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IN TREATMENT: COMPARING THE LEGALITY OF MEDICAL MARIJUANA UNDER AMERICAN LAW AND JEWISH LAW

NOTE

Michael Schultz^{*}

INTRODUCTION

On July 17, 1971, President Richard Nixon declared illegal drugs "public enemy number one."¹ Ever since Nixon's anti-drug comments, American politicians have engaged in a "war on drugs,"² which has cost the United States government over \$2.5 trillion.³ In 1988 alone, the war on drugs led to 1,000,000 drug related arrests in the United States.⁴ By 2006, drug arrests had increased by 3.25 times from what they were in 1980.⁵

The war on drugs is aimed to reduce the illegal trade of several drugs, including marijuana.⁶ Marijuana is a seed born and flowering plant,⁷ which is normally consumed by crushing and smoking the leaves, flowers, stems, and seeds of the marijuana plant.⁸

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¹ Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs"*, 15 U. D.C. L. REV. 59, 65 (2011).

² *Id.*

³ *Id.* at 68.

⁴ Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1396 (1993).

⁵ Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293 (2009).

⁶ Gilmore, *supra* note 1, at 63 (explaining that marijuana was added to the list of prohibited substances in the United States in 1937).

⁷ Aaron Roussell, *The Forensic Identification of Marijuana: Suspicion, Moral Danger, and the Creation of Non-Psychoactive THC*, 22 ALB. L.J. SCI. & TECH. 103, 107 (2012).

⁸ *Id.*

Recently, there has been a widespread perception that punishment for marijuana possession exceeds the harm that marijuana causes on an individual and society as a whole.⁹ This perception has led to increased advocacy for liberalization of marijuana policy in the United States.¹⁰

Although federal law has prohibited marijuana since 1937,¹¹ recent legislation has made that prohibition not absolute. While federal law prohibits the sale and use of marijuana, individual states have passed legislation decriminalizing,¹² and in some cases, legalizing¹³, marijuana use.¹⁴ For example, in 2012, voters in both Colorado and Washington, voted to legalize the recreational use of marijuana for citizens twenty-one and older.¹⁵

⁹ Itai Danovitch, M.D., *Sorting Through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV. 91, 92 (2012).

¹⁰ *Id.*

¹¹ Gilmore, *supra* note 1, at 63.

¹² *Marijuana: Legalized vs. Decriminalized*, STRAINWISE.COM (Sept. 11, 2013), <http://www.strainwise.com/2013/09/marijuana-legalized-vs-decriminalized/> (Explaining that "decriminalized" means that a person will not be subjected to jail time or a criminal record for being caught with marijuana for first time offenders. A person can still be subjected to civil penalties such as fines or drug education classes though.)

¹³ Matt Ferner, *'Marijuana Legalization: What Everyone Needs To Know' Authors Discuss Risks And Rewards Of Legal Weed*, HUFFINGTONPOST.COM (Sept. 4, 2012) http://www.huffingtonpost.com/2012/09/04/marijuana-legalization-research_n_1850470.html

(Explaining that "legalization" means that marijuana would be treated "more or less like any other article of commerce, with substance-specific seeking only to shape the behavior of producers and consumers, not to eliminate market activity." This compares to decriminalization as the market activity is still illegal under decriminalization, there just are not criminal sanctions in place for violators.)

¹⁴ Dan Frosch, *Measures to Legalize Marijuana are Passed*, N.Y. TIMES, A18 (Nov. 7, 2013) available at: http://www.nytimes.com/2013/11/07/us/measures-to-legalize-marijuana-are-passed.html?_r=0.

¹⁵ Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, NEW YORK TIMES, P15 (Nov. 8, 2012) available at: <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

Twenty states, and the District of Colombia, have created an exception to the prohibition on marijuana use and sales for circumstances where marijuana is used for medical purposes.¹⁶

The legality of marijuana in the context of Jewish law is less clear than in American law though. While marijuana use is prohibited in Jewish law,¹⁷ the punishments for violating that prohibition have not been set. Further, while some states in the United States have legalized marijuana for medical purposes, Jewish law has not yet decided whether a medical marijuana exception exists with regards to the prohibition on marijuana use. There have not been many, if any, respected Jewish law authorities, which have made a ruling on the legality of marijuana when used for medical purposes. Therefore, there is not a general consensus as to whether or not medical marijuana is permitted under Jewish law or not.

This paper will analyze how American law and Jewish law control the use of marijuana in their respective jurisdictions. Part I of this paper will focus on the explanation of American law and Jewish law; describing what they are and how they work. Part II will then look at the legality of marijuana in American law and the conflict between federal law and state law. Part III will look at the legality of marijuana in Jewish law. Finally, part IV of this paper will compare the way American law and Jewish law treat medical marijuana, including the uncertainty surrounding medical marijuana under Jewish law.

I. THE LEGAL SYSTEMS

There are two systems of law that will be analyzed in this paper. The first system is American law. American law is comprised of two sets of laws; federal law and state law.¹⁸ The

¹⁶ *State Laws Related to Marijuana*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana> (last visited Mar. 1, 2014).

¹⁷ See TALMUD BAVLI, *Pesachim* 113a (quoting Rab who told his son "do not take drugs").

¹⁸ Robert A. Sedler, *The Constitution and the American Federal System*, 55 WAYNE L. REV. 1487, 1488 (2009).

second system of law is Jewish law. Jewish law is also composed of two sets of laws; written law and oral law.¹⁹

A. *American Law*

The current legality of marijuana in the United States is complicated. This is because of the different types of laws in the United States. American Law has two sets of laws. The first set of laws is the federal law.²⁰ The second set of laws is state law.²¹

Federal law was first created in Philadelphia in 1787.²² At the time, the United States had recently declared its independence from Britain, but did not have a sustainable government in place.²³ Consequently, the Constitutional Framers met in Philadelphia to restructure the American government.²⁴ The Framers attempted to create a government that clearly defined the allocation of sovereign authority.²⁵ Thus, the Framers created the Constitution, which restricts state sovereignty in a number of ways.²⁶

The failures of the Articles of Confederation, the predecessor to the Constitution, helped shape the principles underlying America's modern form of Federal law. Under the Articles of Confederation, the United States failed to have a strong

¹⁹ Steven H. Resnicoff, *Physician Assisted Suicide Under Jewish Law*, 1 DEPAUL J. HEALTH CARE L. 589, 591–592 (1997).

²⁰ Sedler *supra* note 16, at 1488.

²¹ *Id.*

²² Dustin M. Dow, *The Unambiguous Supremacy Clause*, 53 B.C. L. REV. 1009, 1013 (2012).

²³ *Id.* (explaining that the Constitutional Framers had convened because their last attempt at creating a governing body of law, the Articles of Confederation, had failed to create a stable, effective, and cohesive government structure).

²⁴ *Id.*

²⁵ *Id.* (explaining that the 1780's saw "over regulation, chaotic procedures of passing and repealing laws, and commercially damaging ex post facto laws.").

²⁶ Sedler *supra* note 16, at 1489, *accord* Dow, *supra* note 20 (explaining that under the Articles of Confederation the United States struggled to pay back war debts to Revolutionary soldiers, manage its westward expansion, and negotiate treaties with foreign nations.).

central government because the individual states had too much power and independence.²⁷ In addressing this problem, the Constitution would allow the individual states to maintain full sovereignty over domestic matters,²⁸ but also created a stronger the federal government by designating it specific powers as well.²⁹ Originally, the federal government could only pass legislation in specific areas that were enumerated by the Constitution.³⁰ The American courts, however, have interpreted the federal government's powers broadly, and as such, virtually any activity is subject to federal regulation today.³¹

The second set of laws in American law are state laws. Outside of the provisions of the Constitution that restrict the states' powers, states have plenary power over all activity that occurs within their state.³² While the Framers aimed to create a stronger central government with the Constitution,³³ the states' sovereignty was a "given."³⁴ Thus, the states do not draw their sovereignty from the Constitution.³⁵ The Framers, however, did attempt to codify and protect the states' sovereignty, by writing the "Full Faith and Credit Clause" into the Constitution.³⁶ The Full Faith and Credit Clause provides that the public acts, records, and judicial proceedings of a state will be given full faith and credit in every other state.³⁷ In other words, the Full Faith and Credit Clause was written into the Constitution to ensure that written judgments from one state were recognized in another state.³⁸

²⁷ See Dow, *supra* note 20.

