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United States v. Oakland Cannabis Buyers' Cooperative: The Medical Necesity Defense as an Exception to the Controlled Substances Act

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UNITED STATES V. OAKLAND CANNABIS BUYERS' COOPERATIVE: THE MEDICAL NECESSITY DEFENSE AS AN EXCEPTION TO THE CONTROLLED SUBSTANCES ACT

I. INTRODUCTION

Can you imagine how it would feel to be diagnosed with glaucoma and to discover that the disease would render you blind? Can you imagine what you would do if no prescription drugs were available to slow down the disease, but there was an illegal drug that could delay or possibly prevent the blindness? Would you comply with the law and face certain blindness, or would you break the law and give yourself a chance to see longer? What if you were suffering from severe nausea and lack of appetite due to cancer or AIDS treatment? Would you not try almost anything to alleviate the pain and to prolong your life?

Many patients struggle with these exact choices when they confront the federal law that forbids medicinal uses of marijuana. They are forced to choose between either breaking the law and facing serious consequences or complying with the law and enduring painful suffering that could have been avoided.

In November 1996, California attempted to resolve this dilemma by voting on an initiative entitled Proposition 215.[1] This initiative created an exception to the California laws that prohibit the use and cultivation of marijuana.[2] Proposition 215 was designed to allow seriously ill patients to possess marijuana and to permit their primary caregivers to possess and grow marijuana for them.[3] The initiative passed and became the Compassionate Use Act of 1996 (Use Act).[4] The Use Act's purpose is to allow seriously ill patients to obtain marijuana when a physician recommends it because the "person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."[5] The Use Act also ensures that patients and physicians are not subject to state criminal prosecution or sanction for the possession, manufacture, or distribution of marijuana.[6] It aspires to "encourage the federal and state governments to implement a plan to provide

1. Brief for the Respondents at 1, United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711 (2001) (No. 00-151).
2. *Id.*
3. *Id.*
4. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2001).
5. *Id.* § (b)(1)(A).
6. *Id.* § (b)(1)(B).

for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."[7]

In response to the Use Act's passage, several groups organized nonprofit medical cannabis dispensaries to safely and inexpensively distribute marijuana to patients in need.[8] The Oakland Cannabis Buyers' Cooperative (Cooperative) is one such dispensary.[9] Before patients are allowed to become members, the Cooperative requires them to provide a written recommendation from their physician stating that the patient would benefit from the medicinal use of marijuana.[10] After a screening interview by the Cooperative's staff and verification of the physician's approval, patients approved for membership receive an identification card.[11]

Despite this apparently reasonable solution, the federal government challenged the Use Act as a violation of the Federal Controlled Substances Act of 1970 (CSA),[12] which prohibits the distribution, manufacture, dispensation and possession of marijuana.[13] The federal government sued the Cooperative and similar dispensaries to enjoin them from distributing and manufacturing marijuana.[14] In opposing the injunction, the Cooperative asserted a medical necessity defense.[15] This common law defense, a "choice-of-evils" defense, allows a person to choose illegal conduct when it is the lesser of two evils.[16] The necessity defense allows a person to violate the law and produce some harm rather than to follow the law and cause a greater amount of harm.[17]

Notwithstanding the availability of this defense, the United States District Court for the Northern District of California granted the government a preliminary injunction.[18] The court found the necessity defense was insufficient to block the injunction because the individual dispensaries could not satisfy the defense's requirements.[19] To properly assert the necessity defense, the dispensaries had to satisfy its elements for each and every member and not just for the group as a whole.[20]

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7. *Id.* § (b)(1)(C).

8. *See* United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1715 (2001); United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1091-92 (N.D. Cal 1998).

9. Respondent's Brief at 1, United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711 (No. 00-151).

10. *Id.* at 2.

11. *Id.*

12. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1715-16.

13. 21 U.S.C. § 841(a) (West 1999).

14. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1092-93 (N.D. Cal. 1998).

15. *See Cannabis Cultivators Club*, 5 F. Supp. 2d at 1101.

16. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4 (2d ed. 1986); 21 AM. JUR. 2D *Criminal Law* § 158 (1998).

17. LAFAVE & SCOTT, *supra* note 16, § 5.4, at 442.

18. *See Cannabis Cultivators Club*, 5 F. Supp. 2d at 1106.

19. *Id.* at 1102.

20. *Id.* For a detailed discussion of these elements, *see infra* Part II.A.

However, the Ninth Circuit Court of Appeals reversed the district court's order and remanded the case.[21] The Ninth Circuit held that the necessity defense was a "legally cognizable defense that likely would pertain in the circumstances" and found no evidence that Congress had limited the court's "broad equitable discretion" to issue injunctions under the CSA.[22] According to the Ninth Circuit, when formulating the proper injunction, the district court had to "expressly consider the public interest on the record;" one such interest that the district court failed to consider was the "availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of a large group of persons with serious or fatal illnesses."[23] The Ninth Circuit also held that the evidence on the record was sufficient to support the Cooperative's motion to modify and narrow the injunction.[24]

The federal government appealed the Ninth Circuit's decision to the U. S. Supreme Court, and the Supreme Court reversed.[25] The Court observed that the necessity defense "[could not] succeed when the legislature itself ha[d already] made a 'determination of values.'"[26] According to the majority, such a determination had been made because the CSA stated that Schedule I controlled substances, including marijuana, had "no currently accepted medical use."[27] Because of this language, the Court concluded that marijuana had "no medical benefits worthy of an exception."[28]

The Court's rejection of the medical necessity defense as an implied exception to the CSA demonstrates the Court's failure to consider its past acceptance of the necessity defense and its failure to analyze the CSA as a whole. First, the opinion begins by expressing doubt as to whether "federal courts ever have authority to recognize a necessity defense not provided by statute"[29] despite the fact that many federal courts, including the Supreme Court, have considered the defense.[30] Second, the history of marijuana legislation and marijuana's medical uses suggest that the "determination of values" in the CSA is not as simple as the Court conveys.[31] Furthermore, the Act does not contain the appropriate, clear language necessary to abrogate a common law defense.[32] Finally, although the Court was correct in finding that

