

# FEDERAL MARIJUANA LAWS AND THEIR CRIMINAL IMPLICATIONS ON CULTIVATION, DISTRIBUTION, AND PERSONAL USE IN CALIFORNIA

## I. INTRODUCTION

In 2007, California produced \$36.6 billion in cash farm receipt revenue, the highest in the nation.<sup>1</sup> However, this total does not include California's marijuana<sup>2</sup> production,<sup>3</sup> which is actually California's biggest cash crop at \$14 billion per year.<sup>4</sup> In 1996, California legalized medical marijuana and currently \$200 million a year in medical marijuana sales

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<sup>1</sup> CAL. DEP'T OF FOOD AND AGRIC., CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2008-2009 17 (2010), available at [http://www.cdfa.ca.gov/Statistics/PDFs/ResourceDirectory\\_2008-2009.pdf](http://www.cdfa.ca.gov/Statistics/PDFs/ResourceDirectory_2008-2009.pdf).

<sup>2</sup> For the purposes of this Comment, marijuana will be defined according to Health and Safety Code section 11018 which states: "'Marijuana' means all party of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin." CAL. HEALTH & SAFETY CODE §11018 (West 2010).

<sup>3</sup> California's "mild climate, rich soil and a lengthy March-to-October growing season" allows California cultivators massive quantities of marijuana. NAT'L PARK SERV., MARIJUANA ERADICATION FRAMEWORK AND GOALS 4 (2010). Additionally, marijuana has been manipulated to grow in "nearly any type of conditions and budding at anytime of the year." *Id.* at 6. It costs \$400 to grow a pound of marijuana which then sells to a middle man for \$2,500 who sells it on the street for \$6,000. Trish Regan, *Marijuana growers thrive in California*, MSNBC (Jan. 22, 2009, 2:29 PM), [http://www.msnbc.msn.com/id/28354324/ns/business-cnbc\\_tv/](http://www.msnbc.msn.com/id/28354324/ns/business-cnbc_tv/). This type of profit margin is resulting in marijuana production taking the place of failing industries such as lumber and fishing. *Id.*

<sup>4</sup> Alison Steteman, *Can Marijuana Help Rescue California's Economy?*, TIME, Mar. 13, 2010, available at <http://www.time.com/time/nation/article/0,8599,1884956,00.html>.

are subject to sales tax.<sup>5</sup> However, outside of medical marijuana, Mexican drug cartels monopolize the marijuana market.<sup>6</sup>

The most “explosive” marijuana conflicts and the “biggest hauls” are taking place in California because it has become much more difficult to smuggle drugs into the United States since September 11th, 2011.<sup>7</sup> Mexican traffickers have now moved into the United States, primarily California, and are creating vast marijuana plantations stateside.<sup>8</sup> The White House Office of National Drug Control Policy believes that Mexican traffickers currently control 80 to 90 percent of marijuana operations in the United States, reaping billions of dollars annually in illicit profits.<sup>9</sup>

On November 2, 2010, California residents had the opportunity to legalize recreational marijuana through Proposition 19.<sup>10</sup> Proponents<sup>11</sup> stated that Proposition 19 would “control cannabis like alcohol;” “give local governments the ability to tax;” and “generate billions of dollars in

<sup>5</sup> *Id.* Thirteen other states have subsequently also legalized medical marijuana, which include: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *14 Legal Medical Marijuana States*, PROCON.ORG (June 24, 2010, 12:09:02 PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

<sup>6</sup> See NAT'L PARK SERV., *supra* note 3, at 6.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6. “The task of disrupting the Drug trafficking Organizations and their cultivation is a dangerous one.” *Id.* at 5. In 2007, 4.7 million plants were eradicated in California, with 2.6 million of those being on California federal lands. *Id.* at 6. In 2008, California eradicated 5.1 million plants. *Id.*

<sup>10</sup> See Fox News, *Calif. Voters to Decide Whether to Legalize Marijuana*, FOX NEWS, Mar. 25, 2010, available at <http://www.foxnews.com/politics/2010/03/25/calif-voters-decide-legalize-marijuana/>. Proposition 19 would allow those twenty one years of age or older to possess up to one ounce of marijuana. Residents will also be permitted to grow their own crop in a garden that is up to twenty five square feet. Under the proposition, it would be illegal to ingest marijuana in public, smoke it while minors are present, or drive while under its influence. Letter from James Wheaton, to Jerry Brown, Attorney General of California (July 27, 2010), available at [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i821\\_initiative\\_09-0024\\_amdt\\_1-s.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i821_initiative_09-0024_amdt_1-s.pdf).

