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Chronicling Past and Prospective Efforts in Illinois to Establish Legal Protections for Medical Marijuana Users

*Kevin Lichtenberg**

Justice Louis Brandeis' state-government "laborator[ies]"¹ are hard at work. During the 2007 and 2008 legislative sessions, fifty-two medical marijuana related bills were proposed on twenty-seven different state legislature floors.² Michigan, through a November 2008 ballot initiative, became the thirteenth state in the United States³ to legalize marijuana for medicinal purposes.⁴ On the federal level, Representative Barney Frank sent shockwaves throughout Capitol Hill on April 17, 2008 when he introduced H.R. 5842: the Medical Marijuana Patient Protection Act.⁵

The movement toward establishing legal safeguards for severely ill individuals to use medical marijuana is gaining momentum in state legislatures

* Juris Doctor Candidate, Loyola University Chicago School of Law, Class of 2010. Mr. Lichtenberg is a staff member of *Annals of Health Law*.

¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). In his famous dissent, Justice Louis Brandeis penned the idea that state experimentation in public policy not only avoids exposing the entire nation to risk, but may lead to the most innovative of public policy.

² MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST L-1 - L-9 (2008), available at http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008.pdf.

³ Amy Lane & Jay Greene, *All Sides Await Administrative Rules for Medical Marijuana Law*, CRAIN'S BUS. DETROIT, Nov. 9, 2008, available at <http://www.crainsdetroit.com/apps/pbcs.dll/article?AID=/20081109/SUB01/811070285>.

⁴ Michigan Medical Marijuana Act, MICH. COMP. LAWS SERV. § 333.26424 (2008). The measure passed 62.6% to 37.4%. Election Results 2008 – Michigan, N.Y. TIMES, Dec. 9, 2008, available at <http://elections.nytimes.com/2008/results/states/michigan.html>.

⁵ Medical Marijuana Patient Protection Act, H.R. 5842, 110th Cong. (2008); see generally *K Street in Brief*, THE HILL, June 18, 2008, at 14 (noting the existence of a battlefield between medical marijuana advocates and opponents).

across the United States. This article will discuss three facets of how this movement may affect Illinois. First, this article will review current Illinois law and state court decisions related to medical marijuana. Second, this article will chronicle recent medical marijuana legislative efforts in Illinois. Third, this article will proffer a prediction as to whether Illinoisans should expect a medical marijuana bill to be passed.

I. MEDICAL MARIJUANA & ILLINOIS LAW

The only current Illinois law related to medical marijuana is the therapeutic research program (TRP).⁶ The TRP is carved out of Illinois' Cannabis Control Act.⁷ The TRP provision permits the Illinois Department of Human Services (DHS) to authorize the possession, production, manufacture, and delivery of products containing marijuana⁸ by persons engaged in research if the persons meet two conditions.⁹ First, the research must be necessary for the treatment of glaucoma, the treatment of side effects from chemotherapy or radiation therapy in cancer patients, or the treatment for other procedures certified to be medically necessary.¹⁰ Second, a licensed physician must request the authorization from DHS.¹¹ Only then would the person seeking to use the marijuana, under color of the TRP, be exempt from criminal prosecution in Illinois.¹²

Illinois' TRP is largely ineffective. The law requires that the person using the marijuana register with the Federal government.¹³ However, Illinois is not one of the seven states that has obtained all of the necessary federal permissions

⁶ Cannabis Control Act, 720 ILL. COMP. STAT. 550/11 (2009); *see also* ILL. ADMIN. CODE tit. 77, § 2085-2085.65 (2009) (implementing section 11 of the Cannabis Control Act).

⁷ Cannabis Control Act, *supra* note 6, at 720 ILCS 550/11.

⁸ Under Illinois statutes, the term "cannabis" is exclusively used. *Id.* For purposes of clarity, this article will use the term "marijuana," which has been widely adopted in health law academic circles.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Cannabis Control Act, *supra* note 6, at 720 ILCS 550/11.

to receive marijuana distributions.¹⁴ As a result, Illinois' DHS has not received any marijuana from the federal government (the exclusive supplier).¹⁵ Therefore, not a single person in Illinois has received marijuana for research purposes under Illinois' TRP.¹⁶

Despite being ineffective, Illinois' TRP statute generated a highly publicized¹⁷ case in the Appellate Court of Illinois in 2004.¹⁸ *People v. Kratovil* stemmed from the arrest (and subsequent conviction) of a woman who grew more than two dozen marijuana plants in her backyard to treat her glaucoma.¹⁹ The Appellate Court addressed whether Defendant Kratovil fell within the "narrow exception for cannabis possession by a medical research patient as provided for"²⁰ under Illinois' TRP law. The court found that Kratovil did not fit within the exception because her physician did not certify her use of marijuana to treat glaucoma and because her physician had not obtained authorization from DHS.²¹ Lastly, the Appellate Court held that an affirmative defense for medical use of marijuana did not exist in the state of Illinois, absent the legislature enacting such a defense.²²

