

COMMENT

THE MARIJUANA TAX AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

The federal government has long imposed a tax upon transfers of marijuana.¹ With few exceptions,² any person wishing to obtain the plant must procure from the Treasury Department, fill out, and file an order form showing his name and address and those of the proposed vendor.³ Since possession or private sale of marijuana is made criminal in all fifty states,⁴ compliance (or, probably, even at-

¹ INT. REV. CODE OF 1954, §§ 4741-42.

² Only a few types of transfer are exempted from the tax: transfer to a patient from a registered physician or from a dealer pursuant to a written prescription; exportation, if in accordance with the regulations of the country to which the marijuana is exported; transfers to federal and state officials making purchases for the Department of Defense, the Public Health Service, or hospitals or prisons; transfers of seeds to any person registered under § 4753; and transfers from a person registered under § 4753 to a registered miller. *Id.* § 4742(b).

³ *Id.* § 4742(c). In addition, transfer forms will apparently not be provided unless the transferee has registered under § 4753. *See* Treas. Reg. §§ 152.66-69 (1964). In turn, registration under § 4753 will evidently be denied unless the proposed registrant can show that, "under the laws of the jurisdiction in which he . . . proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought." *Id.* § 152.23; *see id.* § 152.22. Consequently, anyone violating state law, *see* note 4 *infra* and accompanying text, will find it virtually impossible to comply with the provisions of the federal statute.

⁴ The provisions of the Uniform Narcotic Drug Act have been enacted in all the states with the exception of California and Pennsylvania: ALA. CODE tit. 22, §§ 256-258 (1958); ALASKA STAT. §§ 17.10.010-17.10.240 (1962); ARIZ. REV. STAT. ANN. §§ 36-1001 to 36-1024 (1956); ARK. STAT. ANN. §§ 82-1001 to 82-1024 (1947); COLO. REV. STAT. ANN. §§ 48-7-1 to 48-7-8 (1963); CONN. GEN. STAT. REV. §§ 19-244 to 19-268 (1958); DEL. CODE ANN. tit. 16 §§ 4701-4722 (1967); FLA. STAT. ANN. §§ 398.01-398.23 (1963); GA. CODE ANN. §§ 42-801 to 42-811, 42-9917 to 42-9919 (1957); HAWAII REV. LAWS §§ 52-10 to 52-39 (1955); IDAHO CODE ANN. §§ 37-2301 to 37-2323 (1957); ILL. REV. STAT. ch. 38, §§ 22-1 to 22-49 (1964); IND. ANN. STAT. §§ 10-3519 to 10-3550 (1956); IOWA CODE ANN. §§ 204.1-204.25 (1946); KAN. STAT. ANN. §§ 65-2501 to 65-2522 (1963); KY. REV. STAT. §§ 218.010-218.2401 (1962); LA. REV. STAT. ANN. §§ 40:961-40:984 (1951); ME. REV. STAT. ANN. tit. 22, §§ 2361-2380 (1964); MD. ANN. CODE art. 27, §§ 276-306 (1957); MASS. ANN. LAWS ch. 94, §§ 197-217D (1957); MICH. COMP. LAWS §§ 335.51-335.78 (Supp. 1952); MINN. STAT. ANN. §§ 618.01-618.25 (1963); MISS. CODE ANN. §§ 6844-6869 (1942); MO. REV. STAT. §§ 195.010-195.210 (1959); MONT. REV. CODES ANN. §§ 54-101 to 54-128 (1947); NEB. REV. STAT. §§ 28-451 to 28-472.01 (1943); NEV. REV. STAT. §§ 453.010-410 (1963); N.H. REV. STAT. ANN. §§ 318-A:1-26 (1964); N.J. REV. STAT. 24:18-1 to 24:18-49 (1937); N.M. STAT. ANN. §§ 54-7-1 to 54-7-51 (1953); N.Y. PUB. HEALTH LAW §§ 3300-3354 (McKinney 1954); N.C. GEN. STAT. §§ 90-86 to 90-113 (1958); N.D. CENT. CODE §§ 19-03-01 to 19-03-32 (1960); OHIO REV. CODE §§ 3719.01-3719.36, 3719.99 (Anderson 1953); OKLA. STAT. ANN. tit. 63, §§ 466-469A (1963); ORE. REV. STAT. §§ 474.10-474.990 (1967); R.I. GEN. LAWS ANN. §§ 21-28-1 to 21-28-66 (1956); S.C. CODE ANN. §§ 32-1461 to 32-1495 (1962); S.D. CODE §§ 22.1301-22.1309 (1939); TENN. CODE ANN. §§ 52-1301 to 52-1323 (1966); TEX. PEN. CODE ANN. art. 725b (1961); UTAH CODE ANN. §§ 58-13-1 to 58-13a-48 (1953); VT. STAT. ANN. tit. 18, §§ 4141-4163 (1959); VA. CODE ANN. tit. 54, §§ 487-519 (1950); WASH. REV. CODE §§ 69.33.220 to 69.33.960 (1959); W. VA.

