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## Is the DUI Double-Jeopardy Defense D.O.A.

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# IS THE DUI DOUBLE-JEOPARDY DEFENSE D.O.A.?

## I. INTRODUCTION

Drunk driving is one of the most commonly committed crimes in the United States.<sup>1</sup> In fact, for every motorist arrested for driving under the influence (DUI), there are an estimated 2000 drunk drivers who go undetected.<sup>2</sup> In 1994 alone alcohol contributed to 16,884 traffic fatalities.<sup>3</sup>

These statistics have not gone unnoticed by the private organizations and various government agencies that have sought to combat the problem by supporting or passing tougher laws.<sup>4</sup> Their efforts have resulted in increased penalties for drunk driving and lower legal limits for blood-alcohol levels.<sup>5</sup> One of the most successful statutory weapons in the war against drunk driving, however, has been automatic license suspensions or revocations for those drivers who either refuse a test for alcohol or who take the test and score above the legal limit.<sup>6</sup> In some states the refusal or failure allows a police officer to seize the license and issue a temporary one that automatically expires in a specified number of days; in other jurisdictions, the officer is required to notify the state department of motor vehicles, which then suspends or revokes the license.<sup>7</sup> In addition to the suspension or

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1. LAWRENCE TAYLOR, *DRUNK DRIVING DEFENSE* 3 (3d ed. 1991).

2. Thomas B. Griffen, Note, *Zoning Away the Evils of Alcohol*, 61 S. CAL. L. REV. 1373, 1374 (1988).

3. Lori Sharn, *Drunk and Deadly: Habitual Drinkers Who Drive Defy Treatment*, USA TODAY, June 21, 1995, at 1A, 2A.

4. Griffen, *supra* note 2, at 1374.

5. See, e.g., 23 U.S.C. § 408 (1994). See generally John H. Reese & James B. Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 ADMIN. L. REV. 313 (1983) (discussing how lawmakers have sought to deter drunk driving).

6. See Griffen, *supra* note 2, at 1413 (stating that summary suspension of licenses has been "hailed as an effective tool against drunk driving"); Mark A. Stein, *New Drunk Driving Law Called Success*, L.A. TIMES, May 20, 1991, at A3, A22 (noting that two nationwide studies showed that immediate license suspensions were the most effective deterrent to drunk driving).

7. See ALA. CODE § 32-5-192(c) (1989); ALASKA STAT. § 28.35.032 (1994 & Supp. 1995); ARIZ. REV. STAT. ANN. §§ 28-691(D) to -694(A) (1989 & Supp. 1995); ARK. CODE ANN. §§ 5-65-104(a), -205(a) (Michie 1993 & Supp. 1995); CAL. VEH. CODE §§ 13353-13353.1 (West 1987 & Supp. 1996); CAL. VEH. CODE §§ 13353.2(a) to (c), 23157(e)-(f), 23158.5 (West Supp. 1996); COLO. REV. STAT. § 42-2-126(5)(a)-(b) (Supp. 1995); CONN.

revocation, the driver is generally also subjected to a criminal prosecution for drunk driving.<sup>8</sup>

The combination of a license suspension or revocation followed by a criminal prosecution has lead many DUI defense lawyers to argue that their clients' rights against double jeopardy have been violated.<sup>9</sup> The basis of their contention is that their clients are being punished twice for the same crime.<sup>10</sup>

GEN. STAT. ANN. § 14-227b(c)-(d) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2742(b)-(e) (1985); FLA. STAT. ANN. § 322.2615(1)(a) (West 1995); GA. CODE ANN. §§ 40-5-67, -67.1 (Harrison 1994 & Supp. 1995); HAW. REV. STAT. § 286-255 (Supp. 1992); IDAHO CODE §§ 18-8002(4)(a), 18-8002A(a) (1987 & Supp. 1995); ILL. ANN. STAT. ch. 625, para. 5/11-501.1(d)-(f) (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. §§ 9-30-6-7, -9 (Burns 1991); IOWA CODE ANN. §§ 321J.9, 321J.12 (West Supp. 1995); KAN. STAT. ANN. §§ 8-1001(f)(1)(D)-(E), 8-1002(3)(e) (1991 & Supp. 1994); KY. REV. STAT. ANN. § 189A.105 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 32:667(A)(1)-(2) (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, §§ 2453(3), 2521(5) (West Supp. 1995); MD. CODE ANN., TRANSP. § 16-205.1(3) (1992 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, §§ 24(4)(c)(4)(f)(1)-(2), 24N (West 1989 & Supp. 1995); MICH. STAT. ANN. § 9.2325(4)-(7) (Callaghan 1991 & Supp. 1995); MINN. STAT. ANN. §§ 169.121(4), 169.123(4), (5)(A) (West 1986 & Supp. 1995); MISS. CODE ANN. §§ 63-11-23(2), -30(3) (1989 & Supp. 1995); MO. ANN. STAT. § 577.041(1) (Vernon 1995); MONT. CODE ANN. § 61-8-402(3) (1995); NEB. REV. STAT. §§ 39-669.08(4), 39-669.15 (1988 & Supp. 1990); NEV. REV. STAT. ANN. §§ 484.382(1), 484.384(3), 484.385(1) (Michie 1994); N.H. REV. STAT. ANN. §§ 265:91-a, :92 (1993 & Supp. 1994); N.M. STAT. ANN. §§ 66-8-111(B), -111.1 (Michie 1994); N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 1986 & Supp. 1996); N.C. GEN. STAT. § 20-16.2(c) (1993); N.D. CENT. CODE §§ 39-20-03.1(1), -04, -04.1 (1987 & Supp. 1995); OHIO REV. CODE ANN. § 4511.191(D)(1) (Anderson 1993 & Supp. 1994); OKLA. STAT. ANN. tit. 47, §§ 753, 754 (West 1988 & Supp. 1996); OR. REV. STAT. §§ 813.100(3), 813.130 (1989 & Supp. 1995); 75 PA. CONST. STAT. ANN. § 1547(b) (1977 & Supp. 1995); S.C. CODE ANN. § 56-5-2950(d) (Law. Co-op. 1991 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 32-23-18 to -19 (Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6701i-5(2)(d)-(i), 6687b-1(2)(a) (West 1977 & Supp. 1995); UTAH CODE ANN. § 41-6-44.10(2)(b) (1993 & Supp. 1995); UTAH CODE ANN. § 53-3-223(3)-(4) (1994 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1205(a) (1987 & Supp. 1994); WASH. REV. CODE ANN. § 46.20.308(6) (West 1987 & Supp. 1996); W. VA. CODE § 17C-5A-1(a)-(c) (1991 & Supp. 1995); Wis. STAT. ANN. § 343.305(9) (West 1991 & Supp. 1995); WYO. STAT. § 31-6-102(a), (d)-(f) (1994 & Supp. 1995). *But see* N.J. STAT. ANN. § 39:4-50.4a (West 1990 & Supp. 1995) (stating that a municipal court will suspend the license); R.I. GEN. LAWS § 31-27-2.1 (1994) (stating that the law enforcement officer notifies an administrative law judge who suspends the license); TENN. CODE ANN. § 55-10-406(a)(2)-(3) (1993 & Supp. 1995) (authorizing the suspension of the license by the court handling the DUI offense); VA. CODE ANN. § 18.2-268.3 (Michie Supp. 1995) (stating that the driver upon refusal should be taken before a magistrate and tried if the driver again refuses to take the test).

8. Sarah Lavender Smith, *Double Jeopardy Defense Delights DUI Attorneys*, L.A. DAILY J., July 25, 1995, at 1, 5.

9. Lawrence Taylor, *Drunk Driving License Suspensions: Double Jeopardy Dilemma*, TRIAL, June 1995, at 80, 80 [hereinafter Taylor, *License Suspensions*].

10. *Id.*

This double-jeopardy argument has spread rapidly throughout the country and has convinced trial courts in at least eighteen states to side with the defendants.<sup>11</sup> The result has been a dismissal of as many as a thousand drunk-driving cases,<sup>12</sup> and police in certain jurisdictions have been told to cease confiscation of licenses until higher courts can settle the matter.<sup>13</sup>

The net effect of these developments is a chaotic enforcement of DUI laws because some trial or appellate courts accept the double-jeopardy argument while others in the same jurisdiction do not. For example, courts in Virginia have not been able to agree on the double-jeopardy issue, thereby creating the "crazy situation where it depends on what courtroom you are in whether it's double jeopardy or not."<sup>14</sup> A similar level of disagreement occurred in the appellate courts of Ohio, forcing the supreme court of that state to consider the problem.<sup>15</sup> Some attorneys feel the issue will go even further and will eventually be decided by the U.S. Supreme Court.<sup>16</sup>

Until that happens, however, states with automatic license suspensions or revocations would be justified in determining that the

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11. Harvey Berkman, *Double Jeopardy Downs DUI Cases*, NAT'L L.J., June 26, 1995, at A7, A7; Smith, *supra* note 8, at 1 (quoting Robert Shearouse, director of public policy for Mothers Against Drunk Driving, as saying that he wasn't aware of any state with a license suspension statute in which the double-jeopardy defense had not been used).

12. See Tony Mauro, *DUI Policy May Run into Double Jeopardy*, USA TODAY, June 21, 1995, at 2A. One person who initially benefitted from the acceptance of the argument by trial courts is singer John Denver, who was charged with drunk driving after he got into an accident in August 1994. Defendant's Brief in Support of Motion to Dismiss on Grounds of Double Jeopardy at 3, *People v. Deutschendorf* (a.k.a. Denver), No. 94 T 491 (Colo. County Court Pitkin County submitted Jan. 16, 1995) [hereinafter Defendant's Brief]; Richard C. Reuben, *Double Jeopardy Claims Gaining*, A.B.A. J., June 1995, at 16, 16. At one point, Denver's double-jeopardy argument became so popular among Colorado DUI attorneys that it was labeled the "John Denver defense." *People*, ORANGE COUNTY REG., July 24, 1995, at A2. Eventually, however, the defense was rejected by a Colorado court, which concluded that license suspensions coupled with DUI criminal charges do not raise double-jeopardy claims. *Id.* The case is currently being appealed. Telephone Interview with Wallace Prugh, attorney at Gerash, Robinson & Miranda, P.C. (Sept. 1, 1995) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Prugh Interview].

13. Taylor, *License Suspensions*, *supra* note 9, at 80.

14. Mauro, *supra* note 12, at 2A (quoting Robert Horan, Jr., Commonwealth Attorney for Fairfax County, Virginia).

15. *State v. Gustafson*, 652 N.E.2d 799, 799-800 (Ohio 1995).

16. Reuben, *supra* note 12, at 16; Smith, *supra* note 8, at 5; Prugh Interview, *supra* note 12; Telephone Interview with Lawrence Taylor, attorney and regent of National College of DUI Defense, Inc. (Sept. 1, 1991) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Taylor Interview].

DUI double-jeopardy argument is not viable.<sup>17</sup> One primary reason is that the cases used by double-jeopardy proponents are mostly inapplicable in the drunk-driving arena.<sup>18</sup> Assuming, arguendo, that they were applicable, double jeopardy would not be a problem because legislative history and case law demonstrate that the suspension or revocation of a drunk motorist's license is an administrative action primarily designed to ensure public safety.<sup>19</sup> Furthermore, analogous case law in other areas suggests that such actions do not violate a defendant's rights against double jeopardy.<sup>20</sup> Thus, with scant legal precedent to support it, the DUI double-jeopardy defense should be declared D.O.A.—dead on arrival—by courts faced with this issue.

In order to reach this conclusion, this Comment will provide an in-depth analysis of the DUI double-jeopardy argument and compare it with current double-jeopardy jurisprudence. Part II gives an overview of civil sanctions and civil forfeiture before delineating the basic elements of double jeopardy, while Part III focuses on drunk-driving laws in general and outlines the arguments used by double-jeopardy supporters. Part IV contains a critical analysis of the DUI double-jeopardy argument, and Part V proposes possible methods that can be utilized by states to eliminate the effectiveness of this defense in the future.

## II. OVERVIEW OF CIVIL SANCTIONS, CIVIL FORFEITURE, AND DOUBLE JEOPARDY

### A. *Civil Sanctions*

Sanctions can be either civil or criminal.<sup>21</sup> In order to determine which label applies, a court must first decide whether the legislature has indicated a preference for either category.<sup>22</sup> If the legislature intended a civil sanction, a court must then analyze whether the penalty is "so punitive either in purpose or effect as to negate that

17. See *infra* part IV.

18. See *infra* part IV.

19. See *infra* part IV.

20. See *infra* part IV.

21. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-26 (1991) [hereinafter Cheh, *Constitutional Limits*].

22. *United States v. Ward*, 448 U.S. 242, 248 (1980).

intention.”<sup>23</sup> This is generally determined by reviewing whether the sanction involves an affirmative disability or restraint, has historically been regarded as punishment, requires a finding of scienter, promotes retribution or deterrence, applies to behavior which is already a crime, is rationally connected to an alternative purpose, and appears excessive in relation to the alternative purpose.<sup>24</sup> If the analysis of those factors leads the court to believe that a sanction is not punitive, it is considered civil in nature.<sup>25</sup> In the case of automatic license suspensions or revocations, most courts have determined that the sanction is a civil remedy.<sup>26</sup>

### B. Civil Forfeiture

Civil forfeiture is one form of a civil remedy that allows the government to obtain property that is either believed to be part of the proceeds of a crime or was used or intended for use in the commission of a crime.<sup>27</sup> The suspension or revocation of a driver's license is similar to civil forfeiture in that it involves the instrument used to commit a crime—a driver's license.<sup>28</sup>

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23. *Id.* at 248-49.

24. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *see Ward*, 448 U.S. at 249 (stating that the *Kennedy* factors, while “neither exhaustive nor dispositive,” were helpful in determining whether a sanction is punitive despite being labeled a civil remedy).

25. *See Ward*, 448 U.S. at 248-51.

26. *E.g.*, *Loughran v. Superior Court*, 699 P.2d 1287, 1289 (Ariz. 1985); *Sheffield v. State*, 361 S.E.2d 28, 29 (Ga. Ct. App. 1987); *People v. Esposito*, 521 N.E.2d 873, 877 (Ill. 1988); *Ruge v. Kovach*, 467 N.E.2d 673, 677 (Ind. 1984); *Severson v. Sueppel*, 152 N.W.2d 281, 285 (Iowa 1967); *Marbut v. Motor Vehicle Dep't*, 400 P.2d 982, 984 (Kan. 1965); *State v. Maze*, 825 P.2d 1169, 1174 (Kan. Ct. App. 1992); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790, 796 (La. 1992); *State v. Savard*, 659 A.2d 1265, 1267 (Me. 1995); *Neil v. Peterson*, 314 N.W.2d 275, 276 (Neb. 1982); *State v. Bowles*, 311 A.2d 300, 302 (N.H. 1973); *State v. Starnes*, 254 N.E.2d 675, 680 (Ohio 1970); *Ohio Bureau of Motor Vehicles v. Williams*, 647 N.E.2d 562, 563 (Ohio Ct. App. 1994); *City of Cleveland v. Miller*, 646 N.E.2d 1213, 1215 (Ohio Mun. Ct. Cleveland County 1995); *City of Cleveland v. Nutter*, 646 N.E.2d 1209, 1211 (Ohio Mun. Ct. Cleveland County 1995); *Price v. Reed*, 725 P.2d 1254, 1259-60 (Okla. 1986); *Blow v. Commissioner of Motor Vehicles*, 164 N.W.2d 351, 352 (S.D. 1969); *Burrows v. Texas Dep't of Pub. Safety*, 740 S.W.2d 19, 20 (Tex. Ct. App. 1987); *State v. Strong*, 605 A.2d 510, 513 (Vt. 1992); *Huffman v. Commonwealth*, 172 S.E.2d 788, 789 (Va. 1970); *Prichard v. Battle*, 17 S.E.2d 393, 395 (Va. 1941); *see also CAL. VEH. CODE* § 13353.2(e) (West 1985 & Supp. 1996) (describing suspension as a “civil matter”); *IDAHO CODE* § 18-8002(5) (1987 & Supp. 1995) (describing suspension as a “civil penalty”).

