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THE MEDICAL NECESSITY DEFENSE AND DE MINIMIS PROTECTION FOR PATIENTS WHO WOULD BENEFIT FROM USING MARIJUANA FOR MEDICAL PURPOSES: A PROPOSAL TO ESTABLISH COMPREHENSIVE PROTECTION UNDER FEDERAL DRUG LAWS

[M]arijuana, in its natural form, is one of the safest therapeutically active substances known to man. . . . One must reasonably conclude that there is accepted safety for use of marijuana under medical supervision. To conclude otherwise, on the record, would be unreasonable, arbitrary, and capricious.¹

I. INTRODUCTION

The marijuana plant has been known to exist for centuries.² Yet, its usage remains a controversial subject even today.³ There are many American citizens who have been stricken with debilitating and terminal diseases, such as cancer, multiple sclerosis ("MS"), and Acquired Immune Deficiency Syndrome ("AIDS").⁴ Many of those afflicted have voiced their desires to have marijuana made available to them for its palliative uses.⁵ However, because of prejudice, bias, and faulty

¹ LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 15 (1993) (quoting Administrative Law Judge Francis J. Young).

² See *infra* note 31 and accompanying text.

³ See *infra* notes 93-100 and accompanying text.

⁴ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 96 (120th ed. 2000). For example, the death rate for males with cancer was an average of 214.6 deaths out of 100,000 in 1997 and 213.6 deaths per each group of 100,000 in 1998. *Id.* For females with cancer, the death rate averaged 189.2 deaths out of 100,000 in 1997 and 187.7 deaths per each group of 100,000 in 1998. *Id.* Moreover, it is estimated that there are 920,000 people afflicted with HIV and AIDS in North America. *Headline Watch*, at <http://www.mayoclinic.com/findinformation/conditioncenters/invoke.cfm> (last visited Jan. 31, 2002). Approximately 45,000 people have become infected in the year 2000 alone. *Id.* Of those afflicted with HIV/AIDS, eighty percent are male. *Id.* By comparison, it is estimated that there are 36.1 million people living with AIDS worldwide. *Id.*

⁵ MARIJUANA, MEDICINE & THE LAW 231 (R.C. Randall ed., 1988). For example, one patient noted,

The effects were so dramatic that it was immediately obvious to me that marijuana was somehow having a beneficial effect on the symptoms of my MS. After that experience I smoked marijuana whenever I felt nauseated or started to vomit. When I smoked marijuana it controlled my vomiting, stopped the nausea, and

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reasoning, the federal government has determined that it will not allow its citizens to realize the benefits of medicinal marijuana.⁶

This Note will analyze the problems that are associated with the current environment of disunion between the relevant state and federal laws regarding medicinal marijuana.⁷ While the medical necessity defense may still be available as a defense for possession of medicinal marijuana under the Federal Controlled Substances Act, it will provide de minimis protection at best.⁸ In order for those afflicted with diseases such as cancer and AIDS to receive protection from the current applicable laws, they must rely on whether a court would consider their condition serious enough to warrant a defense of medical necessity.⁹ Moreover, the medical necessity defense is not sufficient to provide prescribing physicians, manufacturers, or distributors any real protection.¹⁰ Therefore, the federal laws concerning marijuana must be changed.¹¹ The change must come at the federal level in order to provide clarity and uniformity.¹² In doing so, patients' access to medicinal marijuana would not have to be determined by the state in which they reside.¹³

This Note begins by providing a comprehensive look at the history of medicinal marijuana in the United States from the mid-nineteenth century to the present.¹⁴ In doing so, Part II will establish the shift from marijuana being perceived as a local problem to one sufficient to necessitate the intervention of the laws of the federal government.¹⁵ A number of factors contributed to this shift, and each will be considered.¹⁶ These factors include prejudice toward the Mexican immigrants who provided a labor supply in the early 1900s, the prohibition of alcohol,

increased my appetite. I began smoking marijuana in order to eat and to regain my weight.

Id. See also *infra* note 29 and accompanying text.

⁶ See *infra* notes 41-56, 79-87 and accompanying text.

⁷ See *infra* notes 83, 89-90 and accompanying text.

⁸ See *infra* note 189 and accompanying text.

⁹ PAUL H. ROBINSON, CRIMINAL LAW § 1.2, at 13 (1997) (noting that "the criminal law [must] have moral credibility with those sought to be deterred"); see also *infra* note 118 and accompanying text.

¹⁰ See *infra* notes 123-24 and accompanying text.

¹¹ See *infra* Part IV for section 3 of the model statute: Effect on Current Marijuana Laws.

¹² See *infra* Part IV for section 3 of the model statute: Effect on Current Marijuana Laws.

¹³ See *infra* Part IV for section 3 of the model statute: Effect on Current Marijuana Laws.

¹⁴ See *infra* notes 28-40 and accompanying text.

¹⁵ See discussion *infra* Part II.B.

¹⁶ See *infra* notes 41, 47, 51 and accompanying text.

and the role of an early Commissioner of the Federal Bureau of Narcotics.¹⁷

Next, this Note will elucidate the response that the federal government provided to the states' cries for assistance in battling not only marijuana itself but also its users.¹⁸ In doing so, the various statutes that the government has passed will be described and analyzed.¹⁹ Additionally, the interpretations of these statutes by the various courts will be provided.²⁰

Part II will then outline the many attempts that have been made to change the current system of marijuana prohibition.²¹ Among these attempts are various state-based initiatives and the activities of lobbying groups which have tried to use the courts to alter current marijuana laws.²² Next, this Note will analyze defenses that have been asserted by defendants, including the use of the First Amendment and the defense of medical necessity.²³

This Note will then provide an analysis of recent United States Supreme Court jurisprudence regarding medicinal marijuana and the role of federalism.²⁴ The analysis of this jurisprudence will be followed by this Note's contribution to the current discourse in this area of law.²⁵ Because of the number of interests at stake, any change that is to be effectuated must necessarily be accomplished by a complete and multi-faceted approach.²⁶ Because marijuana laws do not exist in a vacuum, each of these interests must be considered and incorporated into any newly proposed approach to the regulation of medicinal marijuana.²⁷

¹⁷ See *infra* notes 41-56 and accompanying text.

¹⁸ See discussion *infra* Part II.B.

¹⁹ See *infra* notes 79, 83-86 and accompanying text.

²⁰ See *infra* notes 77, 79, 86 and accompanying text.

²¹ See discussion *infra* Part II.C.

²² See *infra* notes 88-90, 101-108 and accompanying text; *infra* Part II.C.2.

²³ See *infra* notes 109-120 and accompanying text.

²⁴ See discussion *infra* Part II.D; see also *infra* Part III (discussing the Commerce Clause jurisprudence of the Supreme Court and its implications for medical marijuana).

²⁵ See discussion *infra* Part IV.

²⁶ See *infra* Part IV for section 1 of the model statute: Goals and Purposes.

²⁷ See *infra* Part IV for section 2 of the model statute: Definitions.

II. THE HISTORICAL BACKGROUND AND DEVELOPMENT OF LAWS
REGULATING MEDICAL MARIJUANA

A. *Medicinal Use of Marijuana*

The uses of the marijuana plant are multifarious.²⁸ The most significant, and often overlooked, of these purposes is marijuana's therapeutic uses.²⁹ The healing properties of marijuana have been

²⁸ This Note shall use the term "marijuana" as it is used in the common parlance to refer to the cannabis plant. See 21 U.S.C. § 802(16) (2000). This subsection defines marijuana as:

The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds, thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Id.

²⁹ LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 16 (1997). "Marijuana has been shown to be effective in reducing nausea induced by cancer chemotherapy, stimulating appetite in AIDS patients, and reducing intraocular pressure in people with glaucoma. There is also appreciable evidence that marijuana reduces muscle spasticity in patients with neurological disorders." *Id.* Marijuana has also been shown to be useful in promoting weight gain, reducing muscle spasticity in patients with spinal cord injuries and multiple sclerosis, and lessening tremors associated with those afflicted with multiple sclerosis. *Id.* at 17. Additionally, research has indicated that marijuana may have other therapeutic applications, such as use as an analgesic, antiepileptic, antidepressant, antibiotic, psychotherapeutic aid, and as a means of facilitating withdrawal from addictions associated with opiates and alcohol. LESTER GRINSPOON, M.D., MARIJUANA RECONSIDERED 226 (1971). Furthermore, anecdotal evidence from patients indicates that marijuana may also be useful in alleviating migraine headaches, depression, insomnia, and chronic pain. ZIMMER & MORGAN, *supra*, at 17. For those patients with AIDS whose appetites become suppressed due to the illness and the correlative prescription medicines, marijuana causes a drop in the level of blood sugar, and, therefore, stimulates and increases a hunger response in the patients. Matthew W. Grey, Comment, *Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/Physician Relationship*, 30 U. RICH. L. REV. 249, 252 (1996); see also JOEL SIMON HOCHMAN, M.D., MARIJUANA AND SOCIAL EVOLUTION 55 (1972). Additionally, marijuana possesses what is referred to as the "reverse tolerance phenomenon." HOCHMAN, *supra*, at 54. The "reverse tolerance phenomenon" means that a patient who regularly ingests marijuana will require less of the drug to attain the desired effect in regard to the particular user. *Id.* Thus, marijuana stands in contradistinction to other psychoactive drugs, including alcohol, barbiturates, amphetamines, and opiates in that the other psychoactive drugs require the user to increase their dosages in order to achieve the desired effects. *Id.*

known and utilized for centuries.³⁰ One of the earliest recommendations for marijuana as a plant with healing properties was over five thousand years ago.³¹ Nonetheless, the active cultivation of the plant in the early history of the United States was more likely for the hempen fibers contained in the stalks of the plant rather than for its therapeutic qualities.³² The recreational use of marijuana on a national scale has been linked to the 1876 World Exposition in Philadelphia.³³ Among the other exposition booths was a tent where the Sultan from the country of Turkey introduced the use of hookahs, or water pipes, for smoking marijuana and its derivative hashish.³⁴

³⁰ See RICHARD EVANS SCHULTES & ALBERT HOFFMAN, *PLANTS OF THE GODS: THEIR SACRED, HEALING AND HALLUCINOGENIC POWERS* 72, 93 (1992). Research has identified at least three species of cannabis: *Cannabis indica*, *Cannabis ruderalis*, and *Cannabis sativa*. *Id.* at 92. While all three species contain the cannabinolic compounds (most significantly delta-9-THC, or Tetrahydrocannabinol) that make up the psychoactive property of marijuana, they can be distinguished by such characteristics as growth habits and geographic distribution. *Id.* Researcher Joel Simon Hochman has noted that the THC found in marijuana produces a "painless stupor" effect in the user which is similar to that of morphine, which is used to alleviate pain in those who sustain serious injuries. HOCHMAN, *supra* note 29, at 55. However, unlike morphine, marijuana does not produce the same withdrawal effects on the user. *Id.* Moreover, the potential for abuse of marijuana by the patient is comparatively low, even for chronic users. *Id.* at 59.

³¹ HOCHMAN, *supra* note 29, at 96. Shen-Nung was a Chinese emperor-herbalist who espoused marijuana's use for such maladies as malaria and rheumatic pains. *Id.* *Contra* DRUGS AND DRUG POLICY IN AMERICA 123 (Steven R. Belenko ed., 2000) (discussing that Shen-Nung may have been a mythical figure and that the treatise attributed to him was compiled later). Further instances of marijuana's medicinal use abound in the history of folk-medicines in India, Africa, Mexico, South America, and Medieval Europe. SCHULTES & HOFFMAN, *supra* note 30, at 72, 99. For example, during his travels in 1271, Marco Polo recorded observations of marijuana's usage. *Id.* at 99.

³² GRINSPOON, *supra* note 29, at 11. The fibers are known to be quite strong and can be used for making such goods as rope and clothing. *Id.* In fact, the word "canvas" is derived from the Latin term *cannabis*. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 203 (1986). Interestingly, George Washington is known to have cultivated hemp at his Mount Vernon home for making rope. GLEN HANSON ET AL., *DRUGS AND SOCIETY* 367 (6th ed. Jones & Bartlett 2000). Furthermore, there is some indication that he used marijuana medicinally. *Id.* Washington once noted in his writings that he had forgotten to separate the male and female plants, which is a process used because an unpollinated female plant provides more resin. *Id.* Hemp was also grown in the Jamestown colony and by the Pilgrims at Plymouth. *Id.*

³³ *Hooked: Illegal Drugs and How They Got That Way* (History Channel 2000) [hereinafter *Hooked*].

³⁴ *Id.* Following the World Exposition, a number of "smoking parlors" began to appear in major cities across the United States. *Id.* However, they did not become popular until alcohol became illegal with the passage of the Eighteenth Amendment. *Id.*

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However, by 1850, marijuana had officially been recognized for its therapeutic uses by its inclusion in the highly selective *United States Pharmacopoeia* drug reference manual.³⁵ Prior to 1937, marijuana was not federally regulated.³⁶ Thus, the states were left to regulate marijuana as they deemed necessary.³⁷ It was not until 1914 that state laws began to restrict the sale and possession of marijuana.³⁸ Border states, in particular, became concerned with the perceived adverse effects of marijuana on its citizenry.³⁹ This concern would eventually make its way across the United States.⁴⁰

³⁵ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 123, 127. Marijuana was identified as *Extractum Cannabis* (Extract of Hemp) and remained listed until the early 1940s. *Id.* at 127. Tincture of cannabis was manufactured in the late 1800s by pharmaceutical companies such as Parke-Davis, Lilly, and Squibb. LARRY "RATSO" SLOMAN, REEFER MADNESS: THE HISTORY OF MARIJUANA IN AMERICA 22 (The Bobbs-Merrill Co. 1998) (1979). Marijuana was also included in treatises such as *The National Formulary* and the *United States Dispensatory*. *Id.* Marijuana was subsequently removed from the *United States Pharmacopoeia* in 1941 following passage of the Marijuana Tax Act of 1937. DRUG LEGALIZATION 143 (Scott Barbour ed., 2000); *see also infra* note 57 and accompanying text.

³⁶ GRINSPOON, *supra* note 29, at 10; *see also* Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal and State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 158 (1997); Lauretta Higgins Wolfson, *A Quality of Mercy: The Struggle of the AIDS-Afflicted to Use Marijuana As Medicine*, 22 T. JEFFERSON L. REV. 1, 4 (1999) (noting also that until 1937, there were twenty-eight medications containing marijuana that were available to physicians to prescribe to their patients).

³⁷ *See infra* note 57 and accompanying text.

