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Motion to Dismiss: Drunk Driving and the Double Jeopardy Clause

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MOTION TO DISMISS: DRUNK DRIVING AND THE DOUBLE JEOPARDY CLAUSE

I. INTRODUCTION

A new defense has emerged in drunk driving prosecutions. This article will discuss recent Supreme Court decisions concerning the Double Jeopardy Clause of the Fifth Amendment and their applicability in the context of drunk driving cases. The argument has recently surfaced at the trial level that, because a defendant has his license suspended at a motor vehicle hearing, the state is barred from subsequently punishing the individual on a criminal basis.[1] In November 1994, a trial court in Ohio accepted this argument and dismissed the case against an alleged drunk driver who had had his license suspended on the grounds that criminal punishment of the defendant would constitute a second punishment under double jeopardy analysis. This article will focus on the history of double jeopardy in relation to multiple punishments, its current interpretation in various jurisdictions, and will explore whether practicing attorneys might effectively serve the needs of their clients by raising this defense.

II. HISTORICAL PERSPECTIVE

The Double Jeopardy Clause is set forth in the Fifth Amendment to the United States Constitution.[2] The Supreme Court has delineated a three pronged approach to double jeopardy analysis holding that the Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and—of particular significance to this article—multiple punishments for the same offense.[3]

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[1] *See, e.g.*, Florida v. Wilbur Reilly, No. 94-661MM10 (Broward City., Dec. 22, 1994) (Rothschild, J.) (holding license suspension statute to be punitive); Arizona v. Austin, No. 257256/57/58 (Municipal Court, City of Flagstaff, Dec. 20, 1994) (Ingerich, J.) (holding license suspension was not solely remedial and thus amounted to punishment); Ohio v. Gustafson, Case No. 83-tr 5344 A,B (Hahoning County, Nov. 16, 1994) (Lisotto, J.) (holding double jeopardy barred subsequent prosecution), *reprinted in* 94 U.S. L. WKLY. 1177.

[2] U.S. CONST. amend. V., providing in pertinent part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." The idea of jeopardy has been interpreted to extend not only to corporal punishment, as is literally stated in the Fifth Amendment, but into other areas of penalties and punishments as well. Ex Parte Lange, 18 Wall. 163 (1874).

[3] *See, e.g.*, Department of Revenue v. Kurth Ranch, ___ U.S. ___, 114 S. Ct. 1937, 1941 (1994); United States v. Halper, 490 U.S. 435, 440 (1989); North Carolina v. Pearce, 395 U.S. 711 (1960).

This protection has been considered a fundamental aspect of our constitutional tradition, and accordingly is applicable to the states through the Fourteenth Amendment.[4]

The United States Supreme Court has recently decided a line of cases with a direct impact upon the multiple punishment branch of double jeopardy analysis.[5] It was widely presumed prior to 1989 that the bar against multiple punishments applied only to consecutive proceedings which could adequately be characterized as criminal in nature.[6] In *United States v. Halper*, however, the United States Supreme Court held that a sanction imposed in a "civil proceeding" may be subject to double jeopardy analysis provided that it constitutes: (1) second punishment; (2) for the same offense; and (3) is proscribed in a subsequent proceeding.[7] The defendant in *Halper* was convicted of sixty-five counts of fraud. After his sentencing the government filed a civil claim under the federal False Claims Act, seeking in excess of $130,000 when only $585 in actual damages had been sustained.[8] The Court overruled the punishment on double jeopardy grounds, stating that civil as well as criminal sanctions amount to punishment when, as applied, the sanction in the particular case furthers punitive ends.[9] The issue, therefore, is not whether or not a subsequent proceeding or sanction is civil or criminal, but rather, whether the sanction can be described as a

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[4] Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that double jeopardy protection is a fundamental right applicable to the States through the Fourteenth Amendment). The Double Jeopardy Clause protects a defendant's interest in not being subjected to the "embarrassment, stigma, expense and emotional ordeal" of a second proceeding, all of which are issues of fairness. *See also* E. Jahncke, Note, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 NYU L. REV. 112, 116 (1991). Furthermore, it has also been recognized to protect an interest in finality, which is to say that the defendant can go to sleep without the worry of old matters being relitigated. *See id.*

[5] *See, e.g., Kurth Ranch*, 114 S. Ct. at 1937 (holding drug tax constitutes a second punishment and "must be imposed during first proceeding or not at all"); Austin v. United States, ___ U.S. ___, 113 S. Ct. 2801 (1993) (defining punishment as sanction which is not 100% remedial); *Halper*, 490 U.S. at 441 (unanimously holding that civil sanction may constitute punishment for double jeopardy purposes).

