

# Constitutional Analysis of Indiana's Controlled Substance Excise Tax

F ANTHONY PAGANELLI\*

The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance.<sup>1</sup>

## INTRODUCTION

On July 1, 1992, Indiana's Controlled Substance Excise Tax ("the Tax" or "the Act") became effective after little opposition in the Indiana General Assembly.<sup>2</sup> Passage of the Act added Indiana to the growing number of states taxing the illegal possession of controlled substances.<sup>3</sup> Section five of the Act briefly describes its scope:

Sec. 5. The controlled substance excise tax is imposed on controlled substances that are:

- (1) delivered;
- (2) possessed; or
- (3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.<sup>4</sup>

The Act exempts pharmacists and other persons lawfully registered to dispense controlled substances.<sup>5</sup>

---

\* J.D. Candidate, 1995, Indiana University School of Law-Bloomington; B.A., 1992, The University of Notre Dame. Special thanks to Professor Tom Schornhorst for his guidance and helpful comments, and to the Honorable E. Michael Hoff, Monroe Circuit Court, for providing the fascinating research assignment upon which this Note is based. The opinions expressed herein, however, are mine alone. Thanks also to my family and to Dawn M. Shea for their love and support.

1. *Loubriel v. United States*, 9 F.2d 807, 808 (2d Cir. 1926) (Learned Hand, J.).

2. See STATE OF INDIANA, INDEX TO HOUSE AND SENATE JOURNALS, 107th Gen. Assembly, 2d Regular Sess., at 140 (1992) (reporting that the Act passed in the House by a 96-2 vote and passed the Senate by a vote of 43-6).

3. Other state controlled substance tax statutes include: ALA. CODE §§ 40-17A-1 to -16 (1993); COLO. REV. STAT. ANN. §§ 39-28.7-101 to -109 (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 12-650 to -660 (West 1993); GA. CODE ANN. §§ 48-15-1 to -11 (Supp. 1994); IDAHO CODE §§ 63-4201 to -4211 (Supp. 1994); ILL. ANN. STAT. ch. 35, para. 520/1-/26 (Smith-Hurd 1993 & Supp. 1994); KAN. STAT. ANN. §§ 79-5201 to -5211 (1989 & Supp. 1993); ME. REV. STAT. ANN. tit. 36, §§ 4432-36 (1990 & Supp. 1994); MINN. STAT. ANN. §§ 297D.01-.14 (West 1991); MONT. CODE ANN. §§ 15-25-101 to -123 (1993); NEB. REV. STAT. §§ 77-4301 to -4316 (1990 & Supp. 1994); NEV. REV. STAT. ANN. §§ 372A.010-.150 (Michie 1993); N.M. STAT. ANN. §§ 7-18A-1 to -7 (Michie 1993); N.C. GEN. STAT. §§ 105-113.105 to -113.113 (1992 & Supp. 1994); N.D. CENT. CODE §§ 57-36.1-01 to -16 (1993); R.I. GEN. LAWS §§ 44-49-1 to -16 (Supp. 1994); TEX. TAX CODE ANN. §§ 159.001-.301 (West 1992 & Supp. 1995); UTAH CODE ANN. §§ 59-19-101 to -107 (Michie 1992); WIS. STAT. ANN. §§ 139.87-.96 (West Supp. 1994); WYO. STAT. § 39-6-405(a)(xix) (1994).

4. IND. CODE § 6-7-3-5 (1993). The code references are to the state and federal code sections proscribing the delivery, possession, or manufacture of controlled substances.

5. See *id.*

The Act levies a tax upon controlled substances—based on substance type and weight—ranging from \$10 per gram on Schedule V substances to \$40 per gram on Schedule I, II, or III substances.<sup>6</sup> The amount of tax is based on the weight of the possessed substance, regardless of its degree of purity or dilution.<sup>7</sup> The tax is due upon receipt or manufacture of the substance<sup>8</sup> and every forty-eight hours thereafter.<sup>9</sup> The taxpayer receives a receipt verifying payment but stating expressly that payment of the tax does not “legalize the delivery, sale, possession, or manufacture of a controlled substance.”<sup>10</sup>

The Act provides that “[t]he payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.”<sup>11</sup> Moreover, the Act states that “[a] person may not be required to reveal the person’s identity at the time the tax is paid.”<sup>12</sup>

Nonpayment of the tax subjects the taxpayer to a 100% penalty in addition to the tax.<sup>13</sup> Additionally, “[a] person who knowingly or intentionally delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a Class D felony”<sup>14</sup> This felony provision applies only when the underlying possession offense is itself a felony.<sup>15</sup>

Challenges based on taxpayers’ rights under the Double Jeopardy<sup>16</sup> and Self-Incrimination Clauses<sup>17</sup> of the United States Constitution have met with mixed success against other states’ drug tax statutes. In June, 1994, the United States Supreme Court struck down Montana’s drug tax statute on double

6. *Id.* § 6-7-3-6 (1993). Indiana’s Criminal Code classifies controlled substances into five “schedules,” numbered I through V, based on their individual and group characteristics. Schedule I substances, for example, include those with a high potential for abuse and no accepted use in medical treatment in the United States. *Id.* § 35-48-2-3 (1993). Marijuana and heroin are typical Schedule I substances. For a description and explanation of the schedule classification system, see *id.* § 35-48-2-1 to -14 (1993 & Supp. 1994).

7. *Id.* § 6-7-3-6.

8. *Id.* § 6-7-3-8 (1993).

9. *Id.* § 6-7-3-10(b) (1993).

10. *Id.* § 6-7-3-10(a) (1993).

11. *Id.* § 6-7-3-9 (1993).

12. *Id.* § 6-7-3-8.

13. *Id.* § 6-7-3-11(a) (1993).

14. *Id.* § 6-7-3-11(b) (1993).

15. *Id.* See generally *id.* § 35-48-4-11 (1993) (specifying when possession of marijuana, hash oil, or hashish is a Class A misdemeanor and when it is a Class D felony).

16. See, e.g., *Briney v. State Dep’t of Revenue*, 594 So. 2d 120 (Ala. Civ. App. 1991), *cert. denied*, No. 1910187, 1992 Ala. LEXIS at \*171 (Ala., Jan. 31, 1992); *Sorensen v. State Dep’t of Revenue*, 836 P.2d 29 (Mont. 1992); *Olivarr v. State*, 838 S.W.2d 902 (Tex. Ct. App. 1992); *State v. Riley*, 479 N.W.2d 234 (Wis. Ct. App. 1991).

17. See, e.g., *Leary v. United States*, 395 U.S. 6 (1969); *Briney*, 594 So. 2d 120; *Harris v. State Dep’t of Revenue*, 563 So. 2d 97 (Fla. Dist. Ct. App.), *review denied*, 574 So. 2d 141 (Fla. 1990); *State v. Smith*, 813 P.2d 888 (Idaho 1991); *State v. Godbersen*, 493 N.W.2d 852 (Iowa 1992); *State v. Durrant*, 769 P.2d 1174 (Kan.), *cert. denied*, 492 U.S. 923 (1989); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986); *Lopez v. State*, 837 S.W.2d 863 (Tex. Ct. App. 1992); *Zissi v. State Tax Comm’n*, 842 P.2d 848 (Utah 1992); *State v. Davis*, 787 P.2d 517 (Utah Ct. App. 1990).

jeopardy grounds in *Department of Revenue v. Kurth Ranch*.<sup>18</sup> Other unsuccessful claims have been brought against these state drug tax acts based on cruel and unusual punishment,<sup>19</sup> procedural due process,<sup>20</sup> and equal protection<sup>21</sup> theories. Indiana's statute has already faced multiple challenges at the trial level, and courts in several Indiana counties already consider the Act unconstitutional.<sup>22</sup>

Self-incrimination challenges require no special analysis beyond inquiry into the workings of the Act. The underlying argument in double jeopardy analysis, however, is that the Act is not truly a tax, but a regulatory or punitive measure in disguise. Such an argument requires looking beyond the statute's language to divine the legislature's true intent. Whether an Indiana court may conduct such an inquiry is a matter of some doubt—even after *Kurth Ranch*—because of Indiana's strongly pro-legislature rules of statutory construction.<sup>23</sup>

Application of the Act also triggers a provision of the Indiana Constitution having no federal counterpart. Article X, section 1 of the Indiana Constitution provides for equal and just taxation of all property. Excise taxes are exempt from this requirement.<sup>24</sup> While this Act is labeled an excise tax, that label may not accurately describe its true nature. If the Act is not a true excise tax, but rather a tax on property, it must provide for equal taxation or fail as contrary to the Indiana Constitution.

This Note examines the merits of the strongest constitutional challenges to the Act. Specifically, constitutional challenges that have been successful against other state drug taxes, such as those based on self-incrimination and double jeopardy, as well as the Article X, section 1 theory mentioned above, will all be analyzed.

Part I reviews the development of the legal doctrines that led to the passage of Indiana's Controlled Substance Excise Tax. Part II analyzes whether the courts, in assessing the Act's constitutionality, may look beyond the "tax" language in the Act, or whether the rules of statutory construction require deference to the labels affixed by the legislature. In addition, Part II then questions whether the Act is truly a tax measure, or is instead a punitive

---

18. 114 S. Ct. 1937 (1994).

19. See, e.g., *Zissi*, 842 P.2d at 857-59.

20. See, e.g., *Hyatt v. State Dep't of Revenue*, 597 So. 2d 716 (Ala. Civ. App. 1992); *Reh v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992); *State v. Berberich*, 811 P.2d 1192 (Kan. 1991); *State v. Matson*, 798 P.2d 488 (Kan. Ct. App. 1990), review denied, 249 Kan. 777 (1991); *State v. Heredia*, 493 N.W.2d 404 (Wis. Ct. App. 1992), cert. denied, 113 S. Ct. 2386 (1993).

21. See, e.g., *Zissi*, 842 P.2d at 855-57.

22. Courts in Cass and Greene counties have struck down the Act on various grounds. Monroe County, which contains the state's only unified circuit court system, has seen a split. Two judges have upheld the Act, while a third has ruled it unconstitutional. See *State v. Elvers*, 09C01-9207-CF-00119 (Cass Cir. Ct., Order of Apr. 5, 1993); *State v. Hayes*, 28D01-9209-CF-519 (Greene Sup. Ct., Order of Apr. 16, 1993); *State v. Wagers*, 53D01-9304-00253 (Monroe Cir. Ct. III, Order of Oct. 12, 1993); see also Kurt Vander Dussen, *Local Judges Divided on Indiana Law*, HERALD TIMES (Bloomington, Ind.), June 7, 1994, at A7.

23. See *infra* part II.A.

24. IND. CONST. art. X, § 1.

measure in disguise. Part III analyzes the challenges that may be brought against the Act as a tax measure and, therefore, whether it complies with the Indiana Constitution's Equal Rate of Taxation Clause and the Self-Incrimination Clause of the United States Constitution. Part IV assumes that the tax is actually regulatory or punitive, and examines the double jeopardy challenge that may be brought against it on that ground.

