UIC Law Review

Volume 13 | Issue 2 Article 8

Winter 1980

Mackey v. Montrym - Due Process Limits on the Use of Interest Balancing, 13 J. Marshall L. Rev. 441 (1980)

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CASENOTES

*MACKEY V. MONTRYM**
DUE PROCESS LIMITS ON THE USE OF INTEREST BALANCING

The fourteenth amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty or property, without due process of law. . . ."[1] This procedural safeguard originated in the notion that personal freedom can be preserved only when there is a check on arbitrary governmental action.[2] The due process clause as it applies today limits the power of government to deprive individuals of their constitutional rights.[3]

The Supreme Court has recently considered the extent to which due process requires a hearing prior to deprivation of property by administrative action.[4] The question is when must

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* 99 S. Ct. 2612 (1979).

1. U.S. CONST. amend. XIV (1868):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. *See* Wolff v. McDonnell, 418 U.S. 539 (1974). "The touchstone of due process is protection of the individual against arbitrary action of the government." *Id.* at 558.

"Due Process of Law" first appeared in 1344 when the British Parliament forced King Edward III to accept a statute designed to curb his own excesses: "No man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law." 28 Edw. 3, C. III; *see* Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864). "Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." *Id.* at 233. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

3. *See generally* J. GORA, DUE PROCESS OF LAW (1977).

4. The Court's recent decisions concerning administrative hearings include: Greenholtz v. Inmates of Neb. Penal & Correction Complex, 442 U.S. 1 (1979) (parole release); Dixon v. Love, 431 U.S. 105 (1977) (suspension of driver's license); Mathews v. Eldridge, 424 U.S. 319 (1976) (termination of disability benefits); Fusari v. Steinberg, 419 U.S. 379 (1975) (eligibility for unemployment compensation benefits); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary procedures); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of a yacht by Puerto Rican trans-

adjudicative procedures be imposed upon administrative action to assure fairness to the individual. These considerations are shaped by various conceptions of the primary purpose of procedural due process and by competing ideas as to how that purpose might best be achieved. Whereas the state may be concerned with a cost-efficient guarantee of basic fairness, the individual may believe that the primary purpose of due process is to give maximum protection to his guaranteed rights of life, liberty and property. Thus, judicial determinations of what is "fair" necessarily involve decisions about priority of alternatives.[5]

In ordering its priorities, the Supreme Court has made use of an interest-balancing test. In the early 1960's the Court began to use various utilitarian formulas to structure its due process analysis. In *Cafeteria & Restaurant Workers Union v. McElroy*,[6] the majority held that determination of what process is due requires consideration of two factors: "the precise nature of the government function involved . . . [and] the private interest that has been affected by the governmental action."[7] The Court

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portation officials); Arnett v. Kennedy, 416 U.S. 134 (1974) (termination of government employment); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Perry v. Sinderman, 408 U.S. 593 (1972) (termination of government employment); Board of Regents v. Roth, 408 U.S. 564 (1972) (termination of government employment); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Richardson v. Wright, 405 U.S. 208 (1972) (termination of disability benefits); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Richardson v. Perales, 402 U.S. 389 (1971) (eligibility for disability benefits); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting names of people unfit to drink alcohol); Wheeler v. Montgomery, 397 U.S. 280 (1970) (termination of old-age benefits); Goldberg v. Kelley, 397 U.S. 254 (1970) (termination of public assistance benefits).

5. *See* Tobriner & Cohen, *How Much Process is "Due"?: Parolees and Prisoners*, 25 HASTINGS L.J. 801 (1974):

> Establishment of a "pecking order" of the relative severity of disparate deprivations would largely be a subjective task as to which is more serious: dismissal from a job or eviction from one's home, loss of a driver's license or a misdemeanor conviction for disturbing the peace, the attachment of one's refrigerator or stigmatization as an "excessive drinker"?

Id. at 802.

6. 367 U.S. 886 (1961). In *Cafeteria & Restaurant Workers*, the question was whether due process protected a cook who worked at a naval facility in Washington, D.C. The plant was a security installation. The Navy terminated her employment on the unspecified ground that she failed to meet "security requirements." The Court held that a hearing was not required before termination of her employment. Justice Brennan vigorously dissented and said "under today's holding petitioner is entitled to no process at all. . . . [S]he is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely." *Id.* at 900.

7. *Id.* at 895. *See also* Hannah v. Larche, 363 U.S. 420, 440 (1960).

concluded that a hearing was necessary before termination of government employment.

A similar test used in *Goldberg v. Kelley*[8] measured the individual's interest in avoiding a particular loss against the governmental interest in summary adjudication.[9] At issue in *Goldberg* was whether termination of public assistance payments without a prior hearing denied a welfare recipient due process.[10] Justice Brennan delivered the majority opinion, which stated that due process *did* require a pre-termination evidentiary hearing.[11]

The Court's most recent attempt to define a due process calculus underscored the conservative trend of the Burger Court.[12] The issue in *Mathews v. Eldridge*[13] was analogous to the public assistance question decided in *Goldberg*: whether due process requires a hearing prior to termination of social security benefits. The balancing test devised by Justice Powell required consideration of three factors:

> First, the private interest that will be affected by official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[14]

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8. 397 U.S. 254 (1970).

