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One Token Over the Line: The Proliferation of State Medical Marijuana Laws

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One Token Over the Line: The Proliferation of State Medical Marijuana Laws

TROY E. GRANDEL*

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I. INTRODUCTION

Marijuana has been used for medicinal purposes for at least five thousand years.¹ In fact, it was used medicinally in the United States

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up until the twentieth century when antidrug zealots managed to prohibit it.² Prohibition was the status quo until 1996 when California became the first state to adopt a law allowing medicinal marijuana use.³ Since then, thirteen additional states, along with the District of Columbia, have enacted similar laws.⁴ More states are now lining up with their own laws, which are in various stages of adoption.⁵ In addition, the Supreme Court has impacted the issue, both with decisions made as well as those not made.⁶ The state of the law is rapidly evolving, and this article addresses its history, recent changes, and future. Part II examines the past, from the third millennium B.C. to the 1990s. Part III examines the present, including California's trailblazing law and its imitators. Part IV examines case law and court challenges to medical marijuana laws, as well as currently pending medical marijuana laws. Part V looks to the future to determine the likely legality and impact of medical marijuana laws.

II. THE PAST

According to an ancient pharmacopeia from the third millennium B.C., the *Pen Ts'ao Ching*, the Chinese then knew of marijuana's usefulness in treating malaria and rheumatic pains.⁷ By the second century A.D., the Chinese were also using marijuana as an analgesic

Public Policy at Wilmington University, and he thanks Michael Holley for his initial research for this article.

1. The author is writing with the assumption that marijuana does have valid medical uses. It is beyond the scope of this article to examine marijuana's medical efficacy in any detail. In addition, while it is the cannabis in marijuana that is the portion used for medical purposes, the author will refer to marijuana throughout the article, as that is the most common term used.

2. RICHARD GLEN BOIRE & KEVIN FEENEY, *MEDICAL MARIJUANA LAW* 16–17 (Beverly A. Potter ed., 2006).

3. See MARIJUANA POLICY PROJECT, *STATE-BY-STATE MEDICAL MARIJUANA LAWS* 14–18 (2008), available at http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008_1.pdf (listing all thirteen states and their respective medical marijuana enactment history) [hereinafter MARIJUANA POLICY PROJECT].

4. See *infra* Part III.

5. See *infra* Parts IV–V.

6. See *id.*

7. BOIRE & FEENEY, *supra* note 2, at 13–14.

and an anesthetic.⁸ Over the course of the next two millennia, the medical benefits of marijuana were recognized in India, the Middle East, and Europe.⁹ By the late 1800s, articles concerning medical marijuana use were appearing in England; one physician published an article in *The Lancet*, a prominent British medical journal, describing the use of marijuana to treat opiate withdrawal while Queen Victoria's personal physician described the use of marijuana to treat "uterine bleeding, migraines, neuralgia, and epileptic spasms."¹⁰ The *United States Pharmacopeia of 1850* even recognized the medicinal value of marijuana, listing ailments that marijuana might help treat, such as leprosy, incontinence, alcoholism, rabies, and dysentery.¹¹

The early part of the twentieth century, however, saw a shift in the public's perception of marijuana. Marijuana went from being viewed as a public health and medical matter to a criminal justice and law enforcement matter.¹² Up until 1930, marijuana was used to treat ailments like migraines, insomnia, and anxiety.¹³ Drugs and drug users, however, were seen as deviant, and American policy changes were made primarily in an effort to control this deviance.¹⁴ Specifically, in 1937, Congress passed the Marihuana Tax Act, which outlawed non-medicinal use of marijuana and imposed an astronomical tax on the transfer of marijuana to medical users.¹⁵ While the "Act was framed as a revenue measure," it actually resulted in the effective prohibition of marijuana.¹⁶

Correspondingly, the popular perception of marijuana at this time was entirely negative. For example, in the classic cult film, *Reefer Madness*, which was made in 1936 and released in 1938, ma-

8. *Id.* at 14.

9. *Id.* at 14–15.

10. *Id.* at 15.

11. *Id.* at 16.

12. Kathleen Ferraiolo, *From Killer Weed to Popular Medicine: The Evolution of American Drug Control Policy, 1937–2000*, 19 J. POL'Y HIST. 147, 150–51 (2007).

13. *See id.* at 150.

14. *Id.* at 152.

15. BOIRE & FEENEY, *supra* note 2, at 18–19; Ferraiolo, *supra* note 12, at 153–54.

16. Ferraiolo, *supra* note 12, at 154.

marijuana users went insane and committed violent crimes.¹⁷ Moreover, hearings in the House Ways and Means Committee concerning marijuana were extraordinarily one-sided, with most testimony suggesting that marijuana use would lead to “insanity, murder, and addiction.”¹⁸ Only one witness, Dr. William C. Woodward, a representative from the American Medical Association, testified against the Marihuana Tax Act; he was attacked for his position that Congress had not heard any competent medical testimony that showed that marijuana produced crime and insanity.¹⁹

Subsequent decades brought additional changes in drug policy. The 1950s brought harsher penalties for all drug use, especially marijuana.²⁰ It was also the first time that marijuana was claimed to be a “stepping stone” to harder drugs, even though no medical evidence was cited to support this position.²¹ The 1970s brought the United States into the war on drugs²² and saw the government’s policy towards marijuana shift from a taxing power rationale to an interstate commerce rationale.²³ Essentially, the rationale became: If the government is at war against marijuana, it should not be taxing it because the war could be won by regulating marijuana use right out of existence.

