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Doe v. Edgar: A Constitutional Battle against Drunken Driving, 18 J. Marshall L. Rev. 255 (1984)

Douglas L. Gilmer

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DOE v. EDGAR:*
A CONSTITUTIONAL BATTLE AGAINST
DRUNKEN DRIVING

In 1983, nearly 800 people were killed in Illinois as a result of alcohol-related automobile accidents.¹ Recognizing the seriousness of the danger posed by drunken driving, the United States Court of Appeals for the Seventh Circuit recently upheld a state policy that barred persons twice convicted of driving under the influence of alcohol (D.U.I.)² from the state's highways for five years. In *Doe v. Edgar*,³ the Seventh Circuit held that the policy did not violate the offender's equal protection and due process rights.⁴ The court addressed the question of whether the Illinois Secretary of State could subject twice convicted D.U.I. offenders to a stricter penalty than other serious violators of the state's mandatory license revocation statute.⁵ The court also considered whether the secretary's policy against issuing a restricted driving permit⁶ to such offenders denied them due process of the law. The court held that such a distinction, as applied to repeat D.U.I. offenders, did not violate either their equal protection or due process rights.⁷

In *Doe*, the plaintiffs were twice convicted of D.U.I.⁸ Pursu-

* 721 F.2d 619 (7th Cir. 1983).

1. THE OFFICE OF THE SECRETARY OF STATE, ILLINOIS' D.U.I. LAW: THE FACTS FOR 1983 at 1 (1984).

2. Where analysis shows a trace of 0.10 percent or more alcohol in a person's blood, it shall be presumed that the person was under the influence of alcohol. ILL. REV. STAT. ch. 95-1/2, § 11-501(a)(1) (1983). Illinois' D.U.I. law also encompasses those drivers operating a motor vehicle under the influence of drugs or a combination of drugs and alcohol. *Id.* at § 11-501(a)(4) (1983). Despite this fact, the court in *Doe* limited its discussion to state policies aimed solely at those persons twice convicted of driving under the influence of alcohol. Whether the court's decision can be interpreted to also include those driving under the influence of drugs is unclear because the court never specifically discussed drug offenders in its opinion. Consequently, this matter will have to be resolved by future case law.

3. 721 F.2d 619 (7th Cir. 1983).

4. *Id.*

5. *Id.* at 622.

6. A restricted driving permit allows a person who has had his original license revoked the privilege of driving a motor vehicle between his residence and his place of employment or within other specified geographic limits. ILL. REV. STAT. ch. 95-1/2, § 6-205(c) (1983).

7. *Doe v. Edgar*, 721 F.2d 619 (7th Cir. 1983).

8. Plaintiff *Doe* had his license revoked for D.U.I. the second time in October, 1979. Plaintiff *Roe* had his license revoked for D.U.I. the second

ant to state law, the Illinois Secretary of State revoked the driver's licenses of both plaintiffs.⁹ Because Illinois law entitles a driver whose license has been revoked the opportunity to apply for restoration of his license,¹⁰ or alternatively, for a restricted driving permit upon a showing of undue hardship,¹¹ both plaintiffs requested to have their licenses reinstated or to be issued restricted driving permits.¹² The Secretary denied both requests. This decision was consonant with the Secretary's policy to refrain from reinstating the driver's license or granting restricted driving permits to such offenders for a period of five years following revocation.¹³ The plaintiffs brought a class action suit challenging the constitutional validity of this policy.¹⁴

time in October, 1978. Brief for Doe at 3, *Doe v. Edgar*, 721 F.2d 619 (7th Cir. 1983).

9. ILL. REV. STAT. ch. 95-1/2, § 6-205(a)(2) (1983).

10. ILL. REV. STAT. ch. 95-1/2, § 6-208(b) (1983) authorizes the Secretary of State to reinstate the applicant's license only if he is satisfied after investigation that the applicant will not endanger the public safety through the operation of a motor vehicle.

11. ILL. REV. STAT. ch. 95-1/2, § 6-205(c) (1983) provides that:

Whenever a person is convicted of any of the offenses enumerated in this Section, the court may recommend and the Secretary of State in his discretion without regard to whether such recommendation is made by the court, may, if application is made therefore, issue to such person a restricted driving permit granting the privilege of driving a motor vehicle between his residence and his place of employment or within other proper limits, except that this discretion shall be limited to cases where undue hardship would result from a failure to issue such a restricted driving permit.

Id.

12. *Doe*, 721 F.2d at 621.

13. THE OFFICE OF THE SECRETARY OF STATE, PROCEDURES AND STANDARDS FOR THE ISSUANCE OF RESTRICTED DRIVING PERMITS AND REINSTATEMENT OF REVOKED DRIVERS LICENSES (Dec. 21, 1981) (available from the Office of the Secretary of State, Illinois) [hereinafter cited as PROCEDURES]. Section III, B. 1 provides that:

To be considered for reinstatement, applicants who have two or more D.U.I. convictions on their driving records may not be considered until at least five (5) years have elapsed since the date of the latest revocation. This is to provide a showing that the applicant, if restored to his driving privileges and especially if the applicant has been reinstated once prior to the latest application, will not be a danger to the public safety or welfare on the highways.

The same publication states at § IV.A.2 that:

No restricted driving permits will be granted to applicants who have two or more D.U.I. convictions on their record. Any waivers from this prohibition must be requested in writing, with a full explanation of the circumstances, efforts made at rehabilitation and other relevant evidence to be considered.

14. *Doe v. Edgar*, 562 F. Supp. 66 (N.D. Ill. 1982), *aff'd*, 721 F.2d 619 (7th Cir. 1983). State law provides a hearing for any person who has had his license suspended or revoked, or who has had his application for a license or restricted driving permit denied. ILL. REV. STAT. ch. 95-1/2, § 2-118(a) (1983). Any decision rendered by the Secretary is ultimately subject to judicial review. *Id.* at § 2-118(e).

