REFLECTIONS ON MEDICAL MARIJUANA PROSECUTIONS AND THE DUTY TO SEEK JUSTICE

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Whatever else may be said of state medical marijuana laws, few would disagree that they have generated a wide array of difficult legal issues. During the sixteen years since California passed the first modern state medical marijuana law, the Supreme Court alone has reviewed two medical marijuana cases. In 2001, the Court prevented medical marijuana caregivers from relying on the common law defense of medical necessity in *United States v. Oakland Cannabis Buyers' Cooperative*,[1] concluding that under the federal "Controlled Substances Act, the balance already has been struck against a medical necessity exception."[2] Just four years later, in *Gonzales v. Raich*,[3] the Court affirmed the federal government's authority under the Commerce Clause to prosecute the noncommercial, intrastate cultivation and possession of medical marijuana.[4] Meanwhile, federal trial and circuit courts have considered a variety of issues, including whether sick and dying patients have a fundamental right to medical marijuana;[5] whether physicians have a First Amendment right to recommend medical marijuana to patients;[6] and whether a provision of the Controlled Substances Act (CSA) designed to provide immunity to state and local undercover officers also shields a medical marijuana grower deputized by the City of Oakland.[7] State courts have faced an even more varied set of legal questions, with cases that present issues specific to state medical marijuana laws,[8] as well as cases that call on courts to address the relationship between federal and state marijuana laws.[9]

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1. 532 U.S. 483 (2001).
2. *Id.* at 499.
3. 545 U.S. 1 (2005).
4. *Id.* at 26–27, 32–33 (upholding federal prohibition of intrastate, noncommercial cultivation and possession of medical marijuana because it was an essential part of the broader regulatory scheme governing controlled substances).
5. Raich v. Gonzales, 500 F.3d 850, 859, 866 (9th Cir. 2007) (discussing how medical marijuana has not yet achieved the classification of a fundamental right that would be constitutionally protected).
6. Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (analyzing the interaction of the First Amendment with the ability of a doctor to discuss medical marijuana with his or her patient).
7. United States v. Rosenthal, 454 F.3d 943, 947–48 (9th Cir. 2006).
8. *E.g.*, People v. Colvin, 137 Cal. Rptr. 3d 856, 857–58 (Ct. App. 2012).
9. *See* Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467 (Ct. App. 2008) (considering federal preemption of state medical marijuana laws).

In the midst of these disputes, the application of rules of professional conduct to attorneys who practice medical marijuana law has received comparably little attention. Within the past few years, however, more attorneys have begun to consider this important issue, primarily as the result of two state ethics opinions. Both opinions focused on the application of Rule 1.2(d) of the American Bar Association's Model Rules of Professional Conduct to attorneys who advise medical marijuana patients and caregivers. Model Rule 1.2(d) provides the following:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[10]

It is not difficult to see how this provision might present a difficult question in the context of medical marijuana law. For example, is an attorney who advises her client in the negotiation of a lease to open a medical marijuana dispensary in compliance with this rule? In 2010, Maine's Bar Association became the first to weigh in on the question of "whether and how an attorney might act in regard to a client whose intention is to engage in conduct which is permitted by state [medical marijuana] law . . . but which . . . is a federal crime."[11] The Maine Commission advised a "case by case" evaluation of whether an attorney's advice on establishing a medical marijuana distribution business would run afoul of Model Rule 1.2(d), but cautioned that "participation in this endeavor by an attorney involves a significant degree of risk."[12] In 2011, the State Bar of Arizona became the second official ethics body to address this issue and adopted a position that appears to be somewhat more favorable than Maine's for medical marijuana attorneys. According to the Arizona opinion, "A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act . . . , despite the fact that such conduct potentially may violate applicable federal law" at least in certain circumstances.[13]

The application of Model Rule 1.2(d) to attorneys who advise patients and providers on how to comply with state medical marijuana laws undoubtedly presents a focused and pressing question of professional ethics. This essay argues that medical marijuana prosecutions raise equally challenging—albeit more nebulous—ethical problems. In particular, the prosecution of medical marijuana patients and providers pre-

10. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011).

11. Maine Ethics Opinion No. 199 (2010) (Advising Clients Concerning Maine's Medical Marijuana Act).

12. *Id.*

13. State Bar of Arizona Ethics Opinion 11-01 (2011) (Scope of Representation).

sents difficult and important questions about the exercise of discretion in light of the prosecutor's duty to seek justice. This essay does not seek to offer prosecutors specific advice about how to view medical marijuana prosecutions. Instead, it aims to illuminate some of the ethical issues a conscientious prosecutor should thoughtfully consider in deciding whether and how to pursue a medical marijuana prosecution.

Part I provides an overview of the prosecutor's ethical duty to seek justice and not merely to convict. Part II considers how this ethical duty may be implicated in federal and state medical marijuana prosecutions. I argue that medical marijuana cases can present particularly difficult ethical challenges for prosecutors because they involve a uniquely conflicted area of law that makes the careful exercise of prosecutorial discretion all the more important. Part III offers concluding remarks.

I. THE DUTY TO SEEK JUSTICE

Because of their unique role in the criminal justice system, prosecutors are subject to special ethical duties. While a criminal defense attorney is obligated to zealously advocate for her client, a prosecutor acts as a representative of the sovereign. She "is not simply a lawyer advocating the government's perspective of the case" but "is the alter ego of the [State] exercising its sovereign power of prosecution."[14] In this role, a prosecutor has a great deal of power in the form of nearly unfettered discretion to decide which cases to pursue and which charges to bring.[15] In recognition of the prosecutor's unique "responsibility of a minister of justice and not simply that of an advocate,"[16] Model Rule 3.8 provides for "Special Responsibilities of a Prosecutor," outlining specific requirements prosecutors should follow—for example, the obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[17] However, a prosecutor's ethical obligations extend beyond specific requirements. They are grounded in a general duty

14. United States v. Singleton, 165 F.3d 1297, 1299–1300 (10th Cir. 1999).

15. *See* United States v. Oakes, 11 F.3d 897, 899 (9th Cir. 1993) ("[W]e have no jurisdiction to review prosecutors' charging decisions, absent proof of discrimination based on suspect characteristics such as race, religion, gender or personal beliefs."); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 649 (1997) ("Despite the significant ramifications of the forum selection decision, there is little administrative direction or judicial oversight to guide federal prosecutors in exercising their discretion to choose among offenders eligible for federal prosecution."). Some states courts have been more receptive to arguments to constrain prosecutorial discretion, though even in those states, prosecutors retain a great deal of power in deciding who to prosecute and what charges to bring. *See, e.g.*, Jersey v. Lagares, 601 A.2d 698, 32 (1992) (holding that aspects of New Jersey's mandatory minimum drug sentencing scheme impermissibly delegated judicial sentencing powers to the prosecutor and requiring prosecutors to adopt guidelines to govern their decisions to seek enhanced sentences under the law).

16. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2011).

17. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2011).

under the ABA's Criminal Justice Standards "to seek justice, not merely to convict."[18]

Though the prosecutor's duty to "seek justice" is well ingrained in the criminal justice system and supported by a rich history,[19] the admonition is also highly generalized. The duty to seek justice is not a rule that typically requires a particular course of action in a particular setting—"it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just."[20] The broad nature of the injunction leaves open the possibility that it may "point in contradictory directions"[21] in a given case, and may even tempt a prosecutor to reflexively stretch the concept of "seeking justice" to fit his own preferences in every case. As one commentator put it: "What prosecutor doesn't think that he or she is 'seeking justice'?"[22] Indeed, some believe the duty should be abandoned because it is "unworkably vague for purposes of meaningful interpretation and application."[23]

Though it may be difficult to draw precise instruction from the duty to seek justice because of its fluid nature, many professional ethics scholars and practicing prosecutors have worked to give shape and structure to this broad ethical obligation so that it may help guide prosecutors in engaging in ethical reasoning. A thorough review of the deep literature in this area is beyond the scope of this essay; an impression of different conceptions of the duty is sufficient to appreciate why medical marijuana cases might pose difficult ethical challenges for prosecutors.

Some commentators have relied on the duty to seek justice to counsel prosecutors to follow a particular course of action in response to a legal problem. One commentator recently argued, for example, that the obligation to seek justice should lead prosecutors to voluntary refrain from seeking peremptory challenges.[24] Others have articulated different visions for understanding the duty to seek justice and considered how the duty might relate to some of the different responsibilities of a prosecutor.

18. ABA Standard for Criminal Justice 3.1-2(c) (1993).

19. *See generally* Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) (outlining the history of the prosecutor's duty to "seek" or "do" justice).

20. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV 635, 637 (2006).

21. Green, *supra* note 19, at 622.

22. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 378 (2001).

23. Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339 (2004); *see also* Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845, 850 (2011) (describing proposed revisions to the Criminal Justice Standards that describe "the prosecutor with more nuance and complexity" than implied through analysis of prosecutor's duty to seek justice).

24. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 372 (2010).

In *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, Fred C. Zacharias outlines a theory of the duty to seek justice based on prosecutorial power, arguing that "the fear of unfettered prosecutorial power is the impetus for the [prosecutor's] special ethical obligation."[25] By contrast, Bruce A. Green argues that a role-based justification for the duty to seek justice "best explains ordinary intuitions about the nature of prosecutors' special ethical obligations"[26] and may carry different practical implications for prosecutors than a power-based conception.

To better understand some of the considerations that may be implicated by the duty to seek justice, it may be helpful to briefly examine one recent account of the ethical obligation in more detail. In *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* R. Michael Cassidy attempts to give meaning to the special ethical obligations of prosecutors by looking to Aristotle's framework of virtue ethics.[27] Cassidy contends that virtue ethics is a useful tool for understanding the duty to seek justice because employing consequentialist or deontological theories to inform professional ethics decisions can present difficulties. Virtue ethics, Cassidy argues, can address the shortcomings of other theories because it is a teleological philosophy in which "[t]he proper threshold question" is "not 'what should one do?' but 'what kind of person should one be?'"[28] Singling out Cassidy's theory for closer inspection here is not meant as an endorsement of his approach. Instead, it is meant to serve as an example that highlights some of the different considerations and issues that may relate to the duty to seek justice.

Cassidy believes there are four key virtues that are important for guiding prosecutors in seeking justice: (1) Fairness, (2) Courage, (3) Honesty, and (4) Prudence.[29] By understanding and aiming to possess these virtues, Cassidy argues, prosecutors can more effectively engage in ethical reasoning to help guide their decision-making process in difficult cases. The virtue of fairness,[30] for example, "is concerned with right relations towards others"[31] and encompasses ideas like a concern for the well being of others for their own sake. In the context of making a deal with an accomplice for testimony, this virtue might counsel a prosecutor to be

25. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58 (1991).

26. Green, *supra* note 19, at 625.

27. *See generally* Cassidy, *supra* note 20, at 640–53 (section of the article discussing Aristotle and ethics).

28. *Id.* at 643–44.

29. *Id.* at 646–49.

30. Though this virtue is typically described as the virtue of justice, Cassidy adopts the "construction of justice as fairness . . . to avoid the obvious tautology that would result from attempting to identify the contours of a prosecutor's duty to 'seek justice' with reference to this cardinal virtue." *Id*. at 647–48.

