Denver Law Review

Volume 89
Issue 4 *19th Annual Rothgerber Conference - Toward a Constitutional Right of Access to Justice: Implications and Implementation*

Article 9

January 2012

Marijuana at the Crossroads: Keynote Address

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MARIJUANA AT THE CROSSROADS: KEYNOTE ADDRESS

SAM KAMIN†

INTRODUCTION

I would like to thank the editorial board of the *Denver University Law Review* for all of their hard work in putting this event together and for asking me to give the keynote address. This essay represents a distillation of the speech I gave at that event.[1]

In preparing this keynote, I was contacted by a reporter who would be covering this event wanting to know exactly what I would be saying during my remarks.[2] I told him that giving a keynote address at a conference about medical marijuana is sort of a procrastinator's dream; it is almost impossible to know in advance what you will be talking about because you have no idea what the state of the law will be in two or three days. During one of the conference's sessions one of the participants was leaving the stage and asked the other participants: "Has anyone Googled? Did anything happen while we were on stage?" That really is a pretty accurate encapsulation of the state of medical marijuana law and policy at the moment. This is an area where the state of the law, the facts on the ground, and the actions of law enforcement officials really are changing from day to day. If I had given this same talk a month earlier I might have spoken about a very different set of circumstances.

With that said, my goal in this essay is to provide an overview of where we are with medical marijuana law and policy today. Given how quickly things are changing, taking a step back from the daily details to paint a broad picture of current state of marijuana law and policy is a risky proposition. I then take the further imprudent step of tracing where I see the state of law and policy headed in this ever-changing area.

I. STATE OF THE NATION

When we talk about medical marijuana in the United States today what we have is a pyramid, a hierarchy of federal, state, and local regula-

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1. This essay also builds on my earlier work in this area. *See, e.g.*, Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012)

2. *See* Michael Roberts, *Marijuana at the Crossroads: Event Asks If MMJ Lawyers Are Breaking oath*, DENVER WESTWORD BLOGS (Jan. 26, 2012, 10:32 AM), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CC0QFjAB&url=http%3A%2F%2Fblogs.westword.com%2Flatestword%2F2012%2F01%2Fmarijuana_at_the_crossroads_event.php&ei=SDyKT4_3D4GO2AWc5by3CQ&usg=AFQjCNF12QFv275b14u_8apjCYL35byLKQ.

tion of marijuana. At the top of that pyramid we have federal law, and the federal law governing marijuana is quite clear. The Controlled Substances Act (CSA) which has been in place since the 1970s prohibits the cultivation, possession, sale, or distribution of marijuana and its derivatives.[3] Although you would not know it from the number of institutions brazenly selling marijuana around Denver, Colorado, and throughout much of the western United States, violation of the federal prohibition continues to carry with it the possibility of significant criminal penalties.[4]

What is more, doctors who are licensed by the Food and Drug Administration cannot prescribe marijuana for their patients, because marijuana is classified under the CSA as a Schedule 1 narcotic. The federal government has concluded, in its wisdom, that marijuana is a drug that has no legitimate medical use, has a high possibility for addiction associated with it, and therefore cannot be prescribed by any doctor who is federally licensed.[5]

At the same time that this clear prohibition exists at the federal level, we are experiencing a period of significant legal flux at the state level. Until relatively recently, marijuana was prohibited not just under the CSA but under the laws of every state in the union as well. Over the last twenty or so years, however, a number of states began lowering the penalties for possession of small amounts of marijuana and a number of local authorities enacted provisions making marijuana offenses their lowest enforcement priority.[6] For the last fifteen years, though, the most significant marijuana law reform in the states has been the passage of measures facilitating the medical use of marijuana. Currently seventeen states plus the District of Columbia have enacted some form of a medical marijuana provision.[7]

The medical marijuana laws of this state are emblematic of the broader trend. Using the initiative process, Colorado voters passed Amendment XX to the state constitution in the year 2000, which provides an affirmative defense to patients and caregivers who are in possession of a small amount of marijuana for medical purposes. Rather than repealing Colorado's laws against the possession and distribution of marijuana, Amendment XX simply states that some Colorado residents are immune from conviction under those laws.

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3. *See* 21 U.S.C. § 811 (2012).
4. 21 U.S.C. § 841(b)(1)(A)(vii) (2012).
5. *See* 21 U.S.C. § 812(b)(1) (2012).
6. *2006 Mid-Term Election Results Offer Mixed Bag for Marijuana Law Reform*, NORML.ORG NEWS RELEASES (Nov. 8, 2006), http://norml.org/news/2006/11/08/2006-mid-term-election-results-offer-mixed-bag-for-marijuana-law-reform.
7. *18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Apr. 20, 2012).

Thus, the state has permitted (or at least tacitly endorsed) that which the federal government has officially prohibited—the possession of marijuana.[8] This development is both contradictory and unproblematic from a federalism perspective. That is, it is a matter of black letter constitutional law that the federal government cannot commandeer state governments into helping federal officials enforce the CSA's continuing marijuana prohibition.[9] And the federal government, although free to prohibit marijuana under its Commerce Clause power,[10] cannot force the states to prohibit particular conduct that they do not wish to prohibit. Thus, there is nothing inherently illegitimate or inappropriate about the states choosing to decriminalize or even permit conduct that violates federal law.[11]

It is important to remember, however, that the federal courts have held that a state's adoption of medical marijuana provisions is irrelevant in a federal prosecution under the CSA.[12] That is, if a defendant is charged in a federal court with violation of the CSA, it is legally irrelevant that she was growing or distributing marijuana for medicinal reasons; it is a fact that cannot even be mentioned to a jury considering your guilt under that Act. Thus, while the federal government cannot force the people of Colorado to give up their medical marijuana provisions (and cannot force Colorado to help it enforce the CSA), it is equally true that the state cannot insulate its citizens from federal prosecution simply by passing a medical marijuana provision. Thus, to the extent that state medical marijuana laws are designed to protect state citizens from punishment from using marijuana for medical purposes, that goal is rendered almost fully ineffective by continuing federal prohibition. The fact that conduct permitted under state law is prohibited under federal law thus reduces the state provisions to something approaching mere symbolism.

