Western New England Law Review

Volume 25 *25 (2003)*
Issue 1 *ENVIRONMENTAL LAW SYMPOSIUM – THE FIRST YEAR OF THE BUSH ADMINISTRATION*

Article 4

1-1-2003

CONSTITUTIONAL LAW—MEDICAL MARIJUANA AND THE MEDICAL NECESSITY DEFENSE IN THE AFTERMATH OF UNITED STATES V. OAKLAND CANNABIS BUYERS' COOPERATIVE

Miklos Pongratz

CONSTITUTIONAL LAW—MEDICAL MARIJUANA AND THE MEDICAL NECESSITY DEFENSE IN THE AFTERMATH OF *UNITED STATES V. OAKLAND CANNABIS BUYERS' COOPERATIVE*

> "[T]here are some limited circumstances in which we recommend smoking marijuana for medical uses."
>
> —National Academy of Sciences' Institute of Medicine, Conclusion to the Report funded by the White House Drug Policy Office. March 17, 1999.

INTRODUCTION

In 1996, California voters passed Proposition 215 ("Prop 215"),[1] which authorized physicians to "recommend" the use of marijuana for the treatment of a variety of maladies.[2] As a result, various groups[3] organized for the purpose of providing marijuana to qualified individuals.[4] In 1998, the United States sued one of these groups, Cannabis Cultivators Club, in an attempt to stop the distribution of marijuana that had started as a result of Prop 215.[5] The case eventually worked its way to the United States Supreme Court where, in May 2001, the Court issued a decision.[6] *United States v. Oakland Cannabis Buyers' Cooperative* ("*OCBC*") highlighted the differences among the Supreme Court Justices regarding the controversial topic of the legality of marijuana use for medical purposes. In *OCBC*, an eight-Justice Court, with Justice Breyer abstaining,[7] uniformly agreed that the common law defense of necessity was inapplicable to the manufacture or distribution of mari-

---

1. Proposition 215, Compassionate Use Act of 1996 (codified at CAL. HEALTH & SAFETY CODE § 1362.5 (West 2002)). *See also infra* note 68.

2. *Id.* CAL. HEALTH & SAFETY CODE § 11362.5 (identifing specifically a number of these maladies).

3. Examples include: Cannabis Cultivators Club, Marin Alliance for Medical Marijuana, Ukiah Cannabis Buyers Club, Oakland Cannabis Buyers Cooperative, Flower Therapy Medical Marijuana Club, and Santa Cruz Cannabis Buyers Club. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086 (N.D. Cal. 1998).

4. *Id.* at 1092.

5. *Id.*

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

7. Justice Breyer took no part in the consideration and decision of *OCBC* because his brother, Judge Charles R. Breyer, presided over *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998), the district court case that eventually led to *OCBC*.

juana for medical purposes. However, in the concurring opinion, written by Justice Stevens, three Justices disagreed with the majority's suggestion that the medical necessity defense was equally inapplicable to use and possession violations of the Controlled Substances Act ("CSA")[8] for medical purposes.

This Note advances the proposition that there is a legal distinction between the distribution or manufacture of marijuana and its use or possession in violation of the CSA, and that the medical necessity defense should be available to a seriously ill person who uses or possesses marijuana for medical purposes. The basis for this proposition is that such result is consistent with long-standing legal doctrines and a contrary conclusion would be in conflict with those doctrines. Additionally, this proposition is not in conflict with the Supreme Court's holding in *OCBC*.

Part I of this Note presents a brief summary of the historical use of marijuana for medical purposes and of the federal government's regulation of marijuana in the United States, ultimately leading to the CSA. Part I then reviews the origins of the CSA, the role that scheduling, or drug classification, plays in drug control policy, and the history of one particular effort to reschedule marijuana so that it could be legally prescribed by physicians.

Part II discusses and examines the majority and concurring opinions of *OCBC*. Finally, Part III proposes that the defense of medical necessity should be available in cases dealing with the use and possession of marijuana for medical purposes, and explores the substantive divergence between the majority and concurring opinions in *OCBC*. The analysis centers on three doctrines that could each independently form the basis for allowing a medical necessity defense in cases of medical use of marijuana by seriously ill persons. The Note argues that, in the context of the availability of the medical necessity defense, there is a distinction between the legal treatment of distribution or manufacture of medical marijuana and the legal treatment of its use or possession. This distinction is identified through the analysis of (1) the traditional availability and use of the defense of necessity, (2) the relevance and applicability of equitable jurisdiction, and (3) the doctrine of federalism. In the process, Part III summarizes the development and application of the necessity defense, the historical function and scope of courts of equity, the

8. The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-971 (2000).

relevance of the right to pain relief, and the federalist function of preserving a dual system of government in the United States.

The Note concludes that the medical necessity defense should be available to a seriously ill person who uses or possesses marijuana for medical purposes. Such a conclusion is consistent with the aforementioned doctrines, and a contrary conclusion would be in conflict not only with those doctrines, but also with prior Supreme Court decisions relating to these doctrines.

I. HISTORY OF THE MEDICAL USE OF MARIJUANA

A. *Pre-1970 Medical Use of Marijuana*

The plant known as marijuana has been used as medicine for at least 5000 years.[9] The world's oldest surviving text on medical drugs, the Chinese *Shen-nung Pen-tshao Ching*, specifically cites marijuana's ability to reduce the pain of rheumatism and treat digestive disorders.[10] Marijuana has been cultivated in the United States for its fiber content for over 400 years.[11] According to some historians, George Washington and Thomas Jefferson cultivated marijuana and advocated a hemp-based economy.[12] Regarding marijuana's medicinal qualities, between 1840 and 1900, European and American medical journals published more than 100 articles on the therapeutic benefits of marijuana,[13] and the drug was routinely prescribed until the beginning of its regulation in the 1930's.[14] Marijuana remained in the United States' pharmacopoeia until the passage of the Marijuana Tax Act in 1941,[15] after which physicians were greatly hampered in their ability to prescribe it as a medicine.[16] The American Medical Association was one of the most vocal organizations to testify against the regulation, which ef-

9. LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE 3 (rev. ed. 1997) [hereinafter "GRINSPOON & BAKALAR"].

10. B. ZIMMERMAN ET AL., IS MARIJUANA THE RIGHT MEDICINE FOR YOU? A FACTUAL GUIDE TO MEDICAL USES OF MARIJUANA (1998).

11. NORML, NORML REPORT ON SIXTY YEARS OF MARIJUANA PROHIBITION IN THE U.S. (Mar. 17, 2002), *at* http://www.norml.org/index.cfm?Group_ID=4428.

12. JOHN ROULAC, INDUSTRIAL HEMP: PRACTICAL PRODUCTS—PAPER TO FABRIC TO COSMETICS 8 (1995).

13. Lester Grinspoon, M.D. & James B. Bakalar, Marijuana as a Medicine: A Plea for Reconsideration, 273 JAMA 1875 (1995) (discussing historical and modern medical uses for marijuana).

14. DEPT. OF HEALTH, EDUC. & WELFARE, REPORT ON MARIJUANA AND HEALTH 85 (1971).

15. NORML, MEDICAL USE, *at* http://www.norml.org/index.cfm?Group_ID=5441 (last updated Mar. 10, 2003).

16. *Id.*

fectively acted as a ban, arguing that the regulatory scheme would deprive patients of a safe and effective medicine.[17] The recreational use of drugs, including marijuana, increased during the 1960's. As a result of growing legislative concern over the increased use of all drugs for recreation, Congress enacted the CSA in 1970.

B. *The Controlled Substances Act*

In enacting the CSA, Congress' stated objectives were the unification of law enforcement agencies in the pursuit of drug enforcement efforts inside and outside the United States, compliance with the 1961 International Single Convention on Narcotic Drugs[18] ("Single Convention") through the application of the Single Convention's norms and practices, and the adoption of a legal structure that affords law enforcement the flexibility necessary to adapt to future changes in the drug culture.[19]

1. Scheduling: The Classification of Drugs

As a structural component of the CSA, Congress generated a classification scheme whereby each drug was classified into a category called a "schedule."[20] Congress placed drugs into different schedules on the basis of predetermined factors.[21] Additionally, as a means of ensuring the CSA's adaptation to future demands, Congress built into the CSA a mechanism for the rescheduling of drugs,

---

17. American Medical Association Legislative Counsel William C. Woodword testified before Congress on July 12, 1937, against the Marijuana Tax Act. He stated:

> We cannot understand . . . why this bill should have been prepared in secret for two years without any initiative, even to the profession, that it was being prepared . . . . The obvious purpose and effect of this bill is to impose so many restrictions on the medical use [of marijuana] as to prevent such use altogether . . . . It may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial benefit.

Id.

18. The International Single Convention on Narcotic Drugs was a treaty signed by members of the United Nations establishing several classifications, or schedules, of substances. Parties to the Single Convention are required to limit production, distribution, and possession of classified drugs to authorized medical and scientific purposes; to license and control all persons engaged in the manufacture or distribution of the drugs; and to prepare detailed estimates of national drug requirements. *See* Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin. (DEA), 559 F.2d 735, 739 (D.C. Cir. 1977).

19. *See generally* 21 U.S.C. § 801 (Congressional Findings) (2000); ROBERT L. BOGOMOLNY ET AL., A HANDBOOK ON THE 1970 FEDERAL DRUG ACT: SHIFTING THE PERSPECTIVE 5, 63-65 (1975).

20. 21 U.S.C. §§ 811, 812 (2000).

21. *See infra* note 23 and accompanying text.

if and when it became necessary due to new findings or changing circumstances.[22]

The CSA partitioned psychoactive drugs into five schedules according to their abuse potential, known effect, harmfulness to an individual and to society at large, and level of accepted medical use.[23] Schedule I drugs, which include substances such as heroin, LSD, and marijuana, are defined as drugs with "a high potential for abuse,[24] . . . no currently-accepted medical use in the United States[, and] a lack of accepted safety for use of the substance under medical supervision."[25] Physicians cannot prescribe drugs placed into Schedule I.[26]

Schedule II drugs, like Schedule I drugs, are defined as having a high potential for abuse.[27] However, unlike Schedule I drugs, these drugs have a currently accepted medical use and, therefore, are available to patients through a physician's prescription.[28] Schedule II drugs include morphine, cocaine, amphetamines, and PCP.[29] The remaining schedules, Schedules III, IV, and V, relax the restrictions on the included drugs based on known dangers associated with their use and the medical and/or societal value of the respective substances.[30]

Evidence suggests that Congress intended to place marijuana in Schedule I only temporarily, anticipating a possible change in marijuana's Schedule I status after studies yielded more concrete facts regarding marijuana's characteristics and effects.[31] Accordingly, when the CSA was enacted, Congress deferred its full consideration of the medical use of marijuana pending the outcome of studies commissioned by the Presidential Commission on Marijuana and Drug Use.[32] In 1972, the Commission's findings noted

---

22. 21 U.S.C. § 812 (2000) (establishing procedures for the rescheduling of substances).

23. *Id.* § 812(b)(1) (listing findings required for Schedule I substances).

24. 21 C.F.R. § 1308.11 (2002) (listing current Schedule I drugs).

25. 21 U.S.C. § 812(b).

26. *Id.*; *see also id.* § 829 (1997) (specifying how drugs in Schedules II-V may be dispensed and prescribed for medical use).

27. *Id.* § 812(b)(2).

28. *Id.* § 829(a) (making Schedule II drugs available through a written, non-refillable prescription).

29. 21 C.F.R. § 1308.12.

30. 21 U.S.C. § 812(b)(3)-(b)(5); 21 C.F.R. § 1308.12-1308.15 (identifying the various categories and bases for classification).

31. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, II, THE MARIJUANA CONVICTION 246-47 (photo. reprint 1988) (1974).

32. *See id.* at 247. The Committee Report on the House Bill regarding reschedul-

marijuana lacked dangerousness and recommended dramatic reductions in the legal penalties associated with it.[33]

2. Efforts to Reschedule Marijuana

One of the CSA's goals was to establish flexible drug schedules that could be modified when the circumstances so dictated.[34] Indeed, Congress included specific statutory criteria in the CSA's text to govern the rescheduling process when it became necessary.[35] CSA gave the authority to examine substances and reschedule them to the Attorney General, who, prior to any determination, was required to seek medical and scientific evaluations from the Secretary of Health, Education, and Welfare ("HEW").[36] The Secretary of HEW, in turn, was required to make a recommendation regarding the proper scheduling of the particular drug.[37] The Attorney General delegated his authority to examine and reschedule all drugs to the Bureau of Narcotics and Dangerous Drugs ("BNDD"), the predecessor to the Drug Enforcement Administration ("DEA").[38]

In 1972, the National Organization for the Reform of Marijuana Laws ("NORML")[39] and other groups[40] filed a petition requesting the rescheduling of marijuana from Schedule I to Schedule

---

ing recommended "'that marijuana be retained in Schedule I at least until the completion of studies now underway.' . . . The recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future." H.R. REP. NO. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4573, 4579 (quoting letter from Roger O. Egeberg, M.D. to Hon. Harley O. Staggers (Aug. 14, 1970), *in* H.R. REP. NO. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4573, 4629), *quoted in* BONNIE & WHITEBREAD, *supra* note 31, at 247. Raymond Shafer, a former Republican Governor of Pennsylvania was selected by President Nixon to head the Commission. BONNIE & WHITEBREAD, *supra* note 31, at 256.