<sup>11</sup> Proponents of Proposition 19 include: ACLU of Northern California and San Diego, California NAACP, California Green Party, as well as numerous members of law enforcement, physicians, economists and business leaders, elected officials, organizations and faith leaders. *Endorsements, YES ON 19 CONTROL AND TAX CANNABIS 2010*, <http://www.taxcannabis.org/index.php/pages/endorsements> (last visited July 10, 2010). In fact, the NAACP is calling this initiative “a civil rights issue because black have a disproportionate number of arrests for marijuana possession as compared with whites.” Wyatt Buchanan, *California NAACP backs marijuana ballot measure*, SAN FRANCISCO CHRONICLE, June 20, 2010, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/06/30/BAIB1E6R8BG.DTL&type=printable>.

revenue” for California.<sup>12</sup> Opponents<sup>13</sup> stated that the “opposition to marijuana legalization [had] grown to 56%,” “employers [would] no longer be able to screen job applicants for marijuana use;” “a California employer [would] no longer be eligible to receive federal government grants or contracts greater than \$100,000;” employers could not require employees operating transportation vehicles to be drug free; and that this would not reduce the state deficit because the initiative “specifically does not authorize state taxation.”<sup>14</sup> The Legislative Analyst’s Office<sup>15</sup> estimated that Proposition 19 would result in “savings of up to several tens of millions of dollars annually,” which is currently spent prosecuting marijuana; additionally, major revenue might be collected from its sale and production.<sup>16</sup> The vote was 53.5 percent against the legalization and 46.5 percent in favor.<sup>17</sup> However, proponents are optimistic and already planning for a similar initiative to be on the ballot 2012.<sup>18</sup>

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<sup>12</sup> Letter from Control & Tax Cannabis California 2010, to Whom it May Concern, available at [http://70.32.87.43/documents/Tax\\_Cannabis\\_Endorsement\\_Packet.pdf](http://70.32.87.43/documents/Tax_Cannabis_Endorsement_Packet.pdf).

<sup>13</sup> Public Safety First “has been formed to oppose a November initiative legalizing Marijuana sales and cultivation in California.” *Frequently Asked Questions*, NO ON PROP 19 PUBLIC SAFETY FIRST THE CAMPAIGN TO DEFEAT THE LEGALIZATION OF MARIJUANA IN CALIFORNIA, [http://www.publicsafetyfirst.net/images/stories/docs/FAQs\\_PSF.pdf](http://www.publicsafetyfirst.net/images/stories/docs/FAQs_PSF.pdf) (last visited July 10, 2010). Its endorsements include Mothers Against Drunk Driving, “every major state and national anti-drug abuse organization,” California District Attorneys Association, the California Chamber of Commerce, the California Police Chiefs Association, the California Narcotic Officers’ Association, the California Bus Association, and “dozens of other civic, community and public safety organizations.” *FAQs The Regulate, Control and Tax Cannabis Act of 2010*, NO ON PROP 19 PUBLIC SAFETY FIRST THE CAMPAIGN TO DEFEAT THE LEGALIZATION OF MARIJUANA IN CALIFORNIA, [http://www.publicsafetyfirst.net/images/stories/docs/FAQs\\_PSF.pdf](http://www.publicsafetyfirst.net/images/stories/docs/FAQs_PSF.pdf) (last visited July 20, 2010).

<sup>14</sup> *FAQs The Regulate, Control and Tax Cannabis Act of 2010*, *supra* note 13.

<sup>15</sup> The Legislative Analyst’s Office “has been providing fiscal and policy advice to the Legislature for more than 65 years” and as such “it is known for its fiscal and programmatic expertise and nonpartisan analysis of the state budget.” LEGISLATIVE ANALYST’S OFFICE, ABOUT THE LEGISLATIVE ANALYST’S OFFICE (2010), [http://www.lao.ca.gov/laoapp/laomenus/lao\\_menu\\_aboutlao.aspx](http://www.lao.ca.gov/laoapp/laomenus/lao_menu_aboutlao.aspx) (last visited July 10, 2010).

<sup>16</sup> LEGISLATIVE ANALYST’S OFFICE, 2009 INITIATIVE ANALYSIS: THE REGULATE, CONTROL, AND TAX CANNABIS ACT OF 2010 (2010), <http://www.lao.ca.gov/ballot/2009/090512.aspx> (last visited July, 10, 2010).

<sup>17</sup> *Votes For And Against November 2, 2010, Statewide Ballot Measures*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf> (last visited Mar. 5, 2011).

<sup>18</sup> See Peter Hecht, *Prop 19 defeated, California pot grower vows to try again*, SACRAMENTO BEE, Nov. 3, 2010, available at <http://www.theolympian.com/2010/11/03/1426580/california-pot-grower-vows-to.html>.

