

# CHILD ABUSE AND CANNABIS USE: HOW A PRIMA FACIE STANDARD MISCHARACTERIZES PARENTAL CANNABIS CONSUMPTION AS CHILD NEGLECT

*Jasmine Harris*<sup>†</sup>

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<sup>†</sup> Staff Editor, *Cardozo Law Review*. J.D. Candidate (May 2020), Benjamin N. Cardozo School of Law; B.A. The College of William and Mary, 2013. I would like to thank Mikila Thompson and Daniel Abdul-Malak for their guidance as my supervisors at the Legal Aid Society, Juvenile Rights Practice. Thank you to Professor Edward Stein, my Faculty Advisor, for his feedback and ideas. Finally, thank you to the editors of the *Cardozo Law Review* for their hard work, especially Jon Bash and Sara Sucher.

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## INTRODUCTION

A parent’s right to raise their child without state interference is a fundamental, constitutional right.<sup>1</sup> However, the state’s *parens patriae* power allows the state to occasionally intervene,<sup>2</sup> so long as the state has evidence that the parent is abusive or is unable to adequately provide for their child in a way that creates harm.<sup>3</sup> Drug use, sales, or manufacturing

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<sup>1</sup> See *Troxel v. Granville*, 530 U.S. 57, 67–68 (2000) (holding that the Due Process Clause of the Fourteenth Amendment protects a parent’s fundamental right to be the primary custodian to care for and nurture their child); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (holding that the Fourteenth Amendment protects the liberty of parents “to direct the upbringing and education of children under their control”).

<sup>2</sup> Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 59–62 (2009) (describing the *parens patriae* rationale behind state intervention to limit harm to children).

<sup>3</sup> *Troxel*, 530 U.S. at 68 (holding that so long as a parent is fit and adequately cares for their children, there is no reason for the state to inject itself into a private family or question a parent’s ability to make the best decision for their children).

are often included in state statutes under definitions of neglect,<sup>4</sup> but professionals agree that many interventions are inappropriate and ultimately unnecessary.<sup>5</sup>

Imagine a mother with joint custody of her child. A vindictive neighbor with a grudge calls child protective services claiming that they smell drugs coming from her apartment. The police arrive and find marijuana on a top shelf of the bedroom closet. A caseworker interviews her, and she admits to using cannabis for insomnia and relaxation. A fact-finding hearing and a dispositional hearing are scheduled.<sup>6</sup> Because she earns over 250% of the Federal Poverty line, she does not qualify for free representation.<sup>7</sup>

Her future is determined by the judge she appears before, rather than the applicable statute.<sup>8</sup> To one judge, her testimony of consuming cannabis qualifies as drug misuse under the Family Court Act, and is sufficient as prima facie evidence of neglect.<sup>9</sup> As she is not voluntarily and regularly enrolled in a recognized rehabilitation program, she has no defense to the prima facie evidence.<sup>10</sup>

Alternatively, she appears before a judge who interprets the Family Court Act differently. This judge takes into consideration that she does not use marijuana when her child is in her custody. On the occasional

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<sup>4</sup> CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, PARENTAL DRUG USE AS CHILD ABUSE 2, <https://www.childwelfare.gov/pubPDFs/drugexposed.pdf> [<https://perma.cc/6PKJ-X4WZ>] (last updated Apr. 2015).

<sup>5</sup> Shawndra Jones, *State Intervention in the Family: Child Protective Proceedings and Termination of Parental Rights*, 40 COLUM. J.L. & SOC. PROBS. 485, 485–90 (2007). A working group of professors, lawyers, and judges studied state intervention in child protective proceedings to create recommendations for child services. While the group disagreed on some subjects, there was an overall agreement that, “the basis upon which the state . . . intervenes is often inappropriate” and “there are too many needless removals of children from their parents.” *Id.*

<sup>6</sup> *Child Protective Proceedings (Abused or Neglected Children)*, N.Y.C. FAM. CT., [http://www.nycourts.gov/courts/nyc/family/faqs\\_abusedchildren.shtml#cp2](http://www.nycourts.gov/courts/nyc/family/faqs_abusedchildren.shtml#cp2) [<https://perma.cc/ZD4S-DGNR>].

<sup>7</sup> N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY 12 (2016), <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf> [<https://perma.cc/3462-U8AK>].

<sup>8</sup> N.Y. FAM. CT. ACT §§ 1011–1085 (McKinney 2017); *see also infra* Section I.D.3 (describing the discrepancies in court outcomes involving parental marijuana use).

<sup>9</sup> FAM. CT. ACT § 1046(a)(iii).

<sup>10</sup> *Id.*

times that she does use marijuana, when she needs help with her insomnia, her child is already asleep in another room. The judge determines that she has not harmed her child and there is no risk of harm and dismisses the case. She may have wasted time and money, and her child may have lasting trauma from being separated from her parent and her involvement with the child welfare system,<sup>11</sup> but she exits the process relatively unscathed.

Both of these outcomes are currently possible in New York State.<sup>12</sup> Ambiguity in the Family Court Act creates a discrepancy in case law when it comes to parental marijuana use.<sup>13</sup> As the *prima facie* standard creates a strong presumption<sup>14</sup> in favor of the Administration for Children's Services,<sup>15</sup> defining drug misuse as *prima facie* evidence of neglect creates an assumption that if parents have used drugs, they have neglected their child.<sup>16</sup> This strengthens judges' ability to charge for neglect without any evidence of harm to the child.<sup>17</sup>

Recent changes in cannabis laws should be considered when interpreting this statute.<sup>18</sup> Since 2012, eleven states and the District of Columbia have legalized recreational marijuana.<sup>19</sup> In New York, Governor Andrew Cuomo stated that legalizing recreational marijuana

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<sup>11</sup> See *infra* Section II.B.

<sup>12</sup> See *infra* Section I.D.3.

<sup>13</sup> See *infra* Section I.D.3 (outlining New York case law and the varying conclusions courts have made concerning the *prima facie* implications of parental marijuana use and neglect).

<sup>14</sup> See *infra* Section I.C (describing the different types of *prima facie* standards and the conclusions they imply).

<sup>15</sup> See *About ACS*, N.Y.C. ADMIN. CHILD. SERVS., <https://www1.nyc.gov/site/acs/about/about.page> [<https://perma.cc/ZD7A-F382>]. The Administration for Children's Services (ACS) is generally the petitioner in neglect cases. See *id.*

<sup>16</sup> See, e.g., *In re Keoni Daquan A.*, 91 A.D.3d 414 (N.Y. App. Div. 2012) (finding that a parent's regular consumption of marijuana was sufficient to qualify as neglect according to the *prima facie* standard, even without evidence of harm to the child).

<sup>17</sup> See *id.* (holding that the *prima facie* standard elevated the respondent's conduct to neglect, therefore the petitioner did not have to establish the children's impairment or risk of impairment). The *prima facie* language allows the court to find neglect solely because of the drug use, without evidence of its effect on the child, thereby creating an assumption of neglect.

<sup>18</sup> N.Y. FAM. CT. ACT §§ 1011–1085 (McKinney 2017).

<sup>19</sup> Joseph Ax, *New York Governor Cuomo Aims to Legalize Recreational Marijuana Use*, REUTERS (Dec. 17, 2018), <https://news.yahoo.com/york-governor-cuomo-aims-legalize-recreational-marijuana-181219945.html> [<https://perma.cc/CXG9-6ZG5>].

would be one of his top legislative priorities in 2019,<sup>20</sup> with New York City Mayor Bill de Blasio behind him.<sup>21</sup> These statements are not just empty words: a 2018 New York Department of Health report concluded that the positive effects of a regulated marijuana industry outweighed the negatives.<sup>22</sup>

New research has also widened society's understanding of cannabis's effects on the individual. The plant affects people differently depending on the strain, the manner of ingestion, and the physiology of the individual consuming the product.<sup>23</sup> This conflicts with some courts' assumptions that all marijuana use is necessarily misuse.<sup>24</sup> When it comes to marijuana's effect on parenting, researchers are unable to conclusively find that marijuana use is a direct cause of child neglect or abuse.<sup>25</sup> Instead, marijuana use may just be correlated with other factors that lead to neglect, such as poverty, mental illness, or education levels.<sup>26</sup> That there are thousands of families in which parents use marijuana—whether for medical or recreational purposes—and are not in family court systems

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<sup>20</sup> *Id.*

<sup>21</sup> Andrew Blake, *Bill de Blasio, Mayor of New York City, Backs Marijuana Legalization Following Governor's Lead*, WASH. TIMES (Dec. 21, 2018), <https://www.washingtontimes.com/news/2018/dec/21/bill-de-blasio-mayor-new-york-city-backs-marijuana> [<https://perma.cc/LBN8-SAXB>].

<sup>22</sup> N.Y. DEP'T OF HEALTH, ASSESSMENT OF THE POTENTIAL IMPACT OF REGULATED MARIJUANA IN NEW YORK STATE 5 (2018), [https://www.health.ny.gov/regulations/regulated\\_marijuana/docs/marijuana\\_legalization\\_impact\\_assessment.pdf](https://www.health.ny.gov/regulations/regulated_marijuana/docs/marijuana_legalization_impact_assessment.pdf) [<https://perma.cc/2T4M-FFX4>] (A collection of N.Y.S. agencies studied the health, criminal justice, public safety, and economic impact of legalizing marijuana on New York State).

<sup>23</sup> See *infra* Section I.B.4. The "physiology" refers to an individual's tolerance, body weight, and level of activity. Rebecca L. Hartman et al., *Controlled Cannabis Vaporizer Administration: Blood and Plasma Cannabinoids with and Without Alcohol*, 61 CLINICAL CHEMISTRY 850 (2015) (studying differences in cannabinoid blood levels with and without simultaneous alcohol ingestion).

<sup>24</sup> Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 320 (2016) (discussing how child welfare laws rely on the assumption that parents who use drugs will harm their children or be unable to care for them as a result of their drug use).

<sup>25</sup> COLO. SCH. OF PUB. HEALTH, MARIJUANA AND CHILD ABUSE AND NEGLECT 19 (2016), <http://www.ucdenver.edu/academics/colleges/PublicHealth/Academics/departments/HealthSystems/Research/Documents/MJ%20CW%20HIA%20Final%20Report%2011.3.2016.pdf> [<https://perma.cc/5WU4-3ZYG>].

<sup>26</sup> Bridget Freisthler et al., *Examining the Relationship Between Marijuana Use, Medical Marijuana Dispensaries, and Abusive and Neglectful Parenting*, 48 CHILD ABUSE & NEGLECT 170, 177 (2015).

provides support for the idea that there is a reasonable level of parental cannabis use that does not necessarily harm children.<sup>27</sup>

Moreover, the racism behind the War on Drugs is alive and well in the family court system.<sup>28</sup> Just as people of color are the overwhelming majority of those targeted by cannabis enforcement, families of color are disproportionately represented in child welfare proceedings.<sup>29</sup> Reparative justice calls for forward-thinking changes in legislation and policies that correct the wrongs of antiquated laws.<sup>30</sup> Such an attitude should be adopted in family courts as well, both in adjusting the language of the law and through expungement procedures to help repair damage done to families.

This Note will explore the intersections of cannabis in the United States and family law in the United States, and how both subjects are ripe for a change. Part I will examine the racially motivated history of cannabis prohibition in the United States and the current wave of change towards legalization across the country. It will also discuss the use of prima facie standards in the law and inquire whether this is the appropriate standard to be used for parental marijuana usage, given the inconclusive studies on marijuana's effects on users and parents. Finally, it will turn to New York's Family Court Act and its treatment of parental drug use, with an analysis of current case law in the area of marijuana use. Part II will analyze the harms from the current law, which include harm to parents and children, as well as harm to America's ideal of the law as fair and consistent. Finally, Part III will argue that parental marijuana use should not be prima facie evidence of child neglect without evidence of harm to the child. Part III will use statutes from other states to suggest several

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<sup>27</sup> *Study: Majority of Americans Who Say They Use Marijuana Are Parents*, FOX DENVER 31 NEWS (Apr. 17, 2017, 5:42 PM), <https://kdvr.com/2017/04/17/study-majority-of-americans-who-say-they-use-marijuana-are-parents> [<https://perma.cc/XY3G-NPNR>]; see also STATE OF MICH. DEP'T OF HEALTH & HUM. SERVS., CHILDREN'S PROTECTIVE SERVICES MANUAL (2018), <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/716-7.pdf> [<https://perma.cc/YC6Q-TYWF>] (beginning by clarifying that parents may use legal or illegal substances to varying degrees and still be capable of safely caring for their children).

<sup>28</sup> See *infra* Section I.B.3.

<sup>29</sup> See *infra* Section I.B.3.

<sup>30</sup> *Reparative Justice 2017*, CTR. FOR L. & JUST., <http://www.cflj.org/reparative-justice-2017> [<https://perma.cc/M7M8-7YRQ>].

potential reforms to the New York Family Court Act, as well as a proposal for an expungement provision in future New York marijuana legislation for parents who have been irreparably harmed by the current law.

