

THE ADMINISTRATIVE DRIVER'S LICENSE
SUSPENSION FOR THOSE UNDER TWENTY-ONE:
AN ANALYSIS OF SECTION 322.2616, FLORIDA
STATUTES

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I. INTRODUCTION

A profound statement by United States Supreme Court Justice Tom Clark sums up the problem of drinking and driving in the United States: “[T]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.”¹ Ironically, the Vietnam War, which divided the nation and raised its consciousness with respect to the tragic loss of young lives, had a casualty level far short of the death and mayhem attributable to drinking and driving.² Some 47,369 Americans, mostly teenagers, lost their lives in the jungles of Vietnam.³ During that same time, because of drinking and driving,

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1. *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957).

2. Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong. 93 (1982) (statement of Dr. Alastair Conn, Medical Director, Field Operations Program, Maryland Inst. for Emergency Med. Sys.) [hereinafter Conn Statement].

3. See *THE WORLD ALMANAC AND BOOK OF FACTS* 1997, at 184 (1996); see also Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces* 38 *UCLA L. REV.* 499, 582 n.133 (1991) (stating that the average age of servicemen killed in Vietnam was 19).

274,000 Americans lost their lives⁴ in the far more deadly concrete jungle of our nation's streets and highways.

Attempts to curb the slaughter on our nation's highways have greatly increased since legislation enacted in the early 1900s made it illegal to operate a vehicle while under the influence of alcohol.⁵ In the early 1980s, organizations like Mothers Against Drunk Driving (MADD), Students Against Drunk Driving (SADD), and Remove Intoxicated Drivers (RID) helped raise awareness of the problem and successfully lobbied Congress for tougher drinking-and-driving legislation.⁶ From laws on blood- or breath-alcohol content⁷ to sobriety checkpoints,⁸ the fight to stop drinking and driving has met with overwhelming approval from the courts.

On January 1, 1997, Florida's new administrative driver's license suspension law, section 322.2616, Florida Statutes, became effective, bringing tough new penalties for individuals under the age of twenty-one who drink and drive.⁹ The new law requires the suspension of driving privileges for those under twenty-one who have either a blood- or breath-alcohol level of 0.02% or higher or who refuse to submit to a blood- or breath-alcohol exam.¹⁰

No one would deny that laws aimed at reducing the number of fatalities attributable to drinking and driving on Florida's and our nation's highways are appropriate. However, such laws must be closely scrutinized to ensure that in the process of reducing fatalities, cherished constitutional protections remain intact. This Comment analyzes Florida's new administrative driver's license suspension law for its constitutional and public policy soundness. Part II provides a brief history of recent laws designed to prevent drinking and driving, particularly those laws aimed at individuals under the age of twenty-one. Part III provides an overview of the new law. Part IV provides due process, double jeopardy, and public policy analyses of the new law. Finally, Part V concludes that the Florida Legislature should amend the new law to correct due process problems associated with the use of alcohol screening devices and double jeopardy problems associated with parallel criminal prosecutions.

4. See Conn Statement, *supra* note 2, at 93.

5. See William J. Ostrowski, *Drunk Driving and Chemical Tests—A Labyrinthine Maze*, 63 N.Y. ST. B.J. 22, 22 (1991).

6. See Mark Feigl, Note, *DWI and the Insanity Defense: A Reasoned Approach* 20 VT. L. REV. 161, 166 (1995).

7. See *State v. Rolle*, 560 So. 2d 1154, 1156 (Fla. 1990) (finding that evidence of a blood- or breath-alcohol level of 0.10% is *prima facie* evidence the defendant was under the influence to the extent his normal faculties were impaired).

8. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (finding sobriety checkpoint law constitutional).

9. See FLA. STAT. § 322.2616 (Supp. 1996); see also Act effective Jan. 1, 1997, ch. 96-272, § 3, 1996 Fla. Laws 1091, 1100.

10. See FLA. STAT. § 322.2616(2)(a) (Supp. 1996).

II. A BRIEF HISTORY OF STATE AND FEDERAL LAWS ENACTED TO PREVENT DRINKING AND DRIVING

Just as they suffered the most in the Vietnam War, the youth of our nation have suffered the most from the lethal effects of drinking and driving. Various studies have shown that young drivers are killed in alcohol-related accidents at a higher rate than other drivers.¹¹ One study showed that persons under twenty were killed at a rate of 4.5 for every one million vehicle miles.¹² The same study showed a fatality rate of 3.38 for twenty-year-olds, 4.08 for twenty-one-year-olds, 3.10 for twenty-two- to twenty-four-year-olds, and 1.50 for twenty-five- to forty-four-year-olds.¹³

A. The National Minimum Drinking Age

In 1982, in response to the national drinking-and-driving problem, President Reagan established the Presidential Commission on Drunken Driving.¹⁴ The Commission, attempting to protect young drivers, recommended that states raise the legal drinking age to twenty-one.¹⁵ Many states, including Florida, did not follow the Commission's recommendation, and eventually Congress enacted a law establishing a national minimum drinking age.¹⁶ Congress successfully pressured states, including Florida, to adopt the national minimum drinking age by conditioning receipt of federal highway funds on adoption of the minimum drinking age.¹⁷ Nevertheless, not all states complied quietly with this strong-arm approach. South Dakota unsuccessfully challenged the legislation as a violation of the Twenty-First Amendment and an unconstitutional exercise of congressional spending power.¹⁸ The Supreme Court, finding this method of federal spending constitutional, paved the way for future drinking-and-driving legislation at the federal level.

11. See, e.g., Mark L. Weber, Note, *Reyes v. Kuboyama: Vendor Liability for the Sale of Intoxicating Liquor to Minors Under a Common Law Negligence Theory* 17 U. HAW. L. REV. 355, 355 (1995) (citing statistics showing that the alcohol-related fatal accident rate for 18- to 20-year-olds was twice as high per capita as the rate for those over age 21).

