

STIRRING THE POT: LOCAL MUNICIPALITIES'
INFLUENCE ON PROSECUTORIAL DISCRETION UNDER
THE MICHIGAN MEDICAL MARIHUANA ACT (MMMA)
AND AN ULTIMATE CALL FOR REFORM OF THE
MMMA

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I. INTRODUCTION

AMBIGUOUS statutes pose many challenges for those charged with the duty of law enforcement, including prosecutors and courts responsible for interpreting the law. A statute is said to be ambiguous when it “is capable of being understood by reasonably well-informed persons in two or more different senses.”¹ The standard rule is that “only statutes which are of doubtful meaning are subject to the process of statutory interpretation.”² When it is not possible to determine a clear rule of law from a statute, it is likely that the interpreter will look to the intent of the legislature for guidance.³ This is a difficult task in itself and, due to the subjectivity of interpretation, often results in disputes of opinion. In order to minimize conflict, all legislators should strive to produce well-drafted statutes so that prosecutors and courts have clear guidance.⁴ This is especially important at two stages in the criminal law process: first, when the prosecutor decides to charge an individual for violation of a statute; and second, when the court has to apply the law to facts of any given case.⁵ This comment will focus

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1. Norman J. Singer & J.D. Shambie Singer, *The Problem of Ambiguity*, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:2 (7th ed. 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. For prosecutors, this is particularly important when evaluating whether probable cause exists to charge a defendant with a crime. This involves a comparison of the criminal offense with the facts of a situation. *See, e.g.,* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 864 (1996) (“It is clearly unethical for a prosecutor to charge an accused with offenses for which the prosecutor knows there is no factual basis. The ABA’s Model Rules of Professional Conduct ... Rule 3.8(a) provides that ‘[t]he prosecutor in a criminal case shall ... refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.’”). Probable cause then translates to the trial, where a prosecutor must prove the defendant committed the crime “beyond a

on the first stage in the criminal law process in relation to prosecutors' discretion in charging individuals in violation of the Michigan Medical Marihuana Act (MMMA).

In November of 2008, voters in Michigan passed Proposal 1 with 63% approval⁶ of legalizing the use of medical marihuana.⁷ This ballot initiative went into effect in December of 2008, known as the MMMA.⁸ The MMMA authorizes the use of medical marihuana for qualifying patients who have a debilitating medical condition.⁹ This grants patients and caretakers immunity from state prosecution if they fulfill the requirements of the MMMA.¹⁰ However, the MMMA does not address how a qualifying patient with a debilitating medical condition or their respective caregivers can actually obtain medical marihuana.¹¹ Specifically, the MMMA is silent in regards to medical marihuana dispensaries or cooperatives.¹² This silence, interestingly, has been construed to *not* generate an ambiguity in the statutory language.¹³

Regardless of the distinction between ambiguity and statutory silence, this comment will explore how the lack of statutory language in the MMMA has, nonetheless, created confusion pertaining to the legality of medical marihuana dispensaries in Michigan. Furthermore, this comment will explore how the poorly written MMMA has subsequently caused municipalities in Michigan to enact ordinances that either limit or sustain prosecutors' discretion. This has been accomplished by protecting local medical marihuana dispensaries in operation or banning their existence as a whole. The competing social and political interests of municipalities has generated an inconsistent patchwork of

reasonable doubt" to receive a conviction. *Id.* When courts apply the law to a set of facts, they rely on the doctrine of stare decisis. "[S]tare decisis directs courts to adhere not only to the holdings of their prior cases but also to their explications of the governing rules of law. Stare decisis promotes the evenhanded, predictable, and consistent development of legal principles; fosters reliance on judicial decision; and contributes to the actual and perceived integrity of the judicial process." 2A FEDERAL PROCEDURE § 3:789 (Lawyer's ed. 2012). *But see* 21 C.J.S. *Courts* § 201 (2012) ("Stare decisis does not prevent a court from reconsidering decisions because of error in the interpretation of statutes, nor from reassessing a decision that is in conflict with a previous statutory enactment to which the decision makes no reference, and which is made without reviewing or construing the statute; in such a case, the statute should be followed, rather than the decision.").

6. 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 Nov. 16, 2012, 2:36:24 PM PST).

7. The spelling of "marihuana" is used in this way to be consistent with the terminology in the Michigan Medical Marihuana Act and subsequent case law interpreting the MMMA.

8. MICH. COMP. LAWS ANN. §§ 333.26421-.26429 (West 2008).

9. *Id.*

10. MICH. COMP. LAWS ANN. § 333.26424.

11. Larry Gabriel, *Getting Carded: Fuming Over How Many Months It Takes for the State to Issue Medical Marijuana Cards*, METROTIMES (Detroit, Mich.), Feb. 8, 2012, <http://metrotimes.com/mmj/getting-carded-1.1268708> ("The law doesn't say where a person can get medical marijuana. Where does a person go?"). *See also* MICH. COMP. LAWS ANN. §§ 333.26421-.26429.

12. *Michigan Medical Marijuana*, MICH. MUN. LEAGUE, <http://www.mml.org/resources/information/mi-med-marihuana.html> (last visited Nov. 17, 2012).

13. *See discussion infra* Part II.B.

local laws in Michigan, which seek to fill the void created by the MMMA's lack of statutory language in regards to medical marihuana dispensaries.¹⁴ Not only this, but the social and political agendas of the municipalities are competing with the overall state's expressed preference in legalizing medical marihuana use.¹⁵ As such, prosecutors may be torn between serving the interests of their municipality and the state as a whole.¹⁶ This comment takes the position that this tension greatly influences prosecutors' charging discretion.¹⁷

It is not surprising that the MMMA was called "one of the worst pieces of legislation" by a district court in Michigan.¹⁸ Ultimately, including express language addressing medical marihuana dispensaries in the MMMA will help to facilitate a clearer, less confusing piece of legislation that will assist prosecutors, who may be affected by their community's social and political interests. Furthermore, including language in the MMMA regarding dispensaries will do justice to the original intent behind the Act, which is for individuals with certain medical conditions to obtain and use medical marihuana to lessen their debilitating symptoms. Michigan can look to other states that have enacted similar legislation for guidance on how to address medical marihuana dispensaries. Most importantly, this will ensure that the qualifying patients, who were intended to benefit from the MMMA, actually *are* protected by the law.

Part II, subsection A, of this article outlines the history of medical marihuana legislation, including the conflict between federal and state laws on this subject. Part II, subsection B, turns to the enactment of the MMMA and its current form, highlighting its specific shortcoming in failing to include language about medical marihuana dispensaries. Part III, subsection A, discusses how local municipalities in Michigan have taken it upon themselves to decide the legality of such operations, which has resulted in different outcomes depending on the locality. Part III, subsection B, examines a similar situation in California, but highlights the important distinction that California has legalized medical marihuana dispensaries at the state level. Part IV turns to the theory behind prosecutorial discretion, examining various influences on prosecutors and how they should ultimately strive to be neutral. Part V is an application of the theory of prosecutorial discretion to the MMMA, concluding that the local municipalities that have enacted ordinances regarding medical marihuana dispensaries are either limiting or sustaining prosecutors' charging discretion. Part VI ultimately calls for reform of the law to include language addressing medical marihuana dispensaries. In effect, amending the MMMA would take away the current authority municipalities have in deciding the legality of such operations and would subsequently aid prosecutors by providing clear, unambiguous statutory guidance.

14. See discussion *infra* Part III.A.

15. Compare *infra* Part III.A, with Part II.B (stating that the MMMA was passed with 63% approval, legalizing the use of medical marihuana).

16. See discussion *infra* Parts III.A and V.

17. See discussion *infra* Part V.

18. *People v. Redden*, 799 N.W.2d 184, 189 (Mich. Ct. App. 2010).

II. THE MICHIGAN MEDICAL MARIHUANA ACT: ORIGIN, INFLUENCE, AND ITS CURRENT FORM

A. *Federal and State Law on Medical Marihuana Use*

The rise of state laws in the United States addressing marihuana originate from the division of power between federal and state governments. States have been entrusted with police powers, which grant them the ability to regulate in order to protect “the public peace, good order, safety, and health” of its citizens.¹⁹ In line with these objectives, criminal law has traditionally been recognized as an area subject to state regulation.²⁰ Similarly, within the scope of a state’s police power, unlawful use of dangerous drugs has also been subject to state legislative regulation.²¹ Based on a state’s regulatory power over criminal law and drug use, it logically flows that medical marihuana is also subject to state regulation.

