Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context

LEWIS A. GROSSMAN*

ELECTION NIGHT IN A MARIJUANA SUPERMARKET

It was 7:45 p.m. on Election Day, 1996. The thousands of people assembled in and around the Cannabis Buyers Club (CBC) on San Francisco's Market Street were eager for the polls to close in fifteen minutes so they could start smoking weed.[1]

The crowd had gathered for a victory party celebrating the expected passage of California Proposition 215, the "California Compassionate Use Act of 1996." If enacted, this initiative would be the first state law in the United States to legalize the use of marijuana for medical purposes. Dennis Peron—the founder and director of the CBC—would later remember: "Our freedom itself was on the ballot . . . . The entire planet was watching."[2]

Many of the partygoers had been ready to light up triumphal joints for hours, but Peron pleaded that they keep their pot in their pockets until 8:00 p.m. Although polls showed broad support for *medical* marijuana, Californians overwhelmingly opposed recreational use of the drug. Peron later explained, "We just didn't want . . . live television pictures of folks 'getting high' being the last thing people saw before going out to vote."[3]

In each of the two previous years, the California legislature had passed a bill legalizing medical use of marijuana, only to see Governor Pete Wilson veto it. Peron had thus decided to take the issue directly to the people. He had co-drafted Proposition 215, an initiative immune from gubernatorial veto, and started the successful drive to obtain enough signatures to get it in on the ballot. The measure explicitly recognized that Californians had "a right to obtain and use marijuana for medical purposes" when a physician recommended they do so for treatment of

* Professor of Law, American University Washington College of Law. Ph.D. (History) Yale University; J.D. Harvard University, B.A. Yale University. This article will appear in substantially similar form as a chapter in the author's forthcoming book with Oxford University Press titled CHOOSE YOUR MEDICINE: FREEDOM OF THERAPEUTIC CHOICE IN AMERICA. The author thanks the many colleagues who offered comments on this article at the 2018 Health Law Professors Conference, a 2018 Princeton University Law and Public Affairs Workshop, the 2018 American Society for Legal History Annual Meeting, and a 2019 Seton Hall Law School Faculty Colloquium. He is also grateful to Allen St.-Pierre of NORML and Steph Sherer of ASA for providing their insights and access to their archives. The author is a part-time Of Counsel at Covington & Burling LLP. This article does not reflect the views of the firm or its clients.

1 DENNIS PERON & JOHN ENTWISTLE, MEMOIRS OF DENNIS PERON: HOW A GAY HIPPY OUTLAW LEGALIZED MARIJUANA IN RESPONSE TO THE AIDS CRISIS loc. 3708 (2012) (ebook).

2 *Id.* at 3706–08.

3 *Id.* at 3730.

"cancer, anorexia, AIDS, chronic pain, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."[4] Proposition 215 declared that state prohibitions on the possession and cultivation of marijuana would not apply to such patients or their primary caregivers and that no physician would be sanctioned in any way for making such a recommendation.[5]

Until very recently, the sprawling building where the celebrants gathered had housed the largest non-clandestine marijuana distributor in the country. Peron had founded the Cannabis Buyers Club in 1993 to serve the growing population of San Franciscans seeking pot for medical uses. From its inception, many of the CBC's customers were fighting AIDS, an epidemic savaging the largely gay Castro District where the dispensary was initially located. At its current site just northeast of the Castro, the CBC had become an important social center. People with AIDS and other diseases filled the high-ceilinged interior with marijuana smoke while sharing medical information and emotional support. Since mid-2015, the building had also served as the de facto headquarters of Californians for Compassionate Use, Peron's pro-Proposition 215 organization.

Then, on August 4, 1996, three months before the election, one hundred armed California narcotics agents raided the CBC on orders from Dan Lungren, the state's conservative and politically ambitious attorney general. They seized more than 150 pounds of pot and interrogated the few staffers and patients who happened to be there on a Sunday, the only day the club was closed. On Monday, state authorities obtained a court injunction closing the facility.

The following evening, more than 500 furious protesters marched through the city with signs bearing slogans such as "Marijuana is Medicine" and "Defend Your Right to Smoke Weed."[6] A week later, patient activists conducted a mock public trial of Lungren and then marched to the attorney general's office, where the jury delivered its "guilty" verdict.[7]

Meanwhile, Peron continued to run his Proposition 215 campaign from a second-floor office within the shuttered CBC. One day in October, state authorities arrested and indicted him for the possession and sale of marijuana. He and his comrades implemented a successful media strategy portraying Lungren as a heartless politico. Even cartoonist Garry Trudeau joined the conversation, with a series of sympathetic *Doonesbury* comic strips. In one, the perpetual pothead Zonker bemoans the buyers' club bust, and his friend responds, "Well, if Proposition 215 is approved, it'll never happen again."[8]

On Election Day, November 5, political prognosticators were predicting not only victory for Proposition 215, but also the re-election of Democratic President Bill Clinton. The celebrants at the CBC were far less ebullient about the latter prospect, however. As a candidate in 1992, the slick Arkansan had claimed that he tried

---

[4] Initiative Measure to be Submitted Directly to the Voters (Proposition 215) (proposing the addition of the Compassionate Use Act of 1996 to the California Health and Safety Code).

[5] *Id.*

[6] *500 S.F. Protestors Protest Closure of Cannabis Club*, L.A. TIMES, Aug. 7, 1996, at A22; Dan Reed & Alan Gathright, *Pot Supporters Take to the Streets Over Raid. Demonstrators Call State Move "Political,"* SAN JOSE MERCURY NEWS, Aug. 6, 1996, at 10A.

[7] Press Release, Californians for Medical Rights, Jury of Medical Marijuana Patients Delivers "Guilty" Verdicts, Personal Pleas to Attorney General Lungren (Oct. 15, 1996) (on file with author).

[8] Gary Trudeau, *Doonesbury*, WASH. POST, Oct. 2, 1996, at B3.

marijuana once but "didn't inhale." During his first four years in office, President Clinton had been no defender of pot. He had signed the 1994 Crime Bill and overseen a consequent surge in marijuana arrests.[9] His Drug Enforcement Administration (DEA) had spurned requests to reclassify marijuana from Schedule I to Schedule II under the Controlled Substances Act (CSA) to make it more readily available for research and medical use. Clinton's Department of Health and Human Services had refused to revive a compassionate-use Investigational New Drug program for marijuana cigarettes that the George H. W. Bush administration had discontinued in 1992.[10] Clinton's drug czar, Barry McCaffrey, had even flown to California to campaign against Proposition 215. He had warned that the measure was a "stalking horse for [full] legalization" and had condemned the use of "Cheech and Chong logic to guide our thinking about medicine."[11]

At 8:00, Peron announced that the polls were officially closed and immediately, in his own words, "lit up a big fat joint."[12] He puffed away for the news cameras with a broad smile. The crowd followed his example, and soon smoke was pouring out of the CBC's open windows, along with drumbeats and triumphant whoops. This festive use of marijuana was unusual for the many celebrants who ordinarily smoked it to relieve the symptoms of serious diseases, such as AIDS and cancer. But the throng also included at least some people like Phil Harris, who told a journalist, "I get high because—gosh—life kind of sucks."[13]

By 11:00 p.m., it was clear that Proposition 215 would pass. The revelry continued into the early hours of Wednesday morning. The final tally would show that 55.6 percent of California voters voted "yes."[14] The initiative's passage (along with that of a similar measure in Arizona the same day) triggered a wave of state medical marijuana legalization laws that, by 2019, would encompass 33 states and the District of Columbia.

Following the election, newspapers around the country published AP photographs of Peron gleefully toking at the victory party. These images outraged Proposition 215's opponents. A letter to the editor published in the *San Bernardino County Sun* raged: "The joy on [Peron's] face . . . and the absence of any mention of disease . . . send a harmful message to youth about this dangerous drug. What was passed on the premise of aiding people who painfully suffer from a chronic disease . . . now appears to be a license allowing people to smoke marijuana for pleasure."[15]

Then, on November 19, the *New York Times* quoted Peron opining: "I believe all marijuana use is medical—except for kids."[16] His logic: because stress relief is a

---

9 JOHN HUDAK, MARIJUANA: A SHORT HISTORY 82–83 (2016).

10 OFF. OF THE ASSISTANT SECRETARY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TALKING POINTS ON MEDICINAL MARIJUANA POLICY (July 12, 1994) (on file with author).

11 Carey Goldberg, *Medical Marijuana Use Winning Backing*, N.Y. TIMES, Oct. 30, 1996, at A12.

12 PERON & ENTWISTLE, *supra* note 1, at loc. 3729–33.

13 Happy Smoker (photo), DESERT SUN, Nov. 6, 1996, at 13; *Prop. 215 Faces Many Questions*, DESERT SUN, Nov. 7, 1996, at 6; *Voters Say Marijuana Should be Legal Medicine*, UKIAH DAILY J., Nov. 6, 1996, at 10.

14 *California Proposition 215, The Medical Marijuana Initiative (1996)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_215,_the_Medical_Marijuana_Initiative_(1996).

15 Carl Irby, Letter to the Editor, *Marijuana Use*, SAN BERNARDINO CTY. SUN, Nov. 19, 1996, at 11.

16 Christopher S. Wren, *Votes on Marijuana are Stirring Debates*, N.Y. TIMES, Nov.17, 1996, at 16.

medical purpose, any adult who uses cannabis does so for medical reasons. Peron became so identified with this statement that it could have been his epitaph when he died in January 2018.

Peron's proclamation infuriated many. To Proposition 215's enraged opponents, it confirmed that the initiative's true purpose was to enable recreational use. Peron's statement also incensed people who had supported the proposition believing it to be a genuine medical measure intended to help people with serious illnesses. Californians for Medical Rights (CMR), a well-funded advocacy organization that had run a polished pro-Proposition 215 campaign alongside Peron's grass-roots effort, voiced this view. It quickly issued a press release challenging Peron: "The truth is, the new law applies to relatively few people, under very specific circumstances"[17] Bill Zimmerman, CMR's chief, was blunter. He told the *Washington Post* that the real danger to the new law was not federal officials, but "crazies from our own side," like Peron, who viewed the initiative "as a wedge to legalizing recreational use of marijuana."[18]

Intriguingly, many proponents of legal recreational use were also irritated by Peron's "all marijuana use is medical" declaration. The leadership of the National Organization for the Reform of Marijuana Laws (NORML), the most prominent full-legalization advocacy group, was aghast. Although medical-marijuana-only measures fell far short of NORML's ultimate goal, it had diligently backed them since 1972 and had actively supported Proposition 215.[19] In NORML's view, Peron's post-victory language not only muddied the arguments for full legalization, but also seemed to disregard the use of marijuana for pure pleasure. Peron thus widened an already-existing rift within the marijuana advocacy community. As we will see, this fissure between supporters of medical marijuana and proponents of full legalization endures today.

In some ways, the medical marijuana movement is similar to other movements for freedom of therapeutic choice that I consider in my forthcoming book with Oxford University Press, *Choose Your Medicine: Freedom of Therapeutic Choice in America*. But the fact that marijuana has an alternative, commonly condemned non-medical use—provision of a recreational high—has engendered some profound differences. Pot's widespread recreational use has shaped the tactics and language of medical cannabis proponents and generated fierce intra-movement disputes. Dennis Peron, a hippie stoner genuinely dedicated to helping ill people find relief, embodied all of the ambiguities inherent in marijuana itself.

THE MEDICAL ALCOHOL PRECEDENT

Marijuana is not, of course, the only mind-altering substance with both therapeutic and recreational uses. American law wrestled with the appropriate regulation of another dual-use product—alcohol—from the 1830s through the end of national prohibition in 1933. Almost every one of the legal and policy arguments that would

---

[17] Press Release, Californians for Medical Rights, Responsible Guidelines for Marijuana Patients Issued (1996) (on file with author).

[18] William Claiborne & Roberto Suro, *Medicinal Marijuana Brings Legal Headache*, WASH. POST, Dec. 5, 1996, at A1.

[19] *It's Official! California Voters Will Decide on Medical Marijuana Issue this Fall*, 2 FREEDOM @ NORML, 1996, at 1.

later arise in the context of medical marijuana were foreshadowed in this longstanding debate.

In the nineteenth century, American physicians frequently prescribed alcoholic beverages as a treatment for many conditions, ranging from snake bites to rheumatism to pneumonia. The 1864 (4th) edition of the *U.S. Pharmacopoeia* listed brandy, whisky, sherry wine, and port wine.[20] Doctors also recommended the consumption of gin and malt liquors. Nonetheless, many states, at various times, banned the medical use of such products along with other uses. They either prohibited the prescription of intoxicating liquor altogether or allowed it only if the liquor was rendered unfit as a beverage.[21]

Some early state judicial decisions upheld stringent restrictions on the distribution of alcohol for medical purposes. For example, in 1849, Massachusetts' highest court held that even in a dire situation, an unlicensed retailer could not sell "spirituous liquors" pursuant to a physician's prescription, "however strong a necessity there might be for the buyer's using it as medicine, or for the preservation of health."[22] Around mid-century, however, state courts almost uniformly began to strike down complete bans on the sale of alcoholic beverages for medical use. For instance, in 1854, the Missouri Supreme Court reversed the conviction of a physician who sold a glass of brandy to a patient, holding that the jury should have been instructed to acquit the defendant if "he really administered the liquor to a diseased person, as a medicine, upon his professional judgment of its necessity."[23] Courts read exceptions for medical use into prohibition laws based on the longstanding canon that statutes must be interpreted so as to avoid absurdity and injustice. Conveniently enough, the classic example of this interpretive principle, cited by multiple American courts, concerned the practice of medicine: a medieval Bolognese court ruled that a law mandating severe punishment for "drawing blood in the street" did not apply to a surgeon who opened the vein of a person suffering from a fit.[24]

In 1885, a Kentucky court suggested that a medical exception was *constitutionally* required. "[W]hile the legislature has the power to regulate the sale of liquors to be used as beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as medicine."[25] Legal scholar Ernst Freund, in an influential 1904 treatise, cited this case to support his assertion that a medical exception to prohibition was a "constitutional necessity, since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse."[26]

---

[20] THE PHARMACOPOEIA OF THE UNITED STATES OF AMERICA 51, 52, 55 (4th ed. 1864).

[21] At the time of the ratification of the 18th Amendment, more than half of the states banned the prescription of alcoholic beverages. *See* Lambert v. Yellowley, 272 U.S. 581, 590 n. 2 (1926).

[22] Commonwealth v. Sloan, 58 Mass. 52, 54 (1849); *see also* Commonwealth v. Kimball, 41 Mass. 366 (1837).

[23] State v. Larrimore, 19 Mo. 391, 392 (1854).

[24] Donnell v. State, 2 Ind. 658, 659 (1851); State v. Wray, 72 N.C. 253, 255 (1875); Ball v. State, 50 Ind. 595, 597 (1875).

[25] Sarris v. Commonwealth, 83 Ky. 327, 331 (1885) (dictum).

[26] ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 210–11 (1904).