As part of the war on drugs, the Comprehensive Drug Abuse Prevention and Control Act of 1970 placed all antidrug laws under one comprehensive statute, which created “five schedules for drugs based on potential for abuse and accepted medical use.”²⁴ As the

17. REEFER MADNESS (G&H Productions 1938) (originally titled TELL YOUR CHILDREN).

18. Ferraiolo, *supra* note 12, at 154.

19. *Taxation of Marihuana: Hearing on H.R. 6385 Before the H. Comm. on Ways & Means*, 75th Cong. 85–121 (1937) (statement of Dr. William C. Woodward, Legislative Counsel, American Medical Association); Ferraiolo, *supra* note 12, at 154.

20. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1063 (1970).

21. *Id.* at 1063–64.

22. *See generally* *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) (providing a historical overview of American drug policy).

23. Ferraiolo, *supra* note 12, at 158.

24. *Id.* at 158.

name of the Act implies, drugs were viewed, once again, as a medical matter and not a law enforcement matter. Marijuana was placed in the most restrictive schedule, Schedule 1, along with other drugs thought to have no medical efficacy.²⁵ However, at the same time, most states, along with the federal government, reduced the penalty for marijuana possession from a felony to a misdemeanor.²⁶ In addition, by 1979, eleven states had decriminalized marijuana possession, and four other states had resolutions recognizing marijuana's medical efficacy.²⁷

The gains of the 1970s were completely eliminated in the 1980s, which saw a policy shift back to law enforcement, and drug abuse being seen as the number one problem.²⁸ In fact, in the late 1980s, one study found that 64% of Americans viewed drugs as the nation's top problem.²⁹ President George H.W. Bush appointed William J. Bennett as the nation's first drug czar.³⁰ Bennett saw the erosion of American morals as a result of the country's drug use.³¹

III. THE PRESENT

Marijuana policy began to change again in the 1990s. Until then, political elites, elected officials, and various industries and their lobbyists controlled marijuana-related laws.³² The 1990s, however, brought about a direct democracy movement, with the people becoming involved at a grassroots level.³³ The AIDS crisis was partly

25. *Id.*

26. *Id.* at 159.

27. *Id.* at 159–60.

28. *Id.* at 160.

29. Ferraiolo, *supra* note 12, at 163.

30. Carrie Johnson & Amy Goldstein, *Choice of Drug Czar Indicates Focus on Treatment, Not Jail*, WASH. POST, Mar. 12, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/03/11/AR2009031103567.html.

31. *See* Ferraiolo, *supra* note 12, at 161.

32. *See generally id.* at 150–61 (discussing the history of drug laws from the 1900s until 1990).

33. *Id.* at 162, 164, 167.

driving this movement,³⁴ while frustration with current policies was the other driving factor.

In 1993, California passed a bipartisan medical marijuana bill, but the bill was purely symbolic in that “it fail[ed] to provide patients with protection from arrest.”³⁵ The following year, the California legislature passed an ambitious medical marijuana bill that aimed to change marijuana’s schedule in order to allow physicians to be able to prescribe marijuana to patients.³⁶ Unfortunately, Governor Pete Wilson vetoed the bill on the grounds that the law would cause enforcement problems with existing laws.³⁷ Shortly after, the state’s Attorney General certified Proposition 215, a citizen-led ballot proposition, which aimed to allow marijuana use for medical purposes.³⁸ In 1996, California voters approved Proposition 215 by a vote of 56%.³⁹ The state legislature codified this popular action as the Compassionate Use Act of 1996.⁴⁰

Since California acted, the District of Columbia and thirteen other states—Alaska,⁴¹ Colorado,⁴² District of Columbia,⁴³ Hawaii,⁴⁴ Maine,⁴⁵ Michigan,⁴⁶ Montana,⁴⁷ Nevada,⁴⁸ New Jersey,⁴⁹ New

34. *See id.* at 163 (discussing various attempts and failures at legalizing medical marijuana).

35. MARIJUANA POLICY PROJECT, *supra* note 3, at 1; Ferraiolo, *supra* note 12, at 163.

36. Ferraiolo, *supra* note 12, at 163.

37. *Id.*

38. *Id.* at 163–64.

39. *Id.* at 148.

40. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007 & Supp. 2010); *see also* Gonzales v. Raich, 545 U.S. 1, 5 (2005).

41. ALASKA STAT. §§ 17.37.010–17.37.080 (2008 & Supp. 2009).

42. COLO. CONST. art. XVIII, § 14 (codified as COLO. REV. STAT. ANN. § 18-18-406.3 (West 2004 & Supp. 2010)).

43. D.C. CODE §§ 7-1671.01 to 7-1671.13 (LexisNexis Supp. 2010).

44. HAW. REV. STAT. §§ 329-121 to 329-128 (Supp. 2007).

45. ME. REV. STAT. ANN. tit. 22, §§ 2421 to 2430-A (West, Westlaw through 2009 2d Reg. Sess.).

46. MICH. COMP. LAWS SERV. §§ 333.26421–333.26430 (LexisNexis Supp. 2010).

47. MONT. CODE ANN. §§ 50-46-101 to 50-46-210 (2009).

48. NEV. REV. STAT. ANN. §§ 453A.010–453A.810 (LexisNexis 2009 & Supp. 2009).

49. N.J. STAT. ANN. §§ 24:6I-1 to 24:6I-16 (West Supp. 2010).

Mexico,⁵⁰ Oregon,⁵¹ Rhode Island,⁵² Vermont,⁵³ and Washington⁵⁴—have acted to legalize medical marijuana. Like California, each of these states has enacted an effective medical marijuana law, removing criminal penalties for people using marijuana for medical purposes.⁵⁵ For states that relied on some sort of popular ballot measure, the passing percentages ranged from a low of 54% in Colorado for a constitutional amendment to a high of 65% in Nevada for a ballot question.⁵⁶ The three most recent popular measures, which took place in Michigan, Montana, and Nevada, all earned at least 62% of the vote.⁵⁷ Clearly, the American people are becoming more and more supportive of medical marijuana laws.