9. *Id.* at 262-63.

10. *Id.* at 255.

11. *Id.* at 264. *Goldberg v. Kelley* marked the Court's willingness to review non-traditional notions of property interests. Justice Brennan's majority opinion stated that "[r]elevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation . . . or to discharge from public employment. . . ." *Id.* at 262. Justice Brennan's opinion was foreshadowed by his dissent in *Cafeteria & Restaurant Workers Union v. McElroy*. *See* note 6 *supra*.

12. *See* note 15 *infra*.

13. 424 U.S. 319 (1976). George Eldridge brought an action in federal district court challenging the constitutionality of the procedures employed by the Secretary of Health, Education and Welfare to terminate disability benefits. Eldridge v. Weinberger, 361 F. Supp. 520 (W.D. Va. 1973). His complaint alleged that due process required a hearing prior to the termination of his benefits. *Id.* at 521. The district court viewed Eldridge's interest as identical to that of the welfare recipient in Goldberg v. Kelley, 397 U.S. 280 (1970). 361 F. Supp. at 523. The court held that due process requires a pretermination evidentiary hearing. *Id.* at 528. The Fourth Circuit affirmed, relying entirely on the district court opinion. Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974).

14. 424 U.S. at 335. Although this formula invites specific review, it is tempered by judicial restraint. Justice Powell, writing for the majority, stated that "[i]n assessing what process is due . . . substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they

Weighing the competing interests, the Court held that due process did *not* require a prior hearing.[15]

In the wake of *Mathews*, the Court decided *Dixon v. Love*.[16] At issue in *Love* was a statute authorizing summary revocation of a driver's license for repeated traffic offenses.[17] The Court held that summary suspension was permissible because of the "opportunity for a *full judicial* hearing in connection with each of the traffic convictions on which the decision was based."[18]

Against this background the Supreme Court recently decided *Mackey v. Montrym*.[19] The Court in *Mackey* considered the constitutionality of a Massachusetts statute that mandates suspension of a driver's license for refusal to submit to a breathalyzer test when arrested for drunken driving.[20] The Court employed the *Mathews* test to reach its decision that due process was not violated, because of the availability of a post-suspension hearing and the compelling state interest in highway safety.[21]

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have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 349.

15. *Id.* The result contrary to that reached in *Goldberg* can be explained in part by the change in the Supreme Court bench. The appointment of Justices Blackmun, Rehnquist, and Powell subsequent to the decision in *Goldberg* marked the beginning of a new majority of judicial conservatives. It is significant that in the *Mathews* opinion the three newly-appointed judges joined the *Goldberg* dissenters, Burger and Stewart. Brennan, who wrote the majority opinion in *Goldberg*, rendered the dissent in *Mathews*.

16. 431 U.S. 105 (1977).

17. *Id.* at 106. The statute authorized suspension or revocation where a licensee "has been convicted of not less than three offenses . . . committed within any twelve month period so as to indicate . . . disrespect for traffic laws and a disregard for the safety of other persons on the highways. . . ." ILL. REV. STAT. ch. 95½, § 6-206(a)(2) (1975).

18. 431 U.S. 105, 117-18 (1976) (emphasis added).

19. 99 S. Ct. 2612 (1979).

20. Commonly known as the implied consent law, the Massachusetts statute provides:

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

MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976). The theory behind implied consent statutes is that in return for the privilege of driving on state highways, a driver impliedly consents to take a sobriety test if properly requested to do so by a police officer. *See* Lerblanche, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39 (1978).

21. 99 S. Ct. at 2621.

The Court's reliance on an interest-balancing test necessarily involves basic issues of authority and individual rights.[22] The Court's construction of procedural limits addresses the values that the legal system should promote.[23] Thus, a fundamental question is when must the individual's protected rights be subordinated to the authority of government.

MACKEY V. MONTRYM

Donald Montrym was arrested in Massachusetts for driving while intoxicated.[24] He was taken to a police station and asked to submit to a breathalyzer test[25] mandated by Massachusetts' implied consent law.[26] Montrym refused to submit to the test. After consulting with his attorney, he retracted his initial refusal and asked to be given the test, which the police declined to perform.[27] The arresting officer completed a report of refusal and sent it to the Registrar of Motor Vehicles.[28] The Registrar ordered a 90-day suspension upon receipt of the report.[29]

A state court dismissed the complaint brought against Mon-

22. *See* Mashaw, *The Supreme Court's Due Process Calculus For Administrative Action in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) [hereinafter cited as Mashaw]. "Judicial reasoning, including reasoning about procedural due process, is frequently and self-consciously based on custom or precedent. In part, reliance on tradition or 'authority' is a court's institutional defense against illegitimacy in a political democracy." *Id.* at 54.

23. *See* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975) [hereinafter cited as *Specifying the Procedures*]:

> Since the function of the Court in applying the balancing test is to avoid the greater of . . . two misfortunes by letting the lesser occur, the Court has placed itself in a position where it must compare incommensurables. Such a comparison necessarily requires that an anterior value judgment be made as to the relative importance of avoiding private or public misfortune.

Id. at 1520.

24. 99 S. Ct. at 2614.

25. *Id.*

26. *See* note 20 *supra*.