[6] *See, e.g., Halper*, 490 U.S. 435 (Scalia, J., dissenting).

[7] *Halper*, 490 U.S. at 448.

[8] 31 U.S.C.A, §§ 3729-3731.

[9] *Halper*, 490 U.S. at 448. This is not to say that the determination of whether a sanction should be considered punitive hinges upon the defendant's perspective since even remedial sanctions carry the "sting of punishment." *Id.* at 447 n.7. Instead, the focus turns upon whether the purpose actually served by the sanction amounts to a punishment. *Id.*

"punishment."[10] The Supreme Court, in assessing whether the fine imposed against Halper was punitive, held that the defendant was shielded from the civil fine since the sanction was so grossly disproportionate to the actual damages that it amounted to a second punishment.[11]

In *Department of Revenue v. Kurth Ranch*, the Supreme Court reaffirmed its decision in *Halper*, by holding that a civil tax can constitute a punishment for the purposes of double jeopardy.[12] In *Kurth*, the Court examined a situation in which the defendants had been criminally convicted of drug charges and, subsequent to sentencing, had a "dangerous drug tax" assessed against them in an administrative proceeding.[13] Relying on the underlying reasoning of *Halper*, while not using the same proportionality test utilized therein, the Court in *Kurth* determined that the imposition of the tax was unconstitutional because it did not survive the multiple punishment bar

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[10] *See Halper*, 490 U.S. at 450. The Court states: "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *Id.* at 448 (citing Hicks v. Feiock, 485 U.S. 624, 631 (1988)). For this reason, the Court stated that the tests articulated in Kennedy and Ward are inappropriate for establishing the existence of a punishment because those tests only apply to the issue of whether a proceeding is criminal or civil. *Austin*, 113 S. Ct. at 2806 n.6. *See also* United States v. Ward, 448 U.S. 242, 248 (1980) (requiring the clearest proof that statutory scheme is punitive in purpose or effect before legislative intent in denomination can be overridden); Kennedy v. Mendoza -Martinez, 372 U.S. 114, 167 (1963) (giving greater deference to the legislature when determining whether a criminal punishment exists). *But see Kurth*, 114 S. Ct. at 1955 (Scalia, J., dissenting) In *Kurth*, Justice Scalia argued that *Halper* was decided incorrectly, that there is not a multiple punishment branch of the double jeopardy tree, that *Lange* was decided on due process grounds, and that the determination needed to be made in a double jeopardy inquiry was whether or not a so called civil proceeding is in fact criminal as set forth under the *Kennedy-Ward* test. *Id.*

[11] *Halper*, 490 U.S. at 450. While the Court recognized that the Government is entitled to "rough remedial justice" in the form of seeking compensation through imprecise formulae, e.g., reasonable liquidated damages, it distinguished prior decisions on the grounds that they did not directly address the situation where the alleged remedial sanction did not remotely approximate the governments actual damages. *Id.* at 446. *See* Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (holding that liquidated damages were recoverable when defendant had not been subjected to "unreasonable or excessive" sanction); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) (holding that the sanction was remedial and the damages recovered roughly equaled the actual loss); Helvering v. Mitchell, 303 U.S. 391 (1938) (intimating that although the sanction imposed was not criminal, a civil sanction may constitute punishment under different circumstances).

[12] *Kurth*, 114 S. Ct. at 1948.

[13] *Id.* at 1942-43.

of the Double Jeopardy Clause.[14] The Court relied on the following factors in formulating that the Drug Tax was too far removed from the typical assessment to avoid being characterized as a "punishment": the Act imposed a high rate of taxation, had a deterrent purpose, and the tax was conditioned on the commission of a crime. Furthermore, the tax was assessed on goods no longer in the defendants' possession.[15]

