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Leary v. United States: Marijuana Tax Act - Self-Incrimination

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the specific crime committed. Furthermore, requiring this procedure leaves unanswered the question of what type of conduct justifies an increased sentence.[48] If the Court held as it did to avoid encroachment on the states' police powers, it did not succeed. The unanswered practical and legal questions which arise from the decision[49] may involve the Court in a review of virtually every case involving increased punishment on retrial and may impose the Court's penological theory on the courts of every state.

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Leary v. United States: Marijuana Tax Act — Self-Incrimination

Marijuana was found in the defendant's car as he attempted to re-enter the United States from Mexico. He was convicted in federal district court for failing to register and pay the transfer tax under the Marijuana Tax Act.[1] The Court of Appeals for the Fifth Circuit affirmed[2] and denied the petition for rehearing.[3] The United States Supreme Court granted certiorari.[4] *Held, reversed*: The order form and transfer tax provisions of the Marijuana Tax Act violate the privilege against self-incrimination as they force the defendant either to violate their requirements or to classify himself as a person inherently suspect of criminal activities. *Leary v. United States*, 395 U.S. 6 (1969).

I. Taxation: Regulatory or Revenue Measure

Congress has often utilized a registration or transfer tax to regulate and discourage undesirable or illegal activities.[5] One such regulatory measure is the Marijuana Tax Act which requires that transferees pay a tax upon all transfers of marijuana[6] and makes it unlawful to obtain marijuana without paying the tax.[7] The Act also requires that persons who can legally deal in marijuana (physicians, researchers, etc.) register with the

[48] Conviction of another crime since the original sentencing proceeding seems to be an acceptable criterion for higher punishment on retrial. Jacques v. State, 53 N.J. 61, 247 A.2d 885 (1968), *cert. denied*, 395 U.S. 985 (1969).

[49] Moon v. State, 250 Md. 468, 243 A.2d 564 (Ct. App. 1968), *cert. granted*, 395 U.S. 975 (1969), may begin to answer the questions. The defendant was convicted of armed robbery and sentenced to twelve years. His conviction was nullified because of a faulty indictment. On retrial he was found guilty of armed robbery and also of larceny and assault with intent to commit murder. He was assessed twenty years for armed robbery and given suspended sentences for larceny and assault with intent to commit murder. The higher sentence was upheld on due process grounds. Among the other questions to be argued will be the retroactivity of *North Carolina v. Pearce*.

[1] 26 U.S.C. §§ 4741(a)(2), 4744(a)(2) (1964).

[2] Leary v. United States, 383 F.2d 851 (5th Cir. 1967).

[3] Leary v. United States, 392 F.2d 220 (5th Cir. 1968).

[4] Leary v. United States, 392 U.S. 903 (1968).

[5] Act of Aug. 2, 1886, ch. 840, 24 Stat. 209 (a tax upon oleomargarine colored to resemble butter); Act. of Dec. 17, 1914, ch. 1, 38 Stat. 785 (the Harrison Narcotic Drug Act); Act of Feb. 24, 1919, ch. 18, § 1200, 40 Stat. 1138 (Child Labor Tax Law); Act of June 26, 1934, ch. 757, 48 Stat. 1236 (National Firearms Act).

[6] 26 U.S.C. § 4741 (1964).

[7] 26 U.S.C. § 4744 (1964).

Internal Revenue Service. Both registered and nonregistered transferees are required to obtain an order form on the occasion of each transfer of marijuana.

Challenges to the congressional power to regulate conduct through taxation have met with little success. The United States Supreme Court has repeatedly expressed a reluctance to question congressional power in this area.[8] An example of the Court's approval of obviously discriminatory tax measures was demonstrated by *McCray v. United States*.[9] *McCray* involved a federal tax on artificially colored oleomargarine, which was attacked as being a violation of the due process clause of the United States Constitution and an invasion of the police power reserved to the states. The Court rejected this argument and stated that its powers did not extend to avoiding a congressional exertion of the taxing power, regardless of whether the action was thought by the Court to be an oppressive use of the delegated powers of Congress.[10]

In a number of subsequent cases the Court followed basically the same rationale in refusing to question the motives of Congress so long as the tax measure produced revenue.[11] The highwater mark of this line of cases was reached in *Nigro v. United States*,[12] in which the Court again rejected the police power argument because a raise in the rate of the Anti-Narcotic Act[13] made it purely a revenue measure.

> It may be true that the provision of the Act . . . has the incidental effect of making it more difficult for the drug to reach those who have a normal and legitimate use for it . . . . But this effect . . . should not render the order form provisions void as an infringement on the state police power where these provisions are genuinely calculated to sustain the revenue features.[14]

II. Taxation and Self-Incrimination

As attempts to assert the police power argument failed, an argument based upon self-incrimination was proffered. In *United States v. Sullivan*[15] the defendant was convicted of refusing to file an income tax return on illegally obtained income. The Court rejected a fifth amendment argument and held that "[I]t would be an extreme if not an extravagant application of the 5th Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."[16] The Court did not find it necessary to investigate the possibilities of the tax information being used against the defendant in a subsequent criminal prosecution.

