

## Parenting and Drug Use

In 2018, the Substance Abuse and Mental Health Services Administration (SAMHSA) reported that 164.8 million Americans ages 12 and older, or 60.2%, used tobacco, alcohol, or an illicit drug in the past month.<sup>1</sup> With substance use so widespread, there is no doubt that over the course of most people's lifetimes, they will engage in alcohol or drug use, perhaps regularly. Many of these people are, or will become, parents.

Every year, over 1.6 million people are criminally prosecuted for drug-related charges in the United States.<sup>2</sup> The civil "family regulation system,"<sup>3</sup> separate from state and federal criminal systems, also surveils and punishes parents for drug use. Suspicion or knowledge of a parent using drugs or alcohol has become one of the most common justifications harnessed by the state to condemn, investigate, and separate families. Between 2000 and 2019, the frequency with which parental alcohol or drug use was cited as a contributing factor for child removal more than doubled, from 18.5% to 38.9% nationwide.<sup>4</sup> Accounting for roughly 36% of all removals in 2017, parental substance use has become the "second most common circumstance associated with child removal."<sup>5</sup>

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<sup>1</sup> Substance Abuse & Mental Health Servs. Admin. (SAMHSA), *Key Substance Use and Mental Health Indicators in the United States: Results From the 2018 National Survey on Drug Use and Health* (2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf>.

<sup>2</sup> Drug Policy Alliance, *Mass Incarceration and Criminalization* (2021), <https://drugpolicy.org/issues/mass-criminalization>.

<sup>3</sup> Coined originally by Emma Peyton Williams and popularized by Professor Dorothy E. Roberts, the term "family regulation system" is a more accurate term than the more common "child welfare system" due to the system's surveillance, regulation, and separation of families living in poverty—especially Black and Brown families and those with parents who use substances. See Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition*, Honors Thesis in Comparative American Studies, Oberlin College, April 27, 2020. ("'Child welfare' feels too generous, as the system does not provide welfare services in practice, and it feels historically inaccurate given the 1970s-90s policy shift away from framing child protection as an extension of social services...I finally landed on 'family regulation system,' as I think that this term most accurately centers the impacts of the system on families (as opposed to disregarding the influence of the family unit by isolating children).") Accordingly, we will use the term "family regulation system" for the remainder of this document.

<sup>4</sup> National Center on Substance Abuse & Child Welfare, *Parental Alcohol or Other Drug Abuse as an Identified Condition of Removal in the United States* (2019), <https://ncsacw.acf.hhs.gov/research/child-welfare-and-treatment-statistics.aspx>.

<sup>5</sup> Mihalec-Adkins, et al., *Juggling Child Protection and the Opioid Epidemic: Lessons from Family Impact Seminars*, National Council on Family Relations Policy Brief (Aug. 18, 2020), <https://www.ncfr.org/policy/research-and-policy-briefs/juggling-child-protection-and-opioid-epidemic-lessons-family-impact-seminars>

However, the fact that someone uses drugs tells us nothing about that person’s ability to parent. Putting aside the lack of reliability and accuracy of clinical drug tests,<sup>6</sup> a positive drug test only indicates a chemical compound is present in the bodily fluid,<sup>7</sup> and does not provide evidence of one’s ability—or lack thereof—to parent and care for their child. Nonetheless, family regulation systems have increasingly normalized the practice of using parental drug use as the sole reason to separate parent and child.

Despite misleading and medically-misinformation media coverage, systemic racist practices,<sup>8</sup> and stigma surrounding prenatal drug exposure or parents who use controlled substances,<sup>9</sup> there is no reason to believe that a parent who uses drugs is more likely to abuse or neglect their child than one who does not.<sup>10</sup> And yet, parents who use drugs are at risk of losing their children based on nothing more than the fact of their drug use. These assumptions, disproportionately impacting Black, Indigenous, and Latinx communities at higher rates than their white counterparts despite similar rates of drug use

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<sup>6</sup> National Advocates for Pregnant Women, *Clinical Drug Testing of Pregnant Women and Newborns* (March 2019), <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2019/10/NAPW202522Clinical20Drug20Testing20of20Pregnant20Women20and20Newborns252220March202019.pdf>

<sup>7</sup> Substance Abuse & Mental Health Servs. Admin., *Clinical Drug Testing in Primary Care* 9 (2012), <https://store.samhsa.gov/system/files/sma12-4668.pdf>.