The Supreme Court further defined what constitutes "punishment" in a case involving the Eighth Amendment Excessive Fines Clause. In *Austin v. United States,*[16] the defendant pleaded guilty to one count of cocaine possession with intent to distribute after which the United States filed an *in rem* forfeiture claim against the defendant for property used or intended to be used in furtherance of a drug related crime.[17] The Supreme Court stated that when determining the applicability of the Excessive Fines Clause to *in rem* forfeitures, the preliminary question is whether the extracted payment, in cash or kind, constitutes a punishment.[18] The Court reasoned that while sanctions frequently serve multiple purposes, the inquiry need not exclude the possibility that the forfeiture serves some remedial purpose for the Eighth Amendment to come into play so long as the sanction can be described as serving, at least to some degree, punitive ends.[19] Moreover, the Court stated that it was relying on *Halper's* definition of punishment to reach this conclusion.[20]In making its determination that forfeiture amounted

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[14] *Id.* at 1948-49. Both the majority and Chief Justice Renquist point out that the method used in *Halper* for determining whether or not the "exaction" was remedial or punitive, namely the proportionality test, does not work in relation to a tax statute because a civil penalty and statutory tax by their nature serve different fundamental purposes. *Id.* Quoting a previous case, the majority stated, "'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Id.* at 1946 (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 46 (1934) (citing Child Labor Tax Case, 259 U.S. 20, 38 (1922)).

[15] *Kurth*, 114 S. Ct. at 1946-48.

[16] ___ U.S. ___, 113 S. Ct. 2801, 2805-6 (1993); U.S. Cont., amend VIII.

[17] *In rem* forfeiture under 21 U.S.C.A. §§ 881(a)(4) and (a)(7).

[18] The Court declined to apply the *Kennedy-Ward* test for determining if forfeiture under 21 U.S.C.A. §§ 881(a)(4) and (a)(7) is civil or criminal, and instead looked only to whether the issue of punishment.

[19] *Austin*, 113 S. Ct. at 2806.

[20] *Id.* at 2810 n.12 stating in part: "Under United States v. Halper [citation omitted] the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." *Id.* In *Austin*, the Court placed great emphasis on the language used in *Halper* that if a sanction cannot

to punishment, the Court first undertook a historical examination of how forfeiture was viewed at the time of the Eighth Amendment's enactment, whether it was conditioned on the culpability of the owner, and whether the legislature intended retribution or deterrence.[21] Finding the presence of these elements, the Court held that forfeiture constitutes a punishment.

The Supreme Court has not faced a situation where the criminal proceeding followed a civil proceeding. Both *Kurth* and *Halper*, for example, involved situations in which the criminal actions preceded the civil sanctions. Nevertheless, it stands to reason that since double jeopardy bars the second punishment, the criminal charge should be dismissed if it follows a punitive civil sanction.[22]

III. CURRENT STATUS

In *State of Ohio v. Gustafson*,[23] the trial court granted the defendant's Motion to Dismiss on the grounds that the continued prosecution of the defendant on criminal charges after the suspension of his motor vehicle license constituted double jeopardy. In determining whether the State's prosecution of the defendant for criminal charges violated the Double Jeopardy Clause, the court first analyzed whether the criminal prosecution and the Administrative License Suspension could be deemed separate proceedings. The court found that the civil proceeding was separate from the criminal proceeding because the timing, nature, and content of the administrative hearing set it apart from the criminal prosecution.[24] For example, the civil hearing did not turn on whether the defendant violated the criminal statute, the appeal process of both proceedings were separate and heard at different times,

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be said "solely" to serve remedial ends, but can only be described as also serving a retributive or deterrent purpose, then it amounts to punishment. *Id.* at 2812.

[21] *Austin*, 113 S. Ct. at 2806-12. The Court based its decision that *in rem* forfeiture amounts to a punishment on three factors: (1) there was a historical understanding of forfeiture as a form of punishment, (2) the statutes in question placed a "clear focus" on the culpability of the owner, and (3) there was evidence that Congress understood the provisions to deter and punish. *Id.* at 2812. The Court noted that the focus of the inquiry should turn on looking at the statute as a whole and not simply as applied to the individual case as in Halper. *Id.* at 2812 n.14.

[22] *Kurth*, 114 S. Ct. at 1955-60 (Scalia, J., dissenting) (arguing that the reasoning of *Halper* would require a court to dismiss criminal charges if the defendant had previously suffered civil punishment).

[23] Ohio v. Gustafson, Case No. 83-tr 5344 A,B (Nov. 1994), *reprinted in* 94 U.S. L. WKLY. 1177. Defendant moved to dismiss pending criminal charges after he was arrested for drunk driving under OHIO REV. CODE ANN. § 4511.191 and had his license suspended by the arresting officer.

