

LICENSING POLICIES FOR OLDER DRIVERS: BALANCING PUBLIC SAFETY WITH INDIVIDUAL MOBILITY

INTRODUCTION

Anna Avitabile ("Anna") of Weymouth, Massachusetts learned how to drive at age 52.¹ "My son was going in the service; his car was just going to sit in the driveway, and he said, 'Ma, why don't you take some lessons?'" she recalls.² It made a big difference in her life.³ She no longer had to rely on her husband to go grocery shopping, and she was able to run errands and visit friends.⁴ When Anna was 61-years-old, her husband died and being able to drive helped her to become independent.⁵

Last year, at age 82, Anna decided to stop driving.⁶ "I miss it terrible," she says of her 1966 Ford Fairlane, which now sits in the garage.⁷ Anna relates that it has been a difficult adjustment, but the warning signs were clear.⁸ She had "a few scrapes" with the car, and last December she had an accident.⁹ In addition, Anna says she has problems with her vision and finds it difficult to move because of arthritis and osteoporosis.¹⁰

Anna's family provides some transportation assistance even though they live far away.¹¹ A local agency also offers rides to doctors' appointments and to the grocery store.¹² "I'm very thankful," she says, "[but] I do miss going out for stamps, or cards. . . . [S]omedays, I wish I could just go out for lunch with someone."¹³

¹ See Sue Scheible, *Now's the Time Though They Don't Lack the Drive, Some Elderly are Forced to Relinquish the Wheel*, PATRIOT LEDGER (Quincy, Mass.), Aug. 19, 1996, at 15.

² *Id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See Scheible, *supra* note 1, at 15.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Scheible, *supra* note 1, at 15.

¹² See *id.*

¹³ *Id.*

Not all older drivers are able to recognize their declining driving abilities like Anna, and sometimes, the results have been tragic.¹⁴ Last year, Wilson Cunningham, an 84-year-old man, was driving to his wife's 89th birthday party in Ohio.¹⁵ He became confused and pressed the accelerator instead of the brake, killing a 7-week-old boy.¹⁶

The safety and mobility of older drivers is an issue of mounting concern.¹⁷ Older drivers are the fastest growing segment of the driving population.¹⁸ The goals of safety and mobility, however, often conflict.¹⁹ Most older adults do not want to stop driving, yet statistics show that motor vehicle accident rates increase after age 55, suggesting that some countermeasures are needed to maintain safety.²⁰

On the one hand, a driver's license holds special meaning for older persons.²¹ It serves as a symbol of freedom, independence and self-sufficiency.²² It also reinforces one's identity as a functioning and socially capable adult.²³ Furthermore, most elderly Americans live alone in areas where there is little or no public transportation.²⁴ For them, driving is their key to the outside world and their means of survival.²⁵ Older people rely on their cars to go to the grocery store, doctors' appointments, places of worship, or family and friends' houses.²⁶ Taking away their licenses may lead to depression and a decline in their overall health and well-being.²⁷

On the other hand, numerous studies, such as one in 1980 by Baltes, Cornelius, Spiro, Nesselroade and Willis, show that as people

¹⁴ See *id.*; Karlene Ball & Cynthia Owsley, *Identifying Correlates of Accident Involvement for the Older Driver*, 33 HUM. FACTORS 583, 583 (1991).

¹⁵ See *State Blamed for Lax Oversight of Aged Drivers*, PLAIN DEALER (Cleveland, Ohio), Jan. 15, 1997, at 5B.

¹⁶ See *id.*

¹⁷ See Patricia F. Waller, *The Older Driver*, 33 HUM. FACTORS 499, 499 (1991). For purposes of this Note, "older" generally refers to those persons age 55 and older.

¹⁸ See *id.* Older drivers are the fastest growing segment in terms of number of drivers licensed, miles driven and proportion of the driving population. See *id.*

¹⁹ See *id.*

²⁰ See *id.*; Ball & Owsley, *supra* note 14, at 583.

²¹ See Waller, *supra* note 17, at 499.

²² See *id.*

²³ See Diane Persson, *The Elderly Driver: Deciding When to Stop*, 33 GERONTOLOGIST 88, 88 (1993).

²⁴ See Janet Elder, *Older Drivers: Just How Safe?*, N.Y. TIMES, Apr. 8, 1987, at C1.

²⁵ See Betty Lundy, *Too Old to Drive: More Elderly are on the Road*, CHI. TRIB., Nov. 8, 1992, § 18, at 3; Barbara Mathias, *Older Drivers at the Wheel*, WASH. POST, May 11, 1992, at B5.

²⁶ See Mathias, *supra* note 25, at B5.

²⁷ See *id.*; Waller, *supra* note 17, at 499. A 68-year-old man who gave up driving when he lost feeling in his feet because of diabetes became very depressed and a virtual shut-in, and he was reduced to watching television and eating whatever the Meals-on-Wheels volunteers brought him. See Joan E. Rigdon, *Car Trouble: Older Drivers Pose Growing Risk on Roads as Their Numbers Rise*, WALL ST. J., Oct. 29, 1993, at A1.

age, visual, cognitive and motor functions deteriorate, often diminishing driving ability.²⁸ In addition, a study in 1994 by Koepsell, Wolf, McCloskey, Buchner, Louie, Wagner and Thompson ("Koepsell"), and another in 1992 by Ray, Gurwitz, Decker and Kennedy ("Ray"), show that many older drivers suffer from medical conditions or take medications that reduce their driving skills.²⁹ Moreover, according to a 1991 study by Owsley, Ball, Sloane, Roenker and Bruni, most older drivers are not even aware of their impairments, whether they are due to medical reasons or normal aging.³⁰ Older people's various driving problems appear in statistics of traffic violations and motor vehicle accidents.³¹ Statistics from the National Safety Council show that, in terms of accidents per mile, older drivers are among the most dangerous and often suffer the most serious injuries.³² Renowned older driver expert Patricia F. Waller predicts that the health and safety risks posed by these drivers will increase as the driving population ages.³³

States have responded with varying licensing policies for older drivers.³⁴ Some states have enacted license renewal requirements based on age, while others have specifically prohibited age-based re-examinations.³⁵ Some allow specific restrictions on older drivers' licenses.³⁶ The majority, however, have not addressed older driver issues in their licensing regulations.³⁷

This Note explores the legal and social considerations surrounding licensing policies for older drivers. Part I discusses older drivers in general, focusing on the driving risks and characteristics of older drivers.³⁸ Part II details the responses by states and the federal government in dealing with older drivers and reviews the current standards courts apply to the constitutional issues that age-based licensing poli-

²⁸ See P.B. Baltes et al., *Integration Versus Differentiation of Fluid/Crystallized Intelligence in Old Age*, 16 DEVELOPMENTAL PSYCHOL., 625, 625-35 (1980), cited in Janet P. Szyk et al., *Relative Effects of Age and Compromised Vision on Driving Performance*, 37 HUM. FACTORS 430, 430 (1995).

²⁹ See Thomas D. Koepsell et al., *Medical Conditions and Motor Vehicle Collision Injuries in Older Adults*, 42 JAGS 695, 695 (1994); Wayne A. Ray et al., *Medications and the Safety of the Older Driver: Is There a Basis for Concern?*, 34 HUM. FACTORS 33, 33 (1992).

³⁰ See Ball & Owsley, *supra* note 14, at 583-84; David Carr et al., *The Effect of Age on Driving Skills*, 40 JAGS 567, 567 (1992).

³¹ See Carr, *supra* note 30, at 567.

³² See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS, AGE OF DRIVER 96 (1996); Waller, *supra* note 17, at 500.

³³ See Waller, *supra* note 17, at 501.

³⁴ See Sandy Graham, *How Old Is Too Old to Drive?*, TRAFFIC SAFETY (National Safety Council, Itasca, Ill.), Sept.-Oct. 1995, at 8.

³⁵ See *id.* at 9.

³⁶ See *id.*

³⁷ See *id.* at 8-9.

³⁸ See *infra* notes 43-89 and accompanying text.

cies raise.³⁹ Part III discusses the constitutionality of these policies, argues that present license renewal procedures are inadequate, and proposes a combination of methods, including physician reporting, driving simulators and restricted licenses.⁴⁰ It emphasizes that older drivers should be tested on the basis of their ability, not age, in order to preserve their mobility and ensure public safety.⁴¹ It also recommends providing greater incentives for driver improvement courses, improving highway and automobile designs and expanding alternate means of transportation for older drivers.⁴²

I. THE PROBLEM OF OLDER DRIVERS

Over the years, reports of accidents involving older drivers have received growing attention.⁴³ Waller predicts that as the population of older drivers increases, the number of accidents and the level of public concern will increase as well.⁴⁴ In order to understand this phenomenon, it is helpful to look at aging and driving statistics and the characteristics of older drivers that produce these safety risks.

A. *Statistics on Older Drivers*

Whether older drivers are at a greater risk of being involved in accidents depends on how the risk is calculated.⁴⁵ By simply looking at the number of accidents in relation to the number of drivers in each age group, older drivers appear to be the safest.⁴⁶ For example, according to the National Safety Council, in 1995 the fatal accident involvement rates per 100 million drivers in each age group ranged from a low of 18 for drivers age 65 to 74, to a high of 61 for drivers age 19 and under.⁴⁷ The all accident (fatal and non-fatal) involvement rates per 100 drivers in each age group ranged from 5 for drivers age 65 to 74, to 26 for drivers age 19 and under.⁴⁸ Thus, Waller indicates that if the concern is about absolute number of accidents, as is usually the

³⁹ See *infra* notes 90–283 and accompanying text.

⁴⁰ See *infra* notes 284–383 and accompanying text.

⁴¹ See *id.*

⁴² See *infra* notes 384–410 and accompanying text.

⁴³ See Rigdon, *supra* note 27, at A1. One of the most publicized accidents involving older drivers occurred in 1992, when a 75-year-old drove into an afternoon crowd in New York City's Washington Square Park killing four people and injuring twenty-seven others. See *id.*

⁴⁴ See Waller, *supra* note 17, at 501.

⁴⁵ See *id.*

⁴⁶ See *id.* at 500; see also NATIONAL SAFETY COUNCIL, *supra* note 32, at 96.

⁴⁷ See NATIONAL SAFETY COUNCIL, *supra* note 32, at 96.

⁴⁸ See *id.*

case with licensing agencies, then older drivers do not pose a special problem.⁴⁹

On the basis of miles driven by each age group, however, older drivers present significant risks.⁵⁰ For example, according to the National Safety Council, in 1990 the fatal involvement rate per 100 million vehicle miles traveled was 9.2 for drivers age 16 to 19, about three times the overall rate for all drivers in passenger vehicles.⁵¹ The rate for drivers age 75 and older was 11.5, the highest of all age groups.⁵² Therefore, when crash risk per mile driven is considered, older drivers are the most hazardous.⁵³ According to Waller, this increasing risk occurs even though older drivers, as a group, try to limit their driving to those times and places where they feel the risk is lowest.⁵⁴ Thus, Waller finds that older drivers are less likely to drive at night, in heavy traffic or in other more demanding situations.⁵⁵ Despite their self-imposed restrictions, however, statistics show that older drivers' crash rate per mile driven continues to rise as they age.⁵⁶

According to the American Automobile Association (the "AAA"), by the year 2000, one out of every three drivers in the United States will be over 55 years of age.⁵⁷ According to the Transportation Research Board, in 1988, 12% of the nation's population was age 65 or older, and it is expected to increase to 17% by the year 2020, with 50 million of these older persons eligible to drive.⁵⁸ Almost half of them will be age 75 or older.⁵⁹ Older drivers have increased in their numbers and in their proportion of the total driving population.⁶⁰ Waller indicates that the accelerating risk they pose will rise as their numbers and driving proportion increase.⁶¹

⁴⁹ See Waller, *supra* note 17, at 500.

