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California and Uncle Sam's Tug-of-War over Mary Jane is Really Harshing the Mellow

Daniel Mortensen

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California and Uncle Sam’s Tug-of-War Over Mary Jane is Really Harshing the Mellow

By Daniel Mortensen*

TABLE OF CONTENTS

I. ABSTRACT128

II. INTRODUCTION134

III. GENERAL HISTORICAL BACKGROUND.....137

A. The Drug Enforcement Administration.....138

B. The United States Supreme Court141

C. The Obama Administration and the United States Attorney General142

D. The California Attorney General143

IV. HISTORY OF MARIJUANA LAWS144

A. Federal Law144

B. California State Law144

V. MARIJUANA LAWS AND THEIR ENFORCEMENT IN CALIFORNIA ..146

A. Successes and Failures in California152

 1. Pros.....153

 2. Cons.....163

VI. LOOKING AHEAD & CONCLUSION.....175

I. ABSTRACT

Under an unequivocally clear federal law, marijuana is considered a Schedule I controlled substance--the most dangerous type of substance recognized by the federal government in the Controlled Substances Abuse Act of 1970 (CSA).¹ Under the CSA, possession of any marijuana is a misdemeanor and cultivation is a felony.² However, California and twelve other states have passed laws that legalize the use of marijuana for medical purposes.³ Additionally, the California Attorney General and the United States Attorney General (as the officers charged with the duty of enforcing state and federal laws, respectively) have decided to sidestep and gut the congressional mandate embodied in the CSA.⁴ With the adoption

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1. 21 U.S.C. § 801 (2006).

2. 21 U.S.C. § 841(a)-(b) (2006).

3. Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington make up those thirteen. ALASKA STAT. § 17.37.10 (2007); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006); COLO. REV. STAT. § 0-4-287 (2003); HAW. REV. STAT. § 329-121 (2008); ME. REV. STAT. ANN. tit. 22, § 2383 (2009); MICH. COMP. LAWS § 333.26421 (2008); MONT. CODE ANN. § 50-46-1 (2007); NEV. REV. STAT. § 453A.010 (2008); N.M. STAT. § 30-31C-1 (2007); OR. REV. STAT. § 475.300 (2007); R.I. GEN. LAWS § 1-21-28.6 (2006); VT. STAT. ANN. tit. 18, § 4471 (2003); WASH. REV. CODE § 69.51A.005 (2007).

4. See CALIFORNIA ATTORNEY GENERAL'S OFFICE, GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE, Aug. 2008, http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf (establishing the California Attorney General's official policy of marijuana enforcement in the state of California); see also UNITED STATES DEPARTMENT OF JUSTICE, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS ON INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA, Oct. 19, 2009, <http://blogs.usdoj.gov/blog/archives/192/>

of half-hearted and toothless enforcement policies, these officers have neglected their law enforcement responsibilities and ignored the findings of regulatory agencies pertaining to the dangers of marijuana.⁵ Furthermore, over the course of a few key rulings, the United States Supreme Court has explicitly stated that the federal government has the power to overturn the types of state statutes legalizing marijuana use for both medical and non-medical purposes.⁶ However, because the Court is not in the business of law enforcement, the *Gonzales v. Raich* opinion could not act as a mandate to compel more stringent enforcement of federal drug laws.⁷ Rather, the enforcement arm of the federal government exists in the executive branch in the form of federal prosecutors (in the United States Department of Justice) and executive agencies (like the Drug Enforcement Administration).⁸ The *Raich* opinion held that it is legally within the rights of those with legitimate enforcement authority to crack down on marijuana abusers and distributors, even if the abusers and distributors are in compliance with state laws; therefore, even though the Court does not have enforcement authority, its ruling demonstrates that these types of state laws are not recognized as being truly legitimate.⁹

With California state law directly contradicting federal law, California has suffered a steady barrage of federal raids on marijuana users, grow houses, and dispensaries since the Compassionate Use

(establishing the United States Attorney General's official policy of enforcement of federal marijuana laws in states with medical marijuana statutes).

5. See MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS, *supra* note 4 (demonstrating the federal government's half-hearted enforcement policy).

6. *Gonzales v. Raich*, 545 U.S. 1, 31 (2005).

7. *Id.*

8. See UNITED STATES DEPARTMENT OF JUSTICE, OUR MISSION STATEMENT, <http://www.justice.gov/02organizations/about.html> (articulating the Department of Justice's mission statement, in the broadest sense, as "enforc[ing] the law and defend[ing] the interests of the United States according to the law"); see also UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, DEA MISSION STATEMENT, <http://www.justice.gov/dea/agency/mission.htm> (stating that the "mission of the Drug Enforcement Administration (DEA) is to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States . . . those . . . involved in the growing, manufacture, or distribution of controlled substances.").

9. *Raich*, 545 U.S. at 31.

Act (CUA) was passed in 1996.¹⁰ This direct conflict of federal and state law raises serious issues of due process rights—with state governments telling their citizens one thing only to have those citizens suffer federal prosecutions later. As federal raids become more frequent in California and as economic conditions have become increasingly desperate both state-wide and nation-wide, a perfect storm is looming. The federal government must stop avoiding this issue and instead must concretely decide how it is going to deal with state laws that directly contradict their own. The federal government either needs to (1) attack state laws and ramp-up enforcement on marijuana use, possession, and sales; or (2) legalize the substance and then regulate the content, safety, and sale of marijuana as a consumable item. If legalized, the states and the federal government must work together in crafting better-defined laws and regulatory mechanisms so that the full scope of this substance's impact on American society can be successfully regulated, overseen, and enforced.

The marijuana topic is polarizing on three main fronts: political, social, and economic. Politically, this is an extremely touchy issue.¹¹

10. See Teri Figueroa, *Affidavits Offer Reasons for Pot Raids: Three North County Medical Marijuana Dispensaries Hit Last Month*, N. COUNTY TIMES, Oct. 10, 2009, available at http://www.nctimes.com/news/local/sdcounty/article_945665ec-c039-5e4f-b723-0e6685f3f22c.html (discussing and providing commentary on a few very recent raids on medical marijuana dispensaries in southern California); see also John Hoeffel, *All L.A. County Medical Pot Dispensaries Face Prosecution, District Attorney Says*, L.A. TIMES, Oct. 8, 2009, available at <http://latimesblogs.latimes.com/lanow/2009/10/cooley-says-pot-dispensaries-will-be-prosecuted.html> (reporting on the Los Angeles County District Attorney's recent shift in policy with respect to California medical marijuana); see also John Hoeffel, *Pot Dispensaries Sue L.A. over Moratorium: Medical Marijuana Collectives' Suit Comes as City Struggles to Write a New Ordinance*, L.A. TIMES, Sept. 23, 2009, at A1, available at <http://articles.latimes.com/2009/sep/23/local/me-pot-suit23> (describing the backlash from California medical marijuana users recently facing more hostility from law enforcement agencies); see also John Hoeffel, *Los Angeles County D.A. Prepares to Crack Down on Pot Outlets*, L.A. TIMES, Oct. 9, 2009, at A1, available at <http://articles.latimes.com/2009/oct/09/local/me-medical-marijuana9> (reiterating the Los Angeles County District Attorney's serious policy position of cracking down on medical marijuana).

11. See Patrick Stack, *Medical Marijuana: A History*, TIME MAG., Oct. 27, 2002, available at <http://www.time.com/time/covers/1101021104/history.html>

Some groups are morally opposed to the abuse of controlled substances: they view the legalization of marijuana as endorsing the behavior and legitimizing the substance, gutting our wholesome American society of its morals and sending improper signals to future generations.¹² Further complicating this issue are powerful and well-endowed interest groups falling on both sides of the “War-on-Drugs” debate, which constantly politicize the issue and stir up conflict.¹³ Socially, in terms of evolving societal norms in many pockets of American society, the use of marijuana is coming into the mainstream and is shedding its stigma as being an illicit drug in the traditional sense.¹⁴ Economically, both the state of California and our nation as a whole are in financial shambles.¹⁵ As such, state and federal governments are both actively searching for alternative

(tracing the history of the politics of marijuana from as early as 2737 B.C. up to modern American society).

12. See Mike Thompson, *Why Christians Should Oppose Use of Marijuana*, THE NEWS HERALD, Mar. 5, 2009, available at <http://www2.morganton.com/content/2009/mar/05/why-christians-should-oppose-use-marijuana/> (explaining that, regardless of the steam marijuana is gaining in the realm of mainstream American society, Christians still maintain that marijuana is a mind-controlling substance and thus is morally wrong and inconsistent with their beliefs).

13. See Kelley Vlahos, *Marijuana Lobby Grows in Sophistication*, FOXNEWS.COM, Jan. 28, 2005, <http://www.foxnews.com/story/0,2933,145534,00.html> (describing the political warfare and interest groups involved in the medical marijuana debate).

14. See Adam Tschorn, *Marijuana's New High Life*, L.A. TIMES, Aug. 30, 2009, available at <http://articles.latimes.com/2009/aug/30/image/ig-potculture30> (“Cannabis is moving into the mainstream, with fashion, films, TV and politicians acknowledging it’s here to stay.”).

15. See Stephen Moore, *California's 'Green Jobs' Experiment Isn't Going Well*, WALL ST. J., Jan. 31, 2009, at A9, available at <http://online.wsj.com/article/SB123336500319935517.html> (demonstrating California’s situation: “California’s unemployment rate hit 9.3% in December [2009], up from 4.9% in December 2006. There are now 1.5 million Californians out of work. The state has . . . lost more businesses than any state in recent years, and is facing a \$40 billion deficit.”); see also THE ECONOMIST, *The Stimulus That Should Have Been*, Dec. 1, 2009, http://www.economist.com/blogs/freexchange/2009/12/the_stimulus_that_should_have/; Kelly Evans, *Hard-Hit Families Finally Start Saving, Aggravating Nation's Economic Woes*, WALL ST. J., Jan. 6, 2009, available at <http://online.wsj.com/article/SB123120525879656021.html> (discussing our nation’s collective economic woes).

methods to generate revenue.¹⁶ Because marijuana presents itself as a convenient coffer, marijuana seems to be on the short-list of many state and federal lawmakers' as an untapped source of revenue.¹⁷

This issue is a political pundit's dream: it is a trifecta full of hand-wringing and speculating. Because a legalized market for marijuana is such a new and untested proposition in America, commentators are only able to offer sheer speculation. However, since these opinions are incapable of being properly tested, everyone is able to assume that his or her assertions are correct. Until reliable fact-finders are able to smoke out the truth from the myths, everyone is correct and nothing is accomplished. The cable news networks win, but Californians and Americans lose.

With political, social, and economic tensions, both state-wide and nation-wide, creating this perfect storm, the issue of marijuana in American society demands the careful and close attention of our lawmakers. Right now, although lines have been drawn in the sand, those lines are flimsy and subject to political, social, and economic pressures. In other words, the lines that have been drawn are really policy positions—positions that are often rooted in political convenience and often temporary in nature, being used as stall tactics

16. See Justin Ewers, *Schwarzenegger Hints at Raising Taxes*, U.S. NEWS & WORLD REP., May 15, 2008, <http://www.usnews.com/articles/news/politics/2008/05/15/schwarzenegger-hints-at-raising-taxes.html> (analyzing California's active search for new streams of revenue); see also Sudeep Reddy, *Bernanke Says Deficit Action is Key*, WALL ST. J., Feb. 26, 2010, at A2, available at http://online.wsj.com/article/SB10001424052748704479404575087290468927762.html?mod=WSJ_economy_LeftTopHighlights (discussing the federal government's approach for stabilizing the economy).

17. See Richard Gonzales, *Legitimacy of Pot Tax Revenue Remains Hazy*, N.P.R., Apr. 3, 2008, <http://www.npr.org/templates/story/story.php?storyId=89349791> (describing California tax collectors' recent discussions regarding the largely untapped and healthy revenue stream attached to marijuana sales); see also American Civil Liberties Union, *Members of Congress ask DEA to Stop Obstructing Medical Marijuana Research*, Sept. 18, 2007, <http://www.aclu.org/drug-law-reform/members-congress-ask-dea-stop-obstructing-medical-marijuana-research/> (demonstrating the trend that federal lawmakers, both Democrats and Republicans, are fairly open to the idea of bringing marijuana into the American mainstream for revenue-generating purposes).

more than anything else. These types of lines can easily be washed away by politically-convenient high tides.

As Californians and Americans wait in a perpetual holding pattern for a concrete resolution to this issue, marijuana-using Californians are left unprotected and exposed. Instead of having laws serve their most basic and traditional function of putting individuals in society on *notice* of prohibited activities and societal expectations, all of the recent statements and memorandums released by those with enforcement authority act merely as *policy* positions.¹⁸ In order to protect the due process rights of Californians, as well as all other Americans, and in order to put all relevant parties on fair notice, laws must be passed. Mere policy positions cannot carry the day.

The enforcement of our nation's established laws and the adjudication and administration of justice in our country should not be contingent upon who is in the White House, who is appointed to key positions in the Justice Department, or who is confirmed as Attorney General. As a bedrock of American constitutional tradition and American federal constitutional structure, the legislative branch is charged with lawmaking, while the executive branch is charged with the faithful enforcement or execution of those laws.¹⁹ However, with respect to the issue of state medical marijuana statutes, the federal executive branch has engaged in unofficial lawmaking, not law enforcement.²⁰ With the adoption of their "policies" of enforcement, President Obama and the United States Attorney General have commandeered the federal legislative process and have fundamentally changed the scope and spirit of the CSA.²¹

18. See GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE, *supra* note 4 (establishing the California Attorney General's official policy of marijuana enforcement in the state of California); see also MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS, *supra* note 4 (establishing the United States Attorney General's official policy of enforcement of federal marijuana laws in states with medical marijuana statutes).

19. See U.S. CONST. art. I, § 1 (granting Congress the legislative power to pass laws); see also U.S. CONST. art. II (charging the executive branch with, among other things, preserving and protecting the Constitution).

20. *Memorandum for Selected United States Attorneys*, *supra* note 4.