The district court granted the defendant's motion to dismiss, finding that the plaintiffs failed to state a claim upon which relief could be granted.¹⁵

On appeal,¹⁶ the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision.¹⁷ In reaching this decision, the court addressed two issues. First, the court considered whether the Secretary could implement a policy which imposes a more severe penalty upon repeat D.U.I. offenders than upon other individuals convicted of serious traffic offenses, such as reckless homicide.¹⁸ The court concluded that such disparate treatment, with respect to recidivist D.U.I. offenders, did not violate the plaintiffs' equal protection rights because the policy served to diminish the danger that drunken drivers pose to the public safety.¹⁹ Second, the court considered whether the Secretary's "five year rule" rendered the plaintiffs' hearing for the issuance of a restricted driving permit a mere formality, and therefore a denial of due process of the law. The court dismissed the claim, concluding that the plaintiffs lacked a property interest in a restricted driving permit, and thus were without a proper due process claim.²⁰

15. In his opinion, Justice Brady stressed the fundamental difference between nonalcoholic and alcoholic driving offenders. Brady noted that the drunken driver is a menace to the public safety the moment he gets behind the wheel because he lacks control of the very faculties needed to operate an automobile. *Doe v. Edgar*, 562 F. Supp. 66, 69 (N.D. Ill. 1982), *aff'd*, 721 F.2d 619 (7th Cir. 1983). Based on this observation, he held that the state may rationally distinguish between drivers whose offenses are alcohol-related and drivers convicted of other nonalcohol-related driving offenses. *Id.* Justice Brady then rebuffed the plaintiffs' due process claim on a finding that they were without a property interest to protect. *Id.* at 68. Brady justified this determination by pointing out that Illinois law placed great discretion in the Secretary of State regarding the reinstatement of driving privileges. *Id.* Thus, he concluded that the plaintiffs were without a "reasonable expectancy" of reinstatement, and as a result, could not sustain a valid property interest claim. *Id.*

16. On appeal from the district court's ruling, the plaintiffs reiterated the constitutional arguments they raised in the court below with one exception. They no longer argued that the Secretary's policy with respect to the reinstatement of the license itself, violated the due process clause of the United States Constitution. *Doe*, 721 F.2d at 621-22.

17. *Id.* at 619.

18. ILL. REV. STAT. ch. 95-1/2, § 6-205, in part, orders the Secretary to also revoke the licenses of those individuals convicted of certain other serious offenses, among which are:

- (1) Manslaughter or reckless homicide resulting from the operation of a motor vehicle; *Id.* at § 6-205(a)(1).
- (2) Conviction upon three (3) charges of reckless driving committed within a period of twelve (12) months; *Id.* at § 6-205(a)(6); and
- (3) Violation of the prohibition on drag racing. *Id.* at § 6-205(a)(8).

19. *Doe*, 721 F.2d at 622.

20. *Id.* at 623.

The *Doe* court began its analysis by examining the standard of constitutional review applicable to the plaintiffs' equal protection claim. The court noted that a state classification,²¹ consisting of those persons twice convicted of D.U.I., would be subject to a rigid strict scrutiny standard where either a fundamental right or suspect class is involved.²² The court then determined that the Secretary's refusal to reinstate the driving privileges of repeat D.U.I. offenders did not involve either category.²³ Accordingly, the court concluded that the Secretary's classification of twice convicted D.U.I. offenders was subject to the lesser rational basis standard, and therefore would be upheld insofar as it bore a rational relationship to a legitimate governmental interest.²⁴

Having found the rational basis standard appropriate to the classification encompassing recidivist D.U.I. offenders, the *Doe* court proceeded to examine the state's interest in barring such persons from the road. The court recognized the serious danger posed to the public welfare and noted that such offenses are increasing in Illinois.²⁵ The court also stated that "[t]he Secretary's classification distinguishes between drunk drivers, whose driving judgment is continuously impaired . . . and sober driv-

21. State classifications are not uncommon in our society. A typical example is government mandatory retirement laws requiring public employees to retire at a given age. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (state statute which required all state police officers to retire at age fifty held not violative of the equal protection clause).

22. *Doe*, 721 F.2d at 622. See generally *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (strict scrutiny is required only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantages of a suspect class); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (where the state's action does not operate to the peculiar disadvantage of any suspect class, strict review is still required where the state's action impermissibly interferes with the exercise of a fundamental right).

23. *Doe*, 721 F.2d at 622. See also *Charnes v. Kiser*, 617 P.2d 1201, 1202 (Colo. 1980) (the right to drive upon the public highways is not a fundamental right); *Williams v. Schaffner*, 477 S.W.2d 55, 57 (Mo. 1972) (twice convicted D.U.I. offenders do not amount to a capricious classification).

24. *Doe*, 721 F.2d at 622. See also *Camp v. Department of Public Safety*, 241 Ga. 419, 246 S.E.2d 296 (1978) (habitual violator statute subject only to rational relationship test in constitutional review). Cf. *Anacker v. Sillas*, 65 Cal. App. 3d 416, 135 Cal. Rptr. 537 (1977) (provision of the state's financial responsibility law which requires only those motorists who have been involved in particular types of accidents to demonstrate financial responsibility is subject only to rational basis scrutiny); *Augustino v. Colorado Dept. of Revenue Motor Vehicle Division*, 193 Colo. 273, 565 P.2d 933 (1977) (implied consent law mandating revocation of licenses of those drivers who refuse to take a blood test for intoxication while making revocation only discretionary for drunken drivers who take the test subject only to rational basis scrutiny).