## I. BACKGROUND

### A. *Parental Rights vs. State Intervention*

A parent's constitutional right to raise their child without state interference is fundamental throughout the United States.<sup>31</sup> However, this right is not without limits. If the state can prove that a parent is unfit, the government may interfere with the family or take custody of the child.<sup>32</sup> Specific definitions of parental unfitness vary throughout the states, but all function to identify when a parent or guardian has acted in a way that risks or impairs their child's physical, mental, or emotional condition.<sup>33</sup>

Some child welfare laws define neglect or abuse to include parental substance abuse.<sup>34</sup> While there is certainly a level of substance abuse that adversely affects parenting and can harm a child, some statutes rely on the presumption that parental drug use categorically makes parents unable to care for their children.<sup>35</sup> A manifestation of this presumption is seen in the New York Family Court Act,<sup>36</sup> which uses a *prima facie* standard to establish that drug misuse constitutes neglect without proof of actual harm to the child.<sup>37</sup>

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<sup>31</sup> Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173, 177 (2007).

<sup>32</sup> *Id.* ("Without a showing that a parent is unfit, the state normally has no justification to interfere with the family unit.")

<sup>33</sup> *Id.* at 178; *see, e.g.*, N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 2017).

<sup>34</sup> CHILD WELFARE INFORMATION GATEWAY, *supra* note 4 (compiling state statutes that define parental drug use as neglect and abuse). Eleven states include the use of a controlled substance that impairs a caretaker's ability in their definitions of neglect. *See, e.g.*, CAL. WELF. & INST. CODE § 300.2 (West 2012).

<sup>35</sup> Korn, *supra* note 24, at 16 (discussing how child welfare laws rely on the assumption that parents who use drugs will harm their children or be unable to care for them as a result of their drug use).

<sup>36</sup> N.Y. FAM. CT. ACT (McKinney 2017).

<sup>37</sup> *Id.* § 1046(a)(iii).

### 1. Whether Marijuana Use Constitutes Child Neglect

The antiquated idea that parental drug use causes or exacerbates a majority of child neglect cases is largely based on a report from the 1990s.<sup>38</sup> The shortcomings of this theory are revealed in the report itself. First, the reporting organization (the National Center on Addiction and Substance Abuse) recognized that most professionals questioned by the survey had only received minimal and inadequate training in substance abuse and addiction.<sup>39</sup> Second, the appendix admits that it is unclear whether substance abuse is the primary cause of neglect, or whether it is a co-occurring problem.<sup>40</sup>

In contrast to this older theory, recent research shows that parental marijuana use is not linked to increased rates of supervisory or physical neglect.<sup>41</sup> While the research recognizes that there is a correlation between substance abuse and child maltreatment, modern research suggests that concurrent problems such as depression, homelessness, or strained social relations may be the source of potential neglect, rather than the substance abuse itself.<sup>42</sup> For this reason, some experts question whether substance abuse alone is a legitimate reason for government interference.<sup>43</sup>

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<sup>38</sup> See CTR. ON ADDICTION, NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS 5 (1999), <https://www.centeronaddiction.org/addiction-research/reports/no-safe-haven-children-substance-abusing-parents> [<https://perma.cc/QBS6-3E4H>] (supporting the idea that a child is likely to be neglected or abused if their parent uses drugs).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 165 (“Moreover, studies are inconsistent in defining whether substance involvement is the primary or causal reason for a parent’s involvement with the child welfare system or whether substance involvement is an ancillary or co-occurring problem.”). This minor mention in Appendix D directly contradicts headings in the main body of the report, which state in bold, “[s]ubstance abuse and addiction are the primary causes of the dramatic rise in child abuse and neglect . . .” *Id.* at 3.

<sup>41</sup> Freisthler et al., *supra* note 26.

<sup>42</sup> Mark F. Testa & Brenda Smith, *Prevention and Drug Treatment*, 19 FUTURE CHILD. 147, 162 (2009) (“[C]o-occurring risk factors [such] as parental depression, social isolation, homelessness, or domestic violence may be more directly responsible than substance abuse itself for maltreatment.”).

<sup>43</sup> *Id.* at 148 (“[I]t is arguable whether parental substance abuse provides a legitimate basis in its own right for protective intervention and child removal . . .”).



Considering the parent's constitutional right to raise their child without interference,<sup>44</sup> it is a strong inferential leap to automatically assume neglect if a parent uses drugs. A parent can suffer from drug dependence and still be able to care for their child.<sup>45</sup> Children living in poverty, or in households with four or more children, have an increased risk of neglect,<sup>46</sup> but the government does not impose a presumption of neglect upon poor parents or parents with many children.

## 2. Distinguishing Use vs. Abuse

Critical to the idea that parental marijuana leads to child neglect is the assumption that any marijuana use is necessarily misuse.<sup>47</sup> For harder drugs such as heroin or crack, whose severe and debilitating effects are widely known, any use is considered misuse because the drug "ordinarily" induces substantial intoxication.<sup>48</sup> West's *New York Family Court Practice* series suggests that this could be true of marijuana as well.<sup>49</sup>

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<sup>44</sup> Greene, *supra* note 31, at 173.

<sup>45</sup> Korn, *supra* note 24, at 321 ("Mark Hardin, former Director of Child Welfare at the American Bar Association's Center on Children and the Law . . . has stated: 'Many people in our society suffer from drug or alcohol dependence, yet remain fit to care for a child. An alcoholic or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children.'" (quoting AM. BAR ASS'N, FOSTER CARE PROJECT, NAT'L LEGAL RES. CTR. FOR CHILD ADVOCACY & PROTECTION, FOSTER CHILDREN IN THE COURTS 206 (Mark Hardin ed. 1983))).

<sup>46</sup> VALERIA I. ROMERO, PARENTAL SUBSTANCE ABUSE AND CHILD NEGLECT: A CONTROLLED TRIAL OF A DEVELOPED TREATMENT MANUAL 9 (2009), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1043&context=thesesdissertations> [<https://perma.cc/SS2L-KDYC>].

<sup>47</sup> *In re Keoni Daquan A.*, 91 A.D.3d 414 (N.Y. App. Div. 2012) (finding that a parent's regular consumption of marijuana, without evidence of the extent of the intoxication, was sufficient to qualify as neglect according to the prima facie standard).

<sup>48</sup> MERRIL SOBIE & GARY SOLOMON, NEW YORK FAMILY COURT PRACTICE § 2:20, in 10 NEW YORK PRACTICE SERIES (West 2d ed. 2020) ("Given the widely known effects of certain drugs, such as heroin and crack, the use of a drug often constitutes neglect even in the absence of evidence of its effect on the respondent or evidence of what its effect would "ordinarily" be. This could be true of marijuana as well."); *In re Carter B.*, 154 A.D.3d 1323, 1325 (N.Y. App. Div. 2017) ("Contrary to the mother's contention, petitioner was not obligated to present additional specific evidence to establish the common-sense proposition that repeated, multi-year abuse of cocaine and heroin "would ordinarily have the effect of producing in the use thereof a substantial state of stupor, unconsciousness, intoxication . . ." (quoting N.Y. FAM. CT. ACT § 1046(a)(iii))).

<sup>49</sup> SOBIE & SOLOMON, *supra* note 48 (providing a guide for practicing lawyers and law students by giving overviews of the law and how courts have ruled on certain issues).

However, not all levels of marijuana use necessarily impair a caretaker's ability to function.<sup>50</sup> Like social drinking, there is a reasonable level of marijuana use that does not create the "substantial state of stupor"<sup>51</sup> used to describe alcohol abuse which rises to a level of neglect.<sup>52</sup> Further, if admitted use is enough to find neglect,<sup>53</sup> it is unclear whether a parent can be charged with neglect if the marijuana use is not around the child. Blood tests are commonly used in family courts to test whether a parent is using drugs.<sup>54</sup> However, unlike with alcohol consumption, blood tests alone are often insufficient to determine the extent of an individual's marijuana use.<sup>55</sup> Therefore, a positive blood test alone is inconclusive for caseworkers who want to know whether a parent uses marijuana in their child's presence.<sup>56</sup> And yet, the frequently used requirement of a clean

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<sup>50</sup> See generally Emma Childs et al., *Dose-Related Effects of Delta-9-THC on Emotional Responses to Acute Psychosocial Stress*, 177 *DRUG & ALCOHOL DEPENDENCE* 136 (2017) (concluding that low doses of THC mitigated negative emotional reactions to psychosocial stressors); J.G. Ramaekers et al., *Neurocognitive Performance During Acute THC Intoxication in Heavy and Occasional Cannabis Users*, 23 *J. PSYCHOPHARMACOLOGY* 266, 270–75 (2009) (finding that perceptual motor control, dual task processing, and cognition were not affected when regular users were under the influence of THC).

<sup>51</sup> N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2017).

<sup>52</sup> Ramaekers et al., *supra* note 50.

<sup>53</sup> *In re Keoni Daquan A.*, 91 A.D.3d 414 (N.Y. App. Div. 2012) (finding neglect because the parent admitted to regular marijuana use, though the case did not specify whether the parent used marijuana when the child was in their care).

<sup>54</sup> *Drug Testing in N.Y. Divorce and Family Court Cases*, SPODEK LAW GROUP, <https://www.nyccriminalattorneys.com/drug-testing-ny-divorce-family-court-cases> [<https://perma.cc/SPZ3-ATE4>]. This website explains that a positive drug test can serve as evidence that a parent is unfit to have custody or unsupervised visits. Given the limitations of cannabis detection, *see infra* notes 113–114, a positive drug test is insufficient to determine whether a parent uses cannabis in their child's presence.

<sup>55</sup> Ben Markus & Stephanie O'Neill, *The Difficulty of Enforcing Laws Against Driving While High*, NPR (Sept. 6, 2016, 1:03 PM), <https://www.npr.org/sections/health-shots/2016/09/06/492810932/the-difficulty-of-enforcing-laws-against-driving-while-high> [<https://perma.cc/9MPX-WXCA>]. Individuals can test positive for THC up to thirteen days post-use. Priyamvada Sharma et al., *Chemistry, Metabolism, and Toxicology of Cannabis: Clinical Implications*, 7 *IRANIAN J. PSYCHIATRY* 149, 152 (2012) (studying the properties of cannabis and detection).

<sup>56</sup> Because THC can stay in a person's system for almost two weeks, it is impossible to identify (from a blood test alone) if a parent used marijuana on a particular day that the child was in their custody. Sharma et al., *supra* note 55, at 152.

blood test punishes parents who only use marijuana when their child is not in their care.<sup>57</sup>

## B. *Cannabis in America*

### 1. Racism and the History of Cannabis

A deeper understanding of the history of cannabis is necessary to understand how courts arrived at the current treatment of marijuana. The roots of cannabis in America's soil are older than the United States itself.<sup>58</sup> As far back as 1607, hemp was grown in the colonies to make durable rope and clothing.<sup>59</sup> The earliest recorded use of medical cannabis is from China in 2737 B.C.,<sup>60</sup> but it only became popular for its medicinal uses in the United States around 1850, when it was easily purchasable in pharmacies and general stores.<sup>61</sup>

Cannabis was not commonly used recreationally until the early 1900s.<sup>62</sup> Fleeing political unrest after the Mexican Revolution in 1910, Mexican immigrants brought new traditions and customs to the United States,<sup>63</sup> including their use of cannabis as a relaxant and medicine, which they called "marihuana."<sup>64</sup> When prohibition began with the Volstead Act, enacted in 1919<sup>65</sup> marijuana was positioned as an alternative and

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<sup>57</sup> This inferential leap comes from cases that have found neglect without evidence of harm to the child, solely basing their finding on the parent's "drug misuse." See, e.g., *In re Keoni Daquan A.*, 91 A.D.3d 414. This is not a claim that this has happened in New York Family Courts, only that this possibility exists due to the current law and legal precedent.

<sup>58</sup> *A Social History of America's Most Popular Drugs*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/socialhistory.html> [<https://perma.cc/S79U-KWKA>].

<sup>59</sup> MARTIN BOOTH, *CANNABIS: A HISTORY* 39–40 (2015).

<sup>60</sup> Patrick Stack & Claire Suddath, *A Brief History of Medical Marijuana*, TIME (Oct. 21, 2009), <http://content.time.com/time/health/article/0,8599,1931247,00.html> [<https://perma.cc/5QYT-CGJJ>].

<sup>61</sup> *A Social History of America's Most Popular Drugs*, *supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Alyssa Pagano, *The Racist Origins of Marijuana Prohibition*, BUS. INSIDER (Mar. 2, 2018, 10:57 AM), <https://www.businessinsider.com/racist-origins-marijuana-prohibition-legalization-2018-2> [<https://perma.cc/75TP-2ZNS>].

<sup>65</sup> Volstead Act, ch. 85, tit. II, 41 Stat. 305, 307–19 (1919).

inexpensive intoxicant, further increasing its popularity as a recreational substance rather than a medicine.<sup>66</sup>

As its use spread, marijuana also gained notoriety.<sup>67</sup> As during many periods of mass immigration, a public fear of “undesirable foreigners” grew, increasing anti-immigrant sentiments.<sup>68</sup> Despite cannabis having been in American medicine cabinets for decades, anti-drug campaigners flamed rumors about the dreaded “locoweed” from Mexico that incited a “lust for blood,” causing criminal behavior and insanity.<sup>69</sup> The racist connection between marijuana use and crime was not limited to Mexicans. With Mexican immigration spreading into states such as Texas and Louisiana,<sup>70</sup> marijuana became popular among jazz musicians in the South.<sup>71</sup> Anti-drug campaigners claimed that evil “Satanic music”—now known as jazz and swing—was created by people under the influence of marijuana.<sup>72</sup> As many jazz musicians were Black, prevalent racism further tainted the public’s perception of marijuana.<sup>73</sup>

Amidst sentiments such as, “[r]eefer makes darkies think they’re good as white men,”<sup>74</sup> public policy was quick to react to the “Marijuana

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<sup>66</sup> *A Social History of America’s Most Popular Drugs*, *supra* note 58.