Finally, it is important to remember in this context that marijuana is regulated not just at the state and federal levels, but by towns and municipalities as well. Again, the example of Colorado is illustrative. In our state, medical marijuana distribution can be zoned, including zoned completely out of business, at the city and county level. Local entities cannot prohibit people from using medical marijuana within their borders, but they can certainly choose to prohibit any stores from selling it within those borders. In other states, like California, much of the day-to-day management of medical marijuana is left by the state government to the counties. Unlike the anti-commandeering principle that prohibits the federal government from putting the states to work, California and other

8. It should be noted that Amendment XX does not explicitly permit the sale of marijuana, merely its possession; later regulations have eliminated this odd grey area from the law. *See* COLO. CONST. art. XVIII, § 14(2)(d).

9. *See* New York v. United States, 505 U.S. 144, 145 (1992).

10. Gonzales v. Raich, 545 U.S. 1, 2 (2005).

11. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VANDERBILT L. REV. 1421, 1446 (2009).

12. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001).

states explicitly require counties, even those that are ambivalent or worse about medical marijuana, to implement state policy.[13]

Thus, what we see nationwide in those states that have adopted some kind of medical marijuana provision is this odd hierarchy of regulation. We see continued prohibition at the federal level, increasing encouragement or permissiveness at the state level, and then a wide amount of discretion left to the municipality in terms of how the law actually operates on the ground. At a time of increased focus on the relative powers of the state and federal governments, it is worth noting that no other activity—not abortion, not healthcare, not handguns, not gay marriage—is treated as disparately by the three levels of government in this country as marijuana is.

II. THE COLORADO EXPERIENCE

A. Amendment XX

In order to give a better sense of how we arrived at this particular moment, it might help to give a little background on developments in Colorado. As we have seen, Amendment XX was passed by voter initiative in the year 2000,[14] and then almost literally nothing of note happened for the next eight years. Some caregivers took advantage of the increased clarity that the law gave them to help patients more openly, but the system was nothing like the one we have in Colorado today where there are two or three dispensaries within a few hundred yards of this university, and there are blocks in some of our business districts that seem to consist of nothing *but* dispensaries.

In fact, for the first eight years of medical marijuana in this state, there were never more than a very small handful of dispensaries doing business within the state. All of this changed when Barack Obama came to prominence and then was elected president in November of 2008. During his campaign Senator Obama hinted, in a guarded way, that marijuana law enforcement would not be a high enforcement priority for his administration. He talked about little old ladies who have cancer and how he did not see how their prosecution could serve any important federal principles.[15]

B. The Wild West

Throughout Colorado and elsewhere people took notice of the fact that we were leaving the Bush administration behind and moving to a new, perhaps more permissive, administration. Following President

13. *See* Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467–68 (2008).

14. COLO. CONST. art. XVIII, § 14.

15. *See, e.g.*, Wayne Laugesen, *Obama's Medical Marijuana Campaign Promises*, GAZETTE.COM (May 5, 2011, 4:00 PM), http://www.gazette.com/articles/promises-117589-campaign-marijuana.html.

Obama's inauguration and early hints from his administration that marijuana would in fact be a low federal law enforcement priority, there was explosive growth in the number of dispensaries opening their doors in Colorado. We will never really know the extent of this growth because there was no statewide regulation of marijuana at that point; literally nobody was keeping track of how many dispensaries were opening in the state of Colorado. While there were press reports that famously blared that there were more dispensaries than Starbucks in Denver and that there were more than 1,000 stores open state-wide,[16] the truth is that no one knew for sure.

But what we did know, what we did have information on, is how many Coloradans were seeking to register for marijuana patient cards during this time. While there was no state-wide (and almost no local) regulation of dispensaries during this period, there *was* a state registry of marijuana patients kept by the Department of Health since Amendment XX's passage in 2000. When we look at how many applications were filed each month (and the running total of all applications throughout this period) what we see is approximately six years of virtually flat applications—some patients were registering prior to later years of the decade, but the numbers were small and growing slowly. And then, sometime about April of 2009, what you see is an enormous number of people signing up to get marijuana cards in Colorado.

16. Christopher N. Osher, *As Dispensaries Pop Up, Denver May Be Pot Capital, U.S.A.*, DENVER POST (Jan. 21, 2011, 12:41 PM), http://www.denverpost.com/ci_14112792.

The yellow line in this figure looks like the unchecked growth of an organism. And that's exactly what we had in Colorado during this time—there was nothing, except supply and demand, to put any restrictions on who could open a dispensary, where it could be located, how marijuana could be advertised, and so on.

