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[109] Bell v. Burson, 402 U.S. 535, 540 (1971).
[110] 397 U.S. 254 (1970).
[111] *Id.* at 264.
[112] 402 U.S. 535 (1971).
[113] *Id.* at 542.
[114] Bell v. Burson, 402 U.S. at 540-41; Goldberg v. Kelly, 397 U.S. at 263.
[115] 211 U.S. 306 (1908).
[116] *Id.* at 316.
[117] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).
[118] Fahey v. Mallonee, 332 U.S. 245 (1947).
[119] Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921).
[120] 332 U.S. 245 (1947).
[121] *Id.* at 253-54.
[122] *Id.* at 253.
[123] Stoer v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921).

existed for return of the property in case of mistake, such seizure was justified as part of the general war effort.[124] Thus, the situations in which the Court has found justification for postponing notice and a hearing have been unique and unlikely to recur with any frequency or regularity.

Recently, in *Fuentes v. Shevin,*[125] the Court articulated the characteristics of the few cases in which outright seizure has been permitted without a prior hearing. On such occasions the seizure has been indispensable to secure an important public or government interest,[126] prompt action has been crucial,[127] and the seizure has been performed by a government official employing the standards of a narrowly drawn statute.[128] It therefore appears that the Court continues to regard the emergency doctrine as applicable to only a narrow set of circumstances. Absent these circumstances, government seizure of property should be preceded by some form of hearing.

IV. Analytical and Precedential Problems of *Montrym*

In light of this background, an analysis of how the *Montrym* Court approached the three elements of the *Eldridge* test suggests that the Court's decision is not supported by its prior interpretations of the requirements of the due process clause. The situation presented in *Montrym* is clearly distinguishable from that of *Dixon v. Love.* In addition, the interests asserted by the state are not sufficiently compelling to fall within the traditional emergency exception to the normal presumption of a hearing prior to the deprivation of a property interest. The end result is not, as the majority perceives it,[129] that a driver whose license is suspended by the Massachusetts statute has received some sort of pre-deprivation objective review of the allegations against him. Rather, as the dissent points out,[130] the Court has approved a procedure which does not provide an opportunity for a hearing until after the property has been taken away.

In applying the first step of the *Eldridge* test, the Court evaluated the private interest at stake and defined the extent of a citizen's interest in his driver's license in terms of the suspension statute itself. Looking at the statute, the Court concluded that the interest involved in *Montrym* was less substantial than that in *Love* because the Massachusetts statute provides for a post-suspension hearing immediately following suspension while Illinois is not required to provide one for twenty days.[131] Thus, the Court clearly considered the amount of deprivation in evaluating the substantiality of the private interest. In *Fuentes v. Shevin,* however, the Court specifically declined to consider the length of deprivation in defining the private interest at stake.[132] In

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[124] Central Union Trust Co. v. Garvan, 254 U.S. at 566.
[125] 407 U.S. 67 (1972).
[126] *Id.* at 91.
[127] *Id.*
[128] *Id.*
[129] 443 U.S. at 16.
[130] *Id.* at 25.
[131] *Id.* at 12.
[132] 407 U.S. at 84-85 (1972).

Fuentes, the Court stated that while length of deprivation could be weighed to determine the type of hearing, it is not determinate of the basic right to a prior hearing of some kind.[133]

A further difficulty with the Court's interest analysis is that it begs the very question at issue. Montrym was challenging the statutory procedures which the Court claimed were a part of the definition of the interest itself. An argument that Montrym's interest was less substantial than that in *Love* because the wait for a post-suspension hearing was shorter ignores Montrym's central claim that there should be no wait for a hearing at all, *i.e.* that the hearing should be provided *before* the suspension takes place. Thus, by incorporating into the interest definition the very procedures which were challenged, the Court to a large degree settled the question of the need for a prior hearing before it had even begun.