<sup>67</sup> See Matt Thompson, *The Mysterious History of ‘Marijuana,’* NPR (July 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana> [<https://perma.cc/3K3B-MT9U>].

<sup>68</sup> See Annalisa Merelli, *A History of American Anti-Immigrant Bias, Starting with Benjamin Franklin’s Hatred of the Germans*, QUARTZ (Feb. 12, 2017), <https://qz.com/904933/a-history-of-american-anti-immigrant-bias-starting-with-benjamin-franklins-hatred-of-the-germans> [<https://perma.cc/RGN7-QH5D>].

<sup>69</sup> Thompson, *supra* note 67.

<sup>70</sup> Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POL’Y ALLIANCE (Oct. 8, 2014), <http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place> [<https://perma.cc/7K85-TV4U>].

<sup>71</sup> Unlike alcohol, which sedated and inebriated musicians, marijuana gave performers the energy and creativity to play shows all night. *Marijuana—The First Twelve Thousand Years*, SCHAFFER LIBR. DRUG POL’Y, <http://druglibrary.org/schaffer/hemp/history/first12000/12.htm> [<https://perma.cc/6BDU-MEG2>].

<sup>72</sup> Nick Wing, *Marijuana Prohibition Was Racist from the Start. Not Much Has Changed*, HUFFINGTON POST, [https://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist\\_n\\_4590190.html](https://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html) [<https://perma.cc/L5A9-79YK>] (last updated Jan. 25, 2014).

<sup>73</sup> *Id.*

<sup>74</sup> This quote is attributed to Harry Anslinger. Laura Smith, *How a Racist Hate-Monger Masterminded America’s War on Drugs*, TIMELINE (Feb. 28, 2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189> [<https://perma.cc/4UDA-GVAG>]. His extensive presentations to Congress culminated in the prohibition of cannabis.

Menace.”<sup>75</sup> Similar to California laws that outlawed opium as a way to control Chinese immigrants,<sup>76</sup> southern states quickly outlawed marijuana and hemp as a way to target unwanted immigrants.<sup>77</sup> In 1937, The Marihuana Tax Act criminalized the drug on a federal level.<sup>78</sup> Harry Anslinger, the man who would later serve as the Commissioner of the U.S. Treasury Bureau of Narcotics for thirty-two years,<sup>79</sup> submitted statements to Congress detailing how marijuana was mainly used by “degenerate Spanish-speaking residents” and “a very undesirable lot” (referring to Hindu immigrants).<sup>80</sup> While the Marihuana Tax Act was later ruled unconstitutional,<sup>81</sup> the Controlled Substances Act took its place in the 1970s,<sup>82</sup> categorizing cannabis as a Schedule I drug alongside heroin and ecstasy—meaning the substance has a high potential for abuse and has no recognized medical use.<sup>83</sup>

Stigma surrounding marijuana use continued and morphed through the century.<sup>84</sup> In the 1960s and 1970s, marijuana became associated with

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He is also known for saying: “There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers . . . This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.” *Id.*

<sup>75</sup> See Thompson, *supra* note 67; *A Social History of America’s Most Popular Drugs*, *supra* note 58.

<sup>76</sup> *United States v. Clary*, 846 F. Supp. 768, 775 (E.D. Mo. 1994) (comparing the history of “Yellow Peril” that led to anti-opium legislation to racially biased legislation involving crack cocaine), *rev’d*, 34 F.3d 709 (8th Cir. 1994).

<sup>77</sup> David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUND. FOR ECON. EDUC. (Apr. 11, 2017), <https://fee.org/articles/the-racist-roots-of-marijuana-prohibition> [<https://perma.cc/UW7J-85ZJ>].

<sup>78</sup> Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970).

<sup>79</sup> Michael Weinreb, *The Complicated Legacy of Harry Anslinger*, PENN STATER MAG. 32, 36 (Jan. 2018), <https://www.case.org/system/files/media/file/Penn%20Stater%20Harry%20Anslinger.pdf> [<https://perma.cc/AAL4-8B9E>].

<sup>80</sup> *The Marihuana Tax Act of 1937: Transcripts of Congressional Hearings*, SCHAFFER LIBR. DRUG POL’Y, <http://www.druglibrary.org/schaffer/hemp/taxact/t10a.htm> [<https://perma.cc/R37A-EMJA>]. Hearings included accounts about how marijuana caused violence in men of color and made them solicit sex from white women. Burnett & Reiman, *supra* note 70; *see also* Thompson, *supra* note 67.

<sup>81</sup> *Leary v. United States*, 395 U.S. 6 (1969).

<sup>82</sup> Burnett & Reiman, *supra* note 70.

<sup>83</sup> *Drug Scheduling*, U.S. DRUG ENFORCEMENT ADMIN., <https://www.dea.gov/drug-scheduling> [<https://perma.cc/2945-V688>].

<sup>84</sup> *See Marijuana Timeline*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> [<https://perma.cc/7Y8L-YYCV>].

hippies, rock music, and leftist activists.<sup>85</sup> Marijuana was growing in popularity with the white upper-middle class, but racism continued to be an undercurrent behind President Nixon's War on Drugs.<sup>86</sup> In a *Harper's Magazine* interview, Nixon's former domestic policy chief explained that the War on Drugs and criminalizing marijuana was just a legal façade for a war against "blacks and hippies," despite knowing that the harms of drugs touted on the evening news were lies.<sup>87</sup>

The inherent racism behind these drug laws can be seen in their application to this day. Despite the fact that White and Black people use marijuana at comparable rates, statistics show shocking racial disparities in how drug laws are enforced.<sup>88</sup> In 2017 in New York City, Black people were 8.1 times more likely than white people to be arrested for marijuana possession.<sup>89</sup> Hispanics were five times more likely to be arrested than white people.<sup>90</sup>

## 2. The Green Wave: Where Change Is Coming and Why

The disproportionate effect of drug laws on communities of color is one of the strongest arguments behind legalizing, or at least

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<sup>85</sup> See *War on Drugs*, HISTORY, <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/C4BT-ATF7>].

<sup>86</sup> Dan Baum, *Legalize It All: How to Win the War on Drugs*, *Harper's Mag.* (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all> [<https://perma.cc/R4VD-PTSH>].

<sup>87</sup> *Id.* ("We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.").

<sup>88</sup> AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white> [<https://perma.cc/4AFN-J86J>] ("[A] Black person is 3.73 times more likely to be arrested for marijuana possession" than a white person, even though Blacks and whites use marijuana at similar rates.").

<sup>89</sup> ERICA BOND ET AL., DATA COLLABORATIVE FOR JUSTICE AT JOHN JAY COLL. OF CRIMINAL JUSTICE, *RESEARCH BRIEF: MARIJUANA ENFORCEMENT IN NEW YORK STATE, 1990–2017*, at 5 (2019), [http://datacollaborativeforjustice.org/wp-content/uploads/2019/02/RESEARCH\\_BRIEF\\_FINAL.pdf](http://datacollaborativeforjustice.org/wp-content/uploads/2019/02/RESEARCH_BRIEF_FINAL.pdf) [<https://perma.cc/LWV4-HAYK>].

<sup>90</sup> *Id.*

decriminalizing, marijuana.<sup>91</sup> Despite the long history of marijuana prohibition, there has been a recent shift in marijuana policy in certain states. Marijuana is currently legal for adult recreational use in eleven states and Washington D.C.;<sup>92</sup> medical marijuana is legal in thirty-three states.<sup>93</sup> Public opinion is changing too; while only 8% of U.S. adults want marijuana to remain illegal in all circumstances, around nine-in-ten Americans are in support of the legalization of marijuana for recreational or medical purposes.<sup>94</sup>

Change is coming to New York as well. In 2014, New York passed the Compassionate Care Act,<sup>95</sup> creating a regulated medical marijuana program that permitted doctors to prescribe medical marijuana for a limited number of qualifying conditions.<sup>96</sup> In July 2018, a New York State Department of Health report concluded that the positive effects from a regulated marijuana market in New York outweighed the potential negative effects.<sup>97</sup> The study identified a variety of reasons to legalize marijuana, including a reduction in opioid prescriptions and opioid deaths in places where marijuana products were available,<sup>98</sup> job creation

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<sup>91</sup> N.Y. DEP'T HEALTH, *supra* note 22, at 11–12.

<sup>92</sup> *Marijuana Legalization and Regulation*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/issues/marijuana-legalization-and-regulation> [<https://perma.cc/PSD7-ZAAK>].

<sup>93</sup> Jeremy Berke and Skye Gould, *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis Is Legal*, BUS. INSIDER (Jan. 1, 2020, 8:41 AM), <https://www.businessinsider.com/legal-marijuana-states-2018-1> [<https://perma.cc/RT2M-VKDG>].

<sup>94</sup> Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RESEARCH CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization> [<https://perma.cc/BE92-35A4>].

<sup>95</sup> N.Y. PUB. HEALTH LAW § 3360 (McKinney 2018).

<sup>96</sup> N.Y. DEP'T HEALTH, *supra* note 22.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 4. Along with the rest of the country, New York is facing an unprecedented public health crisis of opioid and heroin addiction, with the number of overdose deaths involving prescription opioids quadrupling between 2005 and 2014. OFFICE OF THE N.Y. STATE COMPTROLLER, *PRESCRIPTION OPIOID ABUSE AND HEROIN ADDICTION IN NEW YORK STATE* (2016), [https://osc.state.ny.us/press/releases/june16/heroin\\_and\\_opioids.pdf](https://osc.state.ny.us/press/releases/june16/heroin_and_opioids.pdf) [<https://perma.cc/JLB8-9EUJ>]. Medical marijuana can help with pain management and reducing opioid use, and states with such programs have a twenty-five-percent lower rate of opioid overdose mortality rates than states without medical marijuana laws. Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999–2000*, 174 JAMA INTERNAL MED. 1668 (2014) (concluding that medical cannabis laws correlate with significantly lower state-level opioid overdose mortality rates).

and tax revenue, little or no change in adolescent marijuana use after legalization, and consumer protection through quality control.<sup>99</sup>

The study also acknowledged that the prosecution of marijuana laws has disproportionately affected low-income communities of color.<sup>100</sup> As of 2017, data from the New York State Division of Criminal Justice Services reflected that 86% of people arrested for marijuana possession in the fifth degree were people of color (48% Black and 38% Hispanic).<sup>101</sup> Incarceration of family members is considered an adverse childhood experience, which can negatively affect a child's life in a variety of ways.<sup>102</sup> With the legalization of marijuana, fewer parents of color would be charged for simple marijuana use or possession, both in criminal and family court settings. This leads to the conclusion that fewer incarcerations and family disruptions would lead to lower exposure to chronic stressful events and a reduction in the harms from such adverse childhood experiences.

### 3. Racism Reflected: The Disparate Impact of Child Protective Services on Families of Color

The racism behind America's long history of cannabis prohibition is important to keep in mind when analyzing the disproportionate impact of the child welfare system on families of color.<sup>103</sup> Despite the fact that children of color are not abused at higher rates than white children,<sup>104</sup> a trip to any family court in New York City will show a shocking number

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<sup>99</sup> N.Y. DEP'T OF HEALTH, *supra* note 22, at 5, 8–9.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 12.

<sup>102</sup> See generally ROSS PARKE & K. ALISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN (2002), <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF> [<https://perma.cc/VG3E-EMMH>].

<sup>103</sup> Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 26–27 (2016).

<sup>104</sup> CTR. FOR THE STUDY OF SOC. POLICY, DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH 24 (2011), [https://repositories.lib.utexas.edu/bitstream/handle/2152/15376/casey\\_disparities\\_childwelfare.pdf?sequence=5](https://repositories.lib.utexas.edu/bitstream/handle/2152/15376/casey_disparities_childwelfare.pdf?sequence=5).



of minority families.<sup>105</sup> This disproportionate minority presence can be seen both in the juvenile justice system and in child welfare.<sup>106</sup> In New York City, as of 2010, Black/African American children made up 28.2% of the general population, but 53.8% of the foster care population.<sup>107</sup> They also compromised 38.7% of the reports of abuse or neglect to New York's registry.<sup>108</sup> White children, who made up 27% of the child population in New York City, were only 3.8% of the foster care population.<sup>109</sup> Black children were more likely to be reported to the State Central Registry for abuse or neglect than Hispanic or Caucasian children.<sup>110</sup> A study in New York found that a mother's race and a record in the child welfare system were the strongest predictors of foster care placement for maternal substance abuse.<sup>111</sup> These statistics reflect the deep racism that is pervasive in America's criminal justice system, as well as the implicit biases that continue its cycle.<sup>112</sup> These racial biases play a part in the disproportionate representation of minorities in the child welfare system.<sup>113</sup>

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<sup>105</sup> Interview with Mikila Thompson, Staff Att'y, Legal Aid Soc'y, Juvenile Rights Practice, in Brooklyn, N.Y. (July 26, 2018).

