

## **Foreshadowing an Inevitable Clash: Criminal Probation, Drug Treatment Courts, and Medical Marijuana**

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### ABSTRACT

The criminal justice system underwent two revolutionary developments over the past twenty years—the legalization of medical marijuana at the state level, which provides criminal immunity protections for qualifying patients, and the exponential rise of drug treatment courts as alternatives to incarceration. Traditionally, offenders serving probationary sentences are generally prohibited from using drugs as one condition of probation. But courts are now increasingly confronted with challenges to probationary conditions prohibiting the use of medical marijuana in states where it has been legalized. The trend among courts permits the medicinal use of marijuana during probationary sentences and invalidates conditions prohibiting such use for therapeutic purposes.

Drug treatment courts are a form of probation that offer intensive treatment services for offenders with substance abuse disorders. Most drug treatment courts across the country operate on an abstinence-based model. While to date there have been no reported challenges to prohibiting the use of medical marijuana by participants in drug treatment court programs, the legal and practical issues are brimming just below the surface, and it is only a matter of time before a clash occurs between criminal immunity provisions under state medical marijuana laws and their consequential applicability in the drug treatment court landscape.

This Article takes a forward-looking approach by foreshadowing this seemingly straightforward, but complicated question: How will criminal immunity provisions under state medical marijuana laws and the judicial protections afforded to offenders on regular probation be construed by appellate courts when inevitably challenged by drug treatment court participants? This is the first scholarly article to address the knotty legal and practical issues underlying this inquiry. The purpose of this contribution then is to provide future scholars, appellate courts, drug treatment courts, legal actors, and drug treatment court professionals with a robust foundation to draw upon in thinking about the adaptability of medical marijuana use in the drug treatment court domain.

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## I. INTRODUCTION

During the span of the past two decades, the state criminal justice system has been fundamentally altered by two seemingly independent and unrelated phenomena—the legalization of marijuana for medicinal use at the state level alongside the explosive and exponential growth of drug treatment courts as adjuncts to the criminal justice system. Broadly defined, drug treatment courts provide criminal offenders who have been diagnosed with substance use disorders community-based treatment services and intensive probation supervision as alternatives to incarceration.<sup>1</sup> The spread of medical marijuana legislation across the United States has introduced future legal and practical complexities for drug treatment courts which are presently simmering just below the surface. This Article is the first in the scholarly literature<sup>2</sup> to address what is the foremost legal and practical issue confronting drug treatment courts in the near future, namely, the intersection between imposed conditions of probationary sentences—which are in large measure permitting the use of medical marijuana—and the present institutional regime of drug treatment courts that overwhelmingly follow an abstinence-based model<sup>3</sup> and prohibit participants from using medical marijuana while serving probationary sentences in the drug treatment court program.

The arguments and observations raised in this Article reduce to a seemingly straightforward, but incredibly complicated legal and pragmatic question: Under what circumstances may the lawful use of medical marijuana be permitted or prohibited as a matter of law in drug treatment courts, and if allowed, what practical considerations should professionals working in drug treatment courts around the country be concerned with so as not to fundamentally disrupt quotidian operations? This Article intentionally does not adopt a normative position in addressing this legal and practical quagmire. Rather, the overarching purpose of this Article is to serve as a future foundational resource for both actors in the criminal justice system and professionals in the problem-solving court domain to harness when inevitably confronted with challenges by participants seeking to use medical marijuana as a palliative for psychological or physical debilitating conditions while serving a probationary sentence in these specialized courts.

A broad public consensus has emerged over the past twenty years accepting marijuana<sup>4</sup> to be a safe drug and a valuable panacea for various physical ailments.

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1. Nathaniel P. Morris, *Problem-Solving Court Policies on Cannabis Use*, 47 J. OF AM. ACAD. PSYCHIATRY & L. 1, 1 (2019).

2. Two existing articles address the intersection between problem-solving courts and medical marijuana, but neither addresses legal questions related to conditions of probationary sentences. See generally McKenzie M. Higgins, *Total Inclusion: Opening Therapeutic Justice Courts to Medical Marijuana Patients in Michigan*, 17 WILLIAM MITCHELL COOLEY J. PRAC. & CLINICAL L. 125 (2016); Morris, *supra* note 1.

3. James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL'Y 31, 36 (2010) (noting that the goal of most drug courts in the United States is “total abstinence”).

4. Marijuana is a cultivar of the genus *cannabis*. Robert L. Page II, et al., *Medical Marijuana, Recreational Marijuana, and Cardiovascular Health*, 142 CIRCULATION 131, 132 (2020). THC is the primary psychoactive component of cannabis as mediated by the activation of endocannabinoid receptors found throughout the

Marijuana can be a useful palliative “in the treatment of many complex or rare conditions which lack effective options, or where the side effects burden of such treatments outweigh the benefits.”<sup>5</sup> Policymakers have responded to this shift in public attitudes and cultural norms by enacting legislation expanding access to medical marijuana across the nation. In the scientific community, the evidence for using marijuana for therapeutic purposes remains underdeveloped and the benefits and risks remain incompletely understood.<sup>6</sup> This primarily results from the federal government’s recalcitrance and continued stance on the illegality of marijuana as a Schedule I substance under the federal Controlled Substances Act<sup>7</sup> together with cumbersome, if not impossible, restrictions on the possibility for empirical studies to be undertaken regarding the potential therapeutic benefits of marijuana.<sup>8</sup> Nonetheless, as of this writing, thirty-seven states and the District of Columbia have passed medical marijuana laws through either ballot initiative or by legislative process.<sup>9</sup> In relation to the criminal justice system, the most salient feature unifying medical marijuana laws is the accompanying immunity for individuals from prosecution under state criminal laws for possessing and using medically approved marijuana.<sup>10</sup> As a consequence of the legalization of

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human body. Mary B. Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 PHARMACY & THERAPEUTICS 180, 181 (2017). In this article I use the term “marijuana” rather than its more formal scientific classification.

5. Caroline A. MacCallum & Ethan B. Russo, *Practical Considerations in Medical Cannabis Administration and Dosing*, 49 EUR. J. INTERNAL MED. 12, 13 (2018).

6. See Laura M. Dryburgh & Jennifer H. Martin, *Using Therapeutic Drug Monitoring and Pharmacovigilance to Overcome Some of the Challenges of Developing Medicinal Cannabis from Botanical Origins*, 42 THERAPEUTIC DRUG MONITORING 98, 101 (2020); Morris, *supra* note 1, at 1-2 (“Further, as a result of historical restrictions on cannabis-related research, a great deal is unknown about the health effects of cannabis use. Existing studies suggest that cannabis use may have therapeutic functions in some contexts, but it also carries a host of potential adverse health effects.”) (citations omitted).

7. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C.A. §§ 801-904 (West 2022)).

8. Page II, et al., *supra* note 4, at 131-32; see Teresa Bigand et al., *Benefits and Adverse Effects of Cannabis Use Among Adults with Persistent Pain*, 67 NURSING OUTLOOK 223, 224 (2019) (noting research on the actual benefits or adverse effects of marijuana use is “lacking due to constraints on conducting cannabis research”).

9. See, e.g., ALA. CODE § 20-2A-2 (West 2022) (aiming to create a legal market for medical cannabis); ALASKA STAT. ANN. § 17.37.010 (West 2022) (creating a confidential registry of patients applying for a medical marijuana identification card); ARIZ. STAT. ANN. § 36-2801 (West 2022) (defining the medical use of marijuana); see also D.C. CODE ANN. § 7-1671.01 (West 2022) (defining medical marijuana). Moreover, nineteen states and the District of Columbia have legalized marijuana for recreational use. See generally, *Legalization*, NORML, <http://norml.org/laws/legalization> [https://perma.cc/G5A8-U5J4].

10. See, e.g., WASH. REV. CODE ANN. § 69.51A.040 (West 2022) (“The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law . . . .”); see also ME. REV. STAT. ANN. tit. 22, § 2430-C (West 2022) (“A person whose conduct is authorized under this chapter may not be denied any right or privilege or be subjected to arrest, prosecution, penalty or disciplinary action, including but not limited to a civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for lawfully engaging in conduct involving the medical use of marijuana authorized under this chapter.”).

medical marijuana, courts are increasingly confronted with challenges to the general prohibition of marijuana use as a condition of criminal probation.

There is a strong correlation between the criminal justice-involved population and substance abuse and drug dependency.<sup>11</sup> Studies suggest that upwards of 70% to 80% of individuals involved in the criminal justice system have a substance use disorder.<sup>12</sup> In fact, the criminal justice system is currently the largest referral source for public drug treatment in the United States.<sup>13</sup> Therefore, it remains a common condition of criminal probation to prohibit an offender from using drugs or alcohol, particularly if their use is somehow related to their underlying criminality.<sup>14</sup> But due to the widespread legalization of medical marijuana across the United States, sentencing courts are increasingly faced with the decision whether to prohibit the use of medical marijuana as a condition of criminal probation.<sup>15</sup> The reported case law to date has not been entirely uniform in application. Some of the inconsistencies are dependent upon the specific provisions adopted by state legislatures in either their respective state constitutions or medical marijuana statutes. However, the developing trend appears to be that state courts are inclined to permit the use of medical marijuana during sentences to criminal probation, assuming various factors can be satisfied by the individual offender.<sup>16</sup>

During the same timeframe when the legalization of medical marijuana across the United States gained a foothold and general acceptance, the national criminal justice system became “not only larger, but also more legally hybrid and institutionally variegated than is sometimes recognized.”<sup>17</sup> The bloating of the modern

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11. See Elaine Wolf & Corey Colyer, *Everyday Hassles: Barriers to Recovery in Drug Court*, 31 J. DRUG ISSUES 233, 234 (2001).

12. Sarah Messer et al., *Drug Courts and the Facilitation of Turning Points: An Expansion of Life Course Theory*, 43 CONTEMP. DRUG PROBS. 6, 7 (2016).

13. Liam Martin, *Reentry Within the Carceral: Foucault, Race and Prisoner Reentry*, 21 CRITICAL CRIMINOLOGY 493, 498 (2013).

14. See, e.g., *Archer v. State*, 309 So.3d 287, 290 (Fla. Dist. Ct. App. 2020) (“Courts may prohibit alcohol consumption as a special condition of probation if there is some evidence in the record that the defendant’s alcohol use had some connection to the defendant’s crime or potential future criminal behavior.”) (citation omitted); *State v. Russell*, 2009 WL 3082575, \*2-3 (Wash. Ct. App. Sept. 28, 2009) (upholding probation conditions prohibiting alcohol and drug use as these terms were found to be reasonably related to preventing future criminal behavior).

15. Frederic B. Rodgers, *On Prohibiting the Use of Medical Marijuana by Persons Granted Probation*, 49 JUDGES’ J. 29, 29 (2010); see Stephanie Domitrovich, *State Courts Coping with Medical Marijuana Legislation: Discerning Strife or Harmony?* 60 JUDGES’ J. 30, 32 (2021) (highlighting that “[d]ue to inadequately written legislation, many more cases will be percolating through the courts as judges continue to interpret medical marijuana legislation discerning harmony in the law or confronting strife”).

16. The use of medical marijuana, even if permissible under state law, remains prohibited conduct for federal offenders on supervised release pursuant to the federal Controlled Substances Act of 1970. See, e.g., *United States v. Bey*, 341 F. Supp. 3d 528, 531 (E.D. Pa. 2018) (holding “federal supervisee’s state-authorized possession and use of medical marijuana violates the terms of federal supervised release”).

17. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 222 (2012).

penal system has been frequently described as the expanded carceral state.<sup>18</sup> This carceral state “includes not only the country’s vast archipelago of jails and prisons but also the far-reaching and growing range of penal punishments and controls that lie in the never-never land between the gate of the prison and full citizenship.”<sup>19</sup> A prime example of the expanded carceral state has been the revolutionary rise of problem-solving courts generally, and in particular, adult drug treatment courts.<sup>20</sup> Described as a “national movement,”<sup>21</sup> drug treatment courts have now become an integral component of the national criminal justice system. The first adult drug treatment court commenced operations in 1989; today there are no less than 4,000 drug treatment courts operating across the United States.<sup>22</sup> Drug treatment courts largely arose in response to a series of dynamic events: the failure on the War on Drugs; high recidivism rates among offenders; the general prison overcrowding problem; and the revolving door of justice whereby offenders with substance abuse issues repeatedly cycled in and out of prison, probation, or parole.<sup>23</sup>

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18. See, e.g., Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010) (referring to carceral state as “the totality of this spatially concentrated, more punitive, surveillance and punishment-oriented system of governance”); Beth E. Ritchie & Kayla M. Martensen, *Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice*, 35 AFFILIA: J. WOMEN & SOC. WORK 12, 12 (2020) (defining the carceral state to “refer to the ways that ideology, economic policy, and legal/legislative initiatives have supported the growth of legal apparatuses associated with punishment”); Beckett & Murakawa, *supra* note 17, at 222 (advocating for expansion of traditional understanding of carceral state).

19. Marie Gottschalk, *Democracy and the Carceral State in America*, 65 ANNALS AM. ACAD. POL. & SOC. SCI. 288, 289 (2014). Indeed, the concept of a carceral state has been “adopted and applied to multiple areas of the social world to describe how institutions, people, and processes embody the logics, practices, and technologies of prison.” Kayla Marie Martensen, *Review of Carceral State Studies and Application*, 14 SOCIO. COMPASS 1, 1 (2020).

20. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 39 (2001) (“The rapid expansion of the drug court model has led participants and observers alike to label the phenomenon a ‘movement,’ even a ‘revolution’ in criminal justice.”); see John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 924 (2000) (describing drug treatment courts as a “fundamental paradigm shift in justice”).

21. Scott J. Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 239, 240 (2005).

22. Angela J. Thielo et al., *Prisons or Problem-Solving: Does the Public Support Specialty Courts?* 14 VICTIMS & OFFENDERS 267, 267 (2019); see *About Treatment Courts*, ALL RISE (last visited Nov. 10, 2023) <https://allrise.org/about/treatment-courts/> (noting existence of 4,000 treatment courts across the country).

23. Michael D. Sousa, *Procedural Due Process, Drug Courts, and Loss of Liberty Sanctions*, 14 N.Y.U. J. L. & LIBERTY 733, 746 (2021) (“The development of drug treatment courts occurred at a significant moment in the history of the American criminal justice system, a time when commentators, scholars, legal actors, and politicians recognized that the War on Drugs and the associated punitive turn failed to adequately address drug usage by swaths of criminal offenders and drug-related crime across the country.”); REBECCA TIGER, *JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM* 19 (2013) (noting that drug courts “[f]ormed partly in response to the overcrowding of jails and prisons that has stemmed from punitive drug policies”); Vickie Baumbach, *The Operational Procedure of Drug Court: Netting Positive Results*, 14 TRINITY L. REV. 97, 97 (2007) (“Beginning in the late 1980’s, the judicial system introduced the implementation of drug court as an alternative to incarceration. The initial objective of drug court was to assuage burdened congestion and reduce recidivism in the United States prison system.”); Sara Steen, *West Coast Drug Courts: Getting Offenders Morally Involved in the Criminal Justice Process*, in *DRUG COURTS IN THEORY AND PRACTICE* 53 (James L. Nolan, Jr. ed., 2002) (“Drug courts first developed in the United States in response to the ‘War on Drugs’ of the 1980s,

Drug treatment courts focus primarily on providing offenders with severe substance use disorders various drug treatment therapies as an alternative to incarceration.<sup>24</sup> Drug treatment courts adopt an understanding that drug addiction is a medicalized disease which requires various behavioral and psychological treatment interventions.<sup>25</sup> In this sense drug treatment courts represent a move away from the purely retributive philosophy of the American criminal justice system dominating the three decades from the 1970s to the late 1990s,<sup>26</sup> and towards a seemingly more rehabilitative-minded penal system.<sup>27</sup> Nonetheless, it has been observed that because drug treatment courts still operate under the umbrella of the formal criminal justice system, the line between treatment and punishment is both blurred and indissoluble.<sup>28</sup>

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which resulted in phenomenal increases in cases involving drug offenders. Drug courts developed in part ‘out of a sense of frustration that law enforcement and imprisonment policies alone were not having the impact on drug supply or demand that the proponents of the ‘War Against Drugs’ of the 1980’s had hoped for.’”) (internal citations omitted).

24. Ursula Castellano, *Problem-Solving Courts: Theory and Practice*, 5 SOCIO. COMPASS 957, 957 (2011) (noting drug treatment courts provide a range of treatment options for participants as alternatives to the revolving door of justice); Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 990 (2002) (“Importantly, substance abuse treatment assumes a central role in these programs rather than being viewed as peripheral to punitive ends and is provided in the community where offenders can maintain family and social contacts and seek or continue in gainful education and employment.”).

25. Rebecca Tiger, *Drug Courts and the Logic of Coerced Treatment*, 26 SOCIO. F. 169, 169 (2011) (“Framing substance dependence as a chronic ‘biopsychological disease,’ drug court practitioners draw on medical and behavioral theories of addiction to argue for a ‘comprehensive approach’ and high levels of involvement in defendants’ lives.”) (internal citation omitted); Tara Lyons, *Simultaneously Treatable and Punishable: Implications of the Production of Addicted Subjects in a Drug Treatment Court*, 22 ADDICTION RSCH. & THEORY 286, 288 (2014) (“Addiction is considered to be a chronic, life-long and permanent disease that resides within individuals according to the disease model of addiction. This conception of addiction as a chronic, progressive, life-long disease is central to . . . US drug courts.”).

26. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8-9 (2001).

27. See, e.g., Thielo et al., *supra* note 22, at 269 (noting that drug treatment courts are “marked by the traditional rehabilitative ideal”); JOANN MILLER & DONALD C. JOHNSON, *PROBLEM-SOLVING COURTS: A MEASURE OF JUSTICE* 26 (2011) (“Yet, this first decade of the twenty-first century has witnessed an absolute return to the rehabilitative ideal with an increasing dependence on drug courts, reentry courts, and community court programs.”); Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 444 (2006) (“[T]he philosophy of drug courts represented something of a radical departure from ‘business as usual’ in the criminal justice system. In order for this departure to occur, judges who chose to participate in these courts had to accept that rehabilitation for drug offenders was viable, abandon some of their ‘tough on crime’ attitudes, and establish partnerships with other agencies, including law enforcement officials, prosecutors, defense lawyers, and treatment providers.”).

28. Michael D. Sousa, *Therapeutic Discipline: Drug Courts, Foucault, and the Power of the Normalizing Gaze*, 2021 MICH. ST. L. REV. 143, 205 (2021) (concluding that the operation of a drug treatment court after empirical study was a form of “therapeutic discipline”); JENNIFER MURPHY, *ILLNESS OR DEVIANCE? DRUG COURTS, DRUG TREATMENT, AND THE AMBIGUITY OF ADDICTION* 4 (2015) (describing the overlap between therapeutic and punitive approaches in the operation of drug treatment courts); TIGER, *supra* note 23, at 6 (noting the “consistent advocacy for coercion as the key to effective treatment” in drug courts); MIRIAM BOERI, *HURT: CHRONICLES OF THE DRUG WAR GENERATION* 162 (2018) (discussing drug courts and noting that the “line between punishment and treatment has become blurred”); Tiger, *supra* note 25, at 173 (arguing that “contradictory institutional approaches to substance use—punitive and medical, legal and therapeutic—are merged in drug courts”).

Drug treatment courts are no doubt a specialized and intensive form of criminal probation<sup>29</sup> that specifically deals with offenders who have diagnosed severe substance use disorders, but it is nevertheless a form of probation. Most drug treatment courts across the country operate on an abstinence-based approach, prohibiting participants from using any drugs unless prescribed by a physician. Anecdotal evidence and news reports observe that drug treatment court judges are requiring prospective drug court clients to relinquish their lawful medical marijuana cards if they wish to partake in the drug treatment court program. The choice presented to potential participants is either to refrain from engaging in legalized and physician-recommended treatment or face prison.<sup>30</sup> As one individual reported to a news agency regarding the requirement that he either turn in his medical marijuana card to participate in a drug treatment court or to decline and face a prison sentence, he commented: “I have to choose between jail and my health right now. I have no option but to comply.”<sup>31</sup>

To date there are no reported cases on the complex intersection between drug treatment courts and the protections afforded to qualifying patients under state medical marijuana laws for those on probation. It is inevitable and only a matter of time that future challenges will be brought before the courts questioning standard prohibitions preventing drug court participants from using lawful and physician-recommended medical marijuana while on this form of specialized probation. Excluding otherwise eligible offenders from participating in drug treatment court programs based solely on their lawful medical marijuana use may very well prove to be a violation of the immunity protections provided to qualifying patients under state medical marijuana laws.

The genesis for this Article stems from my ongoing years-long empirical case study of several drug treatment courts located in a western state (used generically here—and as required by applicable Institutional Review Boards (IRB) guidelines—as the “Western County Drug Court”).<sup>32</sup> During the course of my data collection efforts over the past few years, I have participated in both informal conversations and formal interviews with legal actors and drug treatment court professionals regarding the dynamics between legalized medical marijuana laws and the impact they may have on the quotidian operations of drug treatments courts. Not only are local problem-solving courts having internal deliberations on this very topic, but the issues are currently percolating at the national level as well. For example, in the summer of 2022 the largest nationwide conference for drug treatment court professionals dedicated several panels to the issue of medical marijuana and drug treatment courts.

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29. See, e.g., *State v. Meyer*, 930 A.2d 428, 434 (2007) (noting drug treatment courts are a form of “special probation”).

30. See, e.g., Sam Wood, *Drug Court vs. Medical Pot*, PHILA. INQUIRER, Oct. 19, 2020, at A1.

31. *Id.*

32. Based upon ethical guidelines provided for researchers and governed by university IRBs, I cannot disclose the specific court in which this research took place.

My goal in this Article is intentionally not to adopt a normative position, but rather—and no less importantly—to provide a robust foundational scaffolding for future scholars, appellate courts, drug treatment courts, legal actors, and drug treatment court professionals to draw upon as a starting place for thinking about the adaptability of legal marijuana use in the drug treatment court domain. The contentions, arguments, and considerations raised in this Article presume that a probationer has a valid medical marijuana registry identification card resulting from a bona fide physician-patient relationship, and the individual is possessing and using marijuana in compliance with the respective state medical marijuana laws. Courts will not afford immunity protections to probationers who are in violation of the applicable medical marijuana laws<sup>33</sup> or for the recreational use of marijuana in states where it has been legalized.<sup>34</sup>

The Article proceeds as follows. Part II presents the reader with a generalized overview of the internal operations of drug treatment courts. Part III provides a contextualized historical discussion of the criminalization of marijuana at the federal level, culminating in the Controlled Substances Act of 1970 along with recent developments at the federal level seeking to harmonize federal law with state medical marijuana laws. Part IV summarizes the legalization of medical marijuana at the state level, most notably addressing the various statutory protections from criminal sanctions offered to qualifying patients using and possessing marijuana and how these protections apply to imposed conditions of probation. Part V details and surveys the existing case law on the interplay between legalized medical marijuana use and imposed conditions of probation, and in doing so typologizes the varied approaches taken by appellate courts on this issue to date. Part VI harnesses the material in previous sections—together with incorporating some of my empirical data collected over the past few years—to consider how medical marijuana may be incorporated into the drug treatment court regime, and what practical considerations and problems present themselves for drug treatment court professionals working in the field. Part VII provides a brief conclusion and offers some avenues for future study.

## II. A BASIC OVERVIEW OF DRUG TREATMENT COURTS

As has been well-documented by punishment scholars, the American criminal justice system turned to a more retributive stance following the tumultuous political events of the 1960s and the advent of neoliberalism in the late 1970s and

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33. See, e.g., *People v. Thue*, 969 N.W.2d 346, 353 (Mich. Ct. App. 2021) (reviewing a challenge to the use of medical marijuana while on probation and noting “[t]here is no indication that defendant used marijuana in violation of the [Michigan Medical Marijuana Act]”).

34. See, e.g., *id.* at 354 (“We note, however, that the [Michigan Medical Marijuana Act] is inapplicable to the recreational use of marijuana, and thus, a trial court may still impose probation conditions related to the recreational use of marijuana and revoke probation for such recreational use as well as for marijuana use in violation of the [Michigan Medical Marijuana Act].”).



early 1980s.<sup>35</sup> This “law and order” revolution forsook the notion of a rehabilitative ideal for the American criminal justice system; it was replaced by an expanded carceral state characterized by mass incarceration and a “new penology”<sup>36</sup> whose goal was “no longer to prevent crime or to treat individual offenders with a view toward their reintegration into society after they have served their sentence,”<sup>37</sup> but rather was geared towards isolating groups perceived as dangerous, by monitoring behaviors and managing criminal risks.<sup>38</sup> This era of retributive philosophy in the American criminal justice system has been characterized generally by mass incarceration, lengthier prison sentences, increased punitive sanctions such as “three-strikes” policies and truth-in-sentencing laws, and a limiting of judicial discretion during the sentencing process.<sup>39</sup> All of these dynamics occurred in conjunction with the War on Drugs.<sup>40</sup> Indeed, the incarceration rate in the United States expanded six-fold from the 1970s to the 2000s, resulting in the United States having the highest incarceration rate of any developed nation in the world.<sup>41</sup>

The development of drug treatment courts occurred at a significant moment in the history of the American criminal justice system, a time when commentators, scholars, legal actors, and politicians recognized that the War on Drugs and the associated punitive turn failed to adequately address drug usage by swaths of criminal offenders and drug-related crime across the country.<sup>42</sup> The judge who

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35. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 74 (2010); see BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 58 (2006) (“The 1970s was a transitional decade in the history of American criminal justice. The official philosophy of rehabilitation was replaced by a punitive approach.”); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 9 (2016) (“[T]he expansion of the carceral state should be understood as the federal government’s response to the demographic transformation of the nation at mid-century, the gains of the African American civil rights movement, and the persistent threat of urban rebellion.”); RANDALL G. SHELDON, OUR PUNITIVE SOCIETY: RACE, CLASS, GENDER AND PUNISHMENT IN AMERICA 4 (2010) (noting the “rapid decline in the rehabilitative ideal” beginning in the 1970s); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 55 (2011) (“The shift to a general attitude of ‘toughness’ toward problems associated with communities of color began in the 1960s, when the gains and goals of the Civil Rights Movement began to require real sacrifices on the part of white Americans, and conservative politicians found they could mobilize white racial resentment by vowing to crack down on crime.”).

36. The term “new penology” was first coined by Malcolm M. Feeley and Jonathan Simon to describe the shift in penal ideology that occurred during the 1970s and 1980s. See generally Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992). According to Feeley and Simon, the criminal justice system moved from one concerned with assigning responsibility for offender conduct and providing treatment to one geared towards identifying, classifying, and managing dangerous populations. *Id.* at 452.

37. LOÏC WACQUANT, PRISONS OF POVERTY 68 (2009).

38. *Id.* at 67-68.