³⁸ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 137. In 1914, El Paso, Texas, enacted a law proscribing the sale and possession of marijuana. *Id.* The State of Texas followed suit by enacting its own laws regarding nonmedicinal marijuana in 1919 and 1923. *Id.*

³⁹ *Id.* at 135-40. For example, New Mexico passed a law criminalizing marijuana in 1923, Louisiana in 1924, and Colorado in 1927. *Id.* Indeed, by 1927, the number of states which had enacted anti-marijuana laws was fifteen, and by 1931, the number had increased to twenty-nine. *Id.* at 133. Significantly, most of the state laws provided exceptions for medicinal use of marijuana. *Id.* at 135-40. It was not the adverse effects on health that these laws were concerned with, but rather a perceived correlation between the Mexican immigrants and farm laborers, their marijuana use, and an increased disposition towards criminality. *Id.* at 136-37; *see also* State v. Navaro, 26 P.2d 955, 960 (Utah 1933). In *Navaro*, the Utah Supreme Court upheld a conviction for marijuana possession under Utah's 1927 revised statute. *Navaro*, 26 P.2d at 960. The court also examined similar statutes of neighboring states in assessing a definition of marijuana. *Id.* at 956-60; *see also infra* note 40.

⁴⁰ RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 52 (1975). The following is a list of states, by date, that passed legislation forbidding marijuana distribution for nonmedical purposes: in 1914: Maine and Massachusetts; in 1915: California and Vermont; in 1918: Rhode Island; in 1921: Iowa; in 1923: Arkansas, Montana, Nevada, Oregon, and Washington; in 1927: Idaho, Kansas, Nebraska, New York, and Ohio; in 1929: Indiana, Michigan, and Wyoming; in

During the early twentieth century, a number of factors coalesced which forced the federal government to take notice of a perceived marijuana problem in the United States. One significant factor was an implicit, often overt, racial bias towards those immigrants who brought the use of marijuana as a part of their native culture to the United States.⁴¹ At one time, immigrant labor was welcomed because of the relative prosperity in the United States and the need for additional workers in less desirable occupations.⁴² Additionally, the urbanization that was taking place across the country had lured people away from farms and into burgeoning industries in the growing cities, thus creating a void that needed to be filled by immigrant laborers.⁴³ However, as this prosperity subsided during the Depression era, this surplus labor was seen as undesirable because the immigrant laborers were perceived to be taking jobs away from American citizens.⁴⁴ Moreover, other cultural differences, such as religion, custom, and clothing, created further opportunities for discriminatory treatment against these new laborers.⁴⁵ As a result, the states in the southwestern United States began applying pressure to the federal government to pass laws that

1930: Mississippi; in 1931: Alabama, Arizona, Illinois, and South Dakota; in 1933: Delaware, North Dakota, Oklahoma, and Pennsylvania. *Id.*

⁴¹ GRINSPOON, *supra* note 29, at 14-15. Dr. Grinspoon also provides a particularly telling quote from the *New Orleans Medical and Surgical Journal* from 1931:

The debasing and baneful influence of hashish and opium is not restricted to individuals but has manifested itself in nations and races as well. The dominant race and most enlightened countries are alcoholic, whilst the races and nations addicted to hemp and opium, some of which once attained to heights of culture and civilization have deteriorated both mentally and physically.

Id. at 16; *see also* DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 151. This text also provides a similarly mordant quote from an American Medical Association Committee on Legislative Activities from 1937: "Your committee also recognizes that in the border states the extensive use of the marijuana weed by a certain type of people would be hard to control." DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 151 (emphasis added); *see* SLOMAN, *supra* note 35, at 30 (describing the concern regarding marijuana use in New Orleans as early as 1910 by African Americans and jazz musicians and the fear that marijuana use would be undertaken by white school children).

⁴² *Hooked*, *supra* note 33. The less desirable occupations generally included work that was agricultural in nature. *Id.*

⁴³ BONNIE & WHITEBREAD II, *supra* note 40, at 10 (noting also that the influx of laborers to the cities of America created poverty and disruption in those growing cities).

⁴⁴ *Hooked*, *supra* note 33; *see also* BONNIE & WHITEBREAD II, *supra* note 40, at 45 (noting the difficulties and prejudices that Mexican laborers faced as they migrated into the larger cities in the northern United States).

⁴⁵ BONNIE & WHITEBREAD II, *supra* note 40, at 10.

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would assist them in their struggle to deport and imprison these immigrants.⁴⁶

A second significant factor that forced the federal government to take notice of marijuana was the prohibition of alcohol.⁴⁷ During the time of Prohibition, marijuana remained a legal substance under federal law.⁴⁸ As a result, marijuana became increasingly popular because it was cheaper and easier to obtain than alcohol.⁴⁹ However, after the Eighteenth Amendment was repealed, manufacturers of alcohol became another force behind the anti-marijuana lobby.⁵⁰

A third factor, and quite possibly the most significant, was the moral crusade of Harry J. Anslinger, the Commissioner of the Federal Bureau of Narcotics.⁵¹ Prior to his appointment, Anslinger was known for his work in support of Prohibition.⁵² As he ascended to various governmental positions, including work as an inspector for the War Department and participation in various consulships in Germany, Venezuela, and the Bahamas, he gained a reputation for being a preeminent bureaucrat.⁵³ Faced with an annual budget of \$1,411,260 and just over 300 agents, Anslinger, now acting as Commissioner, was

⁴⁶ *Hooked*, *supra* note 33.

⁴⁷ U.S. CONST. amend. XVIII (1919), *repealed by* U.S. CONST. amend. XXI. Congress enacted the Eighteenth Amendment in 1919 and repealed the Amendment in 1933. HANSON ET AL., *supra* note 32, at 203. Thus, the time span involved correlates to the time frame in which the states were enacting their anti-marijuana laws. *See supra* note 40.

⁴⁸ *See supra* note 47 and accompanying text; *see also infra* note 57.

⁴⁹ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 133; *see also Hooked*, *supra* note 33 (discussing the increase in "smoking parlors" following Prohibition). Smoking parlors were described as essentially similar to taverns in that they were a place where people would congregate to smoke marijuana and socialize. *Hooked*, *supra* note 33; *see also* DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 59 (discussing a study conducted by the Treasury Department that associated the prohibition of alcohol to an increase in drug use and addiction).

⁵⁰ GRINSPOON, *supra* note 29, at 16. Dr. Grinspoon discussed how the post-Prohibition liquor industry was hoping for a "golden age of prosperity" that was threatened by the availability of marijuana as a cheaper alternative to alcohol. *Id.*

⁵¹ SLOMAN, *supra* note 35, at 31. In 1930, Anslinger was appointed to his Commissioner's post in the recently created Federal Bureau of Narcotics. *Id.* at 36. It was from this post that Anslinger mounted a fervent attack against the perceived marijuana menace. *Id.* at 45-47.

⁵² *Id.* at 31. Anslinger honed his crusading tactics by being appointed Assistant Commissioner of Prohibition. *Id.*

⁵³ *Id.* at 32; *see also* BONNIE & WHITEBREAD II, *supra* note 40, at 66 (noting how Anslinger worked with the British in control of the Bahamas to aid Prohibition in the United States by disrupting the bootlegging of liquor from the West Indies); *Hooked*, *supra* note 33.

presented with the formidable task of controlling a weed that grew wild across the United States.⁵⁴ In order to surmount this seemingly unrealizable objective, it became necessary for Anslinger to institute a campaign of propaganda so as to convince the American public of the perceived problems of marijuana use and addiction.⁵⁵ As the campaign of Anslinger and the Federal Bureau of Narcotics gained momentum, the pressure increased for legislative action at the federal level of government.⁵⁶

B. The Federal Government Responds

The federal government acted upon this “new threat” to the American way of life by enacting the 1937 Marijuana Tax Act.⁵⁷ Prior to this enactment, marijuana had remained a legal substance under federal law.⁵⁸ Interestingly, it was the medical community which most

⁵⁴ SLOMAN, *supra* note 35, at 41.

⁵⁵ *Hooked*, *supra* note 33. William Randolph Hearst’s newspaper chain assisted Anslinger’s campaign of scare tactics and distorted truths. BONNIE & WHITEBREAD II, *supra* note 40, at 100-01. For example, one of Hearst’s editorials is particularly indicative of the content of this propaganda machine, where Hearst offered that, “[i]n recent years, the insidious and insanity producing marihuana has become among the worst of the narcotic banes, invading even the school houses of the country” *Id.* at 100. Anslinger himself contributed articles with titles such as *Marihuana: Assassin of Youth*. *Id.* at 98. Interestingly, these same tactics are utilized yet today in the United States’ continued war on drugs. See ZIMMER & MORGAN, *supra* note 29, at 158-60. Much to the consternation of Harry Anslinger and the Federal Bureau of Narcotics, a report commissioned by the Mayor of New York City, Fiorello LaGuardia, undermined the thrust of the anti-marijuana movement. DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 156-57. The LaGuardia report concluded, *inter alia*, that “smoking marihuana does not lead to addiction in the medical sense of the word . . . marihuana is not the determining factor in the commission of major crimes . . . marihuana smoking is not widespread among school children” and that “[t]he publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.” *Id.* at 157-58. These findings all ran contrary to the message that Anslinger and the Federal Bureau of Narcotics were trying to convey to the American public. *Id.*

⁵⁶ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 114.

⁵⁷ Marijuana Tax Act of 1937, ch. 553, Pub. L. No. 75-238, 50 Stat. 551 (1937). It has been noted that “the [Marijuana Tax Act] was tied neither to scientific study nor to enforcement need.” BONNIE & WHITEBREAD II, *supra* note 40, at 174. The constitutionality of the Marijuana Tax Act was upheld by the United States Supreme Court in *United States v. Sanchez*. 340 U.S. 42, 44-45 (1950) (holding that, despite the prohibitive regulatory effect, the tax was a legitimate exercise of the government’s taxing power).

⁵⁸ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 146. The federal government had enacted other laws regarding narcotic drugs. *Id.* The most significant of these was the Harrison Act of 1914. Harrison Anti-Narcotic Act, ch. 1, Pub. L. No. 63-223, 38 Stat. 785 (1914) (codified as part of 21 U.S.C. §§ 801-904 (2000)). The Harrison Act regulated narcotic drugs, specifically opiates and coca leaves, at the federal level. DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 49. It required anyone involved in the manufacture and

strenuously objected to this new legislation.⁵⁹ During the congressional hearings on the proposed Marijuana Tax Act, Dr. William C. Woodward testified on behalf of the American Medical Association.⁶⁰ His testimony would be the only dissenting view allowed to testify at the hearings.⁶¹ Dr. Woodward challenged the proposal on two grounds.⁶² First, Dr. Woodward noted the lack of evidence that had been offered by those favoring the passage of the Act.⁶³ Secondly, he feared that if the Marijuana Tax Act was enacted, scientific research into the uses and effects of marijuana would no longer make any advances.⁶⁴ Because of

distribution of narcotics to register with the proper authorities and pay a tax or license fee for such service. *Id.* The Harrison Act had a deterrent effect on physicians who would have otherwise prescribed the medicine to their patients. *Id.* at 53-54. However, the constitutionality of the Harrison Act was upheld in *Nigro v. United States*. 276 U.S. 332 (1928).

⁵⁹ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 130. The pharmaceutical and medical professions were also responsible for having marijuana dropped from the Harrison Act of 1914, prior to its adoption. SLOMAN, *supra* note 35, at 36.

⁶⁰ SLOMAN, *supra* note 35, at 75. Dr. Woodward was both an attorney and a physician who served as counsel for the American Medical Association. GRINSPOON & BAKALAR, *supra* note 1, at 9.

⁶¹ GRISPOON & BAKALAR, *supra* note 1, at 9. As to the addictive qualities of marijuana to which others had testified, Dr. Woodward noted:

The newspapers have called attention to it so prominently that there must be some grounds for their statements. It has surprised me, however, that the facts on which these statements have been based have not been brought before this committee by competent primary evidence. We are referred to newspaper publications concerning the prevalence of marihuana addiction. We are told that the use of marihuana causes crime.

But as yet no one has been produced from the Bureau of Prisons to show the number of prisoners who have been found addicted to the marihuana habit. An informal inquiry shows that the Bureau of Prisons has no evidence on that point.

You have been told that school children are great users of marihuana cigarettes. No one has been summoned from the Children's Bureau to show the nature and extent of the habit among children.

Inquiry of the Children's Bureau shows that they have had no occasion to investigate it and know nothing particularly of it.

Inquiry of the Office of Education—and they certainly should know something of the prevalence of the habit among the school children of the country, if there is a prevalence of the habit—indicates that they have had no occasion to investigate and know nothing of it.

Hearing on H.R. 6385: Taxation of Marihuana, 75th Cong. 91, 94 (1937) (statement of Dr. William C. Woodward), reprinted in GRINSPOON & BAKALAR, *supra* note 1, at 9.

⁶² SLOMAN, *supra* note 35, at 75-76.

⁶³ BONNIE & WHITEBREAD II, *supra* note 40, at 164-65.

⁶⁴ *Id.*

his position on the proposal, Dr. Woodward was subjected to a very critical and unmerciful examination by the committee conducting the hearings.⁶⁵

Despite the objections of Dr. Woodward and the American Medical Association, Congress enacted the Marijuana Tax Act.⁶⁶ The Marijuana Tax Act was modeled after a prior taxation scheme that involved a tax on machine guns.⁶⁷ Though the Marijuana Tax Act was offered as a revenue-raising measure, the actual effect was that of a prohibitive tax.⁶⁸ While the tax levied on marijuana for medicinal use was set at a lower rate, the tax for other uses was set so extraordinarily high that those wishing to use marijuana for nonmedicinal use would be forced to purchase the drug through illegal means.⁶⁹ Therefore, the possessor of the unregistered marijuana would be subjected to the possibility of prosecution for tax evasion.⁷⁰ The Marijuana Tax Act also had a secondary effect of making legitimate medicinal marijuana increasingly difficult to obtain, as physicians often did not have any desire to deal with all of the bureaucratic red tape that accompanied the registration procedures.⁷¹

⁶⁵ *Id.* at 170-72. In particular, Robert Doughton, the Chairman of the Ways and Means Committee, levied the following condemnation of Dr. Woodward's testimony following his unappreciated answers to some of the Chairman's questions:

If you want to advise us on legislation, you ought to come here with some constructive proposals, rather than criticism, rather than trying to throw obstacles in the way of something that the Federal Government is trying to do. It has not only an unselfish motive in this, but they have a serious responsibility.

Id. at 172.