27. Montrym v. Panora, 429 F. Supp. 393, 395 (D. Mass. 1977). The statute leaves an officer no discretion once a test has been refused: "The police officer before whom such refusal was made shall immediately prepare a written report of such refusal." MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976).

As mandated by the statute, the officer's report recited: (a) the fact of Montrym's arrest for driving while under the influence of intoxicating liquor, (b) the grounds supporting the arrest, and (c) the fact of his refusal to take the breathalyzer examination. 429 F. Supp. at 394 n.1.

28. *Id.* at 395.

29. A 90-day suspension upon receipt of a police report is mandated by the statute. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976). *See* note 20 *supra*.

trym for driving while intoxicated.[30] Montrym advised the Registrar by letter of the dismissal and asked for a stay of the license suspension.[31] The Registrar issued a suspension notice despite Montrym's request.[32]

Lower Court Opinions

Montrym brought a class action lawsuit in the Massachusetts federal district court.[33] A three-judge district court panel was convened.[34] The complaint alleged that the implied consent statute violated due process in that drivers were not afforded pre-suspension hearings.[35] Montrym moved for summary judgment enjoining enforcement of the statute. Relying largely on the Supreme Court's decision in *Bell v. Burson*,[36] the court de-

30. 429 F. Supp. at 395. The dismissal was predicated on the officer's refusal to administer a test after Montrym's initial rejection of it. *Id.*

31. *Id.* at 396.

32. *Id.* The Registrar has no discretionary authority to stay a suspension mandated by the statute.

33. Montrym brought the action in federal court on behalf of himself and others similarly situated. The district court held that the class action could be maintained under the Federal Rules of Civil Procedure. The class was certified under Rule 23(b)(2), which provides that an action may be brought as a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." FED. R. CIV. P. 23(b)(2) (1977).

34. The three-judge federal district court was convened pursuant to 28 U.S.C. § 2281.

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereon unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2281 (1970) (repealed by Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119, Aug. 12, 1976).

Section 2284 provides in part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows: (1) the district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C. § 2284 (1970).

35. 429 F. Supp. at 395.

36. *Id.* at 396. Bell v. Burson, 402 U.S. 535 (1971), involved a constitutional challenge to Georgia's Motor Vehicle Safety Responsibility Act, GA. CODE ANN. § 92A-605(a) (Supp. 1970). Under the statute, an uninsured motorist involved in an accident would have his license suspended unless he posted security equal to the amount claimed in damages by the aggrieved

cleared the statute unconstitutional and granted injunctive relief.[37]

In a subsequent proceeding, the Registrar of Motor Vehicles moved the same three-judge court for reconsideration[38] in light of the Supreme Court's intervening decision in *Dixon v. Love*,[39] which upheld summary suspension of a driver's license. In a second opinion,[40] the three-judge court distinguished *Love* on several grounds[41] and denied the Registrar's motion for modification of its judgment.[42] The Registrar appealed to the United States Supreme Court.[43]

United States Supreme Court Opinion

The Supreme Court reversed the district court judgment, re-

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party. The statute excluded any consideration of fault or responsibility. No prior hearing was required. The Court held that the Georgia statute violated due process. *Id.* at 542.

37. 429 F. Supp. at 400. The court explained, "While we appreciate . . . [the] concern for ensuring the state's ability to compel drivers to take a chemical test, we do not believe this interest is sacrificed by providing the licensee at least a minimal opportunity to be heard prior to suspension." *Id.*

38. Montrym v. Panora, 438 F. Supp. 1157, 1158 (D. Mass. 1977).

39. 431 U.S. 105 (1977). In *Dixon*, the Supreme Court upheld an Illinois statute authorizing summary suspension of a driver's license. ILL. REV. STAT. ch. 95½, § 6-206(a) (1975). Grounds for suspension under the statute are convictions of not less than three traffic offenses committed within any twelve month period. *See* note 17 *supra*.

40. Montrym v. Panora, 438 F. Supp. 1157 (D. Mass. 1977).

41. *Id.* at 1159-61.

> *First*, the private interest here is greater than that at stake in *Love*. There, the Court emphasized that the challenged Illinois Statute allowed a person, upon notification of suspension or revocation, to request emergency relief in the form of a restricted permit. . . . There is no comparable safeguard in the challenged Massachusetts statute.
>
> *Second*, the risk of error under the Illinois scheme is markedly less than under the Massachusetts procedure. The revocation decision in Illinois is based on a series of criminal convictions . . . not solely on a form affidavit. . . .
>
> *Finally*, nothing in our opinion burdens the Commonwealth's valid interest in removing unsafe drivers from the highway. . . . [A] positive breathalyzer test does not automatically remove the chronic drunk driver from the road. . . . Indeed, in the Registrar's discretion, a conviction of drunk driving need not lead to license revocation.

Id.

42. *Id.* at 1161.