And like any unregulated market—like any market, period—there were good actors and bad. There were dispensary owners interested in making medicine available to those who needed it and there were those out to make a quick buck. There were dispensaries that sold reliably dosed medicine and those who sold whatever green flammable material they could get their hands on. There were stores that were knowledgeable about various cannabis strains and their effects and there were stores using shock value to lure customers, any customers, into their stores.[17]

As a result of abuses—both perceived and real—the unchecked growth depicted above simply could not go on indefinitely. Furthermore, there was significant disagreement regarding whether dispensaries were even permitted under Amendment XX; while that amendment talks about caregivers and patients, it makes no mention of dispensaries. Many looked at the industry that popped up in 2009 and saw a reality that was not envisioned in the amendment passed by voters nine years earlier.

C. Out of the Wilderness and into the Light

It became clear, therefore, that 2010 would bring regulation. What was less clear was exactly what kind of regulation we were going to get. There was a strong push by law enforcement to essentially drive the dispensaries out of business, to go back to what we had pre-2009, where there were small individual caregivers helping two, or five, or ten folks, but we did not see storefronts doing commercial business and serving hundreds if not thousands of patients. Law enforcement made their case and the dispensaries—now organized into trade groups—made theirs. And, somewhat miraculously, the industry won. The marijuana industry—people who were in the business of selling a Schedule 1 substance for profit—prevailed in the state house over law enforcement and drug treatment professionals.

But the victory for the industry was a guarded one. With official endorsement came regulation. The legislature did not merely ratify the status quo; instead it passed a number of regulatory measures and empowered the Department of Revenue to create even more. As a result, Colorado has now developed a marijuana regulatory regime that is unique in the world. For the first time that anyone is able to discern, criteria had to

17. *See, e.g.*, Nick Lucchesi, *Sex Sells Medical Marijuana, Too: Meet the $5 Joint Lady on Federal*, DENVER WESTWORD BLOGS (July 27, 2010, 7:02 AM), http://blogs.westword.com/latestword/2010/07/sex_sells_medical_marijuana_too_meet_the_5_joint_lady_on_federal.php.

be created to determine who was authorized to sell marijuana, how they could do so, what sort of security systems they had to put in place, what records they had to maintain, and so forth.[18] Many in the industry bristled at this regulation, arguing that it would benefit first movers and large entities able to pay the cost of compliance at the expense of the mom and pop entities that had done the hard work of developing the industry throughout its early stages. And there is certainly some truth to this. But the crucial fact that lay at the bottom of the system was this: if an applicant satisfied the criteria the state set forth, she could receive a certificate allowing her to legally sell marijuana in this state.

And that is different than what happens in a state like California where most of the regulation and oversight are done at the county level and are comparatively haphazard and uneven. It is also different than what happens in Amsterdam, or Portugal, or other places overseas that have decriminalized or legalized marijuana or other drugs but where manufacture and sale remain very much a gray area. Here, we have made a conscious decision to eliminate gray areas; we have regulated in the sunshine and have created a transparent set of regulations to deal with the industry that has grown up in our state.[19]

And what do those regulations provide for? Take, for example, the vertical integration requirement which came into the 2010 bill at the very last minute;[20] it surprised a lot of people who were involved in the writing and passage of the bill. It said essentially that if you are in the business of selling marijuana you must grow seventy percent of that marijuana yourself—you cannot simply contract with a grower to purchase what you sell as you might have before 2009; instead, the new legislation required every retailer to become a manufacturer as well. Why did this happen? The legislative history on it is pretty spotty. But I think most people would agree now that the vertical integration requirement was an attempt by lawmakers to give federal law enforcement a very wide berth. The vertical integration requirement was designed to ensure that Colorado did not become a net importer (or exporter) of marijuana. Nothing would be more destructive to the nascent industry that Colorado was trying to regulate (and tax) than for large quantities of California or Mexican marijuana to be discovered en route to voracious Colorado consumers. Colorado lawmakers went out of their way to be sure that the externalities of marijuana cultivation were limited inside the state's borders in an attempt to avoid (or at least postpone) confrontation with federal officials.

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18. COLO. REV. STAT. §§ 12-43.3-402, -701 (2012).

19. It is important to remember that what we have is really two regulatory regimes. We have one in the Department of Revenue regulating dispensaries and one in the Department of Health certifying patients and beginning to formulate rules for testing the validity of what is sold in retail stores.

20. COLO. REV. STAT. § 12-43.3-402(4) (2012).

This is but one example of the scale and intensity of regulation that the medical marijuana industry is subject to in Colorado. Other examples—the seed-to-sale video surveillance of dispensaries, the limits on out-of-state ownership and investment, the criminal background checks—would tell a similar story.[21] Simply put, marijuana is regulated and taxed here in a way that it is not anywhere else. The result is an uneasy status quo that at least appeared to be a model for regulation in other states. Currently in Colorado patients who need marijuana can get it. You may have to get on a government list to get it, and a lot of people are chilled by that prospect. But compared to the way things were for marijuana patients before regulation—and in particular with the way they were before Amendment XX—marijuana patients are far better off. Cancer patients no longer have to meet sketchy characters in the park in the middle of the night to buy god knows what; they no longer have risk arrest or worse to obtain their medicine. Now they can meet a state-regulated entrepreneur in the daylight in an attractive retail shop, enjoy a range of options and engage in conversation with someone knowledgeable about the products and their effects.

III. AN UNEASY STATUS QUO

If things are so much better for marijuana patients today, why do I describe the status quo as uneasy? For one thing, the current situation is not necessarily consistent with medical marijuana as a strong state policy. That is, if the voters of this state care deeply enough about medical marijuana to provide for it in our state constitution, why do we let counties ban it? We would not let them ban abortion clinics, or libraries, or other entities that we have deemed constitutionally sacred; why do we allow them to zone or ban outright marijuana dispensaries?

