Fordham Urban Law Journal

Volume 23 | Number 3 Article 13

1996

Administrative License Suspensions, Criminal Prosecution and the Double Jeopardy Clause

Carlos F. Ramirez
Fordham University School of Law

Administrative License Suspensions, Criminal Prosecution and the Double Jeopardy Clause

Cover Page Footnote
The author wishes to thank Professor William M. Treanor for his guidance and helpful comments. The author also thanks his mother and father for their support throughout the years.

ADMINISTRATIVE LICENSE SUSPENSIONS, CRIMINAL PROSECUTION AND THE DOUBLE JEOPARDY CLAUSE

*Carlos F. Ramirez**

Only July 4th, 1993, Vicki Ann Pusich awoke in Anchorage, Alaska, and began her day with a drink of whiskey.[1] After drinking all day, she decided to drive from Anchorage to Walsilla, Alaska.[2] During this drive, Pusich weaved in and out of traffic, tailgated other cars, and traveled at speeds of up to 90 miles an hour.[3] As she approached Walsilla, Pusich failed to negotiate a right-hand curve and crossed two lanes without veering or braking.[4] She hit a car in which four people were traveling, killing the driver, his son and a thirteen year-old friend and critically injuring the driver's wife.[5]

In such DUI[6] cases, a state will typically proceed against the driver through an Administrative License Suspension (an "ALS"), whereby the driver's license is suspended for an average of 90 days[7] and in some cases the driver is charged a $250 reinstatement fee.[8] Subsequently, the state typically proceeds against the driver through criminal prosecution, whereby the driver may either serve jail time or be fined, or both, if convicted.[9] Many attorneys have argued, with increasing success, that this combination of license suspension and criminal prosecution amounts to double punish-

* J.D. Candidate, 1997, Fordham University; B.S., *cum laude*, 1994, John Jay College of Criminal Justice. The author thanks Professor William M. Treanor for his guidance and helpful comments. The author also thanks his mother and father for their support throughout the years.

1. *See* Pusich v. Alaska, 907 P.2d 29, 31 (Alaska Ct. App. 1995).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. DUI stands for driving under the influence of alcohol. Some states refer to this offense as DWI or driving while intoxicated. For purposes of this note the terms will be used interchangeably.

7. *See* Minnesota v. Hanson, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995).

8. Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct. App. 7th Dist. June 27, 1995).

9. State v. Hickham, No. MV 94-618025, 1995 WL 243352, at *1 (Conn. Super. Ct. Apr. 20, 1995).

ment and should be prohibited by the Fifth Amendment's Double Jeopardy Clause.[10]

This Note argues that revocation of a driver's license under ALS proceedings is not a bar to subsequent criminal prosecution by the state. Part I discusses the potential double jeopardy implications surrounding an ALS that is followed by criminal proceedings. Part II discusses the reasoning employed by a majority of the courts that hold that an ALS is remedial and, therefore, not punishment for purposes of the Double Jeopardy Clause. It also explains the reasoning employed by an increasing minority of courts to hold that an ALS is punitive and, if imposed in addition to criminal sanctions, will violate the Double Jeopardy Clause. Part III argues that with regard to determining whether an ALS is punitive, the appropriate test should balance the effect of the statute on the driver against the state's interest in protecting the public's safety. So long as the degree of deprivation to the driver is not overwhelmingly disproportionate to the public safety interest the statute may serve, the ALS should not be deemed punitive for double jeopardy purposes. Because courts pay great deference to governmental regulatory schemes, the analysis should be made under the presumption that the state is acting in a non-punitive manner in the public's interest. This Note concludes that the punitive effects on drunken drivers by the imposition of a 90-day driver's license suspension and a moderate reinstatement fee is not disproporionate to the perceived risk drunken drivers pose to society while they await trial, and thus the presumption that the government is acting in a non-punishing capacity is not rebutted. Accordingly, the typical 90-day ALS is not punitive and may be accompanied by subsequent criminal prosecution.

I. Double Jeopardy, ALSs and Subsequent Criminal Prosecution

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be put twice in jeopardy of life and limb . . . ."[11] The United States Supreme Court has interpreted the Double Jeopardy Clause as protecting against "multiple punishments for the same offense."[12]

10. Richard C. Reuben, *Double Jeopardy Claims Gaining*, ABA JOURNAL, June 1995, at 16.

11. U.S. CONST. amend. V.

12. United States v. Halper, 490 U.S. 435, 440 (1989). *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Two other abuses against which the Double Jeop-

This right is imputed to the states via the Fourteenth Amendment.[13] Although there is no doubt that two criminal prosecutions of a drunk driver under the same statute for the same incident would violate the Double Jeopardy Clause,[14] questions arise as to whether a double jeopardy violation occurs where one of the proceedings is inherently administrative or civil.[15]

In *United States v. Halper*,[16] the Supreme Court held that a civil proceeding, when coupled with a criminal prosecution, violates the Fifth Amendment if the civil action is not remedial, but rather acts as punishment.[17] Courts are largely without guidance, however, in determining whether an ALS is punitive or remedial.[18] The remedial purposes attributed to an ALS range from serving "public safety by removing drunken drivers off the highways pending judicial hearing,"[19] to protecting the individual from his or her own

---

ardy Clause protects are: a second prosecution for the same offense after acquittal and a second prosecution for the same offense after conviction. *Halper*, 490 U.S. at 440.

13. Benton v. Maryland, 395 U.S. 784 (1969).

14. United States v. Dixon, — U.S. —, 113 S. Ct. 2849, 2860 (1993).

15. *See* Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291 (Ohio Ct. App. 12th Dist. Aug. 21, 1995); Minnesota v. Hanson, 532 N.W.2d 598 (Minn. Ct. App. 1995); Davidson v. MacKinnon, 656 So. 2d 223 (Fl. Ct. App. 1995); Nebraska v. Young, 530 N.W.2d 269 (Neb. Ct. App. 1995); Alaska v. Zerkel, 900 P.2d 744 (Alaska 1995); Hawaii v. Higa, 897 P.2d 928 (Haw. 1995); Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ct. App. 7th Dist. June 27, 1995); Connecticut v. Hickham, No. MV 94-618025, 1995 WL 243352 (Conn. Super. Ct. Apr. 20, 1995).

16. 490 U.S. 435 (1989).

17. *Id.* at 448-49. *Halper* was the first Supreme Court case that held that a civil remedy may constitute punishment even though the civil remedy was not intended as such. *Id.* at 442-43. In *Halper*, a medical service manager was indicted for submitting 65 false claims for reimbursement. *Id.* at 437. He was convicted on all 65 counts of violating the criminal false claims statute and 16 counts of mail fraud. *Id.* The Government subsequently brought a second action against Halper under the civil False Claims Act. *Halper*, 490 U.S. at 438. Under the Act's remedial clause Halper would be subject to a penalty of more than $130,000 even though the government's loss through the false claims was $585 plus its cost in investigating and prosecuting him. *Id.* at 439. The District Court held that to impose this civil sanction would violate the Double Jeopardy clause because the amount of the penalty was entirely unrelated to the actual damages suffered and the expenses incurred by the Government. *Id.*

18. *Compare id.* at 449 (stating that punishment will occur when "a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused"), *with id.* at 448 (stating "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"). In a double jeopardy analysis, the first standard would uphold more civil sanctions than the second. Accordingly, whether a statute is held as punitive will depend on what courts interpret as *Halper*'s test.

19. Minnesota v. Hanson, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995); Davidson v. MacKinnon, 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995).

behavior.[20] Punitive purposes include deterring drunk driving[21] and retribution.[22]

In construing an ALS as either punitive or remedial, lower courts generally rely on *Halper*,[23] as well as *Austin v. United States*[24] and *Department of Revenue of Montana v. Kurth Ranch*[25] for guidance.

In *Halper*, the Court held that determining the character of a civil penalty requires "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[26] The Court 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."[27] Some lower courts interpret *Halper* to be generally espousing a "solely remedial" test for analyzing ALS cases;[28] i.e. an ALS is punitive unless its purpose is entirely remedial. However, use of such a test would find most civil statutes punitive thus trumping the government's power in this context. This is a result the Court specifically warned against in Halper.[29]

The *Halper* Court also created a general "proportionality" test for civil penalty cases. This test calls for invalidating statutes "where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[30] Thus, a civil suit, brought in addition to a criminal prosecution, will not violate the Double Jeopardy Clause if it is "rationally related to the goal of making the Government

---

20. *MacKinnon*, 656 So. 2d at 224.

21. Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619, at *5 (Ct. App. 7th Dist. June 27, 1995).

22. *Id.* at *5.

23. 490 U.S. 435 (1989).

24. 509 U.S. —, 113 S. Ct. 2801 (1993).

25. — U.S. —, 114 S. Ct. 1937 (1994).

26. *Halper*, 490 U.S. at 448. In such an analysis labels of criminal and civil, affixed by the government, would not be controlling. *Id.* at 447. Moreover, a "particularized assessment" is not easily made because criminal penalties may serve remedial goals, and remedial statutes may be viewed as punishment by defendants. *Id.* Thus, the assessment cannot be made from "the defendant's perspective as even remedial sanctions [will] carry the 'sting of punishment.' " *Id.* n.7.

27. *Id.* at 448 (emphasis added).

28. Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619, at *4 (Ohio Ct. App. 7th Dist. June 27, 1995).

29. *Halper*, 490 U.S. at 451.

30. *See id.* at 449.

whole."[31] Some courts have held that this "proportionality" test is the standard to apply in civil sanction cases;[32] i.e. civil sanctions, such as an ALS, are not punitive if they reasonably serve to make the government whole.

