# NOTES

## THE PROPOSED ADMINISTRATIVE LICENSE SUSPENSION PROCEDURES IN VERMONT: HOW MUCH PROCESS ARE DRUNKEN DRIVERS DUE?

### INTRODUCTION

The continuing campaign to eliminate drunken driving may be unique among recent social phenomena in its broad-based support. Grass-roots initiatives and lobbying efforts,[1] aimed at toughening and enforcing DWI laws, have met with widespread success among the states.[2] The ensuing explosion of DWI law enforcement activities has placed an increasing burden on state judicial systems and prison facilities during a period of limited government resources.[3] Despite the increasing commitment of government resources, however, the number of highway deaths attributed to drunken driving in Vermont and across the country remains high.[4] Procedural reform appears to offer some partial solutions to these problems, but the experiences of other states suggest that such reform must be limited to the addition of independent, regulatory procedures for license suspension.

The states have taken two basic approaches to DWI procedural reform. First, in 1976, the Minnesota legislature amended its drunken driving statutes to provide for summary license suspension by the police officer at the scene of the stop, with subsequent

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1. Quade, *War on Drunk Driving: 25,000 Lives at Stake*, 68 A.B.A.J. 1551 (1984). Organizations such as Mothers Against Drunk Driving (M.A.D.D.) and Students Against Drunk Driving (S.A.D.D.) have proliferated in recent years. *Id.*

2. *See* Winter, *States Get Tougher on Drunk Drivers*, 68 A.B.A.J. 140 (1984).

3. *Id.* In Vermont, for example, DWI arrests rose steadily from a total of 3,573 in 1980 to a peak of 6,200 in 1983. Telephone interview with Hugo Satarelli, Assistant Director of Highway Safety, Vermont Agency of Transportation (Jan. 3, 1986). Part of the increase is attributed to Vermont's introduction of the alco-sensor in 1982. *Id.* In 1984, 5,948 DWI arrests were made; totals for 1985 are unavailable, but state officials believe that a significant downward trend has continued. *Id.*

4. *Id.* In 1981, 61 of Vermont's 106 traffic fatalities were alcohol-related. *Id.* Between 1982 and 1984, totals averaged about 50 per year, and a tentative estimate of DWI-related deaths in 1985 indicate a somewhat lower figure. *Id.*

administrative or judicial review upon demand.[5] This "summary suspension" approach has two purposes: to enhance the deterrence value of license suspension by making it swift and certain and to discourage dilatory litigation.[6] These purposes are accomplished in Minnesota by adding an independent, regulatory license suspension procedure to traditional criminal proceedings. At least fifteen states have adopted variations of this approach.[7]

Second, Maine amended its statutory scheme in 1981 to allow adjudication of less egregious DWI offenses by means of a civil proceeding.[8] The "civil proceedings" approach substitutes civil proceedings for criminal proceedings at the option of the prosecutor, primarily in first-offense cases.[9] The state's high court recently held Maine's version of this approach invalid.[10]

Variations on both the summary suspension and the civil proceedings approaches have been proposed in recent sessions of the Vermont Legislature.[11] Each of the Vermont proposals differs significantly from the Minnesota and Maine statutory schemes, but the same underlying constitutional issues are raised. Both of the proposed approaches raise the issue of whether a state may suspend traditional criminal procedural protections in the DWI context. The summary license suspension approach raises additional due process questions because the stopped motorist could be deprived of significant interests in liberty and property prior to the opportunity for a hearing.

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5. MINN. STAT. ANN. § 169.123 (West Supp. 1985).

6. Reese, *Summary Suspension of Drunken Drivers' Licenses-A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313 (1983).

7. ALASKA STAT. § 28.15.165 (1984); COLO. REV. STAT. § 42-2-122 (1984); DEL. CODE ANN. tit. 21, § 4177A (1985); IND. CODE ANN. § 9-11-3-1 (Burns Supp. 1985); IOWA CODE § 321.B.16 (1985); LA. REV. STAT. ANN. § 32:414 (West Supp. 1985); MISS. CODE ANN. § 63-11-23 (Supp. 1985); MO. ANN. STAT. § 302.505 (Vernon's Supp. 1986); NEV. REV. STAT. § 484.385 (1985); N.C. GEN. STAT. § 20-16.5 (Supp. 1985); N.D. CENT. CODE § 39-20-03.1 (Supp. 1985); OKLA. STAT. tit. 47, § 754 (Supp. 1985); OR. REV. STAT. § 482.541 (1985); WASH. REV. CODE ANN. § 46.20.292 (Supp. 1986); W. VA. CODE § 17C-5A-1 (1985).

8. ME. REV. STAT. ANN. tit. 29, § 1312-B (1981) (amended 1985). Maine's civil proceeding scheme also required the imposition of a fine of between $250 and $500. *Id.*

9. *Id.*

10. State v. Freeman, ___ Me. ___, 487 A.2d 1175, 1179 (1985).

11. S. 99, 56th Biennial Session (1981); S. 44, 57th Biennial Session (1983); and S. 126, 57th Biennial Session (1983). At the inception of the 1986 legislative session, a significant variation of the summary suspension approach was proposed in the Vermont Senate. S. 164, 59th Biennial Session (1986). The proposed procedure includes license suspension procedures similar to Minnesota's two-track system, except that confiscation would not take place at the scene of the stop. *Id.*

This note analyzes the two proposed approaches and suggests guidelines for any future DWI procedural reform. Section I describes current DWI law and the problems that have been attributed to this statutory scheme. Section II describes the two basic reform approaches proposed in Vermont. Section III addresses the issue of whether Vermont may substitute administrative license suspension procedures for traditional criminal procedures in the DWI context. Section IV focuses on the due process issues raised by the summary suspension proposal and suggests that the applicable balancing analysis must include recognition of the individual's reputation interest. Finally, Section V proposes guidelines for any future legislation in this area. The note concludes that a well defined, two-track procedure for DWI license suspensions could be valid in Vermont, whether summary suspension or civil proceedings were involved.

## I. Current DWI Law: The Problem

Procedural reform appears particularly attractive in the DWI context because the primary behavior involved, operating a motor vehicle, is subject to state regulatory authority. Furthermore, the traditionally regulatory sanction of license suspension is perceived to be the most effective deterrent among DWI penalties.[12] If suspensions could be accomplished without the costs and delays of criminal procedure, then effectiveness and efficiency could be increased.

