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THE WISCONSIN DRUG TAX STAMP LAW, THE FIFTH AMENDMENT, AND THE REALITIES OF TAXING CONTROLLED SUBSTANCES

I. INTRODUCTION

In 1989 the Wisconsin Legislature passed Subchapter IV of Wisconsin Statutes Chapter 139 (“Subchapter IV”), thereby bringing Wisconsin in line with about one dozen other states that had passed taxes on controlled substances.¹ In general, the ten statutory sections that comprise this subchapter establish a system of taxation and punishment under which individuals are required to purchase tax stamps in proportion to the amount of controlled substances in their possession and to affix and display these stamps on the levied drugs.²

It is the purpose of this Comment to address the validity of this statutory scheme in light of three identifiable purposes it could be meant to serve. First, this statutory scheme has been identified as a potential means of identifying drug dealers and to thus serve as a law enforcement tool in the war on drugs. However, this purpose, identified by the Wisconsin Supreme Court in *State v. Hall*³ as the true motivation of the Wisconsin Legislature, cannot be served under a statute that complies with the constitutional protection against state compelled self-incrimination. After the court struck down the statutory scheme in *Hall*, the legislature had to amend the statutes to try and serve the needs of another purpose which the law was never intended to serve. The second purpose this statute could conceivably serve is to raise revenue. The evidence and realities of such a law reveal that the revenue raised under such a statute is negligible and that there was an understanding of this on the part of the State in creating Subchapter IV. Finally, the statutory scheme can be justified in that it serves the purpose of providing another means of punishing drug offenders. This goal is served somewhat under the revised law, but as an analysis of various charging situations will

1. The following states had laws establishing taxes on controlled substances that were passed in or prior to 1989: Alabama, Colorado, Florida, Idaho, Illinois, Kansas, Montana, Minnesota, Nevada, New Mexico, Rhode Island, Texas, and Utah. See Frank A. Racaniello, Note, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 662-63 & nn.35-54 (1992).

2. See WIS. STAT. §§ 139.87-.96 (1997).

3. 557 N.W.2d 778 (Wis. 1997).

show, the statute cannot invariably be used as a means of further punishing drug offenders. Both the federal and state constitutions' double jeopardy provisions and the line of both state and federal cases that have interpreted these provisions stand as a barrier in many situations to charging a defendant under both the state's controlled substances laws and the drug tax stamp law.

Part II of this Comment will explain the Wisconsin statutory scheme. Part III will look at the failed attempt by the Wisconsin Legislature to use the drug tax stamp as a law enforcement tool to identify drug dealers. This discussion focuses on the Wisconsin Supreme Court decision in *State v. Hall*, in which the statutory scheme as originally enacted was struck down for violating the privilege against self-incrimination. Also addressed are the 1997 amendments to the statutory scheme and whether they correct the constitutional deficiencies identified in *Hall*. Part IV is a brief look at the realities behind the use of a tax on controlled substances as a legitimate revenue-raising device. Finally, Part V will look to the double jeopardy protections of the state and federal constitutions as a potential barrier to the use of the drug tax stamp laws as a punitive measure against drug dealers. The double jeopardy protection against multiple punishments may, under Wisconsin law, prevent common charging situations in which both the criminal penalties of the tax stamp law and a substantive drug crime are charged.

II. THE WISCONSIN STATUTORY SCHEME⁴

The statutory provisions of Subchapter IV apply to any person who qualifies as a "dealer," as defined under Wisconsin Statutes section 139.87.⁵ A dealer is any person, who in violation of the Uniform Controlled Substances Act (Wisconsin Statutes Chapter 961),⁶ "possesses, manufactures, produces, ships, transports, delivers, distributes, imports, sells or transfers to another person" a quantity of drugs in excess of certain statutory limits.⁷ Such persons are required

4. This introduction to Subchapter IV discusses the statutes as they existed before 1997 and the decision in *State v. Hall*, 557 N.W.2d 778 (Wis. 1997). For an explanation of how the statutory scheme has been altered to comply with the decision in *Hall*, see *infra* Part III.B.

5. See WIS. STAT. § 139.88 (1995). Section 139.88 states in pertinent part: "There is imposed on dealers, upon acquisition or possession in this state, an occupational tax . . ." *Id.*

6. Previously, including at the time of the pertinent decisions discussed in this Comment, the Uniform Controlled Substances Act, as adopted in Wisconsin, was codified in Wisconsin Statutes Chapter 161.

7. WIS. STAT. § 139.87(2) (1995). The statutory definition reads as follows:

under the law to purchase from the Wisconsin Department of Revenue (DOR), either by mail or in person, tax stamps in proportion to the weight or quantity, depending on the nature of the substance, of the drugs possessed.⁸ The tax stamp provision applies to any Schedule I or II⁹ controlled substance under the Uniform Controlled Substances Act.¹⁰

“Dealer” means a person who in violation of ch. 961 possesses, manufactures, produces, ships, transports, delivers, distributes, imports, sells or transfers to another person more than 42.5 grams of material containing tetrahydrocannabinols, more than 5 plants containing tetrahydrocannabinols, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diethylamide or more than 7 grams of any other schedule I or schedule II controlled substance or of a controlled substance analog of a schedule I or schedule II controlled substance. “Dealer” does not include a person who lawfully possesses a controlled substance or controlled substance analog.

Id.

8. See WIS. STAT. §§ 139.88-.89 (1995); State v. Hall, 557 N.W.2d 778, 785 (Wis. 1997).

9. Schedule I substances are those with a “high potential for abuse,” that have “no currently accepted medical use” and “[l]ack[] accepted safety for use in treatment under medical supervision.” WIS. STAT. § 961.13(1m) (1995). They include opiates such as heroin and morphine, synthetic opiates and hallucinogens such as MDMA and PCP. See WIS. STAT. § 961.14 (1995). Schedule II substances are those with a “high potential for abuse,” but have a “currently accepted medical use.” WIS. STAT. §§ 961.15(1m)(a), (b) (1995). Also, the abuse of such substances “may lead to severe psychological or physical dependence.” WIS. STAT. § 961.14(1m)(c) (1995). They include opium, cocaine and its derivatives, amphetamines, and methamphetamines. See WIS. STAT. § 961.16 (1995).

10. See WIS. STAT. § 139.87(2) (1995). Section 139.88 provides for taxation at the following rates:

(1) Per gram or part of a gram of material containing tetrahydrocannabinols, whether pure or impure, measured when in the dealer’s possession, \$3.50.

...

(1d) Per plant containing tetrahydrocannabinols, regardless of weight, counted when in the dealer’s possession, \$1,000.

...

(1g) Per gram or part of a gram of mushrooms or parts of mushrooms containing psilocin or psilocybin, whether pure or impure, measured when in the dealer’s possession, \$10.

...

(1r) Per 100 milligrams or part of 100 milligrams of any material containing lysergic acid diethylamide, whether pure or impure, measured when in the dealer’s possession, \$100.

...

(2) Per gram or part of a gram of other schedule I controlled substances or schedule II controlled substances, whether pure or impure, measured when in the dealer’s possession, \$200.

The failure to obtain the tax stamps carries several possible consequences. First, there is the civil penalty of collection of the tax and a 100% penalty collected by the DOR.¹¹ Second, the legislature made the possession of controlled substances without tax stamps affixed a felony, punishable up to five years in prison and/or a maximum fine of \$10,000.¹²

Prior to 1997 and the decision in *State v. Hall*,¹³ the statute contained certain safeguards that were meant to protect the confidentiality of the dealer purchasing the stamps. The statute specifically provides no immunity from criminal prosecution to the dealer,¹⁴ but the legislature did recognize potential constitutional challenges on self-incrimination grounds when it wrote the confidentiality provisions of section 139.91.¹⁵ Under the pre-1997 version of this statute, there were three major protections. First, the DOR could not "reveal facts obtained in administering [the drug tax stamp law]," except in publishing "statistics that do not reveal the identities of dealers."¹⁶ Second, dealers were not "required to provide any identifying information in connection with the purchase of the stamps."¹⁷ Both of those confidentiality-protecting provisions remain a part of the new statutory scheme.¹⁸ Third, the law provided that "[n]o information obtained" through administration of the drug tax stamp law could

be used against a dealer in any criminal proceeding unless that

WIS. STAT. § 139.88 (1995).

11. See WIS. STAT. §139.95(1) (1995). For a case holding that the imposition of the tax and penalty under a statutory scheme much like Wisconsin's is so punitive as to be criminal, thereby implicating double jeopardy protections pursuant to *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), see *Lynn v. West*, 134 F.3d 582 (1998).

12. See WIS. STAT. § 139.95(2) (1995). Under recent amendments to the law, the possible sentence for possession of untaxed drugs was raised to seven years and six months on December 31, 1999. See WIS. STAT. ANN. § 139.95(2) (West Supp. 1999); 1997 WIS. ACT 283, § 106.

13. 557 N.W.2d 778 (Wis. 1997).

14. See WIS. STAT. § 139.90 (1995).

15. See *Hall*, 557 N.W.2d at 791 (quoting Memorandum from Eng Braun, Wisconsin Department of Revenue, to Jack Stark, Wisconsin Legislative Reference Bureau (June 17, 1987) (also reproduced in Brief of Defendant-Appellant-Petitioner at App. 38-40, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR) ("The difficulty in maintaining confidentiality could result in dealers claiming that the requirement to pay the controlled substances tax violates their constitutional right against self-incrimination.")).

16. WIS. STAT. § 139.91 (1995).

17. *Id.*

18. See WIS. STAT. ANN. §§ 139.91(1)-(2) (West Supp. 1999).

information [had] been independently obtained, except in connection with a proceeding involving possession of schedule I controlled substances or schedule II controlled substances on which the tax [had] not been paid or in connection with taxes due under [the drug tax stamp law] from the dealer.¹⁹

In effect, the third of these provisions, which was substantially less protective than those found in states applying similar schemes,²⁰ allowed for the use of information conveyed by a taxpayer in a criminal proceeding against the taxpayer in three situations. First, it allowed for the use of “independently obtained” information, that is, information not obtained by the DOR.²¹ Second, it allowed the prosecution to use information obtained by the DOR in a criminal prosecution involving untaxed drugs.²² Finally, the confidentiality provision also provided an exception for use in the case against the dealer on the basis that the tax is owed.²³ For example, if there were evidence that there were *X* pounds of a controlled substance in the possession of the dealer, for which taxes were only paid for *Y* pounds (a lesser amount), the amount of tax actually paid may be used as evidence in the case against the dealer. Indeed, the amount of tax paid is necessary evidence to the establishment of tax liability in such a case.²⁴

III. THE DELEGITIMIZATION OF THE DRUG TAX STAMP LAW AS A LAW ENFORCEMENT TOOL

A. State v. Hall

Prior to 1997, the Wisconsin appellate courts had twice been confronted with constitutional challenges to charges brought against a

19. WIS. STAT. § 139.91 (1995).

20. See, e.g., MINN. STAT. § 297D.13 (1995).

21. See WIS. STAT. § 139.91 (1995).

22. See *id.*

23. See *id.*

24. Other pertinent provisions of Wisconsin Statutes, Chapter 139, Subchapter IV are a section providing for “[e]xamination of records,” WIS. STAT. § 139.92 (1995), a section establishing procedure for “[a]ppeals, presumptions, [and] administration,” WIS. STAT. § 139.93 (1995), a section providing for refunds of tax paid in the case of erroneous levies, see WIS. STAT. § 139.94 (1995), and a section providing for the appropriate “[u]se of revenue,” WIS. STAT. § 139.96 (1995). The last of these statutory provisions, namely the “use of revenue” statute, was altered slightly by the post-*Hall* amendments. See *infra* notes 132-34 and accompanying text.

defendant under section 139.95. In *State v. Heredia*,²⁵ the Wisconsin Court of Appeals upheld the constitutionality of the statutory scheme, particularly the confidentiality provisions of section 139.91, after a facial challenge against the law was brought on various constitutional grounds.²⁶ In *State v. Dowe*,²⁷ the court of appeals rejected an individual challenge based on double jeopardy grounds.²⁸ The defendant argued unsuccessfully that possession with intent to deliver under Wisconsin Statutes section 961.41 (formerly section 161.41) was a lesser included crime of being a dealer in violation of section 139.95, and therefore the charging of both was in violation of the double jeopardy protection against multiple punishments of both the United States and Wisconsin constitutions.²⁹

It was against this background that *State v. Hall*³⁰ reached the court of appeals.³¹ The appellant/defendant, Darryl J. Hall, was convicted on

25. 493 N.W.2d 404 (Wis. Ct. App. 1992).

26. The defendant in *Heredia* attacked the constitutionality of Subchapter IV on three grounds. *See id.* at 406. First he alleged that the statute violates the privilege against self-incrimination by requiring the taxpayer to convey information that would "increase the likelihood of conviction for possession." *Id.* at 407. The court of appeals found that, because "section 139.91 specifically provides that '[d]ealers may not be required to provide any identifying information,'" the statute "both contemplates and permits the anonymous payment of the tax." *Id.* Thus, any identifying information received by the DOR would not be compelled at all, but rather would be voluntarily conveyed. *See id.* Heredia also argued that Subchapter IV was violative of due process because it was "not a true tax, but merely an alternative method of suppressing crime." *Id.* at 408. The court found that even if Heredia's arguments were true, due process is not violated so long as the defendant has the right to a hearing before a penalty is imposed, as is provided under Subchapter IV. *See id.* Heredia also argued that Subchapter IV is void for vagueness. *See id.* at 408. He cited various ambiguities in the statutory scheme, such as whether the weights under the definition "include[] potential contaminants or cutting agents," whether the tax can be applied to those who had the requisite weight of controlled substances in their possession at one time, but no longer do, how the tax stamp is to be affixed, especially given the reality that a dealer will break up the requisite weight of drugs into a smaller quantity for sale, and "whether 'the failure to pay the tax [is] a continuing crime or a separate offense for each day, week or month that the tax is not paid.'" *Id.* at 409. The court dismissed these potential ambiguities out of hand, as they did not implicate First Amendment values. *See id.*

27. 541 N.W.2d 218 (Wis. Ct. App. 1995), *rev'd on other grounds*, 557 N.W.2d 812 (Wis. 1997). The case was overturned on appeal to the Wisconsin Supreme Court because of the decision in *State v. Hall*, 557 N.W.2d 778 (Wis. 1997), which found Subchapter IV to be unconstitutional. *See State v. Dowe*, 557 N.W.2d 812, 813 (Wis. 1997). Therefore, the supreme court did not reach the double jeopardy issue addressed by the court of appeals. *See id.*

28. *See Dowe*, 541 N.W.2d at 219.

29. *See id.* at 219-20. *See infra* Part V.B.2 for a discussion of the court's decision.

30. 540 N.W.2d 219 (Wis. Ct. App. 1995), *rev'd*, 557 N.W.2d 778 (Wis. 1997).

