The Network for Public Health Law

Ideas. Experience. Practical answers.

Federal Law and Its Impact on Medical Cannabis

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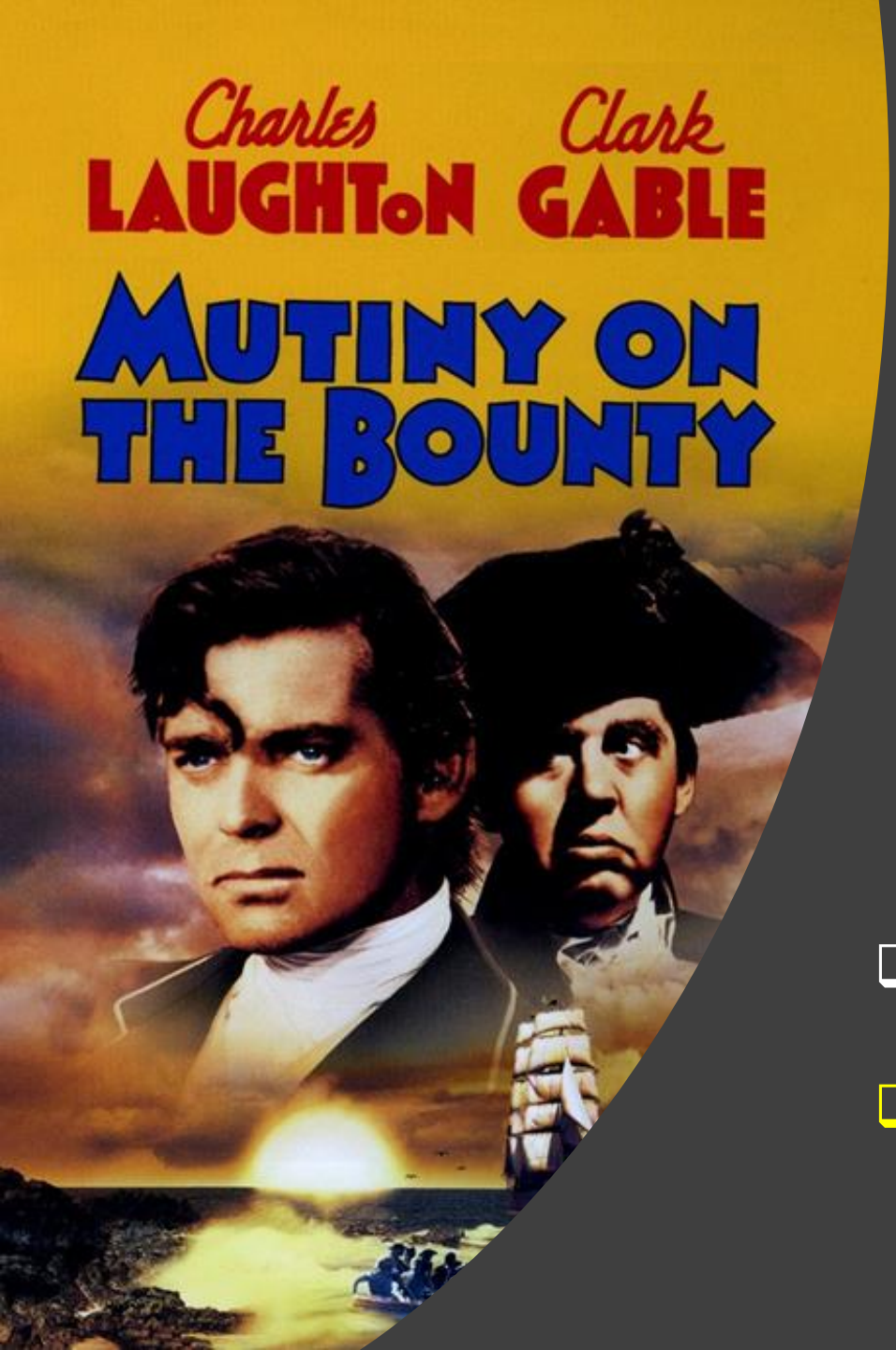
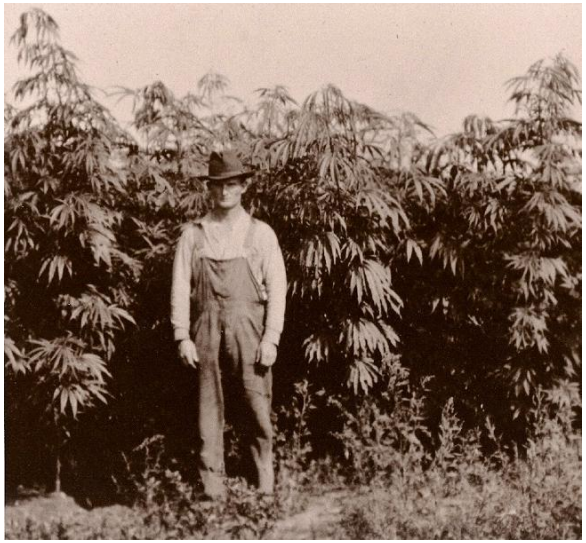
Cannabis Policy: Rapidly Changing Field

