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## TAXING THE WAR ON DRUGS: TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Charles Traugher

### I. INTRODUCTION

In 2005, the Tennessee Legislature passed a law that granted the Tennessee Department of Revenue (hereinafter TDOR) the authority to levy a tax on unauthorized substances.<sup>1</sup> This law requires drug dealers to pay a tax based on the type and amount of unauthorized substance they possess.<sup>2</sup> Following payment of the tax, the TDOR issues the drug dealer a tax stamp that must be attached to the “unauthorized substances to indicate payment.”<sup>3</sup> A drug dealer arrested for possession of an unauthorized substance, absent an affixed tax stamp, faces not only criminal prosecution for the possession of the substance, but also an assessment of the tax, a penalty, and interest accrued on the unpaid tax.<sup>4</sup> The legislative purpose of this tax is to “generate revenue for state and local law enforcement agencies.”<sup>5</sup>

Opponents of illegal drug taxes fear that the imposition of these taxes infringes upon federal constitutional rights. The most prevalent arguments arise from the taxes’ inherent problems with the rights against self-incrimination

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<sup>1</sup> 2004 Tenn. Pub. Acts 803. A tax on narcotics may be referred to as an “illegal drug tax,” “controlled substance tax,” or an “unauthorized substance tax.”

<sup>2</sup> TENN. CODE ANN. § 67-4-2803 (2006).

<sup>3</sup> *Id.* § 67-4-2805.

<sup>4</sup> *Id.* § 67-4-2807.

<sup>5</sup> *Id.* § 67-4-2801; *see also id.* § 67-4-2809(b)(2) (dispensing 75% of the revenue to the local governments and the remaining 25% of the revenue to the state's general fund).

and double jeopardy.<sup>6</sup> A weaker argument may be made that a person who discharges a tax obligation should have the legal right to execute the activity associated with that tax.<sup>7</sup>

A Tennessee Chancery Court struck down Tennessee's unauthorized substance tax as unconstitutional.<sup>8</sup> Davidson County Chancellor Richard Dinkins ruled that the tax violated the Double Jeopardy Clause and the right against self-incrimination.<sup>9</sup> This ruling, however, was only applicable to Jeremy Robbins, who was arrested on federal drug charges and then ordered to pay the unauthorized substance tax.<sup>10</sup> Chancellor Dinkins found that "levying the tax and charging someone with a crime was equivalent to double jeopardy . . .," and "buying the stamps violated a person's right to avoid self-incrimination."<sup>11</sup>

The Tennessee Court of Appeals for the Eastern Section also found that Tennessee's unauthorized substance tax was unconstitutional.<sup>12</sup> Rather than finding the tax unconstitutional on federal constitutional grounds, the court looked to the Tennessee Constitution.<sup>13</sup> The Court determined that the tax was in essence a privilege tax allowable under the Tennessee Constitution Article II, Section 28.<sup>14</sup>

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<sup>6</sup> See generally U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .").

<sup>7</sup> But see § 67-4-2810.

<sup>8</sup> Sheila Burke, *Judge Overturns Illicit-Drugs Tax*, THE TENNESSEAN, July 12, 2006, at 1A.

<sup>9</sup> *Id.* Chancellor Dinkins also ruled that Tennessee's unauthorized substance tax violated substantive due process because the law was invalid on its face. See *id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Waters v. Chumley*, No. E2006-02225-COA-R3-CV, 2007 WL 2500370, at \*1 (Tenn. Ct. App. Sept. 6, 2007).

<sup>13</sup> *Id.* at \*1.

<sup>14</sup> *Id.* at \*2.

For this reason, the tax was deemed subject to the limitation that it “must not be arbitrary, capricious or wholly unreasonable.”<sup>15</sup> Consequently, since “[t]axation of [a] privilege is . . . carried on . . . under protection of the state,”<sup>16</sup> and the tax is levied on “an activity the Legislature has previously declared to be a crime, not a privilege,” the court concluded the tax was “arbitrary, capricious, and unreasonable . . . .”<sup>17</sup>

Taxes on unauthorized substances have not been enacted in every state. Thus far, twenty-seven states have at some point enacted a tax on illegal drugs.<sup>18</sup> State legislatures that have not passed a tax on illegal drugs are now examining the benefits of taxing narcotics. More specifically, these states are interested in the revenue raising capability of taxing the illegal drug trade. Many state

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<sup>15</sup> *Id.* (citing *Hooten v. Carson*, 209 S.W.2d 273, 274 (Tenn. 1948))

<sup>16</sup> *Id.* at \*3 (citing *Bank of Commerce & Trust Co. v. Senter*, 260 S.W.2d 144, 148 (Tenn. 1924)).

