NORML

Working to Reform Marijuana Laws

State-by-State Look at the Medical Necessity Defense

Below is a state-by-state look at the medical necessity defense. There were only a few states where the courts had specifically addressed the issue. There were cases in California, Florida, Hawaii, Idaho, Washington, and Washington, D.C., in which the defense was allowed. There were cases in Alabama, Georgia, Massachusetts, Minnesota, New Jersey and (again) Washington, in which the defense was not allowed. This information is further discussed in the appropriate state section below. In states where there were no cases on the issue, as much information was presented that might be helpful in determining whether or not the defense would be successful. This includes information on the defense of necessity, on whether or not there is a Therapeutic Research Program established, and on scheduling.

Alabama

- **Defense of necessity adopted by common law, however the legislature precluded assertions of medical necessity defense when it enacted the Controlled Substances Therapeutic Research Act.**
    - See: *Kauffman v. State, 1992* --- Defendant claimed that the trial court improperly denied him the opportunity to present the defense of medical necessity to the charges of marijuana possession. The court held that the state legislature had precluded the use of that defense and affirmed defendant's conviction. The court reviewed the law covering the defense of necessity, noting that it was closely related to duress. However, duress required proof that the compulsion was present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm. **Furthermore, the court found that the Controlled Substances Therapeutic Research Act (Act), Ala. Code §§ 20-2-110 - 20-2-120 (1975), precluded use of the defense because the Act specifically permitted marijuana use in certain restricted circumstances not present here.** The Act further specifically provided that any other use of marijuana was a felony.] This Act authorizes certain specially certified physicians to dispense cannabis under certain circumstances to cancer patients receiving chemotherapy treatments and to glaucoma patients, and to those patients only. "... [T]he enactment of the TRA [Therapeutic Research Act], along with the implications of the Schedule I classification of marijuana, show conclusively that the possible medical uses of marijuana have been brought to the legislature's attention. In this regard, [the appellant] has not shown that the anti-seizure potential of marijuana is so unique, or affects such a small number of people, as to be inappropriate for legislative action."
    - **§ 20-2-111. Legislative findings; cannabis research.** The Legislature finds that recent research has shown that the use of cannabis may alleviate nausea and ill-effects of cancer chemotherapy, and may alleviate the ill-effects of glaucoma. The Legislature further finds that there is a need for further research and experimentation with regard to the use of cannabis under strictly controlled circumstances. It is for these purposes that the Controlled Substances Therapeutic Research Act is hereby established.

Alaska

- Medical Necessity affirmative defense allowed ONLY if one is registered with the Department of Health per the Medical Marijuana Act.
    - *Sec. 11.71.090 Affirmative defense to a prosecution under AS11.71.030 -- 11.71.060; medical use of marijuana. (a) In a prosecution under AS 11.71.030 -- 11.71.060 charging the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display of a schedule VIA controlled substance, it is an affirmative*

defense that the defendant is a patient, or the primary caregiver or alternate caregiver for a patient, and (1) at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display, the patient was registered under AS 17.37; (2) the manufacture, delivery, possession, possession with intent to manufacture, deliver, use, or display complied with the requirements of AS 17.37; and (3) if the defendant is the (A) primary caregiver of the patient, the defendant was in physical possession of the caregiver registry identification card at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display; or (B) alternate caregiver of the patient, the defendant was in physical possession of the caregiver registry identification card at the time of the manufacture, delivery, possession, possession with intent to manufacture or deliver, use, or display. (b) In this section, (1) "alternate caregiver" has the meaning given in AS 17.37.070; (2) "patient" has the meaning given in AS 17.37.070; (3) "primary caregiver" has the meaning given in AS 17.37.070. WITH the following restrictions: Sec. 17.37.040 Restrictions on medical use of marijuana. (a) A patient, primary caregiver, or alternate caregiver may not: (1) engage in the medical use of marijuana in a way that endangers the health or well-being of any person; (2) engage in the medical use of marijuana in plain view of, or in a place open to, the general public; this paragraph does not prohibit a patient or primary caregiver from possessing marijuana in a place open to the general public if (A) the person possesses, in a closed container carried on the person, one ounce or less of marijuana in usable form; (B) the marijuana is not visible to anyone other than the patient or primary caregiver; and (C) the possession is limited to that necessary to transport the marijuana directly to the patient or primary caregiver or directly to a place where the patient or primary caregiver may lawfully possess or use the marijuana; (3) sell or distribute marijuana to any person, except that a patient may deliver marijuana to the patient's primary caregiver and a primary caregiver may deliver marijuana to the patient for whom the caregiver is listed; or (4) possess in the aggregate more than (A) one ounce of marijuana in usable form; and (B) six marijuana plants, with no more than three mature and flowering plants producing usable marijuana at any one time. (b) Any patient found by a preponderance of the evidence to have knowingly violated the provisions of this chapter shall be precluded from obtaining or using a registry identification card for the medical use of marijuana for a period of one year. In this subsection, "knowingly" has the meaning given in AS 11.81.900. (c) A governmental, private, or other health insurance provider is not liable for any claim for reimbursement for expenses associated with medical use of marijuana. (d) Nothing in this chapter requires any accommodation of any medical use of marijuana (1) in any place of employment; (2) in any correctional facility, medical facility, or facility monitored by the department or the Department of Administration; (3) on or within 500 feet of school grounds; (4) at or within 500 feet of a recreation or youth center; or (5) on a school bus.]

- *Alaska's statute reads: "(a) A substance shall be placed in schedule VIA if it is found under AS 11.71.120(c) to have the lowest degree of danger or probable danger to a person or the public. (b) Marijuana is a schedule VIA controlled substance." Alaska Stat. § 11.71.190 (1995).*

- Alaska has codified defense of necessity:
  - *Sec. 11.81.320 Justification: Necessity. (a) Conduct which would otherwise be an offense is justified by reason of necessity to the extent permitted by common law when (1) neither this title nor any other statute defining the offense provides exemptions or defenses dealing with the justification of necessity in the specific situation involved; and (2) a legislative intent to exclude the justification of necessity does not otherwise plainly appear. (b) The justification specified in (a) of this section is an affirmative defense.*
  - Defense of necessity requires showing that act charged was done to prevent significant evil, that there was no adequate alternative, and that harm caused was not

disproportionate to harm avoided. Defense of necessity is available if accused reasonably believed at time of acting that act charged was done to prevent significant evil and that there was no adequate alternative, even if that belief was mistaken, but accused's belief will not suffice to show necessary element that harm caused was not disproportionate to harm avoided; rather, objective determination must be made as to whether defendant's value judgment was correct, given facts as he reasonably perceived them. Emergency which produces "necessity" behind charged act must generally be result of physical forces of nature to warrant defense of necessity and thus generally, when threatened harm emanates from human source, actor who violates law in response to it can defend only on grounds of duress, defense of others, or crime prevention. Expansion of necessity defense to encompass human threats should be limited to cases in which threatened man-made harm is illegal. **Cleveland v. Municipality of Anchorage**, 631 P.2d 1073, Alaska, 1981.

Arizona

- Medical necessity defense NOT available **unless** marijuana was prescribed by a physician in compliance with ARS 13-901.01. Necessity defense requires that no reasonable alternative was available…
    - Medical use allowed by statute if prescribed by physician (1996's "Drug Medicalization, Prevention and Control Act" - Ariz. Rev. stat. **§ 13-3412.01.** ***Prescribing controlled substances included in schedule I for seriously ill and terminally ill patients*** *A. Notwithstanding any law to the contrary, any medical doctor licensed to practice in this state may prescribe a controlled substance included in schedule I as prescribed by section 36-2512 to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient, subject to the provisions of this section. In prescribing such a controlled substance, the medical doctor shall comply with professional medical standards. B. Notwithstanding any law to the contrary, a medical doctor shall document that scientific research exists that supports the use of a controlled substance listed in schedule I as prescribed by section 36-2512 to treat a disease, or to relieve the pain and suffering of a seriously ill patient or a terminally ill patient before prescribing the controlled substance. A medical doctor prescribing a controlled substance included in schedule I as prescribed by section 36-2512 to treat a disease, or to relieve the pain and suffering of a seriously ill patient or terminally ill patient, shall obtain the written opinion of a second medical doctor that prescribing the controlled substance is appropriate to treat a disease or to relieve the pain and suffering of a seriously ill patient or terminally ill patient. The written opinion of the second medical doctor shall be kept in the patient's official medical file. Before prescribing the controlled substance included in schedule I as prescribed by section 36-2512 the medical doctor shall receive in writing the consent of the patient. C. Any failure to comply with the provisions of this section may be the subject of investigation and appropriate disciplining action by the Arizona medical board.*
        - From NORML's web site; "House Bill 2518, which was signed by the governor on April 21, 1997, sought to repeal Proposition 200's medical marijuana provision by requiring the Food and Drug Administration (FDA) to first approve marijuana before allowing state physicians to prescribe it. The bill was eventually placed on the November 3, 1998 ballot as a referendum, where voters rejected it by a vote of 57 percent to 43 percent."

- **Non-medical Necessity** defense NOT allowed in marijuana possession prosecution. State v. Belcher (1985) where Defendant claimed necessity in possession of plants b/c he had to destroy them before his children found them. The Court disagreed b/c the Defendant had a number of

other options available including placing an anonymous phone call to the police advising them of the existence of the marijuana.

Arkansas

- Medical necessity defense would probably not be accepted b/c legislature considered and rejected allowing the affirmative defense (see House Bill No. 1321 below)

- Arkansas does have a "Choice of Evils" law on the books:
    - *5-2-604 Choice of evils. (a) Conduct which would otherwise constitute an offense is justifiable when: (1) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and (2) The desirability and urgency of avoiding the injury outweigh, according to ordinary standards of reasonableness, the injury sought to be prevented by the law proscribing the conduct. (b) Justification under this section shall not rest upon considerations pertaining to the morality and advisability of the statute defining the offense charged. (c) If the actor is reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.*
- In Arkansas, marijuana is a Schedule VI drug – no currently accepted medical use…
    - [*5-64-214 Criteria for Schedule VI. The director shall place a substance in Schedule VI if he finds that: (a) The substance is not currently accepted for medical use in treatment in the United States; (b) That there is lack of accepted safety for use of the drug or other substance even under direct medical supervision; (c) That the substance has relatively high psychological and/or physiological dependence liability; and (d) That use of the substance presents a definite risk to public health.*
- There is an Act currently under consideration by the state legislature as of March 24, 2003 (2003 Arkansas House Bill No. 1321) to permit the medical use of marijuana (exemption for those who qualify as well as the allowance of the affirmative defense of medical necessity) – if this Act does not get passed, courts would probably not allow the defense b/c the legislature had specifically considered and rejected it. Will have to keep an eye on this Bill and see whether or not it passes – if it does, the affirmative defense would be allowed.
    - **UPDATE**: (HB 1321) sponsored by Rep. Jim Lendall (D-Mabelvale) **died** in committee March 12.

California

- Medical necessity defense allowed if defendant has approval of a licensed physician (per the Compassionate Use Act – grants a defendant a limited immunity from prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial, by rendering possession and cultivation of marijuana noncriminal for a qualified patient or primary caregiver. West's Ann. Cal. Health & Safety Code §11362.5 subd. b, para. (1)(B), subd.d.
    - From **People v. Ward**, Cal.App. 3 Dist., 2003. March 28, 2003: "Section 11362.5 allows " 'seriously and terminally ill patients to legally use marijuana, *if, and only if,* they have the approval of a licensed physician.' " (*People v. Rigo* (1999) 69 Cal.App.4th 409, 415, original italics.) Thus, to fall within the medical marijuana defense, defendant had to establish the approving "medical personnel" were physicians, as required by the statute."
    - People v. Galambos (2002): Defendant was precluded from advancing the common law defense of medical necessity in his prosecution for marijuana cultivation; the Compassionate Use Act had already established limited immunity for individuals who were using marijuana for medicinal purposes, and judicial recognition of the broader immunity afforded by the common law necessity defense, which would have extended beyond the patient or caregiver and could have excused crimes other than cultivation or

possession of marijuana, would have broken with the aforementioned narrow legislative exception.

- People v. Mower, 28 Cal. 4th 457 (2002). The court held that Health & Saf. Code, § 11362.5, subd. (d), does not confer complete immunity from arrest and prosecution, but rather confers a limited immunity that entitles a defendant to raise the defense at trial and to bring a motion to set aside the information prior to trial, although defendant failed to bring such a motion in this case. The court also held that the trial court did not err in failing to instruct the jury as to defendant's status as a primary caregiver, since substantial evidence did not support such an instruction. The court held that the trial court erred prejudicially in instructing the jury that defendant was required to prove the facts supporting his defense by a preponderance of the evidence. A defendant is required merely to raise a reasonable doubt as to this defense, since it relates to an element of the charged crimes rather than to a collateral matter. The court further held that this instructional error required reversal, since the primary question in this case was whether defendant possessed and cultivated all 31 plants seized by the police for his own personal medical use. Had the jury been properly instructed, it might have found that defendant raised a reasonable doubt, and found him not guilty.
- People v. Young (2001): Compassionate Use Act, allowing a patient to possess or cultivate marijuana for personal medical purposes upon recommendation or approval of physician, did not provide a defense to defendant's transportation of 135.3 grams of marijuana in his car, though defendant at time of arrest had in his possession a signed document in which a physician approved defendant's use of marijuana for treatment of arthritic condition.

