THE SUPREME COURT ASSAULTS STATE DRUG TAXES WITH A DOUBLE JEOPARDY DAGGER: DEATH BLOW, SERIOUS INJURY, OR FLESH WOUND?

CHARLES K. TODD, JR.*

INTRODUCTION

Accusing the Supreme Court of the United States of a lawless act, especially one of a criminal nature, is an accusation fraught with reservation. This Note suggests that the Court's action on June 6, 1994, warrants such an accusation. In the hallowed halls of the Supreme Court building, five Justices picked up a "dagger" and looked for past Supreme Court cases they could use for "accomplices." Although not all the accomplices were willing, the Justices relentlessly pursued their support in the "attack." The victim was unsuspecting, well-liked, and well-supported by the community. But armed with its "double jeopardy dagger" and a "motive" for the crime,[1] the Court wounded the victim in a possible fatal slashing attack; the victim—state drug taxes. Although one may find this "crime scene" analogy extreme, this Note suggests that the Court's recent use of the Double Jeopardy Clause to strike down state drug taxes warrants such extremity.

Because this Note enters the rocky waters of double jeopardy jurisprudence and its recent application to state excise taxes on drugs, it is only fair to advise the reader of Chief Justice Rehnquist's characterization of the jurisprudence in this area as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[2]

In *Department of Revenue of Montana v. Kurth Ranch*,[3] the Supreme Court held Montana's Dangerous Drug Tax Act[4] violative of the Double Jeopardy Clause,[5] and further muddied the already cloudy waters regarding the nature and scope of double jeopardy violations. In *Kurth Ranch*, Montana's law enforcement officers raided the Kurths' family farm, arrested them, and confiscated marijuana plants. After the Kurths pled guilty to criminal drug charges, Montana's Department of Revenue attempted, in a separate proceeding, to collect a state tax imposed on the possession and storage of dangerous drugs. The Kurths, then in

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* J.D. Candidate, 1996, Indiana University School of Law—Indianapolis; B.A., 1984, Ball State University, Muncie, Indiana. This Note would not have been possible without the love, friendship, prayers and encouragement of my wife, Sandy, whose dedication as a wife and a mother helped make this author's participation possible.

1. *See* United States v. Halper, 490 U.S. 435 (1989) (holding that a civil sanction is punishment for double jeopardy purposes).

2. Albernaz v. United States, 450 U.S. 333, 343 (1981).

3. 114 S. Ct. 1937 (1994).

4. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (The Act is cited as it existed at the time of the *Kurth Ranch* decision. It was revised in 1993, with §§ 15-25-103 to -110 and §§ 15-25-116 to -120 reserved).

5. U.S. CONST. amend. V.

bankruptcy proceedings, objected to Montana's proof of claim for the tax and challenged the tax's constitutionality. The bankruptcy court held the assessment on the marijuana was a form of double jeopardy,[6] invalid under the Federal Constitution, and the district court affirmed.[7] The court of appeals reasoned that under *United States v. Halper*[8] the sanction or tax imposed must be rationally related to the damages the government suffered and thus the tax was unconstitutional as applied to the Kurths because Montana refused to offer such evidence.[9] Montana filed petition for writ of certiorari, which the Court granted.[10] The United States Supreme Court, in a five-four decision, with three separate dissenting opinions, held the tax as imposed under Montana's Dangerous Drug Tax Act[11] to be "punishment" for purposes of double jeopardy analysis and thus unconstitutional as pursued in separate proceedings.[12]

The Supreme Court had only recently tested the elasticity of the Double Jeopardy Clause by expanding double jeopardy protection into civil matters.[13] In the *Kurth Ranch* decision, the Court again armed itself with the Double Jeopardy Clause and allowed a tax-free playground for those involved in illegal drugs. The Supreme Court for the first time invited tax legislation into its growing arsenal used to defend the ambiguous state of double jeopardy protections, and thereby strengthened their immunity from solid interpretation.[14]

The purpose of this Note is to examine the *Kurth Ranch* decision, the "scene of attack," and the possible harm the Court has inflicted with its "double jeopardy dagger," especially its effect on the future of state excise taxes on illegal drugs. In holding Montana's drug excise tax punishment for the purposes of double jeopardy analysis, the Supreme Court determined that there were "unusual features"[15] that set Montana's tax apart, thereby leaving behind "bandages" that

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6. *In re* Kurth Ranch, 145 B.R. 61 (Bankr. D. Mont. 1990), *aff'd*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

7. *In re* Kurth Ranch, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

8. 490 U.S. 435 (1989).

9. *In re* Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993), *cert. granted*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

10. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 38 (1993), *aff'd*, 114 S. Ct. 1937 (1994).

11. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (The Act is cited as it existed at the time of the *Kurth Ranch* decision. It was revised in 1993, with §§ 15-25-103 to -110 and §§ 15-25-116 to -120 reserved).

12. *Kurth Ranch*, 114 S. Ct. at 1948-49.

13. United States v. Halper, 490 U.S. 435 (1989).

14. *Kurth Ranch*, 114 S. Ct. at 1945 (acknowledging the Court had "never held that a tax violated the Double Jeopardy Clause").

15. *Id.* at 1947.

states might utilize to "patch the wounds" left on state drug taxes. Whether this will be enough for their survival against future double jeopardy attacks is an area of uncertainty.

Part I of this Note discusses the history of state drug taxes and the previous constitutional attacks they have incurred, as well as the history and progression of the Double Jeopardy Clause.[16] Part II analyzes and critiques the *Kurth Ranch* decision; and Part III predicts the possible impact of applying *Kurth Ranch* both to state drug taxes and to other areas, such as taxation on illegal activities in general. With specific emphasis on the Indiana Controlled Substance Excise Tax (CSET),[17] Part IV recommends some model provisions that states should use to revise existing statutes or to draft new statutes in order to avoid the fate of Montana's drug tax. The proposed revisions to state drug tax statutes emphasize the terminology and elements that have caused constitutional conflict, especially in reference to a double jeopardy attack. This is further highlighted by examining the Indiana Supreme Court's recent decisions concluding that Indiana's drug tax is punishment for purposes of double jeopardy protection.[18]

I. HISTORY OF STATE DRUG TAXES

A. Taxation of Illegal Activities in General

It is well accepted that the states have the power to tax their citizens provided it is done within the confines of the Fourteenth Amendment.[19] Furthermore, legislatures have been given "broad latitude in creating classifications and distinctions in tax statutes."[20]

The Revenue Act of 1913 imposed taxes on "lawful business carried on for gain or profit."[21] The Act was amended three years later by deleting the word "lawful,"[22] which eliminated any explicit distinction between legal and illegal business for tax purposes. Since this amendment, the Court has on several

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16. This discussion of the Double Jeopardy Clause is comparatively brief given that other notes and articles primarily focus on double jeopardy. *See generally* Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799 (1988); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues To Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1 (1993).

17. IND. CODE §§ 6-7-3-1 to -17 (1993).

18. Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). *See infra* discussion Part IV.

19. U.S. CONST. amend. XIV.

20. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983).

21. *See* Frank A. Racaniello, Note, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 658 (1992) (citing Revenue Act of 1913, Pub. L. No. 16, § 2B, 38 Stat. 114, 167 (amended 1916)).

22. *Id.* (citing Revenue Act of 1916, Pub. L. No. 271, § 2(a), 39 Stat. 756, 757).

occasions upheld the taxing of illegal activities. In *United States v. Sullivan*,[23] the Court, looking at a Fifth Amendment challenge to a law requiring the defendant to file an income tax return even though his income was obtained illegally, upheld the taxing of illegal income.[24] In *James v. United States*,[25] authored by Chief Justice Warren, the Court embraced the taxing of illegal income, noting that to do otherwise would promote an injustice on the honest taxpayer.[26] The Supreme Court recognized that, in general, it is beyond comprehension to allow an individual to avoid taxes simply because he or she is participating in illegal activities.[27]

The federal government has imposed taxes on specific illegal activities such as gambling[28] and drugs.[29] The Marijuana Tax Act[30] required the purchaser of marijuana to report to the Internal Revenue Service, pay an occupational tax, register as someone who deals in marijuana, and pay a one hundred dollar per ounce tax.[31] The Supreme Court's earlier views[32] on such laws culminated in the Court's holding in *Leary v. United States*[33] that the federal drug tax violated a person's Fifth Amendment right against self-incrimination.[34] The demise of the tax was not due to its taxation of illegal gain, instead it was struck down because the information provided by the taxpayer was made available to and used by law

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23. 274 U.S. 259 (1927).

24. *Id.* at 263-64 (Holmes, J.) (noting it would "be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime").

25. 366 U.S. 213 (1961).

26. *Id.* The Court noted that failing to tax the illegal income would lead to the "injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income." *Id.* at 221.

27. *See* United States v. Constantine, 296 U.S. 287, 293 (1935) (noting "[i]t would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law"). *See also* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) (citing Marchetti v. United States, 390 U.S. 39, 44 (1968), *cert. granted and judgment vacated*, Picioli v. United States, 390 U.S. 202 (1968); James v. United States, 366 U.S. 213 (1961)).

28. 26 U.S.C. §§ 4401, 4411 (1994).

29. 26 U.S.C. §§ 4741-4475 (1954) (repealed 1970).

30. *Id.*

31. *Id.* The tax actually differentiated between those registering as dealers ($1 per ounce) and those not registering as dealers ($100 per ounce).

32. *See* Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968), *cert. granted and judgment vacated*, Piccioli v. United States, 390 U.S. 202 (1968).

33. 395 U.S. 6 (1969).