⁶⁶ See *supra* note 57 and accompanying text.

⁶⁷ *BONNIE & WHITEBREAD II*, *supra* note 40, at 124-25. The National Firearms Act allowed for the purchase of machine guns. *Id.* However, the tax was not merely a revenue-raising scheme because the tax was set so high so as to make the purchase price prohibitive to an actual purchase. *Id.* The constitutionality of this Act was upheld by the United States Supreme Court. *Sonzinsky v. United States*, 300 U.S. 506 (1937).

⁶⁸ *GRINSPOON*, *supra* note 29, at 20.

⁶⁹ *Id.* at 21.

⁷⁰ *Id.*; see also *United States v. Sanchez*, 340 U.S. 42, 43-44 (1950) (discussing how the Marijuana Tax Act operated and discussing its purposes); Marcia Teirsky, Comment, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 549 (1999) (noting that the penalty for possession of marijuana without payment of the tax carried the penalties of five years in prison and a fine of \$2,000).

⁷¹ See Raymond J. Walsh, Jr., *Populations at Risk for Criminal Liability Under Compassionate Use Acts*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 280 (1999).

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The Marijuana Tax Act remained viable until challenged by Dr. Timothy Leary.⁷² Dr. Leary attempted to cross the border into Mexico, but he was denied entry and told to turn around.⁷³ He reentered the customs stop on the American side, and his car was searched, whereupon, marijuana was found.⁷⁴ Dr. Leary was arrested for marijuana smuggling when it was discovered that he had not paid the transfer tax pursuant to the Marijuana Tax Act.⁷⁵ Dr. Leary challenged the constitutionality of the Marijuana Tax Act by averring that it violated his Fifth Amendment right against self-incrimination and that the statutory presumption that mere possession of marijuana was sufficient evidence that the accused knew that the marijuana had been illegally imported violated his due process rights.⁷⁶ The Supreme Court agreed with Dr. Leary, and the Court subsequently reversed both of his convictions under the Marijuana Tax Act.⁷⁷ Congress wasted little time in reacting to the holding in *Leary v. United States*.⁷⁸

⁷² *Leary v. United States*, 395 U.S. 6 (1969). Dr. Leary was a professor of psychology at Harvard University's Center for Research in Human Personality. DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 271-72. It was there that Dr. Leary conducted research on LSD. *Id.* Dr. Leary was later fired from Harvard because he had become a very vocal proponent of the use of LSD and other psychedelic drugs. *Id.*

⁷³ *Leary*, 395 U.S. at 10; *see also* Bergstrom, *supra* note 36, at 159-60 (providing further examination of Timothy Leary's case).

⁷⁴ *Leary*, 395 U.S. at 10.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* at 29, 52-53. The Court noted that there had never been a nonregistrant who had applied to prepay the transfer tax. *Id.* at 25. In ruling on the self-incrimination theory, the Court reasoned that, because Dr. Leary was faced with a regulatory scheme that required the divulgence of incriminating information and that it, in effect, did not actually allow for him to acquire any marijuana, he could not be held criminally liable for the noncompliance. *Id.* at 26, 29. As to Dr. Leary's due process claim, the Court noted that, because of the way that marijuana was both imported and grown domestically, it could not be more likely than not that a possessor would know of the origin of his marijuana. *Id.* at 46-47. Indeed, such a presumption was "no more than speculation." *Id.* at 52-53. However, the Court found it necessary to add "that nothing in what we hold today implies any constitutional disability in Congress to deal with the marihuana traffic by other means." *Id.* at 54. The United States Supreme Court has similarly invalidated a state taxation scheme that was used in marijuana prosecutions in the state of Montana. *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994). In *Kurth Ranch*, a family was arrested for the cultivation and sale of marijuana on its family farm. *Id.* at 771. The state law provided for the collection of taxes on illegal drugs after the initial prosecution for the criminal charges of cultivation and sale of marijuana. *Id.* at 770-77. The Court found that the purpose and application of the law were inconsistent with normal revenue-raising taxation schemes and, as such, could be fairly characterized as a punitive measure. *Id.* at 783. While the Court noted that taxes for deterring activities may be valid, the particular application of

The following year, Congress enacted the Controlled Substances Act of 1970.⁷⁹ The Controlled Substances Act effected a consolidation of existing federal laws.⁸⁰ Contained within the Controlled Substances Act was the Comprehensive Drug Abuse Prevention and Control Act.⁸¹ The significance of the Comprehensive Drug Abuse Prevention and Control Act is that it establishes a scheduling of drugs with regard to their medical usefulness as well as their potential for abuse.⁸² Marijuana is included in Schedule I, which is the most restrictive classification contained in the Act.⁸³ As a controlled substance under Schedule I,

this tax was punitive. *Id.* The Court held that, because of its punitive character, the tax could not be assessed following a criminal conviction, as this would violate the Double Jeopardy Clause contained in the Fifth Amendment. *Id.* at 784. The Court reasoned that the tax "was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time for the same offense." *Id.* However, the Court did note that such a tax could constitutionally be levied at the same time as the original prosecution. *Id.*

⁷⁸ 395 U.S. 6; *see infra* notes 79-87 and accompanying text.

⁷⁹ 21 U.S.C. § 801 (2000). The United States Supreme Court has recognized that § 841(a)(1) of the Controlled Substances Act makes it unlawful to knowingly or intentionally manufacture, distribute, dispense, or possess a controlled substance with the intention of manufacturing, distributing, or dispensing the controlled substance. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001). The Controlled Substances Act does provide an exception for research projects that are approved by the Attorney General. 21 U.S.C. § 823(f) (2000). *But see infra* note 87 and accompanying text.

⁸⁰ DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 278; *see also* Abbie Crites-Leoni, Comment, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization*, 19 J. LEGAL MED. 273, 275 (1998) (noting that Title 21 incorporated the Controlled Substances Act, the Controlled Substances Import and Export Act, and borrowed from the Uniform Controlled Substances Act).

⁸¹ Pub. L. No. 91-513, 84 Stat. 1236 (1970).

⁸² DRUGS AND DRUG POLICY IN AMERICA, *supra* note 31, at 278; *see also infra* note 83.

⁸³ 21 U.S.C. § 812 (2000). This section provides five schedules of controlled substances. *Id.* Each schedule requires certain findings regarding the particular drug for it to be placed into the particular schedule. *Id.* The requirements are as follows:

(1) SCHEDULE I—

(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 for use of the drug or other substance under medical supervision.

(2) SCHEDULE II—

(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.

marijuana has been determined to have a high potential for abuse, no currently accepted medicinal use for treatment, and, even under medical supervision, a lack of acceptable safety for its use.⁸⁴ An essential difference between controlled substances under Schedule I and Schedule II is that, unlike Schedule I drugs, those drugs that are classified under

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) SCHEDULE III-

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) SCHEDULE IV-

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) SCHEDULE V-

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Id. Marijuana shares its position in Schedule I with other drugs such as heroin, LSD, mescaline, and peyote, while other "innocuous" drugs, such as cocaine and opium, are listed under the less restrictive Schedule II. *Id.* Also present in Schedule II is Marinol, a synthetic form of the THC that is found naturally in marijuana. Nicole Dogwill, Comment, *The Burning Question: How Will the United States Deal with the Medical Marijuana Debate*, 1998 DET. C.L. AT MICH. ST. U. L. REV. 247, 248 (1998). However, Marinol is generally seen as an ineffective alternative to actual marijuana in a smokable form. See generally SLOMAN, *supra* note 35, at 414; ZIMMER & MORGAN, *supra* note 29, at 16-25; Marsha N. Cohen, Comment, *Breaking the Federal/State Impasse Over Medical Marijuana: A Proposal*, 11 HASTINGS WOMEN'S L.J. 59, 71-72 (2000). The problem with the pill form of Marinol is that it is very difficult for those with chemotherapy-induced nausea, for example, to swallow and digest anything, much less a pill. ZIMMER & MORGAN, *supra* note 29, at 18. Additionally, smoked marijuana provides the needed relief relatively quickly as opposed to Marinol, which takes over an hour to provide the desired effects. *Id.* But see DRUG LEGALIZATION, *supra* note 35, at 154-55 (noting the concerns of using the smoked form of marijuana).

⁸⁴ 21 U.S.C. § 812(b)(1).

Schedule II are defined as having a currently accepted medicinal use for treatment.⁸⁵ The Comprehensive Drug Abuse Prevention and Control Act vests the United States Attorney General with the authority to classify a particular substance to be controlled into a schedule.⁸⁶ In

⁸⁵ *Id.* Interestingly enough, when the states have passed marijuana legislation, they consistently refer to the beneficial effects of marijuana in alleviating pain and suffering for such afflictions as chemotherapy-induced nausea, AIDS wasting syndrome, and muscle spasticity disorders. *See infra* note 90. By and large, the American public understands the usefulness of medicinal marijuana, as can be evidenced from a poll conducted by the American Civil Liberties Union, in which 79% of those polled agreed that a doctor should be able to prescribe marijuana for pain relief and other medical uses. ZIMMER & MORGAN, *supra* note 29, at 134. With regard to the safety of marijuana, studies have shown that “[t]here is no possibility of a fatal overdose from smoking marijuana, regardless of THC content.” *Id.* at 139.

⁸⁶ 21 U.S.C. § 811(a) (2000). This section of the Comprehensive Drug Abuse Prevention and Control Act provides:

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Id. The Act also provides for the ability of the Attorney General to transfer drugs into a different schedule. *Id.* Before the Attorney General can transfer drugs to another schedule, the Act provides that he or she must make an evaluation of the drug, whereby:

The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be

considering the rescheduling of marijuana, the ability of the Attorney General to gather new evidence regarding the medicinal value of marijuana has been diminished by Congress' reluctance to allow further medicinal marijuana studies.⁸⁷

listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Id. § 811(b). Prior to control or removal of a drug from the schedules, the Attorney General is required to consider the following factors:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychic or psychological dependence liability.
- (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

Id. § 811(c); see *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 492-93 (2001). The Cooperative argued against the validity of marijuana's classification into Schedule I because it was Congress, rather than the Attorney General, who had determined marijuana's classification. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 492-93. However, the Court rejected the argument because the Court found no reason to treat drugs differently based on who classifies them. *Id.*

⁸⁷ DRUG LEGALIZATION, *supra* note 35, at 155. While medicinal marijuana studies had been halted for some time, the U.S. Food and Drug Administration has recently approved a clinical study of the drug MDMA, more commonly known Ecstasy. Rachel Zimmerman, *FDA Permits Test of Ecstasy as Aid in Stress Disorder*, WALL ST. J., Nov. 6, 2001, at B1. The study is designed to test the usage of MDMA in treatment for Post-Traumatic Stress Disorder ("PTSD"), the incidence of which the proponents of the study feel will continue to increase following the terrorist attacks of September 11, 2001. *Id.* What is interesting about the FDA approval of this study is that MDMA is classified into Schedule I along with marijuana. *Id.* This is especially true in light of the fact that there were thirteen deaths in 1999 alone attributed to MDMA, while studies show that no dose of marijuana would be fatal. *Id.*; see also ZIMMER & MORGAN, *supra* note 29, at 8. However, the aversion to medicinal marijuana studies may be changing, as the Drug Enforcement Agency recently granted approval for marijuana study at the University of California at San Diego.

C. Attempts to Effectuate Change in the System

1. State-Based Initiatives

The states and their citizens have responded to the federal government's classification of marijuana into Schedule I by enacting initiatives allowing for the use of medicinal marijuana under the relevant state laws.⁸⁸ California and Arizona have led this movement by enacting laws allowing the use of medicinal marijuana in 1996.⁸⁹ Numerous other states have followed their example by enacting their own versions of medicinal marijuana reforms.⁹⁰ Significantly, current President George

Associated Press, *UCSD to Conduct Medical Marijuana Study*, at <http://www.cnn.com/2001/HEALTH/11/29/medical.marijuana.ap/index.html> (last visited Dec. 30, 2001).

⁸⁸ See, e.g., Cohen, *supra* note 83, at 66; Alreen Hussein, Comment, *The Growing Debate on Medical Marijuana: Federal Power vs. States Rights*, 37 CAL. W. L. REV. 369, 378 (2001).

⁸⁹ California's law was a direct result of the voter support of Proposition 215. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2002). It is known as the Compassionate Use Act of 1996. *Id.* The text of the Act emphasizes the concern for the unfortunately large number of AIDS patients in the state. *Id.* Arizona voters adopted Proposition 200 in November 1996. ARIZ. REV. STAT. ANN. § 13-3412.01 (West 2001); see also Dogwill, *supra* note 83, at 247. But see Matthew Segal, Comment, *Overdue Process: Why Denial of Physician-Prescribed Marijuana to Terminally Ill Patients Violates the United States Constitution*, 22 SEATTLE U. L. REV. 235, 263 n.5 (1998) (noting that the Arizona legislature revised the voters' initiative by making medicinal marijuana legalization dependent upon federal legalization).

⁹⁰ See ALASKA STAT. §§ 11.71.090, 17.37.010-17.37.080 (Michie 2000); see also COLO. CONST. art. XVIII, § 14. Colorado allowed the "medical use of marijuana for persons suffering from debilitating medical conditions" including cancer, glaucoma, AIDS, severe pain, nausea, seizures, epilepsy, and multiple sclerosis. COLO. CONST. art. XVIII, § 14. The Hawaii statute allowed for an "adequate supply" of marijuana that is

not more than is reasonably necessary to assure the uninterrupted availability of marijuana for the purpose of alleviating the symptoms or effects of a qualifying patient's debilitating medical condition; provided that an 'adequate supply' shall not exceed three mature marijuana plants, four immature marijuana plants, and one ounce of usable marijuana per each mature plant.

HAW. REV. STAT. § 329-121 (Supp. 2001). The medical conditions recognized for marijuana treatment include cancer, glaucoma, AIDS, severe pain and nausea, seizures, and muscle spasms. *Id.* The Maine statute authorized possession for

a person to whom or for whose use any scheduled drug, prescription drug or controlled substance has been prescribed, sold or dispensed for a legitimate medical purpose by a physician, dentist, podiatrist, pharmacist or other person acting in the usual course of professional practice and authorized by law or rule to do so

ME. REV. STAT. ANN. tit. 22, § 2383-B (West Supp. 2001). The statute recognized marijuana as treatment for nausea, vomiting, wasting syndrome or loss of appetite as a result of AIDS, chemotherapy, glaucoma, seizures, and muscle spasms. *Id.*; see also NEV. CONST. art. IV, § 38 (allowing marijuana to be prescribed for treatment of cancer, glaucoma, AIDS, nausea,

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W. Bush has gone on record in support of states' rights to determine for themselves how to address this issue.⁹¹ Moreover, Representative Barney Frank, a Democrat from Massachusetts, has introduced a proposal into the United States House of Representatives that calls for the rescheduling of marijuana from Schedule I to Schedule II.⁹²

epilepsy, seizures, and multiple sclerosis); OR. REV. STAT. § 475.300 (2001). The Oregon statute provided:

The people of the state of Oregon hereby find that:

- (1) Patients and doctors have found marijuana to be an effective treatment for suffering caused by debilitating medical conditions, and therefore, marijuana should be treated like other medicines;
- (2) Oregonians suffering from debilitating medical conditions should be allowed to use small amounts of marijuana without fear of civil or criminal penalties when their doctors advise that such use may provide a medical benefit to them.