II. RECENT LEGISLATIVE EFFORTS

Unlike Michigan, Illinois law does not provide a statutory initiative process, so public questions such as legalization of medical marijuana cannot be

¹⁴ MARIJUANA POLICY PROJECT, *supra* note 2, at J-1. Illinois joins eighteen other states that also enacted TRP laws and similarly did not obtain necessary federal permissions. *Id.*

¹⁵ *See id.*; see also Marc Kaufman, *Federal Marijuana Monopoly Challenged*, WASH. POST, Dec. 12, 2005, at A02, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/11/AR2005121100825_pf.html (explaining that the federal government is the nation's only legal producer of marijuana).

¹⁶ *See* MARIJUANA POLICY PROJECT, *supra* note 2, at J-1.

¹⁷ *See* Susan Kuczka, *Woman Convicted of Growing Marijuana*, CHI. TRIB., June 24, 2003, at N1; see also Eric Zorn, *Drug Laws Look Extreme Through Woman's Eyes*, CHI. TRIB., June 19, 2003, at C1.

¹⁸ *People v. Kratovil*, 815 N.E.2d 78, 90 (Ill. App. 2d 2004).

¹⁹ Kuczka, *supra* note 17, at N1.

²⁰ *Kratovil*, 815 N.E.2d at 91.

²¹ *Id.*

²² *Id.* at 92.

placed on the ballot.²³ Therefore, any medical marijuana provision must emanate from the Illinois General Assembly. Throughout the history of the Illinois General Assembly, three non-binding medical marijuana resolutions have passed²⁴ while eight medical marijuana bills have failed.²⁵

Early in 2004, the “Medical Cannabis Act” (House Bill 4868) became the first medical marijuana bill ever proposed in the General Assembly.²⁶ That bill would have allowed any person “who has been diagnosed by a physician as having a debilitating medical condition”²⁷ and who has received a valid registry card from the state, to possess and use up to one ounce of cannabis and six marijuana plants.²⁸ That bill was sent to a subcommittee but never reached a vote.²⁹

Three years later, in February 2007, State Senator John Cullerton introduced a medical marijuana bill to amend Illinois’ Cannabis Control Act (Senate Bill 650).³⁰ The bill provided that when a person has been diagnosed by a physician as having a debilitating medical condition, the Department of Public Health may issue registry identification cards to the person or his or her caregiver to permit those persons to legally possess no more than twelve marijuana plants and 2.5 ounces of usable marijuana that must be grown in an indoor and locked facility.³¹ The bill was narrowly defeated by a 22-29 vote.³² Less than half of all

²³ Initiative & Referendum Institute at the University of S. Cal., State-by-State List of Initiative & Referendum Provisions, http://www.iandrinstute.org/statewide_i&r.htm (last visited Apr. 1, 2009).

²⁴ H.R.J. Res. 57, 94th Leg. (Ill. 2005); H.R. Res. 398, 94th Leg. (Ill. 2005); S. Res. 256, 94th Leg. (Ill. 2005). The General Assembly sent all three resolutions to the Director of Public Health in 2005. Ill. H.R.J. Res. 57; Ill. H.R. Res. 398; Ill. S. Res. 256.

²⁵ H.R. 4868, 93d Leg. (Ill. 2004); S. 2440, 93d Leg. (Ill. 2004); H.R. 407, 94th Leg. (Ill. 2005); S. 2568, 94th Leg. (Ill. 2006); S. 650, 95th Leg. (Ill. 2007); H.R. 5499, 95th Leg. (Ill. 2008); S. 2865, 95th Leg. (Ill. 2008); H.R. 5938, 95th Leg. (Ill. 2008).

²⁶ Ill. H.R. 4868.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Bill Status of H.R. 4868, 93rd Ill. Gen. Assem.,

<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4868&GAID=3&DocTypeID=HB&LegID=9532&SessionID=3&SpecSess=&Session=&GA=93#actions> (last visited Apr. 1, 2009).

³⁰ Ill. S. 650.

