

URGENT COMPASSION: MEDICAL MARIJUANA, PROSECUTORIAL DISCRETION AND THE MEDICAL NECESSITY DEFENSE

Abstract: *For centuries physicians and patients have extolled the medical benefits of marijuana. The federal government, however, refuses to retreat from its dogged war on drugs, preventing those in serious medical need from realizing marijuana's therapeutic potential. Numerous states have shown their opposition to the federal government's position, as well as their compassion for the seriously ill, by placing pro-medical marijuana initiatives on their election ballots or by introducing such legislation in their state legislatures. Furthermore, the United States Court of Appeals for the Ninth Circuit has recently rendered two landmark decisions holding that the common law medical necessity defense is available to medical marijuana defendants who are criminally prosecuted under federal law, despite the federal government's general marijuana prohibition. Because a change in federal drug policy is unlikely in the near future, one way federal prosecutors can avoid this conflict with the federal judiciary, as well as respect the will of the people in states that have passed pro-medical marijuana laws, is to exercise appropriate prosecutorial discretion, refusing to prosecute medical marijuana patients. This especially should be the case in states where the citizens have clearly expressed their values regarding medical marijuana through the initiative or legislative process.*

INTRODUCTION

Countless people suffering from an array of serious illnesses have discovered the medical benefits of marijuana. Harris Taft is one of those people.¹ Harris was diagnosed with Hodgkin's disease. Following an operation in which his spleen and affected lymph glands were removed through an incision that ran from his pelvic bone to his chest, Harris began what would become a decade of aggressive anti-cancer treatments, primarily chemotherapy. Within ninety minutes of

¹ See LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 32-35 (rev. ed. 1997). Lester Grinspoon, M.D. is an associate professor of psychiatry at Harvard Medical School, and James B. Bakalar is a lecturer in law in the department of psychiatry at Harvard Medical School. The following story is derived from an account of Harris Taft's wife. See *id.*

his first chemotherapy session, Harris began to vomit violently and continued vomiting for hours. When he had vacated everything in his stomach, he began to dry heave. Harris would be forced to endure similar reactions after each of his subsequent treatments. Even when his vomiting subsided, usually a day or so later, Harris remained so nauseated that he could not eat—in fact, he could not even stand the site or smell of food. His physician prescribed a number of drugs to temper the vomiting and nausea, but none was effective.

Finally, after seven years of treatment, Harris was unable to tolerate any more of the pain and suffering associated with his treatment. Moments before one of his chemotherapy sessions, Harris fled the hospital. He confided in his wife that he had come to fear the treatment more than the cancer, or even death itself. He went so far as to say that he would choose death over any further chemotherapy.

Following the suggestion of a nurse and the tacit recommendation of his doctor, Harris began smoking marijuana to relieve the nausea and vomiting. Although skeptical at first, Harris found that smoking marijuana led to a profound improvement in his quality of life. Indeed, for the first time in seven years, he was able to sleep through the night peacefully. No vomiting. No nausea. He also regained his appetite and put on much of the weight he had lost. Furthermore, whereas Harris used to require weeks to recover from chemotherapy, he was now ready to go to work after only forty-eight hours. As a result of smoking marijuana, Harris' mood, manner and overall outlook were transformed for the better. Moreover, in the two years in which Harris used marijuana, he never had an adverse or unfavorable reaction to it.

As noted above, Harris' experience with marijuana is not an anomaly. Currently, however, it is impossible for someone in Harris' position to use marijuana for medical purposes legally. Although a number of states permit the medical use of marijuana under state law, those who choose to use marijuana are not immune from prosecution under federal law.² Federal law reflects the proposition that medical marijuana has no accepted medical use.³ As a result, the federal government claims that those charged with possession of marijuana under federal law are not entitled to assert a well-settled, common law defense otherwise available to those forced by necessity to violate the

² Compare CAL. HEALTH & SAFETY CODE § 11362.5 (West 1997) (permitting medical marijuana for seriously ill under state law), with 21 U.S.C. § 841 (2000) (detailing prohibited acts regarding narcotics under federal law).

³ See Schedules of Controlled Substances, 21 U.S.C. § 812(b)(1)(B) (2000).

law—medical necessity or “choice of evils.”⁴ Fueled largely by ignorance and the “war on drugs,” the federal government is unlikely to change its laws with respect to marijuana or to retreat from vigorous prosecution of those laws, even in cases where the substance is being used for medical purposes. Therefore, for these innocent casualties of the war on drugs, the medical necessity defense represents the only chance to escape criminal sanctions and to continue using marijuana to ease their symptoms. This conflict between the federal government and those states that have chosen to allow the medical use of marijuana is highlighted by cases pending in the federal courts in California, and may eventually be resolved by the United States Supreme Court.⁵

Part I of this Note briefly examines the rise and fall of marijuana as a legitimate form of medicine.⁶ Part II examines the current efforts being made at the federal and state level to make medical marijuana available to the seriously ill.⁷ Part III describes the development of the medical necessity defense and its application to medical marijuana.⁸ Part IV highlights the growing conflict between federal law and state law pertaining to medical marijuana as evidenced by recent cases in federal court in California.⁹ Part V discusses the purpose of prosecutorial discretion and outlines the considerations that should be weighed by federal prosecutors in deciding whether to initiate or decline prosecution.¹⁰ Finally, Part VI suggests that the federal government must structure its policies so as to uphold the will of the people with respect to medical marijuana, and that the courts must be free to exercise their independent discretion by allowing juries to hear arguments of medical necessity as a valid defense to prosecution.¹¹

I. HISTORY OF THE MEDICAL USE OF MARIJUANA

Today, marijuana is one of the most widespread and diversified of plants.¹² Native to central Asia, the first evidence of the medical use of

⁴ See *infra* notes 156–261 and accompanying text.

⁵ See *id.*

⁶ See *infra* notes 12–44 and accompanying text.

⁷ See *infra* notes 44–98 and accompanying text.

⁸ See *infra* notes 99–155 and accompanying text.

⁹ See *infra* notes 156–261 and accompanying text.

¹⁰ See *infra* notes 262–96 and accompanying text.

¹¹ See *infra* notes 297–375 and accompanying text.

¹² See GRINSPOON & BAKALAR, *supra* note 1, at 1. The fiber is used for cloth and paper and was the most important source for rope before the development of synthetic fibers. The seeds are used as bird feed and human food. The oil contained in the seeds was at one

marijuana was published during the reign of the Chinese Emperor Chen Nung more than five thousand years ago.¹³ In the West, however, marijuana's medical properties were not realized until much later.¹⁴ By the mid-nineteenth century, physicians in the United States were using marijuana for a wide variety of medical purposes, and between 1840 and 1900, over one-hundred journal articles on the medical use of marijuana were published.¹⁵ In the twentieth century, moreover, physicians find marijuana to be an effective treatment for a range of ailments, including: nausea and vomiting associated with chemotherapy; weight loss associated with AIDS; glaucoma; epilepsy; muscle spasms and chronic pain in cases of multiple sclerosis, quadriplegia and other spastic disorders; migraines; severe pruritus; and depression and other mood disorders.¹⁶ In addition, physicians find marijuana useful in treating asthma, insomnia, dystonia, scleroderma, Crohn's Disease and diabetic gastroparesis.¹⁷

The zeal of physicians in the United States was tempered greatly by the enactment of the Marijuana Tax Act of 1937 ("the 1937 Act").¹⁸ Under the 1937 Act, persons using marijuana for any purpose were required to register and pay a tax.¹⁹ Those who failed to comply with the Act were subject to large fines or time in prison for tax evasion.²⁰ Although the Act was intended to prevent non-medical use, its practical effect was to make marijuana difficult to obtain, and it ultimately led to marijuana's removal from the United States Pharmacopoeia.²¹

In 1970, following a rise in the recreational use of marijuana, Congress passed the Comprehensive Drug Abuse and Prevention

time used for lighting and soap, and is now used in varnish, linoleum and artists' paint. See *id.*

¹³ See *id.* Marijuana was recommended for malaria, constipation, rheumatic pains, "absentmindedness" and "female disorders." See *id.*

¹⁴ See *id.* at 4.

¹⁵ See *id.* (citing MARIJUANA: MEDICAL PAPERS, 1839-1972 (T.H. Mikuriya ed., 1973)).

¹⁶ See generally Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 552-63 (1999).

¹⁷ See generally GRINSPOON & BAKALAR, *supra* note 1, at 163-222.

¹⁸ See GRINSPOON & BAKALAR, *supra* note 1, at 7. For a discussion of the details surrounding the enactment of the 1937 Act, see DAVID R. FORD, MARIJUANA: NOT GUILTY AS CHARGED, 61-64 (1997). For an excellent review of marijuana's criminalization generally, see Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit of the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

¹⁹ See Marijuana Tax Act, H.R. 6385, 76th Cong. (1937).

²⁰ See *id.*

²¹ See Lester Grinspoon, *Medical Marijuana in a Time of Prohibition*, 10 INT'L J. DRUG POL. 145, 147 (1999) [hereinafter Grinspoon, *Time of Prohibition*].

Control Act, also called the Controlled Substances Act, ("the Act").²² The Act assigned psychoactive drugs to five categories according to their abuse potential, known effect, harmfulness and level of accepted medical use.²³ Marijuana was placed in Schedule I, the most restrictive category, which includes those drugs—such as LSD and heroin—that are said to have a high risk of abuse and no currently accepted medical use.²⁴ Evidence suggests that Congress intended to place marijuana in Schedule I only temporarily, and thus meekly accepted this classification in anticipation of a change after all the facts were in.²⁵ The decision to place marijuana in Schedule I was marked by vigorous debate pertaining to who should be responsible for the factual determination of marijuana's benefit as well as to the underlying social issues implicated by its classification.²⁶ Congress therefore deferred the consideration of marijuana's medical utility pending the outcome of studies commissioned by the Presidential Commission on Marijuana and Drug Use ("the Commission").²⁷ The results of the Commission, chaired by Raymond Shafer,²⁸ focused primarily on marijuana's lack of dangerousness and recommended dramatic reductions in the legal penalties associated with marijuana.²⁹ Because the results were released at a time when both Congress and the Nixon Administration were deeply embroiled in the "Watergate Scandal,"

²² See Controlled Substance Act, 21 U.S.C. §§ 801–41 (2000).

²³ See 21 U.S.C. § 812(b)(1).

²⁴ Schedule I placement requires findings that: (A) the drug or other substance has a high potential for abuse; (B) the drug or other substance has no currently accepted medical use in treatment in the United States; (C) there is a lack of accepted safety or use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b)(1)(B).

²⁵ See RICHARD J. BONNIE & CHARLES H. WHITEBREAD, II, *THE MARIJUANA CONVICTION* 246 (1999).

²⁶ For an excellent treatment of this debate and its social implications, see BONNIE & WHITEBREAD, II, *supra* note 25, at 223–95.

²⁷ See *id.* at 247. Indeed, the Committee report on the House bill regarding scheduling recommended "that marijuana be retained in Schedule I at least until the completion of studies now underway The recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future." See 1970 U.S.C.A.N. 4573, 4579.

²⁸ See BONNIE & WHITEBREAD, II, *supra* note 25, at 247. Raymond Shafer, a former Republican governor of Pennsylvania, was selected by President Nixon to chair the commission.

²⁹ See *id.* (citing COMMISSION ON MARIJUANA AND DRUG ABUSE, *MARIJUANA: A SIGNAL FOR MISUNDERSTANDING; FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE* 145–54 (1972)). [hereinafter *MARIJUANA: A SIGNAL FOR MISUNDERSTANDING*]. The report noted that marijuana was demonized because it symbolized the "counterculture," not because it had any negative physiological effects. See *id.*

however, neither group took the necessary actions to reschedule marijuana.

In 1972, the National Organization for the Reform of Marijuana Laws (NORML) petitioned the Bureau of Narcotics and Dangerous Drugs (now the Drug Enforcement Agency) ("DEA") to reschedule marijuana as a Schedule II drug, which includes those drugs that have a high potential for abuse, but, unlike those in Schedule I, also have a currently accepted medical use.³⁰ On September 6, 1988, after over a decade of litigation, the DEA finally held public hearings on the issue before the DEA's Chief Administrative Law Judge, Judge Francis L. Young.³¹ Judge Young issued the following opinion:

Marijuana, in its natural form, is one of the safest therapeutically active substances known. [T]he provisions of the [Controlled Substances] Act permit and require transfer of marijuana from Schedule I to Schedule II. It would be unreasonable, arbitrary and capricious for DEA to continue its stand between those sufferers and the benefits of this substance.³²

The DEA subsequently rejected Judge Young's ruling,³³ and on February 18, 1994, the Court of Appeals for the District of Columbia Circuit upheld the DEA's categorization of marijuana as a Schedule I drug.³⁴

Notwithstanding NORML's historic—and ultimately unsuccessful—effort to require the DEA to reschedule marijuana as Schedule II, demand for the legalization of medical marijuana on the part of patients and physicians finally forced the Federal Drug Administration ("FDA") to approve the use of marijuana as a medicine in 1976,

³⁰ See Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 164 (1997) (citing Denial of Marijuana Scheduling Petition, 54 Fed. Reg. 53,767, 53,773 (1989)). Schedule II placement requires findings that: (A) the drug or other substance has a high potential for abuse; (B) the drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; (C) abuse of the drug or other substance may lead to severe psychological or physical dependence. 21 U.S.C. § 812(b)(2).

³¹ See Bergstrom, *supra* note 30, at 164.

³² See *In re Marijuana Rescheduling Petition*, No. 86-22, Opinion, Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge, Washington, D.C.: Drug Enforcement Administration (1988).

³³ See Bergstrom, *supra* note 30, at 164.

³⁴ See *Alliance for Cannabis Therapeutics v. Drug Enforcement Agency*, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

by instituting the Individual Treatment Investigational New Drug Program (or Compassionate Use IND program) ("the IND Program").³⁵ Under the IND Program, physicians could obtain an Investigational New Drug application ("IND") that would enable a patient to receive marijuana for medical purposes.³⁶ This program was so bureaucratically burdened by federal law, however,³⁷ that in its history, only three dozen patients received marijuana through the IND Program; only eight are currently participating.³⁸ Indeed, in response to a growing number of requests for admittance to the federal IND Program as a result of the AIDS epidemic, it was suspended by the Bush administration in 1992, thereby limiting treatment to those enrolled in the IND Program prior to 1992.³⁹ The IND Program remains suspended today with no additional patients admitted since 1992.⁴⁰

In the late 1970s and early 1980s, states took matters into their own hands with thirty-four states enacting legislation making marijuana legal for medical use.⁴¹ Because marijuana is not recognized as medicine under federal law, states can only dispense it by creating formal research programs and getting FDA approval for an IND application.⁴² Ultimately, these laws proved too difficult to implement as the paperwork required by federal regulation was more than the physicians and administrators involved could manage.⁴³ The operational costs of these state programs has thus led to their demise.⁴⁴

³⁵ See GRINSPOON & BAKALAR, *supra* note 1, at 20.

³⁶ See *id.* at 20-22.

³⁷ See *id.* at 21. The application process, alone, took four to eight months.

³⁸ See *id.* at 22.

³⁹ See *id.* James O. Madison, Chief of the Public Health Service under President Bush, stated that the program undermined the administration's anti-drug policy:

If it is perceived that the Public Health Service is going around giving marijuana to folks, there would be a perception that this stuff can't be so bad. It gives a bad signal. I don't mind helping people if there is no other way of helping these people But there is not a shred of evidence that smoking marijuana assists a person with AIDS.

See *id.*

⁴⁰ See GRINSPOON & BAKALAR, *supra* note 1, at 22.

⁴¹ See *id.* at 17.

⁴² See *id.*

⁴³ See *id.* at 17; see also Grinspoon, *Time of Prohibition*, *supra* note 21, at 2.

⁴⁴ See GRINSPOON & BAKALAR, *supra* note 1, at 22.

II. CURRENT STATUS OF MEDICAL MARIJUANA

Efforts are being made at the federal level to facilitate the medical use of marijuana. Representative Barney Frank of Massachusetts has reintroduced a bill that would reschedule marijuana as a Schedule II drug.⁴⁵ The bill provides that neither the Controlled Substances Act nor the Federal Food, Drug, and Cosmetic Act shall prohibit the prescription, recommendation, use, production or distribution of marijuana by a physician for medical use so long as the patient meets the relevant state standards.⁴⁶ The bill is currently in the House subcommittee on Health and the Environment.⁴⁷

Although it is unlikely that Congress will reschedule marijuana as a Schedule II drug in the near future, the federal government has displayed an increased interest in medical marijuana research. The National Institutes of Health ("NIH"), for example, has shown some willingness to explore the medical uses of marijuana.⁴⁸ On September 18, 1997, the NIH granted Donald Abrams, M.D. funds to study marijuana's safety as a medicine for people with AIDS.⁴⁹ This represents the first U.S. clinical trial in fifteen years to compile data on the medical use of marijuana.⁵⁰ Since 1994, Dr. Abrams had tried to obtain government permission to study the efficacy of medical marijuana, but the NIH would only allow the study to proceed if its focus was changed from efficacy to safety.⁵¹ Nonetheless, if the study determines that the safety risks to AIDS sufferers are negligible, it may well lead the way for studies in the future focusing on marijuana's efficacy.⁵²

⁴⁵ See Medical Use of Marijuana Act, H.R. 912, 106th Cong. § 2(a) (1999).

⁴⁶ See *id.* §§ 2-3.