But Freund's position was already obsolete when he penned it. Notwithstanding the Kentucky decision, most courts considering the issue after 1880 actually *rejected* the need to read a medical exception into state and local prohibition laws. They concluded that the legislatures in question had intentionally omitted such exceptions and, moreover, that these omissions, far from being absurd, were justifiable. For example, in 1881, the Alabama Supreme Court affirmed the conviction of a physician who had prescribed and sold alcoholic "bitters" to a patient for treatment purposes. "[T]here is no exception made in the statute in favor of physicians, druggists, or any other persons whomsoever, and this court cannot engraft one in their favor without the exercise of legislative power, which it does not possess."[27] The court remarked that in light of potential abuse of such an exception, its omission may have signified "sagacious foresight" by the General Assembly.[28]

In the early twentieth century, orthodox doctors increasingly expressed doubt about alcohol's value as medicine.[29] The 1916 (9th) edition of the *U.S. Pharmacopoeia* omitted alcoholic beverages altogether. In 1917, the American Medical Association (AMA) passed a resolution stating that because alcohol's "use in therapeutics . . . has no scientific value," its "use . . . as a therapeutic agent should be further discouraged."[30] Not coincidentally, elite physicians also tended to support temperance; the same resolution condemned the use of alcohol as a beverage because it was "detrimental to the human economy."[31]

Nevertheless, in 1919, when the Eighteenth Amendment to the U.S. Constitution (banning the sale, manufacture, and distribution of alcoholic beverages) was ratified, many doctors still prescribed alcohol. According to a 1921 survey by the *Journal of the American Medical Association*, a slight majority of American physicians thought whisky was a necessary therapeutic agent, while smaller but significant percentages held the same opinion about wine and beer.[32] Largely in response to this poll, the AMA reversed course in 1922, resolving that restrictions on medicinal liquor were "a serious interference with the practice of medicine."[33] Whiskey and brandy reappeared in the 1925 (10th) edition of the *U.S. Pharmacopoeia*.[34]

The Volstead Act, enacted by Congress in 1919 to implement the Eighteenth Amendment, recognized the use of alcoholic beverages in medicine. It allowed physicians to prescribe, and pharmacists to dispense, liquor for medicinal purposes, albeit pursuant to a stringent permit scheme.[35] The Act permitted states and localities

---

[27] Carson v. State, 69 Ala. 235, 241 (1881); *see also* State v. McBryer, 2 S.E. 755 (N.C. 1887); Carl v. State, 8 So. 156 (Ala. 1890); State v. Durein, 78 P. 152, 156 (Kan. 1904); *cf.* Wright v. State, 101 Ill. 126 (1881) (no implied medical exception to dramshop licensing act); Motlow v. State, 145 S.W. 177 (Tenn. 1912) (upholding total manufacturing ban).

[28] *Id*.

[29] Bartlett C. Jones, *A Prohibition Problem: Liquor as Medicine 1920-1933*, 18 J. HIST. MED. ALLIED SCI. 353, 353–54 (1963).

[30] *American Medical Association and Prohibition*, 176 BOSTON MED. SURG. J. 884–85, 885 (1917).

[31] *Id.*; Jacob M. Appel, *"Physicians are not Bootleggers": The Short, Peculiar Life of the Medicinal Alcohol Movement*, 82 BULL. HIST. MED. 355, 361–62 (2008).

[32] *The Referendum on the Use of Alcohol in the Practice of Medicine*, 78 J. AM. MED. ASSOC. 210, 210 (1922).

[33] Jones, *supra* note 29, at 358.

[34] PHARMACOPOEIA OF THE UNITED STATES OF AMERICA, 352–54, 356 (10th ed. 1925).

[35] National Prohibition Act of 1919, Pub. L. No. 66-66, §§ 6–8, 41 Stat. 305, 310–11 (1919).

to regulate alcohol more strictly than the federal government, however, and many did; indeed, about half of states declined to issue any medical permits at all.[36] Moreover, in 1921, Congress passed the Willis-Campbell Act, which prohibited physicians nationwide from prescribing beer and set stricter limits than the Volstead Act on the quantity of spirits and wine they could prescribe.[37]

During the Prohibition Era, medical professionals occasionally fought such restrictions in court, though with almost complete futility. In 1923, a Los Angeles pharmacist convicted of filling a liquor prescription in violation of that city's ordinance alleged that the measure was invalid because, in combination with federal restrictions, it effectively limited sales to minute amounts that were therapeutically valueless. A California appeals court unequivocally rejected this argument.

> If wine, whisky, brandy, and the like are useful for medicinal and other nonbeverage purposes, still the evils which flow from their use as a beverage so greatly menace the health, peace, morals, and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines . . . . That the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety.[38]

During the same period, a group of more than one hundred prominent New York physicians formed the Association for the Protection of Constitutional Rights (APCR) to challenge the Willis-Campbell Act's quantity limits on prescriptions. In 1922, the APCR's president, Samuel W. Lambert (formerly the dean of Columbia's medical school) filed a federal lawsuit alleging that these provisions were unconstitutional.[39] Lambert advanced three main legal theories: (1) the Act exceeded Congress's power under the Eighteenth Amendment to regulate the beverage use of alcohol, (2) it constituted federal regulation of medical practice, an area reserved exclusively to the states, and (3) it violated physicians' "fundamental" right to practice medicine however they deemed necessary to heal the sick.[40] In 1926, the U.S. Supreme Court rejected these arguments in *Lambert v. Yellowley*.[41]

While Lambert litigated his dispute, John Patrick Davin, another respected New York City physician, fought the Willis-Campbell Act outside of court. His main grievance was the law's prohibition on medical use of beer. Davin had testified against passage of the Act in Congress, insisting that beer was a useful remedy against many illnesses and generally condemning government regulation of medical practice. Unsuccessful on this front, he co-founded a political party called the Medical Rights League in 1922 and launched an unsuccessful campaign for Congress under its aegis.[42]

---

[36] ERNEST H. CHERRINGTON, ANTI-SALOON LEAGUE YEAR BOOK 15 (1921).

[37] Willis-Campbell Act, Pub. L. No. 67-96, 42 Stat. 222 (1921).

[38] In re Application of Hixson, 214 P. 677, 679 (Cal. App. 1923).

[39] Appel, *supra* note 31, at 376–83.

[40] Brief for Appellant, Lambert v. Yellowley, 272 U.S. 581 (1926) (No. 47).

[41] Lambert v. Yellowley, 272 U.S. 581 (1926).

[42] Appel, *supra* note 31, at 367–76.

Radical prohibitionists considered medical alcohol advocacy to be a shrewd wedge attack on the very concept of prohibition.[43] Some "wets" likely agreed. But many physicians opposing Willis-Campbell were genuinely fighting for the rights of physicians and (vicariously) patients. Indeed, some of the APCR's founding members were fervent prohibitionists with respect to alcoholic *beverages* and insisted that the organization disassociate itself from the broader anti-prohibition movement—a foreshadowing of the posture of many medical marijuana advocates a half century later.[44]

In 1933, the 21st Amendment was ratified, repealing the 18th. Amendment. National prohibition disappeared, and only a few states maintained the policy. By 1940, disputes regarding medical alcohol had largely vanished—both because liquor was widely available for any use and because physicians, practicing in the context of emerging "wonder drugs," had largely stopped prescribing it. Whiskey and brandy disappeared from the *USP* for good with the 1947 (13th) edition.

As a legal matter, the long struggle over the medical use of alcoholic beverages provided mostly harmful precedents for the later medical marijuana movement. The judicial decisions generally confirmed the power of the state and federal governments to highly restrict or even wholly prohibit the medical use of an intoxicating and addictive product due to its social and moral risks.[45] Moreover, the only notable public campaign in favor of medical use of alcoholic beverages—Davin's short-lived Medical Rights League—was a flop. Davin's campaign represented elite physicians, however; it was not a popular social movement. The country had not yet seen what might happen when a broad coalition of highly motivated patients demanded access to a culturally disfavored medicine.

THE RISE AND FALL OF MARIJUANA AS MEDICINE (2700 BC TO 1972 AD)

Cultures around the world have used marijuana therapeutically for millennia. They have taken it orally, smoked it, and applied it topically. In Central Asia, cannabis's native region, people apparently used the plant for medicinal purposes (and other reasons) for many thousands of years before the dawn of recorded history. The first written mention of the medical use of marijuana appears in Chinese sources from about 2700 BCE. As cannabis cultivation propagated around the Old World, culture after culture absorbed the plant into their armamentariums. Marijuana was used in ancient Indian Ayurvedic medicine, in African shamanistic healing, and as a peasant folk remedy in Europe. These traditional medical systems employed

---

[43] Beverly Gage, *Just What the Doctor Ordered*, 36 SMITHSONIAN, April 2005, at 112–18.

[44] Appel, *supra* note 31, at 377.

[45] See, however, *Linder v. United States*, 268 U.S. 5 (1925), in which the Court overturned the conviction of a physician under the Harrison Narcotics Tax Act, a 1914 federal revenue statute that taxed and regulated the distribution of opiates and cocaine. The Court held that the particular act of dispensing by the doctor fell within a "professional practice" exception in the statute. The decision noted that "[o]bviously, direct control of medical practice in the states is beyond the power of the Federal government" and that application of the Harrison law to Dr. Linder's conduct "would certainly encounter grave constitutional difficulties." *Id.* at 18, 22. Brandeis ignored *Linder* when he decided *Lambert* (although Lambert cited it).

cannabis to treat a wide variety of conditions, such as rheumatism, fever, malaria, insomnia, digestive problems, and anxiety.[46]

Planters in the American colonies and the early republic—including George Washington and Thomas Jefferson—grew large volumes of cannabis for commercial use. The fiber from the plant's stem (hemp) was used to manufacture rope, paper, and fabric, and the seeds provided hempseed oil. Scholars disagree about how frequently the psychoactive flowers and leaves were used for medical or recreational purposes during the country's early years, although the minimalists seem to have the better of the argument.[47] In the middle of the nineteenth century, however—just as hemp fiber was losing much of its commercial value—cannabis entered orthodox western medicine, thanks to the work of an Irish physician-scientist named William B. O'Shaughnessy. While posted in Calcutta as an employee of the British East India Company in the 1830s, O'Shaughnessy researched medical uses of the plant and published his results.[48] In the early 1840s, he brought this knowledge (and a supply of marijuana) back with him to England. There, he oversaw the production of Squire's Extract, the first of many cannabis preparations sold as remedies in Britain and the United States.[49] In 1851, marijuana made its first appearance in the *U.S. Pharmaocopoeia*, listed as "EXCTRACTUM CANNABIS. *Extract of Hemp.*"[50]

Medical marijuana use in the United States crested in the late nineteenth century. In 1885, the *Dispensatory of the United States* (an unofficial companion to the *U.S. Pharmacopoeia*) noted that extract of hemp was known "to cause sleep, to allay spasm, to compose nervous disquietude, and to relieve pain," and was also prescribed for "neuralgia, gout, rheumatism, tetanus, hydrophobia, epidemic cholera, convulsions, chorea, hysteria, mental depression, delirium tremens, insanity, and uterine hemorrhage."[51] By 1900, medical journals had published more than one hundred articles regarding the drug's efficacy.[52] Although marijuana was never a mainstay of American medicine, more than one in a thousand prescriptions in the early 1900s were for cannabis extracts or tinctures, many of which were manufactured by leading pharmaceutical manufacturers such as Eli Lilly and Squibb.[53] Numerous other companies sold over-the-counter patent drugs containing

---

[46] MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA—MEDICAL, RECREATIONAL AND SCIENTIFIC 3–5, 13–14, 20–21 (2012); MARTIN BOOTH, CANNABIS: A HISTORY 22–23, 70–72 (2003); ROBERT DEITCH, HEMP - AMERICAN HISTORY REVISITED: THE PLANT WITH A DIVIDED HISTORY 9–10 (2003).

[47] *Compare* LEE, *supra* note 46, at 16–19 (use was limited to seeds and fiber), *with* DEITCH, *supra* note 46, at 25–27 (colonial Americans commonly smoked cannabis for medicinal and recreational purposes).

[48] W.B. O'Shaughnessy, *Case of Tetanus, Cured by a Preparation of Hemp (the Cannabis indica)*, 8 TRANSACTIONS OF THE MED. & PHYSICAL SOC'Y OF BENGAL 462–69 (1843); W.B. O'Shaughnessy, On the Preparations of the Indian Hemp, or Gunjah, 8 TRANSACTIONS OF THE MED. & PHYSICAL SOC'Y OF BENGAL, 421–61 (1839).

[49] LEE, *supra* note 46, at 24–25; BOOTH, *supra* note 46, at 109–14; JOHN GELUARDI, CANNABIZ: THE EXPLOSIVE RISE OF THE MEDICAL MARIJUANA INDUSTRY 19–21 (2010).

[50] PHARMACOPOIEA OF THE UNITED STATES OF AMERICA 50 (3rd ed. 1853).

[51] H. C. WOOD, JOSEPH P. REMINGTON & SAMUEL P. SADTLER, THE DISPENSATORY OF THE UNITED STATES OF AMERICA 341 (15th ed. 1885).

[52] LEE, *supra* note 46, at 25–26.

[53] *Taxation of Marihuana: Hearing on H.R. 6385 Before the H. Comm. on Ways & Means*, 75th Cong. 114 (1937) [hereinafter *Taxation of Marihuana Hearing*].

cannabis, often without listing it as an ingredient. One French business even sold cannabis-based "Indian Cigarettes" in the United States as a treatment for asthma.[54]

The medical use of marijuana plummeted during the first few decades of the twentieth century; by 1933, prescriptions of cannabis preparations had plunged by about 97 percent from their peak.[55] In hearings preceding the passage of the federal Marihuana Tax Act of 1937 (discussed below), witnesses described medical use of cannabis as "rare" and "disappearing."[56] Probably the most important factor in marijuana's vanishing role in American medicine was the development of superior alternatives to it for many conditions. New synthetic drugs were equally or more effective, highly standardized (thus providing more consistent results), and injectable (thus quicker-acting).[57]

Lawmakers also played a role in pushing medical cannabis into oblivion, however, due mainly to their loathing of the drug's recreational use. This attitude was rooted largely in racism; in the early 1900s, most Americans who used marijuana as an intoxicant were either Mexican-Americans clustered in the Southwest or African-Americans in the urban jazz scene.[58] Congress took an initial baby step into marijuana regulation in 1906 with passage of the Pure Food and Drugs Act. That statute sensibly mandated that labels declare the amount of cannabis present in any drug containing the substance (along with the amount of alcohol, morphine, opium, cocaine, and heroin).[59] The federal Harrison Narcotics Tax Act of 1914, enacted to reduce abuse of opiates and coca-derived drugs, did not mention cannabis, due partly to pressure from drug companies.[60] But shortly after its passage, states began to include prohibitions on the sale of marijuana in their own anti-narcotics statutes. Although these bans were initially concentrated in western states (where legislators were motivated largely by anti-Mexican prejudice), 22 states around the country had passed such laws by 1931.[61]

In 1934, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Narcotic Drug Act for voluntary adoption by the states. This statute prohibited the sale, distribution, and possession of narcotics, subject to narrow exceptions.[62] The Uniform Act included the option of regulating cannabis like other narcotics. Harry Anslinger, the first commissioner of the Federal Bureau of Narcotics in the Treasury Department, conducted an aggressive campaign to persuade states to embrace the law and to include cannabis. His explicitly racist crusade—bolstered by the Hearst newspaper chain—demonized marijuana as a

---

54 GELUARDI, *supra* note 49, at 22.

55 *Taxation of Marihuana Hearing*, *supra* note 53, at 114.

56 *Id.* at 17, 49.

57 *Id.* at 8, 91; LEE, *supra* note 46, at 54; BOOTH, *supra* note 46, at 116–19; GELUARDI, *supra* note 49, at 22–23.

58 Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. LAW REV. 971–1070, 1011, 1035–36 (1970); LEE, *supra* note 46, at 46.

59 Pure Food and Drug Act, § 8, 34 Stat. 768 (1906).

60 Harrison Narcotics Tax Act, Pub. L. No. 63-233, 38 Stat. 785 (1914); BOOTH, *supra* note 46, at 162–63.

61 Bonnie & Whitebread, *supra* note 58, at 1010, 1012–16.

62 *See* District of Columbia Uniform Narcotic Drug Act, Pub. L. No. 75-682, 52 Stat. 785 (1938).

promoter of violence, crime, sexual depravity, and insanity, particularly in minority communities.[63] By 1937, 35 states had enacted the Uniform Act with its optional marijuana provisions, and every other state had passed alternative anti-cannabis legislation.[64] This early wave of anti-marijuana laws culminated with the 1937 passage of the federal Marihuana Tax Act.[65] This statute, modeled on the Harrison Act, was another product of Anslinger's anti-drug zealotry. It sought to tax and regulate marijuana out of existence.

None of the anti-marijuana statutes discussed above—the early state laws, the Uniform Narcotic Drug Act, and the Marihuana Tax Act—prohibited the medical use of cannabis.[66] Nonetheless, these laws effectively discouraged doctors from prescribing the drug. Not only did they have a stigmatizing effect on cannabis, but they also imposed administrative burdens and taxes on all of the actors along marijuana's chain of distribution. William C. Woodward, the AMA's Legislative Counsel, testified against the Marihuana Tax Act, decrying the taxes and additional paperwork it imposed on physicians.[67] (Woodward also warned that taxes on growers might eliminate marijuana production—an unacceptable result, because "future investigation may show that there are substantial medical uses for cannabis."[68]) Another witness, representing a pharmacists' association, declared that should the law pass, he would destroy all the cannabis drugs he had in stock "so I will not have to register and will not have to pay that extra tax."[69] When the Marihuana Tax Act took effect, many pharmacists presumably did exactly this.