21. See *id.* (articulating the United States Attorney General's official policy of marijuana enforcement); see also Devlin Barrett, *Feds Issue New Medical Marijuana Policy*, ASSOCIATED PRESS, Oct. 19, 2009, available at

Flimsy policy positions are not enough; they are subject to political whims. Rather, truly legitimate approaches to enforcement should be bolstered by or rooted in some type of clearly defined and tangible law. A system of enforcement built upon foundations of policy rather than law is weak, unstable, ripe for corruption and inconsistency, and perpetually on the brink of collapse. In this comment, after establishing some general introductory and background information,²² I want to use the state of California (being the first state to adopt a medical marijuana statute in 1996) as a model to explore the following topics: (1) Who is regulating, monitoring, and enforcing the marijuana laws in California?²³ (2) How successful are they in their regulatory or administrative capacity?²⁴ (3) What are the ramifications of states passing laws that are in direct defiance of expressly mandated federal laws and regulations?²⁵ (4) What types of federal administrative authorities are invoked by states enacting these defiant laws?²⁶

II. INTRODUCTION

A recent wave of Drug Enforcement Administration (DEA) raids on grow-houses and “medical” marijuana dispensaries in more conservative California counties has brought into question the legitimacy of California’s Compassionate Use Act (CUA),²⁷ which legalizes marijuana for medical purposes for card-carrying

<http://abcnews.go.com/Politics/wireStory?id=8859286/> (establishing President Obama as being very supportive of the Attorney General’s official policy of enforcement).

22. See *infra* Parts II-IV.

23. See *infra* Part V.

24. See *infra* Part V.A.1.

25. See *infra* Part V.A.2.

26. See *generally infra* Part V.

27. See Figueroa, *supra* note 10; see also Hoeffel, *All L.A. County Medical Pot Dispensaries Face Prosecution, District Attorney Says*, *supra* note 10; see also Hoeffel, *Pot Dispensaries Sue L.A. over Moratorium: Medical Marijuana Collectives’ Suit Comes as City Struggles to Write a New Ordinance*, *supra* note 10; see also Hoeffel, *Los Angeles County D.A. Prepares to Crack Down on Pot Outlets*, *supra* note 10.

Californians.²⁸ This has triggered a robust debate nation-wide, state-wide, and within my own household.

As a California native growing up in a family of police officers, I have grown up with a law enforcement mentality, vocabulary, and outlook.²⁹ If I had to bet, I would say that I was probably the only ten-year-old on the block with a police scanner cemented to his nightstand, listening to his dad respond to calls during graveyard shifts. This mentality, however, seems to run counter to the always-evolving contemporary societal values both state-wide and nation-wide. Furthermore, it clashes with the mentalities of many of my peers and the youth of today. In fact, although my family is blue-collar and filled with police officers, many of the friends I have made over the years are, for lack of a more eloquent label, habitual pot-smoking stoners.³⁰

For the purpose of full disclosure, although I have had a foot in each world—or in each culture, I have never used marijuana. Therefore, anything written in this comment is not reflective of my own personal experiences with the substance. However, although I cannot give a firsthand account of the effects of the substance, I can

28. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006).

29. As a southern California native originally from San Diego County, I have spent my entire life in California. With a father who is a police officer, a mother who owns a small construction company, and two uncles who are retired captains from separate Los Angeles County law enforcement agencies, I am the youngest of three children. As a family, we have fairly simple and straightforward ambitions: we want to work hard, we want to be proud of that work, and we want that work to matter. We like to think of ourselves as fairly blue-collar, and we tend to approach issues from a “law-and-order” disposition.

30. In the summer of 2009, while I was clerking for the Los Angeles County District Attorney’s Long Beach office, I rented a room from my best friend from high school (we can call him “John Doe”), who was a student living in Long Beach. He is a card-carrying—medical marijuana user who received his medical marijuana card from his doctor for the purpose of easing his fictitious “insomnia.” Twice a month, Doe took his unemployment check to his “dispensary/collective” and returned with a jar of marijuana. While I was voluntarily working forty or more unpaid hours a week at the D.A.’s office, his pot-smoking, drinking, and lounging habits were being supplemented by the same state and county to which I was volunteering my services. The dynamics of the situation were laughably ironic!

provide firsthand observations of the substance's impact on the lives of my friends, family, and acquaintances.

Since I am not a user, what is it about marijuana that intrigues me? Am I morally or religiously opposed to the substance? I would not go that far, as I have close friends and family members who partake. Am I concerned about some of the damaging ramifications associated with frequent use, or habitual abuse, of the substance? That is probably closer to my level of objection to the drug, an objection I levy towards not only marijuana but also a number of substances or vices that are harmful when abused. However, for me personally, it boils down to an issue of respect. Social science studies, economic revenue projections, and medical health studies aside, I come from a family which respects and reveres the rule of law. I have a great respect for my police officer uncles, and an even greater respect for my parents. When my parents told me at a very young age, around the time of the standard "birds and bees" speech, to not drink or do drugs, I listened. As I matured and began forming my own opinions, I was able to see things a bit clearer. I have been able to observe and recognize that smoking a joint will probably not kill you. However, out of respect for what my dad does for a living, out of respect for my family's values, and as a matter of my own physical health and well-being, I have still chosen to abstain..

One of the reasons I choose to abstain is the primary reason I chose to take on the task of writing a comment on this topic—my dad. With pundits and commentators hammering out the "legalize-it" debate on a weekly basis, and with a long line of seemingly annual California initiatives on the ballot seeking to legalize marijuana,³¹ I started a discussion with my dad. Surprisingly, the man I have viewed as "Mr. Law-and-Order" for the last twenty years threw me a curve ball. During our discussion, my dad unequivocally announced his belief that marijuana should be legalized, saying he did not think

31. See Jessica Greene, *Pot Vote: Legalizing Marijuana Could be on 2010 Ballot*, NBC News – Bay Area, Dec. 15, 2009, <http://www.nbcbayarea.com/news/politics/Pot-Legalization-Headed-for-2010-Ballot-79304947.html> (discussing a proposition likely to hit the October 2010 California state ballot).

it was worth the headache or tax dollars spent on the endless enforcement efforts.³²

Although this was just one man's opinion, it was enough to get me thinking about this topic. His stance on legalizing it was so unexpected that my wheels began to churn over this topic, regarding both the tug-of-war between California and federal regulatory agencies and also the tensions between the marijuana enforcement approaches in the more conservative California counties (i.e., San Diego and Modoc) and the more liberal counties (i.e., Los Angeles, Santa Cruz, Alameda, and San Francisco).³³

This comment will address some of the most pressing social, political, and economic issues linked to how state and federal legislative bodies and executive regulatory agencies are currently dealing with the issue of marijuana in our society—whether it means treating it as an illegal substance, legalizing it for medical purposes, or legalizing it for a wider variety of purposes. I will analyze the current climate surrounding state-legalized medical marijuana statutes, using the situation in California as a test group for the rest of the country. Taking what we've learned from California, how should the rest of the nation move forward?

III. GENERAL HISTORICAL BACKGROUND

Currently, there are thirteen states with medical marijuana statutes, all of which vary.³⁴ However, these state statutes legalizing

32. Essentially, he asserted what I dubbed as a "Bigger-Fish-To-Fry" argument; from his experience at the ground level of law enforcement, he feels there are far more serious criminals out there, and that those criminals should be the ones that financially-beleaguered California cities and counties should spend their scarce enforcement resources on.

33. See Voter Contact Services, *California: Voter File*, <http://bbs.vcsnet.com/State.php?CA+County+DA/> (presenting a compilation of California voting habits and political demographics broken down by county).

34. See *supra* note 3. Generally, these states' respective medical marijuana laws are targeted at or have the principle purpose of easing the pain of suffering patients. Furthermore, all of the state statutes delineate what each state considers to be "approved conditions" deserving of medical usage, with most statutory schemes detailing what is considered to be legal amounts to possess for medical purposes. While the states vary slightly and differ on certain line-drawing types of issues (i.e., what a particular state considers to be an approved condition, how much is allowed in terms of possession, and what the mechanisms for control and enforcement are),

the use of marijuana for medical purposes stand in direct contradiction of federal law.³⁵ Because of the direct defiance shown by those states rebuking federal law, political, social, and economic tensions are mounting, and something has to give. As it currently stands, Californians (and citizens of other states with medical-use statutes) who utilize marijuana for medical purposes are acting in violation of federal law. These Americans presently violating federal law are in limbo and are waiting in a kind of calm-before-the-storm of eventual federal action. Their respective states have said one thing, the counties in those states have said something else, the federal executive branch and its arm of enforcement agencies have added yet another contradiction and wrinkle, and the federal judiciary has also let its own distinctive voice be heard. In other words, all the appropriate parties or authorized powers have chimed in and drawn their respective lines in the sand. Now, it is just a matter of waiting for some legitimate form of action to follow up on these blankly-issued policy statements and all of this politically-convenient, hollow saber rattling.

The following briefly maps out the crucial voices who have spoken on this subject: (1) the United States Drug Enforcement Administration, (2) the United States Supreme Court, (3) the Obama Administration and the United States Attorney General, and (4) the California attorney general.

A. The Drug Enforcement Administration

The DEA continues to cling to the true spirit of the CSA, holding that the CSA was enacted into law by the United States Congress as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 in order to combat the use and possession of dangerous substances.³⁶ Title II of this Act was the CSA.³⁷ The CSA is the

the spirit of the thirteen respective statutes remains the same. Furthermore, there are two states, Arizona and Maryland, that have statutes favoring medical marijuana usage, even though they do not fully legalize the medical use of marijuana. ARIZ. REV. STAT. ANN. § 13-3401 (2009); MD. CODE ANN., CRIM. LAW § 5-601 (West 2008).

35. 21 U.S.C. § 801 (2006).

36. 21 U.S.C. § 801 (2006).

37. *Id.*

United States' current federal drug policy under which the manufacture, use, possession, distribution, and importation of certain substances is regulated.³⁸ Under the CSA's regulatory scheme, five "schedules" were created—with each schedule defined as having certain qualities and characteristics and with each schedule subject to different degrees of punishment.³⁹ All substances regulated in some manner under the federal scheme are slotted under one of the five schedules of the CSA.⁴⁰

38. 21 U.S.C. § 812 (2006).

39. *Id.* For example, Schedule I substances are considered the most dangerous, so Schedule I substance violations trigger the harshest punishments. *Id.*

40. *Id.* How does the scheduling of substances work? The CSA places all substances that are in some manner regulated under existing federal law into one of five schedules. *Id.* This placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability. *Id.* The CSA provides a mechanism for substances to be controlled—added to a schedule, decontrolled—removed from control, and rescheduled—transferred from one schedule to another. *Id.* Proceedings to add, delete, or change the previous schedule of a drug or other substance may be initiated by the DEA, the Department of Health and Human Services (HHS), or by petition from any interested person. *See* UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, CHAPTER 1: THE CONTROLLED SUBSTANCES ACT, <http://www.justice.gov/dea/pubs/abuse/1-csa.htm> (describing the scheduling process). When a petition is received by the DEA, the agency begins its own investigation of the drug. *Id.* The DEA also may begin an investigation of a drug at any time based upon information received from law enforcement laboratories, state and local law enforcement and regulatory agencies, or other sources of information. *Id.* Once the DEA has collected the necessary data, the DEA Administrator, by authority of the United States Attorney General, requests from HHS a scientific and medical evaluation and recommendation as to whether the drug or other substance should be controlled or removed from control. *Id.* HHS solicits information from the Commissioner of the Food and Drug Administration (FDA), evaluations and recommendations from the National Institute on Drug Abuse, and on occasion from the scientific and medical community at large. *Id.* The manner in which a substance is classified is often a source of great public debate and unrest. *See* Aaron Gibson & David Joranson, *Is the DEA's New "Prescription Series" Regulation Balanced?*, 22 JOURNAL OF PAIN & PALLIATIVE CARE PHARMACOTHERAPY 218 (2008), available at http://www.painpolicy.wisc.edu/DEA/Rx_Series_Adoption.pdf (discussing the frequent critiques commonly launched at the logic behind scheduling and the inconsistency of outcomes in the scheduling of substances under the CSA). Since there is an element of discretion involved, and because the decisions can often seem arbitrary or politicized, the slotting of substances is a hotly contested and heavily scrutinized event. *Id.* In other words, both the process of specifically classifying or scheduling any substance and also the larger concept of the CSA's

Two federal agencies, the DEA and the Food and Drug Administration (FDA), are the primary engines that determine which substances are added or removed from the CSA's various schedules.⁴¹ Although the DEA has reluctantly fallen into lock-step with the enforcement policies of United States Attorney General Eric Holder and the Obama Administration,⁴² the DEA insists that marijuana is still considered a Schedule I substance⁴³ as defined by the DEA and FDA under the CSA.⁴⁴ As such, even though the DEA is currently falling in line with the quasi-toothless enforcement approaches articulated by Obama and the Justice Department, the DEA remains committed to the core purpose of the CSA and reminds the public that marijuana is still considered a Schedule I substance.⁴⁵ Even though policies of enforcing the CSA are being adopted that run counter to the CSA's mandate, the DEA alleges that the CSA is

core purpose as a regulatory and enforcement mechanism are often sources of huge controversy, triggering constant debate as to the effectiveness of the CSA as both a policy and set of procedures. *Id.* With the CSA standing as the poster child or the face of the federal government's War-on-Drugs, a war many Americans feel is being mismanaged or is altogether unnecessary, the CSA is usually under a political microscope and subjected to constant scrutiny. *Id.*

41. 21 U.S.C. § 812 (2006).

42. *See infra* Part III.C.

43. 21 U.S.C. § 812 (2006).

44. *See* UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, MARIJUANA, <http://www.justice.gov/dea/concern/marijuana.html> (reaffirming that the DEA still considers marijuana to be a Schedule I substance for purposes of the CSA); *see also* UNITED STATES FOOD AND DRUG ADMINISTRATION, SCHEDULING OF DRUGS UNDER THE CONTROLLED SUBSTANCE ACT, <http://www.fda.gov/NewsEvents/Testimony/ucm115087.htm> (reaffirming that the FDA still considers marijuana to be a Schedule I substance for CSA purposes). The DEA and FDA describe Schedule I substances as being substances with high potentials for abuse, with no currently accepted medical use for treatment in the United States, and with a lack of accepted safety for use of the drug or other substances under medical supervision. *See* MARIJUANA, *supra* note 44; *see also* SCHEDULING OF DRUGS UNDER THE CONTROLLED SUBSTANCE ACT, *supra* note 44. Some examples of other Schedule I substances, in addition to marijuana, are heroin, LSD, and methaqualone. *See* CHAPTER 1: THE CONTROLLED SUBSTANCES ACT, *supra*, note 40 (listing other Schedule I substances).