12. See Michael Philip Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 658 (1988) (citing statistics from a 1984 study conducted by the National Highway Traffic Safety Administration).

13. See *id.*

14. See Exec. Order No. 12,358, 47 Fed. Reg. 16,311 (1982).

15. See Rosenthal, *supra* note 12, at 658.

16. See Act of July 17, 1984, Pub. L. No. 98-363, §§ 6-7, 98 Stat. 435, 437-39 (codified as amended at 23 U.S.C. § 158 (1994)).

17. See *id.*

18. See *South Dakota v. Dole*, 423 U.S. 203, 206 (1987).

B. Zero-Tolerance Legislation

Recently, Congress passed the National Highway System Designation Act of 1995,¹⁹ which requires states to enact and enforce zero-tolerance laws aimed at individuals under the age of twenty-one who have a blood-alcohol concentration of 0.02% or greater while operating a motor vehicle.²⁰ Like the National Minimum Drinking Age Act, this federal law requires states to pass zero-tolerance legislation as a condition for receiving federal transportation funds.²¹ A state's failure to pass such legislation will result in a loss of five percent of federal highway funds on October 1, 1998,²² and a ten-percent loss every year thereafter.²³ To date, some thirty-four states, including Florida,²⁴ have passed such legislation.²⁵

Whether they have resulted in tough legislation, increased consciousness, or both, the efforts of groups like MADD have successfully reduced the number of deaths from drunk driving.²⁶ Nonetheless, drunk driving is still a problem. According to MADD, in Florida, intoxicated drivers under age twenty-one were responsible for eighty-four fatalities, 1231 injuries, and 1617 vehicle accidents in 1993.²⁷

III. SECTION 322.2616, FLORIDA STATUTES

In light of economic pressure from Congress and lobbying by anti-drinking-and-driving organizations, the Florida Legislature unanimously passed Committee Substitute for House Bill 455 during the 1996 Regular Session.²⁸ Governor Lawton Chiles signed the bill into law on May 29, 1996.²⁹ In general, the statute provides for the administrative suspension of driver's licenses for individuals under age twenty-one who drive with a blood- or breath-alcohol level of 0.02% or higher or who refuse to submit to a breath-alcohol exam.³⁰

19. Pub. L. No. 104-59, 109 Stat. 568 (codified in scattered sections of 23 U.S.C.A. (West Supp. 1996)).

20. See *id.* § 320, 109 Stat at 589 (codified at 23 U.S.C.A. § 161(a)(3) (West Supp. 1996)).

21. See 23 U.S.C.A. § 161(a) (West Supp. 1996).

22. See *id.* § 161(a)(1).

23. See *id.* § 161(a)(2).

24. See Act effective Jan. 1, 1997, ch. 96-272, § 1, 1996 Fla. Laws 1091, 1091-96 (codified at FLA. STAT. § 322.2616 (Supp. 1996)).

25. See Fla. H.R. Comm. on Crim. Just., CS for HB 455 (1996) Staff Analysis 6 (final July 1, 1996) (on file with comm.) [hereinafter Staff Analysis].

26. See Eustace T. Francis, *Combating the Drunk Driver Menace: Conditioning the Use of Public Highways on Consent to Sobriety Checkpoint Seizures—The Constitutionality of a Model Consent Seizure Statute* 59 ALB. L. REV. 599, 610 (1995).

27. See Staff Analysis, *supra* note 25, at 2.

28. See Act effective Jan. 1, 1997, ch. 96-272, 1996 Fla. Laws 1091; see also Staff Analysis, *supra* note 25, at 6.

29. See ch. 96-272, § 3, 1996 Fla. Laws at 1100.

30. See FLA. STAT. § 322.2616(2)(a) (Supp. 1996).

More specifically, the statute makes it unlawful for persons under age twenty-one to drive or be in actual physical control of a motor vehicle when they have a blood- or breath-alcohol level of 0.02% or higher.³¹ The statute provides that when a law enforcement officer has probable cause to believe that a person under twenty-one operating a vehicle has any alcohol on his or her breath, the officer may detain that person and request that he or she submit to a breath-alcohol test.³² This test can be conducted by a breath-measurement device as provided in section 316.1932, Florida Statutes, or by an approved preliminary alcohol screening (PAS) device.³³ If it is determined the individual has a breath-alcohol level of 0.02% or higher, the law enforcement officer must suspend that individual's license on behalf of the Florida Department of Motor Vehicles (DMV) for a period of six months for the first offense and one year for subsequent violations.³⁴ If an individual refuses to submit to an exam, the officer must suspend that individual's license for a period of one year for a first refusal or for eighteen months if the person has a previous suspension under the statute.³⁵ Although any suspension is automatic, the officer is required to issue a ten-day temporary driving permit.³⁶ During this ten-day period, a suspended driver may request an informal or formal review of the suspension.³⁷

The informal procedure provides only for a review of the materials submitted by the law enforcement officer and by the person whose license was suspended.³⁸ A hearing officer from DMV conducts the hearing.³⁹ The hearing officer can sustain, amend, or invalidate the suspension based on examination of the materials,⁴⁰ including results from PAS devices, which are presumed accurate for both formal and informal reviews.⁴¹

If a formal review is requested, DMV conducts a hearing with any subpoenaed witnesses and any relevant evidence.⁴² The hearing officer determines by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension.⁴³ However, the review is limited to issues of probable cause, age, and

31. See *id.*

32. See *id.* § 322.2616(1)(b).

33. See *id.* § 322.2616(17); see also *id.* § 316.1932.

34. See *id.* § 322.2616(2).

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.* § 322.2616(5).

