TAXING LEGALIZED MARIJUANA: HOW COURTS SHOULD TREAT DRUG TAX STATUTES IN LIGHT OF THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND EXECUTIVE NON-ENFORCEMENT OF THE CONTROLLED SUBSTANCES ACT

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TABLE OF CONTENTS

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INTRODUCTION

There are only two guarantees in life: death and taxes.[1] This Note focuses on the latter. Taxes are virtually everywhere. They are paid on income,[2] estates,[3] purchases,[4] property,[5] and now, marijuana.[6] It is, of course, well within the government's right to tax.[7] In the case of the federal government, such taxing power is derived from the U.S. Constitution.[8] Taxes may even be imposed on illegal activities or substances, or income derived from such illegal activities.[9] But the obligation to pay such a tax only goes as far as any potential external

1 BENJAMIN FRANKLIN, *To Jean Baptiste Le Roy*, *in* X THE WRITINGS OF BENJAMIN FRANKLIN 68, 69 (Albert Henry Smith ed., 1907) ("[I]n this world nothing can be said to be certain, except death and taxes.").

2 *See, e.g.*, 26 U.S.C. § 1 (2012). The federal income tax is a complex statutory scheme whereby individuals are taxed differently based on factors such as their level of income and filing status (e.g., married or unmarried). *See id.* A complete discussion of how the federal income tax works is beyond the scope of this Note.

3 *See, e.g.*, *id.* § 2001(a) ("A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.").

4 *See, e.g.*, N.Y. TAX LAW § 1105 (McKinney 2008) (imposing a four percent sales tax on retail sales of, among other things, tangible personal property, utility services, and certain personal services).

5 *See, e.g.*, ME. REV. STAT. ANN. tit. 36, § 502 (2010) ("All real estate within the State, all personal property of residents of the State and all personal property within the State of persons not residents of the State is subject to taxation on the first day of each April as provided; and the status of all taxpayers and of such taxable property must be fixed as of that date.").

6 *See, e.g.*, COLO. REV. STAT. ANN. § 39-28.8-202(1)(a) (West 2013) ("[T]here is imposed upon all sales of retail marijuana and retail marijuana products by a retailer a tax at the rate of ten percent of the amount of the sale . . . ."); *id.* § 39-28.8-302(1)(a) ("[T]here is levied and shall be collected . . . a tax on the first sale or transfer of unprocessed retail marijuana by a retail marijuana cultivation facility, at a rate of fifteen percent of the average market rate of the unprocessed retail marijuana.").

7 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

8 *See* sources cited *supra* note 7.

9 *See* discussion *infra* Part I.B.

constitutional restraints.[10] For instance, if paying a tax forces one to self-incriminate, presumably one can refuse to pay the tax and invoke the constitutional privilege against self-incrimination.[11] Paying a tax on legalized marijuana would ordinarily show that the person paying such tax was selling or using a once-prohibited substance.[12] There is nothing wrong with such a proposition, assuming marijuana is legal. However, though marijuana is legal in some states, it remains illegal in others.[13] Most importantly, marijuana remains prohibited under federal law.[14] This potentially implicates the Self-Incrimination Clause of the Fifth Amendment.[15] Thus, it is an open question whether paying a tax on the sale or use of state-legalized marijuana constitutes self-incrimination due to the federal illegality of the substance.[16]

The Executive Branch has, very publicly, decided not to enforce the federal criminal laws that conflict with state laws allowing medical or recreational use of marijuana.[17] This might mean that someone who admits to buying or selling marijuana through the payment of taxes has not truly incriminated himself, since the federal laws are not being enforced.[18] This Note will attempt to counter that assertion, and argue that executive non-enforcement does not negate the potential risk of

10 *See* Marchetti v. United States, 390 U.S. 39, 58 (1968) (discussing the obligation that the Supreme Court has to recognize the taxing powers found in the Constitution, but also noting that the Court must "give full effect to the constitutional restrictions which attend the exercise of those powers"); Alan Daniel Gould, *Criminal Law and the Fifth Amendment: Taxation of Illegal Drugs*, 1989 ANN. SURV. AM. L. 541, 541–42 (1991) (discussing the risk that taxes may violate constitutional principles, including the Fifth Amendment's Self-Incrimination Clause).

11 *See* sources cited *supra* note 10. The privilege against self-incrimination, which stems from the Fifth Amendment to the U.S. Constitution, prevents any person from being compelled to testify against oneself. *See* U.S. CONST. amend. V.

12 This is because for much of marijuana's history, it has been a prohibited substance. *See* discussion *infra* Part I.A.

13 *See* discussion *infra* Part I.A.1–2.

14 Controlled Substances Act, 21 U.S.C. §§ 812, 844 (2012).

15 *See* U.S. CONST. amend. V. For more information on the Self-Incrimination Clause, see discussion *infra* Part I.C. The Clause is implicated in this context because paying a tax on income derived from a substance necessarily means that one has *reason* to pay such a tax (e.g., because one has sold or used the substance).

16 The Supremacy Clause of the U.S. Constitution makes federal law supreme over state law and, thus, for the purposes of this Note, marijuana is still considered to be illegal. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added)). For a discussion about executive non-enforcement of the federal laws regarding marijuana use, see *infra* Part III.B.1. For a discussion about the federalism aspects of states being able to legalize marijuana, a topic which is beyond the scope of this Note, see David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013).

17 See *infra* Part III.B.1 for a detailed discussion of federal non-enforcement.

18 *See* discussion *infra* Part III.B.1.

self-incrimination that exists through the payment of taxes on a substance that remains illegal under federal law.

In addition, this Note seeks to demonstrate how state courts should apply the privilege against self-incrimination to state statutes that tax legalized marijuana. It does this by drawing a close analogy between past and present tax statutes of illegal drugs, and those of legal drugs. Part I of this Note traces the history of governmental regulation of both illegal and legal marijuana as a controlled substance, gives a general history of governmental taxation of illegal activities, and discusses the history of the Fifth Amendment's Self-Incrimination Clause. Part II addresses the interplay between self-incrimination and paying taxes on marijuana. It analyzes the self-incrimination framework that courts consider in deciding whether a drug tax statute is constitutional, and finds that framework applicable to the current situation due to federalism concerns. Part III suggests how courts should address state statutes that tax legalized marijuana. It proposes that courts should consider executive non-enforcement of the federal law as an additional factor in determining the constitutionality of such statutes. Part III concludes by finding that executive non-enforcement does not reduce the real and substantial risk of self-incrimination created by paying taxes on legalized marijuana, and thus no distinction between illegal and legal drug tax statutes, for purposes of self-incrimination, truly exists. Courts, therefore, ought to continue to apply a self-incrimination analysis to state drug tax statutes of legalized marijuana. This Note concludes by demonstrating how its proposal would be applied, using Colorado's drug tax statute as an example.

I. BACKGROUND

A. *History of Marijuana as a Controlled Substance*

Marijuana has a long and complicated history in terms of its use, purposes, and, most importantly, regulation.[19] The legality of marijuana has repeatedly gone back and forth.[20] Prior to the twentieth century, marijuana was a largely unregulated substance.[21] In the twentieth century, however, the federal and state governments reversed course,

19 Issues relating to the chemical composition of marijuana, or its practical uses or purposes, either for medical reasons or otherwise, are beyond the scope of this Note and are, therefore, not addressed herein.

20 *See* discussion *infra* Parts I.A.1–2.

21 *See* discussion *infra* Part I.A.1.

imposing heavy degrees of regulation.[22] Now, trends are emerging once again that suggest government regulation, at least in terms of criminalization, may be at an end.[23]

1. Marijuana as an Illegal Substance

Initial federal regulation of drugs usually did not criminalize the substances outright.[24] Rather, the federal government employed alternative means, such as taxing, to regulate such substances.[25] For example, the Pure Food and Drug Act of 1906 was the first major piece of legislation to regulate drugs.[26] That Act imposed labeling requirements on food and drugs, mandating that certain ingredients be disclosed on their label.[27] Cannabis[28] was one such ingredient.[29] The Harrison Narcotics Act of 1914 was the next major piece of legislation that attempted to regulate the drug market.[30] This Act required registration and taxation of opiates and coca products,[31] though it did not touch upon marijuana.[32] Then in 1937, Congress passed the Marihuana[33] Tax Act.[34] This was the federal government's most comprehensive attempt to regulate marijuana to date.[35] As its name suggests, the Marihuana Tax Act regulated marijuana through the

22 *See* discussion *infra* Part I.A.1.

23 *See* discussion *infra* Part I.A.2.

24 *See* Gonzales v. Raich, 545 U.S. 1, 10–11 (2005) (tracing history of federal regulation of marijuana in the United States).

25 See *infra* Part I.B for a more thoughtful discussion of these early tax-based statutes that did not criminalize marijuana and other drugs *per se*, but made the government's displeasure with these substances quite obvious.

26 Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

27 *Id.*

28 Cannabis, as used in the Act, refers to marijuana.

29 Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768.

30 Harrison Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (repealed 1970).

31 *Id.*

32 *See* Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROBS. 237 (1999) (rev. July 2012), http://www.canorml.org/background/Origins_MJ_Proh_2012.pdf, at 17 (explaining that the Harrison Act included a prohibition on cannabis in the first draft, but was later dropped from the final version of the Act).

33 "Marihuana" is an alternative spelling of "marijuana," though it has fallen out of favor as of late. This Note uses the latter spelling, except when in reference to the Marihuana Tax Act. All quotations retain the original spelling as used in the source.

34 Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970) ("To impose an occupational excise tax upon certain dealers in marihuana, to impose a transfer tax upon certain dealings in marihuana, and to safeguard the revenue therefrom by registry and recording.").

35 Gonzales v. Raich, 545 U.S. 1, 11 (2005).

imposition of transfer taxes, as well as through registration and reporting requirements for those who transacted with the drug.[36]

The Marihuana Tax Act stood as the federal government's best attempt to regulate the drug until the Supreme Court held part of it unconstitutional in 1969 on Fifth Amendment self-incrimination grounds.[37] Congress subsequently repealed the Act in 1970 when it passed the Comprehensive Drug Abuse Prevention and Control Act.[38] This new, stronger piece of legislation was enacted in response to the national "war on drugs."[39] Title II of the Act was titled the Controlled Substances Act (CSA).[40] The CSA currently regulates marijuana at the federal level, and differs from its predecessor drug statutes in that it directly criminalizes marijuana and does not simply tax its use or distribution.[41] This came about as a result of the CSA's objectives, which, unlike those of prior legislation that sought only to raise revenue,[42] were to counter and control the widespread drug market.[43]

The CSA classifies drugs according to five different schedules, taking into consideration each drug's potential for abuse, medical use, and safety as it relates to dependence.[44] Marijuana is classified as a Schedule I drug—the highest and most regulated level on the scale.[45]

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36 *Id.* The Act imposed a tax upon all transfers of marijuana that were required to be performed pursuant to a written order form. Leary v. United States, 395 U.S. 6, 14 (1969). It charged one dollar per ounce on transfers to registered persons under the Act, and one hundred dollars per ounce to non-registered persons. *Id.* The person receiving the marijuana, the transferee, was responsible for paying the tax. *Id.* But if he failed to do so, the transferor became liable. *Id.* at 14 n.9. In addition, it was unlawful for a person required to pay the transfer tax to acquire marijuana without doing so. *Id.* at 15. The Act's registration and reporting requirements forced would-be marijuana dealers and purchasers to record the names and addresses of the transferor and transferee, their registration numbers under a different section of the Act, and the quantity of marijuana purchased. *Id.* These records had to be preserved by the Internal Revenue Service and could be made available to law enforcement officials. *Id.* For a more complete discussion on the Marihuana Tax Act, see *infra* Part I.B.

37 *See Leary*, 395 U.S. 6; *see also Raich*, 545 U.S. at 12 (noting that the Supreme Court held certain provisions of the Marihuana Tax Act unconstitutional).

38 *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1292.

39 *Raich*, 545 U.S. at 10–12 ("[A]fter declaration of the national "war on drugs," federal drug policy underwent a significant transformation.").

40 84 Stat. at 1242.

41 *See* 21 U.S.C. §§ 801, 841–44 (2012); *see also* Waters v. Farr, 291 S.W.3d 873, 884 (Tenn. 2009) ("Since the 1970 Act became effective, the federal government has used the criminal laws, rather than the tax code, to regulate the possession and trade of illegal drugs.").

42 *See Raich*, 545 U.S. at 10–11.

43 *Id.* at 12–13 ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." (footnote omitted)).

44 21 U.S.C. § 812.