In short, due to both pharmaceutical advances and legal developments, by the start of World War II, American physicians almost never prescribed or recommended marijuana to patients. In 1942, the *U.S. Pharmacopoeia* omitted cannabis after almost a century of listing the drug.[70] Even as marijuana became increasingly popular as an intoxicant in the 1950s and 1960s (with the beatniks and hippies leading the way), its use as medicine remained rare.

President Richard Nixon, first elected in 1968, identified the recreational use of pot with crime and the leftist counterculture. He waged a fierce, multipronged "War on Drugs." One the first shots in that war occurred in 1970, with the passage of the federal Controlled Substances Act (CSA). The prior year, the U.S. Supreme Court had struck down the 1937 Marihuana Tax Act as unconstitutional in a case brought by Timothy Leary, an ex-Harvard lecturer, countercultural hero, and psychedelic drug enthusiast.[71] Congress enacted the CSA in response to this decision, as well as

---

[63] LEE, *supra* note 46, at 48–54; BOOTH, *supra* note 46, at 174–94; HUDAK, *supra* note 9, at 25–26, 35–40; GELUARDI, *supra* note 49, at 26–31; Bonnie & Whitebread, *supra* note 58, at 1037–53.

[64] Bonnie & Whitebread, *supra* note 58, at 1034.

[65] Marihuana Tax Act of 1937, Pub. L. No. 75–238, 50 Stat. 55 (1937).

[66] *Id.* at 1027; *see also* District of Columbia Uniform Narcotic Drug Act § 6; Marihuana Tax Act of 1937 § 6(b)(1)–(2).

[67] *Taxation of Marihuana Hearing*, *supra* note 53, at 96–97, 106–07 (testimony of Dr. William C Woodward). Woodward noted that he would not object to simply applying the Harrison Narcotics Act to marijuana.

[68] *Id.* at 91 (testimony of Dr. Woodward).

[69] *Id.* at 122 (testimony of Dr. S.L. Hilton).

[70] PHARMACOPOEIA OF THE UNITED STATES OF AMERICA (12th ed. 1942).

[71] Leary v. United States, 395 U.S. 6 (1969) (striking down the statute as unconstitutional under the Fifth Amendment).

international treaty obligations. The statute—still in effect today—created a tiered system in which drugs of abuse were put into one of five differently regulated "schedules," depending on various factors. The CSA placed cannabis into Schedule I, the most stringently regulated category, reserved for drugs with a "high potential for abuse," "a lack of accepted safety for use under medical supervision," and "*no currently accepted medical use*."[72] Schedule I drugs were available only for research purposes, and even scientific investigators had to jump through numerous bureaucratic hoops to obtain them. Heroin and LSD were among other drugs in this category. Cocaine was in Schedule II.

Congress's classification of marijuana as a Schedule I drug in 1970 provoked a reaction that gave birth to the modern medical marijuana movement. The first phase of this movement would take place primarily in courtrooms and federal administrative agencies and would forge an alliance between medical marijuana proponents and advocates of comprehensive legalization. Initially, this relationship was (relatively) cordial.

REFORM WITHIN THE FEDERAL SYSTEM (1972-1986)

The Reemergence of Medical Marijuana

Although the U.S. government dismissed the medical use of marijuana in 1970, others were not ready to do so. Just as the CSA went into effect, modern scientific research emerged supporting cannabis's therapeutic potential. Studies published in 1971 suggested that the drug was an appetite stimulant and anticonvulsant, and that it might be effective in the treatment of glaucoma, the leading cause of blindness.[73] The next year, the CSA-mandated National Commission on Marihuana and Drug Abuse, known as the "Shafer Commission" (after its chairman, former Pennsylvania governor Raymond Shafer), issued a report titled *Marijuana: A Signal of Misunderstanding*. This report garnered headlines because of its proposal to decriminalize the personal possession and use of pot. Less noticed was an addendum recommending that the federal government support studies examining the efficacy of marijuana in the treatment of various diseases, including glaucoma, migraine, alcoholism, and cancer.[74]

Two months after the release of this report, NORML and two other organizations commenced a formal challenge to marijuana's Schedule I status. R. Keith Stroup, a young lawyer, had founded NORML in 1970 with the mission of fighting for decriminalization and eventual full legalization. In May 1972, it petitioned the Bureau of Narcotics and Dangerous Drugs (the predecessor to the DEA) to either remove marijuana from the ambit of the CSA altogether or to reschedule it into a less regulated category. This petition, which challenged Congress's conclusion that

---

[72] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 202(b)(1), 84 Stat. 1236 (1970) (emphasis added).

[73] Studies cited within INST. OF MED., COMMITTEE TO STUDY THE HEALTH-RELATED EFFECTS OF CANNABIS AND ITS DERIVATIVES, MARIJUANA AND HEALTH 139–55 (1982) [hereinafter HEALTH-RELATED EFFECTS OF CANNABIS STUDY].

[74] U.S. COMM'N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING: THE OFFICIAL REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE 176 (1972); Fred P. Graham, *National Commission to Propose Legal Private Use of Marijuana*, N.Y. TIMES, Feb. 13, 1972, at 1.

cannabis had "no currently accepted medical use," marked the start of a tortuous journey back and forth between the agency and the courts—an odyssey that did not finally end until the U.S. Court of Appeals for the D.C. Circuit upheld the DEA's denial of the petition more than twenty years later.[75]

The Trial of Robert Randall

In late 1973, Robert Randall, a 25-year-old aspiring political speechwriter living in the Virginia suburbs of Washington, D.C., accepted a joint from a friend. Randall was suffering from a severe case of glaucoma, a disease that destroys vision by increasing pressure within the eyeball. Despite his ophthalmologist's best efforts, Randall had already lost much of his sight. But that evening, when he looked out the window after smoking, the haloes he normally saw around streetlights were absent. Stoned and delighted, Randall immediately hypothesized a link between marijuana use and lowered intraocular eye pressure. This theory turned into a conviction in the following months, as Randall successfully medicated himself with weed.

Randall obtained marijuana on the black market for a couple of years, but with the intensification of Nixon's War on Drugs, the street became an unreliable source. Randall thus decided to grow pot for himself on the deck of his new home on Capitol Hill. This plan went awry in the summer of 1975, when D.C. police officers spotted and seized Randall's modest cannabis crop. He and his partner, Alice O'Leary, were arrested and charged with possession.

Up to that point in his life, Randall had been disinclined to challenge the system. But now, impelled by righteous anger, he decided to fight the criminal charge on the theory that the drug laws should not apply to people who needed marijuana for medical reasons.[76] He turned to NORML for assistance in preparing his defense. Keith Stroup—helpful but not encouraging—provided him with a folder of information on medical marijuana that the organization had gathered in connection with its rescheduling petition.[77] Randall, who was eking out a living on a mere $68 per week as a part-time professor, then asked Stroup for financial assistance for his legal defense. Stroup provided him with funds from an arm of NORML called (tellingly) the Center for the Study of *Non*-Medical Drug Use.[78]

Randall's bid for acquittal depended on his successful deployment of the "necessity defense," an oft-discussed, rarely invoked, and almost never applied doctrine in criminal law. Stated broadly, it provides that a crime may be excused if the defendant committed the criminal act in an emergency situation to prevent a greater harm from occurring. Generations of law students have learned this doctrine through the celebrated English case *Regina v. Dudley and Stephens*, in which castaways from a yacht, facing starvation in a lifeboat, killed and ate the cabin boy.[79] As some students forget, this case held that necessity was *not* a defense to murder. It rarely worked in other contexts, either.

---

[75] Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994).

[76] RANDALL & O'LEARY, MARIJUANA RX: THE PATIENTS' FIGHT FOR MEDICINAL POT 9–18 (1998) [hereinafter RANDALL & O'LEARY, MARIJUANA RX].

[77] *Id.* at 16–18.

[78] *Id.* at 66–67.

[79] 14 Q.B.D. 273 (1884).

Defendants typically had trouble satisfying all of the necessity defense's multiple requirements. Particularly problematic for Randall were those cases in which courts denied application of the defense in the context of medical alcohol. As we saw earlier, for example, an 1849 decision by the Massachusetts Supreme Judicial Court rejected the use of the necessity defense by an unlicensed storekeeper indicted for providing a desperate patient with alcohol pursuant to a doctor's prescription.[80] The court apparently concluded—in view of alcohol's negative effect on society—that the storekeeper failed to show that the harm avoided by his action was more serious than the harm caused.

To successfully plead the necessity defense, a defendant must also demonstrate he had no practically available, less harmful alternative course of action. In 1899, this requirement tripped up a Georgia woman charged with violating a statute prohibiting the possession of alcohol at church. Although her physician had recommended that she have whiskey with her at all times because of a heart condition, the Georgia Supreme Court ruled that the necessity defense did not apply because she had less offensive alternatives—namely, to stay at home or to carry some other kind of medicine.[81]

Randall's trial for marijuana possession took place in July 1976 before D.C. Superior Court Judge James Washington, formerly the dean of Howard University Law School. Randall's ophthalmologist testified in his defense, and his lawyer introduced a deposition taken from the researcher who first studied marijuana's effect of lowering eye pressure. In December, Judge Washington issued a daring decision acquitting Randall on the basis of "medical necessity."[82] He found that Randall had no acceptable alternative to smoking marijuana. He explained that "treatment with other drugs has become ineffective, and surgery offers only a slim possibility of favorable results coupled with a significant risk of immediate blindness."[83] The judge also confidently ruled that the harm (blindness) avoided by Randall's personal growth and use of marijuana outweighed the "slight, speculative, and undemonstrable harm" caused by it.[84]

Intriguingly, Washington put a thumb on Randall's side of the scale by citing *Roe v. Wade*, then three years old. He invoked *Roe*'s emphasis on "the fundamental nature of the right of an individual to preserve and control her body." Although he did not go so far as to hold that *Roe* gave Randall a constitutional right to use marijuana, the judge explained that the case was relevant to the application of the necessity defense because of its "revelation of how far-reaching is the right of an individual to preserve his health and bodily integrity."[85]

After this decision, Randall became, in his own words, "America's only legal pot smoker."[86] Even before his acquittal, Randall had commenced a struggle to persuade the relevant federal agencies to officially authorize his marijuana use and provide him with a stable and legal supply of the drug. These agencies included the Food and

---

[80] *See, e.g.,* Commonwealth v. Sloan, 58 Mass. 52, 54 (1849).

[81] Bice v. State, 34 S.E. 202 (Ga. 1899).

[82] United States v. Randall, 104 Dly. Wash. Law Report. 2249 (1976).

[83] *Id.* at 2252.

[84] *Id.* at 2253

[85] *Id.* at 2253.

[86] RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 134.

Drug Administration (FDA), which cleared investigational uses of unapproved drugs; the DEA, which controlled access to schedule I drugs used for research; and the National Institute for Drug Abuse (NIDA), which contracted with the University of Mississippi to grow research-grade marijuana. With NORML's assistance, Randall had broken the bureaucratic logjam with a canny media campaign. In November 1976, the month prior to Randall's acquittal, ophthalmologist John Merritt of Howard University Hospital had provided him with 45 NIDA-supplied marijuana cigarettes pursuant to an FDA-approved Investigational New Drug (IND) application.[87]

Although the government demanded Randall's silence as a price for this arrangement, he continued to appear in the press. Consequently, after Dr. Merritt moved away from Washington in early 1978 (bequeathing his last 100 joints to Randall), the federal bureaucrats were uncooperative about transitioning the cannabis "study" to another physician. Randall filed a lawsuit that May, alleging that the government was unconstitutionally coercing him to sacrifice his right to speech as a condition for preserving his "right to sight."[88] The United States quickly settled the litigation and agreed to resume supplying marijuana to Randall under the auspices of a new IND with a different physician-investigator. In complying with this settlement obligation, the FDA established a new "Compassionate IND" process that could also be used by other patients.[89]

Robert Randall's Reform Efforts

In mid-1978, with Randall's own situation resolved, he and Alice O'Leary turned to assisting other medical marijuana users. In 1980, they formed the Alliance for Cannabis Therapeutics (ACT), a nonprofit corporation whose mission was "to promote the public interest in and work to ensure the adequacy of cannabis supplies for legitimate medical, therapeutic, scientific, and research purposes."[90]

One of ACT's primary activities was helping other patients negotiate the new Compassionate IND procedure. In 1980, with ACT's assistance, Anne Guttentag (who smoked cannabis to combat nausea caused by chemotherapy for ovarian cancer) became the second American to obtain marijuana from the government pursuant to an approved Compassionate IND.[91] Guttentag passed away in 1981, but the following year Randall and O'Leary ushered another patient into the program—Irvin Rosenfeld, who suffered from a rare bone disease.[92] The small community of legal pot smokers grew slowly throughout the decade, as the FDA issued Compassionate INDs for other individuals with various conditions, including AIDS. After the FDA approved seven Compassionate INDs in a single day in December 1990, about fifteen people were in the program.[93] In February 1991, Randall launched the Marijuana/AIDS Research Service (MARS). By bundling and partly

---

[87] *Id.* at 85–123.

[88] *Id.* at 160–63, 191–92, 197.

[89] *Glaucoma Victim Gets Marijuana Use Rights*, WASH. POST, May 19, 1978, at B3; RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 198–99.

[90] RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 254.

[91] *Id.* at 229–31.

[92] *Id.* at 304.

[93] *Id.* at 353.

completing the necessary forms, this service dramatically eased the administrative burden on physicians and patients seeking to enter the Compassionate IND program.[94]

A second critical aspect of Randall and O'Leary's medical marijuana work was their fight to get the drug rescheduled under the Controlled Substances Act. In the early 1980s, Randall co-drafted and lobbied for federal legislation that would reclassify marijuana as Schedule II and create a reliable supply system for patients with "life-threatening and sense-threatening" diseases.[95] Reflecting the issue's bipartisan appeal, four Republicans introduced this bill—including a young arch-conservative representative from Georgia (and future Speaker of the House) named Newt Gingrich. The bill eventually acquired more than 70 cosponsors from both parties, ranging from ultra-liberal Barney Frank of Massachusetts to religious right-winger William Dannemeyer of California.[96]

The odd politics of pot ultimately sank this legislation, however. In early 1983, Gingrich bent to the Reagan Administration's increasingly ardent anti-drug rhetoric and withdrew his sponsorship of the bill. He explained to Randall, "The factual case [for medical marijuana] is sustainable, but the cultural case is not."[97] California's Henry Waxman—a Democrat, consumer protection advocate, and chairman of the relevant House subcommittee—then effectively killed the bill by refusing to schedule hearings, despite Randall's entreaties. The bill never came to a vote, despite being reintroduced in the two subsequent Congresses.[98]

Meanwhile, NORML's 1972 rescheduling petition continued its odyssey through the federal bureaucracy. Under the CSA, the DEA Administrator is required, before commencing rulemaking procedures to reschedule or de-schedule a controlled substance, to obtain a scientific and medical evaluation and recommendation from the Secretary of HHS. In practice, the FDA (a subagency of HHS) carries out this evaluation in consultation with NIDA (also part of HHS). The HHS recommendations are binding on the DEA with respect to scientific and medical matters.[99]

In accordance with this procedure, the FDA recommended in 1983 that the DEA retain marijuana's Schedule I classification, concluding that it had no "currently accepted medical use." The scientific record supporting efficacy was indeed thin, in large part because scientists interested in studying the medical effects of cannabis faced numerous regulatory hurdles. First of all, the CSA imposed an extra layer of bureaucratic requirements on any research using Schedule I substances. Secondly, the FDA generally would not approve an IND for a clinical investigation of marijuana unless the sponsor was able to prove that it could administer an essentially identical dose to every subject—a steep challenge when dealing with a naturally variable botanical product. Third, researchers could not readily obtain a supply of weed, because the only legal source was the NIDA-controlled cannabis farm at the University of Mississippi. Finally, it was often impossible to attract funding for

---

94 *Id.* at 358–61.

95 H.R. 4498, 97th Cong., 1st Sess. (Sept. 16, 1981).

96 H.R. 4498, 97th Cong., 1st Sess. (Mar. 3, 1982) (new cosponsors).

97 RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 275.

98 *Id.* at 263–67, 271–77; LEE, *supra* note 46, at 166–67.

