SMOKE ON THE HORIZON: PROSPECTIVE APPLICATION OF THE MICHIGAN MEDICAL MARIJUANA ACT

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INTRODUCTION

When the Michigan Medical Marijuana Act[1] went into effect on December 4, 2008, Michigan became the thirteenth state to legalize medical marijuana.[2] The Michigan Medical Marijuana Act provides a complete defense to the prohibition against use and possession of marijuana.[3] It permits, through the Michigan Medical Marijuana Program, qualifying patients[4] to utilize up to two and one half ounces of marijuana and up to twelve marijuana plants kept in a closed, locked facility for medicinal/therapeutic purposes so long as the qualifying patient suffers from a debilitating medical condition,[5] secures physician written approval prior to use,[6] and registers with the Michigan Department of Community Health securing a registry identity card

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[1] M.C.L. §§ 333.26422-30 (2008). As yet, there is no constitutional right to possess a controlled substance. *See* People v. Ovalle, 222 Mich. App. 463, 467 (1997). Laws prohibiting the possession, use, and sale of marijuana do not violate the rights to privacy, equal protection, or due process. People v. Alexander, 56 Mich. App. 400, 402 (1974). The State of Michigan has the power to pass laws against the sale and use of marijuana, and persons arrested for the sale or possession of marijuana can be prosecuted. People v. Sinclair, 387 Mich. 91, 103 (1972).

[2] The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marijuana. M.C.L. § 333.26422 (2008). Michigan joined in this effort for the health and welfare of its citizens. M.C.L. §§ 333.26422-30 (2008). During the creation of this Note, New Jersey became the fourteenth state to legalize medical marijuana on January 2010. *See* 2008 N.J. Sess. Laws page no. 117; New Jersey Compassionate Use Medical Marijuana Act, Department of Health and Senior Services Homepage, available at http://www.njleg.state.nj.us/2008/Bills/S0500/119_R3.PDF. Additionally, the Arizona Medical Marijuana Initiative is headed for the November 2010 ballot. Arizona Medical Marijuana Act, 2010 Initiatives, Referendums, and Recalls, Arizona Secretary of State.gov, available at http://www.azsos.gov/election/2010/general/ballotmeasuretext/I-03-2010.pdf.

[3] M.C.L. §§ 333.26421-30 (2008).

[4] M.C.L. § 333.26424(1)-(3) (2008).

[5] Patients must suffer from a debilitating medical condition, defined as:

> (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.
> (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 of more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those caused by epilepsy; or severe or persistent muscle spasms, including but not limited to those which are characteristic of multiple sclerosis.
> (3) Any other medical condition or treatment for a medical condition approved by the department, as provided by section 5(a). *See* M.C.L. 333.26423(a)(1)-(3) (2008).

[6] A patient must secure a document from a Michigan licensed physician who has established a patient/physician relationship with the patient stating that in the physician's professional opinion patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat patients debilitating medical condition. *See* M.C.L. § 333.26423 (2008); *see also General Information about the Program*, Department of Community Health Homepage, available at http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52137---,00.html.

subject to annual renewal.[7] The program also permits a qualifying care provider to utilize the defense so long as the care provider's acts were in furtherance of the patient's legal medicinal use of the drug.[8]

The Michigan Medical Marijuana Act and the Michigan Medical Marijuana Program do not directly address whether the statute applies retroactively to pending or prior drug convictions.[9] California was the first state to legalize medicinal use of marijuana.[10] Thus far, California is the only state that retroactively applied its medical marijuana laws to cases pending on direct appeal when the California Compassionate Use Act of 1996 was enacted.[11] Prior to the enactment of the Michigan Medical Marijuana Act, the other eleven medical marijuana states[12] did not follow California's approach and generally applied their respective statutes prospectively to cases pending on direct appeal.[13]

At least three state circuit courts have ruled that the Michigan Medical Marijuana Act should be applied retroactively.[14] The defendants in those cases were allowed to raise the

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[7] Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana%20Ballot%20Proposal%20of%202008.pdf (last visited March 31, 2010). There are three elements to the complete defense provided by Michigan's Medical Marijuana Act. *See* M.C.L. §§ 333.26421-30 (2008). The patient must secure a physician statement from a licensed physician. *See* M.C.L. § 333.26424(b) (2008); *see also* M.C.L. § 333.26428(a)(1) (2008). Next, the quantity of marijuana must be reasonably necessary for treatment. *See* M.C.L. § 333.26424(b)(1) (2008); *see also* M.C.L. § 333.26428(a)(2) (2008). Finally, the contested conduct must have been undertaken to treat a patient's medical condition. *See* M.C.L. § 333.26424(a) (2008); *see also* M.C.L. § 333.26428(a)(1) (2008).

[8] M.C.L. § 333.26428(a)(2) (2008).

[9] M.C.L. §§ 333.26423-30 (2008).

[10] *See* Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West Supp. 2003); People v. Trippet, 66 Cal. Rptr. 2d 559, 562, 566-67, 570-71 (Cal. Ct. App. 1998).

[11] *Id.*

[12] *See supra* note 2 and accompanying text.

[13] *See infra* note 180; *Trippet*, 66 Cal. Rptr. 2d at 559, 562, 566-67, 570-71; Preston v. State Bd. of Equalization, 25 Cal. 4th 197 (2001); U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc., 749 N.W.2d 98 (Minn. Ct. App. 2008); Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370 (Iowa 2000); In re Marriage of Vannausdle, 668 N.W.2d 885 (Iowa 2003); Ubel v. State, 547 N.W.2d 366 (Minn. 1996); Richtmyer v. Richtmyer, 461 A.2d 409 (R.I. 1983); State v. Bolin, 381 S.C. 557 (Ct. App. 2009); *see also* Michael M. O' Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281(Summer 2003).

[14] *See* People v. Peterson, Alger County Circuit Court Case No. 09-1854-FH. James Peterson was charged with manufacturing of marijuana after police seized two marijuana plants from his Alger County home on November 3,

Michigan Medical Marijuana Act as a complete defense, even though they had not yet received medical marijuana registry cards.[15] All these cases involved situations where the defendant had a serious medical condition, would qualify for a registry card, and had a case pending on direct appeal when the law went into effect on December 4, 2008.[16] None of these cases involved sale or delivery of marijuana.[17]

Several other trial courts have refused to allow retroactive application of the Michigan Medical Marijuana Act to cases pending on direct appeal.[18] At this time, at least one court held that if a defendant was convicted under a valid statute prior to the Michigan Medical Marijuana Act's enactment, he or she is not entitled to appellate relief.[19] Thus, it is likely that this issue will ultimately be decided by the higher courts.[20]

2008, one day before the Michigan Medical Marijuana Act was passed by popular vote. *Id.* Circuit Court granted Peterson's motion to dismiss asserting the Michigan Medical Marijuana Act could apply retroactively. *Id.* The Circuit Court held that "[p]ublic policy would certainly suggest that if a medical benefit can be realized from the use of a particular substance, what possible harm can be found by the state in allowing the same to be applied retroactively?" *Id.* *See also* People v. Burke, 775 N.W.2d 800 (Mich. 2009) (remanding issue of retroactive application of the Michigan Medical Marijuana Act); People v. Campbell, 778 N.W.2d 239 (Mich. 2010) (holding that retroactive application of the Michigan Medical Marijuana Act should not be reviewed by the Michigan Supreme Court at this time); People v. Malik, Barry County, COA Case NO 293397; People v. King, Shiawassee County Circuit Court Case No. 09-8600-FH; People v. Vanderbutts, Cass County Circuit Court Case No. 09-08600-FH. Some courts applied the statute prospectively. *See* People v. Peters, 2010 WL 199604 (Mich. App. 2010) (holding that the Michigan Medical Marijuana Act applied prospectively because the statute contained no express language of retroactivity); In the Matter of Keven Joseph Markle v. Green, 2009 WL 2951127 (Mich. App. 2009) (holding that the Michigan Medical Marijuana Act did not apply retroactively to respondent's appeal because his use of marijuana predated the enactment of the MMMA, and there was never any suggestion that respondent's use of marijuana was linked to any health problems or medicinal purposes).

[15] *See Burke*, 775 N.W.2d at 800-12; *Campbell*, 778 N.W.2d at 239-45; People v. Malik, Barry County, COA Case NO 293397 (holding that the Michigan Medical Marijuana Act shall apply retroactively to pending criminal appeals).

[16] *See Burke*, 775 N.W.2d at 800-14; *Campbell*, 778 N.W.2d at 239-46(holding that retroactive application of the Michigan Medical Marijuana Act should not reviewed by the Michigan Supreme Court at this time).

[17] *See Burke*, 775 N.W.2d at 800-12; *Campbell*, 778 N.W.2d at 239-45; People v. Malik, Barry County, COA Case NO 293397.

[18] *See supra* note 14; *see also* People v. Adams, 2009 WL 4144577 (Mich. App. 2009); *See* People v. Peters, 2010 WL 199604 (Mich. App. 2010); In the Matter of Keven Joseph Markle v. Green 2009 WL 2951127 (Mich. App. 2010).

[19] *See Adams*, 2009 WL 4144577 *1-6 (holding that the Medical Marijuana Act was effective after defendant's conviction); M.C.L. §§ 333.26421-30 (2008).

[20] Though, it is unlikely this question will be resolved by the Michigan Supreme Court later this year because the Court has, thus far, rendered such appeals without merit for review. *See* People v. Burke, 775 N.W.2d 800 (Mich. 2009); People v. Campbell, 778 N.W.2d 239 (Mich. 2010). An answer may be more forthcoming in the lower appellate courts. *See* Adams, 2009 WL 4144577 *1-6; *see also* M.C.L. §§ 333.26421-30 (2008).