## I. SOURCES OF LEGISLATIVE AUTHORITY

Taxing illegal conduct is not a novel concept. The government's power to tax illegal activities was not always clear, however, and may not be taken for granted. This Part reviews the development of the doctrine that led to the taxation of controlled substances. As early as 1864, Congress attempted to cast its taxation net broadly to include those individuals who profited from illegal conduct, such as dealing in lottery tickets or liquor.<sup>25</sup> In one 1864 revenue act, Congress "enacted that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a 'license' from the United States."<sup>26</sup> The statute further provided that "no license so granted, or special tax so laid, should be construed to authorize any business within a State prohibited by the laws thereof."<sup>27</sup> Faced with challenges from taxpayers arguing that Congress could not tax illegal conduct, the Supreme Court in the *License Tax Cases*<sup>28</sup> upheld the act's constitutionality, finding that "[t]here is nothing hostile or contradictory in the acts of Congress to the legislation of the States [outlawing the taxed conduct]. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation."<sup>29</sup>

Congressional power to tax illegal conduct thus seemed well-established until 1913, when the advent of the federal income tax<sup>30</sup> raised new disputes about the taxation of illegal activities. In *United States v. Sullivan*,<sup>31</sup> Justice Holmes wrote: "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"<sup>32</sup> Nearly two decades later, however, the Court in *Commissioner v. Wilcox*<sup>33</sup> held that Wilcox, a convicted embezzler, could not be taxed on embezzled funds because he did not earn the money under a bona fide claim of right. The *Wilcox* Court reasoned that without some valid claim to income,

---

25. E.g., Act of July 13, 1866, ch. 184, 14 Stat. 113, 116, 137, 141; Act of Mar. 3, 1865, ch. 78, 13 Stat. 472, 485; Act of June 30, 1864, ch. 173, 13 Stat. 248, 249, 252.

26. License Tax Cases, 72 U.S. (5 Wall.) 462, 463 (1866) (footnote omitted).

27. *Id.*

28. *Id.*

29. *Id.* at 473.

30. U.S. CONST. amend. XVI; Act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 167.

31. 274 U.S. 259 (1927).

32. *Id.* at 263.

33. 327 U.S. 404 (1946), *overruled in part by* James v. United States, 366 U.S. 213 (1961).

a taxpayer cannot be said to have received any taxable gain or profit under the Internal Revenue Code.<sup>34</sup>

Confusing matters further, six years later in *Rutkin v. United States*,<sup>35</sup> the Court heard a claim similar to that addressed in *Wilcox*, but reached the opposite result. Rutkin had been convicted of extortion, and the funds he extorted were taxed as income. The Court, while specifically declining to overrule *Wilcox*, found that there was no basis for Rutkin's claim that the Government could not tax his illegally earned income.<sup>36</sup>

In 1961, the Court in *James v. United States*<sup>37</sup> resolved the conflict in favor of the reasoning in *Rutkin* and the *License Tax Cases*. In *James*, the Court explained that "[i]t had been a well-established principle, long before *Rutkin* or *Wilcox*, that unlawful, as well as lawful, gains are comprehended within the term 'gross income'"<sup>38</sup> under § 61 of the Internal Revenue Code. The *James* Court referred to the "widespread and settled administrative and judicial recognition of the taxability of unlawful gains of many kinds."<sup>39</sup> *James* went beyond *Rutkin*, however, and expressly overruled *Wilcox* in an effort to "correct the error and the confusion resulting from it."<sup>40</sup> The Internal Revenue Service ("IRS") formalized the *James* holding by amending its tax regulations to comport with the decision.<sup>41</sup>

Although the government's power to tax illegal activities seemed at last to have acquired solid constitutional support, taxpayers persisted in their challenges to measures taxing specific criminal pursuits such as the illegal possession of firearms,<sup>42</sup> wagering,<sup>43</sup> and the possession of controlled substances.<sup>44</sup> Although some of these statutes were struck down, the ruling courts specifically held that, assuming Congress could avoid certain constitutional pitfalls, the government still had the power to place a tax on specific acts of illegal conduct.

In *Haynes v. United States*,<sup>45</sup> the defendant challenged a taxation and registration requirement under the National Firearms Act. Justice Harlan, writing for the Court, held that

this Court must give deference to Congress' taxing powers, and to measures reasonably incidental to their exercise; but we are no less obliged to heed the limitations placed upon those powers by the Constitution's

---

34. *Id.* at 408. The Internal Revenue Code section cited in *Wilcox*, § 22(a), was recodified as § 61 by the Internal Revenue Code of 1954. See I.R.C. § 61 (1988).

35. 343 U.S. 130 (1952).

36. *Id.* at 135.

37. 366 U.S. 213 (1961).

38. *Id.* at 218.

39. *Id.* (quoting *Rutkin*, 343 U.S. at 137).

40. *Id.* at 221.

41. See Treas. Reg. § 1.61-14 (as amended in 1965) (stating that "[i]llegal gains constitute gross income").

42. 26 U.S.C. §§ 5801-5845 (1988 & Supp. 1993).

43. 26 U.S.C. §§ 4401-4424 (1988). For a detailed list of state laws which, at that time, taxed illegal wagering and private lotteries, see *Marchetti v. United States*, 390 U.S. 39, 44-45 n.5, 46-47 n.6 (1968).

44. Marihuana Tax Act, ch. 553, § 7(a), (b), (c), 50 Stat. 554 (1939) (repealed 1970).

45. 390 U.S. 85 (1968).

other commands. Accordingly, nothing we do today will prevent the effective regulation or taxation by Congress of firearms.<sup>46</sup>

*Marchetti v. United States*,<sup>47</sup> a companion case to *Haynes*, exhibited a similar qualified deference to the will of the legislature, yet held that, as applied, a federal wagering tax statute<sup>48</sup> violated taxpayers' privilege against compelled self-incrimination. The defendant in *Marchetti* challenged a tax on illegally gained gambling earnings. The Court explained:

The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers. We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful.<sup>49</sup>

In *Leary v. United States*,<sup>50</sup> the Supreme Court used the *Marchetti* test to strike down the federal Marihuana Tax Act. Dr. Timothy Leary was apprehended entering the United States from Mexico in possession of illegal drugs and charged with violating the federal Marihuana Tax Act.<sup>51</sup> Dr. Leary argued successfully that compliance with the Act would require him to incriminate himself by admitting that he illegally possessed the drug. The *Leary* Court did not specifically address whether the government had the right to tax the illegal possession of controlled substances, seemingly taking this fact for granted in its blanket adoption of the *Marchetti* reasoning. However, a later Fifth Circuit case, *Vasilinda v. United States*,<sup>52</sup> held that the government did have such a right.

Obviously, cases upholding various drug taxes contain the implicit holding that state governments may tax the illegal possession of controlled substances. Only one state court has clearly based its holding on this underlying power. In *State v Durrant*,<sup>53</sup> the Supreme Court of Kansas relied on *Marchetti* and granted the same qualified deference to the taxing power of the legislature. As the *Durrant* court explained:

While some have questioned the propriety of a governmental entity imposing a tax upon an illegal act, the United States Supreme Court has held that a tax may be imposed on an activity that is wholly or partially unlawful under state or federal statutes. In doing so, however, the government may not violate constitutional restrictions, including the privilege against self-incrimination.<sup>54</sup>

46. *Id.* at 98; see also *Marchetti*, 390 U.S. at 58 ("We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful").

47. 390 U.S. 39 (1968).

48. 26 U.S.C. §§ 4411, 4412 (1988).

49. *Marchetti*, 390 U.S. at 58. For a detailed analysis of *Marchetti*'s principal holding on self-incrimination, see *infra* notes 100-18 and accompanying text.

50. 395 U.S. 6 (1969).

51. Ch. 553, § 7(a), (b), (c), 50 Stat. 554 (repealed 1970).

52. 487 F.2d 24 (5th Cir. 1973).

53. 769 P.2d 1174 (Kan.), cert. denied, 492 U.S. 923 (1989).

54. *Id.* at 1179 (citations omitted).

As a result, states can now confidently apply the principles first espoused in the *License Tax Cases* to tax the possession of controlled substances. Nevertheless, courts generally agree that the government's power is not absolute. As cases such as *Haynes* and *Marchetti* demonstrate, deference to the legislature's taxing power will not extend so far as to condone violations of basic constitutional rights. Consequently, the primary inquiry into Indiana's Controlled Substance Excise Tax is to determine whether the legislature has abused the courts' qualified deference by trampling upon taxpayers' rights.

## II. CONSTRUING INDIANA'S CONTROLLED SUBSTANCE EXCISE TAX

Entitled the "Controlled Substance Excise Tax," the Act appears to be a tax measure. It is included within the Indiana Code title on taxation and speaks throughout of an excise tax imposed on controlled substances.<sup>55</sup> Presumably, the Indiana General Assembly intended for this statute to be read as such. Certain challenges to the constitutionality of the Act, however, hinge on the argument that the Act is *not* a tax, and that the factors leading one to construe the Act as a tax are subterfuge. These challenges are based on the underlying argument that the Controlled Substance Excise Tax is actually designed to impose additional punishment upon those individuals illegally possessing controlled substances. Before examining whether the "tax" language in the Act is pretextual, however, this Note will first inquire when, if ever, the legislature's classification of a statute may be challenged when the legislation in question is facially unambiguous.

### A. Indiana's Rules of Statutory Construction

Any attack on the Act based upon a legislative intent which is not apparent from the face of the statute may fall on deaf ears in Indiana. Generally, unless the language of the statute is ambiguous, an Indiana court may not look beyond the plain meaning of the statutory language to attempt statutory construction.<sup>56</sup>

---

55. IND. CODE § 6-7-3-5.

56. See *R.L. v. State*, 437 N.E.2d 482 (Ind. Ct. App. 1982); *Jones v. Hendricks County Plan Comm'n*, 435 N.E.2d 82 (Ind. Ct. App. 1982); see also *Bynum v. LaPorte Superior Court No. 1*, 291 N.E.2d 355, 356 (Ind. 1973) ("None will dispute that in construing statutes, it is our duty to give effect to the plain and manifest meaning of the language used.")

The only possible textual ambiguity on the face of the Act from which one could infer a criminal purpose is the repeated cross-reference to the Criminal Code to supply definitions and classifications. Characterizing this "borrowing" of text as an ambiguity, however, is a tenuous assertion at best. The more plausible position is that, by using consistent definitions and classifications, the Code has *eliminated* the ambiguities that may be caused by varying definitions of the same terms within a statutory compilation. See IND. CODE § 6-7-3-1 to -5 (1993). It is noteworthy, however, that § 6-7-3-8 also provides that the tax is due when a person *receives or manufactures* a controlled substance in violation of the criminal statute. Thus, the tax is due only when the taxpayer commits a crime. See *supra* note 8 and accompanying text.

There are, however, exceptions to this general rule. Indiana courts recognize the well-established rule of statutory construction that tax statutes are construed in favor of the taxpayer and strictly against the state.<sup>57</sup> This rule "must be applied in conjunction with the basic principle that all statutes should be read where possible to give effect to the intent of the legislature."<sup>58</sup> Thus, a court interpreting a taxing measure must read the statute in such a manner as to ascertain the legislative intent while simultaneously favoring the taxpayer in any dispute as to the statute's interpretation.