39. See *id.* § 322.2616(5), (7)(b).

40. See *id.* § 322.2616(6).

41. See *id.* § 322.2616(17).

42. See *id.* § 322.2616(7)(b).

43. See *id.* § 322.2616(8).

whether the breath-alcohol level was 0.02% or higher.⁴⁴ If the review is based on a refusal to submit to a breath-alcohol exam, the hearing is limited to issues of probable cause, age, and notice of implied consent to submit to a breath-alcohol exam.⁴⁵ A person may appeal the hearing officer's decision by writ of certiorari to the circuit court in the county where the person resides or where the hearing took place.⁴⁶

Further, the statute provides that by applying for and using a driver's license, a person under twenty-one is deemed to have consented to the provisions of the statute.⁴⁷ In addition, the statute provides that a violation is neither a criminal offense nor a traffic violation, and that any detention under the statute does not constitute an arrest.⁴⁸ Lastly, the statute prohibits the dual suspension of a driver's license through both its own procedures and those of section 316.2615, Florida Statutes.⁴⁹ Nevertheless, a suspension under this section does not bar prosecution under section 316.193, Florida Statutes, for criminal drinking and driving.⁵⁰

IV. ANALYSIS

A. Due Process

The Due Process Clause of the Fourteenth Amendment⁵¹ limits a state's ability to restrict or interfere with an individual's rights and

44. See *id.* § 322.2616(8)(a).

45. See *id.* § 322.2616(8)(b).

46. See *id.* § 322.2616(14).

47. See *id.* § 322.2616(16).

48. See *id.* § 322.2616(18).

49. See *id.*

50. See *id.*

51. See U.S. CONST. amend. XIV, § 1.

Although the Equal Protection Clause of the Fourteenth Amendment prohibits states from denying an individual the equal protection of the laws, see *id.*, and thus mandates that states treat similarly situated persons similarly and not classify them based on impermissible criteria, see JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.2, at 587 (5th ed. 1995), the U.S. Supreme Court has repeatedly upheld age-based classifications when they possess a rational basis, see, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). Moreover, the Court also has specifically upheld laws regulating the rights and liberties of persons under the age of 18 as possessing a rational basis as long as the classification did not impinge upon a fundamental right. See, e.g., *Reno v. Flores*, 507 U.S. 292, 302-03 (1993) (finding that minors do not have fundamental right to be in noncustodial setting). Driving is not considered a fundamental right. See, e.g., *Lite v. State*, 617 So. 2d 1058, 1060 n.2 (Fla. 1993).

Nevertheless, although age classifications are not prohibited by the U.S. Constitution, states may protect age groups through their own constitutions or legislation. See, e.g., LA. CONST. art. I, § 3; FLA. STAT. § 743.07 (1995). The Louisiana Constitution specifies age as a protected category in its equal protection clause. See LA. CONST. art. I, § 3. However, the Louisiana Supreme Court has upheld drinking restrictions based on age using a heightened intermediate level of scrutiny. See *Manuel v. State*, 677 So. 2d 116, 125 (La. 1996). In 1973, the Florida Legislature passed a law stating that individuals over the age of 18 "shall enjoy and suffer the rights, privileges, and obligations of all persons 21 years of age

ensures procedural safeguards before a person can be deprived of certain rights. The protections apply to both civil and criminal proceedings.⁵² Similarly, Florida's due process clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."⁵³

Specifically, due process wears two hats. One is substantive due process, which protects life, liberty, or property interests from unwarranted governmental interference.⁵⁴ The second is procedural due process, which requires states to provide protections, such as notice and an opportunity to be heard, before depriving an individual of life, liberty, or property.⁵⁵

There are two levels of review when determining whether a law violates substantive due process.⁵⁶ Laws restricting fundamental rights are subject to review under the strict scrutiny standard.⁵⁷ Laws restricting nonfundamental rights are subject to review under the highly deferential rational relationship standard.⁵⁸ Under the administrative driver's license suspension statute, the only substantive right at issue is the right to drive, which is not a fundamental right.⁵⁹ Accordingly, courts would review the statute under the rational relationship standard, which would only require the courts to find that the suspension of driving privileges is rationally related to

or older." Act effective July 1, 1973, ch. 73-21, §§ 2-3, 1973 Fla. Laws 59, 59 (codified as amended at FLA. STAT. § 743.07 (1995)). The only exceptions to the law are those rights that are excluded under the Florida Constitution and the state Beverage Law. See FLA. STAT. § 743.07 (1995). Although the administrative driver's license suspension statute would seem to be in conflict with this law, the Florida Supreme Court would likely uphold the statute using basic principles of statutory construction:

[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. . . .

Further, when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent.

McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) (citations omitted). Nevertheless, to ensure that such a conflict does not arise, the Legislature should amend section 743.07, Florida Statutes, to include a specific exception for the new statute, just as it did after passing the state Beverage Law. See Act Effective Oct. 1, 1980, ch. 80-74, § 5, 1980 Fla. Laws 254, 256 (codified at FLA. STAT. § 743.07(1) (1995)).

52. See *NOWAK & ROTUNDA*, supra note 51, § 13.1, at 511.

53. FLA. CONST. art. I, § 9.

54. See, e.g., *United States v. Salerno*, 481 U.S. 739, 746 (1987).

55. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

56. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (finding restrictions on the fundamental right to marry should be subject to strict scrutiny); *Reno v. Flores*, 507 U.S. 292, 303 (1993) (finding the right not to be placed in a custodial institution nonfundamental and thus subject to rational relationship scrutiny).