34. This self-incrimination attack on the federal drug tax has continued to be an area of assault from opponents of state drug taxes. *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 (1994).

enforcement against the purchaser.[35]

Prior to *Kurth Ranch*, the constitutionality of taxing illegal gains and activities was beyond serious question. Although the Court in *Kurth Ranch* recognized prior holdings that supported the taxation of illegal activities, it ignored the practicality of doing so and ultimately used the illegality of the activity as an unusual feature to support its finding that the tax was a punitive measure.[36]

B. Development of State Excise Taxes on Drugs

With the Supreme Court's decision in *Leary*,[37] the taxing of illegal drug trafficking was put on hold. As the use and sale of illegal drugs escalated to epidemic proportions and progressively became a political football, the various branches and agencies of government increased their assault on illegal drugs with both rhetoric and concrete action. These increased efforts have been accompanied, not surprisingly, by increased costs.[38] Despite Ronald Reagan's "war on drugs" in the early 1980s, the United States has seen the illegal drug trade grow into a multi-billion dollar business.[39] Whether an advocate for punishment and law enforcement oriented solutions or for a treatment-oriented approach, all involved would agree that the monetary cost of the war is high.

Some states began enacting their own state drug taxes in the 1980s,[40] while others have done so only recently,[41] and still others have elected not to enact state drug taxes at all.[42] Arguably, state drug taxes gained in popularity due, in part, to

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35. *Leary*, 395 U.S. at 28-29.

36. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945-47 (1994).

37. 395 U.S. 6 (1969) (federal drug tax violative of the self-incrimination protection of the Fifth Amendment).

38. *See* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community,* 24 U.C. DAVIS L. REV. 557, 567 (1991) ("[I]n its fiscal 1991 budget, the Bush Administration sought $10.6 billion and received $10.4 billion to continue the war on drugs."). *See generally* Larry Gostin, *An Alternative Public Health Vision for a National Drug Strategy: "Treatment Works,"* 28 HOUS. L. REV. 285 (1991) (discussing many health associated costs in the use of illegal drugs).

39. *See* Powell & Hershenov, *supra* note 38, at 566 (noting that common estimates of annual black market sales range from $80 to $100 billion a year). *See also Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting) ("The State and Federal Governments spend vast sums on drug control activities," indicating approximately $27 billion spent in fiscal 1991.) (citing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FACT SHEET: DRUG DATE SUMMARY 5 (Apr. 1994)).

40. Arizona (1983); South Dakota (1984); Florida (1984); and Minnesota (1986). *See* Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL'Y 231, 231 (1991).

41. IND. CODE §§ 6-7-3-1 to -17 (1993). Effective in 1992, Indiana's drug tax places Indiana as one of the more recent states to pass some form of drug tax legislation.

42. States choosing not to enact state excise taxes on drugs include Alaska, Arkansas, and Ohio.

the federal government's efforts in collecting drug related tax revenues.[43]

Although states use various schemes of taxation,[44] most statutes provide that certain persons pay assessments, normally taking the form of excise taxes, on specified types and amounts of controlled substances based on possession or sale.[45] While many states have imposed excise taxes on illegal drugs,[46] some have relied only on a general sales tax statute.[47] Of the states that have specific drug taxes, some states levy excise taxes on controlled substances, while others require a licensing fee. Still other states have required drug possessors or dealers to purchase tax stamps that are to be permanently placed on the controlled substances. Of the three different taxation methods, a licensing fee, a flat excise tax, or an excise tax paid by purchasing stamps, the purchasing of stamps is the most common.[48]

In 1983, Arizona became the first state to legislate a controlled substance tax.[49] Other states have followed by requiring that drug stamps be affixed to the drugs. Still others have chosen instead to levy state excise taxes. One example of the latter is Indiana, whose Controlled Substance Excise Tax[50] went into effect on July 1, 1992.[51]

Indiana's CSET imposes a tax that is dependent upon both the weight and the type of the controlled substance.[52] Although only recently passed by the Indiana legislature, the CSET has already come under attack. The attacks are based on historical approaches to attacking drug taxes[53] as well as the double jeopardy attack encouraged by the *Kurth Ranch* decision.[54]

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43. For example, section 280E of the federal tax code denies income tax deductions for expenses incurred in conducting illegal drug activity. 26 U.S.C. § 280E (1994). State drug taxes also provide a means to increase tax revenues and offset the tax burden created by the various aspects of drug enforcement and treatment.

44. *See generally* Alan D. Gould, *Criminal Law and the Fifth Amendment: Taxation of Illegal Drugs*, 1989 ANN. SURV. AM. L. 541 (1991) (comparing various approaches states have taken in taxing illegal drugs).

45. *See generally* Iijima, *supra* note 34.

46. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1954 (1994) (O'Connor, J., dissenting) (citing 22 states that have taxed at approximately the same rate as Montana). *See also* Iijima, *supra* note 34, app. at 136 (comparing the various statutory violations on state drug taxes).

47. MICH. COMP. LAWS ANN. §§ 205.51 to .78 (West 1986 & Supp. 1994). *See generally* Gould, *supra* note 44.

48. *See* Racaniello, *supra* note 21, at 664.

49. ARIZ. REV. STAT. ANN. §§ 42-1203.01 to -1212.02 (West 1991 & Supp. 1994). *See also* Joyce, *supra* note 40, at 231.

50. IND. CODE §§ 6-7-3-1 to -17 (1993).

51. Indiana's CSET does not require the purchase of stamps. *Id.*

52. *Id.* § 6-7-3-6(a).

53. *See* discussion *infra* Part I.C.

54. Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET does not violate the privilege

C. Previous Attacks on State Drug Taxes

State drug taxes have undergone various attacks since their inception. The most common attack, which has met with some success and much support,[55] has been the Fifth Amendment privilege against self-incrimination.[56]

1. Self-Incrimination Attack.—Self-incrimination protection has two main components: first, it prohibits the government from coercing individuals to furnish self-incriminating statements; and second, it forbids the government from using any coerced, self-incriminating information in a criminal trial.[57] In three cases decided on the same day, the United States Supreme Court held that although taxation of illegal activity was not unconstitutional, the requirement that the taxpayer provide incriminating information, which may be passed on to prosecutors and law enforcement, is unconstitutional under the Fifth Amendment.[58]

In *Leary v. United States*,[59] the Supreme Court struck down the Federal Marijuana Tax Act[60] because it required the individual taxpayer to provide information about the planned illegal drug transaction. The Court held that obtaining incriminating information and distributing it to prosecutors and law enforcement authorities brought the Tax Act under the Fifth Amendment protection against self-incrimination.[61]

Many state drug tax statutes have been challenged under this self-incrimination theory. Some state courts have upheld their drug tax statutes from this challenge,[62] although others have not.[63] However, many states have heeded the implicit warning of the Court's decisions[64] and developed confidentiality

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against self-incrimination, the right of equal protection, or the right of due process, but is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). *See* discussion *infra* Part IV.

55. *See generally* Gould, *supra* note 44; Racaniello, *supra* note 21; Iijima, *supra* note 34.

56. U.S. CONST. amend. V (the relevant portion reads "nor shall [any person] be compelled in any criminal case to be a witness against himself . . .").

57. Gould, *supra* note 44, at 542 (citing Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 57 n.6 (1964)).

58. *See* Haynes v. United States, 390 U.S. 85 (1968); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968), *cert. granted and judgment vacated*, Picolli v. United States, 390 U.S. 202 (1968). *See also* Racaniello, *supra* note 21.

59. 395 U.S. 6 (1969).

60. 26 U.S.C. §§ 4741-4475 (1954) (repealed 1970).

61. *Leary*, 395 U.S. at 28-29.

62. *See* State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988).

63. *See* State v. Roberts, 384 N.W.2d 688 (S.D. 1986); Florida Dep't of Revenue v. Herre, 634 So. 2d 618 (Fla. 1994) (overruling Harris v. State Dep't of Revenue, 563 So. 2d 97 (Fla. Dist. Ct. App. 1990)).

64. *See supra* note 58.

provisions within their statutes,[65] as well as criminal sanctions for any violations of such confidentiality.[66] Although this is only a brief introduction to this challenge, it is important to recognize that until the *Kurth Ranch* decision the self-incrimination attack had been the strongest challenge to state drug taxes, and must still be addressed in the drafting or revising of any statute.[67]

2. Due Process Challenge.—State drug taxes have also faced due process challenges, but to a much lesser degree and with little success. The portion of the Due Process Clause requiring that punishments be within the bounds established by the legislature is not implicated by drug tax statutes. The challenges in this area relate to jeopardy assessment.[68] The Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[69] The element necessary to avoid this challenge is the provision to taxpayers of an administrative hearing and judicial review prior to deprivation of their property.

3. Excessive Fines Challenge.—The excessive fines challenge has been a growing attack on state drug taxes in light of the Supreme Court's holding in *Austin v. United States*.[70] In *Austin*, the defendant pled guilty to possession of cocaine with intent to distribute and was sentenced to imprisonment. Thereafter, the United States filed an in rem action against his home and body shop pursuant to federal law.[71] The Court held that the Eighth Amendment's Excessive Fines Clause[72] applies to in rem civil forfeiture proceedings.[73] The Court referred to the history of the Excessive Fines Clause in justifying its application to civil proceedings.[74] It simply did not matter whether the action was labeled criminal or civil;[75] if the government's action had the effect of punishment, the Eighth Amendment's strictures applied.[76]

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65. IND. CODE §§ 6-7-3-8 to -9 (1993); NEB. REV. STAT. § 77-4315-1415 (1991) (providing confidentiality provision, but no punishment for violations of such provision).