99 21 U.S.C. § 811(b); 66 Fed. Reg. 20,038 (Apr. 18, 2001).

marijuana research; the naturally occurring plant would be ineligible for patent protection, thus making it impossible for funders to recoup their investment even in the event of ultimate FDA approval.[100]

Nonetheless, by the early 1980s, a few tenacious scientists had managed to conduct studies on marijuana's potential therapeutic effects. Some of the studies were promising, but not all, and the body of research as a whole was merely preliminary with respect to both benefits and risks. A 1982 Institute of Medicine (IOM) report examined the completed research and concluded that marijuana "might be useful" in the treatment of some conditions, but that "much more work [was] needed." [101] The report further opined that in light of marijuana's psychotropic and cardiovascular side-effects, "the greatest therapeutic potential probably lies in . . . synthetic analogues of marijuana derivatives."[102]

Three years later, the DEA Administrator finally instructed Administrative Law Judge (ALJ) Francis L. Young to conduct hearings regarding NORML's 1972 rescheduling petition. The notice of the hearing invited "all interested persons" to participate.[103] Randall and O'Leary's ACT—despite some reluctance about working alongside NORML—now joined the effort and, indeed, prepared the bulk of the case.[104] In 1987 and 1988, Young collected voluminous medical evidence in the form of affidavits and exhibits from ACT, NORML, and the DEA, and also conducted three oral hearings around the country. The issue for decision, as stipulated by the parties, was whether the marijuana plant should be transferred to Schedule II. The determination of this issue would hinge on two CSA criteria: (1) whether "the marijuana plant has a currently accepted medical use in treatment in the United States" and (2) whether "there is a lack of accepted safety for use of the marijuana plant under medical supervision."[105]

In September 1988, ALJ Young issued a decision that garnered national headlines and galvanized marijuana advocates and anti-drug warriors alike. He found it "clear beyond any question" that "many" medical professionals, researchers, and patients accepted the use of pot to treat nausea and vomiting accompanying chemotherapy. He also determined that a "significant minority" of physicians embraced marijuana for treatment of spasticity resulting from multiple sclerosis (MS) and other causes. (Interestingly, Young declined to make a similar finding with respect to glaucoma.) The ALJ also opined that "[m]arijuana, in its natural form, is one of the safest therapeutically active substances known to man" and that many physicians recognized its safety. Based on these findings, the ALJ concluded that the terms of the CSA "permit and require the transfer of marijuana from Schedule I to Schedule

---

[100] JOHN HUDAK & GRACE WALLACK, ENDING THE U.S. GOVERNMENT'S WAR ON MEDICAL MARIJUANA RESEARCH (2015); JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 98–100 (2012).

[101] HEALTH-RELATED EFFECTS OF CANNABIS STUDY, *supra* note 73, at 4.

[102] *Id*.

[103] 51 Fed. Reg. 22,946 (June 24, 1986).

[104] RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 285; ROBERT C. RANDALL, MARIJUANA, MEDICINE & THE LAW I (Robert C. Randall ed., 1988).

[105] Francis L. Young, ALJ, U.S. Dep't of Justice, Drug Enforcement Admin., In the Matter of Marijuana Rescheduling Petition: Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge, Docket No. 86-22, 5–6 (Sept. 6, 1988) [hereinafter Young Opinion].

II."[106] Although Young's order constituted only a recommendation, ACT and NORML were on the verge of a major triumph.

A third area of activity for ACT was advocating for recognition of the medical necessity defense in court. In 1988, Randall helped prepare the successful necessity defense of Elvy Musikka, a glaucoma patient, already blind in one eye, whom Florida prosecuted for growing four marijuana plants in her home.[107] Randall also worked closely with Kenneth and Barbara Jenks, a married Florida couple who contracted AIDS following Kenneth's infection by a contaminated blood transfusion. Florida prosecuted them for growing two marijuana plants for medical use behind their trailer, and they were convicted. In 1991, however, an appeals court, citing both the *Randall* and *Musikka* decisions, overturned the Jenks' conviction on the basis of the medical necessity defense.[108] Musikka and the Jenks joined Randall in the Compassionate IND program and received a legal supply of marijuana from the federal government.[109]

Randall and O'Leary also did political advocacy work at the state level. With their support, between 1978 and 1982, about thirty states, of all ideological stripes, enacted legislation either recognizing marijuana's therapeutic value or, more commonly, recognizing its potential value and stating the need for further research. This number would reach 34 by the end of the 1980s. About seventeen states established therapeutic research programs and obtained FDA-approved INDs, and between six and ten of these actually administered NIDA-provided marijuana to ill patients through these programs.[110]

Randall's Accomplishments Unravel

Randall and O'Leary's heady (pun intended) triumphs were only temporary, however. By the mid-1990s, their multipronged medical marijuana strategy was in tatters.

Even before the end of the 1980s, states began revoking their medical marijuana statutes or letting them expire. Even where such laws survived, state cannabis research programs withered and disappeared, both because potential research subjects could obtain the drug more readily on the street than in a study and because the federal government stopped providing pot to these programs. By 1990, the only

---

[106] *Id.* at 26, 38, 54, 58–59, 66–67.

[107] Kevin B. Zeese, *Legal Issues Related to the Medical Use of Marijuana*, *in* CANNABIS IN MEDICAL PRACTICE: A LEGAL, HISTORICAL AND PHARMACOLOGICAL OVERVIEW OF THE THERAPEUTIC USE OF MARIJUANA 20–31, 24–26 (Mary Lynn Mathre ed., 1997); RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 302–05.

[108] Jenks v. State, 582 So.2d 676 (D. Ct. App. Fla. 1991).

[109] Zeese, *supra* note 107, at 26; RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 307, 326–53; LEE, *supra* note 46, at 233.

[110] 54 Fed. Reg. 53,767, 53,771, 53,774 (Dec. 29, 1989), LEE, *supra* note 46, at 166; RANDALL & O'LEARY, *supra* note 76, at 267, 302, 359; ROBERT C. RANDALL & ALICE M. O'LEARY, MARIJUANA AS MEDICINE, INITIAL STEPS: RECOMMENDATIONS FOR THE CLINTON ADMINISTRATION 9–11 (1993) [hereinafter RANDALL & O'LEARY, MARIJUANA AS MEDICINE]; *State Legislation or Resolutions Recognizing Marijuana's Medical Value*, NORML (1995) (on file with author). The states that implemented small, but successful, research programs in the 1980s included: New Mexico, New York, Michigan, Georgia, Tennessee, and California.

individuals in the country still legally smoking marijuana were the few fortunate patients within FDA's Compassionate IND program.[111]

At the federal level, a devastating blow came on the last workday of 1989, when the DEA Administrator rejected ALJ Young's recommendation and decided to maintain marijuana's Schedule I status.[112] The U.S. Court of Appeals for the D.C. Circuit briefly revived marijuana proponents' hopes in 1991, when it questioned the administrator's precise reasoning and remanded the matter to the agency. But in 1992, the Administrator issued a new order that almost contemptuously rejected ACT's and NORML's evidence and kept marijuana in Schedule I.[113] In 1994, the D.C. Circuit upheld this order and finally laid the 22-year-old rescheduling petition to rest.[114]

For medical marijuana advocates, the most damaging aspect of the D.C. Circuit's decision was its approval of the DEA's new five-part test for determining whether a drug has "currently accepted medical use."[115] One criterion was that "there must be adequate and well-controlled studies proving efficacy."[116] The DEA explained that the evidence required to satisfy this factor was generally identical to that needed to obtain FDA approval—that is, two positive adequate and well-controlled phase III clinical trials.[117] By this standard, the scientific record was nowhere close to supporting the rescheduling of marijuana. And because of the administrative burdens on cannabis research, and the lack of financial incentives to conduct it, the needed studies might *never* be performed.

Another severe setback occurred in 1991, when the federal government announced that it would phase out the Compassionate IND program, which had been flooded with requests from AIDS patients since Randall established MARS. James Mason, the chief of the Public Health Service (PHS), explained to a journalist that the program sent a "bad signal" that undercut the Bush Administration's battle against drug abuse.[118]

Mason urged patients to instead try THC in capsule form. THC is marijuana's principal psychoactive cannabinoid. In 1985, the FDA approved a synthetic version of it under the brand name Marinol® for treatment of nausea and vomiting associated with cancer chemotherapy. Many medical marijuana activists had welcomed the approval at the time, but now they seethed as the federal government used Marinol's availability to justify cutting off access to marijuana cigarettes. Many patients did not find synthetic THC capsules to be as effective as smoked marijuana, which contained more than sixty additional cannabinoids. Moreover, smoked pot

---

[111] LEE, *supra* note 46, at 106; RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 302, 304; RANDALL & O'LEARY, MARIJUANA AS MEDICINE, *supra* note 110, at 11–12.

[112] 54 Fed. Reg. 53,767 (Dec. 29, 1989).

[113] 57 Fed. Reg. 10,499 (Mar. 26, 1992).

[114] Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994); Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 930 F.2d 936 (D.C. Cir. 1991).

[115] Alliance for Cannabis Therapeutics, 15 F.3d at 1135.

[116] *Id.*

[117] 57 Fed. Reg. at 10,503-506.

[118] Michael Isikoff, *HHS to Phase Out Marijuana Program*, WASH. POST, June 22, 1991, at A14.

took effect more quickly, its dose could be calibrated more precisely, and it was the only choice for people suffering from severe vomiting.[119]

In 1992, despite ACT's resistance, the PHS officially closed the Compassionate IND program to new patients. Randall could take limited solace from the fact that he and other existing participants were grandfathered in and would continue receiving their joints, but nobody else in America would have a legal source for marijuana. Over the next quarter of a century, the group of fourteen individuals receiving Mississippi weed from NIDA dwindled as Randall and others passed away. Today, only two remain.[120]

The emerging promise of the medical necessity defense also evaporated during this period. *Commonwealth v. Hutchins*, a 1991 decision by Massachusetts' highest court, was particularly influential. Joseph Hutchins, a Navy veteran, smoked marijuana to relieve the debilitating and life-threatening symptoms of scleroderma, a chronic autoimmune disease acquired during his term of service. The court refused to let him plead medical necessity, explaining that "the alleviation of the defendant's medical symptoms . . . would not clearly and significantly outweigh the potential harm to the public were we to declare that [his] cultivation of marihuana and its use for his medicinal purposes may not be punishable."[121] Subsequently, most courts around the country refused to allow defendants charged with marijuana crimes to plead the necessity defense provided by the common law or by general criminal codes.[122] It became increasingly clear that such a defense would be available to cannabis sellers and users only if their states established it explicitly by legislation.

Clinton's 1992 election initially gave Randall and O'Leary hope that they would be able to restore, and perhaps greatly expand, access to medical marijuana through existing federal mechanisms.[123] They prepared a booklet of recommendations for Clinton in which they urged the new president to restore the Compassionate IND program and reschedule marijuana into Schedule II.[124] Clinton, however, quickly revealed himself to be no less opposed to medical marijuana than his predecessor.

By the mid-1990s, Robert Randall's stint as the face of America's medical marijuana movement was ending, as Dennis Peron assumed the role. Randall's buttoned-down, work-within-the-system approach was eclipsed by Peron's more provocative and disruptive tactics. Randall's dedication to federal reform gave way to Peron's almost exclusive focus on state-level activism. Randall's strict interpretation of what constituted valid medical use of marijuana (treatment of serious diseases) was replaced, among some activists, by Peron's view, which blurred the line between medical and recreational use by deeming cannabis a legitimate treatment for a very wide range of conditions. Under the influence of people with AIDS, medical marijuana advocacy now became a genuine social

---

[119]Young Opinion, *supra* note 105, at 10–13; RANDALL & O'LEARY, MARIJUANA AS MEDICINE, *supra* note 110, at 28–34.

[120]RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 372–77, 389–90, 396–97, 400–01; Isikoff, *supra* note 118, at A14. The history of the development and cancellation of the Compassionate IND program is related in *Kuromiya v. U.S.*, 78 F. Supp. 367 (E.D. Pa. 1999).

[121]Commonwealth v. Hutchins, 575 N.E.2d 741, 745 (Mass. 1991).

[122]Jay M. Zittler, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R.6th 353, §§ 43–54 (2018).

[123]RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 418.

[124]RANDALL & O'LEARY, MARIJUANA AS MEDICINE, *supra* note 110.

movement characterized by uninhibited, aggressive, street-level direct action. And the center of activity moved from Washington, D.C. to California.

Meanwhile, the relationship between ACT and the broader marijuana legalization movement had frayed irreparably. Randall had concluded that NORML and other drug reform organizations were "exploiting" patients to advance their own broader legalization agendas. NORML, for its part, thought Randall was "putting a stiff arm on NORML at the height of [cultural] anti-druggism, to advocate for medical-only reforms."[125] A breaking point occurred in November 1994, when Randall refused to participate in "National Medical Marijuana Day," a multi-site protest planned by NORML and its allies. Randall demurred not only because he thought the event was poorly planned and futile, but also because he did not want sick people to be used as props.[126]

Going forward, NORML would have to work with the medical marijuana movement's new standard-bearer, Dennis Peron. He would be no less complicated an ally.

DENNIS PERON AND PROPOSITION 215 (1996)

California's Proposition 215 was not the first state-level medical marijuana measure. As noted above, by the mid-1990s, about 35 states had enacted a variety of pro-medical pot statutes, often by overwhelming majorities. But these state laws had almost no practical impact. They ranged from utterly useless legislative "recognitions" of marijuana's medical value to actual research programs that failed to survive the 1980s. Proposition 215 was a different sort of law—one that would immunize patients and their caregivers from state criminal prosecution for marijuana possession or cultivation.

Peron's Background

Dennis Peron, a self-proclaimed "hippie faggot," got hooked on marijuana and came out of the closet while serving in Vietnam as an Air Force volunteer. After his 1969 discharge, the native New Yorker settled in San Francisco, where he founded the "Big Top," a commune-cum-marijuana supermarket, in the Castro neighborhood. During the 1970s, he advocated for marijuana legalization and participated in gay rights activism. He was a close friend and leading supporter of Harvey Milk, a San Francisco Board of Supervisors member and California's first openly gay elected official. In 1978, a deranged ex-supervisor assassinated Milk and Mayor George Moscone inside City Hall. Peron learned of this tragedy from the San Francisco County Jail, where he was serving a six-month sentence following a drug bust in which a policeman shot him in the leg.

In the late 1980s, Peron's devotion to marijuana legalization and gay rights merged with the rise of the AIDS epidemic. He learned that people with AIDS smoked marijuana to combat the anorexia, nausea, wasting syndrome, and pain that accompanied the disease and its pharmaceutical treatments. His first concrete action

---

[125]Email from Allen St. Pierre, Executive Director, NORML, to author (Apr. 29, 2014) (on file with author).

[126]RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 446–47. On planning shortfalls, see Letter from Eric E. Sterling, Criminal Justice Policy Foundation, to Allen St. Pierre, Deputy National Director, NORML (Dec. 5, 1994) (on file with author).

in support of medical marijuana was his participation in a special-ops-like mission that smuggled pot into a hospital AIDS ward for a dying man named Richard, then aggressively barricaded the hospital room while Richard smoked. This operation, Peron remembers, "started a lot of us thinking about marijuana in a different setting, far from the protest drug that you get from a hippy in a schoolyard."[127]

When Peron's longtime lover, Jonathan West, fell ill, he too used cannabis for relief. In January 1990, when West was in the very late stages of AIDS, police raided Peron's house and found four ounces of marijuana. Donning rubber gloves, they forced Peron's frail partner onto the floor, made cruel jokes ("AIDS means 'Asshole in Deep Shit'"), and arrested Peron for drug possession with intent to sell. Peron escaped another jail term only because West—weak, ashen, and 85 pounds—dragged himself to the trial and testified that the pot was his, not Peron's. The judge dismissed the charges. West's death the next week led Peron, a longtime advocate for full marijuana legalization, to start focusing his activism on medical cannabis.[128]

In 1991, Peron co-authored a San Francisco initiative endorsing the prescription use of medical marijuana and led a successful grass-roots campaign to gather enough signatures to get the measure on the ballot. The initiative, known as Proposition P, passed with 80 percent of the vote in November 1991.Though legally toothless, Proposition P attracted national media attention. The city's Board of Supervisors issued a resolution urging the mayor, police commissioner, and district attorney to assign "lowest priority" status to the arrest and prosecution of individuals possessing or cultivating medical marijuana for personal use.[129] With Peron's support, other municipalities up and down the state also issued pro-medical-marijuana statements.

