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# The Carrot and the Stick: Tailoring California's Unlawful Marijuana Cultivation Statute to Address California's Problems

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# The Carrot and the Stick: Tailoring California’s Unlawful Marijuana Cultivation Statute to Address California’s Problems\*

Hunter E. Starr\*\*

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\* This Comment does not express support for, nor does it discuss, legalization of marijuana growth or use pursuant to federal law. At the time of writing, marijuana is a Schedule I drug and is illegal to cultivate, possess, or use under federal law. 21 U.S.C. 812. This Comment relates only to the internal consistency of California law.

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I. INTRODUCTION

On a bright summer day in July 2011, a helicopter hummed through a blue sky over the treetops in Tehama County, California.<sup>1</sup> Below the helicopter, narcotics agents armed with guns and machetes tore apart a large-scale marijuana plantation, which contained thousands of marijuana plants.<sup>2</sup> The agents were participating in a tradition for California law enforcement: the summertime eradication of millions of marijuana plants.<sup>3</sup> Yet, in the fiscal year of 2010 to 2011, the state issued over ten-thousand medical marijuana cards that allow cardholders to grow and use marijuana legally.<sup>4</sup>

If asked whether marijuana cultivation is legal in California, an attorney will likely answer with the lawyer’s standard refrain, “it depends.”<sup>5</sup> Section 11358 of the California Health and Safety Code establishes that cultivating marijuana is a felony,<sup>6</sup> but the law regarding cultivation is not so simple.<sup>7</sup> In 1996, California voters passed Proposition 215, known as the Compassionate Use Act (CUA).<sup>8</sup>

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1. See Zusha Elinson, *Budget Cuts Endanger State’s Marijuana Eradication Program*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/07/29/us/29bccamp.html?pagewanted=all> (on file with the *McGeorge Law Review*) (indicating that the raid occurred on Wednesday of the same week that the article was published).

2. *Id.*

3. See *id.* (stating that the Campaign Against Marijuana Planting is a “predictable rite of summer” that deploys law enforcement agents to cut marijuana crops).

4. *California Medical Marijuana Identification Card By Volume, By County*, CAL. DEP’T OF PUB. HEALTH (Jan. 5, 2011), [http://www.cdph.ca.gov/programs/MMP/Documents/MMP%20County%20FY%20Card%20Count.FY2010\\_11.pdf%20May%2017.pdf](http://www.cdph.ca.gov/programs/MMP/Documents/MMP%20County%20FY%20Card%20Count.FY2010_11.pdf%20May%2017.pdf) (on file with the *McGeorge Law Review*); CAL. HEALTH & SAFETY CODE § 11362.775 (West 2007).

5. See CAL. HEALTH & SAFETY CODE § 11358 (West 2007 & Supp. 2013) (stating that cultivating marijuana in California is a felony). *But see id.* § 11362.5 (West 2007) (codifying the Compassionate Use Act, which created an affirmative defense to felony charges of marijuana cultivation). Both possession and cultivation are illegal under federal law. 21 U.S.C. § 841(a), (b)(5) (2006).

6. See HEALTH & SAFETY § 11358 (stating that people that are convicted of cultivating marijuana serve their sentences in prison).

7. See *infra* note 17 and accompanying text (exploring the state of marijuana law in California).

8. HEALTH & SAFETY § 11362.5 (West 2007).

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The CUA<sup>9</sup> created an affirmative defense to the felony charge of cultivating marijuana.<sup>10</sup> Thus, a person who is charged with cultivating marijuana may be acquitted under the CUA.<sup>11</sup> Medical marijuana legislation followed the CUA.<sup>12</sup>

In 2003, the California Legislature created the Medical Marijuana Program (MMP).<sup>13</sup> Unlike the CUA, the MMP offers immunity from arrest, but conditions that immunity on the number of plants that a person may possess or cultivate.<sup>14</sup> Thus, even though section 11358 establishes that cultivating marijuana is a felony,<sup>15</sup> a person can grow limited amounts of marijuana without fear of arrest or criminal charges.<sup>16</sup> These apparently conflicting laws have created a confusing legal environment where cultivating marijuana is a felony under most circumstances, but is legal under some circumstances.<sup>17</sup> In this confusion, three distinguishable categories of marijuana cultivators have emerged: legal cultivators, lesser illegal cultivators, and major illegal cultivators.<sup>18</sup> This Comment does not discuss the legal cultivators that the CUA and MMP protect. Lesser illegal cultivators grow small amounts of marijuana, generally on private property, sometimes for personal use; major illegal cultivators grow large amounts of marijuana, often on public land for the purpose of sale.<sup>19</sup> The cultivation statute, however, does not differentiate between the two types of illegal cultivators.<sup>20</sup>

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9. California voters passed the CUA (Proposition 215) with 55.58% of the vote. Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKELEY J. CRIM. L. 163, 166 (2010) (citing BILL JONES, SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 5, 1996, at viii (1996)).

10. See HEALTH & SAFETY § 11362.5 (stating that Section 11358 of the Health and Safety Code does not apply to patients who cultivate marijuana and have physician approval to use it).

11. *Id.*

12. Medical Marijuana Program Act, 2003 Cal. Stat. ch. 875 (enacting CAL. HEALTH & SAFETY CODE § 11362.77).

13. *Id.*

14. Compare *id.* (offering immunity from arrest when a person has a limited number of plants), with HEALTH & SAFETY § 11362.5 (stating that Section 11358 of the Health and Safety Code does not apply to patients who cultivate medical marijuana and have physician approval to use it, but not offering immunity from arrest).

15. See HEALTH & SAFETY § 11358 (West 2007 & Supp. 2013) (stating that people who are convicted of cultivating marijuana serve their sentences in prison).

16. See *id.* § 11362.77 (West 2007) (allowing patients to possess up to six full-grown marijuana plants).

17. See Gerald Caplan, Symposium: *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 127 (2012) (“The legal status of medical marijuana is a legislative oddity, perhaps unprecedented, in that state governments authorize possession and use of marijuana in knowing and clear violation of federal criminal law.”).

18. These are the author’s own designations. The distinguishing characteristics will be discussed *infra* in Parts III and IV.

19. This is a general distinction without clearly defined lines between lesser and major offenders. It might be useful to consider a “large amount” of marijuana to be like obscenity in that it would be difficult to define but a judge would know it when he or she saw it.

20. See HEALTH & SAFETY § 11358 (West 2007 & Supp. 2013) (stating that a person who cultivates marijuana must serve a sentence in prison regardless of the amount of marijuana cultivated).

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Even though public opinion has shifted in support of medical marijuana, and the law reflects this in many cases, the unlawful cultivation statute has remained inflexible.<sup>21</sup> Consider the following hypothetical, which demonstrates the statute's inflexibility: a college student who is not a qualified patient under the CUA or MMP is caught growing five marijuana plants in his closet. At the same time, a person employed by a drug cartel and not a qualified patient under the CUA or MMP is caught growing five-thousand marijuana plants on public land. If charged, both face the same charge and potential punishment under section 11358 of the Health and Safety Code.<sup>22</sup>

This Comment questions the wisdom of such an inflexible law in light of the legal status of marijuana, the increased social acceptance of medical use of marijuana, and the increasing problem of large-scale plantations in California. It first argues that the legislature should amend the cultivation statute to become a “wobbler”—a punishment scheme allowing the crime to be charged as either a felony or misdemeanor,<sup>23</sup> instead of a “straight felony,”<sup>24</sup>—a felony statute not allowing for a misdemeanor charge and then recommends harsher sentences for more egregious offenses.<sup>25</sup> This two-pronged solution will give prosecutors flexibility when they decide what charges to file, while giving courts flexible sentencing guidelines. It will also account for the varied legal status of marijuana, the increased social acceptance of the drug for medical purposes, and the growing problem of large-scale plantations in California. Part II provides an overview of California's marijuana laws and notes how the cultivation statute has not changed despite significant shifts in related areas of the law.

In Part III, this Comment discusses a partial solution to the problem of the inflexible statute in light of social and legal change.<sup>26</sup> This Part focuses first on Assembly Bill (AB) 1017, introduced in 2011, which would have amended section 11358 of the California Health and Safety Code, making the statute an alternative felony misdemeanor, or “wobbler,” instead of a “straight felony.”<sup>27</sup>

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21. See *infra* Part II (exploring the relatively static history of the unlawful cultivation statute).

22. HEALTH & SAFETY § 11358 (stating that a person who cultivates marijuana must serve a sentence in prison regardless of the amount of marijuana that they cultivate). In a real-life situation, the actual time served may be different based on various enhancements, such as the presence of a firearm, prior convictions, and further charges under possession for sale, which would have to be charged separately under Section 11359 of the California Health and Safety Code; all things being equal, however, Section 11358 would apply the exact same way. *Id.*

23. See *infra* notes 129–33 and accompanying text (discussing AB 1017 and its likely effects had it been passed).

24. *Id.*

25. See *Beckway v. DeShong*, 717 F. Supp. 2d 908, 920 (N.D. Cal. 2010) (indicating that in criminal law jargon, the offenses that a prosecutor can charge as either felonies or misdemeanors are known as “wobblers”).

26. See *infra* Part III (discussing AB 1017 and the benefits it might have provided had it passed).

27. AB 1017, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as introduced on February 18, 2011, but not enacted). See *infra* notes 129–33 and accompanying text (discussing AB 1017 and the effect it would have had on the unlawful cultivation statute's sentencing formula).

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Part III looks at the benefits and costs of wobbler statutes. While the unlawful cultivation statute should be a wobbler, this Comment further argues that AB 1017 was an incomplete solution to a larger problem.<sup>28</sup>

Part IV explores why AB 1017 was an incomplete solution. This Part also examines California's experience with large-scale marijuana operations, focusing on public safety and environmental dangers. Part IV then discusses how an amended unlawful cultivation statute could deal with these kinds of problems.

Part V of this Comment proposes a new cultivation statute for California, which would allow prosecutors and judges discretion to enforce community standards while simultaneously tackling the rampant, large-scale grow operations in California.<sup>29</sup>

## II. ROOTS OF UNLAWFUL CULTIVATION

This Part first defines unlawful cultivation and distinguishes it from the more serious offense of manufacturing.<sup>30</sup> It then explores how the unlawful cultivation statute has remained static and inflexible in comparison to other aspects of marijuana law, and illustrates some of the confusion resulting from recent developments in marijuana law.<sup>31</sup> Finally, this Part identifies various problems that arise from the unchanged law concerning cultivation in the evolving field of marijuana law.<sup>32</sup>

### A. *Defining and Distinguishing Unlawful Cultivation*

The unlawful cultivation statute contains several elements, any of which may trigger an arrest: planting, cultivating, harvesting, drying, or processing.<sup>33</sup> California's Fourth District Court of Appeal has held that control over land on which marijuana plants are growing creates an inference of cultivation.<sup>34</sup> The

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28. See *infra* notes 129–35 and accompanying text (concluding that AB 1017 was an incomplete solution to a larger problem).

29. *Id.*

30. See CAL. HEALTH & SAFETY CODE § 11358 (West 2007 & Supp. 2013) (stating that convicted cultivators will serve time in state prison); *id.* § 11379.6 (stating that convicted manufacturers will serve time in prison and pay a fine); *infra* Part II.A (discussing the construction of the cultivation statute).