²⁸ See Sedler, *supra* note 16, at 1488.

²⁹ *Id.* at 1507.

³⁰ *Id.* (listing the powers to tax and spend, to wage war, and to regulate interstate and foreign commerce as examples of the enumerated powers the federal government had under the Constitution).

³¹ *Id.*

³² See Sedler, *supra* note 16, at 1490.

³³ See Dow, *supra* note 20, at 1013.

³⁴ See Sedler, *supra* note 16, at 1488.

³⁵ *Id.*

³⁶ U.S. CONST. art. IV, § 1.

³⁷ *Id.*

³⁸ See Sedler, *supra* note 16, at 1503.

When the framers met in Philadelphia, they made sure to restrict the states' sovereignty in several ways.³⁹ The first restriction put on the states was the allocation of certain powers to the federal government only.⁴⁰ The Constitution also listed certain powers that states could only exercise if given permission by the federal government.⁴¹ Finally, the Framers wrote a specific clause into the Constitution called the "Supremacy Clause."⁴² The Supremacy Clause states that the Constitution and laws passed by the federal government shall be the "supreme law of the land."⁴³ Under the Supremacy Clause, if a conflict of law arises between state law and federal law, federal law triumphs state law.⁴⁴ The Supremacy Clause also requires states to enforce federal law, unless there is a valid excuse not to.⁴⁵ However, as will be seen with laws regulating the use and sale of marijuana, certain states have created legislation that contradicts federal law.⁴⁶ The federal government has not challenged these laws in court though, allowing conflicting laws to exist under American law.⁴⁷

B. Jewish Law

Under Jewish law, the legality of marijuana is less ambiguous. This is because the Jewish legal system does not have conflicting sets of laws with respect to marijuana like in the

³⁹ *Id.* at 1489.

⁴⁰ *Id.* (listing the power to enter treaties or coin money as powers that can be exercised exclusively by the Federal government).

⁴¹ *Id.* (listing the power to enter into an agreement with another state or foreign government as a power that states could only exercise if given permission by Congress).

⁴² U.S. CONST. art. VI, § 2.

⁴³ *Id.*

⁴⁴ *See* Sedler, *supra* note 16, at 1489.

⁴⁵ John Kimpflen, *Illinois Law and Practice*, 33A ILL. LAW AND PRAC. STATE GOVERNMENT § 8 (citing *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744, 181 L. Ed. 2d 881 (2012)).

⁴⁶ Keith Coffman & Nicole Neroulis, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS, (Nov. 7 2012) available at <http://www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107>.

⁴⁷ Emily Hobbs-Wright, *DOJ Will Not Challenge State Marijuana Legalization Laws*, COLO. EMP. L. LETTER 1 (Sept. 1, 2013).

American legal system. While the Jewish legal system does operate through two sets of laws, only one set of laws is considered binding authority.⁴⁸ The two sets of laws in the Jewish law system are the written laws and the oral laws.⁴⁹ The oral law, however, is the only binding law.⁵⁰

Jewish written laws are the biblical commandments given to Moses by God.⁵¹ These commandments consist of the Torah, the Prophets, and the Writings.⁵² All these writings compose the "Tanakh,"⁵³ which contains commandments, decrees, laws, and rules.⁵⁴ These commandments, laws, and rules pertain to all aspects of life,⁵⁵ but they are not authoritative in Jewish law.⁵⁶ Included in these commandments, laws, and rules, are religious matters, such as prayer and worship.⁵⁷ These commandments, laws, and rules also pertain to secular matters as well, such as establishing criminal laws that protect society as a whole.⁵⁸

⁴⁸ Resnicoff, *Physician Assisted Suicide Under Jewish Law*, *supra* note 17, at 591–592.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 591.

⁵² Donna Litman, *Jewish Law: Deciphering the Code by Global Process and Analogy*, 82 U. DET. MERCY L. REV. 563, 565 (2005) (stating that the Torah is also known as the "Five Books of Moses").

⁵³ *Id.*

⁵⁴ *Id.* at 566.

⁵⁵ *Id.* (explaining that the written law encompasses the civil law of interrelationships of human beings, the criminal laws of actions which impact society as a whole, and laws that relate to the governmental process, such as creating and administering laws).

⁵⁶ See Resnicoff *Physician Assisted Suicide Under Jewish Law*, *supra* note 17, at 591 (explaining that literal translations of specific verses in the Torah are not seen as authoritative because some verses are incomprehensible when taken literally).

⁵⁷ Litman, *supra* note 50, at 565 (stating that the Torah is also known as the "Five Books of Moses").

⁵⁸ *Id.* (noting that the Torah is also known as the "Five Books of Moses").

As opposed to the written laws, the Jewish oral laws are authoritative.⁵⁹ The oral laws are composed of interpretations of the written laws that were transmitted to Moses.⁶⁰ These interpretations contain specific laws, as well as interpretative rules used for further interpretations of the Torah.⁶¹ The oral laws have since been recorded in writings.⁶² These writings include the Talmud, which includes the Mishnah and its commentary, the Gemara, as well as various other commentaries.⁶³

The oral law is authoritative because God gave the written law specifically to man.⁶⁴ Therefore, Jewish law conclusions can only be determined by a Jewish law analysis.⁶⁵ A Jewish law analysis is the process in which a conclusion about the law is reached through the presentation of various opinions, assertions, and applications of Jewish principles of logic.⁶⁶ The reason underlying why oral law is authoritative in Jewish law, and not written law, is best illustrated by the story of the oven of Akhnai. The oven of Akhnai was a stove that had an unbaked mortar.⁶⁷ The oven sparked an argument amongst rabbis as to whether it was pure or not.⁶⁸ During this argument Rabbi Eli'ezer sought to prove

⁵⁹ Resnicoff, *Physician Assisted Suicide Under Jewish Law*, *supra* note 17, at 591 (explaining that literal translations of specific verses in the Torah are not seen as authoritative because some verses are incomprehensible when taken literally).

⁶⁰ *Id.* at 591–592.

⁶¹ *Id.*

⁶² *See* Litman, *supra* note 50, at 565.

⁶³ *Id.* (explaining that there are various commentaries that exist which include interpretations of the Torah. These commentaries may follow a midrashic style or may be organized in a manner that groups commentaries together based on topic in a mishnaic style).

⁶⁴ Steven H. Resnicoff, *Autonomy in Jewish Law-in Theory and in Practice*, 24 J.L. & RELIGION 507, 546 (2009) (citing Menachem Elon, *Jewish Law: History, Sources, Principles vol. 3*, 1042 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Socy. 1994)).

⁶⁵ *Id.*

⁶⁶ Litman, *supra* note 50, at 570 (stating that the Torah is also known as the "Five Books of Moses").

⁶⁷ David Luban, *The Coiled Serpent of Argument: Reason, Authority, and Law in A Talmudic Tale*, 79 CHI.-KENT L. REV. 1253, 1253 (2004).

⁶⁸ *Id.*

that he was right by calling for divine help.⁶⁹ After being proven right by a carob tree, an aqueduct, the walls of the academy, and a voice from the Heavens Rabbi Eli'ezer was overruled by Rabbi Yehoshua and Rabbi Yirmiyah.⁷⁰ Rabbi Yirmiyah, siding with Rabbi Yehoshua, explained that when the Torah was given to humans at Mount Sinai, it was written in the Torah that humans should "follow the majority."⁷¹ While Rabbi Eli'ezer was correct in identifying the literal translation of the written law, his interpretation was not how the majority interpreted the written law. Therefore, the binding law is the majority's interpretation of the law, and not necessarily the literal translation.