43. 28 U.S.C. § 1253 (1970) provides for direct appeals from decisions of three-judge courts:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

lying largely on its decision in *Dixon v. Love*.[44] The Court concluded that *Love* could *not* be materially distinguished since both cases involved administrative suspension of a driver's license without a pre-suspension hearing. In both *Mackey* and *Love*, the Court framed the sole issue as the "appropriate timing of the legal process due a licensee."[45]

This issue was resolved in *Mackey*, as it had been in *Love*, by reference to the *Mathews v. Eldridge* balancing test.[46] The *Mackey* Court held that neither the nature of the private interest, nor its weight, compelled a conclusion that the procedures violated due process.[47] In reaching its decision, the majority emphasized the state's interest in highway safety and the availability of a prompt post-suspension hearing.[48]

THE *MATHEWS* BALANCING TEST

The Private Interest Affected by the Official Action

It is now established that suspension of a driver's license for statutorily defined cause implicates a protectable property interest.[49] Thus, a licensee should not be deprived of his property by the state unless the constitutional guarantees of due process have been met. Procedural due process has always required notice and a meaningful opportunity to be heard[50] before a deprivation occurs,[51] except in emergency situations.[52] This principle

44. 99 S. Ct. at 2617 (citing Dixon v. Love, 431 U.S. 105 (1977)).

45. 99 S. Ct. at 2617.

46. *Id.* *See* text accompanying note 14 *supra*.

47. 99 S. Ct. at 2618.

48. *Id.* at 2621.

49. Bell v. Burson, 402 U.S. 535 (1971), established that due process applies to a state's suspension of a citizen's driver's license. "Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensee. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539.

50. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1977) (notice before termination of utility services); Wisconsin v. Constantineau, 400 U.S. 433, 434 (1971) (notice before posting names of people unfit to drink alcohol); Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (notice of pending adoption proceedings); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (notice of judicial settlement of a common trust fund); Grannis v. Ordean, 234 U.S. 385, 394 (1913) (notice of judicial proceedings by newspaper publication); Priest v. Las Vegas, 232 U.S. 604, 612 (1913) (notice of judicial proceedings by newspaper publication); Roller v. Holler, 176 U.S. 398, 399 (1899) (notice before foreclosure of a vendor's lien).

51. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1977) (termination of utility services); Goss v. Lopez, 419 U.S. 565, 581-84 (1975) (student suspension from high school); Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972) (parole revocation); Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (replevin of consumer goods held under conditional sales contracts); Bell v.

ensures that a person threatened with divestiture of a constitutionally guaranteed right has an opportunity to present his case "at a time when the deprivation can still be prevented."[53]

Adherence to due process principles is crucial when a deprivation is irreversible. A wrongful license suspension, unlike a wrongful termination of social security benefits, cannot be redressed through retroactive relief.[54] Thus, a prior hearing is particularly important when a "state will not be able to make . . . [a person] whole again for any personal inconvenience suffered."[55]

This notion of retroactive redress has played an important role in the Court's weighing of interests.[56] In *Mathews v. Eldridge*, the Court emphasized that the availability of full retroactive relief was a significant factor in weighing the competing

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Burson, 402 U.S. 535, 542 (1971) (driver's license revocation); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (prejudgment wage garnishment).

52. 99 S. Ct. at 2622 n.1. Emergency situations have generally been defined as those in which swift action is necessary to protect public health, safety, revenue or the integrity of public institutions. *See* Ewing v. Mytinger Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (governmental taxing power); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (emergency action during wartime); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (summary seizure of food unfit for human consumption); *cf.* Goss v. Lopez, 419 U.S. 565 (1975) (summary suspension of a student from high school). *See also* Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (summary imposition of a lien to protect public from a bank failure); *see generally* J. FREEDMAN, CRISIS AND LEGITIMACY IN THE ADMINISTRATIVE PROCESS (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-14 (1978).

53. Fuentes v. Shevin, 407 U.S. 67 (1972). In *Fuentes*, the Court addressed the question whether household goods purchased on an installment contract could be taken away by writ of replevin without a prior hearing. The Court held that due process did require a hearing prior to repossession of the goods. Justice Stewart, writing for the majority, emphasized that:

> If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for wrongful deprivation. *But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.*

Id. at 81-82.

54. *See* Dixon v. Love, 431 U.S. 105 (1977). In *Love*, the Court noted the impossibility of retroactive relief in driver's license suspension cases:

> The private interest affected by the decision here is the granted license to operate a motor vehicle. Unlike the social security recipients in [*Mathews v.*] *Eldridge*, who at least could obtain retroactive payment if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated.

Id. at 113.

55. 99 S. Ct. at 2617-18.

56. *Id.* at 2623 (Stewart, J., dissenting).

private and governmental interests involved.[57] Therefore, when a deprivation is irreversible, as is a license suspension, "the requirement of *some kind* of hearing before a final deprivation takes effect is all the more important."[58]

The Court, after stating that *Mathews* was controlling,[59] circumvented the issue of retroactive redress by reference to its decision in *Dixon v. Love*[60] not to afford a hearing prior to the suspension of a driver's license. But the Court's reliance on *Love* was misplaced because *Mackey* was materially distinguishable.