31. *Id*. at 647.

attuned to whether the defendant making the deal played a more significant role than the person he is testifying against and to weigh that consideration in deciding what might be a fair deal, or whether to make a deal at all.[32] While fairness emphasizes reciprocity and equal treatment, "[c]ourage is the virtue that enables an individual to do what is good notwithstanding harm, danger or risk to themselves."[33] In the context of plea bargaining, for example, a prosecutor might rely on this virtue to reject a deal that is too lenient in exchange for testimony, even if doing so means risking a conviction of the other accomplice.[34] The virtue of honesty requires a person to be comfortable with incongruity and to be "willing to accept circumstances and other people for the way they are, rather than feeling the need to make them consistent with his own predispositions."[35] For a prosecutor making a deal for testimony, this virtue would counsel him to be mindful to affirmatively seek out checks to ensure that the informant is being truthful when he testifies, rather than leaving the task entirely to cross-examination by the defendant's attorney.[36] Finally, the virtue of prudence—also referred to as "practical wisdom"—aims to guide us in moral reasoning by outlining a three-step process of deliberation, judgment and decision for resolving ethical problems.[37] Cassidy argues that this virtue is particularly important for prosecutors because "we expect prosecutors—like judges—to be impartial in assessing the propriety of potential courses of action, and to come to a decision only after careful and balanced deliberation about the public interest."[38]

For present purposes, the particulars of Cassidy's vision are secondary to more fundamental points about the duty to seek justice that it helps to illuminate. Specifically, as the discussion above indicates, many of the most difficult ethical problems that a prosecutor faces cannot easily be reduced to a neat set of guidelines or factors that will inevitably lead to a particular outcome. A prosecutor who is deciding whether to offer a sentence reduction to a defendant in exchange for her testimony (and, if so, how much of a reduction) should surely be guided by the duty to seek justice in exercising this discretion. The different factual permutations that arise in practice make it impossible to formulate a precise ethical rule for this circumstance, but the duty to "seek justice" can provide prosecutors real guidance nonetheless. The duty can help a prosecutor identify and appreciate the ethical considerations involved in each case and provide a meaningful framework to guide her in ethical reasoning. Though in any given case, a range of different outcomes may be ethically

32. *See id.* at 664–67.
33. *Id.* at 648.
34. *Id.* at 660–61 ("A prosecutor must have the courage to say no and mean it . . . .").
35. *Id.* at 648–49.
36. *Id.* at 662–63.
37. *Id.* at 649.
38. *Id.* at 651.

defensible, the duty to seek justice can guide a prosecutor in picking among these options.

Indeed, it is when prosecutors are called upon to exercise discretion in ambiguous factual and legal settings that the duty to seek justice can provide the most value. In these situations—which implicate important ethical questions but where formulating precise ethical rules may be impossible—the injunction to seek justice provides prosecutors with an ethical vision to guide their decisions. The Model Code of Professional Responsibility explains the prosecutor's "duty is to seek justice, not merely to convict" by reference to prosecutorial discretion, noting that the "special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."[39]

II. ETHICAL CONSIDERATIONS IN MEDICAL MARIJUANA PROSECUTIONS

Medical marijuana prosecutions can present especially challenging ethical problems for the prosecutor who aims to conscientiously follow the duty to seek justice. In the medical marijuana setting, the law can often be ambiguous and limited resources may require a prosecutor to select a handful of people for prosecution from a large group of similarly situated individuals. These considerations may lead some prosecutors to pursue medical marijuana prosecutions only in rare instances—for example, where an individual is relying on a state's medical marijuana law as a pretext for clearly unlawful activity.[40] Other prosecutors, however, have not been so restrained. For these prosecutors, determining how to exercise their discretion in the context of medical marijuana prosecutions may be especially difficult. This section considers two examples that highlight some of the ethical problems that prosecutors who decide to pursue medical marijuana cases may face.

A. Federal Medical Marijuana Prosecutions

Though sixteen states and the District of Columbia[41] have adopted medical marijuana laws, it remains illegal to possess, cultivate, or distribute the plant for any purpose under federal law.[42] After California

39. MODEL CODE OF PROF'L RESPONSIBILITY EC 7–13 (1980); *see* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 36 (1998) (arguing that prosecutorial charging decisions "raise fundamental questions about the duty and responsibility of the prosecutor to seek justice for all parties—defendants as well as victims—and to assure that all parties receive equal protection under the law").

40. *See* Memorandum from David W. Ogden, Deputy Attorney Gen., to U.S. Attorneys (Oct 19, 2009).

41. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST 1 (2011), *available at* http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2011.pdf.

42. *See* Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1135 (D.C. Cir. 1994) (upholding the DEA's denial of a petition to reclassify marijuana under federal law

enacted its medical marijuana law in 1996, the federal government immediately took action to try to effectively block implementation of the law.[43] These early efforts included threats to revoke the Drug Enforcement Administration (DEA) registrations of physicians for recommending medical marijuana,[44] civil suits under the CSA to enjoin the operation of medical marijuana dispensaries,[45] and criminal prosecutions of medical marijuana caregivers.[46] The Supreme Court's 2005 decision in *Gonzales v. Raich* left little doubt that the federal government could constitutionally prosecute individuals whose actions conformed with state medical marijuana laws—from the largest dispensary operator to an individual patient in possession of a small quantity of marijuana for personal medical use.[47] Federal drug enforcement officials enthusiastically exercised this power during the 2000s,[48] with nearly 200 raids of medical marijuana dispensaries by 2008[49] and a significant number of criminal prosecutions.[50] Despite federal efforts, states have continued to adopt medical marijuana laws at a steady pace,[51] and there has been a sharp increase in the number of medical marijuana patients and dispensaries in states that permit them.[52] Most of these dispensaries operate in the open like any other business, promoting themselves through advertisements and clearly marked signage, and, in one instance, even becoming the subject of a reality television series on the *Discovery Channel*.[53]

During the Bush administration, there did not appear to be a particular method for selecting medical marijuana providers to target for federal prosecution. In one high profile case from 2008, for example, the federal

after the Administrator determined that marijuana did not have a currently accepted medical use in treatment in the United States).

43. *See* Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 565–72 (2010) (describing federal efforts to interfere with California's medical marijuana laws).

44. *See* Conant v. Walters, 309 F.3d 629, 633 (9th Cir. 2002).

45. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486–487 (2001).

46. *See, e.g.*, Federal Cases, AMS. FOR SAFE ACCESS, http://www.safeaccessnow.org/section.php?id=184 (last visited May 9, 2012) (providing an overview of federal medical marijuana prosecutions).

47. *See, e.g.*, Alex Kreit, *Rights, Rules, and* Raich, 108 W. VA. L. REV. 705, 706 (2006) (describing the scope of the *Raich* decision).

