



ARTICLE

Disabling Families

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Abstract. The family regulation system is increasingly notorious for harming the very families that it ostensibly aims to protect. Under the guise of advancing child welfare, Black, Brown, Native, and poor families are disproportionately surveilled, judged, and separated. Discrimination and ingrained prejudices against disabled parents render their families especially vulnerable to separation and termination. Once enmeshed in the system, disabled parents have little recourse against the state for discrimination based on ableist and raced notions of parenthood.

This Article argues that the family regulation system not only discriminates against disabled parents but also produces disability. It identifies and theorizes three modalities of this production: (1) construction, (2) creation, and (3) reinscription. First, the family regulation system constructs the social category of disability by assuming parents bearing a disability label are unfit, then stigmatizing and separating them from their children. Second, the family regulation system creates disability by causing or exacerbating impairments that contribute to or cause disabilities among parents and their families. Third, the family regulation system reinscribes disability by failing to provide appropriate services or accommodations to disabled parents and then blaming a parent's disability when a termination of parental rights occurs. In these three ways, the family regulation

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system—including the courts, caseworkers, and lawyers who enforce its operation—produces disability.

This Article documents how the judicial decisions and outcomes arising from the family regulation system pathologize disabled people. It argues, however, that while disability is often stigmatized, it is not a negative identity, social group, or label. In fact, disability can be a positive disrupting force in the family regulation system. The Article concludes that disability can be a source of pride, family strength, and personal autonomy. It conceptualizes the act of parenting with a disability as a form of resistance by its very nature. Finally, it offers strategies for disrupting the production of disability in the family regulation system while embracing disability as a positive identity. By unearthing how disability can be constructed, created, and reinscribed by the state, this Article challenges the dominant legal and cultural narrative that disability is solely a medical diagnosis or personal problem.

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Introduction

Being a disabled parent is a rebellious act.

—Eliza Hull¹

Sara Gordon was nineteen-years-old and living with her parents when she became pregnant.² She was poor, White, and had an intellectual disability.³ She had wanted to be a mother.⁴ Sara named her daughter Dana June Gordon, after her maternal great-grandmothers.⁵ In the initial days after Dana's birth, while Sara was still in the hospital recovering, hospital staff contacted the Massachusetts Department of Children and Families (DCF) with concerns about Sara's parenting ability.⁶ Later reports indicated she had missed a feeding, appeared disconnected from her baby, and held the baby in an inappropriate way.⁷ A DCF caseworker visited the hospital and witnessed Sara forget to burp the baby and clean saliva out of the baby's mouth.⁸ Sara also seemed uncomfortable changing Dana's diaper.⁹ These observations, and Sara's status as a person with an intellectual disability, caused concern for DCF.¹⁰ The state removed Dana from Sara's care before Sara and the baby had even left the hospital; two days after the removal, a state court judge agreed that Dana was at risk in her mother's care and ratified DCF's decision to place Dana in foster care.¹¹

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1. Eliza Hull, *Introduction* to WE'VE GOT THIS: ESSAYS BY DISABLED PARENTS 1 (Eliza Hull ed., 2023) (introducing a set of essays written by disabled parents and celebrating disabled parenthood). Ms. Hull is a musician, writer, disability advocate, and mother with a disability. *Id.* at 5, 14.
 2. Sara and her daughter are identified by pseudonym. See Letter from Vanita Gupta, Acting Assistant Att'y Gen., C.R. Div., U.S. Dep't of Just., Jocelyn Samuels, Dir., Off. for C.R., U.S. Dep't of Health & Hum. Servs., and Susan M. Pezzullo Rhodes, Reg'l Manager, Off. for C.R., Region 1, U.S. Dep't of Health & Hum. Servs., to Erin Deveney, Interim Comm'r, Mass. Dep't of Child. & Fams. 1 n.2, 2 (Jan. 29, 2015), <https://perma.cc/VJ8G-64CL> [hereinafter DOJ/HHS Letter of Findings]. Unless otherwise noted, the story of Sara Gordon's experience with the Massachusetts Department of Children and Families is adapted from Lisa Miller's article, *How Intelligent Do You Have to Be to Raise a Child?*, the most in-depth publicly available source about Sara and her family. See Lisa Miller, *How Intelligent Do You Have to Be to Raise a Child?*, CUT (Jan. 24, 2016, 9:00 PM), <https://perma.cc/Q5XQ-FNY2>.
 3. Miller, *supra* note 2.
 4. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. See DOJ/HHS Letter of Findings, *supra* note 2, at 5-6; see also Miller, *supra* note 2.
 11. Miller, *supra* note 2.

While Sara ultimately managed to keep her family together, it took over two years for a court to return Dana to her mother.¹² During that time, Sara and her parents attended an untold number of DCF-supervised visits with Dana.¹³ In each of these interactions, Sara aimed to prove that she could safely care for Dana. But following each visit, the caseworkers expressed skepticism about Sara’s ability to parent.¹⁴

Sara’s case is renowned among disabled parents¹⁵ and people representing and writing about disabled parents.¹⁶ Indeed, Sara’s case is extraordinary in many ways. After enduring years of discrimination, Sara filed a civil rights complaint alleging discrimination based on her treatment in family court. Her complaint led to groundbreaking joint findings from the Department of Justice and the Department of Health and Human Services: In removing and retaining Sara’s child, Massachusetts had unlawfully discriminated against Sara because of her disability.¹⁷ Sara is also one of the only parents with disabilities

12. *Id.*

13. *Id.*

14. *Id.* (describing that the DCF social worker present for Sara’s visits “continued to record the agency’s concerns about Sara’s competence”); *see also id.* (“Sara speaks especially bitterly about her first social worker, who would stand aside and watch as she tried to feed, soothe, and diaper Dana during visits, timing her and taking notes on her phone but offering no encouragement.”).

15. This Article uses both “person-first” and “identity-first” language because the disability community has divergent views on which is preferred. Person-first language describes a person as having or being diagnosed with a specific disability. Identity-first language describes a person’s diagnosis or disability first. For example, “people with disabilities” is an example of person-first language and “disabled people” is an example of identity-first language. *See* Shannon Wooldridge, *Writing Respectfully: Person-First and Identity-First Language*, NAT’L INST. OF HEALTH (Apr. 12, 2023), <https://perma.cc/768E-NQQ7> (“Person-first language is not a one-size-fits-all solution. Some within the disability community oppose person-first language. . . . They may prefer to use identity-first language because they feel the trait is a core component of their identity.”). Generally, the person with a disability should determine whether to use person-first or identify-first language. *See generally* Lydia Brown, *Identity-First Language*, AUTISTIC SELF ADVOC. NETWORK, <https://perma.cc/5NDF-YA4P> (archived Apr. 14, 2024) (discussing arguments for and against identity-first language within the autism community and beyond).

16. Sara’s case is well-known, as it was “the first time the federal government ha[d] taken a stand in a case involving a parent with disabilities.” Susan Donaldson James, *We Can Keep Her’: Disabled Mom Wins Daughter Back After Legal Battle*, TODAY (Mar. 13, 2015, 12:59 PM PDT), <https://perma.cc/2RBS-5KNW>; *see also* Elizabeth Picciuto, *Mom with Disabilities and Daughter Reunited After Two-Year Court Battle*, DAILY BEAST (July 12, 2017, 3:18 PM EDT), <https://perma.cc/4R9U-7FZA>; Prachi Gupta, *Too Disabled to Care for a Child? How One Mom Fought the State to Bring Her Baby Home*, COSMOPOLITAN (Jan. 25, 2016, 3:18 EST), <https://perma.cc/Z9A6-TCKW>; John Loepky, *Landmark Settlement Between DOJ and Massachusetts DCF Requires Changes to State Agency’s Discriminatory Practices Against Parents with Disabilities*, ACCESSIBILITY.COM (Dec. 8, 2020), <https://perma.cc/HL8L-MA4P>.

17. DOJ/HHS Letter of Findings, *supra* note 2, at 11-12.

to have received attention from the mainstream media based on her experience as a disabled parent.¹⁸ Sara is also white, a factor that distinguishes her in a system that disproportionately removes children of color from the care of their parents.¹⁹ But just as her case is exceptional, Sara's story is also disturbingly common, reflecting the experiences of many parents with disabilities who are held to a higher standard than others. Although the caseworker's observations about Sara centered on her disability, these observations actually echo parenting challenges that many non-disabled new parents also experience when holding their infant for the first time.²⁰

Of course, while Sara *could* be any mother, she isn't. Sara has an intellectual disability.²¹ And that made all the difference in her case. Children of parents with an intellectual disability are removed at rates as high as 40% to 80%.²² This is true despite strong evidence that parents with intellectual and developmental disabilities (IDDs) can and do safely and effectively take care of their children.²³ Parents with other disabilities also experience disproportionate involvement in the family regulation system ("the system") and separation from their children.²⁴ For example, parents with disabilities are

18. See *supra* note 16 (collecting articles from the media about Sara Gordon).

19. See *infra* Part I.C (discussing the intersectional nature of disability).

20. See Ashley Marcin, *How to Hold a Newborn Baby*, HEALTHLINE (Aug. 3, 2016), <https://perma.cc/7Q86-TMB7> (providing advice to new parents who "probably have a lot of questions about how to care for" and hold their newborn); see also Sandee LaMotte, *10 Mistakes Parents Make with Newborns—And How to Avoid Them*, CNN (Jan. 29, 2018, 4:13 AM EST), <https://perma.cc/686N-F3KZ> (listing common early parenting mistakes and providing instructions on how to feed and burp babies).

21. Intellectual and developmental disabilities are generally characterized by significant intellectual and adaptive limitations that begin before the age of eighteen. See AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (11th ed. 2010); see also AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 33 (5th ed. 2013) (defining intellectual disability).

22. NAT'L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 16 (2012), <https://perma.cc/Q5G9-XAH7> [hereinafter *ROCKING THE CRADLE*].

23. See, e.g., David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 306-07 (2002) (describing research on the ability of parents with IDD to learn to be effective parents); ELIZABETH LIGHTFOOT & M. ZHENG, *PROMISING PRACTICES TO SUPPORT PARENTS WITH INTELLECTUAL DISABILITIES* 2 (2019), <https://perma.cc/4PKB-TCFH> (noting the lack of evidence "that parents with intellectual disabilities are more likely to mistreat their children" and discussing interventions to support parents with intellectual disabilities).

24. One study found that removal rates for parents with psychiatric disabilities are as high as 70% to 80%. See *ROCKING THE CRADLE*, *supra* note 22, at 16. This disparity is perhaps why disabled parents are often fearful of seeking help. Cf. Liel K. Bridgford, *Liel K. Bridgford*, in *WE'VE GOT THIS: STORIES BY DISABLED PARENTS* 235, 242 (Eliza Hull ed., 2023) ("I feared that if I told someone I was struggling, they wouldn't understand or
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more than three times as likely as parents without disabilities to have their parental rights terminated.²⁵

In earlier work, I argue that anti-discrimination laws such as the Americans with Disabilities Act (ADA) do not adequately protect parents with disabilities in the family regulation system (also called the “child welfare system”).²⁶ Prompted by the question of *why* anti-discrimination law fails, this Article explores related questions: How does disability—as both a social category and a lived reality—function in the family regulation system?²⁷ How does it interact with race? What work does the label “disability” do? And how should the legal system account for the reality that families living and functioning within the family regulation system often leave with new, different, or exacerbated disabilities? Answering these questions requires reckoning with the multiple potential meanings of disability in the family regulation system. In the system, “disability” is not only a label for people who bear specific diagnoses or who might meet the definition of disability under a given law. The term “disability” also marks those experiencing a range of

help. Worst of all, I worried someone would mark my medical files, causing implications with social services or Australian immigration. . . . My exhausted brain tried to calculate my odds—*technically I have a disability, but does the government know? What if I need more support?*)”.

25. TRACI LALIBERTE, ELIZABETH LIGHTFOOT, SHWETA MISHRA & KRISTINE PIESCHER, MINN-LINK, PARENTAL DISABILITY AND TERMINATION OF PARENTAL RIGHTS IN CHILD PROTECTION (2015), <https://perma.cc/2QPF-AF6G>.
26. Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1321-22 (2022). On my choice to use the phrase “family regulation system,” see Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), <https://perma.cc/4XRG-CG5E> (stating that “the misnamed ‘child welfare’ system . . . could be more accurately referred to as the ‘family regulation system’”); and Emma Williams, *Family Regulation, Not ‘Child Welfare’: Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://perma.cc/QP62-9VCX>.
27. Defining disability is not a straightforward task, especially when we seek to include the nuance not only of the physical or psychological experience of living with pain or a diagnosis, but also of addressing the way disability as a social category can be used and cocreated alongside race and other identity factors. See Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Touchstone Text: Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 9, 19 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016). Doron Dorfman recently offered a well-researched and clarifying exegesis of the term “disability,” which has significantly influenced my own understanding. Dorfman states: “Disability is an interactive process between the individual, the impairment, the person’s bodymind, and the environment.” Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1795 (2022) (citing Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 144, 156 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019)).

suspected or actual impairments. And as this Article will argue, disability is also a category that signals a specific kind of unfitness—the unfitness to parent.²⁸

Scholars have documented the myriad ways the family regulation system harms the very families it ostensibly aims to protect,²⁹ including the parents,³⁰ children,³¹ and parents with disabilities.³² This Article builds on the work of these scholars by arguing that the family regulation system itself *produces* disability.³³ The system constructs and reinforces disability as a social

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28. See *infra* Part I.B (discussing the history of disability as a signifier of unfitness to parent).
29. See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi-viii (2002) (documenting the ways in which the system harms Black parents and families); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 229-37 (2022) [hereinafter ROBERTS, *TORN APART*] (chronicling the increased likelihood that children will experience abuse in foster care, the specific harms that can befall LGBTQ children, and the higher rates of death in foster care); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1535-44 (2023) [hereinafter Washington, *Pathology Logics*] (describing how the family regulation system's procedures and institutional focus on individual responsibility "renders invisible the structural conditions of poverty and racism that underlie family safety"); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1142-1149 (2022) [hereinafter Washington, *Survived & Coerced*] (examining the various procedural mechanisms by which the family regulation system can create narratives that subsume and exclude parental knowledge and experience); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527-552 (2019) (documenting the harms of removal and foster care).
30. See, e.g., Washington, *Survived & Coerced*, *supra* note 29, at 1126-28 (arguing that the pathologizing of marginalized parents functions as a compliance mechanism); Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 423-25 (2021) (focusing on the harm to parents when the state uses their children as "bargaining chips").
31. See, e.g., Trivedi, *supra* note 29, at 526 (discussing research showing that children suffer psychological harm when removed from their parents).
32. Robyn M. Powell, *Legal Ableism: A Systemic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423, 429-30 (2022) [hereinafter Powell, *Legal Ableism*] (analyzing "facially discriminatory state laws that list parental disability as grounds for termination of parental rights"); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37, 61-65 (2022); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 141 (2016) [hereinafter Powell, *Safeguarding*]; Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCH. REV. 205, 206-07 (2015); cf. Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112, 149 (2007) (describing variations in state child protection laws' compliance with the ADA); Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1418-19 (1995).
33. The concept of "production" is adopted here because of its broad nature and the extent to which it encapsulates both the actual "creation" or manufacture of disability as well
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category³⁴ and causes or exacerbates impairments that may render families more likely to become disabled over time.³⁵ In addition to expanding the growing field of family regulation scholarship,³⁶ this Article fits within the strain of disability law scholarship making critical interventions in various fields of doctrinal law using a disability lens.³⁷

This Article examines three distinct ways in which the family regulation system produces disability.³⁸ First, this Article demonstrates family regulation law's role in constructing the social category of disability. In this Article, "construction" means the practical ways in which disability is, as a social category, built to be synonymous with those unable to parent or raise their children. To illustrate this phenomenon, this Article examines how state agencies deploy the label of "disability" when filing petitions alleging child abuse and neglect and how courts use the label in written opinions. This

as the "bringing about" of disability as a social category. For additional discussion on the concept of "producing" disability, see note 40 below.

