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PROPOSITION 215: DE FACTO LEGALIZATION OF POT AND THE SHORTCOMINGS OF DIRECT DEMOCRACY

Michael Vitiello*

In 1996, California voters passed Proposition 215, officially titled The Compassionate Use Act of 1996, and popularly known as the "medical marijuana" initiative. This initiative allows qualifying people and their caregivers immunity from criminal prosecution when the state attempts to charge them with possession or cultivation of marijuana. Professor Vitiello uses the medical marijuana initiative as a case study illustrating flaws in California's ballot initiative process. He examines the history of the initiative process in California, misleading aspects of the campaign for Proposition 215, and ambiguities in the proposition's language. Concluding that the initiative process as it now stands fosters poor legislation, Professor Vitiello assesses several reform measures proposed by the nonpartisan Citizens' Commission on Ballot Initiatives and adds his own proposed reforms to address the problems of misleading advertisements and misleading ballot pamphlets.

INTRODUCTION

In 1996, California gained national prominence when its voters again resorted to the initiative process to enact controversial legislation. Proposition 215, entitled The Compassionate Use

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1. See Richard Lacayo, Marijuana: Where There's Smoke, There's Fire, Time, Oct. 28, 1996, at 36 (referring to California's initiative process as "the tricky practice
Act of 1996, allows a qualifying person and her caregiver immunity from criminal prosecution when the state attempts to charge such persons with possession or cultivation of marijuana. Beyond this protection, however, the legal effects of Proposition 215 remain uncertain.

This Article examines the Act from two perspectives. First, Proposition 215 is yet another example of badly drafted legislation that breeds unnecessary litigation. Its drafters used expansive and intentionally ambiguous language to allow the widest use of marijuana, and by utilizing the initiative process, they were not forced to compromise to ensure passage. Recourse to the initiative process also allowed Proposition 215's proponents to gain support through a misleading advertising campaign.

of democracy through referendum" and asserting that Proposition 215, the medical marijuana initiative, was the most controversial initiative of 1996).

2. CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 1998) ("Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.").

3. See J. Clark Kelso, California's Constitutional Right to Privacy, 19 PEPP. L. REV. 327, 338-44 (1992). Kelso asserts that most initiatives in California are drafted by private interest groups who are unlikely to consider the array of consequences that accompany a change in the law. See id. at 339-40. Moreover, the large amount of money poured into initiative campaigns results in massive media campaigns which familiarize the public with catchy slogans rather than the proposed substantive changes in the law. See id. at 341. Kelso also worries that the initiative process improperly weakens the power of elected officials, that voters lack the means to make reasoned decisions about complex issues, and that majoritarian sentiments will endanger minority rights. See id. at 343-44.

4. See id. at 339 (asserting that private interest groups who draft initiatives may not understand how their proposed measure may affect other aspects of state law and recognizing that drafting errors typically weeded out in a more open forum are often overlooked in the initiative process).

It is a truism that politicians often misrepresent their positions in campaign literature and advertisements in order to gain votes. But the consequences of those misrepresentations are greater when voters are misled during the initiative process. A politician who has misrepresented her views to the voters cannot frustrate the will of the people whom she misled unless she can convince a majority of her colleagues and the executive to vote contrary to the promises she made during the campaign. Misrepresentations during an initiative campaign, on the other hand, lead directly to legislation that may not reflect the will of the people. In effect, the voters' mistake in the initiative process may become the law.

5. Cf. Michael Vitiello, "Three Strikes" and the Romero Case: The Supreme Court Restores Democracy, 30 LOY. L.A. L. REV. 1643, 1684-85 (1997) (discussing how proponents of California's Proposition 184, the "Three Strikes" initiative, grossly misled the voters with an advertising frenzy promising to keep rapists, murderers, and child molesters behind bars even though the majority of offenders affected would not fall within these categories).
The second perspective examines why proponents of Proposition 215 were forced to use the initiative process. Despite a brief period during which the federal government allowed limited use of marijuana for compassionate medical purposes, the federal government has demonstrated an uncompromising and highly political position preventing reasonable accommodation between anti-drug policy and the limited medical use in those few areas where marijuana appears to give meaningful relief to seriously ill patients. The California state legislature has not had the same history of hostility toward marijuana, however, repeatedly passing legislation that would allow medical use of marijuana. Yet Governor Wilson has twice vetoed such legislation, despite broad support for limited use of marijuana.

Thus, despite all of Proposition 215's drafting flaws, and the questionable motives of its drafters, the initiative process performed as its Progressive originators intended. The challenge now facing Californians is to reform the initiative process to avoid its excesses while retaining its virtues.

The first part of this Article reviews briefly the history of the initiative process and some of the general problems which have arisen after its enactment. The campaign in support of Proposition 215 and the language of the measure offer a case study demonstrating the failings of the initiative process. The second part of the Article reviews the intransigence of the federal government and elected officials which sparked the shift

6. See discussion infra Part II.A.
7. See discussion infra Part II.A-B. Most notably, marijuana seems to be an effective anti-emetic for patients suffering from the severe nausea that can accompany cancer chemotherapy. One study involving 56 patients who had shown no improvement with standard anti-emetics, found that 78% of those patients had a positive response to smoked marijuana with no serious side effects. Since marijuana not only helps control nausea and vomiting but also stimulates appetite, there is much speculation and anecdotal evidence that the drug would be an effective treatment for the symptoms associated with AIDS wasting syndrome (including the inability to eat, fatigue, and diarrhea that result in a starved, gaunt appearance). Although glaucoma is often touted as one of the main disorders that can be alleviated with marijuana use, current research casts serious doubt on the drug's actual effectiveness. For example, there is concern that smoking marijuana may reduce the blood flow to the optic nerve, exacerbating loss of vision. Additionally, a glaucoma patient must smoke an enormous amount of cannabis in order to experience the reduction of intraocular pressure.
8. See discussion infra Parts I.B, II.B, III.C.
9. See discussion infra Parts I.B, II.B, III.C; see also Tracie Cone, Reefer Madness: Law-Abiding Regular Folks Descend Into a Netherworld to Get Relief for Themselves or Others with Grave Diseases. Why Morphine and Not Marijuana?, SAN JOSE MERCURY NEWS, May 14, 1995, at 12 (citing a statewide survey showing that although very few Californians wanted to legalize marijuana, 66% of those surveyed would support a law allowing medicinal use of marijuana with a doctor's prescription).
in focus by supporters of medical marijuana use toward recourse through the initiative process. The third part of this Article returns to concerns about the poor legislation that often results from the initiative process, speculating on how the initiative process might be reformed to maintain the virtue of direct democracy while avoiding the primary weaknesses often resulting from the process.  

I. HOW THE INITIATIVE PROCESS LEADS TO BAD LEGISLATION

A. The Initiative Process

The initiative process was the brainchild of the Progressive movement in the beginning of the twentieth century. Progressives believed that the only way to free the state from the control of big business and the political machine was through direct democracy. Persuaded to run for governor by the progressive minded Good Government Group, Hiram Johnson campaigned against the Southern Pacific Railroad and promised to end its domination of the California legislature. Shortly after his election, Johnson made good on his campaign promise to get the Southern Pacific Railroad out of politics when he successfully backed a constitutional amendment creating the initiative process.

Recent developments have led to legitimate concerns about the initiative process. In the aftermath of Proposition 13, which limited the ability of local governments to raise property taxes, the initiative process has become increasingly popular with special-interest groups. In addition, the initiative  

10. See discussion infra Part III.A-E.  
12. See David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States 21 (1984) (quoting a progressive scholar who wrote, “if big business was the ultimate enemy of the Progressive, his proximate enemy was the political machine”).  
14. See Sam Stanton, California Voters Lay Down the Law at the Ballot—Routinely, SACRAMENTO BEE, Aug. 4, 1996, at A1 (finding that 168,744 voters approved the initiative process in the 1911 special election, whereas only 52,093 voted against it).  
15. See Gene Marine, Take the Initiative—Please, S.F. Examiner, Oct. 24, 1996, at A19 (noting that special interest groups such as large landowners, corporate farm-
The initiative process has become expensive, in part because proponents must often hire paid signature gatherers to obtain the large number of signatures required to place the initiative on the ballot.\textsuperscript{16} Paid signature gatherers, in turn, have little incentive to explain the implications of the proposed legislation to signers, as their financial interests are best served by providing simplistic answers to complex questions and reassuring signers that they are backing a worthwhile cause.\textsuperscript{17} Recent initiatives, often involving divisive social issues, have also been marked by misleading rhetoric and expensive advertising campaigns.\textsuperscript{18} Thus, the initiative process is at risk of becoming captive of special interests.\textsuperscript{19}

The initiative process offers a special advantage for well-funded special interest groups. Absent competing propositions, voters are given only two choices. For example, when Proposition 161, advocating the legalization of physician-assisted suicide, was on the ballot in California, a voter might have had legitimate concerns about the absence of adequate procedural safeguards

\textsuperscript{16} Five percent of the number of voters in the last gubernatorial election is required if the initiative is a statute; eight percent is required for a constitutional amendment. See CAL. CONST. art. II, § 8(b). The signature requirement is intended to keep "frivolous" or "unreasonably narrow propositions" off the ballot. MAGLEBY, \textit{supra} note 12, at 41. But given the expansion in California's population, the number of signatures required has increased from about 53,000 to several hundred thousand. See Stanton, \textit{supra} note 14, at A1.

\textsuperscript{17} See MAGLEBY, \textit{supra} note 12, at 63 ("Petition circulators in both the Common Cause and the farmworkers' cases framed the requests so as to maximize the likelihood of signing: 'Want to stop corrupt politics?' and 'Want to help the farmworkers?' In an effort to play upon the conforming tendencies in most people, circulators also encourage quick signing rather than discussion.").

\textsuperscript{18} See Kelso, \textit{supra} note 3, at 341 (citing David B. Magleby's finding that most of the information voters gather regarding initiatives comes directly from television, radio, and newspapers); Vitiello, \textit{supra} note 5, at 1679–85; see also Ray Rodriguez, \textit{Prop. 209 Was Created to Aid Republicans}, LONG BEACH PRESS-TELEGRAM, Oct. 30, 1996, at B9 (criticizing the Republican party for using Dr. Martin Luther King, Jr. in campaign advertisement for Proposition 209, which sought to end affirmative action in California).

\textsuperscript{19} See Kelso, \textit{supra} note 3, at 338–39 (asserting that the financial resources available to special interest groups create an exceptional ability to draw media attention to popular causes and stating, "[i]f the initiative was to be an antidote for government by the corrupt, then the result appears to have been government by the uninformed").
within the initiative. Voters have only a limited opportunity to lobby the drafters of an initiative to modify it or to amend offending aspects of an initiative, resulting in the advertisement of propositions in black and white terms. Furthermore, once the initiative is on the ballot, voters have no opportunity to register anything less than complete support or opposition.

The typical legislative process differs markedly from the initiative process. Although there is legitimate concern about money influencing legislation, a bill's proponents must always accommodate some competing interests to ensure the bill's passage. Thus, legislation is amended to avoid ambiguity and to accommodate competing voices. Except in unusual periods of political domination by one party, legislation will seldom command unquestioning support of a majority of the legislative body or avoid the accommodation resulting from the risk of veto by a disagreeing executive.

20. See Dianne Gassman, R.N., Letter to the Editor, 161's Lack of Safeguards, FRESNO BEE, Oct. 7, 1992, at B7 (expressing concern because Proposition 161 required neither witnesses to be present when a person requested that her physician put her to death nor family members or loved ones to be part of the patient's decision to die).

21. Once an initiative has qualified for the ballot, the Secretary of State sends copies of the measure to the Senate and the Assembly. Each house then assigns the proposed law to appropriate committees for the purpose of holding public hearings on the subject of the measure. Although public comments are acknowledged at such hearings, the legislature has no authority to make any of the proposed changes or to prevent the measure from being submitted to the voters. See CAL. ELEC. CODE § 9034 (West 1996); see generally BILL JONES, SECRETARY OF STATE, CALIFORNIA BALLOT INITIATIVE PROCESS HANDBOOK 2 (1997) (summarizing California's initiative procedure and the requirements for preparing and qualifying initiatives).

22. See Vitiello, supra note 5, at 1678–85 (discussing misleading claims made by supporters of Proposition 184).

23. See Gassman, supra note 20.

24. See Dan Bernstein, Did Money Smooth Path for Disputed Toxic Bill?, SACRAMENTO BEE, July 17, 1995, at A9. Sacramento lobbyist Richard Ratcliff states, "To my mind, the money has always been a short-cut to get to the people. The sad part is it does work. If you give $5,000 or $10,000 to a member, he certainly is going to remember that." Id.

25. See Kelso, supra note 3, at 339.

26. A recent example of a major piece of legislation subjected to significant compromise is the federal line-item veto. After facing seemingly irreconcilable differences between the House and the Senate versions of the bill, the GOP congressional leadership proposed a compromise version which was acceptable across the board. See Another Perspective: A Line-Item Compromise, LONG BEACH PRESS-TELEGRAM, Mar. 17, 1996, at D4.

27. One such period of unusual domination was enjoyed by the Democratic party following President Nixon's resignation from the White House in 1974. The election of seventy-five new democrats in 1974 has been viewed as America's response to a presidential abuse of power and the ongoing Vietnam War. See All Things Considered (National Public Radio broadcast, June 17, 1997).

28. See, e.g., David Espo, Late-Term Abortion Dividing Congress, Debate: Clinton May Support Democratic Senator's Alternative Measure to GOP Bill, LONG BEACH
Similar checks and balances do not exist within the initiative process. The passage of Proposition 215 illustrates some of the problems with the initiative process, relating to both the lack of compromise\textsuperscript{29} and to the exclusion of professional legislative drafters.\textsuperscript{30} As a result, California voted for a flawed proposition which was filled with ambiguity and which created a series of complicated problems for lawyers and judges.

B. The Campaign for Proposition 215

Many California residents have supported medical use of marijuana for a number of years.\textsuperscript{31} In both 1994\textsuperscript{32} and 1995,\textsuperscript{33} the legislature voted in favor of legislation recognizing the use of marijuana for medical purposes. In both cases, however, Governor Wilson vetoed the legislation despite significant public support for the law.\textsuperscript{34}

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\textsuperscript{29} For example, Proposition 215 extends immunity to a wide variety of illnesses for which marijuana may not be the most effective treatment. See discussion infra Part I.C.3. Had its drafters been forced to compromise to secure support in the legislature, a more reasonable proposal would have been forthcoming. See, e.g., CALIFORNIA FOR COMPASSIONATE USE, BROCHURE (1996).

\textsuperscript{30} See discussion infra Part I.C.

\textsuperscript{31} See, e.g., Lisa M. Krieger, Medical Marijuana Vote Sends a Message: Big Win for Backers of Drug Law Reform, S.F. EXAMINER, Nov. 7, 1991, at A12 (noting that the city of San Francisco in 1991 overwhelmingly passed Proposition P, which urged state officials to make marijuana legally available for medical use); Keith Stone, Marijuana: Should Law Prevent Medicinal Uses?, L.A. DAILY NEWS, Nov. 8, 1992, at N1 (recognizing that when the city of Santa Cruz passed a ballot measure urging police officials to look the other way with seriously ill persons caught possessing marijuana, it was the third California county to do so).

\textsuperscript{32} See S.B. 1364, 1993–1994 Reg. Sess. (Cal.). Authored by Senator Marks of San Francisco, Senate Bill 1364 sought to have marijuana recognized as a Schedule II drug, a controlled substance with a legitimate medical use. See id.

\textsuperscript{33} See A.B. 1529, 1995–1996 Reg. Sess. (Cal.). Authored by Senator Vasconcellos of San Jose, Assembly Bill 1529 was similar to Proposition 215 because it provided that existing prohibitions against the possession or cultivation of marijuana would not apply to persons possessing or cultivating the drug for their own personal medical use. This exemption applied to persons who had obtained approval for such use in writing from a physician. The exemption also extended to immediate family members, legal guardians, and primary caregivers. See id.

\textsuperscript{34} See Letter from Pete Wilson, Governor of the State of California, to the California Senate (Sept. 30, 1994). Wilson asserted that he saw no reason to sign SB 1364 into law when it was certain to be preempted by existing federal law, which does not recognize the medical use of marijuana. He further cited the FDA's findings that orally administered THC was an effective medical treatment already available for

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As a result of Governor Wilson's strong stance against the legalization of marijuana in any form, long time marijuana activist Dennis Peron decided to resort to the initiative process.\textsuperscript{35} Peron based the language of the initiative on earlier legislation, AB 1529, vetoed by Governor Wilson.\textsuperscript{36} As illustrated below, AB 1529 was more carefully drafted than Proposition 215. A long time advocate of legalization of marijuana, Peron added potentially expansive language to Proposition 215 not included in AB 1529. His hope was to assure support from both those interested in medical use of marijuana and from those in favor of the unrestricted legalization of marijuana.\textsuperscript{37}

While Peron's Californians for Compassionate Use took credit for writing the initiative, Californians for Medical Rights led the campaign for its passage.\textsuperscript{38} Peron has represented himself as a sort of Don Quixote\textsuperscript{39} battling against the establishment, an image consistent with the original concept prescription in California. Finally, he expressed his concern for the state's physicians and pharmacists whom he felt would be placed in danger of facing federal prosecution for prescribing the drug. See id.; see also Greg Lucas, Medical Marijuana Bill Approved, S.F. CHRON., Aug. 19, 1994, at A20 (reporting that Governor Wilson's veto of SB 1364 was no surprise, as the Governor was then embroiled in a re-election battle with being tough on crime as his main platform).

In vetoing AB 1529, Governor Wilson wrote to the California Assembly, reminding the legislature again of the FDA's approval only of orally administered tetrahydrocannabinol (THC). He also echoed the concerns of some of his GOP counterparts on the floor, saying that the bill would "for all intent [sic] and purposes legalize possession and cultivation in California." See Letter from Pete Wilson, Governor of the State of California, to the California Assembly (May 3, 1996) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1501-1550/ab_1529_vt960503.html> (on file with the University of Michigan Journal of Law Reform). The Governor additionally expressed concern for law enforcement officials, whose efforts, he felt, would be complicated by providing a defense to users of marijuana. See id.

35. See Greg Lucas, Bill Flow Slows As Senate, Assembly Fight Over Funds, S.F. CHRON., Sept. 13, 1995, at A16 (observing that at a time when Governor Wilson's veto of AB 1529 was still speculative, Dennis Peron claimed he had already drafted an initiative to make marijuana legal for seriously ill patients).

36. See Interview with Dennis Peron, President of Californians for Compassionate Use 4 (Mar. 5, 1997) [hereinafter Peron Interview] (explaining that he used the wording from SB 1364, from 1994, and AB 1529, from 1995, in writing the language for Proposition 215) (on file with the University of Michigan Journal of Law Reform).

37. See id. at 9.

38. See Dennis Peron, Yes on Prop. 215: A Mission of Mercy, S.F. EXAMINER, Oct. 20, 1996, at C15 (reporting that Dennis Peron co-drafted Proposition 215 because he wanted to authorize medical use of marijuana as a eulogy for his lover, Jonathan, who died of AIDS); see also Glen Martin, Squabble Among Medicinal Pot Initiative Backers, S.F. CHRON., Sept. 4, 1996, at A11 (remarking that the proposition's co-author, John Entwistle, was also a leader of the Cannabis Club with Dennis Peron).

39. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 968 (9th ed. 1989) (defining "quixotic" as "foolishly impractical esp. in the pursuit of ideals").
of the initiative process.\textsuperscript{40} In reality, the passage of the proposition was significantly aided by the contributions raised by Californians for Medical Rights.\textsuperscript{41} George Soros, a New York philanthropist, contributed \$350,000 to the campaign; George Zimmer, owner of the Men's Warehouse clothing stores, contributed \$160,000; Peter Lewis, president of Ohio's Progressive Corporation, contributed \$300,000; and Laurance Rockefeller, brother of the late Vice President Nelson A. Rockefeller, donated \$50,000 to the campaign.\textsuperscript{42}

Armed with over \$1,000,000, the Californians for Medical Rights group secured about 850,000 signatures, well in excess of the required 433,000.\textsuperscript{43} The campaign was well run, but the significance of the unorganized and inadequately funded opposition should not be understated.\textsuperscript{44} The lack of serious opposition may also be explained by miscalculations about Proposition 215's likelihood of passage.\textsuperscript{45} Opponents raised concerns about the effect of Proposition 215, but their lack of organization and resources meant their voices were drowned out by the proposition's supporters.

Substantial funding also allowed proponents of Proposition 215 to develop an effective advertising campaign glossing over the serious problems created by Proposition 215. Unquestionably, some of Proposition 215's prime supporters were interested in legalization of marijuana for general use, but the

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  \item \textsuperscript{40} See discussion supra Part I.A.
  \item \textsuperscript{41} See Jim Herron Zamora, Pot Club Leaders Urged to Drop Out of Vote Drive: Strife Reported Among Medical-Use Measure's Backers, S.F. EXAMINER, Sept. 4, 1996, at A5 (declaring that the state recognized Californians for Medical Rights as Proposition 215's official sponsor even though Dennis Peron's Californians for Compassionate Use wrote the initiative).
  \item \textsuperscript{42} See Carey Goldberg, Currency King Gives Heavily to Groups Fighting Drug Laws, PLAIN DEALER (Cleveland, Ohio), Sept. 12, 1996, at 14A; see also Eric Bailey, California Elections: Proposition 215: 6 Wealthy Donors Aid Measure on Marijuana, L.A. TIMES, Nov. 2, 1996, at A18.
  \item \textsuperscript{43} See Goldberg, supra note 42; CALIFORNIANS FOR COMPASSIONATE USE, MEDICAL MARIJUANA: KNOW YOUR RIGHTS: THE COMPASSIONATE USE ACT EXPLAINED (1996); Peron Interview, supra note 36, at 4 (explaining that the 850,000 signatures constituted one-fifth of the votes needed for the Nov. 6, 1996 election).
  \item \textsuperscript{44} See Goldberg, supra note 42; see also Interview with Brad Gates, Orange County Sheriff (July 28, 1997) (stating that one reason Proposition 215 passed was due to the inadequate funding, only \$30,000, to educate the public of the pitfalls of the initiative) (on file with the University of Michigan Journal of Law Reform).
  \item \textsuperscript{45} See James W. Sweeney, County Solidly Backs Medicinal Marijuana: Bay Area Support May Not Be Enough, PRESS DEMOCRAT (Santa Rosa, Cal.), Sept. 18, 1996, at A1. Stu Mollrich, campaign leader against Proposition 215, acknowledged the strong support for the initiative in the San Francisco area but predicted it would not pass. See id.
campaign focused on "compassionate use," a powerful symbol in support of its passage. Ballot literature emphasized that the proposition would allow "seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician," which suggested limitations not found in the text of the law. For example, section 11362.5, the codification of Proposition 215, may be read to allow use of marijuana by patients other than those seriously and terminally ill, and the law contains no requirement that the recommendation to the patient come from a licensed physician.

The campaign literature also suggests that marijuana would be appropriate for a limited number of specific diseases, listing cancer, glaucoma, AIDS, multiple sclerosis, epilepsy, and spinal cord injuries. Elsewhere, Peron's Californians for Compassionate Use published a brochure stating that marijuana has been shown to "help migraine headaches, relieve menstrual cramps, help overcome insomnia, and mitigate withdrawal from alcohol and other hard drugs." Despite the campaign literature's focus on the least controversial uses of medical marijuana, catch-all language in the proposition creates an ambiguity regarding the types of illnesses for which marijuana may be recommended.

Even if voters did not read the campaign literature distributed with the ballot initiative, the television ads, which were largely unrebutted by the opposition, portrayed a similar impression about the meaning of Proposition 215. Commercials

46. See CAL. HEALTH & SAFETY CODE § 11362.5(a) (West Supp. 1998) (explaining that this section, formerly Proposition 215, shall be known and cited as "the Compassionate Use Act of 1996"). Proponents released lists of diseases and their symptoms which marijuana had been shown to alleviate. The proponents especially concentrated on relief from AIDS wasting syndrome and nausea caused by chemotherapy. See CALIFORNIA'S FOR COMPASSIONATE USE, BROCHURE (1996). Proponents also minimized the effectiveness of Marinol by stating that patients vomited when they took the pill. See Eric Bailey, California Elections: Proposition 215: Initiative on Medical Use of Marijuana Pits Unlikely Foes, L.A. TIMES, Sept. 16, 1996, at A3. In addition, proponents published quotes from doctors supporting the use of medical marijuana. See id. (quoting Dr. Richard Cohen, chief oncologist at California Pacific Hospital: "[t]his medicine does no harm to the patient and is effective in relieving pain and nausea").


49. See California Secretary of State, supra note 47.

50. See CALIFORNIA'S FOR COMPASSIONATE USE, BROCHURE (1996).

51. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West Supp. 1998); see also discussion infra part I.C.3.
played on the "compassionate use" theme, featuring a cancer survivor who used marijuana to ease nausea, a doctor who recommended marijuana to ailing patients, and a widow of a cancer patient who had used marijuana.\(^{52}\)

Furthermore, the campaign in support of Proposition 215 was aided unintentionally by Attorney General Dan Lungren. In August of 1996, Lungren authorized a raid of Peron's Cannabis Buyers Club.\(^{53}\) On October 11, 1996, less than a month before the election, Peron and others at the club were arrested for possession and transportation of marijuana and maintaining a place to furnish marijuana.\(^{54}\) Many viewers perceived the raid as an abuse of power improperly brought against a person trying to serve the needs of the seriously ill.\(^{55}\)

Proposition 215 had many powerful emotional arguments in its favor, as dying patients in need of palliative care justifiably evoked sympathy, but Proposition 215 encompassed much more than care for seriously ill or dying patients. Courts may eventually interpret the law narrowly to require a showing of serious and terminal illness, but the Act itself is not limited to serious or terminal illness,\(^{56}\) and its drafters intended a broader meaning.\(^{57}\) As is increasingly common in campaigns in support of initiatives, the campaign surrounding Proposition 215 played on passion and demonstrated a casual approach, at best, to the hard issues raised by the initiative.\(^{58}\)

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52. See Bailey, supra note 42.
54. See Hatfield & Brazil, supra note 53.
55. See id. (quoting San Francisco District Attorney Terence Hallinan as saying, "[it is a clear abuse of the prosecutorial power of an indictment being used for political purposes to affect an outcome of an election").
56. See discussion infra Part I.C.3.
57. See discussion supra Introduction; Part I.B.
58. See discussion supra Part I.B. Opponents of Proposition 215 also played on passions, describing the initiative as an attempt at legalizing drugs and downplaying stories of patients who claimed relief from using marijuana. They also claimed that passage of Proposition 215 would send the wrong message to children by implying that marijuana is a safe medicine rather than a dangerous drug. See CITIZENS FOR A DRUG-FREE CALIFORNIA, NO ON 215: DON'T LEGALIZE MARIJUANA (1996).
C. The Ambiguities of Proposition 215

Proposition 215 was drafted by laymen who did not engage in the traditional give and take process which allows legislation to evolve. The drafters also lacked the aid of a large legislative staff. Consequently, Proposition 215 has created considerable confusion.

Proposition 215, codified as the Compassionate Use Act of 1996 in Health and Safety Code § 11362.5, contains several provisions. First, it requires a physician to determine that a person's health would benefit from the use of marijuana. The statute states that the physician may recommend the use of marijuana for the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." Second, the statute creates immunity for patients and "their primary caregivers" who obtain and use marijuana upon the recommendation of a physician. Third, the statute includes an exhortation to state and federal governments to provide for a safe supply of marijuana for medical use. Fourth, it protects a physician who complies with the provisions of the act from punishment or denial of other rights or privileges. Fifth, it states that specified code sections relating to marijuana possession and cultivation do not apply to patients and their primary caregivers who possess or cultivate marijuana for personal use upon a written or oral recommendation from a physician. Finally, the statute defines a "primary caregiver" as an "individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

Prior to the 1996 election, some prominent leaders refused to support Proposition 215 because of its ambiguity or "loose" language. During legislative hearings on the initiative, critics

60. Id. (emphasis added).
61. See id. § 11362.5(b)(1)(B).
62. See id. § 11362.5(b)(1)(C).
63. See id. § 11362.5(c).
64. See id. § 11362.5(d).
65. Id. § 11362.5(e).
66. For example, United States Senator Dianne Feinstein refused to support Proposition 215, fearing that the initiative "could open the door to much more than compassionate use of marijuana for the terminally ill. It contains dangerous loopholes
argued that the initiative contained numerous loopholes.67 This section reviews a number of statutory terms that critics of Proposition 215 have identified as ambiguous. This section also attempts to distinguish between political rhetoric and serious problems created by Proposition 215.

1. Physicians—Proposition 215 does not define the term "physician."68 Critics of the measure argued during legislative hearings on the initiative that "the so-called recommendation could be from a physician in the country of Bolivia, Russia, or some other Third World Country that really has no medical standards."69 Alternatively, proponents of a broad interpretation of Proposition 215 urge reliance on the dictionary definition of the term. One meaning of a "physician" is a person "skilled in the art of healing."70 A broad interpretation of the term "physician" would add significantly to the scope of the legislation. A wide variety of professionals are skilled in the art of healing, including chiropractors, homeopaths, and a variety of therapists. Other less conventional healers may also qualify under such broad language.71


69. Joint Hearings, supra note 67 (statement of Orange County District Attorney Michael Capizzi). He also argued that

It has to be recommended by a physician, but it could be a physician recommending it in an underground newspaper that published it once a week. There's no requirement that it be a physician recommending it for a specific patient. It could be just a patient, a doctor, physician, from another country writing an article, recommending it, for people who have any of these illnesses.

70. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 887 (9th ed. 1989).

71. Homeopaths, for example, profess to have the ability to heal persons who "can't be helped by conventional medical care." See Steve Waldstein, Homeopathy: Natural Health Care (visited July 27, 1997) <http://wwwimensional.com/~stevew/> (on file with the University of Michigan Journal of Law Reform). However, homeopaths are not regulated by state or federal law. It is also interesting to note that neither a physical nor a doctor-patient relationship is required in order for a physician recommendation to be made. This has led opponents of Proposition 215 to fear that mass recommenda-
How the courts define "physician" is significant. If courts adopt the dictionary definition, state and federal law enforcement officials lose a considerable measure of their ability to control distribution of marijuana. For example, the initial federal response to Proposition 215 was to threaten licensed physicians with revocation of their privilege to write prescriptions if they violated federal law by prescribing marijuana. The deterrent force of the threat is lost, however, if unregulated "physicians" fall within a broad interpretation of the statute, as a shaman may care little whether or not he is authorized to treat Medicare patients.

The types of illnesses for which marijuana may be prescribed is also open to broad interpretation. Permitting a variety of unconventional healers to recommend marijuana may indirectly influence the types of conditions for which marijuana may be recommended. For example, the types of illnesses for which a licensed medical practitioner might legitimately recommend marijuana are quite limited. Significant anecdotal studies suggest that some cancer patients and AIDS patients respond well to smoking marijuana, whereas alternatives like Marinol do not provide similar relief. Beyond that, however, licensed medical practitioners may not be willing to recommend marijuana because they consider marijuana's benefits too limited and its risks too great.

72. See Joint Hearings, supra note 67, at 34–36 (Testimony of Orange County District Attorney Mike Capizzi).

73. A "shaman" is "a priest who uses magic for the purpose of curing the sick, divining the hidden, and controlling events." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1081 (9th ed. 1989).

74. For example, the earliest written reference to medical use of marijuana appeared in the Chinese Pharmacopoeia in the 15th Century, B.C. See KEVIN B. ZEESER, COMMON SENSE FOR DRUG POLICY, RESEARCH FINDINGS ON MEDICINAL PROPERTIES OF MARIJUANA 2 (1997). The Chinese used marijuana to treat maladies ranging from constipation to rheumatism, while Indians, Africans, ancient Greeks, and medieval Europeans used marijuana to treat fevers, dysentery, and malaria. See Matthew W. Grey, Comment, Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/Physician Relationship, 30 U. RICH. L. REV. 249, 251 (1996).

75. See ZEESER, supra note 74, at 5 (citing the Chang & Sallen studies, finding that other studies comparing smoked marijuana to synthetic THC have found the former much more effective).

76. Physicians face several dilemmas when deciding whether to recommend marijuana to a patient. A decision not to recommend the drug may be considered a
healers, on the other hand, might not be constrained by the same kinds of methodologies or professional ethics as the licensed practitioner. 77

Under traditional maxims of statutory construction, a court might give "physician" its dictionary meaning. 78 Courts justify their use of dictionary meanings on the assumption that, absent contrary evidence, the legislature (or here, the voters) must have intended the common use of the relevant term as reflected in its dictionary meaning. 79 Such a result would be unfortunate, however, because it would increase the opportunities for abuse of the law.

A second argument supports a narrow reading of "physician" and demonstrates the hyperbole engaged in by opponents of Proposition 215. Proposition 215 appears in the Health and Safety Code. Elsewhere in the Code, "physicians" are defined as "persons who are licensed to practice their respective professions in this state." 80 Adopting such a narrow definition would limit the category of qualified people who might recommend marijuana by requiring that healers be licensed. 81

The California Supreme Court has not yet spoken definitively on how courts should interpret initiatives. The court has stated that "[t]he power of the initiative must be liberally construed . . . to promote the democratic process." 82 One scholar has argued, however, that the court's process of interpretation regarding other specific initiatives shows more restraint. 83

decision to discontinue treatment for a patient who has failed to respond to other drugs. On the other hand, a decision to recommend marijuana creates a host of legal and medical risks for the patient. For example, all patients risk being prosecuted for possession of marijuana, and immune-deficient patients risk developing respiratory problems caused by the carcinogens that smoked marijuana produces. See Grey, supra note 74, at 255.

77. See id. at 259 (acknowledging that a medical doctor is bound by the Hippocratic oath which provides that physicians "will keep patients from harm and injustice").


79. See id. at 178-79 (finding that if Congress had intended a meaning other than the common dictionary usage, it had the opportunity to indicate such an alternate meaning).

80. CAL. HEALTH & SAFETY CODE § 11024 (West 1991) ("‘Physician,’ ‘dentist,’ 'podiatrist,' ‘pharmacist,’ and ‘veterinarian’ mean persons who are licensed to practice their respective professions in this state.").

81. See California Secretary of State, supra note 47.


83. See Kelso, supra note 3, at 362 (citing Proposition 13 as the best example of a judicial tendency to construe initiatives narrowly).
One such restraint is the court's reliance on ballot analysis and arguments in its interpretation of the initiative.\textsuperscript{84} Insofar as California's courts rely on such materials, they might be able to limit the scope of Proposition 215. The campaign literature explicitly limited Proposition 215 to licensed physicians,\textsuperscript{85} and limiting the law to licensed physicians prevents some of its potential breadth. As indicated, the types of illnesses for which marijuana might be appropriate may depend on the healer's training,\textsuperscript{86} as licensed physicians with medical training are subjected to limitations created by their professional training and by their fear of federal sanctions.\textsuperscript{87}

The potential ambiguity of the term "physician" was raised during the hearings.\textsuperscript{88} Such ambiguity could have been readily resolved during the legislative process, and the use of professional drafters could have avoided legal uncertainty and potential misinterpretation by the courts. Instead, Proposition 215 is filled with ambiguities because the initiative process lacks the flexibility to avoid such problems if they arise after the initiative has qualified for the ballot.

2. Primary Caregivers—Even more ambiguous than the term "physician" is the term "primary caregiver," the only term defined in the Act.\textsuperscript{89} The immunity from prosecution extended to "primary caregivers" presumably applies only to possession, as opposed to use, of marijuana.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{84} See id. at 358 (suggesting that reliance on campaign literature is "contrary to both common sense and empirical research," because evidence suggests that voters do not rely on the ballot literature). One might make a stronger argument that advertisements in support of the initiative are better evidence of the voters' understanding of what they have intended.
\item \textsuperscript{85} In fact, the opening statement to the Argument in Favor of Proposition 215 appearing in the ballot pamphlet read, "Proposition 215 will allow seriously and terminally ill patients to legally use marijuana, if, and only if, they have the approval of a licensed physician." California Secretary of State, supra note 47.
\item \textsuperscript{86} See discussion infra Part I.C.2.
\item \textsuperscript{87} See discussion supra Part I.C.1.
\item \textsuperscript{88} See Joint Hearings, supra note 67.
\item \textsuperscript{89} See CAL. HEALTH & SAFETY CODE § 11362.5(e) (West Supp. 1998) ("For the purposes of this section, ‘primary caregiver’ means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.").
\item \textsuperscript{90} Section 11362.5(b)(1)(B) states that the law is "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." Id. § 11362.5(b)(1)(B). To avoid ambiguity, the section might have provided immunity only for "patients who obtain and use marijuana" and "caregivers who obtain marijuana for qualifying patients." Other language, such as the requirement in § 11362.5(b)(1)(A) that the use be for medical purposes, makes it sufficiently clear that the section does not give the caregiver immunity from prosecution for her use of marijuana.
\end{itemize}
Proposition 215

Obvious examples exist as to who ought to have immunity from prosecution under Proposition 215's primary caregiver provision. For example, seriously ill patients who are bedridden must rely on a spouse, significant other, or trusted friend to secure their medicine. The law avoids placing these people in a cruel dilemma of committing a crime by aiding their loved ones.91 Dennis Peron, draftsman of the proposition and its most visible proponent, has argued that his Cannabis Cultivators Club qualifies as a "primary caregiver" within the meaning of subsection 11362(e).92 This interpretation is not obvious from the express language of the statute.93

A "primary caregiver," as defined in Proposition 215, is one who has "assumed responsibility for the housing, health, or safety" of a qualified patient.94 The requirements of assuming responsibility for "housing," "health," and "safety" are disjunctive, so the Cannabis Cultivators Club's failure to provide for a person's housing is not controlling. Providing for a person's "safety" is certainly an open-ended concept, but it is hard to understand how a facility like the Cannabis Cultivators Club, open only a few hours a day,95 can take primary responsibility for its users' safety.

marijuana. See id. § 11362.5(b)(1)(A). As a practical matter, if the caregiver smokes marijuana with the qualifying patient in private, imagining how the police might detect the crime is difficult. Furthermore, even if the caregiver is arrested for possession of marijuana and has not used the marijuana in front of the police, it is hard to imagine that a district attorney would be able to proceed to trial against the caregiver, if the other statutory elements are satisfied. One California court has already noted some of the absurd results that might follow from the caregiver provision of the statute. See People v. Trippet, 66 Cal. Rptr. 2d 559, 571 (1997) ("For example, the voters could not have intended that a dying cancer patient's 'primary caregiver' could be subject to criminal sanctions for carrying otherwise legally-cultivated and possessed marijuana down a hallway to the patient's room.").

91. See Diana Greigo Erwin, Mall's No Place For Medicinal Pot, SACRAMENTO BEE, Aug. 12, 1997, at B1 (quoting Dr. Jerome P. Kassirer's Jan. 30, 1997, editorial in the New England Journal of Medicine: "The alleviation of distress can be so striking that some patients and their families have been willing to risk a jail term to obtain or grow the marijuana.").

92. In fact, California Superior Court Judge David Garcia wrote in his order modifying the preliminary injunction issued against the club that, "Defendants may possess and cultivate medicinal marijuana... for the personal medicinal use of persons who have designated the defendants as their primary caregiver pursuant to Health & Safety Code § 11362.5 (e) whose physician has recommended or approved the use of medicinal marijuana either orally or in writing to the defendants." People v. Dennis Peron, Docket No. 980105, Jan. 10, 1997.

