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Juvenile Justice & Diminished Criminal Culpability

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ARTICLES

Juvenile Justice & Diminished Criminal Culpability

MITCHELL F. CRUSTO*

When regulating the bad, albeit illegal, choices made by minors, the law is conflicted. On the one hand, we have a clear national policy to ensure the safety of and to promote the positive development of our young people, yet we simultaneously criminalize minors who make bad choices. This conundrum raises a quintessential jurisprudential flaw in our legal system: We lack a unifying, overarching principle that guides the law's relationship with minors. In a companion piece, I pose and explore such a unifying principle, which I coin as the "best interest of the minor" standard ("BIMS"). Consequently, this Article applies that standard to a contemporary legal problem that is plaguing our society: the negative effects of the "status" crime of minors in the simple,

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non-violent possession of marijuana. It posits the thesis that the offense of minors in the simple, non-violent possession of marijuana should be decriminalized. Concurrently, we should redirect our resources to promote abstention, treat the negative impacts of drug abuse, and promote positive, healthy alternatives to drug abuse.

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INTRODUCTION

Jane Doe¹ is a fifteen-year-old high school student who has been experiencing deep bouts of depression since the death of her father. She is convinced by her best friend that smoking marijuana² is just the cure she needs to manage her depression. Innocently, Jane mistakenly believes that she could smoke marijuana in private for her depression, as its use “is now legal.” In fact, she lives in a State³

¹ Jane Doe is a fictitious character and is created here to illustrate the experiences that many juveniles have or may face relative to the possession of marijuana.

² “Marijuana,” herein, is defined as that provided for in 21 U.S.C. § 802: [T]he terms “marihuana” and “marijuana” mean all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. [Such term] does not include . . . the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802.

In this Article, “marijuana” or “pot” will be used interchangeably to refer to what is legally known as “marihuana.” See Katy Steinmetz, *420 Day: Why There are so Many Different Names for Weed*, TIME (Apr. 20, 2017, 8:25 AM), <http://time.com/4747501/420-day-weed-marijuana-pot-slang/> (noting that over 1,200 slang terms are related to marijuana). By the way, I am aware and sensitive to the xenophobic reference that “marijuana” has been used to refer to people of Mexican descent. “Cannabis” would be a preferred term; however, that term is now commonly being used to refer to non-hallucinogenic chemicals derived from that plant.

³ “State,” herein, refers to the fifty States and various territories as well as municipalities in the United States.

where the non-violent⁴ possession⁵ and personal use of a small amount⁶ of marijuana by an *adult*⁷ is legal, but is illegal where it is possessed by a minor.⁸

Consequently, Jane sets out to buy some marijuana. However, as an underage⁹ person, she is not permitted to purchase “legal” pot

⁴ “Non-violent,” herein, is defined as crimes that do not involve a threat of harm or an actual attack upon a victim. U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 1 (2004), <https://bjs.ojp.gov/content/pub/pdf/pnoesp.pdf> (“Typically, the most frequently identified nonviolent crimes involve drug trafficking, drug possession, burglary, and larceny. . . . The single largest offense category of nonviolent offenders discharged from prisons was drug trafficking, accounting for nearly 1 in 5 nonviolent releasees. . . . Overall, about two-thirds of nonviolent releasees were racial or ethnic minorities.”).

⁵ “Possession,” herein, is defined as being near or in the proximity of, not necessarily owning or controlling, with or without knowledge of the proximity. *See infra* note 19 and accompanying text.

⁶ “Small amount,” herein, is defined as two ounces or less of marijuana which typically constitutes “simple possession.” *See infra* note 19 and accompanying text.

⁷ “Adult,” herein, is defined as a person who is twenty-one years or older. *Cf. infra* note 15 and accompanying text.

⁸ *See infra* Part I.

⁹ “Underage,” herein, is defined as a person under the age of twenty-one. *Cf. infra* note 15 and accompanying text, the definitions of minor and juvenile, which in this Article will be used interchangeably. Our legal system is disjointed when it comes to “underage” youth. The term “minor” refers to any person under the age of twenty-one. *See infra* note 15 and accompanying text. However, the term “juvenile” in our legal system refers to a person under the age of seventeen, for which there are courts dedicated to their care. The youngest a juvenile can be is often fourteen years old. There is some controversy as to the minimum age a child can be held criminally liable. *See Raising the Minimum Age for Prosecuting Children*, NAT’L JUV. JUST. NETWORK, <https://www.njjn.org/our-work/raising-the-minimum-age-for-prosecuting-children> (June 2023) (“As of October 2022, 24 states in the U.S. have no minimum age for prosecuting children. The U.S. is an outlier throughout the world in the practice of prosecuting young children in court; 14 is the most common minimum age of criminal responsibility internationally. . . . In January 2021, we watched in horror as video (*trigger warning*) was released of Rochester police officers pepper spraying a 9-year-old Black girl, while trying to force her into a police car.”); Cheryl Corley, *In Some States, Your 6-Year-Old Child can be Arrested. Advocates Want That Changed*, NPR (May 2, 2022, 5:55 PM), <https://www.npr.org/2022/05/02/1093313589/states-juvenile-minimum-age-arrested-advocates-change> (“Kaia Rolle was 6 years old when police arrested her at a Florida school in 2019. The then first-grader was accused of

from a licensed dispensary. So, she goes to the streets for the purchase.¹⁰ While purchasing the illegal marijuana, Jane is solicited for sex, sees sellers who are heavily armed with firearms, and is not sure whether what she is purchasing is really marijuana.¹¹ Later, when she smokes what she purchased, she becomes deathly ill.¹²

On her way home, during a police stop for an inoperative brake light, Jane is asked to show her driver's license, vehicle registration, and proof of insurance. Unfortunately, she smells of pot. The police search her car for drugs and find none. Nonetheless, the police arrest Jane for possession¹³ of illegal substances.¹⁴ Consequently, Jane is

kicking and punching staff members while throwing a tantrum. A police officer used zip ties to handcuff her.”).

¹⁰ Minors obtain marijuana from illegal, sometimes dangerous sources. *See generally 5 Years After California Legalized Weed, the Illicit Market Dominates*, NPR (Nov. 7, 2021, 5:01 PM), <https://www.npr.org/2021/11/07/1053387426/5-years-after-california-legalized-weed-the-illicit-market-dominates> (“We saw all of these lung illnesses emerge in the summer of 2019 caused almost entirely by illegal cannabis vape pens.”).

¹¹ Minors who purchase marijuana from sources other than legal dispensaries are much more likely to be buying drugs laced with dangerous substances. *See infra* note 28 and accompanying text.

¹² *See 5 Years After California Legalized Weed, the Illicit Market Dominates*, *supra* note 10.

¹³ *See infra* note 19 and accompanying text.

¹⁴ Under federal law, marijuana is considered a very dangerous drug and therefore a prohibited substance. *See* 21 U.S.C. § 802. Schedule I substances are described as those that have all the following findings: “(A) The drug or other substance has a high potential for abuse; (B) [t]he drug or other substance has no currently accepted medical use in treatment in the United States; (C) [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812. Notwithstanding, many states have decriminalized or legalized the use, possession, and sale of marijuana for adult use only, pursuant to strict regulations. *See generally* Claire Hansen et al., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Nov. 8, 2023), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization>.

booked with several misdemeanors and felonies as a minor¹⁵ in possession¹⁶ of marijuana (“MIPM”), alleging an intent to distribute.

Jane is fortunate that her family can afford a lawyer who charges them \$10,000 to take her case.¹⁷ Additionally, her family has the

¹⁵ “Minor(s),” herein, is defined as a person who is “underage” for a given activity which may be under twenty-one years old, whereas a “juvenile” often refers to a person who is under the age of eighteen and subject to juvenile delinquency courts. For purposes of this Article, the author draws no distinction between the two and refers to any person under the age of adulthood in a state as a juvenile. The author recognizes the gap in the law between the ages of eighteen and twenty-one, where a person is technically still a minor and not a juvenile. For contrast, “juvenile,” herein, is defined as a person under the age of eighteen. Some states refer to these persons as “underaged.” In this Article, the term juvenile, minor, and adolescent will be used interchangeably, with the knowledge that these terms are not technically the same in all jurisdictions. The author recognizes that in many jurisdictions, the age of a juvenile is a person under the age of eighteen. The youngest a juvenile can be is often fourteen years old. *See Age Matrix*, INTERSTATE COMM’N JUVS., <https://juvenilecompact.org/age-matrix> (Jan. 16, 2024) (“The age matrix provides information on each state’s age of majority, the age at which a juvenile can be prosecuted as an adult, and the maximum age of probation and parole.”); *see also Minor*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/minor> (July 2023) (“All states define an age of majority, which is usually set at 18. . . . Persons younger than this age are considered minors, and must be under the care of a parent or guardian unless they are emancipated. Minors are treated differently from adults for many legal purposes including privacy of official records, punishment in criminal matters, or the ownership or transfer of property.”). Normally, there is an important, technical distinction between a minor who is a person under twenty-one years old and a juvenile who is a person under the age of eighteen. A minor is typically tried as an adult but for laws prohibiting their behavior due to their age. A juvenile is typically tried in a juvenile court which often imposes less severe punishment. For purposes of this Article, I am conflating the two terms as to include juveniles in the term minors.

¹⁶ “Minor in possession” of marijuana, herein, is defined as a person who is underage under a state’s marijuana laws, typically under twenty-one, who is arrested for simple possession of marijuana. *See infra* note 19 and accompanying text.

¹⁷ *See generally Defenses to Minor in Possession of Alcohol (MIP) Charges*, LEGAL MATCH, <https://www.legalmatch.com/law-library/article/minor-in-possession-of-alcohol-or-drugs.html> (May 29, 2023) (“Minor in possession charges can frequently lead to severe consequences. You may need to hire a qualified juvenile lawyer if you or a loved one needs help defending against MIP charges. An attorney can supply you with legal guidance and tell you what kinds of legal alternatives are available. Also, your lawyer can be on hand to direct you during the court proceedings and hearings.”); Mark Theoharis & Rebecca Pirius,

resources to post a cash bond for her release from jail.¹⁸ To minimize sentencing, avoid possible jail time, and costly legal expenses, Jane pleads guilty of simple possession¹⁹ of marijuana, a misdemeanor in

Juvenile Drug Possession, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/crime-penalties/juvenile/drug-possession.htm> (May 24, 2022) (“Being charged with drug possession as a juvenile is always significant. Speak with a criminal defense attorney in your area who has experience defending juvenile cases. A lawyer can help you understand how the juvenile delinquency process works, what constitutional rights juveniles have in these cases, and what having a juvenile record might mean for your future.”).

¹⁸ See generally Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. JUST., <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> (Feb. 24, 2021).

¹⁹ “Simple possession,” herein, is defined as the non-violent possession of a small amount of marijuana not for sale or distribution. See U.S. SENT’G COMM’N, WEIGHING THE IMPACT OF SIMPLE POSSESSION OF MARIJUANA: TRENDS AND SENTENCING IN THE FEDERAL SYSTEM 1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20230110_Marijuana-Possession.pdf; U.S. SENT’G COMM’N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf (“The simple possession of illegal drugs is a criminal offense under federal law and in many state jurisdictions. The offense occurs ‘when someone has on his or her person, or available for his or her use, a small amount of an illegal substance for the purpose of consuming or using it but without the intent to sell or give it to anyone else.’ Simple drug possession is a misdemeanor under federal law which provides that an offender may be sentenced to a term of imprisonment of not more than one year, fined a minimum of \$1,000, or both. However, if an offender is convicted of simple possession after a prior drug related offense has become final, the offender can be charged with a felony simple possession offense.”); Jeff Burtka, *Marijuana Possession Laws by State*, FINDLAW, <https://www.findlaw.com/state/criminal-laws/marijuana-possession-laws-by-state.html> (Dec. 29, 2022); *What You Need to Know About Your Minor’s Marijuana Possession Charge*, LASSITER CRIM. DEF., <https://www.lomtl.com/what-you-need-to-know-about-your-minors-marijuana-possession-charge/> (last visited Feb. 6, 2024) (“There is no ‘just a kid’ exception for drug possession. If your child is arrested at school or on the bus with marijuana in their backpack or locker, they are subject to the same laws regarding possession of a controlled substance as an adult. Possession of a small amount of marijuana, less than two ounces, is a Class B misdemeanor. Over four ounces and possession becomes a felony, punishable by up to two years in prison. Paraphernalia charges, that is, being in possession of items used to smoke or ingest marijuana, are separate charges, and minors can be charged simply for having vape pens or pipes that are believed to be used for smoking marijuana or THC oil. Because narcotics penalties are assessed by

the State where the possession occurred, and must perform ten hours of community service. The alternative was to face the possibility of real prison time as Jane had prior arrests for shoplifting when she was younger.

Years later, as a college senior, Jane applies to law school and discovers that she needs to disclose any criminal arrests or convictions. She is embarrassed and angry for being treated like a criminal. The MIPM arrests and plea-bargained conviction will haunt her and negatively impact her reputation and livelihood for the rest of her life.²⁰

A. *Minors in Possession of Marijuana*

Jane's story reflects the experiences of millions of minors in this country who are arrested²¹ for the simple possession of marijuana. This unfortunate outcome of making an error in judgment demands a different approach to justice for minors.²² Before moving forward,

weight, the heavier the substance used to ingest the marijuana, the higher the potential penalty. A baggie of marijuana may weigh an ounce, but that same ounce of marijuana baked into edibles could push the weight into a serious felony charge. The prosecutor does not determine how much of the edible consisted of THC or marijuana. They will simply weigh the entire thing and charge accordingly.”).

²⁰ In 2015, in Washington State, three minors were reportedly charged with felonies after being caught with marijuana at school. See Mary Stone, *New Law Makes Pot Possession a Felony for Minors*, LEWISTON TRIB. (Sept. 17, 2015), https://www.lmtribune.com/northwest/new-law-makes-pot-possession-a-felony-for-minors/article_d6128609-085b-53aa-b0a3-3869147b2b9c.html; cf. Julie O'Donoghue, *Louisiana Considers Prison Time for Modest Marijuana Possession Again – But Only for Minors*, LA. ILLUMINATOR (Mar. 28, 2022, 9:52 AM), <https://lailluminator.com/2022/03/28/louisiana-considers-prison-time-for-modest-marijuana-possession-again-but-only-for-minors/>.

²¹ Even where legalized marijuana is still highly regulated, there can still be prohibitions on the use by and sale to minors, as well as driving and operating heavy equipment under the influence, and restrictions on most sales by only licensed dispensaries. See, e.g., S.B. 64, 2017–2018 Leg., Reg. Sess. (Cal. 2016) (the “Adult Use of Marijuana Act”); see also Christopher Ingraham, *California Arrested Nearly Half a Million People for Pot Over the Past Decade*, WASH. POST (Aug. 18, 2016, 1:53 PM), <https://www.washingtonpost.com/news/wonk/wp/2016/08/18/california-arrested-nearly-half-a-million-people-for-pot-over-the-past-decade/>.

²² Traditionally, this approach is referred to as “juvenile justice,” which herein, is defined as the jurisprudence developing for the protection of juveniles and their defense of their human rights. See *Juvenile Justice*, LEGAL INFO. INST.,

we need to acknowledge upfront that marijuana is a dangerous,²³ illegal drug,²⁴ which has negative impacts on brain development, particularly that of minors.²⁵ Repeated marijuana use during adolescence may lead to potentially long-lasting changes in brain function with negative impacts.²⁶

In places where the drug is legally sold, although sales to minors are strictly prohibited, its “quality” is highly regulated to avoid lethal additives.²⁷ However, where marijuana is sold illegally, there is the added danger of it being “laced” with even more harmful and

https://www.law.cornell.edu/wex/juvenile_justice (last visited Feb. 6, 2024) (“Juvenile justice is the area of criminal law applicable to persons not old enough to be held fully responsible for criminal acts. In most states, the age for adult criminal culpability is set at 18. . . . Juvenile law is mainly governed by state law and most states have enacted a juvenile code.”); *see also* Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1974). *See generally* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW (5th ed. 2018).

²³ *See Marijuana and Teens*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Marijuana-and-Teens-106.aspx#:~:text=Many%20states%20allow%20recreational%20use,anywhere%20in%20the%20United%20States (last visited Feb. 6, 2024) (“[R]esearch shows that marijuana can cause serious problems with learning, feelings, and health.”); *What We Know About Marijuana*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/marijuana/featured-topics/what-we-know-about-marijuana.html> (Mar. 1, 2023); *see also* Karen P. Tandy, *Marijuana: The Myths Are Killing Us*, 72 POLICECHIEF 14, 14–15 (2005).

²⁴ *See* 21 U.S.C. § 812.

²⁵ *Cannabis (Marijuana) DrugFacts*, NAT’L INST. ON DRUG ABUSE, <https://nida.nih.gov/publications/drugfacts/cannabis-marijuana> (last visited Feb. 13, 2024).

²⁶ Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2220 (2014).

²⁷ “Quality,” herein, is defined as the inclusion of any additives to the marijuana as well as the THC and CBD content. *See generally* Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Nov. 8, 2023, 11:19 AM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> (In Illinois, “[s]ales are taxed based on how much THC the marijuana contains: Cannabis with more than 35% THC will be taxed at 25% while cannabis with less THC will be taxed at 10%. Though marijuana has become more potent over the years, it’s still unusual for a strain to exceed 35% THC. Cannabis-infused products will be subject to a 20% tax. Local municipalities can also levy up to a 3% tax on sales.”).

possibly lethal drugs.²⁸ This is particularly true of recreational marijuana,²⁹ compared to medicinal marijuana,³⁰ and of vaping.³¹

Notwithstanding the dangers of marijuana and purchasing in the illegal market, “[m]arijuana is the most commonly used federally illegal drug in the United States, with an estimated 48.2 million people using it in 2019.”³² While most minors do not use marijuana,

²⁸ “Laced,” herein, is defined as the practice of adding other natural or synthetic chemicals to marijuana to add an additional “high” or sensation of euphoria. See Meredith Watkins, *What Can Marijuana Be Laced With?*, AM. ADDICTION CTRS., <https://americanaddictioncenters.org/marijuana-rehab/what-can-marijuana-be-laced-with> (July 10, 2023). New York law enforcement officials have issued warnings for illegally-purchased marijuana laced with fentanyl. See Wendy Wright, *N.Y. Law Enforcement Officials Issue Warning for Illegally Purchased Marijuana Laced with Fentanyl*, SPECTRUM NEWS (May 24, 2023, 6:16 PM), <https://spectrumlocalnews.com/nys/central-ny/news/2023/05/24/n-y-law-enforcement-officials-issue-warning-for-illegally-purchased-marijuana-laced-with-fentanyl>; see also LLOYD D. JOHNSTON ET AL., 2021 OVERVIEW: KEY FINDINGS ON ADOLESCENT DRUG USE 72 (2021), <https://monitoringthefuture.org/wp-content/uploads/2022/08/mtf-overview2021.pdf> (“As for other approaches to prevention, it may be useful to emphasize that many street drugs should be considered dangerous simply because they are made and sold by people who seem to be totally unconcerned with adverse consequences for users.”).

²⁹ “Recreational marijuana,” herein, is defined as the legally permitted adult use of marijuana or cannabis usually smoked but also digested for pleasure (“getting high”) or to treat illness or ailments. See Lester Black, *What’s the Difference Between Medical Marijuana and Recreational Weed?*, GOODRX HEALTH (July 14, 2022), <https://www.goodrx.com/classes/cannabinoids/medicinal-vs-recreational-weed-marijuana>.

³⁰ “Medicinal marijuana,” herein, is defined as the legally permitted medically prescribed use of marijuana or cannabis for illness or ailments. See *id.*

³¹ See *Lung Injury Update: FDA Warns Public to Stop Using Tetrahydrocannabinol (THC)-Containing Vaping Products and Any Vaping Products Obtained Off the Street*, U.S. FOOD & DRUG ADMIN. (Oct. 4, 2019), <https://www.fda.gov/safety/medical-product-safety-information/lung-injury-update-fda-warns-public-stop-using-tetrahydrocannabinol-thc-containing-vaping-products> [hereinafter *Lung Injury Update*].