<sup>106</sup> CTR. FOR THE STUDY OF SOC. POLICY, *supra* note 104, at 49.

<sup>107</sup> See VAJEERA DORABAWILA, BUREAU OF EVALUATION & RESEARCH, N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., RACIAL AND ETHNIC DISPARITIES IN THE CHILD WELFARE SYSTEM: NEW YORK CITY COMPARED TO REST OF STATE (OUTSIDE OF NYC), 2009 COMPARED TO 2010 AND COMPARISON OF SELECTED COUNTIES (2011), <https://ocfs.ny.gov/main/recc/Exec%20Staff%20DMC%20presentation%20child%20welfare%20color%20070911.pdf> [<https://perma.cc/L9RB-X8XV>].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Hispanic children are more likely than Caucasian children to be reported to the SCR for abuse or neglect. *Id.*

<sup>111</sup> Daniel R. Neuspiel et al., *Custody of Cocaine-Exposed Newborns: Determinants of Discharge Decisions*, 83 AM. J. PUB. HEALTH 1726, 1727–28 (1993).

<sup>112</sup> See, e.g., Laura Nahmias, *De Blasio Says There's No Racial Bias in the City's Child Welfare System, but Advocates Disagree*, POLITICO (Feb. 22, 2017, 5:29 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/02/de-blasio-says-no-racial-bias-in-new-york-citys-child-welfare-system-but-advocates-disagree-109763> [<https://perma.cc/J9LA-YFUX>].

<sup>113</sup> See, e.g., *id.*

#### 4. The Physical and Mental Effects of Cannabis

Behind the statutory assumption that all parental “drug misuse” is child neglect, and all cannabis use is drug misuse,<sup>114</sup> is a fatal misunderstanding of the cannabis plant and its effects on users. New research indicates that everyone reacts to cannabis differently, and not all strains of cannabis induce the same effects.<sup>115</sup> A better understanding of the drug and its effects on parents is critical to determining whether the statute is correctly presumptive.<sup>116</sup>

The cannabis plant has a complex chemical makeup, with over 400 chemical entities and sixty cannabinoid compounds, some of which have opposing effects.<sup>117</sup> Ingesting cannabis impairs the user in a wide variety of ways, affecting cognitive function, emotion and behavior control, memory, impulsivity, and more.<sup>118</sup> Impairment of attention, memory, and motor coordination are possible side effects that could affect a parent’s ability to care for their child.<sup>119</sup>

There are many factors that can change how the user is affected by marijuana. In studies, regular users who have built up a tolerance show

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<sup>114</sup> SOBIE & SOLOMON, *supra* note 48.

<sup>115</sup> Zerrin Atakan, *Cannabis, a Complex Plant: Different Compounds and Different Effects on Individuals*, 2 THERAPEUTIC ADVANCES PSYCHOPHARMACOLOGY 241 (2012).

<sup>116</sup> SOBIE & SOLOMON, *supra* note 48, § 2:20 n.5 (describing how many courts presume that any marijuana use is necessarily misuse).

<sup>117</sup> *Cannabis indica* and *Cannabis sativa* are the two main subspecies of the plant, which contain varying amounts of the two main compounds, delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD). While THC and CBD can have similar effects in some aspects (such as an anti-inflammatory or as a muscle relaxant), they also have opposite effects in other ways (such as short-term memory problems or sedation). THC is known for its psychoactive effects which creates the “stoned” mood that cannabis is known for producing. CBD on the other hand does not have a significant effect on behavior or sensory processing, and instead has anti-anxiety and antipsychotic properties. Atakan, *supra* note 115, at 241–47.

<sup>118</sup> Rebecca D. Crean et al., *An Evidence Based Review of Acute and Long-Term Effects of Cannabis Use on Executive Cognitive Functions*, 5 J. ADDICTION MED. 1, 2 (2011). Marijuana also has negative physical effects, including decreased brain function and heart and lung problems. *Marijuana*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/marijuana> [<https://perma.cc/W5YE-NH36>] (last updated Dec. 2019).

<sup>119</sup> David Malleis, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LA VERNE L. REV. 357, 373–75 (2012). In addition to physical or mental impairments, a parent’s use of marijuana could endanger a child in other ways, including accidental access to drugs or second-hand smoke. *Id.*

less impairment on executive functions such as attentional tasks and decision-making tasks.<sup>120</sup> How marijuana is consumed—whether it is by smoking a combustible material, ingested in food or a beverage, or using a vaporizer that releases less toxic compounds and carbon monoxide—also changes the effect on the consumer.<sup>121</sup> Other factors that can affect the degree of intoxication include body weight, THC levels of a particular marijuana strain, the user’s level of activity, and simultaneous alcohol consumption.<sup>122</sup>

## 5. Cannabis Use and Parenting

Looking to a future of legalized marijuana, a team from the Colorado School of Public Health conducted a Health Impact Assessment (HIA) on child welfare procedures involving marijuana.<sup>123</sup> The report combined evidence from a variety of sources to produce policy recommendations and an informative study on the impacts of marijuana use on parents.<sup>124</sup>

Despite concerns that impaired attention and motor skills would make it difficult for parents to be alert to child cues or dangerous situations,<sup>125</sup> there was no correlation between marijuana use and physical neglect or supervisory neglect.<sup>126</sup> The study acknowledged other factors that often impact abuse and neglect, including race, education levels, income levels, depressive symptoms, impulsivity, and alcohol use.<sup>127</sup> Given that these variables were not factored into the marijuana use

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<sup>120</sup> Crean et al., *supra* note 118.

<sup>121</sup> See Lauren Cox, *Marijuana: Effects of Weed on Brain and Body*, LIVE SCIENCE (June 7, 2017), <https://www.livescience.com/24558-marijuana-effects.html> [<https://perma.cc/ZU7Q-6K9U>]. Oral ingestion is a slower and less effective form of consumption, which can mitigate the potential effects of marijuana. *Jones v. Jones*, No. NN-33551/10, 2012 WL 517188, at \*7–8 (N.Y. Fam. Ct. Jan. 26, 2012).

<sup>122</sup> *Jones*, 2012 WL 517188, at \*8; see also Hartman et al., *supra* note 23 (studying differences in cannabinoid blood levels with and without simultaneous alcohol ingestion).

<sup>123</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 25, at 4 (the report was used in the development of state policies for mandatory reporting and child welfare screening).

<sup>124</sup> *Id.* at 12 (“[An HIA] is a systematic process that combines evidence, through various methods and data, and stakeholder input to determine the potential effects of a proposed policy, plan, or project.”).

<sup>125</sup> See Malleis, *supra* note 119.

<sup>126</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 25, at 17.

<sup>127</sup> Freisthler et al., *supra* note 26.

data, it is unclear whether marijuana is the direct cause of abuse or merely correlated with abusive behavior.<sup>128</sup> Another concern with parental marijuana use is second hand smoke.<sup>129</sup> While the harms of second hand smoke from tobacco are well known,<sup>130</sup> the health consequences of second hand marijuana smoke exposure remain unclear.<sup>131</sup>

Given the lack of research on marijuana's effect on parenting, and the plethora of other factors known to affect the likelihood of child abuse and neglect, the studies cited by the HIA acknowledged the unclear nature of the causal mechanisms between marijuana use and child neglect and abuse.<sup>132</sup> They also acknowledged the varying degrees of marijuana use by parents, specifically that casual marijuana consumption does not necessarily rise to the clinical criteria for abuse or dependence.<sup>133</sup> The study recommended that in order to reduce unnecessary interventions by child protective services in families that provide adequate care, child protection reports should only be made if a parent's use of marijuana "threatens or results in harm to the health or welfare of" a child<sup>134</sup> This could include marijuana impairing a parent's ability to supervise or provide care, or if there is a reasonable suspicion of pediatric exposure or ingestion if parents do not keep marijuana in a secure place.<sup>135</sup> More importantly, parental marijuana use with no concerns to the child's welfare should not be assigned a report for assessment by child welfare

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<sup>128</sup> *Id.* The cross-sectional study discussed in the report had several limitations that could affect how the study translates to the general community. First, it only collected data from homes with landlines, excluding populations of younger parents, perhaps parents of color or lower socioeconomic status, who only have cellphones. As well, it acknowledged that parents may be hesitant to honestly answer questions about illegal drug use. Last, the study did not take into consideration parents who used marijuana medicinally, whose illness may impact their ability to adequately supervise or care for their children. *Id.*

<sup>129</sup> Karen M. Wilson et al., *Detecting Biomarkers of Secondhand Marijuana Smoke in Young Children*, 81 PEDIATRIC RESEARCH 589, 590 (2017) (finding that trace levels of THC were detected in seventy-five percent of children who had contact with marijuana users).

<sup>130</sup> *Health Risks of Secondhand Smoke*, AM. CANCER SOC'Y, <https://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/secondhand-smoke.html> [<https://perma.cc/29HK-Q4AQ>].

<sup>131</sup> Wilson et al., *supra* note 129, at 591 (finding that marijuana metabolites are detectable in young children who are exposed to secondhand marijuana smoke, but the health consequences remained unclear).

<sup>132</sup> Freisthler, et al., *supra* note 26.

<sup>133</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 25.

<sup>134</sup> *Id.* at 14, 37.

<sup>135</sup> *Id.* at 38.

Review Evaluate and Direct (RED) teams.<sup>136</sup> Such a finding from the Colorado School of Public Health supports the proposition that there is a level of parental marijuana use that does not harm a child, and therefore requires no state intervention.

C. *The Prima Facie Standard & the New York Family Court Act*

Legalese is known for its use of Latin phrases such as “pro se” and “mens rea”—their original meanings often obscured by their commonplace usage in the legal community.<sup>137</sup> One such term is “prima facie,” meaning “at first look” or “on its face.”<sup>138</sup> This seemingly harmless term, used in civil and criminal statutes, is a critical burden-shifting device that can create insurmountable hurdles for a defendant.<sup>139</sup> The phrase carries a significant weight in the presumption that, unless rebutted, the evidence presented is enough to prove a particular fact or proposition.<sup>140</sup>

Originating from an ancient Greek concept that translated to “on/at first viewing,”<sup>141</sup> “prima facie” means essentially the same thing today, used to describe something obvious at first glance.<sup>142</sup> In the law, “prima facie” has a slightly more nebulous meaning.<sup>143</sup> It can be used as an adverb,<sup>144</sup> but it is most often seen as an adjective in the phrases “prima

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<sup>136</sup> *Id.*

<sup>137</sup> *Law School Prep: 30 Legal Terms to Know Before Law School*, JD ADVISING, <https://www.jdadvising.com/legal-terms-know-law-school> [<https://perma.cc/FX4Z-PW95>].

<sup>138</sup> Gerald Hill & Kathleen Hill, *Prima Facie*, PEOPLE’S L. DICTIONARY, <https://dictionary.law.com/Default.aspx?selected=1598> [<https://perma.cc/Q39J-LHGE>].

<sup>139</sup> *Id.*; see also Charles L. Cook & Theodore H. Davis Jr., *Litigating the Meaning of “Prima Facie Evidence” Under the Lanham Act: The Fog and Art of War*, 103 TRADEMARK REP. 437, 437 (2013).

<sup>140</sup> See Cook & Davis, *supra* note 139.

<sup>141</sup> Before the term became popular in legalese, ancient Greek logicians developed a similar concept that translated to “on/at first viewing.” Georg Nils Herlitz, *The Meaning of the Term “Prima Facie,”* 55 LA. L. REV. 391, 391 (1994). This concept most likely made its way to Rome after the death of Alexander the Great in 323 B.C., when Roman philosophy developed and adopted many Greek theories. *Id.* at 391–92. The term “prima facie” subsequently appeared in Roman and Medieval philosophical and legal works, used in its literal meaning, “at first appearance.” *Id.*

<sup>142</sup> *Prima facie*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/prima-facie> [<https://perma.cc/Q6GL-MBZQ>].

<sup>143</sup> See Herlitz, *supra* note 141, at 393–94.

<sup>144</sup> *Id.* at 393.

facie evidence” or “prima facie case.”<sup>145</sup> This Note will deal primarily with “prima facie evidence,” as that is the term used in the relevant Family Court Act section.<sup>146</sup> While the two terms have similar meanings, the distinction is important, as case law shows that some judges mistakenly use the terms interchangeably.<sup>147</sup>

“Prima facie evidence” is often less demanding than a “prima facie case,” describing a piece of evidence that establishes a particular element of a case or crime.<sup>148</sup> On its own, the evidence establishes a critical fact for the plaintiff’s case, but it remains rebuttable and creates no presumption in the plaintiff’s favor.<sup>149</sup> For example, a prosecutor may present death threats from the defendant as prima facie evidence of intent to kill in a murder case, but that evidence alone does not constitute a prima facie case of murder.<sup>150</sup>

On the other hand, the term “prima facie case” has two distinct meanings.<sup>151</sup> The first is when a plaintiff presents sufficient evidence to withstand a motion for a directed verdict, meaning it is sufficient for the case to go to a jury.<sup>152</sup> The second use creates a strong presumption for the plaintiff: so long as the defendant produces no evidence in rebuttal, the plaintiff’s “prima facie case” compels a conclusion in their favor.<sup>153</sup>

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<sup>145</sup> *Prima facie*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie) [<https://perma.cc/P9AW-9H3K>].

