

COMMENTS

ADMINISTRATIVE DRIVER'S LICENSE SUSPENSION: A REMEDIAL TOOL THAT IS NOT IN JEOPARDY

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INTRODUCTION

Drunk driving is a problem that imposes tremendous costs on society.¹ Alcohol-related fatalities numbered 16,589 in 1994,² and thousands more were injured in drunk driving accidents.³ The yearly estimated costs of driving under the influence (DUI) accidents total \$46 billion.⁴ Within the past decade, nationwide advertising campaigns by citizen activist groups⁵ have made the public more aware, and increasingly less tolerant, of the destruction created by drunk drivers.⁶ Public lobbying efforts, along with federal monetary incentives,⁷ have led state legislatures to enact new drunk driving laws

1. See generally 141 CONG. REC. S15,501 (daily ed. Oct. 23, 1995) (statement of Sen. Lautenberg) (noting dangers of drunk driving and urging Senate to support Drunk Driving Prevention Act of 1995); Kirsten K. Davis, Note, *Ohio's New Administrative License Suspension for Drunk Driving: Essential Statute Has Unconstitutional Effect*, 55 OHIO ST. L.J. 697, 697-98 (1994) (noting that in 1990, drunk driving accidents resulted in over 22,000 deaths, 355,000 injuries, and \$57 billion in total costs).

2. *Drunk Driving & Liquor Liability*, INS. ISSUES UPDATE (Ins. Info. Inst., New York, N.Y.) (Ruth Gastel ed.), Oct. 1995, at 1; see also C. Fraser Smith, *Repeat Drunken Drivers Are a National Menace*, BALT. SUN, Jan. 1, 1995, at A18 (stating that more than 17,400 people were killed in crashes involving drunk drivers in both 1993 and 1994). Drunk driving accidents remain the leading cause of death for people between the ages of 6 and 33, causing even more fatalities than handguns. Smith, *supra*, at A18.

3. *Drunk Driving & Liquor Liability*, *supra* note 2, at 1. Injuries in alcohol-related crashes numbered 297,000, the equivalent of one injury every two minutes. *Id.* Alcohol was a factor in 41% of traffic accidents occurring in 1994. *Id.*

4. *Drinking, Driving and Staying Alive*, CHI. TRIB., Dec. 31, 1994, at 22 (editorial) [hereinafter *Staying Alive*].

5. Mothers Against Drunk Driving (MADD) has led the fight against drinking and driving and has been joined in its publicity efforts by groups such as Students Against Drunk Driving (SADD) and Remove Intoxicated Drivers (RID), as well as by the insurance industry. *Drunk Driving & Liquor Liability*, *supra* note 2, at 7. These citizen activist groups have been particularly successful in reaching under-21 drivers, who participate in campaigns at their high schools. *Id.* at 4. This age group has experienced the greatest decline in arrests for drunk driving. *Id.* Future campaigns will target new groups most likely to be involved in drunk driving accidents—adults age 21 to 34 and alcoholics. *Id.*

6. See *Drunk Driving & Liquor Liability*, *supra* note 2, at 1, 7 (stating that public awareness has "increased dramatically over the past dozen years" and polls indicate that most Americans support stricter penalties for DUI offenders); Ellen Perlman, *Authorities Get Even Tougher on Drunken Drivers: States Lowering Limits for Intoxication, Boosting Penalties for Those Caught*, ROCKY MOUNTAIN NEWS, Sept. 25, 1994, at A12 (noting public support behind state efforts to lower standards for legal intoxication and to set harsher penalties for violators). In a 1994 Gallup Poll surveying 2000 people, over half felt that penalties for first-time offenders were too lenient, and two-thirds replied that penalties for repeat offenders were not severe enough. Perlman, *supra*, at A12.

7. See 23 U.S.C. § 158 (1994) (providing that states failing to raise their legal drinking age to 21 by October 1, 1986, faced 5% cut in federal highway aid for 1987 and 10% cut in aid for 1988); see also Drunk Driving Prevention Act of 1988, 23 U.S.C. § 410(d)(1) (1994). In 1988, Congress passed legislation providing increased highway funds for states if they enacted administrative license suspension laws. *Id.* By 1991, in order to receive increased funds, states were required to pass five of six laws identified by experts as being most effective in curbing drunk driving accidents. *Id.* § 410(d). In addition to license suspension laws, state legislatures could choose to use sobriety checkpoints, reduce the legal blood alcohol limit, implement

that impose strict penalties on DUI offenders.⁸ One of the mechanisms most widely used to combat drunk driving and increase highway safety is administrative license suspension (ALS).⁹

education programs for convicted DUI offenders, create self-sustaining drunk driving prevention programs under which a portion of fines collected from offenders are returned to the community, or create schemes making it more difficult for persons under 21 to obtain alcohol. *Id.* § 410(d)(1)-(6).

8. See *Staying Alive*, *supra* note 4, at 22 (stating that "stern" measures taken by legislatures, such as license suspensions, stiffer sentences, and police roadblocks, have helped discourage drunk driving). Several states have reduced the minimum DUI blood alcohol content from .10% to .08%, making it easier to be found guilty of this offense. See, e.g., ALA. CODE § 32-5A-191 (1989 & Supp. 1995); CAL. VEH. CODE § 23,152 (West 1985 & Supp. 1996); KAN. STAT. ANN. § 8-1567 (1991 & Supp. 1994); N.H. REV. STAT. ANN. § 265:82 (1993 & Supp. 1995); N.C. GEN. STAT. § 20-138 (1993 & Supp. 1995); OR. REV. STAT. § 813.010 (1993); UTAH CODE ANN. § 41-6-44 (1993 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1201 (1987 & Supp. 1994); VA. CODE ANN. § 18.2-266 (1988 & Supp. 1995). In addition, various states have recently enacted laws to combat drunk driving, such as vehicle impoundment and installation of steering-wheel locking devices for repeat offenders. See, e.g., ARIZ. REV. STAT. ANN. § 28-697.01 (Supp. 1995) (stating that court shall order convicted offender's vehicle to be forfeited in addition to any other penalty imposed); GA. CODE ANN. § 42-8-111 (1994) (providing that court can order offender's vehicle equipped with ignition interlock device as condition of probation); MD. TRANSP. CODE ANN. § 27-107 (1992) (allowing court to prohibit DUI offenders from operating vehicle for up to three years unless vehicle is equipped with ignition interlock system that prevents vehicle from starting if driver's blood alcohol level exceeds calibrated setting). As of January 1, 1995, Illinois has a "zero tolerance" policy for people under age 21, meaning that a person under age 21 will have his or her license suspended if he or she is found to have a mere .02% blood alcohol level. ILL. ANN. STAT. ch. 625, para. 5/11-501.8 (Smith-Hurd Supp. 1995). Maine enacted a similar law in May 1995. ME. REV. STAT. ANN. tit. 29-A § 2472(3)(B)(4) (West Supp. 1995).

9. Thirty-eight states and the District of Columbia have laws which provide for the immediate suspension of a license when a driver fails a breath test. ALASKA STAT. § 28.15.165(a)(1) (1994 & Supp. 1995); ARIZ. REV. STAT. ANN. § 28-694 (1989 & Supp. 1995); ARK. CODE ANN. § 5-65-104(4) (Michie 1993 & Supp. 1995); CAL. VEH. CODE § 23,137 (West Supp. 1996); COLO. REV. STAT. ANN. § 42-2-122(2)(a)(I) (1993 & Supp. 1995); CONN. GEN. STAT. ANN. § 14-227b(c) (1987 & Supp. 1995); DEL. CODE ANN. tit. 21, §§ 2741-2743 (1985 & Supp. 1995); D.C. MUN. REGS. tit. 18, §§ 302.5, 306.1, 306.4 (1995); FLA. STAT. ANN. § 322.2615 (Harrison 1986 & Supp. 1995); GA. CODE ANN. § 40.5-67.1(b) (Supp. 1995); HAW. REV. STAT. §§ 286-257 to -258 (Supp. 1992); ILL. ANN. STAT. ch. 625, para. 5/6-206(31) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 9-30-6-9(b) (Burns 1991); IOWA CODE ANN. § 321J.12 (West Supp. 1995); KAN. STAT. ANN. § 8-1014(a) (1991); LA. REV. STAT. ANN. § 32:667(A)(1) (West 1989 & Supp. 1996); ME. REV. STAT. ANN. tit. 29A, § 2411(5)(A)(2) (West Supp. 1995); MD. TRANSP. CODE ANN. § 16-205.1(a)(2)(i) (1992 & Supp. 1995); MASS. ANN. LAWS. ch. 90, § 24(1)(f)(2) (Law. Co-op. 1994 & Supp. 1996); MICH. STAT. ANN. § 9.2325(7) (Callaghan Supp. 1995); MINN. STAT. § 169.123(4) (1986 & Supp. 1996); MISS. CODE ANN. § 63-11-23(2) (1989); MO. REV. STAT. § 302.309.3 (Supp. 1995); NEB. REV. STAT. § 60-6, 206 (1993); NEV. REV. STAT. § 484.385 (1993); N.H. REV. STAT. ANN. § 265:91-a (1993 & Supp. 1995); N.M. STAT. ANN. § 66-8-111.1 (Michie 1978); N.C. GEN. STAT. § 20-16.5 (1993); N.D. CENT. CODE §§ 39-20-04, 39-20-03.1 (1980 & Supp. 1995); OHIO REV. CODE ANN. § 4511.19.1 (Anderson 1993 & Supp. 1995); OKLA. STAT. ANN. tit. 47, § 6-205.1 (West Supp. 1996); OR. REV. STAT. § 813.100(3) (1993); TEX. TRANSP. CODE ANN. § 521.341 (West Supp. 1996); UTAH CODE ANN. §§ 53-3-222 to -223 (1993 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1205 (1987 & Supp. 1994); VA. CODE ANN. § 46.2-391.2 (Michie 1994 & Supp. 1995); WASH. REV. CODE ANN. § 46.20.308 (West 1987 & Supp. 1996); W. VA. CODE § 17-C-5A-1 to -3 (1991 & Supp. 1995); WISC. STAT. ANN. § 343.305(9) (West 1991 & Supp. 1995); WYO. STAT. § 31-6-102(e) (1994); see also Tommy Sangchompuphen, *Drunk Drivers Claim They Are Punished Twice*, WALL. ST. J., June 21, 1995, at B1, B4 (stating that 38 states and District of Columbia utilize administrative license suspension for drivers who fail chemical test). In addition, at least 43 states and the District of Columbia suspend the licenses of drivers who refuse to take a breath test. ALA. CODE § 32-5-192 (1989 & Supp. 1995); ALASKA STAT.

§ 28.15.165(a)(1) (1994 & Supp. 1995); ARIZ. REV. STAT. ANN. § 28-691 (1989 & Supp. 1995); ARK. CODE ANN. § 5-65-205 (Michie 1993 & Supp. 1995); CAL. VEH. CODE § 13353 (West 1987 & Supp. 1996); COLO. REV. STAT. ANN. § 42-2-122(2) (1993 & Supp. 1995); CONN. GEN. STAT. ANN. § 14-227b (1987 & Supp. 1995); DEL. CODE ANN. tit. 21, §§ 2742-2743 (1985 & Supp. 1995); D.C. CODE § 40-505(a) (1990 & Supp. 1995); FLA. STAT. ANN. § 322.2615 (West 1986 & Supp. 1995); GA. CODE ANN. § 40.5-67.1(b) (Supp. 1995); HAW. REV. STAT. § 286-155.5 (Supp. 1992); ILL. REV. STAT., ch. 625, para. 5/6-206(31) (Smith-Hurd Supp. 1995); IND. CODE ANN. § 9-30-6-9(a) (Burns 1991); IOWA CODE ANN. § 321J.9 (West Supp. 1995); KAN. STAT. ANN. § 8-1014(a) (1991); LA. REV. STAT. ANN. § 32:667(B)(2) (West 1989 & Supp. 1996); ME. REV. STAT. ANN. tit. 29A, § 2501(3) (West 1995); MD. TRANSP. CODE ANN. § 16-205.1(a)(2)(ii) (2) (1992 & Supp. 1995); MASS. ANN. LAWS. ch. 90, § 24(1)(f)(1) (Law. Co-op. 1994 & Supp. 1996); MICH. STAT. ANN. § 9.2325(1)(6)(b)(iv) (Callaghan 1991 & Supp. 1995); MINN. STAT. § 169.121(4) (1986 & Supp. 1995); MISS. CODE ANN. §§ 63-11-5 & 63-11-23(1) (1989); MONT. CODE ANN. § 61-8-402 (1995); N.H. REV. STAT. ANN. § 1547(b)(1) (1993 & Supp. 1995); N.M. STAT. ANN. § 66-8-111 (Michie 1978); N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1996); N.D. CENT. CODE § 39-20-04 (1980 & Supp. 1995); OHIO REV. CODE ANN. § 4511.19.1 (Anderson 1993 & Supp. 1995); OKLA. STAT. ANN. tit. 47, § 6-205.1 (West Supp. 1996); OR. REV. STAT. § 813.100(3) (1993); 75 PA. CONS. STAT. ANN. § 1547(b)(1) (1977); R.I. GEN. LAWS § 31-27-2.1 (1994 & Supp. 1995); S.C. CODE ANN. § 56-5-2950(d) (Law. Co-op. 1991 & Supp. 1995); S.D. CODIFIED LAWS ANN. § 32-23-11 (1989 & Supp. 1995); TENN. CODE ANN. § 55-10-406 (1993 & Supp. 1995); TEX. TRANSP. CODE ANN. § 521.251 (West Supp. 1996); UTAH CODE ANN. § 41-6-44.10 (1993 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1205 (1987 & Supp. 1994); VA. CODE ANN. § 46.2-391.2 (Michie 1994 & Supp. 1995); WASH. REV. CODE ANN. § 46.20.308 (West 1987 & Supp. 1996); W. VA. CODE § 17-C-5-4 (1991 & Supp. 1995); WISC. STAT. ANN. § 343.10 (West 1991 & Supp. 1995); WYO. STAT. § 31-6-102(a)(ii)(A) (1994); *see also* Sangchompuphen, *supra*, at B4 (stating that all 50 states suspend licenses for drivers who fail breath test).