Currently under federal law, specifically the Controlled Substances Act, there is no acceptable use for marihuana due to the potential detrimental effects on the health and general welfare of the American people.²² Therefore, “it is illegal to import, manufacture, distribute, and possess marijuana for any reason”²³ according to federal law. Furthermore, marihuana is listed as a Schedule I drug.²⁴ Schedule I drugs have “a high potential for abuse” and have “no currently accepted medical use in treatment in the United States.”²⁵ Researchers suggest that while the amount of marihuana usage has not increased, marihuana-related arrests have, however, risen on a national level.²⁶ From the 1990s to early 2000s, there was an approximate annual increase of 8.74% arrests per year.²⁷

19. 5 MICHIGAN CIVIL JURISPRUDENCE *Constitutional Law* § 105 (2012).

20. Marcia Tiersky, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547, 584 (1999).

21. 28 C.J.S. *Drugs and Narcotics* § 212 (2012).

22. Controlled Substances Act, 21 U.S.C. § 801(2) (2007). “The legislature has the power to define what drugs it considers dangerous and to place controls on such drugs ... [therefore] it is within the power of Congress or a state to classify marijuana as a narcotic drug, or as a controlled substance, and to proscribe its possession and use.” 28 C.J.S. *Drugs and Narcotics* § 212.

23. Controlled Substances Act, 21 U.S.C. § 801(2) (2007). See also Tiersky, *supra* note 20, at 578; Daniel J. Pfeifer, *Social Perspectives: Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 363 (2011).

24. 21 C.F.R. § 1308.11 (2012).

25. 21 U.S.C. § 812(b)(1)(a)-(b) (2012). See also *United States v. Mich. Dep’t of Cmty. Health*, No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445, at *5 (W.D. Mich. June 3, 2011); *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“[C]haracterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses.”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 490 (2001) (classifies marijuana as a Schedule I substance, meaning that Congress recognizes no acceptable medical uses for it, and its possession is generally prohibited).

26. Jon Gettman, *Marijuana in Michigan: Arrests, Usage, and Related Data*, BULLETIN OF CANNABIS REFORM 2 (2009), <http://www.drugscience.org/States/MI/MI.pdf>.

27. *Id.* This increase may be attributed to the increased enforcement of smaller neighborhood crimes in an effort to reduce the risk of more serious crime. This originates from the “broken windows theory,” a criminological theory that states “a few broken windows in an empty building quickly lead to more smashed panes, more vandalism and eventually to break-ins. The tendency

Despite federal law's classification of marihuana, states have the freedom to adopt their own policy in the enforcement of federal law.²⁸ According to the Michigan Public Health Code, MCLA Section 333.7403, an individual is "guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00, or both" if they are in possession of marihuana.²⁹ Despite the illegality of marihuana, Michigan had nearly 1,000,000 past-year marihuana users in 2007, resulting in approximately 20,000 arrests for marihuana offenses in that year alone.³⁰ While it is true that many use marihuana for recreational purposes only, there are many individuals who benefit from the use of marihuana for legitimate medical purposes.³¹ An evolution of medical research has suggested "beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions."³² As such, these individuals prompted state legislative action that would provide protection from prosecution for what would otherwise be the illegal possession of marihuana.³³

The illegality of marihuana on a federal level was addressed and disregarded in the "Findings and Declarations" Section of the Michigan Medical Marijuana Act. MCLA Section 333.26422(c) states: "Although federal law currently prohibits any use of marihuana ... states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law."³⁴ This declaration acknowledges that Michigan is exercising its police powers in order to protect "the public peace, good order, safety, and health" of its citizens.³⁵ As such, Michigan preserved the illegality of non-medical marihuana use and carved out an exception for those using marihuana for medical purposes.³⁶ Changing the law in Michigan had the "practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana."³⁷

Even though individual states, including Michigan, have granted immunity to those in possession of marihuana for legitimate medical purposes, state-level

for people to behave in a particular way can be strengthened or weakened depending on what they observe others to be doing." *Can the Can*, *ECONOMIST*, Nov. 22, 2008, at 67, available at <http://www.economist.com/node/12630201>. For example, a "zero tolerance" crime policy was adopted by Mayor Rudolph Giuliani in the mid-1990s in New York City. *Id.* See also *Floyd v. City of New York*, 813 F. Supp. 2d 417, 422 (S.D.N.Y. 2011).

28. MICH. COMP. LAWS ANN. § 333.26422(c) (West 2008) ("Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law.").

29. MICH. COMP. LAWS ANN. § 333.7403(2)(d) (West 2008).

30. Compared to approximately 873,000 arrests on the national level. Gettman, *supra* note 26, at 2.

31. See generally NAT'L RESEARCH COUNCIL, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (Janet E. Joy et al. eds., 1999).

32. MICH. COMP. LAWS ANN. § 333.26422(a) (West 2008).

33. See *supra* text accompanying notes 29-32.

34. MICH. COMP. LAWS ANN. § 333.26422(c) (West 2008).

35. 5 MICHIGAN CIVIL JURISPRUDENCE *Constitutional Law* § 105.

36. See *supra* text accompanying notes 29-33.

37. MICH. COMP. LAWS ANN. § 333.26422(b) (West 2008).

legislation does not have an effect on the federal law's strict prohibition of marihuana. Specifically addressed by the court in *United States v. Michigan Department of Community Health*, the MMMA "d[oes] not alter the existing federal prohibition against marijuana."³⁸ In effect, the use of marihuana remains a federal felony and the federal government can "continue to enforce federal law," since it preempts the MMMA.³⁹ This is true even if medical marihuana is "possessed for ... purposes in accordance with [Michigan] law."⁴⁰

Falling within the scope of a state's police power to regulate the health and safety of its citizens, unlawful use of dangerous drugs has been subject to state legislative regulation.⁴¹ Specifically in regards to medical marihuana, it has been argued that "states are more likely to find the best medical marijuana policy because they can act as 'laboratories for experimentation.'"⁴² Legislation on a state level may be a better forum to take risks that are inherent in experimentation, as "a bad policy decision at the state level will harm only the constituents of that state, whereas a bad federal policy harms all Americans."⁴³ Furthermore, a state is better equipped to cater to the immediate needs of its citizens due to proximity.⁴⁴ This is because legislative action on a state level affords citizens a more direct opportunity to participate in their own governance.⁴⁵ "The importance of citizen participation is particularly exemplified in the medical marijuana issue when referenda are used; referenda is the most direct form of self-government available."⁴⁶

B. *Enactment of the Michigan Medical Marihuana Act*

On November 4, 2008, Proposal 1 was included on the ballot in Michigan, which gave voters the option to approve the legalization of medical marihuana.⁴⁷ Sixty-three percent of voters approved the initiative, which came to be known as

38. *United States v. Mich. Dep't of Cmty. Health*, No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445, at *7 (W.D. Mich. June 3, 2011). *See also* *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010); *United States v. Chapman*, No. 09-20591-BC, 2010 U.S. Dist. LEXIS 101599, at *3 (E.D. Mich. Sept. 27, 2010) ("The Court rejected Defendant's arguments regarding the Michigan Medical Marihuana Act, because possession of marijuana remains an offense under federal law").

39. *Mich. Dep't of Cmty. Health*, 2011 U.S. Dist. LEXIS 59445, at *8. *See also Hicks*, 722 F. Supp. 2d at 833.

40. *Mich. Dep't of Cmty. Health*, 2011 U.S. Dist. LEXIS 59445, at *20. *See also Hicks*, 722 F. Supp. 2d at 833.

41. 5 MICHIGAN CIVIL JURISPRUDENCE *Constitutional Law* § 105.