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g.*, ALA. CODE § 40-17A-1 (2006); CONN. GEN. STAT. ANN. § 12-651(a) (West 2006); GA. CODE ANN. § 48-15-1 (West 2006); IDAHO CODE ANN. § 63-4201 (2006); 35 ILL. COMP. STAT. ANN. 530/1 (West 2006); IND. CODE ANN. § 6-7-3-1 (West 2006); IOWA CODE ANN. § 453B (West 2006); KAN. STAT. ANN. § 79-5201 (2005); KY. REV. STAT. ANN. § 138.870 (West 2006); LA. REV. STAT. ANN. § 47:2601 (West 2006); MASS. GEN. LAWS ch. 64K § 1 (West 2006); MINN. STAT. ANN. § 297D.01 (West 2006); NEB. REV. STAT. § 77-4301 (2006); NEV. REV. STAT. § 372A.070 (West 2006); N.C. GEN. STAT. § 105-113.107 (LexisNexis 2003); OKLA. STAT. tit. 618, § 450.1 (West 2006); 72 PA. CONS. STAT. ANN. § 7204(17) (West 2006) (used in *Zimmerman v. Commonwealth of Pennsylvania*, 449 A.2d 103 (Pa. Commw. Ct. 1982) to tax illegal drugs); TENN. CODE ANN. § 67-4-2803 (West 2006); TEX. TAX CODE ANN. § 159.201 (Vernon 2006); UTAH CODE ANN. § 59-19-101 (West 2006); WIS. STAT. ANN. § 139.88 (West 2006) (found unconstitutional by *State v. Hall*, 557 N.W.2d 778 (Wis. 1989)); ARIZ. REV. STAT. ANN. § 42-1203.01D (West 1990) (repealed 1997); COLO. REV. STAT. ANN. § 39-28.7-101 (West 2006) (repealed 1996); FLA. STAT. ANN. § 212.0505 (West 2006) (repealed 1996); MONT. CODE ANN. § 15-25-101 (2006) (repealed 1995); N.M. STAT. ANN. § 7-18A-1 (West 2006) (repealed 1995).

legislatures have also enacted illegal drug taxes because drug dealers acquire large sums of tax-free money.<sup>19</sup> Regardless of the motive, illegal drug taxes provide many states with the machinery to generate revenue on illegal commercial activity that would otherwise be excluded from assessment.<sup>20</sup>

Many law-abiding, tax-paying citizens may agree with a tax on illegal drugs because of their belief that individuals involved in the illegal drug trade should contribute to the tax burden placed on society. Despite these opinions, the issues that arise from taxing the illegal drug trade—the inherent problems with constitutional safeguards and the effectiveness of obtaining tax revenue—should cause public apprehension.

First, this Note will provide a brief synopsis of the evolution of illegal drug taxes and discuss Tennessee's interest in using an illegal drug tax to assist in the war on drugs. Next, this Note will describe, specifically, the operation of Tennessee's unauthorized substance tax. In conclusion, this Note will examine the effects that illegal drug taxes have on the constitutional privileges against self-incrimination and double jeopardy, noting that the State of Tennessee has not streamlined a collection process for its unauthorized substance tax.

## II. CREATION OF ILLEGAL DRUG TAXES

Illegal drug taxes have their origins in federal legislation and the United States' authority to lay taxes and regulate commerce. The Constitution gives the federal government the ability “[to] lay and collect [t]axes” and “[t]o regulate Commerce . . . among the several States . . .

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<sup>19</sup> Christian D. Stewart, *Double Jeopardy – State Drug Tax Statutes Go up in Smoke: Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), 74 NEB. L. REV. 221, 226 (1995).

<sup>20</sup> *Id.* at 227.

.<sup>21</sup> In 1864, Congress used this power to enact legislation that required people involved in the business of selling lottery tickets or liquor to obtain a license from the federal government.<sup>22</sup> In the *License Tax Cases*, seven separate defendants from various states contested their convictions for non-payment of the lottery and liquor licenses.<sup>23</sup> The defendants challenged whether they could be convicted for non-payment of the lottery and liquor licenses, even though the laws of their states prohibited these activities.<sup>24</sup> The Supreme Court held that the licenses were a “mere form of imposing a tax,” and “it [was] not necessary to regard these laws as giving such authority” to conduct these businesses.<sup>25</sup> This decision provided an avenue for state legislatures to tax illegal drugs while maintaining that payment of the tax had no bearing on the illegality of the drug.

Years after the Supreme Court’s decision in the *License Tax Cases*, Congress enacted the Revenue Act of 1913.<sup>26</sup> This law levied a tax on income from any “lawful business.”<sup>27</sup> The subsequent Revenue Act of 1916 removed the word “lawful” from the previous Revenue Act.<sup>28</sup> The removal of the word “lawful” implied that “illegal

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<sup>21</sup> U.S. CONST. art. I, § 8, cl. 1, 3; *see also* 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.”) (emphasis added).

<sup>22</sup> *United States v. Vassar (License Tax Cases)*, 72 U.S. 462, 463 (1866).

<sup>23</sup> *Id.* at 464.

<sup>24</sup> *Id.* at 464-65.

<sup>25</sup> *Id.* at 471; *see also* *Marchetti v. United States*, 390 U.S. 39, 44 (1968) (noting that the Supreme Court “has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation . . .”).

<sup>26</sup> Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913) (amended 1916).

<sup>27</sup> *Id.* § 2B, 38 Stat. at 167; *see also* Frank A. Racaniello, *State Drug Taxes: A Tax We Can’t Afford*, 23 RUTGERS L.J. 657, 658 (1992).

<sup>28</sup> Revenue Act of 1916, Pub. L. No. 64-271, § 2(a), 39 Stat. 756, 757 (1916).

businesses” were now required to identify themselves for tax purposes.<sup>29</sup> Consequently, this Act may be read to require people involved in the illegal drug trade to report their income to the federal government for tax purposes.

