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Constitutional Law - Due Process - Suspension or Revocation of a Driver's License without Prior Hearing Deemed Constitutionally Adequate

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or both. These issues and whether the threats actually existed will have to be decided by the jury on re-trial.[65] The court of appeals decision properly gives the appellant the opportunity to make its claim before a jury. In addition, and in all fairness, whether the appellee acted in good faith, though mistaken, in making its demand and to what extent such a good faith but mistaken belief should negate the wrongfulness of the threat, should also be considered.[66] Whatever the result, *Jamestown Farmers Elevator* shows that each case in which economic duress is alleged must be decided on its facts, and no prediction can be made of the result in any particular case.[67]

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CONSTITUTIONAL LAW—DUE PROCESS—SUSPENSION OR REVOCATION OF A DRIVER'S LICENSE WITHOUT PRIOR HEARING DEEMED CONSTITUTIONALLY ADEQUATE

Plaintiff's driver's license was revoked, without preliminary hearing, under an Illinois statute[1] which provided for such suspension or revocation upon a showing that the driver had been repeatedly convicted of traffic offenses indicating either an inability to exercise ordinary and reasonable care in operating a motor vehicle or disrespect for the traffic laws and safety of other persons upon the highway. Plaintiff[2] made no request for an administrative hearing,

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65. 552 F.2d at 1291.

66. The court stated as follows: "We recognize that good faith insistence upon a legal right which one believes he has usually is not duress, even if it turns out that that party is mistaken and, in fact, has no such right." *Id.* at 1290. It can certainly be argued that the court of appeals did not give enough consideration to appellee's good faith belief that it had a right to demand shipment of the grain.

67. *See* 13 W. JAEGER, WILLISTON ON CONTRACTS § 1613 (3d ed. 1970).

1. ILL. REV. STAT. ch. 95½, § 6-206(a)(3) (1971) provides as follows:

> (a) The Secretary of State is authorized to suspend or revoke the license or permit of any person without preliminary hearing upon a showing by his records or other sufficient evidence that such person:
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> . . . .
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> 3. Has been repeatedly involved as a driver in motor vehicle collisions or has been repeatedly convicted of offenses against laws and ordinances regulating the movement of traffic, to a degree which indicates lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway. . . .

2. Plaintiff was a resident of Chicago, employed as a truck driver. His license was suspended in November 1969 as a result of his having been convicted of traffic offenses three times within a twelve-month period. He was later convicted for driving while his license was suspended and consequently another suspension was imposed in March 1970. He received no further citations until August 1974, when he was arrested on two separate occasions for speeding. After having been convicted on both charges, he received a third speeding citation in February 1975. On March 27, 1975, he was notified by letter that his driving privileges would cease if he was convicted of a third offense. On March 31, 1975, he was convicted on the third charge. On June 3, 1975, plaintiff received notice of revoca-

as provided for by statute,[3] and instead filed a class action suit[4] challenging the constitutionality of the statute under which his license had been revoked.[5] A three-judge federal district court granted judgment for the plaintiff, holding that a license could not be suspended or revoked until after a hearing had been held to determine whether the licensee met the statutory criteria for suspension or revocation.[6] On direct appeal, the United States Supreme Court reversed and *held* that the Illinois statute was constitutionally adequate under the due process clause of the fourteenth amendment. *Dixon v. Love*, 431 U.S. 105 (1977).

The question of the necessity of a hearing prior to the suspension[7] or revocation[8] of a driver's license has long been a dilemma for the courts. Being largely controlled by statute, regulations in the past that did not provide for a prior hearing were generally sustained despite due process objections.[9] But in 1971, in *Bell v. Burson*,[10] the United States Supreme Court added a new dimension to this constitutional issue.

In *Bell*, the Court was faced with Georgia's Motor Vehicle Safety Responsibility Act,[11] under which the license of an uninsured motorist involved in an accident was to be suspended unless he posted security to cover the amount of damages claimed by the aggrieved parties in the reports of the accident.[12] The Court held that before the state could deprive the motorist of his driver's license, it had to

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tion effective June 6, 1975. A class action was filed on June 5, 1975, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all persons licensed to operate motor vehicles by the State of Illinois and whose licenses are subject to revocation pursuant to statute. Dixon v. Love, 431 U.S. 105, 110-11 (1977).

3. ILL. REV. STAT. ch. 95½, § 6-206(c)(2) (1971).

4. The class was never certified. 431 U.S. at 111 n.9.

5. *See supra* note 1.