57. See *Zablocki*, 434 U.S. at 386.

58. See *Reno*, 507 U.S. at 301-03.

59. See *Lite v. State*, 617 So. 2d 1058, 1060 n.2 (1993).

the objective of highway safety.⁶⁰ Courts have determined that such a relationship exists and, therefore, that suspension of driving privileges does not violate substantive due process.⁶¹

Procedural due process is more commonly thought of when due process issues arise. In *Mathews v. Eldridge*,⁶² the U.S. Supreme Court formulated a balancing test for determining whether procedural due process has been violated.⁶³ Under the *Mathews* test, courts are to balance the importance of the individual interest at stake and the risk of erroneous deprivation of that interest against the importance of the governmental interest, including any fiscal and administrative burdens that additional procedures would entail.⁶⁴

1. The Individual Interest at Stake

The first inquiry in determining whether the driver's license suspension statute violates procedural due process is whether a protectable individual interest is at stake.⁶⁵ "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."⁶⁶ The U.S. Supreme Court has generally taken a liberal view of what constitutes a liberty or property interest:

[Liberty] denotes, not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶⁷

Furthermore, in the early 1970s, the Court expanded the definition of what constitutes property for procedural due process protection to include benefits such as welfare,⁶⁸ even though such benefits were once viewed as a privilege created by the state.⁶⁹

In *Bell v. Burson*,⁷⁰ the Supreme Court determined that a driver's license was a protectable interest when it found that suspending

60. See *id.* at 1060.

61. See *id.* at 1061.

62. 424 U.S. 319, 332 (1976).

63. See *id.* at 335.

64. See *id.*

65. See *id.* at 332.

66. *Id.*

67. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

68. See *Goldberg v. Kelly*, 397 U.S. 254, 262-64 (1970).

69. See *id.*

70. 402 U.S. 535 (1971).

driver's licenses "adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."⁷¹ Thus, the continued possession of a driver's license is a protectable interest, and a state must afford an individual procedural due process when it revokes or suspends the individual's driver's license.⁷²

After finding a protectable interest, the next step is to determine the importance of that interest. The right to drive is considered an important interest, but it is not a fundamental right.⁷³ Accordingly, only minimal process is required before a state suspends or revokes a driver's license. The Bell Court found that only a hearing is necessary before a state deprives an individual of a driver's license.⁷⁴ After Bell was decided, the Court, in *Dixon v. Love*,⁷⁵ determined that although a hearing is required, it does not need to be held before the suspension.⁷⁶ Furthermore, the type of hearing required is not a full judicial hearing, but rather an administrative hearing.⁷⁷ The administrative driver's license suspension statute meets these requirements by providing for an administrative hearing.⁷⁸ The provisions of the new law allowing for the suspension of a driver's license before such a hearing⁷⁹ also meet due process requirements in light of the Court's determination in *Dixon*.⁸⁰

2. The Risk of Erroneous Deprivation and the Governmental Interest at Stake

After finding a protectable interest and determining its importance, courts assess the "risk of an erroneous deprivation of such interest through the procedures used."⁸¹ Evaluating the risk of erroneous deprivation entails considering "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards."⁸²

71. *Id.* at 539.

72. *See id.*

73. *See Lite v. State*, 617 So. 2d 1058, 1060 n.2 (Fla. 1993) ("[D]riving is not a fundamental right."); *see also Bell*, 402 U.S. at 539 ("Suspension of issued licenses . . . adjudicates important interests of the licensees.").

74. *See* 402 U.S. at 542.

75. 431 U.S. 105 (1977).

76. *See id.* at 115

77. *See id.*

78. *See* FLA. STAT. § 322.2616(2)(b)(3) (Supp. 1996) ("The driver may request a formal or informal review of the suspension . . .").

79. *See id.* § 322.2616(2)(a) (allowing a law enforcement officer on the scene to suspend the license on behalf of DMV).

80. *See* 431 U.S. at 106.

81. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

82. *Id.* at 343.

Under the driver's license suspension statute, the three procedures that could lead to erroneous deprivation are:⁸³ (1) the law enforcement officer's observations giving rise to probable cause that an individual was under the influence of alcoholic beverages or had any level of breath alcohol;⁸⁴ (2) the measurement of breath alcohol with scientific devices;⁸⁵ and (3) the screening for sobriety through the use of PAS devices.⁸⁶

Under the statute, an underage person can have his or her license suspended for a blood- or breath-alcohol level of 0.02% or higher.⁸⁷ This is a very low amount of alcohol in light of the fact that a 150-pound person's blood- or breath-alcohol level would be 0.025% after consuming one ounce of hard liquor.⁸⁸ Thus, one alcoholic drink provides twenty percent more blood or breath alcohol than is required to violate the statute. The small alcohol level required to violate the statute thus increases the chance of erroneous deprivation.⁸⁹

a. Human Error

A law enforcement officer must have probable cause that a driver under the age of twenty-one is intoxicated or has any level of breath-alcohol before requesting an individual to submit to a blood- or breath-alcohol test.⁹⁰ To sustain a suspension for an individual's refusal to submit to a blood or breath exam, a hearing officer must determine: (1) whether the law enforcement officer at the scene had probable cause; (2) whether the driver was under age twenty-one; (3) whether the driver refused to submit to an exam after a request; and (4) whether the driver was informed that a refusal to submit to an exam would result in a suspension of his or her license.⁹¹

At the low blood-alcohol level of 0.02%, physical signs of impairment such as slurred speech or bloodshot eyes are not likely to be

83. Although officer fabrication could also lead to erroneous deprivation, this Comment does not address that issue. See *Samborn v. State*, 666 So. 2d 937, 938 (Fla. 5th DCA 1995) (finding that civilian breath-testing technicians routinely destroyed test-result "print-cards" showing that the testing device may have been out of tolerance and operating in error).

84. See FLA. STAT. § 322.2616(1)(b) (Supp. 1996).

85. See *id.*

86. See *id.* § 322.2616(17).

87. See *id.* § 322.2616(2)(a).

88. See Myles A. Kauffman, *The Coming of Subsection (a)(5) of Pennsylvania's Drunk Driving Law: "A Statute with a Face Only a Prosecutor Could Love,"* 4 WIDENER J. PUB. L. 493, 505 (1995).