In 1993, Peron lobbied for California Senate Joint Resolution 8 (SJR8). This measure, co-drafted by Robert Randall, urged President Clinton and Congress to "enact appropriate legislation to permit cannabis/marijuana to be prescribed by licensed physicians and to ensure a safe and affordable supply of cannabis/marijuana for medical use."[130] SJR8 passed overwhelmingly, although most Republican senators voted no. The politicians in Washington took no action. And although the California legislature passed medical marijuana legalization bills the subsequent two years, Governor Pete Wilson vetoed both.

During this period, Peron worked closely with an old friend, Mary Jane Rathbun. "Brownie Mary," an ex-IHOP waitress, had begun selling her cannabis-laced comestibles in the 1970s on the streets of the Castro and out of Peron's "Big Top." In the 1980s, she saw AIDS ravage her many gay customers and friends, and she began distributing free joints and brownies to them for medical use. Rathbun received national media coverage for her multiple arrests on drug charges and her cantankerous yet compassionate advocacy for medical marijuana. She worked hand-

---

[127]PERON & ENTWISTLE, *supra* note 1, at loc. 662.

[128]PERON & ENTWISTLE, *supra* note 1; Paul DeRienzo, *Dennis Peron: The Marijuana Mouse Who Roared*, HIGH TIMES, Aug. 1998, at 44–50; Mark Evans, *Hero or Villain: Passion Drives Pot-Measure Supporter*, SAN BERNARDINO CTY. SUN, Nov. 24, 1996, at B4; Richard Sandomir, *Dennis Peron, an Early Advocate for Medical Marijuana, Dies at 71*, N.Y. TIMES, Jan. 31, 2018, at B12; Zack Ruskin, *Dennis Peron, the Patron Saint of Legal Cannabis, Has Died*, SF WKLY., Jan. 29, 2018, http://www.sfweekly.com/news/dennis-peron-the-patron-saint-of-legal-cannabis-has-died/.

[129]San Francisco Board of Supervisors, Resolution 741-92 (Aug. 31, 1992).

[130]S.J. Res. 8, 1993-1994 Leg., Reg. Sess. (Ca. 1993); RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 428–29.

in-hand with Peron in promoting Proposition P, SJR8, and, eventually, Proposition 215. When the San Francisco Board of Supervisors declared August 25, 1992 "Brownie Mary Day," more than 5,000 people rallied in her honor on the steps of City Hall.[131]

In the early 1990s, Peron joined Rathbun's operation delivering marijuana edibles and smokable "green bud" to people with AIDS in San Francisco. In 1993, to reach more patients, Peron (with Rathbun's assistance) opened the San Francisco Cannabis Buyers Club (CBC). He modeled the enterprise on the AIDS Drugs Buyers' Club, a San Francisco entity that dispensed unapproved remedies but was not bold enough to traffic in marijuana.[132] The CBC's audacious defiance of state and federal narcotics laws went too far for some of Peron's allies, and a fissure opened up in the medical marijuana community. ACT, for example, refused to endorse the CBC and similar clubs, in part because Randall and O'Leary were "unwilling to openly encourage illegality" and in part because the clubs were "too loosely structured, allowing many with questionable 'ailments' to obtain marijuana." Randall thought Peron was cynically exploiting sick people to disguise his true goal of running "a retail pot shop," and that this deceitful conduct "could potentially harm the medical marijuana movement."[133]

Within a couple of years after its founding, the CBC had between 8,000 and 10,000 members. It rapidly outgrew its first two locations and settled into an edifice on Market Street affectionately known as the "Brownie Mary Building." At least in theory, the club required every customer to present both a photo ID and a doctor's note stating that he or she had a medical condition (not necessarily a grave one) that marijuana might alleviate. In addition to housing the nation's first public marijuana dispensary, the Brownie Mary Building was a social center for people with AIDS and other illnesses. It was also the de facto headquarters for California medical marijuana advocacy. In Peron's office on the second floor, he and other pro-marijuana and patients' rights advocates conceived of a plan to circumvent Governor Wilson; they would present the issue of medical cannabis directly to the voters in a veto-proof ballot initiative.[134]

Selling Proposition 215

Thus was born Proposition 215, the Compassionate Use Act of 1996. With a large group of collaborators and attorneys, Peron drafted the measure through a painstaking, eight-month process. The authors strove to make the initiative appealing to voters, protective of patients, and immune as possible from legal challenges based on federal preemption. The final product was in some ways a modest proposal. It required a physician's recommendation, explicitly declined to condone "the diversion of marijuana for nonmedical purposes," and elided the complicated question of exactly who could legally cultivate and distribute medical marijuana. But at Peron's insistence, Proposition 215 also included one daringly broad provision: it

---

[131] EMILY DUFTON, GRASS ROOTS: THE RISE AND FALL AND RISE OF MARIJUANA IN AMERICA 212–21 (2017); LEE, *supra* note 46, at 228–29; PERON & ENTWISTLE, *supra* note 1.

[132] PERON & ENTWISTLE, *supra* note 1, at loc. 1151–63.

[133] RANDALL & O'LEARY, MARIJUANA RX, *supra* note 76, at 417–18, 432.

[134] On the CBC, see LEE, *supra* note 46, at 232, 235–38; PERON & ENTWISTLE, *supra* note 1; Carey Goldberg, *Marijuana Club Helps Those in Pain*, N.Y. TIMES, Feb. 25, 1996, at 16.

legalized the use of cannabis not only for eight specified ailments, but also for "any other illness for which marijuana provides relief."[135]

Peron formed "Californians for Compassionate Use" (CCU) to collect the 433,000 valid signatures necessary to get the initiative onto the November 1996 ballot. In an attempt to appeal to citizens beyond the progressive Bay Area, Peron cut his shoulder-length hair and switched his attire from tie-dyed tee shirts and beads to Oxford dress shirts and ties.[136] The signature drive nevertheless stalled, and seemed doomed, until billionaire George Soros contributed $350,000 to the effort.[137] Rather than direct the money to CCU, however, Soros hired Bill Zimmerman, a public relations strategist, who created a separate organization called Californians for Medical Rights (CMR). Other corporate leaders made large donations to CMR, including Peter B. Lewis of Progressive Insurance, John G. Sperling of the University of Phoenix, and Men's Warehouse CEO George Zimmer ("You'll like the way you look. I guarantee it."). The signature-gathering company retained by Zimmerman collected far more signatures than necessary. State officials certified the initiative in June 1996, and Proposition 215 was on the ballot.

Following certification, Zimmerman ran a slick, polished pro-Prop. 215 campaign. He relied largely on television advertisements featuring medical professionals and older women reminiscent of Brownie Mary. Zimmerman's Madison-Avenue approach represented a dramatic departure from Peron's grass-roots ideal, and the two men often clashed behind the scenes. Peron bristled at his counterpart's philosophy of total message control, his reliance on focus groups, and his strategy of framing medical marijuana as a white, middle-class movement by excluding countercultural figures and people of color from campaign materials.[138]

Peron and Zimmerman also tussled over how to formulate the "Argument in Favor of Proposition 215" that would be included in the official "Ballot Pamphlet" mailed to all voters. They submitted competing versions to the Republican secretary of state, who unsurprisingly selected the PR man's more conservative language. Peron was particularly upset about a passage explaining that police officers would still be free to arrest people for marijuana possession and that the measure merely gave such arrestees an affirmative defense to use in court.[139]

The "Argument in Favor" reflected the fact that scientific evidence for the medical effectiveness of smoked cannabis remained preliminary, at best. Although a growing body of research suggested that, in isolation, the cannabinoids THC and CBD (cannabidiol) might be useful in treating a range of conditions, the number of human efficacy studies on smoked whole marijuana remained tiny.[140] Moreover, none of the completed studies came anywhere near the size, rigor, and design of the phase III

---

[135] LEE, *supra* note 46, at 239–40; PERON & ENTWISTLE, *supra* note 1, at loc. 1593–1615.

[136] Jeordan Legon, *Marijuana Maverick Continues Campaign: Compassion is Key to Prop. 215, Says Measure's Author*, SAN JOSE MERCURY NEWS, Oct. 28, 1996, at 1A.

[137] Carey Goldberg, *Wealthy Ally for Dissidents in the Drug War*, N.Y. TIMES, Sept. 10, 1996, at A12.

[138] LEE, *supra* note 46, at 243; PERON & ENTWISTLE, *supra* note 1, at 2369–2413, 2839–77; DUFTON, *supra* note 131, at 218–19.

[139] CALIFORNIA BALLOT PAMPHLET: MEDICAL USE OF MARIJUANA, INITIATIVE STATUTE 215 (1996) (on file with author); LEE, *supra* note 46, at 243.

[140] *See* studies cited within HEALTH-RELATED EFFECTS OF CANNABIS STUDY, *supra* note 73; AM. PUB. HEALTH ASS'N, ACCESS TO THERAPEUTIC MARIJUANA/CANNABIS, RES. NO. 9513 (1996).

trials that FDA ordinarily requires for drug approval. The California Medical Association voted to oppose Proposition 215 because (its president explained) "[g]ood [medical] care depends on good science, and we're no closer today than we were 20 years ago in understanding the safety and effectiveness of marijuana as a medicine."[141]

Nevertheless, many physicians and other medical professionals believed marijuana should be available to their patients. In a 1991 survey, more than 44 percent of American oncologists reported recommending smoked marijuana to at least one chemotherapy patient, and nearly half said they would if the drug were legal.[142] The official "Argument in Favor" of Proposition 215 relied largely on the testimonials and endorsements of medical professionals who had "witnessed firsthand the medical benefits of marijuana" and on the argument that "[d]octors and patients should decide what medicines are best."[143] There was a stark difference between the FDA standard for drug approval, on the one hand, and the standard by which the people of California were being asked to "approve" marijuana, on the other.[144]

As the campaign in favor of Proposition 215 proceeded, the rhetoric used by Peron's forces diverged strikingly from that used by Zimmerman's team. This difference is reflected in the names of their respective organizations: Californians for Compassionate Use versus Californians for Medical Rights. Peron and his closest allies, consciously or not, generally avoided the language of "rights" and "freedom" and instead used tropes of "compassion" and "common sense." For example, in a *San Francisco Examiner* op-ed, Peron called Proposition 215 a "mission of mercy" that would "herald a turn toward a more loving and compassionate society."[145] A CCU pamphlet explained that the organization's "sole purpose is to relieve suffering." These materials portrayed medical marijuana as a gift that a kind civilization should bestow on its sickest members.[146]

By contrast, the CMR's principal stated mission was to "protect the rights of patients and doctors."[147] In one brochure, a nurse declared: "No government should have the right to deprive a sick person of a medicine—for any reason." In another, a state legislator proclaimed: "It's your life, it's your freedom."[148] Conservative libertarians who supported Proposition 215 were similarly comfortable with the language of liberty and limited government. For example, Richard Brookhiser, a

---

[141]Donna Alvarado, *Medicinal-Pot Measure Stokes Fires of Opinion*, SAN JOSE MERCURY NEWS, Oct. 1, 1996, at 1A.

[142]R.E. Doblin & M.A. Kleiman, *Marijuana as an Antiemetic Medicine: A Survey of Oncologists' Experiences and Attitudes*, 9 J. CLIN. ONCOL. 1314–19 (1991).

[143]CALIFORNIA BALLOT PAMPHLET: MEDICAL USE OF MARIJUANA, INITIATIVE STATUTE 215, *supra* note 139.

[144]Dana Wilkie, *Marijuana as Medicine: Is Measure a Remedy, or Ruse?*, SAN DIEGO UNION-TRIB., Oct. 21, 1996, at A1.

[145]Dennis Peron, *Yes on Prop. 215: A Mission of Mercy*, S.F. EXAMINER, Oct. 20, 1996, at C15.

[146]CALIFORNIANS FOR COMPASSIONATE USE, THE COMPASSIONATE USE INITIATIVE OF 1996 (1996) (on file with author). This is not to say that CCU never engaged in rights talk (one brochure promoted "Freedom of Choice for Your Doctor and You"), but it was clearly a subsidiary message.

[147]Press Release, Californian's for Medical Rights, Medical Marijuana Campaign Goes National (Nov. 6, 1996) [hereinafter CMR 1996 Press Release].

[148]CALIFORNIANS FOR MEDICAL RIGHTS Brochures (1996) (on file with author).

political journalist who had smoked marijuana as a cancer patient, wrote: "I support the Christian Coalition and . . . the Moral Majority. But . . . [m]ost important, I believe in getting government off the people's backs."[149] David Boaz of the libertarian Cato Institute praised Proposition 215's "less government, more freedom" message.

It is unclear why Peron generally eschewed such rhetoric. Perhaps he simply calculated that appealing to the electorate's hearts would be more effective than appealing to their political principles.

Despite their differences, the CCU and CMR agreed that to win the election, they must clearly distinguish Proposition 215 from the cause of comprehensive legalization. Although every poll showed Californians overwhelmingly in favor of medical marijuana, fewer than one quarter of the population supported legalizing recreational use.[150] In recognition of this fact, the law enforcement officials leading the opposition to the initiative characterized it as a "cruel hoax" that "exploit[ed] public compassion for the sick in order to legalize and legitimize the widespread use of marijuana in California."[151] To resist any linkage between Proposition 215 and recreational use in the eyes of the public, the CMR-drafted official argument in favor of the initiative emphasized, "MARIJUANA WILL STILL BE ILLEGAL FOR NON-MEDICAL USE." Peron had the same aim when he frantically urged his allies to refrain from recreational toking in front of the cameras on Election Day.[152]

This tactical imperative created an awkward situation for organizations like NORML that supported both Proposition 215 and comprehensive legalization. Though they were authentically committed to providing succor to sick individuals,[153] they were also worried, as NORML's Keith Stroup observed, that "the emerging medical use debate might make it more difficult for us to focus public attention on the issue we preferred they consider; i.e., whether to decriminalize or legalize marijuana for everyone, recreational users as well as medical users."[154] Nonetheless, during the Proposition 215 campaign, the supporters of full legalization were disciplined and devoted warriors for medical-only cannabis. The week before the election, Kevin Zeese of Common Sense for Drug Policy warned his fellow drug policy reformers that they should respond with "extreme restraint" to the likely victory, so as not to jeopardize further progress on medical marijuana. He cautioned them that even if they saw Proposition 215 as a step toward comprehensive legalization, "it is a mistake to say so publicly."[155]

---

[149] *Marijuana Use in America: Hearing Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 104th Cong., 2nd Sess. 171 (1996) (statement of Brookhiser) (republished in various newspapers as op-ed in October 1996).

[150] LEE, *supra* note 46, at 243.

[151] CALIFORNIA BALLOT PAMPHLET: MEDICAL USE OF MARIJUANA, INITIATIVE STATUTE 215, *supra* note 139.

[152] *Id.*

[153] *See, e.g.*, Memorandum from R. Keith Stroup, Executive Director, NORML, to Interested Parties (May 14, 1996) (on file with author).

[154] Letter from Keith Stroup, Executive Director, NORML, to Steve Kubby (2001), https://www.nationalfamilies.org/legalization/redherring.html.

[155] Email from Kevin Zeese, President, Common Sense for Drug Policy, to "aro-list" (Oct. 28, 1996) (on file with author).