6. Love v. Howlett, No. 75-C 1821 (N.D. Ill., decided January 20, 1976).

7. Where a suspension occurs, the state generally permits reinstatement of the privilege to drive a motor vehicle. People v. Suddoth, 52 Ill. App. 2d 355, 202 N.E.2d 120, 123 (1964). Revocation, on the other hand, requires the issuance of a new license. *Id.*

8. Revocation is defined as the involuntary termination of the driving privilege of a person and is a penalty imposed for purposes of discipline and public protection. Hamilton v. Dick, 254 Cal. App. 2d 123, ——, 61 Cal. Rptr. 894, 896 (1967). *See* 60 C.J.S. *Motor Vehicles* § 164.1 (1969).

Generally, the suspension or revocation of a driver's license is not intended as a punishment to the driver, but is meant to protect the public. This scheme often is one of the most effective measures to compel observance of the traffic laws. 7 AM. JUR. 2d *Automobiles and Highway Traffic* § 109 (1963).

N.D. CENT. CODE § 39-06-23 (1972), defines suspension and revocation as follows:

> 1. Suspension means that the driver's license and privilege to drive a motor vehicle on the public highways are temporarily withdrawn but only during the period of such suspension.
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> 2. Revocation means that the driver's license and privilege to drive a motor vehicle on the public highways are terminated and shall not be renewed or restored, except that an application for a new license may be presented and acted upon by the commissioner after the expiration of the period of revocation, which period shall not be less than thirty days nor more than one year.

9. *See* Jones v. Kirkman, 138 So. 2d 513 (Fla. 1962); Spurbeck v. Statton, 252 Iowa 279, 106 N.W.2d 660 (1960); Blydenburg v. David, 413 S.W.2d 284 (Mo. 1967).

10. 402 U.S. 535 (1971).

11. GA. CODE ANN. ch. 92A-6 (1972) (repealed 1977).

12. GA. CODE ANN. § 92A-605(a) (Supp. 1970). 402 U.S. at 536.

provide a forum to determine whether there was a reasonable possibility of a judgment being rendered against the motorist as a result of the accident.[13] In deciding that the suspension of a license without the benefit of a hearing on fault was a denial of procedural due process, the Court said that once licenses are issued, their continued possession becomes essential in the pursuit of a livelihood. The Court added that the suspension of licenses involves state action and that licenses are not to be taken away without procedural due process as required by the fourteenth amendment.[14] Furthermore, the Court declared that constitutional restraints limit state power to terminate an entitlement, whether the entitlement is called a "right" or a "privilege."[15]

The Court in *Bell* rejected Georgia's argument that if the state must provide the licensee with a hearing to determine the question of liability, such a hearing need not be held prior to the suspension of the license.[16] The Court stated that except in emergency situations,[17] due process requires a state to afford notice and the opportunity for a meaningful[18] hearing appropriate to the nature of the case[19] before the termination becomes effective.[20]

The application of *Bell* is clear with respect to financial responsibility laws[21] because the decision specifically dealt with Georgia's Motor Vehicle Safety Responsibility Act.[22] But *Bell* has also received considerable attention in cases concerning suspension or revoca-

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13. 402 U.S. at 542.

14. *Id.* at 539, *citing* Goldberg v. Kelly, 397 U.S. 254 (1970) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). These words lead one to conclude that possession of a license, being within the scope of the protection afforded by the due process clause, is indeed a property right once the license has been issued, and it remains such until its expiration date so long as the laws pertaining to its use are obeyed.

15. 402 U.S. at 539. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of a tax exemption); Slochower v. Board of Education, 350 U.S. 551 (1956) (discharge from public employment). *See also* Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); Londoner v. Denver, 210 U.S. 373 (1908).

16. 402 U.S. at 542.

17. The situation in *Bell* was not deemed an emergency situation. *Id.* An emergency situation, however, was deemed to exist in Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950) (multiple seizures of misbranded goods under the Federal Food, Drug, and Cosmetic Act) and Fahey v. Mallonee, 332 U.S. 245 (1947) (the appointment of a conservator to take possession of a federal savings and loan association).

The North Dakota Supreme Court has held that the public interest in removing an offender from the highways outweighs the individual's right to a hearing. So where the defendant's record depicts frequent driving violations, a hearing is not required in order to comply with the requirements of due process prior to suspension. A record of frequent driving violations constitutes an emergency under the *Bell* decision. State v. Sinner, 207 N.W.2d 495 (N.D. 1973). *See also* Cox v. Hjelle, 207 N.W.2d 266 (N.D. 1973); Kosmatka v. Safety Respon. Div. of N.D. State Hwy. Dept., 196 N.W.2d 402 (N.D. 1972).

18. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965). A meaningful hearing is one granted at a meaningful time and in a meaningful manner. *Id.* Due process requires notice and an opportunity for a hearing prior to any deprivation of life, liberty, or property. *Id.* at 550.

19. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

20. 402 U.S. at 542.

21. For North Dakota's financial responsibility law, *see* N.D. CENT. CODE ch. 39-16 (1972).

22. *See supra* notes 11 & 12.

tion of a driver's license following a conviction for certain offenses.[23]

The rationale for requiring due process in hearings involving the revocation or suspension of a driver's license is generally founded on the principle that the particular private interest is a property interest within the protection of the due process clause.[24] Government benefits deemed not to be property interests, such as an interest in the use of public parks and highways, are privileges which may be terminated without due process objections.[25]

The prevailing view in the courts across the country is that a license to operate a motor vehicle is indeed a property right,[26] and due process applies to the deprivation of a driver's license by a state.[27] The question of what sort of procedural due process is required still remains, however.

To determine the requirements of procedural due process for the suspension of a right or privilege, it is helpful to look at the factors considered in *Goldberg v. Kelly*,[28] a case concerning the termination of welfare benefits by the State of New York. The state in *Goldberg* contended that it had complied fully with procedural due process by providing for a pretermination "review" and a post-ter-

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23. *E.g.*, Nusberger v. Wisconsin Div. of Motor Vehicles, 352 F. Supp. 515 (W.D. Wis. 1973); Warner v. Trombetta, 348 F. Supp. 1068 (M.D. Pa. 1972), *aff'd* 410 U.S. 919 (1972); Stauffer v. Weedlun, 188 Neb. 105, 195 N.W.2d 218 (1972), *appeal dismissed*, 409 U.S. 972 (1972); Texas Dept. of Public Safety v. Bradley, 503 S.W.2d 413 (Tex. 1973).

24. U.S. CONST. amend. XIV, § 1 provides in part as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *See infra* note 28.

25. For an exhaustive look at the doctrine of privilege and its effect on the application of due process, *see* K. DAVIS, ADMINISTRATIVE LAW 246-54 (1951).

The typical thinking is that no one has a right to a government gratuity, and therefore no one should be entitled to a hearing. The operation of a motor vehicle on public highways is not a right, but is a mere conditional privilege. Due process protects only "life, liberty, and property," and not privileges. Courts need not require fair hearings when nothing more than privileges are at stake. *Id.* at 250. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (Black, J., dissenting); United States *ex. rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). *See also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

26. Ross v. Gunaris, 395 F. Supp. 623 (D. Mass. 1975); Hart Twin Volvo Corp. v. Comm'r of Motor Vehicles, 165 Conn. 42, 327 A.2d 588 (1973); Seufert v. Tofany, 43 App. Div. 2d 890, 352 N.Y.S.2d 70 (1974); People v. Rodriguez, 8 Misc. 2d 1060, 364 N.Y.S.2d 786 (1975).

27. Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Pollard v. Panora, 411 F. Supp. 580 (D. Mass. 1976); Barnes v. Armour, 392 F. Supp. 1240 (E.D. Tenn. 1974); Jones v. Penny, 387 F. Supp. 383 (M.D.N.C. 1974); Earnhart v. Heath, 369 F. Supp. 259 (E.D. Ark. 1974); Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973); Reese v. Kassab, 334 F. Supp. 744 (W.D. Penn. 1971); Pollion v. Lewis, 320 F. Supp. 1343 (N.D. Ill. 1970), *vacated*, 403 U.S. 902 (1971), *on remand*, 332 F. Supp. 777 (N.D. Ill. 1971); Pope v. Cokinos, 232 Ga. 425, 207 S.E.2d 63 (1974); Hurt v. Austin, 42 Mich. App. 2d 554, 202 N.W.2d 554 (1972); *In re* Arndt, 67 N.J. 432, 341 A.2d 596 (1975); State v. Wenof, 102 N.J. Super. 370, 246 A.2d 59 (1968); Dow v. Tofany, 29 App. Div. 2d 901, 287 N.Y.S.2d 938 (1969); Fell v. Bureau of Motor Vehicles, 30 Ohio App. 2d 151, 283 N.E.2d 825 (1972); State v. Scheffel, 82 Wash. 2d 872, 514 P.2d 1052 (1973). *But see* Scott v. Hill, 407 F. Supp. 301 (E.D. Va. 1976) (loss of an operator's license does not constitute a loss of a liberty); Dept. of Highway Safety Motor Vehicles v. Argeros, 313 So. 2d 55 (Fla. 1975) (failure to provide an individual, who has accumulated a sufficient number of points to warrant suspension of his driver's license, with notice and an opportunity to be heard prior to suspension of the license does not deprive him of procedural due process); Robertson v. State, 501 P.2d 1099 (Okla. 1972) (driver's license was not a property right in the constitutional sense and therefore its revocation does not constitute the taking of property).