31. It should be noted that Heredia, Dowe, and Hall were all convicted before certain amendments to sections 139.87 and 139.88 went into effect. *See WIS. STAT. ANN.* §§ 139.87-

four counts: two consecutive thirty-year sentences for delivery of cocaine base in violation of Wisconsin Statutes sections 161.41(1)(cm)4, 161.48, and 161.49 to be served concurrently with two consecutive three year sentences for violation of section 139.95, the penalty provision of Subchapter IV.³² Hall brought both a facial challenge to the drug tax stamp scheme on self-incrimination grounds and a non-facial, individualized challenge based on the fact that that conviction for both the possession charge and the tax stamp violation offends the double jeopardy protection against multiple punishments for the same offense.³³ The court of appeals rejected both of the defendant's arguments.³⁴ The court of appeals did concede that the affix and display provisions of the statute were violative of the privilege against self-incrimination, but it applied a "saving construction" to the statute, thus remedying the constitutional deficiencies.³⁵ The Wisconsin Supreme Court granted review of the decision and handed down its opinion in January 1997, striking down the law as unconstitutional on the grounds that it infringed upon both the federal and state constitutional provisions against state compelled self-incrimination.³⁶ The court did not reach Hall's double jeopardy argument.³⁷

Justice William A. Bablitch, writing for the court, identified three issues presented by the case. The first was whether Wisconsin Statute section 139.89 compels self-incrimination contrary to Article I, section 8(1) of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution.³⁸ The scope of the privilege was defined by

.88 (West Supp. 1998); 1995 Wis. Act 448 §§ 95-99, 100-101. Therefore the definition of dealer as it appears at *supra* note 7 and the section defining the tax rates, *supra* at note 10 were slightly different. However, none of these changes would have affected the outcome of any of the three defendants' cases.

32. See *Hall*, 557 N.W.2d at 782-83.

33. See *id.* at 783 & n.2. See *infra* Part V.B.3 for a discussion of the court of appeals decision concerning the double jeopardy challenge.

34. See *Hall*, 557 N.W.2d at 783; *Hall*, 540 N.W.2d at 223.

35. See *Hall*, 557 N.W.2d at 783; *Hall*, 540 N.W.2d at 226-27. See *infra* for explanation of this "saving construction."

36. See *Hall*, 557 N.W.2d at 783.

37. See *id.* at 783 n.2; Brief of Defendant-Appellant-Petitioner at 58-76, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

38. See *Hall*, 557 N.W.2d. at 783. The Wisconsin constitutional provision embodying the privilege against self-incrimination states that no person "may be compelled in any criminal case to be a witness against himself or herself." WIS. CONST. art. I., § 8(1). The Fifth Amendment of the United States Constitution reads in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V. The law regarding the self-incrimination provisions of the Wisconsin Constitution "parallel[s] federal analysis." *State v. Sorenson*, 421 N.W.2d 77, 90 (Wis. 1988).

the court as extending to any situation in which "a person has a real and appreciable apprehension that information compelled by the state could be used against him or her in a criminal proceeding."³⁹

Pertinent to this case is the two-tiered protection the privilege provides. It protects both "direct" and "derivative" use of compelled information.⁴⁰ The protection against direct use protects against "use of information which would support a conviction."⁴¹ An example of this would be the use by the prosecution of a compelled confession to a crime. The protection against derivative use protects against the use of "compelled information to furnish a link in the chain of evidence necessary for prosecution."⁴² Hall argued that the Wisconsin statutory scheme compelled him to convey information that could be used derivatively against him in a prosecution for a violation of the Wisconsin drug laws.⁴³ The scheme, Hall argued, was constitutionally defective because the actual act of purchasing the drugs conveyed information usable by law enforcement to identify the tax purchaser as being in the possession of narcotics.⁴⁴ Furthermore, because of a loophole in the confidentiality provision of the statute, adhering to the "affix and display" provision of the Subchapter IV would convey "vital evidence" to the state in a prosecution for drugs for which no tax was paid.⁴⁵ The act of affixing and displaying the stamps showed that the possessor of some drugs, for which taxes were paid, had both the requisite knowledge that other unstamped drugs were controlled substances and the statutory intent to possess controlled substances.⁴⁶

In addressing whether the information was actually compelled by the statutory scheme, the court applied the test established by the United States Supreme Court in *Marchetti v. United States*.⁴⁷ The *Marchetti*

39. *Hall*, 557 N.W.2d at 783.

40. *See id.*

41. *Id.* at 783.

42. *Id.* The information compelled will fall within the ambit of this protection if it merely furnishes an "investigative lead." *See Kastigar v. United States*, 406 U.S. 441, 460 (1972); Brief of Defendant-Appellant-Petitioner at 8, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR) (citing *Kastigar*).

43. *See Hall*, 557 N.W.2d at 784.

44. *See id.* The court of appeals rejected this claim relying on the decision in *State v. Heredia*, 493 N.W.2d 404 (Wis. Ct. App. 1992). *See State v. Hall*, 540 N.W. 2d 219, 225 (Wis. Ct. App. 1995), *rev'd*, 557 N.W.2d 778 (Wis. 1997).

45. *Hall*, 557 N.W.2d at 784-85.

46. *See id.* at 785.

47. 390 U.S. 39 (1968). In *Marchetti*, the Court determined that given the reporting requirements of an excise tax on illegal gambling and an occupational tax on bookmakers, a

Court laid out a three prong analysis for the determination of whether the Fifth Amendment was violated by a tax scheme.⁴⁸ If all of the following factors are satisfied, the tax violates the privilege against self-incrimination. First, the tax must concern “an area ‘permeated with criminal statutes’” and be “aimed at individuals ‘inherently suspect of criminal activities.’”⁴⁹ Second, the taxpayer must be required to “provide information which a person might reasonably suppose would be available to prosecuting authorities.”⁵⁰ Finally, the information provided must be of the kind that would “provide a significant link in a chain of evidence tending to establish guilt.”⁵¹

The first prong of the *Marchetti* test was easily satisfied given that the subject of the tax is controlled substances and the taxpayers are “dealers,” who by statutory definition are in possession of the drugs in contravention of the law.⁵² When approaching its analysis under the second prong of *Marchetti*, the court conducted two separate analyses. The first focused on Hall’s attack on the purchase requirements of the statute.⁵³ The court then addressed the attack on the affix and display requirements of the statute.⁵⁴

The court first addressed whether the terms of the statutory scheme require, through the act of purchasing the stamps, the taxpayer to convey information that would be available to prosecuting authorities. The court acknowledged that any information conveyed through the act of purchasing the stamps is incriminating, because it serves as an admission of possession of drugs and provides evidence to establish knowledge of possession.⁵⁵ However, this fact is irrelevant under

defendant who asserts the privilege against self-incrimination could “not be criminally punished for failure to comply with [the] requirements.” *Id.* at 42, 61.

48. See *Hall*, 557 N.W.2d at 784. The *Marchetti* test has been applied in many state cases involving statutory provisions which tax illegal narcotics, some of which are substantially similar to the present-day Wisconsin statutory scheme. See, e.g., *Briney v. State Dep’t of Revenue*, 594 So.2d 120 (Ala. Civ. App. 1991); *Cliff v. Indiana Dep’t of State Revenue*, 660 N.E.2d 310 (Ind. 1995); *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); *State v. Garza*, 496 N.W.2d 448 (Neb. 1993).

49. *Hall*, 557 N.W.2d at 784 (quoting *Marchetti*, 390 U.S. at 47).

50. *Id.*

51. *Id.*

52. See *id.*

53. See *id.*

54. See *id.* at 786.

55. See *id.* at 785. The State had argued that the purchase of stamps was not necessarily incriminating because “not all stamp purchasers are drug dealers. Anyone with the money and the inclination can buy the stamps. And experience in some states shows that most of the stamps are sold to collectors or bought as gag gifts.” Brief of Plaintiff-Respondent at 6, State

Marchetti if there is no reasonable ground to believe that the information would be revealed to prosecuting authorities. Given the confidentiality provisions of the statute, combined with the Wisconsin DOR's mail order procedure for the tax stamps, the court was satisfied that a taxpayer may purchase stamps with the assurance that the act of purchasing will not reveal information to prosecuting authorities.⁵⁶ Under the DOR procedures there were two means by which a taxpayer could pay the tax.⁵⁷ A dealer could purchase the stamps in person at the offices of the DOR in Madison.⁵⁸ Alternatively, a taxpayer could avoid the "serious risk" of being observed by law enforcement while going into the DOR offices⁵⁹ by using the DOR's mail order payment procedure.⁶⁰ If purchased through the mail, any self-identifying information (a name or pseudonym and address or post office box) communicated to the DOR, would be protected from disclosure by the confidentiality provisions of the statute.⁶¹ Thus, Hall's challenge to the purchase requirements of the statute failed because the mail order option, created not by the statute itself, but by the DOR as an administrative procedure, provided sufficient protection from self-incrimination to pass the second prong of *Marchetti*. Because Hall could not satisfy this prong of the *Marchetti* analysis, the court's inquiry concerning the purchase requirements was at an end.

Although the purchase requirement of the statute was not constitutionally defective under prong two of *Marchetti*, the *Hall* court found that given the loopholes in the confidentiality provision of section 139.91, the affix and display requirement would allow a dealer to reasonably suppose that compelled incriminating information would be available to prosecuting authorities.⁶² Affixing and displaying the stamps was an act of self-incrimination because "[p]ossession of the

v. Hall, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR) (citing Racaniello, *supra* note 1, at 665).

56. See *Hall*, 557 N.W.2d at 786.

57. See *id.* at 785.

58. See *id.* Through a prohibition on the transfer of stamps, the statutes require that it must be the dealer who purchases the stamps. See WIS. STAT. § 139.89 (1995) ("No person may transfer to another person a stamp or other evidence of payment.").

59. See *Hall*, 557 N.W.2d at 786. Information of the kind obtained through independent police surveillance of the Department of Revenue office would be considered information "independently obtained" and therefore not covered by the confidentiality statute. See *id.* at 785-86; WIS. STAT. § 139.91 (1995).

60. See *Hall*, 557 N.W.2d at 785-86.

61. See *id.* at 786.

62. See *id.* at 787.

stamp signifies the possessor's knowledge of the nature of the substance he or she possesses – an element of a drug possession charge."⁶³ The confidentiality provisions provided no protection against use of the presence of stamps as evidence against the dealer in a criminal prosecution for violation of the state's drug laws, if such evidence was obtained by a law enforcement agency independent of the DOR.⁶⁴ Thus, although the DOR could not reveal information to a local prosecutor's office regarding the payment of tax, police who discover the stamped drugs could use the presence of the stamps because it is information "independently obtained."⁶⁵ Given this potential use of compelled information by the state, the court found that Hall's challenge to the affix and display provisions of the statute satisfied the second prong of *Marchetti*.⁶⁶

The *Hall* court concluded its *Marchetti* analysis by finding that information compelled by compliance with Subchapter IV would "provide a significant link in a chain of evidence tending to establish guilt."⁶⁷ Here, however, rather than focusing on information independently obtained to prove knowledge of the nature of the controlled substance as it did under prong two analysis, the court relied on two different grounds for finding that Hall satisfied prong three. First, it relied on the determination of the court of appeals that information "obtained by the DOR" could be used in a derivative fashion.⁶⁸ Second, the court found that the "stamp law allows the State to use compelled information as an investigative lead to information used against dealers in a criminal proceeding."⁶⁹ Why the court focused on these two grounds rather than the grounds it relied upon in its prong

63. *Id.* at 786.

64. *See id.* at 786-87.

65. *See id.* The court found that this information "independently obtained" could be used to prove knowledge of the nature of drugs for which taxes have been paid and those for which taxes have not been paid. *See id.* at 787.

66. *See id.* at 787.

67. *Id.*

68. *See id.* In fact, the court of appeals did not address the use of compelled information that was "obtained by the DOR" as suggested by the supreme court. *See State v. Hall*, 540 N.W.2d 219, 226 (Wis. Ct. App. 1995), *rev'd*, 557 N.W.2d 778 (Wis. 1997). Rather, the sole focus of the determination of the court of appeals that the affix and display provision would violate the defendant's right against self incrimination is the use of independently obtained information, namely the use of the presence "of the tax stamps to prove a taxpayer's knowledge of the nature of the controlled substance." *Id.*

69. *Hall*, 557 N.W.2d at 787. The court did not explain which information and from what source it was referring to in establishing the investigative lead grounds for satisfying prong three of *Marchetti*.

two analysis is unclear, but use by law enforcement of the presence of stamps to infer knowledge would have equally satisfied the prong three "substantial link" requirement.⁷⁰

Although Hall's attack on the affix and display provisions satisfied all three prongs of *Marchetti*, this did not end the court's analysis.⁷¹ Rather, the second question the court needed to address was whether the confidentiality provisions of Subchapter IV satisfied the standards established in *Kastigar v. United States*.⁷² In *Kastigar*, the United States Supreme Court held that the privilege against self-incrimination may be protected despite a compulsion to give self-incriminating evidence if there is some other protection as broad as the self-incrimination privilege.⁷³ The State of Wisconsin alleged that section 139.91, the confidentiality provision, provides protection "coextensive" with the privilege.⁷⁴ Reiterating that the privilege against self-incrimination provides protection for both direct and derivative use and because the confidentiality provisions do not provide protection from derivative use, the court found the protection was not coextensive.⁷⁵ The sole focus was on the use of information obtained by the DOR and not on the use of information independently obtained by law enforcement through the presence of affixed stamps. The court's primary concern was with the fact that the state could use information obtained by the DOR in "situations in which taxes are not at issue."⁷⁶ This was allowed under the clause of the confidentiality provision allowing "information obtained

70. It appears that there were four sources of unconstitutionally compelled information that the court could have relied upon in its analysis of *Marchetti* prong two and three for the affix and display requirement: (1) use of independently obtained information of presence of stamps to prove knowledge of the nature of controlled substances for which taxes were paid; (2) use of independently obtained information of presence of stamps to prove knowledge of the nature of controlled substances for which taxes were not paid; (3) use of information obtained by the DOR to prove knowledge of controlled substances for which taxes were not paid, *see infra* note 77 and accompanying text; and (4) "investigative lead" grounds asserted under the prong three analysis.

71. *See id.* at 787.

72. 406 U.S. 441 (1972).

73. *See id.* at 453; *Hall*, 557 N.W.2d at 787.

74. *See Hall*, 557 N.W.2d at 787.

75. *See id.* at 787-89. The court's inquiry into whether the confidentiality provisions were coextensive with the privilege against self-incrimination is duplicative of its earlier analysis under *Marchetti*. This is because the court took section 139.91 into account in conducting its *Marchetti* analysis. Before reaching its conclusion under the *Kastigar* coextensive protection analysis, the court had already concluded that even in light of the confidentiality provisions there were ways in which the state could derivatively use compelled information against the defendant.