In *Austin v. United States*,[33] the Supreme Court applied the "solely remedial" test to invalidate a civil asset forfeiture of a mobile home and an auto body shop that was brought after the defendant had already been convicted of violating state narcotic laws.[34] Although the Court analyzed the *in rem* forfeiture under the Eighth Amendment's Excessive Fines Clause,[35] lower courts have looked to *Austin* for guidance in deciding whether sanctions, which are generally believed to be civil, are remedial or punitive for double jeopardy purposes.[36]

---

31. *Id.* at 451. Because the civil False Claims Act required a substantially disproportionate amount from Halper in relation to the harm done to the government, the statute constituted punishment. *Id.* at 452. However, because the government had not challenged the District Court's figure as to how much Halper had harmed the government, the case was remanded in order to give the government an opportunity to present the court with an accounting of the actual cost arising from Halper's fraud. *Id.* at 452.

32. *See* Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291, at *4 (Ohio Ct. App. 12th Dist. Aug. 21, 1995) (stating that Supreme Court cases can be seen as merely emphasizing that a civil sanction must be substantially disproportionate to the remedial character of the statute for it to be punitive); Minnesota v. Hanson, 532 N.W.2d 598, 602 (Minn. Ct. App. 1995) (stating that a 90-day license revocation is not " 'overwhelmingly disproportionate' to the public safety interest at stake").

33. 509 U.S. —, 113 S. Ct. 2801 (1993).

34. *Id.* at 2803.

35. *Id.* at 2802. The Eighth Amendment to the U.S. Constitution states that "excessive bail shall not be required, nor excessive fines imposed . . . ." U.S. CONST. amend VIII.

36. *See Sims*, 1995 WL 493291 at 5; State v. Ackrouche, 70 Ohio Misc. 2d 34, 39 (Franklin County Mun. Ct. 1995); State v. Hickham, No. MV 94-618025, 1995 WL 243352, at *2 (Conn. Super Ct. Apr. 20, 1995). The statutes involved in *Austin* were 21 U.S.C. §§ 881(a)(4) and (a)(7)(1994). These provisions provide for the forfeiture of vehicles and real property used to facilitate the commission of a crime. In analyzing whether this *in-rem* forfeiture was punitive, the Court looked toward the forfeiture statute's legislative history. Unlike traditional forfeiture statutes, section 881 provides an innocent-owner defense. *Austin*, 509 U.S. —, 113 S. Ct. at 2811. This exemption serves to focus the statute on the owner, thus making the statute punitive. *Id.* at 2811-12. Congress passed these sections upon recognizing " 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish enormously profitable trade in dangerous drugs.' " *Id.* at 2811. In addition, the Court noted that forfeiture had been generally understood as punishment in England and in the United States by the First Congress. *Id.* at 2806-07. As early as 1808, the Supreme Court recognized forfeitures as punishment in Pesich v. Ware, 8 U.S. (4 Cranch) 347 (1808).

The *Austin* Court rejected two arguments by the government that the forfeiture provisions were remedial.[37] First, the government argued that *in rem* forfeitures were remedial because they protected society "from the threat of continued drug dealing" by removing the instruments of the drug trade.[38] The Court responded that the property in *Austin* was neither an instrument of the drug trade nor illegally owned.[39] Second, the government argued that the forfeited property should compensate the government for its law enforcement expenditures.[40] The Court rejected this argument because the forfeiture statute did not correlate the value of the seized property to society's damage or to the government's actual law enforcement expenditures.[41]

In *Department of Revenue of Montana v. Kurth Ranch*,[42] the government sought to collect $900,000 in taxes under the Montana Dangerous Drug Tax Act[43] after the defendant had been convicted on drug charges and their marijuana plants were confiscated and destroyed.[44] Prior to this case, the Supreme Court had "never held that a tax violated the Double Jeopardy Clause, [although it had]

37. *Id.* at 2811. The court stated: "even assuming that [the forfeiture statute] serve[s] some remedial purpose the Government's argument must fail. 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.* at 2812 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

38. *Austin*, 509 U.S. —, 113 S. Ct. at 2811.

39. *Id.* Moreover, the Court had previously rejected this argument in cases regarding the confiscation of vehicles used to transport illegal liquor. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (rejecting the government's categorization of a 1958 Plymouth Sedan as contraband).

40. *Austin*, 509 U.S. —, 113 S. Ct. at 2811.

41. *Id.* at 2812. *Austin* stated, "the 'forfeiture of property is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.' " *Id.* at 2812 (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).

42. — U.S. —, 114 S. Ct. 1937 (1994).

43. Mont. Code Ann. §§ 15-25-101 - 15-25-123 (1987).

44. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1942. This was the third of a series of proceedings. The first proceeding involved the criminal prosecution of the Kurths. *Id.* The second proceeding was brought against the Kurths for recovery of cash and equipment used in the marijuana operation. *Id.* The Kurths settled the forfeiture action by agreeing to pay $18,016.83 in cash and forfeiting various items of equipment. *Id.*

In a bankruptcy proceeding, the Bankruptcy Court held, relying on *Halper*, that the tax was a penalty because it was not designed to recover law enforcement costs. *Id.* at 1943. In addition, a tax resulting in eight times the product's market value evidenced its punitive character. *Kurth Ranch*, — U.S. —, 114 S. Ct at 1943. The District Court affirmed the Bankruptcy Court's findings. *Id.* The Ninth Circuit affirmed the District Court, however, it based its decision on the State's refusal to offer evidence justifying the tax instead of holding that the tax was unconstitutional. *Id.*

assumed that one might."[45] The *Kurth Ranch* Court held that *Halper*'s "proportionality" test was inapplicable in the tax context.[46] Instead, the *Kurth Ranch* Court analyzed the mechanics of the tax to determine whether it was punitive.[47] The Court noted that although a high tax rate and deterrent legislative purpose[48] might tend to characterize a drug tax as penal, these features are not dispositive.[49] Taken as a whole, however, the Court concluded that the Montana tax "is a concoction of anomalies, too-far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."[50] The tax was conditioned upon the commission of a crime,[51] which made it "fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity."[52] Although the Court stated

45. *Id.* at 1945-46. The *Kurth Ranch* Court recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.* at 1946 (quoting A. Magnano Co. v. Hamilton, 292 U.S. 40, 46 (1934)). Moreover, *Halper*'s invalidation of labels of criminal and civil as controlling elements in double jeopardy analyses were further proof to the *Kurth Ranch* Court that a tax is not immune from double jeopardy scrutiny. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1946.

46. *Id.* at 1948. The majority agreed with Chief Justice Rehnquist's dissenting opinion in *Kurth Ranch* which stated that a tax statute's purpose is quite different from civil penalties. *See id. Halper* recognized the government's ability to impose a civil penalty as a remedy for the costs it incurred because of the defendant's conduct. *Id.* at 1948. The Court stated: "Even if it were proper to permit such a showing, Montana has not claimed that its assessment in this case even remotely approximates the cost of investigating, apprehending, and prosecuting the Kurths, or that it roughly relates to any actual damages that they caused the State." *Id.* at 1948. As the Court stated, "whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically . . . motivated by revenue-raising rather than punitive purposes." *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1946.

47. *See infra* notes 51-54 and accompanying text.

48. A significant part of the assessment was more than eight times the drug's market value. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1946.

49. *Id.* at 1947.

50. *Id.* at 1948.

51. *Id.* at 1948. This condition is "significant of penal and prohibitory intent rather than the gathering of revenue." *Id.* at 1948. The Court had relied in the past on the absence of such a condition to render a tax non-punitive. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1948. The Act's preamble indicates anti-crime intent by " 'burdening' violators of the law instead of 'law abiding citizens.' " *Id.* at 1946 n.18.

52. *Id.* In illustrating this point, the Court gives the example of taxes placed upon cigarettes. *Id.* at 1947. Such taxes are placed to discourage smoking. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1947. But because the product's benefits—such as creating employment, satisfying consumer demand and providing tax revenues—are regarded as outweighing the harm, the government will allow for the cigarette industry to continue to produce cigarettes and people to buy them as long as they both pay taxes that

that the Montana tax purported to be a type of property tax,[53] it was assessed on contraband goods the taxpayer neither owned nor possessed because they were destroyed by the state.[54] Accordingly, the Court held that a tax on the "possession of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."[55]

Recently, the Supreme Court granted certiorari in *United States v. 405,089.23 United States Currency*,[56] to re-address the issue of whether civil forfeiture and criminal prosecution brought in separate proceedings violates the double jeopardy clause. In *405,089.23 United States Currency*,[57] the Ninth Circuit held that civil forfeitures were punishment and thus must be brought in the same proceeding to avoid a double jeopardy violation.[58] This case is of particular importance to the ALS context because the Supreme Court may finally provide new insight into how such civil sanctions should be analyzed.

II. Punitive or Remedial? Lower Court Division in the ALS Context

A. Administrative License Suspensions as Remedial

Courts diverge when determining whether an ALS is punitive or remedial for double jeopardy purposes.[59] In addition, those courts

---

reduce consumption and increase government revenue. *Id.* However, these justifications disappear with respect to the Montana tax, "for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." *Id.*

53. *Id.* at 1948. The Montana tax, however, is a "tax on the possession and storage of dangerous drugs." Mont. Code Ann. § 15-25-111 (1987).

54. *Kurth Ranch*, — U.S. —, 114 S. Ct. at 1948. Here the marijuana had been destroyed before the tax was assessed. *Id.*

55. *Id.*

56. — U.S. —, 116 S. Ct. 762 (1996).

57. 33 F.3d 1210 (9th Cir. 1994).