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21. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1115 (9th Cir. 1999).
22. *Id.* at 1114.
23. *Id.*
24. *Id.* at 1115.
25. United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1722 (2001).
26. *Id.* at 1718 (citation omitted).
27. *Id.*; *see* 21 U.S.C. § 812(b)-(c) (Supp. 2001).
28. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1718.
29. *Id.* at 1717.
30. *See* LAFAVE & SCOTT, *supra* note 16, § 5.4, at 441-43.
31. *See infra* Part III.
32. *See infra* Part IV.

the dispensaries could not satisfy the elements of the medical necessity defense, it incorrectly denied individuals the opportunity to argue the defense.[33]

This Comment examines the necessity defense and its applicability to the CSA in light of the Supreme Court's decision in *United States v. Oakland Cannabis Buyers' Cooperative*.[34] Part II describes the elements and purpose of the necessity defense and critiques the Court's analysis of the defense. Part III details marijuana's medicinal values and reviews the history of federal law regulating marijuana use. Part IV argues that there is no "determination of values" in the CSA. Finally, Part V analyzes the use of the medical necessity defense in marijuana cases and asserts an individual's right to use the defense.

II. THE VIABILITY OF THE NECESSITY DEFENSE

A. The Elements, Purpose, and Limitations of the Necessity Defense

The necessity defense applies to situations in which one is forced to choose between two alternatives, both of which will result in some harm.[35] This "choice-of-evils" defense allows an individual to choose illegal conduct when it is the lesser of two evils.[36] It addresses the dilemma that arises when one can choose to produce some harm by violating the law or can choose to cause greater harm by following the law.[37] However, the defense cannot be used if there exists any "reasonable, legal alternative" to the illegal conduct which would avoid the threatened harm.[38]

Public policy requires that the defense be available because the "law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law."[39] "Necessity is, essentially, a utilitarian defense" which "maximiz[es] social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime."[40] The defense can be viewed as "allow[ing the people] to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances."[41]

The necessity defense prevents a boat captain from being found guilty of trespass when he chooses to dock his boat at a private port during a storm in

33. *See infra* Part V.
34. 121 S. Ct. 1711 (2001).
35. LAFAVE & SCOTT, *supra* note 16, § 5.4, at 441-42.
36. *Id.*
37. *Id.*
38. United States v. Bailey, 444 U.S. 394, 410 (1980).
39. LAFAVE & SCOTT, *supra* note 16, § 5.4, at 442.
40. United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).
41. *Id.* at 196-97; *see also* 21 AM. JUR. 2D *Criminal Law* § 158 (1998) (same).

order to save his passengers' lives.[42] Likewise, the defense allows an ambulance to speed in order to get to the hospital more quickly without being prosecuted for the traffic violation.[43] It also allows a prisoner to avoid guilt for a prison escape if the prison is on fire through no fault of his own.[44]

To use the necessity defense, a defendant must establish four elements:

> (1) [T]hat he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.[45]

This analysis requires consideration of the harm avoided, the harm done, and the defendant's intent to avoid the greater harm.[46] The harm avoided may be bodily harm or harm to property.[47] The harm done may be almost anything from property damage to intentional homicide, and it is the "harm-reasonably-expected, rather than the harm-actually-caused, which governs."[48] The second and third elements of the defense require that the person intentionally sought to avoid a greater harm when he made his choice.[49] The individual cannot have intended to break the law for another purpose and then accidentally avoid greater harm.[50]

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42. *See* The William Gray, 29 F. Cas. 1300, 1302 (C.C.D.N.Y. 1810) (No. 17,694).

43. *See* State v. Gorham, 188 P. 457, 457-58 (Wash. 1920).

44. *See* People v. Whipple, 279 P. 1008, 1010 (Cal. Ct. App. 1929).

45. United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989). For another formulation of the requisite elements see *Jenks v. State*, 582 So. 2d 676, 679 (Fla. Dist. Ct. App. 1991). *Jenks* requires the defendant to establish the following:

> 1. That [he] did not intentionally bring about the circumstance which precipitated the unlawful act; 2. That [he] could not accomplish the same objective using a less offensive alternative available to [him]; and 3. That the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it.

Id. For still a third test, see *State v. Cram*, 600 A.2d 733, 735 (Vt. 1991). *Cram* requires that:

> (1) [T]here . . . be a situation of emergency arising without fault on the part of the actor concerned;
> (2) this emergency . . . be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
> (3) this emergency . . . present no reasonable opportunity to avoid the injury without doing the criminal act; and
> (4) the injury impending from the emergency . . . be of sufficient seriousness to outmeasure the criminal wrong.

Id. (quoting State v. Warshow, 410 A.2d 1000, 1001-02 (Vt. 1979)).

46. LAFAVE & SCOTT, *supra* note 16, § 5.4, at 445-46.

47. *Id.*

48. *Id.* at 446.

49. *Id.*

50. *Id.*

The first element of the defense is extremely crucial. It requires a person to balance the harms and convince a court that the harm avoided exceeds the harm done.[51] The defense applies only if a court finds that the "harm that would have resulted from compliance with the law significantly outweighs the harm that reasonably could result from the court's acceptance of necessity as an excuse in the circumstances presented by the particular case."[52]

The other elements of the defense are similarly important. A court must decide, as a matter of law, whether or not the defendant's facts, if taken to be true, are sufficient to satisfy each element.[53] If the facts do satisfy each element, then the defendant is entitled to have the defense submitted to the jury for consideration.[54]

The necessity defense is not available if the legislature has already made a "determination of values"[55]—the legislature cannot have already resolved the balancing of harms and determined that complying with the law is the lesser harm.[56] If a "deliberate legislative choice as to the values at issue" has been made, then "the availability of the defense of necessity is precluded."[57]

B. The U.S. Supreme Court's Opinion Regarding the Necessity Defense

With its opinion in *Oakland Cannabis*, the U.S. Supreme Court has choosen to ignore the established common law principles of the necessity defense. Instead, the Court casts doubt on the defense, calls it "somewhat controversial," and claims that it has never been completely recognized as a viable defense by federal courts.[58] This assertion quite simply contradicts case law. Necessity has long been accepted as a defense to criminal prosecution.[59] The concurring opinion, authored by Justices Stevens, Souter, and Ginsburg, recognizes the majority's mistake and remarks that the Court's "precedent has expressed no doubt about the viability of the common-law defense, even in the

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51. *Id.* at 446-47.