25. The court noted that between 1980 and 1981 alone the number of verified D.U.I. offenses in Illinois increased by 13.3%. *Doe*, 721 F.2d at 623 n. 7.

ers, who in the course of driving may commit an error of judgment, but who are not a constant threat when operating a vehicle."²⁶ Incorporating these two observations, the court reasoned that the Secretary's policy combats a serious public problem by removing repeat D.U.I. offenders from the road and deterring potential offenders.²⁷ Thus, the court concluded that stricter penalties for twice convicted D.U.I. offenders were rationally related to a legitimate governmental interest in public safety, and therefore did not violate the plaintiffs' equal protection rights.²⁸

After finding that the Secretary's policy did not violate the plaintiffs' equal protection rights, the *Doe* court addressed the question of whether the Secretary's refusal to grant a restricted driving permit deprived them of their due process protections. The plaintiffs based this claim on the contention that their hearing to obtain a restricted driving permit was rendered meaningless because of the Secretary's policy of withholding any consideration of issuance for a period of five years. The court summarily dismissed this claim, finding that the plain language of the statute governing the issuance of such permits revealed that the plaintiffs were without a property interest to protect.²⁹

26. *Id.* at 622. See *State v. Kent*, 87 Wash. 2d 103, 108, 549 P.2d 721, 726 (1976) (the problem posed by the alcoholic driver is more serious than that posed by other drivers). Accord *Fuhrer v. Department of Motor Vehicles*, 197 Colo. 325, 592 P.2d 402 (1979) (plaintiff convicted for third time for D.U.I. under Habitual Offender Act poses a greater threat than a person with one serious traffic violation on their record). See generally *Moyland, New Approach to an Old Problem*, 69 A.B.A.J. 46 (1983) (outlining the seriousness of the drunken driving problem in terms of both lives lost and economic loss).

27. *Doe*, 721 F.2d at 623.

28. *Id.* See *State v. Guarderos*, 589 P.2d 870 (Alaska 1979) (stricter penalties for recidivist D.U.I. offenders do not violate their equal protection rights because the state legislature has clearly chosen to distinguish between first-time convictions and subsequent convictions by providing increasingly severe penalties for subsequent convictions).

29. *Doe*, 721 F.2d at 624. See *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (sufficiency of a claim of entitlement must be decided in reference to state law); *Rehbock v. Dixon*, 458 F. Supp. 1056, 1061 (N.D. Ill. 1978) (plaintiff's claim of entitlement in a restricted driving permit must be examined in light of the relevant state law).

The *Doe* court also stated that the Secretary's policy did not create an irrebuttable presumption against issuance because it specifically allowed him to waive the five year rule where appropriate. 721 F.2d at 624. The court in *Doe* brought its due process analysis to a close by recalling its own earlier ruling as to the plaintiffs' equal protection claim. *Id.* In short, the *Doe* court held that even if the Secretary never exercised his discretionary power in favor of such offenders as the plaintiffs, it already determined that such a distinction is rationally related to the reasonable state interest in protecting the safety of the public by the removal of such offenders from the road. *Id.*

In order to understand the decision reached in *Doe*, it is necessary to note the growing problem of drunk driving on the nation's highways.³⁰ In 1983 alone, twenty-five thousand people were killed as a result of alcohol-related accidents; seven hundred thousand more suffered disabling injuries.³¹ In recent years, Illinois state police recorded a dramatic eighty-six percent increase in the number of D.U.I. arrests related to alcohol abuse.³² The *Doe* court's response to this problem, placing an emphasis on the removal of recidivist offenders from the highways, is similar to that taken in many states.³³

The first aspect of the *Doe* decision which warrants discussion is the manner in which the court examined the plaintiffs' equal protection claim. The threshold question which faced the court was the appropriate standard of constitutional review applicable to the Secretary's policy.³⁴ Under traditional equal protection doctrine, a classification is subject to strict scrutiny if it impinges upon a fundamental right or operates to the disadvantage of a suspect class.³⁵ The *Doe* court found the strict scrutiny standard inappropriate and instead relied upon the less stringent rational relationship test.³⁶ Thus, by opting to apply the lesser standard of judicial review, the court determined that the

30. See generally Quade, *War on Drunk Driving: 25,000 Lives at Stake* 68 A.B.A.J. 1551 (1982) (drunk driving has killed 250,000 people in the past decade); Comment, *Deterring the Drinking Driver: Treatment v. Punishment*, 7 U.C.L.A.-ALASKA L. REV. 244 (1978) (one-half of the motor-related fatalities that occur annually are alcohol-related).

31. THE OFFICE OF THE SECRETARY OF STATE, ILLINOIS' D.U.I. LAW: THE FACTS FOR 1983 at 1 (1984). See also Moylan, *New Approach to an Old Problem* 69 A.B.A.J. 46 (1983) (in addition to the thousands killed and injured, drunken driving also cost the economy twenty billion dollars).

32. THE OFFICE OF THE SECRETARY OF STATE, ILLINOIS' D.U.I. LAW: THE FACTS FOR 1983 at 1 (1984).

33. E.g., COLO. REV. STAT. § 42-2-122(g) (1973 & Supp. 1982) (second D.U.I. conviction results in a loss of driving privileges for at least two years); DEL. CODE ANN. tit. 21, § 4177A (1979 & Supp. 1982) (second conviction for D.U.I. results in a loss of driving privileges for eighteen months); FLA. STAT. ANN. § 322.28 (West 1975 & Supp. 1983) (authorizing a five year period of revocation for a twice convicted D.U.I. offender).

34. *Doe*, 721 F.2d at 622.

35. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). In *Murgia*, the plaintiff, a police officer, was retired on his fiftieth birthday pursuant to state law. The plaintiff challenged the law as a violation of equal protection. The Court first stated that strict scrutiny is required only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Id.* at 312. The Court then found that a right to government employment is not *per se* fundamental. *Id.* at 313. The Court also stated that old age does not define a suspect class needing special protection. *Id.* Hence, the Court applied rational basis scrutiny to the plaintiff's claim and held that, because physical ability does decline with age, the statute was sufficiently rational to be upheld. *Id.* at 315.

36. 721 F.2d at 622.

Secretary's policy would be upheld where it was reasonably related to a legitimate state interest.³⁷

This determination by the *Doe* court is in accordance with the views expressed by other state courts.³⁸ For example, in *Heninger v. Charnes*,³⁹ the Colorado Supreme Court considered a situation similar to that in *Doe* and came to a similar conclusion. The *Heninger* court rejected the plaintiff's contention that the rigid strict scrutiny standard should be applied, and held that the right to drive upon the public highways is not a fundamental right warranting the heightened level of review.⁴⁰ The *Heninger* court noted that the classification encompassing alcohol-related driving offenders failed to create a suspect class because it treated equally all persons who, by their actions, placed themselves in that class.⁴¹ Consequently, the *Heninger* court concluded that statutory classifications encompassing D.U.I. of-

37. *Id. See, e.g.,* McDonald v. Board of Election, 394 U.S. 802, 809 (1968) (the statutory distinctions which authorizes those persons entitled to absentee ballots must bare some rational relationship to a legitimate state interest and will be set aside as violative of the equal protection clause only if based on reasons totally unrelated to the pursuit of that goal).

38. *See* Heninger v. Charnes, 200 Colo. 194, 613 P.2d 884 (1980) (rational basis standard applied to supposed discriminatory measures dealt out to drunken drivers convicted under the state's habitual traffic offender statute). *Accord* Anacker v. Sillas, 65 Cal. App. 3d 416, 423, 135 Cal. Rptr. 537, 541 (1976) (the privilege of driving is not a fundamental right of the kind which demands heightened judicial scrutiny in the face of an equal protection claim stemming from a classification arising out of the state's financial responsibility law).

39. 200 Colo. 194, 613 P.2d 884 (1980).

40. *Id.* at 198, 613 P.2d at 887. *Accord* Rehbock v. Dixon, 458 F. Supp. 1056, 1062 (N.D. Ill. 1978) (plaintiff convicted of illegally passing a stopped school bus did not suffer the deprivation of a fundamental right by having her driving privileges revoked); Charnes v. Kiser, 617 P.2d 1201, 1202-03 (Colo. 1980) (plaintiff convicted three times of driving while his ability was impaired by alcohol did not suffer an impingement of a fundamental right when he was denied the opportunity to apply for a probationary license); Fuhrer v. Department of Motor Vehicles, 197 Colo. 325, 329, 592 P.2d 402, 405 (1979) (repeat D.U.I. offenders did not endure the deprivation of a fundamental right when the state terminated their right to drive pursuant to Habitual Offender Act).

41. 200 Colo. at 199, 613 P.2d at 887. *See also* Augustino v. Colorado Dept. of Revenue, 193 Colo. 273, 276, 565 P.2d 933, 935 (1977) (a driver will receive the treatment which the law provides for the class in which he places himself); Williams v. Schaffner, 477 S.W. 2d 55, 57 (Mo. 1972) (recidivist D.U.I. offender who was denied a hardship driving permit was not deprived of equal protection of the law as he brought himself into this group by his own actions). *Cf.* Rehbock v. Dixon, 458 F. Supp. 1056, 1062 (N.D. Ill. 1978) (classification encompassing those drivers who illegally pass a stopped school bus does not amount to a suspect classification); Wells v. Malloy, 402 F. Supp. 856, 858 (D. Vt. 1975) (state statute suspending right to drive of persons who have failed to pay the automobile property and use tax does not create a suspect classification); Anacker v. Sillas, 65 Cal. App. 3d 416, 135 Cal. Rptr. 537 (1977) (classification arising from provision of the state financial responsibility law which requires only those motorists who have been

fenders would be subject to the less restrictive rational relationship test.⁴²

Likewise, the *Doe* court's view that the Secretary may deny license reinstatements to a certain class of traffic offenders without violating their equal protection rights is not without precedent in Illinois.⁴³ This issue was previously addressed by the United States District Court for the Northern District of Illinois in *Rehbock v. Dixon*.⁴⁴ In *Rehbock*,⁴⁵ the plaintiff was convicted of illegally passing a stopped school bus. The Secretary of State subsequently revoked the plaintiff's driving privileges and the plaintiff brought suit arguing that the Secretary's classification deprived her of equal protection under the law.⁴⁶ The *Rehbock* court rejected the plaintiff's claim, concluding that the Secretary's classification served to promote the government's interest in the safety of the state's school children, and therefore would be upheld.⁴⁷ Hence, the *Rehbock* decision is consistent with the *Doe* court's conclusion that the disparate treatment dealt to D.U.I. offenders is constitutionally permissible because it serves to promote the reasonable governmental aim of providing for the protection of the state's citizens as well as deterring drunken driving.

Similarly, other state courts have been equally reluctant to strike down the constitutional validity of laws aimed at reducing drunken driving.⁴⁸ Those courts have supported their decisions based on the premise that state legislatures consider the problem of alcoholic drivers to be a particularly serious one, greater

involved in particular types of accidents to demonstrate financial responsibility is not a suspect classification for equal protection purposes).

42. 200 Colo. at 199, 613 P.2d at 887. *Cf. Anacker v. Sillas*, 65 Cal. App. 3d 416, 135 Cal. Rptr. 537 (1977) (automobile financial responsibility law subject to rational basis scrutiny); *Augustino v. Colorado Dept. of Revenue*, 193 Colo. 273, 565 P.2d 933 (1977) (automobile implied consent law whereby drivers give their consent to be tested for alcohol intoxication subject to rational basis scrutiny).