In comparison, at least 24 states have ignition interlock laws. ALASKA STAT. § 12.55.102(a) (Supp. 1995); ARK. CODE ANN. § 5-65-118 (Michie 1993 & Supp. 1995); COLO. REV. STAT. ANN. § 42-26-126.1 (Supp. 1995); DEL. CODE ANN. tit. 21, §§ 4177F (Supp. 1995); GA. CODE ANN. § 42-8-112 (1994); HAW. REV. STAT. § 286-264(d) (Supp. 1992); IND. STAT. ANN. § 9-30-5-16 (Michie 1991); IOWA CODE ANN. § 321J.4(7) (West Supp. 1995); LA. REV. STAT. ANN. § 32:378.2 (West Supp. 1996); MICH. STAT. ANN. § 9.2325(2)(8) (Callaghan Supp. 1995); Act of Jul. 6, 1995, West No. 122, 1995 MO. LEGIS. SERV. (Vernon); N.C. GEN. STAT. § 20-179.3 (1993); N.Y. VEH. & TRAF. LAW § 1198 (McKinney Supp. 1996); OHIO REV. CODE ANN. § 2951.02(I) (1993 & Supp. 1995); OKLA. STAT. ANN. tit. 22, § 991a (West Supp. 1996); OR. REV. STAT. § 813.602 (1993); R.I. GEN. LAWS § 31-27-2(d)(2) (1994 & Supp. 1995); TENN. CODE ANN. § 55-10-412(d) (1993 & Supp. 1995); TEX. TRANSP. CODE ANN. § 521.246 (West Supp. 1996); UTAH CODE ANN. § 41-6-44.7 (Supp. 1995); VA. CODE ANN. § 18.2-270.1 (Michie Supp. 1995); WASH. REV. CODE ANN. § 46.20.710 (West Supp. 1996); W. VA. CODE § 17C-5A-3a(c) (Supp. 1995); WISC. STAT. ANN. § 343.10 (West Supp. 1995); *see Drunk Driving and Liquor Liability, supra* note 2, at 3-4 (asserting that 24 states have these laws).

At least 22 jurisdictions have laws which allow forfeiture or impoundment of the vehicle or license plate. ALASKA STAT. § 28.35.036 (1994 & Supp. 1995); ARIZ. REV. STAT. ANN. § 28-697.01(a) (Supp. 1995); ARK. CODE ANN. § 5-65-117(a) (Michie 1993); CAL. VEH. CODE § 23195 (West 1987 & Supp. 1996); DEL. CODE ANN. tit. 21, §§ 2756(c) (1985 & Supp. 1995); D.C. CODE § 40-716(c-1) (Supp. 1995); FLA. STAT. ANN. § 316.193(6)(c) (West 1986 & Supp. 1995); GA. CODE ANN. § 40-6-391.2 (1994); ILL. ANN. STAT., ch. 625, para. 5/4-203(e) (Smith-Hurd 1993); IOWA CODE ANN. § 321J (West Supp. 1995); ME. REV. STAT. ANN. tit. 29A, § 2421(1) (West 1995); N.C. GEN. STAT. § 20-28.2 (1993); N.D. CENT. CODE § 39-08-01 (1980 & Supp. 1995); OHIO REV. CODE ANN. § 4507.164 (1993); OR. REV. STAT. § 809.700 (1993); R.I. GEN. LAWS § 31-27-2(d)(3)(ii) (1994 & Supp. 1995); S.C. CODE ANN. § 56-5-6240(A) (Law. Co-op. 1991 & Supp. 1995); TENN. CODE ANN. § 55-10-403(k) (1993 & Supp. 1995); TEX. TRANSP. CODE ANN. § 704.001 (West Supp. 1996); WASH. REV. CODE ANN. § 46.61.5058 (Supp. 1996); WISC. STAT. ANN. § 343.305(10m) (West 1991 & Supp. 1995); Commonwealth v. Crosby, 568 A.2d 233, 239 (Pa. Super. 1990)); *see also Drunk Driving and Liquor Liability, supra* note 2, at 3-4 (providing that 28 states have forfeiture or impoundment laws).

Laws prohibiting open containers of alcohol in the passenger compartments of vehicles exist in at least 25 states. ALASKA STAT. § 28.35.029 (Supp. 1995); CAL. VEH. CODE § 23223 (West 1987 & Supp. 1996); D.C. CODE § 25-128 (1991 & Supp. 1995); FLA. STAT. ANN. § 316.1963

Current state statutory schemes nationwide provide that when a police officer stops a driver on suspicion for drunk driving and the driver either fails to pass or refuses to take the requisite chemical test determining the driver's blood alcohol content, the officer will seize the driver's license, immediately suspending driving privileges.¹⁰ The suspension is temporary,¹¹ and drivers may apply for a restricted license for employment purposes.¹² The driver also may request an

(West 1986 & Supp. 1995); GA. CODE ANN. § 40-6-253 (1994); HAW. REV. STAT. § 291-3.2(a) (Supp. 1992); IDAHO CODE §§ 23-505 & -1333 (1995); ILL. ANN. STAT., ch. 625, para. 5/11-502(b) (Smith-Hurd 1993); IND. CODE ANN. § 9-30-15-3 (Burns Supp. 1995); MD. ANN. CODE art. 2B, § 19-301 (1994); MICH. STAT. ANN. § 9.2324(1) (Callaghan Supp. 1995); MINN. STAT. §§ 169.122(2), (3) (1986 & Supp. 1996); NEV. REV. STAT. § 484.448(2) (1993); N.H. REV. STAT. ANN. §§ 265:81(II)-(III) (1993); N.C. GEN. STAT. § 18B-401(a) (1995); N.D. CENT. CODE § 39-08-18 (1980 & Supp. 1995); OHIO REV. CODE ANN. §§ 4301.62(b)(4), (5) (Anderson 1993 & Supp. 1995); OKLA. STAT. ANN. tit. 21, § 1220 (West Supp. 1996); OR. REV. STAT. § 811.170 (1993); S.C. CODE ANN. §§ 61-5-20, 61-9-87 (Law. Co-op. 1976 & Supp. 1995); S.D. CODIFIED LAWS ANN. § 35-1-9.1 (1992); TENN. CODE ANN. § 55-10-416 (Supp. 1995); UTAH CODE ANN. § 41-6-44.20 (1993); WASH. REV. CODE ANN. § 46.61.519(2) (West 1987 & Supp. 1996); WISC. STAT. ANN. §§ 346.935(2), (3) (West 1991); *see also Drunk Driving and Liquor Liability*, *supra* note 2, at 3-4 (stating that 28 states have open container laws). Finally, at least 27 states and the District of Columbia have lowered the legal limit of blood alcohol content for youthful offenders. ARIZ. REV. STAT. ANN. § 4-244(34) (1989 & Supp. 1995); ARK. CODE ANN. § 5-65-303(b) (Michie 1993); CAL. VEH. CODE § 23136(c) (West Supp. 1996); DEL. CODE ANN. tit. 21, § 41771(a) (Supp. 1995); D.C. CODE § 40-716(b)(1) (Supp. 1995); GA. CODE ANN. § 40-6-391(k) (1994); IDAHO CODE § 18-8004 (Supp. 1995); ILL. ANN. STAT., ch. 625, para. 5/6-206(c)-(d) (Smith-Hurd Supp. 1995); IOWA CODE ANN. § 321J.2 (West Supp. 1995); LA. REV. STAT. ANN. § 14:98(A)(1)(b) (West 1986 & Supp. 1996); ME. REV. STAT. ANN. tit. 29A, § 22472(3)(B) (West 1995); MD. TRANSP. CODE ANN. § 16-113(b) (1993 & Supp. 1995); MASS. ANN. LAWS ch. 90, § 24(1)(f)(2)(iv) (Law. Co-op. 1994 & Supp. 1996); MICH. STAT. ANN. § 9.2325 (Callaghan 1991 & Supp. 1995); MINN. STAT. § 171.173 (Supp. 1996); MISS. CODE ANN. § 63-11-30(1)(c) (Supp. 1995); N.M. STAT. ANN. § 66-8-110 (Michie 1978); N.C. GEN. STAT. § 20-138.3 (1993); OHIO REV. CODE ANN. § 4511.19(b) (Anderson 1993 & Supp. 1995); OR. REV. STAT. § 813.300 (1993); R.I. GEN. LAWS § 31-27-2.5 (1994 & Supp. 1995); TENN. CODE ANN. § 55-10-415(a)(1)(A) (1993); TEX. TRANSP. CODE ANN. § 521.298 (West Supp. 1996); UTAH CODE ANN. § 41-6-44.4 (1993); VT. STAT. ANN. tit. 23, § 1216(a) (Supp. 1994); VA. CODE ANN. § 18.2-266.1(A) (Michie Supp. 1995); W. VA. CODE § 17-C-5-4 (1991 & Supp. 1995); WISC. STAT. ANN. § 343.63(2m) (West 1991); *see also Drunk Driving and Liquor Liability*, *supra* note 2, at 3-4 (asserting that 34 states have taken such measures).

10. *See, e.g.*, ALASKA STAT. § 28.15.165 (1994 & Supp. 1995); CAL. VEH. CODE § 23157 (West Supp. 1995); DEL. CODE ANN. tit. 21, §§ 2741-2743 (1985 & Supp. 1995); FLA. STAT. ANN. § 322.2615 (West 1986 & Supp. 1995); HAW. REV. STAT. §§ 286-257 to -258 (Supp. 1992); MD. TRANSP. CODE ANN. § 16-205.1 (1993 & Supp. 1995); MINN. STAT. ANN. § 169.123 (1986 & Supp. 1995); N.H. REV. STAT. ANN. § 265:91-a (1993 & Supp. 1995); OHIO REV. CODE ANN. § 4511.191 (1993 & Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 6687b-1 (Supp. 1995) (amended 1995); VA. CODE ANN. § 46.2-391.2 (Michie 1994); VT. STAT. ANN. tit. 23, § 1205 (1987 & Supp. 1994).

11. *See, e.g.*, CAL. VEH. CODE § 23157(a)(1) (West Supp. 1995) (stating that license will be revoked for one year if driver refuses chemical test); MD. TRANSP. CODE ANN. § 16-205.1(b) (1993 & Supp. 1995) (setting authorized length of suspension at 45 days for first offenders whose blood alcohol concentration (BAC) when tested exceeded legal limit; 90 days for subsequent offenders who fail test; 120 days for first offenders who refuse to take test; and one year for subsequent offenders who refuse to take test); TEX. REV. CIV. STAT. ANN. art. 6687b-1, § 6 (West Supp. 1995) (amended 1995) (authorizing 60-day suspension for first offenders and 120-day suspensions for second offenders).