45 *Id.* § 812(c)(c)(10). The Attorney General of the United States retains the authority to reclassify marijuana to a lesser schedule, or remove it altogether from the CSA, but has not yet

Schedule I drugs have a high potential for abuse, and lack an accepted medical use and safety.[46] Because marijuana is classified as a Schedule I drug, it is a criminal offense to manufacture, distribute, or possess marijuana.[47]

States have played an active role in regulating drugs as well, concurrent with the first pieces of federal legislation.[48] Early state regulation of marijuana was focused on criminal punishment, which is noticeably different than the federal government's approach.[49] The states did, however, also enact drug tax statutes.[50] California was one of the first states to enact legislation criminalizing marijuana,[51] and many others later followed its lead.[52] By 1937, every state had some form of statute prohibiting marijuana.[53] This criminalization of marijuana held steady until 1996, when California once again paved the way for a new approach to its regulation.[54]

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acted to do so. *See id.* § 811(a)(2); *see also Raich*, 545 U.S. at 14–15. The Attorney General has, in turn, delegated his authority to reclassify marijuana to the Drug Enforcement Administration (DEA). *See* All. for Cannabis Therapeutics v. Drug Enf't Admin., 15 F.3d 1131, 1133 (D.C. Cir. 1994) ("The Attorney General has delegated this authority to the Administrator [of the DEA]."); 28 C.F.R. § 0.100 (2015) ("The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration: . . . functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970 . . . ."). This Note does not address whether marijuana is correctly classified as a Schedule I drug under the CSA, as that question hinges more on politics, science, and social climate than on issues of law, and therefore is outside its scope. It should be noted, however, that were the Attorney General to decide to reclassify marijuana to a lesser schedule, certain factors should be considered: marijuana's actual or potential for abuse, scientific evidence of pharmacological effect, the current state of scientific knowledge in the area, its history and pattern for abuse, the scope of abuse, any risk to public health, physiological dependence liability, and whether marijuana is a preliminary gateway drug to other illegal substances. *See* 21 U.S.C. § 811(c).

46 21 U.S.C. § 812(b)(1).

47 *Id.* §§ 841, 844. This is, of course, also subject to executive enforcement of such laws. For a discussion of prosecutorial discretion and non-enforcement, see *infra* Part III.B.1.

48 *Raich*, 545 U.S. at 5 (discussing California as an example of one of many states that have regulated the sale and possession of marijuana, or have allowed it for medicinal purposes).

49 *See* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 796–97 (2004).

50 *See, e.g.*, Waters v. Farr, 291 S.W.3d 873, 884 (Tenn. 2009).

51 *Raich*, 545 U.S. at 5 (citing 1913 Cal. Stat. ch. 342, § 8(a)).

52 *See* Ann L. Iijima, *The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances*, 29 HARV. C.R.-C.L. L. REV. 101, 101–02 (1994).

53 Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 362 (2013).

54 *See Raich*, 545 U.S. at 5–6.

2. Marijuana as a Legal Substance

In 1996, California voters placed Proposition 215[55] on the ballot, making it the first state to take action towards decriminalization of marijuana.[56] Passed as the Compassionate Use Act, Proposition 215 allowed for the use of medical marijuana under certain circumstances.[57] The Act was enacted to ensure that seriously ill residents had access to marijuana for medical purposes, guarantee that patients were not subject to criminal prosecution, and encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of medical marijuana.[58] Since 1996, twenty-two more states and the District of Columbia[59] have joined California in passing medical marijuana laws.[60]

Four states and the District of Columbia have gone even further and have chosen to permit recreational use of marijuana.[61] Colorado is the best known example, as it not only passed a recreational marijuana law by initiative in 2012, but also amended its state constitution to allow for recreational use of marijuana by persons twenty-one years and

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55 1996 Cal. Legis. Serv. Prop. 215 (West).

56 *See Raich*, 545 U.S. at 5.

57 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

58 *Id.* § 11362.5(b)(1).

59 *See State Laws*, *Medical Marijuana*, NORML, http://norml.org/laws (last visited Oct. 23, 2015) (Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington).

60 *See, e.g.*, COLO. CONST. art. XVIII, § 14; ALASKA STAT. § 17.37.010 (2010); ARIZ. REV. STAT. ANN. § 36-2801 (2014); CONN. GEN. STAT. § 21a-408 (2012); DEL. CODE. ANN. tit. 16, § 4903A (2013); D.C. CODE § 7-1671.01 (2013); HAW. REV. STAT. ANN. § 329-121 (West 2008); ME. REV. STAT. ANN. tit. 22, § 2421 (2009); MASS. GEN. LAWS ch. 94C, app. § 1-4 (2015); MICH. COMP. LAWS ANN. § 333.26421 (West 2008); MINN. STAT. § 152.21 (2011); MONT. CODE ANN. § 50-46-301 (West 2011); NEV. REV. STAT. ANN. § 453A.010 (West 2012), *amended by* 2015 Nevada Legis. Serv. ch. 506; N.J. STAT. ANN. § 24:6I-1 (West 2009); N.M. STAT. ANN. § 26-2B-1 (West 2007); OR. REV. STAT. ANN. § 475.300 (West 1999); 21 R.I. GEN. LAWS. ANN. § 21-28.6-1 (West. 2007); VT. STAT. ANN. tit. 18, § 4471 (West 2007); WASH. REV. CODE ANN. § 69.51A.005 (West 2015). Illinois, Maryland, New Hampshire, and New York have passed medical marijuana laws that are not yet operational.

61 Colorado and Washington were the first states to do so in 2012, followed by Alaska, Oregon, and Washington, D.C. in 2014. *See* Matt Ferner, *Alaska Becomes Fourth State to Legalize Recreational Marijuana*, HUFFINGTON POST (Nov. 5, 2014, 8:59 AM), http://www.huffingtonpost.com/2014/11/05/alaska-marijuana-legalization_n_5947516.html. The situation in the District of Columbia is a precarious one, with the U.S. Congress having to approve all laws in the District. Nevertheless, Congress has not rolled back D.C. voters' wishes to legalize possession of marijuana. *See* Aaron C. Davis, *Budget Bill Outlaws Pot Sales in D.C. for 2 Years*, WASH. POST (June 11, 2015), http://www.washingtonpost.com/local/dc-politics/house-budget-bill-would-outlaw-marijuana-sales-in-dc-for-two-years/2015/06/11/ffd763ae-1051-11e5-adec-e82f8395c032_story.html.

older.[62] Specifically, it permits those persons to purchase and possess marijuana of one ounce or less, and to grow up to six marijuana plants in private.[63] Individuals may also legally consume marijuana in private.[64] On the business side, it is now lawful in Colorado for persons twenty-one years and older to manufacture and sell marijuana.[65] They may also open retail stores, subject to certain licensing requirements.[66] Colorado's law did not change the prohibitions on the sale of marijuana to minors, consumption by minors, and driving under the influence of the drug.[67]

Similar in some respects to the Colorado law,[68] Washington's legalization effort removed all criminal and civil penalties for the use and possession of up to one ounce of marijuana by persons twenty-one years and older.[69] Alaska's law also closely resembles that of Colorado and permits persons twenty-one years and older to possess and purchase one ounce or less of marijuana, personally grow no more than six marijuana plants, and privately consume marijuana.[70] It does not affect existing laws that criminalize driving under the influence, consumption in the workplace, or sales to minors.[71] In Oregon, persons twenty-one years and older are able to possess up to eight ounces of marijuana and four marijuana plants in their home, as well as purchase up to one ounce of marijuana.[72]

B. *History of Taxing Illegal Activities*

The United States has long taxed illegal activities, from wagering and gambling,[73] to firearms,[74] to drugs.[75] Taxing substances has been

62 COLO. CONST. art. XVIII, § 16.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* The Colorado amendment also provides that marijuana should be taxed in a similar manner as alcohol. *Id.* Along these lines, proof of age is required before purchasing marijuana. *Id.*

68 The voters of the State of Washington passed a similar initiative to that of Colorado, Initiative 502, which legalized small amounts of marijuana. *See* Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1107 & n.13 (2014).

69 *See* WASH. REV. CODE ANN. § 69.50.4013(3) (West 2015). Possession of marijuana weighing between one and forty grams is a misdemeanor. *Id.* § 69.50.4014.

70 ALASKA STAT. ANN. § 17.38.020 (West 2007).

71 *Id.* § 17.38.120.

72 Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, 2015 Or. Laws ch. 1, § 6(1)(a); *see also Recreational Marijuana*, OREGON.GOV, http://www.oregon.gov/olcc/marijuana/pages/default.aspx (last visited Nov. 9, 2015).

73 *See* 26 U.S.C. § 4401 (2012) (federal tax on wagering). Section 4401(a) imposes an excise tax of 0.25% on state authorized wagers and a tax of 2% on state unauthorized wagers. *Id.*

one way of showing official displeasure with them, and often stems from reluctance to outright ban the substance.[76] Both the federal government and the states have used such tax statutes for years as a method of counteracting the proliferation of drugs.[77]

The preeminent historical example of the federal government using a tax statute to regulate drugs is the aforementioned Marihuana Tax Act of 1937.[78] That Act imposed a tax on transfers of marijuana and an occupational tax on dealers of the drug.[79] It also made it unlawful to acquire or transport marijuana without paying the necessary transfer tax.[80] After the Supreme Court struck down the Act in 1969,[81] states

§ 4401(a). Persons who are "in the business of accepting wagers" or who "conduct[] any wagering pool or lottery" are liable for paying the tax. *Id.* § 4401(c).

74 *See* 26 U.S.C. § 5801 (federal tax on firearms). Section 5801 imposes an occupational tax on every importer, manufacturer, and dealer of firearms. *Id.* § 5801(a). A transfer tax, paid by the transferor, is to also be paid upon each transfer or making of a firearm. *Id.* §§ 5811, 5821.

75 *See* Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970); *see also supra* note 36 and accompanying text; *infra* this Part.

76 As one example, see *infra* this Part for a discussion of the Marihuana Tax Act. There, the federal government chose, for whatever reason, to tax marijuana rather than outright criminalize it, although the effect was substantially the same. Perhaps taxing illegal activities serves another purpose, which is that it provides an additional strategy for the government to pursue in order to deter and punish. Or perhaps the government simply wants to tax income derived from illegal activities because it is easier to prove tax fraud than it is to prove the illegal activity itself. One only needs to look at the prosecution of Al Capone for this proposition. The infamous mobster of the early twentieth century was finally arrested, prosecuted, and convicted for tax evasion. He was able to escape conviction for more violent activities, but he could not get out of paying his taxes. *See* Christopher Paul Sorrow, Note, *The New Al Capone Laws and the Double Jeopardy Implications of Taxing Illegal Drugs*, 4 S. CAL. INTERDISC. L.J. 323, 323–24 (1995); *see also* Capone v. United States, 56 F.2d 927 (7th Cir. 1932).

77 *See* Gonzales v. Raich, 545 U.S. 1, 10–11 (2005). Drug tax statutes may also simply be another law enforcement method. *See* Gould, *supra* note 10, at 542 ("[A] drug tax may operate merely as an additional means of seizing the assets of drug dealers after they have been convicted. Using the tax in this way transforms it into an auxiliary law enforcement tool that has little practical value as a revenue raiser."); Iijima, *supra* note 52, at 104 ("[D]rug tax statutes have the underlying purposes not only of producing revenue, but also of retribution and deterrence, objectives traditionally pursued by criminal statutes.").

78 50 Stat. 551 (repealed 1970). The Act was ruled, in part, unconstitutional by *Leary v. United States*, 395 U.S. 6 (1969), and later repealed. *See supra* note 38 and accompanying text; *infra* Part II.A.

79 50 Stat. 551; *Leary*, 395 U.S. at 14; *see also supra* note 36 and accompanying text.

80 *See Leary*, 395 U.S. at 15. This transfer tax provision was what Leary was convicted for, and was what led to the Supreme Court case that had self-incrimination implications. *See id.* at 11. Taxes under a federal or state drug statute can be imposed in a variety of different ways, with the most common being the sale of a "stamp" that is required to be purchased and placed on the substance. *See, e.g.*, NEB. REV. STAT. ANN. § 77-4306 (West 2009); *see also* Frank A. Racaniello, Note, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657, 663 (1992). For images of what such a tax stamp looks like in each state, see *Tax Stamps*, NORML, http://norml.org/legal/tax-stamps (last visited Oct. 23, 2015) (listing each state's respective tax stamp with images and information).

81 *See supra* note 37 and accompanying text.

were reluctant to pass drug tax statutes of their own.[82] But after Arizona passed its Luxury Privilege Tax in 1982,[83] and Minnesota enacted a drug tax statute in 1986 that was subsequently upheld in the courts,[84] other states followed suit and passed their own respective drug tax statutes.[85] Neither the constitutionality of these statutes nor the authority of states to pass them is usually questioned.[86] The U.S. Supreme Court has held that both legal and illegal income is taxable,[87] and this proposition is not seriously in question.[88] Thus, the authority of the federal government, and by implication, the states,[89] to pass these drug tax statutes is valid.[90] However, such statutes must still conform to constitutional guarantees.[91] For purposes of this Note, that means questioning whether such drug tax statutes[92] violate the Self-Incrimination Clause of the Fifth Amendment.[93]

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82 *See* Sorrow, *supra* note 76, at 325 ("For over a decade, Leary discouraged states from enacting drug taxes.").

