

The Color of Money

By Stephen Gutwillig

Marijuana is just the type of green that Sacramento needs. The plant already plays a huge role in the economy, as the state's top cash crop — worth \$14 billion a year. Given the worsening state of the economy, it's a revenue opportunity we can't afford to ignore any longer. San Francisco Assemblyman Tom Ammiano is right to propose a plan to harness the market.

The Marijuana Control, Regulation and Education Act (Assembly Bill 390) would tax and regulate marijuana like alcohol, including an age limit of 21 for sales, possession and consumption. Betty Lee, chairwoman of the state's tax board, said the proposed marijuana tax would generate over \$1.3 billion a year in revenue between levies and sales taxes.

Instituting a tax and regulate system (enforced by something like a California Department of Alcoholic Beverage Control) would also allow the state to redirect scarce criminal justice resources to matters of greater public safety. California spends about \$1 billion a year on marijuana law enforcement. In 2007, marijuana arrests in our state increased by a whopping 18 percent to nearly 75,000 arrests — 80 percent were for misdemeanors.

As the economy slows and more Californians lose their jobs and depend on government assistance, the state urgently needs to generate revenue and eliminate waste. California could apply marijuana revenue, for example, to education, housing and health care — including drug prevention and treatment services. But there are other important reasons to end the failed prohibition on marijuana.

Ammiano's regulatory structure would do more to threaten the black market than anything else since marijuana was banned 80-plus years ago. When we ended alcohol prohibition just over 75 years ago, we took

the alcohol market back from Al Capone. Now it's time to take the marijuana market back from the cartels.

By bringing the state's existing marijuana market out of the shadows, California would remove criminal incentives and thereby reduce violence. California would also finally be able to enforce market rules, including health and safety requirements and age restrictions — as with cigarettes and alcohol. This would be quite a change: Of the 100 million Americans who report having tried marijuana, not one (outside of the 13 medical marijuana states) has benefited from consumer health protections or been asked to prove they are old enough to consume responsibly.

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California has been moving in this direction for 30 years. Personal possession of marijuana was decriminalized in the 1970s, voters overwhelmingly legalized medical marijuana in 1996 and, since then, several local jurisdictions have voted to make marijuana the lowest law-enforcement priority. We've significantly reduced penalties for use; taxation and regulation is a sensible next step.

California is a leader when it comes to marijuana law reform. Since California removed criminal penalties for medical marijuana, 12 other states have followed suite. A majority of these states — Alaska, Arizona, Colorado, the District of Columbia, Maine, Michigan, Montana, Nevada, Oregon and Washington state — have done so through voter referendum. Another four state legislatures — Hawaii, Vermont, Rhode Island and New Mexico — have bravely listened to their constituents and passed protections for medical marijuana patients as well. And the reforms go beyond just medical marijuana. Eleven states — Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio and Oregon — have, like California, replaced criminal penalties



for possession of marijuana for personal use with small civil fines.

States have taken these bold steps toward a more reasonable approach to marijuana regulation because this is what a majority of Americans want. The public understands that our current marijuana policies make no sense. Seventy-eight percent of Americans support making medical marijuana available to patients who need it. Fifty-five percent of Americans believe possession of small amounts of marijuana should not be a criminal offense. In California, the numbers are even higher.

Unfortunately, while the states move forward, the federal government has remained devoted to and entrenched in its failed effort to eradicate all marijuana use. Marijuana remains a Schedule I substance — the most tightly controlled — under the Controlled Substance Act. Federal sentences are stiff. Lengthy mandatory minimum sentences apply to a range of marijuana offenses — cultivation of just one marijuana plant is a federal felony.

In response to a reporter's question last week, Attorney General Eric Holder said the Justice Department will no longer raid

medical marijuana dispensaries in states where they are legal. His statement was the second time this month that the Obama administration indicated it would discontinue President Bush's controversial policy of arresting medical marijuana patients and providers. Obama said on the campaign trail last year that he would end the raids.