⁵⁰ See NATIONAL SAFETY COUNCIL, *supra* note 32, at 96.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*; Waller, *supra* note 17, at 500.

⁵⁴ Waller, *supra* note 17, at 500.

⁵⁵ *Id.*

⁵⁶ See *id.* Waller submits that this has special implications for older drivers who work in situations where they must routinely meet driving schedules. *Id.* Under such circumstances, they cannot limit their driving to the safest times and places, and the limited data available from school bus drivers indicates that the increase in crash risk is correspondingly steeper. See *id.*

⁵⁷ See Cristine Russell, *Too Old for the Fast Lane?*, WASH. POST, Feb. 28, 1995, (Health), at 1.

⁵⁸ See Waller, *supra* note 17, at 500.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *Id.* at 501. Furthermore, Waller suggests that the lifestyle changes of each generation could imply increased risks. *Id.* For example, the present generation of older drivers uses medications at a rate higher than that of the population in general. See *id.* Thus, Waller finds that what is

B. *Characteristics of Older Drivers*

Aging produces a number of changes in peoples' bodies and abilities.⁶² According to various studies, many of which are cited in a 1995 report by Szlyk, Seiple and Viana ("Szlyk"), vision, hearing, physical strength and reaction time decrease with age.⁶³ In addition, these studies show that cognitive, risk evaluation and decision-making abilities often decrease as well.⁶⁴ The studies further indicate that these characteristics of normal aging impair driving performance.⁶⁵ Moreover, studies such as those conducted by Koepsell and Ray, and another in 1991 by Kaszniak, Keyl and Albert ("Kaszniak"), reveal that many older drivers suffer from medical conditions with debilitating effects, such as eye problems, diabetes, Alzheimer's disease, other forms of dementia and problems arising from medications.⁶⁶ These factors have been shown to pose serious safety threats.⁶⁷

Evidence reveals that vision is the primary sense used in driving.⁶⁸ According to a 1991 study by Shinar and Schieber, vision is responsible for up to 95% of driving related inputs.⁶⁹ Studies indicate that a number of visual functions deteriorate as people age.⁷⁰ Common visual problems for older persons include cataracts, glaucoma, increased sensitivity to glare and decreased ability to focus on static and dynamic objects.⁷¹ For example, evidence indicates that by age 60, people need three times as much light as they needed at age 20 to see clearly.⁷² One study found that accidents due to a driver's lack of proper lookout on the roads was almost three times more likely when the driver had reduced vision.⁷³

Recent studies headed by prominent older driver researcher Karlene Ball, however, reveal that the visual attention and cognitive proc-

characteristic of older drivers today may not be characteristic of older drivers at any future time. *Id.*

⁶² See Graham, *supra* note 34, at 7.

⁶³ See Szlyk, *supra* note 28, at 430.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See Alfred W. Kaszniak et al., *Dementia and the Older Driver*, 33 HUM. FACTORS 527, 527 (1991); Koepsell, *supra* note 29, at 695; Ray, *supra* note 29, at 33.

⁶⁷ See *id.*

⁶⁸ See David Shinar & Frank Schieber, *Visual Requirements for Safety and Mobility of Older Drivers*, 33 HUM. FACTORS 507, 507 (1991).

⁶⁹ *Id.*

⁷⁰ See *id.* at 508.

⁷¹ See *id.* at 508, 509.

⁷² See *Safety Tips Geared to Senior Drivers*, SAN ANTONIO EXPRESS-NEWS, Jan. 12, 1997, at 3F.

⁷³ See Shinar & Schieber, *supra* note 68, at 508.

essing speed of drivers (how they can focus, understand and respond to multiple things at once), rather than age, eye health or a medical diagnosis, are better predictors of whether older drivers are likely to have an accident.⁷⁴ Ball and Cynthia Owsley have developed a "useful field of view" test which measures how long it takes a driver to process information, how well drivers can divide attention and how well drivers deal with distractions.⁷⁵ Ball and Owsley's research has shown that drivers who have suffered a reduction in their useful field of view were sixteen times more likely to have had an accident in the previous five years.⁷⁶ When Ball and Owsley looked at older drivers who had a moderate to severe loss of visual attention, they found that only 26% of them had driven without an accident for three years.⁷⁷ Moreover, data gathered by Szlyk shows that visual field loss is not as easily compensated for as other age-related losses of driving skills and also suggests that compromised vision predicts accident involvement.⁷⁸ Ball indicates that about half of people age 85 or older show impairments in their visual attention, but only about 5% of people age 60 do.⁷⁹

Studies also reveal that motor responses diminish with aging.⁸⁰ The studies show that older drivers are slower and less precise than younger drivers in performing the physical acts involved in driving.⁸¹ For example, according to the American Medical Association, a 52-year-old takes a full second longer than a 20-year-old to switch focus from the instrument panel to the road.⁸²

In addition, studies demonstrate that many older persons suffer from a number of illnesses and physical problems that may affect driving skills.⁸³ For instance, the study in 1991 by Kaszniak and another in 1991 by Parasuraman and Nestor indicate that Alzheimer's disease, one of the leading causes of dementia, affects more than 10% of all persons age 65 and older and as much as 47% of those age 85 and

⁷⁴ See Karlene Ball & George Rebok, *Evaluating the Driving Ability of Older Adults*, 13 J. OF APPLIED GERONTOLOGY 1, 20, 21, 26 (1994). Studies show that common older driver accidents occur at intersections and include a failure to heed signs, yield the right of way and turn safely. See *id.* at 22. Ball indicates that all of these activities involve the processing of visual information. See *id.*

⁷⁵ See *A Glance Says a Lot About Safe Driving*, CHI. TRIB., Feb. 9, 1997, at 7.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Szlyk, *supra* note 28, at 436.

⁷⁹ See *A Glance Says a Lot About Safe Driving*, *supra* note 75, at 7.

⁸⁰ See George E. Stelmach & Ariella Nahom, *Cognitive-Motor Abilities of the Elderly Driver*, 34 HUM. FACTORS 53, 53 (1992).

⁸¹ See *id.* at 54.

⁸² See Graham, *supra* note 34, at 7.

⁸³ See *id.*

older.⁸⁴ The accident rate was found to be approximately twice as high among those with dementia as among normal older drivers and four times as high among those with dementia and a cardiovascular disease.⁸⁵

Although medications are used effectively to treat many of these health problems, the 1991 study by Ray indicates that side effects of these medications may affect driving ability and thereby increase accident risk.⁸⁶ For example, Ray explains that benzodiazepines, which are common medications for anxiety and insomnia, may cause drowsiness and confusion, dizziness, decreased motor coordination and impaired memory and recall.⁸⁷ In addition, Ray demonstrates that aging reduces the body's capacity to inactivate and excrete many medications, rendering older persons more susceptible to these side effects and making the side effects more severe.⁸⁸ Moreover, researchers indicate that many older drivers are not aware of their declining driving performance from these various causes, thus limiting their appreciation of their potential driving risk.⁸⁹

II. GOVERNMENTAL AND JUDICIAL RESPONSES

Under the police power doctrine, states have the authority to enact and enforce laws in order to protect the health, safety and welfare of their citizens.⁹⁰ Thus, states have the power and responsibility to regulate licensing policies for drivers.⁹¹ States have addressed the safety and mobility of older drivers in a variety of ways.⁹² Because each state independently regulates its licensing policies, the requirements for renewing a driver's license differ greatly from one state to another.⁹³ Commentators note that state standards range from extreme leniency,

⁸⁴ See Kaszniak, *supra* note 66, at 527; Raja Parasuraman & Paul G. Nestor, *Attention and Driving Skills in Aging and Alzheimer's Disease*, 33 HUM. FACTORS 539, 539 (1991).

⁸⁵ See Kaszniak, *supra* note 66, at 528.

⁸⁶ See Ray, *supra* note 29, at 33.

⁸⁷ *Id.* at 35.

⁸⁸ *Id.* at 34.

⁸⁹ See Kaszniak, *supra* note 66, at 533. An 88-year-old man was taking nine different medications when he struck and killed his wife while trying to pick her up. See Rigdon, *supra* note 27, at A1. One of the medications was for senility, two caused drowsiness and two specifically urged caution when driving because of potential dizziness. See *id.*

⁹⁰ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (holding that a state has the "undoubted power to promote the health, safety, and general welfare" of its citizens).

⁹¹ See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) ("In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways.").

⁹² See Graham, *supra* note 34, at 8-9.

⁹³ See *id.*

allowing older drivers with obvious impairments to continue driving, to strict age-based requirements, subjecting many qualified older drivers to unnecessary examinations.⁹⁴ One commentator indicates that the varied approaches reflect the continuing tension between public safety and individual mobility.⁹⁵

A. State Responses

According to a 1992 survey conducted by the American Association of Retired Persons ("AARP"), sixteen states and the District of Columbia have varying kinds of age-based license renewal requirements.⁹⁶ Some states, such as Arizona and Utah, require vision tests after a certain age, typically at age 60 or 65.⁹⁷ The District of Columbia and a few states, such as Illinois, require more extensive testing, such as road and written examinations.⁹⁸ Only six states, including Massachusetts, prohibit re-examinations based solely on age.⁹⁹ A few states, such as Maine and Pennsylvania, require physicians to report potentially unsafe drivers, and many states, including Maryland and Indiana, grant restrictions on older drivers' licenses, allowing older persons to continue to drive under special provisions.¹⁰⁰ All fifty states and the District of Columbia offer driver refresher courses.¹⁰¹

1. Typical Standards

Most states follow some variation of the Uniform Vehicle Code, which has a broad restriction against unsafe drivers in general but does not address older drivers in particular.¹⁰² The Uniform Vehicle Code requires license applicants to take such additional tests as a state's

⁹⁴ See *id.*; Rigdon, *supra* note 27, at A1.

⁹⁵ See Rigdon, *supra* note 27, at A1. Political pressures within each state also affect the extent of legislative regulation. See, e.g., *Put Safety, Not Politics, First*, ST. PETERSBURG TIMES, Feb. 13, 1997, at 18A (describing how Florida's influential seniors lobby defeated past proposals which would have required stricter retesting of older drivers).

⁹⁶ See Graham, *supra* note 34, at 8.

⁹⁷ See ARIZ. REV. STAT. ANN. § 28-426.01(A)(4) (West Supp. 1996) (age 60 or older); UTAH CODE ANN. § 53-3-214(3)(b)(ii) (1994 & Supp. 1996) (age 65 or older).

⁹⁸ See 625 ILL. COMP. STAT. §§ 5/6-103, 109 (West 1993 & Supp. 1996); Graham, *supra* note 34, at 9.

⁹⁹ See MASS. ANN. LAWS ch. 90, § 8 (Law. Co-op. 1994); Graham, *supra* note 34, at 9.

¹⁰⁰ See IND. CODE ANN. § 9-30-4-9(a)(3), (c) (Michie 1997); ME. REV. STAT. ANN. tit. 29-A, § 1258(6) (West 1996); MD. CODE ANN., [TRANSP.] § 16-110.2(d) (1992 & Supp. 1996); 75 PA. CONS. STAT. ANN. § 1518(b) (West 1996).

¹⁰¹ See Betsy Wade, *Safety Skills for Older Drivers*, N.Y. TIMES, Apr. 7, 1991, § 5, at 3.