Vermont's DWI statutes, like those of most states,[13] incorporate both criminal and regulatory aspects. Operating a motor vehicle while under the influence of intoxicating liquor is a criminal offense,[14] and a statutory definition in terms of blood-alcohol content eases the state's burden of proof.[15] If the accused motorist pleads not guilty at the arraignment, then the magistrate can prohibit further driving as a condition of release.[16] Upon conviction, or upon final determination on appeal, a first offender's license is

12. Reese, *supra* note 6, at 313.

13. Most states incorporate the basic approach of the Uniform Vehicle Code. *Id.* at 314.

14. Vt. Stat. Ann. tit. 23, § 1201 (Supp. 1985). Although a violation of § 1201 is commonly referred to as DUI (Driving Under the Influence), this note adopts the conventional designation of DWI (Driving While Intoxicated).

15. *Id.*

16. Vt. Stat. Ann. tit. 23, § 1212 (a) (Supp. 1985).

suspended for ninety days.[17] The offender must also complete an alcohol and driving education program and pay a fee to have his or her license reinstated.[18] Fines ranging from $200 to $750 and jail sentences of up to one year may be imposed in first offense cases; repeat offenders may draw stiffer penalties.[19]

The enforcement of these criminal provisions is aided by means of an "implied consent" fiction: any person operating a motor vehicle on Vermont's highways is deemed to have consented to breath-testing procedures.[20] Although the individual has a statutory right to refuse DWI testing,[21] such a refusal would have two important consequences. First, the refusal can be introduced as evidence at trial, if DWI charges are filed.[22] Second, if a motor vehicle infraction is charged, then streamlined license suspension procedures are invoked.[23] A summary hearing takes place at the arraignment, or "as soon thereafter as is practicable."[24] If the magistrate finds that the arresting officer had reasonable grounds to believe that the defendant was driving while intoxicated, then a report is forwarded to the commissioner of motor vehicles, who "shall suspend" the operator's license.[25] The defendant must also complete the alcohol and driving education program.[26]

Another relevant Vermont statute, unrelated to the DWI statutory scheme, establishes an administrative authority to effect license suspensions.[27] This section authorizes the commissioner of motor vehicles to suspend a driver's license, upon five days notice, if there is reason to believe that the license holder is "an improper or incompetent person to operate a motor vehicle, or is operating improperly so as to endanger the public."[28] If the individual in question requests a hearing, then the suspension does not take effect until the commissioner makes a post-hearing determination that the suspension is justified.[29]

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17. VT. STAT. ANN. tit. 23, § 1206 (a) (Supp. 1985).
18. VT. STAT. ANN. tit. 23, § 1209(a)(1) (Supp. 1985).
19. VT. STAT. ANN. tit. 23, § 1210 (Supp. 1985).
20. VT. STAT. ANN. tit. 23, § 1202 (a) (Supp. 1985).
21. VT. STAT. ANN. tit. 23, § 1205 (a) (Supp. 1985).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. VT. STAT. ANN. tit. 23, § 671 (a) (Supp. 1985).
28. *Id.*
29. *Id.*

Suspension under this section cannot be effected while the license holder is being prosecuted for a motor vehicle offense, unless the commissioner finds, "upon full reports" of a police officer or motor vehicle inspector, that the public would be endangered by the individual's driving or that the individual is seeking to delay the prosecution.[30] If one of these findings is made, then the license can be suspended pending final resolution of the prosecution.[31]

Vermont's streamlined license suspension procedures apply only in cases of DWI testing refusal or driver incompetence, however, and all DWI charges are resolved through the state's criminal justice system. The required criminal procedural safeguards delay the resolution of charges, even in cases where license suspension is the only significant sanction likely to be administered. One scholar has cited fear of license suspension as the primary motivating factor behind contests of DWI charges.[32] Thus, Vermont's courts are faced with increasing numbers of criminal cases where, despite few issues and limited sanctions, contests are vigorous and prolonged.

Delay in the resolution of DWI charges compromises the effectiveness of DWI policy, as well as the efficiency of its enforcement.[33] General deterrence value is reduced because long-delayed license suspensions are not highly visible. Unless driving is prohibited as a condition of release, specific deterrence is lacking because the defendant can continue to drive until all appeals are exhausted.[34]

These problems of efficiency and effectiveness could be alleviated through procedural reforms aimed at swift and certain license suspension accomplished outside of the criminal context.[35] However, whether Vermont may institute DWI procedural reform depends on whether appropriate constitutional safeguards can be maintained.

## II. The Vermont Reform Proposals

Recent legislative proposals to amend Vermont's DWI statutes have included versions of both the civil proceedings and the sum-

30. *Id.* at § 671 (c).
31. *Id.*
32. H. Ross, Deterring the Drinking Driver (1982).
33. *Id.*
34. Vt. Stat. Ann. tit. 23, § 1206 (a) (Supp. 1985).
35. Reese, *supra* note 6, at 315.

mary suspension approaches. Two Senate bills proposed amendments under which DWI license suspensions could be accomplished administratively after civil proceedings in the district courts.[36] Another proposal would have authorized summary license suspension at the scene of the stop in first offense cases.[37]

### *A. The Civil Proceedings Approach*

Under the provisions of the civil proceedings proposals, the state would have the option to seek an administrative suspension of an accused individual's license.[38] The process would begin with a district court finding on the sole issue of whether the individual was operating a motor vehicle while having a blood-alcohol content above the legal limit.[39] The court's finding would be based on a preponderance of the evidence,[40] and the state could establish a prima facie case by introducing affidavits stating that the accused individual was operating a motor vehicle while having the specified blood-alcohol content.[41] The defendant would be allowed to subpoena witnesses and to introduce evidence.[42] If the court found that the essential elements were present, then this finding would be reported to the motor vehicle commissioner, who would suspend the operator's license for a period of ninety days.[43]

The proposed version of the civil proceedings approach would establish a discretionary two-track license suspension scheme: the state's right to seek administrative suspension would be independent of its right to proceed with criminal DWI prosecution.[44] Thus, whether a particular case would be pursued under either or both of the procedural tracks would be a matter of prosecutorial discretion.

The availability of the administrative suspension track under the terms of the civil proceedings proposal is predicated on blood-

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36. S. 99, 56th Biennial Session (1981) and S. 126, 57th Biennial Session (1983).

37. S. 44, 57th Biennial Session (1983). *See also* S. 164, 59th Biennial Session (1986) (summary suspension following report of officer to motor vehicle commission).