39. WESTERN, *supra* note 35, at 52-63.

40. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 420-22 (2009).

41. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L. & SOC’Y REV. 695, 699 (2010).

42. Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 448-49 (1999); see Benedikt Fischer, “Doing Good with a Vengeance”: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America, 3 CRIM. JUST. 227, 230 (“The effects

coordinated and directed the development of the first drug treatment court in Miami, Florida explained the reason for the court's creation in the following way: "[p]utting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders. The [d]rug [c]ourt tackles the problem head-on."<sup>43</sup> By focusing on providing drug treatment services to criminal offenders with severe drug dependencies rather than bluntly sentencing them to a term of incarceration, it is fair to contend that the rise of drug treatment courts nationwide represents a return towards a more rehabilitative model for dealing with individuals ensnared by the criminal justice system and away from the retributive model of the latter portion of the twentieth century.<sup>44</sup>

Adult drug treatment courts operate in accordance with one of the following approaches: a deferred prosecution program, a post-adjudication program, or a probation-revocation program.<sup>45</sup> In a deferred prosecution program, offenders who satisfy certain eligibility criteria are referred to the drug court program prior to pleading to a criminal charge.<sup>46</sup> If the offender successfully completes the drug treatment court program, generally speaking no criminal charges are formally entered. However, if the offender is removed from the drug treatment court program (either voluntarily or involuntarily) prior to successful completion, criminal prosecution for the underlying offense will be renewed. Alternatively, in a post-adjudication drug court model, which now comprises the majority of drug treatment courts in the United States,<sup>47</sup> offenders must first plead guilty to the criminal charges as a condition precedent to any drug court referral, but their sentences are suspended while they participate in the drug treatment court program.<sup>48</sup> Successful completion of the program ordinarily results in a waived sentence—participating in drug treatment court thus becomes the criminal sentence. Again, however, unsuccessful completion of the drug court program will likely result in the offender being returned to the original criminal division for sentencing occasioned by the guilty plea.<sup>49</sup> Finally, in a post-revocation model, criminal offenders are placed on normal probation, but usually after several failed attempts to comply, the probation department files an

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of aggressively expanding punitive drug enforcement starting in the 1980s has been cited as of the main rationales for the vigorous emergence of DTCs in the USA.”).

43. Hora et al., *supra* note 42, at 455 (citation omitted).

44. Sanford & Arrigo, *supra* note 21, at 253-54 (arguing that “the drug court model stands in contrast to predominant ‘get tough’ philosophies within the criminal justice system that favor punitive sentences rather than rehabilitation”).

45. Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-solving Court*, 42 GA. L. REV. 717, 746 (2008).

46. Paul Gavin & Anna Kawalek, *Viewing the Dublin Drug Treatment Court through the Lens of Therapeutic Jurisprudence*, 11 INT’L J. CT. ADMIN. 1, 5 (2020).

47. Steven Belenko, *The Role of Drug Courts in Promoting Desistance and Recovery: A Merging of Therapy and Accountability*, 27 ADDICTION RECOVERY & THEORY 3, 10 (2019).

48. Gavin & Kawalek, *supra* note 46, at 5.

49. *Id.*

application to revoke probation with a strong likelihood that the offender will next face a period of incarceration for their crimes. Probation-revocation drug treatment courts act as a “stopgap” between community-based, intensive supervision/treatment or prison. As an alternative to a harsher sentence, a court can refer the revocation-eligible offender to drug treatment court.

While the granular, everyday operations of each particular drug court are left to the province of local state and county officials, most adult drug treatment courts are institutionalized and structured in accordance with one of the most fundamental documents in the history of these problem-solving courts: *Defining Drug Courts: The Key Components*, published in 1997 by the United States Department of Justice, Office of Justice Programs, in collaboration with the National Association of Drug Court Professionals.<sup>50</sup> This publication sets forth in aspirational terms ten separate “Key Components” that should undergird the operation of any drug court in the United States. These ten Key Components can be briefly summarized as follows: i) the integration of alcohol and drug treatment into the processing of criminal cases; ii) the use of a non-adversarial approach between prosecution and defense counsel; iii) the early identification of suitable participants and the prompt placement into drug court; iv) the providing of a continuum of services by the drug court to its participants, which can address a range of social services, including mental illness, homelessness, unemployment, familial troubles, and sexually-transmitted diseases; v) frequent and random drug testing to monitor substance use; vi) the development of a coordinated strategy to respond to participants’ compliance with the drug court program, which generally calls for the establishment of graduated sanctions and rewards to mark behavior, progress and setbacks; vii) the creation of an ongoing judicial interaction between the drug court judge and each participant through regularly scheduled court appearances; viii) the internal monitoring of drug court programs to measure effectiveness; ix) the continuing interdisciplinary education of the drug court team members; and x) the establishment of partnerships among the drug treatment court and various public and community-based organizations, most commonly treatment providers and social service agencies.<sup>51</sup>

Most every drug treatment court purposefully functions as a collaborative team, generally comprised of a judge, district attorney, public defender, court administrative staff (*e.g.*, a drug court coordinator), law enforcement, probation officers, and treatment providers.<sup>52</sup> An adverse approach among team members is intentionally dispensed with in favor of a concentrated focus on treating the offender’s underlying substance abuse issues and correcting deviant behaviors.<sup>53</sup> As one commentator has noted, drug treatment courts seek “to reshape the offender’s behavior from addiction and irresponsibility to non-use and

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50. See DEP’T OF JUST.: BUREAU OF JUST. ASSISTANCE & NAT’L ASS’N OF DRUG CT. PROS., *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).

51. See *id.*

52. Messer et al., *supra* note 12, at 9.

53. Hora & Stalcup, *supra* note 45, at 788.

accountability. Offenders are required to take charge of their lives by confronting addiction.”<sup>54</sup> Although the results remain mixed regarding the overall effectiveness of drug treatment courts, a survey of the evaluative studies suggests lower rates of recidivism for drug court participants and drug court graduates as against comparison groups.<sup>55</sup>

The decision to participate in drug treatment court must be made voluntarily, intelligently, and knowingly on an informed basis in order to satisfy the legal standards of competency.<sup>56</sup> An individual defendant who chooses to participate in drug treatment court always retains the right to leave the program and re-enter the traditional criminal justice processing system.<sup>57</sup> While a participant’s decision to enter drug treatment court is indeed voluntary from a legal standpoint, this decision has been characterized and criticized as a form of coercive treatment,<sup>58</sup> principally because the decision to enter a drug treatment court usually results in the offender being released from incarceration and returned to the community to begin treatment.<sup>59</sup> Precisely because treatment for a severe drug dependency takes a long time,<sup>60</sup> and relapse is both expected and frequent, a typical sentence to drug treatment court is usually for at least one year, and oftentimes longer.<sup>61</sup>

Drug treatment courts are intensive supervision programs (ISP) that rely upon multiple and frequent points of contact between the participant and the drug court team. ISPs are also characterized by “a rigorous structuring of daily activities”<sup>62</sup> for probationers, consciously done to fill their lives “with a network of rules . . . about appointments, work, treatment participation”<sup>63</sup> and drug testing. As a form of an ISP, a drug treatment court is premised upon the close surveillance<sup>64</sup> of the drug court participant and this is accomplished by a reduced caseload for the drug treatment court probation officers and a general cap on the number of participants sentenced to a particular drug court program. Drug treatment court participants are required to meet with their probation officers at least once a week,

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54. William D. McColl, *Baltimore City’s Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 490 (1996).

55. See, e.g., Lisa M. Shannon et al., *Examining the Impact of Prior Criminal Justice History on 2-year Recidivism Rates: A Comparison of Drug Court Participants and Program Referrals*, 62 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 291, 305 (2018) (finding drug court graduates were less likely to be rearrested in a two-year follow-up window as compared to drug court dropouts or non-participants).

56. Hora & Stalcup, *supra* note 45, at 749.

57. *Id.* at 750; Toby Seddon, *Coerced Drug Treatment in the Criminal Justice System: Conceptual, Ethical and Criminological Issues*, 7 CRIMINOLOGY & CRIM. JUST. 269, 271 (“Reference to options is a reminder that coerced individuals still retain a choice, however constrained.”).

58. TIGER, *supra* note 23, at 139.

59. Hora & Stalcup, *supra* note 45, at 750.

60. Belenko, *supra* note 47, at 12.

61. *Id.* at 9.

62. See JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990* 241 (1993).

63. See *id.* 241.

64. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 117 (1996) (noting that ISPs are based on a close surveillance of the offender).

attend several sessions of individualized treatment programs and counseling services several times a week (which could be either out-patient or in-patient residential living), appear in court before the judge on either a weekly or biweekly basis for the court to check-in and assess compliance with programmatic requirements, and submit to randomized urinalysis tests several times a week.<sup>65</sup>

A participant's progression through the drug court sentence is managed by the entire drug court team through a series of personalized, graduated incentives and sanctions geared towards fostering accountability and recovery.<sup>66</sup> By balancing the granting of incentives along with imposing graduated sanctions upon drug court participants throughout their tenure in the program, drug treatment courts are an institutional blending of rehabilitation and punishment at the same time.<sup>67</sup> Observers have described this process as a "carrot and stick approach"<sup>68</sup> to motivate participants to change deviant behaviors and lead productive lives in the community. In the end, "[t]he conventional wisdom is that drug courts are successful in reducing drug addiction and drug-related criminal recidivism while being less expensive alternatives to traditional case processing."<sup>69</sup>

Despite the apparent success of drug treatment courts to lower recidivism rates and rehabilitate offenders from both drug addiction and criminal behavior, there have been several criticisms lodged against the operation of drug courts, mostly from legal circles. Some commentators question whether the collaborative, non-adversarial approach in drug treatment courts can adequately protect participants' due process rights, most prominently with respect to the requirement of many drug courts that offenders plead guilty to an offense as a condition precedent to being sentenced to drug court.<sup>70</sup> This, of course, raises issues regarding the knowing and intelligent acceptance of the drug court sentence free of any duress or coercion.<sup>71</sup> Others raise concerns over the potential "net widening" effect of drug treatment courts, whereby offenders are being sentenced to drug court who would otherwise be diverted out of the criminal justice system entirely.<sup>72</sup> In addition, others raise alarm over the fact that a drug court sentence may in fact be more punitive than any traditional sentence the offender may have received because drug court programs are not only intrusive and intensive<sup>73</sup> (including the possibility of multiple jail sanctions), but generally last anywhere

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65. Hora & Stalcup, *supra* note 45, at 752-62.

66. TIGER, *supra* note 23, at 88-114.

67. Belenko, *supra* note 47, at 10.

68. GREG BERMAN & JOHN FEINBLATT, GOOD COURT: THE CASE FOR PROBLEM-SOLVING JUSTICE 9 (2005).

69. Kathleen M. Contrino et al., *Factors of Success: Drug Court Graduate Exit Interviews*, 41 AM. J. CRIM. JUST. 136, 138 (2016).

70. Eric L. Jensen et al., *Adult Drug Treatment Courts: A Review*, 1/2 SOCIO. COMPASS 552, 557 (2007).

71. Anida L. Chiodo, *Sentencing Drug-Addicted Offenders and the Toronto Drug Court*, 45 CRIM. L.Q. 53, 77 (2001) ("While the [drug treatment court] gives the appearance that it is based on consent, from the perspective of the offender, it is in essence premised on coercion, such that in order to enter the program, the offender is required to plead guilty.").

72. *Id.* at 77.

73. *Id.* at 83.

from one to two years' in duration. Still another critique are the impacts drug treatment courts have upon the role of defense counsel, who by virtue of being a member of the drug court collaborative team, often may be deprived of or disincentivized to zealously defend their client's due process rights in contravention of ethical guidelines, particularly with respect to the incurrence of graduated sanctions.<sup>74</sup>

Given the institutional aims of drug treatment courts, namely, to decrease future recidivism and to provide offenders with severe use disorders intensive treatment and associated therapies to curb drug and alcohol use both during probation and after successful completion of the program, the question is how the legalization of medical marijuana may, or may not, fit into this institutional paradigm. Before tackling this complicated question directly, however, a brief background on the classification of marijuana at the federal level is necessary to appreciate how states have responded by widely enacting medical marijuana laws, a subject to which this Article now turns. More specifically, the Article next turns to an abbreviated historical account of the criminalization of marijuana by the federal government, resulting in the Controlled Substances Act of 1970, which still considers marijuana to be an illegal substance along the likes of heroin, morphine, and psilocybins.<sup>75</sup>

### III. A CONDENSED HISTORY OF NATIONAL MARIJUANA REGULATION AT THE FEDERAL LEVEL

The use of marijuana (*i.e.*, the flowers and leaves of the *Cannabis sativa* L. plant) for medicinal purposes has a historical lineage tracing back thousands of years across a multitude of different countries.<sup>76</sup> Prior to the twentieth century, physicians and pharmacists in the United States widely prescribed marijuana to alleviate the symptoms of a host of illnesses.<sup>77</sup> By 1850 marijuana was included

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74. Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 J.L. & POL'Y 57, 64 (2009).

75. 21 U.S.C.A. § 812 (West 2022).

76. Sunil K. Aggarwal et al., *Medicinal Use of Cannabis in the United States: Historical Perspectives, Current Trends, and Future Directions*, 5 J. OPIOID MGMT. 153, 157 (2009); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 275 (2005); Elena Quattrone, Note, *The 'Catch-22' of Marijuana [Il]legalization*, 22 B.U. J. SCI. & TECH. L. 299, 301 (2016).

77. DuVivier, *supra* note 76, at 275; see Aggarwal et al., *supra* note 76, at 157 (noting that the medicinal use of marijuana was common in the United States from the 1850s to the early 1940s); Cathryn L. Baine, Note, *Supreme Court "Just Says No" to Medical Marijuana: A Look at United States v. Oakland Cannabis Buyers' Cooperative*, 39 HOUS. L. REV. 1195, 1196 (2002) ("From the early 1800s until 1937, western medicine implemented therapeutic uses of marijuana."); Kayla M. Jacob, Note, *Refer Madness: The Legal Quagmire of Medical Marijuana in the Workplace*, 47 S. UNIV. L. REV. 423, 429 (2020) (noting that marijuana was prescribed as a pain reliever, a muscle spasm suppressant, and a sedative up until the 1930s); Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 792 (2019) ("First listed in the *United States Pharmacopeia* in the middle of the nineteenth century, marijuana was used in patent

in the *United States Pharmacopeia*, which is the national compendium establishing acceptable standards for the use of medicines and drugs.<sup>78</sup> At the time, marijuana was listed as appropriate for treating a variety of ailments, including fatigue; asthma; rheumatism; delirium tremens; migraine headaches; and menstrual symptoms.<sup>79</sup> Indeed, from the founding of the United States until the second decade of the twentieth century, the cultivation, sale, and use of marijuana was not the concern of federal or state criminal laws.<sup>80</sup> The states and the federal government only began regulating drug use towards the end of the nineteenth century and into the twentieth century.<sup>81</sup>

As has been well-documented by scholars and commentators, the impetus to regulate the use of drugs in the United States has an inseparable connection to racism, nativism, and xenophobia.<sup>82</sup> The first explicit piece of anti-drug legislation in the United States in 1874 banned the use of opium due to a political and social moral panic surrounding Chinese immigrant laborers along with the perceived need to protect white American workers facing competition in the prospect of an economic depression.<sup>83</sup> Quickly following on the heels of opium prohibition, a move next arose to regulate the use of cocaine on similarly racist grounds: The phenomenon of cocaine use was tied illegitimately to the southern African American population.<sup>84</sup> As David F. Musto claims in his sweeping account of the history of narcotics control in the United States, “[t]he South feared that [African American] cocaine users might become oblivious of their prescribed bounds and attack white society.”<sup>85</sup> Much like the prior politicization of

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medicines for various conditions, including pain, convulsions, menstrual cramps, lack of appetite, depression, and other mental illnesses.”). Marijuana remained listed in the *United States Pharmacopeia* until 1942. J. Ryan Conboy, *Smoke Screen: America’s Drug Policy and Medical Marijuana*, 55 *FOOD & DRUG L.J.* 601, 601 (2000).

78. Jacob, *supra* note 77, at 429 (“[Marijuana] was first described in the *United States Pharmacopeia* in 1850 and was widely used as a patent medicine.”).

79. Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 *QUINNIPIAC L. REV.* 675, 692 (2009). It was removed from the *United States Pharmacopeia* in 1941 at the urging of Federal Bureau of Narcotics Commissioner Harry J. Anslinger. *Id.* at 687.

80. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform* 110 *J. CRIM. L. & CRIMINOLOGY* 379, 388 (2020).

81. Vitiello, *supra* note 77, at 797. For in-depth, detailed treatment of the history of marijuana legislation in the United States up until the Controlled Substances Act. See generally Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 *V.A. L. REV.* 971 (1970).

82. See generally DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (3d ed. 1999); JOHANN HARI, *CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS* (2015); Deborah Ahrens, *Drug Panics in the Twenty-First Century: Ecstasy, Prescription Drugs, and the Reframing of the War on Drugs*, 6 *ALB. GOV’T L. REV.* 397 (2013); ALEXANDER, *supra* note 35, at 55.

83. Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 *L. & SOC. INQUIRY* 411, 418-23 (1999).

84. MUSTO, *supra* note 82, at 6; see Auerhahn, *supra* note 83, at 427 (noting substantial evidence that “blacks’ cocaine use was not even proportionate to their representation in the population during this period; addiction was primarily a white phenomenon”).

85. MUSTO, *supra* note 82, at 6. This general sentiment is shared by other scholars. See, e.g., Auerhahn, *supra* note 83, at 427 (“It appears that the racist ideological legacy of slavery, coupled with the intensified economic threat posed by blacks after the Civil War, was enough to create and sustain a panic about black cocaine use in the absence of any real social threat.”).

opium and cocaine as a concerted racial mechanism to socially control marginalized groups, the same holds true for marijuana legislation.<sup>86</sup> While opium was tied to Chinese laborers and cocaine tied to African Americans in the south, marijuana was politicized out of racial prejudices aimed at Mexican immigrants entering the United States prior to and during the Mexican Revolution.<sup>87</sup>

The first state regulations concerned the sale of marijuana, and only indirectly. States enacted “poison laws” that imposed labels on medicines sold in pharmacies to ensure consumer awareness about the potentially harmful substances contained in purchased patent medicines (including marijuana).<sup>88</sup> In an effort to bolster the regulation of drugs at the state level, Congress enacted several modest statutes that served to regulate the marketplace for narcotics and to provide for consumer protection measures regarding the purity of the drugs available for sale nationwide.<sup>89</sup> For example, in 1906 Congress enacted the Pure Food and Drug Act which did not criminalize marijuana, but like its state counterparts included marijuana among the drugs that prohibited a misleading labeling along with dosing and purity standards.<sup>90</sup>

The federal government’s first ambitious drug law, the Harrison Narcotics Tax Act of 1914 (Harrison Tax Act), was aimed at taxing and restricting the distribution of morphine and cocaine throughout the United States; only physicians, dentists, and veterinarians were permitted to prescribe these drugs (and

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86. Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 104-05 (2018) (noting that criminalization of people who use marijuana “was born of racial animus,” particularly against Mexicans and African Americans). Deborah Ahrens summarizes this dynamic in the following way:

According to the historians and social scientists who have most extensively studied the subject, new laws criminalizing particular drugs or increasing the penalties for their use, sale, or manufacture rarely reflect increases in the use of those drugs or in social problems related to them but, instead, tend to emerge at moments of great cultural anxiety about particular disfavored social groups. A panicking public develops a cultural narrative that focuses undue attention on the powers of drugs stereotypically associated with the disfavored group and adopts new laws to regulate and punish their use and sale.

Ahrens, *supra* note 82, at 401.

87. Vitiello, *supra* note 77, at 797 (“Much of the impetus to criminalize marijuana dates to the influx of Mexicans during the Mexican Revolution.”); see Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016) (“In the case of marijuana, racial prejudice against both African Americans and Mexicans merged to prompt states and local governments to outlaw usage. In states with significant Mexican populations, such as Texas, Mexican prejudice was the catalyst for prohibition.”).

88. Vitiello, *supra* note 77, at 790.

89. In 1848 Congress passed the Drug Importation Act which was primarily geared towards regulative inspections over the quality and purity of drugs imported into the United States. ROBERT M. HARDAWAY, *MARIJUANA POLITICS: UNCOVERING THE TROUBLESOME HISTORY AND SOCIAL COSTS OF CRIMINALIZATION* 83 (2018). In 1906 Congress enacted the Pure Food and Drug Act which was aimed at regulating the manufacture of narcotics within the United States. “The act deemed any article of food or drugs as misbranded if it contained but did not disclose on its label any alcohol, morphine, cocaine, heroin, or derivatives of these substances.” *Id.* at 85. In 1909, Congress passed the Smoking Opium Exclusion Act of 1909 which banned the importation of opium for smoking purposes. CAROLINE JEAN ACKER, *CREATING THE AMERICAN JUNKIE: ADDICTION RESEARCH IN THE ERA OF NARCOTIC CONTROL* 13 (2002).

90. MARK K. OSBECK & HOWARD BROMBERG, *MARIJUANA LAW IN A NUTSHELL* 37 (2d ed. 2022).



their associated derivatives).<sup>91</sup> The Harrison Tax Act, however, did not directly apply to marijuana.<sup>92</sup> That said, by the end of the first three decades of the twentieth century, the majority of states had added marijuana to their respective prohibited drug lists and banned the distribution of marijuana for purposes other than medical usage.<sup>93</sup> As alluded to above, the state motivations to regulate the distribution of marijuana was engendered by racist and xenophobic attitudes towards African Americans migrating to northern states along with the influx of Mexican laborers throughout the southwestern states.<sup>94</sup> As a consequence of a widespread media and political campaign aimed at demonizing Mexican and African American communities, by the 1930s marijuana went from a narcotic that was not of much, if any, concern in the latter half of the nineteenth century<sup>95</sup> to a “ghastly menace” and an “unspeakable scourge” that when used by Mexicans and African Americans caused them to become “bestial demoniacs” that would be “filled with a mad lust to kill,” most poignantly, white Americans.<sup>96</sup> In relatively short order, marijuana had culturally and politically turned into a “killer weed.”<sup>97</sup> Significantly, during the years between the passage of the Harrison Tax Act and the late 1930s, states began criminalizing the possession and use of marijuana for the first time.<sup>98</sup> The establishment of the Federal Bureau of Narcotics in 1930 laid the groundwork for the promulgation of the Uniform Narcotic Drug Act in 1934—a law proposed by the National Conference of Commissioners on Uniform State Laws—which prohibited the non-medical use of marijuana, thus effectively criminalizing the drug.<sup>99</sup> By 1937 “nearly every state had criminalized non-medical marijuana sales and possession in one way or another.”<sup>100</sup>

Bowing to political pressure from constituencies regarding the growing public hysteria over the “evils” of marijuana use, Congress responded by enacting the first piece of federal legislation directly aimed at marijuana, namely, the Marijuana Tax Act of 1937 (Marijuana Tax Act).<sup>101</sup> Much like the Harrison Tax Act, the Marijuana Tax Act was a revenue-generating statute passed pursuant to

91. Steven Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361 (2013).

92. OSBECK & BROMBERG, *supra* note 90, at 39.

93. Stern & DiFonzo, *supra* note 79, at 681. For a rich and detailed historical sketch of these developments. *See generally* MUSTO, *supra* note 82; Bonnie & Whitebread, II, *supra* note 81.

94. Stern & DiFonzo, *supra* note 79, at 681.

95. Bonnie & Whitebread, II, *supra* note 81, at 1036 (“Prior to 1935 there was little, if any, attention given marijuana in major national magazines and the leading national newspapers.”).

96. Bender, *supra* note 91, at 362-64 (2013); *see* Auerhahn, *supra* note 83, at 434-35.

97. Bonnie & Whitebread, II, *supra* note 81, at 1087.

98. OSBECK & BROMBERG, *supra* note 90, at 42.

99. OSBECK & BROMBERG, *supra* note 90, at 42-43.

100. *Id.* at 43-44.

101. *See* Auerhahn, *supra* note 83, at 432; Bonnie & Whitebread, II, *supra* note 81, at 1052 (“Some observers have attributed passage of the Tax Act to public hysteria.”). Although beyond the scope of this Article, it is certainly worth mentioning that there is a rich history regarding the creation of the Federal Bureau of Narcotics in 1930 and the central role—accompanied by racists motivations—that its first Commissioner, Harry J. Anslinger, played in the development and passage of the Marijuana Tax Act of 1937. *See generally* HARI, *supra* note 82; MUSTO, *supra* note 82; Bonnie & Whitebread, II, *supra* note 81.

Congress' constitutional taxing authority. The Marijuana Tax Act did not outlaw the sale or possession of marijuana, but rather it imposed "registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands."<sup>102</sup> At its essence, the Marijuana Tax Act "imposed such onerous registration and recordkeeping procedures on doctors and wholesale dealers of the drug that it put an end to the market in medical cannabis."<sup>103</sup> For those using marijuana for purposes not approved by the Marijuana Tax Act, they too were required to pay taxes on the transactions "or face stiff fines and lengthy prison sentences."<sup>104</sup> The Marijuana Tax Act operated federally as a de facto "model of prohibition in the guise of taxation"<sup>105</sup> until it was declared unconstitutional by the United States Supreme Court in *Leary v. United States* in 1969.<sup>106</sup> Up until the *Leary* decision, the Marijuana Tax Act was the primary mechanism for the criminalization of marijuana at the federal level (in addition to the various individual state laws adopted in conformity with the Uniform Narcotic Drug Act).<sup>107</sup>

The timing of the Supreme Court's *Leary* decision cannot be overstated in terms of coinciding with the sociological, cultural, and political developments during the 1960s and the consequential election of Richard Nixon as President of the United States. As a correlative response to the dismantling of Jim Crow laws, *Brown v. Board of Education*, the 1964 Civil Rights Act, the 1964 Voting Rights Act, the Watts Riots, and the War on Poverty (along with an expansive welfare state), a new era of American law enforcement and criminal discourse firmly took root, couched in the ideological rhetoric of "law and order."<sup>108</sup> The state and federal governments responded to these strident civil rights challenges with a strong emphasis on punitive enforcement responses largely aimed at

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102. *Gonzalez v. Raich*, 545 U.S. 1, 11 (2005).

103. Stern & DiFonzo, *supra* note 79, at 686.

104. *Id.* at 686-87.

105. *Id.* at 687.

106. *Leary v. United States*, 395 U.S. 6, 12 (1969) (holding that the Marijuana Tax Act of 1937 violates the Fifth Amendment privilege against self-incrimination).

107. For a detailed historical discussion of state and federal legislation, governmental studies, enforcement efforts, and judicial decisions surrounding marijuana and other narcotics between 1937 and 1970, see Bonnie & Whitebread, II, *supra* note 81, at 1063-1172.

108. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 29-36 (1997); see HINTON, *supra* note 35, at 62 ("Thus in the ashes of Jim Crow, following the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and at a time of policy experimentation with the launch of the War on Poverty, the expansion of the welfare state coincided with a new era in American law enforcement."); Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC'Y 9, 14 (2001) (Prior to the 1960s crime had primarily been addressed as a local issue, rarely surfacing in national political discussions. In 1964 though, Barry Goldwater's presidential campaign clearly proclaimed the problem of 'crime in the streets,' followed by Richard Nixon's 1968 appeal for 'law and order.' These messages resonated with a substantial portion of the population concerned with crime and social unrest of the period:").

eradicating street crime.<sup>109</sup> It is commonly understood among law and punishment scholars that once in office President Richard Nixon co-opted President Johnson's fledgling War on Crime and raised it to epic proportions across the country at both the state and federal level, effectively putting into motion the conditions precedent for the growth of mass incarceration and the expansion of the carceral state with a particular strategy aimed at targeting African Americans across urban landscapes.<sup>110</sup>

At the time of President Nixon's election in 1968, drug use and its social consequences had arguably reached a zenith. No former president had equaled "Nixon's antagonism to drug abuse, and he took an active role in organizing the federal and state governments to fight the onslaught of substance abuse."<sup>111</sup> While correlation does not prove causation, a year after Nixon ascended to the presidency, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Controlled Substances Act).<sup>112</sup> The function of the Controlled Substances Act<sup>113</sup> was essentially to federalize the Uniform Narcotic Drug Act and to end the piecemeal approach to narcotics regulation at the federal level.<sup>114</sup> All fifty states have since adopted a version of the Uniform Controlled Substances Act.<sup>115</sup> It is also hardly a coincidence that the War on Drugs engendered by President Nixon commenced in the early 1970s, shortly after the Controlled Substances Act took effect.<sup>116</sup> While the historical journey regarding the

109. BECKETT, *supra* note 108, at 28-43; see Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUDIES IN AM. POL. DEV. 230 (2007) (providing the historical and political context for the development of a punitive criminal justice system in chiefly in response to the civil rights movements).

110. HINTON, *supra* note 35, at 138-79. See generally BECKETT, *supra* note 108 (providing historical context to Nixon's expansion of the national criminal justice system); TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES (2018) (discussing Nixon's role in the punitive turn to the criminal justice system); WESTERN, *supra* note 35 (addressing conservative movement to increase the punitiveness of criminal laws, including the Nixon administration); Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433 (2020) (discussing politicization of crime during the 1960s).

111. MUSTO, *supra* note 82, at 248; see Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 797 (2004) (maintaining that "Richard Nixon elevated the status of drug abuse as a national political issue in 1968, arguing on the campaign trail that drugs were 'decimating a generation of Americans'" (quotation omitted)).

112. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C.A. §§ 801-904 (West 2022)); see *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1146 (N.D. Cal. 2011) (noting Congress passed Controlled Substances Act shortly after Richard Nixon became president).

113. The Controlled Substances Act is technically Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. See 21 U.S.C.A. §§ 801-971 (West 2022).

114. As Alex Kreit recounts, prior to the Controlled Substances Act federal drug prohibition resembled a "patchwork of regulatory, revenue, and criminal measures" with the Harrison Act of 1914 addressing opiates and cocaine, marijuana falling under the Marijuana Tax Act of 1937, and hallucinogens, stimulants, and depressants governed by the 1965 Food, Drug, and Cosmetic Act. Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 ALB. GOV'T L. REV. 332, 334-35 (2013) (quoting RICHARD J. BONNIE & CHARLES WHITEBREAD, II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 242 (1972)).

115. John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. L. & PUB. POL'Y 1, 15 n.75 (2019).

116. ELLIOT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* 14 (1993) (noting that the War on Drugs started in the early 1970s during the Nixon administration); O'Hear, *supra* note 111, at 821;

federal legislation of marijuana ends here with the Controlled Substances Act, this obviously did not end the nation's tortured history regarding the punitive law enforcement efforts centered around drugs continuing throughout the Reagan era's War on Drugs and the federal laws passed during the 1980s and 1990s in increasing the criminal punishments for illicit drug use.<sup>117</sup>

The Controlled Substances Act repealed the earlier federal drug laws to establish a comprehensive framework with the purpose "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."<sup>118</sup> The Controlled Substances Act classifies all drugs with a potential for abuse (except tobacco and alcoholic beverages) into one of five schedules.<sup>119</sup> The schedules are designated I through V in declining order of perceived harmfulness.<sup>120</sup> Marijuana is classified as a Schedule I drug, alongside the likes of heroin and LSD.<sup>121</sup> Pursuant to the Controlled Substances Act, the sale and possession of marijuana is illegal for all purposes.<sup>122</sup> According to the Controlled Substances Act and associated congressional findings, Schedule I drugs have the following common traits: i) the drug has a "high potential for abuse";<sup>123</sup> ii) the drug "has no currently accepted medical use in treatment in the United States";<sup>124</sup> and iii) there exists "a lack of accepted safety for use of the drug . . . under medical supervision."<sup>125</sup> The Controlled Substances Act, however, approves the use of Marinol, which is a synthetic form of THC containing Dronabinol as the active chemical, and is currently listed as a Schedule III drug which can be prescribed by physicians.<sup>126</sup> While physicians can lawfully prescribe Marinol/Dronabinol under the Controlled Substances Act in lieu of smoking marijuana to help alleviate debilitating

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*see* Gonzalez v. Raich, 545 U.S. 1, 12 (2005) ("Then in 1970, after declaration of the national 'war on drugs,' federal drug policy underwent a significant transformation.").

117. For an expansive treatment of the War on Drugs and its consequences, *see generally* HINTON, *supra* note 35; ALEXANDER, *supra* note 35; O'Hear, *supra* note 111; Nekima Levy-Pounds, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV'T L. REV. 563 (2013).

118. Gonzalez v. Raich, 545 U.S. 1, 12 (2005).

119. 21 U.S.C.A. § 812(a) (West 2022).

120. 21 U.S.C.A. § 812(b)(I)-(V) (West 2022).

121. 21 U.S.C.A. § 812(c)(c)(10) (West 2022). Section 802(16)(A) of the Controlled Substances Act currently defines marijuana as "all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C.A. § 802(16)(A) (West 2022). The definition of marijuana under the Controlled Substances Act does not include hemp or "the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." 21 U.S.C.A. § (16)(B) (West 2022).

122. 21 U.S.C.A. §§ 801-971 (West 2022). Under current law, the only exception for marijuana under the Controlled Substances Act is for government-approved research projects. 21 U.S.C. § 823(f) (West 2022).

123. 21 U.S.C.A. § 812(b)(1)(A) (West 2022).

124. 21 U.S.C.A. § 812(b)(1)(B) (West 2022).

125. 21 U.S.C.A. § 812(b)(1)(C) (West 2022).

126. Rescheduling of the FDA Approved Product Containing Synthetic Dronabinol in Sesame Oil from Schedule II to Schedule III 64 Fed. Reg. 35928 (July 2, 1999) (to be codified at 21 C.F.R. parts 1308, 1312).

conditions, it may be cost prohibitive for many patients, particularly if they do not possess adequate health insurance.<sup>127</sup>

Under Section 841(a) of the Controlled Substances Act, it is unlawful for any person “knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”<sup>128</sup> or “to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”<sup>129</sup> Generally speaking, the federal penalties for trafficking, manufacturing, or distributing are severe. Depending upon whether the offender is an individual or a business and what underlying circumstances exist surrounding the conviction and the amount and type of drugs involved, terms of imprisonment for intentionally manufacturing, distributing, dispensing, or possessing marijuana with the intent to manufacture, distribute, or dispense can be anywhere from five years to life in prison and fines from \$250,000 to \$75,000,000.<sup>130</sup>

Section 844 of the Controlled Substances Act also criminalizes the simple possession of controlled substances such as marijuana.<sup>131</sup> This section provides that it “shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of [their] professional practice . . .”<sup>132</sup> Thus, the Controlled Substances Act exempts valid holders of prescription drugs from the crime of simple possession. Because marijuana is classified as a Schedule I drug, prescriptions for marijuana cannot be issued by medical professionals. For the simple possession of marijuana, first offenders are subject to a minimum fine of \$1,000 or imprisonment for not more than one year, or both.<sup>133</sup> For offenders with a prior offense under the Controlled Substances Act or an applicable state drug law, the federal penalty is a minimum of fifteen days of incarceration, not to exceed two years, and a fine of at least \$2,500.<sup>134</sup> For offenders with two previous drug offenses, the Controlled Substances Act mandates a term of incarceration between ninety days and three years along with a minimum fine of \$5,000.<sup>135</sup>

The inclusion of marijuana as a Schedule I drug under the Controlled Substances Act quickly garnered criticism as dismissing the then-available empirical

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127. *State v. Nelson*, 195 P.3d 826, 829 (Mont. 2008) (noting how a probationer could not use Marinol/Dronabinol due to its excessive costs). It is estimated that Marinol/Dronabinol can cost anywhere from \$200 to \$800 per prescription for an individual who does not possess health insurance. See *How Much Does Marinol Cost?*, COSTHELPER (2023), <https://health.costhelper.com/synthetic-marijuana.html#:~:text=HIV%2F-AIDS%20patients%20commonly%20receive%20the%20prescription%20as%20well,without%20medical%20insurance%20costs%20%24200-%24800%2C%20depending%20on%20dosage> [https://perma.cc/R88A-CZBZ].

128. 21 U.S.C.A. § 841(a)(1) (West 2022).

129. 21 U.S.C.A. § 841(a)(2) (West 2022).

130. 21 U.S.C.A. § 841(b) (2022).

131. 21 U.S.C.A. § 844(a) (2022).

132. *Id.*

133. *Id.*

134. *Id.*

135. 21 U.S.C.A. § 844(a) (2022).

data regarding the medicinal benefits of the drug.<sup>136</sup> Commentators have often argued for the rescheduling of marijuana from a Schedule I drug under the Controlled Substances Act.<sup>137</sup> The National Commission on Marijuana and Drug Abuse issued a report in 1972 recommending moving marijuana from Schedule I of the Controlled Substances Act, albeit to no avail.<sup>138</sup> The National Organization for the Reform of Marijuana Laws (NORML) launched high-profile petitions against the federal government seeking to reclassify marijuana, resulting in a horde of litigation and administrative proceedings dragging on for two decades as the Drug Enforcement Agency resisted every effort at reclassification.<sup>139</sup> There have also been a host of unsuccessful legal cases challenging the classification of marijuana as a Schedule I controlled substance under various constitutional theories.<sup>140</sup> The United States Supreme Court has entered the fray over the illegality of marijuana under the Controlled Substances Act. In *United States v.*

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136. See, e.g., Mark Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibitions*, 6 CONN. L. REV. 601, 634 (1974) (“[T]he conclusion is inescapable that by its own terms the classification scheme which includes marijuana within Schedule I of the federal act is arbitrary and irrational. As with the Uniform Narcotic Drug Act, the legislature may have acted out of sincere beliefs, though ignorant and mistaken, concerning marijuana; nevertheless, those beliefs cannot stand in the face of the mass of available empirical evidence”).

137. Quattrone, *supra* note 76, at 300 (arguing that research on therapeutic effects of marijuana can be achieved “through the rescheduling of marijuana from its current status as a Schedule I banned substance”); Stern & DiFonzo, *supra* note 79, at 678 (“Given the overwhelming evidence of therapeutic value, the only reasonable – indeed the only sane – policy option is legalization of medical marijuana.”); Daniel J. Pfeifer, Comment, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 377 (2011) (arguing marijuana should be moved from Schedule I to Schedule II).

138. OSBECK & BROMBERG, *supra* note 90, at 91.

139. See, e.g., *Nat’l Org. for the Reform of Marijuana Law v. Drug Enf’t Agency*, 559 F.2d 735, 737 (1977) (noting continuing controversy between the National Organization for the Reform of Marijuana Law and the Drug Enforcement Agency regarding the reclassification of marijuana from a Schedule I drug); *Nat’l Org. for the Reform of Marijuana Law v. Bell*, 488 F. Supp. 123, 125 (1980) (challenging classification of marijuana under equal protection and Eighth Amendment). For a historical sketch of these efforts, see generally Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137 (2000) (detailing this history of administrative proceedings and litigation between NORML and the Drug Enforcement Agency); GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 3:85 (2022) (providing a brief history of the efforts to administratively reclassify marijuana). Section 811 of the Controlled Substances Act empowers the Attorney General of the United States to reclassify a drug, albeit through a complex administrative procedure. 21 U.S.C.A. § 811 (West 2022).

140. See, e.g., *United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Cal. 2014) (holding there is no fundamental right to use medically prescribed marijuana under the Fifth Amendment to the United States Constitution); *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 120-24 (D.D.C. 2001) (holding that Controlled Substances Act does not violate the First Amendment, Tenth Amendment, Ninth Amendment, or the Commerce Clause); *Kuromiya v. United States*, 37 F. Supp. 2d 717, 728 (E.D. Pa. 1999) (upholding Controlled Substances Act under the equal protection clauses of the Fifth and Fourteenth Amendments as there is no “fundamental right to use or possess or distribute marijuana”); *Seeley v. State*, 940 P.2d 604, 622 (Wash. 1997) (holding that “the rights of privacy and personal liberty do not establish a fundamental right to drug treatment free of government police power”); *Bell*, 488 F. Supp. at 125 (finding that there is no fundamental right to use marijuana, the classification of marijuana does not violate equal protection laws, and the penalization of marijuana under the Controlled Substances Act does not violate the Eighth Amendment); *Raich v. Gonzalez*, 500 F.3d 850, 862-63, 867 (9th Cir. 2007) (finding that use of medical marijuana is not a fundamental right and Controlled Substances Act does not violate the Tenth Amendment).

*Oakland Cannabis Buyers' Cooperative*,<sup>141</sup> the United States Supreme Court declined the invitation to approve a defense of medical necessity for the manufacturing and distribution of marijuana under the Controlled Substances Act in relation to the legalization of medical marijuana pursuant to the California Compassionate Use Act of 1996.<sup>142</sup> In *Gonzalez v. Raich*, the Supreme Court held that Congress' power under the Interstate Commerce Clause includes the authority to prohibit the local cultivation and use of medical marijuana otherwise in compliance with California's Compassionate Use Act.<sup>143</sup>

This conflict between state and federal law on the legality of marijuana obviously raises issues of federalism. As is well-known, the United States Constitution establishes a federalist framework of "dual sovereignty" between the states and the federal government.<sup>144</sup> Although the states collectively surrender much power to the federal government, they do retain "a residuary and inviolable sovereignty"<sup>145</sup> primarily through the Tenth Amendment to the United States Constitution.<sup>146</sup> But as a consequence of this dual sovereignty, possibilities exist where laws can be in conflict or at cross-purposes.<sup>147</sup> If this occurs, the Supremacy Clause<sup>148</sup> establishes "the relative powers of states and the federal government."<sup>149</sup> The Supremacy Clause creates a "rule of decision"<sup>150</sup> for tribunals; they "must not give effect to state laws that conflict with federal laws."<sup>151</sup> That is, under the Supremacy Clause, Congress retains the ability to preempt state

141. 532 U.S. 483 (2001).

142. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) ("For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana"). California was the first state to authorize the use of medical marijuana under the 1996 Compassionate Use Act. Stern & DiFonzo, *supra* note 79, at 711.

143. 545 U.S. 1, 22 (2005).

144. *Printz v. United States*, 521 U.S. 898, 918 (1997) (citation omitted); *see Arizona v. United States*, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.") (citations omitted).

145. *Printz*, 521 U.S. at 919 (citation omitted).

146. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; *see Printz*, 521 U.S. at 919 ("Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'").

147. *Arizona*, 567 U.S. at 389.

148. The Supremacy Clause in the United States Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

149. *City of Alpine v. Abbot*, 730 F. Supp. 2d 630, 633 (W.D. Tex. 2010).

150. *Armstrong v. Exceptional Child Ctr, Inc.*, 575 U.S. 320, 324 (2015).

151. *Id.*

law.<sup>152</sup> Conflicting state laws can be preempted three different ways. First, Congress can “withdraw specified powers from the States by enacting a statute containing an express preemption provision.”<sup>153</sup> Second, if Congress demonstrates an “intent to occupy a given field,” then any state law encompassing the subject matter of that field is preempted.<sup>154</sup> In this regard, the Supreme Court has opined that the intent to displace state law:

can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’<sup>155</sup>

Third, if Congress has not entirely displaced state regulation over the subject matter in question, “state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>156</sup> In any preemption analysis, courts are instructed to assume that “‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”<sup>157</sup>

Scholars and commentators have understandably spent considerable dedication in the literature addressing the contours of federalism in the context of medical marijuana and whether state medical marijuana laws survive preemption analysis under various principles of constitutional law such as “cooperative federalism” and the “anti-commandeering” doctrine.<sup>158</sup> Several factors tend to

152. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

153. *Id.*

154. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1983) (citations omitted); *see Arizona*, 567 U.S. at 399 (noting that “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance”) (citation omitted).

155. *Arizona*, 567 U.S. at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

156. *Silkwood*, 464 U.S. at 248 (citations omitted); *see Arizona*, 567 U.S. at 399 (“Second, state laws are pre-empted when they conflict with federal law. This includes cases ‘where compliance with both federal and state regulations is a physical impossibility.’”) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

157. *Arizona*, 567 U.S. at 400 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

158. *See generally* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015) (arguing that the federal government should adopt a cooperative federalism approach to the marijuana law issue which would enable states to opt out of the Controlled Substances Act); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009) (arguing that state medical marijuana laws survive the preemption analysis under the anti-commandeering rule); O’Hear, *supra* note 111 (outlining the contours of a cooperative federalism approach for state and federal drug relations); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013) (analyzing the synergy between the anti-commandeering doctrine and state medical marijuana laws). *Cf.* DuVivier, *supra* note 76, at 221 (questioning whether the Controlled Substances Act would eventually decimate the ballot initiatives legalizing medical marijuana at the state level); Sprankling, *supra* note 115 (recognizing conflict between federal and state law and questioning whether property rights in marijuana can exist if forbidden by federal law).



assuage these concerns. First, in enacting the Controlled Substances Act, Congress made it clear that it did not intend to preempt the states on the issue of drug regulation. As the Supreme Court declared in *Gonzalez v. Oregon*, the Controlled Substances Act “explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its preemption provision.”<sup>159</sup> This is exemplified by Section 903 of the Controlled Substances Act, which provides as follows:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.<sup>160</sup>

Section 903 of the Controlled Substances Act makes plain that Congress did not intend to preempt state medical marijuana laws by either withdrawing power from the states or intending to occupy the entire field of drug regulation.<sup>161</sup>

Second, any preemption challenge in light of Section 903 of the Controlled Substances Act would need to be premised upon an actual conflict between state and federal law. Conflict preemption will be found “when simultaneous compliance with both state and federal directives is impossible.”<sup>162</sup> In an actual conflict preemption analysis, compliance with both the state medical marijuana law and the Controlled Substances Act must be a “physical impossibility.”<sup>163</sup> While legalizing medical marijuana usage at the state level and its continued prohibition at the federal level may at first blush seem to present a physical impossibility for medical marijuana users to comply with both statutes, courts have overcome this through two lines of reasoning. Conflict preemption would apply only if state medical marijuana laws affirmatively mandated conduct violating the Controlled Substances Act.<sup>164</sup> State medical marijuana laws do not mandate any conduct, but rather simply authorize the use of marijuana for medicinal purposes after the recommendation of a physician and demonstrated compliance with registration

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159. *Gonzalez v. Oregon*, 546 U.S. 243, 251 (2006).

160. 21 U.S.C.A. § 903 (2022).

161. *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 476 (Cal. Ct. App. 2008) (holding that § 903 of the Controlled Substances Act forecloses express and field preemption of state medical marijuana laws).

162. *Id.*

163. *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996).

164. *Cnty. of San Diego*, 81 Cal. Rptr. 3d at 477; see *Gonzalez*, 546 U.S. at 289 (Scalia, J., dissenting) (arguing that conflict under the Controlled Substances Act does not arise unless the state law requires affirmative conduct that violates federal law); *Conant v. Walters*, 309 F.3d 629, 645 (9th Cir. 2002) (relying on *Printz v. United States* and arguing that while “the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so”).

requirements through the proper governmental authority.<sup>165</sup> Accordingly, courts have held that state medical marijuana laws are not preempted by the Controlled Substances Act,<sup>166</sup> but this position has not been entirely uniform.<sup>167</sup> Further, courts also utilize the Tenth Amendment's anti-commandeering doctrine as articulated in *Printz v. United States*<sup>168</sup> to prohibit the federal government from compelling local law enforcement officials to enforce the Controlled Substances Act in states that have legalized medical marijuana.<sup>169</sup> Due to the limitations of the anti-commandeering doctrine and its negligible impact upon state medical marijuana laws, these laws and the Controlled Substances Act can be harmonized in practice.<sup>170</sup> A state can decide not to criminalize the use of medical marijuana under state law even if the conduct remains illegal under the Controlled Substances Act.<sup>171</sup> So while a sentencing court may impose a condition of probation that the offender not violate federal laws in general, it cannot contain a provision requiring compliance with the Controlled Substances Act in states that have legalized the use of medical marijuana.<sup>172</sup> Nonetheless, states cannot stop the

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165. Chemerinsky et al., *supra* note 158, at 106 ("It is not physically impossible to comply with both the CSA and state marijuana laws; nothing in the more liberal state laws requires anyone to act contrary to the CSA. Only if a state law required a citizen to possess, manufacture, or distribute marijuana in violation of federal law would it be impossible for a citizen to comply with both state and federal law.").

166. *See, e.g.*, *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 544 (Mich. 2014) (holding that Controlled Substances Act does not preempt Michigan Medical Marihuana Act); *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 481-83 (Cal. Ct. App. 2008) (holding that Controlled Substances Act does not preempt provisions allowing patients to obtain medical marijuana identification cards); *Qualified Patients Ass'n v. City of Anaheim*, 115 Cal. Rptr. 3d 89 (Cal. Ct. App. 2010) (holding that the California Compassionate Use Act is not preempted by the federal Controlled Substances Act).

167. *See, e.g.*, *Forest City Residential Mgmt., Inc. v. Beasley*, 71 F. Supp. 3d 715 (E.D. Mich. 2014) (holding that Controlled Substances Act conflicts with the Michigan Medical Marihuana Act); *People v. Crouse*, 388 P.3d 39, 40 (Colo. 2017) (holding that state law provision obligating law enforcement to return medical marijuana seized from an individual who is subsequently acquitted of a state drug charge created a positive conflict with the federal Controlled Substances Act as it required law enforcement to distribute marijuana in contravention of federal law).

168. 521 U.S. 898, 912 (1997) ("Thus, if the passage means that state officers must take an action role in the implementation of federal law, it means that they must do so without the necessity for a congressional directive that they implement it."); *see Mikos, supra* note 158, at 1446 ("Commandeering compels state *action*, whereas preemption, by contrast, compels *inaction*. Congressional laws blocking state action (preemption) are permissible, whereas congressional laws requiring state action (commandeering) are not."); Chemerinsky et al., *supra* note 158, at 102 ("The federal government may not commandeer states by forcing them to enact laws or by requiring state officers to assist the federal government in enforcing its own laws within the state. Under this doctrine, the federal government cannot require states to enact or maintain on the books any laws prohibiting marijuana.").

169. *See, e.g.*, *Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 483 (Cal. Ct. App. 2008) (holding that "Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.").

170. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141-42 (Ariz. 2015) ("The state-law immunity [Arizona Medical Marijuana Act] provides does not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic. [T]he people of Arizona 'chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.'" (citation omitted)).

171. Chemerinsky et al., *supra* note 158, at 103.

172. *Hoggatt*, 347 P.3d at 141.

federal government from enforcing the Controlled Substances Act within its own borders.<sup>173</sup>

This last observation raises the third explanation for why concerns with conflicts between state medical marijuana laws and the Controlled Substances Act may no longer be of grave concern. Given the advancement of the legalization of medical marijuana across the United States during the 2000s and the complex intersection between state and federal law under the Supremacy Clause, the United States Department of Justice tempered concerns over the continuing illegality of marijuana at the federal level by signaling a shift in policy through several memoranda issued by then-acting Deputy Attorneys General for the United States.<sup>174</sup> State legislatures have relied upon the positions expressed by the Department of Justice in these memoranda in deciding to promulgate medical marijuana laws.<sup>175</sup> In sum, these memoranda address the continuing interests of the federal government in enforcing marijuana-related crimes on the macroscale with the illegal trafficking and distribution of marijuana by “large-scale criminal enterprises, gangs, and cartels”<sup>176</sup> along with “commercial enterprises that unlawfully market and sell marijuana for profit.”<sup>177</sup> Outside of these federal priorities, the memoranda envision an implied federal-state partnership whereby the federal government would not use resources to prosecute individuals for the use, consumption, and possession of marijuana so long as the state enacted a strong and effective regulatory system to protect health, safety, and law enforcement interests.<sup>178</sup> As a practical matter, most arrests for possession of marijuana occur at the state, rather than the federal, level<sup>179</sup> and the federal government simply does not have the resources to engage in the mass surveilling and arresting of

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173. See, e.g., *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 384 (Cal. Ct. App. 2008) (“In considering the City’s preemption argument, it is also important to recognize what the [Compassionate Use Act] does *not* do. It does not expressly ‘exempt medical marijuana from prosecution under federal law.’”) (emphasis in original) (quoting *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1100 (N.D. Cal. 1998)).

174. See U.S. Dep’t of Just., Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; U.S. Dep’t of Just., Memorandum for United States Attorneys on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/20-14/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; U.S. Dep’t of Just., Memorandum for All United States Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.dfi.wa.gov/documents/banks/cole-memo-08-29-13.pdf>.

175. See, e.g., *Montana Cannabis Indus. Ass’n v. State*, 368 P.3d 1131, 1142-43 (Mont. 2016) (noting how the Montana state legislature “took notice” of the Department of Justice memoranda is establishing the Montana Medical Marijuana Act).

176. U.S. Dep’t of Just., Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

177. *Id.*

178. U.S. Dep’t of Just., Memorandum for All United States Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.dfi.wa.gov/documents/banks/cole-memo-08-29-13.pdf>.