48. For a more detailed discussion of federal efforts to interfere with state medical marijuana laws, see Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 674–75 (2009).

49. *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST S-1 (2008), *available at* http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008_1.pdf (providing an overview of state medical marijuana laws).

50. *See, e.g.*, AMS. FOR SAFE ACCESS, *supra* note 46.

51. *See* MARIJUANA POLICY PROJECT, *supra* note 41, at 1.

52. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1427–28 (2009) (describing why state medical marijuana laws have been able to operate effectively despite federal efforts to interfere with them).

53. *See* Austin L. Ray, '*Weed Wars' Star on Politics, Activism and Wellness*, CNN.COM (Jan. 25, 2012 10:23 AM), http://www.cnn.com/2012/01/25/showbiz/tv/weed-wars-steve-deangelo/index.html (describing the reality television show).

government prosecuted Charlie Lynch, a Morro Bay, California dispensary operator who had the support of town officials—including the mayor and city councilmembers, who attended his store opening ceremony.[54] Lynch was convicted,[55] and at sentencing, District Court Judge George H. Wu indicated some displeasure with having to impose a one-year jail sentence for Lynch. The *New York Times* reported that Wu "talked at length about what he said were Mr. Lynch's many efforts to follow California's laws on marijuana dispensaries" before concluding: "I find I cannot get around the one-year sentence . . . ."[56] People like Lynch, Judge Wu lamented, "are caught in the middle of the shifting positions of governmental authorities."[57] During the same period that the federal government was prosecuting Lynch, however, other dispensaries continued to operate openly throughout the state, many of them engaged in more questionable methods of operation. Six months before Lynch's trial, for example, a dispensary operator in Los Angeles held a press conference to announce the installation of a 24-hour medical marijuana vending machine at his establishment.[58] Asked about the development, Drug Enforcement Administration Special Agent Jose Martinez told the press: "Once we find out where [the vending machine is] at, we'll look into it and see if they're violating laws."[59] The comment is somewhat baffling considering that the location of the machine was announced to the press and its illegality under federal law could not be clearer.

The incongruity between the federal response to Lynch and the marijuana vending machines is almost surely the result of limited federal law enforcement resources. As Robert A. Mikos explained in his insightful article, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, "[t]hough the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior."[60] As a result, prosecutors have been faced with a situation where large numbers of people are openly defying federal law but they only have resources to prosecute a handful of them.

54. *See* John Stossel, Andrew Sullivan & Patrick McMenamin, *California Man Jailed for Medical Marijuana*, ABCNEWS.COM (June 11, 2009), http://abcnews.go.com/Business/Stossel/story?id=7816309&page=1#.T43tftVGz-A.

55. *See* United States v. Lynch, No. 07-0689, 2010 WL 1848209, at *1 (C.D. Cal. April 29, 2010) (providing a history of the case).

56. Solomon Moore, *Prison Term for a Seller of Medical Marijuana*, N.Y. TIMES, June 12, 2009, at A18.

57. *Lynch*, 2010 WL 1848209, at *23.

58. *See* Associated Press, *Pot Vending Machines Take Root in Los Angeles*, MSNBC.COM (Jan. 30, 2008, 7:01AM), http://www.msnbc.msn.com/id/22910820/ns/health-health_care/t/pot-vending-machines-take-root-los-angeles/#.T2pzA1FJQfk.

59. *Id.*

60. Mikos, *supra* note 52, at 1464; *see also id.* at 1464–69 (describing why the federal government lacks the resources to prosecute all but a small number of medical marijuana providers in more detail).

This presents a difficult problem for deciding how to exercise prosecutorial discretion in a way that is consistent with the duty to seek justice.

To be sure, every charging decision may implicate prosecutorial discretion[61] and commentators have noted the lamentable absence of "a systemic effort to define the principles that should govern prosecutorial decision-making."[62] Moreover, drug prosecutions generally have been cited as a particular area of concern in this regard.[63] In one particularly notorious example of questionable federal decision-making in drug enforcement, then-United States Attorney for the Southern District of New York Rudy Giuliani instituted a program called "Federal Day," in which "the feds would choose a day, without advance notice, to prosecute low-level dealers in federal court."[64] In most other contexts, however, a federal prosecutor's charging decision is likely to mean the difference between prosecution at the state or federal level,[65] and criminals who remain free do so only by eluding authorities and concealing their activity. By contrast, when a federal prosecutor pursues charges against a medical marijuana operator, the decision to prosecute is not a choice of venue but the difference between a prison term and freedom. Those who escape prosecution do not do so by avoiding detection; they operate as openly as any other business, and yet only a small fraction of them are prosecuted. As a result, federal prosecutors who insist on pursuing medical marijuana cases must decide how to choose between a number of easy targets for conviction, knowing that the handful they charge may face severe penalties while the rest may continue to operate out in the open. In these circumstances, conscientious prosecutors should be especially mindful of the duty to seek justice and avoid the temptation to engage in decision-making that "would offend common notions of justice [like making decisions] on the basis of a dart throw, a coin toss or some other arbitrary or capricious process."[66]

In recent years, the already difficult ethical problem facing federal prosecutors in this area has become even more complex as the result of federal pronouncements indicating an intent to stop medical marijuana prosecutions altogether. As a presidential candidate, Barack Obama said that he did not think it was a good use of federal resources to interfere with state medical marijuana laws, explaining, "I'm not going to be using

61. For a discussion of other Department of Justice efforts to centralize the exercise of prosecutorial discretion, see, for example, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1442 (2008) ("The project to achieve nationwide uniformity in sentencing . . . became, from the perspective of Main Justice, a project to achieve nationwide centralization of prosecutorial power . . . .").

62. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 842 (2004).

63. *See, e.g.*, Clymer, *supra* note 15, at 649.

64. ETHAN BROWN, SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE 20 (2007).

65. *See* Clymer, *supra* note 15, at 649–51.