58. *Id.* at 1219. The Ninth Circuit accepted *Austin*'s validation of *Halper*'s "solely remedial" test as proof that this was the test to be applied to civil forfeiture cases. *Id.* Rejecting arguments by the government that *Austin* applied to civil forfeitures for Eighth Amendment Excessive Fines Clause purposes only, the Court stated "[w]e believe that the only fair reading of the Court's decision in *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause." *See id.*

59. License revocation through an administrative license procedure will bar a subsequent DUI prosecution if a defendant can show all of the following: (1) an ALS is imposed in a separate proceeding from the criminal prosecution; (2) an ALS and criminal sanctions are imposed for the same offense; and (3) an ALS constitutes punishment. *See generally* Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291 (Ohio Ct. App. 12th Dist. Aug. 21, 1995). The separate proceeding element is the easiest to

that have held that an ALS is remedial have not reached their decision using the same rationales or tests.[60] Courts that find an ALS to be remedial rely on one or more of three basic rationales. Some look to the statute's purpose of protecting the public's interest in keeping roads safe;[61] others look to the proportionality of the license suspension as weighed against the public interest in keeping roads safe;[62] and others rely on the government's inherent power to regulate certain activities, such as driving.[63] The following subsections discuss the various arguments courts have accepted to hold that an ALS is remedial.

1. Purpose of the Statute

In *Ohio v. Sims*,[64] five consolidated appellants received administrative license suspensions for either testing over the legal blood-to-alcohol level or for refusing to take a chemical breath test.[65] The appellants filed motions to dismiss the underlying DUI charges on double jeopardy grounds.[66] In denying their motions, the *Sims* court began by making an assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.[67] In ana-

---

meet because most courts have already held that an ALS and DUI prosecutions are separate proceedings for double jeopardy analyses. New Mexico v. Kennedy, 904 P.2d 1044, 1051 (1995); *Sims*, 1995 WL 493291 at *3. The separate offense element has been met by defendants in some courts, see *Kennedy*, 904 P.2d at 1051-52 (utilizing the *Blockburger* same-elements test to determine that the ALS and DWI prosecution were based on the same offense), while in other courts, defendants have not met this requirement. *See Sims*, 1995 WL 493291 at *3 (recognizing that under a particular section of its drunk driving statute, an ALS imposed for testing above the prohibited alcohol level does not require the same proof of facts as the offense of DUI). Thus, although courts have had few or no problems in determining whether a defendant has met the first two prongs, the last prong has required that courts carefully examine the characteristics of an ALS.

60. *See infra* part II.A.1-3.

61. *See infra* part II.A.1.

62. *See infra* part II.A.2.

63. *See infra* part II.A.3.

64. 1995 WL 493291.

65. *Id.* at *1.

66. *Id.*

67. *Id.* at *3 (citing *Halper*, 490 U.S. at 448) (holding "[t]he determination of whether a civil sanction such as an ALS constitutes punishment for double jeopardy purposes requires an assessment of the purposes the sanction may fairly be said to serve"). *See also* Minnesota v. Hanson, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995) (providing a historical assessment of the statute's purpose).

Additionally, the court looked to Ohio's 25-year history of holding that license suspensions are non-punitive. *Sims*, 1995 WL 493291 at *5. The court cited to State v. Hurbean, 261 N.E.2d 290, 300 (Ohio Ct. App. 1970) which stated: "[License suspension] statutes have as their general purpose the protection of the public from drunk drivers, and to give effect to that general purpose there is prescribed separate from,

lyzing the statute's purpose, the *Sims* court contrasted the older version of the statute, which did not suspend a license until it was processed by the bureau of motor vehicles weeks after the arrest, to the newer version, which provided for immediate license suspension upon arrest.[68] The court stated that this change in the law was proof that an ALS is intended to protect the public from potentially dangerous drivers, not to punish the individual.[69] That multiple DUI offenders faced longer license suspensions was accepted as further proof of the statute's remedial purpose because such defendants posed a greater risk to society.[70]

Similarly, the court in *Davidson v. MacKinnon*,[71] held that public safety justifies revocation of a driver's license upon the commission of certain offenses without implicating the Double Jeopardy Clause.[72] License suspensions protect the public from those who

---

independent of, and cumulative to criminal prosecution a clear remedy of suspending the licenses of those drivers who refuse to take a sobriety test." *See also* Davidson v. MacKinnon, 656 So. 2d 223, 223-24 (Fla. Ct. App. 1995) (looking toward Florida's 38-year history of holding that license suspensions for conviction of drunk driving do not violate the Double Jeopardy Clause).

68. *Sims*, 1995 WL 493291 at *6.

69. *Id.* (discussing the "non-punitive, public safety focus" of the statute). *See also infra* part II.A.2. Conversely, in *Hanson*, 532 N.W.2d at 602, the defendant argued that a seven-day temporary license was proof that the statute was not remedial because potentially dangerous drivers were still allowed to drive for that period of time. The court rejected this argument stating that the temporary license was provided to relieve due process concerns and did not defeat the remedial purpose of the statute. *Id.*

70. *Sims*, 1995 WL 493291, at *6. *But see* Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619, at *4 (Ohio Ct. App. 7th Dist. June 27, 1995) (viewing harsher sanctions for each successive violation as retributive).

71. 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995). In this case, a motorist's driver's license was suspended for not taking a breathalyzer test. He filed a petition for writ of prohibition seeking to prevent subsequent criminal prosecution under the Double Jeopardy Clause, but the court denied the petition.

72. *Id.* at 223-24 (examining Florida state precedents dating back to 1957 which recognized that an ALS was passed to protect the public from potentially dangerous drunk drivers). *See also Sims*, WL 493291 at *5 (looking toward its own state's precedents that have held that an ALS was not punitive, but rather expressly for public safety); *Hanson*, 532 N.W.2d at 601 (stating that "[d]river's license revocations . . . have historically been understood as remedial, imposed for the protection of the public"); New Mexico v. Kennedy, 904 P.2d 1044, 1060 (N.M. 1995) (noting that the legislative goal in their license suspension statute is "to provide the public with safe roadways"); Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995) (noting that "the [license suspension] procedure protects the public interest by removing potentially threatening drivers from our state's roadways. . .").

The *MacKinnon* court did not apply the *Halper* analysis to its ALS; however, it did cite to another Florida case which had analyzed an ALS under *Halper*. That case, Freeman v. State, 611 So. 2d 1260 (Fla. Ct. App. 1992), held that although suspension of a driver's license is not remedial in the *Halper* sense, neither is the purpose puni-

cannot, or who choose not to control their drinking habits.[73] The purpose of the statute is to provide the public with protection against drunken drivers through administrative means, instead of criminal sanctions.[74] Although the loss of driving privileges may be painful to the defendants, the primary purpose of an ALS is to enhance safe driving.[75] Its effect is remedial because it protects the public at large and because it protects the intoxicated driver.[76] An ALS "is no more punitive than denying a person who is legally blind a driver's license. Both [the blind individual and the drunk driver] will live longer and healthier lives if they do not drive."[77]

2. *Proportionality*

In *Minnesota v. Hanson*,[78] the court utilized *Halper*'s "proportionality" test to hold that an ALS was remedial.[79] In *Hanson*, motorists had their driver's licenses suspended for 90 days because they failed urine tests.[80] The court assessed that the statute's purpose was to serve public safety by removing drunken drivers from the highways pending a judicial hearing.[81] Because this was a compelling purpose, the court held that a 90-day driver's license suspension was not "overwhelmingly disproportionate" to this interest and thus is remedial.[82]

---

tive. *Id.* at 1261. *See also* Hawaii v. Higa, 897 P.2d at 934 (agreeing with *Freeman*'s reasoning); State v. Strong, 605 A.2d 510, 513 (Vt. 1992)(holding the license suspension scheme as remedial for double jeopardy purposes in that "[it] serves the rational, remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads"); State v. O'Brien, 609 A.2d 981, 982 (Vt. 1992) (agreeing with the holding in *Strong*); Butler v. Department of Pub. Safety & Corrections, 609 So. 2d 790, 795 (La. 1992) (stating that license suspensions are remedial and thus do not violate the constitutional proscriptions against multiple punishments).

73. *MacKinnon*, 656 So. 2d at 224. *See also* Baldwin v. Department of Motor Vehicles, 42 Cal. Rptr. 2d 422, 430 (Ct. App. 1995) (rejecting the idea that punishment must be determined from the offender's perspective and holding that the purpose of their license suspension statute is to protect the public).

74. *See MacKinnon*, 656 So. 2d at 224.

75. *Id.* at 223.

76. *Id.* at 225.

77. *Id.*

78. 532 N.W.2d 598 (Minn. Ct. App. 1995).

79. *Id.* at 602.

80. *Id.* at 599.

81. *Id.* at 601.

82. *Id.* at 602.

Defendants argued that a 90-day license suspension was not remedial because drivers were issued temporary seven-day driver's licenses and thus could still drive. *Hanson*, 532 N.W.2d at 602. The court rejected this argument by stating, "this hardship relief is provided to alleviate due process concerns. It does not defeat the remedial purpose of the statute." *Id.* Alternatively, defendants argued that this statute was not

In *Sims*, appellants urged the court to apply *Halper*'s "solely remedial" test to an ALS.[83] The court rejected the solely remedial test by stating: "The Supreme Court cases can be seen as merely emphasizing the rule that, in order for a civil sanction to be considered punishment for double jeopardy purposes, it must be excessive, extreme, and *substantially disproportionate* to the remedial character of the statute."[84] In applying *Halper*'s proportionality test, *Sims* looked to: (i) 25 years of precedents establishing that an ALS was for the protection of the public, (ii) the fact that ALS provisions seek to remove potentially dangerous drunk drivers from the streets immediately in order to prevent any accidents and (iii) the fact that progressively longer suspensions were available for multiple offenders who are presumed to create a greater risk to society.[85] These factors were evidence to the court of the statute's non-punitive nature.[86] Accordingly, the court held that the license suspensions were not so disproportionate to the potential harm

---

sufficiently remedial in that it did not disable the driver long enough to cure his or her drinking problem. *Id.* The court disagreed "that only such a statute would be remedial. Although the legislature could enact more stringent measures, the 90-day [suspension] period is" not overwhelmingly disproportionate to the public safety interest at stake. *Id.*

83. Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291, at *4 (Ohio Ct. App. 12th Dist. Aug. 21, 1995). Appellants cited *Austin*, 509 U.S. —, 113 S. Ct. 2801 (1993), Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387691 (Ohio Ct. App. 7th Dist. June 27, 1995) and Ohio v. Ackrouche, 650 N.E.2d 535 (Franklin County Mun. Ct. Ohio 1995), to support their argument that *Halper*'s "solely remedial" test was the proper test to be applied to ALS cases.