Even though there is great similarity in states' medical marijuana laws, the following subsections provide a brief examination of all the state medical marijuana laws that have been enacted. The laws are presented in the order in which they were adopted.

A. *California*

California voters approved Proposition 215 on November 5, 1996 by a vote of 56%.⁵⁸ The law took effect as California's Compassionate Use Act the next day.⁵⁹ Among the medical conditions for which the law permits medical marijuana use include cancer, glaucoma, AIDS, anorexia, severe or chronic pain, epilepsy, multiple

50. N.M. STAT. ANN. §§ 26-2B-1 to 26-2B-7 (2007).

51. OR. REV. STAT. ANN. §§ 475.300–475.375 (West 2003 & Supp. 2010).

52. R.I. GEN. LAWS §§ 21-28.6-1 to 21-28.6-12 (Supp. 2009).

53. VT. STAT. ANN. tit. 18, §§ 4471–4474d (2002 & Supp. 2010).

54. WASH. REV. CODE ANN. §§ 69.51A.005–69.51A.902 (West 2007 & Supp. 2010).

55. MARIJUANA POLICY PROJECT, *supra* note 3, at 1 (reporting a nationwide survey on medical marijuana laws).

56. *Id.* at 14–18 (listing all thirteen states and their respective medical marijuana enactment history).

57. *Id.*

58. *Active State Medical Marijuana Programs*, NORML.ORG, http://norml.org/index.cfm?Group_ID=3391 (last visited Oct. 19, 2010) [hereinafter *Active State Medical Marijuana Programs*].

59. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007 & Supp. 2010); *Active State Medical Marijuana Programs*, *supra* note 58.

sclerosis, migraine headaches, and arthritis.⁶⁰ The law also has a broad provision that allows for treatment of “any other illness for which marijuana provides relief.”⁶¹ A state health agency may also add additional diseases or conditions for which marijuana may be used as treatment.⁶²

B. *Washington*

Washington voters approved Measure 692 on November 3, 1998 by a vote of 59%, and the law took effect the same day.⁶³ Similar to California, Washington’s law authorizes medical marijuana treatment for cancer, glaucoma, AIDS, and HIV; additionally, it also permits treatment for Crohn’s disease and Hepatitis C if they are not relieved by standard medical treatments.⁶⁴ The law also follows California’s law with respect to some specific symptoms, as it allows medical marijuana treatment for anorexia, epilepsy, multiple sclerosis, and diseases that cause severe or chronic pain or nausea if not relieved by standard medical treatments.⁶⁵ Washington also added a provision allowing an affirmative defense for other medical conditions but without protection from arrest.⁶⁶ In addition, a state health agency may add other diseases or conditions for which marijuana may be used to treat.⁶⁷

C. *Oregon*

Oregon voters approved Ballot Measure 67 on November 3, 1998 by a vote of 55%; the law took effect one month later on December 3, 1998 as the Oregon Medical Marijuana Act.⁶⁸ Oregon’s

60. CAL. HEALTH & SAFETY CODE §§ 11362.5(b)(1)(A), 11362.7(h).

61. *Id.* § 11362.5(b)(1)(A).

62. MARIJUANA POLICY PROJECT, *supra* note 3, at T-1.

63. *Active State Medical Marijuana Programs*, *supra* note 58.

64. *Compare* WASH. REV. CODE ANN. §§ 69.51A.005, 69.51A.010(6) (West 2007 & Supp. 2010), *with* CAL. HEALTH & SAFETY CODE § 11362.7(h).

65. *Compare* WASH. REV. CODE ANN. § 69.51A.010(6), *with* CAL. HEALTH & SAFETY CODE § 11362.7(h).

66. WASH. REV. CODE ANN. § 69.51A.040(2).

67. *Id.* § 69.51A.070.

68. *Active State Medical Marijuana Programs*, *supra* note 58.

law is similar to California's, authorizing treatment for cancer, glaucoma, AIDS, and HIV.⁶⁹ Oregon's law also allows other diseases to be treated with medical marijuana if they cause any of the following symptoms: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, and muscle spasms, such as multiple sclerosis.⁷⁰ A state agency also added Alzheimer's disease to the list of treatable illnesses, as is allowed under the law.⁷¹

D. *Alaska*

Alaska voters approved a ballot initiative, Ballot Measure 8, on November 3, 1998 by a vote of 58%; but, unlike Oregon's law, which took effect one month later, Alaska's law was not effective until March 4, 1999, about four months later.⁷² Alaska's law is very similar to Washington's, covering the same specific diseases, such as cancer, glaucoma, AIDS, and HIV, but it does not specifically cover Crohn's disease or Hepatitis C.⁷³ Like Oregon's law, Alaska's law allows for any chronic or debilitating disease to be treated with medical marijuana if it causes any of the following symptoms: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle spasms, such as multiple sclerosis.⁷⁴ The law also includes a provision allowing a state health agency to add additional diseases or conditions for which marijuana may be used as treatment.⁷⁵

E. *Maine*

Maine voters approved Referendum Election Ballot Question 2 by a vote of 61% on November 2, 1999, and the law went into effect

69. Compare OR. REV. STAT. ANN. §§ 475.300, 475.302(3) (West 2003 & Supp. 2010), with CAL. HEALTH & SAFETY CODE § 11362.7(h).