<sup>146</sup> N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2017).

<sup>147</sup> *Tysean P. v. Richard S.*, No. 02091/13, 2013 WL 2278499, at \*3 (N.Y. Fam. Ct. May 21, 2013) (stating that “[t]he Petitioner has failed to establish a prima facie case of neglect,” despite the Family Court Act’s use of the term “prima facie evidence”).

<sup>148</sup> See Herlitz, *supra* note 141, at 393.

<sup>149</sup> See *id.* at 394.

<sup>150</sup> *Prima facie*, AM. L. & LEGAL INFO., <http://law.jrank.org/pages/9373/Prima-Facie.html> [<https://perma.cc/J5H7-5QYN>].

<sup>151</sup> *Husbands v. Pennsylvania*, 395 F. Supp. 1107, 1139 (E.D. Pa. 1975) (“[T]here are two senses in which courts use this concept. The first is in the sense of a plaintiff’s producing evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts. In the common instance of this use of the concept, it means plaintiff’s evidence is sufficient to allow his case to go to the jury. In the second sense of the concept, however, courts use ‘prima facie’ to mean not only that plaintiff’s evidence would reasonably allow the conclusion plaintiff seeks, but also that plaintiff’s evidence compels such a conclusion if the defendant produces no evidence to rebut it.”).

<sup>152</sup> *Id.*

<sup>153</sup> Herlitz, *supra* note 141, at 394.

D. *The New York Family Court Act and “Drug Misuse”*<sup>154</sup>

1. Statutory Language—Alcohol vs. Drugs vs. Marijuana

Sections 1012 and 1046 of the New York Family Court Act guide judges in cases involving parental drug use. Section 1046, which describes the rules of evidence for hearings, states:

[P]roof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence . . . shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child.<sup>155</sup>

The statute continues to explain that only if the person is voluntarily and regularly attending a recognized rehabilitative program will the drug or alcohol misuse not be considered prima facie evidence.<sup>156</sup> This section appears to treat drug and alcohol use similarly by including “a drug or drugs or alcoholic beverage” in the same phrase.<sup>157</sup> On the other hand, section 1012—which defines child neglect—distinguishes drug from alcohol use.<sup>158</sup> It defines a neglected child as:

a child . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions . . . .<sup>159</sup>

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<sup>154</sup> For the purposes of this Note, the author tried to use cases that only, or mostly, focused on parental marijuana use where the neglect was not necessarily obvious from additional factors.

<sup>155</sup> N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2017).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* § 1012(f)(i)(B).

<sup>159</sup> *Id.*

By separating drug from alcohol misuse with a semi-colon, the statute appears to suggest that the two should be treated differently.<sup>160</sup> Further, the statute includes a description of what level the alcohol misuse must rise to before it can be considered neglect, but it does not describe an equivalent description of drug misuse.<sup>161</sup> By having no such description for drug misuse, this opens the question of whether any and all drug use is automatically misuse. Whether there is a responsible level of marijuana use that does not constitute neglect remains unanswered by the statute, leaving judges to decide.

## 2. Prima Facie in the Family Court Act

Section 1046(a)(iii) of New York's Family Court Act, despite using the term "prima facie evidence," appears to evoke the stronger, second meaning of "prima facie case."<sup>162</sup> It reads,

proof that a person repeatedly misuses a drug or drugs or alcoholic beverages . . . shall be prima facie evidence that a child . . . of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program . . . .<sup>163</sup>

Therefore, unless the defendant can prove voluntary and regular enrolment in a drug or alcohol treatment program, the petitioner is entitled to a finding of neglect once it is shown that the defendant "misuses" drugs or alcohol. Unlike the general usage of "prima facie evidence," which only establishes an element of a crime, section

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<sup>160</sup> Excessive corporal punishment and "other acts of a similarly serious nature requiring the aid of the court" are also included in this subsection. *Id.* Just like drug misuse and alcohol misuse, they are also separated by a semi-colon and the word "or." *Id.* The *New York State Bar Association Journal* encourages using semi-colons to connect independent clauses. Gerald Lebovits, *Legal Writing Exercises: Part VI—Punctuation (Continued)*, N.Y. ST. B. ASS'N J., Jan. 2018, at 64, <https://nysba.org/NYSBA/Publications/Bar%20Journal/Sidebar/Lebovits-January%202018.pdf> [<https://perma.cc/6UM2-RW7A>].

<sup>161</sup> FAM. CT. ACT § 1012(f)(i)(B).

<sup>162</sup> *Id.* § 1046(a)(iii).

<sup>163</sup> *Id.*



1046(a)(iii) seems to evoke the stricter, presumptive interpretation.<sup>164</sup> Not only does this create a presumption for the petitioner in favor of neglect, but it greatly limits the defendant's rebuttal by stating that the only defense to drug or alcohol misuse is current voluntary enrollment in a rehabilitative program.<sup>165</sup> Despite this ambiguity, the Family Court Act contains no definition of "prima facie evidence."<sup>166</sup>

The different roles of "prima facie evidence" and "prima facie cases," while seemingly minor, actually make a significant difference when it comes to adjudication.<sup>167</sup> If the stricter meaning of "prima facie evidence" is adopted, the court may find that drug misuse means the child was neglected, even without evidence of harm to the child.<sup>168</sup> Once the petitioner shows that the defendant used cannabis, they are not required to prove that the child was impaired or at risk of impairment.<sup>169</sup> If the looser standard of "prima facie evidence" is adopted, it is possible that the defendant may avoid a finding of neglect, if, for example, there is no evidence of harm to the child or the cannabis use was never in the child's presence.<sup>170</sup> When a standard such as "prima facie evidence" is not properly defined, stigma and personal biases can improperly sway a judge's decision making.<sup>171</sup>

### 3. An Inconsistent Myriad of Case Law

An inspection of New York family court cases involving parental marijuana use reveals a disconcerting myriad of opinions. While many judges adopt a stricter reading of section 1046,<sup>172</sup> others are more hesitant

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<sup>164</sup> *Accord* *Husbands v. Pennsylvania*, 395 F. Supp. 1107, 1139 (E.D. PA 1975).

<sup>165</sup> Case law reflects this conclusion. See *In re Ishaq B.*, 121 A.D.3d 889 (N.Y. App. Div. 2014) (holding that the parents regular use of marijuana was sufficient for a finding of neglect because the parents were not regularly participating in a rehabilitative program).

<sup>166</sup> FAM. CT. ACT § 1046(a)(iii).

<sup>167</sup> Herlitz, *supra* note 141, at 394–95.

<sup>168</sup> See *In re Keoni Daquan A.*, 91 A.D.3d 414, 414–15 (N.Y. App. Div. 2012).

<sup>169</sup> *Id.*

<sup>170</sup> *In re Anastasia L.-D.*, 113 A.D.3d 685 (N.Y. App. Div. 2014).

<sup>171</sup> See Herlitz, *supra* note 141, at 401 (discussing the lack of uniformity); see also Emily Gelmann, *Drink a Pint Smoke a Joint*, 50 MD. B.J. 18 (2017).

<sup>172</sup> See *In re Ishaq B.*, 121 A.D.3d 889 (N.Y. App. Div. 2014); see also *In re Keoni Daquan A.*, 91 A.D.3d 414.

to apply the harsh requirements of the prima facie standard.<sup>173</sup> The stricter readings hold that any marijuana use, without evidence of regular participation in a rehabilitative program, is a prima facie case of neglect.<sup>174</sup> The court in *In re Ishaq B.* held that petitioners do not need to establish the child's impairment or a risk of impairment if the parent or guardian admitted to regular marijuana use.<sup>175</sup> The court in *In re Keoni Daquan A.* also did not require evidence of the child's impairment,<sup>176</sup> basing the holding on cases with evidence of excessive alcohol intoxication and a positive cocaine toxicology at birth.<sup>177</sup> Despite the respondent testifying that he was participating in a drug treatment program, he did not provide sufficient evidentiary documentation to rebut the statutory presumption of neglect.<sup>178</sup>

Behind these decisions is the overarching understanding that the government may intervene only if a child's life or health is seriously endangered or at risk.<sup>179</sup> And yet, these cases support that use of an illegal substance alone is sufficient for a finding of neglect, because the cases explicitly hold that petitioners do not have to establish a child's impairment or risk of impairment where there is evidence of drug misuse.<sup>180</sup> Neither case describes the level of intoxication or whether the drug use was ever in the presence of the children.<sup>181</sup> The statute's prima facie evidence standard provides a loophole to find neglect without evidence of the child's impairment.

In contrast, there are a handful of cases that do not impose a finding of neglect for marijuana use alone. These judges focused on specific aspects of the marijuana use to avoid a finding of neglect where there was

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<sup>173</sup> See *In re Anastasia L.- D.*, 113 A.D.3d 685.

<sup>174</sup> See *In re Aaliyah G.*, 51 A.D.3d 918 (N.Y. App. Div. 2008); *In re Maria Daniella R.*, 84 A.D.3d 1384 (N.Y. App. Div. 2011).

<sup>175</sup> *In re Ishaq B.*, 121 A.D.3d 889.

<sup>176</sup> *In re Keoni Daquan A.*, 91 A.D.3d 414 (finding that respondent's testimony that he regularly smokes marijuana was prima facie evidence of neglect, so petitioner did not have to establish the children's impairment; Respondent's testimony that he was in a drug treatment program was insufficient to rebut this finding as he failed to substantiate his claim with documentation).

<sup>177</sup> *Id.* (citing *In re Nasiim W.*, 88 A.D.3d 452 (N.Y. App. Div. 2011)).

<sup>178</sup> *In re Keoni Daquan A.*, 91 A.D.3d 414.

<sup>179</sup> See *supra* note 1.

<sup>180</sup> See *In re Ishaq B.*, 121 A.D.3d 889; *In re Keoni Daquan A.*, 91 A.D.3d 414.

<sup>181</sup> See *In re Ishaq B.*, 121 A.D.3d 889; *In re Keoni Daquan A.*, 91 A.D.3d 414.

no evidence of harm to the child.<sup>182</sup> For example, *In re Anastasia L.-D.* held that occasional marijuana use outside of the child's presence was insufficient for a finding of neglect without actual evidence of harm.<sup>183</sup> This case emphasized that the danger to the child must be imminent, not merely possible.<sup>184</sup> Even when a parent used marijuana while caring for the child, one court found no imminent risk because it was after the children had gone to bed.<sup>185</sup>

Other courts recognized that there are varying degrees of intoxication depending on how the marijuana is ingested. *Jones v. Jones* dealt with a parent who orally ingested a tea form of marijuana on holidays and during prayer.<sup>186</sup> The court in *Jones* held that, unless the petitioner can present evidence of serious and regular marijuana abuse that impaired the respondent's ability to function, there should not be a finding of neglect.<sup>187</sup>

Behind *Jones*'s holding is an understanding there are varying degrees of drug and alcohol use and abuse, some of which do not result in child neglect.<sup>188</sup> The opinion was clear that state intervention must be limited to imminent or serious harm to the child, not just undesirable parental behavior.<sup>189</sup> The court in *TySean P. v. Richard S.* was also unwilling to find a prima facie case of neglect for a father who admitted to using marijuana because the petitioner failed to prove that the misuse rose to the "substantial state of stupor" level outlined in section 1046(a)(iii) of the Family Court Act.<sup>190</sup> If the petitioner had to prove that the marijuana use resulted in "unconsciousness, intoxication, hallucination," etc.,<sup>191</sup> this

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<sup>182</sup> See, e.g., *In re Anastasia L.-D.*, 113 A.D.3d 685 (N.Y. App. Div. 2014); *In re Anna F.*, 56 A.D.3d 1197 (N.Y. App. Div. 2008).

<sup>183</sup> *In re Anastasia L.-D.*, 113 A.D.3d 685.

<sup>184</sup> *Id.*

<sup>185</sup> *In re Anna F.*, 56 A.D.3d 1197. The appellate court dismissed the trial court's finding of neglect, unconvinced that the possibility that the children might wake up or need to be taken to the emergency room qualified as imminent danger. *Id.*

<sup>186</sup> *Jones v. Jones*, NN-33551/10, 2012 WL 517188, at \*7-8 (N.Y. Fam. Ct. Jan. 26, 2012).

<sup>187</sup> *Id.* at \*8-9. The respondent mother had an expert in neuropsychopharmacology testify, who stated that orally ingesting marijuana is less likely to produce intoxication than smoking it, due to a slower absorption rate and proteins in the stomach. *Id.*

<sup>188</sup> See *id.* at \*10.

<sup>189</sup> *Id.* at \*8-9.

<sup>190</sup> *TySean P. v. Richard S.*, No. 02091/13, 2013 WL 2278499, at \*3 (N.Y. Fam. Ct. May 21, 2013).

<sup>191</sup> N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2019).

implies that there is a responsible level of marijuana use that the Family Court Act does not need to address.