At issue in *Love* was a statute permitting summary revocation of a driver's license for repeated traffic offenses.[61] The Court held that under these circumstances summary suspension was permissible because of the judicial hearing occurring in connection with each of the convictions on which the suspension was based.[62] The Massachusetts statute, in clear contrast, allows suspension without a prior hearing for a first offense, leaving no forum to contest the facts upon which the suspension is based.[63] In *Love*, suspension followed only from duly obtained traffic convictions. "It established no broad exception to the normal presumption in favor of a prior hearing."[64]

The Court's holding that the Massachusetts statute did not violate due process was also premised on the availability of an *immediate* "walk-in" post-suspension hearing.[65] However, "even assuming that such an after-the-fact procedure would be constitutionally sufficient in this situation, the so-called 'prompt post-suspension' remedy is . . . largely fictional."[66] The state

57. 424 U.S. 319 (1976). "Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessations initially established, the worker is entitled to retroactive payments." *Id.* at 339. The provision for retroactive redress, however, does not necessarily mean that a deprivation of benefits can be adequately redressed. Indeed, in *Mathews*, because disability benefits were terminated there was a foreclosure upon the Eldridge home, and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. *Id.* at 350. It cannot be said that the humiliation, hardship and inconvenience suffered by the Eldridge family would be fully redressed through retroactive disability payments.

58. 99 S. Ct. at 2622 (Stewart, J., dissenting). *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

59. 99 S. Ct. at 2617.

60. 431 U.S. 105, 115 (1977).

61. *See* note 17 *supra*.

62. 431 U.S. 105, 113 (1977).

63. *See* note 20 *supra*.

64. 99 S. Ct. at 2623 (Stewart, J., dissenting).

65. *Id.* at 2618.

66. *Id.* at 2626 (Stewart, J., dissenting).

need not notify a driver of the post-suspension remedy.[67] A remedy without notice of its existence is not a meaningful safeguard.[68] "Reasonable" notice of a procedural right is integral to due process.[69] Even if notice of the remedy was given, it could not be characterized as "immediate relief."[70] The "walk-in" procedure provides only an opportunity to request a later hearing.[71] The license suspension continues pending the outcome of that hearing.[72]

In view of the deficiencies inherent in the Massachusetts scheme, the post-suspension procedures appear to be constitutionally insufficient. The Court has never subscribed to the general view "that a wrong may be done if it can be undone."[73] Moreover, the Court "should . . . be even less enchanted by the proposition that due process is satisfied by delay when the wrong cannot be undone at all."[74]

The Risk of an Erroneous Deprivation

The Massachusetts statute provides in part that "if the person arrested refuses to submit to such test or analysis . . . the police officer before whom such refusal was made shall immediately prepare a written report of such refusal."[75] The statute requires that the report be sworn to under penalty of perjury and

67. *Id.* at 2626 n.4. The state statute entitles a driver to a limited hearing before the Registrar. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(g) (West Supp. 1976). *But see* text accompanying notes 71-72 *infra*. The only post-deprivation remedy mentioned in the suspension notice sent to Montrym was the right to take "an appeal" within ten days to the Board of Appeal on Motor Vehicle Liability. "The unexplained reason for petitioner's failure to exercise his right to the putative 'walk-in' hearing . . . thus may lie in the failure of the state to notify him of any such right." *Id.*

68. 99 S. Ct. at 2626 (Stewart, J., dissenting).

69. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1977): The "petitioner's notification procedure . . . was not reasonably calculated to inform them of the availability of an opportunity to present their objections. . . . The purpose of notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *See generally* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). "The notice must be of such nature as reasonable to convey the required information." *Id.* at 314.

70. *See* note 72 *infra*.

71. 99 S. Ct. at 2626 (Stewart, J., dissenting).

72. *Id.* The Registrar has no power or authority to stay a suspension for the driver who contests his refusal to take a test. To resolve such a dispute, a "meaningful hearing before an impartial decisionmaker would require the presence of the officer who filed the report, the attesting officer, and any witnesses the driver might wish to call." *Id.* The majority's notion of "immediate relief" therefore is at best a myth.

73. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

74. 99 S. Ct. at 2627 (Stewart, J., dissenting).

75. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976). *See* note 20 *supra*.

endorsed by the arresting officer. The report is then to be counterendorsed by the chief of police.[76]

The majority in *Mackey* held that the district court overstated the risk of error inherent in the statute's reliance on an affidavit of a law-enforcement officer.[77] Chief Justice Burger noted that the officer "is by reason of his training and experience, well-suited for the role the statute accords him in the pre-suspension process."[78] The penalties for misrepresentation of facts were emphasized: "[H]e has every incentive to ascertain accurately [sic] and truthfully report the facts, [and] . . . there will *rarely* be any genuine dispute as to the historical facts providing cause for summary suspension."[79]

It is ironic that the Court reached this conclusion, because the case *did* involve a genuine dispute over a critical element of the statutory basis for suspension—whether there really was a refusal to take the test within the meaning of the statute.[80] The statute states in part, "If the person arrested refuses to submit to such test or analysis, *after having been informed that his license . . . shall be suspended . . . for such refusal. . . .* , the Registrar shall suspend [the] . . . license. . . ."[81] Montrym consistently contended that he was not informed of the sanction, and he vigorously disputed the accuracy of the police affidavit that claimed he was informed.[82]

The Court suggested, nonetheless, that an informed refusal is so "routine" and "objective" that reliance on police reports involves no risk of error.[83] The Court's analogy to the objective procedure in *Love*[84] was inappropriate. There is a substantial

76. 99 S. Ct. at 2614.