45. *See* CHAPTER 1: THE CONTROLLED SUBSTANCES ACT, *supra*, note 40 (reaffirming that, even though they are adopting an enforcement policy to the contrary, the DEA still considers marijuana to be a Schedule I substance for CSA purposes).

as robust as ever.⁴⁶ Saying you stand for one thing while actively doing the opposite is either political lip-service at its finest or an impressively disillusioned example of cognitive dissidence.

B. The United States Supreme Court

In 2005, in the case of *Gonzales v. Raich*, the Court held that the federal government has the power to overturn laws passed at the state level legalizing marijuana use and possession, even if those laws are narrowly-tailored for medical purposes only.⁴⁷ The Court reasoned that marijuana as a substance was still considered illegal and dangerous in the eyes of the federal government (noting that it remained slotted as a Schedule I substance under the CSA), and as such, it was within the purview of the federal government's authority to disregard any state law saying otherwise.⁴⁸ Although the Court's ruling did not mandate that the federal government had to overturn all those state laws legalizing marijuana, it unequivocally gave the federal government the power to overturn those state laws (whether the state statutes were for medical purposes or not).⁴⁹

46. *Id.*

47. *Raich*, 545 U.S. at 33 (reversing a Ninth Circuit opinion in a case involving two Californians using and cultivating marijuana for medical purposes under the language of California's CUA, where the Court, in a 6-to-3 opinion, found that Congress has the authority to enforce its prohibition against marijuana—even when facing laws allowing for state-approved, homegrown, non-commercial marijuana used *only* for medicinal purposes on a physician's recommendation, like California's).

48. *Id.* at 14-15.

49. *Id.* at 33; see Charles Lane, *A Defeat for Users of Medical Marijuana: State Laws No Defense, Supreme Court Rules*, WASHINGTON POST, June 7, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/06/AR2005060600564.html> (echoing the Court's sentiment that compassionate allowance statutes like California's are vulnerable and violate federal law); see also Bill Mears, *Supreme Court Allows Prosecution of Medical Marijuana*, CNN.COM, June 7, 2005, <http://www.cnn.com/2005/LAW/06/06/Court.medical.marijuana/index.html> (highlighting the Court's inability to enforce or carry-out its rulings). Essentially, the Court's ruling in *Gonzales v. Raich* can be seen as a "rainy day" tool for the federal government to put in its marijuana enforcement tool-kit—a tool-kit used for enforcing federal marijuana laws and combating marijuana possession, sale, and use. Although the Court did not order the federal government to ramp up its enforcement efforts, it provided them with this tool to use, at its discretion, for

C. The Obama Administration and the United States Attorney General

Diverging sharply with the Bush Administration's approach to enforcing federal marijuana laws regardless of the laws passed by states, the Obama Administration has recently announced a new approach to federal marijuana law enforcement efforts.⁵⁰ The Obama Administration has essentially instructed the DEA, federal executive regulatory agencies, and other applicable Justice Department agencies and officials in charge of enforcing the CSA that (1) federal laws will be strictly enforced in states which have not passed medical-use statutes, and (2) in states which have passed medically based statutes, the federal government will only go after those offenders who are violating their respective state's statute.⁵¹ Taking the Obama Administration's lead, United States Attorney General Eric Holder has fallen into lockstep, reflected by his office's internally released memo, and has stated that his office's approach to

future regulatory and enforcement efforts—or, in other words, to use on a rainy day. If or when this presidential administration or the next wave of executive branch officials and agencies decide they want to turn state medical marijuana laws on their respective heads, this holding legitimizes future federal enforcement efforts, giving those federal authorities a silver bullet that can be used against state statutes legalizing marijuana for medical and non-medical purposes.

50. Barrett, *supra* note 21. In a three-page memorandum generated and released by the United States Attorney General's Office on October 19, 2009, the Attorney General's office set forth guidelines for prosecuting and investigating cases involving marijuana use in states, like California, with medical marijuana statutes. See MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS, *supra* note 4 (establishing the United States Attorney General's official policy of enforcement of federal marijuana laws in states with medical marijuana statutes). Issued to all the United States Attorney General's offices across the nation, this memo instructs prosecutors that it is not a good use of their time to arrest people who use or provide medical marijuana in strict compliance with state laws in states with medical marijuana statutes. *Id.* The guidelines issued in this memo do, however, make it clear that DEA agents and federal prosecutors will still pursue people whose marijuana distribution or consumption goes beyond what is permitted under their respective state law, and those who use medical marijuana as a cover for other crimes. *Id.* The new policy is a significant departure from the Bush Administration's, which continued to enforce federal anti-pot laws regardless of state codes. Barrett, *supra* note 21.

51. MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS, *supra* note 4.

enforcement will essentially mirror the above-mentioned Obama approach.⁵²

D. The California Attorney General

In August 2008, California's ultimate law enforcement authority, California Attorney General Edmund Gerald (Jerry) Brown, released his office's "*Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*."⁵³ In this memorandum, Attorney General Brown takes the heat off of California medical marijuana users.⁵⁴ Although his memo is not law, it articulates the California attorney general's approach to how the law will be enforced by his office.⁵⁵ The memo asserts that the spirit of California's CUA was to allow for marijuana to be used in legitimate instances of medical need.⁵⁶ Guided by the spirit of the law, the memo asserts that Californians who follow the stipulations attached to the California medical marijuana law will not face prosecution by the State.⁵⁷ Exemplifying the confusion generated by California's medical marijuana law, the California attorney general office's memo not only acts as a guide for marijuana-using Californians, but also plays the dual-role of a kind of policy guide or model set of rules for

52. Although the statements released by the Obama Administration and the memo released by the United States Attorney General's Office do not hold the same strength, weight, and endurance as official laws, their statements essentially act as a collective articulation of the federal government's policy or official stance on enforcing the federal marijuana law against offenders in states with permissive medical marijuana use statutes. *Id.* This methodology asserts a "prioritization approach" which recognizes the federal government's limited resources and allocates those scarce resources to enforcing against the most egregious offenders first. *Id.*

53. See GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE, *supra* note 4 (establishing the California Attorney General's official policy of marijuana enforcement in the state of California).

54. See *id.* (providing a safe harbor for Californians who are not in violation of California's CUA).

55. *Id.*

56. *Id.*

57. *Id.*

local enforcement authorities to use in crafting policies and strategies for street-level enforcement.⁵⁸

IV. HISTORY OF MARIJUANA LAWS

A. Federal Law

The governing federal law related to the use, sale, or possession of marijuana is found in the CSA.⁵⁹ Enacted by Congress in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, the CSA enabled legislation giving enforcement authority to the DEA and regulatory authority to the FDA.⁶⁰ Establishing a hierarchy of schedules, these executive agencies are charged with both the scheduling and enforcement of the CSA, with enforcement efforts to be supplemented by the United States Justice Department and the United States Attorney General.⁶¹

As mentioned above, marijuana is currently slotted as a Schedule I substance – the most dangerous type of substance recognized by Congress under the CSA.⁶² Under the CSA, possession of marijuana is a misdemeanor and cultivation is a felony, and there are no exceptions carved out for the use, possession, or sale of Schedule I substances for medical purposes under the federal scheme.⁶³

B. California State Law

The present state of California's medical marijuana statute has come to fruition through two main developments: (1) the passage of Proposition 215 (Prop. 215), the Compassionate Use Act of 1996,⁶⁴

58. *Id.*

59. 21 U.S.C. § 801 (2006).

60. 21 U.S.C. § 801 (2006).

61. 21 U.S.C. §§ 811-12 (2006).

62. 21 U.S.C. § 812 (2006).

63. 21 U.S.C. § 841(a)-(b) (2006).

64. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006). Proposition 215 (Prop. 215), the California Compassionate Use Act, was enacted by the voters and took effect on November 6, 1996. *Id.* The law removes criminal penalties for personal use, possession, and cultivation of marijuana for medical purposes by

and (2) the passage of California State Senate Bill 420 of 2003.⁶⁵ Together, these are commonly known as the CUA.

California's Prop. 215 was a trailblazer for state medical marijuana statutes, the first officially legislated and instituted one in the nation.⁶⁶ In 2003, as an addendum to Prop. 215, California State Senate Bill 420 was seen as a compromise between patients' advocates and law enforcement, clarifying some of the vague and ambiguous language of the CUA.⁶⁷

patients (and their designated "primary caregivers") that have a physician's recommendation/approval. *Id.*

65. CAL. HEALTH & SAFETY CODE § 11362.7-.83 (West 2006). Senate Bill 420 went into effect on January 1, 2004. *Id.* This law broadens the scope of Prop. 215 to include the allowance of transportation and the protection from punishment of other offenses in certain circumstances, allows patients to form medical cultivation "collectives" or "cooperatives," and sets limits on how much marijuana patients may have. *Id.* The law also establishes a statewide, voluntary identification card system, which is supposed to be furnished by county health departments. *Id.* Patients with state identification cards are supposed to be protected from arrest if they follow the specified quantity limits. *Id.*

66. See Jessie McKinley, *Push to Legalize Marijuana Gains Ground in California*, N.Y. TIMES, Oct. 27, 2009, at A18, available at <http://www.nytimes.com/2009/10/28/us/28pot.html> (illustrating that there are many interest groups and advocates within the state of California pushing hard for marijuana to be fully legalized for both medical and non-medical purposes).

67. CAL. HEALTH & SAFETY CODE § 11362.7-.83 (West 2006). Senate Bill 420 includes controversial state guidelines regarding the quantity of how much marijuana patients may grow and possess without being subject to arrest. *Id.* Further, it requires counties to implement voluntary patient identification card systems and requires counties to install other mechanisms to protect patients and their caregivers from arrest. *Id.* These hotly disputed guidelines, opposed by patients' advocates for being too restrictive, allow patients up to six mature or twelve immature plants and up to one-half pound of dried, processed marijuana. *Id.* Patient advocates had pushed for more liberal guidelines, but the final guidelines were decided in a last-minute legislative deal between then-California Attorney General Lockyer and California State Senator Vasconcellos. See Scott Imler, *Medical Marijuana in California: A History*, L.A. TIMES, Mar. 6, 2009, <http://www.latimes.com/features/health/la-oe-w-gutwillig-imler6-2009mar06,0,2951626.story> (discussing the evolution and negotiations that took place prior to the passage of the 2003 amendment to the CUA).

V. MARIJUANA LAWS AND THEIR ENFORCEMENT IN CALIFORNIA

Since the CUA was passed in 1996 and further amended in 2003, how is the state of California regulating or enforcing the parameters delineated in this legislation? The short answer is that, for all practical purposes, California is not. Instead, the mechanisms for regulating and enforcing the CUA are extremely informal and not clearly defined.

The only substantive ground-level regulation comes from the California Department of Public Health (DPH).⁶⁸ Accordingly, the overall administrative regulatory methodology for overseeing the use of medical marijuana in California can be described as follows: it is a loose amalgamation of (1) the California DPH keeping track of and registering medical users,⁶⁹ (2) the unchecked discretion of California state doctors,⁷⁰ and (3) self-regulation by users choosing the type they buy based upon their own personal tastes, their own experiences with particular types and dispensaries, and from word-of-mouth in the pot-smoking community.⁷¹

68. California Department of Public Health, *Medical Marijuana Program*, <http://www.cdph.ca.gov/programs/mmp/Pages/Medical%20Marijuana%20Program.aspx> (last visited Mar. 20, 2010).

69. *Id.* The Medical Marijuana Program (MMP) was established by the California Department of Public Health as a way of providing a voluntary medical marijuana identification card and registry program for qualified patients and their caregivers. *Id.* The web-based registry system allows law enforcement and the public to verify the validity of qualified patient or caregiver's cards with respect to who is legitimately authorized to possess, grow, transport and/or use medical marijuana in California. *Id.* To facilitate the verification of authorized cardholders, the verification database is available on the Internet at www.calmmmp.ca.gov. *Id.* The MMP is administered through a patient's county of residence. *Id.* Upon obtaining a recommendation from their physician for use of medicinal marijuana, patients and their primary caregivers may apply for and be issued a Medical Marijuana Identification Card (MMC). *Id.*

70. See American Medical Association, *Medical Ethics*, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics.shtml> (last visited Mar. 20, 2010) (providing a cursory overview of the role the American Medical Association plays in establishing a code of ethical conduct and setting standards for medical healthcare professionals).

71. Interview with John Doe, Medical Marijuana Patient and Card-Carrier, in Long Beach, Cal. (Nov. 25, 2009). In an interview with a close friend, I was informed that the single greatest and most effective regulator impacting patients' purchases of marijuana at local co-operatives and dispensaries is essentially the

With regard to the California DPH, the administrative mechanisms currently in place to regulate the CUA's legalized medical marijuana program are encapsulated by the DPH's Medical Marijuana Program (MMP).⁷² However, the state of California only goes half-way with respect to the full scope of traditional state administrative functions, responsibilities, and roles (often including heavy oversight and regulatory roles). While the California DPH registers and keeps track of medical users, it does not check for quality control or even attempt to regulate nutritional integrity or consistency of the actual substance.⁷³ In other words, nobody in California is performing the function traditionally performed at the federal level by the FDA. Whereas the FDA monitors substances that are available for consumption—checking them for safety, sanctioning violators, and installing informational conduits to warn the public of dangerous substances—there exists no analogous safety net for California consumers of medical marijuana.⁷⁴ Short of fulfilling the role of an abacus keeping track of those qualifying as patients, the DPH is an otherwise toothless and absent regulatory presence.

Second, with respect to the role doctors play in the issuance of medical marijuana in California, the CUA both draws a clear distinction between doctors writing formal prescriptions and merely giving “recommendations,” and places a substantial amount of trust and confidence in the discretion and judgment of the state's medical

free-market capitalist system—customer satisfaction (or dissatisfaction) with past experiences. *Id.*

72. *Medical Marijuana Program*, *supra* note 68.