66. United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (1992).

Justice Department resources to try to circumvent state laws on this issue."[67] Not long after being confirmed as Attorney General, during the first 100 days of the Obama Presidency**,** Eric Holder was asked about medical marijuana prosecutions and replied, "What the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing here in law enforcement."[68] Consistent with that position, Holder announced that "[t]he policy is to go after those people who violate both federal and state law."[69]

A few months after Attorney General Holder's comments to the press, Deputy Attorney General David Ogden issued a memo to all United States Attorneys that advised federal prosecutors "not [to] focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[70] The memo was thought to be the realization of Obama's statements as a candidate and to signal an end to federal interference with state medical marijuana laws. It was widely reported that the memo meant an end to federal raids of medical marijuana dispensaries, so long as they were operating lawfully under relevant state law. The *New York Times* ran a front-page article about the memo under the headline *U.S. Won't Prosecute in States That Allow Medical Marijuana*, reporting that "[p]eople who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications."[71] It does not appear that the White House, the Department of Justice, the Drug Enforcement Administration, or any individual United States Attorneys took steps to dispel this impression in the days and weeks following the release of Ogden's memo. Indeed, in at least one case, the Department of Justice moved to have a Santa Cruz medical marijuana collective's lawsuit seeking to enjoin federal medical marijuana prosecutions on the basis of the Tenth Amendment dismissed as moot because of the memo.[72] Assistant United States Attorney Mark Quinlivan explained

67. Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Mar. 1, 2012), http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216.

68. Bob Egelko, *U.S. to Yield Marijuana Jurisdiction to States*, S.F. CHRON., Feb. 27, 2009, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/26/BA2016651R.DTL.

69. Scott Glover, *U.S. Won't Prosecute Medical Pot Sales: Atty. Gen. Holder's Statements Is Hailed as a Landmark Change in Policy and Echoes a Pledge by Obama*, L.A. TIMES, Mar. 19, 2009, at 1.

70. Memorandum from David W. Ogden, *supra* note 40.

71. David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, at A1.

72. *See, e.g.*, Joint Stipulation of Dismissal Without Prejudice, Santa Cruz v. Holder, Civil Action No. 03-1802 JF (N.D. Cal. Jan. 21, 2010).

to the court that, in light of the Ogden memo, "the plaintiffs would be seeking to enjoin, basically, a policy that is in the past."[73]

Consistent with the Ogden memo, federal raids and prosecutions of medical marijuana dispensaries slowed for a short period but did not stop. Indeed, even as the Ogden memo was released, United States Attorneys continued prosecuting medical marijuana operators, without much clarity as to whether they believed the operators were out of compliance with state law or whether they had decided not to follow the Ogden memo's advice about the use of federal law enforcement resources.[74] One of these prosecutions took place in San Diego against James Stacy, who operated a medical marijuana collective called Movement in Action, taking "great care to make sure that his cooperative was formed and operated in compliance with California law."[75] Stacy became a federal defendant just ten weeks after opening his collective in the late summer of 2009.[76] During a joint investigation involving the DEA and the San Diego County Sheriff's Office, a local undercover agent obtained a medical marijuana recommendation under false pretenses and then purchased medicine from Movement in Action. Not surprisingly, Stacy sought to rely on the Ogden memo to block his prosecution, filing a motion to dismiss the indictment based on an entrapment by estoppel theory. Stacy argued that public statements by Attorney General Holder had led him to believe his conduct was lawful under federal law and that the Ogden memo meant he could not be prosecuted if he was operating in compliance with California law. The prosecutor successfully argued, however, that the Ogden memo created no legally enforceable right. "Even if Defendant's prosecution were contrary to the guidance set forth in the Memorandum," the court explained, there is no legal basis "for dismissing an indictment because it is contrary to internal Department of Justice guidelines."[77] Because Stacy's compliance with California law and his reliance on the widely reported Obama policy would not provide him

73. Transcript of Oral Argument, Santa Cruz v. Holder, Civil Action No. 03-1802 JF (N.D. Cal. Oct. 30, 2009).

74. *See, e.g.*, Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 643–45 (2011) ("Of course, one might expect the DOJ to heed its own policy, in which case judicial enforcement of the NEP would be unnecessary. In reality, however, the DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy.").

75. United States v. Stacy, 696 F. Supp. 2d 1141, 1143 (S.D. Cal. 2010).

76. *See* Teri Figueroa, *Medical Marijuana Activist Speaks of Legal Battle*, N. COUNTY TIMES (Apr. 3, 2011, 9:00 PM), http://www.nctimes.com/news/local/vista/article_7a1e1e18-8935-54e5-b60b-569bedc74a41.html.

77. *Stacy*, 696 F. Supp. 2d at 1149. Though Stacy's case is noteable because of its timing in relation to the Ogden memo, other federal medical marijuana defendants have received much longer sentences. *See, e.g.*, Rebecca Richman Cohen, Opinion *The Fight Over Medical Marijuana*, N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/08/opinion/the-fight-over-medical-marijuana.html (describing the case of Chris Williams, a Montana medical marijuana operator facing a mandatory minimum sentence of more than 80 years).

with a defense in federal court, he ultimately accepted a plea deal and was sentenced to two years of probation.[78]

Perhaps sensing that there would be no internal repercussions for ignoring the Ogden memo,[79] the number of federal medical marijuana raids, prosecutions, and threats of prosecution slowly began to increase during 2010.[80] By the end of that year, claims that these efforts exclusively targeted individuals who were in violation of both state and federal law were losing credibility and began to fall by the wayside. It was becoming clear that the federal approach to medical marijuana under President Obama was not much different than it had been under President Bush.[81] In June 2011**,** likely in recognition of the fact that many prosecutors had decided not to follow the Ogden memo in good faith, Deputy Attorney General James M. Cole issued a second memo.[82] Ostensibly, the Cole memo was issued to provide additional "guidance"[83] regarding the Ogden memo but, in reality, it directly contradicted it. Notwithstanding the Ogden memo's instruction not to "focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana,"[84] Cole's memo advised that "[t]he Ogden Memorandum was never intended to shield [medical marijuana dispensaries] even where those activities purport to comply with state law."[85]

By the beginning of 2012, the Obama administration had largely abandoned any pretense of taking a more deferential approach to state medical marijuana than previous administrations. The over-100 raids on dispensaries during Obama's first three years in office is on pace to exceed the number under Bush. Indeed, in a 2012 article summarizing the Obama administration's approach to medical marijuana, *Rolling Stone* writer Tim Dickinson argued, "over the past year, the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush."[86] Somewhat astonishingly, some Obama officials have continued to make public statements indicating that only those who are in violation of state medi-

78. *See* Figueroa, *supra* note 76.