Applied to the Controlled Substance Excise Tax, this rule does little to assist a taxpayer asking the Indiana courts to look beyond the Act's clear language. If it is to construe language at all, let alone strictly, a court must find some ambiguity in the language to interpret. If statutory language is ambiguous, then the courts will search for legislative intent.<sup>59</sup> Logically, the converse should be true: If there is no ambiguity, the court need not explore the legislative intent. Courts have recognized, however, that such a strict rule would allow pretextual statutes to subvert many constitutional protections when clear statutory language belies an invalid legislative intent. For example, one Indiana court has acknowledged that "[a] court would be remiss to close its eyes to a latent ambiguity in a statute created by legislative history, legislative purpose and the dictates of justice, for these are matters to be considered in interpreting any statute."<sup>60</sup> This, too, is a well-settled rule of statutory construction focusing on the principle that "[t]he intention of the lawmakers constitutes the law"<sup>61</sup> If the intention of the lawmakers runs counter to the interests of justice, courts must look beyond language that camouflages the legislature's true purpose. As Judge Learned Hand once observed, "[T]here is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance."<sup>62</sup>

Any sincere and effective constitutional analysis of the Act must look below the surface of the text. Because the "primary rule for judicial construction of statutes is to ascertain and effectuate the intent of the Legislature,"<sup>63</sup> Indiana courts should be permitted to search beyond the clear language of the statute, and should be encouraged to interpret the Act strictly against the state to uncover any "latent ambiguity" created by the intent of the legislature.

---

57. See, e.g., *Van Orman v. State*, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981); *Faris Mailing, Inc. v. Indiana Dep't of State Revenue*, 557 N.E.2d 713, 716 (Ind. Tax 1990); see also *Gross Income Tax Div. v. Surface Combustion Corp.*, 111 N.E.2d 50, 63 (Ind.), *cert. denied*, 346 U.S. 829 (1953); *Economy Oil Corp. v. Indiana Dep't of State Revenue*, 321 N.E.2d 215, 219 (Ind. Ct. App. 1974).

58. *Faris Mailing*, 557 N.E.2d at 716 (quoting *Park 100 Dev. v. Indiana Dep't of State Revenue*, 429 N.E.2d 220, 222 (Ind. 1981)); see also *Thompson v. Thompson*, 286 N.E.2d 657, 661 (Ind. 1972); *Kinder v. Doe*, 540 N.E.2d 111, 114 (Ind. Ct. App. 1989).

59. *Jones*, 435 N.E.2d at 83.

60. *Morgan County R.E.M.C. v. Indianapolis Power & Light Co.*, 293 N.E.2d 237, 240 (Ind. Ct. App.), *rev'd*, 302 N.E.2d 776 (Ind. 1973); see also *Woods v. State*, 140 N.E.2d 752, 754 (Ind. 1957).

61. *Morgan County R.E.M.C.*, 293 N.E.2d at 240 (citation omitted).

62. *Loubriel v. United States*, 9 F.2d 807, 808 (2d Cir. 1926).

63. *Morgan County R.E.M.C.*, 293 N.E.2d at 240.



A party seeking to challenge the constitutional validity of an Indiana statute faces yet another tradition of judicial deference to the will of the legislature.<sup>64</sup> A strong line of case law has created a safe haven against constitutional challenges for Indiana statutes. To say that an act of the legislature is protected by a strong presumption of constitutionality is a legal understatement.<sup>65</sup> Indiana courts have consistently held that “[a] court may not hold an act unconstitutional except on the clearest showing of invalidity [and all] doubts must be resolved in favor of the statute.”<sup>66</sup> Specifically, “every enactment of our General Assembly stands before [an Indiana court] cloaked with a presumption of constitutionality”<sup>67</sup> The burden on one challenging the constitutionality of an Indiana statute is similar to that imposed upon the prosecution attempting to prove a defendant’s guilt beyond a reasonable doubt.<sup>68</sup>

The result of this presumption, and the corresponding difficulty in overcoming it, is that “[w]hen a statute can be construed to support its constitutionality, such construction must be adopted.”<sup>69</sup> Such are the major obstacles facing those who would challenge the Controlled Substance Excise Tax in Indiana courts. Consequently, any challenge to the Tax must demonstrate that the only reasonable construction of the Act is an unconstitutional one.

### *B. Classifying the Controlled Substance Excise Tax*

Is the Controlled Substance Excise Tax truly a tax, or is it a punitive measure in disguise? While the Act is labeled a tax, “the nature of the tax must be determined by its operation and incidence, rather than by its title or designation made by the legislature. In other words, the legislature may not change a factual situation by giving it a different name or designation.”<sup>70</sup> The legislature’s intent in passing the Act may be scrutinized,<sup>71</sup> and Indiana

---

64. The Controlled Substance Excise Tax is subject to both federal and state constitutional challenges. To avoid unnecessarily covering well-documented ground by examining the standards of review and burdens of proof involved in challenges under the United States Constitution, this Part will focus instead on the special presumptions existing in Indiana to preserve a state law’s constitutionality.

65. See *Taxpayers Lobby v. Orr*, 311 N.E.2d 814, 816 (Ind. 1974).

66. *Id.* (citation omitted); see also *Roeschlein v. Thomas*, 280 N.E.2d 581, 589 (Ind. 1972); *State v. Clark*, 217 N.E.2d 588, 590 (Ind. 1966); *Wright Bachman, Inc. v. Hodnett*, 133 N.E.2d 713 (Ind. 1956). The court of appeals in *Puntney v. Puntney* held that this presumption may be defeated only by demonstrating unconstitutionality beyond a reasonable doubt. 420 N.E.2d 1283, 1288 (Ind. Ct. App. 1981).

67. *Eddy v. McGinnis*, 523 N.E.2d 737, 738 (Ind. 1988); see also *Miller v. State*, 517 N.E.2d 64, 71 (Ind. 1987); *American Nat’l Bank & Trust Co. v. Indiana Dep’t of Highways*, 439 N.E.2d 1129, 1132 (Ind. 1982).

68. See *Championship Wrestling, Inc. v. State Boxing Comm’n*, 477 N.E.2d 302, 305 (Ind. Ct. App. 1985) (“The burden is on the challenger to clearly demonstrate the statute’s invalidity, and all doubts are resolved in favor of the statute.”); see also *Avco Fin. Servs. v. Metro Holding Co.*, 563 N.E.2d 1323, 1329 (Ind. Ct. App. 1990) (granting “all reasonable presumptions” in favor of the constitutionality of the statute).

69. *Miller*, 517 N.E.2d at 71.

70. *Wright v. Steers*, 179 N.E.2d 721, 723 (Ind. 1962).

71. See *supra* 56-63 and accompanying text.

courts have established a test to guide that scrutiny. In *Besozzi v. Indiana Employment Security Board*,<sup>72</sup> the Indiana Supreme Court reasoned that "where the primary purpose is regulation and not revenue, there is an exercise of the police power, rather than the taxing power, the raising of revenue rather than regulation, there is an exercise of the taxing power of the state."<sup>73</sup> This "primary purpose test" provides a more objective standard than simple guesswork as to the subjective legislative intentions, since conflicting legislative ends may be discounted in light of a principal taxing or regulatory goal. In *Besozzi*, for example, the court based its holding on the conclusion that

the primary purpose of the [Employment Security Act] is the accumulation and distribution of funds, and not to police or regulate employment. Therefore, in function the act is primarily the exercise of the taxing authority rather than the police powers of the state, notwithstanding the statement to the contrary contained within the preamble of the act.<sup>74</sup>

The holding in *Besozzi* follows the reasoning of earlier cases that struggled to classify a statute as either punitive or revenue-raising. In *Department of Treasury v. Midwest Liquor Dealers*,<sup>75</sup> the Indiana Court of Appeals held that "the taxing power is exercised for the sole purpose of raising revenue while the police power can be exercised only for the purpose of promoting the public welfare."<sup>76</sup> Similarly, the supreme court held in *City of Terre Haute v. Kersey*<sup>77</sup> that a tax assessed on the operation of vehicles on the streets of Terre Haute, Indiana, according to the type of vehicle and the number of horses pulling it, was a tax because the primary purpose was to provide revenue for the maintenance and repair of the streets.<sup>78</sup>

There are many indications that the Act is in fact a punitive measure. For example, its entire taxation scheme applies only to those persons who possess controlled substances illegally, excluding pharmacists and physicians who are registered under Indiana law to possess or dispense controlled substances.<sup>79</sup>

72. 146 N.E.2d 100 (Ind. 1957).

73. *Id.* at 105 (footnote omitted).

74. *Id.*, see also *Championship Wrestling, Inc. v. State Boxing Comm'n*, 477 N.E.2d 302, 307 (Ind. Ct. App. 1985) ("If the primary purpose of the tax is to raise revenue, it is a tax and not an exercise of the police power to regulate.")

75. 48 N.E.2d 71 (Ind. Ct. App. 1943).

76. *Id.* at 73.

77. 64 N.E. 469 (Ind. 1902).

78. *Id.* at 471. As the *Kersey* court reasoned:

It is apparent that the ordinance neither professes nor is intended in any manner to regulate or restrict the use of vehicles, but the primary purpose thereof is to impose a license tax as revenue for the maintenance and repair of the streets. Therefore, appellant in the adoption thereof, cannot be said to have been in the exercise of the police power, for the functions of the latter are not primarily the raising of revenue. The authorities generally affirm that the power to tax, in a strict and proper sense, for the purpose of creating revenue, is not included within the police power of the state.

*Id.*

79. IND. CODE § 6-7-3-5. The Act excludes those persons registered under §§ 35-48-3-3 to -4 (1993). Section 35-48-3-9 provides that Schedule II, III, IV, and V drugs may be lawfully dispensed only upon the prescription of a practitioner and filled by a pharmacy. *Id.* § 35-48-3-9 (1993).

Moreover, felonious drug possessors face an additional Class D felony for failure to pay the tax, but no such additional penalty is imposed upon misdemeanor drug possessors.<sup>80</sup> Therefore, it may be inferred that the General Assembly intended to tax (or perhaps punish) only criminals, and to burden felony drug possessors more heavily than misdemeanants. Moreover, the Act contains a "reward provision," granting thirty percent of the "total amount collected from an assessment to the law enforcement agency that provided the information that resulted in the assessment."<sup>81</sup> Thus, the assessment and levy of the tax are closely tied to the prosecution of noncomplying taxpayers, a function of the state's police power. It can also be argued that one of the Act's purposes is to encourage "bounty hunting" by financially strapped law enforcement agencies. If true, this goal is principally a function of the police power, which serves to "promot[e] the public welfare"<sup>82</sup> by providing an incentive to zealously enforce the laws.

If the Act is in fact a sincere effort to strengthen the revenue gathering powers of the state, it must have a revenue raising "primary purpose."<sup>83</sup> The most obvious evidence of this purpose is the wording of the statute itself. This aspect alone, however, is insufficient evidence for one to conclude that the Act's primary purpose is taxation. One must also consider what factors might have convinced the General Assembly to enact a revenue measure taxing controlled substances. In so doing, one may presume that the General Assembly considered the financial results of drug tax measures implemented by other states.

This presumption is bolstered by the contents of the Indiana Legislative Services Agency's Fiscal Impact Statement—which was prepared in anticipation of the legislature's vote on the Act. The Fiscal Impact Statement informed the legislators that "[a]nnual revenues [in other states having drug taxes] vary from nothing in a few states to approximately \$300,000 in Minnesota. With few exceptions, collections result from seizure of assets upon arrest of possessors of illegal substances."<sup>84</sup> More precisely, in fiscal year 1991, the year of the Fiscal Impact Statement, Minnesota's Department of Revenue collected \$340,918 under its drug tax statute.<sup>85</sup> This figure, however, does not tell the entire story. In order to collect the \$340,918, the State of Minnesota was forced to impose tax liabilities in excess of \$1.8 million.<sup>86</sup> Moreover, for the five-year period between 1987 and the first portion of 1992, the Minnesota Department of Revenue assessed \$32,951,655 in taxes only to collect \$1,791,506.<sup>87</sup> Thus, Minnesota collected only 5.5%

---

80. *Id.* § 6-7-3-11(b).