tempted compliance⁵) with the federal requirements would typically amount to an admission of an intent to commit a crime under state law: the names and addresses of all prospective vendors and vendees, and of all those persons who have registered with the Treasury Department as a "handler" of marijuana, are readily available to state and local narcotics officials.⁶ Although the federal registration and tax requirements have been sustained in the past against the contention that they violate the fifth amendment's privilege against self-incrimination,⁷ reexamination is warranted in light of recent Supreme Court redefinition of the scope of the privilege.⁸

The registration and tax provisions are enforced by a battery of criminal penalties. Failure to register and pay the transfer tax is punishable both by a prison sentence and a penalty tax of \$100 per ounce.⁹ A prison sentence is also prescribed for failure to pay the occupational tax,¹⁰ for supplying marijuana except pursuant to an order form,¹¹ for obtaining marijuana without having paid the tax,¹² and for transporting or concealing untaxed marijuana.¹³ The statute further provides that mere possession places the burden on the defendant to prove that he has duly registered¹⁴ and that he has complied

CODE ANN. §§ 16-8A-1 to 16-18A-26 (1966); WIS. STAT. ANN. §§ 161.01-25 (1957); WYO. STAT. ANN. tit. 35, §§ 348-371 (1957). Although various modifications and amendments have been made by the individual states, the prohibitory language generally follows that of the Uniform Narcotic Drug Act and makes it unlawful "for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug [which is defined to include marijuana], except as authorized in this act." UNIFORM NARCOTIC DRUG ACT § 2. While California and Pennsylvania have not adopted the Uniform Act, they have adopted substantially similar provisions. See CAL. HEALTH AND SAFETY CODE §§ 11001-11853 (West 1964); PA. STAT. ANN. tit. 35, §§ 780-1 to -31 (1964).

Only one state does not prohibit mere possession. MASS. ANN. LAWS ch. 94, § 198 (1957), outlaws possession only where there is an intent to sell.

⁵ See note 3 *supra*; note 16 *infra*.

⁶ INT. REV. CODE OF 1954, § 4773, makes the names and addresses of registrants and taxpayers available to state narcotics officials on payment of a nominal fee. In addition, "any person" so desiring may obtain a list of the "special taxpayers" under the occupational tax provisions. *Id.* § 4775. See also *id.* § 6701.

⁷ *Browning v. United States*, 366 F.2d 420, 422 (9th Cir. 1966); *Haynes v. United States*, 339 F.2d 30, 32 (5th Cir. 1964), *cert. denied*, 380 U.S. 924 (1965); *Haili v. United States*, 212 F. Supp. 656, 658 (D. Hawaii 1962).

⁸ See *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).