70. OR. REV. STAT. ANN. § 475.302(3).

71. *Id.*; MARIJUANA POLICY PROJECT, *supra* note 3, at T-1.

72. *Active State Medical Marijuana Programs*, *supra* note 58.

73. Compare ALASKA STAT. § 17.37.070(4)(A) (2008 & Supp. 2009), with WASH. REV. CODE ANN. § 69.51A.010(6) (West 2007 & Supp. 2010).

74. Compare ALASKA STAT. § 17.37.070(4)(B), with OR. REV. STAT. ANN. § 475.302(3)(b).

75. ALASKA STAT. §§ 17.37.060, 17.37.070(4)(C).

on December 22, 1999.⁷⁶ Maine's law, like the states previously discussed, authorizes medical marijuana use for cancer, glaucoma, AIDS, and HIV.⁷⁷ The law also authorizes medical marijuana treatments for Hepatitis C, Crohn's disease, and Alzheimer's.⁷⁸ Additionally, there are some specific symptoms caused by chronic or debilitating diseases that Maine allows to be treated with medical marijuana: anorexia, nausea, seizures, such as epilepsy, muscle spasms, such as multiple sclerosis, and diseases that cause severe or chronic pain if they have "not responded to ordinary medical or surgical measures for more than six months."⁷⁹ Maine's law also allows the commissioner to identify other diseases for which marijuana may be used as treatment.⁸⁰

F. *Hawaii*

On June 14, 2000, Hawaii became the first state to add a medical marijuana law through legislative action rather than a ballot initiative, and, on December 28, 2000, the law took effect.⁸¹ Like the states previously discussed, Hawaii's law authorizes medical marijuana for the treatment of cancer, glaucoma, AIDS, and HIV.⁸² And, like Washington's law, it also allows treatment for Crohn's disease.⁸³ It also authorizes medical marijuana treatment for chronic or debilitating diseases that cause: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle spasms, such as multiple sclerosis.⁸⁴ Hawaii's law also allows a

76. MARIJUANA POLICY PROJECT, *supra* note 3, at 15; *Active State Medical Marijuana Programs*, *supra* note 58.

77. ME. REV. STAT. ANN. tit. 22, § 2422 (2), (5) (West, Westlaw through 2009 2d Reg. Sess.).

78. *Id.* § 2422(2)(A).

79. *Id.* § 2422(2)(B)–(C).

80. *Id.* § 2422(2)(D).

81. *Active State Medical Marijuana Programs*, *supra* note 58; see MARIJUANA POLICY PROJECT, *supra* note 3, at 14–18 (listing all thirteen states and their respective medical marijuana enactment history).

82. HAW. REV. STAT. §§ 329-121, 329-122(a) (Supp. 2007).

83. Compare HAW. REV. STAT. § 329-121(2)(E), with WASH. REV. CODE ANN. § 69.51A.010(6)(d) (West 2007 & Supp. 2010).

84. HAW. REV. STAT. § 329-121(2).

state health agency to add additional diseases or conditions for which marijuana may be used as treatment.⁸⁵

G. *Colorado*

Colorado voters, like every state previously discussed, except for Hawaii, used a ballot initiative to legalize medical marijuana.⁸⁶ The initiative, which became Amendment 20 to the state constitution, passed by a vote of 54% on November 7, 2000 and became effective on June 30, 2001.⁸⁷ Colorado's law authorizes treatment for cancer, glaucoma, AIDS, and HIV.⁸⁸ Colorado followed Oregon's example by allowing medical marijuana treatment for chronic or debilitating diseases that cause the following symptoms: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle spasms, such as multiple sclerosis.⁸⁹ A state agency may also add diseases or conditions to the list of treatable illnesses.⁹⁰

H. *Nevada*

Nevada voters passed Question 9 with 65% of the votes on November 7, 2000, and the law became effective on October 1, 2001.⁹¹ The diseases, conditions, and symptoms for which Nevada's law authorizes medical marijuana treatment for are similar to those that Alaska's law authorizes.⁹² Cancer, glaucoma, and AIDS are now treatable with marijuana.⁹³ Nevada's law also allows the use of marijuana to treat a disease that causes: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle

85. *Id.* § 329-121(3).

86. *See* MARIJUANA POLICY PROJECT, *supra* note 3, at 14–18 (listing all thirteen states and their respective medical marijuana enactment history).

87. *Active State Medical Marijuana Programs*, *supra* note 58.

88. COLO. CONST. art. XVIII, § 14(1)(a)(I) (codified as COLO. REV. STAT. ANN. § 18-18-406.3(1)(b) (West 2004 & Supp. 2010)).

89. *Compare id.* § 14(1)(a)(II), with OR. REV. STAT. ANN. § 475.302(3)(b) (West 2003 & Supp. 2010).

90. COLO. CONST. art. XVIII, § 14(1)(a)(III).

91. *Active State Medical Marijuana Programs*, *supra* note 58.

92. *Compare* NEV. REV. STAT. ANN. §§ 453A.050, 453A.120(3) (LexisNexis 2009 & Supp. 2009), with ALASKA STAT. § 17.37.070(4)(A) (2008 & Supp. 2009).