³² *What We Know About Marijuana*, *supra* note 23; see also TESS BORDEN ET AL., EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 2 (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web_0.pdf (noting that every twenty-five seconds within the United States, a person is arrested for simply possessing marijuana for their personal use). Marijuana arrests comprise nearly one-half of all drug arrests reported in the United States. *Id.* at 5. According to the American Civil Liberties Union, there were 8.2 million marijuana arrests from 2001 to 2010, and 88% of those arrests were just for the possession of marijuana.

many of them do, including high school and middle school students, as well as young adults.³³ This raises health and legal challenges.³⁴

The illegality of marijuana has resulted in the possibility of confinement or incarceration of hundreds of thousands of minors, with an overrepresentation of minority youth,³⁵ who are stigmatized as pot offenders for marijuana-related allegations.³⁶ Many include arrests for the non-violent possession of marijuana for personal use,³⁷ despite marijuana usage being legal for adults in that same state.³⁸

³³ See *Teens*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/marijuana/health-effects/teens.html> (Sept. 8, 2021) (“In 2019, 37% of US high school students reported lifetime use of marijuana and 22% reported use in the past 30 days. . . . [L]arge percentages of middle and high school students reported past-year marijuana vaping—8% of eighth graders, 19% of 10th graders, and 22% of 12th graders.”).

³⁴ See JOHNSTON ET AL., *supra* note 28, at 21.

³⁵ See Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>; *United States Marijuana Arrests (1982–2008)*, DRUG SCI., https://www.drugscience.org/States/US/US_total.htm (last visited Feb. 5, 2024); Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, PBS NEWS HOUR (July 26, 2021, 12:55 PM), <https://www.pbs.org/newshour/nation/50-year-war-on-drugs-imprisoned-millions-of-black-americans>. To be clear, juvenile courts don’t sentence or incarcerate juveniles. Rather, they adjudicate them to be delinquent and may send juvenile offenders to various programs, including detention. To be sentenced and incarcerated, juveniles must be referred to their local criminal court and charged, tried, convicted, sentenced, etc., there. Minors who are beyond the age juveniles might be sentenced and imprisoned as adults.

³⁶ “Pot offender(s),” herein, includes persons affected by any aspect of marijuana laws, including investigatory stops, searches, arrests, pleas, convictions, incarcerations, paroles, and/or criminal records, as well as the “collateral consequences” of such laws. See *supra* note 20 and accompanying text.

³⁷ See *What You Need to Know About Your Minor’s Marijuana Possession Charge*, *supra* note 19.

³⁸ About 20%, or about 400,000, of those incarcerated, are imprisoned for marijuana-related offenses. *Drug War Stats*, DRUG POL’Y ALL., <https://drugpolicy.org/drug-war-stats/> (last visited Feb. 21, 2024) (noting how the United States annually spends over \$47 billion “to enforce drug prohibition,” and how “over 1 million arrests are [annually] made for drug law violations,” of which “[m]arijuana possession made up 30% of drug-related arrests in 2020”); see also EZEKIEL EDWARDS ET AL., *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4–5 (2013), <https://www.aclu.org/wp-content/uploads/publications/1114413-mj-report-rfs-rell.pdf> (“[B]etween 2001 and 2010, there were over 8 million marijuana arrests in the United States. . . . In 2010, there was one marijuana arrest every 37 seconds,

Being arrested for and accused of the simple possession of marijuana can result in negative, life-time impacts on the quality of a

and states spent combined over \$3.6 billion enforcing marijuana possession laws. . . . The report concludes that the War on Marijuana, like the larger War on Drugs of which it is a part, is a failure. It has needlessly ensnared hundreds of thousands of people in the criminal justice system . . . [d]espite the fact that aggressive enforcement of marijuana laws has been an increasing priority of police departments across the country, and that states have spent billions on such enforcement, it has failed to diminish marijuana's use or availability."); *see also*, e.g., *Marijuana Legality by State*, DISA, <https://disa.com/marijuana-legality-by-state> (Feb. 1, 2024); Hansen et al., *supra* note 27; *State Laws*, NORML, <https://norml.org/laws/> (last visited Feb. 5, 2024). As research shows:

Additionally, juveniles may be prosecuted for conduct that is prohibited solely based on their age alone, which is commonly called a "status offense." A status offense is an act that is considered a violation of law only because the person accused of the conduct is a minor. For example, although consuming alcohol and using marijuana is legal in a number of jurisdictions for adults, the same cannot be said for juveniles. Some of these status offenses include: possession of marijuana, possession of alcohol, possession of cigarettes or tobacco products, skipping school (truancy), violating local curfew hours, and driving with any measurable amount of blood alcohol. In a given year, approximately 400,000 juveniles are arrested, charged, or detained by police due to a status offense. This shows that about 20% of juvenile offenses are for violations that an adult based solely on age would not be prosecuted for. If a juvenile is sent to juvenile court because of a status offense, the court may in all likelihood decide that it is in the interest of justice to pursue an alternative resolution to address the juvenile's conduct rather than a formal filing. Some of these alternative resolutions may include: community service, counseling, therapy, probation, or just a fine.

Juvenile Offenses, CHILD CRIME PREVENTION & SAFETY CTR., <https://childsafety.losangelescriminallawyer.pro/juvenile-offenses.html> (last visited Feb. 5, 2024). *See generally Status Offenders*, OJJDP, https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/status_offenders.pdf (Sept. 2015).

person's liberty and livelihood: both direct and collateral. Some alleged offenders could serve real jail time.³⁹ Arrest for the use or possession of pot is a traumatic experience.⁴⁰ Furthermore, repeated marijuana use during adolescence may lead to potentially long-lasting changes in brain function with negative impacts.⁴¹

B. *Collateral Consequences*

Moreover, all those arrested can suffer from many forms of negative, collateral consequences.⁴² For example, over 200,000 students have reportedly lost federal financial aid eligibility because of drug convictions.⁴³ Other collateral consequences of marijuana offenses

³⁹ See, e.g., *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016) (holding that its previous ruling in *Miller v. Alabama*, 567 U.S. 460, 489 (2012), that a mandatory life sentence without parole should not apply to persons convicted of murder committed as juveniles, should be applied retroactively). See *infra* Part III.

⁴⁰ See KIM GILHULY ET AL., REDUCING YOUTH ARRESTS KEEPS KIDS HEALTHY AND SUCCESSFUL: A HEALTH ANALYSIS OF YOUTH ARREST IN MICHIGAN 11 (2017), https://humanimpact.org/wp-content/uploads/2018/10/HIP_MichYouthArrests_2017.06.pdf.

⁴¹ See generally Volkow et al., *supra* note 26, at 2219–21.

⁴² See *Federal Collateral Consequences for Marijuana Convictions*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/criminal-justice/federal-collateral-consequences-for-marijuana-convictions/> (last visited Feb. 5, 2024) [hereinafter MPP]; see also *National Inventory of Collateral Consequences of Conviction*, JUST. CTR.: COUNCIL STATE GOV'TS, <https://csgjustice-center.org/publications/the-national-inventory-of-collateral-consequences-of-conviction/> (last visited Feb. 5, 2024) (defining “collateral consequences” of a criminal arrest or conviction as “legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other opportunities,” and providing a searchable database of the collateral consequences in all U.S. jurisdictions and extensive resources).

⁴³ See MPP, *supra* note 42 (citing 20 U.S.C. § 1091); *Drug War Stats*, *supra* note 38; see also *Denial of Federal Benefits (DFB) Program*, BUREAU JUST. ASSISTANCE (Feb. 17, 2012), <https://bja.ojp.gov/program/dfb-program/overview> (noting that “state and federal courts—as part of the sentencing process—[have] the ability to deny all or selected federal benefits to individuals who are convicted of drug trafficking or drug possession,” and supplying a list of the many federal benefits that may be denied to convicted individuals).

include negative impacts on employment,⁴⁴ professional licensing,⁴⁵ immigration,⁴⁶ travel,⁴⁷ governmental benefits,⁴⁸ voting rights,⁴⁹

⁴⁴ See MPP, *supra* note 42 (“Because marijuana possession is a crime at both the federal and state levels, many firms use criminal history and drug tests to deny job applicants.”); Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 704, 704–05 n.69 (2016) (discussing how most low-wage employers, including fast food restaurants, retail stores, hotels, and public transportation, require drug testing, and that racial minorities “may bear the brunt of these requirements that control their behavior by private contract,” and, further, that “past drug offenses can haunt the applicant, as more than 90 percent of employers undertake background checks on prospective employees that encompass criminal records”); see also, e.g., Arlette Saenz et al., *White House Staffers Asked to Resign or Work Remotely After Revealing Past Marijuana Use*, CNN POL., <https://www.cnn.com/2021/03/19/politics/biden-white-house-staff-marijuana/index.html> (Mar. 19, 2021, 3:48 PM); Russ Belville, *4 Civil Rights You Lose by Using Legal Marijuana*, HIGH TIMES (Dec. 13, 2017), <https://hightimes.com/culture/civil-rights-lose-using-legal-marijuana/> (“At the state level, none of the states that have both legal and medical marijuana provide any protection for employment rights in their laws.”).

⁴⁵ See, e.g., CAROLINE COHN ET AL., STAN. L. SCH., UNLOCKING THE BAR: EXPANDING ACCESS TO THE LEGAL PROFESSION FOR PEOPLE WITH CRIMINAL RECORDS IN CALIFORNIA 4 (2019), <https://law.stanford.edu/wp-content/uploads/2019/07/Unlocking-the-Bar-July-2019.pdf> (identifying a range of successive obstacles to becoming a lawyer in California and recommending ways for each of these barriers to be overcome to expand access to the legal profession for qualified people with criminal records).

⁴⁶ Undocumented immigrants, particularly Latinx, experience detrimental consequences for marijuana possession and other drug offenses. Simple possession offenses are grounds for deportation of noncitizens under the Immigration and Nationality Act, unless they fall under the exception for single offense possession of small amounts of marijuana. See Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531–35 (2015) (discussing how this personal use exception can be lost by more than one marijuana offense or by a conviction for social sharing of marijuana and also noting that there is no personal use exception when noncitizens who travel abroad attempt to return to the United States); see also Tom Angell, *New Cory Booker Bill Would Protect Immigrants From Being Deported For Marijuana*, FORBES (June 27, 2019, 3:44 PM), <https://www.forbes.com/sites/tomangell/2019/06/27/new-cory-booker-bill-would-protect-immigrants-from-being-deported-for-marijuana/?sh=442097225d8e> (“Under current law, more than 34,000 immigrants were deported for cannabis possession between 2007 and 2012, according to a Human Rights Watch report. In April, U.S. Citizenship and Immigration Services issued a memo clarifying that using marijuana or engaging in cannabis-related activities—including working at a state-licensed dispensary or cultivation operation—makes immigrants ineligible for citizenship because it means that they do not have ‘good moral character.’”).

See generally Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J. L. REFORM 967, 967–69 (2015) (addressing how racial profiling of minority noncitizens adds to the treacherous immigration law impact of drug offenses); GRACE MENG, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES 22–25 (2015) (discussing the rise in drug deportations and its consequential impact on families).

⁴⁷ *See* Belville, *supra* note 44 (“Obviously, traveling to a state with marijuana prohibition is out, if you intend to possess and use marijuana. But even for medical marijuana patients, traveling to another medical marijuana state may be out of the question. Only Arizona, Arkansas, Maine, Michigan, Nevada, New Hampshire, Ohio and Rhode Island will recognize out-of-state medical marijuana cards.”); *see also, e.g.*, Natasha Anderson, *Prince Harry Could Be Barred from the US and has Put Visa ‘at Risk’ After his Admission he has Taken Drugs*, DAILY MAIL ONLINE, <https://www.dailymail.co.uk/news/article-11610559/Prince-Harry-barred-visa-risk-drugs-admission.html> (Jan. 8, 2023, 4:56 PM).

⁴⁸ *See Drug War Stats, supra* note 38; *see also* MPP, *supra* note 42 (“Students convicted of drug violations are ineligible to receive student loans or grants for one year after their first conviction and two years after their second conviction, and are indefinitely disqualified after a second conviction. They are also ineligible for National Service Trust awards.”). Fortunately, the practice of holding students ineligible for federal financial aid no longer applies. *See Federal Student Aid Eligibility for Students with Criminal Convictions*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> (last visited Mar. 17, 2024). The FAFSA Simplification Act (Title VII of the Consolidated Appropriations Act of 2021, CAA) repeals the disclosure requirement for the Notice of Federal Student Financial Aid Penalties for Drug Law Violations in 20 USC 1092(k), effective July 1, 2023 with the 2023–24 award year.

⁴⁹ *See generally* Bobby Hoffman, *Voting Is a Right that Shouldn’t Be Taken Away*, ACLU (Apr. 17, 2019), <https://www.aclu.org/news/voting-rights/voting-right-shouldnt-be-taken-away> (“As a result of felony disenfranchisement, six million people are still unable to vote because they are incarcerated, completing probation or parole, or are precluded from voting for having a felony conviction in their past.”). For example, some states strip the right to vote from people convicted of some misdemeanors, while most strip it for a felony conviction. *See* U.S. DEP’T OF JUST.: C.R. DIV., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION 2 (2022), <https://www.justice.gov/voting/file/1507306/download>.

public housing,⁵⁰ NCAA sports suspension,⁵¹ the right to bear arms,⁵² and the right to parent.⁵³ Consequently, being arrested for possession and/or use of marijuana will result in a substantial loss of citizenship rights for minors, including constitutionally-guaranteed civil rights and other societal benefits.⁵⁴

⁵⁰ See MPP, *supra* note 42 (“Public Housing Authorities (PHAs) for various states shall terminate the lease of anyone who has engaged in drug-related criminal activities, and offenders may not reside in public housing. PHAs may also deny households whose members have been convicted of a drug offense from participating in a multi-family housing loan property lease.”); see also Marah A. Curtis et al., *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: J. POL’Y DEV. & RSCH. 37, 43–44 (2013).

⁵¹ NCAA, DRUG POLICIES: FOR YOUR HEALTH AND SAFETY 4 (2023) (“Cannabinoids include cannabis and cannabidiol (CBD). Cannabis use is linked to anxiety, panic reactions, respiratory damage, short-term memory impairment and a decreased focus on goals and personal achievement. Cannabinoids are banned by the NCAA and can result in suspension.”). *But see* Chris Radford, *Committee Adjusts THC Test Threshold*, NCAA (Feb. 25, 2022, 10:30 AM), <https://www.ncaa.org/news/2022/2/25/media-center-committee-adjusts-thc-test-threshold.aspx> (“[Committee on Competitive Safeguards and Medical Aspects of Sports] aligned with THC threshold levels established by the World Anti-Doping Agency, raising the threshold for student-athletes from 35 to 150 nanograms per milliliter. The threshold adjustment is effective immediately and applicable to drug tests administered in fall 2021 or later. . . . The proposed new penalty structure: First positive test: No loss of eligibility if the school provides a management plan and education for the student-athlete. Second positive test: No loss of eligibility if the school provides additional management and education and confirms the student-athlete was compliant with the original management and education plan. However, the student-athlete must be withheld from 25% of regular-season contests if they were not compliant with the original management and education plan. Third positive test: No loss of eligibility if the school provides additional management and education and confirms the student-athlete was compliant with the previous two treatment and education plans. However, the student-athlete must be withheld from 50% of regular-season contests if they were not compliant with the previous management and education plan.”).

⁵² See Belville, *supra* note 44 (“[I]f your use of marijuana is publicly known, perhaps by your registration in a medical marijuana registry or by posting proof of your adult use on social media, you are prohibited by federal law from possessing guns and ammo.”).

⁵³ See *id.* (“Prohibition states are infamous for using their ‘crime’ of marijuana use as a justification for removal of children from a family by Child Protective Services. However, legal medical or adult-use marijuana in your state is no protection for your right to parent, except in some of the newer state laws.”).

⁵⁴ See BUREAU JUST. ASSISTANCE, *supra* note 43.

C. *Equity Issues*

Relative to equity, what if Jane Doe was a young Black⁵⁵ or Latinx person? Then, the odds that she would be arrested for possession would increase substantially.⁵⁶ While marijuana use is roughly equal among Black people and white people, Black people are nearly four times more likely to be arrested for marijuana possession.⁵⁷ Further, although whites, Blacks, and Latinx use and sell drugs at similar rates, 57% of the people incarcerated in state prison for drug offenses are Black or Latinx.⁵⁸ Moreover, the criminalization of marijuana use has facilitated the government's harassment of racial minorities⁵⁹ and has disproportionately damaged minority communities.⁶⁰ Despite the fact that marijuana use was not always

⁵⁵ The author has chosen to use the capitalized adjective "Black" to refer to Americans of the African diaspora and "Latinx" to refer to Americans of Hispanic descent, while using the lowercase adjective "white" to refer to Americans of European ancestry. See Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html>.

⁵⁶ *Drug War Stats*, *supra* note 38 ("Black people are 3.6 times more likely to be arrested for marijuana than white people nationally, despite similar rates of use."); see also Alex Burness, *Colorado Could Move to Clear Pre-Legalization Marijuana Convictions Statewide as soon as 2019*, COLO. INDEP. (Dec. 6, 2018), <https://www.coloradoindependent.com/2018/12/06/colorado-marijuana-convictions-2019/>.

⁵⁷ *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (Apr. 17, 2020), <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform> [hereinafter *A Tale of Two Countries*].

⁵⁸ DRUG POL'Y ALL., *THE DRUG WAR, MASS INCARCERATION AND RACE 1* (2015); see also Bender, *supra* note 44, at 690 (noting "[d]espite that legalization, marijuana usage continues to disproportionately impose serious consequences on racial minorities, while white entrepreneurs and white users enjoy the early fruits of legalization").

⁵⁹ There is historical evidence showing that a significant reason for the marijuana ban by the U.S. government was political and racist in nature, aimed to suppress Black and Mexican minorities. 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>; see also MIRJAM VAN HET LOO ET AL., *CANNABIS POLICY, IMPLEMENTATION AND OUTCOMES* 22–31 (2003) (stating that statistics and existing literature show controlling cannabis use leads in many cases to selective law enforcement, which increases the chances of arresting people from certain ethnicities).

⁶⁰ See *Drug War Stats*, *supra* note 38.

associated with people of color,⁶¹ the criminalization of marijuana has been founded on racism and xenophobia.⁶² As a result, one scholar has referred to the War on Drugs (“WOD”)⁶³ as a war on people of color,⁶⁴ with particular harm suffered by the Black community.⁶⁵ Additionally, inner-city, public school students face what is referred to as the “school-to-prison pipeline,”⁶⁶ where the infraction of in-school rules often results in entry into the criminal justice system.

⁶¹ See Thompson, *supra* note 59.

⁶² See Jonathan Blanks, *The War on Drugs Has Made Policing More Violent*, DEMOCRACY J. (July 19, 2016, 2:58 PM), <https://democracyjournal.org/arguments/the-war-on-drugs-has-made-policing-more-violent> (“Police are incentivized to initiate unnecessary contact with pedestrians and motorists, and they do so most often against ethnic and racial minorities. Such over-policing engenders resentment among minority communities and jeopardizes public safety.”).

⁶³ “War on Drugs,” herein, means the politically motivated initiative to use drug use as a weapon to criminalize political opponents. See *infra* Section I.A.

⁶⁴ See generally Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381, 390 (2002); see also Steven A. Ramirez and Andre Douglas Pond Cummings, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 UALR L. REV. 453, 453–54 (2022).

⁶⁵ One noted anti-incarceration scholar, Michelle Alexander, argues that merely legalizing marijuana is inadequate relief for embattled racial minorities ravaged by the War on Drugs:

After waging a brutal war on poor communities of color, a drug war that has decimated families, spread despair and hopelessness through entire communities, and a war that has fanned the flames of the very violence it was supposedly intended to address and control; after pouring billions of dollars into prisons and allowing schools to fail; we’re gonna simply say, we’re done now? . . . I think we have to be willing, as we’re talking about legalization, to also start talking about reparations for the war on drugs, how to repair the harm caused.