66. GA. CODE ANN. § 48-15-10 (Supp. 1994); N.C. GEN. STAT. § 105-113.112 (1992) (each containing confidentiality provisions as well as a penalty for disclosure). In 1990, Idaho amended its statute, which already contained a confidentiality provision, to include a penalty for disclosure. IDAHO CODE § 63-4206(2) (Supp. 1995).

67. Much has been written on the self-incrimination challenge to state drug taxes. For more in-depth analysis, see Racaniello, *supra* note 21; Iijima, *supra* note 34; Gould, *supra* note 44.

68. *See* IND. CODE § 6-7-3-13 (1993) (example of a jeopardy assessment provision).

69. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

70. 113 S. Ct. 2801 (1993).

71. *Id.* at 2803 (citing 21 U.S.C. §§ 881(a)(4), 881(a)(7) (1988)).

72. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

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

74. *Id.* at 2804 (citing Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989)).

75. *Id.* at 2806.

76. "The notion of punishment, as we understand it, cuts across the division between civil and criminal law." *Id.* at 2805-06 (quoting United States v. Halper, 490 U.S. 435, 447-48 (1989)).

Interestingly, the *Austin* decision, combined with a similar holding in *Alexander v. United States*,[77] demonstrates the Excessive Fines Clause's potential use in preventing a disproportionate tax without barring subsequent proceedings or involving the Double Jeopardy Clause. For that reason, the argument could be made that it is the most sensible weapon to curtail a drug tax that becomes too disproportionate.

D. A History of the Double Jeopardy Clause[78]

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[79] Although there is much doubt as to the historical support and application of double jeopardy protection, there does appear to be some historical basis for the concept of protecting an individual from repeated prosecution. However, this is a far cry from the distortion of the doctrine in the modern American context. Regardless of the obscurity of its origin, some form of double jeopardy protection has been in existence "in almost all systems of jurisprudence throughout history."[80] Because of the ambiguous legislative history surrounding the double jeopardy concept, it has been the courts, and not Congress, that have been the driving force in the formulation of its definition and role in the American system of justice.[81]

Over the years, the Supreme Court has inconsistently expounded its double jeopardy jurisprudence. The Court has been critical of itself in reference to its lack of definitive structure in double jeopardy decisions.[82] Justice Rehnquist noted in his dissent in *Whalen v. United States*[83] that the Double Jeopardy Clause is "one of the least understood . . . provisions of the Bill of Rights. [The] Court has done little to alleviate the confusion . . . ."[84]

At early common law, a defendant was "put in jeopardy of life and limb" when he was on trial for an offense that carried the punishment of death or

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77. 113 S. Ct. 2766 (1993) (noting forfeiture can be an excessive fine in violation of the Eighth Amendment).

78. Double Jeopardy jurisprudence is an enormous area with much comment. It is beyond the scope of this Note to describe this area of jurisprudence in detail. *See supra* note 16.

79. U.S. CONST. amend. V. Although the exact origin of the double jeopardy concept is a topic of debate, some scholars have traced the origin to as early as 355 B.C. Nelson T. Abbott, United States v. Halper: *Making Double Jeopardy Available in Civil Actions*, 6 B.Y.U. J. PUB. L. 551 (1992).

80. Burton, *supra* note 16, at 800 (quoting Marc Martin, Heath v. Alabama—*Contravention of Double Jeopardy and Full Faith and Credit Principles*, 17 LOY. U. CHI. L.J. 721, 723 (1986)).

81. Hon. Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 Washburn L.J. 1, 9-10 (1983).

82. Albernaz v. United States, 450 U.S. 333, 343 (1981) (calling the decisional law in the area "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"). *See also supra* text accompanying note 2.

83. 445 U.S. 684 (1980).

84. *Id.* at 699 (Rehnquist, J., dissenting).

physical mutilation.[85] This had the practical effect of extending double jeopardy protections only to crimes that involved death or physical mutilation. The Court expanded this early common law view in *Ex parte Lange*.[86] In *Lange*, the Court held that the words "life and limb" should include all punishments for all felonies and misdemeanors, and jeopardy attaches after a previous conviction or a previous acquittal.[87] In *Green v. United States*,[88] the Supreme Court discussed the Double Jeopardy Clause's underlying ideas stating:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[89]

Historically, the Double Jeopardy Clause shielded defendants from a second prosecution for the same offense after acquittal or after conviction. It did not protect against multiple punishments for the same offense. It was not until the American law developed that the area of multiple punishments was afforded similar footing as the other two protections.[90] The Court has also held that the guarantees of the Fifth Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment.[91]

In *Helvering v. Mitchell*,[92] a fifty-year old case involving a sanction sought in a civil proceeding subsequent to a criminal acquittal, the Court held that "Congress may impose both a criminal and 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."[93] The Court stated "[t]he question for decision is thus whether [the civil statute in question] imposes a criminal sanction. That question is one of statutory construction."[94]

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85. JOY A. SIGLER, DOUBLE JEOPARDY, *THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 60 (1969).

86. 85 U.S. 163 (1873).

87. *Id.* at 176-78.

88. 355 U.S. 184 (1957).

89. *Id.* at 187-88. *See* Burton, *supra* note 16, at 803.

90. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *See also* United States v. Halper, 490 U.S. 435, 440 (1989) ("This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."). The prohibition against multiple punishment does not mean that a legislature may not prescribe two types of penalties for the same offense. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 139 (1980).

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

92. 303 U.S. 391 (1938).

93. *Id.* at 399.

94. *Id. See also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972).

In *Mitchell,* the Commissioner of Internal Revenue determined a taxpayer had fraudulently declared certain tax deductions. The taxpayer was acquitted in a criminal prosecution for tax evasion, and the Government brought a subsequent civil action to collect the tax deficiency plus a fifty percent penalty for fraud. The Supreme Court rejected the defendant's argument that the civil action subjected him to double jeopardy because the penalty was designed to be punishment and was therefore criminal and not civil in nature. The Court held the "remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation."[95] The Supreme Court emphasized that the additions to the tax were "intended by Congress as civil incidents of the assessment and collection of the income tax."[96]

In a subsequent decision, *United States ex rel. Marcus v. Hess*,[97] the Supreme Court reaffirmed its statutory construction approach in *Mitchell* by holding that only actions *intended* to authorize criminal punishment to vindicate public justice subject a defendant to jeopardy within the meaning of the Double Jeopardy Clause.[98] In *Hess*, the defendants were contractors who had been indicted for fraud against the Government and fined subsequent to a nolo contendere plea in the criminal matter. The lower court awarded a judgment against the defendants of $315,000 ($203,000 for double damages plus an additional $112,000 for fifty-six frauds at $2,000 each). The Supreme Court noted, "[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy,"[99] and, further, the "remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered."[100] The Court further commented that "Congress could remain fully in the common law tradition and still provide punitive damages."[101] The Court noted "the general practice in state statutes of allowing double or treble or even quadruple damages"[102] and also stated that "[i]t is . . . well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty."[103]

In *Rex Trailer Co., Inc. v. United States*,[104] a case involving a civil sanction pursued subsequent to a criminal conviction, the Court again relied on the *Mitchell* statutory analysis. *Rex Trailer* involved the fraudulent purchase of five vehicles under the Surplus Property Act of 1944, which gave veterans a priority for the

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95. *Mitchell*, 303 U.S. at 401. The remedy provided by the statute "protect[ed] . . . the revenue and reimburse[d] the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

96. *Id.* at 405.

97. 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).

98. *Id.* at 548-49.

99. *Id.* at 549.

100. *Id.* at 550.

101. *Id.*

102. *Id.* at 550-51 (citing Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512, 523 (1885)).

103. *Id.* at 549.

104. 350 U.S. 148 (1956).

purchase of certain surplus property.[105] The defendants had already been fined $25,000 in the criminal case when the government brought a subsequent civil action under the same Act seeking $2,000 for each fraud plus double damages and costs. The Supreme Court upheld this as a civil penalty even though "the record [did] not show petitioner's gain from the fraud"[106] and the government failed to allege specific damages for recovery.[107] The Court held "there is no requirement, statutory or judicial, that specific damages be shown, and this was recognized by the Court in *Marcus*."[108]

In what appeared to be a departure from the *Mitchell* analysis, the Court created in *United States v. One Assortment of 89 Firearms*[109] a possible sharpening stone for its future "double jeopardy dagger" by deviating from its past formalistic statutory approach. The Supreme Court determined that it should look not only to whether Congress had expressly or impliedly indicated the sanction to be criminal or civil, but to whether the sanction was so punitive in purpose or effect to make it criminal, notwithstanding the civil label. However, the Court in limiting this application noted that "'only the clearest proof'" could suffice to establish the unconstitutionality of a statute on such a ground.[110] This severe limitation and strong deference to legislative purpose, along with *Mitchell* and its progeny, would still seem to protect civil sanctions from being held so punitive as to violate the Double Jeopardy Clause.

The Court, through this development of cases starting over fifty years ago, appeared to establish, as a general rule, that civil sanctions would not be held to violate the Double Jeopardy Clause without a finding that the statute itself was criminal in purpose or effect, requiring the tremendous burden of "only the clearest proof."[111] Further, this development of cases recognized that even recovery in excess of actual damages did not cause a civil action to lose its remedial nature and that civil sanctions with deterrent components[112] did not punish for purposes of a double jeopardy analysis.

Then, the Supreme Court, with a vengeance never shown before, bared its double jeopardy dagger, slashed at fifty years of precedent, and pivoting upon the *Halper* decision,[113] brought civil proceedings clearly under the double jeopardy umbrella of protection.[114] Having further sharpened its weapon with *Halper*, and

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105. *Id.* at 148 (citing Surplus Property Act of 1944, ch. 479, § 1, 58 Stat. 765 and § 26, 58 Stat. 780 (1944), § 26 codified 50 U.S.C. app. § 1635 (1946), repealed July 1, 1949).