Under the federal Controlled Substances Act, the use of marijuana, for any reason, is absolutely prohibited by the federal government.<sup>19</sup> Since the federal government and California both regulate marijuana, they exercise concurrent jurisdiction over marijuana offenses.<sup>20</sup> This means that a single offense can be prosecuted by either jurisdiction.<sup>21</sup> This “patchwork of laws” and jurisdictions has created enormous confusion.<sup>22</sup> Unless the possession occurs on federal land, the state system usually prosecutes possession offenses.<sup>23</sup> Crimes such as cultivation, distribution and the sale of marijuana may be prosecuted by either jurisdiction, with the federal government prosecuting the more serious offenses.<sup>24</sup>

Whether the federal government or state government prosecutes a case can lead to significantly different results for the defendant because the federal government does not recognize medical necessity for marijuana;<sup>25</sup> it will not recognize a recreational marijuana proposal;<sup>26</sup> it can seek forfeiture in marijuana cases;<sup>27</sup> and the sentences in federal court are far lengthier.<sup>28</sup> California cities and counties are also regulating medical marijuana and facing lawsuits regarding those regulations as many of them limit the cultivation, distribution, or use of marijuana in some way.<sup>29</sup> Currently, there is also little to no protection against discrimination based on marijuana use.<sup>30</sup>

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<sup>19</sup> See 21 U.S.C.A. § 841(a)(1) (West 2010); 21 U.S.C.A. § 812 (West 2010).

<sup>20</sup> See *Abate v. U.S.*, 359 U.S. 187, 192 (1959).

<sup>21</sup> *Id.*

<sup>22</sup> Leigh Jones, *Pot Law Practices Grow as Medical Marijuana Debate Rages*, NAT'L L. J., June 23, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202462917583>. “Furthermore, patients and their providers are vulnerable to federal and state raids, arrest, prosecution, and incarceration.” AM. FOR SAFE ACCESS, CALIFORNIA LEGAL MANUAL I (2009), available at [http://americansforsafeaccess.org/downloads/CA\\_Legal\\_Manual\\_2009.pdf](http://americansforsafeaccess.org/downloads/CA_Legal_Manual_2009.pdf).

<sup>23</sup> LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW- CHAPTER 11 DRUG AND ALCOHOL OFFENSES (2009), available at Westlaw CACRLAW § 11.2.

<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001).

<sup>26</sup> See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>27</sup> Memorandum from the U.S. Attorney's Office for the Eastern District of California on Prosecution Guidelines for Misdemeanor Marijuana Possession on Federal Land to Prosecutors (Oct. 23, 2009) (on file with author).

<sup>28</sup> LEVENSON, *supra* note 23.

<sup>29</sup> See Amanda Bronstad, *Calif. Cities Sued Over Medical Marijuana Ordinances*, NAT'L L. J., May 12, 2010, available at <http://www.safeaccessnow.org/article.php?id=6022>.

<sup>30</sup> Americans for Safe Access states that medical marijuana patients and their providers “suffer pervasive discrimination in employment, child custody, housing, public accommodations, education and medical care because of misinformation about the medical efficacy of cannabis and a lack of statutory legal protections.” AM. FOR SAFE ACCESS,

This Comment will analyze the different implications of the cultivation, distribution, and use of marijuana in California with respect to the jurisdictional splits in federal, state, and local laws. A recreational legalization initiative will be subject to the same jurisdictional issues as medical marijuana due to the federal government's strict ban on the use of marijuana<sup>31</sup> and city/county regulation through zoning;<sup>32</sup> therefore, I will focus my analysis on the jurisdictional conflict as applied to medical marijuana.

## II. CALIFORNIA MARIJUANA LAWS

Under California Health and Safety Code section 11357(b), possession of less than an ounce of marijuana was a misdemeanor and punishable by a \$100 fine.<sup>33</sup> Although the fine is fairly minimal, drug convictions can have collateral consequences such as deportation, inability to maintain a professional license,<sup>34</sup> and registration as a drug offender.<sup>35</sup> In fact, legislation has been proposed that would deny those with marijuana convictions "welfare, disability, and social security benefits; an opportunity to reside in public housing; and an opportunity to participate in certain other entitlement programs."<sup>36</sup> Usually, first-time offenders can be eligible for a deferred entry of judgment or diversion, keeping their criminal

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*supra* note 22, at 1. In *Ross v. Raging Wire Telecommunications*, 174 P.3d 200, 208 (Cal. 2008), the California Supreme Court held that the California Fair Employment and Housing Act as well as a general public policy did not prohibit a private employer from failing to accommodate/terminating an employee who used medical marijuana. Americans for Safe Access is working in with the legislature to overturn this decision. Am. for Safe Access, *Landmark Decisions*, AMERICANS FOR SAFE ACCESS (Aug. 6, 2004), <http://americansforsafeaccess.org/article.php?list=type&type=34&printsafe=1> (last visited June 25, 2010). The Governor has already vetoed AB 2279, a bill that would have added a section to the Medical Marijuana Program prohibiting termination of employment for a person lawfully proscribed medical marijuana. Sonia R. Carvalho and Jeffrey V. Dunn, *Medical Marijuana: An Evolving Legal Landscape*, PUB. L. J. Winter 2010, at 1, 5 (discussing *Ross v. Raging Wire Telecommunications, Inc.*, medical marijuana in the workplace).