⁴⁷ H.R. 912 was referred to the subcommittee on March 16, 1999. See *Bill Status and Summary for H.R. 912* (visited Mar. 29, 2000) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.00912>>. Representative Frank proposed a similar bill in the previous session of Congress, H.R. 1782, but it did not receive the support necessary to pass. See *Bill Summary and Status for the 105th Congress* (visited Mar. 29, 2000) <<http://thomas.loc.gov/bss/d105query.html>>.

⁴⁸ See Marijuana Policy Project, *Government Finally Allows Marijuana-for-AIDS Study* (visited Mar. 29, 2000) <<http://www.mpp.org/abrams98.html>> [hereinafter *AIDS Study*]. The National Institutes of Health is comprised of twenty-five separate Institutes and Centers and is one of eight health agencies that is part of the U.S. Department of Health and Human Services. See National Institutes of Health (visited Mar. 29, 2000) <<http://www.nih.gov/icd>>.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See Lester Grinspoon & James B. Bakalar, *Marijuana, the AIDS Wasting Syndrome, and the U.S. Government*, 333 NEW ENG. J. MED. 670 (1995).

⁵² See *AIDS Study*, *supra* note 48.

Further support for medical marijuana research came in January 1997, when the White House Office of National Drug Control Policy ("ONDCP") commissioned the Institute of Medicine ("IOM"), an arm of the National Academy of Sciences, to conduct a review of the scientific evidence surrounding the medical use of marijuana.⁵³ The goal of the study was to assess the potential health benefits and risks of marijuana and its constituent cannabinoids in order to assist the federal government in developing its policy on medical marijuana.⁵⁴ In March 1999, the IOM released its report in a book entitled "Marijuana and Medicine: Assessing the Science Base," which determined that marijuana's active components are potentially effective in treating pain, chemotherapy-induced nausea and vomiting, the anorexia of AIDS wasting and other symptoms.⁵⁵ The report, therefore, urged the federal government to make a commitment to getting new medical marijuana research under way to help identify marijuana's medically active compounds and to deliver the benefits to patients.⁵⁶ In the meantime, the IOM recommended that the federal government open a "compassionate-use" program, similar to the one suspended by the Bush administration in 1992, to give seriously ill people immediate legal access to marijuana.⁵⁷ The report also answered two controversial questions concerning medical marijuana policy: whether legalizing medical marijuana would send the wrong message to children about marijuana use generally and whether marijuana causes people

⁵³ See NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 1 (1999).

⁵⁴ See *id.*

⁵⁵ See generally *id.* at 138–80. The report states that for those suffering from the above-stated conditions, "[C]annabinoid drugs might offer broad-spectrum relief not found in any other single medication." *Id.* at 170.

⁵⁶ See *id.* at 125–26.

⁵⁷ See *id.* The report states:

Until a non-smoked, rapid-onset cannabinoids drug delivery system becomes available, we acknowledge that there is no clear alternative for people suffering from *chronic* conditions that might be relieved by smoking marijuana One possible approach is to treat patients as *n-of-1* clinical trials (single-patient trials)

See *id.* at 126. The federal government's "compassionate-use" program is an example of a *n-of-1* study. See Marijuana Policy Project, *Questions about Medicinal Marijuana Answered by the Institute of Medicine's Report (1999)* (visited Mar. 29, 2000) <<http://www.mpp.org/science.html>>.

to use more dangerous drugs.⁵⁸ The report concluded that there is no sufficient evidence to support either claim.⁵⁹

On May 21, 1999, in response to the IOM's report and a general need for more openness and clearer guidelines, the Department of Health and Human Services ("DHHS") released its "Guidelines on Procedures for the Provision of Marijuana for Medical Research," which took effect December 1, 1999.⁶⁰ Under the new guidelines, the National Institute on Drug Abuse ("NIDA"),⁶¹ is able to sell government marijuana to privately funded scientists whose research proposals have been approved.⁶² Previously, only scientists with federal grants had access to this marijuana, but under the DHHS guidelines, privately funded researchers now are able to obtain government marijuana for "scientifically valid investigations" reviewed and approved by the NIH.⁶³ Although most medical marijuana advocates believe that the new DHHS guidelines are an improvement over existing policies, they note that the guidelines contain numerous impediments to medical marijuana research and neglect the issue of providing legal

⁵⁸ See generally NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, *supra* note 53, at 83-136. The second question refers to the theory that marijuana is a "gateway drug;" once consumed, marijuana will lead to the use of harder drugs, such as cocaine or heroin. See Nicole Dogwill, Comment, *The Burning Question: How Will the United States Deal with the Medical Marijuana Debate?*, 1998 DET. C.L. REV. 247, 286-87. This gateway theory has been one of the cornerstones of the prohibition on less addictive drugs like marijuana. See *id.*

⁵⁹ See NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, *supra* note 53, at 125-36. As to the question regarding the message sent to children, the report stated: "[T]here is no evidence that the medical marijuana debate has altered adolescent's perceptions of the risks associated with marijuana use." *Id.* at 104. As to the second question, the report stated that "there is no evidence that marijuana serves as a stepping stone on the basis of its particular psychological effect." *Id.* at 99. Similarly, the report rejected the claim that there was a causal link between marijuana use and subsequent abuse of other illicit drugs, stating that, "[M]arijuana does not appear to be a gateway drug to the extent that it is the cause or even that it is the most serious predictor of serious drug abuse . . ." See *id.* at 101.

⁶⁰ See National Institutes of Health, *Announcement of the Department of Health and Human Services Guidance on Procedures for the Provision of Marijuana for Medical Research (1999)* (visited Mar. 29, 2000) <<http://grants.nih.gov/grants/guide/notice-files/not99-091.html>> [hereinafter NIH, *Announcement of Guidelines*].

⁶¹ The National Institute on Drug Abuse ("NIDA"), a component of the National Institutes of Health, oversees the cultivation of research-grade marijuana on behalf of the United States government. Government marijuana is grown on a small plot of land by the University of Mississippi under contract with NIDA. See Paul Recer, *US Moves Toward Marijuana Research*, ASSOCIATED PRESS, May 22, 1999, at 1.

⁶² See *id.*

⁶³ See NIH, *Announcement of Guidelines*, *supra* note 60.

access to marijuana for patients in need.⁶⁴ Indeed, the guidelines explicitly reject the IOM's recommendation that the federal government open a compassionate-use program, allowing seriously ill patients to apply for permission to use medical marijuana.⁶⁵

The federal government's increased interest in medical marijuana research comes in the wake of recent public opinion polls that indicate overwhelming support for the medical use of marijuana.⁶⁶ Public support is further evidenced by the trend among voters to support ballot initiatives that remove criminal penalties under state law for seriously ill people who grow or possess medical marijuana.⁶⁷ In 1998, citizens in four states and the District of Columbia ("District of Columbia" or "D.C.") passed ballot initiatives that—either by statute or constitutional amendment—permit doctors to prescribe marijuana

⁶⁴ See Marijuana Policy Project, *Suggested Revisions to the HHS Medicinal Marijuana Research Guidelines* (visited Mar. 29, 2000) <<http://www.mpp.org/lhs-rev.html>>. Marijuana Policy Project proposes the following revisions to the HHS guidelines:

(1) the FDA should be the sole federal agency—along with an Institutional Review Board—to determine whether a proposed study is scientifically meritorious; (2) HHS should not place limitations on medicinal marijuana research beyond those that would be placed on the study of new synthetic drugs; (3) HHS should not discourage researchers from conducting studies with the goal of getting natural marijuana approved; and (4) a limited supply of marijuana should not be used as a reason to influence or reject medicinal marijuana study protocols; HHS should insure that NIDA grows a sufficient amount of research-grade marijuana.

See *id.*

⁶⁵ See NIH, *Announcement of Guidelines*, *supra* note 59 (stating intention to focus on multi-patient clinical studies, thus rejecting IOM's recommendation in favor of single-patient clinical studies); see also Greg Scott & Barbara Douglass et al., *Pain or Prison?*, WASH. POST, Jan. 12, 2000, at A19.

⁶⁶ See National Organization for the Reform of Marijuana Laws (NORML), *Medical Marijuana Polls 1995-1999* (visited Mar. 28, 2000) <<http://www.norml.org/medical/polls.shtml>>. The NORML Web site lists, for example, Gallop Poll, March 1999 (73% of Americans support making marijuana available to doctors so that they may prescribe it); CNN Interactive Poll, April 1999 (96% of respondents said they support the use of marijuana for medical purposes); Journal of American Medicine Association poll, conducted by Harvard School of Public Health, March 1998 (60% of respondents supported allowing physicians to prescribe medical marijuana); *ABC News National Poll*, conducted by Chilton Research Company, May 1997 (69% of respondents favored legalizing medical use of marijuana). See *id.*

⁶⁷ Since 1996, initiatives allowing for the medical use of marijuana have been placed on ballots in Alaska, Arizona, California, Colorado, Nevada, Oregon, Washington and the District of Columbia. See DRUG POLICY FOUNDATION, ELECTION '98: THE VOTE FOR MEDICAL MARIJUANA AND DRUG POLICY REFORM 5 (1998) (offering in-depth description of 1998 ballot initiatives).

for seriously ill patients who would benefit from such treatment.⁶⁸ Since the elections, however, only three states have actually passed laws that codify the initiatives.⁶⁹ Additionally, in 1996, voters in California and Arizona voted in favor of similar initiatives.⁷⁰

Although the initiatives differ somewhat, they share a number of important elements.⁷¹ All of the initiatives include provisions that either give patients and caregivers an affirmative defense in state court if they demonstrate medical need,⁷² or specifically exempt them from

⁶⁸ The states were Alaska, Nevada, Oregon, Washington and the District of Columbia. See *id.* Colorado had a sufficient number of signatures to place a medical marijuana initiative on its 1998 ballot, but the votes were not counted because a state court subsequently held that a number of the signatures were invalid. See Tiersky, *supra* note 16, at 583 (citing *Medical Marijuana Back on in 2000?*, AM. POLI. NETWORK, Dec. 11, 1998).

⁶⁹ See ALASKA STAT. §§ 11.71, 17.37 (Michie 1999); OR. REV. STAT. §§ 475.300–475.346 (1999); WASH. REV. CODE ANN. § 69.51A (West 2000). Voters approved the Nevada initiative, which amends the Nevada constitution to permit the possession and use of marijuana for medical purposes. See Ballot Question 9 (visited Mar. 29, 2000) <<http://sos.state.nv.us/nvelection/1998General>>. The Nevada constitution, however, mandates approval by voters in consecutive elections in order for the amendment to take effect. See NEV. CONST. Art. 19 § 4. Therefore, Nevada voters will have to vote in favor of the initiative again in the 2000 election before medical marijuana will be legal under state law. Similarly, although voters in D.C. passed their initiative, Congress has prevented the initiative from becoming law. See *infra* notes 79–88 and accompanying text.

⁷⁰ See Proposition 215: California Compassionate Use Act (codified at CAL. HEALTH AND SAFETY CODE § 11362.5 (West 1997)); Proposition 200: Drug Medicalization, Prevention, and Control Act of 1996 (codified at ARIZ. REV. STAT. § 13–4312.01 (1999)) [hereinafter Prop. 200]. Although Arizona voters approved Prop. 200 in 1996, the Arizona state legislature subsequently enacted H.B. 2518 and S.B. 1373. These bills lessen the impact of Prop. 200 by stating that “the act does not become effective unless the United States Congress authorizes the medical use of marijuana . . . or the DEA reschedules marijuana to a schedule other than Schedule I.” ARIZ. REV. STAT. § 13–4312.01. Proposition 300: Referendum on H.B. 2518 and S.B. 1373 was placed on the 1998 ballot to permit the voters to decide if these bills should become law. A “NO” vote on Prop. 300 would reject the two bills in favor of the original version of Prop. 200, whereas a “YES” vote would accept the legislature’s changes. In the 1998 election, Arizona voters passed Prop. 300, thereby accepting the legislature’s decision to make Prop. 200’s enactment conditional on federal medical marijuana policy. See Lauretta Higgins Wolfson, *A Quality of Mercy: The Struggle of the AIDS-Afflicted to Use Marijuana As Medicine*, 22 THOMAS JEFFERSON L. REV. 1, 17–19 (1999).

⁷¹ See DRUG POLICY FOUNDATION, *supra* note 67, at 6.

⁷² Oregon’s initiative, for example, provides an affirmative defense to patient’s who have a debilitating medical condition but who have not obtained a registry identification card. See Measure 67: Oregon Medical Marijuana Act § 6 (codified at OR. REV. STAT. § 475.345). A patient must also have a physician’s recommendation and not be in possession of an amount of marijuana greater than that permitted under the Act. See *id.* The Oregon initiative is unique, however, because it goes on to state that, notwithstanding the affirmative defense provided for under the Act, a patient is also entitled to present the common law “choice of evils” or medical necessity defense. See *id.* This is the same defense discussed *infra* notes 99–155 and accompanying text.

certain state controlled substances laws if they suffer from a condition specified in the initiative.⁷³ All of the initiatives specify which medical conditions may be treated with marijuana, and also provide for the addition of other medical conditions as needed.⁷⁴ In order to protect patients from being arrested and to give law enforcement a means of verifying whether a person is a legitimate medical marijuana patient, most of the initiatives establish a confidential patient registry and identification card system.⁷⁵ Those initiatives that do not require the establishment of a patient registry system instead require a doctor's approval, either written or oral.⁷⁶ All of the initiatives also attempt to proscribe the amount of marijuana that a patient is allowed to possess.⁷⁷ Lastly, with the exception of permitting patients to grow their own limited supply, most of the initiatives fail to contain provisions that provide for a supply of medical marijuana.⁷⁸

As noted above, the District of Columbia included a medical marijuana initiative on its November 1998 ballot.⁷⁹ The initiative exempts medical marijuana patients with a doctor's recommendation

⁷³ See *id.* The 1998 initiatives were entitled Proposition 8: An Act Relating to the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions (Alaska); Initiative 19: The Colorado Medical Marijuana Initiative; Initiative 59: Legalization of Marijuana for Medical Treatment Initiative of 1998 (D.C.); Ballot Question 9: A Constitutional Amendment to Make Medicinal Marijuana Available to the Citizens of Nevada; Measure 67: Oregon Medical Marijuana Act; Initiative 692: Washington State Medical Use of Marijuana Act. See *id.* at 11-34.

⁷⁴ See *id.* at 8.

⁷⁵ See *id.*

⁷⁶ See *id.* The Washington state and D.C. initiatives do not require patient registries. In the absence of patient registries, Washington state requires written approval from a doctor and, furthermore, that patients present such documentation to law enforcement if requested. A doctor's recommendation is also required in D.C., but it may be written or oral. See *id.*

⁷⁷ See DRUG POLICY FOUNDATION, *supra* note 67, at 8. Some states are more specific in their terms than others. States such as Alaska, Colorado, Nevada and Oregon, which proscribe very specific possession limits, also provide patients with a legal defense in court if they can prove that the greater amount of marijuana was needed to treat an illness. Washington state's initiative is more general, allowing patients to possess a "two month supply." Similarly, patients in D.C. are permitted to possess a "sufficient quantity" to treat an illness. See *id.*

⁷⁸ See *id.* Only the Nevada and Washington, D.C. initiatives provide for a supply of medical marijuana. Nevada requires that the legislature authorize appropriate methods for supply of the plant to patients. See *id.* The D.C. initiative goes even further by allowing the establishment of non-profit corporations to cultivate and distribute medical marijuana, as well as requiring the eventual supply of safe and affordable marijuana to patients enrolled in Medicare or Ryan White CARE Act-funded programs. See *id.*

⁷⁹ See Initiative 59: Legalization of Marijuana for Medical Treatment Initiative of 1998 (visited Mar. 29, 2000) <<http://www.actupdc.org/text59pg.htm>>; see also Tiersky, *supra* note 16, at 582.

from being prosecuted under D.C.'s Uniform Controlled Substance law and also establishes cannabis buying clubs.⁸⁰ Although the exit polling data suggested that the initiative passed by a wide margin, the votes were not immediately counted because of a provision inserted into the D.C. budget bill by Representative Bob Barr of Georgia thirteen days before election day.⁸¹ This provision prohibited the city from spending any money on the medical marijuana initiative, leaving no available funds to count the votes.⁸² In September of 1999, advocates filed a law suit in federal court seeking the release and implementation of the vote.⁸³ On September 20, 1999, pursuant to an order from a federal judge in D.C., the results were released and indicated that the initiative was approved by 69% of the vote.⁸⁴ Like all D.C. laws, however, the initiative needed approval by Congress.⁸⁵ Following the announcement of the votes, Representative Barr attached an amendment to the fiscal 2000 D.C. appropriations bill, intended to prevent the enactment of the initiative.⁸⁶ Two versions of the D.C. appropriations bill were vetoed before a third was signed into law by President Clinton on November 29, 1999.⁸⁷ The passage of this amendment represents the first time in history that Congress has overturned a ballot initiative passed by a majority of voters in a legal election.⁸⁸

On November 2, 1999, Maine also addressed the issue of medical marijuana when 61% of voters passed Question 2, a law favorable to the medical use of marijuana.⁸⁹ Under Question 2, patients will not be prosecuted for the medical use of marijuana so long as they have a doctor's written approval to use marijuana.⁹⁰ Despite strong opposi-

⁸⁰ See DRUG POLICY FOUNDATION, *supra* note 67, at 23-24.

⁸¹ See Tiersky, *supra* note 16, at 582-83.

⁸² See *id.*

⁸³ See Bill Miller, *Marijuana Vote to Be Released: Judge Unlocks D.C. Election Tally*, WASH. POST, Sept. 18, 1999, at B01.