27. *Mary M. Cheh, Can Something This Easy, Quick, and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 1 (1994) [hereinafter *Cheh, Runaway Civil Forfeiture*].

28. One could also argue that the car is also an instrument of the crime. Some

One of the most common uses of civil forfeiture, however, is the confiscation of such items as houses, money, airplanes, jewelry, and cars by the federal government for violations of drug or customs laws.<sup>29</sup> The program has been so successful that in 1989 the amount forfeited to the U.S. government was twenty times the amount forfeited in 1985.<sup>30</sup>

### C. *The Possible Punitive Aspects of Civil Remedies*

Because of the excessiveness or punitive nature of some civil sanctions, the U.S. Supreme Court has held that in certain situations, civil forfeitures and other civil remedies may raise double-jeopardy problems if preceded or followed by a criminal prosecution.<sup>31</sup> The Court is currently reviewing whether civil forfeitures for drug violations coupled with criminal charges is barred by the Double Jeopardy Clause.<sup>32</sup> As will be shown in Part IV, however, the federal cases involving civil sanctions are inapplicable to situations concerning the revocation or suspension of a driver's license, and even if applied to the DUI setting, would still result in the conclusion that double jeopardy does not occur.

jurisdictions permit forfeiture of the car after a specified number of drunk-driving convictions. See, e.g., OHIO REV. CODE ANN. § 4511.19.5 (Anderson 1993 & Supp. 1994).

29. E.g., 21 U.S.C. § 881(a) (1994); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *United States v. Pierce*, 60 F.3d 886 (1st Cir. 1995); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994); *United States v. Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994); *United States v. U.S. Currency in the Amount of \$145,139*, 18 F.3d 73 (2d Cir. 1994). Two such cases are currently being reviewed by the U.S. Supreme Court. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-345); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), cert. granted, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346). A decision on these cases is expected by June 1996. David G. Savage, *Supreme Court to Review Rules for Seizure of Assets*, L.A. TIMES, Jan. 13, 1996, at A7.

30. Cheh, *Constitutional Limits*, supra note 21, at 1327.

31. *United States v. Halper*, 490 U.S. 435 (1989); see also *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) (holding that civil forfeiture for violation of certain drug and money-laundering laws violated the Double Jeopardy Clause), cert. granted, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346).

32. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-345); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), cert. granted, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346).

## D. Double Jeopardy

### 1. Overview

The prohibition against double jeopardy can be traced back to the Greeks and Romans.<sup>33</sup> By the fourteenth century, England had begun to adopt the idea, although the practice against it was not firmly established until the seventeenth century.<sup>34</sup> America was also slow to adhere to its dictates, with only two state constitutions containing provisions against it when the Bill of Rights was enacted.<sup>35</sup>

Although the details of the Double Jeopardy Clause have been labeled "numbingly complex,"<sup>36</sup> the Fifth Amendment of the Constitution simply states that "[n]o person shall . . . [b]e subject for the same offence to be twice put in jeopardy of life or limb."<sup>37</sup> The U.S. Supreme Court has interpreted this to mean that "no man can be twice lawfully punished for the same offence."<sup>38</sup> The primary reason for this is that

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>39</sup>

Thus, there are three primary situations in which double-jeopardy concerns may be raised: (1) retrial for the same offense after acquittal; (2) retrial for the same offense after conviction; and (3)

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33. *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

34. William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414-16 (1993).

35. *Id.* at 415. The two states were New Hampshire and Pennsylvania. *Id.* at 415 n.25.

36. *Id.* at 413. The U.S. Supreme Court has referred to its own decisions in this area as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

37. U.S. CONST. amend. V. The U.S. Supreme Court has held that the Double Jeopardy Clause applies to the states through the 14th Amendment. *Benton*, 395 U.S. at 787.

38. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873).

39. *Benton*, 395 U.S. at 796 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).



multiple punishments for the same offense.<sup>40</sup> Administrative license suspensions and revocations followed by criminal DUI charges implicate the third category.

## 2. Basic tests and factors that constitute double jeopardy

As stated above, double jeopardy applies to multiple punishments for the same offense. This does not, however, prohibit a state from imposing multiple punishments for one offense in a single proceeding, as long as the legislature has authorized it.<sup>41</sup> Rather, it prohibits the imposition of multiple punishments in separate proceedings for the same offense by the same sovereign.<sup>42</sup> Thus, it is important to pinpoint when jeopardy attaches and define the meaning of "same offense" and "punishment."

The moment when jeopardy attaches is critical because it bars later prosecution or punishment for the same offense, unless certain exceptions apply.<sup>43</sup> In the arena of civil forfeitures, jeopardy attaches when the final judgment of forfeiture is entered by the court, assuming that the civil forfeiture occurs before the criminal charges are tried.<sup>44</sup> If the criminal charges occur first, however, jeopardy attaches when the jury is empaneled and sworn at a jury trial,<sup>45</sup> or when the first witness is sworn in for a bench trial.<sup>46</sup>

Once the attachment of jeopardy is determined, the next step in double-jeopardy challenges is to ascertain whether a defendant is being punished twice for the same offense. This is accomplished by

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

41. *Id.* at 451 n.10; *Ohio v. Johnson*, 467 U.S. 493, 499 (1984); *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

42. *See Halper*, 490 U.S. at 451 n.10; *Heath v. Alabama*, 474 U.S. 82, 87-91 (1985) (holding that the Double Jeopardy Clause is not violated when different states impose punishment for the same offense); *United States v. Lanza*, 260 U.S. 377, 385 (1922) (holding that the Double Jeopardy Clause is not violated when the federal and a state government impose punishment for the same offense).

43. *See generally* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 429-55 (1991) (discussing the Double Jeopardy Clause); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 726-38 (2d ed. 1986) (discussing the Double Jeopardy Clause and its exceptions). Since these exceptions are not the focus of the DUI double-jeopardy debate, they are not included in this Comment.

44. *United States v. Ursery*, 59 F.3d 568, 569 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-345); *United States v. Stanwood*, 872 F. Supp. 791, 795-96 (D. Or. 1994).

45. *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

46. *Serfass v. United States*, 420 U.S. 377, 388 (1975).

using the test set forth in *Blockburger v. United States*.<sup>47</sup> Under the *Blockburger* analysis, there are separate offenses if a conviction for each one requires "proof of an additional fact which the other does not."<sup>48</sup> In the case of successive prosecutions, the U.S. Supreme Court has not clarified to what extent the facts and elements of the offenses must be considered.<sup>49</sup> As a basic example, however, if one crime requires proof of A, B, and C, and a second crime requires proof of A, B, and D, the two crimes are separate offenses.<sup>50</sup> If both crimes consist of of A, B, and C, they would be considered the same offense.<sup>51</sup> Similarly, if the first crime requires proof of A, B, and C, and the second crime requires proof of A and B, they are also the same offense for double-jeopardy purposes.<sup>52</sup>

If there is only one offense, the next step is to determine whether the defendant is being punished.<sup>53</sup> Generally, punishment is defined as "a penalty or burden imposed as a result of an offense against legal rules,"<sup>54</sup> the purpose of which is to rehabilitate, deter, incapacitate, or serve retributive functions.<sup>55</sup> Thus, criminal sanctions automatically qualify as punishment under the Double Jeopardy Clause.<sup>56</sup> Even civil sanctions, however, can be punishment if they seek retribution or deterrence rather than remedial goals.<sup>57</sup>

### III. THE DUI DOUBLE-JEOPARDY CONTROVERSY

#### A. History of DUI

Since the turn of the century, the public has been concerned about the effects of alcohol on persons operating equipment or machinery.<sup>58</sup> Early laws initially responded to this apprehension by

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47. 284 U.S. 299 (1932).

48. *Id.* at 304 (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

49. McAninch, *supra* note 34, at 465-66; Kathryn A. Pamenter, Note, *United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis*, 69 NOTRE DAME L. REV. 575, 576-77 (1994).

50. DRESSLER, *supra* note 43, at 448.

51. *Id.*

52. *Id.*

53. *Ex parte Lange*, 85 U.S. (18 Wall.) at 168; *see supra* text accompanying note 38.

54. Cheh, *Constitutional Limits*, *supra* note 21, at 1356.

55. *Id.*

56. *See Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); DRESSLER, *supra* note 43, at 429-30; WHITEBREAD & SLOBOGIN, *supra* note 43, at 725.

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

58. Reese & Borgel, *supra* note 5, at 314.

requiring law-enforcement officials to evaluate a driver's level of intoxication through observation of his physical symptoms.<sup>59</sup> By 1939 several states began using chemical tests to determine whether someone was under the influence, and in 1953 New York became the first state to enact an implied-consent law requiring a driver to submit to chemical testing upon request.<sup>60</sup>

In 1966 Congress passed the Highway Safety Act,<sup>61</sup> which empowered the Secretary of Transportation to devise highway safety standards.<sup>62</sup> Under this authority the Secretary could withhold federal highway funds from states that did not comply with the criteria.<sup>63</sup> The states eventually met these standards by using chemical tests for alcohol, setting blood-alcohol limits at no greater than .10 percent, and enacting implied-consent laws in which drivers were deemed to have impliedly consented to subject themselves to the chemical tests.<sup>64</sup> Although the program was not as successful as anticipated,<sup>65</sup> the use of these financial incentives by Congress was influential in certain areas.<sup>66</sup> For example, all states had adhered to the mandated setting of blood-alcohol limits by 1971.<sup>67</sup>

In addition to these regulations, states began to pass laws in the 1960s and 1970s that required those convicted of drunk driving to seek treatment for alcohol abuse.<sup>68</sup> These laws were passed after research by scientists and medical experts showed that many drunk drivers had alcohol-abuse problems.<sup>69</sup>

This attempted rehabilitation of drunk drivers, however, was followed by the 1982 passage of the Federal Alcohol Traffic Safety-National Driver Register Act.<sup>70</sup> The law tied traffic-safety funds to

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59. *Id.*

60. *Id.*

61. Pub. L. No. 89-564, § 101, 80 Stat. 731, 731 (1966).

62. MICHAEL LAURENCE, *THE DEVELOPMENT OF CALIFORNIA DRUNK-DRIVING LEGISLATION* 4 (1988).

63. *Id.*

64. *Id.*

65. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 281 (1993).

66. LAURENCE, *supra* note 62, at 4.

67. *Id.*

68. *Id.* at 5; *see, e.g.*, CAL. VEH. CODE § 23102.3 (West Supp. 1996).

69. LAURENCE, *supra* note 62, at 4.

70. Pub. L. No. 97-364, § 101, 96 Stat. 1738, 1738 (1982); Reese & Borgel, *supra* note 5, at 316.

a state's implementation of driver's license suspensions for refusal to take a chemical test or failure of a test.<sup>71</sup>

More recently, drunk-driving laws have focused on increasing the severity of punishment, a viewpoint advocated by citizens' groups such as Mothers Against Drunk Driving (MADD),<sup>72</sup> which have lobbied for mandatory jail sentences and substantial fines.<sup>73</sup> Their efforts have been aided by changed perceptions about the seriousness of drinking and driving, caused in part by the increasing number of fatalities and injuries due to drunk drivers.<sup>74</sup>

### B. Current State DUI Laws

In an effort to force suspected drunk drivers to submit to blood, breath, or urine tests, most jurisdictions have enacted implied-consent laws.<sup>75</sup> These statutes specify that those who drive in the state have impliedly consented to take such tests.<sup>76</sup> In most jurisdictions the

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71. Pub. L. No. 97-364, § 101, 96 Stat. 1738, 1739 (1982); Reese & Borgel, *supra* note 5, at 316.

72. MADD was formed by Candy Lightner in 1980 after her daughter was killed by a drunk driver. FRIEDMAN, *supra* note 65, at 281.

73. LAURENCE, *supra* note 62, at 5; Reese & Borgel, *supra* note 5, at 313.

74. At one point in California, for example, drunk-driving-related fatalities comprised 50% of all fatal traffic accidents. LAURENCE, *supra* note 62, at 7.

75. Reese & Borgel, *supra* note 5, at 314; *see, e.g.*, Walter Karabian, *California's Implied Consent Statute: An Examination and Evaluation*, 1 Loy. L.A. L. Rev. 23, 23 (1968).

76. ALA. CODE § 32-5-192(a) (1989); ALASKA STAT. § 28.35.031(a) (1994 & Supp. 1995); ARIZ. REV. STAT. ANN. § 28-691(A) (1989 & Supp. 1995); ARK. CODE ANN. § 5-65-202(a) (Michie 1993); CAL. VEH. CODE § 23157(a)(1) (West Supp. 1996); CONN. GEN. STAT. ANN. § 14-227b(a) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2740 (1985); FLA. STAT. ANN. § 316.1932(1)(a) (West 1990 & Supp. 1995); GA. CODE ANN. § 40-5-55 (Harrison 1994 & Supp. 1995); HAW. REV. STAT. § 286-151(a) (1985 & Supp. 1992); IDAHO CODE § 18-8002(1) (1987 & Supp. 1995); ILL. ANN. STAT. ch. 625, para. 5/11-501.1(a) (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. § 9-30-6-1 (Burns 1991 & Supp. 1995); IOWA CODE ANN. § 321J.6 (West Supp. 1995); KAN. STAT. ANN. § 8-1001(a) (1991 & Supp. 1994); KY. REV. STAT. ANN. § 189A.103(1) (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 32:661 (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, § 2521 (West Supp. 1995); MD. CODE ANN., TRANSP. § 16-205.1(a)(2) (1992 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, § 24(4)(c)(4)(f)(1) (West 1989 & Supp. 1995); MINN. STAT. ANN. § 169.123(2) (West 1986 & Supp. 1995); MISS. CODE ANN. § 63-11-5(1) (1989 & Supp. 1995); MO. ANN. STAT. § 577.020(1) (Vernon 1995); MONT. CODE ANN. § 61-8-402(1) (1995); NEB. REV. STAT. § 39-699.08(1) (1988 & Supp. 1990); NEV. REV. STAT. ANN. § 484.382 (Michie 1994); N.H. STAT. ANN. § 265:84 (1993 & Supp. 1995); N.J. STAT. ANN. § 39:4-50.2(a) (West 1990); N.M. STAT. ANN. § 66-8-107(A) (Michie 1994); N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 1986 & Supp. 1996); N.C. GEN. STAT. § 20-16.2(a) (1993); N.D. CENT. CODE § 39-20-01 (1987 & Supp. 1995); OHIO REV. CODE ANN. § 4511.191(A) (Anderson 1993 & Supp. 1994); OKLA. STAT. ANN. tit.

implied-consent law allows the state to suspend or revoke the license of a suspected drunk driver who refuses to take a blood, urine, or breath test.<sup>77</sup> Implied-consent laws, or other related drunk-driving

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47, § 751(A) (West 1988 & Supp. 1996); OR. REV. STAT. § 813.100(1) (1989 & Supp. 1994); 75 PA. CONST. STAT. ANN. § 1547(a) (Supp. 1995); R.I. GEN. LAWS § 31-27-2.1(a) (1994); S.C. CODE ANN. § 56-5-2950(a) (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS § 32-23-10 (1989 & Supp. 1995); TENN. CODE ANN. § 55-10-406(a)(1) (1993 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 67011-5(1) (West 1977 & Supp. 1995); UTAH CODE ANN. § 41-6-44.10(1)(a) (1993 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1202(a) (1987 & Supp. 1994); VA. CODE ANN. § 18.2-268.2 (Michie Supp. 1995); WASH. REV. CODE ANN. § 46.20.308(1) (West 1987 & Supp. 1995); W. VA. CODE § 17C-5A-1(a) (1991 & Supp. 1995); WIS. STAT. ANN. § 343.305(2) (West 1991 & Supp. 1995); WYO. STAT. § 31-6-102(a) (1994). *But see* CAL. VEH. CODE § 23159.5 (West Supp. 1996) (authorizing express consent); COLO. REV. STAT. § 42-4-1301(7)(a)(I) (Supp. 1995) (authorizing express consent); FLA. STAT. ANN. § 316.1932(e) (West 1990 & Supp. 1995) (authorizing express consent).