<sup>31</sup> See *Gonzales*, 545 U.S. at 9.

<sup>32</sup> See Bronstad, *supra* note 29; Marc Benjamin, *County takes possession of Tower Dist. pot clinic- Rick Morse says he will not fight writ to evict him.*, FRESNO BEE, June 22, 2010, available at <http://www.fresnobee.com/2010/06/22/1980215/morse-plans-statement-on-medmar.html>.

<sup>33</sup> CAL. HEALTH & SAFETY CODE § 11357(b) (West 2010).

<sup>34</sup> See CAL. BUS. & PROF. CODE § 2237 (West 2010); LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW- CHAPTER 11 DRUG AND ALCOHOL OFFENSES (2009), available at Westlaw CACRLAW § 11.48.

<sup>35</sup> LEVENSON, *supra* note 34.

<sup>36</sup> *Id.*

records clean and avoiding these collateral consequences.<sup>37</sup> It is important to note that California does prosecute simple possession charges, and that in 2009 there were over 60,000 Californians booked on possession alone.<sup>38</sup>

This changed on October 1, 2010 when Governor Arnold Schwarzenegger, citing budgetary reasons, signed SB 1449, which amended Health and Safety Code 11357 to make possession of less than one ounce of marijuana an infraction.<sup>39</sup> This went into effect on January 1, 2011 and while the infraction will still maintain the same \$100 fine, it will not go on a defendant's criminal record.<sup>40</sup>

In terms of cultivation and distribution, marijuana Defense Attorney Bill McPike states that it costs as little as \$5,000 to set up a storefront shop, while a marijuana delivery system can be started for just \$500.<sup>41</sup> The problem is those looking to start a medical marijuana business ". . . just go do it, with no forms to back them up, then the cops come across them and they're in real trouble."<sup>42</sup> Under California Health and Safety Code sections 11358 and 11359, both cultivation of marijuana<sup>43</sup> and possession of marijuana for sale, are felonies and subject to imprisonment.<sup>44</sup>

This is where legalization statutes come in. They act as a defense to these charges and allow a defendant who is cultivating, distributing, or using marijuana in compliance with state law to escape the criminal system without a conviction on their record.<sup>45</sup> The jurisdictional issue with this is that these defenses are good only to the extent that the jurisdiction in which the case is brought recognizes them.

### A. Medical Marijuana--Proposition 215

In 1996, California voters approved California Health and Safety Code section 11362.5, also known as the Compassionate Use Act of 1996, which allows "seriously ill Californians" to use medical marijuana as

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<sup>37</sup> See CAL. PENAL CODE § 1000 (West 2010); *People v. Squier*, 18 Cal.Rptr.2d 536, 537-540 (Cal. Ct. App. 1993).

<sup>38</sup> Nicholas Pell, *California SB 1449 decriminalizes marijuana, Prop 19 looms*, EXAMINER, Oct. 2, 2010, available at <http://www.examiner.com/crime-in-los-angeles/california-sb-1449-decriminalizes-marijuana-prop-19-looms>.

<sup>39</sup> *Id.* See S.B. 1449, 2009 Leg., Reg. Sess. (Cal. 2010).

<sup>40</sup> Pell, *supra* note 38. See Cal. S.B. 1449.

<sup>41</sup> Jones, *supra* note 22.

<sup>42</sup> *Id.*

<sup>43</sup> If the defendant is able to prove that he engaged in cultivation for his or her personal use, then he or she is still eligible for diversion so that the prison sentence does not have to be imposed. See *People v. Tierce*, 211 Cal.Rptr. 325, 332 (Cal. Ct. App. 1985).

<sup>44</sup> CAL. HEALTH & SAFETY CODE §§ 11358-59 (West 2010).

<sup>45</sup> See *People v. Mower*, 49 P.3d 1067, 1070 (Cal. 2002).

deemed appropriate by a physician.<sup>46</sup> In 2003, the California legislature passed Senate Bill 420, now codified as California Health and Safety Code section 11362.7, declaring that this was in response to:

... reports from across the state [that] have revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act.<sup>47</sup>

This did a number of things: it established minimum thresholds at which point qualified patients did not have to demonstrate “reasonable personal use;” it explicitly protected qualified patients and caregivers; and it created a voluntary identification program that could be checked instantly by law enforcement to prevent unnecessary arrests.<sup>48</sup> This framework provided the basic defense to those charged with marijuana offenses.<sup>49</sup>

### *1. Case Law Clarification of the Compassionate Use Act and the Medical Marijuana Program*

In *People v. Kelly*, 222 P.3d 186 (Cal. 2010), the California Supreme Court struck down what it considered to be unconstitutional limitations on how much medical marijuana patients can possess and cultivate.<sup>50</sup>

Whether or not a person entitled to register under the MMP [Medical Marijuana Program] elects to do so, that individual, so long as he or she meets the definition of a patient or primary caregiver under the CUA [Compassionate Use Act], retains all the rights afforded by the CUA, and thus such a person may assert, as a defense in court, that he or she possessed or cultivated an amount of marijuana reasonably related to meet his or her current medical needs, without reference to the specific quantitative limitations specified by the MMP.<sup>51</sup>

Therefore, as long as the defendant meets these requirements, the defense will still stand in California courts.<sup>52</sup>

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<sup>46</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 2010).

