Catholic University Law Review

Volume 19 | Issue 1 Article 5

1969

# Leary and Covington: Registration and the Fifth Amendment

Catholic University Law Review

# *Leary* and *Covington*: Registration and the Fifth Amendment

In his dissenting opinion in *Marchetti v. United States*[1] and *Grosso v. United States*,[2] Mr. Chief Justice Warren characterized the effect of the Court's holding in these cases as an "opening [of] the door"[3] to attacks on federal registration statutes "whenever the registration requirement touches upon allegedly illegal activities."[4] These cases, together with *Haynes v. United States*,[5] form a trilogy holding, in sum, that criminal prosecution for failure to register and pay certain taxes under the federal gambling and firearms control statutes is inconsistent with a defendant's fifth amendment privilege against self-incrimination and that assertion of this privilege constitutes a complete defense to the prosecution. These decisions were based upon the premise that the statutory obligations to register and pay the taxes in question created a "real and appreciable" risk of self-incrimination. From this basis, the Court set down the specific criteria for the application of the trilogy. These require that (a) the area at which the registration statute is directed be one "permeated with criminal statutes"[6] in which there exists a statutory scheme presenting " 'real and appreciable' . . . hazards of self-incrimination,"[7] and (b) the registration requirement focus upon a group "inherently suspect of criminal activities," compelling the production of information which "would surely prove a significant 'link in a chain' of evidence tending to establish . . . guilt."[8]

---

1. 390 U.S. 39 (1968). For a discussion of the principal registration cases see: Note, *Constitutional Law—Wagering Tax Statutes and the Fifth Amendment*, 14 LOYOLA L. REV. 386 (1968); Note, *Registration Statutes and the Privilege Against Self-Incrimination*, 63 NW. U.L. REV. 398 (1968); Note, *Marchetti: Federal Registration and the Fifth Amendment*, 29 OHIO ST. L.J. 771 (1968); 5 SAN DIEGO L. REV. 390 (1968); 22 SW. L.J. 539 (1968).

2. 390 U.S. 62 (1968).

3. *Id.* at 83.

4. *Id.*

5. 390 U.S. 85 (1968).

6. Marchetti v. United States, 390 U.S. 39, 47 (1968), *quoting* Albertson v. SACB, 382 U.S. 70 (1965), which held that registration provisions compelling disclosure of incriminating information contravene the fifth amendment when "directed at a highly selective group inherently suspect of criminal activities . . . where response to any of the form's questions . . . might involve . . . the admission of a crucial element of a crime." *Id.* at 79. *See generally* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103.

7. 390 U.S. at 48.

8. *Id.*

Almost at once, the attack forecasted by the Chief Justice appeared in the form of numerous cases seeking to overturn the registration provisions of the Marihuana Tax Act[9] and the Alcohol Tax Act.[10] This note will focus upon the application of the trilogy rationale to the registration provisions of the Marihuana Tax Act as explicated by the Court in *Leary v. United States*[11] and *United States v. Covington*,[12] with consideration given to the question of waiver, the consequences of a timely assertion of the privilege, and the question of whether the trilogy should be given a retroactive application.

*Application of the Trilogy Rationale to the Marihuana Tax Act*

The granting of a writ of certiorari in *Leary*[13] and the noting of probable jurisdiction in *Covington*,[14] placed the issue of whether the fifth amendment privilege barred conviction for failure to register and pay the marihuana transfer tax[15] squarely before the Court.[16] Prior to the Court's consideration of this issue, the lower federal courts, with one exception,[17] had been in agreement that the registration provisions of the Marihuana Tax Act were not within the scope of fifth amendment protection.[18] In *Leary*, the petitioner had