II. MARIJUANA IN AMERICAN LAW

American laws on marijuana are quite complicated due to the contradictions between the federal laws and State laws on the sale and consumption of marijuana. The federal government has taken a strict approach to regulating marijuana by prohibiting the sale and use of marijuana, arguing that the physical effects of marijuana are addictive and dangerous.⁷² Proponents of legalizing marijuana, however, argue that marijuana can successfully treat an

⁶⁹ *Id.*

⁷⁰ *Id.* (Explaining the story to as Rabbi Eli'ezer exclaimed "if the law is as I say, this carob tree will prove it." The carob tree then jumped a couple hundred cubit feet. The other rabbis argued that a tree does not prove anything, so Rabbi Eli'ezer then exclaimed "if the law is as I say, then this aqueduct will prove it." The water in the aqueduct then began to flow upstream. The other rabbis again argued that an aqueduct does not prove anything, so Rabbi Eli'ezer exclaimed "if the law is as I say, then the walls of the academy will prove it." The walls of the academy then began to fall. At this point, Rabbi Yehoshua reprimanded the walls, asking them what business they had interfering in an argument amongst scholars. Finally, Rabbi Eli'ezer exclaimed "if the law is as I say, it shall be proven from Heaven." Once Rabbi Eli'ezer finished, a divine voice called down "what have you against Rabbi Eli'ezer? The law is always as he says."⁷⁰ Rabbi Yehoshua responded by stating that "it is not in heaven.")

⁷¹ *Id.*

⁷² Jay Zitter, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R.6th 353 (2009).

array of symptoms and disorders,⁷³ and should therefore be legalized for its medical benefits.⁷⁴ The federal government has addressed this argument by claiming marijuana has little or no medical benefit.⁷⁵ The federal government also contends that any medical benefit provided by marijuana can be replicated by other medicines, thereby making marijuana unnecessary for medical purposes.⁷⁶

To fully understand the debate surrounding marijuana, the term marijuana itself needs to be defined. Taxonomically, marijuana is known as “cannabis sativa,”⁷⁷ which is a seed born and flowering plant in the Cannabinaceae family.⁷⁸ Normally, marijuana is consumed by crushing and smoking the leaves, flowers, stems, and seeds of the marijuana plant.⁷⁹ Consuming marijuana can “cause distorted perceptions, impaired coordination, difficulty with thinking and problem solving, and problems with learning and memory.”⁸⁰ Other common effects of marijuana use are sleepiness, depression, euphoria, short-term memory loss, panic, anxiety, and hallucinations.⁸¹ These effects are brought on by the presence of a psychoactive component of marijuana known as tetrahydrocannabinol (THC).⁸² THC is normally concentrated in the flowering head of marijuana plants, and through specific cultivation methods the concentration can be increased.⁸³ THC is not the only psychoactive component found in marijuana though;

⁷³ *Id.*

⁷⁴ *Id.* (stating that proponents of medical marijuana argue that it has the potential to treat various disorders and symptoms, as well as relieving pain).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Roussell, *supra* note 7, at 107.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (NIDA InfoFacts: Marijuana, Nat'l Inst. on Drug Abuse, <http://www.drugabuse.gov/Infofacts/marijuana.html> (last updated Nov. 2010)).

⁸¹ Tim Pudlowski, *Salvia Divinorum and Salvinorin a: The Dangerous Substances America Does Not Know About*, 38 CAP. U. L. REV. 41, 55 (2009).

⁸² Danovitch, *supra* note 9, at 93.

⁸³ *Id.*

there are believed to be at least sixty other cannabinoids in marijuana smoke.⁸⁴ When marijuana is consumed, the THC found in marijuana stimulates two cannabinoid receptors in the human body,⁸⁵ which creates an intoxicating sensation on the consumer.⁸⁶

Although marijuana can cause an intoxicating sensation, marijuana is also useful for medical purposes. The history of marijuana being used for medicinal purposes dates as far back as 2700 B.C. when the Chinese used marijuana as a way of treating constipation and inflammation of joints.⁸⁷ There are also reports showing that Africans, Indians, the Ancient Greeks, and medieval Europeans used marijuana to treat fevers, dysentery, and malaria.⁸⁸ In the United States, marijuana was used to treat lack of appetite, and was included in the United States Pharmacopoeia from 1850 through 1942.⁸⁹ Currently, in a few states, marijuana is being used to alleviate nausea and lack of appetite in AIDS patients, cancer patients undergoing chemotherapy, and inter-ocular pressure among glaucoma sufferers.⁹⁰ Marijuana is also used to help relieve side effects of standard treatment for non-terminal illnesses.⁹¹

While historically marijuana has been used for its medicinal properties, most recently the perceived medical benefits of marijuana have noticeably increased. In Colorado, one case has gained national attention. The Figi family, Matt and Paige, had

⁸⁴ *Id.* See also Moira Gibbons, *The Cannabis Conundrum: Medication v. Regulation*, 24 A.B.A. HEALTH L. SEC. 1, 1 (2011) (explaining that cannabinoids are a group of chemicals that exert physiological effects when they bind to cannabinoid receptors. It is believed that there are over 100 types of cannabinoids, some of which are found naturally in humans, animals, and marijuana plants, and some of which can be created synthetically.).

⁸⁵ See Danovitch, *supra* note 9, at 93–94.

⁸⁶ *Id.*

⁸⁷ Matthew W. Grey, *Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/physician Relationship*, 30 U. RICH. L. REV. 249, 251 (1996).

⁸⁸ *Id.*

⁸⁹ *Id.* at 251–252 (the United States Pharmacopoeia is the official list of recognized medicinal drugs).

⁹⁰ *Id.*

⁹¹ Zitter, *supra* note 71.

their daughter Charlotte who was diagnosed with Dravet Syndrome.⁹² Dravet Syndrome caused Charlotte to suffer from multiple recurring seizures and she began to decline cognitively.⁹³ By the time Charlotte was five years old, she had lost the ability to walk, talk, and eat.⁹⁴ At that point the Figis started treating Charlotte with marijuana.⁹⁵ The Figis bought a strand of marijuana, known as R4, and had their friend extract the oils from the strand. The Figis then dropped an ounce of that oil into Charlotte's food.⁹⁶ Since then, Charlotte has consumed an ounce of marijuana oil per day, which has drastically reduced her seizures from 300 grand mal seizures a week to two or three seizures a month.⁹⁷ Charlotte has also regained the ability to talk, eat, walk, and now she is even able to ride a bicycle.⁹⁸ Following the perceived success of Charlotte's treatment, the strand of marijuana that she uses has been named "Charlotte's Web," and is currently being used by close to three-hundred other patients around the world.⁹⁹

Charlotte Figi's story is not the only recent break-through with respect to the medical benefits of marijuana. In October of 2013, a British researcher published a study that evaluated the effects of six different cannabinoids on leukemia cells.¹⁰⁰ Wai Liu

⁹² Sandra Young, *Marijuana Stops Child's Severe Seizures*, CNN (Aug. 7, 2013) (explaining that Dravet Syndrome is a rare intractable form of epilepsy. Intractable means that the seizures cannot be controlled by medication) *available at* <http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/>

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Young, *supra* note 93.

⁹⁸ *Id.*

⁹⁹ *Medical Marijuana Strain Has Hundreds Of Parents Flocking To Colorado*, CBS DENVER (Jan. 23, 2014), <http://denver.cbslocal.com/2014/01/23/medical-marijuana-strain-has-hundreds-of-parents-flocking-to-colorado/>.

¹⁰⁰ Steven Nelson, *Study: Cannabis Compounds Can Kill Cancer Cells*, US NEWS (Nov. 24, 2013) *available at* <http://www.usnews.com/news/articles/2013/10/24/study-cannabis-compounds-can-kill-cancer-cells>.

conducted the study and found that the six cannabinoids displayed “potent anti-cancer activity.”¹⁰¹ Mr. Liu told U.S. News that the cannabinoids “target and switch off” pathways, which allow cancer cells to grow.¹⁰² Liu, however, did caution that he is not sure whether smoking marijuana would provide the same effect on the leukemia cells as the cannabinoids being injected individually.¹⁰³

Mr. Liu is optimistic that he can create a medication, which can treat leukemia within twelve to eighteen months after the study was completed.¹⁰⁴ However, he does note that the United States is not providing major resources for marijuana research.¹⁰⁵ Thus, even if he is successful in creating his medication, he might still face an uphill battle for approval from the Food and Drug Administration in the United States. Kris Hermes, a spokesman for Americans for Safe Access, a pro-marijuana group, has also stated that the federal government is obstructing marijuana research, which explains why the research is being done elsewhere.¹⁰⁶ There have been other complaints lodged against the federal government also arguing that the government has tried to stifle research into marijuana’s medical benefits. In February of 1997, the National Institutes of Health convened a conference to examine the medical benefits of marijuana.¹⁰⁷ This forum consisted of a group of medical experts who maintained that there was a need for an objective scientific investigation into marijuana’s medical benefits.¹⁰⁸ The group argued that marijuana looked promising

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (stating that “the actual countries that are keen to drive cannabis as an anti-cancer treatment are places like Spain and Italy, as well as the U.K.”).

