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Compassion for Patients but Not for Parents? *Medical Marijuana, Decriminalization & Child Protective Services*

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Introduction

Despite the federal Controlled Substances Act's wholesale prohibition of cannabis—classifying marijuana as a Schedule I substance with no potential medical use[1]—twenty states and Washington D.C. have approved medicinal marijuana programs,[2] and 17 have "decriminalized" possession of small amounts of the plant for personal use.[3] In 2008 and 2012, Massachusetts voters approved marijuana reform ballot initiatives in recognition of marijuana's potential medicinal value

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[1] The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, § 202, 84 Stat. 1247 (1970) (codified as amended at 21 U.S.C. § 812(b)(1) (2012)); 21 C.F.R. § 1308.11(d)(23) (2013).

[2] *20 Legal Medical Marijuana States and D.C.*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited March 17, 2014).

[3] *Why Is Marijuana Decriminalization Not Enough?*, DRUG POLICY ALLIANCE (2014), *available at* http://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Marijuana_Decriminalization_and_Legalization_Feb2014.pdf.

and the unnecessarily harsh consequences for petty possession of the substance.[4] Both laws carve out certain circumstances under which an adult may use and possess limited amounts of marijuana, subject to minimal oversight from state agencies.[5]

In this article, I analyze the protections which both laws offer to pregnant women, parents, and caretakers of minor children, who, compared with non-parenting individuals, face an added layer of possible state sanctions for marijuana possession in the form of child protective services ("CPS") actions. Because neither law explicitly *precludes* a parent's marijuana use from forming the basis for a civil finding of child abuse or neglect, protective custody order or removal of a child from the home, parents and caretakers—who would otherwise face no state action for their conduct—are vulnerable to the discretionary intervention of the Department of Children and Families ("DCF").[6] To carry out its mandate to protect vulnerable children, DCF is authorized to investigate and conduct surveillance on families with minor children who are suspected of being neglected or abused, in part through the state's mandated child welfare reporting system.[7] I argue that DCF's procedures for responding to

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[4] In ascertaining the voters' intent in enacting law through ballot initiative, we can "assume that before casting their votes, voters read the arguments 'for' and 'against,' as well as the new law itself." Commonwealth v. Cruz, 945 N.E.2d 899, 909 (Mass. 2013); *see, e.g.*, *2012 Information for Voters, Question 3: Law Proposed by Initiative Petition*, SEC'Y OF THE COMMONWEALTH OF MASSACHUSETTS, *available at* http://www.sec.state.ma.us/ele/ele12/ballot_questions_12/quest_3.htm (last visited Mar. 30, 2014) [hereinafter *2012 Information for Voters*] (stating a "YES" vote would "ease the suffering of thousands of people" with debilitating illnesses); Whitney A. Taylor, *2008 Information for Voters, Question 2: Law Proposed by Initiative Petition*, Possession of Marijuana, *available at* http://www.sec.state.ma.us/ele/ele08/ballot_questions_08/quest_2.htm (last visited Mar. 30, 2014) [hereinafter *2008 Information for Voters*] (stating a "YES" vote would "remove[] the threat of arrest, jail, loss of student loans, loss of driver's licenses, and other sanctions for possession of an ounce or less of marijuana").

[5] *See* discussion *infra* Parts A-B.

[6] Because child abuse and neglect findings are made at the administrative level and do not exist in public records, there are no published Massachusetts cases available. *See* Div. of Youth & Family Services v. A.L., 59 A.3d 576 (N.J. 2013) (presenting a similar fact pattern and discussion of the probative value of drug test results in abuse and neglect findings); *see also* 1 JAY MCMANUS & ROBIN L. STOLK, CHILD WELFARE PRACTICE IN MASSACHUSETTS § 2.3.4 (Amy M. Karp, ed., 1st ed. 2d Supp. 2012) [hereinafter MCMANUS & STOLK](discussing DCF's 51A screening and decision-making processes).

[7] *See* MASS. GEN. LAWS ANN. ch. 119, § 51B (West 2013).

reports of child abuse or neglect impermissibly sanction parents for possession or use of marijuana otherwise permitted by state law.

