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# OVER-PRIVILEGED: LEGAL CANNABIS, DRUG OFFENDING & THE RIGHT TO FAMILY INTEGRITY

CHARISA SMITH<sup>†</sup>

*Haphazard marijuana legality among U.S. jurisdictions, and our failure to confront federalism concerns, create civil rights consequences that cannot be underestimated. Although long-awaited federal legislation to legalize marijuana in Summer 2022 was backed by diverse, respected institutions and offers the strongest potential for a national reckoning,<sup>1</sup> policymakers, advocates, scholars, and the public still fail to equate the urgent family law and criminal law contexts for communities ravaged by the War on Drugs. Indeed, continued insistence upon “social equity commitments” to accompany marijuana legalization includes an inherent blind spot concerning family policing.<sup>2</sup> Privileged, white caregivers*

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1. 117th Congress, *S.4591 - Cannabis Administration and Opportunity Act*, Congress, <https://www.congress.gov/bill/117th-congress/senate-bill/4591/text?r=15&s=> (last visited Sept. 10, 2022); Editorial Board, *Senate Democrats introduced a cannabis legalization bill. Congress should pass it*, USA TODAY (Aug. 2, 2022, 9:44 AM), <https://www.usatoday.com/in-depth/opinion/todaydebate/2022/08/01/senate-democrats-cannabis-marijuana-pot-bill/10028524002/>; Kris Krane, *With Democrats Gaining Legislative Momentum, Now Is The Time For Biden To Weigh In On Marijuana Legalization*, FORBES (Aug. 10, 2022, 7:15 PM), <https://www.forbes.com/sites/kriskrane/2022/08/10/with-democrats-gaining-legislative-momentum-now-is-the-time-for-biden-to-weigh-in-on-marijuana-legalization/?sh=39689c5b3b3d>; CBT Staff, *Industry Experts, Stakeholders Offer Their Takes on Cannabis Administration and Opportunity Act - A draft of the federal bill to end cannabis prohibition was introduced by Sens. Chuck Schumer, Ron Wyden and Cory Booker on July 14*, CANNABIS BUS. TIMES (July 15, 2021), <https://www.cannabisbusinesstimes.com/article/industry-experts-stakeholders-offer-takes-caoa/> (including quotes from various officials either supporting the legislation, or embracing the legislation as a crucial first step in necessary Congressional negotiations. Officials’ organizational affiliations included the Drug Policy Alliance, United Food and Commercial Workers International, the U.S. Cannabis Council, and the National Organization for the Reform of Marijuana Laws (“NORML”)); *Marijuana Justice Coalition on First-Ever Comprehensive Marijuana Reform Bill in the Senate*, IMMIGRANT DEF. PROJECT (July 21, 2022), <https://www.immigrantdefenseproject.org/marijuana-justice-coalition-statement/> (describing the Marijuana Justice Coalition as “a broad coalition of national advocacy organizations united in their advocacy for federal marijuana reform through a racial and economic justice lens” including such organizations as Immigrant Defense Project, Doctors for Cannabis Regulation, The Leadership Conference on Civil & Human Rights, American Civil Liberties Union, The National Urban League, Center for American Progress, Clergy for a New Drug Policy, Immigrant Legal Resource Center, Drug Policy Alliance, JustLeadershipUSA, National Immigration Project, NORML, and Veterans Cannabis Coalition).

2. *Family Policing System* is the most apt term to describe what has historically been referred to as *the child welfare system*. While the term “child welfare system” implies a benevolent purpose of protecting the welfare of children, extensive experience of low-income communities of color, along with a plethora of research, reveals that such an impression is false. Scholars including Dorothy Roberts and Martin Guggenheim assert that by addressing family needs through separation, surveillance, and coercive control, this system actually focuses on regulating, policing, punishing and destroying families. Although this Article uses the term “family regulation system,” even that phrase insufficiently describes the system’s

savor and profit from the wellness trend “Weed Moms are the New Wine Moms,”<sup>3</sup> while marginalized caregivers of color can continually suffer full termination of their parental rights—coined “the civil death penalty”—if mere hearsay about cannabis spirals into family surveillance.<sup>4</sup> Marijuana law conflicts create an overt zone of over-privilege, bolstering the constitutionally protected right to

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brutal, destructive, oppressive policies and practices. See, e.g., ‘Abolition Is the Only Answer’: A Conversation with Dorothy Roberts, RISE MAG. (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> (discussing with leading scholar Dorothy Roberts (professor at the University of Pennsylvania and researcher, scholar and activist) “about . . . why she is certain abolition is necessary as we work toward a different vision for families, communities and society.” Roberts describes connections between the family policing and criminal justice systems and shares more effective, compassionate ways of addressing harm and supporting families); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 732 (2021) (“Whatever proves to be the most effective messages to achieve radical change in America’s family regulation system, there’s nothing more important than that we succeed in dismantling it.”); Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. CIV. RTS. – C.L. L. REV. (Feb. 17, 2021), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/> (“[A]ctivists, who prefer the terms family regulation or family policing system, are pushing back against popular narratives about the purpose and effects of the [“child welfare”] system by highlighting the racism and classism plaguing it, and by demanding that calls to reimagine public safety include the family policing system.”).

3. Genevieve Shaw Brown, ‘Weed Moms’ are the New ‘Wine Moms’, GOOD MORNING AM. (Oct. 10, 2019), <https://www.goodmorningamerica.com/family/story/weed-moms-wine-moms-66184880> (“Mommy needs a joint should be just as socially acceptable as Mommy needs a glass of wine!” is the tagline for the Facebook group *The Cannavist Mom*, a group for “cannabis choosing moms” with at least thirty-eight thousand members as of December 22, 2021); Jeff Miles, Rebekah Black & Alex Luckey, *Marijuana-Friendly “420 Moms” are the New “Wine Moms”*, 98.7 KLUV RADIO (Aug. 6, 2021) [hereinafter *420 Moms*], [www.audacy.com/kluv/latest/marijuana-friendly-420-moms-are-the-new-wine-moms](http://www.audacy.com/kluv/latest/marijuana-friendly-420-moms-are-the-new-wine-moms); Alex Halperin, ‘Cannabis Strengthened our Bond’: Can Pot Make You a Better Parent?, GUARDIAN (Apr. 16, 2018, 3:01 PM), <https://www.theguardian.com/society/2018/apr/16/cannabis-marijuana-parenting-children-drugs> (discussing purportedly helpful marijuana use by (presumably white) parents in the United States, including lactating mothers. Sentiments included: “Parenting is about consciousness and cannabis makes you very conscious,” cannabis makes a parent “a lot chillier,” and that marijuana should be seen as a healthier alternative to alcohol for both adults and adolescents. While the article mentioned potential grounds for contacting Child Protective Services (“CPS”) and implications for custody disputes, neither the author nor subjects interviewed discussed any knowledge of routine surveillance by CPS).

4. NAT’L CTR. SUBSTANCE ABUSE & CHILD WELFARE, *Child Welfare and Treatment Statistics* [hereinafter *Child Welfare and Treatment Statistics*], <https://ncsacw.samhsa.gov/resources/child-welfare-and-treatment-statistics.aspx> (last visited Feb. 26, 2022) (noting that in many jurisdictions, parental substance use (or suspicion of parental substance use) is the most prevalent contributing factor to a family’s involvement with the child welfare system and its surveillance and control apparatuses. Strict timelines of the Adoption and Safe Families Act, as well as other coercive interventions, have led to terminations of parental rights even when no evidence of cannabis and no risks to child safety were found). See generally Robert Latham & Robin Rosenberg, *The Potential of Florida’s Effective Assistance of Counsel Doctrine to Increase Parent Engagement and Promote the Well-Being of Children*, 17 FLA. COASTAL L. REV. 109, 129-30 (2015) (describing how a consent plea to marijuana usage may escalate to termination of parental rights proceedings, even where the parent’s original behavior was not proven harmful); Shaila Dewan, *Family Separation: It’s a Problem for U.S. Citizens, Too*, N.Y. TIMES (June 22, 2018), <https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html> (“Even a caretaker’s authorized use of medical marijuana use [sic] can be grounds for removing children.”); “Whatever They Do, I’m Her Comfort, I’m Her Protector.” *How the Foster System has become Ground Zero for the US Drug War*, MOVEMENT FOR FAM. POWER 21-23 (June 2020) [hereinafter MOVEMENT FOR FAMILY POWER], <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> (citing a growing body of literature that finds that drug use alone is not necessarily correlated with child maltreatment).

*family integrity*<sup>5</sup> for some while exacerbating the deprivation or arbitrariness of that right for others. As marijuana is “one of the most important federalism conflicts in a generation,”<sup>6</sup> this article demands imminent rectification of the legal landscape, considering the fundamental rights implicated for U.S. families. Doctrinal chaos surrounding cannabis creates a dilemma as untenable as marriage inequality. Federal legalization or decriminalization of marijuana is required. Further, jurisdictions legalizing marijuana with plans to vindicate marginalized communities must recognize the family regulation system as Ground Zero in a War on Drugs that has only morphed and escalated.<sup>7</sup>

## I. INTRODUCTION

### A. SNAPSHOT: THE SNYDERS

Bianca and Tad Snyder raise their young son together, work hard, and play hard as “plant healing” advocates who manage two growing businesses, a community platform, a merchandise line, and more.<sup>8</sup> The Snyders founded the *High Society Mama* and *High Society Papa* Instagram accounts to build acceptance of cannabis in broader U.S. culture and among parents. They also run a “boutique hemp farm” in Michigan and a “cluster of cannabis-friendly rentals in Chicago,” Illinois.<sup>9</sup> While enthusiastically describing their philosophy on the cannabis industry and parenting in the media, the Snyders remain candid about their struggle to balance responsibilities during the COVID-19 pandemic.<sup>10</sup> Bianca, a self-described entrepreneur “inspiring Cannamoms,” confides that

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5. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (stating that “[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” (internal citations omitted)); *Smith v. Org. of Foster Fams.*, 431 U.S. 816, 845 (1977) (noting that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’” (internal citations omitted)); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (stating that: “‘what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action’ . . . . The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” (internal citations omitted)); *Alsager v. Dist. Ct. of Polk Cnty.*, 406 F. Supp. 10, 16 (S.D. Iowa 1975) (asserting that “[t]he inescapable conclusion arising from the foregoing authorities is that the [parents] possess a fundamental ‘liberty’ and ‘privacy’ interest in maintaining the integrity of their family unit . . . . It is this fundamental right to family integrity, protected by the Due Process Clause of the Fourteenth Amendment, which is menaced by Iowa’s parental termination statute.” (internal citations omitted)).

6. Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism & Marijuana Regulation*, 62 UCLA L. REV. 74, 74 (2015). See also Sam Kamin, *Cooperative Federalism & State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1105 (2014) (stating that “marijuana relation in the states [] is, along with marriage equality and immigration, one of the principal places where federalism is being contested today.” (internal citations omitted)).

7. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 15.

8. Eunice Kim, *Rewriting The Narrative: Bianca & Tad Snyder of High Society Mama & Papa and Society’s Plant*, HiVi (HIGH VIBRATIONS) (Sept. 28, 2020), <https://hivi.life/rewriting-the-narrative-bianca-tad-snyder-of-high-society-mama-papa-and-societys-plant/>.

9. *Id.*

10. *Id.*

“social media is very deceiving.”<sup>11</sup> Though her accounts seemingly portray that she has her “shit together,” Bianca admits to being a “living breathing hot mess” who simply tries her best.<sup>12</sup> Although the Snyders’ home state of Michigan legalized recreational marijuana in 2018, after medical cannabis was legalized in 2008, the couple maintains concerns about being nationally known cannabis advocates when the plant remains federally illegal.<sup>13</sup>

Cannabis consumption is a means of bonding, wellness maintenance, and even ritualistic elevation for Bianca and Tad.<sup>14</sup> Tad explains that they utilize both CBD (*cannabidiol*, a cannabis derivative lacking intoxicating psychoactive components, which has numerous proven therapeutic benefits) and CBD/THC blends that involve a “high” traditionally associated with marijuana (with THC being *tetrahydrocannabinol*—the chemical within a cannabis plant that is primarily responsible for causing an intoxicating, psychoactive “high”).<sup>15</sup> The Snyders grow both hemp and marijuana—two different types of cannabis belonging to the same species, *Cannabis sativa*, which are nevertheless treated radically divergently under U.S. law.<sup>16</sup> While marijuana has a higher amount of THC than hemp and is thus most targeted for prosecution and enforcement due to its associated “high,” CBD products that are derived only from hemp are federally legal despite the originating *Cannabis sativa* plant species remaining federally banned in the existing, complex legal regime.<sup>17</sup> Smoking together enables the Snyders to “get a little bit more silly, connect . . . loosen up,” and enhance physical intimacy.<sup>18</sup> The Snyders consider it an honor to help and heal through the cannabis industry and have taught their son to identify “hemp” leaves from the early age of three, explaining to him that it is “only for adults to consume, just like alcohol and caffeine.”<sup>19</sup> The Snyders’ son helps in the hemp fields as much as in their vegetable garden, and he watches his parents roll joints in a way that is normalized rather than hidden.<sup>20</sup> The couple describes stepping away to smoke in

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*; NAT’L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH, *Cannabis (Marijuana) and Cannabinoids: What You Need To Know* (Nov. 2019), <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know>.

16. Kim, *supra* note 8.

17. Lauren Perez, *CBD vs. THC: What’s the Difference?*, FORBES (Jan. 10, 2022), <https://www.forbes.com/health/body/cbd-vs-thc/> (stating that although CBD and THC come from the same plant, their unique chemical structures affect how they interact with the body. These inherent differences lead to distinct treatment of CBD and THC in the U.S. legal system. Notably, CBD can be derived from any type of *Cannabis sativa* plant, but it is legal throughout the United States only when it comes specifically from hemp); Sian Ferguson, medically reviewed by Jeffrey Chen, MD, MBA, *Hemp vs. Marijuana: What’s the Difference?*, HEALTHLINE (Aug. 27, 2020), <https://www.healthline.com/health/hemp-vs-marijuana>; Brandon McFadden & Trey Malone, *Marijuana and Hemp – What is the Difference Among These Cannabis Products, and Which are Legal?*, CONVERSATION (Apr. 1, 2021, 1:44 PM), <https://theconversation.com/cbd-marijuana-and-hemp-what-is-the-difference-among-these-cannabis-products-and-which-are-legal-154256>.

18. Kim, *supra* note 8.

19. *Id.*

20. *Id.*

order to reduce their son's exposure to smoke but insist that "it is not with the intent for him not to see us."<sup>21</sup>

### B. SNAPSHOT: PENELOPE HARRIS

Penelope Harris is a Bronx, New York resident and mother of a ten-year-old son who also stepped up to care for her eight-year-old niece as a foster mom.<sup>22</sup> At age thirty-one, Penelope is in a relationship with her boyfriend and has remained a law-abiding citizen with no criminal record or child protective system contact.<sup>23</sup> After receiving information that drug sales could potentially be occurring at Penelope's home, the NYPD searched her apartment and found less than ten grams of marijuana—an amount below the legal threshold for a misdemeanor at that time, which would have resulted only in the legal equivalent of a traffic ticket.<sup>24</sup> Penelope mentioned that the small quantity of cannabis was for personal use and that neither she nor her boyfriend smoked frequently, and prosecutors thus declined to file charges.<sup>25</sup> However, the police reported the presence of Penelope's son and niece in the home to the child maltreatment hotline and caseworkers from the New York City Administration for Children's Services ("ACS")<sup>26</sup> immediately removed the children in a devastating move to Penelope's family.<sup>27</sup>

A negligible quantity of cannabis in Penelope's home led New York City caseworkers to file child neglect charges a week later, and a lengthy, traumatic

21. *Id.*

22. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), <https://www.nytimes-com.usd.idm.oclc.org/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html>; *Parents' Marijuana Possession Gets Their Kids Taken Away*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/parents-marijuana-kids-taken-away\\_n\\_930796](https://www.huffpost.com/entry/parents-marijuana-kids-taken-away_n_930796); Maia Szalavitz, *Viewpoint: Smoke a Joint, Lose Your Child?*, TIME MAG. (Aug. 19, 2011), <https://healthland.time.com/2011/08/19/viewpoint-smoke-a-joint-lose-your-child/>.

23. Secret, *supra* note 22.

24. *Id.* At the time of the investigation, possession of up to twenty-five grams of marijuana (twenty or thirty cigarettes) was a violation similar to traffic offense and subject to a fine of up to one hundred dollars for first time offenders. N.Y. PENAL LAW § 221.05 (McKinney repealed 2021).

25. Secret, *supra* note 22.

26. Charged with operating NYC's child welfare system, N.Y.C., N.Y., ADMIN. CODE § 21-901 (2022), ACS and has the power to "perform functions related to the care and protection of children," including, but not limited to: 1) receiving and investigating reports of child abuse and maltreatment; 2) providing preventative services to support families and prevent/decrease the amount of time a child must spend in foster care, N.Y.C., N.Y., CHARTER § 617(a)(2) (2021); 3) provide for care of children under the guardianship of the state; 4) provide appropriate daycare, Head Start, and other childcare services; and 5) provide services ensuring that legally responsible parents provide child support, N.Y.C., N.Y., CHARTER § 617(a)(1-5). As a local child protective service agency, ACS is responsible for receiving reports of suspected cases of child abuse/maltreatment from the State Central Register. N.Y. COMP. CODES R. & REGS. tit. 18 § 432.2(c) (2022). ACS is also required to establish, initiate, control, regulate, maintain and operate secure and non-secure facilities for the temporary care and maintenance of children 1) alleged to be juvenile delinquents, 2) adjudicated as juvenile delinquents, and 3) alleged, adjudicated, and convicted as juvenile offenders subject to conditional release. N.Y.C., N.Y., CHARTER § 618(a) (2021) (referencing N.Y. EXEC. LAW § 510-a (McKinney 2012)).

27. Secret, *supra* note 22; Szalavitz, *supra* note 22.

whirlwind of events ensued.<sup>28</sup> While they “investigated” further, Penelope’s biological son was returned upon the conditions that she keep her boyfriend from returning to the apartment, that she receive therapy and submit to random drug screenings, and that caseworkers could make unlimited announced and unannounced visits to her residence.<sup>29</sup> Such conditions were imposed despite ACS lacking any evidence that Harris “repeatedly misused drugs” (the scenario legally required for New York to consider a child neglected), despite a lack of evidence that her boyfriend misused drugs, and without any allegations that someone was actually harming Penelope’s son and niece in the first place.<sup>30</sup> While Penelope’s son returned home from foster care a week after the NYPD first conducted their search, her niece was kept with strangers in foster care for over a year, although Penelope’s drug tests never evinced any use of substances.<sup>31</sup>

When asked about the toll these events took on her, Penelope confided, “I felt like less of a parent, like I had failed my children . . . . It tore me up.”<sup>32</sup> Penelope’s eight-year-old niece had experienced considerable instability prior to joining Penelope’s household from her biological mother’s care, and the supposedly protective marijuana investigation forced her to move twice more and spend over a year living among strangers.<sup>33</sup> Ultimately, Penelope’s case was closed without any finding of child neglect.<sup>34</sup>

Considered in comparison, the Snyders’ and Penelope Harris’ experiences with cannabis, the law, cultural posturing, and parenting evoke the cliché metaphor “apples to oranges,” illustrating the extent of variation and disorder throughout U.S. jurisdictions. Countless aspects of these families’ experiences are distinct. The Snyders are prosperous, Midwestern Caucasian-American entrepreneurs. Penelope is a low-income woman of color from the poorest Congressional District in the United States with the highest concentration of people of color.<sup>35</sup> Penelope’s case occurred back in 2011, before New York legalized recreational marijuana, and the Snyders’ platform proliferated after 2018 when Michigan instituted full legalization. Yet, a current survey of the states

28. Szalavitz, *supra* note 22.

29. *Id.*

30. *Id.* See N.Y. FAMILY CT. ACT § 1046 (West 2021) (defining a neglected child as one whose well-being is threatened by a caregiver who “repeatedly misuses” drugs. If “[s]ubstantial impairment of judgment” is found, it establishes a presumption of neglect. The statute requires no evidence that the caregiver is currently intoxicated or has drugs in their possession. Simply admitting past use to a caseworker is grounds for neglect case. Child welfare agency does not track the number of parents facing marijuana allegations, only total neglect cases for “drugs and alcohol.” There is no distinction between drugs nor reference to quantity.)