73. *See id.* (describing the goals and scope of the DPH's regulatory approach with its MMP).

74. *Id.* A system or a structure has been established in order to issue cards, register patients, and collect applications fees. *Id.* However, considering that the CUA is slotted under the Health & Safety Code of California's legislative scheme, the DPH's regulatory and administrative approach seems to ignore or overlook the most paramount health and safety concerns associated with the use of marijuana—is the actual substance being sold safe for consumption, and what are the ingredients or substances used in the cultivation of the plant? Recognizing the obvious fact that marijuana is far from a homogenous product and comes in a variety of strengths, potencies, ingredients, and strands, I feel there are many issues the state of California and the DPH are either not considering or has chosen to ignore, burying their heads in the sand.

professionals.⁷⁵ As a practical matter, due to the dearth of details and specifics in the language of the CUA, doctors' discretionary recommendations have essentially been treated as gospel and have been left unchecked and unchallenged by any type of regulatory authority.⁷⁶ For example, while over 1,500 California physicians have recommended patients be treated with medical marijuana under the CUA, none have been federally prosecuted for doing so.⁷⁷ This

75. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006); *Medical Marijuana Program*, *supra* note 68.

76. See California NORML, *Medical Cannabis Practitioners*, <http://www.canorml.org/prop/215physicians.html> (last visited Mar. 20, 2010) (demonstrating the scope of the unchallenged discretion many California doctors have experienced under the CUA's legislative scheme).

77. See *id.*; see also Safe Access Now, *California Referring Physicians*, <http://www.safeaccessnow.net/doctors.htm> (last visited Mar. 20, 2010) (echoing the findings of California NORML that California doctors have been left essentially unchallenged by the federal government in issuing their recommendations for users of medical marijuana). While the fact that 1,500 physicians have recommended marijuana without being federally prosecuted might easily lead to the conclusion that doctors are simply acting within their authority under the CUA and thus none are deserving of prosecution for improper behavior, it might just as easily lead to the conclusion that the discretion of doctors in the issuance of medical marijuana cards is being left unchecked and unregulated. *Id.* The facts on the ground, and the rampant ease with which medical recommendations are obtained, seem to support the latter, as the actions of certain doctors certainly do not seem focused on the patient's health. See *How Easy Is It to Get a Medical Marijuana Card?*, NBC San Diego (May 22, 2009), available at http://www.nbcsandiego.com/news/health/How_Easy_Is_It_To_Get_A_Medical_Marijuana_Card_San_Diego.html (demonstrating just how easy it is for nearly anybody to get a marijuana card if they desire). The facts on the ground reveal two things: (1) what is considered to be a true medical necessity giving rise for a medical marijuana recommendation has been substantially watered down since the Act was passed in 1996; and (2) because of this watering down, the result is an "at-your-fingertips" type of easy access to doctor recommendations. *Id.* It appears California doctors are running rough-shot and manufacturing recommendations that run counter to the true spirit of the CUA. *Id.* Although the medical professions are loosely and independently governed by the American Medical Association's (AMA) Code of Ethics, many in the medical community argue over the effectiveness (or ineffectiveness) of the AMA as an enforcement agency, citing its primary role as a policy-making body more concerned with lobbying and effecting change at the national level in the health legislation debate than in actually policing the behavior of medical health practitioners. See *Medical Ethics*, *supra* note 70 (providing a cursory overview of the role the American Medical Association plays in establishing a code of ethical conduct and setting standards for medical

creates a dangerous climate for both doctors and patients in the state of California: doctors risk creating an image of being drug dealers rather than medical health professionals. In fact, when deciding the seminal medical marijuana case, *Gonzales v. Raich*, the Supreme Court voiced concerns related to the abuses by a few “unscrupulous physicians” serving to water-down the meaning of “medical necessity” under California’s CUA.⁷⁸

healthcare professionals); see also Robert M. Wachter, *Reorganizing an Academic Medical Service: Impact on Cost, Quality, Patient Satisfaction, and Education*, 279 J. AM. MED. ASS’N 19 (1998) (discussing the importance of the AMA’s role in monitoring behavior in the medical professions and emphasizing the AMA’s need to bolster its image and presence in the medical community).

78. See *Raich*, 545 U.S. at 33 (2005); see also George J. Annas, *Jumping Frogs, Endangered Toads, and California’s Medical-Marijuana Laws*, 353 NEW. ENG. J. MED. 2291, 2294 (2005) (discussing the Court’s uneasiness with how the CUA’s vague language leaves the door open for doctors to be vulnerable to corruption and to act contrary to the spirit of the Act, which was to provide access to those patients in legitimate medical need). In a 6-to-3 opinion, the Court in *Gonzales v. Raich* reversed the Ninth Circuit’s opinion and decided that Congress has the authority to enforce its prohibition against marijuana, even if the federal enforcement runs counter to state-approved usage of homegrown, noncommercial marijuana, used only for medicinal purposes on a physician’s recommendation. *Raich*, 545 U.S. at 33. Despite California’s CUA proclaiming that marijuana is acceptable for use only for medicinal purposes on the advice of a physician, in rejecting California’s right to make such a proclamation, the Court reasoned that Congress itself had determined that marijuana is a Schedule I drug, which is defined as having “no acceptable medical use.” See *id.* at 14-15; see also 21 U.S.C. § 812(b)(1) (2006) (scheduling marijuana as a Schedule I CSA substance). The Court acknowledged that Congress might be wrong in this scheduling determination, but the issue in *Gonzales v. Raich* was not whether marijuana had possible legitimate medical uses, but rather the focus in *Raich* was on whether Congress has the authority to make the judgment that marijuana has no legitimate uses and to ban all uses of the drug. *Raich*, 545 U.S. at 14-15. In other words, setting aside the issue of whether marijuana had been correctly slotted as a Schedule I substance, the Court affirmatively said the federal government has the power to establish the CSA’s hierarchy of schedules and that the federal government has the authority to slot marijuana, or any other substance, under the CSA’s scheduling regime as federal discretion dictates. *Id.* Surprisingly, the Court was more interested in the role of California doctors in the whole marijuana debacle—being more intrigued and suspicious of the fact that the only limitation on the discretion of California doctors was the requirement that a physician’s recommendation be made on the basis of a medical determination that a patient has an “illness for which marijuana provides relief.” CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2006). The Court’s discussion of this limit may be the

Thus, the present state and the scope of California's CUA is at the mercy of doctors, their pens, and their "recommendation" pads. Even though the CUA was passed by California lawmakers, those lawmakers, through their vagueness and lack of specificity in drafting the Act, forfeited all authority and control over to California doctors. The Act is so poorly worded and has been so poorly regulated and enforced that doctors have essentially taken over, grabbing the reins and playing key roles in both shaping policy and also dictating the practical implementation of the Act. However, in *Gonzales v. Raich*, the Court tugged back when it voiced its concerns and suspicions about "unscrupulous physicians" in the state of California.⁷⁹ With no

most interesting, disturbing, and pertinent aspect impacting the medical marijuana debate in California. Instead of concluding that physicians should be free to use their best medical judgment and that it was up to state medical boards to decide whether specific physicians were failing to live up to reasonable medical standards, the Court took a totally different approach. *Raich*, 545 U.S. at 31. In the Court's words, the broad language of the California medical marijuana law allows "even the most scrupulous doctor to conclude that some recreational uses would be therapeutic. And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so." *Id.* The CUA defines the category of patients who trigger the exemption from criminal prosecution as those suffering from cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, and "any other chronic or persistent medical symptom that . . . substantially limits the ability of a person to conduct one or more major life activities . . . [or] if not alleviated, may cause serious harm to the patient's safety or physical or mental health." CAL. HEALTH & SAFETY CODE § 11362.7(h)(12)(A)-(B) (West 2006). Although these limits are hardly an invitation for unbridled and unchecked recreational-use recommendations, the Court cited two cases to support its "unscrupulous physicians theory," cases involving criminal prosecutions of physicians for acting like drug dealers; one from 1919 and the other from 1975. *See Raich*, 545 U.S. at 31 (citing *United States v. Moore*, 423 U.S. 122 (1975), and *United States v. Doremus*, 249 U.S. 86 (1919)). Essentially, by drawing analogies to these earlier cases, the Court felt entitled to its suspicion of all parties involved in the California medical marijuana market, reasoning that because a few physicians were criminally inclined in the past, it was reasonable for Congress (and the Court), on the basis of no actual evidence, to assume that many physicians may be so inclined today. *Id.* Essentially, the Court was giving itself, and Congress, license to presume the guilt and greed of doctors. *Id.* Additionally, it was not only physicians that the Court found untrustworthy, but sick patients and their caregivers as well. *Id.* As the facts on the ground have played themselves out in reality, the Court's instincts as reflected in its *Raich* opinion have turned out to be on-point and accurate.

79. *Raich*, 545 U.S. at 31.

real oversight of doctors, the practical translation of the Act is that for any Californian who wants a medical marijuana card for any legitimate or fictitious reason, there exists a doctor who ultimately can be found to provide one.

Third, with regard to the self-regulation by users, with no substantive regulatory entities in place, free-market economic principles of supply and demand control.⁸⁰ Since the concept of “medical necessity” under the CUA has been watered down to near meaninglessness, marijuana in the state of California has become less taboo and is no longer in a full-fledged underground market.⁸¹ Rather, it has risen to the level of being a quasi-legitimate market.⁸² With that in mind, one of the controlling factors of marijuana consumer behavior is two-fold: (1) past experiences with particular dispensaries, doctors, and co-operatives; and (2) past experiences of others running in the same crowd, culture, and lifestyle passed on via word-of-mouth.⁸³ With respect to how a patient knows what is actually in the substance he/she is purchasing, John Doe simply stated, “When you buy something that is bad or that you don’t like, you don’t buy it again, you complain to the dispensary, and you tell your friends.”⁸⁴ What a painfully simple, obvious, ironically free-market, and exquisitely capitalistic American concept.

In sum, the situation of medical marijuana regulation in California is a mess. There is no real full-service administrative agency monitoring this situation and there are no uniform standards of enforcement or regulation established at the state level. Filling the regulatory void left by the language of the CUA are self-interested California doctors with financial incentives to give out as many “recommendations” as possible. Because the concept of legalized

80. Interview with John Doe, *supra* note 71. Doe claimed that the greatest regulator of the purchase and sales of “medical” marijuana at local co-operatives and dispensaries is essentially the free-market capitalist system—customer satisfaction (or dissatisfaction) with past experiences. *Id.*

81. See Adam Tschorn, *Marijuana's New High Life*, L.A. TIMES, Aug. 30, 2009, <http://articles.latimes.com/2009/aug/30/image/ig-potculture30> (“Cannabis is moving into the mainstream, with fashion, films, TV and politicians acknowledging it’s here to stay.”).

82. *Id.*

83. Interview with John Doe, *supra* note 71.

84. *Id.*

marijuana flies in the face of federal laws, the state of California cannot depend upon federal administrative agencies to pick up the slack and fulfill the state's regulatory and enforcement duties related to monitoring medical marijuana in connection with the CUA. As such, lacking any uniform state-wide standards or mechanisms for dealing with medical marijuana, the enforcement methods vary county to county. Setting problems associated with state and federal law conflict aside, the problems of county-by-county standards are obvious and challenging, leading to confusion by both law enforcement officers/agencies and also medical marijuana users.

What is needed in the state of California is a state-level analog of the federal FDA. While California has the Department of Public Health (DPH), the DPH only really serves the administrative function of tracking users that are already issued medical marijuana cards—it does not oversee the “recommendation” process, or even attempt to ensure the safety and quality of the actual substance.⁸⁵ This type of oversight is desperately needed and is quintessentially the function of administrative agencies, administrative laws, and administrative policies.⁸⁶ With the DPH essentially functioning only as an abacus counting medical marijuana users in California, an enormous administrative and regulatory void is left. This void is primarily being filled by free market principles and by the discretion of marijuana-friendly California doctors who have made a healthy profit off of medical “recommendations.” These void-fillers do not have the health, safety, and welfare of Californians in mind; they simply will not do.

A. Successes and Failures in California

Now that we have established California's regulatory framework (or lack thereof) for managing how the CUA operates in reality, what

85. See *Medical Marijuana Program*, *supra* note 68 (establishing the DPH's regulatory role as being limited to collecting application fees and tracking users who voluntarily register).

86. See United States Food & Drug Administration, *What We Do*, <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (providing an example of an administrative agency performing the traditional function of overseeing a particular area of American life).

has been going well and what has not been going so well since the Act's passage in 1996?

1. Pros

The current state of marijuana usage under the CUA leads advocates for medical marijuana to cite benefits to both California citizens and the State stemming from this legislative scheme. The strongest arguments or benefits cited or asserted by advocacy groups fall into the following four categories: (1) easier access for patients in legitimate medical need of pain relief,⁸⁷ (2) safer access for patients faking pain-relief need and instead using marijuana recreationally,⁸⁸ (3) an increase in state tax revenue coming in the form of tax paid on the sale of medical marijuana,⁸⁹ and (4) an implosion of the taboo of marijuana and the benefits stemming from that.⁹⁰

a) Easier Access for Legitimate Patients in Need of Alternative and Effective Pain Relievers

As a practical matter, studying marijuana is extremely difficult.⁹¹ However, a flurry of medical marijuana studies began in the late

87. *See infra* Part V.A.1.a.

88. *See infra* Part V.A.1.b.

89. *See infra* Part V.A.1.c.

90. *See infra* Part V.A.1.d.

91. *See* JANET E. JOY ET AL., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 137 (National Academies Press 1999), *available at* http://www.nap.edu/openbook.php?record_id=6376 (discussing the difficulties surrounding the study of marijuana).

The data on the adverse effects of marijuana are more extensive than the data on its effectiveness. Clinical studies of marijuana are difficult to conduct: researchers interested in clinical studies of marijuana face a series of barriers, research funds are limited, and there is a daunting thicket of regulations to be negotiated at the federal level (those of the . . . FDA and the . . . DEA) and state levels. Consequently, the rapid growth in basic research on cannabinoids contrasts with the paucity of substantial clinical studies on medical uses.

Id.