Colorado

- Colorado's Constitution was amended in 2000 (Article 18, section 14) to include an exception for medical uses of marijuana for persons suffering from debilitating medicinal conditions, and to allow the **affirmative defense** of medical necessity "where the patient was previously diagnosed as having a debilitating medical condition, was advised by a physician that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and the patient and his or her primary care-giver were collectively in possession of the amounts of marijuana only as permitted under this section."
- Colorado has codified necessity defense
  - *Colo Rev Stats, S 18-1-702(1)) § 18-1-702. **Choice of evils** (1) Unless inconsistent with other provisions of sections 18-1-703 to 18-1- 707, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.*

Connecticut

- Affirmative defense of medical necessity would probably not be allowed b/c the legislature specifically rejected it. On May 6, 2003 an act was being considered by the General Assembly (Substitute House Bill No. 5100) to allow the affirmative defense of medical necessity to those who "strictly comply with the bill" (must register with Department of Public Health, etc.). However, that act was defeated on May 22, 2003.
- There is a Medical marijuana law on books in CT since 1981, but it is unworkable and not a single prescription has been issued since he law was approved b/c of federal laws.
    - *§ 21a-253. Possession of marijuana pursuant to a prescription by a physician: Any person may possess or have under his control a quantity of marijuana less than or equal to that quantity supplied to him pursuant to a prescription made in accordance with the provisions of section 21a-249 by a physician licensed under the provisions of chapter 370 and further authorized by subsection (a) of section 21a-246 by the Commissioner of Consumer Protection to possess and supply marijuana for the treatment of glaucoma or the side effects of chemotherapy.*
    - Conn. Gen. Stat. § 21a-246 (1994). "Upon application ... the Commissioner of Consumer Protection shall without unnecessary delay, license such physician to possess and supply marijuana for the treatment of glaucoma or the side effects of chemotherapy."
- Necessity defense adopted by common law (not codified):
    - From: *State v. Rubenstein, Not Reported in A.2d, Conn.Super.,2003. May 21, 2003*. "The common-law defense of necessity, although not statutorily codified, is available to Connecticut defendants in limited circumstances. The necessity defense is preserved under the savings clause of the penal code. See General Statute § 53a-4.Procedurally, a defendant who wishes to assert a necessity defense is required to make a preliminary showing through an offer of proof before the defense may be submitted to the jury. As a threshold matter of law, the trial court must determine whether the necessity defense is warranted under the facts presented by the defendant. The defense of necessity, in the present context, requires a showing by the defendant: (1) that there was no third or legal alternative available, (2) that the harm to be prevented was imminent, and (3) that a direct causal relationship may be reasonably anticipated to exist between the defendant's action and the avoidance of harm. Where an offer of proof is made with respect to a defense and it is clear from the offer of proof that the defense is insufficient as a matter of law, the trial court may properly refuse to permit evidence of the defense to be submitted to the jury. In making its assessment of the applicability of the defense, the trial court should view the evidence on an objective basis."

Delaware

- *Medical necessity defense might be able to be raised (see Choice of Evils statute), but may be rejected b/c of Delaware's classification of marijuana as a Schedule I drug.*
- **Choice of Evils defense codified ---**
    - *TITLE 11. CRIMES AND CRIMINAL PROCEDURE, PART I. DELAWARE CRIMINAL CODE, CHAPTER 4. DEFENSES TO CRIMINAL LIABILITY, § 463 Same -- Choice of evils. Unless inconsistent with the ensuing sections of this Criminal Code defining justifiable use of physical force, or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining*

only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. (11 Del. C. 1953, § 463; 58 Del. Laws, c. 497, § 1.)

- "Justification-choice of evils defense" applies to situations where someone must decide in emergency situation to commit what is otherwise a crime to avoid imminent public or private injury, which was not result of defendant's own conduct. 11 Del.C. § 463. **Mills v. State** 732 A.2d 845 Del.Supr.,1999.
- Requested instruction on justification-choice of evils was not warranted, in prosecution for possession of destructive weapon, where defendant did not present any evidence in his own defense and defendant failed to elicit any testimonial evidence to support a choice of evils instruction during cross- examination of State's witnesses. 11 Del.C. §§ 463, 1444. **Mills v. State** 732 A.2d 845 Del.Supr.,1999.
- The justification or choice-of-evils defense is appropriate when the evidence reflects a situation where someone must decide to commit what is otherwise a crime in order to avoid an imminent public or private injury that was not the result of the defendant's own conduct. 11 Del.C. § 463. **Bodner v. State**, 752 A.2d 1169, Del.Supr.,2000. An accused is entitled to a jury instruction if evidence has been produced to support a particular defense. Defendant was entitled to jury instruction on defense of choice-of-evils, or justification, in prosecution for driving under the influence of alcohol; defendant testified that driver of motor vehicle in which she was a passenger abandoned the vehicle when it stalled on railroad tracks, and that she subsequently entered the driver's side to attempt to move the vehicle. 11 Del.C. § 463; 21 Del.C. § 4177.
- Justification defense in Delaware is a general defense that includes the specific defenses of execution of a public duty, choice of evils, and self- defense. 11 Del.C. §§ 431(a), 462, 463, 464. Justification or choice of evils defense is appropriate when the evidence reflects a situation where someone must decide to commit what is otherwise a crime in order to avoid an imminent public or private injury that was not the result of the defendant's own conduct. 11 Del.C. §§ 462, 463, 464. **Alexander v. Cahill,** 2003 WL 1793514, Del.Supr.,2003.

- Marijuana is a Schedule I Controlled Substance in Delaware (**DE ST TI 16 § 4714 -** (19) Any material, compound, combination, mixture, synthetic substitute or preparation which contains any quantity of marijuana or any tetrahydrocannabinols, their salts, isomers or salts of isomers;**)**
  - § 4713. Schedule I tests. The Secretary shall place a substance in Schedule I if the Secretary finds that the substance: (1) Has high potential for abuse; and (2) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

District of Columbia

- United States v. Randall (104 Daily Wash L. Rptr. 2249, DC Super. Ct. 1976): defendant suffering from glaucoma raised medical necessity defense. Court balanced defendant's interest in preserving his sight against the government's interest in controlling the drug problem to determine whether the evil to be avoided by the defendant's act was greater than the possession and personal use of marijuana. The court resolved the balance in favor of the defendant and held that the defendant's right to preserve his sign outweighed the government's interest in outlawing the drug. First case to recognize the medical necessity defense in a marijuana case. Court found that DC Code did not preclude the defense b/c it was one implicitly "requiring a particular state of mind." Therefore, in medical marijuana cases the medical necessity defense should be allowed became the defendant does not possess the requisite criminal intent. [53 SCLR 439]
- Although the DC voters approved a medical marijuana initiative in 1998 with 69% of the vote, Congress overrode the law.
- Marijuana (cannabis) is a Schedule III drug in D.C.

- *The Mayor shall place a substance in Schedule III if the Mayor finds that: (1) The substance has a potential for abuse less than the substances listed in Schedules I and II; (2) The substance has currently accepted medical use in treatment in the United States or the District of Columbia; and (3) The abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.*

Federal law

- US v. Oakland Cannabis Buyers' Co-op., 121 S.Ct. 1171 (US 2001), in which the United States Supreme Court held that no implied medical necessity exception exists to the prohibitions on the manufacture and distribution of marijuana established by the federal Controlled Substances Act, 21 USCA §841(a). The Court did not rule on whether the same defense would be available for those accused of possession of marijuana.
- US v. Burton (894 F.2d 188, 191 (6th Cir. 1990) – court recognized medical necessity defense as applicable in a federal prosecution for the manufacturing and use of marijuana but held that the defendant failed to establish one element of the defense.

Florida

- **In limited circumstances, Medical Necessity Defense allowed**.
  - *Jenks v. State, 582 So. 2d 676 (1991)*: Florida Court of Appeals reversed convictions of a husband and wife for marijuana cultivation. The court found the couple met their burden of establishing a medical necessity defense at trial, and directed the trial court to enter a judgment of acquittal. The appellate court formulated the necessity defense as follows: 1. That the defendant did not intentionally bring about the circumstance which precipitated the unlawful act; 2. That the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and 3. That the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it. Marijuana's schedule I classification did not preclude the Jenks' proffered defense. Specifically, the court pointed to further language in the statute, that "[n]otwithstanding the aforementioned fact that Schedule I substances have no currently accepted medical use, the Legislature recognizes that certain substances are currently accepted for certain limited medical uses in treatment in the United States but have high potential for abuse."
  - This was upheld in *Sowell v. State, 738 So. 2d 333 (1998)*): Defendant was convicted in the Circuit Court, Washington County of cultivating marijuana. He appealed. The District Court of Appeal held that medical necessity is available as a defense to drug charges under limited circumstances.
    - "The "limited medical uses" language which was formerly contained in section 893.03(1)(d) did not directly address the medical use of marijuana or the defense of medical necessity, and under established rules regarding the preservation of the common law the chapter 93-92 amendment to section 893.03(1)(d) does not affect the defense of medical necessity. Indeed, the existence of this provision was not critical to the decision in *Jenks,* which was more fundamentally predicated on the understanding that the "no currently accepted medical use" language in the subsection (1) introduction relates to general medical availability, and does not preclude the common law defense. As in *Jenks,* the appellant should have been allowed to pursue the defense of medical necessity."
    - Court also raised question to be addressed by people of Florida: "Although we conclude that *Jenks* continues to be controlling authority as to the application of the medical necessity defense in this context, we certify the following issue, which is raised by the present case, as a question of great public importance: WHETHER THE CHAPTER 93-92, LAWS OF FLORIDA, AMENDMENT TO SECTION 893.03(1)(D), FLORIDA STATUTES, EFFECTS A CLEAR

AND UNEQUIVOCAL ABROGATION OF THE COMMON LAW DEFENSE OF MEDICAL NECESSITY AS RECOGNIZED IN *JENKS,* AND AS APPLIED TO A SERIOUSLY ILL INDIVIDUAL WHO CULTIVATES MARIJUANA SOLELY FOR PERSONAL USE TO OBTAIN MEDICAL RELIEF?"

Georgia

- No affirmative defenses to the possession or dissemination of marijuana for medical, health or therapeutical purposes unless patient in the TRP (see Carlson case below).
    - *Carlson v. State (1999):* Medical necessity (or justification) defense NOT allowed b/c "Carlson lacked any recognized legal basis that would excuse his conduct. Although the legislature has authorized certain qualified physicians under the supervision of the State Board of Medical Examiners to provide marijuana on a compassionate basis 'cancer patients involved in life-threatening situation in which treatment by chemotherapy or radiology has produced severe side effects,' or to 'glaucoma patients who are not responding to conventional controlled substances,' Carlson did not assert that his drug use fit within either exception…Nor did Carlson claim he was the patient participant in a designated program and thereby entitled to immunity from prosecution under OCGA 43-34-126….In seeking this charge, Carlson was effectively attempting to supplant the legislature's decision not to establish an exception to the crime of possession of marijuana when the marijuana is purportedly being used for medicinal purposes but has not been prescribed by an authorized physician for one of the permitted therapeutic uses."
    - *See Also:* *Spillers v State (1978*): The defendant therein testified at trial that he had suffered severe pain from rheumatoid arthritis since the age of 11 and that the usual ameliorative drugs, such as aspirin, had either become ineffective or the cause of damaging side effects. The defendant further testified that he obtained a percentage of relief from marijuana, which he had learned to use in amounts to dull his body pain without "significant intoxication." His primary defense to the charge of possessing marijuana plants (found by a sheriff growing in a wooded area) was medical necessity, for which he offered to produce medical testimony at trial. The court refused to rule on the propriety of the defense of "medical necessity," considering it an issue to be resolved through legislative action. (The appellate court reversed the defendant's conviction on the sole ground that he should have been granted a trial continuance so his counsel could adequately prepare a defense (including the presentation of medical witnesses)).

- Has a Therapeutic Research Program established (GA ST S43-34-121) for side effects of chemotherapy and glaucoma patients only
    - Ga. Code Ann. § 43-34-120 to -126 (1980). *The legislative purpose behind the statute was: The General Assembly finds and declares that the potential medicinal value of marijuana has received insufficient study due to a lack of financial incentives for the undertaking of appropriate research by private drug manufacturing concerns. Individual physicians cannot feasibly utilize marijuana in clinical trials because of federal government controls which involve expensive, time-consuming approval and monitoring procedures ... limited studies throughout the nation indicate that marijuana and certain of its derivatives possess valuable and, in some cases, unique therapeutic properties, including the ability to relieve nausea and vomiting which routinely accompany chemotherapy and irradiation used to treat cancer patients ... [as well as] reducing intraocular pressure in glaucoma patients who do not respond well to conventional medications ... this article is limited to clinical trials ... [and] should [not] be construed to encourage the use of marijuana in lieu of or in conjunction with other accepted medical treatment, but only as an adjunct to such accepted medical treatment. If the*

prerequisites of legal marijuana possession were not met, patients were subject to Georgia's criminal code.

- Has codified justification as a defense (16-3-20)
    - § 16-3-20. Justification The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed: (1) When the person's conduct is justified under Code Section 16-3-21, 16-3-23, 16-3-24, 16-3-25, or 16-3-26; (2) When the person's conduct is in reasonable fulfillment of his duties as a government officer or employee; (3) When the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis; (4) When the person's conduct is reasonable and is performed in the course of making a lawful arrest; (5) When the person's conduct is justified for any other reason under the laws of this state; or (6) In all other instances which stand upon the same footing of reason and justice as those enumerated in this article.
        - Where defendant testified that he drove without a license because his wife was experiencing labor pains, the doctor said he needed to see her, and she could not drive herself to the doctor's office, a jury could have found that his decision to seek medical help for his wife and their soon-to-be-born child stands on "the same footing of reason and justice" as a government employee's reasonable fulfillment of his duties, a parent's reasonable discipline of a child, and a person's reasonable conduct in performing a citizen's arrest. Tarvestad v. State, 261 Ga. 605, 409 S.E.2d 513 (1991).

