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North Carolina and Pretrial Civil Revocation of an Impaired Driver's License and the Double Jeopardy Clause

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NOTES

NORTH CAROLINA AND PRETRIAL CIVIL REVOCATION OF AN IMPAIRED DRIVER'S LICENSE AND THE DOUBLE JEOPARDY CLAUSE

I. INTRODUCTION

Any person charged with driving while impaired in North Carolina,[1] or who refuses to submit to a chemical analysis,[2] is sub-

1. N.C. Gen. Stat. § 20-138.1 (1993 & Supp. 1995) in relevant part states:
   (a) Offense—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
   (1) While under the influence of an impairing substance; or
   (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.
2. N.C. Gen. Stat. § 20-16.2 (1993 & Supp. 1995) provides in relevant part:
   (a) Basis for Charging Officer to Require Chemical Analysis; Notification of Rights—Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense.
   Except as provided in this subsection . . . before any type of chemical analysis is administered the person charged must be taken before a chemical analyst authorized to administer a test of a person's breath, who must inform the person orally and also give the person a notice in writing that:
   (1) The person has a right to refuse to be tested.
   (2) Refusal to take any required test or tests will result in an immediate revocation of the person's driving privilege for at least 10 days and an additional 12-month revocation by the Division of Motor Vehicles.
   (3) The test results, or the fact of the peron's refusal, will be admissible in evidence at trial on the offense charged.

ject to an immediate civil license revocation.[3] In addition to the immediate license revocation, the individual is subject to criminal prosecution for the offense of "Impaired Driving."[4]

In North Carolina[5] and across the country[6] this common statutory scheme has come under increasing attack by defendants charged with driving while impaired. The argument is that the civil license revocation of those charged with impaired driving constitutes "punishment" for the purposes of the Double Jeopardy Clause,[7] and thus a subsequent criminal prosecution for the offense of impaired driving is barred. Some defendants in North Carolina have successfully used this defense at the superior court level to prevent the State from proceeding with a criminal prosecution.[8] On May 8, 1996 the North Carolina Supreme Court delivered its opinion on the issue.[9]

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(4) The person's driving privilege will be revoked immediately for at least 10 days if:
a. The test reveals an alcohol concentration of 0.08 or more; or
b. The person was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more.

3. N.C. Gen. Stat. § 20-16.5(b) (1993 & Supp. 1995), in relevant part states:
(b) Revocation for Persons Who Refuse Chemical Analyses or Have Alcohol Concentrations of 0.08 or More After Driving a Motor Vehicle or of O.04 or More After Driving a Commercial Vehicle.—A persons driver's license is subject to revocation under this section if:
. . . .
(4) The person:
a. Willfully refuses to submit to the chemical analysis;
b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving; or
c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial vehicle.

This article contemplates a double jeopardy challenge only in those cases where the defendant actually submitted to chemical analysis and registered an alcohol concentration of 0.08 or more. A refusal by a defendant to submit to the chemical analysis appears to give rise to a separate offense and thus would not qualify for Double Jeopardy protection.

4. N.C. Gen. Stat. § 20-138.1 (1993).

5. *See* Michael Dayton, *Failed D.W.I. Defense To Get Review By Appeals Court*, N.C. LAW. WKLY., August 21, 1995, at 1 [hereinafter Dayton].

6. *See* Harvey Berkman, *Double Jeopardy Downs D.U.I. Cases*, NAT'L L.J., June 26, 1995, at A7.

7. The Double Jeopardy Clause states in part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend. V.

8. *See* Dayton, *supra* note 5.

9. State v. Oliver, 470 S.E.2d 16, 1996 WL 240074 (N.C., May 8, 1996).

Section II of this comment introduces the reader to the three primary United States Supreme Court decisions that encouraged the use of the Double Jeopardy defense in D.W.I. cases. Section III examines how courts in other states have dealt with the defense, and Section IV discusses the recent North Carolina Supreme Court decision.

II. THE SUPREME COURT AND THE DECISION THAT GAVE DRUNK DRIVERS A SHOT

It is well established that the Double Jeopardy Clause protects an individual from three separate abuses: "it protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[10] The third protection is implicated in civil license revocation cases, and it is this protection on which the United States Supreme Court focused in *United States v. Halper*.[11]

In *Halper*, the Court confronted the issue of whether a civil penalty can constitute "punishment" for the purposes of the Double Jeopardy Clause.[12] Mr. Halper was the manager of a company which provided health care services for individuals eligible to receive Medicare benefits. Halper submitted 65 separate false claims for reimbursement under the Medicare program and his company received $585 more than it deserved.[13] Mr. Halper was convicted under the criminal false-claims statute,[14] fined $5,000 and sentenced to a term of two years in prison.

