Michigan
Bar Journal
May 1995


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Photo Finished: Calling into Question Michigan's Roadside Driver's License Confiscation Law

By Victor M. Norris and Michael F. Smith

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Your client walks into the office, sits down and begins telling you what happened after the police pulled him over the previous night.

"The officer asked me to take a breath test, and I did," the client explains. "I figured, be cooperative. Then after I take it, he tells me sorry, he's keeping my driver's license. Just like that. He's keeping it. And he gives me this slip of paper." The client removes from his wallet a folded, letter-size document that he hands to you. "Now every time I want to cash a check, or prove to anyone who I am, I don't have my driver's license to show them. I have this 'Breath, Blood, Urine Test Report.'"

"I've already had to show that twice today," he continues. "Once at the supermarket, and once at the bank. The teller didn't know if it was a real identification or not, and ended up passing it around to all the other tellers. It was humiliating."

"No judge, no jury, and I'm branded — and I even cooperated. Can the cops really do that?"

For more than two years, police in Michigan have in fact been able to do just that — confiscate on the spot (and if their department chooses, destroy) the photo driver's license of any motorist who tests at a blood alcohol content of 0.10 percent by weight. In its place, the motorist is issued a "Breath, Blood, Urine Test Report" which serves as a temporary license. The report (temporary license) prominently displays, among other things, the "arrest date," the fact the driver tested for blood-alcohol content of 0.10 percent or greater, and the fact that criminal charges are pending. Nor are motorists any better off refusing the test; those who do also have their photo licenses confiscated, and are issued in its place "Officer's Reports of Refusal to Submit to Chemical Test." These practices are mandated by a portion of the legislative package that took effect January 1, 1992, as part of a revision of the state's drunk- driving laws.[1] But while the zeal to curb drunk-driving that prompted the law has, to date, managed to stifle public outcry over this practice, any defense attorney who has ever had to face a humiliated client understands that bewildered question — "Can they really do that?" — is one that deserves closer inspection.

The license confiscation law was part of a larger drunk-driving revision perhaps better known for creation of the "77-day rule" mandating final adjudication of drinking and driving charges within 11 weeks of arrest. Originally proposed with an eye toward securing $9 million in federal grant money, or so-called "408 funds," the drunk driving package ultimately failed to qualify because, ironically, legislative compromises left its punitive provisions insufficiently "swift and sure" to placate Washington's tough-talking bureaucrats. MCL 257.625g, which was promoted in part by Mothers Against Drunk Driving, calls for police officers to confiscate immediately the photo driver's license of any motorist who is asked to submit to chemical testing of blood, breath or urine, and either refuses or tests above 0.10 percent. While the statute provides that the paper form is to be valid for use as a license until final adjudication of the underlying drunk-driving charge, the state-approved forms currently used are laced with terms such as "arrest," "breath test," "criminal charges, "arresting officer", etc., and are labeled "Michigan Temporary Driving Permit" in bold, capital letters.

Supporters of the license confiscation provision have cited the need to "get tough" on drunk driving as justification for the measure. Indeed, in 1992, the first year the new package was in effect, alcohol- related fatalities dropped 13 percent from 1991 levels, according to the Secretary of State's office. But how much of that is due to the new package of drunk-driving laws, and how much is merely a continuation of a decade-long trend that saw a 31-percent drop in fatalities from 1982 to 1992, is uncertain. One thing that is clear, though, is that plenty of Michigan's seven million licensed motorists have summarily lost their photo licenses under the law. According to the Secretary of State, in the statute's first two years (1992 and 1993), 106,432 motorists — enough to fill Michigan Stadium — had their licenses confiscated on the spot. Of those, 83,986 had tested at or above the 0.10 percent limit, while 22,446 refused to submit to a chemical test.