<sup>8</sup> Dorothy E. Roberts, *Shattered Bonds: The Color of Child Welfare* 15-16 (New York: Basic Books, 2001) (“The racial disparity in the child welfare system also reflects a political choice. Child welfare policy became increasingly stingy and punitive – and the foster care population has skyrocketed – since the 1970s, as Black children composed a greater proportion of the caseloads.”); Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLoS ONE e92785 (2014) (“One in nine Black children and one in seven American Indian children are removed from their parents’ care, compared to one in seventeen white children.”); Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 Child Welfare 151, 165-66 (2008); Alan J. Detlaff, et al., *Disentangling Substantiation: The Influence of Race, Income, and Race on the Substantiation Decision in Child Welfare*, 33 Children & Youth Servs. Rev. 1630, 1634-36 (2011) (“In particular, Black children’s overrepresentation in child removal cases can in part be explained from studies that have found it takes a lesser risk of maltreatment for a Black child to be removed from their home compared to a white child.”).

<sup>9</sup> The peer-reviewed research indicates that parents of infants who were substance-exposed in utero are no more likely to maltreat their children than other parents; the research indicating that those parents posed increased risk of maltreating their children improperly included subsequent substance-exposed-infant allegations, which accounted for almost all allegations against those parents. See Brenda D. Smith et al., *The Risk of Subsequent Maltreatment Allegations in Families with Substance-Exposed Infants*, 26 Child Abuse & Neglect 97 (2002).

<sup>10</sup> The source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report that was not subject to peer review: National Center on Addiction and Substance Abuse at Columbia University (CASA), *No Safe Haven: Children of Substance-Abusing Parents* (1999), <http://www.casacolumbia.org/articlefiles/379-No%20Safe%20Haven.pdf>. Its major publicized finding, that children whose parents abuse drugs and alcohol are three times more likely to be physically or sexually assaulted and more than four times more likely to be neglected than are children of parents who are not substance abusers, was based on what amounted to an opinion survey of people working in the child welfare field. *Id.* at ii. But not only did this survey fail to qualify as reliable scientific evidence, the report itself noted that those who were surveyed were the least qualified to draw conclusions about causation and associations because few had any training in issues concerning drug use and addiction. *Id.* at 5. Moreover, the appendix to the CASA Report acknowledged that it was not based on reliable data. *Id.* at 165. See also David J. Hanson, *The Center on Addiction and Substance Abuse: A Center for Alcohol Statistics Abuse*, <http://alcoholfacts.org/CASAAlcoholStatisticsAbuse.html> (challenging the quality and value of research from the Center and noting its refusal to submit its work to peer review).

across races,<sup>11</sup> result in family regulation that can lead to the separation of children from their parents and/or surveillance and monitoring of families for years.<sup>12</sup>

## Drug Use and Drug Tests are Not a Measure of Parenting Ability

A termination of the parent-child bond based on drug use is contrary to the purpose of the “family regulation system”—to protect children from serious harm or potential harm—and unnecessary and unjustified separation immeasurably hurts the children and families the system should protect. Further, as Movement for Family Power’s Ground Zero Report concluded, these policies and practices are more toxic to children, parents, and families than the alleged effects of drug use on parenting.”<sup>13</sup>