1980's, and in 1999 eleven independent scientists appointed by the Institute of Medicine (IOM) reported that marijuana was effective in controlling some forms of pain, alleviating nausea and vomiting due to chemotherapy, treating wasting due to AIDS, and combating muscle spasms associated with multiple sclerosis.⁹²

More specifically to the situation in California, although the aforementioned findings are not conclusively and universally accepted in the medical community, the modern medical trend cuts towards finding acceptable and effective medical uses for marijuana.⁹³ If we are to accept this modern trend which, at best, confirms marijuana's legitimate medical value as a pain reliever and, at worst, brings strong arguments to the table for marijuana's medical legitimacy, California's legalization of medical uses of marijuana has been successful at making this type of potentially effective pain reliever more easily accessible to patients in legitimate medical need.⁹⁴

92. See Peter A. Clark, *The Ethics of Medical Marijuana: Government Restrictions vs. Medical Necessity*, 21 J. PUB. HEALTH POL'Y 40, 42-48 (2000) (articulating some rough scientific findings as to some purported medical uses for marijuana portending to be legitimate); see also JOY, *supra* note 91, at 137 (establishing the IOM's independent findings and articulating some concrete medical uses they found for marijuana).

93. JOY, *supra* note 91, at 138.

94. Even if your complaint is that the practical realities stemming from the implementation of the CUA have yielded over-inclusive results (in that too many illegitimate patients who do not truly need the relief are being "recommended" the substance), it cannot be ignored that lying in that over-inclusivity are patients legitimately in need and whose needs are being more easily met by the existence of an above-ground, legal supply of "medicine." However, the dilution of the CUA's true spirit of pain relief cannot be ignored. In fact, according to a study conducted by the California Police Chiefs Association, despite the claims that medical marijuana usage stems primarily from critically ill Californian's, only about 2% of those using crude marijuana for medicine are critically ill (suffering from HIV/Aids, cancer, or glaucoma). MICHAEL REGAN, CAL. POLICE CHIEFS ASS'N, CALIFORNIA POLICE CHIEFS ASSOCIATION POSITION PAPER ON THE DECRIMINALIZATION OF MARIJUANA (2009), http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/CPCA_Position_Paper_Decriminalization_Marijuana.pdf. Instead, the vast plurality (about 40%) of those using crude marijuana as medicine are young (age 21-30), have no critical medical condition, and are using the substance for the sole purpose of being under the influence of THC. *Id.*

b) Safer Access for Fakers

The original spirit and purpose of the CUA was to facilitate easier access for patients in true medical need of an alternative and effective pain reliever.⁹⁵ Despite the current state of medical marijuana “recommendations” effectively diluting the true meaning of “medical necessity” in California, a silver-lining might be found. Even those “patients” manipulating, abusing, and gaming the system with fictitious medical ailments—those who are treating medical marijuana not as a medicine but as a recreational drug—presently have unprecedented, and arguably safer, access to the substance in California than ever before.⁹⁶

However, this is a hollow and possibly illusory victory because, essentially, California has traded one bundle of problems for another.⁹⁷ Although it appears safer for marijuana users to acquire

95. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006).

96. *See How Easy Is It to Get a Medical Marijuana Card?*, *supra* note 78 (demonstrating just how easy it is for nearly anybody to get a medical marijuana card if they desire); *see also* Kenny Mack, *How to Get A Prescription For Medical Marijuana* In *California*, EHOW.COM, http://www.ehow.com/how_2117436_prescription-medical-marijuana-california.html (last visited Mar. 20, 2010) (delineating a step-by-step manual for successfully obtaining a medical marijuana card in California—instructing potential patients of where to go, what to say, and any other pertinent details).

97. MICHAEL REGAN, CAL. POLICE CHIEFS ASS'N, PRESENTATION AT THE CALIFORNIA POLICE CHIEFS ASSOCIATION SUMMIT ON THE IMPACT OF CALIFORNIA'S MEDICAL MARIJUANA LAWS: DISPENSARY RELATED CRIME (2009), http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/DispensarySummitPresentation.ppt. The California Police Chiefs Association asserts that medical marijuana dispensaries come with serious baggage: some staggeringly negative crime-related externalities. *Id.* Depending upon the group presenting, collecting, and compiling the statistical data for marijuana-related crimes in California, oftentimes the numbers vary dramatically, or the same numbers can even be spun and manipulated in order to cut towards or lead to irreconcilably opposite conclusions. *Id.* For example, one camp of thinkers states that, legal or not, certain people are going to use marijuana and that legalizing it makes it as safe as possible – avoiding underground drug operations and drug deals where guns, distrust, and bullying are often involved. *Id.* This camp believes easier access reduces the crime strictly associated with marijuana's underground market. *Id.* Although, at first glance, this is a fair and reasonably valid argument, it seems to miss the big picture. Another valid argument comes from the law enforcement camp - pointing out that although there is safer and easier access to marijuana via local dispensaries and co-operatives (essentially eliminating the full-fledged

the substance (in that they no longer have to go “underground” to drug dealers or shady suppliers), the crime rate at and around dispensaries has increased steadily state-wide in California in recent years.⁹⁸ It must be acknowledged, however, that these statistics vary from county to county: some counties lean towards increases in both dispensary-related crime and marijuana-related crime in general, while other counties lean towards decreases in both areas.⁹⁹ The discrepancy and inconsistency in the statewide trends can be attributed to a variety of factors (and speculators provide many). However, the two most prominent factors seem to be (1) a particular

underground market), new marijuana-related crimes have risen from the ashes of the recently extinguished old-forms of marijuana crimes. *Id.* The negative externalities of this quasi-above-ground marijuana trade are that crimes around these dispensaries have boomed – with both card-carrying patients being mugged and robbed for their marijuana and money, and also with dispensaries and co-operatives being robbed frequently for their money and product by people seeking to both use and sell those products. *Id.*; JON E. COX, DIXON CITY COUNCIL, SUMMARY REPORT DIXON CITY COUNCIL MEETING (2009), http://www.ci.dixon.ca.us/agendas/past_ccagendas/082609/6-1%20SR.pdf.

98. See COX, *supra* note 97 (providing a survey of two major metropolitan centers in California, the city of San Francisco and the city of Los Angeles, with respect to recent trends in dispensary-related crimes). For example, from January 2006 to February 2007, the city of San Francisco experienced the following crimes at, or in close proximity to, dispensaries: 3 homicides, 2 attempted homicides, 6 possessions of firearms, 57 robberies, 27 attempted robberies, 98 aggravated assaults, 144 batteries, 7 batteries on a police officer, 1 forcible rape, 1 attempted rape, 3 sexual batteries, 198 burglaries, and 2 attempted burglaries. *Id.* Similarly, in that same time frame, the Los Angeles Police Department reported a 200% increase in robberies, a 52% increase in burglaries, a 57% increase in assaults, and a 130% increase in auto burglaries near cannabis clubs. *Id.* The trends which are less consistent are those calculations pertaining to general marijuana-related crimes (regardless of the proximity to dispensaries/co-operatives). *Id.* However, because there are so many competing studies out there, and because there is no one reputable group in charge of acting as a watchdog to ensure the validity and integrity of these numbers and statistics, the potential risk for “junk-science” is high and the consistency and pertinence of these numbers comes into question for a variety of reasons. *Id.*

99. See *id.* (demonstrating counties with increasing trends of dispensary-related crimes); see also Angela Macdonald, *Crime Down in States with Medical Marijuana Dispensaries*, EXAMINER.COM, Aug. 27, 2009, <http://www.examiner.com/x-17593-NORMML-Examiner~y2009m8d26-Crime-down-in-states-with-medical-marijuana-dispensaries> (discussing counties with decreasing trends of marijuana-related crimes).

county's ideological approach to marijuana,¹⁰⁰ and (2) the manner in which crimes are categorized and calculated in particular counties.¹⁰¹ With these types of obstacles impeding the flow of reliable information, it is difficult to know which numbers to trust.

In sum, the situation in California creates sort of a middle market or a quasi-legitimate universe between a black market and a truly free and open market. However, this sort of middle-ground market cuts both ways: on the one hand it eliminates all of the crimes traditionally associated with an underground market for a product; on the other hand it raises a number of new negative externalities. In this case, the externalities include dispensary-related crimes, potential increases in health/substance abuse problems, and potential increases in law enforcement efforts and expenses, just to name a few. However, because the federal government is not fully on-board

100. While some of the more conservative counties have reacted with prescriptively ramped-up enforcement efforts in order to combat the now-pervasive marijuana use in California, other more liberal counties have taken stances of essential non-enforcement of any type of marijuana-related laws (these liberal counties appear to recognize that California is in direct conflict with the federal government and seem to be waiting for this conflict to be resolved before taking a firm position on the issue). See Figueroa, *supra* note 10 (demonstrating San Diego county's ramped-up, conservative policy of cracking down on all marijuana related crime enforcement); see also Tamara B. Aparton, *Marijuana Enforcement Can Be Tricky for City's Police*, SAN FRANCISCO EXAMINER, Aug. 11, 2009, <http://www.sfexaminer.com/local/Marijuana-enforcement-can-be-tricky-for-citys-police-52925162.html> (illustrating San Francisco's liberal policy of almost-non-enforcement of marijuana laws). Therefore, much of the marijuana-related crime statistics are heavily dependent upon the loose policy positions articulated by particular city councils or chiefs of police, which is all very inconsistent and amorphous.

101. The Dixon City Council Meeting Summary Report provides great examples of how the calculation methods at the various county levels impact the statistical analysis statewide.

Attempts are being made to gather further statistics on the impact of dispensaries. This information has been difficult to obtain because agencies that have a dispensary in their jurisdiction many times do not want to break-out this specific information, and there is a general impression by these agencies that crimes in and around dispensaries are under-reported due to the belief that dispensaries do not want to draw attention to their operations.

COX, *supra* note 97.

with the concept of medical marijuana, the numbers remain fuzzy, unchallenged, and manipulated. There is no real arbiter or official voice to step in and parse out the truths from the mistruths and to establish some uniformity in crime reporting standards to really figure out what is going on here. This role is traditionally filled by the federal government's executive branch, usually an administrative agency like the DEA or the FDA.

c) Increased Tax Revenue

Although it is difficult to pinpoint an exact number due to the underground nature of much of California's marijuana market, recent estimates postulate that the entire California marijuana industry (both medical and non-medical marijuana) is a \$14 to \$16 billion a year industry.¹⁰² According to California State Board of Equalization (BOE) Chairman Betty Yee, in 2009 California collected \$18 million in sales tax from medical marijuana dispensaries.¹⁰³ Yee further estimates that an entirely regulated pot trade, for both medical and non-medical purposes, would bring in \$1.3 billion in sales tax revenue per year.¹⁰⁴

These sales tax revenues are generated by exactly that—sales. Chairman Yee's estimated figure of \$18 million in sales tax collections is generated from the roughly \$200 million in reported medical marijuana sales that are subject to sales tax in California.¹⁰⁵ However, with marijuana's overall sales (for both medical and non-medical purposes) being estimated at roughly \$15 billion in 2009, marijuana is California's biggest cash crop, "dwarfing the state's second largest agricultural commodity—milk and cream—which brings

102. See Karl Vick, *In California, Medical Marijuana Laws are Moving Pot into the Mainstream*, WASHINGTON POST, Apr. 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/11/AR2009041100767.html> (providing estimates of the size, scope, and earnings potential of a completely unregulated marijuana trade in California).

103. *Id.*

104. *Id.*

105. *Id.*

in \$7.3 billion a year, according to the most recent USDA statistics.”¹⁰⁶

These current numbers and estimates are evidence of the tremendous gains the California marijuana trade has made towards legitimizing itself and rising to join the other above-ground California industries in the last few years. For example, in a 2006 report prepared by California NORML head Dale Gieringer and Oakland Civil Liberties Alliance board member Richard Lee, using the city of Oakland as a template and example, some estimates were generated with respect to potential tax revenue from medical marijuana sales in Oakland and the nation as a whole.¹⁰⁷ According to the data, the state's medical marijuana patients were, at the time, consuming somewhere between \$870 million to \$2 billion worth of pot a year, which would translate to somewhere between \$70 to \$160 million in state sales tax revenue, the authors estimated.¹⁰⁸ However, as the report cited, the state treasury was receiving nowhere near that amount because many dispensaries were not, at the time, paying sales taxes or keeping financial records that could be used against them in a federal investigation.¹⁰⁹ Adding to the problem of collecting taxes, both at the time and now, is the fact that some dispensaries and

106. See Alison Stateman, *Can Marijuana Help Rescue California's Economy?*, TIME, Mar. 13, 2009, <http://www.time.com/time/nation/article/0,8599,1884956,00.html> (providing estimates of total marijuana sales, for both medical and non-medical purposes, for 2009).

107. See Dale Gieringer & Richard Lee, OAKLAND MEASURE Z OVERSIGHT COMMITTEE, REVENUE & TAXES FROM OAKLAND'S CANNABIS ECONOMY (2006), <http://www.canorml.org/background/OakZFinancialReport.pdf>; see also Office of Applied Statistics, SAMHSA (DHHS): *National Household Survey on Drug Abuse*, <http://www.oas.samhsa.gov/nhsda.htm>. While the report focused on Oakland, which has seen medical marijuana revenues and the taxes derived from them decline dramatically since the city tightened regulations on dispensaries in recent years, it also looked at state and federal data to attempt to draw a statewide picture of the size of the therapeutic cannabis industry. Gieringer & Lee.