76. *Id.* at 788.

by the DOR to be used [against a dealer in a criminal] proceeding involving possession of . . . controlled substances on which the tax has not been paid.”⁷⁷ Also problematic was the fact that the confidentiality provision was not enforceable, because there was no provision that penalized a DOR employee for breaching the confidentiality provision.⁷⁸

The third and final issue the *Hall* court addressed was whether the court of appeals’ “saving construction” was applicable to the statutory scheme.⁷⁹ The court of appeals, having recognized some of the same constitutional defects as the supreme court, held that it would

construe the drug tax stamp statute to preserve its constitutionality by interpreting [the confidentiality provision] to preclude the State from using *any* information gained as a result of a tax stamp purchaser’s compliance with the statute, including the presence of affixed tax stamps, as evidence in a subsequent drug prosecution.⁸⁰

It reached this conclusion by stating that the purpose of the statute was not to provide information to the State to be used in a criminal prosecution, and therefore, a construction of the statute prohibiting such use of information did not conflict with the legislative intent.⁸¹

However, the supreme court felt that by construing the statute in such a manner, it would be “rewriting the statute” in a fashion contrary

77. *Id.*; WIS. STAT. § 139.91 (1995). The court gave the following hypothetical example of how this clause would allow use of compelled information against the defendant:

[I]n a prosecution for possession with intent to deliver cocaine for which no tax has been paid, any information learned from a defendant who had paid the tax on other, stamped, cocaine could be used against him or her as long as he or she had paid no tax on the cocaine directly involved in the possession charge. For example, if a dealer possesses 25 grams of cocaine, but buys tax stamps for only 15 grams, the statute does not bar the DOR clerk from identifying the dealer as having admitted, by application for the stamps, to possession of 15 grams of cocaine, and thus knowledge and intent that the unstamped 10 grams are illegal cocaine and the dealer intended to possess them.

Hall, 557 N.W.2d at 788.

78. *See Hall*, 557 N.W.2d at 788.

79. *See id.* at 789.

80. *State v. Hall*, 540 N.W.2d 219, 227 (Wis. Ct. App. 1995), *rev’d*, 557 N.W.2d 778 (Wis. 1997) (emphasis in original).

81. *See id.*

to legislative intent.⁸² The court flatly disagreed with the court of appeals on the issue of legislative intent, finding that the “[l]egislative history reveals that the legislature’s purpose for drafting the original drug stamp tax bill was to learn the identity of drug dealers.”⁸³ The legislature was aware of the potential problems of self-incrimination and was fully capable of drafting a statute that would comply with the constitution by providing a protection coextensive with the privilege against self-incrimination, yet chose to write section 139.91 with loopholes allowing Subchapter IV to be used as a law enforcement tool.⁸⁴ In reaching this conclusion, the *Hall* court was particularly persuaded by assertions of state legislators that the tax scheme was created “to get at the dealers” and that it was created with not even a minimal expectation of raising revenue.⁸⁵

In illustrating that the legislature knew how to draft a statute that would withstand constitutional scrutiny, but opted not to, the court in effect suggested to the legislature ways to remedy the statute. The court cited two statutory provisions that the legislature could have used as models, but chose not to.⁸⁶ The first was the confidentiality provision of the Minnesota drug tax stamp law which the court suggested would pass constitutional muster, as it prohibited the derivative use of information obtained by the department and the use of that compelled through the affix and display provisions that was allowed under section 139.91.⁸⁷ The Minnesota statute appears in the drafting record of Subchapter IV, and the court concluded that the deviation from the language of the Minnesota provision provided further evidence of a legislative intent to use Subchapter IV to identify drug dealers.⁸⁸ The other statutory provision the court found relevant was a provision of the same act that contained Subchapter IV, which provided both direct and derivative protection in the context of immunized testimony.⁸⁹ Having found the use of a saving construction to be inapplicable, the court held that the

82. *See State v. Hall*, 557 N.W.2d 778, 789 (Wis. 1997).

83. *Id.* at 790.

84. *See id.*

85. *See id.* at 790-91.

86. *See id.* at 791.

87. *See id.* The Minnesota confidentiality provision provides, in pertinent part, that “[no] information contained in such a report or return or obtained from a dealer be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer making the return.” *Id.* (quoting MINN. STAT. § 297D).

88. *See id.*

89. *See id.* The statute at issue was section 972.085 of the Wisconsin Statutes.

entirety of Subchapter IV was unconstitutional.⁹⁰

B. The Legislative and Judicial Response to State v. Hall

Following the striking down of Subchapter IV in *Hall*, the state legislature was left with the task of trying to revamp the statutory provisions in a manner that would provide the constitutional protections found lacking in *Hall*. The decision in *Hall* came down in January 1997, and by April the leadership of the State Assembly,⁹¹ as well as the Department of Justice,⁹² the DOR,⁹³ and the Governor's Office⁹⁴ were pursuing ways to revitalize Subchapter IV. At this point it was clear that the shortcomings identified in *Hall* would be addressed by following the *Hall* court's not-so-subtle directives.⁹⁵ These two directives were to follow the Minnesota model of statutory confidentiality protections and to secure it by making it a crime to breach that confidentiality.⁹⁶ The Assistant Attorney General who argued on behalf of the State in *Hall* noted:

The supreme court seldom offers us advisory opinions regarding the constitutionality of prospective statutory language. I recommend we take advantage of this opportunity. We should seek amendment of sec. 139.91, Stats., to substitute the language

90. The State did not seek United States Supreme Court review of the decision in *Hall* because they believed the state supreme court decision rested on adequate and independent state grounds. See Steven Walters, *Drug dealers may get refunds: After court ruling, one dealer wants \$17,000 back for tax stamps he bought*, MILWAUKEE J. SENTINEL, May 5, 1997, at A1 ("In its decision, the state Supreme Court relied entirely on Wisconsin law, which is 'not reviewable' by the U.S. Supreme Court, [Assistant Attorney General Matthew Frank] wrote Revenue Department officials.")

91. See Letter from Steven Foti, Wisconsin State Assembly Majority Leader, to Jefren Olsen, Wisconsin Legislative Reference Bureau (Apr. 21, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

92. See Memorandum from Greg Posner-Weber, Assistant Attorney General, to Matthew J. Frank and Sally L. Wellman, Assistant Attorney Generals (Apr. 23, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512) [hereinafter Department of Justice Memorandum].

93. See Memorandum of the Wisconsin Department of Revenue, as attached to Letter from Steven Foti, Wisconsin State Assembly Majority Leader, to Jefren Olsen, Wisconsin Legislative Reference Bureau (Apr. 21, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

94. See Letter from Matthew J. Frank, Assistant Attorney General, to Stewart Simonson, Legal Counsel for the Governor's Office (Apr. 28, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

95. See Department of Justice Memorandum, *supra* note 92.

96. See *id.*; *State v. Hall*, 557 N.W.2d 778, 788, 791 (Wis. 1997).

contained in the Minnesota confidentiality statute.

We should also seek amendment of section 139.91, Stats., to add a criminal penalty for unlawful dissemination of facts obtained by DOR personnel in the administration of the drug tax stamp law. Similar provisions are contained in many state drug tax stamp laws. Once again *Hall* is instructive⁹⁷

In essence what was adopted was a version of the Minnesota statute, tailored somewhat to address the specific concerns of the *Hall* court.⁹⁸ To address the problem of derivative use of information obtained by the department in a drug prosecution where no tax has been paid, the legislature simply eliminated the clauses of the confidentiality provision that excepted this use.⁹⁹ This alteration, along with the passage of a provision providing that anyone in the DOR who reveals information obtained through administering the tax is subject to a fine of up to \$1000 and/or up to sixty days in jail,¹⁰⁰ secured the confidentiality of any information obtained by the DOR. However, the *Hall* court's concern that the affix and display requirement compelled information was focused not on information obtained by the DOR, but on information obtained by law enforcement through their observation of the stamped

97. Department of Justice Memorandum, *supra* note 92.

98. The actual amendments to Subchapter IV came primarily through the 1997 State Budget Act. See 1997 WIS. ACT 27 §§ 2979m – 2979q. However, as this act is voluminous, the legislative history of the amendments may be more easily followed by tracking 1997 Assembly Bill 512, which carried solely the amendments as they appeared in the Budget Act. See 1997 WIS. ASS. BILL 512. 1997 Assembly Bill 512 was tabled at the end of the legislative session and never voted upon; however, all of its provisions were incorporated into the state budget bill. See Wisconsin Assembly Journal, 93rd Sess., 786 (Apr. 2, 1998). The new confidentiality provision reads:

- (1) The department may not reveal facts obtained in administering this subchapter, except that the department may publish statistics that do not reveal the identities of dealers.
- (2) The department may not require dealers to provide any identifying information in connection with the purchase of stamps.
- (3) No information obtained from a dealer as a result of the dealer's compliance with this subchapter may be used against the dealer in any criminal proceeding unless that information has been independently obtained, except in connection with a proceeding involving taxes due under s. 139.88 from the dealer.

WIS. STAT. ANN. § 139.91 (West Supp. 1999).

99. See WIS. STAT. ANN. § 139.91(3) (West Supp. 1999).

100. See WIS. STAT. ANN. § 139.95(4) (West Supp. 1999).

drugs. To eliminate the possibility that the presence of stamps could be used to infer knowledge of the substance, the legislature dropped the language of "information obtained by the department" and replaced it with a comprehensive ban in any criminal proceeding on the use on any information derived from dealers or as a consequence of the dealer's compliance with Subchapter IV.¹⁰¹ As a result of these amendments, the only situations in which information can be used are when information conveyed by the dealer through his compliance is independently obtained, and of course, when the presence or lack of stamps is used as evidence of tax payment in a proceeding involving payment of that tax.¹⁰²

It seems that the legislature's attempt to draft a statute that is valid in light of the Fifth Amendment privilege was successful. All of the *Hall* court's concerns respecting compelled information were addressed through the amended confidentiality provision's comprehensive protection against derivative use of compelled information. This conclusion requires no great gift of foresight however, given the assistance that the *Hall* court gave the legislature in suggesting how to remedy the constitutional defects of Subchapter IV, *i.e.*, by suggesting that the Minnesota confidentiality provision would have withstood constitutional scrutiny¹⁰³ and by making such assertions as "if the legislature had written the statute the way that the court of appeals rewrote it, it would likely resolve the constitutional infirmities."¹⁰⁴

Despite the speedy amendment of Subchapter IV, the decision in *Hall* had widespread effects. First, the supreme court eliminated several cases for which review had already been granted based solely on its ruling in *Hall*.¹⁰⁵ A more dramatic impact of *Hall* is grounded in the retroactivity of the decision, a point not discussed by the *Hall* court. Several court of appeals decisions overturned convictions based on

101. See WIS. STAT. ANN. § 139.91(3); Memorandum from Jefren E. Olsen, Legislative Reference Bureau (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512) [hereinafter Drafter's Note]. The drafters of the statute deviated from the Minnesota statute and added the language above as a consequence of a model confidentiality provision presented in Racaniello, *supra* note 1, at 677. See Drafter's Note, *supra*. This work was also cited by the *Hall* court. See *State v. Hall*, 557 N.W.2d 778, 792 (Wis. 1997); Drafter's Note *supra*.

102. See WIS. STAT. ANN. § 139.91(3).

103. See *Hall*, 557 N.W.2d at 791.

104. *Id.* at 792.

105. See *State v. Hicks*, 557 N.W.2d 412 (Wis. 1997) (deciding a case based on the same challenge as presented in *Hall*); *State v. Dowe*, 557 N.W.2d 812 (Wis. 1997) (deciding that *Hall* eliminated the need to reach a challenge based on double jeopardy grounds).

Subchapter IV solely on the grounds of *Hall*; however their opinions did not address the retroactivity of *Hall* specifically.¹⁰⁶ In *State v. Bentzel*,¹⁰⁷ the court of appeals reached the issue of retroactivity and concluded that although a defendant may not have raised the issue in a timely manner, the defendant will not be treated as waiving the challenge because there are no factual issues to decide and because it is in "the interests of justice" that *Hall* be applied retroactively.¹⁰⁸ Thus, the courts will reverse pre-*Hall* convictions based on violations of the constitutionally defective version of Subchapter IV.

The reversal of convictions raises the related issue of refunds of taxes and penalties paid under the pre-*Hall* version of Subchapter IV. This issue was of particular concern to the legislators in their attempt to revitalize Subchapter IV.¹⁰⁹ The concern was prompted by actual requests by dealers to recover taxes paid¹¹⁰ and possibly by media accounts reporting the total amount of refunds to be around \$200,000.¹¹¹ Legislators toyed with the idea of providing drug dealers with a tax credit for past payment under Subchapter IV,¹¹² but at the request of the Department of Justice the legislature passed a provision to retroactively sever the civil obligation to pay the tax from the criminal punishments for failure to pay, in an attempt to ensure that no refunds would be

106. See *State v. Ruiz*, 570 N.W.2d 556 (Wis. Ct. App. 1997); *State v. Martinez*, 563 N.W.2d 922 (Wis. Ct. App. 1997).

107. 583 N.W.2d 434 (Wis. Ct. App. 1998).

108. See *id.* at 436.

109. See Letter from Representative Steven Foti, Wisconsin State Assembly Majority Leader, to Jefren Olsen, Wisconsin Legislative Reference Bureau (Aug. 20, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512) ("I would like to ensure that drug dealers are simply not eligible for refunds.").

110. See *id.*

111. See Walters, *supra* note 90. This story ran on the front page of the *Milwaukee Journal Sentinel* and contains the assertion by Wisconsin Revenue Secretary Cate Zeuske that a two year statute of limitations on refunds would be applicable to refunds sought as a consequence of *Hall*. See *id.* In this article, the Revenue Secretary is also alleged to have stated that the State has raised \$920,000 from the sale of tax stamps, a figure not supported by documentation released by the Department of Revenue. See *id.*; *infra* Part IV. It seems that the total of requested refunds never reached the \$200,000 level. By November 1997 the total amount of requested refunds was only \$17,600. See Fiscal Estimate Report prepared by the Wisconsin Department of Revenue for 1997 Assembly Bill 512 (Nov. 20, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

112. See Letter from Representative Steven Foti, Wisconsin State Assembly Majority Leader, to Jefren Olsen, Wisconsin Legislative Reference Bureau (Aug. 20, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

available.¹¹³ This non-statutory provision was passed as part of the 1997 Budget Act.¹¹⁴ Its legal effect is unknown because no court has reviewed its validity.

IV. THE REALITY OF THE DRUG TAX STAMP LAW AS A REVENUE-RAISING MECHANISM

“The drug tax stamp law is a tax law. Yet the legislature never expected this tax law to raise revenue.”¹¹⁵ This statement of the Wisconsin Supreme Court in *State v. Hall* raises the question of whether Subchapter IV, after being invalidated as a law enforcement tool in *Hall*, can serve a revenue-raising purpose. The short answer is that it clearly cannot.