After Halper's conviction the government instituted an action against Mr. Halper under the False Claims Act.[15] The district court imposed civil liability on Halper based on the facts established at his criminal trial.[16] Under the Act Halper was liable for a civil penalty of: 1. $2,000 per violation, 2. two times the amount of damages sustained by the government as a result of his con-

10. United States v. Halper, 490 U.S. 435 (1989); North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted).

11. 490 U.S. 435 (1989).

12. *Id.*

13. *Id.* at 437. The government reimbursed the company $12 a claim when the company was entitled only to $3 a claim. This overpayment resulted from Mr. Halper's "mischaracterization" of the services rendered. *Id.*

14. 18 U.S.C. § 287 (1994).

15. 31 U.S.C. §§ 3729-3731 (1994).

16. United States v. Halper, 660 F. Supp. 531 (S.D.N.Y. 1987).

duct, and 3. the cost of civil litigation.[17] Thus, Halper was liable to the government for $130,000.

The district court determined that this amount would constitute punishment. Therefore, since Halper had already been convicted and punished, the government could not extract a penalty in that amount from Halper without violating the Double Jeopardy Clause's prohibition on multiple punishments for the same offense.[18] The district court concluded that a civil penalty designed to make the government whole would constitute "punishment" for double jeopardy analysis where the amount intended to compensate the government was not "rationally related" to the government's actual damages and expenses.[19] Ultimately, the district court imposed liability on Halper only for double damages ($1,170) and the costs of civil litigation.[20] On appeal to the United States Supreme Court the government argued that prior cases established that civil sanctions cannot implicate the Double Jeopardy clause.[21] The Court rejected this argument:

> The relevant teachings of these [prior] cases is that *the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis*. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely

17. 31 U.S.C. §§ 3729-3731 (1994). The False Claims Amendment Act of 1986 changed the civil penalty to "not less than $5,000 and not more than $10,000, plus 3 times the amount of damages that the government sustains because of the act of that person" as well as "the costs of a civil action brought to recover any such penalty or damages." 31 U.S.C. § 3729 (1994).

18. *Halper*, 660 F. Supp. at 533-34.

19. *Id.* at 533. To avoid the constitutional problem presented, the district court read the $2,000 per violation provision to be discretionary and imposed full liability for only eight counts, and entered judgment for the government in the amount of $16,000. However, the government moved for reconsideration and the court admitted that it was in error by holding the $2,000 per violation as discretionary, but still refused to impose full liability on Halper. Halper's ultimate liability did not include any of the mandatory $2,000 per violation penalty. United States v. Halper, 664 F. Supp. 852 (S.D.N.Y. 1987).

20. *Halper*, 664 F. Supp. at 855.

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

> approximate the Government's damages and actual costs, and rough justice becomes clear injustice.[22]

The Court also rejected the government's argument that punishment is imposed only in criminal proceedings, and the contention that whether a proceeding is civil or criminal is a matter of statutory construction.[23] The Court held that while reliance on statutory language, structure, and intent is valuable for identifying the nature of the proceeding or determining what constitutional safeguards apply to the proceeding, "the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."[24] Hence, a violation of this "intrinsically personal" right[25] "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[26] The Court was quick to note however, that this question was not to be decided from the perspective of the defendant since even remedial sanctions "carry the sting of punishment."[27]

The label given to a sanction ("civil"/"criminal") is "not of paramount importance" when assessing whether the sanction is punishment.[28] A civil sanction "constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."[29] Those goals are "retribution and deterrence."[30] The Court held that:

> under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution[31] may not be subjected to

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22. *Id.* at 446 (emphasis added). Note that the italicized portion of the quote is a clear statement that the Court will not demand the government compute only it's exact damages. The Court does not even seem concerned with how the Government arrives at a figure so long as that figure does not approach "clear injustice." *Id.*

23. *Id.*

24. *Id.* at 446-47 (citation omitted).

25. *Id.* at 447.

26. *Id.* at 448.

27. *Halper*, 490 U.S. at 447, n.7.