A limited number of cases have required proof of a causal link between the parent's marijuana use and the child's impairment.<sup>192</sup> While drug misuse has the potential to manifest into harmful behavior or inadequate parenting, that does not mean that all parental marijuana use necessarily impairs a child.<sup>193</sup> *In re Rebecca W.* held that even if a child occasionally witnesses her parent smoking marijuana in their home, that does not impose a presumption of emotional impairment.<sup>194</sup> Instead, the petitioner must show proof of a causal connection between the parent's behavior and the child's impairment.<sup>195</sup> *In re Isaiah D.* also required a causal connection between imminent danger of impairment and the parent's actions, finding that marijuana in Ziploc bags in a closed glass jar in a bathroom cabinet only established a mere possibility of danger, insufficient for a finding of neglect under section 1012(f)(i)(B) of the Family Court Act.<sup>196</sup>

This wide array of decisions exhibits the inconsistencies surrounding the application of Family Court Act sections 1012 and 1046. Courts around New York are producing opposite findings when faced with the same evidence of parental marijuana use. Without a clearer standard to guide them, judges will be able to pick and choose amongst varying decisions to find precedent that supports their personal opinions of marijuana and its effects.<sup>197</sup>

## II. ANALYSIS: THE HARMS CAUSED BY THE CURRENT LAW

The consequences for families entangled in family court, both legal and personal, can be devastating and long-lasting. In its current state, the

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<sup>192</sup> See *In re Rebecca W.*, 122 A.D.2d 582 (N.Y. App. Div. 1986); see also *In re Isaiah D.*, No. NN 06350/10, 2010 WL 4227242, at \*2 (N.Y. Fam. Ct. Oct. 12, 2010).

<sup>193</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 25, at 36.

<sup>194</sup> *In re Rebecca W.*, 122 A.D.2d 582.

<sup>195</sup> *Id.*

<sup>196</sup> *In re Isaiah D.*, 2010 WL 4227242, at \*3.

<sup>197</sup> See generally Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 126–27 (2013) (discussing how a court's focus on parental conduct permits judges to use their own subjective values in determining whether there has been neglect).

Family Court Act's definition of drug misuse as prima facie evidence of neglect causes extreme hardship to families, regardless of whether there was evidence of harm to a child to begin with.<sup>198</sup> Considering the constitutional right of a parent to raise their child without state interference,<sup>199</sup> the law as it stands permits illegitimate intrusions into the private family sphere.

If a court decides that a child has been neglected based on prima facie evidence of marijuana use, a dispositional hearing will be held to determine how to balance the child's best interests with keeping a family together.<sup>200</sup> The court can order that the child be separated from the parent until the court is convinced that the child is no longer at risk.<sup>201</sup> In the case of marijuana misuse, this could require a negative test for THC.<sup>202</sup> Alternatively, the parent can be placed under the supervision of the Administration for Children's Services (ACS),<sup>203</sup> which often includes a list of terms and conditions, including cooperation with unannounced home visits by ACS and random drug screenings.<sup>204</sup>

In 2019, the New York City Council passed Resolution No. 740, that recognized these harms and called upon ACS to implement a policy where the mere possession or use of marijuana does not create an

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<sup>198</sup> *In re Ishaq B.*, 121 A.D.3d 889 (N.Y. App. Div. 2014) (holding that marijuana use qualifies as child neglect without evidence of harm to the child).

<sup>199</sup> See *Troxel v. Granville*, 530 U.S. 57, 66–69 (2000) (holding that the Due Process Clause of the Fourteenth Amendment protects a parent's fundamental right to be the primary custodian to care for and nurture their child); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (holding that the Fourteenth Amendment protects the liberty of parents "to direct the upbringing and education of children under their control").

<sup>200</sup> N.Y.C. BAR ASS'N, COMM. ON FAMILY LAW & FAMILY COURT, INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 30 (2012), <https://www2.nycbar.org/pdf/report/uploads/20072254-IntroductoryGuidetoNYCFamilyCourt.pdf> [<https://perma.cc/H26D-MXSX>].

<sup>201</sup> N.Y. FAM. CT. ACT § 633 (McKinney 2019); see also *Understanding CPS and Family Court Neglect Proceedings*, HOGANWILLIG ATT'YS L. (Aug. 14, 2012), <https://www.hoganwillig.com/blog/understanding-cps-and-family-court-neglect-proceedings> [<https://perma.cc/4YDS-2H2V>]. Children can be placed either in foster care or under the custody of a relative. See Interview with Mikila Thompson, *supra* note 105.

<sup>202</sup> Interview with Daniel Abdul-Malak, Staff Att'y, Legal Aid Soc'y, Juvenile Rights Practice, in Brooklyn, N.Y. (July 26, 2018).

<sup>203</sup> See N.Y.C. BAR ASS'N, *supra* note 200, at 31.

<sup>204</sup> Interview with Mikila Thompson, *supra* note 105.

imminent risk of harm to warrant a child's removal.<sup>205</sup> In response, ACS tweeted that their current policy already mandates staff to assess the impact of all kinds of substance abuse, including alcohol and marijuana, and further specified that use of cannabis alone is not equated with risk of harm.<sup>206</sup> However, City Council resolutions are merely an expression of the collective voice of New York City, they do not have the force of a law.<sup>207</sup> Therefore, this does not change the language of the Family Court Act, nor the history of case law that judges can continue to rely on when ruling on parental marijuana use.

#### A. *Harm to Parents*

A finding of neglect comes with its own set of legal and societal implications. First, if the court deems it necessary, it may order the child placed in foster care for up to one year.<sup>208</sup> If the parent fails to maintain contact or plan for the child's return, this may result in a termination of parental rights.<sup>209</sup> Second, the Office of Child and Family Services maintains a Statewide Central Register of Child Abuse and Maltreatment.<sup>210</sup> A report will be listed there until the youngest child named in the report turns twenty-eight years old.<sup>211</sup> Certain agencies and employers are required to check the Central Register, especially for jobs that involve teaching, caring for, or contact with children.<sup>212</sup>

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<sup>205</sup> N.Y.C. COUNCIL RES. No. 740 (July 23, 2019) (calling upon ACS to implement a policy where mere possession or use of marijuana does not create an imminent risk warranting a child's removal from their parent).

<sup>206</sup> Kyle Jaeger, *New York City Council Passes Two Marijuana Reform Resolutions*, MARIJUANA MOMENT (July 24, 2019), <https://www.marijuanamoment.net/new-york-city-council-passes-two-marijuana-reform-resolutions> [<https://perma.cc/M4J8-YDUK>].

<sup>207</sup> *Legislation*, N.Y.C. COUNCIL, <https://council.nyc.gov/legislation> [<https://perma.cc/JPV3-QU9X>].

<sup>208</sup> *Neglect and Abuse*, N.Y. ST. UNIFIED CT. SYS., [http://www.nycourts.gov/courts/7jd/courts/family/case\\_types/neglect\\_and\\_abuse.shtml](http://www.nycourts.gov/courts/7jd/courts/family/case_types/neglect_and_abuse.shtml) [<https://perma.cc/7VJV-TAUF>].

<sup>209</sup> *Id.*

<sup>210</sup> LANSNER & KUBITSCHKE, *CLEARING YOUR NAME: A STEP-BY-STEP GUIDE THROUGH THE NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE & MALTREATMENT* (2019), [http://www.lansner.com/docs/clearing\\_your\\_name.pdf](http://www.lansner.com/docs/clearing_your_name.pdf) [<https://perma.cc/4K9E-RQAS>].

<sup>211</sup> *Id.*

<sup>212</sup> *How to Challenge an Indicated Finding by CPS?*, L. & MEDIATION OFF. DARREN M. SHAPIRO, P.C.: LONG ISLAND FAMILY L. & MEDIATION BLOG (May 1, 2015),

Even if the court eventually determines that there was no child neglect, there may still be an “indicated” report maintained in the Central Register.<sup>213</sup> Such a report means that there was “some credible evidence” that abuse or neglect happened.<sup>214</sup> While this determination and report can be challenged by an administrative review, it is a long and often complicated process.<sup>215</sup> Many parents may not be aware, or may not be informed by the court, that challenging the report is possible.<sup>216</sup> Like with a finding of neglect, an indicated report could have an adverse effect on a parent’s ability to find gainful employment.<sup>217</sup> Indicated reports can also be persuasive evidence in custody or visitation disputes, as well as adoption or foster petitions.<sup>218</sup>

These harms are not just theoretical. A 2011 *New York Times* article reported on neglect proceedings concerning marijuana possession.<sup>219</sup> Despite parents having a small amount of marijuana, even amounts under the legal threshold for a misdemeanor, children were still taken away from their parents, sometimes for over a year.<sup>220</sup> Representatives for parents said that ACS brought neglect charges solely on recreational marijuana use, then searched later for ways to add to the charges.<sup>221</sup> Further, ACS’s disparate treatment of parents of color in marijuana cases reflects the inherent racism behind America’s drug laws.<sup>222</sup>

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<https://www.longislandfamilylawandmediation.com/how-to-challenge-an-indicated-finding-by-cps> [<https://perma.cc/SW8N-AEMU>].

<sup>213</sup> Chaim Steinberger, *Always, Always, Always, Challenge an “Indicated” SCR Report of Abuse or Neglect*, CHAIM STEINBERGER, P.C. (Dec. 15, 2016), <https://www.manhattan-law.com/always-always-always-challenge-indicated-scr-report-abuse-neglect> [<https://perma.cc/EDF6-F77B>].

<sup>214</sup> *Id.*

<sup>215</sup> *See id.*

<sup>216</sup> Interview with Mikila Thompson, *supra* note 105.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 18, 2011), <https://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html> [<https://perma.cc/7WH6-73H4>].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (“Over all, the rate of marijuana use among whites is twice as high as among blacks and Hispanics in the city, the data show, but defense lawyers said these cases were rarely if ever filed against white parents.”).

### B. *Harm to Children*

The harms from a finding of neglect are not limited to the parents; interactions with child protective services can be extremely traumatic for children as well.<sup>223</sup> Throughout the entire process, which can take years to resolve, the child will be interviewed by a myriad of lawyers, caseworkers, and judges.<sup>224</sup> If a law enforcement official or designated employee believes a child's health will be in imminent danger if they remain with their parent, a child may be placed in protective custody without a court order and without the consent of the parent.<sup>225</sup> These removals happen suddenly, often at night, by officials who are usually complete strangers to the child.<sup>226</sup>

Being separated from their parent, whether it be a temporary removal or placement in foster care, can have long-lasting, adverse effects on any child.<sup>227</sup> The National Association of Pediatric Nurse Practitioners has stated that traumatic life experiences in childhood can cause lifelong risk for cardiovascular and mental health diseases.<sup>228</sup> Such toxic stress can activate genes that increase disease risk, genes that can be passed to future

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<sup>223</sup> Interview with Daniel Abdul-Malak, *supra* note 202.

<sup>224</sup> *Id.*

<sup>225</sup> N.Y. STATE ASSEMBLY, COMM. ON CHILDREN & FAMILIES, A GUIDE TO NEW YORK'S CHILD PROTECTIVE SERVICES SYSTEM, subdiv. Protective Custody (2001), <https://nyassembly.gov/comm/Children/20011016/htmldoc.html#link20> [<https://perma.cc/76V3-R7N4>].

<sup>226</sup> Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAMILY CT. REV. 457, 457 (2003).

<sup>227</sup> Selena Berrier, *The Effects of Grief and Loss on Children in Foster Care*, FOSTERING PERSPECTIVES (Nov. 2001), [http://fosteringperspectives.org/fp\\_vol6no1/effects\\_griefloss\\_children.htm](http://fosteringperspectives.org/fp_vol6no1/effects_griefloss_children.htm) [<https://perma.cc/PF96-D8LT>]; Tina Lee, Letter to the Editor, *Foster Care Should Be a Last Option*, N.Y. TIMES (Dec. 2, 2018), <https://www.nytimes.com/2018/12/02/opinion/letters/foster-care-new-york-city.html>.

<sup>228</sup> Press Release, Nat'l Ass'n of Pediatric Nurse Practitioners, NAPNAP Statement Opposing the Border Separation of Children and Parents (June 11, 2018), <https://www.napnap.org/napnap-statement-opposing-border-separation-children-and-parents> [<https://perma.cc/K2GR-AMB5>]. This statement was in response to Federal policy that was separating noncitizen children from their parents at the border, which is admittedly a different situation from the childcare centers in New York where children are taken in neglect proceedings. However, any forced separation from parents, especially for young children who do not understand what is going on, has been found to have long-term, harmful effects. See Judith L. Herman, *Separation from Parents Is Harmful to Children*, PSYCHOL. TODAY (June 19, 2018), <https://www.psychologytoday.com/us/blog/decoding-trauma/201806/separation-parents-is-harmful-children> [<https://perma.cc/D9X4-D2UH>].



generations.<sup>229</sup> Unnecessary removals are also a burden on the already-strained child protective care system, resulting in run-down children's centers with overworked caretakers.<sup>230</sup> Days away from one's parents in a confusing and frightening place can have lasting effects on a child.<sup>231</sup>

With pressures from federal laws and the fear of damaging reporting from the media,<sup>232</sup> defensive social work can be a tempting, risk-averse policy.<sup>233</sup> Where definitions of maltreatment are broad and determining imminent risk is left to the responder, there is a serious risk of children being separated from their families where there is no actual maltreatment.<sup>234</sup>

### C. Harm to the Court

One concern with how the current law is being interpreted is the lack of consistency in the courts. As seen in Section I.D.3, there are glaring disparities among decisions regarding parental marijuana use: some courts hold that it is conclusive evidence of neglect, while others require actual evidence of harm to the child.<sup>235</sup> Even the *New York Family Court Practice* series is unable to give a straightforward answer to how marijuana use is treated in the courts.<sup>236</sup>

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<sup>229</sup> Press Release, Nat'l Ass'n of Pediatric Nurse Practitioners, *supra* note 228.