28. 397 U.S. 254 (1970).

mination "fair hearing."[29] The Supreme Court rejected this argument, and held that under all circumstances due process requires an adequate hearing before termination of the benefits. A later hearing, even though constitutionally adequate, will not suffice.[30] The Court went on to particularize the essential elements of procedural due process as follows: (1) timely and adequate notice of the reasons for termination;[31] (2) an effective opportunity to defend by confronting adverse witnesses with oral arguments and evidence;[32] (3) disclosure of the evidence to prove the state's case;[33] (4) the right to be heard by counsel retained by the recipient;[34] (5) a decision resting solely on the evidence brought forth at the hearing;[35] and (6) an impartial decision-maker.[36]

In attempting to determine the extent to which these procedural due process requirements are necessary in a hearing prior to the suspension or revocation of a driver's license, the Court in *Dixon v. Love* applied a balancing test.[37] As in any analysis of a purported deprivation of procedural due process, the particular private and governmental interests involved must first be identified and then the relative importance of these interests must be weighed.[38] In *Dixon*,[39] the Court identified a driver's license as a property interest to which the due process clause applies. The Court then went on to weigh the importance of that interest and the governmental interests involved by considering three distinct factors: first, the private interest that will be affected; second, the risk of an erroneous deprivation of such interest through the procedure used, and the value of other procedural safeguards; and third, the government's interest, as well as fiscal and administrative burdens that additional procedures would entail.[40]

Taking into account these considerations, the Court concluded as follows: (1) the private interest in a license to operate a motor vehicle is not so great that an evidentiary hearing is required prior to adverse administrative action;[41] (2) the risk of an erroneous deprivation in the absence of a prior hearing is not great;[42] and (3) the public interest in administrative efficiency and particularly in

29. *Id.* at 258-59.
30. *Id.* at 261.
31. *Id.* at 267-68.
32. *Id.* at 268.
33. *Id.* at 270.
34. *Id.*
35. *Id.* at 271.
36. *Id.*
37. Dixon v. Love, 431 U.S. 105, 113-15 (1977).
38. Gonzales v. Freeman, 334 F.2d 570, 579-80 (D.C. Cir. 1964). *See* Board of Regents v. Roth, 408 U.S. 564, 570 (1972), where the Court stated that a weighing process has always been vital in determining the form of hearing required by procedural due process.
39. 431 U.S. at 112-13.
40. *Id.*, *citing* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
41. *Id.* at 113.
42. *Id.*

highway safety and the prompt removal of a safety hazard is sufficient to make the state's summary initial decision effective without a pre-decision administrative hearing.[43]

North Dakota has taken a different approach to this perplexing area than has the United States Supreme Court, and has afforded the operator of a motor vehicle much more protection than the Supreme Court seemingly requires.[44]

Prior to 1971 and the *Bell* decision, North Dakota provided for suspension of a driver's license without a preliminary hearing.[45] The legislature, in 1973, amended the applicable statute to provide for a hearing before the termination became effective.[46] Recently, the legislature enacted a new statute that particularizes the details of the pre-suspension hearing and further protects the interests of the individual.[47]

The Supreme Court ostensibly indicated that procedural due process in the administrative setting does not always require a strict application of the necessary requirements.[48] Furthermore, the Court asserted that an ad hoc approach would reduce the fairness of the system because it would require a subjective inquiry in each case, whereas objective rules provide all drivers with notice of any sanctioned conduct.[49] Due process, like fairness, is not an absolute concept. There are some extraordinary situations where constitutional protections must be temporarily suspended, but the rarity of these instances is well shown by the terms used by the Court to describe them.[50] Reconciling due process and highway safety may not be a difficult task.[51] States ought to recognize the serious consequences that flow from a license suspension or revocation and offer meaningful opportunities for licensees to contest prior to a proposed sus-