Unlike the dissent, the Court in weighing the private interest at stake failed to reach the question of the availability of retroactive compensation in the event of an erroneous deprivation. This failure is especially curious since both the district court[134] and the dissent[135] indicated that in prior cases the Court had considered whether the wrongful deprivation of the interest at stake could be completely compensated for retroactively. For example, in *Matthews v. Eldridge* the availability of full retroactive relief for a recipient whose Social Security benefits were wrongfully terminated greatly influenced the Court's decision.[136] Conversely, in *Bell v. Burson,* where it would have been impossible to restore to a driver the lost time during which he could not drive, the Court concluded that a prior hearing must be afforded the licensee.[137] The majority in *Montrym,* however, considered that given the statutory provision for an immediate post-suspension hearing, the duration of any possible wrongful deprivation would be short. As a result, it never considered the possible necessity for retroactive relief.

The dissent, realistically doubting the availability of an immediate post-deprivation hearing,[138] recognized a greater likelihood of a lengthy deprivation pending a hearing. Additionally, the availability of retroactive relief is an important factor to be weighed. Since the loss of a driver's license, unlike the loss of Social Security benefits, cannot ever be fully compensated for, the Court should have considered the issue of retroactive relief, however short it thought an erroneous deprivation might be.

In applying the second step of the *Eldridge* test, an assessment of the likelihood of erroneous deprivation and the probable value of an additional or substitute procedures, Chief Justice Burger relied heavily on the Court's ruling in *Dixon v. Love.* The Court likened the procedure used under the Massachusetts statute to those approved in *Love,* because it considered that in both instances the suspension was based upon "objective facts."[139] The Court

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[133] *Id.* at 86.
[134] Montrym v. Panora, 429 F. Supp. 393, 398 (D. Mass. 1977).
[135] 443 U.S. at 21-22.
[136] 424 U.S. 319, 340 (1976).
[137] 402 U.S. 535, 539 (1971).
[138] 443 U.S. at 27.
[139] *Id.* at 13.

emphasized the objectivity of having two officers witness a licensee's refusal to take a breathalyzer test.[140] Yet, clearly, the crucial piece of evidence is the arresting officer's determination that the driver is drunk, and the statute requires no corroboration of this observation. The Court found that the officer's training renders him well-suited to make such determinations and that, therefore, the risk of error is slight.[141] Yet the Court in other contexts has warned that "[z]eal in tracking down crime is not in itself an assurance of soberness of judgment,"[142] and for that reason the Court has required that the *ex parte* decisions of police officers be reviewed promptly by a magistrate in order to effect a deprivation of liberty.[143] In essence, the Court found that a determination by a police officer which alone is not sufficient to effect a deprivation of liberty is sufficient to effect a deprivation of property.

While the Court has justified some *ex parte* initial deprivations of liberty or property by the police—warrantless arrests, for instance—it has done so only after recognizing the exigencies of law enforcement.[144] Furthermore, these initial deprivations must receive prompt review by an independent third party, a magistrate.[145] Under the Massachusetts statute, however, the Registrar has no discretion upon receiving an officer's report of refusal to take a breathalyzer test but "[u]pon receipt of such report, . . . shall suspend any license . . . for a period of ninety days."[146] Yet while the Court noted that the Registrar has no power to suspend a license if the officer's report is materially defective,[147] the Registrar's review of material defects is confined to seeing that the *report* on its face is not defective; it cannot extend beyond this point. Therefore, any safeguard provided by the review is minimal.[148]

The Illinois summary suspension procedure involved in *Love,* on the other hand, mandates license suspension only after a cumulative record of traffic violations.[149] As such, the licensee has had an opportunity for a full

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[140] *Id.* at 14. While the Court makes reference to a second officer witnessing the licensee's refusal to take the test, the statute requires only that the refusal be witnessed by a "third person." It does not require that this person be a police officer. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979).

[141] 443 U.S. at 14.

[142] McNabb v. United States, 318 U.S. 332, 345 (1943).

[143] Gerstein v. Pugh, 420 U.S. 103 (1975). Appellee's brief points out that in this case, the officer did not even arrive at the scene until after the accident had occurred, p. 49, and that his report set out no facts as to Montrym's driving behavior or even that Montrym was involved in an accident. Brief for the Appellee at 46, 48.