¹⁰² See NATIONAL COMM. ON UNIF. TRAFFIC LAWS AND ORDINANCES, UNIF. VEH. CODE AND MODEL TRAFFIC ORDINANCE § 6-103(6) (1992).

department of motor vehicles finds reasonably necessary to determine their fitness to drive.¹⁰³ Many states currently mandate vision and road knowledge tests for license renewals.¹⁰⁴ In a 1995 study, eight states that did not require vision tests had seven percent more traffic fatalities each year among elderly drivers than the forty-two states with mandatory vision screening.¹⁰⁵ Testing of road knowledge also contributed to a reduced rate of fatal crashes involving older drivers.¹⁰⁶

Commentators find, however, that most states have very lax standards.¹⁰⁷ Florida, which has the largest population of older persons, allows drivers to renew their license by mail for up to twelve years at a time, regardless of age, if the applicant has not received any convictions.¹⁰⁸ When renewing by mail, an applicant must merely complete the application and pay the required fee.¹⁰⁹ When renewing in person, the only additional requirements are visual and hearing tests.¹¹⁰ In Alabama, drivers are required to renew their licenses every four years.¹¹¹ When renewing a license, an applicant must merely apply in person and pay the required fee.¹¹² The state statute does not require any road or visual examinations, regardless of age.¹¹³

In Massachusetts, drivers are required to renew their licenses every five years.¹¹⁴ The State may require any individual driver to undergo a road or visual examination if the individual is believed to be a safety hazard, but it cannot discriminate as to age.¹¹⁵ Massachusetts generally waits until a driver has been involved in a certain number of accidents and other traffic violations before requiring retesting or restricting a person's license.¹¹⁶ Registry of Motor Vehicles spokesperson Aubrey H.

¹⁰³ See *id.* The Uniform Vehicle Code provides that a driver's license shall not be renewed to any person "[w]hen the commissioner has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways." *Id.*

¹⁰⁴ See *Study Finds Vision Tests May Reduce Auto Accidents of Elderly*, N.Y. TIMES, Oct. 5, 1995, at A26.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See Rigdon, *supra* note 27, at A1.

¹⁰⁸ FLA. STAT. ANN. §§ 322.18(2)(b), (4), (8) (West Supp. 1997); see also Rigdon, *supra* note 27, at A1.

¹⁰⁹ See FLA. STAT. ANN. § 322.18(4).

¹¹⁰ See *id.* § 322.121(1) (West 1995).

¹¹¹ See ALA. CODE § 32-6-1(b) (Supp. 1996).

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See MASS. ANN. LAWS ch. 90, § 8 (Law. Co-op. 1994).

¹¹⁵ See *id.*

¹¹⁶ See Elaine Thompson, *Safety Factor Shadows Elderly Drivers*, TELEGRAM & GAZETTE (Worcester, Mass.), Dec. 15, 1996, at A1.

Haznar related, "Massachusetts does not believe in age-based testing. We think that's discriminatory We believe in retesting based on ability."¹¹⁷

2. Age-Based Standards

Some state statutes impose strict age-based requirements.¹¹⁸ In Illinois, drivers generally are required to renew their licenses every four years.¹¹⁹ When renewing a license, an applicant must apply in person and pass a vision test.¹²⁰ Applicants age 69 and older, however, must also demonstrate knowledge of the state traffic laws and an ability to read and understand traffic signals.¹²¹ At age 75 and older, applicants must also take a road test to demonstrate their ability to drive with care and control.¹²² At age 81 and older, applicants must take all of these examinations every two years to renew their license.¹²³ Then, at age 87 and older, applicants must take these tests every year.¹²⁴ In the District of Columbia, applicants age 70 and older must take an eye test and submit a doctor's report stating that they are in satisfactory health in order to renew their license.¹²⁵ Applicants age 75 and older must also take road and written examinations.¹²⁶

Pennsylvania, which has the second largest population of older drivers, randomly selects 1,650 licensed drivers age 45 and older each month to undergo vision screening and a medical examination.¹²⁷ The process of selecting drivers to take the tests is heavily weighted toward older drivers.¹²⁸ The older a driver, the more likely he or she will be selected.¹²⁹ Of those tested, about 28% do not get their licenses renewed and an additional 26% have their licenses restricted.¹³⁰

¹¹⁷ *Id.* Massachusetts was the first state to establish a Division of Elder Affairs within a motor vehicle department. See Jerold A. Gnazzo & Jackie Anapolle, *Fair Licensing for Older Drivers*, AAA WORLD, Mar.—Apr. 1993, at 33.

¹¹⁸ See, e.g., 625 ILL. COMP. STAT. §§ 5/6–103, 109, 115 (West 1993 & Supp. 1996).

¹¹⁹ See *id.* § 5/6–115.

¹²⁰ See *id.* § 5/6–109.

¹²¹ See *id.* §§ 5/6–103, 109.

¹²² See *id.* § 5/6–109.

¹²³ See ILL. COMP. STAT. § 5/6–115(g).

¹²⁴ See *id.*

¹²⁵ See Graham, *supra* note 34, at 9.

¹²⁶ See *id.*

¹²⁷ See Thompson, *supra* note 116, at A1.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

3. Other Solutions

Forty-one states have established Medical Advisory Boards comprised of local physicians to assist the local licensing agencies in identifying disorders or other mental or physical disabilities that affect the ability of a person to drive safely.¹³¹ A few states have physician reporting laws, requiring physicians to report potentially unsafe drivers to the local licensing agency.¹³² In Pennsylvania, for example, all physicians are required to file a written report with the Department of Motor Vehicles relating the full name, date of birth and address of every person over the age of 15 diagnosed as having any specified disorder or disability that would affect safe driving.¹³³ Every year, physicians report the names of thousands of patients.¹³⁴ In Maine, physicians are provided with a "Functional Ability Profile" offering guidelines to assist them in evaluating a patient's ability to drive safely.¹³⁵

Some states offer special licensing provisions for older drivers.¹³⁶ In Indiana, for example, 85% of the elderly applicants pass the State's required road test on the first or second try.¹³⁷ Older drivers who fail the test, however, may often continue driving under special restrictions.¹³⁸ "Our examiners go out of their way to come up with a solution that's user-friendly, . . . We understand driving is a sign of independence," related Alvin Hayes, the Public Affairs Director for the Indiana Bureau of Motor Vehicles.¹³⁹ In a similar vein, Maryland issues restricted licenses endorsed "Daylight Driving Only" to applicants with night blindness.¹⁴⁰

All fifty states and the District of Columbia provide driver improvement courses.¹⁴¹ The largest program is the "55 Alive/Mature Driving

¹³¹ See Anne Long Morris, *Physician Reporting, in The Licensing of Older Drivers*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, No. 429, July 1994, at 27.

¹³² See, e.g., 75 PA. CONS. STAT. ANN. § 1518(b) (West 1996).

¹³³ See *id.*

¹³⁴ See Pamela Sampson, *Get Off the Road! And Stay Off, Senate Approves Bill Keeping Incompetent Drivers from Driving*, PITTSBURGH POST-GAZETTE, Sept. 26, 1996, at B2. The Pennsylvania Senate recently approved a bill that would require drivers whose competency has been questioned to pass a test or otherwise prove they can drive. See *id.*

¹³⁵ See MAINE DEP'T OF SECRETARY OF STATE, BUREAU OF MOTOR VEHICLE, PHYSICAL, EMOTIONAL AND MENTAL COMPETENCE TO OPERATE A MOTOR VEHICLE (1994).

¹³⁶ See Graham, *supra* note 34, at 9.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See MD. CODE ANN., [TRANSP.] § 16-110.2(d) (1992 & Supp. 1996).

¹⁴¹ See Wade, *supra* note 101, at 3.

Course" offered periodically by the AARP.¹⁴² It consists of two four-hour sessions that incorporate videos, self-assessment quizzes and class discussion of problems plaguing older drivers.¹⁴³ The program teaches older drivers how to compensate for the mental and physiological changes that can occur with aging, reviews principles of safe driving and accident avoidance and identifies the warning signs that indicate when it may be time to stop driving.¹⁴⁴ Since 1969, when the courses began, the program has graduated almost 2.7 million older motorists.¹⁴⁵ Thirty-four states and the District of Columbia also have laws requiring automobile insurers to offer insurance premium discounts to older drivers who complete a driver improvement course.¹⁴⁶ Older drivers must retake the course every three years to maintain the insurance discount.¹⁴⁷ A recent study conducted by one insurer found at least a ten percent reduction in serious accidents among older drivers who had taken the course.¹⁴⁸

A growing number of states have tried to address older driver issues by recommending automobile and highway improvements.¹⁴⁹ For instance, in New York, the Car Care Council has been drawing attention to the motor vehicle itself as a major factor affecting driving ability.¹⁵⁰ In Florida, pavement markings are now six inches wide instead of four inches and reflective markers are now forty feet apart

¹⁴² See Richard C. Hatch, *More Safety and Lower Rates for Older Drivers*, NEWS & OBSERVER (Raleigh, N.C.), July 23, 1996, at A9.

¹⁴³ See Don Rodrigue, *Desire to Stay Sharp Drives Seniors to Take Class*, ORLANDO SENTINEL, Mar. 2, 1997, at 1.

¹⁴⁴ See Hatch, *supra* note 142, at A9.

¹⁴⁵ See Barbara Dickman, *Don't Target the Elderly*, PITTSBURG POST-GAZETTE, July 25, 1996, at A8.

¹⁴⁶ See Hatch, *supra* note 142, at A9. Commentators find that this financial incentive greatly improves participation by older drivers. See *id.* For example, in South Carolina, the year before the State enacted a law requiring insurance discounts, 775 older drivers graduated from the AARP course. See *id.* The first year after the law was passed, there were 4,002 graduates. See *id.* Commentators indicate it has been that way in every state that has enacted similar laws. See *id.*

¹⁴⁷ See Rodrigue, *supra* note 143, at 1.

¹⁴⁸ See *id.*

¹⁴⁹ See William E. Schmidt, *Graying of America Prompts New Highway Safety Efforts*, N.Y. TIMES, Apr. 6, 1988, at A1.

¹⁵⁰ See *Here are a Few Great 'Stay-out-of-Trouble' Tips for Older Drivers*, TIMES UNION (Albany, N.Y.), Oct. 10, 1996, at T13. We probably all have seen cars moving along the road and wondered where the driver was, only to discover a short elderly person, probably a woman, peering through the steering wheel. See James L. Malfetti & Darlene J. Winter, *Concerned About An Older Driver?, A Guide for Families and Friends* (AAA Found. for Traffic Safety, Wash., D.C.), 1991, at 7. Researchers indicate that the vehicle designs of most manufacturers do not account for the loss of height that accompanies aging. See *id.* at 6-7.

instead of eighty feet.¹⁵¹ In New Jersey, in 1992, the State Department of Transportation began taking an inventory of all signs on its highway system for proper maintenance checkup.¹⁵² The State also works with highway officials to make roads more accommodating to the needs of the elderly.¹⁵³ One modification includes larger letters and highly reflective materials for street and road signs.¹⁵⁴ In Colorado, street signs are also getting bigger, brighter and bolder.¹⁵⁵ "The trend is to [have] larger letters, which are more legible at a greater distance," relates Mark Kulewicz of the National Committee on Uniform Traffic Control Devices.¹⁵⁶

B. *Lack of Federal Response*

The Federal Government has made attempts to enact laws that promote safety on the roads.¹⁵⁷ For example, the federal standards on license renewals include a four-year limit and requirements for a re-examination for visual acuity and knowledge of the rules of the road.¹⁵⁸ Commentators have noted, however, that such laws do not address older driver issues.¹⁵⁹

Congress attempted to pass the High Risk Drivers Act of 1993, but was unable to enact it into law.¹⁶⁰ Although the bill primarily focused on younger drivers, it would have required extensive research to determine ways to maintain the safety and mobility of older drivers and improve driver screening.¹⁶¹ One commentator suggests that budgetary concerns, competing social problems and charges of age discrimination by powerful senior groups have prevented such laws from being enacted.¹⁶²

¹⁵¹ See Graham, *supra* note 34, at 10.