108. Gieringer & Lee, *supra* note 107.

109. See *Medical Marijuana: California Begins Taxing Dispensaries*, STOPTHEDRUGWAR.ORG, http://stopthedrugwar.org/chronicle/481/california_taxes_medical_marijuana_dispensaries (noting that “[s]ome club owners welcome taxation as part of the ‘normalization’ of medical marijuana. But others worry that any tax information they submit could be used against them by federal drug enforcement agents.”).

patient advocacy groups were arguing that non-profit collectives and co-ops should be exempt from taxes.¹¹⁰

The \$18 million in sales tax revenue collected in the recent fiscal year from dispensaries cited by Yee can, in large part, be attributed to the recent shift in the attitudes of dispensary owners. More recently, many dispensaries are chomping at the bit to pay taxes, viewing their payment of taxes as symbolic and as an irrefutable representation of their business' legitimacy.¹¹¹ In that spirit, more taxes are voluntarily being paid—dispensaries are no longer actively eluding the payment of sales tax—on the sales of medical marijuana.¹¹² Medical marijuana advocates estimate that the aggregate annual sales tax revenue that is paid by the approximately 400 dispensaries in California is \$100 million.¹¹³ Although that figure does not match up with the estimate provided by the California BOE, the agency that collects sales taxes, the BOE desperately wants to protect that revenue stream.¹¹⁴

110. California NORML (The National Organization for the Reform of Marijuana Laws), Americans for Safe Access, and Patients Out of Time are examples of marijuana patient advocacy groups. Additionally, many dispensaries morph into co-operatives in order to avoid the payment of sales tax. *Id.* While the distinction between a dispensary and a co-operative is very real, many are manipulating the system purely for the purpose of avoiding taxes, and these newly labeled co-ops do not look, act, or operate like co-ops. *Id.* Essentially, they are wolves hiding in sheep's clothing.

111. *See* Gonzales, *supra* note 17 (stating that “[m]edical marijuana vendors hope that their contribution to the state's tax coffers will bolster their legitimacy.”)

112. *Id.*

113. *Id.*

114. *See id.*; *see also* CAL. STATE BD. OF EQUALIZATION, INFORMATION ON SALES TAX AND REGISTRATION FOR MEDICAL MARIJUANA SELLERS (2007), <http://www.boe.ca.gov/news/pdf/173.pdf> (articulating the California Board of Equalization's (BOE) recent change in policy with respect to the issuance of legitimate sales/business licenses to medical marijuana dispensaries in order to facilitate the collection of sales tax from said businesses). Essentially, the BOE's position paper revealed two enormously important points:

- (1) The sale of medical marijuana has always been considered taxable. However, prior to October 2005, the Board did not issue seller's permits to sellers of property that may be considered illegal,
- (2) In October 2005, after meeting with taxpayers, businesses, and advocacy groups, the Board directed staff to issue seller's permits regardless of the fact that the property being sold may be

"We view medical marijuana dispensaries as law-abiding businesses," board member Betty Yee says. "Many of them have complied with state tax laws. And when there's aggressive federal action to shut these businesses down, it's awfully difficult for a state tax agency like the Board of Equalization to work to ensure compliance with state tax laws." Yee says this could be a "make or break" year for medical marijuana dispensaries, with vendors under constant pressure from the Drug Enforcement Administration either through raids or threats of taking action against their landlords.¹¹⁵

However, Yee went on to acknowledge that the present situation in California is extremely murky.¹¹⁶ Additionally, IRS employee Arlettle Lee points out a further wrinkle of complication. According to Lee, while dispensaries might actually be paying federal tax, there is not always a paper trail to prove it.¹¹⁷

d) Imploding the Taboo

If the end goal is to prevent as many young Americans from using marijuana as possible, the legalization (albeit for medical purposes) of marijuana under the CUA might actually achieve that goal. While many will undoubtedly point out that increased availability of the substance will increase the usage of that substance, legalization of substances is postulated as potentially having the opposite practical impact. Rooted in notions of human behavioral psychology and in a "forbidden fruit" type argument, the legalization of a previously illegal substance effectively destroys what is

illegal, or because the applicant for the permit did not indicate what products it sold. This new policy was effective immediately.

Id.

115. Gonzales, *supra* note 17.

116. *Id.*

117. *Id.*

commonly known as the “illegal high:” the physical or emotional high derived from engaging in a prohibited activity purely from its prohibited status.¹¹⁸ Or, to approach this rationale from another direction, although those Californians who already use marijuana probably use it more now that it is legal, the mere fact that the substance is now essentially legalized in California will not likely be the triggering impetus for previous non-users to start using the substance and, if anything, it will deter those who previously used, or would have used, marijuana for the sheer “illegal high.”¹¹⁹

Those who assert this “illegal high” or “forbidden fruit” argument essentially follow the logic that: (1) there is a camp of people who are going to use the illegal substance anyway, legal or not, and (2) there is another camp of people who often try, and continue to use, illegal substances because of their desire to “rebel” from societal norms and authority. Those asserting the “forbidden fruit” argument attempt to isolate the impact of the CUA as not encouraging more Californians to use marijuana, but rather as shattering the marijuana

118. See *Genesis* 1:16-17 (stating, “[a]nd the Lord God commanded the man, saying, Of every tree of the garden thou mayest freely eat: But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die.”); see also Frosty Woolridge, *The War on Drugs Good for Teens?*, RENSE.COM, July 7, 2007, <http://www.rense.com/general77/warondrugs.htm> (discussing an interview with Lansing, Michigan Police Detective Howard Wooldridge).

Wooldridge said, “Prohibition glamorizes the . . . drugs. The forbidden fruit is often thought to taste better than all the rest. The young teen that tries cigarettes and alcohol thinks, ‘Hummm! Marijuana is illegal so it must be even more fun to use than beer.’ So they try that, too! The good news is that a majority of teens and adults stop at marijuana; in effect it is the terminal drug for most. The bad news is that marijuana is especially harmful to a teen’s brain development rivaling the harm of alcohol in a developing mind.”

Woolridge, *supra*.

119. Cigarettes are legal for Californians age eighteen and older. When you were fourteen years old, weren’t you just a bit curious? Once you reached eighteen, assuming you are not a smoker, were you a little bit less tempted? What if cigarettes were to become illegal – a little bit more tempted now? Maybe - some people are, while some people are not. What about beer? Gambling? Does illegality stoke any of your forbidden-fruit desires?

taboo by means of destroying the concept of the “illegal high” or “forbidden fruit,” especially given the fact that virtually any Californian who wants a medical marijuana card (for legitimate medical purposes or not) can already get it.¹²⁰

2. Cons

Although many allege that taxation of medicinal marijuana will help balance California's budget problems,¹²¹ this concept is misguided and presents a false economy. Yes, it is true that medical marijuana dispensaries give the state of California another repository from which to siphon or collect tax revenue.¹²² However, this view is half-sighted and does not take into consideration the foreseen (and unforeseen) costs associated with the increased prevalence of marijuana usage in the state of California. Will these negative externalities offset and engulf the gains made by increased revenue, eventually overwhelming the California social services system and generating a net loss for California? History says yes. Simply because gross revenues will potentially be up does not mean the state of California will be making a profit on this endeavor—there are other factors (monetary and non-monetary) to consider when assessing marijuana's impact on the state of California.

As it currently stands in California, there are four major issues stemming from California's CUA and the rampant usage (both medically and recreationally under the guise of medicine) of marijuana: (1) impact on health, welfare, and social service systems,¹²³ (2) implications on medical health professionals,¹²⁴ (3) discrepancies in enforcement policies among different California counties,¹²⁵ and the (4) impact from a state law directly defying a federal law.¹²⁶

120. Woolridge, *supra* note 118.

121. CAL. STATE BD. OF EQUALIZATION, *supra* note 114.

122. *Id.*

123. *See infra* Part V.A.2.a.

124. *See infra* Part V.A.2.b.

125. *See infra* Part V.A.2.c.

126. *See infra* Part V.A.2.d.

a) Impact on Health, Welfare, and Social Service Systems

Because the FDA is traditionally charged with regulating ingestible substances and ensuring that the substances released in the American market are safe for consumption, does an act like the CUA, which, as a practical matter, legalizes marijuana for all Californians, undercut the role of the FDA and bypass them as a regulatory safety net or filter for keeping Americans safe from dangerous substances?¹²⁷ Without the FDA performing its gate-keeping function and acting as the first line of defense against these dangerous substances, there will be a tremendously negative ripple effect from these types of substances, impacting California's health, welfare, and social service systems.

As noted above, with various theories and competing interest groups out there examining the health implications associated with smoking marijuana, studying marijuana is, logistically, extremely difficult and perplexing.¹²⁸ Accordingly, studies of the short-term and long-term health effects stemming from marijuana use are inconclusive and often contradictory.¹²⁹ As the quintessential sorter of "junk science," this situation is ripe for FDA intervention.¹³⁰ Traditionally acting as an umpire or arbiter in the face of

127. United States Food & Drug Administration, *What We Do*, <http://www.fda.gov/AboutFDA/WhatWeDo/default.htm>. The FDA's mission statement reads:

The FDA is responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our nation's food supply, cosmetics, and products that emit radiation. The FDA is also responsible for advancing the public health by helping to speed innovations that make medicines and foods more effective, safer, and more affordable; and helping the public get the accurate, science-based information they need to use medicines and foods to improve their health.

Id.

128. See JOY, *supra* note 91 (articulating how difficult it is to accurately and comprehensively study the long and short term effects of a Schedule I illegal drug like marijuana, due to the substance's dangerous and illegal status).

129. *Id.*

130. *What We Do*, *supra* note 127.

inconclusive and contradictory findings, the FDA customarily fills the void, steering an impartial ship with its own independent research mechanisms.¹³¹

Although the topic of marijuana's addictive qualities is malleable and up for debate, what is unshakably clear is that, aside from impacting crime statistics, there are historically recognized long-term impacts and burdens placed on the traditional health, welfare, and social service systems that inevitably occur when a system must aid and treat those that become addicted to mind-controlling substances.¹³² Such treatments carry considerable costs.¹³³ If marijuana is ultimately found to qualify as one of those types of addictive substances, those costs will substantially burden California's health, welfare, and social service systems.¹³⁴

131. *Id.*

132. See CALIFORNIA POLICE CHIEFS ASSOCIATION POSITION PAPER ON THE DECRIMINALIZATION OF MARIJUANA, *supra* note 94 (discussing some of the non-health related costs associated with addictive and mind-altering substances).

The use of intoxicating and addictive substances fuels crime and destroys lives by creating addiction and dependency. Children are victims of abuse and neglect at the hands of parents or caretakers who live in addiction. Young adults are particularly vulnerable to addiction. Relaxed attitudes toward drug use place them at greater risk of addiction . . . The claim that drug legalization will eliminate crime associated with drug trafficking is just not true. Much as we see in the use of other controlled substances, people who become addicted to Marijuana and cannot afford to maintain their addiction will turn to crime in order to supply themselves with their drug of choice. . . Studies show that attitudes about drugs drive youth drug use rates. By trivializing and advocating tolerance for illegal drug use, drug legalization groups send a message to young people that experimentation with dangerous illegal drugs is acceptable. Drug legalization would increase the occurrence of drug impaired driving. Drugs affect concentration, perception, coordination, and reaction time; many of the skills required for safe driving.

Id.; see also REGAN, *supra* note 97 (discussing the recent increase in dispensary-related crimes as an example of other costs).

133. See *infra* note 134 and accompanying text.

134. See CALIFORNIA POLICE CHIEFS ASSOCIATION POSITION PAPER ON THE DECRIMINALIZATION OF MARIJUANA, *supra* note 94 (discussing the negative externalities associated with the already legalized substances, alcohol and tobacco,

Although marijuana's addictive qualities are still up for debate,¹³⁵ due to the historically monumental costs associated with dealing with

to analogize the impact the CUA's virtual legalization of marijuana will undoubtedly have, and is having, on California). It is important to note that America is having an extremely difficult time dealing with its two legal drugs, alcohol and tobacco. *Id.* First, about 65% of the population is slotted as regular alcohol users with this use being attributable to 100,000 deaths per year. *Id.*

The latest studies show that the U.S. collects about \$8 billion yearly in taxes from alcohol. The problem is, the total cost to the U.S. in 2008 due to alcohol-related problems was \$185 billion, and the government pays about 38% of that cost (about \$72 billion), all due to consequences of alcohol consumption, according to the National Institute on Alcohol Abuse & Alcoholism. For every dollar the government collects in alcohol taxes, it expends about \$9 (for such things as Medicare and Medicaid treatment for alcohol-related health troubles, long-term rehabilitation treatment, unemployment costs, and Welfare). Does that seem like a model for emulation?

Bob Stutman, *Legalize Marijuana for Tax Revenue*, BUSINESS WEEK, http://www.businessweek.com/debateroom/archives/2009/03/legalize_mariju.html.

Additionally, about 35% of the population is slotted as regular tobacco users, with this use being attributable to 400,000 deaths per year. CALIFORNIA POLICE CHIEFS ASSOCIATION POSITION PAPER ON THE DECRIMINALIZATION OF MARIJUANA, *supra* note 94. More specifically, 100 million Americans have tried marijuana, but most stopped after one or two times, or after starting a career. *Id.*

135. 21 U.S.C. § 812 (2006). While the FDA and DEA, evidenced by their scheduling of marijuana as a Schedule I substance, consider marijuana to be highly addictive and habit-forming, many others in the medical health community vehemently disagree. *See id.*; *see also* Stephen C. Markoff, *Is Marijuana Addictive?*, THE MEDICAL MARIJUANA MAGAZINE, May 15, 1997, *available at* <http://www.drugsense.org/mcwilliams/www.marijuanamagazine.com/toc/addictiv.htm> (citing DANIEL M. PERRINE, THE CHEMISTRY OF MIND-ALTERING DRUGS (American Chemical Society 1996) and Deborah Franklin, *Hooked: Why Isn't Everyone an Addict?*, IN HEALTH, Nov./Dec. 1990, Vol. 4, No. 6, at 38). However, this is an extremely unsettled issue. Further complicating the "addictiveness" debate is the distinction often drawn between mental and physical addiction. Markoff, *supra*, note 135. Additionally, with marijuana being an inherently inconsistent substance with multiple "species" or types, reaching a conclusive ruling on the addictiveness of the substance is proving to be extremely elusive. *Id.* Markoff's article utilized the independent studies of three doctors (Dr. Jack E. Henningfield Ph.D. in Psychopharmacology, Dr. Neal L. Benowitz MD of the University of San Francisco, and Dr. Daniel M. Perrine, Ph.D., Associate Professor of Chemistry at Loyola College, Baltimore, Maryland) testing the addictive natures

Americans fighting addictions, those making the claim that taxes on marijuana sales will help to balance California's budget are engaging in a fiscal shell game. Proponents of this shell game claim credit for the increased revenue from new taxes on marijuana, but ignore the costs and burdens on the general social service systems associated with increased marijuana usage.¹³⁶ This is a false economy.¹³⁷ Chock-full of logical sleights of hand, these types of "tax-it" arguments are often deceptive, irresponsible, half-sighted, and, due to a dearth of hard data and tangible statistics on marijuana's addictiveness, not yet justifiable.