[144] 443 U.S. at 23.

[145] Gerstein v. Pugh, 420 U.S. 103, 112-13 (1975); Terry v. Ohio, 392 U.S. 1, 20-22 (1968).

[146] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979).

[147] 443 U.S. at 16.

[148] The Court suggests that "the arresting officer ordinarily will have provided the driver with an informal opportunity to tell his side of the story." *Id.* at 14. It offers, however, no authority to support its assertion. Even if the police officer had offered a chance for explanation, the dissent questions whether such action could "seriously be deemed a 'meaningful opportunity to be heard' in the due process sense." *Id.* at 25.

[149] Dixon v. Love, 431 U.S. 105, 108 & n.3 (1977).

judicial hearing in connection with each traffic violation. In essence, the objective facts upon which his license suspension is predicated have already been given a hearing. As a result, the Court's holding in *Love* did not establish a broad exception to the normal presumption in favor of a prior hearing.[150] Thus, *Love* could not serve as a precedent for the Court's holding in *Montrym* where license suspension occurs automatically upon the Registrar's receipt of a police officer's untested allegations.

The Court in *Montrym* noted further that the summary procedure was justifiable because "as this case illustrates, there will rarely be any genuine dispute as to the historical facts providing cause for a suspension."[151] The basis for this conclusion, however, is unclear. The occasion would appear to be ripe for just such disputes. As the dissent points out,[152] there was indeed a dispute over one of the material facts forming the basis of the suspension, namely whether Montrym had been advised of the statute's sanction. Furthermore, in *Bell v. Burson,* which involved the license suspension of an uninsured motorist who had been involved in an accident, the Court required the state to provide the driver with an opportunity for a prior hearing to rebut allegations of material fact.[153] Certainly allegations by the licensee either that the officer lacked reasonable grounds to believe that he was intoxicated or that he had not refused the test would be material under this statute.[154] As such, following *Burson,* the licensee should be provided an opportunity to question assertions of such facts prior to suspension of his license.

In assessing the inherent risks of the procedures of the Massachusetts statute in failing to provide for a pre-suspension hearing, the Court placed great emphasis on the availability of a hearing immediately following license suspension.[155] If Montrym wished to allege errors, he could have done so on the very same day.[156] Prior holdings of the Court have established that the rapidity of administrative review and the duration of any potentially wrongful deprivation are important factors in assessing the sufficiency of the entire process.[157] They do not establish the proposition, however, that prompt

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[150] 443 U.S. at 22.

[151] *Id.* at 14.

[152] *Id.* at 23. License suspension is premised on three factors: reasonable grounds for arrest for driving while intoxicated; a proper request by the officer that the driver take a breathalyzer test; and a refusal to do so by the driver *after* he has been informed of the penalty for refusal. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979). Montrym contended that he was not informed of the sanction of summary suspension, as required by § 24(1)(f), while the police affidavit contends that he was.

[153] 402 U.S. 535, 541 (1971).

[154] Under the statute, these are in fact two of the issues which the licensee may raise at the post-suspension hearing. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(g) (West Supp. 1979).

[155] 443 U.S. at 15.

[156] *Id.* at 5-6 n.5. It was stipulated by the parties that the § 24(1)(g) hearing was available the moment the driver surrenders his license.

[157] Mathews v. Eldridge, 424 U.S. 319, 341 (1976) (citing Fusari v. Steinberg, 419 U.S. 379, 389 (1975)).

post-deprivation review eliminates the need for any prior hearing at all. Furthermore, the effectiveness of the post-deprivation procedure hinges on the property owner's notice of its existence.[158] The Massachusetts statute contains no provision for notifying the licensee of the availability of such a hearing.[159] In addition, the immediate post-suspension "walk-in" procedure provides little more than a right to request the scheduling of a later hearing. Any meaningful hearing to resolve a factual dispute would require time to assemble witnesses during which time the driver's license would remain suspended.[160] It is highly unlikely, therefore, that the safeguard of an immediate post-suspension hearing would in fact be available to a licensee whose license had been suspended.