42. Tiersky, *supra* note 20, at 586.

43. *Id.* at 587.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See Notice: State Proposals-November 4, 2008 General Election: Proposal 08-1: Proposed Legislative Amendment*, STATE OF MICHIGAN, http://www.michigan.gov/documents/sos/ED-20_11-08_Props_Poster2_251561_7.pdf (last visited Nov. 17, 2012).

the MMMA, and it went into effect one month later.⁴⁸ It is a commonly held belief that proponents of medical marihuana tend to fall on the liberal side of the political spectrum.⁴⁹ This point was reaffirmed in Michigan's overall voting results in the same year. In the 2008 presidential election, 57% of the popular vote favored the democratic candidate, and now President, Barack Obama.⁵⁰ Currently, "over 80% of Americans support decriminalizing marijuana for medical use."⁵¹

After the enactment of the MMMA, Michigan became the thirteenth state to legalize the use of medical marihuana.⁵² Since 2008, five other states and the District of Columbia have followed this trend.⁵³ The jurisdictions that have legalized the use of medical marihuana have differed in their methods, either using a ballot initiative or by introducing a bill into the state legislature.⁵⁴ In Michigan, the MMMA created an exception to The Public Health Code, MCLA Section 333.7403, and granted immunity from criminal prosecution to "qualifying patients" and their designated "caregivers" who possess marihuana.⁵⁵ "Medical use" of marihuana, as defined under the MMMA, is "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."⁵⁶

48. *18 Legal Medical Marijuana States and DC*, *supra* note 6. The MMMA was effective on December 4, 2008 but does not apply retroactively. "The general rule . . . is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect." *People v. Carroll*, No. 297541, at *1 (Mich. Ct. App. May 31, 2011) (quoting *People v. Russo*, 487 N.W.2d 698, 702 (1992)).

49. Jesse McKinley, *Petition Drive Challenges Medical Marijuana Ban in Rural California County*, N.Y. TIMES, Nov. 4, 2011, at A15, available at <http://www.nytimes.com/2011/11/04/us/medical-marijuana-ban-challenged-in-kern-county.html?pagewanted=all&r=0>. For an example pertaining to Michigan, see Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 133 (2012) ("There, the movement for legalization began at the city level in Ann Arbor, home of the University of Michigan, a town with a longstanding permissive attitude towards marijuana.").

50. *2008 Election Results: President Map*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/president/map.html>.

51. Allison M. Busby, *Seeking a Second Opinion: How to Cure Maryland's Medical Marijuana Law*, 40 U. BALT. L. REV. 139, 148 (2010) (citing to Press Release, ABC News/Wash. Post, High Support for Medical Marijuana (Jan. 18, 2010), available at <http://abcnews.go.com/images/PollingUnit/1100a3MedicalMarijuana.pdf>).

52. *18 Legal Medical Marijuana States and DC*, *supra* note 6.

53. *Id.*

54. *Id.*

55. MICH. COMP. LAWS ANN. § 333.26424 (West 2008). See also *People v. King*, 2011 Mich. App. LEXIS 224 (2011) ("[T]he MMA does not legalize the possession, manufacture, distribution, or use of marijuana."); *People v. Anderson*, 809 N.W.2d 176, 183 (Mich. Ct. App. 2011) ("[A] defendant may nevertheless establish the elements of the defense provided under the MMA and avoid criminal liability"), *vacated*, 817 N.W.2d 95 (Mich. 2012).

56. MICH. COMP. LAWS ANN. § 333.26423(e) (West 2008), cited in *People v. Bylsma*, 816 N.W.2d 426, 431 n.2 (Mich. Ct. App. 2011).

In order to seek protection from criminal prosecution under the MMMA, an individual must meet requirements as set forth within the statute. To be deemed a “qualifying patient” under the MMMA, a physician must diagnose an individual with a “debilitating medical condition” itemized within the scope of the statute.⁵⁷ If this is satisfied, the physician will give “written certification” stating that “the patient is likely to ... benefit from the medical use of marihuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with ... [that] condition.”⁵⁸ Once a patient has obtained written certification, they must register with the State of Michigan Department of Community Health through an application process and receive a registry identification card.⁵⁹ Should a qualifying patient forego the option to have a primary caregiver, they can possess 12 marihuana plants and no more than 2.5 ounces of usable marihuana for their personal use.⁶⁰ So long as a patient complies with these requirements, they cannot be arrested, prosecuted, or subject to any penalty for the possession of marihuana.⁶¹

Similarly, if a qualifying patient designates a primary caregiver, they must also meet requirements set forth in the MMMA. Like a patient, a primary caregiver must register and receive a registry identification card from the State of Michigan Department of Community Health.⁶² A “primary caregiver” is a person 21 years of age, “who has agreed to assist with a patient’s medical use of marihuana and who has never been convicted of a felony involving illegal drugs.”⁶³ They can grow marihuana for up to five qualifying patients (12 plants per patient), and can possess 2.5 ounces of usable marihuana for each patient.⁶⁴ So long as a primary caregiver complies with these requirements, they cannot be arrested, prosecuted, or subject to any penalty for the possession of marihuana.⁶⁵

However, the MMMA also provides an affirmative defense should an individual be required to defend against prosecution for possession or use of medical marihuana. Like the immunity from prosecution described above, in order to raise a successful defense, “persons can only assert them if they have complied with the [M]MMA’s requirements.”⁶⁶ For example, a defendant is precluded from raising a defense if they possess “more marijuana plants than

57. MICH. COMP. LAWS ANN. §§ 333.26424(f), 333.26428(1) (West 2008). A “debilitating medical condition” is defined in § 333.26423(a).

58. MICH. COMP. LAWS ANN. § 333.26423(l) (West 2008).

59. MICH. COMP. LAWS ANN. § 333.26426(a) (West 2008).

60. MICH. COMP. LAWS ANN. § 333.26424(a) (West 2008).

61. *Id.* *But see* *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 921 (W.D. Mich. 2011) (“[T]he MMMA addresses potential adverse action by the state; it does not regulate private employment.”).

62. MICH. COMP. LAWS ANN. § 333.26423(i) (West 2008).

63. *Id.* § 333.26423(g).

64. MICH. COMP. LAWS ANN. § 333.26424(a).

65. *Id.*

66. *People v. Watkins*, No. 302558, 2011 Mich. App. LEXIS 1471, at *7-8 (Mich. Ct. App. Aug. 11, 2011).

permitted under the [M]MMA and did not have them in an enclosed, locked facility as required under the [M]MMA.”⁶⁷

While it is true that the MMMA lists the specific quantity and form of marihuana that can lawfully be possessed by qualifying patients and their caregivers, it does not address *how* they can actually obtain marihuana to achieve effective medical treatment.⁶⁸ Specifically, the MMMA is silent regarding how a qualifying patient or primary caregiver is to obtain the marijuana seeds or plants to personally cultivate themselves.⁶⁹ Alternatively, should patients and caregivers choose to forego personal cultivation, the MMMA is silent regarding medical marihuana dispensaries or cooperatives.⁷⁰ This issue seems contrary to the intent of the Act because in order for a qualifying patient to use medical marihuana, it must first be obtained.⁷¹

In contrast, other states that have legalized the use of medical marihuana *have* specifically addressed the legality of medical marihuana dispensaries or cooperatives. Looking to other states’ definitions of a dispensary or cooperative, there appears to be no single definition. However after comparing multiple statutes, the general idea is that primary caregivers or qualifying patients operate a facility, where medical marihuana is made available (over-the-counter) to primary caregivers or qualifying patients who comply with the state’s requirements.⁷² For example, compliance can be in the form of receiving written certification from a physician, applying for and receiving a registration card through the appropriate state regulatory body.⁷³ Dispensaries are viewed as a convenience to qualifying patients or their primary caregivers because growing marihuana plants “require[s] a substantial investment of time and capital.”⁷⁴ In addition, dispensaries can prove themselves to be of great economic benefit. In California, for instance, “dispensaries take in \$2 billion every year, increasing the state’s tax revenue by \$100 million annually.”⁷⁵

The lack of language in the MMMA regarding this type of operation has created confusion as to the legality of such dispensaries or cooperatives in the State of Michigan. This stems from the fact that other states with similar statutes have expressly addressed dispensaries and have either protected or banned their

67. *Id.* at *8 (citing *People v. Anderson*, 809 N.W.2d 176, 185 (Mich. Ct. App. 2011)).

68. *See State v. McQueen*, 811 N.W.2d 513, 525 (Mich. Ct. App. 2011).

69. *Id.*

70. *Michigan Medical Marijuana*, *supra* note 12.

71. MICH. COMP. LAWS ANN. § 333.26422 (West 2008) (“Michigan joins in [the] effort [of legalizing medical marihuana] for the health and welfare of its citizens” since there are “beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.”). It is only logical that in order for patients to be alleviated of these symptoms, they must first be able to obtain medical marihuana for their treatment.

72. *See, e.g., EMERYVILLE, CAL. CODE* tit. 5, ch. 28, § 3 (2012) (providing a sample definition of a “medical marijuana dispensary”). *See also infra* Part III.B. for another example definition in California.