43. *Id.* at 114.
44. *Id.* at 115.
45. N.D. CENT. CODE § 39-06-32 (1972).
46. N.D. CENT. CODE § 39-06-32 (Supp. 1977) now provides that "[t]he commissioner may suspend the license of an operator, *after hearing*. . . ." (emphasis added).
47. N.D. CENT. CODE § 39-06-33 (Supp. 1977). Note that this statute even goes so far as to provide for a reexamination of the licensee in the event a suspension is ordered. *Id.*
48. 431 U.S. at 115 (1977). For a summary of the necessary requirements, *see supra* notes 31-36, inclusive, and the accompanying text.
49. *Id.*
50. The Court has used such terms as: "rare and extraordinary," Board of Regents v. Roth, 408 U.S. 564, 570 (1972); "truly unusual," Fuentes v. Shevin, 407 U.S. 67, 90 (1972); "emergency situations," Bell v. Burson, 402 U.S. 535, 542 (1971); "extraordinary situations," Boddie v. Connecticut, 401 U.S. 371, 379 (1971).
51. Several states have recognized the fact that drivers who are a hazard to the public safety cannot be cured merely by suspending or revoking their licenses. These states provide a variety of methods to comport with the requirements of procedural due process. Some states require a full evidentiary hearing prior to suspension or revocation of the license, such as California, CAL. VEH. CODE § 13950 (West 1971), Colorado, COLO. REV. STAT. § 42-2-123(1)(d) (1973), Ohio, OHIO REV. CODE ANN. § 4507.40 (1977), and Texas, TEX. VEH. CODE ANN. tit. 6687b, § 31 (Vernon 1977). Other states, such as Virginia, VA. CODE § 46.1-431 (1974), have required that the driver be given a detailed notice of the reason(s) for the suspension or revocation, the evidence used to support the determination, and a sufficient time within which to request a hearing. Furthermore, the states of Kentucky and Washington have gone so far as to provide for counseling and rehabilitation for the driver prior to suspension or revocation.

pension or revocation.[52] Not until the driver is afforded such a meaningful opportunity will the essentials of procedural due process actually be attained.[53]

DANIEL L. HOVLAND

NEGLIGENCE—OCCUPIERS OF LAND—LAND OCCUPIER HAS A DUTY TO BOTH INVITEES AND LICENSEES TO ACT AS A REASONABLE MAN

Plaintiff, an insurance agent, brought an action for damages suffered when she was bitten by defendant's dog. Plaintiff had gone uninvited to defendant's farm to try to sell an insurance policy. Defendant was not home at the time. As plaintiff was walking to the front door, the dog rushed out of the house, chased her back toward the car, and bit her on the leg.[1] The district court concluded that plaintiff was a bare licensee on the premises and therefore defendant owed her no duty other than not to harm her willfully or wantonly. The court found no such willfullness or wantonness by defendant[2] and dismissed with prejudice plaintiff's complaint. On appeal, the North Dakota Supreme Court remanded the case to the district court and held that the status of the person entering the premises is no longer the sole factor to be used in determining liability and that the occupier[3] has a duty to act as a reasonable person in maintaining his property in a reasonably safe condition for both invitees and licensees.[4] *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977).

Liability for negligence is generally based upon whether the

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52. In both Bell v. Burson, 402 U.S. 535 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970), the Court was careful to point out the serious economic hardships of suspension. In both cases it appears that the Court was cognizant of the relative importance of both state and individual interests.

53. The necessity of notice and hearing is only one of many possible legal issues that may arise on appeal from a suspension or revocation of a driver's license. The reader's attention is accordingly called to several annotations concerning the suspension or revocation of a driver's license on various grounds: Annot., 38 A.L.R.3d 452 (1971) (physical disease or defect); Annot., 9 A.L.R.3d 756 (1966) (habitual, persistent, or frequent violations of traffic laws); Annot., 5 A.L.R.3d 690 (1966) (accumulation of a sufficient number of points under a point system); Annot., 88 A.L.R.2d 1064 (1963) (refusal to take an intoxication test); Annot., 96 A.L.R.2d 612 (1964), Annot., 87 A.L.R.2d 1019 (1963) and Annot., 79 A.L.R.2d 866 (1961) (convictions of motor vehicle offenses). The reader's attention is also called to an annotation concerning the validity of financial responsibility laws, Annot., 35 A.L.R.2d 1011 (1954). *See also* Jennings v. Mahoney, 404 U.S. 25, 26 (1971), where the Court declared that there was plainly a susbstantial question whether the Utah statutory scheme for the suspension of licenses under a financial responsibility law, on its face, afforded the procedural due process required by *Bell*.

1. O'Leary v. Coenen, 251 N.W.2d 746, 747-48 (N.D. 1977).
2. *Id.* at 748.
3. In this comment the term "occupier" shall mean occupier, owner, possessor, or anyone who has control of the premises.
4. 251 N.W.2d at 752.