52. Commonwealth v. Hutchins, 575 N.E.2d 741, 744 (Mass. 1991).

53. State v. Cram, 600 A.2d 733, 734 (Vt. 1991).

54. *Id.*

55. LAFAVE & SCOTT, *supra* note 16, § 5.4, at 442.

56. 21 AM. JUR. 2D *Criminal Law* § 158 (1998).

57. *Cram*, 600 A.2d at 735 (quoting State v. Warshow, 410 A.2d 1000, 1003 (Vt. 1979)); *see also* Long v. Commonwealth, 478 S.E.2d 324, 327 (Va. Ct. App. 1996) (holding that the necessity defense was precluded when the licensure suspension statute regarding habitual offenders addressed necessity in the context of the mitigation of punishment).

58. United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1717 (2001).

59. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 425 (1980) (Blackmun, J., dissenting) (stating that the necessity defense has been accepted throughout the criminal justice system); Jenks v. State, 582 So. 2d 676, 678 (Fla. Dist. Ct. App. 1991) (concluding that the "defense was recognized at common law and that there has been no clearly expressed legislative rejection of such defense"); *Long*, 478 S.E.2d at 327 (analyzing necessity as a defense to a violation of a habitual offender statute and ruling that the defense could not be used because the statute already addressed it in the context of the mitigation of punishment).

context of federal criminal statutes that do not provide for it in so many words."[60]

The Supreme Court has only directly addressed the necessity defense in one other case. In contrast to *Oakland Cannabis*, *United States v. Bailey*[61] did not attack the defense. The defendants in *Bailey* were charged with violating a statute that governed escape from federal custody.[62] Asserting the necessity defense, they claimed the horrible conditions in the jail necessitated their escape.[63] The Court's opinion never questioned the validity of the defense, nor did it rule that the statute precluded the defense. Though the Court held the defendants could not use the defense, this holding was made because the Court found that "where a criminal defendant [was] charged with escape . . . he [had to] proffer evidence of a bona fide effort to surrender or return to custody" before he could assert the necessity defense.[64]

A 1884 Queen's Bench case is the only case the *Oakland Cannabis* majority cites to support the idea that the necessity defense is controversial.[65] However, this case does not support such a claim because the Queen's Bench actually considered the defense without reservation.[66] The real issue in that case was the use of the necessity defense in homicide cases.[67] After reviewing the opinions of several scholars, the court concluded that the necessity defense could not be used in a homicide case, even if the homicide was necessary to preserve one's own life.[68] Contrary to the Court's majority opinion, in *Oakland Cannabis* common law has acknowledged the necessity defense since at least 1551.[69]

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60. *Oakland Cannabis Buyers' Coop.*, 121 S.Ct. at 1723 (Stevens, J., concurring) (citations omitted).

61. 444 U.S. 394 (1980).

62. *Id.* at 396.

63. *Id.* at 398. The defendants claimed that the guards had joined other cellmates in setting things on fire and that the guards would just allow the fires to burn out. *Id.* They also produced evidence that the guards subjected them to beatings and threatened their lives. *Id.*

64. *Id.* at 415.

65. *Oakland Cannabis Buyers' Coop.*, 121 S.Ct. at 1717 (citing Queen v. Dudley & Stephens, 14 Q.B.D. 273, 277-78 (1884)).

66. *Dudley & Stephens*, 14 Q.B.D. at 276-77.

67. *Id.* at 281.

68. *Id.* at 286-88.

69. Todd H. Whilton, Note, Commonwealth v. Hutchins: *A Defendant Is Denied the Right to Present a Medical Necessity Defense*, 27 NEW ENG. L. REV. 1101, 1103 (1993) (footnote omitted).

III. THE CONTROLLED SUBSTANCES ACT AND THE POSSIBLE MEDICAL USES OF MARIJUANA

A. The Benefits of Marijuana Use

It is important for the necessity defense to be available because, for some individuals, marijuana is the only drug that can effectively relieve their pain and suffering. Marijuana helps with nausea and vomiting associated with chemotherapy treatment; ameliorates intraocular pressure so that glaucoma patients can avoid blindness for years; reduces epileptic episodes; alleviates chronic pain; treats nausea, vomiting and loss of appetite for AIDS patients; limits muscle pain and spasticity caused by multiple sclerosis; reduces pain and tremors for paraplegics and quadriplegics; and even helps with depression and other mood disorders.[70] In many of these cases, legal drugs and treatments, unlike the medicinal marijuana, do little to alleviate the symptoms.[71]

Marijuana has not always been labeled as an illegal drug. It has been used in the East for centuries for therapeutic reasons and came to the West as a medicine in the mid-1800s.[72] The United States Dispensatory first listed marijuana in 1854 and permitted commercially-prepared marijuana to be obtained in drug stores.[73] Beginning in the 1850s, physicians published articles and research studies arguing that marijuana had medicinal value due to its ability to alleviate many of the symptoms listed above.[74]

Despite its current label as a Schedule I drug with no medicinal value, research continues to reveal marijuana's medical benefits. In 1997, the White House Office of National Drug Control Policy asked the Institute of Medicine (Institute) to review scientific evidence regarding the "potential health benefits and risks of marijuana."[75] The study focused on cannabinoids, which comprise all the compounds related to tetrahydrocannabinol (THC), the primary active

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70. *See generally* ED ROSENTHAL & STEVE KUBBY, WHY MARIJUANA SHOULD BE LEGAL 67-70 (1996) (listing various medical applications of marijuana); LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, MARIHUANA, THE FORBIDDEN MEDICINE 24-133 (1993) (describing in detail marijuana's myriad medicinal uses).