⁹ INT. REV. CODE OF 1954, §§ 4741(a), 7237. The assets of one California couple were reportedly put under a federal tax lien of \$1,622,000 under § 4741. *N.Y. Times*, April 29, 1968, at 61, col. 3.

¹⁰ INT. REV. CODE OF 1954, §§ 4755(a) (1), 7237.

¹¹ *Id.* §§ 4742(a), 7237(a).

¹² *Id.* §§ 4744(a) (1), 7237(a).

¹³ *Id.* § 4744(a) (2). First offenders are subject to prison terms of 2 to 20 years or fines of not more than \$20,000, or both. *Id.* § 7237. The closest that the federal statute comes to the substantive regulation of marijuana is the prohibition of concealment, transportation, or sale of marijuana by anyone knowing that it has been brought into the United States illegally. 21 U.S.C. § 176a (1964).

¹⁴ INT. REV. CODE OF 1954, § 7491.

with the order form requirements.¹⁵

In spite of the practical self-incriminatory aspects of payment of the tax and compliance with the registration requirements, courts have heretofore failed to discern any substantial self-incrimination problem.¹⁶ In the most recent case to address itself to the issue, *Leary v. United States*,¹⁷ the Court of Appeals for the Fifth Circuit summarily rejected the applicability of the fifth amendment to the federal marijuana statute.

The Supreme Court's decision in *Marchetti v. United States*,¹⁸ however, strongly suggests the opposite result. Marchetti was convicted of willful failure to pay the federal occupational tax on gambling and willful failure to register as a person subject to that tax. The Supreme Court reasoned that if compliance with the occupational tax and registration requirement imposed on those accepting wagers would be tantamount to admission of an intent to violate federal and state gambling laws, the fifth amendment was an absolute defense against prosecution for failure to comply, since such information would be readily available to state and federal prosecuting authorities.¹⁹

In so holding, the Court overruled two earlier decisions, which had held the self-incrimination privilege unavailable because the gambling registration requirement and occupational tax concerned only future acts and hence involved merely speculative incrimination.²⁰

¹⁵ *Id.* Possession also raises the presumption that the marijuana is of illegal foreign origin. 21 U.S.C. § 176a (1964); see note 13 *supra*. These presumptions have been generally upheld, e.g., *Claypole v. United States*, 280 F.2d 768 (9th Cir. 1960); *United States v. Oropeza*, 275 F.2d 558 (7th Cir. 1960); *Caudillo v. United States*, 253 F.2d 513 (9th Cir. 1958), but one case recently held the presumption invalid. *United States v. Adams*, 37 U.S.L.W. 2303 (S.D.N.Y. Nov. 19, 1968).

¹⁶ See cases cited note 7 *supra*. To a certain extent this may not be surprising, since the refusal of the Treasury Department to allow registration without a demonstration on the part of the would-be registrant that his proposed activity is legal, see note 3 *supra*, would make actual self-incrimination unlikely, although it seems probable that the names of persons attempting to register would be turned over to state narcotics officials. Cf. *Treas. Reg. § 152.22* (1964), requiring investigation of would-be registrants under the occupational tax provisions by the narcotics district supervisor. The result of these various provisions, however, is that the federal statute operates to make criminal the failure to perform an act that the regulations will usually not allow to be performed. Stated differently, the effect of the statute and the regulation is to make it a federal offense for a person to engage in activity prohibited by state law.

¹⁷ 383 F.2d 851 (5th Cir. 1967), rehearing denied, 392 F.2d 220, cert. granted, 392 U.S. 903 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term).

¹⁸ 390 U.S. 39 (1968). *Marchetti* was handed down along with two other decisions: *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968). *Grosso* also dealt with self-incrimination under the federal wagering statute. *Haynes* found a federal firearms registration statute violated the same constitutional privilege, since the act both outlawed certain types of firearms and required their registration. See generally, Note, 5 SAN DIEGO L. REV. 390 (1968).