This Comment, in Part I, explains the efforts of various states to legalize medical marijuana use. It describes the Michigan Medical Marijuana Act and the Michigan Medical Marijuana Program. It further describes prospective and retroactive application of Michigan laws focusing primarily on criminal drug laws. It then contrasts California's retroactive application of its medical marijuana laws to pending cases on direct appeal to Michigan's presumption of prospective application of new substantive criminal laws to pending cases on direct appeal. Part II confronts the arguments, made by some courts and some commentators, that the Michigan Medical Marijuana Act should not be applied retroactively to cases pending on direct appeal when the law was enacted on December 4, 2008. Part II argues that the Michigan Medical Marijuana Act is a new substantive law that contains no express or implied indications of retroactivity. New substantive laws that contain no express or implied language of retroactivity are applied prospectively to cases on direct appeal in Michigan. California's retroactive approach is not applicable in Michigan. Retroactive application would be contrary to public policy by furthering individual over societal interests and condoning illegality. Part II also analyzes case law and the relevant background information discussed in Part I and argues that legislatures should be careful and meticulous in drafting their medical marijuana statutes to ensure that their statutes are prospectively or retroactively applied in accordance with legislative intent. Part II concludes with drafting suggestions for future medical marijuana acts.

I. AN OVERVIEW OF RETROACTIVE AND PROSPECTIVE APPLICATION OF MEDICINAL MARIJUANA LEGISLATION AND THE MICHIGAN MEDICAL MARIJUANA ACT

Although federal law currently prohibits any use of marijuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in

activities prohibited by federal law.[21] The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, New Jersey, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marijuana.[22] Michigan joined this effort in 2008.[23]

Thus far, California is the only state to retroactively apply its medical marijuana legislation to cases pending on direct appeal when the California Compassionate Use Act of 1996 was enacted.[24] But, California has subsequently limited retroactive application to those instances where a patient with a debilitating disease procures a doctor's prescription prior to using and possessing medical marijuana.[25] As yet, it is unclear whether Michigan will follow suit or even expand this doctrine.[26]

A. The History of Medical Marijuana Legalization Efforts

The medical community has long recognized the therapeutic value of marijuana.[27] The drug was not seriously regulated until the passage of the Marijuana Tax Act of 1937.[28] The statute fined recreational users one hundred dollars an ounce, effectively pricing recreational users out of the legal market, and placed an exception taxing medical marijuana users only one dollar an ounce.[29] It was not until President Nixon's War on Drugs of the early 1970's, that

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[21] *See* United States v. Cannabis Cultivators Club, 532 U.S. 483 (2001); M.C.L. §§ 333.26422-30 (2008); M. Wesley Clark, *Can State Medical Marijuana Statutes Survive the Sovereign's Federal Drug Laws? A Toke Too Far*, 35 U. BALT. L. REV. 1, 1-6 (Fall 2005).
[22] M.C.L. § 333 26422 (2008).
[23] *See* M.C.L. §§ 333.26423-30 (2008).
[24] *See supra* note 13; Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West Supp. 2003); *see also* People v. Trippet, 66 Cal. Rptr. 2d 559, 562, 566-67, 570-71 (Cal. Ct. App. 1998).
[25] People v. Wright, 40 Cal. 4th 81, 91 (2006); People v. Rigo, 69 Cal. App. 4th 409 (1st Dist. 1999).
[26] *See* People v. Burke, 775 N.W.2d 800 (Mich. 2009); People v. Campbell, 778 N.W.2d 239 (Mich. 2010); People v. Malik, Barry County, COA Case NO 293397.
[27] Marijuana was included in United States Pharmacopeia until 1948. *See* LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 4-8 (1997) (describing the medical uses of marijuana prior to the passage of the passage of the Controlled Substances Act).
[28] *See* Pub. L. No. 75-238, § 7(a)(1)-(2), 50 Stat. 551-54, repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1101, 84 Stat. 1236, 1292.
[29] *Id.*

Congress completely banned medicinal and recreational use of marijuana with the passage of the Controlled Substances Act, listing the drug as a Schedule I drug after concluding it featured a high potential for abuse.[30]

Regardless of this blanket prohibition, the Food and Drug Administration approved therapeutic research programs under the Food and Drug Act's Investigational New Drug Program.[31] With these research efforts, acceptance of the drug by the medical and scientific communities resurfaced.[32] These efforts culminated with California passing the California Compassionate Use Act of 1996[33] ("Compassionate Use Act") effectively ceding enforcement of all medical marijuana related activity, including growth and distribution, to the federal government.[34] In effect, the Compassionate Use Act legalized medicinal use and individual growth of the drug in California, but federal enforcement remained.[35]

The purpose of the Compassionate Use Act was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes."[36] The

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[30] Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242-84 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2000)); *see also* Gonzales v. Raich, 545 U.S. 1, 9 (2005).

[31] *See* Nat'l Org. for the Reform of Marijuana Laws v. DEA, 559 F.2d 735, 741-45 (D.C. Cir. 1977); Nicole Dogwill, *Comment, The Burning Question: How Will the United States Deal with the Medical-Marijuana Debate?*, MICH. ST. L. REV. 247, 256-67 (1998).

[32] 21 U.S.C. § 812(b)(5)(A)-(B) (2000); *Nat'l Org. for the Reform of Marijuana Laws*, 559 F.2d at 741-45; Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 654-56 (D.C. Cir. 1974); Michael Isikoff, *Administrative Law Judge Urges Medicinal Use of Marijuana*, WASH. POST, Sept. 7, 1988, at A2; Marijuana Scheduling Petition, 54 Fed. Reg. 53, 767 (Dec. 29, 1989); Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994).

[33] Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West Supp. 2003). In November 1996, California voters passed Proposition 215, known as the Compassionate Use Act of 1996, by a 56% majority, becoming the first state to legalize the drug for medicinal purposes. Cal. Health & Safety Code, §11362.5(b)-(d) (West Supp. 1998).

[34] *See id.; see also* Richard Lacayo, *Marijuana: Where There's Smoke, There's Fire*, TIME, Oct. 28, 1996, at 36 (discussing the controversies surrounding the passage of the Compassionate Use Act).

[35] United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1114 (9th Cir. 1999) (per curiam), rev'd, 532 U.S. 483 (2001).

[36] Cal. Health & Safety Code §11362.5(A) (West Supp. 1998). Another purpose of the Compassionate Use Act described in the Preamble was "to encourage 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." *Id. Compare* Cal. Health & Safety Code § 11362.5(A) (West Supp. 1998) ("To 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

Compassionate Use Act limits possession and 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."[37] To this end, the Compassionate Use Act's substantive provisions state that 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."[38] The Compassionate Use Act contains no language of retroactivity nor does it construe the limit of marijuana, measured either in the number of marijuana plants or ounces of marijuana, that an individual patient or caregiver may possess.[39]

The federal government's response to the passage of the Compassionate Use Act was two-fold.[40] Neither effort effectively challenged the act's implementation.[41] First, the federal government sought to enjoin cultivation and distribution by California marijuana dispensaries.[42] Defendants asserted the medical necessity defense in those cases.[43] The Supreme Court held that the medical necessity defense was not a valid defense for the manufacture and distribution of

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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.") & Cal. Health & Safety Code § 11362.5 (West Supp. 1998) (The Compassionate Use Act's "purpose is '[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes upon the recommendation of a physician.") with M.C.L. § 333.26422 (2008) ("Modern medical research, as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses for marijuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.").

[37] Cal. Health & Safety Code §11362.5(A) (West Supp. 1998).

[38] Cal. Health & Safety Code § 11362.5(d) (West Supp. 1998).

[39] *See Id.* People v. Tilehkooh 113 Cal. App. 4th 1433, 1436 (2003); *see also* Cal. Health & Safety Code § 113.627(c) (West Supp. 1998).

[40] *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164-70 (Feb. 11, 1997).

[41] *See* United States v. Cannabis Cultivators Club, 532 U.S. 483 (2001); United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1092 (N.D. Cal. 1998).

[42] *Cannabis Cultivators Club*, 532 U.S. at 483-90; Cannabis Cultivators Club, 5 F. Supp. 2d 1086-1092; Linda Greenhouse, *Justices Set Back Use of Marijuana to Treat Sickness*, N.Y. Times, May 15, 2001, at A1.

[43] *Cannabis Cultivators Club*, 532 U.S. at 483-90; Cannabis Cultivators Club, 5 F. Supp. 2d 1086-1092.

marijuana by the dispensaries because the Compassionate Use Act left no doubt that the defense was unavailable.[44] Regardless of these few cases, distribution continued relatively unhampered.[45]

Next, the federal government sought to punish prescribing doctors.[46] In response, California doctors sought an injunction.[47] Thereafter, the Ninth Circuit permanently enjoined the federal government from revoking their licenses where the basis is solely upon recommendation of medical use of marijuana under the First Amendment.[48] Recognizing the successes after the enactment of the Compassionate Use Act and the federal government's limited enforcement efforts, eleven states[49] enacted medical marijuana laws.[50] Most recently, Michigan passed the Michigan Medical Marijuana Act in December 2008.[51]

California's Compassionate Use Act provided a statutory template for many states.[52] Michigan gleaned many of the provisions and definitions within the Michigan Medical

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[44] *Cannabis Cultivators Club*, 532 U.S. at 483-89.
[45] *See supra* note 42.
[46] *See Cannabis Cultivators Club*, 5 F. Supp. at 1086, 1092.
[47] *See id.*
[48] *See id.*
[49] Although federal law currently prohibits any use of marijuana except under very limited circumstances, states are not required to enforce federal law or to prosecute people for engaging in activities prohibited by federal law. M.C.L. §§ 333.26422-30 (2008); Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana%20Ballot%20Proposal%20of%202008.pdf (last visited March 31, 2010). The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marijuana. Michigan joins in this effort for the health and welfare of its citizens. M.C.L. §§ 333.26422-30 (2008).
[50] *See* M.C.L. §§ 333.26423-30 (2008); Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana%20Ballot%20 Proposal%20of%202008.pdf (last visited March 31, 2010); Cal. Health & Safety Code §11362.5 (West Supp. 1998).
[51] *See* M.C.L. § 333.26424 (2008); *see also About the MMMP*, Department of Community Health Homepage, http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52136---,00.html. New Jersey followed suit shortly after in January 2010. 2008 N.J. Sess. Laws page no. 117; New Jersey Compassionate Use Medical Marijuana Act, Department of Health and Senior Services Homepage, available at http://www.njleg.state.nj.us/2008/Bills/S0500/119_R3.PDF. The Arizona Medical Marijuana Initiative is headed for the November 2010 ballot. Arizona Medical Marijuana Act, 2010 Initiatives, Referendums, and Recalls, Arizona Secretary of State.gov, available at http://www.azsos.gov/election/2010/general/ ballotmeasuretext/I-03-2010.pdf.
[52] *Compare* Cal. Health & Safety Code § 11362.5(d) (West Supp. 1998) (The Compassionate Use Act relieves a defendant of criminal liability for certain marijuana-related offenses if the defendant possesses or cultivates marijuana for his "personal medical purposes. . . upon. . .approval of a physician.") with M.C.L. §§ 333.26428(a)(1) (2008) ("A physician has stated that, in the physician's professional opinion, after having completed a full