<sup>47</sup> CAL. HEALTH & SAFETY CODE § 11362.7 (West 2010).

<sup>48</sup> See HEALTH & SAFETY § 11362.7; Americans for Safe Access, *How to Defend a Medical Marijuana Patient in California* (Aug. 6, 2004), <http://americansforsafeaccess.org/section.php?id=103&printsafe=1> (last update Aug. 6, 2004).

<sup>49</sup> See *Mower*, 49 P.3d at 1070.

<sup>50</sup> *People v. Kelly*, 222 P.3d 186, 213-214 (Cal. 2010).

<sup>51</sup> *Id.*

<sup>52</sup> See *Mower*, 49 P.3d at 1070.

In *County of San Diego v. San Diego Norml*, 81 Cal.Rptr.3d 461 (Cal. Ct. App. 2008), San Diego County brought suit against a local marijuana legalization organization for declaratory judgment that counties were not required to comply with the Medical Marijuana Program.<sup>53</sup> Specifically, the County of San Diego objected to being required to establish and maintain a program under which qualified applicants for the Medical Marijuana Program would receive an identification card that could be verified twenty-four hours a day by law enforcement.<sup>54</sup> Their rationale was that the Compassionate Use Act and the Medical Marijuana Program were preempted by the federal Controlled Substances Act, which completely bans the use of marijuana for any reason, and thus, both the Compassionate Use Act and the Medical Marijuana Program are unconstitutional under the Supremacy Clause.<sup>55</sup> The San Diego Superior Court held that the Compassionate Use Act and the Medical Marijuana Program were not preempted because neither conflicted with nor posed an obstacle to the Controlled Substances Act.<sup>56</sup>

The Fourth District Court of Appeal agreed, stating that:

... as to the limited provisions of the [Medical Marijuana Program] that Counties may challenge, those provisions do not positively conflict with the [Controlled Substances Act], and do not pose any added obstacle to the purpose of the [Controlled Substances Act] not inherent in the distinct provisions of exemptions from prosecution under California's laws, and therefore those limited provisions of the [Medical Marijuana Program] are not preempted.<sup>57</sup>

The California Supreme Court illuminated how the Compassionate Use Act operates in *People v. Mower*, 49 P.3d 1067 (Cal. 2002), in which Court held that Health and Safety Code section 11362.5 does not grant immunity from prosecution, but only allows the defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial.<sup>58</sup> However, if a court finds that the possession is legal under California law despite it being illegal under federal law, then the defendant's case must be dismissed or a not guilty verdict entered and the authorities must return the marijuana and any other property seized as forfeiture.<sup>59</sup> Therefore, it is important for a defendant to realize that the marijuana

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<sup>53</sup> *Cnty. of San Diego v. San Diego Norml*, 81 Cal.Rptr.3d 461, 467 (Cal. Ct. App. 2008).

<sup>54</sup> *Id.* at 481.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 467.

<sup>57</sup> *Id.* at 468.

<sup>58</sup> *Mower*, 49 P.3d at 1070.

<sup>59</sup> *See City of Garden Grove v. Superior Court*, 68 Cal.Rptr.3d 656, 682 (Cal. Ct. App. 2008).

charge will still appear on his or her criminal record, but it will not appear as a conviction, and the defendant should be able to regain any marijuana or paraphernalia seized.<sup>60</sup>

## 2. Regulation By Local Government Entities

Counties and cities throughout California are engaged in litigation with dispensaries as they struggle to regulate the cultivation, distribution, and personal use of marijuana through land use moratoria, zoning, permits, and taxation.<sup>61</sup> As discussed above, not all cities and counties have been as eager to implement medical marijuana programs.<sup>62</sup> Counties and cities are not preempted from adopting and enforcing zoning and business licensing requirements regarding marijuana dispensaries by the Compassionate Use Act or the Medical Marijuana Program.<sup>63</sup> According to Americans For Safe Access, as of June 2010, 141 cities and counties in California have flat out banned marijuana dispensaries while forty-two cities and counties have passed laws regulating them.<sup>64</sup>

Some city and county efforts to contain medical marijuana have focused on zoning regulation.<sup>65</sup> The City of Los Angeles City has an estimated 1,000 dispensaries.<sup>66</sup> In early May 2010, city prosecutors sent letters to the operators of 439 medical marijuana dispensaries demanding they shut down or face up to six months in jail and a \$1,000 fine, which increases to \$2,500 per day after the deadlines.<sup>67</sup> The City Attorney's Office stated this was intended to crackdown on dispensaries that were operating in violation of zoning regulations, in particular, those that opened after the 2007 moratorium on marijuana dispensaries.<sup>68</sup> In regards to another Los Angeles ordinance that requires "dispensaries to be located at least 1,000 feet from schools, parks, libraries, churches and other 'sensitive uses,'" <sup>69</sup>Americans for Safe Access claims that this violates dispensary owners' right to due process because they have a vested right to operate their business and that the burden of relocation is so great

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<sup>60</sup> See *Mower*, 49 P.3d at 1070.