¹⁰⁶ *Id.*

¹⁰⁷ Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35, 81 (2009).

¹⁰⁸ *Id.* (explaining that group of experts in anesthesiology, internal medicine, neurology, oncology, ophthalmology, pharmacology and psychiatry maintained that there was a need for accurate and nonbiased scientific investigation of medical marijuana).

enough to recommend that new studies should be performed.¹⁰⁹ The federal government, however, rejected the group's proposal, explaining that past studies had been conducted on marijuana and none of them supported any evidence of marijuana use for medical purposes.¹¹⁰ The federal government's reasoning for rejecting the study is consistent with its past policies. Their additional argument is that marijuana has little or no medical value, especially when smoked, because it is addictive and dangerous.¹¹¹ Therefore, the federal government has focused its efforts to strongly oppose the possession or consumption of marijuana, and the legalization of medical marijuana in particular.¹¹²

Thus, under federal law, the sale and consumption of marijuana remains illegal. This has been the case since Congress passed the Controlled Substance Act in 1970.¹¹³ The Act created five "schedules" of drugs and chemicals.¹¹⁴ Under this Act, marijuana was classified as a "Schedule I controlled substance," meaning that marijuana has no acceptable medical use in the United States.¹¹⁵ Due to its labeling under the Act, marijuana became an illegal drug under federal law.¹¹⁶

¹⁰⁹ *Id.* at 82 (explaining that the group had varying levels of interest in marijuana's medical benefits in relation to appetite stimulation and cachexia, nausea and vomiting following anticancer therapy, neurological and movement disorders, analgesia, and glaucoma).

¹¹⁰ *Id.* at 83 (the federal government argued that a past evaluation done by several Department of Health and Human Services concluded that "no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use").

¹¹¹ *Id.*

¹¹² Zitter, *supra* note 71.

¹¹³ Boyd, *supra* note 112, at 1269-70.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (explaining that because marijuana is a Schedule I controlled substance it is illegal to "knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," unless otherwise provided by the Controlled Substances Act").

Complicating the issue of marijuana's legality under American law is the fact that while the drug is illegal under federal law, there has recently been a push to legalize marijuana at the state level. The push to legalize marijuana has been growing in effectiveness since 2012, when two states, Colorado and Washington, legalized marijuana.¹¹⁷ Both states had a ballot initiative on the legalization of marijuana, and in both states the citizens voted to legalize marijuana.¹¹⁸ In Colorado, the ballot initiative was whether or not to adopt an amendment to the state constitution, which would legalize the use and sale of marijuana.¹¹⁹ In Washington, the ballot initiative was a new law, which would legalize the use and sale of marijuana.¹²⁰ The legalization of marijuana at the state level brought the states' laws into direct conflict with the federal law, which makes marijuana illegal.¹²¹ Despite these changes, under the Supremacy Clause, the federal law's Controlled Substance Act should preempt Colorado and Washington's laws.¹²² This is because federal law has banned the use and sale of marijuana. Since federal law takes priority over state law, if the federal government challenged either the Colorado or Washington law, the state laws should be struck down.¹²³ Yet, the federal government decided to not challenge the states' legislation.¹²⁴ Therefore, despite the federal government's own law and policies regarding marijuana, marijuana is now legal within the borders of Washington and Colorado.

¹¹⁷ Coffman, *supra* note 44.

¹¹⁸ *Id.*

¹¹⁹ *Results for Proposed Initiative #30, available at* <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2011-2012/30Results.html> (last visited Mar. 2, 2014).

¹²⁰ *Initiative, available at* <http://www.newapproachwa.org/content/initiative> (last visited March 2, 2014).

¹²¹ *Id.*

¹²² *see* Dow, *supra* note 20, at 1009 (explaining that when a state law is in direct conflict with a federal law, the federal law will trump, or preempt, the state law).

¹²³ *Id.*

¹²⁴ Hobbs-Wright, *supra* note 45.

The federal government's decision not to challenge Washington and Colorado voters might be a showing that the federal government accepts the shift in public opinion about marijuana legalization. In October of 2013, Gallup conducted a poll asking Americans whether they were in favor of legalizing marijuana.¹²⁵ The poll showed that 58% of Americans were in favor of legalizing marijuana.¹²⁶ This marks the first time in the history of the United States where a clear majority of Americans who participated in a poll regarding the legalization of marijuana are in favor of legalizing marijuana.¹²⁷ Approval for legalizing marijuana jumped 10% from 2012 to 2013.¹²⁸ Though, along with the growing support for the legalization of marijuana, there is also new evidence which helps support the federal government's arguments for opposing the legalization of marijuana. During January to June 2013, after Washington legalized marijuana, a record number of drivers who were pulled over in Washington for vehicle stops tested positive for THC.¹²⁹ Over half of the drivers that tested positive for THC were above the state's legal limit of 5 nanograms of THC per milliliter of blood.¹³⁰

In addition to the legalization of marijuana in Colorado and Washington, and the apparent public approval for legalization, other states and jurisdictions have started the legalization process. The 2014 mid-term elections saw more jurisdictions legalize marijuana. Alaska, Oregon, and Washington D.C. all voted to

¹²⁵ Art Swift, *For First Time, Americans Favor Legalizing Marijuana* (Oct. 22, 2013), available at <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Jonathan Kaminsky, *Pot Smokers Arrested for DUI: A Record High in Washington*, THE CHRISTIAN SCIENCE MONITOR (Nov. 23, 2013), <http://www.csmonitor.com/USA/Latest-News-Wires/2013/1123/Pot-smokers-arrested-for-DUI-A-record-high-in-Washington> (explaining that in the first six months since marijuana was legalized in Washington, 745 drivers stopped by police tested positive for THC. Each of the two years prior to marijuana's legalization saw 1,000 drivers test positive for THC.)

¹³⁰ *Id.*

legalize marijuana for recreational use while Guam legalized medical marijuana.¹³¹

Washington D.C. is not the only jurisdiction in the United States to begin the move toward decriminalizing marijuana. The town of Portland, Maine, voted to legalize recreational marijuana for citizens twenty-one years old and older.¹³² “In the November 2013 elections, 70% of Portland voters supported passing an ordinance allowing citizens that were twenty-one years old and older to possess up to 2.5 ounces of marijuana and paraphernalia.¹³³ Accordingly, Portland became the first city in the North East of the United States to allow the recreational use of marijuana.¹³⁴ Observing the success in Colorado and Washington in legalizing marijuana, voters in Kansas have also become more aggressive in pushing their state towards legalization. A Kansas grass-roots organization called “Fire It Up” was formed with the goal of legalizing marijuana.¹³⁵ The group recently began planning an advertising campaign to promote the legalization of marijuana by using billboards.¹³⁶ Further, twelve states, other than Washington D.C., are contemplating decriminalizing marijuana, and seventeen states have introduced bills or started initiatives to legalize marijuana for personal use as of the time of this paper.¹³⁷

¹³¹ Trevor Hughes, *Where America Landed on Marijuana*, USA TODAY, (Nov. 5, 2014), <http://www.usatoday.com/story/news/politics/elections/2014/11/04/voters-deciding-on-marijuana/18485541/>

¹³² Robin Wilkey, *Portland, Maine, Legalizes Recreational Marijuana*, HUFFINGTON POST (Nov. 5, 2013), http://www.huffingtonpost.com/2013/11/05/portland-maine-marijuana_n_4221919.html.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *'Fire It Up Kansas' Pushing to Legalize Marijuana*, KANSAS CITY STAR (Nov. 6, 2013), <http://www.kansascity.com/2013/11/06/4601325/fire-it-up-kansas-pushing-to-legalize.html>.

¹³⁶ *Id.*

¹³⁷ Rick Lyman, *Pivotal Point Is Seen as More States Consider Legalizing Marijuana*, N.Y. TIMES (Feb. 27, 2014) at A1, available at http://www.nytimes.com/2014/02/27/us/momentum-is-seen-as-more-states-consider-legalizing-marijuana.html?_r=0.