34. See *infra* notes 49-55 and accompanying text (elaborating on the concept of disability as a social construction).
35. Impairment, though not synonymous with disability, is a critical aspect of being disabled. Dorfman, *supra* note 27, at 1759 (arguing that "the concept of impairment is crucial to the legal definition of disability"); *id.* at 1793 (discussing the centrality of pain, suffering, or impairment to the concept of disability).
36. See, e.g., Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1539 (2023) (arguing for the application of traditional Fourth Amendment principles to Child Protective Services (CPS) home searches); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1108-14 (2023) (describing how CPS home searches undermine the protections of the separation of powers); Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 220 (2022) (demonstrating how inexact, imprecise, and subjective child welfare laws exist "through the life of a case").
37. See, e.g., Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 498 (2022) (describing how disability can impact interactions with law enforcement and how Fourth Amendment doctrine can increase vulnerabilities for disabled people in these interactions); Britney R. Wilson, *Making Me Ill: Environmental Racism and Justice as Disability*, 170 U. PA. L. REV. 1721, 1737-39 (2022) (exploring the benefits of using the ADA in environmental and social justice litigation); Prianka Nair, *Surveilling Disability, Harming Integration*, 124 COLUM. L. REV. 197, 206-09 (2024) (assessing how disabled people in particular are harmed through surveillance practices often described as beneficial or harmless).
38. The concept of externally and socially produced disability is well-developed. See, e.g., Liat Ben-Moshe & Jean Stewart, *Disablement, Prison and Historical Segregation: 15 Years Later*, in *DISABILITY POLITICS IN A GLOBAL ECONOMY: ESSAYS IN HONOR OF MARTA RUSSELL* 87, 87 (Ravi Malhotra ed., 2016); Nirmala Erevelles, *Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* 81, 89 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014); Beth Ribet, *Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities*, 14 YALE HUM. RTS. & DEV. L.J., no. 1, 2011, at 155, 159.

analysis reveals how the disability label by itself—even in the absence of specific findings that a parent has neglected or harmed their child—can prompt courts to remove children or find that a parent has neglected a child. Labeling a parent “disabled” within the family regulation system, then, can be a means of marking the parent as unfit—triggering a cascade of legal consequences which bar that parent from caring for her child in the process.

Second, this Article seeks to document the extent to which disability is created within the family regulation system. Here, disability “creation” refers to the physiological and psychological changes that individuals in the system experience that can cause them to become disabled in the present or render them more likely to become disabled in the future. Parents and children who live through the family regulation system experience trauma, psychological impairments, and other harms at greater rates than other members of the population.³⁹ The physical and psychological harms that are incurred within the system create and exacerbate disability.

Third, this Article exposes the extent to which family court decisions reinscribe the belief that individuals with disabilities, as a social category, are unable and unfit to parent. “Reinscription” describes how the system fails to accommodate parents with disabilities, thus prohibiting disabled parents from reuniting with their families. By identifying parents with disabilities but failing to provide the social, psychosocial, and practical supports needed to guarantee equal access to benefits and services as required by federal law,⁴⁰ courts reinscribe existing stigmas about the ability of the disabled to parent.

By unearthing how disability can be constructed, created, and reinscribed by external forces, this Article challenges the dominant legal and cultural narrative that disability is solely a medical condition or problem inherent to the individual.⁴¹ Consequently, this Article rejects the diagnosis-driven view that disability is incompatible with parenting or other aspects of full

39. See *infra* Part II.B.

40. Various federal laws guarantee protection to disabled parents. *E.g.*, Americans with Disabilities Act, 42 U.S.C. § 12132 (prohibiting discrimination against all qualified individuals with a disability, including a promise that such individuals will be allowed to participate in “the benefits of the services, programs, or activities of a public entity”); Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 622(b)(8)(A)(iii)(I) (requiring states to operate a service program designed to reunite parents and children “where safe and appropriate”). For a discussion of the ways that courts fail to offer social, psychosocial, and practical supports, see Part III.C.1 below.

41. See Michael Ashely Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 86 (2007) (discussing the social model of disability as “maintain[ing] that the socially engineered environment and the attitudes reflected in its construction play a central role in creating ‘disability’”); *id.* at 87 (“The social model underscores the manner in which disability is culturally constructed.”). For more on the social model of disability, see notes 51–53 and accompanying text.

personhood. This Article documents how actors in the system use disability status as a basis to exclude those bearing that label—and often other marginalized identities as well—from the law’s narrow conception of the American family.

More broadly, this Article calls for a shift in the legal standards and principles that obscure the full humanity of people with disabilities. Lawyers, courts, and other actors in the family regulation system should instead focus on the great power and agency that exists within the disability community generally and within the lives of disabled parents specifically. Lawyers and advocates must center stories of disability in their advocacy, revealing the nuanced and powerful webs of support that often undergird disabled families. Judges, caseworkers, and other system stakeholders must expand their notions of what, and who, makes a family. Disabled parents themselves should, whenever it is safe to do so, be encouraged to speak honestly and clearly about the ableism that they encounter in the family regulation system. Put another way, embracing disability and refusing to accept a limited, pathologized view of people with disabilities are essential antidotes to current practices in the family regulation system.⁴²

Part I of this Article offers the background necessary to understand how disabled parents, the disability label, and the family regulation system interact. Part II examines case law, social science, and the lived experience of disabled parents in the family regulation system to argue that the family regulation system is a site of the construction, creation, and reinscription of disability status. Part III explores sites of parental agency and examines the potential for parents to disrupt the disabling effects of the family regulation system. Part III also discusses implications of understanding the family regulation system as a force that causes disability and explores how courts, legal advocates, and activists can counter ableism while promoting the strength of parents in the

42. For a discussion of the “turn toward disability positivity in the disability movement,” see Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 576-77 (2021) (describing the growing disability positivity movement and exploring possible factors that have led to the change). See also *Why and How to Celebrate Disability Pride Month*, THE ARC (May 1, 2024), <https://perma.cc/6SEW-H3J7> (“Disability Pride Month is celebrated every July and is an opportunity to honor the history, achievements, experiences, and struggles of the disability community.”); Joseph Shapiro, *Disability Pride: The High Expectations of a New Generation*, N.Y. TIMES (updated July 20, 2020), <https://perma.cc/SJ7Z-HDW6> (reporting that “[m]embers of the A.D.A. generation are quicker than earlier ones to claim disability as a crucial part of identity—and with pride”).

system.⁴³ Ultimately, Part III concludes that embracing disability can be a source of power shifting in family court.⁴⁴

I. Family Regulation and Disability

Disability is a complex, fluid term, the meaning of which fluctuates with the context. Thus, this Part begins by offering a definition of disability. After laying this foundation, this Part focuses on the nuanced relationship between disability and parenting in American law and culture. Both Supreme Court precedent and the laws of the modern-day family regulation system shed light on the legal landscape faced by parents with disabilities today. This Part next documents the family regulation system’s disproportionate targeting of families with disabilities and demonstrates that disabled parents can safely raise their children. This Part also considers the inherent intersectionality of disability as both an identity and a social status. Finally, this Part explores relevant theories of critical disability scholarship and describes what this Article means by the phrase “produce disability.”

43. Lawyer, educator, and organizer Talila “TL” Lewis offers the following “working definition of ableism,” developed “in community with Disabled Black & other negatively racialized people, especially Dustin Gibson”:

A system that places value on people’s bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism.

This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person’s language, appearance, religion and/or their ability to satisfactorily [re]produce, excel and “behave.”

You do not have to be disabled to experience ableism.

January 2021 Working Definition of Ableism, TALILA A. LEWIS (Jan. 1, 2021), <https://perma.cc/KPL4-D6DZ>.

44. For examples of power-shifting frameworks in other legal movements, see Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 34 (2022) (“The power-shifting principle applied to the courts requires imagining ways to wrest the authority over accountability for harm from court authorities into the hands of local communities in a democratic and just way that centers the most vulnerable.”), and Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787 (2021) (arguing that “power shifting might be a means of promoting *antisubordination*, based on the principle that ‘it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups’” (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004))).

A. Defining Disability

The definition of disability is contested and largely contextual.⁴⁵ Indeed, disability is a nuanced concept that includes social, psychosocial, biological, medical, and legal processes; it is not solely a medical category.⁴⁶ In defining disability, one must therefore distinguish between, at minimum, legal, medical or biological, and social or psychosocial meanings of the term. When invoking legal disability, this Article references those disabilities that are recognized by various laws, sometimes in contradiction to each other. For example, although an individual may proudly identify as autistic or depressed, they may not bear a specific diagnosis and—regardless of diagnosis—may not qualify as disabled under the ADA or for Supplemental Social Security Income.⁴⁷ The medical model understands and explains disability by whether a person has certain characteristics and carries a specific diagnosis.⁴⁸ By contrast, the social model understands that disability exists within—and often because of—norms defined by the broader society.⁴⁹ Ascertaining disability as a social category shifts “the

45. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 399 (2000) (noting that the “ambiguity of th[e] definition [of disability] has led to great controversy”); Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (“[N]o issue has generated more controversy and divergence in judicial interpretation than the definition of disability . . .”).

46. See Dorfman, *supra* note 27, at 1795 (“Disability is an interactive process between the individual, the impairment, the person’s bodymind, and the environment.”); see also *id.* at 1762 n.12 (describing “bodymind” as a “term of art” in disability studies that refers to the notion that the body and mind function together (citing Margaret Price, *The Bodymind Problem and the Possibilities of Pain*, 30 HYPATIA 268, 269 (2015))).

47. Compare the Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A) (requiring that an individual with a disability have an impairment that “substantially limits one or more major life activities,” have a record of such impairment or be “regarded as having such an impairment” to be categorized as such), with *How Do We Define Disability?*, SOC. SEC. ADMIN., <https://perma.cc/U65B-GN3T> (archived Apr. 17, 2024) (“To meet our definition of disability, you must not be able to engage in any substantial gainful activity . . . because of a medically determinable physical or mental impairment(s) that is either: [e]xpected to result in death. . . [Or] [h]as lasted or is expected to last for a continuous period of at least 12 months.”). A state might also deny this individual support. See LEAH LAKSHMI PIEPZNA-SAMARASINHA, CARE WORK: DREAMING DISABILITY JUSTICE 40 (2018) (listing, among those with disabilities, people who receive support from the state, those whose disability status is denied by the state, and those who are “in the in-between of needing some care but not fitting into the state model of either Total and Permanent Disability or fit and ready to work—so we can’t access the services that are there”).

48. See Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1406 (2021).

49. Bradley Areheart has observed that under the social model, “disability is redefined as a social construct—a type of multi-faceted societal oppression—and distinguished from the physiological notion of impairment.” Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83
footnote continued on next page

locus of analysis from the individual to the social,” and, in turn, shines a light on the extent to which “compulsory able-bodiedness becomes the ideological and material means to separate mainstream society from its dangerous outcastes.”⁵⁰ Emphasizing social aspects of disability also takes into account the experiences of individuals, which helps to explain why, even after diagnosis, certain communities may still be less likely than others to embrace the disability label.⁵¹

Many legal and disability studies scholars have discussed the idea that disability is a social construction. Sami Schalk, for example, describes an “expand[ed]” conceptualization of disability as “a major intervention of Black and critical race disability studies.”⁵² According to Schalk, this expansion “encourages a move away from a primarily identity-based approach to disability and toward a theoretical approach that seeks to trace how disability functions as an ideology, epistemology, and system of oppression in addition to an identity and lived experience.”⁵³

Disability and impairment are also distinct terms, and the difference between the two concepts is both practically and legally significant.⁵⁴ This Article uses impairment to refer to physical or psychological conditions which cannot be alleviated by external or social conditions, whether they are

IND. L.J. 181, 188 (2008) (noting that “no one restatement of the social model will cover every interpretation”).

50. Erevelles, *supra* note 38, at 89 (“Here, pathological discourses of disability are used to justify the oppressive binary cultural constructions of normal/pathological, autonomous/dependent, competent citizen/ward of the state, and the social divisions of labor.”).

51. See, e.g., U.S. DEP’T OF HEALTH & HUM. SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY; A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 28 (2001), <https://perma.cc/V2GC-EK4F> (“It is well documented that racial and ethnic minorities in the United States are less likely than whites to seek mental health treatment, which largely accounts for their under-representation in most mental health services.” (citations omitted)); *id.* at 28-32 (identifying mistrust, stigma, overall health status of minorities, clinician bias and stereotyping, and other factors as causes of lower rates of treatment and diagnosis in minority communities). For a discussion of the stigma and bias against disclosing disability status in the context of the legal profession, see generally David A. Green, *Shhh!!! Can you Keep a Secret? A Cultural Bias Against Disclosing a Mental Disability & Its Impact on Seeking Reasonable Accommodations for the Bar Exam*, 26 TEX. HISP. J.L. & POL’Y 1 (2020).

52. SAMI SCHALK, BLACK DISABILITY POLITICS 8 (2022).

53. *Id.* (citations omitted); see also Annamma et al., *supra* note 27, at 19 (“emphasiz[ing] the social constructions of race and ability,” while acknowledging the “material and psychological impacts” of being labeled by race or dis/ability).

54. For a thorough and thoughtful account of the importance of impairment to the meaning of disability, see Dorfman, note 27 above, at 1800-01 (discussing the “missing impairment problem” in disability as a social construct and emphasizing the importance of acknowledging impairment for understanding and defining disability).

understood as biological, medical, or otherwise intrinsic to a person's self.⁵⁵ Under federal law, individuals qualify for protection under the ADA if they have "a physical or mental *impairment* that substantially limits one or more major life activities," a record of such impairment, or are suspected of having such an impairment.⁵⁶ Under the ADA, then, an impairment is necessary but not sufficient to constitute a disability.⁵⁷ Beyond the categories recognized in federal law, there are people who embrace disability as a label (or who have it foisted upon them) and thus may be said to fit into a "social" definition of disability, as well as those who have specific impairments that render them unable to perform certain functions but who may nonetheless not meet medical or legal definitions of disability. The challenging reality is that these groups are not always overlapping. Understanding the terms disability and impairment as distinct helps to disentangle the lived experience of both people living with pain or other physical impairments and those living with the effect of a "disability label" that may or may not connect to an actual impairment.