43. *See generally Rehbock v. Dixon*, 458 F. Supp. 1056 (N.D. Ill. 1978).

44. *Rehbock*, 458 F. Supp. at 1056.

45. *Id.*

46. *Id.* at 1062.

47. *Id.*

48. *Williams v. Schaffner*, 477 S.W.2d 55 (Mo. 1972) (the refusal to grant a hardship driving permit, following a second D.U.I. conviction, is neither arbitrary nor unreasonable); *Winter v. Mayberry*, 533 P.2d 968 (Okla. 1975) (statute which provides for the revocation of the plaintiff truck driver's license upon a D.U.I. conviction and which therefore prohibited him from earning a living held not violative of the equal protection clause). *Accord Pepin v. Department of Motor Vehicles*, 275 Cal. App. 2d 9, 79 Cal. Rptr. 657 (1969) (statute which does not provide for an "employment-livelihood" restricted driving permit for those persons who refuse to submit to a blood alcohol test did not deny motorist equal protection of the law).

than those problems posed by other drivers.⁴⁹ Consequently, the *Doe* court's determination that D.U.I. offenders may be held to stricter penalties than other traffic offenders is consonant with previous case law.⁵⁰

The *Doe* court's equal protection analysis does differ sharply with previous Illinois case law in one respect. The court determined that repeat D.U.I. offenders need no longer be considered for a restricted driving permit under the hardship provision of section 6-205 of the Illinois Vehicle Code.⁵¹ Although section 6-205 is silent regarding the need to weigh the danger to the public safety before issuance of a restricted driving permit to a D.U.I. offender,⁵² subsequent case law has construed the statute to encompass a two level test combining both public safety and the hardship to the offender.⁵³ No Illinois court, however, has been willing to exclude D.U.I. offenders entirely from the scope of section 6-205.

Prior to *Doe*, Illinois appellate courts maintained that repeat D.U.I. offenders were eligible for the issuance of restricted driv-

49. *State v. Kent*, 87 Wash. 2d 103, 109, 549 P.2d 721, 726 (1976) (holding that even if a provision of the state's Habitual Traffic Offender Act afforded a treatment option and stay of license revocation to motorists convicted of alcohol-related driving offenses, it did not deny nonalcohol-related offenders equal protection because the state views the problem of the alcoholic driver to be a serious one, thus warranting deferential treatment); *Williams v. Schaffner*, 477 S.W.2d 55, 57 (Mo. 1972) (the legislative determination that a repeat alcohol-related driving offender may not receive a hardship driving permit while a first time offender may is neither arbitrary nor unreasonable). *Cf. Sedlocek v. Ahrent*, 165 Mont. 479, 530 P.2d 424 (1974) (statute prohibiting the issuance of a driver's license to minors held to serve the legitimate governmental aim of protecting users of the public highways from inexperienced and immature drivers).

50. *See State v. Guarderas*, 589 P.2d 870 (Alaska 1979) (upholding the validity of a state law which permitted the issuance of a restricted driving permit to a first time offender of the state's drunk driving law, but expressly forbade any consideration of issuance to a repeat offender); *Williams v. Schaffner*, 477 S.W.2d 55 (Mo. 1972) (statute which called for a five year period of revocation for a repeat drunk driving offender and which provided for a restricted driving permit for first time offenders, but not for repeat offenders, was not violative of the equal protection clause). *Cf. State v. Kent*, 87 Wash. 2d 103, 549 P.2d 721 (1976) (the state may deny the privilege of operating a motor vehicle to such persons who have demonstrated their indifference for the safety and welfare of others).

51. *Doe*, 721 F.2d at 624.

52. *See supra* note 11 for the text of ILL. REV. STAT. ch. 95-1/2, § 6-205 (1983) pertaining to the issuance of a restricted driving permit.

53. *See Murdy v. Edgar*, 117 Ill. App. 3d 1091, 1094, 454 N.E.2d 819, 823 (1983) (stating that before a restricted driving permit is issued, the Secretary must weigh the public interest against the hardship suffered by the applicant); *Foegen v. Edgar*, 110 Ill. App. 3d 190, 192, 441 N.E.2d 1267, 1269 (1982) (stating that the Secretary should not issue a restricted driving permit unless he has determined that granting the applicant a permit will not endanger the public safety).

ing permits under section 6-205.⁵⁴ In *Murdy v. Edgar*,⁵⁵ the plaintiff's driving privileges were revoked following his second D.U.I. conviction. Following the Secretary's denial of all relief, the plaintiff brought suit asking that he be issued a restricted driving permit.⁵⁶ The *Murdy* court found that, pursuant to section 6-205, the Secretary was bound to consider the hardship to the applicant apart from the question of public safety.⁵⁷ In overturning the Secretary's denial, the *Murdy* court weighed the hardship to the applicant against the safety of the public in a balancing test and concluded that the plaintiff should be issued a restricted permit.⁵⁸ As a result of the decision reached in *Doe*, a new standard based solely on a consideration of the danger the D.U.I. offender poses to the public safety has replaced this balancing test.⁵⁹

One questionable aspect of the *Doe* court's equal protection analysis stems from the court's awkward comparison of D.U.I. offenders to other serious offenders of the state's motor vehicle laws.⁶⁰ The court stumbled somewhat when, seeking to justify the exclusion of other serious offenders from the Secretary's stated policy, it declared that repeat D.U.I. offenders could be considered more dangerous than an individual who, for instance, has two manslaughter driving convictions.⁶¹ The court corrected itself, however, by noting that the Secretary possesses alternative statutory methods for handling other serious offenders.⁶² Even if the Secretary had lacked these measures for dealing with serious, nonalcohol-related traffic offenders, the *Doe*

54. See *Murdy v. Edgar*, 117 Ill. App. 3d 1091, 454 N.E.2d 819 (1983) (granting a restricted driving permit to a repeat D.U.I. offender over the Secretary's objections); *Foegel v. Edgar*, 110 Ill. App. 3d 190, 441 N.E.2d 1267 (1982) (where the court refused to grant a restricted driving permit to a twice convicted D.U.I. offender on the ground that he posed a clear danger to the public safety).