83 *See* ARIZ. REV. STAT. ANN. § 42-3001 (2013). The Luxury Privilege Tax originally applied to illegal drugs as well as other items such as cigarettes and alcohol. *See* Sorrow, *supra* note 76, at 325–26.

84 *See* Sorrow, *supra* note 76, at 325–26.

85 *See, e.g.*, ALA. CODE § 40-17A-8 (2011); CONN. GEN. STAT. ANN. § 12-651 (West 2008); FLA. STAT. ANN. § 212.0505 (West 2011) (repealed 1995); GA. CODE ANN. § 48-15-3 (2015); IDAHO CODE § 63-4203 (2015); IND. CODE ANN. § 6-7-3-5 (West 2013); IOWA CODE ANN. § 453B.7 (West 2011); KAN. STAT. ANN. § 79-5201 (West 2008); KY. REV. STAT. ANN. § 138.872 (West 2010); LA. STAT. ANN. § 47:2601 (2014); MASS. GEN. LAWS ANN. ch. 64K, § 4 (West 2011); MINN. STAT. ANN. § 297D.04 (West 2007); NEB. REV. STAT. ANN. § 77-4303 (West 2009); NEV. REV. STAT. ANN. § 372A.070 (West 2011); N.C. GEN. STAT. § 105-113.107 (2008); OKLA. STAT. ANN. tit. 68, § 450.2 (West 2014); 44 R.I. GEN. LAWS § 44-49-5 (2015); S.C. CODE ANN. § 12-21-5020 (2015); TENN. CODE ANN. § 67-4-2803 (2010); TEX. TAX CODE ANN. § 159.001 (West 2015) (repealed 2015); UTAH CODE ANN. § 59-19-101 (West 2008) (repealed 2012); WIS. STAT. ANN. § 139.88 (West 2009), *declared unconstitutional by* Gilbert v. Wis. Dep't of Revenue, 633 N.W.2d 218 (Wis. Ct. App. 2001).

86 *See* Gould, *supra* note 10, at 543; *see also* Iijima, *supra* note 52, at 104 ("The taxation of illegal activities does not normally create self-incrimination problems."). For examples of where these statutes were upheld or struck down based on the privilege against self-incrimination, see *infra* note 225 and accompanying text.

87 *See* United States v. Sullivan, 274 U.S. 259, 263 (1927) ("We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.").

88 *See* Marchetti v. United States, 390 U.S. 39, 44 (1968) ("The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation . . . ."); *see also* License Tax Cases, 72 U.S. (5 Wall.) 462 (1866).

89 *See* State v. Durrant, 769 P.2d 1174, 1179 (Kan. 1989) (recognizing that both the federal and state governments may impose a tax upon an illegal act).

90 Similarly, the long and consistent history of states imposing drug tax statutes reinforces this idea. *See supra* notes 83–85 and accompanying text.

91 *See* sources cited *supra* note 10 and accompanying text.

92 In this case, a statute taxing drugs which are *legal* under state law.

93 For a discussion of the different factors courts have analyzed to determine whether a drug tax statute violates the Self-Incrimination Clause, see *infra* Part II.A.

C. *Overview of the Fifth Amendment's Self-Incrimination Clause*

The Fifth Amendment to the U.S. Constitution states that the government may not compel any person in a criminal case to be a witness against himself.[94] This prohibition has been incorporated to apply to the states through the Fourteenth Amendment.[95] The clause originated, in part, out of the accusatorial system,[96] in which the government must prove a criminal charge by independent evidence and not by the defendant's own words.[97]

A plain text reading of the Self-Incrimination Clause suggests that no further protections are offered by it other than the right to not be compelled to testify against oneself at one's own trial.[98] However, at the time of the Amendment's adoption, criminal procedure rules forbade defendants from testifying under oath at their own trials,[99] suggesting a further meaning to the text.[100] Indeed, the clause applies not only to testifying at one's own trial, but also to *potential* criminal defendants,[101] and to broader statements that could potentially be used to prove that a crime has been committed.[102] The privilege against self-incrimination

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94 U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

95 Malloy v. Hogan, 378 U.S. 1, 6 (1964).

96 *Id.* at 7. At common law, the Self-Incrimination Clause was a reaction to the prior system of justice whereby the defendant had no right to remain silent, no defense counsel to speak for him, and where such silence was held against him. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994). In this prior system, what John Langbein has termed the "accused speaks" period, "the defendant's refusal to respond to the incriminating evidence against him would have been suicidal." *Id.* at 1048. Eventually, the idea that the defendant had to speak to defend himself gave way. *Id.* at 1069. The Fifth Amendment solidified this idea and was, in part, a reaction to the prior system. *See* Garner v. United States, 424 U.S. 648, 655 (1976) (noting that "the preservation of an adversary system of criminal justice" is "the fundamental purpose of the Fifth Amendment").

97 *Malloy*, 378 U.S. at 8. In proving its case, government prosecutors may not even comment on a defendant's choice not to testify. Griffin v. California, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

98 ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11, at 4 (2008).

99 *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 835 (1999). Criminal defendants could, however, submit unsworn testimony. *Id.*

100 DERSHOWITZ, *supra* note 98, at 4.

101 *Id.* at 4–5.

102 Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

may even be asserted in non-criminal cases,[103] so long as the witness's statement has the potential to be used in a criminal proceeding.[104] Finding a *violation* of the privilege against self-incrimination, however, is another matter. While reiterating that the privilege may be asserted beyond merely non-criminal trials, the Supreme Court has held that to find a violation of the privilege, a person's statements must have actually been used against him during a criminal case.[105] Thus, while one may assert the privilege to refuse to give information that would tend to self-incriminate, there is no constitutional violation unless such information (if obtained) is used against a person at trial.[106]

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103 For one particularly well-known example of where the Fifth Amendment has been implicated beyond the realms of a criminal trial, one need not look any further than the U.S. Congress. Persons called to testify before Congress will often invoke their privilege against self-incrimination. *See* DERSHOWITZ, *supra* note 98, at 75 (discussing how the privilege against self-incrimination is often invoked during legislative hearings, such as those that took place during the McCarthy era); *see also* Watkins v. United States, 354 U.S. 178, 195–96 (1957) (noting that the privilege against self-incrimination is available to witnesses before congressional committee); Jim Powell, *Lois Lerner Should be Free to Plead the Fifth—One Question at a Time*, FORBES: OPINION (May 23, 2013, 8:08 AM), http://www.forbes.com/sites/jimpowell/2013/05/23/lois-lerner-should-be-free-to-plead-the-fifth-one-question-at-a-time (regarding Internal Revenue Service official pleading the Fifth in front of the House Oversight and Government Reform Committee).

104 Kastigar v. United States, 406 U.S. 441, 444–45 (1972) ("It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." (footnote omitted)).

105 *See* Chavez v. Martinez, 538 U.S. 760, 770 (2003) ("Although our cases have permitted the Fifth Amendment's self-incrimination privilege to be asserted in noncriminal cases . . . . a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." (citations omitted)). For a general discussion about how *Chavez* has affected the scope of the Self-Incrimination Clause, see DERSHOWITZ, *supra* note 98, at ch. 2. The *Chavez* Court's ruling is beyond the scope of this Note, however, as this Note does not discuss whether a violation of the Self-Incrimination Clause actually occurs in the context of taxation of legalized marijuana. That discussion would only become relevant once a citizen is criminally prosecuted based on paying such taxes.

106 *See Chavez*, 538 U.S. at 770. Justice Thomas, writing for a plurality of the Court, strictly interpreted the Fifth Amendment Self-Incrimination Clause to mean that a constitutional violation only exists when a person is criminally prosecuted and is compelled to be a witness against himself in a criminal case. *See id.* at 766. But that does not bar a person from asserting the privilege in the first place. A person may assert the privilege to avoid giving incriminatory information and, if the government still compels him to do so, the information may not be used against him in a criminal prosecution. *See id.* at 767–68. The concepts of asserting the privilege and finding a violation of the privilege are related, yet distinct. A person must be able to assert the privilege of self-incrimination to protect the core Fifth Amendment right to be free from the use of compelled testimony in a criminal case. *See id.* at 771. A violation of the privilege is the possible result of that assertion. If a person were not able to assert the privilege and was still compelled to testify, such testimony would be deemed voluntary. *See id.* Thus, an assertion of the privilege could be thought of as "memorializ[ing] the fact that the testimony had indeed been compelled." *Id.* at 771–72. This memorialization—the assertion of the privilege—does two things: it either prevents the testimony from occurring, or if it does occur, it prevents it from

For a statement or a piece of evidence to implicate the Self-Incrimination Clause, several components must be met.[107] First, it must be incriminating, which means it has the potential to be used in a criminal case.[108] Second, it must be compelled, which means that the submission of information was not made voluntarily.[109] Lastly, because no person shall be compelled to be a "witness" against himself, such a statement must be testimonial, or a communication that discloses information.[110]

Ordinarily, one must affirmatively claim a Fifth Amendment privilege against self-incrimination or else it is waived.[111] This applies equally to the context of a tax return.[112] Volunteering information on one's income tax return means that the government has no longer "compelled" the information.[113] To preserve the Fifth Amendment's

being used against a person at a criminal trial. *See* Garner v. United States, 424 U.S. 648, 653 (1976). If it were the latter, then a *violation* of the privilege would only occur if the testimony were actually used. *See Chavez*, 538 U.S. at 770.

107 *See* Michael J. Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1140 (2007).

108 *See* Fisher v. United States, 425 U.S. 391, 408 (1976) ("It is . . . clear that the Fifth Amendment . . . applies only when the accused is compelled to make a Testimonial Communication that is incriminating."); Mannheimer, *supra* note 107, at 1140 ("Three elements are essential to a violation of the Self-Incrimination Clause: compulsion, incrimination, and testimony.").

109 *See* sources cited *supra* note 108. The privilege against self-incrimination does not protect against compulsion of real or physical evidence, but rather only against testifying against oneself at trial or providing testimonial evidence that could be used against oneself. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 764 (1966) ("The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."). Furthermore, compulsion is not met if a witness makes voluntary disclosures instead of claiming the privilege. *See* Garner v. United States, 424 U.S. 648, 654 (1976).

110 United States v. Hubbell, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."); *see also* sources cited *supra* note 108. At a most basic level, "testimonial" refers to a communication that, explicitly or implicitly, relates a factual assertion or discloses information. Doe v. United States, 487 U.S. 201, 209–10 (1988); *see also* Mannheimer, *supra* note 107, at 1137. For an interesting discussion of how the word "testimonial" differs in meaning between the Fifth and Sixth Amendments, see generally Mannheimer, *supra* note 107.

111 *See Chavez*, 538 U.S. at 771 ("[T]he failure to assert the privilege will often forfeit the right to exclude the evidence in a subsequent 'criminal case' . . . ."). *But see* Leary v. United States, 395 U.S. 6, 27–28 (1969) (finding that a waiver did not exist despite petitioner never claiming the privilege at trial).

112 *See Garner*, 424 U.S. at 650 (holding that petitioner's privilege against self-incrimination was not violated where he voluntarily made incriminating disclosures on his tax returns because such voluntary disclosures were not compelled and were a failure to assert the privilege); Sullivan v. United States, 274 U.S. 259 (1927) (placing the Fifth Amendment in the context of a tax return).

113 *Garner*, 424 U.S. at 654.

protections, a person must assert the privilege in regards to specific tax disclosures that he or she wishes to protect—the assertion of privilege is submitted in lieu of the tax information.[114] One exception to this arises when the act of asserting the privilege would be incriminating in and of itself.[115] This may occur when the payment of taxes tends to incriminate due to the criminal nature of the activity.[116] In these situations, a person may assert the privilege by simply failing to file.[117] Because the privilege must be affirmatively asserted, or in some situations demonstrated by a failure to file, a self-incrimination argument would be unsuccessful if raised after the fact by a person who filed a tax return including information about marijuana transactions.[118] The Fifth Amendment may protect those who are convicted based on their compulsory admissions on tax forms or their failure to comply with a tax statute that requires self-incrimination,[119] but in order for it to do so, the privilege must be properly invoked.

II. ANALYSIS

A. *The* Marchetti*,* Grosso*, and* Leary *Line of Cases*

The U.S. Supreme Court decided a series of cases between 1968 and 1969 that have since been interpreted as being inextricably connected.[120] This trio of *Marchetti*, *Grosso*, and *Leary* serve as a guidepost and as the basis for courts' self-incrimination analysis in the context of taxes.[121] The analysis coming out of these cases has been

114 *Id.* at 650; *see also Sullivan*, 274 U.S. at 263 ("If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . .").

115 *See Garner*, 424 U.S. at 658.

116 *See id.*

117 *See id.*

118 *See id.* at 656. Such an argument would be along the lines of a defendant being prosecuted for an illegal activity and claiming that the evidence against him (his own tax disclosures) could not be used against him because of the Fifth Amendment.