A. 2008's Question Two (Section 32L) Protects Adults from Civil and Criminal Penalties for Possession of Small Amounts of Marijuana

Known as the Sensible Marijuana Policy Initiative—and now codified at M.G.L. ch. 94C, § 32L—Question Two (hereinafter "Section 32L") broadly "decriminalized" personal possession of one ounce or less of marijuana by adults.[8] Passed with 63 percent of the vote in 2008, Section 32L's main legal mechanism eliminated the penal code offense for personal marijuana possession, and downgraded it to a civil violation, punishable by a $100 fine.[9] The proponents' statement on the ballot began, "A YES vote removes the threat of arrest, jail, loss of student loans, loss of driver's licenses, and other sanctions for possession of an ounce or less of marijuana."[10] Arguments in favor included making more resources available to law enforcement to focus on serious crimes and preventing the offense from appearing on criminal records.[11] Characterizing the proposed civil penalty as "similar to a speeding ticket," the statement concluded by exhorting voters to "let the punishment fit the crime."[12]

Since Section 32L became law on January 2, 2009, the Commonwealth's Supreme Judicial Court ("SJC") has incorporated it into its criminal procedure jurisprudence, usually involving

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[8] An Act Establishing a Sensible State Marihuana Policy, 2008 Mass. Acts ch. 387 (codified at MASS. GEN. LAWS ch. 94C, §§ 32L-N (2012)).
[9] MASS. GEN. LAWS ch. 94C, § 32L (2012).
[10] Whitney A. Taylor, Argument in Favor, *2008 Information for Voters, Question 2: Law Proposed by Initiative Petition*, SEC'Y OF THE COMMONWEALTH OF MASSACHUSETTS, *available at* http://www.sec.state.ma.us/ele/ele08/ballot_questions_08/quest_2.htm (last visited Mar. 30, 2014).
[11] *Id.*
[12] *Id.*

probable cause for warrantless police searches.[13] In *Commonwealth v. Cruz*,[14] the SJC held that the odor of burnt marijuana does not, by itself, meet the threshold for reasonable suspicion of criminal activity needed to justify a police order to exit one's vehicle.[15] In doing so, the Court closely examined the intent of the voters who approved Section 32L.[16] The Court considered the written explanation of the Committee for Sensible Marijuana Policy—the organization behind the petition and initiative—and ascertained from the initiative's passage the voters' clear intent that "possession of one ounce or less of marijuana should not be considered a serious infraction worthy of criminal sanction."[17] Noting the voters' intent to "change the societal impact" of possessing one ounce or less of marijuana, the Court characterized the statute as "do[ing] away with traditional criminal consequences, including the long-term and embarrassing effect that a criminal record has on employment or applying for school loans…."[18]

Though its ruling governed a narrow criminal procedure issue, the Court in *Cruz* acknowledged the broad societal impact of a criminal conviction, extending well beyond purely criminal legal matters. Section 32L provides that neither the Commonwealth nor its agents may impose "*any* form of penalty, sanction or disqualification" for possession of one ounce or less of

[13] *See, e.g.*, Commonwealth v. Jackson, 985 N.E.2d 853, 856-59 (Mass. 2013) (finding "social sharing" of marijuana is not distribution within the meaning of MASS. GEN. LAWS ch. 94C, § 32C(a)); Commonwealth v. Daniel, 985 N.E.2d 843, 848-49 (Mass. 2013) (finding odor of freshly burnt marijuana does not provide probable cause for vehicle search absent evidence that occupant possesses more than one ounce); Commonwealth v. Keefner, 961 N.E.2d 1083, 1086-87 (Mass. 2012) (finding § 32L did not repeal criminal offense of marijuana possession with intent to distribute); *see also* Commonwealth v. Palmer, 985 N.E.2d 832, 834-35 (Mass. 2013) (finding § 32L did not decriminalize marijuana cultivation).
[14] 945 N.E.2d 899 (Mass. 2011).
[15] *Id.* at 910.
[16] *Id.* at 909.
[17] *Id.*
[18] *Id.* at 910.

marijuana, other than the one authorized by its terms.[19] In addition to removing simple possession from the Commonwealth's criminal code and its criminal offender registry, on its face, Section 32L does more than "decriminalize" possession of marijuana. In setting forth a fine and forfeiture as the *sole* permissible means of addressing a violation, it restrains any agent of the Commonwealth from imposing other penalties, sanctions, and disqualifications, be they civil *or* criminal.[20]