31. See *infra* Part II.B–C (discussing some of the confusion that has arisen due to the current statutory framework).

32. See *infra* Part II.D (discussing these problems).

33. HEALTH & SAFETY § 11358.

34. See *California v. Vermouth*, 116 Cal. Rptr. 675, 681 (Ct. App. 4th Dist. 1974) (“We also conclude proof the marijuana plants were growing on the sun deck of the residence, coupled with evidence defendants had control of the premises, was sufficient to support their conviction of cultivating marijuana.”). *Vermouth* is the only published appellate decision on this point of law to date; however, it has been cited by a number of unpublished cases. See, e.g., *People v. Holland*, 23 Cal. 3d 77, 87 (1978) (citing to *Vermouth* without commenting on the Fourth District's holding that control of the premises coupled with the presence of marijuana plants was sufficient to convict for unlawful marijuana cultivation) (disagreed with on other

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“processing” element of section 11358 of the Health and Safety Code widens the scope of the crime.<sup>35</sup> In *California v. Tierce*, the Fifth District Court of Appeal held that a person “who removes the leaves from marijuana plants in order to render the leaves usable for smoking is engaged in processing the drug and thus violates . . . section 11358.”<sup>36</sup>

According to the unlawful cultivation statute, processing marijuana is distinguishable from a more serious type of processing known as manufacturing.<sup>37</sup> While unlawful cultivation includes activities as simple as trimming and preparing marijuana, it does not include the more complex chemical processing found in section 11379.6 of the Health and Safety Code.<sup>38</sup>

Section 11379.6 covers “every person who manufactures, compounds, converts, produces, derives, processes, or prepares [marijuana], either directly or indirectly by chemical extraction or independently by means of chemical synthesis. . . .”<sup>39</sup>

There are three noteworthy differences between sections 11358 and 11379.6.<sup>40</sup> First, section 11379.6 includes a more specific category of activities, focusing on the chemical process.<sup>41</sup> That is, section 11379.6 includes words like “manufacture” and “extraction,” whereas “processing” in section 11358 applies to activities such as trimming plants and preparing leaves for smoking.<sup>42</sup> Second, the purpose of section 11379.6 focuses on the means of processing the drugs.<sup>43</sup> Unlike the unlawful cultivation statute, the purpose of section 11379.6 is to protect the public from the potentially hazardous production process that involves

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grounds); *California v. Arbacauskas*, 123 Cal. App. 4th 502, 862 (Ct. App. 3d Dist. 2004) (finding sufficient evidence for conviction for marijuana cultivation based on the satisfaction of the elements of cultivation in *Vermouth*); *California v. Sivichith*, 2003 WL 549406 at \*7 (Cal. Ct. App. 5th Dist. Feb. 26, 2003) (stating that a person’s physical presence on the property or cohabitation with the owner does not amount to the kind of control over land required to be sufficient evidence of marijuana cultivation under the standard in *Vermouth*); *California v. Haylock*, 2009 WL 1026892 at \*3 (Cal. Ct. App. 2d Dist. Apr. 17, 2009) (finding that because the defendant had control over the property where marijuana plants were growing, there was sufficient evidence to find that the defendant was cultivating marijuana).

35. See *California v. Tierce*, 211 Cal. Rptr. 325, 333 (Ct. App. 5th Dist. 1985) (stating that removing a marijuana plant’s leaves in order to smoke them is a form of processing).

36. *Id.*

37. Compare HEALTH & SAFETY § 11358 (stating that convicted cultivators will serve time in prison), with *id.* § 11379.6 (stating that convicted manufacturers will serve time in prison and pay a fine).

38. HEALTH & SAFETY § 11358; see also *Tierce*, 211 Cal. Rptr. at 333 (stating that removing the leaves of a marijuana plant constitutes processing according to the unlawful cultivation statute).

39. HEALTH & SAFETY § 11379.6.

40. See *infra* notes 41–46 and accompanying text (demonstrating the various differences between Penal Code sections 11358 and 11379.6).

41. HEALTH & SAFETY § 11379.6; see also *id.* § 11358 (encompassing a broad range of activities).

42. HEALTH & SAFETY § 11379.6; see also *Tierce*, 211 Cal. Rptr. at 332–3 (discussing whether removing leaves from marijuana plants constitutes processing marijuana).

43. See *California v. Bergen*, 82 Cal. Rptr. 3d 577, 585 (Ct. App. 2d Dist. 2008) (“[T]he Legislature intended section 11379.6(a) to apply to . . . concentrated cannabis when produced through chemical extraction.”).

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chemical extraction.<sup>44</sup> Third, the punishment for chemical processing is more severe.<sup>45</sup> Section 11379.6 carries a punishment of three, five, or seven years, and a fine of up to fifty-thousand dollars.<sup>46</sup>

Section 11358 therefore does not generally represent the type of dangerous conduct associated with drug production labs, like processing volatile chemicals.<sup>47</sup> The reach of the cultivation statute is limited to conduct such as planting the seeds, watering and maintaining the plants, and drying and trimming the plants to ready them for use.<sup>48</sup> That has not changed substantively in forty years.<sup>49</sup>

*B. Unlawful Cultivation Before and After Determinate Sentencing*

In 1968, before the California Determinate Sentencing Act (CDSA), the legislature enacted section 11530.1 of the Health and Safety Code, which criminalized marijuana cultivation.<sup>50</sup> The statute designated unlawful cultivation of marijuana as a felony, but followed an indeterminate sentencing scheme.<sup>51</sup> By the early 1970s, the indeterminate sentencing scheme had begun to break down,<sup>52</sup> and in 1975, the California Supreme Court recognized the difficulty of reviewing indeterminate sentences.<sup>53</sup> In 1976, the legislature passed Senate Bill (SB) 42,<sup>54</sup> the CDSA, a complex piece of legislation.<sup>55</sup> The CDSA was a milestone in California sentencing history, changing the sentencing paradigm applied throughout the state.<sup>56</sup>

44. *Id.*; see also HEALTH & SAFETY § 11358 (encompassing a broad range of activities).

45. Compare HEALTH & SAFETY § 11379.6 (stating that convicted manufacturers will serve time in prison and pay a fine), with *id.* § 11358 (stating that convicted cultivators will serve time in prison and pay a fine).

46. HEALTH & SAFETY CODE § 11379.6.

47. See *Bergen*, 82 Cal. Rptr. 3d at 585 (“[T]he Legislature intended section 11379.6(a) to apply to . . . concentrated cannabis when produced through chemical extraction.”); *Tierce*, 211 Cal. Rptr. at 333 (stating that removing the leaves of a marijuana plant constitutes processing according to the unlawful cultivation statute).

48. HEALTH & SAFETY § 11358; see also *Tierce*, 211 Cal. Rptr. at 332–3 (concluding that removing the leaves from marijuana constitutes processing).

49. See *infra* Part II.B (discussing the history of the unlawful cultivation statute).

50. See 1968 Cal. Stat. ch. 1465 § 2, at 2931–32 (enacting CAL. HEALTH & SAFETY § 11530.1) (stating that violators of the 1968 version of the unlawful cultivation were punishable by time in state prison for between one and ten years); CAL. HEALTH & SAFETY CODE § 11530.1 (repealed in 1972, redesignated as CAL. HEALTH & SAFETY CODE § 11358).

51. HEALTH & SAFETY CODE § 11530.1 (repealed 1972, redesignated as HEALTH & SAFETY § 11358).

52. April Kestell Cassou & Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PACIFIC L.J. 5, 9–10 (1978).

53. *Id.* at 15.

54. *Id.* at 17.

55. California Determinate Sentencing Act, 1976 Cal. Stat. ch. 1139.

56. Cassou & Taugher, *supra* note 52, at 6.



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The CDSA changed the form of the unlawful cultivation statute, but it remained a felony.<sup>57</sup> While the CDSA did not change the sentences for misdemeanors or “alternative dispositions for felonies, such as probation,”<sup>58</sup> it eliminated the sentencing guidelines that had previously existed in the unlawful cultivation statute.<sup>59</sup> The elimination of the sentencing guidelines shortened the law to its current form<sup>60</sup>: “Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment pursuant to subdivision (h) of section 1170 of the Penal Code.”<sup>61</sup>

#### C. *The Current Legal Landscape*

Section 11358 of the Health and Safety Code includes the phrase “except as otherwise provided by law,” which brings to mind the marijuana legislation of the past two decades.<sup>62</sup> Commentators have exhaustively discussed the last fifteen years of marijuana initiatives and legislation in California.<sup>63</sup> There are major areas of focus in common in each account: the Compassionate Use Act of 1996 (CUA), the Medical Marijuana Program Act of 2003 (MMP), and the current confusion concerning the future of marijuana law.<sup>64</sup> This Part provides a brief history of the CUA and the MMP, but the focus is on the overall trend toward lenience.

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57. *Id.* at 22 (noting the various portions of the law that changed); *see also* California Determinate Sentencing Act, 1976 Cal. Stat. ch. 1139 § 72, 5082 (amending HEALTH & SAFETY § 11530.1) (renumbering CAL. HEALTH & SAFETY CODE § 11530.1 as CAL. HEALTH & SAFETY § 11358 and removing the indeterminate sentencing range).

58. *Id.*

59. *See* California Determinate Sentencing Act, 1976 Cal. Stat. ch. 1139, §§1–358, 5062–5178 (replacing the sentencing criteria that had previously existed in the state with new, determinate sentences for violating numerous code sections).

60. Section 11358 of the California Health & Safety Code actually did not reference subdivision (h) of section 1170 of the Penal Code. CAL. HEALTH & SAFETY CODE § 11358 (West 2007 & Supp. 2013). Although the newest version of the statute references a different code section, it remains a felony conviction. *Id.*

61. *Id.* This is the more recent equivalent to the statute, which originally only referred to time in state prison, rather than “subdivision (h) of Section 1170.” *Id.* § 11358 (West 2007).

62. *E.g.*, Cal. Proposition 215 (1996) (enacting CAL. HEALTH & SAFETY CODE § 11362.5) (comprising the CUA, which is a provision of law that may cut off criminal liability for cultivating marijuana); Medical Marijuana Program Act, 2003 Cal. Stat. ch. 875 (establishing the Medical Marijuana Program, which may cut off criminal liability for cultivating marijuana if the cultivator remains within certain guidelines).

63. *E.g.*, Patton, *supra* note 9 (discussing the financial implications of legalizing marijuana); Michael Berkey, *Mary Jane’s New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 417, 428–33 (2011) (discussing the federal response to various state’s marijuana legalization); Robert Weisberg, Symposium, *The Road to Legitimizing Marijuana: What Benefit at What Cost?*, 43 MCGEORGE L. REV. 1 (2012) (listing various topics related to marijuana laws).

64. Patton, *supra* note 9, at 166; Chris Lindberg, *Room for Abuse: A Critical Analysis of the Legal Justification for the Marijuana Storefront “Dispensary”*, 40 SW. L. REV. 59 (2010).

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California voters passed the CUA by initiative in 1996.<sup>65</sup> In the Voter Information Guide to the 1996 General Election, proponents of Proposition 215 argued that the proposition would help terminally ill patients and that marijuana would still be illegal for non-medical use.<sup>66</sup> The language of the proposition, however, was not so restrictive.<sup>67</sup> The CUA, outlined in section 11362.5 of the Health and Safety Code, included the catch-all phrase “any other illness for which marijuana provides relief” for those who did not suffer from the enumerated ailments.<sup>68</sup> The CUA’s language caused confusion.<sup>69</sup>

In *California v. Spark*, the California Court of Appeal for the Fifth District held that the CUA was not restricted to the “seriously ill” patients mentioned in the language of the statute.<sup>70</sup> It held that “seriously ill” was only prefatory language, and it referred only to the specific diseases following immediately after in the same subsection.<sup>71</sup> The court reasoned that whether marijuana is an appropriate treatment is a question for a physician to answer.<sup>72</sup> It further held that it was not up to a jury to decide whether a defendant asserting a CUA defense was seriously ill.<sup>73</sup> This determination was for a physician to make, and jurors could not “second-guess” that decision.<sup>74</sup> Although jurors have no say on the efficacy of a physician’s determination, that fact does not protect cultivators from arrest.<sup>75</sup>

65. Cal. Proposition 215 (1996) (enacting CAL. HEALTH & SAFETY CODE § 11362.5).

66. Richard J. Cohen, et. al., *Argument in Favor of Proposition 215*, in 1996 CALIFORNIA GENERAL ELECTION VOTER INFORMATION GUIDE/BALLOT PAMPHLET 60 (1996).

67. See CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007) (stating that a doctor can prescribe marijuana for certain enumerated illnesses and “any other illness for which marijuana provides relief”).

68. *Id.*

69. Tammy L. McCabe, *It’s High Time: California Attempts to Clear the Smoke Surrounding the Compassionate Use Act*, 35 MCGEORGE L. REV. 545, 545 (2004) (“Since its enactment, uncertainties in the [Compassionate Use] Act have become manifest, impeding law enforcement’s ability to interpret and enforce the law.”); see also, e.g., *California v. Wright*, 40 Cal. 4th 81, 84–5 (2006) (exploring how the MMPA retroactively affected cases in which defendants could not argue the CUA defense because they had been convicted of transporting marijuana, and not of growing or using it); *California v. Mower*, 28 Cal. 4th 457, 467 (2002) (discussing whether the CUA constitutes immunity from arrest and prosecution or only constitutes an affirmative defense).