38. *See, e.g.*, S. 126, 57th Biennial Session (1983).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

alcohol test results.[45] Refusal cases would continue to be treated under the terms of Vermont's implied consent statute.[46]

The underlying theory of the civil proceedings approach is that license suspensions would be more certain, more rapid, and more economically efficient than they are in the present system.[47] Also, because dilatory strategies engaged in by DWI defendants are motivated by the fear of license loss,[48] rather than any fines that may be imposed, streamlined suspension procedures would discourage protracted litigation of any parallel criminal charges. Moreover, one legislative sponsor of this approach characterizes the proposed scheme as an "equalizer" because license suspension could not be delayed by defendants able to hire a lawyer or to maintain a lengthy defense strategy.[49]

Reform opponents maintain that the apparent benefits of the civil proceedings approach are illusory.[50] Some legislators and prosecutors fear that any move away from the criminal treatment of DWI offenses would create a public perception of inappropriate lenience.[51] If this perception were to arise, then the general deterrence value of the statutory scheme as a whole could be reduced. In response to the assertions of enhanced efficiency, one critic argues that proposed district court involvement and the availability of liberal civil discovery would result in negligible judicial economy.[52]

### *B. The Summary License Suspension Approach*

The second approach taken by proposed DWI legislation in Vermont, incorporating elements of the Minnesota summary suspension scheme, contemplates a more drastic departure from criminal procedure because the driver's license would be confiscated by the police officer at the scene of the stop.[53] The amendment would

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45. *Id.*

46. VT. STAT. ANN. tit. 23, § 1202 (a) (Supp. 1985).

47. Interview with Peter Welch, Vermont State Senator and President of the Vermont Senate (Sept. 13, 1984).

48. F. Lowery, *Minnesota's Double-Barreled Implied Consent Law*, Department of Transportation HS-806-549 (1983).

49. Welch interview, *supra* note 47.

50. Telephone interview with Chris Leopold, Director of the Vermont State's Attorneys Association (Feb. 7, 1985).

51. *Id.*

52. *Id.*

53. S. 44, 57th Biennial Session (1983).

apply both to motorists who are accused of a simple first offense following blood-alcohol testing and to those who refuse to submit to testing.[54] The police officer at the scene of the stop would be required to "take the license or permit of the driver, if any, and issue a temporary permit effective only for thirty days."[55] Notice of the intent to suspend would be served immediately, and the motorist would have a ten-day period to request a summary hearing in the district court.[56] If no hearing were requested, then formal license suspension would become effective thirty days after the service of notice.[57]

If a hearing were requested under the terms of the proposed amendment, then it would be required to take place within thirty days.[58] The court would make findings, based on a preponderance of the evidence presented, on the following issues: whether the police officer had reasonable grounds to believe that the defendant was operating a motor vehicle in violation of the statute; whether the accused was properly informed of the consequences of taking or refusing the test; and whether proper testing and evaluation indicated the required blood-alcohol content.[59] If the suspension were sustained, then the commissioner of motor vehicles would formally suspend the individual's license.[60]

As drafted, the proposed summary suspension procedure includes several significant features. First, the amendment would not establish a two-track system; instead, suspension of the first offender's license under this provision would be in lieu of criminal prosecution and other sanctions.[61] Second, because of the single opportunity for a hearing under this procedure, the scope of the court's inquiry would include the propriety of police procedures.[62] Third, the proposed amendment would not apply in cases where prior DWI convictions or refusals were involved.[63]

The summary suspension approach is based primarily on a de-

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

terrence rationale,[64] although it also offers relative efficiency. In theory, the summary nature of the procedure would foster a public perception of forceful state action against drunken drivers.[65] Statistics compiled in Minnesota provide strong support for the proposition that such an approach would be effective in reducing drunken driving.[66] Efficiency could also be enhanced by this enforcement procedure because, in first offense cases, the state would avoid the necessity of arrests, arraignments, and trials. Requests for hearings would be discouraged because of the low standard of proof required of the state and because no right to jury trial would exist. The approach could also prove to be more equitable than current procedures because license suspensions would be accomplished uniformly and expeditiously.

## III. The Validity of License Suspension Without Criminal Procedural Safeguards

Both of the described approaches to DWI procedural reform raise the threshhold issue of whether a state may abandon criminal procedural protections in order to effect DWI license suspensions. Application of United States Supreme Court criteria leads to the conclusion that Vermont may not seek to achieve traditionally criminal DWI purposes in the absence of criminal procedure. However, analysis of similar procedural reforms in Maine and Minnesota suggests that a system of two procedural tracks for license suspension, one criminal and one regulatory, could be a valid approach to DWI reform in Vermont.

### *A. The United States Supreme Court's Mendoza-Martinez Analysis*

In *Kennedy v. Mendoza-Martinez*,[67] the United States Supreme Court resolved the issue of whether criminal procedure is required for a particular state action against the individual by focusing on the punitive nature of the potential sanction. *Mendoza-Martinez* involved the challenge of a statute that deprived an indi-

64. F. Lowery, *supra* note 48.

65. *Id.*

66. *Id.* at 34. The rapid annual increase in the number of license suspensions effected is directly proportional to a rapid decrease in the numbers of fatalities attributed to drunken driving. *Id.*

67. 372 U.S. 144 (1963).

vidual of citizenship automatically if he avoided military service by leaving the country during wartime.[68] The statute made no provision for adjudicatory proceedings of any sort, despite the magnitude of the deprivation.

The Court opined that the key inquiry in determining whether criminal procedure is required for a particular statute's operation is whether the statute in question is "essentially penal in character."[69] The factors deemed significant for purposes of this analysis included: (1) whether the potential sanction involves an affirmative disability or restraint, (2) whether the penalty has been regarded historically as a punishment, (3) whether imposition of the sanction depends on a finding of scienter, (4) whether the traditional purposes of punishment are served, (5) whether the behavior at issue is already criminal, (6) whether there may be an alternative purpose for the sanction, and (7) whether the sanction appears excessive in relation to any alternative purpose.[70] The Court also noted that conclusive evidence of legislative intent regarding the penal nature of a statute is highly relevant.[71] After considering these factors, the Court held that criminal procedure is required in cases where loss of citizenship is possible.[72]

Application of the *Mendoza-Martinez* criteria leads to the conclusion that Vermont may not substitute streamlined procedures for criminal DWI procedures in an attempt to further traditionally criminal purposes. First, the concept of an "affirmative disability or restraint" may be broad enough to include the suspension of the right to drive because the automobile has become a fundamental mode of personal transportation. Second, license suspension is the primary form of punishment imposed for violations of Vermont's DWI statutes.[73] Third, license suspension serves the traditional penal purposes of general and specific deterrence. The likelihood of license suspension is regarded as the most effective deterrent of drunken driving.[74] Finally, drunken driving has been treated traditionally as criminal behavior in Vermont.[75]

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68. *Id.* at 165-66.
69. *Id.* at 164.
70. *Id.* at 168-69.
71. *Id.* at 169.
72. *Id.* at 186.
73. VT. STAT. ANN. tit. 23, § 1206 (Supp. 1985).
74. Ross, *supra* note 32.
75. Leopold interview, *supra* note 50.