Marijuana Act from the Compassionate Use Act directly.[53] This is especially apparent in the Preamble of the Michigan Medical Marijuana Act.[54]

B. The Michigan Medical Marijuana Act and the Michigan Medical Marijuana Program

The Michigan Medical Marijuana Act was created by ballot initiative as a result of a petition drive sponsored by the Michigan Coalition for Compassionate Care.[55] The initiative was submitted to both houses of the Michigan Legislature on March 2008[56] and was approved by the

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assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition"). See also Ronald Timothy Fletcher, *The Medical Necessity Defense and De Minimis Protection for Patients who would Benefit from Using Marijuana for Medical Purposes: A Proposal to Establish Comprehensive Protection under Federal Drug Laws*, 37 VAL. U. L. REV., 983, 1022 (Summer 2003). All the medical marijuana states have modeled their legalizing statutes after California's Compassionate Use Act, but California's retroactive application of its medical marijuana statute is not typical. *See Marijuana Policy Project, State-By-State Medical Marijuana Laws: How to Remove the Threat of Arrest*, MMP.ogr, available at http:// www.mpp.org/assets/pdfs/general/ SBSR_ 2007.pdf ; *see also* People v Rossi, 18 Cal. 3d 295, 299-30 (1978); People v. Rigo, 69 Cal. App. 4th 409, 415 (1st Dist. 1999); People ex rel. Lungren v. Peron, 59 Cal. App. 4th 1383, 1389 (1st Dist. 1997); People v. Wright, 40 Cal. 4th 81, 98 (2006). No different rule applies to an affirmative defense to the crime for which a defendant was convicted, which defense was enacted during the pendency of her appeal. People v Trippet, 56 Cal App. 4th 1532, 1538-39, 1544-45 (1997). In a majority of states, a statute or amendment will be regarded as operating prospectively where it is in derogation of a common law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994); Langston v. Riffe, 359 Md. 396 (2000); Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578 (2001); Smith v. Mercer, 276 N.C. 329 (1970).

[53] *Compare* M.C.L. §§ 333.26422-30 (2008) (providing a defense where marijuana use is for the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief") *with* Cal. Health & Safety Code §11362.5 (West Supp. 1998) (providing a defense where "the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms[, including cancer, glaucoma, HIV, chronic pain].").

[54] *Compare* Cal. Health & Safety Code § 11362.5 (b)(1)(A) (West Supp. 1998) (asserting that "[s]ubject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.") with M.C.L. §§ 333.26428(a)-(b) (2008) ("Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and this defense shall be presumed valid where the evidence shows [compliance with the substantive terms of this act].").

[55] *See* M.C.L. §§ 333.26423-30 (2008); Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana %20Ballot%20Proposal%20of%202008.pdf (last visited March 31, 2010).

[56] *Id.*

voters on November 2008.[57] So long as the substantive and procedural requirements are met,[58] the law provides an affirmative defense for qualifying patients with debilitating medical conditions and their registered primary caregivers from arrest, prosecution, and penalty for the medical use of marijuana in accordance with the act.[59]

The Michigan Medical Marijuana Program ("MMMP")[60] was established to administer the registration program required by the Michigan Medical Marijuana Act.[61] The MMMP is not a resource for the growing process or the procurement of cultivated marijuana.[62] It will not give physician referrals to patients.[63] There is no place in the state of Michigan to legally purchase medical marijuana.[64]

Only a person with a qualifying debilitating medical condition who has obtained a valid MMMP card is exempt from the criminal laws of Michigan for engaging in the medical use of marijuana as justified to mitigate the symptoms or effects of the person's debilitating medical condition.[65] The act neither protects marijuana plants from seizure nor individuals from

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[57] *See* M.C.L. §§ 333.26420-30 (2008).

[58] The Michigan Medical Marijuana Program permits qualifying patients to utilize 2.5 ounces of marijuana and up to twelve marijuana plants kept in a closed, locked facility for medicinal/therapeutic purposes so long as the qualifying patient suffers from a debilitating medical condition, secures physician approval prior to use, and registers with the Michigan Department of Community Health securing a registry identity card subject to annual renewal. M.C.L. §§ 333.26421-30 (2008).

[59] *General Information about the Program*, Department of Community Health Homepage, available at http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52137---,00.html; Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana%20Ballot%20Proposal%20of%202008.pdf (last visited March 31, 2010).

[60] The Michigan Medical Marijuana Program is a state registry program within the Bureau of Health Professions of the Michigan Department of Community Health. *Id.* The MMMP's primary purpose is assure that the registration process is conducted efficiently and effectively, consistent with all statutes and administrative rules pertaining to the MMMP, and to ensure that the statutory tenants of the act are carried out in a manner that protects the public and assures the confidentiality of its participants. *Id.*

[61] M.C.L. §§ 333.26421-30 (2008).

[62] *See General Information about the Program*, *supra* note 59.

[63] *Id.*

[64] *Id.*

[65] Presuming a patient is registered with the state patient registry and carrying his or her registry identification card, patient may consume medical marijuana on patient's property or elsewhere. M.C.L. § 333.26427 (2008). However, the law does not permit any person to do any of the following:

prosecution if the federal government chooses to take action against patients or caregivers under the Controlled Substances Act.[66]

The MMMP enforces the registration process making sure applications are complete before issuing a registry identification card, terminating incomplete or fraudulent applications, and revoking cards if individuals commit violations of the Michigan Medical Marijuana Act.[67] The MMMP verifies the validity of a registration card with local and state law enforcement personnel if they call the MMMP requesting such information.[68] The MMMP has no authority to direct the activities of local and state law enforcement agencies.[69] Nowhere in the Michigan Medical Marijuana Act or the Michigan Medical Marijuana Program is retroactive application referenced or discussed.[70] The Michigan Medical Marijuana Act contains no express effective date in the text.[71] But, the Constitution provides an effective date of December 4, 2008, and the Michigan Medical Marijuana Act's enforcement provision references that date as well in a footnote.[72]

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(1) Undertake any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice.
(2) Possess marijuana, or otherwise engage in the medical use of marijuana:
    (A) in a school bus;
    (B) on the grounds of any preschool or primary or secondary school; or
    (C) in any correctional facility.
(3) Smoke marijuana:
    (A) on any form of public transportation; or
    (B) in any public place.
(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana. M.C.L. § 333.26427(b)(1)-(4) (2008).

[66] *See supra* notes 21, 40-51 and accompanying text.
[67] *See General Information about the Program*, *supra* note 59.
[68] *Id*.
[69] *Id*.
[70] M.C.L. §§ 333.26421-30 (2008).
[71] *Id.*
[72] MICH. CONST. art. II, § 9 (1963); M.C.L. §§ 333.26429 (2008) (Compiler's note states "2008, Initiated Law 1, Eff. Dec. 4, 2008"); *See* Frank W. Lynch & Co. v. Flex Technologies, 463 Mich. 578, 580-86 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).

C. California's Presumption of Retroactive Application of Legalizing Statutes to Pending Cases on Direct Appeal

California courts recognize a presumption of retroactive application of newly enacted decriminalizing statutes to cases pending on direct appeal and have extended this presumption to the Compassionate Use Act.[73] *People v. Rossi* involved a defendant who was convicted of violating the California Penal Code for filming various illegal sexual acts.[74] During her appeal, the Legislature amended Section 288(a) of the California Penal Code to decriminalize the acts performed in the film.[75] Relying on *In re Estrada*[76] which held that a superseding reduction in the punishment accorded a particular violation could be applied retroactively, the California Supreme Court had no difficulty applying that principle to the slightly different facts before it.[77] Thus, the California Supreme Court held that the common law principles reiterated in *Estrada* apply a fortiarari when criminal sanctions have been completely repealed before a criminal conviction becomes final.[78] Absent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his or her appeal.[79] Because Proposition 215 contains no savings clause, it was held to operate retrospectively to defend against criminal liability, in whole or part, for some who are appealing convictions for possessing, cultivating, and using marijuana.[80]

Applying this principle, the Court of Appeal, Division II, in *Trippet*, held that the Compassionate Use Act, which contained no contrary indicia or savings clause, applied retroactively to defendant's medical necessity defense if its terms and the applicable facts of the

[73] *See* People v. Rossi, 18 Cal. 3d 295, 299-302 (1976).
[74] *Id.*
[75] *Id*.
[76] 63 Cal. 2d 740, 48 (1965).
[77] *Rossi*, 18 Cal. 3d at 295, 299-302.
[78] *Id.* at 295, 299-302.
[79] People v. Rossi, 18 Cal. 3d 295, 299-302 (1976).
[80] *Id.*

case permitted the defendant to assert a common law medical necessity defense.[81] Thus, not only does the California legislation affect future marijuana cases, but it allows any person with a pending marijuana conviction on direct appeal to invoke the act as a partial or complete affirmative defense on direct appeal.[82] The court concluded, and the California Attorney General conceded, that absent wording to the contrary, the legislature should be presumed to have extended to defendants whose appeals are pending on direct appeal, the benefits of intervening statutory amendments which decriminalize formerly illicit conduct or reduce the punishment for acts which remain unlawful.[83]