106. *Id.* at 150.

107. *Id.* at 152.

108. *Id.* at 152-53.

109. 465 U.S. 354 (1984).

110. *Id.* at 365 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)). *See also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); Flemming v. Nestor, 363 U.S. 603, 617 (1960); *Rex Trailer Co., Inc.*, 350 U.S. at 154.

111. *See supra* note 110 and accompanying text.

112. Such as liquidated, double, treble, or quadruple damages.

113. United States v. Halper, 490 U.S. 435 (1989).

114. This is especially ironic given the Court's dual sovereignty doctrine. *See* Bartkus v.

impervious to the future carnage that its holding could cause, the Court proceeded on to *Kurth Ranch*,[115] confident it could draw fresh double jeopardy blood.[116]

II. THE KURTH RANCH DECISION ("THE ATTACK")

A. Factual and Procedural Background (Events Leading up to the "Attack")

The Kurth family[117] for years had operated a mixed grain and livestock farm in Montana.[118] In 1986, they began to cultivate and sell marijuana. In the latter part of 1987, shortly after the effective date of the Dangerous Drug Tax Act,[119] Montana law enforcement officers raided the farm, arrested the Kurths, and confiscated the marijuana plants, materials, and paraphernalia. The State filed criminal charges against all six family members in a Montana district court, charging each with conspiracy to possess drugs with intent to sell,[120] or in the alternative, possession of drugs with intent to sell.[121] After initially pleading not guilty, the Kurths eventually pled guilty to possession of illegal drugs with intent to sell or conspiracy to possess illegal drugs with intent to sell.[122] In a second proceeding, the Kurths settled a state forfeiture action by agreeing to forfeit $18,016.83 in cash and various items of equipment. The Department of Revenue of Montana, in a third proceeding, attempted to collect approximately $900,000 in taxes, interest, and penalties based on the statute assessing taxes on dangerous drugs, the various plants, harvested marijuana, hash tar, and hash oil. After contesting the assessments, the Kurths petitioned for Chapter 11 bankruptcy protection.[123]

In bankruptcy court, the Kurths challenged the constitutionality of the

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Illinois, 359 U.S. 121 (1959) (allowing state criminal prosecution subsequent to federal trial and acquittal based on same acts); Abbate v. United States, 359 U.S. 187 (1959) (allowing subsequent federal criminal prosecution after state prosecution and conviction based on same acts). *See generally* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992).

115. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994).

116. The *Halper* decision, although not used as a direct holding, is vital to the Supreme Court's *Kurth Ranch* analysis. The *Halper* case will be discussed in greater detail in Part II.B. *See infra* notes 143-156 and accompanying text.

117. The Kurth family consisted of Richard Kurth; his wife, Judith Kurth; their son, Douglas Kurth; their daughter, Cindy Halley; Douglas' wife, Rhonda Kurth; and Cindy's husband, Clayton Halley. *Kurth Ranch*, 114 S. Ct. at 1942 n.6.

118. *Id.* at 1955-56 (the factual context is taken from the *Kurth Ranch* opinion).

119. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (revised 1993).

120. *Id.* § 45-4-102 (1987).

121. *Id.* § 45-9-103.

122. Only Richard Kurth was adjudged guilty of possession, the other five pled guilty to a conspiracy charge.

123. *In re* Kurth Ranch, 145 B.R. 61 (Bankr. D. Mont. 1990).

Montana tax. After reducing the amount of the assessment authorized by the Act to $181,000, the bankruptcy court still held the assessment invalid under the Federal Constitution. The bankruptcy court relied primarily on *Halper* in concluding the assessment, because of its retributive nature, constituted a form of double jeopardy.[124] The district court affirmed.[125] The court concluded that the Montana Dangerous Drug Tax "simply punishes the Kurths a second time for the same criminal conduct."[126] The Ninth Circuit Court of Appeals also affirmed,[127] but based its conclusion largely on the State's refusal to offer evidence justifying the tax, not because the tax was unconstitutional on its face.[128] The court held that under *Halper*, a disproportionately large civil penalty can be punishment for double jeopardy purposes.[129]

While the Kurth's case was on appeal, the Montana Supreme Court reversed two lower court decisions that held the Dangerous Drug Tax to be a form of double jeopardy.[130] Because the Montana Supreme Court decision stood in conflict with the Court of Appeals decision, the United States Supreme Court granted certiorari.[131]

It is at this point that the Supreme Court used its double jeopardy dagger to attack a community supported victim and it did so with an instrument inappropriate for the task at hand.[132]

B. The Supreme Court's Attack ("Scene of the Attack")

In holding Montana's Drug Tax in violation of the Double Jeopardy Clause, the Supreme Court made some less than graceful strides around and over prior cases. The Court also compelled the strained support of prior cases in reaching its conclusions. In part, this prompted four Justices to register their dissent in three separate opinions. This portion of the Note will first point to the problem areas of the majority opinion as well as the possible "bandages" the opinion left behind to help heal the wounds of its attack.[133]

1. Double Jeopardy Interpretation (An "Element of the Attack").—The majority in *Kurth Ranch* was comfortable in continuing the questionable

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124. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1943 (1994).

125. *In re* Kurth Ranch, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991).

126. *Id.*

127. *In re* Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993).

128. *Id.* at 1312.

129. *Id.*

130. Sorensen v. State Dep't of Revenue, 836 P.2d 29 (Mont. 1992).

131. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1944 (1994).

132. Other weapons in the Court's arsenal arguably would have been better suited for this attack. *See supra* Part I.C.3. *See also infra* Part IV.

133. *Kurth Ranch*, 114 S. Ct. at 1949 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist notes in his dissent that "the Court goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as 'punishment.'" *Id.*

interpretation of *Ex parte Lange*[134] that has possibly been reinforced in too many cases[135] to be overcome at this point. In *Ex parte Lange,* at the trial level, a jury found Edward Lange guilty of appropriating mail-bags to his own use and the court sentenced him to both one year imprisonment and a $200 fine although the statute authorized a maximum sentence of only one year imprisonment or a fine not to exceed $200, but not both. Justice Scalia, in his dissenting opinion in *Kurth Ranch*, properly pointed out that Justice Miller's opinion in *Ex parte Lange* purposefully avoided relying exclusively on the Double Jeopardy Clause.[136] Scalia further stated that the Due Process Clause alone could support the decision because the penalty imposed exceeded legislative authorization.[137] Scalia's dissent, while noting that the Double Jeopardy Clause has since been applied with frequency to both successive prosecutions and punishment,[138] emphasized that "the repetition of a dictum does not turn it into a holding, and an examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper*, the Court never invalidated a *legislatively authorized* successive punishment."[139]

The Court commented in *Whalen v. United States*[140] that no double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense was punishable by both a fine and imprisonment, even though that is multiple punishment.[141]

Although this Note does not explore in-depth whether the issue of multiple punishments, in the context of the *Kurth Ranch* decision, has been properly brought into the breadth of the Double Jeopardy Clause, to assume it as a foregone conclusion would be ignoring the very abuse that allowed the Court to proceed

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134. 85 U.S. 163 (1873).

135. *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (stating that although the text of the Double Jeopardy Clause only mentions harm to life or limb, it is well settled that the Amendment covers imprisonment and monetary penalties).

136. *Kurth Ranch*, 114 S. Ct. at 1955-56 (Scalia, J., dissenting).

> The opinion went out of its way *not* to rely on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." It is clear that the Due Process Clause alone suffices to support the decision, since the guarantee of the process provided by the law of the land assures prior legislative authorization for whatever punishment is imposed.

Id. at 1956 (quoting Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 28-29 (1991) (Scalia, J., concurring in judgment) (citations omitted).

137. *Id.*

138. *Id.* "Between *Lange* and our decision five Terms ago in *United States v. Halper*, our cases often stated that the Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same criminal offense." *Id.* (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Illinois v. Vitale, 447 U.S. 410, 415 (1980); Ohio v. Johnson, 467 U.S. 493, 498-99 (1984)) (citations omitted).

139. *Id.*

140. 445 U.S. 684 (1980).

141. *Id.* at 688.

with its double jeopardy attack in the first place.[142]

2. *Classifying a Tax as Punishment (An "Element of the Attack").*—The Supreme Court, in holding Montana's Drug Tax to be punishment for double jeopardy analysis, has met another disturbing element of the crime. Although the majority and dissenting opinions agree that the *Halper* mode of analysis does not directly apply to taxes in the *Kurth Ranch* decision,[143] on its face, this holding appears somewhat of a rational jump from the Court's holding in *Halper.*[144] However, the *Halper* decision was instrumental in pushing the Court to the brink of double jeopardy, insanity and in part, it gave the Court the motive it needed for the attack on Montana's state drug tax.

In *United States v. Halper,* the Supreme Court for the first time held that a disproportionately large civil penalty can be punishment for double jeopardy purposes.[145] Halper was convicted of sixty-five separate violations of the Criminal False Claims Statute,[146] each involving a demand for $12 in reimbursement for medical services worth only $3.[147] After Halper's sentencing on the criminal matter, the government took action in a separate proceeding to recover a $2,000 civil penalty for each of the sixty-five violations. The district court held that the total recovery sought of $130,000 failed to bear a rational relationship to the government's minimal loss of $585, even including the cost of investigation and prosecution.[148] The court concluded that the civil penalty, which was over 220 times greater than the government's measurable loss, was punitive and was therefore barred by the Double Jeopardy Clause.