119 Gould, *supra* note 10, at 542–43. This later statement is the basis for the trio of cases discussed in Part II.A, where each time, the petitioner had been convicted for failure to comply with certain provisions of a tax statute for fear of self-incrimination.

120 These cases are *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Leary v. United States*, 395 U.S. 6 (1969). A fourth case, *Haynes v. United States*, 390 U.S. 85 (1968), was also decided in this timeframe, but this Note does not reach a detailed discussion of it. *See infra* note 149. Justice Harlan wrote for the Court in each instance, which may add to the consistency of the opinions or their relatedness to one another.

121 *See, e.g.*, *Leary*, 395 U.S. at 12–14, 16 (adopting and expanding the *Marchetti* analysis); Gould, *supra* note 10, at 543 ("In the *Marchetti/Grosso/Leary* line of cases, the Court has developed a four-factor test to examine the constitutionality of particular taxation schemes.");

applied in the context of drug tax statutes of illegal marijuana,[122] and so is properly used for purposes of drug tax statutes of legalized marijuana. Together, they provide a test to determine whether a drug tax statute violates the Fifth Amendment privilege against self-incrimination. The test is most commonly used, as demonstrated in this line of cases, where a person refuses to pay a tax on grounds that to do so would be incriminatory,[123] and then is prosecuted for a failure to pay.

Marchetti, interestingly enough, did not involve drugs.[124] Rather, it involved violations of the federal wagering tax statute.[125] The petitioner claimed that his duty to register and pay an occupational tax[126] under the wagering statute violated his Fifth Amendment privilege against self-incrimination.[127] The occupational tax itself was just one provision of a larger statutory system for wagering.[128] In addition to the taxes, other related statutory provisions influenced the Court's reasoning.[129] Four provisions referenced by the Court are of particular import.[130] First, those that were required to register under the occupational tax[131] had to "conspicuously" place revenue stamps in their place of business or keep them on their person, denoting payment of the occupational tax.[132] Second, such persons were required to keep, and permit inspection of, daily records indicating the gross amount of wagers subject to taxation.[133] Next, the Internal Revenue Office was required to maintain a list of all those who paid the occupational tax and had to make such list available for public inspection, including to prosecuting

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Iijima, *supra* note 52, at 123 ("[I]n the *Marchetti/Grosso* line of cases, the Supreme Court established a standard for determining a tax's compliance with the privilege.").

122 *See, e.g.*, *Leary*, 395 U.S. at 13, 16 (finding that the Marihuana Tax Act exposed petitioner to a "real and appreciable" risk of self-incrimination within the confines of *Marchetti*, *Grosso*, and *Haynes* (quoting *Marchetti*, 390 U.S. at 48)).

123 An example of this would be for a tax related to an illegal activity, such as consumption or sale of drugs.

124 *Marchetti*, 390 U.S. at 40.

125 *Id.* at 40–42.

126 26 U.S.C. § 4411 (2012).

127 *Marchetti*, 390 U.S. at 41.

128 *See id.* at 42 ("The provisions in issue here are part of an interrelated statutory system for taxing wagers."). The wagering tax statute, in addition to imposing the occupational tax, imposed an excise tax upon those who collect wagers, as well as registration requirements. 26 U.S.C. §§ 4401, 4412; *see also Marchetti*, 390 U.S. at 42. The statutory scheme was a specific system for taxing wagers, providing for the aforementioned occupational tax, an excise tax, and supplemental provisions to ensure their collection. *See Marchetti*, 390 U.S. at 42–44. It provided for widespread regulation of activities that had been prohibited under both federal and state law. *See id.* at 44. The federal wagering statute even remained relevant in states such as Nevada, where wagering or gambling was permitted in some instances at the time. *See id.* at 44–47.

129 *Marchetti*, 390 U.S. at 42–43.

130 *Id.* at 43–44.

131 *See* 26 U.S.C. § 4401.

132 26 U.S.C. § 6806; *see also Marchetti*, 390 U.S. at 43.

133 26 U.S.C. §§ 4403, 4423; *see also Marchetti*, 390 U.S. at 43.

authorities.[134] Finally, the payment of wagering taxes was specifically said not to exempt any person from any penalty that might attach for engaging in such taxable activity.[135] The issue before the Court, therefore, was whether these provisions were consistent with the limitations imposed by the privilege against self-incrimination under the Fifth Amendment.[136]

The Court held that the wagering statute provisions were not consistent with the Fifth Amendment,[137] and that petitioner's assertion of the privilege against self-incrimination should have been a complete defense to his prosecution under the statute.[138] In doing so, the Court considered four significant criteria[139]: (1) whether the activity being taxed is within an area permeated with criminal statutes, and the statute is directed at those who are inherently suspected of criminal activity;[140] (2) whether the information obtained as a result of the tax statute is easily available to law enforcement officials;[141] (3) whether complying

134 *Marchetti*, 390 U.S. at 43, 59 n.15.

135 26 U.S.C. § 4422 ("The payment of any tax imposed . . . with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes."); *see also Marchetti*, 390 U.S. at 44.

136 *Marchetti*, 390 U.S. at 44.

137 *Id.* at 60. The Court did not say that the provisions are unconstitutional *per se*. In fact, Justice Harlan, writing for the Court, explicitly emphasized that the Court was not holding the wagering tax provisions constitutionally impermissible in all circumstances, but only as applied to those who assert their Fifth Amendment privilege against self-incrimination. *See id.* at 60–61.

138 *Id.* at 60. In deciding this way, the Court departed from *stare decisis* and overruled two prior decisions: *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955). *See Marchetti*, 390 U.S. at 49–54. *Kahriger* held, in part, that a defendant cannot raise a self-incrimination defense for failure to register in accordance with a wagering-related occupational tax because it did not compel admission of prior acts. *See Kahriger*, 345 U.S. at 32–33. *Lewis* held that registration and occupational tax requirements do not violate the privilege against self-incrimination because "there is no constitutional right to gamble," and if the gambler wants to avoid self-incrimination, he need only avoid the activity altogether. *See Lewis*, 348 U.S. at 421–23. In overruling this, the *Marchetti* Court countered by stating that "[t]he question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted." *Marchetti*, 390 U.S. at 51.

139 *See Marchetti*, 390 U.S. at 46–50. Interpretations of the criteria vary between courts and scholars, including whether some criteria should even be considered. *See infra* note 183.

140 *See Marchetti*, 390 U.S. at 46–47; Gould, *supra* note 10, at 543; Iijima, *supra* note 52, at 123. If the activity is within an area permeated with criminal statutes and directed toward those inherently suspected of criminal activities, this factor favors finding the statute impermissible. This is because incriminatory information is more likely to be received when paying a tax in an area that is heavily criminalized. In such situations, there is a higher likelihood of "admission of a crucial element of a crime." *See* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965).

141 *See Marchetti*, 390 U.S. at 47–48; Iijima, *supra* note 52, at 123. An affirmative response to this factor favors finding the statute impermissible. Information that is readily available to law

with the tax statute creates a substantial and real hazard of self-incrimination;[142] and (4) whether the disclosure of information under the tax statute in question would be a significant "link in a chain" to prove guilt.[143] These criteria have since been adopted as the test for determining whether a drug tax statute violates the Self-Incrimination Clause.[144]

In relation to the facts in *Marchetti*, the Court found that wagering was traditionally regulated through criminal statutes and those involved in wagering were automatically associated with criminal activity.[145] Thus, the federal wagering tax statute was within an area permeated by criminal statutes, satisfying the first prong.[146] The Court also found that the second prong was satisfied because lists of those who had paid the occupational tax were kept and made available to the criminal authorities.[147] The third and fourth prongs—a substantial and real risk of self-incrimination and whether there was a significant "link in a chain" to prove guilt—were linked together by the Court. Both prongs were met since every tax return disclosing taxes owed under the

enforcement officials is more easily an aid in prosecution and is simply a matter of ease of gathering evidence. *See Marchetti*, 390 U.S. at 47–48.

142 *See Marchetti*, 390 U.S. at 53 ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."); Gould, *supra* note 10, at 543. There is some question as to the precise wording used here. The *Marchetti* Court first introduces the concept by considering whether the petitioner had faced "'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." *Marchetti*, 390 U.S. at 48. The Court later refers several times, however, to whether the risk of self-incrimination is "substantial." *Id.* at 53–54. For purposes of this Note, both the phrases "substantial and real" and "real and appreciable" are used interchangeably, just as scholars and courts refer to them. A finding of a substantial and real hazard of incrimination will automatically conclude that the statute is impermissible, for this is actually the overarching question a court asks. *See infra* note 227 and accompanying text.

143 *Marchetti*, 390 U.S. at 48 ("Petitioner . . . was required, on pain of criminal prosecution, to provide information which . . . would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." (footnote omitted)); Gould, *supra* note 10, at 543; Iijima, *supra* note 52, at 123. Finding such a significant link in a chain of evidence favors holding the statute to be impermissible. This is another matter of providing evidence to prosecuting authorities with ease: the easier it is, the higher the risk of incrimination. *See Marchetti*, 390 U.S. at 48–49.

144 *See* sources cited *supra* note 121. Because *Marchetti* involved wagering, its applicability to drug tax statutes was not direct. However, its applicability beyond wagering was felt immediately, *see infra* note 149, and it was applied to drugs only a year later. *See infra* note 160 and accompanying text.

145 *Marchetti*, 390 U.S. at 47 ("[W]agering is 'an area permeated with criminal statutes,' and those engaged in wagering are a 'group inherently suspect of criminal activities.'" (quoting *Albertson*, 382 U.S. at 79)). The *Marchetti* Court adopted these phrases from *Albertson*, where the Court found that orders requiring members of the Communist Party to register as such were inconsistent with the Self-Incrimination Clause. *Albertson*, 382 U.S. at 77–78.

146 *Marchetti*, 390 U.S. at 47.

147 *Id.* at 47–48.

gambling occupational tax had the potential for incriminating the petitioner.[148]

On the same day that it decided *Marchetti*, the Court similarly decided *Grosso v. United States*.[149] *Grosso* is another case dealing with the federal wagering statute.[150] This time, the petitioner argued that payment of the excise tax[151] under the statute would have violated his privilege against self-incrimination.[152] The Court held that the petitioner could not be prosecuted for failure to pay the excise tax because payment of the tax would have violated his Fifth Amendment right against self-incrimination.[153] Like in *Marchetti*, the Court used the same four-step analysis in its opinion.[154] A comprehensive statutory system existed for punishment of wagering activities.[155] Thus, the petitioner was within an area permeated with criminal statutes.[156] Those who had to pay the excise tax also had to submit a revenue form each month specifically designed for those in the wagering business, a form that one could reasonably expect would be given to state and federal prosecuting authorities.[157] Under these circumstances, the Court found there to be a substantial and real hazard of incrimination.[158]

The *Marchetti* analysis had immediate applicability beyond wagering statutes,[159] but it was not until a year later that it was applied to marijuana in *Leary v. United States*.[160] At issue in *Leary* was the

148 *Id.* at 48–50.

149 390 U.S. 62 (1968). The Court also decided a third case on this same day using the *Marchetti* analysis. Haynes v. United States, 390 U.S. 85 (1968). *Haynes* held that the privilege against self-incrimination served as a defense to prosecution for failure to register a firearm under the National Firearms Act, or for possession of an unregistered firearm, because the registration requirement created real and appreciable hazards of incrimination. *See id.* at 96–97, 100.

150 *See Grosso*, 390 U.S. at 63.

151 26 U.S.C. § 4401 (2012). The excise tax at issue in *Grosso* and the occupational tax at issue in *Marchetti* are different in that the occupational tax is a special tax of a predetermined amount, while the excise tax is dependent on the size of the wager. *Grosso*, 390 U.S. 62; *Marchetti*, 390 U.S. 39. However, both taxes affect the same individuals, since a person becomes liable for the occupational tax only if he is liable for the excise tax. *Compare* 26 U.S.C. § 4411, *with* 26 U.S.C. § 4401.

152 *Grosso*, 390 U.S. at 63.

153 *See id.* at 64, 67.

154 *See id.* at 64–67. For a reminder of the four-step analysis, see *supra* notes 139–43.

155 *Grosso*, 390 U.S. at 64.

156 *Id.*

157 *Id.* at 65–66.

158 *See id.* at 66–67. The Court did not specifically address the fourth prong from *Marchetti*—the link in a chain of evidence—but since this is closely related to the third prong, one can assume that this was met as well. *See supra* note 148 and accompanying text.

159 *See supra* note 149.