33. BONNIE & WHITEBREAD, *supra* note 31, at 270-73 (citing NAT'L COMM'N ON MARIJUANA & DRUG ABUSE, MARIHUANA: A SIGNAL FOR MISUNDERSTANDING 145-54 (1972), *available at* http://www.druglibrary.org/schaffer/library/studies/nc/ncmenu.htm). The Report noted that marijuana was demonized because it symbolized the "counterculture," not because it had any negative physiological effects.

34. H.R. REP. NO. 91-1444, at 13, *reprinted in* 1970 U.S.C.C.A.N. 4573, 4579.

35. *Id.*; 21 U.S.C. § 811(c) (2000).

36. H.R. REP. NO. 91-1444, at 13, *reprinted in* 1970 U.S.C.C.A.N. 4573, 4579; 21 U.S.C. § 811(a)-(b).

37. 21 U.S.C. § 811(b).

38. 28 C.F.R. § 0.100-0.104 (2000) (outlining regulatory functions of the DEA). The BNDD became the DEA in 1973.

39. Since its founding in 1970, NORML has provided "a voice in the public policy debate for those Americans who oppose marijuana prohibition and favor an end to the practice of arresting marijuana smokers. A non-profit public-interest advocacy group, NORML represents the interests of the tens of millions of Americans who smoke marijuana responsibly." NORML, ABOUT NORML, *at* http://www.norml.org/index.cfm?Group_ID=3379 (last updated Apr. 15, 2003).

V.[41] NORML's petition was denied by the BNDD on grounds that the Single Convention barred the rescheduling,[42] and the petitioners appealed. On appeal, the United States Court of Appeals for the District of Columbia held that BNDD's decision was inconsistent with the administrative process required by the CSA for rescheduling, which called for a finding on the merits.[43] On remand, in 1975, Administrative Law Judge Lewis Parker declared that the Single Convention did allow for the rescheduling of marijuana and suggested that the proper course of action was to hold rescheduling hearings as called for in the CSA.[44] The DEA's acting Administrator, however, ignored ALJ Parker's suggestion and entered a final order denying the petition "in all respects."[45] After the petitioners again appealed, the D.C. Circuit Court of Appeals remanded, directing the DEA to refer the petition to the Secretary of HEW for an independent scientific evaluation and to comply with the requirements of the CSA.[46] In 1979, the Secretary of HEW recommended that marijuana remain in Schedule I, and the DEA issued a final order denying the rescheduling petition without holding hearings on the matter.[47]

For a third time, the petitioners appealed, and the case was again remanded to the DEA for a full reconsideration of the issues. The D.C. Circuit Court of Appeals ordered the DEA to carry out a full scientific evaluation and rescheduling recommendation. As a result, rescheduling hearings were held in 1986 before Administrative Law Judge Francis Young. The issues before ALJ Young were whether the marijuana plant had a currently accepted medical use for treatment in the United States and whether there was an ac-

---

40. *See supra* note 3 (identifying groups organized for the purpose of providing medical marijuana to qualified persons).

41. NORML v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); NORML v. DEA, 559 F.2d 735 (D.C. Cir. 1977).

42. NORML v. DEA, 559 F.2d at 750-57 (articulating the reason why rescheduling was barred by the Single Convention).

43. *Ingersoll*, 497 F.2d at 659-60.

44. NORML v. DEA, 559 F.2d at 742. ALJ Parker found that the Single Convention allowed for the rescheduling of cannabis or cannabis resin to CSA Schedule II and cannabis leaves to Schedule V. *Id.*

45. Marihuana Scheduling, 40 Fed. Reg. 44,164, 44,168 (Sept. 25, 1975) (determination).

46. NORML v. DEA, 559 F.2d at 757. See also 21 U.S.C. §§ 811, 812 (2000) for CSA requirements (requiring the DEA to seek medical and scientific evaluations from the Secretary of HEW, who then makes a recommendation to the DEA as to the proper scheduling of the drug evaluated).

47. Marihuana and Synthetic THC, 44 Fed. Reg. 36,123 (June 20, 1979) (final administrative order).

cepted safety for the use of the marijuana plant under medical supervision.[48] Based on the evidence presented, ALJ Young found that marijuana had accepted medical uses[49] and that there existed safety for marijuana use under medical supervision.[50] Though ALJ Young recommended that the DEA reschedule marijuana as a schedule II drug,[51] the DEA disagreed with ALJ Young's interpretation of the phrase "currently accepted medical use," arguing that such accepted use required more than a minority of professionals and scholars.[52] The DEA then applied a self-developed eight-factor test[53] to determine whether a substance had a "current accepted medical value," and found that marijuana did not meet the criteria.[54]

For a fourth time, the petitioners appealed and, once again, the D.C. Circuit Court of Appeals remanded the case. In so doing, the court found that the eight-factor test developed by the DEA, though "in the main acceptable," contained several factors impossible to comply with.[55] For example, one of the factors required gen-

---

48. *In re* Marijuana Rescheduling Petition, No. 86-22 (Sept. 6, 1988) (Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of A.L.J. Francis L. Young), *available at* http://www.druglibrary.org/olsen/MEDICAL/Young/Young1.html.

49. *Id.* at 68. ALJ Young found that marijuana had accepted medical uses in the treatment of multiple sclerosis, spasticity, and hyperarathyroidism. *Id.* at 40-55. Additionally, regarding marijuana's use to treat cancer, ALJ Young held:

> [I]t is clear beyond any question that many people find marijuana to have, in the words of the [CSA], an "accepted medical use in treatment in the United States" in affecting relief for cancer patients. Oncologists, physicians treating cancer patients accept this. Other medical practitioners and researchers accept this. Medical faculty professors accept this. Nurses performing hands-on patient care accept it. Patients accept it.

Id. at 26.

50. *Id.* at 66.

51. *Id.* at 66-68.

52. Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 938 (D.C. Cir. 1991).

53. *Id.* (stating the eight factors used by the DEA: (1) scientifically determined and accepted knowledge of its chemistry; (2) toxicology and pharmacology of the substance in animals; (3)establishment of its effectiveness in humans through scientifically-designed clinical trials; (4) general availability of the substance and information regarding the substance and its use; (5) recognition of its clinical use in generally accepted pharmacopoeia, medical references, journals, or textbooks; (6) specific indications for the treatment of recognized disorders; (7) recognition of the use of the substance by organizations or associations of physicians; and (8) recognition and use of the substance by a substantial segment of the medical practitioners in the United States).

54. Schedules of Controlled Substances, 53 Fed. Reg. 5156 (Feb. 22, 1998) (to be codified at 21 C.F.R. pt. 1308).

55. Alliance for Cannabis Therapeutics v. DEA, 930 F.2d at 937, 941.

eral use and acceptance of a substance before the substance could be found to have an accepted medical value, even though Schedule I expressly prevented such use.[56] The DEA subsequently eliminated its eight-factor test and replaced it with a new five-factor test,[57] again of its own fabrication. Based on this new test, the DEA issued a final order denying the rescheduling petition.[58]

The petitioners appealed a fifth time, objecting to inappropriate evidentiary standards and alleging bias by the DEA.[59] The United States Court of Appeals for the District of Columbia found that the petitioners were not prejudiced by the evidentiary standards and that the DEA's findings were supported by "substantial evidence."[60] Accordingly, the petition for review was denied and the rescheduling effort came to a close, twenty-two years after it was initially filed.[61]

Despite NORML and the other petitioners' unsuccessful attempts at rescheduling marijuana, the continued demand for medical marijuana by patients and physicians throughout the United States persuaded the Food and Drug Administration ("FDA") in 1976 to approve the medicinal use of marijuana on a restricted basis.[62] This was accomplished through the implementation of the Individual Treatment Investigational New Drug Program (or Compassionate Use IND Program) ["IND Program"],[63] under which physicians could obtain special authority to administer marijuana to patients.[64] Although the IND Program at its peak enrolled

---

56. *Id.*

57. Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1135 (D.C. Cir. 1994) (stating the five factors used by the DEA to determine the meaning of "currently accepted medical use: (1) [t]he drug's chemistry must be known and reproducible; (2) [t]here must be adequate safety studies; (3) [t]here must be adequate and well-controlled studies proving efficacy; (4) [t]he drug must be accepted by qualified experts; and (5) [t]he scientific evidence must be widely available." (quoting Notice of Denial of Marijuana Scheduling Petition, 57 Fed. Reg. 10,499, 10,506 (Mar. 26, 1992)).

58. *See* 57 Fed. Reg. at 10,506.

59. The petitioners pointed to the long history of DEA anti-marijuana prejudice, as evidenced by the court's need to remand on four prior occasions and the DEA Administrator's refusal to follow previous recommendations for the rescheduling of marijuana, as well as comments by the Administrator minimizing the value of statements by persons claiming to benefit from marijuana use. *Alliance for Cannabis Therapeutics*, 15 F.3d at 1136-37.

60. *Id.* at 1137 (stating that the Administrator had supplied expert testimony that "marijuana's medicinal value has never been proven in sound scientific studies").

61. *Id.* at 1133.

62. GRINSPOON & BAKALAR, *supra* note 9, at 20-21.

63. *Id.*

64. *Id.*

as many as seventy-eight patients nationwide, it was closed to all new applicants in 1992, in an effort to prevent it from being overrun with AIDS patients requesting access to medical marijuana supplies.[65] Today the IND Program remains in operation for only seven surviving, previously-approved patients.[66]

II. UNITED STATES V. OAKLAND CANNABIS BUYERS' COOPERATIVE[67]

A. *Facts and Procedural History*

When California voters enacted Prop 215 in November of 1996, the purpose of the initiative measure was to ensure that seriously ill Californians had the right to obtain and use marijuana for medical purposes.[68] Prop 215 created an exception to California

---

65. ALLIANCE FOR CANNABIS THERAPEUTICS, MARIJUANA AS MEDICINE FAQ, *at* http://www.marijuana-as-medicine.org/Alliance/faq.htm [hereinafter MARIJUANA AS MEDICINE FAQ]

> The Compassionate IND Program was closed because too many people were asking for access to medical marijuana supplies. In order for marijuana to be classified as a prohibited schedule I drug, it must not have "accepted medical use in treatment" in the United States. The federal government knew that hundreds (or thousands) of approved Compassionate IND recipients would quickly undermine that criteria and marijuana would have to be rescheduled. Rather than face this possibility, the federal government closed the Compassionate IND Program for marijuana.

Id.; *see also* Coalition for Compassionate Access Web site, *at* http://www.compassionateaccess.org/background.html.

66. MARIJUANA AS MEDICINE FAQ, *supra* note 65.

67. 532 U.S. 483 (2001).

68. Proposition 215, the Compassionate Use Act of 1996, states as its purpose:

> (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
>
> (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon a recommendation of a physician are not subject to criminal prosecution or sanction.
>
> (C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.
>
> (2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.
>
> (c) Notwithstanding any other provisions of law, no physician in this state shall be punished or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.
>
> (d) Section 11357 [of the California Code], relating to the possession of mari-

laws that prohibited the cultivation and possession of marijuana.[69] This exception allowed patients and their primary caregivers, with a doctor's prescription, to possess or cultivate marijuana for the purpose of treating the patients' medical maladies. Such individuals were to be exempt from the prohibitions on the use and cultivation of marijuana imposed upon the population at large.

After Prop 215 was enacted into law, several groups organized dispensaries of medical cannabis to meet the needs of qualified patients.[70] In January 1998, the United States sued one of these groups, the Oakland Cannabis Buyers' Cooperative ("Cooperative"), a not-for-profit dispensary of marijuana. The United States brought suit seeking to "enjoin the Cooperative from distributing and manufacturing marijuana . . . [because] whether or not the Cooperative's activities are legal under California law, they violate federal law . . . [s]pecifically . . . the [CSA]."[71] The district court judge, Charles R. Breyer,[72] granted a preliminary injunction.[73] The Cooperative did not appeal the injunction and openly violated it by continuing to distribute marijuana.[74] To end the Cooperative's continuing violation of the injunction, the United States initiated contempt proceedings.[75] The Cooperative claimed that its distribution of marijuana was medically necessary because marijuana was the only drug that could alleviate the severe pain and other debilitating symptoms of its patients and motioned for a dismissal or a medical necessity modification to the injunction.[76]

---

juana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

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

69. § 13362.5(d).

70. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1092 (N.D. Cal. 1998).

71. *OCBC*, 532 U.S. at 487.

72. Charles R. Breyer is Supreme Court Justice Breyer's brother. For this reason, Justice Breyer took no part in the consideration and decision of *OCBC* when it was before the Supreme Court. *Id.* at 485.

73. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d at 1105. The district court granted the government's request for an injunction that prohibited possession of marijuana with the intent to manufacture or distribute in addition to the distribution and manufacturing of marijuana. The Supreme Court, for simplicity, referred to both activities collectively as distributing and manufacturing marijuana. *See OCBC*, 532 U.S. at 487, n.1.

74. *OCBC*, 532 U.S. at 487.

75. *Id.*

76. *Id.* at 488.

Judge Breyer denied the Cooperative's motion to dismiss, denied the Cooperative's motion to modify the injunction, and found the Cooperative in contempt.[77] Judge Breyer, in rejecting the motion to dismiss and the medical necessity defense, reiterated the standard necessary to assert the common law defense of necessity established in *United States v. Aguilar*:[78]

> [Defendant must prove] (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a direct causal relationship between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.[79]

The district court determined that there was insufficient evidence to show that each recipient of marijuana was in actual danger of imminent harm without the drug[80] and modified the preliminary injunction to empower the U.S. Marshall to seize the Cooperative's premises.[81] Although recognizing that "human suffering" could result, the district court concluded that a court's "equitable powers [do] not permit it to ignore federal law."[82] Three days later, the district court also rejected a motion by the Cooperative to modify the injunction to permit distributions that were medically necessary.[83]

The Cooperative appealed the contempt order and the denial of its motion to modify, but before the Ninth Circuit Court of Appeals decided the case, the Cooperative voluntarily purged its contempt by promising compliance with the initial preliminary injunction, thereby rendering the appeal of the contempt order moot.[84] However, the denial of its motion to modify the injunction remained an open issue, and the Ninth Circuit, holding 3-0 that the medical necessity defense was a legally cognizable defense, reversed and remanded with instructions to consider criteria for a medical necessity exception to the CSA's prohibitions.[85]

---

77. *Id.*
78. 883 F.2d 662, 693 (9th Cir. 1989).
79. *Id.*
80. *Cannabis Cultivators Club*, 5 F. Supp. 2d at 1102.
81. *OCBC*, 532 U.S. at 487.
82. *Id.* at 488.
83. *Id.*
84. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1112-13 (9th Cir. 1999), *rev'd*, 532 U.S. 483 (2001).
85. *Id.* at 1114-15 (stating that because the district court had erroneously "believed that it had no discretion to issue an injunction that was more limited in scope than the Controlled Substances Act itself, it summarily denied the requested modifica-

Accordingly, on July 17, 2000, the district court granted the Cooperative's motion to modify the injunction to incorporate the medical necessity defense.[86] Thereafter, the United States filed a petition for certiorari,[87] which was granted by the Supreme Court "because the decision raises significant questions as to the ability of the United States to enforce the Nation's drug laws."[88]

B. *Holding and Reasoning of the Supreme Court*

In an opinion delivered by Justice Clarence Thomas, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the medical necessity defense "is not a defense to manufacturing and distributing marijuana."[89] Justice Stevens filed a concurring opinion[90] in which Justices Souter and Ginsburg joined.

The Supreme Court stated that the CSA allowed an exception to the prohibition on intentionally manufacturing, distributing, or

---

tion [to the injunction] without weighing or considering the public interest"). The Ninth Circuit also stated that because district courts retain "broad equitable discretion" to fashion injunctive relief, the district court could have, and should have, weighed the public interest and considered factors such as the serious harm in depriving patients of marijuana. *Id.* at 1114.

86. United States v. Oakland Cannabis Buyers' Coop., 2000 WL 1517166 (N.D. Cal.). The district court modified the May 19, 1998, injunction as follows:

> The foregoing injunction does not apply to the distribution of cannabis by [OCBC] to patient-members who (1) suffer from a serious medical condition, (2) will suffer imminent harm if the patient-member does not have access to cannabis, (3) need cannabis for the treatment of the patient-member's medical condition, or need cannabis to alleviate the medical condition or symptoms associated with the medical condition, and (4) have no reasonable legal alternative to cannabis for the effective treatment or alleviation of the patient-member's legal medical condition or symptoms associated with the medical condition because the patient-member has tried all other legal alternatives to cannabis and the alternatives have been ineffective in treating or alleviating the patient-member's medical condition or symptoms associated with the medical condition, or the alternatives result in side effects which the patient-member cannot reasonably tolerate.

Id. at *1.

87. Note that it was the George W. Bush Administration that appealed the case to the Supreme Court, an action contrary to President Bush's public support for states' rights in the area of medical marijuana. "I believe each state can choose that decision as they so choose." Susan Feeny, *Bush Backs States' Rights on Marijuana: He Opposes Medical Use But Favors Local Control*, DALLAS MORNING NEWS, Oct. 20, 1999 (quoting President George W. Bush).

88. *OCBC*, 532 U.S. at 489.

89. *Id.* at 494.

90. *See infra* Part II.C. (discussing the concurrence).

dispensing a Schedule I controlled substance only for "[g]overnment-approved research projects."[91] The Court rejected the Cooperative's assertion that 21 U.S.C. § 841(a)[92] of the CSA is subject to "additional, implied exceptions"[93] which should be read into the CSA,[94] one of which, the Cooperative claimed, is the common law defense of necessity.[95]

In its majority opinion, the Supreme Court noted that "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute."[96] However, the Court stated that, in this case, it did not need to decide that particular question and that it needed only to recognize that the terms of the CSA were specifically inconsistent with any medical exception for marijuana.[97] The Court further stated that, regarding the necessity defense, "one principle is clear: The defense cannot succeed when the legislature itself has made a 'determination of values.'"[98]

The Supreme Court held that the Ninth Circuit erred when it recognized the medical necessity defense as a "legally cognizable

---

91. *OCBC*, 532 U.S. at 490 ("providing procedures for becoming a government-approved research project" (citing 21 U.S.C. § 823(f))).

92. 21 U.S.C. § 841(a) (2000) states:

(a) Unlawful acts

Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

93. *OCBC*, 532 U.S. at 490.

94. *Id.*

95. Although the defense was not before the Supreme Court and Justice Thomas overlooked it in his statement that the CSA contains no exceptions except for research, the fact is that § 885 of the CSA creates a broad exception for state or local officials engaged in activities relating to controlled substances as properly authorized by state or municipal law. *See* 21 U.S.C. § 885(d) (stating "no civil or criminal liability shall be imposed by virtue of this title upon any duly authorized . . . officer of any State, territory, [or] political subdivision thereof . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances"). The issue then arises of what would result following the passage by a state of a law authorizing state agencies or individuals to produce and distribute medical marijuana, or state doctors to prescribe and furnish it. Technically in these circumstances, such state agencies or individuals would be immune from federal prosecution for CSA violations as per § 885.

96. *OCBC*, 532 U.S. at 490.

97. *Id.* at 491.

98. *Id.* (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 629 (2d ed. 1986)).

defense"[99] and when it remanded the case to the district court with instructions to consider "the criteria for a medical necessity exemption."[100] The Supreme Court also found that, although district courts have discretion in fashioning injunctive relief, the Court of Appeals erred in stating the factors that district courts may consider when exercising this discretion.[101] The Supreme Court warned that the exercise of discretion by the district courts does not include "ignor[ing] the judgment of Congress, deliberately expressed in legislation,"[102] and that Congress had expressed precisely such deliberate judgment in the CSA.[103]

C. *The "Dissenting Concurrence"*

Justice Stevens, with whom Justices Souter and Ginsburg joined, issued a concurring opinion that, in many ways, read like a dissent. Justice Stevens concurred with the majority opinion because he agreed that a distributor of marijuana does not have a medical necessity defense under the CSA. Justice Stevens did not join in the majority's dicta, however, which extended the holding beyond manufacturing and distribution to possession and use.[104]

---

99. *Id.* at 495 (quoting United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1114 (9th Cir. 1999)).

100. *Id.* (quoting *OCBC*, 190 F.3d at 1115).

101. *Id.* at 498-99.

> [T]he Court of Appeals erred by considering relevant the evidence that some people have "serious medical conditions for whom the use of cannabis is necessary in order to treat or alleviate those conditions or their symptoms," that these people "will suffer serious harm if they are denied cannabis," and that "there is no legal alternative to cannabis for the effective treatment of their medical conditions."

Id. (quoting *OCBC*, 190 F.3d at 1115).

102. *OCBC*, 532 U.S. at 497 (citing Virginian R. Co. v. Railway Employees, 300 U.S. 515, 551 (1937)).

103. *Id.* at 1722 (stating that "in the [CSA], the balance already has been struck against a medical necessity exception."). *See also id.* at 491:

In the case of the [CSA], the statute reflects a determination that marijuana has no medical benefits worthy of an exception . . . Whereas some other drugs can be dispensed and prescribed for medical use . . . the same is not true for marijuana. Indeed, for purposes of the [CSA], marijuana has 'no currently accepted medical use' at all.

104. In his concurring opinion, Justice Stevens stated:

> This confined holding is consistent with our grant of certiorari, which was limited to the question '[w]hether the [CSA] forecloses a medical necessity defense to the [CSA]'s prohibition against *manufacturing* and *distributing* marijuana . . . .
>
> Accordingly . . . respondents have raised the medical necessity defense as a justification for distributing marijuana . . . and it was in that context that the Ninth Circuit determined that respondents had 'a legally cognizable defense.' . . . [This] court is surely correct to reverse that determination. . . .

Justice Stevens characterized the majority's dicta in this respect as "unwarranted and unfortunate excursions" from the case's "limited holding."[105] Specifically, Justice Stevens disagreed with the majority opinion in three ways.

First, Justice Stevens found it inappropriate for the Court in this case to decide "whether the [medical necessity] defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering."[106] Justice Stevens asserted that the majority should, instead, have limited its finding to the facts and issue of the case, that is, to the CSA's applicability to a defendant charged with manufacturing and distributing marijuana.[107]

Second, Justice Stevens disagreed with the majority's casting doubt upon the availability of the necessity defense in cases of less-than-explicit statutory authority. In response to the majority's statement that "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute,"[108] Justice Stevens stated that "our precedent has expressed no doubt about the viability of the common-law defense [of necessity], even in the context of federal criminal statutes that do not provide for it in so many words."[109]

Third, Justice Stevens expressed disagreement with the way the

---

> Apart from its holding, [this] Court takes two unwarranted and unfortunate excursions that prevent me from joining in [the majority] opinion. First, the court reaches beyond its holding, and beyond the facts of the case, by suggesting that the defense of necessity is unavailable for anyone under the [CSA]. . . .
>
> Second, t[his] court gratuitously casts doubt on 'whether necessity can ever be a defense' to *any* federal statute that does not explicitly provide for it.

Id. at 499-501.

105. *Id.* at 500.

106. *Id.* at 501.

107. *Id.* at 500; *see also* Leah M. Perkins, *Supreme Court Upholds Congressional Classification of Cannabis*, 3 No. 13 LAWYERS J. 1 (2001).

108. *OCBC*, 532 U.S. at 490.

109. *Id.* at 501. As authority for his statement, Justice Stevens quoted *United States v. Bailey*, 444 U.S. 394, 415 (1980):

> We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

He then stated, "Our principal difference with the dissent, therefore, is not as to the *existence* of such a defense, but as to the importance of surrender as an element of it." *OCBC*, 532 U.S. at 501.

majority's dicta interfered with Prop 215. He stated, regarding the imposition of federal law contrary to state law, that:

> [R]espect for the sovereign states . . . imposes a duty on federal courts to, whenever possible, avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."[110]

Underscoring the limited nature of the holding and his disagreement with the majority's dicta, Justice Stevens ended his opinion with the warning that *OCBC* should have left two questions open: "[w]hether it would be an abuse of discretion for the District Court to refuse to enjoin . . . violations" of the CSA by a seriously ill patient for whom marijuana may be a necessity, and "whether the District Court may consider the availability of the necessity defense for that sort of violator."[111]

III. GROUNDS FOR ALLOWANCE OF A NECESSITY DEFENSE

The Supreme Court's holding in *OCBC* is narrow and limited: "medical necessity is not a defense to *manufacturing* and *distributing* marijuana."[112] Beyond this limited holding, the majority asserted in its dicta that "nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act."[113] Justice Stevens disagreed with this broad construction and began the concurring opinion with a reminder of the "Court's narrow holding" so that it would not "be lost in its broad dicta."[114]

The concurrence disagreed with the majority on three particular points:[115] (1) whether, as the majority suggests, the defense of

---

110. *OCBC*, 532 U.S. at 502 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

111. *Id.* at 503. Justice Stevens indicated that these questions should be decided when the facts of a future case so warrant, on the authority of cases such as *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

112. *OCBC*, 532 U.S. at 494 (emphasis added).

113. *Id.* at 499 n.7. The Court was referring to other CSA prohibitions, one of which is the use and possession of marijuana. Justice Stevens characterized the majority's statement in footnote seven of the majority opinion as "perhaps the most glaring example of the Court's dicta." *Id.* at 501 n.2 (referring to the manner in which the majority's dicta extended beyond the facts and issue of the case).