179. Stern & DiFonzo, *supra* note 79, at 723 (“State officers carry out the vast majority of drug arrests in the United States.”); see Bender, *supra* note 91, at 381 (“Indeed, roughly 99% of U.S. marijuana arrests are at the hands of state and local officials, not the federal government.”).

individual citizens who are in compliance with state medical marijuana laws but still run afoul of the Controlled Substances Act.<sup>180</sup>

In conjunction with the memoranda distributed by the Department of Justice, in every fiscal year since 2015 Congress has attached a “rider” to its annual omnibus appropriations bill funding the federal government, which provides as follows:

None of the funds made available in this Act<sup>181</sup> to the Department of Justice may be used, with respect to [medical marijuana states], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.<sup>182</sup>

Two federal circuit courts have concluded that the appropriations riders prevent the federal government from prosecuting individuals—and thus spending money—for using, distributing, possessing, or cultivating medical marijuana that is authorized and otherwise in compliance with state medical marijuana laws.<sup>183</sup>

Despite the growing acceptance of marijuana as an acceptable therapeutic practice in the medical community<sup>184</sup> and the rapid expansion of state laws that have legalized medical marijuana, the drug remains classified as a Schedule I drug and thus illegal for all purposes at the federal level.<sup>185</sup> Despite this reality,

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180. Mikos, *supra* note 158, at 1443 (“The basic thrust of the conventional wisdom is that the federal government does not have the capacity to enforce the CSA against marijuana users. As a practical matter, most people can smoke marijuana for any purpose without having to worry much about being caught and punished by the federal government.”).

181. This refers to the annual Consolidated Appropriations Act. *United States v. Bilodeau*, 24 F.4th 705, 709 (1st Cir. 2022).

182. *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016).

183. *Id.* at 1177 (“We therefore conclude that, at a minimum, [the appropriations rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.”); *Bilodeau*, 24 F.4th at 712-13 (agreeing with *McIntosh* and concluding that as a result of the appropriations rider the Department of Justice may not spend funds to prosecute defendants who are in compliance with state medical marijuana laws); *see United States v. Jackson*, 388 F. Supp. 3d 505, 513 (E.D. Pa. 2019) (holding that pursuant to the congressional appropriations rider the Department of Justice is prohibited from prosecuting a violation of supervised release based upon on state-law compliant use of medical marijuana).

184. *See, e.g., Aggarwal et al., supra* note 76, at 158 (“Clearly, there is a growing acceptability of the therapeutic practice of medicinal cannabis use amongst organized medicine groups, yet it is still classified as a Schedule I drug in the United States.”); *Bridgeman & Abazia, supra* note 4, at 181 (arguing that “to deny or disregard the implications of use of this substance on patient health and the infrastructure of the health care system is irresponsible”); Wayne Hall et al., *Cannabinoids and Cancer: Causation, Remediation, and Palliation*, 6 *THE LANCET* 35, 40-41 (2005) (“THC and other cannabinoids are potentially useful adjuvant treatments in palliative care of people with cancer.”); *Sprankling, supra* note 115, at 13 (“Today, many authorities believe that marijuana poses little or no risk to human health and in fact has substantial medical value.”).

185. It is worth mentioning that several federal courts have started terminating federal supervised release early to allow probationers to use medically necessary marijuana so long as they are demonstrating an ability to lead “a productive, law-abiding life.” *United States v. Trotter*, 321 F. Supp. 3d 337, 365 (E.D.N.Y. 2018); *see United States v. Parker*, 219 F. Supp. 3d 183 (D.D.C. 2016) (terminating supervision for an individual using marijuana for medical reasons); *United States v. Johnson*, 228 F. Supp. 3d 57 (D.D.C. 2017) (terminating supervision for a defendant who had taken “affirmative steps to become a well-integrated member of the community”

the majority of states and the District of Columbia have legalized the use of medical marijuana and have incorporated various statutory criminal immunity protections for qualifying patients who comply with the law, a topic to which this Article now turns.

#### IV. THE STATE LEGALIZATION OF MEDICAL MARIJUANA AND CONDITIONS OF CRIMINAL PROBATION

Marijuana remains a Schedule I drug under the Controlled Substances Act with no acceptable medical use for treatment and is unlawful notwithstanding any state law authorizing marijuana use for medical purposes.<sup>186</sup> Nevertheless, public awareness and interest in the legalization of medical marijuana increased over time,<sup>187</sup> and in 1996 California became the first state to legalize medical marijuana through voter proposition (Proposition 215) known as the “Compassionate Use Act,” with the legislature later codifying the California Medical Marijuana Program Act in 2003.<sup>188</sup> Alaska, Oregon, and Washington respectively followed suit in 1998, and states have steadily legalized the medicinal use of marijuana either by ballot initiative or through state legislative processes. The thirty-seven states that have followed in California’s footsteps by enacting legislation permitting the use of medical marijuana have done so in outright defiance of the federal Controlled Substances Act and in the belief that the medicinal properties in marijuana can help alleviate symptoms of various illnesses.

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and used marijuana for medicinal purposes). In addition, several federal marijuana bills have been introduced by Congress, but each has gained no traction towards passage. These marijuana bills proposed, in part, either to remove marijuana from the schedule of drugs in the Controlled Substances Act; to reschedule marijuana to allow for medical use in states where it has been legalized; and to provide an affirmative defense for medical marijuana-related activities conducted in compliance with state laws. *See generally* Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. § 101 (2013); States’ Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. § 4 (2013); Truth in Trials Act, H.R. 710, 113th Cong. § 2(a) (2013).

186. *United States v. Kelly*, 419 F. Supp. 3d 610, 611 (W.D.N.Y. 2019) (noting that although the State of New York legalized medical marijuana, the possession of marijuana remains illegal under federal law with no federal exception for medical marijuana). The Controlled Substances Act does approve the use of synthetic THC in the form of Dronabinol/Marinol or Nabilone/Cesamet. Pfeifer, *supra* note 137, at 359; Annalise Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?* 40 SANTA CLARA L. REV. 1137, 1144 (2000).

187. Chemerinsky et al., *supra* note 158, at 85; *see* Sam Kamin, 43 MCGEORGE L. REV. 147, 167 (2012) (noting that growing numbers of Americans across the country consider medical marijuana use to be “relatively benign conduct”). The surge in medical marijuana legislation since 1996 has outpaced empirical research on the medicinal use of marijuana due to its continued illegality under the Controlled Substances Act. In other words, the continuing illegality of marijuana at the federal level severely hampers researchers’ attempts to empirical investigate the benefits and detriments of marijuana as a medicinal drug. Stern & DiFonzo, *supra* note 79, at 707; *see* Quattrone, *supra* note 76, at 314–19 (discussing some difficulties with medical marijuana research in light of federal hurdles); Conboy, *supra* note 77, at 615 (“Without large-scale clinical studies, the therapeutic benefits of marijuana can neither be supported adequately to justify the drug’s rescheduling nor can they be debunked, thereby reinforcing the government’s proposition that this drug should remain in Schedule I.”).

188. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2022); *People v. Mitchell*, 225 Cal. App. 4th 1189, 1203 (Cal. Ct. App. 2014). For a historical sketch of the political developments leading up to the passage of California’s Compassionate Use Act. *See generally* Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 UNIV. MICH. J.L. REFORM 707, 713–17, 758–64 (1998).

The most common approved uses of medical marijuana under state law relate to relief from the symptoms of cancer; glaucoma; human immunodeficiency virus/acquired immunodeficiency syndrome; multiple sclerosis; seizure disorders; painful peripheral neuropathy; post-traumatic stress disorder; Alzheimer's disease; Parkinson's disease; ulcerative colitis; and cachexia.<sup>189</sup> States also employ a catchall clause for permitted medical marijuana use so long as the individual can demonstrate a "debilitation condition" that is not otherwise specifically delineated in the medical marijuana law.<sup>190</sup> In practical reality, however, chronic pain management is the most common reported reason for medical marijuana use.<sup>191</sup> "In patients with chronic pain, medical cannabis treatment has been associated with an improvement in pain-related outcomes, increased quality of life, improved function, and a reduced requirement for opioid analgesia."<sup>192</sup> The reduced reliance upon opioids in treating chronic pain by switching to medical marijuana as an alternative<sup>193</sup> has particular salience in the drug treatment court regime for two significant reasons. First, while both drugs have the potential for abuse, opioid addiction and overdose can result in death, but in more than several thousand years of documented use, there has never been a reported death due to an overdose of marijuana.<sup>194</sup> Second, at least with respect to the drug treatment courts that I have studied empirically, substance use and abuse rarely revolve around marijuana, but opioid addiction is both frequent and in abundance. So too is the dangerous emergence of fentanyl as a cheap street drug. Some research suggests that the increased accessibility to medical marijuana will reduce patient reliance upon opioids as marijuana may offer a safer alternative for chronic pain management.<sup>195</sup>

While the particular state medical marijuana statutes may differ to some degree, they all share a pattern of affording individuals with the ability to obtain medical marijuana cards after first receiving a physician's referral or recommendation and subsequently registering with the appropriate state administrative

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189. *E.g.*, UTAH CODE ANN. § 26-61a-104 (West 2022) (citing covered medical conditions); *see* Bridgeman & Abazia, *supra* note 4, at 181 (noting common conditions among state medical marijuana statutes).

190. *See, e.g.*, N.M. STAT. ANN. § 26-2B-2 (West 2022) (defining, in part, "debilitating medical condition" as "any other medical condition, medical treatment or disease as approved by the department").

191. Arun Bhaskar et al., *Consensus Recommendations on Dosing and Administration of Medical Cannabis to Treat Chronic Pain: Results of a Modified Delphi Process*, 3 J. CANNABIS RSCH. 1, 2 (2021).

192. *Id.*

193. Bigand et al., *supra* note 8, at 223 ("Many adults with persistent pain who use opioid medications for pain management also report using cannabis to treat pain and related symptoms.").

194. Aggarwal et al., *supra* note 76, at 162.

195. *See, e.g.*, James M. Corroon, Jr. et al., *Cannabis as a Substitute for Prescription Drugs—A Cross-Sectional Study*, 10 J. PAIN RSCH. 989, 996 (2017); Marianne Beare Vyas et al., 66 NURSING OUTLOOK 56, 63 (2018).

agency;<sup>196</sup> restrictions on the amount of marijuana a patient can possess<sup>197</sup> along with a cap on the number of plants the patient may cultivate and grow at home (if permitted by statute);<sup>198</sup> and closely-regulated businesses that may cultivate, process, and sell large quantities of marijuana to qualifying patients.<sup>199</sup>

State statutes routinely carve out exceptions to the personal use and possession of medical marijuana for specific matters of public policy, such as prohibiting: medical marijuana in state or county correctional facilities or in state-run youth detention centers;<sup>200</sup> the use of medical marijuana on any form of public transportation;<sup>201</sup> the use of marijuana in a public space;<sup>202</sup> the use of medical marijuana on the grounds of any public school;<sup>203</sup> or the undertaking of any tasks while under the influence of medical marijuana when doing so would constitute negligence or professional malpractice.<sup>204</sup> The state legalization of medical marijuana does not remove the drug from a Schedule I substance under state criminal codes for the prosecution of crimes related to marijuana that are not specifically protected under the respective medical marijuana law.<sup>205</sup>

Most pertinently, for qualifying patients the crux of all state medical marijuana laws is to provide immunity from criminal punishments for the possession and use of marijuana so long as the individual complies with the medical

196. The issuance of prescriptions by physicians is controlled at the federal level through the Drug Enforcement Agency and thus physicians cannot technically write prescriptions for the medical use of marijuana. Consequently, state medical marijuana laws circumvent this impediment by categorizing the approval of the medical use of marijuana as a “referral” or a “recommendation.” *See, e.g.*, LA. STAT. ANN. § 40-1046(d)(3) (West 2002) (defining recommendation as “an opinion of any physician licensed by and in good standing with the Louisiana State Board of Medical Examiners, provided within a bona fide doctor-patient relationship, that, in the sincere judgment of the physician, therapeutic cannabis may be helpful to the patient’s condition or symptoms . . .”).

197. *See, e.g.*, ALASKA STAT. ANN. § 17.38.020 (West 2022) (one ounce or less of marijuana); DEL. CODE ANN. tit. 16, § 4903A (West 2022) (six ounces of marijuana); D.C. CODE ANN. § 7-1671.03 (West 2022) (two ounces of marijuana).

198. *See, e.g.*, CONN. GEN. STAT. ANN. § 21a-408d (West 2022) (up to three mature marijuana plants); ME. REV. STAT. ANN. tit. 22, § 2423-A (West 2022) (up to six mature marijuana plants); MICH. COMP. LAWS ANN. § 333.26424 (West 2022) (up to twelve marijuana plants).

199. Sprankling, *supra* note 115, at 17; *see* Bender, *supra* note 91, at 372 (“Most of these states allow home cultivation by patients, with some supplying marijuana through private dispensaries. All the states require the medical user to obtain a physician’s recommendation of marijuana treatment and tend to specify a list of qualifying medical conditions that produce pain, nausea, or seizures.”).

200. 35 PA. STAT. ANN. §§ 10231.1309 (West 2022).

201. ARIZ. STAT. ANN. § 36-2802 (West 2022).

202. *State v. Tagge*, 442 P.3d 71, 72 (Ariz. Ct. App. 2019).

203. ARIZ. STAT. ANN. § 36-2802 (West 2022).

204. D.C. CODE ANN. § 7-1671.03 (West 2022).

205. *See, e.g.*, N.D. STAT. ANN. § 19-03.1-05 (West 2022) (marijuana still a Schedule I drug under the North Dakota Controlled Substances Act); *People v. Mitchell*, 225 Cal. App. 4th 1189, 1203 (Cal. Ct. App. 2014) (“When approved by the voters, section 11362.5 was not intended to decriminalize marijuana on a wholesale basis nor eviscerate this state’s marijuana laws”); *see also* *Commonwealth v. Dabney*, 274 A.3d 1283, 1291 (Pa. Super. Ct. 2022) (holding that the Pennsylvania Controlled Substances Act prohibits driving while under the influence of marijuana despite the Pennsylvania Medical Marijuana Act).

marijuana law.<sup>206</sup> State statutes accomplish this in one of three ways. One common provision provides as follows:

[a] person whose conduct is authorized under this chapter may not be denied any right or privilege or be subjected to arrest, prosecution, penalty or disciplinary action, including but not limited to a civil penalty . . . for lawfully engaging in conduct involving the medical use of marijuana authorized under this chapter.<sup>207</sup>

A second common provision is to provide individuals with an affirmative defense to a criminal charge related to marijuana use and possession so long as they are qualifying patients who have been issued a valid registry identification card and were using or possessing marijuana for therapeutic purposes.<sup>208</sup> Third, other state statutes provide for both an exemption from criminal charges in conjunction with an affirmative defense—again, assuming compliance with the medical

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206. Mikos, *supra* note 158, at 1453; *see, e.g.*, WASH. REV. CODE ANN. § 69.51A.040 (West 2022) (“The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences for possession . . . if [t]he qualifying patient . . . has been entered into the medical cannabis authorization database and holds a valid recognition card and possesses no more than the amount of cannabis concentrates, useable cannabis, plants, or cannabis-infused products” as authorized by statute”).

207. ME. REV. STAT. ANN. tit. 22, § 2430-C (West 2022); *see* 410 ILL. COMP. STAT. ANN. 130/25 (West 2022) (“A registered qualifying patient or registered designated caregiver is not subject to arrest, prosecution, or denial of any right or privilege, including, but not limited to, civil penalty or disciplinary action by an occupational or professional licensing board for possession of cannabis that is incidental to medical use, but is not usable cannabis as defined in this Act.”); MICH COMP. LAWS ANN. § 333.26424(4)(a) (West 2022) (“A qualifying patient who has been issued and possesses a registry identification card is not 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 . . . for the medical use of marihuana in accordance with this act.”); N.M. STAT. ANN. § 26-2B-4 (West 2022) (“A qualified patient or a qualified patient’s primary caregiver shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply.”); N.Y. PUB. HEALTH § 3369 (LexisNexis 2022) (“Certified patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations 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, solely for the certified medical use or manufacture of marihuana, or for any other action or conduct in accordance with this title.”); ARK. CONST. amend. 98, § 3 (“A qualifying patient . . . in actual possession of a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, . . . for the medical use of marijuana in accordance with this amendment . . .”).

208. *See, e.g.*, N.H. REV. STAT. ANN. §§ 126-X:51(a) (West 2022) (“It shall be an affirmative defense for any person charged with manufacturing, possessing, having under his or her control, selling, purchasing, prescribing, administering, transporting, or possessing with intent to sell, dispense, or compound cannabis, cannabis analog, or any preparation containing cannabis, if: (a) The actor is a qualifying patient who has been issued a valid registry identification card, was in possession of cannabis in a quantity and location permitted pursuant to this chapter, and was engaged in the therapeutic use of cannabis.”).



marijuana statute.<sup>209</sup> At least one state statute specifically includes probation as a protected condition under its medical marijuana law.<sup>210</sup>

On the other hand, some state medical marijuana statutes may be drafted in such a manner that would enable a court to prohibit the use of medical marijuana for a probationer despite the existence of a state medical marijuana statute, particularly if the legislation does not contain the more inclusive language “denied any right or privilege,” but rather merely specifies arrest and prosecution as protections under the statute,<sup>211</sup> or is limited to an affirmative defense for the condition of being “charged with a violation of the state’s criminal laws related to the patient’s medical use of marijuana.”<sup>212</sup> In order to claim immunity from criminal arrest, prosecution, or sanction under a state medical marijuana law, a trial court must first make factual determinations that the offender possessed a valid registry identification card; was engaged in the medical use of marijuana stemming from a physician-patient relationship; and was in compliance with volume and personal plant growth restrictions under the applicable law.<sup>213</sup>

In considering a particular criminal sentence, courts often emphasize that there is no entitlement or right to probation.<sup>214</sup> Accordingly, state and federal courts view probation as a privilege and thus not a right.<sup>215</sup> A sentence of probation is often characterized as “an act of grace or clemency” provided to the

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209. See, e.g., R.I. GEN LAWS ANN. § 21-28.6-8 (affirmative defense); R.I. GEN LAWS ANN. § 21-28.6-4 (criminal law exemption).

210. See, e.g., MD. CODE ANN. HEALTH-GEN. § 13-3313 (West 2022) (“Any of the following persons acting in accordance with the provisions of this subtitle may not be subject to arrest, prosecution, revocation of mandatory supervision, parole, or probation, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of or possession of medical cannabis.”).

211. See, e.g., MASS. GEN. LAWS ANN. Ch. 94I, § 2(b)(2) (West 2022) (“A qualifying patient or a personal caregiver shall not be subject to arrest or prosecution, or civil penalty, for medical use marijuana.”).

212. COLO. CONST. art. 18 § 14(2)(a) (emphasis added). This latter provision of an affirmative defense provided to those “charged” with a violation of state criminal laws emanates from the Colorado Constitution. The Colorado Court of Appeals has interpreted this language quite literally, permitting the affirmative defense of possessing a medical marijuana card only in instances of initial criminal charges, but being otherwise inapplicable in proceedings seeking to revoke a probationary sentence where the defendant agreed as a condition of probation not to use or possess any narcotics or abusable substances without a prescription. *People v. Wilburn*, 343 P.3d 998, 1001-02 (Colo. Ct. App. 2013).

213. See, e.g., *People v. Hartwick*, 870 N.W.2d 37, 51 (Mich. 2015); see also NEV. REV. STAT. ANN. §§ 678C.200 (West 2022) (listing conditions precedent to be exempt from state prosecution under the medical marijuana statute).

214. See, e.g., *State v. Wilkes*, 479 P.3d 1142, 1151 (Utah Ct. App. 2020) (noting that “there is not entitlement or right to probation”), *cert. denied*, 485 P.3d 944 (Utah 2021); *State v. Varlas*, 844 S.E.2d 688, 696 (W. Va. 2020) (holding same); *U.S. v. Belgard*, 894 F.2d 1092, 1100 (9th Cir. 1990) (holding that “defendants have no constitutional right to probation”), *cert. denied*, *Belgard v. U.S.*, 498 U.S. 860 (1990); *U.S. v. Savage*, 440 F.2d 1237, 1239 (5th Cir. 1971) (“Probation is conferred as a privilege, and cannot be demanded as a matter of right”) (citing *Burns v. U.S.*, 287 U.S. 216 (1932)).

215. See, e.g., *Splawn v. Fitzharris*, 297 F. Supp. 44, 45 (C.D. Cal. 1969) (“Probation is a privilege and cannot be demanded as a right”); *People v. Landis*, 497 P.3d 39, 42 (Colo. App. 2021) (“Probation is a ‘privilege, not a right’”) (citation omitted).

offender by the trial court.<sup>216</sup> It is within the sound discretion of a court whether to impose probation as an alternative sentence to incarceration.<sup>217</sup> Generally speaking, the twin institutional goals of probation are the rehabilitation of the offender and the protection of the public.<sup>218</sup> And while it is within the sound discretion of the court to grant or deny probation, it is frequently articulated that “probation is a creature of statute,”<sup>219</sup> so the terms and conditions of probation must stem from legislative enactment. Probation and its conditions are not imposed involuntarily, of course, but accepted by the offender as a condition necessary to avoid incarceration.<sup>220</sup> Nevertheless, plea agreements contextually occur in inherently coercive environments where vast disparities in power exist between defendants and the state in terms of bargaining leverage.<sup>221</sup>

Probationary sentences can include both standard conditions and special conditions. Standard conditions of probation generally require defendants to obey all laws, to report as directed to the supervising probation officer, to appear in court when scheduled, and to make restitution to victims.<sup>222</sup> Another common condition of probation is prohibiting probationers from drinking alcohol and using illegal drugs and subjecting them to drug testing procedures.<sup>223</sup> Special conditions can be additionally imposed on a probationary sentence based upon the characteristics and crimes of the individual offender. Examples of special conditions may include, but are not limited to, refraining from frequenting disreputable places; working faithfully at suitable employment; undergoing medical or psychiatric treatment; participating in an alcohol or substance abuse program;

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216. See *People v. Scarano*, 290 Cal. Rptr. 3d 121, 130 (Cal. Ct. App. 2022); see also *State v. Methany*, 865 S.E.2d 461, (W. Va. 2021) (“Based on the foregoing, it is clear that probation is not a punishment, it is an act of grace”); *U.S. v. A-Abras Inc.*, 185 F.3d 26, 30 (2d Cir. 1999) (“Supervised release is not an entitlement a defendant possesses, but rather is an act of clemency a court extends to those it finds eligible”).

217. *State v. Montoya*, 957 N.W.2d 190, 198 (Neb. Ct. App. 2021); see *Chaney v. State*, 845 S.E.2d 704, 738 (Ga. Ct. App. 2020) (holding that a “trial court has broad discretion in sentencing to impose conditions reasonably related to the nature and circumstances of the offense and the rehabilitative goals of probation”); *United States v. A-Abras Inc.*, 185 F.3d 26, 30 (2d Cir. 1999) (noting that “trial courts traditionally have enjoyed board discretion to tailor the conditions of probation to the particular circumstances of each case”).

218. *Commonwealth v. Riz*, 55 N.E.3d 1003, 1006 (Mass. App. Ct. 2016); see *State v. Schwind*, 926 N.W.2d 742, 750 (Wis. 2019) (“By authorizing courts to give probation in lieu of a criminal sentence, the legislature gave the courts a new power to extend the mercy of the state when it decides that ‘supervised, conditional freedom’ will best rehabilitate a defendant while adequately protecting the interests of the state and the community.”) (citation omitted).

219. *State v. Pulusila*, 467 P.3d 211, 216 (Alaska 2020); see *Maddox v. State*, 246 A.3d 604, 608 (Md. Ct. Spec. App. 2021) (“Probation is a creature of statute, and as such, the terms of probation are derived from statutory authority.”) (citation omitted). In the decision to grant or deny probation, courts often consider “the circumstances of the offense, the defendant’s criminal record, the defendant’s social history and present condition, the need for deterrence, and the best interest of the defendant and the public.” *State v. Goode*, 956 S.W. 2d 521, 527 (Tenn. Crim. App. 1997).

220. *Rutledge v. State*, 861 S.E.2d 793, 797 (Ga. Ct. App. 2021).

221. Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 78 (2000).

222. See, e.g., MICH. COMP. LAWS ANN. § 771.3 (West 2022); *Maddox v. State*, 246 A.3d 604, 608 (Md. Ct. Spec. App. 2021).

223. NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 13:3 (2d ed. 2021); OR. REV. STAT. ANN. § 137.540(1)(c) (West 2022) (providing for drug testing).

attending educational or vocational training programs; residing in a rehabilitative facility; and financially supporting any dependents or other family members.<sup>224</sup>

Much like the discretion whether to grant or deny probation initially, courts also enjoy broad discretion in imposing the conditions of probation.<sup>225</sup> A limitation on this discretion, however, is that in order to impose a special condition of probation, there must be some nexus or reasonable relationship to the goals of sentencing—rehabilitation and protecting the public—given the probationer’s underlying crimes and socio-demographic circumstances.<sup>226</sup> A special condition of probation will be deemed invalid if it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.”<sup>227</sup> Outside of the medical marijuana context, courts have placed special restrictions on a probationer’s consumption of alcohol or use of illicit drugs where there is a demonstrated connection between past substance abuse and criminality.<sup>228</sup> The standard condition of probation “to obey all laws” includes federal laws, thus triggering a conflict with permitted medical marijuana use pursuant to state law and the continued illegality of marijuana under the Controlled Substances Act.

With this background on the continued illegality of marijuana under the Controlled Substances Act together with state laws permitting medical marijuana use, along with the general contours of criminal probation, this Article now moves to discussing the various ways in which courts across the nation have responded in either permitting or prohibiting lawful medical marijuana use on regular criminal probation. The importance of these interpretations is of paramount significance when extended and applied to drug treatment courts when an inevitable challenging occurs as these judicial decisions will establish the underlying legal analyses that will unfold.

## V. EXISTING CASE LAW ADDRESSING MEDICAL MARIJUANA AND CRIMINAL

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224. See, e.g., COLO. REV. STAT. ANN. § 18-1.3-204 (West 2022); N.Y. PENAL LAW § 65.10 (LexisNexis 2022); N.J. REV. STAT. ANN. § 2C:45-1 (West 2022); PA. STAT. AND CONS. STAT. ANN. § 9763 (West 2022).

225. *State v. Njoku*, 246 A.3d 33, 37 (Conn. App. Ct. 2021).

226. *Commonwealth v. Eldred*, 101 N.E.3d 911, 919 (Mass. 2018); see *Young v. State*, 692 S.W.2d 752, 755 (Ark. 1985) (“[C]onditions for probation will be upheld if they bear a reasonable relationship to the crime committed or to future criminality.”); *State v. Norman*, 484 So. 2d 952, 953 (La. Ct. App. 1986) (“Probation conditions, to be valid, must be reasonably related to the rehabilitation of the defendant.”); *State v. Asher* 595 P.2d 839, 841 (Or. Ct. App. 1979) (stating that “conditions imposed must be ‘reasonably related to the offense for which the defendant was convicted or to the needs of an effective probation’” (citation omitted)).

227. *Biller v. State*, 618 So. 2d 734, 734-35 (Fla. 1993).