<sup>230</sup> Chill, *supra* note 226, at 460.

<sup>231</sup> Berrier, *supra* note 227 (describing how separation from parents can cause grief, leading to issues with separation, behavior, depression, and more).

<sup>232</sup> See, e.g., Rich Calder, *In Just 3 Months, 10 Kids Died on NYC 'Child Services' Watch*, N.Y. POST (Dec. 22, 2016, 12:36 AM), <https://nypost.com/2016/12/22/acs-on-the-hook-for-deaths-of-10-at-risk-kids-in-3-months-probe> [<https://perma.cc/2BG2-K7UT>].

<sup>233</sup> See Akka Gordon, *Taking Liberties*, CITY LIMITS (Dec. 1, 2000), <https://citylimits.org/2000/12/01/taking-liberties> [<https://perma.cc/R8EH-R3CY>] (detailing her experiences as an ex-case worker with New York City Administration for Children's Services working in the foster care system and describing the pressures on case workers); see also Interview with Mikila Thompson, *supra* note 105.

<sup>234</sup> Chill, *supra* note 226, nn.20–22 and accompanying text.

<sup>235</sup> See *supra* Section I.D.3.

<sup>236</sup> SOBIE & SOLOMON, *supra* note 48, § 2:20 (“Given the widely known effects of certain drugs, such as heroin and crack, the use of a drug often constitutes neglect even in the absence of evidence of its effect on the respondent or evidence of what its effect would ‘ordinarily’ be. This could be true of marijuana as well.”).

Consistency and the importance of precedent are a fundamental part of the American judicial system.<sup>237</sup> Consistency in adjudication is critical to the country's ideals of fairness and a trustworthy justice system.<sup>238</sup>

As described in Section I.D.1, the Family Court Act does not clearly define what type of behavior qualifies as drug "misuse."<sup>239</sup> This ambiguity expresses itself in the wide variety of decisions on parental marijuana use, creating inconsistencies in case law.<sup>240</sup> Without a definite, specified definition of "misuse," judges are likely to rely their own personal opinions about marijuana use and its effects on the consumer.<sup>241</sup>

Another important aspect of consistency is the trust it creates in the courts. When different judges come to different conclusions about the same kind of behavior, it creates mistrust in the system.<sup>242</sup> Facing a charge of child neglect can be an extremely anxiety-provoking process that can potentially last over a year.<sup>243</sup> If parents are aware that not all judges treat marijuana use the same, they may be hesitant to be honest with the lawyers and case workers. This impairs the state's ability to accurately

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<sup>237</sup> The Founders specifically chose a common law system, rather than a civil law system, so that the courts would use precedent to ensure that similar factual underpinnings would result in similar outcomes. Edward Richards, *The Importance of Precedent*, in LSU L. CTR., PUBLIC HEALTH LAW MAP—BETA 5.7, <https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html> [https://perma.cc/NV9Z-URHZ] (last updated Apr. 19, 2009).

<sup>238</sup> See Grant Lamond, *Precedent and Analogy in Legal Reasoning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.1 (2006), <https://plato.stanford.edu/entries/legal-reas-prec/#Con> [https://perma.cc/LP86-RRD4].

<sup>239</sup> See *supra* Section I.D.1.

<sup>240</sup> See *supra* Section I.D.3 (describing the different court outcomes applying "drug misuse" to cannabis use).

<sup>241</sup> See Gelmann, *supra* note 171, at 21 (discussing how without uniformity in how courts consider cannabis use, judges are free to insert their own personal biases and morals to harm parents who use cannabis).

<sup>242</sup> BRIAN OSTROM & ROGER HANSON, NAT'L CTR. FOR STATE COURTS, ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS 14–15 (2010) (describing how people trust the legal process and the courts if their expectations for a procedurally fair process are met, including a "consistent, impartial manner").

<sup>243</sup> See *An Overview of Child Protective Proceedings, Abuse and Neglect in New York*, L. & MEDIATION OFF. DARREN M. SHAPIRO, P.C. (Dec. 20, 2014), <https://www.longislandfamilylawandmediation.com/overview-child-protective-proceedings-abuse-neglect-new-york> [https://perma.cc/J48V-5K3B].

assess the family's situation and makes it less likely to provide the help and services needed.<sup>244</sup>

Further, the use of the prima facie standard in the statute detracts from the state's actual goal of protecting children from harm.<sup>245</sup> By having drug misuse qualify as prima facie evidence of neglect, with the only available rebuttal being voluntary and regular enrollment in a rehabilitation program, this allows for findings of neglect when a parent's drug use does not actually harm their child. Parents are brought to court for their private choices, not about whether their choices affect their child. This definition also rejects parents who are in drug treatment programs but not voluntarily. Individuals in rehabilitation programs should not be judged differently depending on why they originally joined.

### III. PROPOSAL

In its current state, New York Family Court Act's characterization of drug misuse as prima facie evidence of neglect allows the state to charge parents for neglect without evidence of harm to the child.<sup>246</sup> There are several parts of the statute that should be revised to address its current problems. Other state statutes on drug use and neglect can serve as a model for potential changes. In light of the racial disparities in family court,<sup>247</sup> the New York State Legislature should consider a reparative justice approach when reforming its laws.<sup>248</sup>

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<sup>244</sup> See DIANE DEPANFILIS & MARSHA K. SALUS, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 17 (2003), for a guide for child protective caseworkers, including how to earn trust, encourage honesty, and build rapport with the families they serve, because "successful intervention and treatment depend heavily on the quality of the caseworker's relationship with the children and family."

<sup>245</sup> *State Laws on Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/can> [<https://perma.cc/9CUE-5V96>] (stating that all states have laws that define states' roles in protecting vulnerable children).

<sup>246</sup> See, e.g., *In re Ishaq B.*, 121 A.D.3d 889 (N.Y. App. Div. 2014).

<sup>247</sup> See *supra* Section I.B.3 and accompanying footnotes.

<sup>248</sup> Reparative justice attempts to repair wrongs from draconian policies, one example being America's war on drugs. See generally *Race, the War on Drugs, and Reparative Justice*, COLOR OF PAIN, <http://www.colorofpain.org> [<https://perma.cc/8S3Z-TPTG>] (acknowledging the harms from the War on Drugs and creating reforms that are health-oriented instead of punitive). Several states have adopted such an approach by including expungement provisions in their new marijuana legislation, allowing people to clear their record, change the charges, or seal it from public view.

### A. *Remove the Prima Facie Language*

In light of studies that conclude that parental marijuana use does not necessarily result in child neglect,<sup>249</sup> the prima facie element of the New York statute should be removed. The prima facie standard denotes that evidence of a specific fact, on its own, is sufficient to prove a particular proposition (unless rebutted).<sup>250</sup> Evidence of marijuana use, on its own, is not sufficient to prove that a child has been neglected—therefore, the prima facie standard is inappropriately used.<sup>251</sup> Instead, the statute should clearly define a level that the marijuana misuse must rise to before a neglect petition can be filed.

Very few statutes use the prima facie standard in their child protective laws concerning drug use.<sup>252</sup> Only eleven states' definitions of neglect include use of a controlled substance that impairs ones parenting

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Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, PEW CHARITABLE TRUSTS (Nov. 20, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away> [<https://perma.cc/H93G-L9DW>]. While this Note does not have the space or policy background to develop an expungement procedure for families, New York should consider an expungement policy if new cannabis legislation is adopted. The current procedure for challenging an indicated report must be initiated within ninety days of notification by the New York State Central Register, leaving many parents with indicated reports for marijuana use without remedy. *Child Abuse and Neglect Reports in the State Central Register and How to Seal or Expunge Them*, S. BROOKLYN LEGAL SERVS. (Aug. 31, 2007), <http://affcnny.org/wp-content/uploads/ExpungeRecords.pdf> [<https://perma.cc/R3YS-LTN8>]; *Child Abuse and Maltreatment—Indicated Reports of Child Abuse and Maltreatment*, KIDS' WELL-BEING INDICATORS CLEARINGHOUSE, [https://www.nyskwic.org/get\\_data/indicator\\_narrative\\_details.cfm?numIndicatorID=26](https://www.nyskwic.org/get_data/indicator_narrative_details.cfm?numIndicatorID=26) [<https://perma.cc/VU9F-3LUH>]. New policy could expand the ninety-day limit for reports based on marijuana use, and shift the burden to ACS to prove that there was neglect and evidence of harm.

<sup>249</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 25. Studies have shown that marijuana use is not related to supervisory neglect and is negatively related to physical neglect, but it is positively related to physical abuse. Freisthler et al., *supra* note 26. However, this Note focuses on the New York definition of child neglect, not child abuse.

<sup>250</sup> Herlitz, *supra* note 141, at 398–99.

<sup>251</sup> The only viable rebuttal for parents, as described in the statute, is voluntary and regular enrolment in a recognized rehabilitation program. N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2017). This provides parents with a very limited opportunity to rebut their cannabis use.

<sup>252</sup> CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, PARENTAL DRUG USE AS CHILD ABUSE (2015), <https://www.childwelfare.gov/pubPDFs/drugexposed.pdf> [<https://perma.cc/2Y7M-NNVJ>].

ability.<sup>253</sup> For example, Alaska uses prima facie evidence in regards to intoxicant use, but in a very different way than New York.<sup>254</sup> In New York, prima facie evidence is introduced very early in proceedings, functioning as a threshold that establishes marijuana misuse as child neglect.<sup>255</sup> In Alaska, the threat of the prima facie standard comes much later.<sup>256</sup> Only when (1) a child has previously needed mandated aid because of their parent's intoxicant use, and (2) the parent continues to use the intoxicant within a year of rehabilitation, is prima facie evidence of substantial risk of harm to the child triggered.<sup>257</sup>

If the prima facie standard is going to be used at all, the Alaska model exemplifies a better treatment of the standard. By limiting prima facie to when the parent is clearly unable to care for their child due to intoxicant misuse, exhibited by past court intervention and relapse,<sup>258</sup> this ensures the correct use of prima facie—where evidence of these facts on its own constitutes neglect.<sup>259</sup> If New York were to retain the prima facie standard, it should come at a much later stage in the child protective proceeding, and only when drug use has incontrovertibly impaired the respondent's parenting abilities.

### B. Clearly Define “Misuse”

In addition to removing the prima facie language, the Family Court Act should be revised for clarity. As discussed in Section I.D.1, New York courts lack a set definition for what qualifies as “drug misuse.”<sup>260</sup> While some may infer that the behaviors described in alcohol abuse should act

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<sup>253</sup> *Id.* at 2 n.7.

<sup>254</sup> ALASKA STAT. § 47.10.011(10) (West 2018).

<sup>255</sup> FAM. CT. ACT § 1046(a)(iii).

<sup>256</sup> ALASKA STAT. § 47.10.011(10).

<sup>257</sup> *Id.* This statute has been in effect since 1998, seventeen years before Alaska legalized recreational cannabis. Crimes Against Children/Foster Care, 1998 Alaska Sess. Laws Ch. 99 (H.B. 375); see also Associated Press, *Alaska Is 3rd State to Legalize Recreational Marijuana*, N.Y. POST (Feb. 24, 2015, 9:54 AM), <https://nypost.com/2015/02/24/alaska-is-3rd-state-to-legalize-recreational-marijuana> [<https://perma.cc/Y8MA-EE6L>].

<sup>258</sup> ALASKA STAT. § 47.10.011(10).

<sup>259</sup> Herlitz, *supra* note 141, at 398–99.

<sup>260</sup> *Supra* Section I.D.1.

as the same standard for drug misuse,<sup>261</sup> this is not at all clear from the statute.<sup>262</sup> Many opinions hold that the level or effect of the drug use is unimportant; so long as there is evidence of regular marijuana use, there is *prima facie* evidence of neglect.<sup>263</sup> An obvious solution to the uncertainty surrounding “misuse” is a clear distinction between substance use and substance abuse by defining a clear level of misuse that marijuana use must rise to before qualifying as *prima facie* evidence of neglect.

When it comes to alcohol use, family courts are tolerant of some levels of intoxication, so long as children are not put at risk.<sup>264</sup> Social and recreational use is accepted, but not alcohol abuse.<sup>265</sup> If the majority of society understands that there is a responsible level of social cannabis use,<sup>266</sup> it does not follow that parents are still being charged for neglect where there is no evidence that marijuana use harmed the child.<sup>267</sup> Instead, ACS should adopt a standard that the cannabis use must rise to before being able to bring a case of child neglect.<sup>268</sup> The New York City Council passed a resolution in July 2019, calling upon ACS to implement such a policy, but its response has been unclear. Further, the standard

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<sup>261</sup> N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 2017) (listing substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality as the level to which alcohol misuse must rise before it is considered *prima facie* evidence of neglect).