Questions raised over the constitutionality of having the police officer in effect serve as judge and jury often are dismissed either by invoking the old saying that "driving is a privilege, not a right," or pointing to statutory language that says the paper license conveys the same degree of driving privileges/rights as the photo license. Closer scrutiny, however, calls both justifications into question. Michigan courts have seen fit to disregard the "privilege/right" distinction in recognizing the pivotal role that the ability to drive carries in our automobile-centered society. And the fact that the photo driver's license now has several essential purposes above and beyond its original intended use indicates that no substitute paper license — especially not one containing the inflammatory language currently in use — can effectively confer the full

range of rights bestowed by the photo license. For those reasons, motorists who feel victimized by the roadside license confiscation measure may want to petition the courts for careful scrutiny of the law's constitutionality.

DUE PROCESS

Practitioners faced with the "can they do that?" question will recognize the potential for a challenge to the license confiscation law on due process grounds. Judicial analysis of procedural due process issues proceeds in two steps. The court inquires first whether the statutory provision in question results in a denial of a protected liberty or property interest. If it does, the next step is to decide what procedures the government must follow to protect that interest[2]

Ample precedent in Michigan recognizes the importance of a motorist's interest in an operator's permit. In *Hurt v Austin*, 42 Mich App 554 (1972), the Court of Appeals held that regardless of whether driving is deemed a "right" or a "privilege," revocation of a driver's license must be accomplished by procedures that afford the motorist due process. The court repeated this concern in *Nicholas v Secretary of State*, 74 Mich App 64 (1977), holding that due process required a preliminary screening by a decision-maker more impartial than a complaining witness before summary suspension or revocation of a driver's license, and that a restoration order calling for the license to be revoked for a mere traffic offense violated due process. It would therefore seem that the license-revocation provision must be justified on its own merits, and challenges to the law may not be dismissed merely with the peremptory "driving is a privilege" argument.

As written and implemented, the statute seems at first blush to satisfy due process concerns since the substitute paper license currently approved for use after police confiscate the photo license states that it carries with it the same driving privileges the motorist possessed at the time of confiscation, and that it remains valid until final adjudication of the case. A more thorough look suggests otherwise, however. At the heart of rulings providing due process protection in license revocation proceedings is a recognition of the importance of the motor vehicle in the autocentered society of our state:

> *[I]n Michigan the independent mobility provided by an automobile is a crucial, practical necessity; it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life.*[3]

Central to the determination of whether an interest receives due process protection is the extent to which government action has fostered citizen dependence and reliance upon the activity in question.[4] Anyone who participates in our economic system at even the most basic level knows that conferring driving privileges is only one of the functions served by the modern photo license. The photo driver's license has become the most widely accepted (and, frequently, required) form of identification in our society. No entity in Michigan has done more to foster this reliance among individuals and businesses than the state itself, through its decades-old practice of licensing motorists, allowing photo licenses to become a heavily used means of ID in commerce and, on occasion, itself demanding the license as proof of ID.

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One deprived of a photo license need only attempt to rent a car or other equipment, cash a check, open a financial account or engage in the plethora of other common transactions in which photo identification is demanded, to understand how vital the photo driver's license is in our modern society. Attorneys subjected to the confiscation law should be especially sensitive to its implications; those who visit clients in most detention facilities are required to produce a bar card *and* a photo ID. In the absence of some other form of photo ID, confiscation under MCL 257.625g could interfere with the ability to provide effective representation. Because the role of the photo license has expanded — with the state's tacit approval — the right to retain the photo license until and unless convicted of a driving offense would seem to be an interest eminently deserving of due process protection.

The second step in procedural due process analysis is determining precisely what process is due. The U.S. Supreme Court enumerated the factors to be weighed in *Mathews v Eldridge*: 1) The private interest affected by the official action; 2) the risk of erroneous deprivation of that interest through the procedures used, as well as the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's countervailing interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural protections would entail.[5]

As noted above, the private interest in one's photo driver's license is arguably more significant than has been recognized to date. Moreover, the summary license confiscation procedure arguably poses a high degree of risk that interest will be abridged unreasonably in a roadside confiscation. Some motorists no doubt are properly deprived of their interest in a photo license upon conviction (perhaps having to secure the alternate Michigan Photo ID). In such instances, however, the license is taken only *after* adjudication of the charges pending against the motorist. Under the license confiscation law, in contrast, that important determination falls to the lone police officer, on the side of the road, in the dark of night, free of the strictures of due process requirements. Making the risk of erroneous deprivation even higher is the mandatory language of MCL 257.625g, and the fact that any discretion the officer may possess evaporates as soon as he asks the motorist to submit to a chemical test. Once that request has been made, the die has been cast: The officer "shall . . . immediately confiscate" the photo license of any motorist who either refuses or tests at 0.10 percent or greater, even if the officer subsequently comes to believe no violation has occurred.