84. *Sims*, 1995 WL 493291 at *4 (emphasis added). *See also Hanson*, 532 N.W.2d at 601-2 (stating that the "solely remedial" test was not the explicit holding in *Halper*, rather it was derived from a broader analysis of the civil-criminal distinction for purposes of due process. Instead the court applied a "proportionality" test, thus holding, "[t]he 90-day license revocation suffered by the . . . defendants is certainly not 'overwhelmingly disproportionate' " to the public safety interest); State v. Uncapher, 70 Ohio Misc. 2d 4, 18 (Bowling Green Mun. Ct. 1995) (applying the proportionality analysis of *Halper*); Johnson v. State, 882 S.W.2d 17, 20 (Tex. Ct. App. 1994) (interpreting *Halper* as requiring a "proportionality" test when determining whether the sanction is punitive for double jeopardy purposes). *But see* Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995) (quoting Loui v. Board of Medical Examiners, 889 P.2d 705, 711 (Haw. 1995) (holding that the *Halper* test did not apply to an ALS because " 'the court was not analyzing the constitutionality of any monetary sanction designed to compensate the government for losses it sustained as a result of [the defendant's] criminal actions.' ")); Alaska v. Zerkel, 900 P.2d 744, 751 (rejecting the application of *Halper*'s "compensation for loss" (or "proportionality") test to an ALS because an ALS does not compensate the government and following *Kurth Ranch* by examining the historical background and understanding of license revocations to determine how such statutes traditionally had been viewed).

85. *Sims*, 1995 WL 493291 at *5-6.

86. *See id.* at *6.

presented by drunk drivers as to constitute punishment for double jeopardy purposes.[87]

3. *Power of Government to Regulate Driving*

Another group of courts has rejected the use of *Halper*'s "proportionality test" and has looked instead toward the government's regulatory power to hold that an ALS is not punitive. These courts have held that a license is not "property" in the everyday sense.[88] Instead, it is a " 'formal permission to do something; [an] authorization by law to do some specified thing.' "[89] Thus, license revocations cannot be equated with forfeiture of a person's land as in *Austin*,[90] or money, as in *Halper*[91] and *Kurth Ranch*[92] because an ALS does not diminish a driver's wealth; rather, it is similar to a restraining order or injunction issued to protect the public from a dangerous driver.[93] Accordingly, the court in *New Mexico v. Kennedy*[94] concluded that the government possesses the power to revoke the license of someone whose conduct shows he or she is unfit to continue the activity sanctioned by the license, without implicating double jeopardy concerns in a subsequent criminal proceeding.[95] The court in *Kennedy* stated:

---

87. *Id.* at *6.

88. Alaska v. Zerkel, 900 P.2d 744, 752 (Alaska Ct. App. 1995). Although a license has been held to be property for Fourteenth Amendment purposes, Bell v. Burson, 402 U.S. 535, 539 (1971), an argument by defendants in *Zerkel* that a license was property which was forfeited and thus served as punishment under *Austin* was rejected by the court. *Id.* at 751-52. *But see* Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct. App. 7th Dist. 1995 June 27, 1995) (stating that a driver's license is no longer merely a privilege given by the state subject to revocation at any time but has taken on new meaning and has become "a substantial right which may not be deprived without due process").

89. *Zerkel*, 900 P.2d at 752 (quoting WEBSTER'S NEW WORLD DICTIONARY 779 (3rd. College ed. 1988)).

90. *See supra* notes 33-41 and accompanying text.

91. *See supra* notes 26-32 and accompanying text.

92. *See supra* notes 42-55 and accompanying text.

93. *Zerkel*, 900 P.2d at 752.

94. 904 P.2d 1044 (N.M. 1995).

95. *Id.* at 1056. *See also* Nebraska v. Young, 530 N.W.2d 269, 278 (Neb. Ct. App. 1995) (quoting Durfee v. Ress, 81 N.W.2d 148, 150 (Neb. 1957)) (" 'A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state.' ").

In regulated areas other than driving, courts have traditionally held that administrative suspension of a license is distinct from criminal prosecution, and thus, suspension of a license is not considered punishment. Two cases in particular, U.S. v. Bizzell, 921 F.2d 263 (10th Cir. 1990) and Loui v. Board of Medical Examiners, 889 P.2d 705 (Haw. 1995) give guidance as to when a non-monetary civil sanction that seeks to revoke a privilege is remedial.

> When an individual fails to adhere to the standards set by the government for participation in a regulated activity or occupation, the government generally may bar the individual from participation in that activity or occupation without implicating double jeopardy, so long as the sanction reasonably serves regulatory goals adopted in the public interest.[96]

Thus the government reserves the power to revoke a license if the licensee fails to act in accordance with set regulations.[97] In an ALS, the government merely exercises the power to revoke the driving privileges it has afforded.

In *Bizzell*, Defendants had administrative complaints filed against them by the Department of Housing and Urban Development ("HUD") for violation of certain HUD regulations in the sale of five properties whose mortgages HUD insured. 921 F.2d at 264. They were barred from participating in HUD programs for approximately two years. *Id.* They were subsequently indicted and charged with conspiracy to defraud the U.S. and HUD, and making false statements to HUD to obtain loans. *Id.* Defendants then moved to dismiss the indictment on double jeopardy grounds. In analyzing the debarment, the court guided by Halper's "proportionality" test held that debarment was not disproportionate because its "clear intent . . . [was] to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition." *Id.* at 267.

In *Loui*, 889 P.2d at 707, the defendant was convicted of the attempted first degree sexual abuse and kidnapping of his medical assistant. His physician's license was subsequently suspended for a period of one year. *Id.* at 708. Defendant appealed the revocation of his license by alleging that it was a second punishment for the same offense and was therefore precluded by the Double Jeopardy Clause. *Id.* at 709. The Hawaii Supreme Court began its analysis by stating that *Halper*'s holding is restricted to the extraction of monetary damages from defendants, but that the broader principles enunciated by *Halper* would be helpful in this case. *Id.* at 711. In evaluating the purpose actually served by the sanction in question as required by *Halper*, the court concluded that the license revocation statute was not designed to punish the defendant; rather, it was designed to protect the public from unfit physicians. *Id.* The court held that this was a legitimate non-punitive governmental objective. *Loui*, 889 P.2d at 711. The *Loui* court also recognized the strong policy considerations for limiting *Halper*: Hawaii statutes applying to disbarment of attorneys, and other professionals such as veterinarians, certified public accountants, and psychologists would be called into question if *Halper* were to be applied to them. *Id.* at 712. Based on the holding of *Halper* which was limited to the "rare case" involving monetary sanctions, extension into the professional license arena was something the *Loui* court declined to do. *Id.*

96. *Kennedy*, 904 P.2d 1044, 1056 (N.M. 1995) (citations omitted).

Similarly, the Alaska Court of Appeals in *Alaska v. Zerkel* held:

> [W]hen the legislature employs a licensing scheme to regulate a profession or an activity affecting the public health or safety, a statute that authorizes a regulatory body to revoke these licenses is "remedial" for double jeopardy purposes even though the law serves to deter licensees from engaging in conduct inconsistent . . . with the public welfare.

900 P.2d 744, 756 (Alaska Ct. App. 1995).

97. *Kennedy*, 904 P.2d at 1056.

B. Administrative License Proceedings as Punitive

The tests iterated in *Halper* and its progeny have been employed by a small minority of courts to hold that an ALS is punitive and thus bars subsequent criminal prosecution.[98] One of these courts, *State v. Ackrouche*,[99] read *Austin* and *Kurth Ranch* as establishing a balancing test whereby "a civil sanction which is imposed for some remedial purpose is nevertheless punishment when the punitive effects are sufficiently great to outweigh the remedial purposes."[100] Other courts apply *Halper*'s "solely remedial" test,[101] or a "totality of circumstances" test to hold that an ALS is punitive.[102] In applying the various tests, these courts have focused on the legislative

98. *See supra* part II.A.

99. 70 Ohio Misc. 2d 34 (Franklin County Mun. Ct. 1995).

100. *Id.* at 39. The court in *Ackrouche* was faced with a motion to dismiss further prosecution by the defendant who argued that he had already been punished for drunk driving by having his license revoked. *Id.* at 36. *Halper*'s decision, the court pointed out, was expressly limited to the "rare case" where a civil penalty bore " 'no rational relation to the goal of compensating the government for its loss.' " *Id.* at 39 (quoting *Halper*, 490 U.S. 435, 449). Although this limitation had been used by other courts to reject the argument that an ALS was punishment for double jeopardy purposes, the *Ackrouche* court stated that *Austin* and *Kurth Ranch* have since interpreted *Halper* much more broadly. *Id. Austin*, for instance, emphasized *Halper*'s "solely remedial" test. *Ackrouche*, 70 Ohio Misc. 2d at 39. Furthermore, although *Kurth Ranch* did not apply the *Halper* test, it "is consistent with the principle that a civil sanction which is imposed for some remedial purpose . . . is nevertheless punishment when the punitive effects are sufficiently great to outweigh the remedial purposes." *Id.* Accordingly, the *Ackrouche* court held that the determination to be made is whether an ALS can be properly characterized as more punitive than remedial, by assessing the character of the sanction imposed by the state. *Id.*

101. Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct. App. 7th Dist. June 27, 1995). This court states that this is the test to be applied to civil sanction cases. *Gustafson* rejected appellant's interpretation of *Halper* by stating "that as long as the sanction serves remedial goals it will not be punishment, is an intentional misrepresentation of the" *Halper* holding as affirmed by *Austin*: "[A] civil sanction that cannot be fairly said to solely 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.* at *5 (quoting *Austin*, 509 U.S. —, 113 S. Ct. at 2812).