It is thus very much open to question whether the procedure sanctioned by the Court in *Montrym* sufficiently minimizes the risk of erroneous decisions to meet procedural due process standards. Not only is the deprivation based solely on one police officer's uncorroborated report of drunken driving, but the Registrar's initial review of the report does not reach any issues material to the deprivation beyond whether the officer's report on its face complies with the requirements of the statute. The statute upheld in *Love,* on the other hand, calls for license suspension only after the driver has compiled a record of prior convictions.[161] In *Burson* the Court insisted that when the suspension of the license of an uninsured motorist who was involved in an accident is at issue, the state must provide a pre-suspension hearing considering the issue of fault.[162] Thus, the procedures the Court approved in *Montrym* stand in sharp contrast to those approved in *Love* or mandated in *Burson.*

When weighing the governmental interest involved, the third step of the *Eldridge* test, Chief Justice Burger likens the interests advanced under the Massachusetts statute to those at issue in *Love.*[163] His conclusion, however, that there is a similarity of interests which justifies upholding the Massachusetts summary suspension scheme does not follow either from the facts of *Love* or from prior holdings of the Court. Both the Massachusetts and Illinois statutes seek to remove from the road drivers who pose a threat to highway safety. This end is indeed accomplished by the Illinois statute. Drivers whose licenses would be suspended under the Illinois statute are those with a prior record of at least three moving traffic violations within a twelve-month period.[164] In contrast, under the Massachusetts scheme no prior record of unsafe driving is required to trigger license suspension.[165] All that is needed is an arresting officer's report that there was probable cause to arrest the driver for driving while intoxicated, that the driver was in fact ar-

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[158] 443 U.S. at 27.

[159] *Id.* The dissent called attention to the Court's recent affirmation of the requirement of "reasonable" notice as an integral element of due process. *Id.* at 25-26. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978).

[160] 433 U.S. at 28.

[161] 431 U.S. at 108 n.3.

[162] 402 U.S. at 540.

[163] 443 U.S. at 17.

[164] 431 U.S. at 108 n.3.

[165] MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1979).

rested, and that he refused to take a breathalyzer test. Thus, there is no ground to conclude that the Massachusetts summary suspension scheme makes the same contribution to highway safety as does the Illinois statute.

The majority also compared the governmental interests served by the Massachusetts statute to those emergency situations where the Court has permitted summary seizures of private property.[166] Chief Justice Burger comments that "[s]tates surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs."[167] This statement assumes that the operation of the statute effectively accomplishes the state's purpose of removing drunken drivers from the road. In fact, as the dissent maintained,[168] the statute removes from the road only those drivers who refuse to take the breathalyzer test, whether intoxicated or not. An intoxicated driver who fails the breathalyzer test retains his license, a result which belies the Court's assertion that the summary suspension of the driver's license serves an emergency protective purpose.[169] To the contrary, as the dissent points out, the main accomplishment of the statute is the punishment of drivers who refuse to cooperate with the police.[170] Furthermore, since the statute mandates license suspension for all drivers arrested for drunken driving who refuse to take the test, it is much broader than the narrowly drawn statutes which have been upheld as serving an emergency purpose.

In addition, the Court upheld the statute as a justifiable deterrent to drunken driving, as a method of obtaining reliable and relevant evidence, and as a method of preventing dilatory tactics on the part of the licensee.[171] Approval of such goals as valid emergency interests, however, considerably expands a previously narrow exception to the normal requirement of a predeprivation hearing. As noted above,[172] the precedents for *ex parte* deprivations of property by the state have required situations where a significant government interest, such as the health of its citizenry, has been posed with a threat requiring immediate action. These cases do not suggest that the collecting of evidence would fall within the scope of such emergency interests. The dissent argued that the fourteenth amendment exists to provide the procedural rights which would prevent coercive tactics[173] such as threatening a

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[166] See text at note 115 *supra*.

