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I. INTRODUCTION

As the war on drugs continues,1 the states have begun to supplement their prosecutorial arsenal. In addition to tougher criminal sentences,2 drug tax assessments increasingly await those convicted...
of drug offenses. This civil method for deterring the possession of illicit narcotics complements the criminal law by allowing the state to impose both a criminal sentence and a punitive tax assessment for the same offense. The United States Supreme Court dealt a severe blow to such tactics in Department of Revenue v. Kurth Ranch. In a 5-4 decision, the Court held that a Montana drug tax proceeding could not follow a criminal conviction without implicating the Fifth Amendment protection against double jeopardy.

This Note analyzes the impact Kurth Ranch will have upon the taxation of illicit drugs. First, a survey of specific-model drug taxation statutes will be provided. Second, this Note will discuss Supreme Court double jeopardy jurisprudence prior to Kurth Ranch. Third, the Court's opinion and holding in Kurth Ranch will be outlined with particular emphasis on Nebraska's Marijuana and Controlled Substances Tax. The Note concludes with a discussion of the administrative and legislative remedies that remain available for taxing illicit drugs after Kurth Ranch.

II. STATE DRUG TAX STATUTES

Although the federal government taxed marijuana over half a century ago, the states have begun to levy taxes on illicit drugs only within the last twelve years. States currently employ two methods to tax the sale of controlled substances. A majority of the states use a

3. Twenty-six states now have drug tax statutes. They are Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, Texas, Utah and Wisconsin.
5. The Double Jeopardy Clause of the Fifth Amendment provides that, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
6. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970). Repeal of the Act was forced by the Supreme Court's decision in Leary v. United States, 395 U.S. 6 (1969). The Act was held to create a "real and appreciable risk of self-incrimination" because information provided by persons paying the tax could be made available to law enforcement authorities. Id. at 16. Contemporary drug tax statutes typically pass the self-incrimination hurdle by providing for confidentiality provisions within the statutory scheme. See, e.g., Neb. Rev. Stat. § 77-4315 (Supp. 1993)(detailing that information provided by the taxpayer "shall not be used against the dealer in any criminal proceeding, unless independently obtained"). The Nebraska statute was held not to violate the guarantee against self-incrimination in State v. Garza, 242 Neb. 573, 496 N.W.2d 448 (1993).
specific-model of drug taxation that sets forth taxes applicable only to illicit drugs.\textsuperscript{9} These laws are excise taxes\textsuperscript{10} much like those imposed upon cigarettes or alcohol. Most often, the statutes require persons subject to the tax to purchase drug tax stamps or certificates which are to be affixed to the contraband.\textsuperscript{11} Some states use a generalized approach and tax narcotics under existing income or sales tax provisions.\textsuperscript{12}

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\item \textbf{An excise tax is:}
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\item A tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.
\item A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer of property.
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12. Wyoming law provides that "sales of controlled substances... which are not sold pursuant to a written prescription of or through a licensed practitioner" are not within the wholesale exemption to the state's excise tax. \textit{Wyo. Stat.} § 39-6-405(a)(xix) (1994). Additionally, courts in Michigan and Pennsylvania have determined illegal drug transactions to be subject to sales tax liability. See \textit{Greer v. Department of Treasury}, 377 N.W.2d 836 (Mich. Ct. App. 1985)(rejecting contention that the sale of marijuana is not a taxable sale); \textit{Zimmerman v. Commonwealth}, 449 A.2d 103 (Pa. Commw. Ct. 1982)(holding that illegal sale of
All specific-model drug tax schemes, with one exception,13 delineate different tax rates based upon the type of drug. The typical scheme establishes the tax rate based on whether the drug is marijuana, a controlled substance14 sold by weight, or a controlled substance not sold by weight.15 For example, Nebraska taxes marijuana at $100 per ounce,16 controlled substances face a levy of $150 per gram,17 and controlled substances not sold by weight incur a tax liability of $500 for every 50 units of the drug.18 Other states also levy the tax on whole marijuana plants in order to facilitate easier taxation calculations on marijuana crops.19 Although “dealers” are usually the only persons required to pay the tax, the statutes often define the term so broadly as to cover those who possess a small amount of drugs for strictly personal use.20

The obligation to pay the tax typically arises immediately upon acquisition or possession of the drugs.21 Other statutes define the tax liability more expansively. For example, Florida levies the tax upon each “sale, use, consumption, distribution, manufacture, derivation, methaqualone did not fall within the prescription or over-the-counter drug exemption to the sales tax). Minnesota has taxed drugs under its income tax provisions. See Swyningan v. Commissioner, No. 4706, 1987 WL 25995 (Minn. Tax Ct. Dec. 7, 1987).

13. The lone exception is the Florida statute. Florida taxes all drugs at 50% of the estimated retail price with an added 25% percent surcharge. FLA. STAT. ANN. § 212.0505(1) (West 1989).

14. In Nebraska a controlled substance is defined as “any drug or substance, including an imitation controlled substance, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Nebraska law. Controlled substance shall not include marijuana.” NEB. REV. STAT. § 77-4301(1) (Cum. Supp. 1994).

15. Controlled substances not sold by weight would include those drugs sold in pill or capsule form.


17. Id. § 77-4303(1)(b).

18. Id. § 77-4303(1)(c).


20. See, e.g., NEB. REV. STAT. § 77-4301(2) (Cum. Supp. 1994), in which a dealer is defined as:

a person who, in violation of Nebraska law, manufactures, produces, ships, transports, or imports into Nebraska or in any manner acquires or possesses six or more ounces of marijuana, seven or more grams of any controlled substance which is sold by weight, or ten or more dosage units of any controlled substance which is not sold by weight.

production, transportation, or storage" of narcotics. Conversely, Maine attaches tax liability only after the person has been convicted under state or federal law for a drug-related offense.

The existence of drug tax schemes has not resulted in compliance. Available statistics from Massachusetts, Minnesota, Idaho, Utah and Wisconsin demonstrate that sales of drug stamps raise little revenue. Those who buy the stamps are thought to be stamp collectors or those in search of a novelty item. Such conclusions are problematic, however, since statutes prevent tax officials from inquiring into a person's motive for buying the stamps.

Failure to pay the tax can result in additional civil and criminal penalties. Most states impose a penalty equal to 100% of the tax. Violators in Colorado and Illinois face penalties of three and four times the amount of the tax respectively. On the other end of the spectrum, some statutes allow the state to levy penalties only at the rate provided for violations of other tax statutes. Furthermore, defend-

22. FLA. STAT. ANN. § 212.0505(1)(a) (West 1989).
23. ME. REV. STAT. ANN. tit. 36, § 4434 (Supp. 1994).
24. See Peter J. Howe, Drug—Tax Stamp Sales Are Limited: Officials Say Buyers May Be Collectors, BOSTON GLOBE, Feb. 7, 1994, at 15 (in six months only 81 tax stamps for marijuana were sold).
25. See Catherine Foster, 'Grass Tax' Aims for Dealers' Wallets, CHRISTIAN SCIENCE MONITOR, Aug. 11, 1989, at 8 (in a three year period, Minnesota sold only 294 stamps amounting to $2000).
27. Interview with Phil Richmond, Special Assistant to the Tax Commissioner of the Nebraska Department of Revenue, in Lincoln, Neb. (Sept. 24, 1994); Collectors Are Only Buyers of Stamp to Tax Illegal Drugs, Chi. TRIB., May 3, 1990, at 3; Foster, supra note 25, at 8; Scott Rothschild, Texas Tax on Illegal Drugs Trips Up Dealers, PHILADELPHIA INQUIRER, Sept. 24, 1990, at C12.
28. Racaniello, supra note 26, at 665.
29. See, e.g., Marijuana and Controlled Substances Tax Regulations, REG-94-003.03A(1), Nebraska Department of Revenue (1992).
ants face felony charges in several states, while other statutes provide punishment ceilings within the tax statute itself. The latter approach most often allows a maximum fine of $10,000 and/or five years imprisonment. Because persons who fail to comply face assessments of the tax plus a penalty, the amount assessed can be exorbitant. For example, the failure of a Utah man to purchase drug tax stamps resulted in an assessment of a $217.6 million claim against him. The State of Nebraska has issued over $162.2 million in drug tax assessments since 1991. The average assessment under the law is nearly $400,000 per person. However, collection of assessment monies has been problematic. Of the $162.2 million assessed, only $322,988.67 has been collected (one-fifth of one-percent of total assessments). Other states also report poor assessment-collection ratios.