The Supreme Court, accepting the district court's findings, held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[149] The Court, however, limited its decision by noting that "[w]e cast no shadow on these time-honored judgements. . . . [W]hat we announce now is a rule for the rare case."[150]

Halper is important to the *Kurth Ranch* decision in that the Supreme Court

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142. For a more in-depth analysis of multiple punishments being included in the scope of the Double Jeopardy Clause, see *supra* note 16.

143. *Kurth Ranch*, 114 S. Ct. at 1948. The majority notes that "as The Chief Justice points out, tax statutes serve a purpose quite different from civil penalties, and *Halper's* method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* Subjecting Montana's drug tax to *Halper's* test for civil penalties is therefore inappropriate. *Id.* Only Justice O'Connor in her dissenting opinion determined the *Halper* method of analysis should be applied. *Id.* at 1955 (O'Connor, J., dissenting).

144. United States v. Halper, 490 U.S. 435 (1989).

145. *Id.* at 452.

146. *Id.* at 437 (citing 18 U.S.C. § 287 (1988)).

147. *Id.* at 437-40.

148. *Id.* at 438-39.

149. *Id.* at 448-49.

150. *Id.* at 449.

used *Halper* as a justification for its double jeopardy madness. By attempting to explain the *Halper* decision as the "rare case,"[151] the Court dodged many of its earlier decisions regarding civil and criminal proceedings.[152] The Court also acknowledged that the holding applied to cases "such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[153] The opinion added that when

> the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[154]

The Court muddied the double jeopardy waters even further, and acknowledged it was doing so,[155] by leaving to the trial courts the arduous task of determining when civil penalties have crossed the imaginary line into punishment.[156]

Armed with the *Halper* decision, the majority in *Kurth Ranch*, although acknowledging that *Halper* did not consider whether a tax may similarly be characterized as punitive,[157] attacked Montana's drug tax by analogy. The Court conceded that while "fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are *usually* motivated by revenue-raising rather than punitive purposes."[158] The majority also noted that the Court has previously "cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect."[159] Immediately thereafter, the Court attacked the weight of precedent

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151. *Id.*

152. *Id.* at 441-46. The Court makes strained efforts to distinguish earlier holdings in several cases including United States v. Ward, 448 U.S. 242 (1980); Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938).

153. *Halper*, 490 U.S. at 441-46.

154. *Id.* at 449-50.

155. *Id.* Specifically the Court stated that "[w]e acknowledge that this inquiry will not be an exact pursuit. In our decided cases we have noted that the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain." *See, e.g., Rex Trailer Co.*, 350 U.S. at 153 (The process of determining the government's compensation and costs "involves an element of rough justice.").

156. *Halper*, 490 U.S. at 450 ("We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.").

157. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994).

158. *Id.* at 1946 (emphasis added).

159. *Id.* at 1946 (citing A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934)).

with the *Child Labor Tax Case*.[160] The Court explained that the *Child Labor Tax Case* supports the proposition that at some point a tax loses its character as such and becomes a penalty.[161] However, the *Child Labor Tax Case* dealt with the federal government's attempt to regulate the employment of child labor through a tax, a matter reserved to the states under the Tenth Amendment;[162] and thus the federal action was an invalid exercise of the taxing power conferred by the Constitution.[163] Notwithstanding the majority's own acknowledgments, it attacked the state drug tax despite appeals to precedent by the minority opinions.

Chief Justice Rehnquist, in his dissenting opinion, tried to dull the double jeopardy blade; however, his efforts seemed only to make the majority swing that much harder. The Chief Justice agreed with the majority that *Halper* begged the question of whether the Montana Drug Tax constitutes a second punishment—for double jeopardy purposes—for conduct already punished criminally.[164] However, this is where his agreement with the majority ends. He noted that "the Court then goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as 'punishment.'"[165] Rehnquist argued that the manner in which taxes have been viewed in prior cases is an area too compelling to be overlooked.[166] In examining the *Halper* decision, he noted that "compensation for the Government's loss is the avowed purpose of a civil penalty statute."[167] In contrasting this purpose with that of tax statutes, he noted that "here we are confronted with a tax statute, and 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 law, but is instead to either raise revenue, deter conduct, or both."[168] He emphasized that "[t]ax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities."[169]

The Supreme Court had previously turned aside Constitutional attacks on taxes that could be enacted to deter or even suppress the taxed activity.[170] In

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160. 259 U.S. 20, 38 (1922).

161. *Kurth Ranch,* 114 S. Ct. at 1946.

162. U.S. CONST. amend. X.

163. 259 U.S. at 36-44.

164. *Kurth Ranch*, 114 S. Ct. at 1950 (Rehnquist, C.J., dissenting).

165. *Id.* at 1949.

166. *Id.* at 1950.

167. *Id.* at 1949.

168. *Id.* (citing Welch v. Henry, 305 U.S. 134, 146 (1938); Sonzinsky v. United States, 300 U.S. 506, 513 (1937)).

169. *Id.* at 1950 (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 (1981)).

170. *See* Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (The Court stated, "it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."); A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934) (Court upheld state tax despite due process challenge to a steep excise tax imposed by the State of Washington on processors of

United States v. Sanchez,[171] the Court used strong language in upholding the former federal tax on marijuana of $100 per ounce against a challenge that the tax was a penalty rather than a true tax, stating, "*[i]t is beyond serious question* that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed."[172]

Finally, Chief Justice Rehnquist summed up his view of the Majority's passive acknowledgment of prior cases to reach its opinion attacking Montana's drug tax by commenting that "[t]he Court's opinion today gives a passing nod to these cases, but proceeds to hold that a high tax rate and a deterrent purpose 'lend support to the characterization of the drug tax as punishment.'"[173]

Justice O'Connor, in her dissent, attempted to apply the *Halper* analysis to the tax statute. In order for the tax to violate the Double Jeopardy Clause, she explained that the tax must serve only the purposes of retribution and deterrence, as opposed to having any non-punitive objective, and further that the amount of the sanction would need to be overwhelmingly disproportionate to the damages or costs suffered by the Government.[174] Throughout her opinion, she provided data from several sources that support the huge monetary cost incurred by both state and federal governments to control drug related activities, incarceration, education, and treatment.[175] Although Justice O'Connor was the only Justice who attempted to apply the *Halper* analysis, her dissent raises other interesting concerns for the future impact of the Court's holding. She noted that the "State of Montana—along with about half of the other States—is now precluded from ever imposing the drug tax on a person who has been punished for a possessory drug offense,"[176] and expressed grave concern for the Court's almost afterthought that the proceeding initiated by Montana to collect the tax on the possession of drugs was the "functional equivalent of a successive criminal prosecution."[177]

III. Possible Ramifications of *Kurth Ranch* ("After the Attack")

Several questions remain after the Supreme Court's attack in *Kurth Ranch,* most importantly whether state drug taxes can survive, and if so, to what extent have they been limited. After *Kurth Ranch*, many states reacted by applying the Court's decision to their own state drug taxes. Some states found that their state drug tax statutes violate double jeopardy protections[178] depending on how they are

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171. 340 U.S. 42 (1950).

172. *Id.* at 44 (emphasis added).

173. *Kurth Ranch*, 114 S. Ct. at 1950 (Rehnquist, C.J., dissenting) (citing majority opinion).

174. *Id.* at 1953 (O'Connor, J., dissenting).

175. *Id.* at 1953-54.

176. *Id.* at 1955.

177. *Id.* (Justice O'Connor was joined in this concern by Justices Scalia and Thomas). *See also id.* 1959-60 (Scalia, J., dissenting).

178. *See, e.g.*, Covelli v. Crystal, No. 534178, 1994 WL 722976 (Conn. Super. Tax 1994), *rev'd sub nom.* Covelli v. Commissioner of Revenue Servs., 1995 WL 747855 (Conn. 1995); Clifft

applied.[179] Still others have found that their drug tax statutes do not violate double jeopardy for various reasons, including whether their statutes share the "unusual features" the Court noted when declaring Montana's statute unconstitutional.[180]

Additionally, federal jurisdictions take different approaches, primarily in the area of forfeitures, to how the *Kurth Ranch* decision should be applied.[181] Based on these differences, one can only hope that the Supreme Court will see the error of its ways and use future decisions to help clarify the situation.

Indirectly, other questions arise, including: 1) what impact will *Kurth Ranch* have when the preceding case is civil and the subsequent case is criminal? (will this bar the criminal prosecution?);[182] 2) what impact will the decision have on the taxation of illegal activities overall?; 3) what other constitutional protection(s) will this decision impose upon tax proceedings?; and 4) what other areas will be affected by this "double jeopardy stretching"?[183]

As expected, several criminal defendants have used the trilogy of cases ending with *Kurth Ranch* to attack civil or administrative proceedings in hopes of pulling them under the expanded double jeopardy umbrella. This is especially prevalent in cases involving driving while intoxicated, wherein the defendants attempt to bar

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v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part*, 660 N.E.2d 310 (Ind. 1995).

179. *Compare Clifft*, 641 N.E.2d at 682, *aff'd in part and rev'd in part*, 660 N.E.2d 310 (Ind. 1995), (holding Indiana's CSET to violate double jeopardy) *with* Whitt v. State, 645 N.E.2d 677 (Ind. Ct. App. 1995), *aff'd*, 659 N.E.2d 512 (Ind. 1995) (holding defendant's prosecution for failure to pay Indiana's CSET was contemporaneous with prosecution for underlying drug offense and did not violate double jeopardy clause).