[167] 443 U.S. at 17. In justifying the summary suspension procedure as an emergency measure, the Court adopts a position not even advanced by the appellant. The state argued in its brief that it "relies upon the implied consent sanction not as a narrow emergency measure for instantaneous removal of the intoxicated driver from the road, but as a mechanism to advance a variety of deterrent, punitive, and rehabilitative measures." Brief for the Appellant at 33.

[168] 443 U.S. at 28.

[169] *Id.* Appellee noted in his brief the recent enactment of a Driver Education Alcohol Program, under which convicted drunken drivers are enrolled in an educational rehabilitative program rather than receive license suspensions. A special commission investigating the matter found license suspension an ineffective means of controlling drunk driving. Brief for the Appellee at 68.

[170] 443 U.S. at 26.

[171] *Id.* at 18.

[172] See text at note 115 *supra*.

[173] 443 U.S. at 26.

driver with license suspension for refusal to take a breathalyzer test. While it is probably true that such a threat, if known to a driver, would indeed encourage cooperation, that result should not automatically justify the means employed. However "critical" the summary suspension scheme may be to the state's objectives,[174] these objectives clearly do not fall within the narrow class which has justified the emergency exception to fourteenth amendment protection. The Court's approval of the Massachusetts statute could open the door to state assertion of other non-emergency interests as justification for suspending pre-deprivation hearings.

V. The Effect of The *Montrym* Decision and a Proposed Alternative

As the preceding analysis reveals, the *Montrym* decision has modified significantly the traditional due process requirement of notice and hearing prior to the deprivation of a property interest. No longer will the private individual with a property interest at stake be assured of some type of prior hearing as a matter of right. Instead, the Court now appears to require that private property interests outweigh the state interests served by summary process in order to merit *any* type of pre-deprivation hearing. Such a position constitutes an abandonment of the traditional emergency doctrine, which permits summary deprivations of property only when the state advances a significant public interest requiring *immediate* state action.

To achieve this modification, the *Montrym* Court fashioned the *Eldridge* balancing approach into a new due process substantiality test. The Court employed this test to determine not merely the *kind* of hearing required, as it did in *Eldridge*,[175] but the *timing* of that hearing as well. Although the Court in *Montrym* considered the private interest at stake and the risk of erroneous deprivation through the procedures used in a traditional manner, it increased dramatically the types of government interests to be considered in the third step of the balancing test. In *Eldridge* and previous cases,[176] the Court evaluated only the state's administrative burden of providing more elaborate hearing procedures. In *Montrym*, however, the Court placed other government interests in the scale to weigh against the private interests at stake in determining whether any form of pre-deprivation hearing was required. Chief Justice Burger weighed not only administrative costs but also the state's interests in general highway safety, in discouraging drunk driving, and in obtaining reliable evidence for subsequent prosecutions,[177] interests which would not previously have been sufficient to justify forgoing notice and an opportunity to be heard. In *Montrym*, however, the Court concluded that these interests do just that. Because Montrym failed to demonstrate that his property interest was more substantial than the state interests involved, he was required to wait until after license suspension for any hearing. Thus, it appears that no pre-deprivation hearing will be required unless the private individual can dem-

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[174] *Id.* at 18.

[175] 424 U.S. 319 (1976).

[176] Bell v. Burson, 402 U.S. 535, 540 (1971); Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

[177] 443 U.S. at 18.

onstrate that his property interests are more substantial than the interests advanced by the state.