70. 16 Cal. Rptr. 3d 840, 846 (5th Dist. 2004).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; see also *California v. Kelly*, 222 P.3d 186, 188 (Cal. 2010) (citing *California v. Mower*, 49 P.3d 1067, 1074–76 (Cal. 2002)) (“The CUA does not grant immunity from *arrest* for [marijuana possession] . . .”).

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### 2. *The Road to the Medical Marijuana Program*

Efforts to clarify, extend, or implement the CUA initially met resistance.<sup>76</sup> In 1999, the California Assembly failed to pass SB 848, which would have “direct[ed] the state to develop and implement a plan for the safe and affordable distribution of medical marijuana.”<sup>77</sup> In 2001, SB 187 would have directed the creation of a similar plan had it passed.<sup>78</sup> SB 187 did not pass.<sup>79</sup> In 2002, the California Supreme Court held that the CUA “renders possession and cultivation of marijuana noncriminal,” but that the CUA is only a defense in court and does not protect patients or caregivers from arrest on marijuana cultivation charges.<sup>80</sup>

Problems with the CUA persisted, including decreased availability of marijuana for qualified patients, its construction with federal law, and “needless” arrests and prosecutions.<sup>81</sup> Confusion abounded regarding the legality of marijuana use, possession, and cultivation.<sup>82</sup> In 2003, SB 187 (2001) was revived as SB 420.<sup>83</sup>

76. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 420, at 8 (Cal. July 1, 2003) (stating the federal authorities tried to close local marijuana distributors).

77. SENATE THIRD READING, SUMMARY OF SB 848, at 2 (Cal. Aug. 29, 2000); BILL HISTORY OF SB 848, (Nov. 30, 2000), available at [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_0801-0850/sb\\_848\\_bill\\_20001130\\_history.html](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_0801-0850/sb_848_bill_20001130_history.html) (on file with the *McGeorge Law Review*).

78. SENATE RULES COMMITTEE, UNFINISHED BUSINESS, SB 187, at 2 (Cal. Sept. 12, 2001).

79. BILL HISTORY, *supra* note 76.

80. *Mower*, 49 P.3d at 1074–76. Ironically, the court relied on the language of the proponents of the CUA found in the Voter Information Guide to limit the CUA. *Id.* at 1075–76.

81. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 420, at 12 (Cal. Jul. 1, 2003) (“Due to vague guidelines, patients and physicians have been subject to needless arrest and prosecution.”)

82. Thomas Elias, *Marijuana Barely Illegal Now: Prop 215 Has Caused Complete Confusion*, LODI NEWS SENTINEL, Apr. 29, 1997, at 4, available at <http://news.google.com/newspapers?nid=hsM0AAAIBAIAJ&sjid=SSEGAAAIBAIAJ&pg=5454,7400745> (on file with the *McGeorge Law Review*); *Medicinal Marijuana Law Needs Some Tightening*, LODI NEWS SENTINEL, July 17, 2000, at 5, available at <http://news.google.com/newspapers?id=hbM0AAAIBAIAJ&sjid=OiEGAAAIBAIAJ&pg=5296,1983746&dq=marijuana+confusion+s+law&hl=en> (on file with the *McGeorge Law Review*) (“California’s groundbreaking medicinal marijuana law is being used in other states as a model of how not to write a law to allow chronically ill patients to smoke the drug.”); see also *San Francisco Might Plant Its Own Marijuana Garden*, UNION DEMOCRAT, July 24, 2002, at 5A, available at <http://news.google.com/newspapers?id=sy5ZAAAIBAIAJ&sjid=Y0cNAAAIBAIAJ&pg=2215,3047262&dq=marijuana+identification+card&hl=en> (on file with the *McGeorge Law Review*) (documenting San Francisco’s own attempts to make marijuana available to users under the CUA model).

83. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 420, at 12 (Cal. July 1, 2003). The number 420, also expressed as 4:20 (time) and 4/20 (date), is associated with recreational marijuana use. Ryan Grim, *420 Meaning: The True Story of How April 20 Became ‘Weed Day’*, HUFFINGTON POST (Apr. 20, 2010, 1:32 AM), [http://www.huffingtonpost.com/2010/04/20/420-meaning-the-true-stor\\_n\\_543854.html](http://www.huffingtonpost.com/2010/04/20/420-meaning-the-true-stor_n_543854.html) (on file with the *McGeorge Law Review*). For an interesting look at its history and use, see *id.*

### 3. *The Medical Marijuana Program: A Failed Attempt to Clear the Haze*

In 2003, the California Legislature passed SB 420, known as the MMP.<sup>84</sup> According to the Bill's author, the MMP came as the result of a task force convened by then-Attorney General Bill Lockyer.<sup>85</sup> The California Department of Public Health's website states that the MMP was enacted to clarify and expand the CUA.<sup>86</sup>

The MMP created a voluntary identification system and outlined standards for "qualified patient" status.<sup>87</sup> The MMP extended the CUA by providing immunity from arrest by police, but only for those who adhered to the qualified patient standards.<sup>88</sup> For instance, section 11362.77 of the Health and Safety Code, which constitutes the MMP, states that "[a] qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient."<sup>89</sup> This limitation is not absolute, however, as section 11362.77(c) allows counties to increase the amounts previously listed.<sup>90</sup> While the CUA and MMP provide immunity for cultivating marijuana, neither has affected how section 11358 applies to individuals other than qualified patients.<sup>91</sup>

Other statutes have also evolved to reflect public opinion.<sup>92</sup> On January 1, 2011, then-Governor Arnold Schwarzenegger signed into law SB 1449, which amended section 11357 of the Health and Safety Code regarding the possession of marijuana.<sup>93</sup> SB 1449 changed possession of 28.5 grams or less of marijuana from a misdemeanor to an infraction.<sup>94</sup> Thus, while the law grants immunity to

84. 2003 Cal. Stat. ch. 875 (enacting CAL. HEALTH & SAFETY CODE §§ 11362.7, 11362.71, 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755, 11362.76, 11362.765, 11362.77, 11362.775, 11362.78, 11362.785, 11362.79, 11362.795, 11362.8, 11362.81, 11362.82, 11362.83).

85. SENATE HEALTH AND HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF SB 420, at 6 (Cal. Apr. 9, 2003).

86. See *Medical Marijuana Program*, CAL. DEP'T OF PUB. HEALTH, <http://www.cdph.ca.gov/PROGRAMS/mmp/Pages/default.aspx> (last updated Jan. 8, 2013, 9:42 AM) (on file with the *McGeorge Law Review*) (stating that the MMP was enacted to address problems with the CUA and also to create a program to give identification cards to qualified patients).

87. HEALTH & SAFETY § 11362.7(f) (West 2007).

88. See *id.* § 11362.77 ("A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient . . . [and] no more than six mature or 12 immature marijuana plants per qualified patient.").

89. *Id.* § 11362.77(a).

90. *Id.* § 11362.77(c). To make matters more confusing, several counties use the name "Medical Marijuana Program" for their own county-wide programs. *Medical Marijuana Program Frequently Asked Questions*, CAL. DEP'T OF PUB. HEALTH, <http://www.cdph.ca.gov/programs/MMP/Pages/MMPFAQ.aspx> (last modified Nov. 14, 2012, 9:59 AM) (on file with the *McGeorge Law Review*).

91. See HEALTH & SAFETY § 11362.715 (detailing how a person gains access to the MMP protections); *id.* § 11362.5(b)(1)(a) (outlining generally the types of people to whom the CUA applies). But see *id.* § 11358 (providing no explicit exception except the phrase "except as otherwise provided by law.").

92. 2010 Cal. Stat. ch. 708 (amending HEALTH & SAFETY § 11357).

93. *Id.*

94. *Id.*

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qualified patients for cultivating marijuana and penalties for non-medical possession have become more lenient, section 11358 does not reflect similar change.<sup>95</sup> This discrepancy contributes to the claim that California’s marijuana law is in a state of chaos.<sup>96</sup>

D. *A Growing Problem: Mandatory Felony Charge for Lesser Offenses*

Given the decriminalized status of cultivation in the context of the CUA<sup>97</sup> and the MMP,<sup>98</sup> as well as the lowered sentence for non-medical possession of a small amount of marijuana,<sup>99</sup> Section 11358 of the Health and Safety Code provides a hefty and inflexible felony sentence.<sup>100</sup> A mandatory felony charge for lesser offenders is a problem because it lowers the chances of successful prosecution and negatively affects public opinion of the legal system.<sup>101</sup>

1. *Cost Versus Benefit: A Victory for Lesser Offenders*

Mandatory felony charges for lesser offenses decrease the likelihood of successful prosecution.<sup>102</sup> People weigh possible outcomes in terms of cost versus benefit when engaging in any activity, be it crossing the street or playing the lottery.<sup>103</sup> In the context of unlawful cultivation of marijuana, cultivators weigh the chances of getting caught and convicted against any benefits that they reap from cultivating marijuana.<sup>104</sup> This is a problem because “criminals prefer a small chance of a big punishment to a big chance of a small punishment.”<sup>105</sup> Thus, in the context of crime, it is “better to double the odds of conviction than to double

95. HEALTH & SAFETY §§ 11362.77, 11358.

96. See Michael Vitiello, Symposium, *Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 MCGEORGE L. REV. 63, 72 (2012) (detailing the confusion resulting from the two programs in light of federal laws).

97. HEALTH & SAFETY § 11362.5(b).

98. *Id.* § 11362.77.

99. *Id.* § 11357.

100. *Id.* § 11358.

101. See *infra* Part II.D.1 (discussing these arguments).

102. See Steven E. Landsburg, *Does Crime Pay?*, SLATE (Dec. 9, 1999, 3:30 AM), [http://www.slate.com/articles/arts/everyday\\_economics/1999/12/does\\_crime\\_pay.html](http://www.slate.com/articles/arts/everyday_economics/1999/12/does_crime_pay.html) (on file with the *McGeorge Law Review*) (explaining that criminals prefer a low chance of a higher sentence to a high chance of a lower sentence); see also Oren Bar-Gill & Oren Gazal-Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 354 (2006) (focusing on the fact that prosecutors can increase plea bargains even in situations where the defendant is innocent). While that article deals with plea bargains for innocent defendants, the same principle would seem to apply to guilty defendants who have a low chance of successful conviction. *Id.* Defendants with a higher chance of acquittal and much to lose will take their chances. *Id.* When the odds are evened—when prosecutors have discretion to provide lower sentences—the defendant will likely be more willing to accept a plea. *Id.*

103. See Landsberg, *supra* note 102 (using the lottery as an example of the average person’s cost-benefit analysis).

104. See *id.* (applying the same cost-benefit reasoning to criminal activities).

105. *Id.*

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the severity of the punishment.”<sup>106</sup> This point becomes more poignant in the context of plea bargains.<sup>107</sup>

In order to obtain convictions in the form of plea bargains, prosecutors rely on their ability to offer a more favorable outcome to the defendant.<sup>108</sup> In plea bargaining, or the process of convincing the defendant to plead guilty in exchange for lesser charges or penalties, prosecutors employ both the “carrot” and the “stick.” The carrot represents a guaranteed lower sentence, and the stick is the possibility of a higher sentence if the defendant loses at trial.<sup>109</sup> In the case of marijuana cultivation, prosecutors are not allowed to offer a misdemeanor cultivation charge in exchange for a guilty plea.<sup>110</sup> That is, prosecutors have no “carrot” to offer the defendant.<sup>111</sup>

The fact that defendants can potentially employ the CUA affirmative defense makes matters more difficult for prosecutors seeking plea bargains.<sup>112</sup> Plea bargains are the most common means of obtaining convictions in the United States.<sup>113</sup> Under current law, a defendant would weigh any deal that the prosecutor offers against the likelihood that they will prevail under the CUA, which sweeps broadly.<sup>114</sup> Given a defendant’s lack of incentive to plead guilty to a “straight felony” and the presence of an arguable affirmative defense, plea bargains will be more difficult to obtain in light of a CUA affirmative defense.<sup>115</sup>

106. *Id.*

107. *See generally* Oren Bar-Gill & Oren Gazal-Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 354 (2006) (focusing on the fact that prosecutors can increase plea bargains even in situations where the defendant is innocent).

108. *See id.* (explaining that broader prosecutorial discretion to offer lower sentences has a positive correlation to the number of plea bargains that can be obtained in cases where the defendant has a higher chance of acquittal).

109. *See generally id.* at 355 (providing an analysis of how defendants approach plea bargains).