While some states are beginning to move towards legalizing marijuana, other states have already, partially, legalized this drug. Twenty states, plus Washington D.C., have drafted specific legislation, creating exceptions to the marijuana prohibition.¹³⁸ In these jurisdictions, special legislation was created which has made certain amounts of marijuana lawful to possess when the marijuana is used for medical purposes.¹³⁹ Additionally, fourteen states are looking at new medical marijuana laws in 2014.¹⁴⁰ Because these laws are state laws, and not federal laws, each state has different standards and requirements for medical marijuana.¹⁴¹ For example, in Arizona a person can only have up to 2.5 ounces of usable marijuana on their person at any given time, but in California a person can carry up to 8 ounces of usable marijuana at a time.¹⁴² While the specifics of the laws vary from state to state, they generally look the same with the same basic provisions. Eighteen of the twenty-one jurisdictions that allow medical marijuana require the patients using medical marijuana to register with the state registry.¹⁴³ Only California and Maine allow patients to voluntarily register,¹⁴⁴ while Washington is the only jurisdiction that does not require any registration.¹⁴⁵ Further, all twenty-one jurisdictions require that the patients using marijuana must be diagnosed with at least one condition from a group of

¹³⁸ 1 Uelmen and Haddox, *Drug Abuse and the Law Sourcebook* § 3:85 (citing *23 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, ProCon, Sept. 16, 2013, available at: <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>). The twenty states are Alaska, Arizona, California, Colorado, Connecticut, Washington D.C., Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

¹³⁹ See *23 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

¹⁴⁰ Lyman *supra* note 138.

¹⁴¹ See *23 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

selected conditions and diagnoses.¹⁴⁶ The conditions vary from state to state, with some states having a longer list of conditions that qualify patients to receive treatment by medical marijuana. One of the main differences among state laws on marijuana is whether patients are able to cultivate their own marijuana.¹⁴⁷ Some states do allow patients to cultivate a specific amount of marijuana for their own use, while other states will only allow patients to cultivate a specific amount of marijuana for their own use if the patient has some sort of issue with the nearest dispensary.¹⁴⁸ For example, in Arizona, a patient can only cultivate their own marijuana if they are twenty-five miles away from the nearest dispensary at the time that they applied for their card permitting them to be treated with medical marijuana.¹⁴⁹ Massachusetts, however, allows patients to grow their own marijuana as long as the patient gets a "hardship waiver."¹⁵⁰

Currently, marijuana is both legal and illegal under American law. Federal law prohibits the use and sale of marijuana.¹⁵¹ State law in Colorado and Washington allows the use and sale of marijuana though.¹⁵² Twenty states, and Washington D.C., allow the use and sale of marijuana when the marijuana is used to treat medical ailments.¹⁵³ This puts state law in direct conflict with federal law. When state law and federal law are in direct conflict, the federal government can preempt the state law under the Supremacy Clause of the Constitution.¹⁵⁴ In this case, however, the federal government has chosen not to preempt either the complete legalization of marijuana in Colorado and

¹⁴⁶ See 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Andrew J. Boyd, *Medical Marijuana and Personal Autonomy*, 37 J. MARSHALL L. REV. 1253, 1269–70 (2004).

¹⁵² Coffman, *supra* note 44.

¹⁵³ See 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

¹⁵⁴ See Sedler, *supra* note 16, at 1489.

Washington, or the medical marijuana exceptions in the twenty-one other jurisdictions.¹⁵⁵

III. MARIJUANA IN JEWISH LAW

The legality of marijuana in Jewish law is not as complex as in American law. Most Jewish law authorities do not specifically single out marijuana as an issue. Though, some Jewish law authorities do discuss drugs in general. Since marijuana is a drug, one can analyze its legality from authorities that discuss drug use and drug sales. When the rules and laws of the Jewish law authorities are applied to the sale and use of drugs in general, such rules and laws support the conclusion that drugs, such as marijuana, are prohibited under Jewish law.

One of the most important commandments under Jewish law is the negative commandment, which states that one should not harm oneself.¹⁵⁶ A negative commandment is a commandment that states what an individual must not do.¹⁵⁷ This commandment is so important that it shows up twice in a matter of verses in Deuteronomy.¹⁵⁸ The first time this commandment shows up in Deuteronomy is in chapter 4, verse 9, in the form of a positive commandment.¹⁵⁹ A positive commandment is a commandment that explains what an individual must do.¹⁶⁰ This commandment is then repeated six verses later, in Deuteronomy chapter 4, verse 15.¹⁶¹ In these verses God commands humans to keep, or guard, their souls diligently and not do anything that could harm them.

¹⁵⁵ Hobbs-Wright, *supra* note 45.

¹⁵⁶ Deuteronomy 4:9 and 4:15.

¹⁵⁷ Litman, *supra* note 50, at 566 (stating that the Torah is also known as the "Five Books of Moses").

¹⁵⁸ Deuteronomy 4:9 and 4:15.

¹⁵⁹ Deuteronomy 4:9 (under the King James Bible translation, it is translated as "keep your soul diligently").

¹⁶⁰ Litman, *supra* note 50, at 566 (stating that the Torah is also known as the "Five Books of Moses").

¹⁶¹ Deuteronomy 4:15 (under the King James Bible translation, it is translated as "Take ye therefore good heed unto yourselves").

The commandment that directs one not to harm oneself is reaffirmed in the Mishna Torah, written by Maimonides. Maimonides explained that there is a positive commandment to remove any hazard that is potentially lethal.¹⁶² While a person removes the hazard he must be extremely cautious and "be careful and guard yourselves very well."¹⁶³ Maimonides then explained that a failure to remove the hazard, or the placing of obstacles in the hazard's way, would constitute a breach of a positive commandment.¹⁶⁴ Rabbi Yosef Caro, who wrote the Shulchan Aruch, agreed with Maimonides in regards to the positive commandment to remove a hazard.¹⁶⁵ Rabbi Caro explained that if there is anything that threatens human life, there is a positive commandment to remove it.¹⁶⁶ Rabbi Caro disagreed with Maimonides, however, in regards to whether a failure to remove the hazard constituted a breach of the positive commandment.¹⁶⁷ Rabbi Caro argued that failure to remove the threat would breach the negative commandment, which states, "do not place blood," because in violating such commandment the person is opening oneself to danger.¹⁶⁸ While Maimonides and Rabbi Caro disagreed as to whether a person would be breaching a positive or negative commandment by not removing a threat to his life, both agreed that there was a commandment to guard oneself and remove any threats to one's life. Thus, the question remains whether marijuana is a drug that causes harm to an individual.

One threat to human life is the ingestion of dangerous chemicals. Dangerous chemicals could cause a person to become

¹⁶² Maimonides, *Mishna Torah*, Hilchot Rotzeach 11:4, translation by R' Joshua Flug, available at http://www.canfeinesharim.org/uploadedFiles/site/Torah_Study/Core_Topics/Protecting_Our_Health/Health_Source_Sheet.pdf.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Caro, *Shulchan Aruch*, Choshen Mishpat, 427: 8-10, translation by Yonatan Neril, available at: http://www.canfeinesharim.org/uploadedFiles/site/Torah_Study/Core_Topics/Protecting_Our_Health/Health_Source_Sheet.pdf.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

sick. Therefore, in the Shulchan Aruch, there is a discussion about not placing one's mouth on a flowing pipe and drinking.¹⁶⁹ It is mentioned that the sages also forbade people from drinking at night from wells and ponds.¹⁷⁰ The reasoning behind these prohibitions were to make sure a person did not accidentally swallow a leech.¹⁷¹ Drinking from a flowing pipe, or from a well or pond at night, was seen as being careless.¹⁷² In being careless, a person would violate the commandment of not harming oneself, and thus, the court would give that person lashes of rebellion, thereby showing how significant it is to follow the commandment of guarding oneself.¹⁷³

The Babylonian Talmud also discusses the issue of ingesting dangerous chemicals. While the Shulchan Aruch discusses the possibility of drinking unsanitary water and swallowing a leech, the Talmud focuses specifically on ingesting drugs.¹⁷⁴ The Talmud recounts a discussion between Rab and his son Hiyya.¹⁷⁵ In this conversation, Rab also tells Hiyya not to do various tasks, which might cause harm to him, again showing the importance of guarding oneself.¹⁷⁶ One of the specific things that Rab tells Hiyya is "do not take drugs."¹⁷⁷ Due to the effects that ingesting marijuana can have on a person,¹⁷⁸ consuming marijuana would be considered ingesting dangerous chemicals.