¹⁵² See Lyn Mautner, *New Concern Over Elderly Drivers*, N.Y. TIMES, July 19, 1992, (N.J. Weekly), at 1.

¹⁵³ See Jacqueline Shaheen, *Driving Programs Focusing on Elderly*, N.Y. TIMES, July 28, 1991, (N.J. Weekly), at 1.

¹⁵⁴ See *id.*

¹⁵⁵ See Renate Robey, *Cities Re-Signed to Readability, Street Markers Made Bigger and Brighter*, DENVER POST, Jan. 19, 1997, at B1.

¹⁵⁶ See *id.*

¹⁵⁷ See Patricia F. Waller, *Renewal Licensing of Older Drivers*, in 2 *Transportation in an Aging Society: Improving Mobility and Safety for Older Persons*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, SPECIAL REP. 218, 1988, at 73.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at 72-73.

¹⁶⁰ See S. REP. NO. 199-103, at 1 (1993).

¹⁶¹ See *id.*

¹⁶² See Graham, *supra* note 34, at 6.

C. Judicial Standards

According to Waller, states that enact age-based licensing requirements may face age discrimination challenges by older drivers based on the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment.¹⁶³ The Fourteenth Amendment protects against discrimination by ensuring that all people are entitled to equal protection of the laws, as well as protecting certain property interests.¹⁶⁴ In order to examine the constitutionality of these various age-based licensing requirements, it is first necessary to review the current standards adopted by the United States Supreme Court and state courts in evaluating Equal Protection and Due Process claims. It is also helpful to review the type of legal protection afforded to state licensing agencies in implementing specific licensing provisions.

1. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment mandates that states treat similarly situated people in a similar way.¹⁶⁵ The Equal Protection Clause does not prevent state legislatures from drawing classifications, but it does require that all classifications be based on permissible considerations, rather than on invidious grounds.¹⁶⁶ The United States Supreme Court has formulated three standards of review for equal protection claims: strict scrutiny, intermediate scrutiny and a rational basis test.¹⁶⁷ The standard employed depends on the nature of the allegedly discriminatory classification.¹⁶⁸

In 1984, in *Palmore v. Sidoti*, the United States Supreme Court held that racial classifications are subject to strict scrutiny and must be narrowly tailored to achieve a compelling governmental interest in order to satisfy the Equal Protection Clause.¹⁶⁹ In *Palmore*, a white man was awarded custody of his three-year-old daughter after the natural mother, also white, remarried a black man.¹⁷⁰ The Supreme Court

¹⁶³ See Mathias, *supra* note 25, at B5.

¹⁶⁴ See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in relevant part: "No State shall . . . 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." *Id.*

¹⁶⁵ See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 83 (1911).

¹⁶⁶ See *id.* at 78, 83.

¹⁶⁷ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 573-90 (4th ed. 1991).

¹⁶⁸ See *id.*

¹⁶⁹ 466 U.S. 429, 432-33 (1984).

¹⁷⁰ *Id.* at 430-31.

noted that the lower court had rested its custody decision wholly on race because the natural mother is customarily allowed to retain custody of her child after a remarriage.¹⁷¹ The Court related that the purpose of the Fourteenth Amendment was to do away with the historic discrimination of people based on their race.¹⁷² The Court reasoned that when people are classified according to their race, the classification is more likely to be based on racial prejudice rather than legitimate public concerns, because the race, not the person, dictates the category.¹⁷³ Thus, the *Palmore* Court held that private racial biases and their effects are not permissible criteria in a custody decision.¹⁷⁴ Moreover, the Supreme Court held that racial classifications are subject to strict scrutiny and must be necessary to the accomplishment of compelling governmental interests.¹⁷⁵

In 1982, in *Mississippi University for Women v. Hogan*, the United States Supreme Court held that sex classifications are subject to intermediate scrutiny and must substantially relate to important governmental objectives to comport with the Equal Protection Clause.¹⁷⁶ In *Hogan*, a male student was denied admission to Mississippi University's School of Nursing because of his sex.¹⁷⁷ The Court reasoned that a heightened level of scrutiny was required because classifications based on gender have often been the product of fixed stereotypes about the proper roles and abilities of men and women and have resulted in unequal treatment.¹⁷⁸ The Court first noted that women are not discriminated against in the field of nursing and then noted that the university allowed men to audit classes, but merely prevented them from earning credits.¹⁷⁹ The *Hogan* Court also noted that the single-sex admissions policy did not assist anyone who was disadvantaged or offer opportunities to anyone who had faced restrictions based on an arbitrary categorization.¹⁸⁰ Thus, the Supreme Court held that gender-based classifications are subject to intermediate scrutiny and must substantially relate to an important governmental objective.¹⁸¹

¹⁷¹ *Id.* at 432.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Palmore*, 466 U.S. at 434.

¹⁷⁵ *Id.* at 432-33.

¹⁷⁶ 458 U.S. 718, 724 (1982); see also *United States v. Virginia*, 116 S. Ct. 2264, 2271 (1996) (affirming that sex classifications are subject to intermediate scrutiny).

¹⁷⁷ 458 U.S. at 720-21.

¹⁷⁸ *Id.* at 725.

¹⁷⁹ *Id.* at 730.

¹⁸⁰ *Id.* at 728, 729.

¹⁸¹ *Id.* at 724.

In 1976, in *Massachusetts Board of Retirement v. Murgia*, the United States Supreme Court held that age-based classifications are subject to a rational basis test and must be rationally related to furthering a legitimate state interest to meet the requirements of the Equal Protection Clause.¹⁸² In *Murgia*, a uniformed state police officer was forced to retire upon reaching the age of 50.¹⁸³ The Court stated that rationality was the proper standard because people are not usually discriminated against because of their age.¹⁸⁴ The Court recognized that the treatment of the aged in our nation has not been wholly free from discrimination.¹⁸⁵ The Court reasoned, however, that old age marks a stage that each of us will reach if we live out our normal life span, so classifications based on age do not impose distinctions on people sufficiently akin to classifications based on race or sex.¹⁸⁶

In *Murgia*, the Court noted that physical ability has been shown to generally decline with age and stated that mandatory retirement at the age of 50, by removing from police service those whose fitness for uniformed work presumptively has diminished with age, is rationally related to protecting the public.¹⁸⁷ The Court also emphasized that it was not necessary for the state to determine fitness more precisely through individualized testing after age 50.¹⁸⁸ Where the standard is mere rationality, the state does not need to choose the best means of accomplishing its purpose.¹⁸⁹ Thus, the *Murgia* Court held that the mandatory retirement of uniformed state police at the age of 50 was rationally related to protecting the public.¹⁹⁰ Moreover, the Supreme

¹⁸² 427 U.S. 307, 314 (1976); see also *City of Dallas v. Stanglin*, 490 U.S. 19, 26-27 (1989); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (affirming that age classifications are subject to the rational basis test).

¹⁸³ 427 U.S. at 309.

¹⁸⁴ *Id.* at 313. The Court explained that the rational basis test is a relatively relaxed standard because the Court recognizes that the difficulty of drawing distinctions among people is a peculiar and unavoidable legislative task. *Id.* at 314. The Court stressed that perfection in making the necessary classifications is neither possible nor necessary. See *id.* Age classifications are thus presumed to be valid as long as they rationally further a legitimate governmental purpose. See *id.*

¹⁸⁵ *Id.* at 313.

¹⁸⁶ *Id.* at 313-14. The Court also noted that the class subject to compulsory retirement were officers over the age of 50, which draws the line at a certain age in middle life, so that it cannot even be said to discriminate against the elderly. See *id.* at 313.

¹⁸⁷ *Id.* at 314.

¹⁸⁸ *Murgia*, 427 U.S. at 316.

¹⁸⁹ See *id.* The Court noted the substantial economic and psychological effects that premature and compulsory retirement can have on an individual and stated that it was not denigrating the ability of older citizens to continue to contribute to society. *Id.* The Court explained, however, that since age was not a classification historically marked by discrimination, the Court's duty was only to determine whether the age limit was rationally related to a legitimate state goal and not to pass on the statute's wisdom or dictate a more just and humane approach. *Id.* at 316-17.

¹⁹⁰ *Id.* at 315.

Court held that age classifications are subject to the rational basis test and must rationally further a legitimate governmental interest.¹⁹¹

2. Due Process

The Due Process Clause of the Fourteenth Amendment protects certain property rights.¹⁹² The Due Process Clause does not prevent states from depriving people of their property interests, but it does place limitations on a state's ability to interfere with an individual's rights and provides procedural safeguards before a person can be deprived of certain rights.¹⁹³

In 1971, in *Bell v. Burson*, the United States Supreme Court held that a driver's license, whether denominated a right or a privilege, is a constitutionally protected property interest under the Due Process Clause of the Fourteenth Amendment.¹⁹⁴ The Court further held that, except in emergency situations, due process requires that when a state seeks to terminate a driver's license, it must afford notice and an opportunity for a hearing appropriate to the nature of the case before the termination becomes effective.¹⁹⁵ In *Bell*, a clergyman was involved in an accident when a five-year-old rode her bicycle into the side of his car.¹⁹⁶ The state statute required license suspension of an uninsured driver involved in an accident, unless he posted security for damages claimed by an aggrieved party.¹⁹⁷ The statute provided a pre-suspension hearing, but allowed no inquiry into the probability that a judgment in the amount claimed would be rendered against the driver.¹⁹⁸

The Supreme Court first noted that once a driver's license is issued, its continued possession may become essential to one's pursuit of livelihood.¹⁹⁹ The Court reasoned that the suspension of an issued license involves state action that adjudicates an important interest of the licensee in retaining his or her license to operate a motor vehicle and, thus, cannot be done arbitrarily.²⁰⁰ In *Bell*, because the purpose of the statute was to obtain security for a potential judgment, the state was required to hear evidence of liability before suspending the driver's

¹⁹¹ *Id.* at 314.

¹⁹² *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

¹⁹³ *See id.*

¹⁹⁴ 402 U.S. 535, 539 (1971).

¹⁹⁵ *Id.* at 542.

¹⁹⁶ *Id.* at 537.

¹⁹⁷ *See id.*

¹⁹⁸ *See id.* at 537-38.

¹⁹⁹ *Bell*, 402 U.S. at 539.

²⁰⁰ *Id.*

license.²⁰¹ Thus, the Court held that a driver's license is a constitutionally protected property interest.²⁰² Moreover, the Court held that, except in emergencies, due process requires notice and an opportunity to be heard before a suspension becomes effective.²⁰³

In 1977, in *Dixon v. Love*, the United States Supreme Court held that a hearing *after* the suspension or revocation of a driver's license based on repeated convictions for traffic offenses comports with the Due Process Clause.²⁰⁴ In *Love*, a truck driver first had his license suspended for three convictions within a twelve month period, then received an additional suspension for driving while his license was suspended, and finally had his license revoked for three convictions of speeding.²⁰⁵ The Court stated that due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁰⁶

The Court noted that the private interest affected by the decision was the granted license to operate a motor vehicle.²⁰⁷ The Court recognized that the driver was not made entirely whole if his or her suspension or revocation was later vacated.²⁰⁸ The Court also stated, however, that a driver's license is not as vital or essential for survival as other entitlements, such as social security payments.²⁰⁹ The Court further noted that the statute included special provisions for hardship relief.²¹⁰ Thus, the Court reasoned that given the nature of the private interest involved, something less than an evidentiary hearing was sufficient prior to adverse administrative action.²¹¹

In addressing the risk of an erroneous deprivation in the absence of a prior hearing, the Court noted that suspension and revocation

²⁰¹ *Id.* at 540.