28. Id. at 448.

29. *Id.*

30. *Id.*

31. A question which immediately comes to the forefront is whether the order of events is critical. The holding in Halper deals with a situation where the defendant has already been convicted in a criminal proceeding. Halper, 490 U.S. at 448-49. In a license revocation situation the summary revocation occurs before any criminal proceeding is instituted. The consensus seems to be that the order of events does not and should not matter. United States v. Sanchez-

> an additional civil sanction to the extent that the second sanction *may not fairly be characterized as remedial, but only as a deterrent or retribution*.[32]

The Supreme Court then went on to state that this was a "rule for the rare case, the case such as the one before [the Court], where a fixed penalty provision subjects a prolific but small-gauge offender to a sanction *overwhelmingly disproportionate* to the damages he has caused."[33]

In *Austin v. United States*,[34] the Supreme Court revisited *Halper*. Although *Austin* did not involve the Double Jeopardy Clause, the Court did have to determine whether a federal in rem forfeiture statute constituted punishment.[35] Mr. Austin had been

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Escareno, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 123 (1992) (stating "the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding"); United States v. Marcus Schloss and Co., 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989) (quoting *Halper*) (stating "if in fact a civil sanction may fairly be characterized 'only as a deterrent or retribution'. . . then its exaction before imposition of criminal punishment should have the same double jeopardy effect as exaction afterwards"); State v. Strong, 605 A.2d 510, 514 (Vt. 1992) (same); *see* 46 OKLA. L. REV. 587, 600 (1993) for an extensive discussion of this issue. *But cf.*, Dept. of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1947, n.21 (1994) (stating "[t]his statute therefore does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character").

32. *Halper*, 490 U.S. at 448-49 (emphasis added). In the sentence immediately prior to the express holding the Court wrote:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Id. at 448.

When read in conjunction with the Court's explicit holding the above quoted statement creates confusion. Is any civil sanction that carries some deterrent purpose automatically punishment? The express holding of the Court simply does not go that far. The question is whether the sanction "may not *fairly* be characterized as remedial, but *only* as a deterrent or retribution." *Id.* (emphasis added). *See* State v. Hanson, 532 N.W.2d 598 (Minn. Ct. App. 1995).

33. *Halper*, 490 U.S. at 449 (emphasis added).

34. 113 S. Ct. 2801 (1993). The question presented in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) & (a)(7) (1988). The Court held that the Excessive Fines Clause does apply in in rem civil forfeiture proceedings because forfeitures have historically been understood to be punishment. *Austin*, 113 S. Ct. at 2801.

35. *Austin*, 113 S. Ct. at 2801.

arrested possessing "small amounts of marijuana and cocaine,"[36] and the Government subsequently sought forfeiture of his mobile home and auto body shop.[37] The Court, looking to *Halper,* 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."[38] However, the Court's analysis differed somewhat from *Halper*:

> In *Halper*, we focused on whether "the sanction as applied in the individual case serves the goals of punishment." In this case however, it makes sense to focus on [the statute] as a whole. *Halper* involved a small fixed-penalty provision, which "in the ordinary case . . . can be said to do no more than make the government whole." The value of the conveyances and real property forfeitable under [the statute], on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.[39]

The Court relied almost solely on the fact that forfeiture statutes historically have been understood as punishment and the statutes in question did nothing to change that perception.[40] Thus, the federal forfeiture statute[41] which provided for the forfeiture of property used or intended to be used in drug offenses[42] was "punishment" for purposes of the Excessive Fines Clause.[43]

More recently the Court dealt with the double jeopardy issue in *Department of Revenue of Montana v. Kurth Ranch*,[44] where the Court subjected Montana's Dangerous Drug Tax Act to double jeopardy inquiry.[45] The State of Montana imposed a tax totalling

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36. *Id.* at 2803.

37. *Id.*

38. *Id.* at 2812 (emphasis added) (citations omitted). The reader will note that this is not the express holding in Halper, thus adding to the confusion surrounding this issue. *See supra* note 32 and accompanying text.

39. *Austin*, 113 S. Ct. at 2812, n.14 (citations omitted).

40. *Id.* at 2811.

41. 21 U.S.C. §§ 881(a)(4) & (a)(7) (1988).

42. *Austin*, 113 S. Ct. at 2811-12.

43. *Id.* at 2811.

44. 114 S. Ct. 1937 (1994).