31. Secret, *supra* note 22.

32. *Id.*

33. *Id.*

34. *Id.*

35. Andrew DiPietro, *Poorest Counties In Every U.S. State 2021*, FORBES (Sept. 1, 2021, 9:00 AM), <https://www.forbes.com/sites/andrewdepietro/2021/09/01/poorest-counties-in-every-us-state-2021/?sh=67587bf8312a>; Amanda Luz Henning Santiago, *NY Has the Richest, Poorest, Smallest, Most Unequal Congressional Districts. New York State is One of Diversity, Poverty, Wealth, and Inequality*, CITY & STATE (Dec. 5, 2019), <https://www.cityandstateny.com/politics/2019/12/ny-has-the-richest-poorest-smallest-most-unequal-congressional-districts/176658/>.

yields similarly haphazard examples.<sup>36</sup> Most importantly, the present status quo of clashing cannabis laws assures that the mere mention of cannabis in situations with low-income caregivers of color will most likely warrant child protective scrutiny and intervention regardless of whether the substance is legal, medicinal, or prohibited in that jurisdiction.<sup>37</sup> Meanwhile, non-Hispanic, white caregivers with higher incomes can reap the benefits of legalization and propel a cultural narrative about shedding stigmas, herbal healing, and cannabis' comparative advantages in relation to alcohol use at home.<sup>38</sup> To make matters worse, doctrinal

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36. Numerous sources addressing both national and state-level developments report the severe uncertainty and discrimination that caregivers face surrounding custody of their children when marijuana is at issue, even when the substance use is legalized. See, e.g., Thomas DeCataldo, Jr., *High Stakes Litigation: The Interplay Between A Parent's Marijuana Use and Child Custody Disputes*, 2018 N.J. LAW. 82, 82, [https://tms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/miscellaneous/Oct2018\\_fullMag.pdf](https://tms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/miscellaneous/Oct2018_fullMag.pdf) ("parents nationwide have lost access to their children due to lawful marijuana use."); Caroline Preston, *Parents face child abuse investigations over pot use*, AL JAZEERA AM. (Sept. 7, 2015, 5:30 AM), <http://america.aljazeera.com/articles/2015/9/7/parents-face-child-abuse-investigations-over-marijuana-use.html> ("Legal standards differ: As states grapple with how to respond to parents' marijuana use, they are guided by different statutes concerning child neglect and abuse. . . . Because the definitions of abuse and neglect are fuzzy, lawyers, parents and cannabis advocates say they leave a lot of room for discretion on the part of police, social workers and judges."); Hugh Michael Gallagher IV, *The Impact of Parental Marijuana Use in Department of Social Services Child Abuse and Neglect Case*, 71 S.C. L. REV. 865, 891 (2020) ("The varying approaches family courts have taken in child custody cases involving parental marijuana use has led to inconsistent outcomes."); Allison Korn, *Detoxing the Child Welfare System*, 23 VA. J. Soc. POL'Y & L. 293, 295 (2016) ("Many existing child welfare laws and policies that address parental drug use . . . presume that any amount of drug use by a parent places a child in imminent danger, or is indicative of future risk of harm. Child welfare authorities will initiate investigations based on these assumptions, and once a case is opened in family court, the family is often split apart . . ."); MOVEMENT FOR FAMILY POWER, *supra* note 4, at 20-23 (citing Bryan G. Victor, Andrew Grogan-Kaylor, Joseph P. Ryan, Brian E. Perron & Terri Ticknor Gilbert, *Domestic Violence, Parental Substance Misuse and the Decision to Substantiate Child Maltreatment*, 79 CHILD ABUSE & NEGLECT 31 (2018); Lawrence M. Berger, Kristen S. Slack, Jane Waldfoegel & Sarah K. Bruch, *Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes*, 15 CHILD MALTREATMENT 199 (2010)) ("[I]n researching the link between caregiver substance use and child maltreatment, the most consistent variable used to determine child maltreatment was CPS investigator opinion about the presence of maltreatment."); David Malleis, Comment, *The High Price of Parenting High: Medical Marijuana and its Effects on Child Custody Matters*, 33 U. LAVERNE L. REV. 357, 390 (2012) (arguing that a hybrid conduct standard should be adopted over a per se probative standard because it more closely matches the spirit of medical marijuana laws).

37. See generally MOVEMENT FOR FAMILY POWER, *supra* note 4 ("Rather than acknowledging and addressing the structural inequities that underpin foster system involvement, the system focuses on rescuing children from parents—overwhelmingly Black, American Indian, Latinx and white mothers living in poverty—with alleged defects in their personalities."); Korn, *supra* note 36 ("Many existing child welfare laws and policies that address parental drug use . . . presume that any amount of drug use by a parent places a child in imminent danger, or is indicative of future risk of harm. Child welfare authorities will initiate investigations based on these assumptions, and once a case is opened in family court, the family is often split apart . . .").

38. See, e.g., Jesse Staniforth, *The 'cannamoms' parenting with cannabis*, BBC (Nov. 18, 2021), <https://www.bbc.com/worklife/article/20211116-the-cannamoms-parenting-with-cannabis> (discussing how a white mother feels cannabis has helped her become a better parent and how she shared that experience by authoring a book); Adam Tschorn, *'I'm not doing anything wrong': Pot-smoking L.A. moms on parenting while high*, L.A. TIMES (May 4, 2022, 7:00 AM), <https://www.latimes.com/lifestyle/story/2022-05-04/moms-who-smoke-weed-cannamoms-parenting> (discussing how a white mother wrote a book about how she believes cannabis makes her a better parent); Samantha Velez, *Cannamoms: How Cannabis Helps Them Through Motherhood*, VERIHEAL (May 7, 2021, 10:30 AM), <https://www.veriheal.com/blog/cannamoms-how-cannabis-helps-them-through-motherhood/> (discussing how a white caregiver uses her Instagram platform to help remove the stigma of being a parent who uses cannabis); Jessica Lucas, *Meet TikTok's cannamoms, mothers who proudly smoke*



confusion throughout the country assures that parents of any identity group may suffer tragic consequences if a decision-maker in a family law forum considers marijuana to be morally reprehensible and harmful—regardless of the jurisdiction’s stance on cannabis legalization.<sup>39</sup>

This paper asserts that variation in marijuana laws throughout the United States creates an imperative to resolve a civil rights crisis in the doctrinal area of family law.<sup>40</sup> While cannabis’ categorization as a federally controlled substance might seem to be a criminal law concern at first glance, law conflicts among states and localities result in both a double-standard and the untenable, generally disparate treatment of caregivers and families with a severe intergenerational impact. The locus of disparate treatment can be seen along various fault lines, including race and ethnicity, socioeconomic status, ability status, gender identity or sexuality, and often solely geographic location. As of 2021, only six of the states that have made marijuana legal on some level included “conduct specific” language in their marijuana statutes to prevent a presumption of maltreatment solely for parental marijuana use.<sup>41</sup>

The status quo patchwork of cannabis laws jeopardizes the fundamental right to family integrity<sup>42</sup> that courts afford to all families because caregivers merit “freedom of personal choice in matters of . . . family life” as “one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>43</sup> Family integrity is a factor utilized in the determination of the “child’s best interests” in a majority of states, with implications for removal from the home, custody, and

*weed: “We use cannabis, and we are productive as f\*ck,” says one*”, INPUT MAG. (Apr. 20, 2022), <https://www.inputmag.com/culture/tiktok-cannamoms-weed-smoking-mothers> (discussing how one caregiver uses her TikTok platform to show how medical marijuana use can positively affect her ability to care for her children).

39. See, e.g., *supra* note 36 (providing numerous sources addressing both national and state-level developments, and reporting the severe uncertainty and discrimination that caregivers face surrounding custody of their children when marijuana is at issue— even when the substance use is legalized); see also Marka B. Fleming & Gwendolyn McFadden-Wade, *The Unthinkable Choice: The Constitutional Due Process Right to Parent or the Legal Right to Use Medical Marijuana*, 25 B.U. PUB. INT. L.J. 299, 311 (2016) (noting that many states lack protections for parents who qualify to use legal medical marijuana).

40. DeCataldo, *supra* note 36, at 82-84 (explaining that the breadth of judicial discretion and authority, and the variation in state laws creates “a recipe for debate, disagreement, and possibly even further media scrutiny when the courts are tasked with evaluating the significance of a parent’s marijuana use—legal or illegal—when the custody and parenting time of children are at stake.” Further, “[t]he enormity of this divide, and the wide range of potential outcomes, creates tremendously high stakes for parents . . . [and] presents a challenge for practitioners in counseling clients where marijuana use is at issue . . .”).

41. Elizabeth Cecilia DeVivo, *Not So Dope: Marijuana Laws Should Include “Conduct Specific” Language to Prevent Unjustified Child Neglect Petitions Against Pot-Smoking Parents*, 59 FAM. CT. REV. 371, 372 (2021).

42. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (discussing the constitutionally protected relationship between parents and children); *Smith v. Org. of Foster Fams.*, 431 U.S. 816, 845 (1977) (stating that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights . . .”); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (discussing the integrity of the family unit as protected by the Due Process Clause of the Fourteenth Amendment); *Alsager v. Dist. Ct. of Polk Cnty.*, 406 F. Supp. 10, 16 (S.D. Iowa 1975) (discussing freedom of personal choice in marriage and family life, as protected by the Due Process Clause of the Fourteenth Amendment).

43. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (internal citations omitted).

termination of parental rights.<sup>44</sup> The Supreme Court clarified this concern in *Santosky v. Kramer*,<sup>45</sup> holding that a state must support its allegations backing termination of parental rights by at least clear and convincing evidence because “the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”<sup>46</sup>

Ultimately, a blatant zone of over-privilege exists for some caregivers and families who use marijuana, while others have fragmented rights or outright deprivation due to—and sometimes regardless of—their states’ marijuana legality. Clashing local, state, and federal marijuana laws compound existing inequities and create a host of new legal conundrums while the cultural stigma surrounding marijuana persists due to federal illegality. Perhaps the clearest example of this over-privilege and rights fragmentation exists in regards to the family regulation (child welfare) system, which is primarily locally and state-run but federally funded and incentivized.<sup>47</sup> Non-Hispanic, white parents like the Snyders in legalized jurisdictions can enjoy not only the constitutional guarantee of family integrity and the freedom to choose their caregiving style with a presumption of basic competence from the state, but can even tout cannabis’s parenting enhancement qualities.<sup>48</sup> Meanwhile, child protective agencies disproportionately single out low-income caregivers of color for scrutiny of cannabis use in jurisdictions where it is legalized, medicinally prescribed, and illegal, despite its relatively small caregiving implications.<sup>49</sup>

For parents like Penelope, routine and unnecessary removal of children for cannabis issues compounds existing racial disparities in state overreach via problematic mandatory child maltreatment reporting policies, police surveillance

44. “The importance of family integrity and preference for avoiding removal of the child from his/her home” is an integral factor in determining the child’s best interests in approximately twenty-eight states, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP’T HEALTH & HUM. SERVS., CHILD BUREAU 2 (2020), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/>. The twenty-eight states are Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming. *Id.*

45. 455 U.S. 745 (1982).

46. *Id.* at 760.

47. See generally Child Welfare Information Gateway, *Fact Sheet: How the Child Welfare System Works*, U.S. DEP’T HEALTH & HUM. SERVS., CHILD BUREAU 2 (2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> (discussing the structure, funding, and purpose of the Child Welfare System); Elizabeth Jordan & Dana Dean Connelly, *An Introduction to Child Welfare Funding, and How States Use It*, CHILDREN’S TRENDS (Jan. 1, 2016), <https://www.childtrends.org/publications/an-introduction-to-child-welfare-funding-and-how-states-use-it-3> (describing the sources of funding for the Child Welfare System).

48. Halperin, *supra* note 3 (discussing purportedly helpful marijuana use by (presumably white) parents in the United States, including lactating mothers. Sentiments included: “Parenting is about consciousness and cannabis makes you very conscious,” cannabis makes a parent “a lot chillier,” and that marijuana should be seen as a healthier alternative to alcohol for both adults and adolescents. While the article mentioned potential grounds for contacting CPS and implications for custody disputes, neither the author nor subjects interviewed discussed any knowledge of routine surveillance by CPS).

49. Dewan, *supra* note 4.

and brutality, and hyper-incarceration.<sup>50</sup> Scientifically specious, mandated, random drug testing of caregivers by family courts adds to the injustice.<sup>51</sup> In New York State, where recreational marijuana was legalized in early 2021, parental substance use was the most prevalent contributing factor to a family's involvement with the child welfare system.<sup>52</sup> In the most extreme situations, termination of parental rights, often deemed the civil death penalty, could be the ultimate price, even where caregiver marijuana use was never found to pose a specific danger to child safety.<sup>53</sup> However, removal from the home is consistently traumatic for children, and transitions between foster homes increase the odds of a child's subsequent mental health challenges, contact with the justice system, educational problems, and (ironically) propensity towards addiction.<sup>54</sup>

As long as cannabis remains federally banned and legal systems lack explicit guidelines about the implications of cannabis use upon caregiving, individual jurisdictions' steps towards legalization will obfuscate a level playing field. Colorado's experience following cannabis legalization in 2012 is highly demonstrative.<sup>55</sup> Colorado policymakers legalizing recreational marijuana aimed to treat cannabis like alcohol, clarifying that there is a constitutional right to produce and use cannabis akin to the right to brew beer.<sup>56</sup> As Denver attorney Rob Corry explains, "[t]here's nothing wrong with it . . . you just keep it on a high shelf, right next to your vodka."<sup>57</sup> Yet, in practice, mandated reporters of child maltreatment, such as teachers and social workers, respond with alarm when cannabis is mentioned by a child or involved in the home.<sup>58</sup> Since 2012, Colorado caregivers (of varying identity groups and socioeconomic status) have experienced child removal, loss of custody, or lost visitation rights when county courts presumed that consumption outside the presence of children, or presence of marijuana in a home, could still impose a risk of child harm.<sup>59</sup> New York parent defense attorneys report consistently similar phenomena, as ACS investigates parents simply for (criminally permissible) cannabis involvement but would not

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50. Secret, *supra* note 22.

51. Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 79 (2019); Robert T. Hoban & Raushanah A. Patterson, *Sprung from Night into the Sun: An Examination of Colorado's Marijuana Regulatory Framework Since Legalization*, 8 KY. J. EQUINE, AGRIC. & NAT. RES. L. 225, 283 (2016); Dewan, *supra* note 4.

52. See Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77, 110 (2016) (providing details about the family's experience); *Child Welfare and Treatment Statistics*, *supra* note 4.

53. Latham & Rosenberg, *supra* note 4, at 129-30; Dewan, *supra* note 4; Secret, *supra* note 22.

54. Secret, *supra* note 22.

55. Associated Press, *Colorado's Marijuana Law Puts Children and Parents in Legal Limbo*, GUARDIAN (June 16, 2014, 10:32 AM), <https://www.theguardian.com/society/2014/jun/16/colorado-legal-marijuana-children-parents-danger-issues>.

56. *Id.*

57. *Id.*

58. See *id.* (telling how one mother was alarmed by a visit from CPS officials after her child mentioned hemp at school).

59. *Id.*

investigate simply because alcohol was present in a home.<sup>60</sup> Attempts to clarify the implications of Colorado's cannabis law for child welfare purposes have sparked backlash and opposition from all sides, proving only that moral—and thus legal—confusion prevails.<sup>61</sup> Washington State's legislature was similarly paralyzed when tasked with setting guidelines for family law stakeholders (commissioners, judges, guardians ad litem, and attorneys).<sup>62</sup>

Doctrinal analysis on the national level means the relevance (or irrelevance) of caregiver cannabis use can be arbitrarily or disparately decided in routine and life-altering family matters, which have domino effects on communities, public health, culture, and the economy. As of 2017, over half of states with medical marijuana statutes remained silent on the issue of child custody, and parents with serious medical conditions may be forced to renounce necessary treatment to simply maintain access to their children.<sup>63</sup> Caregivers complying with state marijuana laws still risk termination of federal government benefits, student loans, and a loss of housing or employment.<sup>64</sup> Parental marijuana use can be cast as pathology, ineptitude, or unfitness, leading to seemingly arbitrary or, at minimum, highly disparate outcomes for child custody and visitation disputes involving multiple jurisdictions. State court determinations of parental unfitness in custody and visitation cases based on cannabis use appear especially ill-informed. Jurists' subjective impressions about character flaws, substance abuse (versus use), or parenting ability often go unchecked.<sup>65</sup>

Although legal scholars and veteran drug policy advocates frame the issue of cannabis law conflicts as a key structural battle (or standoff) for regulatory authority between the federal government, states, and localities, a paradigm shift is required to recognize the urgency of resolving this federalism dilemma to protect the fundamental constitutional rights of families. As at least sixty-eight percent of Americans polled supported legalization and ninety percent supported medical marijuana, research suggests that addressing the family injustices of marijuana law conflicts is a timely and salient concern.<sup>66</sup> Along with marriage equality and immigration, scholars correctly assert that marijuana law is one of

60. Jacob Sullum, *New York City: Where Smoking Pot Can Cost You \$100—and Your Kids*, REASON (Aug. 31, 2011, 5:13 PM), <https://reason.com/2011/08/31/new-york-where-smoking-pot-can/>.

61. Hoban & Patterson, *supra* note 51, at 283.

62. See Dana Petersen, *High Society: Washington State's Recreational Cannabis Law and Its Effects on Child Custody and Visitation Rights*, 13 SEATTLE J. FOR SOC. JUST. 973, 983-84 (2015); Hoban & Patterson, *supra* note 51, at 283; Alice Kwak, *Medical Marijuana and Child Custody: The Need to Protect Patients and Their Families from Discrimination*, 28 HASTINGS WOMEN'S L.J. 123, 124-25 (2017).

63. Fleming & McFadden-Wade, *supra* note 39, at 308; DeCataldo, *supra* note 36, at 82; Kwak, *supra* note 62, at 122. Thirty-seven states regulate marijuana for medical use by qualified individuals as of February 3, 2022. NAT'L CONF. STATE LEGISLATURES, *State Medical Cannabis Laws* (Feb. 3, 2022) [hereinafter NCSL], <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

64. Regarding employer tolerance of medical marijuana use by employees, see Bradley M. Bakker, *Employers Need to Manage Medical Marijuana Issues*, 72 J. MO. B. 186, 189 (2016).

65. See Emily Gelmann, *Drink A Pint Smoke A Joint*, 50 MD. B.J. 19, 20 (2017), <https://www.offitkurman.com/wp-content/uploads/Maryland-Bar-Journal-Reduced-Nov-Dec-2017-Gelman.pdf>.

66. 2022 *Cannabis Policy Reform Legislation*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/> (last visited Apr. 2, 2022).

the principal sites of federalism challenges.<sup>67</sup> Notably, marijuana law is also a historical outlier for involving the only substance and activity consistently prohibited at the federal level yet taxed and regulated within the states.<sup>68</sup> This article argues that similar to the marriage equality struggle, only an imminent resolution of cannabis law conflicts can protect vital constitutional rights in family matters and resolve the pervasive legal uncertainty.

### C. LEGACIES OF OPPRESSION AND FORCED SEPARATION

Though a thorough discussion of the pitfalls of the family regulation (child welfare) system among U.S. states is beyond the scope of this paper, by necessity, this discussion is rooted in the contention that the existing system must be abolished. State intrusion into the private lives of low-income families of color remains a longstanding, misunderstood, and overlooked realm of civil rights that is propelled and exacerbated by cannabis law conflicts. In all states, families in poverty and families of color overwhelmingly comprise those involved with the foster system.<sup>69</sup> In fact, children of color, including indigenous and Native American children, are more likely to be in foster care than in-home even when they evince the “same problems and characteristics as white children,” largely due to implicit and explicit bias regarding parental capacity, credibility, and abilities.<sup>70</sup> Maltreatment cases are rarely filed by state entities against Caucasian parents for marijuana.<sup>71</sup> Family regulation system interventions overutilize surveillance and impose coercive demands upon vulnerable and under-resourced communities, persistently forcing the separation of families of color.<sup>72</sup> Unnecessary state overreach involves the child welfare system and family court practices, as well as federal and state statutory schemes.<sup>73</sup> A range of surveillance tools and monitoring systems are at states’ disposal, including mandated reporting of child maltreatment by professionals and others in society, random drug testing, unnecessary or languishing foster care placements, and the most heartbreaking tool—termination of parental rights.<sup>74</sup>

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67. See, e.g., Chemerinsky et al., *supra* note 6, at 74 (discussing the ongoing conflict between state and federal marijuana laws); Kamin, *supra* note 6, at 1105-06 (exploring whether the federal government or states should be allowed to regulate marijuana).

68. See Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J.L. & PUB. POL’Y 523, 530-40 (2021).

69. See, e.g., MOVEMENT FOR FAMILY POWER, *supra* note 4, at 24 (“It is not a coincidence that the overwhelming majority of parents involved with the foster system are living in poverty, or that Black, American Indian and Latinx parents are overrepresented.” (internal citations omitted)).

70. Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> (last visited Apr. 2, 2022).

71. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 75 n.213 (citing interviews with New York child protective officials in 2018 and 2019 who admit that wealthy parents in communities like Westchester County (which is predominantly white) could drink the afternoon away, or use drugs, yet “rarely” come under child protective purview—often simply because they can afford additional child care).

72. *Id.* at 41-42.

73. Jasmine Harris, *Child Abuse and Cannabis Use: How A Prima Facie Standard Mischaracterizes Parental Cannabis Consumption as Child Neglect*, 41 CARDOZO L. REV. 2761, 2771-77 (2020).

74. *Child Welfare and Treatment Statistics*, *supra* note 4.

Childrearing abilities of caregivers of color, and family integrity within communities of color, have been historically devalued in the United States—even as women of color have always comprised the majority of the domestic workforce, maintaining employment caring for white children.<sup>75</sup> Since their origin in the late nineteenth century, family courts in the United States have pushed traditional, white, middle-class norms upon marginalized communities.<sup>76</sup> In 1899, when the first juvenile court was founded in Chicago, public systems and subsidized private agencies began the present tradition of surveillance and intervention into the lives of African-Americans, Native Americans, immigrants, and poor families in the name of preventing child maltreatment and delinquency.<sup>77</sup> Poverty, social disadvantage, and cultural difference were treated as personal failings. These “carceral protectionist” approaches involve the exertion of state *parens patriae*

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75. See CHICAGO, *History of Domestic Workers in the United States*, <https://www.chicago.GOV/city/en/sites/your-home-is-my-workplace/home/history-of-domestic-workers.html> (explaining that “enslaved, indentured, and semi-free female laborers” were “the original members of the domestic workforce,” in colonial times, inferring that these women were primarily people of color, until after Emancipation when African American women “increasingly became paid domestic workers as they were denied most other jobs and segregated from American society.” By the time Title VII of the Civil Rights Act of 1964 was passed to ban employment discrimination on the basis of race, color, religion, sex, or national origin, “most domestic workers” were still excluded from labor protections); Julia Wolfe, Jori Kandra, Lora Engdahl & Heidi Shierholz, *Domestic workers chartbook*, ECON. POL’Y INST. (May 14, 2020), <https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/> (“A comprehensive look at the demographics, wages, benefits, and poverty rates of the professionals who care for our family members and clean our homes.”). There are “2.2 million people in the United States who—in normal times—work in private homes” as domestic workers who care for children, support older individuals and people with disabilities, and help households stay clean. Wolfe et al., *supra* note 75, at 1.

The vast majority (91.5%) of domestic workers are women and just over half (52.4%) are black, Hispanic, or Asian American/Pacific Islander women. Though most (64.9% of) domestic workers are U.S.-born, they are more likely than other workers to have been born outside the U.S. and they tend to be older than other workers.

*Id.*

76. See generally Charisa Smith, *No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking*, 71 U. MIAMI L. REV. 1, 50 (2016) (discussing how “courts and their corresponding reformatories pushed traditional, white, middle-class norms upon African-American, immigrant, and poor families . . .” beginning with the first juvenile court in 1899); MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 38-40 (2005) (describing how the best interest standard is often applied based on the beliefs of the decision maker); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 234 (2002) (“Judges had the power to place Black children in the care and service of whites if they found the parent to be unfit and deemed placement to be ‘better for the habits and comfort of the child.’”); Shani King, *The Family Law Cannon in a (Post) Racial Era*, 72 OHIO ST. L.J. 575, 595-602 (2011) (discussing how the ideals of white settlers were used to create what the law deemed as “proper” familial roles); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61-62 (1994) (discussing why the “best interest of the child standard” is problematic and subject to the biases of the decision maker); Kimberle’ W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1441-50 (2012) (discussing the intersectional narratives of over policing and under protection of women of color); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1298-99 (2004) (discussing mass imprisonment and political subordination).