The first federal laws that imposed a tax specifically on narcotics were the Harrison Narcotics Tax Act of 1914<sup>30</sup> and the Marijuana Tax Act of 1937.<sup>31</sup> These laws did not explicitly outlaw any substances, but instead made it illegal to transfer certain substances without payment of a tax.<sup>32</sup> Nevertheless, the high rate of tax imposed by these acts may have had a profound deterring effect that likely contributed to the eventual outlaw of the substances covered under each act.<sup>33</sup>

Although these laws may have assisted the federal government in its growing fight with the war on drugs, the Marijuana Tax Act was later found unconstitutional by the United States Supreme Court in *Leary v. United States*.<sup>34</sup> The *Leary* decision may have initially prevented states from enacting their own illegal drug taxes. Nonetheless, “[i]n 1983, Arizona became the first state” to levy a tax on illegal drugs.<sup>35</sup> Other states soon followed, resulting in the

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<sup>29</sup> Eric J. Dirnbeck, *The Supreme Court Confiscates an Unjust Weapon Used in the “War on Drugs”*: Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994), 20 S. ILL. U. L.J. 353, 354 (1996).

<sup>30</sup> Narcotics Tax Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914) (this act placed a tax on opiates and coca leaves, which are used in the production of cocaine).

<sup>31</sup> Marijuana Tax Act of 1937, Pub. L. No. 75-237, 50 Stat. 551 (1937) (repealed 1970).

<sup>32</sup> See *id.*; Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, 38 Stat. 785; see also Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 508 (1990).

<sup>33</sup> For example, people who did not pay the marijuana tax were obligated to pay \$100 per ounce per transfer and \$2,000 for any violation of the act. Marijuana Tax Act of 1937, Pub. L. No. 75-237, 50 Stat. 554-56 (repealed 1970).

<sup>34</sup> *Leary v. United States*, 395 U.S. 6, 53-54 (1969).

<sup>35</sup> Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL’Y 231



present day number of twenty-seven states that have enacted some form of an illegal drug tax.<sup>36</sup>

### III. TENNESSEE'S INTEREST IN ENACTING AN ILLEGAL DRUG TAX

Senator Randy McNally (R-Oak Ridge) sponsored Tennessee's unauthorized substance tax.<sup>37</sup> He "proposed the law to take money out of the drug trade and recover some of the cost of prosecuting and jailing drug offenders."<sup>38</sup> His early estimates projected the legislation would generate 3.6 million dollars per year.<sup>39</sup> The one-time cost to the State of Tennessee to create the ten-person agency to oversee the tax was 1.2 million dollars.<sup>40</sup>

When compared to other states, Tennessee's drug problem may be unique and slightly understated. Geographically, Tennessee touches eight states—more than any other state in the nation. Drug trafficking often involves the transportation of large volumes of narcotics between many states before the product reaches its final destination. For this reason, the flow of narcotics to and through Tennessee is likely impacted by any adjacent state's drug activity.

Moreover, illegal drugs are often linked to violent criminal activity, and Tennessee's violent crime rate ranks

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(1991); *see also* ARIZ. REV. STAT. ANN. § 42-1203.01D (West 1990) (repealed 1997).

<sup>36</sup> *Id.* at 231 (South Dakota and Florida enacted their statutes in 1984, and Minnesota followed suit two years later).

<sup>37</sup> Bonna de la Cruz, *Tennessee Targets Dealers, Users with New Levy*, THE TENNESSEAN, Dec. 29, 2004, at 1A; *see also* N.C. GEN. STAT. § 105-113.107 (LexisNexis 2003).

<sup>38</sup> Cruz, *supra* note 37, at 4A.

<sup>39</sup> *Id.* at 1A.

<sup>40</sup> *Id.*

fifth among all states.<sup>41</sup> Because of its location and the violent nature of the drug trade, Tennessee has a compelling interest in preventing illegal drug activity from increasing within its borders. The Tennessee Legislature may be under the assumption that a tax on narcotics could somehow deter the illegal drug trade and at the same time, provide funding to combat its spread.

The seriousness of Tennessee's illegal drug problem is apparent from the increasing amount of methamphetamine produced, distributed, and used in the state. It has been reported that Tennessee accounts for three-fourths of all methamphetamine lab seizures in the Southeast.<sup>42</sup> Tennessee trails only Illinois, Indiana, and Missouri in the number of methamphetamine lab seizures nationwide.<sup>43</sup> Under Tennessee's unauthorized substance tax, the state could expect large revenues from its frequent number of methamphetamine lab seizures.

Tennessee's methamphetamine problem also causes Tennessee taxpayers to incur additional out-of-pocket expenses. Each methamphetamine lab has an estimated cleanup cost of between \$2,500 and \$7,500,<sup>44</sup> and people jailed for methamphetamine usage have extensive long-term adverse health effects that are often treated while they are in jail.<sup>45</sup> High crime rates are also attributed to methamphetamine usage.<sup>46</sup> Tennessee's unauthorized substance tax could be expected to offset these indirect costs placed on Tennessee residents.