- In 1936, in how many states was cannabis legal?



Cannabis Policy: Rapidly Changing Field

- ❑ In 1936, in how many states was cannabis legal?
- ❑ All of Them

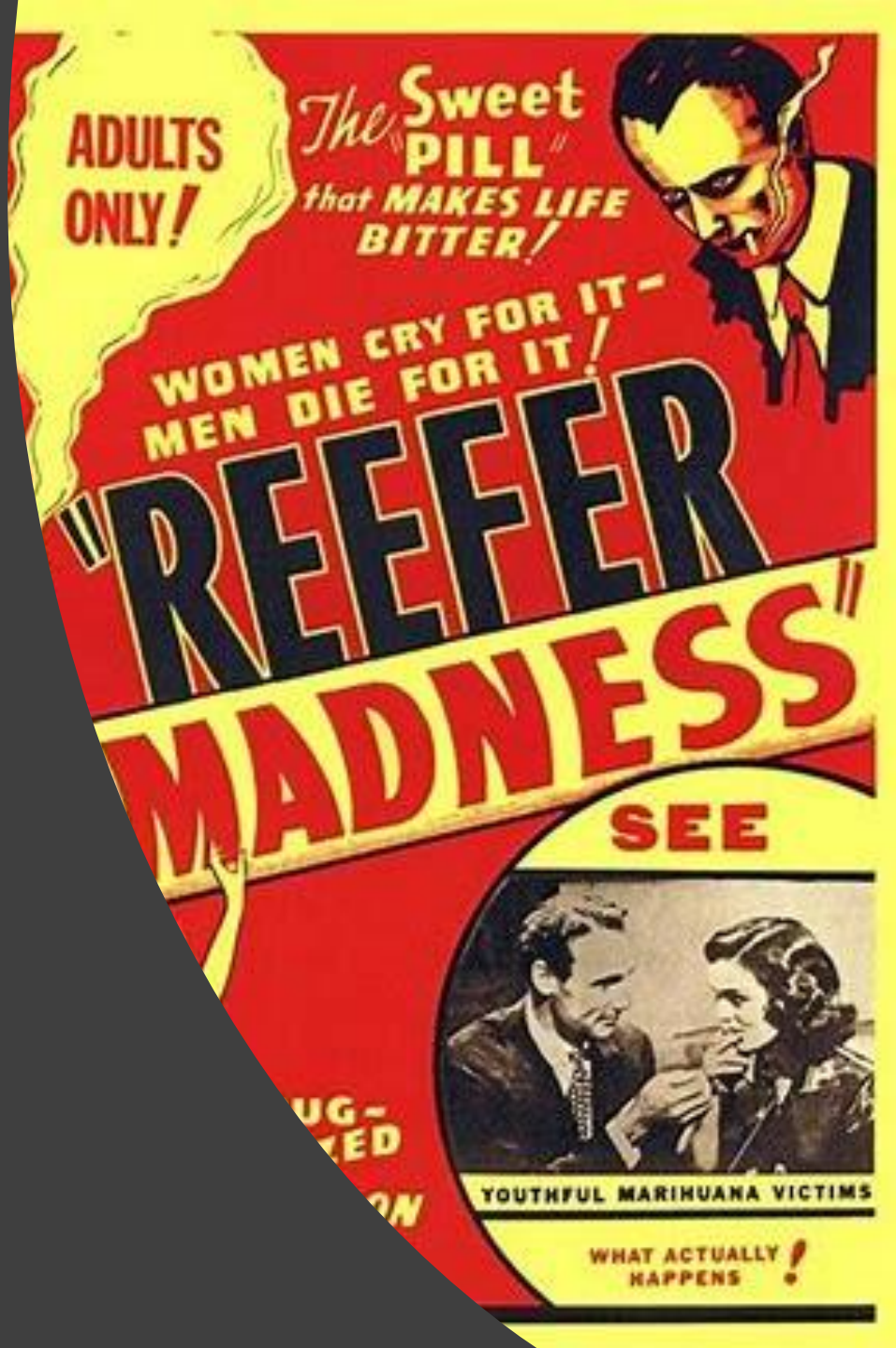


Cannabis Regulation in the U.S.: A Brief History

- Prior to 1937
  - Growing and using cannabis legal under federal and state law
  - Among largest cash crops in U.S. until early 20th century – used for textiles, paper, oil for lamps , rope, food,….
  - Beginning in 1840s widely acknowledged for therapeutic potential – more than half of medicine marketed in late 19th century contained cannabis extract
  - Medicinal use declines with development of aspirin, morphine and other opium-derived drugs

Marihuana Tax Act of 1937

- Law doesn't prohibit marijuana but **imposes registration and reporting requirements and a tax on growers, sellers and users** (effect is the same b/c gov't grants few tax stamps)
- *AMA testifies in opposition to law stating: "there is no evidence, however, that the medicinal use of these drugs [cannabis and its derivatives] has caused or is causing cannabis addiction…How far [the law] may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee."*
- All medicinal products containing marijuana are withdrawn from the market; removed from *United States Pharmacopoeia*



Representative Hale Boggs

Criminalization before the "War on Drugs"

- **The Boggs Act (1951)**
  - Marijuana lumped in with narcotics (opioids)
  - Simple possession punishable by minimum of 2 years, up to 5 years in prison
  - At least 30 states enact "Little Boggs Acts" within 5 years; greatly increasing penalties
  - Reasoning: (1) drug users increasingly younger (avg. age of offender dropped from 37 to 26 between 1948 and 1950); and (2) "Stepping-stone theory" (marijuana as gateway to heroin and other hard drugs)
- **Narcotic Control Act (1956)**
  - Increased penalties: 1st offense – 2 to 10 years, 2nd offense – 5 to 20 years, 3rd offense – 10 to 40 years

Controlled Substances Act (1970)

- **<u>Purpose</u>**: regulate and facilitate the lawful manufacture, distribution and use of controlled substances for medical, scientific, research and industrial purposes, and to prevent substances from being diverted to illegal purposes