93. The First District Court of Appeals reached a similar conclusion in People ex rel. Lungren v. Peron, 70 Cal. Rptr. 2d 20 (Cal. Ct. App. 1998).

94. CAL. HEALTH & SAFETY CODE § 11362.5(e) (West Supp. 1998).

95. See Glen Martin, The Tokin' Joint Inside the Cannabis Cultivators' Club, S.F. CHRON., Aug. 24, 1997, at 1/Z1 (noting that Dennis Peron's San Francisco club is open
Insofar as the Cannabis Cultivators Club provides people with marijuana, one might argue it has assumed responsibility for its members' health, but the claim that the club is the "primary" entity in charge of its members' health still seems doubtful. Seriously ill patients need a wide variety of medical treatments beyond the use of marijuana. For example, a cancer patient who uses marijuana to combat chemotherapy-induced nausea must have a host of health care professionals who share a much greater responsibility for his or her health than Dennis Peron's organization. The Cannabis Cultivators Club also provides a very narrow kind of care. Unlike a spouse or close friend who may offer a wide array of nurturing for the sick person, the club offers only marijuana and a gathering place for occasional socializing.

The potential for abuse under Proposition 215 expands as each term is given a broad interpretation. Liberal interpretation of the term "primary caregiver" creates a large class of healthy people authorized to possess marijuana, and it takes very little imagination to see how abuse may result under such a proposition.

3. "[A]ny other illness:" Is all use of marijuana medical?—One of the primary concerns about Proposition 215 stems from the language of subsection 11362.5(b)(1)(A) of the California Health and Safety Code, which states that marijuana may be recommended for a person suffering from "any other illness for

four hours a day on Monday through Thursday, and eight hours on Friday, serving between 500 and 1,000 patrons per day).

96. Peron notes: "[The Cannabis Cultivators Club] is a support group— I think of it as a giant therapy session." Peron Interview, supra note 36.

97. The characterization of Peron's Club as a "primary caregiver" has evoked skepticism from at least one observer: "A cynical listener might discern [in Dennis Peron's speech] an attitude that seems less like that of the nurturing caregiver, and more like that of . . . an old pothead eager for the good times to roll again." Hanna Rosin, The Return of Pot: California Gears Up for a Long, Strange Trip, THE NEW REPUBLIC, Feb. 17, 1997, at 19. As discussed below, suppliers may be able to avoid prosecution under the doctrine of necessity. See discussion infra Part I.E.3. Whether or not suppliers are covered by the act, however, the ambiguity in the status of suppliers offers an example of how easily a serious legal issue might have been avoided, but wasn't, due to amateur drafting. Professional drafters, interested in avoiding unnecessary litigation, could easily have clarified the status of suppliers if the bill had been adopted by the legislature. In addition, other problems exist that could have been resolved through the legislative process without much difficulty; for example, Proposition 215 does not indicate the amount of marijuana that may be possessed for personal use. A simple solution would be a reference to section 11357 of the California Health and Safety Code, which would make possession of less than 28.5 grams of marijuana a misdemeanor, and section 11359, which would make possession of marijuana for sale a felony. See People v. Trippet, 66 Cal. Rptr. 2d 559, 568 (1997); CAL. HEALTH & SAFETY CODE §§ 11357, 11359 (West 1991).
which marijuana provides relief.\textsuperscript{98} Legitimate concerns about the scope of such broad language heightened when Dennis Peron announced that all use of marijuana is medical.\textsuperscript{99} Anecdotal evidence suggests that some members of the cannabis cultivators’ clubs take his view seriously.\textsuperscript{100}

The residents of California voted for legislation billed as a compassionate way to provide marijuana for medical use.\textsuperscript{101} It was not a referendum on the legalization of marijuana. Yet the potentially liberal construction of the “any other illness” language, combined with limited federal resources\textsuperscript{102} and the concerns of law enforcement about their liability in false arrest suits,\textsuperscript{103} creates a risk of de facto legalization for many marijuana users.

In addition, Proposition 215 contributes to the de facto legalization of marijuana because a large number of marijuana users may be able to find a sympathetic physician willing to interpret “any illness” broadly, thereby giving them a colorable claim of immunity. For such a class of patients, marijuana possession and use may now be lawful as a matter of state law.\textsuperscript{104}

Whether the de facto legalization of marijuana lasts will depend on how broadly California’s courts interpret “any other illness.” Some commentators have argued that even trivial

\textsuperscript{98} CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West Supp. 1998).

\textsuperscript{99} Peron was quoted as saying, “I believe all marijuana use is medical—except for kids.” \textit{Marijuana for the Sick}, Editorial, N.Y. TIMES, Dec. 30, 1996, at A14.

When asked in a later interview whether he regretted making the statement, Peron replied, “NO WAY do I regret it. I believe 90 percent to 100 percent of marijuana use is medical.” Rosin, supra note 97, at 22.

\textsuperscript{100} Many of the clients of the Cannabis Cultivators Club in San Francisco have questionable medical need for the drug. For example, one client, responding to a question about whether marijuana helped the migraine headaches for which she professed to use the drug, replied, “I use it as prevention. I have not had my weekly headache since childhood. It has to be really good bud, and it relaxes me. It takes me to a higher spiritual place. It’s part of my religious belief; it’s a sacrament.” Rosin, supra note 97, at 20.

\textsuperscript{101} Proponents of Proposition 215 ran television commercials emphasizing their desire for compassionate use. The commercials included a breast cancer survivor who used marijuana to ease nausea, a doctor who prescribed marijuana to ailing patients, and the widow of a cancer patient who used marijuana to ease his struggle. See Bailey, supra note 42; James Ricci, \textit{Voters Get Last Word}, L.A. TIMES, Nov. 4, 1996, at B1.

\textsuperscript{102} \textit{See} Public Health: Reno Says Prescribing Marijuana Illegal Under Federal Law Despite State Actions, BNA HEALTH CARE DAILY, Dec. 31, 1996, available in LEXIS, BNA Library, BNAHCD File [hereinafter Public Health] (acknowledging Attorney General Janet Reno’s admission that the federal government does not have the resources “to absorb all the case load of state and local law enforcement”).

\textsuperscript{103} See discussion infra Part I.E.

ailments might come within the meaning of "any other illness." One opponent of Proposition 215 interpreted "any other illness" to include "stress, headaches, backaches, upset stomach or any other minor ailment." Another opponent suggested that "anxiety" and "menstrual cramps" might come within the meaning of the Act's "any other illness" language. Thus, the phrase "any other illness" is extremely open-ended and needs to be interpreted by the courts.

Competing arguments regarding this language must be recognized. First, Proposition 215 explicitly states that marijuana must provide relief for the illness. Such language clearly imposes certain limitations on the illnesses for which marijuana may be recommended, but such limitations lead to additional difficulties in determining what will be considered "relief for the illness."

For example, one might argue that the statute requires marijuana to be a recognized treatment for particular illnesses. Yet due to the settled efforts of the federal government, there are no officially recognized medical uses of marijuana. Hence, the statutory language cannot be interpreted to mean that only uses in the United States Pharmacopoeia or uses recognized by federal law are within the meaning of the statute. This view is supported by the fact that none of the illnesses specified in the statute are recognized by the federal government as illnesses for which the use of marijuana is medically acceptable. Consequently, the requirement that marijuana

105. See Vincent J. Schodolski, In California, Debate Rages Over Easing Marijuana Law in Medical Cases, CHI. TRIB., Oct. 3, 1996, at 3 (quoting Robert Elsberg, Chairman of Narcotics and Alcohol Committee of California Peace Officers Association: "[w]hat [the 'any other illness' language] has done is to open it up to be prescribed for anything from cancer to a sore thumb").

106. Joint Hearings, supra note 67, at 8 (statement of Stu Molrich).

107. See Joint Hearings, supra note 67 (quotation from Dr. Michael Meyers, Board-certified family practitioner and UCLA faculty member in the Department of Family Medicine).

108. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West Supp. 1998) (stating that one of the purposes of the Compassionate Use Act of 1996 is "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief").

109. See discussion infra Part II.A-B.

110. Marijuana is recognized as a Schedule I drug under federal law. See 21 U.S.C. § 812 (1994). This classification denotes that the drug has a high potential for abuse, that no currently accepted medical use for the drug exists, and that there is a lack of accepted safety for use of the drug under medical supervision. See id.
Proposition 215 provide relief must presumably find support in some medical literature.

Additional interpretations of the statute’s capacious language are possible. Courts might limit the language to mean that marijuana may be recommended only for conditions where supporting studies suggest that marijuana provides relief. Such an interpretation would allow many options for a recommending physician.¹¹¹ A broad interpretation would leave the determination to the physician’s discretion, thereby confirming the fears of the opponents of Proposition 215 who were concerned about the large loophole created by the law.

Proposition 215 also lends itself to a far narrower interpretation than that suggested by either Peron or the measure’s opponents. The narrower interpretation focuses on the language, also found in subsection (A), stating that the law’s provisions apply to “seriously ill Californians,”¹¹² thereby eliminating some of the proposed loopholes dealing with cases that do not involve seriously ill people.

If California courts focus on the ballot initiative literature and legislative hearings to determine the meaning of Proposition 215, an additional principled basis exists upon which “any other illness” might be limited. Testimony before the Joint Senate Health and Human Services Committee and Senate Criminal Procedures Committee supports the conclusion that

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¹¹¹ In reviewing medical literature from the nineteenth century alone, one report cited

[n]umerous reports in the literature describ[ing] [marijuana’s] therapeutic effectiveness over an extensive range of ailments, including: gynecological disorders such as excessive menstrual cramps and bleeding, treatment and prophylaxis of migraine headaches, alleviation of withdrawal symptoms of opium and chloral hydrate addiction, tetanus, insomnia, delirium tremens, muscle spasms, strychnine poisoning, asthma, cholera, dysentery, labor pain, psychosis, spasmatic cough, excess anxiety, gastrointestinal cramps, depression, nervous tremors, bladder irritation, and psychosomatic illness.

SUBCOMMITTEE ON ALCOHOLISM & NARCOTICS, U.S. DEPT OF HEALTH, EDUC., AND WELFARE, 92D CONG., REPORT ON MARIJUANA AND HEALTH 53–54 (1971)(citations omitted) [hereinafter REPORT ON MARIJUANA AND HEALTH].

The report then noted that contemporary experiments had considered marijuana or its synthetic analogues as “treatment [for] the withdrawal of the chronic alcoholic”; that unripe Cannabis extracts showed “antibiotic activity”; that “[o]ther THC analogues may prove to be valuable agents for the treatment of high blood pressure and uncontrollable fevers”; and that marijuana might be beneficial for terminal cancer patients since its effects include “stimulation of appetite, euphoria, increased sense of well-being, mild analgesia and an indifference to pain. . . .” Id.

the initiative should be limited to serious illnesses. Furthermore, the ballot pamphlet explicitly stated that the initiative would allow seriously and terminally ill patients to use marijuana for palliative care.

Courts will be forced to make such distinctions, regardless of whether or not they are the best body to make the relevant decisions. Recourse through the legislative process instead of the initiative process, however, would have allowed policy makers to draft far superior legislation.

The claim that the legislature might have avoided some of the initiative's ambiguous language is not merely theoretical in the case of Proposition 215. Peron and his co-drafter modeled Proposition 215 on earlier legislation that Governor Wilson had vetoed. Assembly Bill 1529 contained certain ambiguities. For example, it lacked a limit on the amount of marijuana a person might possess. The key terms, including illnesses for which marijuana treatment methods might be recommended, were properly limited to avoid the kind of legal controversies identified above.

The hearings held by Joint Senate Health and Human Services and Senate Criminal Procedures Committee provide additional evidence that the legislature could have avoided some of Proposition 215's ambiguities. Hearings are required under the California Elections Code once an initiative has qualified for the ballot, but the purpose of those hearings is limited. The hearing has an educational function for the public and the media, but the legislature cannot correct a poorly drafted initiative. During the Joint Committee hearings, witnesses discussed the ambiguity and argued about the correct interpretation of the initiative. In fact, the chair of the hearings, obviously aware of the ambiguity of the initia-

113. See Joint Hearings, supra note 67.
114. See California Secretary of State, supra note 47.
117. See id. (explaining that AB 1529 limited the availability of medical marijuana to cancer, AIDS, glaucoma, and multiple sclerosis patients).
118. See CAL. ELEC. CODE § 9034 (West 1996).
119. See id. (“The appropriate committees shall hold joint public hearings on the subject of such measure prior to the date of the election at which the measure is to be voted upon . . . . Nothing in this section shall be construed as authority for the Legislature to alter the initiative measure or prevent it from appearing on the ballot.”).
120. See Joint Hearings, supra note 67.
tive, even asked a number of witnesses how they would remedy the initiative's uncertainties.\footnote{121. Id.}

**D. Confusion Caused by What Proposition 215 Did Not Say**

Not only was Proposition 215 poorly drafted, but it also failed to address a number of important legal questions. If Proposition 215's proponents had used traditional legislative channels, other interest groups might have forced the law's proponents to address the omitted legal and policy issues.\footnote{122. See Kelso, supra note 3, at 339.}

Dennis Peron has stated candidly that he favors legalization of marijuana,\footnote{123. See Rosin, supra note 97, at 19 ("The movement is about the compassionate extension of relief to sick people . . . but it is also very much, and primarily, about legalization.").} and other supporters share that sentiment.\footnote{124. See id. at 19–20 (asking Jeff Jones, proprietor of a cannabis club located in Oakland, California, one of the strictest cannabis clubs in the state, if marijuana would make "anyone feel better," to which Mr. Jones replied, "Now you're getting the point").}

Yet Proposition 215 was sold to the voters as a statute authorizing medicalization of marijuana, not legalization.\footnote{125. See California Secretary of State, supra note 47.}

The normal legislative process would have allowed both greater clarity, and, assuming that the affected parties had been willing to engage in political compromise, legislation that did what the California public wanted without the unintended possible consequence of de facto legalization. Decriminalizing possession of marijuana raises important policy questions not posed by the debate about medicalization of marijuana.\footnote{126. See, e.g., Richard Lawrence Miller, The Case For Legalizing Drugs 82–83 (1991) (citing the following policy reasons for the legalization of drugs: increased safety for police officers who risk their lives over "substances that cause no more harm than beer or cigarettes"; an end to illicit profits that corrupt narcotics officers; an end to the monitoring of private behavior within private homes; an end to the enforcement of morals by law enforcement officers; and an ease of the burden on prosecutors, judges, and corrections officers).} Using the initiative process to achieve legalization without a full public debate and consideration of the relevant costs is an illegitimate use of the process.

This section reviews how Proposition 215 may lead to de facto legalization of the possession of marijuana and also addresses some of the issues that might have been dealt with
had the legislative process been used, thereby avoiding de facto legalization.

1. Probable Cause and False Arrest—The federal government has the power to enforce marijuana laws fully, and it is not required to recognize the defense of medical necessity authorized under Proposition 215. The federal government is not interested, however, in monitoring possession of small amounts of marijuana. Under current federal policy, federal authorities do not prosecute marijuana cases unless the amount of marijuana exceeds 1,000 pounds or 500 plants. Following the 1996 election, federal drug Czar Barry McCaffrey promoted a plan which threatened physicians with sanctions if they prescribed marijuana. Also, Attorney General Janet Reno promised that the federal government would work with state officials to “ensure as full and complete enforcement of the federal law as possible,” despite her admission that the federal government lacks the resources to supplant local law enforcement efforts.

Local police and prosecutors have already expressed concern about the uncertain scope of Proposition 215. How does a police officer determine whether she has probable cause to arrest a suspect who possesses marijuana? Some law enforcement


128. See Eric Brazil, Federal Marijuana Law Will be Enforced Here: Conflicts Between U.S., State Lead to “Legal Anarchy”, S.F. EXAMINER, Nov. 7, 1996, at A8 (“The threshold for DEA involvement in marijuana arrests, set by the U.S. Attorney, is in the range of 1,000 pounds or 500 plants . . . .”).


130. Public Health, supra note 102.

131. See id.

132. Despite efforts by state officials and law enforcement officials to reach a consensus concerning Proposition 215's implementation, communities have responded in varying ways to what formerly were simple possession or cultivation arrests. See, e.g., Marilee Enge, Policing Agencies Differ on Pot Legality, CONTRA COSTA TIMES, Mar. 7, 1997, at A9 (outlining attempts by various county police agencies to handle the new law); Tyche Hendricks, Fremont Police Hip to Pot Laws: A Note From Driver's Doctor Allows Him to Transport Plants, SAN JOSE MERCURY NEWS, June 10, 1997, at 1B (describing the experience of a man with four marijuana plants in his back seat whom police pulled over but let go once he produced a doctor's note indicating that the drug was to be used to relieve the patient's back pain and nausea); Keith Stone, State Officials Meet Today to Discuss Marijuana Measure, Prop. 215: Conflicting Laws Could
officials argue that the possibility that an offender possesses marijuana lawfully makes it difficult or impossible to prove that a police officer had probable cause to search a suspect and therefore will lead to the suppression of evidence and dismissal of prosecutions.133

Furthermore, law enforcement officials have expressed concern that they may be liable for false arrest if they arrest suspects who possess marijuana for medical purposes.134 Concern about personal liability for false arrest may deter police from enforcing state marijuana laws.135 Police concern about charges based on illegal searches may be overstated, however, since officers are entitled to a good faith defense against such charges.136 Even with such a defense, however, police may be deterred from vigorous enforcement of marijuana laws because of the risk of suit itself. Defending a lawsuit is expensive. Police in some cities may be further deterred because of concern about the relevant jury pool. For example, given the enormous support for Proposition 215 in San Francisco, the San Francisco police may be concerned that juries will reject assertions of good faith and find against the police.137


133. The concern expressed in the text (or by Proposition 215's opponents) may be overstated. For example, with regard to concern about the existence of probable cause, an officer must only demonstrate that there is a "substantial chance" that the person is engaged in a crime. See Illinois v. Gates, 462 U.S. 213, 243–44 n.13 (1983). Most marijuana use is almost certainly not for medical use, notwithstanding Dennis Peron's assertion that all use is medical use. See supra note 99 and accompanying text. Therefore, an officer who observes a person in possession of marijuana almost certainly has a basis for believing that the person possesses marijuana unlawfully. Because a probable cause determination must be made on a case-by-case basis, a person's exit from a cannabis club may not constitute probable cause. Nevertheless, a strong probability remains that the suspect is violating the law unless additional information suggests that the possessor is either a medical user or a medical caregiver.

134. See Dana Wilkie, Clouds Shroud Marijuana Laws, SAN DIEGO UNION-TRIB., Dec. 3, 1996, at A3 (discussing confusion among law enforcement officials concerning the enforcement of marijuana laws and speculating about whether an officer would be liable for an illegal seizure for confiscating marijuana possessed by a suspect who claimed a medical need).

135. See Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.").

136. See id. at 640–41 (holding that a law enforcement officer is entitled to qualified immunity in a civil action under section 1983 if he reasonably believed his actions were constitutional).

Also contributing to the de facto legalization of possession of marijuana is the Act's failure to impose any restrictions on where a qualifying patient may possess marijuana. For example, marijuana use by medical patients is not restricted to use in health care facilities or to use while under medical supervision. Free access to marijuana enables close associates of the qualifying patient to share marijuana in the privacy of the patient's home. Detection and arrest in that setting is unlikely. Thus, associates of qualifying patients may gain

(stating that San Francisco Attorney General Terence Hallinan supports Proposition 215 and noting Attorney General Dan Lungren's decision to prosecute Dennis Peron and five co-defendants in Oakland, rather than in San Francisco, on charges stemming from the August 1996 raid of the San Francisco cannabis club, perhaps because he feared that San Francisco jurors would be "too lenient" with Dennis Peron); Eric Brazil, California's Legalization of Medicinal Marijuana Stymies Law Officials, FORT WORTH STAR-TELEGRAM, Nov. 17, 1996, at 16 ("As a practical matter, lighting up a joint in public has been winked at by law enforcement in California's major cities, notably San Francisco, for some time.").