77. ALA. CODE § 32-5-192(c) (1989); ARIZ. REV. STAT. ANN. § 28-691(D) (1989 & Supp. 1995); ARK. CODE ANN. § 5-65-205(a) (Michie 1993 & Supp. 1995); CAL. VEH. CODE § 13353.1(a) (West 1987 & Supp. 1996); CAL. VEH. CODE § 23157(5)(e) (West Supp. 1996); COLO. REV. STAT. § 42-2-126(2)(a)(II) (Supp. 1995); CONN. GEN. STAT. ANN. § 14-227b(c) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2742(a)-(b) (1985); FLA. STAT. ANN. § 322.2615(1)(a) (West 1995); GA. CODE ANN. §§ 40-5-67(b)(1), -67.1(d) (Harrison 1994 & Supp. 1995); HAW. REV. STAT. § 286-255 (Supp. 1992); IDAHO CODE § 18-8002(3)-(4) (1987 & Supp. 1995); ILL. ANN. STAT. ch. 625, para. 5/11-501.1(d)-(f) (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. §§ 9-30-6-5 to -7 (Burns 1991); IOWA CODE ANN. § 321J.9 (West Supp. 1995); KAN. STAT. ANN. §§ 8-1001(f)(1)(D), 8-1002(e) (1991 & Supp. 1994); KY. REV. STAT. ANN. § 189A.107 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 32:667(A) (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, § 2521(5) (West Supp. 1995); MD. CODE ANN., TRANSP. § 16-205.1(b)(3) (1992 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, § 24(4)(c)(4)(f)(1) (West 1989 & Supp. 1995); MICH. STAT. ANN. § 9.2325(7) (Callaghan 1991 & Supp. 1995); MINN. STAT. ANN. §§ 169.121(4), 169.123(4)-(5) (West 1986 & Supp. 1995); MISS. CODE ANN. § 63-11-30(3) (1989 & Supp. 1995); MO. ANN. STAT. § 577.041(2) (Vernon 1995); MONT. CODE ANN. § 61-8-402(3) (1995); NEB. REV. STAT. §§ 39-669.08(4), -669.15 (1988 & Supp. 1990); NEV. REV. STAT. ANN. §§ 484.382(3), 484.384(3), 484.385(3) (Michie 1994); N.H. REV. STAT. ANN. §§ 265:91-a, :92 (1993 & Supp. 1995); N.M. STAT. ANN. § 66-8-111.1 (Michie 1994); N.Y. VEH. & TRAF. LAW § 1194(2)(b) (McKinney 1986 & Supp. 1996); N.D. CENT. CODE § 39-20-04(1) (1987 & Supp. 1996); OHIO REV. CODE ANN. § 4511.191(D)(1) (Anderson 1993 & Supp. 1994); OKLA. STAT. ANN. tit. 47, §§ 753, 754(A)-(C) (West 1988 & Supp. 1996); OR. REV. STAT. §§ 813.100(3), 813.130 (1989 & Supp. 1994); 75 PA. CONST. STAT. ANN. § 1547(b) (1977 & Supp. 1995); S.C. CODE ANN. § 56-5-2950(d) (Law. Co-op. 1991 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 32-23-18 to -19 (Supp. 1995); TENN. CODE ANN. § 55-10-406(a)(2)-(3) (1993 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 67011-5(2)(d)-(i) (West 1977 & Supp. 1995); UTAH CODE ANN. § 41-6-44.10(2)(b) (1993 & Supp. 1994); VT. STAT. ANN. tit. 23, § 1205(a) (1987 & Supp. 1994); WASH. REV. CODE ANN. § 46.20.308(6) (West 1987 & Supp. 1996); W. VA. CODE § 17C-5A-1(a) (1991 & Supp. 1995); WIS. STAT. ANN. § 343.305(9) (West 1991 & Supp. 1995); WYO. STAT. § 31-6-102(a)(d) (1994 & Supp. 1995). *But see* ALASKA STAT. § 28.35.032(f) (1994 & Supp. 1995) (stating that refusal is a misdemeanor); N.J. STAT. ANN. § 39:4-50.4a (West 1990 & Supp. 1995) (stating that a municipal court can revoke driving privileges); N.C. GEN. STAT. § 20-

statutes, also allow the states to revoke or suspend a license if a person takes such a test and scores above the legal limit.<sup>78</sup>

The revocation or suspension of a license usually occurs in one of two ways. Under some laws the police officer seizes the person's driver's license and issues a temporary license that is valid for a specified number of days; in other jurisdictions, the officer does not seize the license, but notifies the state department of motor vehicles, which then suspends or revokes the license.<sup>79</sup>

In both instances the alleged drunk driver has the right to request an administrative hearing on the matter.<sup>80</sup> In most jurisdictions the

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16.2(c) (1993) (stating that a driver who refuses will be brought before a person authorized to give oaths, who will then execute an affidavit confirming the refusal); R.I. GEN. LAWS § 31-27-2.1 (1994) (stating that officer notifies an administrative law judge, who then suspends the license); VA. CODE ANN. § 18.2-268.3 (Michie Supp. 1995) (stating that a driver who refuses a test will be taken before a magistrate and later tried if the driver refuses the magistrate's request for a test).

78. ARK. CODE ANN. § 5-65-104(a)(1) (Michie 1993 & Supp. 1995); CAL. VEH. CODE §§ 13353.2, 23158.5 (West Supp. 1996); COLO. REV. STAT. § 42-2-126(2)(a)(I) (Supp. 1995); CONN. GEN. STAT. ANN. § 14-227b(c) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2742(f) (1985); FLA. STAT. ANN. § 322.2615(1)(a) (West 1995); GA. CODE ANN. § 40-5-67(b)(2)-(3) (Harrison 1994); HAW. REV. STAT. §§ 286-255 to -256 (Supp. 1992); ILL. ANN. STAT. ch. 625, para. 5/11-501.1(d)-(f) (Smith-Hurd 1993 & Supp. 1995); IOWA CODE ANN. § 321J.12 (West 1985 & Supp. 1995); KAN. STAT. ANN. §§ 8-1001(f)(1)(E), 8-1002(e) (1991 & Supp. 1994); LA. REV. STAT. ANN. § 32:667(A) (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, § 2453(3) (West Supp. 1995); MD. CODE ANN., TRANSP. § 16-205.1(b)(3) (1992 & Supp. 1995); MASS. GEN. LAW ANN. ch. 90, § 24(4)(c)(4)(f)(2) (West 1989 & Supp. 1995); MICH. STAT. ANN. § 9.2325(7) (Callaghan 1991 & Supp. 1995); MINN. STAT. ANN. § 169.123(4)-(5)(A) (West 1986 & Supp. 1995); MISS. CODE ANN. § 63-11-23(2) (1989 & Supp. 1995); NEV. REV. STAT. ANN. §§ 484.384(3), 484.385(3) (Michie 1994); N.H. REV. STAT. ANN. §§ 265:91-a, :92 (1993 & Supp. 1995); N.D. CENT. CODE § 39-20-03.1 (1987 & Supp. 1995); OHIO REV. CODE ANN. § 4511.191(C)(1) (Anderson 1993 & Supp. 1994); OKLA. STAT. ANN. tit. 47, § 754(A)-(C) (West 1988 & Supp. 1996); OR. REV. STAT. §§ 813.100(3), 813.130 (1989 & Supp. 1995); UTAH CODE ANN. § 53-3-223(3)-(4) (1994 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1205(a) (1987 & Supp. 1994); W. VA. CODE ANN. § 17C-5A-1(a)-(c) (1991 & Supp. 1995); WIS. STAT. ANN. § 343.305(7), (9) (West 1991 & Supp. 1995); WYO. STAT. 31-6-102(a)-(f) (1994 & Supp. 1995).

79. See *supra* note 7.

80. ALA. CODE § 32-5-192(d) (1989); ARIZ. REV. STAT. ANN. §§ 28-691(D), 28-694(A) (1989 & Supp. 1995); CAL. VEH. CODE §§ 13353-13353.1 (West 1987 & Supp. 1996); COLO. REV. STAT. § 42-2-126(8)(a) (Supp. 1995); CONN. GEN. STAT. ANN. § 14-227b(d)-(f) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2742(d)-(f) (1985); FLA. STAT. ANN. § 322.2615(1)(b)(4) (West 1995); GA. CODE ANN. § 40-5-67.1(g) (Harrison 1994); HAW. REV. STAT. § 286-259 (Supp. 1992); IDAHO CODE §§ 18-8002(4)(b), 18-8002A(a)(6) (1987 & Supp. 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b) (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. § 9-30-6-10 (Burns 1991); IOWA CODE ANN. § 321J.13 (West Supp. 1995); KAN. STAT. ANN. § 8-1002(f) (1991 & Supp. 1994); KY. REV. STAT. ANN. § 189A.220 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 32:668(A) (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, §§ 2453(8), 2483(1), 2521(8) (West

official who oversees the hearing is an employee of the state department of motor vehicles or related state government department.<sup>81</sup> However, in a few states, a judge conducts the hearing.<sup>82</sup>

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Supp. 1995); MD. CODE ANN., TRANSP. § 16-205.1(f) (1992 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, §§ 24(4)(c)(4)(g), 24N (West 1989 & Supp. 1995); MICH. STAT. ANN. § 9.2325(6)(1)-(2) (Callaghan 1991 & Supp. 1995); MINN. STAT. ANN. § 169.123(5)(b)-(c), (6) (West 1986 & Supp. 1995); MO. ANN. STAT. § 577.041(4) (Vernon 1995); MONT. CODE ANN. § 61-8-403 (1995); NEB. REV. STAT. § 39-669.16 (1988); NEV. REV. STAT. ANN. § 484.382 (Michie 1994); N.H. REV. STAT. ANN. § 265:91-b (1993 & Supp. 1995); N.J. STAT. ANN. § 39:5-30 (West 1990 & Supp. 1995); N.M. STAT. ANN. § 66-8-112 (Michie 1994); N.Y. VEH. & TRAF. LAW § 1194(2)(c) (McKinney 1986 & Supp. 1996); N.C. GEN. STAT. § 20-16.2(d) (1993 & Supp. 1994); N.D. CENT. CODE 39-20-05(1)-(3) (1987 & Supp. 1995); OHIO REV. CODE ANN. § 4511.191(H)(1) (Anderson 1993 & Supp. 1994); OKLA. STAT. ANN. tit. 47, § 754(D) (West 1988 & Supp. 1996); OR. REV. STAT. §§ 813.130(g), 813.410(3) (1989 & Supp. 1995); 75 PA. CONST. STAT. ANN. § 1550(a) (1977 & Supp. 1995); R.I. GEN. LAWS § 31-27-2.1(6)(b) (1994); S.C. CODE ANN. § 56-5-2950(e) (Law. Coop. 1991 & Supp. 1994); S.D. CODIFIED LAWS ANN. § 32-23-11 (1989 & Supp. 1995); TENN. CODE ANN. § 55-10-406(c) (1993 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 67011-5(2)(f), (j)-(k) (West 1977 & Supp. 1995); UTAH CODE ANN. §§ 41-6-44.10(2)(e), 53-3-223(6)(a) (1994 & Supp. 1995); VA. CODE ANN. § 18.2-268.4 (Michie Supp. 1995); WASH. REV. CODE ANN. § 46.20.308(7) (West 1987 & Supp. 1996); W. VA. CODE § 17C-5A-2(a) (1991 & Supp. 1995); WIS. STAT. ANN. § 343.305(8)-(9) (West 1991 & Supp. 1995); WYO. STAT. §§ 31-6-102(f), -103(a) (1994 & Supp. 1995). *But see* MASS. GEN. LAWS ANN. ch. 90, § 24(4)(c)(4)(f)(1)(iii) (authorizing a hearing for suspensions due to refusal only after the offender pleads guilty to drunk-driving charges or the charges are dismissed); MISS. CODE ANN. § 63-11-23(2) (1972 & Supp. 1995) (authorizing a trial on suspension for testing above the legal limit).

81. *See, e.g.*, ALA. CODE § 32-5-192(d) (1989); COLO. REV. STAT. § 42-2-126(9)(b) (Supp. 1995); CONN. GEN. STAT. ANN. § 14-277b(f) (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 21, § 2742(f) (1985); FLA. STAT. ANN. § 322.2615(4), (6)(b) (West 1995); HAW. REV. STAT. § 286-259(d) (Supp. 1992); IDAHO CODE § 18-8002A(a)(6) (Supp. 1995); IOWA CODE ANN. § 321J.13(2) (West Supp. 1995); LA. REV. STAT. ANN. § 32:668(A) (West 1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 29-A, § 2483(2) (West Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, § 24(4)(c)(4)(g) (West 1989 & Supp. 1995); MINN. STAT. ANN. § 169.123(5)(b) (West 1986 & Supp. 1995); NEB. REV. STAT. § 39-669.16 (1988); N.H. REV. STAT. ANN. § 265:91-b (1993 & Supp. 1995); N.M. STAT. ANN. § 66-8-112(D) (Michie 1994); N.D. CENT. CODE § 39-20-05(1)-(3) (1987 & Supp. 1995); OKLA. STAT. ANN. tit. 47, § 754(E) (West 1988 & Supp. 1996); OR. REV. STAT. § 813.410(3)(a) (1989 & Supp. 1995); TENN. CODE ANN. § 55-10-406(c) (1993 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 67011-5(f) (West 1977 & Supp. 1995); UTAH CODE ANN. § 41-6-44.10(2)(e) (1993 & Supp. 1995); W. VA. CODE § 17C-5A-2(a) (1991 & Supp. 1995); WIS. STAT. ANN. § 343.305(8)-(9) (West 1991 & Supp. 1995).

82. *See, e.g.*, ARK. CODE ANN. § 5-65-205(b)-(c) (Michie 1993 & Supp. 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b) (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. § 9-30-6-9 (Burns 1991); KY. REV. STAT. ANN. § 189A.220 (Michie/Bobbs-Merrill Supp. 1994); MASS. GEN. LAWS ANN. ch. 90, § 24N (West 1989 & Supp. 1995); MINN. STAT. ANN. § 169.123(6) (West 1986 & Supp. 1995); MO. ANN. STAT. § 577.041(4) (Vernon 1995); MONT. CODE ANN. § 61-8-403 (1995); OHIO REV. CODE ANN. § 4511.191(H)(1) (Anderson 1993 & Supp. 1994); 75 PA. CONST. STAT. ANN. § 1550(a) (1977 & Supp. 1995); VA. CODE ANN. § 18.2-268.4 (Michie Supp. 1995); *see also* MISS. CODE ANN. § 63-11-23(2)

Under either option, the hearing generally covers some combination of the following: (1) whether the officer had probable cause or reasonable grounds for believing the defendant was driving under the influence;<sup>83</sup> (2) whether the defendant was lawfully arrested;<sup>84</sup> (3) whether the defendant refused to take the test or took the test and scored over the legal limit;<sup>85</sup> and (4) whether the defendant was informed that the license would be revoked or suspended if the defendant refused or failed the test.<sup>86</sup>

In addition to the license suspension/revocation proceedings, the state also files criminal DUI charges.<sup>87</sup> A conviction on these charges could lead to imprisonment,<sup>88</sup> a fine,<sup>89</sup> implementation of an ignition interlock device,<sup>90</sup> or an additional suspension or restriction of the driver's license.<sup>91</sup> These criminal sanctions, combined with the administrative license suspension or revocation, are at the heart of the DUI double-jeopardy debate.

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(1989 & Supp. 1995) (authorizing a trial for suspensions based on testing over the legal limit); R.I. GEN. LAWS § 31-27-2.1(6)(b) (1994) (authorizing a hearing in front of an administrative law judge); TEX. REV. CIV. STAT. ANN. §§ 6687b-1(7)(b), 67011-5(2)(f) (West Supp. 1995) (authorizing a hearing in front of an administrative law judge).

83. See, e.g., CAL. VEH. CODE §§ 13353(c)(1), 13557(b)(2)(A) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(a)(1), (b)(1) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(2) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(c)(1) (McKinney Supp. 1995).

84. See, e.g., CAL. VEH. CODE §§ 13353(c)(2), 13557(b)(2)(B) (West 1987 & Supp. 1995); FLA. STAT. ANN. § 322.2615(7)(a)(2) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(1) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(c)(2) (McKinney Supp. 1995).