55. 117 Ill. App. 3d 1091, 454 N.E.2d 819 (1983).

56. *Id.* at 1093, 454 N.E.2d at 821.

57. *Id.* at 1097, 454 N.E.2d at 824.

58. The *Murdy* court recognized the Secretary's duty to insure the public safety but concluded that the plaintiff no longer posed a danger to society. *Id.* at 1097, 454 N.E.2d at 824. The *Murdy* court based its decision on the fact that the plaintiff, who had his license revoked in 1979, had enrolled in and completed an alcohol counseling program and had not had an alcoholic beverage for two years previous to the date of the trial. *Id.* at 1094, 454 N.E.2d at 822.

59. 721 F.2d at 622.

60. *Id.* at 623.

61. *Id.*

62. See ILL. REV. STAT. ch. 95-1/2, § 6-205(a) (1983) (directing the secretary to revoke the license of those convicted of a manslaughter driving violation); ILL. REV. STAT. ch. 95-1/2, § 6-208(b) (1983) (a revoked license will not be reinstated where such a reinstatement will serve to endanger the public safety).

court could still have relied upon the United States Supreme Court's⁶³ determination that the states possess the discretion not to deal with a class of evils all within the scope of a single enactment. Instead, the state may address itself to the "phase of the problem which seems most acute to the legislative mind."⁶⁴ Hence, the Secretary's policy will not fall to an equal protection challenge simply because it fails to address every danger arising from the use of motor vehicles on the state's highways.⁶⁵

Having concluded that the Secretary's policy did not violate the plaintiffs' equal protection rights, the *Doe* court then addressed the issue of whether such a policy denied the plaintiffs

63. See *McDonald v. Board of Election*, 394 U.S. 802, 809 (1968).

64. *Id.* (quoting *Williams v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)). In *McDonald*, the Court held that an Illinois statute listing those persons entitled to absentee ballots did not violate the equal protection rights of Cook County Jail inmates who were excluded from such consideration. 394 U.S. at 806.

65. See *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (equal protection of the law does not require that the state choose between attacking every aspect of the problem or not attacking the problem at all).

A second debatable aspect of the court's equal protection decision was the finding that the lack of any time restriction on the length of the interval between D.U.I. convictions is immaterial in light of the importance of the Secretary's policy. The court, while admitting that such a policy may seem harsh to those involved, supported its determination with a reference to the more severe penalties imposed upon convicted D.U.I. offenders in other countries. *Doe*, 721 F.2d at 623. See *Ross, Deterrence of Drinking and Driving in France*, 16 L. & Soc'y REV. 345, 346 (1982) (reporting that mandatory prison sentences for first time D.U.I. offenders is now the practice in several countries, including Britain, France, the Netherlands, New Zealand, Canada and Australia). Voter, *Scandinavian Drinking — Driving Control: Myth or Institution?* 11 J. OF LEGAL STUD. 93, 94 (1982) (the penalty for a single conviction of driving under the influence of alcohol in Norway and Sweden is a mandatory jail sentence and an automatic withdrawal of one's driver license for at least one year).

A number of states have enacted statutes which support the *Doe* court's determination that the interval between a first and subsequent D.U.I. conviction is immaterial. See COLO. REV. STAT. § 42-2-122 (1982) (no time limit within which triggering D.U.I. conviction might occur in statute which calls for a greater penalty on third D.U.I. conviction); WIS. STAT. ANN. § 343.31(1)(a), (b) (West 1983) (no time limit between interval of D.U.I. convictions). However, the *Doe* court's judicial determination stands in sharp contrast to the approach taken by other states. See MINN. STAT. ANN. § 169.121(4)(c) (1984) (three D.U.I. convictions in a five year period will result in the revocation of all driving privileges for a period of one year); R.I. GEN. LAWS § 31-27-2(d)(3) (West 1983) (third D.U.I. conviction within a three year period results in a loss of driving privileges under repeat D.U.I. offender provision of statute); WASH. REV. CODE ANN. § 46.20.285(3) (1983) (third D.U.I. conviction in a five year period results in loss of driving privileges).

The decision rendered by the *Doe* court therefore was designed to effectively strengthen the hand of the Secretary in the execution of a rigid policy against D.U.I. offenders.

due process of law.⁶⁶ The plaintiffs based their argument on the contention that the Secretary's "five year rule" rendered their hearing for a restricted driving permit a mere formality.⁶⁷ The court dismissed this claim after finding that the plaintiffs lacked a protectable property interest.⁶⁸ The court based this decision on the determination that an Illinois applicant for a restricted driving permit does not possess a valid claim of entitlement in the sought after permit, but only a "unilateral expectation" of issuance.⁶⁹

The *Doe* court's determination of the due process issue is in accordance with prior Illinois case law.⁷⁰ In *Rehbock v. Dixon*,⁷¹ the District Court for the Northern District of Illinois considered a due process argument analogous to that made in *Doe*.⁷² The *Rehbock* court noted that in order for the plaintiff-applicant to prevail, she would have to show that her interest in a restricted driving permit was more than a mere "unilateral expectation."⁷³

66. The fourteenth amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1. The plaintiffs would not be entitled to due process in their hearing for a restricted driving permit unless such hearing involved the deprivation of some liberty or property interest. See *Board of Regents v. Roth*, 408 U.S. 564 (1972) (non-tenured state college teacher's claim that he was denied due process when he was not given a hearing following his dismissal by the university was rejected by the Court because the teacher could not show that he was deprived of some liberty or property right protected by the fourteenth amendment). The plaintiffs did not claim that the denial of a restricted driving permit injured their reputations or in any other way impaired their liberty interest. *Doe*, 721 F.2d at 623 n. 8. Accordingly, the court confined its due process discussion to the issue of property deprivation. *Id.*

67. *Doe*, 721 F.2d at 623.

