Chapter 4: The Regulation of Marijuana Users in Legalization Regimes

From

Marijuana Law, Policy, and Authority

By

Robert A. Mikos

Professor of Law
Vanderbilt University Law School

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Prefatory note by author: This is Chapter 4 from my textbook, MARIJUANA LAW, POLICY, AND AUTHORITY (2017). The Chapter examines in detail the regulations that apply to marijuana users in states that have legalized the drug for medical or recreational purposes. If you have any feedback or if you are interested in teaching about any aspect of marijuana law and policy, I would be happy to hear from you, robert<dot>mikos<at>vanderbilt<dot>edu. .

The book can be ordered from the publisher and from Amazon.com, among other vendors.

The companion website for the book, which provides updates and additional content, can be found at https://my.vanderbilt.edu/marijuanalaw/.

CHAPTER 4

The Regulation of Marijuana Users in Legalization Regimes

Beginning with the passage of Proposition 215 (the Compassionate Use Act) in California in 1996, a growing number of states have eschewed the strict prohibitions discussed in Chapter 3, opting instead to allow at least some people to possess and use marijuana.[1]

The first reforms were all limited to the medical use of marijuana. For example, California's Proposition 215 provides that the state's laws banning the simple possession and cultivation of marijuana (since repealed by Proposition 64) "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes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(d). In the ensuing decades, more than half of the states have adopted similar measures. Even more traditionally conservative states have adopted reforms, albeit more limited in scope. For example, Alabama's Carly's law, passed in 2014, provides "an affirmative and complete defense" to a prosecution for simple possession of marijuana for defendants who have "a debilitating epileptic condition" and who have "used or possessed cannabidiol (CBD) pursuant to a prescription authorized by the [University of Alabama, Birmingham]. . . ." Ala. Code § 13A-12-214.2.

But more recently, several states have expanded their reforms to legalize recreational marijuana as well. In 2012, for example, Colorado voters passed Amendment 64, which provides, in relevant part:

> (3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:
>
> (a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

Colo. Const. art. XVIII, § 16(3). (**Figure 1.1** in Chapter 1 displays the number of states that pursued each of these reforms from 1996 to 2016.)

1. Some states also allow users to grow marijuana for their own consumption. The rules governing personal cultivation are covered in Chapter 8.

This chapter begins our discussion of these proliferating reforms. It focuses on three key substantive questions the reforms seek to answer regarding marijuana users: (A) who is allowed to possess and use marijuana; (B) what limitations are placed on their use; and (C) what legal protections they enjoy. (Later chapters discuss the reforms governing marijuana suppliers and third parties, such as physicians.) The sections below address these questions and explore the differences both across and within the broad types of reform outlined above (i.e., medical marijuana states, recreational marijuana states, and CBD states).

A. WHO IS ALLOWED TO POSSESS AND USE MARIJUANA?

This section discusses the criteria that states commonly employ to limit eligibility to use and possess marijuana. Because medical, CBD, and recreational states use different criteria, this section discusses each group of states separately.

1. Medical Marijuana Regimes

Medical marijuana states impose a similar set of requirements on individuals who wish to possess and use marijuana. To become a qualified patient, an individual normally must:

(1) obtain a diagnosis with a qualifying condition (all states); and
(2) obtain a physician's recommendation to use marijuana (all states); and
(3) register with a state agency (most states)
(4) be a state resident (some states)

Under Washington law, for example, "Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of marijuana, notwithstanding any other provision of law." Wash. Rev. Code Ann. § 69.51A.005(a). The state's medical marijuana law defines "Qualifying patient" as a person who:

> (i) Is a patient of a health care professional
> (ii) Has been diagnosed by that health care professional as having a terminal or debilitating medical condition;
> (iii) Is a resident of the state of Washington at the time of such diagnosis;
> (iv) Has been advised by that health care professional about the risks and benefits of the medical use of marijuana
> (v) Has been advised by that health care professional that they may benefit from the medical use of marijuana
> (vi)(A) Has an authorization from his or her health care professional; or (B) Beginning July 1, 2016, has been entered into the medical marijuana authorization database and has been provided a recognition card; and
> (vii) Is otherwise in compliance with the terms and conditions established in this chapter.

Wash. Rev. Code Ann. § 69.51A.010(4). The following sections discuss each of the primary requirements in turn.

a. Qualifying Condition

Medical marijuana states limit access to those individuals who have been diagnosed with a condition that state policymakers believe would benefit from the use of marijuana. This book refers to such conditions as "qualifying conditions," although states employ sundry terms to the same effect (e.g., "debilitating medical condition").

Most medical marijuana states have created lists of specific qualifying conditions that are covered by their statutes. New Jersey's medical marijuana law provides an illustrative example. Under the statute, the state defines qualifying condition ("debilitating medical condition") as

> (1) one of the following conditions, if resistant to conventional medical therapy: seizure disorder, including epilepsy; intractable skeletal muscular spasticity; or glaucoma;
>
> (2) one of the following conditions, if severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome results from the condition or treatment thereof: positive status for human immunodeficiency virus; acquired immune deficiency syndrome; or cancer;
>
> (3) amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy, or inflammatory bowel disease, including Crohn's disease;
>
> (4) terminal illness, if the physician has determined a prognosis of less than 12 months of life; or
>
> (5) any other medical condition or its treatment that is approved by the department by regulation.

N.J. Stat. Ann. 24:6I-3. In states that enumerate qualifying conditions via statute or regulation, only patients who have been diagnosed with one of the specifically enumerated conditions may claim the protections afforded by the state's medical marijuana law. (Chapter 5 discusses in more detail the types of conditions that states have included in their medical marijuana laws and the procedures for adding new conditions to their lists.)

Washington v. Fry discusses the qualifying condition requirement in detail.

Washington v. Fry

228 P.3d 1 (Wash. 2010)

JOHNSON, J.:

Two police officers were informed of a marijuana growing operation at the residence of Jason and Tina Fry. When the officers approached the home, the smell of burning marijuana was apparent. Jason Fry did not consent to a search, and Tina Fry presented a document purporting to be authorization for medical marijuana. The officers obtained a telephonic search warrant, entered the Frys' home, and seized over two pounds of marijuana. . . .

[Jason Fry was charged with possession of marijuana. The judge denied his motion to suppress the marijuana as evidence and refused to allow Fry to present a medical marijuana defense at trial because Fry did not have a qualifying condition. Fry appealed both rulings. The court's opinion discussing the legality of the search is excerpted in Section C.1 below.]

The intent of the medical marijuana statute was that "[q]ualifying patients *with terminal or debilitating illnesses* who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana." Former RCW 69.51A.005 (emphasis added).

A "qualifying patient" is a person who:

(a) Is a patient of a physician licensed under chapter 18.71 or 18.57 RCW;
(b) Has been diagnosed by that physician as having a terminal or debilitating medical condition;
(c) Is a resident of the state of Washington at the time of such diagnosis;
(d) Has been advised by that physician about the risks and benefits of the medical use of marijuana; and
(e) Has been advised by that physician that they may benefit from the medical use of marijuana.

Former RCW 69.51A.010(3) (1999). The State argues Fry is not a qualifying patient under the Act because Fry has not been diagnosed as having a terminal or debilitating medical condition under former RCW 69.51A.010(3)(b). Fry's doctor listed "severe anxiety, rage, & depression related to childhood" as the debilitating medical condition qualifying Fry to use medical marijuana. . . . These conditions did not qualify under I-692 as enacted.

In 2007, after the search and seizure in this case, the legislature revised the medical marijuana statute to include additional terminal or debilitating medical conditions that would qualify under the Act. RCW 69.51A.010(4). Fry's conditions of severe anxiety and rage are not included in the list of qualifying conditions, even as amended. In 2004, the State of Washington Department of Health Medical Quality Assurance Commission issued a final order denying a petition to include depression and severe anxiety in the list of "terminal or debilitating medical conditions" under RCW 69.51A.010(4). Final Order on Pet., *In re Condrey*, No. 04-08-A-2002MD (Wash. Med. Quality Assurance Comm'n Nov. 19, 2004).

Fry did not actually have a terminal or debilitating medical condition as provided in the Act. The stated intent of the statute was to allow a qualifying patient with a terminal or debilitating illness to be found not guilty of marijuana possession under certain circumstances. Former RCW 69.51A.005. ("The people of Washington state find that . . . [q]ualifying patients with terminal or debilitating illnesses . . . shall not be found guilty. . . ."). Conversely, the intent was not to excuse a marijuana user without a terminal or debilitating illness from criminal liability. Former RCW 69.51A.005.

In the only case we have decided under the Act, an otherwise qualifying patient received authorization to use medical marijuana from a doctor in California. [*Washington v. Tracy*, 147 P.3d 559 (Wash. 2006).] This court interpreted the provision in the Act defining qualifying doctors as "those licensed under Washington law" to require a doctor formally licensed in Washington. . . . The majority opinion concluded that "[s]ince Tracy was not a patient of a qualifying doctor, she is not entitled to assert the defense." The court stated unequivocally that "[o]nly qualifying patients are entitled to the defense under the act." . . .

This court declined to extend the defense to Tracy, who was not in compliance with the statute because the doctor was not authorized to issue the medical marijuana authorization. Similarly, we will not extend the statute to permit an individual without a qualifying illness to claim its benefits.

In order to avail himself of the compassionate use defense, Fry must qualify under the Act. Fry does not have one of the listed debilitating conditions, and therefore does not qualify. We affirm the Court of Appeals decision to not permit Fry to claim the compassionate use defense. . . .

CHAMBERS, J., concurring:

As a compassionate gesture, the people of this state, by initiative, allowed patients afflicted with medical conditions that might be eased by marijuana to use it under limited circumstances. Generally, whether a patient has a medical condition that qualifies under the Washington State Medical Use of Marijuana Act (the act), ch. 69.51A RCW, is a question of fact, not law. I disagree with the lead opinion's holding that as a matter of law Jason Fry did not have a qualifying condition under the act simply because the words used by Fry's doctor in issuing the authorization may have been inartful. The lead opinion approves the trial court's pretrial application of the law to the facts, its weighing of the evidence, and its decision as a matter of law that the compassionate use of marijuana defense was unavailable to Fry. In my view, a defendant in Fry's position should have the opportunity to offer evidence that he in fact had a qualifying condition and that his doctor issued the medical marijuana authorization for that condition. . . .

Fry was smoking marijuana. Two Stevens County police officers smelled marijuana burning as they approached Fry's house. When questioned, Fry acknowledged the use of marijuana, and his wife, Tina, produced a form entitled "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State" issued by Fry's physician, Dr. Thomas Orvald. Clerk's Papers (CP) at 67, 20. The authorization stated that Dr. Orvald was treating Fry for "a terminal illness or debilitating condition as defined in RCW 6951A.010." CP at 20. On a separate page under a section marked "Documentation of debilitating medical condition from previous healthcare provider," Dr. Orvald wrote, "severe anxiety, rage, & depression related to childhood." Under the "subjective" section of his own notes detailing Fry's background Dr. Orvald wrote, "Severe anxiety!!! Can't function." CP at 22. The authorization also included notes from Dr. Orvald's physical examination of Fry where he noted a scar behind Fry's right ear and on his chin from being injured by a horse. These notes also reflect that Fry suffered from neck and lower back pain. In the comments section Dr. Orvald wrote: "Pt has found use of medical cannabis allows him to function [with] self control of anger, rage, & depression. Pt has been kicked in head 3 times by horse." . . .

There seems to be no question that Fry's physician was qualified, that he advised Fry of the risks and benefits of medical marijuana use, and that Fry was a resident of the state of Washington. Further, Fry possessed what would appear to be a valid authorization as defined by the statute. The issue before us is whether Fry could have had a qualified condition. The statute defines "Terminal or Debilitating Medical Condition" in the disjunctive. One permissible condition is intractable pain, meaning pain unrelieved by standard medical treatments and medications. Former RCW 69.51A.010(4)(b). It may be that Fry's doctor prescribed medical marijuana for chronic pain related to his head or neck injury. Or the authorization may have been to alleviate nausea, vomiting, or appetite loss caused by his severe anxiety and depression. In my opinion, whether Fry was suffering from any of these symptoms can only be determined after a factual inquiry. Without allowing Fry to present a defense, we cannot know whether a fact finder would conclude that Fry had symptoms that would qualify him under the terms defined under the statute. It is the role of the jury to apply the law to facts presented at a trial. . . .

Procedurally, the trial court struck Fry's medical use of marijuana defense upon the prosecutor's motion in limine, because anxiety was listed in the authorization and the court found as a matter of law that it was not a qualifying condition. Despite the signed authorization from Fry's physician that in his medical opinion "the potential benefits of the

medical use of marijuana would likely outweigh the health risks for this patient" and that Fry had "a terminal illness or debilitating condition as defined in RCW 69.51A.010," . . . the lead opinion nevertheless affirms the conclusion of the trial judge that Fry did not have a debilitating condition as a matter of law. In my view, Dr. Orvald's authorization was sufficient to satisfy the threshold showing required of Fry that he was a qualified person under the act. It was not the proper role of the trial judge to review the doctor's records and conclude as a matter of law that Fry did not have a qualifying condition. There is nothing in the act that requires the debilitating condition be listed or described in the authorization, and surely the voters did not intend that whether a person is guilty of a felony should turn on a physician's choice of words when filling out an authorization. . . . Whether Fry had a qualifying condition under the act was a question of fact, not law.

The lead opinion uses our decision in Tracy to bolster its holding that Fry was not entitled to raise a defense. However, in Tracy, the issue was much different. In Tracy, the doctor was not authorized to issue the medical marijuana authorization. . . . Our decision was controlled by the fact that a qualifying patient under the statute is one who has been diagnosed by a Washington-licensed physician and Tracy had been diagnosed only by a California physician not licensed in Washington. . . . Tracy presented a clear question of law, a question of statutory interpretation: could a physician not licensed in Washington satisfy the statutory condition of being diagnosed by a Washington licensed physician as required by former RCW 69.51A.010(3)(a)? We did not mean to imply that the issue of whether a person is a qualified person under the statute is always a question of law to be determined by the court.

When a defendant is charged with a violation of state law involving marijuana, he may assert that he intends to raise a medical marijuana defense under chapter 69.51A RCW. The State may make a motion to preclude the defendant from asserting the defense, arguing that the requirements of the statute have not been met. But in my view, if the defendant is able to present a written authorization from a Washington-licensed physician stating that the defendant has a qualifying condition, then he should be allowed to move forward with the defense. Whether a defendant can meet the burden of proving by a preponderance of the evidence that he in fact has a qualifying condition will of course depend on what is presented at trial to the trier of fact.

Although I conclude that the trial court erred by determining from the authorization alone that Fry did not have a qualifying condition and therefore was not a qualifying patient, I would affirm on alternative grounds. A trial judge has an additional role as a gatekeeper to ensure that there is sufficient evidence to permit any affirmative defense to proceed to trial. An opponent has the right to challenge any claimed defense. Here the prosecutor made a motion in limine to strike Fry's medical marijuana defense, arguing that Fry did not have a qualifying condition and that Fry had well more than a 60 day supply of marijuana. Although Fry was prepared to offer the testimony of a doctor and a botanist on the issue of the quantity of marijuana necessary for a 60 day supply, counsel conceded that Fry did not have a "qualifying condition" under the act. While the trial court erroneously, in my view, concluded as a matter of law that Fry was not a "qualified person" under the act, when the State moved in limine to exclude the defense Fry failed to offer additional supporting evidence that he had a qualifying condition. Based on Fry's concession and failure to provide any additional evidence to support the medical use of marijuana defense I would affirm.

Notes and Questions

1. Barring the concession made by Fry's counsel, should he have been allowed to present a medical marijuana defense to the jury? Did he present any evidence that he had been diagnosed with a qualifying condition, or is the concurring judge merely speculating? Was it enough that Fry's physician recited the words of the statute—"a terminal illness or debilitating condition"—on his authorization (i.e., recommendation) form? *See Washington v. Constantine*, 652, 330 P.3d 226, 234 (Wash. App. 2014) (Korsmo, J., dissenting) ("In a properly presented case, the defense would offer medical evidence that the patient was diagnosed *with a particular condition*.") (emphasis added).

2. To curb abuse of their medical marijuana laws, some states impose an additional exhaustion requirement for certain qualifying conditions, like chronic pain, that are difficult for physicians (and the state) to corroborate. Thus, some states consider chronic pain a qualifying condition only when the patient has already attempted (unsuccessfully) other, more conventional treatments. *E.g.*, Rev. Code Wash. 69.51A.010(6)(d) (defining "terminal or debilitating medical condition" to include "[i]ntractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications").

Does it make sense to require a patient to try all "standard medical treatments" before turning to marijuana? What if such treatments involve the use of powerful opioid painkillers? If so, does the exhaustion requirement run counter to the common advice that patients should use opioid painkillers only as a last resort? *See* Federation of State Medical Boards, Model Policy on the Use of Opioid Analgesics in the Treatment of Chronic Pain 11, July 2013, https://perma.cc/A8WX-24T8 ("Generally, safer alternative treatments should be considered before initiating opioid therapy for chronic, non-malignant pain."). Consider the following Problem:

Problem 4.1: Andy's physician has diagnosed him with degenerative disc disease, which has caused chronic pain. The physician initially prescribed Percocet, a combination of acetaminophen and oxycodone, a powerful opioid painkiller. The Percocet eliminated Andy's pain, but it also made him nauseous. When Andy complained about the side effects and expressed some concern over becoming addicted to Percocet, his physician recommended that he use marijuana instead because he believes it has the same benefits but with less serious side effects. Does Andy have a qualifying condition, as defined by Washington law? *See Washington v. Dalton*, 162 Wash. App. 1062 (2011 unreported) (no, because Percocet relieved his pain).

A handful of states empower physicians to authorize patients to use marijuana for medical purposes, even when they have not been diagnosed with an enumerated qualifying condition. California has adopted the most open-ended approach. Proposition 215 lists several specific conditions for which marijuana may be used as a treatment, but it also allows physicians to recommend the drug for conditions not specifically listed in the initiative. The relevant portion of the initiative provides 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*.

Cal. Health & Safety Code § 11362.5 (emphasis added).[2]

In states that allow a physician to determine whether a patient is authorized to use marijuana, is the physician's determination subject to review? *California v. Spark* addresses the question.

California v. Spark

16 Cal. Rptr. 3d 840 (Cal. App. 2004)

ARDAIZ, J.

[A jury found appellant guilty of cultivating marijuana in violation of California Health & Safety Code § 11358. He raised a defense based on Section 11362.5 of the Compassionate Use Act, which states that "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." The jury had been instructed that one of the elements of a defense under Section 11362.5 was that the defendant "was seriously ill." The jury rejected the defense and found the appellant guilty; he was sentenced to six months in the county jail and three years' probation. On appeal, the appellant claimed, inter alia, that the jury had been erroneously instructed on the medical marijuana defense.]

On October 10, 2001, the Kern County sheriff received an anonymous tip about marijuana growing in the backyard of Zelma Spark's trailer home in Inyokern. Two sheriff's deputies went to the home on the night of October 25 and saw a marijuana plant growing in the backyard area. The plant was about six feet tall.

The deputies went to the front door and contacted Ms. Spark. She told them her son, appellant Noel Spark, had been given permission to grow marijuana. The deputies searched the backyard and found two more marijuana plants. One of the plants was about three feet tall and was in full bloom; the other was a recently harvested stalk. The officers seized all three plants from the backyard. The plants belonged to Ms. Spark's son, appellant Noel Spark, who was living with his mother at the time.

The next day, appellant telephoned the police and said he had stayed in his mother's home for three or four weeks but now lived in San Bernardino County. He admitted the marijuana plants seized from his mother's home were his, and he said he took lengths to keep the plants hidden. He also said he smoked about a half-ounce of marijuana per week. Appellant claimed that he smoked marijuana for pain and that he had obtained a marijuana prescription from Dr. William Eidelman. . . .

Appellant called to the stand Dr. William Eidelman. On May 8, 2001, appellant consulted Dr. Eidelman about medicinal marijuana. Appellant complained he had suffered from chronic back pain for about 10 years. Dr. Eidelman conducted an examination and

2. In 2003, the California legislature passed the Medical Marijuana Program (MMP), which provided additional legal protections to qualifying patients who suffered from specific "serious medical conditions" enumerated in the MMP. Cal. Health & Safety Code § 11362.5(h).

determined appellant suffered from back pain. He gave appellant a letter approving the use of medicinal marijuana pursuant to Proposition 215. At trial, Dr. Eidelman opined appellant was in fact a seriously ill patient who qualified for medicinal marijuana to treat his pain.

On cross-examination, Dr. Eidelman acknowledged he was no longer licensed to practice medicine at the time of the trial. His license had been suspended for giving medicinal marijuana recommendations to four undercover police officers.

Dr. Eidelman also acknowledged that, when he examined appellant in May 2001, he did not review any of appellant's medical records before making his recommendation for marijuana use. The doctor used only his hands and his eyes when examining appellant. Dr. Eidelman's medical practice consisted only of himself—he had no receptionist or nurse. He did not accept insurance and usually only accepted cash payment. He did not arrange to have appellant return for a follow-up consultation.

Appellant also called to the stand Dr. David Bearman. On June 7, 2002—well after appellant's arrest—Dr. Bearman saw appellant to determine if he met the criteria for a recommendation for medicinal marijuana under Proposition 215. After giving appellant a physical examination and reviewing some of appellant's medical records, Dr. Bearman concluded appellant suffered from chronic back pain. Dr. Bearman considered appellant's condition to be serious, qualifying for medicinal marijuana.

Appellant took the stand on his own behalf. He said he was growing the three marijuana plants seized from his mother's yard solely for medicinal use to control back pain. He also said he had suffered from back pain for over 10 years.

Appellant claimed Dr. Eidelman recommended marijuana for treatment and gave him the letter only after the doctor examined him and concluded that appellant suffered from serious, chronic back pain. Only then did appellant begin cultivating marijuana. He claimed he had never grown marijuana prior to the doctor's recommendation. He also said he provided the police with Dr. Eidelman's recommendation after the police seized the plants. Appellant also said Dr. Bearman later examined him and also found his back condition was a serious illness warranting the use of medicinal marijuana. . . .

[In rebuttal, the prosecution sought to discredit Dr. Eidelman.] The San Bernardino County police [had] received information that Dr. Eidelman would sell a medicinal marijuana recommendation "for $250 with no medical condition needed." Police Detective Michael Wirz conducted an undercover operation to investigate the matter. On October 10, 2001, he telephoned Dr. Eidelman to arrange a meeting. Dr. Eidelman told the detective a recommendation would cost $250 to be paid in cash only.

The detective went to Dr. Eidelman's office that same day. He told the doctor he had no medical condition but wanted to buy a marijuana recommendation to keep the police away while he grew his own marijuana. With no further questions, Dr. Eidelman printed a written recommendation. The doctor handed over the certificate and said he needed to list some illness for his records. Detective Wirz again said he smoked marijuana because he liked it, because it made him happy, and because it helped him sleep. Dr. Eidelman then said he would list the detective as suffering from depression for purposes of the recommendation.

The detective then handed Dr. Eidelman $250 in cash. At no time did Dr. Eidelman ask anything about medical history or conduct any kind of examination.

Santa Monica Police Detective Joan Rosario also conducted an undercover investigation of Dr. Eidelman's practice. On August 1, 2001, she telephoned Dr. Eidelman. He said

she could come to his office to buy a marijuana prescription letter for $250 in cash. She went to Dr. Eidelman's office that same day and said she was there to purchase a marijuana prescription. Again, Dr. Eidelman conducted no examination and took no medical history. Again, he simply gave her a recommendation letter and took $250 in return. Again, the detective never complained of any actual illness but simply said she was unable to sleep and suffered from headaches without marijuana. . . .

The Compassionate Use Act of 1996, approved by the electorate in November of that year, states:

> (b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
>
> (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 the recommendation of a physician are not subject to criminal prosecution or sanction. . . .
>
> . . .
>
> (d) Section 11357, relating to the possession of marijuana, 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. . . .

The instruction given by the court, over appellant's objection, to the jury on appellant's compassionate use defense was as follows:

> . . .
>
> The defense of compassionate use is only available to a defendant who proves all of the facts necessary to establish the elements of the defense, namely:
>
> 1. The defendant was seriously ill and suffered from a medical condition where the use of marijuana as a treatment was medically appropriate;
>
> 2. The defendant's use of marijuana was recommended by a physician who had determined orally or in writing that the defendant'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 promotes relief; and
>
> 3. The amount of marijuana possessed or cultivated was reasonably related to the defendant's then current medical needs.

Appellant contends that the essence of the Compassionate Use Act defense is set forth in subdivision (d) of section 11362.5 (that he "cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician") and does not include a requirement that he present evidence that he was "seriously ill." As we shall explain, we agree with appellant. . . .

First, the only reference to "seriously ill" is in the prefatory, or purpose, statement of the act. It is omitted from the heart of the act, that provision set forth in section 11362.5, subdivision (d). . . .

Second, although the prefatory language of subdivision (b)(1)(A) of section 11362.5 contains a reference to "seriously ill Californians," that subdivision also contains a list of

specified illnesses or conditions for which the medical use of marijuana might be "deemed appropriate" and "recommended by a physician who has determined that the person's health would benefit from the use of marijuana in . . . treatment." (*Ibid.*) The list ends with a catchall phrase "or any other illness for which marijuana provides relief." (*Ibid.*)

. . . [W]e conclude that the voters of California did not intend to limit the compassionate use defense to those patients deemed by a jury to be "seriously ill." As is evidenced by the entirety of the language of subdivision (b)(1)(A) and the language of subdivision (d) of section 11362.5, the question of whether the medical use of marijuana is appropriate for a patient's illness is a determination to be made by a physician. A physician's determination on this medical issue is not to be second-guessed by jurors who might not deem the patient's condition to be sufficiently "serious." Our conclusion is further buttressed by subdivision (b)(1)(B) of the statute, which points outs that another purpose of the Compassionate Use Act of 1996 was "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5, subd. (b)(1)(B).)

. . . The instructional error in this case was clearly prejudicial. The evidence that appellant cultivated the marijuana plants was undisputed. Appellant's defense was entirely based upon the Compassionate Use Act. The prosecutor argued to the jury: "Their case rest [*sic*] upon the believability of the Defendant. Someone that says he is seriously ill, yet has no medical records for 12 to 13 years. Someone that has not been to a doctor for 12 to 13 years. He is unbelievable and their case rest upon his believability." Defense counsel, on the other hand, argued to the jury that appellant was indeed seriously ill: "Now, the Prosecution argues his condition is not serious but do not present any evidence. . . . Did you see any medical testimony from the prosecution? No. They said Mr. Spark's condition was not serious. Why would that be? Why would they not find a doctor? They should be able to find a doctor if his condition is not serious. They should find a doctor that says that. I would argue his condition was serious and they cannot find a doctor that would say it was not serious." Indeed, respondent does not even attempt to persuade us that if there was error, the error was not prejudicial. . . .

The judgment is reversed.

Notes and Questions

1. As a matter of policy, do you agree with the court's ruling? Should a physician's determination as to a patient's eligibility be unreviewable? Consider the following Problem:

Problem 4.2: Andy is a reporter with the Los Angeles Tribune. Recently, he has been having trouble meeting his deadlines. His physician has diagnosed him with "writer's block" and has suggested to Andy that his condition might be improved if he were to use marijuana. After buying five ounces of marijuana

(the amount his physician suggested to get Andy started), Andy is arrested by the police and charged with simple possession. Andy asserts a medical marijuana defense and moves to dismiss the charges against him. Does he have a qualifying condition for purposes of California's Proposition 215? What if the physician had instead diagnosed Andy with a case of "dragon bite"?

2. As the *Spark* court notes, Proposition 215 makes reference to "seriously ill Californians," but it does not actually make being "seriously ill" a requirement for invoking the legal protections afforded by the Proposition. Why do you think this language was included in the measure if not to limit access to its protections?

b. Recommendation

In addition to requiring a qualifying diagnosis, every state also requires patients to obtain a physician's recommendation to use marijuana. The recommendation is sometimes referred to as a physician's "certification" or "authorization" or "valid documentation." But for reasons discussed in Chapter 12, it is *NOT* a prescription, even though many commentators mistakenly refer to it as such. So what, exactly, does a recommendation entail?

In every state, a recommendation requires a physician[3] to determine that marijuana would—with some specified degree of confidence—benefit the patient's medical condition. However, the precise degree of confidence that the physician must have about the medical benefits of marijuana use appears to vary from state to state.

In some states, the physician must find that the patient "would benefit" or "is likely" to benefit from the use of marijuana. *E.g.*, Cal. Health & Safety Code § 11362.5 (recommendation means a physician's "determin[ation] 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") (emphasis added); Mich. Comp. Laws Ann. § 333.26423(m) ("'Written certification' means a document signed by a physician, stating all of the following: (1) The patient's debilitating medical condition. (2) The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation. (3) In the physician's professional opinion, the patient *is likely to receive therapeutic or palliative benefit* from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition.") (emphasis added).

In other states, by contrast, the physician need only find that the patient "might" or "may benefit" from the drug. *E.g.*, Alaska Stat. Ann. § 17.37.010(1) (recommendation means a statement signed by the patient's physician "(A) stating that the physician

3. Some states allow other licensed health care professionals to make the recommendation and/or diagnosis, but for ease of exposition, the book refers to the requirement as a physician recommendation.

personally examined the patient and that the examination took place in the context of a bona fide physician-patient relationship and setting out the date the examination occurred; (B) stating that the patient has been diagnosed with a debilitating medical condition; and (C) stating that the physician has considered other approved medications and treatments that might provide relief, that are reasonably available to the patient, and that can be tolerated by the patient, and that the physician has concluded that the patient *might benefit* from the medical use of marijuana") (emphasis added); Wash. Rev. Code Ann. § 69.51A.010(7)(a) ("[A]uthorization" means: (i) A statement signed and dated by a qualifying patient's health care professional written on tamper-resistant paper, which states that, in the health care professional's professional opinion, the patient *may benefit* from the medical use of marijuana.") (emphasis added).