¹⁹ 390 U.S. at 48. The statute required those involved in gambling activities to pay an annual occupational tax on the acceptance of wagers and a 10% excise tax on the gross amount of all wages accepted. INT. REV. CODE OF 1954, §§ 4401, 4411. Each person liable to the tax was required to register his name and address with the Internal Revenue Department. *Id.* § 4412. The information thus obtained is made available to state prosecutors by a section also applicable to marijuana tax information. *Id.* § 6107.

²⁰ *Lewis v. United States*, 348 U.S. 419 (1955); *United States v. Kahrigier*, 345 U.S. 22 (1953).

Marchetti, however, found the potential for incrimination neither speculative nor insubstantial. Compliance with the gambling registration requirement and occupational tax would significantly increase the possibility that any past offenses would be discovered by state prosecutors. Furthermore, compliance would tend to indicate an intent to violate state law, thus possibly exposing registrants to subsequent prosecutions for conspiracy. In addition, the Court saw no reason not to apply the privilege to future acts when the danger of incrimination is substantial.²¹ The danger of self-incrimination as to past, present, or future acts is just as substantial under the marijuana tax, or perhaps even more so: the marijuana registration requires more details of a particular highly suspect transaction.²²

The Court in *Marchetti* also rejected a theory, embraced in an earlier decision,²³ that even if the required disclosures are self-incriminatory, the would-be gambler can avoid that aspect by ceasing or never beginning his illegal activities.²⁴ Since *Marchetti* stressed that the "privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted,"²⁵ it cannot now be argued that marijuana users or vendors have voluntarily waived their right not to incriminate themselves.

The *Marchetti* Court distinguished another earlier decision, which had held that the privilege was not available as a defense to prosecution for willful failure to file a federal income tax return. In *United States v. Sullivan*,²⁶ the defendant had raised the privilege, asserting that the information required by the tax return would have revealed his violation of the National Prohibition Act. It was conceded that there might have been questions within the return which violated the defendant's privilege. However, the Court concluded, the vast majority of questions could have been answered without any fear of self-incrimination. Therefore, although the Court was willing to grant that the defendant might have had a right to object to the privileged questions *within the return*, he could not abstain from filing any return at all.²⁷

Marchetti reasoned that, unlike the general income tax, compliance with any of the gambling registration and tax requirements would have been highly incriminatory.²⁸ The Court was especially concerned with the fact that the federal gambling requirements dealt exclusively in "an area permeated with [federal and state] criminal statutes"²⁹

²¹ 390 U.S. at 52-54.

²² Compare INT. REV. CODE OF 1954, §§ 4403, 4412, 4423, with *id.* §§ 4752(c), 4753, 4754.

²³ *Lewis v. United States*, 348 U.S. 419 (1955).

²⁴ *Id.* at 422-23.

²⁵ 390 U.S. at 51.

²⁶ 274 U.S. 259 (1927).

²⁷ *Id.* at 263-64.

²⁸ 390 U.S. at 48-49.

²⁹ 390 U.S. at 47, quoting *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

and were aimed at a "selective group inherently suspect of criminal activities." ³⁰ Since the wagering statute was aimed at an inherently suspect group, the Court concluded that the fifth amendment was an absolute defense for failure to comply. Significantly, this conclusion was reached despite continued recognition that the gambling tax had a legitimate revenue raising purpose that was the government's "principal interest." ³¹