This posture explains the legalizers' exasperation at Peron's antics after Proposition 215 prevailed in November 1996. For months, they had stowed away their ideal of full legalization to help the medical marijuana cause. Now, Peron—with his "all marijuana use is medical" assertion—was insinuating that he shared their ultimate goal of full legalization while cloaking this objective in the language of medical policy. As Allen St. Pierre of NORML later recalled:

> Dennis and his minions became obsessed with two propagandistic notions. *Only refer to marijuana as "medicine"* [and] *Declare ALL cannabis use medicinal*. The above two strategies were found to be so vexing at places like NORML, that clear divisions opened up[:] intellectually honest vs. dishonest . . . transparent vs. non-transparent . . . .[156]

Implementing Proposition 215

Although Proposition 215 "encouraged" state officials to "implement a plan to provide for the safe and affordable distribution of marijuana" to patients, it left the details to local lawmakers. The result was a hodgepodge of policies. Some counties—with Attorney General Lungren's backing—effectively proceeded as though the new law did not exist. In these jurisdictions, law enforcement continued to bust medical cannabis users, who highly regretted Zimmerman's concession that the initiative provided only an affirmative defense at trial, rather than a complete shield from arrest. Meanwhile, the authorities in other areas—particularly liberal bastions like the San Francisco Bay Area—left medical marijuana users alone and permitted dispensaries to emerge and flourish.[157]

The existence of these dispensaries depended on the legal fiction that they were their customers' "primary caregivers" and thus allowed to obtain and distribute marijuana pursuant to Proposition 215. Some of these entities, epitomized by Scott Imler's Los Angeles Cannabis Resource Center (LACRC) in West Hollywood, cooperated with local law enforcement, rigorously verified prescriptions, banned on-site smoking, and generally conducted themselves like medical clinics. Such clubs distributed pot only to patients suffering from an enumerated list of serious illnesses, so as to strictly distinguish medical use from recreational use.

Peron's newly-named "Cannabis Cultivators' Club (CCC)," which reopened on Market Street in January 1997, was extremely different. In a state lawsuit, Lungren accused the CCC of "an indiscriminate and uncontrolled pattern of sale" to people without doctors' recommendations, including undercover officers.[158] Peron adamantly denied this charge, at least with respect to his post-Proposition 215 operations. But he could not deny—indeed, he took pride in—the fact that the CCC was a thriving social hub with abundant on-site toking. He also openly acknowledged implementing his "all marijuana use is medical" philosophy by selling to everyone with a physician's recommendation (including older minors), regardless of the severity of their illness. In short, Peron conducted his operation in a way that wholly vindicated NORML's concerns about his deviousness.

---

[156]Email from Allen St. Pierre, Executive Director, NORML, to author (Mar. 11, 2014) (on file with author).

[157]LEE, *supra* note 46, at 254–59.

[158]People *ex rel*. Lungren v. Peron, 70 Cal. Rptr. 2d 20, 23 (Ct. App. 1997).

Imler, a gay Methodist minister, had been closely allied with Peron on the Proposition 215 effort until Imler broke away to work with CMR. After the initiative's passage, the two men became the symbols of bitterly competing camps that still characterize the medical marijuana industry. The taxpaying, rule-following medical entrepreneurs on one side fought to distance themselves from the antigovernment, anticorporatist, countercultural ethos embraced by the other. Imler accused Peron of running a "clown show." Peron called his rival "Benedict" Imler. One observer described the Imler-Peron split as "legendary" within the medical marijuana community. After a California appeals court upheld a state injunction shutting down the CCC's operations, Imler ungenerously observed that Peron had served himself up to Lungren "on a silver platter." Peron's club—under legal attack from both state and federal authorities—closed permanently on May 25, 1998.[159]

After Peron lost a whimsical challenge to Lungren for the Republican gubernatorial nomination in 1998, his reign as the face of the medical marijuana movement came to an end. Lungren also departed the scene around this time after losing the general election in a landslide to Democrat Gray Davis. The next attorney general, Bill Lockyer, basically continued Lungren's approach of allowing each county to forge its own path with respect to medical cannabis. Some counties issued medical marijuana identification cards and countenanced sales by retail outlets, while others aggressively arrested patients and caregivers.[160] In 2003, California enacted Senate Bill 420, which required counties to issue patient ID cards for eligible people who wanted them, established a minimum amount of marijuana that all qualified patients in the state would be permitted to possess, and authorized nonprofit co-ops and collectives to grow and distribute marijuana for medical purposes.[161] Although this law was intended to create a more uniform statewide policy, local sovereignty continued to result in a variegated jigsaw puzzle of regulations, enforcement priorities, and cannabis markets. For example, while some California jurisdictions explicitly banned marijuana retail outlets, Los Angeles County acquiesced to a massive proliferation of storefront dispensaries, many of which tested the limits of the words "medical" and "nonprofit." A subset of high-caliber, professionalized providers also sprouted up, both in places like Los Angeles and in more restrictive counties. In 2009, the state started imposing a sales tax on medical marijuana retailers—opening the faucet to a new stream of revenue to which California lawmakers would soon become addicted.[162]

In sum, following the passage of Proposition 215, medical cannabis became an indelible feature of California's commerce and culture. Whether you were a seriously ill person patronizing Imler's dispensary in West Hollywood or a stoner

---

[159]Matt Krasnowski, *L.A.'s Prescription Pot Rebel: He Gets Along with Cops*, COPLEY NEWS SERV., Mar. 27, 1998; PERON & ENTWISTLE, *supra* note 1, at loc. 3518, 5054–65, 5264–73; Mary Curtius, *Activist's Tactics Anger Many in Medical Marijuana Movement*, L.A. TIMES, Dec. 28, 1997, at A3; LEE, *supra* note 46, at 254–64; People *ex rel*. Lungren v. Peron, 70 Cal. Rptr. 2d 20 (1997).

[160]In the latter jurisdictions, medical marijuana users at least gained a new legal tool in 2002, when the California Supreme Court ruled that the Compassionate Use Act gave defendants the right to challenge the propriety of their indictment, in light of the medical-marijuana defense, in a pretrial hearing. *See* People v. Mower, 49 P.3d 1067 (Cal. 2002).

[161]S.B. 420, 2003-2004 Leg., Reg. Sess. (Ca. 2003).

[162]LEE, *supra* note 46, at 334–35, 350–51, 353–54.

with a patient card scoring weed on Venice Beach, it was easy to forget that every seller and purchaser of pot in the state was still violating federal law.

STATE-FEDERAL DIVERGENCE (1996-PRESENT)

Other States Follow California

California's enactment of Proposition 215 in 1996 (along with Arizona's passage the same day of an even broader measure later declared void due to a technicality) was a seminal moment in the evolution of American medical marijuana regulation. The day after the election, Bill Zimmerman changed the name of his organization to "*Americans* for Medical Rights" and vowed to press the issue throughout the nation.[163] Two years later, the people of Alaska, Nevada, Oregon, Washington, and Arizona (again) legalized medical marijuana, although the schemes they created were generally more restrictive than California's. Over the course of the next two decades, state after state passed medical marijuana laws, some by initiative, some by legislation, and one (Florida) by constitutional amendment.[164] Almost every measure that came to a vote passed. Today, medical marijuana is legal in 33 states and the District of Columbia.[165]

With this wave of medical marijuana legalization measures, state law has simply been catching up with American public opinion. When California passed Proposition 215, between 60 and 70 percent of the country already supported giving physicians the right to prescribe marijuana (compared with only about 25 percent who favored complete legalization).[166] Ever since, polls have shown between 70 and 86 percent support for medical cannabis.[167]

Despite Peron's hesitation about using rights talk, post-Proposition 215 advocacy statements in newspapers and online are replete with quasi-constitutional rhetoric. Terminal patient Terry Stephenson, from Illinois, demanded his "constitutional and God given right to use cannabis for medical purposes." Steve Kubby, a prominent California medical marijuana advocate on trial for drug crimes, wrote: "[E]veryone is beginning to see that this issue is no more about marijuana than the Boston Tea Party was about tea. This is about freedom, the Bill of Rights, and using juries to force the government to obey those rights."[168] In honor of Independence Day, Larry Nickerson of Texas invoked the "inalienable rights" of "Life, Liberty, and the Pursuit of Happiness" enumerated in the Declaration of Independence and asserted

---

[163]CMR 1996 Press Release, *supra* note 147.

[164]For comprehensive information on state medical marijuana laws, see http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[165]*State Marijuana Laws in 2018*, GOVERNING, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html (last visited Apr. 8, 2019).

[166]Texas A&M, Sam Houston State Univ. Survey, June 6-June 26, 1995 (50% of adults supported availability by prescription, 11% supported complete legalization); Henry J. Kaiser Foundation, Harvard School of Public Health Survey, Dec. 13–17, 1996 (64% of adults supported availability by prescription, 7 % supported complete legalization); ABC News Poll, May 27, 1997 (70% of adults supported availability by prescription).

[167]HUDAK, *supra* note 9, at 94–95.

[168]Letter from Terry Stephenson, NORML, "Dear Sir" Letter (Mar. 1997) (on file with author); Steve Kubby, *Bill of Rights is the Cure for Government Disease*, WORLDNETDAILY (Oct. 18, 2000), http://www.mapinc.org/drugnews/v00/n1569/a04.html?2535.

that the government's prohibition of medical marijuana constituted denial of "that most basic right: life itself."[169]

Federal Recalcitrance under Bill Clinton and George W. Bush

Despite the spread of state-level medical marijuana legalization, medical cannabis users have never felt completely safe from prosecution anywhere in the United States. Pot remains illegal under the Controlled Substances Act (CSA), regardless of the reason for its use. Even the most protective state laws provide no protection from a knock on the door by federal DEA agents.

The Clinton Administration did not modify its fierce anti-medical marijuana stance following the 1996 passage of Proposition 215. Clinton's drug czar, Barry McCaffrey, swiftly issued a formal response to the enactment in which he emphasized that the United States would continue to treat cannabis as both an illegal Schedule I controlled substance and an unapproved drug prohibited by the FD&C Act.[170] (McCaffrey even threatened to revoke the CSA registration of any practitioner who merely *recommended* medical marijuana—a policy later struck down as infringing doctors' and patients' First Amendment rights.[171]) In 1998, the federal government obtained preliminary injunctions shuttering six northern California cannabis clubs, including Peron's, for violations of the CSA.[172] Although Peron abandoned the dispensary business, the other defendants, led by the Oakland Cannabis Buyers' Cooperative, would fight the injunctions all the way to the Supreme Court.

Upon taking office in 2001, George W. Bush made marijuana a major law enforcement priority. His administration continued its zealous pursuit of medical cannabis-related cases even after the devastating attacks of September 11, 2001.[173] On September 28, federal agents raided the rural California home of Dr. Mollie Fry, a physician and medical cannabis advocate. She and her husband, an attorney, were convicted of manufacturing and selling marijuana and sentenced to sixty months in federal prison. Four weeks later, the DEA raided Scott Imler's West Hollywood dispensary, despite his assiduous efforts to comply with every jot and tittle of Proposition 215—a development that likely provided Dennis Peron a good chuckle.[174]

The most publicized medical marijuana enforcement action under Bush was probably the 2002 arrest and prosecution of Ed Rosenthal. Rosenthal was a California medical pot activist, horticulturist, and *High Times Magazine* columnist who grew cannabis in an Oakland warehouse for distribution to medical marijuana

---

[169]Larry Nickerson, Letter to the Editor, *Life and Marijuana*, FT. WORTH STAR-TELEGRAM, June 25, 2002, available at http://www.mapinc.org/drugnews/v02/n1181/a01.html?635213; *see also* Norah Vincent, *A New "Worst" Drug Stirs up the Snoops*, L.A. TIMES, July 19, 2001, at 15 ("After life, there is no right more inalienable . . . than managing your own pain.").

[170]Statement Released by Barry R. McCaffrey, Director of the Office of National Drug Control Policy, The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200 (Dec. 30, 1996) (on file with author).

[171]Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), *cert. denied* 540 U.S. 946 (2003).

[172]U.S. v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086 (N.D. Cal. 1998).

[173]LEE, *supra* note 46, at 295, 303, 309.

[174]*Id.* at 299–300; Bob Pool, *Medical Marijuana Center in Mourning*, L.A. TIMES, Oct. 30, 2001, at 3.

dispensaries. The federal trial judge refused to allow Rosenthal to introduce evidence of the fact that the City of Oakland had deputized him to cultivate cannabis for use by certified patients. The jury convicted him in January 2003 in a courtroom packed with furious patients and activists. Soon afterward, when the jurors learned about the excluded evidence, five of them held a press conference to rage at the court, apologize to Rosenthal, and demand a new trial.[175] Although the Court of Appeals granted Rosenthal a new trial on different grounds, he was reconvicted in 2007.[176]

Meanwhile, the rescheduling struggle continued. In 2001, the DEA rejected a rescheduling petition submitted in 1995 by former NORML National Director Jon Gettman and *High Times*.[177] On October 9, 2002, a group calling itself the Coalition for Rescheduling Cannabis (CRC) filed still another petition. In 2006, the FDA recommended once again that marijuana remain in Schedule I.[178]

The Emergence of Americans for Safe Access

Federal obduracy on medical marijuana in the early 2000s gave rise to a new advocacy group, Americans for Safe Access (ASA). Steph Sherer, its founder, was a young progressive community organizer and political consultant. She began using medical cannabis in 2001 to treat disabling pain and spasms related to a severe neck injury she incurred when a U.S. marshal muscled her to the ground at a World Trade Organization protest in Washington, D.C. The next year, Sherer started ASA in Oakland as a "patient's rights" group modeled in part on the HIV/AIDS movement. The organization focused from its inception on resisting federal medical cannabis policy, although it also soon also became involved in state-level activism.

ASA swiftly became a large nationwide membership organization that engaged in raucous street protests as well as litigation and lobbying. Its rhetoric was deeply rooted in the American protest tradition. ASA's posters featured the phrase "We the people" and a Thomas Jefferson quotation on perpetual revolution. Its initial logo resembled the Great Seal of the United States: a dove held a scroll containing the words "liberty" and "compassion" while sitting on a shield bearing the image of a marijuana leaf.[179] Due largely to Sherer's irrepressible drive, by 2007 ASA was being mentioned in the media more than NORML.[180]

Courts on the Sideline

As has almost always been the case with respect to American movements for freedom of therapeutic choice, the courts provided little help to medical marijuana legalization advocates during this period. The California cannabis clubs closed by the Clinton Administration sought to persuade the federal courts that an implied

---

[175]Dean E. Murphy, *Jurors Who Convicted Marijuana Grower Seek New Trial*, N.Y. TIMES, Feb. 5, 2003, at A14; LEE, *supra* note 46, at 304–06.

[176]U.S. v. Rosenthal, 445 F.3d 1239 (9th Cir. 2006); *see also* U.S. v. Rosenthal, No. CR 02-00053, 2007 WL 2012734 (N.D. Cal. July 6, 2007) (order denying defendant's motion for a new trial).

[177]66 Fed. Reg. 20,038 (Apr. 18, 2001). This petition focused almost exclusively on cannabis's abuse potential rather than on its medical uses.

[178]Recommendation reprinted at 76 Fed. Reg. 40,552 (July 8, 2011).

[179]THE MEDICAL CANNABIS ADVOCATE'S HANDBOOK 2013 1–4 (2013); LEE, *supra* note 46, at 305–07; Nina Garin, *Picket's Charge: "I Can't Not Do Anything," Says Activist Who Helps Train Others in the Art of Demonstrating*, SAN DIEGO UNION-TRIBUNE, Aug. 14, 2000, at E1.

[180]Comparative Lexis search.

defense of medical necessity should be read into the Controlled Substances Act's prohibition on manufacturing and distributing marijuana. The Supreme Court rejected this argument in 2001, in *U.S. v. Oakland Cannabis Buyers' Cooperative*.[181] The following year, Angel McClary Raich and Diane Monson, both of whom used medical cannabis in compliance with California's Proposition 215, filed a federal claim seeking to enjoin the DEA from enforcing the CSA against them on constitutional grounds. Monson cultivated her own pot within the state, while Raich used state-grown pot her caregivers provided to her at no cost. The plaintiffs contended that the CSA could not apply to such noncommercial, intrastate activity without exceeding Congress's power to regulate interstate commerce pursuant to the U.S. Constitution's Commerce Clause. In 2005, however, the U.S. Supreme Court ruled against them. *Gonzales v. Raich* held that Congress had a rational basis for concluding that the plaintiffs' local activities affected interstate commerce sufficiently to fall within the commerce power.[182]

Raich and Monson also contended that the CSA violated their rights under the Due Process Clause of the Fifth Amendment. The Ninth Circuit Court of Appeals addressed this issue on remand in 2007. Raich (now proceeding without Monson) alleged that she had a fundamental, substantive due process right to "mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life."[183] She based this argument on a line of Supreme Court precedents recognizing rights to privacy and bodily autonomy, including *Planned Parenthood v. Casey* (a 1992 case upholding *Roe v. Wade*) and *Lawrence v. Texas* (a 2003 case declaring state anti-sodomy laws to be unconstitutional).[184]

But the moment in the late 1970s when it seemed that courts might expand the *Roe* holding into a full-blown right to medical choice had long passed. Fierce academic criticism of implied rights jurisprudence had been accompanied by a series of judicial opinions limiting substantive due process protections for medical decisions. In 1980, the Tenth Circuit denied the existence of a constitutional right to use laetrile. The court stated that although the abortion jurisprudence protected a patient's right to decide "whether to have medical treatment or not," it did not guarantee "his selection of a particular treatment, or at least a medication."[185] Seven years later, in *Washington v. Glucksberg*, the Supreme Court unanimously rejected an asserted substantive due process right to physician-assisted suicide. The Court held that unenumerated liberty interests were constitutionally protected only if they were "deeply rooted in this Nation's history and tradition." Assisted suicide failed

[181]U.S. v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001).