12. *See, e.g.*, CAL. VEH. CODE § 13.352.5(f) (West Supp. 1996) (providing for restricted license limited to travel in course of person's employment); MD. TRANSP. CODE ANN. § 16-205.1(n) (1993 & Supp. 1995) (providing that administrative body may modify suspension or issue restrictive license if licensee is required to drive vehicle in course of employment or if

administrative hearing to determine whether the officer had probable cause to detain the driver and conduct the chemical test.¹³ At the same time that the license is suspended, the driver is arrested pursuant to a separate statute and charged criminally with DUI, or as some states title this offense, driving while intoxicated (DWI).¹⁴

While there is evidence that these stricter drunk driving laws have been effective in reducing the number of alcohol-related traffic accidents,¹⁵ the future of ALS provisions is uncertain.¹⁶ Defendants

licensee has no alternative means of transportation and ability to earn living would be substantially impaired by suspension); S.C. CODE ANN. § 56-1-746(D)(1) (Law. Co-op. 1991 & Supp. 1995) (permitting special restricted driver's license for individual who is employed or enrolled in college or university at any time while license is suspended).

13. For an example of state statutes that allow such a hearing, see MD. TRANSP. CODE ANN. § 16-205.1 (1993 & Supp. 1995). The Maryland statute states:

If the person requests a hearing at the time of or within 10 days after the issuance of the order of suspension and surrenders the driver's license . . . the Administration shall set a hearing for a date within 30 days of the receipt of the request. . . .

After a hearing, the Administration shall suspend the driver's license . . . if:

1. The police officer who stopped or detained the person had reasonable grounds to believe the person was driving or attempting to drive while intoxicated, while under the influence of alcohol

Id. §§ 16-205.1(f)(5)(i), (8)(i); see also ARIZ. REV. STAT. ANN. §§ 28-691F (1989 & Supp. 1995) (allowing drivers whose licenses have been suspended 15 days to request hearing which must, in turn, be held within 30 days of request); N.H. REV. STAT. ANN. § 265:91-b (1993 & Supp. 1994) (setting 30-day time limit for defendants to request administrative hearing and 20-day subsequent time limit for administration to schedule that hearing); Lawrence Taylor, *Drunk Driving License Suspensions*, TRIAL, June 1995, at 80, 80 (explaining that in typical case driver can appeal suspension by requesting administrative hearing within 30 days).

14. See, e.g., *State v. Zerkel*, 900 P.2d 744, 758 (Alaska Ct. App. 1995) (holding that administrative revocation of defendants' licenses in consolidated case did not bar later prosecution for driving while intoxicated, refusing breath test, or both); *Davidson v. MacKinnon*, 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995) (finding that administrative license suspension is primarily for public safety, and thus does not violate Double Jeopardy Clause); *State v. Cassidy*, 662 A.2d 955, 958-59 (N.H. 1995) (holding that administrative license suspension is not criminal punishment and that subsequent prosecution for driving under influence is not barred by Double Jeopardy Clause); see also *infra* note 18 and accompanying text (discussing cases in which DUI defendants subjected to both administrative license suspension and criminal prosecution have challenged imposition of these sanctions under 5th Amendment Double Jeopardy Clause).

15. See Daniel T. Gilbert & John A. Stephen, *Is Suspension of Drivers' Licenses in Jeopardy?*, 29 PROSECUTOR, May/June 1995, at 24, 26 ("[A]dministrative license revocation laws have been associated with a 5-9 percent decline in alcohol related crashes in states that enact these laws compared to those that do not." (quoting testimony of Dr. Ralph Hingson, Boston University School of Public Health, National Highway Traffic Safety Administration Town Meeting on Alcohol Abuse and Highway Safety (Feb. 16, 1995))). One newspaper reporter discussed the effect that an absence of stricter drunk driving laws has had on the number of alcohol-related traffic accidents, stating:

[T]he percentage of fatal crashes involving drivers with a blood-alcohol content of 0.10 percent or higher has not fallen as fast in Virginia as in states that have implemented tougher license-revocation laws In 1982, about 27 percent of fatal crashes in both Virginia and Maryland involved such drivers. By last year, Virginia's percentage had fallen to 21.5, while Maryland's had dropped to 10.3.

Rajiv Chandrasekaran, *Many Va. Drivers Convicted of DWI Keep Licenses; Repeat Offenders Often Evade State's Revocation Procedures*, WASH. POST, Dec. 18, 1994, at B1, B4. The National Highway Traffic Safety Administration performed a study of the effects of administrative license suspension (ALS) and found that among 17 states implementing the law, there was a median six percent

have begun challenging the constitutionality of administrative license suspension provisions, claiming that these provisions, when imposed along with criminal sanctions for drunk driving, violate the Fifth Amendment's protection against double jeopardy.¹⁷ This trend began with the United States Supreme Court's decision last fall in *Department of Revenue v. Kurth Ranch*,¹⁸ a Montana drug case. In *Kurth Ranch*, the Court ruled that prosecuting an individual for selling marijuana and then imposing a civil marijuana tax on his property constituted double jeopardy because it subjected the defendant to multiple punishments for the same offense.¹⁹ Defense attorneys have applied the Supreme Court's ruling to DUI cases, using it, somewhat successfully, to convince lower state courts to dismiss criminal charges or reverse convictions on double jeopardy grounds.²⁰ Lower court judges in at least twenty-one states with administrative license suspension laws have accepted the double jeopardy argument, thereby dismissing hundreds of criminal drunk

decrease in crashes likely to be alcohol-related. *Drunk Driving & Liquor Liability*, *supra* note 2, at 8. The study found similar results regardless of whether ALS was the only mechanism in effect to combat drunk driving or whether it was part of a larger scheme. *Id.*

16. See Richard C. Reuben, *Double Jeopardy Claims Gaining*, A.B.A. J., June 1995, at 16 (noting vast split among courts as to whether civil sanctions such as license suspension are constitutional).

17. U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."). For examples of cases in which defendants have raised constitutional challenges under the Double Jeopardy Clause, see *State v. Hickham*, No. MV 94-618025, 1995 WL 243352, at *1 (Conn. Super. Ct. Apr. 20, 1995), *rev'd*, 235 Conn. 614 (1995); *State v. Schwander*, Nos. IN 94-08-1350 to 1354, 1995 WL 413248, at *1 (Del. Super. Ct. June 15, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223, 223 (Fla. Dist. Ct. App. 1995); *State v. Higa*, 897 P.2d 928, 930 (Haw. 1995); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790, 791 (La. 1992); *State v. Savard*, 659 A.2d 1265, 1266 (Me. 1995); *Johnson v. State*, 622 A.2d 199, 201 (Md. Ct. Spec. App. 1993); *State v. Hanson*, 532 N.W.2d 598, 599-600 (Minn. Ct. App. 1995); *State v. Young*, 530 N.W.2d 269, 272 (Neb. Ct. App. 1995); *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at *1 (Ohio Ct. App. June 27, 1995); *State v. Strong*, 605 A.2d 510, 511-12 (Vt. 1992). At the time of this writing, *State v. Hickham* was reversed by the Connecticut Supreme Court. See *State v. Hickham*, 235 Conn. 614, 628 (1995) (concluding that defendant's license suspension had legitimate remedial purpose and does not bar her criminal prosecution on double jeopardy grounds).

18. 114 S. Ct. 1937 (1994).

19. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994).

20. See, e.g., *State v. Hickham*, No. MV 94-618025, 1995 WL 243352, at *6 (Conn. Super. Ct. Apr. 20, 1995) (granting motion to dismiss charges where court determined that 90-day license suspension was "penalty and deterrent of great magnitude" and, therefore, violated Double Jeopardy Clause), *rev'd*, 235 Conn. 614 (1995); *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at *5 (Ohio Ct. App. June 27, 1995) (affirming trial court determination that 90-day license suspension was punishment for purposes of double jeopardy); *State v. Ackrouche*, 650 N.E.2d 535, 539 (Ohio Mun. 1995) (holding that ALS constitutes punishment imposed in separate proceeding for same conduct that is subject of criminal prosecution and therefore Double Jeopardy Clause bars criminal prosecution on that charge). But see *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (holding that Congress may impose both criminal and civil sanctions with respect to same act or omission).

driving charges.²¹ At least one state has even instructed police to stop confiscating drivers' licenses because of the high number of dismissals.²²

This Comment demonstrates that administrative license suspensions imposed along with criminal sanctions do not constitute double jeopardy because they are remedial, not punitive, in both purpose and effect. A remedial sanction, as opposed to a punitive sanction, is one that serves a purpose other than punishment or deterrence—either compensating the government for monetary loss or protecting society from some danger or wrong.²³ Remedial civil sanctions are not characterized as punishment and can be imposed in addition to criminal penalties without invoking the Double Jeopardy Clause's protection against multiple punishments.²⁴

Part I of this Comment discusses the history of double jeopardy protection, detailing a recent trilogy of cases in which the Supreme Court expanded double jeopardy protection to apply to parallel civil and criminal proceedings. Part II analyzes the double jeopardy issue in administrative license suspension cases in light of the standards set by the Supreme Court in this trilogy. This Part particularly discusses the requirement that a second sanction must be considered punitive in character in order to invoke the Double Jeopardy Clause, and argues that license suspensions fail to fit this characterization. Finally, Part III recommends that lower court judges refuse to accept the double jeopardy argument in administrative license suspension cases and continue to allow the use of license suspensions, in addition to criminal prosecutions, as a valuable remedial mechanism in protecting the public from the dangers posed by drunk drivers. This Part also recommends that the Supreme Court address the issue of double jeopardy and administrative license suspension in order to dispel

21. Leef Smith, *Va. Judges of Two Minds When Ruling on Driver's License Seizure Law*, WASH. POST, July 13, 1995, at B5.

22. See IDAHO CODE § 18-8002B (Supp. 1995) (stating that until July 1, 1997 no police officer should enforce ALS law); see also Taylor, *supra* note 13, at 80 (stating that recent flurry of trial court decisions have caused Idaho to end practice of confiscating licenses). The Connecticut legislature modified its DUI laws to avoid losing cases while appeals are pending. See Sangchompuphen, *supra* note 9, at B1, B4 (stating that Connecticut voted to suspend licenses of first-time offenders and to seek criminal prosecution only for repeat offenders or those who physically injure or kill other people); see also Telephone Interview with Susan Naide, Assistant State's Attorney, Connecticut Chief State's Attorney's Office (Apr. 9, 1996) (informing that Connecticut legislature, while *State v. Hickham* was pending on appeal, made license suspension discretionary, saving hundreds of criminal cases from being dismissed on double jeopardy grounds).

23. See *infra* text accompanying notes 56-69, 150-69 (detailing how various courts have defined "remedial" for double jeopardy purposes).

24. See *infra* Part I.B.1 (discussing Supreme Court's stance on whether parallel civil and criminal sanctions constitute double jeopardy violation).

some of the confusion resulting from its recent decisions in other areas concerning double jeopardy in civil and criminal proceedings.

I. BACKGROUND

A. *The Double Jeopardy Guarantee*

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"²⁵ This protection is not limited to capital felonies; it also applies to offenses for which lesser sanctions, such as imprisonment and monetary penalties, can be imposed.²⁶ The guarantee against double jeopardy consists of three separate constitutional protections.²⁷ It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.²⁸ In *Benton v. Maryland*,²⁹ the Court applied the protection against double jeopardy to the states through the Fourteenth Amendment, holding that the guarantee "represents a fundamental ideal in our constitutional heritage."³⁰

25. U.S. CONST. amend. V.

26. See William S. McAnich, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414-16 (1993) (stating that language chosen by Framers of Fifth Amendment provided broader scope of double jeopardy protection applying to all crimes than did English common law protection which covered only capital felonies).

27. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In *Pearce*, one of the defendants was sentenced to 10 years in prison, but after two and one half years his sentence was set aside because he had not been granted his right to counsel. *Id.* at 714. He was retried and sentenced to 25 years, but no credit was given for time already served. *Id.* The Court then held that the constitutional guarantee against multiple punishments for the same offense requires that punishment already exacted must be credited in a new conviction for the same offense. *Id.* at 719.

28. *Id.* (citations omitted).

29. 395 U.S. 784 (1969).

30. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The guarantee against double jeopardy originated in early Roman and canon law and can be traced from ancient times to seventeenth century English common law to colonial American jurisprudence. David S. Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 588 n.4 (1993). Professor Rudstein explains:

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a "universal maxim of the common law." It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but

Several underlying policy considerations provide justification for the Fifth Amendment protection against double jeopardy. The principle interest to be served is the need for finality of decisions.³¹ The Supreme Court has stated:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.³²

Implicit in the Court's statement is that by preserving finality, the Double Jeopardy Clause will protect other principles that constitute the foundation of our legal system, such as the belief that there is an "inherent injustice in punishing a person twice for the same offense,"³³ the prevention of government oppression,³⁴ and the need to protect an innocent defendant from wrongful conviction.³⁵ The Double Jeopardy Clause arguably encompasses additional protections, including "preserving the integrity of a jury acquittal"³⁶ and "preventing judges from administering penalties not authorized by the legislature."³⁷

These underlying policies act as the setting for the analysis of recent Supreme Court decisions expanding double jeopardy protection beyond criminal prosecution to preclude certain sanctions imposed in civil proceedings. It is also with these policies in mind

in the jurisprudence or constitutions of every State, as well as most foreign nations. *Id.* (citing *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting)); see also McAnich, *supra* note 26, at 414-18 (tracing history and policies of double jeopardy protection).

31. See Bryon L. Land, *Increased Double Jeopardy Protection for the Criminal Defendant*: Grady v. Corbin, 27 WILLAMETTE L. REV. 913, 915 (1991) (stating that need for final verdict is fundamental premise behind double jeopardy guarantee).

32. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

33. Rudstein, *supra* note 30, at 589.

34. See Land, *supra* note 31, at 916 (positing that principle of finality underlying double jeopardy is appropriate because potential exists for government to abuse criminal process).

35. See Paul R. Robinson, Comment, Grady v. Corbin: *Solidifying the Analysis of Double Jeopardy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 395, 407 (1991) (stating that repeated attempts at conviction result in likelihood that innocent party will be adjudicated guilty). "Forcing a defendant to 'run the gauntlet' a second time allows the government, with its superior resources, to possibly 'wear down a defendant.' While the defendant is being both economically and psychologically worn down, the government is improving and honing its trial strategy each successive conviction attempt." *Id.* (citations omitted).

36. *Id.* at 408.

37. *Id.*; see also *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 175 (1874) (stating that when court has imposed fine and imprisonment, where statute only conferred power to punish by fine or imprisonment, it has punished defendant twice for one offense).

that one must analyze the more specific issue of double jeopardy and administrative driver's license suspensions.

B. Double Jeopardy and Civil Proceedings

Defense attorneys rely on a trilogy of cases decided by the Supreme Court to argue that license suspensions violate the protection guaranteed in the Double Jeopardy Clause. In 1989, the Court decided *United States v. Halper*³⁸ and ruled for the first time that a civil penalty could be considered punishment for double jeopardy purposes.³⁹ Since *Halper*, the Court has decided two other cases, *Austin v. United States*⁴⁰ and *Department of Revenue v. Kurth Ranch*.⁴¹ In these cases, the Court has held that civil forfeiture proceedings and a civil drug tax violate double jeopardy when imposed along with criminal prosecution for the same offense.⁴² To accurately analyze whether license suspensions along with criminal prosecutions constitute multiple punishments for the same offense in violation of the Fifth Amendment, it is important to closely examine the precedent set by these three cases.

1. United States v. Halper

In *United States v. Halper*, the Supreme Court considered whether a civil penalty may constitute punishment under a double jeopardy analysis.⁴³ Under the particular facts of the case, the Court concluded that a "civil penalty authorized . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute [a] punishment," thereby violating double jeopardy when it is imposed along with a criminal sanction.⁴⁴

The respondent in *Halper* was the manager of a company that provided medical service for patients eligible for Medicare.⁴⁵ Halper submitted inflated claims for reimbursement to an insurance company that served as a fiscal intermediary for Medicare.⁴⁶ Because of this misrepresentation, the insurance company overpaid the medical

38. 490 U.S. 435 (1989).

39. *United States v. Halper*, 490 U.S. 435, 448-49 (1989).

40. 113 S. Ct. 2801 (1993).

41. 114 S. Ct. 1937 (1994).

42. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994) (characterizing Montana drug tax as punishment for double jeopardy purposes); *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993) (holding that Excessive Fines Clause of Eighth Amendment applies to civil forfeiture of property).

43. *Halper*, 490 U.S. at 436.

44. *Id.* at 442.

45. *Id.* at 437.

46. *Id.*

service company, resulting in a total loss to the Government of \$585.⁴⁷ Halper was convicted on sixty-five counts of violating the criminal statute prohibiting false claims, as well as on sixteen counts of mail fraud.⁴⁸ As a result, he was sentenced to imprisonment for two years and fined \$5,000.⁴⁹ Subsequently, the Government filed suit under the civil False Claims Act, seeking to recover the statutorily authorized penalty of \$130,000 (\$2000 for each of Halper's sixty-five false claims).⁵⁰ The district court refused to impose the \$130,000 penalty, stating that it bore no "rational relation" to the Government's \$585 actual loss or the cost of litigating and investigating the respondent's false claims.⁵¹ Because the civil penalty was so far removed from the remedial goal of compensating the Government, the district court held that it constituted punishment.⁵² The civil penalty, therefore, violated the Double Jeopardy Clause's protection against multiple punishments for the same offense.⁵³

The Supreme Court, on direct appeal from the district court, agreed.⁵⁴ In a unanimous decision, the Court concluded for the first time that the Double Jeopardy Clause forbids the imposition of a civil penalty on an individual who has already been punished for the same conduct in a criminal prosecution to the extent that the civil sanction is punitive, and not remedial, in character.⁵⁵

The Court's decision in *Halper* established the test for courts to follow when deciding cases involving parallel criminal and civil sanctions: if the civil sanction is punitive in nature, it violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.⁵⁶ In reaching its decision, the Court in *Halper* took steps to elaborate this test and set forth criteria for determining whether a sanction should be characterized as remedial or punitive.⁵⁷

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 438.

51. *United States v. Halper*, 660 F. Supp. 531, 533 (S.D.N.Y. 1987), *vacated and remanded*, 490 U.S. 435 (1989).

52. *Id.* at 533-34.

53. *Id.*

54. *Halper*, 490 U.S. at 452. The Court remanded the case to the district court, however, in order to allow the Government to contest the lower court's assessment of its losses. *Id.*

55. *Id.* at 447-49.

56. *Id.* at 448-49.

57. *See id.* at 449-50 (describing punishment as "overwhelmingly disproportionate" sanctions or subsequent proceedings that bear no rational relationship to goal of compensating Government).

Prior to *Halper*, courts recognized a bright line distinction between "criminal" and "civil" penalties,⁵⁸ and consequently, courts focused heavily on the labels that Congress attached to particular sanctions.⁵⁹ In *Halper*, the Government argued that the double jeopardy guarantee protects only against a second criminal penalty.⁶⁰ Relying on three previous Supreme Court cases,⁶¹ the Government further argued that criminal penalties are only imposed in criminal proceedings, while proceedings authorized by civil statutes are necessarily civil in nature.⁶² The Court rejected this argument, expressing its view that while recourse to statutory language is usually appropriate in determining the inherent nature of a proceeding, this inquiry was ill-suited to the analysis of a sanction under the Double Jeopardy Clause.⁶³ The Court reasoned that because the double jeopardy protection against multiple punishments for the same offense is "intrinsically personal,"⁶⁴ violation of this protection can be determined only by examining the nature of the actual sanction, not the nature of the proceeding authorizing the sanction.⁶⁵ Simply put, a court must look at the purposes actually served by the sanction, not at the label affixed to it.⁶⁶ In the Court's view, a sanction that is applied in an individual case to serve the traditional goals of

58. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1218 (9th Cir. 1994) (noting that courts once accorded great deference to whether sanctions were labeled "criminal" or "civil"), *cert. granted sub nom. United States v. Ursery*, 116 S. Ct. 762 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (concluding that forfeiture proceeding is "civil" proceeding to which Double Jeopardy Clause does not apply); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (stating that forfeiture of goods and payment of monetary penalties, in spite of their severity, have been upheld as "civil" sanctions and not subject to double jeopardy despite contention that they are essentially "criminal" in nature).

59. *\$405,089.23 U.S. Currency*, 33 F.3d at 1218. The Ninth Circuit stated: "If Congress indicated a preference that the proceeding be denominated 'civil' rather than 'criminal,' the Court would defer to that preference except in extraordinary circumstances." *Id.* (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)).

60. *Halper*, 490 U.S. at 441.

61. *Id.* (citing *Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956)); see *Rex Trailer Co.*, 350 U.S. at 151-52 (adhering strictly to legislative intent that remedies be "civil" to hold that there was no double jeopardy violation); *Hess*, 317 U.S. at 551-52 (referring to statutory language to hold that civil penalty was remedial in nature); *Helvering*, 303 U.S. at 402 (holding that because Congress intended that statute impose "civil" penalty, tax must be considered remedial, thus not invoking double jeopardy).

62. *Halper*, 490 U.S. at 441.

63. *Id.* at 447. The Court found that prior precedent did not "foreclose the possibility that in a particular case a civil penalty . . . may be so extreme . . . as to constitute punishment." *Id.* at 441-42.

64. *Id.* at 447.

65. *Id.* at 447 & n.7.

66. *Id.* at 447-48. "In making th[e] assessment [of whether a sanction constitutes punishment], the labels 'criminal' and 'civil' are not of paramount importance. . . . The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *Id.*

punishment, retribution, and deterrence, must be characterized as punishment and will invoke double jeopardy protection.⁶⁷

The Court enunciated the test for determining whether a civil sanction constitutes a punishment for purposes of double jeopardy: "[A] defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."⁶⁸ The Court emphasized that cases in which a civil sanction constitutes punishment will not arise often.⁶⁹ The Court also took deliberate steps to limit this holding to cases in which the civil penalty is so excessive in relation to a remedial goal that it crosses the line between remedy and punishment.⁷⁰

The Court in *Halper* explicitly stated that its decision would not preclude the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties if it chooses to do so in the same proceeding.⁷¹ In such instances, double jeopardy is not at issue.⁷² Instead, the relevant inquiry is whether the total punishment exceeds that authorized by the legislature.⁷³

After the Supreme Court's decision in *Halper* established the test for determining whether a civil sanction constitutes punishment for double jeopardy purposes, the Court decided two related cases that defendants also use to support double jeopardy arguments in license suspension cases.

2. *Austin v. United States*

Four years later in *Austin v. United States*, the Court revisited the issue of whether a sanction imposed in a civil proceeding could be considered punishment—this time for analysis under the Excessive

67. *Id.* at 448.

68. *Id.* at 448-49.

69. *Id.* at 449 (noting that it is "rare case" where sanctions will be overwhelmingly disproportionate to damage caused).

70. *Id.* The Court stated:

We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

Id.

71. *Id.* at 450.

72. *Id.*

73. *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)).

Fines Clause of the Eighth Amendment⁷⁴ rather than the Double Jeopardy Clause.⁷⁵ Although *Austin* arose under the Excessive Fines Clause, it employed the *Halper* criteria.⁷⁶ It is arguable, therefore, that a sanction that constitutes punishment for excessive fines purposes will also constitute punishment under the Fifth Amendment's Double Jeopardy Clause.⁷⁷

After the defendant in *Austin* pleaded guilty to one count of possessing cocaine,⁷⁸ the Government filed an *in rem* action against his mobile home and auto body shop under the federal forfeiture statute.⁷⁹ The Court held that this type of forfeiture was punitive in nature⁸⁰ and was therefore subject to the Excessive Fines Clause.⁸¹

In reaching this conclusion, the Court emphasized that *in rem* forfeitures have historically been understood as punishment.⁸² The

74. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

75. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

76. *Id.* at 2812. The Court in *Austin* stated that a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* (citing *Halper*, 490 U.S. at 448).

77. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1219 & n.8 (9th Cir. 1994) (finding that "if a forfeiture constitutes punishment under the *Halper* criteria, it constitutes 'punishment' for purposes of both [the Excessive Fines Clause and the Double Jeopardy Clause]"), *cert. granted sub nom.* *United States v. Ursery*, 116 S. Ct. 762 (1996); *United States v. McCaslin*, 863 F. Supp. 1299, 1302 (W.D. Wash. 1994) (finding that although *Austin* arose under Excessive Fines Clause, its holding "compels the conclusion" that forfeiture of real property used in connection with drug offense "is also a punishment under the Double Jeopardy Clause"). The Ninth Circuit announced in *\$405,089.23 U.S. Currency*:

To make it clear, we hold only that because the method of determining whether the forfeiture constitutes punishment is identical, the answer to the question whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment.