81. *Id.* § 6-7-3-16(b) (1993).

82. *Besozzi v. Indiana Employment Sec. Bd.*, 146 N.E.2d 100, 104-05 (Ind. 1957).

83. *See supra* notes 72-74 and accompanying text.

84. OFFICE OF FISCAL AND MANAGEMENT ANALYSIS, LEGISLATIVE SERVS. AGENCY, FISCAL IMPACT STATEMENT LS 6421, at 2 (1991) [hereinafter FISCAL IMPACT STATEMENT].

85. Christina Joyce, *Expanding the War Against Drugs: Taxing Marijuana and Controlled Substances*, 12 HAMLINE J. PUB. L. & POL'Y 231, 237 (1991).

86. *Id.*

87. *Id.* at 242.

of the taxes it initially assessed.<sup>88</sup> The poor collection percentage was attributable to the failure of criminals to voluntarily pay the taxes as well as the fact that no stamps were sold since the second year of the law's enactment.<sup>89</sup> If Minnesota's experience is a drug tax success story worth emulating, then revenue-raising was not the primary purpose of the General Assembly

Collection difficulties with respect drug taxes are not uncommon:

Said a Maine official: "We do a fair amount of assessing, but very little collecting." In Arizona, which has a number of Latin Americans running drugs across its borders, officials face the difficult job of enforcing tax penalties on non-U.S. citizens. Minnesota Revenue officials estimate that from half to two-thirds of all drug arrests in Minnesota involve drug quantities too small to merit their interest. Furthermore, states cannot expect drug tax collections to happen overnight. According to one Minnesota official, "making an assessment is one thing; collecting is another thing. But if [law enforcement agencies] choose not to inform us, it's detrimental to the state because we have no opportunity to [make] a collection."<sup>90</sup>

Thus, the evidence before the General Assembly could not have led a rational legislator to conclude that the Controlled Substance Excise Tax would raise money for the state.

While the Act has only been in effect since July, 1992, the results thus far indicate that Indiana is having no more success than other states. According to the Indiana Department of Revenue's 1994 Annual Report, the state raised just \$260,000 under the Act in Fiscal Year 1994—a twenty percent decrease from 1993, the first year of collection.<sup>91</sup> This figure gains more significance when compared with the state's other sources of tax revenue. For example, the state raised over \$114 million in taxes on cigarettes and other tobacco products, and nearly \$34 million on alcoholic beverage taxes. Thus, these other "sin taxes" are much more financially rewarding to the state.<sup>92</sup> While not essential to the foundation of this Note, these figures serve to demonstrate how little revenue the Act actually raises for the State of Indiana.

Why, then, did the Indiana General Assembly pass the Controlled Substance Excise Tax? The cynical response is that the General Assembly applied "the Al Capone theory of law enforcement: Officials and legislators were certain no one would actually [pay the drug tax], and thus they could be prosecuted not only for having the drugs, but also for tax evasion. In addition, the state could collect the tax and a 100 percent penalty"<sup>93</sup> The more honest answer to this question is that no one except the individual legislators who voted knows why the statute was enacted. While the bulk of the evidence indicates

---

88. *Id.*

89. *Id.*

90. *Id.* at 241 (alterations in original) (citations omitted).

91. INDIANA DEP'T OF REVENUE, ANN. REP. 24 (1994).

92. *Id.* at 24-25.

93. Joyce, *supra* note 85, at 240 (alteration added) (quoting MINNEAPOLIS STAR & TRIB., Oct. 17, 1986, at 1B).

that the Act was designed to punish those who illegally possess controlled substances—and that even if the Act is truly a revenue raising measure, it is at best an effort that will have much more success on paper than in the treasury<sup>94</sup>—the absence of any meaningful legislative history in Indiana erects a wall against a more probing inquiry into the primary purpose of the legislature. Therefore, this Note will leave it to the reader to draw his own informed conclusions based on the available evidence, and then it will proceed with two separate lines of analysis. The first gives the legislature the benefit of the doubt and analyzes the Act's constitutionality based on the underlying assumption that the Act is truly a tax. The other line of reasoning discounts the stated purpose of the Act and examines it as a punitive measure.

### III. ANALYZING THE ACT AS A TRUE TAX

Two challenges to the constitutionality of the Act operate on the assumption that the General Assembly's labels are genuine (or at least deserving of the benefit of the doubt) and that the Controlled Substance Excise Tax is truly a tax measure. Despite this sincerity in classification, analysis of the Act in light of both the Indiana Constitution and the United States Constitution leads to the conclusion that the Act is unconstitutional.

#### *A. Challenges Based on Self-Incrimination*

Under the Act (and in certain cases the Internal Revenue Code),<sup>95</sup> a possessor of a controlled substance is compelled to provide the government with potentially incriminating evidence that could be used if the state wishes to prosecute the taxpayer for drug-related crimes. Thus, compliance with the Act compels self-incriminating testimony in violation of the Fifth Amendment to the United States Constitution and Article I, section 14 of the Indiana Constitution.<sup>96</sup>

---

94. It should be noted, however, that an ill-conceived statute is not necessarily an unconstitutional one. Just because a revenue raising measure will not, in fact, raise revenue, is not a matter for the courts to consider in constitutional analysis. *See Wright v. Steers*, 179 N.E.2d 721, 726 (Ind. 1962) ("We have no right to go into the merits of the proposed tax. Whether an Act is wise or expedient is a matter for the legislature—not the courts. Those matters have no bearing on the constitutionality of the legislation."); *see also Taxpayers Lobby v. Orr*, 311 N.E.2d 814, 820 (Ind. 1974); *Championship Wrestling, Inc. v. State Boxing Comm'n*, 477 N.E.2d 302, 305 (Ind. Ct. App. 1985).

95. *See, e.g.*, 26 U.S.C. § 6050I (Supp. 1993).

96. Since the U.S. Supreme Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), resolution of state constitutional issues by state courts must be clearly delineated from federal issues:

[When] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

*Id.* at 1040-41. To provide a similar distinction between state and federal law, this Note will cite to state cases primarily in support of state constitutional arguments, with explanatory parentheticals in the footnotes to explain substantive differences between state and federal constitutional law where appropriate.

The Fifth Amendment states, in pertinent part, that "[n]o person shall be compelled in any criminal case to be a witness against himself."<sup>97</sup> Article I, section 14 of the Indiana Constitution similarly states that "[n]o person, in any criminal prosecution, shall be compelled to testify against himself."<sup>98</sup> These proscriptions against requiring a defendant to testify or be a witness against himself form the constitutional protection against compelled self-incrimination. This right is a limited one and protects a citizen only against compulsion to provide "testimony"<sup>99</sup> Nevertheless, the United States Supreme Court in *Marchetti v. United States*<sup>100</sup> defined "testimony" broadly enough to include, in some cases, the payment of a tax on illegal activities.

To determine whether the payment of a tax constitutes giving self-incriminating evidence or testimony, Indiana courts must follow the four-part "*Marchetti* test." If the taxpayer challenging the statute meets his burdens under all four prongs of the test, the claim of the privilege against self-incrimination will constitute a complete defense to a failure to pay a tax.<sup>101</sup>

First, a court must consider whether the tax is aimed at individuals "inherently suspect of criminal activities."<sup>102</sup> Second, the court must further determine whether the taxed activity is in "an area permeated with criminal statutes."<sup>103</sup> Third, *Marchetti* applies only to cases in which the taxpayer is "required, on pain of criminal prosecution, to provide information which the individual might reasonably suppose would be available to prosecuting authorities."<sup>104</sup> Finally, the *Marchetti* test looks to whether such information "would surely prove a significant 'link in a chain' of evidence tending to establish [the defendant's] guilt."<sup>105</sup> Only if all of these burdens are met will a taxpayer succeed in showing that a statute compels self-incrimination.

Looking at the first requirement, Indiana's tax is aimed squarely at those in possession of controlled substances. As the Act states, "The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of I.C. § 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852."<sup>106</sup> The Act indicates that it is targeted solely at illegal possessors in two separate respects. First, the tax is imposed only on one who possesses controlled substances *in violation of criminal drug laws*.<sup>107</sup> Second, the tax specifically exempts

97. U.S. CONST. amend. V

98. IND. CONST. art. I, § 14.

99. See *Schmerber v. California*, 384 U.S. 757, 761 (1966) (adopting a two-part test for self-incrimination analysis: whether the evidence is (1) testimony, and (2) has a communicative aspect); see also *Allen v. State*, 428 N.E.2d 1237, 1240 (Ind. 1981) (recognizing that in Indiana, defendants are likewise protected only from "testimonial compulsion").

100. 390 U.S. 39 (1968).

101. *Id.* at 49.

102. *Id.* at 47 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

103. *Id.* (quoting *Albertson*, 302 U.S. at 79).

104. *Id.* at 48.

105. *Id.* (citations omitted).

106. IND. CODE § 6-7-3-8.

107. *Id.*

pharmacists and other professionals who are legally permitted to possess and dispense the drugs in question.<sup>108</sup> Such an exception influenced the *Leary* Court, which noted that certain groups statutorily authorized to possess controlled substances “appear to be wholly exempt from the transfer tax requirements.”<sup>109</sup> Similar exclusionary language contributed to the finding of unconstitutionality in *State v. Roberts*,<sup>110</sup> in which the Supreme Court of South Dakota struck down that state’s drug tax on self-incrimination grounds. As the *Roberts* court wrote:

We also note the alleged purpose of Chapter 10-50A is to tax and license trade in illicit controlled substances. Under SDCL 10-50A-8, those lawfully in possession of controlled substances are exempted from the tax and licensure provisions of the chapter. Additionally, the marijuana and controlled substances subject to taxation are only those substances illegally held. There is no doubt the chapter is directed towards a “select group inherently suspect of criminal activities.”<sup>111</sup>

Like the South Dakota Act, Indiana’s Act is squarely aimed at individuals inherently suspected of criminal activities: in fact it applies *only* to such persons.

With respect to the second prong—whether the taxed area is thoroughly permeated with criminal statutes—the possession and trafficking of controlled substances are areas thoroughly permeated with criminal statutes on both the state and federal level. Courts applying this prong of the *Marchetti* test agree that the state and federal criminal codes are thoroughly permeated with drug laws. In *Leary*, for example, the Court noted that “possession of any quantity of marihuana was apparently a crime in every one of the 50 States, including New York, where Petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted.”<sup>112</sup> The Indiana Criminal Code devotes an entire Article to crimes involving the possession, manufacture, and distribution of controlled substances.<sup>113</sup> Likewise, the United States Code contains many statutes outlawing the same drug-related conduct.<sup>114</sup> Because of the breadth and depth of drug regulation, it is safe to say that the possession, manufacture, and distribution of controlled substances are areas so thoroughly permeated with criminal statutes as to meet the burden imposed by *Marchetti*.

Whether Indiana’s statute meets the third and fourth prongs of the *Marchetti* test is less obvious. *Marchetti* recognizes compelled self-incrimination only when a taxpayer must provide information which the individual “might reasonably suppose would be available to prosecuting authorities.”<sup>115</sup> The

---

108. *Id.* § 6-7-3-5.