73. *Id.*

74. Busby, *supra* note 51, at 154.

75. *Id.*

existence.⁷⁶ Recently, however, emerging perspectives have interpreted the silence in the MMMA as prohibiting the operation of medical marijuana dispensaries or cooperatives. For example, “[t]he Michigan Department of Community Health interprets the [MMMA] as saying that it is illegal to operate a marijuana dispensary.”⁷⁷

Bill Schuette, the Attorney General for the State of Michigan, has supported the proposition set forth by the Department of Community Health. In a published opinion, he asserted that the MMMA *does not* generate an ambiguity in regards to medical marijuana dispensaries.⁷⁸ To support his opinion, he suggested “an ambiguity exists only where the words of the statute can be viewed with more than one accepted meaning.”⁷⁹ Since there are no words in the MMMA regarding dispensaries, it cannot be open to interpretation and certainly not subject to more than one meaning.⁸⁰ “A statute’s silence cannot, by definition, create more than one accepted meaning and, thus, an ambiguity.”⁸¹ As such, in evaluating the plain language of the MMMA, Schuette concluded that “[t]he Act does not provide for the operation of cooperatives.”⁸²

Furthermore, in 2011, the Michigan Court of Appeals supported the notion that medical marijuana dispensaries are illegal under the MMMA.⁸³ Due to the recent genesis of the MMMA, the illegality of medical marijuana dispensaries was first decided by the Michigan Court of Appeals in *State v. McQueen*.⁸⁴ The court noted that the MMMA failed to specify “*how* a primary caregiver or a qualifying patient ... is to obtain mari[h]uana.”⁸⁵ In reaching the same conclusion as Attorney General Schuette and the Michigan Department of Community Health, the court held that the “MMMA has no provision governing the dispensing of marijuana” and, therefore, “the MMMA does not authorize marijuana dispensaries.”⁸⁶

76. *See, e.g., infra* Part III.B.

77. *Michigan Medical Marijuana, supra* note 12.

78. Michigan Medical Marijuana Act, 7259 Op. Mich. Att’y Gen. (2011), available at <http://www.ag.state.mi.us/opinion/datafiles/2010s/op10338.htm>.

79. *Id.* (citing *Bronson Methodist Hosp. v. Allstate Ins. Co.*, 779 N.W.2d 304 (2009)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *State v. McQueen*, 811 N.W.2d 513, 531 (Mich. Ct. App. 2011).

84. *Id.* at 527.

The question becomes whether the medical use of marijuana permits the sale of marijuana. We hold that it does not because the sale of marijuana is not the equivalent to the delivery or transfer of marijuana ... the sale of marijuana consists of the delivery or transfer *plus* ... compensation. The “medical use” of marijuana, as defined by the MMMA, allows for the “delivery” and “transfer” of marijuana, but not the “sale” of marijuana.

Id.

85. *Id.* at 525 (emphasis added).

86. *Id.*

III. HOW LOCAL MUNICIPALITIES IN MICHIGAN AND CALIFORNIA HAVE ADDRESSED MEDICAL MARIHUANA DISPENSARIES

A. *Local Municipalities' Reactions in Michigan*

Despite the opinions suggesting the illegality of medical marihuana dispensaries, municipalities in Michigan have enacted local ordinances to fill the apparent void in the MMMA regarding this type of operation.⁸⁷ This has generated an inconsistent patchwork of local laws, some of which are in direct conflict with the previously-mentioned interpretations of the MMMA.⁸⁸ Furthermore, focusing the legality or illegality of medical marihuana dispensaries on an even smaller scale gives rise to competing social and political interests that directly influence municipalities' laws. This scenario has been described as follows:

With states unable to satisfactorily address the tangential issues related to medical marijuana, including laws that regulate medical marijuana dispensing cooperatives and collectives (dispensaries), medical marijuana has become a more topical concern for local communities. County and municipal ordinances regulating medical marijuana distribution are now being enacted on a regular basis.⁸⁹

Furthermore,

At the local level, municipality regulation of medical marijuana has created yet another layer of legal confusion and disagreement. With federal policy offering little help to keep in check the proliferation of medical marijuana users and distributors, local law enforcement and governments have been forced into policing medical marijuana users, state regulatory programs, and cannabis dispensaries. Local law enforcement officials that arrest medical marijuana users, their primary caregivers, and raid dispensaries are often unable to determine whether the marijuana-related activity is for medical or recreational purposes. Newly enacted state medical marijuana laws or revisions to preexisting laws have compounded the problem as well, pressing state courts into clarifying the gaps and ambiguities in medical marijuana laws.⁹⁰

In 2010, the Michigan Court of Appeals recognized the problems arising from the recently enacted MMMA.⁹¹ In *People v. Redden*, the court emphasized the relationship between statutory interpretation and the means that enact legislation.⁹² The court stressed the MMMA was “a result of an initiative adopted by the voters. ‘The words of an initiative law are given their ordinary

87. *Michigan Medical Marijuana*, *supra* note 12.

88. *See supra* notes 77-86 and accompanying text.

89. Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 419 (2011).

90. *Id.* at 438-39.

91. *See generally* *People v. Redden*, 799 N.W.2d 184 (Mich. Ct. App. 2010).

92. *Id.* at 191.

and customary meaning as would have been understood by the voters.”⁹³ Reiterating a statement of the lower district court that the MMMA is “‘probably one of the worst pieces of legislation ... ever seen[,]’”⁹⁴ the Michigan Court of Appeals indicated the need for a clear set of statutory standards in anticipation of future problems likely to arise with the MMMA. The court insightfully noted:

No system of regulation can succeed without a clear set of rules. Those wishing to use marijuana need to know when, how, and under what conditions they can legally do so. Providers need to know under what conditions they can legally grow, harvest, and distribute their product, and the operators of the new medical-marijuana clinics that appear to be springing up on every corner need to know if they are in fact set up to dispense marijuana to the public legally. Until today, the [Department of Community Health], the Legislature, and the appellate courts have answered very few of these questions.⁹⁵

When applied to Michigan, a number of municipalities have either granted permission or prohibited the operation of medical marijuana dispensaries in their local jurisdictions. The establishment of dispensaries has been accomplished by individual registration and licensing requirements, or through compliance with local zoning ordinances upon approval by the city’s planning commission.⁹⁶ Many municipalities that have decided to address medical marijuana dispensaries have maintained strict compliance with the interpretations of the MMMA, holding that the operation of any dispensary is unlawful.⁹⁷ This is done with an express ban of dispensaries, or alternatively, by maintaining silence in adherence with interpretations of the MMMA.⁹⁸ It is no coincidence that these municipalities tend to be more conservative in regards to political and social issues, and include areas such as Grand Rapids, Michigan.⁹⁹ This suggests that the politics of the municipalities may be driving the local policies in regards to access to medical marijuana. For example, an express ban on dispensaries may serve as a barrier to patients’ access to medical marijuana if a municipality is against the state’s overall policy in allowing the legal use of medical marijuana.

93. *Id.* (citing *Welch Foods, Inc. v. Attorney Gen.*, 540 N.W.2d 693, 695 (Mich. Ct. App. 1995)). See also *Welch Foods*, 540 N.W.2d at 695 (“The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters.”); *Potter v. McLeary*, 774 N.W.2d 1, 8 (Mich. 2009).

94. *Redden*, 799 N.W.2d at 189.

95. *Id.* at 223.

96. *Michigan Medical Marijuana*, *supra* note 12.

97. *Id.* See also *supra* notes 77-86 and accompanying text.

98. See, e.g., *City of Grand Rapids: Frequently Asked Questions About Medical Marijuana*, MICH. MUN. LEAGUE (Mar. 6, 2012), http://www.mml.org/pdf/ords/medical%20marihuana_grand%20rapids.pdf; *An Ordinance Amending Section 3.08 of Article III of Ordinance No. 543, as Amended, Known and Cited as “The City of Livonia Zoning Ordinance,”* MICH. MUN. LEAGUE (June 30, 2009), <http://www.mml.org/pdf/ords/med-marihuana-livonia.pdf>.

99. 2004 Presidential Election results in Kent County, Michigan: 59% Republican, 40% Democratic, 1% other; 2008 Presidential Election Results in Kent County, Michigan: 49% Republican, 50% Democratic, 1% other. *East Grand Rapids, Michigan*, CITY-DATA.COM (2011), <http://www.city-data.com/city/East-Grand-Rapids-Michigan.html#top>.