There appear to be no countervailing governmental interests sufficient to justify summary roadside seizure of licenses. Certainly the state has a weighty interest in curbing drunk driving, but MCL 257.625g does not contribute to achieving this goal. Indeed, it requires police officers to give the motorist a paper license that carries with it the same statutory rights and restrictions as the license that was confiscated. The officer merely substitutes one license for another. Any possible justification grounded in the state's interest in "swift and sure" punishment

of drunk drivers is accomplished by the 77-day rule. The speedy disposition requirement is not only a powerful tool for closing off avenues of delay for accused drunk drivers, it also makes mandatory confiscation that much less imperative. Having guaranteed that drunk-driving cases will be concluded much sooner (the average drunk-driving disposition was 42 days from arrest in 1993, less than half the pre-77-day-rule average), the state's interest in snatching away the photo license during the traffic stop evaporates to zero. Instead, the state succeeds only in depriving the accused of photo identification during the period before conviction when the presumption of innocence still supposedly applies. Finally, the state would incur no additional fiscal or administrative burdens if it accorded due process to accused motorists: The state would simply have to return to its pre-1992 mechanism for seizing licenses, i.e., after a proper adjudication of the charges.

THE "REAL" STATE INTEREST

The circumstances surrounding enactment of MCL 257.625g reveal that the statute was motivated not by the valid state interest in properly curtailing drunk driving, but by a spiteful desire on the part of legislators to "get tough" on drunk drivers and curry public relations points, despite the cost in constitutional rights. An intent to inflict punishment, without the "messiness" of a trial, was at heart of the effort to pass the confiscation provision. During the consideration of SB 314, which ultimately was enacted as MCL 257.625g, supporters of the license confiscation provision touted its "get tough" impact. One official who was privy to legislative development of the proposal noted that to qualify for the $9 million in federal "408 funds," Legislators had to come up with a package of drunk-driving laws that would ensure "swift and sure" punishment and thus meet with the approval of federal bureaucrats.[6]

Although other provisions of the package were subjected to the usual legislative give-and-take during negotiations, Mothers Against Drunk Drivers remained adamant that police be given the power to confiscate immediately the license of any motorist whose blood alcohol tested 0.10 percent or higher, and ultimately won out.[7] To placate both a powerful lobbying group and the bureaucrats who controlled the federal purse strings, legislators chose to punish those stopped on suspicion of drunk driving before they were tried.

Once the law took effect, police agencies throughout the state were only too happy to mete out instant roadside punishment of suspected drunk drivers. One account of the law's early days noted that police tactics ranged from cutting photo licenses in half (Fraser) or in quarters (Warren) to smudging them with black ink (Flint). Kent County adopted the procedure of destroying and disposing of the license in front of the motorist. The Secretary of State's office today urges all departments to destroy the licenses immediately upon confiscation. As one state trooper explained at the time, "What this new law is, it's bringing the real bad guys to justice faster."[8] Clearly, the intent of both those who enacted the bill and those responsible for its enforcement was and is to achieve immediate punishment for those suspected of drunk driving, free of the "cumbersome" safeguards for the rights of the accused that the judicial system has crafted. This impermissible and inappropriate objective suggests a second, perhaps less obvious, but no less valid, ground for challenging the statute.