Hawaii

- Per HI ST S 712-1240.1: "It is an **affirmative defense** to prosecution for any marijuana-related offense defined in this part that the person who possessed or distributed the marijuana was authorized to possess or distribute the marijuana for medical purposes pursuant to part IX of chapter 329." (2000)
- HI has a Medical use of Marijuana law (HI ST S 329) – medical use permitted **only if** patient has been diagnosed by a physician as having a debilitating medical condition, the physician has written that the benefits outweigh the harm, and the amount of marijuana does not exceed an adequate supply. (also requires that patients be registered with the Department of Public Safety)
    - Prior to the passage of the above laws, in 1979, the court in State v Bachman (1979) 61 Hawaii 71, 595 P2d 287, precluded the defendant's use of a medical necessity defense in a drug prosecution due to the absence of expert medical testimony on the issue. While the court considered it "entirely possible" that medical necessity could be asserted as a defense to a marijuana possession charge in a "proper case" (pursuant to HRS 703-302), such a defense would require proof of the beneficial effects of marijuana use on the defendant's condition by competent medical testimony, as well as the absence or ineffectiveness of more conventional medical alternatives. The court emphasized that relief from "simple discomfort" would not suffice. Instead, the court said, the harm to which defendant is exposed must be "serious" and "imminent." The court noted, as well, that a statutory vehicle existed in the jurisdiction whereby marijuana was available through prescription by a licensed medical practitioner.
- **Hawaii has codified necessity defense**:
    - *§ 703-302 Choice of evils. (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that: (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.(2) When the actor was reckless or negligent in bringing*

about the situation requiring a choice of harms or evils or in appraising the necessity for the actor's conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.(3) In a prosecution for escape under section 710-1020 or 710-1021, the defense available under this section is limited to an affirmative defense consisting of the following elements: (a) The actor receives a threat, express or implied, of death, substantial bodily injury, or forcible sexual attack; (b) Complaint to the proper prison authorities is either impossible under the circumstances or there exists a history of futile complaints; (c) Under the circumstances there is no time or opportunity to resort to the courts; (d) No force or violence is used against prison personnel or other innocent persons; and (e) The actor promptly reports to the proper authorities when the actor has attained a position of safety from the immediate threat.

Idaho

- Necessity defense allowed for medical reasons.
    - *State v. Hastings, 1990* – court allowed necessity defense, but refused to create a special defense of "medical necessity," for defendant who argued plants were necessary to ease pain of arthritis. The Idaho Supreme Court declined to create a special medical necessity defense, but held that Hastings could present evidence under the **common law defense** of necessity. The court set forth the elements of this defense as follows: (1) a specific threat of immediate harm; the circumstances necessitating the illegal act were not brought about by defendant; (2) that the same objective could not have been accomplished by less offensive alternatives; and (3) that the harm caused was not disproportionate to the harm avoided. [Emphasis added]
    - This was confirmed in *State v. Tadlock (2001)* BUT court specified that defense could only be used to charge of simple possession and not to charge of possession with intent to distribute.

Illinois

- Has a TRP in effect. This program would most likely prevent the medical necessity defense, if raised, from being used successfully b/c typically courts say that the existence of this type of program creates a reasonable alternative the defendant could have used.
    - IL ST CH 720 S 550/11 – *Research with cannabis; possession, etc. of cannabis; privacy of research subjects. § 11. (a) The Department, with the written approval of the Department of State Police, may authorize the possession, production, manufacture and delivery of substances containing cannabis by persons engaged in research and when such authorization is requested by a physician licensed to practice medicine in all its branches, such authorization shall issue without unnecessary delay where the Department finds that such physician licensed to practice medicine in all its branches has certified that such possession, production, manufacture or delivery of such substance is necessary for the treatment of glaucoma, the side effects of chemotherapy or radiation therapy in cancer patients or such other procedure certified to be medically necessary; such authorization shall be, upon such terms and conditions as may be consistent with the public health and safety. To the extent of the applicable authorization, persons are exempt from prosecution in this State for possession, production, manufacture or delivery of cannabis. (b) Persons registered under Federal law to conduct research with cannabis may conduct research with cannabis including, but not limited to treatment by a physician licensed to practice medicine in all its branches for glaucoma, the side effects of chemotherapy or radiation therapy in cancer patients or such other procedure which is medically necessary within this State upon furnishing evidence of that Federal registration and notification of the scope and purpose of such research to the Department*

and to the Department of State Police of that Federal registration. (c) Persons authorized to engage in research may be authorized by the Department to protect the privacy of individuals who are the subjects of such research by withholding from all persons not connected with the conduct of the research the names and other identifying characteristics of such individuals. Persons who are given this authorization shall not be compelled in any civil, criminal, administrative, legislative or other proceeding to identify the individuals who are the subjects of research for which the authorization was granted, except to the extent necessary to permit the Department to determine whether the research is being conducted in accordance with the authorization.

- Has codified necessity defense:
    - *5/7-13. Necessity § 7-13. Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct*
- *From NORML's web site (News):*
    - **10 June 2003 JUDGE SAYS DRUG WASN'T A MEDICAL NECESSITY** *by Tony Gordon,* (Source:Daily Herald). Illinois ------- Jurors in the upcoming marijuana possession trial of a Beach Park woman will not be allowed to exonerate her simply because she believed the glaucoma she suffers from gave her no other choice than to possess the drug. Circuit Judge Mary Seminara Schostok ruled against Brenda Kratovil's request to have the jury consider a so-called "medical necessity" defense. Schostok said she believes the marijuana may not have been necessary. Monday's ruling came after two days of testimony during which Kratovil's doctor testified he believes laser surgery would relieve suffering from the progressive eye disease. Kratovil also testified eye drops alleviated some of the pain. **"To qualify for a medical necessity, the defendant must prove that the marijuana was the sole viable alternative available**," Schostok said. "I do not find that to be the case after hearing her doctor talk about surgery as an alternative, and the defendant claiming that she finds some relief in legal medications."…. Seven states and Canada allow medical exemptions to marijuana laws under certain circumstances for people who suffer from glaucoma. Illinois is not one of those states. …"Until the legislature sees fit to enact the laws such as those existing in other states, the defendant's request is not an option for the court," said Assistant State's Attorney Amy Meister Falbe. "Laser surgery is available and it remains an option." [Emphasis added]
    - **MARIJUANA RULING WILL BE APPEALED** *by Tony Gordon,* (Source:Daily Herald) 24 June 2003. …Kratovil, 42, of Beach Park, took a felony conviction from Lake County Associate Judge John Phillips, clearing the way for her lawyers to go to the appellate court and argue she uses the drug for her health…. Vernon Hills defense attorney David Stepanich attempted to have the evidence against Kratovil thrown out by arguing her property was illegally searched. He also tried to convince a judge to instruct jurors in the case they could exonerate Kratovil if they believed her medical condition gave her no other choice than to possess the drug. But Stepanich lost both motions and said Monday he did not want to risk taking the case to trial and allowing Kratovil to face up to five years in prison if convicted…. Assistant State's Attorney Amy Meister Falbe said the state was not unsympathetic to Kratovil's medical condition, but one of her own physicians testified at an earlier hearing that prescription drugs and surgery would probably have brought her greater and longer-lasting relief. She also questioned Kratovil's claim the marijuana, or cannabis as it is referred to in court, was strictly for medicinal purposes because in her house were posters celebrating the marijuana culture and pictures of her son and other children standing in front of the plants. "It is obvious that she is suffering, **but the law in Illinois does not recognize that defense at this**

time," Falbe told Phillips. "The posters and the photographs show more of the cannabis lifestyle than a medical necessity." [Emphasis added]

Indiana

- **Indiana has retained common law defense of necessity.**
    - **Toops v. State,** 643 N.E.2d 387, Ind.App. 5 Dist.,1994. Defendant was convicted in the Cass Superior Court, Douglas A. Cox, J., of operating vehicle while intoxicated, operating vehicle with 10% or more of alcohol in blood, operating vehicle while intoxicated with prior offense of operating vehicle while intoxicated, and operating vehicle with 10% or more alcohol in blood with prior offense of operating vehicle while intoxicated. Defendant appealed. The Court of Appeals, Rucker, J., held that defendant was entitled to instruction on **defense of necessity**. Instruction on defense of necessity should include following elements: act charged as criminal must have been done to prevent significant evil, there must have been no adequate alternative to commission of act, harm caused by act must not be disproportionate to harm avoided, accused must entertain good faith belief that his act was necessary to prevent greater harm, such belief must be objectively reasonable under all circumstances, and accused must not have substantially contributed to creation of emergency.
        - "Even if evidence is weak or inconsistent, defendant in criminal case is entitled to have jury instructed on any theory or defense which has some foundation in evidence. Neither this court nor our supreme court has had occasion to discuss the parameters or the applicability of the common law necessity defense in a criminal context. However, our supreme court has recognized the existence of the defense. *See Walker v. State* (1978), 269 Ind. 346, 381 N.E.2d 88 (declining to "wrestle with its obvious complexities" and refusing to apply the defense in a prison escape case). **In any event, contrary to the State's argument, to say that the common law defense of necessity is not a recognized defense in the State of Indiana is incorrect. True, it has not been addressed in any substantive way by a court of review in this State. However, while there are no common law crimes in this State, the same is not true for common law defenses. The law in this jurisdiction is well settled that a defendant in a criminal case is entitled to have the jury instructed on any theory or defense, which has some foundation in the evidence**. **" [Emphasis added]**
    - **Judge v. State,** 659 N.E.2d 608, Ind.App.,1995. Defendants were convicted in the Superior Court, Lake County, Criminal Division, Bernard A. Carter, J., of criminal trespass and of obstructing pedestrian traffic with regard to incident in which they blocked access to family planning clinic. Defendants appealed. The Court of Appeals, Hoffman, J., held that: (1) necessity defense was not available inasmuch as legal abortion was not a significant evil; (2) restitution orders were valid; and (3) sentences were excessive and would be modified. **Necessity defense is available in Indiana. Legal abortions are not a "significant evil," for purposes of defense of necessity to charges to charges of criminal trespass.**
- 35-48-4-11 Possession of marijuana, hash oil or hashish. *Sec. 11. A person who: (1) knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, or hashish; (2) knowingly or intentionally grows or cultivates marijuana; or (3) knowing that marijuana is growing on his premises, fails to destroy the marijuana plants; commits possession of marijuana, hash oil, or hashish, a Class A misdemeanor. However, the offense is a Class D felony (i) if the amount involved is more than thirty (30) grams of marijuana or two (2) grams of hash oil or hashish, or (ii) if the person has a prior conviction of an offense involving marijuana, hash oil, or hashish.*
- 35-48-4-7 Possession of a controlled substance; obtaining a schedule V controlled substance. *Sec. 7. (a) A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possesses a controlled substance (pure or*

adulterated) classified in schedule I, II, III, or IV, except marijuana or hashish, commits possession of a controlled substance, a Class D felony. However, the offense is a Class C felony if the person in possession of the controlled substance possesses the controlled substance: (1) on a school bus; or (2) in, on, or within one thousand (1,000) feet of: (A) school property; (B) a public park; (C) a family housing complex; or (D) a youth program center. (b) A person who, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally obtains: (1) more than four (4) ounces of schedule V controlled substances containing codeine in any given forty-eight (48) hour period unless pursuant to a prescription; (2) a schedule V controlled substance pursuant to written or verbal misrepresentation; or (3) possession of a schedule V controlled substance other than by means of a prescription or by means of signing an exempt narcotic register maintained by a pharmacy licensed by the Indiana state board of pharmacy; commits a Class D felony.

- **Burgin v. State,** 431 N.E.2d 864, Ind.App., 1982. Defendants were convicted before the Municipal Court, Marion County, Charles A. Wiles, J., of possession of Desoxyn, and possession of Desoxyn and marijuana, respectively, and they appealed. The Court of Appeals, Shields, J., held that: (1) possession of a controlled substance pursuant to possession of a valid prescription is an exception to the crime of possession, and therefore defendant had burden of proving a valid prescription; (2) statute providing that burden of proof of any exemption or exception to a crime is on the person claiming it is not unconstitutional, because such exemption or exception is not an element of the crime; (3) evidence that although pharmacist had filled Desoxyn prescriptions for defendant in the past he could not recall when he had filled the prescriptions, that the bottle of Desoxyn discovered in defendant's possession was unlabeled and that a pad of blank prescription forms was found in defendant's home supported finding that the Desoxyn found in the unlabeled bottle was not obtained under a specific valid prescription, thereby supporting defendant's conviction; and (4) evidence that the controlled substance, Desoxyn, was found in plain view on top of a dresser in a bedroom of the home occupied by second defendant and her husband demonstrated her capability to control the substance and her intent to control it, thereby supporting her conviction. Affirmed.
- **Schuller v. State,** 625 N.E.2d 1243. Ind.App. 2 Dist.,1993. Defendant was convicted in the Marion Municipal Court, William E. Young, J. pro tem., of possession of controlled substance, and she appealed. The Court of Appeals, Shields, J., held that: (1) physician's testimony about telephone call between physician and woman, allegedly the defendant, who fraudulently arranged for physician to prescribe her a controlled substance was not hearsay; (2) evidence supported finding that caller was the defendant, thereby supporting admission of physician's testimony about phone call; and (3) where defendant obtained prescription for controlled substance from physician by misrepresenting that she was patient and that she was in pain requiring that substance as medication, prescription was not "valid" within meaning of statute making it a felony to possess controlled substance without valid prescription. Affirmed. [re: Cogesic, a schedule III narcotic.]