110. *See generally* NEIL P. COHEN ET AL., CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS 352–412 (3d ed. 2008) (discussing the general legal framework surrounding the plea bargaining process). Prosecutors may not offer a lower sentence than is legally required by law. *Id.* Any plea bargain a prosecutor offered would have to be lowered by peripheral concerns like dismissing other pending charges in exchange for the plea. *Id.*

111. COHEN ET AL., *supra* note 110. In general, prosecutors will turn to any other charges, such as possession for sale, or just possession in order to secure some kind of plea bargain. *Id.* Without charging those extra offenses, there is no way to reduce Section 11358 to a misdemeanor. *Id.*; CAL. HEALTH & SAFETY CODE § 11358 (West 2007).

112. HEALTH & SAFETY § 11358; *see also supra* notes 68 and accompanying text (discussing the CUA’s catch-all provision, which may include people who do not suffer from serious illness).

113. *See* Bar-Gill & Gazal-Ayal, *supra* note 107, at 353 (“About 95 percent of all convictions in the United States are secured with a guilty plea, most of them through plea bargaining.”).

114. *See generally* California v. Kelly, 222 P.3d 186, 188 (Cal. 2010) (“[T]he CUA provides an affirmative defense to prosecution for the crimes of possession and cultivation.” (emphasis omitted)).

115. *See id.* (explaining that the CUA could not be limited by the requirements of the MMPA, and was therefore still available to eligible defendants who did not qualify for protection under the MMPA); HEALTH & SAFETY § 11358. The terms “straight felony” and “wobbler” do not appear in statutory language, but the a wobbler is a crime that is punishable either by time in state prison or pursuant to California Penal Code Section 1170(h), which are felony sentences, or in the alternative, by up to one year in the county jail, a misdemeanor

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To make matters worse, prosecutors are dealing with a public that does not necessarily associate cultivation of modest amounts of marijuana with criminal behavior<sup>116</sup> and the defendant's own sense of fairness could make obtaining a plea even more difficult.<sup>117</sup>

### 2. *The Pen Versus the Sword: A Net Loss for the Justice System*

Charging lesser offenders with a straight felony has negative consequences for the justice system.<sup>118</sup> The heated debate concerning California's marijuana policy is becoming broader.<sup>119</sup> The California Department of Public Health website lists three patient advocacy groups as sources of information about marijuana and the law: Americans for Safe Access (ASA), CA NORML (CAN), and the Marijuana Policy Project (MPP).<sup>120</sup> Each website provides legal updates, advocates for broadened use, or blogs about experiences with marijuana law.<sup>121</sup> The fact that a government website funnels visitors to marijuana advocacy groups may suggest a social acceptance of marijuana not previously present in California.<sup>122</sup> In 2010, Proposition 19, an effort to decriminalize recreational use of marijuana in California, received over forty percent of the votes.<sup>123</sup> Although it did not pass, it represented a large number of Californians who do not view marijuana use as criminal activity. With so many people supporting some degree of marijuana use, harsh penalties for lesser offenses will work against law enforcement.<sup>124</sup> Ultimately, a law inconsistent with social expectations hurts the

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sentence. *California v. Super. Ct.*, 60 Cal. Rptr. 2d 93, 96 (1997).

116. See *infra* Part II.D.2 (noting that the California Department of Public Health provides the public with contact information to marijuana advocates on the Department's website).

117. See Avshalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 98 (2010) (stating that a defendant is still likely to reject a good deal if he or she thinks it is unfair).

118. See *infra* note 125 and accompanying text (stating that the success of the justice system depends on the public's agreement with its implementation).

119. See Vitiello, *supra* note 96, at 63 (describing an argument concerning marijuana legalization heard on NPR as uncivil and impassioned but ultimately tired and "unenlightening").

120. *Medical Marijuana Program*, CAL. DEP'T OF PUB. HEALTH, <http://www.cdph.ca.gov/PROGRAMS/mmp/Pages/default.aspx> (last updated Jan. 8, 2013, 9:42 AM) (on file with the *McGeorge Law Review*).

121. ASA, <http://www.safeaccessnow.org/> (last visited Jan. 7, 2012) (on file with the *McGeorge Law Review*); CAL. NORML, <http://www.canorml.org/> (last visited Jan. 7, 2012) (on file with the *McGeorge Law Review*); MARIJUANA POL'Y PROJECT, <http://www.mpp.org/> (last visited Jan. 7, 2012) (on file with the *McGeorge Law Review*).

122. *Medical Marijuana Program*, *supra* note 86.

123. Charles Cooper, *Pot Law Hopes Dashed as California Votes Down Prop. 19*, CBS NEWS (Nov. 3, 2010, 2:10 AM), [http://www.cbsnews.com/8301-503544\\_162-20021581-503544.html](http://www.cbsnews.com/8301-503544_162-20021581-503544.html) (on file with the *McGeorge Law Review*).

124. *Id.*; see also *infra* note 125 and accompanying text (discussing the practical effects of treating defendants inconsistently with social expectations).

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legal system because, to be effectively employed, society must trust that the system is fair.<sup>125</sup>

### III. THE CARROT: EXPLORING A PARTIAL SOLUTION

This Part discusses one method of adapting the unlawful cultivation statute to become one of California's "wobblers."<sup>126</sup> It discusses the benefits of such a statute in cases of lesser offenders, as well as possible pitfalls such a statute would face.<sup>127</sup> Ultimately, this Part concludes that a wobbler statute would deal with small-scale illegal marijuana cultivators, but would not be a complete solution to California's problems.<sup>128</sup>

#### A. *Wobbling Toward a Solution*

In 2011, the California Assembly considered AB 1017, which would have amended section 11358 of the Health and Safety Code, turning it into an alternative misdemeanor felony statute,<sup>129</sup> or "wobbler."<sup>130</sup> Upon introduction of the bill, the author commented that the amended law would give prosecutors "discretion to charge either a misdemeanor or felony for marijuana cultivation," which would allow the district attorneys to enforce community standards.<sup>131</sup> The author also cited the resources needed to prosecute felonies rather than misdemeanors and the overcrowded condition of prisons in California.<sup>132</sup> On the other hand, the author stated, the change in law would not offer a "free pass" to

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125. See Leif H. Carter & Thomas F. Burke, REASON IN LAW 32 (8th ed. 2010) (stating that social values like stability and equality are important to an effective judiciary).

126. See *infra* Part III.A (discussing AB 1017).

127. See *infra* Part III.B–C (discussing the benefits and drawbacks of wobbler statutes in the context of marijuana cultivation).

128. See *infra* Part III.D–E (exploring some reasons why simply creating a wobbler statute would not constitute a complete solution).

129. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011) (summarizing the effect of the proposed law).

130. See *Beckway v. DeShong*, 717 F. Supp. 2d 908, 920 (N.D. Cal. 2010) (indicating that in criminal law jargon, the offenses that a prosecutor can charge as either felonies or misdemeanors are known as "wobblers").

131. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2 (Cal. May 3, 2011).

132. *Id.* The author expressed this concern before implementation of Assembly Bill 109 (AB 109). *Id.* The California Legislature passed AB 109 in response to the Supreme Court ruling in *Brown v. Plata*. See 131 S. Ct. 1910 (2011) (holding that overcrowding in Californian prisons violated the Eighth Amendment). The desired effect of this legislation is to reduce the number of non-serious, non-violent, and non-sex offenders in state prison, instead sending them to serve felony sentences in county jail. *Public Safety Realignment*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment> (last visited Jan. 10, 2013) (on file with the *McGeorge Law Review*). For an exhaustive legislative analysis of AB 109, see Steven Thomas Fazzi, Comment, *A Primer on the 2011 Corrections Realignment: Why California Placed Felons Under County Control*, 44 MCGEORGE L. REV. 423 (2013).



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anyone, but merely the possibility of a lesser charge for “backyard grows and trimmers.”<sup>133</sup>

In support of AB 1017, the California Public Defenders Association argued that the change would “untie the hands” of district attorneys, aligning the unlawful cultivation statute with “a more consistent and sensible sentencing scheme.”<sup>134</sup> Citing the discrepancy between Health and Safety Code sections 11357 (possession) and 11358 (cultivation), the Mendocino County District Attorney argued that it makes no sense to prosecute a person differently for the same amount of marijuana just because one person possessed marijuana that was still on the plant.<sup>135</sup>

B. *The Benefits of Wobblers*

In California, many crimes may be charged or sentenced as a misdemeanor or a felony. This determination is based on the language of the statute, how the prosecutor files the complaint, and how the court determines the sentence.<sup>136</sup> The statutory language that allows a crime to be charged as a wobbler is contained in the California Penal Code.<sup>137</sup> Only when a statute explicitly allows such a sentencing scheme are prosecutors allowed to exercise discretion whether to charge a felony or a misdemeanor for violation of that statute.<sup>138</sup>

Under a wobbler statute, prosecutors and judges have discretion to reduce the possible sentence.<sup>139</sup> When a prosecutor charges a wobbler, that prosecutor may charge it either as a felony or a misdemeanor.<sup>140</sup> If the prosecutor charges the wobbler as a misdemeanor, any resulting conviction will be a misdemeanor conviction.<sup>141</sup> On the other hand, if the prosecutor charges the wobbler as a felony, courts still have discretion to reduce the felony sentence to a misdemeanor sentence.<sup>142</sup> Thus, wobbler statutes allow prosecutors and judges to

133. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011).

134. *Id.* at 3.

135. Letter from C. David Eyster, Mendocino County District Attorney, to Assembly Member Tom Ammiano (May 1, 2011) (on file with the *McGeorge Law Review*).

136. *California v. Super. Ct.*, 60 Cal. Rptr. 2d 93, 96 (Ct. App. 1997).

137. PENAL § 17(b).

138. *See California v. Lara*, 202 Cal. Rptr. 262 (Ct. App. 1984) (“A sentencing court has no discretion to deviate from the punishment prescribed by statute.”); *see also* Loren L. Barr, Comment, *The “Three Strikes Dilemma”: Crime Reduction at any Price?*, 36 SANTA CLARA L. REV. 107, 117–18 (1995) (stating that if a prosecutor charges the “wobbler” crime as a felony, the trial court has the discretion to reduce it to a misdemeanor).

139. Barr, *supra* note 138, at 117–18.

140. *Id.* at 118.

141. *Id.*

142. *See California v. Hawkins*, 121 Cal. Rptr. 2d 627, 648 (Ct. App. 2002) (stating that courts may reduce crimes to a misdemeanor); Barr, *supra* note 138, at 118 (“If the prosecutor charges the wobbler as a felony, the court has a number of methods at its disposal to reduce the crime to a misdemeanor.”).

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uphold community standards, just as comments on AB 1017 suggested.<sup>143</sup> Furthermore, turning section 11358 into a wobbler may increase the number of plea bargains and raise conviction rates.<sup>144</sup>

*C. The Drawback of Wobblers*

One drawback to the wobbler is that it may lead to uneven application of California law.<sup>145</sup> Critics of wobbler statutes argue that prosecutors may abuse their discretion.<sup>146</sup> As one commentator suggests, a prosecutor's discretion may include otherwise impermissible considerations, such as the prosecutor's own ideals, prejudices, or feelings against certain classes of people, or even the temptation to lighten their workload.<sup>147</sup> In short, the resulting prosecution will differ more because of geographical location than anything else.<sup>148</sup>

*D. To Wobble or Not to Wobble: A Wobbler Statute Would Be Consistent with Marijuana Law*

In the context of marijuana cultivation, a wobbler statute would be consistent with the overall legal scheme of medical marijuana.<sup>149</sup> Section 11362.77(c) of the California Health and Safety Code provides that individual counties "may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits . . . ."<sup>150</sup> In fact, California counties differ in the amounts of marijuana one may possess under the auspices of the MMP.<sup>151</sup> Some counties adhere to the state-mandated minimum, whereas others greatly increase the minimum.<sup>152</sup> Thus, different treatment based on geographical

143. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011).

144. See Loren Gordon, *Where to Commit a Crime if You Can Only Spare a Few Days to Serve the Time: The Constitutionality of California's Wobbler Statutes as Applied in the State Today*, 33 SW. L. REV. 497, 506 (2004) (indicating that prosecutors use wobbler statutes to obtain guilty or no contest plea bargains); see also *supra* Part II.D.1 (exploring how mandatory higher sentences can make obtaining convictions more difficult).