BILL OF ATTAINDER

Article 1, Section 10 of the 1963 Michigan Constitution and Article 1, Section 10 of the U.S. Constitution forbid the passage of any bill of attainder. A legislative act that applies either to named individuals or to easily ascertainable members of a group, so as to punish them without a judicial trial, is a bill of attainder.[9] Obviously not every proscriptive action of a Legislature qualifies; courts have held that the distinguishing characteristic of a bill of attainder is the infliction of punishment by the Legislature, without a judicial trial. Because MCL 257.625g affects a readily ascertainable class of people, was passed with the intended and publicly proclaimed goal of inflicting "swift and sure" retribution on suspected drunk drivers, and inflicts this punishment before any adjudication, it is a legislative usurpation of judicial power that arguably qualifies as a bill of attainder.

SPECIFICITY OF THE TARGETED GROUP

In determining whether the affected group has been identified with enough specificity to meet attainder requirements, the U.S. Supreme Court focuses on the reversibility of the action that triggers the punishment at issue. When the status that invokes punishment is fixed and unchangeable, the Court is likely to find the group sufficiently identifiable. In *Cummings v Missouri*, 4 Wall. 277,324 (1867), the Supreme Court struck down a state constitutional provision that barred from certain professions those who refused to take an oath denying that they had supported the Confederacy. In a companion case, *Ex parte Garland*, 4 Wall. 333 (1867), the Court invalidated a similar oath that was used to keep attorneys who had supported the Confederacy from practicing in federal courts. As the Court later noted, those challenging the provisions in both Cummings and Garland "were defined entirely by irreversible acts committed by them" — support for the Confederacy — and thus, were readily ascertainable for attainder purposes.[10]

MCL 257625g similarly catches within its net those whose status is irreversible. Once a law enforcement officer has requested that the motorist submit to a test, the provisions are triggered. The onus shifts to the motorist at that point, and anyone who gives an unsatisfactory response — either by refusing the test, or testing at 0.10 or above — is mandatorily and summarily punished by confiscation of the photo license and issuance of the paper license. Even worse than in Cummings and Garland, where those being punished at least had the original choice of deciding whether or not to support the Confederacy, the decision to include a particular driver in the affected group is made by the police officer when he decides whether to request a chemical test.

LEGISLATIVE PUNISHMENT

To evaluate whether a legislative act should be characterized as "punishment" for attainder-clause purposes, Michigan and federal courts look to three inquiries:

(1) *whether the challenged statute falls within the historical meaning of legislative punishment*; (2) *whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes*"; and (3) *whether the legislative record "evinces a congressional intent to punish."*[11]

In analyzing whether a statute is punitive, the U.S. Supreme Court has recognized that "Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct." *Selective Service supra*, 468 US at 851-52. If any one of the three prongs is met, the statute is deemed punitive. *Id.* at 852-856.

Examination of the legislative record, discussed above, clearly reveals an intent to inflict legislative punishment without the "messiness" of a trial. The Legislature was motivated to stigmatize suspected drunk drivers by both the carrot of $9 million held by federal

regulators and the stick wielded by a vocal lobbying group, Mothers Against Drunk Drivers. Both interest groups sought a more effective way of "sending a message" to drunk drivers than was being sent at the time by the courts. The intent was to punish suspected drunk drivers without trial. That is the essence of a bill of attainder.

The license confiscation sanction also arguably falls within the historical meaning of legislative "punishment." At English common law, under which bills of attainder originated, such bills often imposed the death penalty. Lesser punishments — confiscation of property, imprisonment, or stigmatizing punishments such as banishment — were imposed by bills of pains and penalties, which in this country are now included among the things proscribed by the ban on the bills of attainders.[12] The distinction between those sanctions that are included within the historical meaning of legislative punishment and those that are not turns on the statute's effect: If the sanction imposes an affirmative disability or restraint, it is within the historically defined scope of legislative punishment; if it merely denies a noncontractual government benefit, it is not.[13]