Iowa

- Marijuana is a Schedule II drug in Iowa "when used for medicinal purposes pursuant to rules of the board of pharmacy examiners." (IA ST S 124.206)
  - From the IA Controlled Substances Act: "It is unlawful for any person knowingly or intentionally to possess a controlled substance **unless** such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter."
- Several bills have been introduced and sent to committee (in 2001 and again in March 2003) to create a TRP in IA studying the medical uses of marijuana. **2001 IA H.F. 658 (SN)**

- From NORML's News Archives: Iowa Bill Would Allow For A Therapeutic Medical Marijuana Research Program **February 8, 2001 - Des Moines, IA, USA.** A bill creating a medical marijuana therapeutic research program was introduced in the Iowa State Senate last Thursday. Senate Bill 113 would permit state approved doctors to prescribe marijuana to treat patients under their care who suffer from multiple sclerosis, hyperparathyroidism, nail patella syndrome, AIDS, any condition with symptoms of chronic pain or spasms, nausea and glaucoma. SB 113, sponsored by Sens. Joe Bolkcom (D-23), Robert Dvorsky (D-25) and Johnie Hammond (D-31), has been referred to the Senate Human Resources Committee.
- From NORML's News Archives: **Use Of Medical Marijuana Not A Probation Violation, Iowa Judge Affirms. September 4, 1997 - Waterloo, IA, USA** An Iowa judge denied a motion to reconsider an earlier ruling stating that defendant Allen Helmers' use of marijuana for medical purposes does not violate terms of his probation. District Court Judge Jon Fister based his ruling on a 1979 state law rescheduling marijuana when it is used medicinally. "Because there was no medical testimony to support the contention that [the] defendant's chronic pain can be managed without the use of marijuana and because the assistant county attorney previously admitted that marijuana can be prescribed for medicinal purposes under Iowa law, the Court ruled that [Helmers] would continue on supervised probation until the conflict between federal law, which does not permit the prescription of marijuana for medicinal purposes, and Iowa law, which does, is resolved," Judge Fister affirmed in an August 13 decision. In issuing his ruling, Fister rejected the state's claim that marijuana cannot legally be prescribed in Iowa because the board of pharmacy examiners never adopted rules to regulate its medicinal use. "The first flaw in this argument is that it depends on the novel proposition that a state agency ... can do an end run around the general assembly and the governor and amend [state law] by its own action or inaction," Fister decided. "The second flaw in this argument is that nothing prevents the board from adopting any rules it deems appropriate. If there are no marijuana specific rules, it may be assumed that the board sees no need to regulate the medicinal use of marijuana any more than any other [drug.]" Fister stated that his ruling does not reflect a view that marijuana should be legalized for medicinal purposes, but merely addresses discrepancies in state and federal law. He said he would again review the terms of Helmers' probation if the Iowa Legislature opted to repeal the state's medical marijuana law. Law enforcement arrested Helmers in 1995 after seizing three ounces of marijuana from his home. Helmers contended that he uses marijuana to treat chronic pain brought on by fibromyalgia and back problems. He received two five-year prison sentences for marijuana possession and failure to possess an Iowa drug tax stamp, but the judge suspended the sentence in favor of probation. Prosecutors later accused Helmers of violating his probation after he tested positive for THC in August and October 1995. Judge Fister also ruled that the state will not be allowed to drug test Helmers for the remainder of his probation. Presently Iowa and three other states -- New Mexico, Tennessee, and the District of Columbia -- have laws rescheduling marijuana when it is used for medical purposes. NORML Executive Director R. Keith Stroup praised Judge Fister's ruling and said that the case illustrated the need for Congress to pass H.R. 1782, the "Medical Use of Marijuana Act." H.R. 1782 seeks to eliminate federal restrictions, which currently interfere with an individual state's decision to permit the medicinal use of marijuana, Stroup noted.

- Necessity defense adopted by common law (not codified):
  - Necessity defense is generally not available to excuse criminal activity by those who disagree with policies of government. Antiabortion protester, against whom injunctive relief was sought by clinic, failed to establish necessity defense which would excuse repeated trespasses on clinic property to "rescue" the unborn from abortion. **Planned Parenthood of Mid-Iowa v. Maki**, 478 N.W.2d 637, Iowa,1991.

- Justification as a defense is two-pronged: an admission that a proscribed act was done, and the establishment of an exculpatory excuse that takes the act out of the criminal law. I.C.A. § 704.3. **State v. Jeffries,** 313 N.W.2d 508, Iowa, 1981. (murder case)

Kansas

- Kansas has codified defense of Compulsion:
  - *21-3209. Compulsion. (1) A person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which he performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if he reasonably believes that death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, brother or sister if he does not perform such conduct.(2) The defense provided by this section is not available to one who willfully or wantonly places himself in a situation in which it is probable that he will be subjected to compulsion or threat.*
  - **State v. Matson**, 921 P.2d 790, Kan., 1996. (murder case) - Coercion or duress must be present, imminent, impending, and continuous for defense of "compulsion" to be available; it must be of such nature as to induce well-grounded apprehension of death or serious bodily injury to oneself or one's family if act is not done. Doctrine of compulsion may not be invoked as excuse by one who had reasonable opportunity to escape compulsion or avoid doing act without undue exposure to death or serious bodily harm; threat of future injury is not enough.
  - **State v. Alexander,** 953 P.2d 685, Kan.App.,1998. Whether compulsion defense is available to defendant is matter of law determined by court. K.S.A. 21-3209. In order to constitute defense of compulsion, coercion or duress must be present, imminent, and impending, and of such nature as to induce well-grounded apprehension of death or serious bodily injury if act is not done. K.S.A. 21-3209. Doctrine of coercion or duress cannot be invoked as excuse by one who had reasonable opportunity to avoid doing act without undue exposure to death or serious bodily harm. To constitute defense of compulsion, compulsion must be continuous and there must be no reasonable opportunity to escape compulsion without committing crime. K.S.A. 21-3209. Defense of compulsion, even if its definition were enlarged to include emergency, was unavailable to defendant charged with driving while being declared habitual violator where defendant drove after emergency had subsided and at that point, he did not have well-grounded apprehension of death or serious bodily injury if he did not drive home; although defendant conceivably had claim of compulsion emergency when he drove to treatment center to tend to potential premature birth of his child, and though walking was bad for his health and he had no money for taxi, compulsion had subsided. K.S.A. 21- 3209.
  - **City of Wichita v. Tilson,** 855 P.2d 911 Kan.,1993. City brought action against abortion protester for criminal trespass. The District Court, Sedgwick County, Paul W. Clark, J., held that defendant was absolved by the justification by **necessity defense**. City appealed. The Supreme Court held that: (1) the defense of justification by necessity cannot be used when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred is in violation of the law, and (2) evidence on when life begins was irrelevant in action for criminal trespass on property of abortion clinic and thus admission was error. Necessity is generally considered to be affirmative defense that must be proved by defendant, usually beyond a reasonable doubt. If recognized as defense in criminal case, justification by necessity defense only applies when harm or evil which defendant seeks to prevent by his or her own criminal conduct is legal harm or evil as opposed to moral or ethical belief of individual defendant. **Justification by necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted in Kansas.**

Kentucky

- Peak v. Commonwealth (2000): **medical necessity not recognized in KY** as a defense to a criminal charge -- in order to use "choice of evils" statute (KY ST S 503.030) must be able to show attempting to avoid imminent physical injury and no reasonable alternative, etc.
- US v. Burton (1989, Fed/Ky): medical necessity defense recognized but rejected in case involving a glaucoma patient b/c a govt program was established to study effects of marijuana on glaucoma patients, thus, a reasonable legal alternative was available.
- "Choice of evils" defense codified -
    - KY ST 503.030 *Choice of evils (1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, except that no justification can exist under this section for an intentional homicide. (2) When the defendant believes that conduct which would otherwise constitute an offense is necessary for the purpose described in subsection (1), but is wanton or reckless in having such belief, or when the defendant is wanton or reckless in bringing about a situation requiring the conduct described in subsection (1), the justification afforded by this section is unavailable in a prosecution for any offense* for *which wantonness or recklessness, as the case may be, suffices to establish culpability.*

- Non-medical necessity defense NOT allowed. See Greer v. Commonwealth (1988) where Defendant farmer admitted that he allowed the use of his field to grow marijuana, but contended that he was heavily in debt (economic necessity). The Court affirmed Defendant's conviction holding that the "choice of evils" defense (KRS 503.030) applies only to an imminent physical injury, and not to financial or property damage.

Louisiana

- State v. Webb: court remanded case where the defendant was charged with possession with intent to distribute marijuana in order o permit the defendant to testify as to whether he had smoked marijuana to relieve the pain from numerous chronic health problems, which would negate the intent element of his distribution charge. Defendant was convicted in the 32nd Judicial District Court, Parish of Terrebonne, No. 304,279, Edward J. Gaidry, J., of possession of marijuana with intent to distribute, and he appealed. The Court of Appeal, Fitzsimmons, J., held: (1) defendant should have been permitted to testify that he smoked marijuana to relieve his pain to negate intent to distribute element, and (2) improper exclusion of such testimony was not harmless. Reversed and remanded.
- Has TRP: **§ 1021. Prescription of marijuana for therapeutic use; rules and regulations; secretary of health and hospitals.** A. Notwithstanding any other provision of this Part, a physician licensed to practice medicine in this state and who is also registered to prescribe Schedule I substances with the Drug Enforcement Administration may prescribe marijuana, tetrahydrocannabinols, or a chemical derivative of tetrahydrocannabinols for therapeutic use by patients clinically diagnosed as suffering from glaucoma, symptoms resulting from the administration of chemotherapy cancer treatment, and spastic quadriplegia in accordance with rules and regulations promulgated by the secretary of health and hospitals and in accordance with FDA and DEA administrative guidelines for procurement of the controlled substance from the National Institute on Drug Abuse. B. The secretary of health and hospitals, by January 1, 1992, shall promulgate rules and regulations, authorizing physicians licensed to practice in this state to prescribe marijuana for therapeutic use by patients as described in Subsection A of this Section.

Maine

- Justification defense codified
    - (ME ST T. 17-AS 103) *§ 103. Competing harms **1.** Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute. **2.** When the actor was reckless or criminally negligent in bringing about the circumstances requiring a choice of harms or in appraising the necessity of his conduct, the justification provided in subsection 1 does not apply in a prosecution for any crime for which recklessness or criminal negligence, as the case may be, suffices to establish criminal liability.*
- Medical marijuana law on books (Maine Medical Marijuana Act of 1998, ME ST T. 22 § 2383-B), which offers exemption to criminal prosecution, and allows affirmative defense that D was an eligible patient (conditional: for certain conditions, and must have written documentation from physician at time of possession).
    - *MEDICAL USE OF MARIJUANA; EXEMPTIONS. The following provisions govern the medical use of marijuana. A. Notwithstanding any other provision of law, a person who is at least 18 years of age may lawfully possess a usable amount of marijuana for medical use if, at the time of that possession, the person has available an authenticated copy of a medical record or other written documentation from a physician, demonstrating that: 1) The person has been diagnosed by a physician as suffering from one or more of the following conditions: a) Persistent nausea, vomiting, wasting syndrome or loss of appetite as a result of: i) Acquired immune deficiency syndrome or the treatment thereof; or ii) Chemotherapy or radiation therapy used to treat cancer; b) Heightened intraocular pressure as a result of glaucoma; c) Seizures associated with a chronic, debilitating disease, such as epilepsy; or d) Persistent muscle spasms associated with a chronic, debilitating disease, such as multiple sclerosis; 2) A physician, in the context of a bona fine physician-patient relationship with the person: a) Has discussed with the person the possible health risks and therapeutic or palliative benefits of the medical use of marijuana to relieve plain or alleviate symptoms of the person's condition, based on information known to the physician, including, but not limited to, clinical studies or anecdotal evidence reported in medical literature or observations or information concerning the use of marijuana by other patients with the same or similar conditions; b) Has provided the person with the physician's professional opinion concerning the possible balance of risks and benefits of the medical use of marijuana to relieve pain or alleviate symptoms in the person's particular case; and c) Has advised the person, on the basis of the physician's knowledge of the person's medical history and condition, that the person might benefit from the medical use of marijuana to relieve pain or alleviate symptoms of the person's condition; 3) The person has disclosed to the physician that person's medical use of marijuana; and 4) The person is under the continuing care of the physician…. **G. It is an affirmative defense to prosecution for possession, use or cultivation of a usable amount of marijuana under section 2383, Title 15, section 3103 or Title 17-A, chapter 45 that the defendant was an eligible patient under this subsection. H. It is an affirmative defense to prosecution for possession,***
      ***possession with the intent to furnish, furnishing or cultivation of a usable amount of marijuana under section 2383, Title 15, section 3103 or Title 17-A, chapter 45 that the defendant was a designated care giver under this subsection if the person to whom the marijuana was to be furnished or for whom it was cultivated was an eligible patient**. [Emphasis added]*

- Maine legislature even petitioned Congress on April 2, 2002 to change Schedule designation of marijuana to allow for limited medical use.

Maryland

- As of May 22, 2003: 2003 Darrell Putman Compassionate Use Act passed which allows certain individuals to introduce evidence relating to medical necessity under certain circumstances (if medical necessity is found, max penalty imposed can be $100). This Act amends the Maryland **Md. CRIMINAL LAW Code Ann. § 5-601 as follows:**
  - 5-601. (c) (1) Except as provided in [paragraph (2)]PARAGRAPHS (2) AND (3) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 4 years or a fine not exceeding $25,000 or both. (2) A person whose violation of this section involves the use or possession of marijuana is subject to imprisonment not exceeding 1 year or a fine not exceeding $1,000 or both. (3) (I) IN A PROSECUTION FOR THE USE OR POSSESSION OF MARIJUANA, THE DEFENDANT MAY INTRODUCE AND THE COURT SHALL CONSIDER AS A MITIGATING FACTOR ANY EVIDENCE OF MEDICAL NECESSITY. (II) NOTWITHSTANDING PARAGRAPH (2) OF THIS SUBSECTION, IF THE COURT FINDS THAT THE PERSON USED OR POSSESSED MARIJUANA BECAUSE OF MEDICAL NECESSITY, ON CONVICTION OF A VIOLATION OF THIS SECTION, THE MAXIMUM PENALTY THAT THE COURT MAY IMPOSE ON THE PERSON IS A FINE NOT EXCEEDING $100.

- Non-medical Necessity Defense NOT allowed. See Frasher v. State (1970) where defendant was being arrested for shoplifting and did not have time to discard the heroin or paraphernalia in his possession. Defendant tried to raise defense of necessity – saying it was an "emergency" situation (shoplifting arrest). A necessity defense was not available in this state narcotics prosecution, the court concluded, since the defendant could have avoided the "emergency" at issue by taking advance precautions.