9. INT. REV. CODE of 1954, §§ 4741-62 *passim*.
10. INT. REV. CODE of 1954, §§ 5001-693 *passim*.
11. 395 U.S. 6 (1969).
12. 395 U.S. 57 (1969).
13. Leary v. United States, 392 U.S. 903 (1968).
14. United States v. Covington, 393 U.S. 910 (1968).
15. INT. REV. CODE of 1954, § 4744(a). Section 4744(a), in conjunction with Section 4741(a) and Section 4742, forms a comprehensive statutory scheme for the taxation and registration of marihuana. Section 4741(a) imposes a tax upon all transferees of marihuana (upon registered individuals at the rate of $1.00 per ounce transferred and upon unregistered individuals at the rate of $100 per ounce transferred); Section 4742 requires the transferee to register the intended transfer, obtain an "order form" from the Secretary of the Treasury or his delegate, and to preserve the form for a period of two years giving the original copy to any other individual to whom he may transfer the marihuana. Section 4744 makes it unlawful to possess marihuana in the absence of an order form and failure to produce the order form upon demand "shall be presumptive evidence of guilt . . . and of liability for the tax imposed by section 4741(a)."
16. Had the Court granted certiorari in *Leary* only, it could have limited its consideration of the case to the validity of the statutory presumption contained in 21 U.S.C. § 176a (1964). In *Covington*, the single issue presented for resolution was the constitutionality of the registration provisions of the Marihuana Tax Act. Thus the action of the Court in setting these cases together for the purpose of oral argument strongly urged a decision with regard to the fifth amendment attack on the marihuana transfer tax provisions.
17. United States v. Covington, 282 F. Supp. 886 (S.D. Ohio 1968).
18. United States v. Buie, 407 F.2d 905 (2d Cir.), *cert. granted*, 395 U.S. 976 (1969) (No. 2083, 1968 Term; renumbered No. 271, 1969 Term); Thompson v. United States, 403 F.2d 209 (5th Cir. 1968); Sanchez v. United States, 400 F.2d 92 (5th Cir. 1968); Browning v. United States, 366 F.2d 420 (9th Cir. 1966); Rule v. United States, 362 F.2d 215 (5th Cir. 1966), *cert. denied*, 385 U.S. 1018 (1967); Haynes v. United States, 339 F.2d 30 (5th Cir. 1964), *cert. denied*, 380 U.S. 924 (1965); Ruiz v. United States, 328 F.2d 56 (9th Cir. 1964); Manning v. United States, 274 F.2d 926 (5th Cir. 1960); Ramseur v. United States, 285 F. Supp. 1020 (E.D.

been indicted for violation of the *transfer* tax provision of the Marihuana Tax Act.[19] After a motion for a judgment of acquittal was denied, the jury returned a verdict of guilty. The Court of Appeals for the Fifth Circuit affirmed the conviction and rejected the argument, raised by the defendant for the first time on appeal, that the *registration* provisions of the Act violated his constitutional privilege against compulsory self-incrimination.[20] Following the decisions in *Marchetti, Grosso,* and *Haynes,*[21] the defendant filed a petition for rehearing and suggestion for rehearing en banc. The Court of Appeals in a per curiam opinion denied the petition and held that the trilogy rationale was not applicable to cases involving the Marihuana Tax Act since it was possible for a person to qualify as a lawful possessor of marihuana under the Act.[22] The court noted also that Leary had affirmatively waived his fifth amendment privilege by taking the stand and "testifying fully to the details of his acquisition . . . of marihuana without having paid the tax or having secured the . . . written order forms."[23]

In contrast to the Fifth Circuit's approach in *Leary*, the district court in *Covington* granted the motion to dismiss an indictment which had charged the defendant with the acquisition of marihuana without having paid the transfer tax required by the Internal Revenue Code of 1954, Section 4744(a).[24] The district court ruled that the fifth amendment privilege as interpreted by the trilogy provided a complete defense to the prosecution. In responding to the government's argument that the defendant did not face a "real and appreciable" risk of incrimination because he could not possibly have qualified under the Act to pay the tax, the court held that if the defendant could not have paid the tax there could be no basis for the indictment. The government took a direct appeal to the United States Supreme Court.[25]

One of the elements essential to the application of the trilogy rationale is clearly present in the case of marihuana regulation; namely, it is an area

Tenn. 1968); United States v. Vial, 282 F. Supp. 472 (D. Mass. 1968); United States v. Reyes, 280 F. Supp. 267 (S.D.N.Y. 1968); Arrizon v. United States, 224 F. Supp. 26 (S.D. Cal. 1963).

19. INT. REV. CODE of 1954, § 4744(a).

20. Leary v. United States, 383 F.2d 851, 870 (5th Cir. 1967). Although *Leary* originally raised several issues, including a first amendment defense, only one is germane to the present discussion, namely, whether the registration and transfer tax provisions of the Marihuana Tax Act violated the privilege against self-incrimination.

21. Leary had been tried on March 11, 1966, and his conviction was affirmed by the Court of Appeals for the Fifth Circuit on September 29, 1967. *Marchetti, Grosso,* and *Haynes* were decided on January 29, 1968.

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

23. *Id.* at 222.

24. United States v. Covington, 282 F. Supp. 886 (S.D. Ohio 1968).

25. 18 U.S.C. § 3731 (1964) authorizes direct appeal by the government from dismissal of an indictment when the decision is one "sustaining a motion in bar" or "is based upon the invalidity or construction of the statute upon which the indictment . . . is founded."

permeated with criminal statutes. In addition to a comprehensive federal scheme,[26] all states have statutes providing criminal sanctions for the unauthorized possession and use of marihuana.[27] The Court in *Leary* specifically pointed out that at the time the petitioner failed to comply with the Act, the possession of marihuana was a crime in every state.[28] The Court concluded from this fact that "the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' "[29]