Thus, although there are only *possible* negative impacts on health, welfare, and social service systems related to the use and abuse of marijuana, because they are in fact possible and the costs associated with addiction are so great, marijuana's impact *must* be considered, especially in light of President Obama promising the idea of a universal system of American health care (quasi-government run

of alcohol, tobacco, cocaine, heroin, nicotine, caffeine, and marijuana only to have all three doctors conclude that marijuana displayed substantially fewer and significantly weaker addictive characteristics than the other five substances. *Id.*; see also National Institute on Drug Abuse (NIDA), *Marijuana: Facts for Teens*, <http://www.drugabuse.gov/MarijBroch/teenpg13-14.html> (last visited Mar. 20, 2010) (citing NAT'L ASS'N OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS, INC., STATE RESOURCES AND SERVICES RELATED TO ALCOHOL AND OTHER DRUG PROBLEMS FOR FISCAL YEAR 1995: AN ANALYSIS OF STATE ALCOHOL AND DRUG ABUSE PROFILE DATA, July 1997). According to NIDA,

Long-term marijuana use leads to addiction in some people. That is, they cannot control their urges to seek out and use marijuana, even though it negatively affects their family relationships, school performance, and recreational activities . . . In 2004, over 298,000 people entering drug treatment programs reported marijuana as their primary drug of abuse. However, up until a few years ago, it was hard to find treatment programs specifically for marijuana users. Now researchers are testing different ways to help marijuana users abstain from drug use. There are currently no medications for treating marijuana addiction. Treatment programs focus on counseling and group support systems.

Marijuana: Facts for Teens, *supra* note 135.

136. Gonzales, *supra* note 111.

137. *Id.*

and tax funded health care).¹³⁸ With a health care expansion bill looming and near passage in the United States Congress, the health and wellness of all Americans could potentially become, more so than ever, of paramount national importance. If the taxpayers are going to potentially be footing the national health care bill for all Americans, it is in everybody's best interest to cut through the murkiness associated with marijuana usage and to find some concrete answers. Or, in other words, if the health care system is going to become national and costs are going to be distributed amongst all Americans, all Americans deserve to be well-informed about the effects of the substances they are ingesting in order to better understand the risks being taken and the potential consequences of those actions.

b) Doctors as Drug Dealers

Is there a fiduciary relationship between a drug user and his dealer? As articulated by the Supreme Court in its *Gonzales v. Raich* opinion, Congress and the Court have both long been concerned with preserving Americans' confidence in the integrity of doctors and in the medical health profession in general.¹³⁹ However, the legislative scheme constructed by California lawmakers in the CUA relies heavily, if not entirely, on the discretion of doctors.¹⁴⁰ In an American health care system where doctors traditionally act as advisors, advocates, and gate-keepers granting access to the system, California's design is ripe for corruption and attacks the very integrity of the system.¹⁴¹ In fact, since the Act's passage in 1996, the "recommendations" of doctors have been treated as final and their discretion has been left virtually unchecked and unchallenged by any

138. Currently, there are two health care proposals being crafted in the United States Capitol Building: (1) the United States Senate's "Patient Protection and Affordable Care Act" (Senate's bill - H.R. 3590), and (2) the United States House of Representative's "Affordable Health Care for America Act" (House of Representatives' bill - H.R. 3962).

139. See *Raich*, 545 U.S. at 31 (2005) (voicing the Court's concerns about the watering down or dilution of the meaning of "medical necessity" by "unscrupulous physicians" in the state of California).

140. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006); *Medical Marijuana Program*, *supra* note 68.

141. *Medical Ethics*, *supra* note 70.

type of regulatory authority.¹⁴² The corruption is flagrant and rampant.

In California, the only thing standing between a *patient* and a medical marijuana card is a \$50 to \$250 office visit¹⁴³ and the *recommendation* of a California doctor.¹⁴⁴ Instead of installing

142. See *Medical Cannabis Practitioners*, *supra* note 76 (establishing that none of the over 1,500 California doctors to recommend marijuana have faced federal prosecution); see also *California Referring Physicians*, *supra* note 77 (echoing California NORML's contention that there is virtually no oversight of California doctors). As mentioned above, while over 1,500 California physicians have recommended medical marijuana under the CUA, none have been federally prosecuted for doing so. California NORML, *supra* note 76. To demonstrate the watering down of the term "medical necessity" that has occurred, only 2% of California patients receiving recommendations actually suffer from the serious medical conditions enumerated in the Act (HIV/Aids, cancer, and glaucoma), even though the primary purpose and spirit of the Act was to provide relief for patients in serious need. CALIFORNIA POLICE CHIEFS ASSOCIATION POSITION PAPER ON THE DECRIMINALIZATION OF MARIJUANA, *supra* note 94.

143. See Peter Hecht, *Patients Flock to California Doctors Practicing Pot Medicine*, SACRAMENTO BEE, Feb. 26, 2010, <http://www.sacbee.com/2009/11/08/2313095/patients-flock-to-california-doctors.html> ("Doctors argue over whether the recommendations, costing anywhere from \$50 to \$250 each, go to patients who truly need medical marijuana or help facilitate recreational drug users and provide hefty profits for the doctors writing the notes.").

144. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006).

To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

Id. The clause "or any other illness for which marijuana provides relief" has proven to be especially problematic and has opened up the unbridled floodgates for certain corrupt California doctors to exercise manipulative discretion and abuse.

Id. In my opinion, the CUA was so poorly worded, and has been so poorly regulated and enforced, that California doctors have essentially taken over—grabbing the reins and playing key roles in shaping policy and essentially dictating the practical scope and contours of the law. The poorly worded, shoddily regulated, and lazily enforced nature of this California law was astoundingly vague in its drafting, either by accident or by design. In other words, the state legislature either wanted to give doctors sufficient breathing room to do what the state

measures of accountability when crafting the Act, the California legislature did not put a regulatory or enforcement structure in place in order to ensure that the spirit of the Act would be maintained.¹⁴⁵ Instead of installing any regulatory or enforcement mechanisms, the California state legislature left a large void in the statutory scheme and floated this entire piece of controversial legislation on a raft inflated by the discretion and judgment of California doctors.

This legislative void has been swiftly swallowed up by California doctors. While prescription writing acts as the traditional mechanism for holding doctors accountable (both to their own medical ethical standards imposed by the American Medical Association and to certain criminal statutes), by merely requiring *recommendations* instead of prescriptions, California doctors are able to dodge traditional conduits of accountability.¹⁴⁶ The *recommendation* process short-circuits the traditional legal and ethical constraints that normally manage the American health care system.¹⁴⁷ As a practical matter, this has created a degradation of Californians' confidence in medical ethical standards.¹⁴⁸ With virtually no oversight over doctors' actions with respect to marijuana, marijuana-friendly doctors have turned into drug-dealers, flippantly writing "recommendations" in exchange for the fee charged for a one-time office visit.

In sum, the present state and the scope of California's CUA is at the mercy of doctors, their pens, their pocketbooks, and their "recommendations." California doctors are in the driver's seat,

legislature intended to happen (to flatly legalize marijuana use under the guise of medical necessity), or it was an accident and the legislature truly trusted the sound professional judgment of doctors and was legitimately trying to get out of doctors' way in making legitimate professional determinations. However, looking at how this experiment has played itself out in reality since the Act's passage in 1996, the theory that the watering down of medical necessity was by design seems more plausible. This seems more likely because if the Act truly were having unintended consequences and these results were not desired, the California state legislature would step in to clarify its language, counter these otherwise unchecked California doctors, and at least attempt to manage the situation.

145. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006).

146. See *Medical Ethics*, *supra* note 70; see also CAL. HEALTH & SAFETY CODE § 11362.5 (West 2006) (establishing the threshold requirement for obtaining a medical marijuana card is acquiring a doctor *recommendation*).

147. *Medical Ethics*, *supra* note 70.

148. Hecht, *supra* note 143.

shaping policy and dictating the scope and contours of California's CUA. With no real oversight over doctors, the practical translation of the Act is that for any Californian who wants a medical marijuana card, there exists a doctor who can ultimately be found to provide one for any legitimate or fictitious reason.

c) Who's on First?: County Confusion

Setting aside for a moment the issue of the disparity between state and federal law,¹⁴⁹ there are stark contrasts and disparities even at the state level where marijuana enforcement and regulation policies vary drastically from one county to the next.¹⁵⁰ With a lack of uniform state-wide standards, citizens of California are not always on clear notice and do not really know if they are complying with the law.¹⁵¹

Not only does this disparity create confusion among California citizens who are marijuana users, it also generates confusion among California law enforcement agencies.¹⁵² Californians, both marijuana users and enforcers of the law, are unsure of the scope of their rights.¹⁵³ This county-by-county approach is fragmented, disjointed, and allows for other, traditionally non-legislative factors to play substantial roles in shaping the scope of the law.

149. This conflict of laws issue (when federal and state laws are in tension) and its impact on notice and fairness will be explored in greater depth below when discussing this tension's impact on Americans' due process rights.

150. See Figueroa, *supra* note 10 (demonstrating San Diego county's ramped-up, conservative policy of cracking down on all marijuana related crime enforcement); see also Tamara B. Aparton, *Marijuana Enforcement Can Be Tricky for City's Police*, SAN FRANCISCO EXAMINER, Aug. 11, 2009, <http://www.sfexaminer.com/local/Marijuana-enforcement-can-be-tricky-for-citys-police-52925162.html> (illustrating San Francisco's liberal policy of almost-non-enforcement of marijuana laws).

151. See GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE, *supra* note 4 (establishing the California Attorney General's official policy of marijuana enforcement in the state of California).

152. See *id.* (recognizing the confusion of California marijuana users and law enforcement agencies alike, establishing a uniform set of enforcement policy guidelines as a template to correct the discrepancies in enforcement policies of different California law enforcement agencies, and attempting to address the questions posed by many California medical marijuana users).

153. *Id.*

d) Direct Conflict between State and Federal Laws

California's rebuke of the federal legislative scheme places tension on the DEA's role as enforcer of federal drug laws, on the FDA's role as a regulator of substances, and on the United States Congress' federal lawmaking authority.¹⁵⁴ California's rebuke of federal marijuana laws potentially emasculates these federal regulatory and enforcement authorities at the state level, gutting their authority with respect to marijuana enforcement and regulation. Additionally, this climate of disrespecting federal administrative agencies and casting aside the authority of federal mandates from Congress portends a reverberation with larger, national implications.¹⁵⁵ When California and other states enact legislation directly rebuking and defying federal laws, there are a whole host of negative implications triggered, including: (1) the eroding of respect

154. However, at least with respect to enforcement of federal marijuana laws, the DEA has stood its ground on a few recent occasions, raiding grow houses and dispensaries that stand out as some of the more egregious offenders of the true spirit of the CUA. *See* Figueroa, *supra* note 10 (demonstrating recent DEA raids in San Diego county); *see also* Hoeffel, *All L.A. County Medical Pot Dispensaries Face Prosecution, District Attorney Says*, *supra* note 10 (reporting on the Los Angeles District Attorney's recent stance against marijuana in Los Angeles county); *see also* Hoeffel, *Pot Dispensaries Sue L.A. over Moratorium: Medical Marijuana Collectives' Suit Comes as City Struggles to Write a New Ordinance*, *supra* note 10 (commenting on Los Angeles marijuana users' reaction to the Los Angeles District Attorney's recent crack-down on marijuana); *see also* Hoeffel, *Los Angeles County D.A. Prepares to Crack Down on Pot Outlets*, L.A. TIMES, Oct. 9, 2009, <http://www.latimes.com/news/local/la-me-medical-marijuana9-2009oct09,0,5210895.story> (reiterating the Los Angeles District Attorney's recent policy position against marijuana). On the other hand, because the federal government does not recognize any legal or legitimate medical uses for marijuana, they refuse to invoke the regulatory powers or resources of the FDA, because to invoke such regulatory oversight by the federal government would be a tacit admission or ratification of the validity of the CUA's core purpose of recognizing marijuana's legitimate medical properties. 21 U.S.C. § 812 (2006). As such, the FDA stands on the sidelines of the marijuana debate, while the CUA seems to be having the practical effect of stripping the FDA of all of its regulatory teeth with respect to marijuana in the state of California.

155. *See* Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1987) (articulating the many functional and psychological factors that are taken into consideration during the law-making process in American society, while also considering the unique role that unenforced laws play in American society).

for authority, (2) issues regarding notice, (3) adverse economic implications, and (4) the impact on societal morals/values.