Furthermore, it is not clear how many medical users are really just recreational users in disguise. There is still a sense among many in the state that medical marijuana is nothing but a wink and a nod, a foot in the door by those interested in full legalization.[22] At one of our panels, the distinction between medical use on the one hand and recreational use on the other was problematized. If a user of marijuana—or of whiskey, Ambien, steak, or Advil says: "I take this because it makes me feel better," is that medicinal use or is that recreation? We all take medicines or other substances because they make us feel better; this is certainly not a problem that is localized, particularized, or even most pronounced with regard to marijuana. Still, outside of the industry, the view persists that medical marijuana is a sham, that doctors are willing to write a recom-

21. *See* 1 COLO. CODE REGS. 212-1:1.205 (2012).

22. *See* Jerrod Menz, *Medical Marijuana Abuse: Youths Are Making a Mockery of Medical Marijuana Laws*, A BETTER TOMORROW (Mar. 29, 2009), http://abttc.net/medical-marijuana-abuse/156.

mendation for anyone who walks through the door and that the majority of patients are college students with "migraines."[23]

But the biggest problem we have with the status quo is the Sword of Damocles hanging over the industry: namely that the production and sale of marijuana remain a serious felony offense under federal law. The volume of marijuana that is grown and sold in Colorado's larger dispensaries is the sort of drug manufacture and distribution that can earn people something tantamount to a lifetime sentence under federal law.[24] And while it is unlikely that any marijuana dispensary owner in compliance with state law is going to federal prison any time soon, the fact remains that medical marijuana is an industry built entirely on conduct that the federal government continues to prohibit.

So on the one hand, things are perfectly sustainable. The industry is regulated, patients can get their medicines, the state gets its tax revenue and counties that object strenuously to the presence of dispensaries can exclude them. Everything is ok except that every sale in every dispensary is a violation of federal law. For those of you who remember the movie *Pulp Fiction*, it's as John Travolta said to Samuel L. Jackson when describing the hash bars in Amsterdam, "[W]ell they're legal but they aren't 100 percent legal." "Not 100 percent legal" is a particularly uncertain base on which to found a multi-million dollar industry.

And it is important to remember in this context that the vanishingly small risk of being sent to a federal penitentiary is not the only—or even the principal—influence that continuing federal prohibition has on the nascent marijuana industry. Given that every marijuana transaction in this industry is a federal crime, it is often hard for those in the industry to convince banks to do business with them. It is hard to get investors to put their money into a business that could be seized at any moment by the federal government. It is hard to get a lease when your landlord can evict you at any time because your business is one that violates federal law. It is hard to form any contractual relationship when any contract involving the sale of marijuana is almost certainly void because it constitutes a violation of federal law.[25] Thus, so much of predictability that we sought to achieve through our regulatory regime is lost because of this strong disagreement between state and federal policy at this point. Continued

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23. The facts paint a more complicated story. While early press reports did show that a small number of doctors were responsible for a disproportionate share of all marijuana recommendations, more recent public data shows that the average age of a registered marijuana patient in Colorado is forty two, *The Colorado Medical Marijuana Registry: Statistics*, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, http://www.cdphe.state.co.us/hs/medicalmarijuana/statistics.html (last updated Feb. 29, 2012).

24. *See* 21 U.S.C. § 841(b)(1)(A)(vii) (2012).

25. See, *$500,000 Marijuana Loan Up in Smoke*, http://abcnews.go.com/Business/500000-medical-marijuana-lawsuit-smoke/story?id=16322793 (reporting that an Arizona judge ruled unenforceable a pair of $250,000 loans made by two Arizona citizens to a Colorado dispensary).

federal prohibition means that no state government has the power to create legal certainty on its own.

Furthermore, patients do not know where they stand either. We heard a heartbreaking story at the conference from a member of the audience who said that she was trying to convince her mother to get a marijuana patient card to help her ease the pain of a broken hip. She told us that her mother was in terrible pain but that she was more afraid of going to prison. And the panel, to a person, said please tell your grandmother that no U.S. Attorney in the country wants to put her in prison, and that is almost certainly right. What it highlights, however, is that would-be patients are aware of the conflict between state and federal law and are chilled by the prospect of federal law enforcement—however remote it may be.

However, patients' concerns, like those of dispensary owners, are not limited to the fear of going to prison. Many are concerned that they will lose their kids, or their public housing, or other government benefits if they test positive for marijuana, or if they are found out as marijuana users. And this fear may be much more realistic. Many jobs do prohibit you from taking a controlled substance, or from violating any state or federal law. The provision of public housing is often premised on an agreement not to use drugs, or not to have them on the premises. A patient shown to use marijuana or to have it in the home might be less likely to be awarded custody in a divorce proceeding. So even patients who are not worried about going to prison have concerns that their other settled expectations will be lost if they use marijuana as medicine.

Furthermore, those providing services to the industry, whether they're doctors, lawyers, bankers or landlords, do not know where they stand either. For example, lawyers have a professional obligation not to knowingly encourage or knowingly assist in the commission of a crime.[26] Obviously, this does not prohibit an attorney from informing her client about the interaction between state and federal law and the existence and substance of Colorado's regulatory regime. Beyond that, though—when we move from informing to advising and assisting—what conduct is permitted and what is prohibited? Can an attorney incorporate a business whose primary—or sole—business is criminal? Can she write an employment contract for an employee whose every act will be criminal? Can she help a businessperson do the compliance work that will result in the issuance of a state license to sell marijuana?