[182]Gonzales v. Raich, 545 U.S. 1 (2005).

[183]Raich v. Gonzales, 500 F.3d 850, 864 (9th Cir. 2007).

[184]Planned Parenthood v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003).

[185]Rutherford v. U.S., 616 F.2d 455, 457 (1980). The same year, a federal district court ruled against NORML in a suit in which the organization contended that the application of the CSA to the private possession and use (for any reason) of marijuana violated the constitutional right of privacy and individual autonomy established by *Roe* and other cases. Nat'l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123 (D.D.C. 1980).

this test because of the country's longstanding, almost universal legal prohibition against committing and abetting suicide.[186]

In light of *Glucksberg*, Angel Raich had no choice on remand but to contend that medical marijuana use was "deeply rooted in [the country's] history and tradition." The Ninth Circuit predictably rejected this assertion; after all, the use of marijuana had been totally forbidden nationwide since the 1970 enactment of the CSA. But Raich also advanced a more promising substantive due process argument based on *Lawrence v. Texas*, the Supreme Court's 2003 sodomy decision. *Lawrence* had ignored *Glucksberg* and instead applied a test asking whether there was an "emerging awareness" that the right in question was fundamental. To demonstrate that such an awareness was, indeed, "emerging" with regard to medical marijuana, Raich pointed to the eleven states that had passed laws legalizing it by 2007. The Ninth Circuit acknowledged that legal recognition of medical cannabis was "gaining traction" but concluded that it had "not yet reached the point where . . . the right to use medical marijuana is 'fundamental.'"[187] The court's reasoning raised the tantalizing possibility that as more and more states legalized medical cannabis, a cognizable fundamental right might emerge. Until that time, however, elections, not judges, would determine access to medical marijuana.

The Federal Government's Wavering Approach Since 2009

In 2008, medical pot proponents had cause for optimism when Democrat Barack Obama, an admitted inhaler, was elected President. The medical marijuana community was further buoyed on October 19, 2009, when Deputy Attorney General David Ogden circulated a memorandum to U.S. Attorneys serving in states that had authorized medical cannabis use. The "Ogden Memo" instructed these prosecutors to prioritize the pursuit of significant marijuana traffickers rather than "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[188]

Medical marijuana advocates were soon disappointed, however. In June 2011, the DEA rejected the CRC rescheduling petition.[189] One week later, Deputy Attorney General James M. Cole issued a clarifying memorandum ("Cole Memo I") emphasizing that the enforcement discretion set forth in the Ogden Memo applied only to patients and caregivers, not to businesses. In other words, federal prosecutors should continue to bring CSA actions against enterprises—particularly "large scale" ones—involved in the commercial cultivation, distribution, or sale of marijuana, "even where those activities purport to comply with state law."[190] Federal agents

---

[186]Washington v. Glucksberg, 521 U.S. 702, 721–23 (1997). The *Glucksberg* Court also demanded that any substantive due process right be "carefully described," thus ensuring that future medical marijuana decisions would be decided with respect to cannabis in particular rather than some broad notion of medical autonomy. *Id.*

[187]*Id.* at 865–66.

[188]Memorandum from David W. Ogden, Deputy Att'y General, U.S. Dep't of Justice, to Selected United States Attorneys 2 (Oct. 19, 2009), *available at* https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

[189]Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,552 (July 8, 2011).

[190]Memorandum from James M. Cole, Deputy Att'y General, U.S. Dep't of Justice, to United States Attorneys 2 (June 29, 2011), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

subsequently raided two dispensaries in central California and a medical cannabis farm in eastern Washington.[191]

During Obama's second term, the federal government once again sent out more tolerant signals regarding medical marijuana. In August 2013, Cole released yet another memo, which walked back the severity of his first one. "Cole Memo II" stated that federal marijuana enforcement would focus on eight listed priorities, such as preventing distribution to minors and preventing the funding of criminal enterprises through marijuana sales. Cole declared that except in instances in which those priorities were threatened, the federal government would generally defer to state law, including the law of states that had legalized medical or even recreational marijuana.[192] Then, after years of rejecting similar measures, Congress in 2014 passed the Rohrabacher-Farr Amendment, a subsequently renewed provision in the annual omnibus spending bill that prohibited DOJ from using funds to prevent states from implementing their medical marijuana regimes.[193] At the very end of Obama's presidency, however, his administration manifested renewed ambivalence regarding medical cannabis. The DOJ interpreted Rohrabacher-Farr narrowly and, until the courts intervened, continued to pursue defendants despite their likely compliance with state law.[194] And in July 2016, the DEA rejected two additional marijuana rescheduling petitions.[195]

Obama's successor, Donald Trump, claimed as a presidential candidate to be "100 percent" in favor of medical marijuana.[196] In January 2018, however, Trump's Attorney General Jeff Sessions threw the medical marijuana industry into a temporary panic when he issued a memorandum rescinding the Ogden and Cole memos.[197] This move had little practical effect because Congress—over Sessions' objections—had once again reauthorized the Rohrabacher-Farr (now the Rohrabacher-Blumenauer) Amendment. Overall, the Trump administration has sent mixed signals on the medical marijuana issue while essentially continuing Obama-era enforcement policies.[198]

The most dramatic federal actions regarding cannabis during the Trump Era occurred in 2018. First, the FDA approved a cannabis-derived CBD drug

---

[191] MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 113–14 (2017).

[192] Memorandum from James M. Cole, Deputy Att'y General, U.S. Dep't of Justice, to All United States Attorneys (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[193] Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014); Pub. L. No. 114-113, § 542, 129 Stat. 2242 (2015).

[194] U.S. v. Marin Alliance for Medical Marijuana, 139 F. Supp. 3d 1039 (N.D. Cal. 2015); U.S. v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

[195] Letters and FDA Recommendations, 81 Fed. Reg. 53,688, 53,767 (Aug. 12, 2016).

[196] *The O'Reilly Factor* (Fox News Network television broadcast Feb. 10, 2016).

[197] Memorandum from Jefferson B. Sessions, Att'y General, U.S. Dep't of Justice, to All United States Attorneys (Jan. 4, 2018), *available at* https://www.justice.gov/opa/press-release/file/1022196/download; Charlie Savage & Jack Healy, *Justice Dept. Shift Threatens Legal Marijuana*, N.Y. TIMES, Jan. 5, 2018, at A1.

[198] Evan Halper, *Trump Inclined to Back Ending Pot Ban*, L.A. TIMES, June 9, 2018, at A1; Sean Williams, *Trump Continues to Flip-Flop on Medical Marijuana*, MOTLEY FOOL (Feb. 23, 2019, 9:06AM), https://www.fool.com/investing/2019/02/23/trump-continues-to-flip-flop-on-medical-marijuana.aspx.

(Epidiolex®) for certain forms of epilepsy.[199] Then, with the Agricultural Improvement Act of 2018 (the "Farm Act"), Congress embraced a new, bifurcated approach to regulating cannabis in general.[200] While preserving the Schedule I status of "marihuana" under the Controlled Substances Act, the 2018 Farm Act deschedules "hemp," which it defines as *Cannabis sativa L.* containing no more than 0.3 percent THC (the principal psychoactive cannabinoid). The statutory definition of "hemp" does not, however, similarly limit the amount of CBD, a non-intoxicating cannabinoid widely studied and used for its medical (including psychological) effects. Moreover, because the Farm Act's dispensation for hemp covers derivatives of the plant—including "cannabinoids"—the statute effectively deschedules CBD derived from hemp. Congress thus opened the floodgates to the current deluge of hemp and CBD products marketed directly to consumers as dietary supplements, foods, cosmetics, and even drugs. In the FDA's view, almost all of these products remain illegal under the federal Food, Drug, and Cosmetic Act, but the agency remains uncertain about how to exercise its regulatory power in this area.[201]

The proliferation of CBD products (and potentially other hemp extracts) represents a potential threat to the whole-plant medical marijuana industry. According to a 2017 National Academies review of the scientific evidence on the health effects of cannabis and cannabinoids, the latter appear to have more promise than the former.[202] If a large portion of Americans seeking therapeutic benefits from cannabis turn instead to cannabinoid extracts, the industry as a whole may follow the path of Charlotte's Web, a company that started life as a purveyor of whole-plant medical marijuana but now sells only hemp-derived CBD products.[203] After all, the once-robust commerce in willow bark for treatment of pain and fever did not long survive the identification and isolation of its active ingredient, salicylic acid (a precursor to aspirin). Some medical consumers will doubtless always seek out whole-plant marijuana for its amalgamation of hundreds of components, including THC. But it seems likely that as sales of cannabis extracts increase, an ever-growing proportion of people who smoke or eat marijuana buds and leaves will be doing so simply to get high.

Federal Recalcitrance Reconsidered

Even following enactment of the 2018 Farm Act, THC-rich marijuana and its derivatives remain as illegal as ever under the Controlled Substances Act. What explains the federal government's failure to budge on the rescheduling of marijuana, under both Democratic and Republican presidents, even as states have moved in the other direction? Cannabis proponents have long accused federal officials of basing their marijuana policies on crass (if misguided) political calculation. Pure politics may indeed explain why Congress has never rescheduled marijuana (as opposed to hemp) by statute. Medical marijuana proponents have evaded this problem at the

---

[199] FDA News Release, *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy* (June 26, 2018).

[200] Pub. L. No. 115-334, §§ 10113, 12619, 132 Stat. 4490 (2018).

[201] 84 Fed. Reg. 12,969 (Apr. 3, 2019).

[202] NAT'L ACADS. OF SCI., ENG. & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS (2017).

[203] Alyson Krueger, *Seven Buds for Seven Brothers*, N.Y. TIMES, Mar. 7, 2019, at D1.

state level largely by presenting the issue directly to voters through initiatives—a tool not available in federal law.

With respect to administrative rescheduling, however, a more benign explanation is that the federal bureaucracy has approached the problem as a scientific one and has followed the cogent recommendations of a scientific agency—the FDA. The CSA requires any drug of abuse with "no currently accepted medical use" to be placed in Schedule I. The DEA and FDA interpret this phrase as embracing the same standards that the FDA uses to assess drug safety and efficacy in its approval decisions. The relevant data for assessing drugs in the modern era are not doctor and patient testimonials, but adequate and well-controlled clinical investigations.[204] The FDA has not ignored the available research but rather has concluded, accurately, that the completed studies are not of the size and quality that would support NDA approval. In 2015, in connection with recent rescheduling petitions, the FDA performed a rigorous review of all clinical research on inhaled marijuana for therapeutic purposes. The agency identified eleven completed Phase 2 controlled investigations for various indications. While acknowledging that such research had "progressed" since the agency's previous literature review in 2006, and that the new studies showed "positive signals," the FDA reasonably concluded that they provided only preliminary evidence of effectiveness because of their small size and the inconsistency of doses delivered, among other issues.[205]

The government's exclusively research-based interpretation of "currently accepted medical uses" is, of course, open to criticism. After all, because the FDA does not regulate off-label prescribing, many drugs have extremely widespread uses that have never been systematically investigated. Indeed, the DEA itself does not generally sanction physicians for prescribing Schedule II-V *controlled* substances for unapproved indications so long as these prescriptions constitute "legitimate medical purposes" and are not "outside the course of usual professional practice."[206] Undeniably, the medical community as a whole "accepts" many uses for drugs that have not been supported by two adequate and well-controlled clinical studies. Perhaps the DEA should interpret the phrase "currently accepted medical uses" in the CSA to embrace such common uses—especially in a situation like marijuana's, where the lack of available patent protection may well prevent phase III studies from ever being performed.

The FDA has another option available to provide marijuana access, at least to the most desperate patients. The FDA can authorize the treatment use of investigational drugs (including Schedule I substances) by seriously ill patients with no satisfactory alternatives.[207] Indeed, as we have seen, a compassionate IND program was in effect for marijuana until the first Bush Administration terminated it. The FDA could restore and greatly expand this program. The FDA similarly invoked scientific values to defend its initially conservative approach to AIDS drugs, until simple compassion impelled it to reform its policies. Perhaps it is time for the agency to

---

[204] 57 Fed. Reg. 10,499, 10,502–03 (Mar. 26, 1992).

[205] 81 Fed. Reg. 53,688, 53,713–15 (Aug. 12, 2016).

[206] 21 C.F.R. 1306.04(a) (2005); David A. Kessler, *Regulating the Prescribing of Human Drugs for Nonapproved Uses Under the Food, Drug, and Cosmetic Act*, 15 HARV. J. LEGIS. 693–760, 695–97 (1978).

[207] 21 C.F.R. Part 312, Subpart I.

consider a similar approach to medical marijuana, at least with respect to extremely serious conditions.

Federal regulators should also keep in mind a core strand of medical freedom ideology throughout American history—freedom of inquiry. Medical cannabis advocates have long decried the Catch-22 they are trapped in; the government refuses to reschedule marijuana without further research while simultaneously making such research onerous or impossible. A 2015 Brookings report, *Ending the U.S. Government's War on Medical Marijuana Research*, confirmed this "circular policy trap," ascribed it to "statutory, regulatory, bureaucratic, and cultural barriers," and blamed it for the absence of "research freedom" in this area.[208] The report recommended rescheduling cannabis under the CSA, ending the NIDA monopoly on legal production of marijuana for research, and reopening FDA's compassionate use IND program. Bipartisan coalitions have recently sponsored legislation implementing the first two recommendations in both the House and the Senate.[209]

However, if it is valid to ask whether federal law and policy are too tough on medical marijuana, it is also valid to ask whether some states are too *lenient*. Since 1996, state after state has legalized medical cannabis with far less proof of safety and efficacy than Americans generally demand for medical products. Some, like California, do not even limit legal use to serious conditions. Why should pot be subject to lower scientific standards than other drugs? Those who embrace this position seem to rely largely on the argument that the government should not interfere with cannabis use because it is a "natural" product. As medical marijuana user Terry Stephenson declared, "Cannabis has a lot of therapeutic effects and is less harmful to the body than manufactured drugs by a pharmaceutical company. It is bound to be; it is organic and put on earth by God and Nature."[210] Permissive state medical marijuana laws reflect the same American cult of the "natural" that explains the relatively lax regulatory regime for dietary supplements. Supplements are not smoked, however, nor do they have psychoactive effects. Science-based marijuana policy should not simply ignore these safety questions.

Of course, if the United States ever legalizes marijuana for *non*-medical uses, and pot becomes available to all, the details of medical marijuana policy will become largely irrelevant—like medical alcohol policy at the end of prohibition. Indeed, perhaps no phenomenon presents a greater challenge to both medical marijuana regulators and medical marijuana activists than does the burgeoning legalization of recreational marijuana.

MEDICAL MARIJUANA IN THE AGE OF LEGAL RECREATIONAL POT

In November 2010, California nearly became the first state to legalize marijuana for nonmedical uses. By a margin of only seven percentage points, voters rejected Proposition 19, an initiative that would have allowed local governments to authorize the retail sale of marijuana for recreational use and to regulate and tax these

---

[208] HUDAK & WALLACK, *supra* note 100, at 1–2, 8.

[209] Compassionate Access, Research Expansion and Respect States (CARERS) Act of 2015, S. 683, 114th Cong. (2015); CARERS Act of 2017, H.R. 2920, 115th Cong. (2017).