April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), <https://www.alternet.org/2014/03/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison>.

⁶⁶ “School-to-prison pipeline,” herein, refers to the proven phenomenon by which at-risk, often racial minority students are disciplined in such a manner that facilitates their being arrested and ultimately imprisoned. See Lauren Camera, *Study Confirms School-to-Prison Pipeline*, U.S. NEWS (July 27, 2021), <https://www.usnews.com/news/education-news/articles/2021-07-27/study-confirms-school-to-prison-pipeline>; *School-to-Prison Pipeline*, ACLU,

D. *Conundrum*

For each young person residing in the United States, regardless of background, the issue of the criminality of minors in possession of marijuana presents a conundrum. On the one hand, as a society, we have a stated commitment to ensuring the safety and promoting the positive development of our young people.⁶⁷ Yet, at the same time, we punish young people in potentially traumatic and life altering ways when we arrest and confine them for the simple possession of marijuana.⁶⁸ This conflict in our laws and policies is especially troubling considering recent legal developments, which will be explored in detail in this Article.

Law and society's treatment of minors in possession of marijuana is symptomatic of a fundamental jurisprudential question: How do we best ensure the safety and promote the positive development of our young people and what role, if any, should the criminal justice system play in pursuing those important goals? This Article poses and explores a thesis to provide an approach, and ultimately, a potential answer, to this problem. That is, decriminalize the simple, non-violent possession of marijuana by minors, pursuant to a seminal, normative approach to policy relative to minors, what I coin as the "best interest of the minor" standard ("BIMS"),⁶⁹ to protect the

<https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline> (last visited Feb. 16, 2024); Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1206 (2003); Johanna Wald & Daniel F. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9, 11 (2003).

⁶⁷ See *infra* Section III.A; see also, e.g., *About OJJDP*, OJJDP, <https://ojjdp.ojp.gov/about> (last visited Feb. 16, 2024) (noting that the Juvenile Justice and Delinquency Prevention Act of 1974, Public Law 93-415, as amended, established the Office of Juvenile Justice and Delinquency Prevention (OJJDP) "to support local and state efforts to prevent delinquency and improve juvenile justice systems"); William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L.J. 509, 509-11 (1983). *But see CRM 1-499: Federal Juvenile Delinquency Code*, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/jm/criminal-resource-manual-117-federal-juvenile-delinquency-code> (last visited Feb. 16, 2024). Additionally, we expend and dedicate tremendous resources to educate minors. See *infra* Section III.A.

⁶⁸ This conflict is not limited to marijuana and applies to minors in possession of other illegal substances, including alcohol and tobacco. However, herein, the author focuses on minors in the simple possession of marijuana.

⁶⁹ "Best interest of the minor," herein, is defined as a proposed legal standard under which society and the legal system seek to protect and promote the

safety of and promote the positive development of our youth.⁷⁰ Further, this Article utilizes the issue of minors in possession of marijuana (“MIPM”) as a lens through which we can assess the conflicts in our treatment and the need to take an approach that uses our limited resources to protect and educate our youth about the dangers of marijuana rather than to punish and stigmatize them for their possession of small amounts of the illegal substance.⁷¹

E. *Recent Developments*

Three relatively-recent developments compel us to critically analyze whether minors in possession of marijuana are entitled to the same decriminalization/legalization⁷² protections as some adults are receiving in limited jurisdictions. First, there are a growing number of states that have legalized or decriminalized the simple possession

development and well-being of minors. *See infra* Part II. The phrase reflects a standard “best interest of the child,” which is a court doctrine used in legal proceedings when parents are contesting custody of a child. *See Best Interests of the Child*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/best_interests_of_the_child (June 2022); *see also* Federica Versea, *The Best Interest of the Child as put into Practice Worldwide*, HUMANIUM (Feb. 21, 2023), <https://www.humanium.org/en/the-best-interest-of-the-child-as-put-into-practice-worldwide/> (“The best interest of the child determination, therefore, describes a formal process with strict procedural safeguards designed to determine their best interest for particularly important decisions affecting the child. It should facilitate the appropriate participation of children without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to evaluate the best option.”). The author explores the concept of the “best interest of the minor” in a forthcoming, companion piece.

⁷⁰ *See infra* Section III.A.

⁷¹ *See infra* Part II.

⁷² “Decriminalization/legalization,” herein, combines two legally distinct phenomenon. “Decriminalization” refers to law reform wherein a state enacts a law that imposes penalties other than jail time for possession of marijuana. *Types of Cannabis Policy Reform Laws*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/issues/legislation/types-of-marijuana-policy-reform-laws/> (last visited Feb. 16, 2024). Whereas “legalization,” refers to where a state has enacted a law making it legal for adults who are twenty-one and older to use marijuana and allows for the legal sales and purchase of marijuana. *Id.* In California, the decriminalization of marijuana preceded its legalization, as the state made possession of one ounce of marijuana a misdemeanor punishable by a hundred dollar fine, rather than a criminal offense, with some exceptions such as possession on school grounds. *See* CAL. HEALTH & SAFETY CODE § 11357 (2023).

and use of marijuana by adults.⁷³ Additionally, on October 6, 2022, President Joe Biden signed an Executive Order that pardons all past adult persons arrested for the simple possession of marijuana who violated federal laws.⁷⁴ These developments challenge the view that marijuana is a dangerous drug.⁷⁵ Despite this recent action, the decriminalization/legalization of marijuana has failed to effectively assess the needs of juveniles who make up a significant number of offenders.⁷⁶ Here, the law faces a quandary and is conflicted: How do we best protect and develop minors who choose to use marijuana for recreational purposes?

Second, arresting or convicting and victimizing minors as criminally liable for simple possession of marijuana arguably runs afoul of the “diminished criminal culpability rationale” (“DCCR”)⁷⁷ derived from a landmark United States Supreme Court decision on the

⁷³ As of August 2023, twenty-three states and the District of Columbia (D.C.) have legalized the recreational use of marijuana, while forty-four states, Guam, and D.C. have legalized (some with caveats) the medical use of the drug. *How Do Marijuana Laws Differ Between States?*, USA FACTS (Oct. 4, 2023), <https://usafacts.org/articles/how-marijuana-laws-are-different-between-states/>; *Marijuana Legality by State*, *supra* note 38.

⁷⁴ Exec. Order No. 10467, 87 Fed. Reg. 61441 (2022) (granting Pardon for the Offense of Simple Possession of Marijuana).

⁷⁵ See Richard A. Grucza & Andrew D. Plunk, *The Federal Government Should Decriminalize Marijuana*, SCI. AM. (Apr. 11, 2022), <https://www.scientificamerican.com/article/the-federal-government-should-decriminalize-marijuana/>; Natalie Fertig & Paul Demko, *Slightly Higher Times: Biden Administration Moves to Loosen Weed Restrictions*, POLITICO, <https://www.politico.com/news/2023/08/30/marijuana-review-move-to-schedule-iii-00113493> (Aug. 30, 2023, 7:43 PM) (“The Biden administration’s Department of Health and Human Services is recommending that the Drug Enforcement Administration significantly loosen federal restrictions on marijuana . . . [and] wants the drug moved from Schedule I to Schedule III under the CSA, potentially the biggest change in federal drug policy in decades. . . . Cannabis is currently a Schedule I substance on the CSA, which means it is deemed to have a high likelihood of abuse and no medical uses. Heroin and LSD are also Schedule I drugs. Schedule III drugs are categorized as having ‘moderate to low potential for physical and psychological dependence.’ The category includes ketamine and testosterone.”).

⁷⁶ See *infra* Part I.

⁷⁷ “Diminished criminal culpability rationale,” herein, means the author’s synthesis of several Court death-penalty-sentencing decisions that adopted neuroscience research to take judicial notice that the brain development of juveniles impedes their judgment and thereby diminishes their criminal culpability. The DCCR expands the application of the Court’s reasoning beyond death-penalty-

criminal culpability of juveniles.⁷⁸ Third, many States have decriminalized simple possession by adults, recognizing that past marijuana laws have greatly contributed to the problems related to a broken criminal justice system,⁷⁹ including mass incarceration⁸⁰ and racial disparities,⁸¹ particularly to the devastation of communities of color,⁸² and some states have even exonerated past, non-violent marijuana offenders.⁸³

In response to these developments, this Article advances the normative claim that, applying the BIMS, MIPM should be free of criminal culpability for the mere, non-violent possession and use of

sentencing cases, by logically positing that if juveniles and arguably all minors should be less culpable for committing murder due to their diminished capacity, then they should be less culpable for making bad choices for minor infractions such as using or possessing marijuana. *See infra* Section III.B.

⁷⁸ *See Roper v. Simmons*, 543 U.S. 551, 569–70, 578 (2005) (holding that imposing the death penalty on juveniles who commit crimes when they are under age eighteen violates the Eighth Amendment’s prohibition against cruel and unusual punishment and finding that juveniles have less impulse control, increased susceptibility to peer influence, and lack of good reasoning, making them less culpable than adults). *See infra* Section III.B.

⁷⁹ About 20%, or about 400,000 of those incarcerated, are imprisoned for drug-related offenses. *See Drug War Stats, supra* note 38 (“1 in 5 of the nearly 2 million people currently incarcerated in the U.S., 1 in 5 is locked up for a drug offense. . . . Marijuana possession made up 30% of drug-related arrests in 2020. For decades, personal possession of marijuana was the most arrested drug offense in the U.S.”) (citations omitted)).

⁸⁰ The United States incarcerates two million people, which is more than any other country. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 58–94 (2010); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 1* (2017) (critiquing descriptive accounts of mass incarceration that focus too heavily on non-violent drug-related offenses and sentence lengths); Press Release, Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2017* (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> (“[B]eing locked up is just one piece of the larger pie of correctional control. There are another 840,000 people on parole (a type of conditional release from prison) and a staggering 3.7 million people on probation (what is typically an alternative sentence). Particularly given the often-onerous conditions of probation, policymakers should be cautious of ‘alternatives to incarceration’ that can easily widen the net of criminalization to people who are not a threat to public safety.”); *Drug War Stats, supra* note 38.

⁸¹ *See A Tale of Two Countries, supra* note 57.

⁸² *Id.*

⁸³ *Id.*

marijuana in private. Consequently, I recommend that we should direct our resources to better protect and educate our young people of the harms of marijuana and the dangers of the illicit markets, rather than to punish them for their possession of small amounts of the illegal substance.⁸⁴

F. *Roadmap*

As a roadmap, this Article is divided into three parts. Part I will present the problems with the law's current treatment of minors in the simple possession of marijuana as a crime and highlight a conflict between societal goals of both ensuring the safety of and the positive development of our youth while enforcing illegal activities by minors.⁸⁵ Part II will present a statutory decriminalization of the simple, non-violent possession of marijuana by minors and present the tenets of such a statute, which I refer to as the "Decriminalization of Minors in the Simple, Non-Violent Possession of Marijuana" Act ("DMIPMA").⁸⁶ There will be an appendix that lays out the elements of a model act.

Part III will present three justifications for the DMIPMA. The first justification is that it supported by several, ground-breaking Supreme Court decisions that reflect the DCCR, where the Court adopted neuroscience research to find that the brain development of juveniles impedes their judgment and thereby diminishes their criminal culpability.⁸⁷ The second justification is that the Act redresses disparate treatment of MIPM.⁸⁸ The third justification is convincing public policies.⁸⁹ Hence, this Article convincingly defends the proposition that the law should decriminalize the simple, non-violent possession and use of marijuana by minors.

This Article has greatly benefited from the works of other scholars related to the issue. It is a seminal intersection of various disci-

⁸⁴ See *infra* Section III.C.

⁸⁵ See *infra* Part I.

⁸⁶ See *infra* Part II.

⁸⁷ See *infra* Section III.A.

⁸⁸ See *infra* Section III.B.

⁸⁹ See *infra* Section III.C.

plines including: (1) the legal rights of juveniles that involve juvenile law,⁹⁰ *parens patriae*,⁹¹ the juvenile justice system,⁹² the constitutional rights of minors;⁹³ (2) decriminalization/legalization of marijuana that involves drug law,⁹⁴ state decriminalization/legalization laws;⁹⁵ (3) criminal justice reform that involves misdemeanor discrimination,⁹⁶ new ideas,⁹⁷ mass incarceration;⁹⁸ and (4) equity issues that involve racial profiling,⁹⁹ institutional racism,¹⁰⁰ unconscious bias, reform of the criminal justice system, the school-to-

⁹⁰ See generally GARDNER, *supra* note 22; J. ERIC SMITHBURN, CASES AND MATERIALS IN JUVENILE LAW (2d ed. 2014); TONI MARSH, JUVENILE LAW (2006).

⁹¹ See *Juvenile Justice*, *supra* note 22 (“The doctrine of *parens patriae* authorizes the state to legislate for the protection, care, custody, and maintenance of children within its jurisdiction.”).

⁹² See generally ALIDA V. MERLO ET AL., THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW (8th ed. 2015).

⁹³ See generally LARRY J. SIEGEL & PAUL E. TRACY, JUVENILE LAW: A COLLECTION OF LEADING U.S. SUPREME COURT CASES (1st ed. 2019); DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *IN RE GAULT* AND JUVENILE JUSTICE (2011).

⁹⁴ See generally ALEX KREIT, ILLEGAL DRUG AND MARIJUANA LAW (2019); ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

⁹⁵ See Theresa Waldrop, *Californians Line up to Legally Buy Recreational Pot*, CNN, <http://www.cnn.com/2018/01/01/us/california-marijuana-sales/index.html> (Jan. 2, 2018, 6:23 AM) (noting that many other states will follow).

⁹⁶ See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1056–61 (2015).

⁹⁷ See, e.g., Michele Jawando & Chelsea Parsons, *4 Ideas that Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CTR. AM. PROGRESS (Dec. 18, 2014), [https://www.americanprogress.org/article/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/#:~:text=This%20issue%20brief%20offers%20four,diligent%2C%20independent%2C%20and%20thorough%20investigation;IvanaDukanovic>Note,ReformingHighStakesPoliceDepartments:HowFederalCivilRightsWillRebuildConstitutionalPolicinginAmerica,43HASTINGSCONST.L.Q.911,911\(2016\).](https://www.americanprogress.org/article/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/#:~:text=This%20issue%20brief%20offers%20four,diligent%2C%20independent%2C%20and%20thorough%20investigation;IvanaDukanovic>Note,ReformingHighStakesPoliceDepartments:HowFederalCivilRightsWillRebuildConstitutionalPolicinginAmerica,43HASTINGSCONST.L.Q.911,911(2016).)

⁹⁸ See Taifa, *supra* note 35.

⁹⁹ See, e.g., End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.–C.L. REV. 159, 168 (2016) (identifying racial profiling as a factor in police shootings).

¹⁰⁰ See, e.g., ALEXANDER, *supra* note 80, at 58; Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1538 (2016) (positing that the imprisonment of African-American men is one means by which society removes minority populations from mainstream life); Nunn, *supra* note 64, at 390.

prison pipeline,¹⁰¹ decriminalization/legalization of marijuana and minors,¹⁰² and the “best interest of the child” jurisprudence.¹⁰³ Building on the works of other scholars, this Article uniquely argues that our current development and protection goals for our youth, along with ground-breaking Supreme Court decisions and public policy, demands that the law needs to free minors from the negative impacts of criminal liability for the simple, non-violent possession and use of marijuana.

Next, Part I describes the quandary of the criminal culpability of juveniles in the face of the movement to decriminalize/legalize marijuana use and possession by adults. It highlights the need to assess the inherent contradiction of our law’s goals of ensuring the safety of and the positive development of our youth. It describes a problem that demands law reform that calls for an overarching principle in how we regulate bad choices by our youth.

I. CRIMINOLOGY CULPABILITY CONUNDRUM

While most minors abstain from marijuana usage, young people, particularly juveniles, are still among the highest users of marijuana.¹⁰⁴ In 2020, roughly 8% of eighth graders, 19% of tenth graders, and 22% of twelfth graders reported using cannabis or hashish in the past twelve months, predominantly through vaping it.¹⁰⁵ All minors,

¹⁰¹ See, e.g., Camera, *supra* note 66; Am. Acad. of Pediatrics, *supra* note 66, at 1206; Wald & Losen, *supra* note 66.

¹⁰² See, e.g., Magdalena Cerdá et al., *Association of State Recreational Marijuana Laws With Adolescent Marijuana Use*, 171 JAMA PEDIATRICS 142, 143 (2017); Julia A. Dilley et al., *Prevalence of Cannabis Use in Youths After Legalization in Washington State*, 173 JAMA PEDIATRICS 192, 192 (2019); Renee M. Johnson et al., *Race/Ethnicity Differences in Trends of Marijuana, Cigarette, and Alcohol Use Among 8th, 10th, and 12th Graders in Washington State, 2004–2016*, 20 PREVENTION SCI. 194, 194–202 (2018).

¹⁰³ See generally THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW 206 (Jonathan Todres & Shani M. King eds., 2020).

¹⁰⁴ Kristie Ladegard et al., *Marijuana Legalization and Youth*, 145 PEDIATRICS S165, S166 (2020).

¹⁰⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, MARIJUANA USE AND TEENS 1 (2021), <https://www.cdc.gov/marijuana/factsheets/pdf/MarijuanaFactsheets-Teens-508compliant.pdf>.

including those who do not use marijuana, are *subject* to arrest and possible conviction for the simple possession of marijuana.¹⁰⁶

Part I will show how the current law greatly harms minors by criminalizing their simple possession of marijuana and explain how MIPM are treated as criminals. Part I has two Sections. The first Section provides the context of marijuana law: the War on Drugs and the decriminalization/legalization movement. The second Section provides a list of the current, detailed laws that make minors who possess or use even a small amount of marijuana subject to arrest and/or criminal conviction.

A. *The War on Drugs & Marijuana*

The following provides the context in which MIPM should be viewed by providing a brief history of the War on Drugs and a current snapshot of the growing movement to decriminalize/legalize marijuana's use and possession by adults, subject to restrictive laws and regulations.

1. THE WAR ON DRUGS

We begin with a brief history of the WOD,¹⁰⁷ which was fundamentally flawed from the outset and fell short of achieving its stated goal of reducing drug use.¹⁰⁸ On the contrary, the WOD caused, and continues to cause, great harm to individuals and to communities.¹⁰⁹

The first national regulation of marijuana was the Marihuana Tax Act of 1937 ("MTA"), which created elaborate enforcement rules and levied an expensive tax and penalty for marijuana handlers.¹¹⁰ Shortly after MTA's passage, marijuana was taken off the list of

¹⁰⁶ See Bryan Hindin, *What Happens When You Get Caught with Drugs as a Minor?*, RECOVERY VILL., <https://www.therecoveryvillage.com/drug-addiction/what-happens-getting-caught-minor/> (June 20, 2023).

¹⁰⁷ See Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016, 9:10 AM), <http://time.com/4298038/marijuana-history-in-america>.

¹⁰⁸ See *The 'War on Drugs' Has Failed, Commission Says*, THE LEADERSHIP CONF. EDUC. FUND, <https://civilrights.org/edfund/resource/the-war-on-drugs-has-failed-commission-says/> (last visited Feb. 17, 2024).

¹⁰⁹ See *Was the War on Drugs Effective?*, AM. ADDICTION CTRS. LAGUNA HOSP., <https://lagunatreatment.com/addiction-research/war-on-drugs/> (Jan. 24, 2024).

¹¹⁰ The Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

permissible medicines approved by the federal government.¹¹¹ In the 1950s, marijuana regulation went from civil penalties to criminal punishment, with mandatory sentencing and increased penalties through the passage of the Boggs Act of 1952¹¹² and the Narcotics Control Act of 1956.¹¹³

In 1969, President Richard M. Nixon declared a “war on drugs,” namely, to eradicate, interdict, and incarcerate drug offenders.¹¹⁴ In 1970, he signed into law the Controlled Substances Act (“CSA”),¹¹⁵ which, *inter alia*, prohibited marijuana and classified it as a Schedule I dangerous drug.¹¹⁶ President Nixon demonized drug use and addiction,¹¹⁷ declaring drug abuse as “public enemy number one.”¹¹⁸ In retrospect, President Nixon used the WOD as a means to punish his political dissidents¹¹⁹ and was not based on public health and

¹¹¹ MARK EDDY, *MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2–3* (2010), <http://fas.org/sgp/crs/misc/RL33211.pdf>.