<sup>262</sup> See *supra* Section I.D.1 (discussing the differences between section 1046 and section 1012 of the New York Family Court Act).

<sup>263</sup> See, e.g., *In re Keoni Daquan A.*, 91 A.D.3d 414 (N.Y. App. Div. 2012) (holding that regular smoking of marijuana, without evidence of level of intoxication, is *prima facie* evidence of neglect).

<sup>264</sup> See Gelmann, *supra* note 171, at 23.

<sup>265</sup> See *id.*

<sup>266</sup> See generally MARIST COLLEGE INSTITUTE FOR PUBLIC OPINION, YAHOO NEWS/MARIST POLL: WEED & THE AMERICAN FAMILY (2017) (implying that if a majority of Americans approve of legalizing marijuana, it is because they believe there is a socially acceptable level of marijuana use that does not cause extreme and dangerous intoxication).

<sup>267</sup> See Gelmann, *supra* note 171, at 23. With the rapidly increasing societal approval of cannabis, it only makes sense that the courts reflect this change. See MARIST COLLEGE INSTITUTE FOR PUBLIC OPINION, *supra* note 266.

<sup>268</sup> Michigan requires caseworkers to ask a detailed list of questions when they receive a complaint involving substance abuse and child maltreatment to ensure that the use rises to a significant level that impacts a child’s safety. STATE OF MICH. DEP’T OF HEALTH & HUMAN SERVS, *supra* note 27, at 7–8.

should be included in the Family Court Act's definition of drug misuse.<sup>269</sup> This will ensure that judges are aware of the standard and restrict judges from allowing their own biases to interfere when considering a parent's cannabis use.<sup>270</sup>

Alternatively, a standard could be borrowed from the medical community.<sup>271</sup> With many states legalizing recreational marijuana, and even more passing medical marijuana statutes, courts must be able to ensure predictability by distinguishing between legal and responsible levels of cannabis use and harmful substance abuse.<sup>272</sup> For example, a California appellate court held that mere usage of drugs by a parent is insufficient for a finding of neglect, so the court defined substance abuse as either a diagnosis of a current substance abuse problem by a medical professional, or a manifestation of three or more of the criteria for substance dependence in the *Diagnostic and Statistical Manual of Mental Disorders IV*.<sup>273</sup>

### C. Language and Syntax Changes

In addition to a clearer standard for drug misuse, removing the distinction between drug and alcohol use could simplify the statute. New York differentiates between alcohol and drug use simply by using the terms "alcohol" and "drugs," in addition to separating the two by a semicolon in section 1012.<sup>274</sup> Alternatively, a term such as "intoxicant" could

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<sup>269</sup> The Family Court Act's description of drug or alcohol misuse in section 1046(a)(iii) could be moved to the "Definitions" section, section 1012. See N.Y. FAM. CT. ACT §§ 1012, 1046(a)(iii) (McKinney 2017). However, the language "would ordinarily have the effect of producing" should be removed so the petitioner is required to prove that cannabis use in fact caused such a level of intoxication. N.Y. FAM. CT. ACT § 1046a(iii).

<sup>270</sup> See generally Godsoe, *supra* note 197, at 126–27 (discussing how a court's focus on parental conduct permits judges to use their own subjective values in determining whether there has been neglect).

<sup>271</sup> See generally *id.* Using a definition from the medical community ensures that a caseworker or judge's subjective ideas of what qualifies as misuse are not used.

<sup>272</sup> Gelmann, *supra* note 171, at 20.

<sup>273</sup> *In re Drake M.*, 149 Cal. Rptr. 3d 875, 885 (Ct. App. 2012) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000)).

<sup>274</sup> FAM. CT. ACT §§ 1012, 1046(a)(iii).

be used, a blanket term that encompasses legal and illegal substances.<sup>275</sup> Other states do not specifically mention intoxicants or controlled substances at all, but instead focus on the harm to the child.<sup>276</sup> Harm from parental drug or alcohol use may still fall into this category, but the focus of the statute is shifted from the parent's actions to the actual harm to the child. Using a blanket term such as "intoxicant" removes the stigmas attached to individual drugs, an important aspect to remove implicit judicial biases.<sup>277</sup>

Opponents may consider this change unnecessary and advocate for leaving the statute as is. They may point to section 1046, which does not separate drug from alcohol use when describing the "substantial state of stupor" that the parental misuse must rise to before qualifying as prima facie evidence of neglect.<sup>278</sup> Therefore, they could argue that this is a sufficient standard and description of misuse for judges to measure a parent's marijuana use. However, the language allows a judge to find neglect if they believe that such drug use would ordinarily produce substantial impairment,<sup>279</sup> even if there is no evidence of its effect on the respondent.<sup>280</sup> This allows the judge to insert their own beliefs about how marijuana ordinarily affects a user.<sup>281</sup> Even the *New York Practice Series*, a guide for practicing lawyers, acknowledges the uncertainty of how marijuana use is treated.<sup>282</sup> A more specific standard to gauge parental cannabis use would help prevent judges from inserting their own biases.

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<sup>275</sup> ALASKA STAT. § 47.10.011(10) (West 2018) (using the term "intoxicant").

<sup>276</sup> See, e.g., N.J. STAT. ANN. § 9:6-1 (West 2019).

<sup>277</sup> Gelmann, *supra* note 171, at 21 (discussing how without uniformity in how courts consider cannabis use, judges are free to insert their own personal biases and morals to harm parents who use cannabis).

<sup>278</sup> FAM. CT. ACT § 1046(a)(iii) (describing the level of intoxication required to establish parental drug or alcohol misuse as neglect).

<sup>279</sup> *Id.* ("[P]roof that a person repeatedly misuses a drug . . . to the extent that it . . . would ordinarily have the effect of producing . . . a substantial state of stupor, unconsciousness, intoxication. . .").

<sup>280</sup> SOBIE & SOLOMON, *supra* note 48.

<sup>281</sup> Family court judges, at least in Brooklyn Family Court, are known to have varying degrees of tolerance towards parental marijuana use, which can drastically change outcomes in the courtroom. Interview with Mikila Thompson, *supra* note 105.

<sup>282</sup> SOBIE & SOLOMON, *supra* note 48 (stating that the use of certain drugs, such as heroin, is considered neglect because the serious effects of such drugs are widely known, and then suggesting that marijuana use may be treated similarly).



The syntax of the statute is another area that could be changed. In Alaska, the Children's Proceedings<sup>283</sup> section has a different structure than the New York statute.<sup>284</sup> First, the Alaska statute describes how the ability to parent must be substantially impaired, then mentions the addictive or habitual use of an intoxicant, and concludes that the intoxicant use must cause a substantial risk of harm to the child.<sup>285</sup> New York's statute, on the other hand, begins with the drug use, and follows with a description of the intoxication.<sup>286</sup> The differing structures suggest to the readers different conclusions. By beginning with the ability to parent, the Alaska statute makes clear that the parent's ability to care for their child, rather than what drugs they may be using, is the main concern. New York's statute makes it clear that the drug use is what is important, allowing the court to make an inference of neglect without evidence of harm to the child.

Not once does the New York statute mention the ability to parent being impaired, nor whether a risk of harm to the child exists.<sup>287</sup> It creates a prima facie presumption of neglect from drug use that would ordinarily induce a substantial state of intoxication in the user.<sup>288</sup> A parent who is employed and runs a safe household but smokes cannabis at night until their judgment is substantially impaired would be included in this definition. A parent with joint custody, who only uses cannabis when their child is not in their care, would also be included in this definition. For these reasons, the New York Family Court Act should be rewritten in a way that emphasizes the impairment of parenting rather than the substance being used.

#### D. *Require a Nexus*

Further, the language of section 1046 should be amended to require a nexus between the drug misuse and harm to the child. In Delaware, the statute requires a nexus by defining neglect as a parent who chronically

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<sup>283</sup> ALASKA STAT. § 47.10.011 (West 2018).

<sup>284</sup> FAM. CT. ACT § 1046(a)(iii).

<sup>285</sup> ALASKA STAT. § 47.10.011(10).

<sup>286</sup> FAM. CT. ACT § 1046(a)(iii).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

and severely abuses a controlled substance and whose abuse threatens the child's safety and well-being.<sup>289</sup> Other states import this required nexus in their guidelines for caseworkers, detailing intake procedures to determine whether the reported drug use is connected to specific child maltreatment.<sup>290</sup>

The requirement of a nexus ensures that the state does not unnecessarily interfere with a parent's fundamental right to rear their children.<sup>291</sup> The Family Court Act's stated purpose is to protect children from harm,<sup>292</sup> and yet the New York statute does not require a nexus between drug misuse and its impact on the child.<sup>293</sup> The nexus requirement ensures that the state can only intervene when a parent's drug use actually affects their ability to safely care for their child.

### E. *Counterarguments*

Opponents may argue that these changes are too presumptive considering the current illegality of marijuana in New York. While cannabis legislation may have arrived in other states,<sup>294</sup> talks of new policies in New York are not the same as actual legislative action. The Family Court laws should reflect the current drug laws of New York,

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<sup>289</sup> DEL. CODE ANN. tit. 10 § 901(18)(b)(2) (2020).

<sup>290</sup> See, e.g., IDAHO DEP'T OF HEALTH & WELFARE, STANDARD FOR INTAKE/SCREENING (2018), <http://www.healthandwelfare.idaho.gov/Portals/0/Children/AbuseNeglect/IntakeScreening.pdf> [<https://perma.cc/32QT-UJRW>] (stating that drug use without a reported connection between the usage and specific child maltreatment is not accepted for a safety assessment); see also STATE OF MICH. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S PROTECTIVE SERVICES MANUAL (2019), <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/716-7.pdf> [<https://perma.cc/693Q-QHA5>]. Michigan also specifies that a complaint only involving substance use is insufficient to confirm neglect and requires caseworkers to ask a list of questions to determine whether the substance use rises to a level that harms the child. *Id.*

<sup>291</sup> See *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

<sup>292</sup> FAM. CT. ACT § 1011 ("This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.").

<sup>293</sup> *Id.* § 1046(a)(iii).

<sup>294</sup> See, e.g., Ax, *supra* note 19.

where the possession or sale of marijuana is still illegal.<sup>295</sup> This approach ignores the harms caused by the current system.<sup>296</sup> Further, family laws should turn on the actual harm to children instead of the legal status of the substance use, especially considering a parent's fundamental right to raise their children without state intervention.<sup>297</sup> Even if New York does legalize marijuana, findings of neglect could still be possible where a judge believes marijuana use would ordinarily produce a substantial state of stupor.<sup>298</sup>

Further, opponents may argue that when it comes to children's safety, it is better to be overly protective than allow potential neglect to occur.<sup>299</sup> As well, there are still studies that describe how marijuana use can harm children, including secondhand smoke, correlations with physical abuse, etc.<sup>300</sup> However, the proposed changes do not give free reign to parents to abuse cannabis without regard to their child's safety; the changes will just ensure that the law is not over-inclusive by punishing parents whose marijuana use does not harm their child.

#### CONCLUSION

The New York Family Court Act misuses the prima facie standard in its overly-broad characterization of drug use as child neglect.<sup>301</sup> This inappropriately permits courts to infer that all parental cannabis use is necessarily misuse.<sup>302</sup> Not only does this cause inconsistencies in case

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<sup>295</sup> N.Y. PENAL LAW § 221 (McKinney 2014); *see also Marijuana Enforcement*, NYPD, <https://www1.nyc.gov/site/nypd/about/about-nypd/policy/marijuana-law.page> [<https://perma.cc/2FA3-R424>] (describing how marijuana laws in New York have changed; while possession and use is still illegal, penalties have been lessened for smaller quantities of marijuana, effectively decriminalizing simple possession of small amounts of marijuana).

<sup>296</sup> *See supra* Part II.

<sup>297</sup> *See supra* Section I.A.

<sup>298</sup> *See supra* notes 251–253; *see also supra* Section I.B.4 (describing how cannabis affects every user differently); Secret, *supra* note 219.

<sup>299</sup> *Cf.* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 647–52 (2006) (describing a protectionist children's rights approach to family laws that emphasizes a child's safety as the paramount concern of the child welfare system, often as an argument against family preservation efforts which may lead to children staying in dangerous home environments).

<sup>300</sup> COLO. SCH. OF PUB. HEALTH, *supra* note 123.

<sup>301</sup> *See supra* Section I.D.2.

<sup>302</sup> *See supra* Section I.D.3.

law,<sup>303</sup> but it sustains the historical racism that permeates America's drug laws and family courts.<sup>304</sup> In light of changing laws and attitudes towards cannabis, the New York statute should evolve to better reflect the community sentiments it purports to represent.<sup>305</sup> Using other state statutes as models, New York should adopt changes to the prima facie standard, syntax, and language to create a clearer standard for courts and ensure consistent adjudication for parents who use cannabis.<sup>306</sup>

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<sup>303</sup> See *supra* Section I.D.3.

<sup>304</sup> Secret, *supra* note 219.

<sup>305</sup> See *supra* Section I.B.2.

<sup>306</sup> See *supra* Part III.