Proponents of drug tax statutes typically offer at least two rationales for the laws. First, drug tax statutes are based upon a principle of tax fairness. Persons who engage in the drug trade often realize an income that is largely tax-free. Any equitable system of taxation would accordingly seek to ensure that all taxpayers pay their fair


36. Foster, supra note 25, at 8.

37. Interview with Phil Richmond, supra note 27. Four hundred and nine assessments have been issued since 1991. The total amount assessed has been $162,202,797.84, with the average assessment totaling $396,583.86.

38. Interview with Phil Richmond, supra note 27. The amount collected from assessments excludes tax stamp sales. Nebraska has collected on 48 of the 409 assessments issued.

39. See Gould, supra note 8, at 557-58 (in first year of their statutes, Illinois and Nevada levied $68,200 and $27,488,836 respectively, but collected nothing); Joyce, supra note 7, at 227 ($32,951,655 assessed under Minnesota statute with $1,791,506 collected); Michael C. Buslow, Wisconsin Drug Law Is Rarely Used, Philadelphia Inquirer, Feb. 17, 1991, at C13 ($1.1 million assessed, $4,118 collected in Wisconsin); Foster, supra note 25, at 8 (Kansas imposed nearly $2 million in levies and received $7,860.40); Tax on Illegal Drugs Yields Little Revenue, Miami Herald, Dec. 5, 1989, at B1 ($283 million with $538,461 realized under Florida scheme).

40. The Internal Revenue Service estimates that approximately 50-90% of the value of sales of cocaine constituted income. Of that amount only about 10% was actually reported to the IRS. Steven Wisotsky, Exposing the War on Cocaine: The
share. Drug tax statutes provide the states with a mechanism in which to tap into illegal drug profits.\(^4\) Second, drug tax statutes provide prosecutors with an additional weapon in the war on drugs. Because tax officials do not expect drug dealers to arrive at the tax office to pay drug tax assessments,\(^4\) the statutes provide law enforcement authorities with another sanction, in addition to the applicable criminal laws, in which to deter already unlawful activity.\(^4\)

Despite challenges on several constitutional fronts, state drug tax statutes have remained relatively unscathed.\(^4\) The courts have rejected constitutional arguments based upon self-incrimination,\(^4\) substantive and procedural\(^4\) due process, equal protection,\(^4\) Futility and Destructiveness of Prohibition, 1983 Wis. L. Rev. 1305, 1396-97 (1983).

41. Joyce, supra note 7, at 242.

42. Commentators widely agree that noncompliance is expected. See Ann L. Iijima, The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances, 29 HARV. C.R.-C.L. L. REV. 101, 102 (1994); Racaniello, supra note 26, at 679; Lorne H. Seidman, Taxing Controlled Substances, 6 J. SR. TAX'n 257, 257 (1987); Buelow, supra note 39, at C13; Foster, supra note 25, at 8; Howe, supra note 24, at 18; Jennifer Toth, Dealers May Find New Drug War Tactic Very Taxing, L.A. TIMES, May 14, 1991, at 5.

43. Iijima, supra note 42, at 102; Racaniello, supra note 26, at 666; Buelow, supra note 39, at C13.

44. The Nebraska Supreme Court has conceded that the Nebraska statute raises "countless" constitutional issues. State v. Garza, 242 Neb. 573, 577, 496 N.W.2d 448, 452 (1993). For a summary of case law regarding the constitutionality of drug tax statutes see Claudia G. Catalano, Annotation, Validity, Construction, and Application of State Laws Imposing Tax or License Fee on Possession, Sale, or the Like, of Illegal Narcotics, 12 A.L.R. 5th 89 (1993).


But see Florida Dep't of Revenue v. Herre, 634 So.2d 618 (Fla. 1994) (holding statute violates self-incrimination when law enforcement authorities can subpoena taxpayer information); State v. Roberts, 384 N.W.2d 688 (S.D. 1986) (refusing the State's request to read the South Dakota statute so as to require taxpayer confidentiality). For a criticism of the majority view that drug tax statutes do not violate self-incrimination see generally Iijima, supra note 42.

46. See Briney v. State Dep't of Revenue, 594 So.2d 120, 123 (Ala. Civ. App. 1991); State v. Gallup, 500 N.W.2d 437, 444-45 (Iowa 1993); State v. Matson, 798 P.2d
vagueness and overbreadth. However, in light of Department of Revenue v. Kurth Ranch, double jeopardy may become the constitutional argument of choice used to combat drug tax levies when the state also extracts a criminal conviction.

III. DOUBLE JEOPARDY AND MULTIPLE PUNISHMENTS

The Double Jeopardy Clause of the Fifth Amendment provides that, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The protection against being twice put in jeopardy prevents the state or federal government from imposing multiple punishments for the same offense.


49. See State v. Ryan, 501 N.W.2d 516, 518 (Iowa 1993)(delay in the formulation of revenue department regulations did not render the statute impermissibly vague); Sisson v. Triplett, 428 N.W.2d 565, 571 (Minn. 1988)("dealer" and "controlled substance" are adequately defined in statute); State v. Garza, 242 Neb. 573, 586-87, 496 N.W.2d 448, 457 (1993)("dealer" is not vague); Zissi v. State Tax Comm'n, 842 P.2d 848, 854-55 (Utah 1992)("dosage unit" is not unconstitutionally vague); State v. Davis, 787 P.2d 517, 524 and n.12 (Utah Ct. App. 1990)(rejecting in dicta the argument that statute does not sufficiently state where tax stamps are to be affixed); State v. Heredia, 493 N.W.2d 404, 408-09 (Wis. Ct. App. 1992), cert. denied, 113 S. Ct. 2386 (1993)(term "dealer" gave fair notice to persons covered under statute).


52. Although a literal reading of the provision would suggest application only to prosecutions risking capital or corporal punishment, such a narrow construction has long been rejected. 3 WAYNE R. LAFAVExE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.1(b), at 61-62 (1984). Double jeopardy protection was extended to "felonies, minor crimes, and misdemeanors alike" in Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873). It is suggested that the Court's rejection of the literal language of the Amendment "reflected its belief that the range of criminal punishments had increased in variety and significance since the formulation of the 'life or limb' terminology." Note, A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition, 90 YALE L.J. 632, 641 (1981).

53. The Double Jeopardy Clause was held to be applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969).
posing second prosecutions or multiple punishments upon defendants for the same offense. The basic value underlying the protection is verdict finality. Verdict finality is said to lie at "the core of [the] double jeopardy doctrine." The protection provides 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 [the defendant] 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."

A. Defining the Same Offense

To establish a double jeopardy claim the defendant must show she has already been prosecuted or punished for the same offense. In Blockburger v. United States, the Supreme Court held that two statutory offenses are not the same for purposes of the Double Jeopardy Clause when "each provision requires proof of an additional fact which the other does not." For example, if Crime 1 requires proof of elements A, B, and C, and Crime 2 requires proof of elements A and B, the two crimes are the same offense. Crime 1 contains an additional element, C, not contained in Crime 2; but Crime 2 does not contain an element that is not found in Crime 1. Crime 2 is thus a lesser-included offense of Crime 1. When a defendant commits Crime 1, she has necessarily committed Crime 2. On the other hand, if Crime 1 requires proof of elements A, B, and C, and Crime 2 requires proof of elements, A, B, and D, the two offenses are not the same. Each crime contains an element not found in the other.