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<sup>41</sup> Drug Enforcement Administration, <http://www.usdoj.gov/dea/pubs/states/tennessee2005.html> (last visited June 15, 2006).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Judd Matheny, *Meth Problem Growing at a Fast Pace*, TULLAHOMA NEWS, Apr. 1, 2004, <http://www.mapinc.org/tlcnews/v04/a10.htm?135-%20meth%20problem>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

#### IV. OPERATION OF TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Most unauthorized substance taxes are constructed in the form of an excise tax on certain types and amounts of illegal drugs.<sup>47</sup> When Tennessee's unauthorized substance tax went into effect on January 1, 2005, it became the twenty-third state in the union to implement an excise tax on illegal drugs.<sup>48</sup> Tennessee's unauthorized substance tax was modeled after North Carolina's controlled substance tax.<sup>49</sup>

Tennessee's tax is levied on unauthorized substances possessed, either actually or constructively, at various rates.<sup>50</sup> The tax is only applicable to drug dealers<sup>51</sup> who possess an unauthorized substance.<sup>52</sup> A drug dealer is required to pay the tax "within forty-eight hours of coming into possession of unauthorized substances."<sup>53</sup> If the tax for the unauthorized substances is not paid within the required time, then the tax is considered delinquent, and the dealer will suffer a penalty and accrued interest.<sup>54</sup> In addition, if a drug dealer is found with an unauthorized substance lacking a tax stamp, it is presumed that the dealer has been in possession of the substance for more than forty-eight hours.<sup>55</sup>

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<sup>47</sup> Cruz, *supra* note 37, at 1A.

<sup>48</sup> *Id.* at 4A.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See TENN. CODE ANN. § 67-4-2802 (a)(3)(A), (B) (2006) (a dealer is a person who actually or constructively possesses more than forty-two and one-half grams of marijuana, seven or more grams of any other unauthorized substances that are sold by weight, or ten or more dosage units of any unauthorized substance that is not sold by weight).

<sup>52</sup> *Id.* § 67-4-2806.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

After the drug dealer pays the tax, the TDOR issues tax stamps equal to the payment received in taxes.<sup>56</sup> Next, the drug dealer is required to indicate payment of the tax by affixing the tax stamp to the possessed unauthorized substance.<sup>57</sup> Tennessee's unauthorized substance tax provides that "information obtained pursuant to [payment of the tax] is confidential and, unless independently obtained, may not be used in a criminal prosecution other than . . . for a violation of [the tax]."<sup>58</sup>

## V. THE FIFTH AMENDMENT AND ILLEGAL DRUG TAXES

### A. SELF-INCRIMINATION

The constitutionality of taxing illegal activities was originally reviewed by four Supreme Court cases in the late 1960s.<sup>59</sup> The Court found in each case that the Fifth Amendment privilege against self-incrimination prevented the imposition of sanctions from federal tax evasion of illegal activities.<sup>60</sup> *Leary* was the only case of the four that involved the Fifth Amendment's use against a tax on illegal drugs.<sup>61</sup> The defendant, Timothy Leary,<sup>62</sup> was, among

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<sup>56</sup> *Id.* § 67-4-2805(a).

<sup>57</sup> *Id.* § 67-4-2806.

<sup>58</sup> *Id.* § 67-4-2808.

<sup>59</sup> See generally *United States v. Leary*, 395 U.S. 6 (1969) (illegal activity was possession of marijuana); *Haynes v. United States*, 390 U.S. 85 (1968) (illegal activity was possession of a sawed-off shotgun); *Grosso v. United States*, 390 U.S. 62 (1968) (illegal activity was wagering); *Marchetti v. United States*, 390 U.S. 39 (1968) (illegal activity was wagering).

<sup>60</sup> *Leary*, 395 U.S. at 26; *Haynes*, 390 U.S. at 100-01; *Grosso*, 390 U.S. at 67; *Marchetti*, 390 U.S. at 48.

<sup>61</sup> *Leary*, 395 U.S. at 16 (at issue was the Marijuana Tax of 1937 that was later repealed due to the Court's decision).

<sup>62</sup> Timothy Leary was a well-known drug enthusiast and one-time Harvard professor. He is most noted for his famous saying, "turn on,

other things, indicted on charges of having “knowingly transported, concealed, and facilitated the transportation and concealment of marihuana [sic] without having paid the transfer tax imposed by the Marihuana [sic] Tax Act.”<sup>63</sup>

The pivotal issue in *Leary* was the construction of the Marijuana Tax Act of 1937.<sup>64</sup> The statute required “the taxpayer . . . ‘register his name or style and his place or places of business’ at the nearest district office of the Internal Revenue Services.”<sup>65</sup> The Court concluded that “[i]f read according to its terms, the Marihuana [sic] Tax Act compelled petitioner to expose himself to a ‘real and appreciable’ risk of self-incrimination . . . .”<sup>66</sup>

The test for determining whether an illegal activity tax is unconstitutional on self-incrimination grounds is promulgated by *Marchetti v. United States*.<sup>67</sup> The test considers the following: “(1) whether the regulated activity is in an area” of the law saturated with criminal statutes or directed toward a specific group suspected of criminal activity; (2) whether the obligation to pay the tax creates a “real and appreciable risk of self-incrimination;” and (3) whether the payment of the tax may be “a significant link

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tune in, drop out,” which was in reference to drug use. See Harry Ransom Humanities Research Center, *Timothy Leary Collection*, <http://www.hrc.utexas.edu/research/fa/leary.html>.

<sup>63</sup> *Leary*, 395 U.S. at 11.

<sup>64</sup> *Id.* at 12.

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.* at 16; see also *Haynes v. United States*, 390 U.S. 85, 97 (1968) (finding a statute taxing illegal firearms exposed the taxpayer to a risk of self-incrimination); *Grosso v. United States*, 390 U.S. 62, 67 (1968) (finding a statute taxing illegal wagering exposed the taxpayer to a risk of self-incrimination); *Marchetti v. United States*, 390 U.S. 39, 60-61 (1968) (finding a statute taxing illegal wagering exposed taxpayer to a risk of self-incrimination).