In order to fully appreciate whether compliance with the Marihuana Tax Act presents a "real and appreciable" risk of self-incrimination, an examination of the statutory scheme is essential. The Act has two main sub-parts. One part deals with an annual occupational tax[30] and the other imposes a tax upon all transferees of marihuana.[31] The occupational tax assesses a relatively nominal tax upon a "special" class of persons whose pursuits in the area of marihuana are prima facie a legitimate or commercial endeavor. These persons must register with the nearest district office of the Internal Revenue Service.[32]

Section 4741 of the Act imposes a tax upon *all* transferees of marihuana including those who have registered and paid the occupational tax. Likewise, Section 4742 makes it unlawful for any person "*whether or not required to pay a special tax and register*"[33] to transfer marihuana without the written order form issued by the Secretary of the Treasury or his delegate.[34] (Emphasis added). Treasury regulations require that the order form must show the name and address of the transferee and transferor; the individual's registration number, *if registered*; and the amount of marihuana to be transferred.[35] It is also required that the transferee first submit an

26. INT. REV. CODE of 1954, §§ 4741-76.

27. Forty-eight states, the District of Columbia, and Puerto Rico have passed the UNIFORM NARCOTIC DRUG ACT, while California and Pennsylvania have independent legislation. CAL. HEALTH & SAFETY CODE, §§ 11000-11853 (West 1964); PA. STAT. ANN. tit. 35, §§ 780-2(g), 780-4(q) (Purdon 1964).

28. 395 U.S. at 16 (1969).

29. *Id.* at 18.

30. INT. REV. CODE of 1954, §§ 4751-53.

31. INT. REV. CODE of 1954, § 4741(a)(1), (2).

32. INT. REV. CODE of 1954, § 4753.

33. INT. REV. CODE of 1954, § 4742. A definite distinction is made in Section 4741 of the Act regarding application of the transfer tax. Taxpayers who have previously registered under Section 4751 (the occupational tax provisions) are assessed at the rate of one dollar per ounce of marihuana transferred, while "[*u*]*pon each transfer to any person who has not paid the special tax and registered . . . $100 per ounce*" is assessed. INT. REV. CODE of 1954, § 4741(a)(2) (emphasis added). Such variance suggests that the statute considered as a whole presents two schemes, one directed at the lawful pursuits of registered individuals, and the other directed at the illicit activities of unregistered individuals.

34. INT. REV. CODE of 1954, § 4742(a).

35. Treas. Reg. §§ 152.66, 152.69 (1964).

application containing this specific information before an order form may be issued.[36] Section 4744 makes it a crime to carry out a transfer without a written order form signifying prepayment of the tax. A list of those who have paid the *special taxes* and been issued order forms is kept in the district office of the Internal Revenue Service and will be furnished to state and local prosecutors upon request.[37] Individuals who tendered payment of the *transfer tax* were also subject to similar disclosures by the Internal Revenue Service.[38] The Court in *Leary*, upon analysis of the statutory scheme, concluded that the "[p]etitioner had ample reason to fear that transmittal . . . of the fact that he was a recent, unregistered transferee of marihuana 'would surely prove a significant link in a chain of evidence tending to establish his guilt' under the state marihuana laws then in effect."[39] Thus, the second criterion of the trilogy had been satisfied.

In *Leary*, as well as in *Covington*, the Government urged a construction of the Act whereby "its incriminatory aspect [would] be seen to vanish or shrink to less than constitutional proportions."[40] It was argued that the registration requirements of the Act were aimed at the legitimate market and as drafted and administered they presupposed and applied only to activities which were otherwise lawful. The Government contended that the Act, when scrutinized in light of consistent administrative interpretation and application, presented no real and appreciable risk of self-incrimination since the Treasury Department had always denied applications for order forms from unregistered persons and had refused to accept prepayment of the tax by such individuals. The Government viewed the Act as totally proscribing transfers of marihuana by other than lawful registrants. Individuals who could not deal lawfully in marihuana were ineligible to obtain the order forms and, because only information as to lawful activities was supplied, those who were permitted to comply with the Act were not incriminating themselves. In support of this construction, the Government pointed to Treasury Regulations which require that proposed applicants make a showing of lawful purpose as a condition precedent to the issuance of an order

36. *Id.*

37. INT. REV. CODE of 1954, § 6107. In his dissent in *Marchetti* and *Grosso*, Chief Justice Warren contended that "[w]hat seems to trouble the Court is not that registration is required but that the information obtained through the registration requirement is turned over by federal officials, under statutory compulsion of 26 U.S.C. § 6107, to . . . prosecutors." 390 U.S. at 81 (1968).

38. INT. REV. CODE of 1954, § 4773.

39. 395 U.S. at 16 (1969). The Court further noted that "[i]t is also possible that compliance with the Act also would have created a substantial risk of incrimination under 21 U.S.C. § 176a, the other federal statute which petitioner was convicted of violating." *Id.* at n.14.