102. Connecticut v. Hickham, No. MV 94-618025, 1995 WL 243352 (Conn. Sup. Ct. at New London Apr. 20, 1995). Here Defendant sought to have her subsequent criminal prosecution dismissed because she had already been punished for drunken driving by having her license suspended for 90 days. The *Hickham* court held that case by case analysis was necessary and would require *Halper*'s particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve. *Id.* at *3. This is an approach this court feels is mandated by Supreme Court decisions. *Id.* "*Austin* asks that we establish a multi-factor test for determining whether forfeiture is constitutionally excessive." *Id.* (quoting Austin v. U.S., 509 U.S. —, 113 S. Ct. 2801, 2812 (1993)).

purpose, the mechanics of the statute and the hardships an ALS causes a defendant.[103]

In applying the various tests, the aforementioned courts have relied on *Halper*'s definition of what constitutes punishment — whether the statute serves the goals of deterrence and retribution.[104] Deterrence is "anything which impedes or has a tendency to prevent."[105] Retribution is "something given or demanded in payment or in criminal law it is based on the theory that every crime demands payment in the form of punishment.[106] However, *Halper* never answered the question of how much deterrence and retribution is required for a civil sanction to rise to the level of punishment. Justice Scalia's dissent in *Kurth Ranch* specifically addressed this problem:[107]

> We dodged the bullet in *Halper* . . . by leaving it to the lower courts to determine at what particular . . . level [a] civil fine exceeded the government's 'legitimate nonpunitive governmental objectives' and thus became a penalty . . . . In the present case, however, . . . we grapple with the . . . inquiry: when is a tax so high (or something-else) that it is a punishment? Surely further enigmas await.[108]

---

103. *See supra* part II.B.1-3.

104. United States v. Halper, 490 U.S. 435, 448 (1989). *See also* Kennedy v. Mendoza 372 U.S. 144, 168 (1963) (stating that the traditional aims of punishment are deterrence and retribution).

105. BLACK'S LAW DICTIONARY 450 (6th ed. 1990).

106. BLACK'S LAW DICTIONARY 1317 (6th ed. 1990). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1940 (unabridged 1986), defines retribution as the dispensing or receiving of reward or punishment.

The term retributive will be used by courts throughout this part when analyzing what characteristics constitutes punishment. Retributive is defined by Webster's as "of, relating to, or having the nature of retribution: involving condign punishment." *Id.* at 1940. Punishment is defined by Webster's as retributive suffering pain or loss. *Id.* at 1843. Accordingly, it is safe to assume that whenever the court uses the term "retributive characteristics" it is referring to "punitive characteristics," and vice versa.

107. — U.S. —, 114 S. Ct. 1937, 1958 (1994).

108. *Id.* However, in expressing the difficulty in making such an inquiry, Justice Scalia does not provide lower courts with any guidance.

Professor Mary M. Cheh also noted that the most significant limit on *Halper* is that

> we may not always know whether a given civil proceeding actually operates "to punish." For monetary penalties, *Halper* gives us a useful albeit broad formula. For adverse actions that are not measured in currency, however, the matter is less clear. Here we need guidance as to what punishment is for double jeopardy purposes.

Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HASTINGS L.J. 1325, 1378 (1991).

Accordingly, because of lack of guidance, assertions by courts that an ALS serves to punish rather than to protect the public from the risk that a drunk driver poses are often conclusory. For instance, *Ackrouche* held that an ALS "is specifically designed to punish the individual's conduct . . . rather than serving a general remedial purpose."[109] However, in concluding so, the court did not address what "general remedial purposes" an ALS may serve,[110] nor did it explain why a combination of the factors it looked to deemed an ALS punishment.[111]

Finally, these courts' analyses have relied too heavily on an ALS's deterrent characteristic when determining whether they are punishment. For example, *Gustafson* held that "the existence of a deterrent purpose in [an ALS] alone . . . mandates a finding that the sanction imposed on appellee was a punishment for purposes of double jeopardy."[112] However, *Halper* specifically required that punishment serve two goals—deterrence and retribution—not just one of the two.[113] In addition, the Court in *Kurth Ranch*, stated that an obvious deterrent alone does not mark a statute as a form of punishment.[114] Accordingly, for an ALS to be punitive it must fulfill both deterrent and retribution requirements.

1. Legislative Purpose and History

Courts have held that their state's legislatures clearly intended for an ALS to deter drunk driving and that the motivation to deter is indicative of punishment.[115] For example, in *Connecticut v. Hickham*,[116] the court looked to the statements of elected representatives, who often stress the deterrent effect of license suspensions and how it is one of the most severe penalties available for

109. 70 Ohio Misc. 2d 34, 40 (Franklin County Mun. Ct. 1995).

110. *But see* Connecticut v. Hickham, No. MV 94-618025, 1995 WL 243352, at *4 (Conn. Super. Ct. Apr. 20, 1995) (conceding that an ALS does have the intent of making roads safe, but concluding, nonetheless, that an ALS is punitive for double jeopardy purposes).

111. *See supra* notes 107-08 and accompanying text.

112. No. 94 C.A. 232, 1995 WL 387619, at *5 (Ohio Ct. App. 7th Dist. June 27, 1995).

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

114. — U.S. —, 114 S. Ct. 1937, 1946 (1994).

115. *Gustafson*, 1995 WL 387619 at *5. In this case, the defendant was stopped for speeding and subsequently arrested for driving while intoxicated. *Id.* at *1. After suspension of his driver's license, the defendant moved to dismiss the subsequent DUI prosecution on double jeopardy grounds. *Id.* The trial court granted the motion and the State of Ohio appealed. *Id. See also Hickham*, 1995 WL 243352.

116. 1995 WL 243352.

DUI offenders.[117] Additionally, the court examined statements by a transportation safety expert before the Connecticut House Judiciary Committee, which were influential in causing the state to pass an ALS statute.[118] The expert articulated three reasons why an ALS serves as an effective deterrent: "(1) it is viewed by drivers as a severe sanction; (2) it can be invoked with certainty; and (3) it goes into effect shortly after arrest."[119] The expert asserted that an ALS serves as a less costly sanction than jail sentences.[120] Thus the *Hickham* court accepted the statements of its elected government officials and safety experts as proof that the legislative intent was to use an ALS for punitive purposes.[121]

The court in *Ohio v. Gustafson*[122] held that an ALS serves a deterrent purpose by threatening motorists with the sanction of having their license suspended.[123] This purpose, the court stated, was underscored by extensive public relations campaigns warning motorists of the punishment they may face if they drive while under the influence of alcohol.[124] Accordingly, the court held that, "[t]he existence of a deterrent purpose in [an ALS] alone or in conjunction with the finding of a retributive intent associated with the sanctions contained therein,[125] mandates finding that the sanction

117. *Id.* at *5. The *Hickham* court viewed the following statements of its elected officials as proof of an ALS's punitive intent:

> Before the Judiciary Committee [c]onsidering House Bill H.B. 5097 March 20, 1989. . . . Rep. Wollenberg[:] . . . I agree that one of the strongest deterrents we have is to take someone's license . . . [;] Sen. Avallone[:] . . . I understand that a quick suspension of the license was, under the studies an important factor in deterring crime[;] . . . Rep. Lawlor[:] . . . Would it surprise you if I said that a 90 day suspension of someone's driver's license is probably among the most, in terms of numbers, among the most severe penalties that are dolled (sic) out in our court system today?[;] Statement of Laughlin M. McClean Chairman of Governor's Task Force on Driving While Intoxicated in Support of Bill No. 5097—Per Se License Suspension. . . . Loss of license is swift and sure, adding greatly to the deterrent effect [of an ALS] . . . ; House of Representatives, May 30, 1989 . . . [.] Rep. Tulisano[:] . . . [license suspensions] penalize[] people stronger than any thing we have seen here if punishment is the answer. *Id.*

118. *Id.* at *5. (statements by Steven Blackstone of the National Safety Board).

119. *Hickham*, 1995 WL 243352 at *5.

120. *Id.*

121. *Id.*

122. No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct. App. 7th Dist. June 27, 1995).

123. *Id.* at *4.

124. *Id.*

125. These sanctions were noted by the court as the $250 reinstatement fee and a prohibition against work privileges for fifteen days.

imposed on appellee was a punishment for double jeopardy purposes."[126]

Lacking a formal legislative history, the court in *Ohio v. Ackrouche* inferred the intent of the legislature from the provisions of Ohio's ALS statute itself.[127] The *Ackrouche* court noted that in 1993 the state amended its driving offenses code as part of a comprehensive legislative enactment designed to deal with drunk driving.[128] New provisions authorized pretrial sanctions for certain crimes.[129] One provision authorized the seizure of automobiles used in the commission of certain offenses; another provision authorized immediate driver's license revocation for refusing to take a chemical test or for testing over the legal blood-alcohol level; other provisions prohibited "any court from staying an imposed [driver's license] suspension pending its appeal, and [limited] the court's power to grant occupational driving privileges for a minimum specified period."[130] "Considered in their entirety," the *Ackrouche* court held, "the 1993 revisions to the drunk driving law were clearly intended to 'get tough' on drunk drivers by imposing new sanctions which are 'swift and sure.' "[131]

2. *Deterrent and Retributive Mechanics of an ALS*

In analyzing whether an ALS is punishment for double jeopardy purposes, some courts focus on the actual mechanics of the statute.[132] The court in *Ackrouche* noted that the Ohio statute's retributive purpose is evident because "the length of the suspension [increases] according to prior offenses[133] and the availability of oc-

126. *Hickham*, 1995 WL 387619 at *5.