- Plants, drugs and chemicals placed into one of five categories (schedules) based on
  1. legitimate medical use,
  2. potential for abuse and addiction and
  3. safety
- Schedule I drugs are largely prohibited/criminalized and subject to strictest regulation; Schedule II-V are deemed to have medical value and may be manufactured
  - **Schedule I** (no accepted medical use and high potential for abuse) – heroin, LSD, ecstasy, peyote, marijuana .
- **<u>How does schedule I classification effect research into the medicinal marijuana?</u>**

Research Challenges

- DEA, FDA and National Institute on Drug Abuse (NIDA) must all sign off on research proposals
  - Only 8-10 studies a year/ ~350 approved researchers in the country
- University of Mississippi-the only federally approved marijuana grow in the country
  - Only grow one particular strain of marijuana which prevents research into the different effects of different cannabinoids and the effects of different levels/combinations of cannabinoids
  - Can't grow enough to meet demand for research
- On 8/11/2016 DEA announced a plan to allow other manufacturers to apply to DEA for authorization to grow research marijuana
  - *26 Applicants and DEA has not approved any of the applications yet*
- *How does schedule I status effect a doctor's ability to prescribe marijuana?*

Prescribing vs. Recommending

Dr. Marcus Conant

- Doctors must be licensed by the DEA to prescribe a controlled substance in schedules II-V
  - Criminal liability and lose DEA license if prescribe schedule I
- **Conant v. Walters (9th Circuit Court of Appeals-2002)**
  - California Compassionate Use Act 1996
  - Patient Groups (HIV/AIDS) and CA doctors sought to enjoin DEA from revoking the doctors' license to prescribe controlled substances
  - Protected 1st Amendment speech-Dr. may discuss the pros and cons of medical marijuana (recommendation)
- As a result all state medical marijuana legal schemes revolve around *recommendations/certifications*
- **If your doctor recommends it, will your insurance cover it?**

How can we have state medical cannabis programs when it is illegal under federal law (CSA)?