On the other hand, competing considerations under *Mendoza-Martinez* include the fact that license suspension under the authority of Vermont's DWI statute does not depend on a finding of scienter.[76] Moreover, license suspension could serve the legitimate regulatory purpose of promoting highway safety through the speedy removal of intoxicated motorists from the highways.[77] Also, the sanction of license suspension is not an excessive method of achieving either regulatory purposes in general or the specific purpose of removing drunken drivers from the roads.[78] Conclusive evidence of legislative intent is unavailable; the tenor of recorded legislative discussions could be interpreted as support for the existence of either a regulatory or a penal purpose.[79]

A 1985 ruling of the Supreme Judicial Court of Maine provides further guidance in the application of the *Mendoza-Martinez* criteria. In *State v. Freeman,*[80] the court applied *Mendoza-Martinez* in the course of striking down Maine's civil proceedings approach to DWI adjudication. The challenged Maine statute gave prosecutors limited discretion to charge a DWI defendant either with a traffic infraction or with a criminal offense.[81] Once a prosecution decision was made, suspension procedures would continue on the single chosen track.[82] The civil procedures applicable to the infraction cases did not include the right to a jury trial,[83] and potential sanctions included both license suspension and the imposition of a fine.[84]

Under the *Freeman* court's analysis, the first *Mendoza-Martinez* criterion, inquiring "whether the sanction involves an affirmative disability or restraint . . . ,"[85] was dispositive.[86] The court reasoned that, under the statutory provisions, a defendant has already been subjected to arrest and detention by the time the prosecutor's election is made, and that the criminal nature of the process could

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76. VT. STAT. ANN. tit. 23, § 1201 (Supp. 1985).
77. *Id.* at § 1178.
78. *See* Bell v. Burson, 402 U.S. 535 (1971).
79. *See, e.g., Administrative License Suspension: Hearings on S. 44 Before the Senate Judiciary Committee,* 57th Biennial Session (Feb. 1983).
80. ___ Me. ___, 487 A.2d 1175 (1985).
81. ME. REV. STAT. ANN. tit. 29, § 1312-C (1981) (amended 1985).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Freeman,* ___ Me. at ___, 487 A.2d at 1177.
86. *Id.* at ___, 487 A.2d at 1177-78.

not be altered after such treatment.[87]

The *Freeman* court also noted other factors which suggested that the procedure at issue was actually criminal in nature. First, the court emphasized that the effect upon the individual's reputation would be the attachment of a criminal stigma, despite the statutory characterization of the adjudicatory procedure as civil.[88] Second, the elements of the civil infraction were noted to be identical to the elements constituting a criminal DWI violation.[89]

The continuing official consequences of a conviction under the civil procedure provisions were also found to be significant.[90] A conviction of the civil violation meant that any subsequent DWI charge must be treated as a criminal offense, and a conviction on the subsequent charge then required sentence enhancement.[91] Moreover, the civil violation counted towards habitual offender status.[92] The *Freeman* court stated that this "aggregate effect . . . goes beyond the regulatory to the outright punitive."[93] Finally, the court noted that the procedure was "part of a larger statutory scheme that consistently treats all driving while intoxicated as a crime."[94]

The *Freeman* court noted that the statutory procedure at issue could be valid if it were interpreted to include all of the protections of criminal procedures.[95] However, because such a construction would frustrate the legislature's intent of streamlining procedures, the statute was held invalid.[96]

Application of the *Freeman* court's analysis to the Vermont reform proposals begins with a determination of whether arrest and detention of the DWI suspect would occur prior to a decision to pursue only non-criminal procedural alternatives. The summary suspension proposal avoids arrest and detention altogether,[97] but the civil proceedings approach appears to create the potential for

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87. *Id.* at ___, 487 A.2d at 1178.
88. *Id.*
89. *Id.* at ___, 487 A.2d at 1179.
90. *Id.* at ___, 487 A.2d at 1178.
91. *Id.*
92. *Id.* at ___, 487 A.2d at 1179.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at ___, 487 A.2d at 1180.
97. S. 44, 57th Biennial Session (1983).

such a situation.

Although the proposed version of the civil proceedings approach allows the state to proceed independently on both criminal and regulatory tracks, neither procedural track is initiated automatically.[98] Because the proposed amendment does not provide alternatives to arrest and detention, continued use of these preliminary criminal procedures must have been contemplated. Therefore, the civil proceedings proposal, as drafted, would appear to be invalid on the basis of the first *Mendoza-Martinez* criterion as applied in *Freeman.*

Other aspects of the *Freeman* court's reasoning are also relevant to the Vermont inquiry. First, the impact of a DWI license suspension upon an individual's reputation would not be diminished by the substitution of alternative suspension procedures. The stigma of criminality would be associated with the imposition of any DWI sanction, particularly if it were to be accomplished by a police officer. Moreover, the proposed summary suspension approach, like the Maine statute, provides that a suspension under its terms would count as if it were a criminal conviction for purposes of computing cumulative offenses.[99] Finally, either of the Vermont reform approaches would become part of a comprehensive statutory scheme that, like Maine's statute, is otherwise consistent in its treatment of drunken driving as a criminal act.

These observations indicate that both of the Vermont proposals for DWI procedural reform would be invalid as drafted. *Mendoza-Martinez* and *Freeman,* taken together, establish that the state may not seek to achieve traditionally penal purposes in the DWI context without affording criminal procedural protections to the individual.

### *B. The Right to Jury Trial for the DWI Defendant*

Cases which address the right to jury trial in the DWI context support the proposition that criminal procedure is required for the adjudication of DWI charges. Whether the right to jury trial is implicated by a particular offense depends upon its nature.[100] The United States Supreme Court adheres to the common-law distinc-

98. S. 126, 57th Biennial Session (1983).
99. S. 44, 57th Biennial Session (1983).
100. Baldwin v. New York, 399 U.S. 66, 69 n.6 (1970).

tion between "serious" offenses, which require jury trial, and those that are "petty."[101] The potential for incarceration is an important factor, but not an exclusive one, in making this determination.[102]

In cases involving DWI offenses in the national parks, the federal courts have held that drunken driving is a "serious" offense, and that the accused individual must be afforded the right to jury trial.[103] In one case, the Ninth Circuit rejected the proposition that a maximum federal sentence of six months incarceration for a DWI offense meant that the offense was not a serious one.[104] Instead, the court found that the right to jury trial was implicated because of the traditional state practice of affording jury trials to DWI defendants[105] and the potential state penalty of license suspension.[106]

In an analogous context, the United States Supreme Court found that reckless driving charges implicate the right to jury trial.[107] Although the 1930 ruling was made in the early years of the automobile's existence, the Court's reasoning has been cited with approval in more recent cases.[108] The Court stated:

> An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear [sic] distressing witness. To drive such an instrumentality through the public streets of a city so recklessly "as to endanger property and individuals" is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.[109]

The appalling number of contemporary fatalities attributable to drunken driving on the nation's highways gives the Court's statement enduring relevance.