²⁰² *Id.* at 539.

²⁰³ *Id.* at 542.

²⁰⁴ 431 U.S. 105, 110, 113, 115 (1977).

²⁰⁵ *Id.* at 110.

²⁰⁶ *Id.* at 112-13.

²⁰⁷ *Id.* at 113.

²⁰⁸ *Id.*

²⁰⁹ *Love*, 431 U.S. at 113.

²¹⁰ *Id.*

²¹¹ *Id.*

decisions are largely automatic under the regulations.²¹² The Court recognized the possibility of a clerk error, but noted that the driver had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the suspensions and revocation were based.²¹³ Thus, the Court reasoned that additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations.²¹⁴

Finally, the Court noted that the substantial public interest in administrative efficiency would be impeded by the availability of a pre-termination hearing in every case.²¹⁵ The Court reasoned that by automatically giving licensees a choice that delayed the effectiveness of a suspension or revocation, drivers would be routinely encouraged to request full administrative hearings.²¹⁶ The Court also noted the important public interest in safety on the roads and highways and in the prompt removal of a safety hazard.²¹⁷ The Court distinguished the case from *Bell*, where the only purpose of the statute was to obtain security for a possible judgment against the driver, because the statute in *Love* served the public interest by removing unsafe and disrespectful drivers from the roads.²¹⁸ Thus, the Court held that the mandatory suspension or revocation of a driver's license for repeated traffic offenses prior to a full hearing satisfied due process requirements.²¹⁹

In 1979, in *Mackey v. Montrym*, the United States Supreme Court held that a prompt hearing after suspension of a driver's license for refusal to submit to a breath-analysis test upon arrest does not violate the Due Process Clause.²²⁰ In *Mackey*, a driver was arrested after a collision and charged with operating a motor vehicle under the influence of intoxicating liquor.²²¹ He refused to take a breath-analysis test and his license was suspended.²²²

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Love*, 431 U.S. at 114.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 114-15.

²¹⁹ *Love*, 431 U.S. at 115.

²²⁰ 443 U.S. 1, 5, 19 (1979); see also *Illinois v. Batchelder*, 463 U.S. 1112, 1116, 1119 (1983). In *Batchelder*, the United States Supreme Court affirmed *Mackey* and concluded that a hearing prior to the deprivation of a driver's license for failing to submit to a breath-analysis test accords all, and probably more, of the process that the Federal Constitution assures. *Id.*

²²¹ 443 U.S. at 4.

²²² See *id.* at 5.

The Court affirmed that a driver's license is a protected property interest and that the constitutionality of its deprivation without a prior hearing must be determined by balancing the individual's interest with the government's interest.²²³ In comparing the case to *Love*, the Court noted that the individual interest in *Mackey* was less substantial because the licensee faced only a ninety-day suspension and could request an immediate post-deprivation hearing by going to a local office, whereas the licensee in *Love* faced possible permanent revocation and had to file a written request for a hearing.²²⁴ The Court then stated that the post-deprivation review need only be reasonably reliable and error free.²²⁵ Next, the Court noted that even if a factual dispute existed, the risk of error inherent in the Registrar's reliance on the police report for the facts was not substantial enough to require a prior evidentiary hearing.²²⁶ Finally, the Court noted that the summary suspension served the state's profound interest in public safety by acting as a deterrent to drunk driving and providing an inducement to take the breath-analysis test; this helped the state obtain reliable, relevant evidence and summarily removed drunk drivers from the road.²²⁷ The Court reasoned that the state's compelling interest in reducing highway deaths due to drunk drivers justified the summary suspension of drivers' licenses pending review.²²⁸ Thus, the *Mackey* Court held that a prompt hearing after suspension of a driver's license for refusing to take a breath-analysis test comports with due process requirements.²²⁹

3. Effect of Fourteenth Amendment Jurisprudence on Age-based Licensing

The United States Supreme Court has not specifically addressed equal protection and due process requirements for age-based licensing policies.²³⁰ In fact, the level of judicial review has been limited to state appellate courts.²³¹ In 1962, in *Kantor v. Parsekian*, the New Jersey Superior Court held that policies for the re-examination of older

²²³ *Id.* at 11.

²²⁴ *Id.* at 12.

²²⁵ *Id.* at 13.

²²⁶ *Mackey*, 443 U.S. at 15.

²²⁷ *Id.* at 17, 18.

²²⁸ *Id.*

²²⁹ *Id.* at 5, 19.

²³⁰ See, e.g., *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (addressing age-based compulsory retirement standards but not age-based licensing policies).

²³¹ See, e.g., *Kantor v. Parsekian*, 179 A.2d 21 (N.J. Super. Ct. App. Div. 1962).

drivers were not discriminatory and did not violate due process requirements.²³² The court also held that suspension of a driver's license for failure to meet visual acuity standards required a formal evidentiary hearing.²³³

In *Kantor*, a driver over the age of 60 was involved in an accident with another car, his first accident in 43 years of driving.²³⁴ The state has a policy of re-examining all drivers over the age of 60 who had been involved in one reportable accident, regardless of responsibility.²³⁵ The motorist was required to have a physical examination and appear at an accident prevention clinic on a specified date.²³⁶ The motorist was also required to submit to further testing of his vision.²³⁷ His license was suspended for failing to pass the state's minimum acuity requirements.²³⁸

In addressing the re-examination policies for drivers over the age of 60, the court stated that practical necessities may preclude frequent periodic examinations and may require special classifications based on age, accidents, violations or other suitable standards.²³⁹ The court reasoned that as long as the classifications and standards are reasonable and reasonably administered, they should readily withstand judicial attack.²⁴⁰

In addressing the suspension of the driver's license, the court first acknowledged the modern trend of recognizing the vital significance and value of operating an automobile in today's society.²⁴¹ The court reasoned that this important private interest requires that the licensee be afforded fair notice and a fair opportunity to be heard.²⁴² The court noted that a full hearing in this case was unlikely to show compliance with the vision requirements, but the court reasoned that the motorist was still entitled to the right, among other things, to be represented

²³² *Id.* at 23; see also *Pennington v. Commonwealth*, 295 A.2d 630, 631, 632 (Pa. Commw. Ct. 1972) (87-year-old woman, whose operator's license was suspended after special examination was held to determine driving competency, failed to prove that the Commonwealth practiced age discrimination because she did not show that test administered to her was dissimilar to examinations given to all applicants for operator's licenses or to other licensees asked to submit to special examination).

²³³ *Kantor*, 179 A.2d at 24.

²³⁴ *Id.* at 22.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *Kantor*, 179 A.2d at 22.

²³⁹ *Id.* at 23.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 24.

²⁴² *Id.*

by counsel and to cross-examine witnesses called by the state.²⁴³ Thus, the New Jersey Superior Court held that re-examination of drivers over the age of 60 was not discriminatory or violative of due process.²⁴⁴ Moreover, the court held that a formal hearing was required for the suspension of a driver's license for failure to meet visual acuity standards.²⁴⁵

In 1985, in *People v. Arthur W.*, the California Court of Appeal held that a substantially longer minimum period of license revocation for younger drivers convicted of driving under the influence did not violate due process or equal protection.²⁴⁶ In *Arthur W.*, a 17-year-old was convicted of driving under the influence of alcohol and drugs and had his license revoked for a mandatory period of one year.²⁴⁷ The court noted that had he violated the same law on or after his 18th birthday, his license would only have been suspended for a maximum of six months.²⁴⁸ Furthermore, if granted probation as an adult, he would have been eligible for a drug or alcohol education program which would have merely restricted his license to necessary travel for as few as 90 days.²⁴⁹

In addressing the stricter policy for drivers under the age of 18, the court stated the statute must merely bear some rational relationship to a legitimate state purpose.²⁵⁰ The court explained that while we cannot control our age at any particular time, the progression through the stages of life is simply a natural process to which every one of us is subject.²⁵¹ Therefore, the court reasoned that age classifications do not deserve stricter scrutiny because no member of any age group suffers disabilities that have not been encountered by every other member of society at some point in time.²⁵² The court then noted that a number of studies evidenced a higher fatality rate for minor drivers between the ages of 16 and 18 than any other age group.²⁵³ The court

²⁴³ *Kantor*, 179 A.2d at 23-24.

²⁴⁴ *Id.* at 23.

²⁴⁵ *Id.* at 24.

²⁴⁶ 217 Cal. Rptr. 183, 184-85 (Cal. Ct. App. 1985); see also *People v. Valenzuela*, 5 Cal. Rptr. 2d 492, 492, 494 (Cal. Ct. App. 1991) (holding that one year suspension of driver's license of minor convicted of possession of alcohol or illegal drugs, in addition to summary probation, did not violate minor's equal protection or due process rights).

²⁴⁷ 217 Cal. Rptr. at 185.

²⁴⁸ *Id.*

²⁴⁹ See *id.*

²⁵⁰ *Id.* at 187.

²⁵¹ *Id.*

²⁵² *Arthur W.*, 217 Cal. Rptr. at 186-87.

²⁵³ *Id.* at 188.

recognized that the state had a legitimate goal of reducing traffic injuries and fatalities caused by intoxicated drivers under the age of 18 and chose a reasonable means by removing those drivers convicted of such violations from the roads.²⁵⁴ The court also pointed out that a minor's right to drive is not the same as an adult's right.²⁵⁵ For example, the court noted that a California statute required minor driver's license applicants to have their application verified by a parent before issuance of a license.²⁵⁶

With regard to the revocation of a minor's license, the court noted that minors are entitled to the protection of due process, but not to the same extent as adults.²⁵⁷ The court reasoned that because intoxicated drivers under the age of 18 are substantially more likely to be involved in serious and fatal accidents than adults, revocation of their driving privileges in a manner dissimilar to that for adults charged with driving under the influence comports with due process requirements.²⁵⁸ Thus, the California Court of Appeal held that longer periods of license revocation for minors for the same offense as adults were not discriminatory and did not violate due process.²⁵⁹

4. Governmental Immunity

States have traditionally granted immunity to governmental officials for their administrative decisions, including the issuance of licenses to older drivers.²⁶⁰ In recent years, however, there has been a trend toward removing or greatly limiting their immunity to suit and liability.²⁶¹ California is a prime example.²⁶²

In 1976, in *Papelian v. State*, the California Court of Appeal held that the Department of Motor Vehicles (the "DMV") was immune from liability despite a claim that its issuance of a driver's license to an applicant was, by reason of her age and alleged infirmity, the proximate cause of a collision and death.²⁶³ In *Papelian*, a 78-year-old woman was issued a driver's license for a period of five years without restriction in

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 190.

²⁵⁶ *Id.*

²⁵⁷ *Arthur W.*, 217 Cal. Rptr. at 189.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 184-85.

²⁶⁰ *See Waller, supra* note 17, at 502.

²⁶¹ *See id.*

²⁶² *Compare Papelian v. State*, 135 Cal. Rptr. 665 (Cal. Ct. App. 1976), *with Trewin v. State*, 198 Cal. Rptr. 263 (Cal. Ct. App. 1984).