127. Ohio v. Ackrouche, 70 Ohio Misc. 2d 34, 39 (Franklin County Mun. Ct. 1995). *But see* Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291, at *5 (Ohio Ct. App. 12th Dist. Aug. 21, 1995) (looking to 25 years of Ohio precedents holding that an ALS was not punitive for double jeopardy purposes).

128. *Ackrouche*, 70 Ohio Misc. 2d at 39-40.

129. *Id.* at 40.

130. *Id.* Unfortunately, the court does not specify how the second of these two characteristics is punitive. However, we may reasonably infer that the court interprets these as punitive because they limit a judge's ability to make ALS sanctions less severe.

131. *Id.*

132. Factors taken into consideration include whether the statute focuses on the culpability of the driver, whether the amount of time varies according to prior offenses, whether other fines are tagged on to the suspension and whether drivers serving suspensions under criminal prosecution are credited for suspensions served under an ALS. *Id.*

133. *Ackrouche*, 70 Ohio Misc. 2d at 40. *See also* Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619, at *5 (Ohio Ct. App. 7th Dist. June 27, 1995) (noting harsher restrictions imposed for each successive violation as punitive).

cupational driving privileges also depends on the number of prior offenses."[134] Moreover, ALS statutes that provide credit against any judicial suspension of a person's driver's license provide evidence of its punitive intent.[135] From these crediting provisions, the *Ackrouche* court inferred the legislature's recognition "that a driver whose license has been suspended . . . has already been punished by the time any judicial suspension is imposed upon conviction for a violation."[136]

Yet another factor that served as evidence to the court in *Gustafson* that an ALS was punishment was that it punished individual conduct by focusing on the culpability of a specific driver, rather than serving the general remedial goals of protecting public safety.[137] The Court in *Austin* also found that focusing on the culpability of a defendant was indicative of a statute's punitive intent.[138]

Additionally, $250 reinstatement fees tagged onto the suspension have served, in the view of some courts, as further evidence of the statute's retributive intent. For example, the *Gustafson* court held that the additional $250 license reinstatement fee, for a person "working on a minimum wage schedule . . . may . . . constitute cruel and unusual punishment for what should be considered a traffic offense."[139]

3. *Hardship Suffered by Defendant*

Lastly, although courts hold that whether a civil statute is punitive should not be determined from the defendant's perspective, who is likely to feel the "sting of punishment" from any civil sanc-

134. *Ackrouche*, 70 Ohio Misc. 2d at 40. The court does not specifically give reasons why these characteristics are indicative of a statute's punitive nature. The court may be assuming this because punishing predicate defendants more severely is a trait of criminal statutes. However, the court in Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291, at *6 (Ohio Ct. App. 12th Dist. Aug. 21, 1995), noted that people who drink and drive more often are less safe and thus keeping them off the roads for longer periods of time would seem to serve the public interest and thus not be punitive.

135. *Id. See also Gustafson*, 1995 WL 387619 at *5 (stating "the intent to punish under [the ALS statute] is clear by virtue of the fact that credit is given for the license suspension").

136. *Ackrouche*, 70 Ohio Misc. 2d at 40.

137. *Gustafson*, 1995 WL 387619 at *5. *See also Ackrouche*, 70 Ohio Misc. 2d at 40 (noting that the Ohio ALS statute was designed to punish the individual by focusing on his or her culpability).

138. *See* Austin v. U.S., 509 U.S. —, 113 S. Ct. 2801, 2810-11 (1993).

139. 1995 WL 387619 at *5.

tion,[140] some courts nevertheless point out that defendants appear more distressed by an ALS than by jail time. The court in *Hickham* noted that defendants often offer more resistance to the license suspensions than they do to short jail sentences or major fines.[141] In addition, the livelihood of the defendant and his or her family may be dependent on the ability to operate a motor vehicle.[142] Accordingly, the *Hickham* court held that suspension of a driver's license is a great hardship to any person and thus acts as punishment for double jeopardy purposes.[143]

III. A Proportionality Approach to ALS Cases

Courts that have addressed the double jeopardy concerns posed by an ALS have all looked to *Halper* and its progeny for guidance.[144] However, disagreement has arisen because *Halper* espouses contradictory standards to apply when deciding the nature of civil sanctions.[145] For example, *Halper* stated that "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as serving either retributive or deterrent purposes, is punishment."[146] This standard would necessarily render a statute, with the slightest punitive aspect, punishment; thus, trumping any legitimate civil sanctioning power the government may have. *Halper* also created a "proportionality" test whereby a statute will be rendered punishment if what it seeks to exact is overwhelmingly disproportionate to the damages the defendant has caused.[147] This standard would allow a civil sanction to comprise a higher level of retribution and deterrence than the "solely remedial" standard, without it being deemed punishment. In addition, *Halper* and its progeny do not provide factually compatible precedents for drunk driving cases.[148] Therefore, courts

140. *See* United States v. Halper, 490 U.S. 435, 447 n.7 (1989) (requiring that a sanction's punitive nature must not be examined from a defendant's perspective); Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995) (recognizing *Halper*'s requirement that the a statute is not analyzed from the defendant's perspective).

141. 1995 WL 243352 at *5.

142. *Id.* at *6.

143. *Id.*

144. *See supra* part II.A-B.

145. *See supra* part II.A-B.

146. *Halper*, 490 U.S. at 448 (emphasis added).

147. *Id.* at 449.

148. In most cases courts simply applied one of the tests espoused by *Halper*. *See supra* notes 64-70, 78-87 and accompanying text. However, other courts rejected the "overwhelmingly disproportionate" test because the damage caused by drunken divers was not monetarily quantified, and instead looked toward the principles underlying the *Halper* decision and factually similar cases which have recognized the

should disregard the specific tests espoused by *Halper* because they are contradictory and do not work well in the non-monetary civil sanction context. Instead, courts should rely on the general principles espoused in *Halper*.

From *Halper* we can extract the principle that the government can cause some harm to an individual so long as it is not disproportionate to the interest the government has in being compensated for any damage committed by the defendant. In the ALS context, courts should weigh the harm caused to a defendant by an ALS statute against the risk a drunken driver poses to society. So long as the harm to the individual of having his license revoked for a period of time is not overwhelmingly disproportionate to the risk he or she poses to society, the statute should be deemed non-punitive. However, if the harm to the individual is overwhelmingly disproportionate to the risk he or she poses to society, the statute will be deemed punishment for double jeopardy purposes. This entire analysis should be made in light of the deference given to the government in the administrative license context.[149]

A. Factual Incompatibility: The Non-Monetary Nature of ALS Cases

There is factual incompatibility between *Halper* and its progeny and ALS cases.[150] *Halper* dealt with a civil fine for fraudulent billing practices,[151] *Austin* considered the forfeiture of personal property for violating drug laws,[152] and *Kurth Ranch* involved a tax on illegal drug profits.[153] In those cases, the defendant's illegal con-

government's power to revoke a privilege and subsequently prosecute without violating the Double Jeopardy Clause. *See supra* notes 88-97 and accompanying text.

149. Using cases in other administrative license contexts is appropriate because the objectives throughout these regulated areas are the same as in the driving arena: to regulate activities which would pose a danger to society if not carried out properly. *See* In re Nelson, 450 P.2d 188, 193 (N.M. 1969) (holding that action taken against an attorney was for "the protection of the public. . ."); United States v. Hudson, 14 F.3d 536, 541 (10th Cir. 1994) (disbarring banking officials was "a means of protecting the integrity of the banking system and the interest of the depositors"); Loui v. Board of Medical Examiners, 889 P.2d 705, 711 (Haw. 1995) (holding that medical license suspensions were "designed to protect the public from unfit physicians").

150. *See* Alaska v. Zerkel, 900 P.2d 744, 751 (Alaska Ct. App. 1995) (noting that *Halper*'s "compensation for loss" test does not apply to the ALS context); Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995) (holding that the *Halper* test does not apply to non-monetary civil sanctions).

151. *See supra* notes 26-32 and accompanying text.

152. *See supra* notes 33-41 and accompanying text.

153. *See supra* notes 42-55 and accompanying text.

duct was monetarily quantifiable.[154] Thus, the Supreme Court could easily determine, by comparing the cost of the illegal conduct to the cost of the fine exacted, whether the government was trying to remedy its loss or punish the wrongdoer.[155] As stated by Professor Cheh, "for monetary penalties, *Halper* gives us a useful albeit broad formula. For adverse actions that are not measured in currency, however, the matter is less clear. Here we need guidance as to what punishment is for double jeopardy purposes."[156]

Certain courts have rejected the "overwhelmingly disproportionate" or "compensation for loss" test with regard to ALS cases because *Halper*'s tests were designed to decide when a monetary civil sanction does not serve the goal of compensating the government.[157] These courts reason that the *Halper* test was not intended to judge the punitive aspect of a civil sanction that revokes a privilege.[158]

Agreeing with Chief Justice Rehnquist's dissent, the majority in *Kurth Ranch* also rejected use of *Halper*'s "proportionality" test.[159] "Tax statutes need not be based on any . . . damage or cost incurred by the Government as a result of the taxpayer's activity" as was the case in *Halper*.[160] Moreover, the Court stated that even if it were proper to apply *Halper*'s test to the tax statute, "Montana has not claimed that its assessment . . . roughly relates to any actual

154. Even when the fine is not monetary but involves forfeiture of property, determining a statute's remedial nature is not very difficult because a monetary value can be put on property. As the Court stated in Austin v. U.S., 509 U.S. —, 113 S. Ct. 2801, 2811-12 (1993) (citations omitted), "[w]e have previously upheld the forfeiture of goods involved in customs violations as 'a reasonable form of liquidated damages.' But the dramatic variations in the value of conveyances and real property [here] undercut any similar argument with respect to [the present] provisions."