<sup>61</sup> *Carvalho*, *supra* note 30, at 5.

<sup>62</sup> See generally *San Diego Norml*, 81 Cal.Rptr.3d at 467.

<sup>63</sup> See *City of Claremont v. Kruse*, 100 Cal.Rptr.3d 1, 17 (Cal. Ct. App. 2009).

<sup>64</sup> Kevin Fagan, *How towns sort out medical marijuana facilities*, S.F. CHRON., June 22, 2010, available at <http://www.safeaccessnow.org/article.php?id=6044>.

<sup>65</sup> See *Jones*, *supra* note 22; *Benjamin*, *supra* note 32.

<sup>66</sup> *Jones*, *supra* note 22.

<sup>67</sup> *Bronstad*, *supra* note 29.

<sup>68</sup> *Jones*, *supra* note 22.

<sup>69</sup> *Bronstad*, *supra* note 29.

that it will force many dispensaries to close their doors.<sup>70</sup> This approach drastically cuts the number of dispensaries in Los Angeles by prohibiting new dispensaries and shutting down any dispensary opened after the moratorium as well as any dispensary located within the sensitive use area.

Litigation against the City of Lake Forest City (in Orange County) challenged zoning regulations alleging the city has violated the Americans with Disabilities Act (hereinafter "ADA") by denying medical marijuana patients access to public services.<sup>71</sup> The complaint alleged that medical marijuana patients are dependent on medical marijuana in order to be able to utilize public services such as "use of public transportation, public roadways, libraries, parks and other public services."<sup>72</sup> United States District Judge Andrew Guilford did not agree with this argument and denied the plaintiff's motion for a preliminary injunction because the ADA cannot prescribe medical marijuana and thus there was "no likelihood of success on the merits."<sup>73</sup> Jeffrey Dunn, the attorney for Lake Forest, stated that the ordinance does not ban dispensaries; it merely disallows them in commercial zones, "[w]hether they're in compliance with state law, they're not in compliance with our zoning."<sup>74</sup> Thus, constitutional challenges to zoning, at least under the ADA, appear to have an unlikely chance of success.

Counties and cities can also be split within themselves.<sup>75</sup> Fresno County initially approved medical marijuana dispensaries; however, Fresno City, its largest city, subsequently jumped on the zoning bandwagon.<sup>76</sup> This could have resulted in a party being in compliance with county regulations, but not with the city regulations. In 2009, Fresno City officials sued dispensaries claiming that zoning ordinances require that dispensaries comply with state and federal law; and, since federal law prohibits sale of marijuana, the dispensaries are in violation of zoning.<sup>77</sup> Fresno Superior Court judges have found in favor of the city, forcing all marijuana dispensaries in Fresno to close their doors.<sup>78</sup> Fresno

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See Benjamin, *supra* note 32; Brad Branam, *Fresno Co OKs moratorium on pot dispensaries- Concerns about crime drive moratorium.*, FRESNO BEE, July 13, 2010, available at <http://www.fresnobee.com/2010/07/13/2005219/fresno-co-board-oks-freeze-on.html?storylink=mirelated>.

<sup>76</sup> See Benjamin, *supra* note 32; Branam, *supra* note 75.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

County also subsequently passed a moratorium on medical marijuana dispensaries in July 2010, citing concerns of increased crim due to the dispensaries.<sup>79</sup> This prohibits new dispensaries from opening in unincorporated parts of the county and requires existing dispensaries to be evaluated on a case-by-case basis to determine whether they can continue operating.<sup>80</sup> Only two of the fifteen dispensaries currently in place are “properly zoned for now.”<sup>81</sup> This means that Fresno County will also be able to exclude medical marijuana dispensaries.

Not all cities have been completely opposed to being involved in the regulation of the medical marijuana program.<sup>82</sup> Oakland has embraced medical marijuana and in 2009, it became the first city in the United States city to tax marijuana dispensaries.<sup>83</sup> That tax was expected to generate \$1 million in 2010.<sup>84</sup> Oakland is now looking to authorize and tax commercial growing operations.<sup>85</sup> AgraMed Inc, one of the companies planning to seek a grower’s license, said its “proposed 100,000 square-foot-project near the Oakland Coliseum would produce more than \$2 million in city taxes each year.”<sup>86</sup>

Even though the state approves medicinal marijuana, cultivators, distributors, and those personally using medical marijuana need to be aware of city and county zoning and taxation regulations to avoid exposing themselves to substantial criminal liability or forced closure.