145. See generally Gordon, *supra* note 144, at 503, 505 (stating that prosecutors may inject their own personal ideals into their decisions, and policies differ between each prosecutor's office).

146. *Id.*

147. *Id.* at 503.

148. See *id.* ("The ensuing result is that the same crime may be prosecuted and punished differently depending on the jurisdictional forum rather than any number of permissible objective factors.")

149. See CAL. HEALTH & SAFETY CODE § 11362.77(c) (West 2007) (stating that counties may choose to allow how much medical marijuana a qualified patient may have in excess of the amount provided by the statute). While critics argue for a systemic change reducing prosecutorial discretion, this Comment takes the system at face value.

150. HEALTH & SAFETY § 11362.77(c).

151. *Gonzales v. Raich*, 545 U.S. 1, 31 n.41 (2005).

152. *Id.*; see also Caplan, *supra* note 17, at 132 ("California counties also exhibit great variation as to how much marijuana a patient may possess.")

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location is implicit in the MMP. Creating a wobbler statute would, consistent with section 11362.77 of the California Health and Safety Code, allow counties to treat offenders consistent with community standards.<sup>153</sup> The California District Attorneys Association (CDAA), the California Police Chiefs Association (CPCA) and the California Narcotics Officers' Association (CNOA), however, argued against making section 11358 a wobbler.<sup>154</sup>

The CNOA argued against AB 1017 on the grounds that decreased penalties for marijuana cultivators “amounts to an improvement” in the situations of those who have invaded the market with illegal activities.<sup>155</sup> Looking at the characteristics of wobbler statutes, at least in some cases, the CNOA was correct.<sup>156</sup> Because there would be no statutory guideline for how to apply the new wobbler, it is possible for a district attorney to charge a defendant with only a misdemeanor 11358, regardless of the size or location of the cultivation.<sup>157</sup> This means that it would be possible to charge a person with a misdemeanor who had grown multiple thousands of marijuana plants. Thus, turning the unlawful cultivation statute into a wobbler would fail to address larger plantations and the valid concern that the CNOA expressed in its opposition to AB 1017.<sup>158</sup>

*E. An Incomplete Solution*

The legislature did not pass AB 1017.<sup>159</sup> However, it would have been an incomplete solution because it only addressed two of the issues with the current cultivation statute: low probability of conviction and inconsistency with social norms.<sup>160</sup> A better solution to the problem would also address the CNOA's concerns.

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153. HEALTH & SAFETY § 11362.77(c); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011).

154. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 3 (Cal. May 3, 2011) (setting out the CNOA's objections to AB 1017 and listing the CDAA, the CPCA, and the CNOA as opponents to AB 1017).

155. *Id.*

156. See generally *id.* (failing to set any statutory guidelines for application of a misdemeanor charge); *California v. Hawkins*, 121 Cal. Rptr. 2d 627, 648 (Ct. App. 2002) (stating that courts may use their discretion to reduce felony crimes to misdemeanors).

157. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011) (explaining that the misdemeanor charge could be used for lesser offenders); see also AB 1017, 2011 Leg., 2011–20012 Sess. (Cal. 2011) (as introduced on February 18, 2011, but not enacted) (providing no restriction for offering a misdemeanor charge to large-scale cultivators or those who cultivate in specific areas of the state).

158. *Id.*

159. BILL HISTORY OF AB 1017, (Feb. 1, 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_1001-1050/ab\\_1017\\_bill\\_20120201\\_history.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1001-1050/ab_1017_bill_20120201_history.html) (on file with the *McGeorge Law Review*).

160. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011); see also Gordon, *supra* note 144, at 506 (alluding to the fact that prosecutors use wobbler statutes to increase the chances of conviction by offering plea bargains).

## IV. FINDING A MORE COMPLETE SOLUTION

This Part explores in greater detail the problems that result from large-scale illegal marijuana cultivation and use of public lands for such cultivation.<sup>161</sup> Specifically, this Part illustrates how violence and marijuana cultivation are often linked, and examines the various ways illegal marijuana cultivation contributes to destruction of the environment.<sup>162</sup> Finally, this Part explores some economic implications of regulating marijuana cultivation and concludes that such regulation could help deter larger, more environmentally harmful cultivation.<sup>163</sup>

A. *Unlawful Cultivation as a Social Harm*

Marijuana cultivation may be legal under certain circumstances, but unlawful cultivation is still linked with various social harms, particularly violence and environmental degradation.<sup>164</sup> This section explores these social harms to better define policy goals and formulate a new cultivation statute.

1. *Unlawful Cultivation and Violence*

In September 2010, the Fresno County Board of Supervisors, citing recent violence, passed an emergency initiative to ban the outdoor cultivation of medical marijuana.<sup>165</sup> In December 2011, the City of Fresno passed a similar ban after a man was killed trying to steal marijuana from an outdoor cultivation site.<sup>166</sup> In January 2012, the city extended the ban, asserting that outdoor marijuana cultivation led to violent crime.<sup>167</sup>

Fresno is not the only California city that has seen violence linked to marijuana cultivation.<sup>168</sup> Evidence from multiple counties suggests that violence

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161. See *infra* Part IV.A.1 (discussing violence and environmental degradation).

162. See *infra* Part IV.A. (summarizing some of the problems with unlawful marijuana cultivation on public land).

163. See *infra* Part IV.B (noting that the CAMP program might have created more demand for marijuana and that the legislature could take a different approach to reduce demand).

164. See *infra* Part IV.A.1–2 (discussing the problems that are linked to marijuana cultivation).

165. Gene Haagenson & Tommy Tran, *Fresno County Passes Temporary Ban on Outdoor Marijuana Gardens*, ABC LOCAL (Sept. 4, 2010), <http://abclocal.go.com/kfsn/story?section=news/local&id=7668091> (on file with the *McGeorge Law Review*).

166. Gene Haagenson, *Fresno City Council Bans Outdoor Marijuana Cultivation*, ABC LOCAL (Dec. 15, 2011), <http://abclocal.go.com/kfsn/story?section=news/local&id=8468085> (on file with the *McGeorge Law Review*).

167. Gene Haagenson, *Fresno Extends Ban on Outdoor Marijuana Growing*, ABC LOCAL (Jan. 26, 2012), <http://abclocal.go.com/kfsn/story?section=news/local&id=8520661> (on file with the *McGeorge Law Review*).

168. E.g., Diana Marcum, *Central Valley's Booming Medical Marijuana Crop Draws Violence*, L.A. TIMES (Oct. 2, 2010), <http://articles.latimes.com/2010/oct/02/local/la-me-pot-crop-20101003> (on file with the *McGeorge Law Review*) (detailing the heightened level of violence associated with marijuana cultivation); Sean

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associated with marijuana cultivation is a serious problem California.<sup>169</sup> In April 2009, law enforcement officials in Humboldt County responded to a home invasion.<sup>170</sup> The target was a marijuana “grow house.”<sup>171</sup> While officials suggested that violence of this kind goes unreported due to the uncertain legality of growing marijuana, they cited eight occasions between April 2008 and April 2009 in which violence was used against marijuana cultivators.<sup>172</sup> Elsewhere, similar episodes have occurred; for example, a gang-related home-invasion in Lindsay, California resulted in death.<sup>173</sup> Local marijuana vendors have also recognized the violence surrounding marijuana cultivation.<sup>174</sup>

One of the salient features of large-scale marijuana grow operations is the presence of firearms.<sup>175</sup> In September 2011, law enforcement officials raided multiple large-scale grow operations throughout California, many of which also yielded firearms.<sup>176</sup> In a raid in San Mateo County that yielded over 5,000 marijuana plants, law enforcement officers found a loaded .22 caliber rifle.<sup>177</sup> In the same month, a raid in Humboldt County that yielded over one-million dollars’ worth of marijuana also yielded three firearms.<sup>178</sup> An investigation in Napa County that began in September 2011 and concluded in October of the same year yielded a .22 caliber sawed-off rifle, a .22 caliber handgun, five shotguns, and four other rifles.<sup>179</sup> As Fresno’s police chief told the Fresno City Council in January 2012: “The people that are protecting those groves have armed themselves with firearms.”<sup>180</sup> To make matters worse, law enforcement

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Garmire, *Growing Violence: Marijuana Gardens Are Robbery Targets Throughout Humboldt County*, TIMES-STANDARD (Apr. 19, 2009, 1:29 AM), [http://www.times-standard.com/localnews/ci\\_12177281](http://www.times-standard.com/localnews/ci_12177281) (on file with the *McGeorge Law Review*).

169. *E.g.*, *supra* notes 167–168 (exploring violence linked with cultivation); *infra* notes 170–171, 174–177 and accompanying text (detailing more violence associated with cultivation).

170. Garmire, *supra* note 168.

171. *Id.*

172. *Id.*

173. Marcum, *supra* note 168.

174. *See* California v. Colvin, 137 Cal. Rptr. 3d 856, 859 (Ct. App. 2012) (“Patients are allowed no more than one ounce of marijuana in one day, and, to minimize the chance of crime, each Holistic establishment has no more than two to three pounds of marijuana at any time.”).

175. *E.g.*, *infra* notes 177–180 (discussing the firearms that police found during various raids).

176. *See generally id.* (demonstrating a link between firearms and cultivation).

177. *More Than 5,000 Pot Plants Seized in San Mateo Co.*, ABC NEWS (Oct. 4, 2011), <http://abclocal.go.com/kgof/story?section=news/local/peninsula&id=8378328> (on file with the *McGeorge Law Review*).

178. Press Release, Humboldt Cnty. Dist. Att’y, Large Scale Marijuana Cultivation Operation Discovered Near Dinsmore (Oct. 28, 2011), available at <https://co.humboldt.ca.us/distattypdf/PR.Criminal.Dinsmore.MJRaid.Subm.2011.1028.pdf> (on file with the *McGeorge Law Review*).

179. Napa Special Investigations Bureau, *Marijuana Busts Yield Towering Plants, 19 Arrests*, NAPA VALLEY PATCH (Oct. 14, 2011), <http://napa.patch.com/articles/photos-show-towering-super-pot-plants> (on file with the *McGeorge Law Review*).

180. Haagenson, *Fresno Extends Ban on Outdoor Marijuana Growing*, *supra* note 167.

officials have cited violent Mexican drug cartels as the culprits behind large-scale marijuana grow operations.<sup>181</sup>

## 2. *Unlawful Cultivation and Environmental Degradation*

Large-scale marijuana cultivation damages California's environment and natural resources.<sup>182</sup> In Yosemite National Park, for instance, where sixty rangers patrolled over one-thousand square miles as of 2009, "[c]ultivating marijuana . . . has noticeably affected the water quality, animal life, and health and safety of the public."<sup>183</sup> In addition to the danger to wildlife and hikers, large-scale marijuana cultivation negatively affects California during drought years by diverting precious water resources.<sup>184</sup>

In 2007, rangers in Yosemite National Park located a marijuana grow operation that included over seven-thousand plants, herbicides, pesticides, and a complex irrigation system.<sup>185</sup> The National Park Service reported that substantial "natural resource destruction" resulted from the operation.<sup>186</sup> Cultivators divert natural water sources, even damming streams, to achieve effective irrigation systems.<sup>187</sup> Artificial irrigation systems lead to erosion of natural habitat, which affects wildlife.<sup>188</sup>

Large-scale marijuana cultivators harm wildlife indirectly through detriment to their habitat, and directly by killing animals, including endangered species, through the use of chemicals or by poaching.<sup>189</sup> Marijuana cultivators use pesticides and herbicides to keep their marijuana plants healthy.<sup>190</sup> Illegal marijuana cultivators will often use herbicides and pesticides that have been banned in California.<sup>191</sup> Further, cultivators may use generators, which can leak

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181. Tim McGirk, *Mexican Drug Cartels Set Up Shop in California Parks*, TIME (Aug. 22, 2009), <http://www.time.com/time/nation/article/0,8599,1917547,00.html> (on file with the *McGeorge Law Review*).

182. Jessica Intrator et al., Note, *Student Review of Selected Panels at the California State Bar's 2009 Environmental Law Conference at Yosemite*, 36 ECOLOGY L. CURRENTS 227, 228 (2009).

183. *Id.* at 227–28.

184. Jennifer Lance, *Marijuana Plantations Compound California Drought*, BLUE LIVING IDEAS (Oct. 7, 2009), <http://bluelivingideas.com/2009/10/07/marijuana-plantations-compound-california-drought/> (on file with the *McGeorge Law Review*).