77. See *supra* note 76; Michael Yudell, *Proposed 1920s Orphanage Study Just One Example in History of Scientific Racism*, CONVERSATION (Feb. 23, 2015, 5:57 AM), <https://theconversation.com/proposed-1920s-orphanage-study-just-one-example-in-history-of-scientific-racism-37015>.

authority to divide families, exact punitive sanctions against caregivers, institutionalize children, and implement surveillance systems under the cover of care.<sup>78</sup> In many cases, old narratives about the pathology of families of color still deprive them of a drink from the collective empathy well, even when their situations resemble those of white families. Racial disparities exist at all stages of the foster system in every jurisdiction, mirroring disparities in the criminal system.

Countless esteemed scholars, practitioners, and advocates, including Professor Dorothy Roberts, Professor Martin Guggenheim, and Professor Khiara M. Bridges, argue that the current foster system has been instrumental in demarcating the “undeserving poor” and perpetuating the myth of racial inferiority, as a majority of maltreatment cases consist of neglect (rather than affirmative abuse) which conflates squarely with poverty and socioeconomic disadvantage.<sup>79</sup> With cannabis issues, child protective agencies often allege initial child neglect upon learning that the substance might be present, then search for further grounds for maltreatment once they gain “such widespread entrée into the intimate, domestic lives of marginalized families.”<sup>80</sup> Importantly, research has recently illuminated the ways that child protective agencies not only act as law enforcement (conducting sweeping investigations and long-term surveillance, having inordinate discretion, and possessing evidentiary monopolies) but also receive training from law enforcement agencies. Yet, caseworkers are not required to provide *Miranda*-type warnings before entering a family home or to similarly recognize due process and privacy rights.<sup>81</sup>

As long as the family regulation system focuses exclusively on protecting children from harm by their parents, it will not only fail, but compound harms by virtue of ignoring deplorable underlying social conditions and installing mandatory maltreatment reporters in all the places where low-income communities most seek support—including schools, food and housing resource organizations, and medical facilities.<sup>82</sup> As the Movement for Family Power contends, allegations of drug use—particularly marijuana in many jurisdictions—have become a “smokescreen behind which this injustice plays out.”<sup>83</sup> With low-income families of color, unfounded speculation occurs regarding the caregiving implications of marijuana even as privileged, white parents like the Snyders profit

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78. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1313-20 (2015).

79. *Id.*; Khiara M. Bridges, Professor of Law, U. of Cal., Berkeley Sch. L., Seminar on Private Law at Yale L. Sch.: “Family Law of the Poor” (Mar. 2020). See also *supra* note 76 (citing examples of the works of Dorothy Roberts and Martin Guggenheim, among others).

80. Kelly Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 610 (2020).

81. Tarek Z. Ismail, *The Consent of the Compelled: Child Protective Agents as Law Enforcement Officers* (July 7, 2021) (forthcoming) (work on file with author, as cited in Keynote Address of Professor Dorothy Roberts, Colum. J. Race & L. 11<sup>th</sup> Annual Symposium: *Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-being: How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 428 (2021)).

82. *Id.*; Megan Conn, *As New York Legalizes Marijuana, Parent Advocates Push Child Welfare Agencies to Adapt*, IMPRINT (May 11, 2021), <https://imprintnews.org/child-welfare-2/as-new-york-legalizes-marijuana-parent-advocates-push-child-welfare-agencies-to-adapt/54235>.

83. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 24.

heavily by creating podcasts and selling sassy educational resources about being a “Cannamom” and needing “strong weed” to raise “strong children.”<sup>84</sup> This occurs despite similar rates of marijuana consumption across racial and ethnic groups.<sup>85</sup> Further, claims about caregiver marijuana use often lead judges to prolong court supervision of a family or to require parents to complete extra services and drug testing, ultimately delaying children’s return home.<sup>86</sup> There is a need to distinguish between speculation about risk and the actual presence of harm or egregious endangerment. The damage that family separation imposes upon all members of a family is well documented.<sup>87</sup>

Imminent federal cannabis legalization is essential as a family law paradigm shift to afford all parents the presumption of basic competence and the freedom from culturally biased surveillance such as mandated maltreatment reporting. In truth, all parents struggle to balance responsibilities, keep their stress levels as low as possible, provide financially and materially for their children, and garner sufficient support from others. Just as Bianca Snyder candidly confessed to being a “living breathing hot-mess” trying her best amidst the COVID-19 pandemic, any other caregiver merits the equivalent respect to admit vulnerability, seek support, strive for personal wellness, and refuse feelings of shame or failure in the absence of egregious harm or gross endangerment to their children.<sup>88</sup> If anything, the pandemic has laid bare the tattered state of the social safety net in the United States, revealing how close many families are to illness, tragedy, unemployment, displacement, and mental health challenges.<sup>89</sup>

However, legalization without robust, long-term social equity efforts preceded by assessments of the priorities of impacted communities will not

84. See generally Conn, *supra* note 82 (noting the disproportionate number of minority families tested for marijuana use, arrested, and reported to family regulatory agencies); HighSocietyMama Instagram posts include: “I didn’t set out to be a Cannamom. I planned to be the best mom I could be. And using cannabis has only helped.” (Mar. 31, 2021). Discussion about “Cannamom breastfeeding surveys.” (Aug. 3, 2020). “We are strong women raising strong children which is why we need strong weed.” (Apr. 25, 2019). “There should be a weed strain named 5am Toddler.” (Jan. 8, 2019).

85. See, e.g., START SMART NEW YORK, *THE LIFE-CHANGING CONSEQUENCES OF A MARIJUANA ARREST IN NEW YORK: CHILD WELFARE* (Sept. 2019), [http://smart-ny.com/wp-content/uploads/2017/06/The-Life-Changing-Consequences-of-a-Marijuana-Arrest-in-New-York-Child-Welfare\\_4.12.2019.pdf](http://smart-ny.com/wp-content/uploads/2017/06/The-Life-Changing-Consequences-of-a-Marijuana-Arrest-in-New-York-Child-Welfare_4.12.2019.pdf) (“Despite similar rates of marijuana consumption across racial and ethnic groups, 80 percent of the nearly 23,000 people arrested for marijuana possession in New York State in 2016 were Black or Latino.”); Hayley Fox, *Weed and Pregnancy: How Cannabis Laws Are Hurting Mothers*, ROLLING STONE (Nov. 17, 2018), <https://www.rollingstone.com/culture/culture-features/weed-pregnancy-mother-family-marijuana-cannabis-755697/> (noting how poor, minority women are almost exclusively prosecuted for marijuana use during pregnancy despite its use across economic and ethnic groups).

86. Conn, *supra* note 82.

87. See, e.g., *Nicholson v. Scopetta*, 3 N.Y.3d 357, 372-82 (2004) (discussing the impact of removal and separation on children and families).

88. Kim, *supra* note 8.

89. See, e.g., Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards A Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 2-32 (2020) (highlighting the gendered effects of COVID-19); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 329-72 (2014) (expounding on the interrelatedness of gender, race, and economic status); Barbara Stark, *Inequality, COVID-19, and Human Rights: Whose Lives Matter?*, 27 ILSA J. INT’L & COMP. L. 251, 254-59 (2021) (describing COVID-19 disparities).



remedy the legacies of harm caused by either civil or criminal legal systems. Scholars and advocates warn that in the states that fully legalized marijuana, racial biases largely continued as business as usual, including racial and ethnic disparities in arrests, convictions, and K-12 school suspensions for marijuana in Colorado, the District of Columbia, and Los Angeles.<sup>90</sup> Low-income individuals are also disproportionately penalized and profiled, and there is evidence that all such groups have been targeted by legal marijuana stores, many of which have opened in communities of color or low-income neighborhoods.<sup>91</sup> Although Colorado, Oregon, and Washington are the states with the longest record of marijuana legalization, they also notably have predominantly white populations and are not necessarily representative of the nation at large.<sup>92</sup> Any change that involves federal cannabis legalization will necessitate an unprecedented redistribution of resources and decision-making authority towards empowerment of impacted communities and abolition of both the family regulation system and the carceral state.

## II. BACKGROUND

### A. FUNDAMENTAL RIGHTS VIOLATIONS: THE CANNABIS LEGAL LANDSCAPE

#### 1. Patchwork Laws, Jeopardized Rights

As the U.S. legal landscape on cannabis rapidly shifts, caregivers' fundamental rights to family integrity are haphazardly recognized or denied among states, localities, and federal entities. Yet, the nation is marching steadily towards legalization and social acceptance of cannabis use—at least for use by adults when parenting and children are not brought into the equation—in a process that Professor Ernest A. Young describes as the effective nullification of federal marijuana laws by the states.<sup>93</sup> As of November 2021, eighteen states, two U.S. territories, and the District of Columbia have legalized recreational cannabis.<sup>94</sup> In

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90. See, e.g., Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 239 (2018) (“In Colorado . . . arrests of whites for marijuana offenses fell more than 50% after Amendment 64 passed while arrests of Hispanics and blacks fell only 31% and 25%, respectively. For juveniles, the results were even worse; while arrests of white ten- to seventeen-year-olds on marijuana charges declined 9% between 2012 and 2014, Hispanic and African-American arrests actually rose 22% and 52%, respectively.” (internal citations omitted)); Kevin Sabet, *Marijuana and Legalization Impacts*, 23 BERKELEY J. CRIM. L. 84, 92-96 (2018) (outlining various impacts of marijuana legalization).

91. Kamin, *supra* note 90, at 240-41.

92. See generally Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 692-705 (2016) (discussing the connection between race and marijuana legalization).

93. See generally Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 783-94 (2015) (describing how state marijuana laws essentially nullify federal law).

94. NCSL, *supra* note 63.

2020 alone, voters in five states passed eight cannabis-related ballot initiatives.<sup>95</sup> At least seventy-five percent of Americans now favor full legalization, and over forty percent reside in states where some type of legalization has already occurred.<sup>96</sup> Yet, the negative consequences of marijuana use, possession, and sale still fall upon communities already targeted in the War on Drugs, while non-Hispanic white communities reap more benefits of legalization in terms of both acceptable consumption among caregivers and domination of the cannabis industry.<sup>97</sup> Further, around seven hundred thousand people are arrested annually for cannabis offenses, and individuals serving sentences for cannabis comprise a significant portion of the federal prison population.<sup>98</sup>

#### a. Federal cannabis regime

The federal Controlled Substance Act (“CSA”) Schedule I defines cannabis as a dangerous substance with a “high potential for abuse” and “no legitimate medical use.”<sup>99</sup> This categorization communicates to decision-makers in the family law context, along with others in society, that state residents using legalized marijuana—regardless of how upstanding—are willing to violate federal law.<sup>100</sup> The CSA itself has not been changed significantly since 1996, and marijuana law conflicts additionally complicate taxation, banking, and other areas regulated by federal law in addition to criminal systems and sentencing.

While federal agencies have increasingly declined to target individuals who comply with state cannabis laws, as well as those with serious illness and their caregivers, the prevention of distribution to minors remains a major priority—which directly causes concerns about parenting and household management. Diversion between states with law conflicts, curbing driving under the influence, and prosecuting otherwise criminal enterprises are additional federal priorities. Between 2009 and the present, several executive branch memoranda have clarified law enforcement priorities about cannabis as states and localities moved towards legalization.<sup>101</sup> Ultimately, multiple enforcement priorities must be involved to

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95. Michael Hartman, *Cannabis Overview*, NAT’L CONF. STATE LEGISLATURES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

96. William Cummings, *‘We’re Going to Move Forward, Period’: Schumer Ready to Move on Changes to Marijuana Laws—Even if Biden Isn’t*, USA TODAY (Apr. 5, 2021, 2:32 PM), <https://www.usatoday.com/story/news/politics/2021/04/05/marijuana-legalization-schumer-move-bill-even-if-biden-isnt/7088824002/> (quoting Eric Altieri, Executive Director of the NORML).

97. See MOVEMENT FOR FAMILY POWER, *supra* note 4, at 15-18.

98. FED. BUREAU INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV., *Crime in the United States 2017, Persons Arrested* (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/persons-arrested>.

99. See 21 U.S.C. §§ 812, 841 (2013 & Supp. 2021) (illustrating that the CSA of 1970 assigns substances to one of five schedules according to the potential benefits and risks).

100. 21 U.S.C. §§ 812, 841.

101. Memorandum from David W. Ogden, Deputy Attorney General, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-United-State-Attorneys-investigations-and-prosecutions-states>. See also Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding the Ogden Memo in Jurisdictions (June 29, 2011),

devote federal resources to cannabis matters. The nation's current approach to marijuana law results from a longer history of exposure to the substance, including pharmacological usage by one of the founding fathers<sup>102</sup> and a racially abhorrent past stereotyping and criminalizing Mexican laborers in the southwestern United States.<sup>103</sup> Following the youthful, rebellious sociocultural revolution of the 1960s, the Civil Rights Movement, and protests against the Vietnam War, federal entities escalated efforts to penalize the use of intoxicants and hallucinogens. President Richard Nixon largely associated substance use with social deviance and political dissent by the left and communities of color, declaring a “War on Drugs” in June 1971 to increase the size and scope of federal drug control agencies and heighten sanctions for possession, sale, and distribution of controlled substances including marijuana.<sup>104</sup> Previously, the Marijuana Tax Act of 1937 had effectively made marijuana a federally controlled substance.<sup>105</sup>

Although cannabis is largely prohibited for medicinal and pharmacological uses on the federal level, U.S. leaders have recognized since the early twentieth century that cannabis is rather innocuous as compared with alcohol and harder substances, yet concerted efforts to racialize and catastrophize mythologies about cannabis accompanied political efforts to ban marijuana.<sup>106</sup> Yet the federal

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<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> (expressing that enforcement should avoid individuals with serious illness and their caregivers); Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (stating the government's intention to prioritize avoidance of distribution to youth); Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%200%282%29.pdf> (providing a clarification regarding financial crimes).

102. Lisa Gensel, *The Medical World of Benjamin Franklin*, 98 J.R. SOC. MED. 534, 534 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1299336/>.

103. Bender, *supra* note 92, at 689-90. See also Ferguson, *supra* note 17 (discussing harmful, racist stereotypes towards Mexicans relating to marijuana use).

104. See MOVEMENT FOR FAMILY POWER, *supra* note 4, at 13; *A History of the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war>.

105. *Marijuana Timeline*, PBS FRONTLINE (Aug. 16, 2019), <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html>.

106. See generally MAYOR'S COMM. ON MARIJUANA & THE N.Y. ACAD. MED., THE LA GUARDIA COMMITTEE REPORT, THE MARIJUANA PROBLEM IN THE CITY OF NEW YORK, Commissioned by N.Y.C. Mayor Fiorello LaGuardia (1944), <https://www.druglibrary.org/schaffer/Library/studies/lag/lagmenu.htm> (beginning its work in 1939 and found that “[t]he practice of smoking marihuana does not lead to addiction in the medical sense of the word . . . [m]arihuana is not the determining factor in the commission of major crimes . . . [m]arihuana smoking is not widespread among school children . . . [j]uvenile delinquency is not associated with the practice of smoking marihuana [and] [t]he publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded.”). LaGuardia was a strong opponent of the 1937 Marijuana Tax Act. *The La Guardia Committee*, WORDPRESS, <https://weedpress.wordpress.com/science/studies/the-la-guardia-committee/> (last visited Apr. 5, 2022). Release of LaGuardia's report in 1944 “infuriated Harry Anslinger” the first commissioner of the U.S. Treasury Department's Federal Bureau of Narcotics who was “campaigning against marijuana.” *Id.* Anslinger condemned the report as “unscientific.” *Id.* In actuality, however, Anslinger's own efforts focused on racist and xenophobic scare tactics, ludicrous false accusations about marijuana and crime across the country, and underlying motives to curb jazz culture and the intermingling of American youth in growing urban centers. *Id.* See also Robert Solomon, *Racism and Its Effects on Cannabis Research*, 5

regime is somewhat complex and nuanced. Although hemp-derived CBD products can be sold throughout the country because they do not induce intoxication, the originating cannabis plant species itself remains federally illegal.<sup>107</sup> The federal Food and Drug Administration (“FDA”) has also approved THC-based medications for certain limited medical uses, including treatment of nausea during chemotherapy and appetite stimulation in patients with AIDS experiencing wasting syndrome. However, this FDA approval is far narrower than the scope of marijuana use approved in states that have legalized medicinal marijuana. CBD-based medications and products (those lacking any intoxicating psychoactive effects) have been federally legal since the Agriculture Improvement Act of 2018 classified hemp and marijuana as legally distinct substances under CSA—despite the fact that they remain the same species of plant, a type of flowering cannabis plant.<sup>108</sup>

#### b. Federal ban, federal jeopardy

While the federal ban on cannabis does not preclude states from legalizing the drug or developing new statutory schemes to protect caregivers and children, the federal illegality of cannabis jeopardizes any aspects of a caregiver’s life involving federal benefits and resources should a caregiver partake of cannabis. Firstly, the perception that a parent is “willing to violate federal law” is tough to overcome with conservative or unwittingly judgmental local decision-makers.<sup>109</sup> A host of struggles could result when a parent’s state-condoned cannabis use comes to the attention of federal authorities. Loss of any federal public benefits, healthcare, employment, financial aid, federally sourced housing, federally issued professional or commercial licenses, and contracts is likely. Such consequences could diminish a caregiver’s ability to demonstrate financial stability and overall fitness in disputes concerning childrearing. When a child’s best interests are considered in private proceedings, the opposing parent offering more of a safety net could appear best suited for custody or expanded visitation. In scenarios where

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CANNABIS CANNABINOID RES. 2, 3 (2020) (discussing Ansigner’s racist statements regarding marijuana use).

107. Hartman, *supra* note 95. See also Perez, *supra* note 17 (discussing the differences in legality between CBD and THC).

108. NCSL, *supra* note 63; Ferguson, *supra* note 17. See also U.S. FOOD & DRUG ADMIN., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)* (Current as of Jan. 2021), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> (stating that CBD is a cannabis derived product); Perez, *supra* note 17 (quoting Lauren Rudick, partner of the cannabis practice at Hiller, PC law firm) (articulating that THC is the only cannabis compound associated with psychoactive effects is a huge misconception, according to Monique McHenry, Ph.D., director of the Medical Cannabis Center for Research and Education at the University of Vermont Medical School. However, while CBD is “also psychoactive—meaning it affects the mind”—it is importantly non-intoxicating and thus disassociated with “impaired function”).

109. Nicole K. Levy, *Massachusetts DCF Attorney Nicole K. Levy Explores How Legalized Recreational Cannabis May Impact Child Custody and Parental Rights in Massachusetts*, LYNCH & OWENS P.C. (Mar. 5, 2021), <https://www.lynchowens.com/blog/2019/march/how-does-legal-marijuana-impact-child-custody-ca/>.

the state intervenes to remove children from a home, federal implications of state-condoned cannabis use also diminish a parent's material resources and create barriers to reunification.<sup>110</sup>

## 2. *State Cannabis Law: Doctrinal Chaos Lurches Towards Legalization*

### a. States with full legalization

The number of U.S. states and territories with legal, regulated adult-use marijuana programs (combined recreational and medicinal use) is rapidly increasing, with nineteen jurisdictions counted as of August 2022.<sup>111</sup> Yet all such states have either vague or nonexistent guidelines on how cannabis-related information should apply to caregivers and legal proceedings involving the care of children. In addition to the longstanding double-standard about which communities generally receive the benefit of the doubt where privacy from state surveillance and child-rearing are concerned, courts and agencies still have broad discretion to consider, discount, or discard evidence about a parent's cannabis usage in all family law proceedings—public matters involving state intervention upon a family's life, in addition to private disputes between parties seeking access to (or resources for) children. Perhaps unsurprisingly, while low-income caregivers of color are still targeted for state scrutiny and punitive intervention in these states, white parents often develop widespread, public recreational and social support networks celebrating cannabis' benefits in contrast to alcohol's lingering drawbacks and addictiveness.<sup>112</sup> Recreational cannabis legalization in the United States also first began in jurisdictions with predominantly white populations, as previously mentioned—in Colorado and Washington State in 2012 and then in Oregon in 2014.<sup>113</sup>

Legalization has caused high-profile culture clashes and political upheaval in the relevant jurisdictions precisely because of charged, complex views about caregiving implications. As described above, Colorado and Washington State attempted to clarify the legal domain of cannabis and parenting with disastrous

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110. See *id.*; *How Legal Marijuana Impacts Child Custody*, GOLDBERG JONES (Feb. 23, 2021), <https://www.goldbergjones-or.com/child-custody/marijuana-impacts-child-custody/>.

111. Mona Zhang & Paul Demko, *The Fifty: Where cannabis legalization efforts stand across the country*, POLITICO (Aug. 3, 2022), <https://www.politico.com/news/2022/08/03/cannabis-legalization-efforts-across-the-states-00049224>; Hartman, *supra* note 95.

112. Review of TikTok and Instagram accounts of “Cannamoms” and “Pot Smoking Moms” as of September 2021 revealed a large presence on both platforms. Most focused on destigmatizing cannabis use among parents and included podcasts or cannabis product promotion. While most accounts were owned by white women whose personal information was considerably transparent either on social media or through a broader web search, one was owned by two Latinas and one by a Black woman whose personal information was relatively difficult to uncover. See also *supra* note 3 (discussing how “weed moms” are becoming the new “wine moms”).

113. See Bender, *supra* note 92, at 689; *Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEdia, [https://ballotpedia.org/Oregon\\_Legalized\\_Marijuana\\_Initiative,\\_Measure\\_91\\_\(2014\)](https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative,_Measure_91_(2014)) (last visited Sept. 11, 2022).

results that led to political gridlock.<sup>114</sup> States continue to struggle to clarify what, if anything, marijuana use by a caregiver means for legal systems deciding intrafamilial disputes or intervening in families' daily lives.<sup>115</sup> Indeed, "whether raised protectively or opportunistically, the potential exists in family law disputes, particularly dissolution [parental separation or divorce], for the marijuana use of a parent to be used against them."<sup>116</sup>

Even after Massachusetts legalized marijuana in 2016 with Question 4,<sup>117</sup> which was hailed as a nationally extraordinary measure that explicitly prevented conflation of marijuana use with parental endangerment of a child or unfitness, the social stigma reportedly still leads judges, caseworkers, and staff of the Massachusetts Department of Children and Families ("DCF"), and mandated reporters of child maltreatment to disregard fundamental rights to family integrity. Massachusetts attorneys describe disconcerting "unresolved questions . . . about how recreational marijuana use affects the care, attention, and behavior of parents."<sup>118</sup> Although Massachusetts officials cannot legally cite marijuana use as *the sole reason or primary basis* for diminishing a parent's rights to their child

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114. See Associated Press, *supra* note 55; Petersen, *supra* note 62.