93. NEV. REV. STAT. ANN. § 453A.050(1)–(3).

spasms, such as multiple sclerosis.⁹⁴ In addition, the law includes a provision that allows a state health agency to add additional diseases or conditions to this list.⁹⁵

I. Vermont

Vermont became the second state to authorize the medical use of marijuana through legislative action, instead of a ballot initiative, when it passed the Therapeutic Use of Cannabis Act on May 26, 2004.⁹⁶ The law became effective on July 1, 2004.⁹⁷ Vermont's law allows marijuana use for the treatment of cancer, AIDS, HIV, and multiple sclerosis only after reasonable efforts have been made with alternative treatments over a reasonable period of time.⁹⁸ The law also allows medical marijuana treatment for chronic or debilitating diseases that cause: anorexia, severe or chronic pain, severe or chronic nausea, or epilepsy.⁹⁹ Vermont's law does not allow a state health agency to add diseases or conditions for which marijuana may be used to treat, nor does it allow for a medical necessity defense.¹⁰⁰

J. Montana

Montana used a ballot initiative, Initiative 148, to pass the Montana Medical Marijuana Act by a vote of 62% on November 2, 2004; it became effective the same day.¹⁰¹ The effect of Montana's law is very similar to that of Hawaii's. Like Hawaii's law, Montana's law allows medical marijuana use for the treatment of cancer, glaucoma, AIDS, HIV, and Crohn's disease.¹⁰² Also similar to Hawaii's law, Montana's law authorizes medical marijuana use for the treatment of chronic or debilitating diseases that cause: anorexia, severe or chron-

94. *Id.* § 453A.050(4).

95. *Id.* § 453A.050(5).

96. MARIJUANA POLICY PROJECT, *supra* note 3, at 14–18; *Active State Medical Marijuana Programs*, *supra* note 58.

97. *Active State Medical Marijuana Programs*, *supra* note 58.

98. VT. STAT. ANN. tit. 18, §§ 4471, 4472(2)(A) (2002 & Supp. 2010).

99. *Id.* § 4472(2)(B).

100. MARIJUANA POLICY PROJECT, *supra* note 3, at T-1.

101. *Id.* at 16; *Active State Medical Marijuana Programs*, *supra* note 58.

102. MONT. CODE ANN. § 50-46-102(2)(a), (b)(v) (2009).

ic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle spasms, such as multiple sclerosis.¹⁰³ Additionally, a state health agency can select other diseases and conditions for which marijuana may be used as treatment.¹⁰⁴ Montana's law goes a step farther than Hawaii's, however, by allowing an affirmative defense for persons who are arrested for using marijuana for other medical conditions.¹⁰⁵

K. *Rhode Island*

Rhode Island's legislature passed the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act on January 3, 2006, which took effect the same day.¹⁰⁶ Like most other states' laws, Rhode Island's law allows medical marijuana use for the treatment of cancer, glaucoma, AIDS, and HIV; additionally, it allows marijuana use for the treatment of Hepatitis C and Alzheimer's.¹⁰⁷ The law also allows some chronic or debilitating diseases to be treated with medical marijuana if they cause any of the following symptoms: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, or muscle spasms, such as Crohn's or multiple sclerosis.¹⁰⁸ A state health agency is also allowed to add other diseases and conditions to the list of approved conditions and diseases.¹⁰⁹

L. *New Mexico*

New Mexico's governor signed the Lynn and Erin Compassionate Use Act on April 2, 2007, and the Act became effective on July 1, 2007.¹¹⁰ This law authorizes medical marijuana use to treat cancer, glaucoma, AIDS, and HIV.¹¹¹ New Mexico's law also authoriz-

103. Compare *id.* § 50-46-102(2)(b), with HAW. REV. STAT. § 329-121(2) (Supp. 2007).

104. MONT. CODE ANN. § 50-46-102(2)(c).

105. *Id.* § 50-46-206.

106. MARIJUANA POLICY PROJECT, *supra* note 3, at 17; *Active State Medical Marijuana Programs*, *supra* note 58.

107. R.I. GEN. LAWS §§ 21-28.6-2, 21-28.6-3(3) (Supp. 2009).

108. *Id.* § 21-28.6-3(3)(ii).

109. *Id.* § 21-28.6-3(3)(iii).

110. *Active State Medical Marijuana Programs*, *supra* note 58.

111. N.M. STAT. ANN. §§ 26-2B-2, 26-2B-3(B) (2007).

es medical marijuana use for the treatment of epilepsy, multiple sclerosis, and any other diseases or conditions added by a state health agency.¹¹² In addition, persons with spinal cord injuries or persons admitted to hospice care “in accordance with the rules promulgated by the department” may use medical marijuana.¹¹³ The law, however, does not allow for a medical necessity defense.¹¹⁴

M. Michigan

Voters in Michigan used a ballot initiative to legalize medical marijuana use; Proposal 1 passed by a vote of 63% on November 4, 2008 and took effect one month later on December 4, 2008 as the Michigan Medical Marihuana Act.¹¹⁵ This Act authorizes the medical marijuana treatment of cancer, glaucoma, AIDS, HIV, Crohn’s disease, Hepatitis C, and Alzheimer’s.¹¹⁶ Michigan, like Washington, allows the use of medical marijuana to treat chronic or debilitating diseases if any of the following symptoms occur: anorexia, severe or chronic pain, severe or chronic nausea, seizures, such as epilepsy, and muscle spasms, such as multiple sclerosis.¹¹⁷ Like Washington, Michigan added a provision allowing a medical necessity defense for other medical conditions but does not provide protection if arrested.¹¹⁸ Michigan also permits a state health agency to add other diseases and conditions to the list of those allowed.¹¹⁹

N. New Jersey

New Jersey’s governor signed the “New Jersey Compassionate Use Medical Marijuana Act into law on January 18, 2010.”¹²⁰ The

112. *Id.* § 26-2B-3(B).

113. *Id.* § 26-2B-3(B)(4), (7).