Massachusetts

- No choice of evils statute as of 1993
- Common law defense of necessity recognized in prison escape and firearm cases with 4 elements that must be met.
- Medical necessity defense rejected
  - See: COMMONWEALTH v. JOSEPH T. HUTCHINS (1991) 410 Mass. 726. Defendant suffered from scolerderma and presented medical necessity defense which was rejected because the court balanced harms rather than jury (threshold finding) and considered policy and effect of decision, "the alleviation of the defendant's medical symptoms, the importance to the defendant of which we do not underestimate, would not clearly and significantly outweigh the potential harm to the public were we to declare that the defendant's cultivation of marijuana and its use for his medicinal purposes may not be punishable. We cannot dismiss the reasonably possible negative impact of such a judicial declaration ... on the enforcement of our drug laws, ... nor can we ignore the government's overriding interest in the regulation of such substances." The court held that evidence of necessity could not be considered until the trial court first considered "whether the harm that would have resulted from compliance with the law significantly outweighs the harm that reasonably could result from the court's acceptance of necessity as an excuse in the circumstances presented...." The court concluded that, while circumstances can overcome the "competing harms" test, Hutchins' circumstances were insufficient.

        - DISSENT, however, (by Chief Justice Liacos) makes good argument to be able to raise the defense saying that the jury should decide (not the court) and criticized the majority for "speculative judicial fact-finding."
- In 1991, the Massachusetts legislature approved a controlled substances therapeutic research act.
    - *§ 2. Therapeutic research program There shall be in the department a therapeutic research program, hereinafter called the program, to conduct research and monitor experimentation in the use of marijuana as a therapeutic modality in alleviating the nausea and ill-effect of cancer chemotherapy and radiation therapy, in decreasing intraocular pressure in glaucoma patients, and in decreasing airway resistance in asthmatics. Participation in the program shall be limited to patients with respect to whom a physician has certified the following: that the patient is threatened by loss of life or sight, or asthmatics who experience severe respiratory problems or discomfort; that the patient is not responding to or has incurred severe side effects from the administration of conventional controlled substances; and that the patient has given in writing his informed consent based upon information about the nature, duration, and purpose of the research, the method and means by which it is to be conducted, the inconveniences and hazards reasonably to be expected, and the effects upon the patient's health or person which may reasonably be expected to come from his participation. The department shall contract with the national institute on drug abuse, the national cancer institute or any other manufacturer, distributor or analytical laboratory for the receipt of analyzed marijuana, as defined by the department, for distribution to an approved patient upon the written prescription of a physician. Any such program shall comply with all applicable federal and state laws. For the purpose of implementing this act the commissioner shall make such rules and regulations as may be necessary.*
        - In 1997 the legislatures introduced a bill to add an affirmative defense to the TRP regulations – to date, it does not appear that was ever done.

Michigan

- Has Controlled Substance Therapeutic Research Program (limited to cancer and glaucoma.
    - The Marihuana Controlled Substances Therapeutic Research Program of Michigan provides in part: (1) There shall be established in the department a marihuana controlled substances therapeutic research program ....
      (2) Participation in the marihuana controlled substances research program shall be limited to cancer chemotherapy patients and glaucoma patients who are certified to the department by a physician as being involved in a life- threatening or sense-threatening situation, and who is not responding to conventional medical treatment or when conventional medical treatment administered has proven to be effective, but the patient has incurred severe side effects .... Mich. Comp. Laws Ann. § 333.7335 (West 1999).
- From NORML's news archives:
    - Judge Allows Best-Selling Author To Use Defense Of "Medical Necessity" Against Pot Charges October 30, 1997 - Detroit, MI, USA. A district court judge yesterday decided that an AIDS and cancer patient facing marijuana possession charges may present evidence that he uses the drug as part of his medical treatment. The case involves Peter McWilliams, a best-selling author and former Detroit resident who is facing criminal charges for possession of seven marijuana cigarettes. McWilliams, who now lives in California, uses marijuana medicinally to alleviate the side effects of the AIDS wasting syndrome and cancer chemotherapy. He was arrested December 17, 1996, at Detroit Metropolitan Airport after telling officers that he was carrying marijuana legally acquired in California. "This [ruling] is an important victory for all Michigan patients," McWilliams said. "I'm fighting so all patients can have the choice to use a safe, natural, and non-addictive therapeutic drug." NORML Legal Committee member Richard Lustig, who is defending McWilliams, praised the judge's pre-trial decision. "This decision is an

important precedent that will help thousands of Michigan residents suffering from chronic pain," he said. "We are fighting for the right of patients to get all the medical help available." In the sole court case since the passage of Proposition 215 involving a California resident arrested for possessing medical marijuana out-of-state, Nevada state prosecutors eventually dismissed all charges after deciding that the marijuana was for medical use only.

Minnesota

- Necessity defense recognized by courts but not codified.
- Medical necessity defense rejected. See Hanson case below
    - State v. Hanson 468 N.W.2d 77 (1991): Medical necessity defense not available b/c legislature had specifically made a determination of values concerning medical use of marijuana in classifying marijuana as Schedule I drug and making only exception with the THC Therapeutic Research Act (State v. Hanson, 1991 - Defendant was convicted in the District Court, Roseau County, Dennis J. Murphy, J., of the manufacture of marijuana, and he appealed. The Court of Appeals, Klaphake, J., held that: (1) defense of medical necessity was not available to defendant because legislature, by implication, considered and rejected broad exception for medical uses, and (2) prohibition against marijuana possession, despite its claimed medical value to defendant, did not violate defendant's constitutional rights.). The statutory exemption from criminal prosecution does not encompass possession of marijuana; it specifies THC only. Minn. Stat. § 152.21 subd. 6 (1996). The legislature transferred THC from schedule I to schedule II for purposes of the Act, but left marijuana in schedule I. The appellate court found that the legislature's actions "show conclusively that the possible medical uses of marijuana have been brought to the legislature's attention."

- THC Therapeutic Research Act (MN ST S 152.21) (statute does not distinguish between marijuana and THC)
    - See Minn. Stat. § 152.21 (1989). The legislative purpose behind the statute was: The legislature finds that scientific literature indicates promise for ... THC, the active component of marijuana, in alleviating certain side effects of cancer chemotherapy under strictly controlled medical circumstances ... [[[[t]he intent of this section is to establish an extensive research program to investigate and report on the therapeutic effects of THC ... in compliance with all federal laws and regulations promulgated by the federal food and drug administration, the national institute on drug abuse and the drug enforcement agency. The intent of this legislature is to allow the research program the greatest possible access to qualified cancer patients ..... § 152.21(2). The principal investigator is defined as "the individual responsible for the medical and scientific aspects of the research, development of protocol, and contacting and qualifying the clinical investigators of the state." § 152.21(5)(1). All IND's are regulated by the Federal Food, Drug, and Cosmetic Act. See 21 U.S.C. § 301 (1994). § 152.21(5)(2). Protocol information included the description and requirements of the therapeutic research program, "summaries of current papers in medical journals reporting on the research concerning the safety, efficacy and appropriate use of THC in alleviating the nausea and emetic effects of cancer chemotherapy ...."
- On April 2, 2003, a Compassionate Use Act bill was introduced which would allow medical use of marijuana and an affirmative defense of medical necessity to be raised for those in compliance with the Act (2003 MN HF 1440 (SN)).
    - Referred to the Health and Human Services Policy Committee on April 2
    - As of May 16, 2003, only new activity is that an additional author was added to the Bill

Mississippi

- Medical marijuana act introduced to House Legislature on January 21, 2003, which would also move marijuana from Schedule I to Schedule II (2003 MS HB 1044 (SN)).
    - As of February 4, 2003: Bill died in Committee
- **Necessity Defense adopted by common law (not codified):**
    - **See: Corley v. State** 536 So.2d 1314 , Miss.,1988. "The Defendant has raised the defense of escape because of necessity. To constitute such a defense, there must be (1) immediate threat of serious bodily harm to prisoner; (2) prisoner has no time in which to make complaint to authorities about his danger; (3) force or violence is not used in escape; and (4) prisoner must intend to report immediately to proper authorities when he attains position of safety. "
    - **See: King v. State** 788 So.2d 93 Miss.App.,2001. "the defense of necessity is available "where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal." The defense of necessity has been applied to justify the use of deadly force in matters of self-defense, *Calhoun v. State,* 526 So.2d 531 (Miss.1988), escape from custody, *Corley v. State,* 536 So.2d 1314 (Miss.1988), and has been used to justify leaving the scene of an accident. *Knight,* 601 So.2d at 403. "The application of the necessity defense in these cases share the finding of a reasonable belief that imminent danger of death or serious bodily harm induced the criminal conduct." *96 *McMillan v. City of Jackson,* 701 So.2d 1105, 1107 (Miss.1997)."
    - See: *Knight v. State,* 601 So.2d 403 (Miss.1992). Where person reasonably believes that he is in danger of physical harm, he may be excused for some conduct which ordinarily would be criminal. Jury could have found that fear motivated motorist in leaving scene of accident and that there were circumstances which could induce that fear in a reasonable person based on testimony that black motorist struck white child, a crowd gathered, the child's father began to approach him, and a female bystander said "Boy, you better get out of here."
    - See: *McMillan v. City of Jackson,* 701 So.2d 1105, 1107 (Miss.1997). Defense of necessity has three essential elements: act charged must have been done to prevent significant evil; there must have been no adequate alternative; and harm caused must not have been disproportionate to harm avoided. "In support of McMillan's application of the necessity defense, she indicates that the necessity defense is a widely accepted defense that has found favor in Mississippi jurisprudence. We have applied the defense of necessity to justify the use of deadly force in matters of self-defense. *Calhoun v. State,* 526 So.2d 531 (Miss.1988) (circuit court *1107 erred because it refused to grant instruction that self defense may be applicable to a third party.) Also, we have acknowledged that the defense of necessity may justify escape from custody. *Corley v. State,* 536 So.2d 1314 (Miss.1988) (although the Court affirmed the defendant's conviction, it outlined how the defense of necessity could be applied lawfully). Moreover, the defense of necessity has been used to justify leaving the scene of an accident. *Knight v. State,* 601 So.2d 403 (Miss.1992). The application of the necessity defense in these cases share the finding of a reasonable belief that imminent danger of death or serious bodily harm induced the criminal conduct. These cases are distinguishable from the circumstances that led to McMillan's trespass because she had no knowledge that a specific harm was imminent to justify her unlawful action."

Missouri

- On March 11, 2003 a bill was introduced to House for use of marijuana for medical purposes (2003 MO HB 644 (SN)).
    - Status: April 2, 2003 – Public Hearing Held; Bill currently not on calendar; in House Committee: Health Care Policy
- Has codified necessity defense

- MO Ann Stat S 563.026. *Justification generally 1. Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged. 2. The necessity and justifiability of conduct under subsection 1 may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification. 3. The defense of justification under this section is an affirmative defense.*

Montana

- On February 4, 2003 the House introduced a bill (Clinical Cannabis Act) to allow medical use of marijuana (2003 MT HB 506 (SN)).
  - 02/26/03: 2nd reading: 60 votes no; 40 votes yes
  - 02/28/03: Missed deadline for General Bill Transmittal
  - Current Bill Progress: Probably Dead
- Codified defense of "compulsion" (which includes defenses of necessity and justification):
  - 45-2-212. Compulsion. *A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.*
    - The Supreme Court ruled that the compulsion statute does include the common-law defense of "choice of evils." See: State v. Close 267 M 44, 1994 - this Court recognized that § 45-2-212, MCA, abandons the distinction between the related defenses of necessity, duress, and compulsion and represents a "statutory amalgamation." "It brings together all of the related defenses, by whatever name called, under a single codification."
- Necessity defense cases:
  - See: St. v. Shotton, 458 A2d 1105 (Vt. 1983), for the common-law defense of necessity. Shotton set out the elements of the necessity defense as follows: (1) there must be a situation of emergency arising without fault on the part of the actor concerned; (2) the emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either to the actor or to those whom the actor was protecting; (3) the emergency must present no reasonable opportunity to avoid the emergency without doing the criminal act; and (4) the injury impending from the emergency must be of sufficient seriousness to out measure the criminal wrong.
  - See: State v. Nelson, 36 P.3d 405, Mont.,2001. Necessity was not available as a defense to driving or being in actual physical custody of a motor vehicle while under the influence of alcohol, even though defendant stated that the cold weather required him to wait in his vehicle for others to pick him up from a bar; a medical emergency was not present and defendant's predicament was created by himself, as he drove to the bar alone on a cold night without a jacket and was clad only in a sleeveless t-shirt. MCA 61-8-401.