<sup>67</sup> *Marchetti v. United States*, 390 U.S. 39 (1968).

in the chain of evidence” to bring about criminal proceedings or establish guilt.<sup>68</sup>

Tennessee’s unauthorized substance tax satisfies the first factor of the *Marchetti* test; the tax is imposed on unauthorized substances, which carry criminal sanctions.<sup>69</sup> In addition, the tax is only applicable to drug dealers, who are a specific group suspected of criminal activity.<sup>70</sup>

Applying the second factor of the *Marchetti* test, some state courts have decided their state’s illegal drug tax is unconstitutional on the basis that the tax may compel the disclosure of identifying information.<sup>71</sup> Illegal drug taxes in other states have withstood constitutional scrutiny because courts have found safeguards that protect identifying information from dissemination.<sup>72</sup> In *State v. Hall*,<sup>73</sup> the Supreme Court of Wisconsin held that the state’s tax on controlled substances unconstitutionally compelled self-incrimination.<sup>74</sup> The second factor of the *Marchetti* test was fundamental to the court’s determination. Analyzing

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<sup>68</sup> *Sisson v. Triplett*, 428 N.W.2d 565, 571 (Minn. 1988) (citing *Marchetti*, 390 U.S. at 47-48).

<sup>69</sup> *See, e.g.*, TENN. CODE ANN. § 39-17-417 (2006).

<sup>70</sup> *Id.* § 67-4-2802(a)(3)(A)-(B).

<sup>71</sup> *See, e.g.*, Fla. Dep’t of Revenue v. Herre, 634 So. 2d 618, 621 (Fla. 1994) (holding that Florida’s illegal drug tax violated both the Fifth Amendment and the state constitution’s right against self-incrimination); *State v. Smith*, 813 P.2d 888, 890 (Idaho 1991) (finding that the 1989 version of Idaho’s illegal drug tax violated Fifth Amendment protections).

<sup>72</sup> *See, e.g.*, *Briney v. State Dep’t of Revenue*, 594 So. 2d 120, 123 (Ala. Civ. App. 1991) (holding that a taxpayer could not reasonably suppose that information provided to the tax department would be available to prosecuting authorities or establish a significant link in the chain of evidence); *State v. Durrant*, 769 P.2d 1174, 1180, 1182-83 (Kan. 1989) (holding that Kansas’ illegal drug tax prohibited the disclosure of information to be used against a taxpayer in any criminal proceeding not connected to the enforcement of the tax act, unless independently obtained).

<sup>73</sup> *State v. Hall*, 557 N.W.2d 778 (Wis. 1997).

<sup>74</sup> *Id.* at 783.

the second factor, the court chose to evaluate separately “the purchase and the affix and display requirements” of Wisconsin’s controlled substance tax.<sup>75</sup>

The purchase requirement was found to be self-incriminating because the dealer was compelled to reveal to the government his drug dealing status and that he possessed or intended to possess a quantity of a controlled substance, which was usually a large amount.<sup>76</sup> Moreover, the Wisconsin Supreme Court found the purchase requirement, due to the “exception for ‘independently obtained information,’” allowed law enforcement to place an agent outside locations where tax stamps were sold.<sup>77</sup> This would permit law enforcement to take photographs and follow taxpayers at its option.<sup>78</sup> Nevertheless, the court found that the option of purchasing tax stamps by mail alleviated any anonymity issues a taxpayer might encounter by paying the controlled substance tax in person.<sup>79</sup>

The affixation requirement of Wisconsin’s controlled substance tax presented an entirely different concern with respect to self-incrimination. The affixation of a tax stamp to a narcotic was deemed to demonstrate that the dealer “knowingly and intentionally possess[e]d a particular quantity of unlawful drugs.”<sup>80</sup> The court concluded that this information would be available to the prosecution in order to prove that the defendant knew the substance possessed was controlled under Wisconsin law.<sup>81</sup>

In *Hall*, the Supreme Court of Wisconsin also found that Wisconsin’s controlled substance tax satisfied the final factor of the *Marchetti* test. The tax was deemed to only allow a taxpayer “protection from direct—not derivative—

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<sup>75</sup> *Id.* at 784.

<sup>76</sup> *Id.* at 785.

<sup>77</sup> *Id.* at 785-86.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 786.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

use of information obtained by the [Wisconsin Department of Revenue] through compliance with the statute.”<sup>82</sup> The court found that the tax allowed “the State to use compelled information” to obtain investigative leads that could later be used in criminal proceedings.<sup>83</sup>

There are many similarities between Tennessee’s unauthorized substance tax and Wisconsin’s controlled substance tax. Much like Tennessee’s tax, Wisconsin’s tax requires taxpayers to purchase tax stamps that must be attached to an illegal drug.<sup>84</sup> Also, Wisconsin’s controlled substance tax does not demand identifying information for the purchase of tax stamps, but the tax does allow independently obtained information to be used in criminal prosecutions.<sup>85</sup>

In light of *Hall*, the second and third factors of the *Marchetti* test will lead Tennessee’s unauthorized substance tax to the same fate as Wisconsin’s controlled substance tax. First, people who purchase unauthorized substance tax stamps reveal their intent to distribute illegal drugs. Moreover, the TDOR website does not state where or how people may purchase tax stamps.<sup>86</sup> Upon calling the TDOR’s office, potential taxpayers find no readily available alternative to buying tax stamps directly from the TDOR’s central office in Nashville.