109. *Leary v. United States*, 395 U.S. 6, 18 (1969).

110. 384 N.W.2d 688 (S.D. 1986).

111. *Id.* at 691 (quoting *Leary*, 395 U.S. at 18) (citations omitted).

112. *Leary*, 395 U.S. at 16 n.15.

113. Article 48 of Title 35 of the Indiana Code consists of six chapters of the Indiana Criminal Code and is devoted solely to controlled substances. See IND. CODE §§ 35-48-1-1 to -6-15 (1993 & Supp. 1994).

114. See, e.g., 21 U.S.C. §§ 841-852 (1988 & Supp. 1993).

115. *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

information must “surely prove a significant ‘link in a chain’ of evidence tending to establish [the defendant’s] guilt.”<sup>116</sup> The Controlled Substance Excise Tax, however, purports to maintain the taxpayer’s confidentiality. Under the Act, “[a] person may not be required to reveal the person’s identity at the time the tax is paid.”<sup>117</sup> Additionally, “confidential information acquired by the department [of revenue] may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of [the Act].”<sup>118</sup>

The Act, however, fails to define the “confidential information” that may not be used to initiate or facilitate prosecution. Such information may include the taxpayer’s name, address, or physical description—which is especially relevant if the tax is paid in person. Although this information does not appear confidential as that term is commonly understood, such knowledge about one who has just paid the Controlled Substance Excise Tax can be highly incriminating. Without more explicit limitations on precisely what types of information are confidential, and thus nondisclosable, the statute’s ambiguity does not sufficiently prevent incriminating information from being disclosed to law enforcement agencies. The additional statutory provisions found elsewhere in the Indiana tax code<sup>119</sup> purport to provide taxpayers with additional protection. Specifically, section 6-8.1-7-1 provides:

(a) Unless in accordance with a judicial order or as otherwise provided in this chapter, the department, its employees, former employees, counsel, agents, or any other person may not divulge the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes, including required information derived from a federal return, except to:

- (1) members and employees of the department;
- (2) the governor;
- (3) the attorney general or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of the law relating to any of the listed taxes; or
- (4) any authorized officers of the United States; when it is agreed that the information is to be confidential and to be used solely for official purposes.<sup>120</sup>

Additionally, the Code makes violation of the above statute a Class C misdemeanor.<sup>121</sup>

The statutory protections, however, are largely illusory in this case. The above quoted language contains enough loopholes to render its protections meaningless. The first phrase of the statute, “unless in accordance with a judicial order or as otherwise provided in this chapter,” allows two situations

116. *Id.* (citations omitted).

117. IND. CODE § 6-7-3-8.

118. *Id.* § 6-7-3-9.

119. *Id.* § 6-8.1-7-1 (Supp. 1994).

120. *Id.*

121. *Id.* § 6-8.1-7-3 (1993).



where the protection against self-incrimination may be compromised. First, a judge may order tax information disclosed, with no limitation on the type of disclosure ordered. Additionally, "as otherwise provided in this chapter" may be construed to defer to section 6-7-3-9 of the Code, which allows non-confidential information (which has not been defined) to be disclosed to law enforcement officials. This section also allows disclosure to "any authorized officers of the United States." Such officers, who are not described in the statute, may include United States attorneys or agents of the FBI or DEA. Moreover, "official purposes" can easily be read to include non-tax related criminal prosecution on state and/or federal drug charges.

The Act's provision that "[a] person may not be required to reveal the person's identity at the time the tax is paid"<sup>122</sup> does not adequately protect the taxpayer from forced self-incrimination. Other statutory schemes which essentially amounted to mandatory registration of those committing illegal acts have been struck down despite similar attempts at saving language. In *Albertson v. Subversive Activities Control Board*,<sup>123</sup> the U.S. Supreme Court held that the statutory language preventing an individual's registration as a Communist from being "received in evidence against such person in any prosecution for any alleged violation of any . . . criminal statute" was an insufficient protection of the individual's rights against compelled self-incrimination.<sup>124</sup> As the *Albertson* Court observed, "[N]o [immunity] statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the [self-incrimination] privilege."<sup>125</sup> An immunity provision "is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard' by affording 'absolute immunity against future prosecution for the offence to which the question relates.'"<sup>126</sup> Simply put, an immunity provision is inadequate if it does not provide complete protection to the taxpayer's anonymity.

More recently, South Dakota's controlled substance tax was struck down on self-incrimination grounds in *State v. Roberts*.<sup>127</sup> The South Dakota statutory scheme at issue in *Roberts*, while specifically allowing for disclosure of tax return information to law enforcement officials (unlike Indiana's statute), attempted to provide saving language against self-incrimination under the drug tax provision. Nevertheless, the court ruled that the State's provision that nontax-related "[criminal] prosecution may not, however, be initiated or facilitated by the disclosure of confidential information in violation of [the provision detailing prescribed disclosure]," was insufficient to protect

---

122. *Id.* § 6-7-3-8.

123. 382 U.S. 70 (1965).

124. *Id.* at 79-80 n.10 (quoting 50 U.S.C. § 783(f) (1964)).

125. *Albertson*, 382 U.S. at 80 (first alteration in original) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892)).

126. *Id.* (quoting *Hitchcock*, 142 U.S. at 585-86).

127. 384 N.W.2d 688 (S.D. 1986).

taxpayers' rights.<sup>128</sup> This language is very similar to the Indiana Act's purportedly protective language.<sup>129</sup> The *Roberts* court held that "prosecution may be initiated by those officials based upon return information, even though [the statute] purports to eliminate just such an occurrence. We believe filing a return creates the 'real and appreciable' risk of self-incrimination prohibited by *Leary*"<sup>130</sup>

*Roberts* is arguably distinguishable in that the South Dakota statute specifically allows the release of tax information to law enforcement agencies.<sup>131</sup> This argument, however, overlooks the fact that Indiana's statutory section preventing disclosure of "confidential information" fails to define the term "confidential." Moreover, by restricting access to "confidential" information, the Act implicitly allows disclosure of "non-confidential" information. Without a definition to enable officials to determine whether information is confidential (and thus nondisclosable), incriminating information may conceivably be provided to law enforcement authorities under the seemingly innocuous guise of "non-confidential" information. Finally, Indiana's Code *does* allow disclosure of certain information to various officials who are in charge of criminal prosecutions and investigations. The protective language in the statutes addressed in *Albertson* and *Smith* did not save them from unconstitutionality. Thus, the real risk of self-incrimination leading to the decision in *Roberts* is equally present in the context of the Indiana Act, despite the statutory barriers erected by the legislature.

Nevertheless, some state courts have found sufficient protection in their own statutes. In *State v. Durrant*,<sup>132</sup> the Kansas Supreme Court reasoned that "the challenged Kansas statutes prohibit public employees from disclosing any information required under the act and prohibit the use of such information in a criminal proceeding, except to enforce the tax itself."<sup>133</sup> Thus, the

128. *Id.* at 690 (quoting S.D. CODIFIED LAWS ANN. § 10-50A-7 (repealed 1987)).

129. The Act reads as follows: "[C]onfidential information acquired by the department [of revenue] may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter." IND. CODE § 6-7-3-9.

130. *Roberts*, 384 N.W.2d at 691 (quoting *Leary v. United States*, 395 U.S. 6, 18 (1969)).

131. The provision states:

Returns and return information may be disclosed to the following:

(5) Officers, employees or legal representatives of any other state agency or department or political subdivision of the state for a civil or criminal law enforcement activity, if the head of the agency, department or political subdivision desiring such information has made a written request to the secretary specifying the particular information desired and the law enforcement activity for which the information is sought.

S.D. CODIFIED LAWS ANN. § 10-1-28.4(5) (1989). This disclosure provision is slightly more generous than Indiana's.

132. 769 P.2d 1174 (Kan.), *cert. denied*, 492 U.S. 923 (1989).

133. *Id.* at 1180. The protective language of the Kansas statute reads:

(a) Except as otherwise specifically provided by law, all information received by the director of taxation from applications for licensure or registration made or returns or reports filed under the provisions of any law imposing any excise tax administered by the director, or from any investigation conducted under such provisions, shall be confidential, and it shall be unlawful for any officer or employee of the department of revenue to divulge any such information except in accordance with other provisions of law respecting the enforcement and

*Durrant* court interpreted and approved of a stricter confidentiality provision than that found in Indiana's Act. Similarly, the Minnesota Supreme Court ruled in *Sisson v. Triplett*<sup>134</sup> that a statute protecting the confidentiality of a drug taxpayer's identity was sufficient to overcome a self-incrimination challenge. The *Sisson* court held that the Minnesota statute (which is also stricter than Indiana's) sufficiently protected the taxpayer's confidentiality.<sup>135</sup> Accordingly, the fact that these courts found no self-incrimination flaws in their own statutes does not lend support to Indiana's weaker non-disclosure provisions.

The focal point of *Marchetti's* reasoning, and the purpose of the four-point test, is to determine whether a tax law creates a real and substantial risk of self-incrimination.<sup>136</sup> *Marchetti* simply focuses on the taxpayer's reasonably founded fear of self-incrimination. This risk, if present, would arise when the taxpayer attempts to comply with the Act. The Act provides no specific guidance about how the tax must be paid, or by whom it must be paid.

If a taxpayer pays the tax by mail, the Department of Revenue must mail the receipt. Providing the Department of Revenue with a return address forces a taxpayer to disclose his identity, eliminating any chance of taxpayer anonymity. Still another obstacle facing payment by mail is that it will almost certainly not be in cash. Rather, the mailed payment will likely be a personal check, cashier's check, or money order. All three methods provide information about the payor's identity despite the Act's stipulation that the taxpayer need not provide identifying information. Finally, the excise tax is due when the taxpayer takes delivery of a controlled substance.<sup>137</sup> The tax receipt given to the taxpayer is valid for only forty-eight hours.<sup>138</sup> Thus, if payment of the tax is made by mail, the best-case scenario is that payment will be sent in

---

collection of such tax, in accordance with proper judicial order and as provided in K.S.A. 74-2424, and amendments thereto.

KAN. STAT. ANN. § 79-5210 (1988).

134. 428 N.W.2d 565 (Minn. 1988).

135. *Id.* The *Sisson* court interpreted a 1986 statute which provided for more protection than Indiana's Act. However, Minnesota has since gone further, enacting a stronger confidentiality provision in 1987 that reads:

Notwithstanding any law to the contrary, neither the commissioner nor a public employee may reveal facts contained in a report or return required by this chapter or any information obtained from a tax obligor; nor can any information contained in such a report or return or obtained from a tax obligor be used against the tax obligor in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due under this chapter from the tax obligor making this return.

MINN. STAT. ANN. § 297D.13 (1) (West 1991).

Texas has a similar provision, which was approved in *Lopez v. State*, 837 S.W.2d 863 (Tex. Ct. App. 1992). The Texas provision, like that of Minnesota, declares information provided by a taxpayer to be confidential, and forbids disclosure for any purpose other than tax proceedings. The Texas statute also restricts the use of such information in other proceedings unless it is independently obtained. TEX. TAX CODE ANN. § 159.005 (West 1992).

136. *Marchetti v. United States*, 390 U.S. 39, 53 (1968). The *Marchetti* Court held that "[t]he 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." *Id.* (citations omitted).