In demonstrating the broad scope of its directive, the text of Section 32L refers, "[b]y way of illustration rather than limitation," to a variety of non-criminal state programs and services to which an individual may not be denied access solely on the basis of possessing small amounts of marijuana.[21] The included examples—student financial aid, public housing, unemployment, motor vehicle operations licensing, and the foster care system—all implicate integral matters of life and liberty: education, shelter, the means to support oneself, the ability to travel, and the opportunity to serve as a parent.[22] These examples illustrate that the voters of the Commonwealth intended to de-prioritize this minor offense and eliminate its power to be used against an individual.

B. 2012's Question Three Protects Medical Marijuana Patients and their Caregivers from Criminal and Civil Penalties for Possession of a 60-Day Supply

On November 6, 2012, Massachusetts voters approved "An Act for the Humanitarian Medical Use of Marijuana," which directed the Department of Public Health ("DPH") to establish a

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[19] MASS. GEN. LAWS ch. 94C, § 32L (2012) (emphasis added).
[20] Commonwealth v. Cruz, 945 N.E.2d at 909; *see supra* note 9.
[21] ch. 94C, § 32L.
[22] *Id.;* Commonwealth v. Cruz, 945 N.E.2d at 910.

registration system for qualifying patients with debilitating illnesses and nonprofit marijuana dispensaries.[23] Unlike 2008's initiative, which merely reduced the penalty for engaging in conduct that remains illegal, registration with DPH confers to cardholders, acting in compliance with its provisions, an "exemp[tion] from Massachusetts criminal and civil penalties."[24] Presenting arguments in favor of the initiative, the Compassionate Medicine for Massachusetts campaign wrote, "A YES vote will ease the suffering of thousands of people with cancer, Parkinson's disease, Crohn's disease, multiple sclerosis, HIV/AIDS, glaucoma, and other debilitating conditions."[25]

As of this writing, implementation of the program created under Question Three is ongoing.[26] Nevertheless, the voters' intent to exempt qualifying patients and their caregivers from facing "criminal and civil penalties" for "conduct pursuant to the medical use of marijuana" is clear.[27] It provides that qualifying patients and personal caregivers who possess no more marijuana than necessary for the patient's sixty-day supply "shall not be subject to arrest or prosecution, or civil penalty."[28] Surely, the compassion on which the Question Three campaign was based is incongruous with a policy that would allow severely ill parents to face state investigation solely for their use of marijuana. Actions taken by DCF to investigate qualifying patient-parents suffering from debilitating

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[23] An Act for the Humanitarian Medical Use of Marijuana, 2012 Mass. Acts ch. 369, §§ 1-17 (codified at MASS. GEN. LAWS ch. 94C, App. §§ 1-1 *et seq.*).
[24] MASS. GEN. LAWS ch. 94C, App. § 1-2(L) (2012).
[25] *2012 Information for Voters*, *supra* note 4.
[26] For example, there is no statewide patient and caregiver registration yet in place, and no dispensary has opened its doors. *But see* 105 MASS. CODE REGS. 725.000 *et seq.* (2013) (finalizing program regulations released by DPH in May 2013); *From Provisional to Final: A Rigorous Process for Registered Marijuana Dispensaries*, MASS. DEP'T OF PUB. HEALTH (2014), *available at* http://www.mass.gov/eohhs/docs/dph/quality/drugcontrol/medical-marijuana/response/from-provisional-to-final.pdf (last visited Apr. 1, 2014) (detailing phased application process for dispensaries); *Guidance for Municipalities Regarding the Medical Use of Marijuana*, MASS. DEP'T OF PUB. HEALTH, *available at* http://www.mass.gov/eohhs/docs/dph/quality/drugcontrol/medical-marijuana/municipal-guidance.pdf (last updated Dec. 13, 2013) (FAQs and information regarding the application of local zoning and business laws to medical marijuana businesses).
[27] MASS. GEN. LAWS ch. 94C, App. § 1-2(L).
[28] *Id.* at § 1-4(a).

illnesses should be considered civil "sanctions" from which patients should be exempt within the meaning of the medical marijuana law duly enacted by the voters.