Contrary to common stigma, most people who use either legal or prohibited substances (or both) function no differently than other members of society.<sup>14</sup> This is well-established in the employment setting,<sup>15</sup> and the majority of us probably know of a family member, coworker, or community member who regularly uses a stigmatized substance and is a wonderful, high-functioning individual. Or, maybe we are that person. Similarly, with respect to parenting, “cognitive literature has not been able to conclusively draw any causal connection between drug use and inferior parenting.”<sup>16</sup> **Research by leading scholars and accounts from those who use drugs<sup>17</sup> support the proposition that a person can use drugs, and even have a problematic relationship with them, and still adequately parent their child.<sup>18</sup>** In fact, drug use alone does not denote that a parent is unable to

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<sup>11</sup> Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm* 87 *Child Welfare* 125-50 (2008); Dorothy E. Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, *The Appeal* (March 26, 2018)

<https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>; Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 *JAMA* 1603-09 (2002); Stephanie L. Rivau et al., *The Intersection of Race, Poverty and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 *Child Welfare* 151-68.

<sup>12</sup> Movement for Family Power, *Whatever They Do, I’m Her Comfort, I’m Her Protector: How the Foster System Has Become Ground Zero for the U.S. Drug War*, at 30 (June 2020) [hereinafter “Ground Zero Report”], [bit.ly/groundzeroreport](http://bit.ly/groundzeroreport).

<sup>13</sup> *Id.* at 19.

<sup>14</sup> Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings*, at 82 (2013), <https://www.samhsa.gov/NSDUHresults2012.pdf> (a majority of “adults aged 18 or older with substance dependence or abuse were employed full time in 2012.”); Lindsey Richardson & Stephen Epp, *Addiction, Employment & The Return to Work*, University of British Columbia Library, at 6 (2016), <https://dx.doi.org/10.14288/1.0347521> (“Research indicates that most people who use both legal and illegal substances are employed.”).

<sup>15</sup> See Richardson & Epp, *supra* note 14, at 684.

<sup>16</sup> *Ground Zero Report*, at 21.

<sup>17</sup> Kylie Valentine, et al., ‘Good enough’ parenting: Negotiating standards and stigma, 68 *Int’l J. of Drug Policy* 117 (June 2019); M.H. Kearney, et al., *Mothering on crack cocaine: a grounded theory analysis*, *Soc. Sci. & Med.*, Jan.1994, at 351; Phyllis Baker & Amy Carson, “I TAKE CARE OF MY KIDS”: *Mothering Practices of Substance-Abusing Women*, *Gender & Soc’y*, June 1, 1999, at 347; K.P. Richter & Gabriele Bammer, *A hierarchy of strategies heroin-using mothers employ to reduce harm to their children*, *J. Substance Abuse Treatment*, Dec. 2000, at 403; Fiona S. Martin, *Engaging with motherhood and parenthood: A commentary on the social science drugs literature*, *Int’l J. Drug Pol’y*, June 2019, at 147.

<sup>18</sup> Susan Boyd, *Gendered drug policy: Motherisk and the regulation of mothering in Canada*, *Int’l J. Drug Pol’y* (June 2019) at 109, 114 (“Research findings conclude that many women who use illegal drugs are adequate parents and, like non-drug using parents, adopt strategies to mitigate harm... [M]ost drug use is unproblematic...”).

care for their children,<sup>19</sup> keep them safe or loved,<sup>20</sup> or by any means is an incompetent parent.<sup>21</sup> Further, concern around a parent’s unfitness should only arise if an alcohol/drug dependent parents’ reliance “results in mistreatment of the child, or in a failure to provide the ordinary care required for all children.”<sup>22</sup>

A positive drug test does not, by itself, demonstrate harm or a substantial risk of harm.<sup>23</sup> As the U.S. Department of Justice explains, “[d]rug tests detect drug use but not impairment.”<sup>24</sup> A positive drug test cannot determine whether a person: occasionally uses a drug; is addicted; suffers any physical or emotional disability from that addiction; or is more or less likely, if they are parents, to abuse or neglect their children.<sup>25</sup> Further, “leading medical organizations agree that a positive drug test should not be construed as child abuse or neglect” and that surveilling on the basis of a positive drug test “poses serious threats to people’s health ... [by] erod[ing] trust in the medical system, making people less likely to seek help when they need it.”<sup>26</sup> Accordingly, a drug test alone should never form the basis of any action that could lead to the separation of a parent from their child.<sup>27</sup>