OR. REV. STAT. § 475.300. The Washington statute provided:

The People of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

WASH. REV. CODE ANN. § 69.51A.005 (West Supp. 2002).

⁹¹ Susan Feeney, *Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control*, DALLAS MORNING NEWS, Oct. 20, 1999, at 6A. Then Governor of Texas, Mr. Bush stated, "I believe each state can choose that decision as they so choose." *Id.*

⁹² H.R. 2592, 107th Cong. (2001). The avowed purpose of the Bill is "[t]o provide for the medical use of marijuana in accordance with the laws of the various States." *Id.* The Bill includes thirteen co-sponsors from both political parties. *Id.* The Bill provides:

No provision of the Controlled Substances Act [or] . . . the Federal Food, Drug, and Cosmetic Act shall prohibit or otherwise restrict:

- (A) the prescription or recommendation of marijuana by a physician for medical use,
- (B) an individual from obtaining and using marijuana from a prescription or recommendation of marijuana by a physician for medical use by such individual, or
- (C) a pharmacy from obtaining and holding marijuana for the prescription or recommendation of marijuana by a physician for medical use under applicable State law.

Id.

However, many Americans remain opposed to the idea of allowing marijuana to be prescribed as medicine. Many fear that marijuana acts as a gateway drug to more serious drugs, such as heroin or cocaine.⁹³ Others are concerned with the possible deleterious physiological effects that result from the usage of marijuana.⁹⁴ Similarly, those opposed to medicinal marijuana note the increase in drug use by teenagers, the increase in marijuana-related emergency room visits, and the increase in the numbers of babies born addicted to drugs.⁹⁵

Critics of medicinal marijuana also point to the costs of marijuana on society as a whole. First, the illegal drug trade has had a negative impact on the natural environment.⁹⁶ Secondly, there is a concern about the possibility of increased accidents in the workplace that would be caused by marijuana users.⁹⁷ Thirdly, many fear that if any of the restrictions on marijuana are reduced the result would be an increase in crime.⁹⁸ Similarly, those opposed have noted that, because of such an increase in crime, many doctors would refuse to prescribe medicinal marijuana simply because they would not want to be associated with any perception of criminal activity.⁹⁹ The concerns of those opposed to medicinal marijuana are valid, and, as such, any proposal for change would need to address these concerns properly in order to maintain any semblance of legitimacy.¹⁰⁰

⁹³ HANSON ET AL., *supra* note 32, at 387.

⁹⁴ *Id.* at 377-78 (noting that marijuana, when smoked, can have negative effects on the central nervous system, the respiratory system, and the cardiovascular system); *see also* GARY J. MILLER, DRUGS AND THE LAW: DETECTION, RECOGNITION, AND INVESTIGATION 409-11 (1992) (discussing marijuana use by pregnant women and the correlation to lower infant birth weight).

⁹⁵ HANSON ET AL., *supra* note 32, at 368-69. Between 1991 and 1995, marijuana use by twelfth-graders rose from 29.9% to 34% in the United States. *Id.* at 368. Furthermore, marijuana and hashish-related emergency room visits rose 39% from 1993 to 1994. *Id.* at 369; *see also* MILLER, *supra* note 94, at 4, 409 (noting a study conducted in Oregon in which 29% of all infants born addicted to drugs were affected by marijuana).

⁹⁶ MILLER, *supra* note 94, at 6-7 (discussing the use of poisons and rodenticides by clandestine growers in remote areas, which pollute waterways and underground streams).

⁹⁷ *Id.* at 6 (discussing the dangers to which drug-impaired employees expose themselves and co-workers by being impaired while at work).

⁹⁸ *Id.* at 7-8 (noting that nearly half of all federal prisoners in 1990 were convicted for drug offenses).

⁹⁹ *Id.* at 488.

¹⁰⁰ *See infra* notes 199-210 and accompanying text.

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2. Lobbying Groups and the Courts

Over the years, lobbying groups such as the National Organization for the Reform of Marijuana Laws ("NORML") and the Alliance for Cannabis Therapeutics have attempted to use the judicial system to change the application of marijuana laws in the United States.¹⁰¹ In one case, NORML sought to have marijuana removed entirely from the Controlled Substances Act or to at least have marijuana reclassified from Schedule I to Schedule V.¹⁰² The Director of the Bureau of Narcotics and Dangerous Drugs, under a delegation of authority from the Attorney General, refused NORML's request.¹⁰³ NORML then brought suit challenging the Director's ruling.¹⁰⁴ The court held that the Attorney General was within his authority to refuse NORML's request.¹⁰⁵

In a later proceeding involving the same parties, the determination of the Administrator of the Drug Enforcement Agency that marijuana had no currently accepted medical use was challenged.¹⁰⁶ The court found the Administrator's interpretation of the statute to be a reasonable one.¹⁰⁷ As of yet, these lobbying groups have been unsuccessful in their

¹⁰¹ See, e.g., *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936 (D.C. Cir. 1991); *Nat'l Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977).

¹⁰² *Nat'l Org. for the Reform of Marijuana Laws*, 559 F.2d at 741.

¹⁰³ *Id.* The Director's reason for not granting the National Organization for the Reform of Marijuana Laws' ("NORML") request was that he felt that any reclassification would violate the Single Convention. *Id.* The Single Convention was a proposal by the United Nations in 1948 to create a uniform set of rules regarding the international traffic of narcotics; the United States signed the Convention in 1967. *Id.* at 739.

¹⁰⁴ *Id.* at 743.

¹⁰⁵ *Id.* at 752. Interestingly, the court concluded that separated marijuana leaves could be transferred to Schedule V consistent with the Single Convention. *Id.* at 753; see also *supra* note 103. The Acting Administrator had refused to transfer marijuana leaves, which the court found to be a premature decision as he had not consulted with the Department of Health, Education, and Welfare prior to making his decision. *Nat'l Org. for the Reform of Marijuana Laws*, 559 F.2d at 754.

¹⁰⁶ *Alliance for Cannabis Therapeutics*, 930 F.2d at 937. The Administrator found that only a "respectable minority" of physicians adhered to the use of marijuana as medical treatment. *Id.* at 938. The Administrator ruled that this "respectable minority" was not conclusory evidence to show that there was a currently accepted medicinal use for marijuana. *Id.*

¹⁰⁷ *Id.* at 939. The court seemed obliged to defer to the Administrator's finding based on its interpretation of the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). *Id.* The court did, however, remand the case because the Administrator had based his decision on an eight-factor test, of which three of the factors were found to be unrealizable and, therefore, arbitrary and capricious. *Id.* at 940-41. After the remand, the Administrator again refused to reschedule marijuana

attempts to use the court system to have marijuana reclassified into a lower schedule under the Controlled Substances Act.¹⁰⁸ Because marijuana remains classified in Schedule I, those who are arrested must rely on other novel approaches, including the First Amendment and the medical necessity defense, in order to attempt to prevent their criminal prosecution under the current state of the law.

3. The Free Exercise of Religion Clause

Numerous plaintiffs have challenged their convictions for drug possession by asserting their right to free exercise of religion under the First Amendment.¹⁰⁹ However, the free exercise defense has only been recognized when the drug involved was sacramental peyote used by the Native American Church.¹¹⁰ The Ethiopian Zion Coptic Church ("the Church") has sought an exemption for the use of marijuana for religious purposes.¹¹¹ The teachings of the Church involve the continual use of

without the objectionable factors, and his decision was again appealed. *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994). The court held that the Administrator's new five-factor test met its objections and, as a result, again deferred to his interpretation by noting that the findings were supported by substantial evidence. *Id.* at 1135, 1137. The five-factor test formulated by the Administrator for determining whether a drug is currently accepted in medicinal use includes: (1) the drug's chemistry must be known and reproducible; (2) there must be adequate safety studies; (3) there must be adequate and well-controlled studies proving efficacy; (4) the drug must be accepted by qualified experts; and (5) the scientific evidence must be widely available. *Id.* at 1135. The court went on to note that "[n]one of these criteria is impossible for a Schedule I drug to meet." *Id.*

¹⁰⁸ See, e.g., *Alliance for Cannabis Therapeutics*, 15 F.3d 1131; *Alliance for Cannabis Therapeutics*, 930 F.2d 936; *Nat'l Org. for the Reform of Marijuana Laws*, 559 F.2d 735.

¹⁰⁹ *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 917 n.8 (1990) (Blackmun, J., dissenting) (providing a list of cases in which a free exercise exemption was invoked as an affirmative defense and, as to marijuana, was denied). In *Smith*, the United States Supreme Court ruled that Oregon, consistent with the Free Exercise Clause, could refuse to allow an exception for religious peyote use under state law even though the federal government and other states do recognize the exception for religious peyote use. *Id.* at 890.

¹¹⁰ *Id.* Both the federal government and eleven states recognize an exemption for the religious use of sacramental peyote. *Id.* at 906. The religious use of peyote is most clearly associated with the Native American Church. *Id.* Interestingly, under federal law, peyote and marijuana are both classified into Schedule I under the Controlled Substances Act. 21 U.S.C. § 812 (2000). The Court in *Smith* noted a distinction between the religious use of peyote and the religious use of other controlled substances, in that "[s]ome religious claims . . . involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts." *Smith*, 494 U.S. at 918.

¹¹¹ *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1459 (D.C. Cir. 1989).

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marijuana throughout the day for its adherents.¹¹² In refusing to grant such an exemption to the Church, then-Circuit Judge Ruth Bader Ginsburg found the differences in demand between marijuana and peyote to be a crucial factor.¹¹³ It did seem to appear, however, that Judge Ginsburg recognized some beneficial use of marijuana for medicinal purposes.¹¹⁴ To date, though, it does not appear that many courts will be willing to grant a religious use exemption for marijuana.¹¹⁵

4. The Medical Necessity Defense

The necessity defense has been characterized as a choice between two evils.¹¹⁶ The necessity defense was created and recognized under the common law.¹¹⁷ Modern courts, however, have not been receptive to the medical necessity defense when used as a defense for marijuana possession.¹¹⁸ One of the more significant difficulties defendants have

¹¹² *Id.*

¹¹³ *Id.* at 1463-64. *But see Smith*, 494 U.S. at 918 (Blackmun, J., dissenting) (noting that the Roman Catholic Church's use of sacramental wine was exempted from the ban on alcohol during Prohibition).

¹¹⁴ *Olsen*, 878 F.2d at 1463 n.4. Judge Ginsburg noted that the "[g]overnment may allow use of marijuana in programs to lessen the negative side-effects of chemotherapy and to treat glaucoma . . . without thereby opening the way to licenses for the use of marijuana by the healthy." *Id.*

¹¹⁵ *See supra* note 109.

¹¹⁶ *United States v. Bailey*, 444 U.S. 394, 410 (1980) (noting that "the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils").

¹¹⁷ *State v. Hastings*, 801 P.2d 563, 564 (Idaho 1990). In *Hastings*, the Idaho Supreme Court held that Idaho law was not a bar to the use of the defense of necessity. *Id.* The court remanded the case to allow a jury to consider the application of the necessity defense to a woman who was arrested for possessing marijuana that she used to treat her rheumatoid arthritis. *Id.* at 565. The court noted that

The elements of the common law defense of necessity are:

1. A specific threat of immediate harm;
2. The circumstances which necessitate the illegal act must not have been brought about by the defendant;
3. The same objective could not have been accomplished by a less offensive alternative available to the actor;
4. The harm caused was not disproportionate to the harm avoided.

Id. at 564; *see also* George L. Blum, Annotation, *Defense of Necessity, Duress, or Coercion in Prosecution for Violation of State Narcotics Laws*, 1 A.L.R. 5th 938 (1992).

¹¹⁸ *See generally United States v. Burton*, 894 F.2d 188, 191 (6th Cir. 1990) (holding that the medical necessity defense was unavailable to a man suffering from glaucoma due to the amount of marijuana that he possessed); *Spillers v. State*, 245 S.E.2d 54, 55 (Ga. Ct. App. 1978) (holding that the medical necessity defense was unavailable for marijuana possession by a man suffering from rheumatoid arthritis); *State v. Corrigan*, 2001 WL 881394, at *2

had in asserting this defense is that the courts appear to be hostile to the idea that there are no alternatives available other than medicinal marijuana.¹¹⁹ Another significant difficulty in asserting a necessity defense for medical reasons is that marijuana remains classified as a Schedule I controlled substance, which carries the presumption that it has no medically accepted purpose or use.¹²⁰

The United States Supreme Court recently handed down a decision regarding the medicinal use of marijuana in *United States v. Oakland Cannabis Buyers' Cooperative*.¹²¹ In reviewing the federal drug laws, the Court found no implied medical necessity exception to the prohibition on the manufacturing and distribution of medicinal marijuana as established in the Controlled Substances Act.¹²² The Court did not, however, rule on whether the same defense would be available for those accused of *possession* of marijuana.¹²³ Many agree that the Supreme

(Minn. Ct. App. Aug. 7, 2001) (holding that the medical necessity defense was unavailable for marijuana possession); *State v. Tate*, 505 A.2d 941, 942, 947 (N.J. 1986) (holding that the medical necessity defense was unavailable to a quadriplegic who used marijuana); *State v. Piland*, 293 S.E.2d 278, 280 (N.C. Ct. App. 1982) (holding that medical necessity defense was unavailable to a physician who grew marijuana for his patients); *State v. Poling*, 531 S.E.2d 678, 684-85 (W. Va. 2000) (holding that the medical necessity defense was unavailable to a woman who used marijuana to relieve symptoms resulting from multiple sclerosis).