The taxpayers’ only option to satisfy the tax may be to appear in person at the TDOR’s central office. Nothing in Tennessee’s unauthorized substance tax prevents law enforcement from keeping twenty-four hour surveillance of

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<sup>82</sup> *Id.* at 787.

<sup>83</sup> *Id.*

<sup>84</sup> Compare TENN. CODE ANN. § 67-4-2805 (2006) with WIS. STAT. ANN. § 139.89 (West 2001 & Supp. 2006).

<sup>85</sup> Compare TENN. CODE ANN. § 67-4-2808 with WIS. STAT. ANN. § 139.91 (West 2001 & Supp. 2006).

<sup>86</sup> Tennessee Department of Revenue, <http://www.state.tn.us/revenue/faqs/unauthsubfaq.htm#unauth4> (last visited Nov. 29, 2006).



the TDOR's central office.<sup>87</sup> Accordingly, taxpayers may be subject to police surveillance while discharging their tax obligation for the distribution of an unauthorized substance. The police may subsequently use this surveillance to corroborate previous notions of a suspect already under investigation for the distribution of illegal drugs or gain new leads on suspects involved in the illegal drug trade.

For these reasons, taxpayers may be apprehensive about traveling to the TDOR's central office to obtain tax stamps. Thus, taxpayers may inquire about receiving the tax stamps via mail. This inquiry requires taxpayers to supply their residential addresses, their P.O. Boxes, or their acquaintances' addresses, all of which compromise the taxpayers' anonymity, despite the ruling in *Hall*. Tennessee's unauthorized substance act invokes no penalties that prevent employees of the TDOR from relaying information concerning a taxpayer to law enforcement.<sup>88</sup> Therefore, any of this information could be given to law enforcement to be used as a link to the taxpayer. Requesting the stamps via mail would still expose the taxpayer to a risk of disclosing identifying information to law enforcement.

The last factor of the *Marchetti* test is also satisfied by Tennessee's unauthorized substance tax. Tennessee's tax does not forbid the use of "independently obtained" information in a criminal prosecution.<sup>89</sup> The language of the statute permits the state to use compelled information to obtain investigative leads that could later be used to bring about criminal proceedings. As a result, any information obtained by law enforcement from surveillance or any other "independent" method may be used in the prosecution of a taxpayer for the possession of an unauthorized substance.

The unequivocal language of Tennessee's unauthorized substance tax avoids the affixation problem discussed

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<sup>87</sup> See TENN. CODE ANN. § 67-4-2808 (2006).

<sup>88</sup> See *id.* §§ 67-4-2801 to 2811.

<sup>89</sup> *Id.* § 67-4-2808.

in *Hall*. Although “knowingly” is the requisite intent to convict a person for possession of an unauthorized substance in Tennessee,<sup>90</sup> Tennessee’s unauthorized substance tax provides that tax stamps may not be used in a criminal prosecution for the possession of an unauthorized substance.<sup>91</sup> The reader should note, however, that people who purchase an unauthorized tax stamp would only do so if they were aware that they possessed an unauthorized substance. Once they attach the tax stamp to the unauthorized substance, they are admitting they know the substance they possess is unauthorized under Tennessee law. Prosecutors may not be able to enter tax stamps overtly into evidence, but the prosecutors are likely to keep the unauthorized substances in their original packaging, which could include an affixed tax stamp. At trial, a juror may be hard pressed to disregard inadmissible evidence that remains on admissible evidence.

## B. DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .”<sup>92</sup> Case law has interpreted the Double Jeopardy Clause to protect against three distinct situations: (1) “a second prosecution for the same offense after acquittal”; (2) “a second prosecution for the same offense after conviction”; and (3) “multiple punishments for the same offense.”<sup>93</sup> Under the latter situation, the Supreme Court has had difficulty in determining what constitutes a multiple punish-

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<sup>90</sup> See *id.* § 39-17-417(a)(4) (“It is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to manufacture, deliver or sell the controlled substance.”).

<sup>91</sup> See *id.* § 67-4-2808.

<sup>92</sup> U.S. CONST. amend. V.

<sup>93</sup> See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

ment. In *Ex parte Lange*,<sup>94</sup> in which the defendant paid a fine and suffered imprisonment for his crime, the Supreme Court held against the imposition of another punishment from the same verdict because “to do so is to punish him *twice* for the same offence.”<sup>95</sup> In *United States v. Halper*,<sup>96</sup> the Court concluded monetary penalties from a civil statute imposed after a criminal prosecution also constituted a multiple punishment and therefore violated the Double Jeopardy Clause.<sup>97</sup>

*Department of Revenue of Montana v. Kurth Ranch*<sup>98</sup> gave the Court the opportunity to examine whether a tax could be considered a multiple punishment under a Double Jeopardy analysis.<sup>99</sup> The question before the Supreme Court in *Kurth Ranch* was “whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.”<sup>100</sup>

Although the Court found Montana’s illegal drug tax was high, neither the tax’s lofty assessment nor deterrent purpose classified it as punishment.<sup>101</sup> No doubt existed that Montana’s illegal drug tax was implemented to

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<sup>94</sup> *Ex Parte Lange*, 85 U.S. 163 (1873).