In their 2020 *Ground Zero Report*, Movement for Family Power notes:

As research conducted for this report and the research and journalism of many others show, the foster system does not reliably or consistently predict whether and when a child is at serious risk of harm on account of their caretaker’s drug use. [Nor does it consistently

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<sup>19</sup> Anna Olsen, et al., *Contraception, punishment and women who use drugs*, BMC Women’s Health (Jan. 9, 2014) at 1, 1 (“Women’s drug use should not automatically be associated with an inability to make informed health care choices or to care for children.”).

<sup>20</sup> M. Hepburn, *Drug use in pregnancy*, Brit. J. Hosp. Med. (Jan. 6, 1993) at 51 (“This research contributes to filling this gap in information by describing the regular, loving family lives of people who face significant challenges in parenting, including regular use of illicit drugs. Although their lives and relationships do not always conform to mainstream standards, they practice ways of keeping children safe and loved that are rarely documented.”).

<sup>21</sup> Ian Vandewalker, *Taking the Baby Before It’s Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 NYU Rev. of L. & Soc. Change (2008) at 423, 439 (“A woman who uses drugs while pregnant or while parenting is not *ipso facto* an incompetent mother”).

<sup>22</sup> Am. Bar Ass’n Foster Care Project, Nat’l Legal Resource Center for Child Advocacy & Protection, *Foster Children in the Courts* 206 (Mark Hardin ed., 1983) (many parents “suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol 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.”).

<sup>23</sup> See, e.g., *Ground Zero Report*, at 30; Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment, *Drug Testing in Child Welfare: Practice and Policy Considerations*, HHS Pub. No. (SMA) 10-4556 (2010), at 1 (“A drug test alone cannot determine the existence or absence of a substance use disorder. In addition, drug tests do not provide sufficient information for substantiating allegations of child abuse or neglect or for making decisions about the disposition of a case.”).

<sup>24</sup> U.S. Dept. of Justice, *Drugs, Crime, and the Justice System: A National Report from the Bureau of Justice Statistics* 119 (1992).

<sup>25</sup> *Id.*; see also Boyd, *supra* n. 18 (“Drug use in and of itself does not equal risk, nor is it the only factor that shapes family life — neoliberal social and economic policies also reproduce social inequality and other social ills (like drug laws, homelessness and inadequate wages and social benefits) that make parenting difficult for families.”).

<sup>26</sup> American College of Obstetricians and Gynecologists, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, Dec. 2020, <https://www.acog.org/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

<sup>27</sup> Mishka Terplan, *Pregnancy, Substance Use & the Child Welfare System*, panel presentation, Spring 2019 ABA National Conference on Parent Representation (April 12, 2019) (“there’s nothing in a urine drug test that tells you anything about behavior . . . It’s not a motherhood test.”).

apply standards for determining such risk]. Separation from parents causes children acute short- and long-term adverse health consequences... it disrupts the child's bond to their primary caregiver, literally affecting brain architecture and triggering a proliferation of toxic stress. Studies and life experience show that this is just as much true for children who have been maltreated as those who have not.