40. *Id.* at 18.

form.[41] This line of reasoning attempts to remove the statute from the area of constitutional attack by denying unregistered persons the opportunity to pay the $100 per ounce transfer tax which the statute clearly assesses upon them.[42] The Court found the legislative history of the Act to evince a congressional intent contrary to the construction urged by the Government. At the time the bill was introduced, the Department of the Treasury feared that the courts would deny to Congress absolute authority to regulate the use and possession of marihuana to the exclusion of the states.[43] Thus, desiring to avoid any possibility of constitutional attack, the device of a prohibitive tax of the type that had been upheld in *Sonzinsky v. United States*[44] was adopted.

The Treasury Department, as sponsor of the legislation, intended that its registration provisions be patterned after those of the National Firearms Act.[45] That Act allowed an individual to purchase a machine or sub-machine gun, but only after the individual paid a $200 transfer tax *and* provided certain information to the Treasury Department on an official order form. Testifying in support of the Marihuana Tax Act, the Assistant General Counsel of the Department of the Treasury stated that "[t]his bill would permit anyone to purchase marihuana as was done in the National Firearms Act . . . but he would have to pay a tax of $100 per ounce . . . and make his purchase on an official order form."[46]

Since the firearm registration statutes which served as the model for the marihuana provisions had been declared unconstitutional by the Court in

41. Treas. Reg. § 152.23 (1964) provides that "[t]he application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought." *But see* Treas. Reg. § 152.45 (1964) which states that "[p]ersons who engage in business in violation of the law of a State are, nevertheless, required to pay [the] special tax . . . ."

42. Assuming *arguendo* the validity of the Government's construction, serious constitutional problems would still appear to plague the Act. The petitioner would have been denied due process by being convicted for failure to perform an act which the Government made impossible for him to perform. Similarly, due to the presumption in the Act, guilt arises in part from failure to produce a form which the Government has made impossible to obtain. *See* Brief for Petitioner at 13-14, Leary v. United States, 395 U.S. 6 (1969).

43. *Hearings on H.R. 6385 Before the House Comm. on Ways and Means,* 75th Cong., 1st Sess. 9 (1937). [Hereinafter cited as *Hearings on H.R. 6385*]. This fear was based upon an earlier attack on a provision of the Harrison Narcotic Act, forerunner of the Marihuana Tax Act, by dissenting minorities of the Supreme Court in both Nigro v. United States, 276 U.S. 332 (1928) and United States v. Doremus, 249 U.S. 86 (1919). The provision was attacked on the ground that it was an attempt to regulate matters reserved to the states under the tenth amendment.

44. 300 U.S. 506 (1937).

45. 48 Stat. 1236 (1934). This Act was later incorporated into the Internal Revenue Code of 1939.

46. *Hearings on H.R. 6385*, at 14.

*Haynes v. United States*[47] as violative of the privilege against self-incrimination, the Court, in *Leary*, had "no hesitation" in concluding that the interpretation of the transfer provisions urged by the Government was "contrary to the manifest congressional intent that transfers to nonregistrants be taxed, not forbidden."[48] The Court further concluded that those regulations which required a showing of lawfulness by applicants, when viewed in light of the legislative history, supported the proposition that illicit users, although not entitled to register, were still held liable for their failure to produce the order form signifying successful registration and prepayment of the transfer tax. Such a scheme "compelled [the] petitioner to expose himself to a 'real and appreciable' risk of self-incrimination, within the meaning of . . . *Marchetti*, *Grosso*, and *Haynes*."[49] Accordingly, the conviction in *Leary* was reversed and the dismissal of the indictment in *Covington* was affirmed.

### *Waiver of the Trilogy Protection*

Prior to the decisions in *Marchetti*, *Grosso*, and *Haynes*, it was generally held that registration and occupational tax statutes did not infringe upon the privilege against self-incrimination, but rather imposed a "choice" upon an individual to either refrain from an activity or to participate in it at the risk of being penalized for failure to provide incriminating information concerning the nature of the illegal activities engaged in.[50] This line of reasoning was specifically rejected in *Marchetti*, for "if such an inference of antecedent choice [between restraint and participation] were alone enough to abrogate the privilege's protection, it would be . . . withheld from those who most require it."[51] The constitutional privilege is not waived "merely because those 'inherently suspect of criminal activities' have been commanded either to cease [their illegal activities] or to provide information incriminating to themselves, and have ultimately elected to do neither."[52]

The problem of waiver of the trilogy protection has arisen most frequently in situations where the defendant failed to assert his fifth amendment privilege at trial and seeks to raise the defense for the first time on appeal. The privilege, being a substantive defense to the prosecution in such cases, is not limited merely to testifying in judicial proceedings.[53] In *Leary*, the