\$405,089.23 U.S. Currency, 33 F.3d at 1219 n.8.

78. *Austin*, 113 S. Ct. at 2803.

79. *Id.*; see also 21 U.S.C. §§ 881(a)(4), (a)(7) (1994). These sections provide:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

....
(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate to the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials and equipment used in their manufacture and distribution]

....
(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment

Id.

80. *Austin*, 113 S. Ct. at 2812.

81. *Id.*

82. *Id.* at 2810.

Court examined statutes in existence during the period in which the Eighth Amendment was framed, and found that forfeiture was listed alongside other provisions for punishment.⁸³ The Court further determined that the word "forfeit" was often used in place of the word "fine," which has historically been defined as a punitive measure.⁸⁴ The Court also cited several of its prior cases that held that statutory *in rem* forfeiture constituted punishment.⁸⁵

Next, the Court carefully examined the language and legislative history of the statutory provisions and found them to confirm the historical understanding of forfeiture as punitive in nature.⁸⁶ It maintained that the statute's "innocent owner" defense⁸⁷ serves to condition forfeiture on the culpability of the owner of the goods seized,⁸⁸ and reveals a legislative intent to punish only those committing drug offenses.⁸⁹ Additionally, the Court recognized that Congress, in adding subsection (a)(7) to § 881 of the federal forfeiture statute, described the forfeiture of property as "a powerful deterrent" needed in addition to criminal sanctions such as fine and imprisonment that do not provide sufficient deterrence or punishment to combat the drug trade.⁹⁰

Finally, the Court rejected the Government's argument that forfeitures under these statutory provisions were remedial because (1) "they remove the 'instruments' of the drug trade 'thereby protecting the community from the threat of continued drug dealing;'"⁹¹ and (2) "the forfeited assets serve to compensate the Government for the

83. *Id.* at 2806-08.

84. *Id.* at 2807-08. The Court noted that the Act of July 31, 1789, § 12, 1 Stat. 39, which states that an individual "shall forfeit and pay the sum of four hundred dollars for every offence," substituted "forfeit" for "fine." *Id.* at 2807. The Court also cited several dictionaries from the 1700s, all of which defined a forfeiture as a fine or vice versa. *Id.* at 2808 n.7.

85. *Id.* at 2808-10 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974) (finding that forfeiture statute furthers punitive and deterrent purposes)); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (associating forfeiture with punishment for guilty act); *Dobbins Distillery v. United States*, 96 U.S. 395, 401 (1878) (linking forfeiture to unlawful or wanton conduct); *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (describing forfeiture of goods as punishment)).

86. *Austin*, 113 S. Ct. at 2810.

87. See 21 U.S.C. §§ 881(a)(4)(C), (a)(7) (1994) (detailing "innocent owner" defense to federal forfeiture statute). Section 881(a)(4)(C) provides that "no conveyance shall be forfeited under this paragraph to the extent of an interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." *Id.* Similarly, § 881(a)(7) states that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.*

88. *Austin*, 113 S. Ct. at 2811.

89. *Id.*

90. *Id.*

91. *Id.* (quoting Government's argument from Brief for United States, at 32).

expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."⁹² The Court acknowledged that in a prior case, forfeiture of the contraband itself has been considered remedial because it prevents the public from being exposed to dangerous or illegal items.⁹³ It failed to find, however, that this holding applied to vehicles used to transport illegal substances and real property used to facilitate the trafficking of drugs.⁹⁴ The Court refused to categorize these items as "instruments" of the drug trade because there is nothing inherently criminal in possessing these items by themselves.⁹⁵

The Court also rejected the Government's characterization of forfeiture as remedial, stating that substantial variations in the value of goods seizable under the statute negate the possibility that forfeiture is merely intended to compensate society or the government for any damages sustained.⁹⁶ Forfeiture, therefore, serves no remedial purpose, and must be considered punishment that will invoke the protections of the Eighth Amendment.⁹⁷

The Court in *Austin* concluded by referring to the dicta in *Halper* rather than its holding.⁹⁸ The Court in *Austin* stated that even if forfeiture under the relevant statutory provisions serves some remedial purpose, it still must be considered punishment subject to the limitations of the Excessive Fines Clause. The Court reached this conclusion because, as evident from the historical understanding of forfeiture as punishment and the focus of the forfeiture statute on the culpability of the owner, it also serves to deter and to punish.⁹⁹

The *Austin* decision is significant to the administrative license suspension issue because it emphasizes that a sanction's underlying purpose, evident from the sanction's history and the legislative intent behind the statute authorizing the sanction, is crucial to its characterization as punitive or remedial. Lower courts often cite the last statement of the *Austin* opinion, despite its misinterpretation of the

92. *Id.*

93. *Id.* (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984)).

94. *Id.*

95. *Id.* (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)), which held that there is nothing criminal in possessing automobile used to transport illegal liquor).

96. *Id.* at 2812 (citing *United States v. Ward*, 448 U.S. 242, 254 (1980)).

97. *Id.*

98. *Id.* The Court in *Austin* stated: "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

99. *Id.*

Halper holding, to argue that a civil sanction must be "solely" remedial to avoid invoking the Double Jeopardy Clause.¹⁰⁰

3. Department of Revenue v. Kurth Ranch

The Court's most recent pronouncement on double jeopardy, *Department of Revenue v. Kurth Ranch*,¹⁰¹ however, makes no mention of the solely remedial requirement. It instead cites, as the existing rule, *Halper's* holding, which requires only that a sanction "fairly be characterized as remedial" to avoid invoking the double jeopardy guarantee.¹⁰² In *Kurth Ranch*, six members of an extended family were convicted in a criminal proceeding of cultivating and selling marijuana.¹⁰³ The court sentenced two of the respondents to prison and conferred suspended sentences on the others.¹⁰⁴ The county attorney also instituted civil forfeiture proceedings, obtaining \$18,016.83 in cash, along with equipment used in the drug operation.¹⁰⁵ In addition, the petitioner revenue department attempted to collect from the respondents a tax on the possession of marijuana pursuant to Montana's Dangerous Drug Tax Act.¹⁰⁶ According to the state's calculations, the respondents' tax liability totaled almost \$900,000.¹⁰⁷

The Dangerous Drug Tax Act provides that the revenue collected should be allocated to "youth evaluation" and "chemical abuse" programs and to "enforce the drug laws."¹⁰⁸ After conflicting

100. See, e.g., *State v. Zerkel*, 900 P.2d 744, 748 (Alaska Ct. App. 1995) (detailing defendant's argument that because license suspension has deterrent purpose and effect in addition to remedial purpose, it must be characterized as punishment); *State v. Hickham*, No. MV 94-618025, 1995 WL 243352, at *2 (Conn. Super. Ct. Apr. 20, 1995) (stating that *Austin* decision made it clear that double jeopardy question rests on whether statute is solely remedial), *rev'd*, 235 Conn. 614 (1995); *State v. Ackrouche*, 650 N.E.2d 535, 538-39 (Ohio Mun. 1995) (citing *Austin* and using solely remedial requirement to hold that Administrative License Suspension is punishment and violates double jeopardy); see also Taylor, *supra* note 13, at 82 (arguing that Court reaffirmed solely remedial standard in *Austin*).

101. 114 S. Ct. 1937 (1994).

102. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994).

103. *Id.* at 1942.

104. *Id.*

105. *Id.*

106. *Id.*; see MONT. CODE ANN. §§ 15-25-101 to 123 (1987) (repealed 1995) (setting forth Dangerous Drug Tax Act).

107. *Kurth Ranch*, 114 S. Ct. at 1941. Montana law entitled the petitioner to assess the tax at a rate of 10% of the market value of the drugs, or \$100 per ounce of marijuana and \$250 per ounce of hashish, whichever was greater. *Id.*

108. *Id.* (citing MONT. CODE ANN. §§ 15-25-121, 15-25-122 (1987) (repealed 1995)). In *Kurth Ranch*, the Court stated:

According to the Act's preamble, the Montana Legislature recognizes that the use of dangerous drugs is not acceptable, but concludes that because the manufacturing and sale of such drugs has an economic impact on the State, "it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts

rulings from lower federal courts and the Montana Supreme Court, the Supreme Court granted certiorari to determine whether the tax violated the Double Jeopardy Clause.¹⁰⁹

In rendering its decision, the Supreme Court first rejected the lower federal courts' use of *Halper* to answer the issue posed in *Kurth Ranch*.¹¹⁰ The Court reasoned that tax statutes are enacted to serve the nonpunitive purpose of raising revenue, a purpose that is quite different from the "punitive" purposes typically served by civil penalties, such as the one at issue in *Halper*.¹¹¹ Because of this different remedial goal, the Court refused to employ *Halper's* method of balancing the penalty assessed with the costs incurred by the government in order to determine whether the sanction was remedial or punitive.¹¹² The Court recognized that even though taxes are usually intended to serve a legitimate remedial purpose, at some point, they can become punitive in character.¹¹³ The Court then set out to determine whether the specific tax at issue in *Kurth Ranch* crossed the line between remedy and punishment.¹¹⁴

The Court began its analysis by admitting that the statute's tax assessment was extraordinarily high, revealing the legislature's

directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana."

Id. at 1941 n.4 (quoting 1987 MONT. LAWS 563).

109. *Id.* at 1944. The Kurth family filed for bankruptcy shortly after the tax was assessed. *Id.* at 1943. The Bankruptcy Court decided that the proper tax amount was only \$181,000, but stated that even this lower tax assessment violated double jeopardy. *Id.* Relying on *Halper*, the Bankruptcy Court rejected the Government's argument that the tax was remedial because the legislature intended it to recover law enforcement costs, stating that the Department of Revenue "failed to introduce one scintilla of evidence as to cost of the above government programs or costs of law enforcement to combat illegal drug activity." *Id.* (citing *Kurth Ranch v. Department of Revenue*, 145 B.R. 61, 74 (Bankr. D. Mont. 1990)). The Bankruptcy Court noted that the tax assessed was equal to eight times the product's market value, evidence that it was punitive in nature. *Id.* at 1943 n.12. The District Court and the Court of Appeals both affirmed the ruling of the Bankruptcy Court, relying on *Halper* and finding that the tax constituted an impermissible second punishment for the same criminal conduct. *Id.* at 1943-44 (citing *In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1993), *aff'g* No. CV-90-084-PGH, 1991 WL 365065 (D. Mont. Apr. 23, 1991) (holding that drug tax punishes defendants second time for same offense violating double jeopardy)). While this case was pending on appeal, the Montana Supreme Court decided a related case, in which it concluded that the Dangerous Drug Tax Act did not violate double jeopardy because it had a legitimate remedial purpose and was not excessive. *Id.* (citing *Sorensen v. State Dep't of Revenue*, P.2d 29, 33 (Mont. 1992)).

110. *Id.* at 1944. "In *Halper* we considered whether and under what circumstances a civil penalty may constitute 'punishment' for the purpose of double jeopardy analysis. Our answer to that question does not decide the different question whether Montana's tax should be characterized as punishment." *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 436 (1989)).

111. *Id.* at 1946.

112. *Id.* at 1948.

113. *Id.* at 1946.

114. *Id.* at 1946-47.

intention to deter people from possessing marijuana.¹¹⁵ The Court stated, however, that a tax cannot automatically be characterized as punitive simply because of its high rate or obvious deterrent purpose.¹¹⁶ Still, the Court found that these two characteristics, along with several additional features of the Montana statute, distinguished it from most tax assessments and indicated that it was punitive in character.¹¹⁷ The Court noted these features, stating that the statute authorizes the tax only when a crime is committed,¹¹⁸ and that the tax is exacted only after the taxpayer has been arrested for this criminal conduct.¹¹⁹ Furthermore, the Court asserted that despite the legislature's characterization of the Act as a property tax, it exacts payment on an item that the government has already taken from the taxpayer's possession.¹²⁰

The Court also differentiated between taxes on illegal activities and those assessed on legal, but disfavored activities, for the purpose of deterring the activity and simultaneously raising revenue.¹²¹ The Court stated:

[B]y imposing cigarette taxes . . . a government wants to discourage smoking. But because the product's benefits [i.e., employment, revenue] are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.¹²²

The Court concluded that, because of these distinguishing features, the tax in question departed so far from normal revenue laws as to become a form of punishment under double jeopardy analysis.¹²³

115. *Id.*

116. *Id.* at 1946. Showing support for this assertion, the Court recognized that exactions on other items, such as alcohol and cigarettes, have an obvious deterrent purpose and may be quite steep, yet these taxes are presumed valid. *Id.*

117. *Id.*

118. *Id.* at 1947.