85. See, e.g., CAL. VEH. CODE §§ 13353(c)(3), 13557(b)(2)(C)(i)-(iii) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(a)(3), (b)(3) (West 1995).

86. See, e.g., CAL. VEH. CODE § 13353(c)(4) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(b)(4) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(3)-(4) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(c)(3) (McKinney Supp. 1995).

87. Smith, *supra* note 8, at 1.

88. See, e.g., CAL. VEH. CODE § 23160(a)-(b) (West 1985 & Supp. 1996); ILL. ANN. STAT. ch. 625, para. 5/11-501(c) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1193(1)(a) (McKinney Supp. 1995).

89. See, e.g., CAL. VEH. CODE § 23160(a) (West 1985 & Supp. 1996); ILL. ANN. STAT. ch. 625, para. 5/11-501(c) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1193(1)(a) (McKinney Supp. 1995).

90. Lawrence Taylor, *Make it a Single: DUI Dual Punishment May be Unconstitutional*, L.A. DAILY J., Mar. 7, 1995, at 7 [hereinafter Taylor, *Make it a Single*].

91. See, e.g., ILL. ANN. STAT. ch. 625, para. 5/11-501(g) (Smith-Hurd 1993 & Supp. 1995).



### C. *The Double-Jeopardy Analysis Proposed by DUI Attorneys*

DUI defense attorneys contend that the administrative license suspension/revocation proceedings coupled with the subsequent criminal trial subjects their clients to multiple punishments for the same offense.<sup>92</sup> In order to succeed in this argument, double-jeopardy proponents must prove that the administrative and criminal matters are separate proceedings, the two proceedings stem from the same offense, and the suspension or revocation of a license is punishment.<sup>93</sup>

1. A license suspension/revocation proceeding and a criminal trial are separate proceedings for double-jeopardy purposes.

In order for a double-jeopardy issue to arise, the license suspension/revocation hearing and the criminal trial must be separate proceedings because the government is allowed to impose multiple punishments in the same proceeding.<sup>94</sup> Thus, DUI defense attorneys have argued that the two proceedings are separate, partially because the criminal trial and the license suspension/revocation hearing occur at different times, but also because one is held in a criminal courtroom, while the other is an administrative hearing generally overseen by an employee of the state department of motor vehicles.<sup>95</sup>

To buttress their claims, DUI defense attorneys analogize their situation to two federal civil forfeiture cases. In one case, *United States v. McCaslin*,<sup>96</sup> the court found that the forfeiture action and criminal trial were two separate proceedings because the indictment was returned more than eight months after the forfeiture action began, both actions were overseen by different judges, and the forfeiture became final five months before the defendant pled guilty to the criminal charges.<sup>97</sup> In the other case, *United States v.*

92. See *supra* part I.

93. See *supra* part I.

94. *Ohio v. Johnson*, 467 U.S. 493, 500 (1984); *Missouri v. Hunter*, 459 U.S. 359, 365-69 (1983).

95. See Motion to Dismiss for Double Jeopardy at 14, *People v. Kimball*, ECR-16735-A (Cal. Mun. Ct. Tulare County filed Aug. 24, 1995) [hereinafter Motion to Dismiss]; Defendant's Brief, *supra* note 12, at 15-16; *supra* part III.B.

96. 863 F. Supp. 1299 (W.D. Wash. 1994).

97. *Id.* at 1304.

\$405,089.23 United States Currency,<sup>98</sup> the court decided there were two separate proceedings because

[it] fail[ed] to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding." . . . [S]uch a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to 'run the gantlet' more than once.<sup>99</sup>

Because the driver's license suspension/revocation hearing and the subsequent criminal trial basically fall within the same pattern as the two federal cases,<sup>100</sup> DUI lawyers feel that the two proceedings should be considered separate for double-jeopardy purposes.<sup>101</sup>

2. The suspension/revocation of the driver's license and the subsequent criminal trial stem from the same offense

DUI defense attorneys next argue that the suspension or revocation of their clients' licenses and the criminal trial which follows are the result of the same offense.<sup>102</sup> In other words, both proceedings are the result of either driving under the influence of alcohol or driving with a prohibited blood-alcohol level.<sup>103</sup> As will be discussed later, however, this is not always the case.<sup>104</sup>

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98. 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346).

99. *Id.* at 1216-17.

100. *See supra* notes 95-99 and accompanying text.

101. In most jurisdictions the two proceedings are indeed separate, however, in a few states, the license suspension and criminal trial are overseen by the same court. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 24N (West 1989 & Supp. 1995); MINN. STAT. ANN. § 169.123(6) (West 1986 & Supp. 1995); VT. STAT. ANN. tit. 23, § 1205(f) (Supp. 1994). In these jurisdictions a viable argument can be made that the license suspension and criminal matters are handled in one proceeding and, therefore, double jeopardy does not apply. *People v. Frank*, 631 N.Y.S.2d 1014, 1018 (Crim. Ct. 1995); *State v. Baker*, 650 N.E.2d 1376, 1383 (Ohio Mun. Ct. Clark County 1995); *State v. Uncapher*, 650 N.E.2d 195, 205 (Ohio Mun. Ct. Bowling Green 1995).

102. Motion to Dismiss, *supra* note 95, at 5-6; Defendant's Brief, *supra* note 12, at 7; *Murphy v. Virginia*, 896 F. Supp. 577 (E.D. Va. 1995); *Anderson v. Macduff*, 143 N.Y.S.2d 257 (Sup. Ct. 1955); *State v. Baker*, 650 N.E.2d 1376 (Ohio Mun. Ct. Clark County 1995); *State v. Ackrouche*, 650 N.E.2d 535 (Ohio Mun. Ct. Franklin County 1995).

103. Defendant's Brief, *supra* note 12, at 17; *Murphy*, 896 F. Supp. at 580; *Anderson*, 143 N.Y.S.2d at 259; *Baker*, 650 N.E.2d at 1382; *Ackrouche*, 650 N.E.2d at 536-37.

104. *See infra* part IV.A.

Other DUI lawyers argue that their clients are being punished twice for the same offense if both proceedings involve the same "factual situation,"<sup>105</sup> a test that they contend was used by the U.S. Supreme Court in *United States v. Halper*<sup>106</sup> and *Department of Revenue v. Kurth Ranch*.<sup>107</sup>

3. License revocation/suspension is a form of punishment for double-jeopardy purposes

The heart of the DUI double-jeopardy defense is that the license suspension/revocation is punishment under the Fifth Amendment. To buttress this central element of their claim, DUI defense attorneys generally use three U.S. Supreme Court cases.<sup>108</sup> None of these cases deal specifically with drunk driving or the suspension/revocation of driver's licenses, but the language in these cases is nevertheless applied to the DUI arena. Because these cases are so integral to the double-jeopardy debate, an analysis of each case is necessary in order to ascertain whether the cases are in fact applicable to the DUI setting.

a. *United States v. Halper*<sup>109</sup>

The basis of all DUI double-jeopardy claims resides in *Halper*, a fraud case in which the defendant was convicted, sentenced to prison, and fined \$5000.<sup>110</sup> He was then ordered to pay an additional \$1170 sanction after the federal government filed an action against him under the civil False Claims Act.<sup>111</sup>

In assessing the defendant's double-jeopardy argument, the U.S. Supreme Court stated that a civil remedy is not punishment when it approximates government damages and actual costs.<sup>112</sup> If it is extreme and divorced from the government's damages, however, the

105. See Defendant-Appellee's Answer Brief at 13, *People v. Deutschendorf* (a.k.a. Denver), No. 95 CR 23 (Colo. Dist. Ct. Pitkin County submitted June 20, 1995) [hereinafter Defendant-Appellee's Answer Brief]; Defendant's Brief, *supra* note 12, at 17.

106. 490 U.S. 435 (1989).

107. 114 S. Ct. 1937 (1994).

108. Another case periodically cited by DUI defense attorneys is *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346).

109. 490 U.S. 435 (1989).

110. *Id.* at 437-40.

111. *Id.* at 438-40.

112. *Id.* at 446.

civil remedy is punitive in nature and raises double-jeopardy concerns.<sup>113</sup>

In an effort to further delineate its stance, the Court went on to assert that a civil remedy or sanction is punitive when it serves retributive or deterrent functions.<sup>114</sup> It is this section of the case that has created differing interpretations in the double-jeopardy arena because of two conflicting sentences. After first stating that a civil sanction is punitive if it is not “solely to serve a remedial purpose,”<sup>115</sup> the Court in the next sentence expressly held that a civil sanction is punishment if it “may not *fairly* be characterized as remedial, but only as a deterrent or retribution.”<sup>116</sup>

b. *Austin v. United States*<sup>117</sup>

Four years after *Halper*, the U.S. Supreme Court again delved into the area of civil sanctions. Although *Austin* is frequently cited by DUI double-jeopardy proponents, it actually deals with an excessive fines issue under the Eighth Amendment of the Constitution, rather than a double-jeopardy issue under the Fifth Amendment.<sup>118</sup> In *Austin* the defendant pled guilty to one count of cocaine possession with intent to distribute and was sentenced to seven years in prison.<sup>119</sup> Shortly thereafter, the United States filed an *in rem* action seeking forfeiture of Austin’s mobile home and auto-body shop, where the drugs were stored and the drug sale occurred.<sup>120</sup>

In determining whether the forfeiture was an excessive fine under the Eighth Amendment, the Court opted to use the portion of the *Halper* case which stated that a civil sanction is punishment if it does not solely serve a remedial purpose.<sup>121</sup> To ascertain whether the forfeiture in question served such a purpose, the Court first looked at the historical usage of forfeitures and determined that they generally served punitive goals.<sup>122</sup> It then noted that the forfeiture was tied

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113. *Id.* at 442.

114. *Id.* at 448.

115. *Id.* (emphasis added).

116. *Id.* at 449 (emphasis added).

117. 113 S. Ct. 2801 (1993).

118. *Id.* at 2803. At least one federal appellate court has stated that the *Austin* case applies to double-jeopardy cases. *\$405,089.23 U.S. Currency*, 33 F.3d at 1219.

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

120. *Id.*

121. *Id.* at 2806.

122. *Id.* at 2806-10.

directly to the commission of drug offenses and that the focus of the forfeiture statute was on the culpability of the owner of the property.<sup>123</sup> As a result, the forfeiture did not serve solely a remedial purpose and was a punishment subject to the Eighth Amendment prohibition against excessive fines.<sup>124</sup>

c. Department of Revenue v. Kurth Ranch<sup>125</sup>

The most recent U.S. Supreme Court case to address whether a civil sanction is punishment is *Kurth Ranch*. The case dealt with Montana's Dangerous Drug Tax Act,<sup>126</sup> which allowed imposition of a tax on the possession and storage of dangerous drugs.<sup>127</sup> Under the law, the tax would be either ten percent of the assessed market value of the drug or a specified amount that varied from drug to drug.<sup>128</sup> More importantly, the tax would only be levied after any state or federal fines and forfeitures had been imposed.<sup>129</sup>

The defendants in the case were taxed pursuant to the Act after pleading guilty to growing and selling marijuana on their farm<sup>130</sup> and settling a companion forfeiture action in which the government attempted to obtain the cash and equipment used in the drug violations.<sup>131</sup>

In assessing whether the Montana tax was punishment, thus raising a double-jeopardy issue, the U.S. Supreme Court decided that the *Halper* test<sup>132</sup> was not applicable in a tax situation.<sup>133</sup> Instead, the Court used six factors to analyze the Montana statute: (1) the tax was excessive and had a deterrent purpose; (2) the tax was conditioned on the commission of a crime; (3) the tax was imposed only after the taxpayer was arrested for the precise conduct that gave rise to the tax; (4) people arrested for possession of drugs were the only ones subject to the tax; (5) the taxed activity was completely forbidden; and (6) the tax was levied on goods that the taxpayer

123. *Id.* at 2810-12.

124. *Id.* at 2812.

125. 114 S. Ct. 1937 (1994).

126. MONT. CODE ANN. §§ 15-25-101 to -123 (repealed 1995); *Kurth Ranch*, 114 S. Ct. at 1941 n.2.

127. *Kurth Ranch*, 114 S. Ct. at 1941.

128. *Id.*

129. *Id.*

130. *Id.* at 1942.

131. *Id.*

132. *See supra* part III.C.3.a.

133. *Kurth Ranch*, 114 S. Ct. at 1948.

neither owned nor possessed when the tax was imposed.<sup>134</sup> All of these factors made the tax appear to be a punishment rather than a revenue-enhancing scheme<sup>135</sup> and thus contained “anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment.”<sup>136</sup>

*d. applying the double-jeopardy cases to DUI*

DUI double-jeopardy proponents rely on the Supreme Court’s statement in *Halper* 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.”<sup>137</sup> They buttress their use of this quote by pointing out that the *Austin* Court used the same statement in determining whether the fine at issue in that case could constitute punishment under the Eighth Amendment.<sup>138</sup> Thus, the main contention of double-jeopardy proponents is that the revocation or suspension of a driver’s license is not “solely” remedial and instead implicates a punitive or deterrent purpose.<sup>139</sup>

To prove their point, defense attorneys often apply the most favorable prongs or factors used by the Court in *Austin* and *Kurth Ranch*.<sup>140</sup> These include the historical understanding of forfeiture as punishment; a determination that the forfeiture is for a forbidden act, focuses on the culpability of the defendant, and is tied directly to the commission of a crime; and an evaluation that the forfeiture is excessive or saddled with a punitive purpose.<sup>141</sup>

Thus, DUI defense attorneys contend that the arrest and suspension/revocation procedures stem from the forbidden act of driving under the influence.<sup>142</sup> These suspensions and revocations focus on the culpability of the defendant and are tied directly to the commission of a crime because they are only imposed after a police

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134. *Id.* at 1946-48.

135. *Id.* at 1947-48.

136. *Id.* at 1948.

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

138. *Austin*, 113 S. Ct. at 2806.

139. See *infra* notes 145-55 and accompanying text.

140. See Motion to Dismiss, *supra* note 95, at 8-10; Defendant-Appellee’s Answer Brief, *supra* note 105, at 17; Taylor, *License Suspensions*, *supra* note 9, at 82-84.

141. Taylor, *License Suspensions*, *supra* note 9, at 83-84.

142. See Defendant-Appellee’s Answer Brief, *supra* note 105, at 17-18; Taylor, *License Suspensions*, *supra* note 9, at 83-84.

officer either pulls a driver off the road for appearing to be drunk or the driver fails a chemical test detecting alcohol.<sup>143</sup> DUI attorneys reinforce their argument by pointing out that a few jurisdictions reinstate a suspended or revoked license if the defendant is later acquitted of the criminal DUI charge.<sup>144</sup>

The chief focus of their argument, however, is that the suspension or revocation of a driver's license is meant to punish or deter.<sup>145</sup> One way the suspension or revocation accomplishes this is by the deprivation and hardship allegedly imposed on drunk drivers.<sup>146</sup> Under this argument, it is punitive because society is mobile and people depend on their cars.<sup>147</sup> Some people may also require a vehicle or a valid driver's license to complete their job duties, and a suspension or revocation may endanger their employment or cause them to lose promotions.<sup>148</sup>

Another argument made by defense attorneys is that the legislature understood the provisions of the statute to serve either deterrent or punitive purposes.<sup>149</sup> Defense attorneys cite to news articles about the statutes or to their legislative histories to make this argument.<sup>150</sup> For example, news articles about the impending passage or implementation of suspension/revocation bills can sometimes contain statements by supporters which indicate that they considered the law to be punitive or deterrent in nature. In California, for instance, State Senator John Seymour, the co-author of a suspension bill, echoed this sentiment, telling a reporter that the law would bring

143. See Motion to Dismiss, *supra* note 95, at 17-18; Defendant-Appellee's Answer Brief, *supra* note 105, at 17-18; Taylor, *License Suspensions*, *supra* note 9, at 82-83.