The distinction is especially important in the family regulation system, where a doctor, caseworker, or other system actor might identify a parent as disabled based on a set of stereotypical behaviors or a caseworker's impressions rather than on a medical diagnosis, an impairment, or a legal definition. In some cases, a parent might have one disability but be identified through their family court case as having another one, simply because of a caseworker's uninformed assumptions.⁵⁸ Thus, when speaking about disability in the family regulation system, this Article employs the language "disability label" to make clear that this status is not necessarily hinged on a diagnosis, a parent's personal identity, or even the existence of an actual impairment.

55. See, e.g., Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 822 (2022) ("[I]rrespective of social conditions, some people's bodies hurt or may have disorders or conditions that could lead to pain.").

56. 42 U.S.C. §§ 12101(b), 12102(1)(A) (emphasis added). Individuals can also demonstrate that they have "a record of such an impairment" or are "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(B)-(C).

57. This comports with medical definitions of impairment and disability. See Sheena L. Carter, *Impairment, Disability, and Handicap*, EMORY UNIV. SCH. OF MED., <https://perma.cc/2ZCQ-Y2CE> (archived Apr. 17, 2024) (defining impairment as "any loss or abnormality of psychological, physiological or anatomical structure or function" and disability as "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being"). These definitions also track the lay understanding of impairments and disability.

58. See, e.g., Amended Complaint ¶¶ 3, 91-95, *Gronenthal v. City of New York*, No. 22-cv-00895 (E.D.N.Y. Sept. 28, 2022), ECF No. 33 (alleging in a civil rights complaint that the New York City's Administration for Children's Services misidentified a parent as having a cognitive disability based on parent's "mild muscular impairment" and "mobility limitations" caused by a traumatic brain injury).

This Article aims to work in the messy space that acknowledges the necessity of impairment for creating disability while also grappling with the very real way in which disability can be, as a label, externally imposed irrespective of actual impairment. Embracing the social model of disability and acknowledging the extent to which disability can function as a label that is externally imposed does not mean rejecting the existence and impact of physical, neurological, or psychiatric conditions—nor does it require completely disavowing the benefit of medical diagnoses.⁵⁹ Instead, the social model enables us to look beyond individual responsibility and focuses us on the significant power of social conditions and structures in shaping individual lives.⁶⁰ Further, reckoning with the external production of disability may also help us better imagine what effective support for disabled parents might look like.

B. Parenting and Disability

1. The law of disability and family regulation

The Supreme Court has repeatedly and forcefully proclaimed that parents have a fundamental right to raise their children.⁶¹ In *Meyer v. Nebraska*, the Supreme Court first articulated the right to parent without undue state intrusion.⁶² Although the *Meyer* Court focused on the right of parents to control their children’s education, it nevertheless made clear that the Fourteenth Amendment protects the right of citizens to “establish a home and bring up children.”⁶³ The Supreme Court built upon *Meyer* in *Pierce v. Society of*

59. See Morgan, *supra* note 48, at 1408 (“Though the social model of disability recognizes socially constructed categories of difference, it does not reject the obvious existence of corporeal differences among people.”).

60. See Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 939-40 (2021) (identifying “subordination and the social model of disability” as the “unifying thread” between different intersections of race and disability); Arlene S. Kanter, *The Relationship Between Disability Studies and Law*, in RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 1, 2 (Arlene S. Kanter & Beth A. Ferri eds., 2013) (“When disability is defined as a social category rather than as an individual characteristic, it is no longer the exclusive domain of medicine, rehabilitation, special education, physical or occupational therapy, and other professions oriented toward the cure, prevention, or treatment of disease, injury, or physical or mental impairment.”).

61. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”).

62. 262 U.S. 390, 399-401 (1923) (finding that the rights of parents to “bring up children” and engage teachers “to instruct their children” in modern languages of their choosing is protected by the Fourteenth Amendment).

63. *Id.* at 399.

Sisters, confirming the right of parents to make decisions related to how and where their children would be educated.⁶⁴ Since these landmark cases, the Supreme Court has continually affirmed that parents have a fundamental right to raise their children as they see fit.⁶⁵

But just as the Court established the fundamental status of parental rights, it abruptly denied them to parents with disabilities. Two years after *Pierce*, the Court decided *Buck v. Bell*.⁶⁶ *Buck* is the sole Supreme Court case addressing the rights of adults with disabilities to have children—let alone parent them.⁶⁷ In *Buck*, a young mother from Virginia with an intellectual disability sought to avoid sterilization while being held in an institution where she had been placed following her pregnancy.⁶⁸ The Court found that her involuntary sterilization did not offend the Constitution.⁶⁹

Buck v. Bell reveals the exceptional treatment parents with disabilities faced as a historical matter.⁷⁰ Indeed, in a legal landscape predisposed towards

64. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

65. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944); *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The Supreme Court also identified the right to “the integrity of the family unit” in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Meyer*, 262 U.S. at 399); see also *Santosky*, 455 U.S. at 760 (finding that “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship”).

66. 274 U.S. 200 (1927).

67. See *id.* at 207. One other case, *Lehman v. Lycoming County Children’s Services Agency*, 458 U.S. 502, 503 (1982), decided on jurisdictional grounds, raised the question of what a social services agency must prove when it seeks to terminate a parent’s rights based on disability. The state court decision, where the discussion of what an agency owes a parent is discussed in greater detail, is *In re William L.*, 383 A.2d 1228 (Pa. 1978), cert. denied *sub nom. Lehman v. Lycoming County Children’s Services*, 439 U.S. 880 (1978).

68. *Buck*, 274 U.S. at 205.

69. *Id.* at 207. Carrie Buck herself had been in a foster home prior to coming into the form of state custody at issue in *Buck*. See Jennifer Schmidt, Tara Boyle, Shankar Vedantam, Thomas Lu & Laura Kwerel, *Emma, Carrie, Vivian: How a Family Became a Test Case for Forced Sterilizations*, NPR (Apr. 23, 2018, 9:00 PM), <https://perma.cc/F22P-R3EW>. Ms. Buck consistently maintained that she was raped by her foster mother’s nephew. *Id.* It appears likely that the rape and subsequent pregnancy—not her IQ or cognitive ability—were the reasons that her foster mother sent her to the institution. *Id.*

70. The “child saving” era especially focused on the racialized, classed, and ableist norms of parenting. See Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 COLUM. J. RACE & L. 557, 567-68 (2022) (“[T]he explicit goal of the work was to save children from growing up in homes where they would not be raised according to middle and upper class, white, Protestant parenting norms.”); *id.* at 568 n.37 (noting that though Black children were not generally included in “child saving” efforts, children of Italian, Irish, and other largely Catholic, European immigrants—those deemed non-white—were the focus); ROBERTS, TORN APART, *supra* note 29, at 124 (noting that “the roots of America’s child welfare system [are] marked by tearing apart families to uphold white supremacist regimes”); *id.* at 70 (“[T]he family-policing system conflates poverty and neglect . . . [by] accus[ing] poor parents of neglecting their children for the exact same

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protecting parental rights, the Supreme Court assumed that people with disabilities should be excluded from even the possibility of parenting.

While the Supreme Court has never overturned *Buck v. Bell*, courts have referenced its repudiation.⁷¹ Indeed, much has changed since Justice Oliver Wendell Holmes issued the infamous ruling, including broader community integration of people with disabilities and the passage of the ADA in 1990.⁷² Despite the ADA's broad goal to "eliminat[e]... discrimination against individuals with disabilities,"⁷³ it has not been a strong force in the family regulation system. Many family courts have failed to apply the ADA to family regulation cases, often finding that the ADA is inapplicable to family court.⁷⁴ In 2015, citing the investigation of Sara Gordon's case,⁷⁵ the U.S. Departments of Justice and of Health and Human Services issued Technical Assistance clarifying that Title II of the ADA applies to all "activities and programs" of the family regulation system.⁷⁶ The Technical Assistance made clear that

behavior that is considered perfectly acceptable if wealthier parents engage in it."); Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 944-45 (2023) ("The family-policing system has been employed virtually exclusively against low-income and nonwhite families (a changing definition that used to include Italians and Eastern European Jewish communities as nonwhite)—weaponizing children as a political tactic to maintain race, class, and other hierarchies has a long history in the United States." (citation omitted)).

71. See, e.g., *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996) (describing an aspect of *Buck v. Bell* relating to claims of Equal Protection Clause violations based on selective enforcement as "the only part of *Buck v. Bell* that remains unrepudiated").
72. See 42 U.S.C. § 12101(b)(1). In 1999, the Supreme Court decided *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587, 589-90 (1999), clarifying that, pursuant to the ADA, people with disabilities have the right to receive supports and services in the community.
73. 42 U.S.C. § 12101(b)(1).
74. See Lorr, *supra* note 26, at 1350-52 (collecting cases); Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 807-09 (2019) (noting courts' failure to apply the ADA and suggesting means of enforcement). Some commentators believe that the family regulation system would be more equitable if the ADA were enforced. See Powell, *Safeguarding*, *supra* note 32, at 141 n.89, 146-47 (urging the use of social science in family regulation cases to prove the parenting capacity of disabled parents and, in part, to promote application of the ADA).
75. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF JUST., PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT 1, 2 & n.5 (2015) [hereinafter TECHNICAL ASSISTANCE], <https://perma.cc/R7E5-WBSG>.
76. *Id.* at 1, 8, 9 (stating that the ADA protects "parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services"). The Technical Assistance issued by the Department of Justice and Department of Health and Human Services applies with equal force to Section 504 of the Rehabilitation Act (RA). *Id.* at 1. The RA passed in 1973 provides essentially the same coverage as ADA but covers only federal agencies, contractors, and other actors who receive federal funding. See 29 U.S.C. § 794.

discrimination against parents with disabilities is “long-standing and widespread” and that discriminatory separation “can result in long-term negative consequences to both parents and their children.”⁷⁷

Notwithstanding the forceful Technical Assistance, courts have generally refused to apply the ADA or grant parents accommodations.⁷⁸ Despite repeated efforts to raise the ADA in family courts across the country, the majority of jurisdictions continue to find that it is “not a defense” in termination of parental rights proceedings or that it is already incorporated into state statutes protecting parents’ rights.⁷⁹

As with most issues of family law, each state has its own statutes and case law governing family regulation.⁸⁰ These state laws have tremendous commonality, however, in that they comply with federal requirements set under the Adoptions and Safe Families Act (ASFA) and other federal legislation.⁸¹ ASFA aims to identify and establish a permanent adoptive home

77. See TECHNICAL ASSISTANCE, *supra* note 75, at 2. More recently, a federal bill requiring parents with disabilities to be given special consideration in family regulation cases was introduced in Congress. See John Kelly, *Bill to Protect Disabled Parents Involved with Child Welfare System Introduced*, IMPRINT (June 22, 2023, 4:42 PM), <https://perma.cc/47GM-8YX4> (describing the introduction of the Equality for Families with Disabilities Act).

78. See Lorr, *supra* note 26, at 1349-52; Robyn M. Powell & Sasha M. Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act by the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys*, 32 STAN. L. & POL’Y REV. 119, 135-36 (2021).

79. See Lorr, *supra* note 26, at 1349-52.

80. Washington, *Pathology Logics*, *supra* note 29, at 1568 (describing that “every state has its own specific family regulation system”); see also Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL’Y REV. 157, 170 (2020) (describing “the child welfare system” as “administered primarily by states,” though with federal law and funding provisions “play[ing] an ever-increasing role”).

81. See, e.g., Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. § 5101-06) (establishing federal funding for state investigation, prosecution, and other aspects of the family regulation system); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (establishing federal funding for foster care and adoption services, and setting terms on the use of the funding); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.) (clarifying the reasonable efforts requirement and establishing “incentives for providing permanent families for children”); cf. Powell et al., *supra* note 80, at 170 (describing the Child Welfare Prevention and Treatment Act, the Adoption Assistance and Child Welfare Act, and the Adoption and Safe Families Act as the “the three most relevant federal child welfare laws”).

for children in foster care.⁸² It includes strict timelines for children separated from their parents to be either reunified or placed into new homes.⁸³ If a child has been in foster care for a certain length of time, parental rights can be terminated, unless the child is being cared for by relatives, a state agency has documented “a compelling reason for determining” that termination of parental rights “would not be in the best interests of the child,” or the state itself determines that it has not provided reunification services.⁸⁴ Though the timelines in the ASFA are not immutable, the statute “effectively shift[s] the presumption in favor of termination when children have spent more than fifteen of the previous twenty-two months in state custody.”⁸⁵

ASFA also requires that states engage in “reasonable efforts” to reunite parents with their children.⁸⁶ While there are variations among jurisdictions as to what “reasonable efforts” entail, courts have largely required state agents to undertake efforts focused on the individual parents and children involved in a given case.⁸⁷ Despite this acknowledgement, family courts have been loath to require state agencies to create new or specific programs tailored to parents with disabilities.⁸⁸

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82. ROBERTS, TORN APART, *supra* note 29, at 121-22; Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 404 (2002) (explaining that “ASFA radically transformed the focus of federal child welfare policy,” shifting away from the “emphasis on family reunification that characterized its predecessor,” the Adoption Assistance and Child Welfare Act of 1980, to a “legislatively mandated preference for adoption”).
83. 42 U.S.C. § 675(5)(E) (requiring that where a child has been in foster care for “15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child’s parents”); *see also* ROBERTS, TORN APART, *supra* note 29, at 121 (describing the time pressures of the ASFA).
84. ASFA requires that where a child has been in foster care for 15 out of the last 22 months, an agency can file a TPR unless certain exceptions can be met. *See* 42 U.S.C. § 675(5)(E)(i)-(iii); ROBERTS, TORN APART, *supra* note 29, at 121, 188.
85. ROBERTS, TORN APART, *supra* note 29, at 121.
86. 42 U.S.C. § 671(a)(15) (requiring “reasonable efforts . . . to preserve and reunify . . . prior to the placement of a child in foster care . . . [and] to make it possible for a child to safely return to the child’s home”); 42 U.S.C. § 675(5)(C) (requiring family courts to hold permanency hearings every 12 months). States have adopted similar obligations. *See, e.g.*, N.Y. FAM. CT. ACT §§ 1027, 1028, 1055(c), 1089 (McKinney 2024); N.M. CODE R. § 10-345 (LexisNexis 2024); TEX. FAM. CODE ANN. § 263.305 (West 2024).
87. *See, e.g.*, *In re Sheila G.*, 462 N.E.2d 1139, 1148 (N.Y. 1984); *In re C.F.*, 862 N.E.2d 816, 821 (Ohio 2007); *In re C.P.*, 71 A.3d 1142, 1153-54 (Vt. 2012).
88. *See infra* notes 246-63 and accompanying text (collecting cases where courts decide termination is appropriate, in part because of a lack of existing, available services). *But see In re Jose F.*, No. 51600(U), slip op. at 6 (N.Y. Fam. Ct. 2020) (requiring the state agency “to engage a parent coach or locate a dyadic parenting program that is capable of working with parents with cognitive impairments to work directly with the parents”).