¹⁶⁹ *Id.*

¹⁷⁰ Chosen Mishpat, 427: 8-10 *supra* note 165.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Babylonian Talmud, *Pesachim*, 113a, available at <http://halakhah.com/pdf/moed/Pesachim.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (stating that Rab told his son Hiyya "do not leap in great jumps; do not have a tooth extracted, and do not provoke serpents and do not provoke a Syrian woman").

¹⁷⁷ *Id.*

¹⁷⁸ Roussell, *supra* note 7, at 109 (listing the effects of marijuana use as "distorted perceptions, impaired coordination, difficulty with thinking and problem solving, and problems with learning and memory").

Recently though, marijuana has been singled out under Jewish law. Rabbi Feinstein wrote an entire responsa on the use of marijuana.¹⁷⁹ Rabbi Feinstein was asked to help a drug dealer who was in jail, but he refused to help.¹⁸⁰ In the responsa, Rabbi Feinstein concluded that smoking marijuana was clearly forbidden by several essential laws in the Torah.¹⁸¹ Rabbi Feinstein argued that smoking marijuana causes a great desire that will grow into an even greater desire, such as addiction.¹⁸² Additionally, in Rab's conversation with Hiyya, Rab specifically tells Hiyya not to take drugs, even as medicine, because drug use leads to addiction.¹⁸³ Once a person becomes addicted, Rabbi Feinstein reminds us of the lesson from the story of the rebellious son, who had a desire to eat larger quantities of food than he needed.¹⁸⁴ Rabbi Feinstein explains that the rebellious son teaches us that he will steal and rob to satisfy his desire.¹⁸⁵ Therefore, Rabbi Feinstein could not help the drug dealer, because his desire to smoke marijuana would lead him to addiction and then to committing other crimes.¹⁸⁶

In his "responsa" Rabbi Feinstein also argued that one of the most important laws in the Torah that prohibits smoking marijuana is the law that prohibits an individual from harming oneself.¹⁸⁷ He argued that smoking marijuana destroys and harms the body, even if someone could offer an example of a healthy person who smoked marijuana.¹⁸⁸ According to Rabbi Feinstein, in this situation, the person was damaging his mind, which is considered even worse than his body, because if a person who

¹⁷⁹ Iggrot Moshe, Yoreh De'ah 3:35 (translated by Keith Sharfman).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Babylonian Talmud, *Pesachim*, 113a, available at <http://halakhah.com/zpdf/moed/Pesachim.pdf> (footnote 9 saying that drugs are "habit forming").

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Pesachim*, 113a *supra* note 183.

damages his mind to the point where he can no longer understand then he cannot study the Torah.¹⁸⁹

Not everyone shared Feinstein's opinion that one cannot study the Torah if one smokes marijuana. There are some people who try to attribute to historical figures, such as Baal Shem Tov, addictive qualities that helped bring them closer to God.¹⁹⁰ Professor Yaffa Eliach in particular has attempted to prove that Baal Shem Tov reached spiritual highs by smoking something "other than tobacco."¹⁹¹ Professor Eliach, and others in her position would argue that marijuana should be allowed in Jewish law so as to allow one to get closer to God like Baal Shem Tov.¹⁹²

Jewish law does not permit one to smoke marijuana to reach a higher connection with God. Dr. Walter Wurzburger argues that one cannot get closer to God, just because he smokes marijuana.¹⁹³ Rabbi Moshe D. Tendler, Rabbi Feinstein's son-in-law,¹⁹⁴ believed that when under the influence of drugs, one "becomes, for varying lengths of time, a lobotomized caricature of this noble creature that bears the Godly image."¹⁹⁵ Maimonides agreed with Dr. Wurzburger and Rabbi Tendler.¹⁹⁶ Maimonides argued that it is impossible to understand and know the ways of God when one is ill.¹⁹⁷ Maimonides further explained that a

¹⁸⁹ *Id.*

¹⁹⁰ Rabbi Dr. Raymond Apple, *Drugs and Judaism*, OZTORAH, available at <http://www.oztorah.com/2007/08/drugs-judaism/>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (quoting Dr. Wurzburger as saying "proximity to God cannot be reached by putting oneself into a trance either through physical or chemical means").

¹⁹⁴ Rabbi Moshe D. Tendler, *Halakhic Death Means Brain Death*, THE JEWISH REV., Vol. 3 (Jan. 1990), available at <http://www.thejewishreview.org/articles/?id=114>.

¹⁹⁵ See Apple, *supra* note 191.

¹⁹⁶ Maimonides, *Mishna Torah*, Hilhot Deot 4:1, translation by Gideon Aronovich.

¹⁹⁷ *Id.*

person, therefore, needed to distance oneself from "damaging influences."¹⁹⁸

With Jewish law prohibiting marijuana and not making an exception for those who attempted to gain a closer connection to God, the question becomes whether Jewish law provides an exception for medical marijuana. This question, however, is one that has not been discussed prominently. Therefore, there is no consensus answer to this question. To answer this question, one must consult various Jewish law authorities and compare them against one another.

The strongest argument that Jewish law would make an exception to its prohibition against marijuana is the imposed duty to preserve life. This duty originally appears in the Torah, in Leviticus 19:16.¹⁹⁹ The verse imposes a duty to not only preserve one's own life, but also to preserve someone else's life. There is another verse in the Torah that provides a positive commandment to try to preserve life. Deuteronomy chapter 22 verse 8, commands that when one builds a new house, he must build a guardrail on the roof.²⁰⁰ This guardrail is a preemptive measure to make sure no one falls off the roof. By building the guardrail, one is preventing blood from being brought upon his house.²⁰¹ Thus, the person who built the house has done what he can to prevent a person from falling off the roof and killing himself, and thus has done what he can to preserve life.

The duty to preserve life applies even if one happens to find himself in a situation where someone else might need his help, purely by chance. In this case, Maimonides wrote, "if one person is able to save another and does not save him, he transgresses the

¹⁹⁸ *Id.*

¹⁹⁹ Leviticus 19:16 (King James Bible translation, translating as "Thou shalt not go up and down as a talebearer among thy people: neither shalt thou stand against the blood of thy neighbour: I am the LORD.").

²⁰⁰ Deuteronomy 22:8 (King James Bible translation, translating as "[w]hen thou buildest a new house, then thou shalt make a battlement for thy roof, that thou bring not blood upon thine house, if any man fall from thence.").

²⁰¹ *Id.*

commandment."²⁰² The duty is not that the bystander needs to personally save the victim, but that the bystander can pay someone else to help the victim.²⁰³ If the bystander neither pays someone to help the victim, nor tries to help out himself, then, according to Maimonides, he has transgressed the commandment and is in violation of Jewish law.²⁰⁴ While a refusal to help someone in this situation does not result in flogging, it is regarded as though the bystander destroyed the world in letting a single Israelite die.²⁰⁵

Due to the importance of the duty to preserve life, one must do all that is possible in order to attempt to preserve life. This means that even when there is a slight chance of success, there must be an attempt made to preserve the life.²⁰⁶ The same is true even if the life will only be preserved for a short while.²⁰⁷ If one has the ability to help preserve a life, he is commanded to help preserve that life.²⁰⁸ If one has the ability to help preserve that life, but chooses not to, then he has violated Jewish law.²⁰⁹

To determine whether Jewish law would allow the use of marijuana for medical purposes, the Jewish law commandments prohibiting ingesting drugs and requiring preserving life must be prioritized against one another. The two main commandments when discussing medical marijuana are the commandment to preserve life and the commandment not to do harm to your body. One must prioritize these two commandments to determine whether marijuana is allowed for medical purposes under Jewish law. If the commandment to preserve life is more important, it

²⁰² Aaron Kirschenbaum, J.D., *The Bystander's Duty to Rescue in Jewish Law*, available at http://www.daat.ac.il/daat/kitveyet/assia_english/kirschenbaum.htm (quoting Maimonides, Torts, "Murder and Preservation of Life" 1:14, 16).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Resnicoff, *Physician Assisted Suicide Under Jewish Law*, *supra* note 17, at 600.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Kirschenbaum, *supra* note 203.

seems that marijuana would be allowed for medical purposes. On the other hand, if the commandment not to do harm to one's body is more important, then it is unlikely that marijuana is allowed under Jewish law.