- State Law permits something that Federal Law prohibits. It does not require individuals to violate federal law.
- **Anti-commandeering principle-** the federal government can not require state and local governments to enforce federal law.
- Federal Government is also using **Prosecutorial Discretion**
- Ogden Memo (2009)-- deprioritize prosecuting individuals **"whose actions are in clear an unambiguous compliance with existing state laws providing for medical use of marijuana"**
- Cole Memos(2011,2013, 2014)-→Federal Government will focus on
  - Distribution to minors
  - Preventing revenue to go to criminal enterprises
  - Preventing marijuana from leaving state
  - Preventing state-authorized activities from being used as cover for trafficking in marijuana or other drugs
  - Preventing violence and use of firearms in cultivation and distribution
  - Preventing public health consequences (i.e. drugged driving)
  - Preventing growing of cannabis on public lands
  - Preventing possessing or using on federal property

Session Memo: Jan. 4th, 2018

- Rescinds the Cole and Ogden guidance memos
- Acknowledges that enforcement resources are finite
- Federal prosecutors to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Attorney General Barr

Confirmation Hearing: would not crack down on states that relied on Cole Memo.

Testimony before the Senate Appropriations Hearing (4/10/2019)

- "Personally, I would still favor one uniform federal rule against marijuana,"
- "But if there is not sufficient consensus to obtain that then I think the way to go is to permit a more federal approach so states can, you know, make their own decisions within the framework of the federal law. So we're not just ignoring the enforcement of federal law."

Federal Enforcement and the Appropriations Bill

- Congress prohibits the Justice Department from using any federal funds to prevent states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.
- Does not protect recreational/adult use programs
- Interpreted to protect individuals and companies that are in strict compliance with their state law (*United States v. McIntosh*)
- Prohibition needs to be renewed with each appropriations bill.
- This restrictions expires on September 30, 2019
- Appropriations Bill for FY 2020 currently has the same rider.

Senate Bill 3032: Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act) Last Session

Exempted from Controlled Substance Act

- Persons acting in compliance with state cannabis laws
- Persons acting in compliance with the cannabis laws of a Federally recognized Indian tribe within its Jurisdiction, so long the jurisdiction is within a state that allows marihuana.
- Protections would apply to medical and adult use/recreational programs.

Removes the need for appropriations rider

Reintroduced this session.

Federal Employment Protections

Medical cannabis use does not qualify for protections under the ADA.

- **42 U.S.C.A. § 12210**
- *the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use*
- "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act.
- *James v. City of Costa Mesa*

State Employment Protections For Medical Cannabis Use

Explicit statutory protections for medical cannabis use

- Thirteen States→ (AR, AZ, CT, DE, IL,ME, MN,NV, NY, OK, PA, RI, WV)
- Generally do not allow for use, possession, or impairment at workplace.
- Exceptions for safety sensitive positions.
- Exceptions for positions affected by federal law.

Use of state disability discrimination laws

- Unsuccessful cases in CA, MT, OR, WA,…
- Successful case in Massachusetts→ *Barbuto vs. Advantage Sales and Marketing*
  - *Court held that offsite use may be a reasonable accommodation.*

Drug Free Workplace Act 1988

- Recipients of federal contracts over $100,000 and all federal grants must promote a drug free workplace.
- Must act against employees for use of controlled substances even if legal under state law.
- If employer fails to impose sanctions or take required actions to promote a drug free workplace they can lose their contract or grant.
- Potential for being debarred from federal contracting process for a time not to exceed 5 years.

Federally Mandated Drug Testing

- Employers of commercial motor vehicle operators must drug test employees to screen for controlled substances and alcohol
  - Screen before employment, at random, under reasonable suspicion and after accidents
  - Cannabis, as a Schedule I substance, is prohibited and no exceptions for state medical use.
- Federal Railroad Administration requires drug testing of train and signal employees. Cannabis is prohibited and no exceptions for state medical use.

Laws Related to Federally Assisted Housing

Over 5 million low-income households in the United States use federal rental assistance.

The Quality Housing and Work Responsibility Act of 1998 (QHWRA)

- *Restrictions on Prospective Residents*
  - Requires the Public Housing Authority (PHA) to develop standards and lease provisions that **prohibit admission** to any household with a member who is illegally using a controlled substance (public housing, housing choice voucher program, project-based vouchers, ….)
- *Restrictions on Current Residents*
  - Requires PHA to develop standards and lease provisions that **allow** for the termination of lease for illegal use of control substances.
  - The enforcement of these provisions if left up to the discretion of local PHAs and property owners.