54. A defendant has not been placed in double jeopardy when both the state and federal governments prosecute for the same offense under the dual sovereignty exception to double jeopardy. For example, if D commits the act of bank robbery and both the state and federal government have statutes that proscribe such conduct, D can be convicted under both statutes if the sovereigns have jurisdiction over the matter. The dual sovereignty doctrine was described in United States v. Lanza, 260 U.S. 377 (1922), in which the Supreme Court held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." Id. at 382.

55. Double jeopardy is said to consist of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).


59. Id. at 304.
If two offenses are the same under this inquiry, the state can only convict the defendant for one of the offenses unless both punishments are imposed in the same trial and such a result is intended by the legislature. An additional conviction under any other same offense provision would be barred. Consider, for example, a state statute that creates the crimes of assault and assault with the intent to kill. Crime 1, assault, requires proof of an assault (Element A). Crime 2 requires proof of an assault (A) and proof of an intent to kill (Element B). In such a case, assault is a lesser-included offense of assault with intent to kill. A judge or jury could only convict a defendant who committed an assault with the intent to kill of either assault or assault with the intent to kill, but not both. It is likely that the legislature intended such a result. Sentencing the defendant for the single crime of assault with intent to kill would serve the state's interest in prohibiting all assaults, and would also serve the heightened interest in deterring assaults that create a greater risk of serious bodily harm.

The claim that legislatures do not intend to punish both lesser- and greater-included offenses may be rebutted even if an analysis of the elements suggests otherwise under Blockburger. In Missouri v. Hunter, the Supreme Court ruled that when the legislature clearly intends for two "same offense" sanctions to be imposed in the same proceeding, the Blockburger test will not be controlling. All the Court requires to circumnavigate the Blockburger test is clear legislative intent to impose both sanctions, and both punishments must be imposed in the same trial. The Hunter majority emphasized that the defendant had been subjected to only one trial and therefore was only punished once. As a result, the underlying value of verdict finality was not undermined.

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60. See Brown v. Ohio, 432 U.S. 161, 169 (1977) ("[T]he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").


62. Id. at 368-69 ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.").

63. Id. at 365. See also Thomas, supra note 56, at 838 ("When government seeks multiple punishment by instituting multiple trials, protecting finality automatically limits its punishment. Finality, of course, does not limit the number of punishments in a single trial."). But see Missouri v. Hunter, 459 U.S. 359, 371 (Marshall, J., dissenting) (arguing that verdict finality is undermined when the state is allowed to circumvent the multiple punishment prohibition by imposing both sanctions in the same proceeding). See also Note, A Definition of Punishment, supra note 52, at 649 ("The same policy considerations, fairness and finality, underlie both the ban of multiple punishment and retrial prohibition. Prohibiting exposure to multiple trials would be insufficient if the government could later impose multiple sanctions.").
B. Double Jeopardy and Civil Sanctions

If the defendant has been convicted criminally and the state seeks to impose a sanction for the crime in a civil proceeding, the defendant must show (1) both sanctions are for the same offense, and (2) double jeopardy protections extend to the civil context. The courts have struggled to articulate when constitutional protections, including double jeopardy, are applicable to civil proceedings. In some instances, the United States Supreme Court has found the language of the guarantee itself to be instructive. For example, the Sixth Amendment is expressly limited to "criminal prosecutions." The Fifth Amendment’s grand jury and self-incrimination privileges also have explicit textual references to criminal proceedings. On the other hand, the Fourth Amendment protection against unreasonable search and seizure does not contain the criminal limitation. Accordingly, while Fourth Amendment protections have been extended to civil proceedings, self-incrimination privileges and the right to grand jury have not. Other constitutional protections not expressly limited to a criminal or civil context, such as double jeopardy, have been limited to criminal proceedings by courts. The civil-criminal label has thus become crucial to persons facing civil sanctions. A determination that the proceeding is civil resolves the criminal constitutional right dilemma: all rights that are solely criminal are inapplicable. Double jeopardy is no exception. If the proceeding is held to be civil, double jeopardy protections are inapplicable.

66. U.S. Const. amend. VI.
67. U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall [any person] be compelled in any criminal case to be a witness against himself.").
68. U.S. Const. amend. IV.
70. Clark, supra note 64, at 382-83 n.10 ("The double jeopardy clause has been restricted to 'criminal' punishment despite the lack of an explicit textual reference to criminal prosecutions.").
In resolving the civil-criminal label dilemma, courts have initially looked to the statutory scheme. The Supreme Court analyzed statutes in terms of punitiveness but provided considerable deference to the legislature. An important early case illustrating this point was *Helvering v. Mitchell.* The defendant in *Helvering* was acquitted of a tax evasion charge brought by criminal indictment. The Commissioner of Revenue then initiated a civil proceeding for the $728,709.84 tax deficiency along with a 50% penalty of $364,354.92. The Supreme Court rejected the defendant's contention that the penalty constituted criminal punishment for purposes of double jeopardy. The Court reasoned that if the statute reveals the legislature intended to create a civil remedy, then double jeopardy protection does not apply.

The Court in *Helvering* clearly elucidated what was at stake in its decision. If the Court were to determine that tax proceedings were criminal, other constitutional protections would also be applicable. The Court noted that civil proceedings were “incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions.” Otherwise, the Court noted, civil proceedings would require jury trials, the state would have to prove the defendant guilty beyond a reasonable doubt, and the accused would have the right to confront witnesses and to remain silent.

The Supreme Court continued to distinguish civil and criminal procedures by construing the statute involved in each case. Legislative deference was the theme. Double jeopardy claims were thus rejected when the Court determined the legislature intended the procedure to be civil. Instead a statute was considered remedial as long as it served to com-

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73. 303 U.S. 391 (1938).
74. *Id.* at 395.
75. *Id.* at 399. ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [ ] [the statute] imposes a *criminal* sanction. That question is one of statutory construction.") (emphasis added).
76. *Id.* at 402.
77. *Id.* at 402-04.
79. See United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551 (1943)("It is true that 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute." (citing Brady v. Daly, 175 U.S. 148, 157 (1899))).
pensate the government for its loss.80 Few limits were imposed on what would make the government whole. For example, the Court considered statutory sanctions providing for a fixed sum plus double damages to be nonpunitive, even though the defendant had been previously convicted.81

The Court eventually expressed a limited willingness to examine the function of statutes providing for civil procedures. The defendant in United States v. Ward82 complied with a statute that required him to report to the proper authorities any discharge of a hazardous substance into navigable waters. On the basis of this information, the government imposed a civil penalty upon the defendant. The defendant appealed claiming his Fifth Amendment privilege against self-incrimination had been violated. Although the Court rejected the defendant's contention, the Court seemed to be less willing to defer to legislative prerogative. The Court annunciated a two part test:

First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label civil or criminal or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.83

Even so, the defendant's claim in Ward was rejected and the second prong was limited with the Court noting that "only the clearest proof" would be sufficient to establish the punitiveness of a statute.84

The requirement that there be the clearest proof of punitive effect prevented the Court from extending double jeopardy protection to forfeiture proceedings with civil procedural mechanisms. In United States v. One Assortment of 89 Firearms,85 the Court determined that double jeopardy did not prevent the state from initiating a forfeiture proceeding after the defendant had been acquitted of the same act. The Court concluded that the second prong of the Ward analysis supported the legislature's enactment of a civil procedure. As applied, the clearest proof requirement virtually guaranteed that absent clear intent by the legislature to make a proceeding criminal, a sanction would not be held to be punitive.86

Thus, persons who had been convicted criminally and were being charged civilly faced at least two significant barriers. First, the de-

82. 448 U.S. 242 (1980).
83. Id. at 248-49.
84. Id. at 249.
86. Glickman, supra note 72, at 1260.
fendant had to be charged with the same offense. Second, the court would have to determine that the subsequent proceeding was intended by the legislature to be civil or that the intent of the legislature should be overridden because of punitive purpose or effect. Only the clearest proof of the latter requirement would suffice. As a result, the Court was able to remove criminal constitutional protections from the civil arena.