According to Jewish law authorities, it seems that there is a higher level of importance placed on the commandment to preserve life than the commandment not to do harm to one's body. If that were the case then Jewish law would accept marijuana when used for medical purposes. This, however, would not mean that one could totally disregard the commandment not to do harm to one's body. The commandment is still important and people should still follow it. Under Jewish law though, there are often situations in which a commandment is violated in the attempt to preserve life, which would help one understand the potential legality of medical marijuana under Jewish law.

The commandment not to eat on Yom Kippur is specifically mentioned as a commandment that should be violated to preserve a life.²¹⁰ If a person is sick, because he has not eaten on Yom Kippur, that person should violate the commandment not to eat to preserve his life.²¹¹ Further, if the sick will not violate the prohibition on eating on Yom Kippur, another person should force him to eat to preserve his life.²¹² The prohibition on eating on Yom Kippur should be violated even if the risk to life is "doubtful."²¹³

When a person is in pain, which does not constitute danger to life or limb, the person can be treated.²¹⁴ If, however, this situation occurs on the Sabbath, there is a prohibition that prevents the person in pain from performing treatment on himself.²¹⁵ Since there is no danger to life or limb, the person cannot violate the

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Rabbi Moshe David Tendler, Dr. Fred Rosner, *Dental Emergencies on the Sabbath*, available at <http://www.jlaw.com/Articles/dental-emerg.html#14>.

²¹⁵ *Id.*

Sabbath laws entirely.²¹⁶ The person can, however, have another person, who is not Jewish, perform the treatment on him in this situation.²¹⁷

This exception to the Sabbath rules can get complicated. Some treatments are unable to be performed by anyone other than the one needing treatment. When a situation like that arises, the person who needs treatment can perform the treatment on himself.²¹⁸ The Talmud mentions a specific scenario to illustrate this point. When a man has chest pains, which do not threaten life or limb, he is able to suck a goat's milk directly from the goat.²¹⁹ Usually this is prohibited on the Sabbath and the typical exception is for the non-Jew to perform the treatment.²²⁰ In this case, however, because the man who needs the treatment needs to suck the goat's milk directly from the goat, having a non-Jew suck the goat's milk would not accomplish anything in terms of treating the man with chest pain.

Commandments that should be violated do not only refer to commandments pertaining to specific days, such as the commandment not to eat on Yom Kippur, though. Maimonides discussed a series of commandments that one should violate in order to preserve life. Maimonides specifically mentioned the commandment where it is "forbidden to take medicine from a gentile."²²¹ The commandment not to let oneself be treated by a gentile was qualified with the phrase "unless there is no hope that the sick person will live."²²² It was argued that it was preferable to take the risk of being treated by a gentile than to resign oneself to death.²²³ The reason that this commandment existed was due to the fear that the gentiles would harm Jews with weapons.²²⁴ Even

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* (citing Talmud, Ketubot 60a.).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Maimonides, *Mishneh Torah, The Laws of Murder and of the Protection of Human Life*, as translated by Rabbi Eliyahu Touger, 592.

²²² *Id.*

²²³ *Id.* at 593 n.22.

²²⁴ *Id.* at 594 n.30 (citing Rashi, *Avodah Zarah*, 15a).

though there was a fear that the gentiles would harm Jewish patients, it was preferable to take that risk in the hope that the gentile would treat the patient, as opposed to waiting around for the Jewish patient to die without seeking all the help that he could to preserve life.

In Jewish law, preserving a life is considered as a "primary obligation."²²⁵ By being labeled a "primary obligation," that means that the commandment to preserve life supersedes other commandments, which come in direct conflict with it.²²⁶ There are only three laws that will take precedent when in conflict with the duty to preserve life.²²⁷ As a result, the commandment to save a life supersedes the commandments of the Sabbath, even though those who usually violate the laws of the Sabbath can be put to death.²²⁸

According to the Jewish law authorities, the commandment to preserve life outweighs the commandment not to do harm to one's body. There are only three instances in Jewish law where the duty to preserve life is superseded by another commandment,²²⁹ but none of those instances involve the duty not to harm one's body.²³⁰ Therefore, one can violate the commandment not to do harm to your body in order to preserve life, thereby allowing the consumption of marijuana for medical purposes. Before reaching that conclusion though, there is still one question left unanswered. That is whether or not using marijuana is seen as preserving life. When one analyzes the Jewish law authorities, it is clear that marijuana fits within the framework to preserve a life.

The most analogous case to medical marijuana, within Jewish authorities, is the case where one can drink the goat's milk on the Sabbath. In that case, the person who needed to drink the

²²⁵ Eliezer ben Shlomo, *The Obligation to Save Life*, available at http://www.daat.ac.il/daat/kitveyet/assia_english/benshlomo.htm.

²²⁶ *Id.*

²²⁷ *Id.* (listing idolatry, homicide, and prohibited intercourse).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

milk was suffering from chest pains.²³¹ There was not, however, any risk to life or limb.²³² Yet, because the person was in pain, he was allowed to have a non-Jewish person treat him.²³³ The non-Jewish person in this case, however, could not actually treat him, because the only treatment was to drink the goat's milk straight from the goat.²³⁴ If the non-Jewish person were to drink the goat's milk for the suffering person, there would be no benefit for the sufferer. Instead, the sufferer needed to drink the milk, and thus, an allowance was made for him to perform the treatment himself. Medical marijuana provides almost the exact same situation. Since scientific studies are still undecided on the effect that marijuana has on leukemia cells or seizures, most, if not all, the people who would use medical marijuana will be using it to alleviate pain or to treat side effects of other treatments. This places most of those using the medical marijuana in the same position as the man who needs to drink goat milk; their treatment is not to help save life or limb but instead to alleviate pain. Further, the suffering person is the person who would actually need to smoke the marijuana. If a non-Jewish person smoked the marijuana for the suffering Jew, the suffering Jew would receive no benefit, and would still need treatment.

Medical marijuana is also analogous to the old commandment, which states that one should not let a gentile treat them.²³⁵ In that situation, there was fear that the gentile would harm the Jew.²³⁶ If the Jew went to a gentile, he would be violating the commandment to guard their body. Yet, when there were no other options, it was preferable to go to a gentile doctor than to resign oneself to death,²³⁷ and violate the commandment to preserve life. This situation is almost an exact mirror of the Charlotte Figi case. In Charlotte's case, the Figi family tried going to various hospitals and doctors, but nothing worked

²³¹ See Tendler and Rosner, *supra* note 215.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See Maimonides, *supra* note 221.

²³⁶ See Maimonides, *supra* note 221, at 594.

²³⁷ *Id.* at 592.

consistently.²³⁸ Eventually, when it looked like there was nothing left to do for Charlotte, the family tried using medical marijuana.²³⁹ If medical marijuana were considered legal under Jewish law, the circumstances where the marijuana could be used would most likely have to mirror Charlotte's story. Before using medical marijuana a person would most likely have to exert all their resources trying every other form of treatment. Medical marijuana would then only be allowed in those situations where there is no other help, like going to a gentile doctor. Further, the idea of putting oneself at risk with a gentile doctor is just as large of a failure to guard one's body as one would be ingesting dangerous chemicals, in this specific case marijuana.

IV. COMPARING THE STATUS OF MEDICAL MARIJUANA IN AMERICAN AND JEWISH LAW

The legality of medical marijuana differs in American law from Jewish law. First, in American law, there is no generally accepted law amongst all fifty states and the federal government legalizing medical marijuana. In fact, medical marijuana is not even entirely legal in American law. As of today, only twenty-three states, and Washington D.C., allow the sale and use of marijuana for medical purposes.²⁴⁰ This means that close to thirty states still consider medical marijuana illegal. To make matters more difficult, the twenty-three states that do allow medical marijuana do not even have a common law to legalize the drug.²⁴¹ Instead, all twenty-three states have their own laws, with different requirements that must be satisfied.²⁴² Jewish law, on the other hand, has not settled on whether medical marijuana should be legal, yet alone set forth a system to govern the use of it. Though, it appears that medical marijuana would be legal under Jewish law, it also seems that the Jewish law would set forth a system

²³⁸ See Young, *supra* note 91.