The current contradictory state of the law obviously makes these incredibly difficult questions for a lawyer to answer. On the one hand, if Colorado has chosen to regulate and tax this industry, it seems obvious that those regulated by the state government should be allowed to seek

26. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011).

legal advice in complying with that regulation. On the other, if every sale by every dispensary is a federal crime, it seems hard to argue that the attorney—by writing a lease, by doing compliance work, by incorporating a business—is *not* knowingly facilitating criminal conduct.

What is more, there is the possibility, however remote, of criminal prosecution for attorneys who have marijuana entrepreneurs as clients. A lawyer who intends to help and in fact does help her client engage in criminal conduct can be charged as an accomplice in that conduct;[27] an attorney who joins an agreement to engage in criminal conduct can be charged with conspiring to commit that conduct.[28] The specter of criminal prosecution is particularly disarming because, while attorneys are regulated at the state level, it is federal prosecutors who could charge an attorney with conspiring with or aiding and abetting her dispensary owner clients. While it might be far-fetched to imagine the same state that enacted medical marijuana provisions punishing attorneys for participating in that industry, it is less fantastical to imagine a federal prosecutor—who has sworn to uphold federal laws including the CSA—going after not only a dispensary, but its bank, its landlord, and its attorney as well.

So the fact that marijuana is legal but not 100 percent legal makes everybody in the industry—patients, practitioners, lawyers, doctors, landlords—uncertain with regard to exactly where they stand. Uncertainty by its very nature breeds instability. So if the status quo can't hold, where can we go from here?

IV. WHAT THE FUTURE HOLDS

As I stated at the outset, merely attempting to describe the state of the marijuana industry at the moment is hard, trying to predict the future in this area borders on the ridiculous. With that said, I see three possible ways forward from here. If we are not going to stay where we are—and, as I have argued, the current legal status of marijuana does not seem like a stable equilibrium—then where are we going? The first possibility is a federal crackdown that would cripple the industry nationwide. The next possibility is continued change in state law leading to an eventual paradigm shift in federal policy. Finally, I propose a third possibility inspired by what is going on in Colorado at the moment.

A. A Slow-Moving Crackdown

There is very good evidence that a slow-moving federal crackdown on the marijuana industry is already underway. We have seen federal enforcement actions in California, Montana, Washington state, and most recently here in Colorado. What has generally happened in these instances is that the United States Attorneys in these states have sent letters to

27. *See* 28 C.J.S. *Drugs and Narcotics* § 333 (2012).
28. *See* 18 U.S.C. § 371 (2012).

currently operating dispensary owners—and to their landlords—saying, essentially, "your operation is in violation of the CSA, you are to cease operations within the next 45 days."[29]

On the one hand, this is merely the federal government flexing its enforcement muscles. But on the other hand, it is a very unusual kind of federal enforcement. Generally speaking, the DEA is not in the practice of sending cease and desist letters to drug dealers; when the federal government has reason to believe that a large volume of drugs are being sold from a particular establishment, it obtains a search warrant and it serves that search warrant on the property, often very dramatically. What we have in the medical marijuana context is letters being sent asking dispensaries to kindly stop violating the Controlled Substances Act. Obviously, that is more than a little unusual. Another thing worthy of note in this context is that the federal government has been sending letters to landlords saying, in essence, "one of your tenants is violating our federal laws, could you ask them to stop or could you evict them, because we would really hate to have to come in and seize your property because of what they are doing."

The specter of civil forfeiture is enormously important in this context because it addresses what the industry considers one of its greatest assets—the inherent resource limits of federal law enforcement. A United States Attorney probably does not have the resources to prosecute each of the hundreds of dispensaries operating throughout this state. But of course, she does not really have to. Civil forfeiture with its streamlined procedures—property can be forfeited, for example, based on a simple showing that it was more probable than not that a crime was being committed—creates an end-run around the difficulties of criminal prosecution. What is more, sending letters to landlords essentially deputizes those individuals, requiring them to remove the offending tenants or face federal wrath.

These crackdowns started happening in 2011 and occurred in California, Washington, and Montana, primarily. During this period, Colorado—the one state with an extensive state regulatory regime—was spared. This led many to think that Colorado offered a model for how to avoid federal ire. Perhaps federal law enforcement officials, noticing the extensive work that Colorado had done to make sure that our dispensaries were neither importing nor exporting marijuana, that the criminal element had been kept out of the industry, that those selling marijuana were regulated and taxed, would choose to focus their attentions elsewhere. In

29. *See, e.g.*, Lisa Leff, *Calif. Pot Dispensaries Told by Feds to Shut Down: U.S. Prosecutors Send Letters Even Though State Law Allows*, MSNBC.COM, http://www.msnbc.msn.com/id/44806723/ns/us_news-crime_and_courts/t/calif-pot-dispensaries-told-feds-shut-down/ (last updated Oct. 6, 2011).

other states, without any sort of comprehensive registration and licensing provisions, federal pressure was necessary to keep the industry in check, some argued. Here, though, we can be trusted to keep an eye on things ourselves, and the feds will simply choose to leave us alone.

This, as I said out the outset, is why it's not wise to write these talks too far in advance. Just after New Year's 2012, twenty-three letters went out to dispensaries in Colorado, informing them that they were operating a medical marijuana dispensary within 1,000 feet of a school and that they had forty-five days to cease and desist or face forfeiture.[30] And the U.S. Attorney for Colorado has intimated that there are more letters coming.[31] He stated that he did not want to wait until all the letters were ready before he sent any out but that everyone in Colorado who was operating a dispensary within 1,000 feet of a school would be getting such a letter before long.