79. *See* Mikos, *supra* note 74, at 645–46 (arguing that the Ogden memo "may not have much influence over prosecutions brought by U.S. Attorneys" because it is legally unenforceable and cannot easily be enforced internally).

80. *See, e.g.*, Kris Hermes, *Has the Federal Government Changed Its Policy on Medical Marijuana Enforcement or Just Changed Its Reasons for Continued Interference?*, AM. FOR SAFE ACCESS (Feb. 3, 2011, 8:22 AM), http://safeaccessnow.org/blog/?p=1228 (describing the medical marijuana raids that occurred following the release of the Ogden memo).

81. *See* Dickinson, *supra* note 67 (reporting on the developments that led federal prosecutors to disregard Ogden's memo).

82. *See* Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys (June 29, 2011).

83. *Id.*

84. Memorandum from David W. Ogden, *supra* note 40.

85. Memorandum from James M. Cole, *supra* note 82.

86. Dickinson, *supra* note 67.

cal marijuana laws will face federal criminal prosecution. In March 2012, for example, U.S. Attorney for the Eastern District of California Benjamin Wagner discussed the federal crackdown on medical marijuana, stating that his office had "reserve[ed] criminal prosecution for the most flagrant violators of not only federal law but state law."[87] In response to requests to release local medical marijuana prosecutorial guidelines, however, Wagner demurred, "I'm not in a position to be of much comfort." He continued, "You don't ask the CHP, 'How many miles over the speed limit can I go before you pull me over?'"[88] Similarly, in June 2012, Attorney General Holder told a House Judiciary oversight committee that "We limit our enforcement efforts to those individuals, organizations that are acting out of conformity with state law . . . ."[89] Notwithstanding Holder's statement, U.S. Attorneys have threatened to prosecute state and local government *employees* for administering their own medical marijuana laws.[90] It is difficult to see how prosecuting state officials for implementing state law could possibly be consistent with a policy of limiting enforcement to those who are out of compliance with state law.

Though Ogden's memo and Holder's statements may not create legally enforceable rights—particularly in light of the 2011 Cole Memorandum—they should certainly give federal prosecutors reason to think carefully about how to pursue medical marijuana cases in light of their ethical duty to seek justice. Though some have tried to downplay the significance of Attorney General Holder's 2009 statements and the Ogden memo,[91] to pretend that they were not intended to announce a shift in federal policy and signal that state medical marijuana laws would operate free from federal interference is disingenuous at best. They were universally reported in the media in that light, without objection from federal officials. Moreover, some federal prosecutors—including, most recently, Attorney General Holder—regrettably continue to make public remarks implying that only individuals whose conduct does not comply with state medical marijuana laws will face federal prosecution. A federal prosecutor who hopes to act ethically in exercising her discretion cannot be blind to the reality that many people did—and still may—reasonably believe that their compliance with state medical marijuana laws will protect them

87. David Downs, *U.S. Attorney Breaks Silence on Medical-Marijuana Battle*, NEWSREVIEW.COM (Mar. 8, 2012), http://www.newsreview.com/sacramento/u-s-attorney-breaks-silence-on/content?oid=5379500.

88. *Id.*

89. Stephen Dinan, *Holder Says No Effort to Shut Down All Medical Marijuana*, WASH. TIMES, June 7, 2012, http://www.washingtontimes.com/blog/inside-politics/2012/jun/7/holder-no-effort-shut-down-all-medical-marijuana/.

90. *See, e.g.*, Mike Baker, *States Reassess Marijuana Laws After Fed Warnings*, ASSOCIATED PRESS, May 3, 2011, *available at* http:// http://www.huffingtonpost.com/huff-wires/20110503/us-medical-marijuana-feds/ ("Washington state's two U.S. attorneys warned that even state employees could be subject to prosecution for their role in marijuana regulation.").

91. *Id.* ("U.S. attorneys have said in their recent memos that they would consider civil or criminal penalties for those who run large-scale operations—even if they are acceptable under state law.").

from federal prosecution. Although they may be mistaken in believing this, it certainly counsels caution in pursuing medical marijuana prosecutions. Indeed, because the Ogden Memorandum has not been rescinded, there is an argument to be made that an ethical federal prosecutor should seek to act in accordance with its advice and only take legal action against individuals who are truly operating outside the bounds of state medical marijuana laws.[92] Federal prosecutors who do not feel bound to faithfully follow the policy outlined in Ogden's memo, however, should at least consider the impressions it created when deciding what tools to use in pursuing medical marijuana prosecutions.[93]

B. State Medical Marijuana Prosecutions

Because of the complex and unusual relationship between state and federal law with respect to medical marijuana, federal medical marijuana prosecutions present particularly challenging ethical problems with respect to the exercise of prosecutorial discretion. Medical marijuana prosecutions by local officials in some states also pose concerns with respect to the ethical duty to seek justice. This is because some state medical marijuana laws are unusually ambiguous and have been subject to wildly divergent interpretations in different localities. To be sure, not all state medical marijuana laws suffer from this problem. Colorado, for example, has adopted a thorough and precise regulatory structure to govern the medical marijuana market.[94] California stands at the opposite end of the spectrum, with fundamental questions about the law still unresolved sixteen years after passage of the state's Compassionate Use Act.[95]

Though news accounts of large, professionally run medical marijuana stores in California[96] may lead one to assume that the state's law clearly contemplates and regulates storefront dispensaries, their legality is actually premised almost entirely on a single provision of California law. The relevant statute, enacted by the California legislature in 2004, provides that medical marijuana patients and their caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes."[97] In some parts of California, medical marijuana providers and law enforcement are in agreement

92. *See, e.g.*, Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 307 (2001) (arguing that the legal role of individual prosecutors "does not permit unfettered moral discretion" and that "[p]rosecutorial discretion requires attention to office policies and procedures").