160 395 U.S. 6 (1969).

constitutionality of the Marihuana Tax Act.[161] Timothy Leary,[162] the petitioner, had attempted to drive from the United States into Mexico, but was turned away at the Mexican border.[163] When he attempted to re-enter the United States, customs inspection agents found marijuana in his vehicle and on his daughter, who was a passenger.[164] He was subsequently prosecuted for knowingly transporting marijuana without paying the transfer tax imposed by the Marihuana Tax Act.[165] A jury found Leary guilty of the charge,[166] and the Fifth Circuit Court of Appeals affirmed.[167] The Supreme Court granted certiorari to decide

161 *Id.* at 12. The Marihuana Tax Act contained two main parts: a transfer tax on marijuana and an occupational tax. *Id.* at 14. It was not a law of general applicability, but rather a law that specifically targeted marijuana. *Id.* at 27. The occupational tax component of the law required that dealers of the drug register with the Internal Revenue Service (the registration requirement), and also pay a tax. *Id.* The rate of the tax varied depending on the type of dealer (e.g., illegal dealers were supposed to pay a higher rate of tax). *See id.* Likewise, the transfer tax component of the law depended on the legality of the transaction, which could be accomplished because marijuana was not *per se* illegal. *See id.* A transfer of marijuana to properly registered persons under the Act required a smaller tax than a transfer to those who were unregistered. *See id.* Before any transfer could take place, however, the Act required that an order form be submitted with the name of both the transferor and transferee. *See id.* at 15. This form, pursuant to the statute, had to be preserved and made available to law enforcement officials. *Id.* And someone required under the Act to pay the transfer tax was statutorily forbidden to acquire marijuana without doing so. *See id.* at 11 n.3 ("It shall be unlawful for any person who is a transferee required to pay the transfer tax . . . to acquire or otherwise obtain any marihuana without having paid such tax, or . . . to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained." (quoting Marihuana Tax Act)). The statutory record-keeping requirement and provision that allows the form to be handed over to law enforcement played an important role in the Court's decision. *See infra* notes 178, 180 and accompanying text.

162 It is interesting to note that Timothy Leary was well known for his support of drugs and was a one-time Harvard professor. Charles Traughber, *Taxing the War on Drugs: Tennessee's Unauthorized Substance Tax*, 3 TENN. J.L. & POL'Y 157, 166 n.62 (2007). He is noted for his famous drug reference, "turn on, tune in, drop out." *Id.* Leary had also previously been prosecuted for possession and distribution of LSD. *See* Colin S. Diver et al., Debate, *Debate 4: Have Recent Court Holdings Enhanced or Eroded Religious Freedom for All Americans?*, 1 RUTGERS J.L. & RELIGION 7, 18 (1999). His drug activism even inspired the Beatles' song "Come Together." *See Come Together*, THE BEATLES BIBLE, http://www.beatlesbible.com/songs/come-together (last visited Nov. 18, 2015).

163 *Leary*, 395 U.S. at 9–10.

164 *Id.*

165 *Id.* at 11. Leary was also charged with knowingly smuggling marijuana into the United States, and knowingly transporting and facilitating the transportation and concealment of marijuana that had been illegally imported. *Id.* at 10–11. The smuggling charge was later dismissed. *Id.* at 11.

166 *Id.* The jury also found Leary guilty of the second charge, for knowingly transporting and facilitating the transportation of illegally imported marijuana. *Id.* at 10–11; *see also supra* note 165.

167 *See* Leary v. United States, 383 F.2d 851 (5th Cir. 1967).

whether the conviction for failure to pay the transfer tax violated Leary's Fifth Amendment privilege against self-incrimination.[168]

In using the criteria previously set forth in *Marchetti* and its related cases,[169] the Court held that the Marihuana Tax Act would have compelled exposure to a "real and appreciable" risk of self-incrimination.[170] Therefore, the privilege could be used as a complete defense against prosecution for noncompliance with the Act.[171] The Court thus reversed Leary's conviction.[172] The Court went further, however, and also held that the Marihuana Tax Act was, in part, unconstitutional because the Fifth Amendment's Self-Incrimination Clause acted as a restraint on it.[173] The Act gave Leary an impermissible choice between complying with the provisions of the Act and incriminating himself.[174] To fully comply with the statutory requirements would have meant that Leary would have exposed himself to a real and substantial risk of self-incrimination, and thus the Act was unconstitutional.[175]

The *Leary* Court faithfully applied the *Marchetti* analysis to the context of the Marihuana Tax Act. The Court found that compliance with the transfer tax would have forced Leary to identify himself as a member of a selective and suspect group,[176] thus satisfying part of the first prong of the *Marchetti* test.[177] The Court also found that the order

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168 *Leary*, 395 U.S. at 12. The Court also considered a second question regarding due process, which is outside the scope of this Note. *Id.* The Court considered whether Leary was denied due process by a provision contained in 21 U.S.C. § 176a, the criminal statute charging him with smuggling and knowingly transporting illegally imported marijuana. *Id.* at 10–11; *see also supra* note 165. That statute provided that "[w]henever on trial for a violation [of § 176a] the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." *Leary*, 395 U.S. at 30. The Court found this statutory provision to be an impermissible presumption, and struck it down as unconstitutional. *Id.* at 37. A criminal statutory presumption is irrational and arbitrary, and thus unconstitutional, unless the presumed fact "is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36. The presumption at issue in *Leary* did not do so and thus failed. *Id.* at 45–47.

169 *See supra* notes 120–58 and accompanying text.

170 *Leary*, 395 U.S. at 16.

171 *Id.* at 29.

172 *Id.* at 53.

173 *See id.* at 26 ("[A]t the time petitioner acquired marihuana he was confronted with a statute which on its face permitted him to acquire the drug legally, provided he paid the . . . transfer tax and gave incriminating information, and simultaneously with a system of regulations which . . . prohibited him from acquiring marihuana under any conditions.").

174 *See id.*

175 *Id.* To comply with the Act, Leary would have been forced to give incriminating information. *See id.*

176 *Id.* at 18.

177 *See supra* note 140 and accompanying text. The Court did not go into much explicit discussion regarding whether this was an area permeated with criminal statutes, but its

forms required by the Act denoting payment of the transfer tax would be available to law enforcement officials.[178] This satisfied the second prong.[179] The fact that Leary did not pay the transfer tax, and that evidence of this could have been provided to law enforcement officials, provided a significant link in a chain of evidence to prove Leary's guilt, thus satisfying the last factor.[180] These combined factors led the Court to ultimately conclude that the Act would have exposed Leary to a real and appreciable hazard of self-incrimination.[181]

While *Marchetti* provided the initial basis for the test, it is its application to other types of tax statutes and its adoption to drug tax statutes in *Leary* that are most important. Together, these cases provide the test for determining whether a person's Fifth Amendment self-incrimination claim prevails over a tax statute. The third *Marchetti* factor—whether complying with the statute presents a substantial and real hazard of self-incrimination[182]—is not actually part of the test at all when analyzed in this context, but is rather the overarching question a court must answer, to be informed by the other three prongs.[183] This is consistent with courts that have considered the issue,[184] as well as

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discussion of marijuana as a regulated substance implied that the Court believed it to be true. *See Leary*, 395 U.S. at 16–18. The author cannot think of a scenario where the first factor would not be met in relation to a drug tax statute of illegal marijuana. Courts have agreed. *See infra* note 231 and accompanying text.

178 *Leary*, 395 U.S. at 14–15. In reaching this conclusion, the Court looked to the statutory provisions. *Id.* at 14.

179 *See supra* note 141 and accompanying text.

180 *Leary*, 395 U.S. at 16. Furthermore, the fact that Leary was a "recent, unregistered transferee of marihuana," in a time when possession of the drug was illegal in all fifty states, made his guilt even more likely. *Id.*

181 *Id.*

182 *See supra* note 142 and accompanying text.

183 There is some discussion amongst scholars about the exact components of the test. *Compare* Gould, *supra* note 10, at 543 (explaining a four-part test, which says that the Court asks whether the statute (1) is in an area permeated with criminal statutes, (2) directs itself to a group inherently suspect of criminal activities, (3) creates a real and appreciable risk of self-incrimination, and (4) compels the disclosure of information that would create a significant link in a chain of evidence to prove guilt), *with* Iijima, *supra* note 52, at 123 (explaining a three-part test, which says that the Court asks whether the statute (1) is in an area permeated with criminal statutes, and the taxes are aimed at persons inherently suspect of criminal activities; (2) requires the person to provide information that would reasonably be expected to be available to law enforcement authorities; and (3) would provide information that would be a significant link in a chain of evidence to prove guilt). The most troublesome prong for scholars has been the so-called third *Marchetti* prong—whether there is a substantial and real hazard of self-incrimination. *See* sources cited *supra*. There is confusion as to whether this is just one aspect of the analysis that a court must ask, or whether it is the overarching question, with the other factors merely informing its result, but not being exclusive nor dispositive. This Note argues the latter. *See infra* note 184 and accompanying text.

184 One reading of *Leary* is that because the petitioner was subjected to a real and substantial risk of self-incrimination, the statute was unconstitutional, and there was such a risk only *due to* the other factors. *See Leary*, 395 U.S. at 13–18. This reading appears to be correct, and is the

language from *Marchetti* and *Leary*.[185] If each of the three remaining factors are met, the statute in question will be struck down as unconstitutional and cannot be enforced.[186] The opposite is also true. If none of the prongs are met, the statute will be upheld.[187] There is also a middle ground, however, where one or two of the prongs may be easily satisfied, but not the others.[188] When this happens, the court applying

one that courts have taken. Courts agree that the central question is whether the taxpayer is presented with a substantial and real risk of incrimination, and answer this question by looking at the other factors. *See, e.g.*, Briney v. State Dep't of Revenue, 594 So. 2d 120, 122–23 (Ala. Civ. App. 1991) (finding several elements to be considered in determining whether a claimant is confronted by a substantial and real hazard of incrimination); Fla. Dep't of Revenue v. Herre, 634 So. 2d 618, 619–20 (Fla. 1994) (describing the privilege's central standard as "whether the claimant is confronted by substantial and 'real[]' . . . hazards of incrimination," and using *Marchetti*'s factors that the statute be directed to a "selective group inherently suspect of criminal activities," and whether there is a "'link in a chain' of evidence" (quoting Marchetti v. United States, 390 U.S. 39, 48, 53, 57 (1968))); State v. Godbersen, 493 N.W.2d 852, 856 (Iowa 1992) (describing the central standard for the privilege against self-incrimination to be whether the claimant is "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination," and a three-part *Marchetti* test as "(1) whether the tax is aimed at individuals 'inherently suspect of criminal activities,' and whether the tax activity is in 'an area permeated with criminal statutes'; (2) whether an individual is 'required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities'; (3) whether such information 'would surely prove a significant "link in a chain" of evidence tending to establish his guilt'" (quoting *Marchetti*, 390 U.S. at 53, 47–48)); Sisson v. Triplett, 428 N.W.2d 565, 571 (Minn. 1988) (describing the same test). *But see* Waters v. Farr, 291 S.W.3d 873, 890 (Tenn. 2009) ("When applying either these three specific elements *or the broader* 'central standard' . . . ." (emphasis added)). This one line in *Waters* suggests that a court may apply *either* the central standard or the three-prong *Marchetti* test. However, the *Waters* court itself applied the three factors, and concluded that the drug tax statute did not create a "substantial, real and appreciable hazard of self-incrimination." *Id.* at 891. Thus, it appears that both the "central standard" and the three-prong test are meant to work in tandem with one another.

185 In *Marchetti*, the Court mentioned "real and appreciable" or "substantial and real" twice, and referred to it as the "central standard for the privilege's application." *Marchetti*, 390 U.S. at 48, 53. The Court in *Leary* stated that "[w]e *concluded* [in *Marchetti*] that compliance with the statute would have subjected petitioner to a 'real and appreciable' risk of self-incrimination." *Leary*, 395 U.S. at 13 (emphasis added) (footnote omitted). The *Leary* Court also, on the facts of its own case, decided that a "real and appreciable" risk existed after looking to the other factors. *Id.* at 18. By stating that this was the central standard, and basing the Court's conclusion on it, the Court's own language supports the idea that "substantial and real" or "real and appreciable" is the ultimate question a court must decide.

186 *See* State v. Garza, 496 N.W.2d 448, 453 (Neb. 1993) ("A statutory tax meeting each of the three elements of the test violates the constitutional right to be free from self-incrimination and cannot be enforced."). This was what happened in *Marchetti*, *Leary*, and *Grosso*. *See Leary*, 395 U.S. at 18; Grosso v. United States, 390 U.S. 62, 64, 67 (1968); *Marchetti*, 390 U.S. at 53.

187 *See, e.g.*, *Garza*, 496 N.W.2d at 453–54 (upholding the constitutionality of a drug tax statute where two of three factors were not met). It appears that even finding the first factor to be present—the area taxed is one permeated with criminal statutes—does not defeat the statute, and it may still be upheld if the other two factors are missing. *See id.* Thus, if all three factors are missing, the statute would absolutely be upheld as well.