The import of the civil-criminal distinction changed drastically with the Court's decision in Halper v. United States.87 Halper was the manager of a New York City medical facility that served patients eligible for Medicare benefits. During the course of his employment he submitted sixty-five false claims for reimbursement under the Medicare program. Each of the sixty-five claims were charged at a rate of $12 per claim, even though the value of the services entitled the city to only $3 per claim. As a result, the insurance company overpaid $585 and passed along the costs to the federal government. Halper was convicted of all sixty-five counts of violating the criminal false-claims statute. The government then turned to an administrative remedy provided under the civil False Claims Act. Pursuant to the Act's penalty provisions, Halper was subject to a civil penalty of $2,000 per claim. For the sixty-five claims, he faced a penalty of $130,000, or more than 220 times the amount of the fraud.88 The district court determined that such a penalty violated the Double Jeopardy Clause since the government had previously convicted Halper criminally for the same offense.89

The United States Supreme Court upheld the district court in a unanimous decision.90 The same offense requirement was quickly disposed of since the civil and criminal proceedings concerned the same conduct.91 As precedent had suggested, the civil-criminal hurdle would be more problematic.92 However, the Court concluded that "the

88. Id. at 437-38.
89. The district court, on the basis of double jeopardy, refused to impose the $130,000 penalty. Instead the court awarded the Government $16,000 as reasonable compensation. United States v. Halper, 660 F. Supp. 531 (S.D.N.Y. 1987). On reargument the Government demonstrated that the penalty provisions were mandatory instead of discretionary with the court. As a result, the court struck down the entire penalty. United States v. Halper, 664 F. Supp. 852 (S.D.N.Y. 1987).
91. Id. at 441.
92. Not surprisingly, the Government relied upon the civil-criminal distinction. The Government argued that Congress clearly intended a civil sanction as a matter of statutory construction. Id.
labels of 'criminal' and 'civil' are not of paramount importance."93 The Court opined that:

[While recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.94

Rather than examine how the legislature described the proceeding, the Court in Halper addressed a different issue: "[w]hether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause."95 Although the Court had earlier considered the punitive nature of the sanction, it was enough under previous law that the legislature labeled the sanction civil in order for the proceeding not to be punitive. The test originated by the Halper Court was clearly different. No longer would legislative intent control whether a sanction was sufficiently punitive. The Court reasoned that since both civil and criminal penalties may serve punitive goals, "[t]he notion of punishment . . . cuts across the division between the civil and the criminal law."96 Accordingly, the "intrinsically personal" protections of double jeopardy required an "asses[ment] [of] the character of the actual sanctions imposed on the individual by the machinery of the state."97

The Court concluded that if the defendant can show that the subsequent civil penalty "bears no rational relation to the goal of compensating the Government for its loss" and the penalty "appears to qualify as 'punishment' in the plain meaning of the word, the [civil] defendant is entitled to an accounting of the Government's damages and costs" to determine if the penalty is a second punishment.98 Upon a showing that the civil penalty "bears no rational relation" to redressing the Government's loss, the burden shifts to the Government to come forward with an accounting of damages and costs in prosecuting the action.99 The Court noted that because the calculation "inevitably involves an element of rough justice," the Government may be compensated by reasonable liquidated damages clauses.100

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93. Id. at 447. But see United States v. Ward, 448 U.S. 242, 248 (1980)("The distinction between a civil penalty and a criminal penalty is of some constitutional import.").
95. Id. at 446.
96. Id. at 448.
97. Id. at 447.
98. Id. at 449.
Although questionable in its interpretation of prior precedent, the *Halper* Court clearly expanded the double jeopardy protection afforded a defendant who faces civil and criminal sanctions. Whereas before *Halper*, the defendant facing a subsequent civil sanction would first have to show that the civil proceeding was essentially criminal, the *Halper* Court concluded that criminal-civil distinctions were not critical. Perhaps more importantly, the decision allowed the Court to extend double jeopardy protections to civil proceedings without a blanket extension of all criminal constitutional rights. In so doing, the Court preserved, to some degree, the streamlined nature of civil proceedings, while protecting double jeopardy interests.

Lower courts struggled in the wake of *Halper* to determine its applicability to state drug tax laws. Courts differed on how to quantify the Government's loss. Some courts equated the amount of the Government's loss to the amount of the unpaid tax, while others concluded that the loss was the Government's costs in initiating the tax proceeding only. Still others determined that the loss could be the costs of fighting the drug war.

Some courts even differed on whether *Halper* applied at all. For example, in *Sorenson v. State Department of Revenue*, the Montana Supreme Court concluded that "unlike the civil sanction in *Halper* where such proof [an accounting] may be required, a tax requires no proof of remedial costs on the part of the state." In another Montana case, the Ninth Circuit Court of Appeals reached the opposite conclusion and found for the defendant, because the state failed to pro-


105. *See* Rehg v. Illinois Dep't of Revenue, 605 N.E.2d 525, 537 (Ill. 1992). *See also In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1992)(concluding that the failure of the Department of Revenue to provide an accounting prevented the court from taking judicial notice of "the staggering costs associated with fighting drug abuse in this country."). Even in civil penalty situations, courts did not limit the government to a showing of the costs related to prosecuting individual defendants. Instead, overall costs to the public in general were considered. Abbott, *supra* note 72, at 117-18.


107. *Id.* at 33.
vide an accounting of its loss.\(^\text{108}\) The United States Supreme Court granted certiorari in *Department of Revenue v. Kurth Ranch*\(^\text{109}\) to resolve these conflicting results.

**IV. DEPARTMENT OF REVENUE V. KURTH RANCH**

**A. Facts**

In the wake of financial troubles on the Kurth family farm, marijuana harvesting became the Kurth's cash crop.\(^\text{110}\) Until law enforcement authorities responded, the Kurth farm was "the largest marijuana growing operation in the State of Montana."\(^\text{111}\) When criminal charges were eventually brought, all six family members pled guilty. The court sentenced two of the family members to prison. The others received suspended or deferred prison sentences.\(^\text{112}\) A civil forfeiture action was then filed against the Kurths. The Kurths' agreement to settle the action resulted in the forfeiture of $18,016 in cash and equipment.\(^\text{113}\)

Montana's then recently enacted\(^\text{114}\) Dangerous Drug Tax\(^\text{115}\) gave rise to the next legal proceeding. According to the statute, a tax was levied "on the possession and storage of dangerous drugs" and could be "collected only after any state or federal fines or forfeitures have been satisfied."\(^\text{116}\) The rate of taxation was the greater of 10% of the market value of the drugs or $100 per ounce of marijuana and $250 per ounce of hashish.\(^\text{117}\) Applicable regulations mandated that a tax return be filed within seventy-two hours after arrest.\(^\text{118}\)

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108. *In re Kurth Ranch*, 986 F.2d 1308, 1311-1312 (9th Cir. 1993).
114. The drug tax went into effect 17 days before law enforcement authorities raided the Kurth farm.
117. *Id.* (citing MONT. CODE ANN. § 15-25-111(2) (1987)). The statute also taxed drugs other than marijuana and hashish at varying rates.
118. *Id.* (citing MONT. ADMIN. R. 42-34.102(1) (1988)).
Pursuant to the statute, the Montana Department of Revenue sought to levy a tax assessment of $894,940.99 upon the drugs seized in the police raid of the Kurth ranch. In the bankruptcy proceedings the Kurths argued, among other things, that the assessment violated the Double Jeopardy Clause. The bankruptcy court submitted the assessment to a Halper analysis and found for the Kurths because the Department of Revenue failed to produce evidence of the State's loss from the sale of illicit drugs. Additionally, the court noted that because drug tax laws are "essentially penal in nature and assist in the enforcement of the state's criminal laws," the Montana law violated the protection against being held twice in jeopardy. The district court affirmed the bankruptcy court's judgment. The Ninth Circuit Court of Appeals also affirmed, but refused to hold the statute unconstitutional on its face. The court instead relied upon the failure of the State to produce the accounting mandated by Halper.

