OHIO'S ADMINISTRATIVE LICENSE SUSPENSION: A DOUBLE JEOPARDY AND DUE PROCESS ANALYSIS

by

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This Article examines whether Ohio's imposition of an administrative license suspension "ALS" immediately upon arrest for operating a motor vehicle under the influence of alcohol "OMVI" bars a subsequent prosecution for the substantive offense.¹ Traditionally, administrative license suspensions have been considered civil, administrative and primarily remedial. However, increasingly punitive amendments to Ohio's ALS statutory scheme raise the substantial question of whether an ALS is truly remedial, or whether the imposition of an ALS constitutes punishment triggering double jeopardy and due process protection.²

Recent decisions from the Second and Tenth Appellate Districts³ have struck down provisions in Ohio's OMVI/ALS legislation which prohibited a trial court from issuing a stay of an ALS at a motorist's initial appearance in court as violative of the separation of powers doctrine. This article examines whether a court's ability to grant an immediate stay of the ALS sufficiently insulates the ALS/OMVI scheme from constitutional attack. It is the author's conclusion that Ohio's present OMVI/ALS statutory scheme


1. This article examines whether the imposition of an ALS violates double jeopardy and due process protection in the context of a first-time arrestee. Penalties in Ohio become increasingly severe based on the past record of convictions for OMVI, or refusals to take requested chemical tests. These enhanced penalties can include both impoundment and forfeiture of vehicles.

The provisions of the OMVI/ALS, as they relate to multiple offenders, certainly should be scrutinized. In fact, the United States District Court for the Southern District of Ohio, Eastern Division, recently struck down seizure and impoundment provisions of Title 45 of the Revised Code as violative of due process, insofar as they relate to innocent owners of vehicles. See Kutschbach v. Davies, 885 F. Supp. 1079 (S.D. Ohio 1995).

As a general matter, the author agrees that arrestees with a prior record for OMVI offenses present a greater future risk to public safety than first-time arrestees. See State v. Elfrink, No. 95 APC03-364, 1995 WL 584350, at *7 (Ohio Ct. App., 10th Dist., Oct. 5, 1995). Although many aspects of this article are as relevant to motorists with prior records as to first-time arrestees, it is beyond the scope of this article to analyze how Ohio's current OMVI/ALS provisions affect repeat offenders.


violates a motorist's due process and double jeopardy rights. However, if the Ohio Supreme Court adopts the rationale of the Second and Tenth Appellate Districts and permits trial courts to make discretionary judgments about the imposition of the ALS shortly after a motorist's arrest, based on the characteristics of both the offense and the individual, Ohio's OMVI/ALS provisions should be held constitutional.

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**TABLE OF CONTENTS**

I. INTRODUCTION ........................................................................................................ 125
II. OHIO'S OMVI/ALS STATUTORY SCHEME ......................................................... 129
   A. The OMVI Offense .................................................................................. 129
   B. The Implied Consent Law ....................................................................... 131
      1. Pre-1983 ............................................................................................. 131
      2. 1983-1990 ......................................................................................... 132
      3. 1990-1993 ......................................................................................... 133
      4. Present Scheme ................................................................................ 134
   III. OHIO'S ALS TRIGGERS DOUBLE JEOPARDY PROTECTION .................. 136
      A. The ALS Constitutes Punishment for Double Jeopardy Purposes ..... 138
         1. The “Right versus Privilege” Argument ......................................... 138
         2. The Halper-Austin-Kurth Ranch Trilogy ........................................ 141
            a. United States v. Halper .............................................................. 141
            b. Austin v. United States ............................................................ 143
            c. Department of Revenue of Montana v. Kurth Ranch ............ 144
         3. Ohio Decisions Concerning the Punitive Nature of the ALS .... 146
         4. The Difficulty with Prior Ohio Decisions Concerning the ALS .... 149
         5. The Ineffectiveness of Halper in Determining if a Non-Monetary, Civil Sanction Is Punishment ............................................. 150
         6. The Mendoza-Martinez-Ward Tests to Determine if the ALS Is Punishment ............................................................................. 153
      B. Does The ALS Involve a Separate Proceeding ..................................... 169
      C. The ALS And OMVI Punish the Same Conduct ................................ 179
      D. Double Jeopardy Conclusions .............................................................. 187
   IV. THE ALS VIOLATES PROCEDURAL DUE PROCESS ................................ 188
      A. Introduction ...................................................................................... 188
      B. The Constitutional Parameters of Procedural Due Process ............. 190
      C. Ohio's ALS ...................................................................................... 194
   V. SEPARATION OF POWERS ............................................................................. 200
   VI. CONCLUSION ............................................................................................... 203
I. INTRODUCTION

On May 5, 1993, Ohio enacted a new drunk driving law that provided enhanced penalties for the offense ("OMVI"), as well as an immediate administrative suspension of a driver’s license ("ALS"). This suspension is to be effected by the arresting officer at the time of arrest, upon either of the following conditions: a refusal to take a requested blood, breath or urine test ("refusal"), or, upon taking a requested test, having the test result exceed the prohibited concentration of alcohol permitted by statute ("failure"). Similar ALS/OMVI provisions have been adopted by sister states, in part because states receive federal funding for adopting and implementing programs to reduce traffic safety problems resulting from persons driving under the influence of alcohol or controlled substances.

4. OHIO REV. CODE ANN. § 4511.19 (Baldwin 1994) provides:

(A) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if any of the following apply:

(1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(2) The person has a concentration of ten-hundredths of one percent or more by weight of alcohol in his blood;

(3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;

(4) The person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

5. OHIO REV. CODE ANN. § 4511.191 (Baldwin 1994) provides, in part:

(A) Any person who operates a vehicle upon a highway or any public or private property . . . shall be deemed to have given consent to a chemical test or tests of his blood, breath or urine for the purpose of determining the alcohol, drug, or alcohol and drug content of his blood, breath, or urine . . . .

(D)(I) If a person under arrest . . . either . . . refuses to submit to the designated chemical test or the person submits to the designated chemical test and the test results indicate that his blood contained a concentration of ten-hundredths of one per cent or more by weight of alcohol, his breath contained a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or his urine contained a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine at the time of the alleged offense, the arresting officer shall do all of the following:

(a) on behalf of the registrar, serve a notice of suspension on the person that advises the person that . . . , his driver’s or commercial driver’s license or permit or nonresident operating privilege is suspended, [and] that the suspension takes place immediately, . . . ; seize the Ohio or out-of-state driver’s license or permit of the person; and immediately forward the seized license or permit to the registrar.


7. 23 U.S.C. § 408 (e)(1)(A) (1994) states in pertinent part:
The enactment of the ALS in sister states was immediately challenged on a variety of constitutional grounds; however, most challenges were rejected. Despite the earlier opinions to the contrary, recent decisions from the United States Supreme Court expanding the concept of punishment under the Double Jeopardy Clause and the Eighth Amendment have provided new impetus and legitimacy to various constitutional attacks.

For purposes of this section, a State is eligible for a basic grant [providing funds to implement programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol or a controlled substance] if such State provides —

(A) for the prompt suspension, for a period of not less than ninety days in the case of a first offender and not less than one year in the case of a repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer.


In Ohio, defendants immediately challenged the imposition of the ALS on both double jeopardy and due process grounds. Two of these challenges have been successful in the appellate courts, and the Ohio Supreme Court has agreed to review both decisions during the upcoming term. In *State v. Gustafson*, the Seventh Appellate District barred, on double jeopardy grounds, the prosecution of the defendant on both the "under the influence" and "per se" sections of R.C. § 4511.19, because of the imposition of an ALS at the time of arrest.\(^{11}\) In *State v. Knisely*, the Sixth Appellate District, while upholding the conviction of Knisely for OMVI, held that the ALS, imposed "on-the-spot" at the time of arrest, is violative of due process as guaranteed by the United States and Ohio Constitutions.\(^{12}\)

Recently the Tenth Appellate District decided the case of *Village of Groveport v. Lovsey*.\(^{13}\) In *Lovsey*, the court held that the section of Ohio's implied consent law prohibiting courts from issuing a stay of the ALS pending the outcome of OMVI charges violates the separation of powers doctrine of the Ohio Constitution.\(^{14}\) The prohibition was held to impede the court’s

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Lawyers Weekly USA has catalogued successful double jeopardy challenges to OMVI offenses in 25 states. LAW. WKLY USA, October 9, 1995. In addition, the United States District Court for the Eastern District of Virginia has dismissed two cases against defendants who had been arrested for OMVI on a military base. See *Murphy v. Commonwealth*, 896 F. Supp. 577 (E.D. Va. 1995) (Although declining to issue an injunction to stay state criminal proceedings, the district court stated that the double jeopardy defense is "colorable, if not compelling.").


12. No. H-94-044, 1995 WL 490937 (Ohio Ct. App., 6th Dist., Aug. 18), *appeal granted*, 655 N.E.2d 136 (Ohio 1995). *Id.* at *4. The court declined to review Knisely's double jeopardy claim because it was not raised in the trial court. However, the court implied that it was sympathetic to the double jeopardy issue by referring to the *Gustafson* case for consideration of double jeopardy claims. *Id.* at *2 n.1.

The Ohio Supreme Court has also agreed to review *State v. Hochhausler*, Nos. CA93-12-104, CA93-12-105, 1995 WL 308484 (Ohio Ct. App., 12 Dist., May 22, 1995), which held, in a 2-1 decision, that the imposition of the ALS does not violate due process.


14. OHIO REV. CODE ANN. § 4511.191(H)(1) (Baldwin 1994) provides, in pertinent part:

If the person appeals the suspension at his initial appearance, the appeal does not stay the operation of the suspension . . . [N]o court has jurisdiction to grant a stay of a suspension imposed under . . . this section, and any order issued by any court that purports to grant a stay of any suspension imposed under either of those divisions shall not be given administrative effect. . . .
inherent ability to hear and properly determine actions and proceedings within the court's jurisdiction. As will be shown, the ability of a court to stay the ALS at the outset of an OMVI prosecution may have an impact on the court’s ultimate determination as to whether the ALS violates due process, as well as whether the ALS constitutes punishment for double jeopardy purposes.\footnote{See also State v. Sanders, Nos. 95 CA 11, 95 CA 12, 1995 WL 634371 (Ohio Ct. App. 2d Dist., Sept. 29, 1995); State v. Baker, 650 N.E.2d 1376 (Ohio Mun. Ct. 1995). In Baker, the Springfield Municipal Court, while upholding most provisions of Am. Sub. H.B. 432 as constitutional, agreed with the defendants that certain aspects of the legislation concerning the ALS were unconstitutional and unenforceable. These provisions were: (a) the lack of discretion afforded the courts in granting hardship occupational driving privileges pending the appeal of the ALS; (b) the divestiture of the court’s inherent power to stay the ALS pending its appeal; and (c) the lack of termination of the ALS of a driver taking the test who is later convicted of OMVI upon a plea. Id. at 1384.}

15. Article I, section 10 of the Ohio Constitution provides that "no person shall be twice put in jeopardy for the same offense." Ohio courts have interpreted this provision in the same manner as the federal courts have interpreted its federal counterpart. OHIO CONST. art. I, § 10. See City of Cleveland v. Miller, 646 N.E.2d 1213, 1214 (Ohio Mun. Ct. 1995) (Ohio double jeopardy provision is “substantially equivalent” to its federal counterpart).

No case has been found where Ohio has provided greater protection under its state constitutional double jeopardy provision than under the federal provision. Moreover, it can be inferred that the Ohio provision provides less protection than its federal counterpart since Ohio does not permit an interlocutory appeal of double jeopardy issues in a criminal case. See Wenzel v. Enright, 623 N.E.2d 69, 72 (Ohio 1993) (holding the denial of a motion to dismiss based on double jeopardy is not subject to an interlocutory appeal); State v. Crago, 559 N.E.2d 1353, 1355 (Ohio 1990), cert. denied, 499 U.S. 941 (1991). See also Borsick v. State, 652 N.E.2d 951, 952 (Ohio 1995) (interlocutory habeas corpus relief improper for denial of motion to dismiss based on double jeopardy).


II. OHIO'S OMVI/ALS STATUTORY SCHEME

A. The OMVI Offense

Prior to 1983, Ohio had one generic OMVI offense which provided that no person shall drive "under the influence of alcohol." The offense could be proved by the actual inability to operate a motor vehicle, the demeanor and admissions of the driver after arrest, the refusal to take a sobriety test, and by offering the results of a blood, breath or urine test ("chemical test") to show impairment. A breath, blood or urine test above the statutory level would trigger a presumption that an individual was "under the influence." The

in part by State v. Copening, 303 N.W.2d 821 (Wis. 1981). These states do not provide interlocutory review of a denial of double jeopardy claims.

The reluctance of states to hear interlocutory appeals of double jeopardy claims has resulted in federal courts, including the Sixth Circuit, holding that double jeopardy claims are an exception to the abstention doctrine enunciated in Younger v. Harris, 401 U.S. 37 (1971). See Mannes v. Gillespie, 967 F.2d 1310, 1312 (9th Cir. 1992), cert. denied, 113 S. Ct. 964 (1993); Satter v. Leapley, 977 F.2d 1259, 1261 (8th Cir. 1992); Davis v. Herring, 800 F.2d 513, 516 (5th Cir. 1986); Gully v. Kunzman, 592 F.2d 283, 286-87 (6th Cir. 1979); Drayton v. Hayes, 589 F.2d 117, 120 n.7 (2d. Cir. 1979), aff'd sub nom. McQueen v. Hayes, 603 F.2d 213 (2d Cir. 1979). The Fourth Circuit, sitting en banc, recently endorsed the view that a "colorable double jeopardy claim is a preeminent example of one of the very few 'unusual circumstances' justifying federal court intervention in state proceedings." Gilliam v. Foster, 61 F.3d 1070, 1082 (4th Cir. 1995) (en banc).


The standard jury instruction defining "under the influence of alcohol" is derived from State v. Hardy, 276 N.E.2d 247 (Ohio 1971), and reads:

UNDER THE INFLUENCE. "under the influence" means that the defendant consumed some alcohol, whether mild or potent, in such a quantity, whether small or great, that it adversely affected and appreciably impaired the defendant's actions, reaction, or mental processes under the circumstances then existing and deprived him of that clearness of the intellect and control of himself which he would otherwise have possessed. The question is not how much alcohol would affect an ordinary person. The question is what effect did any alcohol consumed by the defendant have on him at the time and place involved. If the consumption of alcohol so affected the nervous system, brain, or muscles of the defendant so as to impair, to an appreciable degree, his ability to operate the vehicle, then the defendant was under the influence.

4 OHIO JURY INSTRUCTIONS § 545.25, ¶ 6 (Anderson 1995).

The term "appreciable" is defined as "noticeable or perceptible." It is not to be confused with substantial. 4 OHIO JURY INSTRUCTIONS § 545.25, ¶ 7. See Mark P. Painter & James M. Looker, Ohio Driving Under the Influence Law §1.15 (1995-96 ed.).

The term "chemical test" is used here to refer to any test approved by the Ohio Department of Health to determine the amount of alcohol in a motorist's body. See Ohio ADMIN. CODE §§ 3701-53-01 to 3701-53-03; Davis, supra note 7, at 700 n.19.

In 1968, the Ohio General Assembly amended Section 4511.19 of the Code to provide
presumption was not conclusive; however, once it was established, the burden was on the defendant to introduce evidence equal to or greater than the prosecution's evidence before the finder of fact could disregard the presumption.19

In 1983, Ohio dramatically revised its drunk driving laws.20 Section 4511.19 of the Ohio Revised Code was divided into four separate offenses.21 The prior "under the influence" provision was retained, but the statutory rebuttable presumption was abolished.22 In its place, the legislature provided that an individual is also guilty of OMVI merely by operating a motor vehicle with a prohibited concentration of alcohol in the person's blood, breath or urine ("per se" offenses).23 The critical "per se" issue at trial is the accuracy that a test result of .15% of alcohol in the blood triggered a rebuttable presumption that an individual was under the influence of alcohol. Am. Sub. H.B. No. 380, 132 Ohio Laws 1632-32 (amended 1970, 1971, 1975, 1983, 1987, 1990, 1994). In 1971, the threshold was reduced to .10%. Am. Sub. S.B. No. 14, 134 Ohio Laws 39-40 (amended 1975, 1983, 1987, 1990, 1994). Test results which determined breath and urine alcohol had to be converted to blood alcohol by use of a ratio.

The prior law also provided that a blood alcohol level ("BAC") lower than .05% gave rise to a presumption of sobriety which could also be rebutted by sufficient evidence of intoxication. For a discussion of Ohio's prior ALS and OMVI laws, see generally Dwight A. Packard, II, Note, On a Collision Course: Procedural Due Process and Ohio's New Drunk Driving Laws, 20 U. DAYTON L. REV. 1009 (1995), and Jon M. Rosemeyer, Note, S. 432: Ohio Enacts Stringent Penalties To Deter Driving While Intoxicated, 9 U. DAYTON L. REV. 147 (1983).

21. Id. at 947. See supra note 2. The mandatory three day term of incarceration was retained for first-time offenders; however, the General Assembly provided for a ten day mandatory term of incarceration for second offenses within five years and a thirty day mandatory term of incarceration for third offenses within five years. Packard, supra note 18, at 1014.
22. See supra note 4; Newark v. Lucas, 532 N.E.2d 130, 133 (Ohio 1988). The statutory presumption previously provided the prosecution with a nexus between the test result and being "under the influence." Since the presumption has been eliminated, a test result is now inadmissible in an "under the influence" case unless the prosecution presents expert testimony correlating the test result to impairment. Id. at 134-35.

The "per se" offenses define "the point the legislature has determined an individual cannot drive without posing a substantial danger, not only to himself, but to others." Newark, 532 N.E.2d at 133 (citing State v. Tanner, 472 N.E.2d 689, 693 (Ohio 1984)). See Lewis R. Katz & Robert D. Sweeney, Jr., Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence, 34 CASE W. RES. L. REV. 239, 240-41 (1984). Katz and Sweeney discuss epidemiological studies regarding the causal relationship between drinking and poor driving, and declare that the relationship is supported by "conclusive scientific proof." Id. As an individual's BAC approaches .08%, the likelihood of involvement in a crash increases dramatically. A driver with a BAC of .15% is fifteen to twenty times more likely to be involved in a fatal crash than a driver who has had nothing to drink. Id. At 240.

The effect of eliminating the rebuttable presumption in the statute is that a test result for alcohol is admissible in the trial of a "per se" case as an essential element of the offense.
of the test, not the behavior of the accused. As to these “per se” offenses, the ability to drive and typical demeanor evidence, such as the ability to perform field sobriety tests, has been held irrelevant.

Theoretically, an individual can be convicted of four OMVI offenses arising out of one incident, because an officer can demand that an individual take more than one type of test to determine alcohol content. Therefore, the statute provides that although a person may be charged with multiple offenses of OMVI, the person “may not be convicted of more than one violation of these divisions.”

B. The Implied Consent Law

1. Pre-1983

Although initially characterized as civil and administrative in nature, the original version of the ALS was designed to encourage motorists to take

(provided compliance with Department of Health regulations). State v. Boyd, 479 N.E.2d 850, 851 (Ohio 1985) (proving the accused’s BAC level while operating the motor vehicle is an essential element of a prosecution for a per se offense). Moreover, by making the “per se” violations dependent on the amount of alcohol in a person’s breath, or in a person’s urine, the legislature made it unnecessary for the prosecution to convert, by means of a ratio or otherwise, breath or urine alcohol test results into a blood alcohol equivalent.


25. In State v. Boyd, the Ohio Supreme Court held that demeanor evidence, such as a person’s appearance, manner of speech, walking, and lack of any symptoms of intoxication are not relevant evidence in the trial of a “per se” offense. 479 N.E. at 851. Thus, under the court’s rationale, evidence that a person could drive through a slalom of cones faster and with more dexterity than Emerson Fittipaldi or Bobby Rahal would not be admissible in a “per se” case as circumstantial evidence that the test result was erroneous. The motorist would still be guilty of OMVI if blood, breath or urine tests revealed a concentration of alcohol over the “per se” level.

26. OHIO REV. CODE ANN. § 4511.191(A) (Baldwin 1994) provides that “[a]ny person . . . shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining alcohol, drug or alcohol and drug content . . . .” (emphasis added). See PAINTER & LOOKER, supra note 16, at 78, § 7.23. A refusal to submit to a second test, such as a urine test after a breath test has been taken, has been held to constitute a refusal. State v. Bakst, 506 N.E.2d 1208, 1212 (Ohio Ct. App. 1986); Stalego v. McCullion, 477 N.E.2d 1215, 1218 (Ohio Ct. App. 1984).

27. Section 4511.19(C) of the Ohio Revised Code states that “[i]n any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1) and a violation of division (A)(1), (2), or (3) of this section, but he may not be convicted of more than one violation of these divisions.” OHIO REV. CODE. ANN. § 4511.19(C) (Baldwin 1994). See additionally § 2941.25 (“Multiple Counts”) (providing that a person can be charged with two or more offenses of similar import, but can only be convicted of one offense).

requested chemical tests upon arrest, and to penalize motorists who impeded
the collection of relevant evidence by their refusals. After an arrest for OMVI,
if a motorist refused to take a requested test, the officer would forward a sworn
report to the Registrar of the Bureau of Motor Vehicles (Registrar) stating that
there was probable cause to believe the motorist was operating a vehicle under
the influence of alcohol and that the motorist refused to submit to a requested
test.29 When the report was received by the Registrar, the Registrar would
notify the motorist30 of an impending six month driver’s license suspension.31
If the motorist petitioned for a hearing to contest the suspension, the suspen-
sion would be stayed until the termination of any hearing or any appeal.32
Moreover, occupational driving privileges were available at the moment of
suspension.33 The actual imposition of the ALS could conceivably be delayed
for years if all appeals were exhausted.