The lack of consensus on how to assess the link between drug use and risk is evident in the wide variation among jurisdictions over whether and when a parent's drug use is sufficient to substantiate an allegation of child maltreatment or remove a child from their parent's care....[In family court], "judges' subjective views of drug use and child rearing influence their daily decision-making so much that one parent can lose custody of their child because of evidence of drug use in one courtroom, and next door the same circumstances will result in a service plan and supervision. There is no real effort to differentiate between drug use and drug misuse, or to conduct a fact specific inquiry into whether or how a parent's drug use is affecting their child rearing."<sup>28</sup>

## Separating a Child from a Parent Based on the Parent's Drug Use Does More Harm to the Child

In addition, policing parental drug use and separating families on that basis poses consequential threats to the child's health, the family's health and wellbeing, and the community's health and wellbeing, and fosters mistrust in the medical system.<sup>29</sup> Health care providers inadvertently become agents of law enforcement, and in "the worst circumstances, this leads people to be treated as suspects instead of patients, subject to bedside interrogations and legal scrutiny."<sup>30</sup> For example, punitive action against parents with children diagnosed with Neonatal Abstinence Syndrome has been documented to be counterproductive and in fact harms both children and parents.<sup>31</sup> Studies have confirmed that punitive approaches to substance use during pregnancy is ineffective as a deterrent to drug use but instead deters pregnant women from seeking the prenatal care they need.<sup>32</sup> In turn, in

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<sup>28</sup> *Ground Zero Report*, at 31-32 ("Typically, the decision to remove a child is not dictated by law, policy, or scientific or legal evidence, but rather by 'hyper-local practice' [influenced by stigma, bias, and misinformation]").

<sup>29</sup> American College of Obstetricians and Gynecologists, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>

<sup>30</sup> *Id.* See also If/When/How: Lawyering for Reproductive Justice, *Making abortion a crime (again): how extreme prosecutors attempt to punish people for abortions in the U.S.* (2019), <https://www.ifwhenhow.org/resources/making-abortion-a-crime-again/> (Retrieved January 13, 2021); AGOG Committee Opinion No. 473: substance abuse reporting and pregnancy: the role of the obstetrician-gynecologist. *Obstet Gynecol* 2011 Jan; 117(1):200-201. doi: 10.1097/AOG.0b013e31820a6116. PMID: 21173672.

<sup>31</sup> See, e.g., Laura J. Faherty, et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, *JAMA Network Open*, (Nov. 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755302> doi: 10.1001/jamanetworkopen.2019.14078; Daisy Goodman, DNP, MPH, et al., *It's Time to Support, Rather Than Punish, Pregnant Women With Substance Use Disorder*, *JAMA Network Open*, (2019), doi: 10.1001/jamanetworkopen.2019.14135.

<sup>32</sup> *Id.*

the context of opioid use, it is hypothesized that disengagement increases Neonatal Opioid Withdrawal Syndrome rates since these women are now missing opportunities for interventions that could have reduced the likelihood of having a newborn with prenatal opioid exposure.<sup>33</sup>

Children are not safer away from their parents, and both children and mothers<sup>34</sup> suffer measurable harm when forcibly separated. The blanket phrase “Harm of removal,”<sup>35</sup> recognizes “[r]emoval and placement in foster care may have a worse impact on children than neglect.”<sup>36</sup> Removal and placement in the foster care system can cause emotional, psychological, and physical harm to children.<sup>37</sup> Children suffer considerable trauma when separated from their parents,<sup>38</sup> and some courts agree the damage caused by removal from one’s parent “may be ‘more damaging to the child than doing nothing at all.’”<sup>39</sup> In addition to the unwarranted trauma, separating children from their families has adverse developmental and biological consequences,<sup>40</sup> such as “hostile aggressiveness,” “temper tantrums,” “speech defects,” “stubbornness and negativism,” and “selfishness.”<sup>41</sup> Even in instances when biological families previously mistreated their children,<sup>42</sup> children may long to return to their biological families, and may benefit from maintaining those familial connections.<sup>43</sup>

## Several Courts Have Recognized that Substance Use Does Not Inherently Impact the Ability to Parent

While many courts continue to accept scientifically unsupported assumptions about parenting and drug use, some courts are rejecting that approach. Here are some examples.<sup>44</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Meaghan Thumath, et al., *Overdose among mothers: The association between child removal and unintentional drug overdose in a longitudinal cohort of marginalised women in Canada*, International Journal of Drug Policy, (May 2021), <https://doi.org/10.1016/j.drugpo.2020.102977>.