¹¹² *See generally* Boggs Act of 1952, Pub. L. No. 82-255, 65 Stat. 767, 768 (1951) (where the Boggs Act of 1952 amended the penalty provisions applicable to persons convicted of violating certain narcotic laws, such that a first federal offense conviction for marijuana possession carried a minimum sentence of two to ten years and a fine of up to \$20,000).

¹¹³ Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567, 568, 571 (1956) (where the Narcotics Control Act of 1956 sought to reduce narcotics trafficking and use in the United States, by, *inter alia*, increasing the penalties and mandatory minimum prison sentences outlined by the Boggs Act of 1952 and introducing the death penalty for certain drug offenses).

¹¹⁴ A WAR THAT CAN’T BE WON: BINATIONAL PERSPECTIVES ON THE WAR ON DRUGS 34 (Tony Payan, Kathleen Staudt & Z. Anthony Kruszewski eds., 2013).

¹¹⁵ 21 U.S.C. § 812(b) (1970) (repealing the MTA).

¹¹⁶ 21 U.S.C. § 812(c).

¹¹⁷ *See* Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATL. (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>.

¹¹⁸ CHRISTOPHER J. COYNE & ABIGAIL R. HALL, *FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS* 6 (2017).

¹¹⁹ Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, at 22 (Top Nixon advisor John Ehrlichman later acknowledged the President’s political motivation behind the WOD, saying “[t]he Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? 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 criminaliz-

safety concerns.¹²⁰ The result of the WOD was an addition of policing and more victims to segments of society that were already over-policed.¹²¹

During the 1980s, President Ronald W. Reagan accelerated the WOD.¹²² During his administration, federal penalties for the cultivation, possession, or transfer of marijuana were increased,¹²³ with harsher penalties and mandatory sentences with the enactments of the Comprehensive Crime Control Act (1984),¹²⁴ the Anti-Drug Abuse Act (1986),¹²⁵ and the Anti-Drug Abuse Amendment Act (1988).¹²⁶

On the judicial front, the United States Supreme Court supported the WOD through its interpretation of the Supremacy Clause of the United States Constitution through which federal laws preempted

ing 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.”).

¹²⁰ See Dufton, *supra* note 117 (explaining how President Nixon viewed drug users as “law-breaking hedonists” that deserved to be punished and not because pot was harmful to society); EDDY, *supra* note 111, at 3, 27 (discussing that marijuana remains classified as a dangerous drug at the federal level, despite science and popular opinion).

¹²¹ Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL’Y REV. 375, 386 (2017) (“With this shift came an increase in sentence lengths [including harsh mandatory minimums], reaffirmation of the death penalty, an expansion of criminal offenses, and a change in the stated purposes of corrections.”).

¹²² See Michael McGrath, *Nancy Reagan and the Negative Impact of the ‘Just Say No’ Anti-Drug Campaign*, GUARDIAN (Mar. 8, 2016, 2:23 PM), <https://www.theguardian.com/society/2016/mar/08/nancy-reagan-drugs-just-say-no-dare-program-opioid-epidemic>.

¹²³ STEPHEN R. KANDALL, *SUBSTANCE AND SHADOW: WOMEN AND ADDICTION IN THE UNITED STATES* 235 (1996) (providing that “[i]n 1992 more than 340,000 people were arrested . . . [b]y the middle of 1994 approximately four million arrests for marijuana violations had been recorded since the early 1980s”).

¹²⁴ Comprehensive Crime Control Act of 1984, S. 1762, 98th Cong. (1984).

¹²⁵ Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986) (changing the system of federally supervised release from a rehabilitative system into a punitive system and enacting new mandatory minimum sentences for drugs, including marijuana).

¹²⁶ Anti-Drug and Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4309–10 (1988) (creating the policy goal of a drug-free America, establishing the Office of National Drug Control Policy, and requiring mandatory minimum penalties for drug trafficking conspiracies and attempted drug trafficking offenses).

conflicting State and local laws.¹²⁷ In two separate cases, *United States v. Oakland Cannabis Buyers' Cooperative*¹²⁸ and *Gonzales v. Raich*,¹²⁹ the Court ruled twice that the federal government has the right to regulate and criminalize marijuana, whether for medical or recreational use.¹³⁰ Accordingly, federal laws that prohibit marijuana use and sale preempt State legalization laws.¹³¹

The battle over the enforcement of the federal prohibition of marijuana flip-flopped during the Obama and Trump administrations.¹³² Following the 2012 reelection of President Barack H. Obama, his administration took a careful, slow approach to assessing its past policy goals relative to drug regulations.¹³³ Then, on August 29, 2013, the United States Department of Justice announced a bold, hands-off policy, known as the "Cole Memorandum," which specified that the commercial distribution of cannabis would generally be tolerated, unless violence or firearms were involved; the proceeds went to gangs and cartels; or it was distributed

¹²⁷ See BRYAN L. ADKINS, ALEXANDER H. PEPPER & JAY B. SKYES, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1, 1 (2023).

¹²⁸ *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 499 (2001) (rejecting the common-law medical necessity defense to crimes enacted under the federal Controlled Substances Act of 1970, regardless of their legal status under the laws of States, such as California that recognize a medical use for marijuana).

¹²⁹ *Gonzales v. Raich*, 545 U.S. 1, 26 (2005) (upholding the constitutionality of the Controlled Substances Act, affirming that Congress has the power to regulate marijuana possession, sale, and cultivation, and that, under Congress' Commerce Clause of the U.S. Constitution, Congress may criminalize the production and use of homegrown marijuana even if State law allows its use for medicinal purposes).

¹³⁰ *Id.*; *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 499.

¹³¹ See *Gonzales*, 545 U.S. at 40 (Scalia, J., concurring) ("Not only is it impossible to distinguish 'controlled substances manufactured and distributed intrastate' from 'controlled substances manufactured and distributed interstate,' but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market.").

¹³² Evan Halper, *Trump Administration Abandons Crackdown on Legal Marijuana*, L.A. TIMES (Apr. 13, 2018, 1:10 PM), <https://www.latimes.com/politics/la-na-pol-marijuana-trump-20180413-story.html>.

¹³³ See News Release, The White House, Obama Administration Releases 21st Century Drug Policy Strategy (Apr. 17, 2012), <https://obamawhitehouse.archives.gov/ondcp/news-releases-remarks/obama-administration-releases-21st-century-drug-policy-strategy>.

to states where it was illegal.¹³⁴ This policy continued throughout the balance of the second term of the Obama Administration.¹³⁵

In 2016, Donald J. Trump was elected as the 45th President, along with a Republican Party control of Congress, with the expectation that the new leadership would reassess the federal enforcement of marijuana regulations.¹³⁶ Some expected that the new administration would challenge the Obama Administration's tolerance of state legalization of marijuana with minimal federal roadblocks.¹³⁷ As predicted, on January 4, 2018, the Trump Administration, under then United States Attorney General Jeff Sessions, rescinded the Cole Memorandum and issued an updated memorandum instructing U.S. Attorneys to enforce the federal law prohibiting marijuana.¹³⁸ As such, Attorney General Sessions granted more discretion to federal prosecutors, allowing them to "use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."¹³⁹ The stated purpose of the guidance was to allow federal prosecutors to decide whether to crack down on marijuana businesses in states where the substance is legal, for recreational use.¹⁴⁰ Despite these stated federal policies, states and municipalities continued to decriminalize or legalize marijuana, both for recreational and medicinal use, and the Trump Administration did not stand in their way.¹⁴¹

¹³⁴ Memorandum from James M. Cole, Deputy Att'y Gen. on Guidance Regarding Marijuana Enf't to All U.S. Att'ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memorandum].

¹³⁵ See German Lopez, *The Trump Administration's New War on Marijuana, Explained*, VOX (Jan. 5, 2018), <https://www.vox.com/policy-and-politics/2018/1/4/16849866/marijuana-legalization-trump-sessions-cole-memo>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See *id.* ("This is going to create chaos . . . If enforcement of laws are subject to the whims of individual prosecutors, no one will have any idea what is legal or what isn't—because it could change from day to day.")

¹⁴¹ Joseph Misulonas, *These Charts Show the Evolution of America's Marijuana Laws over Time*, CANNABIS CULTURE (Aug. 31, 2017), <https://www.cannabisculture.com/content/2017/08/31/charts-show-evolution-americas-marijuana-laws-time/> (providing various charts that demonstrate the exponential growth of

The policies of the Biden Administration will be discussed as it pertains to the current laws for minors.¹⁴²

2. THE WOD HAS FAILED RELATIVE TO MARIJUANA

Despite ongoing federal support, the WOD has failed to reduce the use of drugs, its stated goal, for several reasons.¹⁴³ First, the WOD has not mitigated the use of marijuana.¹⁴⁴ Second, the WOD created a major drain on law enforcement resources.¹⁴⁵ According to the Federal Bureau of Investigation's annual Uniform Crime Report, there have been over 12,000,000 cannabis arrests in the United States since 1996, including 749,825 arrests for marijuana violations in 2012.¹⁴⁶ The WOD has diverted police attention from serious violent crimes by requiring police officers to pursue pot users.¹⁴⁷ Third, the WOD has been expensive; it is estimated to cost the United States fifty-one billion dollars each year.¹⁴⁸

marijuana reform in the United States and the inevitability of a federal level change).

¹⁴² See *infra* Section I.B.

¹⁴³ GLOB. COMM'N ON DRUG POL'Y, WAR ON DRUGS 2 (2011).

¹⁴⁴ *Id.* ("The global war on drugs has failed, with devastating consequences for individuals and societies around the world. . . . [F]undamental reforms in national and global drug control policies are urgently needed.").

¹⁴⁵ See *Cannabis (Marijuana) DrugFacts*, *supra* note 25 (stating that marijuana one is the most widely used illicit drug in the United States); see also CTR. BEHAV. HEALTH STAT. & QUALITY, RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES tbl.1.1A (2015), [https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.htm](https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.htm) (showing an estimated twenty-two million people have used marijuana in a past month).

¹⁴⁶ Brian Stauffer, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RTS. WATCH (Oct. 12, 2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states> (noting that every twenty-five seconds within the United States, a person is arrested for simply possessing marijuana for their personal use and that marijuana arrests comprise almost one-half of all drug arrests reported in the United States); *Marijuana Arrest by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> (last visited Feb. 21, 2024). There were 8.2 million marijuana arrests from 2001 to 2010, and 88% of those arrests were just for the possession of marijuana. *Id.*

¹⁴⁷ See JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 95 (2016).

¹⁴⁸ Christopher Ingraham, *Police Arrest More People for Marijuana Use than for All Violent Crimes — Combined*, WASH. POST (Oct. 12, 2016, 7:00 AM),

Fourth, as previously mentioned in the Introduction, the WOD has produced a disparate impact on people of color.¹⁴⁹

Fifth, the WOD has negatively impacted research on the medicinal benefits of marijuana.¹⁵⁰ In fact, the United States Food and Drug Administration (“FDA”) has prohibited the research and use of marijuana as medicine.¹⁵¹ Despite this prohibition, in 2015, Congress, by approving the Rohrabacher-Farr Amendment,¹⁵² sought to restrict federal raids, arrests, and criminal prosecutions of medical marijuana activities, by prohibiting the Justice Department from using funds to prevent state implementation of medical marijuana laws.¹⁵³

Sixth, the WOD is eroding with the federal government’s repeal of the prohibition of the industrial use of cannabis for Hemp.¹⁵⁴

<https://www.washingtonpost.com/news/wonk/wp/2016/10/12/police-arrest-more-people-for-marijuana-use-than-for-all-violent-crimes-combined/> (“[A]t least 137,000 people sit behind bars on simple drug-possession charges, according to a report released Wednesday by the American Civil Liberties Union and Human Rights Watch.”).

¹⁴⁹ See *supra* pp. 686–87; DRUG POL’Y ALL., FROM PROHIBITION TO PROGRESS: A STATUS REPORT ON MARIJUANA LEGALIZATION 27 (2018).

¹⁵⁰ See *Is Marijuana Safe and Effective as Medicine?*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> (last visited Mar. 8, 2023).

¹⁵¹ *Id.*

¹⁵² See H.R. 4660, 113th Cong. (2015), *amended by* A059 (2013–2014). The amendment has been reenacted every year to date. Initially, the DOJ narrowly interpreted the Amendment to only apply to limit enforcement against state officials. See *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016) (rejecting the DOJ’s restrictive reading of the Amendment, in a case consolidating the appeals of ten medical cannabis providers in the states of California and Washington in a unanimous ruling of the three-judge panel).

¹⁵³ See Cole Memorandum, *supra* note 134, at 3.

¹⁵⁴ See Kyle Jaeger, *Hemp Is Officially Legalized With President Trump’s Signature on the Farm Bill*, HIGH SCI. (Dec. 20, 2018), <https://www.marijuanamoment.net/hemp-is-officially-legalized-with-president-trumps-signature-on-the-farm-bill/>. The distinction between Cannabis, Cannabinoids (“CBD”), and Hemp can be confusing. See Spencer Jakab, *The Verdict on CBD Is . . . Confusing*, WALL ST. J. (June 4, 2019, 5:51 PM) <https://www.wsj.com/articles/the-verdict-on-cbd-is-confusing-11559685073> (reporting that a leading cannabis exchange-traded fund fell by a little over 5% and then rebounded following a United States Food and Drug Administration hearing on CBD). Throughout the United States, CBD, a non-psychoactive component of cannabis, is widely marketed for medicinal purposes. See *State Medical Cannabis Laws*, NCSL, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (June 22,

Originally, there was a zero-tolerance policy towards Hemp.¹⁵⁵ Hemp was illegal to grow without a permit under the CSA, due to its relation to cannabis, and because it was an imported product.¹⁵⁶ However, on December 20, 2018, President Trump signed the 2018 United States Farm Bill, which de-scheduled Hemp, making cannabis plants that contain less than 0.3% THC legal.¹⁵⁷ This action on the part of the Trump Administration sent a strong signal that the WOD, at least relative to Hemp, may be coming to an end.¹⁵⁸

B. *Minors' Marijuana Criminality*¹⁵⁹

The foregoing history and failure of the WOD led to a new chapter in the regulation of marijuana, namely, the decriminalization or legalization at the state and federal levels.¹⁶⁰

1. MARIJUANA REFORMS

This Section describes the current situation relative to the criminality of minors in possession of marijuana. To better understand such criminality, we start with a brief description of the current regulatory environment of marijuana. Three developments stand out. The first is the Biden Administration's reluctance to reinstate the Obama-era Cole Memorandum,¹⁶¹ despite Attorney General Merrick Garland's confirmation hearing statement that his policy would

2023). In December 2018, President Donald J. Trump signed into law the 2018 Farm Bill, which declassified hemp as no longer a Schedule I drug and legalized the growth of hemp by licensed growers. *See also* John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>. As a result, hemp-derived CBD is no longer federally prohibited, while CBD derived from marijuana is prohibited at the federal level. *Id.*

¹⁵⁵ AGRICULTURAL PROGRAMS, TERMS AND LAWS 146 (Frank J. House, ed. 2006).

¹⁵⁶ *Id.*

¹⁵⁷ *See* Jaeger, *supra* note 154.

¹⁵⁸ *See* Marianne Levine, *Gardner: Trump Said He Would Sign Pot Bill*, (Apr. 4, 2019, 11:27 AM), <https://www.politico.com/story/2019/04/04/cory-gardner-trump-marijuana-bill-1255762>.

¹⁵⁹ *See generally* Theoharis & Pirijs, *supra* note 17.

¹⁶⁰ *See generally* Cole Memorandum, *supra* note 134, at 1.

¹⁶¹ *Id.*

be very close to that done in the Cole Memorandum.¹⁶² As previously described, under that document, the Justice Department announced its tolerance of state law's decriminalization and legalization of marijuana.¹⁶³ However, relative to minors, the Cole Memorandum is very clear in its directive that certain changes in the marijuana law should be consistent with endorsement priorities that are particularly important to the federal government including among others: "[p]reventing the distribution of marijuana to minors."¹⁶⁴ Notwithstanding, marijuana continues to be a Schedule I drug with its use and possession prohibited under federal law.¹⁶⁵

The second development is that, over the last few years, many states have enacted laws that decriminalize or legalize adult use and possession of marijuana.¹⁶⁶ However, even where marijuana is "legal," it is highly regulated.¹⁶⁷ The most relevant regulation is the universal rule that minors are still prohibited from the purchase, use, and possession of marijuana.¹⁶⁸

The third development of significance is the recent issuance of an Executive Order by the Biden White House that pardons all past federal arrests or convictions for the non-violent, simple possession

¹⁶² Ben Adlin, *Biden's Attorney General Says DOJ Is 'Still Working On' Federal Marijuana Policy Approach*, HIGH SCI. (Mar. 1, 2023), <https://www.marijuanamoment.net/bidens-attorney-general-says-doj-is-still-working-on-federal-marijuana-policy-approach/>.

¹⁶³ See Cole Memorandum, *supra* note 134, at 1.

¹⁶⁴ *Id.*

¹⁶⁵ See Selena Simmons-Duffin, *Marijuana Could Soon be Downgraded from a Schedule 1 Drug*, NPR (Aug. 31, 2023, 5:28 PM), <https://www.npr.org/2023/08/31/1197084320/marijuana-could-soon-be-downgraded-from-a-schedule-1-drug>.

¹⁶⁶ See *Missouri Becomes 21st State to Legalize Marijuana for Adult Use*, NORML (Nov. 9, 2022), <https://norml.org/blog/2022/11/09/missouri-becomes-21st-state-to-legalize-marijuana-for-adult-use/>. Explaining that:

The measure allows adults to possess up to three ounces of cannabis and to home-cultivate up to six flowering plants, six immature plants, and six plants under 14 inches for their own personal use. It also establishes a program to automatically review and expunge criminal records for eligible non-violent marijuana-related marijuana offenses.

Id.

¹⁶⁷ See, e.g., Colorado Marijuana Rules, COLO. CODE REGS. § 212-3 (2022).

¹⁶⁸ See *id.*

of marijuana.¹⁶⁹ The President asked state governors to follow his lead and to pardon state non-violent, simple possession offenses.¹⁷⁰ This action is in sync with various state laws that have exonerated past marijuana offenders.¹⁷¹ In fact, nearly 2,000,000 marijuana convictions have been pardoned or expunged in the U.S. in the past several years.¹⁷² However, relative to minors in possession, in President Biden's Statement regarding the Executive Order, he pointed out his administration's commitment to prohibiting all sales of marijuana to minors.¹⁷³ Notwithstanding, the President held out the hope for remedial changes.¹⁷⁴

In summary, over the last several years, marijuana law has been greatly transformed, but not without continuing controversy. Despite the several state and federal actions to address the over-criminalization of marijuana, what is clear is that those reform efforts have not brought any relief to minors, who are still being victimized

¹⁶⁹ See *A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana*, THE WHITE HOUSE (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/>. The President's pardon lifts barriers to housing, employment, and educational opportunities for thousands of people with those prior federal convictions. *Presidential Proclamation on Marijuana Possession, Attempted Possession, and Use*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession> (Mar. 4, 2024).

¹⁷⁰ *Statement from President Biden on Marijuana Reform*, THE WHITE HOUSE (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> (“[President Biden is] urging all Governors to do the same with regard to state offenses. Just as no one should be in a Federal prison solely due to the possession of marijuana, no one should be in a local jail or state prison for that reason, either.”).

¹⁷¹ *State Expungement Laws*, NORML, <https://norml.org/laws/expungement/> (last visited Feb. 1, 2024); see *Missouri Becomes 21st State to Legalize Marijuana for Adult Use*, *supra* note 166.