2. 1983-1990

In 1983, the General Assembly enacted a comprehensive revision of
Ohio’s OMVI/ALS statutes and tethered the ALS more directly to the substan-
tive offense.34 When a motorist refused a test or tested above the “per se”
limit, the court, at the initial appearance (which had to be held within five days
of arrest), issued a driver’s rights suspension if one of five factors was found
to be present.35 Any suspension of a license continued until a final adjudica-

4411.191(C)).
4411.191(E)).
4411.191(D)).
4411.191(D)); Andrews, 368 N.E.2d at 1254-55; Rosemeyer, supra note 18, at 157.
1994).
The five factors were:

(1) The person has previously been convicted of a violation of section 4511.19 . . . ;

(2) At the time of arrest, the person’s driver’s or chauffeur’s license or permit or
nonresident operating privilege was suspended or revoked;

(3) The person caused death or serious physical harm to another person;
tion of the case on the merits.36 Also, the length of a "refusal" suspension was increased from six months to one year.37

The five 1983 ALS factors, taken as a whole, related primarily to whether the motorist was a future threat to public safety. For the first time OMVI defendant, the judge made an individual determination, based on the facts of the case and the background of the offender, as to the necessity of issuing an ALS prior to trial.38 Whether a defendant refused a test or tested above the "per se" limit was not necessarily determinative of the judge's ALS decision. Therefore, although the OMVI and the ALS moved along parallel tracks, the actual decision to impose an ALS appeared to be primarily remedial.

3. 1990-1993

Under the 1990 version of Ohio's implied consent provisions, an arresting officer was required to seize and suspend the driver's license of anyone who refused the test or tested above the "per se" level. The officer would forward the license to the court and the court would determine whether to continue the pretrial suspension based on numerous statutorily enumerated factors.39 Any pretrial suspension was ultimately credited towards a suspension imposed as a result of a conviction in the OMVI case.40

At the time the arresting officer would seize the license, he would issue the motorist a fifteen day temporary driving permit. If a hearing was requested by the motorist, the hearing had to be held within 30 days. Only the defendant could request a continuance of the hearing; however, a continuance would not stay the running of the suspension.41 Enhanced suspensions were

(4) The person failed to appear at the initial appearance; or

(5) The court or referee determines that the person's continued driving will be a threat to public safety.


38. See Gonzales v. Franklin Cty. Mun. Ct., 595 F. Supp. 382, 387 (S.D. Ohio 1984) (holding that pre-trial ALS did not violate due process because the suspension was contingent on the trial judge's findings in the individual case).


40. Am. Sub. S.B. 131, 1989-90 Ohio Laws 588, 681 (1990) (amended 1993, 1994). However in the case of a refusal suspension where the defendant did not plead guilty or no contest to OMVI at the conclusion of the case, the refusal suspension would continue and run its full course. Id. at 674; See Packard, supra note 18, at 1016.

41. Davis, supra note 7, at 701.
provided for motorists with a history of refusing requested chemical tests.\textsuperscript{42}

4. Present Scheme

Under the 1993 revisions, when the officer seizes and suspends a driver’s license, the officer immediately forwards the license to the Registrar.\textsuperscript{43} The ALS imposed at the time of arrest will not be reviewed by a court unless the defendant files an appeal,\textsuperscript{44} either before or at the “five-day hearing,” which is usually the arraignment.\textsuperscript{45} The appeal must be filed in the court in which the defendant will appear on the OMVI charge.\textsuperscript{46} If the defendant appeals the suspension, the implied consent statute provides that “the appeal does not stay the operation of the suspension,”\textsuperscript{47} that “\textit{no court has jurisdiction to grant a stay of a suspension imposed}”\textsuperscript{48} and “any order issued by any court that purports to grant a stay of any suspension imposed under either of those divisions shall not be given administrative effect” by the Registrar.\textsuperscript{49} Although the defendant, the prosecution, or the court on its own motion may continue the hearing of the appeal,\textsuperscript{50} the granting of a continuance does not stay the suspension that is the subject of the appeal.\textsuperscript{51}

If a defendant appeals the ALS, the defendant has the burden of proving,\textsuperscript{52} by a preponderance of the evidence, that one or more of the specified conditions of sections 4511.191(H)(1)(a)-(d) have not been met.\textsuperscript{53} If all of the

\textsuperscript{42} Am. Sub. S.B. 131, 1989-90 Ohio Laws 558, 669 (1990) (amended 1993, 1994). If the defendant refused to take one chemical test within the last five years, the period of suspension was increased to two years. For two previous refusals in five years, the suspension lasts three years. For three or more refusals, the defendant’s license is suspended for five years.

\textsuperscript{43} OHIO REV. CODE. ANN. §4511.191(D)(1)(a) (Baldwin 1994).

\textsuperscript{44} OHIO REV. CODE ANN. § 4511.191(H)(1) (granting accused the right to appeal).


\textsuperscript{46} OHIO REV. CODE ANN. § 4511.191(H)(1) (Baldwin 1994).

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.} (emphasis added).

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} OHIO REV. CODE ANN. § 4511.191(H)(2) (Baldwin 1994).

\textsuperscript{53} Revised Code § 4511.191(H)(1) provides:

If the person appeals the suspension at his initial appearance, the scope of the appeal is limited to determining whether one or more of the following conditions have not been met:

(a) whether the officer had reasonable ground to believe the arrested person was operating a vehicle . . . within this state while under the influence of alcohol, . . . or with a prohibited concentration of alcohol in the blood, breath, or urine and whether the arrested person was in fact placed under arrest;
conditions have been met (or if an individual does not appeal his suspension at his initial appearance), the suspension is upheld and continued until the complaint for which the defendant has been arrested is adjudicated on the merits.\textsuperscript{44} If the ALS was imposed for refusing to take a test, the ALS does not terminate if the defendant proceeds to trial, regardless of the outcome of the case.\textsuperscript{55} If the ALS was imposed because the motorist refused to take a test, and the defendant enters a guilty or no contest plea to OMVI, the ALS is terminated and the Registrar is ordered to credit any time the person served for the ALS against any judicial suspension.\textsuperscript{56} If the suspension was imposed for testing over the “per se” level, the ALS suspension terminates if the person is subsequently found not guilty of the charge resulting in the taking of the test or tests under the statute.\textsuperscript{57} Otherwise, the ALS is credited against any suspension given by the court.

After a specified, initial period of absolute suspension, most ALS suspensions permit a court to grant occupational driving privileges if the ALS would seriously affect the person’s ability to continue in the person’s employment.\textsuperscript{58} The length of the unconditional suspension is dependent on the number of previous times an individual has either refused to take a requested test, or has been convicted of OMVI.\textsuperscript{59} At the end of an ALS suspension period, the BMV is instructed to return the driver’s license upon a showing of finan-

\begin{itemize}
  \item (b) whether the law enforcement officer requested the arrested person to submit to the chemical test designated pursuant to division (A) of this section;
  \item (c) whether the arresting officer informed the arrested person of the consequences of refusing to be tested or of submitting to the test;
  \item (d) Whichever of the following is applicable:
    \begin{itemize}
      \item (i) Whether the arrested person refused to submit to the chemical test requested by the officer; [or]
      \item (ii) Whether the chemical test results indicate that his blood[,] breath, or urine contained an alcohol content above the “per se” limit.
    \end{itemize}
\end{itemize}

\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textbf{Ohio Rev. Code Ann.} § 4511.191(K) (Baldwin 1994).
\textsuperscript{59} \textit{Id.} There are a limited number of defendants who are prohibited from obtaining occupational driving privileges under the ALS due to the severity of their past driving record. \textit{See id.} (providing that the court shall not grant occupational driving privileges to a person who has either refused to take a chemical test or has been arrested for OMVI within the last seven years). A driver’s past record of convictions, or refusals to take requested chemical tests, can mandate a maximum suspension of up to five years. \textit{See} § 4511.191(E)(1)(b)-(d).
cial responsibility and the payment of a $250 license reinstatement fee. The proceeds of the fee are designated to a variety of drug treatment, rehabilitation, drug abuse and reparations programs specified in the statute.

Interestingly, when Ohio enacted the 1993 version of the ALS, it also enacted a supplemental suspension statute in the event that the ALS was held invalid and terminated by the trial court. Section 4511.196 provides that a judge may impose a new suspension of a person’s license if the judge determines at the initial appearance that the person’s continued driving will be a threat to public safety. The trial court also has the authority to implement this suspension in cases where the ALS is inapplicable, such as where a defendant is charged with being “under the influence” but has tested below the “per se” limit, or where the defendant has been charged with being under the influence of drugs of abuse. Like the ALS, this “public safety” suspension is credited against any suspension imposed at the conclusion of the OMVI case. In the event a person is found not guilty of the charge, this suspension is also terminated.

III. OHIO’S ALS TRIGGERS DOUBLE JEOPARDY PROTECTION

The determination of whether the ALS bars a subsequent prosecution on the substantive charge of OMVI depends on the outcome of a number of tests traditionally employed to determine jeopardy protection. As will be shown, courts throughout Ohio are not in agreement on any of the important issues that the Ohio Supreme Court must confront in Gustafson this term.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” Although the text of the

60. OHIO REV. CODE ANN. § 4511.191(L)(1) (Baldwin 1994).
63. OHIO REV. CODE ANN. § 4511.196 (Baldwin 1994).
64. OHIO REV. CODE ANN. § 4511.196(B)(1) (Baldwin 1994).
65. OHIO REV. CODE ANN. § 4511.196(B)(2) (Baldwin 1994).
66. OHIO REV. CODE ANN. § 4511.196(C) (Baldwin 1994).
67. Id.
68. U.S. CONST., amend. V.

Legal scholars have debated the precise origins of the Double Jeopardy Clause of the Fifth Amendment. The concept was present in the canon law, which commands that “there shall not rise up a double affliction.” See Francine Ward, The Double Jeopardy Clause of the Fifth Amendment, 26 AM. J. CRIM. L. 1477, 1477 (1995) (citing 15 THE CIVIL LAW, bk.9, tit. XXXI, at 56 (S. Scott ed., 1923)). The command was grounded in the belief that God did not make one suffer twice for the same offence. Id.

Some scholars believe the principle of double jeopardy gained popular approval following
provision mentions harms to "life and limb," traditionally the Amendment has been applied to imprisonment and monetary penalties.\textsuperscript{69} The clause has been interpreted many times by the Court as protecting against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.\textsuperscript{70}

"The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts."\textsuperscript{71} In practical terms, a statutory scheme violates the protections of the Double Jeopardy Clause when (1) the sanction sought to be imposed is in a separate and subsequent proceeding;\textsuperscript{72} (2) the proposed sanction constitutes "punishment;"\textsuperscript{73} and (3) the proposed sanction is for the same conduct that was previously punished.\textsuperscript{74} The Double Jeopardy Clause was inspired by an altercation between Thomas Becket and Henry II.

Becket asserted that clerics who have committed a crime should be subject to only one trial, and that the proceedings be adjudicated in an ecclesiastical court. Conceding that the trial must take place in the ecclesiastical court, the King insisted that the accusation also be made in the lay court. A deposed cleric, now a lay person, could then be punished by the Crown. Becket objected in the name of the canon law, specifically invoking the maxim that a person could not be punished twice for one offense.

\textit{Id.} at 1477-78 (citing F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 447-49 (2d ed. 1923)).


This article focuses on the multiple punishment prong of the Double Jeopardy Clause.

\textsuperscript{71} Abbate v. United States, 359 U.S. 187, 198-99 (1959). In an earlier case, Justice Black explained the purposes of the Double Jeopardy Clause:

\begin{quote}
The underlying idea . . . 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.
\end{quote}


\textsuperscript{72} Missouri v. Hunter, 459 U.S. 359, 366 (1983) (holding that the Double Jeopardy Clause does not preclude the imposition of cumulative punishments in a single trial or proceeding).

\textsuperscript{73} \textit{Halper}, 490 U.S. at 440 (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (stating that the Double Jeopardy Clause "protects against multiple punishments for the same offense.")).

\textsuperscript{74} See, e.g., Brown v. Ohio, 432 U.S. 161, 166 (1977) ("If two offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions."); Harris v. Oklahoma, 433 U.S. 682
Jeopardy Clause bars a second sanction, regardless of the order of the civil and criminal proceedings, if both the first and second sanctions are deemed punishment.\textsuperscript{75}

A. The ALS Constitutes Punishment for Double Jeopardy Purposes

Until recently, courts rarely considered whether a sanction exacted in a civil proceeding could either trigger jeopardy protection for a subsequent criminal prosecution, or be barred by a previous criminal prosecution.\textsuperscript{76} However, three recent United States Supreme Court cases concerning the scope of “punishment” under the Double Jeopardy Clause and its application to civil forfeiture cases have led practitioners and courts to consider the application of the same principles to OMVI statutory schemes providing sanctions in both criminal and “civil” proceedings.

1. The “Right versus Privilege” Argument

Courts often begin their analysis of whether the suspension of a driver’s license is punishment by noting that a license to operate a motor vehicle is a “privilege” rather than a “right.”\textsuperscript{77} These decisions imply that the negation of a mere privilege should not be viewed as sufficiently punitive to trigger the protections of the Fifth Amendment. However, the characterization of a driver’s license as a privilege or a right has very little bearing on the protection the Constitution affords an individual when the state attempts to revoke or suspend a license. Otherwise, simplistic draftsmanship, creating formalistic rather than substantive distinctions in language, could defeat constitutional guarantees.

The Supreme Court has recognized that once driver’s licenses are issued, (1977) (holding that a subsequent robbery prosecution was invalidated after the defendant was previously convicted of felony murder).


76. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) (holding that the defendant’s acquittal on criminal charges did not bar a subsequent forfeiture); United States v. Ward, 448 U.S. 242, 248 (1980) (holding that courts were to defer to Congress’ label of whether a proceeding is “civil” rather than “criminal”).

their continued possession may become essential in the pursuit of a livelihood, and represents a protectible property interest under the Due Process Clause. Therefore, the Fourteenth Amendment ensures that suspension of entitlements, such as licenses, are not to be taken away without procedural due process — whether the entitlement is denominated a right or a privilege. For example, in Mackey v. Montrym, the Supreme Court of the United States held that due process did not require a pre-suspension hearing triggered by the refusal of a licensee to take a breath test for the presence of alcohol. However, the characterization of a license to drive as being either a "right" or a "privilege" was not pivotal to the holding.

The characterization of a license as a "right" or a "privilege" is just as immaterial in determining whether the suspension of a license constitutes punishment for double jeopardy analysis. Regardless of the label given by the state, some license suspensions have traditionally been considered punishment. One need look no further than Ohio's OMVI law, which provides for a license suspension, indexed to the past record of the offender, as one of multiple punishments for the offense. Ohio law also provides for license

80. See Mackey, 443 U.S. at 10 n.7; Dixon, 431 U.S. at 112. See also People v. Linder, 535 N.E.2d 829, 831 (Ill. 1989) (a driver's license is a property interest for purposes of the Due Process Clause); State v. Toriello, 654 N.E.2d 1075, 1078 (Ohio Mun. Ct. 1995) ("A driver's license does confer a limited property interest on its owner and a person may not be deprived of it without [due process of law].").
82. The Massachusetts statute at issue in Mackey provided that an individual could obtain an immediate hearing (within one to ten days) before the Registrar as to whether grounds existed for the suspension. The Registrar was without authority to issue a stay of the suspension pending the hearing. Mackey, 443 U.S. at 8 n.5. The Court recognized that a licensee's interest in a pre-suspension hearing is substantial, however, the licensee's interest was outweighed by what the Court termed the relatively small risk of error in the Registrar's decision to suspend for a refusal, as well as the substantial weight to be accorded to the states in adopting summary procedures to protect public health and safety, such as removing drunk drivers from the highways.
83. OHIO REV. CODE ANN. § 4511.99(A)(1)-(4) (Baldwin 1994) (effective 5-1-95) provides for mandatory incarceration and fines, indexed to a defendant's prior record, "in addition to the license suspension or revocation provided in section 4507.16 of the Revised Code. . . ." Section 4507.16(B) of the Code provides for a license suspension of defendants convicted of OMVI, "in addition to or independent of all other penalties provided by law or by ordinance . . . ." (emphasis added). Further, § 4507.16(A)(1)-(7) provides for license suspensions, "in addition to or independent of all other penalties . . . ." for anyone convicted of such diverse offenses as perjury or the making of a false affidavit concerning the registration of motor vehicles, committing a felony with the use of a motor vehicle, trafficking in cigarettes with
suspensions as punishment for drug and alcohol offenses. Likewise, some license restrictions and suspensions are unquestionably remedial, such as the denial or revocation of driving privileges to alcoholics and drug addicts.

Instead, whether the ALS constitutes punishment should be analyzed according to the parameters laid down by the Supreme Court in its double jeopardy cases. An appropriate starting point is an examination of the trio of cases from the United States Supreme Court which focused the country's attention on the definition of "punishment" in civil cases.

The license suspensions mandated for drug offenses, like the ALS, are also the result of a federal mandate tied to highway traffic safety funds. Some courts, applying minimal scrutiny, have held these suspensions to be unconstitutional deprivations of a property or liberty interest pursuant to the Due Process Clause. These courts have reasoned that although deterring the drug trade is a legitimate, if not important, governmental interest, suspending a drug offender's driver's license is not rationally related to that goal. Driving a car and dealing in drugs have very little to do with one another, especially when one considers that in most license seizure cases, the underlying drug offenses do not require the use of a vehicle during the commission of the offense as a prerequisite for the suspension. Neither are such suspensions a reasonable method to accomplish the alternative goal of the safe and legal operation of motor vehicles upon the highways. See, e.g., People v. Linder, 535 N.E.2d 829, 833 (Ill. 1989); State v. Gowdy, 639 N.E.2d 878, 880 (Ohio C.P. 1994).

In Johnson v. State Hearing Examiner's Office, the Supreme Court of Wyoming concluded that a statutory scheme which required the State Department of Revenue and Taxation to suspend a driver's license after the individual had been convicted of a drug or alcohol offense violated the double jeopardy provisions of the Wyoming and Federal Constitutions. 838 P.2d 158, 160 (Wyo 1992). The administrative suspension, effected after sentencing, was held to be "driven by deterrent and retribution concepts." Id. at 179. The suspension was not dependent on the use of a motor vehicle in the commission of an offense and, therefore, was held not related to public safety concerns. Instead, the suspension was held to impose an additional punishment. Id. at 180. Contra Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 344 (Mass. 1992) (deprivation of driver's licenses could rationally be considered to deter drug sales). For a general discussion, see Rudstein, supra note 75, at 640 n.290.

See, e.g., Drunk Driving Defense Rejected by Eight Appeals Courts, LAW. WKLY. USA, July 3, 1995, at 1, 12.
2. The Halper-Austin-Kurth Ranch Trilogy

a. United States v. Halper

In United States v. Halper, the Court re-examined the circumstances under which a civil monetary penalty may constitute "punishment" for the purposes of double jeopardy analysis. Halper, a medical lab manager, duped Blue Cross into reimbursing him for 65 claims based on mischaracterizations of the medical services performed. The mischaracterizations resulted in overpayments totalling $585. Halper was convicted on 65 counts of violating the criminal false-claims statute, as well as 16 counts of mail fraud. He was sentenced to two years of imprisonment and fined $5,000.

The government then brought an action under the civil False Claims Act, which provided for a mandatory civil penalty of not less than $2,000 per violation, an amount equal to twice the amount of damages the government sustained per violation, and the costs of the civil action. Having violated the Act 65 times, Halper appeared to be subject to a statutory penalty of more than $130,000. Instead, the district court held the civil sanction of $130,000, an amount more than 220 times greater than the government's measurable loss, qualified as punishment and was barred by Halper's prior criminal conviction. The trial court permitted the government to recover double damages of $1,170 and the costs of the civil action, but held the statutory sanction of $2,000 per violation unconstitutional as applied to Halper. The government took a direct appeal to the United States Supreme Court.

88. A series of opinions issued by the United States Supreme Court, prior to Halper, held that civil monetary penalties are merely remedial, primarily because such penalties are usually designed to roughly but appropriately compensate the government for any expenses incurred as a result of the defendant's conduct. Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (Surplus Property Act liquidated damages provision served to reimburse the government for investigation and enforcement expenses); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) (qui tam action was remedial and designed to protect the government from financial loss); Helvering v. Mitchell, 303 U.S. 391 (1938) (civil tax penalty reimburses government for costs of investigating fraud and is not punishment).
89. The details of Halper's fraud, characterized as "of little importance with respect to his double jeopardy claim," are set forth in Halper, 490 U.S. at 437 n.2.
91. 31 U.S.C. §§ 3729-3731 (1994). The Federal False Claims Act was amended in 1986 and increased the civil penalty to "not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which the Government sustains," in addition to the costs sustained by the Government in bringing the proceeding. Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. § 3729(a)).
In rejecting the government's contention that punishment can only be inflicted in criminal proceedings, a unanimous Court held that whether an action is designated "civil" or "criminal" is "not of paramount importance" in determining whether a sanction is punishment. Rather,

[the notion of punishment . . . cuts across the division between the civil and the criminal law . . . . To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.]

The Court previously had held that the goals of punishment are retribution and deterrence. Therefore, "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," and is subject to the prohibition of the Double Jeopardy Clause.

The Court recognized that the inquiry concerning when a sanction is remedial, and when it may fairly be characterized as punishment, "will not be an exact pursuit" and the government is entitled to some latitude ("rough remedial justice") where the actual amount of government "damages and costs may be difficult, if not impossible, to ascertain." Civil fixed-penalty provisions, as well as reasonable liquidated damages clauses, are contemplated within the scope of remedial sanctions which may compensate the government in a given case. However, where a defendant has previously sustained a criminal penalty and the subsequent civil sanction bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the

95. Halper, 490 U.S. at 447-48. See also id. at 452 (Kennedy, J., concurring) (whether a sanction constitutes punishment is an objective inquiry "grounded in the nature of the sanction and the facts of the particular case.").


97. United States v. Halper, 490 U.S. 435, 448-49 (1989) ("[A] defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.").