144. Taylor Interview, *supra* note 16.

145. Motion to Dismiss, *supra* note 95, at 7-13; Defendant-Appellee's Answer Brief, *supra* note 105, at 15-25.

146. Motion to Dismiss, *supra* note 95, at 7-13; Defendant-Appellee's Answer Brief, *supra* note 105, at 15-25.

147. See Motion to Dismiss, *supra* note 95, at 15-16; Defendant-Appellee's Answer Brief, *supra* note 105, at 23-25; Karabian, *supra* note 75, at 43 (stating that driving in California is a practical necessity).

148. See Berkman, *supra* note 11, at A7 (quoting William C. Head, DUI lawyer and cofounder and treasurer of the National College for DUI Defense as stating: "Taking away a driver's license can mean taking away a job and then a house.").

149. Motion to Dismiss, *supra* note 95, at 13; Taylor, *License Suspensions*, *supra* note 9, at 82; Taylor, *Make it a Single*, *supra* note 90, at 7.

150. Motion to Dismiss, *supra* note 95, at 13; Taylor, *License Suspensions*, *supra* note 9, at 80; Taylor, *Make it a Single*, *supra* note 90, at 7.

“swift and certain penalties for those who choose to drink and drive.”<sup>151</sup>

In addition to a few quotes from a handful of news articles, DUI attorneys also contend that the legislative histories of the revocation/suspension laws support the contention that lawmakers understood the statutes to serve a deterrent or punitive purpose. For example, comments contained in the third reading of California’s then-proposed license suspension law state that “the swift and sure suspension or revocation of a person’s driver’s license . . . has proven to be a most successful deterrent.”<sup>152</sup> A legislative analysis of the bill referred to the suspension as a “penalty” from the standpoint of DUI offenders.<sup>153</sup> In addition, MADD—a key supporter of the bill—stated in several letters that the purpose of the legislation was in part to deter others.<sup>154</sup> Similar references to punishment and deterrence are contained in the legislative histories of statutes of other states.<sup>155</sup>

Thus, DUI double-jeopardy proponents choose the most powerful indications of a punitive or deterrent purpose that they can find. As will be shown in Part IV, however, DUI lawyers not only misapply case law, but their findings are also largely countered by more persuasive evidence.

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151. Matt Lait & Davan Maharaj, *In New Law, Drunks Face Instant Loss of Licenses*, L.A. TIMES, July 1, 1990, at B1.

152. CALIFORNIA SENATE THIRD READING OF S.B. 1623, 1989-1990 Regular Sess. 3 (1989) [hereinafter THIRD READING OF S.B. 1623].

153. CALIFORNIA LEGISLATIVE ANALYSIS OF S.B. 1623, 1989-1990 Regular Sess. 2 (1989) [hereinafter LEGISLATIVE ANALYSIS OF S.B. 1623].

154. Letter from Sherry Metcalf, President, Mothers Against Drunk Driving, Orange County Chapter, to Bill Lockyer, California State Senator (Apr. 28, 1989) (on file with *Loyola of Los Angeles Law Review*); Letter from Shirley Graves, Legislative Liaison, Mothers Against Drunk Driving, to Bill Lockyer, California State Senator (Apr. 14, 1989) (on file with *Loyola of Los Angeles Law Review*).

155. For example, Colorado Representative James Lee, at various times during the passage of Colorado’s license suspension law, stated that one, although not the sole purpose of the statute, was to deter people from drinking and driving, a view that was echoed by the Governor’s Task Force. Defendant-Appellee’s Answer Brief, *supra* note 105, at 21-22; COLORADO GOVERNOR’S TASK FORCE ON DRUNK DRIVING, RECOMMENDATIONS 14 (1983). Colorado Representative Ronald Strahle went even further and voiced his concern that the law would result in double punishment for the offender. Defendant-Appellee’s Answer Brief, *supra* note 105, at 23. The current revocation/suspension statute, however, specifically states that it is designed to remove safety hazards from the road and thereby protect the public. See *infra* note 240.



D. *Success and Failure—Mostly Failure—of the Double-Jeopardy  
DUI Defense in State Courts*

1. Trial courts

The double-jeopardy drunk-driving defense has had its greatest success in trial courts, where the argument has resulted in dismissal of the criminal charges in at least eighteen states.<sup>156</sup> At least one federal district court has also indicated that the defense is valid.<sup>157</sup>

Some attribute the early success of the double-jeopardy argument to its rapid use by defense attorneys, who caught prosecutors off-guard.<sup>158</sup> In an effort to combat this advantage, the National Commission on Uniform Traffic Laws and Ordinances, the National Traffic Law Center, and MADD have been distributing prosecutorial resource kits on this issue.<sup>159</sup>

Despite their efforts, some trial courts continue to agree with the double-jeopardy defense, even though other trial courts in the same jurisdiction do not recognize it.<sup>160</sup> This lack of uniformity at the trial-court level has led defense attorneys and prosecutors to seek appellate review.

156. See Berkman, *supra* note 11, at A7; *New Drunk Driving Defense Is Successful in 18 States*, LAW. WKLY. USA, June 5, 1995, at 95; Taylor, *License Suspensions*, *supra* note 9, at 80. The 18 states include Colorado, Iowa, Minnesota, Nebraska, New Mexico, South Carolina, and Washington. *New Drunk Driving Defense Is Successful in 18 States*, *supra*, at 95.

157. *Murphy v. Virginia*, 896 F. Supp. 577 (E.D. Va. 1995). In the *Murphy* case, the defendant brought a habeas corpus proceeding in federal court to obtain an injunction on double-jeopardy grounds to halt the state criminal trial. *Id.* The court, however, did not grant the injunction because it ruled that the defendant was required to seek such relief in state court. *Id.* at 584.

158. See Berkman, *supra* note 11, at A7.

159. See *id.* These kits contain citations to cases that can be used to fight the defense, background information about double jeopardy, and other helpful tips. Memorandum from Mothers Against Drunk Driving, Subcommittee on Double Jeopardy/ALR, to Members of the Coalition for ALR (Mar. 29, 1995) (on file with *Loyola of Los Angeles Law Review*); Memorandum from the National Committee on Uniform Traffic Laws and Ordinances, Subcommittee on Double Jeopardy/ALR, to Members of the Coalition for ALR (Mar. 29, 1995) (on file with *Loyola of Los Angeles Law Review*).

160. See *supra* notes 14-15 and accompanying text; see also *State v. Baker*, 650 N.E.2d 1376, 1390 (Ohio Mun. Ct. Clark County 1995) (holding that double jeopardy did not bar criminal prosecution); *State v. Ackrouche*, 650 N.E.2d 535, 539 (Ohio Mun. Ct. Franklin County 1995) (holding that a double-jeopardy defense was valid); *State v. Uncapher*, 650 N.E.2d 195, 207 (Ohio Mun. Ct. Bowling Green 1995) (holding that double jeopardy did not bar criminal prosecution); *City of Cleveland v. Miller*, 646 N.E.2d 1213, 1217 (Ohio Mun. Ct. Cleveland County 1995) (holding that a double-jeopardy defense was invalid).

## 2. Appellate courts

Although the DUI double-jeopardy defense has found favor with many trial courts, it has met with little success in the appellate arena. In fact all of the appellate courts that have addressed the issue have condemned the defense,<sup>161</sup> with the exception of the Ohio appellate courts, which are split on the issue.<sup>162</sup>

## 3. State supreme courts

For double-jeopardy proponents, the results of DUI cases in state supreme courts are even more disheartening because the states that have heard the issue refuse to accept the argument.<sup>163</sup>

Despite the setback, double-jeopardy advocates remain hopeful that the tide will turn and that a favorable ruling may be in store.<sup>164</sup> Opponents, however, remain skeptical.<sup>165</sup>

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161. *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*, 230 Cal. App. 3d 1557, 282 Cal. Rptr. 93 (1991); *Davidson v. MacKinnon*, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995); *Gomez v. State*, 621 So. 2d 578 (Fla. Dist. Ct. App. 1993); *Freeman v. State*, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992); *Nolen v. State*, 463 S.E.2d 504 (Ga. Ct. App. 1995); *Jackson v. State*, 462 S.E.2d 802 (Ga. Ct. App. 1995); *State v. Spilde*, 536 N.W.2d 639 (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. Ct. App. 1995); *Schreiber v. Motor Vehicles Div.*, 802 P.2d 706 (Or. Ct. App. 1990), *review denied*, 810 P.2d 855 (Or. 1991); *Neaves v. State*, 767 S.W.2d 784 (Tex. Ct. App. 1989); *Walton v. State*, 831 S.W.2d 488 (Tex. Ct. App. 1992); *Tench v. Commonwealth*, 462 S.E.2d 922 (Va. Ct. App. 1995).

162. *See, e.g., New Drunk Driving Defense Rejected by Eight Appeals Courts*, LAW. WKLY. USA, July 3, 1995, at 1 (describing some of the conflicting decisions in Ohio).

163. *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Talavera*, 905 P.2d 633 (Idaho 1995); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790 (La. 1992); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *Maryland v. Jones*, 666 A.2d 128 (Md. 1995); *Luk v. Commonwealth*, 658 N.E.2d 664 (Mass. 1995); *Neil v. Peterson*, 314 N.W.2d 275 (Neb. 1982); *State v. Cassady*, 662 A.2d 955 (N.H. 1995); *State v. Kennedy*, 904 P.2d 1044 (N.M. 1995); *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995); *State v. Strong*, 605 A.2d 510 (Vt. 1992); *see also Dickinson v. Powell*, 539 N.W.2d 869 (N.D. 1995) (following the holding in *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995), and reversing the earlier order of dismissal based upon the Double Jeopardy Clause).

164. *See Prugh Interview*, *supra* note 12 (quoting Prugh as stating that recent negative decisions are "not indicative of how it will turn out in the end" because "trial courts aren't pulling things out of thin air"); *Taylor Interview*, *supra* note 16 (stating that "it's a question of time before there is a favorable decision").

165. *See Telephone Interview with Gordon B. Scott*, deputy district attorney for Sonoma County (Sept. 1, 1995) (on file with *Loyola of Los Angeles Law Review*) [hereinafter *Scott Interview*] (stating that no "principled analysis" could result in a finding that double-jeopardy rights were infringed).

IV. DUI-RELATED LICENSE SUSPENSIONS/REVOCATIONS  
COUPLED WITH CRIMINAL CHARGES DO NOT CONSTITUTE  
DOUBLE JEOPARDY

Although DUI double-jeopardy proponents make a variety of arguments to support their cause, their contentions should be declared dead on arrival. One reason is because much of their argument is supported by inapplicable case law. Moreover, even if the cases were applicable, the most supportable conclusion would be that license suspensions/revocations are remedial measures and, therefore, double jeopardy does not arise.

*A. The Defendant in a DUI Case Is Not Being Punished Twice for the Same Offense if the Defendant's License Was Previously Suspended or Revoked for Refusal to Take a Chemical Test*

Under the *Blockburger* test, there are two offenses for double-jeopardy purposes if each alleged violation requires "proof of an additional fact which the other does not."<sup>166</sup>

In the context of license suspensions/revocations for refusal to take a chemical test, the *Blockburger* analysis clearly shows that the suspension/revocation hearing and the subsequent criminal trial are dealing with two separate offenses. This is because the hearing requires proof that (1) the officer had probable or reasonable cause to believe the defendant was operating a motor vehicle under the influence of alcohol,<sup>167</sup> (2) the driver was lawfully arrested,<sup>168</sup> (3) the driver was told of the consequences of refusal,<sup>169</sup> and (4) the driver refused nonetheless.<sup>170</sup> In contrast, the state is not required

166. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see supra* part II.D.1.

167. *See, e.g.*, CAL. VEH. CODE §§ 13353(c)(1), 13557(b)(2)(A) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(a)(1), (b)(1) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(2) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1193(1)(c) (McKinney Supp. 1996).

168. *See, e.g.*, CAL. VEH. CODE §§ 13353(c)(2), 13357(b)(2)(B) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(a)(2) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(1) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(1)(a) (McKinney Supp. 1996).

169. *See, e.g.*, CAL. VEH. CODE § 13353(c)(4) (West 1987 & Supp. 1995); FLA. STAT. ANN. § 322.2615(7)(b)(4) (West 1995); ILL. ANN. STAT. ch. 625, para. 5/2-118.1(b)(3)-(4) (Smith-Hurd 1993 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(2)(b) (McKinney Supp. 1995).

170. *See, e.g.*, CAL. VEH. CODE §§ 13353(c)(3), 13557(b)(2)(C) (West 1987 & Supp. 1996); FLA. STAT. ANN. § 322.2615(7)(a)(3), (b)(3) (West 1995).

at a criminal trial to prove that the defendant refused to take a chemical test, but, in the absence of a valid chemical test, must only prove that the defendant was in fact driving under the influence of alcohol.<sup>171</sup> In California, for example, proof of driving under the influence would entail showing that the defendant was unable “to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.”<sup>172</sup> Because both proceedings deal with “proof of an additional fact which the other does not,”<sup>173</sup> the defendant is not being punished twice for the same offense, and the Double Jeopardy Clause does not apply.<sup>174</sup>

Some double-jeopardy proponents attempt to evade this conclusion by contending that the *Blockburger* test should not be used.<sup>175</sup> They argue that *Halper*, *Austin*, and *Kurth Ranch* mandate that there is one offense if both proceedings arise from the same set of factual circumstances.<sup>176</sup> None of these cases, however, supports

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171. See, e.g., ALA. CODE § 32-5A-191(a)(3) (1989) (defining under the influence as “incapable of safely driving”); ARIZ. REV. STAT. ANN. § 28-692(A)(1) (Supp. 1995) (defining under the influence as “person is impaired to the slightest degree”); COLO. REV. STAT. § 42-4-1301(1)(f) (Supp. 1995) (defining under the influence as “substantially incapable . . . [of] exercis[ing] clear judgment, sufficient physical control, or due care in the safe operation of a vehicle”); HAW. REV. STAT. § 291-4(1) (1985 & Supp. 1992) (defining under the influence as the consumption of an amount of alcohol that is “sufficient to impair the person’s normal mental faculties or ability to care for oneself and guard against casualty”); IND. CODE § 9-13-2-86(4) (1991) (defining under the influence as a “loss of normal control of a person’s faculties to an extent that endangers a person”); MICH. STAT. ANN. § 9.2325(2) (Callaghan 1991 & Supp. 1995) (defining under the influence as “visibly impaired”); PA. STAT. ANN. tit. 75, § 3731(a)(1) (1977 & Supp. 1995) (defining under the influence as “incapable of safe driving”); WYO. STAT. § 31-5-233(b) (1977 & Supp. 1994) (defining under the influence as “incapable of safely driving”).

172. *People v. Weathington*, 231 Cal. App. 3d 69, 78, 282 Cal. Rptr. 170, 173 (1991) (citing *People v. Cortes*, 214 Cal. App. 3d Supp. 12, 13, 263 Cal. Rptr. 113, 114 (1989)); see CAL. VEH. CODE § 23152(a) (West Supp. 1996); CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC) No. 16.831 (1988 & Supp. 1995); *People v. Schoonover*, 5 Cal. App. 3d 101, 107, 85 Cal. Rptr. 69, 71 (1970).

173. *Blockburger*, 284 U.S. at 304.

174. See *People’s Response to Defendant’s Motion to Dismiss on Grounds of Double Jeopardy at 2, 7*, *People v. Duetschendorf* (a.k.a. Denver), No. 94 T 491 (Colo. County Ct. Pitkin County submitted Jan. 23, 1995) [hereinafter *People’s Response*]; *Anderson v. Macduff*, 143 N.Y.S.2d 257 (Sup. Ct. 1955); *State v. Baker*, 650 N.E.2d 1376, 1383 (Ohio Mun. Ct. Clark County 1995); *State v. Uncapher*, 650 N.E.2d 195 (Ohio Mun. Ct. Bowling Green 1995).

175. Defendant’s Reply Brief in Support of Defendant’s Motion to Dismiss on Grounds of Double Jeopardy at 9, *People v. Duetschendorf* (a.k.a. Denver), No. 94 T 491 (Colo. County Ct. Pitkin County submitted Mar. 8, 1995) [hereinafter *Defendant’s Reply Brief*].