Nebraska

- Medical use exception with prescription §28-421
    - § 28-421. Act, exceptions. *The provisions of sections 28-419 to 28-424 shall not apply to the use or sale of such substances, as defined in sections 28-419 and 28-420, when such use or sale is administered or prescribed for medical or dental purposes, nor shall the provisions of sections 28-419* to 28-424 apply to the use or sale of alcoholic liquors as defined by section 53-103.
- Has codified necessity defense:
    - § 28-1407. Justification; choice of evils. *(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if: (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; (b) Neither sections 28-1406 to 28-1416 nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.*

Nevada

- Medical marijuana laws in place which allow for the affirmative defense of medical necessity.
    - Nevada's Constitution was amended in 2000 after 65% of the voters approved "Question 9" - *Art. 4, §38: "Use of plant of genus Cannabis for medical purposes" allows for patients with advice of physician to have a Cannabis plant "for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment."* (Conditions: minor restrictions, patient registry).
    - The Nevada legislature created legislation to satisfy the new constitutional mandate (similar to CA and OR where the supply and distribution would be left in the hands of the patients): functions as an exception to Nevada's laws on controlled substances; must have a valid registry identification card to be exempt from state prosecution – limited to certain medical conditions and certain amounts of marijuana. To be eligible for a registry card, a person must either have a chronic or debilitating medical condition (done through the Nevada Department of Agriculture) and must have valid, written documentation from a physician.
    - Nevada's law also allows a person who is legitimately engaged in or assisting in the medical use of marijuana, regardless of whether he holds a registry identification card, to raise an **affirmative defense** to certain criminal charges
        - Nev. Rev. Stat. 453A.310: *Except as otherwise provided in this section and NRS 453A.300, it is an affirmative defense to a criminal charge of possession, delivery or production of marijuana, or any other criminal offense in which possession, delivery or production of marijuana is an element, that the person charged with the offense: (a) Is a person who: (1) Has been diagnosed with a chronic or debilitating medical condition within the 12-month period preceding his arrest and has been advised by his attending physician that the medical use of marijuana may mitigate the symptoms or effects of that chronic or debilitating medical condition; (2) Is engaged in the medical use of marijuana; and (3) Possesses, delivers of produces marijuana only in the amount described in paragraph (b) of subsection 3 of NRS 453A.200 or in excess of that amount if*

the person proves by a preponderance of the evidence that the greater amount is medically necessary as determined by the person's attending physician to mitigate the symptoms or effects of the person's chronic or debilitating medical condition…..

New Hampshire

- Has codified necessity defense –
  - ***NH Rev Stats Ann S 627:3 Competing Harms****. I. Conduct which the actor believes to be necessary to avoid harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute, either in its general or particular application. II. When the actor was reckless or negligent in bringing about the circumstances requiring a choice of harms or in appraising the necessity of his conduct, the justification provided in paragraph I does not apply in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish criminal liability.*
- Has TRP:
  - See N.H. Rev. Stat. Ann. § 318-B:10(VI) (Michie 1995). The physician has to prescribe the cannabis in good faith and in the course of professional practice.
  - TRP was amended in 1998 (HB 1563) to only allow doctors to prescribe marijuana if the FDA approves it.
- **From NORML's news archives:**
  - **April 15, 1999 - Concord, NH, USA.** State lawmakers showed their opposition to marijuana decriminalization yesterday by defeating a bill lowering marijuana penalties, and later voting to prevent its reintroduction until after the year 2000. House Bill 87 proposed changing possession of less than one ounce of marijuana from a Class A misdemeanor to a noncriminal violation. The House defeated the measure by a vote of 269 to 92, and later decided 219 to 149 to postpone the bill indefinitely. That vote prevents bill sponsor Rep. Tim Roberston (D-Keene) or any other legislator from reintroducing the measure next year. A bill sponsored by Robertson to legalize medical marijuana has been carried over until next year. House Bill 87 proposes changing possession of less than one ounce of marijuana from a class A misdemeanor to a violation. House Bill 202 proposes legalizing the possession and cultivation of marijuana for medical purposes. Both bills await action from the House Criminal Justice and Public Safety Committee.

New Jersey

- No medical necessity defense allowed. See: State v. Tate (below) - enactment of a therapeutic research program signifies legislative intent to forbid the medical necessity defense.
  - *State v. Tate*: A defendant in a narcotics prosecution, afflicted with quadriplegia, was prevented from asserting either a statutory or common-law defense of necessity. The defendant was indicted for possession of over 25 grams of marijuana, a substance he claimed relieved his severe muscle spasticity. In support of his "justification" or "medical necessity" defense, the defendant sought to present evidence that he utilized marijuana because it eased the effects of spastic contractions regularly suffered by quadriplegics, and that no other prescribable medication gave him such relief. The court ruled that the defendant could not avail himself of the statutory defense of necessity (N.J.S.A. 2C:3-2, subd. a), since: (1) the conduct undertaken by the defendant was not "permitted by law"; (2) alternative code provisions dealt with the specific situation at issue; and (3) the legislative intent to exclude the justification urged in this instance "plainly" appeared. The defendant would not be entitled to a common-law defense of necessity, either, the

court continued, since, pursuant to said principles, conduct which would otherwise be criminal is justified only if it promotes some value higher than compliance with the law. In this instance, the court observed, the legislature had weighed the competing value of the medical use of marijuana against the values served by prohibition of its use or possession, and thereafter set forth narrow circumstances under which the "competing value" may be served. The court concluded that as the defendant was unable to demonstrate the absence of an available alternative, he was precluded from utilizing a necessity defense. The majority further determined that the legislature clearly intended to exclude the defense in Tate's circumstances, and, even under the common law, Tate would not prevail because he was unable to prove the absence of a legal alternative by virtue of the Therapeutic Research Act.. The New Jersey Supreme Court summarily remanded the matter to the appellate division of the superior court (which had denied the State's motion for leave to appeal) to hear the merits of the appeal. New Jersey v. Tate, 97 N.J. 679 (1984). The appellate division, in a brief opinion, noted that if Tate successfully defended on the basis of medical necessity at trial, "his continued use of marijuana will be justifiable ... only until either the [TRA] makes marijuana available ... or until the [federal program] makes tetrahydrocannabinol (THC) available... whichever first occurs." The supreme court granted the State's motion for leave to appeal. New Jersey v. Tate, 505 A.2d 941 (N.J. 1986). (The court pointed out that in this jurisdiction, marijuana was obtainable for specific medical uses from the New Jersey Commission of Health. The court reasoned that since this legal alternative was available, the illegal alternative utilized by defendant was not "necessary," and resort to it could not be considered justified).

        - **The DISSENT, however, makes an argument to be able to use medical necessity argument for marijuana in limited and special circumstances**.

- Has codified necessity defense:
    - *2C:3-2. Necessity and other justifications in general a. Necessity. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear. b. Other justifications in general. Conduct which would otherwise be an offense is justifiable by reason of any defense of justification provided by law for which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.*

- Has a Controlled Dangerous Substances Therapeutic Research Act (NJSA 26: 2L-1 to –9) TRA.
    - N.J. Stat. Ann. § 26:2L-1 (West 1981). The therapeutic research program was limited in scope by the other state programs that were already approved by the FDA's Bureau of Drugs. § 26:2L-4(b). The legislative purpose for enactment was: The Legislature finds and declares that recent medical research has shown that the therapeutic use of certain Schedule I controlled dangerous substances may alleviate the nausea and ill-effects of certain diseases, such as glaucoma. The Legislature further recognizes that there is a need for further therapeutic research with regard to the use of such controlled dangerous substances for these purposes under strictly controlled circumstances.

New Mexico

- Controlled Substances Therapeutic Research Act (NM ST S 26-2A-2) 1978

- N.M. Stat. Ann. § 26-2A-1-7 (Michie 1978). *The legislative purpose for the enactment was: The legislature finds that recent research has shown that the use of marijuana may alleviate the nausea and ill-effects of cancer chemotherapy, and, additionally, may alleviate the ill-effects of glaucoma. The legislature further finds that there is a need for further research and experimentation with regard to the use of marijuana under strictly controlled circumstances. § 26-2A-2.*
- N.M. Stat. Ann. § 26-2A-6 (Michie 1978). *In establishing the research program, the New Mexico legislature stated that the FDA, DEA and National Institute or Drug Abuse guidelines should be "considered" but upon procurement of marijuana, New Mexico and federal guidelines had to be "consistent." Although there was no specific provision that exempted physicians, pharmacists and patients from criminal prosecution, marijuana was rescheduled under a Schedule II classification when used pursuant to the Lynn Pierson program. See id.*

- Common law defense of Compulsion recognized by case law:
  - **See: State v. Lee** 432 P.2d 265 N.M.App. 1967. "The second defense that of compulsion or duress has never heretofore been treated in this jurisdiction. In Castle v. United States, 120 U.S.App.D.C. 398, 347 F.2d 492, it was stated that, 'An act committed under compulsion, such as apprehension of serious and immediate bodily harm, is involuntary and, therefore, not criminal.'
  - **See: State v. Castrillo** 819 P.2d 1324 N.M.,1991. Person operating under some psychological coercion and faced with panoply of choices, including legal and illegal alternatives, cannot opt for unlawful alternative if legal avenues to relief are available. SCRA 1986, Crim.UJI 14-5130.

New York

- Seems that medical necessity would be allowed as a defense (although a very narrow one, see below).
  - *People v. Moore* (1996, 167 Misc.2d 994): Defendant (not a physician, but an activist running a "Medical Marijuana Buyers Club") sold marijuana to AIDS patient and claimed his was a "mission of mercy" and that his case should be dismissed b/c marijuana was necessary to help relieve medical problems of AIDS patient. Court disagreed, and held that "while the Court has assumed the defendant's actions are well motivated, the Court cannot condone the distribution of an illegal drug, whose unsupervised consumption might be injurious to those persons whom defendant seeks to help. The distribution of unprescribed legal drugs un unlicensed individuals is a crime…*A fortiori*, where the defendant has undertaken the unprescribed, unlicensed and unsupervised distribution of an *illegal* drug, the Court is reluctant to find a compelling circumstance warranting dismissal." "Finally, in this regard, defendant's argument that his actions were justified by medical necessity is best left to the trial of this case. It would be premature to express a view as to whether defendant has proffered sufficient proof to warrant the submission of that very narrow defense for consideration by a jury." Court also said, concerning medical properties of marijuana: "although there appears to be legitimate scientific authority in favor of making marijuana available for therapeutic consumption, the Court sees little merit to the contention that a park is the appropriate place to distribute it for that purpose."

  - *People v. Bordowitz*, 1991: Defendants in prosecution for criminal possession of hypodermic instrument were not guilty where their defense that they were engaged in needle exchange program justified by exigencies created by AIDS epidemic fell within **medical necessity defense**. Defendants did not create AIDS crisis; harm defendants sought to avoid – spread of AIDS virus – was greater than harm of violating statute; there were no meaningful available options since there were insufficient drug treatment

programs in the City and no reason to believe that more treatment slots would come into existence in near future; no legislative or executive action precluded necessity defense in this case; and medical evidence indicated that use of clean needle by addicts prevents spread of HIV infection.

- NY has codified defense of justification
    - See NY Penal Law S 35.05(2) – *"Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when: 1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or 2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."*

- Has Therapeutic Research Program:
    - N.Y. Pub. Health Law § 3397-f (1996) governs distribution of marijuana under the New York program: *The commissioner shall obtain marijuana through whatever means he deems most appropriate, consistent with regulations promulgated by the national institute on drug abuse, the [FDA] and the [DEA] and pursuant to the provisions of this article. 2. If, within a reasonable time, the commissioner is unable to obtain controlled substances pursuant to subdivision one of this section, he shall conduct an inventory of available sources of such drugs, including but not limited to the New York state police bureau of criminal investigation and local law enforcement officials. Said inventory shall be for the purpose of determining the feasibility of obtaining controlled substances for use in the program. Upon conducting said inventory, the commissioner shall contract with the available source for the receipt of controlled substances. 3. The commissioner shall cause such marijuana to be transferred to a hospital for distribution to the certified patient pursuant to this article.*
    - *3397-a. Legislative findings: The legislature finds that recent research has shown that the use of marijuana may alleviate the nausea and ill-effects of cancer chemotherapy, may alleviate the ill-effects of glaucoma and may have other therapeutic uses. The legislature further finds that there is a need for further research and experimentation with regard to the use of marijuana for therapeutic purposes under strictly controlled circumstances. It is for such research programs that the controlled substances therapeutic research act is hereby enacted.*

North Carolina

- Medical Necessity Defense NOT available (see below).
    - The defendant, a medical doctor, was not allowed to utilize the defense of medical necessity to state drug charges in State v Piland (1982) 58 NC App 95, 293 SE2d 278, app dismd 306 NC 562, 294 SE2d 374. The defendant, tried for the manufacture and felonious possession of marijuana, grew the drug on his property, claiming that he utilized it to administer to his patients. The physician asserted that the only way he could

be sure the marijuana he used for medical purposes had not been treated with insecticides or other harmful chemicals was to grow it himself. The defendant argued that the trial judge should have submitted to the jury the defense of necessity, and that the jury should have been allowed to determine whether he had a right to grow marijuana in violation of the law in order to furnish it to his patients. The court concluded that the defense of necessity was inapplicable, since there was at least one doctor in the jurisdiction who was authorized to prescribe marijuana, and the defendant could have referred to this other physician any patient whom he felt needed the drug. The court refused to hold that any doctor in the jurisdiction who decided to grow marijuana might do so in disregard of the criminal sanctions set forth by the legislature.

- HOWEVER, the following was found in NORML's news archives:
    - **Update: Charges Dismissed Against North Carolina Medical Marijuana User. March 21, 1996 - Sunny View, NC, USA.** All charges have been dismissed against Jean Marlowe, a medical marijuana user and vocal activist who was facing various drug charges including possession with intent to manufacture a controlled substance after law enforcement agents raided her home and discovered 50 marijuana seedlings. Marlowe, who is clinically disabled and admits to using marijuana at least three times a day to obtain therapeutic relief from three orthopedic conditions she suffers, told NORML that she successfully utilized the medical necessity defense. However, she adds that her fight is still far from over. "I [intend] to file suit against both the state and federal government for medical access to marijuana," she said. "Nobody should have to perform a criminal act to obtain a safe, natural medicine." [Emphasis added]
- **Necessity defense adopted by common law, not codified:**
    - See: **State v. Thomas, 103 N.C. App. 264 (1991). "**Upon reexamination of this issue in greater depth, we acknowledge that in fact several early decisions of the North Carolina Supreme Court appear to have recognized "necessity" as a defense to criminal prosecutions…. Inasmuch as the defense of "necessity" has not been expressly abolished in this State, we find that it indeed remains viable… It is often said that the **necessity defense** was not intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government. 22 C.J.S. *Criminal Law* § 51 (1989). As such, the defense is unavailable where the legislature has acted to preclude the defense by making a clear and deliberate choice regarding the values at issue."