When the Wisconsin legislature originally enacted Subchapter IV, it made no clear predictions as to the amount of revenue to be raised by the statute.¹¹⁶ The revenue raised under the Minnesota drug tax stamp law was taken into account, but could not be used as an accurate measure of what was to be expected in Wisconsin.¹¹⁷ Despite the

113. See Memorandum from Tom Creeron, Wisconsin Department of Justice, (July 11, 1997), as attached to Letter from Representative Steven Foti, Wisconsin State Assembly Majority Leader, to Jefren Olsen, Wisconsin Legislative Reference Bureau (Aug. 20, 1997) (on microfiche with Marquette University Law Library as part of the drafting record of 1997 Assembly Bill 512).

114. See 1997 WIS. ACT. 27 §9143(2v). The provision reads:

The legislature intends that, irrespective of the constitutionality of the affix and display requirements under section 139.89 of the statutes and the rules that interpret that section, all other civil and administrative procedures that are related to the civil obligation to pay the tax, interest and penalties required under subchapter IV of chapter 139 of the statutes are severable from those affix and display requirements and are to remain in full force and effect. To the extent necessary to effectuate the legislature's intent, the civil obligation to pay the tax, interest and penalties required under subchapter IV of chapter 139 of the statutes is retroactively reimposed beginning with the effective date under 1989 Wisconsin Act 122, section 3203(48)(a).

Id.

115. *State v. Hall*, 557 N.W.2d 778, 790 (Wis. 1997).

116. See Fiscal Estimate Report prepared by the Wisconsin Department of Revenue for 1987 WIS. ASS. BILL 519, reproduced in Appendix to Brief of Defendant-Appellant-Petitioner at 36, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR) [hereinafter Fiscal Estimate] (“[I]t is not possible to accurately estimate the revenues which would result from the proposed tax on controlled substances.”).

117. See Summary of Provisions prepared by the Wisconsin Legislative Fiscal Bureau for 1989 WIS. ACT 122 (Feb. 20, 1990) (on file with the author). In the three year period between 1986 and 1989, Minnesota made assessments in the amount of \$28 million, but was able to collect only \$780,000 of that amount. See *id.* The dollar amount of assessments and

inability to make numerical estimates, the view of many of those evaluating the prospective revenue correctly predicted that it would be negligible.¹¹⁸ One fiscal estimate made the observation that the revenue raised would be "very small" because

[in] many instances, the assets of persons charged with being dealers of controlled substances are confiscated in the course of prosecuting the persons. The criminal penalties generally include substantial fines. Based on these actions, it is unlikely that most of the persons subject to the controlled substances tax will have the financial resources to pay the tax and penalties due.¹¹⁹

Although one may only hypothesize as to the reasons why, it is clear that the predictions of the drafters have borne true. Subchapter IV has two means of raising revenue. First is the voluntary purchase of stamps by dealers. Second is the imposition of tax assessments on dealers following their arrest. Although both raise negligible revenue, the data relating to the former clearly show that any notion of voluntary compliance with the tax law is laughable.¹²⁰ The Wisconsin DOR sells five kinds of drug tax stamps. The state has *never* made a sale of two of these.¹²¹ For another, the state has sold one stamp since the enactment

collections is far greater than any in Wisconsin for a given three year period. See *infra* notes 130-31 and accompanying text.

118. See *State v. Hall*, 557 N.W.2d 778, 790-91 (Wis. 1997). The court noted:

The fiscal estimate of every draft of the drug tax bills exhibits a lack of revenue producing purpose. 1989 Act 122 Fiscal Estimate ("[b]ased on the experience of other states . . . revenues from sales of tax stamps would likely be minimal [and] actual tax collections would generally amount to only a small portion of the total assessments since collection of the controlled substances tax is difficult."); 1989 AB 633 Fiscal Estimate (estimating "minimal" sales revenues); 1989 SB 356 Fiscal Estimate (anticipating minimal sales and minimal collection of penalties); 1989 SB 295 Fiscal Estimate (anticipating that this bill would have "no fiscal impact on state or local government.")

Id. (alterations in original).

119. Fiscal Estimate, *supra* note 116.

120. For a comparison of the sale of stamps in Wisconsin to other states see Racaniello, *supra* note 1, at 665-66 (noting that "the strength of these drug taxes to raise revenue is not through stamp sales or pre-assessment compliance").

121. The stamps that have never been bought are those for LSD (\$100.00 per 100 milligrams) and those for marijuana plants (\$1000 per plant). The data relating to the sale of tax stamps by the state were compiled by the author from records received from the Revenue Stamp Accountant of the Wisconsin Department of Revenue. These records are on file with

of the statute in 1989.¹²² The state has sold tax stamps for psychedelic mushrooms on sixteen occasions, first beginning in 1993, for a total sale of twenty-four stamps.¹²³ By far the best-selling drug tax stamp has been that for marijuana. Over the past ten years the state has sold 751 marijuana tax stamps for a total of \$2628.50 in sales.¹²⁴ The fact that this stamp is the best selling is not surprising given that it is the least expensive of the tax stamps at \$3.50 per stamp (*i.e.*, per gram of marijuana). As is the experience in other states, it seems that that majority of sales of these stamps may be to collectors or to the curious.¹²⁵ The sales figures support this belief as the vast majority of sales are for five stamps or fewer. These purchasers are not attempting to comply with Subchapter IV because the tax is not applicable unless the taxpayer has more than 42.5 grams of marijuana in his possession.¹²⁶ Thus, the only purchasers who are trying to comply with the law are those who are purchasing at least forty-three stamps or more. On only two occasions since the law went into effect has there been a sale of at least forty-three stamps, and one of those purchases was pursuant to a court order.¹²⁷

the author.

122. The stamps for which there was only one sale was for "other schedule I or II substances" (\$200.00 per gram).

123. These stamps sell at \$10.00 per stamp. Thus, the purchase of tax stamps for psychedelic mushrooms has raised \$240.00.

124. The sale of marijuana tax stamps has by no means been consistent throughout the past decade:

	<u>Stamps Sold</u>	<u>Tax Collected</u>
1990	232	\$ 812
1991	76	266
1992	14	49
1993	288*	1008
1994	26	91
1995	19	66.50
1996	56	196
1997	20	70
1998	20	70

he sale of 237 of these stamps was pursuant to the order of a judge and therefore was not in actuality voluntary compliance with the tax stamp law.

125. See Racaniello, *supra* note 1, at 665.

126. See WIS. STAT. ANN. § 139.87(2) (West Supp. 1999).

127. See *supra* note 124. To be in compliance with Subchapter IV a dealer in possession of psychedelic mushrooms would have to purchase at least fourteen stamps, because the tax is not applicable unless there are fourteen or more grams in his possession. See WIS. STAT. ANN. § 139.87(2). There has never been a sale of more than five tax stamps for mushrooms. As far as dealers of "other schedule I or II controlled substances," the tax is not applicable unless they have seven or more grams in their possession. Thus, as there has been only one

Therefore, there has been only one individual in the history of Subchapter IV who has voluntarily complied with the law.¹²⁸ The low dollar amount of the sale figures aside, the fact that in almost a decade it is only possible for there to have been one situation of voluntary compliance with the tax defeats the notion that the sale of tax stamps serves any revenue raising purpose.

However, the sale of tax stamps is not the primary means by which the State collects revenue under Subchapter IV. Rather, the tax is collected primarily through imposition of the tax and penalties subsequent to arrest for possession of the drugs.¹²⁹ Even the revenue raised through such assessments, however, fail to legitimize Subchapter IV as a revenue raising mechanism. Generally the amount of assessments tends to be large. For example, for the fiscal years of 1989-90 through 1994-95 there was a total of \$33,927,946.29 assessed against dealers.¹³⁰ Despite this large amount, only \$1,003,521.30 was received or seized.¹³¹ This is a collection rate of approximately 2.96%. Excluding fiscal year 1989-90 in which the law was in effect for only one month, this averages out to be around \$200,000 in revenue raised per year.

sale of one stamp of this category of stamps, and for there to be compliance the taxpayer must purchase at least seven stamps, there has never been a case of voluntary compliance.

128. This lone individual, whose identity is shielded by the confidentiality provisions, purchased fifty of the marijuana stamps on May 30, 1990. It is mere supposition that this sale was to someone actually in possession of 42.5 grams or more of marijuana. It is a realistic possibility that this individual was not trying to comply the law. If this is the case, there has never been voluntary compliance with Subchapter IV.

129. See Racaniello, *supra* note 1, at 666 (“[I]t is overall non-compliance and the penalty provisions that provide all of the revenue raised.”).

130. See Brief of Amicus Curiae, American Civil Liberties Union of Wisconsin Foundation and Wisconsin Association of Criminal Defense Lawyers, at 2 and App. 1, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (94-2848-CR) (presenting chart received from Department of Revenue giving annual breakdown of assessments from fiscal years 1989-90 through 1994-95). The total assessments for these years were levied against 649 dealers. See *id.* This averages to approximately \$52,277.00 per dealer.

131. See *id.* This amount does not include the \$2,545.50 collected through stamp sales. See *id.* The figure of approximately one million collected through 1995 is larger than that presented in newspaper accounts in 1997. In May 1997, the *Milwaukee Journal Sentinel* reported that the total amount collected under Subchapter IV was about \$920,000. See Walters, *supra* note 90. This report also alleged that the state had levied a total of \$35.46 million in assessments, with a collection rate of around 2.6%. See *id.* If these numbers were accurate, and assuming that they went only through the fiscal year 1995-96, the average annual revenue raised is around \$153,333. In October 1997 the *Capital Times* reported, “Revenue Secretary Cate Zeuske said the law has not been a major source of tax revenue. The state collected slightly more than \$1 million in the eight years that the law has been on the books.” David Callender, *Budget Revives Drug Tax Stamp Law*, CAPITAL TIMES (Madison, Wis.), Oct. 1, 1997, at 4A.

Prior to 1997 this amount was paid to the local law enforcement agencies that made the arrest associated with the revenue.¹³² The 1997 amendments to the statutory provision also contained an amendment to the section dictating the appropriate uses of revenue.¹³³ Now the DOR may reduce from the total amount collected the costs of administering Subchapter IV,¹³⁴ which are estimated at \$43,400.¹³⁵ The net result is that the state nets around \$160,000 per year through the enforcement of Subchapter IV.¹³⁶ Thus, although this figure is considerably more substantial than the amounts raised through tax stamp sales, it is still negligible. It could by no means be maintained that this statutory scheme exists solely to raise this minimal amount of state revenue.

V. THE DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENTS AND SUBCHAPTER IV AS A PUNITIVE MEASURE

A. Background

As a practical matter, the Wisconsin scheme of taxing controlled substances is limited in the extent to which it can be used as an additional means to punish drug offenders. This is because the criminal penalties for possession of the drug by a dealer without the appropriate tax stamps may violate the double jeopardy provisions of both the state and federal constitutions,¹³⁷ depending on the penalties and the individual charging situations.¹³⁸

132. See WIS. STAT. § 139.96 (1995).

133. See 1997 WIS. ACT 27 §§ 2979p-q; WIS. STAT. ANN. § 139.96 (West Supp. 1999).

134. See WIS. STAT. ANN. § 139.96 (West Supp. 1999).

135. See Fiscal Estimate Worksheet prepared by the Department of Revenue accompanying 1997 WIS. ASS. BILL 512.

136. This figure corresponds roughly with the fiscal estimate of the DOR in drafting the 1997 amendments to Subchapter IV. At that time the DOR estimated that the annual net revenue would be around \$150,000. See *id.* It should be noted that the figures presented herein do not take into account the considerable sums likely expended by the State in defending the numerous constitutional challenges that have been brought against convictions under Subchapter IV's criminal penalties.

137. The Wisconsin Constitution's double jeopardy provision reads: "[N]o person for the same offense may be put twice in jeopardy of punishment." WIS. CONST. art. I, § 8(1). The United States Constitution's double jeopardy provision reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend V. Wisconsin's construction of its "prohibition against double jeopardy is guided by the rulings of the United States Supreme Court." *State v. Kurzawa*, 509 N.W.2d 712, 721 (Wis. 1994).

138. The defendants in both *State v. Hall* and *State v. Dowe* raised double jeopardy arguments on appeal. In researching and writing this Comment, the author had access to the

The Double Jeopardy provisions of both the United States and State of Wisconsin constitutions provides three primary protections: (1) protection "against a second prosecution for the same offense after acquittal," (2) protection "against a second prosecution for the same offense after conviction," and (3) protection "against multiple punishments for the same offense."¹³⁹ These three protections have developed two strains of double jeopardy law. The first two protections lie behind the law of "successive prosecutions."¹⁴⁰ The third protection provides for the strain of double jeopardy law of "multiple punishments."¹⁴¹

1. The Fundamentals and Origins of the Wisconsin Multiple Punishment Protection

In Wisconsin, the double jeopardy protection against "multiple punishments for the same offense"¹⁴² is centered around the test established by the United States Supreme Court in *Blockburger v. United States*.¹⁴³ Because the terminology attributed to this test in Wisconsin has varied throughout the years, the Wisconsin Supreme Court in the 1992 case *State v. Saucedo*¹⁴⁴ attempted to dispel any confusion concerning the applicable test.¹⁴⁵ In *Saucedo*, the supreme court laid out the two prong analysis that is required to determine whether a combination of charges are violative of the state and federal double jeopardy provisions,¹⁴⁶ or using the terminology of the Wisconsin courts, whether the charges are "multiplicitous."¹⁴⁷ First, a court must

briefs of appellate counsel. In fact, the double jeopardy arguments made in these briefs led to the analysis in this Comment. In *State v. Dowe*, appellate defense counsel on the brief was Bryan J. Borman, Assistant State Public Defender. In *State v. Hall*, appellate defense counsel on the brief was Robert R. Henak of Shellow, Shellow & Glynn, S.C., Milwaukee, Wisconsin. The author has borrowed from these sources with proper attribution and added to their analyses throughout Part V.

139. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Kurzawa*, 509 N.W.2d at 717 (quoting *Pearce*, 395 U.S. at 717).

140. *See Kurzawa*, 509 N.W.2d at 717.

141. *See id.*

142. *Pearce*, 395 U.S. at 717.

143. 284 U.S. 299 (1932).

144. 485 N.W.2d 1 (Wis. 1992).

145. *See id.* at 4 ("The lower courts . . . seemed to be in confusion as to the applicable double jeopardy test.") & n.8 ("Confusion regarding the applicable test for claims of multiplicity has arisen because of the various labels applied to the tests used by this court to determine whether the charging of particular offenses is multiplicitous.").

146. *See id.* at 4.