The *Shepherd* case below, involving a previous formulation of the requirement used by Washington state ("the potential benefits . . . *would likely* outweigh the health risks") suggests the choice of statutory language *does* matter, at least in some cases. The case concerns a prosecution against a designated caregiver charged with growing and possessing marijuana on behalf of a patient (topics covered in Chapters 7 and 8), but the analysis is equally relevant for simple possession cases brought against a patient instead.

Washington v. Shepherd

41 P.3d 1235 (Wash. App. 2002)

SWEENEY, J.

This is the first time a court has had to interpret and apply Washington Initiative Measure No. 692, . . . the Medical Use of Marijuana Act (the Act). The State charged Arthur C. Shepherd with manufacturing marijuana, although the State and Mr. Shepherd ultimately stipulated to the substitution of a reduced charge, felony possession of marijuana. Mr. Shepherd presented evidence that he was a primary caregiver pursuant to the Act and that he provided marijuana to a "qualifying patient," again as defined by the Act.

The question here is whether the showing he made is sufficient under the Act to satisfy the Act's requirements for an affirmative defense to his charge. Specifically, whether a physician's statement that "the potential benefits of the medical use of marijuana *may* outweigh the health risks for this patient" is sufficient to satisfy the "valid documentation" requirement of the Act that "the potential benefits of the medical use of marijuana *would likely* outweigh the health risks for a particular qualifying patient[.]" RCW 69.51A.010(5)(a) (emphasis added). We conclude that it does not. . . . We therefore affirm the conviction.

Washington voters passed Initiative Measure No. 692 on November 3, 1998. . . . Mr. Shepherd . . . tried to comply with that Act and grow marijuana for his friend, John Wilson. As part of this process, Mr. Wilson designated Mr. Shepherd as his primary caregiver. . . .

Mr. Wilson suffers from a variety of conditions including bipolar disorder and a debilitating spine condition. The spine condition also disables him from growing and

maintaining his own marijuana supply. . . . [Mr. Shepherd has supplied marijuana to Mr. Wilson,] which is the source of Mr. Shepherd's current legal difficulties.

Mr. Wilson is treated by Dr. Gregg Sharp. He provided Mr. Wilson with an "Authorization to Possess Marijuana for Medical Purposes in Washington State" [which stated]:

> I have diagnosed and am treating the above named patient for a terminal illness or debilitating condition as defined in RCW 69.51A.010 (should the conditions be listed, a check list? I think not as it may be seen as violating physician-patient confidentiality).
>
> I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that the potential benefits of the medical use of marijuana may outweigh the health risks for this patient.

. . . A number of government agencies work together on joint marijuana eradication in northern Stevens County. As part of that program, they spotted Mr. Shepherd's marijuana grow. Police first seized 15 marijuana plants from Mr. Shepherd. Mr. Shepherd sued to recover the plants. He presented documentation from Dr. Sharp to support Mr. Wilson's need for the marijuana and Mr. Wilson's statement that Mr. Shepherd was the primary caregiver. Judge Larry Kristianson refused to return the plants. He concluded that the statement by Mr. Wilson's doctor was inadequate because it failed to set out the specific nature of Mr. Wilson's medical condition. . . .

Following Judge Kristianson's determination and armed with the same documentation, Mr. Shepherd repeatedly went to both the Stevens County sheriff and the prosecuting attorney and declared that he was growing medical marijuana. Later the sheriff's office seized another 20 to 31 plants from Mr. Shepherd's property. . . .

The State charged Mr. Shepherd by amended complaint with felony possession of marijuana. He waived his right to a jury trial. . . . [The trial judge found that Mr. Shepherd had exceeded the quantity limits (60-day supply) imposed by state law.]

Judge Baker also concluded that Dr. Sharp's statement of need was inadequate because it only specified that Mr. Wilson "*may* benefit from the medical use of marijuana" . . . , whereas the statute requires a statement from the doctor that "the potential benefits of the medical use of marijuana *would likely outweigh* the health risks," RCW 69.51A.010(5)(a) (emphasis added).

THE MEDICAL USE OF MARIJUANA ACT

In 1998, the citizens of Washington enacted the Medical Use of Marijuana Act by way of Initiative Measure No. 692. RCW 69.51A.005. . . . The purpose of the Act is to allow patients with terminal or debilitating illnesses to use marijuana when authorized by their treating physician. . . . The Act also protects people who supply marijuana to such patients: "Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana[.]" RCW 69.51A.005. . . .

BURDEN OF PROOF

Mr. Shepherd is required to show only by a preponderance of evidence that he has met the requirements of the Medical Use of Marijuana Act for affirmatively defending this criminal prosecution. . . . That means considering all the evidence the proposition asserted must be more probably true than not true. . . .

VALID DOCUMENTATION

The trial court found, and we agree, that Mr. Wilson satisfies the requirements of a "qualifying patient." RCW 69.51A.010(3). That is, someone who has been diagnosed with a debilitating medical condition, has been advised of the risks and benefits of the use of marijuana, and has been advised by the physician that he or she may benefit from the medical use of marijuana.

But the Act requires more. It also requires "valid documentation" to prove the affirmative defense. RCW 69.51A.040(4)(c). And the Act is very specific in the elements required for valid documentation. It requires (1) a statement, (2) signed by a qualifying patient's physician (or a copy of the qualifying patient's pertinent medical records) which states, (3) that in the physician's professional opinion, (4) the potential benefits of the medical use of marijuana *would likely outweigh* the health risks for a particular qualifying patient. RCW 69.51A.010(5)(a). It is not enough, as Dr. Sharp did here, to simply say that the potential benefits of the medical use of marijuana *may* outweigh the health risks for a particular patient.

The required proof is tantamount to the level of certainty required of expert opinions in courts. And a well-developed body of law in this state sets out the requirements for admission of professional opinions when the expert must express an opinion on a "more likely than not" basis. Expert testimony should express "'a reasonable probability rather than mere conjecture or speculation.'" . . . For example, medical opinion testimony that an accident caused a physical condition must be based on a more probable than not, or more likely than not, causal relationship. . . . Likewise in the criminal case, expert testimony on a person's mental status is not admissible unless the expert's opinion is based on reasonable medical certainty, which is the equivalent of more likely than not. . . . There are legal consequences that attach to these scientific opinions. And therefore a level of medical certainty is required.

Here, the required medical opinion is that one scientific consideration (the "potential benefits of the medical use of marijuana") outweighs another scientific consideration ("the health risks for a particular qualifying patient"). RCW 69.51A.010(5)(a). The statute requires a stronger showing on necessity than simply "may."

Notes and Questions

1. Is the court splitting hairs? Is it being too formalistic? How do you think patients and physicians would respond to the ruling?

2. Postscript on *Shepherd*. In 2007, the Washington legislature amended the state's medical marijuana statute to lower the standard, such that a physician need only determine that the "medical use of marijuana *may benefit* a particular qualifying patient." 2007 Wash. Legis. Serv. Ch. 371 § 4 (S.S.B. 6032) (emphasis added), codified as Rev. Code Wash. 69.51A.010. In 2015, the legislature removed the standard from the statute and defined authorization instead by reference to a form developed by the state department of health. That form, however, continues to employ the "may benefit" standard. Washington State Department of Health, Washington State Medical Marijuana Authorization Form, https://perma.cc/STB7-PUER.

3. To test your intuitions about the sufficiency of statements made by physicians, consider whether the individuals in the following Problems have satisfied the recommendation requirement:

Problem 4.3: Benjamin has been charged with simple possession of marijuana in a medical marijuana state. He raises a medical marijuana defense, and the state uses the same standard ("would likely benefit") followed by *Shepherd*. As part of his defense, Benjamin submits the written statement of his doctor, which states that the "patient should be able to use marijuana for appetite stimulation. He has tried Marinol, but it is not effective for him & he has lost weight." Is the statement sufficient? *Compare Shepherd,* 41 P.3d 1235, *with Washington v. Otis*, 213 P.3d 613, 618 (Wash. App. 2009) (holding that "'valid documentation' merely requires a written statement that generally conveys a physician's professional opinion that the benefits of the medical use of marijuana outweigh the risks for a particular patient, without requiring the physician to [use] the specific language in the statute").

Problem 4.4: Camila has been charged with simple possession of marijuana in a medical marijuana state, and she raises a medical marijuana defense. As part of her defense, Camila testifies that she visited her physician and asked him about using marijuana for her migraines, and he replied orally that it "might help, go ahead." Sufficient? *Compare* Mich. Comp. Laws Ann. § 333.26423(m) (requiring "*written* certification" signed by physician) (emphasis added) (stating majority rule) *with* Cal. Health & Safety Code section 11362.5(d) (requiring "written or *oral* recommendation or approval of a physician") (emphasis added); *California v. Jones*, 4 Cal. Rptr. 3d 916 (Cal. App. 2003) (defendant's testimony that physician had told him that marijuana "might help, go ahead" is sufficient to establish medical marijuana defense).

4. Some state medical marijuana programs have been criticized for making it too easy for individuals to obtain a physician's recommendation and thereby evade state prohibitions on the non-medical use of marijuana. The problem of recommendation mills and the steps states have taken to address them are discussed at length in Chapter 12.

5. When must a patient obtain the necessary qualifying diagnosis and recommendation? The following Problem sets up the issue:

Problem 4.5: The police search Delilah's car and find marijuana. They arrest Delilah for simple possession of marijuana. The next day, Delilah visits her physician. The physician diagnoses Delilah with a qualifying condition (severe pain) and states that her condition would "certainly benefit" from the use of marijuana. Do you think Delilah has satisfied the diagnosis and recommendation requirements?

The dominant rule is that a patient must obtain the qualifying diagnosis and recommendation *before* taking possession of or using marijuana. *E.g.*, *Montana v. Stoner*, 285 P.3d 402 (Mont. 2012) ("The purpose of the registry identification card under the MMA was to limit the possession and use of marijuana to qualified individuals for specific debilitating conditions, not—as the District Court observed—to be acquired by a person as a 'get-out-of-jail-free' card *after* getting busted.") (emphasis added); *California v. Rigo*, 81 Cal. Rptr. 2d 624 (Cal. App. 1999) (recommendation obtained 3.5 months after arrest is not timely, barring exigent circumstances).

The courts have based the timeliness requirement on both statutory language and the gatekeeping function served by the qualifying diagnosis and recommendation. The Michigan Supreme Court has explained:

> [The immunity provided by section 8(a)(1) of the Michigan Medical Marijuana Act requires, in relevant part, that a physician "has stated that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana. . . ." Mich. Comp. L. § 333.26428.]
>
> [T]he term "has stated" is in the present perfect tense, which "indicates action that was started in the past and has recently been completed or is continuing up to the present time." . . . [T]he term "has stated" indicates that the physician's statement must have been made sometime before a defendant filed the motion to dismiss under § 8 but not necessarily before commission of the offense.
>
> Other language of § 8(a)(1), however, indicates that the statement must in fact have been made even before the patient began using marijuana for the defense to apply. Reading the term "has stated" in conjunction with the language in the same sentence "is likely to receive [benefit from the medical use of marijuana]" indicates a future event that will occur after the physician's statement. Stated differently, § 8(a)(1) contemplates that a patient will not start using marijuana for medical purposes until after the physician has provided a statement of approval. It necessarily follows that any marijuana use before the physician's statement was not for medical purposes. . . .
>
> This interpretation makes sense in light of the laws criminalizing possession, manufacture, and delivery of marijuana and the fact that the MMMA allows such charges to be dismissed under certain circumstances. A reasonable inference to be drawn from the MMMA's provisions allowing the medical use of marijuana is that § 8 is intended to protect those individuals who believe they have a genuine medical need for marijuana that has been recognized by a physician, but for whatever reason have not obtained a registry card. It would be illogical to extend this protection to individuals who have not obtained a physician's recognition of their medical need because the MMMA provides no protections to such individuals. An after-the-fact exception to criminal liability would encourage individuals to engage in self-medication or criminal activity on the basis of the possibility that if prosecuted they could then obtain a doctor's approval postoffense and avoid criminal charges. Because the MMMA was not intended to legitimize illegal marijuana use, it makes sense to require that a defendant obtain a physician's statement authorizing the medical use of marijuana before the defendant actually uses marijuana for that purpose.

Michigan v. Kolanek, 817 N.W. 2d 528, 542-44 (Mich. 2012).

6. Now consider this variation on **Problem 4.5**:

Problem 4.6: The police search Andy's car and find marijuana. They arrest Andy for simple possession of marijuana. He immediately shows the police a recommendation from his physician that was issued one week earlier. He also shows them a separate document from the same physician, issued three years ago, indicating that he has diagnosed Andy with severe pain stemming from a (then) recent hip surgery. Has Andy satisfied the recommendation and diagnosis requirements?

In most states, patients must periodically renew their diagnoses and recommendations to maintain their eligibility to use medical marijuana. *See, e.g.*, Or. Rev. Stat. § 475.319 (limiting medical marijuana defense to person who "[w]as diagnosed with a debilitating medical condition within 12 months of the date on which the person was arrested and was advised by the person's attending physician that the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition"); *Oregon v. Luster*, 350 P.3d 574 (Or. App. 2015) (rejecting defense based on diagnosis and recommendation made more than 12 months prior to arrest).

In California, recommendations and diagnoses do not expire, at least for purposes of the Compassionate Use Act. *California v. Windus*, 81 Cal. Rptr. 3d 227, 231 (Cal. App. 4th 2008) (finding defendant could present medical defense based on three-year old recommendation because "nothing in the [CUA] . . . requires a patient to periodically renew a doctor's recommendation regarding medical marijuana use"). However, patients must provide "updated written documentation" of their medical conditions annually to take advantage of the additional legal protections afforded by the state's Medical Marijuana Program Act (MMP). Cal. Health & Safety Code § 11362.76(a)(2)(A).

Why do states impose a renewal requirement? Should states instead follow California and permit a patient to use marijuana indefinitely once a physician has made the qualifying diagnosis and recommendation? Does it depend on the type of condition?

c. Registration

In the vast majority of medical marijuana states, a patient must also register with a state health agency in order to obtain the protections of the state's medical marijuana law. *See* Conn. Gen. Stat. Ann. § 21a-408a(a) ("A qualifying patient shall register with the Department of Consumer Protection . . . prior to engaging in the palliative use of marijuana. A qualifying patient who has a valid registration certificate from the Department of Consumer Protection . . . and complies with the requirements of [Connecticut law] . . . , shall not be subject to arrest or prosecution, penalized in any manner. . . ."). Even when states do not require registration, they usually grant patients additional legal benefits for voluntarily registering. *See, e.g., Michigan v. Kolanek*, 817 N.W.2d 258 (Mich. 2012) (discussing the benefits of voluntary registration under Michigan law). These legal benefits and protections are discussed in Section C below.

To register, patients must complete a registration application form, supply copies of supporting documentation (e.g., a physician's recommendation), and pay a fee. To see a registration form with instructions, following the link for one of these states:

- California, https://perma.cc/9G3X-YRX5
- Colorado, https://perma.cc/U5S9-W8AC
- Rhode Island, https://perma.cc/E2N9-4MV2

If everything is in order, the state agency will add the patient to its registry and provide the patient with a registration identification card. The card looks something like the one pictured in **Figure 4.1**:

Figure 4.1. A Registry Card

Notes and Questions

1. Must qualified patients carry their registration card with them at all times? Consider the following Problem:

Problem 4.7: Andy has successfully registered with his state's medical marijuana program. He plans to spend the following week working at a friend's cabin upstate. Andy packed his clothes and one ounce of marijuana to take with him. On his drive

to the cabin, Andy is stopped for a traffic violation. The police notice the marijuana in the back seat of the car. Andy explains that he is a registered medical marijuana patient, but discovers that he left his card at home. May the police arrest Andy for possession of marijuana? May the state prosecute him? The law on this point (even within some states) is not entirely clear. *Compare Michigan v. Hartwick*, 870 N.W.2d 37, 51 (Mich. 2015) (holding that patient is entitled to assert immunity under state medical marijuana law only "if *all conduct* underlying [the] charge *occurred during a time when the qualifying patient . . . possessed* a valid registry identification card") (emphases added), *with Michigan v. Nicholson*, 822 N.W.2d 284, 289 (Mich. App. 2012) (holding that patient who is arrested without a registration card could still assert immunity from prosecution if she later produces the card for the court).

2. Even assuming that possession of a registry card is required to assert immunity, what does it mean *to possess* the card? For example, could someone like Andy in **Problem 4.7** argue that he was in constructive possession of his card, even if he was not carrying it on his person at the time he was arrested? After all, he would be in constructive possession of any *marijuana* he left back at home, as discussed in Chapter 3. In *Nicholson, supra*, the court refused to apply constructive possession principles to the registry card requirement, reasoning that:

> provid[ing] immunity to any person who merely makes the claim that they have a valid registry identification card, but is unable to display it, is unworkable because it would eviscerate the ability to enforce the prohibition against the unlawful possession of marijuana with respect to anyone who simply makes a representation of entitlement to immunity without any proof of that status. If only constructive possession of a registry identification card is required, police officers would have no ability to evaluate the legitimacy of a claim of immunity made by individuals in possession of marijuana.

822 N.W.2d at 289, n.6. Do you agree? In this regard, consider that states have adopted confidentiality rules that generally bar the police from accessing medical marijuana registries, except for purposes of verifying whether a given card is valid. *E.g.*, Mich. Comp. L. § 333.26246(h) ("(2) The department [of health] shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Except as provided in subdivisions (3) and (4), individual names and other identifying information on the list are confidential and are exempt from disclosure. . . . (3) The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card. (4) A person, including an employee, contractor, or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not more than $1, 000.00, or both. . . ."). Do such confidentiality rules justify the requirement to carry a registration card at all times when one is in possession of marijuana?

d. Other Limitations on Eligibility

States restrict eligibility for the protections afforded by medical marijuana laws based on other criteria as well, including residency, age, and the criminal history of prospective users.

(i) Residency

Some states explicitly limit participation in medical marijuana programs to in-state residents. *E.g.*, Minn. Stat. Ann. § 152.22 ("'Patient' means a Minnesota resident . . ."); Nev. Rev. Stat. § 453A.210(b) (requiring "[p]roof . . . that the person is a resident of this State" in order to register for the state's medical marijuana program). Even in states that do not explicitly require residency, some courts have found their state programs to impose such a requirement. In *Michigan v. Jones*, for example, the court held that a non-Michigan resident could not seek the protections of the Michigan Medical Marijuana Act:

> The MMMA does not directly address residency. However, § 4(j) of the act does contain a provision allowing a "visiting qualifying patient" to use medical marijuana in conformance with the MMMA while visiting the state of Michigan. A "visiting qualifying patient" is defined by the act to be "a patient who is not a resident of this state or who has been a resident of this state for less than 30 days." MCL 333.26423(l). Moreover, MCL 333.26422 lists several other states that do not penalize the medical use of marijuana, and notes that "Michigan joins in this effort for the health and welfare of *its citizens*." (Emphasis added.) In light of the reference to Michigan citizens, and the provisions regarding a visiting qualifying patient in the MMMA, we agree with the trial court that Michigan residency is a prerequisite to the issuance and valid possession of a registry identification card. If the MMMA were read not to require Michigan residency, there would be no reason to specifically refer to Michigan citizens or to include a provision regarding medical use of marijuana by visitors to Michigan. . . . Thus, we affirm the trial court's conclusion that Michigan residency is a prerequisite to valid possession of a registry identification card.

837 N.W.2d 7, 14-15 (Mich. App. 2013).

As the *Jones* court mentions, however, some states (including Michigan) grant reciprocity to non-residents who have successfully registered in their home states. *E.g.*, Mich. Comp. Laws Ann. § 333.26424(j) ("A registry identification card, or its equivalent, that is issued under the laws of another state . . . that allows the medical use of marihuana by a visiting qualifying patient . . . shall have the same force and effect as a registry identification card issued by the [Michigan health] department."); Ariz. Rev. Stat. § 36-2804.03 (same, except that "a visiting qualifying patient is not authorized to obtain marijuana from a nonprofit medical marijuana dispensary"). As of July 2016, 7 out of 26 states (including D.C.) recognized out-of-state registration cards for purposes of their own medical marijuana laws. *See* Marijuana Policy Project, Key Aspects of State and D.C. Medical Marijuana Laws (July 24, 2016), available at https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/key-aspects-of-state-and-d-c-medical-marijuana-laws/.

Chapter 6 discusses some possible constitutional issues with residency-based requirements.

(ii) Age

All medical marijuana states now appear to allow minors to use marijuana for medical purposes. These states, however, generally require underage patients (or their parents) to jump through additional hoops, including obtaining parental consent and the recommendation of a second physician, in order to take advantage

of the state's medical marijuana law. For example, in Michigan, a minor may use medical marijuana if

> (1) The qualifying patient's physician has explained the potential risks and benefits of the medical use of marihuana to the qualifying patient and to his or her parent or legal guardian;
> (2) The qualifying patient's parent or legal guardian submits a written certification from 2 physicians; and
> (3) The qualifying patient's parent or legal guardian consents in writing to:
> (A) Allow the qualifying patient's medical use of marihuana;
> (B) Serve as the qualifying patient's primary caregiver; and
> (C) Control the acquisition of the marihuana, the dosage, and the frequency of the medical use of marihuana by the qualifying patient.

Mich. Comp. Laws § 333.26426; § 6(a)(7)(b).

What do you think of medical marijuana use by minors? Should it be allowed? What additional requirements, if any, would you impose?

(iii) Criminal History

States also restrict access to medical marijuana by members of the criminal justice population, including individuals who are incarcerated, on parole or probation, and those who have prior convictions for certain types of drug offenses.

To begin, nearly every state bars the possession and use of marijuana by those who are currently incarcerated. *See, e.g.*, Conn. Gen. Stat. Ann. § 21a-408 (West 2015) ("'Qualifying patient' does not include an inmate confined in a correctional institution or facility under the supervision of the Department of Correction[.]"); Minn. R. 4770.4009 (providing that registration of any prisoner "must be suspended for the term of the incarceration"). California is the rare state that tolerates medical use of marijuana inside of its prisons. It allows—but does not require—individual correctional facilities to accommodate medical use of marijuana by prisoners, so long as such use "will not engender the health or safety of other prisoners or the security of the facility." Cal. Health & Safety Code § 11362.785(a), (b).

Some, but not all, states bar possession and use of marijuana by probationers and parolees. On the one hand, Washington has explicitly barred possession and use of marijuana by individuals on probation and other forms of supervised release. Rev. Code Wash. § 69.51A.010(19)(b) ("'Qualifying patient' does not include a person who is actively being supervised for a criminal conviction by a corrections agency or department that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision and all related processes and procedures related to that supervision."). And one Colorado appellate court has suggested that a condition imposed on every probation in that state—"that defendant not commit another offense"—likewise effectively bars all probationers from using or possessing marijuana as long as *federal* law continues to proscribe those activities. *Colorado v. Watkins*, 282 P.3d 500 (Colo. App. 2012). On the other hand, Arizona and Montana appear to grant probationers the same access to marijuana as all other residents, reasoning that revocation of probation is an impermissible sanction under their medical marijuana laws. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 140 (Ariz. 2015) ("[A]ny probation term that threatens to revoke probation for medical marijuana use that complies with the terms of [Arizona Medical Marijuana Act] is unenforceable and illegal under AMMA."); *Montana v. Nelson*, 195 P.3d 826, 833 (Mont. 2008) ("[T]he [Montana Medical Marijuana Act] states unequivocally that a qualified patient . . . 'may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege . . . for the medical use

of marijuana.' . . . The MMA simply does not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision.").[4]

The remaining states that have addressed the issue, including California, appear to grant courts discretion to decide, on a case by case basis, whether or not a defendant should be allowed to possess or use marijuana while on probation or parole. *See, e.g.*, Cal. Health & Safety Code § 11362.795 (establishing procedure through which probationers may petition court to allow medical marijuana use); *California v. Leal*, 210 Cal. App. 4th 829 (Cal. App. 2012) (holding that voters who passed the Compassionate Use Act did not mean "to abrogate a court's longstanding authority . . . to prohibit lawful behavior, as now represented by CUA-approved use of marijuana"). In such states, the sentencing court need only find that a restriction on conduct that is not itself criminal "is reasonably related to the crime of which the defendant was convicted or to future criminality." *California v. Lent*, 541 P.2d 545, 548 (Cal. 1975).

A handful of states also bar felony drug offenders from possessing or using medical marijuana, even after they have completed their sentences. For example, Rhode Island excludes anyone who is "convicted of; placed on probation; . . . pleads nolo contendere; or whose case is deferred . . . for any felony offense under [the] 'Rhode Island Controlled Substances Act' . . . or a similar offense from any other jurisdiction" from enjoying the protections of the state's medical marijuana law. R.I. Gen. Laws § 21-28.6-9(c) (2015). *See also* Ill. Admin. Code tit. 77, § 946.220 (barring anyone convicted of a felony drug offense from receiving the protections of the state's medical marijuana law, but making an exception for individuals convicted of the "possession, cultivation, transfer, or delivery of a reasonable amount of marijuana for medical use").

Notes and Questions

1. What purpose is served by temporarily (or even permanently) barring convicted drug felons from using or possessing marijuana for medical purposes? Do you think such a ban is fair? Necessary?

2. Now consider the following Problems. Do the probation conditions imposed therein reasonably relate to the crime of conviction or to future criminality?

> **Problem 4.8:** During a routine traffic stop, the police discovered two pounds of marijuana in Andy's car. Andy claimed the marijuana was for his personal medical use. Although the government conceded that Andy was a bona fide medical marijuana patient, it proffered evidence that he had planned to sell the marijuana in violation of state law. A jury convicted Andy of possession with the intent to distribute marijuana, and the court sentenced him to two years' probation and barred him from possessing or using marijuana during that time. Is the court's prohibition on the *possession* or *use* of marijuana during probation sufficiently related to Andy's crime of conviction, namely, the possession *with the intent to distribute* marijuana? Why, why not? Might the prohibition instead be upheld as a

4. The *Nelson* court acknowledged that "just as a sentencing court may impose a condition that prohibits a defendant from *abusing* lawfully-obtained prescription drugs, so may a court prohibit a defendant from *abusing* medical marijuana." 195 P.3d at 833 (emphasis added).

reasonable means of preventing Andy from engaging in criminal activity *in the future*? If so, what sort of criminal activity? *See California v. Brooks*, 107 Cal. Rptr. 501, 504 (Cal. App. 2010).

☑ **Problem 4.9:** Benjamin pled guilty to possession of a concealed firearm. During his sentencing hearing, Benjamin testified that he regularly used marijuana pursuant to his physician's recommendation to treat migraine headaches. The court sentenced Benjamin to two years' probation and barred him from possessing or using marijuana during that time. At the sentencing hearing, the judge explained that:

> "A handgun like this is good for one thing, and that's shooting somebody. So if he's in a situation where he needs to have a gun to shoot somebody, he's got real problems going on in his life, and smoking dope isn't helping him. That's the bottom line. So I'm willing–I mean, he has a really, almost no criminal history. He's a young man. Obviously, he's got potential, but he keeps smoking dope and carrying firearms, and he's going to have a lot of problems in this life, if he lives very long."

Why do you think the judge imposed the prohibition on possessing and using marijuana? Does the prohibition relate to Benjamin's crime of conviction, namely, the possession of a concealed firearm? How, exactly? Is the prohibition likely to reduce the chances that Benjamin will offend again in the future *See California v. Moret*, 180 Cal. App. 4th 839 (Cal. App. 2009); *California v. Leal*, 210 Cal. App. 4th 829 (Cal. App. 2012).

☑ **Problem 4.10:** Same facts as **Problem 4.9**. But at the sentencing hearing, the court also remarked that "medical marijuana is a sham. It's not really medicine. I don't believe it." Does the court's additional statement regarding marijuana change your view of the validity of the probation condition? In other words, is this scenario distinguishable from **Problem 4.9**? Why, why not? *See California v. Hughes*, 136 Cal Rptr. 3d 538, 544 (Cal. App. 2012).

☑ **Problem 4.11:** Same facts as **Problem 4.9**. But instead of barring Benjamin from possessing or using marijuana, the judge orders him to "obey all laws, both state *and federal*." *Compare Watkins*, 282 P.3d 500, 505 (Colo. App. 2012) ("In light of the purposes of probation, one of which is to 'ensure that the defendant will lead a law-abiding life,' the prohibition . . . is a reasonable restriction on defendant's freedom, even to the extent that it prohibits violations of federal law."), *with Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015) ("Federal law does not require our courts to enforce federal law, and Arizona law does not permit them to do so in contravention of AMMA."), *Montana v. Nelson*, 195 P.3d 826, 834 (Mont. 2008) ("[W]hile the District Court may require Nelson to obey all federal laws as a condition of his deferred

sentenced, it must allow an exception with respect to those federal laws which would criminalize the use of medical marijuana in accordance the MMA."), *and California v. Tilehkooh*, 113 Cal. App. 4th 1433, 1447 (Cal. App. 2003) ("California courts do not enforce the federal marijuana possession laws when defendants prosecuted for marijuana possession have a qualified immunity under [the CUA]. Similarly, California courts should not enforce federal marijuana law for probationers who qualify for the immunity. . . .").