71. *See* GRINSPOON & BAKALAR, *supra* note 70, at 24-133. In chapter two, the authors discuss in detail the benefits of marijuana for medical purposes and the problems of legal drugs. *Id.* For example, certain drugs are legally prescribed to reduce the side effects of cancer chemotherapy, but these extremely expensive drugs sometimes never work or work for a very short time. *Id.* at 25-26. One study found that out of "fifty-six patients who got no relief from [legal drugs], 78 percent became symptom-free when they smoked marihuana." *Id.* at 26. The chapter proceeds to offer compelling, real-life accounts of people who found marijuana effective where legal drugs were not for cancer therapy, glaucoma, epilepsy, multiple sclerosis, paraplegia, and quadripelegia, among others. *Id.* at 26-133.

72. *Id.* at 3-4.

73. *Id.* at 4.

74. *Id.* at 5-7.

75. MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 1 (Janet E. Joy et al. eds., 1999) [hereinafter MARIJUANA AND MEDICINE].

ingredient in marijuana.[76] The Institute concluded that these compounds played a "natural role in pain modulation, control of movement, and memory" and that the withdrawal symptoms "appear[ed] to be mild compared to opiates or benzodiazepines, such as diazepam (Valium)."[77] Though the study found that there often exist more effective drugs than THC compounds (including marijuana), it noted that "people vary in their responses to medications, and there will likely always be a subpopulation of patients who do not respond well to other medications."[78] In addition, the Institute concluded that "except for the harms associated with smoking, the adverse effects of marijuana use are within the range of effects tolerated for other medications."[79]

The Institute's report describes marijuana as a potentially effective drug for relief from pain, nausea, and for the stimulation of appetite.[80] The study notes that the therapeutic effects of cannabinoid drugs "are most well established for THC."[81] According to the report, cannabinoid drugs could "offer broad-spectrum relief not found in any other single medication" for patients who suffer simultaneously from severe pain, nausea, and weight loss, particularly for AIDS and cancer patients undergoing chemotherapy.[82] Though the researchers found less support for cannabinoid drugs' therapeutic effects on movement disorders, epilepsy, and glaucoma, they did not discount such effects entirely; instead, the report labeled this application the "least promising."[83]

B. Federal Laws Prohibiting the Medicinal Use of Marijuana

Marijuana was not always prohibited and condemned as a recreational drug with no medical value. One of the first federal laws to regulate the use of marijuana was a 1937 tax law.[84] The Marihuana Tax Act of 1937 (Tax Act) imposed a transfer tax requiring anyone who manufactured, imported, possessed, dispensed, or otherwise used marijuana to pay special taxes and to register his name and place of business with the local tax collector.[85] Producers of marijuana, physicians, dentists, and other practitioners who distributed, dispensed, or otherwise used marijuana were required to pay a tax of one dollar per year; the Tax Act made it unlawful to "import, manufacture, produce,

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76. *Id.* at 2.
77. *Id.* at 3.
78. *Id.* at 3-4.
79. *Id.* at 5.
80. *Id.* at 177.
81. MARIJUANA AND MEDICINE, *supra* note 75, at 177.
82. *Id.*
83. *Id.*
84. Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (1937) (repealed 1970). *See also* Michael Aldrich, *History of Therapeutic Cannabis*, *in* CANNABIS IN MEDICAL PRACTICE: A LEGAL, HISTORICAL AND PHARMACOLOGICAL OVERVIEW OF THERAPEUTIC USE OF MARIJUANA 49-50 (Mary Lynn Mathre ed., 1997) (noting the repeal of the Marihuana Tax Act of 1937).
85. Ch. 553, 50 Stat. at 551-52.

compound, sell, deal in, distribute, dispense, prescribe, [or] administer" marijuana if the tax was not paid.[86] The purpose of the Tax Act was not to abolish the medicinal use of marijuana, which was accepted at the time, but to discourage the recreational use of the drug.[87] Unfortunately, the law required extensive paperwork when marijuana was sought to be used for medical purposes, thus making it increasingly difficult to legally obtain the drug.[88] Four years later, marijuana was removed from the United States Pharmacopoeia and National Formulary because federal restrictions made it increasingly inconvenient for manufacturers to dispense the drug legally.[89]

The decline in medical marijuana use was also brought about by the Narcotic Drugs Import and Export Act (Narcotic Drugs Act) and the responses to it.[90] While the Tax Act was still in effect, Congress enacted the Narcotic Drugs Act, which governed all illegal importation and smuggling of marijuana.[91] The Narcotic Drugs Act forbid marijuana importation and the buying, selling, or transporting of imported marijuana.[92] Furthermore, the Act presumed that marijuana possessors were using illegally-imported marijuana, stating that "such possession [will] be deemed sufficient evidence to authorize conviction, unless the defendant explain[ed] the possession to the satisfaction of the jury."[93] In addition, many states had statutes that made marijuana possession illegal.[94]

When combined with the Tax Act, these federal and state laws became a problem. In order for marijuana users to comply with the Tax Act, they had to report the possession of marijuana.[95] However, because state laws made marijuana possession illegal and the Narcotic Drugs Act presumed that the drug was illegally imported, reporting possession in accordance with the Tax Act created a "per se violation of both federal and state marijuana laws."[96] In 1969, the U.S. Supreme Court acknowledged this problem in *Leary v. United States*.[97] The Court held that the Narcotic Drugs Act violated due process by presuming

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86. *Id.* at 552-53.

87. GRINSPOON & BAKALAR, *supra* note 70, at 8.

88. *Id.*

89. *Id.*; *see also* Aldrich, *supra* note 84, at 49 (discussing marijuana's 1941 removal from the United States Pharmacopeia).