¹¹⁹ *Tate*, 505 A.2d at 942, 947 (noting the availability of alternative means in obtaining medicinal marijuana, while the dissent argued that the program was too ineffective to be considered a true alternative). Additionally, some courts have chosen to defer to the state legislatures for determinations regarding a defense of medical necessity. See *Corrigan*, 2001 WL 881394, at *2 (noting that "the question whether possession should be viewed differently is one for the legislature to address"); *Poling*, 531 S.E.2d at 685 ("The Legislature has made no exception for medical use [W]e hold that medical necessity is unavailable as an affirmative defense to a marijuana charge in West Virginia"). Judicial deference to the legislature seems peculiar for a defense that has its origins in the common law created by the courts. See *supra* note 117 and accompanying text.

¹²⁰ *Poling*, 531 S.E.2d at 685 (holding that the state legislature had classified marijuana as a Schedule I controlled substance without providing an exception for medicinal use).

¹²¹ 532 U.S. 483 (2001).

¹²² *Id.* at 492-93. The Court noted that, while the Controlled Substances Act did not specifically nullify such a defense, "its provisions leave no doubt that the defense is unavailable." *Id.* at 491. The Court further noted that while prior decisions had considered the possibility of a defense of necessity, they had not rejected the idea altogether. *Id.* at 490; see *United States v. Bailey*, 444 U.S. 394, 410 (1980); see also *Tate*, 505 A.2d 941; *State v. Diana*, 604 P.2d 1312 (Wash. Ct. App. 1979); Blum, *supra* note 117, at 938 (surveying state court cases in which the medical necessity defense has been asserted).

¹²³ *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 494-95. "For these reasons, we hold that medical necessity is not a defense to *manufacturing* and *distributing* marijuana." *Id.* (emphasis added).

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Court's decision will create additional litigation.¹²⁴ Moreover, disagreement on this issue will not subside without distinguishing the proper role of states' rights and the regulatory power of the United States Congress.

D. *The Role of Federalism*

Federalism refers to a system of government, like that of the United States, in which governmental power is divided among a national government and individual states.¹²⁵ The result of this form of government is a great variety in both procedural and substantive laws and rights.¹²⁶ The Framers of the United States Constitution saw this balance of powers as necessary to avoid any risk of tyranny or abuse from any one entity.¹²⁷ Because of their former relationship with England, the Framers' biggest fear was an overpowering central government.¹²⁸ As a result, the Bill of Rights was intended to restrain the central government provided for by the Federal Constitution.¹²⁹ The Ninth and Tenth Amendments of the Bill of Rights reflect this in their acknowledgment of the retention of rights in both the people and the states.¹³⁰ Thus, citizens at this time looked to their state constitutions for protection of their rights.¹³¹ However, the passage of the Fourteenth Amendment established that Americans have a dual citizenship in both

¹²⁴ John Gibeaut, *The Grass May Still Be Greener*, A.B.A. J., Oct. 2001, at 90. Indeed, Gerald Uelman, the law professor who argued on behalf of the Oakland Cannabis Buyers' Cooperative in front of the Supreme Court, was quoted as saying, "It didn't end the litigation." *Id.* Professor Uelman took part in a panel discussion of recent legal and legislative developments on the medicinal marijuana issue at the American Bar Association's Annual Meeting. *Id.* The panelists agreed that, if the states continue their efforts to get marijuana on state ballots, then Congress will eventually feel the pressure and change the federal statutes. *Id.*

¹²⁵ COURTS, LAW, AND JUDICIAL PROCESSES 1 (S. Sidney Ulmer ed., 1981); see also BLACK'S LAW DICTIONARY 253 (6th ed. 1996) (defining federalism as "[t]he relationship and distribution of power between the individual states and the national government").

¹²⁶ COURTS, LAW, AND JUDICIAL PROCESSES, *supra* note 125, at 1.

¹²⁷ Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 994 (1996).

¹²⁸ *Id.* at 997.

¹²⁹ *Id.*

¹³⁰ U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

¹³¹ G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1099 (1997).

the United States and their individual states.¹³² Moreover, the Fourteenth Amendment also worked as a restriction on the states' power to prevent them from infringing on the liberties that dual citizenship provided.¹³³

After passage of the Fourteenth Amendment, the United States Supreme Court began the process of selectively incorporating rights guaranteed by the Bill of Rights into the Fourteenth Amendment, thus making them applicable to the states.¹³⁴ This process of incorporation was incremental, and, as a result, very few provisions of the Bill of Rights became binding on the states.¹³⁵ During the 1960s, however, the Supreme Court became more active and extended nine provisions of the Bill of Rights to the states.¹³⁶ The result of this judicial activism was that states now have become deeply involved in the application of federal law.¹³⁷ Many scholars have noted that this shift has been detrimental to individuals who attempt to assert their rights under the United States Constitution because state constitutions often provide more expansive protections.¹³⁸ Even the United States Supreme Court has recognized this in *Michigan v. Long*.¹³⁹

¹³² U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

¹³³ *Id.* The Fourteenth Amendment further provides that

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. See also Holland, *supra* note 127, at 1003.

¹³⁴ Holland, *supra* note 127, at 1002.

¹³⁵ See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

¹³⁶ *Id.* at 493-94. During the 1960s, provisions of the Fifth, Sixth, and Eighth Amendments were made applicable to several states. *Id.*

¹³⁷ *Id.*

¹³⁸ See, e.g., *id.*, at 493; Holland, *supra* note 127, at 1002; Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 453 (1996); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 577 (1989); Tarr, *supra* note 131, at 1099; G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1170 (1992).

¹³⁹ 463 U.S. 1032, 1033 (1982) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, this Court will not undertake to review the decision.").

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The states, however, are not unrestrained in their provision of rights and protections. The states remain bound by the Supremacy Clause, which requires state action to comply with laws passed by Congress and with the interpretations of those laws by the United States Supreme Court.¹⁴⁰ Similarly, state courts are also bound by the Supremacy Clause when exercising their discretion in fashioning equitable relief.¹⁴¹ It is this delicate balance of powers which has led to the current stalemate involving medicinal marijuana.

On occasion, the United States Supreme Court has determined that Congress has overstepped its Commerce Clause powers and, thus, has invalidated certain federal statutes.¹⁴² For many years, the Supreme Court had been more deferential to congressional action.¹⁴³ However, recent decisions indicate that the Supreme Court has become more aggressive in reviewing congressional action.¹⁴⁴ In *United States v.*

¹⁴⁰ U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

¹⁴¹ *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.").

¹⁴² *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding § 13981 of the Violence Against Women Act of 1994 unconstitutional); *United States v. Lopez*, 514 U.S. 549, 557-68 (1995) (holding § 922(q) of the Gun-Free School Zones Act of 1990 unconstitutional).

¹⁴³ *Lopez*, 514 U.S. at 556-57 (analyzing Commerce Clause case precedent from 1937 to the 1990s); see also *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (upholding federal regulations of wheat grown intrastate because the aggregate of such activity had a substantial effect on interstate commerce).

¹⁴⁴ See *Morrison*, 529 U.S. at 617. In *Morrison*, the Court assessed the constitutionality of § 13981 of the federal Violence Against Women Act of 1994. *Id.* at 604. Section 13981 provided a civil remedy for the victims of crimes of violence that were motivated by gender. *Id.* at 605-06. The Court held that this provision could not stand as a proper exercise of Commerce Clause power by Congress. *Id.* at 619. The Court reasoned that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 618.; see also *Lopez*, 514 U.S. at 556-57. In *Lopez*, the Court evaluated the conviction of a high school student under the Gun-Free School Zones Act of 1990. *Lopez*, 514 U.S. at 551. This Act made it a federal offense to knowingly possess a firearm within 1000 feet of a school. *Id.* The Supreme Court affirmed the determination of the Fifth Circuit Court of Appeals that Congress had exceeded its Commerce Clause

Lopez,¹⁴⁵ the Court established a paradigm for reviewing federal statutes based on Congress' Commerce Clause powers.¹⁴⁶ The Court began by noting three broad categories of activity that Congress is permitted to regulate.¹⁴⁷ The three categories include: first, the use of the channels of interstate commerce; second, the instrumentalities of interstate commerce, or persons or things in interstate commerce; and third, economic activities that substantially affect interstate commerce.¹⁴⁸

The Court has determined that congressional action must contain a jurisdictional element in order to show some nexus between the activity to be regulated and interstate commerce.¹⁴⁹ Furthermore, it was also determined that legislative findings regarding the effects that the regulated activity has on interstate commerce would be relevant.¹⁵⁰ The Court noted that, while formal findings are normally not required, they would assist in evaluating the constitutionality of congressional action.¹⁵¹ Subsequently, the Court has established that it is within this framework

authority. *Id.* at 552. One of the Court's reasons for doing so was that § 922(q) of the Act was a criminal statute that failed to regulate an activity that had any substantial affect on interstate commerce. *Id.* at 561.

¹⁴⁵ *Lopez*, 514 U.S. at 561.

¹⁴⁶ *Id.* at 559-63.

¹⁴⁷ *Id.* at 558.

¹⁴⁸ See, e.g., *Morrison*, 529 U.S. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Lopez*, 514 U.S. at 558-61 (holding that the statute regulating possession of guns in a school zone was "a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms").

¹⁴⁹ See, e.g., *Morrison*, 529 U.S. at 613 (noting that § 13981 "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"); *Lopez*, 514 U.S. at 562 (noting that § 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce").

¹⁵⁰ *Morrison*, 529 U.S. at 617. In *Morrison*, the Court was faced with numerous findings on the impact of gender-motivated violence on the victims and their families. *Id.* at 614. However, the Court noted that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id.*; see also *Lopez*, 514 U.S. at 563. In *Lopez*, the statute contained no express findings to correlate gun possession in a school zone and any effects it may have had on interstate commerce. *Lopez*, 514 U.S. at 562. Rather, the government had sought to rely on previous findings in prior federal enactments. *Id.* at 563. The Court found this reliance to be inappropriate because the prior findings did not address the same subject matter. *Id.* Nor did the prior findings establish any relationship of the statute at issue to interstate commerce. *Id.*

¹⁵¹ *Lopez*, 514 U.S. at 562-63 (noting that, "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here").

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that it will review legislative enactments.¹⁵² However, the Court did assert that it will not invalidate such enactments unless Congress has clearly exceeded its constitutional bounds.¹⁵³

Some commentators have asserted that Congress has exceeded its constitutional boundaries under the Commerce Clause by enacting the Controlled Substances Act.¹⁵⁴ However, an investigation of the Controlled Substances Act within the framework established by *Lopez* will demonstrate that Congress has not exceeded its power, but rather that Congress has wrongfully exercised its power.¹⁵⁵ As a result, a new approach must be considered in order to effectuate any changes in medicinal marijuana policy at the federal level.¹⁵⁶

III. AN ANALYSIS OF THE ATTENDANT PROBLEMS ASSOCIATED WITH
CURRENT FEDERAL LAW REGARDING MEDICINAL MARIJUANA

A. *Federalism and Medicinal Marijuana*

Under the current federal laws and the analytical framework established by the United States Supreme Court, it becomes apparent that the federal government has the power to control this issue.¹⁵⁷ While many states have indicated their desire to be able to allow for medicinal marijuana, it is the federal government that is preventing them from doing so.¹⁵⁸ The Supreme Court has held that Congress may regulate economic activities that substantially affect interstate commerce.¹⁵⁹

Unlike the statutes involved in *Lopez* and *Morrison* that did not regulate activities with any economic effects on interstate commerce,

¹⁵² *Morrison*, 529 U.S. at 608-09.

¹⁵³ *Id.* at 607.

¹⁵⁴ See, e.g., Hussein, *supra* note 88, at 384-93; Erik R. Neusch, Comment, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201, 201 (2001). Both of these articles take the position that Congress has exceeded its Commerce Clause powers because the Controlled Substances Act regulates mere possession and compare it to the statute at issue in *Lopez*. However, this argument fails to account for the fact that the marijuana must have come from elsewhere before a person could be in "mere possession." See discussion *infra* Part III.A.

¹⁵⁵ See *infra* notes 159-69 and accompanying text.

¹⁵⁶ See *infra* Part IV.

¹⁵⁷ See *supra* notes 83, 148-50 and accompanying text.

¹⁵⁸ See *supra* notes 89-90, 121 and accompanying text.

¹⁵⁹ *United States v. Lopez*, 514 U.S. 549, 559 (1995); see also *supra* note 148 and accompanying text.

marijuana does have an impact on interstate commerce.¹⁶⁰ In order to see this impact, one can look to the amount of money expended in the enforcement of drug laws. For example, in 1983 the federal budget allocated approximately two billion dollars to the war on drugs, but by 1993 that number had increased to nearly thirteen billion dollars.¹⁶¹ Moreover, those who would be responsible for prescribing, manufacturing, and distributing medicinal marijuana would be making profits on a substance that has an established market.¹⁶² Thus, marijuana regulation can be seen as more akin to the regulation of the wheat market that was upheld in *Wickard v. Filburn*.¹⁶³

The next steps in the *Lopez* analysis look to the statute to find a jurisdictional element and indications of congressional findings.¹⁶⁴ The Controlled Substances Act provides for both of these items in the text of the Act.¹⁶⁵ The jurisdictional element can be satisfied by noting the flow

¹⁶⁰ *Lopez*, 514 U.S. at 564; see also *United States v. Morrison*, 529 U.S. 598, 607 (2000); see also *supra* note 148 and accompanying text.

¹⁶¹ MIKE GRAY, *DRUG CRAZY* 201 (1998). Similarly, the state and federal prison population increased from 528,945 in 1986 to 1,987,110 in 1996. *Id.* Of those incarcerated, over 400,000 had been convicted for drug law violations. *DRUG LEGALIZATION*, *supra* note 35, at 96.

¹⁶² See *infra* note 220 and accompanying text.

¹⁶³ 317 U.S. 111, 128 (1942); see *supra* note 143.

¹⁶⁴ See *supra* notes 149-51 and accompanying text.

¹⁶⁵ 21 U.S.C. § 801 (2000). This portion of the Controlled Substances Act provides:

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

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of controlled substances not only across state lines, but also across international borders. Additionally, the Controlled Substances Act regulates much more than mere possession, unlike the statute in *Lopez*, which regulated mere possession of guns.¹⁶⁶ Moreover, unlike the statute in *Lopez* that had no congressional findings, the Controlled Substances Act provides an enumerated list of findings.¹⁶⁷ A particularly significant finding is that it is impossible to differentiate drugs that are manufactured and distributed intrastate from those involved in interstate movement.¹⁶⁸ Thus, under the *Lopez* analysis, Congress is within its constitutional domain to regulate controlled substances.¹⁶⁹ However, merely recognizing that Congress has the power to regulate does not mean that it has done so in accordance with the will of the people.