⁸⁴ See *id.*

⁸⁵ See Tiersky, *supra* note 16, at 582.

⁸⁶ See H.R. 3064, 106th Cong. § 167(b) (1999).

⁸⁷ See H.R. 3194, 106th Cong. (enacted by Pub. Law No. 106-113 (1999)). H.R. 3194, a \$385 billion omnibus appropriations bill, was a collection of nine separate bills. See *id.*

⁸⁸ See Marijuana Policy Project, *Patients Protest Congressman Bob Barr's Move to Overturn D.C. Medical Marijuana Initiative*, Press Release, Sept. 20, 1999 (visited Mar. 29, 2000) <<http://www.mppp.org/mr092099.html>>.

⁸⁹ See Maine Medical Marijuana Act of 1998, Initiated Bill No. 2, 1999, Chap. 1 (codified at ME. REV. STAT. ANN. tit. 22, § 2383 (b)(5) (West 1999)). The initiative also amends ME. REV. STAT. ANN. tit. 15, § 5821 (West 1999) and ME. REV. STAT. ANN. tit. 17-A, § 1111 (West 1999).

⁹⁰ See *id.*

tion, Maine passed Question 2 by an overwhelming margin,⁹¹ and became the sixth state since 1996 to enact a law legalizing medical marijuana.⁹² Most recently, the state legislatures in Maryland and Hawaii have addressed the issue with pro-medical marijuana legislation,⁹³ while the citizens of Arkansas are advocating for a constitutional amendment or ballot initiative permitting medical marijuana use by the seriously ill.⁹⁴

Although the state actions described above exempt legitimate medical marijuana users from prosecution under state law, those same users are nonetheless subject to prosecution under federal law.⁹⁵ Indeed, as the result of Congress' efforts in recent years to expand federal criminal law jurisdiction to include matters traditionally within the purview of the states, the federal government enjoys concurrent jurisdiction with the states in a wide variety of areas.⁹⁶ One such area is

⁹¹ See *Support for Maine's Medical Excuse Marijuana Initiative Stalls*, BUS. WIRE 08:23:00, Nov. 2, 1999; Meredith Goad, *Mainers Strongly Support Marijuana for Medical Reasons*, PORTLAND PRESS HERALD, Nov. 3, 1999, at 1A.

⁹² Maine joins Alaska, Arizona, California, Oregon and Washington state.

⁹³ The Maryland General Assembly introduced a bill prohibiting state and local law enforcement from arresting seriously ill patients if they have doctor's recommendation. See *Marijuana—Exception for Compassionate Use*, H.B. 308, 404th Gen. Assem. (Md. 2000); see also Marijuana Policy Project, *Support Maryland Medical Marijuana Bill* (visited Mar. 29, 2000) <<http://www.mpp.org/Maryland/index.html>>. The Hawaii Senate and House have both passed bills allowing seriously ill people to possess small amounts of marijuana for personal use. See H.B. 1157, 20th Leg. (Haw. 2000); S.B. 862, 20th Leg. (Haw. 2000); James Sterngold, *Hawaii Lawmakers Approve Bill on Medical Use of Marijuana*, N.Y. TIMES, Apr. 21, 2000. Once signed into law by the governor, Hawaii will become the first state to enact a medical marijuana law through its legislature. See *Hawaii Lawmakers OK Medical Marijuana*, L.A. TIMES, Apr. 27, 2000, at A29.

⁹⁴ See Mark Minton, *Need Exists to Reform 'Pot' Law, Group Says*, ARKANSAS DEMOCRATIC-GAZETTE, Feb. 21, 2000, at B1.

⁹⁵ See 21 U.S.C. § 841. Pursuant to the Supremacy Clause of the United States Constitution, federal laws enjoy legal superiority over any conflicting state law. See U.S. CONST. Art. VI. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ."). For discussion of the Supremacy Clause pertaining to conflicts between state laws or constitutions and federal law, see ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 143-164 (3d. ed. 1999); see also, JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1-13 (5th ed. 1995).

⁹⁶ See Greg Hollon, Note, *After the Federalism Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. REV. 449, 449 (1996) (noting that in vastly increasing federal government's jurisdiction over activities traditionally considered purely state matters, Congress has relied primarily on expansive reading of commerce clause); W. John Moore, *The High Price of Good Intentions*, NAT'L L.J., May 8, 1993, at 1140 (noting more than three-thousand criminal statutes passed by federal government prior to 1993). For a more in depth discussion of the federalization of criminal law, see Kathleen F. Brinkey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1144-45 (1995); Stephen Chippendale, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV.

that of drug control and enforcement.⁹⁷ Thus, unless medical marijuana defendants are entitled to assert a legal defense to prosecution under federal law, they will continue to be convicted, and the will of the people in those states legalizing medical marijuana will be frustrated. The common law defense of necessity offers hope for such defendants and their supporters in states throughout the country.⁹⁸

III. HISTORY OF THE MEDICAL NECESSITY DEFENSE

The concept of necessity as a defense to prosecution has been "anciently woven into the fabric of our culture."⁹⁹ At common law, the necessity defense was known as the "choice of two evils" defense because the actor was usually in the position of being imminently threatened by a dangerous force that only could be overcome by violating the law.¹⁰⁰ The necessity defense is founded upon the theory that individuals should not be punished when they are not acting out of free will,¹⁰¹ and recognizes that "the law ought to promote the achievement of higher values at the expense of lesser values, and that sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."¹⁰² The necessity defense thus involves assessing individual conduct and comparing it with community values to determine personal culpability.¹⁰³

The English courts introduced the concept of necessity as early as 1551.¹⁰⁴ The necessity defense has since become ingrained in Ameri-

455, 461-65 (1994); Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 775, 775-79 (Sanford H. Kadish et al. eds., 1983).

⁹⁷ See, e.g., 21 U.S.C. § 841-44 (2000) (regulating drug transactions, including simple possession of user amounts of controlled substances).

⁹⁸ See *infra* notes 156-261, 297-375 and accompanying text.

⁹⁹ See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY, 289, 291 (1974) (quoting J. HALL, *GENERAL PRINCIPLES OF THE CRIMINAL LAW* 416 (2d ed. 1960)).

¹⁰⁰ See Todd H. Whilton, *Commonwealth v. Hutchins: A Defendant is Denied the Right to Present a Medical Necessity Defense*, 27 NEW ENGL. L. REV. 1101, 1101 (1993).

¹⁰¹ See *id.* (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 28).

¹⁰² WAYNE R. LAFAYE & AUSTIN W. SCOTT, *CRIMINAL LAW* 382 (1972).

¹⁰³ John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 Hous. L. REV. 397, 439 (1999).

¹⁰⁴ See P.R. Glazebrook, *The Necessity Plea in English Common Law*, 30 CAMBRIDGE L.J. 87, 93 (1972) (citing *Reninger v. Fagossa*, [1551] 1 Plowden, 75 Eng. Rep.) The court in *Reninger* stated that "A man may break the law, and yet not break the law itself . . . where the words of them are broken to avoid greater inconvenience, or through necessity, or by compulsion." See *id.* (emphasis added). In addition to Glazebrook, for a more in-depth treatment of the necessity defense at English common law, see Benjamin Reeve, *Necessity: A*

can jurisprudence, and today over thirty states have codified the defense.¹⁰⁵ Although there is no federal statute codifying the common law defense of necessity, the Supreme Court of the United States recognized the applicability of the defense in federal court in 1980, in *United States v. Bailey*,¹⁰⁶ and the necessity defense remains a well-established defense to federal criminal prosecution not involving homicides.¹⁰⁷ In addition to the English common law notion of necessity, American jurisprudence has developed and extended the role of necessity in the law.¹⁰⁸ The doctrine of "medical necessity" is one such example.¹⁰⁹

The first successful articulation of the medical necessity defense in the history of the common law, and indeed, the first case to extend the necessity defense to the crimes of possession or cultivation of marijuana, was *United States v. Randall*.¹¹⁰ In 1976, in *Randall*, the D.C. Superior Court accepted the defendant's medical necessity defense and consequently held that the defendant was "not guilty" of the crime of possession of marijuana.¹¹¹ The defendant, Robert Randall, suffered from a severe case of glaucoma, which led to an almost total loss of vision.¹¹² Randall began smoking marijuana cigarettes after conventional drugs proved ineffective in treating his failing eyesight, and on August 27, 1975, he was arrested and charged with possession

Recognized Defense, 21 NEW ENG. L. REV. 779, 781 (1985-1986); Celia Wells, *Necessity and the Common Law*, 5 OXFORD J. LEGAL STUD. 471, 72 (1985).

¹⁰⁵ See Reeve, *supra* note 104, at 786 n.42. Most state statutes that have codified a necessity or choice of evils defense follow the Model Penal Code. See MODEL PENAL CODE, § 3.02 (1)(c) (1998).

¹⁰⁶ See 444 U.S. 394, 415-16 (1980) (stating that necessity defense exists in prison escape case but defendant failed to establish defense because he failed to show that escape was only available alternative).

¹⁰⁷ See *e.g.*, *United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993) (holding necessity defense available to defendant charged with violations of federal firearm possession statute); see also WAYNE R. LAFAYE & AUSTIN W. SCOTT, 1 SUBSTANTIVE CRIMINAL LAW 631-33 (1986); American Law Institute, Model Penal Code and Commentaries, § 3.02, cmt., n.1 (1985).

¹⁰⁸ See Reeve, *supra* note 104, at 785.

¹⁰⁹ See *id.* The medical necessity defense has been extended to a number of other contexts as well, including abortion, where it would otherwise have been illegal. See *id.* (citing *Thornburg v. American College of Obstetricians*, 106 S. Ct. 2169 (1986); *Simopoulos v. Virginia*, 462 U.S. 506 (1983)).

¹¹⁰ No. 65923-75 (D.C. Super. Ct. Nov. 24, 1976), reprinted in 104 DAILY WASH. L. REP. 2249 (1976); GRINSPOON & BAKALAR, *supra* note 1, at 57; Robin Isenberg, Note, *Medical Necessity as a Defense to Criminal Liability: United States v. Randall*, 46 GEO. WASH. L. REV. 273, 277 (1978).

¹¹¹ See *Randall*, 104 DAILY WASH. L. REP. at 2254.

¹¹² See *id.* at 2249.

of marijuana.¹¹³ In response to Randall's assertion of the medical necessity defense, the court set forth the requisite elements of the defense: (1) that the defendant did not intentionally bring about the circumstances that precipitated the unlawful act; (2) that the defendant could not accomplish the same objective using a less offensive alternative; and (3) that the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it.¹¹⁴ In applying the medical necessity defense, the court balanced the defendant's interest in health against the state's interest in enforcing drug laws that protect the public.¹¹⁵ The court concluded that the defendant's right to preserve his sight outweighed the state's interest in outlawing the drug.¹¹⁶ As a result, the court held that the defendant was not guilty of marijuana possession.¹¹⁷

In addition to the elements enunciated in *Randall*, the common law generally has recognized that the defense of necessity is available only in situations where the legislature has not precluded the defense by a clear and deliberate choice regarding the values at issue.¹¹⁸ In other words, the defense is available where the legislature has not itself, in a criminal statute, balanced the competing harms to the state and to the individual and made a determination regarding the values of each.¹¹⁹ If the legislature has done so, its decision governs.¹²⁰ If, however, the legislature is silent on the matter, the question of the necessity defense is open and courts can properly weigh the merits of the competing interests.¹²¹

Since *Randall*, states have varied greatly in their acceptance of a medical necessity defense in cases involving violations of marijuana

¹¹³ See *id.*

¹¹⁴ See *id.* at 2252.

¹¹⁵ See *id.* at 2252-53.

¹¹⁶ See *Randall*, 104 DAILY WASH. L. REP. at 2253.

¹¹⁷ See *id.* at 2254. After being arrested and charged for possession of marijuana, Randall petitioned the federal government for access to medical marijuana. See GRINSPOON & BAKALAR, *supra* note 1 at 57. The IND Program, discussed *supra* notes 35-40, was created in response to Randall's action. See *United States v. Burton*, 894 F.2d 188, 191 (6th Cir. 1990); GRINSPOON & BAKALAR, *supra* note 1, at 57.

¹¹⁸ See LAFAYE & SCOTT, *supra* note 107, at 382. The Model Penal Code, which contains the language used by most states that have codified the defense, incorporates this idea. Section 3.02 provides that: "(1) Conduct which the actor believes is necessary to avoid harm or evil to himself or another is justifiable, provided that . . . (c) a legislative purpose to exclude the justification does not otherwise plainly appear." MODEL PENAL CODE, § 3.02 (1)(c).

¹¹⁹ See LAFAYE & SCOTT, *supra* note 107, at 382.

¹²⁰ See *id.*

¹²¹ See *id.*

law.¹²² In 1991, in *Jenks v. State*, the Court of Appeals for the District of Florida held that a state statute classifying marijuana as a Schedule I substance did not preclude the use of the medical necessity defense, and furthermore, that the defendants had established such a defense.¹²³ The appellant, Kenneth Jenks, a hemophiliac, contracted AIDS through a blood transfusion and unknowingly passed it on to his wife Barbara.¹²⁴ As a result of both the disease and the medication administered, the Jenks experienced severe nausea and suffered significant weight loss.¹²⁵ The Jenks began using marijuana that they obtained on their own and found that they were able to retain their AIDS medication, eat, gain weight and maintain their health.¹²⁶ After being unable to procure a prescription for marijuana, the Jenks decided to grow two marijuana plants of their own.¹²⁷ They were subsequently arrested for cultivation of marijuana and possession of paraphernalia.¹²⁸ The court denied the State's claim that the Florida legislature had foreclosed the necessity defense by scheduling marijuana as a substance with no valid medical use, and stated that a statute should not be interpreted as abrogating the common law unless it unequivocally calls for such treatment.¹²⁹ Finding that the Jenks met their burden of proving the elements of a medical necessity defense as set forth in *Randall*, the court held that the trial judge erred in rejecting the defense and convicting the Jenks as charged.¹³⁰

Notwithstanding the decisions of state courts in other jurisdictions that are consistent with the holdings in *Randall* and *Jenks*, some state courts have been unwilling to accept the medical necessity defense.¹³¹ In 1993, in *Commonwealth v. Hutchins*, the Massachusetts Su-

¹²² Compare e.g., *Jenks v. State*, 582 So.2d 676, 679 (Fla. Dist. Ct. App. 1991) (holding that medical necessity available as defense to charges of cultivation of marijuana and possession of paraphernalia), with *Commonwealth v. Hutchins*, 575 N.E.2d 741, 745 (Mass. 1991) (holding that medical necessity not available to defendant charged with cultivation and possession of marijuana).

¹²³ See 582 So.2d at 679-80.

¹²⁴ See *id.* at 677.

¹²⁵ See *id.* The conventional medication given to the Jenks to treat the nausea was ineffective. See *id.* Barbara's weight dropped from 150 to 112 pounds in three weeks. See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *Jenks*, 582 So.2d at 677.

¹²⁹ See *id.* at 679.

¹³⁰ See *id.* at 679-80.

¹³¹ See, e.g., *State v. Hastings*, 801 P.2d 563, 564-65 (Idaho 1990) (holding that common law necessity defense available to defendant claiming she used marijuana to control pain and muscle spasms associated with rheumatoid arthritis); *People v. Trippet*, 56 Cal. App. 4th 1532, 1538-39, review denied, 1997 Cal. LEXIS 8225 (1997) (stating that medical

preme Judicial Court rejected the medical necessity defense.¹³² The defendant, Joseph Hutchins, was a forty-eight year old Navy veteran who suffered from scleroderma and Raynaud's phenomenon.¹³³ In addition to causing other physical ailments, these diseases had an especially severe effect on Hutchins' gastrointestinal tract.¹³⁴ Hutchins found that smoking marijuana alleviated many of his symptoms including: nausea; loss of appetite; difficulty in eating, drinking or swallowing; loss of mobility of the esophagus; spasticity; hypertension; and anxiety.¹³⁵ Unable to secure a legal supply of marijuana, Hutchins was eventually arrested for cultivating and possessing two pounds of marijuana with the intent to distribute.¹³⁶ The court determined that a threshold question in such cases is whether the harm that would have resulted from compliance with the law significantly outweighs the harm that reasonably could result from the court's acceptance of necessity as an excuse.¹³⁷ Only when the circumstances favor excusing the defendant, will the court then inquire into the elements of the defense.¹³⁸ The court held that the harm to the defendant did not

necessity defense assumed valid); *Sowell v. State*, 738 So.2d 333, 334 (Fla. Dist. Ct. App. 1998) (holding that medical necessity defense available in criminal prosecution of seriously ill patient using marijuana to treat glaucoma and combat nausea); *State v. Bachman*, 595 P.2d 287, 288 (Haw. 1979) (holding that medical necessity defense available as defense to marijuana charges in proper case); *State v. Diana*, 604 P.2d 1312, 1316-17 (Wash. App. Ct. 1979) (stating that medical necessity is encompassed in common law defense of necessity and applicable in context of possession of marijuana where defendant used marijuana to ease symptoms of multiple sclerosis). *But see, e.g., Hutchins*, 575 N.E.2d at 741 (holding that medical necessity not available to defendant suffering from scleroderma as defense to charges of cultivation and possession of marijuana); *State v. Hanson*, 468 N.W.2d 77 (Minn. App. 1991) (holding that medical necessity not available to defendant suffering from epilepsy as defense to charge of manufacturing marijuana); *State v. Tate*, 505 A.2d 941 (N.J. 1986) (holding that medical necessity not available to defendants suffering from quadriplegia as defense to charge of possession of marijuana).