114. MARIJUANA POLICY PROJECT, *supra* note 3, at T-1.

115. *Id.* at 15; *Active State Medical Marijuana Programs*, *supra* note 58.

116. MICH. COMP. LAWS SERV. §§ 333.26422, 333.26423(a)(1) (LexisNexis Supp. 2010).

117. *Compare id.* § 333.26423(a)(2), with WASH. REV. CODE ANN. § 69.51A.010(6) (West 2007 & Supp. 2010).

118. *Compare* MICH. COMP. LAWS SERV. § 333.26428, with WASH. REV. CODE ANN. § 69.51A.040(2).

119. MICH. COMP. LAWS SERV. § 333.26423(a)(3).

120. *Active State Medical Marijuana Programs*, *supra* note 58.

Act was supposed to become effective in July 2010, but the incoming governor requested that its effective date be delayed until October 1, 2010.¹²¹ The Act authorizes medical marijuana treatment for cancer, AIDS, and HIV “if severe or chronic pain, severe nausea . . . , [or anorexia] . . . results from the condition or treatment thereof.”¹²² Conditions also treatable with medicinal marijuana in New Jersey are: epilepsy, glaucoma, Crohn’s disease, and multiple sclerosis if they are “resistant to conventional medical therapy.”¹²³ New Jersey also allows treatment with medical marijuana if a patient is diagnosed with a terminal illness and has less than twelve months to live.¹²⁴ Like some other states, a state health agency may add other diseases or conditions for which marijuana may be used as treatment.¹²⁵

O. *District of Columbia*

In 1998, the District of Columbia passed a ballot measure by a vote of 69% legalizing marijuana for medical use.¹²⁶ However, the U.S. Congress banned the Legalization of Marijuana for Medical Treatment Initiative from taking effect.¹²⁷ Congress lifted the ban in 2009, and, in May 2010, the District’s Council passed a bill amending the law, which took effect on July 26, 2010.¹²⁸ This law allows patients with cancer, glaucoma, AIDS, HIV, and multiple sclerosis to use medical marijuana for treatment.¹²⁹ Additionally, the District of Columbia’s Health Department may add other conditions through its rulemaking process.¹³⁰

121. *Id.*

122. N.J. STAT. ANN. §§ 24:6I-2, 24:6I-3 (West Supp. 2010).

123. *Id.* § 24:6I-3.

124. *Id.*

125. *Id.*

126. *Active State Medical Marijuana Programs*, *supra* note 58.

127. *Id.*

128. *Id.*

129. D.C. CODE § 7-1671.01(17)(A)–(E) (LexisNexis Supp. 2010).

130. *Id.* § 7-1671.01(17)(F)

IV. CASE LAW AND PENDING LAWS

Of course, there have been court challenges to these laws and their applicability. One of the most significant court cases concerned Angel Raich and Diane Monson, two California women who used medical marijuana to treat a number of medical conditions that afflicted them.¹³¹ While both women were in full compliance with California law, Federal Drug Enforcement Administration agents seized and destroyed Monson's medical marijuana plants.¹³² Both women sought injunctive and declaratory relief to prohibit enforcement of federal antidrug laws, arguing that enforcement "would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity."¹³³ When the district court denied their motion for a preliminary injunction, they appealed to the Ninth Circuit, which reversed and ordered the district court to enter the preliminary injunction.¹³⁴ On appeal, the Supreme Court held, relying largely on the notorious case, *Wickard v. Filburn*,¹³⁵ that the U.S. government has the authority to regulate the cultivation and possession of marijuana even when that cultivation and possession is allowed under state law.¹³⁶

After the *Gonzales* decision, federal law enforcement continued to arrest people as well as seize and destroy marijuana being grown and used for medical purposes.¹³⁷ Marijuana growers were forced to balance generating enough marijuana to earn an income while, at the same time, not growing so much marijuana as to receive attention from federal law enforcement officials.¹³⁸

131. *Gonzales v. Raich*, 545 U.S. 1, 6–7 (2005).

132. *Id.* at 7.

133. *Id.* at 7–8.

134. *Id.* at 8.

135. 317 U.S. 111 (1942).

136. *See Gonzales*, 545 U.S. at 32–33 (holding that federal regulation applies to locally cultivated product used domestically).

137. *See Marijuana Inc.: Inside America's Pot Industry* (CNBC television broadcast Sept. 29, 2010), available at <http://www.cnbc.com/id/28281668> (last visited Oct. 28, 2010) [hereinafter *Marijuana Inc.*].

138. *Id.*

In May 2009, the Supreme Court denied appeals from the counties of San Diego and San Bernardino in California.¹³⁹ Both counties had refused to join the medical marijuana movement within California and sought to have the state's medical marijuana act declared illegal.¹⁴⁰ By refusing to accept these cases, the Court, in effect, declared California's medical marijuana law legal.¹⁴¹

Six other states now have medical marijuana laws pending: Delaware,¹⁴² Kansas,¹⁴³ Maryland,¹⁴⁴ Massachusetts,¹⁴⁵ Pennsylvania,¹⁴⁶ and Wisconsin.¹⁴⁷ On November 2, 2010, Arizona voted on Proposition 203, a ballot initiative to legalize medical marijuana.¹⁴⁸ At the time this article was published, Arizona was still counting the Proposition 203 votes and the race was too close to call.¹⁴⁹ Additionally, on November 2, 2010, California voters voted on a new

139. *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461 (Cal. Ct. App. 2008), *cert. denied*, 129 S. Ct. 2380 (2009).