185. *Marijuana Gardens Raided in Yosemite National Park*, NAT'L PARK SERV. (Aug. 14, 2007), <http://www.nps.gov/yose/parknews/marijuana2007.htm> (on file with the *McGeorge Law Review*).

186. *Id.*

187. Intrator et al., *supra* note 182, at 228.

188. *See id.* (stating that the grower's measures to divert water lead to negative consequences for fish and any habitat that the fish use to spawn).

189. *Id.*

190. *Id.*

191. Nancy Upham, *Be Safe on Our Public Lands: What to Do if You Encounter a Marijuana Cultivation Site*, U.S. FOREST SERVICE (Aug. 18, 2011), <http://www.fs.usda.gov/detail/inyo/alerts-notice/?cid=stelprdb5324909> (on file with the *McGeorge Law Review*).

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fuel into the soil and water supply.<sup>192</sup> Some cultivators leave hazardous materials, such as sewage and trash.<sup>193</sup> They create a danger of wildfire through the use of chemicals, generators, and cooking fires.<sup>194</sup> Aside from the indirect effect on wildlife, cultivators may poach wildlife.<sup>195</sup> In Yosemite, cultivators kill animals for a variety of purposes. They “hunt[] deer for meat, they kill[] bear to hang as a deterrent to other wildlife, and even poach[]” endangered species, such as the ring-tail cat, to keep “for a souvenir.”<sup>196</sup>

Even on the federal level, agencies recognize the deleterious environmental effects of marijuana cultivation.<sup>197</sup> The Office of National Drug Control Policy stated that “[o]utdoor marijuana cultivation . . . has negative environmental effects.”<sup>198</sup> The paper cited the same kinds of problems that have plagued Yosemite National Park: “chemical contamination and alteration of watersheds; diversion of natural water courses; elimination of native vegetation; wildfire hazards; poaching of wildlife; and disposal of garbage, non-biodegradable materials, and human waste.”<sup>199</sup> In California, the problem is so prevalent that the United States Forest Service has printed warnings in the Mendocino National Forest that instruct hikers and visitors on what to do if they stumble upon a marijuana grow operation.<sup>200</sup>

B. *Trends in Unlawful Cultivation*

Legislative action can affect the market for marijuana just as it affects any other market.<sup>201</sup> Because the market for marijuana encompasses not just the sale and use, but the production of marijuana, the legislature should consider the economic implications of its choice to amend the cultivation statute.<sup>202</sup>

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192. Intrator et al., *supra* note 182, at 228.

193. Upham, *supra* note 191.

194. Intrator et al., *supra* note 182, at 228.

195. *Marijuana Gardens Raided*, *supra* note 185.

196. Intrator et al., *supra* note 182, at 228.

197. *Marijuana Cultivation on U.S. Public Lands: Hearing Before the Senate Caucus on Int’l Narcotics Control*, 112th Cong. (2011) (statement of Gil Kerlikowske, Dir., Off. of Nat’l Drug Control).

198. *Id.*

199. *Id.*

200. *Marijuana Cultivation on U.S. Public Lands: Hearing Before the Senate Caucus on Int’l Narcotics Control*, 112th Cong. (2011) (statement of Congressman Mike Thompson, Representative, Cal. 1st Cong. Dist.).

201. See *infra* Part IV.B.1–2 (noting that the CAMP program might have created more demand for marijuana, and that the legislature could take a different approach to reduce demand).

202. *Id.*

1. *Some Basic Economic Observations: Eradication Efforts and the Price of Marijuana*

In order to define policy goals for controlling illegal marijuana cultivation, it is useful to examine the economic history of marijuana cultivation. Factors to consider include the number of plants grown and their location in relation to the cost of marijuana and California's legal stance regarding marijuana cultivation.<sup>203</sup> At first glance, it is clear that illegal marijuana cultivation has risen significantly since the advent of the CUA and MMP.<sup>204</sup>

In 1983, amid the war on drugs<sup>205</sup> and during a time that NORML calls its darkest days,<sup>206</sup> California saw the creation of the Campaign Against Marijuana Planting (CAMP).<sup>207</sup> CAMP, which ceased operations when the legislature cut its funding in 2012,<sup>208</sup> was a "unique multi-agency law enforcement task force managed by the Bureau of Narcotic Enforcement."<sup>209</sup> It consisted of federal, state,

203. Basic economic principals tell us that the number or amount of a particular product produced, in this case marijuana, affects the market for that product. See Matt Johnson, *Economic Basics: Supply and Demand*, SOPHIA (last visited Jun. 25, 2013), <http://www.sophia.org/economic-basics-supply-and-demand-tutorial> (on file with the *McGeorge Law Review*) (demonstrating how higher supply correlates to lower demand). California's interest in public safety requires it to concern itself with the location of marijuana cultivation sites, and Section 11358 of the Health and Safety Code makes it clear that cultivation should be considered within the broader scheme of marijuana statutes. See CAL. HEALTH & SAFETY CODE § 11358 (West 2007) (alluding to legal marijuana cultivation by including the language "except as otherwise provided by law."); see also Part IV.A (exploring the public safety hazards associated with marijuana cultivation).

204. See CAMPAIGN AGAINST MARIJUANA PLANTING, CAMP FINAL REPORT 1 (1983), available at <http://library.humboldt.edu/humco/holdings/CAMP.htm> [hereinafter CAMP FINAL REPORT] (on file with the *McGeorge Law Review*) (discussing the history of the Campaign Against Marijuana Planting (CAMP)).

205. Richard Nixon declared the "War on Drugs" in 1971. See Frontline, *Thirty Years of America's Drug War*, PBS (last visited June 25, 2013), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (on file with the *McGeorge Law Review*) (providing a timeline outlining many of the more significant events in the "War on Drugs").

206. See *Marijuana Law Reform Timeline: NORML's and Marijuana's Law Reform Timeline in America*, NORML (last visited June 25, 2013), <http://norml.org/about/item/marijuana-law-reform-timeline> (on file with the *McGeorge Law Review*) (describing the time period from 1980 to 1988 as "NORML's darkest days politically and financially with most of the political efforts directed to" lobbying and organizing).

207. See CAMP FINAL REPORT 1, *supra* note 204 and accompanying text.

208. Julie Johnson, *Annual Pot Eradication Program Scaled Back*, THE PRESS DEMOCRAT (Jul. 24, 2012), <http://www.pressdemocrat.com/article/20120724/ARTICLES/120729742> (on file with the *McGeorge Law Review*).

209. *Campaign Against Marijuana Planting*, OFF. ATTY. GENERAL, <http://ag.ca.gov/bne/camp.php> (last visited Jan. 6, 2012) (on file with the *McGeorge Law Review*); see also CAMP FINAL REPORT, *supra* note 204 (listing all the agencies involved under federal and state categories). In CAMP's inception year, it included the following federal agencies: Drug Enforcement Administration; Bureau of Land Management; U.S. Forest Service; U.S. Marshal's Service; Alcohol, Tobacco and Firearms; U.S. Customs; Federal Bureau of Investigation; Bureau of Indian Affairs; and the following state agencies: Bureau of Narcotic Enforcement; Western States Information Network; Office of Emergency Services; California Department of Forestry; California Highway Patrol; and California Army National Guard. *Id.*



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and local agencies<sup>210</sup> with the overarching objective of significantly diminishing unlawful cultivation of marijuana in California.<sup>211</sup> The main focus of CAMP's work was decreasing cultivation and trafficking, with the goal of "increasing public and environmental safety by removing marijuana growers from public and private lands."<sup>212</sup>

By the late 1980s, critics claimed that organizations such as CAMP had only spurred the evolution of the marijuana market.<sup>213</sup> Critics of CAMP in particular claimed that efforts to eradicate the market by targeting large grows have merely caused marijuana farmers to establish "guerilla patches," which are harder to see using aerial surveillance techniques, and have also caused them to move their operations to public lands.<sup>214</sup> Critics also point to the increase in indoor grow operations.<sup>215</sup>

CAMP's data does show a lower number of eradicated plants after 1989, but only up to the mid-nineties.<sup>216</sup> According to CAMP, the raids between 1993 and 1996 yielded approximately the same number of plants as the few that had been seized in 1983, the year CAMP was organized.<sup>217</sup> Starting in 1997, however, the data shows a consistent increase in the number of plants seized per year, from over 100,000 in 1997 to over 1.6 million in 2006.<sup>218</sup> In 2009, "California produced more outdoor-grown marijuana . . . than Mexico,"<sup>219</sup> most of it grown on public land.<sup>220</sup> One report indicates that the potential amount of marijuana produced in California totals as much as 155,042 metric tons per year.<sup>221</sup> The data

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210. See CAMP FINAL REPORT, *supra* note 204, at 1 (including the U.S. Drug Enforcement Administration; U.S. Bureau of Land Management; U.S. Forest Service; Office of National Drug Control Policy; U.S. National Park Service; Governor's Office of Emergency Services; California National Guard; California Department of Fish and Game and California State Parks, as well as police departments and sheriff's offices).

211. *Id.*

212. *Campaign Against Marijuana Planting*, *supra* note 209.

213. James B. Slaughter, *Marijuana Prohibition in the United States: History and Analysis of a Failed Policy*, 21 COLUM. J. L. & SOC. PROBS. 417, 459 (1988).

214. *Id.* at 459–60.

215. *Id.* at 460. CAMP came under fire for other reasons as well. See Gayle J. Mayfield, Comment, *Florida v. Riley: The Beginning or the End of "Big Brother"?*, 12 CRIM. JUST. J. 53, 59–60 (1990) (describing the use of injunctions against CAMP in the context of search and seizure law).

216. See 2009 CAMPAIGN AGAINST MARIJUANA PLANTING STATISTICS, HUMBOLDT ST. UNIV. (2006), available at <http://library.humboldt.edu/humco/holdings/CAMP/CAMP2009.pdf> (illustrating a decrease of over 60,000 plants from 1989 to 1990, but then a steep increase in eradicated plants after 1996) (on file with the *McGeorge Law Review*).

217. *Id.*

218. *Id.*

219. MARIJUANA PRODUCTION IN CALIFORNIA, CENTRAL VALLEY CAL. HIDTA, 3 (2010).

220. See 2009 CAMPAIGN AGAINST MARIJUANA PLANTING STATISTICS, HUMBOLDT ST. UNIV. (2009), available at <http://library.humboldt.edu/humco/holdings/CAMP.htm> (on file with the *McGeorge Law Review*) (revealing that of 4,463,917 plants seized in 2009, 3,397,016 (76%) of them were seized on public land).

221. MARIJUANA PRODUCTION IN CALIFORNIA, *supra* note 219, at 4.

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appears to correlate with developments of recent marijuana laws.<sup>222</sup> The correlation suggests that California's legal stance on marijuana has an effect on illegal production, but a brief look at the economy of marijuana also helps explain these numbers.

One outdoor marijuana plant yields two-hundred grams, or seven ounces, of marijuana.<sup>223</sup> An indoor plant yields one-half that.<sup>224</sup> Between 2001 and 2005, the cost of one gram of marijuana averaged approximately six dollars.<sup>225</sup> Thus, where an indoor home cultivation of twenty plants would yield approximately twelve-thousand dollars' worth of marijuana, a larger cultivation of one-thousand plants, outdoors on public land, would yield over one-million dollars' worth of marijuana.<sup>226</sup> The cost, however—a possible felony conviction—would be the same.<sup>227</sup> Furthermore, CAMP is no longer functioning and eradication efforts on public land will be scaled back.<sup>228</sup> Thus, with a single, inflexible penalty for the cultivation for any amount of marijuana, the system has incentivized large-scale cultivation by keeping the penalties the same for higher amounts of marijuana.<sup>229</sup>

## 2. *Using the Law to Influence the Cultivation Economy*

Whether shifting large cultivation operations to farmland, or reducing the size of individual cultivation sites, California's marijuana statutes have affected cultivation economy, which inevitably affects the cultivators' behavior. For instance, there has been a recent increase in farmland utilization.<sup>230</sup> While

222. Compare 2009 STATISTICS, *supra* note 216, to the timing of the CUA, CAL. HEALTH & SAFETY § 11362.5 (West 2007) (enacted in 1996) and MMPA, CAL. HEALTH & SAFETY § 11362.71 (West 2007) (enacted in 2003) (showing a steady increase in marijuana eradication after 1997 and a sharp increase after 2003).