In sum, federal cases addressing the right to jury trial provide indirect support for the proposition that Vermont may not abandon criminal procedure where the resolution of DWI charges is involved. The issue remains, however, whether a state may imple-

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101. *Id.*
102. *Id.* at 69.
103. U.S. v. Craner, 652 F.2d 23 (9th Cir. 1981); U.S. v. Woods, 450 F. Supp. 1335 (D. Md. 1978).
104. *Craner*, 652 F.2d at 27.
105. *Id.*
106. *Id.* at 26.
107. District of Columbia v. Colts, 282 U.S. 63 (1930).
108. *See, e.g., Craner*, 652 F.2d at 26.
109. *Colts*, 282 U.S. at 73.

ment summary procedures for license suspension in this context if independent criminal DWI procedures are also maintained.

### *C. A Two-Track Procedural System: The Solution?*

Under a two-track approach to DWI license suspension, Vermont would add a regulatory procedural track for license suspension to the provisions of the implied consent statute.[110] Failure or refusal of blood-alcohol testing would result automatically in the initiation of administrative license suspension proceedings.[111] Independent criminal charges would be filed under the current DWI statutory provisions in appropriate cases, and license suspension would continue to be a criminal penalty.[112]

Minnesota enacted the nation's first two-track license suspension system in 1976.[113] The concept was developed in order to provide the speedy post-suspension hearing necessitated by the summary suspension approach.[114]

However, the two-track concept could also help to ensure validity under *Mendoza-Martinez* and *Freeman.* Analysis under *Mendoza-Martinez* would change because a two-track system would reflect the independent regulatory purpose of removing drunken drivers from the highways. The *Freeman* court's concerns regarding the effective abandonment of criminal procedure,[115] especially where arrest and detention are involved, would be eliminated because criminal proceedings would proceed independently of the administrative license suspension track.

Minnesota's two-track system includes several key features, each of which reflects the independent regulatory purpose of ensuring immediate highway safety. First, license suspension proceedings along the administrative track are mandatory following either testing failure or refusal.[116] Second, arrest, arraignment, and criminal prosecution proceed along an independent track in all appropriate cases.[117] Third, administrative suspension procedures ap-

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110. *See* Lowery, *supra* note 48, at 2-7.
111. *Id.*
112. *Id.*
113. *Id.* at 20.
114. *Id.*
115. *Freeman,* ___ Me. at ___, 487 A.2d at 1177-80.
116. MINN. STAT. ANN. § 169.123 (2) (a) (West Supp. 1985).
117. *Id.*

ply without regard to the number of previous convictions or testing refusals.[118] Finally, the administrative authority to proceed summarily is expressly provided for in the terms of the implied consent statute.[119]

The Vermont civil proceedings proposal includes a variation of the two-track approach.[120] However, the proposal differs significantly from Minnesota's scheme, because administrative suspension procedures are not mandated[121] and because they are applicable in first offense cases only.[122] The limited applicability of the proposed procedure and its discretionary nature conflicts with the underlying regulatory rationale, and such a scheme would include the potential for the effective substitution of summary procedures in certain classes of DWI cases.

The Vermont civil proceedings proposal also fails to express a legislative purpose for enactment of the summary suspension procedure. A clear statement of regulatory purpose, focusing on the need for immediate removal of drunken drivers from the public roadways, would assist a court in any subsequent analysis of procedural validity.

Finally, the proposed Vermont version of the two-track system does not identify the administrative authority under which summary procedures could be implemented. The close relationship between penal and regulatory purposes in the DWI context indicates that explicit distinctions should be made where possible. The administrative track should be grounded expressly on Vermont's implied consent statute, thereby applying to testing refusals as well as testing failures.

In summary, because the addition of an independent procedural track for license suspension would accomplish a legitimate regulatory purpose, a two-track system could be a valid approach to DWI procedural reform. If the administrative track of such a system took the form of summary suspension at the scene of the stop, however, then significant due process concerns would also be raised.

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118. *Id.*
119. *Id.*
120. S. 126, 57th Biennial Session (1983).
121. *Id.*
122. *Id.*

## IV. The Due Process Analysis

The summary suspension approach proposed in Vermont implicates the due process clause because the individual's license is confiscated prior to the opportunity for a hearing.[123] Although formal license suspension does not become effective prior to the hearing opportunity,[124] the individual is deprived summarily of a property interest in the license and a liberty interest in community reputation. Application of the United States Supreme Court's balancing analysis leads to the conclusion that a post-deprivation hearing procedure would not afford due process in the DWI context unless it is part of a well defined two-track system.

Whether a post-deprivation hearing violates due process requirements in a particular context is determined by means of a two-fold inquiry.[125] The first question is whether there is a constitutionally protected interest,[126] i.e., whether the due process clause applies. If a protectible interest is found, then the second inquiry defines what process is due with the application of a balancing analysis.[127] Here, whether a post-deprivation hearing would be valid depends on the relative weights assigned to the individual's interests in liberty and property and to the state's interest in highway safety.

### *A. The Individual's Protectible Interests in Liberty and Property*

Where state action involves the potential for deprivation of an individual's interest in liberty or property, the fourteenth amendment's due process requirements apply.[128] The liberty or property interest in question must be one of constitutional proportions, and this status depends upon the nature of the interest rather than its weight.[129] Here, analysis suggests that protectible interests in both property and liberty are implicated by the summary suspension proposal.

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123. S. 44, 57th Biennial Session (1983).
124. *Id.*
125. Morrissey v. Brewer, 408 U.S. 471, 481-83 (1971).
126. *Id.* at 481.
127. Mathews v. Eldridge, 424 U.S. 319 (1976).
128. U.S. Const. amend. V.
129. Board of Regents v. Roth, 408 U.S. 564 (1972).