Though the ASFA's time requirement does not include specific barriers for disabled parents, it may disproportionately burden parents with disabilities because of variations in learning speed, learning style, and ability; parents with disabilities may require additional time or more tailored support to be safely reunited with their children.⁸⁹ Likewise, disability remains a permitted basis for termination of parental rights (TPR) in thirty-seven states.⁹⁰

2. Disproportionate inclusion

Family regulation agencies investigate the families of 3.5 million children every year nationwide.⁹¹ Families caught in the family regulation system are often marginalized, disproportionately poor, and people of color.⁹² These families experience the invasive reach of the family regulation system. Investigators—deputized agents of the states who are often not social workers—enter family homes, ask probing questions, and inspect nearly all

89. Lorr, *supra* note 26, at 1339, 1339 n.137.

90. ROCKING THE CRADLE, *supra* note 22, at 16, 84 (stating that thirty-seven states have laws allowing disability as a basis for TPR and that all allow disability to be considered as a factor in determining whether TPR is in the “best interest” of a child); *see also* Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. 1069, 1076, 1094 (2020) (analyzing TPR appellate decisions issued between January 1, 2006, and December 31, 2016, involving mothers with disabilities and their families, and finding that 93% resulted in termination of parental rights).

91. ROBERTS, TORN APART, *supra* note 29, at 162.

92. *Id.* at 36 (“Family policing is most intense in communities that exist at the intersection of structural racism and poverty.”); *id.* at 162-63; *see also* Kelley Fong, *Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment*, 90 CHILD ABUSE & NEGLECT 13, 17 (2019) (finding “Hispanic and Black children more than twice as likely to experience” CPS investigations where a preponderance of evidence is found to support a finding of neglect); Dorothy Roberts, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being; How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 456 (2021) (“Although Black children were only 14% of children in the United States in 2018, they made up 23% of children in foster care.” (citations omitted)). The racial disparities are especially stark. As Dorothy Roberts has observed, “White children are very underrepresented in foster care (48 percent of child population versus 23 percent of foster care population), while Black children are very overrepresented in the system (15 percent of the population versus 44 percent of the foster care population).” ROBERTS, TORN APART, *supra* note 29, at 38. However, statistics do not easily capture how disability and race overlap in the family regulation system. This is in part because of the challenges inherent in defining disability in the system. *See* Lorr, *supra* note 26, at 1330-32.

aspects of the family home.⁹³ These investigations can intrude upon wide swaths of the personal lives of family members.⁹⁴

Numerous studies have established the disproportionate representation of parents with disabilities in the family regulation system.⁹⁵ Parents with IDD face the greatest risk of involvement in the family regulation system. According to one study, parents with IDD experience child removal at rates of 40% to 80%.⁹⁶ One study looked at more than 1.2 million births in Washington State from 1999 to 2013. In this subset of births, 21.7% of infants born to mothers with IDD were the subject of a CPS report within one year of birth compared with 6.3% of infants born to mothers without an IDD diagnosis.⁹⁷ 35.8% of children born to mothers with IDD were also the subject of a CPS

93. See HUM. RTS. WATCH & ACLU, “IF I WASN’T POOR, I WOULDN’T BE UNFIT”: THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 20 (2022), <https://perma.cc/5XTK-7HLF> (choosing to use the term “caseworker” instead of “social worker” because “[m]any agency staff do not have advanced social work degrees or mental health training”); Ismail, *supra* note 36, at 1503 (describing caseworkers as often “making a full inventory of the content and upkeep of the kitchen cabinets and refrigerator; the tidiness and cleanliness of various rooms and shared spaces; the contents and condition of private bedrooms, the number of beds, and the sleeping arrangements of the occupants; the status of the fire alarms and carbon monoxide detectors; whether there are guards on the windows; the working order of the bathroom sinks and toilets; and the presence or absence of clutter”); see also *id.* at 1493-98 (describing, at length, the extent and scope of investigations); cf. Charlotte Baughman, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 518-20 (2021) (explaining the disparate impact of surveillance on Black, Brown, and Native families).

94. See Kelley Fong, *Getting Eyes in the Home*, 85 AM. SOCIO. R. 610, 611 (2020) (arguing that the “dual capacities” of CPS investigations—“the possibility of therapeutic support alongside the threat of coercive intervention—generate expansive investigations of domestic life by inviting referrals from adjacent systems, such as healthcare, education, law enforcement, and social services”).

95. See ROCKING THE CRADLE, *supra* note 22, at 18; Powell, *Safeguarding*, *supra* note 32, at 135. See generally TECHNICAL ASSISTANCE, *supra* note 75, at 1 (“Both the HHS Office for Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising.”).

96. ROCKING THE CRADLE, *supra* note 22, at 16.

97. Rebecca Rebbe, Sharan E. Brown, Rebecca A. Matter & Joseph A. Mienko, *Prevalence of Births and Interactions with Child Protective Services of Children Born to Mothers Diagnosed with an Intellectual and/or Developmental Disability*, MATERNAL & CHILD HEALTH J. 626, 628-29 (2021).

report within four years of birth, compared to 9.9% of infants born to mothers without an IDD diagnosis.⁹⁸

Disparities persist among other groups of disabled parents as well. For example, children of parents with a psychiatric disability are removed at rates as high as 70% to 80%.⁹⁹ 13% of parents with a physical disability report discriminatory treatment in custody cases.¹⁰⁰ Overall, 19% of children in foster care are placed there at least in part because of parental disability, and 5% are in foster care solely because of parental disability.¹⁰¹

Parents with disabilities are significantly overincluded in the family regulation system despite strong evidence that people with disabilities can and do parent.¹⁰² Indeed, more parents today have a diagnosed disability than at any time in our history.¹⁰³ Research also shows that there is no clear relationship between intelligence and parenting ability.¹⁰⁴ And while certain physical, psychological, and social realities of a given disabled parent may raise unique challenges for them, many of those challenges can be resolved with adaptive techniques or equipment for holding, feeding, or traveling with their children.¹⁰⁵ Walkers and wheelchairs can be adapted to work with strollers

98. *Id.* at 629.

99. ROCKING THE CRADLE, *supra* note 22, at 16.

100. *Id.*

101. Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD & YOUTH SERVS. REV. 22, 23 (2016).

102. *See supra* note 23 (collecting sources).

103. Powell, *Legal Ableism*, *supra* note 32, at 427 & n.28 (citing Lorán B. Kundra & Leslie B. Alexander, *Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them*, 33 PSYCHIATRIC REHABILITATION J. 142, 142 (2009)).

104. *See, e.g.*, Tim Booth & Wendy Booth, *Parenting with Learning Disabilities: Lessons for Practitioners*, 23 BRIT. J. SOC. WORK 459, 463 (1993) (“On this point, however, the research evidence is consistent and persuasive. There is no clear relationship between parental competency and intelligence.”). *See generally* Katie MacLean & Marjorie Aunos, *Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Policy Project*, 16 J. DEVELOP. DISABILITIES, no. 1, 2010, at 18-19 (summarizing the initial group of studies that “discredited the idea that one’s IQ was the sole predictor of child outcomes”).

105. For examples of physically adaptive technology, techniques, and equipment, see, for example, Robin M. Powell, Monika Mitra, Suzanne C. Smeltzer, Linda M. Long-Bellil, Lauren D. Smith, Eliana Rosenthal & Lisa I. Iezzoni, *Adaptive Parenting Strategies Used by Mothers with Physical Disabilities Caring for Infants and Toddlers*, 27 HEALTH & SOC. CARE IN THE CMTY. 889, 893 (2019); Through Tlg Mod, *Parents and Grandparents with Disabilities: Using Public Transportation with Your Child*, FACEBOOK (June 10, 2016), <https://perma.cc/GKQ4-V2NZ> (to locate, select “View the live page”). For parents with psychiatric or psychological disabilities, adaptations can involve calling on backup childcare support during medication imbalances. *See Parenting with a Mental Health Condition*, MENTAL HEALTH AM., <https://perma.cc/M3SA-27FM> (archived Apr. 17, footnote continued on next page)

and baby carriers, and wheelchairs can be altered to include extra steps to allow children to climb into their parents' laps.¹⁰⁶ Parents with intellectual disabilities can learn adaptive techniques and skills through one-on-one training, offered in the environment where they will be practiced (such as a parents' home or the community) and tailored to the specific parent involved in the class.¹⁰⁷ The list of adaptations is as long and unique as the parents and children who benefit from them.

C. Disability and Intersectionality

This Subpart aims to shed light on the intersectional nature of disability, societal perceptions of an individual with a disability, and the connection between these phenomena.¹⁰⁸ An intersectional inquiry is especially appropriate in the context of the family regulation system where race and class disparities abound.¹⁰⁹ For example, Black children and families of color are

2024) ("If you have a crisis action plan or a psychiatric advance directive, you should designate someone to help with your parenting duties.").

106. See, e.g., Angela Frederick, *Mothering While Disabled*, 13 CONTEXTS, no. 4, Fall 2014, at 32-35 (showing pictures of mothers using various adaptations for parenting with a disability).

107. See, e.g., LIGHTFOOT & ZHENG, *supra* note 23, at 3 (explaining that most parents with IDD would benefit from receiving tailored services designed for the specific parent in question and learning one-on-one in the type of environment where the skills will be used); THE ARC, PARENTS WITH INTELLECTUAL DISABILITIES 2 (2011), <https://perma.cc/7LPT-T5CZ> ("Services need to be responsive to the parents' individual needs and focus on the whole family to ensure that interests of both parents and children are served.").

108. Intersectionality is also a central focus of the Disability Justice movement. SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 23 (2d ed. 2019) (explaining that individuals with disabilities "are not only disabled," but also each come "from a specific experience of race, class, sexuality, age, religious background, geographical location, immigration status, and more"). Rabia Belt warns us that an "intersectionality paradigm that incorporates attention to social justice" is not for the faint of heart. Belt, *supra* note 55, at 833 (explaining that forward movement in this area "is complicated and fraught but also offers the potential for significant overlapping opportunities for scholarship and advocacy").

109. Black children and families are disproportionately involved in the family regulation system: nearly 21% of children entering foster care in fiscal year 2019 were Black and 21% were Hispanic. CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020—No. 27, at 2 (2020), <https://perma.cc/C6FV-URQQ>. Yet Black children comprised only 13.71% of the population. See, *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. OF STATE LEGISLATURES (updated Jan. 26, 2021), <https://perma.cc/YQK3-393A>. Moreover, 53% of Black children experience a child protective investigation by the age of 18, compared to just 37.4% of all children, and Black families are almost "twice as likely to be investigated as Whites." Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017). Another scholar found that although Black children made up only 15% of the population, they comprise more than 25% of the foster care population. ROBERTS,

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disproportionately involved in the family regulation.¹¹⁰ In New York City, despite making up only roughly 22% of the total children, Black children account for 50.6% of the children in foster care.¹¹¹ A parent's race, class, and trauma history all influence their experience in family court.¹¹² When applied to the family regulation system, "[u]se of an intersectional lens may expose potential inequities in child welfare processes and outcomes that are not produced or maintained by a single factor (such as ableism or racism)."¹¹³

An intersectional analysis encourages an examination of how the system coproduces race and disability.¹¹⁴ Historically, the medical label of "disability"

TORN APART, *supra* note 29, at 21. Class disparities are also well documented. See Fong, *supra* note 92, at 17 tbl.2 (finding that rates of substantiated CPS investigation are three times higher in high poverty neighborhoods than low poverty ones); Fong, *supra* note 94, at 611 (describing CPS investigations as "concentrated among poor families and families of color").

110. See generally Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1552 ("The disproportionate number of families of color who are poor creates a direct link between these concerns about poverty and similar concerns about the child neglect system's disproportionate regulation of Black and Indigenous families in particular.").
111. See BRONX DEFS., BROOKLYN DEF. SERVS., CTR. FOR FAM. REPRESENTATION & NEIGHBORHOOD DEF. SERVS. OF HARLEM, WRITTEN TESTIMONY BEFORE THE NEW YORK ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS ON THE NEW YORK FAMILY POLICING SYSTEM AND ITS IMPACT ON BLACK CHILDREN AND FAMILIES 4 (2023), <https://perma.cc/RWT2-H86F>.
112. See Tricia N. Stephens, Colleen Cary Katz, Caterina Pisciotta & Vicki Lens, *The View from the Other Side: How Parents and their Representatives View Family Court*, 59 FAM. CT. REV. 491, 498 (2021) ("Trauma, race and class are salient factors in Family Court Proceedings. The interaction of these three factors hold the potential to multiply the often negative and anti-therapeutic effects of the adversarial court system.").
113. Cate Thomas, Susan Flynn, Elspeth Slayter & Lisa Johnson, *Disability, Intersectionality, Child Welfare and Child Protection: Research Representations*, 25 SCANDINAVIAN J. DISABILITY RSCH., 45, 46 (2023). Researchers in one study sought to uncover "how and to what extent" researchers in child welfare are incorporating an intersectional lens. *Id.* The authors found that "researchers seem to be using the term intersectionality in these papers but are not always rigorously engaging with the concept methodologically" and urged more "intentional" engagement with the concept. *Id.* at 57, 61 ("Though intersectionality in child welfare research is growing, the field needs to be more intentional about engaging in disability-focused analyses of the intersections of various social identities and experience in different child protection settings and interaction.").
114. See Subini Ancy Annamma, Beth A. Ferri & David J. Connor, *Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence, and Potential Futures of DisCrit in Education*, 42 REV. RSCH. EDUC., Mar. 2018, at 48 (recognizing that disability is "a political identity, socially constructed in tandem with race and class, rather than an objective medical condition"); see also Harris, *supra* note 60, at 933 ("Intersectionality takes one major step that distinguishes it from the scholarship in the comparative subordination category: both race and disability operate as constructed identities and mutually reinforcing elements for critical reflection.").

was deployed as a means to justify the subjugation of Black, Native, and poor people.¹¹⁵ This historical trend often holds true today. For example, one parent with experience in the family regulation system has written about how her diagnosis of a psychiatric disability, coupled with her race, compounded the stigma that her diagnosis alone might carry: “What I find interesting is that ‘bipolar’ is a quick umbrella term that both relies on stigma and is commonly used to advance stigma, particularly the stigma of an angry Black woman who needs to be on medication because of two extreme personalities or mood swings.”¹¹⁶

An intersectional lens also exposes the overlap between disability and poverty.¹¹⁷ Disabled adults are more than twice as likely to live in poverty as

115. One oft-cited example in this context is drapetomania, a “diagnosis” given to Black people seeking to escape slavery. See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 38 (Paul K. Longmore & Lauri Umansky eds., 2001). There are other historical examples in the context of race and poverty. See, e.g., SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 186 (Paul K. Longmore & Lauri Umansky, eds., 2009) (describing how the infamous “Jump Jim Crow” minstrel show demonstrated an “inextricabl[e] mix” of disability and Blackness based on an 1828 routine performed by “an elderly and crippled Louisville stableman belonging to a Mr. Crow” (citations and internal quotation marks omitted)); *id.* at 153 (detailing the story of a street performer fined for displaying a “deformed Indian” on the Streets of San Francisco in 1855 and “affrightening the women” nearby (citations and internal quotation marks omitted)); see also *id.* at 31-32 (describing how an ordinance requiring the removal of beggars, mendicants” and others displaying their “infirmities” might target simply the poor by noting that “[t]he beggar’s infirmity could be, of course, sheer poverty”).