77. *Id.* at 2619. In considering the second factor set forth in *Mathews*, the risk of an erroneous deprivation, the lower court reviewed the Massachusetts procedures and held that "[d]espite these precautions, errors, clerical or otherwise, could occur." Montrym v. Panora, 429 F. Supp. at 398.

78. 99 S. Ct. at 2619.

79. *Id.* (emphasis added).

80. *See* note 20 *supra*.

81. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1976). *See* note 20 *supra*.

82. 99 S. Ct. at 2623 (Stewart, J., dissenting).

83. *Id.* at 2619. Similarly, in *Mathews*, Justice Powell had asserted that the risk of an erroneous deprivation was slight because the decisions were based on "hard" medical evidence and "routine, standard and unbiased medical reports by physician specialists." 424 U.S. at 344. It is interesting to note, however, that Justice Powell rejected the statistical evidence indicating that 58.6% of the appealed reconsiderations were reversed. *Id.* at 346-47.

84. 99 S. Ct. at 2619. Chief Justice Burger, speaking for the majority, noted that "[a]s was the case in *Love*, the predicates of a driver's [license] suspension under the Massachusetts scheme are objective facts within the personal knowledge of an impartial government official or readily ascertainable by him." *Id. Contra*, Montrym v. Panora, 438 F. Supp. 1157 (D. Mass.

difference between the records of adjudicated convictions involved in *Love*, and the facts of an encounter between a motorist and the police. Justice Stewart recognized this distinction and emphasized that the Court had never held "that the police version of a disputed encounter between the police and a private citizen is inevitably accurate and reliable."[85]

Thus, contrary to the majority's opinion, the factual situation in *Mackey* exemplifies the accuracy problems of the Massachusetts procedure. The case specifically illustrates the risk of error inherent in procedures utilizing one-sided form affidavits such as those previously declared unconstitutional by the Court.[86] This problem is not new: Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*[87] emphasized that "fairness can rarely be obtained by . . . one-sided determinations of facts decisive of rights . . . and self righteousness gives too slender an assurance of rightness."[88] Although the majority in *Mackey* recognized that "[t]he specific dictates of due process must be shaped by the risk of error inherent in

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1977). "We . . . disagree . . . that the three issues which must be set forth in the police officer's affidavit amount to 'a simple, objectively-ascertainable event'. . . ." *Id.* at 1161.

85. 99 S. Ct. at 2624 (Stewart, J., dissenting).

86. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). In *Fuentes*, the Court struck down replevin statutes in two states as being unconstitutional. The statutes authorized state agents to seize a person's possessions simply upon the ex parte application of any party who claimed a right to them and posted a security bond. Neither of the statutes provided for notice to be given to the possessor of the property or an opportunity to challenge the seizure at a prior hearing.

Although the affidavit in *Mackey* was furnished by a government official instead of a private party, a police officer has an interest in the outcome of the controversy. His version of the facts is by nature subjective and tailored to serve his interests. Thus, the risk of an erroneous deprivation is not insubstantial.

See Note, *Due Process and the Combination of Administrative Functions: A Balancing Approach*, 63 IOWA L. REV. 1186 (1978). "Because the significance of factual events to perceivers is shaped by the purpose for which the perceptions are made, the preconceived view of the facts, if shaped by the will to win on a particular position, will consistently favor that position." *Id.* at 1195.

87. 341 U.S. 123 (1951). The importance of due process and fair procedures in the government's dealing with its citizens was highlighted in *Joint Anti-Fascist Refugee Comm. v. McGrath*. The case grew out of the witchhunts and anti-communist hysteria of the 1950's. In *McGrath*, the Court addressed the validity of a Loyalty Review Board established by executive order. The Board empowered the Attorney General to brand organizations as communist or subversive without affording a prior hearing to contest the factual basis of the black-listing. Once an organization was black-listed, its ability to attract supporters and raise funds was seriously impaired. The Supreme Court invalidated the actions of the Attorney General and held that the denial of prior hearings violated due process.

88. *Id.* at 170-71.

the truthfinding process . . . ,"[89] the risk factor was understated in the balancing of interests.

The Government's Interest

Considering the governmental interest, the third factor in the *Mathews* balancing test, the Court concluded that the interest in highway safety justified summary suspensions.[90] The majority enumerated several ways in which the public is served by summary suspensions:

> First, . . . the summary sanction . . . serves as a deterrent to drunk driving. Second, it provides . . . inducement to take the . . . test and thus effectuates the . . . interest in obtaining reliable . . . evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction . . . contributes to the safety of public highways.[91]

Chief Justice Burger, speaking for the Court, stressed that the summary character of the suspension sanction was critical to the attainment of these three objectives. He warned that prior hearings would substantially undermine the state interest "by giving drivers significant incentive to refuse the . . . test and demand a pre-suspension hearing as a dilatory tactic."[92] The Court also reasoned that the incentive to delay arising from a prior hearing would impose a substantial fiscal and administrative burden.[93]

The arguments raised over administrative costs illustrate how a balancing test side-steps the constitutionally relevant issues.[94] Justice Stewart's dissent addressed this problem and re-

89. 99 S. Ct. at 2619.

90. *Id.* at 2621.

91. *Id.*

92. *Id.*

93. *Id.* "[T]he availability of a pre-suspension hearing would generate a sharp increase in the number of hearings and therefore impose a substantial fiscal and administrative burden on the commonwealth."