2. The Special Case of CBD States

As of 2016, at least fourteen states have legalized the possession and use of cannabidiol (CBD), a non-psychoactive cannabinoid found in marijuana. Although these CBD laws are motivated by the desire to unlock the medical benefits of marijuana, they are much more restrictive than the medical marijuana laws discussed above. Alabama passed the first CBD law in the nation in 2014. Its law has served as a template for other CBD laws and provides, in relevant part:

> (b) As used in this section, the following words shall have the following meanings: . . .
>
> (2) CANNABIDIOL (CBD). A (nonpsychoactive) cannabinoid found in the plant Cannabis sativa L. or any other preparation thereof that is essentially free from plant material, and has a THC level of no more than 3 percent. . . .
>
> (3) DEBILITATING EPILEPTIC CONDITION. Epilepsy or other neurological disorder, or the treatment of epilepsy or other neurological disorder that, as diagnosed by a board-certified neurologist under the employment or authority of the [Department of Neurology at the University of Alabama at Birmingham (UAB)] . . . produces serious, debilitating, or life-threatening seizures. . . .
>
> (c) In a prosecution for the unlawful possession of marijuana under the laws of this state, it is an affirmative and complete defense to the prosecution that the defendant has a debilitating epileptic condition and used or possessed cannabidiol (CBD) pursuant to a prescription authorized by the UAB Department. . . .
>
> . . .
>
> (f) . . . Health care practitioners of the UAB . . . shall be the sole authorized source of any prescription for the use of cannabidiol (CBD), and shall be the sole authorized source to use cannabidiol (CBD) in or as a part of the treatment of a person diagnosed with a debilitating epileptic condition. A health care practitioner of the UAB Department shall have the sole authority to determine the use or amount of cannabidiol (CBD), if any, in the treatment of an individual diagnosed with a debilitating epileptic condition. . . .
>
> . . .
>
> (j) Pursuant to the filing requirements of . . . the Alabama Rules of Criminal Procedure, the defendant shall produce a valid prescription, certification of a debilitating epileptic condition, and the name of the prescribing health care professional authorized by the UAB Department. . . .
>
> . . .
>
> (l) Nothing in this section shall be construed to allow or accommodate the prescription, testing, medical use, or possession of any other form of Cannabis other than that defined in this section.

Ala. Code § 13A-12-214.2.

Notes and Questions

1. In what ways do CBD laws like Alabama's differ from the medical marijuana laws discussed above? Do they constitute meaningful reforms? For the textbook author's take on these questions, see Robert A. Mikos, Did Alabama Just Legalize Medical Marijuana? Marijuana Law, Policy, and Reform Blog (Mar. 21, 2014) (discussing the differences between CBD laws and medical marijuana laws), https://perma.cc/2G5P-FD6E.

3. Recreational Marijuana States

As of 2016, eight states and the District of Columbia have legalized marijuana for recreational purposes. These states impose comparatively few restrictions on who may possess and use the drug. Colorado's Amendment 64, for example, provides that:

> Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:
>
> (a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.
>
> (b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.
>
> (c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.
>
> (d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.
>
> (e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

Colo. Const. art. XVIII, § 16(3).

In many respects, these recreational marijuana states have modeled their laws on laws governing alcohol. As they do with alcohol, all states impose a minimum age of 21 years on who may buy, possess, or use marijuana for recreational (or other non-medical) purposes. *E.g.*, *id.*; Wash. Rev. Code § 69.50.4013(3)(a) ("The possession, by a person twenty-one years of age or older, of useable marijuana . . . in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section . . . or any other provision of Washington state law."). The possession of marijuana by minors is still prohibited and remains a criminal offense in at least some of these states. For example, Oregon law treats simple possession by a minor as a violation carrying a presumptive fine of $650 if it involves one ounce or less and a class A misdemeanor carrying a maximum sentence of one year's incarceration if it involves eight ounces or more of the drug. Or. Rev. Stat. §§ 161.615, 475.864(3)(4).

Apart from the minimum age requirement, recreational marijuana states impose no special limitations on who may possess or use the drug, although these states (like medical marijuana states) do impose several restrictions on *how* and *where* the drug may be used (discussed below in Section B).

Notes and Questions

1. What happens to medical marijuana laws after a state legalizes recreational marijuana? To date, every state that has legalized recreational marijuana had previously legalized medical marijuana. The time lag between the adoption of a medical marijuana law and the adoption of a recreational marijuana law has ranged from as few as 4 years (D.C. and Massachusetts) to as many as 20 years (California). Marijuana's status as an approved drug for both medical and recreational use raises an important question for lawmakers: Does legalizing recreational marijuana eliminate the need for special rules to govern medical marijuana? In other words, is there any reason to maintain the relatively strict and burdensome regulations that apply only to qualified medical marijuana users? After all, why would patients bother to jump through the hoops of diagnosis, recommendation, and registration, if they could more easily obtain the drug through the recreational market?

To answer these questions, it is important to recognize that many states have bestowed special legal benefits that only apply to *medical* marijuana. These benefits include higher quantity limits (discussed below); unique exemptions from restrictions on marijuana use (e.g., in schools) (discussed below); exemptions from marijuana taxes (discussed in Chapter 9); and protections from various forms of private discrimination, such as employment discrimination (discussed in Chapter 13). What is more, there is a small population of qualified patients who would not be allowed to possess the drug for recreational purposes, including minors and potentially some people in the corrections population.

2. Can you think of any other substance that has both *approved* medical and recreational uses? Is marijuana unique in this regard?

B. WHAT LIMITATIONS ARE IMPOSED ON THE POSSESSION AND USE OF MARIJUANA?

Even though many states now allow certain individuals to possess and use marijuana, they continue to restrict some activities involving possession and use of the drug, such as driving under the influence of marijuana. The restrictions on marijuana use are commonly enumerated by state reforms. For example, section 7 of Michigan's Medical Marijuana Act provides that

> (b) This act shall not permit any person to do any of the following:
>
> (1) Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
>
> (2) Possess marihuana, or otherwise engage in the medical use of marihuana:
>
> (A) in a school bus;
>
> (B) on the grounds of any preschool or primary or secondary school; or
>
> (C) in any correctional facility.
>
> (3) Smoke marihuana:
>
> (A) on any form of public transportation; or
>
> (B) in any public place.
>
> (4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

> (5) Use marihuana if that person does not have a serious or debilitating medical condition.

Mich. Comp. Laws Ann. § 333.26427. The following sections discuss the most common restrictions imposed by both medical and recreational marijuana states.

1. Quantity

All states limit the quantity of usable marijuana that an individual may lawfully possess (or purchase) at any one time. (Several states also allow individuals to grow marijuana for their own consumption. The limits on the number of plants one may possess and grow at any one time are covered in more detail in Chapter 8.)

In most medical marijuana states, the amount of marijuana that a qualified patient may possess is limited expressly via statute. The limits vary considerably from one state to the next. At opposite ends of the spectrum, Alaska allows qualified patients to possess up to 1 ounce of marijuana, whereas Oregon allows them to possess up to 24 ounces. Ak. Stat. § 17.37.040(a)(4); Or. Rev. Stat. § 475.320 (1)(a). Most states fall somewhere between those two extremes. *See* Marijuana Policy Project, Key Aspects of State and D.C. Medical Marijuana Laws, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/key-aspects-of-state-and-d-c-medical-marijuana-laws/ (surveying quantity limitations).

In some states, these statutes only create *presumptive* limits. Patients may possess more if their physicians determine it is necessary. *E.g.*, 105 Mass. Code Regs. 725.010(I) ("A certifying physician may determine and certify that a qualifying patient requires an amount of marijuana exceeding ten ounces as a 60-day supply and shall document the amount and the rationale in the medical record and in the written certification. For that qualifying patient, that amount of marijuana constitutes a 60-day supply.").

A few states do not impose specific limitations (presumptive or otherwise), but instead permit physicians to determine how much marijuana their patients may possess in a given period of time. *E.g.*, N.Y. Pub. Health Law § 3362(1)(a) (McKinney) ("[T]the marihuana that may be possessed by a certified patient shall not exceed a thirty day supply of the dosage as determined by the practitioner, consistent with any guidance and regulations issued by the commissioner, provided that during the last seven days of any thirty day period, the certified patient may also possess up to such amount for the next thirty day period[.]").

California's quantity rules are unique. California's Compassionate Use Act (CUA) is silent about the quantities that patients may possess. In 2003, however, the California legislature attempted to impose a presumptive limit of 8 ounces, as part of its Medical Marijuana Program (MMP) reforms. The limits were only presumptive because local governments could raise them, and physicians could still recommend higher doses. Cal. Health & Safety Code § 11362.77.

However, the California Supreme Court later held that the presumptive limit conflicted with the CUA and was thus unenforceable. *California v. Kelly*, 222 P.3d 186, 209-10 (Cal. 2010). (The *Kelly* court's decision regarding the legislature's authority to amend popular ballot initiatives is discussed in Chapter 6.) As a result, for purposes of the CUA, patients "are not subject to any specific limits and do not require a physician's recommendation in order to exceed any such limits; instead they may possess an amount of medical marijuana reasonably necessary for their . . . personal medical

needs." *Id.* at 209. To take advantage of the added legal protections available only under the MMP, however, patients do need to abide the quantity limits imposed by that statute. *Id.* at 214.

The limits states impose on possession of recreational marijuana are generally (much) lower than those they apply to medical marijuana. Some recreational marijuana states have also begun to adjust the limits for the different ways marijuana is consumed (smoked, ingested, etc.), reflecting differences in the potencies of different forms of marijuana (as discussed in Chapter 2). **Table 4.1** summarizes the quantity limits for the five jurisdictions that had legalized recreational marijuana as of July 2016. The limits adopted by the four jurisdictions that legalized recreational marijuana in the fall 2016 elections are similar.

Table 4.1. Quantity Limits in a Sampling of Recreational Marijuana States[5]

State	Possession limits
Alaska	1 oz. of marijuana (4 oz. in home) 6 marijuana plants
Colorado	1 oz. of marijuana 6 marijuana plants
District of Columbia	2 oz. of marijuana 6 marijuana plants
Oregon	8 oz. of usable marijuana (1 oz. in public) 1 oz. marijuana extracts 16 oz. of marijuana-infused solids 72 oz. of marijuana-infused liquids 4 marijuana plants
Washington	1 oz. of usable marijuana 7 grams of marijuana concentrate 16 oz. of marijuana-infused solids 72 oz. of marijuana-infused liquids

Notes and Questions

1. Are quantity limitations necessary in medical marijuana states? In recreational marijuana states? What purpose(s) do they serve? What do you think would happen if they were abolished?

2. Does it make sense for a state to set strict or even presumptive limits by statute for medical marijuana patients, given the wide range of conditions for which marijuana may be recommended and the various forms in which it may be consumed? *See, e.g.*, *California v. Windus*, 81 Cal. Rptr. 3d 227, 233 (Cal. App. 4th 2008) (noting patient

5. The quantity rules can be found in Alaska Stat. § 17.38.020(1)-(2) (outside home); *Noy v. Alaska*, 83 P.3d 538, 543 (Alaska Ct. App. 2003) (in home); Colo. Const. Art. XVIII, § 16(3); D.C. Code Ann. § 48-904.01(a)(1)(A) (West); Or. Rev. Stat. § 475.864(6); Rev. Code. Wash. § 69.50.360(3).

claims that "eating [marijuana] requires four to eight times the amount of marijuana than that needed when smoking it").

3. In medical marijuana states, how are physicians supposed to determine the correct dosage for any given patient? Chapter 12 discusses the practical difficulties physicians now face in meeting their obligations to patients and the state.

4. How is marijuana to be measured for purposes of determining compliance with quantity limitations? Chapter 7 discusses the measurement issues that arise in the analogous context of criminal sentencing.

5. In medical marijuana states, what are the consequences if a qualified patient exceeds the relevant quantity limits? Consider the following Problem.

Problem 4.12: Camila is a qualified patient, but she possessed a total of 3 ounces of marijuana, which is more than the 2.5-ounce maximum permitted by state law. She acknowledges that she was using the extra half-ounce for purely recreational purposes. Under state law, possession of one ounce or less of marijuana is considered a civil infraction, whereas possession of more than one ounce is considered a misdemeanor. May Camila assert a medical marijuana defense with respect to the 2.5 ounces she was allowed to possess? *Compare Arizona v. Fields*, 304 P.3d 1088, 1092 (Ariz. App. 2d 2013) ("*None* of a cardholder's marijuana use or possession is protected by the AMMA if he or she fails to abide by the enumerated conditions", including quantity limitations.") (emphasis added), *with California v. Trippet*, 66 Cal. Rptr. 2d 559, 570 (Cal. App. 1997) (permitting defendant who claimed to use marijuana for both medical and religious reasons to assert a partial defense to possession charges). What do you think? Should qualified patients be allowed to assert a partial defense when they violate conditions imposed on marijuana possession and use?

6. What are the consequences if someone exceeds the quantity limits in a recreational marijuana state? **Table 4.2** details the penalties under Colorado law for possession of more than one ounce of marijuana.

Table 4.2. Penalties for Exceeding Possession Limits in Colorado[6]

Quantity	Offense grade	Penalty range
$\leq$ 2 oz.	Petty offense	Maximum $100 fine
$\leq$ 6 oz.	Level 2 drug misdemeanor	0-12 months' imprisonment and $50-$750 fine
$\leq$ 12 oz. (3 oz. concentrate)	Level 1 drug misdemeanor	6-18 months' imprisonment and up to $5,000 fine
> 12 oz. (3 oz. concentrate)	Level 4 drug felony	6-12 months' imprisonment (presumptive), and up to $100,000 fine

6. *See* Colo. Rev. Stat. §§ 18-18-406, 18-1.3-501.

2. Purpose

All medical marijuana states limit patients to using marijuana solely for *medical* purposes. Typically, this means that a patient may use marijuana only to alleviate his/her qualifying condition or the symptoms associated therewith. *See, e.g.*, Mich. Comp. L. § 333.26423(f). Notwithstanding the name this textbook gives them, recreational marijuana states allow adults to use the drug for *any* purpose they deem fit, medical, recreational, religious, or otherwise.

Determining whether a patient has used (or will use) marijuana for a medical purpose could prove challenging. To address this evidentiary issue, some states have created a rebuttable presumption that a patient uses marijuana for medical purposes as long as he/she satisfies the other requirements imposed by state medical marijuana laws (e.g., registration). Under Michigan's Medical Marijuana Act, for example,

> (d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:
>
> (1) is in possession of a registry identification card; and
>
> (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption [that one is engaged in the medical use of marihuana] may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

Mich. Comp. L. § 333.26423. *See also* Minn. Stat. Ann. § 152.32(1) (West) (same).

Michigan v. Hartwick, 870 N.W.2d 37 (Mich. 2015), provides a rare discussion of the purpose limitation and the evidentiary rules surrounding it. In the case, the police arrested one of the defendants, Tuttle, for selling marijuana to another individual, Lalonde, in violation of the Michigan Medical Marijuana Act (MMMA). The police then searched Tuttle's home and found marijuana plants and a small quantity of dried marijuana. Based on the sale to Lalonde, the state charged Tuttle with distribution of marijuana. But it also charged Tuttle with the possession and manufacture of the marijuana and plants found at Tuttle's home. Against these latter charges, Tuttle sought to invoke immunity from prosecution under the Michigan Medical Marijuana Act (MMMA) (immunity is discussed below in Section C.2). Tuttle was a registered qualifying patient and a registered caregiver for at least one other patient under the MMMA, and he arguably possessed no more marijuana than was allowed by the MMMA. However, the prosecution claimed that Tuttle's sale of *some* of his marijuana to Lalonde rebutted the presumption of medical use for *all* of Tuttle's marijuana-related activities, including marijuana he might have been growing/possessing for his own medical use. The court rejected the prosecution's claim:

> Tuttle argues that unprotected marijuana-related conduct may only rebut the presumption as to otherwise protected conduct if a nexus exists between the unprotected conduct and the protected conduct. . . .
>
> . . .
>
> It is clear, as Tuttle concedes, that conduct violating the MMMA directly rebuts the presumption of medical use when a defendant's charges are based on that specific conduct. . . . It is not clear, however, that conduct violating the MMMA would also rebut the presumption of medical use related to other charges against the defendant when the

> illicit conduct does not form the basis of charges. . . . While the statutory language is neither compelling nor expressly direct, we nonetheless conclude that the statutory text lends support for Tuttle's proposition.
>
> Use of the permissive "may," [Mich. Comp. L. § 333.26423(d) (presumption "may be rebutted"),] in conjunction with the trial court's general gatekeeping responsibility to admit only relevant evidence, leads us to conclude that to rebut the presumption of medical use the prosecution's rebuttal evidence must be relevant, such that the illicit conduct would allow the fact-finder to conclude that the otherwise MMMA-compliant conduct was not for the medical use of marijuana. In other words, the illicit conduct and the otherwise MMMA-compliant conduct must have a nexus to one another in order to rebut the . . . presumption [of medical use]. . . .
>
> Further, Tuttle's view not only has statutory support, but also comports with how generally a presumption should be rebutted. Only relevant evidence that allows the fact-finder to conclude that the underlying conduct was not for "medical use" may rebut the . . . presumption. A wholly unrelated transaction—i.e., a transaction with no nexus, and therefore no relevance, to the conduct resulting in the charged offense—does not assist the fact-finder in determining whether the defendant actually was engaged in the medical use of marijuana during the charged offense. Conduct unrelated to the charged offense is irrelevant and does not rebut the presumption of medical use.
>
> Therefore, . . . the prosecution may rebut the presumption of medical use for each claim of immunity. Improper conduct related to one charged offense may not be imputed to another charged offense unless the prosecution can establish a nexus between the improper conduct and the otherwise MMMA-compliant conduct. The trial court must ultimately determine whether a defendant has established by a preponderance of the evidence that he or she was engaged in the medical use of marijuana. The defendant may do so by establishing this powerful presumption of medical use. If the presumption of medical use has been rebutted, however, the defendant may still prove through other evidence that, with regard to the underlying conduct that resulted in the charged offense and for which the defendant claims immunity, the defendant was engaged in the medical use of marijuana. . . .

Id. at 54-55.

Notes and Questions

1. Does the presumption make the medical purpose requirement superfluous? After all, how are the police supposed to rebut the presumption? Consider the following Problem:

Problem 4.13: On the drive home from a Phish concert, the car in which Delilah was riding was stopped for speeding. Delilah consented to a search of her backpack, which contained about ½ ounce of usable marijuana. When questioned, Delilah acknowledged that she had also smoked one marijuana joint at home before the concert. However, Delilah is a registered qualified patient who suffers from chronic back pain, and she showed the officer her registry identification card. Is Delilah entitled to the presumption of medical use for her possession of the ½ ounce of marijuana in her backpack, the joint she smoked earlier, or both? Could the state successfully rebut the presumption for either (or both)? What if Delilah had shared the joint with her friends—none of whom is a qualified patient—before the concert?

3. Type

Some states also limit the type or form of marijuana that individuals may possess and consume. (The forms marijuana takes and the methods used to consume it are discussed in Chapter 2.) Not surprisingly, CBD states are the most restrictive in this regard. In these states, the only type of marijuana patients may possess and consume is CBD, usually in oil form, and then, only if it contains very little THC. *E.g.*, Ala. Code § 13A-12-214.2(b)(2) (patient may possess CBD that "has a THC level of no more than 3 percent"); Iowa Code Ann. § 124D.6 (West) ("The defenses afforded a patient . . . apply . . . only if the quantity of cannabidiol *oil* possessed by the patient does not exceed thirty-two ounces.") (emphasis added).

By contrast, all recreational marijuana and most medical marijuana states allow qualified individuals to possess and use marijuana in whatever form they choose. *See, e.g.*, *California v. Mulcrevy*, 182 Cal. Rptr. 3d 176 (Cal. App. 2014) (holding that CUA implicitly adopted pre-existing definition of marijuana, which includes all parts of the plant and concentrated cannabis oil). However, a few medical marijuana states continue to ban possession of certain forms of the drug, including, most notably, smokable marijuana. In New York state, for example, the products approved for the medical marijuana market are limited to:

> (1) liquid or oil preparations for metered oromucosal or sublingual administration or administration per tube;
>
> (2) metered liquid or oil preparations for vaporization;
>
> (3) capsules for oral administration; or
>
> (4) any additional form and route of administration approved by the commissioner. *Smoking is not an approved route of administration.*
>
> (5) approved medical marihuana products may not be incorporated into edible food products by the registered organization [i.e., a medical marijuana dispensary], unless approved by the commissioner.

N.Y. Comp. Codes R. & Regs. tit. 10, § 1004.11(g) (emphasis added).

Notes and Questions

1. Attempts to limit the types of marijuana individuals may consume have generated some delicious legal disputes. In *Michigan v. Carruthers*, 837 N.W.2d 16 (Mich. App. 2013), for example, the court had to decide whether patients and caregivers are allowed to possess THC infused *brownies* under the Michigan Medical Marijuana Act (MMMA). Section 4 of the MMMA grants immunity for possession only of "*usable* marihuana." Mich. Comp. L. 333.26424(a) & (b)(1) (emphasis added). The statute defines "usable marihuana" as the "dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but . . . not . . . the seeds, stalks, and roots of the plant." *Id.* at 26423(k). The *Carruthers* court concluded that the brownies the defendant in the case possessed (and sought to distribute) did not satisfy this definition even though they contained marijuana and were otherwise usable (in the practical sense of the term):

> The prosecution offered into evidence the testimony of the forensic chemist who analyzed the brownies in this case. The chemist testified that there was no detectable plantlike material in the brownies, but they contained THC. . . . The chemist also testified that THC extraction techniques involve extracting THC from the resin of the marijuana plant. . . .

. . . [D]efendant acknowledged that THC was extracted from marijuana and infused into the brownies. Defendant's counsel also stated that the brownies were "not made of . . . ground up marijuana" but were instead made with cannabutter containing THC extract. . . .

. . . By excluding resin from the definition of "usable marihuana," as contrasted with the definition of "marihuana," and defining "usable marihuana" to mean only "the dried leaves and flowers of the marihuana plant, and any mixture or preparation *thereof,*" Mich. Comp. L. 333.26423(k) (emphasis added), the drafters clearly expressed their intent *not* to include resin, or a mixture or preparation of resin, within the definition of "usable marihuana." They therefore expressed their intent not to include a mixture or preparation of an *extract* of resin. Consequently, an edible product made with THC extracted from resin is excluded from the definition of "usable marihuana." Rather, under the plain language of the MMMA, the only "mixture or preparation" that falls within the definition of "usable marihuana" is a mixture or preparation of "the dried leaves and flowers of the marihuana plant. . . ." *Id.*

Nor are we persuaded by the . . . argument that usable marijuana merely constitutes marijuana that is "usable" and that a brownie containing THC extracted from the resin of a marijuana plant is usable marijuana because it is marijuana that is "usable" simply by virtue of its ingestion. That argument requires a circularity of reasoning that would read into the drafters' definition of "usable marihuana" a component (resin) that the drafters expressly excluded. Moreover, it ignores the fact that the term "usable marihuana" is not simply a combination of the words "usable" and "marihuana"; rather, it is a term of art specifically defined by the MMMA. We are not at liberty to ignore that definition in favor of our own. . . . The drafters' definition of the term "usable marihuana" clearly was not intended to encompass all marijuana that theoretically is "usable," in the colloquial meaning of the term, by virtue of its ability to be ingested. Rather, as a term of art, it is designed to identify a subset of marijuana that may be possessed in allowed quantities for purposes of an immunity analysis under § 4 of the MMMA. . . .

In defining the parameters of legal medical-marijuana use, the drafters of the MMMA adopted a definition of "usable marihuana" that we believe comports with the voters' desire to allow limited "medical use" of marijuana and yet not to allow the unfettered use of marijuana generally. . . . Given the heightened potency of the THC extract, as compared with "the dried leaves and flowers," . . . this definition of "usable marihuana" . . . strikes us as a sound and reasoned mechanism to promote the "health and welfare of [Michigan] citizens[]." . . .

Our interpretation also does not preclude the medical use of marijuana by ingestion of edible products; to the contrary, that use is authorized by the MMMA, within the statutory limitations, provided that the edible product is a "mixture or preparation" of "the dried leaves and flowers of the marihuana plant," rather than of the more potent THC that is extracted from marijuana resin. Mich. Comp. L. 333.26423(k). . . .

. . .

For the reasons stated, . . . [the] brownies [defendant possessed] did not constitute "usable marihuana." . . . The parties agree, however, as do we, that the brownies did constitute "marihuana" under that term's statutory definition. Possession of THC extracted from marijuana is possession of marijuana. . . . By possessing edible products that were not usable marijuana under the MMMA, but indisputably were marijuana, he failed to meet the requirements for § 4 immunity.

Carruthers, 837 N.W.2d at 21-27.

2. Do you think the limitations on the forms of marijuana qualified patients may consume are reasonable? What is the purpose behind such limitations?

3. The defendant in *Carruthers* had been convicted by a jury and sentenced to three years' probation with 33 days in jail. However, in a portion of its decision not excerpted here, the appeals court vacated the defendant's conviction and remanded for a new hearing. It found that the defendant should have been allowed to assert an affirmative defense under a different provision of the MMMA (section 8), even though he did not satisfy the more demanding criteria for immunity applicable under section 4. In pertinent part, the court noted that section 8 "does not refer to 'usable marihuana,' but instead states that a patient or primary caregiver, or both, 'may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana.' Mich. Comp. L. 333.26428(a)." *Carruthers*, 837 N.W.2d at 29. Section C below discusses the different types of legal protections medical marijuana states now afford users, including the differences between affirmative defenses and immunities.

4. Place

All jurisdictions that have legalized marijuana use continue to bar the use and sometimes even possession of the drug in certain places, such as near public parks and schools. The Connecticut medical marijuana statute below provides a representative formulation of these place restrictions. It provides that state law does not permit the use of marijuana:

> (A) in a motor bus or a school bus or in any other moving vehicle, (B) in the workplace, (C) on any school grounds or any public or private school, dormitory, college or university property, unless such college or university is participating in a research program and such use is pursuant to the terms of the research program, (D) in any public place, or (E) in the presence of a person under the age of eighteen, unless such person is a qualifying patient or research program subject. For the purposes of this subdivision, (i) "presence" means within the direct line of sight of the palliative use of marijuana or exposure to second-hand marijuana smoke, or both; (ii) "public place" means any area that is used or held out for use by the public whether owned or operated by public or private interests. . . .

Conn. Gen. Stat. Ann. § 21a-408a (West) (2016).

a. Public

Perhaps the most widely adopted place restriction bars the use and/or possession of marijuana in public. These bans have two distinct formulations. One formulation bans the *public use* of marijuana. For example, Colorado's Amendment 64, which legalizes recreational use of marijuana, provides that:

> (I) . . . a person who openly and publicly displays, consumes, or uses two ounces or less of marijuana commits a drug petty offense and, upon conviction thereof, shall be punished by a fine of up to one hundred dollars and up to twenty-four hours of community service.
>
> (II) Open and public display, consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate is deemed possession thereof, [a level 2 drug misdemeanor—level 4 drug felony, depending on quantity,] and violations shall be punished [by imprisonment of 0-12 months and a fine of $50 to $100,000].

Colo. Rev. Stat. 18-18-406(5)(b). A second formulation instead bans the open use of marijuana *in a public place*. For example, Michigan's medical marijuana law provides that it "does not permit any person to . . . [p]osess marihuana, or otherwise engage in the medical use of marihuana . . . [i]n any public place." Mich. Comp. L. 333.26427 (2016).

What sort of actions do these bans prohibit? The following case examines the application of a state ban that incorporates both formulations of the offense.

New York v. Jackson

967 N.E.2d 1160 (N.Y. Ct. App. 2012)

GRAFFEO, J.

While operating his vehicle on a public street in Brooklyn, defendant committed a traffic infraction that was witnessed by a police officer. When the officer pulled him over and approached his vehicle, she detected a strong odor of marihuana and saw defendant holding a ziplock bag of marihuana in his hand. Other items of contraband were subsequently discovered as a consequence of the motor vehicle stop, including more than a dozen bags of marihuana. Defendant was ultimately charged with one count of criminal possession of marihuana in the fifth degree, two counts of unlawful possession of marihuana and other offenses. He pleaded guilty to criminal possession of marihuana in the fifth degree in satisfaction of all the charges and was sentenced to five days in jail.

Despite the guilty plea, defendant appealed his conviction . . . , arguing that . . . because he was in a private vehicle, he was not in a public place when he was found in possession of marihuana. He further asserted that the police officer's allegation that he was holding the marihuana in his hand exposed to public view was too conclusory to satisfy that element of the offense. . . .

. . .

[In 1977, the New York Legislature] . . . restructured marihuana possession offenses with the intent to reduce criminal culpability for the possession of a small quantity of marihuana for personal use in a private place (such as in the home), making such conduct a violation when it had previously been a misdemeanor. . . . However, the Legislature did not alter its view that the possession or use of marihuana in public constituted a crime. Toward that end, [New York Penal Law § 221.10] was enacted creating the misdemeanor offense of criminal possession of marihuana in the fifth degree. Under the subsection at issue in this case, "[a] person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses . . . marihuana in a public place, as defined in section 240.00 of this chapter, and such marihuana is burning or open to public view." . . .

PUBLIC PLACE

When the Legislature made possession in a "public place" an element of criminal possession of marihuana in the fifth degree, . . . it incorporated by reference a preexisting definition of the phrase from article 240, a separate Penal Law article relating to a broad range of offenses against public order. Under Penal Law § 240.00(1), a "public place" is

> "a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence."

In this case, where defendant was found in possession of marihuana during a motor vehicle stop on a public street, the People alleged that defendant was in a "public place" because he was on a "highway"—a location that the Legislature specifically designated as a public place in Penal Law § 240.00(1).

Defendant does not dispute that a public street is a highway within the meaning of Penal Law § 240.00(1). Rather, he contends that he was not in a public place because he was situated inside his vehicle when the officer observed marihuana in his hand. Thus, defendant characterizes the issue as whether the interior of a car used for personal transportation is a "public place." Although defendant acknowledges that a pedestrian walking on a public street would be in a "public place," under his rationale a location would change from a public street to a private place if a person is in a private vehicle. We disagree.