176. *Id.*

the proponents' argument.<sup>177</sup> Instead, the Court seemed to assume that the civil and criminal proceedings dealt with the same offense since it never engaged in any sort of same-offense analysis.<sup>178</sup> Moreover, the Court has recently reiterated its support of the *Blockburger* test.<sup>179</sup>

Assuming for the sake of argument that a same-facts analysis was used, the result would still show that a test refusal and driving under the influence are different offenses. Although both arise from the defendant's alleged inability to drive due to alcohol, the suspension for a refusal is not based on that inability, but rather, is based on the driver's unwillingness to submit to a chemical test.<sup>180</sup> As a result, the factual context of the criminal and administrative proceedings are different and would constitute two separate offenses.

### *B. The Cases Cited Most Frequently by DUI Double-Jeopardy Proponents Are Not Applicable to the DUI Setting*

As stated above,<sup>181</sup> DUI double-jeopardy proponents generally use *United States v. Halper*,<sup>182</sup> *Austin v. United States*,<sup>183</sup> and *Department of Revenue v. Kurth Ranch*<sup>184</sup> to support their argument that license suspension/revocation followed by a criminal trial triggers a double-jeopardy violation. None of the cases, however, are

177. Defendant-Appellee's Answer Brief, *supra* note 105, at 13; Defendant's Brief, *supra* note 12, at 12.

178. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1941-48 (1994); *Austin v. United States*, 113 S. Ct. 2801, 2803-12 (1993); *United States v. Halper*, 490 U.S. 435, 437-47 (1989). If the Court did engage in a same-offense analysis using the *Blockburger* test, it would have reached the conclusion in all three cases that there was only one offense. For example, in *Halper*, both the civil and criminal proceedings required proof that the defendant defrauded a medical insurer. *Halper*, 490 U.S. at 437-38. Similarly, in *Austin*, the civil and criminal proceedings required proof that the defendant had engaged in drug violations. *Austin*, 113 S. Ct. at 2803. Finally, in *Kurth Ranch*, both proceedings required proof that the defendants had grown marijuana on their property. *Kurth Ranch*, 114 S. Ct. at 1941-43.

179. *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993).

180. See, e.g., CAL. VEH. CODE § 13353(a) (West 1987 & Supp. 1996); CAL. VEH. CODE §§ 13557(b)(1), 13558(c)(1), 23157 (West Supp. 1996); FLA. STAT. ANN. § 322.2615(1)(a), (7)(b) (West 1995); MICH. STAT. ANN. § 9.2325(4)-(7) (Callaghan 1991 & Supp. 1995); N.Y. VEH. & TRAF. LAW § 1194(2)(b)-(c) (McKinney Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 67011-1 to -5(2)(d)-(e) (West 1977 & Supp. 1995).

181. See *supra* part III.C.3.a-c.

182. 490 U.S. 435 (1989).

183. 113 S. Ct. 2801 (1993).

184. 114 S. Ct. 1937 (1994).

applicable to the drunk-driving arena and, thus, they should not be used to support a double-jeopardy argument.<sup>185</sup>

One primary reason the cases are inapplicable is that they do not involve drunk driving or the suspension of driver's licenses or elements closely related to those issues.<sup>186</sup> Instead, *Halper* focuses on the civil forfeiture of substantial amounts of money following a prosecution for fraudulent acts.<sup>187</sup> *Kurth Ranch*, on the other hand, deals with a state tax imposed after conviction of drug charges,<sup>188</sup> while *Austin* determines whether a civil fine for drug offenses was excessive under the Eighth Amendment.<sup>189</sup> Thus, *Austin* has nothing to do with the Double Jeopardy Clause. Furthermore, since all of the cases are factually distinct from drunk driving or driver's license suspensions, they are inapplicable in this area and the attempts to apply them have resulted in a somewhat implausible use of the Court's holdings.

An example of this implausible use is the frequent invocation of the *Halper* analysis by DUI attorneys, even though the Court has placed limits on its applicability. One way the Court has done this is by refusing to apply it to certain situations, such as the tax setting in *Kurth Ranch*, where the *Halper* analysis was deemed an "inappropriate" test.<sup>190</sup> Another way the Court has limited the applicability of *Halper* is by stating that it is only meant to be applied in the "rare

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185. One attorney has called the double-jeopardy defense a "slice and dice approach to legal analysis" in which "[v]arious quotations of seemingly related language are cooked together to make a double jeopardy stew." Return to Writ of Prohibition at 19, *In Re DeTourney*, No. SCV-210833 (Cal. Super. Ct. Sonoma County filed July 12, 1995) [hereinafter Writ of Prohibition].

186. See *Johnson v. State*, 622 A.2d 199, 205 (Md. Ct. App. 1993); *City of Cleveland v. Miller*, 646 N.E.2d 1213, 1216 (Ohio Mun. Ct. Cleveland County 1995); *City of Cleveland v. Nutter*, 646 N.E.2d 1209, 1211-12 (Ohio Mun. Ct. Cleveland County 1995); Scott Interview, *supra* 165; *supra* part III.C.3.a-c. As noted previously, *supra* note 108, DUI double-jeopardy proponents periodically cite to *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346). The *\$405,089.23 U.S. Currency* case, however, does not deal with the suspension of drivers' licenses or drunk driving. Instead, the case involves the civil forfeiture of money and property coupled with a criminal prosecution for drug offenses. *Id.* at 1214.

187. *Halper*, 490 U.S. at 437-38.

188. *Kurth Ranch*, 114 S. Ct. at 1941-42.

189. *Austin*, 113 S. Ct. at 2803; see Ellen Silverman Zimiles, *Do Halper and Austin Put Civil Forfeiture in Jeopardy?*, 39 N.Y.L. SCH. L. REV. 189, 198 (1994) (stating that *Austin* dealt with forfeiture of property involved in drug trafficking and that other statutes may not be construed in the same manner by the Court).

190. *Kurth Ranch*, 114 S. Ct. at 1944, 1948.

case" where a fixed penalty subjects a "small-gauge offender" to an overwhelming sanction that is disproportionate to the costs incurred by the government.<sup>191</sup> License suspensions and revocations are safety measures that do not compensate the government for any costs it has incurred.<sup>192</sup> Therefore, license suspensions and revocations are not the "rare case[s]" contemplated by *Halper*. As one commentator stated, *Halper* gives guidance for monetary penalties, but anything beyond this is not clear.<sup>193</sup> Thus, *Halper* has limited applicability in other contexts and should not be applied to the drunk-driving arena.

Rather than attempting to apply *Halper* or the other inapplicable cases, double-jeopardy proponents should instead look to existing state precedent which is on point and binding authority on this matter. These cases show that courts have almost uniformly held that suspension of a driver's license is primarily an administrative, remedial measure.<sup>194</sup> Because the suspension is not punishment, no double-jeopardy rights are violated.<sup>195</sup>

*C. Even if Halper, Austin, and Kurth Ranch Are Applied to the DUI Arena, the Suspension or Revocation of Driver's Licenses Does Not Constitute Punishment for Double-Jeopardy Purposes*

Assuming, arguendo, that *Halper*,<sup>196</sup> *Austin*,<sup>197</sup> and *Kurth Ranch*<sup>198</sup> did apply to the DUI situation, the suspension or revocation of a driver's license would still not constitute punishment for double-jeopardy purposes.<sup>199</sup>

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

192. See *infra* part IV.C.2.

193. Cheh, *Constitutional Limits*, *supra* note 21, at 1378; see also *State v. Zerkel*, 900 P.2d 744, 750-51 (Alaska Ct. App. 1995) (stating that the *Halper* test does not apply to license suspensions); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 1642, 42 Cal. Rptr. 2d 422, 430 (1995) (stating that license revocation is nothing like the tax in *Kurth Ranch*); *Miller*, 646 N.E.2d at 1215 (stating that since there are no penalties assessed, *Halper* and *Kurth Ranch* are inapplicable); *Nutter*, 646 N.E.2d at 1211-12 (arguing that because there were no monetary sanctions, the analysis used in the cases cited by DUI offenders is not applicable).

194. See *infra* part IV.C.2.

195. See *infra* part IV.C.2.

196. 490 U.S. 435 (1989).

197. 113 S. Ct. 2801 (1993).

198. 114 S. Ct. 1937 (1994).

199. Some attorneys feel that *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), should be used to determine whether a sanction is punitive. *Writ of Prohibition*, *supra* note 185, at 6-7. Under this scenario, *Ward* is used

1. *Halper* has been misinterpreted by DUI double-jeopardy proponents

DUI double-jeopardy proponents have interpreted *Halper* to mean that any civil sanction which carries even the slightest tinge of punishment is punishment for double-jeopardy purposes.<sup>200</sup> Invariably, they come to this conclusion by misstating the holding of *Halper* as being: "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."<sup>201</sup> That statement, however, is not the Court's expressed holding. Instead, the Court clearly states in the next sentence, "We therefore *hold* that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the [civil] sanction may not *fairly* be characterized as remedial, but *only* as deterrent or retribution."<sup>202</sup>

Thus, the actual holding of the Court states that a sanction is punishment, not if it can "solely" be defined as remedial, but rather, if it can "only" be defined as serving a deterrent or retributive function. The rest of the case indicates that this is indeed the true holding because the majority then states that a court should balance the amount of government damages and costs against the actual sanction that was imposed.<sup>203</sup> Only if the sanction is disproportionate to the damage caused and "bears no rational relation to the goal of compensating the Government for its loss" is the sanction deemed

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to determine whether the sanction is civil or criminal in nature. *Id.* Once something is determined to be civil in nature, *Mendoza* is then used to determine whether the sanction is so punitive in purpose or effect that it negates the noncriminal intention of the legislature. *Id.* Most courts have ruled, however, that the *Ward/Mendoza* test is not applicable when determining whether a civil sanction is punishment for double-jeopardy purposes. *\$405,089.23 U.S. Currency*, 33 F.3d at 1218; *Bae v. Shalala*, 44 F.3d 489, 496 (7th Cir. 1995). Thus, it will not be applied in this Comment.

200. Motion to Dismiss, *supra* note 95, at 6-8; Defendant-Appellee's Answer Brief, *supra* note 105, at 5, 15; Defendant's Brief, *supra* note 12, at 9.

201. *Halper*, 490 U.S. at 448 (emphasis added). This is the interpretation of the holding used in *\$405,089.23 U.S. Currency*, 33 F.3d at 1219.

202. *Halper*, 490 U.S. at 435, 448-49 (emphasis added). For double-jeopardy purposes it does not appear to matter whether the civil sanction precedes or follows the criminal trial. *See, e.g.*, *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.), *cert. denied*, 111 S. Ct. 178 (1990).

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



a punishment for double-jeopardy purposes.<sup>204</sup> The use of this balancing standard is a clear indication that the Court contemplated that as long as something is “fairly remedial” it is not punishment. If the “solely remedial” language was intended to be the holding, the balancing standard that the Court later describes would be irrelevant. Instead, the Court could have looked at whether there was even the slightest indication of a nonremedial purpose without ever engaging in a full-blown recitation of the balancing standard that should be applied in future cases.

Furthermore, the “solely remedial” language flies in the face of the Court’s later statement that the “rule [is] for the rare case . . . [of a] small-gauge offender [subjected] to a sanction overwhelmingly disproportionate to the damages he has caused.”<sup>205</sup> Not only does this statement reiterate the balancing standard, it also emphasizes that civil sanctions should infrequently be labeled as punitive. This would not be the case if the “solely remedial” standard was intended to be used. Since almost all civil remedies “carry the sting of punishment,”<sup>206</sup> the rule would not be applied to just the rare case, but to practically all cases.

The same conclusion is reached when an analysis is undertaken of how the U.S. Supreme Court later defines its *Halper* holding and how lower federal and state courts have interpreted the case.

Thus, while DUI defense attorneys argue that the “solely remedial” language was cited as the holding in *Austin*,<sup>207</sup> the Court in that case also stated that *Halper* stands for the proposition that the Double Jeopardy Clause prohibits a second sanction that may not be fairly characterized as remedial.<sup>208</sup> Furthermore, *Austin* is not a double-jeopardy case, but is actually a case based on the Excessive Fines Clause of the Eighth Amendment.<sup>209</sup> As a result, even if the “solely remedial” language is applicable in the Eighth Amendment context, it is not necessarily applicable in the Fifth Amendment context, especially since the *Halper* case itself is a Fifth Amendment/double-jeopardy case and is, therefore, more directly applicable to other Fifth Amendment/double-jeopardy cases.

204. *Id.* at 449.

205. *Id.*

206. *Id.* at 447 n.7.

207. Defendant’s Reply Brief, *supra* note 175, at 5; Defendant’s Brief, *supra* note 12, at 10.

208. *Austin*, 113 S. Ct. at 2805 n.4.

209. *Id.* at 2803.

An additional indication that the “solely remedial” language in *Halper* is not the binding precedent in Fifth Amendment cases is the Court’s statement in *Kurth Ranch* describing the *Halper* holding as barring “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.”<sup>210</sup> Thus, *Kurth Ranch*, which is also a Fifth Amendment/double-jeopardy case, asserts that a civil sanction does not have to be “solely remedial” to be nonpunitive.

The state courts and lower federal courts generally agree with this assessment. Although a handful of cases in the drunk driving or civil forfeiture arena have stated that the *Halper* holding is the “solely remedial” line,<sup>211</sup> most cases in these areas have stated that the “fairly remedial” sentence is the holding.<sup>212</sup> These courts further state that *Halper* requires a court to apply to the “rare case” a test of balancing the sanction against the costs to the government or, alternatively, determining whether the sanction can be seen as only having a deterrent or retributive function.<sup>213</sup>

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210. *Kurth Ranch*, 114 S. Ct. at 1945 (emphasis added) (quoting *Halper*, 490 U.S. at 448-49).

211. *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994); *United States v. Stanwood*, 872 F. Supp. 791, 797 (D. Or. 1994); *Davidson v. MacKinnon*, 656 So. 2d 223, 224 (Fla. Dist. Ct. App. 1995); *City of Cleveland v. Miller*, 646 N.E.2d 1213, 1215 (Ohio Mun. Ct. Cleveland County 1995); *Cleveland v. Nutter*, 646 N.E.2d 1209, 1211 (Ohio Mun. Ct. Cleveland County 1995).

212. *United States v. Tilley*, 18 F.3d 295, 298 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 36 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *United States v. Woods*, 949 F.2d 175, 177 (5th Cir. 1991), *cert. denied*, 503 U.S. 961 (1992); *United States v. Bizzell*, 921 F.2d 263, 266-67 (10th Cir. 1990); *Mayers*, 897 F.2d at 1127; *Oakes v. United States*, 872 F. Supp. 817, 825 (E.D. Wash. 1994); *State v. Zerkel*, 900 P.2d 744, 747 (Alaska Ct. App. 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630, 1639, 42 Cal. Rptr. 2d 422, 428 (1995); *Ellis v. Pierce*, 230 Cal. App. 3d 1557, 1560, 282 Cal. Rptr. 93, 94 (1991); *Freeman v. State*, 611 So. 2d 1260, 1261 (Fla. Dist. Ct. App. 1992); *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995); *Alexander v. Louisiana State Bd. of Medical Examiners*, 644 So. 2d 238, 243 (La. 1994), *cert. denied*, 116 S. Ct. 64 (1995); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790, 795-97 (La. 1992); *State v. Jones*, 666 A.2d 128, 132 (Md. 1995); *Johnson v. State*, 622 A.2d 199, 205 (Md. Ct. Spec. App. 1993); *Kvitka v. Board of Registration*, 551 N.E.2d 915, 918 (Mass.), *cert. denied*, 498 U.S. 823 (1990); *State v. Hanson*, 532 N.W.2d 598, 601 (Minn. Ct. App. 1995); *People v. Frank*, 631 N.Y.S.2d 1014, 1016 (Crim. Ct. 1995); *State v. Zimmerman*, 539 N.W.2d 49, 53 (N.D. 1995); *Johnson v. State*, 882 S.W.2d 17, 18 (Tex. Ct. App. 1994); *State v. Strong*, 605 A.2d 510, 514 (Vt. 1992); *State v. Naydihor*, 483 N.W.2d 253, 258-59 (Wis. Ct. App. 1992).