In *Bell v. Burson,*[130] the Supreme Court held that the individual has a protectible property interest in a granted driver's license.[131] *Bell* involved the challenge of a Georgia procedure that allowed license suspension where uninsured drivers were involved in automobile accidents. The suspension hearing did not include the opportunity to present evidence on liability.[132] The individual affected was a clergyman whose ministerial duties required him to travel a circuit of three rural towns. Reasoning that a license may become essential to continued pursuit of the holder's livelihood, the *Bell* Court held that the due process clause requires a more meaningful hearing.[133]

*Bell* is a rather dated case in the evolving jurisprudence of due process analysis, however, and the Court's finding of a protectible interest appeared to be based on the importance of the license to drive.[134] Whether an individual's interest is protectible under the due process clause no longer depends upon the weight of the particular interest but upon its nature.[135]

Under current law, a claimed property interest must constitute a "legitimate claim of entitlement" supported by "existing rules or mutual understandings."[136] These rules or understandings stem from a source other than the Constitution, such as state law.[137] The Supreme Court by-passed an opportunity to apply this test of a protectible property interest in a relatively recent license suspension case,[138] citing *Bell* instead.[139]

However, it is likely that a claim of entitlement to a duly granted driver's license would be deemed legitimate. Once the license to operate a motor vehicle in Vermont is granted, renewal is understood to be automatic upon payment of the periodic fee. Thus, both *Bell* and an entitlement analysis support the conclusion that the individual has a protectible property interest in a granted driver's license.

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130. 402 U.S. 535 (1971).
131. *Id.* at 539.
132. *Id.* at 537-38.
133. *Id.* at 539-41.
134. *Id.* at 539.
135. *Roth,* 408 U.S. at 571.
136. *Id.* at 577.
137. *Id.*
138. Mackey v. Montrym, 443 U.S. 1 (1978).
139. *Id.* at 10, n.7.

The courts have failed to recognize a second constitutionally protectible interest implicated by DWI license suspension procedures, the individual's liberty interest in his or her reputation. The United States Supreme Court has stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[140]

As the high court of Maine noted in *Freeman*,[141] the criminal stigma attaching to a DWI license suspension will not be diminished because it is accomplished administratively. A summary license suspension at the scene of the stop would become a matter of public record immediately, and a subsequent hearing on a single administrative procedural track would have little remedial effect on the individual's community standing. Therefore, an assessment of the individual's interest in the due process analysis must include consideration of this reputation interest.

### *B. The Post-Deprivation Hearing in the DWI Context*

The second stage of the applicable due process analysis determines what procedural elements are required in order to accomplish a particular state action.[142] Due process is a flexible concept, and the relative weights of the various interests implicated by a particular procedure will determine what procedural safeguards are due to the individual.[143]

Here, the narrow issue is whether summary license suspension must be preceded by the opportunity for a hearing. Application of the United States Supreme Court's balancing analysis suggests that due process problems could be encountered unless the summary procedures were part of a two-track system.

#### *1. The Supreme Court's Balancing Analysis*

In *Mathews v. Eldridge*,[144] the Supreme Court enunciated a three-factor balancing analysis to be used in deciding what procedural elements are required where a protectible interest is at stake.

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140. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).
141. ___ Me. at ___, 487 A.2d at 1177.
142. *Mathews*, 424 U.S. at 334-35.
143. *Id.* at 335.
144. *Id.* at 324.

*Mathews* involved the termination of disability insurance benefits by the Social Security Administration and a subsequent due process challenge of post-termination hearing provisions.[145] The challenged procedure provided for notice and an opportunity to submit written arguments before the termination decision.[146]

To determine whether a pre-termination hearing was required for such a procedure, the Court weighed three factors: (1) the individual's interest, (2) the government's interest, and (3) the relative risk that the nature of the procedure would result in erroneous deprivation by the state.[147] If the risk of erroneous deprivation inherent in a particular procedure is relatively high, as compared to possible alternatives, or if the individual's interest outweighs that of the government, then greater procedural protection is required.[148]

The *Mathews* Court found that the risk of erroneous deprivation through use of the procedures at issue was not appreciably greater than it would be under other alternatives, including the alternative of a pre-termination hearing.[149] The Court also reasoned that the interest of a disabled worker in avoiding the loss of disability payments, which are not based on financial need, is not likely to be as great as a welfare recipient's interest in maintaining uninterrupted government payments.[150] The Court acknowledged the strength of the government's interest in preserving scarce fiscal and administrative resources and held that the procedures in question meet due process requirements.[151]

### 2. *The Supreme Court's Application of Mathews to License Suspension Procedures*

The United States Supreme Court's opinion in *Mackey v. Montrym*[152] provides guidance in the application of the *Mathews* balancing analysis to a summary license suspension procedure. The *Mackey* Court considered the constitutionality of a Massachusetts procedure that provided for post-suspension hearings in cases

145. *Id.*
146. *Id.* at 335.
147. *Id.*
148. *Id.* at 342-43.
149. *Id.*
150. *Id.* at 347.
151. *Id.* at 348-49.
152. *Mackey*, 443 U.S. at 1.

where blood-alcohol testing was refused. The challenged procedure provided that the state's registrar of motor vehicles must order a ninety-day license suspension upon the report of a refusal to submit to DWI testing, and that the accused motorist was entitled to an "immediate" post-suspension hearing.[153]

The Court first considered the individual's interest in avoiding loss of the license to drive. Recognizing that this interest was substantial, the Court reasoned that the state would "not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures."[154] The majority noted, however, that the immediacy of the post-suspension hearing and the ninety-day limit on the suspension reduced the impact of the state action on the private interest involved.[155]

Second, the additional risk to error was assessed as minimal because, although the suspension is made on the basis of the officer's report alone, all statutory elements for such suspensions "will inevitably be within the personal knowledge of the reporting officer."[156] Also, the risk of error was not seen as appreciably different than it would be under the pre-suspension hearing alternative.[157]

A third *Mathews* factor, that of the state's combined interests in the function involved and in maintaining a summary proceeding, was assigned substantial weight by the majority.[158] Three reasons supporting the state's interest in the procedure were noted: (1) the general deterrence of drunken driving created by the "very existence" of the summary nature of the sanction, (2) the strong inducement created for the suspected motorist to submit to the testing, and (3) the prompt removal of "such" drivers from the public roads.[159] A divided *Mackey* Court upheld the post-suspension hearing procedure.[160]

A strong dissent, authored by Justice Stewart,[161] agreed that

153. *Id.* at 4.
154. *Id.* at 11.
155. *Id.* at 12.
156. *Id.* at 14.
157. *Id.* at 17.
158. *Id.*
159. *Id.* at 18.
160. *Id.* at 19.
161. *Id.* at 25 (Stewart, J., dissenting).

the gravity of a state's interest in quickly removing the drunken driver from the road could not be questioned.[162] Justice Stewart noted, however, that the Massachusetts testing procedure was not designed to satisfy this interest in speedy removal because, if the test is taken and failed, then the motorist retains the license.[163] Therefore, the state's true interest in the procedure at issue was characterized as one of deterring non-cooperation with the police, and not one of removing intoxicated drivers from the roads.[164] Thus, if the balancing analysis is to be accurately applied, then the assertion that a particular procedure furthers the state's interest in removing the drunken driver from the public roads must be carefully examined.