188 *See, e.g.*, *Waters*, 291 S.W.3d at 891 (finding the tax was aimed at individuals inherently suspect of criminal activities, but information was not available to law enforcement officials, nor was there a significant link in a chain of evidence).

the test should weigh the factors accordingly and decide whether the statute, taken as a whole, presents a real and substantial risk of self-incrimination.[189] One factor may be weighed more heavily than another, and there is no set combination of factors that are dispositive to find a statute constitutional or unconstitutional.[190]

In the area of drug tax statutes for illegal drugs, at least one scholar has decided to focus on the last factor—a significant link in a chain of evidence—because it is clear that the area of illegal drugs is permeated with criminal statutes and that any such taxes in this area will necessarily be aimed at persons inherently suspect of criminal activities.[191] But this decision presupposes that drugs are always illegal.[192] They are, of course, not always illegal,[193] so this blanket decision is misguided for current purposes. A court applying this factor will have to define the drug market narrowly or broadly. A statute taxing legal drugs is not necessarily directed at those persons inherently suspected of illegal activity, nor is the area being taxed necessarily one permeated with criminal statutes.[194] Under a narrow interpretation, such taxes are aimed at persons conducting lawful state activity. However, a more correct interpretation would be to define the area being taxed broadly—not as "legal" marijuana, but rather as marijuana in general. This is consistent with the *Leary* Court, which defined the subject matter as "marijuana" rather than "*illegal* marijuana."[195] When put into this context, the area is undeniably permeated with criminal statutes.[196]

When analyzing a drug tax statute of legalized marijuana, all three of the *Marchetti* factors should be looked at, but the most appropriate

189 *See id.* (holding that payment of the tax did not create a "substantial, real and appreciable hazard of self-incrimination").

190 There may also be countervailing considerations. For example, a drug tax statute that is aimed at individuals inherently suspect of criminal activities, but which has confidentiality provisions so that the information cannot be used in a criminal prosecution or made available to law enforcement officials, and so it cannot become a significant link in a chain of evidence, does not create a real and substantial risk. *Id.* Such a statute was found to not violate the Fifth Amendment. *Id.*

191 *See* Iijima, *supra* note 52, at 123. Iijima's focus on this does not take into account the second factor regarding whether the information provided will be easily available to authorities. She appears to be linking this with the last factor, and saying that if it is readily available, then the link in the chain of evidence is more easily proven. *See id.*

192 *See id.* This, of course, is important for purposes of this Note because marijuana is no longer illegal under several states' laws. *See supra* note 61.

193 *See supra* Part I.A.2.

194 *See supra* note 191.

195 *See infra* note 232.

196 Although this conclusion seems to support the finding that courts should automatically find the area permeated with criminal statutes, and thus focus on the other factors, that need not always be the case, as some state courts may choose to interpret the area being taxed more narrowly.

factor to focus on has yet to be considered—the role of executive non-enforcement of the federal law.[197]

B. *The* Marchetti *Test Remains Applicable to Drug Tax Statutes of Legalized Marijuana*

Simply because a drug tax statute taxes legalized marijuana does not mean that the risk of incrimination is gone. Of course, one would not ordinarily assert the privilege against self-incrimination when it comes to a legal substance, and perhaps, under some states' laws, there is no longer risk of prosecution. But marijuana remains illegal under federal law, and so the risk of incrimination remains.

1. Marijuana Remains Illegal Under Federal Law

The Supremacy Clause of the U.S. Constitution makes federal law supreme and binding over state law.[198] Thus, while marijuana remains illegal under the CSA,[199] any state laws legalizing it have no effect on a person's culpability under federal law.[200] This is the concept of preemption. It deserves some discussion, for it is the reason why there is still a chance of self-incrimination in states that have legalized marijuana.

Issues of preemption are guided by the intent of Congress in passing legislation.[201] Congress can expressly show preemptive intent through a statute's language, or can impliedly do so through a statute's structure and purpose.[202] The CSA does not expressly preempt state law.[203] Therefore, if it does so at all, it does so implicitly. An implicit preemption can be shown either by the scope of the federal law being such that it occupies the entire legislative field, or an actual conflict between state and federal law.[204] The CSA is an example of the latter, as

197 *See infra* Part III.B.

198 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

199 21 U.S.C. § 841, 844 (2012).

200 Practically speaking, this is only true to the extent that enforcement of federal laws is upheld.

201 *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008).

202 *See id.*

203 *See generally* 21 U.S.C. §§ 801–904.

204 *See Altria Grp.*, 555 U.S. at 76–77.

it represents an actual conflict between state and federal law. This may exist when compliance with both state and federal law is impossible, or the state law is an obstacle to the accomplishment of the federal law.[205] It is satisfied here because one cannot be both compliant with state marijuana laws and the CSA at the same time. Therefore, the CSA preempts such state laws under a theory of conflict preemption.[206] As such, persons remain susceptible to federal marijuana laws, notwithstanding states' decisions to legalize. The effect of the states' legalization is nil, and thus the self-incrimination analysis remains important.

2. The Privilege Against Self-Incrimination Transcends Jurisdictional Boundaries

Since there is currently a state-federal split on the legalization of marijuana, compounded by the issue of preemption, one must analyze what effect this federalism issue has on the privilege against self-incrimination. The law is very clear: a state may not compel someone to give incriminating testimony that could be used against him in the federal jurisdiction.[207] The Fifth Amendment's privilege against self-incrimination protects evidence gathered by the state from being used against oneself federally.[208] The issue of how to treat potentially self-incriminatory evidence in light of possible prosecution by a different sovereign is not limited to the issue of legal marijuana. The facts of the *Murphy* case are a good example. There, the petitioners refused to testify about a certain work stoppage before a state commission on grounds that such testimony would incriminate them federally.[209] The petitioners did this despite being granted immunity from state prosecution.[210] The Supreme Court held that the claim of privilege protected the petitioners

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205 *See* Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

206 While the CSA does not expressly preempt state laws, it does reserve the right to do so. Section 903 states that the CSA does not implicitly preempt state law through occupying the entire legislative field, "*unless* there is a positive conflict" between federal and state law. *See* 21 U.S.C. § 903 (emphasis added).

207 *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 77–78 (1964), *abrogated in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998). Likewise, the federal government may not compel incriminating testimony to be used in a state jurisdiction. *Id.*

208 *See id.* at 77–78 ("[T]he constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.").

209 *See id.* at 53–54.

210 *See id.*

from incrimination under federal as well as state law.[211] Notably, however, the Court still compelled their testimony, finding that it could not be used in any subsequent federal prosecution.[212]

For a more analogous example to the one at hand, one need only look at how medical marijuana has been treated for self-incrimination purposes, since it too remains illegal under federal law. Medical marijuana, of course, has been legalized by many states,[213] with the federal government declining to prosecute such cases.[214] As such, it contains the same preemption and sovereignty issues as legalized marijuana, for it is legal in many state jurisdictions but remains illegal under the CSA.[215] Not surprisingly, claims have been made that complying with a tax on medical marijuana violates the Self-Incrimination Clause of the Fifth Amendment.[216] These claims have been rejected, but for good reason. For example, in *Montes v. United States*,[217] the petitioner ran a medical marijuana dispensary, paid taxes, and furnished business records to the city.[218] After being convicted in federal court for several marijuana-related crimes, he appealed on the basis that the business records that had been used to help convict him—tax information—violated his Fifth Amendment privilege against self-incrimination.[219] The court found that the business-reporting requirement of the statute did not violate the privilege because the information obtained by the city was not incriminating, but was rather general tax information.[220] Had the tax statute required more specific incriminating information, the outcome may have been different.[221] As such, it is still useful to consider.

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211 *See id.* at 77–78.

212 *See id.* at 79–80. This result, however, would not be likely in the current situation for reasons discussed *infra* Part III.B.2 (regarding immunities).

213 *See supra* note 60 and accompanying text.

214 *See infra* Part III.B.1.

215 *See supra* Part I.A.2.

216 *See, e.g.*, Nickerson v. Inslee, No. C14-692 MJP, 2014 WL 3900020, at *1 (W.D. Wash. Aug. 7, 2014) (participant of a "collective garden" for medical marijuana opposed assessment of required excise tax, arguing that complying with the tax would violate his Fifth Amendment right against self-incrimination).

217 Montes v. United States, No. 1:06-CR-00342-LJO, 2012 WL 2798810 (E.D. Cal. July 9, 2012).

218 *Id.* at *1.

219 *Id.* at *2–3.

220 *Id.* at *4 ("The declarations do not provide the types of products sold by the business nor is there any indication that the business was involved in illegal activity."). Additionally, the court found that the petitioner had waived any potential privilege against self-incrimination when he voluntarily submitted the tax records to the city. *Id.*

221 It is for this reason that the proposal in this Note is necessary. Had the tax statute at issue in *Montes* not required general information, but rather specific incriminatory information showing that the petitioner engaged in unlawful activity, the court might have found the statute to be unconstitutional. See, for example, the difference between this and the Colorado tax

III. PROPOSAL

A. *Courts Should Apply a Self-Incrimination Analysis to State Drug Tax Statutes of Legalized Marijuana*

As previously shown in this Note, despite various states' legalization of marijuana, preemption dictates that marijuana remains illegal under federal law through the CSA.[222] Additionally, it has been shown that a person may invoke the privilege against self-incrimination to avoid providing information to a state that the federal government could use against him.[223] When applied to the context of a state drug tax statute of legalized marijuana, these are the principles to keep in mind. Courts should apply the test first set forth in *Marchetti* to determine the constitutionality of such a drug tax statute. The legality of the drug at the state level does not negate the need for such analysis; it merely introduces a new aspect of federalism to the equation.[224] Now courts will also have to consider what effect, if any, the federal illegality of marijuana has on the real and substantial risk of prosecution. Just as courts have previously done with drug tax statutes for illegal marijuana, such statutes may either be upheld or struck down on self-incrimination grounds.[225] Although the test has normally been used where a person is prosecuted for failure to pay a tax, it is equally applicable where a person

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statute, which requires specific information related to marijuana businesses. *See* COLO. CONST. art. XVIII, § 16; *see also infra* Part IV.

222 *See supra* Part II.B.1.

223 *See supra* Part II.B.2.

224 Ordinarily, where the statute is taxing a lawful substance or activity, there should be no self-incrimination analysis required. At first glance, one might think that is also the case here, where a state is taxing legalized marijuana. But because marijuana remains illegal under federal law, the self-incrimination analysis remains important and relevant.

225 Of the state drug tax statutes that have had their constitutionality challenged before a state appellate court, eight have been upheld on grounds that they do not violate the privilege against self-incrimination. *See* Briney v. State Dep't of Revenue, 594 So. 2d 120 (Ala. Civ. App. 1991); State v. Godbersen, 493 N.W.2d 852 (Iowa 1992); State v. Durrant, 769 P.2d 1174 (Kan. 1989); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988); State v. Garza, 496 N.W.2d 448 (Neb. 1993); White v. State, 900 P.2d 982 (Okla. Crim. App. 1995); Waters v. Farr, 291 S.W.3d 873 (Tenn. 2009); State v. Davis, 787 P.2d 517 (Utah Ct. App. 1990). State drug tax statutes have been struck down because of self-incrimination concerns on four occasions. *See* Fla. Dep't of Revenue v. Herre, 634 So. 2d 618 (Fla. 1994); State v. Smith, 813 P.2d 888 (Idaho 1991); State v. Roberts, 384 N.W.2d 688 (S.D. 1986); State v. Hall, 557 N.W.2d 778 (Wis. 1997). Additionally and alternatively, courts have questioned the constitutionality of drug tax statutes on the grounds of the Double Jeopardy Clause of the Fifth Amendment. *See* People v. Maurello, 932 P.2d 851 (Colo. App. 1997); Wilson v. Dep't of Revenue, 662 N.E.2d 415 (Ill. 1996); Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Comm'r of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998); Desimone v. State, 996 P.2d 405 (Nev. 2000); N.M. Taxation & Revenue Dep't v. Whitener, 869 P.2d 829 (N.M. Ct. App. 1993); Brunner v. Collection Div. of Utah State Tax Comm'n, 945 P.2d 687 (Utah 1997).

has the potential for being prosecuted for violation of federal drug laws.[226]

B. *The Constitutional Test*

Whether compliance with the drug tax statute of legalized marijuana creates a "substantial and real" risk of self-incrimination is the overarching question a court must ask when determining the statute's constitutionality in light of the Self-Incrimination Clause of the Fifth Amendment.[227] The remaining three *Marchetti* factors, as well as one new factor set forth below, should inform this question. Therefore, the current factors to consider are: (1) whether taxing legalized marijuana is in an area permeated with criminal statutes, and the statute is directed at those persons inherently suspected of criminal activities;[228] (2) whether information obtained as a result of the drug tax statute is readily available to law enforcement officials;[229] (3) whether the information provided would prove a significant link in a chain of evidence to help establish guilt;[230] and a new factor, (4) whether non-enforcement of federal marijuana laws has an effect on the possibility of prosecution.