In contrast, however, a number of Michigan municipalities have granted authority for the operation of medical marihuana dispensaries. Roseville and Tawas City, for example, have specified that medical marihuana dispensaries are permitted to conduct business in certain districts upon the approval and obtainment of a permit by the local zoning planning commission.¹⁰⁰ Alternatively, Ferndale and Hartford simply require the dispensary to obtain a permit from the city in order to lawfully operate.¹⁰¹ Most notably, Ferndale tends to be liberal in regards to politics and social policy.¹⁰² Again, this supports the notion that the political preferences of the municipalities are influencing local laws regarding medical marihuana. For example, as more liberals tend to be proponents of legal medical marihuana use,¹⁰³ municipalities with these political tendencies may want to facilitate patients' and caregivers' access to medical marihuana for effective medical treatment.

B. A Comparison of Medical Marihuana Legislation in California and Michigan

In 1996, California was the very first state to legalize the use of medical marihuana by passing Proposition 215 with 56% voter approval.¹⁰⁴ This ballot initiative went into effect in the same year, known as the Compassionate Use Act (CUA).¹⁰⁵ As the pioneer in establishing laws encompassing the use of medical marihuana, California's legislature created much of the framework that was later looked to by other states in subsequent years, including Michigan. Like the MMMA, the CUA "[r]emoves state-level criminal penalties on the use, possession and cultivation of marijuana by patients who possess a 'written or oral recommendation' from their physician that he or she 'would benefit from medical marijuana.'"¹⁰⁶

Also similar to the MMMA, the CUA did not initially address the issue of medical marihuana dispensaries. On January 1, 2004 Senate Bill 420 went into effect, amending the CUA with respect to medical marihuana dispensaries.¹⁰⁷

[The amendment] grants implied legal protection to the state's medicinal marijuana dispensaries, stating, 'Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients ... who associate within the state of California in order to collectively or cooperatively to cultivate marijuana for

100. *Michigan Medical Marijuana*, *supra* note 12.

101. *Id.*

102. 2004 Presidential Election results in Oakland County, Michigan: 50% Democratic, 49% Republican, 1% other. 2008 Presidential Election results in Oakland County, Michigan: 57% Democratic, 42% Republican, 1% other. *Ferndale, Michigan*, CITY-DATA.COM (2011), <http://www.city-data.com/city/Ferndale-Michigan.html#top>.

103. McKinley, *supra* note 49.

104. *18 Legal Medical Marijuana States and DC*, *supra* note 6.

105. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2011).

106. *18 Legal Medical Marijuana States and DC*, *supra* note 6.

107. CAL. HEALTH & SAFETY CODE § 11362.768 (West 2011).

medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions.¹⁰⁸

According to established guidelines in California, “[c]ollectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative.”¹⁰⁹ Furthermore, California specifies two types of facilities legally capable of cultivating and distributing marijuana for medical purposes: statutory cooperatives and collectives. The following defines a “statutory cooperative”:

A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. No business may call itself a “cooperative” (or “co-op”) unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. Cooperative corporations are “democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons.” The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. Agricultural cooperatives are likewise nonprofit corporate entities “since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.” Agricultural cooperatives share many characteristics with consumer cooperatives. Cooperatives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.¹¹⁰

Although not defined under California law, a “collective” is described as:

“a business, farm, etc., jointly owned and operated by the members of a group.” Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members—including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-

108. *18 Legal Medical Marijuana States and DC*, *supra* note 6.

109. EDMUND G. BROWN, JR., GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE 10 (2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf. See also CAL. HEALTH & SAFETY CODE §§ 11362.765, 11362.775 (West 2011).

110. BROWN, JR., *supra* note 109, at 8 (internal citations omitted).

members; instead, it should only provide a means for facilitating or coordinating transactions between members.¹¹¹

After the 2004 amendment took effect, California courts started recognizing the legal protection granted to medical marihuana cooperatives or collectives composed of registered qualifying patients or primary caregivers. In *People v. Hochanadel*, the court noted “that storefront dispensaries that qualify as ‘cooperatives’ or ‘collectives’ under the CUA ... and otherwise comply with those laws, may operate legally, and defendants may have a defense at trial to the charges in this case based upon the CUA ...”¹¹²

Since the CUA authorized the operation of medical marihuana cooperatives or collectives on a state level, counties have been authorized to subsequently regulate these facilities on a local level. Similar to Michigan, counties in California have required medical marihuana cooperatives and collectives to adhere to local zoning ordinances, as well as to obtain licenses or permits required by these regulations. The courts have subsequently upheld these local regulations. For example, in *County of Los Angeles v. Hill*, the court affirmed the grant of plaintiff county’s motion for a “preliminary injunction prohibiting [defendants] from dispensing marijuana anywhere in the unincorporated area of Los Angeles County ... without first obtaining the necessary licenses and permits required by County ordinances.”¹¹³

In addition, the court acknowledged the county’s authority to further regulate the operation of medical marihuana dispensaries authorized under the CUA.¹¹⁴ This conclusion is reasonable because the city has an obligation to meet the needs of its citizens, and is using the authorization of the statewide CUA amendment to regulate the legal operation of medical marihuana dispensaries within their jurisdiction. Since medical marihuana cooperatives and collectives are now authorized under the CUA, local counties have the right to regulate their operation or even place a moratorium on the authorization of permits to operate them under local land use regulations.¹¹⁵

However, unlike the CUA, the lack of language in the MMMA has been interpreted to prohibit the operation of medical marihuana dispensaries in Michigan.¹¹⁶ Similar to the CUA in California, the local counties in Michigan should *only* have this authority if the MMMA actually authorized the operation of medical marihuana dispensaries in Michigan on a state level. Therefore, the enactment of city ordinances that not only allow the dispensaries to operate, but also compel them to adhere to local zoning ordinances and registration requirements are in direct conflict with the current interpretations of the MMMA.

111. *Id.* (internal citation omitted).

112. 98 Cal. Rptr. 3d 347, 351 (Cal. Ct. App. 2009).

113. 121 Cal. Rptr. 3d 722, 725 (Cal. Ct. App. 2011).

114. *Id.* at 728. *See also* Cnty. of Sonoma v. Superior Court, 118 Cal. Rptr. 3d 915, 916 (Cal. Ct. App. 2010); City of Corona v. Naulls, 83 Cal. Rptr. 3d 1, 3 (Cal. Ct. App. 2008).

115. *See, e.g.*, City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1, 7-8 (Cal. Ct. App. 2009); Wilson v. Cnty. of Merced, No. F057130, 2010 WL 658718, at *1 (Cal. Ct. App. Feb. 25, 2010).

116. *See supra* notes 77-86 and accompanying text.

This inconsistency has generated a variety of authorized and unauthorized activities in counties all over the State of Michigan. As a result, this has either sustained or limited local prosecutors' discretion in regards to their ability to prosecute for the illegal operation of dispensaries in their jurisdictions. This is a cause for concern because there are many competing factors that influence a prosecutor. When they have the ability to prosecute, officials may be motivated by many forces outside of the ultimate goal of fighting crime. Here, prosecutors may be influenced by the political or social agendas of the respective municipalities that they serve. Specifically, municipalities that have allowed the lawful operation of medical marijuana dispensaries have created a conflict for their local prosecutors, who are now torn between serving the immediate preferences of their community and maintaining adherence to the statewide interpretations indicating that medical marijuana dispensaries are illegal.¹¹⁷

Challengers of the legal operation of medical marijuana dispensaries may have two main reasons for their position. First, they may generally oppose the use of medical marijuana and want to create barriers to its access. Second, opponents may believe there is a correlation between the operation of medical marijuana dispensaries and an increase in crime rates in a given area. In 2011, The RAND Corporation published the results of a study that investigated the connection, if any, between an increase in crime rates and the operation of medical marijuana dispensaries.¹¹⁸ Examining California's medical marijuana dispensaries and crime reports, the study concluded that these operations do not necessarily attract crime.¹¹⁹ In fact, the study reveals that crime actually *decreases* because "[d]ispensary regulations bring greater oversight ... to local communities," meaning an increase in security, an increase in foot traffic, and an increase in police presence.¹²⁰

Similarly, proponents of the legal operation of medical marijuana dispensaries may have many reasons to justify their opinion. First, they may generally support the use of medical marijuana and want to provide more convenient access to qualifying patients and their primary caregivers. Second, as previously mentioned, proponents may see economic benefits in the operation of a dispensary because it would provide business and employment opportunities in the area—subsequently increasing a state's tax revenue.¹²¹ Lastly, and most importantly, proponents may argue the operation of medical marijuana dispensary gives full effect to the legislative intent behind any state law that legalizes the use of medical marijuana. The laws grant protection to certain individuals who would medically benefit from the use of medical marijuana to

117. See discussion *infra* Part V.

118. See generally MIREILLE JACOBSON ET AL., REGULATING MEDICAL MARIJUANA DISPENSARIES: AN OVERVIEW WITH PRELIMINARY EVIDENCE OF THEIR IMPACT ON CRIME (2011), available at http://americansforsafeaccess.org/downloads/RAND_Study.pdf.