93. *See* Cassidy, *supra* note 20, at 636.

94. *See* Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 150–51 (2012) (describing Colorado's medical marijuana laws).

95. *See* Peter Hecht, *California Supreme Court's Daunting Task: Unite Pot-Dispensary Rulings*, SACRAMENTO BEE, Mar. 13, 2012, at 1A ("When it comes to rulings on medical marijuana, California courts have a case of multiple personality disorder.").

96. *See, e.g.*, Roger Parloff, *How Marijuana Became Legal*, CNNMONEY, Sept. 18, 2009, *available at* http://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/.

97. CAL. HEALTH & SAFETY CODE §11362.775 (West 2012).

in interpreting this provision to allow for storefront medical marijuana "collectives or cooperatives" that operate more-or-less like food cooperatives. In Oakland, for example, the Harborside Health Center has over 30,000 patients registered in its database and, though it operates as a nonprofit as required by California law, generates annual revenues of about $20 million.[98]

In other parts of the state, however, local law enforcement officials have adopted a significantly more restrictive interpretation of the "collective and cooperative" provision.[99] In San Diego, for example, District Attorney Bonnie Dumanis has made clear that she does not believe storefront dispensaries are permitted under California law.[100] Instead, her office has argued that the law allows only literal collective cultivation, meaning that most (or possibly all) medical marijuana collective members would need to contribute physical labor to cultivation efforts to operate lawfully.[101] Though her office clearly believes that California's medical marijuana does not permit operations like Oakland's Harborside, Dumanis has never clearly articulated exactly what she believes the law does allow. This has resulted in a significant amount of confusion and has complicated efforts by cities within the county to pass ordinances to regulate dispensaries. In 2010, the San Diego County grand jury issued a report criticizing Dumanis's office for failing to provide "clear and uniform guidelines under which qualified medical marijuana patients can obtain marijuana."[102] The grand jury recommended "that the District Attorney's Office should publish a position paper to outline what it considers the legal and illegal operation of medical marijuana collectives and cooperatives."[103]

Instead of releasing guidelines, however, Dumanis's office has limited pronouncements about its view of the law to a case-by-case series of criminal prosecutions. In perhaps the most well-known case, her office prosecuted Jovan Jackson for operating a medical marijuana collective

98. *See* Parloff, s*upra* note 96.

99. *See, e.g.*, Chris Lindberg, *Room for Abuse: A Critical Analysis of the Legal Justification for the Medical Marijuana Storefront "Dispensary,"* 40 SW. L. REV. 59, 103 (2010) (arguing for a more restrictive interpretation of California's medical marijuana laws).

100. On September 10, 2009, for example, Dumanis said that there was "no such thing right now" as a "legitimate medical marijuana dispensar[y]" in San Diego. Eric Wolff, *District Attorney: There Are No Legal Medical Marijuana Dispensaries Right Now*, LAST BLOG ON EARTH (Sept. 10, 2009), http://lastblogonearth.com/2009/09/10/district-attorney-there-are-no-legal-medical-marijuana-dispensaries-right-now.

101. *See* Lindberg, *supra* note 99, at 117–18 ("To cultivate whether individually or as a group, you have to plant, water, fertilize, protect from pests, and prune, i.e., cultivate. If some members of the group do not participate in the cultivation, then they are not among those who cultivated collectively or cooperatively.").

102. *Medical Marijuana in San Diego*, SAN DIEGO COUNTY GRAND JURY (June 7, 2010), http://www.sdcounty.ca.gov/grandjury/reports/2009-2010/MedicalMarijuanaReport.pdf.

103. *Id.*

known as Answerdam.[104] Answerdam was operated in a similar fashion to other storefront dispensaries in the state and so fell into the disputed area of California's law.[105] At the close of trial, the prosecutor argued that the jury should not be instructed on California's medical marijuana "collective and cooperative" provision because Jackson's storefront operation was illegal as a matter of law. The Judge disagreed, instructed the jury on the medical marijuana defense, and the jury promptly acquitted Jackson. After the trial, the jury held a press conference in which the foreperson explained that "the prosecution gave his . . . kind of narrow definition [of a collective] during the closing arguments, but there was nothing in the law that really backed that up."[106] Somewhat incredibly, after Jackson's acquittal, Dumanis's office prosecuted him a second time for running the same medical marijuana collective, which had continued to operate during the first trial.[107] This time, however, the trial court granted the prosecutor's motion to deny Jackson's medical marijuana defense and he was convicted.[108]

San Diego County's District Attorney is far from alone in advancing a narrow interpretation of California's medical marijuana law, and courts are currently split on its meaning. Two recent decisions interpreting California's "collective and cooperative" provision are instructive. In *People v. Colvin*,[109] decided February 23, 2012, the Second Appellate District overturned a trial court decision that denied a medical marijuana defense to a man charged with "transporting in his car about one pound of marijuana from one medical marijuana establishment to the second."[110] The trial court reasoned that Colvin did not qualify for the defense because "the transportation here had nothing to do with the cultivation process."[111] The appellate court reversed in a decision that found the statute allows medical marijuana cooperatives that operate like "[a] grocery cooperative [which] may have members who grow and sell the food and run a store out of which the cooperative's products are sold. But not everyone who pays a fee to become a member participates in the cooperative other than to shop at it."[112] Less than one week after *Colvin*, on February 29, 2012, the Court of Appeal for California's Second Appellate District came to a much different conclusion about what the state's

104. Brief for Appellant at *1–2, People v. Jackson, No. D058988, 2011 WL 6402248 (Cal. App. 4 Dist. Nov. 21, 2011).

105. *See id.*

106. *Id.* at *12 (first alteration in original).

107. *Id.*

108. Shortly before this essay went to press, Jackson's conviction was overturned. *See* People v Jackson, 210 Cal. App. 4th 525 (2012).