²⁶³ 135 Cal. Rptr. at 665, 668.

accordance with the state statute.²⁶⁴ On that same date, the motorist collided with another vehicle, resulting in the death of both drivers.²⁶⁵ The court noted that the statute provided the DMV with the discretion to determine an applicant's ability to exercise reasonable control in operating a motor vehicle.²⁶⁶ The court also noted that the statute provided that the age of an applicant, by itself, did not constitute evidence of a condition which may affect an applicant's driving ability.²⁶⁷ The court stated that the DMV may not issue a driver's license to any person who is unable to understand traffic signs or operate a motor vehicle safely because of physical or mental defect or lack of skill.²⁶⁸

The court reasoned, however, that if the DMV follows its official duties and exercises discretion, it cannot be held responsible for subsequent accidents caused by the individuals it licenses.²⁶⁹ The court reasoned that government could not govern effectively if the discretionary decisions made by these officials were subject to review in tort suits for damages.²⁷⁰ The court then reaffirmed that the remedy for officials who do not adequately enforce existing laws is to replace them with other officials.²⁷¹ Thus, the *Papelian* court held that the DMV was not liable for issuing a driver's license to an applicant whose age and alleged infirmity subsequently led to a collision and death.²⁷²

In contrast, in 1984, in *Trewin v. State*, the California Court of Appeal held that the DMV was not immune from liability for issuing a license to an older applicant, known to suffer from physical and mental deficiencies, who subsequently caused injuries.²⁷³ In *Trewin*, an 87-year-old man was issued a license despite a determination that he suffered from general debilities.²⁷⁴ Less than two months later, he caused a collision resulting in injuries.²⁷⁵ The court first defined the word "debility" as "[t]he quality or state of being weak, feeble, or infirm; esp[ecially]

²⁶⁴ *Id.* at 666.

²⁶⁵ *See id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 667; *see Feely v. Hulst*, 279 N.Y.S.2d 249, 249, 250 (N.Y. App. Div. 1967) (holding that without evidence of mental or physical disability, license could not be revoked merely by fact that licensee was 77-years-old).

²⁶⁸ *Papelian*, 135 Cal. Rptr. at 667.

²⁶⁹ *Id.* at 666; *see Solowitch v. Bennett*, 456 N.E.2d 562, 563, 566 (Ohio Ct. App. 1982) (Deputy Registrar of Bureau of Motor Vehicles had no duty to give examination to 80-year-old applicant for timely renewal of her license).

²⁷⁰ *Papelian*, 135 Cal. Rptr. at 667.

²⁷¹ *Id.* (citing *Hirsch v. Department of Motor Vehicles*, 115 Cal. Rptr. 452, 454 (1974)).

²⁷² *Id.* at 666, 668.

²⁷³ 198 Cal. Rptr. 263, 264, 267 (Cal. Ct. App. 1984).

²⁷⁴ *Id.* at 264, 265.

²⁷⁵ *See id.* at 264.

physical weakness."²⁷⁶ The court then noted that there was evidence on the license application that the motorist was suffering from general debilities.²⁷⁷ The court stated that public entities may have certain duties in the performance of their governmental functions, the breach of which may result in liability for damages to those injured by a risk contemplated by that duty.²⁷⁸ The court then stated that, in this case, the DMV had a mandatory duty to refrain from issuing a license to a driver with known physical or mental impairments.²⁷⁹

The court implicitly reasoned that because the DMV was responsible for licensing drivers, it had to protect other motorists on the road from people posing safety risks.²⁸⁰ The court stated, therefore, that the DMV was not immune from liability because it knew that the applicant was unable to drive safely.²⁸¹ The court distinguished *Papelian*, where it had held that the duty to refrain from issuing the license was discretionary, because there had been no allegation that the state had determined beforehand that the older driver was unable to safely operate a motor vehicle.²⁸² Thus, the *Trewin* court held that the DMV was not immune from liability for automatically issuing a license to an older driver known to suffer from physical and mental deficiencies.²⁸³

III. ISSUES OF CONSTITUTIONALITY AND PROPOSED SOLUTIONS

The standards articulated by the United States Supreme Court and applied by state courts can be used to determine the constitutionality of age-based licensing policies.²⁸⁴ An assessment of the validity of these licensing regulations, however, does not resolve the conflict between safety and mobility.²⁸⁵ Various proposals that deal with the prob-

²⁷⁶ *Id.* at 266.

²⁷⁷ *Id.* at 265.

²⁷⁸ *Trewin*, 198 Cal. Rptr. at 265.

²⁷⁹ *Id.* at 267.

²⁸⁰ *See id.* at 265.

²⁸¹ *Id.* at 267.

²⁸² *Id.* Compare *Johnson v. Department of Pub. Safety*, 627 So. 2d 732, 734, 739 (La. Ct. App. 1993) (state officials immune from liability arising from fatal accident caused by recently renewed driver's epileptic seizure where driver developed epilepsy between renewals and officials had no duty to make periodic medical inquiry), with *Fowler v. Roberts*, 556 So. 2d 1, 3, 8 (La. 1989) (state officials not immune from liability arising from fatal accident caused by licensed driver's epileptic seizure where driver voluntarily disclosed seizure disorder and officials had duty to prevent issuance or automatic renewal of license of driver with known dangerous physical condition).

²⁸³ *Trewin*, 198 Cal. Rptr. at 267.

²⁸⁴ *See infra* notes 287-325 and accompanying text (analyzing judicial standards).

²⁸⁵ *See id.*

lem of unsafe drivers in general and older drivers in particular will be explored in an attempt to reach a sensitive, yet effective, solution.²⁸⁶

A. *Equal Protection and Due Process Claims*

The efforts by the District of Columbia and states such as Illinois to meet the challenges posed by older drivers are commendable, especially given the lack of response by most states.²⁸⁷ Their renewal policies seem to be based on statistics, such as those previously mentioned, which show a gradual deterioration in driving ability and an accelerated accident risk for certain age groups.²⁸⁸ The main problem with their policies, however, is that all older drivers do not age the same way.²⁸⁹

The statistics which evidence an accelerated accident risk are based on group performance.²⁹⁰ Thus, the individual performances within each group may be very different.²⁹¹ For instance, one driver may begin to show a decline in driving abilities in the early 50s, while another driver may continue without difficulty until a much later age, if at all.²⁹² Moreover, older drivers show the greatest variability in performance of any age group.²⁹³ This variation in terms of vision, cognition, complex reaction time and other driver-related skills has been well documented by Waller in studies conducted in 1974 and 1988.²⁹⁴ Therefore, even though the probability of declining performance increases as people age, the presence of individual differences suggests that no specific chronological age can be chosen as an appropriate age to automatically deny a license or even require additional testing.²⁹⁵

In response to this difficulty of pinpointing a particular age group as a driving hazard, some states have classified older drivers into more specific groupings.²⁹⁶ Illinois, for example, has increasing licensing requirements at age 69, age 75, age 81 and age 87, and although such classifications are an attempt to recognize the differences among "older" drivers, individuals may or may not adhere to these group-

²⁸⁶ See *infra* notes 343-410 and accompanying text (discussing various proposals).

²⁸⁷ See Graham, *supra* note 34, at 8-9.

²⁸⁸ See *supra* notes 45-89 and accompanying text (discussing statistics on older drivers).

²⁸⁹ See Waller, *supra* note 17, at 501-02.

²⁹⁰ See *id.* at 501.

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See Waller, *supra* note 17, at 501-02.

²⁹⁵ See *id.* at 502.

²⁹⁶ See *id.*; see also 625 ILL. COMP. STAT. §§ 5/6-103, 109, 115 (West 1993 & Supp. 1996).

ings.²⁹⁷ Efforts to deny or restrict license renewals to older drivers, without clear evidence that each particular driver poses a significant safety risk, will likely seem unfair to older drivers and may raise challenges of age discrimination based on the Equal Protection Clause and procedural violations based on the Due Process Clause.²⁹⁸ It is not likely, however, that older drivers will prevail in their claims.

The Equal Protection Clause requires that all individuals be treated fairly and not be judged by impermissible criteria.²⁹⁹ Older drivers may argue that stricter relicensing requirements based on age are impermissible criteria and pose an unfair burden on older drivers because of their great reliance on their automobiles.³⁰⁰ The United States Supreme Court has stated that when the challenged legislation does not restrict a fundamental right or hinder a suspect class, a court merely examines whether a rational basis exists for the law.³⁰¹ This is the least restrictive level of review.³⁰² Because older drivers do not constitute a suspect class and operating a motor vehicle is not a fundamental right, licensing policies for older drivers would be reviewed under the rational basis standard.³⁰³ Thus, the legislation will be upheld if the age classification rationally relates to a legitimate state purpose.³⁰⁴ The party claiming age discrimination also bears the burden of proving that the licensing policies are irrational.³⁰⁵ It would, therefore, be very difficult for older drivers to prevail on age discrimination claims based on the Equal Protection Clause.

States have the authority, through their general police power, to enact and enforce laws to protect people's health, safety and welfare.³⁰⁶ Thus, states have the power and obligation to regulate driving and licensing policies for drivers.³⁰⁷ The purposes of age-based licensing requirements, to enhance public safety and reduce traffic accidents, are legitimate state goals.³⁰⁸ Given the statistics on the enhanced driving risks posed by older drivers, a court is likely to conclude that various

²⁹⁷ See 625 ILL. COMP. STAT. §§ 5/6-103, 109, 115; Waller, *supra* note 17, at 502.

²⁹⁸ See Waller, *supra* note 17, at 502; Dickman, *supra* note 145, at A8.

²⁹⁹ See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 83 (1911).

³⁰⁰ See, e.g., *Kantor v. Parsekian*, 179 A.2d 21, 23 (N.J. Super. Ct. App. Div. 1962).

³⁰¹ See, e.g., *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979).

³⁰² See *id.* at 97.

³⁰³ See *id.* at 96-97; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976).

³⁰⁴ See *Vance*, 440 U.S. at 96-97.

³⁰⁵ See, e.g., *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979).

³⁰⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

³⁰⁷ See *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

³⁰⁸ See *People v. Arthur W.*, 217 Cal. Rptr. 183, 188 (Cal. Ct. App. 1985).

licensing policies for older drivers are constitutional, as the United States Supreme Court implied in *Murgia* and the New Jersey Superior Court held in *Kantor*.³⁰⁹

The Due Process Clause may provide a stronger challenge to age-based licensing requirements but is also not likely to succeed.³¹⁰ The Due Process Clause protects certain property rights.³¹¹ Although states often assert that a driver's license is a privilege and not a constitutional right, the United States Supreme Court ruled in *Bell* that a driver's license is a property interest that may not be denied or revoked without due process and just cause.³¹² In addition, the Court held in *Love* and *Mackey* that a high-risk driver's procedural due process rights outweigh the state's public safety interest.³¹³ These cases, however, dealt with the suspension or revocation of a driver's license due to a lack of insurance, driving under the influence of alcohol or other related violations.³¹⁴ They did not involve older drivers and the issue of stricter licensing policies.³¹⁵

Thus, even though a driver's license is recognized as a private property right entitled to Fourteenth Amendment protection, it is still uncertain what kind of procedural due process the United States Supreme Court would require.³¹⁶ In *Bell*, the Court stated that a driver must receive notice and an opportunity for a meaningful hearing before his or her driver's license is revoked unless there is an emergency, but the Court failed to clarify what situation would constitute an emergency.³¹⁷ Moreover, in *Mackey*, the Court modified the required timing of a revocation hearing by stating that a summary suspension of a driver's license satisfies procedural due process if the statute provided for an immediate post-suspension hearing.³¹⁸

The provisions for notice and a hearing differ from one state to another.³¹⁹ As long as they allow for an immediate post-suspension

³⁰⁹ See *Murgia*, 427 U.S. at 313; *Kantor*, 179 A.2d at 23; see also *supra* notes 45-89 and accompanying text (discussing driving statistics).