180. *See, e.g.*, State v. Lange, 531 N.W.2d 108 (Iowa 1995) (punishment of defendant did not constitute double jeopardy when defendant had already been punished by assessment of tax following arrest); State v. Gulledge, 896 P.2d 378 (Kan. 1995) (payment of amounts allegedly owed under Kansas Drug Tax Act did not constitute criminal punishment for double jeopardy purposes); State v. Morgan, 455 S.E.2d 490 (N.C. Ct. App. 1995) (sentences for trafficking in cocaine and for failure to pay excise tax did not violate double jeopardy).

181. *See* United States v. One Parcel of Real Property Located at No. 14-I, 899 F. Supp. 1415 (D.V.I. 1995) (indicating the court was aware of the contrary conclusions reached by courts of appeals in other circuits on the double jeopardy issue as it applies to forfeiture). *See generally* Gary M. Maveal, *Criminalizing Civil Forfeitures,* 74 MICH. B.J. 658 (1995).

182. The Court recognizes this as a future issue. "This statute . . . does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1947 n.21 (1994). The Indiana Supreme Court recently answered this question in the affirmative in Bryant v. State, 660 N.E.2d 290 (Ind. 1995) (holding that jeopardy first attached when the Indiana Department of State Revenue served Bryant with a Record of Jeopardy Findings and Jeopardy Assessment Notice & Demand, thus barring future criminal prosecution).

183. *Kurth Ranch* was even used to argue against the registration of convicted sex offenders as required by the state. Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

criminal prosecution based on prior administrative license suspensions.[184] These challenges meet with varying degrees of success.[185] Additionally, courts handle a number of appeals that use *Kurth Ranch* to bolster their argument to declare forfeitures unconstitutional on double jeopardy grounds.[186]

Finally, there is a concern that this type of policy statement sends the wrong message to those involved in the drug trade. This message is especially meaningful to members of the drug trade too far removed to incur, with any frequency, the sting of criminal punishment, yet consistently able to enjoy the illegal gains that state drug taxes are meant to impact.

A. The Survival of State Drug Taxes ("Severity of the Wounds")

The Supreme Court, despite its vicious attack on state drug taxes, left behind a few "bandages" with which to patch the wounds, leaving the possibility that the drug taxes have not incurred a fatal blow.[187] Noting that unlawfulness of an activity does not prevent its taxation,[188] the Court in *Kurth Ranch* used strong language in asserting that Montana could have collected its tax if it had not previously punished the taxpayer for the same offense, or had assessed the tax in the same proceeding.[189] The possibility of imposing the tax in the criminal prosecution appears to be one avenue, however impractical, a state may use to pursue its drug tax. Allowing for the tax and then forcing it into the same proceeding as a criminal prosecution emphasizes the difficulty of applying the Double Jeopardy Clause to state drug taxes. Burdens of proof are different,[190] required elements of each case are different, and the administrative problems concerning which departments and personnel are best qualified to handle the case make this option practically impossible.

The Court also emphasized, in *Kurth Ranch*, specific or "unusual features,"[191]

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184. *See* Daniel T. Gilbert & John A. Stephen, *Is Suspension of Drivers' Licenses in Jeopardy?*, PROSECUTOR, June 29, 1995, at 24.

185. *See, e.g.*, Davidson v. MacKinnon, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995), *review denied*, 663 So. 2d 931 (Fla. 1995) (administrative suspension of driver's license for DUI does not bar subsequent criminal prosecution); Florida v. Reilly, No. 94-6661MM10 (Broward County Ct. Fla. Dec. 22, 1994) (suspension of license constitutes punishment for double jeopardy purposes). *See also* Richard C. Reuben, *Double Jeopardy Claims Gaining: Issue is raised with Some Success in Civil-Forfeiture, Drunk-Driving Cases*, A.B.A. J., June 1995, at 16.

186. *See generally* Maveal, *supra* note 181.

187. *See* discussion *infra* Part IV.

188. *See supra* notes 24-27 and accompanying text.

189. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994) (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1989)).

190. This is assuming that the Court's recognition of the tax as a "functional equivalent of a successive criminal prosecution" does not open the floodgates for more constitutional protections such as the requirement of proof beyond a reasonable doubt in criminal matters. *Id.* at 1955.

191. *Id.* at 1947.

which if avoided by a state in formulating its statute[192] may prevent the Supreme Court from subjecting that statute to scrutiny under double jeopardy analysis.

1. High Rate of Taxation and Deterrent Purpose.—The Court explained that "neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax as a form of punishment,"[193] but then continued by stating that these were consistent with a punitive character. The Court determined the tax rate was eight times the market or "street" value on a particular portion of the drugs,[194] and that ultimately the state taxed the drugs at about 400% of their overall market value.

2. Tax Collected After Fines and/or Forfeiture.—The Montana Drug Tax expressly provided that the tax was to be collected only after state or federal fines or forfeitures had been satisfied. To avoid this seemingly harmless fallacy in the statute it could simply be omitted from any draft or revision.

3. Taxed on Goods Neither Owned or Possessed.—The Court argued that the tax was levied on goods the taxpayer neither owned nor possessed at the time of taxation. This argument fails to take into consideration the practicality of taxing illegal goods. Although the tax alludes to storage or possession, it is clear the purpose of the Act was to tax the drug. Further, Chief Justice Rehnquist pointed out the absurdity of the Court choosing form over substance, stating "[s]urely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession."[195]

4. Only Taxpayers Arrested had Obligation to Pay.—The Act authorized the Department of Revenue to adopt rules to administer and enforce the drug tax. Under those rules, the taxpayer must file a return within seventy-two hours of arrest. The rules provided for law enforcement to complete a Dangerous Drug Act report and give taxpayers an opportunity to sign it.[196] The Court interpreted this to mean that the taxpayer had no obligation to file a return or to pay any tax unless and until he or she is arrested, meaning that persons arrested for marijuana constituted the entire class of taxpayers subject to Montana's tax.[197] Chief Justice Rehnquist in his dissent disputes this conclusion, noting this only "acknowledges the practical realities involved in taxing an illegal activity."[198]

5. *Preamble Alluded to Burden for Law Violators.*—The Supreme Court found a further punitive feature in the preamble of Montana's Drug Tax Act by reasoning that without question the intent of Montana's legislature was to deter people from possessing marijuana.[199] Despite the Court's conclusion that the

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192. *See* discussion *infra* Part IV (proposing provisions of a model statute which would avoid these features).

193. *Kurth Ranch*, 114 S. Ct. at 1946.

194. *Id.* at 1943 n.12 (The lower valued portion of the drug is "shake" which refers to the stems, leaves, and other parts with lower levels of tetrahydrocannabinol (THC).).

195. *Id.* at 1951 (Rehnquist, C.J., dissenting).

196. *Id.* at 1941-42.

197. *Id.* at 1942 (citing MONT. ADMIN. R. 42.34.103(3) (1988)).

198. *Id.* at 1950 (Rehnquist, J., dissenting).

199. *Id.* at 1946 (quoting 1987 Mont. Laws, ch.563, p. 1416). *See also id.* at 1951 n.3

preamble "evinces a clear motivation to raise revenue," it also indicated that the tax "provide[d] for anticrime initiatives by 'burdening' violators of the law instead of 'law abiding taxpayers.'"[200]

In order for a state drug tax statute to survive the *Kurth Ranch* attack, these features must be addressed in the initial drafting or revising of state drug tax legislation. Part IV of this Note addresses these concerns in proposing certain provisions of a model statute.

As mentioned previously, courts have already reacted to the *Kurth Ranch* decision. Much to the delight of drug offenders, some courts have held their state drug taxes to be unconstitutional based on the *Kurth Ranch* holding.[201] The Supreme Court itself has remanded cases for further consideration in light of *Kurth Ranch*.[202] Still other cases concerning forfeiture, civil penalty, and tax proceeding, are working their way through the Supreme Court maze.[203] Worse yet, the fear of previous civil actions barring subsequent criminal proceedings has come to light.[204]

B. Indirect Ramifications of Kurth Ranch

Several questions could arise regarding the *Kurth Ranch* decision's indirect impact on other areas of the law.[205] As alluded to by the Court, the question of whether a subsequent criminal case would be barred by a preceding civil case is left unanswered. The disturbing statement that the tax collection proceeding was a "functional equivalent of a successive criminal prosecution"[206] possibly encourages a criminal drug defendant to proceed with payment of the tax in hopes of utilizing a double jeopardy argument to thwart his prosecution.

Through numerous decisions of the Supreme Court, the taxation of illegal activities has been upheld.[207] In *Kurth Ranch*, with one swoop of the pen, the Court seemingly erased solid precedent. Although only time will tell, the future

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(provides the preamble in text, citing MONT. CODE ANN. § 15-25-122 (1993) (preamble)).

200. *Id.* at 1946 n.18.

201. Covelli v. Crystal, No. 534178, 1994 WL 722976 (Conn. Super. Tax, Dec. 21, 1994), *rev'd*, Covelli v. Commissioner of Revenue Servs., No. 15198, 1995 WL 747855 (Conn. Dec. 19, 1995); Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Dep't of State Revenue, 641 N.E.2d 694 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 319 (Ind. 1995); Bailey v. Indiana Dep't of State Revenue, 641 N.E.2d 695 (Ind. Tax 1994), *rev'd*, 660 N.E.2d 322 (Ind. 1995).

202. Ward v. Texas, 115 S. Ct. 567 (1994) (mem.); Stennett v. Texas, 115 S. Ct. 307 (1994) (mem.).

203. United States v. Haywood, 864 F. Supp. 502 (W.D.N.C. 1994).

204. Fant v. State, 881 S.W.2d 830 (Tex. Ct. App. 1994).

205. *See infra* Part III.

206. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994).