98. Id. at 446.

99. Id. at 449.

100. Moreover, civil suits seeking damages filed by a private party for conduct that previously was the subject of criminal prosecution and punishment do not trigger jeopardy protection. The Court expressed no opinion concerning whether a qui tam action, in which a private party brings suit in the name of the United States and shares with the government any proceeds of the action, can trigger the protections of the Double Jeopardy Clause. See 31
Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.\textsuperscript{101}

In \textit{Halper}, the Supreme Court agreed with the district court that the potential $130,000 liability was "sufficiently disproportionate that the sanction constitute[d] a second punishment in violation of double jeopardy." The Court remanded the case to permit the government to demonstrate what, if any, portion of the $130,000 might be validly assessed to compensate the government for its losses and costs.

\textit{b. Austin v. United States}

The Court quickly revisited the issue of when a civil sanction can appropriately be characterized as punishment in \textit{Austin v. United States}.\textsuperscript{102} Austin had sold one ounce of cocaine to undercover drug agents. He pled guilty to a state drug trafficking charge and was sent to prison for seven years. One month later, the United States filed a civil \textit{in rem} forfeiture action seeking forfeiture of his mobile home and auto body shop, where the cocaine was stored and sold, respectively. The district court rejected his argument that the forfeiture of the properties would violate the Excessive Fines Clause of the Eighth Amendment.\textsuperscript{103} The Eighth Circuit Court of Appeals "reluctantly agree[d] with the government" and affirmed.\textsuperscript{104} Although the Eighth Circuit believed the government was "exacting too high a penalty in relation to the offense committed,"\textsuperscript{105} it felt prior Supreme Court precedent, permitting forfeitures of arguably innocent owners,\textsuperscript{106} made it extremely unlikely that the Constitution would require proportionality review of forfeitures where indi-

\textsuperscript{101} \text{Halper, 490 U.S. at 449-50.}
\textsuperscript{102} \text{Austin v. United States, 113 S. Ct. 2801 (1993).}
\textsuperscript{103} \text{The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII.}
\textsuperscript{104} \text{United States v. One Parcel of Property, 964 F.2d 814, 817 (8th Cir. 1992), rev'd sub nom. Austin v. United States, 113 S. Ct. 2801 (1993). Austin could not raise a cognizable double jeopardy claim because the criminal case and the civil \textit{in rem} forfeiture case involved different sovereigns. See Abbate v. United States, 359 U.S. 187 (1959) (holding that the Double Jeopardy Clause does not prevent a person from being tried and punished by both the federal and a state government); Bartkus v. Illinois, 359 U.S. 121 (1959) (holding that separate trials for federal and state armed robbery offenses are not barred by Double Jeopardy Clause); see also Heath v. Alabama, 474 U.S. 82 (1985) (holding that a defendant may be prosecuted and punished for the same offense by two different states).}
\textsuperscript{105} \text{One Parcel of Property, 964 F.2d at 817.}
\textsuperscript{106} \text{See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).}
individuals had pled guilty to criminal offenses involving the property.\textsuperscript{107}

The Supreme Court disagreed and reversed. After concluding that the prohibition contained in the Excessive Fines Clause applies to both civil and criminal cases, the Court directly addressed the issue of whether a civil in rem forfeiture could constitute punishment.\textsuperscript{108} The Court repeatedly cited to Halper\textsuperscript{109} in reaffirming that sanctions frequently serve multiple purposes, and a sanction designed, in part, to serve “retributive or deterrent purposes, is punishment, as we have come to understand the term.”\textsuperscript{110} After concluding that the history of forfeiture laws in both England and the United States had a punitive aspect, the Court noted that the statutory scheme tethered forfeiture to the commission of a drug offense, and the legislative history characterized forfeiture as “a powerful deterrent” and penal in nature.\textsuperscript{111} In light of the historical understanding of forfeiture as punishment and the legislative history of the statutory scheme, the Court concluded that a civil in rem forfeiture does not serve “solely a remedial purpose” and is subject to the limitations of the Eighth Amendment Excessive Fines Clause.\textsuperscript{112}

c. Department of Revenue of Montana v. Kurth Ranch

In Department of Revenue of Montana v. Kurth Ranch,\textsuperscript{113} the Supreme Court was asked to decide a permutation on the theme of Halper: whether a tax on the possession of illegal drugs, assessed in an administrative proceeding, violates the constitutional prohibition against successive punishments for the same offense, when a state had already imposed a criminal penalty for the same conduct.\textsuperscript{114}

\begin{enumerate}
\item[107.] \textit{Id.} See also United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), \textit{cert. denied sub nom.} Jaffee v. United States, 493 U.S. 954 (1989).
\item[108.] Although the Court could have considered the issue of “punishment” solely within the context of the Excessive Fines Clause, and conceivably have developed a test which differed from the tests developed in the double jeopardy line of cases, it did not. The repeated citations to Halper and Mendoza-Martinez, etc., make it clear that what constitutes punishment for the Excessive Fines Clause will also qualify as punishment for purposes of double jeopardy.
\item[109.] See United States v. Austin, 113 S. Ct. 2801, 2806, 2810 n.12, 2812 (1993).
\item[110.] \textit{Id.} at 2806 (citing United States v. Halper, 490 U.S. 435, 448 (1989)).
\item[111.] \textit{Id.} at 2810-12.
\item[112.] \textit{Id.} at 2812. The Court remanded the case to determine the appropriate test for determining when a forfeiture becomes constitutionally excessive.
\item[114.] Prior to Kurth Ranch, the Court had never invalidated a tax on double jeopardy grounds, although the Court had recognized the possibility in \textit{United States v. La Franca}, 282 U.S. 568 (1931). In \textit{La Franca}, the Court invalidated a liquor tax assessed only against those prosecuted for illegal manufacture or sale of liquor on statutory grounds, thus avoiding the “grave constitutional question” of whether double jeopardy principles precluded such an assessment. \textit{Id.} at 574, 576.
\end{enumerate}
Six members of the Kurth family were charged with various counts of cultivation and distribution of marijuana. The Kurths pled guilty and were sentenced. Subsequently, a civil forfeiture action was filed and settled by the family for $18,016.83. A third proceeding was then initiated, involving an assessment by the Department of Revenue ("DOR") of almost $900,000 in taxes under a newly enacted Dangerous Drug Tax. The Kurths filed a petition for bankruptcy under Chapter 11, wherein they challenged both the proof of claim for the unpaid drug taxes and the constitutionality of the Montana tax.115

The Montana taxing scheme imposed a tax on the possession and storage of drugs, which could only be collected after any state or federal fines or forfeitures had been satisfied. The tax was either ten percent of the assessed market value of the drugs, as assessed by the DOR, or a specified amount depending on the drug. A return was requested to be filed by the taxpayer within 72 hours of arrest and, if the taxpayer refused to do so, the law enforcement officer is required to file the form. There was no obligation to file a return or pay any tax unless and until the taxpayer was arrested.116

The Bankruptcy Court held the assessment invalid under the Federal Constitution.117 Relying primarily on Halper, the court held the tax constituted a form of double jeopardy.118 The DOR refused to produce any evidence concerning the remedial aspects of the tax, and the assessment, which resulted in a tax eight times the product's market value, made the punitive aspects of the tax evident.119 Both the district court120 and the Eighth Circuit Court of Appeals affirmed.121

As in Halper, the Supreme Court recognized that a legislature’s description of a statute as a “tax” does not foreclose an inquiry into whether, at some point, the provision loses its character as such and becomes a penalty.122 Distinguishing Halper, the Court recognized that Halper’s test of determining whether a sanction is remedial or punitive (a comparison of the individual’s gain to the amount of the sanction, including the government’s loss) is inappropriate in the case of a tax statute.123 Instead, the Court engaged in a sanction-specific, objective inquiry in making the determination that the

116. Id. at 1941-42.
118. Id. at 75-76.
119. Id. at 74.
121. In re Kurth Ranch, 986 F.2d 1308, 1312 (9th Cir. 1993).
See also Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934).
123. Kurth Ranch, 114 S. Ct. at 1948; Id. at 1950 (Rehnquist, J., dissenting).
tax constituted a second punishment in violation of the Double Jeopardy Clause. The Court noted the unusual features of the Montana tax. The "remarkably high" assessment, set at eight times the market value of the drug, unquestionably was designed to deter the drug trade. More importantly, the tax, "exact[ed] only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place," clearly differentiated the tax from "mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money." Finally, the Court thought it anomalous, if not disingenuous, that a purported tax on the "possession" and "storage" of dangerous drugs is levied on "goods that the taxpayer neither owns nor possesses when the tax is imposed . . . . This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." Therefore, the imposition of the tax at a subsequent proceeding is a second punishment within the contemplation of double jeopardy protection.

3. Ohio Decisions Concerning the Punitive Nature of the ALS

There is no consensus in Ohio court decisions as to whether an ALS suspension constitutes punishment. Currently, three decisions characterize the imposition of an ALS as punishment, and nine cases characterize the ALS as primarily remedial. Of the nine cases holding the ALS is remedial, two of the cases have strong dissents, and one case would have held differ-

124. Id. at 1947.
125. Id. at 1948.
126. The Court noted that Montana could have attempted to collect its tax if it had not previously punished the taxpayer for the same offense, or if it had assessed the tax in the same proceeding that resulted in his conviction. Id. at 1945. See United States v. Halper, 490 U.S. 435, 450 (1988) (noting that "[n]othing in today's ruling . . . prevent[s] the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."); Missouri v. Hunter, 459 U.S. 359, 368-69 (1983). Of course, the attempt to impose cumulative penalties during the criminal case would still be subject to a proportionality inquiry under the Eighth Amendment pursuant to Austin v. United States, 113 S. Ct. 2801 (1993).
129. Weese, 1995 WL 614139, at *6 (Close, J., dissenting); Elfrink, 1995 WL 584350, at
ently if the issue were a matter of first impression.\textsuperscript{130}

The predominant theme in the decisions holding that the ALS is not punishment is that the traditional purpose behind the ALS, gleaned from prior case law,\textsuperscript{131} has been to protect the public from intoxicated drivers — not to punish the licensee.\textsuperscript{132} However, these decisions also recognized the necessity of revisiting the issue of punishment in light of the substantial changes to the ALS statute in 1993, as well as the U.S. Supreme Court’s recent willingness to examine civil and administrative schemes to determine whether they constitute punishment.\textsuperscript{133} Most Ohio courts undertook to revisit the issue “through the \textit{Halper} lens.”\textsuperscript{134}

Although \textit{Halper} is not free from ambiguity,\textsuperscript{135} most Ohio courts interpreted \textit{Halper} as adopting a disproportionality test to determine when a civil sanction should properly be considered punishment. Thus, the issue became whether the ALS sanction was “the rare case,”\textsuperscript{136} where the “civil or presumably administrative remedy may be so extreme, so outrageous and so disproportionate, that it could only be fairly characterized as punitive rather than remedial.”\textsuperscript{137} Not surprisingly, courts employing this test found the current

\textsuperscript{130} (Bowman, J., dissenting).


\textsuperscript{133} Although the Supreme Court has characterized the \textit{Halper} inquiry as reserved for the “\textit{rare case} … where a defendant previously sustained a criminal penalty and the civil penalty bears no rational relation to the goal of compensating the Government for its losses,” United States v. Halper, 490 U.S. 435, 449 (1988) (emphasis added), the Court quickly revisited the \textit{Halper} punishment issue in \textit{Austin} and \textit{Kurth Ranch}. Moreover, since \textit{Halper}, lower courts have not been reluctant to bar criminal and civil penalties on Double Jeopardy grounds. \textit{See}, \textit{e.g.}, \textit{DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES} (Mathew Bender) ¶ 12.10 (1995) and cases cited therein.


\textsuperscript{135} \textit{See} discussion \textit{infra} part III(A)(5).

\textsuperscript{136} \textit{See}, \textit{e.g.}, State v. Strong, 605 A.2d 510 (1992).

ALS merely remedial.\textsuperscript{138}

These decisions further emphasized that the ALS had been characterized as civil, administrative and remedial in case law for the past 25 years. At least two decisions capitalized on the perceived distinction between a “right” and the “privilege” to operate a motor vehicle. In \textit{State v. Uncapher}, the municipal court held, without elaboration and notwithstanding that some license suspensions clearly constitute punishment, that “if the privilege to drive is not a right, then the deprivation would not be punishment in the sense we normally apply the term.”\textsuperscript{139} Similarly, the Tenth District Court of Appeals, in \textit{State v. Elfrink}, determined that the revocation of a conditional privilege merely returns the parties to their pre-contract status. Therefore, the ALS remedy “is in the nature of restitution”\textsuperscript{140} and, thus, remedial. The “sting of punishment”\textsuperscript{141} flowing from the remedial sanction was not sufficiently severe to outweigh the legitimate purposes of the statutory scheme.

The cases holding that an ALS constitutes punishment also examined the issue primarily on the basis of \textit{Halper}. However, these decisions focused on \textit{Halper}’s recognition that a sanction constitutes punishment when the sanction serves the goals of punishment, such as retribution and deterrence.\textsuperscript{142} Rather than utilizing a disproportionality analysis, these courts\textsuperscript{143} read \textit{Halper} as employing a mixed-motive test, which requires a sanction to be characterized as punishment if the sanction “cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes.”\textsuperscript{144} Because even the United States Supreme Court noted that an ALS serves as a deterrent to drunk driving,\textsuperscript{145} these courts were hard-pressed to characterize the ALS as anything but punishment once

\begin{itemize}
\item \textsuperscript{139} \textit{Uncpaher}, 650 N.E.2d at 202.
\item \textsuperscript{140} \textit{Elfrink}, 1995 WL 584350, at *7.
\item \textsuperscript{142} \textit{Halper}, 490 U.S. at 448 (“We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence.”).
\item \textsuperscript{144} United States v. Halper, 490 U.S. 435, 448 (1989) (emphasis added).
\item \textsuperscript{145} Mackey v. Montrym, 443 U.S. 1, 18 (1977) (Blackmun, J., dissenting).
\end{itemize}
they had adopted the "not-solely-remedial" test.\footnote{Halper rationale was adopted in the civil forfeiture context by the Ninth Circuit Court of Appeals in United States v. $405,089.23, 33 F.3d 1210, 1219 (9th Cir. 1994), opinion amended, 56 F.3d 41 (9th Cir. 1994), cert. granted sub nom. United States v. Ursery, 64 U.S.L.W. 3477, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346). Quoting from United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994), the Ninth Circuit stated: "[a]ppellants contend that [the Halper] language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in Austin v. United States." $405,089.23, 33 F.3d at 1219.}

4. The Difficulty with Prior Ohio Decisions Concerning the ALS

As a threshold matter, decisions from the 1970s, characterizing the ALS as civil, administrative and remedial, are of very little help in determining whether the current ALS sanction constitutes punishment. Ohio’s present scheme bears little resemblance to the system in place at that time.\footnote{See discussion of the pre-1983 ALS at supra Part II(B)(1).} At the time that decisions such as State v. Starnes, State v. Hurbean and Andrews v. Turner were rendered, the ALS was primarily concerned with motorists who refused requested alcohol tests. After receiving notice of an ALS by mail from the Registrar, the motorist could petition for a hearing to contest the suspension, and the suspension would be stayed until the termination of any hearing or any appeal.\footnote{See supra note 28.} Since imposition of the ALS could conceivably be delayed for years, this scheme, although characterized as civil and administrative, is hard to justify as being remedial. Instead, although civil in nature, it was clearly a penalty to encourage motorists to take requested tests and to penalize motorists who impeded the collection of relevant evidence.\footnote{See supra note 35. Under the 1983 revisions, an ALS was not a final, appealable order. City of Columbus v. Adams, 461 N.E.2d 887, 890 (Ohio 1984).}

The 1983 amendments increased the scope of the ALS to include “failures” as well as “refusals.”\footnote{Am. Sub. H.B. No. 380, 1967-68 Ohio Laws 1636 (1967) (amended 1969, 1972, 1975, 1977, 1978, 1983, 1985, 1987, 1989, 1990, 1993, 1994) (previous Revised Code § 4411.191(D)); Andrews v. Turner, 368 N.E.2d 1253, 1254-55 (Ohio 1977). Moreover, occupational driving privileges were available at the moment of suspension.} The court made an immediate determination (within five days of arrest) if one of five statutorily enumerated factors was present.\footnote{In State v. Beltz, 654 N.E.2d 199, 201 (Ohio Mun. Ct. 1995), the court noted that the Ohio Supreme Court “has . . . recognized that such a refusal does not go unpunished.” (emphasis added).} Although the OMVI and the ALS moved along parallel tracks, the actual decision to impose an ALS appeared to be primarily remedial because it did not focus on the culpability of the actor, but rather was dependent on the...
motorist's potential for inflicting future harm by operating a motor vehicle.

The 1990 amendments began the transformation of the ALS from being a primarily remedial scheme to one more closely associated with punishment. The arresting officer would seize and suspend a motorist's license and forward it to the court having jurisdiction of the OMVI charge, although a fifteen day temporary driving permit would be issued contemporaneously with the suspension. Enhanced suspensions were provided for motorists with a history of refusing requested chemical tests. The court still had some discretion to stay the ALS if the motorist was not a threat to public safety.

The 1993 amendments completed the process of revision. Upon arrest for OMVI, the officer seizes and suspends the motorist's license and immediately forwards the license to the Registrar. The suspension will not be reviewed unless the defendant files an "appeal" prior to the "five day hearing." This immediate hearing is oftentimes illusory, because either party or the court can request that it be continued, and a continuance cannot stay the ALS. The inquiry at the ALS hearing is limited to whether the ALS was imposed in a procedurally proper manner, rather than whether the motorist is a threat to public safety. Regardless of the decision of the trial court concerning the imposition of the ALS, the motorist will already have been subject to a license suspension, without occupational privileges, for a considerable period of time.

The ALS is inextricably connected to the conclusion of the OMVI case. If an acquittal results, the ALS is terminated (except in the case of a "refusal"). If conviction ensues, the ALS is credited against any suspension given by the court. The ALS also triggers a $250.00 reinstatement fee independent of any other penalties or reinstatement fees imposed on the defendant.

5. The Ineffectiveness of Halper In Determining if a Non-Monetary Civil Sanction is Punishment

In determining whether the ALS constitutes punishment, as the Ohio Supreme Court must do when considering the Gustafson case, one must ask

153. See discussion of the 1990 amendments, supra at Part II(B)(3).
154. See discussion of the 1993 amendments, supra at Part II(B)(5).
156. In Manning v. City of Columbus, the Solicitor General of Ohio characterized the $250.00 ALS reinstatement fee as a "fine." No. C-2-95-613 (S.D. Ohio Dec. 20, 1995) (available from court).
whether *Halper* provides a suitable framework for assessing the proper classification of a civil, non-monetary, mixed-motive sanction.\(^{157}\) Is it possible to reconcile the ambiguity of *Halper*—"not solely remedial" v. "grossly disproportionate"—in order to reach a determination as to whether the ALS is punitive or remedial? How does one quantify and weigh the punitive aspects of the ALS against the remedial aspects of the legislation in order to determine the extent of disproportionality? Is the outcome of any weighing process inevitably predetermined using a disproportionality test because the punitive aspects of any scheme involving potential drunk drivers will never be disproportionate to the carnage and loss of life resulting from drunk drivers on the highways? If so, what are the limits that the Constitution places on this type of legislation?

The difficulty of using *Halper* as a guide for future cases involving non-monetary, civil sanctions was quickly realized by the Supreme Court. In *Kurth Ranch*, the Court endorsed *Halper*’s recognition that "civil" penalties may, under some circumstances, trigger double jeopardy protection. However, *Halper*’s analysis was not a sufficient substitute for an individual inquiry into the nature of the particular sanction. Thus, in *Kurth Ranch*, the Court found that "the *Halper* method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute."\(^{158}\)

*Halper* does, however, provide some guidance concerning the nature of the inquiry when non-monetary, non-restitution civil sanctions are employed by a jurisdiction in order to achieve desirable, social goals. Nowhere in the *Halper* opinion does the Court limit the decision to monetary sanctions.

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Court speaks to “an additional second sanction,” without restriction or qualification.159 What the Halper Court did require was a “particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.”160 The inquiry is necessarily objective, because from the defendant’s perspective, “even remedial sanctions carry the sting of punishment.”161

Justice Kennedy, in a brief concurring opinion, stressed the nature of the objective inquiry.

Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands. In approaching the sometimes difficult question whether an enactment constitutes what must be deemed a punishment, we have recognized that a number of objective factors bear on the inquiry.162

Therefore, when considering the important question of when a civil sanction should be considered punishment triggering double jeopardy protection, the Halper Court anticipated a sanction-specific, objective evaluation directed to “the purposes actually served by the sanction in question,” without regard to “the underlying nature of the proceeding giving rise to the sanction.”163

Some civil sanctions cannot be sufficiently analyzed solely on the basis of retribution and deterrence.164 A license suspension, which unquestionably has both remedial and punitive qualities, and which has historically been justified on both grounds, appears to be one of those sanctions incapable of resolution using the Halper matrix. Instead, when in undertaking an assessment of whether a mixed-motive, non-monetary sanction, such as a license suspension, should be designated sufficiently punitive as to bar a subsequent penalty for the same conduct, the Ohio Supreme Court should apply the multi-

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159. Rudstein, supra note 75, at 625.
161. Id. at 447 n.7.
162. Id. at 453 (Kennedy, J., concurring).
163. Id. at 447 n.7.
164. "Halper's focus on whether the sanction serves the goals of 'retribution and deterrence' is just one factor in the Kennedy-Ward test, and one factor alone is not dispositive." Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1959 (1994) (Scalia, J., dissenting)(citations omitted).
factored test set forth in *Kennedy v. Mendoza-Martinez*\(^{165}\) — a test repeatedly cited with approval in the trilogy.