The Drug Enforcement Administration raided a medical marijuana dispensary in California on the day Obama took office and raided several dispensaries on the day Holder took office. Asked if such raids were going to continue, Holder said "No. ... What the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing in law enforcement. He was my boss during the campaign. He is formally and technically and by law my boss now. What he said during the campaign is now American policy."

Despite its best efforts, the federal government has been unable to prevent California from charting its own course. Thankfully, our federalist system of government allows the states to decide for themselves what to criminalize and how to spend their scarce law enforcement resources. The federal government has no legal authority to

prevent state governments from changing their laws to remove state-level penalties for marijuana cultivation, sale, or use. State legislatures have the authority and responsibility to change state law. We do not have to march in lock step with the federal government's failed drug policies.

The states are laboratories of democracy. California has led the way toward more compassionate, evidence-based and cost-effective approaches to marijuana policy and it should continue to do so. Important changes often happen at the state and local level first. The federal government will eventually follow.

Assembly Bill 390 provides California the perfect opportunity to lead. It is an opportunity for California to continue to chart its own course with respect to marijuana and to help save itself from financial ruin. Let's give other states — as with medical marijuana — and the federal government an example to follow.

Stephen Gutwillig is the California state director of the Drug Policy Alliance, the nation's leading organization working to promote alternatives to the failed war on drugs.

The Bizarre Law That Punishes the Kindness of Strangers

By Michael A.S. Newman

A man out for a jog sees a child fall into a fast-running river. Disregarding his own safety, the jogger leaps into the water and manages to drag the child back to the shore. The current is violent, and the child's spine is severely injured during the rescue. On reaching dry land, the jogger determines that the child is not breathing and has no vital signs, and so begins to administer CPR. In so doing, he cracks the child's ribs. The child recovers, but has sustained injuries during the rescue (injured spine) and during the administration of CPR (broken ribs). This is California, so six months later, the jogger is served with a summons and complaint, alleging damages for the injuries caused to the child.

Is our Good Samaritan liable for those injuries?

The answer in California is truly bizarre. The jogger is immune from liability for the broken ribs caused during the administering of CPR.

But he is not immune from liability for spine injury caused during the rescue from the water. This is because of a Dec. 18, 2008, ruling by the California Supreme Court, which held that only the volunteer who renders emergency medical care can be immune from liability. *Van Horn v. Watson*, 45 Cal. 4th 322 (2008). Nonmedical rescue efforts don't count.

Why is there immunity for the citizen who performs chest compressions on the sidewalk, but not for the citizen who risks life and limb to pull the victim out of the water?

Health and Safety Code Section 1799.102, the governing statute, provides that "[n]o person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission." The statute does not on its face limit the definition of "emergency care" to medical aid.

So why, then, did the Supreme

Court read nonmedical care out of the law, contrary to the plain words of the statute? The answer is ... well, rather technical. Suffice it to say, the Supreme Court, in a 4-1 opinion, made its determination after a hairsplitting analysis of the key statute, including looking at the location of the statute within the Health and Safety Code, the chapter headings within the code, the statutory history and other mental gymnastics that might have garnered the admiration of medieval scholastic thinkers.

In the end, the court concluded that the Legislature had meant to immunize Good Samaritans who provide medical care from civil liability, but not those who provide other kinds of essential assistance (like pulling someone out of a fire).

The lone dissenter of the *Van Horn* court, Justice Marvin Baxter, stated, "I cannot believe that the Legislature intended results so illogical, and so at odds with the clear statutory language." It is difficult to disagree with Baxter.

Indeed, the California Legislature has not been silent in the wake of *Van Horn*. Since the December ruling, no fewer than three pieces of legislation have been proposed in response to the decision.

AB 90, introduced by Assemblyman Anthony Adams, R-Hesperia, would clarify the jumble created by *Van Horn*, providing that "[n]o person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission."