68. *Id.* at 623-24.

69. *Id.* at 624.

70. See *Rehbock v. Dixon*, 458 F. Supp. 1056, 1062 (N.D. Ill. 1978) (driver convicted of passing a stopped school bus does not have a property interest in a restricted driving permit).

71. 458 F. Supp. 1056 (N.D. Ill. 1978).

72. The plaintiff in *Rehbock* was convicted of illegally passing a school bus which had stopped in order to allow children to depart. *Id.* at 1058. Subsequently, the plaintiff's application for a restricted driving permit was denied. The plaintiff was granted a hearing for reconsideration and learned that it was the Secretary's policy to hold such hearings only after the applicant's period of suspension had passed. *Id.* at 1059. Thus, the plaintiff argued that she was effectively denied due process of the law because such a hearing, after the period of suspension had already ended, was useless. *Id.* at 1060.

73. *Id.* at 1060-61. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Roth*, the plaintiff was released from his teaching position at a public university. 408 U.S. at 566. The plaintiff then brought suit, claiming that he was deprived of a property interest without a constitutionally required hearing. *Id.* at 569. In its analysis, the Court stated that property interests are not created by the Constitution but by independent sources, such as state law. *Id.* at 577. The Court then found that the plaintiff had no specific

The court stated that the plain language of the statute would determine if a legitimate claim of entitlement was present.⁷⁴ The court then noted that the Illinois Vehicle Code's provision regarding the issuance of a restricted driving permit does not support the plaintiff's claim of entitlement because it was predicated upon the Secretary's discretion to grant such permits.⁷⁵ The *Rehbock* court concluded, therefore, that no property interest was affected when the plaintiff's application for a restricted driving permit was denied.⁷⁶

This conclusion, reiterated in *Doe*, however, has not been uniformly accepted by all courts.⁷⁷ In *Elizondo v. State*,⁷⁸ the Supreme Court of Colorado inferred that a restricted driving permit was not a protectable property interest.⁷⁹ Nevertheless, the court held that, in its issuance, due process was required because of the intimate role it played in the furtherance of other constitutionally protected rights.⁸⁰ The court stated that where the Department of Motor Vehicles had the authority,⁸¹ it must promulgate rules in accordance with due process by articulating the standards governing its policies to the public.⁸² The

contractual interest in being rehired, nor did state law recognize any such property interest. *Id.* at 578. Therefore, the Court concluded that the Constitution did not require that the plaintiff be given a hearing before being released by the defendant. *Id.* at 578-79.

74. *Rehbock v. Dixon*, 458 F. Supp. 1056, 1061 (N.D. Ill. 1978). See *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (sufficiency of the plaintiff's claim of entitlement must be decided by a reference to state law).

75. See *Rehbock*, 458 F. Supp. at 1061. The *Rehbock* court quoted ILL. REV. STAT. ch. 95-1/2, § 6-206(c) (1975), which is identical with ILL. REV. STAT. ch. 95-1/2, § 6-205(c) (1983) in its provision for the issuance of a restricted driving permit, to the effect that the statute provides that "the Secretary of State . . . may . . . to relieve undue hardship, issue a restricted driving permit. *Rehbock*, 458 F. Supp. at 1061 (emphasis added).

76. *Rehbock*, 458 F. Supp. at 1061.

77. See *Elizondo v. State*, 194 Colo. 113, 570 P.2d 518 (1977). For a discussion of *Elizondo*, see *infra* notes 78-84 and accompanying text.

78. 194 Colo. 113, 570 P.2d 518 (1977).

79. *Id.* at 117, 570 P.2d at 522.

80. The *Elizondo* court reasoned that the use of motor vehicles on the public highways was an "adjunct" to the constitutional right to acquire, possess, and use property and thus cannot be taken away without due process of law. *Id.*

81. Compare COLO. REV. STAT. § 42-1-204 (1973 & Supp. 1982) (which authorizes the motor vehicle director to make rules and regulations in the furtherance of his duties); with ILL. REV. STAT. ch. 95-1/2 § 6-211(a) (1983) (granting the Secretary of State the authority to make and enforce rules and regulations related to the administration of the Illinois Vehicle Code).

82. *Elizondo*, 194 Colo. at 118-19, 570 P.2d at 522. The *Elizondo* court ordered that these rules or regulations be sufficiently specific to inform the public of the factors that will be considered relevant by the Department's hearing officers, so that requests for probationary licenses may be supported by pertinent evidence and arguments. *Id.* Furthermore, the court ordered that these rules require that hearing officers specifically state, in

Elizondo court, however, indicated that these rules were only guidelines⁸³ and noted that, in hearings for the issuance of restricted permits, primary consideration must be given to the protection of the public safety.⁸⁴

As a result of the decision reached in *Elizondo*, it appears that even if the plaintiffs in *Doe* were able to sustain a property claim in the restricted permits, their constitutional claims would still fail for two reasons. First, the Illinois Secretary of State's articulated rules regarding the issuance of a restricted driver's permit meet all of the due process requirements set forth in *Elizondo*.⁸⁵ Second, the *Elizondo* court, while ordering the Department to exercise its discretion under some form of standard

each case where a probationary license is denied, the reasons for the denial. *Id.* While the court noted that these requirements cannot guarantee a fair hearing, they will reduce significantly the possibility that the decision process will be arbitrary. *Id.*

83. 194 Colo. at 119, 570 P.2d at 522.