6. The Mendoza-Martinez-Ward Tests to Determine if the ALS is Punishment

In *Kennedy v. Mendoza-Martinez*, the Supreme Court had to determine whether the loss of citizenship, for remaining outside the country in time of war or national emergency in order to avoid military service, was penal in character. The case concerned whether this civil penalty should be reclassified as criminal. If so, then the appellees were denied due process of law by being denied various safeguards which attend criminal prosecutions under the Fifth and Sixth Amendments.\(^{166}\) In determining whether the non-monetary sanction of loss of citizenship was punitive, the Court set forth a multi-factored test:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.\(^{167}\)

The Court continued:

Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the

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166. It is not the purpose of this paper to determine what safeguards must be afforded in a “civil” proceeding that metes out punishment. In the civil forfeiture context, for example, a Sixth Amendment right to counsel does not exist, because the Sixth Amendment begins “at or after the initiation of adversary judicial criminal proceedings,” *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), is case specific, *McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991), and concludes at the time of sentencing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *See, e.g.*, United States v. $292,888.04, 54 F.3d 564, 569 (9th Cir. 1995).


provisions in question can only be interpreted as punitive.\textsuperscript{168}

The Court elaborated on the \textit{Mendoza-Martinez} criteria in \textit{United States v. Ward}.\textsuperscript{169} The Court was left to determine whether a monetary penalty imposed by the Federal Water Pollution Control Act was civil, or whether it was sufficiently criminal that it triggered criminal constitutional protections. The Court set forth a two-step process:

First, it is necessary to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, further inquiry is necessary to determine if the statutory scheme was so punitive either in purpose or effect as to negate that intention.\textsuperscript{170}

In applying the analysis to the case \textit{sub judice}, the Court, despite Congress’ “manifest intention to establish a civil, remedial mechanism,”\textsuperscript{171} considered whether the scheme “nevertheless provided for sanctions so punitive as to ‘transfor[m] what was clearly intended as a civil remedy into a criminal penalty.’”\textsuperscript{172} In making its determination, the Court utilized the factors set forth in \textit{Mendoza-Martinez} as guidance.\textsuperscript{173}

Ultimately the \textit{Ward} Court found the provisions of the act were more analogous to traditional civil damages and held accordingly. In reaching its determination, the Court had the benefit of “overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect.”\textsuperscript{174}

Thus conceived, the \textit{Mendoza-Martinez-Ward} test initially contemplates whether, in establishing a particular sanction, the legislature has either expressly or impliedly indicated its intent for the scheme to be remedial and civil or punitive.\textsuperscript{175} The Ohio ALS/OMVI statutory scheme does not explicitly set forth the intent of the General Assembly at the time of enactment. Ohio does not record its legislative history so there is no record of the policy consider-

\textsuperscript{168} Id. at 169.
\textsuperscript{169} 448 U.S. 242 (1980).
\textsuperscript{170} Id. at 248-49 (citations omitted).
\textsuperscript{171} Id. at 249.
\textsuperscript{172} Id. In both \textit{Ward} and \textit{Mendoza-Martinez}, the Court had the benefit of express manifestations of congressional intent. In \textit{Mendoza-Martinez}, a detailed comparison, between the statutory scheme and the tests traditionally applied to determine whether an act is penal or regulatory, was deemed “unnecessary, because the objective manifestations of congressional purpose indicate \textit{conclusively} that the provisions in question can only be interpreted as punitive.” Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963) (emphasis added).
\textsuperscript{173} \textit{Ward}, 448 U.S. at 249.
\textsuperscript{174} Id. at 254.
\textsuperscript{175} Id. at 248.
Ohio’s Administrative License Suspension

ations taken into account by the General Assembly during enactment. The ALS itself is silent concerning whether the civil rules of procedure apply or whether the criminal rules of procedure apply to ALS hearings. Therefore, “absent conclusive evidence of congressional intent as to the penal nature of a statute, [the] factors [in Kennedy v. Mendoza-Martinez] must be considered in relation to the statute on its face.”

(1) Whether the ALS involves an affirmative disability or restraint

“Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood.” Therefore, a person cannot be deprived of this “substantial” property interest without satisfying the procedural requirements of the due process guarantee in the Fourteenth Amendment.

When a driver’s license is improperly revoked, a licensee can never be made whole for the personal inconvenience and economic hardship suffered as a result. The imposition of the ALS, at the time of arrest, is “swift and sure,” and courts are precluded, for a substantial period of time, from providing even limited driving privileges based on hardship.

When the ALS is imposed, it effectively works a partial forfeiture of the motorist’s economic rights by severely restricting the motorist’s ability to earn a living and carry on normal day-to-day activities. Although the ALS

176. Mendoza-Martinez, 372 U.S. at 169. In State v. Casalicchio, the Ohio Supreme Court adopted the rationale and factors articulated in Kennedy v. Mendoza-Martinez, 569 N.E.2d 916, 920 (Ohio 1991) (forfeiture of contraband which required a criminal conviction was intended as a penalty for the underlying felony and barred by double jeopardy).

In State v. Strong, the Supreme Court of Vermont adopted the factors in Mendoza-Martinez in determining that the ALS did not constitute punishment which would bar a subsequent trial for OMVI. 605 A.2d 510 (Ver. 1992). Like Ohio, the Vermont version provided for an ALS at the time of arrest. However, a motorist could avoid the immediate suspension by requesting a hearing on whether the procedural prerequisites of the ALS were properly met. The State had the burden of proving the statutory requirements for the suspension by a preponderance of the evidence. Once met, the suspension commenced for 90 days, during which period the motorist had to participate in alcohol screening and therapy, or education requirements if needed.


182. 15 days for first-time arrestee failure; 30 days for first-time arrestee refusal.

183. Cf. Austin v. United States, 113 S. Ct. 2801 (1993). In Austin, the Supreme Court defined a “forfeiture” as “an economic penalty.” Id. at 2810, which serves not only remedial purposes, but also “either retributive or deterrent purposes.” Id. at 2806. In refining the concept of punishment as it relates to civil, economic penalties, the Court rejected the government’s argument that the decisive difference between forfeiture proceedings and the concept of punishment is that the typical civil proceeding is designed principally to serve remedial purposes.
does constitute the "revocation of a privilege voluntarily granted," an ALS nonetheless unquestionably results in a substantial disability and restraint for the motorist.

(2) Whether the ALS has historically been regarded as a punishment

Historically, Ohio's ALS has been considered civil and administrative. Although the ALS had punitive aspects, the ALS was not closely connected to the prosecution of a criminal case. Further, the ALS provided both significant judicial review prior to its imposition, and immediate occupational driving privileges after its imposition.

In the due process context, the United States Supreme Court has been willing to characterize the ALS of sister states as primarily remedial. In determining what process was required in order to constitutionally seize a driver's license, the Court, in Dixon v. Love and Mackey v. Montrym held that the important public interest in safety on the roads and highways trumped a driver's substantial interest in a pre-seizure deprivation hearing. However, in the same breath, the Court also characterized the ALS as a penalty.

Ohio's present ALS has punitive aspects far exceeding the schemes discussed in Dixon and Mackey. There is no availability of hardship driving privileges, nor is there a guarantee of a prompt, post-seizure deprivation hearing. For the first-time arrestee, if a continuance is requested by the prosecution or the court at the initial appearance, the burdensome period of absolute suspension will generally have expired prior to a hearing.

Hence, the historical background of Ohio's ALS as a remedial sanction is only of marginal relevance in determining the present character of Ohio's ALS. Historically, and generally, license suspensions, like fines and confinements, can be characterized as either punitive or remedial. The appropriate

185. See supra note 28 and accompanying text.
186. See Bender, supra note 19, at 121. "Since there is no practical way to arrest every DWI offender or even a significant percentage, the only effective method to generally deter this mass antisocial conduct is to instill in the public the perception of deterrence. The most effective deterrent penalty in DWI enforcement is license suspension. Therefore, if every arrested offender suffers some form of immediate license suspension without the complicated time-consuming procedures of the criminal justice system, the public perception of deterrence will be increased." Id.
188. 443 U.S. 1 (1979).
189. South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("Such a penalty for refusing to take a blood alcohol test is unquestionably legitimate, assuming appropriate procedural protections.").
190. Davis, supra note 7, at 702.
OHIO'S ADMINISTRATIVE LICENSE SUSPENSION

Designation is dependent upon the purpose for which the sanction is employed and the method and severity of its application. As increasingly punitive provisions to Ohio's ALS are enacted, reliance on past history becomes increasingly tenuous.

Although the ALS has been traditionally characterized as civil and administrative, a "refusal" ALS is more in the nature of a penalty for declining to produce potentially incriminating evidence than a remedy for dangerous driving. This is because states want motorists "to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." The punitive aspect of a "refusal" ALS in Ohio is obvious when compared to a "failure." Unlike a "failure," a "refusal" suspension is not terminated unless the defendant pleads no contest or guilty. Those motorists who fail the test, and produce reliable, scientific evidence of the commission of a crime, are treated with more leniency than motorists where, because of the refusal itself, proof of an OMVI crime is more problematic. Thus, the "refusal" defendant is more likely to be found innocent of the charge, and presumably less of a risk to public safety than those who are actually guilty of OMVI, but is still subject to the one year ALS suspension. This suspension can only be described as a penalty for refusing to take a requested test to determine alcohol content.

Ohio's ALS has never been justified as "remedial" in the sense that the suspension would improve the motorist's ability to operate a motor vehicle in the future. If the ALS does serve to improve poor driving habits, it can probably be attributed to the fear of a future suspension. Such an improvement results from deterrence, and thus punishment, rather than from some general remedial purpose.


By the same token, the absence of potential imprisonment does not prove a sanction is non-criminal, as evidenced in Halper and Kurth Ranch. In some circumstances, a large fine may effect a more severe hardship than a short imprisonment.

192. State v. Hanson, 532 N.W.2d 598, 606 (Minn. App. 1995) (Crippen, J., concurring) ("License revocation has always had characteristics of punishment, and a continuing series of amendments make it evident that this purpose is expanding.").

193. Neville, 459 U.S. at 564.

194. The Ohio ALS is also not remedial in the Halper sense of compensating injured parties for a tangible loss, or reimbursing government for the costs incurred in investigation and prosecution. See United States v. Halper, 490 U.S. 435, 446 (1989).

195. J. Morris Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 MINN. L. REV. 379, 481-487 (1976). See also Hanson, 532 N.W.2d at 604 (Randall, J., concurring). Judge Randall concluded that Minnesota's ALS constituted punishment, although not yet excessive punishment. He explained:
Whether the ALS comes into play only on a finding of scienter

The Ohio Supreme Court has characterized Ohio’s “per se” OMVI statute as a strict liability offense. The “under the influence” division of the statute can also be considered a strict liability offense in the sense that an actor’s culpability in attaining the state of impairment is irrelevant—as long as the impairment was voluntary. The prosecution does not have to prove a culpable mental state. Initially, it would seem at first that an ALS is likewise triggered without a finding of scienter. All that appears to be required is a test over the “per se” level. Even a refusal to take a test need not be knowingly or intelligently made. The implementation of a “refusal,” without requiring an understanding of the nature of the proceedings, has been described as “harsh,” but to hold otherwise would present an opportunity for drivers to argue that they were too intoxicated to knowingly refuse and, thus, escape the penal aspect of the statute.

Although a “refusal” ALS does not require the degree of scienter nor-

197. In United States v. Ward, 448 U.S. 242 (1980), the Court ultimately determined that the civil sanctions of the Rivers and Harbors Appropriation Act were not sufficiently punitive to trigger the protections afforded by the Constitution to a criminal defendant. Criminal penalties under the Act were for the precise conduct penalized in the civil scheme. In reaching its determination, Chief Justice Rehnquist seemed to imply that strict liability sanctions are indicative of a punitive scheme, although logically, the opposite conclusion would seem more likely to comport with Mendoza-Martinez. The Chief Justice noted: “respondent points out that at least one federal court has held [the act is] a ‘strict liability crime,’ for which there is no scienter . . . . [T]his consideration seems to point toward a finding that § 311(b)(6) is criminal in nature.” Id. at 250. This conclusion was strongly disputed in Justice Blackmun’s concurring opinion, wherein he notes that, unlike the statutory scheme in Ward, when scienter is present in a statute, it “might be indicative of a criminal proceeding.” Id. at 256 (Blackmun, J., concurring).
mally associated with criminal statutes, some degree of culpability is appar-
ent. Ohio’s ALS/OMVI laws bear a much greater resemblance to statutes pe-
nalizing recklessness than strict liability offenses. The effects of alcohol are
well-known, and information is readily accessible to the public showing the
correlation between alcohol consumption and the hazards of operating a motor
vehicle.\textsuperscript{200} When an individual drinks and drives, he runs the risk that his
blood alcohol content (BAC) may exceed the “per se” level,\textsuperscript{201} and, depend-
ing on the harm caused by the driving, that he may be subject to a variety of
criminal charges in addition to OMVI.\textsuperscript{202}

\textit{(4) Whether the ALS’ operation will promote the traditional aims of
punishment — retribution and deterrence}

There is no legislative history in Ohio, and the statutory scheme is silent
as to the purpose of the ALS. However, the ALS, in its present form, is the
result of federal legislation which provided federal highway funding to the
states in return for the states adopting various provisions, including the ALS,
in their OMVI statutory schemes. The legislative history surrounding these

\begin{footnotesize}
200. The commentary to § 2.08 of the Model Penal Code notes:

[T]he potential consequences of excessive drinking . . . [are] by now so dispersed in
our culture that it is not unfair to postulate a general equivalence between the risks
created by the conduct of the drunken actor and the risks created by his conduct in
becoming drunk. Becoming so drunk as to destroy temporarily the actor’s powers
of perception and judgment is conduct that plainly has no affirmative social value to
counterbalance the potential danger. The actor’s moral culpability lies in engaging
in such conduct.

\textsc{Model Penal Code} § 2.08, commentary at 357-359 (1985).

2901.22 (Baldwin 1994). Division (C), entitled Culpable Mental States, provides:

[a] person acts recklessly when, with heedless indifference to the consequences, he
perversely disregards a known risk that his conduct is likely to cause a certain result
or is likely to be of a certain nature. A person is reckless with respect to circumstances
when, with heedless indifference to the consequences, he perversely disregards a
known risk that such circumstances are likely to exist.

§ 2901.22(C). “Risk” is defined as “a significant possibility, as contrasted with a remote
possibility, that a certain result may occur or that certain circumstances may exist. \textsc{Ohio
Rev. Code Ann.} § 2901.01(G) (Baldwin 1994).

At a minimum, the motorist, by testing over the “per se” level, has acted in a criminally
negligent manner “when, because of a substantial lapse of due care, he fails to perceive or
avoid a risk that this conduct may cause a certain result or may be of a certain nature.” \textsc{Ohio
Rev. Code Ann.} § 2901.22(D) (Baldwin 1994).

202. \textit{See} \textsc{Ohio Rev. Code Ann.} § 2903.06(A) (Baldwin 1994) (providing that no person,
while operating a motor vehicle, shall recklessly cause the death of another). Division (B)
provides that if a person tests over the “per se” limit, the “offender shall be presumed to have
been under the influence of alcohol.” § 2903.06(B). \textit{See also} § 2903.04(B) (“No person shall
cause the death of another as a proximate result of the offender’s committing or attempting to
commit a misdemeanor.”).
federal statutes clearly portrays the ALS as substantially motivated by the twin penal concerns of deterrence and retribution.

Two federal statutes enumerate conditions to be met by states in order to receive federal funding for highways. The first applicable statute is 23 U.S.C. § 408. This statute provides that "the Secretary shall make grants to those states which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol or a controlled substance." Section 408 authorizes a basic grant for any state adopting alcohol traffic safety programs that mandate the "prompt suspension . . . of the driver's license of any individual who a law enforcement officer has probable cause . . . to believe has committed an alcohol-related traffic offense." This suspension is enacted if an individual is either determined to be intoxicated after a chemical test is performed, or if the suspected individual refuses to submit to a chemical test. Under these circumstances, the license suspension is effective for not less than ninety days.

This statute was designed to encourage states to design and implement programs to reduce alcohol-related traffic accidents and deaths. State compliance was meant to be voluntary rather than mandatory. Thus, the goal of improving highway safety could be accomplished by preventing alcohol-related accidents, without dictating policy that would interfere with the domain of the states.

However, the congressional history of § 408 indicates that improving highway safety was not the only goal to be accomplished by this legislation. In fact, in the House of Representatives, deterrence and punishment were motivating factors behind enacting this legislation. These same attitudes

208. Id.
209. 128 CONG. REC. 25,966 (1982) (statement of Mr. Howard) ("[The bill] addresses all of the vital concerns of the law enforcement community . . . [T]he main aim of the bill is deterrence [and] [p]unishment is justified after the fact."); 128 CONG. REC. 25,968 (1982) (statement of Mr. Young) (Federal funds will deter drunk driving by utilizing "swift and sure arrest, conviction, punishment, and rehabilitation of the offender."); 182 CONG. REC. 25,970 (1982) (statement of Mr. Evans) ("The bill . . . will provide seed money to encourage States to adopt effective plans that will really crack down on drunk driving . . . includ[ing] prompt suspension of driving licenses [and] mandatory jail or community service sentences[]."); 128 CONG. REC. 28,971 (1982) (statement of Mr. Ratchford) (states will be encouraged to "punish and rehabilitate drunk drivers."). See 128 CONG. REC. 25,970 (1982) (statement of Mr. Oberstar) ("The key factor in deterring drunk driving is the level of enforcement and the driver's perception that he will be apprehended."). See also 128 CONG. REC. 25,971 (1982) (statement of Mr. Fary) ("We should . . . encourage all States to strictly enforce their drunk
were present in the Senate. The deterrent effect of an administrative license suspension was emphasized, and it was noted that this penalty should not be implemented after lengthy court proceedings.\textsuperscript{210} Thus, the intent of the legislation was not solely to improve safety by reducing the likelihood that drunk drivers would cause injury and death on the nation's highways. The congressional intent also illustrates that the federal funding was a financial incentive to induce states to deter and punish drunk drivers.

The legislative history surrounding the amendments to this statute does not indicate that punishment was the main goal motivating the changes in this alcohol-traffic safety provision. However, it cannot be disputed that the legislators were aware of the punitive purpose behind the original provision. For example, when the Senate debated H.R. 4616, which was later adopted to amend 23 U.S.C. § 408, the intent of the original legislation was echoed on the floor. One senator noted that "in 1982 we enacted Public Law 97-364... to prevent, detect, and punish drunk driving."\textsuperscript{211} Thus, the legislative history of the 1984 amendment to 23 U.S.C. § 408 indicates an awareness on the part of the legislators to carry out the original punitive purposes of this legislation.

The second statute relating to whether the legislative history of federal highway funding programs indicates an intent to punish drunk drivers is 23 U.S.C. § 410. This statute provides federal funding to states that adopt five or more of the six recommended options to reduce alcohol-related incidents.\textsuperscript{212} One of these options is to suspend the license of an individual who is determined to be driving under the influence of alcohol.\textsuperscript{213} The legislative history illustrates that this section seeks to expand on section 408, because the emphasis on deterring drunk driving is present.\textsuperscript{214} However, the history surrounding this statute and its corresponding amendments lacks any direct statements

driving laws ... so drunk drivers will be punished and kept off the highways. It is my hope that this legislation will help us reach this goal.").

\textsuperscript{210} 128 CONG. REC. 26,949 (1982) (statement of Mr. Danforth) ("Historically, license revocation has been treated as a discretionary criminal sanction. This bill, however, recognizes that license revocation is a highly effective deterrent against drunk driving that should not be used exclusively as a criminal penalty imposed only after lengthy court proceedings."). \textit{See generally} Eric Pianin, \textit{Bill Urges Suspending Drunk Drivers' Licenses; Federal Highway Trust Funds Would be Offered as Incentive}, WASH. POST, May 12, 1988, at B4. Rather, the bill was designed to increase the penalties for driving under the influence of alcohol. 128 CONG. REC. 26,950 (1982) (statement of Mr. Pell) (the legislation "provides incentives for the State to increase penalties."). \textit{See} 128 CONG. REC. 26,950 (1982) (statement of Mr. Dole) ("[W]e must encourage tough State laws that treat the drinking driver like the dangerous criminal that he is ... [and] encourage State laws that threaten severe punishment for drunk drivers.").

\textsuperscript{211} 130 CONG. REC. 18,657 (1984) (statement of Mr. Mathias).

\textsuperscript{212} 23 U.S.C. § 410(d) (1994).


that indicate an intent to use an ALS as punishment for drunk driving.

However, one excerpt persuasively supports the view that an ALS, pursuant to 23 U.S.C. § 410, is a method of punishment. The statute was originally introduced as part of H.R. 5210, which was entitled the Anti-Drug Abuse Act of 1988.215 This Act addressed a wide-range of issues, including an amendment to the Assimilative Crimes Act.216 Although the alcohol-traffic safety provisions appear to be unrelated to the Assimilative Crimes Act amendment, one possible relation can be inferred from the statements of Senator Hatch.217

Senator Hatch explained that the Assimilative Crimes Act “authorized Federal judges to apply State criminal statutes for acts . . . taking place within [a] state but on federal property.”218 However, the Senator criticized the Act for having a loophole which prevented federal judges from imposing non-jail sanctions, such as license suspensions, because the non-jail sanctions were not viewed as punishment.219 Mr. Hatch supported the Assimilative Crimes Act amendment because the Amendment changed this interpretation and allowed state-enacted sanctions to be defined as punishments.220

The legislative history supports the conclusion that an ALS is a method of punishment for alcohol-related traffic offenses. The Assimilative Crimes Act was changed to state “that which may or shall be imposed through judicial or administrative action under the law of a State . . . for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law.”221 The statements of Senator Hatch expand on this statutory language, because he recognized and supported the use of non-jail sanctions as punishments. Although this legislative history does not directly apply to the provisions of section 410, the important point is that a state-administered license suspension was interpreted at the federal level as punishment. Thus, this legislative history argues persuasively for the proposition that administrative license suspensions, as mandated by the federal alcohol-impaired countermeasures in 23 U.S.C. § 410, should be viewed as a form of punishment.