90. Narcotic Drugs Import and Export Act, Pub. L. No. 84-728, ch. 629, 70 Stat. 570 (1956) (repealed 1970). For a discussion of President Nixon's 1970 repeal of the various federal drug laws, see Aldrich, *supra* note 84, at 49-50.

91. *See* Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 159 (1997).

92. *Id.*

93. Ch. 629, 70 Stat. at 571.

94. *See* Leary v. United States, 395 U.S. 6, 16 (1969) ("[I]n late 1965, possession of any quantity of marihuana was apparently a crime in every one of the 50 states.").

95. *See supra* notes 84-85 and accompanying text.

96. Bergstrom, *supra* note 91, at 159.

97. 395 U.S. 6 (1969).

that a "defendant knew of the unlawful importation or bringing in [of the drug]."[98] It also held the Tax Act unconstitutional because complying with the Act had the effect of self-incrimination under federal and state marijuana laws.[99]

By the time the Supreme Court found the Marijuana Tax Act and the Narcotic Drugs Act unconstitutional, legislative concern about the recreational use of marijuana had greatly increased.[100] In response to this concern and the *Leary* decision, Congress passed the Controlled Substances Act (CSA).[101] Congress made several findings regarding controlled substances, including a finding that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."[102]

In response to these findings, Congress grouped prescription drugs into a series of "schedules" ranging from Schedule I, which prohibits any use of the drug, to Schedule V, which imposes the least amount of restriction.[103] Marijuana is classified as a Schedule I drug, meaning that it has "a high potential for abuse" and has "no currently accepted medical use in treatment;" furthermore, Schedule I drugs are not "safe[] for use . . . [even] under medical supervision."[104] Schedule II drugs also have a "high potential for abuse" but these drugs have "a currently accepted medical use in treatment . . . or a currently accepted medical use with severe restrictions."[105] The CSA gives the U.S. Attorney General the power to reschedule controlled substances.[106] In order to do so, the Attorney General must request a scientific and medical evaluation from the Secretary of Health and Human Services along with the Secretary's recommendations as to whether the drug should be rescheduled or removed as a controlled substance.[107] The Attorney General may use only these findings to ultimately determine whether or not the drug warrants removal or rescheduling.[108]

In 1972, the National Organization for the Reform of Marijuana Laws (NORML) petitioned the Drug Enforcement Agency (DEA), formerly the Bureau of Narcotics and Dangerous Drugs, to reschedule marijuana as a Schedule II drug or to remove it entirely from the list of controlled

98. *Id.* at 37.
99. *Id.* at 26.
100. GRINSPOON & BAKALAR, *supra* note 70, at 13.
101. 21 U.S.C.A. §§ 801-971 (West 1999); *see also* Bergstrom, *supra* note 91, at 160 (detailing the legislative response to the increasing recreational use of marijuana).
102. 21 U.S.C.A. § 801(2).
103. *Id.* § 812.
104. *Id.* § 812(b)(1).
105. *Id.* § 812(b)(2).
106. *Id.* § 811.
107. *Id.* § 811(b).
108. 21 U.S.C. § 811(b).

substances.[109] This effort began nearly two decades of litigation as NORML and other groups such as the Alliance for Cannabis Therapeutics, lobbied the DEA to reevaluate marijuana's medical use.[110] In 1986, public hearings finally began, and many witnesses, including doctors and patients, were called to testify.[111] The hearings lasted for two years and concluded with the DEA's Administrative Law Judge, Francis L. Young, recommending that marijuana be rescheduled as a Schedule II substance.[112] Judge Young determined that approval by a "significant minority" of physicians in the United States was sufficient to find that marijuana had a current medical use so as to justify its classification as a schedule II drug.[113] He ruled as follows:

> The evidence in this record clearly shows that marijuana has been accepted as capable of relieving the distress of great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in this record.[114]

Despite these strong recommendations, the DEA refused to reschedule marijuana because it believed that a "significant minority" of physicians was insufficient to prove marijuana had accepted medical uses.[115] In 1994, the U.S. District Court of Appeals for the District of Columbia, in a petition for review of the DEA's final order, ruled that marijuana possessed no medicinal value.[116]

IV. CONGRESS HAS NOT MADE A "DETERMINATION OF VALUES" IN THE CONTROLLED SUBSTANCES ACT

The U.S. Supreme Court found that Congress had made a "determination of values" in the CSA since the Act describes Schedule I drugs as having no currently accepted medical use, therefore, the necessity defense could not even be raised.[117] However, courts should not construe statutes to exclude common law defenses unless there exists an absolutely clear legislative intention to do

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109. *See* Aldrich, *supra* note 84, at 51; ALAN BOCK, WAITING TO INHALE: THE POLITICS OF MEDICAL MARIJUANA 224 (2000); GRINSPOON & BAKALAR, *supra* note 70, at 13; Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 704 (2000); Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 550 (1999).

110. Aldrich, *supra* note 84, at 51.

111. GRINSPOON & BAKALAR, *supra* note 70, at 14-15.

112. LeVay, *supra* note 109, at 704.

113. GRINSPOON & BAKALAR, *supra* note 70, at 15; *see* 21 U.S.C. § 812(b)(2)(B).

114. Aldrich, *supra* note 84, at 51-52.

115. GRINSPOON & BAKALAR, *supra* note 70, at 16-17.

116. Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994).