228. See, e.g., *People v. Lindsey*, 13 Cal. Rptr. 2d 676, 678 (Cal. App. Ct. 1992) (upholding a special condition of no alcohol consumption for an offender with a history of substance abuse and illegal sales of cocaine); *State v. O’Connell*, 261 P.3d 1042, 1046-47 (Mont. 2011) (upholding a condition preventing the probationer from entering bars due to her past drug abuse despite her conviction for theft which did not relate to drugs or alcohol); *Eldred*, 101 N.E.3d at 920 (upholding a condition of being “drug free” because the probationer’s past drug use motivated her to commit larceny).

## PROBATION GENERALLY

An offender placed on probation can either request to use medical marijuana in compliance with state law as an exception to conditions *ex ante*, or seek a modification of probation conditions *ex post* to permit the use of medical marijuana in circumstances where the defendant becomes a qualifying patient after the probation sentence is initially imposed.<sup>229</sup> In either case, the immunity afforded by a state medical marijuana statute only applies prospectively, after the defendant has been authorized as a qualifying patient with a physician's referral for medical marijuana.<sup>230</sup> Based upon an exhaustive review of the reported decisions to date across the country addressing the intersection between legalized medical marijuana and conditions of probation, the law has seemingly coalesced around the following typologies in wading through this judicial thicket.

These different approaches can be characterized as follows: i) imposed conditions prohibiting the use of medical marijuana on regular probation are unlawful and impermissible; ii) a rebuttable presumption standard which favors the use of medical marijuana on regular probation absent extraordinary circumstances; iii) a condemnation of blanket probation policies prohibiting medical marijuana; iv) protecting the use of medical marijuana on regular probation as falling under the domain of doctor-patient privacy; v) employing the legal concept of waiver to either uphold or invalidate conditions of probation related to medical marijuana use; vi) upholding probation conditions prohibiting medical marijuana use as remaining unlawful under federal law; and vii) applying a reasonable relationship/nexus test in either sanctioning or prohibiting medical marijuana use on regular probation.

*A. Medical Marijuana Statute Prohibits Imposed Marijuana Conditions*

Appellate decisions from a handful of courts across states have held that prohibitions on the use of medical marijuana as an imposed condition of probation are unlawful and invalid. The Arizona Medical Marijuana Act contains an immunity provision that protects qualifying patients from being “subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege” so long as their use complies with the terms of the statute.<sup>231</sup> In *Reed-Kaliher v. Hoggatt*, the Arizona Supreme Court interpreted this provision broadly, particularly with respect to the legislature's chosen language of “any” manner, or the denial of “any” right or privilege. Moreover, the Arizona Supreme Court interlaced this immunity provision with the statutory exceptions to the use of medical marijuana under the Arizona Medical Marijuana Act. While the latter statutory provision excepts lawful medical marijuana use from spaces such as correctional facilities and public parks, it is silent regarding conditions of probation and “does not

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229. *Commonwealth v. Vargas*, 55 N.E.3d 923, 930 (Mass. 2016).

230. *Id.*

231. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015).

expressly prohibit those who have been convicted of drug offenses from using medical marijuana” under the medical marijuana statute.<sup>232</sup> Consequently, the Arizona Supreme Court held that the lawful use of marijuana in compliance with the Arizona Medical Marijuana Act cannot be prohibited as a condition of probation, and affirmatively doing so is unenforceable and illegal as violative of Arizona law.<sup>233</sup>

The Oregon Medical Marijuana Act provides that an individual lawfully possessing a medical marijuana registry identification card is exempt from the criminal laws for possession and use.<sup>234</sup> Perhaps unique among states, the Oregon probation conditions statute contains a separate provision for medical marijuana, providing that if a qualifying patient holds an authorized medical marijuana card and is sentenced to probation, conditions related to the use of marijuana “must be imposed in the same manner as the court would impose supervision conditions related to prescription drugs.”<sup>235</sup> Because of these unique statutory features, Oregon may arguably be the most protective state in permitting probationers to use lawfully medical marijuana while serving a sentence to probation, and the Oregon courts have explicitly rejected arguments by prosecutors claiming that even if a defendant has a medical marijuana card, a court nonetheless may prohibit medical marijuana use while on probation if it is “reasonably related to the crime of conviction or the needs of the probationer for the protection of the public or reformation of the probationer, or both.”<sup>236</sup> In short, a condition of probation that prohibits an offender from using, possessing, or consuming marijuana while partaking in the Oregon Medical Marijuana Program is inconsistent with the marijuana laws and impermissible as a matter of law, and a sentencing court has no discretion on the issue.<sup>237</sup>

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232. *Id.*

233. *Id.* at 140 (“Thus, we harmonize [the probation statute] with the [Arizona Medical Marijuana Act] by interpreting the former as barring probationers from illegally using drugs while nonetheless permitting legal medicinal use of such drugs, which seems to be the intent of the statutes.”); *see State v. Hancock*, 347 P.3d 142, 143 (Ariz. 2015) (similarly holding that pursuant to the immunity provision of the Arizona Medical Marijuana Act, a trial court may not condition probation on refraining from using and possessing medical marijuana in compliance with the Act).

234. OR. REV. STAT. ANN. § 475C.883 (West 2022).

235. *Id.*

236. *State v. Kilgore*, 435 P.3d 817, 818 n.4 (Or. Ct. App. 2019).

237. *State v. Fryer*, 435 P.3d 824, 825 (Or. Ct. App. 2019); *State v. Harper*, 447 P.3d 532, 532 (Or. Ct. App. 2019) (holding that “the legislature has provided an exception to the general probation condition that a probationer may not ‘use or possess controlled substances’ if the probationer has a medical prescription, . . . and that exception applies to those persons who have a marijuana medical registry card. The sentencing court does not have the discretion to impose a probation condition that runs counter to [the probation conditions statute]”) (quoting *State v. Bowden*, 425 P.3d 475, 477-78 (Or. Ct. App. 2018); *State v. Heaston* 482 P.3d 167, 173-74 (Or. Ct. App. 2021) (holding that the effect of the Oregon probation statute “is that a special probation condition regarding marijuana use must contain an exception for marijuana use that complies with Oregon’s medical marijuana laws, if the probationer holds a medical marijuana registry identification card.”) (citation omitted); *State v. Miller*, 450 P.3d 578, 579 (Or. Ct. App. 2019) (holding that probation conditions preventing a probationer from applying for or using a medical marijuana registry identification card and prohibiting the use or possession of marijuana are invalid); *State v. Jackson*, 450 P.3d 580, 581 (Or. Ct. App. 2019) (holding same). *Cf State v. Charron*, 504 P.3d 1284, 1287 (Or. Ct. App. 2022) (holding that the lower court erred “in imposing special conditions of

In *State v. Nelson*, the Montana Supreme Court held that a trial court does not have the statutory authority to impose an outright ban of marijuana as a condition of probation if the defendant is a qualifying patient under the Montana Medical Marijuana Act.<sup>238</sup> Parroting the majority of state medical marijuana immunity provisions, the Montana Medical Marijuana Act provides, in relevant part, that a qualifying patient who possesses a valid registry identification card “may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege . . . for the medical use of marijuana”<sup>239</sup> if the patient is otherwise in compliance with the statute. After being charged, but prior to sentencing, Nelson was accepted as a qualifying patient under the Montana Medical Marijuana Act.<sup>240</sup> Nelson subsequently entered into a plea agreement with the state and received a three-year deferred probationary sentence.<sup>241</sup> The sentencing court denied Nelson’s request to use medical marijuana while on probation. Nelson appealed the prohibition of medical marijuana use as an imposed condition of probation.

On appeal Nelson argued that the trial court imposed an illegal sentence upon him through the restriction on marijuana in contravention of the Montana Medical Marijuana Act and its immunizing provision.<sup>242</sup> The Montana Supreme Court agreed with Nelson, holding as follows:

In light of the plain language of the [Medical Marijuana Act], we conclude that the District Court exceeded its authority in imposing [the condition]. The District Court unlawfully denied Nelson the right and privilege to use a lawful medical treatment for relief from a debilitating condition under the [Medical Marijuana Act].<sup>243</sup>

Although holding that an outright prohibition and ban on the use of medical marijuana as a condition of probation exceeds the authority of the trial court, the Montana Supreme Court noted nonetheless that certain use restrictions may be put into effect in the terms of a probationary sentence, such as preventing the use of marijuana in the presence of children or not abusing even lawfully obtained

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probation that completely prohibit defendant from using or possessing marijuana and from entering any marijuana dispensary, without giving the defendant an opportunity to establish whether he holds a marijuana registry identification card”). *But see* *State v. Cunningham*, 451 P.3d 268, 269-70 (Or. Ct. App. 2019) (holding that if a defendant does not possess a medical marijuana registry identification card prior to a probationary sentence, it is not plain error for a trial court to impose a prohibition on the use or possession of marijuana).

238. *State v. Nelson*, 195 P.3d 826, 833 (Mont. 2008). The Montana Supreme Court also rejected the prosecution’s federalism argument under the Controlled Substances Act, holding that the Montana Medical Marijuana Act “does not in any way prohibit the federal government from enforcing the [Controlled Substances Act] against medical marijuana users like Nelson if it chooses to do so; however, a state court may not, under these circumstances, use violation of the federal law as a justification for revocation of a deferred sentence.” *Id.* at 834.

239. *Id.* at 828.

240. *Id.* at 829.

241. *Nelson*, 195 P.3d at 829.

242. *Id.* at 830.

243. *Id.* at 832.

medical marijuana.<sup>244</sup> The *Nelson* decision is also significant for two reasons. First, the Montana Supreme Court claimed that as a potential condition of probation, the state Medical Marijuana Act “takes the possession and use of medical marijuana ‘and puts it in a special category apart from other legal acts, such as the use of alcohol, that can properly be made a condition of probation.’”<sup>245</sup> Moreover, the Montana Supreme Court further proclaimed that when a qualifying patient is using medical marijuana in compliance with the state statute, they are “receiving lawful medical treatment. In this context, medical marijuana is most properly viewed as a prescription drug.”<sup>246</sup>

Second, in *Nelson* the state argued that the appropriate nexus between the medical marijuana prohibition and Nelson’s status had been satisfied because “Nelson admittedly has a past history of illegal drug use, and has pled guilty to possessing the precursors of a methamphetamine lab.”<sup>247</sup> In other words, the state contended that past illegal drug use in an offender’s personal history establishes the requisite nexus or relationship for imposing a sentencing condition of probation prohibiting medical marijuana use. The Montana Supreme Court rejected this argument, holding in no uncertain terms as follows:

[T]he [Medical Marijuana Act] states unequivocally that a qualified patient in the Program “may not be arrested, prosecuted, or penalized in any manner *or be denied any right or privilege, . . . for the medical use of marijuana . . .* The [Medical Marijuana Act] simply does not give sentencing judges the authority to limit the privilege of medical use of marijuana while under state supervision.<sup>248</sup>

Courts in the State of Michigan adopt a similar approach as those of Montana, Oregon, and Arizona. The Michigan Medical Marihuana Act provides in part that “[t]he medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act.”<sup>249</sup> Similar to most states, the immunity provision of the Michigan Medical Marihuana Act provides that “[a] qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, . . . for the medical use of marijuana in accordance with this act . . . .”<sup>250</sup> In *People v. Thue*, the Michigan Court of Appeals addressed a then issue of first impression of whether a sentencing court could

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244. *State v. Nelson*, 195 P.3d 826, 833 (Mont. 2008).

245. *Nelson*, 195 P.3d at 832 (citation omitted).

246. *Id.* at 832 (citation omitted).

247. *Id.* at 832.

248. *Nelson*, 195 P.3d at 833 (emphases in original). Inexplicably, and despite the holding in *Nelson* that past illicit substance use cannot form the required nexus between a probation condition and a probation sentence, approximately nine years later the Montana Supreme Court upheld a prohibition on the use of medical marijuana while on probation where the defendant had a history of alcohol abuse and charges of driving under the influence. *State v. Corriher*, 497 P.3d 579, 583 (Mont. 2021).

249. MICH COMP. LAWS ANN. § 333.26427(a) (West 2022).

250. *Id.*

prohibit a defendant from using medical marijuana as a condition of probation.<sup>251</sup> More specifically, the defendant argued on appeal that the denial by the lower court of their ability to use medical marijuana while on probation, and the subsequent revocation of their probationary sentence due to their marijuana use amounting to the imposition of a penalty in violation of the Michigan Medical Marihuana Act.<sup>252</sup>

In agreeing with the analyses of its sister courts, the Michigan Court of Appeals equally held that the state probation statute—which allows a trial court to prohibit a range of behaviors such as restrictions on alcohol and drug use—impermissibly conflicts with the Michigan Medical Marihuana Act’s immunity provision and consequently, restrictions on the use of medical marijuana as a condition of probation are illegal and unenforceable.<sup>253</sup> Moreover, the Michigan Court of Appeals rationalized this decision to accord with the specific language of the medical marijuana immunity provision, which protects “qualifying patients from arrest, prosecution, or *penalty in any manner*, or denied *any right or privilege*.”<sup>254</sup> While most every court sardonically characterizes probation as a “privilege,”<sup>255</sup> implicitly suggesting that a defendant should be grateful to a sentencing court for exercising its “grace”<sup>256</sup> in not imposing a harsher penal sanction, the Michigan Court of Appeals contorted this understanding to benefit medical marijuana patients. That is, because the Michigan Medical Marihuana Act protects qualifying patients from suffering a denial of “any privilege”—of which probation is one—prohibiting *ex ante* the lawful use of medical marijuana while on probation, or revoking probation for its lawful medicinal use, amounts to an unlawful penalty and the denial of a privilege.<sup>257</sup>

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251. *People v. Thue*, 969 N.W.2d 346, 349 (Mich. Ct. App. 2021).

252. *Id.*

253. *Id.* at 353 (“However, provisions of the probation act that are inconsistent with the [Michigan Medical Marihuana Act] do not apply to the medical use of marijuana. In other words, a condition of probation prohibiting the use of medical marijuana that is otherwise used in accordance with the Michigan Medical Marihuana Act is directly in conflict with the Michigan Medical Marihuana Act and is impermissible.”). In an earlier decision, the Michigan Court of Appeals upheld a probation condition prohibiting the use of medical marijuana under the reasonable relationship test where the defendant pled no contest to driving under the influence and the presentence investigative report revealed that the defendant had a long history of alcohol and marijuana abuse. The defendant, however, expressed a preference for using medical marijuana while on probation rather than demonstrating medical necessity. *People v. Magyari*, 2017 WL 12744, \*2-3 (Mich. Ct. App. Jan. 12, 2017).

254. *Thue*, 969 N.W.2d at 350.

255. *See, e.g.*, *People v. Landis*, 497 P.3d 39, 41 (Colo. Ct. App. 2021) (“Probation is a ‘privilege, not a right’”) (citation omitted); *Commonwealth v. Jennings*, 613 S.W.3d 14, 17 (Ky. 2020) (stating same).

256. *See, e.g.*, *State v. Methany*, 865 S.E.2d 461, 468 (W. Va. 2021) (“This Court has long held that ‘probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime.’”) (citation omitted); *Gaddis v. State*, 171 N.E.3d 1227, 1229 (Ind. Ct. App. 2021) (“Probation is not a right but a matter of grace left to trial court discretion.”).

257. *People v. Thue*, 969 N.W.2d 346, 353 (Mich. Ct. App. 2021).



*B. Rebuttable Presumption Approach—State of Colorado*

The medical use of marijuana has been enshrined in the Constitution for the State of Colorado since 2000.<sup>258</sup> Marijuana is legal for medical use for individuals suffering from a debilitating medical condition. If a patient is issued a registry identification card by the governing state health agency, then a patient charged with a violation of Colorado’s criminal laws can establish an affirmative defense to the allegation, so long as three conditions have been satisfied: i) “[t]he patient was previously diagnosed by a physician as having a debilitating medical condition”;<sup>259</sup> ii) “[t]he patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition”;<sup>260</sup> and iii) “[t]he patient [was] in possession of amounts of marijuana only as permitted” by law.<sup>261</sup>

The Colorado probation conditions statute provides that “[t]he conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so.”<sup>262</sup> While this undoubtedly affords a sentencing court with wide latitude to determine appropriate probation conditions, this statute further provides that as a condition of probation, a court may:

require that the defendant . . . refrain from . . . any unlawful use of controlled substances . . . or of any other dangerous or abusable drug without a prescription; except that the court shall not, as a condition of probation, prohibit the possession or use of medical marijuana, as authorized [under the state constitution], unless . . . the court determines, based on any material evidence, that a prohibition against the possession or use of medical marijuana is necessary and appropriate to accomplish the goals of sentencing . . . .<sup>263</sup>

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258. COLO. CONST. art. 18 § 14.

259. COLO. CONST. art. 18 § 14(2)(a)(I).

260. COLO. CONST. art. 18 § 14(2)(a)(I)(II).

261. COLO. CONST. art. 18 § 14(2)(a)(I)(III).

262. COLO. REV. STAT. § 18-1.3-204(1)(a) (West 2022).

263. COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII) (West 2022). In turn, the goals of criminal sentencing under Colorado law are the following: “(a) [t]o punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense”; (b) [t]o assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; (c) [t]o prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses; (d) [t]o promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders; (e) [t]o select a sentence, a sentence length, and a level of supervision that addresses the offender’s individual characteristics and reduces the potential that the offender will engage in criminal conduct after completing his or her sentence; and (f) [t]o promote acceptance of responsibility and accountability by offenders and to provide restoration and healing for victims and the community while attempting to reduce recidivism and the costs to society by the use of restorative justice practices.” COLO. REV. STAT. § 18-1-102.5 (West 2022).

In *Walton v. People*, the Supreme Court of Colorado was charged with synthesizing the lawful use of medical marijuana pursuant to the state constitution together with the probation conditions statute.<sup>264</sup> In harmonizing both provisions, the Supreme Court of Colorado held that the probations statute first creates a presumption that an offender may lawfully use medical marijuana while serving a sentence to probation and second, a sentencing court “shall not” impose any limitation upon this right unless “there is a clear indication otherwise.”<sup>265</sup> This clear indication would most likely fall under the exception where prohibiting medical marijuana use and possession is “necessary and appropriate”<sup>266</sup> to accomplish the purported goals of sentencing more generally. In terms of sentencing goals, the most pertinent would be promoting the rehabilitation of the probationer, selecting a condition that reduces the potential of recidivism, and having the offender accept “responsibility and accountability” for their conduct.<sup>267</sup>

Under Colorado law, then, a rebuttable presumption favors offenders by allowing them to use authorized medical marijuana while on probation, and the burden falls upon the prosecution to rebut this presumption.<sup>268</sup> Consequently, rather than placing the burden upon a probationer to demonstrate the necessity for medical marijuana while on probation (as most state courts seem to do), it is the prosecution’s burden to specify material evidence showing why a court should prohibit a particular defendant from using authorized marijuana while on probation. Moreover, the Colorado Supreme Court struck down as unreasonable a standing probation policy requiring any defendant who wished to use medical marijuana while on probation to present a medical professional to testify on their behalf at the sentencing hearing to justify the medical necessity of using medical marijuana so long as the offender possesses a state-sanctioned medical marijuana card.<sup>269</sup> The court also disapproved of a blanket policy prohibiting marijuana while on probation.<sup>270</sup> Under this rebuttable presumption approach employed by courts in the State of Colorado, medical marijuana will be permitted on normal probation absent the prosecution presenting exceptional circumstances for why the constitutional right should be denied.

### C. Medical Marijuana and Blanket Probation Policies

In accord with Colorado law which disfavors blanket probation policies preventing medical marijuana use, in *Gass v. 52nd Judicial District*, a group of individuals under probation supervision in the State of Pennsylvania challenged

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264. *Walton v. People*, 451 P.3d 1212 (Colo. 2019).

265. *Id.* at 1216.

266. *Id.* at 1215.

267. COLO. REV. STAT. § 18-1-102.5 (West 2022).

268. *Walton*, 451 P.3d at 1216.

269. *Id.* at 1217. That said, the Supreme Court of Colorado noted that a probation department may still ensure the validity of the medical marijuana card through the registry identification system. *Id.* at 1217 n.5.

270. *Id.* at 1217.

the validity of a county's blanket policy prohibiting the use of medical marijuana while on probation regardless of whether the probationer lawfully possesses a medical marijuana card pursuant to the Pennsylvania Medical Marijuana Act.<sup>271</sup> The county justified the blanket policy across four different fronts. First, the county differentiated between a recommendation for medical marijuana under the statute as not falling under the protected status of prescriptions, leaving the county more flexibility to ban medical marijuana even if suggested by a physician as part of a therapeutic treatment regime.<sup>272</sup> Second, unlike drugs such as methadone, medical marijuana has not been approved by the Food and Drug Administration as a medically assisted treatment.<sup>273</sup> Third, while recognizing that medical marijuana may be beneficial for certain conditions, the county nonetheless adopted the position that the criminal sentencing goals of rehabilitation would not be served by permitting medical marijuana for individuals "who are involved in substance abuse and issues surrounding addiction which may have played a part in the defendant's criminal violations of law."<sup>274</sup> Fourth, the county's probation policy required probationers to comply with all state and federal laws, and permitting probationers to use medical marijuana would run afoul of the Controlled Substances Act.<sup>275</sup>

The Pennsylvania Medical Marijuana Act protects qualifying patients from governmental sanctions, providing that no individual "shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, . . . solely for lawful use of medical marijuana . . . or for any other action taken in accordance with this act."<sup>276</sup> In assessing whether the blanket policy conflicts with the immunity provision of the Pennsylvania Medical Marijuana Act, the court was confronted with deciding two interlocking issues of statutory construction: i) does the status of "probationer" somehow wrench it from the immunity protections under the act; and ii) does the prohibition on medical marijuana use while on probation pursuant to county policy arise "solely for" use as opposed to a defendant's status qua probationer.<sup>277</sup> The court concluded that the blanket policy ran afoul of the immunity protections under the Pennsylvania Medical Marijuana Act principally because while the medical marijuana statute explicitly excepted certain criminal offenders from immunity (*e.g.*, convicted drug offenders cannot be affiliated with medical marijuana dispensaries), the legislature did not

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271. *Gass v. 52nd Judicial District, Lebanon Cnty.*, 232 A.3d 706, 708 (Pa. 2020).

272. *Id.* at 708. A distinction between a physician's authorization or referral for medical marijuana as not rising to the protected status of a prescription as a partial justification for prohibiting the use of medical marijuana while on probation is frequently raised by courts, even if only in passing. *See, e.g.*, *State v. Nieves*, 2022 WL 402933, \*2 (Ohio Ct. App. Feb. 10, 2022) ("The court also notes that the Defendant's brief contains an inaccurate statement that he was 'prescribed' marijuana by a physician. Under Ohio law, physicians do not prescribe marijuana, rather they 'recommend' it.").

273. *Gass*, 232 A.3d at 708.

274. *Id.*

275. *Id.*

276. *Id.* at 708 (citation omitted).

277. *Gass v. 52nd Judicial District, Lebanon Cnty.*, 232 A.3d 706, 713 (Pa. 2020).

specifically carve out exceptions for offenders on probationary status.<sup>278</sup> The court noted that while judges and probation officers may make reasonable inquiries into the lawfulness of a particular probationer's use of medical marijuana, a blanket policy prohibiting any and all marijuana use is impermissible and cannot be upheld under the Pennsylvania Medical Marijuana Act.<sup>279</sup>

#### D. Doctor-Patient Privacy

In *Glasgow v. State*, a jury convicted Michael Glasgow of third-degree assault after he pointed a knife at another individual during an altercation over the latter's unleashed dogs.<sup>280</sup> The presentence probation report recommended that the court impose certain conditions of probation, including that Glasgow not possess, apply for, or obtain a medical marijuana card.<sup>281</sup> Glasgow objected to the condition, claiming that he had been prescribed marijuana to alleviate his symptoms stemming from rheumatoid arthritis, hypoglycemia, and anxiety.<sup>282</sup> Nevertheless, believing Glasgow's conduct somehow "related to a mental illness and possibly related to marijuana use, I don't know," the judge imposed the condition claiming a desire for Glasgow to be free of marijuana to facilitate a court-ordered comprehensive medical and psychological evaluation.<sup>283</sup> Glasgow appealed, arguing that the probation condition prohibiting medical marijuana interfered with his "constitutional right to privacy in making independent medical decisions in consultation with a physician."<sup>284</sup> The Alaska Court of Appeals held that so long as an individual obtains a medical marijuana card in the context of a bona fide physician-patient relationship and the physician has diagnosed the person with a debilitating condition for which the use of medical marijuana would prove beneficial, the probation condition would be invalidated under the special scrutiny afforded to constitutional privacy protections between physician and patient.<sup>285</sup>

#### E. The Theory of Waiver

Oftentimes when offenders challenge probation conditions, courts employ the analytical lenses of contract theory and waiver to justify burdening conditions imposed by the state. The underlying premise for denying such challenges resides in contract theory in which the acceptance of probation is a contractual

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278. *Id.* The court also held that the county policy could be harmonized with the Controlled Substances Act by raising both the anti-commandeering doctrine as well as the yearly riders limiting the enforceability by the Department of Justice as contained within the Consolidated Appropriations Act. *Id.* at 714.

279. *Id.* at 715. Other courts have also expressed disapproval of blanket probation policies prohibiting marijuana use in all plea agreements. *Polk v. Hancock*, 340 P.3d 380, 386 (Ariz. Ct. App. 2014), *vacated on other grounds by State v. Hancock*, 347 P.3d 142 (Ariz. 2015).

280. *Glasgow v. State*, 355 P.3d 597, 598 (Alaska Ct. App. 2015).

281. *Id.* at 599.

282. *Id.*

283. *Id.*

284. *Glasgow*, 355 P.3d at 600.

285. *Id.* at 600-01.

agreement between the state and the defendant.<sup>286</sup> The probationary contract suspends what might otherwise be a harsher sentence, so if the offender subsequently breaches the terms of the contract, the court will likely revoke probation and impose the originally contemplated criminal sentence.<sup>287</sup> This contractual theory of probation rests upon the belief that an offender is free to reject the imposed terms and conditions of probation if personally undesirable and accept the alternative, likely incarceration.<sup>288</sup> Putting aside the problematic institutional dynamic of plea bargaining agreements occurring in inherently coercive environments where vast disparities in power exists between defendants and the prosecution in terms of bargaining leverage,<sup>289</sup> courts nevertheless operate on the misguided presumption that defendants are freely thinking, rational actors with complete agency.