114. *Id.* at 499.

115. *Id.* at 501-03.

necessity is unavailable not just to manufacturers and distributors, but also to users and possessors under the CSA; (2) whether the defense of necessity is, or can be, available as a defense to a federal statute in instances where the statute does not explicitly or deliberately bar it; and (3) whether it would be an abuse of discretion for a district court to refuse to enjoin certain violations of the CSA, such as the use and possession of marijuana by a seriously ill patient for whom the drug may be a necessity.[116]

This Note proposes that a person charged with use or possession of marijuana for medical purposes in violation of the CSA should be allowed by the courts to use the defense of medical necessity. This claim rests on the analysis of three legal issues examined in this section. The first part of this section examines the traditional availability of the defense of necessity, specifically, whether the common law "choice of evils" defense justifies the allowance of the necessity defense where physical forces beyond the defendant's control and lack of legal alternatives to breaking the law threaten irreparable injury to the defendant. The second part examines the historical function and scope of the doctrine of judicial equitable discretion, specifically, whether it would be an abuse of equitable discretion for a district court to refuse to enjoin use and possession of marijuana violations of the CSA, when such use and possession is related to serious medical need. The third part examines principles of federalism, as they relate to the duty imposed upon federal courts to minimize or avoid conflict between state and federal law, particularly in cases where the citizens of a state have directly enacted laws that are in conflict with federal law. Specifically, the third part of the analysis focuses on whether principles of federalism require federal courts to resolve the conflict between the CSA and Prop 215 on the side of Prop 215 because it represents a situation where the citizens of California have enacted a law that conflicts with the federal CSA. Additionally, since the topic of pain relief is inherently tied to the use of marijuana for medical purposes, the history and scope of the right to pain relief is discussed generally in each of the Subsections.

A. *The Defense of Necessity*

While there seems to be no exact, comprehensive definition of

116. *Id.*

what constitutes a defense of necessity,[117] the actual concept has been "anciently woven into the fabric of our culture."[118] History is filled with situations where the defense has been raised, and a general understanding of its meaning can be drawn from these contexts.[119] Some scholars suggest that a defense of necessity recognizes that one may violate the law to avoid a greater evil.[120]

Whatever its origin, the rationale for the necessity defense is that society is sometimes willing to excuse, or even justify, what would otherwise be illegal conduct, if done to avoid an even worse or greater evil.[121]

> The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, [the defendant] is [by virtue of the defense of necessity] justified in violating it.[122]

While the act of breaking the law itself is voluntary in the sense that the actor consciously decides to do it, the decision is dictated by the absence of an acceptable alternative.[123] The act is therefore excused or justified even though it constitutes otherwise unlawful conduct.

English and American courts have long recognized the defense of necessity.[124] In addition, about half of the states have codified it into statutes and all of them have historically recognized it as a common law defense.[125] Similarly, the Model Penal Code ("MPC")

---

117. *See* GEORGE E. DIX & MICHAEL SHARLOT, CRIMINAL LAW 718-32 (3d ed. 1987) (discussing necessity, duress, and justification defenses).

118. Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY, 289, 291 (1974) (quoting J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 416 (2d ed. 1960)).

119. *Id.* at 291-96; see note 133 *infra* for a list of such cases.

120. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 441 (2d ed. 1986).

121. *Id.* at 385.

122. *Id.*

123. Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 716 n.114 (2000) (citing United States v. Randall, 104 Daily Wash. L. Rep. 2249, 2251 (D.C. Super. Ct. 1976)).

124. Arnolds & Garland, *supra* note 118, at 291-96.

125. *See, e.g.*, ARK. CODE ANN. § 5-2-604 (Michie 1993) (recognizing necessity as

defines the necessity defense as a choice of evils where: 1) the threatened injury would be worse than the legal violation, 2) the law does not provide exceptions or defenses in the particular situation, 3) there is no legislation that specifically forbids the necessity defense, and 4) the actor has not negligently or recklessly caused the situation which necessitated the breaking of the law.[126]

The Supreme Court in *United States v. Bailey*[127] stated that the "defense of necessity, or choice of evils, traditionally [encompassed] the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."[128] The Court in *Bailey* also reiterated that "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense of necessity would fail."[129] With the lack of a federal statute codifying the defense of necessity, *Bailey* remains an important articulation of the law by the Supreme Court because it established the Court's recognition of the availability of the defense of necessity in federal courts.[130] The defense of necessity has been used in a variety of situations, such as justifying property damage and trespass or in other circumstances,[131] including cases within a medical context.[132]

---

a defense in "choice of evils statute"); COLO. REV. STAT. ANN. § 18-1-702(1) (West 1999) (recognizing necessity as a defense in emergency situations to avoid imminent public or private injury); DEL. CODE ANN. tit. 11, § 463 (2001) (recognizing the necessity defense in a "choice of evils statute"); HAW. REV. STAT. § 703-302 (1999) (recognizing the necessity defense in a "choice of evils statute"); KY. REV. STAT. ANN. § 503.030 (Michie 1999) (recognizing the necessity defense in a "choice of evils statute"); N.Y. PENAL LAW § 35.05 (McKinney 1997) (recognizing necessity as a defense in emergency situations to avoid imminent public or private injury).

126. MODEL PENAL CODE § 3.02 (1985).

127. 444 U.S. 394, 410 (1980).

128. *Id.*

129. *Id.* (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 379 (1972)).

130. *Id.* at 410-11.

131. *See* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 475 (1994); *see also* MODEL PENAL CODE AND COMMENTARIES § 3.02 comments, at 9-14 (ALI 1985) (discussing typical necessity defense cases); LAFAVE & SCOTT, *supra* note 120, at 444 (discussing typical necessity defense applications).

132. *See, e.g.*, State v. Bachman, 595 P.2d 287 (Haw. 1979) (defendant suffered from glaucoma); People v. Bordowitz, 588 N.Y.S.2d 507 (N.Y. Crim. Ct. 1991); State v. Cole, 874 P.2d 878 (Wash. Ct. App. 1994) (defendant had history of back pain); State v. Diana, 604 P.2d 1312 (Wash. Ct. App. 1979)(defendant suffered from multiple sclerosis).

1. The Medical Necessity Defense in Marijuana Cases: The Lesser of Two Evils

The defense of medical necessity is often raised in situations where the use of drugs to alleviate pain or other effects of terminal illnesses has resulted in violation of drug laws.[133] While judicial decisions indicate mixed results in the acceptance of the medical necessity defense for marijuana use or possession, the basis for the rationale of the courts that have allowed the use of the defense has hinged on the core concept of the necessity defense—a choice between conflicting evils.[134] The medical necessity defense should be available as a relevant excuse or justification for violations of CSA provisions dealing with use and/or possession of marijuana, on the ground that medical need renders the violation of the CSA the lesser of two evils.

Prior to *OCBC*, the defense of necessity had been raised in courts throughout the nation by persons claiming a medical need for the drug. For example, in *State v. Hanson*,[135] the defendant smoked marijuana to combat the effects of epilepsy medication. The Minnesota Court of Appeals disallowed the medical necessity defense because it found that the defense ran counter to the Minnesota legislature's decision to classify marijuana as a schedule I substance.[136] Similarly, in *State v. Tate*[137] the defendant smoked marijuana to provide relief from his quadriplegic condition.[138] The New Jersey Supreme Court rejected the medical necessity defense on the ground that the legislature of New Jersey had not given the

---

133. *See, e.g.*, Jenks v. State, 582 So. 2d 676 (Fla. Dist. Ct. App. 1991) (defendants had AIDS); *Diana*, 604 P.2d at 1312.

134. In *Randall* and *Diana*, the courts weighed the patient's interests versus the government's interests before allowing the defense of medical necessity, and in *Jenks*, the court allowed the defense of medical necessity after it discussed the medical necessity defense elements and the choice of evils concept. *See* LeVay, *supra* note 124, at 716 n.114 (citing United States v. Randall, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976)); *Diana*, 604 P.2d at 1315-16; *Jenks*, 582 So. 2d at 678-79.

135. 468 N.W.2d 77 (Minn. Ct. App. 1991).

136. *Id.* at 78-79. *See also* MINN. STAT. §§ 152.01(7) & 152.02(1) (1990) (attaching criminal penalties to the possession, sale, or cultivation of marijuana).

137. 505 A.2d 941 (N.J. 1986).

138. Quadriplegia is a condition resulting from a spinal chord injury near the neck, resulting in paralysis of the muscles in the body. GRINSPOON & BAKALAR, *supra* note 9, at 82. Sometimes quadriplegia results in spasticity, the involuntary and abnormal contraction of muscles. In such cases, marijuana can provide relief. *See* MARIJUANA, MEDICINE AND THE LAW: HEARING BEFORE THE U.S. DRUG ENFORCEMENT ADMINISTRATION 425 (R.C. Randall ed. 1988) (citing and quoting INST. OF MEDICINE, MARIJUANA AND HEALTH 139 (National Academy Press ed., 1982)) [hereinafter MEDICINE AND THE LAW].

court discretion to accept the medical necessity defense.[139]

Other courts have allowed the use of the medical necessity defense in cases dealing with the medical use of marijuana.[140] In *United States v. Randall*,[141] the defendant used marijuana to treat his glaucoma.[142] The court balanced the defendant's interest in preserving his sight against the government's interest in controlling the drug and concluded that the defendant's interest outweighed the government's. In arriving at its conclusion, the *Randall* court applied the reasoning of the United States District Court for the Western District of Oklahoma in *Stowe v. United States*.[143] The *Stowe* court had found that the patients' right to medical treatment outweighed the government's interest in protecting the general public. Based on this finding, the district court prohibited the FDA from preventing the patients' use of laetrile to treat their cancer.[144]

In *State v. Diana*,[145] the defendant suffered from multiple sclerosis[146] and claimed that his use of marijuana was supported by

---

139. *See Tate*, 505 A.2d at 944-45.

140. *See, e.g.*, People v. Trippet, 66 Cal. Rptr. 2d 559 (Cal. 1997); Sowell v. State, 738 So.2d 333 (Fla. Dist. Ct. App. 1998); State v. Bachman, 595 P.2d 287 (Haw. 1979); State v. Hastings, 801 P.2d 563 (Idaho 1990); State v. Diana, 604 P.2d 1312 (Wash. Ct. App. 1979).

141. LeVay, *supra* note 124, at 716 n.114 (citing United States v. Randall, 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. 1976)).

142. The defendant believed that marijuana neutralized the inner-ocular pressure and decreased the visual distortions caused by glaucoma. *Id.*; *see also* GRINSPOON & BAKALAR, *supra* note 9, at 40 (stating that glaucoma is the leading cause of blindness in the U.S. accounting for 10% of the onset of blindness in adults, and afflicting 1.5% of the population at age 50 and 5% at age 70).

143. Civ. No. 75-0218-B (W.D. Okla. 1975). In *Stowe*, an unreported civil case, the plaintiffs sought to enjoin the FDA from preventing their cancer-suffering spouses from receiving laetrile, a drug banned by the FDA because it was not proven that it effectively treated cancer. This reasoning was later applied in *Randall*. The *Randall* court enjoined the FDA because "the patient's right to medical treatment with a substance which had demonstrably favorable effects on their cancers superseded any interest of the government in protecting the general public from a drug whose properties were not conclusively proven." West Virginia v. Donna Jean Poling, No. 26568 (W. Va. May 10, 2000) (Starcher, J., dissenting), *at* http://www.state.wv.us/wvsca/docs/spring00/26568d.pdf (quoting U.S. v. Randall, 104 Daily Wash. L. Rep. 2249, 2253 (D.C. Super. Ct. 1976)). This right to medical treatment was the basis for the court enjoining the FDA from preventing the plaintiffs from importing laetrile for their own medical use. *See also* Keene v. United States, 81 F.R.D. 653 (S.D. W. Va. 1979).

144. *Stowe*, Civ. No. 75-0128-B.

145. 604 P.2d 1312 (Wash. Ct. App. 1979).

146. GRINSPOON & BAKALAR, *supra* note 9, at 66-68 ("Multiple sclerosis is a disorder in which patches of myelin (the protective covering of nerve fibers) in the brain and spinal chord are destroyed and the normal functioning of the nerve fibers themselves is interrupted."); *see also* MEDICINE AND THE LAW, *supra* note 138, at 362 (quoting INST. OF MEDICINE, MARIJUANA AND HEALTH 139 (National Academy Press ed.,

medical research, that he needed marijuana because other drugs generated unpleasant side effects, and that he unsuccessfully attempted to obtain marijuana legally through his doctor. The Washington Court of Appeals held that the medical necessity defense was justified in certain limited and specific circumstances, such as those present in that case.[147] The court stated that, in cases where the medical use of marijuana is in question, "the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved."[148]

Similarly, in *Jenks v. State*[149] the defendants used marijuana to obtain relief from problems derived from AIDS[150] and claimed that, since they could not obtain relief from other alternatives,[151] the evil avoided was greater than the evil of violating the law.[152] The court held that the defendants had proved the three elements necessary for the medical necessity defense: 1) they had not intended to contract AIDS; 2) their physicians supported their claim that no other drug effectively controlled their nausea; and 3) failure to control the effects of AIDS would put their lives in jeopardy.[153] Based on these facts, the court allowed the medical necessity defense.[154]

The bases for the rationale of the courts that have allowed the use of the defense of necessity in marijuana cases has thus hinged

---

1982)) (stating that a victim of multiple sclerosis claimed that five minutes after smoking marijuana, she stopped vomiting and no longer felt nauseous and that there was a noticeable reduction in her spasms).