138. See CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 1998). In a recent case arising in the California state capital, a 25-year-old AIDS patient who carried a note from his doctor and an identification card from a San Francisco cannabis buyers' club was cited by police for smoking marijuana casually in a downtown mall. The Sacramento County District Attorney's office decided not to prosecute the man because his use was not illegal under Proposition 215. The DA's office also suggested that such illicit public use could soon become illegal under local ordinance. See Jim Sanders, No Charges in Medicinal Pot Case: Man Who Smoked Marijuana on K Street Mall Won't Be Prosecuted, SACRAMENTO BEE, Aug. 28, 1997, at B1; cf People v. Trippet, 66 Cal. Rptr. 2d 559, 557 (Cal. Ct. App. 1997) (proposing as a test to determine if an act of marijuana transportation is permissible "whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs").

139. While the Supreme Court has cut back on Fourth Amendment protections over the past twenty years, it has left intact the highest level of protection in a person's home. For example, the Court has held that police may arrest a suspected felon without a warrant when the arrest is made in public. See United States v. Watson, 423 U.S. 411, 421–24 (1976). It has also held that an arrest in the home must be accompanied by an arrest warrant. See Payton v. New York, 445 U.S. 573, 576, 589–90, 602–03 (1980). If the police arrest attempt is in a third party's home, a search warrant is required. See Steagald v. United States, 451 U.S. 204, 220–22 (1981). Even in cases involving the hot pursuit of an offender, the Court has limited the police power to enter a home without a warrant for relatively minor offenses. See Welsh v. Wisconsin, 466 U.S. 740, 749–54 (1984). The Court has further held that even when the police are lawfully on the premises for one purpose, they must nonetheless secure a warrant if they seek to extend a search beyond the limits of evidence in plain view. See Arizona v. Hicks, 480 U.S. 321, 324–26 (1987). Even in the area of technological information gathering, the Supreme Court has distinguished between monitoring a suspect's activity that takes place in public (and is, therefore, unprotected) and activity that takes place in the home (and is, therefore, protected by the Fourth Amendment). Compare United States v. Knotta, 460 U.S. 276, 281–82 (1983) (holding that drivers have a diminished expectation of privacy, even when an electronic device is used to track a suspect) with United States v. Karo, 468 U.S. 705, 716–17 (1984) (holding that law enforcement officials must obtain warrants to use electronic monitoring devices in private residences).
access to marijuana in a setting where detection is unlikely. The risks inherent in the classic surreptitious marijuana purchase from a street dealer can be easily and successfully avoided by associates of a qualifying patient.

2. The Americans with Disabilities Act—During the Proposition 215 hearings, opponents raised concerns that employers would be required to accommodate marijuana use by employees in the workplace if its use was recommended by a physician. Similar concerns have been voiced by some labor lawyers. There is some debate about whether an employee with an otherwise qualifying disability may claim the right to use marijuana under the Americans with Disabilities Act (ADA), but this debate is not yet in the courts.

Drug testing became common in the workplace during the 1980s, and, while on the wane in recent years, it is still an accepted practice in many employment settings. Before Proposition 215, the law was settled that an employer could discharge an employee for marijuana use, even if she were disabled within the meaning of the ADA.

At first blush, the ADA seems to speak definitively to protect an employer's right to discharge an employee for illegal drug use. Section 12114 of the ADA deals extensively with illegal drug use. Subsection 12114(a) excludes from the protection of the Act "any employee or applicant who is currently engaging in the illegal use of drugs . . . " The provision

140. See Joint Hearings, supra note 67 (statement of Stu Mollrich, Consultant to Citizens for a Drug-Free California).


142. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (finding that the need for drug testing by the United States Customs Service of employees engaged in drug interdiction or other activities requiring them to carry firearms outweighed the privacy interests of those employees); see also Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 664–65 (1995) (holding that drug testing of high school athletes was reasonable and constitutional); MILLER, supra note 126, at 74 (noting that during the War on Drugs, the Reagan and Bush administrations shifted the emphasis of enforcement efforts away from large dealers and onto individual drug users by supporting drug testing in schools and places of employment).

143. See, e.g., Collings v. Longview Fibre Co., 63 F.3d 828, 832–33 (9th Cir. 1995) (approving employer’s termination of employees who used, sold, and purchased marijuana on company property despite employees' claim of disability on the ground that the discharge was based on misconduct rather than on any alleged disability).


145. See id.
recognizes an employer's right to administer drug testing, and to prohibit illegal drug use in the workplace. The ADA's definition of "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provision of federal law, but does include the use of drugs that are unlawful to possess or distribute under the Controlled Substances Act. Marijuana is a drug that is unlawful to possess or distribute under the Controlled Substances Act. Yet Proposition 215 has caused uncertainty because an otherwise qualifying person who uses marijuana may claim that she did so "under supervision by a licensed health care professional." If that is the correct reading of the ADA, employers will have to accommodate qualifying workers for whom a physician has recommended marijuana. However, that reading is not required by the language of the ADA taken as a whole.

While the above reading conforms with the literal language of the ADA, it ignores the language immediately following the phrase "under supervision by a licensed health care professional," which states "or other uses authorized by the Controlled Substances Act . . . ." Read together, the second phrase limits the first; that is, the first phrase is limited to instances in which the licensed health care professional has prescribed a controlled substance as authorized by the Controlled Substances Act. The "other uses" language suggests that the preceding phrase, "under supervision" is a use.

146. See id. § 12114(b),(d).
147. See id. § 12114(d)(2).
148. See id. § 12114(c)(1).
149. See id. § 12111(6)(A).
151. 42 US.C. § 12111(6)(A) (1994). Even if Proposition 215 were controlling over the ADA, many patients who qualify under Proposition 215 would remain excluded by the ADA, because the ADA requires the medication be taken by a person who is under the supervision of "a licensed health care professional," while section 11362.5 requires a recommendation from a "physician." See CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 1998). Were the courts to define "physician" broadly, an inordinate number of healers would be able to recommend marijuana, despite not being licensed health care professionals. The ADA, however, does not require that the health care professionals prescribe the medication. See 42 U.S.C. § 12111(6)(A) (1994). If it did, there could be no real concern that employers would be required to accommodate employees who qualify as patients under Proposition 215, because physicians cannot currently prescribe marijuana, which is still a Schedule I drug. See 21 U.S.C. § 812(c) (Schedule I)(c)(10) (1994).
153. See id. § 12111(6)(A).
authorized by the Controlled Substances Act.\textsuperscript{154} Because marijuana remains a Schedule I drug, one with no recognized medical use, its use is not authorized by the Controlled Substances Act and cannot, therefore, be one properly prescribed by a licensed health care professional.\textsuperscript{155}

Senate ADA hearings have already addressed the issue of a worker's use of marijuana.\textsuperscript{156} In written responses to Senators' questions during those hearings, a Deputy Attorney General addressed the problem.\textsuperscript{157} The administration argued that those who use illegal drugs should not fall within the definition of a person with a "handicap," but then stated that the administration did not wish to penalize those persons who, in limited cases, are using 'controlled substances' such as marijuana or morphine under the supervision of medical professionals as part of a course of treatment, including, for example, experimental treatment or to relieve the side-effects of chemotherapy. These persons would fall under the same category as those who are users of legal drugs.\textsuperscript{158}

The Justice Department recognizes that the ADA may protect some employees who use marijuana, but the Deputy Attorney General's reference to marijuana use only applies to the specific language in the ADA and would not extend protection beyond the limited use of marijuana recognized by the federal government. Therefore, under federal law at the time of the ADA's adoption, a patient could lawfully use marijuana if she came within the Compassionate Use Program. According to the Deputy Attorney General, medical marijuana use would be within the meaning of the term "illegal use of drugs"\textsuperscript{159} unless it was prescribed as part of the Compassionate Use Program, because only then would it be a use "authorized by . . . [an]other provision of Federal law."\textsuperscript{160}

\textsuperscript{154} Id.
\textsuperscript{157} See id.
\textsuperscript{158} Id. at 837–38.
\textsuperscript{159} 42 U.S.C. § 12114(a) (1990).
\textsuperscript{160} COMM. ON EDUC. AND LABOR, 101ST CONG., LEGISLATIVE HISTORY ON THE AMERICANS WITH DISABILITIES ACT 8 (Comm. Print 1990) (defining the illegal use of drugs as not including "the use of controlled substances, including the use of experi-
Given the strong anti-drug protections reflected in other provisions of the ADA, the timing of its enactment (at the height of the Bush administration's War on Drugs), and the subsequent suspension of the Compassionate Use Program, a reading extending protection to employees who use illegal drugs for medical reasons would pervert congressional intent. This competing interpretation of the ADA, however, is plausible.

While complex interpretive problems like the effect of Proposition 215 on the ADA can always arise with new legislation, the initiative process exacerbates the problem, because recourse to the initiative process decreases the likelihood of the involvement of professional legislative drafters. Even when groups affected by an initiative do testify in hearings on an initiative, the initiative process allows the drafter to ignore otherwise sound input. Short of proposing a counter-proposition, individuals and groups who can demonstrate a proposition's inadequacies have only one remedy available to them—opposing the proposition. Yet opposing the proposition may be inappropriate. A group may share the goals of the proposition but object to its lack of clarity or to its inadequate handling of some legal issues. In contrast to the normal legislative process, the initiative process is more likely to force simplistic choices between adoption and rejection of the proposition. The public is not well served by this process for a number of reasons, including the fact that we all bear the cost of legal uncertainty.

3. Sources of Medical Marijuana—The status of marijuana suppliers is perhaps the most important issue left unresolved by Proposition 215. The Act gives primary caregivers, physicians, and patients immunity from prosecution.

mental drugs, taken under the supervision of a licensed health care professional. It also does not include uses authorized by the Controlled Substances Act or other provisions of federal law.

161. See, e.g., 42 U.S.C. § 12114(a) (1990) ("For purposes of this subchapter, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."); 42 U.S.C. § 12114(c) (1990) ("A covered entity—(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace ... ").

162. Lester Grinspoon & James Bakalar, Marijuana as Medicine: A Plea for Reconsideration, 23 JAMA 1875 (1995) (announcing the Public Health Service's suspension of the Compassionate Use Program "because it undercut the [Bush] administration's opposition to the use of illegal drugs").

163. See Kelso, supra note 3, at 339–40.

164. See CAL. HEALTH & SAFETY CODE § 11362.5(c)–(d) (West Supp. 1998).
Subsection (b)(1)(c) encourages the federal and state governments “to implement a plan to provide for the safe and affordable distribution of marijuana.” Thus, the statute does mention suppliers, at least implicitly.

Since the passage of Proposition 215, cannabis clubs have proliferated. In fact, Dennis Peron, proprietor of the Cannabis Cultivators Club, has boldly announced his efforts to contract with marijuana growers throughout California. Elsewhere, anecdotal reports circulate that growers are trying to secure statutory protection for their crops. A serious legal question exists as to whether statutory immunity extends to clubs and growers.

As mentioned above, a cannabis club may be able to qualify as a primary caregiver, but only if that term is loosely interpreted. No plausible argument could be made that a supplier is a primary caregiver without a much closer association between the patient and the marijuana supplier. Both patient and supplier, however, may attempt to claim a defense of necessity. Since the 1970s, a number of defendants charged with possession of marijuana have attempted to raise a defense of medical necessity. That defense has

165. Id. § 11362.5(b)(1)(C).
166. See id.
167. See John Hendren, State’s Pot Clubs Still Viewed by Many as Outlaws, CONTRA COSTA TIMES, June 7, 1997, at D1 (noting that at least a dozen clubs have opened in California since voters approved Proposition 215); Alan Hess, The Innovations that Will Shape the Way We Live, SAN JOSE MERCURY NEWS, Mar. 23, 1997, at 1P (speculating that pot clubs in California will someday become franchised businesses).
168. See Eric Brazil, Pot Farming Ready To Bloom, S.F. EXAMINER, Dec. 22, 1996, at A1 (quoting Dennis Peron: “We’ve already signed contracts with a consortium of growers .... We’ve got 250 people signed up who have assigned [medicinal marijuana] caregiver status to these professional growers.”); Pot Club Signs Up Growers But Law Officers Vow To Prosecute, SACRAMENTO BEE, Apr. 4, 1997, at A4 (reporting that Dennis Peron, in hopes of ensuring a steady supply of marijuana for his Cannabis Cultivators Club, signed contracts with Mendocino and Humboldt County growers that he believed legally protected the growers as third-party caregivers).
169. See Martha Irvine, Marijuana Grower Goes Public: He and Others Say Medical Pot Law Will Legitimize North State Crop, SACRAMENTO BEE, Apr. 28, 1997, at B5 (telling the story of one Trinity County marijuana grower who announced to the county supervisors his plan to grow one acre of the drug for medicinal purposes).
170. See discussion supra Part I.C.2.
171. See, e.g., Jenks v. State, 582 So. 2d 676, 676 (Fla. Dist. Ct. App. 1991) (recognizing medical necessity as a defense to charges for possession of marijuana where the defendant was using the drug to combat the symptoms of AIDS); State v. Bachman, 595 P.2d 287, 288 (Haw. 1979) (holding a medical necessity defense is entirely possible under the right circumstances, but that the defendant in this case did not prove that it was medically necessary to possess marijuana); State v. Cole, 874 P.2d 878, 880–81, 883 (Wash. Ct. App. 1994) (holding the medical necessity defense
produced mixed results.\textsuperscript{172}

Necessity is a form of justification.\textsuperscript{173} The elements of a necessity defense vary from jurisdiction to jurisdiction.\textsuperscript{174} Typically, a defendant must establish several elements: (1) the harm sought to be avoided must be greater than the harm caused by the defendant's conduct; (2) the danger with which the defendant is faced must be "clear and imminent"; (3) the action chosen must be one that will abate the harm; (4) there must be no legal alternative that would allow the defendant to avoid the harm; and (5) the defendant must be without fault in creating the necessity.\textsuperscript{175} One final requirement is critical to a successful necessity defense: a showing that the defense is consistent with legislative intent.\textsuperscript{176} Underlying the defense is the idea that a legislature cannot anticipate all possible circumstances and that, in cases in which the elements of necessity are satisfied, the legislature would not intend to criminalize the defendant's conduct. Evidence of an intent to criminalize necessarily defeats the defense.\textsuperscript{177}

Whether the defense to a criminal charge stemming from the use of medical marijuana is classified as a justification or

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was applicable because the defendant had seen five doctors for his back pain and had tried the other medications prescribed for him, which caused "constipation, dizziness, nausea, disorientation, constant sleeping, and inability to drive," while marijuana was the only medication available without these side effects); State v. Diana, 604 P.2d 1312, 1316–17 (Wash. Ct. App. 1979) (citing the elements of the traditional necessity defense that are applicable when using the medical necessity defense for possession of marijuana charges).

\textsuperscript{172} See supra note 171 and accompanying text.

\textsuperscript{173} Professor Joshua Dressler has observed that necessity is a "residual justification defense," "a defense of the last resort ... which does not fall within any other recognized justification defense." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 262 (2d ed. 1995). The theory of the necessity defense is that even though the defendant's conduct comes within the literal language of the relevant criminal statute, no crime has been committed, since the defendant has chosen between two harms, and by choosing correctly, he has avoided the greater social harm. In other words, the defendant has made the "right" choice. See Martin R. Gardner, The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault, 49 S. CAL. L. REV. 110, 120 (1975). A successful necessity defense essentially negates the actus reus of the crime charged. See Michelle R. Conde, Comment, Necessity Defined: A New Role in the Criminal Defense System, 29 UCLA L. REV. 409, 413 (1981).

\textsuperscript{174} See DRESSLER, supra note 173, at 262.

\textsuperscript{175} See id. at 263–65.

\textsuperscript{176} See id. at 264; see also United States v. Schoon, 971 F.2d 193, 196–97 (9th Cir. 1991) (explaining that the necessity defense essentially allows the court to make the choice the legislature would make when confronting the same situation).

\textsuperscript{177} See United States v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972) (noting that a tentative draft of the Model Penal Code specifically limits the necessity defense to justifications that the legislature did not plainly intend to exclude).
as an excuse matters to a third party who aids another, since many courts have blurred the line between the necessity defense and the duress excuse. In cases of both justification and excuse, the defendant's act causes social harm, but in the latter case society understands (excuses) the defendant because of the mental illness or compulsion under which he acted. If a defense is merely an excuse, it typically does not justify the third person's conduct. For example, a sane getaway driver who helps an insane actor commit a bank robbery is not entitled to a defense of excuse based on the insane actor's insanity. But if the primary actor has a justification for her conduct, that defense also justifies the third person's conduct.

Proponents of the medical use of marijuana will almost certainly attempt to characterize the distribution of marijuana as a justified act rather than an excused act. For example, witnesses in support of Proposition 215 have already argued that marijuana is superior to any other available drugs for treating serious illnesses and for relieving severe pain. In Hawaii, the defense has already been raised as a justification.

Without a provision like Proposition 215, the availability of a medical necessity defense for a patient seeking to use marijuana is complicated. For example, some courts have found necessity to be unavailable because the harm involved was not sufficiently imminent or the patient created the harm. Perhaps most importantly, the necessity defense may


179. See Gardner, supra note 173, at 116.

180. See Conde, supra note 173, at 415 (observing that an excused criminal act remains unlawful and that any third party participating in the unlawful act is guilty of a crime unless he too is individually excused).


182. See Conde, supra note 173, at 414 ("If the criminal act is justified, it is not wrongful, and the victim or any third party has no right to resist."); Robin Isenberg, Note, Medical Necessity as a Defense to Criminal Liability: United States v. Randall, 46 GEO. WASH. L. REV. 273, 275 (1978) ("Justification . . . is a theory of extraordinary relief applied where the unlawful act itself was so commendable as to be inherently non-criminal.").

183. See, e.g., Joint Hearings, supra note 67 (recording the testimony of Arnold Leff, who stated that smoked marijuana was more effective in combating nausea in cancer patients and was safer than the drug's legal counterpart, Marinol).


185. See id. at 288 (determining that relief from simple discomfort did not meet the imminency and seriousness requirements); see also United States v. Moore, 486
be inapplicable if an alternative legal drug is available.\textsuperscript{186} Alternative drugs are available for many illnesses.\textsuperscript{187} At least one court has found, as a matter of law, that the harm caused by drug use (eroding the war on drugs) outweighs the benefit desired by a defendant: the avoidance of pain.\textsuperscript{188}

Some courts have rejected the defense when presented with evidence of a contrary legislative intent.\textsuperscript{189} Many jurisdictions, including the federal government, have classified marijuana as a Schedule I drug, meaning it has no authorized medical use.\textsuperscript{189} This characterization has been viewed as evidence of legislative intent to disallow the defense of medical necessity in cases

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\textsuperscript{186} See State v. Belcher, 706 P.2d 392, 394 (Ariz. Ct. App. 1985) (illustrating that the necessity defense was unavailable to a defendant possessing marijuana taken from a “wash,” a dry stream-bed, to keep it away from children, because the defendant “had a number of other options available to him, most notably, an anonymous phone call to the police”); State v. Piland, 293 S.E.2d 278, 280 (N.C. Ct. App. 1982) (acknowledging that a doctor could not use the necessity defense for growing marijuana because there was one doctor in the state who was allowed to prescribe the drug legally). \textit{But see} Jenks v. State, 582 So. 2d 676, 679 (Fla. Dist. Ct. App. 1991) (allowing the medical necessity defense because “the [defendants] obviously did not intend to contract AIDS” by receiving the virus from a contaminated blood transfusion).