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[8] Sonzinsky v. United States, 300 U.S. 506 (1937); Alston v. United States, 274 U.S. 289 (1927); Bailey v. Drexel Furniture, 259 U.S. 20 (1922); United States v. Doremus, 249 U.S. 86 (1919).

[9] 195 U.S. 27 (1904).

[10] *Id.* at 63-64.

[11] Sonzinsky v. United States, 300 U.S. 506 (1937); Alston v. United States, 274 U.S. 289 (1927); United States v. Doremus, 249 U.S. 86 (1919).

[12] 276 U.S. 332 (1928).

[13] This Act was the Revenue Act of 1914, 38 Stat. 785 (1913-1915).

[14] Nigro v. United States, 276 U.S. 332, 353-54 (1928).

[15] 274 U.S. 259 (1927).

[16] *Id.* at 263-64.

The constitutionality of the Marijuana Tax Act was upheld in *United States v. Sanchez*.[17] However, *Sanchez* did not involve a criminal prosecution, and the fifth amendment question was not raised. The Government was seeking to recover taxes due under the Act in a civil suit. Thus, the Court found that since liability for the tax does not depend on criminal conduct, it is properly termed a civil rather than a criminal sanction.

In *United States v. Kahriger*[18] the provisions of the Revenue Act of 1951 requiring registration of those engaged in the business of accepting wagers were attacked as being violative of the fifth amendment. Noting that the defendant's willful failure to register *preceded* the gambling, the Court held that the self-incrimination privilege was inapplicable because the privilege "has relation only to past acts, not to future acts that may or may not be committed."[19] This rationale was further developed in *Lewis v. United States*.[20] There, the defendant was prosecuted for failure to pay the wagering tax. The Court, in considering the self-incrimination issue, again emphasized that the defendant was not required to disclose information as to past acts and that payment of the registration fee must be made *before* engaging in gambling. Thus, registration and payment of the fee compelled no self-incrimination at the time of registration. The Court held that the Act only forced the defendant to make a threshold decision to either forego wagering or pay the tax; he may be forced to give up gambling, but the Court pointed out that there is no constitutional right to gamble.[21] The latter argument was used by at least one district court in upholding the Marijuana Tax Act.[22]

The Court abandoned this line of reasoning in 1968 and emphasized the privilege against self-incrimination in three companion cases. *Marchetti v. United States*[23] held that a conviction for failure to pay an occupational tax for engaging in the business of accepting wagers[24] violated the defendant's privilege against self-incrimination. *Grosso v. United States*[25] extended *Marchetti* and held that the excise tax[26] itself imposed on wagering was also unconstitutional. In *Haynes v. United States*[27] the Court struck down the registration requirements for certain firearms and the crime of possession of unregistered firearms.[28] All three decisions were based on the self-incrimination argument, and *Marchetti* overruled *Kahriger* and *Lewis*: "The central standard for the privilege's application had been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination . . . . This

[17] 340 U.S. 42 (1950).
[18] 345 U.S. 22 (1953).
[19] United States v. Kahriger, 345 U.S. 22, 32 (1953).
[20] 348 U.S. 419 (1955).
[21] Lewis v. United States, 348 U.S. 419, 425 (1955).
[22] Arrizon v. United States, 224 F. Supp. 26, 27 (S.D. Cal. 1963).
[23] 390 U.S. 39 (1968).
[24] 26 U.S.C. §§ 4411, 4412 (1964).
[25] 390 U.S. 62 (1968).
[26] 26 U.S.C. § 4401 (1964).
[27] 390 U.S. 85 (1968).
[28] 26 U.S.C. §§ 5841, 5851 (1964).

principle does not permit the rigid chronological distinction adopted in *Kahriger* and *Lewis*."[29] The Court emphasized the danger of the categorization of an individual as a participant in a wrongful activity as far as his privilege against self-incrimination was concerned. "They are unmistakably persons 'inherently suspect of criminal activities'."[30] This meant that the individuals who were required to register were forced to identify themselves as criminals or as individuals likely to participate in criminal activities. Thus, the registration requirements were self-incriminatory as they provided a "link in a chain" of evidence which facilitated the categorization that could tend to establish guilt.[31] The Court no longer considered this protection from the position of an individual being allowed to violate laws, but in relation to the choice of either violating a statutory tax or exposing himself to self-incrimination.[32]

Chief Justice Warren predicted ultimate blanket protection at the expense of federal regulation. In dissenting to *Marchetti* and *Haynes*, he noted that special registrations of narcotics, marijuana, white phosphorous matches, distilleries, and firearms, among others, were made vulnerable to attack by these decisions.[33]

III. LEARY V. UNITED STATES

In *Leary v. United States*[34] the United States Supreme Court followed the reasoning of *Marchetti, Grosso*, and *Haynes* and held the Marijuana Tax Act to be unconstitutional.[35] The requirements that an individual register and pay a tax upon the transfers of marijuana were held to be violations of the individual's right against self-incrimination.