116. L. Frunel & Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477, 488 (2022).

117. See, e.g., David Pettinichchio, Michelle Maroto & Jennifer D. Brooks, *The Sociology of Disability-Based Economic Inequality*, 51 CONTEMP. SOCIO. 249, 250, 257 (2022) (noting the “abysmal” employment rates among disabled Americans and that, even among employed individuals, the disabled are “overrepresented in clerical, service, and food preparation occupations, among the lowest paying jobs”); Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 431-33 (2001). Benefit structures also work as a structural impediment to the marriage of people with disabilities. See Erika Mahoney, *Millions of Disabled Americans Could Lose Federal Benefits if They Get Married*, NPR (Feb. 13, 2022, 8:00 A.M. ET), <https://perma.cc/5WNB-LGUZ> (describing how, because certain benefit programs presume that a married spouse will be able to provide medical insurance, the act of marriage for a person with a disability can risk the elimination of federal disability benefits).

adults without disabilities.¹¹⁸ One quarter of families with a disabled parent live below the poverty line.¹¹⁹ Benefit structures reinforce the connection between disability and poverty.¹²⁰ Recent literature has also captured the additional costs inherent to living with a disability, such as the costs in time and money in documenting one's disability to receive accommodations or attending to medical needs related to one's disability.¹²¹ Living in poverty compounds these costs and challenges for disabled people.

These overlapping intersections are often reciprocal in their impact: the pathology of poverty also overlaps significantly with the pathology of race. For example, “[p]oor Black women and the gendered racism they encounter render them vulnerable to both public and private violence, economic instability, societal disgust and therefore, disablement, sometimes in the form of mental illness or addiction.”¹²² This reciprocal relationship is on

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118. See John Elflein, *Poverty Rate Among People with and Without Disabilities in the U.S. from 2008 to 2022*, STATISTA (May 6, 2024), <https://perma.cc/UAG2-3SV3>; NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 12 (2017), <https://perma.cc/PFW8-X6VA>.
119. See Kay, *supra* note 74, at 787. Race can further influence the likelihood that an individual with disabilities will live in poverty. AZZA ALTIRAIFI, CTR. FOR AM. PROGRESS, ADVANCING ECONOMIC SECURITY FOR PEOPLE WITH DISABILITIES 6 (2019), <https://perma.cc/6LHK-9KAM> (“[W]hile the poverty rate for non-Hispanic whites with disabilities was 24 percent in 2015, nearly 40 percent of African Americans with disabilities lived in poverty [that year].”).
120. David C. Stapleton, Bonnie L. O’Day, Gina A. Livermore & Andrew J. Imparato, *Dismantling the Poverty Trap, Disability Policy for the Twenty-First Century*, 84 MILBANK Q. 701, 703-04 (2006). For a comprehensive look at the way the American health care system impacts people with disabilities and may limit social freedoms more generally, see Valarie K. Blake, *The Freedom Premium* 5-6 (W. Va U. L. Rsch. Paper Series, Paper No. 2023-010), <https://perma.cc/WYS6-VD6X>.
121. See, e.g., Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331-32 (2021) (“Though admin plays a role in every life, some lives are unusually burdened by admin. Disability in particular can provoke admin onslaughts from multiple directions.”); Sophie Mitra, Michael Palmer, Hoolda Kim, Daniel Mont & Nora Groce, *Extra Costs of Living with a Disability: A Review and Agenda for Research*, 10 DISABILITY & HEALTH J. 475, 476 (2017) (explaining that “[d]isability may lead to extra costs for individuals and households with disabilities”).
122. Priscilla A. Ocen, *Beyond Analogy: A Response to Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 255, 255 (2010) (citing the “burgeoning population of poor Black women in jails and prisons across the country” as evidence that poor Black women are both highly likely to be enmeshed in the criminal legal system and “invisible victims of pervasive disablement”).

particularly vivid display in family regulation, where participants in the system are often poor¹²³ — and disproportionately people of color.¹²⁴

D. What Does it Mean to Produce Disability?

Given the complexity of disability, and the extent to which it can be both a biomedical and psychosocial term, this Subpart endeavors to define the concept of “disability production” as used in this Article. Jennifer Pokempner and Dorothy E. Roberts brought the concept of “emergent disabilities” from social science literature to legal scholarship in their 2001 article, *Poverty, Welfare Reform, and the Meaning of Disability*.¹²⁵ Pokempner and Roberts describe emergent disabilities as “closely linked with poverty” and discuss how data on emerging disabilities demonstrate the “inequitable structure of society produces concrete physical and mental impairments that affect an individual’s life chances.”¹²⁶ The concept, as they outline it, “adds a more materialist dimension to the social model of disability.”¹²⁷ Such impairments include, for example, post-

123. See CHILD WELFARE INFO. GATEWAY, SEPARATING POVERTY FROM NEGLECT IN CHILD WELFARE 3 (2023), <https://perma.cc/N7J7-V9RC> (“[F]amilies who are poor are overrepresented in the (much smaller) population of people reported to CPS agencies for neglect.”); see also Baughman, et al., *supra* note 93, at 513 (describing the “fishbowl effect,” which posits that families already under the scrutiny of homeless shelter staff are more likely to be referred to the family regulation system (citing Jung Min Park, Stephen Metraux, Gabriel Brodbar & Dennis P. Culhane, *Child Welfare Involvement Among Children in Homeless Families*, 83 CHILD WELFARE 423, 432-33 (2004))). A recent study found that anti-poverty programs proposed by the National Academy of Sciences could reduce the number of children investigated the family regulation system by between 386,000 to 669,000 children, depending on the scope of financial relief provided and the model specifications. See Jessica Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement*, 97 SOC. SERV. REV. 43, 72 (2023); see also Gupta-Kagan, *supra* note 110, at 3, 17 (explaining that “the vast majority of families investigated and subject to [CPS] . . . are poor,” and there is “a growing body of social science evidence show[ing] that financial supports to fight poverty can reduce the number of families impacted by CPS agencies as well as child maltreatment”).

124. See ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL’Y, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 4, 16 (2018), <https://perma.cc/ML22-TH3H> (arguing that “racism has always played a central role in the publicly funded systems that separate families” and linking racially disparate family separation to the child welfare, immigration, and criminal legal systems).

125. Pokempner & Roberts, *supra* note 117, at 427.

126. *Id.*

127. *Id.*

traumatic stress disorder.¹²⁸ Pokempner and Roberts describe the overlap of poverty and disability as “more than additive,” noting that “[e]ven for those whose disability or impairment is less directly linked to poverty, poverty and disadvantage affect the experience of disability.”¹²⁹ Going beyond the impact of poverty alone, Pokempner and Roberts examine how disability mirrors social inequality as it intersects with poverty, race, and gender.¹³⁰

Subsequent scholarship has built upon Pokempner and Roberts’s ideas. For example, Beth Ribet introduces the concept of “disablement,” an institutional and systemic process that results in the infliction of physical and psychiatric conditions that are, or become, disabling.¹³¹ Jasbir Puar posits a related theory of “debilitation,” arguing that debilitation is distinct from disablement because it encapsulates the “wearing down of populations instead of the event of becoming disabled.”¹³² Specifically, debilitation is “the slow wearing down by racial violence—psychological, emotional, financial, and physical.”¹³³ While Ribet notes that disablement has been described as “the social, political, legal and economic processes by which people who have disabilities are subordinated,”¹³⁴ scholar Jasbir Puar theorized debilitation to also encapsulate bodies that “may not be recognized as or identify as disabled, [but that] may well be debilitated, in part by being foreclosed access to legibility and resources as disabled.”¹³⁵

128. See Dorfman *supra* note 27, at 1786 n.150 (noting that poverty could cause impairments including post-traumatic stress disorder and complex post-traumatic stress disorder).

129. Pokempner & Roberts, *supra* note 117, at 444.

130. *Id.* at 431.

131. Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L., 281, 284-85 (2010) [hereinafter Ribet, *Prison Rape as Disablement*]; see Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 209, 217 (2011).

132. JASBIR K. PUAR, *THE RIGHT TO MAIM: DEBILITY, CAPACITY, DISABILITY* xiii-xiv (2017).

133. SCHALK, *supra* note 52, at 14-15 (describing debilitation as “essential to understanding Black disability politics, as Black disability political work often occurs at sites of or in response to the debilitation of Black people”). “Slow death,” originally theorized by Lauren Berlant, may also offer a useful lens. See Lauren Berlant, *Slow Death: Obesity, Sovereignty, Lateral Agency in Cruel Optimism*, 33 CRITICAL INQUIRY 754, 754 (2007) (“The phrase *slow death* refers to the physical wearing out of a population in a way that points to its deterioration as a defining condition of its experience and historical existence.”). Stephen Lee applied the framework of slow death to family separation in the immigration context, describing the horror and harms that extend from the separation of families at the border. Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2336 (2019) (arguing that family separation is a kind of “slow death”).

134. Ribet, *Prison Rape as Disablement*, *supra* note 131, at 284.

135. PUAR, *supra* note 132, at xv; see also *id.* at xvii (“Debility addresses injury and bodily exclusion that are endemic rather than epidemic or exceptional, and reflects a need for
footnote continued on next page”)

So why use the idea of “disability” at all? This Article centers the concepts of constructing, creating, and reinscribing *disability* because it is disabled people whose experiences are at the center of this project, in their ingenuity, strategies of survival, and in the discrimination that they face.¹³⁶ In focusing on the forces that produce disability, this work is also influenced by legal scholar Rabia Belt. Belt urges “[a] refocus on socially unequal conditions” and “the inequities that *produce* disabled people in the first place.”¹³⁷ Belt’s analysis centers *ex ante* inequality rather than *ex post* inequality.¹³⁸ Instead of seeking to merely “add[] disability to the pantheon of identity factors that we use to talk about inequality,” Belt advocates that we reckon with “how other types of injustice, such as racism, factor into producing disability in the first place.”¹³⁹ Thus, in Part II of this Article, I argue that family regulation—and its overinclusion of Black, Brown, poor, and disabled parents—drives these “*ex ante*” inequalities that produce disabled people.

II. The Production of Disability

Disability—whether an actual diagnosis, an externally-imposed label based on stereotypes, or a self-assigned identity—can play multiple and sometimes-overlapping roles for a parent in the family regulation system. Disability can be a precursor to involvement in the system,¹⁴⁰ a basis for intervention and family

rethinking overarching structures of working, school, and living rather than relying on rights frames to provide accommodationist solutions.”).

136. For an example of a leading scholar making a similar decision, see SCHALK, note 52 above, at 14-15 (describing her decision to use the word disability, rather than debilitation, because it “honors and prioritizes the preferred terms of the communities within which” she developed her research, “because of its recognition and value in the wider world beyond the academy,” and “because of the key role disabled people and oppression against disabled people play in this project”).

137. Belt, *supra* note 55, at 822.

138. *Id.* (“Most stigma discussion is focused on *ex post* inequality—the discrimination disabled people face *because of* their disabled bodies and identities, in other words, the subordination that occurs due to the negative treatment of disabled people. By contrast, I want to redirect our attention to the inequities that *produce* disabled people in the first place.”).

139. *Id.* at 826. Jasmine Harris has also observed that “disability can be a direct by-product of structural racism.” Harris, *supra* note 60, at 939.

140. For example, “parents who had a disability label in their school records are more than three times more likely to [experience termination of their parental rights] than parents without a disability label.” ROCKING THE CRADLE, *supra* note 22, at 77 (2015). Parents who had a disability label in their school records are also “more than twice as likely to have child welfare involvement than their peers without such a label.” *Id.* at 77-78.

separation,¹⁴¹ a compounding consequence of experiencing invasion and separation in the family regulation system,¹⁴² or a reason to assume reunification will not be successful.¹⁴³ This Part assesses how disability and the disability label function in the family regulation system and argues that the system produces disability. This Part surfaces and describes three distinct types of disability production within family regulation: construction, creation, and reinscription.

It is difficult—if not impossible—to unearth cases representing the full scope of the family regulation system. This is because of the variation in laws across the fifty states,¹⁴⁴ the propensity for family regulation cases to be unpublished,¹⁴⁵ and the vast number of cases that are never litigated in court but nonetheless involve months or years of interaction with the state officials monitoring families.¹⁴⁶ Thus, this Part relies on experiences of families in the

141. For example, there have been several publicized cases of children taken from their parents solely because of blindness. See, e.g., Nicole Neroulias, *Baby Belongs with Blind Parents, Activists Say*, E. BAY TIMES (updated Aug. 14, 2016, 11:02 PM), <https://perma.cc/9NRY-ML9Q>; Gary Wunder, *Whose Child Is This if Mom and Dad Are Blind?*, 53 BRAILLE MONITOR, no. 10, Nov. 2010; April Corbin Girnus, *Facing Discrimination, Blind Moms and Dads Seek Parental Protections*, NEV. CURRENT (Sept. 4, 2018, 5:55 AM), <https://perma.cc/PKJ7-MMNS>. Notably, since these cases, there has been a national effort to write protections for blind parents into state laws. See, e.g., NAT'L RSRCH CTR FOR PARENTS WITH DISABILITIES, SUMMARY OF MODEL LEGISLATION TO PREVENT DISCRIMINATION AGAINST BLIND PARENTS (2022), <https://perma.cc/4EMU-AB8Q>.

142. See *supra* Part I.B.2 (collecting social science and arguing that the trauma caused by family separation in the family regulation system can lead to impairment and disability); cf. Ribet, *Prison Rape as Disablement*, *supra* note 131, at 295 (offering a similar analysis of the role of disability in the prison system).

143. See *infra* Part II.C (collecting and analyzing cases).

144. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1198 (2016) (“Since family law is primarily regulated at the state level, significant variation persists across states—even though uniform acts and constitutional principles have produced some consistency.”).

145. See William B. Reingold, Jr., *Finding Utility in Unpublished Family Law Opinions*, 19 U. ST. THOMAS L.J. 607, 608 (2023) (“Family law attorneys across the country know all too well that much of their case law will be unpublished and nonprecedential.”).