¹³² See *Hutchins*, 575 N.E.2d at 745.

¹³³ See *Whilton*, *supra* note 100, at 1110.

¹³⁴ See *id.* at 1110.

¹³⁵ See *id.* at 1111.

¹³⁶ See *id.* at 1112.

¹³⁷ See *Hutchins*, 575 N.E.2d at 744.

¹³⁸ See *id.* In addressing the elements of the necessity defense, the court stated:

We have ruled that the application of the defense is limited to the following circumstances: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his [or her] action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.

See *id.* (quoting *Commonwealth v. Schuchardt*, 557 N.E.2d 1380, 1381 (Mass. 1990)).

outweigh the potential harm to the public as a result of the negative impact on drug enforcement efforts, and thus, there was no error in denying the right to present the medical necessity defense.¹³⁹

In a dissenting opinion, Chief Justice Liacos concluded that *Hutchins* had, in fact, met his burden of production on the defense of necessity, and thus, the jury should have determined whether his actions were justified.¹⁴⁰ Essentially arguing against the majority's threshold question requirement, Chief Justice Liacos accused the majority of "speculative fact finding."¹⁴¹ While recognizing the importance to the public of enforcing drug laws, Liacos did not believe that the interest would be harmed significantly by permitting a jury to consider whether the defendant cultivated and used marijuana in order to alleviate painful symptoms of an illness.¹⁴² Furthermore, Judge Liacos stated that the majority did not adequately consider the values supporting the common law defense of necessity; namely, "that under very limited circumstances, the value protected by the law is, as a matter of public policy, eclipsed by a superceding value which makes it inappropriate to apply the usual criminal rule."¹⁴³

Like *Hutchins*, other state courts have rejected the medical necessity defense, often based on the belief that the state legislature had already spoken on the appropriateness of the defense.¹⁴⁴ State courts generally have found evidence of such legislative intent not by reference to state scheduling laws, which are usually analogous to federal law, but rather by reference to the legislature's explicit exclusion of the defense in the text of a statute or the legislature's establishment of a research program providing access to marijuana for certain patients.¹⁴⁵

¹³⁹ See *Hutchins*, 575 N.E.2d at 745.

¹⁴⁰ See *id.* at 745 (Liacos, C.J., dissenting).

¹⁴¹ See *id.* (Liacos, C.J., dissenting).

¹⁴² See *Hutchins*, 575 N.E.2d at 746 n.1 (Liacos, C.J., dissenting).

¹⁴³ *Id.* (Liacos, C.J., dissenting) (quoting *Commonwealth v. Brugmann*, 433 N.E.2d 457, 460 (Mass. App. Ct.1982)).

¹⁴⁴ See, e.g., *Hanson*, 468 N.W.2d at 79; *Tate*, 505 A.2d at 945-46.

¹⁴⁵ See, e.g., *Hanson*, 468 N.W.2d at 78 (rejecting defendant's medical necessity defense where defendant claimed that marijuana was necessary to treat epilepsy symptoms, stating that by creating medical research program where only cancer patients could receive drug, legislature had already spoken on medical use of marijuana); *Tate*, 505 A.2d at 944-45 (holding that legislature had foreclosed medical necessity defense by establishing Dangerous Substance Therapeutic Research Act and allowing for exception in drug offense statute for substances received pursuant to valid prescription); see also Suzanne D. McGuire, *Medical Marijuana: State Law Undermines Federal Marijuana Policy—Is the Establishment Going to Pot?*, 7 SAN JOAQUIN AGRIC. L. REV. 73, 81-91 (1999). For an in depth discussion of state therapeutic research programs, see Dogwill, *supra* note 58, at 255-67.

Contrary to state courts' wide-ranging treatment of the medical necessity defense in connection with the use of marijuana, federal courts' consideration of the defense in the marijuana context was, until recently, limited to a single case.¹⁴⁶ In 1990, in *United States v. Burton*, the United States Court of Appeals for the Sixth Circuit recognized the medical necessity defense as being applicable in the context of a federal prosecution for the manufacturing and use of marijuana, but held that the defendant failed to establish one element of the defense.¹⁴⁷ Defendant, James Burton, suffered from glaucoma and claimed that he grew and used marijuana to relieve the symptoms from his illness.¹⁴⁸ He was charged with three counts of unlawfully manufacturing and possessing marijuana and one lesser charge of simple possession.¹⁴⁹ The trial court permitted Burton to present a medical necessity defense and the jury found him not guilty on all but the charge of simple possession.¹⁵⁰ Burton appealed the jury's verdict, claiming that it was inconsistent with the evidence, and thus, unreasonable.¹⁵¹ The court, relying on the Supreme Court's decision in *Bailey*, acknowledged that the medical necessity defense was available in cases involving the medical use of marijuana by seriously ill individuals.¹⁵² Like some of its state court counterparts, however, the Sixth Circuit opined that the IND Program recently established by the federal government mitigated against a finding that Burton had no reasonable, legal alternative to the illegal manufacturing and use of marijuana.¹⁵³ Thus, in holding that the jury's verdict was not unreasonable, the court stated that the medical necessity defense was available under federal law but was not established by the defendant in this particular case.¹⁵⁴ Eight years passed before a federal appeals court, this time in California, once again had the opportunity to wrangle with the question of whether the medical necessity defense was valid under federal law.¹⁵⁵

¹⁴⁶ See 894 F.2d 188, 191 (6th Cir. 1990).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 190.

¹⁴⁹ See *id.* at 189.

¹⁵⁰ See *id.* at 190.

¹⁵¹ See *Burton*, 894 F.2d at 190.

¹⁵² See *id.* at 191.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1111 (9th Cir. 1999).

IV. RECENT MEDICAL NECESSITY CASES IN CALIFORNIA

In 1996, the people of California approved Proposition 215, also known as the Compassionate Use Act of 1996, which was one of the first state initiatives of its kind.¹⁵⁶ Under the law, patients or their primary caregivers who possess or cultivate marijuana for medical treatment recommended by a physician are exempted from criminal prosecution under state law.¹⁵⁷ Since the passage of Proposition 215, the U.S. Justice Department has repeatedly stated that marijuana remains banned under federal law, with no medical exemption.¹⁵⁸ Thus, pursuant to federal law, the Department has threatened to act against

¹⁵⁶ Proposition 215 reads as follows:

113.62.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996. (b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and it has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. (C) To encourage federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. (2) Nothing in this act shall be construed to supercede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the distribution of marijuana for nonmedical purposes. (c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege for having recommended marijuana to a patient for medical purposes. (d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient or any patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. (e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this act who has consistently assumed the responsibility for the housing, health, or safety of that person.

Proposition 215: California Compassionate Use Act (codified at CAL. HEALTH & SAFETY CODE § 11362.5 (West 1997)).

¹⁵⁷ See *id.*

¹⁵⁸ See, e.g., J. Wells Dixon, Note, *Connant v. McCaffery: Physicians, Marijuana, and the First Amendment*, U. COLO. L. REV. 975, 979 (1999); Wolfson, *supra* note 70, at 22; Bob Egelko, *Lochner Backs "Necessity" Defense, Asks Feds to Drop Opposition*, ASSOCIATED PRESS, Oct. 14, 1999, at 1.

doctors who prescribe the drug and has sued to shut down six Northern California clubs that distribute marijuana to patients.¹⁵⁹

In 1998, in *United States v. Cannabis Cultivator's Club*, the United States District Court for the Northern District of California held, *inter alia*, that medical necessity was not a defense to injunctive relief.¹⁶⁰ Following the passage of Proposition 215, the United States filed six separate lawsuits against six independent marijuana clubs and individuals associated with the management of the dispensaries, seeking to preliminarily and permanently enjoin the defendants' conduct.¹⁶¹ The central issue was whether the defendants' admitted distribution of marijuana for use by seriously ill individuals under a physician's recommendation violates federal law, and if so, whether the conduct should be enjoined pursuant to the injunctive relief provision of the federal Controlled Substances Act ("the Act").¹⁶² After laying out the preliminary injunction standard,¹⁶³ the court considered and subsequently rejected the defendants' arguments that the Act did not apply to their case.¹⁶⁴ The court then considered the affirmative defense

¹⁵⁹ See Dixon, *supra* note 158, at 979. California has experimented extensively with cannabis clubs since the passage of their medical marijuana initiative, Proposition 215. This experimentation has resulted in two distinct distribution models. One model is based on a conventional, pharmacy-like delivery system: A patient visits a buyers' club where he or she presents a note from a physician. The proprietor of the club fills the prescription and the patient leaves to use the medicine, presumably at home. Oakland Cannabis Buyers' Club is one of a number of clubs that follow this model. The second model resembles a social club more than a pharmacy. The club has a menu offering various types and grades of marijuana. Similar to an Amsterdam-style coffee house, most people stay after they obtain their marijuana to smoke and talk. See Grinspoon, *Time of Prohibition*, *supra* note 21, at 479.

¹⁶⁰ See 5 F. Supp. 2d 1086, 1102 (N.D. Cal. 1998).

¹⁶¹ See *id.* at 1092.

¹⁶² See *id.* at 1091.

¹⁶³ See *id.* at 1098-99. When deciding whether to issue a preliminary injunction, the court stated that it considers: (1) the likelihood of success on the merits; (2) the possibility of irreparable harm to the moving party if the injunction is not granted; (3) the balance of hardships; and (4) in certain cases, whether the public interest will be advanced by granting preliminary relief. The court went on to state that in cases where the federal government seeks to enforce a statute, once the government has met the "possibility of success prong" of the test, the court will presume that the government has met the "possibility of irreparable injury" prong because the passage of the statute itself implies a finding by Congress that a violation will cause a harm to the public. See *id.* at 1099.

¹⁶⁴ See *id.* at 1099-1100. Among the arguments submitted by the defendants in support of their contention that federal law was inapplicable, the defendants reasoned that federal law applies only to illicit or illegal distribution of marijuana, not medical marijuana, which is legal under state law. See *id.* In dismissing the defendants' argument, the court stated that although Proposition 215 does not directly conflict with federal law because it allows persons who obtain and use marijuana for medical purposes to be exempt from state drug laws, and because it does not legalize the distribution of marijuana, such distribution is pro-

submitted by the defendants that, even if the law applied to their case, the common law necessity defense justified their conduct.¹⁶⁵ Reiterating the standard set forth by the Ninth Circuit in *United States v. Aguilar*, the court stated that in order to assert the necessity defense, defendants must prove that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) there were no legal alternatives.¹⁶⁶ The defendants asserted that they met each of the requisite elements.¹⁶⁷ In response to the defendants' claim that they satisfied the fourth element because their members had no reasonable alternative, the government argued that the defendants did have an alternative—they could petition to have marijuana rescheduled from a Schedule I substance to a Schedule II substance.¹⁶⁸ The court agreed with the defendants' contention that rescheduling was not a reasonable alternative because of the delay and bureaucratic burden it imposed on patients.¹⁶⁹ Nonetheless, the court denied the necessity defense because the defendants did not offer proof that the defense would apply to *every* patient to whom the defendants provided marijuana.¹⁷⁰ The court went on to caution that it was not ruling that the necessity defense was wholly inapplicable to injunction actions, but rather that sufficient facts were not present for the court to determine whether such a defense was available in this case.¹⁷¹ Therefore, the

hibited by federal law, and thus, the relevant federal law applies to the defendants. *See id.* at 1099–103.

¹⁶⁵ *See Cannabis Cultivators' Club*, 5 F. Supp. 2d at 1101–02.

¹⁶⁶ *See id.* at 1101 (quoting *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989)).

¹⁶⁷ *See id.* at 1101. First, the defendants claimed that they were faced with two evils—letting their members die, go blind or suffer severe pain, or risking violation of federal law—and they chose the lesser evil. Defendants claimed that they could meet the second and third requirements because the harm to be averted was imminent and supplying marijuana to their members was necessary to prevent that harm. Lastly, they claimed that they had no legal alternative: legal drugs were not effective in treating the symptoms of many of their members and thus, they had no legal or safe alternative. *See id.*

¹⁶⁸ *See id.* at 1102.

¹⁶⁹ *See id.*

¹⁷⁰ *See Cannabis Cultivators Club*, 5 F. Supp. 2d at 1102. According to the court's holding, in order for the defense to be available, defendants would have had to have proven that each and every patient to whom it provided cannabis was in danger of imminent harm; that the cannabis would alleviate the harm for that particular patient; and that the patient had no other alternatives. *See id.*

¹⁷¹ *See id.* Judge Breyer stated: "If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, there will be specific facts and circumstances before the Court to determine if the jury should be given a necessity instruction as a defense . . ." *See id.*

court held that, given the lack of supporting facts, medical necessity was not an appropriate defense to the issuance of an injunction.¹⁷²

Oakland Cannabis Buyers' Cooperative ("OCBC"), one of the defendants in *Cannabis Cultivators Club*, chose not to appeal the district court's ruling on the medical necessity defense but instead filed two new motions.¹⁷³ The district court denied both motions, and OCBC appealed the denial of these motions as well as a subsequent order by the district court finding the defendants in contempt of the preliminary injunction.¹⁷⁴ The first motion OCBC filed was a motion to dismiss the plaintiff's complaint on grounds that an Oakland City ordinance made OCBC immune from liability under federal law.¹⁷⁵ The second was a motion to modify the court's injunction to permit the distribution of marijuana to patients having a doctor's certificate stating that marijuana is a medical necessity.¹⁷⁶

In 1999, in *United States v. Oakland Cannabis Buyers' Cooperative* ("Buyers' Cooperative"), the United States Court of Appeals for the Ninth Circuit stated that it did not have jurisdiction to hear either the appeal of the denial of the defendant's motion to dismiss or the district court's contempt order, but could consider the order denying the defendant's motion for modification.¹⁷⁷ On this issue, the court held that the district court erred in accepting the government's argument that it lacked the discretion to grant OCBC's request for a modification that would exempt from the injunction distribution to

¹⁷² See *id.* The court also addressed the defendants' third and final argument that the injunction should be denied because it would infringe upon the fundamental right to be free from unnecessary pain and to receive palliative treatment for a painful medical condition, to care for oneself and to preserve one's own life. The court denied defendants' claim holding that the government was likely to prevail at trial on the issue of whether defendants have a constitutional right to medical marijuana. Again, the court noted that it was not denying that such a right may exist as a matter of law, but only that the defense is inapplicable to the injunction action. See *id.*

¹⁷³ See *Buyers' Coop.*, 190 F.3d at 1111.

¹⁷⁴ See *id.* at 1111.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* OCBC asked the district court to modify the injunction to allow cannabis to continue to be distributed to patients whose physicians certify that: (1) the patient suffers from a serious medical disorder; (2) the patient will suffer imminent harm if the patient does not have access to marijuana; (3) marijuana is necessary for the treatment of the patient's medical condition, or marijuana will alleviate the medical conditions or symptoms associated with it; and (4) there is no legal alternative to marijuana for the effective treatment of the patient's medical condition because the patient has tried other medical alternatives to marijuana and has found them ineffective in treating his or her condition, or has found that such alternatives result in intolerable side-effects. See *id.*

¹⁷⁷ See *id.* at 1111-12.

seriously ill individuals for whom marijuana was a medical necessity.¹⁷⁸ The court stated that it was within the district court's equitable jurisdiction to allow the modification,¹⁷⁹ especially in light of the many declarations submitted by OCBC of seriously ill patients and their doctors, attesting to the patients' medical need for marijuana.¹⁸⁰ Moreover, the court stated that there was no evidence in this case that Congress had intended to divest the court of its broad equitable discretion.¹⁸¹ Additionally, the court noted that because the government decided to enforce the federal marijuana laws by seeking an injunction—as opposed to the usual process of arresting and prosecuting those that it believed had committed a crime—the court was required to deal with any violations on an anticipatory basis.¹⁸² The court reasoned, therefore, that it should consider any available defenses on an anticipatory basis as well.¹⁸³ Implicit in the court's statement is the fact that because the defense of medical necessity is available at trial to a patient or cannabis club accused of violating federal marijuana law, it thus should be made available in an action for injunctive relief.¹⁸⁴ Lastly, the court concluded that the district court further erred by failing to expressly consider the public interest in denying the injunction on the record.¹⁸⁵

According to the court, while OCBC identified a strong public interest in the availability of a doctor-prescribed treatment to help suffering patients, the government identified no interest in blocking distribution, aside from its general interest in enforcing the statute.¹⁸⁶ This failure to weigh or consider the public interest, the court stated, was an abuse of the district court's discretion.¹⁸⁷ Finding that the district court erred in refusing to consider OCBC's motion for mod-

¹⁷⁸ See *Buyers' Coop.*, 190 F.3d at 1115.

¹⁷⁹ See *id.* at 1114. The Ninth Circuit noted that by stating that "its equitable powers do not permit it to ignore federal law . . . the district court misapprehended the issue. The court was not being asked to ignore the law. It was being asked to take into account a *legally cognizable defense* that would likely pertain in the circumstances." *Id.* at 1114 (emphasis added).

¹⁸⁰ See *id.*

¹⁸¹ See *id.* (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156 (9th Cir. 1988) (holding that courts retain broad equitable discretion when it comes to injunction against violations of federal statutes unless Congress has clearly and explicitly demonstrated that it has balanced equities and mandated injunction)).

¹⁸² See *id.* at 1114.