With one exception, Penal Law § 240.00(1) defines a "public place" in terms of fixed physical locations—highways, schools, parks and the like—declaring these spaces to be public no matter whether a person is standing still or moving through them and regardless of the particular means of locomotion in use, if any. Thus, though certainly relevant to the second issue we address (the "open to public view" element), for purposes of the Penal Law § 240.00(1) definition of "public place," the fact that defendant was in his personal automobile does not alter the fact that he was on a highway—and was therefore in a public place—when he was seen in possession of marihuana. . . .

. . . [D]efendant notes that [section 240.00(1)] also incorporates "transportation facilities" which are defined to include not only certain physical spaces (e.g. airports and train stations) but also vehicles used for public passenger transportation, such as "aircraft, watercraft, railroad cars, buses" and the like. . . . By referencing certain types of public transit in the definition of "public place," defendant argues that the Legislature must have intended to exclude privately-owned automobiles used exclusively for personal transportation, intending such vehicles to be private. Again, the question is not whether a person's automobile is "public" or "private" but whether defendant was in a public place when he was in his car on the street. The People do not argue that a privately-owned vehicle used exclusively for personal transportation is a "public place" akin to a subway train or public bus. Rather, a driver of a personal automobile will be in a public place only when the vehicle is in a location that qualifies under the statute as a public place. In contrast, by defining certain vehicles used for public transportation—such as a bus—as themselves constituting "public places," the Legislature made the location of those vehicles at the time of the crime irrelevant; they are "public places" whether they are being driven on a highway or are parked in a private parking lot. The Legislature's decision to broadly incorporate public transit vehicles within the definition of "public place" regardless of their location in no way undermines our conclusion that a person is in a public place when located on a highway even if he or she is inside a personal automobile.

In fact, the contrary view of the statute propounded by defendant and the dissent would distinguish unfairly between those prosecuted for less serious violations and

those subject to misdemeanor convictions. For example, under their rationale, because the "public place" element would be lacking, a person smoking marihuana while sitting in a parked personal vehicle on a public street with the windows open, readily observable to anyone passing by, would be guilty of nothing more than a violation (the same offense that would apply were the person at home)—while a person standing just outside the vehicle in the same location engaged in the same behavior would be guilty of misdemeanor possession under Penal Law § 221.10(1). This would be true even though both hypothetical parties would have engaged in conduct that impacted the public in precisely the same manner. Although acknowledging that the marihuana possession offenses were restructured to reduce penalties for private marihuana possession or use in some circumstances, the dissent and defendant would extend the 1977 reforms well beyond the private conduct the Legislature intended to address, encompassing behavior that can fairly be described as occurring in public.

Moreover, given that the Penal Law § 240.00(1) definition of "public place" applies to a wide variety of crimes, many involving conduct bearing little similarity to the marihuana possession offense to which defendant pleaded guilty, it would be imprudent to give the phrase the restricted reading urged by defendant and the dissent. A holding that a person in a private vehicle can never be in a public place could have a far-reaching impact on the scope of other offenses—leading to results likely never intended by the Legislature. For example, under Penal Law § 240.62, entitled "[p]lacing a false bomb or hazardous substance in the first degree," it is a class D felony to position in a "public place any device or object that by its design, construction, content or characteristics appears to be . . . a bomb, destructive device, explosive or hazardous substance, but is, in fact, an inoperative facsimile or imitation of such a bomb." Were we to conclude that the interior of a private automobile is not a "public place" under the Penal Law § 240.00(1) definition, then a person that put a convincing—though fake—bomb on the passenger seat of a private vehicle and parked it on the street in front of a government building would not be guilty of this offense, despite the significant public disruption, fear and even chaos that would likely ensue when the device was observed by the police or a passing civilian. Similarly, were we to conclude that a highway is not a public place as long as an individual remains inside a private vehicle, then someone who engaged in harassment by slowly traveling alongside a pedestrian walking on a secluded public street, thereby placing that person in reasonable fear of physical injury, might avoid prosecution for harassment in the first degree (Penal Law § 240.25). Under the theory suggested by defendant and the dissent, by electing to follow the victim in an automobile rather than on foot, the offender would have negated the "public place" element of that offense. Considered in this broader light, we are unpersuaded that the Legislature could have intended the definition of "public place" to have the narrow meaning they ascribe to it.

. . .

OPEN TO PUBLIC VIEW

Next, defendant contends that even if he was in a public place, [the allegations against him failed to demonstrate that the marijuana was "open to public view"]. . . .

. . . [T]he "open to public view" element . . . is not defined either in Penal Law § 221.10(1) or elsewhere. But in keeping with the policy underlying the 1977 restructuring of marihuana possession offenses, it is evident that the Legislature included this

requirement to limit the criminal culpability of a party that possesses a small quantity of marihuana in a public place but does so in a manner that conceals the drug. In many respects, this element speaks more directly to the legislative concern for personal privacy—whether an individual is in a private automobile or elsewhere—than the "public place" element. That marihuana must be "open to public view" (or burning) to support prosecution under Penal Law § 221.10(1) ensures that a pedestrian walking on a public street carrying an inconsequential amount of marihuana secreted in a bag or pocket would not be subject to misdemeanor prosecution. When considered in the context of this case, it is this element that recognizes that, although a vehicle may be located in a public place, this does not mean that its occupants and owners have relinquished privacy interests in items concealed inside. Thus, it is the "open to public view" requirement—rather than the "public place" provision—that addresses the concern expressed by the dissent that personal automobiles are, in some respects, private in the sense that certain areas within the interior of an automobile are hidden from view. . . .

. . . Although not a model of specificity, we conclude that the allegations [against the defendant were legally sufficient to satisfy this element] . . . Here, the accusatory instrument[7] alleges that, upon approaching the vehicle, the officer "smelled a strong odor of marihuana emanating from inside the . . . vehicle" and "observed the defendant holding a quantity of marihuana in [his] hand, open to public view." Additional allegations—in which the officer explains the basis for her conclusion that the substance was marihuana . . . indicate that the contraband was in a ziplock bag. Although the officer did not describe the precise location of defendant's hand, since she was standing outside the vehicle when she saw the substance in the ziplock bag, these allegations support the inference that any other member of the public could also have seen the marihuana from the same vantage point—meaning that the marihuana was in an unconcealed area of the vehicle that would have been visible to a passerby or other motorist. Indeed, the statute does not require that a member of the public (other than a law enforcement officer) have actually seen the contraband—it requires only that the substance have been "open" or unconcealed in a manner rendering it susceptible to such viewing. The allegations were therefore sufficient to supply a jurisdictionally adequate accusatory instrument. . . .

Lippman, C.J., dissenting:

Thirty-five years ago, recognizing the dangers to society and individuals inherent in overcriminalization, the Legislature amended the Penal Law to lessen the burden on an already overtaxed justice system by decriminalizing private possession of small amounts of marihuana. The majority's conclusion that a private car on a highway is a "public place" under Penal Law § 240.00(1) and § 221.10(1) is not only contrary to the plain meaning of the statutory language, but also fails to accord sufficient weight to the broader legislative intent. The purpose of the subject Penal Law amendments was to decrease the penalty for nonviolent private conduct that does not pose a threat to public safety, while making clear that such behavior was still illegal and not to be condoned or encouraged. For these reasons, I respectfully dissent.

7. Author's note: An accusatory instrument is an information, indictment, complaint, or similar document charging a person with a criminal offense. *See* N.Y. Penal Law § 100 (defining accusatory instruments).

A public place is defined in the statute as "a place to which the public or a substantial group of persons has access" (Penal Law § 240.00[1]). The idea that the public or a substantial group of persons has access to the interior of a private car, whether traveling or parked, such that drivers and all passengers in private cars on public roads are in a "public place," contravenes the plain meaning of the statute's words. The majority claims that defendant's "situation is no different than if he were riding a bicycle on a highway," . . . but a car, unlike a bicycle which is clearly open and exposed to public access, is an enclosed private space. Based on the definition in the statute, the interior of a private car is a private place whether it is on a highway or in a privately owned driveway. . . .

Criminal statutes must be interpreted in terms of their plain meaning. . . . The majority broadens the scope of the statute beyond what the words of that provision reasonably convey. It is important to keep in mind that the underlying offense in this case is a low-level possessory violation, which under certain specific circumstances (namely when occurring in public)—and *only* under those circumstances—is transformed into a crime. The majority, in elevating a violation to a misdemeanor crime, without justification, has failed to adhere to the plain meaning of the statute. . . .

The majority's decision runs afoul of . . . fundamental principles [of due process notice] and conflicts with the reasonable interpretation of the statute as written. Certainly, the Legislature *could have* included all motor vehicles within the definition of a "public place." Had the Legislature intended such meaning, it would have used language to that effect, and indeed it has done just that in another context (*see* Penal Law § 240.37[1] [prohibiting "(l)oitering for the purpose of engaging in a prostitution offense," and defining a "public place" as "any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, *or a motor vehicle in or on any such place*"] [emphasis added]). If the Legislature desired to include private cars in the definition of "public place" prescribed by Penal Law § 240.00(1), it seems rather odd that it did not include them in much the same way it did in Penal Law § 240.37(1). The Legislature's choice lends itself to only one logical conclusion—that it deliberately excluded private cars from the meaning of "public place" in this particular statute while reserving and exercising the right to classify such vehicles as public places in other contexts. This choice is entirely rational and it is not for this Court to determine whether it represents an unwise policy decision. . . .

Not every unlawful act is also criminal, and in decriminalizing certain conduct, the Legislature recognized a need to provide for "more lenient treatment of marihuana offenses, as opposed to those involving other drugs." . . . This distinction is more than a mere difference in wording and it is a significant one. It reflects the view that when people are needlessly "arrested and prosecuted for simply possessing marihuana," lives are ruined, and police and judicial resources are wasted. . . . The Legislature determined that decriminalization was necessary in order to conserve public resources and avoid the "staggering" costs to society caused by prosecution of possession of small amounts of marihuana, and that it was important that people who possess inconsequential amounts of the substance for personal, private use would no longer have to live in fear of criminal penalties. . . . These changes made it extremely important for courts to properly distinguish between criminal possession and noncriminal (but unlawful) possession

in order to avoid the adverse consequences of overcharging, including the stigmatization arising from a misdemeanor conviction resulting in a permanent criminal record.

In making the distinction between conduct that amounts to a violation and criminal behavior, the Legislature identified two key factors. In order for possession to qualify as a violation, warranting only a fine of up to $100, the amount possessed must be small (under 25 grams) and the possession must occur somewhere that is not designated as a "public place" within the meaning of Penal Law § 240.00. Here, these requirements were met.

Contrary to the majority's contention, it is expanding the scope of Penal Law § 240.00(1) to include private vehicles that may lead to absurd results. For example, a person in possession of a small quantity of marihuana while parked on a public street adjacent to his home would be guilty of a crime whereas if he moved the car by a matter of feet to his driveway, he would be responsible only for a violation; a recreational vehicle parked at an otherwise empty rest stop or a privately owned car on an isolated road would be deemed "public places" for purposes of Penal Law § 221.10(1).

Because the possession did not occur in a "public place," there is no need to reach the "public view" element of the crime. . . .

Notes and Questions

1. Jurisdictions commonly treat these offenses (however formulated) as an aggravated form of simple possession/use, subject to more severe penalties than simple possession in other places. For example, New York normally classifies the simple possession of marijuana as a civil violation punishable by a fine of not more than $100, N.Y. Penal Law § 221.05 (McKinney), but it classifies open (or burning) possession in a public place as a class B misdemeanor, *id.* at § 221.10, which is punishable by up to three months in jail, *id.* at § 70.15(2).

2. Do you agree with the majority or the dissent in *Jackson*? If you think the legislature probably did not mean to punish Jackson's offense as a crime (as opposed to a civil violation), who should correct the result? The court? Or the legislature? How, if at all, would you rewrite New York's statute?

3. As the *Jackson* court notes, the crime of public possession in New York requires both that the defendant *openly* possess (or burn) marijuana *and* that the defendant do so in a place *open to the public*. Do both elements serve a useful function? Along these lines, consider the following Problem:

Problem 4.14: Suppose that Andy does one of the following:

(1) smokes a marijuana joint in plain view on the front porch of his house
(2) vapes marijuana discretely in a public

Does (1) violate a ban on public use? Does (2) violate a ban on use in a public place? Does one of these actions seem more likely to cause harm than the other? If so, which one?

4. Scenarios like the one posed by **Problem 4.14** have vexed some policymakers. Most notably, Colorado's Amendment 64 Implementation Task Force, which was formed to work out some of the details of Colorado's marijuana legalization initiative, could not agree on how to define "open and public . . . consumption." As recounted by two members of the Task Force:

> Defining "open and public consumption" of marijuana, which is expressly prohibited by the plain language of Amendment 64, has proven to be one of the most contentious issues in the new law. The Governor's Task Force could not reach consensus on this issue after hours of debate. A common hypothetical posed was the burning of a joint in a backyard or on a front porch. Since one's front porch is private property but viewable from the curb, and a burning joint can certainly be smelled from afar, it was unclear if such conduct constituted open and public use. . . .
>
> There is also confusion about when a gathering is private enough for "consumption" to occur. Most would agree, on the one hand, that a group of friends aged twenty-one and above gathered in a private home can smoke or otherwise consume marijuana without violating the law. On the other hand, most would also agree that public facilities such as bars and restaurants are off limits. However, there is a wide gray space in between these two extremes. For example, does an otherwise public facility that charges a "membership fee" for admission to an evening of marijuana consumption create a space private enough to pass legal muster? What about a private club with initiation fees and monthly dues?
>
> The confusion about what is not "open and public" has prompted a clamoring for marijuana social clubs—public locations run for the exclusive purpose of providing a controlled environment in which to consume marijuana and socialize with like-minded consumers. There are advantages to licensing such establishments. For example, under the new law, tourists visiting Colorado for mountain sports can legally purchase and possess . . . marijuana, but unless they stay at a pot-friendly hotel, they cannot consume the product. A mountain town social club dedicated to marijuana would solve that problem. However, social clubs have yet to be authorized by state authorities, as they bring with them myriad issues related to local zoning, public health, nuisance complaints, and drugged driving. Only a few establishments have conducted a risk assessment and opened their doors as private clubs, including one with local government approval.
>
> A central challenge of crafting rules in this area is distinguishing between burning cannabis and consuming an edible cannabis product. While an argument could be made that smoking a joint on a front porch clearly visible from a public sidewalk constitutes open and public consumption, it would be difficult also to conclude that a group of friends inconspicuously eating candies or cake infused with marijuana on that same porch would be engaged in open and public consumption. And because Colorado law makes no distinction between smoking tobacco and smoking marijuana when prohibiting both in public places, smoking marijuana is generally proscribed in all indoor facilities open to the public. But could an infused edible product be enjoyed in a public gathering place—from a bar or restaurant to a sports stadium or public park—if its consumers give no notice that it contains cannabis?

David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 Harv. L. & Pol'y Rev. 359, 374-75 (2014).

5. As Blake and Finlaw note in the excerpt, some entrepreneurs have created members-only clubs that (arguably) are not open to the public and thus, not subject to bans on public consumption of marijuana. *See* Paresh Dave, *Colorado Pot Law Bans Smoking in*

Public, L.A. Times, May 14, 2014 (discussing clubs and ticketed events). The Clubs include Studio A64 in Colorado Springs, https://perma.cc/V74U-37KC, and the Lazy Lion in Colorado Springs, https://perma.cc/PGM2-WAV6. Are these members-only clubs violating the law? What if the only requirement for membership is to pay a small fee at the door?

6. In the fall 2016 elections, Denver voters passed a new ordinance (Initiative 300) that permits the public use of marijuana in some businesses, such as bars and restaurants. The measure states, in relevant part:

> [T]he City and County of Denver . . . may permit a business or a person with evidence of support of an eligible neighborhood association or business improvement district to allow the consumption of marijuana ("cannabis") in a designated consumption area; such associations or districts may set forth conditions on the operation of a designated consumption area, including permitting or restricting concurrent uses, consumptions, or services offered, if any; the designated consumption area is limited to those over the age of twenty-one, must comply with the Colorado Clean Indoor Air Act, may overlap with any other type of business or licensed premise, and cannot be located within 1000 feet of a school; a designated consumption area that is located outside cannot be visible from a public right-of-way or a place where children congregate. . . .

Denver, Colo., Code of Ord., Tit. II, ch. 6, Art. VI (2016), at https://perma.cc/F6AK-US4K (providing full text of measure). *See also* Ricardo Baca, *Initiative 300: Everything You Need to Know About Denver's Social Cannabis Use Measure*, Denver Post, Nov. 8, 2016 (discussing Initiative 300). What do you think of the Denver measure? Is it consistent with the provisions of Colorado's Amendment 64 governing public use?

7. Notably, three of the four new state recreational marijuana measures adopted in the fall 2016 election all permit the public consumption of marijuana in certain establishments, so long as those establishments obtain the approval of local authorities. Cal. Health & Safety Code § 11362.3(a)(1) (2016) (permitting consumption in licensed marijuana businesses); Me. Stat. tit. 7, § 2452(5)(B) (2016) (permitting consumption in marijuana social clubs); Mass. Gen. Laws Ann. ch. 94G, § 7(a)(1) (2016) (permitting consumption in marijuana establishments). These measures arguably signal a growing receptivity toward allowing limited public use of marijuana (or use of marijuana in public places) as part of state marijuana reforms. Do you think jurisdictions should ban public use/use in public places? Why, why not? Chapter 5 considers some of the policy arguments for and against such bans.

b. Schools

Until recently, every state banned the possession and consumption of marijuana on school grounds, including both K-12 schools and universities. No exception was made for students who were otherwise permitted to use the drug for medical purposes. The Connecticut statute quoted at the start of Section B.4 provides an example.

In 2015, however, Maine and New Jersey became the first states to allow the use of medical marijuana in K-12 schools. For example, New Jersey's legislation provides:

> a. A board of education or chief school administrator of a nonpublic school shall develop a policy authorizing parents, guardians, and primary caregivers to administer medical

marijuana to a student while the student is on school grounds, aboard a school bus, or attending a school-sponsored event.

b. A policy adopted pursuant to subsection a. of this section shall, at a minimum:

(1) require that the student be authorized to engage in the medical use of marijuana pursuant to [New Jersey's Compassionate Use Medical Marijuana Act (NJCUMM)] and that the parent, guardian, or primary caregiver be authorized to assist the student with the medical use of marijuana . . . ;

(2) establish protocols for verifying the registration status and ongoing authorization pursuant to [NJCUMM] . . . concerning the medical use of marijuana for the student and the parent, guardian, or primary caregiver;

(3) expressly authorize parents, guardians, and primary caregivers of students who have been authorized for the medical use of marijuana to administer medical marijuana to the student while the student is on school grounds, aboard a school bus, or attending a school-sponsored event;

(4) identify locations on school grounds where medical marijuana may be administered; and

(5) prohibit the administration of medical marijuana to a student by smoking or other form of inhalation while the student is on school grounds, aboard a school bus, or attending a school-sponsored event.

c. Medical marijuana may be administered to a student while the student is on school grounds, aboard a school bus, or attending school-sponsored events, provided that such administration is consistent with the requirements of the policy adopted pursuant to this section.

N.J. AB 4587 (2015), codified at N.J. Rev. Stat. § 18A:40-12.22. For background on the legislation, see Susan K. Livio, *N.J. School 1st in Nation to Allow Medical Marijuana for Students*, NJ.com, Nov. 12, 2015, https://perma.cc/8AFQ-9QHR.

Notes and Questions

1. By contrast, no state bans outright the use or possession of other legal medications in schools, including psychotropic drugs like Adderall. Authorities do, however, tightly regulate how some drugs are used, both to prevent diversion to illegal uses and also to protect the safety of legitimate users. Thus, among other things, many jurisdictions specify how certain medications are to be delivered, stored, and administered in schools. *See, e.g.*, 14 Del. Admin. Code 817. Should medical marijuana states allow qualified patients to possess and use marijuana on school grounds, at least on terms similar to those that apply to other drugs?

2. What about recreational marijuana on college campuses? It appears that no college yet formally permits of-age students to possess and use recreational marijuana on campus. *See* Eliza Gray, *How Colleges are Dealing with Legal Pot*, Time.com, Feb. 19, 2015, https://perma.cc/88JH-BBQC?type=image. Many colleges do, however, permit of-age students to use *alcohol* on campus. *See* K.M. Lenk et al., *Alcohol Policies and Practices among Four-Year Colleges in the U.S.: Prevalence and Patterns*, 73 J. Stud. Alcohol & Drugs, 361 (2012). Should states treat the use and possession of recreational marijuana the same way they treat the use and possession of alcohol? Why, why not?

3. The materials in Chapter 14 suggest that federal law may be at least partly responsible for the states' reluctance to allow marijuana (medical or otherwise) on school grounds.

5. Driving Under the Influence

Marijuana's potential impact on traffic accidents and related harms is one of the chief concerns now surrounding marijuana reforms. This section considers how the states have reacted to this concern. (Chapter 5 discusses in more detail marijuana's impact on driving harms and the impact that the regulations discussed below have had on this harm.)

Every state has prohibited driving under the influence of marijuana (DUI-impaired). A sizable contingent of states has also prohibited driving with marijuana (or some metabolite thereof) in the body, regardless of whether the driver was impaired (DUI-per se). This section discusses the elements of these DUI offenses and the legal issues that have arisen under them.

a. DUI-Impaired

All states have made it a criminal offense to

(1) drive a motor vehicle (or be in actual physical control thereof)
(2) while under the influence of marijuana

For purposes of the offense, the latter element (being "under the influence") connotes something more than having consumed the drug, though that is obviously a prerequisite. It connotes being *impaired* by the drug. In *Webb v. Georgia*, for example, the defendant had been convicted of driving while under the influence of marijuana. At trial, the government demonstrated that the defendant had been driving 60 mph in a 50 mph zone and had, at some prior point, consumed marijuana (the defendant's urine had tested positive for the drug and the police discovered a small baggie of marijuana and a partially smoked marijuana cigarette in the defendant's car). But the appeals court nonetheless reversed the defendant's conviction because the government had failed to produce enough evidence that the defendant's driving had been *impaired* by marijuana. The only evidence the prosecution had offered for impairment was the fact that the defendant had been driving ten miles per hour over the speed limit. The court held that this evidence, standing alone, was insufficient to meet the government's burden on the second element. It emphasized that "the mere fact that a defendant has ingested marijuana is not sufficient to support a conviction [for driving while under the influence of a drug]. . . . The State is required to present some other form of evidence showing the defendant was impaired." 476 S.E.2d 781, 783 (Ga. App. 1996).

The degree of impairment required for a conviction varies across the states. In some jurisdictions, the government must demonstrate that the marijuana rendered the defendant "incapable of driving safely." 23 Vt. Stat. § 1201 ("a person shall not operate. . . . any vehicle on a highway . . . when the person is under the influence of [marijuana] . . . to a degree which renders the person incapable of driving safely").

In a small number of jurisdictions, however, the government need only show that the defendant was slightly impaired. For example, Arizona provides that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle . . . [w]hile under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination [thereof] . . . if the person is impaired *to the slightest degree*." Ariz. Rev. Stat. § 28-1381(A)(1) (emphasis added).

There are many types of evidence that the government may use to demonstrate that a defendant both consumed marijuana and was impaired thereby, including blood or urine tests, field sobriety tests, the defendant's demeanor, the smell of burnt marijuana in the defendant's car or on the defendant's person, the presence of marijuana or marijuana paraphernalia in the car or on the defendant's person, and the defendant's admission of marijuana use. In *Oregon v. Beck*, for example, the court upheld the defendant's conviction for DUI marijuana, based on evidence that the defendant's poor driving (he had crossed a median divider), admission to using marijuana the previous evening, and performance on a field sobriety test (his eyelids and legs trembled, his pupils were dilated, and the taste buds on the back of his tongue were raised, which is a sign of recent usage). 292 P.3d 653, 67-68 (Or. App. 2012).

Although blood or urine tests may help the government make its case, courts have held that the government is not required to perform such tests in order to demonstrate that a defendant had ingested or was impaired by marijuana (or other drugs). *E.g.*, *Richardson v. Georgia*, 682 S.E.2d 684, 685 (Ga. App. 2009) ("[The appellant] has cited to no authority, and we are aware of none, that requires the State to present the results from scientific testing of a driver's blood or urine in order to prove the specific type of drug allegedly ingested by the defendant so that the State may obtain a conviction for DUI less safe. . . .").

The following cases explore the sufficiency of different types of evidence in meeting the government's burden of demonstrating impairment.

Pennsylvania v. Hutchins

42 A.3d 302 (Pa. App. 2012)

Olson, J:

[The appellant, Corey Adam Hutchins, was convicted of various offenses, including driving under the influence of a controlled substance. On appeal, he challenged the sufficiency of the evidence supporting his conviction for DUI. The court recited the facts as recorded by the trial court:]

> On September 19, 2009, at approximately 4[:00] p.m., Christopher White was traveling eastbound on Jonestown Road, a two-lane road, when Appellant's car, a 1999 Dodge Stratus turned in front of his vehicle. [Appellant was driving his car. His three young daughters were also in the vehicle.] Appellant's vehicle was making a left turn in front of White's vehicle on Old Jonestown Road. White testified that at this particular section of Old Jonestown Road there are no hills or slopes in the road. Rather, the location where the accident occurred was flat. On the date in question, there were no adverse weather conditions, such as rain or sleet, and there were no problems with lighting because it was a sunny day. White was traveling approximately forty-five (45) miles per hour, the posted speed limit, before the accident occurred. The force of impact was enough to deploy the airbags in his vehicle, and White's car was totaled.

> Trooper David Mays was dispatched to assist with the accident. Trooper Mays testified that he arrived at the scene in a matter of a couple of minutes. Upon arriving at the scene, Trooper Mays observed a two-car crash along the roadway. . . . As Trooper Mays searched Appellant's vehicle for registration and insurance information, he smelled an odor of [ ] marijuana. He found a Camel cigarette case in the left driver's side door pocket that contained marijuana.
>
> The Commonwealth also presented testimony of Trooper Nathan Trate. He testified that he arrived on the scene of the accident at approximately 4:20 p.m. . . . At the scene, Appellant admitted that the accident was his fault because he was "distracted" and thought that he could make the turn. Trooper Trate testified that Appellant's demeanor was "unusually calm" or "flat line" after the accident. After being asked whether he had consumed alcohol, Appellant stated that he had not, but he admitted to smoking marijuana earlier in the day.
>
> . . . Trooper Trate believed that in his opinion, based on his experience and training, the Appellant was under the influence of marijuana and that this had an impairing effect on his ability to drive. To come to that conclusion, Trooper Trate considered Appellant's "unusually calm" demeanor after the accident; furthermore, he did not see another reason why the Appellant would turn in front of a car on a straight roadway. Trooper Trate also noted that the Appellant's pupils seemed "constricted" and considered Appellant's statement that "he had a lot of things on his mind" before the accident.
>
> In addition, Trooper Trate explained that the effects of marijuana on the body include a "lack of depth perception, fatigue [and an] inability to concentrate." Furthermore, he revealed that marijuana is a depressant which slows the body down, including one's reaction time.[ ] No standard field sobriety tests were performed because Appellant left the scene to accompany his daughters to the hospital before Trooper Trate was able to conduct the tests. At the hospital, Trooper Trate placed Appellant under arrest. The Appellant then admitted to smoking a half of a bowl [of marijuana] hours earlier in the day.
>
> The parties stipulated that the substance found in Appellant's car was determined to be [.63 grams of] marijuana. . . .
>
> Appellant consented to a blood draw. The toxicology report prepared by Good Samaritan Hospital indicated that Appellant had no alcohol in his blood. The Appellant's blood sample contained 43 ng/ml of carboxy acid [a metabolite of the marijuana plant].

. . .

On September 14, 2010, a jury convicted Appellant of the aforementioned crimes. . . .

Appellant's first issue challenges the sufficiency of the evidence for his conviction under 75 Pa. C.S.A. § 3802(d)(2) [which states that "an individual may not drive, operate or be in actual physical control of the movement of a vehicle" if the individual "is under the influence of a drug . . . to a degree which impairs the individual's ability to safely drive."] . . .

. . .

According to Appellant, the blood test result showing the presence of metabolites in his blood stream, without any expert explanation[, (the government provided none)], fails to establish that he was under the influence of a controlled substance at the time of the accident. . . . Moreover, Appellant argues that the only other evidence establishing intoxication is his admission that he had smoked marijuana earlier in the day. . . . Appellant contends that his admission, by itself, is insufficient to establish that his use of marijuana prevented him from safely operating his vehicle on the occasion in question. . . .

We agree with Appellant that, under the circumstances of this matter, any reliance upon the result of Appellant's blood test for purposes of establishing causation . . . required expert testimony. Specifically, the result of Appellant's blood test showed the presence of carboxy acid metabolite in Appellant's system. . . . That metabolite is a waste product of marijuana, not evidence of active marijuana. . . . What the discovery of carboxy acid in Appellant's blood stream reveals as far as Appellant's ability to safely drive that afternoon is not an issue within the knowledge of an ordinary layman. . . . Indeed, absent expert explanation, Appellant's blood test result tells us only that Appellant ingested marijuana in the past; the test result, without expert explanation, fails to establish that Appellant was under the influence of marijuana at the time of the accident. . . .

However, . . . we disagree with Appellant that the only other evidence against him is his confession to having smoked marijuana earlier in the day. . . .

To the contrary, the Commonwealth presented evidence that upon arriving at the scene of the accident, Trooper Trate observed that, despite the fact that Appellant's three daughters were injured (one bleeding profusely), covered in glass, and crying, Appellant was unusually calm in his demeanor. . . . Appellant's reaction caused Trooper Trate, who is trained to detect the effects of controlled substances on the body, to suspect that Appellant was under the influence. . . . Trooper Trate inquired as to whether Appellant was intoxicated, to which Appellant confessed that he had not been drinking, but that he had smoked marijuana earlier in the day. . . . However, before Trooper Trate could inquire further or perform any field sobriety tests, Appellant left the scene, accompanying his daughters to the hospital. Later, at the hospital, Appellant confessed to having smoked half a bowl of marijuana at approximately noon that day.