[24] *Id.*

and both used different standards to determine the admissibility of evidence. The next question thus became whether the license suspension amounted to a punishment.[25] What is of critical importance to this precedent setting case, is the court's interpretation of *Halper, Kurth,* and *Austin* in formulating its decision.[26] The Ohio court extracted from these decisions a rule which it found applicable in defining an administrative license suspension as a punishment.[27] The court held that the suspension constituted a punishment because it was designed *in part* to deter people from operating a motor vehicle while under the influence, and to effectuate an immediate punishment on those individuals who violate the law.

While the Ohio court in *Gustafson* found that the Double Jeopardy Clause precluded the criminal punishment of a defendant for driving while intoxicated, the aftermath of *Halper* was the genesis of a rule which has been subjected to two different interpretations.[28] The most important interpretational difference emanates from courts' differing determinations of

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[25] *Id.*

[26] *See Gustafson*, Case No. 83-tr 5344 A,B.

[27] *Id.*

[28] *See, e.g.,* United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210, (9th Cir.1994) (reasoning that even coordinated civil and criminal trials are by nature separate proceedings, and that sanction is punishment if not wholly remedial); United States v. Torres, 28 F.3d 1463 (7th Cir. 1994); United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994) (concluding that if a sanction is not exclusively remedial, but can only be explained as affecting deterrence or retribution, it is a punishment for double jeopardy analysis); United States v. McCaslin, 863 F.Supp. 1299 (W.D. Wash. 1994) (reasoning that Austin invalidated previous reasoning that forfeiture was not a punishment); State v. 1979 Cadillac Deville, 632 So. 2d 1211, 1227 (La.App. 2 Cir, 1994) (holding that double jeopardy applies because seizure of derivative contraband is not solely remedial); Fant v. State, 881 S.W.2d 830, 833, (Tex. App. 1994) (sanction equals punishment if not fully remedial). *Contra* United States v. Tilley, 18 F.3d 295, 299 (5th Cir. 1994) (stating that forfeiture was rationally related to remedial purpose and that Austin was inapplicable) *reh'g denied*, May 11, 1994, *reported at* 1994 U.S. App. Lexis 11829. United States v. Bullock, 1993 U.S. App. Lexis 12561 *1 (8th Cir. 1993) (holding that application of administrative sanction in suspending drivers license was not so divorced from remedial goal that it equaled a punishment); United States v. WRW Corp., 986 F.2d 138, 141 (6th Cir. 1993) *reh'g en banc denied*, May 7 1993, 1993 U.S. App. Lexis 10899 (holding that sanction was rationally related to making government whole, and while it did punish, because it could be seen as promoting mine safety, double jeopardy was precluded); United States v. Haywood, 864 F. Supp. 502 (W.D. N.C. 1994); Ex parte Camara, 1994 Tex. App. Lexis 2919 (finding neither *Kurth* nor *Austin* applicable to double jeopardy analysis of forfeiture); Johnson v. State, 882 S.W.2d 17 (Tex. App. 1994) (holding that forfeiture was not punishment if rationally related to remedial purpose); State v. Johnson, 632 So. 2d 817, 818 (La. App. 4th Cir. 1994) (reasoning that Austin analysis inapplicable to 5th Amendment).

whether or not a sanction is a punitive or remedial.[29] The language used in *Halper* is partly responsible for this. For instance, many courts have relied on the fact that the Supreme Court stated it was simply announcing "a rule for the rare case" where the sanction was overwhelmingly disproportionate to the damages incurred by the state.[30] These courts tend to focus upon the existence or absence of a remedial purpose in characterizing a sanction as punishment. If the sanction bears a rational relationship to some remedial goal, then it is not considered punitive in terms of double jeopardy.[31] Likewise, these courts tend to find that the sanction does not constitute punishment unless the sanction as applied is disproportionate to the governmental loss.[32]

Most courts adopted this approach prior to the decisions in *Austin* and *Kurth*. With the advent of these two cases and the Court's clarification of the *Halper* rule, however, some courts have begun to rethink their analysis. In defining what constitutes punishment in the context of the Eighth Amendment Excessive Fines Clause, the Supreme Court in *Austin* relied heavily on statements made in *Halper* that a civil sanction which is not *fully* remedial, but also serves the traditional aims of punishment, namely retri-

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[29] *See Gustafson*, Case No. 83-tr 5344 A,B.