84. 194 Colo. at 117, 570 P.2d at 520. The *Elizondo* court noted that the obvious purpose of the state's Uniform Safety Code was to protect the public. *Id.* The court then stated that this general purpose is to be considered in all hearings for probationary or restricted licenses. *Id.*

85. The court in *Elizondo* ordered rules or regulations to inform the public of the factors to be considered relevant by the Department of Motor Vehicles. 194 Colo. at 119, 570 P.2d at 522. The Illinois Secretary of State's policy statement regarding the reinstatement of driving privileges contains an extensive listing of all relevant criteria relating to any such restoration, including (1) evidence to be presented by the applicant on his own behalf, (2) questions to be asked by the hearing officers during the interviews with the applicant, and (3) a listing of the general standards to be applied by the Secretary in the consideration of such applications. PROCEDURES, *supra* note 13, at § IA.

The Secretary's Procedures provide, in part, that:

1. A restricted driving permit (R.D.P.) may be issued only in conjunction with employment and cannot be issued to drive to school, stores, or any other such place, or to look for employment.
2. A person is eligible for an R.D.P. only after conviction for the offenses listed in Chapter 95-1/2, Sections 6-205 and 6-206, 11-501.1, Illinois Revised Statutes.
3. An applicant must submit verification of employment in the form of a letter from his employer on the form provided by this office, confirming his employment, or if the applicant is self-employed, evidence of self-employment.
4. Applicant must demonstrate that he is suffering an undue hardship resulting from the suspension or revocation. Mere inconvenience is insufficient. The hearing officer and/or attorney for the Secretary should determine the existence of a hardship by asking the following questions:
 - (a) Availability of public transportation, car pool, or family members, friends, or co-workers who can drive the applicant to work.
 - (b) Whether employment will be lost if a R.D.P. is not issued.
 - (c) If already suspended or revoked, how is the applicant getting to work?
 - (d) Whether applicant is required to drive on the job.
 - (e) Distance between the residence and place of employment.

guidelines,⁸⁶ nevertheless left intact the authority of the state to exercise its discretionary power to preserve the safety of its highways.⁸⁷ Thus, it appears that the plaintiffs in *Doe* were afforded all the due process safeguards that they were entitled to under the law.

It is evident that Illinois courts have taken a firm stand regarding the increasing danger posed by drunken drivers. Although the *Doe* court was correct in recognizing the need to combat this serious problem, its determination that D.U.I. offenders should always be considered more dangerous than other serious traffic offenders was poorly reasoned and unnecessary to support its holding.⁸⁸ Aside from this superfluous diversion, the court has generally centered its reasoning on the conservative views prevalent in other states. The precedential

5. The hearing officer should also take into account the applicant's age, number of months or years licensed to drive, duration of present employment or self-employment, driving record, and recognition of the seriousness of disobeying traffic law.

6. No one factor will be totally determinative of the result in any case, but all factors must be considered. These procedural requirements pertain to all types of hearings conducted upon any application.

PROCEDURES, *supra* note 13, at § IA. 1-11. The same publication states at § IVA that:

1. No restricted driving permits will be granted to applicants who have two or more D.U.I. convictions on their records. Any waivers from this prohibition must be requested in writing, with a full explanation of the circumstances, efforts made at rehabilitation and other relevant evidence to be considered.

2. All applicants must enroll in and successfully complete a current remedial driver's course and an approved counseling program which may be consultation with a psychologist experienced in alcohol evaluation, before an R.D.P. may be granted.

3. D.U.I. offenders shall provide the hearing officer with at least three (3) character letters from persons who are not family members, who have known the petitioner for at least 2 years and well enough to testify as to his character. These letters must state whether or not the petitioner has a drinking problem, and whether the petitioner, in their opinion, would be a safe and responsible driver if issued a license or permit.

PROCEDURES, *supra* note 13, at § IVA.1-4. Finally, the Secretary's Procedures provide that:

The formal hearing officer should not recommend reinstatement unless and until he is satisfied after investigation of the applicant that to grant the privilege of driving a motor vehicle on the highways will not endanger the public safety or welfare.

PROCEDURES, *supra* note 13, at § IIIA.1-4.

86. 194 Colo. at 118-19, 570 P.2d at 523.

87. *See id.* at 117, 570 P.2d at 520. *See also* Rehbock v. Dixon, 458 F. Supp. 1056, 1062 (N.D. Ill. 1978) (where the court held that even if the plaintiff had a property interest in a restricted driving permit, her due process claim would still fail because her interest was outweighed by the state's interest in assuring prompt enforcement of its vehicle laws and the protection of its citizens as they travel the highways of the state).

88. *See supra* text accompanying notes 60-65 for a discussion of this aspect of the *Doe* court's decision.

value of *Doe* is notable because the court overturned previous case law in holding that twice convicted D.U.I. offenders need no longer be considered under the hardship provision of section 6-205 of the Illinois Vehicle Code. The scope of the decision is properly narrow, with the court confining its review solely to the issue of the state's interest in keeping repeat D.U.I. offenders off the highways. The *Doe* decision seems to take on added importance when one considers that the prosecution of D.U.I. offenders in Illinois has been vigorously pursued in recent years.⁸⁹ In essence, the *Doe* decision reflects the view that Illinois courts are determined to support a strong state policy toward combating alcohol abuse by drivers on the state's highways.

Douglas L. Gilmer

89. In 1983, 7,719 persons arrested for D.U.I. in Illinois were convicted, up twenty-five percent from 1982 and up eighty-one percent from 1981. THE OFFICE OF THE SECRETARY OF STATE, ILLINOIS' D.U.I. LAW: THE FACTS FOR 1983 at 1 (1984).