119. *Id.*

120. *Id.* at 1948. The Court characterized this tax as unmistakably punitive in character, because unlike normal taxes to raise revenue, it is imposed on criminals and no others. *Id.*

121. *Id.* at 1947.

122. *Id.*

123. *Id.* at 1948. In reaching this conclusion, the Court cited a long history of court rulings that held that drug taxes, in general, have a punitive and deterrent character. *Id.* at 1948 n.24 (citing *United States v. Sanchez*, 340 U.S. 42, 45-46 (1950); *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525, 531 (Ill. 1992); *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986); and *Sims v. State Tax Comm'n*, 841 P.2d 6, 13 (Utah 1992)).

As a result, it affirmed the judgment of the court of appeals and held the tax unconstitutional as applied to the defendants.¹²⁴

Halper, Austin, and Kurth Ranch set forth the precedent against which double jeopardy challenges of administrative license suspensions must be examined. These decisions are crucial because they articulate the test for determining whether civil sanctions imposed along with criminal sanctions, in a separate proceeding for the same offense, constitute punishment in violation of the Double Jeopardy Clause. An examination of the ALS issue under this test must result in the conclusion that license suspensions are not punishment because they are remedial in both purpose and effect.

II. DOUBLE JEOPARDY AND ALS

In ALS cases, defendants argue that administrative license suspensions imposed along with criminal sanctions invoke the Fifth Amendment's protection against "multiple punishments for the same offense," as do other sanctions imposed in parallel civil and criminal proceedings.¹²⁵ Although the question of punishment is the crucial issue, proponents of ALS have attempted, with little success, to persuade courts to dismiss constitutional challenges to license suspensions based on an alternative argument. The crux of this alternative argument is that these sanctions are imposed as part of the same proceeding,¹²⁶ which is permissible under the Double Jeopardy Clause.¹²⁷ Even if this arguments fails, however, license suspensions do not invoke double jeopardy protection because they cannot be characterized as punishment.¹²⁸

124. *Id.* at 1949.

125. *United States v. Halper*, 490 U.S. 435, 440 (1989).

126. *See State v. Baker*, 650 N.E.2d 1376, 1382 (Ohio Ct. App. 1995) (holding that although criminal and civil sanctions at issue may occasionally demand separate hearings, both are imposed in same proceeding and do not invoke double jeopardy). By contrast, the vast majority of courts either address this issue without much analysis, and simply concede that the sanctions involved are imposed in separate proceedings, or fail to address it at all. *See, e.g., Davidson v. MacKinnon*, 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995); *State v. Sims*, No. CA94-12, 1995 WL 493291, at *2 (Ohio Ct. App. Aug. 21, 1995); *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at *3-4 (Ohio Ct. App. June 27, 1995).

127. *See Halper*, 490 U.S. at 450. "Nor does th[is] decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." *Id.* While in certain circumstances multiple punishments are permissible, they are barred if imposed in separate proceedings. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

128. Prosecutors sometimes also argue in the alternative that license suspension and subsequent prosecution are not sanctioning the same offense. Two sanctions for separate offenses, they contend, are permissible under the Double Jeopardy Clause regardless of whether both sanctions constitute punishment. *See Jesselyn McCurdy, Talking Points: Double Jeopardy/Administrative License Revocation*, PROSECUTOR, June 1995, at 21, 23 (arguing that criminal DUI and license suspensions are not imposed for same offense because elements that state must

A. *ALS and DUI as Separate Proceedings*

Recent decisions by the Second¹²⁹ and Eleventh¹³⁰ Circuits have considered whether parallel criminal and civil sanctions should be imposed in the same or separate proceedings. In these cases, both courts held that because the forfeiture actions and criminal prosecutions involved took place at approximately the same time and involved the same criminal violations, they were part of a "single, coordinated prosecution"¹³¹ and did not invoke double jeopardy protection.¹³²

The Ninth Circuit, however, in *United States v. \$405,089.23 U.S. Currency*, rejected this rationale as contradictory to both common sense and Supreme Court precedent.¹³³ The Court noted that the civil forfeiture action and the criminal prosecution were instituted and tried at different times before different fact finders, presided over by different judges, and resolved by separate judgments.¹³⁴ Based on these factors, it held that these two actions constituted separate proceedings.¹³⁵ According to the Ninth Circuit, a forfeiture case could not be considered the same proceeding as a criminal prosecution unless the two were brought in the same indictment at the same time.¹³⁶

prove to impose them are different).

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court stated, "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304 (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)). This inquiry is one in which close examination of statutory provisions is critical. Because license suspensions exist in 38 states, each constructing the relevant provisions differently, the inquiry is beyond the scope of this Comment. See *supra* note 9 (listing state statutory provisions mandating ALS). Most ALS decisions, in fact, have failed to address the issue, simply assuming that sanctions are imposed for the same offense and focusing on the issue of punishment. See, e.g., *State v. Schwander*, No. IN94-08-1350, 1995 WL 413248, at *4 (Del. Super. Ct. June 15, 1995) (finding that facts did not support determination that severity of tax constituted punishment for double jeopardy purposes); *State v. Hanson*, 532 N.W.2d 598, 601-02 (Minn. Ct. App. 1995) (determining that license revocation is not punishment for purposes of double jeopardy); *State v. Strong*, 605 A.2d 510, 514 (Vt. 1992) (holding that license suspension is not criminal punishment invoking protection from double jeopardy).

129. *United States v. Millan*, 2 F.3d 17 (2d Cir.), *cert. denied sub nom. Bottone v. United States*, 114 S. Ct. 922 (1993).

130. *United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994).

131. *Id.* at 1499; *Millan*, 2 F.3d at 21.

132. *One Single Family Residence*, 13 F.3d at 1499; *Millan*, 2 F.3d at 21.

133. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994), *cert. granted sub nom. United States v. Urserly*, 116 S. Ct. 762 (1996).

134. *Id.*

135. *Id.*

136. *Id.* at 1216-17. Attacking the claimants on two separate fronts gives the Government a significant advantage. *Id.* at 1217. If the defendant is convicted on criminal charges, then the Government can obtain summary judgment as to the civil forfeiture, but even if the defendant is acquitted, the Government still may be able to seek forfeiture because of the more lenient

License suspensions are, arguably, part of a "single, coordinated prosecution"¹³⁷ imposed in the same proceeding as criminal DUI sanctions.¹³⁸ Both the license suspension and DUI sanction result from a single arrest.¹³⁹ The requisite forms for each are filed together and are reviewed together at the defendant's initial appearance, and both matters are docketed together for consideration at a pretrial conference.¹⁴⁰ These factors have led at least one court to rule that these sanctions are in fact imposed as part of the same proceeding and do not invoke double jeopardy.¹⁴¹

Other factors in license suspension cases, however, lead to the concession that these sanctions are, in fact, imposed in two separate proceedings. For example, an administrative license suspension instituted for violation of Maryland's statute,¹⁴² is made without determination of whether an individual has violated criminal statutes.¹⁴³ While an appeal procedure is allowed, that procedure can only be classified as an administrative action independent of the criminal action for the following reasons: (1) the appeal is heard separately of the criminal charges; (2) the burden of proof is placed upon the licensee rather than upon the state; and (3) otherwise impermissible evidence which would be excluded in a criminal proceeding becomes *prima facie* evidence against the individual under suspension.¹⁴⁴ As the majority of courts have concluded,¹⁴⁵ and as one has expressly stated, the timing and manner of the administrative procedure demonstrate that it is designed to be

standards in civil matters. *Id.* The Ninth Circuit expressed concern that this strategy used by prosecutors will provide the government, with its superior resources, a greater opportunity to force an individual to defend himself against the same charges more than once. *Id.* Based on this concern, the court believed that a double jeopardy violation existed in this case and was unwilling to mask the reality of the violation by labeling the two proceedings a "single coordinated prosecution." *Id.*

137. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir.), *cert. denied sub nom. Bottone v. United States*, 114 S. Ct. 922 (1993).

138. See *State v. Baker*, 650 N.E.2d 1376, 1383 (Ohio Mun. Ct. 1995) (describing how single arrest triggers both sanctions); *State v. Uncapher*, 70 Ohio Misc. 2d 4, 16 (Mun. Ct. 1995) (discussing how current version of statute has immediate suspension of license at time of DUI, constituting one proceeding).

139. *Baker*, 650 N.E.2d at 1383.

140. *Id.*

141. *Id.*

142. MD. TRANSP. CODE ANN. § 16-205.1 (1993 & Supp. 1995).

143. *Id.*

144. *Id.*

145. See, e.g., *Marzolf v. Superior Court*, No. 1 CA-SA 95-0245, 1995 WL 686671, at * 1 (Ariz. Ct. App. Nov. 21, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995); *People v. Devorak*, 658 N.E. 2d 869, 876 (Ill. App. Ct. 1995).

separate from the criminal prosecution.¹⁴⁶ Accordingly, "[e]ven though some courts may adjudicate the civil administrative and criminal issues in a single courtroom proceeding, 'the law clearly characterizes the two proceedings as separate and independent.'"¹⁴⁷

B. ALS: Punishment or Remedy

The test established in *Halper* for determining whether a civil penalty constitutes punishment, requires an assessment of the character of and purposes served by the sanction, rather than of the nature of the proceedings.¹⁴⁸ Defendants in DUI cases rely on the language in *Halper*, *Austin*, and *Kurth Ranch* to argue that ALS provisions constitute punishment in violation of the Double Jeopardy Clause because they serve retributive and deterrent functions and are not of the remedial nature envisioned by the Supreme Court when it decided these cases.¹⁴⁹ This argument, however, strictly relies on the language of these cases, and does not consider the specific context of the ALS argument. Defendants relying on this argument are therefore making misplaced analogies to support their claims. A close analysis by state courts of the ALS issue reveals that license suspensions were not intended as and, consequently, do not operate as "punishment."¹⁵⁰

1. ALS as remedial in purpose

Administrative license suspensions serve a goal quite different than the civil sanctions in *Halper*, *Austin*, and *Kurth Ranch*.¹⁵¹ Yet, such

146. *State v. Sims*, No. CA94-12, 1995 WL 493291, at *3 (Ohio Dist. Ct. App. Aug. 21, 1995) (citing *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at * 5 (Ohio Ct. App. June 27, 1995); *Ohio v. Ackrouche*, 650 N.E.2d 535, 537 (Ohio Mun. Ct. 1995)).

147. *Id.* (quoting *Cleveland v. Miller*, 646 N.E.2d 1213, 1215 (Ohio Mun. Ct. 1995)).

148. *United States v. Halper*, 490 U.S. 435, 446-52 (1989).

149. See *supra* text accompanying notes 98-99 (discussing Court's reliance in *Austin* on dicta from *Halper* and how statutory provisions served punitive function rather than remedial function).

150. For cases holding that a license revocation does not constitute a punishment for double jeopardy purposes, see *State v. Zerkel*, 900 P.2d 744, 753 (Alaska Ct. App. 1995); *Baldwin v. Department of Motor Vehicles*, 42 Cal. Rptr. 2d 422, 427 (Ct. App. June 23, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223, 223-24 (Fla. Dist. Ct. App. 1995); *State v. Higa*, No. 17737, 1995 WL 297073, at *5 (Haw. May 17, 1995); *State v. Savard*, 659 A.2d 1265, 1267 (Me. 1995); *State v. Hanson*, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995). See also Daniel T. Gilbert, *Is Suspension of Drivers' Licenses in Jeopardy?*, PROSECUTOR, June 1995, at 24 (discussing how ALS is not punishment); *McCurdy*, *supra* note 127, at 21 (detailing how ALS is remedial, not punitive).