[30] *Halper*, 109 U.S. at 449; *see, e.g., Kurth*, 114 S.Ct at 1954 (O'Connor, J., dissenting) (arguing that the defendant must first show disproportionality of sanction before burden shifts to government to prove sanction justified); *Tilley*, 18 F.3d at 298; *WRW Corp.* 986 F.2d at 141.

[31] *See, e.g., Tilley*, 18 F.3d at 299; Halper, 490 U.S. at 452-53 (Kennedy, J., concurring). Justice Kennedy concluded that because the sanction in Halper was not rationally related to the damages suffered by the government, it should be considered a punishment.

[32] *See Kurth*, 144 S. Ct. at 1952. (O'Connonr, J., discontenting). In *Kurth*, for example, Justice O'Connor contended that because the defendants had not met their burden of producing evidence that the drug tax was not rationally related to nonpunitive governmental objectives, the double jeopardy question should not be reached. *Id.* at 1954. Justice O'Connor begins with the proposition that a sanction denominated as civil must be presumed to be nonpunitive. *Id.* Therefore, she contends, in order for an individual to contest a sanction as applied and overcome this presumption, he must make an affirmative showing that the sanction lacks a ration relation to a remedial purpose. *See Id.* In critiquing the appellate court's reasoning, Justice O'Connor stated that the defendant's in *Kurth* had failed to establish the absence of a rational relationship of the tax to a remedial purpose, and because of this, the burden had not shifted to the sate to justify its position. *See Id.* O'Connor goes on to acknowledge that the majority circumvents this inquiry by shifting the focus away from the approach taken in *Halper* of looking at the sanction *as applied*, and, instead, deciding the issue on the basis of whether the tax *as enacted* equals a punishment. *See Id.* at 1955.

bution and deterrence, amounts to punishment.[33] Furthermore, in *Kurth*, the Court invalidated a tax without applying the rational basis test used in *Halper*.[34] As a result of this interpretation, some courts have rejected the rational relation/proportionality test that had hitherto been considered the sole basis for determining whether a sanction amounts to a punishment. Instead, these courts have framed the issue against the backdrop of *Austin* and *Kurth*, and reexamined multiple punishments in a different light.[35] *Halper* involved a monetary penalty, arguably exacted as a form of liquidated damages.[36] In finding that double jeopardy barred the fine, the Supreme Court looked not to the statutory basis of the sanction, but instead to the application of the penalty in the individual case.[37] The method used to establish if the application was punitive was to determine whether it was rationally related to a remedial purpose or so disproportionate to the actual damages that it effectively amounted to a punishment. This does not, however, mean that the absence of a legitimate remedial purpose is essential to finding that a sanction constitutes a punishment.[38] Instead, it simply stands for the proposition that when dealing with sanctions as a form of liquidated damages, disproportionality with actual damages is a *method* of determining whether punishment exists.[39] It is the means and not the end. This is why punishment can be found in *Austin* and *Kurth* even though the sanction may have at least in part served some remedial goal.[40] In *Austin*, even though the forfeiture may have been related to a legitimate government purpose of preventing crime, the fact that it was in part punitive was sufficient for the Court to consider it a punishment. Similarly, in *Kurth*, the Court sidestepped the proportionality analysis used in *Halper* because it found the underlying purpose of a tax to be different than a civil fine even though an

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[33] *Austin*, 113 S. Ct. at 2812 (stating that even if the forfeiture served a remedial goal, it is "punishment" if it serves in part to punish). "'A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term'" *Id.* (quoting Halper, 490 U.S. at 448). The Court stated that "under United States v. Halper, [citation omitted], the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion. *Id.* at 2810 n.12.

[34] *See supra* note 14.

[35] *See $405,089.23*, 33 F.3d. 1210.

[36] *See supra* note 11.

[37] *See supra* note 9.

[38] *See Kurth*, 114 S. Ct. 1937; *Austin*, 113 S. Ct. 2801.

[39] *See Kurth*, 114 S. Ct. 1937; *Austin*, 113 S. Ct. 2801.

[40] *See Kurth*, 114 S. Ct. 1937; *Austin*, 113 S. Ct. 2801.

argument had been advanced that the drug tax was a form of liquidated damages.[41] It therefore follows that the Supreme Court has established a rule where a sanction can be deemed a punishment even though it is rationally related to a remedial purpose.