147. *Diana*, 604 P.2d at 1314-15.

148. *Id.* at 1317.

149. 582 So. 2d 676 (Fla. Dist. Ct. App. 1991). The defendants, Kenneth and Barbara Jenks, smoked marijuana to control the nausea caused by some side effects of AIDS treatment medication. *Id.* at 677. Kenneth Jenks inherited hemophilia from his mother and contracted AIDS from a blood transfusion. Kenneth subsequently unknowingly passed it on to his wife Barbara. *Id.*

150. Acquired Immune Deficiency Syndrome ("AIDS") is a deadly disease that attacks the immune system, making the individual susceptible to opportunistic infections. Many people claim that marijuana helps reduce some negative effects of AIDS treatment, such as nausea and the inability to keep food down. GRINSPOON & BAKALAR, *supra* note 9.

151. *Jenks*, 582 So. 2d at 679-80. The Jenks' doctor, Dr. Thomas D. Sunnenberg, testified that "he had been unable to find any effective drug for treating the defendants' nausea," that the nausea was so debilitating that the defendants could die if it was not controlled, and that the only drug that controlled their nausea effectively was marijuana. *Id.*

152. *Id.* at 678.

153. *Id.* at 679-80; *see also supra* note 151 (discussing the Jenks' doctor's testimony).

154. *Id.*

on the core concept of the necessity defense: the choice between conflicting "evils."[155] On the one hand, there exist the interests of the government, and on the other, the interests of the medical marijuana user. These conflicting interests translate into conflicting evils for both parties: the government's societal interest in preventing drug use represents an "evil" to the patient in medical need of an illegal drug, whereas an individual's interest in using an illegal drug for medical reasons represents an "evil" to a government attempting to reduce the harmful societal effects of drug use.

The enactment and enforcement of the CSA represents Congress' decision to restrict or nullify one individual's medical interest for the benefit of the greater societal interest. Presumably, Congress has made the choice of the greater value, or, conversely, the choice of the lesser evil. Consequently, an individual must weigh his or her medical interests against the criminality of his or her actions. Thus, the breaking of the law represents the individual's choice of engaging in criminality for the benefit of his medical needs—in this case, the choice of greater value, or lesser evil, to the individual.

Based on the above reasoning, the medical necessity defense should be available for violations of CSA provisions dealing with use or possession of marijuana on the ground that medical need renders the violation of the CSA the lesser of two evils.

2. Conflicting Evils: Breaking the Law or Living in Pain

The concept of a choice of evils in the medical marijuana context boils down to a choice between 1) breaking the law in the course of using marijuana and, as a result, relieving pain or remedying some other medical malady or 2) not breaking the law and, as a result, living with the pain or the medical malady.[156]

The Supreme Court's articulation in *Bailey*[157] that the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal

---

155. *See supra* note 132 and accompanying text (discussing cases where necessity defense has been used in medical context).

156. Many of the cited cases illustrate how people use marijuana for a variety of medical reasons. While this Note focuses on the application of marijuana for pain relief as a source for its legal reasoning and a basis for its conclusions, it should be noted that the analysis involved is equally valid for uses of the drug beyond the relief of physical pain.

157. United States v. Bailey, 444 U.S. 394 (1980).

conduct the lesser of two evils[158] hints at the validity of the medical defense of necessity in marijuana use cases. Many users claim that they smoke marijuana to control the pain derived from a variety of sources, or to avoid starvation resulting from an inability to keep food down without vomiting, or for other medical reasons,[159] all "beyond the actor's control," which came upon them absent any fault of their own. On the basis of these physical forces beyond the actor's control, seriously ill persons should be allowed to use the defense of necessity in cases dealing with use or possession of marijuana for medical purposes.[160]

In *Bailey*, the Supreme Court reiterated that if there were reasonable, legal alternatives to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defense of necessity would fail.[161] Users of medical marijuana are typically faced with a bleak choice between the refusal to commit the criminal act of smoking marijuana, and consequent harm to themselves, or the avoidance of the harm by voluntarily committing the criminal act.[162] In some cases, courts have found that the possibility of rescheduling marijuana outside of schedule II (thus allowing for its legal medical prescription) represents an administrative alternative and, therefore, the *Bailey* standard of exhausting all available potential remedies is not met.[163] Other courts

---

158. *Id.* at 410.

159. *See* Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U.L. REV. 547, 552-63 (1999). In the twentieth century, physicians have found marijuana to be an effective treatment for a range of ailments, including: nausea and vomiting associated with chemotherapy; weight loss associated with AIDS; glaucoma; epilepsy; muscle spasms and chronic pain in cases of multiple sclerosis; quadriplegia and other spastic disorders; migraines; severe pruritus; and depression and other mood disorders. *Id.* at 552-63; *see also* GRINSPOON & BAKALAR, *supra* note 9, at 163-75 (stating that physicians have found marijuana useful in treating asthma, insomnia, dystonia, scleroderma, Crohn's Disease, and diabetic gastroparesis).

160. *See e.g.*, *Jenks*, 582 So. 2d at 679-80; *see also*, *e.g.*, ARK. CODE ANN § 5-2-604 (Michie 1993) (recognizing the necessity defense in "choice of evil" statute); COLO. REV. STAT. ANN. § 18-1-702(1) (West 1990) (same); DEL. CODE ANN. tit. 11, § 463 (1995) (same); HAW. REV. STAT. § 703-320 (1993) (same).

161. *Bailey*, 444 U.S. at 410 (quoting LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW § 28, at 379 (1972)).

162. For example, a person who smokes marijuana to ameliorate her pain can either voluntarily choose not to break the law by ceasing to smoke marijuana or can voluntarily choose to break the law by continuing to smoke marijuana. In the former instance, if she cannot find an alternative method of pain control, she will adhere to the law but live in uncontrollable pain. Alternatively, in the latter instance, she will be in conscious violation of the law, but she will live without the pain.

163. LeVay, *supra* note 124, at 728 n.208 (citing Order, United States v. Smith, No. S-97-558 GEB (E.D. Cal. 1999) (stating that since the defendant had not pursued

have recognized the logistical impracticality and unrealistic time requirements of such an alternative and have, on that basis, concluded that rescheduling does not represent a reasonable alternative.[164] The defense of medical necessity should therefore be available in circumstances where the user lacks a reasonable alternative in his or her treatment of the effects of the medical malady.

Under *United States v. Bailey*, the opportunity to avoid the threatened harm renders the necessity defense inapplicable.[165] For seriously ill individuals using marijuana to combat pain or other maladies, the lack of legal alternatives represents an absence of choice or power to avoid the threatened harm. This lack of power to avoid personal injury forms a basis for the allowance of the necessity defense in cases of use or possession of marijuana for medical purposes.

Furthermore, viewed in the textual context of the MPC, a choice between evils, or, stated another way, the defense of necessity, is valid where the threatened injury is worse than the legal violation and where the law does not otherwise explicitly bar it.[166] For a medical marijuana user, the potential for his or her living in continuous pain, or with some other bodily impairment that may be remedied by the use of marijuana,[167] represents a significant "threatened injury." Where the legislature has not clearly mandated otherwise and no other legal alternative exists, the choice of evils doctrine should apply favorably to a defendant charged with a violation of the CSA because of marijuana use for medical purposes, since the threatened injury to the individual of not using the drug is greater to that individual than the violation of the law.

---

the option of rescheduling marijuana, he had "bypassed the available administrative procedures established by Congress to effect a change in how marijuana is classified under federal law")).

164. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1102 (N.D. Cal. 1998) (doubting whether a rescheduling petition is a reasonable alternative for all seriously ill patients whose physicians recommended marijuana for therapeutic purposes).

165. *Bailey*, 44 U.S. at 410.

166. MODEL PENAL CODE § 3.02 (1985) (defining the necessity defense as a choice of evils where 1) the threatened injury would be worse than the legal violation, 2) the law does not provide exceptions or defenses in the particular situation, 3) there is no legislation that specifically forbids the necessity defense, and 4) the actor has not negligently or recklessly caused the predicament which necessitated the breaking of the law).

167. *See supra* notes 156 & 159 and accompanying text.

B. *The Purpose of Equity: Irreparable Injury and Inadequacy of Legal Remedies*[168]

The formulation of an exception to the strictness of the law became necessary long ago, as evidenced by the equitable remedies doctrine that has existed since the beginning of our system of jurisprudence.[169] The Supreme Court has held that parties seeking injunctive relief in the federal courts must always show "irreparable injury and the inadequacy of legal remedies."[170] Equitable jurisdiction has traditionally functioned to establish a judicial framework through which parties in dispute may arrive at a "nice adjustment and reconciliation."[171]

1. Exercising Equitable Discretion

Equity in American jurisprudence has been characterized by a special type of flexible judicial power: the power to examine cases individually and to provide remedies appropriate to the specific circumstances. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."[172] When considering the appropriate remedy, a court of equity should consider the circumstances; specifically, the benefits and injuries to each party resulting from the equitable judicial remedy.[173] Moreover, courts of equity, in exercising their discretion and employing the remedy of an injunction, must consider the consequences not just to the parties in dispute, but also to the public at large.[174] Consequently, where a court's injunction to the violation of a law "will adversely affect a public interest," the court has the discretionary power to withhold enforcement of that law,

---

168. Although equitable jurisdiction can form part of an argument in support of a medical necessity defense, in this Note the two issues are treated separately in Parts III.A and III.B.

169. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (stating that the practice of equitable jurisdiction has a history of several hundred years).

170. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975)).

171. *Id.* (quoting *Hecht*, 321 U.S. at 329).

172. *Id.*

173. Yakus v. United States, 321 U.S. 414, 440 (1944) (stating that in equitable jurisdiction, "the court balances the conveniences of the parties and possible injuries to them according [to how] they may be affected by the granting or withholding of the injunction").

174. *See Weinberger*, 456 U.S. at 312 (stating that courts of equity should pay particular attention to the public consequences of their use of injunctions when exercising their discretion) (citing R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941)).

even where "the postponement of enforcement may be burdensome to the plaintiff."[175] This practice of considering all the circumstances of a case, as well as the consequences of any decision upon the parties, prior to the determination of a remedy in a court of equitable jurisdiction is an integral part of the American system of jurisprudence.[176]

The prominent flexibility of equitable jurisdiction is equally applicable when a statute is at issue.[177] "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances . . . and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of the law."[178]

a. Bodily Integrity

The issue of the medical use of marijuana should be viewed through the judicial lens of equity. Courts of equity, when considering appropriate remedies, have traditionally considered the benefits and injuries to each party and to society as a whole and have been flexible with their judicial power, examining cases individually to provide remedies that are appropriate to the circumstances.[179] In the case of a person using marijuana to alleviate pain or other maladies, such use relates to the most basic decisions about bodily integrity. Such a decision involves vital implications for the individual, as well as for society at large.[180]

In 1914, then-judge Cardozo underscored the importance of control over one's body when he stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ."[181] The use of marijuana by adults to combat illness or its symptoms, particularly when alternatives are unavailable, lies at the heart of control of one's body. For that reason, the use of marijuana for medical purposes should be examined, with particular emphasis, in the light of the mercy and fairness-

175. *Yakus*, 321 U.S. at 440.

176. *See Weinberger*, 456 U.S. at 313 (stating that "[t]hese commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect a 'practice with a background of several hundred years of history'" (quoting *Hecht*, 321 U.S. at 329)).

177. *See* TVA v. Hill, 437 U.S. 153 (1978); *see also Hecht*, 321 U.S. 321.

178. *TVA*, 437 U.S. at 193; *Hecht*, 321 U.S. at 329.

179. *See supra* text accompanying notes 171-74.

180. *See* Washington v. Glucksberg, 521 U.S. 702, 777 (1997) (Souter, J., concurring) (stating that the Constitution limits states' interference with such decisions).