The same analysis applies with at least equal force to the marijuana tax and registration requirements. Again, possession, use, trafficking in, and transportation of marijuana are outlawed by a myriad of state criminal statutes.³² Although there are in theory legitimate uses for marijuana, such uses are rare in practice. Currently, there is only a small industrial use for the plant,³³ and its medical uses are limited.³⁴ In contrast, the great bulk of marijuana in the United States is consumed privately for pleasure,³⁵ an activity uniformly outlawed by state law. The fact that there are *some* legitimate uses of marijuana does not render the *Marchetti* rationale inapplicable, since there are also some legitimate forms of gambling. Gambling is permitted generally in Nevada,³⁶ and in many other states some forms of charity bingo are permitted. Second, due to the abundance of statutory restrictions related to marijuana, individuals involved with marijuana are at least as "inherently suspect" as those involved with gambling. Furthermore, there is even less of a legitimate federal purpose involved in the marijuana tax. While at least two Supreme Court decisions have indicated that the primary purpose of the gambling tax was to raise revenue,³⁷ the Court in the past has implied that the marijuana tax was primarily intended not to raise revenue, but rather to regulate the use of marijuana.³⁸ The Treasury Department's refusal to allow most persons to register to pay the tax strengthens this argument.³⁹

³⁰ 390 U.S. at 57, quoting *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

³¹ 390 U.S. at 57. Mr. Chief Justice Warren, in dissent, also believed that the gambling statute had a significant revenue raising purpose, pointing out that \$115,000,000 had been raised by the tax within the past "several years." *Id.* at 82. See also *United States v. Calamaro*, 354 U.S. 351, 358 (1957).

³² The statutes are collected in note 4 *supra*.

³³ Not more than 10,000 acres are currently devoted to legal production. This acreage is centered in Kentucky, Illinois, Minnesota, and Wisconsin. *THE MARIHUANA PAPERS* 240 (D. Solomon ed. 1966).

³⁴ Interview with Doctor Gordon French, Assistant Dean, University of Pennsylvania Medical School, October 8, 1968. See also *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 3-4* [hereinafter cited as *TASK FORCE REPORT*]; *THE MARIHUANA PAPERS* xiv, xxi (D. Solomon ed. 1966).

³⁵ *THE MARIHUANA PAPERS* 259 (D. Solomon ed. 1966).

³⁶ *NEV. REV. STAT.* § 463.130 (1963).

³⁷ *Marchetti v. United States*, 390 U.S. 39, 57 (1968); *United States v. Calamaro*, 354 U.S. 351, 358 (1957).

³⁸ See *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

³⁹ Of course, refusal to allow registration does subject the transferor and transferee to an additional tax liability of \$99 per ounce, *INT. REV. CODE OF 1954*, § 4741, but less than the total amount of tax due is actually collected. In fiscal 1962-1966, only \$418,000 was collected. *TASK FORCE REPORT* 13.

The Court also found that the "required records" doctrine of *Shapiro v. United States*⁴⁰ did not apply to gambling tax requirements. In *Shapiro*, the defendant, a wholesaler of fruit and produce, failed to comply with section 202(g) of the Price Control Act,⁴¹ which required that he "keep and preserve for examination 'various records' of the same kind as he has customarily kept" ⁴² The Court in that case denied defendant the fifth amendment privilege and upheld his conviction for violations of the Act.

Marchetti distinguished the tax requirements on three bases. First, the gambling provisions did not require the preservation of records "customarily kept," but simply required gamblers to provide information that was not likely to be related to records an individual would have maintained. Second, the information required by the gambling provisions had no "public aspects"⁴³ as had the records required in *Shapiro*. Most important, the regulatory requirements at issue in *Shapiro* were not vitally concerned with criminal areas of inquiry, as were those in *Marchetti*.⁴⁴ Therefore, the *Marchetti* Court refused application of the required records doctrine. The parallel nature of the marijuana provisions leads to the same conclusion.

One possible method of escape from a fifth amendment self-incrimination problem is to shield the information from federal and state prosecuting authorities, as had been done in *Murphy v. Waterfront Commission*.⁴⁵ In *Marchetti*, however, the Court declined to follow this course, even after admitting that the paramount purpose of the federal gambling statute was to raise revenue. The Court reasoned that the provisions making the gambling registration information available to prosecuting authorities compelled the assumption "that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purpose in adopting the wagering taxes."⁴⁶ Furthermore, the use-restriction would require local prosecutors to establish that their evidence had not been tainted by the coerced registration,⁴⁷ a requirement that might "seriously" hamper local enforcement of antigambling laws.⁴⁸ Again, the marijuana tax seems to present an even stronger case. Considering that the Court has in the past indicated that the paramount purpose of the marijuana tax was not to raise revenue,⁴⁹ it appears that the

⁴⁰ 335 U.S. 1 (1948).