146. Many calls made to the state are investigated and substantiated but do not lead to the filing of a case in family court. See Amanda S. Sen, Stephanie K. Glaberson & Aubrey Rose, *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857, 864-65 (2020) (describing the scope, varied length, and potential outcomes of family regulation investigations); *id.* at 865 (“Because the agency may decide against going to court, many substantiated reports are never litigated in a court of law.”); see also Washington, *Pathology Logics*, *supra* note 29, at 1546 (“Subsequent intervention, with or without court involvement, can last for months and sometimes, years.”). These investigations—even if they never lead to family court cases or the underlying court case is dismissed—can still have a lasting impact on families. Sen et al., *supra*, at 868-69 (listing the consequences of inclusion on state central registries, including employment consequences, prohibition from acting as a kinship or adoptive care provider, exclusion from parent-child volunteer opportunities, and a potential influence on custody terminations); see also Nikita
footnote continued on next page

system and social science research, in addition to case law. Although caselaw is critical for understanding the system's own description of what it does and how it operates, the law does not always depict the full truth, and it rarely explains the experiences of the people whose lives are at stake.¹⁴⁷ Social science research and the testimony of system survivors help fill that gap.

A. Disability Construction

Judges and caseworkers construct the social category of disability by assuming disabled parents are unfit and then separating them from their children. In these cases, case workers and attorneys who allege neglect are engaging in a sorting that prevents certain people from acting as parents for their children.¹⁴⁸ When based on disability status, the sorting of families gives meaning to the social category of "disability" as one that excludes safe, desirable parenthood.¹⁴⁹ Thus, a court or caseworker actively produces disability when they assume, based on a disability status or label, that a parent must be monitored, separated from their child, or found unfit. This Subpart analyzes a series of parental experiences and cases that reveal how actors in the family regulation system use a disability label as a sorting mechanism, effectively creating subcategories of parents within the family regulation system and reinscribing pathological notions of disability.

Stewart, *The Child Abuse Charge Was Dismissed. But It Can Still Cost You a Job*, N.Y. TIMES (Feb. 25, 2019), <https://perma.cc/5A9Q-VGYV> (revealing that in 2018, New York "ordered investigations into 166,000 complaints of child abuse or neglect and ended up including 47,541 cases in the database" of people who mistreated children).

147. See Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1800 (2024) (arguing that "people with lived experience confronting the daily realities of injustice and organizing the disenfranchised are often theorists, whose perspectives are sorely needed to reimagine broken legal structures").
148. In the criminal law context, Robert Cover has written about the violence committed by judges in their use of the law to control behavior. Robert M. Cover, *Essay, Violence and the Word*, 95 YALE L.J. 1601, 1601 n.1 (1986) (exploring the power and violence of language in courts in the criminal law context); *id.* at 1607 n.16 ("It is enough that it is the case that where people care passionately about outcomes and are prepared to act on their concern, the law officials of the nation state are usually willing and able to use either criminal or violent civil sanctions to control behavior.").
149. When caseworkers and state lawyers use disability as a reason to intervene in a family's life and family courts sanction this, they discriminate based on disability and reveal the extent to which family regulation constructs a normative bodymind: a parent who meets certain mental and physical ideals. See *supra* note 46 (discussing and defining the concept of "bodymind"); cf. Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, in DISCRIT EXPANDED: REVERBERATIONS, RUPTURES, AND INQUIRIES 20 (Subini A. Annamma, Beth A. Ferri, David J. Connor eds. 2022) (arguing that, in the context of the Fourth Amendment, "[b]y erasing any discussion of race or disability in legal doctrine, the Supreme Court effectively constructs a normative bodymind").

Once in the system, the invocation of a parental disability makes temporary and permanent family separation more likely.¹⁵⁰ This proposition is especially fraught in family court, where medical professionals—sometimes those employed or appointed by the court for the purpose of evaluating litigants—provide emergency medical evaluations based on little information and brief meetings with evaluation subjects.¹⁵¹ These evaluations can then become the bases for new diagnoses that attach to a parent or other litigant throughout the life of a case, regardless of whether a parent had a diagnosis when first appearing in court.¹⁵² Parents who were themselves in foster care—a significant percentage of parents who become enmeshed in the family regulation system¹⁵³—are especially at risk of having previous, documented childhood diagnoses raised again.¹⁵⁴ In such cases, caseworkers and courts with access to prior records can leverage evidence of prior diagnoses and particular medications collected when the parent was a child in foster care.¹⁵⁵ Once the state labels a parent as unfit, a parent must proactively prove their fitness through a series of often-degrading court appearances, supervised visitation, and court-mandated services.¹⁵⁶

150. See Part II.B below for more on the compounding consequences of inclusion in the family regulation system.

151. See *In re Jasmine R.*, 800 N.Y.S.2d 307, 309-10 (N.Y. Fam. Ct. 2005) (documenting the use of an emergency, in-court mental health services clinic to establish a mental health diagnosis).

152. *Id.* at 310 (using in-court evaluation of Ms. S., the mother, to terminate mother's parental rights).

153. See Amy Dworsky, *Child Welfare Services Involvement Among the Children of Young Parents in Foster Care*, 45 CHILD ABUSE & NEGLECT 68, 76 (2015) (examining data of parents who had children while in foster care in Illinois, finding that “39 percent of [the children surveyed] were the subject of at least one CPS investigation, 17 percent had at least one indicated report, and 11 percent were placed in DCFS care at least once before their 5th birthday”); see also Lisa Rapaport, *Teen Mothers in Foster Care Have High Risk of Losing Custody of Babies*, REUTERS (May 29, 2018, 12:11 AM EDT), <https://perma.cc/X9D6-MP4D> (describing a study showing that, in Canada, “teen mothers in foster care were more than 11 times more likely to lose custody than other mothers” during their child's first week of life); Stephanie Haupt, *Fight and Flight — Will My Family Ever Be Safe from Child Welfare's Reach?*, RISE MAG. (Sept. 1, 2015), <https://perma.cc/C6RS-JH6E> (detailing the story of one mother who, after becoming pregnant in foster care at age 18, lost two of her children to the family regulation system, one permanently and one temporarily).

154. See Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 549 (2006) (arguing that “[b]y giving up on teenage parents, the child welfare system creates a self-fulfilling prophecy”).

155. See, e.g., Baughman et al., *supra* note 93, at 510-11 (describing the case of a mother whose childhood diagnosis was dredged up when she was later investigated as a parent).

156. See Washington, *Pathology Logics*, *supra* note 29, at 1536-37, 1569-73. Though this Article does not explore the extent to which appearances in family court can be categorized as “status degradation ceremonies,” there may be fruitful comparisons. See *footnote continued on next page*

1. When disability influences a case's investigation and trajectory

In 1979, the New York Court of Appeals upheld the removal of a child based on the mother's "mental retardation."¹⁵⁷ Specifically, the court in *In re Trina Marie H.* found that the mother's diagnosis, "while not a per se basis for finding of neglect," added "to the legitimate concern that her toleration of her present husband's beating of the infant child and her own lack of proper care . . . [would] not readily yield to reformation."¹⁵⁸ Rather than supporting the mother in leaving her abusive partner and allowing her to parent her child with the support of a disability-informed domestic violence counselor, the court reasoned that the mother's disability was a proper basis to remove her infant child.¹⁵⁹ *In re Trina Marie H.* relies both on the mother's status as a person with a disability and her status as a person in a violent relationship. In 2004, New York courts recognized that parents harmed in domestic violence relationships should not lose their children based on their status as "victims,"¹⁶⁰ but the court's ongoing bias against parents with disabilities is noteworthy. Underlying the court's logic was the belief that the mother's disability made her more likely to submit herself and her child to abuse and, therefore, rendered her an unfit parent.

More recently, L. Frunel, a Black mother writing under a pseudonym, described the extent to which a caseworker's discomfort with a potential disability can alter the course of a family court proceeding. Ms. Frunel's son was removed after she was called to his school and, subsequently, to a police interrogation.¹⁶¹ From the timeline of the events in her case, it appears that her son's school called the police who, in turn, called the New York Administration for Children's Services (ACS).¹⁶² When Ms. Frunel eventually met with a caseworker in family court, it was before ever appearing in front of

generally Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO. 420 (1956) (defining "status degradation ceremony" as "communicative work between persons" that transforms another's public identity "into something looked on as lower in the local scheme of social types"); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 304-06 (2013) (applying Harold Garfinkel's concept of degradation ceremonies to practices targeting "low-income women of color" in the United States).

157. *In re Trina Marie H.*, 397 N.E.2d 1327, 1327 (N.Y. 1979).

158. *Id.*

159. *Id.*

160. *In re Trina Marie H.* relies both on the mother's status as a person with a disability and her status as a person in a violent relationship. This case might have a different outcome today. *See also* Nicholson v. Scopetta, 820 N.E.2d 840, 842-44, 846-47 (N.Y. 2004) (holding that parents in violent relationships should not lose access to their children because of their status as "victims").

161. *See* Frunel & Lorr, *supra* note 116, at 482.

162. *See id.*

a judge and understanding that ACS would file a family court case based on excessive corporal punishment against her. During this meeting, the case worker asked specifically if Ms. Frunel was “bipolar.”¹⁶³ At the moment of disclosure, Ms. Frunel did not understand that she would be facing allegations in family court and felt she was in a “safe place where [she] could be vulnerable.”¹⁶⁴ Believing it better to have an open mind, to “identify if you have a health condition,” and to get any appropriate treatment, she replied that she was unsure.¹⁶⁵ Instead, Ms. Frunel’s open-mindedness to treatment became not only a potential diagnosis for her but also the focus of the ACS investigation.¹⁶⁶ Ms. Frunel described how the agency’s pursuit of a bipolar diagnosis changed her case:

When ACS labeled me as bipolar, they also assumed that I was violent, incompetent, unstable, and unable to take care of my children without the help of someone else. To them, the word “bipolar” meant that I, as the one with the label, was a violent individual so my children were not safe around me.¹⁶⁷

From Ms. Frunel’s perspective, the caseworker took the mere potential that she might have a diagnosis to implicitly put her in a category of people unfit for parenthood.¹⁶⁸ One cannot easily separate Ms. Frunel’s race and class from her experience before the New York Family Court. After all, parents with economic means who bear similar diagnoses do not face the same risk of losing their children.¹⁶⁹

Ms. Frunel’s experience and the logic of the court in *In re Trina Marie H.* reveals how family courts equate the category of disability with those who are unfit or unable to parent. When courts use a parent’s alleged disability as the basis to file a case, change the focus of their investigation, or remove a child, the family regulation system’s role in defining disability as a category inconsistent with parenthood is clear. By blaming disability, courts and caseworkers ignore the nuances of each individual’s disability and its particular

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 483.

167. *Id.* “It makes me second guess whether or not I should discuss my mental health with someone, particularly whether or not it can be weaponized against me.” *Id.* at 488.

168. *Id.* at 483; *see also* Washington, *Pathology Logics*, *supra* note 29, at 1565 (“Behavioral descriptors are such effective labels because they comport with already existing narratives about poor families and the dominant child safety narrative, which juxtaposes parent support and child safety, pathologizes poor parents, and suggests that the family regulation system is primarily focused on violence against children.”).

169. *See also* ROBERTS, *TORN APART*, *supra* note 29, at 70.

impact on their ability to parent. They also avoid addressing the roles that poverty, race, and gender might play in any given investigation.¹⁷⁰

2. When disability is synonymous with neglect

At their most extreme, courts construct disability by outright preventing disabled people from parenting and by treating disability as synonymous with neglect. By removing children from their parents based on disability, courts create a reality where disabled parents cannot raise their own children, thus reifying the disability status as one inconsistent with parenthood.

The most glaring examples of this phenomenon are cases in which a court finds neglect based on disability before a parent has even left the hospital with a newborn infant. In *H.C.*, for example, the Court of Appeals for the District of Columbia found that a mother, K.C., “neglected” a child whom she never had a chance to parent.¹⁷¹ Her daughter, H.C., was removed from her care the day of her discharge from the hospital.¹⁷² She was eight days old.¹⁷³ Only after the state removed H.C. did the state assess the parenting-related services that K.C. was engaged in—services which she had participated in before the case was filed.¹⁷⁴ Months after H.C.’s removal, the trial court made a finding of neglect based on the few days that H.C. had been in her mother’s care after birth.¹⁷⁵ The finding of neglect did not seem to be based on specific actions that K.C. had taken, or not taken, with respect to her daughter.¹⁷⁶ Instead, relying on witnesses who “were in general agreement that K.C. struggled with the basic tasks of parenting,” and before K.C. was ever given the chance to practice those basic parenting skills with her child, the state presumed that K.C. was “incapable of discharging her parental responsibilities” because of her

170. The family regulation system’s work of constructing disability is thus akin to the “pathology logics” identified by S. Lisa Washington. See Washington, *Pathology Logics*, *supra* note 29, at 1533-34 (noting logics that produce “pervasive notions of individual responsibility,” “obscure the destabilizing effects of poverty and racism,” and “erase the expertise of directly impacted families and communities”).

171. See *In re H.C.*, 187 A.3d 1254, 1256-57, 1267 (D.C. 2018).

172. *Id.* at 1256-57.

173. *Id.*

174. *Id.* at 1257-58.

175. *Id.* at 1256, 1258.

176. *Id.* at 1258.

disability.¹⁷⁷ Cases like K.C.'s, where a removal takes place almost immediately after birth, happen all too often.¹⁷⁸

Caseworkers, attorneys, and judges will also treat disability as synonymous with neglect even after infants leave the hospital. *In re M.S.*, a 2015 New York State decision, illustrates how the state's treatment of disability could lead to a child's removal from parental custody.¹⁷⁹ In its initial filing, the ACS alleged that "the Mother is a person of diminished intellectual capacity who has difficulty understanding and expressing herself verbally as well as remembering and quickly processing information."¹⁸⁰ Because of these deficits, the mother failed to mix her infant's formula properly, "resulting in an inadequate weight gain and a diagnosis of 'failure to thrive.'"¹⁸¹ The ACS also alleged that the mother was unable to independently "travel or take her children to their medical appointments," had missed medical appointments for her new baby, and had failed to have her new baby properly immunized.¹⁸² The child was removed following the filing of the petition.¹⁸³ The state argued that the mother's IDD was evidence of neglect because it evinced an "unwillingness or *inability*'... to exercise a minimum degree of care towards the child."¹⁸⁴ After a trial, the court found that the state failed to prove the mother's diagnosis "impaired her ability to adequately parent her children or her capacity to learn how to be a more competent, effective parent."¹⁸⁵ Despite the mother's vindication at trial, the allegations led to the mother's separation from her newborn baby during the many months between birth and trial.¹⁸⁶

177. *Id.* ("The court found H.C. to be a neglected child... because K.C.'s intellectual disability and mental health needs rendered her incapable of discharging her parental responsibilities." (citing D.C. CODE § 16-2301(9)(A)(iii)).