In the meantime, Trooper Mays remained with the vehicles involved in the accident, and entered Appellant's vehicle to obtain the registration and insurance information for that vehicle. Upon entry of the vehicle, Trooper Mays, who is trained to detect the smell of marijuana, smelled marijuana and discovered raw marijuana in the driver's side door. Finally, all evidence presented regarding the accident, including Appellant's own confession, indicates that the accident was Appellant's fault in that Appellant turned directly into on-coming traffic.

Considering the totality of the above circumstances, viewed in the light most favorable to the Commonwealth, we hold that there was sufficient evidence to establish that the accident was caused as a result of Appellant's inability to safely operate his vehicle due to the influence of marijuana. Therefore, we hold that, even without the consideration of Appellant's blood test result, the evidence was sufficient to establish Appellant's conviction under Subsection 3802(d)(2).

United States v. Davis

261 F. Supp. 2d 343 (D. Md. 2003)

DAY, Magistrate J.:

Clifton Davis ("Defendant") is charged with [inter alia] . . . Driving Under the Influence of Alcohol and/or Drugs in violation of 36 C.F.R. 4.23(a)(1). . . .

I. FINDINGS OF FACT.

At approximately 8:00 p.m. on July 27, 2002, . . . Officer Gary E. Hatch [of the United States Park Police] . . . was alerted by another motorist that a vehicle was being operated

erratically on the [Baltimore-Washington] Parkway. Shortly thereafter, Officer Hatch heard a crashing sound and observed a black sports utility vehicle make contact with construction barrels on the right shoulder of the Parkway. . . . The black vehicle, later identified as Defendant's 2001 Isuzu Rodeo, moved off to the right shoulder and then swerved back into the far-right travel lane after having hit three to four barrels. Officer Hatch . . . began pursuing Defendant . . . [who] was traveling at approximately 65 miles per hour. Defendant was observed swerving onto the right shoulder of the Parkway and returning to the far right traveling lane several times. After Officer Hatch noticed Defendant's pattern of doing so, the Officer activated his emergency equipment (i.e., roof rack lights, flashing headlights, and siren).

Defendant increased his speed to approximately 75 to 80 miles per hour, occasionally encountering slower-moving vehicles, getting "right on top of them and then had to slam his breaks on to avoid striking them." Defendant, while breaking [sic], would repeatedly swerve as if losing control of his vehicle before correcting. Defendant also changed lanes a number of times to take an open lane and increased his speed when no other vehicle was directly in front of him. Officer Hatch changed lanes as Defendant did until the Officer finally took the center lane when he saw that Defendant was quickly approaching a commercial truck. Defendant approached the commercial truck and applied his brakes to avoid hitting it, causing his own vehicle to slide sideways. Defendant then attempted to move to the left lane, where Officer Hatch was driving, causing the Officer to swerve to avoid a collision with Defendant. Officer Hatch pursued Defendant in this manner . . . [for] a span of approximately 6 to 7 miles.

Sergeant William E. Hayes of the Maryland State Police entered the Parkway . . . [,] activated his vehicle's emergency equipment and positioned his vehicle in front of Defendant in an effort to slow Defendant's speed. At that point, by Sergeant Hayes' estimate, Defendant was traveling at 75 to 80 miles per hour. Sergeant Hayes remained in front of Defendant's vehicle, changing lanes each time Defendant changed lanes—approximately 4 to 5 times—eventually slowing him down to a stop after approximately 1 mile. . . .

Once Defendant's vehicle was stopped, Officer Hatch and Sergeant Hayes approached Defendant's vehicle with their weapons drawn. Both Defendant and his passenger were non-responsive and appeared disoriented. When asked to show their hands, neither occupant of the vehicle responded with more than a "blank" stare. Officer Hatch reached into the vehicle and across Defendant's lap to unlatch Defendant's seatbelt, then physically removed Defendant from the vehicle. The passenger was removed from the vehicle in the same manner. According to Sergeant Hayes, Defendant was not combative in any way.

Defendant was taken to the United States Park Police station . . . for processing. Defendant continued to appear disoriented and confused about where he was and the reason why he was there. Defendant was asked for his name and home address, but did not appear able to provide that information. Officer Hatch considered performing field sobriety tests, but given Defendant's apparent inability to communicate, the Officer opted not to conduct such testing. Defendant was then taken to [the hospital] where blood samples were taken for screening. Officer Hatch escorted Defendant to . . . detention. Officer Hatch testified that it was at that time, approximately three hours after initially encountering Defendant, that Defendant began to speak normally and appeared coherent.

II. CONCLUSIONS OF LAW

. . . The Court finds Defendant not guilty driving under the influence of alcohol and/or drugs in violation of 36 C.F.R. § 4.23(a)(1).

The Code of Federal Regulations prohibits "[o]perating or being in actual physical control of a motor vehicle" while "under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation." 36 C.F.R. § 4.23(a)(1) (2003). The Government bears the burden of proving . . . that (1) Defendant was operating or was in actual physical control of a vehicle, (2) that Defendant was under the influence of alcohol, or a drug, or drugs, or any combination thereof, and (3) to a degree of intoxication that rendered Defendant incapable of safe operation. . . . Clearly, Defendant was operating his vehicle, however, the Government failed to carry its burden with regard to the final two elements of this offense.

The Government bears the burden of proving that a defendant is under the influence of a substance and what the substance actually is at the time of the conduct in question. The Government's burden is a high one. This Court cannot convict Defendant given the exculpatory results of chemical blood analysis performed here. The Government does not and cannot assert that the chemical analysis performed in the instant case revealed the presence of alcohol in Defendant's blood. Nor is there any other evidence of the consumption of alcohol by Defendant. Further, the results of the chemical analysis ruled out the presence of PCP, LSD, or some other hallucinogenic drug. The only evidence presented regarding the presence of any drug in Defendant's system was that marijuana was present in an unspecified concentration.

Defendant admitted to having used marijuana in the two weeks prior to July 27, 2002 but denied having used marijuana on the day in question. Officer Hatch's search of Defendant's person and vehicle upon arrest did not reveal any drugs or drug paraphernalia. The support for the Government's claim that Defendant was inebriated were his "glassy eyes" and his prolonged appearance that seemed to convey an absence of knowledge of what was going on, coupled with bad driving. Defendant did not appear to be alert and oriented in any fashion. The Government offered no evidence that the amount of marijuana affected Defendant to the extent of rendering him incoherent or disoriented. The Government failed to provide any evidence that Defendant's driving was affected by alcohol, or a drug, or drugs, or any combination thereof, to a degree that rendered the operator incapable of safe operation.

. . .

There are other explanations for a person to become disoriented or catatonic other than drug and/or alcohol use. Officer Hatch recalled asking Defendant whether he suffered from a medical condition that contributed to his behavior and testified in court that from his training and experience it is possible for some medical conditions to cause a person to act the way Defendant acted. Defendant could have suffered from a medical condition or may have fallen under the spell of vehicle fumes. While direct evidence of voluntary intoxication may be difficult to adduce, the Government must do more to support a conviction than claim that Defendant's version of events is merely a collection of self-serving denials while simultaneously ignoring the fact that there was no significant evidence of the presence of alcohol and/or drug use. The Government's evidence is simply not enough to prove Defendant's guilt beyond a reasonable doubt.

Notes and Questions

1. Was the evidence sufficient to convict the defendant in *Hutchins* of DUI-impaired? Can you think of a reason (other than marijuana) why someone like the defendant might have been distracted when making the left turn? How about *Davis*? Do you agree with the judge's conclusion that there was insufficient evidence to show beyond a reasonable doubt that the defendant was under the influence of some drug at the time of the offense? Is it possible to reconcile the two decisions?

b. DUI-Per Se

Beginning with Arizona in the 1990s, several states have added a separate per se offense for driving with drugs (including marijuana) in the driver's body. The Department of Transportation, NHTSA, Drug Per Se Laws: A Review of Their Use in the States (2010) (surveying per se DUI laws in the states). This new offense supplements the core DUI offense just discussed. In other words, a defendant may be charged with either the core driving while impaired offense, or the per se offense, or (perhaps) even both. For example, Arizona makes it a crime to "drive or be in actual physical control of a vehicle"

> 1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.
>
> . . .
>
> 3. While there is any drug defined in Section 13-3401[, which includes marijuana,] or its metabolite in the person's body.

A.R.S. § 28-1381(A).

The DUI-per se offense simplifies the government's burden of demonstrating a violation. Under the per se approach, the government need only show that the defendant

(1) was driving a motor vehicle (or in actual physical control thereof), and
(2) had a requisite quantum of marijuana or marijuana metabolites in his or her system at the time

As with the DUI-impaired offense, there is some variation in the second element of the DUI-per se offense. Namely, some jurisdictions employ a zero tolerance approach, meaning that *any* amount of marijuana in the body constitutes an offense. The Arizona statute quoted above, for example, makes it a crime to drive with "any drug" prohibited by the state "or its metabolite in the person's body." *See also* Mich. Stat. 257.625 (making it a crime to operate a vehicle "if the person has in his or her body any amount of a controlled substance listed in schedule 1" of the state's drug law). However, other jurisdictions have set the threshold above zero, normally between 2 and 5 nanograms of cannabinoids or metabolites per milliliter of blood (and higher amounts for urine). For example, Nevada provides that

> It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his or her blood or urine that is equal to or greater than [10 nanograms per milliliter of marijuana in urine or 2 nanograms per milliliter in blood; or 15 nanograms per milliliter of marijuana metabolites in urine or 5 nanograms per milliliter of same in blood]

N.R.S. 484C.110(3). (As discussed in Chapter 5, doubts have been raised concerning the reliability of predicting impairment based on specific quantities of marijuana or metabolites found in blood or urine tests.)

In most of these states, once the government establishes the requisite presence of marijuana, it need not demonstrate any impairment therefrom. In Colorado, however, establishing the presence of marijuana merely creates a permissible inference of impairment. The Colorado law provides that if the "driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the defendant's blood, such fact gives rise to a *permissible inference* that the defendant was under the influence of one or more drugs." Col. Stat. 42-4-1301(6)(IV) (emphasis added). This means that a jury will not necessarily convict a defendant based solely on the fact that she had the requisite quantum of marijuana metabolite in her blood while driving, though it would be allowed to do so.

(i) What Is Marijuana for Purposes of DUI-Per Se Laws?

There is also some variation across the states in terms of what is considered "marijuana" for purposes of DUI-per se law. Namely, some states appear leery of applying their DUI-per se prohibitions to marijuana metabolites like 11-carboxy-tetrahydrocannabinol that might be found in the blood or urine of a driver. *See, e.g., People v. Feezel,* 783 N.W.2d 67 (Mich. 2010) (holding that 11-carboxy-tetrahydrocannabinol is not a controlled substance or its derivative under Michigan law, and hence, positive test for 11-carboxy-THC was not enough to establish violation of per se drugged driving law). Marijuana metabolites are basically the waste product produced after the body has consumed (i.e., metabolized) marijuana's psychoactive ingredient (THC). As compared to THC, these metabolites are easier to detect: they stay in the body for longer periods of time and may pass through to the urine (THC is only found in the blood).

In the following case, the court discusses the different marijuana metabolites that may be found in the body and why one state's DUI-per se law does not cover them all.

Arizona ex rel. Montgomery v. Harris

322 P.3d 160 (Ariz. 2014)

Brutinel, J.

Police stopped a vehicle driven by Hrach Shilgevorkyan for speeding and making unsafe lane changes. Suspecting that he was impaired, officers administered field sobriety tests. After participating in the tests, Shilgevorkyan admitted that he had smoked some "weed" the night before and voluntarily submitted to a blood test that revealed [Carboxy-Tetrahydrocannabinol ("Carboxy-THC"), a non-impairing metabolite of marijuana] . . . in his blood.

The State charged Shilgevorkyan with two counts of driving under the influence. Count one alleged a violation of A.R.S. § 28-1381(A)(1) ("the (A)(1) charge"), which prohibits a person from driving a vehicle in Arizona "[w]hile under the influence of . . . any drug . . . if the person is impaired to the slightest degree." Count two alleged a violation of A.R.S. § 28-1381(A)(3) ("the (A)(3) charge"), which prohibits driving a vehicle "[w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body."

Shilgevorkyan moved to dismiss the (A)(3) charge, arguing that the blood test revealed neither the presence of THC nor "its metabolite" Hydroxy-Tetrahydrocannabinol

("Hydroxy-THC"). At an evidentiary hearing, the State presented expert witness testimony that: (1) marijuana has "many, many metabolites," (2) Hydroxy-THC and Carboxy-THC are the two major marijuana metabolites, (3) although it is possible to test for Hydroxy-THC in the blood, the Arizona Department of Public Safety chooses not to do so because Hydroxy-THC does not "exist in the blood for very long" and is quickly converted to Carboxy-THC, (4) Carboxy-THC is inactive and does not cause impairment, and (5) Carboxy-THC can remain in a person's body for as many as twenty-eight to thirty days after the ingestion of marijuana.

[The trial court granted Shilgevorkyan's motion to dismiss the (A)(3) charge and the State appealed.]

. . .

The term "metabolite" is not defined by statute. . . . A standard medical dictionary defines metabolite as "[a]ny product of metabolism." Taber's Cyclopedic Medical Dictionary 1349 (20th ed. 2005). It defines metabolism in pertinent part, as "the sum of all physical and chemical changes that take place within an organism." *Id.* These definitions comport with the State's expert's testimony, which defined "metabolite" as "any chemical compound that is produced during the process of metabolism, the breakdown process of getting rid of a drug or substance."

Shilgevorkyan argues that the meaning of "its metabolite" in § 28-1381(A)(3) is clear. He asserts that because the statute uses the possessive singular, it prohibits only Hydroxy-THC, the initial product of the metabolism of THC. Labeling Hydroxy-THC the "primary" metabolite, he contends the statute does not include the products of the further breakdown of Hydroxy-THC into subsequent or "secondary" metabolites such as Carboxy-THC. He further argues that interpreting "metabolite" in the plural expands the statutory definition to include a "secondary non-psychoactive metabolite . . . [that] does not cause impairment," which is inconsistent with the legislature's intent to criminalize driving under the influence of an intoxicating substance. The State, on the other hand, argues we should construe "metabolite" in the plural in accordance with A.R.S. § 1-214(B), which generally provides that statutory "[w]ords in the singular . . . include the plural. . . ."

. . .

Because the term "its metabolite" is reasonably susceptible to differing interpretations, the statute is ambiguous and we cannot determine from the term alone whether the legislature intended to penalize the presence of any byproduct, including Carboxy-THC, in a driver's blood. . . .

. . . When a statute's meaning cannot be discerned from its language alone, "we attempt to determine legislative intent by interpreting the statute as a whole, and consider 'the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.'" . . . Furthermore, we consider a statute "in light of its place in the statutory scheme[]." . . .

The State's interpretation that "its metabolite" includes any byproduct of a drug listed in § 13-3401 found in a driver's system leads to absurd results. . . .

Most notably, this interpretation would create criminal liability regardless of how long the metabolite remains in the driver's system or whether it has any impairing effect. For example, at oral argument the State acknowledged that, under its reading of the statute, if a metabolite could be detected five years after ingesting a proscribed drug, a driver who tested positive for trace elements of a non-impairing substance could be prosecuted.

Additionally, this interpretation would criminalize otherwise legal conduct. In 2010, Arizona voters passed the Arizona Medical Marijuana Act ("AMMA"), legalizing marijuana for medicinal purposes. 163 A.R.S. § 36-2801 et seq. Despite the legality of such use, and because § 28-1381(A)(3) does not require the State to prove that the marijuana was illegally ingested, prosecutors can charge legal users under the (A)(3) provision. Because Carboxy-THC can remain in the body for as many as twenty-eight to thirty days after ingestion, the State's position suggests that a medical-marijuana user could face prosecution for driving any time nearly a month after they had legally ingested marijuana. Such a prohibition would apply even when the driver had no impairing substance in his or her body and notwithstanding the State's ability to test both for THC, the primary substance that causes impairment, and Hydroxy-THC, the metabolite capable of causing impairment. . . .

. . . Section 28-1381(A)(3)'s placement within the statutory scheme also demonstrates a legislative intent to prevent and punish impaired driving, not simply driving while having a non-impairing metabolite in one's system. The "its metabolite" language appears in the "Driving Under the Influence" section of Arizona's statutes. . . . And the statute's title begins "Driving or actual physical control *while under the influence*. . . ." A.R.S. § 28-1381 (emphasis added). . . .

This legislative intent is further evidenced by A.R.S. § 28-1381(A)(2), which provides that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle . . . [i]f the person has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle. . . ." Neither the (A)(2) nor (A)(3) charge requires that the State prove impairment. The (A)(2) charge creates a per se threshold at which a driver is presumed to be under the influence. . . .

Similarly, in enacting the (A)(3) charge, the legislature sought to proscribe driving by those who could be impaired from the presence of illegal drugs in their body. However, unlike alcohol, there is no generally applicable concentration that can be identified as an indicator of impairment for illegal drugs. . . . The (A)(3) charge establishes that a driver who tests positive for any amount of an impairing drug is legally and irrefutably presumed to be under the influence. Although the legislature could rationally choose to penalize the presence of any amount of an impairing metabolite, we do not believe that the legislature contemplated penalizing the presence of a metabolite that is not impairing.

. . .

Because the legislature intended to prevent impaired driving, we hold that the "metabolite" reference in § 28-1381(A)(3) is limited to any of a proscribed substance's metabolites that are capable of causing impairment. Accordingly, marijuana users violate § 28-1381(A)(1) if they drive while "impaired to the slightest degree," and, regardless of impairment, violate (A)(3) if they are discovered with any amount of THC or an impairing metabolite in their body. Drivers cannot be convicted of the (A)(3) offense based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana. . . .

The record establishes that Carboxy-THC, the only metabolite found in Shilgevorkyan's blood, does not cause impairment. Accordingly, we . . . affirm the trial court's dismissal of the (A)(3) charge.

Justice TIMMER, dissenting:

Arizona is one of at least seven states that combats drugged driving with a zero-tolerance, per se ban on driving with any controlled substance or its metabolite in the body. . . . One of these states, Delaware, explicitly excludes inactive metabolites from its per se ban. Del. Code Ann. tit. 21, § 4177(c)(10) (West 2014). The Majority aligns Arizona with Delaware by construing A.R.S. § 28-1381(A)(3) in a manner that contradicts its plain meaning. I respectfully dissent.

The Majority holds that § 28-1381(A)(3) is ambiguous because the phrase "its metabolite" can mean all of a proscribed drug's metabolites, some of its metabolites, or only those that can cause impairment. . . . But "metabolite" has an accepted meaning, . . . and nothing in the language of § 28-1381 suggests that the legislature intended to exclude certain types of metabolites from the statutory prohibition. Because § 28-1381(A)(3) "admits of only one meaning," it is not ambiguous. . . .

I also disagree with the Majority that the legislature must have intended something different from what it plainly stated in § 28-1381(A)(3) because imposing a flat ban on driving with any metabolite of an illegal drug in the body is absurd. . . . The legislature reasonably could have concluded that a zero-tolerance provision would most effectively enhance detection and prosecution of drugged driving.

First, the difficulty of detecting drug impairment justifies a flat ban. . . . For example, an expert witness in this case testified that Hydroxy-THC converts quickly to Carboxy-THC, which is why law enforcement typically does not test blood for Hydroxy-THC. Thus, a driver with Carboxy-THC in the blood at the time of testing may or may not have had Hydroxy-THC in the blood while driving. The flat ban ensures that a driver who had an impairing substance in the body while driving is prosecuted even though that substance may have quickly metabolized into a non-impairing substance.

Second, the flat ban permits law enforcement to detect drugged driving by testing urine as well as blood. "[W]hile a urine test detecting metabolites does not conclusively establish the presence of the active proscribed parent drug in the bloodstream, neither does it rule it out, because the metabolite and the active parent will often be present in the body simultaneously." . . . Imposing a flat ban on driving with a metabolite of a controlled substance in the body enhances law enforcement's ability to detect drugged driving. . . .

The Majority contends that a flat ban is absurd because it permits prosecution if the non-impairing metabolite in the driver's body derives from ingesting . . . medically authorized marijuana. . . . [But the] scenario described by the Majority would unquestionably trigger constitutional scrutiny that might invalidate § 28-1381(A)(3) as applied in particular circumstances. . . . And § 28-1381(A)(3) might not apply if the detected metabolites—active or inactive—emanated from medically authorized marijuana use. See A.R.S. § 28-1381(D) ("A person using a drug as prescribed by a medical practitioner . . . is not guilty of violating subsection A, paragraph 3 of this section."). This case does not present either situation.

I share some of the Majority's concerns about imposing a zero-tolerance, per se ban on driving with the presence of non-impairing metabolites in the body. But because § 28-1381(A)(3) clearly and unambiguously reflects that the legislature intended this result, it is not appropriate to employ secondary canons of statutory construction to find a different meaning. Any constitutional challenges to this provision should be addressed on a case-by-case basis.

Notes and Questions

1. Do you agree with the majority's decision? Is it absurd to criminalize driving with the non-impairing metabolites of an impairing drug in one's body? If the majority's assessment is correct, is it any less absurd to criminalize driving with minute quantities of an impairing drug (or metabolite) in one's body?

2. Do you think per se DUI laws like Arizona's strike an appropriate balance between security and liberty? Are such bans even necessary to protect public safety? The *Harris* court briefly mentions that the state originally charged Shilgevorkyan under both section (A)(3) and section (A)(1), which bans driving while impaired *to the slightest degree*. Do you think the state could have prevailed on the (A)(1) charge? Is the added burden on the government of pursuing that charge (discussed earlier) too high? Does the DUI-impaired offense fail to adequately address the driving harms of marijuana use?

3. One of the key issues surrounding DUI-per se laws is whether they should apply to lawful marijuana users (e.g., qualified patients), an issue that simply did not exist when these laws first came into vogue. The problem identified by the *Harris* court is that DUI–per se laws could effectively prohibit lawful medical marijuana users from ever driving, given the length of time some marijuana metabolites remain in the body.

To address this concern, many medical marijuana states have adopted specific provisions of law designed to shield lawful medical marijuana users from DUI-per se laws (though not DUI-impaired laws). Indeed, even Arizona has such a shield, although *not* the one cited by the dissent in *Harris*. That provision, a part of Arizona's DUI law, provides that a "person using a drug *prescribed* by a medical practitioner . . . is not guilty of violating [(A)(3)]." A.R.S. § 28-1381(D) (emphasis added). As the Arizona Supreme Court later held, section 28-1381(D) does not protect medical marijuana users because they do not have a *prescription* for marijuana, as opposed to a recommendation. *Dobson v. McClennen*, 361 P.3d 374, 392-93 (Ariz. 2015). Nonetheless, the *Dobson* Court found that another provision of state law, passed as part of the state's medical marijuana law, gave medical marijuana users an affirmative defense to DUI-per se charges. *Dobson v. McClennen*, 361 P.3d 374, 392-393 (Ariz. 2015) (discussing Ariz. Rev. Stat. section 36-2802(D) ("[A] registered qualifying patient shall not be considered to be under the influence of marijuana *solely because of the presence of metabolites* or components of marijuana that appear in insufficient concentration to cause impairment.")) (emphasis added). Other states have adopted similar provisions. *E.g.*, 625 Ill. Comp. S. 5/11-501(a)(6) (specifying that state's DUI-per se law "does not apply to the lawful consumption of cannabis by a qualifying patient . . . unless that person is impaired by the use of cannabis"). *See also Michigan v. Koon*, 832 N.W.2d 724 (Mich. 2013) (holding that medical marijuana law supersedes state's DUI-per se law, so that qualified patients are liable only under state's DUI-impaired law).

(ii) Proof of the Presence of Marijuana

How is the government supposed to prove that a defendant had marijuana in her system? Although the government is not required to perform a blood or urine test on the defendant, as noted above, obtaining a conviction under a DUI-per se law may be difficult without one, as the following case demonstrates.

Illinois v. McPeak

927 N.E.2d 312 (Ill. App. 2010)

JORGENSEN, J.

[The defendant, Samuel McPeak, was charged under Illinois' DUI-per se law, which bars a person from operating a vehicle while "there is any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis." Ill. Comp. Stat. Ann. 5/11-501(a)(6).]

. . . [A] bench trial was held on stipulated facts. Those facts included that [in the course of a traffic stop, Officer Steve] Howell smelled burnt cannabis "about Mr. McPeak's person" and that McPeak admitted that "about an hour ago" he had "taken two hits out of a hitter box." McPeak also stipulated that, after he was arrested, Howell located in the vehicle a smoking pipe that contained a burnt substance that smelled like cannabis and that later field-tested positive for cannabis. . . . The court found McPeak guilty and sentenced him to 18 months of court supervision and assessed various fines, fees, and costs. . . .

[On appeal,] McPeak contends that the evidence was insufficient to convict him of DUI, because there was no evidence of the presence of cannabis in his breath, blood, or urine as required by section 11-501(a)(6). . . .

Two cases are helpful when considering McPeak's argument. In [*People v. Allen*, 873 N.E.2d 30 (Ill. App. 3d 2007),] the defendant was arrested under section 11-501(a)(6) after the arresting officer noticed an odor of burnt cannabis on the defendant's breath and the defendant's pupils seemed dilated. However, the officer was precluded from testifying that he believed the dilated pupils meant that the defendant had consumed cannabis. The defendant told the officer that he had smoked cannabis the night before. There was nothing unusual about how the defendant walked, his speech was clear, and there was no drug paraphernalia or residue located inside the defendant's vehicle. The defendant was convicted of DUI, and the [court] reversed based on insufficient evidence, stating:

> "The statute does not criminalize having breath that smells like burnt cannabis. Furthermore, even though the trial court found the officer's testimony credible regarding defendant's admission of smoking cannabis the night before his arrest, the State put on no evidence that there would have been 'any amount' of the illegal drug in defendant's breath, urine, or blood at the time of defendant's arrest as a result of smoking cannabis the night before." . . .

[*Id.*]

In comparison, in *People v. Briseno*, . . . [799 N.E.2d 359 (Ill. App. 1st 2003)], also involving section 11-501(a)(6), the defendant told the arresting officer that he smoked cannabis "in his vehicle, just before driving it." The officer smelled cannabis on the defendant's breath, the defendant's motor skills were slower than average, and the defendant had trouble performing field sobriety tests. Under those circumstances, the [court] determined that there was sufficient evidence of DUI. . . .

Unlike in *Briseno*, where the defendant's admission was that he smoked cannabis "in his vehicle" and "just before driving," where an odor of cannabis was on the defendant's breath, and where the defendant showed signs of impairment, here there was a lack of evidence that McPeak had cannabis in his breath, blood, or urine when he was driving. . . . McPeak admitted to smoking "two hits" of cannabis "about an hour ago" but there was no evidence whether consuming that amount of cannabis would result in

any cannabis being left in his breath, blood, or urine an hour later. Also, there was no evidence that McPeak was impaired and no evidence of any odor of cannabis on McPeak's breath, as opposed to his "person."

. . . We believe that evidence of the odor of cannabis on the breath of a defendant could provide circumstantial evidence that the defendant has cannabis in his breath. . . . [However], in McPeak's case there was no such evidence. The evidence was that Howell smelled burnt cannabis about McPeak's person, something that does not address whether McPeak had cannabis in his breath, blood, or urine at that time. Thus, based on the lack of evidence that there was cannabis in McPeak's breath, blood, or urine when he was driving, we reverse.

. . . [Likewise,] evidence of the presence of open alcohol (or, here, drug paraphernalia) may be circumstantial evidence that the defendant has recently consumed the substance at issue. . . . But here, there is no dispute that McPeak consumed cannabis about an hour before the stop. Instead, the issue is whether there was sufficient evidence that any of that cannabis remained in his breath, blood, or urine when he drove. Unlike each case cited by the State, which provided additional evidence of the presence of alcohol in the defendant's body while he was driving, notably evidence of impairment and the odor of alcohol on the defendant's breath, here the State provided no evidence that cannabis remained in McPeak's breath, blood, or urine while he was driving.

Notes and Questions

1. Apart from offering the results of a blood or urine test, what else could the government have done to satisfy its evidentiary burden in *McPeak*?

2. Blood or urine tests can obviously help the government build its case, but must a driver submit to them? All states appear to have some form of implied consent law that allows the police to obtain a blood or urine sample from a driver. A driver's refusal to submit a sample can lead to the suspension of driving privileges and may give rise to an inference that the driver was intoxicated. Georgia law illustrates:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial.

Ga. Code Ann. § 40-5-67.1 (West). However, the government's power to require such tests is not without limit. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply [with testing requirements]. . . . It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.").

6. Other, Forgotten(?) Crimes

Lawful marijuana users might also be ensnared by a variety of less-well-known prohibitions that were added during the heyday of marijuana prohibition (e.g., bans on the transportation of marijuana), but that have not always been addressed in reforms. California's experience with such prohibitions following the passage of Proposition 215 is illustrative and provides lessons for other states considering their own marijuana law reforms. The following materials discuss the legal issues the state confronted in trying to reconcile its medical marijuana reforms with sundry pre-existing prohibitions implicating marijuana users.

California v. Young

111 Cal. Rptr. 2d 726 (Cal. App. 3d 2001)

SIMS, J.

On November 6, 1999, California Highway Patrol Officer Rick LaGroue was on patrol . . . on State Route 36. . . . He noticed a green car with Oregon plates travelling in the opposite direction. The car abruptly went off the right shoulder of the road and then jerked back onto the road.