The actions that the states and their citizens have undertaken in an attempt to allow medicinal marijuana to be prescribed are laudable and deserve due credence.¹⁷⁰ However, this activity has been ineffectual because of congressional power to control drugs for the safety and health of the citizens in all states. This Note does not take issue with the federal

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

Id.

¹⁶⁶ See *supra* notes 148, 165 and accompanying text. Beyond possession, the Controlled Substances Act also applies to manufacture, importation, and distribution. 21 U.S.C. § 801.

¹⁶⁷ 21 U.S.C. § 801(3); see also *supra* note 165.

¹⁶⁸ See 21 U.S.C. § 801(5); see also *supra* note 165.

¹⁶⁹ See *supra* notes 146-50 and accompanying text. Interestingly, the Supreme Court did not analyze the Controlled Substances Act under the *Lopez* analysis in *United States v. Oakland Cannabis Buyers' Cooperative*. 532 U.S. 483, 497 (2001). Rather, the Court merely accepted the findings of Congress in order to decide if there was an implied necessity defense to the Controlled Substances Act. *Id.* Thus, the *Oakland* decision may signal a return to the Court's more deferential, pre-*Lopez* analysis. See *supra* note 143 and accompanying text.

¹⁷⁰ See *supra* notes 89-90 and accompanying text.

government's ability to control drugs but rather with the way in which this power has been exercised. Indeed, it is this power of the federal government which must be called upon to effectuate lasting and uniform change to the laws pertaining to medicinal marijuana. Drugs and the regulation thereof involve issues which are more suitable to being dealt with at the federal level because of the federal government's unique national viewpoint.¹⁷¹ Additionally, there is an international element to the drug issue in that the federal government has the responsibility of controlling drugs that are imported illegally.

Allowing states to decide for themselves how to deal with this issue would result in a patchwork of laws that would create even more problems because the states focus on solving problems within the confines of their borders.¹⁷² For example, if one state allows for medicinal marijuana and another does not, patients may be forced to choose between leaving their prescription at home or not traveling out of state. Similarly, a state that allowed for medicinal marijuana could be faced with an influx of patients wishing to have the opportunity to have a medicinal marijuana prescription. The medicinal use of marijuana is not simply an issue that one state must address, but, rather, it must be addressed at the federal level to ensure uniformity and clarity.

B. What Hath Federalism Wrought?

Current federal laws forbid marijuana from being prescribed to patients by their physicians who believe that these patients would benefit from the medicinal uses of marijuana.¹⁷³ Numerous states have recognized not only the inherent unfairness of this restriction, but also the lack of objective reasons for the continued prohibition of a medically useful plant that grows naturally among the Earth's flora.¹⁷⁴ However, any treatment of the medicinal marijuana issue at the federal level has not produced results that could be considered positive to proponents of medicinal marijuana.¹⁷⁵ Similarly, treatment of the issue has failed to sufficiently provide any protection from prosecution under current

¹⁷¹ Holland, *supra* note 127, at 998 (noting that the "national perspective of the federal government requires it to focus on problems and solutions that transcend state lines").

¹⁷² James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 481 (1996); *see also* Holland, *supra* note 127, at 998 (discussing the idea of the states as laboratories that Justice Louis Brandeis had proffered).

¹⁷³ *See supra* notes 83-84.

¹⁷⁴ *See supra* notes 89-90 and accompanying text.

¹⁷⁵ *See supra* notes 101-08 and accompanying text.

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marijuana laws to patients who use medicinal marijuana.¹⁷⁶ As a result, patients are left to weigh the costs, the possibility of prosecution and prison sentences, with the benefits, the alleviation of the negative symptoms and the concurrent devastating effects resulting from their individual afflictions.¹⁷⁷ Similarly, state courts are relegated to finding new and unique methods of attempting to provide the necessary protection from prosecution to certain parties, including patients, physicians, manufacturers, and distributors.¹⁷⁸

The most recent discussion and ruling at the federal level on medicinal marijuana has been provided by the United States Supreme Court.¹⁷⁹ The case of *United States v. Oakland Cannabis Buyers' Cooperative* arose out of an initiative passed by the voters of California.¹⁸⁰ The initiative allowed physicians to prescribe marijuana to seriously ill patients.¹⁸¹ The United States Attorney's Office brought a civil suit in order to obtain an injunction that would shut down the medicinal marijuana distribution centers.¹⁸² The injunction was granted by the United States District Court for the Northern District of California.¹⁸³ This ruling was reversed by the Ninth Circuit Court of Appeals.¹⁸⁴ That court found that an implied exception for medical necessity existed in the language of federal drug laws.¹⁸⁵ However, the Supreme Court did not share the same interpretation.¹⁸⁶

¹⁷⁶ See *supra* notes 116-20 and accompanying text.

¹⁷⁷ GRINSPOON & BAKALAR, *supra* note 1, at 137.

¹⁷⁸ See *infra* notes 193, 196 and accompanying text.

¹⁷⁹ See *supra* notes 121-23 and accompanying text for further discussion.

¹⁸⁰ *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 488 (2001).

¹⁸¹ See *supra* note 89.

¹⁸² *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 488.

¹⁸³ *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1105 (N.D. Cal. 1998).

¹⁸⁴ *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1115 (9th Cir. 1999).

¹⁸⁵ *Id.* The judge granting the injunction was Charles Breyer, the younger brother of United States Supreme Court Justice Stephen Breyer. *Id.* at 1111.

¹⁸⁶ *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 498. The Court held that it was a mistake for the court of appeals to order the district court to consider "criteria for a medical-necessity exemption." *Id.* The criteria that the court of appeals had instructed the district court to consider was whether there was

a class of people with serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms; who will suffer serious harm if they are denied cannabis; and for whom there is no legal alternative to cannabis for the effective treatment of their medical conditions because they have tried other alternatives and have found that they are ineffective, or that they result in intolerable side effects.

The concurring opinion hinted that the Court's holding should be narrowly construed.¹⁸⁷ The Oakland Cannabis Cooperative was a marijuana distributor, which, according to the Court, foreclosed the medical necessity defense to the Cooperative.¹⁸⁸ However, because none of the Cooperative's patients were before the Court, Justice Stevens noted that the holding should not be construed so as to establish with any absolute certainty that the medical necessity defense would be foreclosed to those patients charged with possession of medicinal marijuana.¹⁸⁹

The controversy that has now arisen is that the state courts of California have explicitly recognized a medical necessity defense to the possession, cultivation, and, in some circumstances, the transportation of medicinal marijuana under California state law.¹⁹⁰ However, as the concurring opinion in *Oakland Cannabis Buyers' Cooperative* noted, the question of whether a similar defense exists under relevant federal law, in particular the Controlled Substances Act, has been left open.¹⁹¹ The court in *Clauer v. Castro*¹⁹² even went so far as to elucidate this distinction in the disposition of that case.¹⁹³

Oakland Cannabis Buyers' Coop., 190 F.3d at 1115. The United States Supreme Court, however, ruled that the Controlled Substances Act precluded the Court from taking into account such evidence. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 498.

¹⁸⁷ *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 498-99 (Stevens, J., concurring, joined by Souter and Ginsburg, JJ.).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Justice Stevens noted that "whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here." *Id.* at 499.

¹⁹⁰ *Clauer v. Castro*, 2001 WL 725391, at *3 (N.D. Cal. June 19, 2001); *People v. Mower*, 122 Cal. Rptr. 2d 326 (Cal. 2002) (providing an elaborate discussion of the statutory defense under California law); see also CAL. HEALTH & SAFETY CODE ANN. § 11362.5(b)(2)(d) (West Supp. 2002) which provides:

Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a 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.

CAL. HEALTH & SAFETY CODE ANN. § 11362.5(b)(2)(d).

¹⁹¹ See *supra* note 189.

¹⁹² 2001 WL 725391.

¹⁹³ *Clauer*, 2001 WL 725391, at *3 n.1. The *Clauer* court noted that "[t]he United States Supreme Court recently held that 'medical necessity is not a defense to manufacturing and distributing marijuana.' . . . The Court's decision, however, was based on the federal Controlled Substances Act . . . and does not preclude a medical marijuana defense to a state law violation." *Id.*

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From these decisions, it has become apparent that change is needed.¹⁹⁴ Even if a state court does recognize the medical necessity defense, such a defense fails to provide adequate protection because these defendants' liberties are then dependent upon erratic and unpredictable judicial interpretations of the defense.¹⁹⁵ Furthermore, because of the uncertainty that surrounds the medical necessity defense, patients, physicians, law enforcement, the courts, and the states are finding it necessary to resort to unique and even more uncertain means to protect those who wish to use medicinal marijuana.¹⁹⁶ From this uncertainty, it becomes readily apparent that, in order for certain and

¹⁹⁴ See *supra* notes 121, 193 and accompanying text.

¹⁹⁵ See Blum, *supra* note 117, at 938 (surveying state court cases in which the medical necessity defense has been asserted both successfully and unsuccessfully); see also *supra* notes 118-19 and accompanying text.

¹⁹⁶ See, e.g., Jack Kresnak, *Detroit Might Vote on Marijuana*, DETROIT FREE PRESS, Nov. 23, 2001, at B1. In Detroit, Michigan, a political activist group named the Detroit Medical Marijuana Initiative compiled enough signatures on a petition regarding medicinal marijuana to get a proposed ordinance onto a city ballot to be voted upon in the next election. *Id.* While this ordinance would not legalize medicinal marijuana, the ordinance would essentially make the medicinal use of marijuana the lowest priority for the Detroit Police Department. *Id.* The ordinance would accomplish this by barring the city from spending money to prosecute anyone possessing three or fewer mature plants or the dried equivalent for medicinal use. *Id.* A former Detroit police chief noted that allowing medicinal marijuana would be the humane thing to do. *Id.* Also, a member of the group responsible for the petition noted that "[w]e have to find new ways of approaching this thing as a means of eliminating this drug war which has been perpetrated on the community." *Id.*; see also Bill Delaney, *Maine Sheriff Proposes Using Seized Pot for Medicinal Purposes*, at <http://www.cnn.com/2000/HEALTH/alternative/05/12/medical.marijuana/index.html> (last visited Oct. 20, 2002). Mark Dion, sheriff of the largest county in Maine, proposed giving the marijuana seized from drug busts to those who need the marijuana for medicinal purposes. Delaney, *supra*. Sheriff Dion noted that "[t]he law is about making sure we follow the rules; justice seeks the exceptions. And for me, supporting medicinal marijuana was a journey to that exception." *Id.* However, not all law enforcement is on board with the idea, as the director of Maine's Drug Enforcement Agency noted that "[l]aw enforcement shouldn't be involved in the process of handing out any drug, that's not our job. That's not our business. Our business is to identify and arrest drug dealers." *Id.* Yet another innovative response to the restrictions imposed by federal law can be found in the city of San Francisco. See Francine Vida, *Going to Pot: San Francisco Voters to Decide If City Should Grow Marijuana*, at <http://abcnews.go.com/sections/us/dailynews/marijuana020731.html> (last visited Oct. 22, 2002). The Board of Supervisors in San Francisco has put forth an initiative to the voters that would allow the city itself to grow medicinal marijuana that would then be distributed to citizen patients. *Id.* Presently, in order to get medicinal marijuana, the patient is required to obtain a physician's permission and an identification card from the San Francisco Department of Health. *Id.* However, because marijuana remains illegal under federal law, the Drug Enforcement Agency ("DEA") has continued to crack down on the cannabis clubs that would normally provide the patients with their marijuana. *Id.* Indeed, the author of the initiative notes this distribution problem as the impetus for the initiative. *Id.* See also *supra* note 193.

lasting change to occur, it must be done both at the federal level and by giving it the force of a statutory enactment.¹⁹⁷ The result of such an enactment would be more definite, uniform, and equitable holdings.¹⁹⁸

However, medicinal marijuana has continued to be a hotly contested issue among the states, the federal government, and the citizenry of both.¹⁹⁹ Therefore, any proposal for change must take many interests into account.²⁰⁰ First of all, the federal government maintains an interest in protecting its citizens from the adverse effects of drugs that have been classified under Schedule I, as, by definition, drugs within this Schedule have been determined to have no currently accepted medical use.²⁰¹ While the protection of health is indeed an important governmental function, this interest is less persuasive to those afflicted with terminal diseases, such as AIDS or cancer, who wish to use medicinal marijuana to alleviate their suffering.²⁰² Furthermore, there are the interests and concerns of those who oppose the idea of allowing for medicinal marijuana.²⁰³ Some have voiced a concern that marijuana will act as a gateway drug to more harmful drugs.²⁰⁴ However, this "gateway theory" is largely unfounded since it attempts to use a statistical correlation between common and uncommon drugs to establish a causal

¹⁹⁷ See *infra* Part IV, for section 1 of the model statute.

¹⁹⁸ See *infra* Part IV, for section 1 of the model statute.

¹⁹⁹ See GRAY, *supra* note 161, at 171-74 (providing an analysis of the aftermath following the passage of California's Proposition 215 and Arizona's passage of Proposition 200).

²⁰⁰ JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 164 (2001) ("The intersection between philosophical statements, cultural sensibilities, and actual judicial practices are complex and multifaceted [T]he political order generally, and the law in particular, is influenced by culture even as it influences culture.").

²⁰¹ 21 U.S.C. § 812(b)(1)(B) (2000).

²⁰² MARIJUANA, MEDICINE & THE LAW, *supra* note 5, at 103. For example, the following quote is from the wife of a man who used medicinal marijuana for his cancer treatment:

After years of chemotherapy we knew the routine fairly well. Within 90 minutes, awake or asleep, my husband would begin his violent bouts of vomiting. I decided to stay with Harris through the night in case he needed my help. This time there was no vomiting. That night Harris experienced the first full night of restful sleep he had had following chemotherapy in nearly seven years of cancer and anti-cancer treatments We wondered why someone had not told us sooner and why my husband had gone through all those years of needless suffering.

Id.

²⁰³ See *supra* notes 93-99 and accompanying text.

²⁰⁴ See *supra* text accompanying note 93.