Relying on *Trippet*, the Third Appellate District in *People v. Frazier* limited retroactive application of the Compassionate Use Act to cases pending on direct appeal further.[84] The Third Appellate District held that because the new affirmative defenses to defendant's marijuana conviction are not available to him, retroactive application is not appropriate because a retroactive defense is only required if its terms and the applicable facts permit a defense to defendant.[85]

The Supreme Court of California in *People v. Wright*[86] essentially agreed with the analysis set forth in *Trippet* and *Frazier* and concluded that the Compassionate Use Act must be retroactively applied to cases pending on direct appeal.[87] The inquiry did not end there because the defendant was still required to establish that the facts and terms of the act apply to the case, effectively prohibiting prescriptions by licensed physicians after a patient is convicted of

[81] *See* People v Trippet, 56 Cal. App. 4th 1532, 1538-39, 1544-45, 1568-69 (1997). *Trippet* concerned a woman who alleged her use of marijuana was for the treatment for her migraines. *Id.* She sought retroactive application of the statute to her pending appeal. *Id.*
[82] *Id*. at 1567.
[83] *Id.* at 1532, 1538-39, 1544-45, 1567.
[84] People v Frazier, 128 Cal. App. 4th 807, 825-826 (2005) (citing *Trippet*, 56 Cal. App. 4th at 1532, 1544-45).
[85] *Frazier*, 128 Cal. App. 4th at 807, 825-26.
[86] 40 Cal. 4th 81, 91 (2006).
[87] *Id.* (citing *People v Trippet*, 56 Cal. App. 4th 1532, 1544-45 (1997); *Frazier*, 128 Cal. App. 4th at 807, 825-26).

unlawful use or possession of marijuana without a prescription.[88] Thus, retroactivity was effectively narrowed.[89] Medical approval via issuance of a prescription for the drug after arrest was prohibited on direct appeal in California under the Compassionate Use Act.[90]

D. Retroactive and Prospective Application of Michigan Criminal Laws to Pending Cases on Direct Appeal

Michigan's general rule of retroactivity asserts that a substantive criminal statute is presumed to operate prospectively unless there is either an express or implied indication by the drafters that the statute is to have retroactive effect.[91] However, an exception to this general rule is recognized if a statute is remedial, procedural, or curative in nature."[92] Considerations of fairness may require retroactive application of a statute.[93]

A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy and does not create or destroy existing rights.[94] Procedural laws pertain to and prescribe the practice and procedure or the legal machinery by which the substantive law is determined or made effective.[95] Curative laws correct defects subsequently discovered in a statute and restores what Congress had always believed the law to be." [96] Michigan extends fairness considerations generally to new principles

[88] *Wright,* 40 Cal. 4th at 91.
[89] *Id.*
[90] *Id.*
[91] *See* Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008) (holding that a statute that "affects or creates substantive legal rights…is not given retroactive effect, absent a clear indication of legislative intent otherwise"). California courts recognize a presumption of retroactive application of newly enacted decriminalizing statutes to cases pending on direct appeal and have extended this presumption to the Compassionate Use Act. *See* People v. Rossi, 18 Cal. 3d 295, 299-302 (1976).
[92] *See* Lynch, 463 Mich. at 578-85.
[93] *See* Graham v. Collins, 506 U.S. 461, 478 (1993); People v. Houlihan, 474 Mich. 958 (2005).
[94] *See* Lynch, 463 Mich. at 578-585; Conyer, 281 Mich. App. at 526-29.
[95] *See id.*
[96] See also People v. Link, 225 Mich. App. 211, 214-18 (1997); Preston v. Dep't of Treasury, 190 Mich. App. 491, 495-96 (1991).

of law to cases pending in civil court[97] or to new watershed rules of criminal procedure to cases in habeas court under *Teague v. Lane.*[98]

The Michigan Supreme Court held that in determining whether a statute is to be applied retrospectively, most instructive is whether the Legislature includes express language regarding retroactivity.[99] The Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.[100] Retroactive application has been stated in former legislation: "this act shall be applied retroactively,"[101] "this subsection shall be given retroactive application,"[102] and "[t]he changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application."[103]

In the absence of express language of retroactivity, the Michigan Supreme Court held that retroactivity may be implied where there are no penalties in the statute for failure to comply with the terms of the statute.[104] If the statute lacks an express effective date, the statute is generally given prospective application.[105] The effect that retroactive application will have on overall judicial efficiency is also to be considered in determining whether a statute requires retroactive or prospective application.[106]

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[97] *See* Michigan Educ. Employees Mut. Ins. Co. v. Morris, 460 Mich. 180 (1999). Where the decision does reflect a new principle of law, the Michigan Supreme Court has acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy, and has employed a three-part test to determine to what extent, if any, a decision should receive retroactive application. *Id.* Under this test, the Court weighs (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id*. at 190.

[98] *Teague v. Lane* held that retroactivity is properly treated as a threshold question, for, once a new constitutional rule of criminal procedure is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. 489 U.S. 288 (1989).

[99] In determining whether a statute should apply retroactively, the intent of the Legislature and the language within the statute govern. Chesapeake & O. R. Co. v. Public Service Comm., 382 Mich. 8, 22-23 (1969)

[100] M.C.L. § 141.1157 (2008).

[101] *Id.*

[102] M.C.L. § 324.21301(a)(2) (2008).

[103] M.C.L. § 324.21301(a) (2008).

[104] *See* Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); *see also* People v. Conyer, 281 Mich. App. 526, 529 (2008).

[105] *Id.*

[106] *See also* Morrisey v. Brewer, 408 U.S. 471 (1972); Parshay v. Dept. of Corr., 61 Mich. App. 677 (1975).

II. THE MICHIGAN MEDICAL MARIJUANA ACT DOES NOT APPLY RETROACTIVELY TO PENDING CASES ON DIRECT APPEAL BECAUSE THERE IS A PRESUMPTION IN FAVOR OF PROSPECTIVE APPLICATION OF SUBSTANTIVE LAWS IN MICHIGAN, THERE IS NO EXPLICIT OR IMPLIED LANGUAGE OF RETROACTIVITY IN THE STATUTE TO REBUT THE PRESUMPTION, AND THE ATTENDANT PUBLIC POLICY IMPLICATIONS REQUIRE PROSPECTIVE APPLICATION

The Michigan Medical Marijuana Act does not apply retroactively to cases pending on direct appeal.[107] It is a substantive law.[108] In Michigan, substantive laws, without express or implied indications otherwise, are presumed to apply prospectively.[109] The Michigan Medical Marijuana Act contains no express or implied indications of retroactivity.[110] Regardless, retroactive application of the Michigan Medical Marijuana Act would be contrary to public policy.[111] It would essentially condone illegal acts after their completion.[112] It would further individual interests over societal interests and countermand respect for Michigan's criminal statutes.[113] Thus, in order to save prosecuting attorneys' offices and other various state agencies time and money and in order to spare individual citizens from the uncertainty that follows from the passage of ambiguous criminal statutes, it would be in the best interests of the next state that legalizes marijuana for medicinal purposes and all other states that follow suit to provide an express statement of prospective or retrospective application in their legalizing statutes.[114]

A. Substantive Laws Apply Prospectively unless the Statute Expressly of Impliedly Provides for Retroactive Application on Direct Appeal

The Michigan Medical Marijuana Act creates a new substantive right: "The medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the

[107] *See infra* notes 115-42 and accompanying text.
[108] *See infra* notes 115-17 and accompanying text.
[109] *See infra* notes 119-20 and accompanying text.
[110] *See infra* notes 146-95 and accompanying text.
[111] *See infra* notes 196-250 and accompanying text.
[112] *Id.*
[113] *Id.*
[114] *See infra* notes 251-65 and accompanying text.

provisions of this act."[115] The act creates, defines, and regulates the rights and duties of parties.[116] Where the retroactivity of a substantive statute is at issue, courts apply the rules of strict construction requiring clear, express indications of retroactivity.[117] The question whether a statute operates retrospectively is one of legislative intent.[118] The general rule in Michigan is that substantive statutes are applied prospectively unless the Legislature expressly or impliedly indicates its intention to give retroactive effect or unless the statute is remedial, procedural, or curative in nature.[119] Considerations of fairness and public policy may also require retroactive application of a statute.[120]

The remedial character of a statute may require retroactive application.[121] A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy and does not create or destroy

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[115] M.C.L. § 333.26427(a) (2008).
[116] Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001).
[117] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); Davis v. Michigan Cent. R. Co., 147 Mich. 479 (1907); In re Davis' Estate, 330 Mich. 647 (1951); Hughes v. Judges' Ret. Bd., 407 Mich. 75 (1979); Se. Michigan Transp. Authority v. Dep't of Treasury, 122 Mich. App. 92 (1982); Davis v. State Employees' Ret. Bd., 272 Mich. App. 151 (2006); Christian v. Sanak, 179 Mich. App. 9 (1989); Thompson v. Merritt, 192 Mich. App. 412 (1991); Cheron, Inc. v. Don Jones, Inc., 244 Mich. App. 212 (2000); Mary v. Lewis, 399 Mich. 401 (1976); Brooks v. Mammo, 254 Mich. App. 486 (2002).
[118] Hassett v. Welch, 303 U.S. 303 (1938); Kolster v. I.N.S., 101 F.3d 785 (1st Cir. 1996); Aka v. Jefferson Hosp. Ass'n, Inc., 344 Ark. 627 (2001); Andersen Consulting, LLP v. Gavin, 255 Conn. 498 (2001); Metro. Dade County v. Chase Federal Housing Corp., 737 So. 2d 494 (Fla. 1999).
[119] *See* Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008) People v. Conyer, 281 Mich. App. 526, 529 (2008). Conyers was convicted of assault with intent to do great bodily harm less than murder and possession of firearm during commission of felony. *Id.* at 529. On direct appeal, Conyers contended the self-defense statute applied retroactively to his conviction. *Id.* The Court of Appeals held that the self-defense statute did not apply retroactively to shootings that occurred prior to enactment of statute noting that the substantive statute contained no express language of retroactivity and that the statute referenced an effective date. *See id.; see also Judges' Ret. Bd*., 407 Mich. at 75, 85; City of Sour Lake v. Branch, 6 F.2d 355 (C.C.A. 5th Cir. 1925); Flournoy v. State, 230 Cal. App. 2d 520 (3d Dist. 1964); City of Burbank v. Superior Court for Los Angeles County, 231 Cal. App. 2d 675 (2d Dist. 1965); Jackson v. State, 261 N.Y. 134 (1933); Bryant v. City of Blackfoot, 137 Idaho 307 (2002); Hyder v. Jones, 271 S.C. 85 (1978). Statutes are also valid that provide new remedies and apply them to past transactions. Pope v. U.S., 323 U.S. 1 (1944); Montana Power Co. v. Federal Power Commission, 445 F.2d 739 (D.C. Cir. 1970). But, unless express language of retroactivity is provided and the statute relates to practice, procedure or remedies, statutes that affect substantive or vested rights are not presumed to apply retroactively. Hubbard v. Hibbard Brown & Co., 633 A.2d 345 (Del. 1993); Jennings v. Debussey, 1997 WL 295690 (Del. Fam. Ct.); Harding v. K.C. Wall Products, Inc., 250 Kan. 655 (1992); Langston v. Riffe, 359 Md. 396 (2000).
[120] *See Graham v. Collins,* 506 U.S. 461, 478 (1993); People v. Houlihan, 474 Mich. 958 (2005).
[121] People v. Conyer, 281 Mich. App. 526, 529 (2008).