207. See *supra* Part I.A. for a discussion of the history behind taxation of illegal activity in general.

taxation of illegal activities will probably follow a similar path as state drug taxes. This Note argues that only the craftiest of legislatures can outwit the Court's cunning decision on the taxation of illegal activities. The areas the Supreme Court considered problematic with respect to the Montana Drug Tax must be scrutinized when drafting any tax legislation, unless the legislation also falls on the honest, law abiding tax payer.

Kurth Ranch has made the time ripe for introducing additional protections into tax proceedings. An argument could be made that the safeguards the Court gave in *Kurth Ranch* will lead to the same problems that accompanied the *Halper* decision. Nonetheless, the true blow the Supreme Court struck is against the allies of the victim—programs for drug education and treatment, law enforcement efforts, and the morale of the country to name a few. Understandably, all legislation must have limits, but surely those limits do not include allowing an industry to inflict numerous economic and social costs upon a state and walk away without even paying for the damage caused. This is especially disturbing given the enormous economic fruits the drug industry is enjoying.

IV. MODEL STATUTE PROVISIONS FOR STATE DRUG TAXES ("BANDAGING THE WOUNDS")

Due to constitutional attacks, specifically the double jeopardy attack set forth in *Kurth Ranch*, careful construction of state drug tax statutes will determine whether they survive judicial scrutiny. Most state drug tax statutes, regardless of the taxation scheme, have several provisions. Various aspects of the statutes, such as those dealing with the definition of statute terminology or technical aspects of administration,[208] have not prompted the constitutional attacks. There are, however, those sections that have been the turning point on which some statutes have been upheld and others have fallen prey. The primary concern of this Part of the Note is to provide a model for those provisions that have the potential to immunize drug taxes against a double jeopardy attack.[209] To a lesser degree,

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208. An example of such an aspect would be how the drug stamps will be printed.

209. This Note does not attempt to analyze the constitutionality of Indiana's CSET based on the Indiana Constitution. For more in this area, see F. Anthony Paganelli, *Constitutional Analysis of Indiana's Controlled Substance Excise Tax,* 70 IND. L.J. 1301 (1995). For purposes of drafting some model provisions, this Note will use, in part, Indiana's Controlled Substance Excise Tax (CSET) at IND. CODE §§ 6-7-3-1 to -17 (1993). Following is the text of the code in its current form:

6-7-3-1 "Controlled substance" defined

Sec. 1. As used in this chapter, "controlled substance" has the meaning set forth in IC 35-48-1-9.

6-7-3-2 "Delivery" defined

Sec. 2. As used in this chapter, "delivery" has the meaning set forth in IC 35-48-1-11.

6-7-3-3 "Department" defined

Sec. 3. As used in this chapter, "department" refers to the department of state revenue.

6-7-3-4 "Manufacture" defined
Sec. 4. As used in this chapter, "manufacture" has the meaning set forth in IC 35-48-1-18.

6-7-3-5 Imposition of tax
Sec. 5. The controlled substance excise tax is imposed on controlled substances that are:
(1) delivered;
(2) possessed; or
(3) manufactured;
in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

6-7-3-6 Determination of amount of tax; weight of substance
Sec. 6. (a) The amount of the controlled substance excise tax is determined by the weight of the controlled substance as follows:
(1) On each gram of a schedule I, II, or III controlled substance, forty dollars ($40) for each gram and a proportionate amount for each fraction of a gram.
(2) On each gram of a schedule IV controlled substance, twenty dollars ($20) for each gram and a proportionate amount for each fraction of a gram.
(3) On each gram of a schedule V controlled substance, ten dollars ($10) for each gram and a proportionate amount for each fraction of a gram.
(b) A gram of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste.

6-7-3-7 Delivery to law enforcement officer; deliver's duty to pay tax
Sec. 7. A person who delivers a controlled substance to a law enforcement officer is not relieved of the duty to pay taxes under this chapter.

6-7-3-8 Payment of taxes, when due; identification of person not required
Sec. 8. The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. A person may not be required to reveal the person's identity at the time the tax is paid.

6-7-3-9 Immunity from criminal prosecution; use of confidential information for prosecution
Sec. 9. The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.

6-7-3-10 Evidence of payment; required statement

Sec. 10. (a) The department shall issue evidence of payment of the tax to the person paying the tax. The evidence of payment must include a statement stating the following: "THIS EVIDENCE OF PAYMENT DOES NOT LEGALIZE THE DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE. THE UNAUTHORIZED DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE IS A CRIME."
(b) The evidence of payment is valid for forty-eight (48) hours after the payment is received by the department. A person who receives delivery of, takes possession of, or manufactures a controlled substance must also have a valid evidence of payment in the person's possession.

6-7-3-11 Failure or refusal to pay tax; penalty; class D felony
Sec. 11. (a) A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax.
(b) A person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a Class D felony. This subsection does not apply to a person in violation of IC 35-48-4-11, if the violation is a Class A misdemeanor.

6-7-3-12 Rules
Sec. 12. The department may adopt rules under IC 4-22-2 necessary to enforce this chapter, including rules relating to the refunding of taxes paid under this chapter.

6-7-3-13 Assessment as jeopardy assessment; collection of tax
Sec. 13. An assessment for the tax due under this chapter is considered a jeopardy assessment. The department shall demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

6-7-3-14 Jeopardy assessments as secondary liens to seizure and forfeiture
Sec. 14. All jeopardy assessments issued for nonpayment of tax shall be considered a secondary lien to the seizure and forfeiture provisions of IC 16-42-20, IC 34-4-30.1, IC 34-4-30.5, and any federal law.

6-7-3-15 Controlled substance tax fund; creation, administration, and appropriation
Sec. 15. (a) The controlled substance tax fund is established to receive all the revenue collected by the department under this chapter.
(b) The fund shall be administered by the treasurer of state. Any expenses incurred in administering the fund shall be paid from the fund. Any interest earned on money in the fund shall be credited to the fund.
(c) Any revenue remaining in the fund at the end of a state fiscal year does not revert to the state general fund.
(d) Money in the fund is annually appropriated to cover the department's administrative and enforcement expenses under this chapter and to make the distributions required by

other statutory aspects that have subjected drug taxes to other constitutional attacks will be discussed.[210]

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this chapter.

6-7-3-16 Awards for information leading to collection of tax liability; use of money deposited in fund

Sec. 16. (a) The department may award up to ten percent (10%) of the total amount collected from an assessment under this chapter to any person who provides information leading to the collection of a tax liability imposed under this chapter. An award made under this subsection must be made before any other distributions under this section.

(b) Whenever a law enforcement agency provides information leading to the collection of a tax liability imposed under this chapter, the department shall award thirty percent (30%) of the total amount collected from an assessment to the law enforcement agency that provided the information that resulted in the assessment. The law enforcement agency shall use the money the agency receives under this chapter to conduct criminal investigations. A law enforcement agency may not receive an award under more than one (1) subsection.

(c) The department shall award ten percent (10%) of the amount deposited in the fund during each month to the law enforcement training board to train law enforcement personnel.

(d) The department may use twenty percent (20%) of the amount deposited in the fund during a state fiscal year to pay the costs of administration and enforcement of this chapter.

(e) Awards may not be made under this chapter to the following:

(1) A law enforcement officer.

(2) An employee of the department.

(3) An employee of the Internal Revenue Service.

(4) An employee of the federal Drug Enforcement Agency.

(f) All the money deposited in the fund that is not needed for awards or to cover the costs of administration under this chapter shall be transferred to the state drug free communities fund established under IC 5-2-10.

(g) An award made under subsection (a) or (b) shall be made on the basis of collections from each individual assessment that resulted from information supplied to the department by a person or law enforcement agency.

(h) Money shall be considered collected under this section only after all protest periods have expired or all appeals have been adjudicated.

6-7-3-17 Distributions and transfers; payments; certifications to state auditor

Sec. 17. (a) All distributions and transfers from the controlled substance tax fund shall be paid monthly by the fifteenth of the month following the month of collection.

(b) The department shall certify to the auditor of state the amount to be distributed to each law enforcement agency that is entitled to receive an award under section 16 of this chapter. The treasurer of state shall make the distributions upon warrants issued by the auditor of state.

210. *See* discussion *supra* Part I.C.

A. Provisions At-Risk for Double Jeopardy Analysis ("Inviting an Attack")

1. High Rate of Taxation.—In *Kurth Ranch*, the Supreme Court acknowledged that when looking at the collective value of the marijuana, the tax assessment, including the tax and the 100% penalty, was approximately four times the collective value.[211] The Court emphasized, however, that in looking at only the "shake"[212] portion of the marijuana, the tax assessment was over eight times the value of the lesser valued portion. Although the tax thought to be excessive in *Kurth Ranch* was $100 per ounce, in *United States v. Sanchez*[213] the Supreme Court did not find a $100 per ounce tax plus a 50% penalty to be excessive. Justice O'Connor noted in her dissent that at least twenty-two other state legislatures have determined this as an appropriate amount.[214] In addition, the Court has held double, treble, and even quadruple damages to be appropriate in some civil proceedings.[215] The question then becomes at what level does a state drug tax cross the line and become vulnerable to double jeopardy analysis?

The Montana statute was written to be the *greater* of $100 per ounce or 10% of street value.[216] The Court points out that the statute deals with a market value term for a product that cannot be legally sold, but then uses that same market value to determine that the tax is too high in proportion to the value.[217] Leaving the lower courts to grope for a threshold amount logically forces them to use market or street value, as the Supreme Court did, to determine when the tax crosses the line and transforms from a tax to a punishment.