Conversely, other courts have been reluctant to adopt an approach which calls for finding punishment when a sanction is rationally related to some legitimate non-punitive end. These courts generally refuse to read *Austin* as having any application in the Fifth Amendment context, but rather view the dicta of the case as only affecting the definition of punishment in regards to Eighth Amendment challenges. This approach calls for defining punishment differently depending upon whether it is in a Fifth Amendment context or and Eighth Amendment one. Furthermore, these courts tend to read the majority's statement in *Kurth* that taxes serve a different purpose than civil penalties as supporting the *Halper* rational relation/proportionality test in all areas except those which are tax based.

Similar to jurisdictional differences in what qualifies as "punishment," courts are split over what constitutes a "separate proceeding" in relation to the Double Jeopardy Clause.[42] The Ninth Circuit has reasoned that two separate actions, one criminal and one civil, instituted at different times, tried at different times, in front of different judges, and determined by different judgments, are, on their face, separate proceedings.[43] This reasoning is similar to statements made by the Seventh Circuit that even if two trials are close in time, they still amount to separate proceedings.[44] This approach

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[41] *Kurth*, 114 S. Ct. at 1953 (O'Connor, J., dissenting). Justice O'Connor contended that the government had a legitimate nonpunitive interest in defraying the costs incurred by the State in drug control activities. *Id.* This argument can be supported by a string of cases which adopt the position that the government can set reasonable liquidated damages for its expenditures. *See, e.g.*, Ward, 448 U.S. at 254; One Lot of Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); *Rex Trailer*, 350 U.S. at 148. Nevertheless, the Court did not employ the *Halper* test. Two possible reasons for this are respective set out in the majority opinion and in Justice O'Connor's dissent. The majority seems to say that because the purpose of a tax is different in nature than a civil penalty, the *Halper* method does not apply. *Kurth* 114 S. Ct. at 1948. Furthermore, Justice O'Connor states the court avoids the *Halper* test by looking at the statute as a whole and not just as applied. *Id.* at 1955 (O'Connor, J., dissenting). Thus, either the court does not apply *Halper* because the purpose of tax is not the same as a civil penalty or because it focuses on the statute as a whole. The determinative issue in the case is whether or not a punishment exists, and not whether the tax is proportionate to actual expenses suffered by the government. *See id.* at 1948.

[42] *See Kurth*, 114 S. Ct. at 1948.

[43] $405,089.23 U.S Currency, 33 F.3d at 1216.

[44] *Torres*, 28 F.3d at 1465.

appears to be in line with *Kurth*.[45] As the Ohio court pointed out in *Gustafson*, *Kurth* involved a situation where two cases against the defendants were started six weeks apart, pursued simultaneously, and concluded separately.[46] The Supreme Court noted that the circumstances did not require them to comment on the possibility of multiple punishments imposed at the same proceeding.[47] Implicit in that statement is the fact that the Court viewed the civil and criminal actions as separate proceedings.[48] On the other hand, both the Second and Eleventh Circuits have held that when forfeiture actions and criminal prosecutions are initiated at or about the same time, involving the same criminal violation, and part a single coordinated prosecution, the proceedings should not be considered separate for double jeopardy purposes.[49]

IV. ANALYSIS

Presently, the majority of states have administrative proceedings where alleged drunk drivers can have their licenses suspended prior to their criminal trial.[50] Since these suspensions are the progeny of statutes, a determination of whether the sanction amounts to a punishment will turn on an interpretation of the purpose underlying the legislation. Applying *Austin*-like reasoning, a motion to dismiss may be sustained if: (1) there is a historical understanding that administrative license suspensions are a form of

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[45] *See Kurth*, 114 S. Ct. at 1947.

[46] *Gustafson*, Case No. 83-tr 5344 A,B, *accord*, McCaslin, 863 F.Supp. at 1304.

[47] *Kurth*, 114 S. Ct. at 1947 n.21. Stating: "Nor does the statute require us to comment on the possibility of 'multiple punishments' imposed in the same proceeding [citation omitted], since it involves separate sanctions imposed in successive proceedings.' *Id.* Not only does this note appear to clarify the standard used in assessing whether a separate proceeding exists bases on the fact pattern of the defendant's civil and criminal prosecutions, but it also addresses the lack of import *Hunter* plays in terms of separate proceedings. *See id.*; Missouri v. Hunter, 459 U.S. 359 (1983) (holding that the Double Jeopardy Clause does not bar multiple punishments if imposed in single trial pursuant to legislative intent). In *Hunter*, the Court recognized that the legislature specifically authorized cumulative punishments under two different statutes. *Hunter*, 459 US at 367. Because this authorized punishment was handed out in a single trial, it did not violate the Double Jeopardy Clause. *See Id.* at 368. *But see Kurth*, 114 S. Ct. at 1955-60 (J. Scalia Dissenting) (arguing that until *Halper* the Court never invalidated a legislative authorized successive punishment).