223. Jon Gettman, *Marijuana Production in the United States*, BULLETIN OF CANNABIS REFORM 7 (Dec. 2006), available at [http://www.drugscience.org/Archive/bcr2/MJCropReport\\_2006.pdf](http://www.drugscience.org/Archive/bcr2/MJCropReport_2006.pdf) (on file with the *McGeorge Law Review*).

224. *Id.*

225. See *id.* at 9 (listing prices ranging from \$5.91 to \$6.14). These numbers only approximate the value of marijuana, and like any other products, can fluctuate with time and market forces. See Lindy Stevens, *How Is the Street Value of Marijuana Determined*, MICHIGAN DAILY (Mar. 6, 2008), <http://www.michigandaily.com/content/how-street-value-marijuana-determined> (on file with the *McGeorge Law Review*) (describing a rough calculus performed by the Drug Enforcement Agency to determine drugs' street value). Based on DEA calculations, the price of marijuana can fluctuate significantly. *Id.*

226. See *id.* (showing prices for one gram of marijuana for the years 2001, 2002, 2003, 2004, and 2005 as \$6.14, \$6.79, \$5.83, \$5.47, and \$5.91 respectively).

227. See CAL. HEALTH & SAFETY CODE § 11358 (West 2007) (criminalizing cultivation of marijuana irrespective of the number of plants).

228. Johnson, *supra* note 208.

229. See Landsburg, *supra* note 102 and accompanying text (stating that criminals weigh the potential cost of crime with the potential benefits that they may reap from the crime).

230. See *Marijuana Cultivation on U.S. Public Lands: Hearing Before the Senate Caucus on Int'l Narcotics Control*, 112th Cong. (2011) (statement of Sen. Diane Feinstein, Chairman, U.S. Sen. Caucus on Int'l Narcotics Control) (citing an increase in farmland utilization and a decrease from seventy grows discovered on public land to thirty between 2009 and 2011).

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federally-led efforts to eradicate marijuana plantations continue, laws like the CUA and MMPA have contributed to the shift to farmland use in California.<sup>231</sup> The proposed statute would support small-scale cultivation and discourage large-scale cultivation on public lands, further expediting the shift.<sup>232</sup>

Another example of a legal change that has caused an economic shift is the recent downturn in marijuana prices. The recent legal shift to regulated marijuana appears to have dealt a blow to illegal marijuana growers all over the state by lowering the cost of marijuana.<sup>233</sup> Because Californians are now able to grow their own marijuana legally, demand is lower than in previous years.<sup>234</sup> Because the demand for marijuana is lower, the cost of marijuana has dropped.<sup>235</sup> In some areas of California that rely heavily on marijuana cultivation, the drop in prices has been catastrophic for the local economy.<sup>236</sup> Since supply is higher than demand, growers are forced to expand production to realize the same profits.<sup>237</sup> In the short term, large increases in production may have caused the rise in the number of marijuana plants that authorities eradicated on public land.<sup>238</sup> The proposed statute should address this escalation, something AB 1017 failed to do.

The breadth of possible economic responses to making section 11358 a wobbler underlines the incompleteness of AB 1017. In this economic environment, amending the cultivation statute to become a wobbler may have any of the following consequences: the price of marijuana would decrease more, leading to even larger plantations; a larger number of plantations throughout the state in light of the possibility of lower penalties; or there could be no noticeable effect.<sup>239</sup> Ideally, a wobbler would lower the price of marijuana further, making large-scale operations too costly in light of the chance of losing the entire crop to

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231. Sasha Khokha, *Where the Marijuana Grows: Feds Target Landowners*, NPR (Oct. 25, 2011), <http://www.npr.org/2011/10/25/141690170/where-the-marijuana-grows-feds-target-landowners> (on file with the *McGeorge Law Review*) (explaining that marijuana growers in California largely ignore federal authorities because of California marijuana law).

232. *E.g., id.* (arguing that eradication programs like that presented by CAMP are ineffective).

233. Michael Montgomery, *Plummeting Marijuana Prices Create a Panic in Calif.*, NPR (May 15, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=126806429> (on file with the *McGeorge Law Review*).

234. *See id.* (discussing the increase in supply in the California marijuana market, which also tends to suggest a decreased demand).

235. *See Id.* (exploring the effects of increased production of marijuana in California, including a decline in marijuana prices and consequently lower profits for suppliers).

236. *Id.* (“California’s pot economy is transforming, and it’s starting to resemble a real commodities market where only big players can compete.”).

237. *Id.*

238. *See* 2009 CAMPAIGN AGAINST MARIJUANA PLANTING STATISTICS, *supra* note 220 (showing an upward trend in spite of the felony charge under Section 11358).

239. As Professor Caplan has demonstrated, shifts in marijuana law have produced unintended results; these are merely some of the more likely results and do not represent an exhaustive list of the possibilities. *See* Caplan, *supra* note 17 (discussing consequences of recent marijuana legislation such as increased use of marijuana by younger people, massive increases in the number of qualified patients, and explosive commercialization of the marijuana market).

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eradication.<sup>240</sup> On the other end of the spectrum, there is the possibility that lower penalties might encourage would-be cultivators to go into business, even providing a friendly market for outside organizations such as drug cartels to exploit.<sup>241</sup> Based on the deleterious consequences of large-scale operations, particularly on public land, the latter possibility should be avoided at all costs, hence the CNOA's opposition to AB 1017.<sup>242</sup> In order to prevent the possible negative consequences, the proposed statute should increase penalties for large-scale cultivation.

The proposed statute should therefore be twofold, increasing penalties for major offenders while decreasing penalties for lesser offenders. Providing lower sentences for lesser offenders should not take pressure off people who grow thousands of plants for commercial gain while creating a public safety hazard and wreaking havoc on California's natural habitat.<sup>243</sup> The trend toward numerous large-scale operations demonstrates that the charges currently associated with section 11358 are not enough to deter major offenders.<sup>244</sup> The proposed statute should therefore function to encourage smaller grows by individuals, leading to decreased demand and lower marijuana prices.<sup>245</sup> At the same time, the proposed statute should block any attempt to create a safe haven for major offenders and drug cartels by mandating higher sentences for large-scale cultivation on public land.<sup>246</sup> Even if the statute does not end large-scale cultivation, it should encourage a shift to private lands, such as farmland, where environmental degradation will play a much smaller role. The proposed statute could encourage smaller marijuana gardens by providing a carrot—lower sentences—to lesser offenders, while simultaneously using the stick—increasing penalties for those who threaten California's public safety and environmental welfare—to achieve its public policy goals.<sup>247</sup>

## V. CULTIVATING A PROPOSED STATUTE

This Part focuses on the terms of the proposed statute. First, this Part examines the form and function of an unrelated criminal statute: California's

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240. See Montgomery, *supra* note 233 (observing that California's relaxed legal restrictions on marijuana have contributed to a drop in the drug's costs).

241. See McGirk, *supra* note 181 (discussing how Mexican drug cartels use the land in California State Parks for covert marijuana grow sites).

242. *Marijuana Cultivation on U.S. Public Lands*, *supra* note 230; *id.* (opening Statement of Sen. Charles E. Grassley, Co-Chairman, U.S. Sen. Caucus on Int'l Narcotics Control).

243. See *supra* Part IV.A.2 (discussing some of the ways that unlawful marijuana cultivation contributes to environmental degradation).

244. 2009 CAMPAIGN AGAINST MARIJUANA PLANTING STATISTICS, *supra* note 220.

245. See Montgomery, *supra* note 233 (observing that California's relaxed legal restrictions on marijuana have contributed to a drop in the drug's costs).

246. *Id.*

247. See *supra* Part IV (setting forth California's policy goals regarding marijuana cultivation).

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assault with a deadly weapon statute.<sup>248</sup> The assault with a deadly weapon statute is a wobbler, and mandates higher, felony sentences for more egregious behavior, providing a useful template for the proposed statute.<sup>249</sup> Then, it formulates statutory terms to address the policy goals discussed in previous sections, as well as statutory provisions that could be altered while still meeting certain policy goals.<sup>250</sup> This Part suggests that this statutory format is better-suited for dealing with California’s unique marijuana statutory scheme and the dangers of large-scale illegal marijuana cultivation.<sup>251</sup>

*A. Selecting an Appropriate Sentencing Guideline: Using Section 245 of the Penal Code as a Model*

Recent changes in marijuana law have led to a deluge of unintended consequences.<sup>252</sup> In amending a statute that has remained unchanged for thirty years, it is imperative that the statute is clear in its goals, consistent with the overall scheme of California marijuana law, is easy for police officers to effectively apply in the field, and causes minimal confusion in the courts. This section explores how the amended cultivation statute should be structured to maximize its effectiveness and minimize its confusion. The form of the proposed statute should resemble California’s assault with a deadly weapon statute because such a structure allows the legislature to decrease penalties for lesser offenders while requiring stricter sentences for major offenders.

California’s assault with a deadly weapon statute, section 245 of the Penal Code, provides a useful model.<sup>253</sup> Aggravating factors aside, section 245 deals with assault with deadly weapons, and provides that a “person who commits an assault . . . by any means of force likely to produce great bodily injury” may receive a misdemeanor sentence or a felony sentence of up to four years in prison.<sup>254</sup> A wobbler charge is available for both an assault with a firearm and an assault with any other deadly instrument.<sup>255</sup> From there, the number of years in prison increases depending on whether certain aggravating factors are present.<sup>256</sup>

248. CAL. PENAL CODE § 245 (West 2007).

249. See *infra* Part V.A (discussing the assault with a deadly weapons statute, Section 245 of the California Penal Code, as a model for an effective marijuana cultivation statute); see also, e.g., PENAL CODE § 245 (providing that the number of years that a person spends in prison for assault with a deadly weapon increase as the egregiousness of the offense increases).

250. See *infra* Part V.B–C (outlining and creating the proposed statute and discussing which portions of the proposed statute could be modified to meet specific legislative goals, such as exact quantity of marijuana).

251. See *infra* Part V.C (suggesting that elements such as the exact quantity and precise sentences could be changed without seriously diminishing the usefulness of the statute).

252. Caplan, *supra* note 17.

253. PENAL § 245.

254. *Id.* § 245(a)(1).

255. *Id.* § 245(a)(1)–(2).

256. See *generally id.* § 245 (aggravating factors are based on the type of weapon used and the nature of

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Depending on a defendant's choice of weapon or target, section 245 offers anything from a misdemeanor sentence to twelve years in prison.<sup>257</sup> For instance, if the perpetrator carries out the assault with a single action revolver—as opposed to a semiautomatic pistol—it is possible that the defendant could receive a misdemeanor sentence.<sup>258</sup> On the other hand, if the weapon is a semiautomatic, the possibility for a misdemeanor evaporates, and the law requires a heftier felony sentence of three, six, or nine years in prison.<sup>259</sup> If the weapon is a machine gun, the felony sentence jumps to four, eight, or twelve years in prison.<sup>260</sup> These graduated steps are consistent with a legislative scheme of controlling the use of semiautomatic weapons and machine guns.<sup>261</sup>

Other than supporting California's gun control policy, section 245 also supports a public policy of protecting emergency workers in the line of duty.<sup>262</sup> According to section 245, if defendants assault a person whom they know or should know is a peace officer or firefighter, the sentence is three, four, or five years in prison.<sup>263</sup> In a combination of policy considerations, section 245 merges the prohibited conduct to include punishments for assaulting emergency personnel with semiautomatic weapons and machine guns, with punishments reaching as far as six, nine, or twelve years.<sup>264</sup> The unlawful cultivation statute should resemble the assault with a deadly weapon statute, because this model allows increased penalties for specific types of conduct associated with marijuana cultivation with minimal confusion.

Rather than covering all marijuana cultivation with a blanket of higher penalties, which would contravene the clear steps toward leniency and legality, the legislature should amend the cultivation statute to punish major offenders more severely and lesser offenders less severely.<sup>265</sup> It is clear from the support for proposed changes in AB 1017 that legislators, defense attorneys, and at least one district attorney see the value in making the cultivation statute a wobbler.<sup>266</sup> On

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the victim. Higher penalties are imposed if the victim is a police officer or firefighter.)

257. Compare *id.* § 245(a)(1) (providing for a sentence in county jail), with *id.* § 245(d)(3) (setting forth a sentencing scheme of six, nine, or twelve years).

258. *Id.* Although Section 245(a)(2) covers assault with a firearm, Section 245(b) covers assault with semiautomatic weapons, which would not include a single-action revolver. *Id.* § 245(a)(2), (b).