existing rights.[122] The Michigan Supreme Court has "rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively because it can also be characterized in a sense as 'remedial.'"[123] The Court continued, "[t]he term 'remedial' in [the retroactivity] context should only be employed to describe legislation that does not affect substantive rights."[124] Thus, the Michigan Supreme Court will not give the substantive laws in the Michigan Medical Marijuana Act retroactive application under a remedial gloss.[125]

A statute may require retroactive application if it can be characterized as procedural.[126] Procedural laws pertain to and prescribe the practice and procedure or the legal machinery by which the substantive law is determined or made effective.[127] The Michigan Medical Marijuana Act contains procedural rules that permit medicinal marijuana usage by qualified patients.[128] The procedural provisions are given effect by the substantive provisions.[129] Where newly created procedural provisions are given effect by a substantive statute, the Michigan Supreme Court held that the express intent of the Legislature gleaned from the language within the statute governs.[130] Here, neither the Michigan Medical Marijuana Act nor the Michigan Medical

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[122] *Id.*
[123] Frank W Lynch & Co. v Flex Technologies, 463 Mich. 578, 585 (2001).
[124] *Id.*
[125] *Conyer*, 281 Mich. App. at 529.
[126] People v. Russo, 439 Mich. 584 (1992); Hansen-Snyder Co. v. General Motors Corp., 371 Mich. 480 (1963); People v. Wesley, 2001 WL 1277480 *2-3 (2001).
[127] People v. Conyer, 281 Mich. App. 526, 529 (2008).
[128] *See* M.C.L. §§ 333.26427-8 (2008). "If the department fails to adopt rules to implement this act within 120 days of the effective date of this act, a qualifying patient may commence an action in the circuit court for the county of Ingham to compel the department to perform the actions mandated pursuant to the provisions of this act." M.C.L. § 333.26429(a) (2008).
[129] *See* M.C.L. §§ 333.26425-26 (2008); Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997); Edwards v. Lateef, 558 A.2d 1144 (D.C. 1989); State v. Kelley, 588 So. 2d 595 (Fla. Dist. Ct. App. 1st Dist. 1991); Serfass v. Warner, 707 S.W.2d 448 (Mo. Ct. App. S.D. 1986); City of Madison v. Town of Madison, 127 Wis. 2d 96, (Ct. App. 1985); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994); Langston v. Riffe, 359 Md. 396 (2000); Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578 (2001).
[130] People v. Miller, 182 Mich. App. 482, 485 (1990); *Lynch*, 463 Mich. at 578.

Marijuana Program expressly or impliedly state that the substantive or procedural provisions apply retroactively.[131]

A statute may be applied retroactively if it can be characterized as curative.[132] The Michigan Medical Marijuana Act cannot be characterized as curative because the courts have consistently upheld the retroactive application of curative legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be." [133] The Michigan Medical Marijuana Act does not correct subsequently discovered defects.[134] It is a substantive legalizing statute implemented by procedural rules that were adopted by the Michigan Department of Health.[135] It is presumed to apply prospectively unless express or implied language of retroactivity is provided in the statute.[136]

Considerations of fairness may require retroactive application of a substantive statute.[137] Michigan extends fairness and public policy considerations generally where a new principle of law is created either by overruling clear past precedent on which the parties have relied on or by deciding an issue of first impression where the result would have been unforeseeable to the parties.[138] This test is generally employed in matters of equity and is inapplicable in the context

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[131] *See* M.C.L. §§ 333.26421-30 (2008); *Lynch*, 463 Mich. at 578, 583; People v. Russo, 439 Mich. 584, 594 (1992); Saylor v. Kingsley Area Emergency Ambulance Service, 238 Mich. App. 592, 598 (1999); *see also About the MMMP*, Department of Community Health Homepage, available at http://www.michigan.gov/mdch/0,1607,7-132-27417_51869_52136---,00.html.

[132] *See Lynch*, 463 Mich. at 578, 585; *see also* People v. Conyer, 281 Mich. App. 526, 529 (2008).

[133] See People v. Link, 225 Mich. App. 211, 214-18 (1997); Preston v. Dep't of Treasury, 190 Mich. App. 491, 495-6 (1991).

[134] *See* M.C.L. §§ 333.26421-30 (2008).

[135] *Id*.

[136] Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).

[137] *See Graham v. Collins,* 506 U.S. 461, 478 (1993); People v. Houlihan, 474 Mich. 958 (2005).

[138] Michigan Educ. Employees Mut. Ins. Co. v. Morris, 460 Mich. 180, 190 (1999). Where the decision does reflect a new principle of law, the Michigan Supreme Court has acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy, and has employed a three-part test to determine to what extent, if any, a decision should receive retroactive application. *Id.* Under this test, the Court weighs (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id*. at 190.

of criminal legalizing statutes.[139] Considerations of fairness and accuracy of criminal proceedings are generally applicable to new watershed rules of criminal procedure to cases in habeas under *Teague v. Lane*.[140] Direct appeals involving substantive legalizing statute do not implicate *Teague v.* Lane.[141] The Michigan Supreme Court or the United States Supreme Court has yet to define the right to use marijuana for medical purposes as a constitutional right.[142]

B. The Michigan Medical Marijuana Act Contains No Express or Implied Language of Retroactivity Rebutting the Presumption of Prospective Application

The Michigan Supreme Court held that most suggestive of retroactivity is whether there are express words of retroactivity in the substantive statute.[143] The Court further held that retroactivity may be implied where there are no penalties in the statute for failure to comply with the terms of the statute and where the statute contains no effective date.[144] Judicial efficiency is also considered in determining retroactive or prospective application.[145]

The Michigan Medical Marijuana Act contains no express words of retroactivity.[146] The Michigan Supreme Court held that most suggestive of prospective application is the fact that the

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[139] This three-part test was first enunciated by the United States Supreme Court in Linkletter v. Walker, 381 U.S. 618, 629 (1965), a criminal case, and later utilized in a civil case, Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). The Michigan Supreme Court first adopted this test in People v. Hampton, 384 Mich. 669, 674 (1971). The United States Supreme Court abandoned the three-part test in Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993). Now, Michigan generally employs the test in civil law contexts. Riley v. C & H Indus, 431 Mich. 632, 644-645 (1988); Bryant v Oakpointe Villa Nursing Ctr. Inc, 471 Mich. 411, 432 (2004); Apsey v Memorial Hosp, 266 Mich. App 666, 681 (2005).

[140] *Teague v. Lane* held that retroactivity is properly treated as a threshold question, for, once a new constitutional rule of criminal procedure is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. 489 U.S. 288 (1989). Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, it should be determined whether such a rule would be applied retroactively to the case at issue. *Id.*

[141] *Id.*

[142] *See id.;* Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008); People v. Wright, 40 Cal. 4th 81, 91 (2006). New federal substantive constitutional laws are generally applied retroactively to abate state laws that implicate them. *See* Hamm v. City of Rock Hill, 379 U.S. 306, 307-09 (1965). But, issues arising when a state enactment intervened prior to the finalizing of state criminal convictions are for the state courts to pass on. *See* Bell v. Maryland, 378 U.S. 226 (1964).

[143] *See Lynch*, 463 Mich. at 578, 580-86; *Conyers*, 281 Mich. App. 526-29.

[144] *Id.*

[145] *See* Morrisey v. Brewer, 408 U.S. 471 (1972); *Lynch*, 463 Mich. 578-86; Parshay v. Dept. of Correction, 61 Mich. App. 677 (1975).

[146] *See id.*; M.C.L. §§ 333.26420-30 (2008).