89. See Robert J. DeLucia, *Drug and Alcohol Testing Issues in the Airline and Railroad Industries*, SA31 A.L.I.- A.B.A. 765, 779 (1996) (stating questions of calibration of the equipment and skill of the collector are likely to arise at the low threshold of 0.02%).

90. See FLA. STAT. § 322.2616(1)(b) (Supp. 1996).

91. See *id.* § 322.2616(8)(b).

present.⁹² Absent physical signs of impairment, the law enforcement officer must rely on the odor of alcohol on the breath of the driver or the presence of open containers in the vehicle for probable cause. The low blood-alcohol level of 0.02% is difficult to detect by relying on the odor of alcohol on the breath of the driver because such a low blood-alcohol level results in a correspondingly low breath-alcohol level.⁹³ Also, there is the strong possibility that at these low levels, the odor of alcohol from an open container or a passenger might be mistaken for alcohol on the breath of the driver.

These possibilities of erroneous deprivation through mistaken probable cause must be balanced against the state's interest in highway safety. Courts have found highway safety to be a very important interest that can outweigh the erroneous deprivation of driving privileges.⁹⁴ Nevertheless, the question arises whether there are any serious concerns about highway safety when drivers have a blood- or breath-alcohol level of 0.02%. In Florida, there is a presumption of sobriety at a blood- or breath-alcohol level of less than 0.05%.⁹⁵ This fact arguably destroys any contention of serious safety problems at low alcohol levels. Accordingly, in balancing the individual's interest in erroneous deprivations by law enforcement officers against the state's interests, it is possible that courts could find a violation of procedural due process.

b. Machine Error

Common sense leads one to believe that a driver not engaged in illegal activities will be more likely to submit to a breath exam than one who is. Accordingly, the reliability of breath measurement devices is paramount in avoiding erroneous deprivation of the driving privileges of those who submit to breath-alcohol tests.

Errors due to the calibration of a breath-alcohol testing device or the skill of the officer in operating the device are likely to arise at low breath-alcohol levels such as 0.02%.⁹⁶ Furthermore, breath-

92. See, e.g., *State v. Taylor*, 648 So. 2d 701, 703 (Fla. 1995) (signs of bloodshot eyes, slurred speech, and a strong odor of alcohol used as probable cause that defendant was intoxicated). Obviously, none of these signs are present with a 0.00% blood-alcohol level. Some experts maintain that outward signs of intoxication such as slurred speech cannot be detected until an individual's blood-alcohol level reaches 0.15%. See Greg K. Vitali, Note, An In-Depth Analysis of the Development and Ramifications of New Jersey's Social Host Liability Statute, 20 SETON HALL LEGIS. J. 532, 562 n.82 (1996). Accordingly, the ability to detect outward manifestations of intoxication increases as blood-alcohol levels increase. See *infra* note 93 and accompanying text.

93. See, e.g., Andrew J. Schatkin, Criminal Procedure, 1994-95 Survey of New York Law, 46 SYRACUSE L. REV. 405, 411 (1995) (stating that blood-alcohol level is directly related to breath-alcohol level).

94. See *Dixon v. Love*, 431 U.S. 105, 114 (1977).

95. See FLA. STAT. § 316.1934(2)(a) (1995).

96. See DeLucia, *supra* note 89, at 779.

alcohol testing devices do not differentiate between alcohol from alcoholic beverages, cold medicines, or mouthwash.⁹⁷ There are some popular cold medicines that are ten percent alcohol by volume and some mouthwashes that are over twenty percent alcohol by volume.⁹⁸ Scenarios in which someone's teenage son or daughter wrongfully loses his or her driver's license because of cold medicine or mouthwash are far from fiction.⁹⁹ Lastly, all breath-alcohol testing devices have some degree of tolerance. The Intoxilyzer 5000, which is used in Florida, has a tolerance of 0.005%.¹⁰⁰ Although this is a small amount, it is one-quarter of the 0.02% breath-alcohol level required for suspension of driving privileges under the new statute.¹⁰¹

As previously discussed, with sobriety presumed at a blood- or breath-alcohol level of 0.05%,¹⁰² it would seem difficult for the state's interest in highway safety to carry much weight in light of these possible sources of erroneous deprivation. However, while developing a more accurate and discriminatory breath-alcohol testing device would reduce the chances of erroneous deprivation, such a device would, in all likelihood, be extremely expensive. Thus, the state's fiscal interest would likely outweigh the individual's interest in preventing erroneous deprivation.¹⁰³

c. Preliminary Alcohol Screening Devices

Of greatest concern is the use and presumed accuracy of PAS devices.¹⁰⁴ Specifically, the statute provides:

A breath test to determine breath-alcohol level pursuant to this section may be conducted as authorized by s. 316.1932 or by a preliminary alcohol screening test device listed in the United States Department of Transportation's conforming-product list of evidential breath-measurement devices. The reading from such a device

97. See *People v. Bergman*, 623 N.E.2d 1052, 1054 (Ill. Ct. App. 1993) (reporting that Listerine mouthwash and Binaca breath spray give a reading of alcohol on the breathalyzer); see also FLA. ADMIN. CODE ANN. r. 11D-8.007(2) (1996) (requiring 20-minute observation before administering a breath test to ensure that the subject does not regurgitate or take anything by mouth).

98. The label for NyQuil cold medicine reports that the alcohol content is 10% by volume. The label for Listerine mouth wash reports that the alcohol content is 21.6% by volume.

99. See *Bergman*, 623 N.E.2d at 1054.

100. See FLA. ADMIN. CODE ANN. r. 11D-8.003(7)(a)(2) (1996).

101. See FLA. STAT. § 322.2616(2)(a) (Supp. 1996).

102. See *supra* text accompanying note 87.

103. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("At some point the benefit of an additional safe-guard to the individual affected . . . to society in terms of increased assurance that the action is just, may be outweighed by the cost.").