137. IND. CODE § 6-7-3-8.

138. *Id.* § 6-7-3-10(b).

anticipation of receipt of the controlled substance so that the payment will reach the state when due, if not sooner. The state then mails the receipt to the taxpayer, reaching the taxpayer no sooner than the day after payment is recorded. Thus, the forty-eight-hour validity period is reduced by one-half before the taxpayer receives evidence of payment.

If the taxpayer elects to pay the tax in person, the excise statute still creates a risk of self-incrimination. One who pays in person but seeks to protect his anonymity will almost certainly pay in cash, which provides no information about the payor and is untraceable. This cash payment will likely require the taxpayer to divulge his identity and significant personal information to the state by virtue of his appearance at a government office for the sole purpose of declaring publicly that he owes a tax on controlled substances that he illegally possesses or sells.

Moreover, the cash payment of a tax as costly as the Controlled Substance Excise Tax may compel the taxpayer to incriminate himself in a potential federal prosecution. The Indiana Department of Revenue may be subject to a federal tax statute requiring "any person who is engaged in a trade or business, and who, in the course of such trade or business, receives more than \$10,000 in cash in 1 transaction (or 2 or more related transactions)" to file an information return (IRS Form 8300) with the Internal Revenue Service.<sup>139</sup> Form 8300 requires significant personal information about the taxpayer, including name, address, and social security number. Given the high rate of taxation on controlled substances, the cash tax payments will very likely be in excess of \$10,000, thereby triggering the Form 8300 filing requirement.<sup>140</sup>

Recently, in *United States v. Ritchie*<sup>141</sup> the Sixth Circuit Court of Appeals addressed a self-incrimination claim based on the compulsion to submit a Form 8300 for the payment of a large legal fee in cash. Although the court denied the self-incrimination claim, it left open the possibility that the filing of a Form 8300 could be the source of compelled self-incrimination in other cases.<sup>142</sup> As the court explained, "[T]he information required must be incriminating or integrally linked with behavior deemed offensive in order for the Fifth Amendment to be implicated; paying one's attorney in cash does not fall within this category"<sup>143</sup> Therefore, if a cash transaction integrally linked with offensive behavior required the submission of a Form 8300, the taxpayer's right against self-incrimination might be in danger. The cash payment of the Controlled Substance Excise Tax provides just such a scenario—the information on a Form 8300 filed by one paying the tax in cash is integrally linked to the illegal possession of controlled substances.

The question remains whether the Indiana Department of Revenue is required to file a Form 8300 when receiving Controlled Substance Excise Tax

---

139. 26 U.S.C. § 6050I.

140. For example, the tax on 250 grams of marijuana (approximately one-half pound) is \$10,000.

141. 15 F.3d 592 (6th Cir.), cert. denied, 115 S. Ct. 188 (1994).

142. *Id.*

143. *Id.* at 602 (citation omitted).

payments. The phrase "person who is engaged in a trade or business" is vague. The term "person" may include governmental entities such as the Indiana Department of Revenue. A state department of revenue is, in fact, engaged in a trade or business: the assessment, collection, and distribution of state taxes. Section 6050I does not define the term "person." This omission is most likely the result of legislative oversight since other related sections define "person" for purposes of those sections. Those definitions vary as to whether a governmental entity is actually a person.<sup>144</sup>

Once the IRS receives this information, it is statutorily authorized to disclose it to federal law enforcement agencies under certain circumstances.<sup>145</sup> As the Internal Revenue Code provides:

[A]ny return or return information [including taxpayer identity] shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in

- (i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specially designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,
- (ii) any investigation which may result in such a proceeding, or
- (iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party,

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.<sup>146</sup>

Thus, agencies such as the FBI or the DEA could petition a federal judge for access to Forms 8300 filed by the Indiana Department of Revenue in payment of the Controlled Substance Excise Tax, and thereby receive the names of the individual taxpayers as a result of the taxpayers' forced compliance with the Controlled Substance Excise Tax. As a result, a taxpayer who is required to pay a tax in excess of \$10,000 is exposing himself to a real and substantial risk of providing self-incriminating evidence that may be used in a federal criminal drug prosecution. A Form 8300 detailing an individual's payment of the Controlled Substance Excise Tax would provide evidence of a taxpayer's guilt equal, for all practical purposes, to a forced confession. Moreover, the possibility that even a cash payment could compel the disclosure of self-incriminating testimony is a real and appreciable risk of self-incrimination.

By complying with the Controlled Substance Excise Tax, a taxpayer is subjected to a real and appreciable risk of self-incrimination. Compelling

---

144. Compare 26 U.S.C. §§ 6049(b)(4), 6050J(d) (1988) (including governmental entities as "persons") with *id.* §§ 6050B(b), 6050D(c) (1988) (limiting "person" to specific individuals for purposes of the particular section).

145. *Id.* § 6103(i)(1) (Supp. V 1993).

146. *Id.*

payment of this tax in the face of inadequate protections against self-incrimination is tantamount to extracting a forced confession. The possessor of a controlled substance is compelled to admit his or her guilt every forty-eight hours. Such "testimony" is one of the most self-incriminating types imaginable and would surely establish a "significant link in a chain of evidence" that would establish a taxpayer's guilt under *Marchetti*. Moreover, the evidence would meet the Supreme Court's test from *Schmerber v California*<sup>147</sup> for determining whether evidence is subject to a self-incrimination challenge by virtue of its testimonial and communicative nature. Therefore, the Act is unconstitutional because it forces the taxpayer to provide potentially self-incriminating evidence to the government.

*B. Article X, Section 1 of the Indiana Constitution*

[T]he Indiana Constitution provides a great variety of protections for citizens which are not contained in the Federal Bill of Rights. Aside from the ability to submit a claim that Indiana's provisions provide greater protection, there are a great many parts of Indiana's Bill of Rights which simply have no federal counterpart.<sup>148</sup>

Although the above quoted language is directed toward the Indiana Bill of Rights, its author, the current Chief Justice of the Indiana Supreme Court, specifically reminded the legal community that there exist throughout the Indiana Constitution rights and safeguards not present in the United States Constitution.<sup>149</sup>

One such right is found in Article X, section 1 of the Indiana Constitution, which requires that "[t]he General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."<sup>150</sup> This equal assessment requirement is, however, limited to property taxes under the general levy.<sup>151</sup> Thus, if the Controlled Substance Excise Tax is not a property tax under the state's general levy, the limitations found in Article X, section 1 are irrelevant.

---

147. 384 U.S. 757 (1966); see also *supra* notes 96-99 and accompanying text.

148. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 580 (1989).

149. *Id.* at 580 n.37.

150. IND. CONST. art. X, § 1.

151. *Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Bd.*, 29 N.E.2d 776 (Ind. 1940), *cert. denied*, 312 U.S. 698 (1941); *Miles v. Dep't of Treasury*, 199 N.E. 372 (Ind. 1935), *appeal dismissed*, 298 U.S. 640 (1936).

### 1. Is the Act an Excise Tax?

Obviously, the Controlled Substance Excise Tax has been labeled an "excise tax." The labels affixed by the state legislature, however, are not necessarily dispositive of a law's true nature. "[T]he nature of the tax must be determined by its operation and incidence, rather than by its title or designation made by the legislature. In other words, the legislature may not change a factual situation by giving it a different name or designation."<sup>152</sup> An excise tax is "one which is imposed upon the exercise of a privilege or use within the state."<sup>153</sup> Additionally, to qualify as an excise tax, the Act "must be so because the tax is imposed against the person because of privileges enjoyed and not against the property of the taxpayer."<sup>154</sup> Privileges and uses found to be permissibly taxed as excise include the use of the public highways,<sup>155</sup> the right to sell intoxicating liquors,<sup>156</sup> the right to enter "a particular business or calling, or as a license on particular pursuits, or as a mere police regulation,"<sup>157</sup> and the right to record mortgages.<sup>158</sup> These and other state excise tax statutes are all similar in that payment of the tax confers the right to enjoy a privilege on the taxpayer.<sup>159</sup>

Unlike the excise taxes discussed above, payment of the Controlled Substance Excise Tax confers no right or privilege on the taxpayer. The payment of this tax, assessed on the possession, delivery, and manufacture of controlled substances, does not allow the taxpayer to conduct these activities with impunity. Rather, the Act explicitly states that payment of the tax does not give the taxpayer the privilege of possessing, delivering, or manufacturing controlled substances.<sup>160</sup>

Nevertheless, Article X, section 1 is limited to property taxes under the general levy.<sup>161</sup> Courts have interpreted this limitation to mean that "this section of our fundamental law relates to a general assessment of taxes on property according to its value."<sup>162</sup> Under the Act, the tax is not assessed on an activity, but rather on the controlled substance by its weight. For controlled substances, assessment by weight is the same as assessment by

---

152. *Wright v. Steers*, 179 N.E.2d 721, 723 (Ind. 1962).

153. *Id.*

154. *Lutz v. Arnold*, 193 N.E. 840, 844 (Ind. 1935).

155. *City of Terre Haute v. Kersey*, 64 N.E. 469, 471 (Ind. 1902).

156. *Fry v. Rosen*, 189 N.E. 375 (Ind.), *appeal dismissed*, 293 U.S. 526 (1934).

157. *Bright v. McCullough*, 27 Ind. 223, 232 (1866).

158. 1933 Op. Att'y Gen. 19, 20.

159. *See, e.g., Village of Lombard v. Illinois Bell Tel. Co.*, 90 N.E.2d 105 (Ill. 1950) (holding that excise taxes arise from a privilege associated with the use of property, while property taxes arise from the property itself); *Herman v. Mayor & City Council of Baltimore*, 55 A.2d 491 (Md. 1947) (holding that excise taxes are taxes paid on the manufacture, sale, or consumption of commodities, and corporate privileges); *Columbus & Southern Ohio Elec. Co. v. Porterfield*, 324 N.E.2d 779 (Ohio Ct. App. 1974) (holding that an excise tax is one imposed upon the performance of an act, the engaging in of an occupation, or the enjoyment of a privilege).

160. IND. CODE § 6-7-3-9.

161. *Miles v. Dep't of Treasury*, 199 N.E. 372, 374 (Ind. 1935), *appeal dismissed*, 298 U.S. 640 (1936).

162. *City of Terre Haute v. Kersey*, 64 N.E. 469, 472 (Ind. 1902).

value, since the substances are sold and valued in their applicable market by weight (the "street value").<sup>163</sup> Indeed, the taxpayer need not use or transfer controlled substances to be taxed on them. The Act does not look solely to use or enjoyment of the illegal drugs. Rather, the statute specifically taxes "controlled substances that are possessed in Indiana."<sup>164</sup> Possession of the drugs, rather than use, is sufficient for a taxpayer to be subject to the tax. This leads to the conclusion that the drugs themselves (property) are being taxed, not the use or enjoyment thereof (excise). Consequently, the Act must be read as a tax on property, rather than an excise tax on the exercise of a right or privilege.