117. *See supra* notes 25-28 and accompanying text.

so.[118] In particular, criminal statutes "'are not to be construed as taking away a common law right, unless the intention is manifest;'" therefore, if the legislature does not expressly deny the right to raise a necessity defense, then the defense should be available.[119]

The CSA does not manifest a clear legislative intention to exclude the necessity defense. In order for a statute to make such intent "manifest," it would need to clearly weigh the harms addressed by the defense. For example, an abortion statute that makes abortion illegal even though childbirth places a woman's life in danger demonstrates that the legislature has weighed the competing harms and has decided that having an abortion would cause greater harm than enforcing the law. It could also be assumed that the necessity defense would be precluded if pleas of necessity were already provided by the legislature in other sections of the CSA, such as in the mitigation section.[120] The Supreme Court did not hold the necessity defense inapplicable in *United States v. Bailey*,[121] where a federal statute designed to punish escapees from federal custody was as clear as the CSA in its purpose.[122] Like the CSA, the federal statute at issue in *Bailey* did not contain clear language negating the necessity defense.[123] As an implicit acknowledgment of this fact, the Court did not deprive the parties of the opportunity to argue the defense.[124]

The CSA simply classifies drugs into certain schedules, preventing the use of Schedule I drugs because they have "no currently accepted medical use."[125] The CSA does not explicitly deny such drugs to patients who have an absolute need for the drugs in order to alleviate severe ailments and diseases. Most significantly, Congress does not say that Schedule I drugs have absolutely no medical use. It specifically states that these drugs have "no *currently accepted*

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118. Jenks v. State, 582 So. 2d 676, 679 (Fla. Dist. Ct. App. 1991).

119. Whilton, *supra* note 69, at 1130 (quoting Melody v. Reab, 4 Mass. 471, 473 (1808)).

120. *See supra* notes 55-57 and accompanying text.

121. 444 U.S. 394 (1980).

122. *Id.* at 410-11. 18 U.S.C.A. § 751(a) (West 2000) provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both; or if the custody or confinement is for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined under this title or imprisoned not more than one year, or both.

123. *Bailey*, 444 U.S. at 410-11.

124. *See id.* at 409-15 (analyzing the elements of the necessity defense and its applicability to the defendants).

125. 21 U.S.C. § 812(b)(1)(B) (West 1999).

medical use."[126] The addition of these words shows that Congress recognizes that these drugs may come to have medical value in the future. Congress does not wish to permanently forbid the drugs' use.

Additionally, the CSA exists to prevent the "substantial and detrimental effect[s] on the health and general welfare of the American people" that the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances have."[127] Since Congress felt it necessary to pass the CSA in order to protect the "*welfare* of the American people,"[128] one can assume that use of a controlled substance would be tolerated if the drug were necessary to prolong the health and general welfare of an individual. Congress appears to acknowledge this possibility by leaving room for Schedule I drugs to be deemed to have medical value in the future.

Some argue that the necessity defense is precluded because the CSA gave the Attorney General sole authority to determine a drug's medical value.[129] However, this authority extends only to rescheduling a drug or to removing it from the schedules entirely.[130] The common law defense of necessity does not deprive the Attorney General of his statutory authority; it simply allows a drug to be taken if the user can prove, on a case-by-case basis, that such use is absolutely necessary to preserve his health and well-being.[131]

Courts should maintain their equitable discretion in issuing an injunction pursuant to 21 U.S.C. § 882 so that the necessity defense can be applied.[132] There is "no evidence that Congress intended to divest . . . [courts of their] broad equitable discretion to formulate appropriate relief when and if injunctions are sought."[133] Employing this equitable discretion, courts can properly weigh government interests with an individual's interests on a case-by-case analysis.

V. THE MEDICAL NECESSITY DEFENSE AS AN EXCEPTION TO THE CONTROLLED SUBSTANCES ACT

A. Marijuana Cases Involving the Medical Necessity Defense

The medical necessity defense is a specific application of the necessity defense, and it allows unlawful conduct that is necessary to alleviate a medical

126. *Id.* (emphasis added).
127. *Id.* § 801(2).
128. *Id.* (emphasis added).
129. Brief for the Petitioner at 25, United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711 (2001) (No. 00-151).
130. *See* 21 U.S.C. § 811.
131. *See supra* Part II.A.
132. *See* 21 U.S.C. § 882.
133. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1114 (9th Cir. 1999).

condition.[134] The medical necessity defense has been successfully used in marijuana cases for patients suffering from glaucoma, multiple sclerosis, AIDS, and other serious ailments.[135] This defense has been employed when the defendant suffers from a medical condition that marijuana alleviates in a way that no legal medicine can.[136]

The first case to recognize the medical necessity defense in a marijuana case was *United States v. Randall.*[137] Robert Randall suffered from glaucoma, a disorder that causes an imbalance of pressure in the eyes and that ultimately results in blindness.[138] He had attempted to use legal medicines to alleviate the pressure, but they became "increasingly ineffective as [his] tolerance [to the drugs] increased."[139] Eventually, the intraocular pressure could not be controlled, and he lost sight in his right eye; he also began to lose sight in his left eye.[140] He began smoking marijuana and found it alleviated the pressure in his eyes.[141] After his arrest for marijuana possession and cultivation, Randall raised the defense of medical necessity.[142]

The District of Columbia Superior Court provided an insightful analysis of the medical necessity defense in marijuana cases. The court concentrated its reasoning on the balancing of harms after it found that Randall had satisfied all the other elements of the necessity defense.[143] The court weighed Randall's interests against those of the government.[144] It began by reviewing the legislative history of marijuana prohibition and emphasized that "[m]edical evidence suggest[ed] that the prohibition [was] not well founded."[145] The court cited reports from the Department of Health, Education and Welfare, the predecessor of the Department of Health and Human Services, which "found the current penalties too harsh in view of the relatively inoffensive character of the drug, and recommended decriminalization."[146]

To weigh the competing interests, the court cited the famous case *Roe v. Wade.*[147] In finding state statutes prohibiting abortion unconstitutional, the U.S. Supreme Court "stressed the fundamental nature of the right of an individual

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134. *See supra* Part II.A.

135. *See* Kevin B. Zeese, *Legal Issues Related to the Medical Use of Marijuana, in* CANNABIS IN MEDICAL PRACTICE 22 (Mary Lynn Mathre ed., 1997).

136. *Id.* at 23.

137. 104 Daily Wash. L. Rep. 2249 (1976).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Randall*, 104 Daily Wash. L. Rep. at 2252; *see supra* note 45 and accompanying text.

144. *Randall*, 104 Daily Wash. L. Rep. at 2252.