³¹ *Id.*

³² S. Doc. No. 15, 95th Leg. (Ill. 2007).

the fifty-nine state senators voted against the bill, indicating that if Senator Cullerton could have garnered support from the remaining eight senators, who either voted present or abstained, the bill would likely have passed.³³

A year later, in February 2008, Senator Cullerton introduced another medical marijuana bill: The Alternative Treatment for Serious Diseases Causing Chronic Pain and Debilitating Conditions Act (Senate Bill 2865).³⁴ The bill provided that: (1) the Department of Public Health shall issue registry identification cards to qualifying patients, (2) the patient may not possess more than twelve marijuana plants and 2.5 ounces of usable marijuana, and (3) the TRP provision of the Cannabis Control Act be repealed.³⁵ This bill picked up four more sponsors than its predecessor and was making its way through the state senate, only to fall short a vote on the floor before the legislative session ended on January 13, 2009.³⁶

III. CONDITIONS IN ILLINOIS: FAVORABLE TO MEDICAL MARIJUANA?

In Illinois, the prospects for adopting medical marijuana provisions received a boost when State Senator John Cullerton assumed his post as Illinois State Senate President.³⁷ In the 96th Legislative session, on February 11, 2009, State Senator William Haine introduced a bill similar to the one Senator Cullerton introduced in the previous session.³⁸ Senator Haine's bill would create the Compassionate Use of Medical Cannabis Pilot Program Act (Senate Bill 1381).³⁹ The bill provides that when a person has been diagnosed by a physician as having

³³ *Id.*; see Marijuana Policy Project, *Illinois Medical Marijuana Bill Narrowly Defeated in Senate 22-29*, <http://www.mpp.org/states/illinois/alerts/illinois-medical-marijuana-bill-narrowly-defeated-in-senate-22-2.html> (last visited Apr. 1, 2009).

³⁴ S. 2865, 95th Leg. (Ill. 2008).

³⁵ *Id.*

³⁶ Bill Status of S.B. 2865, 95th Ill. Gen. Assem., <http://www.ilga.gov/legislation/billstatus.asp?DocNum=2865&GAID=9&GA=95&DocTypeID=S B&LegID=37610&SessionID=51> (last visited Apr. 1, 2009).

³⁷ Marijuana Policy Project, *Patients Look Forward to 2009 Session for Relief*, <http://www.mpp.org/states/illinois/overviews/patients-look-forward-001-1.html> (last visited Apr. 1, 2009).

³⁸ S. 1381, 96th Leg. (Ill. 2009).

³⁹ *Id.*

a debilitating medical condition, the person and his or her primary caregiver may be issued a registry identification card by the Department of Public Health, and these persons may legally possess no more than seven dried cannabis plants and two ounces of dried, usable cannabis.⁴⁰

In fact, Senator Haine's bill adopts many of the amendments made to Senator Cullerton's bill (Senate Bill 2865) after Senator Cullerton sat down with law enforcement agencies to listen to their concerns.⁴¹ Since its introduction, Senator Haine's bill has picked up two chief Co-Sponsors, passed the Senate Public Health Subcommittee on Special Issues, and currently awaits a vote on the floor.⁴² Furthermore, while Senate President Cullerton's office cannot release any opinion regarding whether Senator Haine's bill will pass⁴³, the potential support of the Senate President would be significant.

Public opinion in Illinois seems to compliment more favorable conditions in the state legislature. A public opinion poll, conducted by Mason-Dixon Polling in February 2008 of 625 registered voters in Illinois, revealed that 68% of those voters are in support of allowing seriously and terminally ill patients to use and grow medical marijuana for personal use if the patient's doctor recommends doing so.⁴⁴

IV. CONCLUSION

Certainly, the prospects for legalized medical marijuana in Illinois are not as "grim" as Andrew J. Boyd assessed them to be in 2004.⁴⁵ While medical

⁴⁰ *Id.*

⁴¹ Marijuana Policy Project, *Medical Marijuana Bill in Illinois Updated*, <http://www.mpp.org/states/illinois/ChangesToSB2865.html> (last visited Apr. 1, 2009).

⁴² Bill Status of SB 1381, 96th Ill. Gen. Assem., <http://www.ilga.gov/legislation/billstatus.asp?DocNum=1381&GAID=10&GA=96&DocTypeID=SB&LegID=42617&SessionID=76> (last visited Apr. 9, 2009).

⁴³ E-mail from Justine Miele, District Director, Illinois State Senator John Cullerton, to Kevin Lichtenberg, ANNALS HEALTH L. Member, Loyola University Chicago School of Law (Feb. 13, 2009, 15:02 CST) (on file with author).

⁴⁴ MARIJUANA POLICY PROJECT, *supra* note 2, at D-4.

⁴⁵ Andrew J. Boyd, *Medical Marijuana and Personal Autonomy*, 37 J. MARSHALL L. REV. 1253, 1269 (2004).

marijuana bills have had a troubled history in the Illinois General Assembly, numerous forces are at work to make an Illinois medical marijuana law reality. Illinois policymakers should look to the thirteen other states already providing legal protection for seriously ill individuals who use medical marijuana for helpful templates. In that way, *when* the Illinois General Assembly passes such a law, it will be administered efficiently and effectively.