¹⁷² Kyle Jaeger, *Nearly 2 Million Marijuana Convictions Have Been Pardoned or Expunged in the U.S. in the Past Five Years, New Report Shows*, HIGH SCI. (Dec. 14, 2022), <https://www.marijuanamoment.net/nearly-2-million-marijuana-convictions-have-been-pardoned-or-expunged-in-the-u-s-in-the-past-five-years-new-report-shows/>.

¹⁷³ *Statement from President Biden on Marijuana Reform*, *supra* note 170 (“Finally, even as federal and state regulation of marijuana changes, important limitations on trafficking, marketing, and under-age sales should stay in place.”).

¹⁷⁴ *Id.* (“Too many lives have been upended because of our failed approach to marijuana. It's time that we right these wrongs.”).

by these laws.¹⁷⁵ Unfortunately, decriminalization, legalization, and the proliferation of CBD products send the “wrong” message to juveniles who are often ill-informed about—or who intentionally ignore—the harm and the legality of marijuana use and possession.¹⁷⁶

2. MINORS IN POSSESSION LAW

There is no single manual that details the law that regulates minors in possession of marijuana. As a result, the law relative to minors in possession of marijuana lacks uniformity and can lead to misunderstanding of the specific rules in each jurisdiction.¹⁷⁷ Interestingly, a Google search produces pages of law firm advertisements and information on the criminal laws of a particular state.¹⁷⁸ While not a highly-lucrative area of law practice today, there appears to be a strong demand for legal services representing minors who are arrested for MIPM charges.¹⁷⁹ The following is the author’s summary of the law of minors in possession of marijuana law, based on the laws reviewed in the author’s Ohio State grant study of MIPM laws.¹⁸⁰ This summary is not intended to provide legal advice, as each state’s and municipality’s laws and the facts of individual cases should be evaluated by knowledgeable local, licensed attorneys.

By way of background and to establish how widespread of an issue this is, juveniles and young adults are among the highest users

¹⁷⁵ See *What You Need to Know About Your Minor’s Marijuana Possession Charge*, *supra* note 19 and accompanying text.

¹⁷⁶ See *Talk. They Hear You: Talking With Your Child About Marijuana: Keeping Your Kids Safe – Parent Brochure*, SAMHSA (June 2018), <https://store.samhsa.gov/product/Talk-They-Hear-You-Talking-With-Your-Child-About-Marijuana-Keeping-Your-Kids-Safe-Parent-Brochure/SMA18-5081>.

¹⁷⁷ See *Marijuana Legality by State*, *supra* note 38.

¹⁷⁸ Marijuana possession laws for minors by state, GOOGLE, <http://google.com> (search “Marijuana possession laws for minors by state” and view results).

¹⁷⁹ See Sarah Garvey, *4 Most Lucrative Legal Practice Areas Today*, LAW CROSSING (Oct. 6, 2016), <https://www.lawcrossing.com/article/900047447/4-Most-Lucrative-Legal-Practice-Areas-Today/> (discussing lucrative practice areas, such as complex litigation, mergers and acquisitions, and healthcare law).

¹⁸⁰ See Mitchell F. Crusto, Jillian Morrison and Laurel Taylor, *Assessing the Status of Minors in Possession: Marijuana Versus Alcohol* (Ohio State Legal Stud. Working Paper, Paper No. 2022-18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203910.

of marijuana.¹⁸¹ In 2019, 37% of U.S. high school students reported lifetime use of marijuana, with 22% reported use in the past thirty days.¹⁸² In 2020, past-year vaping of marijuana also remained steady after large increases in 2018 and 2019.¹⁸³ However, large percentages of middle and high school students reported past-year marijuana vaping—8% of eighth graders, 19% of tenth graders, and 22% of twelfth graders.¹⁸⁴

Notwithstanding its use by minors, as previously noted, marijuana is a dangerous drug, particularly when purchased “on the street.”¹⁸⁵ It is harmful to brain development in young people.¹⁸⁶ As a result, the current law takes a zero-tolerance policy when it comes to minors in possession of marijuana.¹⁸⁷ “Underage” or “minor” status for marijuana possession varies by jurisdiction, but generally means anyone under twenty-one years old.¹⁸⁸

Simply put, “possession” of marijuana by a minor is a criminal offense¹⁸⁹ with very limited exceptions.¹⁹⁰ This is particularly true

¹⁸¹ Ladegard et al., *supra* note 104.

¹⁸² *Marijuana and Public Health - Health Effects - Teens*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/marijuana/health-effects/teens.html> (last visited Mar. 9, 2024) [hereinafter *Marijuana Use and Teens*]; Ladegard et al., *supra* note 104.

¹⁸³ *Marijuana Use and Teens*, *supra* note 182; Ladegard et al., *supra* note 104.

¹⁸⁴ *Marijuana Use and Teens*, *supra* note 182; Ladegard et al., *supra* note 104.

¹⁸⁵ Because marijuana is regulated when sold from dispensaries, it is safer to purchase through a dispensary than on the street. *See, e.g., 5 Years After California Legalized Weed, the Illicit Market Dominates*, *supra* note 10.

¹⁸⁶ *See* Pravesh Sharma, *How Youth Marijuana, Alcohol Use Impacts Life*, MAYO CLINIC HEALTH SYS. (Jan. 17, 2023), <https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/how-teen-marijuana-use-impacts-brain-development#:~:text=Marijuana%20use%20among%20adolescents%20and,coordination%2C%20reaction%20time%20and%20judgment>.

¹⁸⁷ *See* Brent Staples, *The Human Cost of ‘Zero Tolerance,’* N.Y. TIMES (Apr. 28, 2012), <https://www.nytimes.com/2012/04/29/opinion/sunday/the-cost-of-zero-tolerance.html>.

¹⁸⁸ *See Minor*, *supra* note 15.

¹⁸⁹ *Id.*

¹⁹⁰ Some states consider such possession by a minor to be an “infraction” subject to a civil fine for a first-time offender. *See, e.g., § 11357 HS—“Possession of Marijuana” in California*, SHOUSE CAL. L. GRP., <https://www.shouse-law.com/ca/defense/health-and-safety-code/11357/#Penalties%20For%20Marijuana%20Possession%20Crimes%20After%20Prop%2064> (last visited Mar. 8, 2023) (“Health and Safety Code § 11357 HS prohibits the ‘unlawful’ possession of marijuana in California. . . . [A]dults ages 21 and over are allowed to possess

in states that have not decriminalized or legalized *adult* use or possession of marijuana.¹⁹¹ Perhaps surprisingly, it is also illegal for minors to possess or use marijuana in the states where the possession of small amounts of marijuana for personal use is *legal* for adults.¹⁹²

To be arrested and criminally charged, a minor's "possession" of marijuana does not require knowledge, control, or ownership of the marijuana.¹⁹³ Merely being in the presence of marijuana leads to a presumption of possession. Lack of knowledge of "possession" is no excuse.¹⁹⁴ The misplaced belief that marijuana possession or use

up to 28.5 grams of dried marijuana or up to 8 grams of concentrated cannabis (hashish). However, it is a criminal offense: to possess more than these quantities, or for a minor under 21 to possess any amount of marijuana, or to possess marijuana at a K-12 school." Section 11357 HS states:

(a) Except as authorized by law, possession of not more than 28.5 grams of cannabis, or not more than eight grams of concentrated cannabis, or both, shall be punished or adjudicated as follows:

(1) Persons under 18 years of age are guilty of an infraction and shall be required to:

(A) Upon a finding that a first offense has been committed, complete four hours of drug education or counseling and up to 10 hours of community service over a period not to exceed 60 days.

(B) Upon a finding that a second offense or subsequent offense has been committed, complete six hours of drug education or counseling and up to 20 hours of community service over a period not to exceed 90 days.

(2) Persons at least 18 years of age but less than 21 years of age are guilty of an infraction and punishable by a fine of not more than one hundred dollars (\$100).

Id.

¹⁹¹ *See id.*

¹⁹² *See The Facts on DC Marijuana Laws*, METRO. POLICE WASH. D.C., <https://mpdc.dc.gov/marijuana> (last visited Jan. 31, 2024).

¹⁹³ *See generally* INA 212(A) 9 FAM 302.4-2(B)(3)(U)(c) (Under the Immigration and Nationality Act, the U.S. State Department specifies that as related to drug crimes, a conviction for possession or any other activity "relating to" a controlled substance will not be affected by whether or not the individual had "guilty knowledge" or "knowingly participate[d] in the activity.").

¹⁹⁴ *Id.*

by a minor is legal is no defense.¹⁹⁵ A juvenile in possession of marijuana is not excused for being charged with possession because the juvenile was accompanied by an adult.¹⁹⁶ Smoking or vaping marijuana in many public spaces is a violation of the law, even in states where marijuana use by adults is permitted.¹⁹⁷

A minor in possession of marijuana, depending on the jurisdiction and sometimes the discretion of the law enforcement personnel and the court system, might result in no arrest or an arrest followed by criminal prosecution, conviction, and jail time.¹⁹⁸ Depending on the weight of the marijuana in possession, a minor in possession might be charged with a civil infraction, misdemeanor, or felony.¹⁹⁹ In some circumstances, a bag of “pot brownies” might result in a felony charge.²⁰⁰ Intent to distribute may be presumed from the

¹⁹⁵ *Ignorantia legis non excusat* or “ignorance of law excuses no one” is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely by not knowing that the law existed. *See* BLACK’S LAW DICTIONARY 895 (11th ed. 2019). However, there might be exceptions. In *Lambert v. California*, the Supreme Court ruled that a person who is unaware of a *malum prohibitum* law cannot be convicted of violating it if there was no probability he could have known the law existed. 355 U.S. 225, 229 (1957). Nevertheless, such an exception does not apply when a reasonable person would expect their actions to be regulated, such as when possessing narcotics or dangerous weapons. *See, e.g.*, *United States v. Freed*, 401 U.S. 601, 608 (1971).

¹⁹⁶ *See* Jaclyn Wishnia & Jose Rivera, *Smoking Weed or Marijuana in Front of Child Law*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/marijuana-and-child-custody-lawyers.html> (May 21, 2021) (“Even in states where marijuana is legal, parents have still been arrested for using marijuana in front of their child.”).

¹⁹⁷ *See, e.g.*, *Secondhand Marijuana Exposure is Increasing*, AM. NONSMOKERS’ RTS. FOUND., <https://no-smoke.org/smokefree-threats/marijuana-smoke/> (Jan. 2024) (“As of January [sic] 2024, 1009 localities and 39 states/territories/commonwealths restrict marijuana use in some or all smokefree spaces. Of these, 551 localities and 22 states/territories/commonwealths prohibit smoking and vaping of recreational and medical marijuana in one or more of the following venues: non-hospitality workplaces, restaurants, bars, and/or gambling facilities.”).

¹⁹⁸ *See, e.g.*, SHOUSE CAL. L. GRP., *supra* note 190. Arrest depends on the specific law enforcement officer at the specific time of the incident and whether the law of the jurisdiction provides discretion to the officer. *See id.*

¹⁹⁹ *See id.*; Burtka, *supra* note 19. The type of charge depends on the state in which it took place and the amount the minor was carrying. *See* SHOUSE CAL. L. GRP., *supra* note 190.

²⁰⁰ *See* Heather Warner, *Texas Teen Facing Life in Prison, Accused of Selling Pot Brownies Says, “I’m Out of that Business!”*, FOX43,

weight of the pot alone.²⁰¹ Marijuana located in an automobile may result in an arrest for driving under the influence, which is a crime for both minors and adults.²⁰²

When a minor is arrested for simple possession of marijuana, they can face substantial legal expenses.²⁰³ Those who cannot afford legal representation will be assigned to a public defender for legal counsel.²⁰⁴ If the minor is under the age of eighteen, they are processed through dedicated, local juvenile delinquency courts.²⁰⁵ If the minor is between seventeen and under twenty-one, they will likely be processed as an adult.²⁰⁶ In either case, a minor charged with simple possession as a first offense and with no prior criminal record might have to post cash bail.²⁰⁷ If this is their first offense, the minor will likely not serve jail time, will be diverted to a counseling program, and will likely have their arrest record sealed.²⁰⁸ They often are placed under court-supervised probation. However, if the

<https://www.fox43.com/article/news/local/contests/texas-teen-facing-life-in-prison-accused-of-selling-pot-brownies-says-im-out-of-that-business/521-81a43037-4453-4ecd-9888-d36863f4c3e7> (May 22, 2014, 8:04 AM); cf. O'Donoghue, *supra* note 20.

²⁰¹ See *Louisiana Laws and Penalties*, NORML, <https://norml.org/laws/louisiana-penalties-2/#:~:text=Possession%20of%202.5%20lbs%20or,a%20maximum%20fine%20of%20%2450%2C000> (last visited Sept. 8, 2023).

²⁰² *What You Need to Know about Substance Use and Driving – Including Marijuana*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 12, 2022), <https://www.cdc.gov/marijuana/featured-topics/impaired-driving.html> (“Alcohol and marijuana were the two most commonly reported substances involved in impaired driving in 2018, with 8% and 4.7% of the U.S. population aged ≥16 years reporting alcohol and marijuana respectively. [One] in [eight] high school student drivers reported driving after using marijuana at least once during the past month in 2017.”).

²⁰³ See Catherine Brock, *Lawyer Hourly Rate & Fees by State*, LAWPAY (Apr. 24, 2023), <https://www.lawpay.com/about/blog/lawyer-hourly-rate-by-state/>.

²⁰⁴ A public defender is a lawyer appointed by the courts and provided by the state or federal government to represent and advise those who cannot afford to hire a private attorney, pursuant to the Constitution’s Sixth Amendment “right to counsel.” See U.S. CONST. amend. VI.

²⁰⁵ See *Juvenile Justice System Structure & Process*, OJJDP (2019), https://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp#:~:text=In%20most%20States%2C%20the%20juvenile,arrest%2C%20or%20referral%20to%20court.

²⁰⁶ See *id.*

²⁰⁷ See *Louisiana Laws and Penalties*, *supra* note 201.

²⁰⁸ See *id.*

amount of marijuana is beyond the local definition of “simple” possession and/or the minor has a prior arrest, including for the simple possession of marijuana, they will likely face confinement and a criminal record.²⁰⁹

A few states consider such minors in possession of marijuana to be an “infraction” subject to a civil fine for a first-time offender, but those states are rare exceptions.²¹⁰ For example, in Washington, D.C., it is illegal for a minor to possess marijuana; however, that person will not be arrested if the possession is of no more than two ounces.²¹¹ A juvenile who has been issued a medicinal marijuana card in Washington D.C. may legally possess no more than two ounces of marijuana per month, although the use of medical marijuana in public remains a criminal offense and can result in an arrest.²¹²

²⁰⁹ *See id.*

²¹⁰ *See, e.g.,* SHOUSE CAL. L. GRP., *supra* note 190.

²¹¹ *See The Facts on DC Marijuana Laws, supra* note 192 (“Marijuana possession by persons under 21 years of age is not allowed. Initiative 71 did not change existing law on marijuana possession for anyone under 21 years of age: It is still illegal. A person under 21 with more than two ounces of marijuana can be arrested. If an MPD officer sees a person under 21 with up to two ounces of marijuana, it will be seized. However, the person will not be arrested or issued a ticket. If the person says they are at least 21 years old but cannot prove their age, the person will be issued a warning ticket by the MPD officer. The seized marijuana will be returned if the person brings the warning ticket to the police station in the police district where the seizure occurred (no sooner than 24 hours and no later than 21 days after the seizure) and provides proof of age. . . . [F]ederal law enforcement officers may arrest anyone in the District of Columbia for possession or use of any amount of marijuana as a violation of federal law.”); *Marijuana Laws for the District of Columbia*, ACLU D.C., <https://www.acludc.org/en/your-rights/marijuana-laws-district-columbia> (last visited Jan. 31, 2024) (“[I]t remains a crime under D.C. law for anyone to: [p]ossess more than two ounces of marijuana[;] [s]moke or consume marijuana on public space (parks, streets, alleys, sidewalks) or anywhere to which the public is invited – including restaurants and bars (even hookah bars and cigar lounges)[;] [s]ell any amount of marijuana to another person or buy any amount from another person[;] [o]perate a vehicle or boat under the influence of marijuana[;] p]ossess any amount of marijuana if under the age of 21.”).

²¹² *The Facts on DC Marijuana Laws, supra* note 192 (“A person who has been issued a Medical Marijuana Card by the District Department of Health may continue to possess up to two ounces of medical marijuana per month. However, the use of medical marijuana in public remains a criminal offense and can result in arrest.”).

In most states, minors who are under the age of eighteen are legally deemed to be juveniles.²¹³ While juveniles are protected by various constitutional rights, they do not have a federal constitutional right to seek bail.²¹⁴ Notwithstanding, bail is usually not an issue, as in most instances, juveniles are released to their parents or guardians before arraignment in juvenile court.²¹⁵ Additionally, the Supreme Court has held that juvenile delinquency proceedings do not require a jury.²¹⁶ Relative to criminal culpability, the Supreme Court, in a series of landmark decisions, noted that minors should be viewed differently from adults when it comes to criminal culpability because of their underdevelopment.²¹⁷ However, these decisions have yet to be applied to relieve minors of culpability for misdemeanors, including simple possession of marijuana.²¹⁸

Unfortunately, minors are ill-informed about the illegality of their possession and use of marijuana and are acting under the mistaken assumption that their use and possession is legal.²¹⁹ This misunderstanding of the law results in great part from a dearth of information, such as public service announcements, that would educate minors about the stark reality: Marijuana, particularly when purchased on the streets, is a dangerous drug, and its use and possession by minors is strictly prohibited and subject to criminal arrest and conviction.²²⁰ Furthermore, minors are being given the impression

²¹³ *Minor*, *supra* note 15.

²¹⁴ Kathleen Michon & Kelly Martin, *Constitutional Rights in Juvenile Cases*, NOLO, <https://www.nolo.com/legal-encyclopedia/constitutional-rights-juvenile-proceedings-32224.html> (last visited Jan. 31, 2024).

²¹⁵ *Id.*

²¹⁶ *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971); *see Michon & Martin*, *supra* note 214.

²¹⁷ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (discussing the differences between juveniles and adults including a lack of maturity, susceptibility to peer pressure, and underdeveloped character); *see also infra* Section III.A.

²¹⁸ *See What You Need to Know About Your Minor's Marijuana Possession Charge*, *supra* note 19 (noting that regardless of age, possession of a small amount of marijuana constitutes a Class B misdemeanor and possession of over four ounces becomes a felony).

²¹⁹ *See Elizabeth J. D'Amico, What Your Kids Need to Know About Marijuana, Legalized or Not*, RAND (Sept. 21, 2016), <https://www.rand.org/pubs/commentary/2016/09/what-your-kids-need-to-know-about-marijuana-legalized.html>.

²²⁰ *See id.*

that the movement to decriminalize and legalize the use and possession applies to them when it does not.²²¹

In summary, throughout this country, minors who possess any amount of marijuana are criminal offenders subject to arrest, prosecution, confinement, and a criminal record, with limited exceptions.²²² As previously noted, such a criminal record can also result in negative, collateral consequences.²²³ This rule equally applies in states that have decriminalized or legalized simple possession of marijuana, as minors are expressly prohibited from even simple possession.²²⁴ As such, minors are not entitled to any of the benefits that come from decriminalization/legalization, including reduced fines and penalties, reduction in over-policing, elimination of the cost of legal defense, not being arrested, establishing a criminal report, and expungement of a past arrest or conviction.²²⁵ Further, minors must acquire marijuana in the unregulated, dangerous, and risky illegal markets. Hence, minors, particularly racial minorities, must be cautioned that the War on Drugs relative to marijuana use and possession is still being waged against them.²²⁶ This disparate treatment of minors begs for urgent attention and reform—especially as our Nation believes in supporting the development of our youth. Despite all the changes in marijuana laws and the new tax revenue stream that states acquire from licensed marijuana sales,²²⁷ minors are still left out of the safe harbor provided by decriminalization and legalization.

²²¹ See *id.*

²²² See Hindin, *supra* note 106.