Legislature included no words of retroactivity.[147] The Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.[148] If retroactive application was intended, it could easily been stated via "this act shall be applied retroactively,"[149] "this subsection shall be given retroactive application,"[150] or "[t]he changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application.[151] Nowhere in the text of the statute are such express words of retroactivity found.[152]

Proponents of retroactive application assert that the ballot language contains implied language of retroactivity.[153] The Michigan Medical Marijuana Act is a product of initiative.[154] Even though initiative provisions are liberally construed to effectuate their purposes, they are subject to the same rules of statutory construction as statutes enacted by the Legislature.[155] The ballot summary of the Michigan Medical Marijuana Act states that the purpose of the act was to "[p]ermit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana."[156] Proponents of retroactive application assert that the Michigan Constitution requires effectuation of the original intent of the ballot initiative to "permit registered and unregistered patients" to utilize the

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[147] *See Lynch*, 463 Mich. at 578, 583-84.
[148] M.C.L. § 141.1157 (2008).
[149] *Id.*
[150] M.C.L. § 324.21301(a)(2) (2008).
[151] M.C.L. § 324.21301(a) (2008).
[152] M.C.L. §§ 333.26420-30 (2008).
[153] *See* People v. Burke, 775 N.W.2d 800 (Mich. 2009); People v. Campbell, 778 N.W.2d 239 (Mich. 2010); People v. Malik, Barry County, COA Case NO 293397 (holding that the Michigan Medical Marijuana Act shall apply retroactively to pending criminal appeals).
[154] M.C.L. §§ 333.26420-30 (2008); Ballot Proposal 08-01, House Fiscal Agency Homepage, available at http://house.michigan.gov/hfa/PDFs/Medical%20Marijuana%20Ballot%20Proposal%20of%202008.pdf (last visited March 31, 2010).
[155] CF National Pride at Work, Inc. v. Governor of Michigan, 481 Mich. 56, 67-68 (2008) (interpretation of voter-approved constitutional amendment is "not dissimilar to any other exercise in judicial interpretation."); Welch Foods, Inc. v. Attorney General, 213 Mich. App. 459, 461-62 (1995).
[156] *See* Ballot Proposal 08-01, *supra* note 154.

defense.[157] They assert that the statute should be applied retroactively because possession of a registry card or a physician's prescription is not a necessary requirement to utilizing the defense as per the ballot language.[158] In this vein, all a defendant needs to show is that he or she has a debilitating medical condition and possessed marijuana for a medical purpose in order to assert an affirmative defense under the Michigan Medical Marijuana Act.[159]

To support their argument, proponents assert that the broad language of the ballot was carried over into Section 8(a) of the Michigan Medical Marijuana Act: "Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana...."[160] Proponents of retroactive application assert that this language suggests that the defense is applicable in "any prosecution" regardless if the patient secured a registry card or otherwise complied with the substantive or procedural provisions of the statute.[161] Section 8(a) does not mention "qualified patient."[162]

These arguments are without merit.[163] Section 7 and the remaining provisions in Section 8 narrow the scope of the act.[164] The preeminent canon of statutory interpretation requires a "presum[ption] that [the] [L]egislature says in a statute what it means and means in a statute

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[157] *See Burke*, 775 N.W.2d at 800-10; *Campbell*, 778 N.W.2d at 239-45; People v. Malik, Barry County, COA Case NO 293397. Section 9 of the Michigan Constitution asserts:

> "No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature." MICH. CONST. art II, § 9 (1963).

[158] *See Burke*, 775 N.W.2d at 810-12; *Campbell*, 778 N.W.2d at 239-250.
[159] *See* People v. Burke, 775 N.W.2d 800 (Mich. 2009).
[160] *See* M.C.L. § 333.26428(a) (2008); Frank W Lynch & Co v Flex Technologies, 463 Mich. 578, 585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).
[161] *See id.*
[162] *See id.*
[163] *See Lynch*, 463 Mich. at 578-85; *Conyer*, 281 Mich. App. at 526-29; People v. Burke, 775 N.W.2d 800 (Mich. 2009); People v. Campbell, 778 N.W.2d 239 (Mich. 2010); People v. Malik, Barry County, COA Case NO 293397.
[164] *See* M.C.L. §§ 333.26427-8 (2008).

what it says…."[165] Thus, an inquiry into the proper interpretation of a statute begins with the statutory text, and ends there if the text is unambiguous.[166] It is a commonplace of statutory construction that the specific governs the general.[167]

Section 7(a) asserts: "The medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act."[168] Furthermore, Section 7(b) defines circumstances to which the act does not apply.[169] The broad language in the ballot summary and Section 8(a) conflicts with the narrow language of the statutory text in Section 7, which implements the statute.[170] Specific language requiring a patient to satisfy Section 7, before he or she can utilize the defense, governs the general.[171]

"[A]ccordance with the provisions of this act" under Section 7(a) requires "[a] qualifying patient [to have] been issued…a registry identification card…."[172] Section 7 creates a rebuttable presumption that use or possession of marijuana was for a medical purpose if the patient was "in possession of a registry identification card…and [was] in possession of an amount of marijuana that does not exceed the amount allowed under this act."[173] Section 4 contains procedural and substantive requirements that must be complied with in order to secure a registry card.[174] It is unlikely that the Legislature intended the act to be retroactive to a date prior to its effective date

[165] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).
[166] Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); *Conn. Nat'l Bank*, 503 U.S. at 254.
[167] Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).
[168] *See* M.C.L. 333.26427(a) (2008).
[169] *See* M.C.L. 333.26427(b) (2008).
[170] *See* Ballot Proposal 08-01, *supra* note 154; *see also* M.C.L. 333.26427-8 (2008).
[171] *Morales*, 504 U.S. at 374-98; *Hartford Underwriters Ins. Co*., 530 U.S. 1, 6; *Hughes Aircraft Co*., 525 U.S. at 432, 438; *Conn. Nat'l Bank*, 503 U.S. at 253-54.
[172] M.C.L. § 333.2624(a) (2008).
[173] M.C.L. §§ 333.2624(d)(1)-(2) (2008).
[174] M.C.L. § 333.26424 (2008).

when the policies and procedures regarding identifying qualifying medical conditions and processing applications for registration cards were not even established.[175]

If defendant secures a registry card, the burden shifts to the prosecution to establish that he or she failed to satisfy Section 8(a)(1)-(3).[176] Section 8(a)(1)-(3) of the Michigan Medical Marijuana Act provides three elements: the procurement of a "physician statement…from a licensed physician[,]" the quantity of the marijuana must be "reasonably necessary" for treatment, and the conduct must have been "to treat or alleviate the patient's serious or debilitating medical condition."[177] None of these elements can be satisfied by a defendant whose direct appeal is pending prior to the enactment of the Michigan Medical Marijuana Act because at that time physicians were prohibited from prescribing medical marijuana and marijuana use

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[175] *See* M.C.L. § 333.26425(a)-(b) (2008); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

[176] People v. Rios, 191 N.W.2d 297 (Mich. 1971) (holding Court will not infer change in burden of proof without express statutory language to such effect); M.C.L. § 767.48 (2000); People v. Samuels, 233 N.W.2d 520 (Mich. App. 1975) (holding there is a rebuttable presumption that persons present at the time and place of the crime are res gestae witnesses and prosecution must prove otherwise if it fails to endorse and present them evidence defense may produce); People v. Hicks, 234 N.W.2d 720 (Mich. App. 1975) (holding that since there is rebuttable presumption that persons present at time and place of alleged illegal conduct are res gestae witnesses, prosecutor must prove otherwise). M.C.L. § 333.26428(a)(1)-(3) (2008).

[177]

> Except as provided in section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marijuana as a defense to any prosecution involving marijuana, and this defense shall be presumed valid where the evidence shows that:
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> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition. M.C.L. § 333.26428(a)(1)-(3) (2008).

and possession was prohibited.[178] The only way a defendant seeking retroactive application of the Michigan Medical Marijuana Act could satisfy section 8(a)(1)-(3) would be by securing a prescription by a qualified physician after his or her arrest.[179] California rejects medical approval after arrest.[180]

Because the Michigan Medical Marijuana Act contains penalties for failure to comply with its terms, it provides further support that the statute must be prospectively applied.[181] The Michigan Supreme Court held that legislative intent of prospective application of a substantive statute is gleaned where there is no express language of retroactivity in the statute and the statute

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[178] *See id.*

[179] *See* Section 8(a) requires that a physician state that "the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana." M.C.L. § 333.26428(a) (2008); *see also* M.C.L. § 333.26428(b) (2008) ("A person may assert the medical purpose for using marijuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection(a).").

[180] People v. Wright, 40 Cal. 4th 81, 91 (2006); People v Rigo, 69 Cal App 4th 409 (1999). In *People v. Rigo*, the First District Court held that the medical marijuana statute did not extend to the situation where, three and one half months after the defendant's arrest, a physician ratified the defendant's self-medication for his gastritis. *Id.* The statute provided that provisions relating to the possession or 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 of approval of a physician." *See Id*.; *see also* Cal. Health & Safety Code § 11362.5 (West Supp. 2003). The California Appellate Court held that to allow self-medication in the context of the instant case would improperly promote non-medically supervised use of marijuana for a variety of subjectively held reasons that would frustrate the intent of the voters in enacting the statute. *Rigo*, 69 Cal. App. 4th at 409. The State of Oregon followed suit in 2005. State v. Root, 202 Or. App. 491 (2005). In *State v. Root*, Oregon Appellate Court affirmed a judgment convicting the defendant of the manufacture and possession of marijuana holding that the trial court properly barred the defendant from raising a "medical marijuana" affirmative defense under Or. Rev. Stat. Ann. § 475.319(1), inasmuch as he failed to prove that he had received a physician's approval before the incident for which he was arrested. *Root*, 202 Or. App. at 491-98.

[181] *See* Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); M.C.L. § 333.2627(a) (2008). "Any registered qualifying patient or registered primary caregiver who sells marijuana to someone who is not allowed to use marijuana for medical purposes under this act shall have his or her registry identification card revoked and is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both, in addition to any other penalties for the distribution of marijuana." M.C.L. § 333.2624(k) (2008). "All other acts and parts of acts inconsistent with this act do not apply to the medical use of marijuana as provided for by this act." M.C.L. § 333.2627(e). "If the department fails to adopt rules to implement this act within 120 days of the effective date of this act, a qualifying patient may commence an action in the circuit court for the county of Ingham to compel the department to perform the actions mandated pursuant to the provisions of this act." M.C.L. § 333.2629(a) (2008). "If the department fails to issue a valid registry identification card in response to a valid application or renewal submitted pursuant to this act within 20 days of its submission, the registry identification card shall be deemed granted, and a copy of the registry identification application or renewal shall be deemed a valid registry identification card." M.C.L. § 333.2629(b) (2008).

provides for liability for "fail[ure] to comply with [its terms]."[182] Because the Medical Marijuana Act did not exist at the time that the disputes arose, it would have been impossible for defendants to "comply" with its provisions in order to avoid criminal or civil liability.[183] Accordingly, this language supports a conclusion that the Legislature intended that the Michigan Medical Marijuana Act operate prospectively only.[184]