115. See *supra* Part I.B.

116. Bender, *supra* note 92, at 704 n.68 (citing *In re Marriage of Parr*, 240 P.3d 509, 512-13 (Colo. Ct. App. 2010)) (holding a father's use of medical marijuana cannot support a restriction on parenting time absent an evidentiary hearing to demonstrate some threat to the health or safety of the child). Cf. Malleis, *supra* note 36, at 377-89 (discussing cases where courts employed lawful marijuana use as negative evidence in child custody decisions).

117. One provision of the law that specifically focuses on child custody and DCF cases is Massachusetts General Law chapter 94G, section 7(d), which states as follows:

[A]bsent clear, convincing and articulable evidence that the person's actions related to marijuana *have created an unreasonable danger* to the safety of a minor child, *neither* the presence of cannabinoid components or metabolites in a person's bodily fluids *nor* conduct permitted under this chapter related to the possession, consumption, transfer, cultivation, manufacture or sale of marijuana, marijuana products or marijuana accessories by a person charged with the well-being of a child *shall form the sole or primary basis for substantiation, service plans, removal or termination or for denial of custody, visitation or any other parental right or responsibility.*

MASS. GEN. LAWS ANN. ch. 94G, § 7(d) (West 2016) (emphasis added).

118. Levy, *supra* note 109.

barring clear and convincing evidence, judges and the Massachusetts DCF<sup>119</sup> can freely consider marijuana to a lesser degree.<sup>120</sup>

Maine reached full legalization through its approval of recreational marijuana in 2016, and its statutes clarify that denials of “parental rights and responsibilities” require a showing that “the person’s conduct [involving marijuana] is contrary to the best interests of the minor child . . . .”<sup>121</sup> One year prior to full legalization and before further statutory clarification about parental rights and marijuana, the Supreme Judicial Court of Maine affirmed a father’s denial of custody, noting that his methods of storing his legal, medicinal marijuana in a kitchen cabinet and within frozen baked goods, meant his actual ingestion of the substance “negatively affects, limits, or impairs” his “capacity to parent.”<sup>122</sup> In response, the Director of Medical Marijuana Caregivers of Maine expressed disapproval of such a jump to conclusions regarding the father Dustin Sternick, explaining that medicinal marijuana “should be treated like any other medicine,” including “Nyquil and more potent prescription pills” that are kept in locations “technically accessible to a child,” yet not used as reasons to “specifically [] deny a parent custody.”<sup>123</sup> However, the Maine Supreme Court, and lower courts, did not solely rely on information about Sternick’s storage or use of marijuana in their decision. Chief Justice Leigh I. Saufley also emphasized Sternick’s inattention to his child’s medical needs, and several other problematic supervisory choices, as reasons to affirm his denial of custody and allow his four-year-old daughter to move to Florida with her mother.<sup>124</sup>

119. DCF states that its primary responsibility is to protect children from abuse/neglect and ensure their growth in a safe and nurturing environment, primarily through investigating reports of maltreatment. MASS. DEP. CHILD. & FAMS., A FAMILY’S GUIDE TO PROTECTIVE SERVICES FOR CHILDREN, [https://www.mass.gov/files/documents/2017/11/30/Protective%20Services%20Guide\\_FINAL.pdf](https://www.mass.gov/files/documents/2017/11/30/Protective%20Services%20Guide_FINAL.pdf) (last visited Sept. 11, 2022). DCF also makes legal interventions and determinations, MASS. DEP. CHILD. & FAMS., *Actions DCF takes when child abuse or neglect is reported*, <https://www.mass.gov/info-details/actions-dcf-takes-when-child-abuse-or-neglect-is-reported> (last visited Sept. 11, 2022), and maintains the Registry of Alleged Perpetrators, MASS. GEN. LAWS ANN. ch. 119, § 51F (West 2008). The DCF registry is akin to New York’s State Central Register of maltreatment, referenced *supra*, Part I. DCF states that it discerns and provides for the best interests of children under its care by: 1) considering factors and conditions relating to a child’s placement status; 2) child’s fitness, readiness, abilities and developmental levels; 3) the particulars of a child’s service plan; and 4) the effectiveness, suitability and adequacy of the services provided and of placement decisions, including child’s progress. MASS. GEN. LAWS ANN. ch. 119, § 1 (West 2008). DCF also regulates foster care. MASS. GEN. LAWS ANN. ch. 119, § 23 (West 2017).

120. *How Legal Marijuana Impacts Child Custody*, *supra* note 110; Nicole K. Levy, *How Does Legal Marijuana Impact Child Custody Cases?*, LYNCH & OWENS P.C. (Mar. 5, 2019), <https://www.lynchowens.com/blog/2019/march/how-does-legal-marijuana-impact-child-custody-ca/>.

121. ME. REV. STAT. ANN. tit. 22, § 2430-C (West 2018). See also Scott Dolan, *Using Medical Pot Could Make Parent Unfit, Maine’s Highest Court Rules*, PORTLAND PRESS HERALD (Jan. 29, 2015), <https://www.pressherald.com/2015/01/29/court-says-medical-marijuana-use-may-be-considered-in-custody-disputes/> (discussing parental rights protections under the Maine Medical Use of Marijuana Act).

122. *Daggett v. Sternick*, 109 A.3d 1137, 1141 (Me. 2015).

123. Nok-Noi Ricker, *Maine Supreme Court Rules Against Medical Marijuana Patient in Child Custody Appeal*, BANGOR DAILY NEWS (Jan. 29, 2015), <https://bangordailynews.com/2015/01/29/news/maine-supreme-court-rules-against-medical-marijuana-patient-in-child-custody-appeal/>.

124. *Daggett*, 109 A.3d at 1141.

More recent Maine cases available for public view suggest that since the full legalization regime developed, courts and communities have normalized the role that marijuana plays in everyday life. Marijuana is not singled out as a rationale for family separation, although many other rationales for child removal and permanent family separation remain highly problematic. In fact, most cases mention a parent's marijuana use only in passing as they proceed to describe the misuse of other drugs or other alleged negative behavior as justification for curbing parental rights.<sup>125</sup> *In re Child of Corey B.*<sup>126</sup> presents one example, wherein the Supreme Judicial Court of Maine upheld the termination of a father's parental rights (again, coined the civil death penalty) because of "unfitness" related to a lack of consistency and stability required in "his own life to nurture and care for [the child]."<sup>127</sup> As justification, the court cited the father's missing of multiple visits with the child that resulted in suspended visitation, continued missed visits after visitation was reinstated, and a failure to find stable housing or employment, although it commended him for active recovery from opiate addiction and did not find his medical marijuana use a concern even during his parenting program that technically required abstinence.<sup>128</sup>

Maine child protective agencies and courts (not unlike most other states) are more likely to penalize marijuana use during pregnancy or breastfeeding, despite the lack of conclusive evidence that prenatal or post-natal marijuana use could cause long-term developmental challenges for infants.<sup>129</sup> For example, in *In re Child of Lacy H.*,<sup>130</sup> a mother was initially separated from her "fragile newborn" because of his exposure to marijuana during her pregnancy and her resistance to "the directions of hospital staff" about his care.<sup>131</sup> Ultimately, Lacey H.'s parental rights were terminated, with the agency and courts citing "her likelihood of having unstable living arrangements" and a diagnosed Antisocial Personality Disorder which is "difficult to treat," yet allegedly made her "likely to place her own needs

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125. See, e.g., *In re Child of Carl D.*, 207 A.3d 1202, 1204 (Me. 2019) ("[The mother] has apparently been 'clean' for a few months except that she smokes marijuana daily.")

126. 223 A.3d 462 (Me. 2020).

127. *Id.* at 465-67.

128. *Id.*

129. JOINTLY-ISSUED COMMENTS BEFORE THE NEW YORK STATE SENATE COMMITTEE ON WOMEN'S ISSUES REGARDING MATERNAL AND CHILD HEALTH IN UPSTATE NEW YORK 2, 8-9 (Nov. 19, 2020) (citing Ciara A. Torres et al., *Totality of the Evidence Suggests Prenatal Cannabis Exposure Does Not Lead to Cognitive Impairments: A Systematic and Critical Review*, 11 FRONTIERS PSYCH. 1 (May 2020)), <https://www.nyclu.org/sites/default/files/20201204-jointtestimony-maternalandchildhealth.pdf> ("Collective testimony" submitted by Ancient Song Doula Services, Brooklyn Defender Services, The Bronx Defenders, Movement for Family Power, National Advocates for Pregnant Women, and the New York Civil Liberties Union "to lend our strong support to [the state senate's] work to improve maternal and child health outcomes and better the lives of families and communities across New York State. Together we are a coalition of advocacy and defense organizations that work collaboratively to eliminate discrimination at the intersection of reproductive health and child welfare); MOVEMENT FOR FAMILY POWER, *supra* note 4, at 20-21. See also NAT'L INST. ON DRUG ABUSE, CANNABIS (MARIJUANA) RESEARCH REPORT 24-27 (2020) (discussing the fact that studies have had mixed results when looking at the various effects of marijuana use by pregnant or breastfeeding mothers).

130. 212 A.3d 320 (Me. 2019).

131. *Id.* at 321.



and desires ahead of” her son’s, and a poor prognosis for behavior change.<sup>132</sup> Other rationales in *Lacy H.* included relapses in her prescription drug addiction, failure to attend and participate consistently in counseling and required programs, and “a lifetime warrant for her arrest in Georgia.”<sup>133</sup>

Ultimately, caregivers engaging in generally “problematic behavior while using [fully legal] marijuana may see their parental rights limited based on their behavior, while parents whose marijuana use does not appear to negatively impact their [caregiving] seem to be offered stronger protections by [legalization] statutes.”<sup>134</sup> New Jersey voters approved recreational marijuana in November 2020, and the governor signed relevant bills into law in February 2021 after having a robust medical marijuana regime since 2010. While the family justice implications of full legalization are unclear, as recently as 2018, *New Jersey Lawyer* magazine urged the legal community to discern the relevance (or irrelevance) of marijuana for each individual family law case.<sup>135</sup> Describing the potential for arbitrary evaluation of marijuana evidence and the broad discretion of whichever judge a family appears before, New Jersey attorney Thomas DeCataldo called for an approach that examines the nexus between marijuana use and parental fitness (physical and psychological capability of fulfilling the role of the parent), child safety, and stability of the home environment to decide a child’s best interests.<sup>136</sup>

New York’s move to legalize recreational marijuana in March 2021 is also very recent, and more information is needed to discern the impact on caregivers and legal systems, although the extensive past damage that marijuana enforcement caused New York’s low-income families of color creates an imperative for radical change.<sup>137</sup> At the very least, New York has immediately issued guidelines clarifying certain issues that can potentially affect caregivers. While a complex regime for legal marijuana use is under construction,<sup>138</sup> recent rules enable those with medical marijuana needs and their caregivers to grow their own marijuana at home<sup>139</sup> while also asserting that employers cannot discriminate against adults for marijuana, provided it is used outside of the workplace and is not affecting the employee’s ability to perform.<sup>140</sup> As of December 2021, New York

132. *Id.* at 322.

133. *Id.* at 321.

134. Levy, *supra* note 109; *How Legal Marijuana Impacts Child Custody*, *supra* note 110.

135. See DeCataldo, *supra* note 36, at 84.

136. *Id.* (referring to the statutory factors a family part judge must consider when making a custody determination, as set forth in N.J. STATUTES ANNOTATED section 9:2-4, and referring to parental “fitness” as defined by the New Jersey Supreme Court in *Beck v. Beck*, 86 N.J. 480, 498 (1981)).

137. See *supra* Part I.B; *infra* Part II.B.

138. Melissa Schiller, *New York Cannabis Control Board Chair Says First Adult-Use Licenses Will Not Be Issued Until 2023*, CANNABIS BUS. TIMES (Nov. 1, 2021), <https://www.cannabisbusinesstimes.com/article/new-york-cannabis-control-board-chair-says-first-adult-use-licenses-issued-2023/>.

139. Caroline Lewis, *NY Cannabis Board Issues New Rules Allowing People To Grow Medical Marijuana At Home*, GOTHAMIST (Oct. 21, 2021), <https://gothamist.com/news/ny-cannabis-board-issues-new-rules-allowing-people-grow-medical-marijuana-home>.

140. Eric B. Sigda & Nicholas A. Corsano, *Cannabis and the Workplace: New York DOL Clears the Smoke with New Guidance*, NAT’L L. REV. (Oct. 28, 2021),

municipalities have each also declared whether or not they will be “dry” in regards to marijuana, and those discrepancies may impose a considerable burden of uncertainty upon families and legal stakeholders in a scenario where certain family members reside in a dry municipality and others do not.<sup>141</sup>

While courts have viewed a totality of evidence from the past and present to discern the context of cannabis use in a person’s parenting ability, concerns about fairness remain. A key issue with private custody cases is the origin of the complaint of a parent’s marijuana usage. Attorneys in myriad states urge judges and colleagues to discard evidence that could be a ploy used by one parent looking to attack another.<sup>142</sup> Another important consideration in private intrafamilial disputes is the role that cannabis use plays when combined with the existing gender and sexual orientation biases pervading matrimonial cases, as well as the interplay between a parent’s cannabis use and their comparative socioeconomic status, privilege, or racial or ethnic identity in relation to the opposing party.<sup>143</sup>

### b. Medical Marijuana

Having a medically diagnosed basis for cannabis use, a state-issued medical marijuana card, and a valid prescription still does not guarantee caregivers and children protection of the fundamental constitutional right to family cohesion. As of early February 2022, thirty-seven states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands had comprehensive medical marijuana programs, while at least eleven other states allow the use of products with low-THC for medical purposes.<sup>144</sup> Although Mississippi voters passed a 2020 ballot initiative approving medical cannabis, the state supreme court overturned it in mid-May 2021.<sup>145</sup> All states now have at least some experience with the legalization of medical marijuana. Medical cannabis regimes require intricate systems of licensing, insurance, grower and dispensary regulation, and production and sale of smoking or vaporization products, among other commercial matters.<sup>146</sup>

Caregivers in medical cannabis jurisdictions confront multiple challenges in family law contexts. In cases of state intervention into families (public family

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<https://www.natlawreview.com/article/cannabis-and-workplace-new-york-dol-clears-smoke-new-guidance>; NEW YORK STATE DEP’T LAB., ADULT USE CANNABIS AND THE WORKPLACE: NEW YORK LABOR LAW 201-D (Oct. 2021), <https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf>.

141. Heather Trela, *To Opt In or Opt Out—That is the Question for NYS Municipalities*, ROCKEFELLER INST. GOV. (Oct. 29, 2021), <https://rockinst.org/blog/to-opt-in-or-opt-out-that-is-the-question-for-nys-municipalities/>.

142. See *How Marijuana Impacts Child*, *supra* note 134; Levy, *supra* note 109; DeCataldo, *supra* note 36, at 82.

143. See generally, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (considering the role of cannabis); Leigh Goodmark, *Law is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) (examining the effects on battered women); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000) (describing how norms are applied to marriages).

144. NCSL, *supra* note 63.

145. *Id.*

146. *Id.*

law), racial disparities and biases persist, and prescription marijuana use can still become a pretext for caseworker surveillance and mandated programming. Judges may make premature, unfair, negative presumptions about a caregiver's unhealthy dependence on a federally controlled substance. In the worst-case scenario, a parent might have to choose between necessary treatment of their own illness and continued access to their child while risking exposure to criminalization for endangerment. In private family law cases, including divorces, custody and visitation disputes, parenting plan and child support negotiations, and adoption and fostering deliberations, state agencies and decision-makers can be likewise ill-informed or biased. As of 2017, over half of states with medical marijuana statutes remained silent on the issue of child custody.<sup>147</sup> In one Pennsylvania case, a parent's custody was limited due to "drug abuse" simply because of a legal, medical marijuana card. The court required the parent to produce consistently negative drug tests despite their valid medical clearance.<sup>148</sup>

While Oklahoma legalized medical marijuana in 2018 with a statute that explicitly protects caregivers, practitioners report that the law leaves many unaddressed questions, while the state has preserved a dangerous presumption against substance-dependent parents, which is not the only one of its kind. Oklahoma's medical marijuana statute provides that no license holder "may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment for conduct allowed under this law unless the behavior of the person creates an unreasonable danger to the safety of the minor."<sup>149</sup> Yet, clarity evades regarding what constitutes "an unreasonable danger" to the safety of a minor by a medical marijuana license holder, family law judges maintain broad discretion when making best interests decisions and weighing a parent's behavior. Practitioners stress that a "nexus" is required to demonstrate that the "effect of" a parent's behavior regarding marijuana is detrimental to the best interests of the child.<sup>150</sup> Another Oklahoma law further protects caregivers by requiring that all emergency custody motions demonstrate

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147. Fleming & McFadden-Wade, *supra* note 39, at 327. See, e.g., DeCataldo, *supra* note 36, at 82 (explaining the minimal guidance offered under New Jersey law); Kwak, *supra* note 62, at 199 n.2 ("The twenty-four states that have passed medical marijuana laws are: Alaska (Alaska Stat. §17.37.10 to 17.37.80), Arizona (Ariz. Rev. Stat. § 36-2801 to 36-2819), California (Cal. Health & Saf. Code § 11362.7 to 1362.83), Colorado (Colo. Rev. Stat. § 18 to 18-406.3), Connecticut (An Act Concerning the Palliative Use of Marijuana), Delaware (Senate Bill No. 17 (2011)), Georgia (House Bill 1 (2015)), Hawaii (Haw. Rev. Stat. § 329-121 to 329-128), Illinois (House Bill 1 (2013)), Maine (Me. Rev. Stat. § tit. 22, 2421-2430), Maryland (Md. Code Ann., Crim. Law § 5-601(c)(3)(II)), Massachusetts (Law for the Humanitarian Medical Use of Marijuana), Michigan (Mich. Comp. Laws § 333.26421 to 333.26430), Minnesota (Minn. Stat. § 13.3806), Montana (Mont. Code Ann. § 50-46-1 to 50-46-103), Nevada (Nev. Rev. Stat. § 453A.010 to 453A.240), New Hampshire (House Bill 573 (2013)), New Jersey (Senate Bill 199 (2010)), New Mexico (N.M. Stat. Ann. § 26-2B-1 - 26-2B-7), New York (Compassionate Care Act (2014)), Oregon (Or. Rev. Stat. § 475.300 - 475.346), Rhode Island (6 R.I. Gen. Laws § 21-28.6-1 to 21-28.6-2), Vermont (Vt. Stat. Ann. tit. 18, § 4471- 4474d), and Washington (Wash. Rev. Code § 69.51A - 69.51A.901).")

148. Michael E. Bertin, *Medical Marijuana and Child Custody: A New Frontier in Pa.*, LEGAL INTELLIGENCER (ONLINE) (Feb. 10, 2020), <https://www.law.com/thelegalintelligencer/2020/02/10/medical-marijuana-and-child-custody-a-new-frontier-in-pa/?slreturn=20220813193018>.

149. OKLA. STAT. ANN. tit. 63, § 425 (West 2022).

150. Aaron Bundy, *Marijuana and Family Law*, 92 OKLA. B.J. 10, 11-12 (2021).

the child is in such dangerous surroundings that “if such conditions continue, the child would likely be subject to irreparable harm.”<sup>151</sup>

Ultimately, however, Oklahoma jeopardizes families and misinterprets best practices in mental health through its rebuttable presumption that a parent is affirmatively unfit if they are “an alcohol-dependent person or a drug-dependent person as established by clear and convincing evidence and who can be expected in the near future to inflict or attempt to inflict serious bodily harm to himself or herself or another person as a result of such dependency.”<sup>152</sup> Oklahoma medical professionals are also still required to report to their child protection agency when an infant tests positive for alcohol or a controlled dangerous substance, including marijuana.<sup>153</sup>

### c. Decriminalization

As of early 2022, thirty-one states and the District of Columbia have decriminalized the possession of small amounts of marijuana for personal consumption, with that number including states declining to incarcerate for those acts, as well as states with full legalization regimes;<sup>154</sup> and yet purported decriminalization does not protect caregivers from the constant threat of losing their children over cannabis. The case of Penelope is one such common scenario, as New York was under a decriminalization scheme during the time of her case.<sup>155</sup> In decriminalized jurisdictions, cannabis possession is generally treated as a civil or local infraction or a minor misdemeanor without jail time rather than a crime. As of March 2021, twelve additional states had pending legislation to remove jail time as a consequence for simple marijuana possession, but many of the bills either stalled in committee or were not taken up for consideration in the past legislative session.<sup>156</sup> Despite criminal justice systems in decriminalized jurisdictions signaling that cannabis is not a major threat to public safety or health (absent a massive kingpin operation or otherwise criminal enterprise), family regulation systems overwhelmingly treat marijuana as a sign of neglectful parenting and child endangerment, especially among low-income families of color.<sup>157</sup>

The Movement for Family Power and its co-author organizations assert that the foster system has effectively become “ground zero in the War on Drugs” as an alternate justice system with tougher legal and moral standards than most criminal courts or broader society.<sup>158</sup> Prior to New York State’s legalization of recreational cannabis in March 2021, over ninety percent of the cases handled by the Brooklyn

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151. OKLA. STAT. ANN. tit. 43, §107.4 (West 2010).

152. OKLA. STAT. ANN. tit. 43, §112.5(C)(3) (West 2014).

153. OKLA. STAT. ANN. tit. 10A § 1-2-101(B)(3) (West 2019).

154. *2022 Cannabis Policy Reform Legislation*, *supra* note 66.

155. *See supra* Part I.B (featuring snapshot of Penelope).

156. *2022 Cannabis Policy Reform Legislation*, *supra* note 66.

157. Miriam Mack & Elizabeth Tuttle Newman, *Parents Threatened with Losing Children Over Cannabis Use*, APPEAL (Sept. 9, 2019), <https://theappeal.org/parents-threatened-with-losing-kids-over-cannabis-use/>.

158. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 7.

Family Defense Practice—which defends most parents facing neglect charges in Family Court in Brooklyn—alleging drug use involved cannabis.<sup>159</sup> It was the most common illicit drug in New York City in 2015 and 2016, with sixteen percent of people age twelve and older using it, according to the New York City Department of Health.<sup>160</sup> In 2017, New York City ACS data revealed that at least one in four removals of children from the home involved parental drug use allegations, whereas only one in ten people in New York state prisons was incarcerated for a drug offense.<sup>161</sup> That same year, nearly twenty-five percent of child protective investigations in the Bronx were due to allegations of drug use, and forty percent of those yielded an “indicated” case—meaning “some credible evidence” of maltreatment was found, even if evidence of the caregiver’s innocence outweighed evidence of maltreatment.<sup>162</sup> Throughout New York, parental substance use was the most prevalent contributing factor to a family’s involvement with the foster system, and cannabis issues could ultimately lead to termination of parental rights if sufficient roadblocks and challenges confront a family over a long enough period of time.<sup>163</sup> Hundreds of caregivers like Penelope also continue to lose custody temporarily.

The sharp disconnect between criminal legal and family regulation system priorities on cannabis imposes unreasonable conditions upon caregivers in instances of both public and private family law litigation. Parental marijuana use, possession, and sale is cast as pathology, ineptitude, or unfitness by family courts regardless of the caregiver’s ability to provide for their children and avoid criminal sanctions. Decision-makers and system stakeholders, including guardians ad litem and attorneys, are often motivated by ill-informed, subjective impressions and stereotypes about cannabis—including the proverbial “stoner” image. For example, they may presume that a caregiver involved with cannabis (although decriminalized) has questionable character, judgment, or morals. The parent’s level of motivation, overall and during various steps of a case requiring particular actions, might be doubted. Family court authorities may also question the caregiver’s credibility throughout the legal process, conflate substance use with substance abuse, and doubt the individual’s caregiving ability and capacity to protect their child from harm. Too often, cannabis gets equated with child endangerment, parental unfitness, and personal failings. Once embroiled in the foster system, parents may be presumed incapable of complying with conditions for reunification (employment, receiving public benefits, housing, etc.). More coercive interventions are also imposed, including mandated substance abuse

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159. Secret, *supra* note 22.

160. N.Y.C. HEALTH, CANNABIS USE IN NEW YORK CITY (Sept. 2019), <https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief117.pdf>.

161. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 61.

162. *Family Separation in The Medical Setting: The Need for Informed Consent*, MOVEMENT FOR FAM. POWER, 1, 2, 9 (Nov. 24, 2019), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5e6ac6f3ea60e51301d4ee47/1584056066082/Policy+Brief+2020.pdf>.

163. *Child Welfare and Treatment Statistics*, *supra* note 4.

treatment regardless of the presence of addiction, outdated or inapplicable parenting classes, frequent drug testing, and other onerous monitoring.<sup>164</sup>

d. Family court drug testing: flawed and persistent

Alarmingly, and perhaps contrary to the understanding of most Americans, the lack of standardized, reliable drug testing protocols in civil courts can also lead to totally inaccurate yet life-altering results for a family. Often, the presence of a drug on a court-ordered drug test does not reflect impairment or even use of illegal substances.<sup>165</sup> Many people fail mandated drug tests because of wholly legal, non-intoxicating CBD use because tests cannot differentiate between CBD and THC in cannabis. Routinely used drug tests may actually just be indicating exposure to certain drugs. Poppy seeds from bagels or muffins and even contact with marijuana smoke in enclosed places have all been linked to false positive drug screens, which were meant to determine a test subject's actual impairment.<sup>166</sup> Experts in the field of toxicology also emphasize the notorious unreliability of urine screens, caused by factors including interfering substances, cross-reaction between illicit substances and other substances, human error, inadequate or improper handling of urine samples, and the use of inadequate testing procedures. Ultimately, the deep flaws in civil court drug testing have all been reported to cause both false positives and false negatives. Perhaps the greatest shortcoming of these tests is their inability to determine either when a drug was taken or the distinction between levels of impairment (i.e., intoxication, under-the-influence, impairment, etc.).<sup>167</sup>

e. Criminalized, illegal cannabis

If caregivers experience disastrous consequences when jurisdictions with legalized, medicinal, or decriminalized cannabis deprive them of the fundamental right to family integrity, the situation only worsens with illegal cannabis states. In addition to the pervasive stigma and disrespect in the foster system and domestic relations proceedings, caregivers face harsh prosecution and even incarceration that necessitates a loss of child custody. The Adoption and Safe Families Act ("ASFA") dictates that when a child is in foster care for fifteen out of the last

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164. Ketteringham et al., *supra* note 52, at 79. See also Levy, *supra* note 120 (describing Massachusetts' wait-and-see approach regarding impact of decriminalization on child custody).

165. Carol J. Weiss, *Protocol Design and Implementation for Monitoring Parental Substance Use in Child Custody Litigation*, 59 FAM. CT. REV. 534, 538 (2021).

166. GERALD F. UELMEN & VICTOR G. HADDOX, DRUG ABUSE AND THE LAW SOURCEBOOK § 4:7 (2022); KEVIN B. ZESSE, DRUG TESTING LEGAL MANUAL § 3.2 (2d ed. 2021-22).

167. ZESSE, *supra* note 166, at § 3.2. See also *Child Custody Drug Testing*, U.S. DRUG TEST CTRS., <https://www.usdrugtestcenters.com/child-custody-drug-testing.html> (last visited Apr. 16, 2022) (explaining eight different types of testing panels, which drugs they each test for, as well as drug and alcohol detection windows); *Court Ordered Drug Testing*, NAT'L DRUG SCREENING, INC., <https://www.nationaldrugscreening.com/court-ordered-drug-testing/> (last visited Apr. 16, 2022) (describing different forms of drug testing).

twenty-two months, they must be freed for adoption, and a petition to terminate parental rights should be filed.<sup>168</sup> Incarceration is considered a voluntary absence from a child's life, and incarcerated parents receive scarce legal advice about ways to arrange visitation, maintain their rights, or make contingency plans to avoid the permanent loss of their children.<sup>169</sup> Further, people of color are overwhelmingly more likely to receive severe penalties for similar cannabis infractions, and after a release from incarceration, there are lingering collateral consequences preventing a caregiver from finding employment, housing, educational opportunities, or even financial assistance.<sup>170</sup> Ironically, child support obligations typically continue during incarceration unless an obligor files paperwork to toll the accrual of support debt.<sup>171</sup> Thus, avenues for maintaining strong custodial and noncustodial relationships with children become closed off to caregivers who are prosecuted for cannabis offenses. In general, criminal justice involvement is a driver of family separation and economic hardship, leading to negative educational and life outcomes for children, caregivers, and communities.<sup>172</sup>

Clashing cannabis laws throughout the states ultimately convey that a fundamental constitutional concern in the family law context is negligible at worst and worthy of only arbitrary recognition at best. Yet, monumental and routine legal matters involving caregiving should not be left to happenstance or the luck of the draw.

## B. THE FUNDAMENTAL RIGHT TO FAMILY INTEGRITY

Federal marijuana legalization is imperative because the current hodgepodge of marijuana laws consistently denies caregivers' access to their children and even legally severs families, despite their longstanding, fundamental constitutional

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168. 42 U.S.C. § 675(5)(E) (2021).

169. Carla Laroche, *The New Jim and Jane Crow Intersect: Challenges to Defending the Parental Rights of Mothers During Incarceration*, 12 COLUM. J. RACE & L. (forthcoming 2022) (manuscript at 27-31).

170. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 94-95 (2010) (describing how the U.S. criminal justice system is a tool of racial control, including the use of probation and parole surveillance and restrictions, which essentially guarantee that those released from prison will end up back there); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553 (2014); Mathias H. Heck, Jr., *Focus on Abolishing Slavery and Involuntary Servitude Here at Home*, 29 CRIM. JUST. 1, 46 (2014); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 396 (2008); PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 34 (The New Press, 2009) (problematizing mass incarceration); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 133-36 (2011); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1200-01 (2015).

171. Ann Cammett, *The Incarcerated Family*, Lecture at the CUNY School of Law (Fall 2020); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 129-32 (2011); Tonya L. Brito, *The Child Support Debt Bubble*, 9 UC IRVINE L. REV. 953, 973-82 (2019); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 655-59 (2012).

172. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 6, 15; *Million Dollar Blocks Project*, COLUM. CTR. FOR SPATIAL RSCH., <https://c4sr.columbia.edu/projects/million-dollar-blocks> (last visited Apr. 16, 2022); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 38 (2003).

right to remain intact. “Termination of parental rights is one of the most violent acts that a government can take against its people[,] . . . permanently and irreversibly removing a child from their parents’ care” and diminishing the part of a person that many hold most dear about themselves—their identity as a specific family member, whether as a parent or a child.<sup>173</sup> In *Santosky*, the U.S. Supreme Court boldly noted that a biological parent’s fundamental liberty interest in raising their children “does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”<sup>174</sup> More recently, the Supreme Court in *DeBoer v. DeBoer*<sup>175</sup> upheld the importance of biological family bonds by confirming that “[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.”<sup>176</sup>

The Supreme Court also dealt directly with a state’s presumption about parental unfitness in *Stanley v. Illinois*,<sup>177</sup> reiterating the extreme legal burden posed by the potential loss of access to one’s children.<sup>178</sup> The Court asserted that under the Due Process Clause, “parents are constitutionally entitled to a hearing of their fitness before their children are removed from their custody,” striking down the law that presumed Mr. Stanley unfit merely through his identity as an unwed father.<sup>179</sup> The Court in *Stanley* also affirmed the fundamental liberty “interest of a parent in the companionship, care, custody, and management” of their children, ruling that a denial of parental fitness hearings also violated the Equal Protection Clause.<sup>180</sup>

Although most fail to recognize marijuana law conflicts as a constant threat to this constitutional right, still other parts of the family law cannon originate and reiterate the principle of family integrity and of a parent’s right to raise, reside with, and care for their own child. In *Meyer v. Nebraska*,<sup>181</sup> the Supreme Court first ruled that a statute unreasonably infringed on a parent’s Fourteenth Amendment liberty to make decisions regarding their child’s education.<sup>182</sup> The Court clarified that this liberty guarantee included an adult’s “freedom from bodily restraint” as well as their right to “establish a home and bring up children . . . .”<sup>183</sup> *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*<sup>184</sup> reinforced this doctrine, as the Court again confirmed the “liberty of parents and guardians to direct the upbringing and education of [their] children . . . .”<sup>185</sup>

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173. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 80.

174. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

175. 509 U.S. 1301 (1993).

176. *Id.* at 1302 (quoting *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)).

177. 405 U.S. 645 (1972).

178. *Id.* at 651-53.

179. *Id.* at 658.

180. *Id.* at 651.

181. 262 U.S. 390 (1923).

182. *Id.* at 396-400.

183. *Id.* at 399.

184. 268 U.S. 510 (1925).

185. *Id.* at 534.



Marriage equality and the Supreme Court's ruling in *Obergefell v. Hodges*<sup>186</sup> offer a highly instructive comparison, illuminating the high stakes for families treated disparately through unresolved marijuana law conflicts across the country.<sup>187</sup> The Court found a basis for protecting the right to marry among same-sex couples in this same imperative to "safeguar[d] children and families" and foster "childrearing . . . and education."<sup>188</sup> Citing to *Pierce*, among other cases, the *Obergefell* Court held that "the challenged laws burden the liberty of same-sex couples[] and . . . abridge central precepts of equality," because "the marriage laws [at issue] are in essence unequal" and same-sex couples were barred from exercising a fundamental right.<sup>189</sup> Ignoring unequal treatment of families in the untenable, status quo marijuana law regime implicates this precise "fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . ."<sup>190</sup> Further, failure to rectify the matter of over-privilege (and under-protection) in the marijuana law context likewise "works a grave and continuing harm[,] . . . serv[ing] to disrespect and subordinate" all families who confront murky, arbitrary guidelines about their fate, who land an unfavorable decision-maker, or who end up forever deemed legal strangers, simply due to the sheer luck of the draw.<sup>191</sup> Ultimately, *Obergefell* demands comity for same-sex unions regardless of their location in the United States. Location, identity, and privilege in the context of marijuana legality also cannot justify the denial of these fundamental rights to any other families.

### 1. Cannabis & Caregiving: Myth, Reality, and Happenstance

Opponents of lifting the federal cannabis ban, as well as opponents of legal cannabis more generally, often decry the damaging impact of cannabis on caregivers' judgment, parenting ability, physical reflexes, and relationship to addiction. However, among serious researchers and clinicians, the striking point of consensus about the impact of cannabis use on caregiving is that there is inconclusive, conflicting evidence. Indeed, the reason why states are racing towards legalization is that the benefits of cannabis usage by adults seem to far outweigh the drawbacks, while alcohol is demonstrably more physically and mentally damaging.<sup>192</sup> A particular study by the University of Colorado Boulder found that alcohol consumption was linked with "long-term changes to the

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186. 576 U.S. 644 (2015).

187. See *id.* at 667-68 (discussing how deprivation of right to marry for same-sex couples affects children).

188. *Id.* at 668.

189. *Id.* at 675.

190. *Id.*

191. *Id.*

192. See Liz Krueger, *Final Bill Introduced To Legalize, Tax, And Regulate Adult-Use Marijuana*, N.Y. SENATE (Mar. 27, 2021), <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/final-bill-introduced-legalize-tax-and-regulate-adult-use> (releasing statement of New York State Senator announcing plan to legalize marijuana); Honor Whiteman, *Alcohol 'more damaging to brain health than marijuana'*, MED. NEWS TODAY (Feb. 12, 2018), <https://www.medicalnewstoday.com/articles/320895> (reviewing effects of alcohol and marijuana on the brain).

structure of white matter and gray matter in the brain,” while marijuana use “seemed to have no significant long-term effects on brain structure.”<sup>193</sup> Countless “Cannamom” blogs and social media communities also insist that “weed moms” outshine “wine moms” because the body literally treats alcohol as a poison, and with continuous use of wine—though more legally and socially acceptable—can increase depression and cause weight gain, hangovers, “brain fog,” and exacerbated substance abuse disorders.<sup>194</sup> Incidentally, the COVID-19 pandemic has led to increased self-reported cannabis use among women, as well as increased alcohol usage to somehow cope with extreme, unparalleled stress.<sup>195</sup>

As the “wine mom” trope has glamorized leisure alcohol consumption among (primarily affluent, white, suburban) mothers in the past several years, it has garnered pop culture celebration, humor, ridicule, and serious critique for downplaying binge drinking and alcoholism.<sup>196</sup> Many sources emphasize the underlying issue—that a “wine mom” isn’t really saying “I need wine” but rather “this is hard and I need support” in a country where “affordable child care, paid-family-leave, equitable wages, and an equitable division of labor at home seem beyond reach.”<sup>197</sup> Further, critics and journalists rightfully bristle at the fact that “wine mom” memes and frivolous merchandise evoke glamor and fun in wealthy, white circles while any remotely similar behavior by moms of color would warrant a child protective, if not criminal legal, response. Tomi Akitunde, the founder of *mater mea*, explains, “[w]ine mom culture lets white women cosplay as ‘bad moms’ because they’re given the benefit of the doubt that BIPOC moms aren’t afforded.”<sup>198</sup>

193. Whiteman, *supra* note 192.

194. *Supra* note 3; JSP1073, *Are Weed Moms the New Wine Moms? Are Cannabis Edibles and Vape Pens the New Mommy Juice?*, CANNABIS.NET (Sept. 9, 2020), <https://cannabis.net/blog/opinion/are-weed-moms-the-new-wine-moms>; Sari Frances, *Are Weed Moms The New Wine Moms?*, FRESH TOAST (Dec. 21, 2019), <https://thefreshtoast.com/cannabis/are-weed-moms-the-new-wine-moms/>.

195. *420 Moms*, *supra* note 3; Michael S. Pollard, Joan S. Tucker & Harold D. Green, Jr., *Changes in Adult Alcohol Use and Consequences During the COVID-19 Pandemic in the US*, JAMA NETWORK OPEN (Sept. 29, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770975?widget=personalizedcontent&previousarticle=187> (survey/study illustrates the uptick in drinking during COVID-19).

196. Ashley Abramson, *The Cheeky ‘Wine Mom’ Trope isn’t Just Dumb. It’s Dangerous.*, WASH. POST (Sept. 21, 2018), <https://www.washingtonpost.com/news/parenting/wp/2018/09/21/the-cheeky-wine-mom-trope-isnt-just-dumb-its-dangerous/>; Sarah Hosseini, *The Pandemic is Taking a Toll on Parents, and it’s Showing in Alcohol Consumption Rates*, WASH. POST (Nov. 9, 2020), <https://www.washingtonpost.com/lifestyle/2020/11/09/parents-alcohol-consumption-covid/>.

197. Ashley Fetters, *The Many Faces of the ‘Wine Mom’*, ATLANTIC (May 23, 2020), <https://www.theatlantic.com/family/archive/2020/05/wine-moms-explained/612001/>; *Wine Mom*, URBANDICTIONARY.COM, <https://www.urbandictionary.com/define.php?term=Wine%20Mom> (last visited Apr. 19, 2022); The Wine Community, *8 Signs You Might Be A Wine Mom*, JUST WINE (Jan. 4, 2021), <https://justwineapp.com/article/this-is-why-a-mom-needs-wine>.

198. Rachel Tepper Paley, *Meme Girls: The Wine Mom Phenomenon Speaks Volumes*, WINE ENTHUSIAST (Mar. 23, 2021). See also Kelly Burch, *An ‘SNL’ skit captured everything uncomfortable about ‘wine mom’ culture*, INSIDER (Mar. 4, 2021, 4:20 PM), <https://www.insider.com/snl-skit-captured-everything-uncomfortable-about-wine-mom-culture-2021-3> (discussing the problematic nature of the “wine mom” culture). But see Jessica Grose, *Mother’s Little Helper Is Back, and Daddy’s Partaking Too*, N.Y. TIMES (Oct. 3, 2020) (discussing the uptick in parental drinking and cannabis smoking since the onset of the pandemic and asserting that this may not be as new a phenomenon as people think, considering the old tropes in advertisements from the 1950s-1970s promoting alcohol and pills targeted to parents in

Despite the lack of clear scientific or medical consensus about cannabis and caregiving, most studies find that parents who self-report consumption for either medical or recreational purposes extoll its virtues for easing anxiety, improving mood, controlling temperament, and alleviating physical pain, which in turn enables more attentive and positive parenting.<sup>199</sup> Surveyed caregivers have gloated about more openness and receptivity to their children, yet also contrastingly report an increase in punitive parenting at times. A study of over three thousand parents from fifty cities in California revealed that a caregiver's current marijuana use was not related to supervisory neglect in any way, while current marijuana use likewise "does not appear to occur at the expense of caring for [a] child's basic needs," (i.e., was not associated with incidences or increases in physical neglect of a child).<sup>200</sup> Regardless, participants in adult-use cannabis studies cannot always be reliably surveyed if they ingest alcohol recreationally, if not comorbidly, along with cannabis.<sup>201</sup>

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order to "take the edge off a long day dealing with the responsibilities of intensive parenting."). BIPOC stands for Black, Indigenous, and People of Color.

199. See Grose, *supra* note 198 (explaining why some parents partake in marijuana use); Christian Thurstone, Ingrid A. Binswanger, Karen F. Corsi, Deborah J. Rinehart & Robert E. Booth, *Medical Marijuana Use and Parenting: A Qualitative Study*, ADOLESCENT PSYCHIATRY (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6706266/> (collecting data between May and July 2012); see also GOV'T CAN., HEALTH EFFECTS OF CANNABIS, <https://www.canada.ca/content/dam/hc-sc/documents/services/campaigns/27-16-1808-Factsheet-Health-Effects-eng-web.pdf> (recognizing that marijuana can be used for "therapeutic purposes"). See generally Marisa Taylor & Melissa Bailey, *Medical Marijuana's 'Catch-22': Limits on Research Hinder Patient Relief*, NPR (Apr. 7, 2018, 7:00 AM), <https://www.npr.org/sections/health-shots/2018/04/07/600209754/medical-marijuanas-catch-22-limits-on-research-hinders-patient-relief> (regarding the lack of scientific consensus on cannabis and caregiving).

200. Bridget Freisthler, Paul J. Gruenewald & Jennifer Price Wolf, *Examining the Relationship between Marijuana Use and Abusive and Neglectful Parenting: Lessons for Marijuana Legalization*, CONF.: SOC'Y FOR SOC. WORK & RSCH. (Jan. 2015), [https://www.researchgate.net/publication/274253091\\_Examining\\_the\\_Relationship\\_between\\_Marijuana\\_Use\\_and\\_Abusive\\_and\\_Neglectful\\_Parenting\\_Lessons\\_for\\_Marijuana\\_Legalization](https://www.researchgate.net/publication/274253091_Examining_the_Relationship_between_Marijuana_Use_and_Abusive_and_Neglectful_Parenting_Lessons_for_Marijuana_Legalization).