178. *See, e.g.*, Amended Complaint at 22-23, *Gronenthal v. City of New York*, No. 22-cv-00895 (E.D.N.Y. Sept. 28, 2022); DOJ/HHS Letter of Findings, *supra* note 2, at 2; *see also* Rebbe et al., *supra* note 97, at 631 (documenting disparate CPS removal rates, wherein children born to mothers with IDD were more often subject to removal by the time that they turn four than children whose mothers did not have IDD).

179. *In re M.S.*, No. NN-06138-9/13, slip op. at *2 (N.Y. Fam. Ct. Oct. 1, 2015).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at *5 (citing N.Y. Fam. Ct. Act § 1012(h)).

185. *Id.* at *4. The state did not call an expert witness to offer an opinion about the effect of IQ on parenting capacity, instead relying only on the mother's IQ to prove that she would be unable to parent. *Id.*

186. *Id.* at *1-2, *8 (describing that all of the mother's children, including the baby born in 2014, had been removed from her and subsequently ordering that the children be returned within five days of the court's October 2015 order).

The ACS's argument reveals the weight and meaning that it assigned to the disability label in this case.

State and local laws sometimes directly allow a parent's disability status to be the basis for a neglect finding. For example, the D.C. neglect law relied upon in *H.C.* allows for a finding of neglect when a parent is "unable to discharge his or her responsibilities to and for the child because of . . . physical or mental incapacity."¹⁸⁷ D.C. is not alone in having a statute that allows intellectual, psychiatric, or physical disability to be a basis for a finding of neglect.¹⁸⁸

M.S.'s and K.C.'s cases demonstrate the role that a disability label plays in family court and, by extension, how it gives content to the social category of people with disabilities. First, these cases illustrate the propensity of the label, applied early in a case, to sow doubts about a parent's ability to parent and to learn, change, or grow. Second, because the disability label often leads to a finding of neglect and the removal of a child before a parent has even had the opportunity to parent or receive assistance, the category of parents with disabilities becomes a category filled with parents found unfit. In these ways, family courts and the family regulation system use the disability label and attendant stereotypes to create a class of parents who are significantly less likely to be reunified with their children and who will, by virtue of the way they are treated as a group, not be allowed to parent their own children.

B. Disability Creation

Parents and children who live through the family regulation system can develop material impairments that render them disabled or more likely to be disabled in the future. Impairment, though a critical aspect of disability, is not the same as disability.¹⁸⁹ Indeed, impairments are physical or psychological conditions which cannot be alleviated by external or social conditions, regardless of whether they are biological, medical, or otherwise intrinsic to a person's self.¹⁹⁰ This Subpart argues that legally sanctioned family separation can cause trauma which,¹⁹¹ in turn, can change the brains of children and their

187. D.C. CODE § 16-2301(9)(A)(iii) (2018); see *In re H.C.*, 187 A.3d 1254, 1257 (D.C. 2018).

188. See, e.g., N.Y. SOC. SERV. L. § 384-b(4)(c) (McKinney 2023); TENN. CODE ANN. § 36-1-113(r) (2023).

189. See *supra* notes 54-59 and accompanying text (exploring the difference between disability and impairment).

190. See *supra* note 55 and accompanying text.

191. Trauma has multiple definitions, including specific criteria required for clinical diagnosis. See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 265 (5th ed. 2013). Sara Katz, who has written about trauma in the family regulation system, describes that "[t]rauma occurs when an individual's internal and external resources are inadequate in the face of external threats, such that coping with the threat is not possible." Sara Katz, *Trauma-Informed Practice: The Future of Child*
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parents.¹⁹² These changes can cause impairments which may be, or become, medically and legally recognized disabilities.¹⁹³ This analysis builds on scholars' work documenting the harms—legal and otherwise—of the family regulation system¹⁹⁴ and the trauma that can result from judicially-enforced family separation.¹⁹⁵ Going further than prior scholars, this exploration links trauma experienced in the family regulation system to psychological and physical impairments in parents and children.¹⁹⁶

While this Subpart focuses on family separation, I recognize that there are many other areas of the family regulation system that arguably create or contribute to disability.¹⁹⁷ This Subpart focuses on family separation because it is a blunt instrument of the family regulation system that results in psychological and downstream impairments.¹⁹⁸ Notably, this Subpart is

Welfare?, 28 WIDENER COMMONWEALTH L. REV. 51, 53 (2019) (citing Richard P. Kluff, Sandra L. Bloom & J. David Kinzie, *Treating Traumatized Patients and Victims of Violence*, 86 NEW DIRECTIONS FOR MENTAL HEALTH SERVS., Summer 2000, at 79, 79). Like Sara Katz, this Article “concerns itself with trauma as defined broadly” and is not limited to trauma defined by the DSM-5. *Id.* at 54.

192. See *infra* note 232 and accompanying text.

193. See *supra* notes 54-58 (discussing the difference between impairment and disability).

194. See *supra* notes 29-32 and accompanying text.

195. See generally Katz, *supra* note 191, at 51 (evaluating child welfare through the lens of trauma and trauma-informed lawyering, and arguing that the “infliction of trauma is encoded in federal law”); Trivedi, *supra* note 29. For work on the harms of family separation in the immigration context, see Lee, note 132 above, at 2367 (“The migrants who experienced family separation at the border are likely to experience long-lasting trauma, anxiety, and depression.”).

196. See Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 259-60 (2023) (describing the physical and emotional grief experienced by parents whose parental rights were separated); Amy Sinden, “Why Won’t Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings”, 11 YALE J.L. & FEMINISM 339, 363 (1999) (describing harms to parents and children as “reciprocal and synergistic”).

197. For example, many parents enmeshed in the family regulation system are required to engage in mental health counseling as a condition of reuniting with their children. Therapy perceived to be coerced is “linked to an impaired therapeutic process and outcome compared to voluntary treatment.” Washington, *Survived & Coerced*, *supra* note 29, at 1125 (quoting Henning Hachtel, Tobias Vogel & Christian G. Huber, *Mandated Treatment and Its Impact on Therapeutic Process and Outcome Factors*, 10 FRONTIERS PSYCHIATRY, Apr. 2019, at 1, 5). Surveillance and a lack of privacy are also connected with lasting harms. See Baughman et al., *supra* note 93, at 510-11 (describing long-term, material harms connected with a mental health-related investigation).

198. Due to the scrutiny of family separation in the immigration context, family separation is also among the most well-researched outcomes that can result from an interaction with the family regulation system. See *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1147 (S.D. Cal. 2018) (noting, in the immigration context, that “separating children from parents is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development” (quoting

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different from other components of this Article because it considers harms to both parents and children. The decision to include harms to children here reflects scholarly focus on how family separation harms children (as opposed to parents).¹⁹⁹ It also reflects the hope that studying both sets of harms will provide a clearer understanding of how the system *creates* disability. Grappling with the intergenerational harms of the family regulation system is an especially appropriate endeavor because children who live through foster care are themselves at greater risk of being involved in the family regulation system as parents.²⁰⁰

1. Family separations create trauma

When judges forcibly separate parents from their children, the separation itself can cause significant trauma for the parent.²⁰¹ Trauma exposure is also a common antecedent to involvement in the family regulation system.²⁰² So for many parents in the family regulation system, family separation is a new,

Brief for Children’s Rights et al. as *Amici Curiae* for Plaintiff, Ms. L. v. U.S. Immigr. & Customs Enf’t, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (18-cv-00428), ECF No. 17-13).

199. See Rachel Mayes & Gwynnyth Llewellyn, *What Happens to Parents with Intellectual Disability Following Removal of Their Child in Child Protection Proceedings?*, 34 J. INTELL. & DEV. DISABILITY 92, 93 (2009) (noting the dearth of study on parental responses to child removal through family regulation and arguing that “[w]ithout systematic investigation of parents’ experiences in the specific situation of having a child removed via the care and protection system, we can only, at best, postulate the serious consequences for parents and their children”); cf. Sankaran & Church, *supra* note 196, at 259 (explaining how “disenfranchised grief,” the kind of grief parents feel when their rights are terminated, is not officially recognized by society).
200. Shanta Trivedi, “Am I Still a Parent?": How the Child Welfare System Harms Parents 22 (June 8, 2023) (unpublished manuscript) (on file with author) (“Children who grow up in foster care are more likely to have their own children removed when they become parents despite their best efforts.”); see also Shereen A. White, *We Must Demand the Recognition and Protection of the Sanctity of Black Families*, CHILDREN’S RTS. (June 2, 2023), <https://perma.cc/XM54-VVGL> (“We’re generational products of the family policing system. So they didn’t just start with my mother and my aunt. They took my mother’s kids, they took my dad’s kids, they’ve taken some of my sister’s kids.”).
201. Trivedi, *supra* note 200 (manuscript at 16) (describing, among other harms of losing a child in the family regulation system, that “mothers described feelings of trauma, shame and guilt and feeling totally alone in their experience”); Charlotte Atkin & Biza Stenfert Kroese, *Exploring the Experiences of Independent Advocates and Parents with Intellectual Disabilities, Following Their Involvement in Child Protection Proceedings*, 37 DISABILITY & SOC’Y 1456, 1470 (2022) (describing the “[g]rief and loss” experienced by parents with IDD whose children had been removed).
202. Tricia Stephens, *Traumatic Experiences and Perceptions of Parenting Self-Efficacy: A Mixed-Methods Study of Black and Latino Mothers with Single and Multigenerational Child Welfare System Involvement* 53 (May 2015) (Ph.D. dissertation, New York University) (Proquest). Tricia Stephens distinguishes between trauma itself and harms caused by trauma. See *id.* at 153-54.

additional trauma, compounding previous traumatic experiences. While exposure to trauma does not, on its own, equate to disability, extended trauma can lead to post-traumatic stress disorder (PTSD), and “traumatic experiences are associated with both behavioral health and chronic physical health conditions, especially those traumatic events that occur during childhood.”²⁰³

Consider, for example, April Lee. Ms. Lee’s children were removed after she experienced a sexual assault and was coping with the aftermath. Ms. Lee has described the trauma from the removal of her children as multiplying the trauma of her assault.²⁰⁴ In addition to describing herself and her children as “still dealing with the PTSD,” she described that after her children were removed, she metaphorically “jumped off the ledge.”²⁰⁵ She recalls being told that she was not “responding correctly” to the court and her caseworker as she was struggling to recover from the incredible loss of her children: In Ms. Lee’s words, the court “snatched the only thing that [she] knew—the only thing that was good in [her] life of trauma.”²⁰⁶

Ms. Lee’s experience is not anomalous. Parents express “raw grief” years after the removal of their children.²⁰⁷ Others report experiencing “deep depression to the point of self-harm or contemplating suicide.”²⁰⁸ Ms. Frunel described how family separation and investigation by the family regulation system impacted her psychological health: “Prior to coming into this case,” she reflected, “I was spirited to conquer the world. Now, I feel broken. I have anxiety attacks, Post-Traumatic Stress Disorder, nightmares, and things of that nature. What I didn’t have before, I am starting to feel now.”²⁰⁹ Parents also experience practical dislocation that may render them more vulnerable and more likely to develop impairments. As scholar S. Lisa Washington has described, because shelter placement is linked to family composition, “[e]ven

203. *Trauma and Violence*, U.S. DEP’T OF SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://perma.cc/526Z-5JH2> (last updated Sept. 27, 2022).

204. See LegalServicesNJ, *April Lee, Director of Client Voice & Peer Parent Advocate, Community Legal Services of Philadelphia*, YOUTUBE, at 3:45 (July 21, 2022), <https://perma.cc/C6P5-XNYA>; see also Steve Volk, *For Families Involved in Philly’s Child Welfare System, This Program Is Building a Safety Net*, KENSINGTON VOICE (Nov. 12, 2020, 12:13 PM), <https://perma.cc/V24X-JC8M> (describing Ms. Lee’s role in helping parents “negotiate a traumatic and complicated process”).

205. LegalServicesNJ, *supra* note 204, at 0:55-2:00.

206. *Id.* at 2:50.

207. Mayes & Llewelyn, *supra* note 199, at 93; see also Atkin & Kroese, *supra* note 201, at 1470; Erin Carrington Smith & Shanta Trivedi, *The Enduring Pain of Permanent Family Separation*, FAM. JUST. J., Summer 2023, at 26, 29 (noting that the “gravity” of parental trauma is “rarely examined”).

208. Mayes & Llewelyn, *supra* note 199, at 93.

209. Frunel & Lorr, *supra* note 116, at 488.

the temporary removal of a child residing in a family shelter with their parents can lead to the loss of the shelter placement for the entire family.”²¹⁰

Terminations of parental rights, the most extreme and final form of family separation, are sources of psychological devastation for parents.²¹¹ Parents experience “increases in mental illness, substance abuse, anxiety, and depression” after their rights are terminated.²¹² In fact, these increases are significantly higher for mothers who involuntarily lose custody of a child than for those who experience the death of a child.²¹³ “[T]he loss of a child to foster care [is] a powerful and unique type of adversity with potential long-term implications for [parents’] well-being.”²¹⁴ Parents describe turning to “stone,” becoming a “paranoid nut,” and using drugs to “numb the pain of their loss.”²¹⁵ Others speak in analogies, describing the “collapse of the universe” or the “end of the world.”²¹⁶

For children, the harms of removal vary depending on their age, understanding, and specific situation.²¹⁷ For example, separation from a mother can be particularly detrimental to young children.²¹⁸ The first two

210. Washington, *Survived & Coerced*, *supra* note 29, at 1130.

211. Though extreme, it is not uncommon. See Sankaran & Church, *supra* note 196, at 248 (estimating that, in the United States, more than 50,000 terminations occur each year (citing CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERV., TRENDS IN FOSTER CARE AND ADOPTION: FY 2010 – FY 2019 (2019), <https://perma.cc/GC8M-G9XP>)).

212. Sankaran & Church, *supra* note 196, at 259 (describing how a parent’s loss of a child through the family regulation system “heightens their ‘structural vulnerability’ by increasing risks of housing instability, intimate partner violence, and the initiation of drug use and sex work”).

213. Kathleen S. Kenny, *Mental Health Harm to Mothers When a Child Is Taken by Child Protective Services: Health Equity Considerations*, 63 CANADIAN J. PSYCHIATRY 304, 304 (2018).

214. *Id.* at 305.

215. Sankaran & Church, *supra* note 196, at 259-60 (citations omitted) (collecting social science research).

216. Kathleen S. Kenny, Clare Barrington & Sherri L. Green, “I Felt for a Long Time That Everything Beautiful in Me had Been Taken Out”: Women’s Suffering, Remembering, and Survival Following the Loss of Child Custody, 26 INT’L J. DRUG POL’Y 1158, 1161 (2015).