In summary, the legislative history of 23 U.S.C. § 408 clearly shows that an ALS was intended to be a punishment for drunk driving. The legislative history of 23 U.S.C. § 410 further supports this conclusion, and illustrates the

218. Id. at 15982.
219. Id.
220. Id.
willingness of federal legislators to address the problem of drunk driving on the nation’s highways. It indicates that although the statutes were designed to accomplish many goals, one of the intended goals was to deter and punish drunk drivers. 222

(5) Whether the behavior to which it applies is already a crime

An ALS triggered by a “failure” mirrors the “per se” OMVI offenses in Ohio. For a first-time arrestee, the ALS results in a 90 day license suspension with no occupational driving privileges for fifteen days. The sanction is the same for both the first-time arrestee who tests marginally over the “per se” limit and the first-time arrestee involved in a serious accident who fails a breath test miserably.

222. In State v. Hickham, No. MV 94-618025, 1995 WL 243352 (Conn. Sup. Ct. Apr. 20, 1995), the court was persuaded that the ALS constituted, in part, punishment, as evidenced by Connecticut’s legislative history which clearly characterized the ALS as a “severe penalty,” “swift and sure,” and an “effective deterrent.” Id. at *5. Moreover, the decision quoted from a statement by a representative of the National Transportation Safety Board before the House Judiciary Committee on February 15, 1989, wherein the representative stated that the ALS is “viewed by drivers as a severe sanction” which “goes into effect shortly after arrest” and a “less costly sanction for society than other countermeasures such as jail sentences.” Id. Thus, “the licenses of dangerous drivers are revoked more quickly, and the certainty of receiving a penalty for drunk driving is dramatically increased.” Id. See also Johnson v. State, 622 A.2d 199, 204 (Md. Ct. Spec. App. 1993); State v. Hanson, 532 N.W.2d 598, 606 (Minn. Ct. App. 1995) (Crippen, J., concurring) (referenced the administrator’s testimony before the legislature that the [15 day period of unconditional license suspension] would make sure violators suffered a deterrent.”).

In Florida, the legislative history of its ALS/OMVI statutory scheme states that the ALS was designed to “prevent, punish and discourage criminal behavior.” FLORIDA HOUSE OF REPRESENTATIVES, CRIMINAL JUSTICE COMMITTEE FINAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CH. 89-525 (Laws of Florida, June 13, 1989).

After Ohio’s enactment of its 1993 amendments to R.C. § 4511.191, the Ohio Department of Highway Safety distributed a brochure to the public entitled, “Swift and Sure.” The brochure announces that, “IF YOU DRINK AND DRIVE, YOU ARE COMMITTING A SERIOUS CRIME WHICH HAS SWIFT AND SURE CONSEQUENCES THAT ARE HARD TO IGNORE.” The brochure goes on to state:

Beginning September 1, 1993, sweeping reforms of Ohio’s drunk driving laws will go into effect which will make it tough for drivers who make the wrong decision to drink and get behind the wheel of a motor vehicle.

NEW
Administrative License Suspension
(ALS)

If you are stopped for drunk driving and you refuse to take the sobriety test or if your test results exceed the legal limit of .10% Blood Alcohol Concentration BAC the officer can take your driver’s license on the spot and the suspension begins immediately . . . . The administrative license suspension is independent of any jail term, fine or other criminal penalty imposed in court for a DUI offense.

SWIFT AND SURE, supra note 181.
An ALS as a consequence of a refusal, although not a crime, does result in both civil and criminal sanctions. A "refusal" results in a one year driving rights suspension, with no occupational driving privileges available for 30 days. In addition, evidence of a refusal is admissible in the "under the influence" case to prove guilt. The prosecution's use of "refusal" evidence has been upheld by the United States Supreme Court, in South Dakota v. Neville, as not infringing on a motorist's Fifth Amendment privilege against self-incrimination. Currently, at least five jurisdictions have gone beyond

223. The length of both the refusal suspension and the period without any hardship driving privileges increases significantly if the motorist has a prior history of refusing requested chemical tests. Ohio Rev. Code Ann. § 4511.191 (E)(1)(a)-(d) (Baldwin 1994). 224. The Ohio Supreme Court has approved of the following jury instruction for OMVI cases involving a refusal:

Evidence has been introduced indicating the defendant was asked but refused to submit to a chemical test of his [or her] breath to determine the amount of alcohol in his [or her] system, for the purpose of suggesting that the defendant believed he [or she] was under the influence of alcohol. If you find the defendant refused to submit to said test, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol.


The Court in Anistik relied on South Dakota v. Neville, 459 U.S. 553 (1983), in determining that refusal evidence is admissible in a prosecution for OMVI. See infra note 227. The overwhelming majority of states permit a prosecutor to comment on a motorist's refusal to take a chemical test. See Howard S. Cohen, Note, Evidence of Refusal to Submit to Chemical Breath Test for Alcohol Admissible Only When Relevant to Matters Other than Defendant's Innocence or Guilt, 22 U. Balt. L. Rev. 115, 123 n.49 (1992).


226. In Schmerber v. California, 384 U.S. 757 (1966), the Court held that the state could compel the withdrawal of blood for alcohol analysis, and introduce the results of the analysis into evidence, without violating the Fifth Amendment. The Fifth Amendment was limited to evidence of a testimonial or communicative nature. Therefore, the Fifth Amendment did not require exclusion of the "body as evidence when it may be material." See Holt v. United States, 218 U.S. 245, 253 (1910). As a result, "compulsion which makes a suspect or accused the source of 'real or physical' evidence does not violate" the Fifth Amendment. Schmerber, 384 U.S. at 764.

Schmerber reserved the question of whether evidence of a refusal to submit to a test for alcohol content violates the Fifth Amendment. Id. at 765 n.9. However, in South Dakota v. Neville, the Court held that the Fifth Amendment did not prohibit a prosecutor from commenting at trial on a motorist's refusal to take a requested test for alcohol content, notwithstanding that a refusal may be "a tacit or overt expression and communication of the defendant's thoughts." 459 U.S. at 560 (1983). According to the Court, "[a] refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the
Neville, and actually criminalized the refusal to take requested chemical tests.227 Some of these states provide that the penalties for refusing to take a chemical test are identical to the OMVI offense.228 The Ohio Criminal Sentencing Commission ("OCSC") is currently debating whether to criminalize the refusal to take a requested chemical test and to provide penalties co-extensive with the penalties for OMVI.229 The impetus for this debate has been the extremely high rate of refusals in some counties in Ohio — as high as 50-60%.230 An alternative OCSC proposal provides that evidence of a refusal would not only be fair comment by the prosecution in the criminal case, but would also result in a rebuttable presumption at trial that the motorist was under the influence of alcohol.231 A third proposal is to increase the civil disabilities attendant to a refusal, in an effort to increase compliance.232

An ALS is currently subject to severe sanctions. In the case of a "fail-


229. Minutes, Ohio Criminal Sentencing Commission, October 26, 1995. For example, a proposed amendment to the implied consent law, R.C. § 4511.191, would provide:

(A)(3) The refusal to take a chemical test would be a misdemeanor of the first degree.


231. For example, a proposed amendment to the implied consent law, R.C. § 4511.191, would provide:

(A)(3) No person has the right to refuse the test designated by the law enforcement agency. If the person refuses the designated test, it is a rebuttable presumption that the person was under the influence of alcohol, a drug of abuse, or alcohol or a drug of abuse.


232. Minutes, Ohio Criminal Sentencing Commission, October 26, 1995 (statements of Max Kravitz, Ohio State Bar Association Representative).
ure," the identical conduct constitutes a criminal offense. In the case of a "refusal," the implied consent law currently suspends driving rights for a significant length of time, and establishes an adverse inference at the criminal trial. It is likely that the sanctions for a "refusal" will be increased significantly in the future. Against this backdrop, it is clear that an ALS is identical to, or closely associated with, criminal activity.

(6) Whether there is an alternative purpose to which the ALS may be rationally connected

The remedial purpose underlying the ALS is obvious—reduce deaths on the highways as a result of the impaired motorist "which occurs with tragic frequency."233 This purpose is well-documented, and has been the subject of comment in numerous Supreme Court decisions.234 However, to characterize the ALS as "remedial" because one of the purposes of the legislation is to improve highway traffic safety ignores the manner in which the ALS implements the remedy. It provides a "swift and sure"235 "penalty"236 to potential lawbreakers without a hearing, and without an individualized consideration of whether the motorist is a future threat to public safety.237


234. Id. Neville referenced numerous earlier Court decisions expressing the same concern. Mackey v. Montrym, 443 U.S. 1, 17-18 (1979) (recognizing the "compelling interest in highway safety"); Perez v. Campbell, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) ("The slaughter on the highways on this Nation exceeds the death toll of all our wars"); Tate v. Short, 401 U.S. 295, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard on the battlefields."). See also Doyle v. Ohio Bur. of Motor Vehicles, 554 N.E.2d 97, 104 (Ohio 1990).

235. SWIFT AND SURE, supra note 181.

236. Neville, 459 U.S. at 560.

237. The TECHNICAL HANDBOOK ON OHIO'S NEW DUI LAWS explains the ALS as follows:

Ohio's new OMVI laws (Sub.S.B. 275 and Sub. S.B. 62), which take effect September 1, 1993, will be SWIFT and SURE. The basis is simple enough: if you drink and drive in Ohio, you'll automatically lose your license. The Ohio Department of Public Safety has produced this handbook to help you understand the various aspects of these laws.

* * * *

As law enforcement officers, the courts, and the Department of Public Safety begin to enforce the stiffest penalties ever for impaired driving in the State of Ohio, we know they will have a major impact on reducing deaths and injuries on our highways because the penalties will be SWIFT and SURE.

Ohio's new laws are the toughest yet on drunk drivers and removes them from our roadways. In fact, for multiple OMVI offenders and those driving under an OMVI or FRA suspension, it's the end of the road. To this end, I hope you'll find this handbook helpful.
The temporary nature of an ALS undermines its stated "remedial" purpose. A license to drive will revert back to the motorist regardless of whether the motorist is a threat to public safety.\textsuperscript{238} The fact that a motorist may be a threat to future public safety is beyond the scope of the ALS hearing, since the hearing is only concerned with whether various procedural prerequisites have been met. Moreover, occupational driving privileges may be granted solely on the basis that an ALS would be a hardship. The statute does not require the court to determine if the interest of future public safety would outweigh the motorist's interest in occupational privileges.

If statistical evidence exists that a motorist becomes a safer driver as a result of the imposition of the ALS, the reason for this is probably the fear of future punishment, because there is no remediation required of the motorist in the statute. In this sense, the ALS operates as remedial in the manner that all criminal laws are remedial. Criminal laws are designed to prevent conduct which inflicts or threatens substantial harm, to punish and hopefully, to rehabilitate.\textsuperscript{239}

\textit{(7) Whether the ALS appears excessive in relation to the alternative purpose assigned}

The decisions finding the ALS remedial rely on numerous decisions holding that the ALS is designed to remove from the highways drivers that are a danger to the public.\textsuperscript{240} However, the statutory scheme is both arbitrary and excessive. At the same time, it is insufficient to accomplish its professed remedial objectives.

\textsuperscript{238} Cf. Clark, supra note 195, at 483 n.315 (implying that the willingness to release a criminal without proof of rehabilitation belies rehabilitation as the justifying aim of confinement and indicates retribution or deterrence instead).

\textsuperscript{239} MODEL PENAL CODE § 1.02.

The ALS exceeds what is necessary for remediation.\textsuperscript{241} It is equally applicable to all first-time arrestees without regard to prior driving record, the degree of intoxication, the need for treatment or the actual harm caused by the driving. If the ALS were truly related to highway safety, the length and conditions of a license suspension, as well as the opportunity for occupational driving privileges, would be tailored to the circumstances of the individual and the alleged offense, rather than being applied mechanically and identically to all arrestees.\textsuperscript{242}

Although the ALS purports to be concerned with public safety, the suspension period often terminates prior to the completion of the criminal case. A driver who is a danger to the community can obtain full driving privileges prior to a court making an individualized determination that the defendant is not a risk to public safety. Moreover, after the absolute period of suspension has expired, the ALS provides for occupational driving privileges, without regard to public safety, if the ALS “would seriously affect the person’s ability to continue in his employment.”\textsuperscript{243}

The punitive nature of the ALS is clearly revealed when it is compared to other provisions in the 1993 legislation that provide for remedial intervention. In 1993, the General Assembly enacted Revised Code § 4511.196(B),\textsuperscript{244} which permits judges, at the motorist’s initial appearance, to make a discretionary determination whether the motorist’s “continued driving will be a

\textsuperscript{241} It has been suggested that whenever a deterring sanction goes beyond what is strictly necessary to disable the actor from future undesirable conduct, the sanction should be regarded as criminal for all constitutional purposes. Jonathan I. Charney, \textit{The Need for Constitutional Protections for Defendants in Civil Penalty Cases}, 59 \textsc{Cornell L. Rev.} 478, 507-14 (1974).

\textsuperscript{242} See Elfrink, 1995 WL 584350, at *10 (Bowman, J., dissenting). In addition, a $250.00 reinstatement fee must be paid—an amount 40 times the actual cost ($6.25) of issuing a new license. This fee is not related to compensating the governmental entity for any loss and has been characterized as a “fine,” rather than a remedial sanction, by the Solicitor General of Ohio. Manning v. City of Columbus, No. C-2-95-613 & n.2, (S.D. Ohio 1995) (Memorandum and Order, Dec. 20, 1995) (Holschuh, J., presiding).

In \textit{State v. Jerry Packman}, the court overruled the defendants’s double jeopardy claim but held that the defendant had previously been punished by having to pay a $250.00 reinstatement fee which bears no rational relationship to the remedial aspects of the statute. No. 95 TRC 473, slip op. at 3 (Ohio Mun. Ct. March 31, 1995). In \textit{City of Seven Hills v. Adkins}, the court opined:

\begin{quote}
It is clear that not one cent of the Reinstatement Fee is allocated toward the cost to the Bureau of Motor Vehicles of reinstating a driver’s license, but is nothing more than a “fine,” which is allocated to five different purposes of the Government of the State of Ohio. There is no question that the “Reinstatement Fee” is in fact not a reinstatement fee, but a $250.00 fine, which is allocated to various sources.
\end{quote}


\textsuperscript{243} \textsc{Ohio Rev. Code Ann.} § 4511.191(I)(I) (Baldwin 1994).

\textsuperscript{244} \textsc{Ohio Rev. Code Ann.} § 4511.196(B) (Baldwin 1994).
threat to public safety." This "public safety" suspension continues until the complaint on the charge resulting from the arrest is adjudicated on the merits. By making public safety the criterion for a license suspension under § 4511.196, a factor that is notably absent from consideration in the ALS, the General Assembly has created a truly remedial statute that affords a motorist an immediate hearing on the only issue that provides justification for a preconviction suspension in the first place. The ALS, which focuses mechanically on a "failure" or a "refusal", without consideration for future public safety, and which penalizes all drivers regardless of potential for future harm, can only be considered excessive, and thus punitive, when measured against the "public safety" statute.

The factors delineated in Mendoza-Martinez all point to the conclusion that the ALS is punishment, and courts "should follow the notion where it leads." The features of Ohio's ALS are the result of a coordinated effort to promote highway safety by providing a "swift and sure" penalty prior to conviction. The imposition of this penalty deserves protection from further prosecution. If the General Assembly desires to implement an ALS that is true to its stated remedial purpose, it certainly has the ability to do so, and contemporaneously protect public safety. Until that time, the infliction of the ALS will probably lead to thousands of OMVI prosecutions that are either dismissed or delayed indefinitely as the cases are appealed through Ohio and federal courts.

B. Does the ALS Involve a Separate Proceeding?

Most Ohio courts that have examined the ALS/OMVI statutory scheme have held that the imposition of the ALS takes place at a separate proceeding.

245. OHIO REV. CODE ANN. § 4511.196 (Baldwin 1994). The statute provides:

(B)(1) If a person is arrested . . . and if the judge . . . at the initial appearance terminates the suspension . . . the judge, referee, or mayor at the initial appearance may impose a new suspension of the person's license, permit, or nonresident operating privilege, notwithstanding the termination of the [ALS], if the judge, referee, or mayor determines at the initial appearance that the person's continued driving will be a threat to public safety.

Id. Thus, the public safety suspension can only be imposed if the ALS is terminated. Otherwise, a court is precluded from utilizing this statute.

246. Like the ALS, the suspension period is credited towards any suspension imposed at the end of the case.

247. No Ohio court has considered the availability and nature of R.C. § 4511.196 when considering whether the ALS is punitive or remedial.


249. See discussion regarding stays, infra at Part V.
from the OMVI charge(s). However, three courts argue that the ALS and OMVI take place in a "single, coordinated prosecution." One court has questioned whether the imposition of the ALS, effected summarily at the time of arrest, can even be characterized as a proceeding at all.


253. State v. Beltz, 654 N.E.2d 199 (Ohio Mun. Ct. 1995). The court, in holding that a refusal ALS suspension did not bar a subsequent prosecution for OMVI, noted:

It is difficult to characterize the A.L.S. as a "proceeding" at all. The sanction, loss of driving privileges, is accomplished with the stroke of a law enforcement officer's pen within minutes of arresting the suspected drinking driver—no notice, no hearing. The only "proceeding" is the appeal which occurs after the fact, and during which driving privileges remain suspended. Gone are the troublesome requirements of prior notice and opportunity to be heard. With supreme efficiency the execution is over before the trial begins.

Id. See also State v. Knisely, No. H-94-044, 1995 WL 490937 (Ohio Ct. App. Aug. 18, 1995), where the court, in striking down the ALS as violative of due process, noted that "[a]n 'on the spot' suspension, by its very nature, deprives the licensee of any notice of the proposed action . . . [a]nd, an arresting officer, who is both the accuser and arbiter of the offense, can hardly be deemed neutral and impartial."

The Beltz court tangentially raised an issue of some importance—can jeopardy attach if a defendant acquiesces to the ALS at the time of arrest and does not contest (or appeal) the ALS at the initial appearance? Stated another way, have the Double Jeopardy Clause concerns as to anxiety, expense, depletion of resources, and public embarrassment by repeated attempts to convict and punish been significantly infringed by permitting a trial on the OMVI charge after a summary ALS that has not been contested? See, e.g., State v. Uncapher, 650 N.E.2d 195 (1995). In Uncapher, the defendant did not contest the ALS in court. The Uncapher court held that:

Uncapher did not avail herself of any court proceedings. The notice of the ALS was given to her but she did not appeal. Therefore there has never been a judicial or administrative proceeding beyond the service of notice either of the ALS or the DUI/PAC, excepting this motion to dismiss. . . . In every authority cited by the defendant, the other proceeding involved a hearing or trial process wherein a determination was made to impose or continue the civil sanction. If the defendant waives such a determination and forgoes the hearing, no judicial or quasi-judicial process has put the defendant through all the hurdles that double jeopardy is intended to foreclose.

Id. at 14.
“The most basic element of the Double Jeopardy Clause is the protection it affords against successive prosecutions — that is, against efforts to impose punishment for the same offense in two or more separate proceedings.”254 The requirement of a second proceeding “is critical in triggering the protections of the Double Jeopardy Clause.”255 However, the Supreme Court has also stated unequivocally that the government may seek and obtain “both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding.”256


In United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994), Torres failed to file a claim in the civil forfeiture proceeding and $60,000 was forfeited. In denying his claim that the forfeiture triggered double jeopardy protection at a subsequent criminal trial, the court held that as a non-party, Torres was not at risk in the forfeiture proceeding, and “[w]ithout risk of a determination of guilty, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.” Id. at 391-92. Accord United States v. Cotts, 1995 U.S. Dist. LEXIS 4992 (E.D. Ill. 1995); United States v. Martin, 1995 U.S. Dist. LEXIS 3459 (N.D. Ill. 1995); United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995).

But see Quinones-Ruiz v. United States, 864 F. Supp. 983, 986 (S.D. Cal.), on reconsideration, 873 F. Supp. 359 (S.D. Cal. 1995) (“Although in this case plaintiff did not timely contest the forfeiture because he claims he never received notice of the impending proceeding, the forfeiture still constituted a ‘proceeding’ separate from the criminal prosecution. The government’s characterization of the forfeiture in this case as ‘administrative’ does not preclude this conclusion. The Court therefore finds that the forfeiture in this case constituted a separate proceeding from the criminal conviction.”); United States v. Aguilar, 886 F. Supp. 740, 743 (E.D. Wash. 1994) (“It is irrelevant whether, as the government claims, Aguilar failed to contest the forfeiture . . . . This criminal proceeding constitutes a second punishment for the conduct already punished by the civil forfeiture action, and is barred by the double jeopardy clause.”).

Unlike Torres, and to a greater extent than in Quinones-Ruiz and Aguilar, a motorist has participated, albeit unwillingly, to an “on the spot” summary ALS process.


256. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature. Halper, 490 U.S. at 450; Missouri v. Hunter, 459 U.S. 359, 368-369 (1983) (“Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.”).
Ohio courts that have analyzed whether the ALS/OMVI statutory scheme constitutes separate proceedings, or, instead, dovetail into the same proceeding, have examined recent double jeopardy cases for guidance.\(^{257}\) Ohio courts that have held that the ALS/OMVI statutes constitute a “single, coordinated proceeding” look to the case of *United States v. Millan* for support.

In *Millan*, arrest warrants for members of the Bottones family, and seizure warrants for their property, were issued on the same day by the same magistrate for the same criminal conduct. Shortly thereafter, the Bottones entered into a stipulation, in which they forfeited property and $234,804.48. Prior to trial, they moved to dismiss their criminal charges on the basis of double jeopardy. The trial court rejected their motions, holding, *inter alia*, that the civil forfeiture and the criminal case constituted a single proceeding.