201. See, e.g., Thurstone et al., *supra* note 199 (using a small sample group of thirty-two participants, eleven of which were parents, mostly whom were white (nineteen out of thirty-two). The study occurred among adult medical marijuana patients in Denver, Colorado, where only medical use was legal at the time. The study found that six of eleven parents felt that using marijuana (while caregiving) helps them to stay calm around their children); Ohio State Univ., *Marijuana May Not Make Parents More "Chill"*, SCIENCE DAILY (2019), <https://www.sciencedaily.com/releases/2019/07/190717084343.htm> (citing Bridget Freisthler & Nancy Jo Kepple, *Types of Substance Use and Punitive Parenting: A Preliminary Exploration*, PUBMED (July 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6686895/>) (communicating data collected from a telephone survey in 2009. At that time medical marijuana was legal but recreational use was not legalized until 2016); Gabby Landsverk, *Advocates say marijuana makes them better parents, but a new study links pot use with more punitive parenting*, INSIDER (July 18, 2019, 3:36 PM), <https://www.insider.com/marijuana-use-parents-more-likely-to-discipline-children-research-2019-7> (finding that parents who use marijuana are more likely to punish their children than those that do not); Bridget Freisthler, Paul J. Gruenewald & Jennifer Price Wolf, *Examining the relationship between marijuana use, medical marijuana dispensaries, and abusive and neglectful parenting*, 48 CHILD ABUSE & NEGLECT 170, 170 (2015), <https://www.sciencedirect.com/science/article/abs/pii/S0145213415002379?via%3Dihub> (illustrating mixed findings: Current marijuana use was positively related to frequency of child physical abuse, negatively related to physical neglect, and no relationship was found between supervisory neglect and marijuana use); Kathryn Foust, *The Complicated Relationship Between Marijuana Use and Parenting* 5 (Nov. 18, 2019) (Ohio State Pub. L., Working Paper No. 512), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3486864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486864) ("Scant research exists overall as to how

Other chief concerns about caregiver use of cannabis include the potential effects of secondhand smoke on children, driving and vehicle safety, and prevention of children's access to the drug. Common sense guidance advises parents to safely store marijuana products, avoid smoking inside the home or around minors, and ensure that children are adequately supervised during the times that adults are consuming. Secondhand exposure to cannabis smoke under extreme conditions such as unventilated rooms or vehicles has caused "contact highs" among nonsmokers, minor memory and coordination problems, and even positive urinalyses for those who abstain from cannabis.<sup>202</sup> Cannabis has proven far less deadly an influence on drivers than alcohol.<sup>203</sup> Further, it remains difficult to gather data about marijuana's influence on vehicle incidents because states lack the resources to engage in drug screens as routinely as alcohol tests, and car crashes frequently involve both alcohol and marijuana.<sup>204</sup> Notably, extensive research from the past two decades refutes the myth that marijuana itself is a "gateway drug," causing children to resort to harder drugs during adolescence.<sup>205</sup>

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marijuana use alone, particularly medical marijuana, can affect parenting skills, or its correlation to abuse or neglect.").

202. Evan S. Herrmann, Edward J. Cone, John M. Mitchell, George E. Bigelow, Charles LoDico, Ron Flegel & Ryan Vandrey, *Non-smoker exposure to secondhand cannabis smoke II: Effect of room ventilation on the physiological, subjective, and behavioral/cognitive effects*, PUBMED (June 1, 2015), <https://pubmed.ncbi.nlm.nih.gov/25957157/>; Alexander Posis, John Bellettiere, Sandy Liles, John Alcaraz, Benjamin Nguyen, Vincent Berardi, Neil E. Klepeis, Suzanne C. Hughes, Tianying Wu & Melbourne F. Hovell, *Indoor Cannabis Smoke and Children's Health*, U.S. NAT'L LIBR. MED. 2 (Mar. 16, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6441784/>.

203. Guohua Li, Joanne E. Brady & Qixuan Chen, *Drug use and fatal motor vehicle crashes: A case-control study*, PUBMED (Sept. 8 2013), <https://pubmed.ncbi.nlm.nih.gov/24076302/>.

204. Matt Byrne, *Are pot-related problems on the rise? State lacks data to say for sure*, PRESS HERALD (Oct. 19, 2021), <https://www.pressherald.com/2021/10/19/state-lacks-data-to-say-whether-pot-related-problems-are-on-the-rise/>. See generally *Background on: Marijuana Impaired Driving*, INS. INFO. INST. (Mar. 29, 2019), <https://www.iii.org/article/background-on-marijuana-and-impaired-driving> (discussing difficulties measuring impairment when it comes to automobile accidents involving marijuana); Paul J. Larkin, Jr., *Medical Or Recreational Marijuana And Drugged Driving*, 52 AM. CRIM. L. REV. 453 (2015) (discussing marijuana use and highway safety); Steven Reinberg, *Coming Soon: A 'Pot Breathalyzer'?*, HEALTHDAY (Sept. 3, 2019), <https://consumer.healthday.com/public-health-information-30/marijuana-news-759/coming-soon-a-pot-breathalyzer-749936.html> (discussing the development of a breathalyzer designed to measure the psychoactive ingredient in marijuana).

205. See, e.g., Nat'l Insts. Health, *Cannabis (Marijuana) Research Report: Is marijuana a gateway drug?*, NAT'L INST. ON DRUG ABUSE (July 2020), <https://nida.nih.gov/publications/research-reports/marijuana/marijuana-gateway-drug> (finding that "the majority of people who use marijuana do not go on to use other, 'harder' substances."); CTRS. FOR DISEASE CONTROL & PREVENTION, *Risk of Using Other Drugs* (Oct. 19, 2020), <https://www.cdc.gov/marijuana/health-effects/risk-of-other-drugs.html> (stating that the majority of people who use marijuana do not go on to use other, "harder" substances); Andrew R. Morral, Daniel F. McCaffrey & Susan M. Paddock, *Using Marijuana May Not Raise the Risk of Using Harder Drugs*, RAND CORP. (2002), [https://www.rand.org/pubs/research\\_briefs/RB6010.html](https://www.rand.org/pubs/research_briefs/RB6010.html) (finding some support for marijuana as a gateway drug, but also finding support for other explanations); *Debunking the "Gateway" Myth*, DRUG POL'Y ALL. 1, 1 (Feb. 2017), [https://drugpolicy.org/sites/default/files/DebunkingGatewayMyth\\_NY\\_0.pdf](https://drugpolicy.org/sites/default/files/DebunkingGatewayMyth_NY_0.pdf) ("Research shows that marijuana could more accurately be described as a 'terminus' drug because the vast majority of people who use marijuana do not go on to use other illicit drugs."). The National Institutes of Health also explains that cross-sensitization is common with many substances including alcohol and nicotine, which "prime the brain for a heightened response" to other intoxicants. Nat'l Insts. Health, *supra* note 205.

Findings are somewhat conflicting, but at minimum unconvincing, regarding marijuana legalization, parental use, and minors' increased use or access.<sup>206</sup> As recently as 2021, the Hazelden Betty Ford Foundation stated that although youth risk perceptions about cannabis and marijuana use were decreasing rapidly, the “good news” is that “most teens are not using marijuana any more than they were prior to the cannabis legalization movements across the United States.”<sup>207</sup> Oregon studies following medical marijuana legalization likewise “found no significant changes in adolescent use.”<sup>208</sup> One Oregon study focused on recreational marijuana also reported that recreational use “did not increase marijuana use for youth who did not use marijuana, but did increase use in youth who were already using.”<sup>209</sup> Importantly, like all states with medical marijuana programs, Oregon is home to children who themselves use marijuana under the care and direction of a medical professional. As of 2019, the Oregon Secretary of State reported that roughly ten percent of their medical marijuana patient community included both “children under 18 years of age and seniors over 70.”<sup>210</sup> Colorado researchers likewise reported “good news” that although marijuana use by teens in Colorado is higher than elsewhere in the nation, “there is no indication that this number has risen since marijuana was legalized, either for adult users or for medical patients.”<sup>211</sup> Without citing significant statistical data, a 2018 resource by Barnstable County, Massachusetts Human Services claims that parental marijuana use is the primary influence on a youth's decision to use marijuana.<sup>212</sup> Perhaps unsurprisingly, a 2019 a National Institutes of Health (“NIH”) study examined “cannabis-specific parenting strategies” to reveal that such parenting did not reduce adolescent cannabis use, while parents' sharing about negative cannabis experiences was detrimental to youth behavior.<sup>213</sup> Lastly, a meta-study from 2017

206. See *supra* note 205.

207. *Does Legal Mean Less Risky? Here's How the Marijuana Debate Impacts Student Drug Use— and How We Can Help*, HAZELDEN BETTY FORD FOUND. (Nov. 16, 2021), <https://www.hazeldenbettyford.org/articles/prevention/what-legal-marijuana-means-for-teenagers>.

208. Julie C. Rusby, Erika Westling, Ryann Crowley & John M. Light, *Legalization of Recreational Marijuana and Community Sales Policy in Oregon: Impact on Adolescent Willingness and Intent to Use, Parent Use, and Adolescent Use*, 32 PYSCH. ADDICT BEHAV. 84, 84 (2018), <https://ww2.uthscsa.edu/artt/AddictionJC/2019-12-04-Rusby.pdf> (summarizing previous studies on medicinal marijuana legalization).

209. *Id.*

210. OR. SEC'Y STATE: AUDITS DIV., OREGON'S FRAMEWORK FOR REGULATING MARIJUANA SHOULD BE STRENGTHENED TO BETTER MITIGATE DIVERSION RISK AND IMPROVE LABORATORY TESTING 1, 31 (Jan. 2019), <https://sos.oregon.gov/audits/Documents/2019-04.pdf>.

211. Kamin, *supra* note 90, at 233 (citing Retail Marijuana Pub. Health Advisory Comm., *Monitoring Health Concerns related to Marijuana in Colorado: 2016*, COLO. DEP'T PUB. HEALTH & ENV'T 4 (2017), <https://mccagueborlack.com/emails/pdfs/marijuana-health-concerns-colorado-2016.pdf>); Christopher Ingraham, *Following Marijuana Legalization, Teen Drug Use Is Down in Colorado*, WASH. POST. (Dec. 11, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/>.

212. Kim Slade, *Issue Brief 6: Marijuana Use and Parenting: What You Need to Know*, BARNSTABLE CNTY. HUM. SERVS. 1, 2 (2018), <https://www.bchumanservices.net/library/2018/02/RSAC-Issue-Brief-6-Marijuana-Use-and-Parenting-FINAL-2.2.18.pdf> (noting cannabis was fully legalized in Massachusetts at the time of this issue brief).

213. Ariel Sternberg, Melanie L. Hill, Hye Won Suk, Madeline Meier & Laurie Chassin, *Exploring Cannabis-Specific Parenting as a Mechanism of the Intergenerational Transmission of Cannabis Use and*

compiled “lower-risk cannabis use guidelines” for safety in the home, including adult abstinence from synthetic cannabinoids, giving preference to nonsmoking methods, and avoiding high frequency (daily or near-daily) use.<sup>214</sup>

More broadly, states approaching or managing legalization are attempting to implement firm checks on minors’ access to cannabis, establish safety guidelines for new THC strains and products, and support research and public education tools that debunk a misperception that marijuana could ever be acceptable, legal, or safe for children and adolescents whose “brains are still developing.”<sup>215</sup> States have experienced considerable hurdles regulating the legal adult-use marijuana market while preventing children’s access. Strategies include identification checks, prohibition of individuals under age twenty-one in dispensaries, requirements for child-resistant packaging, and prohibitions on public use of cannabis. Unfamiliar cannabis products and strains pose unique challenges because people metabolize and retain THC differently than alcohol and actual levels of impairment are tough to determine. Colorado and Washington use the threshold of five nanograms or more of THC per milliliter of blood as the measure of cannabis DUI.<sup>216</sup> Some scholars also argue that the age of majority for any type of legal cannabis should be raised to age twenty-one since that is a medically understood, socially sanctioned age for legal purchase and consumption of alcohol.<sup>217</sup> Others assert that states legalizing marijuana have a duty to amend their K-12 public school drug and alcohol instructional statutes to include marijuana education.<sup>218</sup>

With the proliferation of innovative cannabis products, including deaths from vaping of both nicotine and cannabis, fears about young children ingesting marijuana are important, and necessary measures should ensure the safe usage and storage of cannabis products by adults.<sup>219</sup> Many incidents have occurred across

*Cannabis Use Disorder*, 80 J. STUD. ON ALCOHOL & DRUGS 32, 39-40 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6396513/pdf/jsad.2019.80.32.pdf>.

214. Benedikt Fischer, Cayley Russell, Pamela Sabioni, Wim van den Brink, Bernard Le Foll, Wayne Hall, Jürgen Rehm & Robin Room, *Lower-Risk Cannabis Use Guidelines: A Comprehensive Update of Evidence and Recommendations*, 107 AJPH POL’Y e1, e4 (2017), <https://crism.ca/wp-content/uploads/2018/03/LRCUG-2017.pdf>; Lauren Villa, *The Great Debate: Alcohol vs. Marijuana*, AM. ADDICTION CTNS. (May 6, 2022), <https://drugabuse.com/blog/marijuana-vs-alcohol/> (providing a general comparison of alcohol and marijuana; discusses overdose, crime rates, driving, learning and memory, and pregnancy).

215. NAT’L CONF. STATE LEGISLATURES, *Deep Dive Marijuana*, <https://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> (last visited June 11, 2022).

216. *Id.*

217. See Katharine Silbaugh, *Medical Cannabis and the Age of Majority*, 101 B.U. L. REV. 1155, 1170-71 (2021), [https://scholarship.law.bu.edu/faculty\\_scholarship/1167/](https://scholarship.law.bu.edu/faculty_scholarship/1167/). The article considers “the intersection of the medical cannabis market, recreational cannabis market, and underlying status law regulating late adolescents aged 18 to 21.” *Id.* at 1155. It illuminates a lacuna wherein “an 18-year-old can access medical cannabis, but not recreational cannabis or alcohol, in all states that have allowed commercial cannabis,” and “raises the need to monitor the profit motive of the legal cannabis industry as it relates to these late adolescents.” *Id.* at 1157.

218. Amanda Harmon Cooley, *The Impact of Marijuana Legalization on Youth & The Need For State Legislation on Marijuana-Specific Instruction in K-12 Schools*, 44 PEPP. L. REV. 71, 82 (2016), <https://digitalcommons.pepperdine.edu/plr/vol44/iss1/3/>.

219. Alex Halperin, *Legal weed faces its first crisis as vaping deaths spark health scare*, GUARDIAN (Sept. 30 2019), <https://www.theguardian.com/society/2019/sep/29/legal-weed-cannabis-vaping-deaths>.

the United States, yet—perhaps unsurprisingly—caregivers of color appear to exclusively face criminal sanctions and family separation, while non-Hispanic whites are portrayed sympathetically, and even praised as advocates for cannabis safety. Likewise, most narratives focus on a mother’s missteps rather than those of a male (or nonbinary) caregiver. Notably, however, in several cases, children who ingested edible cannabis did not require medical treatment.<sup>220</sup>

In Maine, where marijuana is fully legalized, data shows that accidental ingestion and “overdoses” of marijuana products are on the rise, with increased calls to the regional Poison Center, and the sharpest rise among cases of children and teens age nineteen or younger, most of whom ingested marijuana edibles such as “gummy candies, brownies and soda” which “can look and taste like their drug-free counterparts while delivering mega doses of THC.”<sup>221</sup> Victoria Frankl, a registered nurse staffing the Maine poison control hotline, describes “pretty

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220. See Bill Bird, *Teens charged in pot-laced gummy bear incident at Naperville North*, CHI. TRIBUNE (Feb. 10, 2017), <https://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-naperville-more-gummy-arrests-st-0212-20170210-story.html>; Meghan Holohan, *Florida mom pushes for safer packaging of marijuana edibles*, TODAY (June 9, 2021), <https://www.today.com/health/florida-mom-urges-safer-packaging-marijuana-edibles-t221213>; Doreen Gentzler, *Parent Shares Warning After 2-Year-Old Consumes Edible Marijuana Candy*, NBC WASH. (Aug. 9, 2021), <https://www.nbcwashington.com/news/health/parent-shares-warning-after-2-year-old-consumes-edible-marijuana-candy/2767227/>; Antonio Harvey, *Cal DOJ: Look Out for Illegal Cannabis Edibles Mimicking Popular Snacks, Candy*, SACRAMENTO OBSERVER (Nov. 4, 2021), <https://sacobserver.com/2021/11/cal-doj-look-out-for-illegal-cannabis-edibles-mimicking-popular-snacks-candy/>; Sun News Reports, *Mom charged for giving pot ‘edibles’ to child*, LAS CRUCES SUN NEWS (Jan. 30, 2018), <https://www.lcsunnews.com/story/news/crime/2018/01/30/mom-charged-giving-pot-edibles-child/1080511001/>; Lindsey Bever, *A 12-year-old gave out THC-laced gummies, police say. At least five classmates were hospitalized*, WASH. POST (Nov. 30, 2018), <https://www.washingtonpost.com/education/2018/11/30/year-old-gave-out-thc-laced-gummies-police-say-least-five-classmates-were-hospitalized/>; Doha Madani, *11 children as young as 5 treated at hospital after eating marijuana gummies at Cleveland school*, NBC NEWS (Feb. 4, 2019), <https://www.nbcnews.com/news/us-news/11-children-young-5-treated-hospital-after-eating-marijuana-gummies-n966786>; Nicole Acevedo, *Two children hospitalized after eating THC candy from a food bank*, NBC NEWS (Apr. 4, 2020), <https://www.nbcnews.com/news/us-news/two-children-hospitalized-after-eating-thc-candy-food-bank-n1176721>; Angela Stelmakowich, *Three-year-old, New Jersey boy hospitalized after ingesting weed edibles*, REGINA LEADER-POST (Dec. 30, 2020), <https://leaderpost.com/edibles/three-year-old-new-jersey-boy-hospitalized-after-ingesting-weed-edibles/wcm/e7b3e9a4-c3c8-4278-871c-af1149fa7230/amp/>; *Mother arrested on negligence charge after child allegedly eats marijuana cookie*, KRGV.COM (Mar. 4, 2021), <https://www.krgv.com/news/mother-arrested-on-negligence-charge-after-child-allegedly-eats-marijuana-cookie-primera-police-chief-says/>; Melissa Russo, *NYC Area Pediatricians See Sharp Rise in Kids Ingesting Marijuana Edibles*, NBC N.Y. (July 27, 2021), <https://www.nbcnewyork.com/investigations/i-team-pediatricians-see-sharp-rise-in-kids-ingesting-marijuana-edibles-at-toxic-levels/3175893>; Chris Anderson, *Mother arrested after Sandusky police say her child became sick from eating marijuana edibles*, CLEVELAND 19 NEWS (Aug. 2, 2021), <https://www.cleveland19.com/2021/08/02/mother-arrested-after-sandusky-police-say-her-child-became-sick-eating-marijuana-edibles/>; Rohan Parakkad, *Mother Seen On Video Smoking Weed With 4 Minor Children*, L.A. TIMES (Aug. 6, 2021), <https://www.latintimes.com/mother-seen-video-smoking-weed-4-minor-children-480355>; Christopher Walker, *Couple arrested after child ingests THC edible*, TIMES REC. NEWS (Sept. 24, 2021), <https://www.timesrecordnews.com/story/news/local/2021/09/24/couple-arrested-after-child-ingests-thc-edible/5844033001/>.

221. Byrne, *supra* note 204 (“Typical suggested dosages range from 5 to 50 milligrams, depending on the strain of marijuana used to make the edible and the effects sought by the user. With more edible products for sale and in homes, some children have reportedly consumed dozens of times the recommended amount.”).

serious effects,” including “children having seizures” and a child requiring a “ventilator to help them breathe while the effects of [marijuana] wore off.”<sup>222</sup>

## 2. Threshold Concerns for Caregiving

Important threshold concerns regarding caregiving are often mentioned in current statutes that specifically discuss marijuana and caregiving, even though specificity and clarity remain elusive and case dispositions may still rely upon the penchant of each decision-maker. A comparison between marijuana and legal alcohol is both appropriate and instructive, while common experience using alcohol or prescription drugs provides insight.<sup>223</sup> When and if an adult’s cannabis use literally causes them to exhibit behavior that injures a child or places the child in imminent risk of actual harm, that situation can require intervention. In such a case, a clear nexus exists between the parent’s substance use and the child’s safety. Whether the case involves child dependency and state intervention or a private custody dispute, the parental fitness analysis applies.<sup>224</sup> Further, although not wholly determinative, identifying a pattern of behavior where a parent’s substance use directly causes significant harm or imminent risk of harm can be far more significant than focusing on a single, isolated incident.<sup>225</sup> Indeed, accidents involving children’s ingestion of legal cannabis edibles in privileged, white communities are typically chocked up to insufficient packaging by retailers or a caregiver’s misfortune to confront such happenstance without severe judgment by the legal system or local media.<sup>226</sup>

Distinguishing between substance use and abuse is also paramount.<sup>227</sup> Grounding inquiries in a Disability Justice framework can foster family integrity, racial, and economic justice, as well as a deeper understanding of substance use disorders. Disability Justice offers principals to guide disability rights advocacy into a future that elevates consciousness of racism and ableism while prioritizing cross-movement building.<sup>228</sup> Created and led by queer and gender non-

222. *Id.*

223. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 21-22.

224. Gelmann, *supra* note 65, at 23.

225. CHILD WELFARE INFO. GATEWAY, DEFINITION AND SCOPE OF NEGLECT 9, 17 (2022), [https://www.childwelfare.gov/pubPDFs/neglect\\_ch2.pdf](https://www.childwelfare.gov/pubPDFs/neglect_ch2.pdf) (“a persistent pattern of family functioning in which the caregiver has not sustained and/or met the basic needs of the children, which results in harm to the child.”).

226. *See supra* Part II.B.1 (Cannabis & Caregiving: Myth, Reality, and Happenstance).

227. Jason Patel & Raman Marwaha, *Cannabis Use Disorder*, STATPEARLS (July 12, 2021), <https://www.ncbi.nlm.nih.gov/books/NBK538131/> (“With the expansion of evidence-based uses, it is important to separate the abuse of marijuana from use with thorough history taking.”); Gelmann, *supra* note 65, at 21-23.

228. Charisa Smith, *From Empathy Gap to Reparations: An Analysis of Caregiving, Criminalization & Family Empowerment*, 90 FORDHAM L. REV. 2621, 2623 (2022) [hereinafter *Empathy Gap*], <https://ir.lawnet.fordham.edu/flr/vol90/iss6/9/> (discussing Disability Justice and arguing that an “empathy gap” in U.S. society and law is illuminated through the examples of The War on Drugs, the Opioid Crisis, and most recently the COVID-19 pandemic. The article asserts that the general public, policymakers, and mainstream media view similarly situated families in vastly disparate ways depending on their race, ethnicity, and socioeconomic status, and that comprehensive transformation is needed, including a robust



conforming disabled people of color, Disability Justice started as a response to a Disability Rights movement that caused “invisibilization of disabled people” who live at the intersections of “race, gender, sexuality, class, immigration status, and other identities . . . .”<sup>229</sup> The evolving Disability Justice framework confronts the limitations of a rights-based disability framework as one that often benefits those who “can achieve status, power and access,” including access to civil rights fora and protections, and is based upon principles of intersectionality, anti-capitalism, and cross-disability movement building.<sup>230</sup> Mia Mingus, one of the original organizers of Disability Justice, explains that this framework centers on justice and wholeness for all disabled people and communities.<sup>231</sup> Importantly, Disability Justice also confronts the intersection between ableism, white supremacy, and state violence against people of color, highlighting the way that racial and institutional barriers play a crucial role in disabling people of color.<sup>232</sup>

While a caregiver’s use of cannabis or their substance abuse disorder says little about their identity, let alone their caregiving ability, legal protections for individuals with substance use disorders still require a social perception of disability that links individuals together as a “discrete and insular” minority group according to Congress and the Americans with Disabilities Act.<sup>233</sup> Substance use disorders are diagnosable mental health conditions per the American Psychiatric

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social safety net for families experiencing hardship, resourced through abolition of carceral protection systems; restorative approaches; and true reparations for slavery). *See generally* Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J. 191 (2015) [hereinafter *Making Good*] (providing recommendations relating to the application of the Americans with Disabilities Act and the Rehabilitation Act to the family regulatory system); Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL’Y REV. 307 (2015) [hereinafter *Conundrum*] (discussing the critical issue of the termination of parental rights in parents with mental disabilities); Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 L. & PSYCH. REV. 207 (2015) (discussing how the holistic family wellbeing standard should be used to determine how termination of parental rights should be used when analyzing termination of parental rights of mentally disabled parents should be used instead of the New Jersey statutory scheme so those parents are not deprived of their due process rights); Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent’s Mental Challenges*, 5 CHARLOTTE L. REV. 377 (2014) (providing a conceptual framework for thinking about parental rights of those with mental disabilities that would benefit those of that population and create a practical approach for termination of parental rights).