Officer LaGroue made a U-turn to investigate. By the time he caught up with the car, it had pulled over on the shoulder. Officer LaGroue went up to speak with the driver. Defendant was the sole occupant of the car. Defendant told the officer he lived in Paynes Creek[, California]. . . .

While the officer was conducting a routine records check on the defendant, the defendant took off his straw hat and dropped it on a small blue gift bag on the passenger side floorboard of his car. The officer asked defendant if he had any drugs in the car. Defendant told him he had marijuana in the blue gift bag he then handed it to the officer. The gift bag contained a baggie of marijuana marked "Awesome Shake Bud," a black tin container, some cigarette rolling papers, a rolling device, matches, and 16 burnt marijuana ends (roaches). The black tin contained a smoking pipe, 21 hand rolled marijuana cigarettes, another roach, and a small sandwich baggie containing marijuana marked "Maggie."

The officer searched the car and found another clear gallon-sized baggie containing marijuana marked "Rhonda Flower" with a "121" crossed out with a "113" next to it. The officer also found a second gallon-sized baggie containing seven smaller bags of marijuana marked with the words "Star-76." All told, the officer recovered 135.3 grams (about 4.74 ounces) of marijuana.

Defendant handed Officer LaGroue a document entitled "California Compassionate Use Act of 1996, Health & Safety Code § 11362.5, Physician's Statement." That document stated: "James W. Young . . . is under my medical care and supervision for treatment of the serious medical condition(s): Traumatic Arthritis Major Dep [*sic*] Recurrent. . . . I have discussed the medical risks and benefits of cannabis use with him/her as an appropriate treatment. I recommend and approve his/her use of cannabis with the following limitations/conditions: No more than ten plants." The document was signed by Dr. Tod H. Mikuriya.

[The state charged defendant with the transportation of marijuana, a felony drug trafficking offense under California law:

> Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment . . . for a period of two, three or four years.

Cal. Pen. Code § 13360(a). Defendant claimed that he believed transportation of marijuana was lawful under the Compassionate Use Act. The trial court refused to instruct the jury on this claim.[8] He was convicted by a jury and sentenced to four years in prison. In upholding the jury's verdict, the appeals court discussed the ongoing validity of the state's ban on transportation following passed of the CUA.]

. . .

In 1996, the voters of this state enacted the Compassionate Use Act "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes. . . ." (§ 11362.5, subd. (b)(1)(A).) Subdivision (d) of the Compassionate Use Act provides: "Section 11357, relating to the possession of marijuana, 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."

In *People v. Trippet*[, 66 Cal. Rptr. 2d 559 (Cal. App. 1st 1997), the court] examined whether the Compassionate Use Act provided the defendant with a defense to charges she transported marijuana. The court stated, "the statute specifically identifies only two penal provisions (out of five) from article 2 of division 10 of the [Health and Safety] Code, section 11357, dealing with possession, and section 11358, dealing with cultivation, etc. It would have been a simple matter for the drafters to have included a reference to section 11360 within subdivision (d) of section 11362.5. Thus, that subdivision could just as easily have read: 'Sections 11357, 11358 and 11360 shall not apply to a patient . . . who possesses, cultivates, or transports marijuana for the personal medical purposes of the patient' but it doesn't. We may not infer exceptions to our criminal laws when legislation spells out the chosen exceptions with such precision and specificity." The court went on, "Not only is there no evidence of any 'contrary' intent here, indeed the voters were expressly told by the Legislative Analyst that the proposed law 'does not change other legal prohibitions on marijuana. . . .' [Citation.] This symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution under section 11360." . . . [*Id.*]

Despite the plain language of the statute, the *Trippet* court stated, "practical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges. The results might otherwise be absurd. For example, the voters could not have intended that a dying cancer patient's 'primary caregiver' could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room. Our holding does not, therefore, mean that *all* transportation of marijuana is without any defense under the new law.

8. Author's note: Defendant styled his claim as a mistake of fact defense, but as the appeals court correctly noted, it amounted to a non-cognizable mistake of law defense. For a discussion of the difference between these two defenses, see Chapter 3, *supra*.

But so stating is a far cry from agreeing that transportation of two pounds of marijuana in a car by one who claims to suffer from migraine headaches is, even assuming the necessary medical approval, ipso facto permissible, as appellant would have it. The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not." . . . [*Id.*] The *Trippet* court remanded the case so that the defendant could attempt to prove that he met this test. . . .

. . . The Compassionate Use Act does not provide a defense to the transportation of marijuana in the circumstances presented here. The statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients. . . . It does not exempt transportation as defined in section 11360. "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." . . .

We need not decide whether we agree with the *Trippet* court that incidental transportation of marijuana from the garden to a qualifying patient may implicitly fall within the safe haven created by the Compassionate Use Act. This case does not involve the movement of marijuana from a plant legally cultivated in a garden to a seriously ill cancer patient but rather the transportation of marijuana in a vehicle. That kind of transportation is not made lawful by the Compassionate Use Act.

Notes and Questions

1. Does the decision in *Young* make sense? Do you think the drafters of Proposition 215, or those who voted on the measure, ever considered the transportation issue? If not, do you think the court should try to "fix" the oversight by recognizing an exception to the plain language of section 13360? If so, what would that exception look like? If you think the court should not recognize any exception to the statute, would anything stop a prosecutor from charging a caregiver for carrying marijuana across a hallway to a seriously ill qualified patient (the scenario that bothered the *Trippet* court)? Do you think the prosecution in *Young* doubted that the defendant was a legitimate medical marijuana patient? If so, why not charge him with simple possession of the drug?

2. In 2003, the California legislature addressed the specific issue raised by *Young* in the Medical Marijuana Program Act (MMP). In relevant part, the MMP provides:

> (a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366 [maintaining property for distributing or using marijuana], 11366.5 [renting property to store, manufacture, or distribute marijuana], or 11570 [nuisances]. . . .
>
> (b) Subdivision (a) shall apply to all of the following:
>
> (1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.
>
> (2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary

> caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

Cal. Health & Safety Code § 11362.765 (2004).

However, the MMP did not specifically address *another* provision of California law, found in the state Vehicle Code, that prohibits the simple possession of not more than one ounce of marijuana while driving a motor vehicle. Cal. Vehicle Code § 23222. Nonetheless, in *City of Garden Grove v. Kha*, 157 Cal. App. 4th 355 (Cal. App. 2007), a different California appeals court found that the MMP shielded qualified patients from charges under section 23222, even though that provision was not specifically mentioned in the MMP:

> Although the CUA speaks only to the possession and cultivation of marijuana (§ 11362.5, subd. (d) [referencing §§ 11357 and 11358]), the MMP is more broadly intended to protect a qualified patient "who transports . . . marijuana for his or her own personal medical use." (§ 11362.765, subd. (b)(1) . . . [T]he record indicates Kha is such a patient. However, the only transportation statute referenced in the MMP is section 11360. . . .
>
> The MMP does not mention Vehicle Code section 23222, subdivision (b), the law with which Kha was charged. . . . Obviously, a violation of this provision also constitutes a violation of section 11360, subdivision (b). The Vehicle Code provision is simply a more specific statute covering the act of driving, as opposed to other methods of transportation.
>
> We are therefore impelled to the conclusion it would be illogical to find the MMP covers one provision, but not the other. Such a result would lead to the absurd consequence of permitting a defendant who drives with a large amount of marijuana to invoke the MMP . . . , while excluding drivers who transport the small amount covered by the Vehicle Code section. We cannot construe the law to permit such a clearly unintended and patently nonsensical result. . . .
>
> There is an additional, even more fundamental reason why qualified patients who are charged with violating Vehicle Code section 23222, subdivision (b) should be included within the ambit of the state's medical marijuana laws. As Kha notes, that section prohibits driving with marijuana, "[e]xcept as authorized by law." (Veh. Code, § 23222, subd. (b).) Since the MMP allows the transportation of medical marijuana, . . . the MMP effectively authorizes the conduct described in Vehicle Code section 23222, subdivision (b), when, as here, the conduct at issue is the transportation of a small amount of medical marijuana for personal use—conduct "authorized by law."

Id. at 375-76. Is it possible to reconcile *Young* and *Kha*? Why does the *Kha* court hold that the MMP covers an unmentioned provision (section 23222), while the *Young* court holds that the CUA does not (section 13360)?

3. How would you recommend that state lawmakers address the issue raised by *Young* and *Kha*? Is there a way to anticipate and address all of the possible legal charges that might be brought against individuals who possess and use marijuana when contemplating reforms? One Tennessee legislator has proposed medical marijuana legislation that would exempt qualified patients from prosecution for several specifically enumerated offenses, such as the possession of marijuana, as well as "[a]ny other criminal offense in which the possession, delivery, or production of marijuana or cannabis or the possession or delivery of drug paraphernalia is an element of the offense." S.B. 1248 § 68-1-2608 (2015). Would this provision have shielded the patients in *Young* and *Kha* from criminal charges? Do you think reform legislation should include such a catch-all provision? Why, why not?

C. LEGAL PROTECTIONS

The states have adopted elaborate rules to delineate who may possess and use marijuana (discussed above). So what is the payoff to following the rules? Put differently, what rights do state laws confer on law-abiding marijuana possessors in criminal investigations? This is one of the most important, complicated, and (unfortunately) neglected questions surrounding state marijuana reforms.

This section begins to explore the legal protections states have created. It focuses on rights and remedies in the criminal justice system. Rights and remedies in the civil justice system, including rights against other private parties, such as employers and landlords, are covered in Part IV of the book.

Every state has adopted some legal protections for individuals who are permitted to possess and use marijuana. For example, the Arizona Medical Marijuana Act (AMMA) provides, in relevant part:

> A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau:1. For the registered qualifying patient's medical use of marijuana pursuant to this chapter, if the registered qualifying patient does not possess more than the allowable amount of marijuana. . . .

Ariz. Rev. Stat. Ann. § 36-2811 (B).

As the materials below will demonstrate, however, the rights of marijuana users vary considerably across the states, both in terms of their scope and the ease of successfully invoking them. The differences become evident when examining rights at each of the most important stages of a criminal investigation. Section C.1 discusses the protections states afford marijuana users against police investigations, focusing on searches. Section C.2 then discusses the protections states afford marijuana users against criminal prosecutions.

1. Search

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

To understand how (if at all) state reforms shield marijuana users from police searches, it is necessary have at least a rudimentary understanding of the Fourth Amendment and probable cause. Under the Fourth Amendment to the United States Constitution, the police need probable cause to conduct a search. (The police also need probable cause to make an arrest, but to simplify discussion—and because it is the focus of the caselaw—this section will focus on probable cause to conduct a search.)

To satisfy the probable cause standard, the police must have enough facts to convince a reasonable person to believe there is evidence of a crime—or in some states, a civil offense (as discussed below)—in the area to be searched. Normally, the police must

demonstrate probable cause to a judge before conducting the search—this is called the warrant requirement; however, the same probable cause standard applies regardless of whether a warrant is required.

The adequacy of the government's cause for conducting a given search has important ramifications for the use of any evidence that is discovered in course of the search. If the police had probable cause at the time of the search, they may use any evidence they discovered in a subsequent prosecution against the suspect. But if the police lacked probable cause to conduct the search in the first instance, any evidence they discovered will normally be considered tainted and thus inadmissible in a criminal prosecution. *Mapp v. Ohio,* 367 U.S. 643 (1961).

With this background in mind, consider the following Problem:

☑ **Problem 4.15:** While driving his car, Benjamin is stopped for speeding. In the course of inspecting Benjamin's license and car registration, the officer detects the faint smell of unburnt marijuana emanating from Benjamin's car. Does the smell of the marijuana alone give the officer probable cause to search the car?

Not surprisingly, the answer to the question in the Problem will depend to a large extent on the scope of the state's marijuana prohibition. When marijuana is strictly prohibited—as it was until recently in all states—facts that suggest an individual possesses marijuana, such as the drug's distinctive odor, would normally be sufficient to establish probable cause to conduct a search of the area where the marijuana might be found. *See, e.g., Washington v. Olson,* 869 P.2d 110, 115 (Wash. App. 1994) ("When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search."). But when some people are allowed to possess (grow, etc.) marijuana, it may change the probable cause calculus.

a. Recreational Marijuana States

The change in the probable cause calculus is most dramatic and consistent in states that allow adults to possess and use marijuana recreationally. After all, if a state no longer bans the possession of marijuana (at least by adults), then the simple fact that an individual possesses marijuana, by itself, no longer reasonably suggests that the individual has violated the law. The following case discusses the issue.

Alaska v. Crocker

97 P.3d 93 (Alaska Ct. App. 2004)

MANNHEIMER, J.:

Leo Richardson Crocker Jr. was charged with fourth-degree controlled substance misconduct after the police executed a search warrant at his home and found marijuana plants, harvested marijuana, and marijuana-growing equipment. The superior court later concluded that the search warrant for Crocker's home should not have been issued. The superior court therefore suppressed all of this evidence and dismissed the charges against Crocker. The State now appeals the superior court's decision.

Our main task in this appeal is to clarify what the State must prove in order to obtain a warrant to enter and search a person's home for evidence of marijuana possession. The issue arises because not all marijuana possession is illegal. In *Ravin v. State*, [537 P.2d 494 (Alaska 1975),] the Alaska Supreme Court held that the privacy provision of our state constitution (Article I, Section 22) protects an adult's right to possess a limited amount of marijuana in their home for personal use.[9] And recently, in *Noy v. State*, [83 P.3d 538 (Alaska App. 2003), *on rehearing*, 83 P.3d 545 (Alaska App. 2003),] we held (based on *Ravin*) that Alaska's marijuana statutes must be construed to allow possession by adults of any amount less than four ounces of marijuana in the home for personal use.

For the reasons explained in this opinion, we hold that a judicial officer should not issue a warrant to search a person's home for evidence of marijuana possession unless the State's warrant application establishes probable cause to believe that the person's possession of marijuana exceeds the scope of the possession that is constitutionally protected under *Ravin*. And, because the State's warrant application in Crocker's case fails to meet this test, we conclude that the superior court properly suppressed the evidence against Crocker. . . .

Under . . . [Alaska Stat. 12.35.020], a judicial officer is empowered to issue a warrant authorizing the police to enter a premises and search for specified property . . . [only if the government can show] probable cause to believe that the property being sought is connected in one of these ways to the commission (or intended commission) of a crime. . . .

Not all marijuana possession is a crime in Alaska. Under *Ravin* and *Noy*, an adult may possess any amount of marijuana less than four ounces in their home, if their possession is for personal use. Thus, it would seem that a court should not issue a search warrant based on an allegation of marijuana possession unless the State establishes probable cause to believe that the type of marijuana possession at issue in the case is something other than the type of possession protected under *Ravin*. (For instance, a court might properly issue a search warrant if the State establishes probable cause to believe that the marijuana is possessed for commercial purposes, or that the amount of marijuana is four ounces or more.)

But the State disputes this conclusion. . . . [T]he State argues that *Ravin* . . . established an affirmative defense—the defense of personal use—that can be raised by people who are charged with marijuana possession. Based on this interpretation of *Ravin*, the State argues that all possession of marijuana continues to be crime in Alaska—and, thus, a judicial officer can lawfully issue a search warrant for evidence of marijuana possession so long as the State establishes probable cause to believe that the premises to be searched contains *any* marijuana. . . .

We addressed and rejected this same argument in our opinion on rehearing in *Noy:*

> *Ravin* did not create an affirmative defense that defendants might raise, on a case-by-case basis, when they were prosecuted for possessing marijuana in their home for personal use. . . . T]he Alaska Supreme Court has repeatedly and consistently characterized the *Ravin* decision as announcing a constitutional limitation on the government's authority to enact legislation prohibiting the possession of marijuana in the privacy of one's home.

9. Author's note: The *Ravin* decision is discussed in Chapters 5 and 6.

> Accordingly, we reject the State's suggestion that *Ravin* left Alaska's marijuana statutes intact but created an affirmative defense to be litigated in each individual case.

[83 P.3d at 547-48.] . . .

The State further argues that if search warrant applications must establish probable cause to believe that the marijuana possession at issue in that case falls outside of the marijuana possession protected by *Ravin*, this would be tantamount to "a presumption that all marijuana possessed in a home is for purely personal use." But this "presumption" of non-criminality is built into the search and seizure clause of the Alaska Constitution and the statutory law governing the issuance of search warrants.

Before a search warrant can lawfully issue, the government must establish probable cause to believe that the evidence being sought is connected to a crime. This same rule governs search warrants for all controlled substances, not just marijuana.

Every day, people obtain controlled substances legally through a doctor's prescription. For instance, several prescription painkillers contain codeine, which is a Schedule IA controlled substance [under Alaska law]. Our state constitution protects people from government intrusion into their homes unless the government affirmatively establishes a valid reason for the intrusion. Thus, even though the police may have firm information that a person currently possesses codeine in their home, a judicial officer should not issue a warrant that authorizes the police to enter the person's home and search the person's cupboards and drawers for evidence of this codeine possession unless the police also present the magistrate with some affirmative reason to believe that the codeine was obtained illegally or that (having been obtained lawfully) it is being distributed illegally.

The same rule applies to marijuana possession. . . . [N]o search warrant can issue for evidence of marijuana possession unless the State affirmatively establishes probable cause to believe that the type of marijuana possession at issue in that case is something other than the type of possession protected under *Ravin*.

As the State correctly points out, the question is one of probable cause, not ultimate proof. Thus, the search warrant application need not negate every other reasonable, exculpatory explanation of the observed facts. But the search warrant application can not rely solely on the fact that someone is in possession of marijuana. The warrant application must provide an affirmative reason to conclude that the possession is illegal or that the marijuana otherwise constitutes evidence of a crime.

. . .

Under the law advocated by the State . . . (that is, if possession of any amount of marijuana in one's home constituted adequate grounds for the issuance of a search warrant), Alaska citizens would have the constitutional right to possess marijuana for personal use in their homes, but they would exercise this right at their peril—because their possession of marijuana would subject them to thorough-going police searches of their homes. If this were the law, the Alaska Constitution's protection of the right of privacy in one's home—the cornerstone of the *Ravin* decision—would be eviscerated. . . .

. . .

. . . [The warrant application alleged that when the officers launched their investigation on the basis of an anonymous tip, they] smelled "a strong odor of growing marijuana" when they stood at [Crocker's] front door. . . .

The State asserts that the strength of the smell (including the fact that the officers could detect the odor while standing outside the house) tends to show that the amount of

marijuana inside the house must have exceeded the amount protected by *Ravin* and *Noy*. But the search warrant application contains no assertion that the strength of the smell gave the officers any indication of the amount of marijuana that might be growing in the house.

Moreover, we can not simply assume that there is a direct proportionality between the strength of the odor and the amount of marijuana giving rise to that odor. . . .

There may or may not be a correlation between the strength of the odor of growing marijuana and the amount of marijuana being grown. But the search warrant application in the present case makes no assertion concerning such a potential correlation, and we will not assume such a correlation in the absence of evidence.

Moreover, even if such a correlation exists, the officer in this case merely asserted that the odor was "strong." There was nothing to indicate whether an odor of this unexplained degree of strength provided a reasonable basis for concluding that the amount of marijuana in the house exceeded the amount protected under *Ravin* and *Noy*.

The State also argues that the amount of electricity usage at the . . . residence provided probable cause to believe that the amount of marijuana inside the house exceeded the amount of marijuana protected under *Ravin* and *Noy*.

After receiving the tip from their "confidential source" that marijuana was being grown at the . . . residence, the police—employing unspecified means—conducted a "check" of the utility usage at the residence. They discovered that, over the preceding thirteen months, the average electricity usage at [the] home was 56.6 kilowatt hours per day. The officer who applied for the search warrant asserted that, "[b]ased on [his] training and experience, the [electricity] consumption . . . [was] higher than average for a home of [its] size."

One of the boilerplate paragraphs of the search warrant application contains an assertion that, according to the Homer Electric Association, "prospective customers should expect an average monthly [electricity] consumption of approximately 22 [kilowatt-hours] per day with natural gas heating, and 27 to 31 [kilowatt-hours] per day with electric heat." However, the search warrant application does not describe [Crocker's] house (other than identifying its address). The magistrate had no way of knowing whether [the] house was of average size or was smaller or larger than average. Thus, the magistrate had no way of knowing whether one would reasonably expect [Crocker's] electricity usage to fall within, below, or above the average range for all of the Homer Electric Association's customers.

Indeed, when the officer who applied for the search warrant made his assertion about the "higher than average" electricity usage at [the] residence, he did not rely on the estimate given by the Homer Electric Association. Rather, the officer relied on his "training and experience." But the officer did not explain what training or experience he might have received that would allow him to offer an informed opinion concerning the typical or average electricity usage for homes of various sizes.

And although the officer asserted that the electricity usage at [Crocker's] home was "higher than average" for a house its size, the officer did not say how much higher than average this usage was. When an "average" amount of electricity usage has been identified for a particular type or size of house, this means that many (conceivably, up to half) of those houses will have electricity usage that is *higher* than average. Thus, even if we credit the officer's assertion that the . . . residence was using more electricity than average for a house its size, this unelaborated assertion did not significantly bolster the assertion that

[Crocker's] house was the site of marijuana cultivation. Much less did this "higher than average" electricity usage establish probable cause to believe that the amount of marijuana being cultivated in the house exceeded the amount protected under *Ravin* and *Noy*.

For these reasons, . . . the search warrant should not have been issued, and the superior court correctly suppressed the evidence obtained under the authority of that warrant.

Notes and Questions

1. Do you agree with the *Crocker* decision? Why, why not?

2. What could the police have done to establish probable cause to conduct a lawful search of Crocker's residence?

b. Decriminalization States

The probable cause analysis is somewhat more complicated in states that have decriminalized but not legalized the simple possession of marijuana. In these states, marijuana is still contraband and the possession of it remains a *civil* offense. But not all states grant the police authority to conduct searches based on suspicion that someone has committed a civil offense, as the following cases demonstrate.

Oregon v. Smalley

225 P.3d 884 (Or. App. 2009)

SCHUMAN, J.:

Medford Police Officer Jewell conducted a lawful traffic stop of a pickup truck in which defendant was a passenger. During the course of that stop, Jewell obtained the driver's consent to search the truck. Upon opening the driver's-side door, Jewell noticed the odor of marijuana. When he lifted the seat forward, the odor became stronger. Behind the seat, he found a backpack. As he got closer to the backpack, the odor of marijuana became still stronger; according to his testimony, it was "obvious" to him that the backpack contained "a large amount of marijuana." He opened the backpack, and, indeed, it contained a large amount of marijuana—approximately 62 ounces. After the driver denied owning the backpack, defendant admitted that it was his.

Defendant was charged with unlawful manufacture of marijuana, ORS 475.856, and unlawful possession of marijuana, ORS 475.864. Before trial, he moved to suppress the evidence obtained as a result of the warrantless search of his backpack. . . . The trial court . . . granted defendant's motion [on the grounds that the police had failed to obtain a warrant], and ordered that the evidence be suppressed. . . .

On appeal, the state . . . [argued] that the search was lawful under the automobile exception [to the warrant requirement]. Defendant argues, in response, that "the state failed to demonstrate . . . that [the officer] had probable cause to believe that evidence of a *criminal offense* (as opposed to a violation) would be found." (Emphasis in original.) According to defendant, because possession of less than one ounce of marijuana is not a criminal offense, *see* ORS 475.864(3), the state needed to prove that the officer had

probable cause to believe that defendant's backpack contained more than that amount, which, defendant asserts, it failed to do. . . .

We conclude that the court erred in suppressing the evidence.

"[W]arrantless . . . searches . . . are *per se* unreasonable unless falling within one of the few specifically established and well-delineated exceptions to the warrant requirement." . . . One such exception is the automobile exception, under which

> "probable cause to believe that a lawfully stopped automobile which was mobile at the time of the stop contains contraband or crime evidence justifies an immediate warrantless search of the entire automobile for the object of the search, despite the absence of any additional exigent circumstances."

[*Oregon v. Brown*, 721 P.2d 1357 (Or. 1986).] . . .

In those circumstances, the police may search any area of the vehicle or any container within the vehicle in which they have probable cause to believe that the contraband or crime evidence may be found. . . . The state need not articulate particular circumstances demonstrating the impracticality of obtaining a warrant; rather, exigency is presumed. . . .

[In this case], the automobile exception applied. . . . [T]o establish that exception, the state must show (1) that the truck was mobile at the time that Jewell stopped it and (2) that probable cause existed for the search of the backpack—that is, that Jewell subjectively and reasonably believed that defendant's backpack contained contraband or crime evidence. Defendant does not dispute that the truck was mobile at the time that it was stopped by police. And Jewell's testimony—that he "noticed the odor of marijuana"; that the odor "[got] stronger" as he got closer to the backpack; that it was "obvious to [him] that there[ ] [was] a large amount of marijuana in [it]" because the odor "permeat[ed] out of [it]"; that the odor had been "pretty strong," "probably about a six or seven" on a scale of one to 10; and that, based on his training and experience, which included "the opportunity to seize various amounts of marijuana," he had been able to "tell that there was a significant amount"—is more than sufficient to establish that he believed that defendant's backpack would contain at least some amount of contraband and that his belief was reasonable.

According to defendant, that objectively reasonable belief was not enough; rather, the officer had to believe that the backpack contained more than an ounce of marijuana, because possessing an amount smaller than that is not a crime. Without probable cause to believe that evidence of a *crime* would be found, no search was justified. . . .

According to defendant, . . . first, the automobile exception requires probable cause to believe that a crime, not a mere violation, has occurred, and second, that a strong odor cannot by itself form the basis for an objectively reasonable belief that an automobile contains more than an ounce of marijuana. Additional evidence is necessary, defendant contends, and, in the present case, there is nothing beyond odor.

We reject defendant's argument. . . . [T]his court has never directly confronted the question whether the automobile exception encompasses situations in which an officer has probable cause to believe a violation, as opposed to a crime, has occurred. . . . However, the [Oregon] Supreme Court in [Oregon v.] *Brown* specified that "probable cause to believe that a lawfully stopped automobile which was mobile at the time of the stop contains *contraband or crime evidence* justifies an immediate warrantless search of the entire automobile." . . . 721 P.2d 1357 [(Or. 1986)] (emphasis added). By using the

phrase, "contraband or crime evidence," the court signaled its understanding that the two things were not identical and that probable cause to believe in the presence of either could justify an automobile search. . . .

Defendant does not argue that marijuana becomes contraband only in quantities of more than an ounce, and we know of no authority for that proposition. Indeed, both the legal and common definitions of "contraband" indicate that the term encompasses anything that the law prohibits possessing. *Black's Law Dictionary* defines "contraband" as "[g]oods that are unlawful to import, export, produce, or possess." *Id.* at 365 (9th ed. 2009); *see also Webster's Third New Int'l Dictionary* 494 (unabridged ed. 2002) ("goods or merchandise the importation, exportation, or sometimes possession of which is forbidden"). Marijuana falls within these definitions regardless of its quantity.

In the next case, the Massachusetts Supreme Judicial Court breaks with *Smalley* and holds that, following decriminalization of simple possession of the drug, the odor of marijuana, standing alone, no longer supplies probable cause to conduct a search.

The case arose when police spotted a car parked in front of a fire hydrant in a high-crime Boston neighborhood. While approaching the car, the officers detected the "faint odor" of burnt marijuana coming from inside. Based on the "odor of marijuana and just the way they were acting," the police ordered the driver and his passenger, defendant Benjamin Cruz, to exit the vehicle. As the defendant got out of the car, one of the officers asked him if he had "anything on his person," to which defendant replied that he had "a little rock for myself." The officer reached into defendant's pocket and seized four grams of crack cocaine.

The defendant was charged with several offenses related to the crack cocaine, including possession of the drug in a school zone. Prior to trial, however, he moved to suppress the crack cocaine evidence, and the judge granted his motion. The judge found that the police lacked a valid reason for ordering the defendant to exit the vehicle in the first instance. The state appealed, claiming, inter alia, that the police had probable cause to search the car, and that the exit order was necessary to facilitate that search. (The state (unsuccessfully) offered other grounds for issuing the exit order, but because they fall beyond the scope of this book, the court's discussion of them is excluded here.)

Massachusetts v. Cruz

945 N.E.2d 899 (Mass. 2011)

IRELAND, J.:

Although we have held in the past that the odor of marijuana alone provides probable cause to believe criminal activity is underway, we now reconsider our jurisprudence in light of the change to our laws. On November 4, 2008, voters approved [an initiative, later codified as] . . . "An Act establishing a sensible State marihuana policy." This act changed the status of the possession of one ounce or less of marijuana from a criminal to a civil offense. It became effective on December 4, 2008. Our analysis must give effect to the clear intent of the people of the Commonwealth in accord with art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. . . .

. . .

. . . We have held that the odor of burnt marijuana is sufficient to believe that there is contraband in the car. . . . As the Commonwealth appears to argue, it follows then, that if the police have probable cause to believe that contraband, i.e., any amount of marijuana, exists in the car, the police may then validly conduct a warrantless search [pursuant to the automobile exception to the warrant requirement] (and order any passengers out of the car to facilitate that search).

At least one court has adopted this reasoning. In *State v. Smalley*, 233 Or. App. 263, 265, 270-71, 225 P.3d 844 (2010), the Court of Appeals of Oregon determined that, despite the decriminalization of marijuana in small amounts for personal use, when an officer has probable cause, based on the odor of burnt marijuana, to believe that a validly stopped automobile contains any quantity of marijuana, a warrantless search is justified based on the likely presence of contraband. . . .