147. "Multiplicity is the charging of a single offense in separate counts. Multiplicitous

apply the “elements only” test of *Blockburger*.¹⁴⁸ If the statute passes this test, explained below, then “[t]he statutes presumptively allow for multiple punishments.”¹⁴⁹ The second prong of the multiple punishment test is an analysis of legislative intent.¹⁵⁰ Charges may still be “multiplicitous if the legislature intended that the multiple offenses, [which pass the *Blockburger* elements-only analysis], be brought as a single count.”¹⁵¹

The first prong of the Wisconsin multiple punishment analysis, and the focus of any inquiry into the multiple punishment strain of double jeopardy protections, is the elements-only test of *Blockburger*.¹⁵² In *Blockburger*, the United States Supreme Court established that if prosecution is sought under two statutory provisions, they will constitute the “same offense” and thus be in violation of the double jeopardy provision of the Fifth Amendment, unless “each provision requires proof of [an additional fact] which the other does not.”¹⁵³ It is the use of the word “fact” in *Blockburger* that has caused confusion among the courts,¹⁵⁴ because at least in Wisconsin, to apply the test for multiple

charging is impermissible because it violates the double jeopardy provision of the Wisconsin and United States Constitutions.” *State v. Tappa*, 378 N.W.2d 883, 885 (Wis. 1985) (citations omitted).

148. See *Sauceda*, 485 N.W.2d at 4.

149. *Id.* at 5.

150. *See id.*

151. *State v. Anderson*, 580 N.W.2d 329, 335 (Wis. 1998).

152. The “elements-only” test is also referred to as the *Blockburger* “same-elements” test. See, e.g., *United States v. Dixon*, 509 U.S. 688, 696 (1992); *State v. Vassos*, 579 N.W.2d 35, 40 (Wis. 1998).

153. 284 U.S. 299, 304 (1932).

154. See *Sauceda*, 485 N.W.2d at 4 n.8. In attempting to address this confusion, the Wisconsin Supreme Court, as Justice Shirley Abrahamson correctly pointed out in dissent, helped to further confusion. See *id.* at 8 (Abrahamson, J., dissenting). The court asserts that the “additional fact” and “different fact” test are the same as the elements-only test. See *id.* at 4 n.8. The court was trying to make this clarification because it had been misapplying these labels in prior case law. See *id.* What the court failed to recognize in *Sauceda* is the existence of tests for lesser included crimes applied in other jurisdictions, which unlike the elements-only test, do look to see if there is an additional fact in the case which is necessary to prove the allegedly included crime. See *State v. Carrington*, 397 N.W.2d 484, 486 (Wis. 1986) (“Commentators discern three approaches courts use to identify a lesser included offense: the elements only approach (the strict statutory approach); the fact-element approach (the pleadings approach; the cognate approach); and the fact approach.”). “The elements only test focuses on the statutes defining the offenses, not the facts of a given defendant’s activity.” *Id.* In *Carrington*, the court stated, “We have declined to use either the fact-element or the fact approach.” *Id.* at 490. Although *Carrington* did not concern a double jeopardy claim, but rather dealt only with the Wisconsin lesser included crime statute, Wisconsin Statutes Section 939.66, and whether a defendant should have received an included offense jury instruction, the court has said on many occasions that the *Blockburger* elements-only test is

punishments one does not look to the individual facts of a case, rather the comparison of the two charges relies solely on the statutory elements of the crime charged.¹⁵⁵ In general the test requires that if all the elements of one crime for which conviction is sought are contained within another crime for which conviction is sought, and as such there is no extraneous element necessary to convict for the first (included) crime, conviction on the included charge is illegal.¹⁵⁶ In Wisconsin, this elements-only test has been codified in Wisconsin Statutes section 939.66, the lesser included crime statute.¹⁵⁷ Thus, if a crime is a lesser

codified under section 939.66. See *Sauceda*, 485 N.W.2d at 4. Thus, although the double jeopardy analysis and the section 939.66 analysis are derived from two different sources, a constitutional protection against multiple punishments and a statutory limit on convictions, the analysis of the first prong of the multiple punishments test and the lesser included crimes analysis are identical. Therefore, Justice Abrahamson's dissent accurately portrays the confusion surrounding the alternating use of labels by the court.

The continued confusion is a consequence of statements by the court which characterize the test for multiple punishments as "whether each offense requires proof of *an additional element or fact* which the other offense or offenses do not." *Id.* at n.8 (emphasis in original). The court attempted to justify the use of such language by differentiating multiple punishments under different statutory provisions following a single criminal act and multiple punishments under a single statutory provision for multiple criminal acts. See *id.* Although both raise multiple punishment issues, the court should cease using the term "additional element or fact" in its statement of the law of cases involving multiple punishments under different statutory provisions. Although the tests derive from the same protection, they are analytically different. Both issues were raised in *Blockburger*, but the elements-only test arose only in the discussion under part "Two" of that decision, which concerns a single act being in violation of multiple statutes. See *Blockburger v. United States*, 284 U.S. 299 (1932). The additional elements test concerns only situations where there are multiple punishments under different statutory provisions. This is the *Blockburger* test. The statutes, however, also perpetuate confusion in this area for they are modeled after the original language of *Blockburger*. See, e.g., WIS. STAT. § 939.66(1) (1997) (defining an included crime as one "which does not require proof of any *fact* in addition to those which must be proved for the crime charged.") (emphasis added).

155. See *Carrington*, 397 N.W.2d 484, 487 (Wis. 1986) ("The paramount inquiry in the elements only test is the meaning of the words of the statute. The elements only test requires the court to place the statutes defining the greater and lesser offenses side by side . . . to compare those elements.").

156. See *id.* at 486-87. One explanation of the elements-only test which has been challenged is that in *Randolph v. State*, 266 N.W.2d 334 (Wis. 1978). The court stated therein: "The rule consistently applied by this court is that, for one crime to be included in the another, it must be 'utterly impossible' to commit the greater crime without committing the lesser." *Id.* at 341; see also Craig Albee, Note, *Multiple Punishment in Wisconsin and the Wolske Decision: Is it Desirable to Permit Two Homicide Convictions for Causing a Single Death?*, 1990 WIS. L. REV. 553; William O. Salen, Note, *Critique of Wisconsin's Lesser Included Offense Rule*, *Randolph v. State*, 83 Wis. 2d 630, 266 N.W.2d 334 (1978), 1979 WIS. L. REV. 896.

157. See *State v. Saucedo*, 485 N.W.2d 1, 4 (Wis. 1992). The statute reads, in pertinent part:

included crime of another, the defendant has both a statutory protection and the constitutional double jeopardy protection against conviction for both.

There is only one situation in which Wisconsin courts have acknowledged that they will delve further than the plain statutory language to determine if two crimes fail the elements-only analysis, and that is when one of the crimes provides for alternating elements.¹⁵⁸ In such a case, if a crime may be proved by one of a choice of elements, for purposes of an elements-only analysis, the court will treat the offense as “two or more crimes, each crime being defined as containing one of the alternative elements.”¹⁵⁹ In order to determine which of the alternative crimes to apply the *Blockburger* test, the court must look to the charging instrument¹⁶⁰ to see which of the elements was actually charged.¹⁶¹

939.66 Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

- (1) *A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.*

Wis. STAT. § 939.66 (1995) (emphasis added).

The statute goes on to list other crimes which would fall under the *Blockburger* test embodied in subsection (1), but which are deemed by the legislature to be lesser included crimes. See Wis. STAT. §939.66 (2)-(7). Another Wisconsin statute that encompasses the *Blockburger* test is section 939.71. This statute concerns only successive prosecutions and reads:

939.71 Limitation on the number of convictions. If an act forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision *unless each provision requires proof of a fact for conviction which the other does not require.*

Wis. STAT. §939.71 (emphasis added).

For a recent discussion by the Wisconsin Supreme Court of the interplay between these two statutes and the respective double jeopardy interests which they serve see *State v. Vassos*, 579 N.W.2d 35 (Wis. 1998).

158. See *State v. Carrington*, 397 N.W.2d 484, 489 (Wis. 1986). *Carrington* was concerned with explaining the lesser included crimes doctrine under 939.66 and the focus of which is on attacks on the selection of charges issued by the prosecutor and not attacks on multiple convictions on double jeopardy grounds. However, because the pertinent test is the same under section 936.66 and under the multiple punishments analysis, the explanation of the test in *Carrington* would seem to be applicable to a multiple punishment case.

159. *Id.*

160. The view to the charging instrument may be applicable in an attack on multiplicity in charging based on the statutory protection provided by section 939.66; however, if one was

The focus on legislative intent as a second element of the multiple punishments analysis arose in *Missouri v. Hunter*.¹⁶² The United States Supreme Court in *Hunter* held that regardless of the outcome of the *Blockburger* test, legislative intent controlled the multiple punishment question.¹⁶³ Thus, as in *Hunter* itself, if a charging scenario failed *Blockburger*, i.e., one charge was an included crime of the other, the defendant could be convicted on both counts if it was clear that the legislature intended to allow it.¹⁶⁴ The *Hunter* Court stated:

[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes

Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.¹⁶⁵

It is the existence of Wisconsin Statutes section 939.66¹⁶⁶ that alters the application of the *Hunter* legislative intent inquiry in Wisconsin. In *State v. Gordon*,¹⁶⁷ the Wisconsin Supreme Court analyzed legislative

attacking on double jeopardy grounds following conviction, the view should more properly be to which of the alternative elements were relied on at trial by the prosecution to prove the crime. See Brief of Defendant-Appellant-Petitioner at 72, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

161. The *Carrington* court relied for its explanation on a footnote in the case of *Hagenkord v. State*, 302 N.W.2d 421 (Wis. 1981). See *Carrington*, 397 N.W.2d at 489. In this footnote the court explained that because the crime of first degree sexual assault could be proved by one of two alternating elements, namely causing great bodily harm or by causing pregnancy of the victim, to determine which element is charged one must look to the accusatory pleading. See *id.*; *Hagenkord*, 302 N.W.2d at 437 n.8. Appellate counsel in *State v. Hall*, developed a similar explanation of the case involving alternating elements in his brief. See Brief of Defendant-Appellant-Petitioner at 70-72, *State v. Hall*, 507 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

162. 459 U.S. 359 (1983).

163. See *id.* at 368-69.

164. See *id.*

165. *Id.*

166. See *supra* note 157.

167. 330 N.W.2d 564 (Wis. 1983).

intent to determine whether multiple punishments for felony murder and kidnapping, which failed *Blockburger*, because kidnapping is a lesser included crime of felony murder, was authorized by the legislature.¹⁶⁸ The court found that separate statutory sections for each crime would not suffice as “clear” legislative intent to allow two convictions and two sentences where the same criminal conduct violates both statutes.”¹⁶⁹ The court was particularly convinced that the legislature did not intend multiple punishments by the embodiment of the *Blockburger* test in Wisconsin Statutes sections 939.66 and 939.71.¹⁷⁰ These statutes served as “clear and express statements of the legislature’s intent to prohibit multiple punishments of included crimes.”¹⁷¹ Thus, in light of the existence of these two statutes and in the absence of a clear statement of the legislature that multiple punishments are allowed, there was no need to continue with the second prong of the analysis,¹⁷² given that the charging situation failed *Blockburger*.¹⁷³

168. See *id.* at 566-70.

169. *Id.* at 567.

170. See *id.*; *supra* note 157.

171. *Gordon*, 330 N.W.2d at 569.

172. See *id.* at 570.

173. Following *Gordon*, there was confusion among the courts as to the role legislative intent was to play. In *State v. Bohacheff*, two charges passed *Blockburger*, yet the court found that despite the fact that the charges were not for the “same offense” the legislature did not intend to allow conviction for both. 338 N.W.2d 466, 473 (Wis. 1983). In *State v. Tappa*, the court stated, “Even though the charging of multiple counts is not violative of double jeopardy, it may still be multiplicitous if the legislative intent shows that the allowable unit of prosecution is one count.” 378 N.W.2d 883, 887 (Wis. 1985). However, in two court of appeals cases which followed, the courts terminated their analysis after the offenses were found not to be the “same offense” under *Blockburger*. See *State v. Nelson*, 432 N.W.2d 115, 119 (Wis. Ct. App. 1988); *State v. Ambuehl*, 425 N.W.2d 649, 657 (Wis. Ct. App. 1988). It appears that it was the state supreme court’s decision in *State v. Kuntz*, 467 N.W.2d 531 (Wis. 1991), that authoritatively established the role of legislative intent as it was presented in *Sauceda* and subsequent cases such as *State v. Anderson*, 580 N.W.2d 329, 335 (Wis. 1998). In *Kuntz*, the court acknowledged that because section 939.66(1) codifies *Blockburger*, that *Blockburger* is the “established rule of statutory construction in Wisconsin for determining whether the legislature has authorized multiple punishments.” *Kuntz*, 467 N.W.2d at 544. The court cited to *Gordon* for this proposition, suggesting that it had always been the case that if a charging scenario failed *Blockburger* and, as such, the two charges were for the “same offense,” that the legislative intent question would always be decided in favor of disallowance of conviction for both. See *id.* The court went on to recite the role of legislative intent in situations where the *Blockburger* test was satisfied. In such a case, as applied in *Bohacheff* and as stated first in *Tappa* and later in *Sauceda*, legislative intent to disallow multiple punishment would trump the outcome of the *Blockburger* analysis. See *id.* at 544-45. Thus, despite the court of appeals’ admitted confusion in the post-*Kuntz* case of *State v. Grayson*, 478 N.W.2d 390, 393 n.3 (Wis. Ct. App. 1991), the *Kuntz* court had established how the *Hunter* analysis is currently applied in the context of the section 939.66(1). For a misstatement of the law by a court in 1995, see *infra* note 269.

However, if a given combination of convictions passes the *Blockburger* analysis, that is neither crime is an included crime of the other, it has cleared the hurdle of the first prong of the multiple punishments test and that of the lesser included crime statute, but it may still be susceptible to attack under the legislative intent analysis. For constitutional purposes, at this point, the conviction for both is presumptively valid.¹⁷⁴ This presumption of validity may be rebutted if there is a "clear indication" of a contrary legislative intent,¹⁷⁵ that is, that the legislature intended to disallow multiple punishments for the two crimes.¹⁷⁶ Therefore, in Wisconsin, as a consequence of section 939.66, legislative intent may trump the *Blockburger* analysis only in the situation in which the convictions do not involve the conviction of both a greater and lesser included crime.

2. The Interplay Between Successive Prosecution and Multiple Punishment Jurisprudence

Developments in the law of successive prosecutions at the United States Supreme Court level have also played a role in shaping the law of multiple punishments in Wisconsin. The Wisconsin Supreme Court, although recognizing that the two strains of double jeopardy law exist to "protect[] different interests," has determined that these different interests do not "necessarily require or even recommend separate analyses."¹⁷⁷ This oversimplifies the issue somewhat, by implying that the tests are identical. The *Blockburger* test is the cornerstone for analysis under both the successive prosecution and multiple punishment protections,¹⁷⁸ but the tests are not identical. The multiple punishment analysis, as explained above, requires an inquiry into legislative intent patterned after *Missouri v. Hunter*, which is not engaged in under a successive prosecution analysis.¹⁷⁹ Despite the differences between the

174. See *State v. Saucedo*, 485 N.W.2d 1, 5 (Wis. 1992).

175. See *id.*; *State v. Anderson*, 580 N.W.2d 329, 335 (Wis. 1998).

176. Legislative intent may be determined in the multiple punishments context by looking to several factors, namely statutory language, legislative history, "the nature of the proscribed conduct," and "the appropriateness of multiple punishment." *Anderson*, 580 N.W.2d at 335.