104. See *Coniglio v. Department of Motor Vehicles*, 46 Cal. Rptr. 2d 123, 133-34 (Ct. App. 1995) (finding that due process requires a foundational showing of the reliability of breath measurement devices and that such reliability cannot be presumed).

is presumed accurate and is admissible in evidence in any administrative hearing conducted under this section.¹⁰⁵

This addition is suspect for three reasons. First, the use of such devices is not enumerated in section 322.2615, Florida Statutes, the driver's license suspension statute applicable to individuals of all ages.¹⁰⁶ Because suspensions under both statutes are based on blood- or breath-alcohol levels, it seems difficult to justify the use and presumed accuracy of PAS devices against those under age twenty-one but not against those over twenty-one.¹⁰⁷ Furthermore, because the individual's interest in additional procedural protections, which in this instance would prohibit the use of PAS devices, must be balanced against the state's interest in increased highway safety, PAS devices should be used only in suspensions under section 322.2615, Florida Statutes, which require a 0.08% blood- or breath-alcohol level¹⁰⁸ and are thus more closely related to highway safety.¹⁰⁹

Second, the issue of residual mouth alcohol causing inaccurate measurements is more prevalent in PAS devices.¹¹⁰ If mouth alcohol is present, an inordinately high reading will result because breath measurement devices cannot differentiate between alcohol in the breath from respiration and alcohol present in the mouth from recent alcohol intake.¹¹¹ In Florida, before administering a breath exam using the Intoxilyzer 5000, the law enforcement officer or technician administering the test must observe the subject for twenty minutes.¹¹² This observation is required to ensure the subject does not drink any alcohol or regurgitate, which causes alcohol from the stomach to become present in the mouth.¹¹³ No similar observation period is required before administering a breath exam using a PAS device because they are normally used as screening tools to determine if an additional breath exam needs to be given. However, under

105. See FLA. STAT. § 322.2616(17) (Supp. 1996) (emphasis added).

106. See FLA. STAT. § 322.2615 (1995).

107. But see Coniglio, 46 Cal. Rptr. 2d at 128. Under the initial version of California's zero-tolerance law, a breath test was required at a testing facility. See *id.* However, opponents representing law enforcement associations said such procedures would take too much time to accomplish and would be too costly. See *id.* The law's final version allowed the use of PAS devices. See *id.*

108. See FLA. STAT. § 322.2615(1)(a) (Supp. 1996).

109. See *supra* text accompanying note 95.

110. See E. John Wherry, Jr., *The Rush to Convict DWI Offenders: The Unintended Unconstitutional Consequences* 19 U. DAYTON L. REV. 429, 446-47 (1994) (stating that mouth alcohol causes inordinately high readings if it has not dissipated and thus officers should not give an immediate breath test). Because preliminary devices are used on the scene, there would not be any time for mouth alcohol to dissipate if the driver had consumed alcohol within the last 20 minutes.

111. See *id.* at 446 n. 129 (stating that the test will multiply the breath-alcohol level it measures by 2100).

112. See FLA. ADMIN. CODE ANN. r. 11D-8.007(2) (1996).

113. See *id.*

the new statute, PAS readings are presumed accurate and are admissible as evidence in both formal and informal review proceedings.¹¹⁴

Third, the presumption of accuracy and reliability of PAS devices is questionable. Although Florida has not addressed the admissibility of PAS devices, most states have determined that they do not meet the reliability requirements for admissibility under *Frye v. United States*.¹¹⁵ The fact that PAS devices are not generally admissible in other states raises serious concerns about their general acceptance in the scientific community.¹¹⁶ Like Florida, California has a zero-tolerance law for persons under twenty-one and uses PAS device readings as admissible evidence.¹¹⁷ A California court reviewing a challenge under this zero-tolerance statute ruled that the state must lay a foundation for the reliability of these devices.¹¹⁸ The court emphasized that "attacking the reliability of the PAS test may be the licensee's only real way of defending against a zero tolerance law violation. To conclude that the DMV need not establish a foundation for the admission of the PAS tests would severely hamper the licensee's ability to defend."¹¹⁹ Thus, California requires a showing that the device was in proper working order and a qualified operator properly administered the test.¹²⁰

Balancing the individual's right against erroneous deprivation through the use of PAS devices requires returning to the issue of the state's interests in fiscal costs and public safety. The state apparently does not have a strong fiscal reason for the admissibility of readings from PAS devices.¹²¹ As previously stated, the issue of public safety in relation to blood- or breath-alcohol levels as low as 0.02% would appear to carry little weight.¹²² With the strong possibility of erroneous deprivation through the use and presumption of accuracy of PAS devices, it seems that the individual's procedural

114. See FLA. STAT. § 322.2616(17) (Supp. 1996).

115. 293 F. 1013 (D.C. Cir. 1923). *Frye* established the "generally accepted in the scientific community" rule for determining admissibility. See *id.* at 1014; see also Wherry, *supra* note 110, at 466. However, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the U.S. Supreme Court held that the *Frye* standard was superseded in federal courts by the more flexible standard of whether the evidence is based on scientific knowledge and will assist the jury in understanding or determining a fact in issue. See *id.* at 587-92. Nonetheless, Florida continues to recognize *Frye* as the appropriate standard. See *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993).

116. See *Flanagan*, 625 So. 2d at 828.

117. See CAL. VEH. CODE § 23136 (West 1995).

118. See *Coniglio v. Department of Motor Vehicles*, 46 Cal. Rptr. 2d 123, 132 (Ct. App. 1995).

119. *Id.* at 133.

120. See *id.*

121. It should not cost the state any more to use the machines that are already in use and that are admissible under sections 322.2615 and 316.1932, Florida Statutes.