213. *Tilley*, 18 F.3d at 298; *38 Whalers Cove Drive*, 954 F.2d at 36; *Woods*, 949 F.2d at 177; *Bizzell*, 921 F.2d at 266-67; *Mayers*, 897 F.2d at 1127; *Oakes*, 872 F. Supp. at 825; *Zerkel*, 900 P.2d at 747-48; *State v. Nichols*, 819 P.2d 995, 998 (Ariz. Ct. App. 1991); *Baldwin*, 35 Cal. App. 4th at 1639, 42 Cal. Rptr. 2d at 428; *Ellis*, 230 Cal. App. 3d at 1560,

As noted previously, license revocations and suspensions are not such rare cases.<sup>214</sup> But assuming that they were, *Halper* requires that the sanction carry a heavy punitive or deterrent aspect in order to be deemed punishment for Fifth Amendment purposes.<sup>215</sup>

These elements are not evident in license suspensions or revocations for several reasons. First, a civil sanction is "characteristically free of the punitive criminal element" when it involves a revocation of a privilege voluntarily granted.<sup>216</sup> Most state courts have ruled that a driver's license is such a privilege and not a fundamental right.<sup>217</sup> As a result, the revocation or suspension of a drunk driver's license is nonpunitive because the person disobeyed the law and thereby failed to follow the terms that govern continued use of the privilege.

Another reason the suspension or revocation is nonpunitive is that it is comparable to confiscating an instrument used to perpetrate a crime. In the case of drunk drivers the license is, in a sense, the instrument used to commit the crime because a person is technically not allowed to drive without it. Courts almost unanimously deem forfeitures of crime instruments as being nonpunitive because to do otherwise would allow the perpetrator to profit from the crime or put the community at risk.<sup>218</sup> In a similar manner, a drunk driver would also endanger the public if allowed to indefinitely use the license after arrest.

An even closer analogy exists between suspensions of drivers' licenses and suspensions of professional licenses. The latter are generally deemed nonpunitive, even though the suspension prevents

282 Cal. Rptr. at 94; *Freeman*, 611 So. 2d at 1261; *Funke*, 531 N.W.2d at 126; *Alexander*, 644 So. 2d at 243; *Butler*, 609 So. 2d at 795-97; *Johnson*, 622 A.2d at 202-03; *Kvitka*, 551 N.E.2d at 918; *Hanson*, 532 N.W.2d at 601; *Johnson*, 882 S.W.2d at 19; *Strong*, 605 A.2d at 514; *Tench v. Commonwealth*, 462 S.E.2d 922, 924-25 (Va. Ct. App. 1992); *Naydihor*, 483 N.W.2d at 258-59.

214. *See supra* part IV.B.

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

216. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

217. *Berlinghieri v. Department of Motor Vehicles*, 33 Cal. 3d 392, 397-98, 657 P.2d 383, 387-88, 188 Cal. Rptr. 891, 895-96 (1983); *People v. Zinn*, 843 P.2d 1351, 1353 (Colo. 1993); *Jackson v. State*, 462 S.E.2d 802, 803 (Ga. Ct. App. 1995); *Marbut v. Motor Vehicle Dep't*, 400 P.2d 982, 984-85 (Kan. 1965); *State v. Savard*, 659 A.2d 1265, 1267-68 (Me. 1995); *Prichard v. Battle*, 17 S.E.2d 393, 395 (Va. 1941).

218. *United States v. \$145,139*, 18 F.3d 73, 75 (2d Cir.), *cert. denied*, 115 S. Ct. 72 (1994); *Tilley*, 18 F.3d 295; *United States v. Cullen*, 979 F.2d 992, 994 (4th Cir. 1992); *38 Whalers Cove Drive*, 954 F.2d at 36.

a person from working in the person's chosen field.<sup>219</sup> One primary reason for barring double jeopardy in these cases is that the state would otherwise be prevented from revoking a license and later punishing the professional in a related criminal matter.<sup>220</sup> For example, if the suspension of a license was considered punitive or deterrent in nature, a state that suspended a lawyer's license for fraudulent work would then be prevented from initiating a later criminal proceeding for the same violation.<sup>221</sup> This would throw disciplinary actions against professionals into turmoil and would make little or no sense. It would also be nonsensical to label suspensions or revocations of drivers' licenses as punitive. If preventing someone from working in a certain field is not punishment then a revocation or suspension of a driver's license could not possibly be punitive, either. Any other conclusion defies logic.

It would be equally unsound to label license suspensions as heavily punitive when they are actually remedial and are done to protect the public.<sup>222</sup> As many courts and commentators have noted, drunk driving is a serious problem that results in numerous deaths each year.<sup>223</sup> It is, therefore, dangerous to allow those arrested for drunk driving to get back in their cars. The only sensible method of dealing with the problem is to remove them from the highways where they pose a danger to others. The suspension or revocation of licenses is a quick and easy method to ensure the public's safety and is not disproportionate to the potential dangers the driver has presented. This remedial goal is supported by statistics which show that states with automatic license suspensions or

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219. *Bae*, 44 F.3d at 494 (stating that suspension of medical license was not punishment under the Double Jeopardy Clause); *Schillerstrom v. State*, 885 P.2d 156, 158 (Ariz. Ct. App. 1994) (concerning suspension of chiropractor's license); *Kaplan v. Department of Registration & Educ.*, 361 N.E.2d 626, 631 (Ill. App. Ct. 1977) (concerning suspension of medical license); *Moser v. Richmond County Bd. of Comm'rs*, 428 S.E.2d 71, 73 (Ga. 1993) (concerning suspension of business license); *Loui v. Board of Medical Examiners*, 889 P.2d 705, 711-12 (Haw. 1995) (concerning suspension of medical license); *Alexander*, 644 So. 2d at 243-44 (concerning suspension of a medical license); *Kvitka*, 551 N.E.2d at 918 n.4 (concerning suspension of medical license).

220. *See, e.g.*, Scott Interview, *supra* note 165.

221. *Id.*

222. *See infra* note 255 and accompanying text.

223. *Mackey v. Montrym*, 443 U.S. 1, 17 n.9 (1978); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957); *Griffen*, *supra* note 2, at 1373-74.

revocations have seen a dramatic drop in the number of alcohol-related fatalities and accidents.<sup>224</sup>

Thus, the primary focus of the suspension/revocation statutes is to protect the public and not to punish the offender or deter others. Since *Halper* requires a heavy punitive or deterrent quality before a law violates the Double Jeopardy Clause, the suspension or revocation of a driver's license falls outside the parameters of the Fifth Amendment.

2. The suspension or revocation of a driver's license is also nonpunitive in nature under the factors used in *Austin*<sup>225</sup> and *Kurth Ranch*<sup>226</sup>

DUI double-jeopardy proponents contend that the suspension or revocation of a license is punishment under the factors used by the U.S. Supreme Court in *Austin* and *Kurth Ranch*.<sup>227</sup> Rather than using the entire set of factors, however, they tend to concentrate on the ones most favorable to their argument. This strategy distorts their analysis and leads to the erroneous conclusion that a license suspension or revocation is punishment. A more accurate view of the situation, however, can only be reached by analyzing all of the factors. This process entails giving weight to the historical understanding of

224. See THIRD READING OF S.B. 1623, *supra* note 152 (stating that studies in Alabama, California, North Carolina, Washington, and Wisconsin have shown that driver's license revocation reduces accidents); Stein, *supra* note 6, at A3 (stating that alcohol-related traffic deaths fell 7.7% in the year following license suspensions for drivers testing over the legal limit).

225. 113 S. Ct. 2801 (1993).

226. 114 S. Ct. 1937 (1994).

227. See, e.g., Taylor, *License Suspensions*, *supra* note 9, at 83-84. DUI double-jeopardy proponents periodically cite to *United States v. \$485,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 16, 1996) (No. 95-346). The Ninth Circuit Court of Appeals used the *Austin* factors in its analysis of the double-jeopardy issue being resolved in the *\$405,089.23 U.S. Currency* case. *Id.* at 1220-22. At this point it is difficult to fully and accurately ascertain how the U.S. Supreme Court's impending decision in the *\$405,089.23 U.S. Currency* case will affect the DUI double-jeopardy argument. If the Court finds that double jeopardy is not applicable, most courts will probably refuse to find that double jeopardy applies in the DUI arena since the drunk-driving related forfeiture of a driver's license is even less punitive in nature than the forfeiture of valuable property or large sums of money due to drug offenses. If the court finds that double jeopardy does apply, however, the wording of the case will determine how the DUI double-jeopardy argument is strengthened or weakened. Arguably, the case would not apply since the *\$405,089.23 U.S. Currency* case is factually distinguishable from DUI cases. See *supra* note 186.

forfeiture as punishment.<sup>228</sup> It also involves determining whether: the sanctioned activity is completely forbidden; the people arrested for the crime are the only ones subject to the sanction; the statute focuses on the culpability of the defendant and the commission of a crime; the sanction is imposed only after the defendant is arrested for the precise conduct that gives rise to the sanction; the sanction is levied on goods that the defendant does not own or possess; and the legislative body either understood the statute to be punitive or the purpose of the statute was to punish or deter.<sup>229</sup>

The first factor weighs in favor of double-jeopardy proponents since the U.S. Supreme Court decreed in *Austin* that civil forfeiture has been historically viewed as punishment.<sup>230</sup> This factor alone, however, is not dispositive, as shown by the fact that the Court analyzed all of the factors listed in *Austin* before rendering a decision on whether the civil sanction in that case was punitive.<sup>231</sup>

Another factor that supports the double-jeopardy argument is that the sanctioned activity—testing above the legal limit or refusing to take a chemical test when requested to do so by a police officer—is completely forbidden.<sup>232</sup>

Several of the other factors, however, are not as clear. Thus, one could argue that people arrested for drunk driving are the only ones subjected to a suspension for refusing to take a test or testing over the legal limit. In a broader sense, however, there are many other traffic violations that result in the suspension or revocation of a driver's license.<sup>233</sup>

The fourth and fifth factors—whether the statute focuses on the culpability of the defendant and the commission of a crime and whether the sanction is imposed only after the defendant is arrested for the precise conduct that gives rise to the sanction—also support both sides of the double-jeopardy debate. In the case of those who fail the blood-alcohol tests, the suspension of the license is indeed

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

229. *Id.*; *Kurth Ranch*, 114 S. Ct. at 1946-48.

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

231. *Id.* at 2812.

232. *See supra* part III.

233. For example, in Delaware there is a mandatory license revocation for vehicular homicides, vehicular assaults, perjured statements made to the state department of motor vehicles, failure to stop after an accident resulting in death or injury, the commission of any felony with a motor vehicle, and attempts to flee from a police officer. DEL. CODE ANN. tit. 21, § 2732 (1985 & Supp. 1994).

linked to the criminal culpability of the defendant, and the defendant is indeed arrested for the precise conduct which gives rise to the sanction. When a license is suspended or revoked for refusal to take a test, however, the sanction is not directly linked to the culpability of the defendant or the commission of a crime, nor is the defendant arrested for the refusal. Instead, the cause of the suspension is the act of refusing, not the act of driving under the influence. Because the refusal is not criminal behavior the defendant's culpability is not at issue, thereby diminishing the double-jeopardy argument.<sup>234</sup>

This argument is further weakened by the other factors. For example, licensed drunk drivers do indeed possess their drivers' licenses. Thus, they are unlike the defendants in *Kurth Ranch*, who grew marijuana on their farm but did not "own" or "possess" the drug since to do so would be illegal.<sup>235</sup>

Legislative knowledge and the purpose of the drunk driving statutes are even more damaging to double-jeopardy proponents. In fact, these linchpins of the double-jeopardy argument are, ironically, also the key weaknesses. The biggest reason is that although legislative history can be contradictory and difficult to ascertain, much evidence and precedent suggest that these measures were designed to protect the public, rather than punish the drunk driver.<sup>236</sup>

One method of analyzing legislative intent, for example, is to analyze how legislators or supporters of a law describe it to the media. Using this analysis, double-jeopardy proponents often contend that legislators or supporters sometimes refer to suspension or revocation measures as sanctions or penalties.<sup>237</sup> Yet, for every punitive-purpose quote gleaned from a newspaper by DUI attorneys,

234. *But see* ALASKA STAT. § 28.33.031(f) (1995); ALASKA STAT. § 28.35.032(f) (1994 & Supp. 1995) (stating that refusal is a misdemeanor); CAL. VEH. CODE § 23159 (West Supp. 1996) (listing possible penalties if person refuses test and is later convicted of driving under the influence); MINN. STAT. ANN. § 169.121(1)(a) (West Supp. 1995) (stating that refusal to submit to test is "a crime"); NEB. REV. STAT. § 39-669.08(3) (1988 & Supp. 1990) (stating that refusal is a misdemeanor); R.I. GEN. LAWS § 31-27-2.3(b) (1994) (stating that refusal of a preliminary test is an infraction); TENN. CODE ANN. § 55-10-406(a)(3) (1993 & Supp. 1995) (authorizing the officer to charge the person with violating the law for refusing to submit to a test). As noted previously, however, punishing someone for refusal to take a test and punishing someone for drunk driving would constitute separate offenses for double-jeopardy purposes. *See supra* part IV.A.

235. *Kurth Ranch*, 114 S. Ct. at 1948. The Court also stated that the marijuana was not owned or possessed by the defendants at the time the tax was imposed because the drug had previously been destroyed by the state. *Id.*

236. *See infra* notes 238-56 and accompanying text.

237. *See supra* part III.C.3.d.

a number of nonpunitive quotes exist in the same articles. For example, when California passed a license revocation/suspension law for those who test over the legal limit, a few supporters called it a "penalty," while three law-enforcement officials and one spokesperson for the Department of Motor Vehicles stated that the main purpose of the law was to protect the public.<sup>238</sup> In addition, an official from MADD, the primary force behind many suspension/revocation laws, has stated to the press that the "reasoning behind [the procedure]—and one of the reasons it is an effective measure—is it provides a swift, certain, and prompt measure to remove from the road fairly quickly someone who was driving under the influence and endangering the public."<sup>239</sup>

This viewpoint is supported by a handful of states which specifically declare in their statutes that the suspension laws are enacted to protect the public.<sup>240</sup> Most jurisdictions, however, do not explicitly delineate the purpose of their suspension measures. Thus, the only way to determine the intent of the statute is to research the legislative history of the law.

These background materials generally show that license suspension/revocation laws were passed for both punitive and safety reasons. This interpretation is clearly supported by the legislative history of a California law authorizing suspension of licenses for those testing over the legal limit.<sup>241</sup> For example, the Senate Bill that initiated the law stated that the purpose of the then-proposed statute was to ensure the safety of motorists.<sup>242</sup> The third reading of the bill, however, stated that one of the purposes was to provide a "swift and sure" suspension

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238. Lait & Maharaj, *supra* note 151, at B1. For example, one officer stated that "[t]he important thing is that the new law will keep people from getting hurt." *Id.* at B8.

239. Smith, *supra* note 8, at 5 (quoting Bob Shearouse, MADD's public policy director).

240. *See, e.g.*, COLO. REV. STAT. § 42-2-126(a) (Supp. 1995) (stating that the purpose is "[t]o provide safety for all persons using the highways . . . by quickly revoking the driver's license of any person who has shown himself or herself to be a safety hazard by driving with an excessive amount of alcohol in his or her body"); GA. CODE ANN. § 40-5-55 (1994) (stating that drunk drivers are "a direct and immediate threat to the welfare and safety of the general public"); ME. REV. STAT. ANN. tit. 29-A, § 2453(1)(A)-(B) (West Supp. 1995) (stating that the purpose is to "provide maximum safety for all persons who travel on or otherwise use the public ways" and to "remove quickly from public ways those persons who have shown themselves to be a safety hazard"); *see also* City of Maumee v. Anistik, 632 N.E.2d 497, 499 (Ohio 1994) (stating that the Ohio implied-consent statute was passed by the general assembly so that "needless tragedies" would be avoided).