What is interesting about the Colorado letters, though, is what they do not say. The letters do not merely inform dispensary owners that they are in violation of the CSA and order them to close. Rather, federal officials sent letters only to those dispensaries operating within a 1,000 feet of a school because a separate provision of the United States Code provides for increased penalties for drug sales occurring in such proximity to schools.[32] Thus, the feds targeted those committing particularly egregious violations of the CSA, rather than all of those openly violating the CSA. This is the equivalent of telling a bank robber: "It's a crime to rob a bank, but it's a more serious one to do so with a firearm. Could you please stop robbing banks with firearms?"

As disappointed as so many in Colorado were when these enforcement letters went out in early 2012, therefore, I see some hope for optimism in them. The letters, at least so far, have only been sent to a subset of Colorado dispensary owners. While it would be hopeless optimism to conclude that the federal government is tacitly approving of the operation of the rest of the state's dispensaries by not sending them letters as well, there is at least some basis for believing that the federal crackdown here will be a limited one. We will see in the weeks and months ahead whether the rest of the businesses operating under state regulation will be allowed to proceed unmolested.

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30. *See, e.g., Medical Marijuana: Deadline Reached for Colo. Dispensaries Near Schools to Move or Shut Down*, HUFFINGTON POST (Feb. 27, 2012, 10:39 AM), http://www.huffingtonpost.com/2012/02/27/medical-marijuana-deadlin_n_1303712.html.

31. Twenty five more letters, with some minor changes, were in fact sent out in late March. *See* Michael Roberts, *Medical Marijuana: U.S. Attorney May Target Grows with Future Closure Letters*, DENVER WESTWORD BLOGS (Mar. 26, 2012, 11:29 AM). http://blogs.westword.com/latestword/2012/03/medical_marijuana_us_attorney_seizure_letters_25_dispensaries.php.

32. 21 U.S.C. § 860(a) (2012).

Other developments on the federal level are significantly less promising, however. Perhaps most ominous is the Harborside case, an audit of the largest dispensary in California and perhaps the world, in which the IRS invoked a Reagan-era provision stating that drug dealers could not deduct most of their expenses from their taxes.[33] There are not a lot of businesses in this country that can survive if they have to pay taxes on their gross receipts, and there's little reason to believe that the marijuana business is any different. IRS enforcement thus provides another powerful, non-criminal means of squeezing the industry—a federal prosecutor, concerned that she might not be able to obtain a conviction against a dispensary in a medical marijuana state, might see an IRS audit—or the specter of one—as a particularly effective tool in surprising the industry.

Banks, as I mentioned earlier, have been threatened as well. Not as directly as dispensaries, to be sure, but the federal government has raised the threat of money laundering charges against those doing business with marijuana dispensaries.[34] And, as with lawyers' ethical obligations under the model rules, a literal reading of the money laundering statute would seem to prohibit banks from providing services to those knowingly violating the CSA. As a result of these threats, the last bank willing to do business with Colorado dispensaries announced that it was closing its remaining marijuana accounts.[35]

Even the Bureau of Alcohol, Tobacco and Firearms has gotten involved in the federal government's multi-prong attack on the marijuana industry. A perfect storm of political criticism arose earlier this year when the Obama Administration indicated that those persons known to be users of medical marijuana were ineligible to possess firearms under federal law.[36] Montanans were particularly outraged that dispensary owners arrested there had been charged with an enhancement for the use of a firearm in connection with a drug crime; as one irate e-mailer told me after I was quoted in a local paper there: "This is Montana, all of us have guns."

What we see in all of these contexts is the federal government coming down on the marijuana industry in subtle, interconnected, but unmis-

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33. Lisa Leff, *Harborside Health Center, Oakland Pot Shop, Hit with $2.4 Million Tax Bill*, HUFFINGTON POST (Oct. 4, 2011, 8:19 PM), http://www.huffingtonpost.com/2011/10/04/harborside-health-center-tax-bill_n_995139.html.

34. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice (June 29, 2011), *available at* http://safeaccessnow.org/downloads/James_Cole_memo_06_29_2011.pdf ("Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.").

35. *See*, Michael Byars, *Colo. Bank to Close Medical Marijuana Accounts, Leaving Dispensaries Scrambling*, BOULDER DAILY CAMERA (August 23, 2011) http://www.dailycamera.com/boulder-county-news/ci_18743882.

36. *See* John Ingold, *ATF Say Medical-Marijuana Patients Are Prohibited from Owning Guns*, DENVER POST (Oct. 3, 2011, 1:00 AM), http://www.denverpost.com/news/marijuana/ci_19026921.

takable ways. Without a major crackdown, without SWAT teams, without an announced change in official policy, the second half of 2011 and the first half of 2012 have seen the federal government making things much harder on the marijuana industry. And certainly, the federal government has the capacity to make things very difficult indeed. They do not need to arrest everybody to make this industry go away; and as we have seen it is quite possible that they lack the resources to do so if they tried. But what they can do, what they appear to be in the middle of doing, is to make it extremely hard for marijuana businesses to do business.

B. Pressure at the Polls

Another possible way forward is continued pressure at the polls. That is, medical marijuana momentum of the last fifteen or so years—now eighteen states plus the District of Columbia—could become twenty states, twenty-five states, thirty states. At the point where you have thirty states and the majority of the nation's population living in a world where marijuana is legal within the state but illegal nationally, the pressure of those citizens' representatives in Washington to change law would become unavoidable.