122. See *supra* text accompanying note 95.

due process interest would outweigh any state interest.¹²³ Hence, the presumption of accuracy for PAS device readings would likely be a violation of procedural due process.¹²⁴ To remedy this problem, the Legislature should either remove this provision altogether, amend it to allow PAS devices to be used only as screening tools, or require the state to lay a foundation for their reliability.

C. Double Jeopardy

Both the U.S. Constitution and the Florida Constitution ensure that an individual will not be put in jeopardy for an offense more than once.¹²⁵ The double jeopardy guarantee consists of three constitutional protections: (1) the right not to be prosecuted for the same crime following acquittal; (2) the right not to be prosecuted for the same crime following a conviction; and (3) the right not to suffer multiple punishments for the same offense.¹²⁶ Civil penalties are not exempt from a double jeopardy analysis and may constitute a violation.¹²⁷

Many have argued unsuccessfully that an administrative suspension of a driver's license and a criminal drinking and driving prosecution that arise out of the same incident constitute a double jeopardy violation.¹²⁸ While the issue is well settled, the new administrative suspension statute raises constitutional issues not present in previous cases.

Florida courts, in analyzing double jeopardy challenges to administrative suspensions of driver's licenses and criminal drinking and driving prosecutions, have looked to the "primary purpose" of the suspension statute.¹²⁹ Penalties that are characterized as pri-

123. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

124. See *id.*

125. See U.S. CONST. amend. V; FLA. CONST. art. I, § 9.

126. See *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

127. See, e.g., *United States v. Halper*, 490 U.S. 435, 448 (1989) ("Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment.").

128. See *Smith v. Gainesville*, 93 So. 2d 105, 106-07 (Fla. 1957) (holding the administrative suspension of driver's license did not violate double jeopardy because the primary goal of the statute was to protect the public and not to impose pain or punishment on the offender); *Davidson v. MacKinnon*, 656 So. 2d 223, 223-25 (Fla. 5th DCA 1995) (finding no double jeopardy violation); *State v. Murray*, 644 So. 2d 533, 533-35 (Fla. 4th DCA 1994) (finding primary purpose of suspension was remedial and not punitive); *Freeman v. State*, 611 So. 2d 1260, 1261 (Fla. 2d DCA 1992) (finding suspension was for public protection and not punishment).

129. See *Smith*, 93 So. 2d at 106-07 (stating that the statute's "primary purpose is to relieve the public generally of the sometimes death-dealing pain" caused by drunk drivers); *Davidson*, 656 So. 2d at 225 ("[W]e conclude that the administrative remedy of suspending a driver's license . . . continues to be primarily for the purpose of enhancing safe driving on the public highways."); *Murray*, 644 So. 2d at 535 ("Because the primary pur-

marily remedial in nature do not invoke double jeopardy.¹³⁰ The courts have broadly defined remedial civil penalties as those meant to compensate the state for a loss or remove a danger from its citizens.¹³¹ The crux of the double jeopardy argument is that the suspension is punitive because it constitutes retribution for, or seeks to deter individuals from, driving under the influence of alcohol.¹³² The courts in Florida, however, have always found that driver's license suspensions are remedial rather than punitive in nature.¹³³ Courts base this finding on the premise that drunk drivers are a lethal danger and the removal of such dangers enhances the safety of the public highways.¹³⁴

Under the new statute, it would be difficult for the courts to find a primarily remedial purpose for the suspension. In cases where the courts found no double jeopardy violation, the findings were based on the fact that the suspension was for public protection.¹³⁵ Again, however, the low levels of alcohol required for a suspension do not primarily serve the purpose of creating safer highways.¹³⁶ One is presumed legally sober with a blood- or breath-alcohol level of less than 0.05%.¹³⁷ Before passage of the statute, persons under the age of twenty-one could have their driver's license suspended under section 322.2615, Florida Statutes, as could those over twenty-one.¹³⁸ Despite the new statute, persons under the age of twenty-one can still have their driver's license suspended under Section 322.2615.¹³⁹ It should be obvious that the primary purpose of the new statute is to deter those under twenty-one from drinking and driving at all. While this is a laudable goal, it is untenable to maintain that removal of the driver's licenses for persons with blood- or breath-alcohol levels of 0.02% serves the primary purpose of public protection.¹⁴⁰ If the pri-

pose of [the statute] is to provide an administrative remedy for public protection, and not to punish the offender, a double jeopardy prohibition does not arise.”)

In *United States v. Halper*, the U.S. Supreme Court held that a defendant may not be subjected to an additional civil sanction if the sanction “may not be fairly characterized as remedial, but only as a deterrent or retribution.” 435 U.S. at 449. However, the Halper decision used the term “remedial” in the sense of reimbursing the government for actual costs attributable to the defendant's conduct, not for actual public protection, as the term is used by Florida courts in suspension of driver's licenses cases. See *id.* at 449; *Freeman v. State*, 611 So. 2d 1260, 1261 (Fla. 2d DCA 1992) (“A driver's license suspension . . . is not remedial in the sense meant by the Halper decision.”).

130. See, e.g., *Davidson*, 656 So. 2d at 223-25.

131. See, e.g., *id.*

132. See *id.* at 224.

133. See, e.g., *id.*

134. See *id.* at 225.

135. See, e.g., *id.*

136. See *supra* text accompanying note 95.

137. See FLA. STAT. § 316.1934(2)(a) (Supp. 1996).

138. See *id.* § 322.2615.

139. The suspension just cannot be dual. See *id.* § 322.2616(18).

140. See *id.* § 316.1934(2)(a).

mary purpose were indeed public protection, it arguably should be illegal for all drivers to have such blood- or breath-alcohol levels.