HR 2338: Marijuana in Federally assisted Housing Parity Act of 2019

Would Amend the Quality Housing and Work Responsibility Act to

- Allow admission to federally assisted housing if individual is complying with their state's medical cannabis law
- Prevent lease termination for federally assisted housing if individual is complying with their state's medical cannabis law
- Require HUD to draft regulations restricting marijuana smoking in federally assisted housing in the same manner and same locations as the smoking of tobacco.

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Maryland's Medical Cannabis Program: A Patient's Perspective and New Changes

Kathi Hoke
Executive Director,
Network For Public Health Law-
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State Policy is Changing Fast

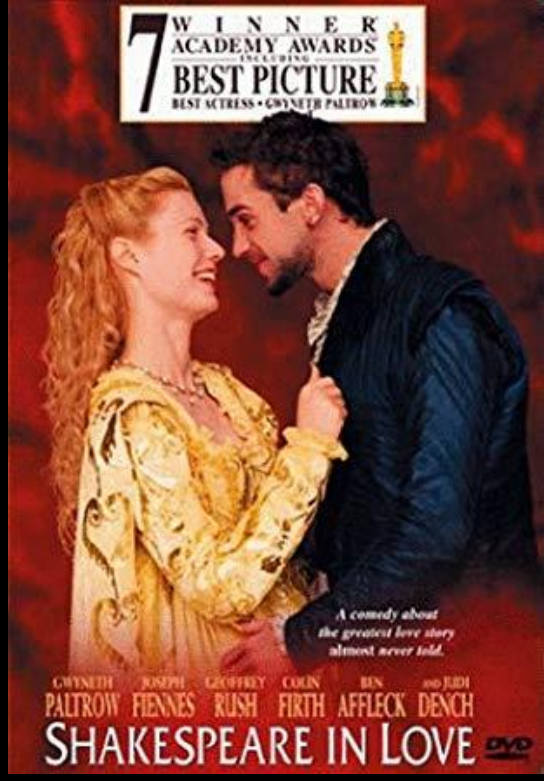
20 years ago (1999)

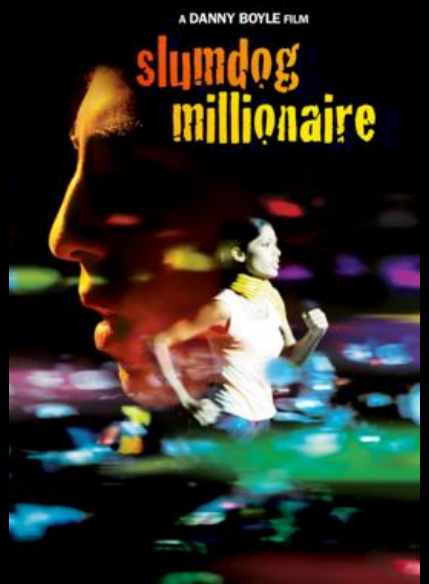
- 4 states had legalized medical cannabis programs (CA, AK, OR, WA)
- No state had adult-use (recreational) programs

10 years ago (2009)

- 13 states had legalized medical cannabis
- No adult-use programs

•Today (2019) . . . . .