259. *Id.* § 245(b).

260. *Id.* § 245(a)(3).

261. See *id.* § 30505(a) (West 2011) (“The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state.”); see also Hunter Starr, *Pandora’s Lockbox: Is the Legislature Locking Guns in a Box, or Unleashing Concealed Weapons?*, 43 MCGEORGE L. REV. 779 (2012) (exploring California’s public policy of gun control).

262. See *id.* § 245(c) (discussing punishment for defendants who assault police officers or firefighters).

263. *Id.*

264. *Id.* § 245(d)(3).

265. See *supra* Part III.D (discussing the suitability of wobbler statutes when it comes to marijuana cultivators).

266. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1017, at 2–3 (Cal. May 3, 2011); see also Letter from C. David Eyster, *supra* note 136 (asserting the Mendocino County District

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the other hand, it is clear from CAMP, the California District Attorneys Association, and from an environmental standpoint, that there are specific kinds of criminal behaviors associated with marijuana cultivation that should not be eligible for lowered sentences.<sup>267</sup>

#### B. *The Proposed Statute*

This Comment proposes a model marijuana cultivation statute that would increase penalties for specific types of conduct associated with marijuana cultivation while minimizing the resulting confusion. The first section of the unlawful marijuana cultivation statute should remain the same as the current statute.<sup>268</sup> Using the historical statutory language, with the addition of wobbler language, would minimize confusion.<sup>269</sup> Thus, a multipart cultivation statute would begin as section 11358(a) of the California Health and Safety Code: “Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or pursuant to subdivision (h) of section 1170 of the Penal Code.”<sup>270</sup>

The second section of the amended cultivation statute should concentrate on these public policy concerns: deterring large illegal operations, deterring the use of public land, deterring damage to public land, and deterring danger to the public.<sup>271</sup> Considering that large-scale grow operations present a more lucrative opportunity to anyone who would use violence to obtain or protect the plants and that large-scale operations often take place on public lands, cultivation of a large number of plants increases the probability and extent of violent crime and environmental degradation.<sup>272</sup> Thus, the second section of the new statute should increase penalties for cultivation of a larger number of plants.<sup>273</sup>

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Attorney C. David Eyster’s support for AB 1017).

267. *Id.*; see also *supra* Part IV.A–B (discussing the environmental implications of marijuana cultivation on public land and CAMP’s efforts to reduce that activity).

268. “Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.” CAL. HEALTH & SAFETY CODE § 11358 (West 2007 & Supp. 2013).

269. See *supra* Part II.C (noting that more recent cases interpreting the statute focus on the statute’s construction with the CUA, rather than the meaning of the statute itself).

270. HEALTH & SAFETY § 11358.

271. See *supra* Part IV.A (discussing all of these social issues).

272. *Id.*

273. The problem with a statutory attack on large cultivation sites is that the California Supreme Court has already held that a legal limit on the number of plants one may possess is an unconstitutional check on the will of the voters as it is applied to the CUA. *California v. Kelly*, 222 P.3d 186, 188 (Cal. 2010). On the other hand, because the CUA is an affirmative defense that can still be employed, and the amendment would not seek to limit the number of plants that could be claimed under the CUA, a higher sentence for a larger number of plants should be relatively safe from a constitutional challenge. See *id.* (holding that the provision of the Medical Marijuana Program limiting quantities of marijuana were only unconstitutional as applied to the CUA).

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In numerous grow operations shut down by CAMP, there have been thousands of marijuana plants at each major site, whether on public or private land.<sup>274</sup> Because large grows on public and private land can lead to violence and environmental degradation, the initial penalty increase should apply to both public and private land. The statutory number of plants should appeal to the common sense of voters and stay out of the reach of the CUA defense as applied<sup>275</sup>: for instance, five-hundred plants, mature or otherwise.<sup>276</sup> Due to the recent confusion regarding dispensaries,<sup>277</sup> the proposed statute should not raise the sentence too high for even this large number of plants. Section 11358(b) should read: “every person who cultivates five-hundred or more marijuana plants, regardless of the maturity of the plants, shall be punished by imprisonment in the state prison or pursuant to section 1170(h) of the Penal Code.” As such, organizations like the California District Attorneys Association can rest easy knowing that large-scale operations will still be punishable as a felony, while still preserving felony time in a county jail as a sentencing option.

The third section of the statute should address the public hazard of cultivation on public lands.<sup>278</sup> As discussed above, growth on public lands raises concerns simply not associated with growth on private lands, such as destruction of wildlife, increases chances of wildfires, and contamination of natural water sources.<sup>279</sup> As was the case in section 245 of the Penal Code, and because large plantations are particularly detrimental to public lands, the punishment for the number of plants should be joined with the public hazards of violence and environmental degradation.<sup>280</sup> Thus, section 11358(c) would read: “every person

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274. See 2009 CAMPAIGN AGAINST MARIJUANA PLANTING STATISTICS, available at [http://w3.calema.ca.gov/WebPage/oeswebsite.nsf/PDF/Campaign%20Against%20Marijuana%20Planting%20Program%20\(CAMP\)/\\$file/CAMP%20200K%20JO%20AM.pdf](http://w3.calema.ca.gov/WebPage/oeswebsite.nsf/PDF/Campaign%20Against%20Marijuana%20Planting%20Program%20(CAMP)/$file/CAMP%20200K%20JO%20AM.pdf) (last visited May 6, 2013) (on file with the *McGeorge Law Review*) (stating that in 2009, CAMP conducted 665 raids and seized over four-million plants).

275. See *California v. Kelly*, 222 P.3d 186, 188 (Cal. 2010) (holding that to the extent that the MMPA put a limit on the number of plants that could be grown under the protection of the CUA, it was unconstitutional). While the CUA does not place a limit on the number of plants that may be grown by a person, the MMP provides useful insight as to the number of plants that would be required by a seriously ill person. CAL. HEALTH & SAFETY CODE § 11362.77 (West 2007). The proposed should avoid the appearance of unconstitutionally amending the CUA.

276. According to Section 841 of title 21 of the United States Code, possession of one-thousand plants with the intent to distribute them can result in a sentence of “imprisonment which may not be less than 10 years or more than life.” 21 U.S.C. § 841(b) (2006). If the number of plants reaches one-thousand, then federal prosecutors can prosecute for a much higher sentence. *Id.* This way, California authorities can prosecute large-scale cultivators that fall slightly short of this federal requirement. See *id.* (requiring one-thousand plants for federal prosecution, which might conflict with state jurisdiction if the proposed state statute uses the same minimum quantity).

277. *E.g.*, Lindberg, *supra* note 64, at 59.

278. *E.g.*, Jessica Intrator et al., *supra* note 182, at 227 (2009) (stating that large-scale marijuana operations damage the environment and that cultivation on public land is becoming more prevalent).

279. See Part IV.A (exploring the various ways that cultivation on public lands destroys natural habitat and wildlife).

280. *Id.*



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who cultivates five-hundred or more marijuana plants, regardless of the maturity of the plants, in a place that the person knew was public land, or reasonably should have known was public land, shall be punished by imprisonment in the state prison for two, three, or four years.”

Because large-scale cultivators have grown far more than five-hundred plants,<sup>281</sup> the statute should offer a higher sentence for extremely large numbers of plants. Based on a cost-benefit analysis,<sup>282</sup> the statute should place a hefty cost on those seeking to reap substantial illegal gains. Thus, the statute should offer an even higher sentence for cultivators of one-thousand or more plants, such as a sentence of three, four, or five years. This system of sentencing enhancements by quantity of illegal drugs is consistent with other aspects of California drug law.<sup>283</sup> Section 11358(d) would read: “Every person who cultivates one-thousand or more marijuana plants, in a place that the person knew was public land, or reasonably should have known was public land, regardless of the maturity of the plants, shall be punished by imprisonment in the state prison for three, four, or five years.”

Overall, this proposed enhancement scheme would be consistent with the increased environmental damage that larger cultivation operations will inevitably cause. A graduated sentencing scheme will also raise potential cost with increased benefit, thereby lessening the incentives for growers.<sup>284</sup> It will also protect California from environmental degradation while protecting the public from the public safety hazards of armed cultivators on public lands.

This Comment proposes the following language for a new marijuana cultivation statute:

- (a) Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or pursuant to subdivision (h) of section 1170 of the Penal Code.
  
- (b) Every person who cultivates five-hundred or more marijuana plants on private land, regardless of the maturity of the plants, shall be punished by imprisonment in the state prison or pursuant to section 1170(h) of the Penal Code.

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281. *E.g., More Than 5,000 Pot Plants Seized in San Mateo Co., supra* note 177 (discussing a single raid that turned up more than five-thousand plants).

282. *E.g., Landsburg, supra* note 102 (stating that criminals weigh the potential cost of crime with the potential benefits that they may reap from the crime).

283. *See* CAL. HEALTH & SAFETY CODE § 11370.4 (West 2007) (raising the penalties incrementally with the amount of specified drugs).

284. *See supra* Part IV.B (describing how the current economic trends have led to increased production in order to reap the same profits).

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- (c) Every person who cultivates five-hundred or more marijuana plants, in a place that the person knew was public land, or reasonably should have known was public land, regardless of the maturity of the plants, shall be punished by imprisonment in the state prison for two, three, or four years.
- (d) Every person who cultivates one-thousand or more marijuana plants, regardless of the maturity of the plants, in a place that the person knew was public land, or reasonably should have known was public land, shall be punished by imprisonment in the state prison for three, four, or five years.

This proposed statute would therefore take into account both the scale of the illegal cultivation and its location, offering a misdemeanor charge to lesser offenders, while requiring minimum sentences for cultivators who threaten public safety and contaminate California's environment. The proposed statute should therefore facilitate a shift from large-scale cultivation to small-scale cultivation and from cultivation on public land to cultivation on private land.

*C. What Elements Could Be Changed*

There are several elements of the proposed statute that are approximations based on public policy goals. For instance, the numbers five-hundred and one-thousand in the second and third subparts have no intrinsic significance,<sup>285</sup> but represents a definite limit that was exceeded in the raids that CAMP conducted.<sup>286</sup> Mandating a specific number would help avoid any accusation that prosecutors were abusing their discretion, as there would be a mandatory minimum. On the other hand, it would then be possible for large-scale cultivators to plant just under five-hundred plants and avoid higher penalties. It is within the discretion of the legislature to determine whether five-hundred should be the limit or some other number, but the number should be high and definite.

The legislature also has the discretion to define what constitutes public land. For instance, the legislature may determine that certain types of public land may be punishable by higher penalties or lower penalties, such as public camp grounds, state parks, or municipal land. As an example, in more remote areas, environmental degradation may be the main concern, while in others public safety may play a larger role. Thus, the proposed statute may single out specific areas with numerous tourists as well as wildlife that could receive greater protection, such as Yosemite National Park. While there is room for discussion,

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285. *E.g.*, 21 U.S.C. § 841(b) (2006) (requiring at least one-thousand plants to prosecute).

286. *E.g.*, *More Than 5,000 Pot Plants Seized in San Mateo Co.*, *supra* note 177 (discussing a single raid that turned up more than five-thousand plants).

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the fact remains that the inflexibility of the unlawful cultivation statute does not reflect public opinion or legislative policy and it must be changed.

VI. CONCLUSION

California's marijuana laws have been trending toward lenience since the CUA in 1996.<sup>287</sup> Changing the cultivation statute to reflect this shift is the next step. At the same time, this Comment recognizes that California has been the site of rampant large-scale marijuana cultivation that has led to public safety hazards, degradation of the environment, and large expenditures in public tax money to regulate unlawful cultivation.

The new statute employs a "carrot and stick" approach to marijuana law. By turning the cultivation statute into a wobbler, the state can offer lesser offenders a "carrot"—a guaranteed lower sentence. The result will be some combination of deterring unlawful cultivation through increased chances of successful prosecution and raising the effectiveness of conviction through plea bargains in cultivation cases. The "stick" of higher penalties for larger plantations and cultivating on public lands will result in some combination of deterring cultivators from planting large cultivation sites and deterring cultivators from using public lands. On balance, a wobbler cultivation statute with internal enhancements for major offenders will increase the number of successful marijuana cultivation prosecutions, contain public disappointment with the justice system, reduce the cost of large-scale marijuana eradication efforts, and protect California's environment.

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287. CAL. HEALTH & SAFETY § 11362.5 (West 2007).