47. 390 U.S. 85 (1968).
48. Leary v. United States, 395 U.S. 6, 23-24 (1969).
49. *Id.* at 16.
50. Lewis v. United States, 348 U.S. 419 (1955); United States v. Kahriger, 345 U.S. 22 (1953).
51. Marchetti v. United States, 390 U.S. 39, 51 (1968).
52. *Id.* at 52.
53. In this respect, the exercise of the defendant's discretion in refusing to take the stand in his own behalf is only one circumstance to be weighed against the totality when determining whether the privilege has been effectively and intelligently waived.

defendant had taken the stand and testified to the details of his acquisition of marihuana in order to rebut the presumption of knowing importation under the other federal statute he was charged with violating.[54] Had he not taken the stand, the statutory presumption of knowledge of illegal importation would have "authorized conviction." Thus, if the privilege was held to offer testimonial protection only, it could have been effectively abrogated in all federal marihuana prosecutions by joinder of an illegal importation count with a transfer tax count.

While the Court has yet to carve out precise guidelines defining what constitutes an effective and intelligent waiver of the trilogy defense, certain criteria may be drawn from a review of decisions dealing with the question of waiver. *Marchetti* and *Grosso* clearly enunciated the principle that the privilege, asserted at the trial level, acts as a complete defense to prosecutions encompassed by the trilogy rationale. A more difficult question was presented in *Haynes*, where the defendant entered a plea of guilty after his motion to dismiss the indictment had been denied. On appeal, he sought to withdraw his plea of guilty and rely upon the argument raised in his pretrial motion that compliance with the registration provisions of the National Firearms Act required incriminatory statements and therefore prosecution for failure to comply with the provisions of the Act was constitutionally impermissible. In reversing the conviction, the Court held that his plea of guilty did not serve to waive his previous claim of constitutional privilege.[55] In *Leary* the Court reaffirmed the proposition that failure to raise the defense at trial does not constitute an absolute waiver of the trilogy protection, while in *Covington* it was held that the privilege may properly be invoked by a motion to dismiss the indictment.

Lower federal courts have generally adopted an ad hoc approach to the question of waiver of the trilogy defense. In *Gillespie v. United States*,[56] the Seventh Circuit held that a plea of guilty acts as a waiver of all defenses, known and unknown, while the Fourth Circuit, in *United States v. Miller*,[57] has permitted the withdrawal of a guilty plea and allowed the defendant to plead the privilege against self-incrimination. Where the defendant's trial

54. 21 U.S.C. § 176a (1964) prohibits the importation of marihuana and also "authorize[s] conviction" based upon a showing of mere possession. Under the statute, the presumption is created that anyone in possession of marihuana has knowledge of the fact that it was illegally imported.

55. Haynes v. United States, 390 U.S. 85, 87 n.2 (1968). *See also* United States v. Ury, 106 F.2d 28 (2d Cir. 1939), which held that a plea of guilty does not operate as a waiver of a previous claim of constitutional privilege.

56. 409 F.2d 511 (7th Cir. 1969) (firearms). *See also* Whaley v. United States, 394 F.2d 399 (10th Cir. 1968) (firearms); Yearwood v. United States, 294 F. Supp. 748 (S.D.N.Y. 1969) (narcotics).

57. 406 F.2d 1100 (1969) (firearms).

occurred prior to the decisions in *Marchetti*, *Grosso*, and *Haynes*, the courts have allowed the trilogy defense to be raised for the first time on appeal.[58] Some courts have attempted to minimize the effect of the trilogy by holding that the privilege must be asserted at the time the incriminating matter is offered against the defendant[59] or that the privilege is not properly asserted if raised for the first time after conviction and sentencing.[60] Such narrow construction of the trilogy protection appears both unwarranted and inconsistent with the Court's application of the privilege in *Leary* and indicates the need for criteria outlining the scope of an effective and intelligent waiver of the fifth amendment guarantee.

*Consequences of a Timely Assertion of the Trilogy Protection*

Consistent with the concept expressed by the trilogy that a timely assertion of the fifth amendment privilege provides a complete defense to the prosecution, invocation of the privilege by motion at a pretrial stage of the proceedings will lead to a dismissal of the indictment.[61] In *Covington*, the Court affirmed the dismissal of the indictment and noted that such disposition was proper "if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." It further concluded that "[t]he question [of] whether the defendant faced a substantial risk of incrimination is usually one of law which may be resolved without reference to the circumstances of the alleged offense."[62]

Timely assertion of the trilogy protection will also result in the suppression of evidence seized pursuant to warrants based solely on alleged violations of the federal wagering registration provisions.[63] Likewise, the privilege has been successfully asserted in a civil action brought by the United States to

58. Lauchli v. United States, 402 F.2d 455 (8th Cir. 1968) (firearms); Drennon v. United States, 393 F.2d 342 (8th Cir. 1968) (firearms); Greenwood v. United States, 392 F.2d 558 (4th Cir. 1968) (wagering). *See also* Grosso v. United States, 390 U.S. 62, 71 (1968), where the Court concluded that petitioner's failure to raise the self-incrimination issue at the trial level did not constitute an effective waiver of the constitutional protection.