Further support for prospective application is also found in the fact that the Michigan Medical Marijuana Act has an express effective date.[185] In a footnote, the rules applicable to the Michigan Department of Community Health in the Michigan Medical Marijuana Act reference an effective date of December 4, 2008.[186] There is nothing included in the act to indicate that it was intended to be effective sooner.[187] Regardless of the fact that the effective date is not in the substantive text of the statute, the Constitution provides an effective date: "Any law submitted to the people by initiative…and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote."[188]

Judicial efficiency requires that the Michigan Medical Marijuana Act apply prospectively.[189] The Michigan Medical Marijuana Act applies to more than just criminal charges.[190] The affirmative defense in Sections 7 and 8(a)(1)-(3) apply to regulatory and

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[182] *See* M.C. L. §333.2627-29 (2008); *see also Lynch*, 463 Mich. at 578-585 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008); Chesapeake & Ohio Co. v. Public Service Comm., 382 Mich. 8, 22, 23 (1969).
[183] "The medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act." *See* M.C.L. §§ 333.2627(a) (2008); *see also* M.C.L. §§ 333.2624(k) (2008); M.C.L. §§ 333.2627(e); M.C.L. §§ 333.2629(a) (2008); M.C.L. §§ 333.2629(b) (2008).
[184] *See Frank W. Lynch & Co*., Inc., 463 Mich. at 580-86.
[185] *See Id.;* M.C.L. §§ 333.26422-30 (2008).
[186] *See* M.C.L. § 333.26425(a)(b) (2008); *see also* People v. Peters, 2010 WL 199604 (Mich. App.) (noting a Michigan Medical Marijuana Act effective date of December 4, 2008).
[187] M.C.L. § 333.26420-30 (2008).
[188] MICH. CONST., art II, § 9 (1963).
[189] *See* Morrisey v. Brewer, 408 U.S. 471 (1972); Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); Parshay v. Dept. of Corr., 61 Mich. App. 677 (1975).
[190] *Id.*

forfeiture actions.[191] Is there to be a different retroactivity analysis depending on the nature of the action?[192] The Michigan Court of Appeals, Division II recognized that such rules may not be retroactive if there was a prior law requiring forfeiture and the new rule would be overly burdensome on federal and state officials.[193] Retroactive application of the Michigan Medical Marijuana Act would likewise hinder economic and judicial efficiency.[194] It would foster uncertainty, especially with regard to those individuals whose appeals are pending.[195]

C. Retroactive Application of the Michigan Medical Marijuana Act is Contrary to Public Policy

Proponents of retroactive application would point to the social harm surrounding the offense.[196] By proscribing that certain acts accompanied certain states of mind, a statute seeks to prevent either the occurrence of a harmful result or conduct that can predictably and unreasonably lead to a harmful result.[197] When a criminal statute's purpose is to prevent a harmful result, the crime is said to be a result crime; when its intent is to prevent potentially harmful conduct, the crime is said to be a conduct crime.[198] In either case, the harm is referred to as "social harm" because the prohibited conduct is a public wrong that offends the common good.[199] From this perspective, proponents of retroactive application assert that there is little social harm in retroactively applying a medical marijuana statute whose ultimate purpose is

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[191] M.C.L. § 333.26428(c)(1)-(2); "Any marijuana, marijuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marijuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited." *See* M.C.L. §333.2624 (h) (2008). "If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marijuana pursuant to this section, the patient and the patient's primary caregiver shall not be subject to…forfeiture of any interest in or right to property." *See* M.C.L. § 333.26428(d) (2008).

[192] *Id.*

[193] *See Parshay*, 61 Mich. App. at 677.

[194] Veltman v. Detroit Edison Co., 261 Mich. App. 685, 694-695 (2004).

[195] Bennis v. Michigan, 516 U.S. 442 (1996); U.S. v. Delgado, 959 F. Supp. 1523 (S.D. Fla. 1997).

[196] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B], at 207 (3d ed. 2001); Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965).

[197] DRESSLER, *supra* note 196.

[198] *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATION FOR CRIMINAL LAW 218-20 (1983).

[199] 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 199 (London, MacMillan 1883).

furthering the common good (e.g., advancing medical application of the drug).[200] They would further assert that there is no social harm in enforcing the statute against a few individuals who utilized the drug for their own medical benefit.[201]

The previous argument is analogous to the civil disobedience defense where activists attempt to change legal or social conditions by deliberately and publicly violating the law.[202] Here, morality and legality are in direct conflict.[203] Conditions where civil disobedience is utilized to bring about social or legal change include instances where the law is contrary to eternal law (i.e., natural law), applied only to the minority, not consented to by the minority, or unjustly applied.[204] Proponents of retroactivity may assert that the violators are disobeying an unjustly applied law that restricts their access to a pain suppressant.[205] Though it is unclear whether the defendants in medical marijuana cases are trying to make social statements or bring about social or legal change, what is clear is that these individuals determined that their circumstances warrant them to disregard established law in favor of furthering their own medical interests.[206]

In order to dissect these arguments, it is necessary to define what crimes are and how they apply to society.[207] Crimes are kinds of conduct that are defined by the law as wrong.[208] The criminal law purports to declare and enforce authoritative standards of value, in particular of

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[200] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 426 (2d ed. 1961); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. HANDBOOK ON CRIMINAL LAW § 10 (1972); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 757 (2d ed. 1961).
[201] *See supra* notes 199-200.
[202] *See* FEINBERG, JOEL, CIVIL DISOBEDIENCE IN THE MODERN WORLD, 2 (1): 37-60 (1979); KING, MARTIN LUTHER, JR., LETTERS FROM BIRMINGHAM JAIL, (London: Routledge 1976).
[203] *See* FEINBERG, *supra* note 202.
[204] *Id.*
[205] *Id.*
[206] *Id*.
[207] HUSAK, DAVID, PHILOSPHY OF CRIMINAL LAW ch. 4 (Rowman & Littlefield 1987).
[208] *Id.*

moral value.[209] It claims the authority to tell us how we should live, and to enforce its demands on us if we disagree or disobey.[210] Crimes can be further distinguished between public and private wrongs.[211] A wrong or harm is "public" if and because it affects (i.e., wrongs or harms) "the public," rather than only an individual victim.[212] Criminal drug laws are generally considered public order crimes.[213] Their proper purpose is to protect the "smooth functioning of society and the preservation of order."[214] What makes crimes wrongful in a way that properly concerns the criminal law is, on such accounts, not the wrongful harm that they do to their immediate individual victims, but their wider effects on social stability.[215]

Proponents of retroactivity assert that the harm caused is not public because the consensus in society is to place an exemption from criminal laws, be it formalized through legislation or not, on the medicinal use of marijuana.[216] Certain kinds of wrongful conduct are apt for criminalization because they involve serious unfairness towards one's fellow citizens.[217] For example, someone who evades their taxes might cause no identifiable consequential harm, either to any individual or to the social institutions which are funded by taxation.[218] If asked to explain the wrong she commits, the Prosecution would likely appeal to some version of "what if everyone did that?," rather than trying to identify any consequential harm that she causes.[219] The Prosecution would appeal, that is, to the unfair advantage that she takes over all those who pay

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[209] *Id.*
[210] *Id.*
[211] MILL, J. S., ON LIBERTY (London: Parker 1859).
[212] BLACKSTONE, W., COMMENTARIES ON THE LAWS OF ENGLAND, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford: Clarendon Press 1765).
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] HUSAK, DAVID, PHILOSPHY OF CRIMINAL LAW ch. 4 (Rowman & Littlefield 1987).
[217] *Id.*
[218] *Id.*
[219] *Id.*

their taxes: she gains the benefits that accrue to all citizens from the taxation system, but refuses to make her appropriate contribution to that system.[220]

This argument applies in the context of medical marijuana users who willfully violate criminal drug laws.[221] The harm they cause society is indeed public because it thwarts the applicability and validity of criminal drug laws.[222] These individuals procured marijuana through illegal means with the culpable state of mind to stand for conviction.[223] They funded the criminal drug market, an illegal black market that deals in drugs and violence.[224] These individuals are just as culpable as recreational users of the drug who could argue that they cause no harm to anyone but themselves.[225]

Proponents' reasoning could have far reaching and negative application.[226] For example, is a patient suffering from the symptoms of aids, arthritis, glaucoma, or cancer permitted to rob a drug store in order to procure prescription drugs to alleviate his pain?[227] This may be an extreme example, but it does show the apparent flaws in proponents' arguments.[228] Condoning illegality for the benefit of individual interest is a slippery slope, especially in the context of illegal drugs.[229]

Justice Holmes recognized that public policy often sacrifices the individual to the general good.[230] It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage

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[220] *Id.*
[221] *See* DOUGLAS HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS 125-78 (2002).
[222] *See id* 125-78.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *See id.*
[227] DOUGLAS HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS 125-78 (2002).
[228] *See id.*
[229] *See id.*
[230] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881).

ignorance.[231] Justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[232] Thus, if ignorance of the law is no excuse, how can knowingly violating the law for the purpose of medical treatment be justified, especially considering the larger societal interests in strict application?[233]

There are several approaches that pundits and legal theorist have furthered that may be applicable.[234] The Public Benefit Theory asserts that legal wrongs can be justified on the basis that they benefited society generally, as opposed to the actor himself.[235] But, in this context, it is the individual, not society who benefits from the violation (i.e., medical treatment).[236] Society gains nothing except probably lack of reverence of its criminal code.[237] Individuals who have broken the law and are now seeking retroactive application of their convictions were not likely trying to make political or social statements when they violated the law.[238] Although, they may feel that the law needed to change, their ultimate goals were self-satisfying.[239]

The Moral Forfeiture Theory holds that a crime is justified if it does not result in a socially undesirable outcome.[240] This approach is based on the view that people possess certain moral rights or interests that society recognizes through its criminal laws (e.g., the right to life, etc.), which may be forfeited by the holder of the right through his misconduct.[241] Criminal drug users who do not fulfill the statute's procedural requirements are furthering illegality and

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[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B]-[C], 207 (3d ed. 2001).
[235] *See id.*
[236] *Id*.
[237] *Id.*
[238] *Id*.
[239] *Id.*
[240] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B]-[C], 207 (3d ed. 2001).
[241] *Id*.