[48] *See Kurth*, 114 S. Ct. at 1947.

[49] *See* United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 20 (2nd Cir. 1993).

[50] S. Cardoza, *'Drunk Driving' Defense Works in First Two Cases*, 94 U.S.L.W. 1177. (noting also that the remaining thirteen states are expected to enact similar plans in order to secure federal highway funds).

punishment; (2) the statute in question placed a "clear focus" on the culpability of the driver; and (3) there was evidence that the legislature intended the provisions to deter and punish.[51] When arguing a motion to dismiss a drunk driving complaint on double jeopardy grounds, defense counsel might be faced with the difficult task of determining the legislative intent behind the statute imposing the sanction. While the history behind some states' statutes may be readily accessible in the form of committee notes and preambles, other's will be cloaked in a cryptic fog of silence.

Statutory construction will also affect a determination of whether a defendant is being punished twice for the same offense. The Supreme Court delineated a standard for assessing whether different charges under separate statutes equate to the same offense by looking at the elements of the violation to be proven. If both charges require proof of the same elements, then it could be found that the defendant was being punished twice for the same offense. For this reason, the double jeopardy argument is more likely to fail if the arrest involves the failure to take a breathalyzer test because the elements of the offense are different from those of driving while intoxicated.[52] The legislature might redefine the two offenses to avoid an identical overlap of elements so as to circumvent the entire Fifth Amendment argument. If there was not first a finding that the proceedings involved the same offense, there would be no need to evaluate the license suspension and subsequent criminal prosecution under the critical eye of the Double Jeopardy Clause.[53]

In any event, if a lawyer is in a jurisdiction where courts employ the rational relation/proportionality test, in all likelihood the motion will be over-ruled on the grounds that the suspension is rationally related to the remedial goal of promoting driver safety. On the other hand, if a lawyer is in a jurisdiction such as the Ninth Circuit, where it is generally accepted that a sanction must be one hundred percent remedial in order not to constitute a punishment, applying analogous reasoning to drunk driving license suspensions should yield the result that the second prosecution is barred by the Double Jeopardy Clause.

Another obstacle to overcome will be the inevitable reluctance of trial court judges to make precedent-setting decisions in such a controversial area of the law. In all likelihood, the defendant asserting a double jeopardy defense will be forced to argue his or her case in the appellate arena. Yet, there is little reason to believe that the appellate courts will look any more favorably upon the argument than the trial court judge. In *State of Maine v.*

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[51] *See supra* note 19. This criteria is in accord with that set forth in *Kurt.*

[52] *See* 94 U.S.L.W. 1176.

[53] *See id.*

Savard, et al.,[54] the defendants argued to the state's highest court that the constitutional prohibitions against double jeopardy barred their prosecution after an administrative hearing affirmed the suspension of their licenses. The defendants-appellants argued that the legislature's use of the word "Penalties" in the license suspension statute evinced the legislature's understanding that the license suspension was not just a prophylactic measure but was also punitive in nature.[55] The court ruled that the administrative license suspension was non-punitive in character because the holder of the license had no ownership right in it. The court reasoned that the license suspension merely amounted to the operator's failure to comply with specified standards.[56] The court stated that any punitive or deterrent purpose served by the suspension was merely incidental to the overriding purpose of the legislature to maintain the safety of the roads.[57] When question about this appeal, Leonard I. Sharon, Esq., who represented the defendants-appellants, stated, "[n]ever have I been so confident about how a case ought to be decided, and so certain that the court [would] rule against us."

Adam A. Rowe

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[54] 659 A.2d 1265 (Me. 1995).

[55] Maine v. Savard, Brief of Defendants-Appellants, Docket Nos. AND-95-5 and KEN-95-46 (Sharon, Leonard I., on brief for defendants-appellants).

[56] *Savard*, 659 A.2d at 1268.

[57] *Id.*