²²³ See *supra* pp. 682–85; see also Caislin L. Firth et al., *Implications of Cannabis Legalization on Juvenile Justice Outcomes and Racial Disparities*, 58 AM. J. PREVENTIVE MED. (2020).

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See Firth et al., *supra* note 223 (“Inequities in the juvenile system may be exacerbated by cannabis legalization. In the U.S., youth of color disproportionately enter the juvenile justice system and rates of arrest are more than five times higher for black youth compared with white youth.”).

²²⁷ See Jon Gettman, *Marijuana Production in the United States*, BULL. CANNABIS REFORM, Dec. 2006, at 3 (reporting that marijuana is the top cash crop in twelve states, is one of the top three cash crops in thirty states, and is one of the top five cash crops in thirty-nine states, and estimating the value of U.S. pot production at 35.8 billion dollars, which is more than the combined value of corn and wheat).

* * *

Current marijuana laws and respective legalization and decriminalization regimes, where they exist, have failed to address the needs and circumstances of minors. In fact, rather than alleviate the criminal law's impact on minors who use or possess marijuana, decriminalization has sent minors the wrong message: that marijuana is safe and no longer criminal.²²⁸ The law's treatment of minors also reflects the need to address the shortcomings of the criminal justice system, such as the need to make jails and prisons more humane and to reduce the high costs of incarceration.²²⁹ Hence, decriminalization/legalization rules have two shortcomings: (1) they lack provision to educate young people about the various harms of using marijuana, and (2) they do not address how marijuana reform should apply to minors, other than to state that such reform does *not* apply to them.²³⁰ These factors leave minors and their families to rely on self-education often *after* being arrested, along with the cost of legal representation and the possibility of jail time and collateral negative impacts.

Ultimately, the observations relative to a comparative study of a select group of states on their handling of minors in possession of marijuana versus that of alcohol lead to a profound conclusion: Society stigmatizes minors in possession of marijuana compared to those in possession of alcohol.²³¹ Consequently, Part I shows that minors in possession of marijuana are over-criminalized compared to those in possession of alcohol, particularly considering the decriminalization of simple possession for adults in many states and at the federal level. Such a problem relative to MIPM is one that demands an

²²⁸ See D'Amico, *supra* note 219.

²²⁹ See JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 4 (2007) (stating that the U.S. spends an estimated \$200 billion per year on incarceration).

²³⁰ Schools have done an excellent job of educating students on the dangers and the illegality of illicit drugs. One such program is "D.A.R.E.". See *About, D.A.R.E.*, <https://dare.org/about/> (last visited Mar. 18, 2024) ("D.A.R.E. is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives.").

²³¹ See *supra* Section I.B.

overarching principle that reconciles the goals of safeguarding and promoting our youth while still regulating the rules of law. In Part II, this Article presents such a seminal solution and a standard to address how we regulate the misbehavior of minors.

II. “DECRIMINALIZATION OF MINORS IN THE SIMPLE, NON-VIOLENT POSSESSION OF MARIJUANA” ACT

How we treat minors in the simple, non-violent possession of marijuana is symptomatic of a fundamental flaw in our jurisprudence. On the one hand, we seek to achieve the best interest of minors. On the other, we criminally penalize our young people for the victimless, minor offense of simple possession. A better approach would be to decriminalize the simple, non-violent possession of marijuana by minors.

There are three major tenets of the “Decriminalization of Minors in the Simple, Non-Violent Possession of Marijuana” Act (“DMIPMA”): First, whereas, the Nation is committed to and benefits from the best practices and outcomes for the safety of and holistic development of our youth. Second, whereas, it has been established through scientific analysis that brain and cognitive skills are still in formation and development and impact the decision making of minors, and that the Supreme Court has recognized and established what can be referred to as the “diminished criminal culpability” for minors, we should not hold minors criminally culpable for making bad, non-violent choices. Third, whereas, it has been recommended by experts on the subject that it is in the best interest of minors not to subject them to the criminal justice system, but rather to deploy our limited resources on education, training, and counseling.

Therefore, we hereby proclaim and establish that the simple, non-violent possession of marijuana by minors be hereby and hereafter decriminalized and apply retroactively to exonerate all past offenses.²³² Hence, any matter for consideration must meet a strict

²³² This Article does not explore the issue of retroactive amelioration, exoneration, and/or amnesty for past offenders. See generally Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367, 367 (2020).

scrutiny test, that is, prove that their actions such as the criminalization of simple possession of marijuana by a minor serves the best interest of that minor.

A model act of the “Decriminalization of Minors in the Simple, Non-Violent Possession of Marijuana” Act follows the main text of this Article.²³³ I have drafted the model act with the hopes that government officials and policymakers will adopt it as a standard for reform in this area of law. The constitutional and policy bases for DMIPMA are presented next.

III. JUSTIFICATION

Part III supports the normative claim that we should enact the DMIPMA to decriminalize the simple, non-violent possession of marijuana by minors. It posits that such a statute (1) is the logical application of the Supreme Court’s rationale relative to the criminal culpability of minors; (2) redresses disparate treatment of MIPM; and (3) is supported by good public policy. This legislative initiative should apply universally and particularly in states where adults are not criminally liable for the simple, non-violent possession of marijuana.

A. “Diminished Criminal Culpability Rationale”²³⁴

The first justification for the DMIPMA is that it is grounded in the Supreme Court’s rationale relative to the criminal culpability of minors. In a series of groundbreaking decisions, the Supreme Court decided that juveniles cannot be sentenced on the same basis as adults for capital crimes.²³⁵ There, the Court adopted neuroscience research showing that the brain development of juveniles impedes their judgment, thereby diminishing their criminal culpability. I coin

²³³ See *infra* Appendix.

²³⁴ See generally Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, AM. BAR ASS’N (Aug. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/ (“[A]dolescent defendants may have less criminal culpability than their adult counterparts based on the latest neuroscience.”).

²³⁵ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); see also *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

this jurisprudential development as the “diminished criminal culpability rationale” (“DCCR”).²³⁶

The DCCR is derived from the significant decisions relative to the sentencing of juveniles for capital crimes.²³⁷ Since 2005, the U.S. Supreme Court has held three times that the Eighth Amendment requires individuals under eighteen years of age to be sentenced differently from adults.²³⁸ In response to these decisions, there has been extensive litigation and legislative activity in states around the country.²³⁹ Below, we briefly summarize these three Supreme Court cases followed by how the Court’s rationale applies to minors in possession of marijuana.

In 2005, in *Roper v. Simmons*, the Supreme Court held that it was cruel and unusual punishment under the Eighth Amendment to impose the death penalty on an individual who was under eighteen at the time of the crime.²⁴⁰ The Court observed that the death penalty is reserved for offenders who commit the most serious crimes “and whose extreme culpability makes them ‘the most deserving of execution.’”²⁴¹ The Court reasoned those certain differences between juveniles and adults “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”²⁴² Most relevant here, the Court declared that the youth have a “lack of maturity and an underdeveloped sense of responsibility,”²⁴³ are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,”²⁴⁴ and their character “is not as well formed as that of an adult.”²⁴⁵ These differences diminish a juvenile’s culpability and “render suspect any conclusion that a juvenile falls among the worst offenders.”²⁴⁶

²³⁶ See *supra* text accompanying note 77.

²³⁷ *Overview of U.S. Supreme Court Decisions*, JUV. SENT’G PROJECT, <https://juvenilesentencingproject.org/us-supreme-court-decisions/> (last visited Feb. 6, 2024)..

²³⁸ See *Roper*, 543 U.S. at 578; see also *Graham*, 560 U.S. at 74; *Miller*, 567 U.S. at 460.

²³⁹ *Overview of U.S. Supreme Court Decisions*, *supra* note 237.

²⁴⁰ *Roper*, 543 U.S. at 578.

²⁴¹ *Id.* at 553.

²⁴² *Id.*

²⁴³ *Id.* at 569.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 570.

²⁴⁶ *Roper*, 543 U.S. at 570

The Court in *Roper* emphasized that “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”²⁴⁷ Indeed, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”²⁴⁸ The Court stressed that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”²⁴⁹ Accordingly, the Court categorically barred the death penalty for juveniles, concluding that “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”²⁵⁰ Following *Roper*, life without parole thus became the harshest available penalty for a juvenile offender which came under Court review in 2010.²⁵¹

In 2010, in *Graham v. Florida*, the Court held that the Eighth Amendment categorically prohibits life-without-parole sentences for juveniles who commit “non-homicide” crimes.²⁵² In such cases, states must provide juveniles with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”²⁵³ In concluding that juveniles who commit non-homicide crimes may not receive life without parole, the Court reasoned that “[t]he age of the offender and the nature of the crime each bear on the analysis.”²⁵⁴

As it did in *Roper*, the Court in *Graham* emphasized that juveniles are less culpable than adults due to their underdeveloped brains and characters.²⁵⁵ Regarding the nature of the crime, the Court noted

²⁴⁷ *Id.* at 553.

²⁴⁸ *Id.* at 570.

²⁴⁹ *Id.* at 573.

²⁵⁰ *Id.* at 572.

²⁵¹ Joshua Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT’G PROJECT (Apr. 7, 2023), <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>.

²⁵² *Graham v. Florida*, 560 U.S. 48, 74 (2010).

²⁵³ *Id.* at 123 (Thomas, J., dissenting).

²⁵⁴ *Id.* at 69 (majority opinion).

²⁵⁵ *Id.* at 68.

that it had previously recognized that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”²⁵⁶ Relying on these two lines of precedent, the Court concluded that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”²⁵⁷ In light of this diminished capacity and the greater prospects that juveniles have for reform, the Court concluded that life-without-parole sentences may not be imposed on juveniles in non-homicide cases.²⁵⁸ This led to the Court’s review of mandatory life-without-parole sentences as applied to juvenile offenders.²⁵⁹

Most recently, in 2012, the Supreme Court held in *Miller v. Alabama*²⁶⁰ that mandatory life-without-parole sentences violate the Eighth Amendment when imposed on juvenile offenders.²⁶¹ Under *Miller*, juveniles facing the possibility of life-without-parole sentences are entitled to “individualized sentencing,” and the sentencer must give mitigating effect to youth-related factors.²⁶² *Miller* reasoned that “children are constitutionally different from adults for purposes of sentencing,” and therefore “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”²⁶³ As in *Roper* and *Graham*, the Court in *Miller* emphasized the capacity of children to rehabilitate.²⁶⁴ The Court stated that children have “greater prospects for reform” than adults, and a mandatory life-without-parole sentence “disregards the possibility of rehabilitation even when the circumstances most suggest it.”²⁶⁵

In explaining its holding, the Court stated:

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison

²⁵⁶ *Id.* at 69.

²⁵⁷ *Id.*

²⁵⁸ *Graham*, 560 U.S. at 74.

²⁵⁹ *See id.* at 90.

²⁶⁰ *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

²⁶¹ *Id.* at 465–66.

²⁶² *Id.* at 475–76.

²⁶³ *Id.* at 471, 503.

²⁶⁴ *Id.* at 479.

²⁶⁵ *Id.* at 471, 478.

without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.²⁶⁶

Hence, the rationale evidenced in Supreme Court landmark decisions on juvenile criminal culpability in sentencing provides support for the proposition that when it comes to assessing criminal culpability, minors should be held to a lower standard of culpability compared to their adult counterparts, adopting neuroscience studies on brain development.²⁶⁷ This provides the first justification for the DMIPMA, that is, it codifies the Court's diminished criminal culpability rationale and establishes the best interest of the minor as the primary consideration for the formulation and application of the status crimes of minors. If we believe in the Court's rationale of diminished mental capacity of juveniles for serious crimes, why should

²⁶⁶ *Miller*, 567 U.S. at 479–80.

²⁶⁷ *Id.* at 471–72.

that rationale not apply to assessing the criminal culpability of misdemeanor offenses, particularly when applied to mind-altering drugs?

When we apply the Court's rationale to the issue of how to regulate minors' use and possession of marijuana, we are compelled to take a different, less harmful approach than we currently employ. This is especially the case as marijuana has a negative impact on brain development for young people, which may further harm their judgment.²⁶⁸ Further, marijuana use among minors leads to a higher chance of dependency.²⁶⁹ Epidemiologists have found that 9% of people who begin smoking marijuana at eighteen years or older satisfy the criteria of dependency, and this number triples at ages under eighteen years old.²⁷⁰ The reason for this is that a minor's brain is under rapid development when they are young.²⁷¹ Additionally, studies have shown that anxiety and depressive disorders have been the product of cannabis use and exposure among minors.²⁷²

Fortunately, much involvement of minors in criminal activity is part of the normal developmental process of identity formation, and most minors will mature out of these tendencies.²⁷³ Researchers note that:

Evidence of significant changes in brain structure and function during adolescence strongly suggests that these cognitive tendencies characteristic of adolescents are associated with biological immaturity of the brain and with an imbalance among developing brain systems. This imbalance model implies dual systems: one involved in cognitive and behavioral control and another involved in socio-emotional processes. Accordingly, *adolescents lack mature capacity for self-regulation because the brain system that*

²⁶⁸ CAL. SOC'Y ADDICTION MED., IMPACT OF MARIJUANA ON CHILDREN AND ADOLESCENTS 11 (2009), <https://csam-asam.org/wp-content/uploads/impactof-marijuanaonchildrena.pdf>.

²⁶⁹ *Id.* at 1.

²⁷⁰ *Id.* at 3.

²⁷¹ *Id.*

²⁷² *Id.* at 4.

²⁷³ NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2 (Richard J. Bonnie et al. eds., 2013).

*influences pleasure-seeking and emotional reactivity develops more rapidly than the brain system that supports self-control.*²⁷⁴

This knowledge of adolescent development has underscored important differences between adults and adolescents with direct bearing on the design and operation of the justice system, raising doubts about the core assumptions driving the criminalization of juvenile justice policy in the late decades of the twentieth century.²⁷⁵ Hence, research indicates that for most minors, the period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity.²⁷⁶

It was in this context that the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) asked the National Research Council to convene a committee to conduct a study of juvenile justice reform.²⁷⁷ The goal of the work—Reforming Juvenile Justice: A Developmental Approach—was to review recent advances in behavioral and neuroscience research and draw out the implications of this knowledge for juvenile justice reform, to assess the new generation of reform activities occurring in the United States, and to assess the performance of OJJDP in carrying out its statutory mission as well as its potential role in supporting scientifically-based reform efforts.²⁷⁸

Therefore, in applying the DCCR from *Roper* and its progeny to minors in possession of marijuana, one would conclude that we should decriminalize or legalize minors’ use or possession of marijuana, as clearly their brains are still developing, and that their drug use clouds their good judgment. However, we still have laws that unfairly penalize minors for the simple, non-violent possession of marijuana, and even in states where marijuana for adults has been decriminalized, the best interest of the minor standard requires that we re-evaluate those laws.

So, the question then is, knowing that minors have this diminished mental culpability which might be even more diminished by

²⁷⁴ *Id.* (emphasis added).

²⁷⁵ *Id.* at 45.

²⁷⁶ *Id.* at 90.

²⁷⁷ *Id.* at 1.

²⁷⁸ *Id.*

the negative effects of marijuana use, when minors make bad decisions and use marijuana, how should the law operate if within the best interest of the minor? The appropriate response should not be punitive, criminal measures; rather, we should seek to educate and treat the affliction. As will be discussed next, there are Equal Protection and equity reasons why the DMIPMA compels us to take a non-criminal, holistic approach to MIPM.

B. *Redresses Disparate Treatment*²⁷⁹

While there is currently no minors' rights law, the Equal Protection Clause of the Fourteenth Amendment applies to minors.²⁸⁰ Further, there are both state and federal sources of minors' rights law.²⁸¹ In a nutshell, minors have many, although not all the same, constitutional rights as adults have.²⁸² The federal government,²⁸³ as well as the state and local governments,²⁸⁴ have enacted laws and regulations to promote their positive development and to protect them from harm, such as child labor laws.²⁸⁵ Some of these laws include "status crimes," which are prophylactic, such as a prohibition

²⁷⁹ See generally Mitchell F. Crusto et al., *Assessing the Status of Minors in Possession: Marijuana Versus Alcohol 2* (Ohio State Legal Stud. Working Paper, Paper No. 2022-18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203910 [hereinafter *Assessing the Status of Minors in Possession*]. This working paper is co-authored by Loyola Law graduates Jillian Morrison and Laurel Taylor and funded by a grant from the 2020-2021 Marijuana Grant Award from The Ohio State University Moritz College of Law, Drug Enforcement and Policy Center. *Id.*

²⁸⁰ See U.S. CONST. amend. XIV, § 1.

²⁸¹ *Children's Rights*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/children%27s_rights#:~:text=There%20are%20both%20state%20and,have%20the%20right%20to%20vote (last visited Feb. 23, 2024).

²⁸² *Id.*

²⁸³ See, e.g., Indian Child Welfare Act, 25 U.S.C. § 1901–1963 (2018); Civil Rights of Children, 42 U.S.C. § 1983 (2018); Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5101–5116 (1978); Social Security, 42 U.S.C. § 301-1397 (2018); Children's Bureau, 42 U.S.C. § 191-94 (2018).

²⁸⁴ See, e.g., UNIF. L. COMM'N, UNIFORM PARENTAGE ACT (2000); UNIF. L. COMM'N, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997); *Emancipation of Minors – Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_emancipation (last visited Feb. 7, 2024).

²⁸⁵ Jade Yeban, *What Are the Legal Rights of Children?*, FINDLAW, <https://www.findlaw.com/family/emancipation-of-minors/what-are-the-legal-rights-of-children.html> (May 29, 2023).

against hazardous activities including driving a car without a license.²⁸⁶ Furthermore, the law looks to and holds parents and guardians responsible for developing and protecting minors.²⁸⁷ This includes laws protecting minors from parental abuse.²⁸⁸ Additionally, when minors who are juveniles are alleged of violating criminal laws, we have established juvenile courts that operate at the local level and are subject to state and federal oversight.²⁸⁹

The overall impact of either legalization or decriminalization of marijuana on individuals under the age of twenty-one requires additional data and analysis to create a comprehensive analysis and how it may vary across state, socioeconomic, racial, and gender classifications. One indicator of the law and society's attitude to the criminality of minors in possession of marijuana ("MIPM") is to compare it with that of minors in possession of another substance that minors are prohibited from purchasing, using, or possessing alcohol

²⁸⁶ See Denise Witmer, *Driving Age by State: What You Need to Know for Your Teen to Safely and Legally Drive*, VERYWELLFAMILY (Dec. 28, 2022), <https://www.verywellfamily.com/driving-age-by-state-2611172> (noting that car crashes are a leading cause of death for young people and that young people are more likely to take dangerous risks when driving); see also NAT'L RSCH. COUNCIL & INST. OF MED., PROTECTING YOUTH AT WORK: HEALTH, SAFETY, AND DEVELOPMENT OF WORKING CHILDREN AND ADOLESCENTS IN THE UNITED STATES (1998), <https://www.ncbi.nlm.nih.gov/books/NBK230173/> (noting that regulations for hours and type of work children under sixteen may perform is restricted by law to protect their health and well-being).

²⁸⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997) (emphasizing that the Constitution, and specifically the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children).

²⁸⁸ See *Current Laws for Child Protection*, CHILDUSA, <https://childusa.org/law/> (last visited Feb. 23, 2024) (providing a map for understanding the different child abuse and neglect prevention laws by state).

²⁸⁹ See *Raising the Minimum Age for Prosecuting*, *supra* note 9. There is a particular issue of disparate treatment relative to how minors are treated relative to the age of a minor, which is not the subject of this article. That is how the juvenile law and special protective legal treatment applies to "juveniles," minors who are under age of eighteen versus how "young adults," which I define as minors who are eighteen years old but under twenty-one years old. While young adults are entitled to vote and are required to register for military service, they are not afforded the right to possess marijuana.