### III. FEDERAL LAWS

#### A. Legislative Enactment and Judicial Effect

Under the Controlled Substances Act, the use of marijuana is absolutely prohibited by the federal government.<sup>87</sup> In *United States v. Oakland Cannabis Buyer Cooperative*, 532 U.S. 483 (2001), the United States Supreme Court held that a person in federal court may not argue that distribution of cannabis to patients is a medical necessity, thus in-

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<sup>79</sup> Branan, *supra* note 75.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Lisa Leff & Marcus Wohlsen, *Oakland to license, tax marijuana growers*, AZ-CENTRAL, May 28, 2010, available at <http://www.azcentral.com/business/consumer/articles/2010/05/28/20100528oakland-marijuana-tax.html>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See 21 U.S.C.A. § 841(a)(1) (West 2010); 21 U.S.C.A. § 812 (West 2010).

validating the medical marijuana defense in federal court.<sup>88</sup> Recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the United States Supreme Court held that the Commerce Clause includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.<sup>89</sup> Therefore, the federal government is allowed to prosecute those cultivating, distributing, or using marijuana in compliance with California law because they are still in violation of federal law.<sup>90</sup>

Under Federal sentencing guidelines, possession in an amount exceeding one kilogram of marijuana with no criminal record carries “a sentence of six to twelve months with a possibility of probation and alternative sentencing.”<sup>91</sup> If the amount is over 2.5 kilograms, it carries “a sentence of at least six months in jail; with multiple prior convictions, a sentence might be up to two to three years in jail with no chance of probation.”<sup>92</sup> There are also statutory minimum sentences which primarily target offenses involving larger quantities of marijuana.<sup>93</sup> “There is a five-year mandatory minimum [sentence] for cultivation of 100 plants or possession of 100 kilograms, and there is a ten-year minimum [sentence] for these offenses if the defendant has a prior felony drug conviction.”<sup>94</sup> Cultivation or possession of 1000 kg or 1000 plants “triggers a ten-year mandatory minimum [sentence], with a twenty-year mandatory sentence if the defendant has one prior felony drug conviction, and a life sentence with two prior felony drug convictions.”<sup>95</sup>

### B. Executive Execution

Depending on the presidential administration, the federal government may or may not conduct raids in California of those involved in any cultivation, distribution, or personal use of marijuana, regardless of whether or not the offense occurred on federal land.<sup>96</sup> During the George W. Bush administration, it is estimated that federal authorities conducted 200 raids in California alone.<sup>97</sup>

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<sup>88</sup> *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001).

<sup>89</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>90</sup> *See Id.*

<sup>91</sup> AM. FOR SAFE ACCESS, *supra* note 22, at 9.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See Carrie Johnson, U.S. eases stance on medical marijuana*, WASH. POST, Oct. 20, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/19/AR2009101903638.html>.

<sup>97</sup> *Id.* (citing Americans for Safe Access).

Under the Obama administration, Former Deputy Attorney General David W. Ogden sent a memorandum to federal prosecutors on October 19, 2009, in an attempt to provide uniform guidance regarding the prosecution of marijuana offenses.<sup>98</sup> The Department of Justice reaffirmed its commitment to the enforcement of the Controlled Substances Act but also cited limited resources as an important concern.<sup>99</sup> The prosecution and disruption of “significant traffickers of illegal drugs, including marijuana . . . continues to be a core priority” which “investigative and prosecutorial resources should be directed towards . . . .”<sup>100</sup> However, these limited resources should not be focused on those “whose actions are in clear and unambiguous compliance”<sup>101</sup> with their respective state’s medical marijuana laws.<sup>102</sup> The memorandum states that it is just intended to guide investigative and prosecutorial discretion; that it does not “legalize marijuana;” and that it will not “provide a legal defense to a violation of federal law.”<sup>103</sup> Thus, federal prosecutors will be reviewing marijuana cases on “case-by-case basis” consistent with federal priorities set forth in the memorandum,<sup>104</sup> “the considerations of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.”<sup>105</sup> Current Attorney General, Eric H. Holder, Jr., has reiterated this, stating “it will not be a priority to use federal re-

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<sup>98</sup> Memorandum from David W. Ogden, The Deputy Attorney General to Selected United States Attorneys (Oct. 19, 2009), *available at* <http://www.aclu.org/drug-law-reform/doj-memorandum-us-attorneys-re-medical-marijuana-enforcement>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The memorandum states that when the following is present, the conduct is not in “clear and unambiguous compliance” with state law and therefore federal prosecutors should prosecute: “unlawful possession or unlawful use of firearms; violence; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; amounts of marijuana inconsistent with purported compliance with state or local law; illegal possession or sale of other controlled substance; or ties to other criminal enterprises.” *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> The memorandum states “[f]or example, prosecution of individuals with cancer or other serious illnesses who use marijuana as a part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law, who provide individuals with marijuana, is unlikely to be an efficient use of limited federal resources.” *Id.* “On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.” *Id.*