Marijuana initiatives are expected to be on the ballot in a number of states this fall and we could see that momentum build before the end of this year. Marijuana advocates in as many as a dozen states will be seeking this fall to get medical marijuana provisions approved.[37] Interestingly, these advocates have focused nearly exclusively on the initiative process rather than the various state houses.[38] Perhaps this is why medical marijuana has so far been largely a western phenomenon; the overlap between states with an initiative and referendum process and states that have approved medical marijuana laws is quite pronounced.[39]

But it is not just medical marijuana that is on the ballot this fall. In California, Washington State, and Colorado, voters will have the option to approve full legalization—marijuana unmoored from the requirement of a doctor's recommendation. Despite the momentum that medical marijuana has developed at the polls nationwide, no state has yet been bold enough to take the federal prohibition head on and repeal its prohibition on possession and sale by adults.

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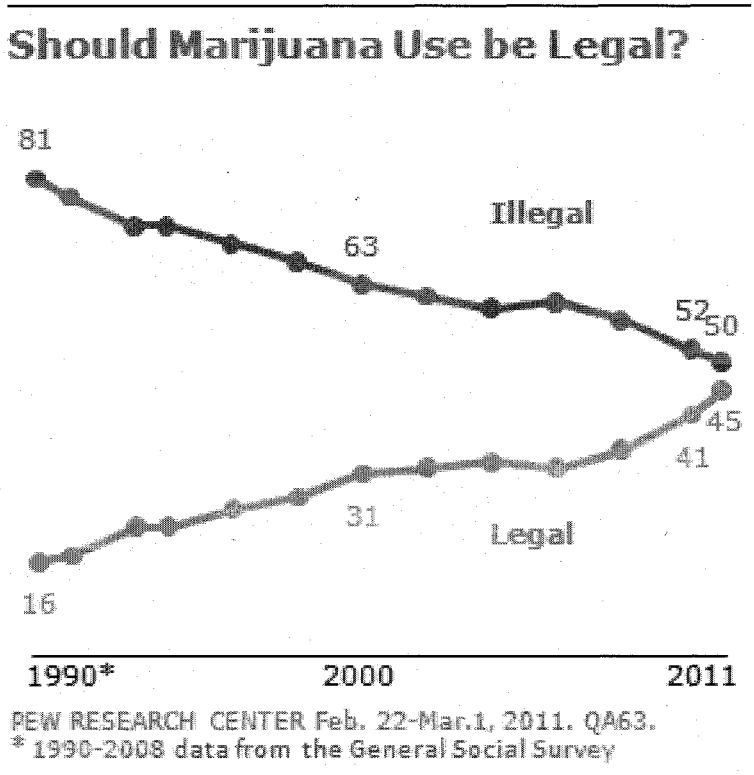
37. *12 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (last updated May 8, 2012).

38. Two states have explicitly used the initiative process, but eight more have passed medical marijuana through the similar processes of ballots or propositions. *See 18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 7.

39. *Compare Medical Marijuana States, Marijuana Laws, Medical Marijuana Laws*, MEDICAL MARIJUANA BLOG, http://www.medicalmarijuanablog.com/state-laws (last visited Apr. 15, 2012), *with* State-by-State List of Initiative and Referendum Provisions, INITIATIVE & REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Apr. 15, 2012).

The closest we have come thus far was Proposition 19 in California in 2010. There, California came within 8 percentage points of passing a full legalization provision.[40] Notably, the federal government came out very strongly against it in the closing days of the campaign. Attorney General Eric Holder, in a public statement, assured the voters of California that full legalization would not be tolerated by federal law enforcement. Again, it is important to remember that neither Attorney General Holder nor President Obama can force the voters of a state to approve a particular measure or to not approve another. By contrast what they can do in the context of marijuana laws is promise to enforce federal law more aggressively if provisions like Proposition 19 are enacted.

How likely is legalization to pass in one of these states in 2012? Figure 2 presents a national poll on whether marijuana should be legal. What is pretty amazing is in that in the twenty-two years since the poll was first taken, the gap in support for medical marijuana has gone from 65 percentage points (81 percent against and 16 percent in favor) to just 5 percentage points (50 percent against and 45 percent in favor). Thus, the overall trend is incredibly encouraging for marijuana supporters.



40. Lisa Leff & Marcus Wohlsen, *Prop 19 Supporters Vow to Push Marijuana Legalization in 2012*, HUFFINGTON POST (Nov. 3, 2010, 8:58 PM), http://www.huffingtonpost.com/2010/11/03/prop-19-results-marijuana_n_778050.html.

Closer to home, we see a similar story. A Public Policy Polling survey[41] (entitled, fabulously enough, "Colorado Favors Gay Marriage, Marijuana Use, Loves Tebow") shows continued strong support for medical marijuana but comparatively weak support for full legalization. While Colorado voters support medical marijuana by 68 percent to 25 percent, support for legalization of marijuana stood at just 49 percent (though only 40% were opposed; the rest were undecided).

Perhaps part of the reason that support for full legalization consistently lags behind support for medical marijuana is that legalization creates interesting tensions in the marijuana community itself. Allen St. Pierre, the head of NORML, which for years has been at the forefront of law reform when it comes to marijuana, said recently that it was time to admit that medical marijuana is a "farce" and to change the focus to outright legalization.[42] As dismissive of medical marijuana as St. Pierre was, there is reason to think that many in the medical marijuana community will be equally unimpressed with the prospect of full legalization. As I discussed above, things are in a pretty decent state for those who view marijuana as medicine. Many of those in the medical marijuana community worry that legalization will create both a public backlash—confirming the worst fears of those who long suspected that medical marijuana was just a gateway to full legalization—and that it will wake the oft-slumbering federal giant.