45. Montana's Dangerous Drug Tax Act imposed a tax in a separate proceeding on individuals who had been convicted of violating the Act. *Id.* at 1942. The civil proceeding was based on the same underlying offense. The tax was 10% of the market value or a set price depending on the drug. The Kurths were sentenced to prison, and forfeited cash and equipment used in the drug operation, valued at approximately $18,000. *Id.*

$900,000 on the Kurths after their criminal conviction. The Court reaffirmed the express holding in *Halper*:

> we held [in *Halper*] that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution".[46]

Once again the Court stated that a legislature's characterization of a statute as "civil" does not control for purposes of double jeopardy analysis.[47] However, the Court loosened its strict holding in Austin stating that "neither a high rate of taxation *nor an obvious deterrent purpose* automatically marks this tax a form of punishment."[48] These two factors alone were not enough to transform the tax into "punishment" for double jeopardy purposes, but under *Austin* it appears that they would have been.[49]

However, here again the Court did not use *Halper's* remedial v. punitive test.[50] Rather the Court focused in on the unusual characteristics of the tax to determine that the "tax is *fairly characterized* as punishment."[51] Thus, *Kurth Ranch* is important because it stands for the proposition that a civil sanction, even if it

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46. *Kurth Ranch*, 114 S. Ct. at 1945, 1948. Why did the Court not use the express holding of *Halper* in *Austin*? *See supra* note 38 and accompanying text. Whatever the reason, given the express holding in *Halper* and then the reaffirmation of that holding in *Kurth Ranch*, reliance on the language in *Austin* would seem to be misplaced, or at the very least on unstable ground. *See* Johnson v. State, 622 A.2d 199 (Md. Spec. Ct. App. 1993); State v. Hanson, 532 N.W.2d 598 (Minn. Ct. App. 1995).

47. *Kurth Ranch*, 114 S. Ct. at 1945.

48. *Id.* at 1946 (emphasis added). The Court stated: "That the Montana Legislature intended the tax to deter people from possessing marijuana is beyond question. The D.O.R. reminds us, however, that many taxes that are presumed valid, such as taxes on cigarettes and alcohol, are also both high and motivated to some extent by an interest in deterrence." *Id.*

49. At this point it looks even more like the language in *Austin* was an anomaly. *See supra* notes 32 and 46.

50. *Kurth Ranch*, 114 S. Ct. at 1947-48. That test would be an analysis of whether the penalty is imposed for actual costs to the state that are attributable to the defendant's conduct or in other words, whether the sanction is rationally related to the damages the government suffered. *See supra* pp. 3-9.

51. *Kurth Ranch*, 114 S. Ct. at 1947-48. The factors in addition to the high rate of taxation and obvious deterrent purpose that the court considered were: 1. conditioned on commission of crime, 2. tax levied on goods that the taxpayer neither owned nor possessed when the tax was imposed (the taxed items had been seized). *Id.*

serves some deterrent purpose, may withstand double jeopardy analysis if it can still be "fairly characterized" as remedial.[52]

It is clear from these decisions that a civil sanction may be deemed punishment for purposes of the Double Jeopardy Clause. What is not clear is what kind of test should be used where the sanction imposed is not monetary. *Kurth Ranch* seems to offer some help, but how have the states applied the *Halper* holding in the license revocation context?

III. This Might Sting a Little—License Revocation and the *Halper* Holding in the States

North Carolina is not the first state since the decision in Halper to be faced with a challenge to its license revocation scheme on double jeopardy grounds. Almost all of the appellate level courts in other states have held that pretrial civil license revocation based on an impaired driving offense does not constitute "punishment" for the purposes of the Double Jeopardy Clause.[53]

Halper's remedial v. punitive[54] test simply cannot apply in the context of license revocations.[55] Thus, the state courts generally have focused on the language in *Halper* calling for a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve".[56]

Courts have consistently held that the statutes authorizing license revocation for impaired driving historically serve the reme-

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52. *Id.*

53. State v. Zerkel, 900 P.2d 744 (Alaska Ct. App. 1995); State v. Nichols, 819 P.2d 995 (Ariz. Ct. App. 1991); Ellis v. Pierce, 282 Cal. Rptr. 93 (Cal. Ct. App. 1991); Davidson v. Mackinnon, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995); Freeman v. State, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992) *cert. denied*, 114 S. Ct. 415 (1993); State v. Higa, 897 P.2d 928 (Haw. 1995) *reconsideration denied*, 902 P.2d 976 (1995); Butler v. Dept. of Pub. Safety & Corrections, 609 So. 2d 790 (La. 1992); State v. Savard, 659 A.2d 1265 (Me. 1995); Johnson v. State, 622 A.2d 199 (Md. Ct. Spec. App. 1993); State v. Parker, 538 N.W.2d 141 (Minn. Ct. App. 1995); State v. Hanson, 532 N.W.2d 598 (Minn. Ct. App. 1995); State v. Young, 530 N.W.2d 269 (Neb. App. 1995); State v. Uncapher, 650 N.E.2d 195 (Ohio Misc. 1995); State v. Strong, 605 A.2d 510 (Vt. 1992). *Contra* Ohio v Gustafron, 1995 WL 387619 (Ohio App. Dist. 7 June 27, 1995).