Given the holdings of previously discussed cases, and the discussion of sin taxes that are imposed on legal products, a model provision prescribing the amount of tax should contain both a set amount *and* a percentage of *overall* market or street value, taxing the drugs on *the lesser of the two.* This Note suggests that the appropriate set amount is 80% of the value of the various controlled substances at the time the legislation is passed. For example, if one ounce of marijuana was valued at $100 when the legislation was passed, the set tax for one ounce of marijuana would be $80. In addition, *overall* market or street value should be set at 80%. By using an overall value, the problem of valuing the different portions of controlled substances is taken into consideration when computing the tax. This does not suggest that computation and determination of value is simple, but given the *Kurth Ranch* decision, these determinations must be made in either instance.

With the Court's emphasis on a proportionate dollar amount, the allowance for double and treble damages in civil awards, along with an acceptance for a strong governmental incentive against tax fraud, a penalty provision for failure to

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211. Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1946 n.17 (1994).

212. Shake is a street name for the marijuana with lower street value. *See supra* note 194.

213. 340 U.S. 42 (1950).

214. *Kurth Ranch*, 114 S. Ct. at 1954 (O'Connor, J., dissenting).

215. *See supra* note 102 and accompanying text.

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

217. *Id.* at 1946-47.

pay the tax might be upheld as well. However, the safer approach would be to exclude any penalty provision. Nonetheless, this model statute will include a penalty clause that may not pass constitutional hurdles.

A model provision,[218] which is based on an adaptation of Indiana's provision dealing with the amount of tax on controlled substances,[219] would read as follows:

> Determination of amount of tax;
> Sec. ___. (a) The amount of the controlled substance excise tax is determined by the overall weight of the controlled substance as follows:
> (1) On each ounce of a schedule I, II, or III controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (2) On each ounce of a schedule IV controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (3) On each ounce of a schedule V controlled substance, eighty dollars ($80) for each ounce and a proportionate amount for each fraction of an ounce *OR* 80% of the market value of the controlled substance, *whichever is least.*
> (b) An ounce of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste. However, any dilution of a controlled substance shall be taken into consideration in arriving at market value.
> Failure or refusal to pay tax; penalty;
> Sec. ___ A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of fifty percent (50%) of the tax in addition to the tax.

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218. This model will be based on a hypothetical presumption that the selling price of marijuana and all other controlled substances is $100 per ounce. This presumed price is needed to calculate the current fixed price portion of the statute.

219. IND. CODE §§ 6-7-3-6, -11 (1993). Clearly Indiana's provision as written, which provides for a tax of over $1,000 per ounce, would not, and did not withstand a double jeopardy challenge under *Kurth Ranch. See* Clifft v. Indiana Dep't of State Revenue, 641 N.E.2d 682 (Ind. Tax 1994), *aff'd in part, rev'd in part*, 660 N.E.2d 310 (Ind. 1995) (holding that the CSET does not violate the privilege against self-incrimination, the right of equal protection, or the right of due process, but is punishment for double jeopardy purposes pursuant to the *Kurth Ranch* decision). Additionally, Chief Justice Shepard writing for the Indiana Supreme Court noted in *Bryant* that a taxpayer who possesses the drug must repay the tax every forty-eight hours to avoid the CSET's additional sanctions. Bryant v. State, 660 N.E.2d 290 (Ind. 1995).

2. Payment of Taxes (Who Pays and When).—Other provisions facing double jeopardy assault are those that address when the tax is due and when it should be collected. In *Kurth Ranch*, the Supreme Court enunciated its concern that Montana's drug tax only applied to that class of individuals who had been arrested.[220] To provide as much protection from double jeopardy analysis as possible, a model statute should allow for the tax to be due immediately upon or even prior to possession or transfer of the drugs. The payment of the tax would be the responsibility of the taxpayer and would in no way be conditioned upon his or her arrest for any criminal offense.

The double jeopardy attack may still be difficult to overcome even if the imposition of tax after the arrest is omitted.[221] However, emphasizing and encouraging tax investigation, pursuit, and collection separate from and prior to any criminal investigation or arrest would further enhance the provision's ability to withstand the attacks.

Using Indiana's current provision for tax collection[222] and making appropriate modifications, a model provision would read as follows:

> Payment of taxes, when due;
> Sec. ___. The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of _____ or 21 U.S.C. § 841 through 21 U.S.C. § 852 and may be paid in advance of such delivery, possession, or manufacture. Payment of the tax shall be pursued [by appropriate tax authorities] on all persons, regardless of the lack of arrest or criminal charges.

3. Preamble with Proper Intent.—The preamble to the statute was also alluded to by the Supreme Court in *Kurth Ranch* as an "unusual feature" which bolstered the Court's conclusion that the statute violated the Double Jeopardy Clause. Although the Court recognized the portion of the preamble indicating that payment of the tax did not give credence to any notion that manufacturing, selling, or using of drugs was legal or proper, this was not the critical portion in the preamble's demise. The practicality of taxing an illegal activity, which the Court agrees is still permissible, makes a preamble important, and failure to inform the taxpayer could be interpreted as an injustice. The Court recognized another area of Montana's preamble as more problematic, because it placed a burden on violators of the law as opposed to all citizens.[223] This reference to a burden on law violators would be avoided in a model provision such as the following:

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220. *Kurth Ranch*, 114 S. Ct. at 1941-42 (Montana's administrative rules even provided for law enforcement filling out the drug tax paperwork and submitting it within 72 hours of arrest).

221. The Indiana Supreme Court seemed to ignore the practicalities of collecting taxes on illegal goods by noting that, although the plain language of the statute did not limit the imposition of the tax to a time after arrest, the effect was to do so. *Bryant*, 660 N.E.2d at 290.

222. IND. CODE § 6-7-3-8 (1993).

223. *Kurth Ranch*, 114 S. Ct. at 1947.

> Whereas, dangerous drugs are commodities having considerable value and are part of a large and profitable business in the state of _____, the expense incurred by the state of _____ is indisputable. This legislation recognizes the economic impact upon the state of such activity and has drafted such legislation so as to generate revenues to offset the tremendous tax burden placed on the state of _____ due to the cost associated with such activity.[224]

B. Provisions At-Risk for Additional Constitutional Attacks

Prior to the *Kurth Ranch* holding, several statutes were challenged because they did not require the confidentiality of information obtained from the taxpayer. The self-incrimination problems stemming from an absence of a confidentiality provision caused other states to heed the warning and incorporate such provisions into their drug tax statutes. In addition, several of these states incorporated within their confidentiality provisions penalties for those who failed to comply with the confidentiality requirements.[225] Clearly, statutes containing these provisions would be less likely to be subjected to a self-incrimination attack. Such an inclusion would also bolster the argument that the state is genuinely seeking the revenues and not information for prosecution, further legitimizing the underlying reasons for the tax. In addition, the model should contain a clause prohibiting the use of any confidential information obtained except for a violation of the tax statute itself.

The following is a modification of Indiana's confidentiality provision[226] which provides a model for purposes of confidentiality:

> Identification of person not required
> Sec. ___ (a) A person may not be required to reveal the person's identity at the time the tax is paid.
> (b) Notwithstanding any law to the contrary, neither the [proper authority] nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a person under this chapter.
> (c) Any person violating this Code section shall be guilty of [a high misdemeanor, example in Indiana, a Class A Misdemeanor].
> Immunity from criminal prosecution; use of confidential information for prosecution
> Sec. ___ The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or

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224. More in-depth analysis should be done to determine what effect, if any, the sources that receive the funds have on the tax being perceived in a more punitive light.

225. GA. CODE ANN. § 48-15-10 (Supp. 1994); N.C. GEN. STAT. § 105-113.112 (1992) (each containing confidentiality provisions as well as a penalty for disclosure).

226. IND. CODE §§ 6-7-3-8 to -9 (1993).

> facilitate prosecution for an offense other than an offense based on a violation of this chapter.

Although far from a complete healing process, this model statute should provide some protection for states drafting or revising provisions of their state drug statutes to avoid "unusual features" and thus being deemed unconstitutional. At the very least, it will give them their best chance for survival.

CONCLUSION

In looking at the *Kurth Ranch* decision, one wonders how far the United States Supreme Court will go in continuing the confusion in double jeopardy jurisprudence. The Court wielded its "weapon" in the *Halper* decision. Rather than retreat from further double jeopardy madness, it chose to pursue another victim in *Kurth Ranch* and struck down the state drug taxes.

Justice Scalia, with wisdom for the future, pointed out that "'[t]he only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.'"[227] He noted that the "Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be."[228]

The future for state drug taxes, although not necessarily headed for extinction, is far from promising. States must have enough concern and optimism to view *Kurth Ranch* as a set-back and not a fatal attack. In revising current statutes or drafting new legislation, legislatures can refuse to allow those making huge profits on illegal drugs to pay less taxes than a young adult or teenager working at his or her first minimum wage job.[229]

Unfortunately the message that *Kurth Ranch* sends is loud and clear. One sentenced in a criminal matter should not also be expected to pay a tax although his or her very actions caused the expenditure of large amounts of both state and federal revenues. For the Double Jeopardy Clause to allow an individual to stand trial for the same criminal act in both a state and federal court,[230] and not allow an individual to be subject to both a civil and criminal proceeding where the legislature has authorized both appears illogical.

In the words of Justice Scalia, who initially voted with a unanimous Supreme Court in *Halper* but realized its egregious ramifications in *Kurth Ranch*, "[i]t is time to put the *Halper* genie back in the bottle."[231] Hopefully, there is enough

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227. *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)).

228. *Id.* at 1958 (Scalia, J., dissenting).

229. One wonders if state legislatures are motivated enough to do so, especially if state court decisions have viewed their previous attempts with a dim light.

230. *See supra* note 114 (discussing dual sovereignty).

231. *Kurth Ranch*, 114 S. Ct. at 1959.

room left in the bottle for *Kurth Ranch*.