(“MIPA”).²⁹⁰ The results of a study of that comparison are presented next.²⁹¹

While many states are considering legalizing or decriminalizing marijuana, such reforms have little, if any, positive impact on minors and criminalize relatively harmless youth behavior.²⁹² Most of the existing research focuses on the impact of the legalization of marijuana usage among minors,²⁹³ but not how that usage correlates to actual arrests or contrasts potential reform options.²⁹⁴ A study conducted by the author and two of his former students examined the statutory language of MIPM and cross-referenced that language to MIPA which is compiled and categorized based on legal status: legalized, decriminalized, or illegal.²⁹⁵

The study found that states across the board appear to be decreasing arrest rates for marijuana possession, and more states are looking to alcohol violation statutes to craft their marijuana violation statutes for minors.²⁹⁶ Accordingly, the public shift in marijuana appears to be impacting the practicalities of drafting statutes and mandating arrests for the better: to create a less hostile approach with less punitive impact on minors.²⁹⁷

Across the board, there does not seem to be a substantial difference in the penalties for the use of alcohol or marijuana due to decriminalization compared to legalization.²⁹⁸ In general, it depends on the severity with which a particular state addresses drug and alcohol violations—some including intense penalties with high fines and imprisonment, with others including small fines and simple relinquishment of the substance.²⁹⁹ All states would benefit from reviewing both their alcohol and marijuana possession for minors to

²⁹⁰ Mitchell F. Crusto, *Unequal Protection: Minors in Possession, Marijuana versus Alcohol* (forthcoming); see also *Assessing the Status of Minors in Possession*, *supra* note 279.

²⁹¹ *Assessing the Status of Minors in Possession*, *supra* note 279.

²⁹² See Ladegard et al., *supra* note 104, at S166–67.

²⁹³ *Id.* at S166.

²⁹⁴ *Id.*

²⁹⁵ *Assessing the Status of Minors in Possession*, *supra* note 279, at 2.

²⁹⁶ *Id.* at 2.

²⁹⁷ See *id.*

²⁹⁸ *Id.* at 5.

²⁹⁹ *Assessing the Status of Minors in Possession*, *supra* note 279, at 5.

ensure arrest is not included at any point in the process to protect children.³⁰⁰

While originally this study planned to compare arrest rates across jurisdictions for MIPM and MIPA offenses, this was unfeasible due to the classification for alcohol-related offenses in the Uniform Crime Reporting database.³⁰¹ Arrests for minors in possession of alcohol were encompassed as part of a larger “drunkenness” category.³⁰² Since this category includes numerous additional violations beyond the MIPA classification and does not break down arrest classification into subcategories, it was not feasible to compare this to the MIPM arrest data.³⁰³

When it comes to assessing the impact of decriminalization/legalization as it would pertain to minors and its impact on usage, a lot of arguments set forth do not necessarily have strong data backing them. The study found that it is very difficult to ascertain the impact of decriminalization/legalization of marijuana on minors because there is a lack of uniformity in data reporting.³⁰⁴ It is inconclusive to look at states that have relaxed their laws around MIPM for marijuana to say this is an example of what could work.

As the United States seems likely to make significant progress on marijuana discrimination and legalization reform, policymakers are concerned that the level of adult use and possession of marijuana among minors may grow.³⁰⁵ Repeated marijuana use during adolescence may lead to potentially long-lasting impairments in brain function.³⁰⁶ However, it is possible that decriminalization/legalization of marijuana may have no significant effect,³⁰⁷ or even decrease

³⁰⁰ *Id.*

³⁰¹ *Id.* at 50.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 50.

³⁰⁵ Volkow et al., *supra* note 26, at 2219 (discussing the “rapidly shifting landscape” concerning marijuana legalization and its potential effects on youths).

³⁰⁶ *Id.* at 2225.

³⁰⁷ See Aaron L. Sarvet et al., *Medical Marijuana Laws and Adolescent Marijuana Use in the United States: A Systematic Review and Meta-Analysis*, 113 *ADDICTION* 1003, 1013 (2018); see also Rebekah Coley et al., *Recreational Marijuana Legalization and Adolescent Use of Marijuana, Tobacco, and Alcohol*, 69 *J. ADOLESCENT HEALTH* 41, 43 (2021). For a discussion as it pertains to medical marijuana, see D. Mark Anderson et al., *Medical Marijuana Laws and Teen Marijuana Use*, 17 *AM. L. & ECONS. REV.* 495, 495 (2015).

recreational usage by minors.³⁰⁸ For example, following the 2012 legalization of marijuana sales for adults in Washington, marijuana usage decreased or remained stable through 2016 in a case study focused on the usage of King County students in sixth, eighth, tenth, and twelfth grades.³⁰⁹ Another recent study surveying trends in Washington and California, two states with legalized recreational marijuana for adults, estimates that recreational marijuana legalization use actually decreased among eighth and tenth graders, with no effect on twelfth graders.³¹⁰ As this is consistent with rates in states without legal recreational marijuana, this trend suggests that legalization does not impact use prevalence by minors.³¹¹

Despite this, minors and young adults remain among the highest users of marijuana.³¹² Overall rates of adolescent substance use have decreased in recent years, and a growing body of research is attempting to determine whether the legalization or decriminalization of marijuana has any correlation with this.³¹³ A 2020 study examined the impact of California's marijuana legalization and found that although recreational marijuana legalization was not associated with changes in marijuana use, there were observed increases in youth use rates in Pennsylvania, a state in which recreational marijuana remains illegal.³¹⁴

Those studies, and the instant study, remain concerned with the impact of arrests on minors. Being arrested during adolescence can

³⁰⁸ D. Mark Anderson et al., *Association of Marijuana Laws With Teen Marijuana Use: New Estimates From the Youth Risk Behavior Surveys*, 173 JAMA PEDIATRICS 879, 880 (2019).

³⁰⁹ Myduc Ta et al., *Trends and Characteristics in Marijuana Use Among Public School Students — King County, Washington, 2004–2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 845, 846 fig.1 (2019).

³¹⁰ Greg Midgette & Peter Reuter, *Has Cannabis Use Among Youth Increased After Changes in Its Legal Status? A Commentary on Use of Monitoring the Future for Analyses of Changes in State Cannabis Laws*, 21 PREVENTION SCI. 137, 137 (2020).

³¹¹ *Id.*

³¹² Ladegard et al., *supra* note 104.

³¹³ See Jennifer A. Bailey et al., *Marijuana Legalization and Youth Marijuana, Alcohol, and Cigarette Use and Norms*, 59 AM. J. PREVENTATIVE MED. 309, 310 (2020).

³¹⁴ See Emily Kan et al., *Marijuana Use Among Justice-Involved Youths After California Statewide Legalization, 2015–2018*, 110 AM. J. PUB. HEALTH 1386, 1389 (2020).

affect a child's life and health, as arrests are traumatizing and can even result in physical harm.³¹⁵ Teens who are arrested are more likely to drop out of high school than their peers.³¹⁶ Those arrested may find it more difficult to be admitted to college and may be ineligible for financial aid.³¹⁷ Arrests on a record can also affect future employment.³¹⁸ Some states have attempted to pass bills to stop the criminalization of young people for marijuana possession, noting that where youth in possession of alcohol are reprimanded, youth in possession of marijuana are frequently detained.³¹⁹ This study suggests that more states should take steps to regulate marijuana like alcohol by adopting reprimand outcomes rather than arrests for marijuana possession. For all these reasons and more, it remains important to research the impact marijuana policy has on youth and take steps to reduce youth arrests wherever possible.

Both on a federal and state level, there is momentum to both legalize and decriminalize marijuana for adults.³²⁰ While this marks a potential tremendous victory for marijuana activists, the overall impact of either legalization or decriminalization on individuals under

³¹⁵ See Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321–22 (2014) (“The criminal justice system has been recognized increasingly as a threat to physical and mental health.”).

³¹⁶ David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOCIO. EDUC. 36, 39 (2013).

³¹⁷ See MARSHA WEISSMAN ET AL., CTR. FOR CMTY. ALTS., *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED* 26 (2010), <https://communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf>; *Eligibility for Students with Criminal Convictions*, U.S. DEP'T OF EDUC., <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> (last visited July 1, 2022).

³¹⁸ See Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, ANNALS: AM. ACAD. POL. & SOC. SCI. 195, 197 (2009).

³¹⁹ See, e.g., Dana Gentry, *Legislation Aims to End Racial Disparities in Youth Possession of Weed*, NEV. CURRENT (Mar. 4, 2021, 6:05 AM), <https://www.nevadacurrent.com/2021/03/04/legislation-aims-to-end-racial-disparities-in-youth-possession-of-weed/>.

³²⁰ See CORY BOOKER ET AL., *CANNABIS ADMINISTRATION & OPPORTUNITY ACT: DISCUSSION DRAFT 1* (2021), <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>. See generally *Marijuana Opportunity Reinvestment and Expungement Act*, H.R. 3617, 117th Cong. (2021) (passed in the House and referred in the Senate on April 4, 2022).

the age of twenty-one requires additional data and analysis in order to create a comprehensive analysis of what impact marijuana legalization or decriminalization has on those under the age of twenty-one, and how it may vary across state, socioeconomic, racial, and gender classifications.

The following presents important observations relative to the criminal culpability of a juvenile in possession of marijuana that derive from the study just presented:

Observation #1: The law lacks uniformity, which leads to misunderstanding of the specific rules in each jurisdiction.

Observation #2: Permitting adult possession of small amounts of marijuana and holding juveniles criminally accountable for the same behavior sends a mixed message and minimizes the reality that marijuana is still legally considered a dangerous drug.

Observation #3: There is a dearth of information such as public service announcements that would educate juveniles that marijuana possession is still criminal and that its use is dangerous.

Observation #4: The overall impact of either legalization or decriminalization on individuals under the age of twenty-one requires additional data and analysis to create a comprehensive analysis of what impact marijuana legalization or decriminalization has on those under the age of twenty-one, and how it may vary across state, socioeconomic, racial, and gender classifications.

Observation #5: Marijuana decriminalization has failed to address the continuing criminalization of minors in simple possession of marijuana.

Observation #6: Juveniles need to take caution that any possession of marijuana makes them a criminal, even in states that have decriminalized or legalized

adult use and possession. Criminalizing simple possession of marijuana places needless, irrational, expensive, and sometimes lasting negative burdens on our youth.

Observation #7: A limited study of state laws and enforcement practices indicates that minors in simple possession of marijuana are not treated more severely than minors in simple possession of alcohol.

Conclusion #8: Criminalization of minors in simple, non-violent possession of marijuana does great harm, serves no benefit, and demands reform.

Hence, there is inconclusive evidence and therefore a lack of data needed to direct policymakers when comparing MIPM versus MIPA. Notwithstanding, the Equal Protection Clause dictates how we treat minors similarly to adults unless there is a good governmental justification. When it comes to holding minors criminally liable for the simple, non-violent possession of marijuana, the government has not provided such a valid justification in states where the same behavior by an adult is not a crime. This leads to the third justification for the enactment of the DMIPMA, which is that it is supported by public policy.

C. *Public Policy*

Public policy dictates that our criminal justice system does no harm to minors and focuses limited resources on serious, dangerous criminal behavior.³²¹ This provides the third and final justification for the decriminalization of MIPM.

Let us face the truth: Minors are abusing marijuana, and making their bad behavior a crime is not preventing their wrong choices.

³²¹ See Nicole Scialabba, *Should Juveniles Be Charged As Adults in the Criminal Justice System?*, AM. BAR ASS'N (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/> (“[J]uvenile courts were originally created in the nineteenth century because society recognized that juveniles did not have the cognitive development that adults had, would benefit more from rehabilitative services to prevent recidivism, and needed more protections.”).

Consistent with our libertarian principles and inspired by constitutional analysis, we turn to policy justifications for adopting the best interest of the minor standard. These policy justifications are illustrated through the lens of the decriminalization of the simple, non-violent possession of marijuana by minors.

I believe that the DMIPMA has several positive public policy justifications. First and foremost, it would be a positive solution to address the harms that the current criminalization has on minors, particularly the WOD's negative, direct, and collateral consequences on people's lives.³²² Second, the DMIPMA promotes the use of a holistic remedial response to minors who choose to abuse marijuana. Third, the DMIPMA directs us to reimagine the law's relationship to the protection and promotion of the development of minors, particularly how we should better use resources of prevention, counseling, and treatment rather than to arrest, prosecute, and sometimes incarcerate minors for simple, non-violent possession.

1. HARM REDUCTION

The first policy justification for the DMIPMA is to minimize the harm to minors. The test is whether our current policies and practices are causing harm to our young people beyond the benefit achieved. As previously presented, relative to criminalizing simple possession of marijuana by minors, our current approach irreparably harms minors in several ways: (1) directly via arrests;³²³ (2) financially via the cost of legal representation;³²⁴ (3) emotionally via the status of a criminal;³²⁵ (4) beneficially via diminished citizenship rights;³²⁶ and (5) reputationally via a criminal record.³²⁷ Those harms are real, despite meaningful reforms to the effectiveness of juvenile drug courts.³²⁸ Perhaps more importantly and as previously

³²² See *supra* Section I.A.

³²³ See RICHARD MENDEL, THE SENT'G PROJECT, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 4 (2023).

³²⁴ See *id.* at 6.

³²⁵ See *id.* at 17.

³²⁶ *Id.* at 14–15.

³²⁷ *Id.* at 12, 14–15.

³²⁸ See generally U.S. DEP'T OF JUST., JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE 1 (2003), <https://www.ojp.gov/pdffiles1/bja/197866.pdf> (providing a guide to the optimal design for a juvenile drug court).

explained, our current strategy for regulating minors who use or possess marijuana is dangerous because it exposes our youth to illegal products laced with lethal substances.³²⁹ Additionally, it forces them to associate with criminals as their source for drugs or participate in the illegal, dangerous, and sometimes lucrative distribution of drugs,³³⁰ although some minors are reportedly purchasing drugs online through social media platforms.³³¹

Furthermore, our current approach leaves a lasting stain that has negative, collateral impacts on the futures of our youth.³³² In a nutshell, our criminalization of the bad choices that some of our minors is demonizing them rather than uplifting them. Harm reduction might include civil fines such as issuing a civil ticket like we do for parking violations.

2. HOLISTIC REMEDIATION

The second test of the efficacy of the DMIPMA is whether our current policies and practices achieve or accomplish the best interest of the minor standard. Clearly, criminalizing bad, non-violent choices is not in the best interest of minors. That is made clear when we apply the standard to simple, non-violent possession of marijuana by minors. Just as the Court relied on neuroscience to establish what I call the diminished criminal capability rationale, we should consult the scientific experts on how to achieve the best interest of the minor when it comes to marijuana use. Unfortunately, the states that have decriminalized/legalized adult use of marijuana ignore the need to recognize and treat minors who abuse marijuana as a social/medical disorder that is best treated with counseling and other

³²⁹ See Wright, *supra* note 28.

³³⁰ See *supra* pp. 674.

³³¹ See Amy Keller, *How Do Teens Get Drugs*, DRUGREHAB, <https://www.drugrehab.com/teens/how-teens-get-drugs/> (Mar. 2, 2020) (“In a national survey of high schoolers, nearly half said they knew a student who sold drugs at their school. The internet is another avenue where teens can order substances ranging from opioid painkillers to sleeping pills. Often, though, the easiest place for teens to access drugs and alcohol is within their own home.”); *Protecting Children from Online Drug Dealers*, SUBSTANCE USE PREVENTION EDUC., <https://www.addicted.org/supe/parents/protecting-children-from-online-drug-dealers/> (Jan. 22, 2024).

³³² See *supra* pp. 682–85; see also MENDEL, *supra* note 323, at 28.

related techniques.³³³ Such an approval clearly should apply to minors who possess or use marijuana for recreational purposes.

One highly-respected authority in the public health of minors has recommended a harm reduction³³⁴ approach to minors in possession of marijuana.³³⁵ They addressed the question: Should young people be arrested or jailed for using marijuana? In 2015, the American Academy of Pediatrics (“AAP”) issued a policy statement supporting the decriminalization of marijuana possession for minors and young adults, noting that the “[c]riminal prosecution for marijuana possession adversely affects hundreds of thousands of youth yearly.”³³⁶ In a 2019 quasi-experimental study, researchers set out to answer the question of whether arrests of youths for possession of cannabis change when cannabis policy focuses on adults.³³⁷ The study was intended to address the civil liberty advocates that support the legalization of cannabis, which targets adult use, rather than decriminalization, which affects both youths and adults.³³⁸ The study concluded that legalization did not appear to reduce arrests for cannabis possession among youths, despite having benefited adults.³³⁹

³³³ Seth Ammerman et al., *The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update*, 135 AM. ACAD. PEDIATRICS 583, 583–86 (2015).

³³⁴ “Harm reduction,” refers to a range of intentional practices and public health policies designed to lessen the negative social and/or physical consequences associated with various human behaviors, both legal and illegal. See CRITICAL APPROACHES TO HARM REDUCTION: CONFLICT, INSTITUTIONALIZATION, (DE-)POLITICIZATION, AND DIRECT ACTION ix–x (Zack Marshall & Christopher B.R. Smith eds., 2016); *Principles of Harm Reduction*, NAT’L HARM REDUCTION COAL., <https://harmreduction.org/about-us/principles-of-harm-reduction/> (last visited Aug. 10, 2023); Joseph P. Williams, *A Fight to Do No Harm: Strategies Embraced Elsewhere to Curb the Impact of Drug Addiction Still Face Obstacles in the U.S.*, U.S. NEWS (Jan. 24, 2019, 10:17 AM), <https://www.usnews.com/news/healthiest-communities/articles/2019-01-24/opioid-crisis-harm-reduction-struggles-for-acceptance-in-us>.

³³⁵ Ammerman et al., *supra* note 333, at 583–86; see Ladegard et al., *supra* note 104, at S166.

³³⁶ Seth Ammerman et al., *The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update*, 135 AM. ACAD. PEDIATRICS 770, 779 (2015).

³³⁷ Andrew D. Plunk et al., *Youth and Adult Arrests for Cannabis Possession After Decriminalization and Legalization of Cannabis*, 173 JAMA PEDIATRICS 763, 764 (2019).

³³⁸ *Id.*

³³⁹ *Id.* at 763.

The study further determined that decriminalization reduces youth arrests in most cases, but findings also suggested that any benefit for youth could be lost when adult use has also been legalized.³⁴⁰ The study posited that to address this problem, state decriminalization policies should take the step of explicitly describing when youths can be arrested for possession of small amounts of cannabis.³⁴¹ Other research supported these findings: Decriminalization of cannabis resulted in decreased arrests for adults and youths in Massachusetts, Connecticut, Rhode Island, Vermont, and Maryland through 2015.³⁴² Further, it was not associated with any increases in cannabis use by youths in those states.³⁴³

The AAP:

Strongly supports the decriminalization of marijuana use for both minors and young adults and encourages pediatricians to advocate for laws that prevent harsh criminal penalties for possession or use of marijuana. A focus on treatment for adolescents with marijuana use problems should be encouraged, and adolescents with marijuana use problems should be referred to treatment.³⁴⁴

In addition to decriminalization, early intervention, and treatment, the AAP recommends, *inter alia*, “strict enforcement of rules and regulations that limit access and marketing and advertising to youth” and that “public health campaigns effectively communicate the harms associated with teen marijuana use.”³⁴⁵

Hence, when it comes to the best interest of the minor relative to the simple, non-violent possession of marijuana, education, family

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² Richard A. Grucza et al., *Cannabis Decriminalization: A Study of Recent Policy Change in Five US States*, 59 INT’L J. DRUG POL’Y 67, 67 (2018).

³⁴³ *Id.*

³⁴⁴ See Ammerman et al., *supra* note 333, at 585–86.