The argument over administrative costs was addressed in Justice Brennan's dissenting opinion in Richardson v. Wright, 405 U.S. 208 (1970). At issue in *Richardson* was the constitutionality of terminating disability benefits without a prior hearing. Richardson, the Secretary of Health, Education and Welfare, had argued that prior hearings would require "massive restructuring of the existing administrative process." *Id.* at 223. Justice Brennan noted the provisions for post-termination hearings and suggested that "the only 'restructuring' necessary would be a change in timing of the hearings." *Id.*

94. *See* Mashaw, *supra* note 22, at 48-49:

> [I]t is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberties in the face of contrary collective action. Therefore, a collective legislative or administrative decision about procedure, one arguably reflecting the intensity of contending social values and representing an optimum position from

jected the cost-saving argument stating, "If costs were the criterion, the basic procedural protections of the Fourteenth Amendment could be read out of the Constitution. Happily, the Constitution recognizes higher values than 'speed and efficiency.' "[95]

The Court's weighing of the state's interest disclosed other latent inconsistencies. The majority's conclusion that summary procedures are necessary for highway safety[96] exemplifies their defective reasoning. It is true that the interest in removing drunken drivers from highways is significant and important. However, case law supporting ex parte action has not turned solely on the significance of the asserted governmental interest.[97]

Generally, ex parte actions have been justified because the delay arising from a prior hearing would frustrate the state's interest in taking action.[98] The effect of the Massachusetts statute, however, is not to remove drunks from the road but only to remove those who have refused the test.[99] A motorist who fails the test keeps his license pending a hearing.

This result contradicts the majority's argument that summary suspension serves an emergency protective purpose.[100] Suspension is based not on intoxication but on non-cooperation with the police.[101] Justice Stewart, speaking for four dissenters, noted that "[a] State is simply not free to manipulate Fourteenth Amendment procedural rights to coerce a person into compliance with its substantive rules, however important it may

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the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded.

95. 99 S. Ct. at 2621. *See* Stanley v. Illinois, 405 U.S. 645 (1972):

> Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the over-bearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 656.

96. 99 S. Ct. at 2621.

97. *Id.* at 2625 (Stewart, J., dissenting).

98. *E.g.*, North Am. Storage Co. v. City of Chicago, 211 U.S. 308 (1908) (allegedly spoiled food). *See* note 52 *supra*.

99. 99 S. Ct. at 2625 (Stewart, J., dissenting); *accord*, Chavez v. Campbell, 397 F. Supp. 1285, 1288 (D. Ariz. 1973); Holland v. Parker, 354 F. Supp. 196, 202 (D.S.D. 1973).

100. 99 S. Ct. at 2621. Chief Justice Burger characterized *Mackey* by implication as an emergency case when he claimed that "[s]tates have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Id.* *See* note 52 *supra*.

101. 99 S. Ct. at 2625 (Stewart, J., dissenting).

consider those rules to be."[102]

THE IMPLICATIONS OF *MACKEY*

Interest balancing is implicitly utilitarian in nature.[103] Utilitarian theories suggest that the purpose of decision-making procedures is to advance the interests of society.[104] Indeed, commentators have suggested that the *Mathews* type of balancing test serves a social welfare function.[105]

The problem in using a theory of utility to decide constitutional issues was made clear in *Mackey*. The Court, seeking to justify the social ends of public safety and cooperation with police, gave little recognition to the limiting function of the due process clause. The majority's reasoning converted due process from a restriction upon the power of government to a judicial check on whether state procedures advance the general welfare.[106] This emphasis on social goals "is difficult to reconcile with the traditional view that . . . [due process] limits the power of government to pursue even policies which benefit the majority."[107]

The Court's present move toward restricting individual rights to advance state interests is exemplified by *Barry v. Barchi*.[108] In *Barry*, a licensed horse racing trainer brought an action in a New York federal district court[109] challenging the constitutionality of a statute authorizing suspensions of racing

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102. *Id.*

103. "The use of interest balancing to specify the procedures required by due process has been an essentially utilitarian venture." *Specifying the Procedures, supra* note 23, at 1523; *see* Mashaw, *supra* note 22, at 46: "The Supreme Court's analysis in [*Mathews v.*] *Eldridge* is not informed by systematic attention to any theory of values underlying due process review. The approach is implicitly utilitarian, but incomplete and the Court overlooks alternative theories that might have yielded fruitful inquiry."

104. Mashaw, *supra* note 22, at 47. *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. Burns & H. Hart ed. 1970); D. LYONS, IN THE INTEREST OF THE GOVERNED: A STUDY IN BENTHAMS PHILOSOPHY OF UTILITY AND LAW (1973).

105. Mashaw, *supra* note 22, at 47.

106. *See Specifying The Procedures, supra* note 23, at 1511. In requiring that the individual's interest must outweigh the government's interest in summary procedures, such analysis makes the individual's entitlement to procedural safeguards dependent upon whether it is in the state's best interest that the procedures be accorded.

107. *Specifying the Procedures, supra* note 22, at 1524. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (noting that where individual interests are balanced against the public interest, the latter almost always prevails). *Id.* at 776-77.

108. 99 S. Ct. 2642 (1979).