The effect of AB 90 would be to draw nonmedical caregivers back within the scope of the immunity provisions of Section 1799.102. The anomaly created by the *Van Horn* decision would disappear. Our jogger would be immune from liability both for the rescue and for the medical care he provided.

But other pieces of proposed legislation offer cures that are as bad as the disease. AB 83, a bill introduced by Assemblyman Mike Feuer, D-Los Angeles, would indeed level the playing field that *Van Horn* has slanted, but only by eliminating immunity for both medical and nonmedical volunteer caregivers alike. Under AB 83, absolute immunity would only exist for law enforcement and emergency personnel. Private Good Samaritans, however, would be subject to liability for "gross negligence or willful or wanton misconduct." Proponents argue that AB 83

would make Good Samaritans liable only where attempts at emergency aid exhibit misconduct that is extreme — for example, the rescuer who recklessly drags a person with an obvious spine injury across the pavement. It goes without saying that the goal of discouraging reckless behavior is a worthy one. And gross negligence is a relatively steep standard. Some California cases have defined it as "the want of even scant care or an extreme departure from the ordinary standard of conduct." The problem is that, while on paper this is a high standard, in practice it is highly subjective. How do you define "scant care"? What departure from the ordinary standard qualifies as "extreme"?

As a practical matter, factual circumstances are as malleable as warm wax, and a skillful attorney can shape any number of scenarios into "gross negligence" or "wanton misconduct." (In full disclosure, it should be noted that the majority of my practice involves the defense of insurance companies in bad faith litigation.) Consider the jogger who rescues the child. Let's say the child recovers, but his spinal injuries render him a paraplegic. Is the jogger at fault for this? It does not matter; the child will be an extremely sympathetic plaintiff. Is there any reasonable guarantee that an attorney will not seek to characterize the child's injuries as being the result of "gross negligence" or "wanton misconduct" on the part of the jogger? As Shakespeare said, "when the fox hath once got in his nose, he'll soon find means to make the body follow."

AB 83 opens the doors to a potentially limitless team of Monday morning quarterbacks, who for a relatively small filing fee can pull a defendant into litigation. Since defending a lawsuit is often more expensive to the defendant than paying a settlement, there will no doubt be plenty of professional litigators ready and willing to see "gross negligence" in acts of foolish heroism, confident that they will probably never need to prove their cases at trial.

In short, the chilling effect of eliminating immunity for private Good Samaritans should not be underestimated. From a legal standpoint, AB 83 makes doing nothing the most prudent option. The law does not require a bystander to help an injured person. If AB 83 becomes law, a would-be Good Samaritan might reasonably decide to play it safe and resist the altruistic



urge to help altogether.

Is this really the kind of society we want to create? One where prudence dictates that you mind your own business rather than attempt to help another? AB 83 states that "[i]t is the intent of the Legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly." Here, the attempt to ensure volunteers "act responsibly" will swallow up, or at very least cripple, the goal of encouraging individuals to volunteer to help others during an emergency.

AB 83 may cure the illogical asymmetry caused by *Van Horn*, but at a severe cost. Proponents of the bill argue that 40 other states have passed Good Samaritan laws with similar language. So what? It is certainly possible for 40 other state legislative bodies to get it wrong. Does that mean California needs to as well?

Nevertheless, it looks like AB 83 is set to pass, while AB 90 — which simply corrects the anomaly caused by *Van Horn* while ensuring immunity to both medical and nonmedical volunteer caregivers — will most likely be consigned to the legislative dust heap.

This might explain why the third proposed piece of legislation offered in response to *Van Horn*, Senate Bill 39 (introduced by state Sen. John J. Benoit, R-Bermuda Dines), started out with exactly the same language as AB 90, but has recently been modified to have exactly the same language as AB 83. Success has a thousand parents, but failure is an orphan.

Unless measures are taken to rescue AB 90, or to radically modify AB 83, immunity for volunteer Good Samaritans will very soon be a thing of the past in California.

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