In reality, however, many defendants who receive probation as part of a negotiated agreement—likely as an alternative to a more ominous fate, incarceration—may subjectively and reasonably believe they are in no position to challenge the propriety of any imposed probation conditions.<sup>290</sup> For example, the probation department in the judicial district in which I conduct empirical research has a blanket policy prohibiting the use of medical marijuana by any adult or juvenile offender who accepts supervised probation. The express justification for this prohibition resides in the judiciary’s conceptualization that probation is a “privilege” rather than a right which conditionally suspends what might be a harsher penal result. In essence, the district’s blanket policy against the use of medical marijuana while on probation—which I will reasonably assume is widespread across the United States—is an example *in situ* of the contract theory underlying sentences to probation. In essence, probation is accorded only to those defendants who seek it and willingly accept it as a sentence and “freely” bargain and agree to its terms to save themselves from prison. While this agreement may be beneficial to many offenders, it nonetheless is inherently coercive and is a consequence of a great disparity in bargaining power.

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286. Horwitz, *supra* note 221, at 84.

287. Frederic Rodgers, *When May a Probation Condition Allowing Use of Medical Violate the Code of Judicial Conduct? Judicial Respect for the Law and Promoting Public Confidence in the Judiciary*, 89 DENV. UNIV. L. REV. 1017, 1018 (2012).

288. Scholars generally criticize the contract theory when applied to conditions of probation. *See, e.g.*, Judah Best & Paul I. Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 832-34 (1963) (criticizing contract theory); Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 57 (1981) (discussing the disparity in bargaining power between the prosecution and the defendant). Some federal courts have also denounced contract theory in setting the terms of probation. *See, e.g.*, *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 n.15 (9th Cir. 1975) (rejecting the contract theory as inappropriate in the probation setting); *Hahn v. Burke*, 430 F.2d 100, 104 (7th Cir. 1970) (“Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state.”).

289. Horwitz, *supra* note 221, at 78; *People v. Moret*, 104 Cal. Rptr. 3d 1, 16 (Cal. Ct. App. 2010) (upholding a probation condition requiring the defendant to turn in his medical marijuana card and refrain from medical marijuana while on probation because the defendant “explicitly agreed” to do so at sentencing).

290. Horwitz, *supra* note 221, at 81.

Related to the contract theory is the concept of waiver. Some courts find that by accepting the imposed conditions of probation, offenders consequently forfeit their rights to challenge them at a later time.<sup>291</sup> For example, in *State v. Ryan* a sentencing court imposed a probation condition preventing the probationer from using or possessing any controlled substance despite his valid registration card for medical marijuana under the Ohio Medical Marijuana Control Program.<sup>292</sup> On appeal, the Ohio Court of Appeals upheld the challenged probation condition by initially interpreting the probation statute to vest a trial court with wide discretion “to impose any condition of community control conditions or requirements it deems appropriate”<sup>293</sup> and then applying the concept of waiver, insofar as the probation condition prohibiting the use of controlled substances of any kind was “acknowledged and agreed to despite his possession of an active medical marijuana card at the time of his sentencing.”<sup>294</sup> As the Ohio Court of Appeals stated, for the probationer “to now argue that the trial court’s imposition of these prohibitions is error because they conflict with the [Ohio Medical Marijuana Control Program] and that the trial court may not find a violation based upon the clear terms of his community control sanctions” would not vitiate that a violation of probation occurred.<sup>295</sup> Stated differently, probationers may voluntarily waive their right to use medical marijuana as a condition of probation should they choose to do so, and the waiver of this entitlement will be upheld by appellate decisions.

While some courts employ the waiver theory in justifying a probation condition which conflicts with a state medical marijuana statute, this is not a uniform judicial approach. By way of example, the Supreme Court of Arizona in *State v. Hancock* concluded that not only is a probation condition prohibiting the use of medical marijuana impermissible under the Arizona Medical Marijuana Act, but a defendant cannot waive this right through a negotiated plea agreement.<sup>296</sup> Again, the Arizona Medical Marijuana Act provides that a qualifying patient cannot be subject to “arrest, prosecution or penalty in any manner, or denial of any right or privilege” for authorized marijuana possession and use.<sup>297</sup> In *Hancock*, the defendant was charged with multiple offenses, including driving while under the influence.<sup>298</sup> At the time of arrest, the defendant possessed a registry identification card which enabled them to use medical marijuana in accordance

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291. *United States v. Sullivan*, 498 Fed. Appx. 831, 833-34 (10th Cir. 2012); see *State v. Karan*, 525 A.2d 933, 934 (R.I. 1987) (per curiam) (upholding probation condition, reasoning the defendant was precluded from “complain[ing] of an agreement that he proposed and voluntarily entered into”).

292. *State v. Ryan*, 2021 WL 5298847, \*2 (Ohio Ct. App. Nov. 15, 2021).

293. *Id.* at \*4.

294. *Id.* at \*5.

295. *Id.*

296. *State v. Hancock*, 347 P.3d 142, 146 (Ariz. 2015); see *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 140 (Ariz. 2015).

297. ARIZ. REV. STAT. ANN. § 36-2811(B) (West 2022).

298. *Hancock*, 347 P.3d at 145.

with the Arizona Medical Marijuana Act.<sup>299</sup> In exchange for the dismissal of some pending charges, the defendant signed a plea agreement with one of the conditions prohibiting them from buying, growing, possessing, using, or consuming marijuana despite their authorization to do so under the medical marijuana statute.<sup>300</sup>

The defendant moved to strike the marijuana prohibition, arguing that the condition conflicts with the Arizona Medical Marijuana Act by penalizing them for the otherwise lawful possession and use of medical marijuana.<sup>301</sup> In opposition the state argued that the defendant waived their rights by agreeing to the probation condition prohibiting marijuana.<sup>302</sup> While the Arizona Supreme Court conceded that a defendant may generally waive statutory and constitutional rights as part of a plea agreement, a defendant cannot however waive rights in contravention of public policy.<sup>303</sup> In this regard, the Arizona Supreme Court held that:

[b]y adopting the [Arizona Medical Marijuana Act], voters established as public policy that qualified patients cannot be penalized or denied any privilege as a consequence of their [Arizona Medical Marijuana Act]-compliant marijuana possession or use. This policy would be severely comprised if the state and a defendant could bargain away the defendant's ability to lawfully use medical marijuana.<sup>304</sup>

In rejecting the waiver theory as applied to probation conditions and a prohibition on marijuana use in contravention of the Arizona Medical Marijuana Act, the Arizona Supreme Court even went a step further, holding that “parties cannot confer authority on the court that the law proscribes.”<sup>305</sup> That is, because the Arizona Medical Marijuana Act prohibits a court from conditioning probation upon a defendant refraining from authorized medical marijuana use, the parties themselves cannot confer this authority on a court and, consequently, at least in Arizona, probation conditions prohibiting medical marijuana use that are otherwise in compliance with the state medical marijuana statute are impermissible and cannot be imposed upon a defendant.<sup>306</sup> In a companion decision, the Arizona Supreme Court similarly held that waivers of medical marijuana use as a condition of probation are invalid as a matter of law.<sup>307</sup> According to the court, qualified patients comporting with the requirements of the Arizona Medical Marijuana Act are immune against “penalty in *any* manner, or denial of *any* right or

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299. *Id.*

300. *Id.*

301. *Id.*

302. *State v. Hancock*, 347 P.3d 142, 145 (Ariz. 2015).

303. *Hancock*, 347 P.3d 145-46.

304. *Id.* at 146.

305. *Id.*

306. *Id.*

307. *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 142 (Ariz. 2015).

privilege” and since probationary status is not an enumerated exclusion in the medical marijuana statute, a probation condition restricting lawful medical marijuana use and possession is unlawful.<sup>308</sup>

*F. Prohibition Permitted—Marijuana Status as Illegal Controlled Substance*

In *State v. Houck*, an appellate court in the State of Washington upheld probation conditions prohibiting the use of medical marijuana despite the existence of the state Medical Use of Cannabis Act which immunizes qualifying patients from arrest, prosecution, or other criminal sanctions based upon the use of medical marijuana while also affording qualifying patients with an affirmative defense to criminal charges.<sup>309</sup> The court in *Houck* justified its position based upon the confluence of the Washington probation statute, the continuing status of marijuana as a Schedule I substance under Washington law, and the inability of physicians to “prescribe” medical marijuana to otherwise qualifying patients. In *Houck*, the defendant challenged the imposition of a probation condition prohibiting them “from consuming controlled substances except pursuant to lawfully issued prescriptions because the condition subjects him to criminal sanctions if he possesses or consumes marijuana for medical purposes in violation of the Medical Use of Cannabis Act.”<sup>310</sup> The *Houck* court disagreed with the defendant for the following reasons.

First, the Washington probation statute dictates that a court must, unless waived by the court, order that a defendant “refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.”<sup>311</sup> Second, under Washington law, marijuana remains listed as a Schedule I controlled substance, and the Medical Use of Cannabis Act did not serve to implicitly or to explicitly repeal this statutory classification.<sup>312</sup> Third, physicians are not capable of issuing prescriptions for medical marijuana—only “authorizations” for use under Washington law—and consequently, marijuana, even if for medicinal purposes, remains prohibited pursuant to the probation statute. In this regard, the *Houck* court also determined that the Medical Use of Cannabis Act does not supersede the state probation statute. Nevertheless, the *Houck* decision to prohibit medical marijuana as a condition of probation even in the face of the state medical marijuana statute seems unintelligible in light of the earlier Washington appellate court decision in *State v. Hanson*, where the court afforded an affirmative defense to a qualifying patient under the Medical Use of Cannabis Act for a criminal charge of manufacturing marijuana in a private residence.<sup>313</sup> In other words, the courts in Washington State may afford a defendant with an

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308. *Id.* at 139.

309. *State v. Houck*, 446 P.3d 646, 653 (Wash Ct. App. 2019).

310. *Id.* at 649.

311. *Id.* at 651.

312. *Id.*

313. *State v. Hanson*, 157 P.3d 438, 443 (Wash. Ct. App. 2007).



affirmative defense to an initial criminal charge pursuant to the Medical Use of Cannabis Act, but this same statute may not be construed as protecting the use of medical marijuana while serving a probationary sentence.

*G. Reasonable Relationship/Nexus Test in Considering Restrictions Upon Medical Marijuana Use While on Probation*

As noted previously, trial courts enjoy broad discretion to impose a condition of probation so long as it is “reasonably related to the crime of conviction or the needs of the probationer” and imposed “for the protection of the public or reformation of the probationer, or both.”<sup>314</sup> In addition to this “reasonable relationship” test, other courts characterize the appropriate inquiry as a “nexus test” whereby a condition of probation may be imposed “so long as the condition has a nexus to either the offense for which the offender is being sentenced, or to the offender himself or herself.”<sup>315</sup> This nexus test is very similar, if not identical in scope, to the reasonable relationship test. In conducting such an inquiry, sentencing courts have considered a defendant’s personal history or pattern of previous drug abuse to establish the necessary nexus or relationship between a condition of probation prohibiting drug or alcohol use and the defendant’s personal characteristics or the crimes for which they were convicted, even in some instances where the drug or alcohol abuse is unrelated to the offense, so long as “the court in its discretion determines the condition will assist in [the] particular defendant’s alcohol or drug rehabilitation.”<sup>316</sup>

In surveying the published and reported decisions to date, the reasonable relationship/nexus standard in assessing the impermissibility of medical marijuana use as a condition of probation has been most frequently employed in decisions emanating from the appellate courts of the State of California.<sup>317</sup> The California Compassionate Use Act provides in relevant part that one of its aims is to ensure that patients “who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.”<sup>318</sup> Further, the California Medical Marijuana Program<sup>319</sup> provides that

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314. *State v. Worthey*, 460 P.3d 545, 546 (Or. Ct. App. 2020) (citing OR. REV. STAT. ANN. § 137.540(2) (West 2022)).

315. *State v. Corriher*, 497 P.3d 579, 583 (Mont. 2021).

316. *Id.*

317. *But see id.* at 583-84 (finding a nexus between the defendant’s convictions for driving under the influence and his past substance abuse history).

318. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2022). The California Supreme Court has held that the Compassionate Use Act does not provide complete immunity from all prosecutions or from law enforcement procedures such as arrests, but rather only a limited defense to charges at trial or to set aside an indictment or information prior to trial. *People v. Mower*, 49 P.3d 1067, 1073-74 (Cal. 2002); *see People v. Mulcrevy*, 233 Cal. App. 4th 127, 133-34 (Cal. Ct. App. 2014) (holding that the Compassionate Use Act provides a defense when a defendant violates a probation condition that they “obey all laws” by possessing marijuana with an adequate physician’s recommendation”).

319. In 2003 the California legislature enacted the Medical Marijuana Program to, in part, “promote the fair and orderly implementation of the [Compassionate Use Act].” *City of Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 666 (Cal. Ct. App. 2008).

qualifying patients shall not be subject to criminal liability “on the sole basis” of their lawful use of medical marijuana.<sup>320</sup> Because the California statutes do not contain the predominating state medical marijuana immunity clause which protects qualifying patients from either arrest, prosecution, or penalty in any manner, or the denial of any right or privilege based on the medical use of marijuana,<sup>321</sup> the courts in the State of California can take a much more impermissive approach to the use of medical marijuana as a condition of probation than other states that have also passed medical marijuana legislation.

When called upon, the California courts apply a three-step inquiry in deciding to limit the use of medical marijuana by a probationer. First, a court examines the validity of the offender’s medical marijuana authorization pursuant to California’s Compassionate Use Act and its Medical Marijuana Program.<sup>322</sup> Second, courts in California next apply the relationship or nexus test espoused by the California Supreme Court in *People v. Lent*<sup>323</sup> to determine whether to interfere with an offender’s use of medical marijuana while serving a sentence to probation.<sup>324</sup> The relationship test espoused by *Lent* is nothing more than the general guiding standard mentioned above in determining whether any condition of probation is invalid. According to the *Lent* decision, a condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted”; (2) “relates to conduct which is not in itself criminal”; and (3) “requires or forbids conduct which is not reasonably related to future criminality.”<sup>325</sup> The second factor of the *Lent* test is problematic insofar as the use of medical marijuana is lawful in California.<sup>326</sup> Nonetheless, a condition of probation “which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.”<sup>327</sup> Third, courts “consider competing policies” between the goals of probation and the electorate’s decision to legalize medical marijuana in the State of California when a trial court is exercising its discretion to restrict the use of medical marijuana while on probation.<sup>328</sup>

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320. CAL. HEALTH & SAFETY CODE § 11362.765 (West 2022).

321. See, e.g., MICH. COMP. LAWS ANN. § 333.26424(a) (West 2022).

322. *People v. Leal*, 210 Cal. App. 4th 829, 837 (Cal. Ct. App. 2013). One of the purposes of the Compassionate Use Act is to “ensure that patients . . . who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.” CAL. HEALTH & SAFETY CODE § 11362.5 (West 2022). The California Medical Marijuana Program similarly provides that a qualifying patient in compliance with the program “shall not be subject, on that sole basis, to criminal liability.” CAL. HEALTH & SAFETY CODE § 11362.765 (West 2022).

323. 541 P.2d 545 (Cal. 1975).

324. *Leal*, 210 Cal. App. 4th at 840.

325. *People v. Lent*, 541 P.2d 545, 548 (Cal. 1975) (internal citation omitted); see *People v. Hughes*, 136 Cal. Rptr. 3d 538, 543-44 (Cal. Ct. App. 2012) (applying the *Lent* standard to determine the appropriateness of prohibiting medical marijuana on probation).

326. *People v. Hughes*, 136 Cal. Rptr. 3d 538, 543 (Cal. Ct. App. 2012) (“The probation condition at issue here relates to otherwise legal conduct because the medical use of marijuana has been legal in California since 1996 when the electorate passed Proposition 215 . . .”).

327. *Lent*, 541 P.2d at 548.

328. *People v. Leal*, 210 Cal. App. 4th 829, 837 (Cal. Ct. App. 2013).

Quite unlike the more definitive statutes and their respective interpretations taken by the courts in Arizona, Oregon, Montana, Michigan, Colorado, Pennsylvania, Alaska, and Ohio in harmonizing medical marijuana laws and existing probation statutes, the reasonable relationship/nexus test adopted by the California courts offers the widest breadth of discretion by necessitating an individualistic finding in each specific case—not necessarily a bad thing in itself—but it also grants courts the greatest pliancy for justifying a prohibition on the use of medical marijuana while on probation, where oftentimes the decision may be an outgrowth of the subjective sensibilities of a specific prosecutor’s office, probation department, or sentencing judge.<sup>329</sup> In short, the crux of the inquiry in California jurisdictions is whether the circumstances of a particular offender’s case demonstrate a sufficient nexus or relationship to the offender, their crimes, and their past historical use of drugs and alcohol. But even with this wide discretion, the reasonable relationship/nexus test is not applied in uniform fashion.

Regarding medical marijuana and probation conditions in California, with the exception of a single case,<sup>330</sup> all the appellate courts in California have concluded that a sentencing court can prevent a probationer from possessing or using marijuana as a condition of probation even if the defendant has a medical marijuana recommendation from a physician.<sup>331</sup> This wide latitude philosophy is not only an outgrowth of the specific medical marijuana statutes in California on criminal liability, but also by Section 11362.795 of the California Medical Marijuana Program which provides in part that any criminal offender who is eligible to use medical marijuana “may request that the court confirm that he or she is allowed to use medical cannabis while he or she is on probation or released on bail.”<sup>332</sup> A second provision in Section 11362.795 specifically requires that the court’s decision on the issue and the reasons therefor shall be placed on the judicial

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329. Rodgers, *supra* note 287, at 1025 (noting some sentencing judges “are chiefly concerned that marijuana use violates the law regardless of whether the federal government intends to enforce it against medical users and, thus, is incongruous with the requirement that a probationer be law-abiding.”); see *People v. Moret*, 104 Cal. Rptr. 1, 8 (Cal. Ct. App. 2009) (imposing a prohibition of medical marijuana on a probationer despite the possession of a medical marijuana registry card because the trial court subjectively believed the offender was “gam[ing] the system, which I think it what’s really going on here with this medical marijuana for a headache”).

330. *People v. Tilehkooh*, 7 Cal. Rptr. 3d 226 (Cal. Ct. App. 2003).

331. Some cases are clearly justifiable. For example, in *People v. Hughes*, the defendant essentially used his medical marijuana registry identification card to grow plants not only for personal use, but for sale on the local market to produce income. 136 Cal. Rptr. 3d 538, 540 (Cal. Ct. App. 2012). The California Court of Appeals upheld a probation condition prohibiting the defendant’s possession of marijuana even for medical use because possessing marijuana had a direct relationship to the crimes for which the defendant was convicted, namely, unlawful cultivation of marijuana, possessing marijuana for sale, and transporting marijuana. *Id.* at 544; see *People v. Brooks*, 107 Cal. Rptr. 3d 501, 503-04 (Cal. Ct. App. 2010) (upholding a prohibition on the medical use of marijuana where the defendant possessed two pounds of marijuana slated for sale as opposed to personal use).

332. CAL. HEALTH & SAFETY CODE § 11362.795(a)(1) (West 2022). This section also provides that during the period of probation or release on bail, a probationer or defendant may request a modification to the conditions of probation or bail to permit the use of medical marijuana if a physician so recommends. CAL. HEALTH & SAFETY CODE § 11362.795(a)(3) (West 2022).

record.<sup>333</sup> The California courts have interpreted these two statutory provisions as granting a sentencing court with the discretion “to impose a no-marijuana-use probation condition on the holder of a medical marijuana card.”<sup>334</sup>

In *People v. Bianco*, the California Court of Appeals rejected an appeal from a probationer who maintained that a probation condition prohibiting them from using or possessing marijuana impinged upon their right to use medical marijuana under the Compassionate Use Act.<sup>335</sup> The defendant had pled guilty to a charge of cultivating marijuana for nonmedical purposes.<sup>336</sup> In upholding the probation condition, the *Bianco* court concluded that neither the Compassionate Use Act nor the Medical Marijuana Program abrogate a sentencing court’s “traditional discretion to impose appropriate conditions of probation” so long as the court concludes that the challenged condition of probation passes muster under the *Leal* three-pronged conjunctive test.<sup>337</sup> In *Bianco*, the appellate court found the probation condition was directly related to defendant’s criminal offense of the unlawful cultivation of marijuana.<sup>338</sup> But regarding the need to also find that the medical marijuana provision is reasonably related to future criminality, the entirety of the court’s analysis is shallow-thin and provides as follows:

Specifically, defendant acknowledged that he started using marijuana after he was discharged from the United States Air Force in 1967, and he did not claim all prior use was for medical reasons. Moreover, the defendant is apparently susceptible to drug addiction, as evidenced by a physician’s report indicating he had become “hooked” on certain prescription drugs. Under these circumstances, the probation condition is reasonably related to the goal of precluding future criminal (and nonmedical) use or possession of marijuana.<sup>339</sup>

To date, the sole decision in California permitting the use of medical marijuana while on probationary status is *People v. Tilehkooh*.<sup>340</sup> In *Tilehkooh*, a court found the defendant guilty of misdemeanor marijuana possession; their probation conditions included the admonishment to “obey the laws,” and to “not possess/-consume controlled substances unless prescribed by a physician.”<sup>341</sup> The defendant possessed a valid medical marijuana registration card. After the defendant

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333. CAL. HEALTH & SAFETY CODE § 11362.795(a)(2) (West 2022).

334. *People v. Hughes*, 136 Cal. Rptr. 3d 538, 543 (Cal. Ct. App. 2012); see *Brooks*, 107 Cal. Rptr. 3d at 504 (holding that under § 11362.795(a)(2), which requires a court to place its decision to permit or to deny medical marijuana use on the record, there would “be no reason for the Legislature to speak of the court’s ‘decision’ or to require the court to state reasons for its decision on the record if the court had no discretion to prohibit the use of medical marijuana.”).

335. *People v. Bianco*, 93 Cal. App. 4th 748, 753-54 (Cal. Ct. App. 2001).

336. *Id.* at 750.

337. *Id.* at 751.

338. *Id.* at 754.

339. *Bianco*, 93 Cal. App. 4th at 754.

340. *People v. Tilehkooh*, 113 Cal. App. 4th 1433 (Cal. Ct. App. 2003).

341. *Id.* at 1438.

tested positive for THC metabolite on several occasions, the probation department moved to revoke their probation, which was later approved by the court.<sup>342</sup> The trial court rejected the defendant's defense to criminal liability under the Compassionate Use Act because they were not "seriously ill," were not in any "imminent danger," and had not sufficiently established a "legal alternative" to marijuana use.<sup>343</sup> Because these factors ordinarily comprise elements of the "medical necessity" defense, which is inapplicable to the right to obtain and to use medical marijuana under the Compassionate Use Act, the appellate court in *Tilehkooh* reversed the probation condition prohibiting the use of controlled substances.<sup>344</sup>

In doing so, the *Tilehkooh* court read the Compassionate Use Act expansively, linking contextually the section providing that qualifying patients are not "subject to criminal prosecution or sanction"<sup>345</sup> with another subdivision affording Californians the "right to obtain and use marijuana for medical purposes."<sup>346</sup> Interpreting these two statutory provisions together, the appellate court applied the criminal protection to probationary status, stating that "[i]t is readily apparent that the right to obtain or use marijuana is not 'ensured' if its use is not given protection from the adverse consequences of probation. Since the use of marijuana is not a crime, the term 'prosecution or criminal sanction' must be read to apply to any criminal sanction for the use of marijuana."<sup>347</sup> The *Tilehkooh* court held that the revocation of probation is inappropriate in the absence of any claims where the probationer neither endangered others with their conduct nor diverted marijuana for nonmedical purposes.<sup>348</sup>

But the *Tilehkooh* court went even further in fleshing out its own vision of medical marijuana use on probation. Regarding the reasonable relationship/nexus test, while the court recognized the wide latitude provided to courts in fashioning conditions of probation, the court nevertheless believed that any rehabilitative purpose underlying the traditional justification for probation

is not served when the probation condition proscribes the lawful use of marijuana for medical purposes pursuant to [the Compassionate Use Act] any more than it is served by the lawful use of a prescription drug .... It ordinarily cannot be said that the treatment of an illness by lawful means is so related.<sup>349</sup>

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342. *Id.*

343. *Id.* at 1440.

344. *Tilehkooh*, 113 Cal. App. 4th at 1440-42.

345. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B) (West 2022).

346. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2022).

347. *People v. Tilehkooh*, 113 Cal. App. 4th 1433, 1443 (Cal. Ct. App. 2003). The *Tilehkooh* court bolstered this finding through a comment made by the California Supreme Court in *People v. Mower*. In *Mower*, the California Supreme Court stated in passing that under the Compassionate Use Act, the possession and cultivation of marijuana is no more criminal "than the possession and acquisition of any prescription drug with a physician's prescription," provided compliance with the statute. *People v. Mower*, 122 Cal. Rptr. 2d 326, 346 (Cal. 2002).

348. *Tilehkooh*, 113 Cal. App. 4th at 1437.

349. *Id.* at 1444.

Consequently, at least under *Tilehkooh*, the revocation of probation premised upon the lawful use of medical marijuana while on probationary status runs afoul of California's Compassionate Use Act and upends the rehabilitative purposes underpinning probation by preventing a qualifying patient from receiving medically recommended treatment.

Now armed with all of this important contextual background, the remainder of the Article turns to specifically discussing how these legal developments may play out in the drug treatment court domain when challenges in the future will be inevitably made by offenders seeking to use lawfully prescribed medical marijuana while participating in these specialized probationary programs.

## VI. MEDICAL MARIJUANA AND DRUG TREATMENT COURTS

The previous sections serve as critical background and delineate the legal issues future courts will grapple with in determining whether to extend the same medical marijuana criminal immunity provisions for normal probationers to participants in drug treatment court programs around the country. This section harnesses this backdrop and turns to examining the practical and legal quagmires confronting these specialized courts in the future. There are two fundamental, interrelated, and precarious lines of inquiry that drug treatment courts will need to consider moving forward. First, what practical considerations and structural challenges will present themselves for drug treatment court programs when thinking about permitting the use of medical marijuana for participants who qualify under state medical marijuana laws? Second, if an abstinence-based approach remains the standard institutional structure for drug treatment courts, how might future courts respond when participants challenge the prohibition on medical marijuana use? The Article now turns to addressing these questions.

### A. *Everyday Operations and Structural Considerations*

Drug treatment courts obtain funding for operations from a variety of public and private sources. A large source of funding is the United States Department of Justice, Office of Justice Programs. Based upon the continued illegality of marijuana under the Controlled Substances Act, along with the federal government's ability to condition grants upon programs maintaining certain standards, it is unlikely that any local drug treatment court that accepts federal grants would be permitted to accept medical marijuana patients as participants in their treatment programs.<sup>350</sup> For drug treatment courts that do not accept federal funds, however, there are still several significant structural and operational considerations that come along with permitting participants to use medical marijuana when recommended by a physician.

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350. Morris, *supra* note 1, at 5 ("Problem-solving courts may rely on state and federal funding, and it is possible that allowing cannabis use among court participants may jeopardize such funding.").