2019

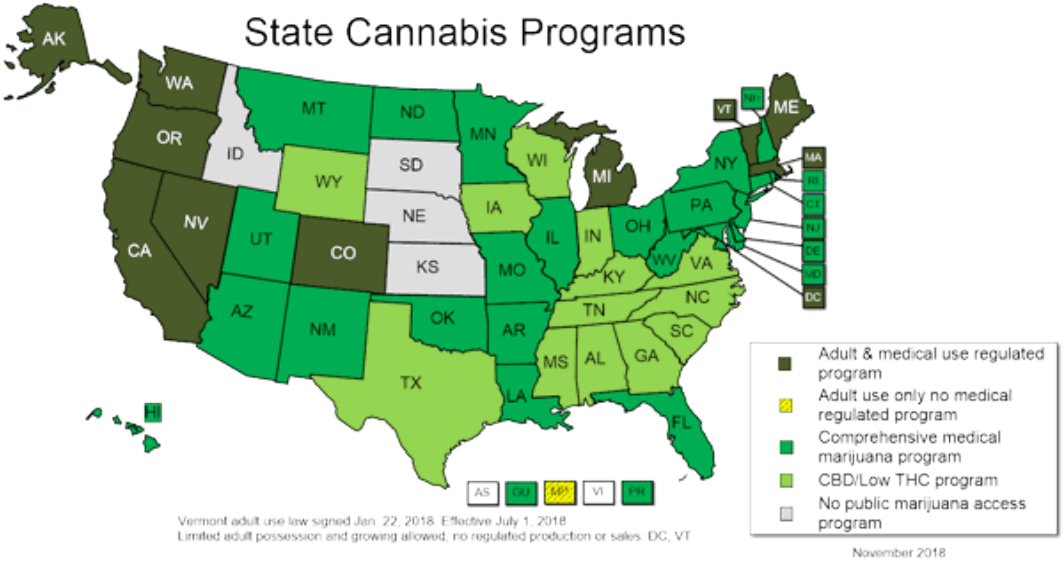
Recreation/Adult Use-

- **10 states and DC**
  - WA,OR,CA,NV,CO,MA, AK, ME, MI, VT, and DC

Comprehensive Medical- **33 states and DC**

Limited Medical- **13 states--u**sually only allow a specific cannabis extract to be used in medical treatments—CBD Oil

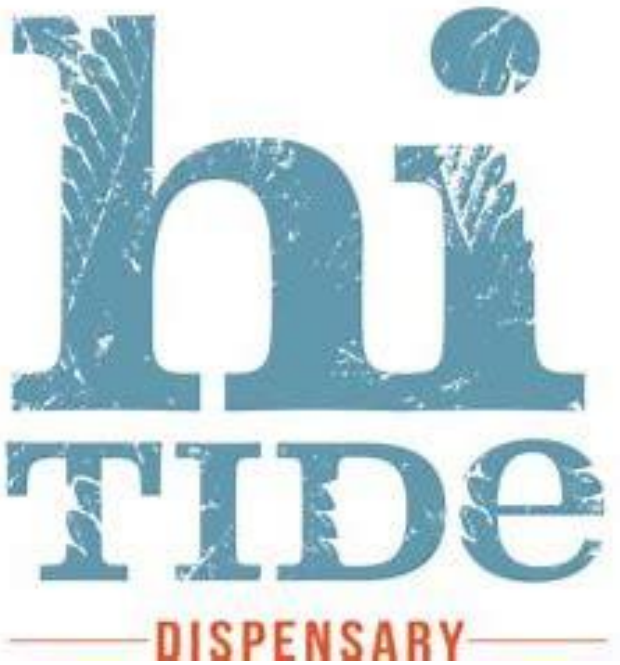
Decrimalized in small amounts- **22 jurisdictions**



Status of Cannabis in Maryland

1. Decriminalization of Small Amounts (under 10 grams)
2. Comprehensive Medical Cannabis Program
   - First Dispensary Opened in December 2017
3. Adult-use/Recreational is not legal in Maryland

How big is the medical cannabis industry in Maryland?



Scope Of Medical Cannabis Program in MD

State Report--(December 1, 2017—November 30, 2018)

- 51,589 certified medical cannabis patients, who are certified for 82,446 medical conditions.
- 1,174 certified providers
- $96,314,260 in sales
- 10,800 pounds of cannabis flower
- 14 Licensed Growers
- 14 Licensed Processors
- 102 Preapproved Dispensaries
  - 77 Operational Dispensaries

Medical Cannabis Program-The Basics

- Qualifying patients may lawfully access a specific amount of medical cannabis from a licensed Maryland dispensary
  - Patient cannot grow their own cannabis
- Minor patients (under 18 years of age) permitted
- A qualifying patient is an individual who:
  - Has a chronic or debilitating disease or medical condition,
  - Registers with MMCC and secures a patient identification number
  - Receives an in-person assessment from a certifying provider, and
  - The certifying provider determines the (1) patient meets the inclusion criteria for treatment with medical cannabis, and (2) potential health benefits outweigh the health risks for the patient.
- Once certified, a qualifying patient must secure a Medical Cannabis Identification Card→
  - Required to purchase cannabis at dispensaries starting April 1st, 2019.
  - However, due to technical difficulties in distribution of these cards exception criteria have been created. (Government ID and Patient/Caregiver ID number)

Medical Cannabis Program- The Basics

Patient Certification

- Valid for up to 1 year
- provider can set any time period
- Can be revoked by the provider at any time

"30-Day supply" is default

- 120 grams of usable cannabis or 36 grams of THC in infused products
- may be increased or decreased by certifying provider