disregard for Michigan's legal system and further a socially undesirable outcome.[242] The Legislature had its reasons for providing a procedural threshold for the marijuana defense.[243] One such reason was to prevent haphazard or irresponsible use of the defense.[244] The law may excuse a person from the consequences of an objectively illegal act only if the person does not deserve to be stigmatized and punished for performing it.[245] Punishment in the absence of moral blame is morally objectionable.[246] Surely, individuals who disregard established law in furthering their own interests are morally objectionable and deserve punishment.[247] If they are not, what is the point of having such criminal statutes to begin with? Why not let anyone with a debilitating medical condition have absolute immunity from any marijuana offense?[248] The fact that there are regulations in place establishes that society decided to place limits on this defense.[249] The legitimacy of the Michigan Medical Marijuana Act and Michigan's criminal drug laws depend on strict compliance.[250]

D. Suggestions for Future Medical Marijuana Legislation

As a preamble, state statutes typically set forth the underlying purpose for allowing the medicinal use of marijuana as providing its citizens who suffer from debilitating medical conditions an alternative source of relief.[251] This section broadly defines the goals and purposes behind the enactment of the statute.[252] It provides recognition of the patients who have suffered

[242] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881).
[243] M.C.L. §§ 333.26422-30 (2008).
[244] M.C.L. § 333.26422 (2008).
[245] *See* DRESSLER, at § 17.02[B]-[C], 207,
[246] *See id*.; *see also* CICERO, DE INTENTIONE, at bk. 2, ch. XXXIII (C.D. Yonge trans., Bell & Sons 1888).
[247] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 17.02[B]-[C], 207 (3d ed. 2001).
[248] *Id.*
[249] *Id.*
[250] *See id.; see also* M.C.L. §§ 333.26422-30 (2008).
[251] Calif. Health & Safety Code § 11362.5(b)(1)(A) (West Supp. 1999).
[252] *See* Calif. Health & Safety Code § 11362.5(d) (West Supp. 1999).

from the illegal status of marijuana.[253] Because ballot initiatives are often overly broad, it is suggested that the preamble contain express language cabining the language of the ballot initiative.[254] This section should serve the purpose of aiding in subsequent legislative or judicial interpretation.[255] It should be unambiguous and every term used should be consistent and well planned.[256] The California Compassionate Use of 1996 provides a great template.[257]

In this vein, the preamble and a separate section within the substantive provisions of the statute should state that "this act shall be applied prospectively"[258] or "this subsection shall be given prospective application."[259] Another effective approach would be to explain that "this defense is only applicable upon the attainment of a registry card and compliance with the use and possession restrictions of the Michigan Medical Marijuana Program."[260] Furthermore, "use or possession of marijuana prior to the date of the enactment of the Michigan Medical Marijuana Act, December 4, 2008, or not in compliance with the Michigan Medical Marijuana Act or the Michigan Medical Marijuana Program is not governed by the terms of the Michigan Medical Marijuana Act and the Michigan Medical Marijuana Program and shall be governed by the criminal drug laws and forfeiture provisions of the State of Michigan."[261]

An effective date in the substantive text of the statute is also preferred so that there is a point in time in which the statute may reference.[262] An effective date can be simply stated: "this

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[253] *See id.; see also* Ronald Timothy Fletcher, *The Medical Necessity Defense and De Minimis Protection for Patients who would Benefit from Using Marijuana for Medical Purposes: A Proposal to Establish Comprehensive Protection under Federal Drug Laws*, 37 VAL. U. L. REV., 983, 1022 (Summer 2003).
[254] *See* M.C.L. §§ 333.26422 (2008).
[255] *Id.*
[256] *Id*.
[257] *See id*.; Calif. Health & Safety Code § 11362.5 (West Supp. 1999).
[258] M.C.L. § 141.1157 (2008); Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001).
[259] M.C.L. § 324.21301(a)(2) (2008).
[260] *See* M.C.L. § 141.1157 (2008).
[261] *See id.*
[262] *See id.*; *Lynch*, 463 Mich. at 578, 580-86.

act shall be applied prospectively as of December 4, 2008."[263] The state constitution may provide an effective date in some states.[264] If this approach were taken, a direct reference to the state constitution as providing the effective date is suggested.[265]

CONCLUSION

The Michigan Medical Marijuana Act does not apply retroactively.[266] It is a substantive law.[267] California's retroactive approach to new substantive laws is based on California's legal tradition and case law.[268] In Michigan, substantive laws, without express indications otherwise, are presumed to apply prospectively.[269] Only procedural, remedial and curative laws are presumed to apply retroactively in Michigan.[270] Retroactive statutes in Michigan have provisions asserting their retroactivity (e.g., "this act shall be applied retroactively"[271] or "this subsection shall be given prospective application."[272]) and generally contain no express effective date.[273] The Michigan Medical Marijuana Act contains no express or implied indications of retroactivity suggesting that the Legislature did not intend to rebut the presumption that the statute applies prospectively.[274] Although there is no express effective date, the Michigan Constitution and the footnote in the enforcement provision of the Michigan Medical Marijuana Act provide an effective date of December 4, 2008.[275] The Michigan Medical Marijuana Act limits the defense upon satisfaction of the substantive and procedural provisions provided in

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[263] M.C.L. § 324.21301(a)(2) (2008); M.C.L. § 141.1157 (2008).
[264] MICH. CONST. art. II, § 9.
[265] *Id.*; Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).
[266] *See supra* notes 115-240 and accompanying text.
[267] *See supra* notes 73-90 and accompanying text.
[268] *See supra* notes 115-120 and accompanying text.
[269] *See supra* notes 115-136 and accompanying text.
[270] *See Lynch*, 463 Mich. at 578, 580-86; *see also* People v. Conyer, 281 Mich. App. 526, 529 (2008).
[271] M.C.L. § 141.1157 (2008).
[272] M.C.L. § 324.21301(a)(2) (2008).
[273] Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).
[274] *See supra* notes 115-240 and accompanying text.
[275] *See* MICH. CONST. art. II, § 9; *see also* M.C.L. §§ 333.26422-30 (2008).

Sections 7 and 8.[276] If defendants whose direct appeals were pending when the statute was enacted utilized this defense, he or she would require an after-the-fact diagnoses by a qualified physician to satisfy Sections 7 and 8.[277] After-the-fact diagnoses are not permitted in California and in the other medical marijuana states.[278] Retroactive application of the Michigan Medical Marijuana Act would be contrary to public policy.[279] It would essentially condone illegal acts after their completion.[280] It would further individual interests over societal interests and countermand respect for Michigan's criminal statutes.[281]

In order to save prosecuting attorneys' offices and other various state agencies time and money and in order to spare individual citizens from the uncertainty that follows from the passage of ambiguous criminal statutes, it would be in the best interests of the next state that legalizes marijuana for medicinal purposes and all other states that follow suit to provide an express statement of prospective or retrospective application in their legalizing statutes.[282] Some suggested qualifying language include: "this act shall be applied prospectively"[283] or "this subsection shall be given prospective application."[284] Another effective approach would be to explain that "this defense is only applicable upon the attainment of a registry card and compliance with the use and possession restrictions of the Michigan Medical Marijuana

[276] *See* M.C.L. §§ 333.26427-28 (2008).
[277] People v. Wright, 40 Cal. 4th 81, 91 (2006); People v. Rigo, 69 Cal. App. 4th 409 (1999).
[278] *Id.; see also* Preston v. State Bd. of Equalization, 25 Cal. 4th 197 (2001); U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc., 749 N.W.2d 98 (Minn. Ct. App. 2008); Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370 (Iowa 2000); In re Marriage of Vannausdle, 668 N.W.2d 885 (Iowa 2003); Ubel v. State, 547 N.W.2d 366 (Minn. 1996); Richtmyer v. Richtmyer, 461 A.2d 409 (R.I. 1983); State v. Bolin, 381 S.C. 557 (Ct. App. 2009).
[279] *See supra* notes 196-250 and accompanying text.
[280] *See id.*
[281] *See id.*
[282] *See supra* notes 251-65 and accompanying text.
[283] M.C.L. § 141.1157 (2008); Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).
[284] M.C.L. § 324.21301(a)(2) (2008); *Lynch*, 463 Mich. at 578, 580-86; *Conyer*, 281 Mich. App. 526-29.

Program."[285] Furthermore, "use or possession of marijuana prior to the date of the enactment of the Medical Marijuana Act, December 4, 2008, or not in compliance with the Michigan Medical Marijuana Act or the Michigan Medical Marijuana Program is not governed by the terms of the Michigan Medical Marijuana Act and the Michigan Medical Marijuana Program and shall be governed by the criminal drug laws and forfeiture provisions of the State of Michigan."[286] Adding these provisions will limit judicial interpretation and direct appeals.[287] It will ensure proper application of the statute as per legislative intent.[288] An effective date is also preferred so that there is a point in time in which the statute may reference for prospective application of the statute to take effect.[289] An effective date can be simply stated: "this act shall be applied prospectively as of December 4, 2008."[290] If the Legislature intends to rely on its state constitution for an effective date, a direct reference in the statute to the state constitution as providing the effective date is suggested.[291]

[285] *See* M.C.L. § 324.21301 (2008); M.C.L. § 141.1157 (2008); *Lynch*, 463 Mich. at 578, 580-86; *Conyer*, 281 Mich. App. 526-29.
[286] *See id.*; *Lynch*, 463 Mich. at 578, 580-86; *Conyer*, 281 Mich. App. 526-29.
[287] M.C.L. § 333.26422-25 (2008); *Lynch*, 463 Mich. at 578, 580-86; *Conyer*, 281 Mich. App. 526-29.
[288] M.C.L. §§ 333.26422 (2008); *Lynch*, 463 Mich. at 578, 580-86; *Conyer*, 281 Mich. App. 526-29.
[289] *See id.*
[290] M.C.L. § 324.21301(a)(2) (2008); M.C.L. § 141.1157 (2008).
[291] *See id.*; *see also* MICH. CONST. art. II, § 9; Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 580-86 (2001); People v. Conyer, 281 Mich. App. 526, 529 (2008).