<sup>105</sup> *Id.*

sources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana.”<sup>106</sup>

In an attempt to balance “enforcement of the federal Controlled Substances Act and deference to state medicinal marijuana laws for possession of marijuana, consistent with Deputy Attorney General David W. Ogden’s guidance memorandum of October 19, 2009,” the United States Attorney’s Office for the Eastern District of California adopted guidelines that prosecutors will not file marijuana charges against those people that have valid medical marijuana prescriptions.<sup>107</sup> This does not apply to situations in which the person cannot provide a verifiable Proposition 215 card/letter from their doctor, the amount of marijuana exceeds a “reasonable amount for personal use,” or when the case involves “serious aggravating factors.”<sup>108</sup> It is also important to note that this is still limited to guiding investigative or prosecutorial discretion and does not provide a legal defense federal drug charges.<sup>109</sup> In regards to forfeiture,<sup>110</sup> the guidelines “are not to be construed as prohibiting enforcement authorities on federal land from seizing marijuana possessed by an otherwise qualified person if the agency deems the seizure appropriate under the particular circumstances of the offense.”<sup>111</sup>

Due to the seriousness and severity of penalties for federal marijuana convictions and the ever changing enforcement strategies with each new administration, the cultivation, distribution, and use of marijuana is an extremely risky venture.

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<sup>106</sup> Johnson, *supra* note 96.

<sup>107</sup> Memorandum from the U.S. Attorney’s Office for the Eastern District of California on Prosecution Guidelines for Misdemeanor Marijuana Possession on Federal Land to Prosecutors, *supra* note 27.

<sup>108</sup> *Id.* These “serious aggravating factors” can include: when the person engaged in behavior that was negligent, reckless or dangerous after using marijuana; the person (not a “primary caregiver”) provided marijuana to another person; the amount of marijuana exceeds the “reasonable amount for personal use;” the person was causing a disturbance or if the person is using marijuana in the presence of children. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> The government claims that forfeiture is one of its greatest weapons against the war on drugs because it hits the drug dealers’ pocket books. LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW- CHAPTER 11 DRUG AND ALCOHOL OFFENSES (2009), available at Westlaw CACRLAW § 11.53. Under Health and Safety Code section 11470, as long as law enforcement might have “probable cause” to believe that the property is related to narcotics trafficking then they may seize the property and if they win they may use it in furtherance of their law enforcement endeavors. *Id.* See generally CAL. HEALTH & SAFETY CODE § 11470 (West 2010).

<sup>111</sup> Memorandum from the U.S. Attorney’s Office for the Eastern District of California on Prosecution Guidelines for Misdemeanor Marijuana Possession on Federal Land to Prosecutors, *supra* note 27.

## IV. CONCLUSION

A legalization bill has the potential to have a significant impact on California's economy.<sup>112</sup> The current \$14 billion annual value of California's marijuana crop not only has the potential to provide millions of dollars in tax revenue, but to also ignite a new economic engine for both entrepreneurs and their potential employees due to the substantial profit to be made on the cultivation and distribution of marijuana.<sup>113</sup> In addition, legalizing widespread cultivation and distribution would not only take away the Mexican drug traffickers' chief source of income and, therefore, reduce violence in the United States;<sup>114</sup> it would also reduce the cost of prosecuting and imprisoning such offenders.<sup>115</sup>

Despite this rosy scenario, the path for potential buyers and sellers is rife with risk which should make even the most adventurous entrepreneur or user wary. Compliance with the state and local ordinances may not be enough to avoid federal prosecution, which can be enforced as quickly as a change in administration,<sup>116</sup> nor the strict federal penalties<sup>117</sup> and collateral consequences that come with a federal drug conviction.<sup>118</sup> At this point the battle between federal, state, and local laws is still ongoing and cultivators, distributors and users alike will have to continue walking the fine line between enjoying the benefits of marijuana and the criminal risk and implications that come with that enjoyment.

RACHEL A. CARTIER<sup>119</sup>

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<sup>112</sup> Stateman, *supra* note 4.

<sup>113</sup> *Id.* See Regan, *supra* note 3.

<sup>114</sup> See NAT'L PARK SERV., *supra* note 3, at 6.

<sup>115</sup> LEGISLATIVE ANALYST'S OFFICE, *supra* note 16.

<sup>116</sup> See Johnson, *supra* note 96.

<sup>117</sup> See generally AM. FOR SAFE ACCESS, *supra* note 22, at 9-10.

<sup>118</sup> LEVENSON, *supra* note 34.

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