C. CPS Investigations are Civil Sanctions within the Meaning of Section 32L and Question Three, and Should Not Apply for Personal or Medicinal Marijuana Use

The 1974 enactment of the federal Child Abuse Prevention & Treatment Act ("CAPTA")[29]—which grants federal funding to state child protection agencies whose programs meet certain federal guidelines—marked the beginning of modern child abuse and neglect laws.[30] CAPTA requires states to adopt plans that provide child abuse prevention services, as well as procedures for screening and investigating reports of child abuse or neglect.[31] Concurrent with CAPTA's enhancement of CPS agencies, state "mandated reporting" laws proliferated.[32] Approximately 48 states have laws requiring certain social service professionals to file a report with the state's CPS agency when the reporter knows or suspects that a child is experiencing abuse and/or neglect.[33]

CPS employees, tasked with screening and assessing both mandated and anonymous reports of child abuse and neglect, wield substantial discretion in deciding which reports warrant further

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[29] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 1191, 88 Stat. 4 (1974) [hereinafter CAPTA].
[30] Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption & Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 18 (2001).
[31] 42 U.S.C. §§ 5106a(b)(2) (2010) (detailing contents of state plans eligible for federally-authorized grants for child abuse or neglect prevention, treatment, investigation and prosecution).
[32] JOHN M. HAGEDORN, FORSAKING OUR CHILDREN: BUREAUCRACY & REFORM IN THE CHILD WELFARE SYSTEM 32-34 (1995).
[33] *See* CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE & NEGLECT (2012), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (current through Aug. 2012) (providing a compilation of state mandated reporting laws).

attention and which types of cases to prioritize.[34] The rise of mandated reporting laws, along with CAPTA, resulted in a massive increase in the number of reports of child maltreatment—from just 10,000 nationally in 1967 to 669,000 in 1976[35]—and an accompanying surge in the number of investigations, protective removals, and legal actions to terminate the parental rights of parents and guardians deemed unfit.[36] In the years immediately following CAPTA, the expanded power of CPS agencies came with heavy costs for poor, nonwhite families, who faced increasing surveillance and state oversight of their competence as parents.[37]

In 2003, CAPTA was amended to require states to develop "policies and procedures" for the reporting of "infants born with and identified as being *affected by* illegal substance abuse or withdrawal symptoms *resulting from* prenatal drug exposure."[38] Several states expanded or interpreted grounds for mandated reporting of child abuse or neglect to include a parent or caretaker's use of illegal drugs.[39] Some state laws consider exposing a child to activities involving drugs or drug paraphernalia to be criminal child endangerment.[40] Others include substance exposure at birth in the

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[34] 110 MASS. CODE REGS. 4.21 (2012); Protective Intake, Policy 86-015(R), *cited in* MCMANUS & STOLK, *supra* note 6 at § 2.3.4.
[35] *See* LEROY ASHBY, ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, & ABUSE IN AMERICAN HISTORY 136 (1997).
[36] HAGEDORN, *supra* note 31 at 32-34.
[37] *See generally* CHILD WELFARE INFORMATION GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE (2011), *available at* http://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality/racial_disproportionality.pdf (reviewing empirical data on racial disparities in foster care); *see also* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2003) (discussing the overrepresentation of black children in the child welfare system and its roots in systemic poverty and racism).
[38] Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, tit. I, § 114(b), 117 Stat. 808 (2003) (codified as amended at 42 U.S.C. § 5106a(b)(2)(B)(ii) (2012)) (emphasis added).
[39] GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: SUBSTANCE ABUSE DURING PREGNANCY (2013), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf (last visited Apr. 1, 2014).
[40] *See* CHILD WELFARE INFORMATION GATEWAY, PARENTAL DRUG USE AS CHILD ABUSE, 3 (2012), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/drugexposed.pdf (current through July 2012).

definition of non-criminal child abuse & neglect statutes, and have created civil sanctions applicable only to the conduct of pregnant women.[41]