\textsuperscript{187} See \textsc{Lester Grinspoon & James B. Bakalar, Marihuana, The Forbidden Medicine} 253 (1993) (listing anti-emetic drugs, like Zofran and Compazine, which provide relief from the side-effects of chemotherapy); \textit{see also} Geoffrey Cowley, \textit{Can Marihuana Be Medicine?}, \textsc{Newsweek}, Feb. 3, 1997, at 23 (explaining that the most promising treatment for glaucoma is Xalatan, a once-a-day eye drop, which is virtually free of side effects).

\textsuperscript{188} See \textsc{Commonwealth v. Hutchins}, 575 N.E.2d 741, 745 (Mass. 1991) (discussing the possible negative societal impact which would result were the Defendant permitted to use marijuana to alleviate his medical symptoms). \textit{But see} United States v. Randall, Crim. No. 65923-75, \textit{reprinted in} 104 \textsc{Daily Wash. L. Rep.} 2249, 2252–53 (D.C. Super. Ct. 1976) (holding that defendant’s right to relieve the symptoms and to deter the progression of glaucoma through marijuana use outweighed government interests).

\textsuperscript{189} See \textsc{Spillers v. State}, 245 S.E.2d 54, 55 (Ga. Ct. App. 1978) (explaining that because “there are no affirmative defenses as to possession or dissemination of marijuana for medical, health and therapeutic purposes,” to rule that the defendant had an affirmative defense would “be a judicial usurpation of a legislative prerogative”); \textit{see also} State v. Tate, 505 A.2d 941, 944 (N.J. 1986) (asserting that the classification of marijuana as a Schedule I drug was specific evidence that medical use of marijuana was contemplated and rejected).

involving medical marijuana. Within California, adoption of Proposition 215 should preempt the need to rely on the residual defense of necessity. Proposition 215 provides an express defense against a charge of possession of marijuana, at least where reasonable amounts of marijuana are involved, for personal and medical use.

The more intriguing question is whether a grower or supplier, like a cannabis club, may interpose a necessity defense to a marijuana sale or distribution charge brought by the state. Proposition 215 exhorts the state and federal governments to guarantee an adequate supply of marijuana for medical use. However, the statute cannot bind the federal government, and were the state to provide the guaranteed marijuana, it would violate federal law. Proposition 215 simply does not explain how a qualifying patient can secure marijuana.

If a supplier is charged with the sale of marijuana, the supplier almost certainly will attempt to utilize a necessity defense. Because necessity is a residual defense, the fact that it is not mentioned in the statute is irrelevant. Thus, the

191. See Spillers, 245 S.E.2d at 55. But see Jenks v. State, 582 So. 2d 676, 679–80 (Fla. Dist. Ct. App. 1991) (illustrating that in the Schedule I classification, a subsection indicates that there are limited uses for marijuana); Tate, 505 A.2d at 957.


193. State law cannot create a defense to a federal law violation. See infra note 195 and accompanying text. Sellers and growers of very large quantities of marijuana may still be of interest to federal prosecutors. See Brazil, supra note 128, at A8; see also Emelyn Cruz Lat & Jim Herron Zamora, Hallinan Knocks Feds Over Pot Raid: DA Offers to Testify for Defense if U.S. Prosecutes, S.F. EXAMINER, Apr. 22, 1997, at A1 (maintaining that the federal government “normally defers to local prosecutors in Bay Area cases involving less [marijuana] than 2 tons”).


195. See Tarble’s Case, 80 U.S. (13 Wall.) 397, 406–07 (1871) (finding federal authority superior to state authority because the potential for disrupting the government was too extreme and because, under the Supremacy Clause, “[w]henever . . . any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States”). See generally Michael Vitiello, The Power of State Legislatures to Subpoena Federal Officials, 58 TUL. L. REV. 548, 556–58 (1983) (discussing the Supremacy Clause argument in Tarble).

196. See DRESSLER, supra note 173, at 262. But see People v. Trippet, 66 Cal. Rptr. 2d 559, 570 (1997). In Trippet, the First Appellate District of the California Court of Appeals held that, because section 11362.5 identifies a defense only to section 11357 (dealing with possession) and to section 11358 (dealing with cultivation), Proposition 215 did not create a defense to the crime of transportation of marijuana. The court reasoned: “We may not infer exceptions to our criminal laws when legislation spells out the chosen exceptions with such precision and specificity.” Id. The Trippet court failed to recognize, however, that if legislation creates a defense, there is no need to resort to the residual defense of necessity. Ironically, the court of appeals effectively recognized its failure by remanding the case and recognizing that the defendant could
California courts must resolve a number of legal questions. Whether growers and sellers should be afforded the necessity defense is far from clear. Three issues pose especially difficult legal questions.

First, a court must conduct a balancing test, weighing the harm the state wishes to avoid against the harm likely to be caused by the defendant's conduct.\(^{197}\) Weighing and balancing intangibles is notoriously imprecise,\(^{198}\) and identifying the relevant harm is also subject to manipulation.\(^{199}\) For example, one court found that the harm suffered by a patient with progressive systemic sclerosis\(^{200}\) was outweighed as a matter of law by the potential harm to the government's War on Drugs.\(^{201}\) Enabling suppliers to avoid imprisonment on distribution charges would encourage additional suppliers to enter the market. Further, the necessity defense limits the government's ability to control who has access to marijuana. Finally, marijuana use may be harmful in itself. For some seriously ill patients, the harm may seem slight, but smoking marijuana involves real health risks.\(^{202}\)

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197. See DRESSLER, supra note 173, at 264; Laura J. Schulkind, Note, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. REV. 79, 82 (1989) ("The necessity defense involves a balancing test to determine whether a criminal act was committed to avoid a greater harm.").

198. See LAFAVE & SCOTT, supra note 178, § 5.4, at 636–37 (explaining that a person with unusual values will usually lose because the court, which conducts the balancing test, would most likely favor traditional values).

199. See id. at 637 n.50 (stating that although "[t]here was no suggestion . . . that in shipwreck cases women and children should be assigned a higher value than men—and indeed it would be hard to prove that there is a greater intrinsic value in the life of a woman over that of a man," the suggestion has been made that the law should favor women and children over men).

200. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1495 (28th ed. 1994) (defining "systemic scleroderma" as "a systemic disorder of the connective tissue characterized by induration and thickening of the skin, by abnormalities involving both the microvasculature . . . and larger vessels . . ., and by fibrotic degenerative changes in various body organs, including the heart, lungs, kidneys, and gastrointestinal tract"); see also id. at 1360 (defining "progressive" as "increasing in scope or severity").


Balanced against these harms are widely-proclaimed health benefits which vary among illnesses. For example, glaucoma sufferers get benefits from marijuana even though those benefits are limited. Marijuana is most promising in only a limited number of situations where, for example, nausea prevents ingestion of other medicines. Marinol, the prescription version of THC, has marijuana's active ingredient, but it causes undesirable side effects such as nausea. The prescription of choice in those cases would be marijuana. Even with identified benefits, the courts face the difficult task of balancing between uncertain benefits and uncertain harms.

A second difficulty is determining whether the legislature intended a necessity defense. Courts might find that the statute implicitly provides that the state or federal government is the lawful source of marijuana. In other words, the obvious expectation, or at least, hope, of subsection 11362.5(b)(1)(C) is that the state and federal government will rejuvenate the now largely defunct Compassionate Use Program. Such a hope is doubtful.

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203. See Statement by American Cancer Association, California Division, In Re: Prop. 215 (stating that there is strong evidence that inhaling marijuana controls nausea and increases the appetite in chemotherapy patients); see also American Academy of Ophthalmology, The Use of Marijuana in the Treatment of Glaucoma (last modified Nov. 24, 1997) <http://www.eyenet.org/public/glaucoma/gl_maryj.html> [hereinafter American Academy of Ophthalmology] (noting that marijuana can lower intraocular pressure, which relieves stress on the optic nerve in glaucoma patients); Grinspoon & Bakalar, supra note 187, at 82 (observing that marijuana appears to reduce muscle spasms, relieve depression, and reduce sleeplessness for patients with involuntary muscle spasms); John Bourdrea, Marijuana for Pain?, Chi. Trib., May 2, 1996, at 7 (reporting that marijuana stimulates appetite and helps to control nausea and pain in AIDS patients with “wasting syndrome,” which is characterized by the loss of muscle mass and a gaunt appearance).

204. See Kelso, supra note 3, at 344–45 (noting that determining voter intent is often more difficult than determining legislative intent). With legislatively enacted statutes, one can always turn to the legislative history, including committee reports, staff reports, and the like to determine legislative intent. With initiatives, a tempting source for determining voter intent is the ballot pamphlet. The arguments found in pamphlets, however, are drafted by interested parties who are typically biased in their interpretation of the statute. Additionally, it is questionable whether voters actually read the ballot arguments presented in the pamphlets. See id.


206. See John Bowersox, PHS Cancels Availability of Medicinal Marijuana, 84 J. Nat'l. Cancer Inst. 475 (noting that following a lengthy policy review, Public Health Service decided to bring an end to the federal compassionate-use investigational new drug program which for over 10 years had provided selected patients with a legal supply of marijuana).

The Act is exhortatory and cannot compel state or federal governments to act. Absent governmental action, the purpose of the statute would be frustrated without another supply of marijuana implicitly recognized by the Act. Since Proposition 215’s enactment, neither the state or federal government has made marijuana lawfully available. Therefore, were the statute read to intend that the only lawful supply of marijuana would come from state or federal government, seriously ill patients would be unable to find a safe and reliable source of marijuana. Voters could not have intended to guarantee qualifying patients a defense to possession of marijuana while simultaneously denying them lawful access to it.

This issue also concerns growers and suppliers. Subsection 11362.5(d) of the Act implicitly recognizes a source of marijuana. "Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who . . . cultivates marijuana . . . ." The statute implies that patients and caregivers can grow marijuana for medical use, but where will they get the marijuana seeds? This may create a dilemma for the patient or caregiver unable to cultivate marijuana. Although marijuana is notoriously easy to grow, not everyone is blessed with a

208. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(C) (West Supp. 1998) (encouraging “the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana”).

209. See Scott Hadly, Activists Propose Cannabis Club to Get Pot to the Ill: Laws: Passage of Prop. 215 Has Created a Gray Area of Jurisprudence and Forced Some Local Residents to Obtain the Plant Through Channels Other Than Their Doctor, L.A. TIMES, Oct. 5, 1997, at 1B (noting that although the passage of Proposition 215 appears to be helpful for seriously ill patients in need of the drug, it has left them no recourse but to turn to the illegal drug market to purchase their supply).

210. See People v. Trippet, 66 Cal. Rptr. 2d 559, 570 (Cal. Ct. App. 1997) (citing the statutory construction maxim expressio unius est exclusio alterius, which means that if a statute specifies exemptions, courts cannot imply additional exemptions absent clear, contrary legislative intent).

211. See generally CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 1998); cf. Trippet, 66 Cal. Rptr. 2d at 570–71 (discussing the fact that Proposition 215 did not mention any exemption from prosecution for the violation of § 11360, which prohibits the transportation of marijuana). The court noted, however, that “practical realities dictate that there be some leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges.” Id.

212. CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 1998).


214. See Maria Alicia Guara, Growing Pot, and Proud of It: Santa Cruz Nonprofit Group Helps the Sick, S.F. CHRON., Dec. 30, 1996, at A1 (quoting a Santa Cruz, California resident as saying, “[m]arijuana is really easy to grow”).
green thumb. Subsection 11362.5(b)(1)(B) provides that patients and primary caregivers "who obtain and use marijuana for medical purposes" are immune from prosecution for possession. That language implicitly recognizes that those within the statute's protection must obtain their marijuana from someone.

Because voters were aware of the events leading up to Proposition 215's enactment, one might argue that they were aware that its primary purpose was to supply marijuana to seriously ill patients. Attorney General Lungren's untimely raid on Peron's Cannabis Buyers Club months before the 1996 election and Peron's subsequent arrest guaranteed headlines that not only created a martyr for Proposition 215's cause but also created voter awareness that Proposition 215 regulated both the supply and use of marijuana. Voter awareness bolsters the argument that the initiative intended to offer marijuana suppliers immunity.

A third issue is whether the patient has a lawful alternative. Typically, a defendant may not violate the law if she has a lawful alternative. Courts have refused to recognize the

215. Dennis Peron admits that not everyone is successful at growing marijuana. In a recent interview, Mr. Peron stated, "I know half my [clients] couldn't even grow nothing [sic]. I knew that someday I would have to grow for them so I put in there for a caregiver and that is what I am." Peron Interview, supra note 36, at 6.


217. California voters were made aware of Peron's efforts to distribute marijuana long before the 1996 election. See Cynthia Hubert McClatchy News Service, Membership in this Club is Criminal, Provides Marijuana to Chronically Ill, FRESNO BEE, Sept. 4, 1994, at B10 (noting that Peron started the Cannabis Buyers Club in 1991 in response to the death of his lover from AIDS); see also Pot Club Founder is Ready for Fight, Indictments: Peron Affirms Distribution of Marijuana is for Medicinal Purposes, LONG BEACH PRESS-TELEGRAM, Oct. 13, 1996, at D3 (connecting Peron with the Cannabis Buyers Club and noting his recent arrest for distributing marijuana).


219. See Larry D. Hatfield & Eric Brazil, S.F. Pot Club Leader Held on Drug Charges: Surprise Bust by State Agents, S.F. EXAMINER, Oct. 11, 1996, at A1 (noting that the Attorney General had Peron and others arrested for possession, transportation, and maintenance of a place to furnish marijuana).

220. Newspapers across the state chronicled the events surrounding Peron's club and the raids undertaken by the state. See e.g., Pot Club Founder to Fight Indictment; Says Lungren Acted on Politics, Not Law, SACRAMENTO BEE, Oct. 13, 1996, at A3; see also Leader of Medical Marijuana Initiative Says Arrests Will Backfire, ORANGE COUNTY REG., Oct. 13, 1996, at A4.

221. See DRESSLER, supra note 173, at 263–65.
medical necessity defense to possession of marijuana if other lawful drugs are available.\(^{222}\)

As previously mentioned, glaucoma patients benefit from smoking marijuana.\(^{223}\) Glaucoma cases are often cited by advocates to support marijuana's medicinal utility.\(^{224}\) However, the literature suggests that glaucoma patients have other alternatives.

Treatment for glaucoma requires reduction of intraocular pressure to prevent damage to the optic nerve.\(^{225}\) Some drugs typically employed to reduce intraocular pressure have serious side effects and some types of corrective surgery have high failure rates.\(^{226}\) However, the most recently available medication, Xalatan, is virtually free of side effects,\(^{227}\) and laser surgery has shown greater promise than conventional surgery.\(^{228}\) As to marijuana, it reduces eye pressure,\(^{229}\) but it is not the best alternative. Marijuana may reduce the blood flow to the optic nerve and increase the risk of blindness.\(^{230}\) The dosage necessary to provide benefits is very high. As one expert observed, for a glaucoma patient to receive significant benefits from smoking marijuana, "[he'd] have to be stoned all the

\(^{222}\) See, e.g., United States v. Burton, 894 F.2d 188, 191 (6th Cir. 1990) (holding that the defendant could not use the medical necessity defense for his conviction for possession of marijuana since a government program for medical marijuana use had been established and the defendant had failed to utilize that lawful alternative); State v. Piland, 293 S.E.2d 278, 280 (N.C. Ct. App. 1982) (ruling that a doctor could not grow marijuana for a patient in need of the drug because there was already at least one other doctor in the state who was legally allowed to prescribe the drug).

\(^{223}\) See generally American Academy of Ophthalmology, supra note 203.

\(^{224}\) See, e.g., CALIFORNIA BALLOT PAMPHLET 1996, ARGUMENTS IN FAVOR OF PROPOSITION 215 ("University doctors and researchers have found that marijuana is also effective in lowering internal eye pressure associated with glaucoma, slowing onset of blindness.").

\(^{225}\) See American Academy of Ophthalmology, supra note 203.

\(^{226}\) For example, some of the available eye drops have serious side effects. The beta-blocker drops cause depression, aggravate asthma, and increase the risk of heart failure. See GRINSPOON & BAKALAR, supra note 187, at 40–41. The miotic drops work by constricting the pupil, but they can blur vision and cause cataracts. See id.

\(^{227}\) See Cowley, supra note 186, at 23.

\(^{228}\) See Drug Enforcement Agency, In re Marijuana Rescheduling Petition, Docket No. 86–22, Opinion, Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge, Sept. 6, 1988, at 35 (on file with the University of Michigan Journal of Law Reform) [hereinafter Marijuana Rescheduling Petition].


\(^{230}\) See Cowley, supra note 186, at 23 (noting that such a decrease in blood supply is the last thing a glaucoma sufferer needs).
time." Moreover, smoking sufficient quantities to bring relief often leaves patients with chronic bronchitis.\textsuperscript{232}

Were a court to apply the traditional elements of the necessity defense to a case involving marijuana use by a glaucoma patient, and by extension, to a case involving her supplier, the defense would fail because the patient has lawful alternative treatments.\textsuperscript{233} However, under Proposition 215, if a qualifying patient is charged with possession of marijuana, the law would explicitly immunize that person.\textsuperscript{234}

Presumably, a supplier would not lose a necessity defense because of the availability of legal alternatives. In effect, the Act makes marijuana a legal alternative for the qualifying patient, and, if the other elements of a necessity defense are met, the defense would extend to a supplier.

The foregoing discussion does not purport to exhaust the legal issues posed by the Act.\textsuperscript{235} It does demonstrate, however, that Proposition 215 is poorly drafted, leaving numerous questions unanswered. Clear drafting helps preserve the distinct roles of courts and legislatures,\textsuperscript{236} but in this instance, courts will be forced to interpret the law's meaning without any clear guidance from either the legislature or the voters regarding the intent and scope of the law.

This problem is exaggerated by the initiative process. The drafters were not required to subject Proposition 215 to the normal checks found in the legislative process.\textsuperscript{237} Had Proposition 215 gone through the normal legislative process, many of the issues already discussed might have been resolved.

Full discussion of the issues surrounding legalized medical use of marijuana was particularly important because the

\textsuperscript{231} Id.
\textsuperscript{232} See Killer Weed Drug Hardly as Benign as its Advocates Suggest, SAN DIEGO UNION–TRIB., Dec. 19, 1996, at B14 (noting that smokers of 3–4 joints a day suffer from chronic bronchitis as often as cigarette smokers who smoke a pack or more a day).
\textsuperscript{233} See DRESSLER, supra note 173, at 263–64.
\textsuperscript{236} See Kelso, supra note 3, at 339 (noting that statutes are drafted with due deference to the roles the executive and judicial branches will play in implementing the expressed policy of the law). This assumes that we take seriously the role of legislatures to declare the law and that of the courts to interpret the law. Poorly drafted legislation forces courts to create law to fill gaps.
\textsuperscript{237} See discussion supra Part I.A.
poorly drafted legislation may have actually affected the de facto legalization of marijuana itself. Many voters who probably thought they were endorsing the compassionate use of marijuana for seriously ill patients would be stunned to realize they had voted to enact an open-ended statute that invites abuse.

II. ANOTHER PERSPECTIVE: WHY WAS THE INITIATIVE PROCESS THE ONLY PROCESS AVAILABLE?

Despite all of the problems posed by Proposition 215, it reflects a reasonable concern for seriously ill patients who benefit medically from using marijuana, even if those benefits are fewer than the proposition's proponents advocated. This section discusses why proponents of medical marijuana use were forced to resort to the initiative process despite the fact that a majority of Californians, and even Americans, favor compassionate use. This section explores why the normal legislative process did not reflect the sentiment of a majority of the population.

A. A Short History of Federal Regulation of Marijuana

To understand the absence of a remedy, one must first consider the history of the federal regulation of marijuana. Concern about marijuana use in the United States is of relatively recent origin. Worldwide, marijuana has a long

238. See CALIFORNIANS FOR COMPASSIONATE USE, BROCHURE (1996) (listing the serious ailments marijuana would help alleviate, including AIDS wasting syndrome, nausea from chemotherapy, muscle spasms caused by multiple sclerosis and paralysis, arthritis pain, epileptic seizures, migraine headaches, menstrual cramps, asthma, and insomnia).