54. *See supra* note 50.

55. "The notion of a sanction being remedial in the sense meant by *Halper* connotes redress to an injured party." Ellis v. Pierce, 282 Cal. Rptr. 93 (Cal. Ct. App. 1991).

56. *See e.g.*, United States v. Halper, 490 U.S. 435, 448 (1989); State v. Parker, 538 N.W.2d 141 (Minn. Ct. App. 1995); State v. Hanson, 532 N.W.2d 598 (Minn. Ct. App. 1995).

dial purpose of protecting the public, and thus do not constitute "punishment" under *Halper*.[57] As one Florida Appellate Court recently stated:

> [T]he administrative remedy of suspending a driver's license because of drunk driving or other related behavior was and continues to be primarily for the purpose of enhancing safe driving on the public highways. Its effect is remedial in a general or universal sense, because it removes dangerous drivers from the highways. And it can also be viewed remedial for the individual, since in an intoxicated state, a driver poses a serious danger to himself or herself as well as to others. As such it is no more punitive than denying a person who is legally blind a driver's license. Both will live longer and healthier lives if they do not drive.[58]

Some courts have drawn a parallel between the revocation of a driver's license and that of professional licenses.[59]

However, it is also clear that the revocation of an individual's license will have a deterrent effect on not only that individual, but others as well.[60] Does this deterrent impact require that civil license revocations which have historically been understood as remedial must be transformed into "punishment" under *Halper*? The answer consistently has been "no".[61] In *State v. Zerkel*[62] the Court of Appeals of Alaska explained:

> [T]he monetary penalty at issue in *Halper* was ostensibly intended to compensate the government for monetary loss stemming from Halper's fraud. In such a context, the Supreme Court could justifiably state that the government's declared aim of restitution had to be divorced from the aim of deterrence.

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57. *See supra* note 53.

58. Davidson v. Mackinnon, 656 So. 2d 223, 225 (Fla. App. 1995). *See also*, State v. Zerkel, 900 P.2d 774 (Alaska Ct. App. 1995). In *Zerkel* the court stated:

> [I]t is clear that administrative suspension or revocation of a driver's license has traditionally been viewed, not as punishment for a driver's criminal offense or traffic violations, but as a remedial action prompted by the need to protect the public by removing dangerous drivers from the roads.

Id. at 755.

59. *See* State v. Savard, 659 A.2d 1265, 1268 (Me. 1995) (stating that "[w]e analogize the driver's license to professional licensing and certification which if abused may be revoked in the name of public safety"). *See also*, Ellis v. Pierce, 282 Cal. Rptr. 93 (Cal. Ct. App. 1991).

60. *See* Johnson v. State, 622 A.2d 199, 203 (Md. Ct. Spec. App. 1993).

61. *See supra* note 53.

62. 900 P.2d 744 (Alaska Ct. App. 1995).

> In *Kurth Ranch*, on the other hand, the Supreme Court recognized that other types of non-punitive sanctions could legitimately include deterrent aspects . . . Instead of asking whether Montana's tax was intended to deter people from using illegal drugs the Court asked whether Montana's tax departed so far from normal revenue laws as to become a form of punishment.[63]

The states appear to fall into two categories in relation to how they conclude that the deterrent effect of license revocations does not transform the revocation into "punishment" under *Halper*.

The first approach is that since license revocations historically have been understood as remedial,[64] the deterrent impact is simply the "sting of punishment" which might accompany remedial statutes as explained in *Halper*.[65] The Hawaii Supreme Court chose this approach:

> Although license revocation may, from [the defendant's] point of view, "carry the sting of punishment," as stated by the Supreme Court in *Halper*, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment'."[66]

In *Johnson v. State*,[67] the Maryland Court of Special Appeals held, "the mere fact that the suspension of driving privileges may carry the 'sting of punishment' is immaterial."[68] In *State v. Savard*,[69] the Supreme Court of Maine explained:

> [A]ny punitive or deterrent purpose served by the suspension of an operator's driver's license following an arrest for [impaired driving] is merely incidental to the overriding purpose intended by the legislature to provide the public with safe roadways. Although we acknowledge that any suspension may have a deterrent effect on

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63. *Id.* at 756-57 (citations omitted).