177. *State v. Kurzawa*, 509 N.W.2d 712, 721-22 (Wis. 1994).

178. See *id.*

179. See *United States v. Dixon*, 509 U.S. 688, 724 (1993) (White, J., concurring in part) (explaining that a legislative intent analysis is improper in successive prosecution cases given the interests that the protection is meant to serve); *Kurzawa*, 509 N.W.2d at 722 (reaching the conclusion that double jeopardy in a successive prosecution case was not violated solely on the grounds that "the two offenses each require proof of an element the other does not" and

two tests, for the purposes of this discussion, it is relevant that the Wisconsin Supreme Court has recognized that the *Blockburger* analysis conducted under each test is the same.¹⁸⁰

The unification of the law in the two areas was a consequence of the 1993 United States Supreme Court decision in *United States v. Dixon*.¹⁸¹ This case is relevant to this discussion for two reasons. First, it allowed the Wisconsin Supreme Court to reach the conclusion that at least part of the analysis under multiple punishment and successive prosecution law is identical, and thus it allows successive prosecution precedent to be used in arguing multiple punishment cases. Second, the analyses of the Court in the various opinions of the case provide new insight into the *Blockburger* elements-only test.

In *Dixon*, two respondents were both convicted of criminal contempt of court for violating court orders, and both challenged subsequent prosecution for the conduct that led to the contempt convictions on double jeopardy grounds.¹⁸² Alvin Dixon was released on bond while awaiting trial for homicide.¹⁸³ A condition of his release was that he not commit “any criminal offense,” and the penalty for a violation of this condition was a prosecution for contempt.¹⁸⁴ Dixon was found to have violated this condition by being in possession of cocaine with intent to distribute.¹⁸⁵ The trial court convicted Dixon of criminal contempt, finding beyond a reasonable doubt that he was in possession with intent to distribute.¹⁸⁶

thus “survive[s] *Blockburger* analysis.”). In addition to the legislative intent protection required in a multiple punishment case, the defendant in a successive prosecution case, in which the defendant faces charges following conviction or acquittal that do not offend *Blockburger*, has the additional protection of the collateral estoppel doctrine that is incorporated into the double jeopardy protection. See *Ashe v. Swenson*, 397 U.S. 436 (1970). This protection prevents the state from “relitigat[ing] factual issues that have already been adjudicated to the defendant’s benefit in an earlier prosecution.” *Kurzawa*, 509 N.W.2d at 721.

180. See *Kurzawa*, 509 N.W.2d at 722.

181. 509 U.S. 688 (1993). The author was lead to an analysis of the drug tax stamp law charging situation using *United States v. Dixon* by the arguments presented in the defendant’s briefs in *State v. Hall* and *State v. Dowe*. See Brief for Defendant-Appellant-Petitioner at 21-23, *State v. Dowe*, 557 N.W.2d 812 (Wis. 1997) (No. 95-0314-CR); Brief for Defendant-Appellant-Petitioner at 65-70, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR). This Comment, however, explores *Dixon* in greater depth and provides a slightly altered analysis in this context.

182. See *Dixon*, 509 U.S. at 691.

183. See *id.*

184. See *id.*

185. See *id.*

186. See *id.* at 691-92.

The second respondent, Michael Foster, was subject to the conditions of a civil protection sought by his wife on the grounds of alleged spousal abuse.¹⁸⁷ The order required that Foster, subject to penalty of a criminal contempt conviction, not “molest, assault, or in any manner threaten or physically abuse” his wife.¹⁸⁸ Foster’s wife subsequently sought to have Foster held in contempt based on three threats and two assaults.¹⁸⁹ The trial court convicted Foster on four counts of contempt, finding beyond a reasonable doubt that Foster had threatened his wife¹⁹⁰ and had twice assaulted her, as defined by the statute for criminal assault.¹⁹¹

In addition to their respective contempt convictions, the prosecution also sought substantive criminal convictions against Dixon and Foster based on the underlying conduct.¹⁹² Dixon faced indictment on a charge of cocaine with intent to distribute.¹⁹³ Foster faced charges of simple assault, three counts of threatening to injure another, and one count of assault with intent to kill.¹⁹⁴

Faced with this factual situation, the Court was left with two questions to consider. First, does the Fifth Amendment double jeopardy protection mandate that “prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense?”¹⁹⁵ And in so answering the first, the Court addressed the second question of which test to apply in a successive prosecution double jeopardy case. In its resolution of these issues the Court was heavily divided. The case produced five opinions. Justice Scalia, announcing the Court’s judgment, carried a majority for only three of the five portions of his opinion.¹⁹⁶ In addition there were partial concurrences and partial

187. *See id.* at 692.

188. *Id.*

189. *See id.*

190. Foster was acquitted on some of the charges alleging his violation of the court order based on threats to his wife. *See id.* at 693. This is relevant only in the sense that his later attacks on the indictments against him would be based on both the protections against successive prosecutions after acquittal and after conviction.

191. *See id.*

192. *See id.* at 691, 693.

193. *See id.* at 691.

194. *See id.* at 693.

195. *Id.* at 695.

196. *See id.* at 691. Of the parts of Justice Scalia’s opinion, only Part I (statement of the facts and case history), Part II (review of the law of criminal contempt), and Part IV (abrogation of the “same-conduct” test of *Grady v. Corbin*, 495 U.S. 508 (1990)) are the

dissents by Chief Justice Rehnquist,¹⁹⁷ Justices White,¹⁹⁸ Blackmun,¹⁹⁹ and Souter.²⁰⁰ Ultimately the judgment of the Court was that the charges of possession with intent to deliver against Dixon and the charge of simple assault against Foster were violative of the Double Jeopardy Clause.²⁰¹ A majority of the Court also held that the 1990 case of *Grady v. Corbin*²⁰² was overruled, thus eliminating the “same-conduct” test for successive prosecution analysis.²⁰³

Certainly the most significant effect of *Dixon* on double jeopardy jurisprudence is its overruling of *Grady*. In 1990, Justice Brennan, writing for the Court, widened the scope of double jeopardy protection in successive prosecution cases by holding that “the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”²⁰⁴ Arguing in dissent against the establishment of this “same-conduct” rule, Justice Scalia stated his belief that the *Blockburger* test alone was not only sufficient, but was the “‘established test’ for determining whether successive prosecutions arising out of the same events are the ‘same offense.’”²⁰⁵ In *Dixon*,

opinion of the Court. See *Dixon*, 509 U.S. at 691. Only Justice Kennedy joined Justice Scalia’s opinion as to Part III (application of the *Blockburger* to the facts of the case). See *id.*

197. Chief Justice Rehnquist was joined by Justices O’Connor and Thomas. See *Dixon*, 509 U.S. at 713 (Rehnquist, C.J., concurring in part). These three Justices dissent to the judgment reached in Part IIIA of Justice Scalia’s opinion (the finding of double jeopardy violations through the application of *Blockburger*), but joined in the overruling of *Grady v. Corbin*, 495 U.S. 508 (1990), in part IV of Justice Scalia’s opinion. See *Dixon*, 509 U.S. at 713-14 (Rehnquist, C.J., concurring in part).

198. Justice White was joined by Justice Stevens and joined by Justice Souter for Part I of the opinion (the concurrence in the judgment as to Part IIIA of Justice Scalia’s opinion). See *Dixon*, 509 U.S. at 720 (White, J., concurring in part). Together they agreed with the judgment as to Part IIIA of Justice Scalia’s, but dissented to the judgment as to Part IIIB of Justice Scalia’s opinion (the finding that the charges of threatening to injure another and assault with intent to kill against Foster were not in violation of the Double Jeopardy Clause) and to Part IV. See *id.*

199. Justice Blackmun concurred in the judgment as to Part IIIB of Justice Scalia’s opinion, but dissented to the judgment as to Parts IIIA and Part IV. See *id.* at 741-42 (Blackmun, J., concurring in part).

200. Justice Souter was joined by Justice Stevens. See *id.* at 743. They dissented to the judgment as to Part III B of Scalia’s opinion and to Part IV, but concurred in the judgment as to Part IIIA. See *id.* at 743-44 (Souter, J., concurring in part).

201. See *id.* at 712.

202. 495 U.S. 508 (1990).

203. See *Dixon*, 509 U.S. at 691, 704.

204. *Grady*, 495 U.S. at 510.

205. *Id.* at 528 (Scalia, J., dissenting).

Justice Scalia now writing for the Court on this issue, held that because *Grady* lacked “constitutional roots” and was generally “inconsistent” with precedent, it was overruled.²⁰⁶

In the place of *Grady*'s same-conduct standard, it is clear that a majority of the *Dixon* court felt that at a minimum *Blockburger* remained in its place.²⁰⁷ It is the application of the *Blockburger* test to the cases of *Dixon* and *Foster* in the various opinions that will shed light on the state of multiple punishment analysis in Wisconsin. Although essentially four positions were established in *Dixon* as to the outcome of *Dixon*'s and *Foster*'s cases, relevant to this discussion are the positions of Justice Scalia and Chief Justice Rehnquist,²⁰⁸ as they both agree that *Blockburger* is the sole test to be applied.²⁰⁹

Justice Scalia put forth an analysis that will be referred to as an “incorporation” analysis. Under this analysis, *Blockburger* is the sole test to be applied, and in reviewing the elements of non-summary criminal contempt one must look to the conditions actually imposed by the judge issuing the violated court order.²¹⁰ If the conditions imposed reference another crime, all of the elements of that crime are “incorporated” into the elements of criminal contempt.²¹¹ Thus, in the case of *Dixon*, where the condition imposed by the judge was that *Dixon*

206. *Dixon*, 509 U.S. at 704. While the overruling of *Grady* is the key holding of *Dixon*, as this Comment is concerned with the multiple punishment strain of double jeopardy analysis and, in particular, the effects of *Dixon* on the *Blockburger* analysis, this aspect of the holding is intentionally given short shrift.

207. See Brief of Defendant-Appellant-Petitioner at 66, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

208. The other two positions were that of Justices Souter, Stevens, and White and that of Justice Blackmun. The group of three Justices in their three opinions all objected to the overruling of *Grady* and stated that although *Blockburger* is an applicable test, it is not the exclusive test. See *Dixon*, 509 U.S. at 735 (White, J., concurring in part), 749 (Souter, J., concurring in part). In their minds, *Blockburger* provides insufficient protection against the special interests meant to be served by the protection against successive prosecutions and is better suited to multiple punishment analysis. See *id.* at 724 (White, J., concurring in part). Although the opinions maintaining this position sometimes shed light on the application of *Blockburger*, they will be addressed only briefly because these Justices were not working solely within the framework of *Blockburger*, as were Justice Scalia and Chief Justice Rehnquist. Thus, the outcome of their analysis is irrelevant for the purposes of this Comment. Justice Blackmun's position was that criminal contempt is a special situation protecting a separate judicial interest than the substantive criminal law, and therefore does not implicate the Double Jeopardy Clause. See *id.* at 741-42 (Blackmun, J. concurring in part). His opinion sheds no light on the applicable standard of analysis after *Grady*, much less on *Blockburger*, and is irrelevant for present purposes.

209. See *Dixon*, 509 U.S. at 717 (Rehnquist, C.J., concurring in part).

210. See *id.* at 697-98.

211. See *id.* at 698.

not commit any criminal offense, the elements of *any* statute defining *any* crime were made elements of criminal contempt.²¹² The barred subsequent prosecution could have just as easily been for arson or armed robbery, for example, as it was for possession with intent to distribute, so long as the act prosecuted in the subsequent prosecution was the grounds for finding a violation of the release order.

In the case of Foster, who was subject to a court order providing that he not “molest, assault, or in any manner threaten or abuse” his spouse, Justice Scalia found that the condition barring assault carried with it the elements of criminal assault as defined by the District of Columbia statutes.²¹³ Therefore, “the subsequent prosecution for assault fail[ed] the *Blockburger* test, and [was] barred.”²¹⁴ However, the other counts against Foster were not barred under *Blockburger*.²¹⁵ The three counts of the indictment for alleged threats passed *Blockburger* because the court order merely stated that Foster not “in any manner threaten” his wife, but the statute under which he was indicted required that the threats be “to kidnap . . . or to injure the person of another or physically damage . . . property.”²¹⁶ Because of the broad array of non-criminal threats that could be made in violation of the court order, Justice Scalia found it “highly artificial” to find that the court order incorporated any criminal law proscribing a form of threatening.²¹⁷ Thus, on a purely elemental analysis, the criminal threatening charges contained numerous other elements beyond the mere threatening that would have sufficed to violate the court order.²¹⁸ Furthermore, the assault with intent to kill could not be included within the “assault” portion of the court order because of the extra-element of the substantive crime requiring a “specific intent to kill.”²¹⁹

In support of his incorporation analysis, Justice Scalia pointed to *Harris v. Oklahoma*,²²⁰ a three paragraph per curiam opinion.²²¹ In

212. *See id.*

213. *See id.* at 700.

214. *Id.*

215. *See id.*

216. *Id.* at 702.

217. *See id.* at n.8.

218. *See id.* at 702.

219. *See id.* at 701. Justice Scalia also pointed out how criminal contempt could not be an included crime of either the statute defining threatening or the statute defining assault with intent to kill because of the existence of the additional element or requiring proof of knowledge on the part of the defendant of the court order. *See id.* at 701-03.

220. 433 U.S. 682 (1977).

221. *See Dixon*, 509 U.S. at 698.

Harris v. Oklahoma, a defendant was first convicted of felony-murder, a crime requiring proof of an underlying felony, which in this case was armed robbery.²²² He was later brought up on charges of armed robbery.²²³ The court stated simply, "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."²²⁴ Although the *Harris v. Oklahoma* Court did not cite to *Blockburger*, Justice Scalia construed the fact that the existence of one crime rested on the existence of a predicate crime to support his theory of elemental incorporation.²²⁵ That is, just as the elements of armed robbery were incorporated into felony-murder, so should the elements of crimes included in a court order be incorporated into the crime of criminal contempt for violation of that order.