145. *Id.*

146. *Id.*

147. Roe v. Wade, 410 U.S. 113 1973.

to preserve and control her body."[148] Following this reasoning, the court in *Randall* held that in a medical marijuana case:

> [N]o direct harm will be visited upon innocent third parties; any major ill effects from the inhalation of marijuana smoke will occur to the defendant alone. Furthermore, defendant, by growing marijuana for his own consumption, cannot be said to be contributing to the illegal trafficking in this drug, and thus injuring, however nebulously, innocent members of the public. In any event, it is unlikely that such slight, speculative and undemonstrable harm could be considered more important than defendant's right to sight.[149]

To reach its conclusion, the court analyzed whether the District of Columbia's governing statute precluded the necessity defense.[150] The D.C. Code mirrored the current restriction in the CSA.[151] Though the statute did not provide for any defenses other than the obvious defense that one did not commit the act, courts had interpreted the statute and similar criminal statutes as implicitly "requiring a particular state of mind."[152] The implication, then, is that in medical marijuana cases, the medical necessity defense should be allowed because the defendant often does not possess the requisite criminal intent.[153] The defendant should be allowed to defend against the CSA by arguing necessity to show that the violation was due to a different set of circumstances than the required criminal intent.

The medical necessity defense was also successful in *Jenks v. State*.[154] That case involved a married couple, both of whom were afflicted with AIDS.[155] Kenneth Jenks, a hemophiliac, contracted AIDS from a blood transfusion.[156] He unknowingly gave it to his wife, who soon began vomiting and suffering from weight loss.[157] She was prescribed numerous drugs for her nausea, but none of them worked.[158] In addition, Kenneth Jenks suffered from nausea and lack of appetite when he started AZT treatment.[159] The Jenks tried marijuana and found

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148. *Randall*, 104 Daily Wash. L. Rep. at 2253. For a further discussion of this issue, see *Roe*, 410 U.S. at 152-55.

149. *Randall*, 104 Daily Wash. L. Rep. at 2253.

150. *Id.*

151. *Id.* The statute read: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter." *Id.* (footnote omitted).

152. *Id.*

153. *Id.*

154. 582 So. 2d 676 (Fla. Dist. Ct. App. 1991).

155. *Id.* at 677.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

it helped them stay on their AIDS medications because it relieved their nausea, stimulated their appetite, and helped them gain weight.[160] The Florida District Court of Appeals concluded that the Florida statute, which was similar to the CSA, did not bar the necessity defense because it did not "speak[] unequivocally" about "abrogating" the common law defense.[161] The Court of Appeals found that the Jenks had sufficiently established medical necessity.[162] The Jenks proved that there was no legal alternative to their course of action by having a medical expert and physician testify that there existed no drug treatment that could alleviate the couple's symptoms as effectively as marijuana.[163]

The Massachusetts Supreme Court in *Commonwealth v. Hutchins*[164] came to the opposite conclusion of *Randall* and *Jenks*. That case involved a man diagnosed with scleroderma, a slowly progressive disease that causes the build-up of scar tissue in the skin and internal organs.[165] The patient also suffered from a range of ailments related to the disease, such as nausea, loss of appetite, and pain from swallowing.[166] Although no known effective treatment or cure existed for this possibly fatal disease, the patient found that marijuana alleviated some of his symptoms.[167] Though the court did not find that the governing statute precluded the medical necessity defense, it concluded that the defense could not be sustained in this case after balancing the competing harms.[168]

Chief Justice Liacos and Justice Nolan wrote a vigorous dissent,[169] which quickly led to the passage of a marijuana research law and to the Massachusetts governor's pardon of the defendant.[170] The dissenting opinion charged the majority with "engag[ing] in a speculative judicial fact finding" in its reasoning about which harm was greater.[171] The dissenting justices argued that it should be for the jury to decide whether obeying or breaking the law produced the greater harm:

> While [we] recognize that the public has a strong interest in the enforcement of drug laws and in the strict regulation of narcotics, [we] do not believe that the interest would be significantly harmed by permitting a jury to consider whether

160. *Jenks*, 582 So.2d at 679.
161. *Id.*
162. *Id.*
163. *Id.*
164. 575 N.E.2d 741 (Mass. 1991).
165. *Id* at 742.
166. *Id.*
167. *Id.* at 743.
168. *Id.* at 745.
169. *Id.* at 745-47.
170. *See* Zeese, *supra* note 135, at 28.
171. *Hutchins*, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

> the defendant cultivated and used marihuana in order to alleviate agonizing and painful symptoms caused by an illness.[172]

The dissenting opinion also pointed out that the majority ignored the rationale behind the necessity defense in that sometimes "the value protected by the law" was overruled by a "superseding value which [made] it inappropriate and unjust to apply the usual criminal rule."[173] The majority had ignored the superseding value in medical marijuana cases, which was the "humanitarian and compassionate value in allowing an individual to seek relief from agonizing symptoms."[174]

B. Medical Marijuana Justified by the Necessity Defense

It appears that the U.S. Supreme Court has also ignored the "humanitarian and compassionate value in allowing an individual to seek relief from agonizing symptoms."[175] In *Oakland Cannabis*, the Court ruled that lower courts could not consider the medical necessity defense without directly violating the CSA because "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."[176] However, as explained above, such a balance should not be read into the CSA.[177] Therefore, courts should recognize that the balancing of harms required by the defense could come out in a defendant's favor.[178] As Justice Stevens stated in his concurring opinion in *Oakland Cannabis*, "whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented [in this case]."[179]

Allowing the medical necessity defense will not nullify the purpose of the CSA[180] because the defense is not easily proven. It will not be possible for everyone to defend the use of marijuana or other Schedule I substances. Before the defense can even be argued at trial, the defendant must prove to the court, as a matter of law, that enough evidence exists to support the defense.[181] A defendant must show that he was faced with a choice of evils and that he chose

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172. *Id.*; *see also* United States v. Bailey, 444 U.S. 394, 419-20 (Blackmun, J., dissenting) (disagreeing with the Court's decision to rule out the necessity defense for prison escapees because it was a fact question for a jury to decide whether or not the conditions were so bad as to leave the escapees with no choice but to flee).