³¹⁰ See *Mackey v. Montrym*, 443 U.S. 1, 11 (1979).

³¹¹ See *Bell v. Burson*, 402 U.S. 535, 539 (1976).

³¹² *Id.*

³¹³ *Mackey*, 443 U.S. at 13; *Dixon v. Love*, 431 U.S. 105, 112 (1977).

³¹⁴ See *Mackey*, 443 U.S. at 4, 5 (driving under the influence of alcohol); *Love*, 431 U.S. at 110 (speeding and other related violations); *Bell*, 402 U.S. at 537 (lack of insurance).

³¹⁵ See *Mackey*, 443 U.S. at 4, 5; *Love*, 431 U.S. at 110.

³¹⁶ See *Mackey*, 443 U.S. at 4, 5; *Love*, 431 U.S. at 110.

³¹⁷ 402 U.S. at 542.

³¹⁸ *Mackey*, 443 U.S. at 19.

³¹⁹ Compare *Illinois v. Batchelder*, 463 U.S. 1112, 1113-14 (1983), with *Mackey*, 443 U.S. at 5.

hearing, though, they meet procedural due process standards under *Mackey* and its progeny.³²⁰ These cases, however, all dealt with suspension or revocation of driver's licenses rather than non-renewal of an older person's license resulting from stricter relicensing policies.³²¹ It is not clear, therefore, whether the Court would view this situation differently.³²² Nevertheless, the Fourteenth Amendment does not explicitly bar stricter state relicensing policies for older drivers.³²³ Hence, the constitutional rights involved in a renewal of an older person's driver's license remain unclear.³²⁴ The individual variations in driving performance, however, especially among older drivers, make age-based relicensing requirements at least questionable.³²⁵

B. Governmental Immunity on Shaky Ground

Many states have not addressed older driver issues in their license renewal policies.³²⁶ Government officials have historically enjoyed absolute immunity from liability on the basis of their licensing decisions of applicants, particularly the licensing of older drivers, as evidenced by the California Court of Appeal's decision in *Papelian*.³²⁷ There is an increasing trend, however, as indicated by the same court's decision in *Trewin* eight years later, to hold government officials liable for their licensing decisions regarding older drivers where they *know* that the applicant may pose a safety risk on the roads.³²⁸

The California Court of Appeal recognized that *Papelian* and *Trewin* presented similar factual situations.³²⁹ In *Papelian*, however, the court held that the licensing decision was discretionary, whereas in *Trewin*, the court held that the state had a mandatory duty to refrain from issuing the license.³³⁰ The *Trewin* court implied that the result in *Papelian* might have been different if the injured party had specifically shown that the examiner was aware of the applicant's declining physical and mental abilities.³³¹ With an increasing number of studies show-

³²⁰ See, e.g., *Mackey*, 443 U.S. at 19.

³²¹ See generally *Mackey*, 443 U.S. at 1; *Love*, 431 U.S. at 105; *Bell*, 402 U.S. at 535.

³²² See *Mackey*, 443 U.S. at 1.

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See Waller, *supra* note 17, at 502.

³²⁶ See Graham, *supra* note 34, at 8, 9.

³²⁷ See generally *Papelian v. State*, 135 Cal. Rptr. 665 (Cal. Ct. App. 1976).

³²⁸ See *Trewin v. State*, 198 Cal. Rptr. 263, 267 (Cal. Ct. App. 1984).

³²⁹ See *id.* at 266.

³³⁰ *Id.* at 265; *Papelian*, 135 Cal. Rptr. at 667.

³³¹ See *Trewin*, 198 Cal. Rptr. at 267.

ing that visual, cognitive and motor functions deteriorate with age, there is a growing need for state officials to develop accurate measures for determining whether an older applicant poses a public safety risk in order to avoid potential liability.³³²

There is no easy solution to the dilemma facing state licensing agencies.³³³ They would surely welcome efficient, effective, low-cost means of evaluating applicants for license renewals.³³⁴ The problem is that the research community is just beginning to develop the basic information needed for effective screening of license applicants.³³⁵ For years, researchers have emphasized the need for more information to determine the proper balance between public safety and individual mobility in regulating the licenses of all drivers.³³⁶ Recent studies, however, indicate a big step in the right direction and should guide licensing agencies in their implementation of better solutions.³³⁷

C. Proposed Solutions

A proper balance between safety and mobility may require a compromise between state standards that do not take the problems of older drivers into account and those that strictly impose substantial requirements on the older driving population.³³⁸ Pennsylvania and Maine have physician reporting laws to identify incompetent drivers.³³⁹ Indiana and Maryland have tried to resolve this conflict by offering restricted licenses.³⁴⁰ All states are offering driver improvement courses.³⁴¹ New York, New Jersey and Colorado are recommending highway and automobile improvements.³⁴² These methods are a good start, but they need to be supplemented by better performance screening procedures for all drivers.

³³² See *supra* notes 62–89 and accompanying text (discussing various studies on aging and driving).

³³³ See Waller, *supra* note 17, at 503.

³³⁴ See *id.*

³³⁵ See Bill Hendrick, *Screening Test Identifies Higher-Risk Older Drivers*, ATLANTA J. & CONST., Aug. 13, 1996, § D, at 8.

³³⁶ See Waller, *supra* note 17, at 503.

³³⁷ See Hendrick, *supra* note 335, at 8.

³³⁸ See 625 ILL. COMP. STAT. §§ 5/6–103, 109, 115 (West 1993 & Supp. 1996); Rigdon, *supra* note 27, at A1.

³³⁹ See ME. REV. STAT. ANN. tit. 29-A, § 1258(6) (West 1996); 75 PA. CONS. STAT. ANN. § 1518(b) (West 1996).

³⁴⁰ See IND. CODE ANN. § 9–30–4–9(a)(3), (c) (Michie 1997); MD. CODE ANN., [TRANSP.] § 16–110.2(d) (1992 & Supp. 1996).

³⁴¹ See Wade, *supra* note 101, at 3.

³⁴² See *supra* notes 149–156 and accompanying text (discussing highway and automobile modifications).

1. Physician Reporting

The most practical and economical way for states to identify older drivers who need their driving ability retested, without branding a particular age group, is through physician reporting.³⁴³ Physicians are the one factor that most people, particularly the elderly, have in common.³⁴⁴ By using the physician reporting laws adopted in Pennsylvania and Maine as starting points, states can give physicians an important role in a performance-based licensing process.³⁴⁵

Some commentators suggest that physician reporting laws may not work.³⁴⁶ First, they point to evidence that compliance with existing reporting laws has been scattered, particularly among eye care specialists who are aware of vision changes in their patients that may affect driving, but usually do not report such changes to the state.³⁴⁷ In addition, commentators assert that many physicians are unaware such laws exist, and even among those who are aware of their responsibilities under the law, there is confusion as to their role in complying and how the process works.³⁴⁸ Moreover, commentators emphasize that physicians are reluctant to report their patients for fear of jeopardizing their relationships with their patients.³⁴⁹

All of these are valid concerns, but rather than negate the desirability of physician reporting, they point to issues that need to be addressed in fashioning appropriate physician reporting laws.³⁵⁰ One way to deal with physician reluctance and scattered compliance is to establish consequences for a physician's failure to report patients with driving impairments.³⁵¹ For example, a state could revoke a physician's license or impose liability on the physician for failure to report if the patient drives and causes a collision.³⁵² With respect to limited aware-

³⁴³ See Carmella M. Strano, *Screening for Driving Performance*, in *The Licensing of Older Drivers*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, No. 429, July 1994, at 6. All states and provinces have procedures whereby anyone may report unsafe drivers of any age. See Malfetti & Winter, *supra* note 150, at 12.

³⁴⁴ See *id.*

³⁴⁵ See ME. REV. STAT. ANN. tit. 29-A, § 1258(6) (West 1996); 75 PA. CONS. STAT. ANN. § 1518(b) (West 1996).

³⁴⁶ See Strano, *supra* note 343, at 6.

³⁴⁷ See *id.*

³⁴⁸ See *id.*

³⁴⁹ See *id.*

³⁵⁰ See Morris, *supra* note 131, at 27.

³⁵¹ See *id.*

³⁵² See *id.* But see, e.g., *Withhoeft v. Kiskaddon*, 676 A.2d 1223, 1226 (Pa. Super. Ct. 1996) (holding that physicians neglecting to report impaired drivers who later cause accidents not liable to injured parties).

ness of the laws, states could follow Maine's example by providing specific evaluation guidelines and reporting procedures to all physicians in the state.³⁵³

2. Driving Simulators

Vision and road tests are important tools for screening out potentially dangerous drivers, but current testing procedures must be modified to be truly effective screening methods. For instance, most states with visual testing only examine a driver's static visual acuity, which is the ability to resolve small details in the distance.³⁵⁴ They do not test for visual field (how much is absorbed in a brief glance), dynamic visual acuity (subject or target moving), color perception, depth perception or other visual proficiency.³⁵⁵ Thus, they are unable to assess other perceptual difficulties, and even dementia can go undetected.³⁵⁶ For example, drivers with normal visual acuity but visual field loss may be able to see the cars in front of them but be unable to perceive the cars to the left or right of them, and yet, these drivers would probably pass the standard eye test given at most licensing agencies.³⁵⁷ Given the importance of all visual functions in driving, it is imperative that licensing examinations include sensory perception testing and, in particular, visual field testing.³⁵⁸

States that require road tests are also making a start, but the road tests employed only examine basic operational and tactical skills.³⁵⁹ They do not measure how drivers will respond to urgent and emergent situations on the road, which is more a function of reaction time and motor skills.³⁶⁰ States such as Illinois that specifically require older drivers to submit to road tests do not actually test for the skills that have been shown to decline with age.³⁶¹ Statistics reveal that older drivers have slower reaction times, but older drivers usually compensate for this by slowing their driving speed.³⁶² Thus, Illinois' attempt to

³⁵³ See MAINE DEP'T OF SECRETARY OF STATE, *supra* note 135.

³⁵⁴ See Mark Ward, *Driving Simulators for the Elderly*, TECH. REV., July 1996, at 19.

³⁵⁵ See *id.*; see also *A Glance Says a Lot About Safe Driving*, *supra* note 75, at 7; Malfetti & Winter, *supra* note 150, at 15.

³⁵⁶ See Ward, *supra* note 354, at 19.

³⁵⁷ See Malfetti & Winter, *supra* note 150, at 16.

³⁵⁸ See *id.* at 15, 16, 17.

³⁵⁹ See Carr, *supra* note 30, at 570.

³⁶⁰ See *id.*

³⁶¹ See *id.*

³⁶² See *id.*

screen out unsafe older drivers through a regular road test is not likely to be efficacious or cost-effective.³⁶³

Ball and Owsley's new computer-based driving simulator identifies drivers with cognitive, motor and visual-processing difficulties that are likely to cause accidents.³⁶⁴ Ball and Owsley are developing a three-minute version of the test to meet the high-volume requirements of state licensing agencies, while allowing them to effectively determine which drivers are impaired.³⁶⁵ Motor vehicle departments in California, Maryland and Pennsylvania are currently testing the computerized examination.³⁶⁶ In addition to identifying impaired drivers, the simulator may be used as a training tool to help these drivers compensate for their perceptual and other limitations and improve their driving performance.³⁶⁷

There are two concerns, however, with computerized testing that need to be taken into account.³⁶⁸ First, many older drivers may feel uncomfortable using a computer to demonstrate their driving skills.³⁶⁹ Second, the cost of implementing this testing procedure for all license applicants remains to be seen.³⁷⁰ Despite these concerns, though, the driving simulator is a promising development in the quest for effective, performance-based screening of all drivers.³⁷¹

3. Restricted Licenses

There are advantages and disadvantages to restricted licenses.³⁷² On the one hand, they are not always successful and may increase accident risks.³⁷³ Although it is admirable for states like Indiana to try to preserve individual mobility by offering licenses with restrictions,

³⁶³ See *id.* at 571.