59. Williams v. United States, 297 F. Supp. 1030 (E.D.N.C. 1969).

60. Nunley v. United States, 288 F. Supp. 58 (W.D. Okla. 1968) (narcotics); United States v. Rodgers, 288 F. Supp. 57 (W.D. Okla. 1968) (wagering).

61. FED. R. CRIM. P. 12(b)(1) states that "[a]ny defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." *See* United States v. Covington, 395 U.S. 57 (1969).

62. United States v. Covington, 395 U.S. 57, 60 (1969). *See also* United States v. Freeman, 412 F.2d 1180 (10th Cir. 1969) (marihuana); Cedillo v. United States, 391 F.2d 607 (9th Cir. 1968) (firearms); United States v. Fincher, 391 F.2d 603 (2nd Cir. 1968) (wagering); United States v. Fine, 293 F. Supp. 189 (E.D. Tenn. 1968) (distilled spirits).

63. Silbert v. United States, 282 F. Supp. 635 (D. Md. 1968).

enjoin individuals from participating in the business of accepting wagers until they had complied with the federal wagering tax statutes.[64]

As a corollary to the decisions in *Marchetti, Grosso,* and *Haynes,* the issue has arisen whether the trilogy protection is available as a defense in a civil forfeiture proceeding.[65] *Leary* and *Covington* should generate similar attempts to apply the privilege defensively in such proceedings and thereby thwart governmental attempts to proceed against vehicles that have been used to transport contraband where the taxes imposed on such contraband have not been paid. Currently, the circuit courts are split—the trilogy rationale has been held to be applicable where the forfeiture proceedings are quasi-criminal,[66] but where forfeiture is viewed as an action in rem this rationale has been rejected. In support of this latter view the Sixth Circuit held, in *United States v. One 1965 Buick,*[67] that the "mere fact that an exclusionary rule of evidence [resulting from the application of the trilogy rationale] may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax."[68] By holding forfeiture proceedings to be actions in rem (and thereby permitting forfeiture despite the trilogy defense) the Sixth Circuit went beyond recognizing the existence of a civil liability for the payment of tax. By so doing it allowed the Government to collect indirectly much more than it could have collected directly.[69] However, "[t]he Sixth Circuit opinion appears to misconceive the true nature of a forfeiture proceeding[70] . . . . The Government *does not* seek to recover the tax which it is owed, but instead seeks the forfeiture of property used by the gambler; the gambler remains liable civilly for the full amount of the tax."[71] (Emphasis added).

---

64. United States v. Riccio, 282 F. Supp. 979 (N.D. Ill. 1968).

65. *See* 26 U.S.C. § 7302 (1964) and 49 U.S.C. §§ 781-88 (1964).

66. United States v. United States Coin and Currency in the Amount of $8674, 393 F.2d 499 (7th Cir.), *cert. granted,* 393 U.S. 949 (1968) (No. 477, 1968 Term; renumbered No. 8, 1969 Term).

67. 392 F.2d 672 (6th Cir. 1968), *petition for cert. filed, sub nom.* Dean v. United States, 37 U.S.L.W. 3139 (U.S., Oct. 8, 1968) (No. 619, 1968 Term; renumbered No. 12, 1969 Term).

68. *Id.* at 676. *See also* Brief for the United States at 19 n.23, Leary v. United States, 395 U.S. 6 (1969); United States v. Sanchez, 340 U.S. 42 (1950). In Grosso v. United States, 390 U.S. 62, 69, 70 n.7 (1968), the Court was careful to note that "[w]e do not hold . . . that a proper claim of privilege extinguishes liability for taxation."

69. Take, for example, the case of a person arrested for possession of two ounces of marihuana while driving his automobile. His criminal conviction might be barred by the trilogy defense but he would still be civilly liable for payment of the tax on the transfer by which he came into possession of the marihuana. In this case it would amount to $200. The Sixth Circuit, however, would allow the forfeiture of a $5,000 automobile in satisfaction of the $200 liability.

70. The Supreme Court views forfeiture proceedings as essentially quasi-criminal actions. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

71. United States v. One 1967 Buick Electra 225, 289 F. Supp. 642, 644 (D.N.J. 1968).

In *United States v. United States Coin and Currency in Amount of $8674*,[72] the Seventh Circuit was confronted with a similar problem. In its initial ruling, the court affirmed a judgment for the Government and held that the privilege against self-incrimination did not operate as a bar to a civil forfeiture proceeding. On appeal, the Supreme Court vacated the judgment and remanded the case for further consideration in light of *Marchetti*, *Grosso*, and *Haynes*. On remand, the Seventh Circuit held that those who cannot be punished directly for violation of the federal registration requirements "should not be punished indirectly through forfeiture."[73] Consistently with this view, various district courts have upheld the availability of the privilege as a bar to civil forfeiture proceedings predicated upon violation of areas encompassed by the trilogy rationale.[74] With both the conflicting Sixth and Seventh Circuit decisions on the Supreme Court's 1969-70 docket, resolution of this problem should be forthcoming.