We are not persuaded by this reasoning. The standard used to determine the validity of a warrantless search is the same as that used by a magistrate considering the application for a search warrant. . . . In Massachusetts, search warrants are issued by magistrates "authorized to issue [them] in criminal cases." G.L. c. 276, § 2B. Moreover, this court concluded more than 150 years ago:

> "Search warrants were . . . confined to cases of public prosecutions, *instituted and pursued for the suppression of crime or the detection and punishment of criminals*. . . . The principles upon which the legality of such warrants could be defended, and the use and purpose to which, by the common law, they were restricted, were well known to the framers of our constitution. . . . Having this knowledge, it cannot be doubted that by the adoption of the 14th article of the Declaration of Rights it was intended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants of that character to the general class of cases, in and to the furtherance of the objects of which they had before been recognized and allowed as justifiable and lawful processes, and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used. . . ." (Emphasis added.)

Robinson v. Richardson, 79 Mass. 454, 13 Gray 454, 456-57 (1859).

Here, no facts were articulated to support probable cause to believe that a *criminal* amount of contraband was present in the car.[10] We conclude, therefore, that in this set of circumstances a magistrate would not, and could not, issue a search warrant.[31] . . .

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10. Author's note: In another portion of the decision, the court had already ruled that:

> The stop's location [in a high-crime neighborhood], . . . cannot justify reasonable suspicion to believe a person is involved in criminal activity. . . . Further, the officers knew that the defendant lived on . . . the very street on which the encounter occurred. Surely the officers could not find it suspicious that the defendant was spending time on his own street. Moreover, the defendant's nervous demeanor cannot be the grounding factor on which to base suspicion of criminal activity. . . . It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police, even though, as a passenger, the consequence of receiving a citation is not personal. Here, . . . a myriad number of innocent reasons other than hiding criminal contraband may more readily explain why a nineteen year old man would appear nervous while being addressed by a police officer.

945 N.E.2d at 904.

31. We note that in other jurisdictions a search warrant could, potentially, issue. See *United States v. Pugh*, 223 F. Supp. 2d 325, 330 (D. Me. 2002), citing *State v. Barclay*, 398 A.2d 794, 797 (Me. 1979) ("Under Maine law, marijuana, even in an amount that would only give rise to a civil violation, can be the legitimate

Because the standard for obtaining a search warrant to search the car could not be met, we conclude that it was unreasonable for the police to order the defendant out of the car in order to facilitate a warrantless search of the car for criminal contraband under the automobile exception.

Our conclusion is in accord with our oft-repeated principle of proportionality. . . . In these circumstances, without probable cause that a crime is being committed, we cannot condone such an intrusive measure as a warrantless search. . . . It also is supported by the intent of the ballot initiative, which was, in part, to free up the police for more serious criminal pursuits than the civil infraction of low-quantity marijuana possession. . . . It is unreasonable for the police to spend time conducting warrantless searches for contraband when no specific facts suggest criminality.

. . . Because the exit order issued to the defendant cannot be justified on [the grounds discussed above], the . . . seizure of the crack cocaine . . . must be suppressed [under the fruit of the poisonous tree doctrine]. . . .

Notes and Questions

1. Why do the Oregon and Massachusetts courts disagree about the impact that decriminalization has on the probable cause inquiry? Do you think the police should be allowed to search an individual based on a reasonable belief that the individual has committed a civil offense, as opposed to a crime?

2. In *Cruz*, even if the smell of burnt marijuana did not give the police probable cause to believe the defendant possessed criminal quantities of marijuana, could it have given them probable cause to believe that defendant was engaged in *another* crime—namely, driving under the influence of marijuana? In an omitted portion of the opinion excerpted above, the *Cruz* majority rejected this argument, noting that the officers who conducted the search "could not recall whether the engine was running" and the record did not reveal "how long the vehicle had been parked." *Cruz*, 945 N.E.2d at 908, n.17. Under these circumstances, the court concluded that the police did not have probable cause to believe that the driver—let alone the defendant, who was a passenger in the car—had committed a DUI offense at the time the officers approached the vehicle. *Id.*

3. At the time both *Smalley* and *Cruz* were decided, the possession of more than one ounce of marijuana was still considered a criminal offense in both Oregon and Massachusetts. Although the *Smalley* court based its decision on other grounds, it noted the state's alternative argument that the odor of marijuana emanating from the defendant's backpack was so strong that it allowed Officer Jewell to reasonably believe the defendant possessed a criminal quantity of marijuana (i.e., more than one ounce). The *Cruz* and *Crocker* courts noted the argument as well, but both found it unnecessary to address. What do you think about this argument? In other words, do you think it is reasonable to estimate the quantity of marijuana to be found in an area based on the strength of the smell of the drug?

object of a search warrant. . . ."). In contrast, the Commonwealth has cited no law in Massachusetts permitting a search warrant to issue solely based on probable cause that a civil violation has been committed.

After *Cruz* was decided, the Massachusetts Supreme Judicial Court addressed and rejected the claim that the police can normally make reliable inferences about quantity based on smell:

> Massachusetts cases since 2008 . . . have recognized the dubious value of judgments about the occurrence of criminal activity based on the smell of burnt marijuana alone, given that such a smell points only to the presence of some marijuana, not necessarily a criminal amount. . . . . Although the odor of unburnt, rather than burnt, marijuana could be more consistent with the presence of larger quantities, . . . it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause.
>
> The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another. See Doty, Wudarski, Marshall, & Hastings, Marijuana Odor Perception: Studies Modeled from Probable Cause Cases, 28 Law & Hum. Behav. 223, 232 (2004) (identifying traits such as gender and age that may influence ability to smell). Moreover, the strength of the odor perceived likely will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present. . . . [*Id.* at 231-32]. As a subjective and variable measure, the strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana.
>
> Although it is possible that training may overcome the deficiencies inherent in smell as a gauge of the weight of marijuana present, see . . . [*id.* at 232], there is no evidence that the officers here had undergone specialized training that, if effective, would allow them reliably to discern, by odor, not only the presence and identity of a controlled substance, but also its weight. Indeed, in somewhat related cases that turn on the sense of smell, such as those involving canine alerts and canine tracking evidence, we have required that a sufficient foundation be laid as to the canine's ability before the evidence may be admitted at trial.
>
> In sum, we are not confident, at least on this record, that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine. In the absence of reliability, "a neutral magistrate would not issue a search warrant, and therefore a warrantless search is not justified based solely on the smell of marijuana," whether burnt or unburnt.

Massachusetts v. Overmyer, 11 N.E.3d 1054, 1058-60 (Mass. 2014). Do you agree with the *Overmyer* court? Can you imagine any set of facts under which a police officer might reasonably believe that a suspect possesses more than one ounce of marijuana, based solely on the smell of the drug?

4. The *Overmyer* court based its decision, in part, on a fascinating study of human ability to detect the odor of marijuana. *See* Richard L. Doty et al., *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 Law & Human Behavior 223 (2004). The authors of the study conducted a set of experiments designed to test scientifically the sniff-based evidence commonly used to make probable cause determinations in marijuana cases. In one of the experiments (Experiment 1) that is most relevant here, the authors placed a garbage bag containing either marijuana or newspapers into the trunk of a car, then asked each of nine subjects to sniff the interior of the car and indicate whether they smelled marijuana. The authors repeated this trial

twelve times for each subject, alternating between the bag containing marijuana and the control. Even though they were familiar with the smell of marijuana, the subjects could not accurately detect its presence in the trunk of the car. Indeed, the authors report that "the number of false positives (9.26%; 5 of 54 trials) was essentially the same as the number of correct positives (12.96%; 7 of 54 trials)," and that there was no statistically meaningful difference between the two. *Id.* at 226. Does the Doty et al. study support the result in *Overmyer*? Might it have even broader ramifications? For example, might the study be used to challenge the widely held notion that the smell of marijuana, standing alone, is enough to establish probable cause in prohibition regimes?

c. Medical Marijuana States

Medical marijuana laws are typically much narrower in scope than recreational marijuana laws, in the sense they allow a comparatively small subset of the state's population to possess and use marijuana. In medical marijuana states, does the fact that someone possesses marijuana, standing alone, still provide probable cause to believe that a crime has been committed? The majority and dissenting opinions in *Washington v. Fry* highlight the competing positions states have taken on the issue. (The *Fry* court's decision regarding qualifying conditions was excerpted above in Section A.1.a.)

Washington v. Fry

228 P.3d 1 (Wash. 2010)

JOHNSON, J.:

On December 20, 2004, Stevens County Sheriff Sergeant Dan Anderson and Deputy Bill Bitton (officers) went to the residence of Jason and Tina Fry. The officers had received information there was a marijuana growing operation there.

The officers walked up to the front porch and smelled the scent of burning marijuana. Jason Fry opened the door, at which time the officers noticed a much stronger odor of marijuana. Fry told the officers he had a legal prescription for marijuana and told the officers to leave absent a search warrant. Tina Fry gave the officers documents entitled "medical marijuana authorization." The authorization listed Fry's qualifying condition as "severe anxiety, rage, & depression related to childhood." . . .

The officers obtained a telephonic search warrant and found several containers with marijuana, growing marijuana plants, growing equipment, paraphernalia, and scales in the Frys' home. The marijuana was found to weigh 911 grams (more than 2 pounds).

Prior to trial, Fry made a motion to suppress the evidence seized by the officers pursuant to the search warrant. The motion also indicated Fry would assert the affirmative defense of medical marijuana authorization (compassionate use defense) pursuant to former RCW 69.51A.040 (1999).

After hearing arguments, the superior court judge denied Fry's motion to suppress. The court concluded the officers demonstrated probable cause to search the Frys' home based on the strong odor of marijuana and other facts described in the telephonic

affidavit. The court also concluded that Fry did not qualify for the compassionate use defense because he did not have a qualifying condition.[1]

After a stipulated facts bench trial, Fry was convicted of possession of more than 40 grams of marijuana. The court sentenced him to 30 days of total confinement, converted to 240 hours of community service. [This appeal followed.] . . .

Fry argues the marijuana evidence seized by the officers should have been suppressed. . . .

. . .

There is no contention that the facts, including the information and smell of marijuana, do not support a finding of probable cause to search the Frys' residence. However, Fry contends the probable cause was negated once he produced the authorization. Although there was a later dispute over the validity of the authorization, there is no indication in the record that the officers or the magistrate questioned the validity at the time the search warrant was issued. Nevertheless, the officers' search and arrest were supported by probable cause, and a claimed authorization form does not negate probable cause. . . .

By passing Initiative 692 (I-692), the people of Washington intended that

> [q]ualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana.

Former RCW 69.51A.005 (1999). Additionally,

> [i]f *charged with a violation* of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, *will be deemed to have established an affirmative defense to such charges* by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

Former RCW 69.51A.040(1) (emphasis added). Based on I-692 and the derivative statute, we have recognized that Washington voters created a compassionate use defense against marijuana charges. . . . An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. . . . The defendant must prove an affirmative defense by a preponderance of the evidence. . . . An affirmative defense does not negate any elements of the charged crime. . . .

Possession of marijuana, even in small amounts, is still a crime in the state of Washington. *See* RCW 69.50.4014. A police officer would have probable cause to believe Fry committed a crime when the officer smelled marijuana emanating from the Frys' residence. Fry presented the officer with documentation purporting to authorize his use of marijuana. Nevertheless, the authorization only created a potential affirmative defense that would excuse the criminal act. The authorization does not, however, result in making the act of possessing and using marijuana noncriminal or negate any elements

1. Because the court found Fry was not a "qualifying patient," it declined to reach the State's other arguments. The State also argued Fry would not qualify because the amount of marijuana in his possession, over 2 pounds, exceeded the 60-day supply the statute allowed. . . .

of the charged offense. Therefore, based on the information of a marijuana growing operation and the strong odor of marijuana when the officers approached the Frys' home, a reasonable inference was established that criminal activity was taking place in the Frys' residence. Therefore, the officers had probable cause and the search warrant was properly obtained.

This conclusion is supported by *McBride v. Walla Walla County*, . . . 990 P.2d 967 (Wash. App. 1999). In *McBride*, a police officer arrested McBride for hitting his son. The officer had substantial facts and information to indicate McBride acted in self-defense. Nevertheless, the officer arrested McBride as mandated by the domestic violence section in former RCW 10.31.100(2)(b) (1996).

Like the compassionate use defense, self-defense is an affirmative defense. . . . McBride argued it was the officer's duty to evaluate the self-defense claim and determine whether it negated the existence of probable cause to arrest him. . . . The court concluded, "[t]he officer is not judge or jury; he does not decide if the legal standard for self-defense is met." *Id.* . . . The court determined the affirmative defense "did not vitiate probable cause." *Id.*

Fry attempts to distinguish *McBride*. He notes that the officers in that case were required to arrest an individual involved in a domestic violence dispute. There was no statutory requirement compelling the officers to search Fry's residence and seize the marijuana. However, probable cause is not created or negated by statutory mandate to search or arrest (or lack thereof). In most cases, including the one before us, officers have discretion as to whether they will conduct a search or make an arrest once they have probable cause. However, this discretion has no impact on whether probable cause exists.

Under the Act, a person "charged with a violation of state law relating to marijuana . . . will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter." Former RCW 69.51A.040(1). One of the requirements is that a qualifying patient "[p]resent his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana" (presentment requirement). Former RCW 69.51A.040(2)(c).

. . . It is argued that if the presentment requirement is to have meaning, presentation of a patient's authorization must establish lawful possession of marijuana, and thereby the absence of criminal activity that would provide probable cause for a search or seizure.

The presentment requirement must be read in context. . . . One of the other requirements [of the state's medical marijuana law] mandates that . . . [an] individual "[p]ossess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply." Former RCW 69.51A.040(2)(b). It would be impossible to ascertain whether an individual possesses an excessive amount of marijuana without a search.

Instead, the presentment requirement facilitates an officer's decision of whether to use his or her discretion and seize the marijuana and/or arrest the possessor. Once the officer has searched the individual and established that the individual is possessing marijuana in compliance with the Act (i.e., appropriate documentation, limited supply, etc.) the officer would then have sufficient facts to determine whether an arrest is warranted. This view is supported by the 2007 amendment to RCW 69.51A.040. The current version reads, "[i]f a law enforcement officer determines that marijuana is being possessed lawfully under the medical marijuana law, the officer may document the amount of

marijuana, take a representative sample that is large enough to test, but not seize the marijuana." RCW 69.51A.040(1). It is difficult to imagine how a law enforcement officer, having been presented with a medical marijuana authorization, would be able to determine that the marijuana is otherwise being lawfully possessed (and take a sample) without some kind of search.

I-692 did not legalize marijuana, but rather provided an authorized user with an affirmative defense if the user shows compliance with the requirements for medical marijuana possession. *See* former RCW 69.51A.005, .040. As an affirmative defense, the compassionate use defense does not eliminate probable cause where a trained officer detects the odor of marijuana. A doctor's authorization does not indicate that the presenter is totally complying with the Act; e.g., the amounts may be excessive. An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed. We therefore affirm the Court of Appeals on this issue.

SANDERS, J., dissenting:

Former RCW 69.51A.040(1) (1999) provides, "Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and *shall not be penalized in any manner, or denied any right or privilege, for such actions.*" (Emphasis added.) Under our state constitution we have a right to be free from searches and other invasions of privacy, absent authority of law. Const. art. I, § 7. This authority of law comes in the form of a warrant, which requires probable cause to believe a person is involved in criminal activity and a search will uncover evidence of that criminal activity. . . .

Here, police officers smelled burnt marijuana at Jason Fry's residence and therefore initially had probable cause to believe Fry was involved in *criminal* activity stemming from the possession of marijuana.[1] However, Fry produced documentation to the officers demonstrating he met the requirements of former RCW 69.51A.040(2) permitting him *legally* to possess marijuana. This documentation alleviated any probable cause to believe Fry was engaged in *criminal* activity based upon the smell of burnt marijuana. As the lead opinion recognizes, there is no indication the officers questioned the validity of the documentation at the time the search warrant was issued. . . . Nevertheless the officers conducted the search, invading Fry's home and his private affairs in violation of article I, section 7 and former RCW 69.51A.040(1).

The lead opinion reads the Washington state medical use of marijuana act to provide only an affirmative defense. Majority at 4 (quoting RCW 69.51A.005 (1999); .040(1)). Even so this ignores the protections of the second sentence of former RCW 69.51A.040(1): "Any person meeting the requirements appropriate to *his or her status* under this chapter *shall be considered* to have engaged in activities permitted by this

1. The officers were informed of a marijuana-growing operation at Fry's residence, but the State has provided no additional details regarding that information. The probable cause justifying the search warrant was based entirely on the officers' smelling burnt marijuana. . . . There is no argument here that additional grounds existed to provide probable cause absent the smell.

chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions." (Emphases added.) Fry's wife provided documentation to the officers to show Fry's "status" under the chapter—the status of a "qualifying patient." *See* former RCW 69.51A.010(3) (1999). As a facially "qualifying patient" Fry should have been "considered to have engaged in activities permitted by this chapter"—a presumption that a qualifying patient is acting in accordance with the chapter. *See* former RCW 69.51A.040(1). The only basis for probable cause was the smell of burnt marijuana. That evidence is consistent with activities permitted for qualifying patients under the chapter.

The requirement under former RCW 69.51A.040(2)(c) supports this reading of the second sentence of former RCW 69.51A.040(1). That provision requires a person asserting compliance with the act to "[p]resent his or her valid documentation to any law enforcement official who questions the patient or provider regarding his or her medical use of marijuana." Doing so provides officers with the basis to determine whether a person meets the requirements for a "qualifying patient" and thus invokes the presumption. Conversely, if former RCW 69.51A.040(1) provides only an affirmative defense after one is charged with a crime, as the majority asserts, the requirement to provide valid documentation to the officer serves no purpose as the officer has no reason to view the documentation relevant only to establishing an affirmative defense in court. Therefore with or without the required documents the individual is still arrested and jailed.

The lead opinion clings to the notion that an officer must conduct a search, even when an individual produces documentation of his status, because the search is the only way for the officer to confirm the individual does not possess more than a 60-day supply of marijuana. *See* majority at 5-6 (quoting former RCW 69.51A.040(2)(b)). But this ignores the fact that the officers here did not have probable cause to believe Fry possessed more than a 60-day supply; thus a search on this basis is unconstitutional. Whereas former RCW 69.51A.040(1) provides a reason for an officer to confirm an individual's status and former RCW 69.51A.040(2)(c) provides the means to do it, nothing in the act suspends constitutional privacy rights (nor could a statute trump the constitution in any event) permitting officers to confirm that all criteria in the act are met by searches not supported by probable cause.

Ultimately the lead opinion's interpretation of the act provides an absurd form of protection to qualifying patients. When an officer smells burnt marijuana coming from the home of an individual with a terminal or debilitating illness who benefits from marijuana use, the individual must provide his documentation to the officer to show he is a "qualifying patient." Yet according to the lead opinion, he is still subject to a search of his home and to an arrest. Certainly, at the individual's trial, he can assert the affirmative defense of the lead opinion's neutered version of the Washington state medical use of marijuana act; however this does not cure the unconstitutional search. Upon release he can return home once again, exhausted and in pain, and use marijuana again to alleviate his pain. However, following another knock on his door from an officer smelling burnt marijuana, the individual is again subject to interrogation, home search, and arrest. I do not find the mercy of the people of Washington for individuals with terminal or debilitating illnesses to be so fickle.

The trial court erred by not suppressing the fruits of a search that was based upon a warrant lacking probable cause. . . .

Notes and Questions

1. The majority and dissenting opinions in *Fry* illustrate two competing approaches to search and arrest practices in medical marijuana states. The approach espoused by the *Fry* dissent appears to impose an affirmative duty on the police to investigate whether marijuana possession is lawful before conducting a search (or making an arrest) in any given case. *E.g.*, *Massachusetts v. Canning*, 28 N.E.3d 1156, 1165 (2015) (holding that a "search warrant affidavit setting out facts that simply establish probable cause to believe the owner is growing marijuana on the property in question, without more, is insufficient to establish probable cause to believe that the suspected cultivation is a crime," in light of state medical marijuana law allowing some qualifying patients to cultivate marijuana). In contrast, the approach espoused by the *Fry* majority appears to leave search and arrest practices largely unchanged by medical marijuana laws. The police may search and arrest an individual based solely on the reasonable belief that the individual possesses marijuana. *E.g.*, *Arizona v. Sisco*, 373 P.3d 549, 554 (Ariz. 2016) ("AMMA makes marijuana legal in only limited circumstances. Possession of any amount of marijuana by persons other than a registered qualifying patient . . . is still unlawful, and even those subject to AMMA must strictly comply with its provisions to trigger its protections and immunities. . . . A reasonable officer is therefore justified in concluding that [the] sight or smell [of marijuana] is indicative of criminal activity, and thus probable cause exists."). In other words, the police have no duty to investigate whether or not the individual's behavior comports with the state's medical marijuana law. *See California v. Mower*, 49 P.3d 1067, 1074 (Cal. 2002) (holding that the CUA "does not grant any immunity from arrest, and certainly no immunity that would require reversal of a conviction because of any alleged failure on the part of law enforcement officers to conduct an adequate investigation prior to arrest").

Which approach strikes a better balance between the rights of qualified patients and ongoing concerns about use of marijuana for non-medical purposes? On the one hand, does an affirmative duty to investigate unduly burden the ability of officers to enforce state marijuana laws, including prohibitions on recreational marijuana? What if only 1 out of every 10 people who use (grow, etc.) marijuana in a state were allowed to do so under the state's medical marijuana laws? On the other hand, does subjecting all marijuana users to searches based on presence of marijuana unduly burden the rights of qualified medical marijuana users?

2. Does the law's treatment of other items that are sometimes—but not always—possessed lawfully shed light on the prior question? For example, in *Crocker*, *supra*, the court suggests that the police may not search and arrest someone who possesses a prescription drug (like codeine) that is lawful for some—but not all—to possess, absent some indication that the possessor is breaking the law. Similarly, in *Canning*, 28 N.E.3d at 1164, the court noted that the police may not search and arrest someone who possesses a firearm, absent some indication that the possessor lacked a license (or was committing some other crime). Should the same logic apply to marijuana? Can you think of reasons to treat marijuana differently?

3. Even when they have no affirmative duty to investigate, may the police ignore evidence suggesting that a suspect's marijuana possession comports with the state's medical marijuana law? It is generally accepted that the police must consider *all* available

evidence, including exculpatory evidence, when making probable cause determinations. The court's statement in *Michigan v. Brown* is instructive:

> While we decline . . . to impose an affirmative duty on the police to obtain information pertaining to a person's noncompliance with the [Michigan Medical Marijuana Act] MMMA before seeking a search warrant for marijuana, if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant.

825 N.W.2d 91, 95 n.5 (Mich. App. 2012). *See also Mower*, 49 P.3d at 1073 ("Probable cause depends on all of the surrounding facts . . . , including those that reveal a person's status as a qualified patient or primary caregiver under [the CUA]."). Now consider the following Problems that test this proposition.

☑ **Problem 4.16**: The police conducted a flyover of Camila's house, where they observed "at least three marijuana plants" in the backyard. Based on this information, the police obtained a warrant to search Camila's home. Before the police could execute the warrant, however, Camila showed them what appeared to be a qualifying diagnosis and physician's recommendation to use marijuana. State law allows qualified patients to possess up to three marijuana plants and eight ounces of usable marijuana. May the police proceed to conduct their search of Camila's home? *See California v. Fisher*, 117 Cal. Rptr. 2d 838 (Cal. App. 3d 2002).

☑ **Problem 4.17**: Delilah was seated in the driver's seat of her car, which was parked at a gas station. A police officer approached the car on foot and smelled marijuana. When asked, Delilah acknowledged she had been smoking marijuana just before the officer arrived, and she showed him a bag containing less than one ounce of the drug. Delilah also told the officer "I have a medical marijuana card," but the officer refused to look at it and told her "We don't think much of that stuff in this county." State law permits qualified patients to possess up to eight ounces of marijuana. May the officer search Delilah's car for (more) marijuana? *See California v. Strasburg*, 56 Cal. Rptr. 3d 306 (Cal. App. 1st 2007). Would it make a difference if the state had a per se DUI offense?

2. Prosecution

Apart from being searched, qualified patients might also be prosecuted for simple possession of marijuana if their states continue to classify possession as a criminal offense in some circumstances. The following Problem illustrates this scenario:

☑ **Problem 4.18**: While conducting a consensual search of Andy's residence, the police find a bag containing one ounce of marijuana in his dresser drawer. Andy openly acknowledges that the marijuana belongs to him, but he insists he

has scrupulously complied with the state's medical marijuana law. Nonetheless, the district attorney charges Andy with simple possession. What can Andy do to challenge the prosecution?

a. Immunity and Affirmative Defenses

Every medical marijuana state has provided its qualified patients some form of protection against prosecution for simple possession and related charges. To simplify somewhat, this protection may be labeled either: (1) immunity from prosecution, or, (2) an affirmative defense in a criminal prosecution. Although both are designed to shield qualified patients from criminal sanctions that are levied against other marijuana users, immunity is more defendant-friendly, largely because it makes it easier for defendants to have charges dismissed *before* trial.

The Michigan Medical Marijuana Act (MMMA) grants both immunity and an affirmative defense and thus provides a useful vehicle for exploring and comparing the procedures surrounding each. The relevant portions of the MMMA provide:

> Section 4: [Immunity]
>
> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, . . . 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.
>
> . . .
>
> (f) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.
>
> Section 8: Affirmative Defense and Dismissal for Medical Marihuana
>
> (a) Except as provided in [Mich. Comp. L. 333.26427(b)[11]], a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:
>
> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;

11. Author's note: The exceptions include those discussed above in Section B, such as possessing marijuana on school grounds or driving while under the influence of marijuana.

> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.
>
> (b) A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a). . . .

Mich. Comp. L. 333.26424, 28.

The Michigan Supreme Court describes both section 4 immunity and the section 8 affirmative defense in the following case. The excerpt focuses on the procedural and substantive differences between immunity and the affirmative defense. Because the facts of the case are largely irrelevant to this description, they are omitted here.

Michigan v. Hartwick

870 N.W.2d 37 (Mich. 2015)

ZAHRA, J.:

The possession, manufacture, and delivery of marijuana are punishable criminal offenses under Michigan law. Under the MMMA, though, "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act." The MMMA grants to persons in compliance with its provisions either immunity from, or an affirmative defense to, those marijuana-related violations of state law. In the cases before us, we must resolve questions surrounding the § 4 grant of immunity and the § 8 affirmative defense. . . .

. . . SECTION 4 IMMUNITY

Section 4 grants broad immunity from criminal prosecution and civil penalties to "qualifying patient[s]" and "primary caregiver[s]." Subsection (a) specifically grants immunity to qualifying patients and states in relevant part:

> (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified . . . a primary caregiver . . . , 12 marihuana plants kept in an enclosed, locked facility.

. . .

1. Procedural Aspects of § 4

We begin our analysis of the procedural aspects of § 4 with the rather unremarkable proposition that entitlement to immunity under § 4 is a question of law. Immunity is a

unique creature in the law and is distinguishable from other traditional criminal defenses. A successful claim of immunity excuses an alleged offender for engaging in otherwise illegal conduct, regardless of the sufficiency of proofs in the underlying case. This is consistent with the way claims of immunity are handled in other areas of law. Moreover, the parties agree that § 4 immunity should be determined as a matter of law. There is no indication that the voters who enacted the MMMA intended to treat § 4 immunity differently than other claims of immunity.

Our decision in [*People v. Kolanek*, 817 N.W.2d 528 (Mich. 2012),] supports this conclusion. There we explained that § 4 "'grants qualifying patient[s]' who hold 'registry identification card[s]' broad immunity *from* criminal prosecution, civil penalties, and disciplinary actions." A registered qualifying patient, however, "who do[es] not qualify for immunity under § 4, as well as unregistered persons, are entitled to assert *in* a criminal prosecution the affirmative defense . . . under § 8. . . ." By contrasting the broad grant of immunity in § 4 "*from* prosecution" with the affirmative defense in § 8 "*in* a criminal prosecution," we implied that the decision regarding entitlement to immunity must be made before trial. By its very nature, immunity must be decided by the trial court as a matter of law, and in pretrial proceedings, in order to establish immunity *from* prosecution.

Deciding these questions of law necessarily involves resolving factual disputes. To determine whether a defendant is entitled to the § 4 grant of immunity, the trial court must make factual determinations, including whether the defendant has a valid registry identification card and whether he or she complied with the volume, storage, and medical use limitations. The expediency of having the trial court resolve factual questions surrounding § 4 underscores the purpose of granting immunity *from* prosecution.

Other matters routinely conducted in pretrial contexts, such as entrapment hearings, call for the trial court to act as both the finder of fact and arbiter of law. Like entrapment, § 4 immunity "is not a defense that negates an essential element of the charged crime. Instead, it presents facts that are collateral to the crime that justify barring the defendant's prosecution." We therefore conclude that the trial court must resolve factual disputes for the purpose of determining § 4 immunity.

Of course, the trial court's determinations are not without review. Questions of law are reviewed de novo by appellate courts. A trial court's factual findings are subject to appellate review under the clearly erroneous standard:

> Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

. . . .

2. Substantive Aspects of § 4

Section 4 provides a broad grant of immunity from criminal prosecution and civil penalties to registered qualifying patients and connected primary caregivers. . . . [T]he statute leaves much to be desired regarding the proper implementation of this grant of immunity. . . .

a. Burden of Proof

The MMMA is silent regarding the burden of proof necessary for a defendant to be entitled to immunity under § 4. When statutes are silent as to the burden of proof, "we are

free to assign it as we see fit, as long as we do not transgress the constitutional requirement that we not place on the defendant the burden of persuasion to negate an element of the crime." . . .

Assigning the burden of proof involves two distinct legal concepts. The first, the burden of production, requires a party to produce some evidence of that party's propositions of fact. The second, the burden of persuasion, requires a party to convince the trier of fact that those propositions of fact are true. The prosecution has the burden of proving every element of a charged crime beyond a reasonable doubt. This rule of law exists in part to ensure that "there is a presumption of innocence in favor of the accused . . . and its enforcement lies at the foundation of the administration of our criminal law." . . . To place the burden on a criminal defendant to negate a specific element of a crime would clearly run afoul of this axiomatic, elementary, and undoubted principle of law.