¹⁸³ See *Buyers' Coop.*, 190 F.3d at 1114.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

ification based on a lack of authority, the Ninth Circuit reversed the order denying the motion and remanded the case for reconsideration of OCBC's motion.¹⁸⁸

Despite the urgings of California's Attorney General to the contrary,¹⁸⁹ the Department of Justice requested that the Ninth Circuit reconsider its ruling, maintaining that the medical necessity defense is invalid because of Congress's declaration that marijuana has no medical benefit.¹⁹⁰ On March 2, 2000, however, the Ninth Circuit decided to deny the government's petition for a rehearing *en banc*.¹⁹¹ Therefore, assuming the Clinton Administration wishes the Department of Justice to continue its challenge of the propriety of the Ninth Circuit's decision, the only remaining option is an appeal to the United States Supreme Court.

The Ninth Circuit's ruling is especially significant in light of two other cases currently pending in federal court in California.¹⁹² The first case, *United States v. Smith*, represents the first federal criminal prosecution of a medical marijuana patient and caregiver¹⁹³ since the passage of Proposition 215 in 1996.¹⁹⁴ On May 21, 1999, B.E. Smith was convicted in the United States District Court for the Eastern District of California of the manufacturing and possession of marijuana in violation of the Controlled Substances Act.¹⁹⁵ On August 6, 1999, Smith was sentenced to twenty-seven months in prison—the maximum sentence authorized by law and a term seventeen months longer

¹⁸⁸ See *Buyers' Coop.*, 190 F.3d at 1114.

¹⁸⁹ See Bob Egelko, *supra* note 158. In an attempt to get the Clinton Administration to drop its opposition to medical marijuana, Attorney General Bill Lockyer wrote a letter to United States Attorney Janet Reno urging the government not to appeal the Ninth Circuit's ruling. See *id.*

¹⁹⁰ See *Justice Department Asks for Rehearing of Medical Marijuana Ruling*, ASSOCIATED PRESS, Oct. 27, 1999.

¹⁹¹ See *Buyers' Coop.*, 190 F.2d 1109 (9th Cir. 1999) (No. 98-16950); see also Robert Raich (counsel to OCBC), *Major Victory for Medical Marijuana in California: 9th Circuit Court of Appeals Denies Clinton Administration's Petition of for Rehearing and Rehearing En Banc*, MARIJUANA NEWS (visited Mar. 29, 2000) <<http://216.9.192.67/news.php3?sid=133>>.

¹⁹² See *United States v. Smith*, (E.D. Cal. 2000) (No. CR S-97-558 GEB); *United States v. McWilliams*, (C.D. Cal. 1999) (No. CR-97-997 (A-GHK)).

¹⁹³ Under Proposition 215, caregivers are those persons who cultivate medical marijuana for distribution to specific patients.

¹⁹⁴ See Rachael Swain, *B.E. Smith: Compassionate Caregiver or Common Criminal?*, MARIJUANA NEWS (visited Mar. 29, 2000) <http://www.marijuananeews.com/woody_harrelson_and_defense_lawy.htm>.

¹⁹⁵ See Defendant's Memorandum Re Bail Pending Appeal and Remanded Issue of Medical Necessity Defense; Request for Hearing at 1, *United States v. Smith*, (E.D. Cal. 2000) (No. CR S-97-558 GEB) [hereinafter Defendant's Memorandum Re Bail].

than that which was recommended by the federal Probation Department in its pre-sentence investigation report.¹⁹⁶

Smith, a decorated Vietnam veteran, began suffering from Post-Traumatic Stress Disorder ("PTSD") shortly after his return from the war.¹⁹⁷ Following the passage of Proposition 215, Smith's doctor recommended marijuana in order to treat the pain and other symptoms associated with his condition.¹⁹⁸ Shortly thereafter, Smith established himself as a "caregiver" pursuant to Proposition 215 so that he could grow marijuana for his personal medical use.¹⁹⁹ Smith eventually became the caregiver for nine other seriously ill patients suffering from various illnesses including cancer, sickle cell anemia, AIDS and chronic pain due to a severed limb.²⁰⁰ From the time he began growing marijuana plants, Smith meticulously documented his activities and informed local law enforcement officials, such as the sheriff and district attorney, of his intentions.²⁰¹ None of the law enforcement officials with whom Smith spoke discouraged him from growing marijuana or counseled him on the illegality of such action under federal law.²⁰² In addition, Smith had posted a sign in his front yard reading "Medical Marijuana Garden," and had attached to it all of the relevant doctor recommendations.²⁰³ Nevertheless, on September 24, 1997, federal officers seized upon Smith's home, searched his property and destroyed his marijuana plants.²⁰⁴ At that time, Smith was growing eighty-seven plants—just enough, he claimed, to accommodate him-

¹⁹⁶ See *id.* at 2.

¹⁹⁷ See Defendant's Declaration of Counsel in Support of Memorandum Re Bail Pending Appeal and Remanded Issue of Medical Necessity Defense at 2, *United States v. Smith*, (E.D. Cal. 2000) (No. CR S-97-558 GEB) [hereinafter Defendant's Declaration of Counsel]. Although Smith was not formally diagnosed with PTSD until after his conviction, his family and close friends have been aware of his condition since his return from Vietnam. See *id.*

¹⁹⁸ See Defendant's Memorandum Re Bail, *supra* note 195, at Exhibit B (Correspondence from Dr. Jeri Rose, June 6, 1997).

¹⁹⁹ See *id.* at Exhibit C (caregiver designation). Under Proposition 215, patients can also serve as caregivers. See CAL. HEALTH & SAFETY CODE § 11362.5(C)(2)(c) (West 2000).

²⁰⁰ See Defendant's Declaration of Counsel, *supra* note 197, at 3.

²⁰¹ See Defendant's Memorandum Re Bail, *supra* note 195, at 9-10; Swain, *supra* note 194, at 4.

²⁰² See Defendant's Memorandum Re Bail, *supra* note 195, at 10; Swain, *supra* note 194, at 4.

²⁰³ See Defendant's Memorandum Re Bail, *supra* note 195, at 9-10; Swain, *supra* note 194, at 4.

²⁰⁴ See Swain, *supra* note 194, at 5.

self and the others for whom he was a caregiver.²⁰⁵ Significantly, Smith's case represented the first time in Northern California that a person was prosecuted under federal law for the possession of less than one hundred marijuana plants.²⁰⁶

At trial, Smith was prohibited from making any mention of his medical condition or the reason that he was growing marijuana.²⁰⁷ This was the result of a decision by the district court to grant the government's pre-trial motion to exclude any defenses relating to Proposition 215 or the medical use of marijuana, including medical necessity.²⁰⁸ The government reasoned that because federal law fails to recognize that marijuana has any medical value, as evidenced by its scheduling of marijuana as Schedule I, any defenses related to such a claim are barred in a federal case.²⁰⁹

On September 13, 1999, following Smith's conviction for manufacturing and possession of marijuana, the district court filed an order denying the defense's request for release on bail pending appeal and remanded Smith into custody until his sentencing on August 6, 2000.²¹⁰ In denying the request, the district court set forth the standard under federal law for determining whether to grant bail pending appeal.²¹¹ Pursuant to that standard, a convicted defendant shall be detained pending appeal unless the judicial officer finds:

²⁰⁵ See Denny Walsh, *Actor Harrelson, Judge Clash in Pot Trial*, SACRAMENTO BEE, May 21, 1999, at 2.

²⁰⁶ See Swain, *supra* note 194, at 5.

²⁰⁷ See Defendant's Memorandum Re Bail, *supra* note 195, at 1.

²⁰⁸ See *id.* Smith's lawyers had sought to introduce four separate defenses to the charges of manufacturing and possession in addition to medical necessity: (1) substantive due process; (2) Section 884(a) "valid prescription" defense; (3) entrapment by estoppel; and (4) reliance on the advice of counsel. See Order at 6-10, *United States v. Smith*, (E.D. Cal. 1999) (No. CR S-97-558 GEB) [hereinafter District Court's Order].

In addition to granting the government's pre-trial motion, Judge Burrell also overturned a discovery motion that had been granted by a U.S. Magistrate regarding Smith's claim of selective prosecution. See *id.* The Magistrate had granted a request by the defense to compel the federal government to disclose documentation relating to the decision to prosecute Smith. See *id.* The government appealed the Magistrate's decision and Judge Burrell reversed. See *id.* at 5.

²⁰⁹ See Government's Opposition to Smith's Motion for Bail Pending Appeal Following Remand at 4 n.1, *United States v. Smith* (E.D. Cal. 2000) (No. CR S-97-558 GEB) [hereinafter Gov't Opposition].

²¹⁰ See District Court's Order, *supra* note 208, at 2.

²¹¹ See *id.* at 1. The court stated that the decision of whether to grant bail pending appeal is governed by the provisions of the Bail Reform Act, 18 U.S.C. § 3143(b) (2000). See *id.*

(A) by clear and convincing evidence that the person is *not likely to flee or pose a danger to the safety of any other person or the community if released . . .*; and (B) that the appeal is not for the purpose of delay and raises a *substantial question of law or fact*²¹² likely to result in (1) reversal, (2) an order for a new trial, (3) a sentence that does not include a term of imprisonment, or (4) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.²¹³

According to the court, the defense failed to show by "clear and convincing" evidence that Smith would not pose a "danger to the safety of the community" if released.²¹⁴ Specifically, the district court found that there was a high likelihood that Smith would continue to traffic marijuana if released.²¹⁵ The district court's determination that Smith was a potential danger to the community was sufficient to disqualify him for release pending appeal.²¹⁶ Nonetheless, the court went on to state that its denial of Smith's previously asserted defenses relating to Proposition 215 or the medical use of marijuana does not raise "substantial questions of law or fact" likely to result in reversal, a new trial or a greatly reduced sentence.²¹⁷ Specifically, with respect to the medical necessity defense, the district court ruled that Smith could not utilize the defense—either at trial or in his motion for release pending appeal—because he had not first pursued the rescheduling of marijuana, and therefore, had "bypassed the available administrative procedures established by Congress to effect a change in how marijuana is classified under federal law."²¹⁸

The district court's decision to deny release on bail pending appeal was rather unusual given the magnitude of the charges and the fact that Smith had no prior convictions.²¹⁹ Furthermore, the decision highlighted the tension that existed between the district court judge,

²¹² See *id.* at 1–2. A substantial question of law or fact has been interpreted by the Ninth Circuit and other federal circuit courts of appeals to mean "one that is 'fairly debatable' or 'fairly doubtful.' In short, a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.3d 1279, 1280 (9th Cir. 1985).

²¹³ 18 U.S.C. § 3143(b)(1)(A), (B) (2000) (emphasis added).

²¹⁴ See District Court's Order, *supra* note 208, at 3–4.

²¹⁵ See *id.* at 4.

²¹⁶ See *id.* at 5–10.

²¹⁷ See *id.*

²¹⁸ See *id.* at 6.

²¹⁹ See Swain, *supra* note 194, at 3.

Judge Burrell, and the defense, and served to illuminate some of the Judge's own views on marijuana.²²⁰ Indeed, after denying bail, Judge Burrell stated that marijuana is a gateway to "violence, gangs and the destruction of families and communities."²²¹

On September 27, 1999, Smith appealed the district court's decision by motion to the United States Court of Appeals for the Ninth Circuit.²²² It is noteworthy that Smith's appeal came fourteen days after the Ninth Circuit had issued its opinion in *Buyers' Coop.*, holding that it was within the district court's discretion to permit the distribution of marijuana to seriously ill individuals who could satisfy the elements of the medical necessity defense.²²³ Notwithstanding the court's earlier decision in *Buyers' Cooperative*, however, on October 13, 1999, a Ninth Circuit Panel denied Smith's motion for bail pending appeal, stating that "appellant has not shown that the appeal raises a 'substantial question' of law or fact that is likely to result in reversal, [or] an order for a new trial"²²⁴ The Panel did not go on to determine whether Smith was likely to flee or posed a danger to the community if released.²²⁵

Maintaining that the Panel erred in failing to recognize the denial of the medical necessity defense as an issue raising a "substantial question" of law that is likely to result in reversal or a new trial,²²⁶ Smith filed a motion with the Ninth Circuit on October 29, 1999, seeking reconsideration of the Panel's Order.²²⁷ In support of his mo-

²²⁰ See *id.* at 7.

²²¹ See *id.*

²²² See Appellant's Motion for Reconsideration of Application of B.E. Smith for Release Pending Appeal at 3, *United States v. Smith* (9th Cir. 1999) (No. 99-10477) [hereinafter Appellant's Motion for Reconsideration].

²²³ See *Buyers' Coop.*, 190 F.3d at 1114 (decided Sept. 13, 1999); Appellant's Motion for Reconsideration, *supra* note 222, at 3.

²²⁴ Order at 1, *United States v. Smith* (9th Cir. Oct. 13, 1999) (No. 99-10447).

²²⁵ See *id.*

²²⁶ See Appellant's Motion for Reconsideration, *supra* note 222, at 2. Smith's attorneys believed that the Panel erred further by refusing to find a "substantial question" likely to result in a reversal or new trial with regards to other decisions by the district court as well. See *id.* at 2 n.1. Specifically, the defense maintained that the district court wrongfully overturned the U.S. magistrate's decision regarding selective prosecution and improperly excluded evidence regarding the entrapment by estoppel and advice of counsel defenses. See *id.* In recognition of the limited circumstances for a motion for reconsideration, however, the defense limited its petition to the district court's denial of the medical necessity defense. See *id.*

²²⁷ See *id.* at 1. Ninth Circuit Rule 27-10 authorizes a petitioner to seek clarification, reconsideration or rehearing of an order. Rule 27-10 states:

tion for reconsideration, Smith argued that the Panel overlooked or misunderstood Ninth Circuit precedent and directly contradicted the court's decision in *Buyers' Cooperative*.²²⁸ According to Smith, the court in *Buyers' Cooperative* not only reaffirmed its earlier decision in *Aguilar*, which recognized the necessity defense generally, but also expressly applied the medical necessity defense to those citizens using medical marijuana.²²⁹ Furthermore, Smith maintained that although *Buyers' Cooperative* involved the government's seeking civil injunctive relief to close the OCBC, that case is not distinguishable from his own case because the court in *Buyers' Cooperative* specifically addressed the applicability of the medical necessity defense to *criminal defendants* when it stated that "[h]ad the government proceeded in the usual way, by arresting those it believed had committed a crime . . . the defendants would have been able to litigate their necessity defense under *Aguilar* in due course."²³⁰ Consistent with the court's decision, therefore, Smith urged that he was in exactly the same position as those individuals identified in *Buyers' Cooperative*, and thus should have been allowed to litigate his necessity defense at trial.²³¹

Additionally, Smith argued that the Panel erred in refusing to reverse the district court's conclusion that Smith's medical necessity defense was properly denied—both at trial and on his motion for release pending bail—because he had not exhausted his legal alternatives by seeking the rescheduling of marijuana with the federal government.²³² Smith maintained that the court in *Buyers' Cooperative* made clear that this "administrative alternative" was irrelevant to the medical necessity inquiry.²³³ Thus, in light of the court's decision in *Buyers' Cooperative*, Smith argued that the denial of his medical neces-

A party . . . shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

See *id.* (stating Ninth Circuit Rule 27-10).

²²⁸ See Appellant's Motion for Reconsideration, *supra* note 222, at 2-7.

²²⁹ See *id.* at 5 (quoting the requirements set forth by court in *Buyers' Cooperative*, as well as its recognition that medical marijuana was "legally cognizable defense").

²³⁰ See *id.* (quoting *Buyers' Coop.*, 190 F.3d at 1115).

²³¹ See *id.* at 6.

²³² See Appellant's Motion for Reconsideration, *supra* note 222, at 6-7.

²³³ See *id.* at 7.

sity defense raised a "substantial question" of law that is likely to result in reversal or a new trial, thus entitling him to bail pending appeal.²³⁴

On February 3, 2000, the Ninth Circuit issued an Order granting Smith's motion for reconsideration of the court's October 13, 1999 order denying bail and remanded to the district court the issue of whether Smith is entitled to bail pending appeal. Reaffirming its decision in *Buyers' Cooperative*, the Ninth Circuit stated:

In light of this court's decision in *United States v. Oakland Cannabis Buyers' Cooperative*, . . . Smith is entitled to bail pending appeal if he can demonstrate: 1) a likelihood that he was entitled to present a medical necessity defense at trial; and 2) his release does not pose a danger that he will distribute marijuana to people not falling within the class of individuals described in *OCBC* . . . Accordingly, we remand for the limited purpose of allowing the district court to conduct this inquiry in the first instance.²³⁵

Thus, the Ninth Circuit recognized that the medical necessity defense is available as a matter of law to criminal defendants who can offer sufficient facts to establish a likelihood that they will be able to satisfy the requisite elements of the defense at trial.²³⁶ Pursuant to the court's order, therefore, the district court must consider the facts in the record and determine whether there is a likelihood that Smith will be able to satisfy the elements of the medical necessity defense—as set forth *Buyers' Cooperative* and reaffirmed by the Order—at trial.²³⁷ If the district court finds the existence of such facts, Smith is entitled to bail pending his appeal.²³⁸

On remand, therefore, the parties are limited to arguing, on the facts of the case, (1) whether Smith and the patients for whom he provided marijuana satisfy the requirements for the medical necessity

²³⁴ See Order at 1–2, *United States v. Smith* (9th Cir. Feb. 3, 2000) (No. 99–10447) [hereinafter Ninth Circuit Order]; Appellant's Motion for Reconsideration, *supra* note 222, at 2–7. Smith also addressed the district court's ruling that he is a flight risk or a danger to the safety of the community. See Appellant's Motion for Reconsideration, *supra* note 222, at 7. Although the Ninth Circuit remanded this issue to the district court, Smith argued that the district court's conclusion was "inseparably enmeshed with that court's unsupported and inaccurate belief that he was an unjustified and flagrant violator of federal law who had no right to assert a medical necessity defense." See *id.* at 8.