*Retroactive or Prospective Application*

In *Stovall v. Denno*,[75] the Supreme Court set forth the criteria to be considered in determining whether a new constitutional rule should be given a retroactive or prospective application. Factors to be considered are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[76] Applying these principles, the Fourth Circuit in *United States v. Miller*[77] has held that the decision in *Haynes* should be given a retroactive application. Noting that a retroactive application of the trilogy protection would overturn only federally obtained convictions, the court stressed that a "conviction for failure to file the incriminatory form demanded by the statute could be sustained only in blatant disregard of the Fifth Amendment privilege."[78] Thus in every case a different result on retrial would be compelled.

72. 379 F.2d 946 (7th Cir. 1967), *vacated and remanded, sub nom.* Angelini v. United States, 390 U.S. 204 (1968).

73. United States v. United States Coin and Currency in the Amount of $8674, 393 F.2d 499, 500 (7th Cir.), *cert. granted*, 393 U.S. 949 (1968) (No. 477, 1968 Term; renumbered No. 8, 1969 Term).

74. United States v. One Philco Television, 292 F. Supp. 35 (S.D. Tex. 1968); United States v. One 1967 Buick Electra 225, 289 F. Supp. 642 (D.N.J. 1968); United States v. $125,882 in United States Currency, 286 F. Supp. 643 (S.D.N.Y. 1968); United States v. $3,296.00 in Currency, 286 F. Supp. 543 (N.D.N.Y. 1968).

75. 388 U.S. 293 (1967).

76. *Id.* at 297.

77. 406 F.2d 1100 (1969). Some district courts have also held the privilege to operate retroactively, *see* Isaac v. United States, 293 F. Supp. 1096 (D.S.C. 1968); United States v. One Philco Television, 292 F. Supp. 35 (S.D. Tex. 1968); United States v. $125,882 in United States Currency, 286 F. Supp. 643 (S.D.N.Y. 1968).

78. United States v. Miller, 406 F.2d 1100, 1104 (4th Cir. 1969). Joining in this

Any reliance by law enforcement officials would appear to be outweighed by the fact that a retroactive application of the trilogy protection goes directly to the constitutional validity of the offense for which the defendant has been convicted.

Contrasted with this approach is the view expressed by the Sixth Circuit in *Graham v. United States*[79] that the purpose of the trilogy would be adequately served by applying it prospectively. Considering the effect of retrials on the administration of justice and the reliance by law enforcement officials on previous standards, the court concluded that retroactive application of the trilogy was unwarranted. Though the Supreme Court has not explicitly given the trilogy retroactive effect, it has implicitly accorded it a greater degree of retroactivity than other recent decisions in the fifth amendment area.

Both *Griffin v. California*[80] and *Miranda v. Arizona*[81] were accorded a prospective effect by the Court, but the decisions in *Marchetti*, *Grosso*, and *Haynes* have been applied to 23 cases which were on appeal to the Supreme Court at the time the trilogy was decided.[82] In each, the judgments below were vacated and the cases remanded for further consideration in light of *Marchetti*, *Grosso*, and *Haynes*. By this action, the Court granted the trilogy that type of retroactivity observed in *Linkletter v. Walker*,[83] where the exclusionary rule of *Mapp v. Ohio*[84] was applied to all cases on direct appeal at the time *Mapp* was decided.

Although an explicit holding of retroactivity has not been forthcoming from the Court, its action in the case of *Forgett v. United States*[85] is most interesting. On March 4, 1968, the Court, on a petition for rehearing, granted certiorari and vacated its prior order denying certiorari.[86] It then

---

view, the Fifth Circuit, in United States v. Luccia, 38 U.S.L.W. 2212 (Sept. 17, 1969), afforded *Marchetti* retroactive application to vacate the 1965 conviction of a coram nobis petitioner. The court held that neither a guilty plea at trial, nor completion of a resulting prison sentence can deprive an individual of vindication of his fifth amendment rights.

79. 407 F.2d 1313 (1969). *See also* Williams v. United States, 291 F. Supp. 376 (D. Minn. 1968).

80. 380 U.S. 609 (1965). *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) which limited application of *Griffin* to trials which were commenced after the date of that decision.

81. 384 U.S. 436 (1966). *See* Johnson v. New Jersey, 384 U.S. 719 (1966) which held that the new constitutional standards enunciated in *Miranda* were applicable only to custodial interrogations which took place after the date of that decision.