B. The Kurth Ranch Holding and Analysis

The United States Supreme Court struck down the Montana tax as violating double jeopardy in a 5-4 decision. Interestingly, the Court did not engage in a Blockburger analysis to ensure the Kurths were being prosecuted for the "same offense." The Department of Revenue failed to raise the issue in the lower courts. Similarly, the

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119. Id. at 1943 n.10 (citing In re Kurth Ranch, 145 B.R. 61, 68 (Bankr. D. Mont. 1990)).
122. Id. at 72-73 (Bankr. D. Mont. 1990).
123. Id. at 74-75.
125. In re Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993).
126. Id. at 1312.
128. Id. at 1942 n.9. Had Montana raised the issue, perhaps the result in Kurth Ranch would have been different as applied to five of the six defendants. Only one of the six Kurth family defendants, Richard Kurth, pled to the charge of possession of dangerous drugs. Brief for the United States as Amicus Curiae Supporting Petitioner at n.4, Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994)(No. 93-144) (LEXIS, Genfed library, Briefs file). A possessory offense will generally be considered a lesser-included offense of a drug tax violation. The Blockburger test would suggest at least two elements are necessary if a person fails to pay drug tax liability: possession of drugs (Element A) and failure to meet tax liabilities (Element B). Therefore, possession is a lesser-included offense of a
practitioner who neglects to raise the same offense issue at the trial court level does so at her own peril.

The majority noted that Halper did not present the question of whether a tax may be considered punishment for purposes of double jeopardy analysis.129 This distinction was critical, the Court concluded, because taxes and penalties serve different purposes. Accordingly, the majority sought to annunciate tax-specific criteria to determine when an illegal drug tax, imposed in a subsequent civil proceeding, went beyond legitimate taxation and served impermissible punishment objectives.130 In finding the imposed tax to be punishment, the Court analyzed four aspects of the Montana statute: its high rate of taxation, its obvious deterrent purpose, the fact that it was collected only after the person had been arrested, and the fact that it was collected only after the goods had been confiscated.131 These circumstances led the Court to conclude that the tax was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'"132

1. The Precedential Value of Halper v. United States

In Halper, a unanimous Supreme Court established its willingness to closely scrutinize civil penalties imposed in proceedings following criminal conviction.133 Even though the Court in Kurth Ranch suggested, in dicta, that the Halper test would lead to the same result,134...

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130. Id. at 1946.
131. Id. at 1946-48.
132. Id. at 1948.
the Kurth Ranch Court adopted a double jeopardy test that applied specifically to taxes on illegal goods. The Court justified this second test by simply distinguishing taxes from penalties, stressing that Halper did not present the question of whether a tax may be considered punishment for purposes of double jeopardy.\textsuperscript{135} The Kurth Ranch majority noted that whereas penalties serve to compensate government for its loss, taxes have an additional purpose: they raise revenue.\textsuperscript{136}

Justice O'Connor concluded in her dissent that if the Supreme Court had strictly applied the Halper test, the result in Kurth Ranch would possibly have been different. According to Justice O'Connor, "[t]here is no constitutional distinction between such a [Halper] fine and the tax at issue in this case."\textsuperscript{137} O'Connor argued that because under the Halper test the Kurths would be accountable for "the costs of detecting, investigating, and raiding their operation, the price of prosecuting them and incarcerating those who received prison sentences, and part of the money spent on drug abuse education, deterrence and treatment," the Montana tax assessment should be upheld.\textsuperscript{138} Using readily available statistics, O'Connor concluded that the costs of apprehending, prosecuting and incarcerating the Kurths would total at least $120,000, which the State could seek to recover through drug tax statutes that approximate liquidated damages.\textsuperscript{139}

Nevertheless, separating taxes from penalties is a sound distinction. Taxes and penalties are fundamentally different: the primary purpose of taxation is to raise revenue. This distinction logically follows from Halper. The Court in Halper engaged in a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."\textsuperscript{140} Devoid of punitive intent, penalties serve to compensate government for its losses. Likewise, it is instructive to examine the purposes of taxes. Taxes, unlike penalties, do not serve to compensate the government for its losses. Rather, taxes seek, in part, to raise revenue.\textsuperscript{141} Therefore, the proper test in light of Halper would attempt to determine when a given tax levied after a criminal conviction exceeds its revenue-raising function and seeks to

\begin{footnotes}
\item[135] \textit{Id.} at 1945.
\item[136] \textit{Id.} at 1946. Chief Justice Rehnquist, in dissent, also found the revenue-raising function of taxes to be the basis for distinguishing taxes from penalties. \textit{Id.} at 1949-50 (Rehnquist, C.J., dissenting).
\item[137] \textit{Id.} at 1953 (O'Connor, J., dissenting).
\item[138] \textit{Id.} (O'Connor, J., dissenting).
\item[139] \textit{Id.} at 1954 (O'Connor, J., dissenting).
\item[141] Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1949 (Rehnquist, C.J., dissenting) ("the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of the law, but is instead to either raise revenue, deter conduct, or both.").
\end{footnotes}
punish. The Court in *Kurth Ranch*, by adopting a test specific to taxes, furthered the reasoning of *Halper* by conducting an individualized assessment of the sanction imposed.

As a result, the Court's opinion in *Kurth Ranch*, when considered in tandem with *Halper*, leads to a pigeonholing of the various sanctions that may be imposed by the state in a subsequent civil proceeding. One test of punishment is adopted for penalties; another is adopted for taxes. It is possible the Court may have reached a different result if Montana had instead devised a penalty scheme based upon the amount of drugs in the Kurths' possession, given the costs of fighting the war on drugs. It may become necessary for the Court to refine or synthesize these analytical categories in order to scrutinize taxation schemes legislatures label as penalties in order to trigger the arguably more generous *Halper*-based analysis.

2. Drug Taxation and Punishment

When lower courts face the issue of whether a drug tax assessment violates double jeopardy, they will undoubtedly look to the four factors annunciated by the Court in *Kurth Ranch*: (1) whether the statute imposes a high rate of taxation; (2) whether the statute has an obvious deterrent purpose; (3) whether the tax liability is triggered upon arrest for a crime; and, (4) whether the tax is imposed only after the goods have been confiscated. These four factors will have profound implications for the taxation of illicit substances. Because such statutes generally serve an obvious deterrent purpose and are collected only after the goods have been confiscated pursuant to an arrest, all that will remain is the determination of whether the tax impermissibly serves punishment objectives in light of the tax rate assessed upon legal goods and activities. Specific-model drug tax statutes suffer from all four infirmities. For purposes of this Note, the Nebraska statute will be used to provide an example of these problems. The only statutes that will survive scrutiny will be schemes that tax illegal drugs under existing sales or income tax mechanisms or schemes based on similar rates.

a. Rate of Taxation

The *Kurth Ranch* Court concluded that the Montana law imposed an assessment with a high rate of taxation, noting that the overall

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142. See id. at 1952-55 (O'Connor, J., dissenting)(Because Justice O'Connor found no constitutional difference between taxes and penalties, she applied a strict *Halper* test and concluded the Montana statute did not violate double jeopardy.).
143. See infra notes 169-81 and accompanying text.
144. See infra notes 192-96 and accompanying text.
145. See infra notes 182-91 and accompanying text.
146. See infra notes 147-65 and accompanying text.
rate of taxation was four times the market value of the drugs. The Court reasoned as follows: "The State thus taxed the drugs at about 400 percent of their market value. Compared to similar taxes on legal goods and activities, Montana's tax . . . appears to be unrivaled."147 In deciding the tax rate was exorbitant, the Court took notice of the tax rate imposed by the drug tax and compared it to taxes on legal goods and activities. In the estimation of the majority, the Montana tax was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment."148