Accordingly, the primary purpose of the statute is deterrence. Therefore, if an individual's driver's license is suspended under section 322.2616, Florida Statutes, and that individual is criminally prosecuted for drinking and driving under section 316.193, a double jeopardy issue arises. While the primary purpose of the statute as applied to a person with a blood- or breath-alcohol level of 0.05% or higher is arguably remedial, and thus not a double jeopardy violation, courts employing a double jeopardy analysis first look only at the statute, not how it is applied in an individual case.¹⁴¹ The Florida Legislature can remedy a potential problem by amending the new statute to limit suspensions to blood- or breath-alcohol levels of 0.02 to 0.049%, which would eliminate possible criminal drinking and driving charges.

D. Public Policy

The administrative driver's license suspension statute presents two conflicting public policy concerns. The first concern is the prevention of bodily harm and injury brought about by underage drinking and driving. The second concern involves issues of fairness and the protection of individual constitutional rights. In balancing these two concerns, the statute gives greater weight to preventing the harm that results from underage drinking and driving than to issues of fairness and the protection of individual constitutional rights. However, the harm the statute aims to prevent is marginal and, therefore, it should not be allowed to promote an unfair public policy and infringe on individual constitutional rights.

Intimately linked to the public policy debate over this statute is the public policy debate over the national drinking age. At the height of the Vietnam War, the drinking age was twenty-one.¹⁴² However, fairness concerns caused society to evaluate this restriction because tens of thousands of young men were dying in the war, yet were not old enough to drink legally.¹⁴³ Accordingly, many states lowered their drinking age from twenty-one to either eighteen or nineteen.¹⁴⁴ Based on similar concerns, the nation amended its Constitution—an extremely rare event—to give those aged eighteen to twenty the right to vote.¹⁴⁵ In the 1980s, with the Vietnam War over and an in-

141. See *United States v. Brown*, 917 F. Supp. 780, 784 (M.D. Ala. 1996) (“[D]ouble jeopardy analysis . . . requires that a court first inquire whether the statute’s civil sanctions include sanctions which can be characterized as punishment.”). Following a determination that a statute is punitive, courts generally proceed to look at the statute as applied. See *id.*

142. See Rosenthal, *supra* note 12, at 652.

143. See *id.* at 652-53.

144. See *id.*

145. See U.S. CONST. amend. XXVI.

creased national awareness of the warlike carnage resulting from drinking and driving, the pendulum swung back towards the public policy concern of preventing bodily harm and injury brought about by underage drinking and driving, and the drinking age was returned to twenty-one.¹⁴⁶

Nevertheless, with the enactment of the administrative suspension statute, the pendulum has swung too far. Society must not lose sight of basic fairness and the protection of individual rights. First, if the true concern of lawmakers and organizations like MADD is reducing fatalities through tough zero-tolerance legislation, why only target drivers under twenty-one? Although drinking-and-driving statistics for this age group are generally higher per capita than for other age groups, some groups over the age of twenty have a higher rate of fatal accidents per vehicle mile.¹⁴⁷

A second issue—one that is applicable to those aged eighteen to twenty—is whether it is appropriate to treat young adults differently than other adults. How can a society whose cornerstone is freedom tell young adult men that at eighteen they are old enough to be drafted and sent off to die for their country, but are neither old enough nor responsible enough to drink alcohol? Further, how can this age group be told that at eighteen both men and women are old enough and responsible enough to make the decision to freely serve the military and put themselves in harm's way, but are not old enough to drink alcohol? Although the body counts in Grenada, Panama, Iraq, and Somalia were not as high as those in Vietnam, the principles of fairness that brought about the lowering of the drinking age and the voting age remain the same, even without fresh memories of Vietnam. It is hypocritical to behave paternalistically when it comes to the individual freedom of consuming alcohol, yet subject this group to possible death under the guise of protecting freedom. The nation should return to a practice of fairness and concern for individual rights and lower the drinking age to reflect the level of responsibility expected of young adults. Alternatively, the nation should raise the age of conscription and age for enlistment to parallel society's concern for protecting the young.

V. CONCLUSION

As shown, Florida's new administrative driver's license suspension statute presents both potential constitutional problems and underlying public policy concerns. The Legislature should amend or

146. See discussion *supra* notes 14-17.

147. See Rosenthal, *supra* note 12, at 658 (citing statistics showing that 21-year-olds have a fatal accident rate of 4.08 per one million miles compared to a rate of 3.38 for 20-year-olds); see also *Manuel v. State*, 677 So. 2d 116, 128 (La. 1996).

remove the provision of the statute allowing readings from PAS devices as prima facie evidence of guilt or, at a minimum, require the state to lay a foundation for the reliability of the device readings. Additionally, the use of PAS devices as a screening tool is extremely questionable, and thus the Legislature should reconsider their use. Lastly, the statute should be amended to apply only to blood- or breath-alcohol levels of 0.02 to 0.049% to avoid any potential double jeopardy problems. All persons, whether over or under the age of twenty-one, are still covered by section 322.2615, Florida Statutes, for blood- or breath-alcohol levels of 0.05% or higher.

Society should strive to avoid fixing its problems by adding to the law books. There are many nonlegal ways to make streets safer and reduce drunk driving by the young, such as through education and by setting an appropriate example. Sober-driver programs should be encouraged because the underaged will continue to drink regardless of the law. Prohibition did not stop adults from drinking alcohol in the early 1900s, and it will not stop those under twenty-one from drinking today or tomorrow.

Lastly, placing such restrictions on a group of young adults is problematic and counterintuitive to our foundation of freedom. Our nation should think hard about treating young adults differently and possibly revisit the issue of the national drinking age or, in the alternative, the age for conscription. In a perfectly safe world, there would be no airplane accidents, no automobile accidents, and no acts of terrorism. However, in obtaining a perfectly safe world, we would sacrifice most of the freedoms and protections we hold dear. The lives of all Americans are precious, and the goals of protecting them from the evils of drunk driving should continue. However, our freedoms and rights are precious as well, and we should be cautious when treading on them in the name of safety.