³⁶⁴ See Ward, *supra* note 354, at 19.

³⁶⁵ See *id.* A research program specialist at the California Department of Motor Vehicles related, "[w]e process tens of thousands of people a day, so every minute of testing costs us millions of dollars." *Id.*

³⁶⁶ See *Computer Test Measures Safety of Elders' Driving*, PATRIOT LEDGER (Quincy, Mass.), Aug. 13, 1996, at 1.

³⁶⁷ See Ward, *supra* note 354, at 19.

³⁶⁸ See *id.*; see also Jerry Thomas, *Road Class a Tuneup for Seniors*, CHI. TRIB., May 29, 1994, at 1.

³⁶⁹ See Thomas, *supra* note 368, at 1. "I will give up driving if I have to drive like this," commented an 81-year-old who became nervous and frustrated with a video simulator. *Id.*

³⁷⁰ See Ward, *supra* note 354, at 19.

³⁷¹ See *Computer Test Measures Safety of Elders' Driving*, *supra* note 366, at 1. Older driver expert Harvey Sterns remarked, "everything I've seen about this particular test is positive." *Id.*

³⁷² See Rigdon, *supra* note 27, at A1. Some commentators prefer calling them graduated or graded licenses. See Graham, *supra* note 34, at 9; Malfetti & Winter, *supra* note 150, at 13.

³⁷³ See Rigdon, *supra* note 27, at A1.

the licenses may be granted for the wrong reasons, such as pity for an older person.³⁷⁴ Thus, a state examiner sympathetic to the plight of an older driver without other adequate means of transportation should not automatically grant a restricted license when that driver fails a road test.³⁷⁵ In fact, Arizona's Sun City abandoned its restricted license program after an elderly woman with a restricted license ran down and killed a pedestrian in a parking lot.³⁷⁶ Also, as previously mentioned, many older drivers place their own limits on their driving, thus questioning the necessity of a graduated licensing system.³⁷⁷

On the other hand, placing restrictions on some older drivers' licenses would allow many drivers to maintain their independence while not posing a safety risk on the road.³⁷⁸ For example, a driver whose only impairment is less acute night vision should still be permitted to drive during the day.³⁷⁹ A graduated licensing system would achieve this desired balance between safety and mobility.³⁸⁰ In addition, the growing number of states that now hold state examiners liable for knowingly licensing dangerous drivers will aid in curbing potential abuse.³⁸¹ Finally, not all older drivers place restrictions on their own driving, making such a system desirable.³⁸² Overall, the benefits of a graduated licensing system outweigh its risks.³⁸³

4. Driver Improvement Courses

Many older drivers never completed formal training or developed safe driving practices.³⁸⁴ Driver improvement courses are thus a useful

³⁷⁴ See *id.* One researcher noted anecdotally that it is common for law enforcement officers to issue fewer citations for traffic violations to older drivers because of parental associations and compassion for a "sweet old lady". See Steven A. Evans, *Aging and Driving: Accident Likelihood Based on Driving History Obtained Through Individual Driver Records* (1996) (unpublished Ph.D. dissertation, Brandeis University (Waltham, Mass.)) (on file with author).

³⁷⁵ See Rigdon, *supra* note 27, at A1. State license administrators are in a difficult predicament. See Schmidt, *supra* note 149, at A1. As one official stated, "[t]here is nothing harder than having to tell an elderly person that they have failed a driving test. It's a heart-rending thing to do, because you know the effect it will have on their life." *Id.*

³⁷⁶ See Rigdon, *supra* note 27, at A1.

³⁷⁷ See Waller, *supra* note 17, at 500.

³⁷⁸ See Thomas L. Miller, *Licensing Restrictions*, in *The Licensing of Older Drivers*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, No. 429, July 1994, at 15.

³⁷⁹ See, e.g., MD. CODE ANN., [TRANSP.] § 16-110.2(d) (1992 & Supp. 1996).

³⁸⁰ See Malfetti & Winter, *supra* note 150, at 13.

³⁸¹ See Waller, *supra* note 17, at 502.

³⁸² See *id.* at 500.

³⁸³ See generally Malfetti & Winter, *supra* note 150, at 15-16.

³⁸⁴ See Alma M. Fonseca, *Training Elderly Drivers*, in *The Licensing of Older Drivers*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, No. 429, July 1994, at 21.

way of teaching older drivers proper procedures as well as how to compensate for perceptual, cognitive or motor deficiencies.³⁸⁵ All states should continue to offer and expand the availability of driver improvement courses for older motorists.³⁸⁶ To increase attendance, all states should require automobile insurers to give insurance discounts and/or a reduction of infraction points for those completing a course.³⁸⁷ Also, licensing agencies can encourage participation by mailing information about courses with license renewal notices.³⁸⁸

To have a maximum positive impact, all older driver training programs should combine classroom, simulation and in-car instruction.³⁸⁹ While classes currently offered by the AARP and other organizations offer a strong classroom component, they often do not give the older driver an opportunity to practice behind the wheel or to demonstrate newly mastered skills and information.³⁹⁰ Without simulation instruction and actual practice, older drivers may hear but not conceptualize the theory.³⁹¹ The downside to this proposal is that it will be more expensive, but the bottom-line savings achieved by reducing the number of crashes with resultant injuries and deaths make this proposal worth implementing.³⁹² Moreover, the costs can be shared by the older driver participants, insurance carriers and the government.³⁹³

5. Highway and Automobile Modifications

There have been encouraging changes in the designs of highways and motor vehicles to enhance the safety of older drivers.³⁹⁴ Florida, Colorado and New Jersey represent a growing trend to modify street signs and road markers by using larger letters and highly reflective materials, in order to accommodate older drivers with slower reaction times and vision problems resulting from night glare.³⁹⁵ Although changing all the current signs and markers would be too expensive, all states should at least redesign those signs that need to be replaced.³⁹⁶ In

³⁸⁵ See *id.* at 21–22.

³⁸⁶ See DONALD W. MARYOTT, *Education, Counseling, and Forms of Support, in The Licensing of Older Drivers*, TRANSPORTATION RES. BOARD, NATIONAL RES. COUNCIL, No. 429, July 1994, at 19.

³⁸⁷ See Malfetti & Winter, *supra* note 150, at 10.

³⁸⁸ See Fonseca, *supra* note 384, at 22.

³⁸⁹ See Maryott, *supra* note 386, at 20.

³⁹⁰ See *id.*

³⁹¹ See *id.*

³⁹² See *id.*

³⁹³ See *id.*

³⁹⁴ See Mathias, *supra* note 25, at B5.

³⁹⁵ See *id.*; Shaheen, *supra* note 153, at 1.

³⁹⁶ See Mathias, *supra* note 25, at B5.

addition, in order to make driving decisions easier for all drivers, states should create more left-turn lanes and use traffic signals that indicate who has the right of way.³⁹⁷

There is a similar trend among automotive engineers to redesign motor vehicles by taking older drivers' needs into account.³⁹⁸ For instance, General Motors now manufactures cars with bigger buttons and electrochromic mirrors to reduce glare.³⁹⁹ More automotive manufacturers need to begin making changes in the design of their cars.⁴⁰⁰

6. Transportation Alternatives

Many older drivers will eventually reach the point at which they can no longer drive safely, but their transportation needs will not cease with their licensure.⁴⁰¹ Thus, as older drivers experience restriction or cancellation of their licenses, they must be directed toward other resources and services in the community to meet their mobility needs.⁴⁰² Public transportation should be expanded to provide safe, rapid, convenient and economical service to the entire community.⁴⁰³ Although people in all age groups would benefit, those older persons with little or few alternatives would receive the greatest benefit.⁴⁰⁴ In addition, senior centers or organizations must be mobilized to provide necessary transportation to various destinations through mini-vans, small buses and automobiles.⁴⁰⁵ Also, the private sector should get more involved.⁴⁰⁶ Many merchants already recognize the spending power of older citizens and provide free or low-cost busing services from rural and distant locations to attract seniors' business.⁴⁰⁷ This practice should be expanded through communications with area merchants and business organizations.⁴⁰⁸ Similarly, churches should be encouraged to provide

³⁹⁷ See Audrey Straight & Ann-Marie Platz, *Older Drivers*, AARP PUB. POL'Y INST., FACT SHEET, OLDER DRIVERS 6 (1996).

³⁹⁸ See Mathias, *supra* note 25, at B5.

³⁹⁹ See *id.*

⁴⁰⁰ See Waller, *supra* note 17, at 503.

⁴⁰¹ See *id.* at 504.

⁴⁰² See *id.* Some older persons have families, friends and neighbors who can help, but their assistance can only go so far. See Malfetti & Winter, *supra* note 150, at 14. As one elder with a seasoned humor put it, "Neighbors will take you once out of goodness of soul, and twice out of guilt; but the third time they have something else to do." *Id.* Moreover, many older people do not have anyone available to provide transportation. See *id.*

⁴⁰³ See Maryott, *supra* note 386, at 21.

⁴⁰⁴ See *id.*

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

⁴⁰⁷ See *id.*

⁴⁰⁸ See Maryott, *supra* note 386, at 21.

transportation to their older members.⁴⁰⁹ Finally, van and car pooling should be promoted within the senior communities.⁴¹⁰

IV. CONCLUSION

As the driving population ages, the safety and mobility of older drivers will continue to be a pressing concern.⁴¹¹ We need to recognize the importance of a driver's license in meeting the mobility needs of older persons, while acknowledging the evidence pointing to their diminishing driving abilities and increasing safety risks.⁴¹² Some states have addressed this issue by imposing strict licensing requirements based on the driver's age.⁴¹³ These measures have been found constitutional by state courts and would likely be upheld by the United States Supreme Court.⁴¹⁴

And yet, we must bear in mind that every person ages and drives differently.⁴¹⁵ Moreover, the age-based screening methods that have been adopted do not test the driving skills shown to decline with age.⁴¹⁶ Recent studies offer the hope of accurate screening methods to identify high-risk drivers of any age.⁴¹⁷ Although it is too early to tell whether they will be cost-effective, the future looks promising.⁴¹⁸ Combined with other proposals, these screening methods can give state licensing agencies the tools they need to accurately test the driving abilities of all drivers.⁴¹⁹ Ultimately, this will improve the quality of life for all of us.⁴²⁰

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⁴⁰⁹ See *id.*

⁴¹⁰ See *id.*

⁴¹¹ See Waller, *supra* note 17, at 499.

⁴¹² See *id.* at 499-500.

⁴¹³ See *supra* notes 118-30 and accompanying text (discussing age-based licensing requirements).

⁴¹⁴ See *supra* notes 230-59 and accompanying text (discussing state decisions); *supra* notes 287-325 and accompanying text (discussing federal constitutional standards).

⁴¹⁵ See *supra* notes 287-98 and accompanying text (discussing individual variations).

⁴¹⁶ See *supra* notes 354-63 and accompanying text (discussing ineffectiveness of current age-based licensing tests).

⁴¹⁷ See *supra* notes 364-71 and accompanying text (discussing developing driver screening tests).

⁴¹⁸ See *id.*

⁴¹⁹ See *id.*; *supra* notes 338-410 and accompanying text (discussing various proposals).

⁴²⁰ See Malfetti & Winter, *supra* note 150, at 14.