First, regarding the eroding respect for authority, having federal marijuana laws that are not actively enforced and instead ignored demonstrates flagrant disregard for federal laws, disrespect for the DEA's marijuana enforcement authority, and insolence for the FDA's potential marijuana regulation authority.¹⁵⁶ This runs the risk of creating a society with less respect and reverence for law and order.¹⁵⁷ This creates a slippery slope that potentially fosters a culture and atmosphere where citizens might become increasingly willing to violate more serious laws.¹⁵⁸

Second, with respect to the notice issue, when your state says one thing, but the federal government comes in and turns the state's law on its head, who should you as a citizen trust and believe? Among other things, written laws serve the fundamental function of putting citizens on notice regarding what is and is not legally acceptable behavior in society.¹⁵⁹ Its written form puts citizens on notice of these rights and expectations.¹⁶⁰ Accordingly, when there are conflicting laws, citizens' confidence in the integrity of the legal justice system is significantly affected.¹⁶¹

Third, with respect to adverse economic implications, by having an illegal (albeit quasi-legal in California), booming black market like the marijuana trade thriving in the United States, both the federal and state governments are leaving a lot of money on the table by not having a comprehensive regulatory, enforcement, and taxation scheme in place to tax the activities of this black market.¹⁶² Even in states with established medical marijuana statutes, like California, there are inconsistent approaches to issuing cards and a lack of uniform standards in monitoring the distribution and use of marijuana, thus creating several loopholes where sales taxes can be

156. *Id.*

157. *Id.*

158. *Id.*

159. Ronald Dworkin, *LAW'S EMPIRE* 140 (Harvard University Press 1986).

160. *Id.*

161. *Id.*

162. See Gonzales, *supra* note 17 (introducing California BOE Chairman Betty Yee who estimates that a regulated pot trade, for both medical and non-medical purposes, would bring in \$1.3 billion in sales tax revenue).

avoided.¹⁶³ Additionally, not only are states missing out on potential revenue generators, they are left with the other negative externalities, such as potential increases in costs to state and federal health, welfare, and social service systems.¹⁶⁴

Finally, relating to laws' impact on society's morals and values, while I do not intend for this article to be a moral judgment on the use of marijuana, the legalization of substances generally has the effect of quashing taboos, elevating substances to mainstream thought and acceptance, and impacting society's moral barometer.¹⁶⁵ Although it is unclear if laws help to establish or drive the evolution of society's lowest common moral denominators on particular issues, or if instead laws act as a reflection of society's already established moral norms, laws undoubtedly serve as a fairly accurate social barometer that communicate to children and the rest of society what we as a society deem to be acceptable or unacceptable behaviors (or, if nothing else, what our society deems to be the bare minimum or lowest common denominator).¹⁶⁶ Although commentators argue that you cannot legislate morality, our laws are a fairly accurate gauge of society's moral temperature on certain issues.¹⁶⁷ Do laws dictate societal morals and values or do societal morals and values dictate the laws passed? Either way, the two seem to be inextricably intertwined.

163. *Id.*

164. *Id.*

165. Nachman Ben-Yehuda, *THE POLITICS AND MORALITY OF DEVIANCE: MORAL PANICS, DRUG ABUSE, DEVIANT SCIENCE, AND REVERSED STIGMATIZATION* 59 (SUNY Press 1989) (attaching the passage of laws with the re-drawing, re-centralizing, and the revitalizing of the "moral universes" or "moral boundaries" in society – linking the installation of new laws with the establishment of contemporary societal values).

166. *Id.*

167. *See generally* Norman L. Geisler & Frank Turek, *LEGISLATING MORALITY: IS IT WISE? IS IT LEGAL? IS IT POSSIBLE?* (Bethany House 1998).

VI. LOOKING AHEAD & CONCLUSION

As California goes, so goes the rest of the nation.¹⁶⁸ Good or bad, California is generally on the cutting edge and a trend-setter when it comes to American social and economic legislative policies. As a leader whose actions could have national implications, California owes a duty both to its own citizens and to the rest of the nation to pause and seriously consider everything on the table with respect to the marijuana debate. With the great number of “pros” and “cons” attached to the legalization of marijuana, is legalization something Californians want to encourage and see permeating throughout the rest of the nation?

The federal government must stop sending mixed signals to the American public with respect to marijuana. On the one hand, the United States Congress has passed legislation scheduling marijuana as the most dangerous type of substance recognized in the United States.¹⁶⁹ However, on the other hand, the United States Attorney General, the President, and the United States Drug Enforcement Administration have formally adopted policies of enforcing Congress’ drug laws that essentially serve as ratifications of state laws, like California’s, that practically amount to a legalization of marijuana.¹⁷⁰ By adopting these types of enforcement policies, the federal government’s enforcement arm strongly signals its tacit endorsement or approval of those state legislative schemes, even when those laws fly directly in the face of federal congressional mandates.¹⁷¹ In other words, while our federal legislature is saying one thing, the enforcement arm for that legislature is adopting

168. See Peter Schrag, *As California Goes . . .*, THE NATION, Mar. 30, 2007, <http://www.thenation.com/doc/20070409/schrag> (“[W]hat California is, America is likely to become.”).

169. See 21 U.S.C. § 812 (2006) (slotting marijuana as a Schedule I controlled substance, the most dangerous type of substance recognized under the federal legislative scheme).

170. See MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS ON INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA, *supra* note 4 (falling into lock-step with the Obama Administration’s policy of respecting state medical marijuana laws, this memo establishes the United States Attorney General’s official policy of essentially not enforcing federal marijuana laws in states with medical marijuana statutes).

171. *Id.*

policies undercutting the legislative mandate by enforcing the law in a half-hearted manner.

The regulatory and enforcement arms of the federal government can unilaterally dictate the scope, contours, and impact of a piece of legislation through the manner in which they choose to regulate and enforce the law. Usurpation of Congressional lawmaking authority by the federal regulatory and enforcement arms can be harmful for two reasons: (1) it runs counter to the voice of the people by short-circuiting the role of the federal lawmakers who were elected by the American public to carry out the public's collective will, and (2) rather than anchoring legislation in concrete and tangible laws, it threatens to float legislation on policy rafts, rafts often weak and subject to numerous inappropriate extrinsic influences.¹⁷²

If the situation in California is used as both a measuring stick and a barometer of things to come with respect to the marijuana climate in America, it is safe to say that the disjointed marijuana mess in California bodes poorly for America's collective future relationship with marijuana. The marijuana discussion creates an interesting wrinkle in the federalism debate—a quintessential debate involving the perpetual tug-of-war between states and the federal government. While this debate may be an enjoyable academic exercise in a law school classroom, it has substantially higher stakes in real life and is a messy issue.

172. Policy positions are often rooted in political convenience, used as stall tactics, and temporary in nature. Since policies are not law, they are not rooted in or bolstered to the firm foundation of the written and recorded word. As such, these types of lines can easily be washed away by politically-convenient high tides. Furthermore, mere policy positions establishing how laws will be enforced leave those subject to those laws unprotected and exposed. Instead of having laws serve their most basic and traditional function of putting individuals in society on notice of prohibited activities and establishing societal expectations, policy positions serve the function of putting those subjected to such laws on notice of merely the current trends or attitudes of the law's enforcers, essentially putting them on notice of nothing. In my opinion, in order to protect the due process rights of Californians and other Americans, and in order to put all relevant parties on fair notice, written laws must be passed. Mere policy positions cannot carry the day since they are flimsy and subject to political whims. Rather, truly legitimate approaches to enforcement should be bolstered by or rooted in some type of clearly defined and tangible law. A system of enforcement built upon a foundation of policy, rather than law, is weak, unstable, ripe for corruption and inconsistency, and perpetually on the brink of collapse.

Looking ahead with respect to marijuana and defiant state laws, the federal government has three options: (1) do nothing, (2) enforce its laws, or (3) reform its approach. As to option one, the federal government can continue to ignore the disparity between the federal and state approaches, blindly living with the conflict and allowing states to craft their own policies, unchecked by federal authority. Under this option, a state-level analog of the federal FDA would need to be created by the state of California to regulate the health and safety of marijuana as a substance being consumed. This is the federal government's current stance and, as I hope this comment has delineated, the practical difficulties and pitfalls stemming from this present strategy make it an unsustainable and ineffective approach. While ignorance is often bliss, the federal government cannot ignore this inherently and historically important federalism question, as it could have a resounding impact on the dynamics of power as understood between the federal and state governments on issues other than marijuana. The federal government burying its head in the sand is not a sound long-term approach.

As to option two, the federal government can ramp-up its enforcement efforts by unleashing the DEA, invoking the Supremacy Clause¹⁷³ and overturning state laws that run counter to the federal mandate. The federal government does have the authority, as explicitly stated by the Supreme Court in *Gonzales v. Raich*, to ignore California's CUA because it is in direct defiance of a federal statute.¹⁷⁴ However, because the Court grounded much of its opinion in that case on the scheduling of marijuana (a designation that is now largely in dispute as more reputable scientific studies surface indicating that legitimate medical uses of marijuana exist), the Court's foundation for finding federal authority here might be crumbling.¹⁷⁵ If nothing else, revisiting the process of scheduling

173. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws 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.").

174. *Gonzales*, 545 U.S. at 31 (empowering the federal government of the United States to vigorously enforce its marijuana laws, even though the Court does not and cannot mandate that the federal government take action).

175. *Id.* at 14-15.

marijuana as a substance under the CSA would be a logical first step in moving forward under this option.

As to option three, a comprehensive plan for federal reform on the subject of marijuana in American society can be crafted. In this case, the DEA and FDA would need to weigh in, states would need to be included in the conversation, and a re-scheduling of marijuana would probably occur. The federal government could realistically go one of two ways in completely overhauling or reforming marijuana laws nation-wide: (1) the federal government could institute minimal guidelines, while deferring to the states to come up with suitable legislative, enforcement, and regulatory schemes in dealing with marijuana at the ground level, or (2) the federal government could come up with a uniform approach to regulating and enforcing the distribution and use of marijuana (for medical and non-medical purposes), treating it similarly to other prescription drugs and potentially dangerous commodities such as aspirin, Vicodin and beer—all of which are subject to FDA regulation and some to other forms of federal enforcement. Both of these approaches look a lot like de-criminalization.

Whichever option is chosen, the FDA and DEA must be reinstituted to their traditional roles as regulators and enforcers. If a scheme is adopted whereby marijuana will play a more prominent role in everyday American society, then the FDA will undoubtedly play a larger role in regulating the quality, content, and safety of the substance. However, if a scheme is ultimately adopted where marijuana's place in society is solidified as a Schedule I substance, then the DEA must sharpen its enforcement teeth and not have its hands tied behind its back by other executive branch officials. Both of these administrative agencies play enormously important roles in keeping Americans safe, healthy, and secure. However, in the context of marijuana, both agencies are presently being used as political pawns and bureaucratic paper-weights at a time when their respective skills and expertise are needed more than ever. It is time for the powers that be to get off of the policy fence, make some hard decisions, and take some real action.

The current state of marijuana sales, use, and consumption in the state of California is analogous to the Underground Railroad of 19th century America. Whereas the Railroad was an underground network of secret routes and safe-houses enabling African-American slaves to get to "free" states and escape slavery, there is a similar

network of safe harbors in place for marijuana-using Californians. With countless patient advocacy groups and marijuana-friendly doctors and lawyers flooding the Internet with websites, a climate has been created in the state of California where anybody who wants a medical marijuana card (for legitimate medical needs or not) can get one.¹⁷⁶ There are lists of marijuana-friendly California doctors, broken down and listed alphabetically and by county.¹⁷⁷ There is even an eHow.com page instructing users on how to procure a medical card, getting down to the exact details of what to say to doctors to ensure the receipt of a recommendation.¹⁷⁸

All of these conduits, informational pipelines, and helping hands readily available to California marijuana users have created a modern-day Underground Railroad, a *Pineapple Express* of sorts.¹⁷⁹ However, one main difference is that these modern networks hide in plain site on the Internet. Surprisingly, the stoners are fervently

176. See *California Referring Physicians*, supra note 77; see also Safe Access Now, *California Attorney Referral List*, <http://www.safeaccessnow.net/attorneys.htm> (listing marijuana-friendly lawyers in California).

177. See *Medical Cannabis Practitioners*, supra note 76 (listing California marijuana-friendly doctors who openly give out medical marijuana recommendations – listed alphabetically and by county).

178. See Mack, supra note 96.

179. PINEAPPLE EXPRESS (Columbia Pictures 2008). Pineapple Express is described on the Internet Movie Database as follows:

Lazy court-process clerk and stoner Dale Denton has only one reason to visit his equally lazy dealer Saul Silver: to purchase weed, specifically, a rare new strain called Pineapple Express. But when Dale becomes the only witness to a murder by a crooked cop and the city's most dangerous drug lord, he panics and dumps his roach of Pineapple Express at the scene. Dale now has another reason to visit Saul: to find out if the weed is so rare that it can be traced back to him--and it is. As Dale and Saul run for their lives, they quickly discover that they're not suffering from weed-fueled paranoia: incredibly, the bad guys really are hot on their trail and trying to figure out the fastest way to kill them both. All aboard the Pineapple Express.

The Internet Movie Database (IMDb), *Plot Summary for Pineapple Express*, available at <http://www.imdb.com/title/tt0910936/plotsummary> (last visited Mar. 31, 2010).

organized and united. They know the rules and loopholes, they know how to exploit them, and they are doing a great job at it. They run a remarkably tight ship. In the War-on-Drugs in the state of California, the marijuana users are winning. And, in fairness, they should be winning because they have demonstrated that they care about this issue more than their opponents. Marijuana users' efforts reveal that having access to the substance is much more important to them than keeping the substance out of California is to their opponents.

The stakes here are incredibly high. Marijuana impacts the triad of social service systems (health, welfare, and social services), tax revenues, the family structure, crime, and social values, just to name a few. While the California marijuana market in general is a potential billion dollar industry, one cannot be automatically enticed by the false economy that increased tax revenues from this industry will cover, account for, or cure all the negative externalities that come along with the increased usage and prevalence of this substance in our society.¹⁸⁰ Marijuana, like any potentially addictive substance that is abused, would invariably trigger a whole number of societal costs if brought into the mainstream.¹⁸¹ Looking at our society's previous experiments with alcohol and tobacco, and the fact that the astronomical societal costs attributable to those legal substances are not even close to being offset by the tax revenues generated from those substances, both California and the federal government must tread very carefully when making a decision on how to deal with marijuana.

If marijuana is legally recognized, just like we cannot un-ring the alcohol or tobacco bells, it too will be extremely difficult, if not impossible, to untangle or unwind. There is essentially no turning back. Thus, "legalize-it" theorists who base their arguments and justifications on alcohol and tobacco grounds are ignoring the mess alcohol and tobacco make in our society—they are overlooking the

180. See Gonzales, *supra* note 17 (discussing the opinion of California BOE Chairman Betty Yee who estimates that a regulated pot trade, for both medical and non-medical purposes, would bring in \$1.3 billion in sales tax revenue, and also explaining the concept of the false economy asserted by those who ignore marijuana's negative externalities and instead focus only on marijuana's potential for generating increased tax revenues).

181. See REGAN, *supra* note 97 (discussing the costs associated with alcohol and tobacco in America).

strain those substances place on local, state, and federal governments. Because it is nearly impossible to make something illegal once it has already been made legal, before the genie is officially let out of the bottle, a serious balancing of the “pros” and “cons” must be undertaken. The time for reflection and action is now. Some definitive federal action must be taken and something must be done, because, for all practical purposes, the genie is starting to peek out of the bottle in the state of California.