Chief Justice Rehnquist's opinion shows that it is on this reading of *Harris v. Oklahoma* that his and Justice Scalia's views as to elemental incorporation diverge. The Chief Justice will follow Justice Scalia only halfway to conclude that Harris did stand for some elemental incorporation, but not to the degree applied by Justice Scalia in *Dixon* itself.²²⁶ He likens Justice Scalia's approach to an absolute departure from *Blockburger* because it looks to "the facts that must be proved under the particular indictment at issue – an indictment being the closest analogue to the court orders in [*Dixon*]."²²⁷ Justice Scalia's flaw lies in his departure from the statute and view to the court order.²²⁸ *Harris v. Oklahoma*, Chief Justice Rehnquist contends, stands for elemental incorporation only to the extent that there is in one statute a "generic reference which by definition incorporates the statutory elements of" another, as was the case in *Harris v. Oklahoma*.²²⁹ Thus, because the statute defining criminal contempt did not reference any of the criminal provisions under which Foster and Dixon were indicted, there was no double jeopardy violation.²³⁰

In addition to the statutory "generic reference" which is required,

222. See *Harris*, 433 U.S. at 682.

223. See *id.*

224. *Id.*

225. See *Dixon*, 509 U.S. at 698.

226. See *id.* at 717 (Rehnquist, C.J., concurring in part).

227. *Id.*

228. See *id.*

229. *Id.*

230. See *id.*

the Chief Justice laid out two additional requirements necessary for a violation of *Blockburger*. First, the two crimes must be “akin to greater and lesser included offenses.”²³¹ He rejects the “counterintuitive” notion that a serious felony, such as Dixon’s possession charge, could be “a lesser included offense of criminal contempt, a relatively petty offense as applied to the conduct in this case.”²³² Also, Chief Justice Rehnquist would require that a lesser included offense be one that is “‘necessarily included’ within the statutory elements of another offense.”²³³ This means that one necessarily satisfies the element of the greater crime by committing the lesser.²³⁴ In the case of a criminal contempt, because the statute does not make assault, for example, a predicate act, one may commit assault and not necessarily satisfy the statutory elements.²³⁵

In sum, Chief Justice Rehnquist’s view of incorporation by reference is a more narrow construction of *Blockburger* than Justice Scalia’s incorporation analysis. It seems that were a case presented that could be decided on those more narrow grounds, the Chief Justice would garner Justice Scalia’s support, and a majority of the Court²³⁶ would be satisfied that at least the Chief Justice’s incorporation by reference would be applicable.²³⁷

Following the decision in *Dixon*, the Wisconsin Supreme Court in *State v. Kurzawa*,²³⁸ adopted the “analysis of *Dixon*” in successive prosecution cases.²³⁹ Given the lack of analytical consistency among the various *Dixon* opinions, what this statement means is unclear. It is clear that *Blockburger* was adopted in lieu of *Grady*.²⁴⁰ It is also made clear that some form of incorporation analysis was understood to come along with the adoption of *Dixon*. However, the court was not faced with a

231. See *id.* at 718 (Rehnquist, C.J., concurring in part).

232. *Id.*

233. *Id.*

234. See *id.*

235. See *id.*

236. The Chief Justice carried the support of Justices O’Connor and Thomas with his opinion in *Dixon*. Together with Justices Scalia and Kennedy, these five compose a majority of the current Supreme Court.

237. Interestingly, Justice White, who is no longer on the Court appears to have stated that were he of the belief that *Blockburger* was the sole applicable test, he would have been inclined to adopt the Scalia approach. See *id.* at 734 n.8 (White, J., concurring in part) (“At the very least, where conviction of the crime of contempt cannot be had without conviction of a statutory crime forbidden by court order, the Double Jeopardy Clause bars prosecution for the latter after acquittal or conviction of the former.”).

238. 509 N.W.2d 712 (Wis. 1994).

239. See *id.* at 722.

240. See *id.*

situation in which it had to choose explicitly between Chief Justice Rehnquist's and Justice Scalia's approaches. The *Kurzawa* court was faced with a claim that two charges were of the "'incorporation' species of lesser included offenses."²⁴¹ In addressing this claim the court pointed to Chief Justice Rehnquist's "necessarily included" analysis, but it did not discuss the application of elemental incorporation in *Dixon*, but rather focused on the incorporation through "statutory definition" in *Harris v. Oklahoma*.²⁴² It is only in a footnote that Justice Scalia's application of *Blockburger* was addressed.²⁴³ Thus, although neither approach of *Dixon* was explicitly adopted or rejected, the Wisconsin Supreme Court seems to have accepted that at a minimum Chief Justice Rehnquist's interpretation of *Harris v. Oklahoma* is applicable in Wisconsin.

Despite the fact that the supreme court was not explicit in its choice of incorporation analysis, the Wisconsin Court of Appeals has found in a case analogous to the facts of *Dixon*, *State v. Harris*,²⁴⁴ that *Kurzawa* is to be construed as rejecting Justice Scalia's approach.²⁴⁵ In finding that a conviction of bailjumping, where the predicate offense was cocaine possession, together with conviction for the cocaine possession was not violative of double jeopardy's multiple punishment protection, the court stated that *Kurzawa* "implicitly reject[ed] the incorporation analysis discussed in [Justice Scalia's opinion] by reference to 'statutory elements.'"²⁴⁶ Whether the *Kurzawa* court intended to address the issue of the applicability of Justice Scalia's approach is debatable, but the *State v. Harris* court clearly misconstrued *Kurzawa* in making another assertion, namely that *Dixon* is distinguishable on the grounds that it was a successive prosecution case, while the case at hand was a multiple punishment case.²⁴⁷ The *Kurzawa* court explicitly rejected any such distinction and unified the analysis under both strains of double

241. *Id.* at 721-22.

242. *See id.* at 722.

243. *See id.* at n.16. The defendant in *State v. Hall* urged the Wisconsin Supreme Court to ignore *Harris* as "poorly reasoned." *See* Brief for Defendant-Appellant-Petitioner at 74, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

244. 528 N.W.2d 7 (Wis. Ct. App. 1994).

245. *See id.* at 9.

246. *Id.*

247. *See id.* Another questionable use of precedent by the *State v. Harris* court was the use of the pre-*Dixon* Wisconsin Court of Appeals case of *State v. Nelson*, 432 N.W.2d 115 (Wis. Ct. App. 1988), which held that bail jumping and its predicate crime are separate offenses. *See Harris*, 528 N.W.2d at 8. Although Scalia's *Dixon* opinion is not binding, given the court's questionable reading of *Kurzawa*, the court's reliance on *Nelson* is dubious.

jeopardy.²⁴⁸ If one disregards the court of appeals' faulty attempt to differentiate the analysis under the two strains, *State v. Harris*, in light of the statements in *Kurzawa*, still leaves the impression that at least Chief Justice Rehnquist's incorporation by generic reference analysis under *Blockburger* would be applicable in Wisconsin under either strain of double jeopardy analysis.

B. The Post-Dixon Multiple Punishment Protection and Subchapter IV.

The criminal penalties for violation of Subchapter IV serve an ancillary role in state prosecutions of drug offenders and are not used with great frequency.²⁴⁹ This is likely a result of the fact that the Uniform Controlled Substances Act ("Chapter 961") provides an array of penalties that are sufficient, severe, and with which prosecutors are comfortable. Another possible reason is that, as recent history has shown, Subchapter IV is a ripe ground for constitutional issues on appeal. The issues raised here do not involve facial challenges to the statute, but show how the manner in which the statute has been drafted forecloses the use of the Subchapter IV's criminal penalties in many situations and present constitutional questions concerning individual charging situations.

In discussing the use of Subchapter IV as a punitive measure in light of the double jeopardy protection against multiple punishments, it is necessary to develop several scenarios involving different combinations of convictions. These situations, some of which have been presented to the Wisconsin Court of Appeals, are based on combinations of convictions of the three primary penalty provisions under Chapter 961 with the primary criminal penalty under Subchapter IV, section 139.95(2). The primary provisions under Chapter 961 are convictions for (1) possession of controlled substances,²⁵⁰ (2) possession with intent to manufacture, distribute, or deliver controlled substances,²⁵¹ and (3)

248. See *Kurzawa*, 509 N.W.2d at 721-22 ("[W]e recognize that the Double Jeopardy Clause's prohibition against 'successive prosecutions' protects different interests than does its prohibition against 'multiple punishments.' Still, we do not believe that these different interests necessarily require or even recommend separate analyses."); *supra* note 177 and accompanying text.

249. In 1998 in Milwaukee County, the most populous and urban county in the state, the District Attorney's office brought only 36 charges under Subchapter IV. In the same year there were 1,999 felony drug cases in the county. Thus, less than 2% of the charges brought were for violations of Subchapter IV. This information was obtained through a telephone interview with Pat Kenney, Assistant District Attorney for Milwaukee County, Wisconsin.

250. See WIS. STAT. § 961.41(3g) (1997).

251. See WIS. STAT. § 961.41(1m) (1997).

manufacture, distribution, or delivery of controlled substances.²⁵² By applying the Wisconsin multiple punishment test to the convictions under each of these in combination with a violation of Subchapter IV, it is clear that the combination involving possession charges are violative of double jeopardy, and that the combination with possession with intent may be as well. The consequence of this is that the limited viability of Subchapter IV as a punitive measure is even more hampered.

1. Simple Possession Cases

Under the first scenario, a defendant is convicted under Wisconsin Statutes section 961.41(3g) for possession of a schedule I or II narcotic as a first offense and under section 139.95(2) for being a dealer in possession of the drug without evidence of payment of the tax. The defendant is subject to up to one year in jail for the possession conviction²⁵³ and up to five years for the Subchapter IV violation.²⁵⁴ Such a defendant has a strong argument that his conviction for both of these offenses violates the double jeopardy protection against multiple punishments for the same offense.

Following the analysis under *Sauceda*, one must first break down the statutory elements of the two crimes in order to apply *Blockburger*. For the conviction of the possession charge, the state must prove that the defendant *possessed* a controlled substance which is a narcotic.²⁵⁵ To prove the violation of Subchapter IV, the prosecution must prove the following: (1) that the defendant is a dealer, (2) that he possessed a schedule I or II controlled substance, and (3) that the drugs did not bear evidence of payment of the tax.

Applying *Blockburger*, because the second element of Subchapter IV is the same as that required for a conviction under Chapter 961, a defendant who violates Subchapter IV necessarily violates Chapter 961.²⁵⁶ Thus, the possession charge is a lesser included crime of the

252. See WIS. STAT. § 961.41(1) (1997).

253. See WIS. STAT. § 961.41(3g)(a). The statute provides for a felony sentence of up to two years upon conviction for the defendant's second offense. See *id.*

254. See WIS. STAT. § 139.95(2) (1997).

255. This analysis works on the assumption that Wisconsin courts would construe the requirements as to quantity to be more in the nature of a penalty enhancer. Cf. *State v. Thompson*, 431 N.W.2d 716 (Wis. Ct. App. 1988) (holding that proof of the monetary amount of damage in a criminal damage to property case is not an element of the crime for multiplicity purposes).

256. The criminal penalty under Subchapter IV actually contains the element of

stamp tax violation, and punishment for both fails *Blockburger*. As explained above the legislative intent analysis, because of section 939.66, is also completed, and as such, the conviction for both is violative of double jeopardy.

The defendant in this situation is benefited only marginally by this result however. First, when a defendant is convicted in such a manner, the remedy is that the lesser included conviction is vacated.²⁵⁷ Thus, the defendant is left with the conviction for the felony drug tax stamp violation that carries the greater sentence. Although the prosecutor may avoid this result through his discretion not to charge the drug tax violation if they deem the case worthy of only the misdemeanor treatment, another consideration suggests that the prosecutor may seek the felony conviction. Because the definition of dealer requires that the defendant have in his possession certain quantities (e.g., 42.5 grams of marijuana) before the statute is applicable to him, the amount of drugs that such a defendant would have to have in his possession would be substantial. Thus, it would seem that the prosecutor would likely seek a charge of possession with intent to manufacture, distribute, or deliver, which carries a larger penalty. This intent may be shown by a variety of factors, including quantity.²⁵⁸ If for some reason, however, there was not a solid case against the defendant for possession with intent, the larger sentence under the drug tax stamp violation would be a viable alternative.

2. Cases Involving Possession with Intent

In the second situation a defendant is convicted of possession with intent to deliver, manufacture, or distribute²⁵⁹ and the criminal violation of the drug tax stamp law. The penalties for possession with intent vary

possession twice. The definition of "dealer" provides that one may possess the set quantity of drugs as a means of achieving that status. See WIS. STAT. § 139.87(2) (1997). Although there are others, if the substantive drug charge is for simple possession it is likely that the state would not be able to show, for example, that the defendant shipped or manufactured the drugs. If the prosecutor could show such, the substantive drug charge would likely be under a statute penalizing such conduct rather than under the possession statute. Thus, the defendant would in effect be convicted three times under the charging situation of being in possession of the narcotics under the above charging situation.

257. See Brief of Defendant-Appellant-Petitioner at 76-77, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR) (citing *State v. Gordon*, 330 N.W.2d 564, 570 (Wis. 1983)).

258. See WIS. STAT. § 961.41(1m) (1997).

259. See *id.* For the purposes of this argument it is not necessary to denote which specific intent is actually being charged. In actuality, however, these three specific intents comprise three different crimes.

greatly based upon the quantity and the drug possessed. Therefore, taking marijuana as an example, because the defendant would have had to possess at least 42.5 grams for Subchapter IV to be applicable, the corresponding penalty for possession with intent of that amount is a three-year felony.²⁶⁰ Although this sentence is lighter than that for violation of the tax stamp law, the penalty for possession of a different drug with intent could greatly exceed that for the Subchapter IV violation.²⁶¹

Unlike with simple possession, the elemental breakdown under these statutes requires that the dealer element of the drug tax violation be broken down in order to reveal the potential multiple punishment problem.²⁶² The dealer element may be satisfied by one of ten alternative forms of conduct.²⁶³ A “[d]ealer” means a person who in violation of ch. 961 possesses, manufactures, ships, transports, delivers, distributes, imports, sells, or transfers to another” the requisite amount of drugs.²⁶⁴ For the purposes of someone charged with possession with intent to deliver, it will be assumed that the element that could be satisfied is that of possession in violation of Chapter 961. This is based on the assumption that, if the dealer could satisfy any other provision of this definition, they would have been brought up on charges of manufacturing, delivery or distribution of controlled substances which carry a more severe penalty. Given this assumption, the elemental breakdown of the tax stamp violation would be as follows: (1) the defendant possessed the controlled substance in violation of Chapter 961, (2) the defendant possessed the statutory minimum of under section 139.87(2) (*e.g.*, 42.5 grams of marijuana), (3) the defendant possessed a schedule I or II controlled substance, and (4) the controlled substance did not bear evidence of payment of the tax.²⁶⁵ The two elements of the possession with intent charge are that the defendant possessed the controlled substance and that he had the intent to deliver,

260. See WIS. STAT. § 961.41(1m)(h)(1) (1997).

261. For example, the tax is not applicable unless one has seven or more grams of heroin. See WIS. STAT. § 139.87(2) (1997). The maximum penalty for possession of seven grams of heroin with intent is 15 years. See WIS. STAT. § 961.41(1m)(d)(2). In almost all cases, the potential fine for possession with intent is far greater than that under the drug tax violation. Compare WIS. STAT. § 941.41(1m)(h)(1) (1997) with WIS. STAT. § 139.95(2) (1997).