140. David G. Savage, *Supreme Court Action Upholds California's Medical Pot Law*, L.A. TIMES, May 19, 2009, <http://articles.latimes.com/2009/may/19/nation/na-court-marijuana19>.

141. *See id.* (stating that the denial will likely clear the way for residents of San Diego and San Bernardino to seek identification cards allowing them to legally purchase medical marijuana).

142. S. 94, 145th Gen. Assemb., Reg. Sess. (Del. 2009), *available at* <http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/2F8CB2F9E155C0918525757C005AE5B9?Opendocument>.

143. H.R. 2610, 83d Leg., Reg. Sess. (Kan. 2010).

144. S. 627, 2010 Leg., Reg. Sess. (Md. 2010); H.R. 712, 2010 Leg., Reg. Sess. (Md. 2010).

145. H.R. 2160, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

146. S. 1350, 2010 Leg., Reg. Sess. (Pa. 2010); H.R. 1393, 2009 Leg., Reg. Sess. (Pa. 2009).

147. Assemb. 554, 99th Leg. Sess., Reg. Sess. (Wis. 2009); S. 368, 99th Leg. Sess., Reg. Sess. (Wis. 2009).

148. Alia Beard Rau, *Arizona Will Vote on Medical Marijuana*, ARIZ. REPUBLIC, June 2, 2010, *available at* <http://www.azcentral.com/arizonarepublic/local/articles/2010/06/02/20100602potballot0602.html> (last visited Oct. 28, 2010).

149. Patrick McNamara, *Medical Marijuana Losing by 3,489 Votes: Provisional Ballot Count Could Determine Outcome*, EXPLORER, Nov. 10, 2010, *available at* <http://www.explorernews.com/articles/2010/11/10/news/doc4cd9cfc53e327274339758.txt>.

ballot initiative, Proposition 19, which aimed to legalize marijuana possession and use for all adults over the age of twenty-one.¹⁵⁰

V. THE FUTURE

What will the future hold for medical marijuana? Fourteen states and the District of Columbia have already legalized medical marijuana, and seven other states either have bills in their legislatures or ballot measures pending that would do the same. The popular support for medical marijuana continues to grow. Some problems, however, still remain.

One problem is that the federal antidrug law conflicts with every state law mentioned above.¹⁵¹ The Supreme Court has already held that the federal law applies even with a valid state law in place.¹⁵² Congress has introduced bills over the past few Congressional terms that would prevent people from being subject to federal law if they are in compliance with state law.¹⁵³ Without a constitutional amendment, though, this situation is unlikely to change anytime soon. President Obama and Attorney General Eric Holder, however, have both said that federal antidrug laws will not be enforced so long as the offender is in compliance with a valid state law.¹⁵⁴ In a somewhat similar move, the District Attorney of Philadelphia has announced a new policy where people caught with small amounts of marijuana will not be arrested; instead, their cases will be handled as

150. See *About Proposition 19*, YESON19.COM, <http://yeson19.com/about> (last visited Oct. 28, 2010) [hereinafter *About Proposition 19*]; see *infra* Part V.

151. See generally Controlled Substances Act, 21 U.S.C. §§ 801–971 (containing federal laws that conflict with state laws permitting use of medicinal marijuana).

152. See *Gonzales v. Raich*, 545 U.S. 1, 25–26, 32–33 (2005) (reaffirming previous decisions that federal laws determining that marijuana is a Schedule I drug falls within the scope of the commerce clause and therefore validly preempts state law).

153. Paul Armentano, *Medical Marijuana Patient Protection Act Reintroduced In Congress*, NORML.ORG BLOG (June 11, 2010, 5:00 PM), <http://blog.norml.org/2009/06/11/medical-marijuana-patient-protection-act-reintroduced-in-congress/>.

154. See Clarence Page, *Ending Pot Raids Only a First Step Toward Sanity*, NEW HAVEN REG., Mar. 16, 2009, available at <http://www.nhregister.com/articles/2009/03/16/opinion/doc49be2dd639a81722780928.txt> (last visited Oct. 21, 2010); Armentano, *supra* note 153.

minor offenses.¹⁵⁵ In fact, the Philadelphia Chapter of the National Organization for the Reform of Marijuana Laws analyzed data on arrests and determined that the old policy, which treated the possession of small amounts of marijuana as a serious crime, cost the city \$3 million in 2008.¹⁵⁶ It has been suggested that the old policy also helped clog the city's court dockets with cases.¹⁵⁷

The situation in Philadelphia is not unique. Delaware spent over \$678 million on its criminal justice system in 2006;¹⁵⁸ marijuana arrests accounted for 6.95% of Delaware's arrests in 2006.¹⁵⁹ A simple formula provided by the Office of National Drug Control Policy calculates that marijuana arrests in Delaware cost the state over \$47 million in 2006.¹⁶⁰ A similar analysis provides even more striking results in California, which has the largest population in the United States.¹⁶¹ California's criminal justice system cost more than \$31 billion in 2006; marijuana arrests accounted for 4.23% of all arrests that year.¹⁶² Accordingly, "marijuana arrests would have cost the state \$1.34 billion," but many of those arrests were treated as minor offenses.¹⁶³ In actuality, more serious marijuana arrests accounted for 1.53% of arrests, and those arrests cost the state more than \$480 million.¹⁶⁴ In addition, California collected almost \$4 million in fines from marijuana citations.¹⁶⁵ Applied nationally, the

155. See Chris Goldstein, *Lynne Abraham's Costly Reefer Madness*, PHILA. INQUIRER, May 17, 2010, available at http://www.philly.com/philly/opinion/inquirer/20100517_Lynne_Abraham_s_costly_reefer_madness.html (last visited Oct. 28, 2010).