²³⁵ Ninth Circuit Order, *supra* note 234, at 1–2.

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ See *id.*

defense set forth in *Buyers' Cooperative*,²³⁹ and (2) whether Smith poses a danger that he will distribute marijuana to people not falling within the class of individuals described in *Buyers' Cooperative*.²⁴⁰ Furthermore, as the result of the court's reaffirmation of *Buyers' Cooperative*, the government has been forced to abandon its earlier contention that because marijuana is a Schedule I substance, a medical necessity defense is never available in a marijuana case.²⁴¹ Nonetheless, the government maintains that the defense should not apply to Smith in this case.²⁴²

The Ninth Circuit's Order in *Smith* is a historic decision insofar as it represents the first time that a circuit court recognized the applicability of the medical necessity defense for medical marijuana in a federal criminal prosecution.²⁴³ Furthermore, the court's Order seems to imply that a criminal defendant, while on bail pending appeal, may lawfully distribute medical marijuana to those people suffering from

²³⁹ See *id.* Smith argues that he and the people to whom he distributed marijuana are in the same position as those described in *Buyers' Club*, and thus, he meets the minimum threshold showing that he had a right to present his medical necessity defense at trial. See Defendant's Memorandum Re Bail, *supra* note 195, at 11–14. The government argues that Smith cannot avail himself of the defense because he fails to satisfy the requirement of "necessity," which the government suggests requires a showing of an "emergency" or "absolute and uncontrollable necessity." See Gov't Opposition, *supra* note 209, at 2–7 (citing *United States v. Dorrell*, 758 F.2d 427, 431). Indeed, the government states that Smith does not allege that he was faced with imminent danger of dying or permanent disability. See *id.* at 6. Smith argues, in turn, that the government's definition of the necessity requirement is not supported by case law and contradicts both *Aguilar* and *Buyers' Club*. See Defendant's Reply Memorandum Re Bail Pending Appeal and Remanded Issue of Medical Necessity Defense at 2–3, *United States v. Smith* (E.D. Cal. 2000) (No. CR S-97-558 GEB) (arguing that government's interpretation of *United States v. Dorrell* is incorrect, but regardless, the case is irrelevant because it preceded *Aguilar* and *Buyers' Club*) [hereinafter Defendant's Reply Memorandum]. The government also maintains that Smith had other legal alternatives including the use of other drugs, such as Valium, and the pursuit of rescheduling by the federal government. See Gov't Opposition, *supra* note 209, at 6–7. Smith urges that both of the government's arguments concerning legal alternatives are in contradiction of *Buyers' Club* and the Ninth Circuit's directives in his case. See Defendant's Reply Memorandum, *supra*, at 4–5 (stating that even assuming some degree of merit in government's argument concerning medical alternatives, such a question is for jury).

²⁴⁰ See Defendant's Memorandum Re Bail, *supra* note 195, at 14–15; Gov't Opposition, *supra* note 209, at 7–10.

²⁴¹ See Gov't Opposition, *supra* note 209, at 4. The government stated that it disagreed with the court's analysis in *Buyers' Club* that there was no evidence of Congress's intention to divest district court's of their broad equitable discretion. See *id.* The government maintains that Congress has divested the courts of such discretion by choosing to classify marijuana as Schedule I. See *id.* at n.1.

²⁴² See *id.*

²⁴³ See Letter from David M. Michael, attorney for B.E. Smith, Feb. 24, 2000 (on file with author).

serious medical conditions for which marijuana provides necessary relief.²⁴⁴ In addition, it is important to note two key differences between the Ninth Circuit's decisions in *Smith* and in *Buyers' Coop*. First, the federal government's action in *Smith* involved the criminal prosecution of an individual, whereas the government's action against the cannabis clubs in *Cannabis Cultivators Club* consisted of injunctions, which are a civil remedy.²⁴⁵ Second, the use and cultivation of marijuana by an individual patient or primary caregiver, unlike the distribution of marijuana through cannabis clubs, is explicitly recognized by California's Proposition 215.²⁴⁶ Therefore, although the Ninth Circuit's decision in *Buyers' Cooperative* was crucial insofar as it recognized the appropriateness of the medical necessity defense in federal court and laid the foundation for the court's decision in *Smith*, it is the latter decision that will likely have the greatest impact on subsequent cases involving the criminal prosecution of patients attempting to use and cultivate marijuana for medical purposes.²⁴⁷

One case that will be affected by the Ninth Circuit's decision in *Smith* is *United States v. McWilliams*.²⁴⁸ On November 5, 1999, Judge George H. King of the United States District Court for the Central District of California granted the government's pre-trial motion prohibiting the defendants from making any reference to the medical benefits of marijuana at trial.²⁴⁹ Specifically, the defendants were barred from referring to California Proposition 215, the federal government's own experimental medical marijuana programs or any claim that marijuana use is a medical necessity.²⁵⁰ In July 1998, defendants Peter McWilliams and Todd McCormick were arrested following a police raid in Los Angeles that turned up more than four thousand

²⁴⁴ See *id.* By relying on *Buyers' Cooperative*, which held that cannabis clubs such as OCBC may be entitled to continue distributing marijuana to those seriously ill patients that satisfy the elements of the medical necessity defense, the court's Order in *Smith* can reasonably be interpreted as extending the *Buyers' Cooperative* holding to include someone acting as a patient's primary caregiver. See Ninth Circuit Order, *supra* note 234, at 1-2.

²⁴⁵ Compare District Court's Order, *supra* note 208, at 1, with *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1101.

²⁴⁶ Although the cannabis clubs urge that they qualify as caregivers within the meaning of Proposition 215, their case is not as clear as *Smith*, where the individual patient or caregiver possesses or cultivates medical marijuana. See *supra* notes 199-200 and accompanying text.

²⁴⁷ See Ninth Circuit Order, *supra* note 234, at 1.

²⁴⁸ See (C.D. Cal. 1999) (No. CR-97-997 (A-GHK)).

²⁴⁹ See David Rosenzweig, *Activists Plead Guilty to Drug Charges*, L.A. TIMES, Nov. 20, 1999, at B1.

²⁵⁰ See *id.*

marijuana plants, and were charged with manufacturing and conspiring to grow and sell marijuana in violation of federal law.²⁵¹ The charges carry with them a minimum sentence of ten years and a maximum sentence of life in prison.²⁵²

The government has sought to characterize McWilliams and McCormick as commercial dealers, alleging that they were growing marijuana to sell to marijuana clubs.²⁵³ McCormick maintains that he smokes marijuana to treat pain from cancer treatments.²⁵⁴ He also claims that he was growing an abundance of plants to determine which strains work best for which types of illnesses. McWilliams claims that he uses marijuana to treat nausea resulting from drugs he uses to treat AIDS.²⁵⁵ McWilliams further asserts that he tried other traditional medication to treat his nausea, including Marinol—a legal drug in pill form containing THC, the active ingredient in marijuana—but only marijuana allowed him to keep his anti-AIDS drugs down.²⁵⁶ Since McWilliams' access to marijuana was blocked, he has been unable to keep down his pills and his viral load²⁵⁷ has risen to 250,000, a level that greatly reduces the effectiveness of the immune system.²⁵⁸ Despite pleas by McWilliams' attorney to alter the bail conditions so that McWilliams can continue to smoke marijuana, Judge King has said that "he cannot authorize someone to break the law."²⁵⁹ In addressing the medical necessity defense, Judge King stated that such a defense is inappropriate because it contradicts an explicit determination by Congress to classify marijuana as a Schedule I drug, a substance with no legitimate medical use.²⁶⁰

On November 19, 1999, following Judge King's ruling, McCormick and McWilliams pled guilty to reduced drug charges.²⁶¹ The

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ See Rosenzweig, *supra* note 249, at B1.

²⁵⁵ See *id.*

²⁵⁶ See Lynda Gorov, *US Prosecutes Cancer Patient Over Marijuana*, BOSTON GLOBE, Oct. 23, 1999, at A1. For a discussion of the Schedule II drug, Marinol, and why it is not always as effective as the smoked form of marijuana, see Tiersky, *supra* note, 16, at 567-68. For example, the recent IOM report concluded that "Marinol's oral route of administration hampers its effectiveness because of slow absorption . . ." See NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, *supra* note 53, at 205-06.

²⁵⁷ The viral load is the measure of active AIDS virus in the body.

²⁵⁸ See Mary Curtius, *AIDS Patient Pins Hopes on Pot Ruling*, L.A. TIMES, Sept. 20, 1999, at A3.

²⁵⁹ See *id.*

²⁶⁰ See Rosenzweig, *supra* note 249, at B1.

²⁶¹ See *id.*

government agreed to drop the marijuana manufacturing charges, which carry a ten-year minimum sentence, and allowed defendants to plead guilty to the charges of conspiracy to grow and distribute, which are punishable by a maximum sentence of five years.²⁶² The guilty plea allows the lawyers for McCormick and McWilliams to appeal the district court's medical necessity ruling following the sentencing hearing that occurred on February 28, 2000.²⁶³ In addition to the medical necessity defense, which the Ninth Circuit has held applicable in medical marijuana cases, there exists yet another option for avoiding the conflict between federal and state law; namely, the appropriate exercise of prosecutorial discretion.

V. ROLE OF PROSECUTORIAL DISCRETION

Despite its long standing position in the common law, the case law dealing with the necessity defense is relatively underdeveloped.²⁶⁴ This can be explained, in large part, by the fact that many of the cases in which a necessity defense would be appropriately asserted are simply not prosecuted.²⁶⁵ The notion that the prosecuting attorney is vested with a broad range of discretion in deciding whether to prosecute is firmly entrenched in American jurisprudence.²⁶⁶ When exercised properly, this discretion can assure that justice will prevail over law.²⁶⁷ In the words of then Attorney General, Justice Robert Jackson:

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See Arnolds & Garland, *supra* note 99, at 291.

²⁶⁵ See *id.*

²⁶⁶ See WAYNE R. LAFAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE § 13.2(a), at 561 (1985); THEODORE W. HOUSEL & GUY O. WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES 47 (1946). Because of legislative "overcriminalization" and limitations on enforcement resources, no prosecutors are able to prosecute all of the offenses that come to their attention. See LAFAVE & ISRAEL, at 562. One scholar has noted, to deny the exercise of discretion under these circumstances is "like directing a general to attack the enemy on all fronts at once." See *id.* (quoting T. ARNOLD, THE SYMBOLS OF GOVERNMENT 163 (1935)). For a more in-depth treatment of prosecutorial discretion and the role that it should play in the criminal justice system, see, for example, Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2127 (1998) (describing policy goals that guide prosecutorial discretion); Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 506 (1976) (discussing prosecutor's role in charging decisions).

²⁶⁷ See Arnolds & Garland, *supra* note 99, at 298 (quoting generally F. MILLER, PROSECUTION (American Bar Foundation, 1969)). The Supreme Court has stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in

"The prosecutor has more control over life, liberty, and reputation than any other person in America."²⁶⁸ The role of prosecutorial discretion in the federal sphere has received increased discussion and debate in recent years as Congress sought to "federalize" crimes that are traditionally left exclusively to state control.²⁶⁹ Such concurrent jurisdiction can result in problems when the values of a state, as evidenced by its legislative and constitutional decisions concerning criminal law or procedure, differ from that of the federal government.²⁷⁰ Federal prosecutorial discretion is thus especially relevant in states like California that have passed medical marijuana laws, because it has the potential to correct the imperfection of the federal law's reflection of state and community values.²⁷¹

The Department of Justice ("DOJ") instructs federal prosecutors to commence with prosecution when a federal offense is violated and there is evidence to convict, unless no "substantial federal interest" is served by the prosecution.²⁷² In determining whether to exercise their prosecutorial discretion to decline prosecution in a particular case, therefore, prosecutors must first conclude that declining prosecution would not sacrifice a substantial federal interest.²⁷³ A subchapter of the DOJ's United States Attorney Manual ("the Manual"), entitled "Initiating or Declining Charges—Substantial Federal Interest," sets forth the considerations that a prosecutor should weigh in determining whether a substantial federal interest is at stake.²⁷⁴ The Manual states that:

a criminal prosecution is not just that it shall win a case, but that justice is done.

Berger v. United States, 295 U.S. 78, 88 (1935).

²⁶⁸ Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L., CRIMINOLOGY, & POL. SCI. 3, 4 (1940).

²⁶⁹ See *supra* notes 95–97 and accompanying text.

²⁷⁰ See Hollon, *supra* note 96, at 501, 520–26 (arguing for expansive application of selective prosecution doctrine because of perverse incentive given to federal prosecutors in areas of concurrent jurisdiction to prosecute solely where state constitutional or procedural protections would be advantageous to defendant in state court).

²⁷¹ See *id.*

²⁷² UNITED STATES ATTORNEY MANUAL, *Grounds for Commencing or Declining Prosecution*, Tit. 9, Chap. 9–27.220(A) (1997). Two further justifications for declining to prosecute are that the person is subject to effective prosecution in another jurisdiction, or that there exists an adequate non-criminal alternative to prosecution. See *id.*

²⁷³ See *id.*

²⁷⁴ See UNITED STATES ATTORNEY MANUAL, *Initiating and Declining Charges—Substantial Federal Interest*, Tit. 9, Chap. 9–27.230 (1997) [hereinafter USAM 9–27.230].

[I]n determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including: (1) federal law enforcement priorities; (2) the nature and seriousness of the offense; (3) the deterrent effect of prosecution; (4) the person's culpability in connection with the offense; (5) the person's history with respect to criminal activity; (6) the person's willingness to cooperate in the investigation or prosecution of others; and (7) the probable sentence if convicted or other consequences if the person is convicted.²⁷⁵

Addressing the first factor, "federal law enforcement priorities," the DOJ acknowledges that it must be mindful of the limited enforcement resources available.²⁷⁶ In establishing national prosecutorial priorities, therefore, the DOJ states that it should focus on those matters that are most deserving of federal attention and that are most likely to be handled effectively at the federal level.²⁷⁷ The DOJ also acknowledges, however, that individual United States Attorney offices must be free to establish their own prosecutorial priorities within the national priorities in order to focus most effectively on matters of local concern.²⁷⁸

In referring to its second listed factor, "nature and seriousness of the crime," the Manual asserts that "of primary importance is the actual or potential impact of the offense on the community and on the victim."²⁷⁹ Moreover, the Manual states that in assessing the impact of the offense on the community, a prosecutor properly may take into account the gravity of the offense and the community's attitude towards prosecution under the circumstances of the case.²⁸⁰ The importance of considering the community's views as a factor in deciding whether to prosecute is emphasized also by scholars who suggest that prosecutors often decline prosecution based on their expectation that, given the community's attitude towards a particular offense, a judge or jury will choose to acquit, notwithstanding proof of guilt be-

²⁷⁵ See *id.* Although the Manual lists only seven factors, the Comment section of USAM 9-27.230 discusses an additional factor; namely, "the person's personal circumstances." See *id.* § (B) (1).

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ See USAM 9-27.230, *supra* note 274, § (B) (2).

²⁸⁰ See *id.*

yond a reasonable doubt.²⁸¹ Thus, the inability of a prosecutor to obtain a conviction for certain offenses, scholars argue, should influence the decision of whether to prosecute future offenses.²⁸²

The Manual also states that federal prosecutors should take cognizance of a "person's personal circumstances."²⁸³ In so doing, the Manual maintains that: "[s]ome circumstances peculiar to the accused, such as . . . mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense."²⁸⁴ This factor is thus representative of the DOJ's recognition that, in the name of justice, prosecutors must tailor their decision of whether to prosecute, not only to the particular type of offense, but to the circumstances surrounding the particular person as well.²⁸⁵ According to the DOJ, then, a federal prosecutor should weigh the potential defendant's personal circumstances with the other seven considerations listed in the Manual in deciding whether a substantial federal interest exists so as to justify prosecution.²⁸⁶

At least one state's DOJ office decided to endorse prosecutorial discretion in medical marijuana cases, declining to criminally prose-

²⁸¹ See LAFAYE & ISRAEL, *supra* note 266, at 564 (discussing discretion of judge and jury as influence on prosecutor's decision to prosecute); Aaron T. Oliver, Note, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL'Y 49, 60-62 (1997) (discussing jury's willingness to nullify law when community views harm resulting from crime to be *de minimus* or law to be inappropriate restriction on victimless activity); Harvey Uhlenhopp, *The Criminal Trial: Observations from the Bench* (speech presented to National District Attorneys Association / Iowa County Attorneys Seminar), in PRACTICING LAW INSTITUTE, THE PROSECUTOR'S SOURCEBOOK 24-5 (B. James George, Jr. ed. 1969). A jury may exercise its discretion to acquit the guilty for a variety of reasons, including: (1) sympathy with the defendant; (2) belief that the offense is *de minimus*; or (3) the fact that the statute violated is an unpopular law. See LAFAYE & ISRAEL, *supra* note 266, at 564.

²⁸² See LAFAYE & ISRAEL, *supra* note 266, at 564; Oliver, *supra* note 281, at 60-62. For example, a prosecutor in a county where jurors simply will not convict in driving-while-intoxicated cases absent aggravating circumstances must consider whether it is wise to continue prosecuting similar cases. See Uhlenhopp, *supra* note 281, at 24-25.

²⁸³ See USAM 9-27.230, *supra* note 274, § (B)(7).