⁴¹ Act of January 30, 1942, ch. 26, § 202(g), 56 Stat. 23.

⁴² 390 U.S. at 55.

⁴³ See *Shapiro v. United States*, 335 U.S. 1, 34 (1948).

⁴⁴ 390 U.S. at 57.

⁴⁵ 378 U.S. 52 (1964).

⁴⁶ 390 U.S. at 59.

⁴⁷ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1958).

⁴⁸ 390 U.S. at 59.

⁴⁹ See notes 38-39 *supra*.

providing of incriminatory information to state prosecuting authorities was not only "a significant element" of legislative intent in passing the marijuana tax but *the most significant* element.⁵⁰

One post-*Marchetti* decision did apply the above reasoning to void a conviction for violating the marijuana tax laws.⁵¹ The defendant had been charged with being a transferee of marijuana without having paid the federal tax. The federal district court found the statutory requirements of the marijuana and gambling taxes operatively identical: both were "directed primarily at those who are inherently suspect of criminal activities" and both required disclosure to federal and state prosecutors of the identities and proposed activities of those who register and pay the taxes.⁵²

Surprisingly, the Fifth Circuit in *Leary v. United States*⁵³ did not likewise appreciate the significance of the intervening decision in *Marchetti*. In a *per curiam* refusal of a petition for rehearing, the court distinguished *Marchetti* on the ground that under Texas law⁵⁴ possession of marijuana, unlike gambling, is not "per se a crime."⁵⁵ This, however, is an unsupportable reading of *Marchetti*. The Supreme Court was not concerned with the illegality of gambling in all circumstances; the apparent test was "inherently suspect" not inherently *guilty*. The overwhelming majority of marijuana users do not fall within the medical and pharmaceutical exceptions of the Texas statute, and in these circumstances it is very difficult to avoid characterizing registrants and taxpayers as an inherently suspect group.

One interesting problem does arise, however, from the existence of a parallel federal scheme for the taxation and registration of narcotics. There are similar occupational and transactional taxes as well as registration requirements under the federal narcotics tax.⁵⁶ As with marijuana, the information is made available to state prosecuting authorities.⁵⁷ Since this almost identical tax is already in force, Congress might use it to continue the current regulation of marijuana by merely expanding the definition of narcotic drugs to include marijuana.⁵⁸ This

⁵⁰ See also the discussion in the House of Representatives, 81 CONG. REC. 5689-90 (1937); *id.* App. 1440-41 (Extension of Remarks of Congressman Buck).

⁵¹ *United States v. Covington*, 282 F. Supp. 886 (S.D. Ohio 1968), *prob. juris. noted*, 89 S. Ct. 238 (1968) (No. 366).

⁵² *Id.* at 888-89.

⁵³ 383 F.2d 851 (5th Cir. 1967), *rehearing denied*, 392 F.2d 220, *cert. granted*, 392 U.S. 903 (1968) (No. 1365, 1967 Term; renumbered No. 65, 1968 Term).

⁵⁴ TEX. PEN. CODE ANN. art. 725b (1961).

⁵⁵ 392 F.2d at 221. For a similar interpretation of *Marchetti*, see *Brown v. United States*, No. 25,008 (5th Cir., October 7, 1968) where it was asserted that there is no self-incrimination problem so long as activity about which disclosure is required is "to some extent legal."

⁵⁶ Except for narcotics received by a patient for treatment, it is illegal to possess narcotic drugs unless one has registered and paid the prescribed tax. INT. REV. CODE OF 1954, §§ 4701-24.