The basic controversy in *Leary* centered upon the applicability of *Marchetti, Grosso*, and *Haynes*. The Government attempted to distinguish the situation established by the Marijuana Tax Act from the measures voided in these cases, and argued there was no real danger of self-

[29] Marchetti v. United States, 390 U.S. 39, 53 (1968).

[30] Haynes v. United States, 390 U.S. 85, 96 (1968).

[31] Marchetti v. United States, 390 U.S. 39, 48 (1968): "[H]e was required on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt."

[32] *Id.*

[33] Grosso v. United States, 390 U.S. 62, 83 (1968). *See also id.* at 84: "The implications of the Court's decisions today also extend beyond the tax statutes. For example, the statute requiring narcotics addicts and violators to register whenever they enter or leave the country, . . . can now be expected to come under attack." For an application of the *Marchetti* reasoning to a state statute requiring an automobile driver who is involved in an accident to furnish his identity and other information to the other party, see Byers v. Justice Court, 80 Cal. Rptr. 553 (Cal. 1969).

[34] 395 U.S. 6 (1969).

[35] A lower court had earlier applied the principles to the same situation of possession of marijuana. United States v. Covington, 282 F. Supp. 886, 888-89 (S.D. Ohio 1968), *aff'd*, 395 U.S. 57 (1969):

> A reading of the statutory tax scheme presently in question discloses that it, like those previously declared 'unconstitutional,' raises more than merely imaginary hazards of self-incrimination. The hazards here are likewise real, appreciable and substantial, and the statutory requirements, with many exclusions, are primarily directed at those who are inherently suspect of criminal activities. Again, as was the case of persons who complied with the statutes challenged in *Marchetti, Grosso*, and *Haynes*, those who pay the tax imposed by § 4741(a) are subject to having their names published in a list made available to interested prosecuting authorities by virtue of § 6107.

incrimination, as the Act was not aimed at the group protected by *Marchetti,* but it taxed a non-criminal group—those who obtained and used marijuana for legal purposes. The Government emphasized the congressional power to place preconditions on the sale or purchase of a regulated commodity.[36] It was claimed that if the individual was not a member of the non-criminal group, he could not obtain an order form. His registration form would be returned and no further action would be taken. The Government argued on the basis of *Sanchez* that the individual had a choice of either registering or abstaining. Thus the Act did not compel self-incrimination. Ineligibility to pay a tax does not excuse an illegal act.[37]

The Court followed *Marchetti, Grosso,* and *Haynes* to the extent claimed by the defendant and predicted by Chief Justice Warren in his dissent to *Marchetti* and *Haynes* and held that the Marijuana Tax Act did subject an individual to a great risk of self-incrimination. The registration requirement gave notice that the registrant had a serious interest in obtaining marijuana. The Court felt that such notice was sufficient to incriminate the individual in a subsequent criminal prosecution.[38] The purpose of the statute was the "bringing to light transgressions of the marijuana laws,"[39] and the defendant was required to identify himself as a member of a " 'selective group inherently suspect of criminal activities.' "[40]

In holding that the rejected registration form could incriminate an individual, the Court apparently is concerned with two possibilities of self-incrimination. However, there seems to be nothing incriminating about telling one he cannot legally do something, as is the case under the Marijuana Tax Act when registration is refused. The only option left for the individual is to refrain or disobey the law. The criminal classification theory seems to be the second possibility. The fact that an individual has alerted a governmental agency that he desires to obtain marijuana is self-incriminatory only because the agency would imply that he was already a user, and be aware of him as a potential suspect. The only incriminating aspect of that implication would be if he were found with marijuana he possessed before applying; anything obtained after his rejection would be his own choice. Thus, the Court seems to be relying heavily upon the "inherently suspect" doctrine emphasized in *Marchetti.*[41]

IV. Conclusion

Leary v. United States seems to be significant as it cuts deeply into the area of governmental regulation of individual conduct. Considered along with *Marchetti, Haynes,* and *Grosso, Leary* may mean the federal restric-

[36] United States v. Wong Sing, 260 U.S. 18, 21 (1922).
[37] Webb v. United States, 249 U.S. 96, 99 (1919).
[38] Leary v. United States, 395 U.S. 6, 18 (1969).
[39] *Id.* at 27.
[40] *Id.* at 18.
[41] For lower court application of *Leary* see: Becton v. United States, 412 F.2d 1005 (8th Cir. 1969); Miller v. United States, 412 F.2d 1008 (8th Cir. 1969); Baker v. United States, 412 F.2d 1010 (8th Cir. 1969).