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ See *id.* §§ (A) & (B). At least one commentator, however, has suggested that it is naive to believe that a prosecutor's decisions concerning whether to prosecute are controlled by any rules or guidelines, such as those set forth in the DOJ's Manual. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 558-60 (1999). Rather, Levenson argues that charging decisions take place within "a gap in the rules—a gap intentionally left so that prosecutors can tailor justice." *Id.* at 558. According to Levenson, prosecutors must seek to fill the gap through a practical sense of what is right and wrong and a moral standard. See *id.*; see also generally, Bennet L. Gershtman, *A Moral Standard for the Prosecutor's Exercise of the Charging Decision*, 20 FORDHAM URB. L.J. 513 (1993).

cute medical marijuana patients possessing a sixty-day supply or less of marijuana.²⁸⁷ On December 1, 1999, in a letter that seems consistent with the DOJ's desire to give individual offices flexibility in defining their priorities, Western Washington's top federal prosecutor, United States Attorney Kate Plaumer, stated, "[g]iven our limited funding and overwhelming responsibilities to enforce an ever larger number of federal offenses, we simply cannot afford to devote prosecutive resources to cases of this magnitude."²⁸⁸ Washington is one of five states that permits the possession and use of medical marijuana under state law.²⁸⁹ Plaumer stated that she sent the letter to the Seattle police in order to address the fact that the conflict between state and federal law puts the police in a difficult position as to which law to enforce.²⁹⁰ Plaumer stated that there are policies already in place that preclude her office from charging qualified medical marijuana patients under federal law, and thus, police should not enforce federal drug law against those patients legitimately possessing and using medical marijuana under state law.²⁹¹ In response to a question of how much marijuana was permitted, Plaumer suggested that an amount fewer than 250 plants would constitute an authorized "sixty-day supply" of marijuana under Washington law.²⁹²

Although prosecutorial discretion potentially can bring the law into conformity with the values of the community, like all types of discretion, it has a high potential for abuse.²⁹³ Indeed, Justice Jackson, in his earlier quoted statement, went on to say that: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."²⁹⁴ This abuse is most glaring where the government prosecutes a defendant for political—as opposed to purely legal—reasons.²⁹⁵ In such cases, contrary to the ideal application of a prosecutor's discretion,

²⁸⁷ Carl M. Ostrom, *Feds Clarify Medical-Marijuana Guidelines; Reject Busting Patients*, SEATTLE TIMES, Dec. 2, 1999, at B1.

²⁸⁸ See *id.*; see also LAFAYE & ISRAEL, *supra* note 266, at 565 (stating that established standards are necessary for each prosecutor's office to guide exercise of prosecutorial discretion, particularizing such standards as circumstances that properly can be considered mitigating or aggravating, or kinds of offenses that should be most vigorously prosecuted in view of community's needs).

²⁸⁹ See WASH. REV. CODE ANN. § 69.51A (West 2000).

²⁹⁰ See Ostrom, *supra* note 287, at B1.

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See Arnolds & Garland, *supra* note 99, at 298.

²⁹⁴ Jackson, *supra* note 267, at 3.

²⁹⁵ See Arnolds & Garland, *supra* note 99, at 298.

the prosecutor uses the technicalities of the law to *harass* a person for conduct that the community might not find criminal.²⁹⁶ Scholars suggest several indicia for when the government is prosecuting "political defendants": (1) where the defendants are "political persons" dissenting from the conventional wisdom; (2) where the defendants are being prosecuted in part for what they say or think; (3) where there is selective prosecution²⁹⁷; and (4) where the trial is not a model of evenhandedness and judicial restraint.²⁹⁸

VI. PLEA FOR COMPASSION

The use of prosecutorial discretion as described above, the medical necessity defense and the rescheduling of marijuana as a Schedule II substance, are three routes that the federal government could choose to implement a compassionate policy regarding medical marijuana. Although passage of the congressional legislation supported by Representative Frank²⁹⁹ and/or the rescheduling of marijuana as a Schedule II drug by the DEA would constitute the most resounding support for permitting the use of medical marijuana, they are the least likely to occur in the near future. Conversely, as public opinion continues to support medical marijuana, it is likely that more states will pass initiatives resembling that recently passed in Maine, which exempts patients with a doctor's recommendation from state criminal prosecution.³⁰⁰ The tension between states and the federal govern-

²⁹⁶ See *id.*

²⁹⁷ A defendant can challenge the use of prosecutorial discretion under claims of selective prosecution as a violation of equal protection, see generally *United States v. Armstrong*, 514 U.S. 546 (1996), or prosecutorial vindictiveness as a violation of due process, see generally *United States v. Batchelder*, 442 U.S. 114 (1979). Due to the heavy burdens placed on the defendants, however, both claims are extremely difficult to make out successfully. For an exhaustive treatment of the subject, see JOSEPH F. LAWLESS, JR., *PROSECUTORIAL MISCONDUCT* ch.3 (1985 & Supp. 1990).

²⁹⁸ See Arnolds & Garland, *supra* note 99 at 298 n.111 (quoting Waltz, *Tensions Between Political Defendants and the Courts*, Oct. 15, 1971 (unpublished lecture, DePaul College Speakers Program)). Professor Waltz also included in his list of indicia: (5) where the statute that is the source of the charges was enacted for the purpose of combating persons like the defendants who oppose particular administration policies; and (6) where it is necessary to rely on undercover agents and provocateurs. See *id.*

²⁹⁹ See *supra* notes 45-47 and accompanying text (discussing H.R. 912).

³⁰⁰ See Maine Medical Marijuana Act of 1998, Initiated Bill No. 2, 1999, Chap. 1 (codified at ME. REV. STAT. ANN. tit. 22 § 2383 (b)(5) (West 1999)). Several states will consider medical marijuana ballot initiatives in 2000, including Massachusetts, Michigan, Ohio and Florida. See Tiersky, *supra* note 16, at 584 (citing *Trends & Timelines, Medical Marijuana: More Ballot Measures to Come*, AM. POLI. NETWORK, Dec. 11, 1998). Additionally, Colorado and Nevada will vote again in 2000 to complete their initiative process. See *id.*

ment will continue to increase, therefore, if the federal government refuses to alter its policy regarding marijuana and the states simultaneously continue experimenting with new legislative schemes relating to medical marijuana.

The cases in California, moreover, highlight another growing conflict—this one involving a dispute over federal law between the executive and judiciary branches.³⁰¹ The DOJ insists that marijuana has no legitimate medical use—as evidenced by Congress's classifying marijuana as a Schedule I drug—and that federal drug law therefore applies absolutely with no medical necessity exception.³⁰² The Ninth Circuit, on the other hand, with its holdings in *Buyers' Coop.* and *Smith*, stated that a medical necessity defense is appropriate in certain cases where patients are criminally prosecuted under federal law, despite Congressional scheduling.³⁰³ This question of the appropriateness of the medical necessity defense in medical marijuana cases is likely to increase in importance as the medical benefits of marijuana become more well documented as a result of increased numbers of persons using marijuana for medical purposes under state law and government sponsored studies pertaining to medical marijuana.³⁰⁴ Additionally, the medical necessity defense likely will continue to represent the only available option for those patients hoping to escape federal prosecution, save Congressional legislation or rescheduling. Ultimately, this issue only can be resolved by a decision from the United States Supreme Court. An antecedent question to that of the appropriateness of the medical necessity defense, moreover, is what role, if any, prosecutorial discretion should play as a means of respecting the values of those states that support the medical use of marijuana.

A. Rescheduling Marijuana as a Schedule II Substance

As noted above, the most effective and efficient means for seriously ill patients to legally obtain marijuana is to reschedule marijuana as a Schedule II substance, thereby allowing doctors to prescribe it to their patients.³⁰⁵ Twelve years ago, the DEA's Administrative Law Judge, Judge Young, held that it would be "arbitrary and capricious" for the

³⁰¹ See *supra* notes 156–261 and accompanying text.

³⁰² See Gov't Opposition, *supra* note 209, at 4.

³⁰³ See Ninth Circuit Order, *supra* note 234, at 1; *Buyers' Coop.*, 190 F.3d at 1115.

³⁰⁴ See *supra* notes 48–65 and accompanying text (discussing government research); *supra* notes 66–98 and accompanying text (discussing state laws permitting use of medical marijuana).

³⁰⁵ See *supra* notes 45–65 and accompanying text.

DEA to refuse to transfer marijuana to Schedule II.³⁰⁶ Since that time, the federal government has ignored the pleas of patients, doctors and medical organizations to make marijuana available for those in serious need. The people of this country clearly favor a more compassionate policy from the federal government regarding medical marijuana.³⁰⁷ Indeed, citizens in states throughout the country have spoken on the issue through the initiative process, and public opinion polls show similar support for medical marijuana in other states as well.³⁰⁸ Just this year, the IOM's report, which was commissioned by the federal government, documented marijuana's therapeutic potential and urged the federal government to implement some policy whereby patients in serious need can receive marijuana immediately.³⁰⁹

Given the overwhelming support for medical marijuana in the United States, it is time that Congress and the DEA respect the will of the people and reschedule marijuana as Schedule II substance.³¹⁰ It is the contention of this Note, moreover, that if the government insists on conducting further studies, they at least should follow the recommendation of the IOM and reopen, or create something comparable to, the Compassionate Use IND program, which was suspended in 1992.³¹¹

B. Federal Prosecutorial Discretion as a Solution to Federal-State Conflict

Although the ultimate goal for medical marijuana advocates should be rescheduling, the immediate objective ought to be preventing those suffering from serious illnesses from being criminally prosecuted under federal law. In those states that have passed medical marijuana initiatives, federal prosecutors should avoid the conflict be-

³⁰⁶ See *In Re Marijuana Rescheduling Petition*, Docket 86-22, Opinion, Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge, Washington, DC: Drug Enforcement Administration (1988).

³⁰⁷ See *supra* notes 65-98 and accompanying text.

³⁰⁸ See *id.* In a development that may foreshadow a more reasonable federal policy in the future, both presidential candidates—Vice President Al Gore and Governor George W. Bush—have indicated that they support medical marijuana, framing the issue as one implicating either patients' or states' rights. See Dana Hill, *Gore Backs Medical Marijuana*, ABCNEWS.com, Dec. 15, 1999 (visited Mar. 29, 2000) <<http://abcnews.go.com/sections/politics/DailyNews/gore991215.html>>; Susan Feeney, *Bush Backs States' Rights on Marijuana*, DALLAS MORNING NEWS, Oct. 20, 1999, at 6A.

³⁰⁹ See NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, *supra* note 53, at 1.

³¹⁰ See Tiersky, *supra* note 16, at 595; McGuire, *supra* note 145, at 96.

³¹¹ See NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, *supra* note 53, at 126.

tween federal and state law by declining to prosecute and thus respecting the values of the citizens vis-a-vis medical marijuana.³¹² Indeed, when exercised appropriately, prosecutorial discretion serves to make the law consistent with the values and notions of justice held by a particular community.³¹³ Given the apparent willingness of the people in some states to tolerate a violation of federal marijuana law when there is a serious medical need, it seems clear under the DOJ's prosecution guidelines that a local federal prosecutor is justified in declining to prosecute such violations.³¹⁴

In the first place, as the letter sent from Washington's U.S. Attorneys office to the Seattle police made explicit, the criminal prosecution of those legitimately possessing or using medical marijuana under state law should not and must not be a top priority of federal prosecutors.³¹⁵ Those states that have passed laws like California's Proposition 215 authorizing the use of medical marijuana have spoken on what they see as the proper priorities for law enforcement.³¹⁶ That is, implicit in the passage of such laws is the statement that precious law enforcement resources should be used to prevent violent crimes that endanger the safety of its citizens, not to pursue seriously ill individuals using marijuana for medical purposes.³¹⁷ Therefore, consistent with the flexibility granted to individual U.S. Attorneys offices in the Manual, offices in every state with laws permitting medical marijuana should make formal announcements similar to that made in Washington, declining to prosecute legitimate medical marijuana patients.³¹⁸

³¹² See *supra* notes 66-98 and accompanying text, discussing state initiatives; Dixon, *supra* note 158, at 1017.

³¹³ See Arnolds & Garland, *supra* note 99, at 298.

³¹⁴ See UNITED STATES ATTORNEY MANUAL, *Grounds for Commencing or Declining Prosecution*, Tit. 9, Chap. 9-27.000 (1997).

³¹⁵ See Ostrom, *supra* note 287, at B1.

³¹⁶ Remarks, *Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction*, 26 FORDHAM URB. L.J. 657, 664 (1999) (discussing medical marijuana controversy in California as example of inconsistency between federal and state law enforcement priorities) [hereinafter *Panel Discussion*].

³¹⁷ See *id.*

³¹⁸ See *supra* notes 286-91 and accompanying text; see also generally Steven D. Clymen, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (stressing need for local priorities). This decision would also show sensitivity towards important issues of federalism generally. See *Panel Discussion*, *supra* note 316, at 665-68. As Congress continues to expand the federal government's criminal law jurisdiction, a conscious decision must be made by prosecutors in each case over whether it is wise to override decisions that are made by the states. See *id.*

Other DOJ factors point towards declining to prosecute as well.³¹⁹ When considering the "nature and seriousness" of a seriously ill person violating federal marijuana law, prosecutors must consider the fact that the violation does not have a significantly negative impact on the community.³²⁰ In passing laws that permit medical marijuana, citizens codified their values with respect to the seriously ill and medical marijuana.³²¹ In exempting medical marijuana patients from criminal prosecution under state law, the citizens of these states engaged in their own balancing test and concluded that any impact that the violation of state law may have on the community is minimal when compared with the potential harm to seriously ill people who are denied effective medicine. Unfortunately, due to federal constitutional constraints, the citizens of the individual states cannot exempt medical marijuana patients from prosecution under federal law.³²² It must be the case, however, that were such restraints not applicable, the views of these same citizens towards a violation of *federal* marijuana law under the same circumstances, would be identical.

Furthermore, in many of the cases involving medical marijuana, the defendants are facing criminal charges for the first time in their lives. As the DOJ's Manual points out, the absence of any prior criminal activity should weigh against prosecution.³²³ Similarly, prosecutors must be aware of the fact that criminally prosecuting seriously ill people under federal marijuana laws, especially those with no prior criminal history, will fail to achieve one of the primary goals of criminal law—the deterrence of criminal activity.³²⁴ Indeed, implicit in cases involving a "choice of evils" or necessity is the fact that a far greater harm will come to the person who chooses to obey a particular law.³²⁵ So long as those seriously ill patients for whom marijuana is their only hope of relief conclude that violating federal law is a lesser evil than enduring the pain and suffering associated with being unable to receive the necessary treatment, the mere threat of prosecution is unlikely to serve as much of a deterrent.

³¹⁹ See *supra* notes 275–86 and accompanying text.

³²⁰ See *supra* notes 279–82 and accompanying text.

³²¹ See Arnolds & Garland, *supra* note 99, at 298.

³²² See *supra* note 95 and accompanying text.

³²³ See USAM 9–27.230, *supra* note 274, § (B) (5).

³²⁴ See *id.* (listing deterrent effect of prosecution as factor in determining whether to prosecute).

³²⁵ See Reeve, *supra* note 104, at 785–87.

Lastly, prosecutors must consider the personal circumstances of the potential defendant in each case.³²⁶ To criminally prosecute and incarcerate seriously ill individuals, including those who are suffering tragically from conditions such as cancer or AIDS, is contrary to our notions of justice and common decency as well as the great spirit of human compassion that, itself, defines our laws.³²⁷ Indeed, these unfortunate individuals should be spending their most difficult and painful days with loved ones, not left to deteriorate in a federal courtroom or an overcrowded prison where they are treated like criminals. It is quite likely, moreover, that the DOJ was focusing on precisely such seriously ill individuals when drafting its guidelines specifically to include a place for the consideration of a potential defendant's "personal circumstances."³²⁸

Despite the many sound reasons reflected in the DOJ's Manual for declining to federally prosecute seriously ill people who legitimately cultivate or possess marijuana under state law, it is unlikely, due to political pressures, that many states will follow Washington's lead.³²⁹ Indeed, the federal government's unwillingness to forgo prosecution of those violating federal drug laws, even the seriously ill, is the result of the fact that many medical marijuana defendants are charged for "political" reasons.³³⁰ Such political trials commonly involve an abuse of prosecutorial discretion.³³¹ Medical marijuana cases are no exception.

As discussed above, there are several indicators of when the government is prosecuting a defendant for political reasons.³³² One such indicator is that the defendant is dissenting from the conventional wisdom.³³³ Those that represent views contrary to the current dogma are seen as a threat and, as such, are prosecuted vigorously regardless of any other extenuating circumstances.³³⁴ In the context of medical

³²⁶ See USAM 9-27.230, *supra* note 274, § (B) (7).

³²⁷ See Defendant's Memorandum Re Bail, *supra* note 195, at 3.

³²⁸ See USAM 9-27.230, *supra* note 274, § (B) (7).

³²⁹ See Elizabeth T. Lear, *Criminal Law: Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. & CRIMINOLOGY 625, 634-35 (noting political motivations of U.S. Attorneys in desiring to appear tough on crime as influential in decision to prosecute).

³³⁰ See Lear, *supra* note 329, at 634-35; Margaret A. Berger, *The Deconstitutionalism of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 566 (1992).

³³¹ See Arnolds & Garland, *supra* note 99, at 298.

³³² See *supra* notes 297-98 and accompanying text.