### 3. *Application of Mathews to the Proposed Summary Suspension Approach*

The summary suspension amendment proposed in Vermont, like Minnesota's approach, reflects a calculated compromise between competing considerations of deterrence and due process. The Minnesota Supreme Court, in *Heddan v. Dirkswager*,[165] applied *Mathews* and *Mackey* and held that Minnesota's two-track approach to summary suspension affords due process. However, the proposed Vermont approach is distinguishable because it contemplates a single-track procedure, applicable to first offenders only.[166] A comprehensive *Mathews* analysis, guided by *Mackey* and *Heddan*, reveals that this single-track version of summary suspension may be constitutionally infirm.

#### *(a) The Individual's Interest*

The first factor to be considered in the application of a *Mathews* analysis to a summary license suspension procedure is the individual's interest in avoiding the loss of the license to drive.[167] This interest was acknowledged as a substantial one in both *Mackey*[168] and *Heddan*.[169]

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162. *Id.* at 26.
163. *Id.*
164. *Id.*
165. 336 N.W.2d 54 (Minn. 1983).
166. S. 44, 57th Biennial Session (1983).
167. *Mathews*, 424 U.S. at 334-35.
168. *Mackey*, 443 U.S. at 11-12.
169. *Heddan*, 336 N.W.2d at 61.

The resident of a rural state like Vermont has an especially strong interest in avoiding license loss because of the widely dispersed population, the lack of mass transportation, and the scarcity of alternative employment opportunities. The rural settlement pattern means that the individual is likely to live some distance from his or her place of employment, and that it would be difficult or impractical to obtain transportation from a friend or to use any public transportation that may be available. A penalty that represents three months of inconvenience in some areas may constitute a significant burden for a resident of Vermont, and this burden could have economic effects, such as job loss, that would endure well beyond the ninety-day period of suspension.

In *Mackey*, however, the Supreme Court reasoned that the gravity of the individual's interest was decreased because the duration of the license suspension was limited to a period of ninety days, hardship relief was available, and an immediate post-suspension hearing was available.[170] The *Heddan* court adopted this reasoning and noted that Minnesota's statute provides for limited driving privileges in hardship cases.[171]

The summary suspension amendment proposed in Vermont would limit license suspensions to a ninety-day period, extend hardship relief in the form of the temporary driving permit, and afford the opportunity for a post-suspension hearing.[172] Although these provisions would reduce the weight of the individual's interest, their mitigating effect is limited to property interest aspects.

The individual affected by a DWI license suspension procedure also has a significant liberty interest in avoiding a criminal stigma.[173] The Minnesota court's analysis in *Heddan* did not refer to this liberty interest. Injury to community reputation is not easily reparable, and the United States Supreme Court has implied that a pre-deprivation hearing is required in cases where an individual's reputation interest is implicated.[174]

Here, the police officer's confiscation of the motorist's license at the scene of the stop would be noted in local newspapers as a matter of police enforcement of DWI laws. On the other hand, the

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170. *Mackey*, 443 U.S. at 11-12.
171. *Heddan*, 336 N.W.2d at 60.
172. S. 44, 57th Biennial Session (1983).
173. *See supra* notes 140-41 and accompanying text.
174. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

results of the subsequent administrative hearing, if requested, are less likely to be disseminated by the popular news media. The public perception would be that the guilt of the stopped motorist was established and that a penalty was imposed. The legislative purpose underlying such procedures is to encourage this public perception of summary action as a means of promoting general deterrence.[175]

Unlike the situations in *Mackey* and *Heddan,* therefore, the individual's interest here would include both liberty and property aspects. Neither the extension of temporary driving privileges nor the official pause before final suspension would mitigate the impact of the proposed summary procedure upon the individual's reputation. Thus, the individual's interests should be accorded significant gravity in the application of a *Mathews* balancing analysis.

### *(b) The State's Interest*

Vermont's interest in the general deterrence of drunken driving is to be accorded great weight; the gravity of this interest alone would be a substantial factor in the balancing analysis. However, some aspects of the governmental interests involved in *Mackey* and in *Heddan* are not relevant to analysis of the proposed single-track approach. The specific deterrence rationale, questioned by dissenting Justice Stewart in *Mackey,*[176] is also questionable in the context of the Vermont proposal. A specific deterrence basis would require that the proposed procedure be effective in the speedy removal of drunken drivers from the highways. The proposal under consideration here would allow the driver who fails the test to continue driving until the hearing.[177] In contrast, the current DWI statute allows the arraigning magistrate to prohibit further driving as a condition of release.[178]

Vermont could also assert a governmental interest in easing the increasing burden on the state's courts, in a time of limited state resources, by increasing the efficiency of the license suspension process. Both *Mackey* and *Heddan* recognized this interest as substantial.[179]

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175. *See* Reese, *supra* note 6, at 315.
176. *See supra* notes 140-41 and accompanying text.
177. S. 44, 57th Biennial Session (1983).
178. VT. STAT. ANN. tit. 23, § 1212 (1983).
179. *Mackey,* 443 U.S. at 18; *Heddan,* 336 N.W.2d at 63.

In sum, Vermont's interests in promoting general deterrence and conserving judicial resources would be accorded great weight in the balance. However, it is not clear that the state's interest in specific deterrence would be served better by a single-track summary suspension procedure than it is by the criminal justice system.

### *(c) The Relative Risk of Erroneous Deprivation*

The risk of erroneous license suspensions that would be incurred through use of the summary procedure, relative to the risk incurred through use of criminal procedure, must also be considered in the analysis.[180] The *Mackey* Court characterized the additional risk incurred by the Massachusetts suspension procedure used in testing refusal cases as "insubstantial."[181] The Court noted that two officers are required to be present and that the statutory elements of the refusal violation will "inevitably be within the personal knowledge of the reporting officer."[182]

The Minnesota court, in *Heddan,* focused on the risk of error incurred through reliance on blood-alcohol testing results, particularly those results derived from breath testing.[183] The court acknowledged that the risk of erroneous deprivation is greater where it is dependent on such testing but reasoned that the degree of increased risk was not sufficient to alter the balance.[184] The summary suspension procedure proposed in Vermont places similar reliance upon blood-alcohol testing,[185] but it appears unlikely that the risk of erroneous suspensions would be a significant factor in a due process analysis.