109. 137 Cal. Rptr. 3d 856 (Ct. App. 2012).

110. *Id.* at 857.

111. *Id.* at 859.

112. *Id.* at 863; *see also id.* (criticizing the State's position because it "does not specify *how* many members must participate [in the cultivation process] or in *what* way or ways they must do so, except to imply that Holistic, with its 5,000 members and 14 growers, is simply too big to allow any 'meaningful' participation in the cooperative process").

medical marijuana law allows in *Lake Forest v. Evergreen Holistic Collective*.[113] *Lake Forest* concerned the validity of a local ban on medical marijuana dispensaries. As in *Colvin*, the *Lake Forest* court "reject[ed] the City's suggestion . . . that a patient or primary caregiver personally must engage in the physical cultivation of marijuana" for a collective operation to be lawful.[114] But, while *Colvin* permitted a medical marijuana defense for transportation between two collectives under the collective and cooperative provision, *Lake Forest* concluded that medical marijuana collectives must cultivate and store all marijuana on the same site as it is dispensed in order to be lawful.[115] According to *Lake Forest*, transportation between dispensaries of the sort involved in *Colvin* is not authorized under California's medical marijuana laws. Instead, "a qualified patient [may] transport medical marijuana from the cultivation site in an amount limited to his or her personal medical need."[116]

In sum, courts and prosecutors across California are currently divided on the question of what sorts of entities and activities the state's medical marijuana law permits. Some believe that the law legalizes only cooperatives in which every member contributes labor to the cultivation project; others argue that medical marijuana cooperatives may operate like food cooperatives; still others conclude that storefront operations are allowed, but only so long as they abide by certain conditions (like growing and storing all marijuana on site). As a result, a collective that may be welcomed by prosecutors in one county might face stiff criminal penalties in another. This is not to imply that where there is disagreement about what the law means, it is unethical to bring prosecutions. But, when there is so much uncertainty in the law, the duty to seek justice should lead prosecutors to carefully consider their decisions to ensure defendants are treated with fairness and honesty.[117] For example, a dutiful prosecutor who interprets California's law more narrowly than colleagues in other jurisdictions may wish to consider issuing clear guidelines before bringing prosecutions so that those who wish to abide by the law can do so. Whatever course of action a prosecutor decides to take, she should be sure not to overlook—and, indeed, give serious consideration to—the ethical considerations involved in pursuing prosecutions amidst fundamental disagreements about the meaning of the law she is planning to enforce.

113. *See* 138 Cal. Rptr. 3d 332, 337 (Ct. App. 2012).

114. *Id.* at 352; *see id.* ("A person may participate in a lawful cooperative without any requirement that he or she personally must create goods to stock the shelves of a consumer cooperative or grow the produce in an agricultural one.").

115. *Id.* at 351 ("[S]ection 11362.775 requires that any collective or cooperative activity involving quantities of marijuana exceeding a patient's personal medical need must be tied to the cultivation site.").

116. *Id.*

117. *See* Cassidy, *supra* note 20, at 640.

III. CONCLUSION

Amidst the increasing focus on the ethical obligations of private attorneys who represent medical marijuana providers, there is a risk that the ethical duties of the attorneys who prosecute them may be overlooked. This essay attempts to shed light on this issue, and argues that, in comparison to the ethical problems facing private attorneys, medical marijuana prosecutions present equally compelling—albeit less precise—ethical questions. Because of the unique relationship between state and federal laws concerning medical marijuana and the unusual history of federal enforcement, federal prosecutors who pursue medical marijuana cases should carefully evaluate how they exercise their discretion. In many states with medical marijuana laws, hundreds of dispensaries currently operate in the open like any other business and federal drug enforcement officials have the resources to prosecute only a small percentage of them. Moreover, statements by federal officials may have understandably led some of these operators to believe that complying with state law will provide them with some measure of protection from federal prosecution. In this setting, the decision to bring a federal prosecution carries especially significant consequences. Similarly, in states with ambiguous medical marijuana laws, state prosecutors face difficult decisions about how to exercise their discretion in a manner that is most consistent with the duty to seek justice.

Though this essay sketches some of the ethical problems facing prosecutors in the context of medical marijuana law, it does not advocate any particular course of action for prosecutors. Some of the prosecutorial tactics discussed above appear to be on shakier ethical ground than others. For example, months after Eric Holder announced the Obama administration's "policy is to go after those people who violate both federal and state law,"[118] James Stacy found himself facing federal prosecution for operating a dispensary that appeared to be in compliance with California law and that was no different than hundreds of other dispensaries openly operating throughout the state. Within the State of California, San Diego's district attorney has ignored a county grand jury's request for prosecutorial guidelines and, instead, left dispensary operators to guess at how her office will view their operation.

Reasonable minds may disagree about how the duty to seek justice relates to these examples. But, at a minimum, they should give conscientious prosecutors a reason to be carefully attuned to this duty when exercising discretion in the medical marijuana context. In particular, prosecutors who decide to pursue action against medical marijuana caregivers should consider whether it may be more consistent with the duty to seek justice to take some action short of prosecution as an initial step. Increas-

118. Glover, *supra* note 69, at 1.

ingly, federal prosecutors have sent warning letters to dispensary operators and landlords before pursuing legal action against them. There may be public policy-based reasons to disagree with even this sort of federal interference into state medical marijuana laws.[119] From an ethical perspective, however, this approach would seem to be preferable to filing charges without warning in light of the unique legal uncertainties in this area of the law.[120] The open-ended nature of a prosecutor's ethical obligations may make it difficult to draw more definitive conclusions than this. Though the injunction that prosecutors "seek justice" is notoriously vague and cannot be easily reduced to precise advice, however, this should not diminish its importance.

119. *See, e.g.*, Kreit, *supra* note 43, at 556 (arguing that because the federal government does not have sufficient resources to block the implementation of state medical marijuana laws, its efforts to interfere result in a less regulated market and are counter-productive).

120. *See* Cassidy, *supra* note 20, at 640.