Minor Patients

- Minor Patients must have a care giver
- Parent or legal guardian over the age of 21 must supervises the acquisition and administration of medical cannabis for minor
- Caregiver must register with the MMCC as a caregiver
- Maryland less restrictive than other jurisdictions
    - Requires Multiple Medical Providers to certify—
    - Requires Pediatrician or pediatric specialist to certify
    - Limit qualifying conditions-
    - Limit products that are available
    - Require more frequent doctors visits
- **Maryland Does Not Require a minor patient to get their certification from a Pediatrician**

Qualifying Medical Conditions

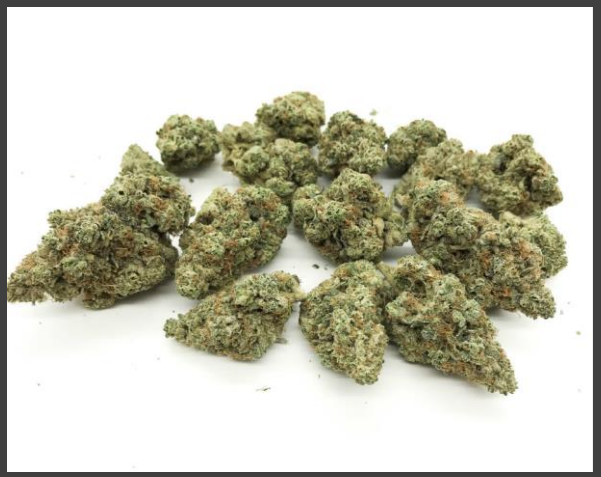
- **Qualifying Medical Conditions Set by Law**
- Chronic and Debilitating disease or medical conditions that results in:
  1. Hospice or palliative care
  2. Severe or chronic pain (34,623 patients)
  3. Cachexia, anorexia, or wasting syndrome
  4. Severe nausea
  5. Seizures
  6. Or severe or persistent muscle spasms
- Glaucoma
- Post Traumatic Stress Disorder
- The MMCC can be petitioned to include additional conditions on the qualifying medical conditions list
  - MMCC hears petitions at least once a year
- Can add new conditions through legislation

- Must register with the MMCC, at which time they indicate what conditions they may be certifying.
- Approval is valid for 2 years

The following licensed medical providers can register to certify patients for Medical Cannabis

- **Physicians (723)**
- **Dentists (70)**
- **Podiatrists (12)**
- **Nurse Practitioners and Nurse Midwives (369)**
- **Physicians Assistants (just added by legislation in 2019)**

Certifying Providers



What Medical Cannabis Products are Legal in Maryland?

1. Flower/ Pre-rolls
2. Extracts, Oils, & Tinctures
3. Vape Cartridges
4. Capsules & Patches
5. Salves, Lotions, Ointments
6. Edibles/Cannabis food products (New in 2019)
   - MMCC needs to draft regulations regarding this product
   - Permitting process to be able to sell

No One Eats 1/10 of a Brownie

National Edibles Market

- 2017→ $1 billion
- 2022→$3.24 billion

Special Health Challenges

1. Dosing/Over Consumption

- Delayed onset
- Potency of products→ 1000 Mg THC
- Serving size
- Uniformity of THC distribution in product

2. Attractiveness to Children

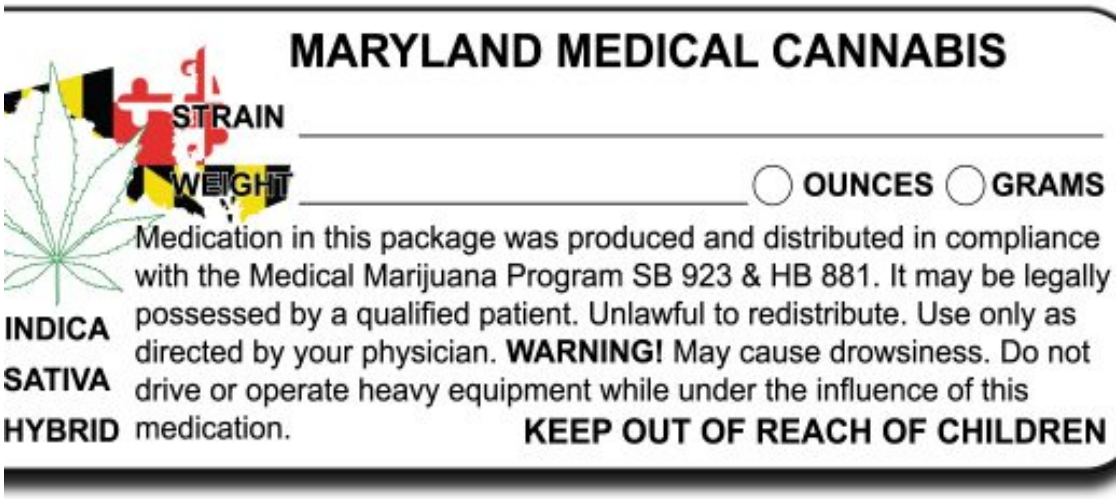
- Legalization→ increased accidental ingestion→ increased hospital visits and calls to poison control.
- Concerns regarding child brain development

CAN YOU TELL WHICH CANDY IS A MARIJUANA EDIBLE?