So, oddly, we see that a federal crackdown is underway at a time when a near-majority of the country supports the legalization of marijuana and large majorities in a number of states are in support of or have enacted medical marijuana provisions. So we see something of a collision course.

C. A Third Way?

A collision course, that is, unless there is a more cooperative way for the state and federal governments to interact with regard to marijuana. I conclude, therefore, on a hopeful note. And this hopefulness derives from what we have seen happen in Colorado. In this state we have moved in just a few years from a Wild West free-for-all, to the most regulated marijuana market anywhere in the world. We've gone from a place where anyone could sell marijuana anywhere without oversight or supervision to a regulatory regime with over seventy pages of meticulous reg-

41. *Colorado Favors Gay Marriage, Marijuana Use, Loves Tebow*, PUBLIC POLICY POLLING (Dec. 9, 2011), http://www.publicpolicypolling.com/main/2011/12/colorado-favors-gay-marriage-marijuana-use-loves-tebow.html.

42. Michael Roberts, *Medical Marijuana v. Recreational Use: NORML Controversy, Colorado Connection*, DENVER WESTWORD BLOGS (Jan. 25, 2012, 12:25 PM), http://blogs.westword.com/latestword/2012/01/medical_marijuana_norml_controversy_colorado.php

ulations.[43] These regulations cover such arcana as Display of License Required–Limited Access Area; Lock Standards in Medical Marijuana Licensed Premises; and, my personal favorite, Specifications for Video Surveillance and Recording of Medical Marijuana Licensed Premises.[44]

Is the Colorado medical marijuana regime perfect? Of course not. There are probably drugs sold by licensed providers to licensed patients that end up being sold to others; some of those others are almost certainly children. There are probably doctors writing prescriptions to patients in the absence of a bona fide doctor-patient relationship. Out-of-state money may be funding Colorado dispensaries; dispensaries may not be reporting all of their income; employees may be taking inventory and selling it on the street. The state has done its best to solve these problems but probably has not eliminated all of the bad actors in the industry or all of the opportunities for them to misbehave. The Colorado system is not perfect. It is just much, much better than any other state has done so far in regulating the medical marijuana industry. Yet, as long as the federal government maintains the CSA as an immutable constant, it doesn't matter how much thought a state puts into its medical marijuana regulation. It is simply rearranging the deck chairs on the Titanic.

Unless. The federal government could come to the conclusion that not all medical marijuana states are created equally. One thing that could follow from that is that Congress could go from making the Controlled Substances Act a rule, to making it a default. That is, Congress could conclude that the CSA applies—that marijuana is a prohibited substance—unless a state is able to convincingly regulate marijuana within its own borders. Congress could say to the states: Can you find a way to keep kids from buying? Can you find a way to make sure it is being sold in-state to people who are authorized to buy it? Can you find a way to make sure that organized crime is kept out of it? That the drugs do not end up on the streets? Can you track marijuana from seed to sale all of these pieces? If you can do those things we will allow you to do so and we will leave you alone. If you can come up with a sufficiently robust state regulatory regime we will allow you to use that regime, rather than us coming in from Washington and enforcing our own.

We have seen similar state-federal cooperation in other contexts. For example, under the Clean Water Act, the Environmental Protection Agency can authorize states to issue discharge permits within their own territories or to leave the issuance of these permits to the EPA itself.[45] In a very different context, the Supreme Court said something similar to the

43. *See Colorado Medical Marijuana Enforcement Division Rules*, COLORADO DEPARTMENT OF REVENUE, http://www.colorado.gov/cs/Satellite/Rev-MMJ/CBON/1251592984795 (follow "Current MMED Rules" hyperlink) (last visited Apr. 15, 2012).

44. *See* 1 COLO. CODE REGS. 212-1:10.105, 212-1:10.300-400 (2012).

45. *See* Clean Water Act, 33 U.S.C. § 1344(a), (g) (2012).

states in *Miranda v. Arizona*[46] with regard to the now famous Miranda warnings; it essentially told the states: "You need not necessarily use these warnings in every case but you must use something at least as effective."[47] In the habeas corpus setting, Congress has told the states that federal courts will apply a one year statute of limitations in federal habeas proceedings, unless the state meets certain criteria for the provision of counsel, in which case a shorter statute of limitations will apply.[48]

All of these are examples of cooperative federalism; of the federal government setting a goal and leaving it to the states to determine the best way to implement that goal. What is more, because the federal government is not requiring anything of the states in any of these examples—a state is free to allow the federal government to issue discharge permits, to use the warnings set forth in *Miranda*, or to choose not to opt-in to the counsel provisions—there is no infringement upon state autonomy. Thus, if the federal government were to determine that its goal was not a blanket ban on marijuana, but rather a regime in which marijuana was regulated, supervised by doctors, and taxed in a way that minimizes its negative externalities on society, a cooperative federalism solution would satisfy both federal concern about the dangers of recreational drugs and an increasing public support for the use of marijuana as medicine.

Now that you have finished reading this, please Google medical marijuana law and policy. You will likely find that what was true when you started reading this essay no longer is.

46. 384 U.S. 436 (1966).

47. *See id.* at 467 ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.").

48. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2261 (2012).