<sup>95</sup> *Id.* at 175 (emphasis in original).

<sup>96</sup> *United States v. Halper*, 490 U.S. 435 (1989).

<sup>97</sup> *Id.* at 449-50.

<sup>98</sup> *Dep’t of Revenue of Mon. v. Kurth Ranch*, 511 U.S. 767 (1994).

<sup>99</sup> *Id.* at 767.

<sup>100</sup> *Id.* at 769. The State of Montana enacted a tax on the storage and possession of illegal drugs and provided that the state would be able to collect the tax after the offenders satisfied their fines and obligations. *Id.* at 770 (citing MONT. CODE ANN. §§ 15-25-101 to 123). The Montana Department of Revenue was given authority to adopt rules to oversee the tax. *Id.* at 770-71. The agency promulgated rules that required the taxpayers to pay the tax sometime after their arrests and placed the taxpayers under no obligation to file or pay the tax unless arrested. *Id.* at 771.

<sup>101</sup> *Id.* at 780.

deter the drug trade, but the Montana Department of Revenue claimed, and the Court accepted, that many taxes, such as those on cigarettes and alcohol, are high and to some extent motivated by deterrence.<sup>102</sup> Nonetheless, the high rate of Montana's illegal drug tax did "lend support to the characterization of the [tax] as punishment," although this factor alone was not dispositive.<sup>103</sup>

The Court found two "unusual features" that made Montana's illegal drug tax especially problematic with the Double Jeopardy Clause.<sup>104</sup> First, the tax was shown to be conditioned strictly on criminal activity.<sup>105</sup> The Court considered this condition to be significant because it demonstrated that the tax had purposes other than raising revenue; the tax also had punitive and prohibitory purposes.<sup>106</sup> Second, the tax was "exceptional" because "it [was] levied on goods that the taxpayer neither own[ed] nor possess[e]d when the tax [was] imposed."<sup>107</sup> Montana's illegal drug tax required payment of the tax only after the offender had been arrested and displaced of the illegal drug. The Court found "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."<sup>108</sup>

The *Kurth Ranch* decision essentially employed a three-part test to determine whether a tax is punitive and thus infringes on an individual's right against double jeopardy. The test employs the following: (1) whether the tax's rate is high enough to make it a significant deterrent; (2) whether the tax is conditioned on the commission of a crime; and (3) whether the tax levies on goods the taxpayer

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<sup>102</sup> *Id.* at 780-81.

<sup>103</sup> *Id.* at 781.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 783.

<sup>108</sup> *Id.*

no longer owns nor lawfully possesses when the tax is assessed.

Tennessee's unauthorized substance tax satisfies the first factor of the *Kurth Ranch* test. The tax is imposed on various unauthorized substances as follows: \$0.40-\$3.50 for each gram of marijuana depending on the type, \$200 for each gram of any controlled substance or low-street value drug sold by weight, \$50 for each ten dosage unit of any low-street value drug that is not sold by weight, and \$200 for each ten dosage unit of any other controlled substance that is not sold by weight.<sup>109</sup> These rates may be regarded as high enough to sustain an argument that Tennessee's unauthorized substance tax is a significant deterrent. For example, Tennessee's tax enforces approximately the same tax rate on marijuana as Montana's illegal drug tax, which the *Kurth Ranch* court characterized as "a remarkably high tax."<sup>110</sup>

As aforementioned, Tennessee's unauthorized substance tax is based on North Carolina's controlled substance tax. North Carolina's model has stood firm in state court against attacks from the second and third factors of the *Marchetti* test. For example, in *State v. Ballenger*,<sup>111</sup> the court distinguished North Carolina's controlled substance tax from Montana's illegal drug tax by finding it "contain[ed] neither of the 'unusual features' upon which the Supreme Court relied in *Kurth Ranch* to conclude that Montana's dangerous drug tax constituted punishment for double jeopardy purposes."<sup>112</sup> The court was persuaded by the fact that North Carolina's tax levies an assessment forty-eight hours after a drug dealer comes into possession

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<sup>109</sup> TENN. CODE ANN. § 67-4-2803 (2006).

<sup>110</sup> *Kurth Ranch*, 511 U.S. at 780. The high end of Tennessee's tax on marijuana imposes \$3.50 per gram (or approximately \$98 per ounce), which is analogous to Montana's illegal drug tax that levied \$100 per ounce on marijuana. *See id.* at 780 n.17.

<sup>111</sup> *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996).

<sup>112</sup> *Id.* at 574.

of a controlled substance rather than imposing the tax after the drug dealer has been apprehended by law enforcement.<sup>113</sup> From this fact, the court inferred that the tax is not levied on the commission of a crime, and the controlled substance is not confiscated and destroyed before the tax can be imposed.<sup>114</sup>

The *Ballenger* decision is unpersuasive in light of the *Kurth Ranch* holding. First, North Carolina's controlled substance tax is unsuccessful in circumventing the requirement of avoiding a tax that is conditioned on the commission of a crime. The *Ballenger* court fails to consider North Carolina law regarding controlled substances.<sup>115</sup> The court neglects the fact that it is illegal for any person to possess a controlled substance in North Carolina.<sup>116</sup> This fact alone suffices as a violation of the *Kurth Ranch* condition. A person must be in possession of a controlled substance to be subject to North Carolina's controlled substance tax.<sup>117</sup> Thus, one could reasonably argue that North Carolina's controlled substance tax is predicated on the commission of a crime.