229. *See* Natalie Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 683, 687 (2021); SINS INVALID, SKIN, TOOTH AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE 25-26 (2d ed. 2019).

230. Chin, *supra* note 229, at 717.

231. Harriet Tubman Collective (@HTCSolidarity), Twitter (Jan. 22, 2017, 11:14PM), <https://twitter.com/HTCSolidarity/status/823383475537461248>.

232. *Id.*

233. *Making Good*, *supra* note 228, at 195-96. *See* 42 U.S.C. § 12101(a)(7) (repealed 2008); Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 112, 114-23 (2001); Deborah S. Hasin, Charles P. O’Brien, Marc Auriacombe, Guilherme Borges, Kathleen Bucholz, Alan Budney, Wilson M. Compton, Thomas Crowley, Walter Ling, Nancy M. Petry, Marc Schuckit & Bridget F. Grant, *DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale*, 170 AM. J. PSYCHIATRY 834, 835-36 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3767415/>.

Association.<sup>234</sup> NIH researchers clarify that “cannabis abuse” is actually “an outdated medical definition” from previous versions of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”). Reflecting increased expertise, the most recent DSM–5 revised the term to “cannabis use disorder,” combining cannabis *abuse* and *dependence* into a “single entity capturing the behavioral disorder that can occur with chronic cannabis use,” including “nine pathological patterns classified under impaired control, social impairment, risky behavior, or physiological adaptation.”<sup>235</sup>

Crucially, a 2021 NIH publication entitled *Cannabis Use Disorder* affirms the notion that cannabis’ impacts do not require special distinction among the legal intoxicants commonly used throughout the U.S. population.<sup>236</sup> Many of the reasons why cannabis is treated differently than alcohol in caregiving analyses simply stem from differences in social acceptability and a more relatable, familiar tolerance for alcohol ingestion, “rather than scientific fact.”<sup>237</sup> States continue to move towards legalization precisely because the benefits of cannabis use by adults outweigh the drawbacks, while alcohol creates far more serious impairment on a mental and physical level.<sup>238</sup> NIH research confirms that cannabis has a “more benign nature compared to an opiate, benzodiazepine, and alcohol use,” stating that expanded use and legalization are propelled by “potential health benefits and the absence of health concerns that are not well substantiated.”<sup>239</sup> The Marijuana Policy Project further explains that, unlike alcohol, cannabis has no proven statistical linkage to death, overdose, brain damage, cancer, violent crimes, or domestic violence.<sup>240</sup>

Nevertheless, a cannabis use disorder could still pose the potential for “ill health effects and marked impairment on social and occupational functioning” in the life of a caregiver.<sup>241</sup> Similar to alcohol, clinical evaluation regarding cannabis requires an extensive patient history investigating substance use, mental health, family history for substance use and mental health disorders, medical history, medications, substance use amongst social circles (particularly in adolescents), and environmental stressors. Extremely heavy use of cannabis can increase the risk of severe intoxication or withdrawal, which may require medical attention or cause long-term complications.<sup>242</sup> For substance use disorders more generally, DSM-5 utilizes eleven criteria, or symptoms, based on decades of research that explicitly resist an excessive focus on withdrawal. The symptoms

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234. See generally Hasin et al., *supra* note 233 (discussing whether to keep substance dependence and substance abuse as two separate disorders).

235. Patel & Marwaha, *supra* note 227.

236. *Id.*

237. Gelmann, *supra* note 65, at 23. See Associated Press, *supra* note 55 (illustrating how judges, officials and police are struggling with how to enforce child protection laws in health and custody dispute involving drug); Sullum, *supra* note 60.

238. Krueger, *supra* note 192. See Whiteman, *supra* note 192.

239. Patel & Marwaha, *supra* note 227.

240. Gelmann, *supra* note 65, at 23.

241. Patel & Marwaha, *supra* note 227.

242. *Id.*

break down into four categories that hold significance for caregiving—impaired control, social problems (interpersonal conflicts, neglected responsibilities), risky use (driving under the influence, overdose), and physical dependence.<sup>243</sup> Two or three symptoms indicate a mild substance use disorder; four or five symptoms indicate a moderate disorder; and six or more symptoms indicate a severe substance use disorder (addiction).<sup>244</sup> Ultimately, labeling the severity of a substance use disorder helps clinicians determine the best treatment plan and decide how intensive intervention should be.<sup>245</sup> Recovery and relapse are fraught, often misunderstood stages of a substance use disorder that currently bear the utmost significance for family court decision-making and also implicate unreasonable federal timelines for initiating termination of parental rights proceedings.<sup>246</sup>

Scholar Emily Gelman argues for a uniform approach to considering cannabis use in cases involving caregivers, analyzing numerous cases across the country that distinguish the use and misuse of cannabis as well as other legal substances. Gelman asserts that if “a parent who drinks a pint of beer with dinner every Saturday night” is not automatically unfit, then “neither is the parent who socially smokes a joint with friends.”<sup>247</sup> Gelman explains that a father’s arrests for driving under the influence established a clear pattern of his misuse (not just use) of alcohol in a particular case, which then justified less access to his child on at least a short-term basis.<sup>248</sup> Likewise, a parent taking Ativan (an addictive prescription substance with potential side effects including severe dizziness, drowsiness, weakness, and memory problems) is not considered unfit as long as the drug is taken as prescribed. However, unfitness may enter the equation when a parent is abusing a legally prescribed drug.<sup>249</sup> Gelman points to *In re Drake M.*<sup>250</sup> as a model for delineating a uniform approach to cannabis considerations regarding caregivers. The California appellate court in *In re Drake M.* emphasized a distinction between “substance use” and “substance abuse” where children were placed in the care of dependency court and deemed to be at “substantial risk of suffering and serious physical harm or illness” solely because of their father’s use of prescription marijuana.<sup>251</sup> Deriding the child protection agency and trial court, the appellate court compared medicinal marijuana to any other socially acceptable prescription and pointed to the DSM diagnostic description of substance abuse as

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243. *DSM-5 Criteria for Addiction Simplified*, ADDICTION POL’Y F. (Aug. 20, 2020), <https://www.addictionpolicy.org/post/dsm-5-facts-and-figures>; CornerstoneSoCal, *The DSM-5 Substance Use Disorder Definition And Why It Matters*, CORNERSTONE NEWS (May 4, 2020), <https://www.cornerstonesocal.com/blog/dsm-5-substance-abuse-disorder-and-why-it-matters/>.

244. *DSM-5 Criteria for Addiction Simplified*, *supra* note 243.

245. *Id.*; Hasin et al., *supra* note 233, at 834-51.

246. *See generally Conundrum*, *supra* note 228 (discussing how unacceptable timelines laid out in the federal ASFA, along with states’ failures to provide appropriate and effective substance abuse services and neglect of best practices in addiction science, cause many families to be permanently separated).

247. Gelmann, *supra* note 65, at 23.

248. *Id.* at 21-23.

249. *Id.*

250. 149 Cal. Rptr. 3d 875 (Ct. App. 2012).

251. Gelmann, *supra* note 65, at 22.

a reliable definition of problematic behaviors that could possibly raise closer scrutiny about parenting abilities or child endangerment.<sup>252</sup>

There is a fine line between understanding how a cannabis use disorder may shape a caregiver's experiences (due to underlying mental health challenges, intoxication, and influence of the drug itself, ableism, entrenched barriers, complex intersectional oppression, and general life struggles), and overstating the impact of such a disorder on an individual's ability to successfully parent. Scarce evidence demonstrates any causal link between parental substance misuse and child maltreatment.<sup>253</sup> Advocate Lynn Paltrow shrewdly points out that if drug use could actually predict who would maltreat their children, every parent would naturally be required to take a drug test.<sup>254</sup> Ironically, however, historically, the connection between cannabis use and actual harm or risk of harm to children has been exaggerated and taken out of context, primarily in regard to low-income caregivers of color.<sup>255</sup> Further, a growing body of literature reveals that in situations where both drug use and child maltreatment are present, drug use alone is not necessarily correlated with child maltreatment, but rather environmental factors including socio-economic insecurity, lack of access to health care, housing, and other factors account for much of the observed maltreatment.<sup>256</sup> Ultimately, the mere usage of marijuana by a caregiver is an unfounded basis for denying a caregiver access to their child—particularly in a legal landscape where marijuana is frequently sold and enjoyed recreationally and where it is widely deemed medication among a populace that values psychotropic medications as part of necessary treatment plans.<sup>257</sup>

Another critical threshold concern involves the need to weigh any potential harm caused by the removal of a child from their caregiver on account of marijuana, against the imminent risk of harm posed by keeping the child in the home. The New York Court of Appeals clarified the import of this consideration in *Nicholson v. Scopetta*,<sup>258</sup> a class action lawsuit making New York the first state to challenge unfair child welfare practices that punished, rather than protected, domestic violence victims and their children.<sup>259</sup> Although an in-depth discussion of marijuana use among pregnant and breastfeeding women is beyond the scope of this article, extensive research and advocacy suggests that states should emphasize support and potential treatment to pregnant women and postpartum mothers whose infants test positive for marijuana, rather than

252. *Id.* (citing *In re Drake M.*, 149 Cal. Rptr. 3d 875).

253. See *supra* Part II.B.1 (Cannabis & Caregiving: Myth, Reality, and Happenstance); MOVEMENT FOR FAMILY POWER, *supra* note 4, at 13-19.

254. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 23 n.58 (citing Paltrow's words).

255. *Id.* at 21-23.

256. *Id.* at 22-23 n.55 (citing an extensive list of research studies).

257. Gelmann, *supra* note 65, at 22.

258. 3 N.Y.3d 357 (2004).

259. *Nicholson v. Scopetta Sets Precedent Protecting Children of Battered Women From Being Taken Away From Their Mothers*, PARENT ADVOCES., [http://www.parentadvocates.org/nicecontent/dsp\\_printable.cfm?articleID=6839](http://www.parentadvocates.org/nicecontent/dsp_printable.cfm?articleID=6839) (last visited May 23, 2022).

surveilling and investigating in these situations, or their most catastrophic response—punitively severing vital family bonds near the time of a baby’s birth.<sup>260</sup>

### III. DISCUSSION

#### A. IMMEDIATE RESOLUTION OF CANNABIS LAW CONFLICTS: FEDERAL LEGALIZATION OR INITIAL DECRIMINALIZATION

Lifting the federal cannabis ban is of urgent import to protect the fundamental constitutional right to family integrity throughout this democracy. While the predominant discourse outside of certain advocacy circles ignores the monumental implications of marijuana injustice for family equality, both House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Chuck Schumer (D-NY) have at least made passing marijuana reform a major priority and the first ever federal hearings on cannabis legalization occurred in July 2022.<sup>261</sup> True marijuana justice requires Congressional action, and the stakes for families and communities in this context are comparable to those propelling same-sex marriage equality.<sup>262</sup> In addition to the pressing need for family justice on this matter, the Marijuana Policy Project raises the likewise crucial concern that “finite government resources” available in

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260. See CHILD WELFARE INFO. GATEWAY, PARENTAL SUBSTANCE USE AS CHILD ABUSE 2-3 (2020), <https://www.childwelfare.gov/pubPDFs/parentalsubstanceuse.pdf>. The article states:

The requirement to respond to the needs of substance-exposed newborns appears in the laws and policies of many States. The child abuse and neglect reporting laws in approximately 26 States and the District of Columbia specifically require health-care providers to report when they treat infants who show evidence at birth of having been exposed to drugs, alcohol, or other controlled substances. In 23 States and the District of Columbia, prenatal exposure to controlled substances is included in definitions of child abuse or neglect in civil statutes, regulations, or agency policies.

*Id.* at 2. Several other states require mandated reporters to report when they suspect pregnant women are abusing substances in order to refer them “for treatment,” while Rhode Island only investigates a pregnant woman after a report of substance use “if there is an allegation of abuse and/or neglect of the newborn or other children in the home.” *Id.*; MOVEMENT FOR FAMILY POWER, *supra* note 4, at 18-21 (citing extensive research findings that “contrary to popular opinion, science has not been able to conclusively draw a causal link between in utero illicit drug exposure and long-term developmental outcomes in infants,” and asserting “[t]here is compelling evidence that the resulting policy and practice [of oppressive interventions] is more toxic to children, parents and families than the alleged effects of drug use on pregnancy and parenting.”). The report additionally notes that while New York State law firmly disallows drug use alone, or a positive toxicology in a parent or newborn, to form the basis of a maltreatment finding “without any actual impairment to the child or a real and imminent risk of impairment to the child . . . caused by the parent’s drug misuse,” pregnant and postpartum low-income mothers of color are routinely drug tested at hospitals, without their informed consent, when no such testing is required. MOVEMENT FOR FAMILY POWER, *supra* note 4, at 67. Hospital drug tests are regularly reported as evidence of child abuse to ACS, and the agency categorizes a newborn’s positive toxicology as placing them at “high risk” of maltreatment during its investigative phase, which ensures that more intensive resources are directed into those investigations. *Id.*

261. Krane, *supra* note 1.

262. See Chemerinsky et al., *supra* note 6, at 99-100 (explaining that marijuana use plays a big role in family law matters); Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PENN. J. CONST. L. 871, 874 (2018). See generally Larkin, *supra* note 68 (arguing that cannabis policy is an issue that Congress alone needs to resolve).

the persistent COVID-19 pandemic should not “be wasted on cannabis prohibition.”<sup>263</sup> Throughout the states, medical needs are proliferating, health care facilities are overwhelmed as new strains of COVID arise, and marijuana legality implicates the labor sector and the potential for hundreds of millions of dollars in tax revenue for states.<sup>264</sup>

The most promising measure to lift the federal marijuana ban has been the long-anticipated Cannabis Administration and Opportunity Act (“CAOA”), introduced on July 21, 2022, by Senate Majority Leader Schumer, Senate Finance Committee Chairman Ron Wyden (D-OR), and Senator Cory Booker (D-NJ).<sup>265</sup> CAOA has been coined “SAFE Banking Plus” or the “cannabis omnibus” bill to indicate both its wide scope and its inclusion of provisions from other proposed bills like the SAFE Banking Act, which already passed the House five times with bipartisan support.<sup>266</sup> CAOA involves comprehensive cannabis reform, reconciling certain concerns that have previously fragmented members of the Democratic Party, including moderates’ preference for urgent banking access provisions and progressives’ insistence that any federal reform must include concrete, upfront plans to repair the communities most damaged by marijuana prohibition.<sup>267</sup> The senators’ press release states that the CAOA aims to “work towards reversing the many injustices the failed War on Drugs levied against Black, Brown, and low-income people,” promote the safe use of cannabis products, and facilitate potentially forty-five billion dollars or more in annual sales in the cannabis industry by 2025.<sup>268</sup>

Either expressly backed or enthusiastically propelled forward for revision by numerous high-profile organizations and institutions,<sup>269</sup> CAOA has already incorporated feedback from 1,800 public comments and multiple Senate committees. CAOA represents the Senate’s version of the U.S. House’s attempt

263. Rachel Ehrenfeld, *George Soros’s Marijuana Legacy and COVID-19*, AM. THINKER (Apr. 1, 2020), <https://acdemocracy.org/george-soross-marijuana-legacy-and-the-covid-19/>.

264. See *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, MPP (Apr. 5, 2022), <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/>.

265. Troutman Pepper, *Cannabis Administration and Opportunity Act Introduced in the Senate: Will It Live Up to the Hype?*, JDSUPRA (Aug. 8, 2022), <https://www.jdsupra.com/legalnews/cannabis-administration-and-opportunity-9408026/>.

266. Kyle Jaeger, *Booker Says There’s Republican Support for ‘SAFE Banking Plus’ Marijuana Compromise*, SCHEDULE 6 FOUND. (Aug. 4, 2022), <https://www.marijuanamoment.net/booker-says-theres-republican-support-for-safe-banking-plus-marijuana-compromise/>.

267. As a proposal for incremental federal marijuana reform, the support, the Secure and Fair Enforcement (“SAFE”) Banking Act focuses on permitting banks to service cannabis institutions without fear of reprisal, and was included in the House-passed National Defense Authorization Act. Despite having potential for bicameral success with existing support from nine Senate Republicans, Senator Majority Leader Schumer and other progressives including Representative Alexandria Ocasio-Cortez (D-NY) have vowed not support the SAFE Banking Act without addressing broader criminal reforms, such as those in the CAOA. See, e.g., Editorial Board, *supra* note 1 (summarizing the benefits of the SAFE Banking Act); David P. Grosso & Shahiedah Shabazz, *Summer 2022: A Brief Cannabis Legalization Update*, NAT’L L. REV. (Aug. 9, 2022), <https://www.natlawreview.com/article/summer-2022-brief-cannabis-legalization-update> (same); Krane, *supra* note 1 (discussing how progressives, such as Representative Ocasio-Cortez, do not support the SAFE Banking Act); Pepper, *supra* note 265 (same).

268. Pepper, *supra* note 265.

269. See *Marijuana Justice Coalition on First-Ever Comprehensive Marijuana Reform Bill in the Senate*, *supra* note 1 (including list of organizations within the coalition).

to federally legalize cannabis through the Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act of 2019, which passed 220-204 along party lines in April but is unlikely to pass the Senate.<sup>270</sup> Along with setting the legal age for cannabis use at twenty-one, CAO A includes multiple major provisions related to health, education infrastructure, labor, veterans, tax and operations, and banking, housing, and community development.<sup>271</sup> The bill would remove marijuana from the list of scheduled substances under the CSA, remove marijuana entirely from the purview of the Drug Enforcement Administration (to that of other agencies such as the FDA), and legislate myriad other vital provisions, including a mandate for research on marijuana use, highway safety, and public health; the establishment of programs to assist minority-owned marijuana businesses; authorization of grants for jurisdictions to consider mitigating factors when determining expungement or sealing of marijuana convictions; authorization of federal restrictions on the marketing of marijuana-related products; and distribution of loans and technical assistance for businesses under the jurisdiction of an Indian tribe.<sup>272</sup>

Prospects for CAO A’s successful passage are largely described in terms of uncertain political and electoral outcomes, including the upcoming November 2022 midterm elections, a much-needed public stance from the Biden Administration on the bill’s abundant provisions, and ongoing negotiations that might result in a compromise bill that could truly garner sixty Senate votes—perhaps in the “lame duck” session between winter 2022 and early 2023.<sup>273</sup>

Although the CAO A is by far the most sweeping proposal for federal cannabis legalization, which has also garnered the most momentum through Congressional hearings and media coverage, it is only one of several federal proposals, and many commentators assert that either a compromise bill or incremental marijuana reforms have better short term prospects. In general, scholars on marijuana federalism describe prevailing inertia on the issue, considering Congress has not changed the CSA significantly since 1996, so the more recent, high-profile bills and the overall presence of a bipartisan Congressional Cannabis Caucus prove that legislators feel immense pressure from a broad swath of constituents and civic leaders, along with economic imperatives.<sup>274</sup>

270. Editorial Board, *supra* note 1; Krane, *supra* note 1.

271. See CBT Staff, *supra* note 1; Pepper, *supra* note 265.

272. Editorial Board, *supra* note 1; Pepper, *supra* note 265.

273. See, e.g., Krane, *supra* note 1 (stating that the bill is likely to be voted on during the lame duck session); Grosso & Shabazz, *supra* note 267 (stating that cannabis regulation depends partly on the results of the midterm elections); Pepper, *supra* note 265 (discussing the uncertainty of CAO A).

274. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339-40 (2001); Young, *supra* note 93, at 792-93 (describing “gridlock” at the federal level); Smith Amundsen, LLC & Darren Grady, *Federal Cannabis Reform Gaining Momentum: New Legalization Bill Introduced By Republican Congressmen*, JD SUPRA (May 14, 2021), <https://www.jdsupra.com/legalnews/federal-cannabis-reform-gaining-7746305/>; see also Jason Lemon, *Republicans Push for Federal Legislation of Marijuana to Ensure ‘Individual Liberty’*, NEWSWEEK (May 13, 2021, 1:07 AM), <https://www.newsweek.com/republicans-push-federal-legalization-marijuana-ensure-individual-liberty-1591296> (describing the push by Republican lawmakers to legalize marijuana).