The first factor has, in relation to drug tax statutes of *illegal* marijuana, properly been answered in the affirmative.[231] When the factor arises in relation to *legal* marijuana, it should still be answered affirmatively. It should be interpreted broadly so that the area being

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226 *See supra* notes 120–23 and accompanying text. There is also the potential for prosecution for tax evasion on other grounds. Persons or businesses that are subject to a legal marijuana drug tax must report it as income on their federal income tax return. This provides direct evidence to the federal government of a violation of federal law. If a person were to fail to report the income on their federal income tax return so as to not admit to violating federal law, but still reported it to the state, there would be an income disparity and the potential for a tax evasion prosecution.

227 This is not necessarily a new arrangement of the *Marchetti* test, but rather a clarification in light of some scholarly confusion. *See supra* note 183 and accompanying text. It is consistent with how state courts have interpreted the test. *See supra* note 184 and accompanying text.

228 *See supra* note 140 and accompanying text.

229 *See supra* note 141 and accompanying text.

230 *See supra* note 143 and accompanying text.

231 *See, e.g.*, Briney v. State Dep't of Revenue, 594 So. 2d 120, 122 (Ala. Civ. App. 1991) ("[D]rug dealing is an area permeated with numerous criminal statutes, and those who engage in it are criminals."); *see also* Iijima, *supra* note 52, at 123 & n.100 ("[I]t is unquestionable that the area of illegal drug activities is 'permeated with criminal statutes' and that the taxes are aimed at persons 'inherently suspect of criminal activities.'" (citing *Briney*, 594 So. 2d at 122); State v. Durrant, 769 P.2d 1174, 1181 (Kan. 1989); State v. Davis, 787 P.2d 517, 522 (Utah App. 1990); State v. Roberts, 384 N.W.2d 688, 691 (S.D. 1986); Leary v. United States, 395 U.S. 6, 16 n.14 (1969))).

regulated is not thought of as *legal* marijuana, but just marijuana.[232] Such a broad interpretation would allow a court to take into account the national criminalization of marijuana that still exists, and not simply what is happening in that specific jurisdiction. Furthermore, state statutes that legalize marijuana do not do so entirely. In those jurisdictions that have legalized marijuana, statutes still exist that criminalize higher levels of drug use, sales, or manufacturing. Therefore, the area as a whole is still one that is permeated with criminal statutes.

A court generally must look to the text of the statute to answer the second factor, as it will state that such information either may or may not be provided to law enforcement officials. For example, the wagering statute at issue in *Marchetti* specifically required that lists of wagering taxpayers be provided to law enforcement officials upon request.[233] Closely related to the second factor[234] is the issue of confidentiality provisions. If a statute provides for confidentiality of the information a person is supposed to provide, and that such information may not be used against them in a criminal proceeding, then the taxpayer might not be able to reasonably believe that information he provided would be available to law enforcement officials.[235] Inclusion of confidentiality provisions in a drug tax statute is highly indicative of finding the statute constitutional.[236] Therefore, the second factor is extremely important to the analysis.

Like the second factor, the third factor—whether the information would prove a significant link in a chain of evidence—strongly depends on the construction and wording of the statute. For example, the statute

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232 This would be consistent with how the Court in *Leary* interpreted the first factor. There, the Court made no distinction between illegal marijuana and marijuana in general, instead just referring to the area being regulated as marijuana. *See Leary*, 395 U.S. 6 *passim* (referring generally to "marihuana"). The same should be done here. No distinction should be made between "legal marijuana" and "marijuana," with the latter being considered the area that is being regulated.

233 *See id.* at 13 (discussing Marchetti v. United States, 390 U.S. 39 (1968)).

234 And to the third factor. The second and third factors are related in this regard. *See infra* note 238 and accompanying text.

235 *See, e.g.*, State v. Garza, 496 N.W.2d 448, 453 (Neb. 1993).

236 *See id.* at 453–54. On the other hand, drug tax statutes that do not limit the sharing of information to law enforcement officials is probative of finding the statute to be unconstitutional. *See id.* (discussing drug tax statutes that have been held constitutional or unconstitutional based on the inclusion of confidentiality provisions). Thus, confidentiality and immunity provisions are potentially the distinguishing factor between otherwise identical drug tax statutes, which might point to why some have been found constitutional and others not. *See* White v. State, 900 P.2d 982, 989–90 (Okla. Crim. App. 1995). Without such a provision, the second and third *Marchetti* factors are likely to sway in favor of unconstitutionality. *See id.* at 990–91.

may require the taxpayer to affix his signature to a form.[237] Or it may provide that no information could be used against a defendant unless independently obtained.[238] Some other factors courts may consider are whether the statute was intended to create such a link in a chain of evidence, and whether it forbids or provides penalties for using such information to help establish guilt.[239]

Finally, courts should now take into consideration executive non-enforcement of federal marijuana laws and prosecutorial discretion.[240] In other words, courts should address the actual likelihood of prosecution. Since the overall question that is trying to be answered is whether there is a substantial and real risk of incrimination, it only makes sense to question whether a taxpayer has any practical chance of being prosecuted and incriminated. If the chance is illusory, then the Fifth Amendment's privilege should not apply.[241] Consider a person who receives a grant of immunity in exchange for his testimony. Such person may not then assert the privilege against self-incrimination and refuse to testify.[242] The Fifth Amendment does not apply because it does not need to—its core principle is preserved by the grant of immunity.[243] Such a witness has an illusory chance of being prosecuted, and thus the privilege does not apply.[244] The same should hold true for a person who has no actual chance of prosecution. The only difference between that scenario and an additional grant of immunity is that the person *knows* he or she will not be prosecuted where there is a grant of immunity.

Courts applying this new factor could come down on one of two sides: non-enforcement of the law does not reduce the real and substantial risk of incrimination, or that it does. If non-enforcement of the law can be relied upon by a person to the same extent as, for

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237 *See* Fla. Dep't of Revenue v. Herre, 634 So. 2d 618, 620 (Fla. 1994) ("The taxpayer's signature on the form, which serves as an admission that the taxpayer has participated in criminal activity, provides a link in the chain of incriminating evidence against him.").

238 *See, e.g.*, ALA. CODE § 40-17A-13(a) (2011) ("[N]either the commissioner nor a public employee may reveal facts contained in a report or return . . . , nor can any information contained in such a report or return be used against the dealer in any criminal proceeding . . . , unless such information is independently obtained.").

239 *See* Iijima, *supra* note 52, at 123.

240 This factor could theoretically also be applied to drug tax statutes of illegal marijuana, but it is more relevant in this context in light of non-enforcement of federal marijuana laws and states' legalization of marijuana.

241 This is especially important because the "central standard" solidified by *Marchetti* was "whether the claimant is confronted by substantial and 'real,' and *not merely trifling or imaginary*, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53 (1968) (emphasis added). "[I]t is not mere time to which the law must look, but the *substantiality* of the risks of incrimination." *Id.* at 54 (emphasis added).

242 *See* Kastigar v. United States, 406 U.S. 441, 453 (1972).

243 *See* Chavez v. Martinez, 538 U.S. 760, 770–71 (2003).

244 *See id.*

example, a grant of immunity, then there would be no risk of prosecution and thus no risk of self-incrimination. But enforcement of criminal laws is within the discretion of each prosecutor's office.[245] Furthermore, people cannot rely on patterns of non-enforcement in making, or failing to make, incriminating statements.[246] As such decisions are subject to change on a whim, this Note argues that courts should generally apply a strong presumption in favor of finding that non-enforcement does not reduce the real and substantial risk of self-incrimination. A more specific discussion of why this should be the case as it relates to legalized marijuana and the CSA follows.

1. Executive Non-Enforcement of the Controlled Substances Act Does Not Reduce the Real and Substantial Risk

Prosecutorial discretion and executive non-enforcement of laws is the prerogative of the current executive in charge,[247] but it raises a host of issues. All federal executive power is vested in the President of the

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245 *See* United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). This discretion is broad when it comes to deciding whether or not to prosecute, *see* United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965) (holding U.S. Attorney not required to prosecute even after grand jury indictment); FED. R. CRIM. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint."), and may come from the constitutional idea of separation of powers. *Cox*, 342 F.2d at 171 ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."). One of the few restraints is that choosing whom to prosecute and what laws to enforce may not be done selectively based on unjustifiable, arbitrary standards such as race and religion. *See Batchelder*, 442 U.S. at 125 & n.9. No such arbitrary standard appears to come into play here with non-enforcement of the CSA. One other potential restraint is that the prosecutor's duty in a criminal case is not to win, but to see that "justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); *see also* United States v. Modica, 663 F.2d 1173, 1178 (2d Cir. 1981) (noting a prosecutor is "duty-bound to see that justice is done"); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."). *But see* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety . . . by exercising discretion to not pursue criminal charges in appropriate circumstances.").

246 This reliance factor is important, and reminiscent of the second factor of the test. If a person cannot reasonably suppose that information he supplies will not be available to prosecuting authorities, it weighs on finding against the second factor, and thus finding the statute unconstitutional. *See supra* notes 235–36. Likewise, if a person cannot reasonably suppose or rely on a promise that he will not be prosecuted, he may reasonably believe that the possibility of such prosecution remains substantial and real.

247 This would be the President of the United States, or someone with delegated authority, such as the Attorney General of the United States.

United States,[248] and as part of these constitutional duties, he must faithfully execute the laws.[249] This should, of course, include the federal law on marijuana, which under the CSA is a Schedule I drug and thus an illegal substance.[250] But in a series of memoranda,[251] the Obama[252] administration has chosen not to enforce the law. This non-enforcement policy, however, does not reduce the real and substantial risk of self-incrimination by a person subject to a state drug tax statute of legalized marijuana. There are two main reasons for this: the non-enforcement policy does not affect the legal status of marijuana under federal law, and it does not prevent the enforcement of the federal law or stop potential prosecutions.

The non-enforcement memoranda do not legalize marijuana at the federal level. There is nothing in the documents that suggests such an idea, and they even recognize that marijuana is still illegal.[253] The memoranda simply state that federal resources are better spent elsewhere than prosecuting medical marijuana users or persons in compliance with state law.[254] But until marijuana is declassified as a Schedule I drug under the CSA, its legal status will remain the same, and any person breaking federal law faces potential federal prosecution. The non-enforcement policy does not authorize such declassification,

248 U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

249 U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . ."). The President also takes an oath to do so upon his swearing in. *See* U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will *faithfully execute the Office of President of the United States*, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" (emphasis added)).

250 *See supra* note 40 and accompanying text; discussion *supra* Parts I.A.1 (regarding marijuana as a Schedule I drug), and II.B.1 (discussing federal preemption).

251 *See* Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys, U.S. Dep't of Justice, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009) [hereinafter Ogden Memorandum], http://blogs.justice.gov/main/archives/192; Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys, U.S. Dep't of Justice, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) [hereinafter Cole Medical Marijuana Memorandum], http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf; Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys, U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Legalized Marijuana Memorandum], http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

252 Barack Obama, 44th President of the United States. *President Barack Obama*, WHITE HOUSE, http://www.whitehouse.gov/administration/president-obama (last visited Sept. 4, 2015).

253 *See* sources cited *supra* note 251.

254 *See* sources cited *supra* note 251.

although the Attorney General of the United States does have the power to make such a determination.[255]

More importantly, by its own admission, the Department of Justice has stated that it may still enforce the federal law whenever it chooses to, and that the non-enforcement memoranda are only guidelines for prosecutorial discretion. In the first memorandum addressing this new non-enforcement policy,[256] former Deputy Attorney General David Ogden wrote to U.S. Attorneys, stating that enforcement of the CSA is still a priority, but that federal resources should not be spent on the prosecution of individuals who are in compliance with state medical marijuana laws.[257] However, it was specifically noted that such guidance does not prevent an absolute enforcement of the federal law.[258] This first memorandum was followed up with another,[259] shortly after Colorado and Washington's legalization of small amounts of recreational marijuana.[260] This time, the Department of Justice stated that enforcing federal marijuana law under the CSA should not be undertaken against those who are in compliance with state law, as long as doing so does not conflict with one of the priorities of the Department.[261] But again, it was noted that the memorandum was only a guide and did not affect the Department's authority to enforce federal law.[262] The memorandum also stated that it was not to be relied upon in creating a legal defense to a violation of federal law.[263] Such a policy of non-enforcement does not

255 *See* 21 U.S.C. § 811(a)(2) (2012); *see also supra* note 45.

256 President Obama's predecessor, President George W. Bush, did not have such a policy of non-enforcement of the federal marijuana laws. *See* Vijay Sekhon, Comment, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision to Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 554 (2010) (noting that President Bush actually increased the Executive Branch's investigation and prosecution of medical marijuana from late 2005 through early 2009).

257 *See* Ogden Memorandum, *supra* note 251.

258 *Id.*

259 *See* Cole Legalized Marijuana Memorandum, *supra* note 251.

260 *See supra* note 61 and accompanying text.