64. Note that this is similar to the analysis in *Austin* where the Court relied in large part on the historical perception of forfeiture statutes as punitive.

65. To refresh the reader's memory, the Supreme Court wrote:

> [O]ur cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment . . . we hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

Halper, 490 U.S. at 447, n.7 (citations omitted).

66. State v. Higa, 897 P.2d 928, 933 (Haw. 1995) *reconsideration denied*, 902 P.2d 976 (1995) (citations omitted).

67. 622 A.2d 199 (Md. Ct. Spec. App. 1993).

68. *Id.* at 205.

69. 659 A.2d 1265 (Me. 1995).

> the law-abiding public, our analysis does not focus on that perspective. In the eyes of the defendant even remedial sanctions may carry a "sting of punishment."[70]

This approach falls short of Halper's call for a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[71]

Other courts have confronted the punitive effect head on, rather than dismissing it as the mere "sting of punishment." These courts focus in on the "rare case"[72] and "overwhelmingly disproportionate"[73] language in *Halper*. From this the courts have determined that the revocation is not so divorced from the historically recognized remedial goal of the statutes as to render it "punishment."[74] For example, in *Butler v. Department of Public Safety & Corrections*,[75] the Supreme Court of Louisiana held:

> Unlike Halper's disproportionate fine, Butler's license suspension is temporary (90 days), the last 60 days of which he will be able to obtain a restricted license. Furthermore, Butler's license suspension, in contrast to Halper's fine, bears a rational relationship to the legitimate governmental purpose of promoting public safety on Louisiana highways.[76]

In holding that license revocations in the impaired driving context did not constitute punishment, the Minnesota Court of Appeals stated:

> *Halper* requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve . . . The implied consent driver's license revocation provision serves public safety by removing drunken drivers from the highways pending the judicial hearing . . . . The 90-day license revocation suffered by these defendants is certainly not "overwhelmingly disproportionate" to the public safety interest at stake . . . . Neither the character of the implied consent sanction, a driver's

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70. *Id.* at 1268.

71. *See infra* section II.

72. 490 U.S. 435, 449 (1989) (stating that "[w]hat 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").

73. *Id.*

74. *See e.g.*, Butler v. Dept. of Pub. Safety & Corrections, 609 So. 2d 790 (La. 1992); State v. Spilde, 536 N.W.2d 639 (Minn. Ct. App. 1995); State v. Hanson, 532 N.W.2d 598 (Minn. App. 1995); State v. Uncapher, 650 N.E.2d 195 (Ohio Mun. Ct. 1995).

75. 609 So. 2d 790 (La. 1992).

76. *Id.* at 794.

license revocation, nor the 90-day length of the sanction in this case prevents it from being "fairly . . . characterized as remedial."[77]

This type of analysis more fully addresses the relevant issues after *Halper* than does a terse declaration that any deterrent effect a license revocation statute may carry is merely the "sting of punishment." Under a *Butler* type analysis a court can explain the historical remedial nature of the statutes, admit that they also do serve some deterrent purpose, but then dismiss this as not controlling under *Halper* and *Kurth Ranch* because the sanction is not "overwhelmingly disproportionate" to the offense.[78] The holdings in *Kurth Ranch* and *Halper* appear to require this much from a reviewing court.[79] The "sting of punishment" argument carries considerably more weight once the relationship between the statute and the triggering act has been established.

No matter which rationale is used, appellate courts in other states have not been receptive to the argument that license revocations constitute "punishment" under *Halper*.[80]

IV. LICENSE REVOCATIONS AND THE DOUBLE JEOPARDY DEFENSE IN NORTH CAROLINA *STATE V. OLIVER*[81]

On May 10, 1996 the North Carolina Supreme Court issued its opinion in *State v. Oliver,*[82] a case challenging North Carolina's ten-day administrative license revocation on double jeopardy grounds.[83] Justice Lake, writing for the Court, briefly discussed *Halper*, *Austin*, and *Kurth Ranch*. The issue before the Court was whether the automatic revocation "cannot fairly be said to serve a remedial purpose because the revocation also serves the goals of

77. State v. Hanson, 532 N.W.2d 598, 601-02 (Minn. Ct. App. 1995); *See also*, State v. Uncapher, 650 N.E.2d 195 (Bowling Green Mun. Ct. 1995) (stating "*Halper* and *Kurth Ranch* combine to emphasize the rule that civil penalties are not punishment, but there may be an exception in rare and extreme cases where the sanctions may . . . qualify as equivalent to criminal punishment.") *Id.* at 201.