119. *Id.* at 12.

120. RAND Study Finds No Link Between Medical Marijuana Dispensaries and Crime, AMERICANS FOR SAFE ACCESS (Sept. 20, 2011), <http://safeaccessnow.org/article.php?id=6809>. See also JACOBSON ET AL., *supra* note 118, at 11 fig.1 (pinpointing medical marijuana dispensaries in Los Angeles).

121. See, e.g., Busby, *supra* note 51, at 154.

alleviate their debilitating symptoms. This is a legitimate goal to provide for the health of state citizens, and without the legalization of medical marihuana dispensaries, there is a significant barrier standing in the way of qualifying patients' receipt of effective medical treatment.

IV. PROSECUTORIAL DISCRETION: BACKGROUND THEORY

The uncertainty of the MMMA regarding medical marihuana dispensaries has implicitly delegated discretion and interpretation of the statute to those at the law enforcement level. As a practical matter, many decisions, such as the decision to charge an individual with a crime, are left to the discretion of individual prosecutors. This discretion is very broad.

Prosecutors' power has been described as "ha[ving] more control over life, liberty, and reputation than any other person in America."¹²² Undoubtedly, this immense source of power has great consequences, for better or worse, for those who find themselves involved with the criminal justice process. "[T]he future of many individuals and the protection of the community may hinge on the judgments of a prosecuting attorney who, through inertia, bias, inability or inexperience, unwisely exercises the responsibilities of his office."¹²³

Most importantly, a prosecutor's power is unmatched by any other governmental official, as their discretion is unreviewable by any process.¹²⁴ The rationale behind this is grounded in an effort to maintain separation of powers within the branches of government. Specifically, prosecutors are not responsible for answering to judicial supervision, nor regulatory or statutory policies of prosecution.¹²⁵ In the alternative, if they were subject to these constraints, the arising concern is that the body responsible for reviewing decisions would become a "superprosecutor."¹²⁶

Courts have noted that it would be "unwise" for a regulatory body to review and, potentially, compel a prosecutor to prosecute a case.¹²⁷ These doubts stem from issues such as the standard of proof, the weight of authority given to the prosecutor, and the admissibility of collateral factors.¹²⁸ Alternatively, it has been argued that the legislative branch lacks an interest in regulating prosecutors

122. Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to do with It?*, 18 GEO. J. LEGAL ETHICS 739, 739 (2005).

123. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1057 (1955).

124. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009). See also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1259 (2011) ("A prosecutor's charging decision is the heart of the prosecution function. The charging decision involves an extraordinary exercise of discretionary power that is unreviewable.")

125. *Inmates of Attica Corr. Facility*, 477 F.2d at 380.

126. *Id.*

127. *Id.* at 380-81.

128. *Id.* at 380.

because they are a necessary component to fight crime.¹²⁹ If anything, there is a very strong incentive for legislators to give prosecutors freedom because it yields more convictions of criminal offenders.¹³⁰

Even though prosecutors are not bound by a formal review process, they are subject to boundaries set by informal mechanisms, such as public oversight, political realities, and internal and administrative supervision.¹³¹ Within these realms, there are many sources of influence over a prosecutor. While it is true that a prosecutor is ultimately bound by the law, tension may arise from influence grounded in other areas such as personal beliefs, public opinion, and community political or social preferences. This tension gives rise to a concern regarding the enormous power vested in prosecutors and how these outside influences can affect their charging discretion. This is especially apparent when there is confusion in statutory language. “[L]egislative drafters posture to the public to seem tough on crime, yet ... prosecutors usually find ways to exploit ambiguities or loopholes in ... legislation, invoke it selectively, or flout it outright.”¹³²

First and foremost, prosecutors are constrained by the U.S. Constitution in regards to selective enforcement of the law.¹³³ While there is a “settled rule” that prosecutors have sole discretion regarding “[w]hether to prosecute and what charge to file or bring before a grand jury,” the Equal Protection Clause “prohibits selective enforcement ‘based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”¹³⁴ Other than the explicit language of the Constitution, there are very few examples of express constraints on prosecutors’ charging discretion.¹³⁵

Scholars have suggested that prosecution involves a “classic principal-agent problem.”¹³⁶ According to this view, the relationship between prosecutors and their constituents is analogous to a corporation, in which the shareholders are the principals and the corporate employees are agents.¹³⁷ In the shareholder-corporate employee context, the shareholders seek to “align their agents’

129. Bibas, *supra* note 124, at 966-68. “[L]egislatures lack the interest and incentive to check prosecutors vigorously; they would rather be seen as prosecutors’ allies in the fight on crime.” *Id.* at 968.

130. *Id.* at 966.

131. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 846-47.

132. Bibas, *supra* note 124, at 967-68.

133. *See* U.S. CONST. amend. XIV.

134. *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (citing to *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

135. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 854 (1995) (synthesizing boundaries on prosecutorial discretion, indicating that the Constitution sets a “floor”). Furthermore, “prosecutors are immune from civil damages for misconduct arising from their actions as advocates. Professional disciplinary institutions such as bar associations, state grievance committees, and prosecutorial supervisors rarely consider prosecutorial misconduct.” *Id.* Finally, the whole concept behind prosecutorial discretion is that it is very broad and, generally, unreviewable. *See* discussion *supra* Part IV.

136. Bibas, *supra* note 124, at 979.

137. *Id.* at 980.

incentives with their own.”¹³⁸ Most importantly, in the corporate structure, top managers or executives “are most accountable to these stakeholders so [executives] feel external pressures most directly” from the risk of being voted out of office by their shareholders.¹³⁹ Just as shareholders have power over corporate executives, so too do constituents hold prosecutors responsible for accommodating their needs and expectations.¹⁴⁰ “Pressure from voters, victims, and defendants can influence prosecutors, particularly head prosecutors who care about reelection. These pressures align head prosecutors’ interests and values with those of their principals, the stakeholders.... [P]rosecutors must ... work to translate stakeholders’ interests and values into practice.”¹⁴¹

Undoubtedly, this is a difficult task to accomplish, as there are many competing interests that must be navigated in order to adequately satisfy constituents’ interests.¹⁴² Differences of opinion stem from moral, political, or social preferences. For example, in regards to punishment, “[s]ome prosecutors and ... citizens emphasize retribution, while others may care more about deterrence, incapacitation, or rehabilitation.”¹⁴³ Although “[t]hese groups seem to have irreconcilable interests ... prosecutors must somehow aggregate their views and interests under any system.... Heeding [the] community conception of justice is crucial to maintain the criminal law’s compliance, efficacy, and legitimacy in the public’s eyes.”¹⁴⁴

Despite the formal legal and informal mechanisms that constrain prosecutors to some extent, “when all is said and done, individual prosecutors’ preferences still control a vast range and number of choices, free of outside or supervisory controls.”¹⁴⁵ Ideally, prosecutors should strive to be neutral in making discretionary decisions.¹⁴⁶ Three components are essential to achieving this goal: first, prosecutors should avoid bias in their decision-making; second, prosecutors should avoid partisan decision-making; and third, prosecutors should “base their decisions on readily identifiable and consistently applied criteria.”¹⁴⁷

One common thread that links the first two components of prosecutorial neutrality together is the presence of nonpartisan decision-making. First, in order to avoid biased decision-making, a prosecutor should not consider his or her self-interests, including personal political beliefs and the “party politics” of their close colleagues.¹⁴⁸ Second, in order to engage in nonpartisan decision-making, prosecutors can engage in three alternatives: independence, objectivity, and

138. *Id.*

139. *Id.* at 980-81.

140. *Id.* at 981.

141. *Id.* at 996.

142. *Id.* at 982.

143. *Id.*

144. *Id.*

145. Green & Zacharias, *supra* note 131, at 847.

146. *Id.* at 838-39.

147. *Id.* at 851. *See also id.* at 850-52 (detailing the three components of prosecutorial neutrality).