151. See Gilbert, *supra* note 150, at 25 (arguing that license suspension's purpose is to protect public safety). Many ALS cases state this explicitly. See, e.g., *Butler v. Department of Safety & Corrections*, 609 So. 2d 790, 796 (La. 1992); *Hanson*, 532 N.W.2d at 601; *State v. Sims*, 1995 WL 493291, at *6 (Ohio Dist. Ct. App. Aug. 21, 1995); *State v. Strong*, 605 A.2d 510, 513 (Vt. 1992). Compare these cases with *Halper*, *Kurth Ranch*, and *Austin*, *supra* Part I.B (stating that alleged purposes of penalty, tax, and forfeiture were, respectively, to compensate government for loss,

suspensions still meet *Halper's* requirement of being "fairly characterized as remedial."¹⁵² As a result, these ALSs do not invoke double jeopardy protection.¹⁵³ Evidence to support this characterization lies in (1) the purpose and intent of state legislatures in enacting ALS statutes,¹⁵⁴ (2) the fact that ALS statutes have been historically viewed as remedial, because they revoke a privilege voluntarily granted and not a constitutional right,¹⁵⁵ and (3) the fact that *Halper* does not require that statutes be solely remedial.¹⁵⁶

a. Legislative intent behind ALS

In enacting ALS statutes, state legislatures intended to enhance public safety by providing efficient means of removing potentially dangerous drivers from the road.¹⁵⁷ Defendants note that the Supreme Court in *Halper* worded the test distinguishing a remedial sanction from a punitive sanction by asking whether the civil penalty sought bears any "rational relation to the goal of compensating the Government for its loss."¹⁵⁸ They argue that the government rarely suffers monetary loss because of defendants' chemical test results, and that, even when monetary loss is suffered, license suspension does not adequately compensate for that loss.¹⁵⁹ Defendants claim that license suspensions, therefore, cannot be considered remedial in

to raise revenue, and to reimburse government for costs spent investigating and combatting crime).

152. *Halper*, 490 U.S. at 448-49.

153. *Id.*

154. See *infra* notes 156-69 and accompanying text (analyzing legislative intent behind ALS).

155. See *infra* notes 170-79 and accompanying text (discussing historical views of ALS).

156. See *infra* notes 180-90 and accompanying text (providing overview of *Halper's* requirements).

157. See *Davidson v. MacKinnon*, 656 So. 2d 223, 225 (Fla. App. 1995) ("[T]he administrative remedy of suspending a driver's license . . . continues to be primarily for the purpose of enhancing safe driving on public highways."); *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995) (maintaining that legislature intended suspension to provide public with safe roads); *State v. Cassady*, 662 A.2d 955, 958 (N.H. 1995) (emphasizing that primary goal of ALS procedure is to remove irresponsible drivers from state highways as quickly as possible to protect public); see also *Johnson v. State*, 622 A.2d 199, 203 (Md. Ct. Spec. App. 1993) (discussing legislative history of ALS bill for drunk drivers). A report behind the bill proposing what has become MD. TRANSP. CODE ANN. § 16-205.1, clearly indicates this purpose. The report states:

This bill would assure immediate and certain sanctions by the Administration. Speedy [A]dministrative sanctions would help the offender to recognize the cause and effect relationship between the offense and the sanction which would otherwise be weakened by lengthy delays in the court processes. It takes drunk drivers off the roads and it would save lives . . . [Q]uick Administrative Hearings could identify an individual who may be a problem drinker and result in alcohol treatments sooner than the delays caused by the court trial e.g. jury prayers, continuances.

Id.

158. *United States v. Halper*, 490 U.S. 435, 449 (1989).

159. See *State v. Zerkel*, 900 P.2d 744, 748 (Alaska Ct. App. 1995) (detailing defendant's argument against license revocation).

accordance with the *Halper* criteria, and thus violate the Double Jeopardy Clause when invoked with criminal prosecution.¹⁶⁰

By strictly adhering to the language in *Halper*, *Austin*, and *Kurth Ranch*, defendants are interpreting the term "remedial" too narrowly. As one court has stated, a "remedy" is any mechanism that corrects a wrong; the term should not be limited to apply only to compensation for monetary loss.¹⁶¹ By this definition, statutory provisions intending to remove a possibly dangerous driver from the highway serve a remedial purpose—that of removing the evil of dangerous, intoxicated drivers—and courts have consistently recognized this characterization as being accurate.¹⁶² According to one court:

[t]he revocation of a driver's license is part of a civil/regulatory scheme that serves a vastly different purpose from criminal punishment. Our State's interest is to foster safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior, which interest is grossly different from the criminal penalties that are available in a driving while under the influence prosecution.¹⁶³

While this purpose may "not [be] remedial in the sense meant by the *Halper* decision,"¹⁶⁴ because it does not serve to compensate for monetary loss, it is well within the broader definition of "remedy," and therefore license suspensions should not be considered "punishment" under the double jeopardy analysis.¹⁶⁵

Moreover, the legislative intent of license suspensions is not focused on the culpability of the DUI offender, unlike the forfeiture in *Austin* or the marijuana tax in *Kurth Ranch*. License suspension statutes include no provisions analogous to the "innocent owner defense" of civil forfeiture statutes,¹⁶⁶ and are not conditioned on the commis-

160. *Id.*

161. *Id.* (citing WEBSTER'S NEW WORLD DICTIONARY 1135 (3d College ed. 1988)); see also BLACK'S LAW DICTIONARY 1293 (6th ed. 1990) (defining "remedial laws" as "those that [are] designed to . . . introduce regulations conducive to the public good").

162. See, e.g., *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790, 795 (La. 1992) (stating that license suspension is remedial measure); *State v. Fitzgerald*, 622 A.2d 1245, 1248 (N.H. 1993) (holding that license suspension effected for purpose of removing irresponsible drivers from highways is not criminal punishment, but is remedial in nature); *State v. Strong*, 605 A.2d 510, 513 (Vt. 1992) (holding that ALS has rational remedial purpose of protecting public safety by removing drunk drivers from roads).

163. *State v. Maze*, 825 P.2d 1169, 1174 (Kan. Ct. App. 1992); see also *Strong*, 605 A.2d at 514 (declaring that summary suspension scheme serves rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from roadways).

164. *Ellis v. Pierce*, 282 Cal. Rptr. 93, 95 (Ct. App. 1991).

165. *Id.*

166. See *supra* text accompanying notes 87-89 (discussing significance of "innocent owner" defense).

sion of a crime.¹⁶⁷ The fact that license suspensions are imposed on those who refuse to take a chemical test, and not just on those who fail and will probably be convicted of DUI, is indicative of the fact that their purpose truly is the remedial one of removing possibly dangerous drivers from the highway.¹⁶⁸

License suspensions can again be distinguished from the tax in *Kurth Ranch* because, unlike the alleged revenue-raising purpose of that tax, the purpose served by ALS cannot "be equally well served by increasing the [length of suspension] imposed upon conviction."¹⁶⁹ The purpose of ALS is to remove drivers from the highways quickly while awaiting determination of pending criminal charges.¹⁷⁰ If states had to wait until conviction to impose license suspensions, this safety-oriented purpose would not be served and the danger to the public would not be alleviated.

The legislative intent behind license suspensions supports the assertion that they should be characterized as "remedial" for double jeopardy purposes. Justification for this characterization is further bolstered by the fact that suspensions have historically been viewed as remedial.

b. History of ALS as remedial

Suspension of an individual's license to drive has not historically been considered punishment because a license is a privilege granted voluntarily and not a constitutional right conferred automatically.¹⁷¹ The revocation of such a privilege is a "traditional attribute of a remedial sanction."¹⁷² Thus, any analogy comparing license suspensions to forfeitures is misplaced. The forfeiture of property, imposed

167. See *supra* text accompanying notes 112-23 (discussing marijuana tax that is conditioned on commission of crime).

168. See *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995) ("This court has . . . repeatedly observed that the license suspension of habitual offenders is designed not to punish the offender but to protect the public."); *State v. Young*, 530 N.W.2d 269, 278 (Neb. 1995) (asserting that "purpose of license revocation is to protect the public, and not to punish the licensee"); *Strong*, 605 A.2d at 514 (stating that "a 'bright line' has developed because the non-punitive purpose of the license suspension is so clear and compelling").

169. See *supra* text accompanying note 121 (observing that increasing fine could equally serve same purpose as revenue-raising tax).

170. See *supra* note 157 (discussing rationale behind ALS).

171. See *Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting that constitutional restraints limit state power to terminate rights and privileges); *Johnson v. State*, 622 A.2d 199, 205 (Md. 1993) (maintaining that driving is not right but privilege); *State v. Young* 530 N.W. 2d 269, 278 (Neb. Ct. App. 1995) (acknowledging that license is privilege, issued with understanding that state may revoke it for cause); *Strong*, 605 A.2d at 513 (observing that while sanction arguably involves affirmative restraint, it is revocation of voluntarily granted privilege (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938))); see also *McCurdy*, *supra* note 128, at 23 (asserting that driver's license is privilege, not constitutional right).

172. *State v. Zerkel*, 900 P.2d 744, 758 (Alaska Ct. App. 1995).

as a penalty for crime, constitutes punishment for double jeopardy purposes.¹⁷³ A driver's license is not, however, a form of property. Unlike property, a license cannot be purchased, sold, transferred, or inherited, but rather is "a formal permission to do something; especially authorization by law to do some specific thing."¹⁷⁴

A driver's license stands as evidence of the government's authorization to the individual to perform the activity of driving a motor vehicle. As with many other activities, the government regulates the right to drive subject to the condition that the licensee will perform the activity competently and safely.¹⁷⁵ In general, systems of government regulation are based on the rationale that the public is exposed to an unacceptable risk of harm if a licensee fails to act in a proper manner.¹⁷⁶ Under these systems of regulation, the government has the power to revoke a license to protect the public from this risk of harm if a license-holder demonstrates that he or she is not fit to continue the licensed activity.¹⁷⁷ A better analogy exists in comparing license suspensions to injunctions or restraining orders, which also serve to prevent harm to the public and traditionally have been considered remedial, than to forfeitures, which traditionally have been viewed as punitive.¹⁷⁸

Furthermore, the system of licensing and regulating drivers is analogous to the issuance and regulation of licenses to practice professions, such as law or medicine.¹⁷⁹ In both instances, the

173. *Id.* at 748.

174. *Id.* at 752.

175. *Id.* at 753.

176. *Id.*

177. *Id.*

178. *Id.* If, however, defense attorneys persist in claiming that license suspensions are analogous to forfeitures of property, they still cannot prevail on the issue of punishment. Some types of forfeiture are not punitive. As the Court in *Austin* recognized, "forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." *Austin*, 113 S. Ct. 2801, 2811 (1993) (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984)). License suspensions, if anything, are analogous to forfeiture of contraband. Like the seizure of drugs, the suspension of a license removes a dangerous instrumentality—a potentially hazardous driver—from a position in which he or she can do harm to the public.

179. *State v. Zerkel*, 900 P.2d 744, 753 (Alaska Ct. App. 1995); see also *Ellis v. Pierce*, 230 Cal. Rptr. 93, 94 (Ct. App. 1991).

The suspension of a driver's license after refusal to take a chemical test is closely analogous to the disbarment or suspension of an attorney after a conviction of a crime involving moral turpitude. The attorney's disbarment or suspension does not constitute a second punishment in violation of the Double Jeopardy Clause . . . [T]he purpose of disbarment or suspension is not to punish, but to protect the public from unfit lawyers.

Id. at 95; see Gilbert, *supra* note 150, at 26 (arguing that states would be hampered in prosecution or civil suspension of those who hold professional license if suspension of administrative driver's licenses are found to violate double jeopardy); Rudstein, *supra* note 30,

government can revoke a license if the licensee fails to adhere to certain conditions and act responsibly. Courts have consistently recognized that suspension of professional licenses, even if the conduct leading to the suspension is potentially criminal, is remedial because it is imposed to protect the public from unfit practitioners.¹⁸⁰ Because driver's licenses are so closely related to professional licenses, in both purpose and method of regulation, they should also be recognized by courts as remedial in nature and should be held not to invoke double jeopardy protection.

c. ALS statutes not required to be "solely" remedial

It is evident from the legislative intent and the historical view of license suspensions, that ALS statutes serve a remedial purpose. Defendants in ALS cases argue, however, that this remedial purpose is not enough to support the characterization of license suspensions as remedial for double jeopardy purposes because they are also intended to serve a deterrent purpose,¹⁸¹ one of the "goals of punishment" under *Halper*.¹⁸² The following language, crucial to the *Austin* decision, lends support to this argument:

Retribution and deterrence are not legitimate nonpunitive governmental objectives. From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.¹⁸³

at 612 (making same argument for constitutionality of professional licenses as for driver's licenses).