### 1. *Abstinence Only, Harm Reduction, or a Model Somewhere in Between?*

Established in 1994, the National Association of Drug Court Professionals (NADCP) “is the premier training, membership, and advocacy organization for the treatment court model.”<sup>351</sup> The NADCP has published “best practice standards” for treatment courts<sup>352</sup> and is the primary representative figurehead for the everyday operations of drug treatment courts. In this regard, the NADCP serves a policy-making function for drug treatment courts nationwide and many, if not most, drug treatment courts adhere to the official positions offered by the NADCP.<sup>353</sup> To date, the NADCP has promulgated two documents which address the use of medical marijuana in the drug treatment court context.<sup>354</sup> Reviewing each document leaves one with an unmistakable impression that the NADCP disapproves of participants using medical marijuana in drug treatment courts and is also hesitatingly suspicious of the nationwide movement legalizing marijuana for therapeutic purposes.<sup>355</sup> In *The Facts on Marijuana*, the NADCP understandably addresses the potential physical and addictive harms associated with the use of marijuana—akin to nicotine and alcohol according to the publication—along with raising the specter of a correlation between marijuana use during adolescence or young adulthood as a predictive force towards future criminality.

With respect to the state legalization movement regarding medical marijuana, the NADCP takes the position that drug court practitioners need not “abide its usage by their participants.”<sup>356</sup> Consequently, and in furtherance of my observation above, the NADCP seems to be steering its drug court practitioners to resist attempts to integrate medical marijuana into the drug treatment court regime. More specifically, with respect to a participant who possesses a valid physician’s recommendation for medical marijuana, the NADCP argues that while this situation presents “a more challenging issue,” it is nonetheless “probably not

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351. *About All Rise*, ALL RISE (2023), <https://allrise.org/about> [<https://perma.cc/4SQF-B8N8>]. In June of 2023, the NADCP rebranded its organization as “All Rise.” Because industry professionals and drug treatment courts still often utilize the name NADCP, this Article will refer to the organization by its former long-standing name. *See id.*

352. *See id.*

353. Higgins *supra* note 2, at 126 (2016).

354. DOUGLAS B. MARLOWE, *THE FACTS ON MARIJUANA* (Dec. 2010) (copy on file with author); Nat’l Ass’n of Drug Ct. Pros., *Position Statement on Marijuana* (2012) (copy on file with author).

355. For example, the author of *The Facts on Marijuana* contends that smoked marijuana “could be no more considered a ‘medication’ than cigarettes or alcohol,” intentionally using quotation marks around the term “medication” as to suggest skepticism, distrust, or suspicion. MARLOWE, *supra* note 354, at 4. However, in reaction to the changing legal landscape as detailed herein and with some states now expressly permitting the use of medical marijuana while on probation (*e.g.*, Montana, Oregon, Arizona, and Pennsylvania), the NADCP issued a statement in October of 2022 conceding that drug treatment courts must permit participants to use marijuana while on probation so long as the participant’s use complies with the applicable state’s medical marijuana laws. Further, for those states adopting a flexible approach to the use of medical marijuana while on probation (*e.g.*, California, Colorado, and New York), the NADCP recommended that drug treatment courts adopt a “case-by-case basis” in deciding whether to allow a drug court participant to use medical marijuana while on probation. *Medical Marijuana and Treatment Courts*, NADCP (Oct. 2022) (copy on file with author).

356. MARLOWE, *supra* note 354, at 4-5.

insurmountable.”<sup>357</sup> The NADCP envisions what the procedures should resemble if a medical marijuana challenge arose in the environs of a drug treatment court program:

Under such circumstances, the judge might subpoena the physician to testify or respond to written inquiries about the medical justification for the recommendation. In addition, the court may be authorized by the rules of evidence or rules of criminal procedure to engage an independent medical expert to review the case and offer a medical recommendation or opinion. Having a Board-certified addiction psychiatrist on hand to advise the Drug Court judge may provide probative evidence about whether marijuana use is medically necessary or indicated.

If judges make these decisions based on a reasonable interpretation of medical evidence presented by qualified experts, it seems unlikely that Drug Courts – which were specifically designed to treat seriously addicted individuals – could not restrict access to an intoxicating and addictive drug as a condition of criminal justice supervision.<sup>358</sup>

In 2012, two years after disseminating *The Facts on Marijuana*—and at a time when only a handful, not the majority of, states had legalized medical marijuana—the NADCP issued its official institutional *Position Statement on Marijuana*.<sup>359</sup> While once again using quotes around the word “medical” immediately preceding the word “marijuana” as if to express overall institutional suspicion,<sup>360</sup> the NADCP declared as follows:

*Whereas* several states have passed voter initiatives or legislation declaring marijuana to be ‘medicine’; and

*Whereas* some states are considering the legalization of marijuana;

*Now, therefore, be it resolved that the National Association of Drug Court Professionals:*

Opposes the legalization of smoked or raw marijuana; and

Opposes efforts to approve any medicine, including marijuana, outside of the FDA process; and

Supports continued research into a medically safe, non-smoked delivery of marijuana components for medicinal purposes; and

Supports reasonable prohibitions in Drug Courts against the use of smoked or raw marijuana by participants and the imposition of suitable consequences,

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357. *Id.* at 5.

358. *Id.* at 4.

359. National Association of Drug Court Professionals, Position Statement on Marijuana (December 2012).

360. The NADCP’s position on marijuana has been characterized as antiquated. *See Higgins supra* note 2, at 147.



consistent with evidence-based practices, for positive drug tests or other evidence of illicit marijuana consumption; and

Recommends Drug Courts require convincing and demonstrable evidence of medical necessity presented by a competent physician with expertise in addiction psychiatry or addiction medicine before permitting the use of smoked or raw marijuana by participants for ostensibly medicinal purposes . . . .<sup>361</sup>

Based upon its official pronouncements, the NADCP takes the position that drug treatment courts should follow an abstinence-only model.<sup>362</sup> The NADCP opposes the legalization of marijuana and opposes any efforts to approve marijuana as a medicine outside of the processes of the Food and Drug Administration, a current impossibility given the Controlled Substances Act. Moreover, the NADCP adopts the viewpoint that marijuana serves as a proverbial gateway drug<sup>363</sup> and in *The Facts on Marijuana* cites to two studies concluding that “marijuana use during adolescence or young adulthood significantly predicts later involvement in criminal activity and crime arrests.”<sup>364</sup> However, the NADCP’s statement in this regard is a bit clumsy and overstated. For instance, the NADCP fails to include in its document studies that have demonstrated only a modest positive association between marijuana and juvenile delinquency<sup>365</sup> or studies that have found no association between marijuana use and the onset or persistence in criminal engagement.<sup>366</sup>

More specifically, the first study relied upon by the NADCP to support a ban on medical marijuana in drug treatment courts is *Cannabis and Crime: Findings from a Longitudinal Study*.<sup>367</sup> The aim of the study was to examine the association between cannabis use during adolescence and young adulthood and subsequent criminal activity.<sup>368</sup> While the study did demonstrate a definite correlation between marijuana use in early adulthood and future *drug-specific crimes* such as possession, smuggling, and distribution—which the authors admittedly explain as stemming “from a continuity of behaviour over time”<sup>369</sup>—the authors also found “there is no evidence that [the] use of cannabis—or any other substances—is associated with [an] increased risk of subsequent non-drug-specific

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361. Nat’l Ass’n of Drug Ct. Pros., Position Statement on Marijuana 5-6 (December 2012).

362. Cf. Alex Ricciardulli, *Getting to the Roots of Judges’ Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 332 (2003) (arguing that “[d]rug courts believe that all use leads to abuse and thus decriminalization is undesirable”).

363. Higgins *supra* note 2, at 126.

364. MARLOWE, *supra* note 354, at 4.

365. See, e.g., James H. Derzon & Mark W. Lipsey, *A Synthesis of the Relationship of Marijuana Use with Delinquent and Problem Behaviors*, 20 SCH. PSYCH. INT’L 57, 66 (1999).

366. J.M. Chaiken & M.R. Chaiken, *Drugs and Predatory Crime*, in DRUGS AND CRIME 203 (M. Tonry & J.Q. Wilson eds., 1990).

367. Willy Pedersen & Torbjørn Skardhamar, *Cannabis and Crime: Findings from a Longitudinal Study*, 105 ADDICTION 109 (2009).

368. For the methods underlying the article. See generally *id.*

369. *Id.* at 115.

criminal charges, such as criminal gain or violence.”<sup>370</sup> The authors state plainly as follows: “[t]he main finding of the study is that the use of cannabis does not seem to represent a risk factor for a general criminal involvement but that it may be associated with a considerable risk of receiving a drug-specific criminal charge.”<sup>371</sup> The statement made by the NADCP is selective and more overstated than one should be led to believe given the findings of this study. According to the researchers, the use of marijuana does not foster a general involvement in crime, but rather later criminal charges specifically related to drug conduct, and even then, primarily for the personal use and possession of drugs.<sup>372</sup>

In the second study relied upon by the NADCP in making its claim, *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*,<sup>373</sup> the researchers indeed found a statistical association between criminality and the recreational use of marijuana, but the authors also importantly found this relationship to be weaker than for other drugs such as heroin, crack, cocaine, and amphetamines.<sup>374</sup> It is not uncommon for opponents of the legalization of medical marijuana like the NADCP to:

have cited addiction, criminal activity, marijuana’s status as a so-called gateway drug, and marijuana’s lack of demonstrated medical value as reasons for keeping the drug illegal. However, the casual link between the use of marijuana and the use of harder drugs has never been proven definitively, nor has the link between medical marijuana and criminal activity.<sup>375</sup>

The point of this excursion was simply to make the following observations. The current institutional structure of most drug treatment courts revolves around an abstinence-only model for medical marijuana that is promoted by the most powerful, influential organization in the landscape of drug treatment courts, namely, the NADCP. The most difficult obstacle in the future of potentially incorporating legalized medical marijuana for qualifying participants serving probationary sentences in these specialized courts may not be a legal impediment, but rather a cultural mindset from a select few.<sup>376</sup> While I do not see the influence of the NADCP waning at any point in the future, and nor should it, at least one commentator has maintained that its position on marijuana “does not

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370. *Id.*

371. *Id.* at 116.

372. *Id.*

373. Trevor Bennett et al., *The Statistical Association Between Drug Misuse and Crime: A Meta-Analysis*, 13 *AGGRESSION & VIOLENT BEHAV.* 107 (2008).

374. *Id.* at 117.

375. Ashley C. Bradford & David W. Bradford, *Medical Marijuana Laws Reduce Prescription Medication Use in Medicare Part D*, 35 *HEALTH AFFS.* 1230, 1231 (2016).

376. I am not the first to make this observation. Relatedly, commentator McKenzie M. Higgins argues as follows with respect to the position of the NADCP: “This adherence excludes many individuals from potentially reaping the benefits afforded by a therapeutic justice program. This position is not only discriminatory but is also contract to scientific evidence and social policy.” Higgins *supra* note 2, at 126.

have teeth,”<sup>377</sup> primarily because the NADCP functions “like a voluntary membership in a bar association”<sup>378</sup> and while providing assistance to drug treatment courts around the country, it does not “provide operating funds and budgets.”<sup>379</sup> Therefore, according to this commentator, “the position statement, if followed by each of the individual courts, becomes aspirational.”<sup>380</sup>

By its terms the NADCP policy statement on marijuana does leave room for its incorporation into the operations of drug treatment courts so long as “reasonable prohibitions”<sup>381</sup> and certain prophylactic procedures are put into place to legitimate use and to protect against prospective abuse, a conciliatory position by the NADCP that many drug treatment court professionals might not be aware of at the present time. Given that drug court participants are invariably plagued by severe substance use disorders—indeed, it is a criterion for admission—it makes incredible sense to have a participant’s treating physician testify in court or aver in a written document explaining the reasons why they believe marijuana to be an appropriate therapeutic treatment for the participant’s psychological or physical ailments. I agree with the NADCP that drug treatment court judges should be required to make particularized findings in each case about the necessity of allowing medical marijuana for a participant in the program or the justifications for why such recommended use should be disallowed.<sup>382</sup>

But the concession made by the NADCP requiring “convincing and demonstrable evidence of medical necessity” offered by a physician with a specialization in addiction psychiatry may impart an unrealistic standard for participants otherwise qualifying for medical marijuana to satisfy in practice.<sup>383</sup> Not only do participants not have the financial resources to hire such a specialist on their own behalf, but this expense may also not be covered under any health insurance policies they do possess. Further, even if participants qualified for Medicaid as a result of their financial disadvantages, it is uncertain whether Medicaid would cover the retention of such a medical expert other than one’s own treating physician. The NADCP undoubtedly appreciates that it is also highly unlikely that drug treatment court programs around the country have the financial resources to retain a specialized addiction psychologist as a member of the drug court team.

To its credit, studies exist demonstrating that drug court participants do use recreational marijuana as their primary drug or as part of their polysubstance use.<sup>384</sup> However, at least in the drug treatment courts I study, most participants in drug treatment court are not addicted to marijuana, but instead are chiefly addicted to methamphetamine, fentanyl, some form of opioid, or cocaine. The

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377. *Id.* at 145.

378. *Id.*

379. *Id.*

380. Higgins *supra* note 2, at 145.

381. MARLOWE, *supra* note 354, at 4.

382. *Id.* at 5.

383. See Higgins, *supra* note 2, at 146.

384. Morris, *supra* note 1, at 3.

number of people who have severe use disorders for marijuana alone is very low, if not rare. In the drug treatment courts I have observed, marijuana as an abused drug is not a primary concern, and most positive urinalysis tests do not come up “hot” for marijuana. This is not to suggest that marijuana has no role to play in substance abuse and criminality, but rather from my empirical observations over the past several years concerns over the illicit use of marijuana—let alone lawful medical marijuana use recommended by a trained physician—may be overblown. My point is simply this: at the end of the day lawful medical marijuana use may not be as great of a concern for the operation of drug treatment courts in comparison to the riskier drugs people are much more likely abusing which can quickly result in overdose or death, or both. As a member of the Western County Drug Court team recounted to me, “because when you think about the drugs that are the primary issues leading to criminality, marijuana’s not one of them. I don’t have clients who are super high on marijuana who are doing crazy, weird things. I do have clients who are high on meth doing crazy, weird things.”

In the Western County Drug Court, the common crimes for which participants are convicted revolve around property crimes such as theft, motor vehicle theft, issuing fraudulent or forged checks, trespassing, eluding, or low-level drug possession. These offenses are to some degree committed to support their drug addictions. Individuals who have been convicted of serious violent offenses are ineligible for drug treatment court. But as the drug court team member mentioned to me:

My clients who are committing the forgeries, committing the motor vehicle thefts, committing all the property crimes, I don’t see there is a link between their use of marijuana and their use of other substances, because generally if you’re committing those crimes, it’s because you’re trying to get your hands on street drugs. Meth, fentanyl, heroin, things that they either had a prescription for, but don’t have it anymore for whatever reason, or they’ve run out and so they’re needing to go to the more illicit sources for their drugs, whereas marijuana, you don’t have to go to an illicit source anymore. You just go to the store. There’s literally a store on every corner.

Whereas the NADCP issued an official position statement related to marijuana use, it currently has no similar official position statement for other highly addictive substances, most prominently opioids (*e.g.*, morphine and oxycodone). These prescription painkillers are legal across the United States and are permitted to be taken in drug treatment courts with some additional oversight and minimally invasive restrictions. This permissive oversight is likely attributable to the fact that opioid analgesics like morphine and oxycodone are Schedule II drugs under the Controlled Substances Act and are widely prescribed for pain management by physicians. As one commentator has astutely noted:

[p]hysicians and medical professionals are trusted to administer these potentially harmful substances [*i.e.*, opioids], and patients are trusted to faithfully take these medications appropriately and monitor themselves. The dangers of these substances are plastered all over the media, yet they are somehow given a higher esteem and credit due to their prescription status as recognized by the federal government.<sup>385</sup>

Further, fentanyl also falls under Schedule II of the Controlled Substances Act.<sup>386</sup> And similarly, methadone falls under Schedule II of the Controlled Substances Act,<sup>387</sup> yet it is widely used and accepted in the substance abuse community as a worthwhile medically assisted treatment.

The ironic distinction between prescribable opioids and physician recommendations for medical marijuana is not lost on some members of the Western County Drug Court team. For example, one professional noted to me that “[i]f somebody is prescribed an opiate because they broke their leg or something, nobody in their right mind is trying to say that that person has violated” conditions of probation “[b]ecause it’s a prescription, because they’re not seeing medical marijuana as a prescription. Never mind the fact that it is.” Another member of the Western County Drug Court team echoed this sentiment. This individual agreed that a hypocrisy was afoot in allowing participants to use methadone or suboxone as part of their drug abuse treatment regime or to be prescribed opioids and benzodiazepines by a physician while in drug treatment court, but not allowed to use recommended medical marijuana. On this topic, the person commented in the following manner:

You can get high off of methadone. You can get high off of suboxone. That’s not me saying I don’t think those are good options. I think it’s whatever works to get people off of the heroin, the fentanyl, everyone knows they’re using fentanyl now, but it’s to get off of those things that just have the bigger chance of risk of dying. [But] because it goes through doctors who everybody sees as more legitimate, and you have to go to a clinic for it. I don’t personally see the difference.

Treating medical marijuana as a prescription, as some states do, would give its therapeutic use validity in the drug treatment court arena simply because identifying something as a prescription shelters it with cultural legitimacy. However, a very real practical concern between suboxone/methadone and medical marijuana may be in the inability of a drug treatment court to monitor for potential abuse of marijuana. One of the ways in which drug treatment courts and

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385. See Higgins, *supra* note 2, at 153.

386. 21 U.S.C.A. § 812 (West 2022). Outside of a hospital setting, fentanyl is generally prescribed for cancer-related pain and comes in a patch form to regulate dosing.

387. *Id.*

therapeutic providers make it difficult for participants to potentially abuse suboxone and methadone is in the manner by which they are dosed out to participants. Unlike medical marijuana laws which enable a patient to lawfully possess up to a certain amount of marijuana at a given time, a Western County Drug Court team member explained to me that for suboxone and methadone

they make it so that it cannot be abused is how they dose it out, you actually have to go to the clinic every day and they give you your dose. So, the assumption is if you're testing positive for it and there's nothing else in your system, then you're following the rules of the clinic and you're not abusing your drug.

A possible, but likely imperfect, solution offered by this individual concerning the inability to regulate smoked marijuana in a drug treatment court program is perhaps by allowing the consumption of marijuana edibles so that consumption and dosing can be at least better regulated, "like my doctor says that I'm allowed a gummy in the morning and a gummy at night . . . because you can regulate that. You can regulate the dosage of whatever's in there." Another possibility, though similarly imperfect, is to allow drug treatment court participants to use Marinol/Dronabinol over extended periods of time to relieve chronic pain and to alleviate debilitating conditions.<sup>388</sup>

The advantages of an abstinence-based drug treatment court model in terms of medical marijuana may be that a uniform approach "may simplify court procedures and ensure that all participants are treated equally with respect to cannabis use."<sup>389</sup> Allowing some participants to use medical marijuana, even in accordance with a doctor's therapeutic recommendation, may send mixed and confusing messages to other participants in the program, possibly giving other participants the belief that substance use is tolerated by the court, and thereby undermining a drug treatment court's fundamental purpose of treating offenders with severe substance abuse disorders.<sup>390</sup> While these concerns are justifiable, an abstinence-based model of a drug treatment court is not the only possibility.

Rather than requiring complete abstinence from medical marijuana use, drug treatment courts can adopt a tolerance-based approach.<sup>391</sup> In a tolerance-based model, the drug court team would sanction the use of medical marijuana so long as the participant is a qualifying patient under state law and the recommending physician testifies or otherwise avers to the necessity of prescribing medical marijuana for the participant's ailments, taking into consideration the aims and goals of the drug treatment court. Moreover, the physician would be required to

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388. Even if this form of synthetic THC can assuage symptoms as successfully as smoked marijuana, drug testing is unable to distinguish whether a positive result from THC stemmed from Marinol/Dronabinol or smoked marijuana. *See State v. Donoho*, 2018 WL 6445608, \*4 (Ohio Ct. App. Dec. 10, 2018).

389. *Morris*, *supra* note 1, at 4.

390. *Id.*

391. *See id.* at 6 (contemplating a tolerance-based approach for marijuana use in general for drug treatment courts).

communicate with the drug court team members on an ongoing basis regarding the continued need for the participant to smoke medical marijuana for their physical conditions. Under this model, the drug treatment court could either forego testing for the presence of marijuana on drug screen panels or continue to test for marijuana but not impose any graduated sanctions stemming from a positive urinalysis result for marijuana alone.<sup>392</sup> Assuming workable standards could be put into place, the advantage of a tolerance-based approach is that drug treatment courts that permitted the medicinal use of marijuana—in light of understandable concerns around maintaining programmatic integrity—would not be found to be unlawfully running afoul of existing medical marijuana laws providing both a right for individuals to use and possess marijuana while affording criminal immunity protections for those on probation.

Closely related to a tolerance-based approach is what has been described as an “adaptive approach” in which drug court team members would continue generally to promote abstinence openly among participants, but medical marijuana patients on probation in the drug treatment court could affirmatively “opt-in”<sup>393</sup> to a different drug testing regime and more stringent medical oversight as in the tolerance-based approach. In fact, problem-solving courts in California, Michigan, Minnesota, Rhode Island, and Washington have approached medical marijuana in this way, in which “courts may review medical cannabis on a case-by-case basis and may potentially authorize participant cannabis use if deemed medically necessary.”<sup>394</sup> Much like the tolerance-based approach, the adaptive approach would allow drug treatment courts to harmonize their programs with the existing medical marijuana laws and criminal protections for probationers. Moreover, an additional advantage of an adaptive approach is “the ability to tailor these approaches to the individual needs of court participants, which may optimize harm reduction”<sup>395</sup> from the use of possibly riskier and far more damaging drugs such as opioids, methamphetamine, and fentanyl. As one observer has argued, adaptive treatment plans around marijuana use:

might enhance the likelihood of participant recovery and successful program completion, given that some participants [need to] use cannabis for medical needs. Offenders who would be suitable for participation in a problem-solving court may be more likely to do so if they learn that courts are willing to allow cannabis use withing specific boundaries.<sup>396</sup>

This last point should not be quickly dismissed. Prospective drug treatment court participants may well be dissuaded from seeking entry into these programs

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392. *See id.* (suggesting that drug treatment courts can still test for marijuana, but not take any sanctions resulting from a positive test).

393. Morris, *supra* note 1, at 6.

394. *Id.* at 7.

395. *Id.*

396. *Id.*

because they do not wish to relinquish their medical marijuana registration cards and to refrain from using a drug that may be benefitting them therapeutically. And while drug treatment court professionals may consider this decision to be nothing other than a voluntary choice because “you don’t have to do drug court,” the consequences of this decision may be dire. In either a pre-adjudication or post-adjudication model of drug treatment court, a trial judge can rescind any outstanding referral to a drug treatment court program and sentence the offender according to statute, which may result in prison. In a post-revocation model, an offender can request that the court give them another opportunity on regular probation. But as a member of the Western County Drug Court team characterized this entreaty to me, “at that point you’re rolling the dice that the person will get put back on normal probation.” Thus, offenders may be suffering greater criminal punishments and experiencing the denials of rights and privileges based upon their status as qualifying medical marijuana patients by being denied entry into the drug court program *ex ante*, or personally deciding not to enter a drug treatment court program at all. If the offender is consequentially sentenced to a term of incarceration, offenders will unquestionably then be deprived of medical marijuana as a therapeutic aid since all state laws prohibit the use of medical marijuana while in public correctional facilities. But the tolerance-based or adaptive approaches also come with practical pitfalls, primarily in the domains of entry considerations, court reviews, difficulties with testing for potential marijuana abuse, and the provision of treatment services.

## 2. *Entry into the Drug Treatment Court Program*

While guided by the Ten Key Components and Best Practices promulgated by the NADCP, each drug treatment court is its own self-contained institution which has the flexibility to establish internal rules on appropriate entry standards. Consequently, drug treatment courts in different jurisdictions even within a single state may treat medical marijuana patients differently. While local courts and the NADCP are developing objective standards for admission to these programs, in practice this remains a largely subjective enterprise and decisions are negotiated among members of the drug treatment court team. Reasons may vary as to why or why not drug court team members may screen out potential referrals who are lawfully authorized to use medical marijuana and are otherwise eligible for admission.

The most significant may be simple efficiency and ease. As will be discussed in the next section, perhaps the greatest challenge to drug treatment court programs in supervising medical marijuana patients is the difficulty in monitoring proper use through drug screen tests. Because of this, some members of drug court teams may intentionally or implicitly reject criminal referrals based upon the arduousness of supervision or the lack of resources to do so. Second, as I learned through both informal conversations and formal interviews with members of the Western County Drug Court team, judges have independent,



subjective views on the legalization of medical marijuana while it remains an illegal substance under the Controlled Substances Act and may still feel reticent to permit the entry of a medical marijuana patient into their drug treatment court given this continued discrepancy between state and federal law.<sup>397</sup>

### 3. *The Difficulty in Monitoring Medical Marijuana Use*

Marijuana is “derived from a plant containing compounds with psychoactive properties and presents a potential abuse liability.”<sup>398</sup> The scientific community is continually evaluating the therapeutic possibilities of marijuana through ongoing empirical studies.<sup>399</sup> While recommended dosages for Marinol/Dronabinol which contain pure THC and are delivered through an oral gelatin capsule have been established,<sup>400</sup> the same may not be said for smoked marijuana. The difficulty with smoked marijuana as a prescribed therapeutic drug, compared to opioids and Adderall, for example, which are also mind-altering substances, is the limited data in the scientific literature over optimal dosage.<sup>401</sup>

Appropriate dosing schedules for smoked marijuana, at present, are frustrated by a host of difficult variables to control, such as: the potency of the product; the heterogeneity of patient populations; the lack of consistency in cannabinoid products; variability in intrasubject and intersubject bioavailability; inhalation characteristics (*e.g.*, number, duration, volume); and the accumulation of cannabinoids in adipose tissue<sup>402</sup> which causes marijuana to remain in the body for extended periods of time. Nonetheless, empirical efforts are underway to develop standardized dosing recommendations for smoked medical marijuana<sup>403</sup> as well as therapeutic monitoring techniques.<sup>404</sup> The present accepted approach for medical marijuana dosing is to “start low, go slow, and stay low.”<sup>405</sup> Some suggest that for smoked marijuana, patients should start with one inhalation and wait fifteen minutes, then increase by an additional inhalation every 15-30 minutes until the “desired symptom control has been achieved.”<sup>406</sup> In essence, individual

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397. *Cf.* Morris, *supra* note 1, at 4 (“Given recent changes in the legal standards and medical knowledge on cannabis use, policymaker may develop varying attitudes toward cannabis use among participants of problem-solving court. These attitudes may emerge as a result of a combination of factors, including the function of specific problem-solving courts . . . , state laws, offender demographics, opinions of court officials and mental health professionals, and past experiences with court participants who used cannabis.”).