173. *Hutchins*, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

174. *Id.* at 746 (Liacos, C.J., dissenting).

175. *Id.* (Liacos, C.J., dissenting).

176. United States v. Oakland Cannabis Buyers' Coop., 121 S. Ct. 1711, 1721 (2001).

177. *See supra* Part IV.

178. *See Hutchins*, 575 N.E.2d at 744.

179. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1723 (Stevens, J., concurring).

180. *See supra* notes 100-02 and accompanying text.

181. State v. Cram, 600 A.2d 733, 734 (Vt. 1991).

the lesser evil.[182] In other words, he must convince the court that not using marijuana would have caused greater harm than using the drug and breaking the law.[183] He must also prove that he acted to prevent imminent harm and that he reasonably believed that marijuana use would avoid the potential harm.[184] A recreational drug user would have difficulty using the defense because he would have to show that his use began with the intent of alleviating a severe, imminent bodily condition. Finally, a defendant would be forced to prove that he tried legal drugs but that none of them were as effective as marijuana.[185]

However, some patients can successfully use the medical necessity defense. To correctly assert the defense, a patient would first have to prove that he used the marijuana with the intention of improving a medical ailment.[186] He would have to show that his action was in response to imminent harm and that he reasonably believed that the marijuana would alleviate the medical condition or the painful symptoms associated with the ailment.[187] Second, he would have to demonstrate that there was no legal alternative to marijuana for effective treatment of his medical condition.[188] One way of proving this element would be to show that the patient had tried other legal alternatives but had found them ineffective.[189] Finally, the defendant would need to prove that he was faced with two evils and that he chose the lesser evil.[190] This balancing of harms would require him to convince the court that the harm to society in letting him use marijuana was less than the human suffering sought to be avoided.[191] Using these requirements, individuals should be allowed to prove that the necessity defense applies to them. The U.S. Supreme Court was mistaken to deny them this opportunity.

Many of the Cooperative's patients should be able to invoke the defense. They face a choice of evils because they are required to violate the law in order to prevent severe pain, nausea, loss of appetite or sight, and other serious ailments.[192] When the suffering is great enough, the benefits of marijuana use should outweigh the possible dangers to society. The patients also face imminent harm, such as excruciating pain, severe spasms, blindness, and even death, if they are not allowed access to marijuana.[193] It seems likely that their sole intention in using marijuana is to alleviate this harm.

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182. *Id.* at 735.
183. *Id.*
184. *Id.*
185. *See id.*
186. *See supra* note 45 and accompanying text.
187. *See supra* note 45 and accompanying text.
188. *See supra* note 45 and accompanying text.
189. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1114 (9th Cir. 1999).
190. *See supra* note 45 and accompanying text.
191. *See supra* notes 147-49 and accompanying text.
192. Respondent's Brief at 5, *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1711 (No. 00-151).
193. *Id.*

There is often no legal alternative to using marijuana because the legal drugs are not effective.[194] A legal form of the THC chemical in marijuana exists in a pill called Marinol.[195] However, this pill is not an effective treatment for all patients:

> Marinol is taken orally, in pill form. Patients suffering from severe nausea and retching cannot tolerate the pills and thus do not benefit from the drug. There are likely other reasons why smoked marijuana is sometimes more effective tha[n] Marinol. The body's absorption of the chemical may be faster or more complete when inhaled.[196]

The necessity defense requires that there be a *reasonable* legal alternative before it is precluded.[197] Marinol is not a reasonable alternative for some people because they cannot swallow the pill or keep it in their system long enough to digest it so as to enjoy its benefits.[198] Petitioning the government to reschedule marijuana as a Schedule II drug is also not a reasonable alternative. Such a petition has already been attempted, and it took almost two decades to resolve.[199] If such an alternative were feasible, then patients would be required to obey the CSA, but "it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years [or more] if the patient requires marijuana to alleviate a current medical problem."[200] By the time another petition for rescheduling is decided, the patients will likely have died.

VI. CONCLUSION

The fight for the medicinal use of marijuana has not ended with the U.S. Supreme Court's recent decision. Despite the ruling, eight states—Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington—have medical marijuana laws similar to California's and show no signs of repealing the laws.[201] In fact, one month after the Court's ruling, Nevada's governor signed a bill "allowing 'seriously ill' patients to use marijuana for medical

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194. *See* Jenks v. State, 582 So. 2d 676, 677 (Fla. Dist. Ct. App. 1991).

195. Respondent's Brief at 6, *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1711 (No. 00-151).

196. *Id.* at 7.

197. United States v. Bailey, 444 U.S. 394, 410 (1980).

198. Respondent's Brief at 7, *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1711 (No. 00-151).

199. *See supra* notes 109-16 and accompanying text.

200. United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1102 (N.D. Cal. 1998).

201. *Statelines Medical Marijuana: Supreme Court Ruling Has Little Effect*, AMERICAN HEALTH LINE (June 14, 2001), *available at* http://www.americanhealthline.com.

purposes."[202] To date, there has been no federal movement to prohibit the laws in these states.[203] Furthermore, according to an operator of one of San Francisco's cannabis clubs, "business has thrived" since the ruling.[204]

There are individuals who endure tremendous suffering, whether due to glaucoma, AIDS, cancer, or some other severe illness, and thus can alleviate the symptoms by using marijuana. When an individual is faced with deciding between severe bodily harm and compliance with the law, the law should allow the person to relieve his suffering. The necessity defense is not precluded by the Controlled Substances Act and is an equitable and just legal remedy for people facing these decisions.

Emily Farr

202. *Statelines Nevada: Governor Signs Medical Marijuana Bill*, AMERICAN HEALTH LINE (June 15, 2001), *available at* http://www.americanhealthline.com.

203. *Statelines Medical Marijuana: Supreme Court Ruling Has Little Effect*, *supra* note 201.

204. *Id.*

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