The Second Circuit affirmed. Noting that *Halper* did not preclude the government from seeking the full range of civil and criminal penalties in the same proceeding,\(^ {258}\) the court held that the civil and criminal actions “were but different prongs of a single prosecution of the Bottones by the government.”\(^ {259}\) Although the civil and criminal cases were filed under different docket numbers, “courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated.” Although cognizant of the *Halper* [and $405,089.23] concern that the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action, the Second Circuit noted that the actions were filed contemporaneously and not consecutively, and thus provided the Bottones with notice at the outset that the government intended to pursue all available civil and criminal remedies.\(^ {260}\)


\(^{259}\) *Millan*, 2 F.3d at 20.

\(^{260}\) *Id.* *See also One Single Family Residence*, 13 F.3d at 1499. In *One Single Family Residence*, the court held the “simultaneous pursuit” of criminal and civil sanctions, both encompassed in 18 U.S.C. § 1955, falls within the contours of a single, coordinated prosecution and is merely seeking cumulative punishment for a single course of punishment.
The cases that have held that Ohio’s scheme constitutes “separate proceedings” ground their decisions, in part, on United States v. $405,089.23 and United States v. Ursery. In $405,089.23, the government filed a forfeiture case five days after a grand jury issued a superseding indictment for a variety of drug, money laundering and conspiracy charges. The case was stayed, pending the completion of the parallel criminal case being heard before a different judge. After the claimants in the forfeiture action were convicted of the criminal charges, the government filed for summary judgment in the forfeiture case, relying on the convictions in the criminal case to establish probable cause for the forfeiture. Since the claimants did not produce any evidence tending to show the property was not subject to forfeiture, the court granted summary judgment to the government.

The Ninth Circuit reversed, noting that the case implicates “core Double Jeopardy protection.” The court explained:

We fail 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.” In ordinary legal parlance, such actions are often characterized as “parallel proceedings,” but not as the “same proceeding.” A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time. . . . However, the government chose to proceed against the claimants on two separate fronts — in two separate, parallel proceedings. Because the district court followed the customary practice and held the civil action in abeyance pending the outcome of the criminal prosecution, the government obtained a significant advantage: if it succeeded in the criminal case it could obtain summary judgment based on the conviction. . . . while if it lost it could still seek forfeiture and urge that the more lenient standards applicable in civil proceedings be applied. . . . We believe that such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to “run the gauntlet” more than once.262

Both Millan and One Single Family Residence were decided before Kurth Ranch and have been criticized as “clearly wrong.” See SMITH, supra note 133, at ¶ 12.10. For example, Judge Easterbrook noted, “[i]n Kurth Ranch itself, the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered. 114 S.Ct. at 1747 n.2.” United States v. Torres, 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).


262. Id. at 1216-17.
The court further held:

We can discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action. We conclude, therefore, that whether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopardy clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." 263

In United States v. Ursery, the government instituted a civil forfeiture action, which Ursery resolved by entering into a consent judgment and agreeing to pay the government $13,250.00. During the pendency of the civil suit, the federal government indicted Ursery for drug trafficking, which was resolved by a jury's guilty verdict, approximately one month after the court had accepted and filed the consent judgment in the forfeiture case. The Sixth Circuit "acknowledged" the Ninth Circuit's position that parallel criminal and civil forfeiture proceedings based on the same conduct will always violate the Double Jeopardy Clause. However, the Sixth Circuit believed that the Ursery case would still be outside the scope of a "single, coordinated proceeding," regardless of $405,089.23, because the attorneys who handled the civil and criminal cases respectively had no communication with each other, the actions were filed four months apart, were presided over by different judges and were resolved by different judgments. 264

Ultimately the United States Supreme Court must decide the limits of pursuing parallel criminal and civil actions, as well as the significance of "timing" in bringing the actions. 265 On the one hand, the government has always been permitted to bifurcate a single indictment containing both crimi-

263. Id. at 1218.
264. United States v. Ursery, 59 F.3d 568, 575 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346) ("The district court judge found these two proceedings to be part of a 'single, coordinated proceeding' without providing any factual support for this determination. As a matter of principle, applying a label to something does not make it so."). Accord United States v. Perez, 70 F.3d 345 (5th Cir. 1995).

Perez was arrested with 96 kilograms of marijuana in her vehicle. After indictment, the government brought an in rem civil proceeding seeking forfeiture of her vehicle. Perez entered into a "Stipulation of Settlement" and agreed to the forfeiture of her $23,000.00 car. Subsequently she moved to dismiss her indictment on double jeopardy grounds. Perez's ongoing prosecution was held to be a second attempt to punish her criminally for the same marijuana offenses as implicated in the civil forfeiture action and was barred by the Double Jeopardy Clause. Id. at 349.

265. However, after Kurth Ranch, the government "would do well to seek imprisonment, fines and forfeitures in one proceeding" because "after Halper, Austin and Kurth Ranch, the nomenclature 'civil' does not carry much weight." United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).
nal and forfeiture counts, if the defendant consents to the bifurcation. In many cases, especially if contemporaneous with each other, a defendant will be able to effectively negotiate the resolution of all proceedings and, rather than be victimized by a "coordinated, manipulative prosecution strategy," actually obtain an advantage by being able to swap property for sentencing concessions. Conversely, the prospect of defending two different actions, often in different courtrooms with different judges and juries, with different burdens of proof and procedures, is just the type of mischief the Double Jeopardy Clause was designed to prevent.

It is immediately clear that the Ohio ALS/OMVI statutory procedure is neither a unitary proceeding where all charges are heard at the same trial, nor separate, parallel proceedings of the nature condemned in $405,089.23 and permitted in Millan. Instead, the ALS is somewhat of a hybrid, evolving over decades on the basis of increasingly punitive amendments which narrowed the timing of the actions in relation to each other, and which left to the courts the formidable task of providing solutions to any unanswered questions in the amendments.

The cases holding that the ALS is a proceeding separate and apart from the OMVI charge all rely on Ohio Supreme Court precedent (State v. Starnes and Hoban v. Rice) from the early 1970s holding the ALS to be civil and administrative in nature. However, the system in effect at the time of Starnes and Hoban resembles the present system in name only. At that


267. The author makes no comment on the ethics of this type of plea negotiation except to acknowledge that it takes place and appears to be accepted in the practice.

268. For example, "[t]he statute does not specify whether the licensee must file a written notice of appeal and request a hearing in order to perfect an ALS appeal." State v. Hochhausler, Nos. CA93-12-104, CA93-12-105, 1995 WL 308484, at *9 (Ohio Ct. App., 12th Dist., May 12, 1995). See also State v. Knisely, No. H-94-044, 1995 WL 490937, at *4 (Ohio Ct. App., 6th Dist., Aug. 18, 1995) (in rejecting Knisely's void for vagueness claim, the court noted that "[m]erely because a statute doesn't patently describe the type of rules to be applied to a hearing, such a purported deficiency is not of such a magnitude as to overcome the presumption of unconstitutionality.").


271. See supra section III(E) (describing the 1970 system).
time, a refusal to take a requested chemical test resulted in notification by the Registrar that a motorist’s license would be suspended, unless the motorist filed a petition contesting the suspension. The filing of the petition, heard under a different case number and by a different judge than the OMVI charge, tolled any license suspension pending adjudication by the court and any appeal that might be filed. Additionally, occupational driving privileges were immediately available to the motorist. Therefore, the ALS and the OMVI charge oftentimes did not run on even closely parallel tracks.

Today, the ALS, as recognized by at least four Ohio courts,\textsuperscript{272} is closely tied to the OMVI charge. When a motorist tests over the “per se” limit, the ALS is triggered by the precise conduct that is subject to the criminal charge. Both the complaint and the ALS suspension are given to the motorist at the time of arrest. The ALS can be reviewed at the initial appearance on the substantive OMVI charge. Oftentimes, the cases are docketed together.\textsuperscript{273} When consideration of the ALS is continued by either the parties or the judge, the ALS is assigned to the same judge, (and often the same prosecutor), as assigned to the OMVI.\textsuperscript{274} A court is statutorily without power to stay the effect of the ALS, or to grant occupational driving privileges, during the initial stages of the suspension. Even though the statute provides that the ALS is “independent” of any penalties for the OMVI charge, the ALS is inextricably connected to the outcome of the OMVI charge since it terminates upon a guilty or no contest plea, or upon acquittal by the court.\textsuperscript{275} Moreover, the duration of any ALS is credited against any suspension given by the court.\textsuperscript{276}

\begin{itemize}
\item \textsuperscript{273} Weese, 1995 WL 614139 at *7 (Close, J., concurring in part and dissenting in part) (the ALS and the criminal proceedings were docketed together and labeled under the same case number and heard by the same judge).
\item \textsuperscript{274} In Elfrink, 1995 WL 584350, at *4, the ALS proceeding has been characterized as more closely resembling the resolution of a pretrial motion proceeding rather than a separate administrative proceeding.
\item \textsuperscript{275} An ALS suspension triggered by a refusal is terminated if the motorist pleads guilty or no contest to the charge of OMVI. Otherwise it continues until expiration.
\item \textsuperscript{276} As stated in Uncapher:
\end{itemize}

\textquote{[T]he ALS merges with the DUI/PAC case in the municipal court, where the traffic judge, within the traffic case, determines the ALS appeal, occupational rights, termination of the suspension, continuation of the suspension, and crediting of the ALS to the court suspension. For all purposes, there is one case, one court, one judge and one suspension. Therefore, double jeopardy does not apply because the ALS does not involve multiple proceedings as previously characterized by court analysis.}

650 N.E.2d at 205.
It is also clear that, but for the mandated "on the spot" license suspension, the present ALS does not lend itself to a "manipulative prosecution strategy" producing "significant advantage[s]" to the prosecution of the type condemned in $405,089.23. Rather than "whitewashing [a] double jeopardy violation . . . by affording constitutional significance to the label of 'single, coordinated prosecution,'" for many defendants, a holding that the ALS is part of the same proceeding as the OMVI charge may result in significant advantages for them. For example, if the ALS were a separate civil proceeding, counsel would not have to be provided at state expense. A holding that the ALS is in the form of a "pretrial motion," would appear to mandate appointment of counsel who would be obliged to contest the ALS in many cases. Moreover, contested ALS hearings would yield defendants valuable discovery for the trial on the substantive charges, and could provide leverage for resolving the case on a favorable basis. The downside for the judiciary may be more hearings, using up scarce courtroom space, time and resources.

There is no easy answer to the issue of "separate proceedings." Other nuances of the present scheme militate in both directions. For example, the method of adjudication of the ALS is significantly different than an OMVI violation. The ALS is exacted without a finding of guilt beyond a reason-


279. One authority has recommended that the ALS proceeding be considered "civil in nature" that is "ancillary to the criminal matter." Painter and Looker, supra note 16, at ¶ 7.6.

At this time, Ohio courts are not in agreement concerning the treatment of the ALS as a separate proceeding. Painter and Looker have described the confusion as follows:

Some courts seem to have taken the position that the appeal of the ALS is a separate civil matter, and should be filed as a separate civil complaint, as was the case with the previous "implied consent" suspensions. Under the former "implied consent" law, an appeal of the suspension for the refusal to take the test . . . was filed in the municipal or county court which had jurisdiction over the place where the defendant resided, not the place where the event occurred . . . .

In light of the language that the appeal of the ALS may be "filed" at the initial appearance, which is obviously part of the criminal case, it is only common sense that the ALS appeal should be part of the criminal case. Otherwise, an extremely anomalous situation would occur, especially in a multi-judge court: one judge might hear the D.U.I. case and another hear the ALS suspension, and even a third judge could hear the petition for occupational privileges. Under the Rules of Superintendence, a civil case would be assigned to a judge selected by lot.

For all the above reasons, it is strongly recommended that the ALS appeal, and the petition for occupational privileges, be treated as civil matters, ancillary to the criminal case, have the same case number, and be assigned to the same judge.

Id.

280. An ALS hearing certainly meets the statutory definition of a "trial," which is defined
able doubt, and unlike many typical criminal motions, the defendant must shoulder the burden of proof. Also, ALS proceedings are subject to the Rules of Civil Procedure rather than the Rules of Criminal Procedure,281 and are not strictly governed by the Ohio Rules of Evidence, as is characteristic of an administrative proceeding where the rules of evidence are frequently relaxed.282 In fact, courts have permitted law enforcement officers’ reports to be admissible under Evidence Rule 803(8), as an exception to the hearsay rule, because the ALS is a civil rather than criminal proceeding.283 The means of satisfying a judgment also differs in that the reinstatement fee for the ALS is paid to the Registrar, while the reinstatement fee after an OMVI suspension is paid to the court.284 Finally, an appeal of the ALS to the municipal court is decided separately from the criminal charges.285

On the other hand, the interaction between the ALS and OMVI adjudications suggests some degree of interconnection. While the ALS is “independent” of penalties and sanctions imposed pursuant to any other section of the Revised Code,286 the ALS is merged and credit is given at the time of sentencing for any ALS suspension, or it is terminated in the event of an acquittal.287

as “a judicial examination of the issues, whether of law or of fact, in an action or proceeding,” OHIO REV. CODE ANN. § 2311.01 (Baldwin 1994), but that is of little assistance as this definition can just as easily apply to a pretrial motion.


283. See State v. Sanders, Nos. 95 CA 11, 95 CA 12, 1995 WL 634371 (Ohio Ct. App., 2d Dist., Sept. 29, 1995). OHIO R. EVID. 803(8) provides:

Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness. (Emphasis added).


285. The outcome of an ALS hearing may affect the admissibility of prosecution evidence at trial. For example, a determination that no reasonable grounds existed for an arrest on a charge of OMVI, which the defendant must prove at an ALS hearing by a preponderance of the evidence, should be accorded collateral estoppel effect at a subsequent, similarly grounded motion to suppress. However, at least one court has rejected the use of collateral estoppel by the defendant in this fashion. See State v. Roberts, No. 93 CA 2020, 1995 WL 271729 (Ohio Ct. App., 4th Dist., May 4, 1995).


287. Except for a refusal suspension where no plea is entered.
The Third and Twelfth Appellate Districts have determined that the appeal of an ALS before a municipal court judge is a “final, appealable order” which must be appealed within 30 days of the municipal court decision.\textsuperscript{288} Notwithstanding that, the ALS is merged into any sentence at the conclusion of the case, thereby rendering many, if not most, appeals moot.

Ultimately the Ohio Supreme Court will have to determine whether the current ALS departs so far from its predecessors that former ALS precedent can no longer be considered controlling. In a 25 year unbroken string of decisions from Ohio courts, an ALS suspension has been considered civil and administrative in nature. It is unlikely the court will acknowledge that the ALS is a component of the criminal case, because such a holding would mandate counsel be provided to indigents to contest the ALS.\textsuperscript{289} However, the state cannot declare the ALS a civil proceeding in order to avoid the Sixth Amendment guarantee of counsel and, in order to take advantage of relaxed rules and procedures, concurrently hold that the ALS does not constitute a separate proceeding in order to deny double jeopardy protection. Until the Ohio Supreme Court is willing to change the nature of the proceeding to ensure that the rights ordinarily afforded criminal defendants are afforded to ALS appellants, the hearing should continue to be characterized as “civil,” and the hearing represents a “separate proceeding” for the purpose of determining double jeopardy protection.

\section*{C. The ALS and OMVI Punish the Same Conduct}

The Double Jeopardy Clause protects the accused from multiple punishments, in multiple proceedings, for the same offense. “[W]here the two offenses for which the defendant is punished or tried cannot survive the “same-
elements’ test [of Blockburger v. United States\textsuperscript{290}], the double jeopardy bar applies.’’\textsuperscript{291}

In Blockburger, the Supreme Court was asked to determine whether consecutive sentences could be imposed for two convictions under different sections of the Harrison Narcotics Act. Blockburger was convicted, based on one sale, of both selling drugs not in their original stamped package, as well as selling drugs “not in pursuance of a written order of the person to whom the drug is sold.” The two counts netted Blockburger two five year sentences, the terms of imprisonment to run consecutively.\textsuperscript{292} The Court, in formulating a device for determining congressional intent regarding cumulative sentences,\textsuperscript{293} held:

\begin{quote}
[\text{U}pon the face of the statute, two distinct offenses are created. Here there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one.]
\end{quote}

\* \* \* \*

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . . A single act may be an offense against two statutes; \textit{and if each statute requires proof of an additional fact which the other does not}, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other . . . . Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.\textsuperscript{294}

\begin{footnotes}
\item[290.] Blockburger v. United States, 284 U.S. 299 (1932).
\item[292.] \textit{Id.} at 303-4.
\item[293.] \textit{See} LAFAVE AND ISRAEL, CRIMINAL PROCEDURE 779 (2d ed. 1992).
\item[294.] Blockburger, 284 U.S. at 303 (emphasis added). \textit{See also} Illinois v. Vitale, 447 U.S. 410 (1980). In \textit{Vitale}, Vitale allegedly caused a fatal accident. A police officer at the scene issued Vitale a ticket for failure to reduce speed to avoid an accident. Vitale was convicted and sentenced to pay a $15 fine. The day after his conviction, the State charged Vitale with two counts of involuntary manslaughter, based upon reckless driving. Vitale argued that the subsequent prosecution was barred by the Double Jeopardy Clause. \textit{Id.} at 414.

The Court held that the second prosecution was not barred under the traditional \textit{Blockburger} test because each offense “require[d] proof of a fact which the other [did] not.” \textit{Id.} at 416. Although involuntary manslaughter required proof of a death, failure to reduce speed did not. Likewise, failure to slow was not a statutory element of involuntary manslaughter. Thus, the subsequent prosecution survived the Blockburger test.
\end{footnotes}
The Court applied the *Blockburger* test to multiple prosecutions in *Brown v. Ohio*\(^{295}\). Brown stole a car on November 29, and was apprehended in another county on December 8. He was originally charged with joyriding on December 8, to which he pled guilty. Shortly thereafter, he was indicted for auto theft and joyriding stemming from his conduct on November 29. His convictions for the new offenses were affirmed by the state courts, despite his double jeopardy objection.

The Supreme Court reversed. After concluding that an offense could be the same without being "identical" for double jeopardy purposes, the Court adopted the *Blockburger* test for determining when two offenses constitute the same offense: whether each provision requires proof of an additional fact which the other does not. The *Brown* Court then held:

> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions . . . . Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive prosecutions.\(^{296}\)

The Court then proceeded to apply the test to the facts of the case. Looking to the definitions of joyriding and auto theft under Ohio law, the Court determined that joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding plus the intent to permanently deprive the owner of possession. That is, the relationship of the two offenses — joyriding being a lesser included offense of auto theft — was that of concentric circles rather than overlapping circles. Thus, they were the "same" under *Blockburger* since, as a matter of Ohio law, only a single, continuing offense was involved.\(^{297}\)

*United States v. Dixon*\(^{298}\) is the most recent United States Supreme Court opinion interpreting the Double Jeopardy Clause as it relates to multiple punishments in multiple prosecutions.\(^{299}\) The Court reaffirmed *Blockburger*
as the sole test to determine whether a second prosecution is barred on double
jeopardy grounds due to the imposition of punishment in a prior case.

Dixon was arrested for murder and released on bail. His Conditions of
Release Form provided that he was not to commit "any criminal offense," and
violation of a condition of release might subject him to criminal contempt.
While Dixon was awaiting trial, he was arrested and indicted for possession
of cocaine with intent to distribute. The trial court issued a show cause order,
a hearing ensued and Dixon was held in contempt and sentenced to 180 days
in jail. He later moved to dismiss the cocaine indictment on double jeopardy
grounds, which the trial court granted and the Supreme Court affirmed.

The Court held that the contempt statute, as applied in Dixon’s case,
incorporated as elements the entire governing criminal code, including the
offense of possession of cocaine with intent to distribute. Applying
Blockburger, the criminal contempt charge contained numerous elements
which were not contained in the cocaine distribution offense. Without more,
a prosecution on the cocaine distribution charge would not be barred. How-
ever, the cocaine distribution charge did not contain any element not con-
tained in the criminal contempt charge. “Because Dixon’s drug offenses did
not include any element not contained in his previous contempt offense, his
subsequent prosecution violate[d] the Double Jeopardy Clause.”300 Stated
another way, “the relationship of the two offenses was that of concentric
circles rather than overlapping circles,” and was therefore the ‘same’ under
Blockburger.301

whether multiple punishments are barred in separate proceedings is the Blockburger “same
elements” test.

In Harris v. Oklahoma, a subsequent prosecution for robbery with a firearm was barred by
the Double Jeopardy Clause, because the defendant had already been tried for felony-murder
based on the same underlying conduct. Id. at 682.

301. By way of contrast, in the companion case in Dixon, Foster was subject to a civil
protection order ("CPO") providing that he not molest, assault, or in any manner threaten or
physically abuse his wife, which he violated by throwing her “down basement stairs, kicking
her body, . . . [and] push[ing] her head into the floor causing head injuries . . . [and] lost
consciousness.” Dixon, 113 S. Ct. at 2854. He was subsequently charged with criminal
contempt, which was prosecuted by his wife’s private attorney. The criminal contempt charge
required the prosecution to prove as elements that there was a CPO, that Foster was aware of
it, and that an assault occurred. Foster was found guilty and sentenced to jail. Id.

Subsequently Foster was indicted for assault with intent to kill and moved to dismiss on the
basis of double jeopardy, which was denied by the trial court. The Supreme Court affirmed.
Highlighting the reciprocal nature of the inquiry under Blockburger, the Court stated:

On the basis of the same episode, Foster was . . . indicted for . . . assault with intent
to kill. Under governing law, that offense requires proof of specific intent to kill;
simple assault does not. Similarly, the contempt offense required proof of knowledge
of the CPO, which assault with intent to kill does not. Applying the Blockburger
According to the Blockburger-Dixon test, "if each statute requires proof of an additional fact that the other does not," the defendant will not be protected from punishment in two separate proceedings. Therefore, in order to determine if multiple punishments are barred, it is necessary to determine the proof, or "elements," that comprise both the ALS and OMVI proceedings.\(^{302}\)

Because the ALS can be triggered by both a "refusal" and a "failure," it is necessary to examine both occurrences, and the elements of each independently, in order to determine which, if any, substantive OMVI charges may be barred. For example, when the ALS is the result of a refusal to take a chemical test, the only OMVI charge that the defendant can be charged with is driving "under the influence."\(^{303}\) When the ALS is the result of a "failure," in order to determine whether the double jeopardy bar applies, a comparison of the ALS elements must be made with the elements of both the "under the influence" and the "per se"\(^{304}\) divisions of the statute.