180. See *Emory v. Texas State Bd. of Medical Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984) (maintaining that imposition of both criminal and civil sanctions does not violate double jeopardy); *Schillerstrom v. State*, 885 P.2d 156, 158 (Ariz. 1994) (holding that revocation of chiropractor's license did not violate double jeopardy when imposed after criminal conviction for fraudulent behavior because it served remedial purpose of maintaining professional standards of conduct for protection of public); *Moser v. Richmond Bd. of Comm'rs*, 428 S.E.2d 71, 72-73 (Ga. 1993) (upholding suspension of business license to operate spa after owner pled guilty to sexual offense); *Loui v. Board of Medical Examiners*, 889 P.2d 705, 713 (Haw. 1995) (holding that suspension of doctor's license was permissible under Double Jeopardy Clause even though doctor had already been convicted of criminal sex abuse and kidnapping); *Kvitka v. Board of Registration in Medicine*, 551 N.E.2d 915, 918 n.4 (Mass. 1990) (upholding revocation of medical license after criminal conviction).

181. See *State v. Hickham*, No. MV 94-618025, 1995 WL 243352, at *2 (Conn. Super. Ct. April 20, 1995) (discussing civil and criminal sanctions for license revocation), *rev'd*, 235 Conn. 614 (1995); *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619, at *5 (Ohio Ct. App. June 27, 1995) (finding that deterrent purpose of suspension barred criminal prosecution); *State v. Ackrouche*, 650 N.E.2d 535, 539 (Ohio Mun. Ct. 1995) (holding that double jeopardy barred criminal prosecution of individual who tested in excess of Ohio's prohibited alcohol concentration).

182. *United States v. Halper*, 490 U.S. 435, 448 (1989).

183. *Id.*

Although administrative license suspensions serve a deterrent purpose, this purpose is secondary to the remedial purpose of removing dangerous drivers from the roads.¹⁸⁴ By requiring ALS statutes to serve solely remedial purposes, *Halper*, *Austin*, and *Kurth Ranch* have been interpreted too broadly.

It is important to emphasize that the language suggesting that a sanction must be solely remedial to avoid characterization as "punishment" for double jeopardy purposes, was not the explicit holding in *Halper*.¹⁸⁵ It was, instead, dicta. The Court in *Halper* stated:

[W]e therefore *hold* that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.¹⁸⁶

The plain language of this holding merely requires that a remedial goal, and not a deterrent or punitive one, be the *primary* purpose underlying a civil sanction in order for it to escape characterization as punishment for double jeopardy purposes.¹⁸⁷ *Halper* does not require that this remedial purpose be the sole purpose.

Opponents of license suspensions have persistently used the solely remedial argument, asserting that the Court in *Austin* adopted a new test when it cited dicta in *Halper*, rather than the *Halper* holding.¹⁸⁸ This is simply not the case. The *Kurth Ranch* case, decided after *Austin*, stated that *Halper*, not *Austin*, was the controlling precedent.¹⁸⁹ Because *Kurth Ranch* is the Court's most recent double

184. See *Davidson v. MacKinnon*, 656 So. 2d 223, 225 (Fla. Dist. Ct. App. 1995) (announcing that "the administrative remedy of suspending a driver's license because of drunk driving . . . continues to be primarily for the purpose of enhancing safe driving on public highways"); *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995) ("[A]ny punitive or deterrent purpose served by the suspension of an operator's driver's license . . . is merely incidental to the overriding purpose intended by the Legislature to provide the public with safe roadways"); *State v. Miller*, 1995 WL 275770, at * 3 (Ohio Ct. App. May 12, 1995) (noting that ALS "may have the incidental effect of punishing the licensee and deterring other drivers from driving while intoxicated," but that alone does not mean that ALS constitutes punishment for double jeopardy purposes).

185. See *Halper*, 490 U.S. at 449-50 (discussing whether sanction must be solely remedial to avoid characterization as "punishment"); see also text accompanying notes 55-70 (detailing reasoning behind Court's holding in *Halper*).

186. *Halper*, 490 U.S. at 448-49 (emphasis added).

187. *Id.*

188. Taylor, *supra* note 13, at 82 (arguing that after *Austin*, license suspensions must be considered punishment for double jeopardy purposes because they are designed in part to deter and punish even though they also have remedial purpose).

189. See *supra* text accompanying note 101 (observing that *Kurth Ranch* does not mention solely remedial requirement). Evidence that the Supreme Court did not interpret the *Halper* holding to require that a sanction must be solely remedial lies in the fact that the Court began its analysis of the tax in *Kurth Ranch* by stating, "[N]or [does] an obvious deterrent purpose

jeopardy decision, it must be followed when analyzing the ALS issue.¹⁹⁰ *Kurth Ranch* does not employ the solely remedial requirement,¹⁹¹ and therefore license suspensions must not be held to that standard. Because license suspensions were created primarily to protect the public, they must be characterized as having a remedial purpose under double jeopardy analysis, even if they also serve some incidental deterrent or punitive purpose.

2. *ALS is not punitive in effect*

The double jeopardy analysis of civil sanctions does not stop after a remedial purpose is found. To prevent the invocation of the Double Jeopardy Clause, courts must find that these sanctions are not so punitive in effect as to negate their remedial purpose.¹⁹²

In *Halper*, the Court found that the civil penalty at issue was so far removed from serving its remedial purpose of reimbursing the government that it crossed the line between remedy and punishment.¹⁹³ The penalty sought equaled \$130,000, whereas the actual loss only amounted to \$585.¹⁹⁴ The Court explicitly limited its holding to cases in which the punitive effect of a sanction is "overwhelmingly-disproportionate" to the damage it is seeking to correct.¹⁹⁵ The Court in *Halper* recognized that "for the defendant even remedial sanctions carry the sting of punishment."¹⁹⁶ A

automatically mark this tax a form of punishment." Department of Revenue v. *Kurth Ranch*, 114 S. Ct. 1937, 1946 (1994). This statement implies that a remedial purpose can co-exist with a punitive purpose and still result in the overall classification of a sanction as remedial.

190. See, e.g., *United States v. \$405,089.23 U.S. Currency*, 56 F.3d 41, 43 & n.3 (9th Cir. 1995) (Rymek, J., dissenting) (arguing that when panel denied en banc hearing, it wrongly collapsed *Halper* into *Austin*; and that *Kurth Ranch* handed down after denial needs to be considered), *denying reh'g* to 33 F.3d 1210 (9th Cir. 1994); *Baldwin v. Department of Motor Vehicles*, 42 Cal. Rptr. 2d 422, 427-30 (Ct. App. 1995) (failing to mention *Austin* and using only *Kurth Ranch* and *Halper* to hold that ALS does not violate Double Jeopardy Clause); *State v. Savard*, 659 A.2d 1265, 1266 (Me. 1995) (employing *Kurth Ranch* standard in analysis of Double Jeopardy Clause); *State v. Becker*, 669 A.2d 548, 549 (Vt. 1995) (concluding that *Kurth Ranch* is controlling and that it affirms *Halper's* holding which states that sanction is punishment only if there is no remedial purpose behind it).

191. See *Kurth Ranch*, 114 S. Ct. at 1944 (analyzing case under *Halper* standard rather than solely remedial requirement used in *Austin*).

192. See *supra* note 70 and accompanying text (observing that Court in *Halper* limited holding to cases where civil penalty is excessive in relation to remedial goal).

193. *United States v. Halper*, 114 S. Ct. 435, 449 (1989); see *supra* text accompanying notes 52-53 (noting that in *Halper*, civil penalty was so far removed from remedial goal of compensating government that it violated Double Jeopardy Clause).

194. *Halper*, 490 U.S. at 439; see *supra* text accompanying note 51 (discussing district court's refusal to impose \$130,000 penalty in *Halper*).

195. *Halper*, 490 U.S. at 450; see *supra* note 70 and accompanying text (supporting proposition that Court's decision limit's *Halper* analysis to case where civil penalty crosses line between remedy and punishment).

196. *Halper*, 490 U.S. at 447. *Halper* implies that a mere "sting of punishment" felt by the defendant is not determinative of sanction's characterization as "punishment" for double

"sting," however, which occurs incidentally when a sanction is imposed to serve a legitimate remedial goal, will not elevate the sanction to the level of "punishment" for double jeopardy purposes.¹⁹⁷

License suspensions are distinguishable from the penalty assessed in *Halper* because they are not far removed from their remedial goal, but rather are specifically tailored to address the goal of public safety.¹⁹⁸ Studies have shown that suspensions are an effective means of protecting the public and improving the safety of highways.¹⁹⁹ Additionally, license suspensions are not excessive. Any possible punitive effect felt by defendants—in the form of a deterrent effect, inconvenience, or monetary ramifications for those who use motor vehicles in their occupations—is mitigated by the fact that license suspensions are temporary and that exceptions can be granted for employment.²⁰⁰

Applying *Halper's* rationale, the incidental punitive effect of license suspensions does not outweigh the valuable remedial goal that such suspensions were enacted to serve. Because license suspensions serve the purpose of protecting the public from the dangers posed by drunk drivers, they cannot be characterized as punishment. As a result, they do not subject defendants to "multiple punishments for the same offense," and, thus, do not invoke the Double Jeopardy Clause.

III. RECOMMENDATIONS

The Supreme Court has recently granted certiorari to a pair of forfeiture cases and plans to revisit the issue of double jeopardy in parallel civil and criminal proceedings. The Court has recently heard the Justice Department's appeal in the consolidated cases of *United States v. \$405,089.23 U.S. Currency*²⁰¹ and *United States v. Ursery*²⁰² and should clarify soon its stance on this issue so that the existing confusion in the lower courts can be eliminated.

jeopardy purposes. *Id.*; see *State v. Nichols*, 819 P.2d 995, 998 (Ariz. Ct. App. 1991) (maintaining that statute which incidentally serves purpose of punishment does not violate Double Jeopardy Clause).

197. *Halper*, 490 U.S. at 448.

198. McCurdy, *supra* note 128, at 22-23.

199. See *supra* note 15 (providing statistics on effectiveness of ALS revocation law in deterring drunk driving).

200. See *supra* notes 11-12 and accompanying text (acknowledging that ALSs are temporary and drivers may apply for restricted license for employment purposes).

201. 33 F.3d 1210 (9th Cir. 1994), *cert. granted sub nom.* *United States v. Ursery*, 116 S. Ct. 762 (1996).

202. 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996).

In resolving this issue, the Court should state explicitly that *Halper's* holding is the controlling test for determining whether a sanction can be characterized as remedial or punitive for double jeopardy purposes. This test requires only that a sanction be fairly characterized as remedial to escape characterization as punishment; it does not require, as does language in *Austin*, that a sanction be solely remedial. Adopting the *Halper* test will limit the double jeopardy bar to rare cases in which the civil sanction is excessive in relation to any remedial goal. This solution is necessary to avoid drastic consequences. If the Court fails to rule this way, thousands of agency and governmental regulations in existence, monitoring everything from rules in the workplace, to clean air and water standards, to professional conduct, will be unusable when the government chooses to seek criminal prosecution. This result is extremely undesirable and is not what the Court intended when deciding *Halper* and allowing a punitive civil sanction to invoke the Double Jeopardy Clause.

In the meantime, state courts, at all levels, need to acknowledge that license suspensions serve a valid and tremendously important remedial goal that outweighs any incidental punitive or deterrent effect on defendants. These actions save lives and protect citizens from the danger caused by drunk drivers. Courts must not focus their analyses so narrowly as to find double jeopardy violations simply when remedial actions have some limited punitive effects. Doing so would stretch recent Supreme Court holdings far beyond the scope to which the Court intended they be applied.

Courts faced with double jeopardy challenges to ALS provisions should uphold the provisions as constitutional and allow their use along with criminal sanctions in the fight against drunk driving. Anything less would conflict with the intent of state legislatures when drafting the statutes, and the requirements set by the Supreme Court in *Halper*.

Public policy also dictates this outcome. If license suspension provisions are struck down in drunk driving cases, the government will lose a highly effective method of protecting the public from dangerous drivers. Furthermore, courts likely would be inundated with challenges to other administrative license suspensions, increasing the possibility that other valuable mechanisms for protecting the public will be lost.

CONCLUSION

Careful analysis of the double jeopardy issue as applied to ALS provisions compels the conclusion that administrative license suspensions do not invoke the Double Jeopardy Clause's protection against "multiple punishments for the same offense." Support for this conclusion rests on the fact that license suspensions are neither punitive in purpose, nor in effect. They have been created by state legislatures primarily to serve the remedial purpose of protecting the public by removing dangerous drivers from the highways. The underlying remedial purpose of ALS provisions allows them to escape characterization as "punishment" for double jeopardy purposes. Courts must uphold these provisions as constitutional, and allow them to be imposed along with criminal prosecution in drunk driving cases.