The latter is the case in Massachusetts, where mandated reporters must file a "51A report" when they have "reasonable cause to believe a child is suffering physical or emotional injury resulting from: (i) abuse…which causes harm or substantial risk of harm…; (ii) neglect…; and (iii) physical dependence on an addictive drug at birth."[42] Though a positive drug test does not necessarily indicate dependence, and there is no research supporting the notion that prenatal exposure to marijuana results in either abuse or neglect or the newborn's "physical dependence" at birth,[43] DPH policy states that a 51A report must be filed for every positive newborn toxicology result.[44] A 51A report, once filed, is likely to be "screened in," giving DCF license to investigate whether the allegations of abuse or neglect occurred.[45] From there, DCF may require the parent to comply with conditions of a service plan, which can include random drug testing, parenting classes, substance abuse evaluation and/or treatment, or a number of other "behavioral changes" that DCF deems necessary.[46] The commencement of a DCF investigation, its findings of abuse or neglect, and

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[41] *Id.* at 2.
[42] MASS. GEN. LAWS ch. 119, § 51A(a) (2012).
[43] Mark L. Hudak & Rosemarie C. Tan, AMERICAN ACADEMY OF PEDIATRICS COMM. ON DRUGS & COMM. ON FETUS & NEWBORN, *Neonatal Drug Withdrawal*, 129 PEDIATRICS E540 (2012), *available at* http://pediatrics.aappublications.org/content/129/2/e540.full.pdf+html; *see also* NATIONAL ADVOCATES FOR PREGNANT WOMEN, PRENATAL EXPOSURE TO ILLEGAL DRUGS & ALCOHOL 2-3 (2010), *available at* http://advocatesforpregnantwomen.org/2010%20drugmyth%20factsheet%20v3.pdf.
[44] *See generally* MASS. DEP'T OF PUB. HEALTH, GUIDELINES FOR COMMUNITY STANDARD FOR MATERNAL/NEWBORN SCREENING FOR ALCOHOL/SUBSTANCE USE 4 (2013), *available at* http://www.mass.gov/eohhs/docs/dph/quality/hcq-circular-letters/2013/dhcq-1305586-sen-guidelines.pdf; *see also* Jess Cochrane, *Mandated Reporting of Substance-Exposed Newborns in an Era of Changing Marijuana Laws* 4, 18 (Aug. 31, 2013) (unpublished M.P.H. thesis, Tufts University), *available at* http://flcalliance.org/wp-content/uploads/2013/10/Cochrane-ALE-Final.pdf.
[45] MASS. GEN. LAWS ch. 119, § 51B (2012); 110 MASS. CODE REGS. 4.20 *et seq.* (2012); Protective Intake, Policy 86-015(R), *cited in* MCMANUS & STOLK,, *supra* note 6 at § 2.3.4. *See also* Cochrane *supra* note 43, at 20.
[46] *See* MASS. GEN. LAWS ch. 119, § 51B(g) (2012); 110 MASS. CODE REGS. 6.03(2) (2012) (authorizing DCF to develop service plans); *see also* 1 DAWN E. LIVIGNE & ROBIN L. STOLK, CHILD WELFARE PRACTICE IN MASSACHUSETTS § 7.2.2 (Amy

its imposition of conditions on parents—which must be met in order to retain the right to parent one's children—are the impermissible civil sanctions of the type contemplated by marijuana reform measures passed in Massachusetts.[47]

Conclusion

Read together, the provisions of these two Massachusetts marijuana reform laws limit the authority of the Commonwealth and its actors to impose sanctions for certain conduct involving adults' marijuana use and possession. When an individual is registered and compliant with DPH's medical marijuana program, or when his or her sole infraction is possession of less than one ounce of marijuana, civil and criminal sanctions do not apply.[48] The reform laws do not fully define the scope of impermissible civil sanctions, though the stated intent of the ballot initiatives' proponents was to protect adults who engage in limited conduct relating to marijuana use from a broad range of adverse state actions, including denial of financial aid, public housing, and the ability to become a foster parent. To close this loophole, DCF should clarify its policy to reflect that it will take no actions diminishing the parental rights of adults whose marijuana use does not exceed the bounds contemplated by Section 32L or Question 3, the Commonwealth's medical marijuana law.

M. Karp, ed., 1st ed. 2d Supp. 2012) (discussing certain components of service plans and their underlying function in child welfare practice).

[47] *See supra* note 4.

[48] *See* discussion *supra* Parts A-B.