82. *See* Stone v. United States, 390 U.S. 204 (1968) (six cases); Forgett v. United States, 390 U.S. 203 (1968); Piccioli v. United States, 390 U.S. 202 (1968) (seven cases); DeCesare v. United States, 390 U.S. 200 (1968) (seven cases); Lee v. Kansas City, 390 U.S. 197 (1968); Rainwater v. Florida, 390 U.S. 196 (1968).

83. 381 U.S. 618 (1965).

84. 367 U.S. 643 (1961).

85. 390 U.S. 203 (1968).

86. *Id.*

proceeded to remand the case for further consideration in light of *Haynes*. By following this course of action, the Court thus gave *Haynes* full retroactive effect by applying it to a conviction which had become final with a denial of certiorari in 1966. Whether this action indicates a preference for full retroactive application of the trilogy and its offspring—*Leary* and *Covington* —is conjecture and will remain so until such time as the Court chooses to handle the issue directly.

### *A Constitutionally Permissible Solution*

*Leary* and *Covington*, like the trilogy, ultimately raise more problems than they solve, but they are not problems incapable of solution. If the federal government is to persist in its use of "registration" statutes to gain a jurisdictional foothold over certain criminal acts which would otherwise be purely state offenses, the most effective means of preserving its registration system from continued constitutional attack is to engraft immunity restrictions upon the subsequent use of information derived from registration. If immunity restrictions bar government officials from divulging the contents of registration forms to federal and state prosecutors, potential registrants can no longer contend that they are presented with "real and appreciable" risks of incrimination. Until the introduction of the proposed Wagering Tax Amendments of 1969,[87] the Government had failed to pursue this approach despite the fact that the Supreme Court had characterized immunity restrictions as "an attractive and apparently practical resolution of the difficult problem."[88] The revised Section 4412 in the proposed legislation retains the registration requirement for those engaged in the business of accepting or receiving wagers, but Section 4423 imposes broad restrictions upon disclosure permissible under the Act. Government officials may not divulge "any information derived, directly or indirectly, from any such return, payment, registration or record."[89] Permissible disclosure is confined to use in civil or criminal prosecution for nonpayment of the tax, and unauthorized disclosure is a misdemeanor punishable by a $1,000 fine or one year imprisonment, or both.[90]

In drafting proposed "stop-gap" legislation to shore up the constitutional deficiencies inherent in the registration requirements of the Marihuana Tax

87. S. 1624, 91st Cong., 1st Sess. (1969). Section 2 of the bill would amend Section 4423 of the Internal Revenue Code of 1954 to provide limitations on the disclosure of information found in the registration forms.

88. Marchetti v. United States, 390 U.S. 39, 58 (1968). *See also* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

89. S. 1624, 91st Cong., 1st Sess. § 2(a) (1969), *amending* INT. REV. CODE of 1954, § 4423 (a)(3).

90. *Id.* § 3(a), *amending* INT. REV. CODE of 1954, § 7213.

Act,[91] the Bureau of Narcotics and Dangerous Drugs has chosen an alternative solution rather than impose immunity restrictions upon the statutory scheme. The main feature of this proposed legislation is the amendment of Sections 4722 and 4753 of the Internal Revenue Code to require an applicant to show that his proposed activities are legal under state law before he is allowed to prepay the tax and complete the required order form.[92] The disclosure provisions of the Act remain intact, but by definition would provide information as to individuals who have already shown that their activities are lawful. Therefore it is believed that the fifth amendment problem is alleviated because no incriminatory information is gained through registration.

The proposed legislation does not, in fact, solve all the constitutional problems with the Marihuana Tax Act. Under the new legislation individuals are to be prosecuted for failure to pay a tax which the government makes impossible for them to pay. Thus, while the self-incrimination problems may have been cured, the Act is susceptible to a fifth amendment due process attack on the grounds that prosecution is predicated upon failure to perform an act which the government makes impossible to perform. In curing one problem in the Act, another of equally serious magnitude has been raised.

Just as the trilogy raised litigation and developed law in areas not completely anticipated, so the decisions in *Leary* and *Covington* will have their own marked effects in each of these sensitive and controversial areas of development. Until such time as enforcement of the federal registration statutes can be made consistent with the defendant's privilege against self-incrimination[93] it is likely that many more petitioners will move on through the "open door," as Chief Justice Warren predicted, spurred on by the decisions in *Leary* and *Covington*.

---

91. S. 2657, 91st Cong., 1st Sess. (1969).

92. Section 4741 of the Internal Revenue Code would also be amended to eliminate the disparity of taxation between registered and unregistered individuals. *See* note 33 *supra*. Rather than the previous tax assessment of $100 per ounce on unregistered individuals and one dollar per ounce on registered individuals, all individuals will be taxed at the rate of one dollar per ounce of marihuana transferred.

93. As an alternative to the imposition of immunity restrictions, Judge Henry J. Friendly has suggested that the fifth amendment be revised so as to be inapplicable to the area of federal registration requirements. *See* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 721-22 (1968).