- North Carolina had a TRP program (90-101), but it was changed in 1987 to only allow doctors to prescribe synthetic THC.
    - *N.C. Gen. Stat. § 90-101.* (i) A physician licensed by the North Carolina Medical Board pursuant to Article 1 of this Chapter may dispense or administer **Dronabinol** or Nabilone as scheduled in G.S. 90-90(5) only as an antiemetic agent in cancer chemotherapy.

- Marijuana is a Schedule VI drug in NC:
    - § 90-94. Schedule VI controlled substances. This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that such substance comes within this schedule, the Commission shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects. The following controlled substances are included in this schedule: (1) Marijuana. (2) Tetrahydrocannabinols. [Emphasis added]

North Dakota

- Marijuana is a Schedule I controlled substance
    - (N.D. Cent. Code S 19-03.1-04, 1997) ["a substance shall be placed in Schedule I if it is found that the substance: (1) has high potential for abuse and (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."]
- January 3, 1979 – North Dakota legislature introduces the Controlled Substances therapeutic Research Act to study the issue, which would have been limited to cancer and glaucoma patients, but it was voted down (4 yeas and 92 nays) on January 12, 1979.
- Defense of justification has been codified, but this does not preclude common law defense of necessity from being raised. See below.
    - § 12.1-05-01. **Justification.** 1. Except as otherwise expressly provided, **justification** or excuse under this chapter is a defense. 2. If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the **justifications** afforded by this chapter are unavailable in a prosecution for such recklessness or negligence. 3. That conduct may be justified or excused within the meaning of this chapter does not abolish or impair any remedy for such conduct which is available in any civil action.
    - **State v. Sahr, 470 N.W.2d 185 (1991):** A claim of necessity cannot be used to justify a crime that simply interferes with another person's right to lawful activity. **"**Our Legislature adopted, "almost completely," the National Commission's chapter on justifications and excuses in enacting our criminal code in 1973. Leidholm, 334 N.W.2d at 814. Thus, while the history of the legislative development of justification defenses in our state shows that NDCC Ch. 12.1-05 "is not intended to preclude the judicial development of other justifications," it is clear that our criminal code does not license the judicial extension of justification to any individualized conception of "necessity."

Ohio

- Ohio legislatively recognized the medical necessity defense on August 10, 1995, providing "it is an affirmative defense ... to a charge of possessing marihuana under this section that the offender, pursuant to the prior written recommendation of a licensed physician, possessed the marihuana solely for medicinal purposes." The legislature approved this defense despite marijuana's schedule I status under state law. The defense requires proof of a physician's written recommendation before an accused may successfully plead the affirmative defense. (Ohio Rev. Code Ann. S. 2925.11 (1996)).
    - **UPDATE**: This affirmative defense was removed from the Ohio Code in 1997. Therefore, courts would probably not allow an affirmative defense of medical necessity b/c the legislature had already considered and rejected the idea.
- Ohio had a TRP but it expired and the affirmative defense (above) was repealed.
- Ohio has adopted defense of necessity by common law. See below.
    - **City of Columbus v. Spingola, 144 Ohio App. 3d 76 (2001): "**The common law elements of necessity in Ohio are as follows: (1) The harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm."

Oklahoma

- Oklahoma Uniform Controlled Dangerous Substances Act (OK ST T. 63 S 2-402): "It shall be unlawful for any person knowingly or intentionally to possess a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act."
- Necessity defense adopted by common law (not codified).
    - See: **Jones v. City of Tulsa** 857 P.2d 814 Okl.Cr.,1993. Necessity is a defense to trespass when defendant is faced with burden of committing lesser harm to prevent occurrence of different and somewhat greater harm, which is both significant and immediate. "Appellee correctly points out that Oklahoma does not have a statutory provision for the necessity defense. To review appellants' argument, it is therefore necessary to review the common law and other state law in reference to the facts in the case due to the fact that this is a case of first impression in Oklahoma. In general, the defense of necessity is allowed when a defendant is faced with the burden of committing a lesser harm to prevent the occurrence of a different and somewhat greater harm. The harm being prevented needs to be *significant* and *immediate.* The Model Penal Code requires the following criteria before one can utilize the necessity defense: Section 3.02. (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability. While this criteria is not binding in Oklahoma, it is clear that the behavior of the appellants do not trigger the defense of necessity under the aforementioned criteria."

Oregon

- Medical marijuana laws on book as of 1999 –
    - Oregon Medical Marijuana Act (Title 37, Chapter 475) (allows the use of marijuana for medical purposes within specified limits – registry card system, aid by a primary care giver - and establishes an **affirmative defense** to a criminal charge of possession or production that the person has been diagnosed with a debilitating medical condition and is engaged in the medical use of marijuana). Despite this law, individuals in federal jobs which require random drug testing, such as aviation, rail transport, pipelines, and the commercial marine industry, may be prevented from using medical marijuana, lest they be fired.
    - Passed in November 1998, the Oregon medical marijuana law exempts persons from state criminal penalties for the "production, delivery, or administration of marijuana or paraphernalia used to administer marijuana provided they comply with very detailed requirements." Id. The Oregon law provides registry identification cards to qualified patients who receive "'written documentation' from their 'attending physician;'" these cards are relied on by state officials to determine exemption status.
    - Bill introduced in Oregon that would force participants in that state's ongoing medical marijuana program to complete an education course and would bar anyone with a prior drug conviction from participating in the program. Introduced by Rep. Jeff Kruse (R-Roseburg), HB 2939 is set for a hearing at the Health and Human Services Committee.

On 04/30/2003 HB 2939 Passed HOUSE. *****To SENATE. And on 05/06/2003 To SENATE Committee on HEALTH POLICY.

- State v. Ownbey (996 P.2d 510, 2000) – act was committed before Dec. 3, 1998 so medical marijuana law does not apply. Legislature balanced evils and therefore necessity defense cannot be raised. Defendant was convicted, in the Circuit Court, Multnomah County, Ellen F. Rosenblum, J., of manufacture of a controlled substance, marijuana, and possession of a controlled substance, marijuana. Defendant appealed. The Court of Appeals, Deits, C.J., held that defendant, a war veteran who claimed marijuana was the only substance that alleviated his symptoms of Post-Traumatic Stress Disorder (PTSD), could not assert a choice-of-evils defense.
- Has codified necessity defense:
    - *161.200. Choice of evils. (1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when: (a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and (b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. (2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder*.

Pennsylvania

- Medical necessity defense may be able to be successfully used in PA (see below):
- Has codified justification (choice *of evils)*
    - *PA ST 18 Pa. CSA §503 - in order to be entitled to an instruction on justification as a defense, the defendant must first offer evidence that the defendant was faced with clear and imminent danger, that he or she could reasonably expect that his or her actions would be ineffective in avoiding greater harm, that there was no legal alternative which would be effective in abating the harm and that the legislature had not acted to preclude the defense by a clear and deliberate choice*.
- Marijuana is a Schedule I drug ("no currently accepted medical use in the United States") in PA
    - But see: *Commonwealth v. Gindlesperger* (705 A.2d 1216, 1997): **recognized defense of medical necessity as an available defense in marijuana case** but did not consider the issue on its merits in this particular case as court vacated sentence for evidence errors: "Such an analysis would be more appropriate in a case in which the lower court's determination of guilt is upheld. In such a case, the issue of medical necessity as related to sentencing could be properly addressed." [Emphasis added]

Rhode Island

- On February 26, 2003 a bill was introduced in the Rhode Island General Assembly for an Act that would authorize the use of marijuana for medical purposes only (2003 RI S.B. 725 (SN))
    - 02/26/2003 Introduced, referred to Senate Judiciary
    - 05/27/2003 Scheduled for hearing and/or consideration
    - 05/27/2003 Continued

- Necessity defense adopted by common law (not codified).
    - See: State v. Champa (494 A.2d 102, 1985 – protesters who broke into a nuclear submarine plant attempted to use necessity/justification defense and were denied by court): necessity, or justification, as a defense is not available if a legal alternative exists; to be excused from liability a defendant must show that there is no third and legal

alternative available that harm is imminent, and that a direct causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm; it can be asserted only by a defendant who is confronted with such a crisis as a personal danger and is not a defense to charges arising from a typical protest.

- RI has a TRP program in effect (this would probably prevent the success of a medical necessity defense because the court may hold that there is a "third and legal alternative available…"
    - *21-28.4-1 Controlled substances therapeutic research program established -- Participation. (a) There is established within the department of health the "controlled substances therapeutic research program." The program shall be administered by the director of health or the director's designee. The department shall promulgate rules and regulations necessary for proper administration of this chapter. (b) The controlled substances therapeutic research program shall be limited to patients who are certified by a practitioner as being involved in a life- threatening or sense-threatening situation and who are not responding to conventional drug therapies or where these conventional therapies have proven effective but expose the patient to intolerable side effects.(c) The director of health is authorized to protect the privacy of individuals who are participants in the controlled substances therapeutic program by withholding from all persons not directly connected with the conduct of the program the names and other identifying characteristics of the participants. Persons who are given this authorization shall not be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are participants in the controlled substances therapeutic research program, except to the extent necessary to permit the director of health to determine whether the controlled substances therapeutic program is being conducted in accordance with the authorization.*

South Carolina

- Necessity Defense adopted by common law (not codified). See below.
    - State v. Cole 403 S.E. 2d 117, 1991 – necessity defense defined in case where defendant attempted to raise in driving with suspended license case: In order for defense of necessity to apply, defendant must show that: (1) there is a present and imminent emergency arising without fault on part of actor concerned; (2) emergency is of such nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done; and (3) there is no other reasonable alternative, other than committing crime, to avoid threat of harm.
- South Carolina has a TRP in effect (see below). This program would probably prevent a successful use of the medical necessity defense because courts may consider it a "reasonable alternative….to avoid threat of harm."
    - S.C. Code Ann. § 44-53-610 to -660. (Law Co-op 1980). Although no legislative purpose was given, the program was described as one that will "distribute to cancer chemotherapy and radiology patients and to glaucoma patients who are certified ... marijuana ... for the purpose of alleviating the patient's discomfort, nausea and other painful side effects of their disease or chemotherapy treatments."

South Dakota

- Medical necessity defense rejected.
    - State v. Koehn (637 N.W. 2d 723, 2001): Defense of medical necessity is not recognized in South Dakota. "Most states refuse to recognize such a defense for those who self-prescribe illegal substances. South Dakota grants no authority, by statute or precedent, for medicinal use of marijuana."
- Necessity defense adopted by common law. Not codified.

- **State v. Rome** 452 N.W.2d 790 S.D.,1990. Necessity defense is affirmative defense which requires defendant to present credible evidence in its support prior to its submission to trier of fact. Necessity defense is properly raised only when offered evidence, if believed by jury, would support finding that offense was justified by reasonable fear of death or bodily harm so imminent or emergent that, according to ordinary standards of intelligence and morality, desirability of avoiding injury outweighed desirability of avoiding public injury arising from offense committed. Necessity defense is limited defense in nature of choice of evils.

- Defense of justification is codified:
  - 22-5-1 Conduct forced or under threat of force. A person may not be convicted of a crime based upon conduct in which he engaged because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been lawfully unable to resist.
    - **State v. Miller** 313 N.W.2d 460 S.D., 1981. "The precise question of the existence of a justification defense to an escape charge based on fear of injury or death from physical attack has not been decided previously by this court. Our statutes recognize, however, that the defense of justification may negate criminal purpose.

Tennessee

- Has codified necessity defense:
  - **§ 39-11-609.** ***Necessity*** *Except as provided in §§ 39-11-611--39-11-621, conduct is justified if: (1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and (2) The desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.*
- HAD a Controlled Substances Therapeutic Research Act , which was repealed. However, the scheduling change still remains in effect (Schedule II when used for medical purposes – see underlined portions of 39-17-408 below).
  - See Tenn. Code Ann. § 39-17-408(b)(6)(A) (1989). Next to the notification that marijuana had been rescheduled was a note that the therapeutic research program had been repealed.
  - **§ 39-17-408. Schedule II** (a) Schedule II consists of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. (b) SUBSTANCES, VEGETABLE ORIGIN OR CHEMICAL SYNTHESIS. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: (1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalmefene, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following: (A) Raw opium; (B) Opium extracts; (C) Opium fluid extracts; (D) Powdered opium; (E) Granulated opium; (F) Tincture of opium; (G) Codeine; (H) Ethylmorphine; (I) Etorphine hydrochloride; (J) Hydrocodone; (K) Hydromorphone; (L) Metopon; (M) Morphine; (N) Oxycodone; (O) Oxymorphone; or (P) Thebaine; (2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subdivision (b)(1), except that these substances shall not include the isoquinoline alkaloids of opium; (3) Opium poppy and poppy straw; (4) Coca leaves (DEA Drug Code No. 9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (DEA Drug Code No. 9041) and ecgonine (DEA Drug Code No. 9180) and their salts, isomers,

derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine; (5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy); (6)(A) Marijuana, but only for the use of certified patients under the Controlled Substances Therapeutic Research Act, compiled in title 68, chapter 52 (repealed); (B) Marijuana shall be considered a Schedule II controlled substance only for the purposes enumerated in the Controlled Substances Therapeutic Research Act, compiled in title 68, chapter 52 (repealed); (7)(A) Tetrahydrocannabinols, but only for the use of certified patients under the Controlled Substances Therapeutic Research Act, compiled in title 68, chapter 52 (repealed); (B) Tetrahydrocannabinols shall be considered a Schedule II controlled substance only for the purposes enumerated in the Controlled Substances Therapeutic Research Act, compiled in title 68, chapter 52 (repealed); (C) Synthetic equivalents of the substance contained in the plant, or in the resinous extractives of *Cannabis, sp.* and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following: (i) 1 cis or trans tetrahydrocannabinol, and its optical isomers; (ii) 6 cis or trans tetrahydrocannabinol, and its optical isomers; or (iii) 3, 4 cis or trans tetrahydrocannabinol, and its optical isomers; Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered; or (8) Deleted by 2000 Pub.Acts, c. 884, § 1, eff. June 6, 2000. [Emphasis added]

Texas

- Has codified Necessity Defense:
    - (TX Penal S 9.22) *["Conduct is justified if: (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; (2) the desirability and urgency of avoiding he harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear."]*
- Medical necessity defense could probably be raised if able to meet requirements above – although very narrowly defined defense – see case below.
    - *Stefanoff v. State* (78 S.W. 3d 496, 2002): medical necessity defense for marijuana use to treat post-traumatic stress disorder not accepted b/c the requirement that the harm must be imminent was not met, nor was the requirement that the defendant must have a reasonable belief that the criminally-prohibited conduct is immediately necessary to avoid that harm. "According to the uncontested testimony, smoking marihuana was appellant's preferred coping mechanism. However, appellant himself testified that during a five-month period when he did not smoke marihuana, he was able to avoid causing serious injury to himself or others. While we do not doubt that appellant's post-traumatic stress disorder may have made this task difficult, the imminent harm component contemplates more than this; it necessitates an immediate, non-deliberative action made without hesitation or thought of the legal consequence….Appellant's marihuana possession resulted from a considered decision to cultivate fifteen marihuana plants. Appellants "medicinal" use of marihuana to manage his post-traumatic stress disorder symptoms is not the type of imminent harm to which the necessity defense applies."
    - *Pennington v. State (54 S.W. 3d 852, 2001)*: mere existence of a legal alternative does not automatically defeat a defendant's entitlement to an instruction of the defense of necessity. Unavailability of legal alternatives is not a requirement of the defense of

necessity. The legislature has not made proof of the lack of available legal alternatives an element of this offense. "We will not judicially enforce a legislatively nonexistent element."