Oddly enough, the majority in Kurth Ranch adopted the test advocated by the United States in its amicus brief supporting the Montana Department of Revenue. The United States argued that "the analysis should turn on whether the tax is of a type, and in an amount, that is ordinarily also imposed on legal goods and activities."149 The Supreme Court agreed this was the appropriate test but differed with the United States on its application. The United States contended that the Montana tax was within the range of tax rates imposed on legal goods and activities. To reach this conclusion, the United States pointed to a selected portion of the tax assessed against the Kurths. The Montana Department of Revenue had taxed high grade marijuana with a market value of $2000 per pound at $1600 per pound, an 80% rate of taxation.150 The United States noted that a proposed federal tax on cigarettes "could easily surpass" the 80% rate imposed by the Department of Revenue.151 The Court, however, declined to examine only these portions of the Montana tax assessment. The Court noted that the United States could not provide an example of a tax equivalent to Montana's taxing of a lower-valued drug at a rate of eight times its market value152 or of a tax that approached a tax rate of four times the market value of all the drugs confiscated from the Kurths.153 Lower courts should therefore examine the tax rate by

148. Id. at 1948 (emphasis added).
152. Authorities also confiscated 100 pounds of shake. Shake is the remaining leaves and stems of the marijuana plant. Shake has a lower street value because it contains lower levels of tetrahydrocannabinol (THC), the substance that produces the drug's narcotic effect. In re Kurth Ranch, 145 B.R. 61, 66 (Bankr. D. Mont. 1990). Shake was determined to have a market value of $200 per pound yet was taxed at the same $1600 per pound rate—an 800% rate of taxation. Id. at 66-67.
looking at the overall tax rate imposed in a particular case and should not examine only selected portions.

Perhaps because of the differing factual conclusions of the United States and the Kurth Ranch majority, Chief Justice Rehnquist employed a different test in arguing that the tax rate imposed upon the Kurths did not violate double jeopardy. Rehnquist contended that only if the rate imposed was "so high as to be deemed arbitrary or shocking" when compared to taxes on legal goods would such assessments violate double jeopardy.154 He concluded that "given both the traditional deference accorded to state authorities regarding matters of taxation, and the fact that a substantial amount of the illegal drug business will escape taxation altogether," the higher "arbitrary or shocking" threshold was more appropriate.155

The Court's deference to the states in matters regarding taxation is well documented.156 However, legislative deference has a more limited application when tax statutes implicate double jeopardy and other constitutional limitations.157 Although the Court has upheld a $100-per-ounce tax on marijuana,158 the same tax amount imposed by Montana, double jeopardy was not at issue in that case. Instead, the Court has employed a test similar to Rehnquist's in cases in which double jeopardy was not at stake. For example, in United States v. Constantine,159 the defendant argued that a $1000 "special excise tax" on persons selling alcoholic beverages in violation of Prohibition was not a tax, but instead, was a penalty for violation of state law. The defendant contended that the tax could not be imposed in any proceeding because the tax was a pretext for a penalty. The Court in Constantine used a test similar to that advocated by Rehnquist in Kurth Ranch. The Constantine majority noted that,

Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.160

Constantine demonstrates that defendants can attack a tax assessment if it is "grossly disproportionate" to standard taxes. However,

154. Id. at 1952 (Rehnquist, C.J., dissenting).
155. Id. (Rehnquist, C.J., dissenting).
157. In the context of a self-incrimination claim under a tax law, the Court has said, "The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." Marchetti v. United States, 390 U.S. 39, 58 (1968).
159. 296 U.S. 287 (1935).
160. Id. at 295 (emphasis added).
unlike a double jeopardy challenge, such an attack is not premised on a prior criminal conviction. As a result, Rehnquist's test does not take into account the fact that the defendant has been convicted criminally. He would apply the same test regardless of prior convictions. However the Fifth Amendment demands a different result. The fact that a defendant has been convicted previously is of constitutional significance.

Tying permissible tax rates to the tax rates on legal goods and activities when a defendant has been previously convicted does not prevent the state from taxing illegal activities. The Court has long maintained that the states may do so. However, when the legislature taxes illegal activities for which one defendant has been previously convicted, the state should not use their illegality as grounds for imposing exponentially higher taxes without implicating double jeopardy. Taxation then becomes a subterfuge for punishment that "could be equally well served by increasing the fine imposed upon conviction" for the criminal offense.

As the lower courts apply the Kurth Ranch test for taxation, they will find that specific-model drug tax statutes impose rates of taxation far in excess of taxes on legal goods and services. The tax rate imposed by Montana is not atypical of those imposed in other states. Current drug tax statutes, including Nebraska's, do not remotely approximate the tax rates imposed upon legal goods and activities. The only existing schemes likely to pass constitutional muster are those that tax drugs under existing state sales or income tax mechanisms or at similar rates. In such cases, the tax does not reach the level of a "high rate of taxation" since legal and illegal goods are taxed at the same rate. Because the taxes imposed by current drug tax stamp and excise tax statutes do not approximate the rate applied to legal goods and activities, they violate the Double Jeopardy Clause when imposed in a subsequent proceeding.

163. For a summary of the taxes imposed on legal goods and activities in Nebraska see 1 State Tax Guide (CCH) ¶ 927.
164. Some examples are provided in note 12, supra.
165. The United States in its amicus brief drew a similar conclusion:

[Where the tax is a tax of general applicability that is imposed on both legal and illegal goods or activities, there is ordinarily no reason for any further inquiry into whether it is a punishment. The fact that the burden falls on both legal and illegal goods or activities generally ensures that the tax serves the normal revenue-raising purposes of taxation.

b. Other "Unusual Features"

The Kurth Ranch majority relied upon three other factors or "unusual features" in striking down the tax assessment. The Court stressed that the law had "an obvious deterrent purpose" and the assessment was "conditioned on the commission of a crime" on goods "the taxpayer neither own[ed] nor possese[d] when the tax [was] imposed." These factors, however, merely describe the operation of taxes on illegal goods. They do not separate permissible from impermissible drug taxes. As a result, the only factor left to distinguish a constitutional drug tax scheme from an unconstitutional punishment is the rate of taxation.

In addition to a high rate of taxation, the Court determined that the Montana tax served an obvious deterrent purpose. The Court opined that such an obvious deterrent purpose was indicative of punishment. The Court in Kurth Ranch disposed of the obvious deterrent purpose factor cursorily, noting only that it was "beyond question" the Montana statute served to deter. All specific-model drug tax statutes will be similarly afflicted since they serve deterrent purposes.

Obviously, illicit substance tax laws are not adopted with the intent to undermine the deterrent goals of state drugs laws. For example, persons in legal possession of drugs are exempted from specific-model drug tax laws. Only those who violate possession laws are subject to the tax. The Nebraska statute is no exception. The Nebraska version provides that payment of the tax does not "in any manner provide immunity for a dealer from criminal prosecution pursuant to Nebraska law." Nor is the tax applicable to persons "lawfully in possession of marijuana or a controlled substance." The law clearly does not sanction the possession of illegal drugs. It discourages such possession.

In examining the deterrent purposes of drug tax statutes, the courts should also consider the penalties that are imposed in the face of expected noncompliance. Not only do the states seek to collect the tax itself, they are often also able to invoke 100, 200 or 300% pen-
The penalty plus the tax is, in effect, a double tax. Nebraska and several other states do not distinguish between the tax and penalty, and require that the penalty be assessed as part of the tax. Not only does the rate of taxation deter, penalties that double and triple the rate of taxation further punish those who do not comply with the criminal law.

Even if the state can show that its intent was not to deter the possession of illegal narcotics, evidence of the state's motive in raising revenue is likely to be of no avail. Although the Kurth Ranch Court recognized that the Montana legislature was motivated, in part, by revenue-raising, the majority was unwilling to conclude that the Montana law did not also serve to deter the possession of drugs. Legislative claims that the purpose of the statute is to raise revenue are undermined by the available data. The revenue raised from drug tax statutes is negligible. Consider recent Nebraska Department of Revenue Statistics. Since 1991, only ninety-eight tax stamps have been purchased under the Nebraska statute. Ninety-one of the stamps sold were of the lowest denomination. To date no person has purchased $500 or $1,000 stamps. Revenue from stamp sales totals only $1360. In fact, law enforcement authorities in Nebraska have not arrested any person for the possession of illicit drugs that has purchased the tax stamps.