262. See Brief of Defendant-Appellant-Petitioner at 16, *State v. Dowe*, 541 N.W.2d 218 (Wis. Ct. App. 1995) (No. 95-0314-CR).

263. See WIS. STAT. § 139.87(2) (1997).

264. *Id.*

265. See Defendant's Brief at 16, *Dowe* (No. 95-0314-CR).

distribute, or manufacture.

At first this seems like a case where *Blockburger* is passed, that is neither crime is included in the other as there is the added element of intent to deliver, distribute or manufacture in the substantive drug crime charge. This is how the court of appeals construed this combination of charges in *State v. Dowe*.²⁶⁶ In *Dowe*, the defendant was charged with possession with intent to deliver marijuana and the tax stamp violation, and sought an interlocutory appeal subsequent to the trial court's denial of a motion to dismiss the possession with intent charge on the grounds that it was a lesser included offense of the tax stamp violation.²⁶⁷ Although the information did not specify how the dealer element was satisfied,²⁶⁸ the court of appeals apparently assumed that it was on the grounds of possession, as they held that the possession under the definition of dealer did not include possession with intent, given the additional element of intent to deliver.²⁶⁹

However, the *Dowe* court failed to recognize the implications of the fact that the definition of dealer requires possession in violation of Chapter 961. In light of the conclusions drawn above regarding *U.S. v. Dixon*,²⁷⁰ it seems that this is a case calling for incorporation by generic reference under Chief Justice Rehnquist's analysis.²⁷¹ In this situation the qualifier that the possession be in violation of Chapter 961 would seem to incorporate all forms of criminal drug possession into the definition of dealer.²⁷² Because possession of drugs with intent to deliver is possession in violation of Chapter 961, all of the elements of the possession with intent are replicated in the elements of the drug stamp

266. 541 N.W.2d 218, 220 (Wis. Ct. App. 1995), *rev'd on other grounds*, 557 N.W.2d 812 (Wis. 1997). The Wisconsin Supreme Court granted a petition for review but did not rule on the double jeopardy issue as a consequence of the decision in *State v. Hall*, 557 N.W.2d 778 (1997). See *State v. Dowe*, 557 N.W.2d 812 (Wis. 1997).

267. See *Dowe*, 541 N.W.2d at 220.

268. See Defendant's Brief at App. at 112, *Dowe*, (No. 95-0314-CR).

269. See *Dowe*, 541 N.W.2d at 220. Interestingly, the court did not engage in an inquiry into legislative intent. In explaining why they need not reach the issue, the court showed how it did not understand the implications of *Missouri v. Hunter* and *State v. Saucedo*. The court stated, "Since we have concluded that the offenses are different, we do not discuss whether the legislature nonetheless did not intend to allow multiple prosecutions or punishments." *Id.* at 220 n.2. This is an incorrect application of the two part multiple punishment analysis. See *supra* notes 171-73 and accompanying text.

270. 509 U.S. 688 (1993); see *supra* notes 207-37 and accompanying text.

271. See *supra* notes 226-37 and accompanying text; Defendant's Brief at App. at 17, *Dowe*, (No. 95-0314-CR).

272. See Defendant's Brief at App. at 112, *Dowe*, (No. 95-0314-CR).

violation.²⁷³ Once this incorporation is acknowledged, one cannot “abstract” the intent element from the possession to reach the conclusion that the two crimes are separate.²⁷⁴

Chief Justice Rehnquist, however, also laid out two qualifications to his approval of incorporation by generic reference of the kind in *Harris v. Oklahoma*.²⁷⁵ First, he required the crimes be “akin to greater and lesser included offenses.”²⁷⁶ In *Dowe* and like situations there is no disparity between the seriousness of the offenses comparable to that present in *Dixon*.²⁷⁷ Both offenses are felonies, and as under the facts of *Dowe*, in many situations the Chapter 961 violation will actually be a lesser crime, that is one with a lighter penalty.²⁷⁸ Also the Chief Justice required that commission of the lesser crime necessarily satisfy the elements of the greater crime.²⁷⁹ In this case, a defendant who commits possession with intent to deliver has necessarily committed possession in violation of Chapter 961.

There are several other arguments to be made that, while not falling into the framework of *Blockburger*, suggest that the definition of dealer should be construed as incorporating all forms of criminal possession. First, an “incongruous result” occurs if a possession with intent is not a lesser included offense of the drug tax stamp statute, but other drug crimes (e.g., simple possession and possibly delivery, manufacture and distribution)²⁸⁰ are lesser included offenses.²⁸¹ Second is the fact that the legislature included the word “possesses” in the language of section 139.87(2) in order to make the provision applicable to those “drug dealers . . . arrested for possession with intent to sell or deliver.”²⁸² Finally, the common-sense meaning of “dealer” would sooner include those possessing with intent to deliver, manufacture, or distribute before

273. *See id.*

274. *See id.*

275. 433 U.S. 682 (1977); *see Dixon*, 509 U.S. at 717-19 (Rehnquist, C.J., concurring in part); *supra* notes 226-37 and accompanying text.

276. *Dixon*, 509 U.S. at 718 (Rehnquist, C.J., concurring in part); *supra* notes 231-32 and accompanying text.

277. *See Dixon*, 509 U.S. at 718 (Rehnquist, C.J., concurring in part).

278. *See supra* note 257 and accompanying text.

279. *See Dixon*, 509 U.S. at 718 (Rehnquist, C.J., concurring in part).

280. *See infra* Part III.B.3.

281. *See* Brief of Defendant-Appellant-Petitioner at 25-28, *State v. Dowe*, 557 N.W.2d 812 (1997) (No. 95-0314-CR).

282. *Id.* at 27-28, App. 146 (quoting Motion to Amend Spec. Sess. Wisconsin Assembly Bill 12, excerpted from the Legislative Reference Bureau's drafting file for 1989 Wis. Act 122).

it would include those simply in possession.²⁸³ The effect of not giving the term its common-sense meaning is that those who possess the statutory minimum for personal use will be subject to the criminal penalties of Subchapter IV, while an actual drug trafficker in possession of less than the statutory minimum will not, despite the fact that he is a “dealer” as the term is commonly understood.²⁸⁴

A legitimate counter-argument to the proposition that the tax stamp law includes possession with intent is that, given Justice Scalia’s careful parsing of the words of Michael Foster’s court order in *Dixon*,²⁸⁵ he would equally parse the words listing the elements that satisfy the dealer element.²⁸⁶ Just as the word “assault” in Foster’s court order standing alone could not be interpreted to mean assault with intent to kill, likewise the word “possesses” could not be interpreted to mean possesses with intent to deliver.²⁸⁷ Also, the implication that the reference to Chapter 961 incorporates all forms of criminal possession is problematic given that one who “ships” or “imports” controlled substances in violation of Chapter 961 may be a dealer, despite the fact that neither of these terms are used in Chapter 961. Although they may be forms of delivery or distribution, to construe them as included in delivery would be to flout the elements-only test.

Whether a court will accept the above arguments and find possession with intent to be included within the definition of a dealer is subject only to speculation. It is a legitimate construction of the statute, but the Wisconsin courts have never applied an incorporation analysis like that presented in *Dixon*, despite the adoption of the analysis of *Dixon*. As illustrated by *Dowe*, the Wisconsin courts tend not to stray from technical readings of statutory language, in which they do not look beneath the surface of the words when conducting *Blockburger* analyses. However, if such an analysis were adopted, by logical implication, all forms of possession under Chapter 961, including the forms of possession signified by proximity to certain places, such as schools, would also be included.²⁸⁸

283. See Amicus Brief of Wisconsin Association of Criminal Defense Lawyers at 5-6, *State v. Dowe*, 557 N.W.2d 812 (1997) (No. 95-0314-CR).

284. See *id.* at 11.

285. See *U.S. v. Dixon*, 509 U.S. 688, 700-01 (1993).

286. See Brief of Plaintiff-Respondent at 14-15, *State v. Dowe*, 557 N.W.2d 812 (1997) (No. 95-0314-CR).

287. See *id.*; *Dixon*, 509 U.S. at 701.

288. See, e.g., WIS. STAT. § 961.49 (1997) (prohibiting “[d]istribution of or possession with intent to deliver a controlled substance on or near certain places”).

3. Cases Involving Manufacture, Distribution, or Delivery

In the third possible combination of convictions, a defendant is convicted under Chapter 961 for the manufacture, delivery, or distribution of a controlled substance²⁸⁹ and for violation of the drug tax stamp law. In general, regardless of the type or amount of drug for which the Chapter 961 violation is for, the maximum sentence will greatly exceed that for the drug tax violation.²⁹⁰ Therefore, it is important to note at the outset that from the prosecutor's perspective the delivery charge will invariably be the preferred charge.

With this combination of convictions a defendant is likely to have the least success in arguing that the convictions violate the multiple punishment protection. The facts of *State v. Hall*²⁹¹ present the problems with any such argument. Before having his conviction overturned on the grounds of the violation of the Fifth Amendment privilege, Darryl Hall had argued unsuccessfully to the court of appeals that his combination of convictions for both delivery of cocaine base and the drug tax penalty violated double jeopardy.²⁹² The delivery of cocaine base, Hall argued, was included within the tax stamp violation, because his dealer status was established by proving that he delivered seven or more grams of a controlled substance in violation of Chapter 961.²⁹³ The court of appeals, in brief fashion, held that double jeopardy was not violated because a dealer "includes an individual who *possesses* seven grams or more of a . . . controlled substance."²⁹⁴ Because the tax stamp violation did not require proof of delivery, while the Chapter 961 violation did, the combination passed *Blockburger*.²⁹⁵ The court's opinion leaves much to be desired, but it is justifiable through some interpretation. One interpretation is that the court was suggesting that because other elements hypothetically could satisfy the dealer element, there was no double jeopardy violation.²⁹⁶ This is contrary to the

289. See WIS. STAT. § 961.41(1). Each of these three is a separate crime for which the charging instrument would identify only one per charge and for which a jury at trial would be instructed as to only one. See Wis. JI - Criminal 6020 (delivery), 6021 (manufacture).

290. The only exception to this is for delivery, manufacture or distribution of marijuana, for which there must be at least 500 grams involved before the maximum sentence reaches the level of five years. See WIS. STAT. § 961.41(1)(h)(2) (1997).

291. 540 N.W.2d 219 (Wis. Ct. App. 1995), *rev'd*, 557 N.W.2d 778 (Wis. 1997).

292. See *id.* at 228.

293. See Brief of Defendant-Appellant-Petitioner at 72, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

294. *Hall*, 540 N.W.2d at 228 (emphasis added).

295. See *id.*

296. See Brief of Defendant-Appellant-Petitioner at 62-63, *State v. Hall*, 557 N.W.2d 778

understanding of the elements only test in any case where any of a number of forms of conduct may fulfill the requirements of a crime.²⁹⁷ However, the court may have been implying that because the drug tax stamp violation requires proof of possession as an element external to the definition of dealer,²⁹⁸ proof of this, which was given at trial, would satisfy the alternative element of possession under the definition of dealer. This would foreclose the argument that the dealer element was necessarily established by showing that Hall had delivered the drugs.

On appeal, Hall argued that just as one looks to the charging document in deciding which crime was charged under a statute with alternating elements, the court must look to which element was actually relied upon at trial to satisfy the dealer requirement.²⁹⁹ The difficulty with this argument is that there was no evidence that the State specified which of the alternative forms of conduct was meant to satisfy the dealer element. At trial, although it is unclear from the record, the jury likely received a pattern instruction in which the jury is told simply that any one of the elements will satisfy the dealer element.³⁰⁰ Because both possession and delivery were proved beyond a reasonable doubt, it would have to be shown that the jury satisfied the dealer requirement on grounds of delivery.

Even if the Wisconsin Supreme Court had reached the issue and made the unlikely determination that the ambiguity as to which ground satisfied the dealer element required reversal, unlike with the charging combinations above, prosecutors could easily circumvent this problem. This is because in any case involving delivery the prosecution should be able to prove easily that the defendant was in possession of the drugs at some point in time. In fact, to prove a violation of section 139.95(2), the

(Wis. 1997) (No. 94-2848-CR). In the information the defendant was charged as being a "dealer in possession" and the state interpreted this to mean that the underlying basis of his dealer status was his possession and not his delivery. See Brief for Plaintiff-Respondent at 27, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR).

297. See Brief of Defendant-Appellant-Petitioner at 63-65, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR). Hall correctly points out that if his premise (*i.e.*, that the court of appeals was suggesting that the existence of a hypothetical alternative means of satisfying the statute would suffice) were true, this would contradict the decisions in *Harris v. Oklahoma*, 433 U.S. 682 (1977), and *State v. Gordon*, 330 N.W.2d 564 (Wis. 1983). See *id.* In both of these cases, if his premise were true, the courts could have found that the underlying felony in a felony-murder conviction was not included because the felony-murder could have been proved by any number of hypothetical predicate felonies. See *id.*

298. See WIS. STAT. § 139.95(2) (1997).

299. See Brief of Defendant-Appellant-Petitioner at 70-72, *State v. Hall*, 557 N.W.2d 778 (Wis. 1997) (No. 94-2848-CR); *supra* notes 158-61 and accompanying text.

300. See Wis. JI – Criminal 6009.

prosecution must prove this.³⁰¹ Thus, a prosecutor need only draft a charging instrument making it clear that the dealer element rests upon possession and request a jury instruction that instructs the jury to find the dealer requirement satisfied only on the grounds of possession. It is merely the duplication of the element of possession in the criminal penalty of Subchapter IV that allows this result.

In summary, the manner in which Subchapter IV was drafted precludes the use of the criminal penalty in combination with simple possession, and possibly with possession with intent. These problems may only be remedied by altering the statutory language. It is also the awkward nature of the statutory language which allows the State to use the Subchapter IV as an additional punitive measure in a case involving delivery, manufacture, or distribution. Although the drug tax criminal penalty is not used with great frequency, its own language limits its applicability, even in many situations in which it was intended to be used, *i.e.*, situations involving the taxable quantity of controlled substances.

VI. CONCLUSION

The Wisconsin drug tax stamp law was born out of desires to satisfy an illegitimate purpose. After judicial intervention prevented the State from using the law to serve this purpose, the law was left to find some purpose for its existence. The law cannot be seen to serve any legitimate revenue-raising purpose, and although it serves some function as an additional punitive measure in the war on drugs, the manner in which the statute was drafted makes it ripe for challenge. At the time of its passage it was innovative and *en vogue*, but in its short life, the law has proved to be a failure and a waste of legislative and judicial resources.

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301. See WIS. STAT. § 139.95(2) (1997).

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