398. Dryburgh & Martin, *supra* note 6, at 99.

399. Aggarwal et al., *supra* note 76, at 165.

400. Bernard Beitzke & David W. Pate, *A Broader View on Deriving a Reference Dose for THC Traces in Foods*, 51 *CRITICAL REVIEWS IN TOXICOLOGY* 695, 702 (2021); Page II, et al., *supra* note 4, at 136; Bhaskar et al., *supra* note 191, at 8.

401. Dryburgh & Martin, *supra* note 6, at 99.

402. *Id.* at 100.

403. Bhaskar et al., *supra* note 191, at 4.

404. Dryburgh & Martin, *supra* note 6, at 99.

405. MacCallum & Russo, *supra* note 5, at 13.

406. *Id.*; see Page II, et al., *supra* note 4, at 134-35 (“Dosing should begin at the lowest possible dose, be increased gradually with caution (with sufficient time between puffs/inhalations to gauge effects, ~30 minutes),

patients need to be trusted to self-regulate and titrate until the symptoms are alleviated. The current model of self-regulated dosing may be understandably unacceptable to drug treatment court programs given that their participants have diagnosed substance abuse disorders and predominantly have long histories of past substance abuse.

Whether an individual tests positive for marijuana on a urine screen test depends on multiple factors, including the frequency of use, the recency of use, body composition, food and water intake, type of marijuana product, and type of screen administered.<sup>407</sup> Drug screen tests “typically detect cannabis use through the presence of tetrahydrocannabinol metabolites, and these metabolites may be detectable in urine as many as 30 days after last cannabis use.”<sup>408</sup> While other types of drug screen tests, such as hair or oral fluid testing, may be more precise, problem-solving courts “tend to rely on urine drug testing due to ease of administration, perceived reliability, and inexpensiveness.”<sup>409</sup>

For these reasons, testing for medical marijuana while a participant is in drug treatment court is inherently problematic. While a drug treatment court program may not be opposed to allowing a participant to use physician-recommended medical marijuana, they are nevertheless likely concerned about the potential for abuse. At present, determining whether a participant is using medical marijuana on a limited basis in accordance with a physician’s prescription (*e.g.*, smoking once in the morning and once at night) or abusing the drug whole cloth is near impossible to ascertain with scientific certainty based upon my conversations with members of the Western County Drug Court team.

Drug screen panels test for marijuana use through two indicators. First, the drug screen urinalysis test measures marijuana in the body from a low level of 50 nanograms per milliliter to a maximum of 1120 nanograms per milliliter. If an individual has the maximum score of 1120, this signifies to drug court team members that “you are just open and freely using whenever and it’s not necessarily a pain management thing for you. It’s not being used medically—it’s recreationally and medical [use] is your skirt around being able to use that while on supervision.” If the drug screen test is alternatively negative for marijuana, then this obviously means that it is not presently in a person’s body. But because marijuana is quite unlike other drugs (*i.e.*, fat soluble and possibly taking up to thirty days to evacuate the body), test results between zero presence and the maximum of 1120 are generally unreliable in assessing the amount of marijuana an individual is smoking.

A second indicator for the presence of marijuana on a drug screen test is the THC creatinine ratio. According to a member of the Western County Drug Court team, this “is a better identifier of whether or not it’s new use.” While marijuana

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and cease with the onset of any of the following effects: disorientation, dizziness, ataxia, agitation, anxiety, tachycardia and orthostatic hypotension, depression, hallucinations, or psychosis.”).

407. Morris, *supra* note 1, at 4.

408. *Id.*

409. *Id.*

levels may fluctuate for a host of different reasons, the THC creatinine ratio serves to alert drug court team members to new marijuana use. If the participant is no longer smoking marijuana, the THC creatinine ratio will continually go down while at the same time marijuana levels may bounce up and down daily until the drug completely leaves the body. If the THC creatinine ratio spikes, this alerts the drug court team members to new use. But while the THC creatinine ratio can indicate new use, it still cannot provide scientific confirmation of whether a drug court participant is abusing medical marijuana by smoking more freely than the physician recommends. As a member of the Western County Drug Court team told me, "I don't feel confident or comfortable being able to say, 'yes,' you are or are not following your prescription as you should be because there's no consistency in the testing."

Due to the inherent inability to gauge smoked marijuana use with precision on drug screen tests, it is understandable that an abstinence-based approach provides drug treatment courts with an easy method to decipher marijuana use. That is, if the participant has a marijuana level of 1120 or if there is no detected marijuana in the body, then either there is no use or heavy, frequent, and concentrated use. Between these two extremes, it is impossible to measure marijuana use with preciseness and drug screen tests can themselves be imprecise. Consequently, as applied to a medical marijuana patient in a drug treatment court setting, it would be impossible to determine if someone is using their marijuana prescription appropriately or possibly abusing the drug beyond the physician's recommendations. When I asked a member of the Western County Drug Court team about this difficulty, they responded in the following manner:

Well, I think how you monitor that, and are you overusing your prescription? How can I definitively say that? There's not a concrete number between the 50 and the 1120 to say, this is what you are supposed to be at. If you are given a prescription for Oxy and it's a five-milligram tablet, one time per day, if we're running confirmations, I can get those levels and say, "okay, you're sitting right at about where you are" because we'll have, some of my folks in sober living, they will run those tests and I've had people find out that way, like, "hey you're abusing your Suboxone because your levels are well above any reasonable prescription that is given to anyone for Suboxone."

Because marijuana presents such difficulties in determining appropriate usage in smoked form, this may well be the biggest practical impediment to the adaptability of medical marijuana in the drug treatment court forum. One possible contention to temper such concerns is the frequency of drug testing in drug treatment court programs. For example, on the terms of regular probation, random drug testing ordinarily occurs only a few times per month. But in drug treatment courts, random drug testing happens three to four times per week, at least in the first several phases of the program. So perhaps through this heightened surveillance and the sheer frequency of drug testing, it may be possible for a drug court

team to “normalize” and gauge a particular individual’s use of medical marijuana, along with establishing a base range of acceptable varying marijuana levels over an extended period through the collection of multiple data points.

#### 4. *Court Appearances Before Other Participants*

Drug treatment courts are structurally arranged in a purposeful way. The required weekly or biweekly court review appearances are held at the same time which results in all drug treatment court participants congregating in the courtroom for the entirety of the day’s events and allowing them to observe all participant reviews. More for intentionally fostering a sense of community among participants and the drug treatment court team, rather than simply promoting judicial efficiency, one of the intended benefits of these open review proceedings is affording all participants with the opportunity to share communally in individual success stories and to observe the judge’s doling out of rewards for those progressing well (*e.g.*, verbal praise, gift certificates, or token of appreciation) or graduated sanctions for participants not performing in accordance with programmatic expectations (*e.g.*, community-service, “court-time,” or short-jail stay).

Notably, because of the communal nature of these docket reviews, participants will swiftly learn if another participant has been authorized to use medical marijuana while in the drug treatment court program. In addition to the risk of giving participants the impression that drug use is permissible and will be overlooked by the drug court team, one member of the Western County Drug Court team expressed “the fear that every single person would be a user of medical marijuana at some point” by getting “a prescription for marijuana and then just use it. We would have every single person” on medical marijuana in drug treatment court. This potentiality is a real concern, particularly if obtaining a recommendation for medical marijuana from a treating physician is not very difficult to come by. This possibility cannot obviously exist in order to protect the therapeutic integrity of treatment programs. But if only a very few participants in a drug treatment court program had a physician submitting verification that medical marijuana is an appropriate and optimum therapeutic palliative for a participant’s condition in light of other available alternatives, then one way to protect against a slippery-slope problem may be to schedule those small number of court reviews either before formal docket commences or after the regular docket ends for the day and the other participants have already filed out of the courtroom. While this may be a possible solution, it is not infallible by any means—participants routinely talk amongst themselves outside of the environs of the courtroom and it would be only a matter of time that all participants knew about the tolerance for medical marijuana. This may influence increased marijuana use among participants either medically, recreationally, or illicitly.

### 5. *Drug Treatment Therapy*

The prevailing belief for drug treatment discourse is that if an individual has demonstrated a tendency to misuse one addictive substance, they will invariably be prone to use and misuse other addictive substances and any such use will likely spiral out of control. For this reason, permitting drug court participants to use medical marijuana while undergoing intensive drug treatment may also have a deleterious effect on their own rehabilitative efforts as well as the recovery efforts of individuals around them. Drug treatment courts generally require participants to attend both individual counseling as well as engage in group therapy sessions. The integrity of one-on-one treatment sessions may be impacted if the individual participant is under the influence of medical marijuana during counseling sessions, even if used in accordance with a prescription. In addition, individuals under the influence of drugs are not allowed to participate in group therapy sessions or similar recovery meetings because it presents a conflict of interest in substance abuse group counseling sessions by potentially becoming a triggering event for other individuals in attendance. Further, even if a medical marijuana patient was not under the influence during group therapy sessions, if even discussed during group therapy this may also serve as an unfortunate triggering event for people in the program and would put other people's sobriety in jeopardy and at risk. Finally, the medicinal use of marijuana for participants in drug treatment court programs would limit some of their recovery efforts. Oftentimes drug court participants reside in sober-living facilities during their time in drug treatment court and sober-living facilities—as adjuncts to formal treatment and where therapy sessions do occur with regularity—similarly adopt an abstinence-only policy where smoking medical marijuana or possessing marijuana paraphernalia may jeopardize the integrity of the entire facility.

#### *B. Legal Considerations for Drug Treatment Courts to Consider Moving Forward*

The current abstinence-only model may not stand legal scrutiny when challenged in the future by a participant in a drug treatment court. The legal ramifications for drug treatment courts to consider when developing policies around medical marijuana use is the subject of this section and relate to the previous discussion on the ways in which the appellate courts around the nation have construed medical marijuana immunity protections for offenders serving a regular probationary sentence.

As of the date of this writing, there have not yet been any reported or published decisions addressing the permissibility of using and possessing medical marijuana under a state medical marijuana law while an offender is serving a term of probation in a drug treatment court program. The closest existing published decision is *People v. Beaty*, which addressed the propriety of an offender using

medical marijuana while participating in California's Proposition 36 probation program.<sup>410</sup>

By way of background, in 2000 California voters passed Proposition 36, officially titled as the "Substance Abuse and Crime Prevention Act of 2000."<sup>411</sup> Proposition 36 requires a court to grant probation to any individual convicted of a nonviolent, personal use, drug possession offense with the condition that the offender participate in structured outpatient drug treatment programs in lieu of incarceration for a period not to exceed twelve months together with an extended period of follow-up care.<sup>412</sup> Proposition 36 probation is premised upon three principles: i) drug abuse is a medically treatable condition; ii) incarcerating non-violent drug offenders is a wasteful and costly exercise; and iii) communities are best served by diverting drug offenders from sentences of incarceration and into drug treatment programs.<sup>413</sup> When an offender qualifies for Proposition 36 probation, incarceration may not be imposed unless the defendant fails to complete the drug treatment program or commits another criminal offense.<sup>414</sup>

Much like the philosophy underlying the structure of drug treatment courts, the architects of Proposition 36 understood that relapses occur for those participating in drug treatment programs and people often falter in their initial efforts at recovery.<sup>415</sup> Given this understanding, Proposition 36 afford probationers three drug-related violations (*i.e.*, use) prior to any revocation of the probationary sentence. It is only after a third drug-related violation of probation that a court can impose a sentence of incarceration in accordance with the underlying conviction.<sup>416</sup> If a defendant successfully completes Proposition 36 probation and the attendant drug treatment program, "the conviction is set aside, the information or indictment is dismissed, and for most purposes, the arrest is deemed not have to occurred."<sup>417</sup> While Proposition 36 probation in California operates differently and has different institutional standards and requirements than drug treatment courts, the two programs share a significant commonality—providing

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410. *People v. Beaty*, 105 Cal. Rptr. 3d 76 (Cal. Ct. App. 2010).

411. *People v. Dagostino*, 12 Cal. Rptr. 3d 223, 231 (Cal. Ct. App. 2004).

412. *People v. Guzman*, 109 Cal. App. 4th 341, 346 (Cal. Ct. App. 2003).

413. Gregory A. Forest, *Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters?*, 36 MCGEORGE L. REV. 627, 634 (2005); see Meghan Porter, Note, *Proposition 36: Ignoring Amenability and Avoiding Accountability*, 21 BYU J. PUB. L. 531, 534 (2007) (noting that purpose of Proposition 36 "was to make communities safer by helping drug offenders move toward recovery instead of steering them toward overcrowded prisons and to lower taxpayer costs by aiding those convicted of simple drug possession or drug use in getting treatment for their addictions rather than wasting money incarceration them").

414. Ricciardulli, *supra* note 362, at 353. Proposition 36 excludes defendants who, in addition to a nonviolent drug possession conviction, have either: committed a serious or violent crime within the past five years; are convicted in the same proceeding for a felony or misdemeanor not related to drug use; possessed or used a firearm while under the influence of drugs; or have failed drug treatment as a condition of probation twice in the past and have been found to be unamenable to drug treatment. *Guzman*, 109 Cal. App. 4th at 347.

415. *Guzman*, 109 Cal. App. 4th at 347.

416. *People v. Friedeck*, 183 Cal. App. 4th 892, 896 (Cal. Ct. App. 2010). If a probationer violates a non-drug related condition of Proposition 36 probation, revocation is at the discretion of the judge even for a first offense. *Guzman*, 109 Cal. App. 4th at 347.

417. *People v. Dagostino*, 117 Cal. App. 4th 974, 987 (Cal. Ct. App. 2004).

and mandating drug treatment services for criminal offenders who have substance use problems or addictions, or both. Indeed, Proposition 36 probationers are often treated by the same programs administered by formal drug treatment courts.<sup>418</sup> Consequently, the legal position taken by the court in *People v. Beaty* may be the best indication to date regarding how future appellate courts will interpret the medical marijuana laws in the context of a drug treatment court program.

In *People v. Beaty*, the California Court of Appeals faced the legal issue of whether a medical marijuana user was not an appropriate candidate for Proposition 36 probation as being unamenable to treatment due to his use of medical marijuana.<sup>419</sup> In *Beaty*, defendant Brian Beaty was convicted of transporting and possessing methamphetamine in violation of state law.<sup>420</sup> The trial court suspended the imposition of sentence and placed Beaty on Proposition 36 probation for a period of five years.<sup>421</sup> The terms of probation required Beaty to participate in a drug treatment program and prohibited him from using any unauthorized drugs, narcotics, or controlled substances without a prescription from a physician.<sup>422</sup> Almost ten years prior to his Proposition 36 probationary sentence, Beaty had been prescribed medical marijuana for chronic pain, anxiety, and stress following a motorcycle accident which left him disabled.<sup>423</sup> When first placed on Proposition 36 probation, Beaty informed his probation officer about his medical marijuana prescription. The probation officer advised Beaty that he could not use marijuana while on a Proposition 36 sentence, despite marijuana having been prescribed by a physician.<sup>424</sup> Nevertheless, Beaty's attorney advised him that his medical marijuana use was legal, so Beaty continued to use medical marijuana daily.<sup>425</sup> Unsurprisingly, Beaty tested positive for marijuana on five separate occasions. The court then ordered Beaty to comply with the probation department's medical marijuana use policy while he served his Proposition 36 probationary sentence.<sup>426</sup>

These probationary restrictions were more stringent than those under the Compassionate Use Act, but the court nonetheless permitted Beaty to use medical marijuana while on Proposition 36 probation so long as he satisfied several conditions: i) he needed to obtain a physician's verification every three months regarding his continuing need for marijuana; ii) he could neither possess more than six mature marijuana plants nor more than a half-pound of dry marijuana; iii) he could only purchase medical marijuana from a licensed dispensary; and

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418. Forest, *supra* note 413, at 633.

419. *People v. Beaty*, 105 Cal. Rptr. 3d 76, 78 (Cal. Ct. App. 2010).

420. *Id.*

421. *Id.*

422. *Id.*

423. *Beaty*, 105 Cal. Rptr. 3d at 78-79.

424. *Id.* at 79.

425. *Id.*

426. *Id.*

iv) if and when a THC inhaler became available on the marketplace, he could no longer use marijuana in smoked form.<sup>427</sup> For whatever reason, Beaty refused to agree to this policy, and after failing to provide the quarterly verification, the probation department filed a petition to remove his Proposition 36 probation as being unamenable to treatment.<sup>428</sup> The trial court agreed with this assessment, and revoked Beaty's Proposition 36 probation, finding him "unamenable to treatment because, for someone with a past history of using methamphetamine, the daily use of marijuana poses a danger of future criminality and future use of methamphetamine."<sup>429</sup> The court sentenced Beaty to a term of thirty days in county jail.<sup>430</sup>

Beaty appealed, which raised the following issue of first impression for the California appellate courts: "[c]an the authorized use of medical marijuana serve as a basis for terminating Prop. 36 probation based on a finding that the defendant authorized to use marijuana under [the Compassionate Use Act] is unamenable to drug treatment?"<sup>431</sup> In large measure, this legal question called upon the appellate court to interpret the intersection between probationary conditions requiring long-term drug treatment services in a program resembling a drug treatment court with a state statute authorizing the legal use of medical marijuana for qualifying patients. Importantly, the finding by the sentencing court that Beaty was unamenable to be treated rested entirely on his marijuana use and the opinion of treatment providers that complete abstinence from drugs is required for recovery.<sup>432</sup> For example, one of the testifying treatment providers maintained that "being under the influence of any type of narcotic was inappropriate in a drug treatment group and that, in his opinion, someone with a medical marijuana prescription should *never* participate in a Prop. 36 program."<sup>433</sup>

Based upon the drug treatment providers' refusal to allow Beaty to participate in group sessions while using medical marijuana daily, the trial court concluded that Beaty was therefore unamenable to treatment as a justification for revoking probation. The appellate court in *Beaty* rejected this position, holding that

[i]n essence, the court's ruling equates to a finding that, as a matter of law, medicinal use of marijuana alone is sufficient to render an individual unamenable for treatment in a Prop. 36 drug treatment program. We conclude this conclusion is not supported by the law or the evidence and impermissibly defers a legal conclusion to the drug treatment program.<sup>434</sup>

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427. *People v. Beaty*, 105 Cal. Rptr. 3d 76, 79 (Cal. Ct. App. 2010).

428. *Id.* at 80.

429. *Id.*

430. *Id.*

431. *Beaty*, 105 Cal. Rptr. 3d at 80-81.

432. *Id.* at 82.

433. *Id.*

434. *Id.* at 83.



In this regard, the appellate court overrode the opinions of the expert treatment providers on the wisdom of using medicinal marijuana while on probation in a drug treatment program, finding that while the use of medical marijuana does not comport with the treatment program's view of recovery—namely, abstinence—the court found this position “unreasonable and not supported by the statute” as a matter of law.<sup>435</sup> Ultimately, the *Beaty* court held that the authorized use of medical marijuana pursuant to the California Compassionate Use Act cannot as a matter of law render a defendant otherwise unamenable to treatment under the Proposition 36 probation program.<sup>436</sup>

Based upon the *Beaty* decision and the interpretations adopted by other appellate courts in states where the criminal immunity provisions shield qualifying patients from being penalized in any manner or denied any right or privilege, future drug treatment courts may no longer be permitted as a matter of law to prohibit the use of medical marijuana by participants in their programs. Such a legal development would force drug treatment courts across the nation to forego the prevailing abstinence-based model and to pivot towards restructuring their internal operations and treatment services to accommodate the medical marijuana use by participants to comply with state medical marijuana laws, even over the possible professional objections of treatment providers and other drug court team members.

Furthermore, while some appellate courts may still cling to a framework permitting drug court participants to waive their rights to use medical marijuana in gaining entry into drug treatment court programs, blanket prohibitions on medical marijuana may equally be found unlawful pursuant to the legal analyses by courts in Pennsylvania and Arizona. Relatedly, individual waivers of the right to use medical marijuana as a condition of serving probation in a drug treatment court program may also be found violative of the medical marijuana laws because the policies underlying these laws would be severely comprised if the participant and the drug court program could bargain away the former's ability to lawfully use medical marijuana for therapeutic purposes.

For example, the Western County Drug Court has a prescription drug use policy in its “client contract and agreement.” Under this policy, prescribed narcotics such as opiates and other painkillers are permissible if certain criteria are satisfied: i) if such medication is deemed necessary, participants “should make every effort to obtain a non-narcotic alternative” (if one is available); ii) assuming no alternative, the participant must get permission from the drug court team to use the recommended medication; iii) a requirement that at some point in the future the participant agrees to titrate off any habit-forming medication under their physician's supervision. On the other hand, if a participant possesses a medical marijuana registry identification card, as an express condition of participating in drug treatment court, they are “required to abstain from marijuana use in any

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435. *People v. Beaty*, 105 Cal. Rptr. 3d 76, 85 (Cal. Ct. App. 2010).

436. *Id.* at 88.

form despite having a license. The purchase of medical marijuana and/or failure to abstain from medical marijuana use will result in termination from the drug court program for good cause.” In the future, however, these provisions may be rendered unlawful and impermissible in the majority of states that have legalized medical marijuana.

For drug treatment court programs that wish to remain abstinence-based, the most fruitful legal avenue for continuing such practices will be if future courts in states that have legalized marijuana for medicinal purposes utilize the reasonable relationship/nexus test (such as California) for deciding the propriety of allowing offenders with severe substance use disorders, and episodes of past criminality likely linked to some degree to their substance abuse, to use medical marijuana while serving probationary sentences in drug treatment court programs. Under this type of legal analysis, it would not be difficult for courts to rationalize and legitimate a probation condition prohibiting the use of medical marijuana for participants in drug treatment court. For example, courts that do utilize the reasonable relationship/nexus test will still need to make individualized decisions about particular offenders so they will need to probe and question a defendant’s medical condition and whether the participant has been using medical marijuana in compliance with the state medical marijuana statute. If the offender’s historical use of drugs, including medical marijuana, demonstrates non-medical use, such as selling to make a profit, or conduct in violation of the statute, such as possessing amounts greater than permissible, this too should lean in favor of prohibiting the use of medical marijuana by participants in drug treatment court programs.

## VII. CONCLUSION

As noted at the outset, the intended purpose of this Article is to serve as a foundation for scholars, courts, legal practitioners, and drug treatment court professionals to draw upon and to consider as the chatter surrounding medical marijuana and problem-solving courts continues to grow. The legal issues and practical considerations are wide in scope and thorny in application. When challenges to prohibitions on medical marijuana for those serving probationary sentences in these specialized institutions reach the courts, many jurisdictions may be prohibited from denying medical marijuana to drug treatment court participants. It is just as easy to envision the legal winds blowing in the opposite direction. Perhaps because drug treatment courts are inherently different than regular probation with institutional aims of treating participants with substance use disorders, future appellate courts may be receptive to relying upon the traditional reasonable relationship/nexus standard for assessing probation conditions and find that drug treatment court participants’ past histories of substance abuse and criminality (whether related or not) establishes a basis for concluding as a matter of law that prohibiting medical marijuana is reasonably related to curbing future

criminality. Time will tell and interested observers should stay abreast of legal developments to come.<sup>437</sup>

In the predominantly abstinence-only model of drug treatment courts nationwide, proponents of this approach will have a difficult time and may fervently resist the introduction of medical marijuana as a therapeutic drug due to the present inability to regulate and monitor its actual use by participants. This concern and the potentiality of abuse for individuals who have already been diagnosed with severe substance abuse disorders is understandable and defensible. The ability to regulate smoked marijuana with any scientific precision may be years away, if ever. But even if drug treatment courts continue down the path of prohibiting the use of medical marijuana, it may be nonetheless imposed upon them in the future by appellate courts around the country that have generally protected the lawful use of medicinal marijuana for those on normal probation pursuant to the existing immunity provisions built into the medical marijuana laws.

In the meantime, future empirical research should be targeted to better understanding the interactions between drug treatment courts and medical marijuana use. Individual problem-solving courts experimenting in this regard should collect data on the outcomes for medical marijuana patients both during and after their tenure concludes in the drug treatment court program (successfully or not). Doing so could yield important longitudinal insights related to the permissibility of medical marijuana use in these specialized institutional spaces. Moreover, individual drug treatment courts should also collect data on the ways in which permitted medical marijuana use for a small number of participants affected programmatic functioning. On a broader scale, statewide or national surveys can be distributed by research teams to collect data on how different drug treatment courts across the nation approach medical marijuana use for their participants. In addition to quantitative efforts, qualitative studies can be undertaken by researchers to better understand the subjective experiences of both drug treatment court participants and professionals regarding medical marijuana use to gain a better appreciation for how this dynamic unfolds *in situ*.

While the legal issues and practical considerations remain brimming below the surface, the future clash is forthcoming and inevitable. All who have a vested

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437. One commentator has proposed the following four-part checklist to help guide sentencing courts in deciding whether to prohibit a probationer from using legalized medical marijuana while serving a term of probation: i) is the prohibition “reasonably related to the crime for which the defendant was convicted?”; ii) is the prohibition of medical marijuana “reasonably related to preventing future criminal conduct given a demonstrated likelihood that defendant will possess marijuana for nonmedical purposes, or in greater quantities than permitted for medical purposes under law?”; iii) is the prohibition “reasonably related to preventing a demonstrated tendency on defendant’s part to become addicted to drugs?”; and iv) is the prohibition “reasonably related to promoting defendant’s success in a court-ordered substance abuse treatment program?” According to this commentator, any “yes” answer weighs in favor of imposing the condition of prohibiting medical marijuana on probation. Rodgers, *supra* note 15, at 31.

interest in resolving these thorny matters now have a starting place in which to center their efforts moving forward.<sup>438</sup>

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438. As this Article was proceeding to final print, on August 23, 2023, the Biden Administration and the United States Department of Health and Human Services recommended that the United States Drug Enforcement Agency ease restrictions on marijuana by rescheduling the drug from Schedule I to Schedule III of the Controlled Substances Act. Stefan Sykes, *U.S. Health Officials Want to Loosen Marijuana Restrictions. Here's What it Means*, CNBC (Aug. 31, 2023), <https://www.cnbc.com/2023/08/31/hhs-wants-to-reclassify-marijuana-what-it-means.html> [<https://perma.cc/GQ6W-SPPS>]. While rescheduling marijuana under the Controlled Substances Act would not end its criminalization under federal law, doing so would offer two potential benefits for the future operations of problem-solving courts. First, removing marijuana from Schedule I will enable drug treatment court participants, professionals, and the courts to recognize that marijuana has potential medicinal benefits. Second, it will foster additional research on the therapeutic benefits of marijuana as a matter of empirical science, thereby possibly increasing the acceptance of medical marijuana for probationers serving sentences in drug treatment courts. As of now, the rescheduling recommendation is still under advisement.