- Texas has a TRP still in effect: Texas Health & Safety Code Ann. § 481.201-.205 (West 1992). No legislative purpose was given for the enactment. Texas had to distribute the marijuana in such a manner as to "prevent unauthorized diversion of the substances and in compliance with the [DEA] ...."

Utah

- Defense of necessity not codified.
    - One case on the issue, State v. Magee, states: "assuming arguendo, that the defense of necessity is the law of Utah, we need not reach the issue…."
    - No clear holding whether common law defense of necessity would even be acknowledged in Utah.
    - Justification is codified, but only allowed in defense of persons or property (UT ST S 76-2-401) or in fulfillment of duties as a government officer or employee, or reasonable discipline of minors by parents, teachers, etc.
- No TRP ever in effect in Utah
- Marijuana is a Schedule I drug in Utah

Vermont

- March 13, 2003 An Act Relating to the Medical Use of Marijuana passed by First House (2003 VT S.B. 76 (SN))
    - Passed Senate with amendments 22-7
    - Currently in the House
- Defense of necessity recognized by case law (requires evidence in the record that supports the elements of the defense, State v. Shotton, 142 Vt. 558 (1983))
    - State v. Dapo, 470 A.2d 1173, 1983: elements of defense of necessity are: there must be situation of emergency arising without fault on part of actor concerned, the emergency must be so imminent and compelling as to raise reasonable expectation of harm to actor or upon those he was protecting, the emergency must present no reasonable opportunity to avoid injury without doing criminal act, and injury impending from emergency must be of sufficient seriousness to outmeasure criminal wrong.
- Has TRP: See Vt. Stat. Ann. tit. 18, § 4471 (1981). § 4471(c). Although the commissioner was the sole distributor of marijuana to physicians, patients could receive marijuana directly from their respective physicians if they participated in the program.
    - *§ 4471 Cannabis therapeutic research program; establishment; participation (a) There is established in the department of health the cannabis therapeutic research program. The program shall be administered by the commissioner of health who shall promulgate rules and regulations necessary to enable physicians entitled to prescribe regulated drugs under chapter 84 of this title to prescribe cannabis. In promulgating such rules and regulations, the department shall take into consideration those pertinent rules and regulations promulgated by the federal drug enforcement agency, the federal food and drug administration, and the national institute on drug abuse.*
      (b) The program shall be used only for treating cancer patients and for such other medical uses as are prescribed by the commissioner by rule.
      (c) The commissioner of health shall have the authority to obtain and shall be the sole distributor for Vermont physicians of cannabis administered under this program. Distribution directly to a patient may take place only pursuant to the instructions of a physician.

Virginia

- Medical Necessity Defense rejected. See below.
    - Murphy v. Commonwealth (31 Va.App. 70, 1999 – marijuana may not be taken to "alleviate debilitating migraine headaches"): Necessity defense unavailable to charge of possession of marijuana. (The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values; if it has done so, its decision governs.) "Subsequently, the General Assembly significantly curtailed the medicinal use of marijuana. Code §18.2-251.1 allows the possession of marijuana only 'pursuant to a valid prescription issued by a medical doctor in the course of his professional practice' and only 'for the treatment of cancer or glaucoma.' By specifying the two permitted medicinal uses of the drug, the legislature excluded all other uses from the scope of the statute."
- Virginia has a TRP still in effect.
    - See: VA ST S 18.2-251.1 "Possession or distribution of marijuana for medical purposes permitted." (Although state statute allowed physicians to prescribe and pharmacists to dispense marijuana, no provision was made for the actual acquirement of marijuana.)

Washington

- Has a medical marijuana law in effect that allows affirmative defense of medical necessity to qualifying patients (see below).
    - § 69.51A.040. Qualifying patients' affirmative defense. (1) If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions. (2) The qualifying patient, if eighteen years of age or older, shall: (a) Meet all criteria for status as a qualifying patient; (b) Possess no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (c) Present his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical use of marijuana. (3) The qualifying patient, if under eighteen years of age, shall comply with subsection (2)(a) and (c) of this section. However, any possession under subsection (2)(b) of this section, as well as any production, acquisition, and decision as to dosage and frequency of use, shall be the responsibility of the parent or legal guardian of the qualifying patient. (4) The designated primary caregiver shall: (a) Meet all criteria for status as a primary caregiver to a qualifying patient; (b) Possess, in combination with and as an agent for the qualifying patient, no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; (c) Present a copy of the qualifying patient's valid documentation required by this chapter, as well as evidence of designation to act as primary caregiver by the patient, to any law enforcement official requesting such information; (d) Be prohibited from consuming marijuana obtained for the personal, medical use of the patient for whom the individual is acting as primary caregiver; and (e) Be the primary caregiver to only one patient at any one time.
    - The law also protects primary caregivers and doctors from civil or criminal liability for assisting the patient with obtaining medical marijuana.

- No defense of medical necessity for Schedule I drugs.
    - See: *State v. Williams (968 P.2d 26, 1998*): Court held that in order for a defendant to use the defense of medical necessity, he "must prove, by a preponderance of the

evidence, the following elements of the affirmative defense of medical necessity: (1) he or she reasonably believed his use of marijuana was necessary to minimize the effects of a specific disease; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. Corroborating medical evidence is required to support the defendant's assertions that he reasonably believed his actions were necessary to protect his health. An assumption that is implicit in this defense is that marijuana has currently accepted medical uses. This fact must be confirmed by medical evidence to support the defendant's assertion of reasonable belief. We hold that there would also have to be corroborating medical evidence that no other legal drugs were as effective in minimizing the effects of the disease. Although this element was not stated in the prior case law, it would only make sense that this element be expressed by an expert who knew the qualities of other drugs, not just the preference of the defendant." The court goes further to state that since the legislature made a determination that marijuana is a Schedule I drug and that it has no acceptable medical uses, "Thus, our holding is that with respect to Schedule I drugs, there is not a defense of medical necessity."

  - *State v*. Pittman (943 P.2d 713, 1997 – marijuana use by glaucoma sufferer): absence of legal alternative is implicit element of medical necessity defense in drug case; defendants asserting a medical necessity defense against controlled substances must prove that no legal alternative, rather than no drug, is as effective as the controlled substance in minimizing the effects of the medical condition."

- *Medical necessity defense allowed*
  - *State v. Diana, 1979,* the court confronted medical necessity claimed by a defendant suffering from multiple sclerosis. Relying on United States v. Randall and the state's recent enactment of a therapeutic research act, the court held that Samuel Diana could utilize the defense. The court instructed that Diana's conviction should be set aside if he showed by a preponderance of the evidence: (1) [he] reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. Reasonableness of the belief must be sustained by corroborating medical testimony. The court recognized that Washington's TRA limits medical marijuana use to alleviating the effects of cancer chemotherapy and glaucoma, but did not comment on the impact, if any, of multiple sclerosis' exclusion from maladies encompassed in the TRA.
  - *State v. Cole (874 P.2d 878, 1994):* A Washington Court of Appeal determined the propriety of the medical necessity defense. Fred Cole, a repeat offender, suffered chronic back pain. The state moved to bar the medical necessity defense, alleging Cole caused the condition requiring marijuana, and failed to avail himself of legal sources of medical marijuana. The trial court found that Cole had failed to produce adequate evidence to support the defense. The appellate court found that the lower court's scrutiny of the evidence was improper. The court held, if Cole produced some evidence on each of the Diana factors, it was for the jury sitting as trier of fact, rather than the judge hearing a motion in limine, to balance Cole's need to preserve his health against the state's interest in regulating marijuana, and decide if the marijuana use was justified. Washington's TRA was neither raised by the state nor discussed by the court in its analysis.

- Washington also still has a TRP on the books and in effect (Sec. 69.51 – 1979)

- Non-medical Necessity Defense NOT allowed. See State v. Turner (1985): defendant was transporting marijuana to her husband in jail because otherwise he would "be hurt" in prison. She tried to raise the necessity defense, but the court noted that, generally, such a defense is available only when the "physical forces of nature" or the "pressure of circumstances" cause the accused to take criminal action to avoid harm which social policy deems greater than the harm resulting from

the violation of the law. Since, by evidence produced at trial, it was clear that any threats to the defendant came from another human being (her husband) and not "the physical forces of nature," the trial court properly declined to instruct the jury on the defense of necessity.

West Virginia

- Medical Necessity Defense not available (see below).
    - The court in State v. Poling, 207 W. Va. 299, 531 S.E.2d 678 (2000), held that medical necessity is unavailable as an affirmative defense to a marijuana charge in West Virginia because the legislature has designated marijuana as a Schedule I controlled substance with no exception for medical use.
- Had a TRP program on the books (16-5a-7) which appears to have been repealed:
    - "Former §§ 16-5A-6 through 16-5A-9 (enacted by Acts 1979, c. 56), pertaining to definitions, the controlled substances therapeutic research program, patient qualification review board and contracts for receipt of marihuana, were repealed by Acts 1997, c. 61."

Wisconsin

- Necessity defense codified
    - (WI ST 939.47): *"Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd degree intentional homicide."*

- Bill introduced on January 14, 2002 for the medical use of marijuana "failed to pass pursuant to Senate Joint Resolution 1" on March 26, 2002. Act would have established a medical necessity defense to marijuana related prosecutions and property seizure actions.

- Medical necessity defense would probably be accepted in Wisconsin. However, considering that WI has a TRP in effect, courts may reject the defense in a marijuana case because they may consider the program giving the defendant an "alternative means of preventing the harm." But, the TRP is conditional upon federal approval, which really means that it is unusable – this may allow the defense to be successfully raised.
    - State v. Anthuber (549 NW 2d 477, 1996 – **heroin** possession case): "Natural physical force" element of necessity defense does not preclude defendant from asserting medically related necessity as defense, so long as defendant is not responsible for creating a medically related necessity."
    - State v. Olsen (99 Wis.2d 52, 1980): court identified the four elements which comprise the necessity defense – "(1) the defendant must have acted under pressure from natural physical forces; (2) the defendant's act was necessary to prevent imminent public disaster, or death, or great bodily harm; (3) the defendant had no alternative means of preventing the harm; and (4) the defendant's beliefs were reasonable."

- Has TRP in effect (which is conditional upon FEDERAL approval).
    - *961.34. Controlled substances therapeutic research. Upon the request of any practitioner, the controlled substances board shall aid the practitioner in applying for and processing an investigational drug permit for marijuana under 21 USC 355(i). If the federal food and drug administration issues an investigational drug permit, the controlled substances board shall approve which pharmacies can distribute the marijuana to patients upon written prescription. Only pharmacies located within hospitals are eligible to receive the marijuana for distribution. The controlled substances board shall also approve which practitioners can write prescriptions for the marijuana.*

Wyoming

- January 2, 2003 bill introduced to Senate (2003 WY S.B. 44 (SN)) for an Act that would exempt medical use of marihuana from prosecution, and reclassify marihuana as a Schedule II drug.
    - "In Wyoming, a medical marijuana bill sponsored by state Sen. Keith Goodenough (D-District 28) died Monday when the Senate leadership refused to act on it, instead placing it on the dead letter "general file." The defeat was at least the sixth for Goodenough's long-standing campaign to pass such a bill in Wyoming. Goodenough's bill would have allowed seriously ill people to use marijuana with their doctors' approval. Goodenough had succeeded in guiding this year's bill through the Senate Judiciary Committee, where several of his previous efforts had met their doom, on a 3-2 vote last month. "It's a fairness issue," Goodenough said at the time of that vote. "If you're gonna die in two months, you should be able to do whatever you want. It really bothers me that the government steps between the doctor and patient." As in Arkansas, opponents of the Wyoming medical marijuana bill cited concerns about federal intervention and concerns about handling a non-pharmaceutical medicine, as well as reciting drug war bugaboos. One lobbyist for the Wyoming Association of Sheriffs and Chiefs of Police warned the committee that marijuana use leads to violence."
- WY codified "common law defenses" (WY ST S 6-1-102): ""Common-law defenses are retained unless otherwise provided by this act."
- "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substances was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act."
- Marijuana is a Schedule I drug in Wyoming. § 35-7-1013 Findings requiring inclusion of substance in **Schedule I**. (a) The commissioner shall place a substance in **Schedule I** if he finds that the substance: (i) Has high potential for abuse; and (ii) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.