### *(d) The Balance*

Because of the unquestionable gravity of the state's interest in deterring drunken driving and the minimal risk of erroneous deprivations under the summary suspension scheme, the weight assigned to the individual's interests in the Vermont procedure would probably be determinative. If the individual's liberty inter-

180. *Mathews,* 424 U.S. at 335.
181. *Mackey,* 443 U.S. at 14.
182. *Id.*
183. *Heddan,* 336 N.W.2d at 61-2.
184. *Id.* at 62.
185. S. 44, 57th Biennial Session (1983).

est in his or her reputation were recognized, then significant weight could be attributed to the interests of the individual in the balance. Moreover, the United States Supreme Court has implied that a post-deprivation hearing is inadequate procedural protection for the individual where a reputation interest is implicated.[186] Therefore, the validity of the proposed single-track approach to summary license suspension in Vermont appears to be questionable under the due process clause.

### 5. *The Solution: Due Process on Two Tracks*

These due process concerns could be reduced if the proposed summary suspension legislation were redrafted to incorporate a well defined, two-track system modeled upon Minnesota's approach. First, strict separation of the regulatory suspension track from the independent criminal procedures of arrest, detention, and prosecution would be a partial solution to the criminal stigma problem. Second, a clearly defined regulatory track would allow the invocation of a line of cases establishing an exception to the pre-deprivation hearing requirement. Finally, the maintenance of the present criminal procedures would allow the arraigning magistrate to prohibit further driving as a condition of release in appropriate cases.

The foregoing analysis suggests that due process problems are created by a single-track DWI procedure primarily because the individual's reputation interest is implicated by the potential for criminal stigma.[187] A two-track system would not eliminate the stigma involved in a DWI investigation, but a carefully designed system could reduce the perceived association between regulatory license suspension and criminal implications.

First, it is likely that the local news media would focus upon the criminal aspects of the incident, rather than emphasizing the regulatory license suspension in each case. This effect could be encouraged by ensuring that police records of the regulatory aspects of the stop are maintained separately from records of criminal procedures. The existence of the summary suspension procedure and its universal application could still be publicized by law enforcement authorities.

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186. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

187. *See supra* notes 173-74 and accompanying text.

Second, the availability of independent criminal proceedings would afford full protection of the individual's reputation interest. Trial by jury would be available and the final determination of guilt or innocence would be highly visible.

Redrafting the proposed summary suspension procedure as a two-track system would also allow invocation of the "emergency doctrine," noted in *Mackey*,[188] which allows post-deprivation hearings in certain regulatory contexts. In cases involving tainted meat[189] and mislabeled drugs,[190] the United States Supreme Court has ruled that practical considerations and a perceived threat to public health can eliminate the need for a pre-deprivation hearing. This doctrine has been extended to affirm summary action in securities regulation[191] and summary suspension of a private employee's security clearance to work in a military installation.[192]

The increasingly severe drunken driving problem could be characterized as a more compelling emergency situation than that of spoiled meat or mislabeled drugs. Drunken driving threatens the entire population and is one of the leading causes of injury and death in Vermont.[193] A two-track system would reflect the independent regulatory purpose of removing drunken drivers quickly from the public highways, and the emergency doctrine could justify a post-suspension hearing procedure as a legislative attempt to achieve this purpose.

## V. A Proposed Model For Future Legislation

Analysis of the two reform approaches as proposed in the Vermont legislature and a review of the experiences of other states leads to three general conclusions. First, Vermont may not abandon criminal procedural protections in favor of summary administrative procedures that serve the same traditionally criminal purposes as current DWI statutes. Second, United States Supreme Court criteria and case-law from Maine and Minnesota suggest that a two-track system may be the only valid means of imple-

188. 443 U.S. at 25.

189. North American Cold Storage v. City of Chicago, 211 U.S. 306 (1908).

190. Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950).

191. R.A. Holman & Co. v. S.E.C., 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

192. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 866 (1961).

193. J. Waller, J. Worden, & I. Maraville, *Baseline Data for Public Education About Alcohol and Highway Safety in Vermont*, Vermont Department of Public Health (1972).

menting alternative license suspension procedures in the DWI context. Third, although the summary suspension approach raises more due process concerns than does the civil proceedings approach, it appears to be a valid and effective reform model for use in a two-track system.

Any future legislation in this area should incorporate a comprehensive scheme of amendments that would establish a well defined, two-track system similar to Minnesota's summary suspension approach. The administrative track of such a system should be grounded on the regulatory authority of the implied consent statute, and summary license suspension proceedings should be mandated in all cases of testing failure or testing refusal without regard to prior offenses. An express statement of legislative purpose should be included, emphasizing the regulatory purpose of removing drunken drivers from the public roads expeditiously. An independent criminal procedural track should be initiated in all appropriate cases, and license suspension should continue to be an available criminal sanction.

Each provision of the implied consent statute and the administrative suspension procedure should be tailored to reflect the underlying, regulatory rationale. In addition to the provisions for temporary driving permits, draft legislation should include hardship provisions that allow limited driving privileges in exceptional circumstances. Relatively immediate summary hearings should be available. Finally, license suspensions accomplished under the administrative procedural track should not have a cumulative effect or be accorded significance in any criminal context.

## Conclusion

Analysis of two DWI reform measures recently proposed in the Vermont legislature reveals that each approach could be of questionable validity as drafted. However, rulings by the United States Supreme Court and courts in Maine and Minnesota indicate that a properly structured, two-track approach to summary license suspension could be valid and effective in Vermont.

Adoption of Minnesota's two-track system of summary license suspension at the scene of the stop would represent a more radical departure from present procedures than would the civil proceedings proposal, but the summary suspension approach appears to offer greater potential effectiveness. Suspension at the scene of the

stop would increase general and specific deterrence of drunken driving by establishing swift and certain license suspension. The burden on the judicial system would be decreased because hearing requests and dilatory strategies would be discouraged by the administrative license suspension. The maintenance of independent criminal proceedings would resolve constitutional questions because the administrative suspension track would be confined to its proper regulatory function.

Therefore, if considerations of effectiveness and efficiency suggest that procedural reform of Vermont's DWI statutes is desirable, than a properly drafted two-track system would be a valid statutory approach. A two-track summary suspension procedure, implicated automatically by DWI testing failure or refusal, would be an effective method of accomplishing regulatory purposes without compromising constitutional principles.

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