The effect of the Court's new approach to due process analysis is evidenced by the case of *Barry v. Barchi*,[178] decided the same day as *Mackey v. Montrym*. The Court upheld in part a New York State Racing and Wagering Board rule permitting summary suspension of a horse trainer's license upon the Board's receipt of post-race test results revealing the presence of a stimulant drug in the system of the trainer's horse.[179] These rules established an evidentiary presumption that if such a drug were found in a horse's system, the horse's trainer was responsible or at least negligent.[180] Not citing *Mathews v. Eldridge* but employing essentially the same balancing test, the Court weighed the state's interest in preserving the integrity of horse racing carried on under its auspices against a trainer's interest in his occupational license. The Court concluded that the state's "important interest in assuring the integrity of the racing carried on under its auspices"[181] justified the use of a summary interim suspension. The *Barchi* decision thus demonstrates that the Court's catalogue of significant state interests justifying summary deprivations of property has expanded far beyond what has traditionally been considered an emergency interest.

In concluding that Massachusetts need not provide Montrym with any prior hearing beyond the minimal safeguards available under the suspension statute, Chief Justice Burger strongly implied that the only alternative procedure would be to have a full evidentiary hearing.[182] The Court found that such a procedure would unduly hinder the state's achievement of its objectives.[183] In *Bell v. Burson*, however, the Court found it possible for a state to provide a hearing procedure which could consider the question of probable cause without becoming a full evidentiary hearing.[184] Indeed, it insisted that a pre-deprivation hearing must, in this context, make some inquiry into the matter of fault of the licensee and that, absent such an inquiry, the state could not summarily remove a driver's license.[185] Since both the private property interest and the potential loss to the licensee in *Montrym* are the same as those at issue in *Burson*, the Court was inconsistent to conclude that the only reasonable alternative to the Registrar's review was a full evidentiary hearing.

It should, therefore, be possible for a state to provide a pre-suspension hearing without unduly burdening the attainment of legitimate state objectives. Such a hearing initially need not be a full evidentiary affair, but instead could follow the guidelines set forth in *Burson*. There the Court insisted that before a motorist's license could be suspended, he should be permitted a hearing considering the material issues in the case. In that instance the Court concluded that a hearing considering whether there was a reasonable possibil-

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[178] 443 U.S. 55 (1979).
[179] *Id.* at 59.
[180] *Id.*
[181] *Id.* at 64.
[182] 443 U.S. at 16.
[183] *Id.* at 18.
[184] 402 U.S. at 540.
[185] *Id.* at 541.

ity that judgment could be returned against the uninsured driver must be provided.[186]

In the circumstances of *Montrym,* the state could provide a pre-deprivation hearing to consider the following material factors: whether probable cause of driver intoxication existed; whether the driver had been arrested; whether he had been given the appropriate warnings concerning the statutory sanctions which could be imposed; and whether, after receiving such warnings, he refused to take the test. License suspension would be delayed only upon a finding of a reasonable likelihood that any one of these elements was lacking. If such a delay was found warranted, the state should provide the licensee with the opportunity for an evidentiary hearing prior to suspension. Absent such findings, license suspension could occur immediately, with a subsequent opportunity for a full hearing. In this manner, the state could reasonably guard against the possibility of erroneous deprivations, while at the same time expeditiously fulfilling its worthy goal of preserving highway safety.

CONCLUSION

In *Montrym* the Court held that a statute mandating summary *ex parte* suspension of a driver's license upon the licensee's refusal to take a breathalyzer test after being arrested for driving under the influence of intoxicating liquor did not violate the due process clause. The Court's holding is a significant modification of traditional due process doctrine in that it expands the circumstances under which a state may deprive an individual of a property interest without affording that individual an opportunity for a prior hearing. The Court's use of the *Eldridge* balancing test suggests that as long as a state provides a prompt post-deprivation hearing a wide variety of state interests may now justify an initial *ex parte* deprivation of private property. The emergency exception to the traditional due process requirements of notice and a hearing has ceased to be an exception, and a citizen can no longer expect a pre-deprivation hearing as a matter of right. Instead, he will have to demonstrate that his property interest is more substantial than the interests advanced by the state. *Montrym* indicates that a license to drive is not sufficiently substantial to justify the administrative burden of a pre-deprivation hearing when a driver has been accused of drunken driving. Whether other property interests will lose their traditional protections must await further decisions.

CLOVER M. DRINKWATER-LUNN

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[186] *Id.*