78. *See e.g.* Butler v. Dept. of Pub. Safety & Correction, 609 So. 2d 790 (La. 1992).

79. *See supra* section II.

80. *See supra* note 53.

81. 470 S.E.2d 16, 1996 WL 240074 (N.C., May 8, 1996).

82. *Id.* The defendant had been convicted in Alamance County Superior Court after a chemical analysis of his breath showed an alcohol concentration of 0.08.

83. This case was heard on discretionary review prior to any determination in the North Carolina Court of Appeals.

punishment such that defendant's subsequent conviction for DWI amounts to a second punishment . . ."[84]

In holding that the license revocation did not rise to the level of punishment for the purposes of double jeopardy analysis the Court began by emphasizing that the North Carolina Supreme Court has traditionally viewed license revocations as a remedial measure.[85]

In particular, the Court discussed *Henry v. Edmisten*[86], a case challenging North Carolina's ten-day adminstrative revocation, but on grounds other than double jeopardy.[87] In Henry, the Court stated that the "ten-day revocation . . . promotes the State's important police function of protecting the safety of its people."[88] Reliance on these prior cases, and *Henry* in particular, is troubling given *Halper's* declaration that double jeopardy analysis requires a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[89]

However, perhaps in anticipation of the scrutiny that would accompany a decision merely affirming pre-Halper decisions the Court was quick to recognize that Henry did not involve the double jeopardy analysis, but nonetheless the Court found the "analysis and conclusion that [license revocation] is remedial" compelling.[90]

The Court next confronted commentary contained in the legislative history of North Carolina General Statute § 20-16.5:

> This [revocation] provision serves a couple functions important to the governor and the proponents of the bill. First, it provides an immediate slap in the face to virtually all drivers charged with a D.W.I. Second, the fact that it is imposed independent of the trial on the criminal charge makes it more certain that a sanction will be imposed regardless of the defendant's status or his lawyer's expertise.[91]

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84. 1996 WL 240074, *3.

85. *See* Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); State v. Carlisle, 285 N.C. 229, 204 S.E.2d 15 (1974).

86. 470 S.E.2d 16, 1996 WL 240074, *3 (N.C., May 8, 1996).

87. *Henry* presented a challenge to North Carolina's ten-day revocation on Due Process and Equal Protection grounds.

88. *Henry*, 315 N.C. 474, 481, 340 S.E.2d 720, 729.

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

90. 470 S.E.2d 16, 1996 WL 240074, *4 (N.C., May 8, 1996).

91. *Id.*, (quoting *"Impaired Driving: The Safe Roads Act,"* A Summary of Legislation In The 1983 General Assembly Of Interest To North Carolina Public Officials 117 (1983)).

The defendant's position was that this language established that the statute was intended solely to punish those drivers who violated the statute.[92] This argument has been presented in at least two other states with no success,[93] and in *Henry*, when confronted with the very same language, the Court refused to rely on the "intent of individual proponents."[94] Not surprisingly, in the present case the Court simply deferred to *Henry* and dismissed the argument once again.

This result actually seems to be entirely consistent with *Halper*, given the declaration in that case that recourse to statutory language, structure, and intent is not appropriate for determining whether a sanction is actually remedial.[95] If the intent of individual legislators is insufficient to establish the remedial character of a statute it logically should be insufficient to establish conclusively the punitive character of a statute. This is especially so given Halper's declaration that the court is to conduct "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."[96]

The Court's strongest argument was a *Butler* type analysis where the Court compared sanctions at issue in *Halper* with those challenged in the present case.[97] The Court highlighted *Halper's* pronouncement that the decision was a "rule for the rare case," [98] properly invoked in cases where a defendant was subjected to sanctions "overwhelmingly disproportionate to the damages he

92. *Id.*

93. *See* State v. Fox, No. MV94 31 52 60, 1995 WL 55900 (Conn. Super. Ct. 1995) (Stating "the language used by the legislators . . . is not controlling) Id. at *3. *See also*, Davidson v. Mackinnon, 656 S.E.2d 223 (Fla. Dist. Ct. App. 1995).

94. Henry, 340 S.E.2d at 734.

95. United States v. Halper, 490 U.S. 435, (1989):

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the humane interests safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing *the character* of the actual sanctions imposed on the individual by the machinery of the state.