A defendant invoking § 4 immunity, however, does so without regard to any presumption of innocence. The defendant does not dispute any element of the underlying charge when claiming immunity. Indeed, the defendant may even admit to otherwise unlawful conduct and yet still be entitled to § 4 immunity. When claiming § 4 immunity, the defendant places himself in an offensive position, affirmatively arguing entitlement to § 4 immunity without regard to his or her underlying guilt or innocence of the crime charged. In [a prior case], we determined that the accusatorial nature of a defendant's request for a defense of entrapment, without regard to his or her guilt or innocence of the underlying criminal charge, required the burden of proof by a preponderance of the evidence to be allocated to the defendant. The accusatorial nature of an entrapment defense and the offensive nature of immunity are similar because in both the defendant posits an affirmative argument, rather than defending a particular charge. We now follow this well-established rule of criminal procedure and assign to the defendant the burden of proving § 4 immunity by a preponderance of the evidence.

b. Elements Required to Establish Immunity

A defendant may claim entitlement to immunity for any or all charged offenses. Once a claim of immunity is made, the trial court must conduct an evidentiary hearing to factually determine whether, for each claim of immunity, the defendant has proved each element required for immunity. These elements consist of whether, at the time of the charged offense, the defendant:

(1) was issued and possessed a valid registry identification card,
(2) complied with the requisite volume limitations of § 4(a) and § 4(b),
(3) stored any marijuana plants in an enclosed, locked facility, and
(4) was engaged in the medical use of marijuana.

The court must examine the first element of immunity—possession of a valid registry identification card—on a charge-by-charge basis. In most cases, satisfying the first element will be an all-or-nothing proposition. A qualifying patient or primary caregiver who does not have a valid registry identification card is not entitled to immunity because the first element required for immunity cannot be satisfied. Conversely, a qualifying patient or primary caregiver satisfies the first element of immunity if he or she possessed a valid registry identification card at all times relevant to the charged offenses. . . . A qualifying patient or primary caregiver can only satisfy the first element of immunity for any charge

if all conduct underlying that charge occurred during a time when the qualifying patient or primary caregiver possessed a valid registry identification card.

Generally, the second and third elements of immunity are also all-or-nothing propositions. The second element—the volume limitations of § 4(a) and § 4(b)—requires that the qualifying patient or primary caregiver be in possession of no more than a specified amount of usable marijuana and a specified number of marijuana plants. When a primary caregiver is connected with one or more qualifying patients, the amount of usable marijuana and the number of plants is calculated in the aggregate—2.5 ounces of usable marijuana and 12 marijuana plants for each qualifying patient, including the caregiver if he or she is also a registered qualifying patient acting as his or her own caregiver.[54] When a qualifying patient cultivates his or her own marijuana for medical use and is not connected with a caregiver, the patient is limited to 2.5 ounces of usable marijuana and 12 marijuana plants. A qualifying patient or primary caregiver in possession of more marijuana than allowed under § 4(a) and § 4(b) at the time of the charged offense cannot satisfy the second element of immunity.

The third element of § 4 immunity requires all marijuana plants possessed by a qualifying patient or primary caregiver to be kept in an enclosed, locked facility. Thus, a qualifying patient or primary caregiver whose marijuana plants are not kept in an enclosed, locked facility at the time of the charged offense cannot satisfy the third element and cannot receive immunity for the charged offense.

The fourth element conditions immunity on the "medical use" of marijuana, as defined in § 3(f). Unlike elements two and three, the fourth element does not depend on the defendant's aggregate conduct. Instead, this element depends on whether the conduct forming the basis of each particular criminal charge involved "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Whether a qualifying patient or primary caregiver was engaged in the medical use of marijuana must be determined on a charge-by-charge basis.

While the qualifying patient or primary caregiver retains the burden of proving this fourth and last element of immunity, § 4(d) of the MMMA creates a rebuttable presumption of medical use when the qualifying patient or primary caregiver . . . establish[es] the first two elements of § 4 immunity.

c. Rebutting the Presumption

The presumption of the medical use of marijuana is a powerful tool for a defendant in asserting § 4 immunity. But this presumption is rebuttable. . . .

According to § 4(d)(2), the presumption of the medical use of marijuana may be rebutted by examining "conduct related to marihuana. . . ." While the statute does not

54. For example, a registered qualifying patient who is his or her own caregiver and the caregiver to five other qualifying patients is allowed to possess up to 72 marijuana plants and up to 15 ounces of usable marijuana. If that individual actually possessed 73 marijuana plants or 16 ounces of usable marijuana and was charged with multiple marijuana-related offenses, the individual could not satisfy the second element of immunity under § 4 for any of the charged offenses because the individual possessed marijuana in excess of the volume limitations in § 4(a) and § 4(b).

specifically state whose marijuana-related conduct may be used, when read in context it is clear that it refers to the defendant's conduct. Stated differently, in § 4(d), only the defendant's conduct may be considered to rebut the presumption of the medical use of marijuana. This interpretation is consistent with the purpose of § 4, which is to provide immunity from prosecution to a defendant who abides by certain restrictions. . . .[12]

. . . Section 8 Defense

Section 8(a) of the MMMA provides any patient or primary caregiver—regardless of registration with the state—with the ability to assert an affirmative defense to a marijuana-related offense. The affirmative defense "shall be presumed valid where the evidence shows":

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

In *Kolanek*, we determined that if a defendant establishes these elements and no question of fact exists regarding these elements, then the defendant is entitled to dismissal of the criminal charges. We also clarified that if questions of fact exist, then "dismissal of the charges is not appropriate and the defense must be submitted to the jury." Additionally, if a defendant has not presented prima facie evidence of each element of § 8 by "present[ing] evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense, . . . then the circuit court must deny the motion to dismiss the charges," and "the defendant is not permitted to present the § 8 defense to the jury."

A defendant seeking to assert the MMMA's statutory affirmative defense must present prima facie evidence for each element of § 8(a).[69] Overcoming this initial hurdle of presenting prima facie evidence of each element is not an easy task. The elements of § 8 are clearly more onerous than the elements of § 4. The statutory scheme of the MMMA is

12. Author's note: The court's discussion of the presumption is discussed in greater detail in Section B.2, *supra*.

69. . . . In *Kolanek*, we did not determine the standard by which a defendant must establish a § 8 defense. We now clarify that well-established rules of criminal procedure require a defendant to prove the affirmative defense by a preponderance of evidence. . . . Thus, when the § 8 affirmative defense is submitted to a fact-finder, the defendant's burden of proof is to establish the elements of § 8(a) by a preponderance of the evidence.

designed to benefit those who properly register and are meticulous in their adherence to the law. Presumably, a properly registered defendant facing criminal charges would invoke immunity under § 4. However, a § 8 defense may be pursued by any defendant, regardless of registration status. With this background, we consider each element of the § 8 affirmative defense.

1. Section 8(a)(1): The Imprimatur of the Physician-Patient Relationship

Section 8(a)(1) requires a physician to determine the patient's suitability for the medical use of marijuana . . .

This provision may be reduced to three elements:

> (1) The existence of a bona fide physician-patient relationship,
>
> (2) in which the physician completes a full assessment of the patient's medical history and current medical condition, and
>
> (3) from which results the physician's professional opinion that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition.

Each of these elements must be proved in order to establish the imprimatur of the physician-patient relationship required under § 8(a)(1) of the MMMA. [Defendants] Hartwick and Tuttle argue that the registry identification card establishes these three elements. We do not find merit in this position.

As part of the process for obtaining a registry identification card, an applicant must submit, among other materials, a "written certification." At the time of the offenses at issue,[72] the MMMA defined a written certification as:

> [A] document signed by a physician, stating the patient's debilitating medical condition and stating that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. [former MCL 333.26423(l)]

. . .

Comparing the definition of "written certification" with the elements of § 8(a)(1), a registry identification card satisfies the third element (the patient has a debilitating medical condition and would likely benefit from the medical use of marijuana). A registry identification card, however, does not establish the second element (a physician has completed a full assessment of the patient's medical history and current medical condition). The second element must be established through medical records or other evidence submitted to show that the physician actually completed a full assessment of the patient's medical history and current medical condition before concluding that the patient is likely to benefit from the medical use of marijuana and before the patient engages in the medical use of marijuana. Additionally, the physician certification leaves unsatisfied the first element of § 8(a)(1) (the existence of a bona fide physician-patient relationship).

72. In 2012, the Legislature garnered sufficient votes to satisfy the three-fourths super majority required to amend a voter-enacted initiative and amended the MMMA to include the additional requirement that the physician conducted a full, in-person assessment of the patient. . . .

2. Section 8(a)(2): The Quantity of Marijuana

[Section 8(a)(2) imposes limits on the quantity of marijuana a patient or primary caregiver may possess.] . . .

The critical phrase . . . is "reasonably necessary to ensure uninterrupted availability of marihuana [for treatment]. . . ." Hartwick and Tuttle maintain that a registry identification card establishes a presumption that any amount of marijuana possessed by a defendant is a reasonable amount of marijuana under the MMMA. In the alternative, they argue that a valid registry identification card, coupled with compliance with the volume limitations in § 4, establishes a presumption that the amount of marijuana possessed is reasonable. Again, we do not find support for the defendants' position in the text of the MMMA.

The issuance of a registry identification card or compliance with the volume limitations in § 4 does not show that an individual possesses only a "reasonably necessary" amount of marijuana "to ensure uninterrupted availability" for the purposes of § 8(a)(2). A registry identification card simply qualifies a patient for the medical use of marijuana. It does not guarantee that an individual will always possess only the amount of marijuana allowed under the MMMA.

Further, nothing in the MMMA supports the notion that the quantity limits found in the immunity provision of § 4 should be judicially imposed on the affirmative defense provision of § 8. Sections 4 and 8 feature contrasting statutory language intended to serve two very different purposes. Section 4 creates a specific volume limitation applicable to those seeking immunity. In contrast, § 8 leaves open the volume limitation to that which is "reasonably necessary." The MMMA could have specified a specific volume limitation in § 8, but it did not. In the absence of such an express limitation, we will not judicially assign to § 8 the volume limitation in § 4 to create a presumption of compliance with § 8(a)(2). . . .

A patient seeking to assert a § 8 affirmative defense may have to testify about whether a specific amount of marijuana alleviated the debilitating medical condition and if not, what adjustments were made to the consumption rate and the amount of marijuana consumed to determine an appropriate quantity. Once the patient establishes the amount of usable marijuana needed to treat the patient's debilitating medical condition, determining whether the patient possessed "a quantity of marihuana that was not more than was reasonably necessary to ensure [its] uninterrupted availability" also depends on how the patient obtains marijuana and the reliability of this source. . . .

3. Section 8(A)(3): The Use of Marijuana for a Medical Purpose

. . . [Section] 8(a)(3) requires a patient and primary caregiver to show that any marijuana use complied with a very similar "medical use" requirement found in § 4, and defined in § 3. . . .

The slight variance between the definition of "medical use" in § 4 and medical use as it appears in § 8 can be attributed to the fact that only registered qualifying patients and registered primary caregivers may engage in the "medical use" of marijuana, as indicated by use of the term in § 4. Those patients and primary caregivers who are not registered may still be entitled to § 8 protections if they can show that their use of marijuana was for a medical purpose—to treat or alleviate a serious or debilitating medical condition or its

symptoms. Hartwick and Tuttle again argue that a registry identification card alone, or a registry identification card coupled with compliance with either the volume limitations of § 4(a) and (4)(b) or § 8(a)(2), satisfies § 8(a)(3). Once again, defendants seek to attribute greater significance to the registry identification card than that which is expressly provided in the MMMA. . . .

A registry identification card merely qualifies a patient for the medical use of marijuana. It does not establish that at the time of the charged offense, the defendant was actually engaged in the protected use of marijuana. Section 8(a)(3) requires that both the patient's and the primary caregiver's use of marijuana be for a medical purpose, and that their conduct be described by the language in § 8(a)(3). Thus, patients must present prima facie evidence regarding their use of marijuana for a medical purpose regardless whether they possess a registry identification card. . . .

Notes and Questions

1. Although *Hartwick* holds that judges alone decide whether defendants are entitled to immunity from criminal prosecution, not all states give judges exclusive authority to decide all questions concerning immunity. For example, even though Arizona gives judges the power to decide whether a defendant's claims establish immunity from prosecution, it gives juries the power to resolve any factual disputes surrounding those claims. *E.g.*, *Arizona v. Liwski*, 2015 WL 5090356, at *2 (Ariz. Ct. App. Aug. 28, 2015) ("[I]f there are disputed facts related to immunity, such facts must be resolved by the jury before the trial court determines if immunity has been established."); *Arizona v. Fields*, 304 P.3d 1088, 1092 (Ariz. App. 2d 2013) ("Whether . . . immunity exists is a question of law for the trial court. . . . 'If the existence of immunity turns on disputed factual issues, the jury determines the facts and the court then determines whether those facts are sufficient to establish immunity.'"). Who do you think should decide whether (or not) a defendant is entitled to legal protection (immunity or a defense) under a state's medical marijuana law? What are the implications—for prosecutors and defendants—of assigning authority to a judge versus a jury?

2. In nearly all states, the defendant bears the burden of persuading the relevant decisionmaker (judge or jury) by a preponderance of the evidence that all of the elements of immunity or the affirmative defense have been satisfied. *See Hartwick*, *supra*; *Fry*, *supra*; *Arizona v. Cheatham*, 237 Ariz. 502 (Ariz. App. 2015). As the *Hartwick* court notes, however, some states have created evidentiary presumptions that ease the defendant's burden.

3. The California Supreme Court has created a (very) unique set of protections for qualified patients under the state's Compassionate Use Act (CUA). While the CUA "does not grant any immunity from arrest", it does "grant a defendant a limited immunity from prosecution" that would enable a defendant to have charges dismissed after arrest but before trial. *California v. Mower*, 49 P.3d 1067, 1074-75 (Cal. 2002). In particular, a defendant may make a motion to set aside an indictment by demonstrating that "in light of the evidence presented to the grand jury or the magistrate, he or she was indicted or committed 'without reasonable or probable cause' to believe that he or she was guilty of

possession or cultivation of marijuana in view of his or her status as a qualified patient. . . ." *Id.* at 1076. The CUA also allows a patient to raise a defense at trial, should a motion to dismiss prove unsuccessful. Because the defense is based on facts "peculiarly within the defendant's knowledge"—namely, that she was a qualifying patient, possessed marijuana for medical purposes, and did so on the recommendation of a physician, the defendant bears the burden of proof regarding the facts underlying the defense. *Id.* at 1079. However, because those same facts also relate to the defendant's guilt or innocence, namely, whether her possession was "unlawful," the defendant need only raise a reasonable doubt as to their existence in order to prevail at trial. *Id.* at 1083.

Does the *Mower* decision make it too easy for defendants to prevail on the medical marijuana defense? Should defendants be required to prove by a preponderance of the evidence that they have satisfied the criteria of the CUA? Along these lines, consider the following Problem:

Problem 4.19: The state charges Camila with simple possession of 7 ounces of marijuana. At trial, Camila gave the following testimony:

> *Defense attorney*: Camila, is the marijuana yours?
>
> *Camila*: Yes, the marijuana is mine. But I'm only using it for medical purposes. You see, I've had chronic pain ever since I suffered a bike accident a decade ago. I've seen some doctors about the pain. Less than a year ago I saw one who told me that marijuana would help, and that it would be a lot safer than the prescription painkillers I'd been using before.
>
> *Defense attorney*: What is the name of this doctor? Did he write down his recommendation?
>
> *Camila*: I'm sorry, but I won't tell you his name. I know that sounds fishy, but the doctor was very reluctant to talk about marijuana. He only did so because he was so worried I might get hooked on the opioids I had been taking. He told me that talking about marijuana could get him into a lot of legal trouble with the feds.

Has Camila raised a reasonable doubt about the CUA? Has she established her compliance by a preponderance of the evidence?

4. When the California legislature added the Medical Marijuana Program Act (MMP) in 2003, it provided immunity for qualifying patients who voluntarily register with a county health department:

> No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

Cal. Health & Safety Code § 11362.71(e). Assuming that the immunity afforded by the MMP operates similarly to that granted by Michigan and other states, what are the advantages (if any) of invoking MMP immunity as opposed to making the motion to set aside created by the *Mower* court?

b. The Necessity Defense

May a defendant fall back on the necessity defense (discussed in Chapter 3), if she fails to meet all of the requirements of immunity or the affirmative defense? Most states that have addressed the question have found that the adoption of a specific medical marijuana statute abrogates the generic necessity defense for marijuana charges. *E.g., Oregon v. Miles,* 104 P.3d 604 (Or. App. 2005) ("[I]f marijuana manufacture was necessary to address defendant's chronic pain and nausea, . . . defendant had legal means of obtaining that relief under the [Oregon Medical Marijuana Act (OMMA)]. Defendant failed to present evidence of an inability to follow the legal course of action—compliance with the OMMA—or that there was an 'emergency requiring immediate extra-legal action.'") (citation omitted); *Noy v. Alaska,* 83 P.3d 538, 544 (Alaska App. 2003) (because Alaska's medical marijuana law "specifically addresses this issue . . . and defines a separate affirmative defense of medical necessity to possess marijuana . . . [defendant's] claim of necessity was . . . governed by the specific [medical marijuana law] . . . rather than by the general necessity statute"); *California v. Galambos,* 128 Cal. Rptr. 2d 844 (Cal. App. 3d 2002) (finding that common law necessity defense must give way to voters' choice of a narrower medical marijuana law).

These courts have rejected the necessity defense for the reasons given by the dissent in *Washington v. Kurtz,* a case in which the Washington Supreme Court holds that the defense *is* still available notwithstanding the state's adoption of a specific medical marijuana statute.

Washington v. Kurtz

178 309 P.3d 472 (Wash. 2013)

MADSEN, C.J.:

In 2010, police executed a search warrant on petitioner William Kurtz's home and found marijuana and marijuana plants. The State charged Kurtz with manufacturing and possession of marijuana. . . .

The jury found Kurtz guilty and he appealed. . . .

Kurtz contends the trial court erred by not allowing him to present a common law medical necessity defense for his marijuana use. Specifically, he argues that the necessity defense was not . . . superseded by the [Washington State Medical Use of Marijuana Act]. . . .

[The court first noted that Washington courts had previously recognized a medical necessity defense to marijuana possession charges "in very limited circumstances," notwithstanding the state legislature's classification of marijuana as a Schedule I controlled substance. Under the test adopted by the state courts, defendants had to demonstrate: (1) that they reasonably believed their use of marijuana was necessary to minimize the effects of their conditions; (2) the benefits derived from their use of marijuana were no greater than the harms sought to be prevented by the state marijuana ban; and (3) no other drug was as effective in minimizing the effects of their conditions. *See, e.g., Washington v. Diana,* 604 P.2d 1312 (Wash. App. 3d 1979). The Washington Supreme Court then turned to the issue whether the passage of the Act in 1998 or subsequent legislative amendments had abrogated this common law necessity defense.]

In general, Washington is governed by common law to the extent it is not inconsistent with constitutional, federal, or state law. . . . "However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law." . . . When "the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law." . . .

The Act contains no language expressing a legislative intent to abrogate the common law. To the contrary, a 2011 amendment to chapter 69.51A RCW added that "[n]othing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010," suggesting the legislature did not intend to supplant or abrogate the common law. RCW 69.51A.005(3). In explaining the purpose of the Act the legislature stated that "[h]umanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." RCW 69.51A.005(1)(b). To hold that this Act limits existing defenses for medical necessity would undermine the legislature's humanitarian goals.

The State argues, however, that because the legislature spoke directly to the purpose of the common law necessity defense, it intended to abrogate the common law. The State relies on two United States Supreme Court cases for this rule of construction. . . . The federal common law analysis proceeds on the principle that Congress, not federal courts, is to articulate the standards to be applied as a matter of federal law. . . . In contrast, common law is not a rarity among the states and is often developed through the courts, as was the case with medical necessity for marijuana. . . . Indeed, Washington has several statutory provisions addressing the authority of common law. . . . Because the federal and state schemes differ, federal cases are unhelpful. . . .

The State also contends that each element of the medical necessity defense is addressed by the Act and establishes inconsistencies between the two. As to the requirement that a defendant provide medical testimony to support his belief that use of marijuana was medically necessary, the State notes that the Act similarly requires a defendant to obtain authorization for use from a qualifying physician. As to the balancing of harms requirement, the state contends this element is met by the Act's limitation on the quantity of marijuana that a patient may possess. Responding to the final requirement, that no drug is as effective at treatment, the State notes an individual under the Act is not required to show there are no other drugs as effective. While some of these elements are indeed similar to the common law defense, they are not identical and are not clearly inconsistent. For example, the fact that the Act does not require proof that no other drug is as effective simply means the Act is broader in that respect. Other elements in the Act may overlap with the common law defense, but are not identical nor "so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." . . .

The State points to other aspects of the Act that it views as "obvious inconsistencies." . . . For example, the State hypothesizes that an individual who obtains authorization by an unqualified physician would not satisfy the Act but will be able to assert the common law defense. The State also posits that an individual who possesses a certain amount of marijuana may not have a defense under the Act but would under the common law. While correct, these examples do not show inconsistencies, but rather demonstrate that the common law may apply more broadly in some circumstances.

The State also asserts that the statutory language and initiative make it clear that the Act was intended to replace the common law defense with an affirmative defense for certain individuals with terminal or debilitating illnesses. . . . [However], the Act is not so broad as to cover every situation of marijuana use that might arise. . . .

Moreover, in 2011 the legislature amended the Act making qualifying marijuana use a legal use, not simply an affirmative defense. RCW 69.51A.040. A necessity defense arises only when an individual acts contrary to law. Under RCW 69.51A.005(2)(a), a qualifying patient "shall not be arrested, prosecuted, or subject to other criminal actions or civil consequences under state law based solely on their medical use of cannabis, notwithstanding any other provision of law." One who meets the specific requirements expressed by the legislature may not be charged with committing a crime and has no need for the necessity defense. Only where one's conduct falls outside of the legal conduct of the Act, would a medical necessity defense be necessary. The 2011 amendment legalizing qualifying marijuana use strongly suggests that the Act was not intended to abrogate or supplant the common law necessity defense. . . .

The State argues, though, that even if the necessity defense is theoretically available, Kurtz could not rely on the defense because the Act provides a legal avenue for his marijuana use. . . .

The United States Supreme Court . . . addressed necessity and duress defenses and noted that "[u]nder any definition of these defenses one principle remains constant: 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 defenses will fail." [*United States v. Bailey*, 444 U.S. 394 (1980)]. . . . Thus, implicit in the marijuana necessity defense is whether an individual has a viable legal alternative to the illegal use of marijuana. In other words, the mere existence of the Act does not foreclose a medical necessity defense, but it can be a factor in weighing whether there was a viable legal alternative to a violation of the controlled substances law. . . .

Here, the trial court did not consider whether the evidence supported a necessity defense . . . , including whether Kurtz had a viable legal alternative. Instead, the record suggests that the trial court denied the common law defense concluding it was unavailable . . . and denied the statutory defense because Kurtz did not obtain timely medical authorizations. Accordingly, we reverse . . . and remand to the trial court to determine whether Kurtz presented sufficient evidence to support a medical necessity defense, including whether compliance with the Act was a viable legal alternative for Kurtz. If the evidence supports the necessity defense, Kurtz is entitled to a new trial.

Owens, J., dissenting:

While I sympathize with William Kurtz's unfortunate situation, I am compelled to dissent because the common law defense of necessity is predicated on a lack of legal alternatives. Washington voters have provided a comprehensive statutory scheme for the use of medical marijuana, enacted by initiative in 1998. Because individuals in this state have a legal way of using medical marijuana, the previously articulated common law defense of medical necessity for marijuana use is no longer appropriate. Therefore, I respectfully dissent.

. . .

When the Court of Appeals created the medical necessity defense for marijuana use in 1979, there was no provision for legal medical use of marijuana to treat the defendant's multiple sclerosis. [*Diana*, 604 P.2d 1302.] . . . Accordingly, the Court of Appeals created a three-part medical necessity defense, including a requirement that defendants present evidence that there was no legal alternative to using marijuana illegally to treat their symptoms. *Id.* . . . Specifically, defendants had to show that no legal drug was as effective as marijuana in minimizing the effects of their disease. *Id.* Defendants that made such a showing could assert the medical necessity defense because they had no legal alternative to use marijuana for medical purposes.

But in 1998, the people of this state passed Initiative Measure 692 (the Washington State Medical Use of Marijuana Act, chapter 69.51A RCW), which provided a legal alternative for individuals to use marijuana for medical purposes. Consequently, the crucial underpinning to the necessity defense—the lack of legal alternatives—no longer existed for medical marijuana use. This change is particularly evidenced by *Diana*'s requirement that defendants show that no legal drug was as effective as marijuana in minimizing the effects of their disease. Logically, I do not see how Kurtz can show that no legal drug is as effective as marijuana when marijuana itself is now allowed for medical purposes. The specific necessity defense designed by the Court of Appeals for medical marijuana use has become moot by its own terms.

. . .

Of course the overall common law necessity defense continues to protect defendants who are forced to violate the law to avert a greater harm. But the narrow medical necessity defense developed in *Diana* specifically for individuals with a medical need to use marijuana no longer makes sense in a state that specifically provides a legal method for the medical use of marijuana. I would hold that a defendant wishing to assert a necessity defense would have to prove the broader elements that have developed over hundreds of years—including the lack of legal alternatives—not the narrow medical necessity test developed in a context that no longer exists. In Kurtz's case, the record shows that he was later able to obtain appropriate authorization to legally use medical marijuana for his serious condition. He had a legal alternative to violating the law and thus does not qualify for the necessity defense.

. . .

Furthermore, I find no way to avoid the conclusion that the Medical Use of Marijuana Act abrogated the common law defense. A statute abrogates the common law when "'the provisions of a . . . statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.'" . . . In this case, the Medical Use of Marijuana Act created a defense to charges of use or possession of marijuana if the defendant can show that he or she was using the marijuana for medical purposes—the exact issue addressed by the common law defense. Because the Medical Use of Marijuana Act addresses the very concern addressed by the common law, the two cannot coexist. The Medical Use of Marijuana Act sets out a comprehensive structure for the defense, including the qualifying conditions or diseases, the amount of marijuana allowed, and documentation of a physician's recommendation. As a result of these detailed requirements, the statutory defense is much narrower than the common law defense. The common law did not require any communication with a physician nor did it place a limit on the amount of marijuana at issue. Therefore, the provisions of the Medical Use of Marijuana Act's defense are so inconsistent with the prior common law that

both cannot simultaneously be in force. It does not make sense that the state would create a significantly narrower and more detailed statutory defense if it did not mean to replace the broader common law defense.

Moreover, allowing the common law defense to coexist with the statutory defense would frustrate the purpose of the Medical Use of Marijuana Act. When determining whether a statute is exclusive, this court has repeatedly indicated that it must strive to uphold the purpose of the statute. . . . . In passing the Medical Use of Marijuana Act voters set up a structure to allow medical marijuana, but they specifically limited the defense to individuals using medical marijuana under a doctor's supervision. If the court were to uphold the broader common law defense without the requirement of a doctor's supervision, the court would frustrate the purpose of the voters that specifically added that requirement for the medical use of marijuana.

Notes and Questions

1. What do you think? Should courts continue to recognize a common law necessity defense for marijuana when their states have adopted medical marijuana legislation? Does the defense undermine the design of a state medical marijuana system? Consider the following Problems. In which, if any, would you recognize a medical necessity defense? Would your answer be different if the state had never adopted a medical marijuana law?

Problem 4.20: Andy suffers from PTSD linked to his military service in Afghanistan. Although Andy lives in a state with a medical marijuana law, the state does not recognize PTSD as a qualifying condition. Since being diagnosed with PTSD three years ago, Andy has tried a handful of medications and therapies, but they have not fully resolved his symptoms. He continues to suffer from mild depression, occasional memory loss, and irritability at work and at home. In a recent visit, Andy asked his doctor whether marijuana might help him. She told Andy, "It's not legal for your condition here, but a few other states do allow people to use marijuana for PTSD. I suppose it might help your symptoms." Following the visit, Andy bought one ounce of marijuana from a friend. On his way home, however, he was stopped for speeding. He promptly told the officer he had one ounce of marijuana, and the officer proceeded to charge Andy with simple possession of the drug.

Problem 4.21: Benjamin has not worked regularly for nearly three years and has no health insurance. He does occasional odd jobs, but otherwise gets by with help from his parents and friends. Eighteen months ago, Benjamin was diagnosed with Crohn's disease, which his state medical marijuana program recognizes as a qualifying condition. At the time, his physician recommended marijuana to treat his symptoms. Benjamin subsequently registered with the state medical marijuana program. He has continued to use marijuana ever since, but his registration, recommendation, and diagnosis expired five

months ago. Benjamin says he does not want to pay another $100 to renew his registration, or $150 to visit his physician for another diagnosis and recommendation. While driving to a friend's house, Benjamin was pulled over for speeding. He promptly told the officer that he had one ounce of marijuana, and he showed him his expired registration card. But the officer proceeded to charge him with possession of marijuana.

Problem 4.22: Camila lives in a state that recently adopted a law allowing residents who suffer from severe intractable epilepsy to use CBD. Camila has been diagnosed with wasting syndrome associated with AIDS. On the recommendation of her physician, she has been using marijuana to restore her appetite. So far, she believes the treatment has helped her. However, last week, on her way home from buying one ounce of marijuana from a black market dealer, Camila was stopped for speeding. She promptly told the officer she had one ounce of marijuana, and the officer proceeded to charge Camila with simple possession of the drug.

2. Chapter 14 discusses the availability of legal remedies against law enforcement agents for wrongful search, arrest, seizure, or prosecution.