174. See supra notes 30-35 and accompanying text.
176. For commentary arguing that penalty provisions serve punishment objectives see Iijima, supra note 42, at 117, and Racaniello, supra note 26, at 672.
178. See supra notes 24-29 and accompanying text.
179. Tax stamp sales statistics reveal:
6. Stamps sold:

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Interview with Phil Richmond, supra note 27.
180. Telephone Interviews with Lieutenant Bill Hobbs, Lincoln, Sergeant Al Walton, Norfolk, Investigator Mike Riley, Grand Island, Lieutenant Norbert Liebig, North Platte, and Trooper Brian Heggarty, Scotts Bluff, officers of the Nebraska State Patrol (Oct. 28, 1994), Lieutenant Mike Jones, Omaha, officer of the Nebraska State Patrol (May 9, 1995).
The Kurth Ranch Court's opinion implies that whether in fact the legislature intended to raise revenue is irrelevant. The argument that the state seeks to recover what drug dealers are not contributing to the tax system is no defense to a double jeopardy claim. Instead, the presence of an obvious deterrent purpose trumps legislative intent. The Court effectively prevents legislators from forming a legislative history expressing a motivation to raise revenue in order to avoid Kurth Ranch. Thus, this functionalist approach takes notice of the fact that although some taxes on legal goods also act to deter consumption, they raise revenue. Drug tax statutes, on the other hand, operate primarily to deter illegal conduct.181

The Court also found notable that the tax is "conditioned on the commission of a crime."182 This fact, according to the Kurth Ranch majority, established that the statute was "significant of penal and prohibitory intent rather than the gathering of revenue."183 Still, this is merely a description of drug tax statutes and, for that matter, all other statutes that tax illegal goods and activities. Drug tax statutes specifically exclude persons in lawful possession from tax liability.184 The Court merely annunciated a truism: Illegal drug taxes are levied on illegal goods. This "unusual feature" will accordingly plague all drug tax statutes.

Further language in the opinion suggests that the Court may have been concerned with more than just the fact Montana chose to tax an illegal activity. After all, on other occasions the Court has held that the illegality of the taxed activity or good does not prevent its taxation.185 The Court in Kurth Ranch continued its analysis by saying "[p]ersons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax."186 The

181. "Sin" taxes on cigarettes and alcohol are the best examples of taxes on legal goods that seek to deter consumption. However the Court in Kurth Ranch distinguished such "mixed-motive taxes" from taxes on illegal goods:

By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits—such as creating employment, satisfying consumer demand, and providing tax revenues—are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.


182. Id. at 1947 (citing United States v. Constantine, 296 U.S. 287, 295 (1935)).

183. Id.


Court pointed out that “the [Montana] tax assessment not only hinges on the commission of a crime, it is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place.”187 The Court’s language can be read to imply that the Montana statute would not be as offensive if the statute allowed for the assessment of the tax prior to arrest.

It is helpful to illustrate this point by comparing the tax statute in Kurth Ranch with the Nebraska statute. Tax liability under the Nebraska drug tax law does not arise upon arrest. The tax is due and payable immediately upon possession of the marijuana or controlled substances, or upon the expiration of previously purchased stamps. At either point the dealer must purchase drug tax stamps and affix them to the container holding the drugs.188 There is no requirement that the taxpayer first be arrested for a possessory drug offense. In comparison, the Montana tax could be collected only after arrest.189

It is difficult to determine if, in this respect, the Nebraska statute is fundamentally different from the Montana scheme. Two interpretations of the ambiguity are possible: (1) the Court holds that the Montana assessment was offensive because the tax liability could only arise after the person was arrested; or, (2) the holding implies that the Montana tax was offensive because a person is being taxed for an act that is also a crime. Under the first mode of analysis, a drug tax law is not “conditioned on the commission of a crime” if the tax liability arises upon possession but before arrest. The Nebraska statute would pass muster under this approach. According to the second interpretation, a drug tax law poses double jeopardy problems when the payment of the tax arises from an activity that is also illegal. Under the second approach, the Nebraska law would violate double jeopardy on similar facts.

The latter reading is most consistent with the operation of drug tax statutes. The fact that the tax obligation in Nebraska and other states arises upon possession instead of arrest is merely theoretical. As Chief Justice Rehnquist argued in dissent, “individuals cannot be expected to voluntarily identify themselves as subject to the tax.”190 If violators cannot be expected to comply, then the tax liability, in effect, does not arise until arrest and criminal prosecution procedures have been set in motion. In essence, all the Montana statute did was

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187. Id. (emphasis added).
188. Marijuana and Controlled Substances Tax Regulations, REG-94-002.01A, Nebraska Department of Revenue (1992).
190. Id. at 1950 n.2 (Rehnquist, C.J., dissenting). See also supra note 42.
take notice of the fact persons will not pay the tax unless they have been arrested.\textsuperscript{191}

The opposite rule would reach an unjust result. When the state presumes persons will not comply with the statute, one must invoke a merely theoretical distinction to contend that arrest does not trigger tax liability. As a matter of practical circumstances, the only persons who will be held liable for the tax are persons who have been arrested. Drug dealers are not paying the tax voluntarily. The entire class of taxpayers are almost inevitably people already arrested.

For the fourth variable in its decision, the Court noted that although the Montana tax was a levy on the possession of drugs, the tax was levied on goods the taxpayer did not own or possess when the tax was imposed. The Court suggested the defendant did not have possession of the drugs since "the State presumably destroyed the contraband goods . . . before the tax on them was assessed."\textsuperscript{192} The Court reasoned that "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."\textsuperscript{193}

The Court's conclusion employs a narrow construction of the Montana statute. The Court's determination that the Montana tax is assessed on previously confiscated goods misconstrues the Montana statute. The Montana law does not tax the goods because they are confiscated. Rather, the tax liability arises because the dealer possessed the drugs at a point prior to arrest, before confiscation. The collection of the tax after the state has confiscated the contraband merely reflects the law enforcement interest in removing drugs from the flow of commerce. Otherwise, the state would be required to leave the drugs in the possession of the dealer in order to tax them.\textsuperscript{194}

Taken to its logical conclusion, the Nebraska statute and others like it, will not pass scrutiny under this factor either. In Nebraska the law imposes the tax "immediately upon acquisition or possession."\textsuperscript{195} However, the tax will only be collected after state officials have confiscated the drugs, because dealers will not pay the tax voluntarily. Unless law enforcement allows the taxpayer to keep the drugs in her possession, the scheme runs afoul of the Court's analysis. It is difficult, if not impossible, to conceive of a situation in which illegal drug taxes would avoid such an infirmity. The "goods" will not be in possession of the dealer after confiscation. Nor will the dealer ever be in

\textsuperscript{191} Id. at 1950 (Rehnquist, C.J., dissenting).
\textsuperscript{192} Id. at 1948.
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 1951 (Rehnquist, C.J, dissenting)("Surely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession.").
lawful possession since the activity itself is against the law. Thus, the Court’s reasoning is puzzling. Drug taxation will overcome this hurdle only if the courts establish an overly technical rule that requires the state to inform the drug dealer of the tax liability before confiscating the drugs. The drugs will be confiscated first as a matter of course.

The Court’s claim that all drug tax statutes have an obvious deterrent effect is reasonable. Its deduction that drug tax liability will arise after the arrest is logical. The Court’s suggestion that drug assessments are a tax on nonexistent goods, however, is difficult to comprehend. In any event, these three factors point in the same direction: Specific-model drug tax statutes are of questionable constitutionality. The only factor the legislature can reasonably attempt to impact is the rate of taxation.