## 2. Application of Article X, Section I

If Article X, section 1 governs the Act's constitutionality, that section must be applied to determine whether the Controlled Substance Excise Tax provides for a uniform and equal rate of taxation and a just valuation for taxation. These constitutional requirements are strictly enforced by the courts.<sup>165</sup>

Cases interpreting Article X, section 1 have developed several principles to guide the construction of this provision. These principles are: "(1) Uniformity and equality in assessment; (2) uniformity and equality as to rate of taxation; and (3) a just valuation for taxation. *Each of these propositions are interlocking and mandatory.* They are the constitutional basis of a valid tax law"<sup>166</sup> Therefore, the absence of any of these three requirements should render a statute unconstitutional. Moreover, the legislature itself has decreed that "[a]ll tangible property which is subject to assessment shall be assessed on a just valuation basis and in a uniform and equal manner."<sup>167</sup>

The Act provides for no valuation; no reference whatever is made to the value of the controlled substances taxed, nor to a formula for taxation based on such a valuation. Rather, the arbitrary scale taxing the substances by weight from \$10-\$40 per gram has been promulgated by the state with no explanation or justification for this scheme.<sup>168</sup> Even assuming that there were a valuation for tax purposes, the Act does not provide a just valuation or assessment.<sup>169</sup> Indiana courts have held that "[t]here is uniformity and equality of assessment and taxation when all the property is to be assessed at its true cash value, and the same rate is fixed on all the property subject to

163. Don J. DeBenedictis, *How Long Is Too Long?*, A.B.A. J., Oct. 1993, at 74, 76.

164. IND. CODE § 6-7-3-5. This Note will not venture into the debate as to whether, or to what degree, possession constitutes conduct for criminal purposes.

165. Article X, section 1 "mandate[s] Indiana to maintain rigid requirements of equality in taxing property." *Bielski v. Zorn*, 627 N.E.2d 880, 884 (Ind. Tax 1994) (omission in original) (quoting *Indiana Aeronautics Comm'n v. Ambassador, Inc.*, 368 N.E.2d 1340, 1343 (Ind. 1977), *cert. denied*, 436 U.S. 905 (1978)).

166. *Id.* at 884 (emphasis in original) (citations omitted).

167. IND. CODE § 6-1.1-2-2 (1993).

168. *See id.* § 6-7-3-6.

169. The cases of *Wright v. Steers*, 179 N.E.2d 721 (Ind. 1962), and *Finney v. Johnson*, 179 N.E.2d 718 (Ind. 1962), added the requirement that both the valuation and assessment of property must be just for a tax measure to survive scrutiny under Article X, section 1.



assessment for the tax."<sup>170</sup> However, even a tax assessment based on the cost of taxed property does not satisfy the constitutional requirements unless it "move[s] towards the goal of securing a just valuation of all property on the principles of uniformity and equality."<sup>171</sup>

The taxes imposed under the Act far exceed any notion of fair or just taxation on property in relation to what a taxpayer would pay to acquire controlled substances. For example, marijuana (a Schedule I controlled substance),<sup>172</sup> is taxed at \$40 per gram. The estimated 1993 "street" value for marijuana in Indianapolis, Indiana, was \$3-\$6 per gram.<sup>173</sup> Other substances taxed by the Act are also taxed at or above their actual street values, and certainly in excess of any just assessment. For example, cocaine (a Schedule II drug)<sup>174</sup> and heroin (a Schedule I drug),<sup>175</sup> each having a per gram "street value" of between \$30 and \$50,<sup>176</sup> are taxed at \$40 per gram.<sup>177</sup>

Additionally, there is more to a just assessment than the stated amount of tax. Frequency of payment should also be considered in determining fairness. The receipt for payment under the Act is valid for a mere forty-eight hours. No other type of property is taxed so excessively, or so frequently. As a comparison, it is worth noting that few other states have drug taxes as financially severe as those listed in Indiana's Act.<sup>178</sup> The typical tax rate for marijuana is \$3.50 per gram, and many statutes provide thresholds for weight of the substance possessed, below which the tax is not assessed.<sup>179</sup>

It is safe to conclude that taxes in excess of the value of the taxed property, due every forty-eight hours, and having no actual relation to the value of the property, must violate a constitutional requirement calling for fair valuation and assessment. As a result, the Controlled Substance Excise Tax, which in

---

170. *Indiana State Bd. of Tax Comm'rs v. Lyon & Greenleaf Co.*, 359 N.E.2d 931, 933 (Ind. Ct. App. 1977); *see also* *Conter v. Commercial Bank of Crown Point, Ind.*, 199 N.E. 567 (Ind. 1936) (holding that Article X, section 1 implies that the basis for taxation shall be valuation); *Davis v. Sexton*, 200 N.E.2d 233, 243 (Ind. 1936) ("The provision of [Article X, section 1] is complied with when all property is assessed at its true cash value and at the same rate; there is then uniformity and equality of assessment and taxation. Our tax system here involved is based upon the true cash value of all property."). *But see* *Indiana Dep't of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91 (Ind. 1957) (holding that the Federal Constitution does not demand that states equate tax to property value), *appeal dismissed*, 355 U.S. 607 (1958).

171. *Lyon & Greenleaf*, 359 N.E.2d at 934.

172. IND. CODE § 35-48-2-4(d)(14) (Supp. 1994).

173. *DeBenedictis*, *supra* note 163, at 76.

174. IND. CODE § 35-48-2-6(b)(4) (1993).

175. *Id.* § 35-48-2-4(c) (Supp. 1994).

176. *DeBenedictis*, *supra* note 163, at 76.

177. IND. CODE § 6-7-3-6(a)(1) (1993).

178. Of the 23 state drug tax laws surveyed in a recent study, 15 taxed marijuana at \$3.50 for each gram above a threshold level ranging from 28 to 42.5 grams. It is noteworthy, however, that Indiana's tax rate on other controlled substances is much lower than those in most states. While Indiana taxes Schedule I substances such as heroin at the same \$40 per gram rate as marijuana, most states surveyed taxed nonmarijuana "controlled substances" as high as \$250 or \$300 per gram. 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, 137-39 (1994).

179. *Id.*

fact taxes property and not excise, violates Article X, section 1 of the Indiana Constitution.

#### IV CONSTRUING THE ACT AS A DISGUISED PENALTY DOUBLE JEOPARDY ANALYSIS

If the Controlled Substance Excise Tax is not in fact a tax, then it may be a "civil sanction" imposed only attendant to a conviction of the underlying drug offense. If so, the sanction violates a taxpayer's double jeopardy rights. The Fifth Amendment to the U.S. Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."<sup>180</sup> Similarly, the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense."<sup>181</sup>

Double jeopardy applies when the State attempts to prosecute or punish a defendant twice for the same offense.<sup>182</sup> Although the Act itself does not impose a criminal sanction, it does provide for a civil sanction which penalizes the taxpayer for possessing a controlled substance. While the tax is not a criminal penalty *per se*, double jeopardy may still apply if the civil sanction is disproportionately large and serves no remedial purpose that is linked to the costs of law enforcement.

##### A. Foundations for Double Jeopardy Reasoning: United States v Halper

In *United States v Halper*,<sup>183</sup> the Supreme Court applied the Double Jeopardy Clause to a civil sanction. The defendant in *Halper* was sentenced to prison and fined \$5000 for submitting false Medicare claims.<sup>184</sup> The trial court granted summary judgment in favor of the Government in its civil suit under the federal civil False Claims Act.<sup>185</sup> The civil remedy exceeded \$130,000, compared to the Government's \$16,000 actual loss in bringing the case.<sup>186</sup> The Supreme Court held that the statutory penalty of the False Claims Act, as applied to Halper, violated the Double Jeopardy Clause.<sup>187</sup> The Government argued that Halper's claims were meritless based on prior Supreme Court holdings that no civil penalty may give rise to double jeopardy.<sup>188</sup> Specifically, the Government argued that cases such as

---

180. U.S. CONST. amend. V

181. IND. CONST. art. I, § 14.

182. "[T]he [Federal Constitution's] Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989).

183. 490 U.S. 435 (1989).

184. *Id.* at 437.

185. 31 U.S.C. §§ 3729-3731 (1988 & Supp. V 1993).

186. *Halper*, 490 U.S. at 438-39.

187. *Id.* at 452.

188. *Id.* at 441.

*Helvering v. Mitchell*,<sup>189</sup> *Rex Trailer Co. v. United States*,<sup>190</sup> and *United States v. Ward*<sup>191</sup> established that criminal penalties can be imposed only in criminal proceedings. The *Halper* Court disagreed, holding that "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated."<sup>192</sup> Moreover, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."<sup>193</sup> Thus, the lesson to be learned from *Halper* is that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis."<sup>194</sup>

Simply put, to avoid violating the Double Jeopardy Clause, a civil sanction must not be punitive, and whether the legislature labels the sanction "criminal" or "civil" is not dispositive. "It is commonly understood that civil proceedings may advance punitive as well as remedial goals."<sup>195</sup> Thus, a civil remedy or penalty, such as the Controlled Substance Excise Tax, may take on the characteristics of a penalty for double jeopardy purposes if the sanction is grossly disproportionate to the actual damages or costs of prosecuting a defendant.

Perhaps fearful of a "floodgate" crisis resulting from overuse of double jeopardy in civil proceedings, the *Halper* Court limited its decision to "the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."<sup>196</sup> Seizing on the "overwhelmingly disproportionate" language in that limitation, courts have applied *Halper*'s reasoning to drug taxes. The need for clear guidance in this area led to the 1994 U.S. Supreme Court decision in *Department of Revenue v. Kurth Ranch*.<sup>197</sup>

---

189. 303 U.S. 391 (1938).

190. 350 U.S. 148 (1956).

191. 448 U.S. 242 (1980).

192. *Halper*, 490 U.S. at 447 n.7.

193. *Id.* at 448. *But see* *Eddy v. McGinnis*, 523 N.E.2d 737, 739 (Ind. 1988) ("Unless th[e] sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.") (quoting *Mitchell*, 303 U.S. at 398-99) (alteration in original). Both the *Eddy* and *Mitchell* decisions, however, preceded the Supreme Court's *Halper* decision.

194. *Halper*, 490 U.S. at 446; *see also* *State v. Riley*, 479 N.W.2d 234 (Wis. Ct. App. 1991) (holding that a \$43,600 penalty was remedial, not punitive).

195. *Halper*, 490 U.S. at 447. *But see* *Brney v. State Dep't of Revenue*, 594 So. 2d 120 (Ala. Civ. App. 1991) (finding that Alabama's drug tax was not fundamentally punitive, but remedial in nature).

196. *Halper*, 490 U.S. at 449.

197. 114 S. Ct. 1937 (1994).

### B. Specific Interpretation. The Kurth Ranch Case

In *Kurth Ranch*, the defendants were a farming family that turned to growing marijuana to raise revenue to save their Montana farm. After being apprehended by law enforcement authorities, the Kurth family was assessed nearly \$865,000 in drug taxes and penalties on their plants, marijuana, hash tar, and hash oil.<sup>198</sup> The case began as a bankruptcy proceeding, wherein the Department of Revenue filed a claim for taxes due. Following a trial, the Bankruptcy Court, relying on *Halper*, found that the tax assessment served to punish the Kurths a second time for conduct to which they had pleaded guilty and been punished.<sup>199</sup> The district court affirmed,<sup>200</sup> and the Department of Revenue appealed to the Ninth Circuit.