261 *See* Cole Legalized Marijuana Memorandum, *supra* note 251, at 2. The memorandum lists eight priorities: (1) "[p]reventing the distribution of marijuana to minors;" (2) "[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;" (3) "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states;" (4) "[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;" (5) "[p]reventing violence and the use of firearms in the cultivation and distribution of marijuana;" (6) "[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;" (7) "[p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;" and (8) "[p]reventing marijuana possession or use on federal property." *Id.* at 1–2.

262 *Id.* at 4.

263 *Id.*

mean that, with certainty, persons who are in compliance with state law will never be prosecuted under the CSA.[264] They could be.[265]

As further support as to why the non-enforcement memoranda do not prevent the real and substantial risk of self-incrimination, such memoranda do not have the force of law.[266] A court deciding whether the federal government may prosecute someone for violating federal drug laws would most likely agree, finding that such memoranda do not bind the court.[267] To hold otherwise would interfere with a prosecutor's

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264 *Id.* (noting that "this memorandum is intended solely as a guide" and "does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law").

265 *See* Kamin, *supra* note 68, at 1121 ("Those using, selling, or manufacturing marijuana under state law are not subject to criminal prosecution simply because federal prosecutors have chosen not to prosecute them.").

266 At least two different federal district courts have reached this conclusion with regard to the medical marijuana memoranda. *See* United States v. Hicks, 722 F. Supp. 2d 829, 833–34 (E.D. Mich. 2010) (concluding that the Department of Justice's stance on medical-marijuana prosecution does not prevent the government from actually prosecuting); United States v. Stacy, 696 F. Supp. 2d 1141, 1148–49 (S.D. Cal. 2010) (finding that a general policy against prosecuting marijuana dispensaries or a memorandum setting forth the Justice Department's internal guidelines were not official policies to which the force of law attached). There is no reason to think that such conclusions would not also relate to the memoranda on recreational-use marijuana. Alternatively, such memoranda may be likened to an executive agency's manual. The Supreme Court has held that such information and methods contained therein do not have the force of law. *See* United States v. Caceres, 440 U.S. 741 (1979) (holding that evidence obtained in violation of an Internal Revenue Service manual may be admitted at trial). Here, should the Department of Justice prosecute for violation of federal marijuana laws, they would be violating their own internal memoranda, but nothing is preventing them from doing so. *See id.*

267 *See* sources cited *supra* note 266. The author is not aware of any explicit examples of the federal government prosecuting someone for violation of the CSA for small levels of possession or sale of marijuana, notwithstanding compliance with state drug laws. However, there have been several recent examples of the federal government prosecuting persons for violations of federal drug laws that go beyond simple possession or sale. In one case in Washington, the federal government prosecuted five persons for manufacturing a large amount of marijuana plants in violation of the CSA. *See* Superseding Indictment, United States v. Firestack-Harvey, No. 13–CR–00024–FVS (E.D. Wash. May 6, 2014), 2014 WL 3724851. These types of prosecutions, some argue, violate the non-enforcement policies because the defendants were in compliance with state law. *See* Nicholas K. Geranios & Gene Johnson, *Feds Seek Prison for Rural Washington Pot Growers*, DENVER POST (May 12, 2014, 9:53 AM), http://www.denverpost.com/marijuana/ci_25741775?source=rss ("Medical marijuana advocates have cried foul, arguing the prosecution violates Department of Justice policies announced . . . last year that nonviolent, small-time drug offenders shouldn't face lengthy prison sentences."). The Washington prosecution may be an exception, however, since guns were also found on the premises, and the number of marijuana plants was exceedingly large. *See id.* In another case, this one from Colorado, the federal government seized the property of marijuana businesses using forfeiture. *See* Kirk Mitchell, *Documents Reveal New Details of Feds' Raid on Colorado Pot Operations*, DENVER POST (October 1, 2014, 3:08 PM), http://www.denverpost.com/news/ci_26643395/documents-reveal-new-details-feds-raid-colorado-pot. This situation, like the one in Washington, may also be distinguished, however, since the businesses were apparently targeted for money laundering and connections to international drug cartels. *See id.*

wide discretion,[268] especially in light of the fact that these memoranda are not directed at any one person.[269] All these factors show that executive non-enforcement does not reduce the real and substantial risk of self-incrimination by admitting, through the payment of taxes, to the sale or use of marijuana that is legal under state law.

2. Under Narrow Circumstances May Non-Enforcement Lessen the Real and Substantial Risk

To find that a policy of non-enforcement of a criminal law negates the real and substantial risk of self-incrimination to the point that the privilege cannot be applied, an official policy of non-enforcement would need to exist, not merely guidelines. More so, however, it would have to have the force of law, enforceable in the courts by a defendant against prosecution.[270] One possibility is that such a statement would have to be made directly to a specific person.[271] For reasons already shown, this is an exceedingly high burden unlikely to be reached.

A related issue is what happens if the government grants a taxpayer immunity against criminal prosecution for providing incriminatory information pursuant to a drug tax statute. The Supreme Court has held that a grant of immunity that is broad enough to encompass the protections of the Fifth Amendment means that the privilege can no longer be asserted.[272] A grant of immunity against criminal prosecution might reduce any real and substantial risk of self-incrimination. Restricting how the information may be used would allow drug tax statutes to remain completely enforceable. This outcome, however, is unlikely for several reasons. First, in both *Grosso* and *Marchetti*, the Court declined to adopt such an approach.[273] Congress had intended, the Court said, that the information provided under the wagering statute in those cases be available to prosecuting authorities, and thus it

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268 *See* sources cited *supra* note 245 and accompanying text.

269 *See* United States v. Washington, 887 F. Supp. 2d 1077, 1098 (D. Mont. 2012) ("A direct, targeted statement to a discrete person or group of people appears to be required.").

270 This is because several courts have already held the non-enforcement memoranda to not have the force of law, thus not allowing them to be relied upon and enforced in the courts. *See supra* note 266.

271 *See Washington*, 887 F. Supp. 2d at 1098 (stating that "[a] direct, targeted statement to a discrete person or group of people appears to be required" and noting that the non-enforcement memoranda were addressed to government attorneys).

272 *See* Marchetti v. United States, 390 U.S. 39, 58 (1968) ("Nor can it be doubted that the privilege against self-incrimination may not properly be asserted if other protection is granted which 'is so broad as to have the same extent in scope and effect' as the privilege itself." (quoting Counselman v. Hitchcock, 142 U.S. 547, 585 (1892))).

273 *See* Grosso v. United States, 390 U.S. 62, 69 (1968); *Marchetti*, 390 U.S. at 58.

would not make sense to impose a restriction.[274] Second, under the proposal in this Note, such drug tax statutes will continue to be subjected to a constitutional analysis that protects against self-incrimination, already taking into account whatever protections might be afforded by grants of immunity. Finally, such immunity would have to be provided by the federal government, since that is where the only potential for prosecution lies.[275] But the power to grant immunity to persons paying a *state* drug tax statute lies with the state, and states have no authority to grant federal immunity. Such immunity would only be valuable if it came from the federal government.[276]

IV. APPLICATION: COLORADO MARIJUANA TAX STATUTE

To see how this Note's proposal would be applied, an analysis of the law in Colorado[277] would be useful. The law governing legal

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274 *See Marchetti*, 390 U.S. at 58–59. In this sense, one would have to determine the purpose behind the state drug tax statute in question.

275 The CSA actually has a provision in regards to immunities, 21 U.S.C. § 884. This section states:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before a court or grand jury of the United States, involving a violation of this subchapter, and the person presiding over the proceeding communicates to the witness an order issued under this section, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. But no testimony or other information compelled under the order issued under subsection (b) of this section or any information obtained by the exploitation of such testimony or other information, may be used against the witness in any criminal case, including any criminal case brought in a court of a State, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

21 U.S.C. § 884(a) (2012). This is distinguishable for purposes of this Note for two reasons. First, this Note addresses a person's privilege against self-incrimination under a state drug tax statute, not the CSA. Therefore, § 884 does not apply. Section 884 only applies to persons who wish to assert the privilege against providing information that would incriminate them under the CSA *while facing* charges under the CSA. Second, even if that were not true, the language in § 884 suggests that it would not apply to a person asserting the privilege by not submitting taxes in compliance with a state drug tax statute. Such an act would not be before a court proceeding, and even if it were, it would take place in state court and not a "court or grand jury of the United States." *Id.* Although § 884 is the immunity provision specific to the CSA, it is hardly ever invoked. *See* Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309, 1319 n.34 (2001). Rather, the Department of Justice relies on the general immunity statute, 18 U.S.C. § 6002. *See id.* Generally speaking, immunity is rarely granted, perhaps due to the difficulties in getting it approved. *See id.*

276 This is because there would be no basis for prosecution under a state law that legalizes marijuana. Grounds for prosecution come only from federal law.

277 An application could have similarly been done for any of the states that currently have a statutory tax of legalized marijuana.

marijuana in Colorado is controlled by the state constitution.[278] Besides making it legal to possess certain amounts of marijuana,[279] the relevant portion of the constitution establishes an excise tax to be levied upon the sale or transfer of marijuana, and directs the state's department of revenue to create guidelines for its taxation.[280] Colorado's statutory code, in turn, sets both a sales tax[281] and an excise tax[282] on retail marijuana. The excise tax presents a more useful application.[283] Under the excise tax, Colorado requires every retail marijuana cultivation facility to keep on hand detailed records regarding manufacturing facilities and retail stores, including names and addresses.[284] It also requires each retail store to keep on hand records showing that its marijuana was purchased according to prescribed methods.[285] Notably, the statutory scheme requires that each business provide a copy of these records to the state, if requested.[286] In addition to keeping records, each marijuana facility must file a tax return with the state on a monthly basis.[287] Failure to do so is a felony.[288]

With the statutory structure laid out, the *Marchetti* test, as adopted in this Note, may be applied to determine if someone complying with the statute subjects himself to a real and substantial risk of self-incrimination.[289] As previously shown, the first factor should be interpreted broadly as to encompass the entire marijuana field and not just legalized marijuana.[290] Therefore, taking into account that Colorado still criminalizes marijuana outside of small amounts for personal possession, the tax statutes do exist in an area permeated with criminal statutes.[291] As to the second factor—whether information obtained is readily available to law enforcement officials—the statute requires that marijuana businesses provide their records to the state,[292] along with

278 COLO. CONST. art. XVIII, § 16.

279 See Part I.A.2 for more information regarding the current law in Colorado.

280 COLO. CONST. art. XVIII, § 16(5)(d).

281 COLO. REV. STAT. § 39-28.8-202 (2013).

282 *Id.* § 39-28.8-302.

283 This is because the sales tax is less specific with reporting requirements.

284 COLO. REV. STAT. § 39-28.8-303.

285 *Id.*

286 *Id.*

287 *Id.* § 39-28.8-304. This form is reminiscent of the one in *Grosso v. United States*, 390 U.S. 62 (1968), which was created specifically for those in the wagering business, and was important to the Court in finding a real and substantial risk of self-incrimination. *See supra* notes 157–58 and accompanying text.

288 COLO. REV. STAT. § 39-28.8-306.

289 *See* discussion *supra* Part III.B.

290 *See supra* note 196 and accompanying text.

291 For example, Colorado criminalizes sale of marijuana to minors. *See* COLO. REV. STAT. § 18-18-406.

292 *See id.* § 39-28.8-303.

monthly tax returns detailing their sales.[293] The state, in turn, could provide these documents to federal law enforcement officials or be subject to a subpoena, and there are no confidentiality provisions in the statute that might protect people who are subject to the tax. As such, the second prong lends support to finding the statute impermissible. Once obtained by the state, the tax information is sure to provide a link to help establish guilt, thus satisfying the third prong of the test. Finally, as already shown, federal non-enforcement of the CSA does not eliminate the possibility of prosecution.[294] Taking all the above into account, the Colorado excise tax statute presents a real and substantial risk of self-incrimination for persons who comply with it.

CONCLUSION

While states are experimenting with legalization of marijuana, the federal government still classifies the drug as an unlawful Schedule I substance under the CSA.[295] This provides a problem for persons subjected to new state drug tax statutes of legalized marijuana: complying with the statute potentially means providing incriminating information under federal law. To resolve this, courts need to apply a self-incrimination analysis to these new state drug tax statutes. This should be done by applying the test first set forth in *Marchetti*,[296] which asks whether complying with the statute presents a real and substantial risk of self-incrimination. This question is informed by four factors, including this Note's proposal to take into account executive non-enforcement of the federal law. At present, that factor should be found to not reduce any real and substantial risk of self-incrimination, since non-enforcement policies do not have the force of law and cannot be relied upon to prevent prosecution. Therefore, courts will have to weigh the other factors, and interpret statutory language, to make an ultimate determination as to the constitutionality of drug tax statutes of legalized marijuana.

293 *See supra* note 287 and accompanying text.
294 *See* discussion *supra* Part III.B.1.
295 *See* discussion *supra* Part I.A.
296 Marchetti v. United States, 390 U.S. 39 (1968).