181. *Id.* (quoting Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129 (1914)).

driven doctrine of judicial equity.[182] The Supreme Court clarified that the Constitution extends protection to the right of control over one's body, when it stated that "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity."[183] On these grounds, the medical use of marijuana should fall within the scope of equitable jurisdiction because disputes involving seriously ill individuals who use marijuana can lead to continued suffering, to aggravation of serious medical conditions, and even to death. Such detrimental outcomes for these medical marijuana users directly affect bodily integrity and typically result from adverse court rulings that deprive medical marijuana users of their only method of pain control or other adverse symptom control. Equitable discretion, thus, offers the possibility to arrive at a "nice adjustment" while avoiding irreparable harm to an individual.

b. Equitable Prevention of Unnecessary Pain

Courts of equity should have an inherent role in preventing irreparable harm to ordinary people who use marijuana for the relief of their pain or discomfort when nothing else provides such relief. Sometimes, persons suffering from a serious illness can resort only to marijuana for effective treatment because other alternatives, legal or otherwise, are ineffective in the treatment of their maladies or symptoms.[184] Furthermore, such seriously ill individuals often lack the benefit of remedies that are both legal and effective, resulting in a real threat not only to their well-being but to their lives as well.[185] When these individuals' quality of life becomes almost unbearable, anything that improves their quality of life has a constitutional dimension.[186] In such circumstances, a common understanding of "liberty" should encompass the right to

182. *See Hecht*, 321 U.S. at 329 ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .").

183. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849 (1992); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (recognizing a liberty interest in refusing medical treatment).

184. *See e.g.*, GRINSPOON & BAKALAR, *supra* note 9, at 28-33 (stating that the patient's doctor had been unable to find any effective drug for treating the patient's nausea, that the nausea was so debilitating that the patient was incapacitated, and that the only drug that controlled his nausea effectively was marijuana).

185. *See supra* note 151 and accompanying text (discussing the lack of effective drugs to treat some patients).

186. *See* Washington v. Glucksberg, 521 U.S. 702, 777 (1997) (Souter, J., concurring); *see also id.* at 745 (Stevens, J., concurring) (citing Planned Parenthood v. Casey,

mitigate, where feasible, the suffering underlying such an unbearable existence. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[187] In fact, "defin[ing] one's own concept of existence" is the essence of the natural law expressed in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[188] Accordingly, in *Board of Regents v. Roth*,[189] the Court stated that it had not attempted to define the liberty guaranteed by the Constitution with precision because "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[190]

It is a basic notion in a civilized society, and even more so in a free and democratic one, that individuals who are suffering, vulnerable, or in need are to be afforded care, assistance, and understanding beyond that normally afforded to others not in their predicament.[191] In accordance with these beliefs, some members of the Supreme Court have articulated that the treatment of intolerable pain is something to which all human beings are entitled.[192] "Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[193]

So strong is our society's belief that people are entitled to combat their pain that many states have enacted laws categorically authorizing pain treatment even where it hastens death,[194] despite the

---

505 U.S. 833, 851 (1992)) (highlighting the Supreme Court's stance that all human beings are entitled to the treatment of intolerable pain).

187. *Casey*, 505 U.S. at 850-51.

188. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

189. 408 U.S. 564 (1972).

190. *Id.* at 572.

191. *See Glucksberg*, 521 U.S. at 731 ("[T]he state has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons- from abuse, neglect, and mistakes.").

192. *See id.* at 777 (1997) (Souter, J., concurring); *id.* at 745 (Stevens, J., concurring).

193. *Id.* at 745 (Stevens, J., concurring) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

194. *Glucksberg*, 521 U.S. at 780 (Souter, J., concurring) (stating that the state of Washington "generally permits physicians to administer medication to patients in termi-

long and steady historical opposition to euthanasia. Not only is the average person entitled to exist without pain (to the extent that it is medically and practically feasible) but, so fundamental are American societal notions in this area, that they lead one to conclude, as did our founding fathers, that even the most horrible criminals are entitled to safeguards against cruel and unusual punishment.[195]

It seems, therefore, that even the most vicious criminals have the right to be punished and to live, or even die, without pain. Few would argue that consciously and purposefully subjecting a convicted criminal to pain is acceptable in our society today. Yet many argue that, in certain circumstances, allowing ordinary people who are not convicted criminals to suffer is acceptable.[196] To avoid this scenario, courts of equity should have an inherent role in preventing unnecessary pain to ordinary people who use marijuana for the relief of their pain or discomfort when nothing else provides such relief. To do so, courts of equity should be able to exercise their discretion in a manner that allows individuals who meet certain criteria to medicate themselves with whatever relieves their pain, or to make use of the defense of necessity in furtherance of such action, notwithstanding the criminalization of the medication or the strict letter of the law. This flexibility has characterized courts of equity for hundreds of years.[197] Additionally, this type of molding of the remedy to each particular case has defined the rationale for such

---

nal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding"). A number of other states do the same. *See e.g.*, IND. CODE ANN. § 35-42-1-2.5(a)(1) (West 1998) (exempting from assisted suicide ban licensed health care providers who administer or dispense medications or procedures to relieve pain or discomfort, even if such medications or procedures hasten death, unless provider intends to cause death); IOWA CODE ANN. § 707A.3.1 (West Supp. 2002) (same); KY. REV. STAT. ANN. § 216.304 (Michie 1998) (same); MICH. COMP. LAWS ANN. § 752.1027(3) (West Supp. 2002) (same); MINN. STAT. ANN. § 609.215(3)(a) (West Supp. 2002) (same); OHIO REV. CODE ANN. §§ 2133.11(A)(6), 2133.12(E)(1) (West Supp. 2002) (same); R.I. GEN. LAWS § 11-60-4(a) (2000) (same); S.D. CODIFIED LAWS § 22-16-37.1 (Michie 1998) (same); TENN. CODE ANN. § 39-13-216(b)(2) (1997). Other states permit patients to sign instructions or waivers authorizing pain treatment even where it may hasten death. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, §§ 5-804, 5-809 (West 1998 & Supp. 2001); N.M. STAT. ANN. §§ 24-7A-4, 24-7A-9 (Michie 2000); S.C. CODE ANN. § 62-5-504 (Law. Co-op. Supp. 2001); VA. CODE ANN. §§ 54.1-2984, 54.1-2988 (Michie 2002).

195. *See* U.S. CONST. amend. VIII.

196. *See* State v. Hanson, 468 N.W.2d 77, 79 (Minn. Ct. App. 1991) (preventing the defendant from using marijuana to obtain relief from his epilepsy seizures because in the opinion of the court the medical necessity defense ran counter to legislative intent); *see also* State v. Tate, 505 A.2d 941, 946-47 (N.J. 1986) (preventing the defendant's use of marijuana to ease severe spasms associated with quadriplegia).

197. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

courts since the beginning of our system of jurisprudence.[198]

In some instances, equity demands that a human being who is suffering, vulnerable, or in need be allowed to use marijuana to relieve his or her pain or discomfort, if such an allowance is the only legal remedy and thus the only way to prevent both the "inadequacy of legal remedies" and "irreparable injury."[199] This assertion rests on the very purpose of the doctrine of equitable jurisdiction—to alleviate the inadequacy of existing legal remedies[200]—and that courts of equity exercise their discretion on the basis of the facts of each case.[201] A society that calls for the existence of courts of equity can hardly refuse equity's application in instances where people are in pain. It is difficult to envision circumstances more demanding of, or appropriate for, an equitable remedy than the allowance of pain control where, absent such allowance, the application of the strict letter of the law results in preventable human suffering.

Allowance of the medical necessity defense in cases where the medical use of marijuana results in violation of the CSA thus prevents, in certain instances, the irreparable harm and suffering that results from the application of the strict letter of the CSA. Moreover, it does so without the judicial need to overrule the CSA in its entirety. Furthermore, a court sitting in equity is best suited to weigh and balance the factors it deems proper in its consideration of an equitable remedy.[202] The court should consider the benefits and detriments to the individual of marijuana use by a seriously ill person as well as the benefits and detriments to the public at large of that person's use.[203] Whether or not the court should exercise its

198. *Id.*

199. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

200. *Id.* (quoting *Hecht*, 321 U.S. at 329).

201. *See Hecht*, 321 U.S. at 329.

202. Yakus v. United States, 321 U.S. 414, 440 (1944).

203. *Id.* New figures released by the Bureau of Justice Statistics for 2001 show an on-going rate of growth for state and federal prisoners. However, in contrast to the relatively stable growth of state prison populations of 0.3%, the federal prison count is rising at an alarming rate of 8%. This primarily reflects the continuing general impact of federal drug policies, and marijuana policies in particular, reflected in the fact that drug offenders constitute 57% of federal prisoners. As a specific illustration of the impact of marijuana users upon the total incarceration count, in the year 2000, of the 1,579,566 total drug-related arrests, 46.5%, or 734,497, were for marijuana violations alone. Of these, 646,042, or 88%, were for simple possession, the category including medical marijuana users. THE SENTENCING PROJECT, NEW PRISON POPULATION FIGURES: CRISIS AND OPPORTUNITY (2002), *available at* www.sentencingproject.org/news/bjsreport-july2002.pdf.

To contrast the societal effects of these numbers with other western or populous

equitable discretion and allow the individual to use marijuana, even in violation of the law, should then be decided on the basis of the weight of the interests of the seriously ill person versus those of society in general, as equitably balanced by the court.[204] In such instances, courts of equity would consider this analysis on a case-by-case basis.[205] Whether the court finds that an equitable exception to the violation of drug laws in such cases is warranted, judicial tradition supports the application of equitable remedies when the potential exists for irreparable harm to an individual or adverse consequences to the public.

2. Equitable Discretion and CSA Language: Imputed Knowledge and Statutory Ambiguity

Given the American legal system's long tradition of equitable discretion, when Congress enacts laws, it presumably does so with an understanding of the principles of equitable jurisdiction, "a practice of which Congress is assuredly well aware."[206] Therefore, Congress must be imputed with the knowledge that, absent clear language to the contrary, equitable principles should, and will, apply to the interpretation of a statute such as the CSA. Accordingly, given the absence in the CSA of clear language to the contrary, Congress cannot be said to have intended to bar the use of the medical necessity defense in a case where the defendant is a seriously ill person charged with marijuana use or possession in violation of the CSA.

Furthermore, the ambiguous statutory language of the CSA,

---

nations, a 1999 Justice Policy Institute study found that in the United States, 52.7% of state prison inmates, 73.7% of jail inmates, and 87.6% of federal inmates were jailed for non-violent offenses (including drug-related offenses). John Irwin, Ph.D., Vincent Shiraldi & Jason Ziedenberg, *America's One Million Nonviolent Prisoners* (Just. Pol'y Inst., D.C.) Mar. 1999, *available at* http://www.cjcj.org/pubs/one_million/onemillion.html. The non-violent prisoner population of the United States is three times the combined violent and non-violent prisoner population of the entire European Union (possessing a combined general population of 370 million, compared to the U.S. population of 274 million). *Id.* The study also found that the number of non-violent prisoners in the U.S. is five times the number of people held in India's entire prison system, even though India has a population four times that of the U.S. *Id.*

As a further illustration of the negative effects upon the public at large, the report found that the costs involved with the incarceration of non-violent offenders in 1998 ($24 billion) exceeded the entire federal welfare budget ($16.6 billion), which provides support for some 8.5 million Americans, and that the U.S. spends more in building prisons ($2.6 billion) than universities ($2.5 billion). *Id.*

204. *Yakus*, 321 U.S. at 440.

205. *Id.*

206. *Weinberger*, 456 U.S. at 313.

made apparent in *OCBC* through the obvious interpretive disagreement among the Justices,[207] should be sufficient to invoke the full effect of the Court's equitable discretion in the determination of a remedy that avoids irreparable harm to the defendant. The Supreme Court has held that "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."[208] The Court, in *Weinberger v. Romero-Barcelo*, emphasized this point when it stated:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the *full* scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'[209]

In *OCBC*, the disagreement among the Justices regarding whether the CSA allows the common law defense of necessity illustrates the inherent ambiguity and doubtful construction of the CSA and its lack of clear language. While four Justices construed CSA language to bar the use of the necessity defense, three others interpreted the CSA text to potentially allow for it. This statutory ambiguity demonstrates an absence of "clear and valid legislative command" and should provide sufficient grounds for the judicial exercise of equitable discretion in order for courts to allow the defense of medical necessity in cases where a user of medical marijuana violates the CSA.

C. *One of the Happy Incidents of the Federal System: Why Use and Possession Should Be Distinguished from Distribution and Manufacture of Medical Marijuana*

The essence of the doctrine of federalism is embodied in the popular modern movement in the United States toward the legalization of marijuana as a medicine.[210] Nine states, with more than

---

207. *See supra* Part II.B.; United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001).

208. *Weinberger*, 456 U.S. at 313 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

209. *Id.* (emphasis added) (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836)).

210. *See* Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 801-807 (1997) (stating that the ballot initiative (1) serves to keep government closer to the people it is meant to serve; (2) allows for diversity and experimentation among the states, in accordance with Justice Brandeis' vision of laboratories of experimentation; and (3) keep government more competent and effective by allowing the states to govern the daily lives of its citizens).

20% of the nation's population, have passed ballot initiatives which legalize the medical use of marijuana and are, as a result, in conflict with federal law prohibiting the use or possession of marijuana for *any* purpose.[211] "Between 1978 and 1996, legislatures in 34 states and the District of Columbia passed laws recognizing marijuana's therapeutic value.[212] Twenty-three of these laws remain in effect today."[213] If the courts do not distinguish the use and possession from the manufacture and distribution of medical marijuana under the CSA, these states will face the same obstacles as California faced when it implemented Prop 215.