148. *Id.* at 852-53.

nonpoliticism. Independence suggests “independence from police investigators, elected officials interested in the case, victims or their families, and other interested parties.”¹⁴⁹ Objectivity simply refers to “the notion that a prosecutor must remain objective in making prosecutorial decisions.”¹⁵⁰ Lastly, nonpoliticism “encompasses both avoiding obligations to the political parties with which they are affiliated ... and holding themselves above public outcry and frenzy about particular cases.”¹⁵¹

Finally and most relevant to the MMMA, the third component of prosecutorial neutrality is grounded in principled decision-making.¹⁵² This has been described as “identifying fixed ... criteria that can constrain decision-making in categories of cases without depending upon the exercise of a great deal of discretion.”¹⁵³ In order to follow principled decision-making, prosecutors can make sure to adhere to legislative will and the purposes of criminal law.¹⁵⁴ Not only does this generate a sense of consistency in the application of the law, but it also provides the benefit of accountability by identifying a criteria that “at a minimum allows the public to evaluate the office’s general approach.”¹⁵⁵

V. PROSECUTORIAL DISCRETION APPLIED TO THE MICHIGAN MEDICAL MARIHUANA ACT

In 2009, the U.S. Attorney’s Office demonstrated an example of federal prosecutorial discretion when applied to medical marihuana. On February 24, 2009, U.S. Attorney General Eric Holder announced the Justice Department was not making it a priority to prosecute marihuana dispensaries operating legally under state laws.¹⁵⁶

Arguably a politically policy-driven decision, Holder maintained that the Obama administration would focus their efforts on “egregious” offenders in violation of both federal *and* state law.¹⁵⁷ This move was in direct contrast with the Bush administration, which had a “zero-tolerance” policy regarding medical marihuana and “targeted medical marijuana distributors even in states that had

149. *Id.* at 860-61.

150. *Id.* at 864.

151. *Id.* at 869.

152. *Id.* at 871.

153. *Id.*

154. *Id.* at 874-75.

155. *Id.* at 886.

156. Josh Meyer & Scott Glover, *U.S. Won’t Prosecute Medical Pot Sales*, L.A. TIMES, Mar. 19, 2009, at A1, available at www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story; Ryan Grim, *Holder Vows to End Raids on Medical Marijuana Clubs*, HUFFINGTON POST (Feb. 26, 2009), http://www.huffingtonpost.com/2009/02/26/holder-vows-to-end-raids_n_170119.html. See also Daniel J. Pfeifer, *Smoking Gun: The Moral and Legal Struggle for Medical Marijuana*, 27 TOURO L. REV. 339, 376 (2011) (“[M]edical marijuana clinics will be free of federal investigations provided their operations are lawful.”).

157. Meyer & Glover, *supra* note 156. For more information regarding the Justice Department’s Policy, see Memorandum from David W. Ogden, Deputy Attorney General to Selected United States Attorneys (Oct. 19, 2009), available at <http://medicalmarijuana.procon.org/sourcefiles/USDOJNewPolicy.pdf>.

passed laws allowing use of the drug for medical purposes.”¹⁵⁸ A Justice Department official noted the U.S. Attorney’s Office exercise of discretion in saying, “if you are operating within ... [state] law, we are not going to prioritize our resources to [prosecute] them.”¹⁵⁹

In an attempt to take advantage of the Justice Department’s clear priorities regarding the prosecution of medical marihuana dispensaries, criminal defendants have tried to raise reliance on these statements as a defense. For example, defenses have taken the form of entrapment by estoppel.¹⁶⁰ These efforts have been unsuccessful. In the 2010 case of *United States v. Stacy*, defendant Stacy operated a medical marihuana collective and was charged with, among other counts, “conspiracy to manufacture and distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846; and manufacturing 96 marijuana plants in violation of 21 U.S.C. § 841(a)(1)”¹⁶¹

Defendant alleged that these counts violated his due process rights, as the prosecution was the result of entrapment by estoppel. In other words, defendant argued “the government affirmatively told him that the proscribed conduct was permissible, and that he reasonably relied on the government’s statement.”¹⁶² Dissuaded by the defense, the U.S. District Court for the Southern District of California recognized Attorney General Holder’s statements, but distinguished that they did “not constitute affirmative representations that [d]efendant would not be prosecuted under federal law.”¹⁶³ The court maintained that a reasonable person “would not rely on these statements as an assurance that he or she would not be prosecuted under federal law.”¹⁶⁴

Turning to the exercise of prosecutorial discretion regarding medical marihuana dispensaries on the state level in Michigan, local prosecutors are currently facing three alternatives in enforcement of the MMMA. First, prosecutors may encounter a limitation on their discretion to criminally prosecute those operating medical marihuana dispensaries if their municipality has enacted a city ordinance that protects such an operation. Second, prosecutors may not face any obstacle in prosecuting those operating a medical marihuana dispensary if their local municipality has enacted an ordinance that expressly forbids their existence. Third, by remaining silent on the issue of legality, municipalities may confer absolute discretion upon their prosecutors.

Municipalities, such as Grand Rapids, which have either expressly or silently maintained the illegality of medical marihuana dispensaries, are not of

158. Meyer & Glover, *supra* note 156. The difference between the Obama and Bush administration policies with respect to medical marihuana may be indicative of their political affiliation.

159. *Id.*

160. *See, e.g.*, *United States v. Stacy*, 696 F. Supp. 2d 1141, 1146 (S.D. Cal. 2010).

161. *Id.* at 1143.

162. *Id.* at 1146 (quoting *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000)).

163. *Id.* at 1147.

164. *Id.* at 1148.

concern because they are consistent with the interpretations of the MMMA.¹⁶⁵ However, the concern lies with municipalities that have legalized the operation of medical marihuana dispensaries. These communities have a view in direct contrast with the current interpretations of the MMMA and have taken advantage of the absence of language addressing medical marihuana dispensaries. The clash between these two opposite outcomes has created a patchwork of local viewpoints regarding the legality of medical marihuana dispensaries in Michigan.

Recently, a case arose in Grand Rapids, Michigan, where an individual was charged with manufacturing marihuana. In *People v. Bylsma*, 88 marihuana plants were seized from defendant's apartment, in addition to various other resources used in cultivating marihuana.¹⁶⁶ As a registered primary caregiver for two qualifying patients under the MMMA, defendant argued that he was in lawful possession of 24 marihuana plants—12 for each qualifying patient.¹⁶⁷ He further asserted that “nothing in the language of the MMMA prohibits primary caregivers and qualifying patients from utilizing the same enclosed, locked facility to grow and cultivate marihuana plants.”¹⁶⁸

The court disagreed with defendant's argument, and supported their conclusion by interpreting the plain language of the MMMA. The court stated: “[W]e conclude that the plain language of §§ 4(a) and 4(b) unambiguously provides that only one person may possess 12 marijuana plants for the registered qualifying patient's medical use of marijuana.”¹⁶⁹ While the court did not expressly address the issue of medical marihuana dispensaries or collectives, it is easy to infer the general viewpoint from the decision in this case. Any person or combination of people, in possession of more than the legal limit of 12 marihuana plants per qualified patient within a single, locked facility will be found in violation of the MMMA and criminally culpable.¹⁷⁰ Therefore, a dispensary in Michigan would, undoubtedly, be an unlawful operation because it would hold more than the legal limit of medical marihuana per patient.

In a closely located region in Michigan, a prosecutor appealed a decision to dismiss a criminal charge of delivery and manufacture of marihuana.¹⁷¹ In *People v. Walburg*, an Ottawa Circuit Court case, defendant was found in possession of 25 marihuana plants, an amount in excess of that legally allowed under the MMMA.¹⁷² Although the court did not agree with the prosecutor's rationale, finding the cited section of the MMMA inapplicable,¹⁷³ this case demonstrates that prosecutors are exercising their discretion to charge those in possession of marihuana in *any* excess amount allowed under the MMMA.

165. *See supra* notes 77-86 and accompanying text.

166. 816 N.W.2d 426, 428 (Mich. Ct. App. 2011).

167. *Id.* at 428-29.

168. *Id.* at 430.

169. *Id.* at 433-34.

170. *Id.*

171. *People v. Walburg*, No. 295497, 2011 Mich. App. LEXIS 274, at *1 (Mich. Ct. App. Feb. 10, 2011).

172. *Id.* at *3-4.

173. *Id.* at *4.