The Ninth Circuit began its analysis with *Halper*. In determining whether the tax was a civil sanction similar to that at issue in *Halper*, the court of appeals reasoned that:

A disproportionately large civil sanction imposed in a subsequent civil proceeding, however, may constitute "punishment" within double jeopardy's multiple-punishment prohibition. Although the Montana statute labels the assessment as a "tax," this in itself is not dispositive as to whether this imposition constitutes an impermissible second punishment. A state cannot evade the prohibitions of the federal constitution merely by changing the label of the punishment. Indeed, "labels affixed either to the proceeding or to the relief imposed are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law."<sup>201</sup>

By focusing on the retributive and deterrent elements of Montana's tax, the court found that the record lacked any evidence of the proportionality required for the sanction to be characterized as remedial.<sup>202</sup> Moreover, the *Kurth Ranch* court refused to consider the growing societal costs of fighting drug abuse in determining proportionality.<sup>203</sup> The Ninth Circuit concluded "that allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits."<sup>204</sup>

---

198. *Drummond v. Department of Revenue (In re Kurth Ranch III)*, 986 F.2d 1308, 1310 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

199. *Drummond v. Department of Revenue (In re Kurth Ranch I)*, 145 B.R. 61, 75 (Bankr. D. Mont. 1990), *aff'd*, 1991 WL 365065 (D. Mont., Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

200. *Drummond v. Department of Revenue (In re Kurth Ranch II)*, No. CV-90-084-PGH, 1991 WL 365065 (D. Mont., Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

201. *In re Kurth Ranch III*, 986 F.2d at 1310 (quoting *Halper*, 490 U.S. at 448) (citations omitted).

202. *Id.* at 1312. *But see* *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992) (holding that the loss suffered by the state must include any tax avoided by the taxpayer, as well as the typical expense incurred by the state in detecting and prosecuting drug tax cases).

203. *In re Kurth Ranch III*, 986 F.2d at 1312.

204. *Id.* Shortly before the Ninth Circuit handed down its decision, the Montana Supreme Court decided *Sorensen v. State Dep't of Revenue*, which ignored *Halper* and found that "a tax requires no proof of remedial costs on the part of the state." 836 P.2d 29, 33 (Mont. 1992). The Ninth Circuit criticized *Sorensen* because the state court's reasoning "ignore[d] the particularized double jeopardy inquiry required under *Halper*." *In re Kurth Ranch III*, 986 F.2d at 1312 n.2.

Not surprisingly, the State of Montana appealed. The U.S. Supreme Court granted certiorari to address the question of "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>205</sup> Justice Stevens, writing for a 5-4 majority, stated that "[t]his drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence.'"<sup>206</sup>

To support its holding, the Court first reiterated the principles from *Halper* that "a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct."<sup>207</sup> The Court then drew from earlier Supreme Court cases where it had recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."<sup>208</sup> Accordingly, the Court adopted *Halper's* conclusion that "a tax is not immune from double jeopardy scrutiny simply because it is a tax."<sup>209</sup>

Based on that principle, the Court looked to the Montana statute itself and found that it was "conditioned on the commission of a crime,"<sup>210</sup> and that such a condition is

significant of penal and prohibitory intent rather than the gathering of revenue. . . [T]he tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.<sup>211</sup>

Accordingly, the Court concluded that the Montana drug tax was punitive in nature and that it was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."<sup>212</sup>

### C. Application of *Halper* and *Kurth Ranch*

The reasoning adopted by the Supreme Court in *Halper* and extended in *Kurth Ranch* does not apply to all taxes. Indeed, "there is no need for the civil sanction to be tied to any remedial analysis when it is imposed apart from a criminal conviction."<sup>213</sup> Thus, the mootness issue arises if the state

---

205. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1941 (1994).

206. *Id.* at 1948 (quoting United States v. Halper, 490 U.S. 435, 440 (1989)).

207. *Id.* at 1945.

208. *Id.* at 1946.

209. *Id.*

210. *Id.* at 1947.

211. *Id.* (citations omitted).

212. *Id.* at 1948.

213. Drummond v. Department of Revenue (*In re Kurth Ranch III*), 986 F.2d 1308, 1311 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994).

chooses to bring the tax prosecution in the absence of the typical possession charge. In such a case, the tax penalty would be the only sanction against the taxpayer and, accordingly, there could be no double jeopardy.<sup>214</sup> The *Halper* and *Kurth Ranch* holdings were specifically tailored to the factual situations before the Court. Halper had been convicted of a crime, then punished with a civil sanction.<sup>215</sup> Thus, the civil sanction was the second punishment that placed Halper in double jeopardy. The same sequence of events applied to the Kurth family. Logically, however, there is no reason why the civil sanction cannot be the first punishment, to be followed by a criminal prosecution that places the defendant in double jeopardy. In the case of a drug tax, the sanction which actually places the defendant in jeopardy for the second time is simply a matter of timing depending on whether the prosecutor or the assessor reaches the defendant first. In *Kurth Ranch*, for example, the tax assessments took place before the defendants were actually punished (sentenced) for their crimes.<sup>216</sup> If a drug tax is a punishment, it is equally punitive regardless of whether it is the first or second sanction imposed on the defendant. If the drug tax comes first, followed by a drug prosecution under the criminal statutes, then the criminal sentence would trigger the double jeopardy challenge.<sup>217</sup>

In Indiana, like Montana, the tax on controlled substances will almost certainly be imposed along with the conviction. The Indiana Act itself is drafted so that its enforcement will complement a criminal prosecution. For example, the most basic provisions of the Act are designed to connect assessment and prosecution. Specifically, section 5 of the Act imposes the tax

---

214. If the state chose to proceed only under the tax statute, then the double jeopardy question would indeed be moot. However, assuming that the purpose of the tax is to provide for *additional* punishment of the drug offender, prosecution solely for the tax penalty would be icing without cake. This is especially true considering that the felony provision in the tax statute applies only to drug possessors whose underlying offense is itself a felony. Thus, prosecuting a misdemeanor drug possessor solely under the statute would serve only to exact a fine he cannot pay, without the threat of any jail time at all. Similarly, if the State prosecuted a felony drug possessor for failure to pay the tax without bringing the underlying felony drug charges, the best-case scenario for the State is a D felony conviction and a staggering fine (which will also very likely go unpaid). Nevertheless, many felony drug statutes provide for much heavier A or B felonies and the correspondingly heavier potential jail sentences. See, e.g., IND. CODE § 35-48-4-1 to -15.

215. As the *Halper* Court explained: "[U]nder the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." United States v. Halper, 490 U.S. 435, 448-49 (1989).

216. The Kurths were arrested on October 18, 1987, and assessed nearly \$865,000 in taxes and penalties on December 18, 1987. Drummond v. Department of Revenue (*In re Kurth Ranch I*), 145 B.R. 61, 66, 68 (Bankr. D. Mont. 1990), *aff'd*, 1991 WL 365065 (D. Mont. 1991, Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1937 (1994). They were sentenced on July 18, 1988. *In re Kurth Ranch III*, 986 F.2d at 1310.

217. The Court in *Kurth Ranch* indicated that "Montana could no doubt collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction. Here, we ask only whether the tax has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) (emphasis added). The implication is that the tax can be either a first or a second punishment, but in either case it is considered *punishment* for double jeopardy purposes.

on controlled substances that are delivered, possessed, or manufactured in violation of the criminal code.<sup>218</sup> Thus, the tax is levied only after the government has determined that a crime has been committed. Moreover, the "bounty hunter" provisions of the statute award up to ten percent of the taxed amount to an individual, or thirty percent to a law enforcement agency, for reporting a drug possessor.<sup>219</sup> Not only is this tax likely to be imposed along with a conviction, but it is difficult to imagine a taxpayer being taxed without also being prosecuted for criminal drug offenses.<sup>220</sup> Also significant to the Court in *Kurth Ranch* was the fact that the same sovereign imposed both the tax and the criminal penalty. The Court used this point to distinguish previous cases in which taxes on illegal activities were upheld.<sup>221</sup>

The final question to be determined is whether the Indiana tax is a remedial measure, and therefore permissible; or punitive, and therefore an additional punishment in violation of taxpayers' double jeopardy rights. So convinced was the *Kurth Ranch* Court that the Montana statute was punitive that it refused to engage in the "rough remedial justice" type of balancing contemplated by *Halper*. The State of Montana did not claim that its assessment remotely approximated the cost of prosecuting the Kurths or, for that matter, any other costs to the state.<sup>222</sup> Moreover, the Court implied that, even if the State of Montana did make such a showing, such balancing was unnecessary once a tax was characterized as punitive. The implication from *Kurth Ranch* is that such a tax measure would not even be saved by a showing that the assessment was based on a remedial formula.<sup>223</sup>

Like Montana's statute, Indiana's Act does not provide for any remedial purpose. Even before passing the Act, the State of Indiana determined that it would incur no additional costs by administering the tax.<sup>224</sup> Even if the State did incur costs and damages in the prosecution of drug tax claims, this tax is not designed to compensate for them. Rather, the Act's provisions distribute money in various ways that are unrelated to the costs of taxing drug possessors. For example, up to ten percent of any taxes received may be paid to the individual who reports the taxpayer.<sup>225</sup> An additional thirty percent may be paid to the law enforcement agency that turns in the taxpayer, not to compensate that agency for the costs of its tax prosecution, but rather as an incentive to conduct criminal investigations.<sup>226</sup> In fact, only twenty percent of the money collected under the Act may be appropriated to pay the costs of

---

218. IND. CODE § 6-7-3-5.

219. *Id.* § 6-7-3-16.

220. *See supra* note 214.

221. *Kurth Ranch*, 114 S. Ct. at 1947 n.22.

222. *Id.* at 1948.

223. *Id.* Although the non-remedial nature of the statute was a factor considered by the *Kurth Ranch* majority, Chief Justice Rehnquist dissented in part on the grounds that a tax, unlike a civil sanction, "need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities." *Id.* at 1950 (Rehnquist, C.J., dissenting).

224. FISCAL IMPACT STATEMENT, *supra* note 84, at 1 ("The Department of Revenue reports that it can absorb any administrative costs [of the Act] within its existing budget.")

225. IND. CODE § 6-7-3-16.

226. *Id.*

administering and enforcing the Act.<sup>227</sup> Similar to the Montana tax interpreted in *Kurth Ranch*, the Act's provisions do not provide for any of the "rough justice" permitted by *Halper*. Rather, any money collected is distributed in various directions, very little of which has anything to do with enforcing and administering the Act. Because the Indiana statute is aimed squarely at drug offenders, will almost certainly be imposed attendant to a criminal prosecution, and serves no remedial purpose, the Act must be construed as a penalty, and as a violation of the Double Jeopardy Clause.

### CONCLUSION

The Controlled Substance Excise Tax is unconstitutional on its face and as applied in any collection action. As applied, it violates constitutional safeguards against self-incrimination and double jeopardy, as well as Article X, section 1 of the Indiana Constitution. While its ends may be noble, a public policy aim of eliminating illegal drug use does not justify the enactment of a pretextual revenue measure as a means to exact additional punishment from drug possessors.

Despite Machiavelli's assertions to the contrary, the ends here do not justify the means. This is particularly true in light of the constitutional barriers established to prevent an overzealous legislature from abridging the rights of its citizens to achieve an end that it perceives as worthy. These barriers do not distinguish between good and ill intent on the part of the legislature, but serve only to limit the power that body has to impose its will on its constituency. While few people can muster a great deal of moral outrage over additional sanctions on drug dealers and possessors, the more basic concern over the Act is that a legislature which is permitted to tax without limit will do so, often to the detriment of those in society who are more sympathetic to the public. If the legislature wishes to tax controlled substances, numerous cases confirm its right to do so. It must, however, act within its constitutional bounds. To allow the legislature to do otherwise would endanger much more than the pocketbook of the occasional drug dealer or marijuana grower.