109. Barchi v. Sarafan, 436 F. Supp. 755 (S.D.N.Y. 1977).

licenses.[110] The state procedures made no provision for a hearing prior to the license revocation.

According to the New York State Racing and Wagering Board rules, drugging of horses within 48 hours of a race was forbidden.[111] Barchi's license was suspended when a post-race urinalysis revealed a stimulant drug in the horse's system. Barchi claimed lack of knowledge, and two lie-detector tests supported his innocence.[112] The district court held that the absence of a pre-suspension hearing or a prompt post-suspension hearing denied Barchi "the meaningful review due process requires."[113]

The Supreme Court Justices' opinions polarized on the constitutionality of the statute exactly as they did in *Mackey*. The four dissenters in *Mackey* comprised the *Barry* dissent.[114] The majority recognized the magnitude of the trainer's interest in avoiding suspension.[115] The state's interest predominated, however, because of the "important interest in assuring the integrity of the racing carried on under its [the state's] auspices."[116]

One can only speculate on the limitless opportunities to deny a prior hearing based on the precedent set in this case. No prior hearing was afforded *even with* evidence of Barchi's innocence. Furthermore, the Court did not even attempt to justify the ex parte action on "emergency" grounds as it had in *Mackey*. Nor did the Court justify its decision on social welfare grounds.

The implications are clear. The increasing use of the "state's interest" to justify withholding procedural protections will progressively emasculate the due process limits prescribed in the Constitution. Justice William O. Douglas warned that "[i]t is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or

110. 99 S. Ct. at 2647.

111. *Id.* at 2646. The New York State Racing & Wagering Board is empowered to license horse trainers participating in harness races. The Board issues regulations specifying the standards of conduct that a trainer must satisfy to retain his license. The Trainer's Responsibility Rules provide that when a post-race urinalysis reveals the presence of drugs in the horse's system, it is presumed that the trainer administered the drug or negligently failed to adequately protect the horse from being drugged. 9 N.Y.C.R.R. §§ 4120.4-.6 (1974).

112. 99 S. Ct. at 2647.

113. *Id.*

114. The dissenters in *Mackey* and *Barry* were Justices Stevens, Stewart, Marshall, and Brennan. Chief Justice Burger, and Justices Powell, Rehnquist, Blackmun, and White comprised the majority in both cases.

115. *Id.* at 2649.

116. *Id.*

caprice."[117]

CONCLUSION

Focusing on administrative costs and general welfare leads to a situation in which due process ceases to be a right as against the majority and becomes, instead, a judicial check on legislative policies. This form of due process is at odds with the original form whose purpose was to protect the individual from the total power of government, legislative as well as judicial. Our government of limited powers was created to safeguard individual rights, despite the agreement between branches of government that denial of a right would be appropriate under certain circumstances.[118] The basic notion is to protect the individual from group action, particularly when denial of rights would benefit the majority.[119]

Unquestionably, there are times when an individual's rights must be subordinated to a compelling state interest. These emergency situations[120] are an exception to procedural fairness because avoiding harm to one would greatly injure many.[121] However, denying individual rights for administrative convenience alone uniquely benefits no identifiable group of persons outside the government bureaucracy.

Mackey elucidates the problems inherent in relying on utilitarian formulas to resolve constitutional issues. Its resolution

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117. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., dissenting). *See* note 87 *supra*.

118. *See* J. GORA, DUE PROCESS OF LAW (1977).

> [W]hat we as a nation honor far more than constitutions or presidents are the "truths" which the Declaration of Independence so eloquently holds to be self-evident: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of happiness." It is "to secure these rights" said the Declaration of Independence, that "Governments are instituted among Men." Thus government *is merely a means to a greater end*—the achievement and protection of the unalienable rights of its citizens.

Id. at vii (emphasis added).

119. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-14 (1978):

> Like many other provisions of the Constitution, the due process requirement represented a decision by the Framers to safeguard certain rights and values, those considered fundamental in a free society and yet vulnerable to the risk of denial by the majority. Adequate protection of such "core" concerns cannot be afforded by "balancing" the general interests of the majority against those of the individual. Here, as elsewhere, the Court should decline the invitation to engage in a utilitarian comparison of public benefit and private loss.

Id. at 543.

120. *See* note 52 *supra*.

121. *See, e.g.*, North Am. Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (summary seizure of food unfit for human consumption).

within the formal constructs of a balancing test effectively evades the fact that the Massachusetts scheme is functionally inappropriate as an emergency protective measure.[122] *Barry v. Barchi* continues the trend of masking judicial value judgments with the presumably neutral language of utility. The judicial use of a balancing test should not be unlimited in its scope, because it clearly abandons any effective limits on the power of the government to deprive individuals of their constitutional rights.

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122. Systematic attention should be given to functional considerations within the larger scheme of interest-balancing. Reference to the functions performed by various procedures is imperative because functional utility clearly modifies the weight of the individual's interest in obtaining a particular procedure. Functional appropriateness *should not* be treated as a factor distinct from either the individual or governmental interest. Due process is at the heart of our constitutional system and as such should not be regarded lightly.

> [T]hose who wrote our original constitution . . . and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.

Boddie v. Connecticut, 401 U.S. 371, 375 (1971).