<sup>35</sup> See, e.g., Removals from Parents and Caretakers in Child Welfare Cases, Oversight Hearing Before the Comms. on Justice Sys. & Gen. Welfare 4–5 (2018), <http://bds.org/wp-content/uploads/BDS-City-Council-Testimony-on-Family-Separation-Final-1.pdf> (statement of Lauren Shapiro, Director, Family Defense Practice, Brooklyn Defender Services); Theo Liebmann, What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards, 28 HAMLIN J. PUB. L. & POL’Y 141, 155, 175 n.126 (2006); Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 Fam. L.Q. 393, 407 (2007); Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind It Harm Children*, 13 U.D.C. L. Rev. 435, 444 (2010).

<sup>36</sup> Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019), [https://scholarworks.law.ubalt.edu/all\\_fac/1085](https://scholarworks.law.ubalt.edu/all_fac/1085)

<sup>37</sup> *Id.*

<sup>38</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002).

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

<sup>40</sup> Delilah Bruska & Dale H. Tessin, *Adverse Childhood Experiences and Psychosocial Well-Being of Women Who Were in Foster Care as Children*, 17 Permanente J. 131, 138 (2013).

<sup>41</sup> See, e.g., Lawson G. Lowrey, *Personality Distortion and Early Institutional Care*, 10 Am. J. Orthopsychiatry 576, at 579-585 (1940); see also Frank C. P. van der Horst & René van der Veer, *Loneliness in Infancy: Harry Harlow, John Bowlby and Issues of Separation*, 42 Integrative Psychol. & Behav. Sci. 325, 326–27 (2008).

<sup>42</sup> See Douglas F. Goldsmith, David Oppenheim, & Janine Wanlass, *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 Juv. & Fam. Ct. J. 1, 6 (2004).

<sup>43</sup> See Susan L. Brooks, *The Case for Adoption Alternatives*, 39 Fam. Ct. Rev. 43, 47 (2001).

<sup>44</sup> This is not an exhaustive list.

## California

Appellate courts in California have repeatedly reversed findings of neglect based on parental drug use where there was no evidence establishing a connection between such use and an actual or a substantial risk of harm to the children.<sup>45</sup>

In *Destiny S.*, involving a happy and healthy 11 year-old child with “tardiness to school” and a mother who tested positive for marijuana and methamphetamine, the appellate division stated, “the use of marijuana without more does not bring a minor within the jurisdiction of the dependency court... *The same is true with respect to the use of hard drugs.*”<sup>46</sup> The court found there was no evidence of a substantial risk of imminent physical harm or illness and therefore no basis to exercise any jurisdiction over this family.

In *Rebecca C.*, the appellate court was even more explicit, finding that even where the mother used methamphetamine regularly and was found to have a substance use disorder, her use did not place the child at risk and therefore there was no basis for the court to exercise jurisdiction over the family.<sup>47</sup> Further, the court rejected the state’s argument that, inherently, a child cared for by a parent under the influence of methamphetamine was at risk. The court therefore overturned the trial level disposition, ended the courts’ jurisdiction over the family, and allowed the child to remain with her mother.

## Iowa

In multiple cases, including *M.S.*, *J.S.*, and *J.W.*, courts in Iowa have reversed findings of termination of parental rights, stating the mere fact of parental substance use alone does not establish an appreciable risk of harm to the child.<sup>48</sup> In fact, a 2016 Court of Appeals decision held in *M.S.* that where a parent had a severe substance-related disorder that did not support the termination of the parent’s parental rights.<sup>49</sup>