⁵⁷ Both taxes are covered by the disclosure provisions, *id.* §§ 4773, 4775, 6107.

⁵⁸ The definition of narcotic drugs subject to the tax does not now include marijuana. *Id.* § 4731.

would put users in a larger regulatory scheme that courts might consider to be outside the scope of an inherently suspect group.

One federal decision has already attempted to distinguish the narcotics tax from the reasoning set forth in *Marchetti*. In *United States v. Minor*,⁵⁹ the Second Circuit held that the self-incrimination privilege was not available as a defense to prosecution under the narcotics tax, on the theory that the tax was not directed at an inherently suspect group. The court in *Minor* pointed out that in 1966 there were 394,193 persons registered under the narcotics act; 430,000 kilograms of narcotics were legally imported, while only 100 kilograms of contraband narcotics were seized or purchased by federal agents. By emphasizing the legitimate uses of narcotics for medical and pharmaceutical purposes, the court concluded that while the narcotics tax is certainly not "directed at the public at large," neither is it directed towards an inherently suspect group.⁶⁰

The figures, of course, are loaded. Standing alone, all they prove is that the federal government does not seize a particularly large quantity of illicit narcotics. There are, in addition, figures that indicate a considerably larger volume of traffic in illicit narcotics than that recognized by the Second Circuit in *Minor*. In 1951, a House Committee estimated that there were fifty thousand drug addicts in the country, generating a 1.5 to 6 million dollar volume of business in illegal "retail" transactions alone.⁶¹ More recently, the total population of drug addicts has been estimated at fifty-six thousand.⁶² It is doubtful that these persons obtain their drugs from legitimate dealers.⁶³

Nevertheless, the analysis in *Minor* seems basically sound. Although heroin has relatively few legitimate medical uses today,⁶⁴ the narcotics tax sweeps a broader path. Many, if not most of the drugs taken illicitly are in widespread medical use.⁶⁵ It is hard to conceive of the corner pharmacist as being by that fact a member of an "inherently suspect group."

⁵⁹ 398 F.2d 511 (2d Cir. 1968).

⁶⁰ *Id.* at 516. Between 1962 and 1966, nearly six million dollars was raised through the narcotics tax. TASK FORCE REPORT 13.

⁶¹ Most of the Nation's 50,000 dope addicts are labeled as the "criminal type" who steal and murder to raise the \$30 to \$120 a week they require to keep themselves supplied with the drug.

Hearings on H.R. 3490 and 348 Before a Subcomm. of the House Comm. on Ways and Means, 82d Cong., 1st Sess. 41 (1951).

⁶² TIME, INC., THE DRUG TAKERS 54 (1965). Some sources go even further and put the figure at close to one in every 1000 Americans. TASK FORCE REPORT 47-48.

⁶³ It is roughly estimated that 1,500 kilograms of heroin are smuggled into the United States every year. TASK FORCE REPORT 6.

⁶⁴ Heroin (diacetylmorphine) and heroin hydrachloride (diacetylmorphine hydrachloride) no longer appear in the *United States Pharmacopeia*, and although it was formerly employed, like morphine sulfate, as an analgesic, its dangers are felt to outweigh its medical value. See DISPENSATORY OF THE UNITED STATES OF AMERICA 1613-15 (25th ed. 1955); MERCK INDEX OF CHEMICALS AND DRUGS, *s.v.* "diacetylmorphine" and "diacetylmorphine hydrachloride" (7th ed. 1960).

⁶⁵ See TASK FORCE REPORT 1-6.

One thing, however, seems certain. The marijuana tax as it is presently constituted cannot withstand constitutional challenge; in all the relevant aspects, the registration and disclosure requirements parallel those deemed obnoxious to the fifth amendment in *Marchetti*. If the federal government desires to continue to require tax and registration of the possession and transfer of marijuana, while making the information thus obtained available to state prosecuting authorities, it must merge the provisions into the larger scheme for taxation and registration of narcotics.