[210] Letter from Terry Stephenson, *supra* note 168.

transactions. A surprising group joined law enforcement and anti-drug organizations in opposing the initiative; some (though hardly all) medical cannabis patients, sellers, growers, and advocates. They dominated a web-based advocacy group, "Stoners Against Proposition 19," which contended that the measure would harm patients. One vociferous member of this informal organization was none other than Dennis Peron. He asserted that legalization of "recreational" marijuana simply made no sense because all cannabis use is medical.[211]

Proposition 19 advocates were apoplectic over this opposition from within the marijuana movement. NORML's blog charged medical dispensary owners who opposed the initiative with having an "I gots mine" attitude.[212] The website "Loopy Lettuce" accused Peron of trying to suppress new competition for his "pot friendly" bed and breakfast in San Francisco.[213] These intra-movement tensions exploded at the International Cannabis and Hemp Expo held in San Francisco in September 2010. The previous Expo had been a mellow celebration of public toking. This one devolved into near-chaos.[214] After the election, legalization proponents blamed the initiative's defeat on a "greedy, reactionary . . . fifth column within the medical cannabis community."[215]

Two years later, on November 6, 2012, the citizens of both Colorado and Washington State, by comfortable margins, voted in favor of measures that legalized the possession and use of small amounts of marijuana for recreational purposes purchased from state-licensed dispensaries while also taxing such sales and imposing various restrictions.[216] Many medical pot advocates fervently and noisily resisted these initiatives, particularly in Washington. They denounced that state's I-502 as a pathetic, less-than-halfway measure that would expose patients to DWI charges and prohibit personal cultivation.[217] The conflict between the medical and recreational camps continued following the initiative's passage, as the Washington legislature debated how to structure the state's new non-medical cannabis distribution system. Americans for Safe Access organized a campaign called "Health Before Happy

---

[211]Marcus Wohlsen, *Proposition 19 Shows State's Conflicted Link to Pot*, MONTEREY CTY. HERALD, Oct. 12, 2010.

[212]Russ Belville, *"I Gots Mine": Dispensary Owners Against Marijuana Legalization*, NORML (July 14, 2010), http://blog.norml.org/2010/07/14/i-gots-mine-dispensary-owners-against-marijuana-legalization/.

[213]*Stoners Against Prop 19*, LOOPY LETTUCE (Nov. 5, 2010), https://loopylettuce.wordpress.com/2010/11/05/stoners-against-prop-19/.

[214]Angela Bacca, *Chaos Erupts Over Prop 19 at California Cannabis Expo*, CANNABIS CULTURE (Sept. 27, 2010), https://www.cannabisculture.com/content/2010/09/27/chaos-erupts-over-prop-19-california-cannabis-expo.

[215]Steve Elliott, '*Stoners Against 19' Hand Victory to The Cops: BOYCOTT THEM*, CANNABIS CULTURE (Nov. 4, 2010), https://www.cannabisculture.com/content/2010/11/04/stoners-against-19-hand-victory-cops-boycott-them.

[216]Colorado Amendment 64, Amending Colo. Const. Art. XVIII §16(3) (2012), *available at* https://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bddd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20merged.pdf; Washington Initiative 502, amending RCW 69.50.4013 and 2003 c 53 s 334 (2012), *available at* https://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

[217]Kirk Johnson, *Marijuana Referendum Divides Both Sides*, N.Y. TIMES, Oct. 14, 2012, at A18; EVERGREEN: THE ROAD TO LEGALIZATION IN WASHINGTON (Evergreen Film 2013).

Hour" to inform politicians that "the needs of patients are much different from those of recreational marijuana users, and they will not be easily brushed aside."[218]

Since 2012, eight more states and the District of Columbia have legalized recreational marijuana—in each case despite resistance from some in the medical marijuana community.[219] One of these states is California, which in 2016 easily passed Proposition 64 (the "Adult Use of Marijuana Act"), despite opposition from medical cannabis proponents, including Dennis Peron, by then a cannabis farmer in rural Humboldt County.[220]

As we have seen, tensions have existed between proponents of medical legalization and recreational legalization (I will call them Medicals and Recreationals) for at least a quarter of a century. But the recent comprehensive legalization measures have elevated the acrimony to new levels. The Recreationals are obviously most infuriated by some Medicals' active opposition to full legalization. They are also, however, indignant about the calculated passivity of many other Medicals with respect to this cause. ASA's official policy, for example, is not to take a position on the legalization of recreational use, while warning policymakers "against letting the debate surrounding legalization of cannabis for recreational use obscure the science and policy regarding the medical use of cannabis."[221] In the opinion of ex-NORML chief Allen St. Pierre, ASA's stance is based not on principle, but on the goal of protecting the material interests of its dispensary-owner members, whose business model is threatened by the rise of recreational pot retailers.[222]

To many Recreationals, this position is not only selfish and ungrateful, but also positively harmful. Many embrace the "Box Canyon" theory of medical marijuana, which, as explained by cannabis blogger and podcaster Russ Belville, "means that if you fight only for medical marijuana, your marijuana will become only medical."[223] Inevitably, Belville explains, "tighter and stricter forms of medical marijuana laws are passed to appease the powers that wish marijuana prohibition to continue."[224] Recreationals thus fear that "medical only" advocacy will inadvertently bring about a highly regulated "medical only" future that even most medical marijuana advocates (at least those outside pharmaceutical companies) would despise: FDA regulation, production controls, inventory caps, distribution limits, prohibition of home

---

[218]Press Release, Kris Hermes, Americans for Safe Access, Medical Marijuana Patient Advocates Launch "Health Before Happy Hour" Campaign (Aug. 13, 2013) (on file with author).

[219]Patrick Whittle, *Pot Ballot Drives Put Medical, Recreational Users at Odds*, ASSOCIATED PRESS: FIN. WIRE, Oct. 29, 2016.

[220]Natalya Estrada, *Proposition 215 Author Fights Proposition 64: Medical Pot Advocate Peron Speaks to Humboldt About Recreation Measure Dangers*, EUREKA TIMES-STANDARD, Oct. 12, 2016.

[221]*ASA Policy Positions: Legalization of Cannabis for Recreational Use*, AMS. FOR SAFE ACCESS, https://www.safeaccessnow.org/asa_medical_marijuana_policy_position (last visited May 7, 2019).

[222]Email from Allen St. Pierre, Emeritus Board, NORML, to author (Oct. 12, 2018) (on file with author).

[223]Russ Belville, New York Governor Steering Medical Marijuana Into the Box Canyon, HUFFPOST (June 17, 2014, 9:07 AM), https://www.huffingtonpost.com/russ-belville/new-york-governor-steerin_b_5501003.html.

[224]*Id*.

cultivation, elimination of high-THC products, and, potentially, the total abolition smoked whole-plant pot.[225]

The rancor runs in both directions, however. Despite the Recreationals' longtime support of medical marijuana, the Medicals have long been skeptical about their true motives. Many think that Recreationals support medical marijuana legalization only as a stepping stone to full legalization, and that they do not actually care about patients. To make this point, Medicals frequently invoke NORML founder Keith Stroup's ill-phrased assertion in a 1979 interview that his organization would use cannabis treatment of cancer patients as a "red herring to give marijuana a good name."[226] Their suspicions were stirred up again in 2012, when Allen St. Pierre was quoted on the Celebstoner.com website as describing the medical cannabis industry as a "political and legal farce" and "sham." Though St. Pierre explicitly stated that he was not demeaning medical marijuana itself, this subtlety was lost on many enraged Medicals.[227]

But those Medicals who have resisted comprehensive legalization have not done so merely out of pique. Rather, they believe that legalization of recreational use will have negative consequences for medical marijuana sellers and users. Most fundamentally, medical marijuana dispensaries and growers fear economic ruination from competition with the major corporations (akin to big tobacco or big alcohol) that are likely to dominate the emerging recreational markets.[228] This concern is particularly powerful in states that establish unified medical-recreational distribution and retail systems, such as Washington. Recreational legalization in Washington resulted in the closure of hundreds of medical dispensaries. Colorado, by contrast, tried to mitigate this phenomenon by preserving a dual-track system and by giving existing medical dispensary operators priority in applying for recreational licenses. Indeed, Colorado's medical cannabis industry remained relatively stable following full legalization.[229] But more recently, Colorado has seen a drop in medical cardholders parallel to that in other full legalization states, as patients avoid the hassle and cost of obtaining such cards by shopping in the recreational market instead.[230]

---

[225]Email from Allen St. Pierre, Executive Director, NORML, to author (Mar. 7, 2014) (on file with author); Email from Keith Stroup, Legal Counsel, NORML, to author (Mar. 23, 2015) (on file with author); Email from Allen St. Pierre, Executive Director, NORML, to Rick Cusick, Board of Directors, NORML (Mar. 4, 2015) (on file with author).

[226]Emory Wheel Entertainment Staff, *NORML Chairman Keith Stroup Talks on Pot Issues*, EMORY WHEEL, Feb. 6, 1979, at 18–19, *reproduced at* http://www.nationalfamilies.org/legalization/redherring.html.

[227]Michael Roberts, *Medical Marijuana v. Recreational Use: NORML Controversy*, *Colorado Connection*, WESTWORD (Jan. 25, 2012, 12:25PM), https://www.westword.com/news/medical-marijuana-v-recreational-use-norml-controversy-colorado-connection-5897167.

[228]Whittle, *supra* note 219; Patrick McGreevy, *Pot Community Deeply Divided Over Prop. 64: Some Fear Measure Will Disrupt Medical Cannabis Market*, L.A. TIMES, Oct. 6, 2016, at A1; Hilary Bricken, *The "Why" Behind California's Battle to Legalize Marijuana*, CANNA LAW BLOG (Nov. 21, 2014), https://www.cannalawblog.com/first-in-last-out-californias-battle-to-legalize-continues/.

[229]Dan Adams, *Advent of Legal Pot Use Challenges Medicinal Shops*, BOS. GLOBE, May 10, 2017, at B11.

[230]Chris Kudialis, *With Recreational Weed Sales Coming, What Will Happen to Medical Marijuana in Nevada?*, LAS VEGAS SUN BLOG (May 31, 2017, 2:00AM), https://lasvegassun.com/news/2017/may/31/with-recreational-weed-sales-coming-what-will-happ/.

In the eyes of many Medicals, the disappearance of dedicated medical marijuana shops through absorption into recreational retailers will harm patients as well as merchants. First, they argue, recreational stores are unlikely to stock the specialized strains and products needed by small classes of patients. Second, the employees of such establishments will probably be less qualified to advise patients about medical cannabis use. Third, many Medicals believe that the interiors, exteriors, and neighborhoods of recreational stores have a "head-shoppy" (and even dangerous) aura rather than the serious, controlled, medical atmosphere preferred by many patients.[231]

In those jurisdictions that legalize recreational marijuana, ASA and its allies believe that the preservation of a distinct legal regime for medical marijuana is essential. States legalizing recreational marijuana since 2012 have embraced a "tax and regulate" approach similar to that imposed on the liquor and tobacco industries. They have done so with the acquiescence of the recreational marijuana lobby, which understands that guarantees of revenue and control are necessary for passage of comprehensive legalization measures. The industry pays high sales and excise taxes, while the state imposes strict limits on, for example, purchaser age, the amount of cannabis per purchase, "home grow," and driving while intoxicated. Medicals maintain that while the "tax and regulate" approach may be suitable for vices, it is utterly inappropriate for medicine. They argue that if the same high taxes are imposed on medical cannabis as on recreational weed, patients will find the drug unaffordable—and medical dispensaries will lose a price advantage they need to survive in competition with recreational outlets. Medicals further contend that it is unfair for the state to impose the same restrictions on patients (who use cannabis by necessity) that it imposes on recreational consumers (who use it electively). Finally, they believe that a distinct regulatory regime must be established for medical cannabis so as to provide patients access to insurance coverage and protection from discrimination.[232]

Time is likely on the side of comprehensive legalization, as poll after poll shows increasing support for this policy. One reason for this trend is that the marijuana policy preferences of more and more Americans, particularly people of color, are shaped primarily by the ineradicable racial discrimination that characterizes the enforcement of drug laws. Until quite recently, much of the African-American community resisted the conclusion that the drug war's disproportionate impact on the black population justified elimination of marijuana prohibitions. For example, in the mid-1970s, black politicians in Washington, D.C. rejected a bill to decriminalize cannabis possession, even in the face of data showing that the marijuana laws were selectively enforced against African-Americans. Most black government officials and pastors, and the bulk of the city's black population, concluded that marijuana use harmed the African-American community in ways that outweighed other concerns.[233]

---

[231]Don Duncan, California Director, Ams. for Safe Access, *ASA Broadcast: What Legalization Means for Medical Cannabis* (Nov. 20, 2014) [hereinafter Duncan, ASA Broadcast]; Adams, *supra* note 229.

[232]Duncan, ASA Broadcast, *supra* note 231; Adams, *supra* note 229; EVERGREEN: THE ROAD TO LEGALIZATION IN WASHINGTON, *supra* note 217; McGreevy, *supra* note 228; *ASA Policy Statement: Taxation of Medical Cannabis*, AMS. FOR SAFE ACCESS, https://www.safeaccessnow.org/asa_policy_statements (last visited Apr. 9, 2019).

[233]JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 17–46 (2018).

Attitudes started to shift in the early 1990s, however, largely because of growing awareness of the ruinous consequences—both direct and collateral—that discriminatory marijuana prosecutions had on black people. Nevertheless, even as late as 2010, the California NAACP faced fierce opposition from black religious and community leaders when it supported Proposition 19, the failed initial measure that would have legalized recreational marijuana.[234] Michelle Alexander's bestseller *The New Jim Crow*, published the same year, helped turn the tide by detailing the drug war's devastating effect on African-Americans.[235]

In November 2014, Washington, D.C.'s residents, by a 70% to 30% margin, passed an initiative fully legalizing the use and cultivation of small amounts of pot—a more radical measure than the decriminalization bill rejected four decades earlier. Although white Washingtonians supported the initiative at a higher rate than their black counterparts, a healthy majority of African-American voters (about 58%) also favored it.[236] And in 2016, when Californians overwhelmingly passed Proposition 64, legalizing recreational marijuana, African-Americans favored the measure at a rate higher than any other group.[237] Both jurisdictions had previously legalized medical cannabis. But to Americans who view marijuana policy primarily through the lens of racial justice, a "medical only" regime is patently inadequate, for it still permits discriminatory prosecution of people of color. As minority communities add their support for comprehensive legalization to the already robust support among whites, other "medical only" states will likely join the ten that currently permit recreational use of marijuana.

NORML founder Keith Stroup is not alone in predicting that "we are approaching a time when medical use laws will become irrelevant to the marijuana legalization movement. Once marijuana is legalized for all adults, there is no need for a medical use law."[238] Allen St. Pierre similarly opines: "I don't think the distinction between medical and recreational marijuana will hold up."[239] When Robert Randall commenced his fight in the mid-1970s, who could have predicted that forty years later, the greatest threat to a thriving medical cannabis industry would not be prohibition, but rather full legalization?

---

[234]Patrick McGreevy, *NAACP Leader's Ouster is Sought*, L.A. TIMES, July 8, 2010, at AA4.

[235]FORMAN, *supra* note 233, at 204–05; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[236]Aaron C. Davis & Peyton M. Craighill, *Poll: D.C. Voters Poised to Legalize Pot, Elevating National Debate Over Marijuana*, WASH. POST (Sept. 18, 2014), https://www.washingtonpost.com/local/dc-politics/poll-dc-voters-poised-to-legalize-pot-elevating-national-debate-over-marijuana/2014/09/18/08360f90-3dfe-11e4-b0ea-8141703bbf6f_story.html?utm_term=.73bda08a3453; FORMAN, *supra* note 233, at 217–20.

[237]INST. FOR GOVERNMENTAL STUD., IGS POLL FINDS SUPPORT FOR GUN CONTROL, MARIJUANA LEGALIZATION, UC BERKELEY: INST. FOR GOVERNMENTAL STUD. (Aug. 17, 2016), *available at* https://escholarship.org/uc/item/7xx7k7jk.

[238]Email from Keith Stroup, Legal Counsel, NORML, to author (Mar. 23, 2015) (on file with author).

[239]Maggie Clark, *For Medical Pot, a New Legal Haze: Colorado's OK of Recreational Use Worries Dispensaries*, SUN-SENTINEL, Jan. 31, 2013, at 10A.