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<sup>45</sup> See, e.g., *In re David M.*, 134 Cal. App. 4th 822, 827-833, 36 Cal. Rptr. 3d 411, 414-418 (Cal. Ct. App. 4th Dist. 2005) (rejecting finding of neglect where mother used marijuana and parents had mental illness and/or disability, and children were loved, healthy and well-cared for); *Jennifer A. v. Superior Court*, 117 Cal. App. 4th 1322, 1333- 1347, 12 Cal. Rptr. 3d 572 (Cal. Ct. App. 4th Dist. 2004) (rejected order terminating reunification services where mother was sufficient parent, there was no evidence linking the mother’s marijuana or alcohol use to her parenting skills or judgment, and there was no evidence of clinical substance abuse, no testimony from a medical professional and no report of a clinical evaluation establishing a pattern of substance abuse leading to clinically significant impairment or distress).

<sup>46</sup> *In re Destiny S.*, 148 Cal. Rptr. 3d 800 (Cal. Ct. App. 4th Dist. 2012).

<sup>47</sup> *In re Rebecca C.*, 175 Cal. Rptr. 3d 264 (Cal. Ct. App. 2d Dist. 2014).

<sup>48</sup> See *In re M.S.*, 889 N.W.2d 675, 682 (Iowa Ct. App. 2016) (reversing termination of parental rights, which was based on father’s use of marijuana, because “the mere fact of use does not establish adjudicatory harm”); see also *In re J.S.*, 846 N.W.2d 36, 42 (Iowa 2014) (holding the mother’s methamphetamine use, in and of itself, did not constitute adjudicatory harm); *In re J.W.*, 855 N.W.2d 202 (Table), 2014 WL 3749419, at \*3 (Iowa Ct. App. July 30, 2014) (holding the mother’s status as a prior substance abuser did not necessarily establish adjudicatory harm).

<sup>49</sup> See *In re M.S.*, 889 N.W.2d 675, 682 (Iowa Ct. App. 2016) (stating “the mere fact of [marijuana] use does not establish adjudicatory harm”).

Courts must find that clear and convincing evidence exists to support the conclusion that children have suffered or are imminently likely to suffer harmful effects “due to the parent’s failure to exercise a reasonable degree of care in supervising” them,<sup>50</sup> and a finding that the child’s parent’s “mental capacity or condition, imprisonment, or drug or alcohol abuse results in the child not receiving adequate care.”<sup>51</sup> Following *L.R.*, the state has the burden of establishing a nexus between use and inadequate care by clear and convincing evidence to support statutory grounds for termination.<sup>52</sup>

Additionally, termination of a child’s relationship with a parent must be proven by clear and convincing evidence to be in the child’s best interest.<sup>53</sup> On several occasions, Iowa courts have affirmed the importance of preserving the parent-child relationship,<sup>54</sup> concluding that termination is a final step in drastic cases. As an Iowa appellate court found, in a case reversing a termination of a father’s parental rights based on his occasional cannabis use, “the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State....This father is not perfect, but the law does not require perfection.”<sup>55</sup>

## New Jersey

In *A.L.*, the New Jersey Supreme Court found that mere use of cocaine during pregnancy was insufficient to support a finding of abuse or neglect.<sup>56</sup> Rather, the State must prove actual impairment to the child, or in the absence of an actual impairment, the State must prove *imminent* danger or *substantial risk of future* harm to the child.<sup>57</sup> Neither past drug use, including drug use during pregnancy, nor a positive toxicology at birth are alone sufficient to support a finding of neglect.<sup>58</sup>

## New York

In New York, the law recognizes that there are many degrees of parental drug and alcohol use, and not all require treatment or support a finding that the parent has harmed their children or placed them at imminent risk of harm.<sup>59</sup>

In *Nicholson v. Scopetta*, the highest New York court affirms there has to be an actual or imminent risk of harm to the child present in the case, and that imminent risk of harm must be “clearly

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<sup>50</sup> See Iowa Code § 232.2(6)(c)(2) (2020).

<sup>51</sup> See *id.* 232.2(6)(n).