Two recent Supreme Court decisions, *United States v. Lopez*[214] and *United States v. Morrison*,[215] illustrate the Court's continued commitment to the principles embodied in the doctrine of federalism.[216] In *Lopez*, Chief Justice Rehnquist began the majority opin-

---

211. Arizona and California voters approved medical marijuana laws in 1996. *See* NORML, MEDICAL USE: FREQUENTLY ASKED QUESTIONS, *at* http//www.norml.org/index.cfm?Group_ID=3387 (last updated Dec. 16, 2002). Voters in Alaska, Oregon, and Washington approved similar laws in 1998. *Id.* District of Columbia voters approved a similar initiative in 1998 by a 69% margin, but Congress invalidated the law. *Id.* Voters in Maine approved a medical marijuana law in 1999. *Id.* In Hawaii, the Senate approved a bill that protects seriously ill patients who use marijuana medically from local and state prosecution. It was signed into law on June 14, 2000, by Governor Cayetano. *Id.* In 2000, Nevada and Colorado citizens passed similar medical marijuana initiatives. *See* NORML, MEDICAL MARIJUANA INITIATIVES PASS IN COLORADO AND NEVADA; CALIFORNIANS PASS INITIATIVE TO KEEP NON-VIOLENT DRUG OFFENDERS OUT OF JAIL, *at* http//www.norml.org/news/archives/00-11-09.sctml. Also worthy of note is the fact that no state has rejected an initiative that solely addressed medical marijuana.

212. *See* NORML, STATEMENT ON THE MEDICAL USE OF MARIJUANA: SCIENCE SUPPORTS AMENDING FEDERAL LAW, *at* http//www.norml.org/medical/index.html. These states are Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Iowa, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Vermont, Washington, Wisconsin, and West Virginia. *Id.*

213. *Id.* These states are Alabama, Connecticut, District of Columbia, Georgia, Iowa, Illinois, Louisiana, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

214. 514 U.S. 549 (1995).

215. 529 U.S. 598 (2000).

216. In both cases, the Supreme Court refused to accept, as a basis for the exercise of commerce powers, the effects upon the national economy of either gun possession near schools or violence against women. In *Lopez*, a federal grand jury indicted Alfonso Lopez, a twelfth-grade student who brought a gun to school, under the Gun-Free School Zones Act of 1990 ("GFSZA"), Pub. L No. 101-647, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921, 922, 924). The GFSZA made it a federal crime for "any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone." 18 U.S.C. § 922(q)(2)(A) (2000). In a 5-4 decision, the Supreme Court held that the GFSZA was unconstitutional because it "neither regulates a com-

ion with a foreword on federalism principles. He stated that "[w]e start with first principles," and quoting James Madison, reminded us that "[t]he powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[217] Justice Rehnquist also stressed that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[218] In the same spirit, Justices Kennedy and O'Connor emphasized in their concurrence that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[219] Similarly, in *Morrison*, the Court rejected the "argument that Congress may regulate noneconomic, violent criminal conduct solely based on that conduct's aggregate effect on interstate commerce."[220] The majority emphasized that "[t]he Constitution requires a distinction between what is truly national and what is truly local."[221]

CSA prohibitions that interfere with California's medical marijuana laws should be viewed as being inconsistent with fundamental principles of federalism.[222] First, the CSA regulates in traditional

---

mercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551. The Court stated that, were it to accept the government's argument and aggregate non-economic conduct to arrive at interstate commercial activity, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564.

In *Morrison*, a female student brought suit under § 13981 of the Violence Against Women Act of 1994, 42 U.S.C. §§ 13981-14040 (1996), against two male students. The Supreme Court invalidated § 13981, *Morrison*, 529 U.S. at 602, enacted to compensate for the inadequacy of state court remedies afforded to victims of gender motivated violence, *id.* at 620. The Court applied the reasoning in *Lopez*, stating that federalism principles underlined the *Lopez* majority's analysis and that to allow the expansion of congressional reach would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.

217. *See Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

218. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

219. *Lopez*, 514 U.S. at 577.

220. *Morrison*, 529 U.S. at 617-18.

221. *Id.*

222. *See* Conant v. Walters, 2002 WL 31415494, at *8 (9th Cir. Apr. 8, 2002) ("Our decision is consistent with principles of federalism that have left the states as the primary regulators of professional conduct.") While *Conant* was decided primarily on First Amendment grounds, the Ninth Circuit also relied on the limiting principles of federalism doctrine, and cited *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("recogniz-

areas of state concern. Second, its prohibitions undermine one of the essential advantages of the federalist structure of the U.S. government—that individual states act as laboratories of social experimentation where they can legislate in the manner that best suits their citizens and their circumstances. Thus, courts should allow the defense of necessity in cases that involve the use or possession of medical marijuana because such allowance permits the enforcement of the CSA in a manner consistent with these principles of federalism.

1. Interference with Powers Reserved to the States

While federalism principles have played a major role in American government for over two centuries, serving to limit the incursion by the federal government upon state affairs, critics assert that these limitations have grown weaker over the years and the incursions have increased dangerously.[223] As a consequence of this continuing federal intrusion, some areas of traditional state control have become subject to federal control. The CSA is just one example. Whereas states have traditionally had, under their general police powers, the right to regulate and control public health, safety, welfare, and morals,[224] the CSA intrudes upon the states' control of these areas.[225] The use of marijuana generally implicates all four police powers since the consequences or implications of marijuana use affect health, safety, crime, and morals. More particularly, however, the use of marijuana for medical purposes conspicuously implicates public health and welfare directly,[226] and the drug's criminalization strongly implicates crime control, also a tradition-

---

ing states broad police powers to regulate the administration of drugs by health professionals"), and *Linder v. United States*, 268 U.S. 5, 18 (1925) (holding that "direct control of medical practice in the states is beyond the power of the federal government"), as additional support for its holding that California doctors are allowed to recommend medical marijuana under the authority of Prop 215.

223. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) ("[A]ll that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.").

224. *See* Berman v. Parker, 348 U.S. 26, 32 (1954).

225. *See* U.S. v. Oakland Cannabis Buyers' Coop, 532 U.S. 483, 487 (2001) (stating that the federal government was seeking to "enjoin the Cooperative from distributing and manufacturing marijuana . . . whether or not the Cooperative's activities are legal under California law, they violate federal law . . . specifically . . . the [CSA]").

226. California's Proposition 215, the Compassionate Use Act of 1996, is codified in CAL. *Health & Safety* Code § 11362.5 (West 1996) (emphasis added to the title of the code).

ally recognized function of the states under their police powers.[227]

Moreover, whereas in *Lopez* and *Morrison* Congress attempted to enact, and the federal government to enforce, a federal law that was intended to exist alongside state law,[228] the issue of the co-existence of federal and state laws is significantly different when it comes to medical marijuana. Through its enforcement of the CSA, the federal government intends to preclude the states from exercising their will altogether where there is a clash between state laws which authorize the medical use of marijuana and the CSA which prohibits such use.[229] Federalism principles demand that powers not conferred on the federal government belong to the states.[230]

On the basis of this allocation of powers, CSA provisions that interfere with California's medical marijuana laws should be considered inconsistent with federalism principles because California is exercising its police powers in an area traditionally of state concern.[231] The conflict with federalism principles is illustrated by the fact that, although California has expressly authorized the use of medical marijuana in certain circumstances, the implementation of such laws is barred under the CSA. Therefore, the CSA's interference with California law is at odds with the Supreme Court's long-established recognition that states retain their police powers as part of the division of powers which form part of the federalism doctrine.[232]

---

227. *See* United States v. Lopez, 514 U.S. 549, 552 (1995) (describing the constitutional framework of our government divided among the national government and the states).

228. In *Morrison*, the provision of a federal civil remedy for victims of gender-motivated violence did not interfere with similar state provisions, providing additional protection beyond that provided by state statutes. United States v. Morrison, 529 U.S. 598, 601-02 (2000).

229. *C.f.* Berman v. Parker, 348 U.S. 26, 32 (1954).

230. U.S. CONST. art. I, § 8 (specifying the powers of the federal government); *see also* U.S. CONST. amend. X (reserving for the states those powers not delegated by the Constitution to the federal government).

231. Judge Alex Kozinski of the 9th Circuit Court of Appeals, one of three judges assigned to rule on the government's appeal to crack down on doctors who recommend marijuana for medical use, stated, "Why in this world does an administration that's committed to federalism want to go to this length to put doctors in jail for doing things that are perfectly legal under state law?" Claire Cooper, *Effort to Muzzle Pro-pot Doctors Argued in Court*, SACRAMENTO BEE, Apr. 9, 2002, *available at* www.freedomtoexhale.com/sab.htm.

232. *See* Anna Johnson Cramer, *The Right Results for All the Wrong Reasons: A Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 288 (2000). According to the Executive Director of NORML, Keith Stroup, the problematic nature of this interference, and Congress' manifested concern in that regard, is well

The Supreme Court unanimously held in *OCBC* that the federal government has the power to regulate the distribution and manufacture of marijuana and that the medical necessity defense is not available because Congress had not authorized it in the CSA.[233] However, the Court has strong legal grounds on which to distinguish *OCBC* from a case involving charges of use or possession of marijuana brought against a seriously ill individual using the drug for medical purposes. In contrast to the manufacture and distribution of the drug, control over the use or possession of marijuana for medical purposes is tied to governmental functions—the regulation of health and safety—that the Court has traditionally recognized as within the purview of states' police powers.[234]

Moreover, the Court should distinguish distribution and manufacture from use and possession of medical marijuana in cases related to CSA prohibitions against the use of marijuana and, more specifically, the defense of medical necessity in such cases, on the basis of a principle articulated by Justice Brandeis in 1932: the important role of laboratories for novel social experiments in the furtherance of our democracy.[235]

2. Laboratories of Social Experimentation

In creating a form of government in which the powers of the federal government were limited and non-enumerated powers were reserved to the states, the founding fathers recognized that all fifty

---

illustrated by the fact that on July 23, 2001, a mere two months after the Supreme Court ruling in *OCBC*, the States' Rights to Medical Marijuana Act was introduced into the United States Congress "to amend federal law so that states that wish to permit the legal use of marijuana as a medicine for seriously ill patients may do so, without interference from the federal government." Press Release, NORML, Congressional Alert on Medial Marijuana, *at* www.norml.org/index.cfm?Group_ID=5347 (last updated Dec. 9, 2002). The Act, originally introduced in July 2001, was referred to the Health Subcommittee of the Energy and Commerce Committee. H.R. 2592, 107th Cong. (1st Sess. 2001). However, "[d]espite bipartisan co-sponsorship from 36 members of Congress, the committee failed to schedule a hearing or vote on H.R. 2592, effectively cutting off all Congressional debate on the proposal." *Id.* On July 24, 2002, Representatives Barney Frank (D-Ma.), Ron Paul (R-Tex.), Dana Rohrabacher (R-Cal.), and Janice Schakowsky (D-Ill.) joined former Ronald Reagan presidential aide Lyn Nofziger and seriously ill patients in a Capitol Hill press conference calling on Congress to act on the Bill. *Id.*

233. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 493-94 (2001).

234. *Id.*; *see also supra* text accompanying notes 224-27 (discussing the line between state sovereignty and Congress).

235. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

states need not enact the same laws, but that each could develop its own laws consistent with its particular circumstances.[236] The issue of the use of marijuana for medical purposes affects different states in different ways and to different extents. For example, whereas in California about fourteen persons per 100,000 suffer from AIDS, in Wyoming, only two person per 100,000 does.[237] Given these differences, it makes sense that the approach taken to combat the disease collectively, as well as to combat the symptoms individually, might be different in the two states.

Justice Brandeis identified the existence of differences among states and their populations, and found a well-suited, built-in mechanism in the American form of government to address this diversity.[238] He stated, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[239]

The notion of the states as "laboratories" has at least two aspects.[240] First, after thorough testing in a variety of contexts, a national solution will emerge that is suitable for implementation in every state.[241] Second, based on American notions of pluralism[242] and relativism,[243] and given the wide variations in conditions and preferences in a country as diverse as ours, different solutions may be best for different states.[244]

---

236. *See* RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 3 (1987) (defining federalism as a division of power between the federal government and state governments). *See also infra* notes 238-39; *New State Ice*, 285 U.S. at 280-311 (Brandeis, J., dissenting).

237. Centers for Disease Control, Division of HIV/AIDS Prevention, SURVEY REPORT VOL. 13, NO. 2 table 2, *available at* http://www.cdc.gov/hiv/stats/hasr1302/table2.htm.

238. *See New State Ice*, 285 U.S. at 310-11.

239. *Id.* at 311.

240. *See* DAVID SHAPIRO, FEDERALISM: A DIALOGUE 85 (1995).

241. *Id.*

242. Pluralism is defined as "a view that theories of what is right and good are relative in that ethical truths depend upon the individuals and groups holding them. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1916 (3d ed. 1976).