239. A majority of Californians favor compassionate use, as evidenced by Proposition 215's passage in November 1996 by a 56% majority. See Rachel Zimmerman, Marijuana For Pain Ruled Out; State Supreme Court Sees No Constitutional Right, SEATTLE POST-INTELLIGENCER, July 25, 1997, at A1 (citing an ABC news poll which found that 69% of Americans support the medicinal use of marijuana).

240. In our earliest history, marijuana was widely grown for cloth and rope manufacturing. During the 1600s, Virginia farmers were required to grow marijuana, a tradition followed by George Washington. Surviving records from the 1600s contain references only to marijuana's commercial, not pharmaceutical, uses. See MILLER, supra note 126, at 85. Even much later, in the early 1900s, there was no evidence of public concern about marijuana despite growing public concern regarding narcotics in
At least since the 1800s, physicians in Europe and the United States have recommended marijuana as a treatment for migraines, as an appetite stimulant, a muscle relaxant, a hypnotic, an analgesic, and an anti-convulsant. Marijuana was officially listed in the *United States Pharmacopoeia* in 1850, and it was routinely prescribed until the late 1930s. Before the 1937 Marijuana Tax Act was passed, physicians could prescribe 28 pharmaceutical preparations containing cannabis.

In 1937, Harry J. Anslinger was serving as the United States Commissioner of Narcotics. He had served in the Treasury Department where he aggressively enforced the Harrison Act and headed the Federal Bureau of Narcotics in the Treasury Department. Anslinger's appeal to racism and hysteria was unabashed. He and other proponents of the...
Marijuana Tax Act argued that marijuana caused criminal and violent behavior. During the brief hearings on the Act, Anslinger stated that, "[m]arihuana [was] an addictive drug which produce[d] in its users insanity, criminality, and death."

During the hearings on the Marijuana Tax Act, witnesses on both sides recognized that marijuana's medical benefits should be studied. For example, Dr. William C. Woodward, testifying on behalf of the American Medical Association (AMA), advocated study and continued medical use of marijuana. Woodward's testimony that the AMA had no evidence that marijuana was a dangerous drug was greeted with hostility by members of Congress.

Despite agreement among marijuana's proponents and opponents that continued study was in order, and despite a professed intent to prevent recreational use of marijuana, Congress created excessively burdensome requirements which effectively eliminated prescription of marijuana by physicians. Interestingly, more harmful drugs have not been

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248. See id.; see also Bilz, supra note 243, at 119.

249. Charles Whitebread, Speech to the California Judges Association 1995 Annual Conference, The History of the Non-Medical Use of Drugs in the United States (visited June 5, 1997) <http://mojo.calyx.net/~olsen/DPF/whitebread06.html>. A second proponent of the Marijuana Tax Act who testified at the hearings was a pharmacologist from Temple University who claimed to have injected THC into the brains of 300 dogs, resulting in the death of two of the animals. "When asked by the Congressmen, and I quote, 'Doctor, did you choose dogs for the similarity of their reactions to that of humans?' the answer of the pharmacologist was, 'I wouldn't know, I am not a dog psychologist.'" Id.

250. Proponents argued that the Act "would raise revenue from marijuana sales, discourage illicit use of marijuana, and facilitate ... the medical use of marijuana." Bilz, supra note 243, at 120. Opponents, on the other hand, argued that the restrictive legislation would prevent further studies on the medical benefits of marijuana. See id.

251. See id.

252. See Miller, supra note 126, at 99 (citing Woodward as asserting that the movement to outlaw marijuana relied on rumor and hearsay rather than on solid facts).

253. See Whitebread, supra note 249. One of the congressmen attending the hearings said in response to Woodward's testimony, "Doctor, if you can't say something good about what we are trying to do, why don't you go home?" Id. The next congressman to speak up reacted similarly, "Doctor, if you haven't got something better to say than that, we are sick of hearing you." Id. Professor Whitebread explains this hostility as being responsive to the American Medical Association's systematic opposition to all of the New Deal legislation; the committee largely consisted of New Deal Democrats. See id.

254. See Grinspoon & Bakalar, supra note 161, at 1875.
subject to similar bureaucratic regulation. Nevertheless, the Act led to the decision to drop cannabis from the United States Pharmacopoeia.

While the AMA might have continued to oppose federal policy, Anslinger convinced the AMA to reverse its position. Prior to the publication of a study commissioned by New York City’s Mayor, Fiorello La Guardia, the AMA described the report as a “careful study” of marijuana. Apparently, the AMA continued to believe that marijuana might have medical uses. Almost immediately, however, the AMA reversed itself at Anslinger’s urging. Consequently, for over thirty years, the AMA has remained clear of the political and scientific debate about marijuana’s medicinal qualities.

Looking at the Marijuana Tax Act 35 years later, the National Commission on Marijuana and Drug Abuse concluded that the Act was misguided. It found that “[t]he policy-makers knew very little about the effects or social impact of the drug; many of their hypotheses were speculative and, in large measure, incorrect.”

Wholesale experimentation with marijuana during the 1960s changed the focus from potential medical use of marijuana to legalization. That debate is largely beyond the scope of this article, but a brief look at the First Report of

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255. See id. (comparing the lethal dose to effective dose ratios of secobarbitol and ethanol).
256. See Bilz, supra note 244, at 118.
258. See id.
259. See id.
260. See id. On March 19, 1982, the Journal of the American Medical Association printed a letter to the editor from U.S. Representative Newt Gingrich, which read in part, “Federal policies do not reflect a factual or balanced assessment of marijuana’s use as a medicant. The Council, by thoroughly investigating the available materials, might well discover that its own assessment of marijuana’s therapeutic value has, in the past, been more than slightly shaded by federal policies that are less than neutral.” Newt Gingrich, Letter to the Editor, Legal Status of Marijuana, 247 JAMA 1525, 1563 (Mar. 19, 1982). In response, a representative of the AMA agreed that “dispassionate examination” of the benefits of medical marijuana use was needed. Id.
261. SIGNAL OF MISUNDERSTANDING, supra note 257, at 132.
262. See Whitebread, supra note 249 (noting that in 1969 Congress passed the Dangerous Substances Act, which actually lowered the penalties for possession of marijuana).
263. For a more complete treatment of that issue, see MILLER, supra note 126; Bonnie & Whitebread, supra note 240, at 1178 (offering a statutory scheme that “permits those who choose to smoke marijuana to do so but which inhibits spread of the conduct; that is, it simply takes the user of marijuana out of the criminal proc-
the National Commission on Marijuana and Drug Abuse, a commission appointed by President Nixon in 1971,224 indicates how dramatically attitudes about marijuana changed. For example, it recommended that federal law be changed so that "possession of marijuana for personal use would no longer be an offense."225 Despite the report's assurances that "President Nixon ha[d] frequently expressed his personal and official commitment to providing a rational and equitable public response to the use and misuse of drugs,"226 Nixon disavowed the recommendations before publication and announced that 'even if the commission does recommend that [marijuana] be legalized, I will not follow the recommendation.'227

President Nixon began a new war on drugs by urging the adoption of new federal anti-drug legislation.228 In 1970, Congress responded with the Comprehensive Drug Prevention and Control Act (also known as the Controlled Substances Act).229 The Controlled Substances Act classifies marijuana as a Schedule I drug,227 which, according to the Act, lacks an "accepted medical use," an "accepted safety for use," and carries "a high potential for abuse."228

The Act allows interested parties to petition Congress for a hearing to demonstrate that a drug should be reclassified.229 On May 19, 1972, the National Organization for the Reform of Marijuana Law (NORML) utilized that right and petitioned to have marijuana removed from Schedule I, to allow no restrictions on its use, or alternatively to have it rescheduled as a

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225. Id. at 3.
226. Lester Grinspoon, M.D., Marijuana Reconsidered 193 n.3 (2d ed. 1977).
Schedule V drug, which would only subject marijuana to minimal control.273 A brief review of the history of NORML’s legal efforts to reschedule marijuana illustrates the federal government’s continued hostility toward any modification of federal law.274

The Director of the Bureau of Narcotics and Dangerous Drugs, the Drug Enforcement Agency’s (DEA) predecessor, initially refused to accept the filing of the petition.275 The United States Court of Appeals for the District of Columbia reversed that decision and remanded the case for further proceedings.

The DEA rejected NORML’s efforts to reschedule marijuana twice between 1975276 and 1986.277 Each time, the circuit court remanded the case for further proceedings.278 Finally, in April 1986, the DEA requested that ALJ Francis L. Young conduct a hearing.279

The hearing took two years, creating a record so vast that it “stands nearly five feet high.”280 Eventually, Judge Young recommended rescheduling marijuana from Schedule I to

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273. See Marijuana Rescheduling Petition, supra note 227, at 2.
276. Hearings were held at the DEA in January 1975. Although the judge found in NORML’s favor on various issues, the acting administrator of the DEA denied NORML’s position “in all respects.” See Marijuana Rescheduling Petition, supra note 228, at 2.
277. The second time around, the DEA referred NORML’s petition to the Secretary of Health, Education, and Welfare, who subsequently recommended to the DEA that marijuana remain a Schedule I drug. The DEA then issued a final order declining to transfer marijuana from its Schedule I status. See 44 Fed. Reg. 36123 (1979).
278. See Nat’l Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin., 559 F.2d 735 (D.C. Cir. 1977); see Marijuana Rescheduling Petition, supra note 228, at 3 (quoting NORML v. DEA, No. 79–1660 (D.C. Cir., unpublished order filed Oct. 16, 1980)).

During the early stages of the proceedings, NORML and co-petitioner, Alliance for Cannabis Therapeutics (ACT), amended the petition to request that marijuana be rescheduled from Schedule I to Schedule II. See Marijuana Rescheduling Petition, supra note 228, at 4. While Schedule II substances have a high potential for abuse, they also have a currently accepted medical use in treatment. See 21 U.S.C. § 812(b)(2)(1994). The issues addressed, therefore, were “whether marijuana has a currently accepted medical use in treatment in the United States, or a currently accepted medical use with severe restrictions,” and “whether there is a lack of accepted safety for use of the marijuana plant under medical supervision.” Marijuana Rescheduling Petition, supra note 228, at 7.
Schedule II. The judge held that if a respectable minority of physicians supported the use of marijuana in treatment, such use would be medically acceptable. Furthermore, the judge rejected the DEA's standard, which required the petitioner to demonstrate the drug has eight distinct characteristics. The DEA's position was that rescheduling marijuana was inappropriate, but the judge disagreed.

Once again, the DEA administrator rejected the recommendation to reschedule marijuana. The court of appeals affirmed the order of the administrator. The court held that since neither the medical Controlled Substances Act nor its legislative history defined "currently accepted medical use," it was obligated to defer to the agency's interpretation if that interpretation was reasonable. The court, however, did reject

281. See Marijuana Rescheduling Petition, supra note 228, at 67. Judge Young noted that other federal agencies, such as the FDA, would likely have to act even if the DEA rescheduled the drug to Schedule II to make marijuana readily available.

282. See id. at 28–29.

283. The characteristics were as follows: 1) "Scientifically determined and accepted knowledge of the chemistry of the substance"); 2) "toxicology and pharmacology of the substance in animals"; 3) "establishment of its effectiveness in humans through scientifically designed clinical trials"; 4) "general availability of the substance and information regarding the substance and its use"; 5) "recognition of its clinical use in generally accepted pharmacopeia, medical references, journals, or textbooks"; 6) "specific indications for the treatment of recognized disorders"; 7) "recognition of the use of the substance by organizations or associations of physicians"; and 8) "recognition of the substance by a substantial segment of the medical practitioners in the United States." 54 Fed. Reg. 53,767, at 53,783 (1989).

284. See Marijuana Rescheduling Petition, supra note 228, at 31. Judge Young noted that the standards were inappropriate when applied to marijuana, a natural plant substance, because they were developed to handle proceedings relating to synthetic drugs. See id. He also noted that FDA regulations are designed to accommodate pharmaceutical companies which manufacture synthetic drugs. See id. at 33–34.

285. The judge found that the respectable minority of physicians met the standard for accepted medical use when treating cancer patients for nausea and vomiting resulting from chemotherapy treatments, spasticity resulting from multiple sclerosis and other causes, and for hyperthyroidism. He found insufficient evidence that there was accepted medical use for treatment of glaucoma. Id. at 34, 39, 54.

286. The administrator called the standard for a respectable minority of physicians "preposterous" and criticized the judge for lacking impartiality, for accepting anecdotal evidence, for ignoring the government's evidence, and for relying on "irresponsible and irrational statements propounded by the pro-marijuana parties." 54 Fed. Reg. at 53,767. The administrator also accused NORML and ACT of attempting to "perpetrate a dangerous and cruel hoax on the American public by claiming marijuana has currently accepted medical uses." Id. at 53,783–84. See also Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 930 F.2d 936, 938–39 (D.C. Cir. 1991) (stating that the administrator of the DEA "exercised with a vengeance his prerogative . . . to reject the ALJ's recommended decision"); 51 Fed. Reg. 22,946 (1986) (notice of hearing).

287. See ACT v. DEA, 930 F.2d at 941.

288. See id. at 939.
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some of the factors relied on by the DEA because they would be impossible to prove. The court remanded the case to allow the DEA to clarify which factors it relied on in rejecting the rescheduling petition. 289

Not surprisingly, in March 1992 the administrator issued his final order denying the rescheduling petition. 290 The order was based on various factors. 291 The administrator, however, did eliminate those found objectionable by the court of appeals. 292 Twenty years of litigation left the matter where it stood in 1972, with marijuana still characterized as a Schedule I drug.

The NORML litigation demonstrates the DEA's intransigence. As a result, parties seeking to reclassify marijuana will be deterred from using these administrative proceedings. Not only was the litigation protracted and expensive, but the standard adopted by the agency continues to make reclassification through the administrative forum almost impossible. 293 For example, the federal government's position has made the requirement that adequate, well-controlled studies prove the drug's efficacy almost impossible to satisfy. 294 Currently, the only

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289. Specifically, the court rejected factors (4), (5), and (8) as impossible to fulfill due to the strict controls on Schedule I drugs. See id. at 940. The court stated that it would be nearly impossible to show that any Schedule I drug was in general use or generally available. See id. Further, the court added that a drug rarely prescribed would not be listed as medically useful under any pharmaceutical category. See id.


291. The administrator emphasized the lack of any concrete scientific data establishing the effectiveness of marijuana for medical treatment. See id. at 10,502–03. However, the DEA administrator pointed to what he termed "significant" short- and long-term side effects and risks of marijuana use. See id. at 10,500. Additionally, the administrator attacked reliance on anecdotal evidence, comparing such reliance to snake oil salesmen. See id. at 10,502. The administrator stated that the doctors who testified in favor of rescheduling relied not on any legitimate scientific studies, but on anecdotal evidence. The DEA also noted that nearly half of the doctors who testified on behalf of NORML were psychiatrists and did not specialize in treating the conditions at issue in the hearings. See id. Further, the DEA administrator discounted studies that were relied upon by NORML as unscientific. See id. at 10,500 (stating that studies conducted by states in the 1970s and 1980s indicating that marijuana is medically effective "failed to follow responsible scientific methods").

292. See id. at 10,506.

293. The currently accepted medical use standard adopted by the DEA mandates: 1) the drug's chemistry be known and reproducible; 2) that there must be adequate safety studies; 3) that there be adequate, well-controlled studies proving efficacy; 4) that the drug be accepted by qualified experts, meaning those with training and experience in evaluating the effectiveness of drugs; and 5) that the scientific evidence be widely available. See id.

294. See Mark Sauer, Political Smoke Screen: Truth About Pot is Casualty in Drug War, Researchers Say, SAN DIEGO UNION TRIB., Jan. 12, 1997, at D1 (describing the
lawfully grown marijuana in the United States is cultivated on a Mississippi farm operated by the National Institute on Drug Abuse. Over the past twenty years, at least ten states have established research programs to seek FDA approval for Investigational New Drug applications, but the programs have been abandoned because of burdensome regulations on the program participants. Studies relied on by NORML and ACT tend to be anecdotal, similar to the kind of evidence treating physicians are likely to rely on in making a recommendation to a seriously ill patient. Those studies did not impress the DEA and are not likely to satisfy its standards for rescheduling.

During the 1970s, the FDA did institute a program entitled Individual Treatment IND, commonly referred to as Compassionate IND or the Compassionate Use Program. Between 1976 and 1988, the program provided free, pre-rolled marijuana cigarettes to about a dozen approved patients. The program was under the control of three separate agencies, the FDA (responsible for evaluating the medical merits of applications), the DEA (responsible for enforcing legal procedures to secure the marijuana), and the National Institute on Drug Abuse (responsible for the cultivation of marijuana on its Mississippi farm).

During the late 1980s, the application process was streamlined. The FDA approved a form that could be completed in less than an hour, replacing one that took up to 50 hours to complete. As a result, in 1989, the FDA was swamped with new applications from AIDS patients seeking to become participants in the Compassionate Use Program. In 1991, partly

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further frustrates of physicians whose research projects were blocked by the federal government's marijuana policy).

295. See Bilz, supra note 243, at 132.
296. See Grinspoon & Bakalar, supra note 162, at 1875.
297. See id.
299. See Grinspoon & Bakalar, supra note 162, at 1875.
301. See Bilz, supra note 243, at 132.
303. See id.
304. Although the government stated that the application process took thirty days, the ACT placed the wait at approximately six months and stated that there were about 200 backlogged applications. See Bilz, supra note 243, at 133.
in response to the rise in applications, the FDA suspended the program pending review.305

Apart from administrative problems, the Compassionate Use Program posed bureaucratic problems for the FDA,306 because the program could undermine President Bush’s public opposition to illegal drugs. The head of the Public Health Service stated that the program sent a “bad signal” and that it invited the “perception that this stuff can’t be so bad.”307 The government cancelled the program in March 1992.308

The Clinton administration promised to reconsider the decision to cancel the program,309 but it has not reinstated it. Eight people who had enrolled in the program before it was canceled are still receiving marijuana.310

By 1993, when California’s legislature passed Senate Joint Resolution 8, 37 states had petitioned the government to pass legislation allowing physicians to prescribe marijuana for medical uses.311 In a letter to California Representative Dan Hamburg, the Assistant Secretary of Health, Dr. Philip Lee, explained that the federal government could not reclassify marijuana due to a lack of sound scientific studies relating to medical use of marijuana.312

Apart from the limited Compassionate Use Program, the government has opposed marijuana use for sixty years. That position has been motivated by a variety of often inappropriate considerations. Early drug policy was motivated by racism and hostility towards lower socioeconomic classes.313 Even at the

305. Cf. Cotton, supra note 302, at 2573 (stating that the timing of the cancellation of the program was influenced by the influx of applications from AIDS patients).
306. See Grinspoon & Bakalar, supra note 162, at 1876.
307. Cotton, supra note 302, at 2573. The head of Public Health Service also expressed fear that “AIDS patients, crazed on marijuana, would be more likely to practice unsafe sex.” Medical Marijuana: The Last Smoke, ECONOMIST, Mar. 28, 1992, at 23–24.
308. See John Bowersox, PHS Cancels Availability of Medical Marijuana, 84 J. NAT’L CANCER INST. 475 (1992). Two weeks after the cancellation of the Compassionate Use Program, the DEA administrator issued his final order rejecting the petition of NORML to transfer marijuana from Schedule I to Schedule II on the basis that marijuana has no currently accepted medical use. See Medical Marijuana, supra note 307, at 23–24.
311. See Dennis Peron, Marijuana for Medical Use, BALTIMORE SUN, Jan. 19, 1997, at 6F.
313. See supra text accompanying notes 244–47.
height of tolerance towards marijuana use, President Nixon began a war on drugs, rejecting his own commission's recommendations that would have treated marijuana differently from other drugs.314 Narrow, targeted efforts to modify federal policy to accommodate the needs of seriously ill patients have also failed.315 At least insofar as proponents of Proposition 215 hoped to secure the right to use marijuana for medical purposes, their conduct can be understood as a direct reaction to the consistent, unyielding position of the federal government.316

B. California's Response to Marijuana Use

California was one of the first states to outlaw marijuana, preceding federal efforts to regulate marijuana by over twenty years.317 California also led efforts to legalize medical use.318 Despite less intransigence by state than by federal officials, medical-use proponents were still forced to resort to the initiative process. This section reviews local efforts to legalize medical use of marijuana prior to Proposition 215.319

314. See supra text accompanying note 267.
315. See supra text accompanying notes 299–15.
316. Some members of Congress continue to demonstrate extreme hostility toward marijuana use, medicinal or otherwise. Several bills have been proposed in Congress to limit the medicinal use of marijuana. See H.R. 1310, 105th Cong. (1997) (amending the Controlled Substances Act to require the Attorney General to revoke the registration of any registrant under the Act who recommends the illegal use of a controlled substance to a patient); H.R. 1265, 105th Cong. (1997) (providing disincentives to the illegal use of marijuana in states allowing the medicinal use of marijuana by denying federal benefits to individuals convicted of certain drug offenses); S. 40, 105th Cong. (1997) (outlining federal sanctions for practitioners who administer, dispense, or recommend the use of marijuana).
317. California first regulated marijuana in 1907. The state legislature classified the drug as a "poison." Possession of marijuana remained legal until 1915, at which point state law mandated that the drug could be possessed legally only with the prescription of a physician. See Michael A. Town, Comment, The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?, 19 HASTINGS L.J. 758, 759 (1968). The prohibition of marijuana in the West at the turn of the century was motivated by outright prejudice against Mexican immigrants, who were thought responsible for the proliferation of marijuana throughout the Western United States. See Bonnie & Whitebread, supra note 240, at 1012.
318. See infra text accompanying notes 320–54.
319. As early as 1954, California criminal defendants were attempting to beat charges for possession of marijuana by raising the issue of the plant's medicinal value. See People v. Saldana, 271 P.2d 561, 563 (Cal. Dist. Ct. App. 1954). The only defense witness in the case testified that the marijuana seeds found on the defendant were
By the late 1960s, Californians began a serious study of marijuana. In 1968, the California legislature established a state research advisory panel to investigate the effects of marijuana and hallucinogenic drugs. Health and Safety Code section 11481 (formerly codified under section 11655.6) gave the panel authority to approve and review annually research projects on marijuana. In 1979, Senate Bill 184 added a requirement that the Research Advisory Panel establish an additional panel to research marijuana's medicinal uses.