<sup>52</sup> *In re L.R.*, 779 N.W.2d 495 (Table), 2010 WL 200817, at \*5 (Iowa Ct. App. Jan. 22, 2010) (reversing termination order where State failed to establish nexus between parent’s alcohol use and actual or risk of harm to the child).

<sup>53</sup> *Id.* at \*6.

<sup>54</sup> See, e.g., *id.*; *In re M.S.*, 889 N.W.2d 675, 686 (Iowa Ct. App. 2016).

<sup>55</sup> *In re M.S.*, 889 N.W.2d 675, 686 (Iowa Ct. App. 2016).

<sup>56</sup> *New Jersey Dep’t of Children & Families, Div. of Youth & Family Servs. v. A.L.*, 59 A.3d 576, 589 (N.J. 2013).

<sup>57</sup> *Id.* at 588.

<sup>58</sup> *Id.* at 589.

<sup>59</sup> Besharov, Practice Commentaries, McKinney’s Cons Laws of NY, Book 29A, Family Ct. Act § 1012 [1998 Ed.].

attributable” to the parent’s use in order to find neglect and set the stage for termination.<sup>60</sup> In *Dante M.* the court found that “[a] positive toxicology alone... does not prove that the child has been physically, mentally or emotionally impaired, or that he is in imminent danger of becoming impaired in a manner clearly attributable to the parent’s failure to exercise the requisite degree of care” and so is insufficient to support a finding of neglect.<sup>61</sup>

Further, New York courts are clear that assumptions about risk presented by parental drug use are not sufficient to make the requisite showing that there is actual risk of harm, nor that alleged risk is clearly attributable to the parent’s use.<sup>62</sup> “[S]ince the purpose of the statute is to protect children from serious harm or potential harm the statutory test is a minimum degree of care ‘not maximum, not best, not ideal and the failure [of the parent, to exercise a minimum degree of care] must be actual, not threatened.’”<sup>63</sup> While someone might think it is not ideal for a parent to use a substance, that is insufficient to justify the state’s intervention in the family’s life or separation of parent and child.

## Conclusion

There is no medical or scientific consensus that drug use alone—including ongoing use—provides a permissible or even logical basis for the intervention and or termination of a parent-child bond through removal. The family regulation system ostensibly exists to protect children from caregivers who are unable to provide a minimum degree of care to their children, not to dictate morals around parenting or punish families for parents’ unconventional behavior. Courts must demand individualized case-specific support for the proposition that the parent in question is unable to care for their child, and not rely on outdated stereotypes and stigma that equates drug use with neglect or harm.

A termination of the parent-child bond based on mere use is contrary to the stated purpose of the family regulation system—to protect children from serious harm or potential harm—and unnecessary and unjustified termination immeasurably hurts the children and families the system should protect.

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<sup>60</sup> *Nicholson v. Scopetta*, 3 N.Y.3d 357, 369 (2004).

<sup>61</sup> *In re Dante M.*, 87 N.Y.2d 73, 78-79 (1995) (overturning a finding of neglect based solely on a positive toxicology at birth); see also *In re Delanie S.*, 165 A.D.3d 1639, 1639 (4th Dep’t 2018) (“[T]he mere use of illicit drugs is insufficient to support a finding of neglect.”).

<sup>62</sup> *In re Smith Jones Children*, 950 N.Y.S.2d 491, at \*10 (Kings Cnt’y Fam. Ct. 2012) (noting “[a] presumption of risk cannot be used as a substitute for proof that the alleged harm or risk of harm to the child is ‘clearly attributable’ to the parent’s misconduct” and dismissing the neglect petition) (citing *Dante M.*, 87 N.Y.2d at 78-79; *In re Afton C.*, 17 N.Y.3d 1, 10 (2011); *Nicholson*, 3 N.Y.3d at 368, 371, 375).

<sup>63</sup> *Smith Jones*, 950 N.Y.S.2d at \*11 (citing *Nicholson*, 3 N.Y.3d at 370).