³⁴⁵ *Id.*; see also *Mrs. Reagan’s Crusade*, RONALD REAGAN PRESIDENTIAL FOUND. & INST., https://web.archive.org/web/20060427235046/http://www.reaganfoundation.org/reagan/nancy/just_say_no.asp (last visited Feb. 16, 2024) (referencing “Just Say No,” which was the advertising campaign created and championed by Nancy Reagan during President Ronald Reagan’s Administration during the late 1980s and early 1990s).

awareness, and abstinence/prevention are the best solutions, followed by intervention, counseling, and then treatment if necessary. Although our schools are burdened with many, various tasks, schools rather than the courts are better places for these goals to be accomplished with the least amount of harm. They are community- and family-centered and therefore are an excellent place to educate minors and their parents on the dangers and illegality of marijuana use or possession.³⁴⁶

3. REIMAGINE RESOURCES

The third policy justification for the DMIPMA raises the question as to whether our current policies and practices are the best use of limited resources to achieve or accomplish the best interest of the minor standard. As mentioned above, the AAP recommends that we take a holistic approach to drug use through education, prevention, intervention, counseling, and treatment.³⁴⁷ This is where we should be expending our limited financial and personnel resources. To the contrary, we are using those resources to hunt for, arrest, interrogate, investigate, intake, process, charge, put on probation, imprison, bail, hear cases, employ prosecutors, hire defense counsel, negotiate pleas, utilize judges and court staff, diversion personnel, drug treatment experts, and fill overcrowded, underfunded jails and prisons.³⁴⁸ Instead, through the establishment and application of the best interest of the minor standard, we should reimagine how to deploy those tremendous resources to help minors rather than harm them.

³⁴⁶ See *Student Alcohol and Drug Policy*, ROCKWOOD SCH. DIST., <https://www.rsdm.org/departments/student-services/student-handbook/departments/student-services/student-handbook/student-alcohol-and-drug-policy> (last visited Feb. 7, 2024) (noting that short-term use of marijuana can lead to school difficulties, problems with memory and concentration, increased aggression, car accidents, use of other drugs or alcohol, risky sexual behaviors, worsening of underlying mental health conditions including mood changes and suicidal thinking, increased risk of psychosis, interference with prescribed medication and that regular use of marijuana can lead to significant problems including Cannabis Use Disorder, breathing problems, lung cancer, decreased motivation or interest which can lead to decline in academic or occupational performance, lower intelligence, and mental health problems such as schizophrenia, depression, anxiety, anger, irritability, moodiness, and risk of suicide).

³⁴⁷ See *supra* notes 344–45 and accompanying text.

³⁴⁸ See Grucza et al., *supra* note 342, at 74 (broadly noting the financial and human costs associated with punitive drug control policies).

One significant resource that should be re-deployed from arresting minors and adults in simple, non-violent possession of marijuana is that of law enforcement personnel. Instead of chasing after non-violent pot offenders who are minors, police officers should be freed up to prevent and solve serious crimes, such as gun violence and economic crimes, pursuant to a police highest utilization hierarchy.³⁴⁹

Hence, public policy supports the proposition that the DMIPMA should be adopted and that it should apply to decriminalize the non-violent, simple possession of marijuana by minors. While the above discussion has provided convincing support for the Act, one should not deny that the DMIPMA may have some shortcomings. A couple of those potential shortcomings and my responses to each of them will be presented next.

D. *Response to Critics*

This Section responds to two criticisms against the proposed DMIPMA. The first critique is that the DMIPMA equates to a broad license for minors to participate in all illegal activities without penalty and thereby promotes and condones minors' use of dangerous drugs. The second critique is that the DMIPMA would relieve minors of more severe crimes, in that there are no boundaries to its application. Each critique is accompanied by a response, which provides how the benefits of the solution outweigh its possible shortcomings.

1. PROMOTES UNHEALTHY BEHAVIOR

The first critique is that the DMIPMA equates to a broad license for minors to participate in all illegal activities without penalty and thereby promotes and condones minors' use of dangerous drugs.

³⁴⁹ 2023 DOJ Budget Highlights Enforcement and Safety Priorities, POLICE GRANTS HELP (Jan. 17, 2023), <https://www.policegrantshelp.com/news/2023-doj-budget-highlights-enforcement-and-safety-priorities-poyzBoJ8Cch9WXu2/#:~:text=1%20Reduce%20violent%20crime%20and%20gun%20violence%20,Protect%20vulnerable%20communities%205%20Protect%20our%20democratic%20inst> (highlighting five goals: reducing violent crime and gun violence; protecting national security; combatting drug trafficking and preventing overdose deaths; protecting vulnerable communities; and protecting our democratic institutions).

Some critics might argue that the DMIPMA promotes unhealthy behavior for minors by effectively condoning the private use of recreational marijuana, which is still on the federal Schedule I list of the most dangerous drugs, along with others such as heroin and LSD.³⁵⁰

Policymakers are understandably concerned that decriminalizing the simple possession and use of recreational marijuana by minors will result in an increase in marijuana usage among them. Clearly, it is important to discourage minors from using marijuana. This imperative is echoed in the federal guidance to states as they began to decriminalize/legalize adult use of marijuana. As previously mentioned, in the Justice Department's 2013 "Cole Memorandum," the federal government advised that if a state seeks to decriminalize marijuana, that state must clearly establish regulations that address eight federal government priorities.³⁵¹ The first of these priorities is very pertinent here: "[p]reventing the distribution of marijuana to minors."³⁵²

In response, the DMIPMA does not give minors an absolute, blanket right to behave irresponsibly. Just to be clear, I am not advocating that we should promote or condone the private use of marijuana by minors. On the contrary, the DMIPMA is a balancing act that requires policymakers to weigh the benefits of criminalizing the activities of minors against the detriments of doing so. For example, when balancing MIP of simple possession, the DMIPMA questions whether the benefits of criminal culpability (what are they really?) outweighs the many detriments of doing so.

Consistent with the DMIPMA, I believe the facts show that decriminalizing simple, non-violent possession of marijuana by minors will not result in greater use by minors. Studies show that decriminalizing marijuana use for adults does not increase the number of adults using the drug. Further, studies show that legalization of

³⁵⁰ *Drug Scheduling*, U.S. DRUG ENF'T AGENCY, <https://www.dea.gov/drug-information/drug-scheduling> (last visited Feb. 22, 2024).

³⁵¹ Press Release, U.S. Dep't of Just., Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

³⁵² Cole Memorandum, *supra* note 134, at 1. This priority is very pertinent because if we can stop minors from getting a hold of marijuana, they cannot be charged with being in possession of it.

marijuana may have no significant effect,³⁵³ or decrease recreational usage by minors.³⁵⁴ For example, following the 2012 legalization of retail marijuana sales for adults in Washington, marijuana usage decreased or remained stable through 2016 in a case study of King County students in grades six, eight, ten, and twelve.³⁵⁵ This case study only focused on usage.³⁵⁶

A more recent study surveying trends in Washington and California, two states that have legalized recreational marijuana for adults, estimated that recreational marijuana legalization use prevalence actually decreased marijuana use prevalence among eighth and tenth graders, with no effect on twelfth graders.³⁵⁷ This was consistent with those in states without recreational marijuana laws, suggesting that legalization did not impact adolescent use prevalence.³⁵⁸ Despite this, adolescents and young adults remain among the highest users of marijuana.³⁵⁹ However, overall rates of adolescent substance use have decreased in recent years; and, therefore, this is a growing body of research that is attempting to determine whether the legalization or decriminalization of marijuana has any correlation to this.³⁶⁰ A 2020 study examined the impact of California's recreational marijuana legalization on the marijuana use among justice system-involved adolescents and young adults and found that although recreational marijuana legalization was not associated with changes in marijuana use among youths in California, there were observed increased rates of use in Pennsylvania, where only medical marijuana is currently legal.³⁶¹ The majority of the existing research focuses solely on usage, rather than arrests, for marijuana and minors.

In fact, I would continue the current laws that prohibit the sale of marijuana to minors. However, I believe that freeing minors from

³⁵³ See Sarvet et al., *supra* note 307, 1012–13; see also Coley et al., *supra* note 307, at 48. For a discussion as it pertains to medical marijuana, see Anderson et al., *supra* note 307, at 495.

³⁵⁴ Anderson et al., *supra* note 307.

³⁵⁵ See Ta et al., *supra* note 309, at 845.

³⁵⁶ *Id.*

³⁵⁷ Midgette & Reuter, *supra* note 310.

³⁵⁸ *Id.*

³⁵⁹ Ladegard et al., *supra* note 104, at S166.

³⁶⁰ See Bailey et al., *supra* note 313, at 315.

³⁶¹ Kan et al., *supra* note 314, at 1386.

the limited recreational use of marijuana in private accepts the current reality that most minors have either experimented with marijuana, are active users, or are functionally addicted to marijuana. I do not believe that decriminalizing its private use will result in an increase in its use. On the contrary, decriminalizing minors' limited use follows the same convincing arguments for why some states have decriminalized limited adult recreational use: It saves society, including law enforcement and the parents of minor children, tons of dollars and many personal hours that can be used to address much more pressing, productive activities. Besides, if society wants to send a signal that discourages marijuana use among minors, then it can adopt non-criminal "infractions" or tickets or fines like the approach that some have taken. For example, as previously mentioned, in Washington D.C., the possession of two ounces or less of marijuana by a person under twenty-one years old is illegal, but the penalty for such a violation is the seizure of the marijuana as the person possessing it will not be arrested or issued a ticket.³⁶²

Further, there are many examples of inherently dangerous activities that we do or should protect minors from, such as contact sports, driving an automobile, and crossing the street. Yet, we do not criminalize these activities. There are lots of dangerous behaviors that are not regulated by criminal or even civil penalties. Like driving, perhaps we should issue a license to smoke pot along with training and a permit. That would protect minors from the dangers of laced marijuana that is purchased from unlicensed, unregulated vendors.

2. SLIPPERY SLOPE

The second critique is that DMIPMA leads to a slippery slope as there are no limits to its application. The critics posit that if DMIPMA permits the decriminalization of the simple, non-violent possession of marijuana, it will also permit the decriminalization of

³⁶² *The Facts on DC Marijuana Law*, *supra* note 192; *cf.* Carly Wolf, *Delaware: Governor Signs Measure Amending Cannabis Penalties for Minors*, NORML (Sept. 21, 2021), <https://norml.org/blog/2021/09/21/delaware-governor-signs-measure-amending-cannabis-penalties-for-minors/> (“[H.B.] 241 allows law enforcement to refer a juvenile to counseling, treatment, or other appropriate intervention services in lieu of a monetary fine. It amends a 2019 law that reduced first-time marijuana possession offenses by juveniles from a criminal misdemeanor to a civil violation, punishable by a \$100 fine.”).

the possession of alcohol, tobacco, heroin, firearms, and other dangerous activities. Further, the critics fear that DMIPMA would relieve minors of criminal culpability for serious, violent crimes such as rape or murder.

Of course, law students are keenly aware of and cautioned to avoid the illogical outcomes of the “slippery slope fallacy.”³⁶³ In response to the critique that DMIPMA gives minors a blank check to do everything and anything without responsibility or remorse, I would say, “balderdash!” First and foremost, by definition, DMIPMA follows the best interest of the minor standard,³⁶⁴ which is not a mandate. As such, its application represents a balancing of many interests and considerations and does not give minors an absolute pass or excuse to act irresponsibly, recklessly, or in a lawless manner. Second, it is absurd to argue that balancing the best interest of the minor against the continuation of a criminal justice system that is overly burdensome, expensive, ineffective, and archaic will result in lawlessness. On the contrary, I believe that what our criminal justice system is doing to our youth is criminal. In fact, in some cases, minors in possession of marijuana have and may face felony charges for simple possession.³⁶⁵ Third, our current system of regulating minors in possession of marijuana is not producing any positive results in behavior and, as previously stated, puts our youth in

³⁶³ “Slippery slope fallacy,” is defined herein as a fallacious argument in which a party asserts that a relatively small first step leads to a chain of events culminating in some significant, negative outcome. *See generally* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1470–71, 1516 (1999).

³⁶⁴ “Standard,” herein, is defined as “something that others of a similar type are compared to or measured by, or the expected level of quality.” *See Standard*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/standard> (last visited Feb. 8, 2024).

³⁶⁵ In 2015, in Washington State, three minors, were reportedly charged with felonies after being caught with marijuana at school. *See* Stone, *supra* note 20; *cf.* O’Donoghue, *supra* note 20; Wolf, *supra* note 362.

greater harms' way by exposing them to adulterated, tainted drugs,³⁶⁶ and gang activities.³⁶⁷

Moreover, to those critics, I say that the harm to society and to the victims of the continuing inequities of our unjust criminal justice system is untenable and makes the cost of change immaterial. Besides, with the legalization of adult use of marijuana in some states, there is a new source of tax revenue and economic development.³⁶⁸ Recognizing that marijuana use might result, followed by drug addiction, civil fines, and the cost savings from freeing up police enforcement and judicial resources, these funds could be used for much-needed drug treatment programs, particularly for minors. Therefore, in creating a better world, we should free minors from criminal stigma as victims of the WOD.

* * *

In summary, Part III supports the proposition that we decriminalize the simple, non-violent possession of marijuana by minors with three justifications. The Court's "diminished criminal culpability rationale," the law's disparate treatment of MIPM compared to possession by adults, and good policy compel us to act in the best interest of the minor. Hence, we should revoke such laws that demonize our young people for no good reason. Lastly, Part III briefly

³⁶⁶ Watkins, *supra* note 28 (discussing how marijuana may be "laced" with "foreign substances," including lead, other heavy metals, glass, fungus, bacteria, PCP, heroin, embalming fluid, laundry detergent, LSD, methamphetamine, ketamine, or cocaine).

³⁶⁷ Bill Sanders, *Gangs, Drug Use, and Drug Selling in the United States*, OXFORD RSCH. ENCYCS. (Apr. 26, 2021), <https://oxfordre.com/criminology/display/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-443> ("Compared with non-gang youth, gang members also begin to use drugs at earlier ages, use a greater variety of drugs, use them with greater frequency, and participate in other risk behaviors (e.g., violence, unsafe sexual behaviors) while intoxicated. Alcohol and marijuana feature prominently within the drug use repertoires of gang members, and the latter is considered normalized within gang cultures.").

³⁶⁸ See Adam Hoffer, *Cannabis Taxation: Lessons Learned from U.S. States and a Blueprint for Nationwide Cannabis Tax Policy*, TAX FOUND. (Dec. 14, 2023), <https://taxfoundation.org/research/all/state/cannabis-tax-revenue-reform/> ("The revenue potential from cannabis is substantial. States collected nearly \$3 billion in marijuana revenues in 2022. Nationwide legalization could generate \$8.5 billion annually for all states.").

explains how adopting the decriminalization of minors in the simple, non-violent possession of marijuana provides a balanced, holistic approach to regulating the immature behavior of some minors. It does not provide minors a broad license to act irresponsibly, nor does it result in the legalized use of all illicit drugs by minors.

CONCLUSION

When it comes to protecting minors from the dangers of bad decisions, such as marijuana usage and possession, the law is conflicted. On the one hand, we aspire to protect minors from harm and promote their positive development, while we simultaneously hold minors criminally liable for the simple, non-violent possession of marijuana. This conundrum raises a quintessential jurisprudential flaw in our legal system: We lack a unifying, overarching principle that guides the law's relationship with minors. This Article applies the "best interest of the minor" standard to minors in possession of marijuana law.

Applying the proposed standard, this Article demands that we decriminalize minors' bad, albeit, illegal choices such as the simple, non-violent possession of marijuana. In the wake of our criminalization of these bad choices by some minors, we create a vulnerable population traumatized, stigmatized, and marginalized. It is axiomatic that society will greatly benefit from freeing our youth and their families from the fear of arrest, actual arrest, onerous incarceration, fines, expensive legal fees, and the stigma and collateral, negative effects of a criminal record.

* * *

APPENDIX: THE "DECRIMINALIZATION OF MINORS IN THE SIMPLE, NON-VIOLENT POSSESSION OF MARIJUANA" ACT ("DMIPMA")

As noted in Part II of this Article, the following is the proposed model Act that the government, courts, and policymakers should adopt to provide, promote, and protect the development of minors in our society by decriminalizing their simple, non-violent possession of marijuana.

WHEREAS, our society and the Nation are committed to the welfare and well-being of our young people, that is “minors” who are persons who have not yet reached the age of majority or adulthood which is generally under the age of twenty-one and over the age of fourteen;

WHEREAS, the Nation is committed to and benefits from the best practices and outcomes for the holistic development of our youth;

WHEREAS, neuroscience reports that minors are still developing their brains such that makes them more likely than mature adults to make bad choices that run afoul of societal norms and good character;

WHEREAS, the Supreme Court has recognized and adopted the findings of neuroscience relative to the brain development of minors and have in several ground-breaking decisions found it unconstitutional to sentence a minor as an adult for serious crimes such as murder;

WHEREAS, the Court’s decisions on the sentencing of minors establish the “diminished criminal culpability” rationale by which the legal system should minimize the application and enforcement of criminal laws for the non-violent acts of minors that result from bad judgment;

WHEREAS, it is logical, consistent with our Nation’s fundamental tenet, and good public policy to establish as a primary goal the welfare and well-being of our young people;

WHEREAS, there is a delicate balancing act between promoting the needs of minors and societal norms that seek to protect minors and the community from harm and dangerous behavior;

WHEREAS, one example of the need to balance the developmental needs of minors against the need to protect them from harmful bad behavior is the criminal laws that seek to restrict minors in simple, non-violent possession of marijuana which is a dangerous, illegal substance;

WHEREAS, there is a cultural and political shift relating to the safety and benefits of marijuana, and in the non-violent use, possession, cultivation, sale, and distribution of small amounts of the same adults;

WHEREAS, the War on Drugs has failed to stop the use of marijuana and has resulted in, direct and indirect, negative impacts on the lives of millions of Americans; and the prohibition of marijuana has been utilized by the legal system to denigrate, investigate, and infiltrate the private, protected spheres of our society;

WHEREAS, there are ongoing efforts at every level of government to address how marijuana laws negatively impact our criminal justice system, including racial inequities, wasted resources in the policing, prosecution, and incarceration of such offenses in crowded prison conditions, and the collateral consequences of these offenses;

WHEREAS, the criminalization of marijuana has resulted in the incarceration of hundreds of thousands of non-violent offenders, some of whom are serving life imprisonment without the possibility of parole;

WHEREAS, the criminalization of marijuana has produced negative, collateral damage to the lives of millions of Americans, particularly minors, creating a second-class citizenry;

WHEREAS, society, particularly minors and their families, have been and continue to be harmed by such past criminalization, imprisonment, or collateral consequences of having a criminal record;

WHEREAS, criminalizing non-violent actions of minors that represent bad judgment on their part creates unneeded stress, mental and emotional anxiety, and trauma that promotes minors' distrust and hatred of the government, the law, and law enforcement;

WHEREAS, there is a recognized need to reconcile this past intrusion on privacy, to provide exoneration and remediation to victims of the War on Drugs, and to compensate the victims and remediate the communities negatively impacted by past marijuana laws;

WHEREAS, the decriminalization of the simple possession of marijuana by adults recognizes the waste of valuable, limited law enforcement and judicial resources;

WHEREAS, the criminalization of the simple possession of marijuana by minors creates significant expenses in the form of law enforcement, legal representation, bail, jail, and judicial proceeding that places an enormous financial burden on minors and their families and is especially onerous on working class and impoverished families;

WHEREAS, the criminalization of the simple possession of marijuana by minors is particularly inequitably burdensome to racial minorities who are over-policed via racial discriminatory practices;

WHEREAS, the legalization of marijuana recognizes the need to make available safe, restricted sales of marijuana and to reduce or eliminate the dangers in the product and in the circumstances of purchased potentially laced marijuana in dangerous surroundings;

WHEREAS, public health and juvenile health care experts have recommended that minors who possess or use marijuana should not be criminalized but rather should be educated and if needed treated and counseled;

WHEREAS, this Act recognizes that we should be protecting minors from themselves through caring and not through arrest or conviction or jailtime;

THEREFORE, IT IS HEREBY ENACTED that the “Decriminalization of Minors in the Simple, Non-Violent Possession of Marijuana” Act provides all federal, state, and local laws to decriminalize the simple, non-violent possession of marijuana by minors. Hence, any matter for consideration must meet a strict scrutiny test, that is, prove that their actions do not criminalize minors in possession of marijuana.