SB 184 received widespread support from mainline medical organizations like the American Cancer Society, the Board of Osteopathic Examiners, and Stanford's Children's Hospital and from the print media. Published opposition was slim. The only outspoken opponent of the bill was a representative of the DEA, who argued that marijuana had no recognized medical use. In addition to mandating research, SB 184

actually his and that an Indian doctor had recommended the seeds to help with his kidney trouble.

320. See S.B. 1268, 1968 Reg. Sess. (Cal.)

321. See id. The panel was to consist of representatives from the State Department of Health, the Department of Mental Hygiene, the State Board of Pharmacy, the Attorney General, the University of California, and a California private university. All members were to be appointed by the heads of their respective entities. See id.

322. See CAL. HEALTH & SAFETY CODE § 11481 (West 1991). Since its inception, the panel has existed largely in obscurity, gaining notoriety only in 1990, when the advisory panel's annual report to the legislature recommended the decriminalization of marijuana in California. See Maria Puente, Hushed Report: Pot Growing Should Be Decriminalized, SAN JOSE MERCURY NEWS, Aug. 17, 1990, at 1F. Then California Attorney General John Van de Kamp blocked publication of the portion of the report which recommended decriminalization of marijuana cultivation for personal use, creating media interest that thrust the panel and its report into the spotlight. See id. Prior reports, including those on the medicinal uses of marijuana, were typically printed and forgotten. See Joanne Jacobs, Drug Prohibition Just Doesn't Work; So End It, SAN JOSE MERCURY NEWS, Aug. 20, 1990, at 5B.

323. See S.B. 184, 1979–1980 Reg. Sess. (Cal.), Assembly Office of Research, Apr. 5, 1979, at 1. At the time Senate Bill 184 was passed, Illinois, Florida, Louisiana, and New Mexico had already enacted similar legislation allowing for the use of marijuana as a remedy for glaucoma and cancer. See Medicinal Use of Marijuana, SAN DIEGO UNION, Feb. 9, 1979 (on file with the University of Michigan Journal of Law Reform).


325. See, e.g., Medicinal Use of Marijuana, supra note 323; see also, Marijuana As a Relief for Pain, L.A. TIMES, Feb. 14, 1979 (on file with the University of Michigan Journal of Law Reform); Marijuana by Prescription, SACRAMENTO BEE, Jan. 13, 1979 (on file with the University of Michigan Journal of Law Reform); Marijuana Benefits? THE UNION (Sacramento, CA), Jan. 12, 1979 (on file with the University of Michigan Journal of Law Reform).

326. See S.B. 184, 1979–1980 Reg. Sess. (Cal.), Analysis of the Senate Democratic Caucus, Mar. 7, 1979, at 1. David Wakka of the DEA was the only opponent listed among the numerous analyses of the bill. See id.

327. See id.
instructed the Research Advisory Panel to establish a study program on marijuana's utility for cancer patients.\footnote{328.} The law exempted program participants from prosecution for possession and distribution of marijuana.\footnote{329.}

SB 184 included a sunset provision that would have terminated the Cannabis Therapeutic Program in 1984.\footnote{330.} A later bill, Senate Bill 1765, not only extended the program through 1988 but also expanded it to include patients suffering from glaucoma.\footnote{331.} However, the program was effectively terminated in October 1986, when the FDA approved the marketing of Marinol.\footnote{332.} Despite FDA approval, the panel found that smoked marijuana received comparable favorable ratings with Marinol from patients in the program.\footnote{333.} Nonetheless, with the availability of Marinol, the panel found that the physician investigators in charge of the program did not have a continuing interest in marijuana.\footnote{334.}

Average Californians, on the other hand, remained interested in having available a lawful supply of marijuana. More

\begin{itemize}
\item \footnote{328.} See id. (Analysis of Assembly Committee on Health) (Apr. 5, 1979). The bill also provided for program expansion at a later date to study marijuana as a remedy for glaucoma. See id.
\item \footnote{329.} See S.B. 184, ch. 300, § 1, 1979–1980 Reg. Sess. (Cal.) (adding section 11261 to the California Health and Safety Code).
\item \footnote{330.} See id. ("The pilot program shall be terminated, unless extended by the Legislature, four years after the date cannabis or its derivatives are first distributed to patients under the program or December 31, 1984, whichever first occurs.").
\item \footnote{331.} See S.B. 1765, ch. 417, § 4, 1983–1984 Reg. Sess. (Cal.). "[T]he Research Advisory Panel shall . . . (4) Establish a program of research into the use of cannabis and its derivatives to determine its potential effectiveness in reducing intraocular pressure in glaucoma patients who do not respond well to conventional medication. The panel shall be responsible for establishing protocols, for working with the medical community and with ophthalmologists, and taking whatever steps are necessary to further the program." Id.
\item \footnote{332.} See California Research Advisory Panel, Cannabis Therapeutic Program, Results of Study with Smoked Marijuana, Jan. 24, 1989 (visited June 10, 1997) <http://www.druglibrary.org/schaffer/hemp/medical/ctp3.htm>. The Advisory Panel was of the opinion that the California study was a key factor in the FDA's decision to approve Marinol for marketing. See id.
\item \footnote{333.} The panel found the effectiveness of smoked marijuana as an anti-emetic treatment for cancer patients to be similar to that of orally administered tetrahydrocannabinol (THC). See id. Effectiveness was rated very or moderately successful by 58.7% of patients. See id. Smoked marijuana did produce slightly more intense side effects than orally administered THC, but this result was expected due to the rapid delivery resulting from the act of smoking. See id. Side effects from both methods were found to be significant, but never life-threatening. See id. Clinically serious adverse reactions to THC or smoked marijuana were experienced in a total of only ten patients. See id.
\item \footnote{334.} See id. (noting that interest in continuing the program declined despite the fact that all participants had been advised that marijuana cigarettes would continue to be available through the end of 1988).
\end{itemize}
recently, proponents of medical marijuana have used local politics to gain limited acceptance of medical use. For example, in 1993, the Santa Cruz district attorney dropped marijuana charges against a woman arrested for cultivating five marijuana plants. Charges were dropped because the district attorney accepted the woman’s claim that her use was necessary to treat her severe epileptic seizures.

Santa Cruz was also one of the first of many communities to pass a measure asking state and federal authorities to allow marijuana to be used for medicinal purposes. In 1992, over 75% of the local electorate voted in favor of Measure A, which supported efforts to legalize marijuana for medicinal purposes and ordered the Santa Cruz Board of Supervisors to ask local law enforcement officials to “adhere to the spirit of the ordinance” by overlooking cases in which a person possessed marijuana for medical use. Similar measures were passed throughout northern California.

When it became obvious that the Clinton administration would not break from its predecessors’ position on rescheduling marijuana to allow limited medical use, the California legislature responded by passing Senate Bill 1364, which sought to recognize marijuana as a Schedule II drug for medicinal use. See John Enders, *Woman’s Pot Use Lights Up a Debate*, SACRAMENTO BEE, Sept. 23, 1993, at B1.

See *Jane Meredith Adams, Quadriplegic Sues Over State’s Marijuana Ban*, SACRAMENTO BEE, Sept. 17, 1994, at B5. Claiming that the state’s restrictions on his use of the drug were unconstitutional, Scott Hager asserted that his rights to safety, privacy, and happiness as well as his protection from unreasonable search and seizure were violated when police confiscated marijuana plants from his home. See *id.* The case was eventually thrown out of court by a judge who stated that this is a legislative issue. See *Pot Ban Challenge Dismissed*, SACRAMENTO BEE, Feb. 25, 1995, at B3.


legitimate medical use. Governor Wilson vetoed the bill on September 30, 1994, during a heated gubernatorial race in which his campaign strategy posed him as the toughest anti-crime candidate in the race. Wilson's veto letter to the Senate asserted that the bill served no purpose because it would be preempted by federal law, because orally administered THC was already available for prescription, and because the bill would put physicians and pharmacists at risk of federal prosecution if they prescribed marijuana.

In 1995, proponents of legalizing marijuana for medical use attempted a different approach. Unlike SB 1364, which would have reclassified marijuana, Assembly Bill 1529 created a defense for a seriously ill person charged with possession of marijuana. Such an approach would not be preempted by federal law; AB 1529 created a defense if state authorities attempted to bring state criminal charges against the seriously ill person.

Support for the legislation had grown since SB 1364. The official list of supporters included nearly 30 groups and


341. See Vitiello, supra note 5, at 1660; see also Greg Lucas, Medical Marijuana Bill Approved, S.F. CHRON., Aug. 19, 1994, at A20.


343. See A.B. 1529, 1995–1996 Reg. Sess. (Cal.), Legislative Counsel's Digest, Feb. 24, 1995, at 1. AB 1529 provided that existing prohibitions against the possession or cultivation of marijuana would not apply to persons possessing or cultivating the drug for their own personal medicinal use. This exemption applied to persons who had obtained approval for such use in writing from their physician. See id. at 1–2

individuals representing diverse viewpoints. Among the list of supporters were not only organizations like NORML, but also California Advocates for Nursing Home Reform, the Los Angeles District Attorney, and an American Legion post. Proponents from both parties urged passage on the Assembly floor. Like SB 1364, AB 1529 passed through both houses. Again, Governor Wilson vetoed this bill. He stated concerns that the bill would "for all intents and purposes legalize possession and cultivation in California." He also expressed concern that AB 1529 would unduly complicate law enforcement's efforts and noted that "[t]he FDA concluded that marijuana has no recognized medical use."

There may be sound policy reasons to resist the legalization of medicinal marijuana, but Governor Wilson did not make a very compelling case for his second veto of legislation aimed at making marijuana lawful for medical use. Twice, a majority of the legislature overcame the normal fear of appearing soft on crime to pass medical marijuana bills. They did so because a significant majority of Californians favor such legislation. That majority has been shaped, in part, by organizations that have pursued legalization efforts for decades.

346. See id.
347. See Greg Lucas, Assembly Approves Marijuana as a Medicine But it Remains Illegal Under Federal Law, S.F. CHRON., May 19, 1995, at A21. Opponents were quite outspoken; for example, Assemblyman Tom Woods (R-Shasta) asserted that, "This is just an open-door policy to get marijuana on the street. This would only send the message to young people that it's fine to smoke marijuana to feel better." Id.
349. Letter from Pete Wilson, Governor of California, to the California Assembly (May 3, 1996).
350. Id.
351. For example, while marijuana provides relief for some medical conditions, it may also pose risks for some patients. Thus, while proponents argue that marijuana is appropriate for patients suffering from glaucoma, it may also cause optic nerve damage and bronchial problems. See Cowley, supra note 187, at 22; see also Eric Bailey, Politics, Science Clash on Marijuana as Medicine: Drugs: As State Debates Prop. 215, Some Say U.S. Stymies Test to Prove Pot's Value. Critics Say Research is Flawed, L.A. TIMES, Oct. 30, 1996, at A1 (noting that marijuana has been linked to bacterial pneumonia among HIV patients).
352. See supra notes 31, 239.
353. The best example of such an organization is NORML, which has been involved in state and federal attempts at marijuana legalization on both the judicial and legislative fronts since the 1970s. See supra notes 274–98 and accompanying text.
officials, Wilson did not offer a compromise solution to the problem. That proved to be a mistake. 354

III. HOW CAN WE REFORM THE INITIATIVE PROCESS

Proposition 215 demonstrates both the best and worst aspects of the initiative process. Its poor drafting and the misleading campaign carried out by its supporters demonstrate some of the glaring weaknesses of the initiative process. 355 Even with flaws in the initiative process, in the case of Proposition 215 it worked as intended. Despite wide public support for the legislation, the normal legislative channels failed, leaving the initiative process as the only available route. 356 Insofar as it put power back in the hands of the voters, whose aims were frustrated by unresponsive elected officials, Proposition 215 demonstrates the virtue of a device that reinjects the popular voice into the political process.

As this Article has argued, that voice comes at a considerable cost. After reviewing some current reform proposals, this section considers how the initiative process might be reformed to keep its strengths intact while remedying its weaknesses. 357

354. The public would have been better served by AB 1529, even as written, than by Proposition 215. For example, AB 1529 did not include some of Proposition 215’s open-ended language, like the § 11362.5 (b)(1)(A) allowance for “any other illness,” which promises to produce confusion and unnecessary litigation. Had legislators been willing to engage in compromise with Governor Wilson, some of AB 1529’s defects might have been avoided as well. See supra notes 115–17, 123–26 and accompanying text.

355. See supra Part I.

356. See supra Part II and infra notes 357–91.

357. This section discusses the weaknesses in the initiative process demonstrated by passage of Proposition 215. It does not delve into all of the problems with the system. For example, it does not address problems created by the initiative cottage industry that has generated income for itself by proposing new initiatives.

This problem is best illustrated by the 1984 initiative that created California’s state lottery system. The lottery initiative was the brain–child of Kelly Kimball, head of a Los Angeles-based signature-gathering firm. In 1984, Kimball convinced a Georgia-based lottery equipment company to contribute more than two million dollars to back his lottery campaign. See Dan Bernstein, Lottery Initiative Was One Consultant’s Roll of the Dice, SACRAMENTO BEE, Aug. 5, 1996, at A1. Once the initiative passed, the Georgia company was awarded a forty-million-dollar contract to print game tickets and to provide other services for the state. See id. That example demonstrates the incentive to create a demand for reform where none existed. This kind of initiative hardly seems consistent with the original goal of the process.
A. Some Recent Proposals

In 1979, 83% of Californians polled said that they found the initiative process to be a good thing.\(^{358}\) Based on recent legislation aimed at reforming the process and on anecdotal evidence, it is doubtful that the initiative process would receive such overwhelming support today. As one member of the Assembly observed, the initiative process "needs to be cleaned up to reflect the realities and complexities of the 1990s."\(^{359}\)

A number of reform proposals have emerged during the past decade. The most thorough reform proposals were drafted by a commission created by the legislature in 1991. Assembly Concurrent Resolution 13 created the Citizens' Commission on Ballot Initiatives, consisting of the Attorney General, the Secretary of State, the president of the County Clerks' Association, and 12 members from the public and business sectors, the general public, and the academic community.\(^{360}\)

The legislature appointed the commission to address public concerns about aspects of the initiative process.\(^{361}\) Among those concerns were overuse of the process, the employment of increasingly complex measures designed to confuse the voters, and domination of the process by special interest groups.\(^{362}\)

The commission's proposals should be the starting point for discussion of initiative process reforms. Unlike some current proposals, the commission's report did not play to the passions of the moment.\(^{363}\) A number of specific proposed reforms are worth careful review.


\(^{361}\) See id.

\(^{362}\) See id. In adopting the resolution, the legislature specifically recognized the following problems: increased number of initiatives (60% of all initiatives in the state's history were submitted during the 1970s and 80s alone); initiatives based on single interests rather than broad-based policy; initiative drafting that created financial benefit for sponsors; the growing "initiative industry"; the complexity of initiative measures; an overload on the judiciary and an over-amended constitution "alongside a body of inflexible quasi-constitutional statutory law"; and decreased voter support of the initiative process itself. See id. ACR 13 also refers to a 1990 election day poll which showed that 40-50% of those casting ballots had little or no knowledge of several of the ballot propositions. See id.

\(^{363}\) Assembly Joint Resolution 26 and its parallel provision in Congress, H.R. 1170, offer a recent example of playing to current political passions. AJR 26 urges the
Among the most important recommendations were the following. First, the legislature should be required to hold a timely public hearing on all initiatives qualifying for the ballot. Second, the legislature should have the opportunity to develop and enact a similar proposal. This may eliminate the need for the initiative to appear on ballots at all. Third, proponents of the initiative should have the power to amend the initiative within seven days of the public hearing as long as those amendments are consistent with the "purposes and intent" of the initiative. Fourth, the legislature should have the power to amend a statutory initiative three years after its passage, also provided that it is consistent with the initiative's purposes and intent. Fifth, related initiatives should have comparison charts in the ballot literature to allow voters to compare the measures and to warn them that if conflicting initiatives are approved, only one becomes effective. Sixth, the pamphlet should state how legislators and the governor voted on the initiative. Seventh, the Legislative Analyst's summary should clearly explain the effect of a "yes" or "no" vote. Eighth, if proponents challenge the wording of a pamphlet's summary or caption, judicial review should be immediate and before the pamphlet is circulated. Finally, there should be full disclosure of the top five financial contributors to the initiative process.


365. See id.
366. See id.
367. See id. at 4.
368. See id. at 6.
369. See id. at 7.
370. See id. In 1994, this suggestion was codified on a trial basis. See CAL. ELEC. CODE § 9085 (West 1996). Included in the statute is a sunset provision, repealing the section on Jan. 1, 1999, unless a later statute extends the date. See id.
371. See CITIZEN'S COMMISSION REPORT, supra note 364, at 7.
372. See id. at 7. The Citizen's Commission Report included other recommendations which address technical and procedural issues not raised by Proposition 215. See id. at 3-8.
B. Public Hearings

The Election Code currently provides that the legislature must hold hearings after an initiative has qualified for the ballot. In some cases, the legislature fails to conduct the required hearings without repercussions because the Election Code provides no remedy. The Election Code might be reformed to give any voter standing to bring an action for a writ of mandate to compel the legislature to conduct a hearing.