Ohio courts have given only cursory treatment to this issue. Many courts determined that the ALS did not constitute punishment and never reached consideration of the Blockburger-Dixon issue.\(^{305}\) All courts considering the issue of whether an ALS "failure" is comprised of the same elements as the "per se" offense conclude that the elements are identical.\(^{306}\) All courts con-

\(^{302}\) Many Ohio cases which have reached this issue have defined the issue as whether the ALS and the OMVI constitute the "same offense," see State v. Baker, 650 N.E.2d 1376, 1381 (Ohio Mun. Ct. 1995); State v. Uncapher, 650 N.E.2d 195, 197 (1995), or involve the "same conduct," see City of Whitehall v. Weese, No. 95 APC02-169, 1995 WL 614139, at *6 (Ohio Ct. App., 10th Dist., Oct. 17, 1995). State v. Sims, No. CA-94-12-215, 1995 WL 493291, at *2 (Ohio Ct. App., 12th Dist., Aug. 21), appeal granted, 656 N.E.2d 346 (Ohio 1995); State v. Gustafson, No. 94 CA-232, 1995 WL 387619, at *3 (Ohio Ct. App., 7th Dist., June 27), appeal granted, 652 N.E.2d 800 (Ohio 1995); State v. Ackrouche, 650 N.E.2d 535, 536 (Ohio Mun. Ct. 1995). If these terms are meant to be synonymous with "same elements," then these courts applied the correct legal terminology in determining the issue. However, the United States Supreme Court, in Dixon, clearly rejected a "same conduct" test as a vehicle to determine the propriety of when multiple punishments can be imposed in separate proceedings. Dixon, 113 S. Ct. at 2860.


\(^{304}\) OHIO REV. CODE ANN. § 4511.19(A)(2)-(4) (Baldwin 1994).


considering the issue of whether a “refusal” suspension bars a subsequent prosecution for the “under the influence” charge conclude that a “refusal” ALS does not present a bar to a subsequent prosecution for driving “under the influence.” Only three courts have considered whether a “failure” ALS bars a subsequent prosecution for an “under the influence” prosecution. Two courts held that it does not; one court held that it does.

Assuming the ALS constitutes punishment, the courts holding that an OMVI prosecution can proceed after an ALS suspension have improperly applied the Blockburger-Dixon test. An ALS predicated on either a “refusal” or a “failure” will serve as a bar to prosecution for any division of the OMVI statute.

In every Ohio case, courts have simply examined whether the ALS contains an element that is not included in the substantive OMVI charge. Using this approach, a “refusal” suspension would not bar a prosecution on an “under the influence” charge, because “under the influence” does not contain the element of refusing to take a chemical test. Likewise, a “failure” would not bar a prosecution on the “under the influence” charge, because a test over the “per se” level is not an element of the “under the influence” charge.

However, Blockburger-Dixon requires reciprocal inquiries: “whether each offense contains an element not contained in the other.” Although an


308. Sims, 1995 WL 493291, at *2 (bar only as to the “per se”); Ackrouche, 650 N.E.2d at 537 (bar only as to the “per se”).

In Harrison, 654 N.E.2d at 211, it is unclear whether the court, had it determined the ALS was punishment, would have barred both the “under the influence” and “per se” charge.

One reason that appellate courts have not considered the issue of whether an ALS “failure” presents a bar to both the “under the influence” and “per se” offense is that both offenses should not be before the appellate court at the same time. Section 4511.19(C) provides that a person may be charged with more than one section of the OMVI statute, “but he may not be convicted of more than one violation of these divisions.” OHIO REV. CODE ANN. § 4511.19(c) (Baldwin 1994). See also OHIO REV. CODE ANN. § 2941.25 (Baldwin 1994) (Multiple Counts). Since one of the OMVI charges will ultimately be dismissed by the trial court prior to appeal, it is beyond the scope of the appeal to determine if both the “under the influence” and the “per se” OMVI offenses are barred by double jeopardy. Trial courts generally sentence on the “per se” offense, perhaps because defense attorneys believe it carries less stigma than “actually” driving under the influence of alcohol, and request sentencing accordingly.

309. See discussion, supra notes 177-250 and accompanying text.

310. See statutes, infra notes 314-15 and accompanying text.

ALS may have elements not included in the substantive OMVI charge, it does not necessarily follow that the reverse is true.\textsuperscript{312} The ALS elements are set forth in the statute describing the scope of the ALS appeal:

(a) Whether the law enforcement officer had reasonable ground to believe the arrested person was \textit{operating a vehicle} upon a highway or public or private property used by the public for vehicular travel or parking within this state \textit{while under the influence of alcohol}, a drug of abuse, or alcohol and a drug of abuse or with a prohibited concentration of alcohol in the blood, breath, or urine, and whether the arrested person was in fact placed under arrest;

(b) Whether the law enforcement officer requested the arrested person to submit to the chemical test designated pursuant to division (A) of this section;

(c) Whether the arresting officer informed the arrested person of the consequences of refusing to be tested or of submitting to the test;

(d) Whichever of the following is applicable:

(i) Whether the arrested person \textit{refused} to submit to the chemical test required by the officer;

\textsuperscript{312} An example of the reciprocal inquiry formula is found in United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), \textit{cert. granted}, 64 U.S.L.W. 3477, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346). The court stated:

The government argues that the civil forfeiture and criminal conviction here do not constitute punishment for the same offense because the criminal prosecution requires proof that \textit{a person}, the defendant, committed the crime, while the forfeiture requires proof that the \textit{property} subject to forfeiture has been involved in the commission of a criminal violation. Thus each offense requires an element that the other does not. We disagree with this analysis.

We find that the forfeiture and conviction are punishment for the same offense because \textit{the forfeiture necessarily requires proof of the criminal offense}. The forfeiture applies to "[a]ll real property ... which is used ... to commit or to facilitate ... a violation of this subchapter." 21 U.S.C. § 881(a)(7). Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery’s residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action.

\textit{Id.} (citations omitted) (emphasis added). \textit{Accord} United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 495 (9th Cir. 1994); United States v. Tilley, 18 F.3d 295, 297-98 (5th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 574 (1994); Oakes v. United States, 872 F. Supp. 817, 824 (E.D. Wash. 1994) ("[U]nless the civil forfeiture under § 881(a)(4) can be predicated upon some offense other than those for which McCullogh has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause.").
(ii) Whether the chemical test results indicate that his blood contained a concentration of ten-hundredths of one per cent or more by weight of alcohol, his breath contained a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath, or his urine contained a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine at the time of the alleged offense. 313

The OMVI section reads:

(A) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if any of the following apply:

(1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(2) The person has a concentration of ten hundredths of one per cent or more by weight of alcohol in his blood;

(3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;

(4) The person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine. 314

When viewed from the perspective of whether every element of the OMVI offenses are contained within the ALS, it is clear that they are. After a simple comparison, it is immediately apparent that each element of all four divisions of the OMVI statute are contained in the Ohio prerequisites for a valid ALS suspension. Although a refusal is not an element of an “under the influence” OMVI charge, the OMVI element of being “under the influence” is a requirement of the ALS. Likewise, although a test over the “per se” limit is not an element of an “under the influence” OMVI charge, the OMVI element of being “under the influence” is a requirement of the ALS. 315 Therefore,

315. It is true that the person who appeals the suspension has the burden of proving, by a preponderance of the evidence, that one or more of the specified conditions in Ohio Revised Code § 4511.191(H)(1)(a-d) have not been met. It is also true that a law enforcement officer must only have “reasonable ground” to believe the arrested person was operating under the influence of alcohol. However, in making double jeopardy determinations, “[t]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.” United States v. Halper, 490 U.S. 435, 448 (1989) (quoting, Hicks v. Feiock, 485 U.S. 624, 631 (1988)).

In a civil forfeiture action, the government must show probable cause that the res was used in the commission of various, designated offenses. Once shown, the burden shifts to the
because the ALS and OMVI do not each contain different elements, utilization of both the ALS and OMVI violates the Double Jeopardy Clause as multiple punishments of the same offense in multiple proceedings.

D. Double Jeopardy Conclusions

The imposition of an ALS suspension was meant as a penalty for potentially violating Ohio’s OMVI laws. At the time the original versions of the present scheme were enacted, there was no realistic double jeopardy check, largely because the Supreme Court had been reluctant to extend double jeopardy protection to “civil” proceedings. Since the “Halper genie” has been let out of its bottle, however, legislatures must reassess penalty schemes that inflict punishment in parallel criminal and “civil” proceedings for the same conduct.

During the past twelve years, the General Assembly has increasingly ratcheted up the punitive provisions of the ALS, and has correspondingly eliminated an individualized assessment of a first-time arrestee’s potential threat to public safety from ALS consideration. This trend, left unchecked, will certainly continue in the future.

At some point, courts have a constitutional responsibility to acknowledge that the label “remedial” does not operate as a talisman in order to avoid difficult, politically unpalatable, decisions. Ohio’s present ALS constitutes punishment. Ohio can continue to subject motorists to a variety of punitive pretrial sanctions, but not without cost—critical judicial scrutiny which will result in significant impediments to prosecuting the substantive OMVI offense. The lesson of Halper, Austin and Kurth Ranch is that when a jurisdiction overreaches with civil punishment, it is limited to that punishment, and a later opportunity to punish criminally will be barred.

claimant to prove by a preponderance of the evidence one or more defenses. See 21 U.S.C. § 881 (1994). “Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery’s residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action.” Ursery, 59 F.3d at 573.


317. See State v. Hanson, 532 N.W.2d 598, 605 (Minn. 1995) (implied consent is substantial punishment “with remediation barely hanging on as an afterthought.”).

318. Resolution of double jeopardy claims in favor of defendants can be a sensitive political issue. “Many trial judges are reacting to it like Dracula to sunshine.” Statement of John Henry Hingson, Portland, Oregon, quoted in LAW. WKLY. USA, February 13, 1995.
IV. THE ALS VIOLATES PROCEDURAL DUE PROCESS

A. Introduction

During the upcoming term, the Ohio Supreme Court will review the Sixth Appellate District’s conclusion, in State v. Knisely, that Ohio’s ALS is violative of procedural due process. Ohio’s ALS is punitive, at least for double jeopardy purposes. That conclusion, however, is only a factor in determining whether Ohio’s ALS violates due process guarantees.

At first glance, a punitive ALS would seem to undermine the argument that the scheme comports with due process. Punishment is commonly thought of as being meted out after conviction, and the converse has been criticized long before Lewis Carroll wrote Alice in Wonderland. However, many civil proceedings, such as forfeitures, inflict punishment without the nicety of a criminal conviction and without the full panoply of rights that are required in criminal prosecutions. At this juncture, constitutionally required proce-


321. In Mendoza-Martinez, the Supreme Court held that the loss of citizenship was sufficiently punitive to trigger application of safeguards normally associated with criminal trials. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). However, the Supreme Court has not specifically addressed what rights normally attach to punitive civil proceedings.

ALS hearings have been held not to require the rights normally attendant to a criminal trial. See People v. McKnight, 617 P.2d 1178, 1183 (Colo. 1980); People v. Gerke, 525 N.E.2d 68, 71-73 (Ill. 1988); Holte v. North Dakota State Highway Comm’r, 436 N.W.2d 250 (N.D. 1989); Carney v. Motor Vehicles Division, 786 P.2d 1319, 1320 (Or. Ct. App. 1990) (ALS does not implicate criminal constitutional guarantees); State v. O’Brien, 609 A.2d 981, 982 (Ver. 1993) (no right to appointed counsel, jury, confrontation, proof beyond a reasonable doubt).

In United States v. Furlett, 974 F.2d 839 (7th Cir. 1992), the defendants argued that civil penalties in prior proceedings before the Commodities Futures Trading Commission ($75,000.00 fines) barred their subsequent prosecution on criminal offenses. Although the district court ultimately held that the civil fines were remedial, the court was also concerned with the constitutional rights that may be applicable to punitive civil proceedings:

Courts traditionally have been reluctant to impose upon administrative investigations and other proceedings the rigorous requirements which the Constitution demands of criminal prosecutions. Rules which up the constitutional ante in the administrative setting may well render this line of authority obsolete. If the outcome of an administrative charge against an individual can determine whether or not the government has the right to indict that person, for example, it becomes difficult to see why certain of the safeguards which attend criminal prosecutions should not be imposed in the administrative context.

United States v. Furlett, 781 F. Supp. 536, 542 (N.D. Ill. 1991), aff’d, 974 F.2d 839 (7th Cir. 1992) (citations omitted). See also Rudstein, supra note 75, at 600-16.
dural safeguards for punitive civil proceedings are dependent primarily on the Due Process Clause of the Fourteenth Amendment, and many important questions, such as whether the right to counsel and confrontation apply in a particular setting, remain unanswered.\textsuperscript{322} Thus, although Ohio's ALS constitutes punishment prior to conviction, that conclusion does not mean, \textit{ipso facto}, that the ALS violates due process. While the characterization of the ALS as punitive is a consideration, employment of a broader calculus is necessary in reaching an answer.

In \textit{State v. Knisely},\textsuperscript{323} the Sixth Appellate District held that Ohio's ALS, exacted "on the spot," at the time of arrest, by the arresting officer, violates the Fifth and Fourteenth Amendments to the United States Constitution, and

\textsuperscript{322} In many respects, the present status of procedural protections in punitive civil proceedings can be analogized to the protections afforded criminal defendants in state criminal trials before 1960. Whatever protection existed depended on individual state constitutional and statutory protection and the sometimes amorphous protections of the Due Process Clause. Rochin v. California, 342 U.S. 165, 210 (1952) ("Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'.") See also Betts v. Brady, 316 U.S. 455, 462 (1942) ("Due process of law ... formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.").


Whether the Seventh Amendment right to a jury trial attaches to a punitive civil proceeding depends on whether the action was triable to a jury at common law. For example, in civil forfeiture proceedings arising from seizures on land, the courts of Exchequer provided for a jury trial at common law. Therefore, in federal court, civil forfeitures cases are triable by jury. See C.J. Hendry v. Moore, 318 U.S. 133 (1943). However, the Seventh Amendment has never been made applicable to the States. Nonetheless, most state courts have interpreted their state constitutional right to a jury trial, often couched in language identical to their federal counterpart, as mandating a jury if the cause of action was triable to a jury at common law. See Vergari v. Marcus, 300 N.Y.S.2d 200 (N.Y. App. Div. 1970); Commonwealth v. One 1984 Z-28 Camaro Coupe, 610 A.2d 36 (Pa. 1992). See also \textit{SMITH}, supra note 133, at $11.01, and cases cited therein.

Since automobiles weren't invented until approximately 100 years after the adoption of the Seventh Amendment, there is no constitutional right to a jury trial in an ALS proceeding. Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 741 (Ohio 1992) (right to jury trial under the Ohio Constitution applies to causes of action that were tried to juries at common law).

Article I, section 16 of the Ohio Constitution. The appellate court found fault with two provisions of the ALS. The court was concerned that the arresting officer, “who is both accuser and arbiter of the offense,” is not neutral and impartial. Furthermore, the court believed that a summary “on-the-spot” license suspension deprived a motorist of appropriate notice and an opportunity to be heard prior to the deprivation. In order to determine whether Knisely should be affirmed, it is necessary to compare the Knisely court’s concerns to Supreme Court precedent.

B. The Constitutional Parameters of Procedural Due Process

The Due Process Clause of the Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” Supreme Court “precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.” Further, the hearing must be meaningful and “appropriate to the nature of the case.” The nature and extent of the process due depends on the resolution of the three-prong test set forth in Mathews v. Eldridge:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and

324. The Fifth and Fourteenth Amendments to the United States Constitution prohibit governments from depriving an individual of “life, liberty, or property, without due process of law.” U.S. Const. amend. V, and amend. XIV, section 1. The procedural requirements of the Fifth Amendment have been incorporated into the Fourteenth Amendment. Ingraham v. Wright, 430 U.S. 651, 672-73 (1977).
326. The Ohio constitutional guarantees provide substantially the same safeguards as the Fourteenth Amendment. See id.
327. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 498 (1993) (due process requires a pre-seizure hearing before seizing real property subject to civil forfeiture); Fuentes v. Shevin, 407 U.S. 67 (1972) (potential loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing). See also discussion of right and privilege, supra Part II(B); State v. Mateo, 565 N.E.2d 590, 593 (Ohio 1991) (“It is . . . fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner” (quoting, Armstrong v. Manzo, 380 U.S. 545, 552 (1982))).
finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.\textsuperscript{330}

Based on a balancing of the enumerated factors, a court can determine whether the existing procedures are constitutionally sufficient.

The Constitution does permit some exceptions to the traditional rule requiring pre-deprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event .... Whether the seizure ... justifies such an exception requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings.'\textsuperscript{331} In the context of ex parte seizures of property, the analysis turns on whether the nature of the property creates a "special need for prompt action" that otherwise an owner could frustrate by notice and a hearing prior to seizure.\textsuperscript{332} "To establish exigent circumstances, the Government must show that less restrictive measures ... would not suffice to protect the Government's interests .... [Without a] showing of exigent circumstances, ... the ex parte seizure" violates due process.\textsuperscript{333} The Supreme Court has examined these due process requirements, in the context of license suspensions, in three cases: \textit{Bell v. Burson}, \textit{Dixon v. Love}, and \textit{Mackey v. Montrym}.\textsuperscript{334}

In \textit{Bell v. Burson}, the Court held that a driver's license is a protectible property interest, which cannot be suspended or revoked without procedural due process, notwithstanding whether the license is denominated a "right" or a "privilege."\textsuperscript{335} The Court held that Georgia's Motor Vehicle Safety Responsibility Act violated due process because it mandated a suspension of a motorist's license after an accident, unless the motorist posted security to cover the amount of any claimed damages stemming from an accident. The hearing conducted prior to suspension excluded consideration of the motorist's fault or liability for the accident.\textsuperscript{336} The Supreme Court held that

\begin{thebibliography}{999}
\bibitem{330} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
\bibitem{331} \textit{James Daniel Good Real Property}, 114 S. Ct. at 501.
\bibitem{332} \textit{Id.} at 501. "The purpose of [prior notice and a hearing] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property ...." \textit{Fuentes}, 407 U.S. at 80-81. \textit{See also} Connecticut v. Doehr, 111 S. Ct. 2105 (1991) (state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional in the absence of extraordinary circumstances).
\bibitem{333} \textit{James Daniel Good Real Property}, 114 S. Ct. at 505.
\bibitem{335} \textit{Bell}, 402 U.S. at 539. \textit{See discussion supra} Part III(B) (right or privilege).
\bibitem{336} In \textit{Bell v. Burson}, Bell was a clergyman who was subject to the Georgia Motor Vehicle...
procedural due process required a pre-suspension hearing on whether there was a reasonable possibility of judgments being rendered against the licensee in the amounts claimed.\textsuperscript{337}

Public safety was not a concern of the statutory scheme in \textit{Bell}. However, the Court, in \textit{Dixon v. Love}, addressed the issue of the procedural due process requirements for license suspensions designed to protect public safety. Love had been convicted of a number of traffic offenses which required the Secretary of State to suspend his license for being “repeatedly convicted of [traffic] offenses to a degree which indicates disrespect for the traffic laws.”\textsuperscript{338} The statutory scheme did not provide for a pre-deprivation hearing, although, if a motorist requested a hearing, the hearing had to be scheduled “as early as practical.”\textsuperscript{339} Pending a hearing, a restricted permit could be issued to a motorist, for either commercial use, or to alleviate a hardship caused by the suspension.\textsuperscript{340}

The Court applied the three-pronged \textit{Mathews} balancing test\textsuperscript{341} in determining that the Illinois scheme comported with procedural due process. The Court recognized that a license suspension was a substantial penalty, but the Illinois scheme was tempered by the special provisions for hardship and occupational driving privileges. The risk of an erroneous deprivation in the absence of a prior hearing was considered “not great,” because the suspension was operative on the basis of prior convictions, and clerical errors in a

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\textsuperscript{337} \textit{Id.} at 540-541 (“Since the statutory scheme makes liability an important factor in the State’s determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.”).

\textsuperscript{338} \textit{Dixon v. Love}, 431 U.S. 105, 110 (1977). The Secretary of State, pursuant to his rulemaking authority, had adopted administrative regulations that defined the bases and procedures for suspension which included assigning “points” for various kinds of traffic offenses. The accumulation of a sufficient amount of points by a motorist triggered a suspension or license revocation. \textit{Id.} at 106.

Regarding commercial licenses, the statutory provision provided that a suspension shall not deny “a person’s license to drive a commercial vehicle . . . unless 5 offenses were committed, at least 2 of which occurred while operating a commercial vehicle in connection with his regular occupation.” Any driver whose license is suspended, in order to “relieve undue hardship” may apply for a restricted permit to drive to his place of employment “or within other proper limits.” \textit{Id.} at 110 n.7.

\textsuperscript{339} \textit{Id.} at 109-10.

\textsuperscript{340} \textit{Id.} at 110 & n.7.

\textsuperscript{341} \textit{See supra} note 331.
motorist's driving license could be corrected by letter to the Secretary.\footnote{342} Finally, in upholding the Illinois law, the important public interest in the prompt removal of individuals who represent a safety hazard was held to sufficiently distinguish the case from \textit{Bell}.