156. *Id.*

157. *Id.*

158. JON GETTMAN, MARIJUANA IN DELAWARE: ARRESTS, USAGE, AND RELATED DATA 3 (2009), <http://www.drugscience.org/States/DE/DE.pdf>.

159. *Id.*

160. *Id.*

161. *National and State Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/NST-ann-est.html> (follow "Excel" hyperlink) (last visited Nov. 7, 2010).

162. JON GETTMAN, MARIJUANA IN CALIFORNIA: ARRESTS, USAGE, AND RELATED DATA 4 (2009), <http://www.drugscience.org/States/CA/CA.pdf>.

163. *Id.*

164. *Id.*

165. *Id.*

figures are staggering; in 2006, marijuana-related arrests cost states and localities combined more than \$10 billion.¹⁶⁶

Another problem is when state medical marijuana laws conflict with employer drug policies. Employees who legally use medical marijuana under state law are still being fired from their jobs for violating company policy.¹⁶⁷ This is a prime example of unintended legal consequences. While individuals are able to use marijuana for medicinal purposes, there is nothing to prevent an employer from terminating that employee for failing a drug test.¹⁶⁸ This is an area where the law needs to catch up with the times. It is unlikely that an employee would be terminated for taking legally prescribed blood pressure medication or painkillers; marijuana should not be any different.

Marijuana also has value as a crop.¹⁶⁹ In California, marijuana was estimated to be the number one crop in the state in 1997.¹⁷⁰ The marijuana crop was valued at nearly \$4 billion dollars, which was more than one-third higher than the second highest crop, grapes.¹⁷¹ While California is known as an orange producer, marijuana made approximately six times more money than oranges.¹⁷² California is not alone: “The domestic marijuana crop is larger than Cotton in Alabama, larger than Grapes, Vegetables and Hay combined in California, larger than Peanuts in Georgia, and larger than Tobacco in

166. JON GETTMAN, MARIJUANA ARRESTS IN THE UNITED STATES (2007): ARRESTS, USAGE, AND RELATED DATA 3 (2009), http://www.drugscience.org/Archive/bcr7/Gettman_Marijuana_Arrests_in_the_United_States.pdf.

167. See Sylvia Cochran, *Smoking Medical Marijuana Gets Wal-Mart Worker Fired*, ASSOCIATED CONTENT (June 30, 2010), http://www.associatedcontent.com/article/5539876/smoking_medical_marijuana_gets_walmart.html?cat=3 (last visited Oct. 28, 2010) (discussing the instance of Wal-Mart firing an employee for testing negative on a drug test after smoking legalized medicinal marijuana).

168. See *id.* (discussing how at-will employment and company policies allow employees to be fired even if marijuana is used for medicinal purposes).

169. *California Top 10 Cash Crops*, NORML.ORG, http://norml.org/index.cfm?Group_ID=4525&wtm_view=crop10 (last visited Oct. 28, 2010).

170. *Id.*

171. *Id.*

172. *Id.*

both South Carolina and North Carolina.”¹⁷³ Even the business news network, CNBC, aired a special on marijuana as a booming crop.¹⁷⁴ The tax revenues from marijuana crops would be enormous and would certainly help cash-strapped states.¹⁷⁵ One estimate puts the lost revenue to government at more than \$31 billion per year.¹⁷⁶ When the cost of law enforcement spent on marijuana is totaled, marijuana costs total more than \$41 billion per year.¹⁷⁷

When Californians went to the polls on November 2, 2010, they voted on Proposition 19, which sought to legalize marijuana for all adults over twenty-one.¹⁷⁸ Proposition 19 would have enabled California to collect tax revenues on the sale of marijuana and stop needlessly diverting law enforcement funds to combat marijuana.¹⁷⁹ Voters rejected Proposition 19 by a margin of 54% to 46%.¹⁸⁰ Despite the loss, supporters of Proposition 19 found several things about which to be encouraged.¹⁸¹ First, Proposition 19 received more support, 46%, than any ballot measure to legalize marijuana in the past ten years.¹⁸² Second, 50% of voters and 30% of “No” voters believe that marijuana should be legalized.¹⁸³ Midterm elections historically have smaller voter turnout than in presidential election years; even with the lower voter turnout, and in a year in which conservatives regained the House of Representatives, Proposition 19 nearly passed.¹⁸⁴ A similar proposition is almost certain to be on the ballot

173. JON GETTMAN, MARIJUANA PRODUCTION IN THE UNITED STATES 3 (2006), http://www.drugscience.org/Archive/bcr2/MJCropReport_2006.pdf.

174. *Marijuana Inc.*, *supra* note 137.

175. *See id.*

176. JON GETTMAN, LOST TAXES AND OTHER COSTS OF MARIJUANA LAWS 35 (2007), <http://www.drugscience.org/Archive/bcr4/Lost%20Taxes%20and%20Other%20Costs%20of%20Marijuana%20Laws.pdf>.

177. *Id.* at 36.

178. *About Proposition 19*, *supra* note 150.

179. *Id.*

180. GREENBURG QUINLAN ROSNER, MARIJUANA PROJECT: PROPOSITION 19 IN PERSPECTIVE 1 (2010), http://www.greenbergresearch.com/articles/2538/6127_Marijuana%20Project%20-%20Prop.%2019%20-%20Report.pdf.

181. *See id.*

182. *Id.* at 2.

183. *Id.* at 3.

184. *Id.* at 4.

again in November 2012.¹⁸⁵ If other states follow California's example, it may be the beginning of the end of the long, costly, and unnecessary war on marijuana.

185. *See id.* at 4.