³³³ See *id.*

³³⁴ See Arnolds & Garland, *supra* note 99, at 298 n.111).

marijuana, the "war on drugs" represents the current dogma or conventional wisdom, at least among politicians and law enforcement officials.³³⁵ The war on drugs, which was declared in the 1960s and reinvigorated in the 1980s, is motivated by the government's perception that the public desires a zero-tolerance, "tough on crime" approach to drugs.³³⁶ This approach has had disastrous effects on health and health care throughout the United States.³³⁷ Indeed, the federal government's vigorous prosecution of the seriously ill reflects the government's perception that anything less signifies an unacceptable retreat in the war on drugs.³³⁸ Unfortunately for those in serious medical need, moreover, many incorrectly believe that medical marijuana advocates are simply using the medical context as a hook for larger-scale legalization.³³⁹ Those suffering from cancer, AIDS and

³³⁵ For a more in-depth treatment of the motivations and history behind the war on drugs, see, for example, Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993), and Lisa M. Bianculli, Note, *War on Drugs: Fact, Fiction, and Controversy*, 21 SETON HALL LEGIS. J. 169.

³³⁶ See DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 9 (Cambridge Univ. Press 1992) Berger, *supra* note 330, at 566; Finkelman, *supra* note 335, at 1392, 1396. This perception was evidenced, for example, in 1988 during George Bush's acceptance speech: "Zero tolerance isn't a policy, its [sic] an attitude . . . My administration will be telling the dealers: *Whatever we have to do, we'll do it, but your day is over.*" 1988 Republican Nation Convention Bush Text, *Stakes are High—Choice is Crucial*, L.A. TIMES, Aug. 19, 1988 (emphasis added). Even if government's perception were in fact accurate with respect to drugs generally, it is clearly erroneous in the context of medical marijuana, which receives overwhelming public support.

³³⁷ See Lester Grinspoon, *The War on Drugs—A Peace Proposal*, 330 N. ENG. J. MED. 357, 358 (1994) (stating that federal law enforcement policies have strangled medical potential of marijuana) [hereinafter Grinspoon, *The War on Drugs*].

³³⁸ See Dogwill, *supra* note 58, at 286–87 (stating that war against drugs will be seen by many as futile if marijuana is allowed to be smoked as medicine); see also Finkelman, *supra* note 335, at 1397; Dixon, *supra* note 158, at 980. This perception is fueled largely by the government's belief that marijuana is a "gateway drug" and that legalization of marijuana for medical purposes will send the wrong message to children about drug use in general. See Dogwill, *supra* note 58, at 287. As discussed above, however, the recent IOM report specifically rejected both of these claims. See *supra* notes 58–59 and accompanying text.

³³⁹ See Raymond J. Walsh, Jr., Note, *Populations at Risk for Criminal Liability Under Compassionate Use Acts*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 283 (1999); see also Dixon, *supra* note 158, at 980; Dogwill, *supra* note 58, at 287. For example, in response to protests by medical marijuana supporters, Representative Barr of Georgia said, "[I]t is truly sad to see marijuana legalization activists using seriously ill patients as props in their campaigns to make dangerous, mind altering drugs legally available." David Pace, *Medical Marijuana Use Advocates Stage Protest at Barr's House Office*, ASSOCIATED PRESS, Oct. 21, 1999. Query, however, why those who supported the decision to classify cocaine, methadone and other highly addictive drugs as Schedule II were not similarly seen as advocates for legalization. See Finkelman, *supra* note 335, at 1397. Clearly, cocaine and methadone are more addictive and harmful than marijuana. Could it be the rather narrow yet enduring view that "marijuana supporters," medical or otherwise, are associated with the "subversives" or

other horrific diseases or conditions thus have become the innocent casualties of the war on drugs.³⁴⁰

Furthermore, as asserted by the lawyers of B.E. Smith, Todd McCormick and Peter McWilliams, medical marijuana defendants are often selectively prosecuted, largely because of their outspoken views in support of medical marijuana.³⁴¹ All three of the above-named defendants were ardent and vocal supporters of Proposition 215 and medical marijuana.³⁴² Smith, for example, is well-known for his writings on constitutional rights and individual liberties.³⁴³ The federal government's decision to prosecute in the case of Smith is even more suspect due to the fact that he was charged with cultivating and possessing only eighty-seven plants—an amount well below the 250 maximum that the U.S. Attorney for the Western District of Washington state has suggested.³⁴⁴ Also, as noted above, Smith's case was the first federal case in Northern California where an individual was prosecuted for cultivating or possessing under 100 plants.³⁴⁵ The *McWilliams* case contains several disturbing oddities as well, regarding the issue of why they, and not other offenders, were selected for prosecution. The key witnesses in the government's case were large-scale buyers, sellers and growers of medical marijuana, many of whom were worse offenders than the defendants.³⁴⁶ Moreover, the government does not allege any sales by the defendants, only that they "intended" to sell to the government's witnesses, who, in the meantime, are still on the street buying, selling and growing marijuana.³⁴⁷ Surely,

"hippies" that were so despised by the Establishment throughout the 60s? See BONNIE & WHITBREAD II, *supra* note 25, at 262–63 (discussing perception of marijuana users as sick, emotionally maladjusted persons).

³⁴⁰ See Finkelman, *supra* note 335, at 1397.

³⁴¹ See Richard Cowan, *Was the Decision to Prosecute B.E. Smith Made at the White House? The Key Question About the Selective Prosecution of Medical Marijuana Activists*, MARIJUANA NEWS, (visited Mar. 29, 2000) <http://www.marijuananeews.com/was_thr_decision_to_prosecute_b.htm>. The federal government has also sought to silence voices in the press that have spoken out in opposition to the war on drugs. See Finkelman, *supra* note 335, at 1405 (discussing government's attack on First Amendment as part of war on drugs).

³⁴² See *id.*

³⁴³ See Swain, *supra* note 194, at 4. Peter McWilliams has also written a number of works on individual liberties. See, e.g., PETER MCWILLIAMS, *AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN A FREE SOCIETY* (1993).

³⁴⁴ See Swain, *supra* note 194, at 5.

³⁴⁵ See *id.*

³⁴⁶ See Cowan, *supra* note 341, at 3.

³⁴⁷ See *id.*

there must be a uniquely political reason why the federal government chose to target McCormick and McWilliams.

Finally, the government's political motivations are clear when one considers the statements and actions of judges, which are often anything but models of evenhandedness and judicial restraint.³⁴⁸ The judge in Smith's case serves as one example. Judge Burrell's decision to deny bail to Smith, considering Smith's lack of a criminal record and relatively minor violation, suggests that the judge was being less than evenhanded.³⁴⁹ Furthermore, the sentence imposed in that case—the maximum term authorized by law and longer than that requested by the government prosecutors—can be dubbed restraint only jokingly.³⁵⁰ Judge Burrell's predilections on the issue of medical marijuana were evidenced further by his comments on the "evils" of marijuana.³⁵¹ Actions and statements such as these clearly indicate that Judge Burrell does not take seriously the medical marijuana claims of gravely ill individuals, and, on the contrary, harbors a negative predisposition towards medical marijuana defendants such as Smith.³⁵²

Although the evidence that medical marijuana defendants are prosecuted for political reasons is likely not sufficient to make out a claim of selective or vindictive prosecution—because of the high-threshold showing required by the Supreme Court³⁵³—it nonetheless serves two important purposes. First, such evidence should act to enlighten federal prosecutors that their prosecution of seriously ill individuals represents an inappropriate exercise of their prosecutorial discretion.³⁵⁴ More importantly, however, revealing the government's political motivations in prosecuting medical marijuana defendants will inform judges and juries, so that they, through defenses like

³⁴⁸ See Arnolds & Garland, *supra* note 99, at 298 n.11 (quoting Waltz, *Tensions Between Political Defendants and the Courts*).

³⁴⁹ See Swain, *supra* note 194, at 7.

³⁵⁰ See Appellant's Motion for Reconsideration, *supra* note 222, at 1.

³⁵¹ See *supra* notes 219–20 and accompanying text.

³⁵² See Swain, *supra* note 194. Even General Barry McCaffery, the White House drug czar, enjoys mocking the pleas of the seriously ill and other supporters of medical marijuana: "Ask a doctor if he really wants a big blunt stuck in a patient's face as treatment A lot of this is a crock." *Medical Marijuana Called a Crock*, MARIJUANA NEWS, Mar. 6, 2000 (visited Mar. 29, 2000) <<http://216.9.192.67/news.php3?sid=140>>.

³⁵³ See *Armstrong*, 514 U.S. 546; *Batchelder*, 442 U.S. 114; see also Hollon *supra* note 96, at 507–08.

³⁵⁴ See Arnolds & Garland, *supra* note 99, at 299.

medical necessity, can act as a check on the government's abuse of its prosecutorial discretion.³⁵⁵

C. Viability of the Medical Necessity Defense

Because federal prosecutors in most states are not exercising their prosecutorial discretion appropriately, the courts must retain a means by which they can exercise their own discretion when the law and justice do not coincide.³⁵⁶ In the context of criminal prosecutions involving medical marijuana, the medical necessity defense provides such a means.³⁵⁷ Affirming the role of the courts and juries in these cases, one commentator notes that: "The necessity defense is a 'safety valve,' fully within our legal tradition, whereby juries may be informed of their discretionary function as the conscience of the community."³⁵⁸ Similarly, the Supreme Court has stated that: "[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system."³⁵⁹

It is without question that the medical necessity defense is a valid defense to prosecution under federal statutory law.³⁶⁰ The only remaining question, therefore, is whether the medical necessity defense can be applied in the medical marijuana context. The Ninth Circuit has resoundingly answered in the affirmative.³⁶¹ Indeed, with its decision in *Buyers' Cooperative* and its Panel Order in *Smith*, the Ninth Circuit correctly cut through the government's misguided belief that, because marijuana is a Schedule I substance, the medical necessity

³⁵⁵ See Oliver, *supra* note 281, at 61-63 (referring to jury nullification as check on prosecutors). Outright jury nullification—where the jury chooses to acquit even when its factual findings, if applied literally to the law, would have resulted in conviction—is obviously another alternative. See LAFAVE & ISRAEL, *supra* note 266, at 830-31. It is generally regarded, however, that a judge should not instruct a jury as to its power to nullify a law because nullification upsets the balance in the courts and erodes citizens' respect for the law. See *id.*; Arnolds & Garland, *supra* note 99, at 299. A legally recognized defense like medical necessity, therefore, is preferable.

³⁵⁶ See LAFAVE & ISRAEL, *supra* note 266, at 564; Arnolds & Garland, *supra* note 97, at 299; Oliver, *supra* note 281, at 61-63.

³⁵⁷ See Deborah Garner, *Up in Smoke: The Medicinal Marijuana Debate*, 75 N.D. L. REV. 555, 585 (1999) (urging expansion of courts' power to accept medical necessity defense); Whilton, *supra* note 99, at 1125-34 (arguing for application of medical necessity defense to medical marijuana cases in Massachusetts).

³⁵⁸ Arnolds & Garland, *supra* note 99, at 299; see also Oliver, *supra* note 281, at 61-63.

³⁵⁹ *Witherspoon v. Illinois*, 391 U.S. 510, 515 (1968) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

³⁶⁰ See *supra* notes 106-07 and accompanying text.

³⁶¹ See Ninth Circuit Order, *supra* note 234, at 1; *Buyers' Coop.*, 190 F.3d at 1115.

defense is not available as a defense to federal prosecution for manufacturing or possessing marijuana.³⁶² In addition to the Ninth Circuit, other federal circuits have similarly rejected the government's position.³⁶³ Furthermore, the basis for the government's argument regarding the scheduling law also has been rejected by numerous state courts that have allowed the medical necessity defense in medical marijuana cases despite state scheduling laws that are analogous to the federal government's scheduling law.³⁶⁴

The federal circuit and state courts that have faced the issues of medical marijuana and the medical necessity defense have rightly concluded, implicitly or otherwise, that the attempt to link two unrelated concepts—scheduling and medical necessity—is wholly without merit. Indeed, the government's interest in prohibiting the use of marijuana generally is not furthered by prohibiting the use of marijuana in certain exceptional circumstances where it could offer relief to, for example, a cancer victim suffering from excruciating pain or a multiple sclerosis victim suffering from continuous spastic contractions.³⁶⁵ As discussed above, the doctrine of necessity has been developed and judicially required throughout the years specifically to counterbalance legislative pronouncements and leave to courts—through judges and juries—the discretion to craft a just outcome in a particular case.³⁶⁶ To think or reason otherwise, moreover, blatantly ignores the history of the necessity defense and the separation of powers doctrine upon which this country was founded.

Notwithstanding the government's misguided efforts to reconcile federal scheduling law with its rejection of the medical necessity defense, it is apparent that the Controlled Substances Act was not intended to prohibit the medical use of marijuana forever.³⁶⁷ The legislative history surrounding the law's enactment suggests that Congress did not even consider the medical utility of marijuana in placing marijuana in Schedule I, let alone the question of whether it should be illegal to use a Schedule I substance in a medical emergency.³⁶⁸ On the contrary, Congress intended to place marijuana in Schedule I

³⁶² See *id.*; see also Defendant's Memorandum Re Bail, *supra* note 195, at 6.

³⁶³ See *supra* notes 146–54 and accompanying text.

³⁶⁴ See *supra* notes 110–30 and accompanying text.

³⁶⁵ See *Tate*, 505 A.2d at 957 (Garibaldi, J., dissenting).

³⁶⁶ *Arnolds & Garland*, *supra* note 99, at 298; see also *Oliver*, *supra* note 281, at 61–63.

³⁶⁷ See *supra* notes 22–27 and accompanying text.

³⁶⁸ See *id.*

only temporarily, pending the outcome of the Commission's report.³⁶⁹ For political reasons, however, this report, which concluded that marijuana lacked any harmful physiological effects, was never employed properly to reschedule marijuana.³⁷⁰

Federal courts that correctly allow the medical necessity defense in medical marijuana cases in the future will still face questions regarding its application, specifically, how to apply the element requiring that "no other legal and reasonable alternatives" be present. With regard to this question, the Ninth Circuit's recent holdings wisely lead the way towards a rational and compassionate rule.³⁷¹ In *Buyers' Cooperative*, the Ninth Circuit correctly determined that the concept of other legal and reasonable alternatives referred to other medications, not to legislative or executive branch remedies.³⁷² Thus, the administrative opportunity for rescheduling cannot be used to deny a criminal defendant the occasion to present a medical necessity defense at trial. As discussed in *Buyers' Club*, the rescheduling odyssey experienced by NORML, beginning in 1972 and finally concluding in 1994,³⁷³ makes it clear that rescheduling is not a "reasonable" alternative, especially for a seriously ill individual in need of instant relief. Therefore, unless the federal government follows the IOM's recommendation and reinstates its IND Program, the government cannot argue—as some state courts have in denying the defense—that seriously ill individuals for whom marijuana is the only effective treatment have any other legal and reasonable alternative.³⁷⁴ Thus, a defendant only should be denied the opportunity to present a medical necessity defense to the judge or jury in cases where the defendant failed to produce facts, such as a doctor's recommendation, that marijuana was necessary to prevent a medical harm.

The success of the medical necessity defense in federal court is especially crucial for citizens in states without medical marijuana laws. In these states, the argument urging prosecutorial discretion applies with less force because there is not a clear indication of the community's disposition regarding medical marijuana.³⁷⁵ Nonetheless, the

³⁶⁹ See *id.*

³⁷⁰ See *id.*

³⁷¹ See Ninth Circuit Order, *supra* note 234, at 1; *Buyers' Coop.*, 190 F.3d at 1115.

³⁷² See *Buyers' Coop.*, 190 F.3d at 1114.

³⁷³ See *supra* notes 24–29 and accompanying text.

³⁷⁴ See *supra* notes 271–86, 312 and accompanying text, discussing state courts that have held that defendant had reasonable legal alternative under state law by virtue of a state sponsored research program.

³⁷⁵ See *supra* note 312 and accompanying text.

medical necessity defense is of great importance in all states as it can serve as both an important check on local and federal prosecutors and as a conduit for proclaiming community values.³⁷⁶ Indeed, if the medical necessity defense is allowed in medical marijuana cases and juries overwhelmingly accepts the defense, a strong message will be sent to prosecutors. Over time, prosecutors hopefully will accept the will of the people and decline to prosecute such cases in which they cannot obtain a conviction.

CONCLUSION

America's relationship with marijuana has been extremely tumultuous and political. In this century, marijuana, a substance that has enjoyed a rich medical history dating back thousands of years, has been relegated to merely another target in the war on drugs. This war on drugs has been responsible for thousands of innocent casualties—seriously ill individuals, suffering from illnesses such as cancer and AIDS, who cannot receive legally a form of treatment that can relieve their pain.³⁷⁷ Consequently, many otherwise law-abiding citizens have been forced to violate federal law. In many cases, these same individuals face criminal prosecution and possible incarceration. The recent burgeoning of medical marijuana laws in states throughout the country indicates that Americans will no longer tolerate this inhumane treatment of the seriously ill.

The federal government should follow the lead of these states and respect the will of the people by rescheduling marijuana or by exercising their prosecutorial discretion in a way that formally ends the prosecution of medical marijuana patients. Additionally, federal courts throughout the country should follow the Ninth Circuit's lead in *Buyers' Cooperative* and *Smith* to ensure that the medical necessity defense is available to all of those defendants having a sufficient medical need for marijuana. Such a showing of compassion on the part of the federal government would be consistent with this nation's notions of fundamental fairness, liberty and justice.

ANDREW J. LEVAY*

³⁷⁶ See Parry, *supra* note 103, at 440 (stating that necessity verdicts advance net social welfare by reaching result that upholds, advances and renews community values and signals shifts in those values).

³⁷⁷ See Finkelman, *supra* note 335, at 1397.

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