The Court decided once more that a pre-deprivation license procedure, predicated on public safety, was permissible.\footnote{343} In \textit{Mackey}, the Registrar of Motor Vehicles was required to issue a 90 day license suspension to any motorist who refused to take a requested test to determine the presence of alcohol. The suspension did not take place at the time of the refusal. Instead, a written report by the officer was forwarded to the Registrar, and a subsequent notice of suspension was issued.\footnote{344} No hardship or occupational privileges were available prior to or contemporaneous with the suspension. However, the opportunity for a hearing to contest the suspension was considered immediate (within one to ten days).\footnote{345}

The Court held that the timeliness of the available post-suspension review sufficiently protected the motorist's substantial interest in his license. The Court noted the 90 day suspension period was far less onerous than the suspension periods mandated by the Illinois scheme in \textit{Dixon}. The Court believed the risk of an erroneous deprivation was "not so substantial" that the Massachusetts scheme should be invalidated. To the contrary, the officer requesting the chemical test was characterized as "a trained observer and investigator" who is acting on first hand information, and who must have a driver's refusal witnessed by two officers in order for the suspension to be valid. Finally, as in \textit{Dixon}, the function of the statutory scheme was designated as grounded in public safety — a purpose for which the Court has "traditionally accorded the states great leeway in adopting summary procedures . . . ."\footnote{346} In promoting the ends of public safety, the "summary and automatic character of the suspension was considered an appropriate deterrent to drunk driving, as well as providing a strong inducement to take requested chemical tests — an interest which would be substantially undermined by a pre-suspension hearing.\footnote{347}
C. Ohio’s ALS

The issue the Ohio Supreme Court must confront in Knisely is whether Ohio’s ALS is sufficiently similar to the suspension schemes already upheld in Dixon and Mackey, or whether increasingly punitive amendments have not only pushed the envelope, but have exceeded the boundary of due process. 348 The Sixth Appellate District addressed two concerns of Ohio’s present ALS — the lack of impartiality on the part of the suspending agent (the arresting officer), and the lack of notice and an opportunity for a pre-suspension hearing. These concerns, standing alone, probably would not be sufficient to invalidate Ohio’s ALS. However, when combined with additional due process concerns not specifically addressed in Knisely, the General Assembly has gone beyond what the Constitution can tolerate.

The constitutionality of the ALS/OMVI scheme must be analyzed under the Mathews test. The first prong of Mathews requires a consideration of the nature and weight of the private interest affected by the challenged statute. In determining this factor, all courts recognize that a motorist’s interest in the continued possession of a driver’s license is substantial, because the state will not be able to make a driver whole for any economic or personal hardship suffered by any delay in redressing an erroneous suspension. 349 The additional relevant factors that must be considered are the duration of the license suspension, the availability of prompt post-suspension review and the availability of hardship relief. 350

Ohio’s ALS is particularly punitive. The suspension for first-time offenders is a minimum of 90 days for “failures” and one year for “refusals”. The initial period without occupational driving privileges ranges from 15 days for “failures” to 30 days for “refusals”. Individuals with a prior record for OMVI or for refusing to take a chemical test are subject to severe license suspensions ranging up to five years, 351 with no occupational driving privileges permitted at any time. 352

The Knisely court was concerned that the summary nature of the ALS afforded a motorist “no opportunity to be heard in any meaningful manner.” 353

348. Compare Davis, supra note 7, at 721 (Ohio’s ALS is violative of due process), with Packard, supra note 18 (Ohio’s ALS should be able to withstand procedural due process challenges).


If the *Knisely* court meant that a summary suspension of a license violates due process, then its conclusion is clearly undermined by both *Dixon v. Love* and *Mackey v. Montrym*. In both cases, the Court upheld summary suspensions in the face of due process challenges. However, if the *Knisely* court was concerned with the unavailability of prompt, post-suspension review, then its concern is justified.

Once summary action has been taken, the motorist’s stake in a prompt, neutral review of that action increases significantly, and the state’s interest in deferring review decreases dramatically. Logically, the more punitive the scheme, the greater the need for an immediate, meaningful post-deprivation hearing. The Supreme Court tolerates summary license suspensions provided that sufficient safeguards are in place to provide immediate, meaningful post-deprivation review, or, at a minimum, procedures be available to minimize the economic and personal impact on a motorist until a hearing can be conducted.

Rather than providing for an immediate hearing, Ohio permits a hearing to be continued indefinitely at the request of the defendant, the prosecutor or the court. If a continuance is granted, the statutory scheme does not permit an exception to the provisions prohibiting occupational driving privi-

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354. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979). See also *Illinois v. Batchelder*, 463 U.S. 1112, 1118 (1983) (per curiam) (Illinois scheme which provided driver with the right to pre-suspension hearing for failing to submit to a breath test "accords him all, and probably more, of the process that the Federal Constitution assures.") (emphasis added).

355. See also *State v. Sanders*, Nos. 95 CA 11, 95 CA 12, 1995 WL 634371, at *6 (Ohio Ct. App., 2d Dist., Sept. 29, 1995) (Ohio’s ALS is lacking in due process because it subjects motorists to attenuated deprivations of property without a reasonable opportunity for relief.).


359. In *Mackey*, the Court characterized the availability of a hearing after summary suspension as between one to ten days. *Mackey*, 443 U.S. at 8 n.5.

leges, or to the prohibition on granting a stay of the ALS pending a determination on the merits.\textsuperscript{361}

In \textit{State v. Hochhausler}, the court held that the length of the ALS suspension period was not unduly burdensome because the Supreme Court upheld a summary suspension scheme in \textit{Dixon v. Love} that provided for an indefinite revocation of a driver’s license.\textsuperscript{362} In both \textit{Hochhausler} and \textit{Lovsey}, the courts determined that the availability of post-suspension review within five days of arrest sufficiently protected the due process rights of motorists.\textsuperscript{363} However, in \textit{Dixon v. Love}, although the statutory scheme provided for an indefinite revocation, occupational or hardship privileges were immediately available to the motorist.\textsuperscript{364} Moreover, in Ohio, five day post-suspension review is illusory. The Ohio scheme gives lip service to a prompt hearing but in actuality permits courts and prosecutors unfettered discretion to delay ALS hearings indefinitely.\textsuperscript{365}

In Franklin County, it was the common practice at the initial appearance to delay consideration of all ALS issues until the criminal case was assigned to a judge — even when the BMV ALS form was facially defective. Occupational driving privileges were never granted at the initial appearance. Oftentimes, a determination of the merits of the ALS, or even a determination of the request for occupational driving privileges, would be delayed several


\textsuperscript{363} \textit{Village of Groveport v. Lovsey}, No. 95 APC01-83, 1995 WL 527769, at *16 (Ohio Ct. App., 10th Dist., Sept. 5, 1995) ("any wrongful deprivation . . . is minimal prior to the time of the hearing being held"); \textit{Hochhausler}, 1995 WL 308484, at *5.

\textsuperscript{364} \textit{See Hochhausler}, 1995 WL 308484, at *15 (Jones, P.J., dissenting) ("This statutory scheme does not provide an aggrieved licensee with a means of obtaining immediate hardship relief . . . [and does not] substantially reduce the burden imposed upon Hochhausler by the ALS.").

\textsuperscript{365} \textit{Id.} at *15 (Jones, P.J., dissenting) ("There is no guarantee that an aggrieved licensee may obtain judicial review . . . within a reasonable time or even within the period of the suspension.").

In \textit{Village of Groveport v. Lovsey}, No. 95 APC01-83, 1995 WL 527769 (Ohio Ct. App., 10th Dist., Sept. 5, 1995), the court was unconcerned about the potential unavailability of a hearing within five days. The court noted that a hearing "must be held on the ALS within five days of the seizure," noting that "any wrongful deprivation of the driver’s license is minimal prior to the time of the hearing being held." \textit{Id.} at *8. The court casually dismissed Lovsey’s concern that, as a practical matter, the ALS hearing is often continued indefinitely, by noting "nonetheless the statute provides for a hearing within five days." \textit{Id.} The \textit{Lovsey} court may have interpreted Lovsey’s assignment of error as an attack on the facial validity of the statute rather than as applied. More realistically, the court probably dismissed Lovsey’s due process concern for the unavailability of a prompt hearing because of its contemporaneous holding that the provisions prohibiting a stay of the ALS at the initial appearance were invalid as a violation of the separation of powers doctrine. \textit{See} discussion concerning separation of powers, \textit{infra} Part V.
This is also the practice in many of the larger counties in Ohio, where arraignment courts are generally overcrowded and time does not exist for an individualized determination of the validity of the ALS.\textsuperscript{367}

Both the \textit{Hochhausler} and \textit{Lovsey} courts substantially understate the interest of the motorist according to the \textit{Mathews} format. If occupational privileges were immediately available, or if a hearing was immediately mandated, then the scheme would comport with due process. But neither of these concerns is present. Instead, the Ohio scheme imposes substantial disabilities on the motorist without a prompt, post-suspension hearing and without any procedures to mitigate the lack of a prompt hearing. Although the public interest served by an ALS is great, in both \textit{Dixon} and \textit{Mackey}, the Supreme Court would not have upheld the ALS schemes if these safeguards were not present.

The \textit{Knisely} court was also concerned with the second prong of the \textit{Mathews} test — the likelihood of an erroneous deprivation due to the imposition of the ALS. Specifically, the \textit{Knisely} court was concerned that the arresting/suspending officer is not neutral and impartial. Both the \textit{Hochhausler}
and Lovsey courts address this concern and dismiss it pursuant to Mackey v. Montrym.

In Mackey, the Supreme Court addressed the role of the arresting officer and determined that the officer’s role did not create an unacceptable risk of an erroneous deprivation. In Mackey, the arresting officer was required to forward a report to the Registrar if a motorist refused a chemical test. The refusal was characterized as an objective fact which is “readily ascertainable” by the officer — "a trained observer and investigator . . . well suited for the role the statute accords him in the presuspension process."368 The Court stressed that the “refusal” report had to be witnessed by two officers, and that the officers were personally subject to civil liability for any unlawful arrest or misrepresentation of the facts.369 Noting that the risk of error would be a “rare exception,” the Court held that a pre-hearing suspension did not present an unacceptable risk of an erroneous deprivation and, therefore, would not be violative of due process.

Ohio’s ALS violates current due process protection notwithstanding that the Supreme Court has characterized the actions of the arresting officer as presenting a minimal risk of erroneous deprivation. The role of the arresting officer should be re-examined, especially in light of Ohio case law indicating that the risk of erroneous deprivation may be substantially greater than that present in the Illinois and Massachusetts statutory schemes. It is seriously questioned whether a valid refusal constitutes an objective fact that an officer can determine in a fair and neutral manner. The Supreme Court has held in a long line of prior cases that officers are not neutral and impartial when discharging their duties, but instead are engaged in the “competitive activity of ferreting out crime.”370

In Wadsworth, Ohio, most arraignments are continued in order to afford a defendant the opportunity to retain counsel or meet with appointed counsel. When the ALS is appealed, a hearing is set down within 30 days of the date of arrest. Interview with Judge James Kimbler (January 2, 1996).


370. Even magistrates and prosecutors have been held biased when their duties involve conducting investigatorial functions. See Lo Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (magistrate not neutral if he participates in the execution of a warrant); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (chief investigator and prosecutor were not neutral and detached).

See also State v. Hochhausler, Nos. CA93-12-104, CA93-12-105, 1995 WL 308484, at *17 (Ohio Ct. App., 12th Dist., May 22, 1995) (Jones, P.J., dissenting) (“R.C. § 4511.195 places the police officer in the unique position of both judge and jury. I am shocked and appalled that the General Assembly would enact legislation requiring a police officer, who can hardly
Further, the issues that comprise a valid "refusal" are complex and oftentimes subjective. The motorist must be arrested with probable cause, advised of the consequences of a refusal, the BMV form must be filled out properly and witnessed, the driving must be on a public highway (as opposed to private property), the motorist must manifest an unwillingness to take the test, and an opportunity to speak with counsel must be afforded. Any deviation from these prerequisites can invalidate the ALS.\(^{371}\) In the case of a "failure" ALS, there is support for the conclusion that a chemical test failure presents a greater risk of an erroneous deprivation than in a "refusal" situation.\(^{372}\)

It is impossible to ascertain without statistics the number of administrative license suspensions that are improperly imposed. Suffice it to say that the caselaw is replete with instances where the imposition of these suspensions have been held invalid.\(^{373}\) Since ALS suspensions often expire before an appeal can be taken, or are merged into the criminal penalties at the conclusion of the case, it is nearly impossible to determine the number of suspensions that have been improperly imposed prior to disposition of the criminal case. However, Ohio courts have noted that the risk of an improperly imposed ALS is considerably greater than the insubstantial risk found in Mackey. Ohio courts have described the power to impose the ALS as "often abused,"\(^{374}\) and the issues subject to "serious dispute."\(^{375}\)

As presently constituted, Ohio's ALS does not provide any of the safeguards relied upon by the Supreme Court to uphold ALS schemes. There is no question that the state has a weighty interest in protecting public safety. That interest, however, is not enough to justify Ohio's current scheme when balanced against the substantial interest of the motorist, and the very real risk of an erroneous deprivation. The Ohio Supreme Court should acknowledge the obvious when considering the issue this term.

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373. See Painter and Looker, supra note 16, at chs. 7 & 9 and cases cited therein.

This court has seen the power to impose immediate license suspensions often abused. R.C. 4511.191 provides for immediate license suspensions only if the drinking driver "tests" over the legal limit or refuses to consent to a test. Many officers are routinely imposing the A.L.S. immediately upon drawing blood or urine specimens even though chemical analysis will not be done for weeks. The driver has neither refused nor tested over the limit at this juncture.

Id. at 200-01 n.2.
375. Hochhausler, 1995 WL 308484, at *15 (Jones, P.J., dissenting) ("It has been my experience that the reliability and the timeliness of the chemical testing procedures used in drunken driving cases is often subject to serious dispute.").
V. SEPARATION OF POWERS

When the Ohio Supreme Court decides *Gustafson* and *Knisely*, the court will be faced with three choices. First the court can uphold the constitutionality of Ohio’s current ALS/OMVI statutory scheme, despite compelling arguments to the contrary. Second, the court can make the politically unpalatable but correct decision that the ALS, as presently enacted, infringes on the double jeopardy and due process rights of motorists. The court also has a third option—one which can transform the ALS into a truly remedial remedy, as well as short-circuit future double jeopardy and due process claims. The court can adopt the reasoning in *Village of Groveport v. Lovsey* and *State v. Sanders,* and hold that the provision of the implied consent statute which forbids courts from granting a stay of the ALS pending a hearing, or pending the outcome of the OMVI charge, is unconstitutional as violative of the separation of powers doctrine.

Revised Code § 4511.191(H)(1) provides:

If the person appeals the suspension at his initial appearance, the appeal does not stay the operation of the suspension . . . [N]o court has jurisdiction to grant a stay of a suspension imposed under division (E) or (F) of this section, and any order issued by any court that purports to grant a stay of any suspension imposed under either of those divisions shall not be given administrative effect.

The *Lovsey* court recognized that the General Assembly has no right to limit the judicial branch of the government with respect to its properly hearing and determining actions and proceedings within the court’s jurisdiction. Inherent within the court’s jurisdiction is the right to grant or deny stays. Be-
cause R.C. § 4511.191(H)(1) was held to deprive a court of its ability to stay an ALS suspension, the General Assembly was held to have improperly interfered with the exercise of the court's judicial functions. Therefore, the Lovsey court struck down the prohibition.\textsuperscript{381} The court in State v. Sanders reached the same conclusion. Noting that the exercise of judicial powers is confined to the courts, the court held that the power to stay the proceedings before it is essential to the existence of a court, and necessary to the orderly and efficient exercise of its jurisdiction. As in Lovsey, the absolute prohibition of judicial stays was held to violate the separation of powers principle.\textsuperscript{382}

The ability to stay the ALS at the initial appearance effectively transforms a patently punitive and unconstitutional ALS into a scheme which comports with due process and is true to its stated purpose—remedial intervention. Double jeopardy and due process arguments are seriously undermined when the decision to continue the ALS is based on an individualized assessment of whether the motorist is a threat to public safety. Drivers with a history of impaired or reckless driving, or who have displayed other indicia of dangerousness, can be prohibited from driving until a court has the opportunity to hear their ALS appeal.\textsuperscript{383} As to those drivers that present a lesser risk to public safety, a court can either stay the ALS or tailor conditions to any occupational driving privileges granted. In those cases where driving privileges are granted in some form, the ALS post-suspension hearing need not be

\textsuperscript{381} Sister states have struck down similar provisions as violative of the separation of powers doctrine. See, e.g., Ardt v. Illinois Dep't of Prof. Reg., 607 N.E.2d 1226, 1232 (Ill. Sup. Ct. 1993) (statute which prohibited the stay of administrative sanctions during pendency of judicial proceeding violated separation of powers doctrine); Smothers v. Lewis, 672 S.W. 62, 64 (Ky. Sup. Ct. 1984) (legislation prohibiting courts from issuing injunctions staying administrative orders revoking liquor licenses).

\textsuperscript{382} Sanders, 1995 WL 634371, at *9. See also Ardt, 607 N.E.2d at 1226 (legislation forbidding stay of sanctions during pendency of judicial review held violative of separation of powers doctrine); Smothers, 672 S.W.2d at 64 (legislation prohibiting stay of administrative order revoking retail beer license held violative of separation of powers doctrine); Commonwealth v. Yameen, 516 N.E.2d 1149, 1151 (Mass. Sup. Ct. 1987) (“To allow a defendant to appeal his conviction yet mandate that his punishment could not be stayed while he did so would be to pay lip service to the statutory provisions that establish the right for a licensee to appeal while eradicating any practical reason for taking the appeal.”). Cf. State ex rel. Silcott v. Spahr, 552 N.E.2d 926 (Ohio 1990) (statute prohibiting trial court from granting bond pending appeal conflicts with appellate rules and violates Ohio Constitution); State v. Greer, 530 N.E.2d 382 (Ohio 1988) (statute providing for 12 peremptory challenges in capital cases is “of no force and effect” because it conflicts with criminal rules promulgated by the Ohio Supreme Court); State v. Smith, 537 N.E.2d 198 (1989) (courts have the inherent power to stay execution of a sentence pending an appeal or a motion for a new trial). See also Landis v. North American Co., 299 U.S. 248, 254 (1936) (“The power to stay is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

\textsuperscript{383} These drivers are still entitled to a prompt, post-suspension hearing of their ALS appeals.
immediate, because driving privileges will usually reduce the motorist’s interest in a prompt hearing. An unconditional stay would not mandate a hearing at all in most cases. In the case of a “failure,” the ALS will be either terminated by an acquittal or will be merged with the penalties for the OMVI offense. “Refusals,” which result in a plea of no contest or not guilty to an OMVI offense, would also obviate the need for a hearing, provided interim driving privileges are available. Only “refusals” where the OMVI charge is actually tried, or where the OMVI charge is reduced, will result in ALS hearings before the municipal court.

The Ohio Supreme Court can implement the Lovsey and Sanders rationale in one of two ways. It can hold the ALS as presently enacted is unconstitutional and invalidate the entire statute, or, the court can hold that the stay prohibition is severable from the remainder of the implied consent statute. As will be shown, the result is the same under either scenario.

The effect of finding that the provision concerning stays is not severable from the remainder of the statute would be that R.C. § 4511.196 would become operative in every case. This truly remedial statute requires a court to suspend a license pending the outcome of the OMVI charge if the person’s continued driving will be a threat to public safety. Under this scenario, an arresting officer would no longer have the authority to seize and suspend a license, however, a court would be able to quickly determine whether to issue a public safety suspension.

In Lovsey and Sanders, the courts found the prohibition against issuing stays of the ALS severable from the remainder of the implied consent statute. The deletion of the prohibition would result in a brief seizure and suspension of a driver’s license until a court could make an individualized assessment of the particular circumstances. The seizure and temporary suspension by the arresting officer would provide a sufficient wake-up call to the motorist concerning the seriousness of the alleged conduct, but would also permit a court to temper the unnecessarily punitive aspects of the scheme at the outset of the criminal case.

384. Village of Groveport v. Lovsey, No. 95 APC01-83, 1995 WL 527769, at *8 (Ohio Ct. App., 10th Dist., Sept. 5, 1995). Both Lovsey and Sanders held the provision in the implied consent statute which prohibited the issuance of a stay of the ALS was severable from the remainder of the statute.

385. OHIO REV. CODE ANN. § 4511.196 (Baldwin 1994).

386. OHIO REV. CODE ANN. § 4511.196(B)(1) (Baldwin 1994) provides that if the ALS is terminated, the judge may impose a new suspension based on the motorist's threat to public safety.
VI. CONCLUSION

Ohio’s current ALS/OMVI scheme exceeds the permissible limits of due process and contravenes the double jeopardy protection of those subject to an ALS suspension. This conclusion is not the result of some unanticipated thunderbolt from the United States Supreme Court, but instead is the result of the legislature’s failure to reconcile increasingly punitive civil sanctions with constitutional doctrines in effect at the time of the 1993 enactment. Despite its highly-charged public support, drunk driving legislation is not immunized from constitutional scrutiny. Although courts have struggled to uphold questionable ALS/OMVI provisions against constitutional challenges, there comes a point when disregard for the rights of citizens will cause a statutory scheme to collapse from its own unconstitutional weight.

An OMVI charge is a serious crime and the legislature has broad latitude to fashion penalties that effectively deal with the problem. However, punishment is traditionally exacted after a criminal conviction. The imposition of punishment prior to conviction will ultimately impede, rather than assist, in the prosecution of offenders and the state’s goal of improving public safety. The Ohio scheme can be salvaged, at least in terms of future cases, by permitting a court to stay the ALS at the initial appearance. The Ohio Supreme Court should adopt the rationale of Lovsey and Sanders, and hold that the stay prohibition of the ALS violates the separation of powers doctrine inherent in the Ohio Constitution.