The exercise of discretion is inherent in a prosecutor's role and is typically viewed as a necessary attribute for them to effectively execute their responsibilities. This is due to the fact that prosecutors are positioned in such a proximate manner to citizens in their locality, so that they are attuned to the needs of the people and overall welfare of the community.¹⁷⁴ The silence of the MMMA in regards to medical marihuana dispensaries has allowed local municipalities in Michigan to take the matter into their own hands—despite the official opinions and interpretations of the MMMA that firmly stand for the proposition that dispensaries are illegal.¹⁷⁵

Furthermore, in taking advantage of the lack of express language in the MMMA, municipalities have let their political and social tendencies influence ordinances that forbid or protect the operation of medical marihuana dispensaries in the respective locality. Ordinances that protect dispensaries directly limit a prosecutor's charging discretion, and arguably, causes tension between the local viewpoint in allowing dispensaries versus the state-level interpretations in holding such operations are illegal. This is very problematic because, ultimately, a prosecutor should strive to be neutral in their decision-making.¹⁷⁶

There seems to be a correlation between the political preferences of municipalities and their opinions regarding medical marihuana dispensaries. Conservative municipalities in Michigan have enacted ordinances or remained silent about such operations.¹⁷⁷ Despite the means, the same outcome is reached in the prohibition of medical marihuana dispensaries. This may be due to local citizens being opposed to the statewide legality of medical marihuana and, as such, they seek to impose barriers to qualifying patients' or caregivers' access to medical marihuana.

Alternatively, municipalities with liberal tendencies in Michigan have enacted ordinances that expressly protect the operation of medical marihuana dispensaries.¹⁷⁸ This outcome is consistent with the idea that proponents of the legalization of medical marihuana tend to fall on the liberal side of the political spectrum.¹⁷⁹ Furthermore, proponents of medical marihuana would seek to eliminate as many barriers as possible so that qualifying patients can achieve effective medical treatment. For example, a medical marihuana dispensary may be viewed as a greater convenience to those suffering from debilitating medical conditions. However, these current ordinances in Michigan directly conflict with a prosecutor's ability to remain neutral.¹⁸⁰ While it is true that elected prosecutors have a duty to serve their constituents, the municipalities legalizing

174. Tiersky, *supra* note 20, at 587.

175. *See supra* Part II.B.

176. In order to be neutral, prosecutors should first, avoid bias in their decision-making; second, avoid partisan decision-making; and third, should "base their decisions on readily identifiable and consistently applied criteria." Green & Zacharias, *supra* note 131, at 851. *See also* discussion *supra* Part IV.

177. *See supra* Part III.

178. *Id.*

179. McKinley, *supra* note 49.

180. Green & Zacharias, *supra* note 131, at 847.

medical marihuana dispensaries have placed their prosecutors in an area of tension. This is because the MMMA has not expressly addressed the operation of dispensaries and all official interpretations of the statute point to the notion that such operations are illegal.¹⁸¹ Additionally, there is an absence of “readily identifiable and consistently applied criteria” that prosecutors can access to guide their discretion.¹⁸² If anything, depending on the specific municipality in Michigan, there is an extremely inconsistent criterion that is applied with respect to the prosecution of medical marihuana dispensaries. Therefore, a prosecutor’s charging discretion is currently being torn between more authoritative, state-level interpretations and the local preferences of his or her municipality.

VI. A CALL FOR A REFORM OF THE MICHIGAN MEDICAL MARIHUANA ACT TO CREATE CONSISTENCY AND GUIDANCE FOR PROSECUTORS

Ultimately, amending the MMMA to include express language regarding dispensaries will help define the boundaries of prosecutorial discretion regarding medical marihuana dispensaries. Express language will help to provide “readily identifiable ... criteria”¹⁸³ and allow prosecutors to move away from the politically and socially driven local ordinances that have taken it upon themselves in deciding the legality of medical marihuana dispensaries. The lack of express language in the MMMA has allowed this inconsistent outcome to occur, and those municipalities that have enacted ordinances that protect the operation of dispensaries are in direct conflict with the interpretations of the MMMA.¹⁸⁴

Since Michigan has recently entered the controversial group of states that have legalized the use of medical marihuana, there are many other states that can be looked to as examples in addressing the legality of medical marihuana dispensaries. For example, California enacted an amendment regarding this issue eight years after the initial passage of the CUA.¹⁸⁵ By expressly addressing the operation of medical marihuana dispensaries in Michigan, municipalities will no longer have the authority to decide the legality of this critically important issue.

Furthermore, amending the MMMA will also assist prosecutors in achieving neutrality in their decision-making process. Language addressing dispensaries will help to alleviate current tensions between the statewide interpretations of the MMMA and municipalities that have enacted ordinances in direct conflict with the interpretation that dispensaries are illegal. Should Michigan decide to authorize the operation of medical marihuana dispensaries, it may be seen as giving full effect to the intent of the MMMA because patients must first obtain medical marihuana in order to use it for effective medical treatment. Dispensaries can provide many benefits¹⁸⁶—most importantly,

181. *See supra* notes 77-86 and accompanying text.

182. Green & Zacharias, *supra* note 131, at 851.

183. *Id.*

184. *See supra* Part II.B.

185. *See supra* Part III.A.

186. Busby, *supra* note 51, at 154.

providing a convenient location for patients who choose to forego personal cultivation of medical marihuana. In the alternative, should Michigan decide to prohibit the operation of medical marihuana dispensaries, elected officials will have to explain how this decision is consistent with the legislative intent behind the statute. Although this may be in conflict with the intent to provide effective medical treatment, a decision to expressly prohibit dispensaries would not be surprising given the previous official interpretations of the MMMA's silence on the issue.

Recently, a bill was introduced into the Michigan House of Representatives that addresses the operation of medical marihuana dispensaries in Michigan. House Bill 5580 recognizes the legality of dispensaries and grants local municipalities the authority to allow such operations, referred to as "medical marihuana provisioning centers."¹⁸⁷ The Bill provides criminal and civil protection for provisioning centers that have "been granted any applicable required municipal registration or license and is operating in accordance with this act and any applicable municipal ordinance."¹⁸⁸ However, allowing the operation of provisioning centers is not compulsory, as municipalities still have the discretion to prohibit their operation pursuant to the laws of their respective jurisdiction.¹⁸⁹ House Bill 5580 was introduced in May of 2012, and its fate has yet to be determined by the Michigan Legislature.¹⁹⁰

VII. CONCLUSION

Throughout the past 15 years, the number of states legalizing the use of medical marihuana has steadily grown. This is projected to remain consistent in the future, with "New York, Illinois, Delaware, South Dakota, ... and Kansas moving towards proposed legislation."¹⁹¹ While the use of medical marihuana is still illegal under federal law, states have been allowed to experiment in regulating its use.¹⁹² However, in Michigan, municipalities have taken this experimentation to another level regarding medical marihuana dispensaries due to the absence of language in the MMMA. The municipalities have decided the legality or illegality of the operation of dispensaries in the respective locality, which directly influences a prosecutor's charging ability. These outside

187. Medical Marijuana Provisioning Center Regulation Act, H. 5580, 96th Leg., Reg. Sess. § 2(b) (Mich. 2012), available at <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2012-HIB-5580.pdf>.

188. *Id.* § 3(1).

189. *Id.* § 5(1).

190. To track the progress of House Bill 5580, see *House Bill 5580*, MICH. LEGIS. WEBSITE, [http://www.legislature.mi.gov/\(S\(c3cbev45j0uhpc55fbpzur2e\)\)/mileg.aspx?page=getobject&objectname=2012-HB-5580](http://www.legislature.mi.gov/(S(c3cbev45j0uhpc55fbpzur2e))/mileg.aspx?page=getobject&objectname=2012-HB-5580) (last visited Oct. 7, 2012).

191. Pfeifer, *supra* note 23, at 371. In the time that has elapsed since this comment was written, Delaware passed Senate Bill 17 in 2011, creating the Delaware Medical Marijuana Act which legalizes the use of medical marihuana. For a final version of the enacted Bill, see S. 17, 146th Gen. Assemb. (Del. 2011), available at <http://medicalmarijuana.procon.org/sourcefiles/delaware-senate-bill-17-passed.pdf>.

192. Tiersky, *supra* note 20, at 584.

influences on a prosecutor's discretion conflict with their ability to strive for neutrality in their decision-making.¹⁹³

By amending the MMMA to expressly address the operation of medical marihuana dispensaries, municipalities in Michigan will no longer be able to decide the legality of such operations. Additionally, and most importantly, express language will help to alleviate the tension between the conflicting state and local viewpoints in relation to the legality of medical marihuana dispensaries. Legislators should strive to assist those responsible for enforcing the MMMA by providing unambiguous statutory guidance. Not only will this lessen the confusion, but it will also have the practical effect of providing "readily identifiable and consistently applied criteria"¹⁹⁴ to help prosecutors execute their charging discretion.

193. Green & Zacharias, *supra* note 131, at 351.

194. *Id.*