243. Relativism is defined as "a metaphysical theory that there are more than one. . . kind[ ] of ultimate reality" or "a state or condition of society in which members of diverse ethnic, racial, religious or social groups maintain an autonomous participation in . . . their traditional culture or special interest within the confines of a common civilization." *Id.* at 1745.

244. SHAPIRO, *supra* note 240.

a. Adherence to the Laboratories Design

When Congress exerts its power over the states and deliberately overturns the will of a state or its people, it should only do so in a manner acceptable in the light of our "laboratories" design. The legalization of marijuana for medical purposes in the United States is becoming an increasingly popular idea, and greater numbers of people support the concept every day.[245] As Justice Stevens reminded the majority in *OCBC*, "[R]espect [for the sovereign states] imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law . . . ."[246]

When the federal government refuses to acknowledge actions of the people in a state and of a state itself, fundamental concepts of federalism are undermined.[247] Federalism principles require the division of government powers through their apportionment between the federal and state governments.[248] The very purpose of our dual system of government is to restrain either government from intruding upon the protected freedoms of the people.[249] One of the goals of federalism is to accomplish this task through the particular allocation of responsibilities and powers to the state governments and, separately, to the federal government.[250] When one government pushes out beyond its prescribed boundaries, it invades the allotted territory of the other and, by so doing, erodes the barriers to abu-

---

245. NORML, FAVORABLE MEDICAL MARIJUANA POLLS 1995-2000, *at* http://www.norml.org/index.cfm?Group_ID=4457 (last updated Dec. 16, 2002). Gallop Poll, March 1999 (73% of respondents support "making marijuana legally available to doctors to prescribe"); CNN Interactive Poll, April 1999 (96% of respondents said they "support the use of marijuana for medicinal purposes"); Journal of American Medicine Association Poll, conducted by Harvard School of Public Health, March 1998 (60% of respondents "supported allowing physicians to prescribe medical marijuana"); ABC News/Discovery News Poll, May 1997 (69% of respondents favored "legalizing [the] medical use of marijuana"). *Id.*

246. *OCBC*, 532 U.S. at 502.

247. *See New State Ice*, 285 U.S. at 311 ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.")

248. United States v. Lopez, 519 U.S. 549, 552 (1995).

249. *See generally* BERGER, *supra* note 236, at 131; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.") (Kennedy, J., concurring).

250. *See OCBC*, 532 U.S. at 502 (Stevens, J., concurring); *Lopez*, 514 U.S. at 532; *see also* United States v. Morrison, 529 U.S. 598, 615, 617 (2000) (articulating that Congress must exercise its power so as to preserve the distinction between national and local authority, a distinction that was designed "so that the people's rights would be secured by the division of power").

sive government—precisely the consequence that the founders of our nation intended to avoid, or at least minimize.[251]

To the extent that the people of the individual states are making their wishes known through their actions at the ballot box, the federal government has a responsibility to comply with those wishes or, at the very least, minimize the potential conflict between the wishes of the people and its own actions.[252] "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. This is as true today as it was when the Constitution was adopted."[253]

As democratic as local representative governments are, as compared to federal government, referendums and initiatives are even more democratic. Such popular ballot measures allow citizens to raise and vote on issues important to them that, in many instances, lack sufficient political support, or are too controversial, to be addressed by legislatures.[254] Prop 215 and the many other initiatives and referendums dealing with medical marijuana[255] represent this type of lawmaking. These medical marijuana initiatives would not have been enacted absent the direct promotion and participation by the populace.

In some instances, the voice of the people has directly contradicted the voice of the legislature. For example, in 1996, the citizens of Arizona passed Proposition 200[256] only to have the Arizona

---

251. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

252. *See OCBC*, 532 U.S. at 500-02 (2001) (Stevens, J., dissenting).

253. *Garcia*, 469 U.S. at 575 n.18 (Powell, J., dissenting) (citations omitted).

254. *See* Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL'Y REV. 149, 168 (1996) ("[T]he initiative system allows issues to be considered by the populace and not by elected officials with their own, particular self-interests . . . . [I]nitiative lawmaking empowers a type of constituency that is represented very differently in a more republican form of government.").

255. Since 1996, initiatives allowing for the medical use of marijuana have been placed on ballots in Alaska, Arizona, California, Colorado, Nevada, Oregon, Washington, and the District of Columbia. *See Election '98: The Vote For Medical Marijuana And Drug Policy Reform* (Drug Pol'y Found., D.C. 1998), at 5, *available at* http://www.drcnet.org/election98/elections98.html (offering an in-depth description of 1998 ballot initiatives).

256. Proposition 200, Drug Medicalization, Prevention, and Control Act of 1996, ARIZ. REV. STAT. § 13-3412.01 (2001) was approved by Arizona voters on November 5, 1996. Proposition 200 amended title 13, chapter 9 of the Arizona Revised Statutes by adding § 13-901.01, which allows "any person who is convicted of the personal possession or use of" marijuana to be eligible for probation. § 13-901.01(A).

legislature essentially invalidate the initiative through amendments.[257] However, the people, two years later in 1998, placed on the ballot and passed the same proposition, this time, with an additional provision barring the legislature from invalidating it again.[258] Proposition 200 illustrates how the popular political participation mechanisms of referendums and initiatives serve to constrain the ever-present threat of abusive, unresponsive, or unrepresentative government. Thus, as the Arizona legislature had to abide by the clear mandate from its citizens, so should the federal government: where the citizens of a state have expressed their position on an issue that falls within the purview of state powers, as Californians did on the use of medical marijuana, the federal government should respect the wishes of that state.

b. Sustaining the American Form of Government

The idea that ours is a government of the people and for the people exists hand in hand with basic concepts of democracy: elected officials represent the wishes and needs of the people.[259] As a result of this fundamental principle embedded in the American tradition, American people deeply value their right to political participation in the election of their government representatives.

In this context, American democracy is like a tree whose roots are the principles of federalism, constantly watered by the electoral involvement of the people: a tree that, like any other, would wither absent watering. When the people feel disenfranchised (whether they are or not is irrelevant), they lose faith in the idea that their representatives and their government exist by the people and to do the peoples' work.[260] When this occurs, the populace withdraws from the political process.

The people may withdraw as a consequence of their distrust in a government seemingly pursuing its own agendas or driven by ulterior motives; or they may withdraw as a result of their disgust with specific policies or perhaps to demonstrate their disapproval of

---

257. *See* Tanyanika Samuels, *The Pot Prescription*, NEWSDAY, Oct. 14, 1997, at C8.

258. *See* Martin Van Der Werf, *Hull Wins, Dems Hold On; Medical Marijuana Again Has Voter Support*, ARIZ. REPUBLIC, Nov. 4, 1998, at A1.

259. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

260. *See* SHAPIRO, *supra* note 240, at 111 (stating that "[t]he political integrity of a republican form of government . . . center[s] on the accountability of elected representatives to their electorate").

what they view as unfair or corrupt government conduct.[261] Whatever the cause may be, the final result is the same: the populace retreats from political involvement, the government becomes increasingly less "of the people and for the people," and democracy and freedom gradually wither away.[262]

As this erosion progresses, elected officials become increasingly detached from their constituencies, and their accountability to their constituencies diminishes. This process fosters an environment where corruption and special interests preside over transparency and legitimacy.[263] This road can quickly lead to a breakdown in the fabric of our free society.[264]

Perhaps, given enough time, this represents the inescapable evolution of the American system of government. However, as Justice Brandeis pointed out, our system of federalism derives a great benefit from "one of its happy incidents": the built-in mechanism of our laboratories of experimentation, through which the people may try "novel social and economic experiments."[265] The flexibility and versatility embodied in the laboratories concept, which exists as an intrinsic part of our dual system of government, is easy to underestimate. This vast potential for experimentation in numerous aspects of American society,[266] within the bounds of the Constitution, pro-

---

261. In 2000, approximately 51% of eligible voters voted in the presidential election. In 1996, a mere 49% cast their votes, the lowest turn out in over 70 years. In the 1998 congressional election, only 36.4% of the electorate cast its vote, down from 38.8 in 1994. CENTER FOR VOTING & DEMOCRACY, VOTER TURNOUT, *available at* www.fairvote.org/turnout/ (last modified Nov. 22, 2002).

262. United States v. Lopez, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.")

263. *See supra* notes 252, 259 and accompanying text.

264. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 386 (1932) (Brandeis, J., dissenting).

265. *Id.* at 311 (Brandeis, J., dissenting).

266. There have been thousands of initiatives, referendums, and recalls in various States pertaining to numerous issues since the initiative process was first adopted in 1898. BALLOT WATCH, THE HOT ISSUES (1999), *at* www.ballotwatch.org/hotissues.htm. For example, in 1998 there were 235 statewide ballot questions on general election ballots in 44 states. Of these, 55 were initiatives, 6 popular referendums, and 174 legislative referendums. *Id.* Of the 235 ballot questions, 160 were constitutional amendments, 51 were statutes, 15 were bond issues, 6 were popular referendums, two were non-binding advisory votes, and one was a constitutional convention question. *Id.* In total, the voters approved 177 of the 235 statewide ballot questions, a passage rate of 75%. *Id.*

As examples of the varied issues raised in ballot measures, Maine voters rejected a partial birth abortion initiative (44%-56%), but approved a medical marijuana initiative

vides a means to overcome the aforementioned erosion of our free society and avoids the resulting "serious consequences to the Nation."[267]

From time to time, human tendencies or political forces may lead the government down flawed paths, fueled by unforeseen or sudden incidents or discoveries, and steered by zealot "patriots" awaiting the proper environment in which to flourish. However, armed with our fifty laboratories of societal experimentation, our system is primed to provide limitless options to limitless predicaments through innovative approaches to small and large problems alike.[268] The extent to which an innovative approach would then propagate throughout our union, from state to state, and the value that Americans as a people eventually place on it, would be determined solely by the approach's effectiveness as a solution to the problem at hand.[269] In this sense, it is not surprising that Justice Brandeis called this feature of our federalist system of government a "happy incident." It is arguably one of its most important qualities.[270]

Accordingly, when Congress exerts its power over the states and deliberately overturns the will of a state or its people, its actions should be acceptable and supportable only in light of our "laboratories" design. The courts should carefully scrutinize such congressional action to prevent the erosion of the separation of powers secured by federalism principles. The legitimacy of the medical use of marijuana should fall within the purview of these laboratories of social experimentation, given the health, safety, and welfare aspects of the issue and the traditional inclusion of these interests within areas of state responsibility.

The right to a defense of medical necessity should also fall within the purview of traditional areas of state responsibility because it represents the type of "novel social experiment" that Jus-

---

(61%-39%); Mississippi voters rejected a state legislator term limits initiative (45%-55%); Alabama voters rejected a legislative referendum to start a state lottery (46%-54%); Washington state voters approved an initiative to revamp the car registration fee method (57%-43%); and Washington voters rejected an initiative to ban commercial net fishing (40%-60%). *Id.*

267. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

268. *Id.*

269. Presently, more than 51 million Americans, or approximately 19% of the U.S. population, live in the eight states where medical marijuana users are protected by state law. NORML, MEDICAL USE: FREQUENTLY ASKED QUESTIONS, *at* http//www.norml.org/index.cfm?Group_ID=3387 (last updated Dec. 16, 2002).

270. See *New State Ice*, 285 U.S. at 311.

tice Brandeis considered so worthy of promotion and protection. Interference by the federal government with persons attempting to use marijuana for medical purposes in states that have decriminalized such action constitutes nothing less than interference with our laboratories of experimentation.

Medical marijuana, and the use of the medical necessity defense in its context, are just two experiments among many going on today in our "laboratories of societal experimentation." However, every instance where the federal government inhibits the states' inherent tendency to serve as laboratories undermines this important tool and diminishes its effectiveness as a control to the erosion of our republic. The CSA should not interfere with the use of a defense of medical necessity by a seriously ill person who uses marijuana for medical purposes under Prop 215. In the long run, this type of federal interference with state law fosters the destruction of our free and democratic society.

CONCLUSION

The doctrines of equity and choice of evils, as well as the fundamental principle of federalism, command the allowance of the medical necessity defense in cases of use and possession of medical marijuana. On the basis of these principles, a distinction exists between the enforcement of the CSA where the distribution and manufacturing of marijuana is at issue and its enforcement where the use or possession of marijuana for medical purposes is at issue.

The Supreme Court, in its majority and concurring opinions in *OCBC*, identified issues that are relevant regarding that distinction. Sooner or later, the Supreme Court will likely address the question of the use or possession of marijuana in violation of the CSA by a seriously ill patient for whom marijuana is a necessity. When it does, the Court should allow the use of the medical necessity defense because such allowance is required by the doctrines of equitable jurisdiction, choice of evils, federalism, and an individual's right to pain relief. Additionally, such allowance is required by the Court's prior case law relating to these doctrines; and because such allowance is not inconsistent with the Court's holding in *OCBC*.

Miklos Pongratz