C. Implications for the Taxation of Illicit Substances

If a state should still seek to impose a drug tax assessment after a defendant has been convicted for a possessory drug offense, the tax rate must not impermissibly serve punishment objectives in comparison to the tax rate assessed upon legal goods and activities. Taxing the income or sales of persons who engage in illegal activities is certainly a laudable goal. Tax statutes, in some form, are necessary to ensure that persons who operate outside the law pay their fair share. Means remain to achieve this objective that do not implicate double jeopardy protections. States can employ existing tax mechanisms, such as income or sales tax provisions, without running afoul of double jeopardy. The Court’s opinion in Kurth Ranch does not foreclose states from taxing drugs at a rate similar to that imposed on legal goods. The double jeopardy clause would not be implicated even though the state previously convicted the defendant for a drug-related offense. When the legislature taxes drugs at the rate of legal goods and activities, the rate of taxation does not fall into the punitive category. Existing sales and income tax laws therefore provide a convenient mechanism for the states to tax illicit drug revenue. They do not violate double jeopardy protections because the applicability of the tax law is not based upon a distinction between the criminal and the law-abiding citizen. Each and every person is subject to the tax. The drug dealer cannot therefore claim to have been singled out in retribution for his illegal activities.

Although imposing taxes on illegal drugs under income and sales tax schemes present difficult problems of proof, courts will often uphold revenue department methods of calculating tax assessments

196. See generally subsection IV.B.2.
197. See Wisotsky, supra note 40, at 1376-77.
under existing income\textsuperscript{198} and sales tax schemes.\textsuperscript{199} To the extent the states may wish to avoid problems of proof altogether, the state could instead tax the possession of the illegal goods at a rate equivalent to the sales or income tax rate. Because the rate of taxation is equated to that imposed on legal goods and activities, the statutes do not implicate double jeopardy. The drug would be taxable at a rate similar to the income or sales tax rate based upon the drug's market value. The statutory mechanisms to administer this excise tax are already in place. The legislature would only have to amend the rate of taxation authorized by current specific-model drug tax statutes.

The Court in \textit{Kurth Ranch} also approved the levying of the tax assessment in the same proceeding with the criminal offense.\textsuperscript{200} The courts have repeatedly struck down double jeopardy claims when the state seeks to impose the criminal sanction and the drug tax assessment in the same proceeding.\textsuperscript{201} This result follows from the Supreme Court's decision in \textit{Missouri v. Hunter}\.\textsuperscript{202} So long as both sanctions are authorized by the legislature, these laws are free from multiple punishment concerns and the \textit{Blockburger} test is not controlling.\textsuperscript{203} Without doubt legislatures intend drug tax statutes to work in tandem with the criminal law, since paying the tax does not provide criminal immunity to the dealer.\textsuperscript{204} However, levying the criminal punishment

\textsuperscript{198} See Swyningan v. Commissioner, No. 4706, 1987 WL 25995 (Minn. Tax Ct. Dec. 7, 1987). In \textit{Swyningan}, law enforcement authorities executed a search warrant upon the defendant and seized $10,000 and a small bag of cocaine. The court upheld the revenue department's assessment of $7,500 in unpaid income taxes based upon a reconstruction of the defendant's drug-related income.

\textsuperscript{199} See People v. Queenan, 404 N.W.2d 693 (Mich. Ct. App. 1987), cert. denied, 484 U.S. 1076 (1988); Greer v. Department of Treasury, 377 N.W.2d 836 (Mich. Ct. App. 1985). In \textit{Greer}, the taxpayers were found in possession of twenty-seven pounds of marijuana. Law enforcement officials also had knowledge of a previous sale of fifteen pounds. To compute the sales tax, the revenue department calculated the assessment based on 243 pounds of marijuana, which included 200 pounds of "potential" sales. The appeals court upheld the resulting tax assessment of $50,876. Similarly the court in \textit{Queenan} upheld a revenue department calculation amounting to over $2.1 million in unreported taxable sales. The calculation was based upon 60 pounds of marijuana found in the possession of the defendant and tax records seized by law enforcement authorities. People v. Queenan, 404 N.W.2d 693, 695 (Mich. Ct. App. 1987), cert. denied, 484 U.S. 1076 (1988).


along with the civil punishment presents a variety of procedural problems. Difficulties with determining the applicable burden of proof\textsuperscript{205} and the scope of discovery\textsuperscript{206} are likely to arise. Furthermore, the defendant in a criminal case has constitutional protections not found in civil contexts, including the privilege against self-incrimination, the right to a jury trial, and the assistance of counsel.\textsuperscript{207}

Nor is the state precluded from assessing the tax and foregoing criminal remedy, or assessing the tax after the defendant has been found not guilty in a criminal proceeding.\textsuperscript{208} As Kurth Ranch demonstrates, the amount of these taxes can serve the objectives of the criminal law. For example, failure to pay the tax in Nebraska can result in the imposition of a Class IV felony\textsuperscript{209} that is punishable by up to five years imprisonment and/or $10,000 fine.\textsuperscript{210} Such a sentence could serve the state's interest in incarcerating the drug dealer, however allowing the state to initiate a drug tax proceeding after a not guilty criminal verdict has been rendered, would undermine the defendant's finality interest.\textsuperscript{211} It has therefore been argued that an acquittal should also bar future prosecutions in civil proceedings.\textsuperscript{212}

Undoubtedly the states will continue to attempt to tap into the tax base provided by the narcotics trade. Constitutional means exist for states to do so. Already existing income and sales tax schemes provide the most logical method. Simply amending the tax rate of current drug tax schemes can accomplish the same result. On the other hand, there is no reason to believe that state officials could not better coordinate civil and criminal actions in order to avoid placing defendants in double jeopardy.

V. CONCLUSION

As the regulatory nature of government continues to grow, violators of the criminal law are increasingly facing parallel civil sanctions for the same conduct.\textsuperscript{213} Those who offend drug laws are no exception.

\textsuperscript{205} In criminal cases, the state is constitutionally required to find the defendant guilty beyond a reasonable doubt. \textit{In re Winship}, 397 U.S. 358 (1970). Civil matters require a lesser threshold of proof, often preponderance of the evidence.

\textsuperscript{206} Eads, \textit{supra} note 72, at 979-83; Glickman, \textit{supra} note 72, at 1280.

\textsuperscript{207} Cheh, \textit{supra} note 72, at 1349.


\textsuperscript{211} \textit{See supra} notes 56-57 and accompanying text.


\textsuperscript{213} Cheh, \textit{supra} note 72, at 1325.
Since civil procedures are not encumbered with the constitutional protections afforded criminal defendants, they are easier to use, more efficient, and less costly than criminal prosecutions. However, the United States Supreme Court has recognized that such tactics, if left unchecked, could compromise the constitutional protection of double jeopardy, particularly given the increasingly punitive nature of civil sanctions. To resolve the tension between allowing all the constitutional protections and compromising double jeopardy interests, the Court crafted a rule extending double jeopardy protection only.

In *Kurth Ranch*, the Court cast a broad net that will catch most, if not all, specific-model drug tax statutes. Where the Court in the past has deferred to the legislature's intent to impose a civil sanction, the *Kurth Ranch* majority refused to do so. Accordingly, unless the state can demonstrate that the tax rate imposed is equivalent to the rate imposed on legal goods and activities, the assessment operates in a way very similar to the criminal law, and the Double Jeopardy Clause affords the defendant constitutional protection. The unwillingness of the Court to look the other way when the states enact drug tax statutes reflects a healthy judicial antagonism toward revenue-raising as a pretext for punishing drug-crime defendants twice for the same offense.

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215. Although the *Kurth Ranch* majority concludes the Montana drug assessment was "the functional equivalent of a successive criminal prosecution," *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994)(emphasis added), this language should not be read to imply that all protections afforded to the criminal defendant are applicable in civil proceedings. *Kurth Ranch* extended double jeopardy protection only. As Justice Scalia correctly noted in his dissent, the standard for whether all criminal constitutional protections apply is substantially different and less deferential than the standard articulated by *Halper* and *Kurth Ranch* in the context of double jeopardy. Furthermore, if drug tax assessments are criminal in nature, then such levies violate, not only double jeopardy, but all of the criminal procedure guarantees regardless of whether the sanction was imposed in a prior criminal prosecution. *Id.* at 1959-60 (Scalia, J., dissenting). But see *id.* at 1955 (O'Connor, J., dissenting)("[T]he presumably the State cannot tax anyone for possession of illegal drugs without providing the full panoply of criminal procedure protections.").

216. See *supra* notes 73-86 and accompanying text.