241. CAL. VEH. CODE § 13353.2 (West Supp. 1996).

242. CALIFORNIA S.B. 1623, 1989-1990 Regular Sess. 3-4 (1989).



as a deterrent to drunk driving.<sup>243</sup> The Senate Committee on the Judiciary reiterated those statements,<sup>244</sup> as did the Assembly Committee on Public Safety, although the latter also mentioned the possible reduction in fatal alcohol-related accidents.<sup>245</sup> In a similar manner, a legislative analysis of the proposed statute referred to the measure as a "penalty," but also said it was a step towards reducing drunk-driving related injuries and deaths.<sup>246</sup> The enacted version of the bill, however, only stated a remedial intent by declaring that "[t]he purpose of this act is to . . . provide safety for all persons using the highways of this state by quickly suspending the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies."<sup>247</sup> The governor reiterated this remedial purpose by stating that he signed the bill into law because it "would enhance traffic safety."<sup>248</sup>

Thus, the legislative history does not show a solely punitive or solely remedial purpose behind the statute. Instead, punitive goals can be found and remedial goals are not only evident, but emphasized by the enacted law itself.<sup>249</sup> Because a statute must "only" serve deterrent or punitive purposes to be considered punishment,<sup>250</sup> the suspension law falls outside the parameters of the Double Jeopardy Clause.<sup>251</sup>

243. THIRD READING OF S.B. 1623, *supra* note 152, at 3.

244. CALIFORNIA SENATE COMM. ON THE JUDICIARY, COMMITTEE REP. FOR S.B. 1623, 1989-1990 Regular Sess. 3 (1989).

245. CALIFORNIA ASSEMBLY COMM. ON PUB. SAFETY, COMMITTEE REP. FOR S.B. 1623, 1989-1990 Regular Sess. 3 (1989).

246. LEGISLATIVE ANALYSIS OF S.B. 1623, *supra* note 153, at 1-2.

247. 1989 Cal. Stat. ch. 1460, § 1.

248. *Id.*; see also *People v. Frank*, 631 N.Y.S.2d 1014, 1017 (Crim. Ct. 1995) (quoting a 1954 New York governor's memorandum as stating that the New York suspension law would give law enforcement the tools "with which to rid our highways" of "one of the worst hazards." *Id.* The sentiment was reiterated in a 1980 governor's memorandum which stated that the law would diminish the number of "senseless and tragic deaths" caused by drunk drivers. *Id.*).

249. See *supra* notes 238-48 and accompanying text.

250. See *supra* part IV.C.1.

251. A few state courts have interpreted their statutes to be remedial in nature even when faced with legislative histories that indicate a punitive intent behind such laws. See, e.g., *Nichols*, 819 P.2d at 999 (finding a remedial purpose even though the minutes of the Senate Committee on the Judiciary stated that the law was a sanction and was designed to be a penalty); *Davidson*, 656 So. 2d at 223-24 (finding a remedial purpose even though legislative history stated that the law was passed to prevent, punish, and discourage criminal behavior).

In addition to legislative history, however, several states further emphasize the safety aspects of their laws by preventing the return of a revoked or suspended driver's license until the offender has attended a drug or alcohol dependency class or treatment program.<sup>252</sup> If their statutes were meant to punish people, the legislature would not have linked recovery of a driver's license to programs designed to ensure that a driver would be safe once he or she began driving again.<sup>253</sup> Thus, these measures can only be seen as enhancing the safety aspects of the suspension/revocation laws.

The strongest support, however, for finding a "fairly" remedial purpose behind such statutes is the case law of many states. Although not all of these state courts have analyzed their license suspension/revocation statutes for double-jeopardy violations,<sup>254</sup> they have almost universally stated that suspending or revoking an alleged drunk driver's license is done to make the streets safer for the general public.<sup>255</sup> As one court declared, the primary objective of such

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252. Sample Memorandum, *Memorandum in Opposition to Defendant's Motion to Dismiss* at 17, in *Memorandum from Mother's Against Drunk Driving*, *supra* note 159; *see, e.g.*, ARIZ. REV. STAT. ANN. § 28-692.01(A), (G) (1989).

253. Sample Memorandum, *Memorandum in Opposition to Defendant's Motion to Dismiss* at 18, in *Memorandum from Mother's Against Drunk Driving*, *supra* note 159; *see, e.g.*, CAL. VEH. CODE § 13352(a)(6), (7) (West 1987 & Supp. 1996).

254. *See, e.g.*, *Beamon v. Department of Motor Vehicles*, 180 Cal. App. 2d 200, 4 Cal. Rptr. 396 (1960); *State v. Bowles*, 311 A.2d 300 (N.H. 1973); *Barnes v. Tofany*, 261 N.E.2d 617 (N.Y. 1970); *State v. Sinner*, 207 N.W.2d 495 (N.D. 1973); *Blow v. Commissioner of Motor Vehicles*, 164 N.W.2d 351 (S.D. 1969); *Prichard v. Battle*, 17 S.E.2d 393 (Va. 1941).

255. *Zerkel*, 900 P.2d at 744; *Schade v. Department of Transp.*, 857 P.2d 1314, 1316 (Ariz. Ct. App. 1993); *Baldwin*, 35 Cal. App. 4th at 1641-42, 42 Cal. Rptr. 2d at 430; *Ellis*, 230 Cal. App. 3d at 1561-62, 282 Cal. Rptr. at 95 (1991); *Beamon*, 180 Cal. App. 2d at 210, 4 Cal. Rptr. at 403; *Cordova v. Mansheim*, 725 P.2d 1158, 1160 (Colo. Ct. App. 1986); *Freeman*, 611 So. 2d at 1261; *State v. Higa*, 897 P.2d 928, 933 (Haw. 1995); *People v. Talavera*, 905 P.2d 633, 638 (Idaho 1995); *People v. Esposito*, 521 N.E.2d 873, 877 (Ill. 1988); *State v. Maze*, 825 P.2d 1169, 1174 (Kan. Ct. App. 1992); *Butler*, 609 So. 2d at 796; *State v. Savard*, 659 A.2d 1265, 1267-68 (Me. 1995); *Johnson*, 622 A.2d at 203-04; *Heddan v. Dirkswager*, 336 N.W.2d 54, 63 (Minn. 1983); *State v. Spilde*, 536 N.W.2d 639, 641 (Minn. Ct. App. 1995); *Hanson*, 532 N.W.2d at 601; *Bowles*, 311 A.2d at 302 (stating that license revocations in the case of habitual offenders are not criminal sanctions, but are done instead to remove unsafe drivers from the road); *State v. Kennedy*, 904 P.2d 1044, 1057 (N.M. 1995); *Barnes*, 261 N.E.2d at 620; *State v. Zimmerman*, 539 N.W.2d 49, 56 (N.D. 1995); *Sinner*, 207 N.W.2d at 501; *Doyle v. Ohio Bureau of Motor Vehicles*, 554 N.E.2d 97, 104 (Ohio 1990); *State v. Hurbean*, 261 N.E.2d 290, 299 (Ohio Ct. App. 1970); *Price v. Reed*, 725 P.2d 1254, 1260 (Okla. 1986); *Robertson v. State ex rel. Lester*, 501 P.2d 1099, 1102 (Okla. 1972); *Blow*, 164 N.W.2d at 353; *State v. Conley*, 639 S.W.2d 435, 437 (Tenn. 1982); *Strong*, 605 A.2d at 513-14; *Huffman v. Commonwealth*, 172 S.E.2d 788, 789 (Va. 1970); *Prichard*, 17 S.E.2d at 396; *Tench v. Commonwealth*, 462 S.E.2d 922, 924 (Va. Ct. App. 1995); *Fritts v. Department of Motor Vehicles*, 492 P.2d 558, 562 (Wash. Ct. App.

statutes is to relieve the public of this danger because "the catastrophes associated with drunk driving, the tragic loss of life and the permanent debilitating injuries that can result have reached nearly epidemic proportions across the nation."<sup>256</sup> Because these state cases deal specifically with drunk driving and license suspension/revocation statutes, they are binding precedent showing that the primary goal of such laws is to protect the public from intoxicated motorists.

The U.S. Supreme Court has often upheld the power of the state to protect its citizens against such dangers. In the license suspension/revocation context, this is most strongly stated in *Mackey v. Montrym*,<sup>257</sup> in which the Court held that such laws were both valid and constitutional exercises of a state government interest to remove drunk drivers from the streets.<sup>258</sup>

The Court also upheld such laws in *Dixon v. Love*,<sup>259</sup> in which the Court concluded that the suspension of a driver's license could be done without a presuspension hearing.<sup>260</sup> The Court buttressed its opinion by pointing to the "visible and weighty" public interest in safety and the fact that the statute was meant to remove drivers who are unable or unwilling to respect traffic rules and the safety of others.<sup>261</sup>

Similarly, in *Breithaupt v. Abram*,<sup>262</sup> the Court stated that administering a blood-alcohol test while the defendant was unconscious after an accident was not a violation of the driver's constitutional rights because of the "increasing slaughter" caused by drunk drivers.<sup>263</sup> Since the number of fatalities had reached "the astounding figure only heard of on the battlefield," the interests of society in preventing one of the "mortal hazards of the road" outweighed any interests of the defendant.<sup>264</sup>

The Court has also held that a refusal to take a blood-alcohol test can be used as evidence against a defendant because the test is a safe,

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1971).

256. *City of Columbus v. Adams*, 461 N.E.2d 887, 890 (Ohio 1984).

257. 443 U.S. 1 (1979).

258. *Id.* at 17.

259. 431 U.S. 105 (1977).

260. *Id.* at 115.

261. *Id.*

262. 352 U.S. 432 (1957).

263. *Id.* at 439.

264. *Id.*

painless, and commonplace method of meeting a “clearly legitimate” need for the information.<sup>265</sup> In so holding, the Court noted that it had “repeatedly lamented the tragedy” caused by drunk driving before concluding that the test was a valid use of state power.<sup>266</sup>

The assessment that drunk driving exacts a heavy toll has also led the Court to uphold sobriety checkpoints<sup>267</sup> and license suspensions in which the officer failed to list specific reasons leading him or her to conclude that the defendant was driving under the influence of alcohol.<sup>268</sup>

Thus, the suspension or revocation of a license is strongly related to the legitimate government purpose of protecting the safety of the motoring public. This conclusion is supported not only by case law, but also by the legislative history of such statutes. As a result, license suspensions/revocations do not solely serve retributive or deterrent goals and are, therefore, not punishment for double-jeopardy purposes. As a result, states can suspend or revoke a drunk driver’s license and then file criminal charges without violating the Double Jeopardy Clause. Any argument to the contrary should be declared dead on arrival.

## V. METHODS FOR AVOIDING THE DUI DOUBLE-JEOPARDY DEFENSE IN THE FUTURE

### A. Overview

If the current trend continues, most state appellate or state supreme courts will eventually declare that double jeopardy does not apply to the suspension or revocation of licenses and will consign the argument to the burial that it deserves. Before that happens, however, many states may be forced to engage in costly litigation to finally settle the matter. Other states, which currently do not have these suspension or revocation measures, may avoid enacting such laws in order to prevent such hassles. This would be tragic since license suspensions/revocations are one of the most sensible and effective measures of lowering drunk-driving-related accidents and

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265. *South Dakota v. Neville*, 459 U.S. 553, 563 (1983).

266. *Id.* at 558, 563.

267. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (stating that the magnitude of the drunk driving problem was indisputable and that the states had an interest in eradicating it).

268. *Illinois v. Batchelder*, 463 U.S. 1112, 1119 (1983).

fatalities.<sup>269</sup> For states that are interested in avoiding such challenges, they can either change their laws or adopt laws in such a way as to avoid such problems.

*B. Enact Statutes That Explicitly State That the Purpose of Revoking or Suspending a Driver's License Is to Keep the Public Safe*

Because DUI proponents often look at the legislative history of statutes to determine whether they are punitive for double-jeopardy purposes,<sup>270</sup> states can avoid needless litigation on this issue by including a provision in the statute stating that the purpose of license revocations/suspensions is to keep the public safe. This would preclude any misinterpretation of the statute as a punitive measure since the intention of the legislature is clearly indicated in the law itself. Drunk drivers would, thus, be effectively prevented from fully developing the strongest element of their double-jeopardy argument.

To further ensure this goal, state legislatures should also ensure that the law as written not only explicitly states that it is a remedial effort, but also remove any indications that the law is punitive or that it acts as a deterrent. This would include removing such words as "sanction" or "penalty" because they could be interpreted as words of punishment even if they are not intended in that way.<sup>271</sup>

*C. Combine the License Suspension/Revocation Proceedings and the Criminal Charges in the Same Proceeding*

As the *Halper*<sup>272</sup> case notes, the government can seek civil and criminal penalties in the same proceeding as long as it is authorized by the legislature.<sup>273</sup> Thus, another way to prevent the DUI double-jeopardy argument is to combine both the license suspension/revocation hearing and the criminal trial in the same proceeding. This would still permit the police to confiscate the license at the scene of the arrest and issue a temporary license, while simultaneously preventing any sort of specious double-jeopardy argument.

In order to accomplish this, the license suspension or revocation hearing should be one of the many pretrial matters adjudicated by the

269. Stein, *supra* note 6, at A3.

270. See *supra* part III.C.3.d.

271. See, e.g., Motion to Dismiss, *supra* note 95, at 9-11.

272. 490 U.S. 435 (1989).

273. *Id.* at 450.

judge who is overseeing the criminal trial. A preponderance of the evidence standard should be applied,<sup>274</sup> and the court should base its decision on whether the officer had probable or reasonable cause to believe the defendant was driving under the influence,<sup>275</sup> whether the defendant was advised of the consequences of either refusing a test or taking a test and failing, whether the defendant was arrested for driving under the influence, and whether the defendant refused to take the test or tested over the legal limit. In addition, the state should be allowed to prove these factors by presenting the police officer's report or affidavit in lieu of calling the officer to testify. These methods would allow the court to informally and quickly resolve the matter, which is the main goal of the license suspension/revocation hearings currently used by most states.<sup>276</sup> The benefit of retaining the informal nature and relaxed evidentiary standards is that it prevents the hearing from turning into an intensely litigated trial-like proceeding. At the same time, the defendant is precluded from making a double-jeopardy argument since the suspension is done in the same proceeding as the criminal trial.

*D. Wait Until the Double-Jeopardy Trend is  
Declared Dead on Arrival*

For many states it would be a needless waste of money to go through a lengthy legislative process in an effort to pass a law that is impervious to any type of double-jeopardy argument. This is especially true of states with binding case law stating that the suspension/revocation statutes are remedial in nature.<sup>277</sup> For these states the better course of action would be to wait until the use of the double-jeopardy argument subsides. Eventually, this will happen because higher courts will agree that the double-jeopardy defense is unfounded and will consign it to extinction.

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274. See, e.g., COLO. REV. STAT. ANN. § 42-2-126(9)(C)(I) (West Supp. 1995).

275. See, e.g., CAL. VEH. CODE § 13353(c)(1) (West Supp. 1996).

276. *People v. Moore*, 561 N.E.2d 648, 651-52 (Ill. 1990); *State v. Ratliff*, 744 P.2d 247, 250 (Or. 1987); see also Berkman, *supra* note 11, at A7 (quoting Robert Shearouse, director of public policy for MADD, as saying that the goal of such measures is to "remove intoxicated drivers from the highway as quickly as possible").

277. See *supra* note 255.

## VI. CONCLUSION

Although the drunk-driving double-jeopardy defense is currently a “defense du jour”<sup>278</sup> and is sometimes used with great success at the trial-court level, it is built on an untenable argument. The defense attempts to apply cases that are so vastly different from drunk driving that it makes no sense to apply them in the context of license suspensions or revocations.

Assuming that they were viable in the drunk-driving arena, the argument would still fail to withstand judicial scrutiny. The primary reason is that the suspension or revocation of a driver’s license following the arrest of the defendant for drunk driving is primarily remedial in nature and designed to ensure the safety of the motoring public. Thus, the imposition of a suspension or a revocation is not solely punitive and does not raise double-jeopardy concerns. As a result, the DUI double-jeopardy defense should be declared D.O.A. by courts faced with this matter.

*Stephanie Ann Miyoshi\**

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278. Smith, *supra* note 8, at 5.

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