Id. at 447.

96. Halper, 490 U.S. at 448.

97. *See infra* Section II.

98. *Halper*, 490 U.S. at 449.

has caused."[99] The Court then concluded that North Carolina's ten-day revocation and $50 restoration fee did not present the type of "overwhelmingly disproportionate" sanctions that *Halper* was intended to prevent.[100]

If the purpose of the statute is to protect the public from the dangers posed by drunk drivers why is the revocation for ten-days rather than a shorter period such as 24 hours? Obviously this would serve the purpose of the statute by allowing a drunk driver to sober up, thus alleviating the danger of harm that accompanies driving while impaired. A close reading of *Halper* and *Kurth Ranch* seems to reveal the answer. The North Carolina Supreme Court simply was not required to engage in this kind of exact determination. The relevant question under *Halper* and *Kurth Ranch* is whether the sanction in question is so "overwhelmingly disproportionate" that it cannot be "fairly characterized as remedial." With that in mind the Court determined that the ten-day revocation does not go so far.

Once the Court established that there was a rational relationship between the ten-day revocation and the triggering offense the Court simply noted *Halper's* declaration that whether a sanction constitutes punishment is not to be determined through the eyes of the defendant, because often "remedial sanctions carry the sting of punishment."[101]

V. Conclusion

Halper, *Austin*, and *Kurth Ranch* taken together leave no doubt that under certain circumstances civil sanctions may constitute "punishment" for the purpose of the Double Jeopardy Clause. However, as the states attempting to apply *Halper* have demonstrated, the *Halper* test for determining remedial v. punitive is not well suited for the context of license revocations.[102] *Halper*, *Austin*, and *Kurth Ranch* all dealt with monetary sanctions which provide a more workable measuring stick than the intangibles involved in the case of license revocation, e.g. mobility.

Despite the difficulties involved in applying *Halper* to license revocation cases it appears that the state courts have devised two approaches.[103] The approach that most closely reflects the con-

99. *Id.*
100. *Oliver*, 1996 WL 240074, *4.
101. *Id. See also infra* Section I.
102. *See infra* Section II.
103. *See infra* Section III.

cern in *Halper*[104] is to focus on the relationship between the goals of the statute and the sanction imposed to determine whether the sanction is "overwhelmingly disproportionate" to the triggering act. Only then can a judgment be made as to whether a given statute may be "fairly . . . characterized as remedial."[105] This is the approach that the North Carolina Supreme Court has chosen.

In *State v. Oliver,*[106] the Court ruled that the ten-day administrative license revocation resulting from a chemical analyisis revealing an alcohol concentration of 0.08 or more does not constitute "punishment" for the purposes of double jeopardy analyisis. The Court held that the revocation is neither "overwhelmingly disproportionate" as a response to the danger posed by drunk drivers, nor the kind of "rare case" presented in *Halper*.[107] As such the statute is "fairly . . . characterized as remedial" and does not bar a subsequent prosecution for the offense of Driving While Impaired in the state of North Carolina.

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AUTHOR'S NOTE: During publication of this comment the United States Supreme Court issued its opinion in United States v. Ursery, *1996 WL 340815 (U.S., June 24, 1996). Here the Court distinguished in rem civil forfeitures from "potentially punitive in personam civil penalties" and held that the former are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. 1996 WL 340815, *11.*

While Ursery *dealt with in rem civil forfeitures portions of the opinion seem to be relevant in the context of in personam civil penalties, and particularly to temporary license revocations and the replacement fee in impaired driving cases.*

First, the Court restricted the strict language in Austin *to cases involving the Excessive Fines Clause of the Eighth Amendment. (See Section II for a discussion of* Austin*).*

Second, the Court noted that Halper*'s test could not be applied in civil forfeitures because it is impossible to quantify the nonpunitive purposes served by an in rem civil forfeiture. Therefore, one cannot determine whether the forfeiture bears a rational relationship to*

104. *See infra* Section II.

105. United States v. Halper, 490 U.S. 435, 448 (1995); *see also* Dept. of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994).

106. 470 S.E.2d 16, 1994 WL 240074 (N.C., May 8, 1996).

107. *Id.*

the nonpunitive purpose(s) it is intended to serve. The same reasoning could easily be used in the license revocation context.

In short, language in Ursery *may serve as an indication that the Court plans to curtail the use of* Halper *in other areas at some point in the near future.*