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explanation.²⁰⁵ Another concern that those opposed to medicinal marijuana have noted is that marijuana may have certain negative physiological effects on its users.²⁰⁶ While this is certainly a valid concern, the risks and benefits should be determined and assessed by individual patients and their physicians just as any other form of medicine would be evaluated prior to being prescribed.²⁰⁷

The critics of medicinal marijuana have also raised concerns regarding the costs to the environment, an increase in workplace accidents, and an increase in crime.²⁰⁸ However, these concerns can all be ameliorated by a complete statute which takes all of these concerns into account. Moreover, it should be remembered that allowing doctors to prescribe marijuana would not simply legalize all forms of marijuana. Rather, it would provide the necessary protection to those patients who would benefit from such an allowance and also give protection to those who would provide the medicinal marijuana. Not all of the interests involved are co-extensive, and, as a result, some interests must be given greater accord than others.²⁰⁹ The following proposal necessarily

²⁰⁵ ZIMMER & MORGAN, *supra* note 29, at 32-37. Studies have shown that out of one hundred marijuana users, only one would also be a regular user of cocaine. *Id.* at 34.; see also HANSON ET AL., *supra* note 32, at 387 (noting that factors such as personality and social environment are much more important factors for determining whether a person will move on to harder drugs).

²⁰⁶ See *supra* note 94 and accompanying text.

²⁰⁷ HANSON ET AL., *supra* note 32, at 368-69 (noting that the rise in marijuana potency is a major factor in the increase of emergency room visits attributed to marijuana). This concern regarding the potency of medicinal marijuana is addressed by section 5 of the model statute in the licensure requirements for manufacturers of medicinal marijuana. See *infra* Part IV, for section 5 of the model statute.

²⁰⁸ See *supra* notes 96-98 and accompanying text.

²⁰⁹ See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 116 (1993). In this book, the authors evaluate the idea of a "drug war" and conclude that

This wrongheaded emphasis has led us to evaluate the performance of the police and the criminal justice system by counting bodies—bodies arrested, convicted, confined, and executed—rather than by trying to determine whether our war efforts have made our streets safer and more civil. The current war on drugs has made cynics of much of the population, adding to them the great numbers of street-level police officers. On the streets, too many cops long ago stopped believing that their lives were on the line for anything that could be regarded as a viable grand strategy. Instead, most cops see drug and crime wars for what they are: politics, in all the pejorative senses of that word.

Id. at 115-16. Detroit Police Chief Jerry Oliver has expressed similar sentiments by noting that "[w]e will never arrest our way out of this problem." John Stossel, *Just Say No: Government's War on Drugs Fails*, at http://abcnews.go.com/onair/2020/stossel_drugs_

considers the interests of those afflicted with debilitating diseases and conditions to be those which are first and foremost among the competing interests.²¹⁰

The public perception of medicinal marijuana has been plagued by misunderstanding and unfortunate associations with certain subcultures.²¹¹ However, there are certain indications that this negative perception is changing.²¹² One of the most significant developments is that the Drug Enforcement Agency has recently given its approval for marijuana studies to be conducted at the University of California at San Diego.²¹³ Additionally, certain members of the United States Supreme Court have indicated that marijuana for medicinal purposes, with further study, may be feasible.²¹⁴ Certainly, the states which have made attempts to permit the use of medicinal marijuana under state law provide further indication that the issue will not fade.²¹⁵

What these examples show is that marijuana usage for medicinal purposes no longer appears to be an illusory idea. However, because of the conflicting interests involved and the difficulty that is created when

020730.html (last visited Oct. 8, 2002). Police Chief Oliver went on to note that “[c]learly, we’re losing the war on drugs in this country [and] it’s insanity to keep doing the same thing over and over again.” *Id.* Similarly, Superior Court Judge James Gray from Orange County, California, noted that “[w]hat we’re doing now has failed. In fact it’s hopeless. This is a failed system that we simply must change.” *Id.* Interestingly, Federal Bureau of Investigation Director Robert Mueller has determined that 400 agents will be redirected from drug cases to working to combat terrorism. Bradley Cole, *FBI Offices Taking Focus Off Fighting Drugs*, TIMES OF NORTHWEST IND. (VIDETTE EDITION), June 1, 2002, at A1.

²¹⁰ See *supra* note 29 and accompanying text (discussing diseases and conditions that debilitate individuals who would benefit from medicinal marijuana).

²¹¹ See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 82-83 (1963) (noting the negative association of marijuana with early jazz musicians); HANSON ET AL., *supra* note 32, at 368 (noting marijuana and its association with the beat generation of the 1950s and the hippie counterculture of the 1960s).

²¹² See Associated Press, *Medical Marijuana Popular at Polls* (noting the success of medicinal marijuana initiatives in the 1998 elections), available at <http://www.cnn.com/ALLPOLITICS/stories/1998/11/03/election/ballots/medical.marijuana/> (last visited Oct. 8, 2000). For an examination of how many countries in Europe are addressing the marijuana issue, see Gregory Katz, *Europe Loosens Its Pot Laws*, ROLLING STONE, July 4-11, 2002, at 55-56.

²¹³ See Associated Press, *supra* note 87. This article discusses the recent final approval by the DEA for the Center for Medicinal Cannabis Research to conduct studies regarding the medicinal usefulness of marijuana. *Id.* Asa Hutchinson, DEA Administrator, was quoted as saying that “[t]he question of whether marijuana has any legitimate medical purpose should be determined by sound science and medicine.” *Id.*; see also *supra* note 87.

²¹⁴ See *supra* notes 114, 189 and accompanying text.

²¹⁵ See *supra* note 90 and accompanying text.

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attempting to provide for clarity and uniformity, a complete and authoritative edict must come from the federal level.²¹⁶ While the states have attempted to find solutions on their own, federal law still trumps states' laws on this issue.²¹⁷ The following proposal endeavors to provide a complete, clear, and uniform statute that could be enacted at the federal level in order to accomplish all of these goals.

IV. CONTRIBUTION: A PROPOSED MODEL FEDERAL STATUTE FOR THE ALLOWANCE OF THE USE OF MARIJUANA FOR MEDICINAL PURPOSES

Because the medical necessity defense is often accompanied by dilemmas in burdens of proof and establishment of uniformity, it should be considered *de minimis* protection at best.²¹⁸ In order to provide uniform application of controlled substance laws, the first step must include a rescheduling of marijuana from its current position in Schedule I to Schedule III.²¹⁹ By doing so, rescheduling will allow for greater options in finding an agreeable solution to the quandary surrounding medicinal marijuana.

Rescheduling marijuana into Schedule III would initially allow for greater research into further uses of marijuana in the treatment of various illnesses. A rescheduling would also allow for establishing a licensing scheme for local growers to be able to provide the marijuana itself to doctors who would prescribe marijuana for their patients. Such a licensing scheme would benefit the state by raising revenue through taxes. Moreover, by establishing a preference for smaller operations, these small businesses and farms would remain viable in relation to the corporate farms and commercial drug manufacturers.²²⁰ While it could be asserted that individuals to whom medicinal marijuana is prescribed should be allowed to grow their own marijuana for personal use, such a

²¹⁶ See *supra* notes 199-210 and accompanying text.

²¹⁷ See *supra* notes 88-90, 157-69 and accompanying text.

²¹⁸ See *supra* notes 116-20 and accompanying text.

²¹⁹ See *supra* note 83 and accompanying text.

²²⁰ Reuters, *Drug Industry Most Profitable in U.S.*, at <http://cnn.com/2001/HEALTH/11/30/drug.profits.reut/index.html> (last visited Dec. 30, 2001). This article notes that "[p]rofits as a percent of revenues for the pharmaceutical industry have been more than four times the median rate for all Fortune 500 firms in the late 1990's." *Id.* Furthermore, "[t]he result is the average price of a prescription is now \$45, double what it was ten years ago." *Id.*; see also Ann Zimmerman & David Armstrong, *How Drug Makers Use Pharmacies To Push Pricey Pills*, WALL ST. J., May 1, 2002, at A1 (discussing how large drug companies pay pharmacies for calling and mailing letters to the pharmacy's customers in order to market more expensive prescription drugs).

situation would provide little assurance of good faith growers. Issues such as the quality of the marijuana and prevention of misuse by those without a physician's prescription would be difficult to control.²²¹ Moreover, most of those to whom marijuana would be prescribed would not be physically able to undertake such a task because of their particular illnesses. The current version of the Controlled Substances Act allows for a licensing scheme; however, it makes licensing contingent upon approval by the Attorney General.²²² Instead, such a plan should be established by the individual states. This would ensure local oversight of those who would be issued such licenses. While the states would be responsible for issuing these permits, uniform requirements and restrictions need to be established.

For growers to obtain a license, they need to show that the place where the growing occurs is secure against persons trying to obtain the marijuana illegally. Similarly, an accounting of the amount of marijuana grown and distributed must be provided to the relevant state authorities. Considerations of health and safety would similarly need to be addressed.²²³ An important aspect of this consideration would involve restrictions on fertilizers and pesticides.²²⁴ Also, the growers would be required to submit samples for testing to determine the proper content of the tetrahydrocannabinol.²²⁵ These provisions would provide physicians with the information to tailor the amount prescribed to the particular patient. Implementation of such a scheme would not only benefit the small businesses that would provide the marijuana but also those patients whose suffering could be alleviated by allowing physicians to prescribe marijuana. The following is a proposed model federal statute designed to address these issues:

²²¹ See Kurt Ullman, *Marijuana's Active Ingredient May Help Control Spasticity: Does Study Hold Promise for MS Patients?*, at <http://my.webmd.com/content/article/1728.55346> (last visited Oct. 8, 2002) (noting the difficulty of assuring the quality of illegally purchased marijuana); see also Delaney, *supra* note 196 (noting federal and state authorities' concern with adulteration by the cultivator in response to a proposal for distributing seized marijuana to medical patients).

²²² See 21 U.S.C. § 823 (2000).

²²³ See GRINSPOON & BAKALAR, *supra* note 1, at 137 (discussing the risks and benefits of marijuana when used as medicine); see also Ullman, *supra* note 221 (noting the difficulty of ascertaining the mixture of chemicals that could be found in illegally purchased marijuana).

²²⁴ See *supra* note 96 and accompanying text.

²²⁵ See *supra* note 30.

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Title: *The Use of Marijuana for Medicinal Purposes*

Section 1: Goals and Purposes

The United States of America does hereby recognize that some of its citizens, because of terminal or debilitating conditions and diseases, may benefit from the use of medicinal marijuana. Diseases and conditions benefiting from the use of medicinal marijuana include, but are not limited to, cancer and nausea caused by chemotherapy, AIDS and its resulting wasting syndrome, glaucoma, seizures, multiple sclerosis, depression, and Crohn's disease. The purpose of this statute is to enable citizens with such afflictions to obtain and use marijuana for medicinal purposes without the fear of harassment, arrest, or prosecution. Therefore, compassion for patients with such diseases and conditions necessarily determines that the goal of this statute is that such citizens shall obtain the benefits that marijuana provides in relation to an individual's particular affliction. Any subsequent interpretation of this statute shall abide by these goals and purposes.

Commentary

Section 1 is included as a preamble to the proposed statute. It broadly defines the goals and purposes behind the enactment of this statute for two reasons: (1) it provides a recognition of those patients who have suffered unnecessary pain and discomfort as a result of the illegal status of marijuana; and (2) the goals and purposes of the statute should aid in any subsequent legislative or judicial interpretation. Section 1 is modeled after California's Compassionate Use Act of 1996.²²⁶

Section 2: Definitions

As used in this statute:

(a) "Marijuana" refers to the whole cannabis plant and/or its derivatives, which includes, but is not limited to, the seeds, stems, stalks, flowers, and leaves. This definition is intended to cover all known, and heretofore undiscovered, species of the cannabis plant.²²⁷

²²⁶ CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2002).

²²⁷ See *supra* notes 28-30 (discussing other definitions of marijuana).

(b) “Medicinal Marijuana” means marijuana which has been grown, distributed, or prescribed legally and for medicinal purposes. This definition shall not cover marijuana which has been illegally grown, distributed, or obtained. Thus, statutes pertaining to illegal marijuana and their respective definitions shall apply and are, therefore, not altered by this statute.

(c) “Prescribing Physician” means one who has the authority under section 5(a) of this statute to prescribe marijuana to patients. This definition shall include medical doctors, dentists, psychiatrists, and any other such profession which, under current laws, are permitted to practice medicine and to issue forth prescriptions for drugs which are not available over the counter. The prescribing physician must include his signature upon any prescription for medicinal marijuana in order for such prescription to be valid.

(d) “Qualifying Patient” means the individual to whom a valid prescription is issued by a prescribing physician, as defined in this section.

(e) “Adequate Supply” means that which is not more than reasonably necessary to assure the uninterrupted availability of marijuana for the purpose of alleviating the symptoms or effects of a qualifying patient’s debilitating medical condition; provided that an “adequate supply” shall not exceed five mature marijuana plants, four immature marijuana plants, and two ounces of usable marijuana per each mature plant.²²⁸

(f) “Diseases” and “Conditions,” under this statute, shall be broadly interpreted to allow physicians the latitude necessary to make individual assessments as to which of their patients would benefit from being prescribed medicinal marijuana.

(g) “Valid Prescription” means one issued by a prescribing physician, as defined in this section, and subsequently filled by a pharmacist, as defined in this section. A valid prescription requires, and must include, the signatures of both the prescribing physician and of the pharmacist who fills such prescription.

²²⁸ HAW. REV. STAT. § 329-121 (Supp. 2001). The definition of “adequate supply” in this proposed statute mirrors that of the Hawaii statute; however, it allows a slight increase in amount. *Id.*; see also *supra* note 90.

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(h) "Valid Research" and "Research Facility" mean research conducted in facilities pursuant to and in accordance with section 7 of this statute.

(i) "Pharmacist" means one who is licensed to fill valid prescriptions that have been issued by a prescribing physician. Pharmacists so defined must include their signature upon a prescription that they have filled in order for the prescription to be valid.

(j) "Manufacture" means the production, preparation, propagation, compounding, or processing of marijuana for medicinal purposes. This definition is intended to encompass any packaging or repackaging of such substance or labeling or relabeling of its container.²²⁹

(k) "Manufacturer" means a person who manufactures, as defined by this section, marijuana to be used for medicinal purposes.²³⁰

(l) "Distributor" means a person involved in delivering marijuana to be used for medicinal purposes to a prescribing physician, pharmacist, or licensed research facility.

(m) "Importer" means one who brings medicinal marijuana, in all forms, into the United States for purposes of delivering the marijuana to a licensed research facility. Delivery of imported medicinal marijuana to any other entity shall be prohibited under this statute.

Commentary

Section 2 is an attempt at clearly defining the terms used in the statute. Some definitions have been broadly defined purposefully in order to provide those involved with the greatest protection under the law and in order to be in accordance with the goals and purposes established in section 1. In the past, courts have struggled with defining marijuana for enforcement purposes.²³¹ Thus, this definition section

²²⁹ See 21 U.S.C. § 802(15) (2000). This subsection is modeled after the definition of manufacture under the Controlled Substances Act. *Id.* § 801.