MCL 257.625g's requirement that police officers confiscate the photo license and replace it with a paper license branding the holder as an accused drunk driver arguably falls within the historical meaning of legislative punishment because it inflicts an affirmative disability upon the motorist. While the statute supposedly provides that the temporary license confers the same rights and privileges as the photo license, the temporary permits have no other purpose but to stigmatize, much in the same way as banishment and other historical methods of ostracism. The natural and intended effect is to require the defendant to reveal to the world, every time he is asked to produce his driver's license, that he has been stopped by police on suspicion of drunk driving. There can be no reason for conferring on the motorist a license that otherwise provides the same rights as the one removed, other than to ostracize and stigmatize the accused with the modern day equivalent of a scarlet letter — all without benefit of trial. The paper license also no doubt raises suspicions among any officer who stops the motorist subsequently, and in all likelihood serves, either overtly or subconsciously, to prejudice the second officer against the motorist. The substitution of a paper "badge of infamy" that is bound to result in the ostracism of the bearer is directly analogous to banishment, confinement in the stocks and other stigmatizing historical forms of legislative punishment.

USURPING THE COURTS' ROLE

In the end, the most distinctive feature of bills of attainder is the abrogation by the Legislature of the judiciary's power to determine guilt or innocence, and punish accordingly. Bills of attainder violate the most fundamental cornerstone of our constitutional system, at both the federal and state levels — the separation of powers. Unquestionably, drunk driving is a problem in our society. Much of the public no doubt believes the judicial process is too slow, too cumbersome and too unwilling to guarantee a 100-percent conviction rate in drunk driving cases. Certainly the state of Michigan has a legitimate interest in punishing drunk driving. Nevertheless, by succumbing to public pressure and mandating on-the-spot confiscation of an accused's permanent operator's license, the Legislature usurped the power of the judiciary without advancing any of these legitimate interests. Whatever else our state and federal constitutions might stand for, they certainly guarantee that the power to determine guilt and mete out punishment is the province of the courts, not the Legislature or the police.

The license confiscation law has generated little public debate since taking effect, largely because its targets are not sympathetic and much of the public supports the underlying goal of meting out instant punishment. Despite being more than three years old, the statute has yet to be challenged before the Court of Appeals. This could be due in part to the increased speed which the 77-day rule has brought to adjudication of drunk-driving cases; absent unusual circumstances, most motorists who are issued the paper license will either have their photo license restored, or their driving privileges restricted, long before their challenge reaches the appellate level. These procedural facts of life, however, do little to diminish the nature of the statute's imposition upon those it affects. Precisely for these reasons, attorneys sworn to protect the rights of the accused against abuses of power by the legislative and executive branches must see to it that such politically "popular" measures receive the most rigorous scrutiny. ■

FOOTNOTES

1. MCL 257.625g.
2. See Johnson-Taylor v Gannon, 907 F2d 1577 (6th Cir 1990).
3. Shavers v Attorney General, 402 Mich 554, 598 (1978).
4. Id.
5. 424 US 319, 334.
6. See Elaine Hiscoe Charney, History and Substance of the 1991 Drunk Driving Legislation, 4 Colleague, October 1991, at 2. See also House Legislative Analysis of HB 4827 et al. (8-14-91), at 1 ("Common wisdom has it that to successfully deter drunk driving, there should be swift and sure sanctions"), and 5 ("particularly strong deterrent effects, especially for potential repeat offenders, will follow from provisions for immediate license confiscation, with its strong shock value ...").
7. Elaine Hiscoe Charney, Michigan's 1992 New Anti-Drunk Driving Legislation, 71 Mich BJ. 182, 183 (1992).
8. Smudges, scissors greet driver caught drinking, Detroit Free Press, January 2, 1992, at 1A, and Cut to the Quick, Detroit Free Press, January 3, 1992, at 3F
9. Matulewicz v Governor 174 Mich App 295, 305 (1989), quoting United States v Lovett, 328 US 303 (1946); see also, Nixon v Administrator of General Services, 433 US 425 (1977).
10. Selective Service System v Minnesota Public Interest Research Group, 468 US 841, 852 (citation omitted). 104 S Ct 3348; 82 L Ed 2d 632 (1984).
11. Matulewicz, supra note 8, quoting Selective Service (the so-called "Nixon test").
12. Selective Service, supra note 9, at 468 US at 852 and n. 9, citing Brown, Lovett, Cummings and Garland, supra.
13. Flemming v Nestor 363 US at 617.

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