Among the other pieces of federal legislation on marijuana reform are a proposed amendment to the long-standing Congressional Spending Bill rider, which was jointly introduced by Representatives Barbara Lee (D-CA) and Dave Joyce (R-OH), co-chairs of the Congressional Cannabis Caucus. Representative Lee and Representative Joyce’s amendment applies to the current prohibition on the use of federal funds for the prosecution of activities that comply with state medical cannabis laws.<sup>275</sup> If passed, it would likewise prohibit federal spending on the prosecution of activities that comply with states’ adult-use cannabis laws as of Fiscal Year 2023. As of August 2022, the proposed amendment to the Spending Bill Rider was approved by the House Appropriations Committee and was slated to receive a House vote in mid-September 2022.<sup>276</sup> Overall, three major bills were introduced both in the House and Senate during the 116th Congress with significant bipartisan support—the SAFE Banking Act, the MORE Act, and the STATES Act—none of which have passed both chambers.<sup>277</sup>

Prospects for revamping the federal cannabis landscape are also complicated by differing stances among the executive and legislative branches. The Biden Administration has not weighed in on the more recent, detailed, nuanced proposals currently being negotiated in Congress. However, President Joseph Biden’s stance to date has been one of opposition to full federal legalization, in favor of decriminalization, freedom of states to set their own policies, medicinal legality, and rescheduling cannabis on the CSA for research purposes in light of its widespread legality throughout the states.<sup>278</sup> That said, as *Forbes Magazine* commentator Kris Krane points out, “banking and tax reform, expungement, and SBA [small business administration] loans for equity businesses all fall short of full legalization, but go beyond decriminalization,” so President Biden appears conspicuously silent on a range of critical issues.<sup>279</sup> Further, President Biden has consistently demonstrated a “willingness to change with the times, as evidenced by his political evolution on issues like same sex marriage and abortion,” so it is within the realm of possibility that he would sign a federal marijuana bill that passes both chambers of Congress, lest he veto something “universally popular

275. Grosso & Shabazz, *supra* note 267.

276. *Id.*

277. See generally Lawrence J. Trautman, Paul Seaborn, Adam Sulkowski, Donald Mayer & Robert R. Luttrell III, *Cannabis At The Crossroads: A Transdisciplinary Analysis And Policy Prescription*, 45 OKLA. CITY U. L. REV. 125 (2021) (exploring current U.S. federal statutes regarding cannabis); Theo Wayt, *Amazon Endorses GOP Bill That Would Legalize Marijuana On Federal Level*, N.Y. POST (Jan. 25, 2022, 11:20 AM), <https://nypost.com/2022/01/25/amazon-endorses-bill-legalizing-marijuana-on-federal-level/> (discussing the State Reform Act introduced by Representative Nancy Mace (R-SC)); Alicia Victoria Lozano, *‘Nothing has changed’: Frustration builds as cannabis reform stalls*, NBC NEWS (Jan. 15, 2022, 3:30 AM), <https://www.nbcnews.com/news/us-news/nothing-changed-frustration-builds-cannabis-reform-stalls-rcna11130> (discussing how two prominent marijuana reform bills failed to pass both houses); Alex Malyshev & Sarah Ganley, *Five cannabis trends to watch in 2022*, REUTERS (Jan. 13, 2022, 10:10 AM), <https://www.reuters.com/legal/transactional/five-cannabis-trends-watch-2022-2022-01-13/> (discussing federal bills that were introduced, even though they likely would not be passed).

278. Cummings, *supra* note 96; Mike DeBonis & Colby Itkowitz, *Schumer vows to undo federal marijuana laws; GOP continues to balk*, WASH. POST (Apr. 20, 2021, 5:30 PM), [https://www.washingtonpost.com/politics/congress-schumer-marijuana/2021/04/20/28bb7c4a-a1f8-11eb-a7ee-949c574a09ac\\_story.html](https://www.washingtonpost.com/politics/congress-schumer-marijuana/2021/04/20/28bb7c4a-a1f8-11eb-a7ee-949c574a09ac_story.html).

279. Krane, *supra* note 1.



among his party and base.”<sup>280</sup> Advocates, constituents, and Congress may also increase pressure on the Biden Administration to take executive and administrative action to propel marijuana reform.<sup>281</sup>

Regardless, the fact that policy perspectives of federal legislators regarding marijuana legalization cuts across traditional right-left political divides is a testament to the ubiquitousness of marijuana and the widespread concern for marijuana justice across the country.<sup>282</sup> This stereotypically “liberal” issue of drug policy reform is surprisingly popular among conservatives who champion states’ rights, while moderate Democrats (including President Biden and members of his administration) continue to oppose cannabis legalization and actually appear somewhat conservative and “tough on crime.”<sup>283</sup> Republican Congress members even introduced a federal legalization bill in May 2021 (albeit without any social equity provisions redressing the War on Drugs or explicitly mentioning racial disparities) to ensure the protection of “individual liberties” and states’ rights.<sup>284</sup> The “Common Sense Cannabis Reform for Veterans, Small Businesses, and Medical Professionals Act,” sponsored by Representatives Joyce and Don Young (R-AK), would remove cannabis from the Controlled Substances Act, provide detailed banking protections for the cannabis industry, allow military veterans access to state-legal cannabis programs, and expand the ability for cannabis research. Within one year of enactment, the GOP-proposed law would require the FDA and the Alcohol and Tobacco Tax and Trade Bureau of the Department of the Treasury to promulgate federal cannabis regulations.<sup>285</sup>

Despite stopping short of a proposal that thoroughly lifts the federal cannabis ban and would demand equal treatment of cannabis-involved caregivers within the states, Professor Jonathan Adler suggests several potential approaches to resolving cannabis law conflicts, all of which require federal legislative reform. Among Professor Adler’s proposals is a regime where the federal government treats marijuana like alcohol, retaining control over illegal interstate trafficking but enabling each state to set its own marijuana policy—not unlike the approach following alcohol prohibition. Another alternative suggested by Professor Adler involves the federal government offering states cooperative agreements or waivers

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280. *Id.*

281. *Id.* Such actions of the executive and administrative branch could include seeking new guidance memos from the Department of Justice to replace the Obama-era Cole Memo, directives to the IRS regarding licensed cannabis businesses, mass presidential pardons, commutations and expungements for those currently and previously convicted of cannabis offenses in federal court, guidance allowing for interstate commerce, or instructions to the federal Small Business Association to consider loans to social equity and “mom and pop” cannabis business owners. *Id.*

282. Jonathan H. Adler, *Marijuana, Federal Power and the States*, 65 CASE W. RES. L. REV. 505, 510, 512 (2015).

283. *Id.* at 510 (noting that during the 2016 presidential election, several potential Republican candidates voiced support for state prerogative on marijuana, including Senator Ted Cruz (R-TX), former Texas Governor Rick Perry, and former Florida Governor Jeb Bush).

284. Anna Kaplan, *Republicans Introduce Bill to Decriminalize Marijuana Amid Stalled Proposals*, FORBES (Apr. 21, 2022), <https://www.forbes.com/sites/annakaplan/2021/11/15/republicans-introduce-bill-to-decriminalize-marijuana-amid-stalled-proposals/?sh=fbcbeb66af1a>.

285. Smith Amundsen, LLC & Grady, *supra* note 274.

from the federal enforcement regime.<sup>286</sup> This paper argues that only a clear, affirmative pronouncement about the federal legality or (at the very least federal decriminalization) of cannabis can better guarantee fundamental Due Process and Equal Protection rights of caregivers and families currently at the whim of state legal systems and public agencies. Importantly, a federal ban on cannabis also deters and prevents further invaluable research on the substance by the medical and scientific communities.<sup>287</sup>

### 1. Urgent reframing of Social Equity

Reframing the concept of social equity in the public consciousness is vital, both because the family justice implications of marijuana illegality remain unrecognized and because inattention to pervasive racism and structural inequality has kept the status quo unchecked in places where legalization has already occurred. To date, social equity in the context of marijuana legalization has been only perceived as a type of endeavor to ameliorate the impact of disparate arrests and convictions, and the “downstream effects of having a criminal record” for Black, Indigenous, and People of Color (“BIPOC”) communities.<sup>288</sup> While disparate racial treatment in the criminal system is absolutely not exclusive to cannabis offenses, cannabis legalization presents one of the most feasible opportunities to roll back the devastation of the War on Drugs and mass incarceration, as described by scholar Michelle Alexander in her best-selling book *The New Jim Crow*, along with many other experts over the past two decades.<sup>289</sup>

While no scholars or advocates actively demanding social equity in cannabis legalization have appropriately situated that concept in the family law realm, several suggest more cohesive and far-reaching ways to begin redressing or repairing the harms caused to BIPOC communities. Scholar Deborah M. Ahrens argues that the “policy-making apparatus” of legalization should “redress both the failings of our prior system of drug regulation and the social and economic

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286. JONATHAN H. ADLER, MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 8 (2020). *See generally* Changdae Back, *Ending the Federal Cannabis Prohibition: Lessons Learned from the History of Alcohol Regulations, Twenty-first Amendment, and Dormant Commerce Clause Jurisprudence*, 71 CASE W. RES. L. REV. 1323 (2021) (arguing interstate measures regarding cannabis policy would better address the issue than intrastate measures); John Vigorito, *Creating Constitutional Cannabis: An Individual State’s Tenth Amendment Right to Legalize Marijuana*, 46 U. TOL. L. REV. 221 (2014) (arguing that the Tenth Amendment provides individual states the protection from federal prosecution); Herbert E. Tucker, *Back to the Future: How the Legalization of Marijuana Echoes the Prohibition Era*, 44 COLO. LAW. 87 (2015) (comparing and contrasting the alcohol prohibition of the 1920s to modern cannabis regulation).

287. *See generally* Taylor & Bailey, *supra* note 199 (discussing how the illegal status of marijuana prevents research and development of marijuana to levels required for FDA approval).

288. Beau Kilmer, Jonathan P. Caulkins, Michelle Kilborn, Michelle Priest & Kristin M. Warren, *Cannabis Legalization And Social Equity: Some Opportunities, Puzzles, And Trade-Offs*, 101 BOS. L. REV. 1003, 1005 (2021).

289. ALEXANDER, *supra* note 170, at 2, 59; NAT’L INST. OF JUST., *National Inventory of the Collateral Consequences of Conviction* (Nov. 13, 2018), <https://nij.ojp.gov/topics/articles/national-inventory-collateral-consequences-conviction>; AM. C.L. UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 1, 48, 55 (June 2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rell.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf).

disparities in current law” by embracing “retroactive legality,” defaulting to “mass expungement,” and presumptively restoring those with marijuana convictions “to the rights and civic status they would have had if their conduct had never been illegal.”<sup>290</sup> Researchers Beau Kilmer, Jonathan P. Caulkins, Michelle Kilborn, and their co-authors likewise argue for a system of addressing previous cannabis offenses.<sup>291</sup> New York State cannabis arrests have fortunately declined sharply since legalization, and as of October 2021, eleven people remained incarcerated in state prisons with a marijuana-related offense.<sup>292</sup>

Recognizing the long-term harms caused to communities and the multifaceted nature of harm repair, various city and state legislatures, and authors including Professor Jasmine Mize and Kilmer and co-authors, are proposing or implementing economic measures to benefit disproportionately affected communities (“DACs”). These endeavors range from creation of market participation opportunities to the provision of deserved, long-denied, direct reparations to descendants of African slaves. New York State has articulated the goal of giving fifty percent of its forthcoming cannabis licenses to social equity applicants and “those disproportionately impacted by the war on drugs.”<sup>293</sup> Other localities implement licensing preferences, create imperatives to diversify the cannabis workforce, and utilize cannabis tax revenues for “traditional community reinvestment” (e.g., green spaces, infrastructure, public education, general job training/workforce development) or healthcare.<sup>294</sup> Although the marijuana market is booming and growing, “marginalized groups that championed legalization struggle to compete with corporate refugees jumping on the bandwagon.”<sup>295</sup> While there are calls to use cannabis tax revenues to make direct cash payments to members of a relevant DAC as reparations, only one concrete example exists—the city of Evanston, Illinois.<sup>296</sup> Presently, Alaska, Colorado, Oregon, and Washington are developing their own unique structures to collect tax

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290. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 386 (2020), <https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss3/1/>.

291. See Kilmer et al., *supra* note 288.

292. Tiffany Cusaac-Smith, *New York Used To Arrest Thousands For Marijuana Each Year. Now? Hardly Anybody*, ADIRONDACK DAILY ENTER. (Nov. 24, 2021), <https://www.adirondackdailyenterprise.com/news/2021/11/new-york-used-to-arrest-thousands-for-marijuana-each-year-now-hardly-anybody/>.

293. *Id.*

294. Kilmer et al., *supra* note 288, at 1019. The City of Los Angeles apparently hit “stumbling blocks” with its social equity program and voted in July 2020 to massively overhaul its approach to increasing diversity in the cannabis industry. *Id.* at 1015. The state of Massachusetts is one of the few jurisdictions to collect data on its progress towards social equity through diversifying the cannabis industry. *Id.* See generally Jasmine Mize, *Reefer Reparations*, 3 WILLAMETTE SOC. JUST. & EQUITY J. 2 (2021) (explaining the cannabis industry “is increasingly inaccessible for those who experienced the greatest impacts of marijuana prohibition.”).

295. Alex Halperin, *Cannabis Capitalism: Who Is Making Money In The Marijuana Industry?*, GUARDIAN (Oct. 3, 2018), <https://www.theguardian.com/society/2018/oct/03/cannabis-industry-legalization-who-is-making-money>.

296. Kilmer et al., *supra* note 288, at 1019 (providing an inaugural example of reparations from cannabis taxation funds exists in Evanston, Illinois, where officials utilized the first ten million dollars collected to address the enduring effects of both slavery and the War on Drugs).

revenue and license and regulate marijuana cultivation facilities and retail shops.<sup>297</sup>

a. Lessons from alcohol prohibition.

Future work by this author may revisit lessons learned from the alcohol Prohibition Era and examine the utility of a legal and sociocultural comparison with marijuana federalism. While that matter is beyond the scope of the present article, certain parallels and lessons become apparent at first glance. For example, just as the criminalization of alcohol failed miserably and led all aspects of alcohol consumption, production, transport, and sale to become more dangerous, the continued criminalization of marijuana raises the likelihood of questionable product quality control and a thriving black market—for socioeconomic and political reasons, as well as behavioral reasons surrounding the innate search for recreational inebriation.<sup>298</sup>

b. Operationalizing Family Regulation System Abolition

Other work by this author provides in-depth justification for, and recommendations about, abolition of the family regulation system.<sup>299</sup> However, suffice it to say herein that utter transformation is necessary for the overall legal approach to families who face complex challenges, including poverty, housing instability, underemployment, community and state violence, ableism, caregiver substance misuse, and unmet mental health needs. Considering that a caregiver's most fundamental rights are jeopardized on a daily basis, and children risk severance from their family identity and relationship, the family regulation system, as currently conceptualized, is simply untenable. Drastically reducing, if not eliminating, mandated reporting requirements for child maltreatment is key.

297. *Status of State Taxation/Sales of Marijuana*, FED'N TAX ADMIN. (May 27, 2022), <https://www.taxadmin.org/assets/docs/Research/Rates/marijuana.pdf>; *State and Local Backgrounders: Marijuana Taxes*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/marijuana-taxes> (last visited May 30, 2022); Ulrik Boesen, *How High Are Taxes on Recreational Marijuana in Your State?*, TAX FOUND. (Mar. 31, 2021), <https://taxfoundation.org/state-recreational-marijuana-taxes-2021/>; NAT. CONF. STATE LEGISLATURES, STATE TAXATION OF CANNABIS (2021), [https://www.ncsl.org/Portals/1/Documents/fiscal/Marijuana\\_Fiscal\\_Brief\\_Jan\\_2021.pdf](https://www.ncsl.org/Portals/1/Documents/fiscal/Marijuana_Fiscal_Brief_Jan_2021.pdf).

298. Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 109 (2018). See Danielle M. Ciniello, *Don't Hate the Player, Hate the Game: Gangs and Their Operation As A Criminal Enterprise in an Alternate Illegal Economic Market*, 15 RUTGERS BUS. L. REV. 210, 211-16 (2020); Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 HARV. J.L. & PUB. POL'Y 547, 560-64 (2019).

299. See generally *Empathy Gap*, *supra* note 228 (discussing why a paradigm shift is necessary to protect the rights of marginalized families); see also generally Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (arguing in favor of abolishing the prison industrial complex); Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> (writing that abolition of police is needed rather than reform); MOVEMENT FOR FAMILY POWER, *supra* note 4 (explaining how the current practice of monitoring families leads to injustice).

Likewise, many advocates are calling for the repeal of ASFA due to its continued destruction of myriad families and communities.<sup>300</sup>

The exercise of re-envisioning family support, defaulting to a non-intervention principle on the part of the state, creating a possible system of reparations through direct payments to individuals harmed by the War on Drugs (in both its criminal legal and family law iterations) and other legacies of oppression, and divesting from one system to invest and invigorate impacted communities, is both nascent and ongoing. Short-term efforts in the direction of family regulation system abolition would include a presumption of the basic competence of caregivers who garner the attention of public systems (analogous to “innocent until proven guilty” in criminal law), eradication of the highly problematic and discriminatory “best interest of the child” standard,<sup>301</sup> and revamping of the guidelines and practices for drug testing in civil courts.

On the matter of radically reforming drug testing, experts in toxicology and drug evidence recommend serious standardization of substance use testing and monitoring protocols—especially when a fundamental liberty interest such as parental rights is at issue. Best practices would involve a “neutral evaluator” to oversee monitoring processes. Testing methods necessitate solid procedures and safeguards that can guarantee the integrity of a particular sample. Basic testing procedures can be broken down into the categories of sample collection, sample identification, chain-of-custody, who performs the tests, the tests themselves, employees’ right to retest, test analysis, reporting results, and record keeping.<sup>302</sup>

### c. Standardizing yet Maintaining Individualization in Assessments about Cannabis and Caregiving

As previously discussed, jurisdictions are in urgent need of consistent, standardized guidance for decision-makers and stakeholders—including attorneys and advocates—regarding the matter of cannabis and caregiving. Decision-makers should utilize uniform definitions and guidelines, such as the DSM-5 definition of a substance use disorder and clear articulation of the distinction between cannabis use and a disorder.<sup>303</sup> Jurisdictions should codify and require explicit ways to identify a nexus between actual harm to a child or imminent risk

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300. REPEAL ASFA, <https://www.repealasa.org/> (last visited May 30, 2022); Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can't Be Repealed, Here's How to At Least Make it Better*, IMPRINT (Feb. 9, 2021), <https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490>; Shanta Trivedi, *Adoption and Safe Families Act is The 'Crime Bill' of Child Welfare*, IMPRINT (Jan. 28, 2021), <https://imprintnews.org/adoption/adoption-safe-families-act-crime-bill-child-welfare/51283>.

301. See GUGGENHEIM, *supra* note 76, at 38-40 (describing the effect the opinion of the decisionmaker has on the application of the best interests standard); ROBERTS, *supra* note 76, at 234 (describing some of the first uses of a “best interests” like standard). See generally, e.g., *supra* notes 76, 228 (listing works by this author which explain that the “best interests” standard is vague, contextual, and perpetuates systemic harms upon disadvantaged children and families).

302. Weiss, *supra* note 165, at 538-40; UELMEN & HADDOX, *supra* note 166; ZESSE, *supra* note 166, § 2. DRUG TEST PLAN PROCEDURES, 1 GUIDE TO EMPLOYMENT LAW AND REGULATION § 1:76 (2d 2022).

303. Gelmann, *supra* note 65, at 22.

of serious danger to a child and a caregiver's behavior caused by the use of marijuana. However, experts also insist that family law controversies be decided on a case-by-case basis to ensure courts and agencies address each family with integrity and fresh eyes.<sup>304</sup>

Further, at a minimum, judges, attorneys, advocates, caseworkers, and others involved in various family law cases should undergo intensive, continuing education to equip them as long as they retain extraordinary discretion to assess the facts of a case and weigh parties' credibility. Mandatory, routine training for decision-makers and mandated reporters should address cannabis, implicit bias, racial disparities in their systems, the distinction between myth and scientific reality, cultural humility, the harms of child removal and family separation, and more restorative or transformative methods for reaching families—such as Family Group Decision-Making, economic empowerment, and diversion of families from the legal system.<sup>305</sup>

#### IV. CONCLUSION

Even on their best day, caregivers in the United States must contend with a global Pandemic, a tattered social safety net, and the stark reality that—like all other people—they are vulnerable to happenstance which could bring illness, misfortune, or mental health challenges to any family member (including themselves) at any given moment.<sup>306</sup> Yet, whether a caregiver must live in constant terror of losing their children at the hands of the state, or can instead focus on daily life, merely depends on the luck of the draw, including their jurisdiction of residence, race or ethnicity, ability status, and socioeconomic status. The present, haphazard legal landscape of cannabis laws violates fundamental constitutional rights to family integrity and reveals the most serious, unresolved federalism conflict since same-sex marriage equality was contested.<sup>307</sup> A persistent double standard exists, and white, wealthier caregivers can benefit from widespread cannabis legalization in ways that bring personal healing, socio-emotional support networks, and even financial gain, while low-income caregivers of color remain subject to state surveillance and family separation regardless of marijuana's legality or even their own use of marijuana.<sup>308</sup> In addition to that double-standard, the doctrinal confusion regarding marijuana also subjects

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304. See *supra* Part II.B.1 (discussing how family law cases must be decided on an individualized basis).

305. See *Conundrum*, *supra* note 228; see also 11th Annual Symposium, COLUM. RACE & SOC. JUST. L. (July 2021) (discussing economic empowerment in the family law context).

306. See, e.g., *Empathy Gap*, *supra* note 228, at 2640-42 (drawing from Professor Martha Albertson Fineman's theory of Vulnerability and the Human Condition, and discussing it in the context of family policing disparities and drug use).

307. See Kamin, *supra* note 6.

308. *Supra* note 38 and accompanying text; MOVEMENT FOR FAMILY POWER, *supra* note 4, at 75 n.213

caregivers in private family disputes to fear and uncertainty regarding custody and access to their children.<sup>309</sup>

Although no scholars, advocates, or policymakers to date have expressly demanded social equity in cannabis legalization where family policing injustice is concerned, anything less than that type of pervasive social equity for impacted communities would be farcical at best and hypocritically cruel at worst. The federal and state-level momentum surrounding marijuana legalization and redress of harms to DACs must thoroughly envision both current reality and future transformation.<sup>310</sup> Further, a uniform approach to the consideration of cannabis use in cases involving caregivers is needed to reflect the fact that cannabis is no more likely to connote parental wrongdoing than alcohol or other prescription medications.<sup>311</sup> No notable causal link has been found between parental substance use or misuse and child maltreatment.<sup>312</sup> On the contrary, entrepreneurs and average individuals alike are extolling the virtues of “Cannamom” life and receiving necessary medical and psychotropic treatment while parenting with marijuana—simply because their identity and location afford them that privilege, which is effectively a longstanding, constitutionally protected fundamental right.

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309. *Supra* note 36 and accompanying text.

310. *Supra* note 294 and accompanying text.

311. Gelmann, *supra* note 65, at 21-23.

312. *See supra* Part II.B.1 (Cannabis & Caregiving: Myth, Reality, and Happenstance); MOVEMENT FOR FAMILY POWER, *supra* note 4, at 13-19.