155. *See infra* notes 168-69 and accompanying text.

156. Cheh, *supra* note 108, at 1378.

157. New Mexico v. Kennedy, 904 P.2d 1044, 1055 (N.M. 1995); Alaska v. Zerkel, 900 P.2d 744, 751 (Alaska Ct. App. 1995) (rejecting *Halper*'s "compensation for loss" ("proportionality") test); Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995) (noting that *Halper*'s "proportionality" test did not apply to the ALS context). In ALS cases, the harm committed against the government by a person driving under the influence of alcohol cannot be monetarily quantified for purposes of *Halper*.

158. *Kennedy*, 904 P.2d at 1055. In the ALS context, the government is not seeking to be remedied in any way. This was noted by Freeman v. State, 611 So. 2d 1260, 1261 (Fla. Dist. Ct. App. 1993), which stated that an ALS was not remedial in the *Halper* sense, nor was the statute punitive. The California Court of Appeals also noted this in Ellis v. Pierce, 282 Cal. Rptr. 93 (Ct. App. 1991): an ALS "achieves no compensation for any injured party for tangible loss," nor is the statute punitive, instead the statute's purpose is to facilitate the collection of evidence and to protect the public from unfit drivers. *Id.* at 94.

159. — U.S. —, 114 S. Ct. 1937, 1948 (1995).

160. *Id.* at 1950 (Rehnquist, C.J., dissenting).

damages that [the defendants] caused the state. And in any event, the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all."[161] Thus, the Court examined the tax statute's nature by analyzing its specific mechanics and characteristics.[162]

Nevertheless, a proportionality, or balancing test akin to the one described in *Halper* should be employed in non-monetary civil sanction cases, such as those concerning an ALS; however, rather than determining whether the sanction is overwhelmingly disproportionate to the money owed to the government, the non-monetary civil sanction test should determine whether the deprivation the civil sanction causes the driver is overwhelmingly disproportionate to the perceived risk of harm the driver poses to society.

B. *Halper*'s Contradictory Nature

Halper's holding has been widely misconstrued by lower courts. Courts that interpret *Halper* as espousing a "solely remedial" test have not identified the test actually espoused in that case.[163] The Court in *Halper* specifically stated:

> 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 [and] bears no rational relation to the goal of compensating the Government for its loss.[164]

Justice Kennedy in concurrence explained the Court's holding: "The controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government. Here it does not, so it must be considered punishment for purposes of the Double Jeopardy Clause."[165] Use of a "solely remedial" test would deem almost any remedial statute punitive and thus trump the government's power

161. *Id.* at 1948.

162. *See supra* notes 51-54 and accompanying text.

163. *See* Ohio v. Gustafson, No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct. App. 7th Dist. June 27, 1995) (applying the "solely remedial" test). *But see* Minnesota v. Hanson, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995) (stating that the "solely remedial test" was not the explicit holding in *Halper*. Instead that language was derived from a broader analysis of the civil-criminal distinction for purposes of due process, not for determining whether civil sanctions are punishment.).

164. United States v. Halper, 490 U.S. 435, 449 (1989) (emphasis added).

165. *Id.* at 453 (Kennedy, J., concurring).

to collect civil penalties. The Court specifically stated in *Halper* that it did not want to cause this result.[166] Moreover, both the majority and the concurrence focus on proportionality in determining whether the statute is remedial or punitive.[167]

For example, the defendant in *Halper* defrauded the government of $850 and the government then sought to exact over 220 times that amount in a civil proceeding.[168] The government could no longer be remedying any loss it had sustained; instead, it was punishing the defendant.[169] Thus, only in a situation where the government grossly misuses its power will the Court deem the government to have punished the individual for double jeopardy purposes.[170] The *Halper* Court conceded "that this inquiry will not be an exact pursuit;"[171] nonetheless, for an ALS sanction to be punishment it must be overwhelmingly disproportionate, excessive or extreme.[172]

C. *Halper*'s Proportionalty Principle in the ALS Context

Although *Halper* and its progeny are factually incompatible in analyzing the nature of non-monetary civil sanctions, nevertheless, a proportionality, or balancing test akin to the one described in *Halper* should be employed; however, rather than determining whether the sanction is disproportionate to the money owed to the

166. *Id.* at 451.

167. Evidence that the Court would not apply the "solely remedial" test can be found in its approval of fixed penalty-plus-double damages statutes as remedial. *Id.* at 449. Because such statutes go further than merely compensating the government, the double damages aspect of the statute would necessarily fail under the "solely remedial" test. Thus, approval of civil sanctions as remedial that would necessarily fail under a "solely remedial" test is proof that the Court would not approve of applying such a test to civil sanctions.

168. *Id.* at 439-40.

169. *Id.* at 452.

170. Ohio v. Sims, No. C.A. 94-12-215, 1995 WL 493291 (Ohio Ct. App. 12th Dist. Aug. 21, 1995), State v. Ackrouche, 70 Ohio Misc. 2d 34 (Franklin County Mun. Ct. 1995), Connecticut v. Hickham, No. MV 94-618025, 1995 WL 243352 (Conn. Super. Ct. 1995) misinterpreted what the Supreme Court was trying to accomplish in *Halper* and its progeny. *Halper* and its progeny paid deference to the government's remedial purpose unless the penalty sought was either "overwhelmingly disproportionate" as in *Halper*, 490 U.S. at 449, the forfeiture had been considered punishment historically as in *Austin v. U.S.*, 509 U.S. —, 113 S. Ct. 2801, 2806-07 (1993), or the tax was a "concoction of anomalies, too-far removed in crucial respects from a standard tax assessment" as in *Department of Revenue of Montana v. Kurth Ranch*, — U.S. —, 114 S. Ct. 1937, 1948 (1994). It is true that an ALS may serve a deterrent effect and it may carry the sting of punishment, but not to the extent that they should be held punitive for double jeopardy purposes as espoused under the aforementioned cases.

171. *Halper*, 432 U.S. at 449.

172. *Sims*, 1995 WL 493281 at *4.

government, the non-monetary civil sanction test should determine whether the deprivation the civil sanction causes the driver is disproportionate to the perceived risk of harm he or she poses to society.

The analysis employed in *Kurth Ranch* is limited to the facts of that case and, thus, should not be applied to non-monetary civil sanctions. The Court in *Kurth Ranch* did not seek to balance any interests between the individual and society; rather, it analyzed the tax statute's "unusual features" to determine whether it was punitive.[173] Although those features were held "unusual" for a tax statute, it does not necessarily follow that they are "unusual" for other types of civil sanctions. For example, a non-monetary civil sanction, which lacks the "unusual features" spoken of in *Kurth Ranch*, may be deemed non-punitive under the *Kurth Ranch* test even though it in fact acts as punishment; thus illustrating that the *Kurth Ranch* test is factually incompatible with, and should not be employed to evaluate, non-monetary civil sanctions under the Double Jeopardy Clause.

When determining whether an ALS statute is punitive, a test which balances the interests between the driver and society can be more easily applied than one which analyzes the specific mechanics of a statute.[174] Moreover, this balancing of interests can be reasonably interpreted as *Halper*'s main principle. For example, the Court in *Halper* determined that the government should be able to deprive a defendant of something, i.e. money, without it being punishment if he commits a harm against the government; however, for double jeopardy purposes, the Court was not willing to allow the government to exact from the defendant an amount disproportionate to the government's interest in being compensated.[175] Thus, from *Halper*'s outcome, we can reasonably infer that the Court was concerned with balancing the extent to which a defendant may be harmed against the interest the government may have in carrying out its governmental powers. Consideration of the sub-

173. — U.S. —, 114 S. Ct. 1937, 1947. *See supra* notes 51-54 and accompanying text.

174. Since *Halper*, 490 U.S. 435 (1989) and *Kurth Ranch*, — U.S. —, 114 S. Ct. 1937 (1994), analyzed monetary civil sanctions for double jeopardy purposes, courts are largely without guidance as to what specific mechanics and what combination of different mechanics deem a non-monetary civil sanction punitive, and as to when such mechanics rise to the level of punishment. *See also* Cheh, *supra* note 108, at 1378 (asking for guidance when determining what is punishment for double jeopardy purposes in the non-monetary civil sanction context).

175. *See supra* notes 26-32 and accompanying text.

jective harm that a defendant experiences when deprived of his or her driver's license is necessarily required because non-monetary civil sanctions lack an objective manner by which to analyze them: unlike *Halper*, the harm committed against the government cannot be monetarily quantified.

Because there is a balance of interests in the ALS context fairly similar to the balance of interest in *Halper*, a "proportionality" test should be used to determine whether an ALS is punitive or remedial. In an ALS, the effect of the suspension on the individual, through deprivation of his or her driver's license, can be balanced against the state interest in protecting society. As the driver's license suspension becomes longer, the degree of deprivation to the driver will at some point become disproportionate to the perceived risk he poses to society and, thus, become punishment.

D. Administrative License Suspension Cases as Evidence of the Government's Regulatory Power

In cases dealing with administrative revocations of professional licenses, the state's remedial objective is not quantified in terms of money owed to the government for a specific harm, rather it reflects a desire to keep certain irresponsible and incompetent professionals from harming the public. Accordingly, these cases translate easily to the ALS context, where the remedial purpose in suspending driver's licenses is to keep potentially dangerous drivers off the streets.[176] Moreover, these cases stand for the proposition that the government can grant a privilege, revoke it for proper reasons and then, if appropriate, bring criminal prosecution without violating the Double Jeopardy Clause.