²³⁰ *Id.* § 802(14).

²³¹ See *State v. Navaro*, 26 P.2d 955, 957 (Utah 1933). The Utah Supreme Court held:

should be interpreted as to be one of inclusion, rather than exclusion, thereby providing maximum protection.

Section 3: Effect on Current Marijuana Laws

This statute is enacted in order to allow medicinal marijuana to be validly prescribed by a physician. Therefore, in order to establish this statute and to accomplish its goals, all federal and state laws regarding medicinal marijuana are hereby superseded. However, nothing in this section, nor in this statute, shall preempt valid laws regarding marijuana possessed, manufactured, distributed, or transported in contravention of this statute. Thus, marijuana which is not permitted by license or prescription under this statute remains subject to the heretofore established criminal laws.

Commentary

Access to medicinal marijuana should not be dependent or contingent upon the state in which a person resides. Therefore, this section establishes necessary uniformity among state and federal laws regarding medicinal marijuana. Uniformity is required for apprising all involved of their rights and obligations and of possible penalties for nonconformity to the statute. Moreover, uniformity is required to ensure the equal administration of the laws contained under this statute. This statute, however, is not intended to provide an across-the-board legalization of marijuana; thus, nonmedicinal marijuana remains subject to the established criminal laws of the states and federal government.

Section 4: Rescheduling

This section does hereby reschedule marijuana from Schedule I to Schedule III. This section is intended to recognize that marijuana, when used for medicinal purposes, meets the requirements enunciated under 21 U.S.C. § 812.²³² This section and statute establish that marijuana, when used

From our reading on the subject we have reached the conclusion that as used in our statute it means or refers to the preparation or product from the plant scientifically known as *cannabis sativa*, and is the same product or preparation described in the technical dictionaries and books as *cannabis*.

Id.

²³² See *supra* note 83 and accompanying text.

*medicinally, has a potential for abuse that is less than drugs in Schedules I and II, has a currently accepted medical use in the United States, and may lead to moderate or low physical dependence or high psychological dependence.*²³³ *Schedule III is a less restrictive schedule under federal law and thereby permits distribution to the qualifying patient by use of prescription.*²³⁴

Commentary

Section 4 is a necessary predicate for the allowance of marijuana for medicinal purposes. Under current law, marijuana is scheduled under Schedule I and, as such, cannot be legally prescribed for use.²³⁵ However, a transfer from Schedule I to Schedule III would, therefore, enable a qualifying physician to prescribe marijuana to patients for medicinal purposes.

Section 5: Licensing

In order to effectively provide medicinal marijuana to qualified patients and to oversee the administration of a workable distribution scheme, it is necessary to establish a set of guidelines which shall provide licenses to those involved in the various phases of providing for the use of medicinal marijuana. The following subsections identify those who are or are not required to obtain licensure under both federal and state law. While these categories of who must obtain licenses are mandatory with respect to the states, the actual procedural requirements for obtaining a license shall be determined by the individual state. The state may establish more stringent, but not less stringent, application procedures than those mandatory upon the federal government. Such state-

²³³ See *supra* note 83 and accompanying text.

²³⁴ See 21 U.S.C. § 829(b) (2000). This section provides:

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

Id.

²³⁵ See *supra* note 83 and accompanying text.

established guidelines must not contravene the goals and purposes of this statute as defined in section 1. The guidelines following shall be established by the federal government and shall be used as a model for the individual states:

(a) Those who do not require additional licensure under this statute:

(1) "Prescribing physicians" shall not be required to obtain federal or state licensure in order to prescribe marijuana for medicinal use. This provision does not, however, infringe upon the requirement that prescribing physicians must have a valid license to practice medicine in their respective states. Prescribing physicians also must recognize that they continue to be bound by the ethical canons and codes which apply to their profession. This subsection shall apply to those defined under section 2(c).

(2) "Pharmacists" shall not be required to obtain federal or state licensure in order to fill prescriptions issued by a prescribing physician for marijuana to be used for medicinal purposes. This provision does not, however, infringe on the requirement that they must have a valid license to fill prescriptions in the respective states. Pharmacists also must recognize that they continue to be bound by the ethical canons and codes which apply to their profession. This subsection shall apply to those defined under section 2(i).

(b) Those who shall require licensure under this statute:

(1) "Manufacturers," as defined by section 2(k) of this statute, shall be required to obtain a license by the qualifications enunciated under subsection (c) of this section. Furthermore, the Food and Drug Administration shall oversee and establish the necessary guidelines in providing for:

a. Scientific testing for quality of the medicinal marijuana;

b. Restrictions and guidelines pertaining to the use of pesticides by manufacturers;

c. *Restrictions and guidelines for proper labeling of the medicinal marijuana. Proper labels shall include: a measurement of the amount provided, the scientific name and species of plant contained therein, the measure of the active ingredient contained by the medicinal marijuana, any additional requirements that the FDA may require, and any additional requirements established by the individual state.*

(2) *"Distributors," as defined by section 2(l) of this statute, shall be required to obtain a license by the qualifications enunciated under subsection (c) of this section. Licensed distributors will thus be the sole means of conveyance for wholesale or premarket medicinal marijuana. Transportation of medicinal marijuana by a qualifying patient after a valid prescription has been filled is to be governed by the dictates of section 6 of this statute.*

(3) *"Importers," as defined by section 2(m) of this statute, shall be required to obtain a license by the qualifications enunciated under subsection (c) of this section. Scientific research on medicinal marijuana should not be inhibited; thus, importation of medicinal marijuana shall be allowed under this section for delivery to valid research facilities only. Delivery of imported medicinal marijuana to any other entity shall be prohibited under this statute. A license on importers is thus required in order to distinguish legal, medicinal marijuana from that marijuana which is illegally imported.*

(c) *Qualification for Licensure:*²³⁶

No license shall be issued under this section unless and until the applicant therefor has furnished proof satisfactory to [insert here proper official designation of state or federal officer or board] that:

²³⁶ See GERALD F. UELMEN & VICTOR G. HADDOX, *DRUG ABUSE AND THE LAW* 521 (1974). This text provides analysis of the Uniform Narcotic Drug Act that was proposed for states to ratify prior to passage of the Marijuana Tax Act of 1937. *Id.* This Act is no longer in effect since passage of the Controlled Substances Act. *Id.* However, the Uniform Narcotic Drug Act provided a model for licensing under section 5. *Id.*

(1) The applicant, individual, corporation, or association is equipped as to land, buildings, and paraphernalia properly to carry on the business that shall be properly described in their application.

(2) No license shall be granted to any individual, corporation, or association who has within five years been convicted of a willful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict.

(3) The [insert here proper official designation of state or federal officer or board] may suspend or revoke any license for cause.

(4) In issuing licenses, [insert here proper official designation of state or federal officer or board] shall, to the degree feasible, show a preference for both local and small businesses.

(5) In issuing licenses, [insert here proper official designation of state or federal officer or board] shall limit the number of licenses issued to a number which will allow for the proper administration and oversight of the particular licensing scheme by [insert here proper official designation of state or federal officer or board].

Commentary

Section 5(b), which establishes those who must obtain licenses, is to be mandatory on both the federal government and the states. However, section 5 further recognizes that the states must be overseers at the local level and, thus, may set licensing requirements in order to efficiently oversee the licensing process. The states shall be allowed to do this, even though the overall goal of the legislation is uniformity, because section 5 recognizes that the individual state may be subject to unique circumstances that make the administration of a licensing scheme more difficult in that state. Thus, section 5(c) provides requirements which are mandatory upon the federal government. The states, however, may enact more stringent guidelines as long as the goals and purposes established in section 1 of this statute are not violated. The states may not, however, enact guidelines which are less stringent.

Section 6: The Prescription of Marijuana for Medicinal Purposes

The following section is applicable only to the qualifying patient, as defined in section 2(d) of this statute:

(a) A valid prescription shall be adequate to prevent arrest and prosecution for possession of validly obtained and validly prescribed medicinal marijuana; thus, no license for a qualifying patient is necessary.

(b) A qualifying patient shall carry and make available the qualifying patient's valid prescription to a requesting officer of the state or federal government. A valid prescription must accompany the medicinal marijuana at all times until the amount prescribed and described within the valid prescription has been depleted. A valid prescription must similarly accompany the medicinal marijuana during the transferal of the medicinal marijuana from the pharmacist to the qualifying patient's home.

(c) The total amount of medicinal marijuana that any qualifying patient is allowed to maintain in his possession shall be an adequate supply, as defined in section 2(e).

(d) The penalty for a qualifying patient in possession of medicinal marijuana without a valid prescription is to be determined in accordance with section 8.

(e) Qualifying patients shall not make use of medicinal marijuana outside of their domicile or other approved areas. Nor shall qualifying patients operate any motor vehicle while under the influence of medicinal marijuana. Violations of this section shall be penalized in accordance with section 8.

Commentary

Section 6 is applicable only to the qualifying patient. It is necessary to make particular restrictions apply to those who will be utilizing the medicinal marijuana. The purpose of these restrictions is to ensure less confusion for police officers and other agents of the federal and state governments regarding what is legal, medicinal marijuana and what is illegal marijuana. An additional benefit of these restrictions is that qualifying patients should not receive any unreasonable harassment for possession of medicinal marijuana if they can present their valid prescription to government agents.

Section 7: Provision for Further Research and Research Facilities

In recognition of the fact that science and the respect for its findings are furthered by scientific investigation, further research and new research facilities shall not be inhibited by the laws of the United States. However, this recognition is not to diminish the necessary limits and procedures contained herein. Any further research and research facilities, currently operational and those established subsequently to enactment of this section, shall abide by the following guidelines:²³⁷

(a) Any research facility that desires to perform research on marijuana in order to establish new uses for medicinal marijuana or safer procedures for administering medicinal marijuana shall submit a "Proposal for Research."

(b) A Proposal for Research must, at a minimum, contain the following information:

(1) The location of the proposed research facility;

²³⁷ See CAL. HEALTH & SAFETY CODE § 11362.9 (West Supp. 2002) (establishing the California Marijuana Research Program). The guidelines in section 7 are modeled after this California statute.

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(2) *The names and qualifications of the proposed researchers who will be working on the proposed research project;*

(3) *A thorough description of the research that is to take place, including the thesis for the project and its applicability to medicinal marijuana; and*

(4) *A complete accounting of sources of funding for the project, which shall be updated as new sources of funding are provided.*

(c) *The Food and Drug Administration shall appoint a Qualification Committee to evaluate proposals submitted pursuant to section 7(a).*

(d) *The Qualifications Committee shall evaluate proposals based on the following criteria:*

(1) *The degree to which the proposed research would provide new information to the scientific community;*

(2) *The efficacy of the scientific methods chosen by the researchers involved;*

(3) *The amount of funding that the proposal carries, to the extent that the project will be able to maintain independent and objective evaluation of findings; and*

(4) *The qualifications of those to be involved in the research project.*

(e) *Any research proposal accepted by the Qualifications Committee shall also require periodic review and reapproval, at a minimum, every 365 days by the Committee in order to determine the continued efficacy of the project.*

Commentary

This section is intended to recognize the need for further research into the medicinal uses of marijuana. Research should continue in the hope that new and beneficial uses for marijuana as medicine may be discovered and subsequently utilized. In order to properly administer and oversee such research, the creation of a Qualifications Committee is necessary to prevent so-called “junk science.”

Section 8: Penalties

In recognition of the fact that the intent of this statute is not to provide an across-the-board legalization of marijuana, federal law, in accordance with the United States Sentencing Guidelines, and related state laws, shall not be preempted by this section for those in possession of marijuana without a valid license or valid prescription.²³⁸ However, the following special penalties shall apply to:

(a) Prescribing Physicians

(1) A prescribing physician who makes available medicinal marijuana to an individual for purposes other than legitimate medicinal use shall have his license to practice medicine withdrawn for a period of not less than one year. A mechanism to appeal such withdrawal and to apply for reinstatement shall be established by the state licensing board.

(2) However, no physician shall be punished under this statute for having recommended medicinal marijuana to a qualifying patient.²³⁹

(b) Valid Researchers and Research Facilities

Any violation of the prohibitions contained within this statute shall be cause for the Qualifications Committee to withdraw permission for such researchers or research facilities to continue their research. Thereafter, any acts performed by the researcher or research facility are to be judged under the relevant criminal laws.

(c) Qualifying Patients

Any qualifying patients found to be in violation of section 6(d) or section 6(e) of this statute shall be exposed to the following penalties:

²³⁸ See generally 21 U.S.C. §§ 841-849 (2000) (defining offenses and penalties under the Comprehensive Drug Abuse Prevention and Control Act).

²³⁹ See CAL. HEALTH & SAFETY CODE § 11362.5(c). This section provides that, "[n]otwithstanding 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." *Id.*

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(1) Loss of ability to have medicinal marijuana prescribed to them for no more than six months;

(2) A jail sentence of no more than one year, in addition to the relevant criminal penalties already provided under the United States Sentencing Guidelines;

(3) Fines not to exceed \$1,000.00; and

(4) Any individuals to whom this statute applies shall have their penalty increased twofold beyond the normal sentence given for the respective transgression for making available any amount of medicinal marijuana to any minor under the age of eighteen.

Commentary

Penalties under this statute are not intended to preempt any of the state or federal criminal laws respecting illegal marijuana. Marijuana defined as medicinal under section 2(b) is not defined as illegal and is, therefore, exempt from such criminal laws. Because of the fact that some marijuana is defined as illegal and some is defined as legal, those who benefit in any way from medicinal marijuana shall be held to higher standards and penalties for their transgressions of applicable laws.

VI. CONCLUSION

Marijuana used as medicine is not a new idea. Throughout history people have used marijuana for numerous purposes, including medicine. However, since 1937 marijuana has been forbidden for any purposes. The time for a change is significantly overdue. This Note attempts to establish the reasons why this change is overdue. Although the medical necessity defense may be workable in some contexts, it is merely an illusory panacea when it comes to medicinal marijuana. Such a defense provides inconsistent results to patients and fails to give any protection to physicians, manufacturers, and distributors. While Congress has not exceeded its authority in regulating medicinal marijuana, it is the manner in which it has chosen to regulate medicinal marijuana that is flawed. Those afflicted with debilitating diseases and conditions that would benefit from the healing properties of medicinal marijuana should no longer be made to suffer because of outmoded, inefficient, and discriminatory laws that prohibit a naturally occurring plant known as marijuana.

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