Legislative hearings, despite their notorious excesses, serve a number of important functions. They allow input from groups affected by the proposed legislation. They help educate the public about pending legislation. They help explain the intent of the legislature in adopting the legislation. Hearings may also demonstrate the need for textual changes to avoid confusion or to address unanticipated legal problems.

The Senate did hold hearings on Proposition 215. The hearings highlighted numerous problems with the initiative. While the hearings may have served a purpose in educating the media and the public, the legislature had few options once problems were identified. The hearings did not diffuse support for Proposition 215. The legislature might have passed its own version of the initiative. Typically, the legislature lacks incentive to do so, since the initiative supersedes legislation insofar as the legislation differs from the initiative. Absent the ability to amend the initiative or take other effective remedial action if hearings reveal weaknesses in the initiative, the legislative role is more ceremonial than substantive.

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373. See CAL. ELEC. CODE § 9034.
374. See id.
375. See, e.g., Peter Grier, Campaign Probe Unlikely to Offer Watergate's Grip: Congress's Investigation Into Campaign-Finance Scandals Begins Tomorrow Amid Partisan Squabbles and Other Problems, CHRISTIAN SCI. MONITOR, July 7, 1997, at 3 (noting that the Senate had subpoenaed 30 witnesses ranging from President Clinton's closest aide to Hillary Clinton's chief of staff to testify about alleged 1996 campaign fund-raising abuses).
376. See generally Joint Hearings, supra note 67.
377. See supra notes 66–69, 106–07 and accompanying text.
378. Consistent with traditional maxims of statutory construction, a later enactment is controlling when it conflicts with an earlier statutory provision. See, e.g., City of Petaluma v. Pac. Tel. & Tel. Co., 282 P.2d 43, 46 (1955).
C. Amendments and Similar Legislation

Some of the commission’s recommendations would, under some circumstances, address the problem of poorly drafted legislation. The commission recommended that the initiative’s proponents be given authority to amend the proposition’s language as long as it does not alter the original intent of the initiative.379 It also proposed that the legislature be empowered to enact similar legislation, thereby obviating the need for the initiative.380

Those recommendations go a long way toward solving some of the basic problems with the initiative process. The hearings demonstrated Proposition 215’s primary weaknesses.381 Had the initiative drafters been empowered to amend Proposition 215 after the hearings, they might have specified, for example, that “physician” meant a licensed physician under the laws of California.382

That remedy may not go far enough. For example, Proposition 215 was based on AB 1529, which was passed by both houses of the legislature a year earlier.383 The governor’s veto forced Peron and his supporters to use the initiative process.384 There is no reason to think that the governor would have changed his position on medical use of marijuana in the interim.385 Hence, the legislature’s ability to avoid the need for the initiative process is limited.

380. See id.
381. See generally Joint Hearings, supra note 67. For example, opponents of Proposition 215 objected to the initiative’s loose language at the hearing. Concern was expressed over the “any other illness” language and the lack of adequate definitions for the terms “physician” and “primary caregiver.” See id. at 40 (statement of Dr. Michael Meyers).
382. See Joint Hearings, supra note 67, at 63 (statement of Dr. Peter Keegan).
383. See supra notes 33–34.
384. See supra notes 35–37.
385. However, after the passage of Proposition 215, Governor Wilson appeared to soften his position on the concept of medical marijuana use, stating, “I understand and share the desire of Californians, a compassionate desire, to ease the suffering of anyone suffering from a terrible disease . . . (But) this law is so badly drafted, so loosely drafted, that it effectively legalizes the sale of marijuana.” Poor, Pitiful Pete, The Press Democrat, Nov. 9, 1996, at B6 (noting that Wilson vetoed medical marijuana bills prior to the passage of Proposition 215 and stating that Wilson’s comments were indicative of an “old story in California, where a politician fails to respond to a public need and then complains because the popular response is imperfect”).
Further, had the proposal to allow post-hearing amendment been in place, there is no guarantee that Proposition 215 proponents would have agreed to any proposed amendments. Proposition 215 departed from AB 1529 in some key ways. For example, Peron and his co-author added language allowing marijuana use for "any other illness." Proponents of Proposition 215 might not have been willing to amend that language because it was intentionally included to expand the scope of the initiative. In other words, the language reflects Peron's view that all use of marijuana is medical and was part of a conscious strategy to decriminalize marijuana.

In such a case, the legislature might have been unable to pass similar but more appropriately restricted legislation because of the governor's and Peron's intransigence. A refinement of the commission's recommendation would allow the legislature, if unable to secure voluntary amendment by initiative supporters, to place its own version of the initiative on the ballot as a competing proposal, potentially remedying the problem. This remedy preserves the power of the people to circumvent unyielding elected officials but gives professional drafters an opportunity to write better legislation.

AB 1529 could have been improved, but in contrast to Proposition 215, it came closer to the voters' intent to legalize marijuana use for medical purposes. It would have given physicians and law enforcement officials better guidance on the scope of the law, reducing unnecessary litigation.

The remedy may also limit the power of special interest groups. Although special interest groups have ample influence

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386. See A.B. 1529, 1995–1996 Reg. Sess. (Cal.). The Assembly Bill also limited immunity from prosecution to patients of cancer, glaucoma, AIDS, and multiple sclerosis. See id. Additionally, the term "caregiver" was given a stricter definition and the drug had to be approved for use in writing by a physician. See id.

387. See discussion supra Introduction.

388. Such action by the legislature seems to be constitutionally prohibited. Article IV § 8(b) of the California Constitution says that the legislature must legislate by statute. See CAL. CONST. art. IV, § 8(b). Additionally, Article II § 8(a) says that it is the electors who place initiatives on the ballot. See CAL. CONST. art. IV, § 8(a). The only reason to doubt unconstitutionality is found in Article VI § 12, which suggests that the legislature can put a bill before the electorate. See CAL. CONST. art. VI, § 12. That provision must be read in conjunction with Article II § 10, which states that the only way to amend an initiative statute is by submitting it to the voters. See CAL. CONST. art. II, § 10. Hence, Article VI § 12 must be read by cross-referencing Article II § 10, and the result remains that the legislature is left with no practical way to offer voters a competing, well-drafted initiative.

in the legislature, legislators who are not beholden to a given interest group may be able to forge a compromise. As currently constituted, the initiative process requires no such compromise. Allowing competing initiatives, authored by the legislature, may undercut some of the power of special interest groups.

D. Problems Not Addressed: Misleading Ballot Pamphlets

The commission recognized that initiative drafters have often designed ballot measures to confuse voters. The commission, however, did not address the related concern of misleading campaign literature or the more difficult problem posed by misleading advertisements.

Campaign literature is subject to limited judicial review, but the standard imposed is difficult for opponents to meet. As I have argued elsewhere, the campaign literature supporting the Three Strikes initiative, for example, was extremely misleading. Despite that fact, opponents could not meet the clear and convincing evidence standard required to compel changes to the literature.

The commission addressed the problem only indirectly. The commission recommended requiring the Legislative Analyst to make a clear statement regarding the effect of a “yes” or “no” vote, to provide notice of legislators’ votes on the proposed initiative, and to identify the primary financial donors to the initiative effort. This kind of information may help voters recognize the unstated policies that drive the legislation, but

390. See, e.g., D. HERZBERG & J. UNRUH, ESSAYS ON THE STATE LEGISLATIVE PROCESS 5 (1970) (noting the influence of interest groups on the political process when individuals fail to participate).
391. See CITIZEN’S COMMISSION REPORT, supra note 364, at 1.
392. See Brosnanah v. Eu, 641 P.2d 200, 201 (Cal. 1982) (“As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people’s franchise, in the absence of some clear showing of invalidity.”).
393. See Vitiello, supra note 5, at 1679.
394. See id.; see also Peter Hecht, “3 Strikes” Fight Rages Inside, Outside Court, SACRAMENTO BEE, Aug. 16, 1994, at B1.
395. See CITIZEN’S COMMISSION REPORT, supra note 364, at 7.
396. See id.
397. See id.
nowhere did the commission suggest methods to correct mis-
statements in campaign literature.

Empirical evidence suggests that campaign literature, as opposed to advertising, has a limited role in a voter's deci-
sion.\textsuperscript{398} Hence, campaign literature reform may be less important than reforming misleading advertisements. However, it is counterintuitive to think that ballot literature has no effect on voters' decisions. I offer two proposals to limit the use of misleading ballot statements.

The first requires no legislative or voter action. Instead, it would require courts to develop a maxim of statutory construc-
tion and to follow it consistently. As argued above, if the courts, in interpreting acts, give weight to statements made by proponents in the ballot literature, some of the law's feared excesses will not occur.\textsuperscript{399} As Professor Kelso has argued, the California Supreme Court has not formally recognized such a "Rule of Caution,"\textsuperscript{400} and has stated, to the contrary, that initiatives should be read liberally. When Kelso examined how the court behaved, however, he found that despite its pronounce-
ments to the contrary "the court has effectively followed the Rule of Caution (i.e., rejection of the ballot argument when expedient, strict construction, and, especially no presumption of constitutionality).\textsuperscript{401}

Currently, the "new textualism," popular among a number of judges\textsuperscript{402} and commentators, urges that the plain text of an act should usually be definitive. While this argument may have merit with regard to statutes drafted by the legislature,\textsuperscript{403} it does not have merit where the law was enacted through the ini-
tiative process. As argued above, the initiative process invites careless drafting.\textsuperscript{404} Also, most voters are unlikely to understand

\textsuperscript{398} See Kelso, supra note 3, at 358.

\textsuperscript{399} See supra notes 113–14 and accompanying text.

\textsuperscript{400} See Kelso, supra note 3, at 344–46.

\textsuperscript{401} Id. at 346–47.


\textsuperscript{403} See Eskridge, supra note 402, at 666–70 (criticizing extensive reliance on plain meaning without reference to legislative history).

\textsuperscript{404} See supra notes 35–37, 66–121 and accompanying text.
the technical statutory language of the proposition. 405 A voter is far more likely to understand the narrative that accompanies the text.

Proposition 215 is a case in point. Earlier, I argued that, by using traditional maxims of construction, a court might conclude that "any other illness" includes a wide array of conditions, ones for which a medical doctor would not recommend marijuana use. 406 The language is intentionally open-ended and confusing because of Peron's belief that all marijuana use is medical. 407 By comparison, the campaign literature promised that the initiative was intended to provide palliative care to seriously and terminally ill patients. 408 When similarly misleading claims are also made in advertisements, courts should construe campaign literature language more liberally because that literature almost certainly comes closer to the voters' understanding of what they voted for than does the statutory language itself.

The second proposed reform would work in conjunction with a proposal (developed below) to reform misleading advertising. 409 Currently, the Legislative Analyst has a limited role in preparing the ballot pamphlet, consisting of a statement concerning the initiative's effect. 410 The office appears to be both non-partisan and expert, but more importantly, it is accountable to the legislature. 411 Voters might be better served by a commission composed of lawyers and scholars who would review the proposed campaign statements of interested parties, negotiate changes to reflect accurately the substance of the

405. See Kelso, supra note 3, at 342–43 (noting that as little as 30% of the electorate can actually comprehend the information provided in ballot pamphlets, which includes the text, a legislative analysis, and arguments both for and against each initiative).

406. See supra notes 104–11.

407. See supra notes 99–100 and accompanying text.

408. See California Secretary of State, supra note 47.

409. See infra notes 412–33 and accompanying text.

410. See CAL. ELEC. CODE § 9087 (West 1996).

The Legislative Analyst shall prepare an impartial analysis of the measure describing the measure and including a fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost to state or local government . . . . The analysis shall be written in clear and concise terms, so as to be easily understood by the average voter, and shall avoid the use of technical terms whenever possible.

Id.

411. See CAL. GOV'T CODE § 9143 (West 1992) (providing that the Joint Legislative Budget Committee has the authority to create a legislative analyst).
initiative, and prepare an independent analysis of the initiative that would appear prominently in the ballot pamphlet.

**E. Problems Not Addressed: Misleading Advertisements**

As argued above\(^{412}\) and elsewhere,\(^ {413}\) campaigns in support of ballot initiatives have been marred by misleading advertising campaigns. Unlike ballot literature, which is read by a relatively small segment of voters, advertisements are widely disseminated and almost unquestionably influence elections.\(^ {414}\) Reforming political advertising, however, is problematic.

Political advertising comes close to the core of the freedoms protected by the First Amendment.\(^ {415}\) There is much debate about whether the First Amendment protects commercial speech and whether it is designed to further self realization,\(^ {416}\) but there is universal agreement that the core protection of the First Amendment involves the protection of political debate. Democracy is served by vigorous political debate.\(^ {417}\)

Efforts directed at limiting advertising would almost certainly run afoul of the First Amendment.\(^ {418}\) Requiring approval of the content of advertisements would neither be sound policy nor a constitutional practice. When confronted with concerns about false speech, free speech advocates traditionally argue that more speech is the answer.\(^ {419}\)

In an election, false or misleading advertising is presumably countered by the opponents’ true speech. Observers of California’s recent ballot initiatives recognize that, after listening to the cacophony, voters may be left not with truth, but with

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\(^{412}\) See supra notes 46–58 and accompanying text.

\(^{413}\) See generally Vitiello, supra note 5.

\(^{414}\) See Kelso, supra note 3, at 342 (noting that when asked about the importance of various sources of information on ballot initiatives, voters rank the ballot pamphlet materials below newspapers and television).

\(^{415}\) See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1131–32 (2d ed. 1988) (“The consequences of chilling free expression by attempting to purge speech of false charges are peculiarly pronounced in the context of political elections, which are absolutely dependent upon the free exchange of ideas that lies at the core of the first amendment.”).

\(^{416}\) See id. at 890–04 (discussing commercial speech doctrine).


\(^{418}\) Such a limitation on political speech would limit core First Amendment speech. One could not seriously argue that such advertisements come within the Court's commercial speech cases allowing for greater regulation.

\(^{419}\) See TRIBE, supra note 415, at 785–86 (discussing the “marketplace of ideas” argument for freedom of expression).
competing, equally misleading accounts of the proposed legislation. As recognized by critics of competing experts in our trial system, at the end of the day, the listener may have no more confidence in where the truth lies than she did before.

Proposition 215 was unusual in that opponents were not well funded,\textsuperscript{420} which is surprising given that many crime related initiative campaigns raised large sums of money.\textsuperscript{421} A well-funded opposition might have addressed the real problems with Proposition 215. While more speech is the traditional answer to combat misinformation, Proposition 215's opponents were as casual, if not less so, about the initiative's effect as were its proponents.

As discussed earlier, at least some opponents who spoke during the joint hearings demonstrated a casual regard for the truth, at best.\textsuperscript{422} For example, one witness opposing Proposition 215 argued that a foreign physician's recommendation of marijuana published in an underground newspaper would be sufficient to give a person reading that recommendation a defense to prosecution.\textsuperscript{423} Another witness suggested that the initiative would give a youngster the right to grow and to use marijuana because, "anxiety levels on going to school make their learning very difficult, and because anxiety is a legitimate medical illness in which a substance like marijuana may provide relief."\textsuperscript{424} Other similarly extravagant claims were made by opponents to Proposition 215.\textsuperscript{425}

The initiative process works if the voters understand what they are adopting. Examining these campaign advertisements does not give one confidence that the voters understood what Proposition 215 accomplished.\textsuperscript{426} Restricting political speech is obviously unconstitutional\textsuperscript{427} and poor policy, but adding a neutral and scholarly account of the initiative would help voters.

\textsuperscript{420} See supra note 44.

\textsuperscript{421} See, e.g., Vitiello, supra note 5, at 1678 (noting that proponents of the "Three Strikes" initiative engaged in a propaganda campaign of embarrassing proportions).

\textsuperscript{422} See supra note 69 and infra notes 424–25.

\textsuperscript{423} See Joint Hearings, supra note 67, at 36.

\textsuperscript{424} Id. at 40.

\textsuperscript{425} One opponent, who asserted that Proposition 215's loopholes were intentional, stated, "No medical exam's required. No documentation. You go to a doctor's office, they have no idea that that's not even their patient. They don't have to say. All they have to do is orally recommend it." Id. at 54. Later, that same opponent continued, "... this just allows a few pro-marijuana doctors or a few quacks to get up there and just legalize marijuana by just saying it. You get a radio doctor. That's all it takes." Id. at 55 (statement of Tom Gorman).

\textsuperscript{426} See supra notes 46–52 and accompanying text.

\textsuperscript{427} See U.S. CONST. amend. I; see also CAL. CONST. art. I, § 2(a).
For example, a scholarly account might have addressed whether the initiative was limited to seriously and terminally ill patients.\textsuperscript{428} It might have addressed whether marijuana actually provides relief from the illnesses where it might be recommended.\textsuperscript{429} The analysis might have discussed whether the initiative was in fact allowing any healer or only licensed medical practitioners to recommend marijuana.\textsuperscript{430} It might have examined whether marijuana can be recommended for stress, headaches, and menstrual cramps.\textsuperscript{431}

The Legislative Analyst's office is highly regarded.\textsuperscript{432} Were that agency entrusted with the job of drafting a neutral assessment, it might become the target of increasing political pressure to conform its legislative assessment to that of a particular interest group or group of legislators. For that reason, as suggested above, I would urge creation of a commission of legal scholars whose tenure would not be dependent on the legislature.\textsuperscript{433} This commission could draft public interest advertisements that would air along with advertisements funded by proponents and opponents of an initiative.

Requiring public interest advertisements to be aired alongside other advertising would almost certainly rid the current system of its excesses. Proponents and opponents alike would have an incentive to avoid hyperbole in their advertising because having false claims exposed by a non-partisan group would undercut the credibility of the speaker. Such a procedure would confirm our faith that more speech is the answer to misleading speech.

CONCLUSION

Proposition 215 may have been the only way to circumvent intransigent elected officials who were unwilling to pass popular legislation. In that sense, it demonstrates the utility of the initiative process.

\begin{itemize}
\item \textsuperscript{428} See supra notes 105-14 and accompanying text.
\item \textsuperscript{429} See supra notes 109-11.
\item \textsuperscript{430} See supra notes 68-73, 78-81, 88 and accompanying text.
\item \textsuperscript{431} See supra notes 105-07 and accompanying text.
\item \textsuperscript{432} See California Legislative Analyst's Office, About the Legislative Analyst's Office (visited October 22, 1997) <http://www.lao.ca.gov/laofacts.html> (noting that the Legislative Analyst's Office enjoys a national reputation for its ability to provide non-partisan analyses to the California Legislature on fiscal and policy issues).
\item \textsuperscript{433} See supra text accompanying notes 410-12.
\end{itemize}
Beyond that, though, Proposition 215 demonstrates the flaws of the initiative process. Based on these flaws, this article has suggested specific reforms to the process. It identified the foremost problem with the initiative process: that initiatives are poorly drafted, at times intentionally so. Excluding professional drafters and legislators from the process almost guarantees that result. Further, the initiative process does not currently require proponents to accommodate competing interests. Hence, even if legislative hearings demonstrate inadequate drafting or areas of confusion, the process does not anticipate amendment or other accommodation once the initiative has qualified for the ballot. Finally, current advertising practices and campaign literature erode our confidence that the electorate is properly informed about its selection when voting on an initiative.

These problems can be corrected through specific reforms. Procedural reform might allow amendments to the initiative by proponents even after the initiative has qualified for the ballot. In addition, the legislature would be able to place a competing proposition on the ballot when proponents resist amendments. Creation of a commission of independent legal scholars to prepare both a neutral assessment of a ballot initiative and public service advertising can correct current practices that frustrate efforts to educate voters about their choices.

For millions of Californians who are tired of partisanship and who remain distrustful of politicians, reform would be a welcome relief, allowing us to fulfill the responsibility imposed by the initiative process.

434. See supra notes 29–30, 355–57 and accompanying text.
435. See supra notes 365–75 and accompanying text.
436. See supra notes 46–52 and accompanying text.
437. See supra notes 365–75 and accompanying text.
438. See supra note 433 and accompanying text.