Denver Police News Presents

TRICK'D OR TREAT?

Why is this label probably illegal??



Packaging/Labeling

Requires

- Tamper proof packaging/child resistant
- Opaque packaging
- Allergen information
- MD poison control #
- Warning to keep away from children . . . .

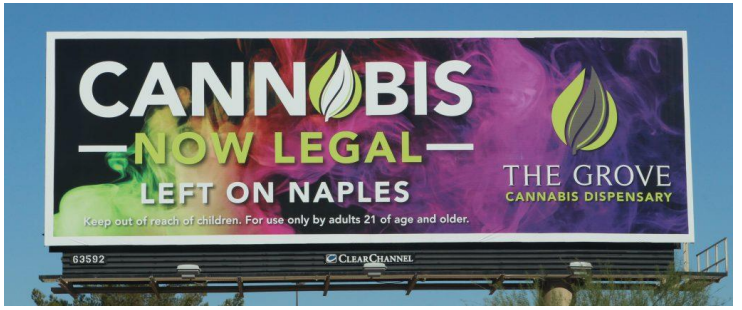
Prohibits

- Cartoon, color scheme, image, graphic or feature that might make the package attractive to children
- Trademark infringement
- Imagery that would lead one to believe endorsed by the state

Advertising Restrictions (New in 2019)

Advertisements cannot…

- Make unsupported therapeutic and medical claims
- Be false or misleading
- Contain designs or representations that encourage recreational use/use as an intoxicant
- Target or be attractive to minors
- Show the use of cannabis
- Be obscene
- Be within 500 feet of
  - Substance abuse or treatment facility
  - Primary or secondary school
  - Child care facility
  - Playground, recreation center, library, public park



On the Horizon: Failed Bills in 2019 Session

Physical Therapists and Opioids

House Bill 18—wanted to increase list of licensed providers that can certify patients for medical cannabis.

- physical therapists
- psychologists, and
- physicians assistants

Was amended so only physicians assistants were added.

House Bill 33—wanted to add opioid use disorder to the list of qualifying conditions

- Failed

Employment Protections

House Bill 794

- Employers cannot discriminate against qualifying patients or caregivers because of their status
  - Hiring, firing, terms or conditions, or otherwise penalize
  - Does not protect from being impaired, using or possessing at work
- Patients cannot be punished for failed drug test unless
  - used, possessed, or was impaired at work
- Employers can be fined for violating
- **Failed**

Cannabis Use at Home: Maryland's Current Law

MD Code, Health - General, § 13-3314

Does not allow smoking of medical cannabis in a private dwelling when the property is:

1**. rented from a landlord** and subject to a policy that prohibits the smoking of marijuana or cannabis on the property

2. subject to a policy that prohibits the smoking of marijuana or cannabis on the property of an attached dwelling adopted by one of the following entities:

- The board of directors of the council of unit owners of a condominium regime; or
- The governing body of a homeowner's association.

The law exempts vaporizing of cannabis from this prohibition.

Does this prohibition apply to tinctures, edibles, ...?

Senate Bill 862:
Failed Bill

Landlord cannot deny a qualifying patient or caregiver a lease solely based on:

- possession of medical cannabis and related products and
- in the case of the patient, the use of nonsmoked medical cannabis.

The above listed actions cannot be the sole basis of breach of a lease.

Would not apply to federal assisted housing because of federal preemption.

Recreational/Adult Use

House Bill 63

- Creates an adult use/recreational cannabis program in Maryland
- At least 21 years of age.
- Allowed to possess up to 1 once and grow up to 6 plants.
- Allowed to share 5 grams with another adult.
- Does not authorize driving while impaired.
- Does not require an employer to accommodate in the work place.
- Does not prevent landlords from restricting use, display or cultivation of cannabis.

Constitutional Amendment: Failed

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Questions?

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