²³⁹ *Id.*

²⁴⁰ See 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

²⁴¹ *Id.*

²⁴² *Id.*

governing the use of medical marijuana by borrowing pieces from the twenty states' legislation.

For example, Jewish law would most likely take the idea of a registry that has mandatory registration. The registry contains a list of all the users in a jurisdiction who are legally allowed to possess and use marijuana for medical purposes. Twenty-one of the twenty-four jurisdictions require mandatory registration with the registry, while two make registration voluntary, and Washington does not require it at all.²⁴³ Since non-medical marijuana use is still prohibited under Jewish law, it would seem logical that Jewish law would require those who are legally able to possess and use marijuana to register with a central area. This way there is no confusion as to who is legally able to possess and use marijuana.

While the registry system used in American law could be confusing, the registry system has potential to work better under Jewish law. Since the twenty-four jurisdictions all have different laws governing their medical marijuana use,²⁴⁴ and the twenty-three states all have their own sovereignty,²⁴⁵ there is confusion amongst registration. Some states will allow a patient's registration card from another state, while other states require a patient to register specifically in that state.²⁴⁶ Arizona, for example, accepts patients' registration cards from other states, but California does not.²⁴⁷ Since Jewish law is more unified than the American state laws, this should not be an issue. Under an entirely unified system, only one central registry is needed. This would eliminate the issue of registering in one jurisdiction and then being rejected in another jurisdiction. Most likely, a Jewish person using marijuana for medical purposes would have their registration card accepted in any jurisdiction, which follows Jewish law.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See Sedler, *supra* note 16, at 1488.

²⁴⁶ See 23 *Legal Medical Marijuana States and DC Laws, Fees, and Possession Limits*, *supra* note 138.

²⁴⁷ *Id.*

Jewish law is also likely to model some states' statutes, and allow cultivation only under certain circumstances. There is a much wider gap in the disparity between the states' laws for allowing medical marijuana patients to cultivate their own marijuana.²⁴⁸ Some states allow the patients to cultivate a set amount of marijuana on their own, some states do not allow cultivation at all, and some states only allow it if there is an issue with the dispensaries.²⁴⁹ Jewish law would potentially follow Nevada's regulations for cultivating marijuana. In Nevada, patients are only allowed to cultivate their own marijuana if they live more than twenty miles away from the nearest dispensary, if they are not able to reasonably travel to a dispensary, or if there are no dispensaries in the counties, which supply the specific strand of marijuana needed for the specific patients.²⁵⁰ Since Jewish law has various commandments, which make travel difficult, like the Sabbath laws, it would seem that Jewish laws on medical marijuana would take this into account.²⁵¹ Therefore, it would be understood, and expected, that not everyone will have access to the most practical dispensary for them. So, if a person cannot travel to a dispensary that carries a specific strand, that person would most likely get permission to cultivate his own marijuana.

The biggest challenge lays on what conditions would Jewish law allow for treatments using medical marijuana. All twenty-one American jurisdictions have a varying list of conditions that they accept in allowing the use of medical marijuana.²⁵² Some states include more conditions than others.²⁵³ It is tough, if not impossible, to guess how Jewish law will rule on every specific condition, but one can assume that the list of conditions would be

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *The Shabbat Laws*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/95907/jewish/The-Shabbat-Laws.htm (last visited March 2, 2014) (explaining that on the Sabbath, Jewish law commands a person to refrain from "driving or riding in cars or other vehicles, [...] using the telephone").

²⁵² See 23 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 138.

²⁵³ *Id.*

shorter than the states' lists. Arizona, for example, has a fairly liberal list of conditions that can be treated with marijuana, including Alzheimer's disease and severe nausea.²⁵⁴ Jewish law would most likely not allow for severe nausea, because there are a variety of other medications on the market that treat nausea. Under Jewish law, marijuana is not a legal remedy simply because a condition is severe. Jewish law would still require the lack of other options to treat a condition before allowing a medical marijuana treatment. Thus, the list of accepted conditions for medical marijuana under Jewish law would probably be extensively shorter than many American states, because medical marijuana treatment would be an absolute last resort.

If medical marijuana was legalized under Jewish law, the conflict in the United States over legalized marijuana would be significantly intensified. In American law, there is already the issue of federal law prohibiting marijuana, and some states creating their own laws that contradict the federal law. If medical marijuana became legal under Jewish law, it would result in multiple sets of laws governing the use of marijuana in the United States. For example, if Jewish law legalized marijuana, then in a state like Maine, where marijuana is legalized in one town, there would be four distinct laws governing the use of marijuana in that town. There would be a federal law banning marijuana, a state law banning marijuana, a town law legalizing marijuana, and Jewish law legalizing medical marijuana. Such a result would lead to potential chaos in policing and enforcing the marijuana laws in that town in Maine.

As a result, American law would have to trump Jewish law on medical marijuana. Whether federal or state law should be followed, is a more difficult question. Since the federal government is apparently not going to challenge the legalization of marijuana at the state level, it would make sense for Jewish people to follow the state laws of the state they are living in.

This would not be the first time that American law takes priority over Jewish law. Recently, a group of Jews brought a case

²⁵⁴ *Id.*

to federal court regarding land use and zoning regulations. The group of Jews wanted to build an eruv²⁵⁵ around their town, but the zoning board refused its construction.²⁵⁶ Instead of ignoring the zoning board's decision and constructing the eruv, the group ceded that American law was controlling, and brought a law suit in federal court.²⁵⁷

In a situation more analogous to the medical marijuana issue, a Rabbi was recently arrested for violating American law. Rabbi Mendel Epstein was arrested and charged with kidnapping conspiracy.²⁵⁸ Rabbi Epstein, along with another Rabbi, formed their own rabbinical court where they ruled that the use of force in obtaining a get was legal under Jewish law.²⁵⁹ With this newfound power to use violence to obtain gets,²⁶⁰ Rabbi Epstein organized a series of kidnappings, where husbands were tortured until they agreed to give their wives a get.²⁶¹ While this was legal under Jewish law, at least under Rabbi Epstein's interpretation of Jewish law, American law trumped it and Rabbi Epstein is now subject to punishment under the American legal system. These situations show that citizens who follow Jewish law also avail themselves to the American laws if they live in the United States.²⁶² Since American law is binding on American citizens, it takes precedence over Jewish law thereby making Jewish law only morally binding.²⁶³

²⁵⁵ *Hamptons Group Going To Federal Court In Eruv Bid*, THE JEWISH WEEK (Aug. 29, 2013), available at <http://www.thejewishweek.com/news/new-york-news/hamptons-group-going-federal-court-eruv-bid>.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Joseph Goldstein, Michael Schwartz, *U.S. Accuses 2 Rabbis of Kidnapping Husbands for a Fee*, THE NEW YORK TIMES, A18 (Oct. 11, 2013).

²⁵⁹ *Id.*

²⁶⁰ *Id.* (explaining that a wife cannot get a divorce unless the husband gives consent to the divorce, also known as a "get").

²⁶¹ *Id.*

²⁶² *Id.* See also *Hamptons Group Going To Federal Court*, *supra* note 257.

²⁶³ Resnicoff, *Autonomy in Jewish Law-in Theory and in Practice*, *supra* note 63, at 509.

CONCLUSION

The issue of medical marijuana is far from settled under American law and Jewish law. While there is currently a large push to legalize the use of medical marijuana in America, Jewish law has yet to look into the issue and make a definitive ruling on the legality of medical marijuana. From the Jewish law authorities that do exist though, it would seem that medical marijuana would be legal as a last attempt to preserve life under Jewish law. If Jewish law were to attempt to codify its apparent approval of legalized medical marijuana, the governing law would probably be structured in a way that resembles the laws of the states, which have already legalized medical marijuana. If, however, a group of Jews were living in an American jurisdiction that does not allow marijuana, the issue would be moot, as American law would trump Jewish law. Unless the state government chooses not to exercise its right to preempt a contradictory law, which it has supremacy over, like the federal government has done.