Additionally, North Carolina's controlled substance tax may be said to violate the second "unusual feature" of the *Kurth Ranch* decision. It is almost absurd to assume that a drug dealer will satisfy an illegal drug tax before the narcotic is seized by law enforcement. Drug dealers are unlikely to pay the tax out of a reasonable suspicion that the purchase, affixation, and display of a tax stamp may

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 575.

<sup>116</sup> See N.C. GEN. STAT. § 90-95(a)(3) (LexisNexis 2003).

<sup>117</sup> See, e.g., *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 781 (1994) (noting that "the tax assessment not only hinges on the commission of a crime" but "is also exacted only after the [potential] taxpayer has been arrested for precise conduct that gives rise to the tax obligation . . .").

signify admission to a crime.<sup>118</sup> Consequently, when law enforcement seize the controlled substance without an affixed stamp, the dealer, who out of fear of self-incrimination has not paid the tax, has been disposed of and is no longer in control of the narcotic. More importantly, it cannot be argued that the drug dealer ever lawfully owned the controlled substance.<sup>119</sup> Given that Tennessee's tax is modeled after North Carolina's tax, it will incur the same constitutional problem with the Double Jeopardy Clause.

## VI. COLLECTING REVENUE FROM TENNESSEE'S UNAUTHORIZED SUBSTANCE TAX

Tennessee's unauthorized substance tax was contemplated to generate millions of dollars in revenue for the state's general fund and local and state law enforcement agencies.<sup>120</sup> Since its inception in January of 2005, the results have not been as encouraging as estimates envisioned. According to the TDOR, the tax garnered only \$340,000 in its first year.<sup>121</sup> This figure is further diluted by the fact that the Drug Investigation Division of the Tennessee Bureau of Investigation reported that from 2005 to the first half of 2006 it seized 5,340 grams of crack cocaine; 111,064 grams of powder cocaine; 4,309 pounds of bulk marijuana; 12,897 marijuana plants; 9,169 grams of methamphetamine; 88 methamphetamine labs; and 5,912

<sup>118</sup> See, e.g., *Leary v. United States*, 395 U.S. 6, 16 (1969).

<sup>119</sup> N.C. GEN. STAT. § 90-95(a)(3); see *Kurth Ranch*, 511 U.S. at 783 (finding that the tax was levied on goods that were no longer in possession of the taxpayer and "never lawfully possessed," which gave the drug tax "an unmistakable punitive character").

<sup>120</sup> Cruz, *supra* note 37, at 4A.

<sup>121</sup> TENNESSEE DEPARTMENT OF REVENUE, REVENUE COLLECTIONS (Dec. 2005), <http://state.tn.us/revenue/pubs/2005/coll200512.pdf>; REVENUE COLLECTIONS (June 2005), <http://state.tn.us/revenue/pubs/2005/coll200506.pdf> (last visited June 15, 2006). These figures only calculate actual collections and do not factor in assessments as a result of the tax. *Id.*

dosage units of ecstasy.<sup>122</sup> This information also suggests that the tax is not recovered as easily as predicted.

Notably, the state spent \$1.2 million to establish the TDOR agency that administers the unauthorized substance tax. The yearly maintenance of this agency was projected to cost an additional \$800,000.<sup>123</sup> Although it may be premature to evaluate the successfulness of the tax, the early returns are definitely not consistent with initial projections.

Diminutive returns also raise questions about the validity of the tax. Not surprisingly, only \$1,300 in tax stamps were collected in the tax's first year of existence.<sup>124</sup> These returns should cause concern over whether the unauthorized substance tax is arbitrary. If drug dealers are not purchasing unauthorized substance tax stamps, and the tax is only assessed and never recovered, then the presumption may be that Tennessee's unauthorized substance tax is clearly to punish drug dealers.

## VII. CONCLUSION

Tennessee's unauthorized substance tax has the potential to raise constitutional concerns each time it is enforced. Undoubtedly, the tax will come under scrutiny for the abridgment of the Fifth Amendment rights against self-incrimination and double jeopardy. Additionally, Tennes-

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<sup>122</sup> TENNESSEE BUREAU OF INVESTIGATION, ANNUAL REPORT (2004-2005), at 5, <http://www.tbi.state.tn.us/Info%20Div/Color%20-%20TBI%2004-05%20Annual%20Report.pdf> (last visited June 15, 2006).

<sup>123</sup> Cruz, *supra* note 37, at 1A.

<sup>124</sup> TENNESSEE DEPARTMENT OF REVENUE, REVENUE COLLECTIONS (Dec. 2005), <http://state.tn.us/revenue/pubs/2005/coll200512.pdf>; REVENUE COLLECTIONS (June 2005), <http://state.tn.us/revenue/pubs/2005/coll200506.pdf> (last visited Jun. 15, 2006). The purchase of \$1,300 worth of tax stamps does not necessarily signify that those stamps were purchased to affix to an unauthorized substance. Those stamps could have been purchased for other reasons (*e.g.*, as collector's items).



see has not streamlined a process to recover revenue from the tax. If the unauthorized substance tax is to remain under Tennessee law, the State of Tennessee must ensure that the tax does not have any characteristics that would lead the general public to believe its purpose is arbitrary or abusive of constitutional rights. Because of these concerns, the Tennessee Legislature should reconsider the legitimacy of Tennessee's unauthorized substance tax.