In other administrative licensing contexts, the government can both prosecute and exercise a civil remedial role. For example, it is well established that a lawyer who is disbarred for possessing narcotics cannot argue that his disbarment was punishment and therefore he should be insulated from criminal liability for the same offense.[177] Similarly, it would be absurd for a person who murders

176. *See supra* notes 72-73 and accompanying text.

177. In re Calhoun, 538 N.W.2d 797, 801 (Wis. 1995) (imposing a three-year suspension of an attorney for convictions of possessing and delivering cocaine and various misrepresentations to the court and others). *See* United States v. Payne, 2 F.3d 706 (6th Cir. 1993) (upholding conviction of postal employee for obstruction and desertion of mail). In *Payne*, the Sixth Circuit rejected the defendant's argument that his termination was punishment thus barring subsequent prosecution. *Id.* at 710. To allow this argument, the court cautioned, would work an absurd result. *Id.*

someone with a registered gun to argue that he or she cannot be prosecuted because their registered gun was taken away.

In an ALS, a person's driver's license is suspended to prevent future irresponsible behavior. In addition, the drunk driver will be prosecuted because there are criminal laws against driving while intoxicated. The fact is that these situations present two distinct objectives. One objective is to protect public safety and the other is to punish criminal behavior. Commenting on the differences between punishment and regulatory sanctions, Professor Cheh has stated:

> Common experience and common sense dictate that a criminal conviction for aggravated assault should not bar a departmental proceeding to suspend the police officer for the same conduct .... Indeed, if we allowed the fact of a previous conviction to bar administrative action against an individual for the same conduct, felons would enjoy immunity from regulation to which others are not subject.[178]

There is an argument that professional license cases should not control in the ALS context because we may place a higher value on driver's licenses than professional licenses.[179] As the court in *Ohio v. Gustafson* noted:

> In this society where public transportation is either non-existent or is, at best, inadequate and entire commercial shopping areas are located in suburbs surrounding our cities, we can no longer view a driver's license as merely a privilege which is given by the State and which is subject to revocation at any time.[180]

Moreover, although a person can pursue another career after a professional license is revoked, a driver's license revocation can cause a person to become immobilized.[181]

Nonetheless, the argument that accords driver's licenses a higher status in our society than professional licenses disregards the severe repercussions suffered by professional license revokees. Professionals, such as doctors and lawyers, have attended college and graduate school, and have often spent tens of thousands of dollars

178. *See* Cheh, *supra* note 108, at 1378.

179. *See infra* notes 180-81 and accompanying text.

180. No. 94 C.A. 232, 1995 WL 387619, at *5 (Ct. App. 7th Dist. June 27, 1995). Moreover, driving is so intrinsic to our society that some would treat it as a fundamental right according it the utmost protection.

181. For example, for the person living in a city with different modes of public transportation, the harm may not be so great. But for the majority of people in this country, who live in suburbs or rural areas, this can cause substantial or total immobilization.

in tuition, books, travel expenses and unearned wages.[182] If given the choice, a professional would probably forego his or her driver's license more quickly than his or her professional license because of the difference in time and money invested in the two. In fact, revocation of a driver's license which is obtained after taking a simple test and paying a small fee, can only be described as minimal when compared to the revocation of a professional license, which requires years of schooling and large monetary expenditures. Arranging for an alternative means of transportation is generally easier than being forced to pursue a different career. Moreover, even though professional license revocations tend to be longer than the average 90-day suspensions drunken drivers receive,[183] courts have consistently upheld revocation of professional licenses and subsequent criminal prosecution as not violative of the Double Jeopardy Clause.[184]

E. Application of the Proportionality Test to an ALS

As part IIB discussed, some courts have held that an ALS is punishment for double jeopardy purposes.[185] However, an ALS also serves to protect the public's interest by keeping "potentially threatening drivers . . . [off a] state's roadways; and . . . between the time offending drivers are cited and their criminal adjudication, the procedure precludes such drivers from continuing to drive."[186] In addition, courts pay deference to regulatory agencies as long as

182. *See* Johnathan D. Glater, *Loansome Law Students: Why Payback is Tough*, WASH. POST, Aug. 21, 1995, (Washington Business), at 7 (stating that half of graduating lawyers carried $38,000 or more in debt in 1994. In the medical field, "[t]he average debt for a George Washington University medical school graduate in 1995 was about $75,000.").

183. In re Calhoun, 538 N.W.2d 797, 801 (Wis. 1995) (imposing a three-year suspension of a license to practice law); Loui v. Board of Medical Examiners, 889 P.2d 705, 716 (Haw. 1995) (imposing a one-year license suspension of a license to practice medicine).

184. United States v. Hudson, 14 F.3d 536, 541 (10th Cir. 1994) (barring of banking officials indefinitely until such time as they obtained written consent from regulatory agencies, in addition to criminal prosecution, did not violate the Double Jeopardy Clause); United States v. Bizzell, 921 F.2d 263, 264 (10th Cir. 1990) (barring of defendants from HUD program for two years, in addition to criminal prosecution, was not punitive for double jeopardy purposes). Loui v. Board of Medical Examiners, 889 P.2d 705, 716 (Haw. 1995) (concluding that a one-year medical license suspension, in addition to criminal prosecution, was not violative of the Double Jeopardy Clause).

185. *See supra* part II.B.

186. Hawaii v. Higa, 897 P.2d 928, 933 (Haw. 1995).

their regulatory powers are not abused.[187] Accordingly, when determining whether an ALS is punitive for double jeopardy purposes, courts should start with the presumption that the regulation is a non-punitive civil sanction.

Because courts usually hold that suspensions of licenses for noncompliance with certain regulations can accompany criminal prosecution,[188] this Note's analysis should begin with the rebuttable presumption that an ALS is non-punitive. Accordingly, in weighing the degree of deprivation an ALS has on a defendant against the state's interest in protecting society, courts would probably find that a 90-day suspension is not disproportionate to the safety interest at stake. Having a driver's license suspended for a short 90-day period cannot cause a defendant hardship to the extent that it would render a presumptively non-punitive suspension punitive. In fact, the hardship on the victim of a drunk driving accident is much greater than that on a person who has had his or her license revoked. Moreover, the government has the power to regulate driving "in the interest of the public's safety and general welfare."[189] From this regulatory power stems the state's power to revoke the individual's privilege for non-adherence to set standards.[190]

However, as suspensions become longer, it is more likely that they will be deemed punitive.[191] With regard to longer suspensions, the degree of deprivation to a driver will at some point become disproportionate to the perceived risk of harm that the driver presents. Consider a hypothetical: Dining at a restaurant, John Doe has three glasses of wine for dinner—enough to have him test slightly over the legal blood-to-alcohol maximum. While driving home, he is arrested for driving while intoxicated. He then has his license revoked for a year through an ALS proceeding. This situation would probably be equivalent to that of *Halper*'s. The driver had no prior convictions of drunk driving. The reason why the statute was passed, to protect the public's interest in safe roadways, is not reasonably reflected in a one-year license suspension in this

187. *See* United States v. Halper, 490 U.S. 435, 449 (1989) (holding that a monetary civil sanction will be punitive when it seeks to exact an amount that is "overwhelmingly disproportionate" to making the government whole).

188. *See supra* part II.A.

189. New Mexico v. Kennedy, 904 P.2d 1044, 1056 (N.M. 1995).

190. Alaska v. Zerkel, 900 P.2d 744, 753 (Alaska 1995).

191. *See* Minnesota v. Hanson, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995) (avoiding the issue of whether 180-day driver's license suspensions for repeat offenders were remedial).

situation. This hypothetical driver has been punished and should not face subsequent criminal prosecution. Conversely, Jane Doe drinks considerably, and decides to go driving with a group of friends. This is the second time she has been arrested for drunk driving. She has her license suspended through an ALS for six months. In this hypothetical, she probably has not been punished since her past convictions prove that she is a dangerous driver, and testing three times over the legal blood-to-alcohol is evidence that she is an irresponsible person. Here, the deprivation to the driver is not disproportionate to the perceived risk of harm she poses to society.

Accordingly, an ALS which seeks to suspend a driver's license should be analyzed on a case-by-case basis weighing the effect on the driver against the state interest in protecting public safety.[192] In making this analysis, courts should afford the government the same deference it would in any other regulatory arena.[193] In analyzing longer suspensions, courts should take into account the number of previous convictions for drunk driving. A higher number of convictions will heighten the government's interest in keeping a potentially dangerous driver off the roads.

Conclusion

The power to regulate driving is inherent in the state's power to regulate potentially dangerous activities. This power does not diminish in the face of criminal prosecution, but in fact, works hand-in-hand with it. Except in rare situations where the government's power in civil proceedings is abused, courts have consistently upheld civil sanctions when brought against defendants in separate proceedings. The public's interest in keeping potentially dangerous drivers off a state's roads for 90 days is not disproportionate to any harm it may cause the driver. Accordingly, 90-day driver's license suspensions brought before or after criminal prosecutions do not violate the Double Jeopardy Clause. However, an ALS that calls for longer suspensions should be examined more closely. With longer suspensions, the harm to the individual should be weighed against the state's interest in maintaining safe roads. At some point the harm to the driver becomes so great, that the presump-

192. *See* Cheh, *supra* note 108, at 1379 (stating "[a]s *Halper* itself indicated . . . courts actually must determine, on a case by case basis, whether a given burden is reasonably calculated to achieve and actually does achieve the non-punishment goals of . . . regulation").

193. *See supra* part II.A.4.

tion that a government agency is exercising its non-punitive powers in the public's interest should be rebutted. Accordingly, in extreme cases it should be held that the government is punishing the individual and subsequent prosecution should be barred by the Double Jeopardy Clause.