217. See Anthony Bald, Eric Chyn, Justine Hastings & Margarita Machelett, *The Causal Impact of Removing Children from Abusive and Neglectful Homes*, 130 J. POL. ECON. 1919, 1921, 1942 (2022) (noting some positive and varied effects of removal on educational outcomes); see also Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70, 71 (2008) (reporting that specific mental health needs of children in foster care will depend on neglect, poverty, and age).

218. Kimberly Howard, Anne Martin, Lisa J. Berlin & Jeanne Brooks-Gunn, *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 8-10, 21-22 (2011) (studying 2,080 predominantly poor families and concluding that separation can “result in distress for a young child who
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years of a child's life are crucial to their development, and the period after birth is critical for mother-child bonding.²¹⁹ By comparison, children who are old enough to consciously know their family of origin experience “ambiguous loss” upon removal.²²⁰ Ambiguous loss occurs when there is a “lack of clarity about the psychological and/or physical presence” of one's psychological family or one's role in that family.²²¹ For example, “[w]hen a child is expected to be physically a part of a new family while she is still psychologically a part of her biological family, it can cause her distress and lead her to believe she doesn't belong to any family.”²²² The harms of removal can also manifest psychologically as depression, anxiety, PTSD, toxic stress, and suicidal ideation.²²³ Removal may also lower IQ and break fight-or-flight responses in children.²²⁴ And children who are removed from their parents can experience sleeping challenges, heart problems, obesity, diabetes, or even cancer.²²⁵ Post-removal harms can be irreparable.²²⁶ These physical and psychological changes, in turn, may result in those children later being labeled as disabled. Foster children are acutely aware of this risk, one stating, “I know you're

lacks the cognitive abilities to understand the continuity of maternal availability despite physical unavailability”).

219. *Id.* at 6.

220. MONIQUE B. MITCHELL, *THE NEGLECTED TRANSITION: BUILDING A RELATIONAL HOME FOR CHILDREN ENTERING FOSTER CARE* 81 (2016).

221. *Id.*

222. Trivedi, *supra* note 29, at 533 (explaining how ambiguous loss functions).

223. CHILDREN'S RTS. LITIG. COMM., AM. BAR ASS'N SECTION OF LITIG., *TRAUMA CAUSED BY SEPARATION OF CHILDREN FROM PARENTS: A TOOL TO HELP LAWYERS* 6, 11 (2019), <https://perma.cc/VHG4-WWBX>. Even children who are separated for legitimate reasons or are only separated for short periods of time can be significantly harmed by the separation. See Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211-12 (2016) (“[R]emoving children—even abused and neglected children—from the custody of their parents harms them emotionally, developmentally, and socially.”); Howard et al., *supra* note 218, at 6 (describing how even separation “as brief as a few hours in duration can result in distress”). Multiple placement changes can exacerbate challenges. See Christian M. Connell et al., *Changes in Placement Among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 SOC. SERV. REV. 398, 399 (2006) (revealing that children who experience multiple placement changes are more likely to exhibit attachment difficulties, decreased academic performance, increased levels of physical and mental health service use, and, among male foster youth, increased rates of juvenile delinquency).

224. William Wan, *What Separation from Parents Does to Children: 'The Effect Is Catastrophic,'* WASH. POST (June 18, 2018, 6:15 PM EDT), <https://perma.cc/3VFQ-Y8BQ>.

225. *Id.* at 6-7 (citing Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation Is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), <https://perma.cc/7E9S-F9Y6>; and Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AM. (June 20, 2018), <https://perma.cc/UZR9-SUXD>).

226. CHILDREN'S RTS. LITIG. COMM., *supra* note 223, at 6.

supposed to let painful emotions out, but I'm glad I succeeded at suppressing my feelings while I was in [foster] care. I feared being labeled an emotionally troubled youth and put on medication or placed in a group home, and I kept that from happening."²²⁷

Children who are placed in the foster care system also have a higher likelihood of entering the criminal legal system, engaging in substance abuse, leaving school, or becoming homeless.²²⁸ Such children also have higher rates of neurodevelopmental disorders and diagnoses such as anxiety, depression, and bipolar disorder.²²⁹ Even if reunification occurs, the stress of removal can persist.²³⁰ Children who have been temporarily separated from their parents may experience anxiety when parents leave rooms for brief periods of time, refuse to attend school for fear of further separation, or refuse to sleep unless being held.²³¹

2. Trauma can facilitate or cause disability

The trauma, psychological injuries, and harms associated with family separation and foster care could lead to lasting impairments.²³² Although not

227. K.B., *Not Ready to Feel it All Yet*, REPRESENT MAG., Spring 2018, at 18, 20.

228. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007).

229. Sylvana M. Côté, Massimiliano Orri, Mikko Marttila & Tiina Ristikari, *Out-of-Home Placement in Early Childhood and Psychiatric Diagnoses and Criminal Convictions in Young Adulthood: A Population-Based Propensity Score-Matched Study*, 2 LANCET CHILD & ADOLESCENT HEALTH 1, 5 (2018).

230. Nicole Jones, *A Long Time Gone: Fourteen Years Later, My Children Still Feel Scared and Angry*, RISE MAG., Spring 2012, at 5, 6 (“Even now, when someone knocks on the door, sometimes my children run and hide, even though they are grown. My older son and daughter both have trouble sleeping.”); At Liberty Podcast, *Mandatory Reporting is Destroying Families*, ACLU, at 08:51 (Mar. 23, 2020), <https://perma.cc/L3WK-WT95> (featuring April Lee, now reunified with her children, describing their relationship to one another as harmed and her children as still coping with anxiety and depression); see also U.S. CHILDREN’S BUREAU, REUNIFICATION: BRINGING YOUR CHILDREN HOME FROM FOSTER CARE 10 (2016), <https://perma.cc/RTP2-NKYL> (explaining that during the reunification process children may have difficulty transitioning and re-adjusting to their homes and parents); Trivedi, *supra* note 29, at 561 (noting that Colorado considers reunification to be a stressful process for children, especially those who formed a connection with their caretaker at their placement).

231. Trivedi, *supra* note 29, at 530.

232. See, e.g., David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601, 625, 630 (2018); Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232, e237 (2012); Nat’l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain* 2 (Harv. U. Ctr. On Developing Child, Working Paper 3, 2014) (“Frequent or sustained activation of brain systems that respond to stress can lead to heightened vulnerability to a range of behavioral and physiological disorders over a lifetime.”). See generally Alexander C. McFarlane, *The Long-Term Costs of Traumatic Stress: Intertwined*
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every traumatic interaction will necessarily correlate with impairments or exacerbate existing disabilities, the connection between trauma exposure and later impairments is clear. For example, in 1998, investigators from the Centers for Disease Control and Kaiser Permanente collected data using a short questionnaire designed to probe participants' early childhood experiences, specifically traumatic experiences including familial instability and abuse.²³³ Though the original study, called the Adverse Childhood Experiences (ACE) Study, focused on largely white, middle- or upper-middle-class participants,²³⁴ the study has been repeated and expanded in different contexts and with broader, more diverse populations.²³⁵ A different study found "substantially increased health risks to adults who report multiple ACEs."²³⁶ Indeed, the Center on the Developing Child at Harvard University has described "a powerful, persistent correlation between the more ACEs experienced and the greater the chance of poor outcomes later in life."²³⁷ While not all ACEs directly impact mental health, neurology, or physical health, many do.²³⁸ Given the numerous physical and mental health outcomes associated with trauma, experiencing trauma likely places people at higher risk of exacerbating or developing disability.

Forced separation from one's family is a traumatic experience likely parallel to ACEs. Moreover, the trauma of parent-child separation is also associated directly with other disabilities. According to Dr. Alan Shapiro,

Physical and Psychological Consequences, 9 WORLD PSYCHIATRY 3 (2010) (describing the long-term consequences of traumatic stress beyond the realm of foster care).

233. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 246-48 (1998); see also Katz, *supra* note 191, at 55 ("These ten questions, called 'ACEs' range from asking about a parent with mental illness to witnessing domestic violence.").
234. Peter F. Cronholm et al., *Adverse Childhood Experiences: Expanding the Concept of Adversity*, 49 AM. J. PREVENTIVE MED. 354, 358 (2015).
235. See, e.g., Zachary Giano, Denna L. Wheeler & Randolph D. Hubach, *The Frequencies and Disparities of Adverse Childhood Experiences in the U.S.*, BMC PUB. HEALTH, 2020, at 1, 5-9 (analyzing the frequency and prevalence of ACEs along the lines of gender, age, race, income, education, employment status, sexual orientation, and census region); History, PHILA. ACE PROJECT, <https://perma.cc/6VCV-3MTA> (archived Apr. 22, 2024) (describing the Philadelphia ACE Project's "Expanded ACE Study" as complete by 2013).
236. Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-analysis*, 2 LANCET PUB. HEALTH e356, e363, e365 (2017) (describing "violence, mental illness, and problematic substance abuse" as the "outcomes showing the strongest relations with multiple ACEs").
237. *ACEs and Toxic Stress: Frequently Asked Questions*, HARV. UNIV. CTR. ON DEVELOPING CHILD, <https://perma.cc/X9S7-CQTK> (archived Apr. 22, 2024).
238. See *id.* (stating that experiencing more ACEs correlates to "dramatically increased risk of heart disease, diabetes, obesity, depression, substance abuse, smoking, poor academic achievement, time out of work, and early death").

Assistant Clinical Professor in Pediatrics at Albert Einstein College of Medicine, the “dysregulated stress response” spurred by a removal can cause “architectural changes in the brain—which means that in the future children might end up with serious learning, developmental and health problems.”²³⁹ Likewise, parental trauma and loss have been connected to mental health diagnoses including PTSD, anxiety, and depression.²⁴⁰ In addition, parents whose children have been permanently separated from their care are more likely to experience housing instability or harm from an intimate partner and are more likely to engage in sex work.²⁴¹ Of course, not all of the negative outcomes and harms correlated with forced family separation will lead to disability. Still, it is remarkable that forced separation can cause the very same disabilities that are correlated with disproportionate inclusion in the family regulation system.²⁴²

Not every interaction with the family regulation system will lead to a parent or child developing a disability, but evidence suggests that experiences in the system can set the conditions for the development of impairments, which render families more likely to develop a disability in the future. Experiences in the system will also likely exacerbate existing psychiatric disabilities.²⁴³ Attending to the connection between impairments incurred during or as the result of contact with the family regulation system reveals the extent to which intervention by the family regulation system can begin a process that creates new social inequities for the families it is designed to support. These social inequities may, in turn, lead to disability.

C. Disability Reinscription

Actors in the family regulation system—specifically caseworkers, prosecutors, and judges—reinscribe disability by failing to provide, demand, or order appropriate services or accommodations for disabled parents and then blaming a parent’s disability when a termination of parental rights occurs. This Subpart focuses on the termination of parental rights (TPR) phase of the family regulation system; TPR is the stage in legal proceedings during which families have a final opportunity to reunite. During the TPR phase of a family regulation case, a court must decide whether a parent’s legal relationship with

239. See Goudarzi, *supra* note 225.

240. See *supra* notes 204–16 and accompanying text.

241. See Sankaran & Church, *supra* note 196, at 259 (citing Kenny et al., *supra* note 216, at 1158–66).

242. See *supra* note 212 and accompanying text.

243. See Smith & Trivedi, *supra* note 206, at 26 & n.7 (describing how, after child removal, “[f]eelings of deep guilt and shame push many parents into increasingly severe substance use, mental health crises and homelessness”).

their child should be permanently severed.²⁴⁴ In cases involving parental disability, the parent's disability and biased stereotypes about the disability play central roles. Often, state agents have identified the parent as having a disability and have provided services ostensibly aimed at reunification, but they are not satisfied that the parent has changed or will do so quickly enough. Courts and agencies then look to the parent's disability to explain why the offered services have not helped the parent and to reach the conclusion the parent cannot be helped.²⁴⁵ This circular logic has the effect of reinscribing the parent's disability status and the view that people with disabilities cannot parent.

This Subpart identifies two ways disability status is reinscribed at TPR. First, courts reinscribe disability status when they justify termination by the lack of available services. Second, courts reinscribe disability when they deem a parent unable to reunify within a "reasonable time."

1. Courts reinscribe disability by justifying termination with the lack of supports and services available to the disabled parent

The reinscription of disability is on stark display in decisions where courts identify a loving relationship between a parent and child but nonetheless legally end the relationship because of that parent's disability or the state's purported inability to provide appropriate supports for that parent.²⁴⁶ In *In re Doe*, the Family Court of the First Circuit of Hawaii terminated the parental rights of a mother and father identified as having, respectively, a mild intellectual disability and borderline intellectual functioning.²⁴⁷ Early in the case, state caseworkers reported that the parents "appear to be *willing* to resolve the safety issues[,] . . . have participated with court ordered services and seem to be trying very hard to comply with every aspect of [the state-designed plan for

244. See Chris Gottlieb, *The Short Life of the Civil Death Penalty: Reassessing Termination of Parental Rights in Light of Its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. (forthcoming 2024) (manuscript at 1) (on file with author) (describing how the United States uses TPR to "permanently [sever] the parental relationships of over 70,000 children a year" and the contemporary legal landscape for TPRs).

245. See *infra* notes 246-62 and accompanying text.

246. Though the lack of services for people with disabilities is not always the explicit basis for TPR, it is often mentioned in the case law. See, e.g., *Lucy J. v. State Dep't of Health & Soc. Servs.*, 244 P.3d 1099, 1106 (Alaska 2010) ("OCS does not offer specific services for people with disabilities . . ."); *In re Terry*, 610 N.W.2d 563, 571 (Mich. Ct. App. 2000) ("The ADA does not require [the] petitioner to provide [the] respondent with full-time, live-in assistance with her children.").

247. *In re Doe*, 58 P.3d 78, 80 n.2 (Haw. Ct. App. 2002) ("Dr. Tom Loomis, a psychologist, testified that his tests showed Mother to be mildly mentally retarded, with an intelligence quotient (IQ) of between 55 and 69, and Father to have 'borderline intellectual functioning[,] with an IQ of between 70 and 79.," *aff'd*, 60 P.3d 285 (Haw. 2002).

reunification].”²⁴⁸ Despite the parents’ full and active participation, the assigned caseworker recommended against reunification because there were no other appropriate adults available to help support the parents.²⁴⁹ The *In re Doe* court agreed, finding that “although Parents clearly loved Daughter,” they would be unable to safely raise their daughter because of their “mental and cognitive deficiencies.”²⁵⁰

In effect, the state’s failure to provide appropriate support services, and the court’s failure to require that these services be provided, led to the termination of the *In re Doe* parents’ rights.²⁵¹ When the lower court inquired as to whether there were residential assistance programs available for the parents, there is no indication that the state’s lawyer volunteered any such programs.²⁵² The state caseworker testified that she could find homes for adults with disabilities but not homes where the parents could live together with their child.²⁵³ The father’s counsel stated that he was aware of a facility for parents and children, and the mother’s counsel agreed that the state should find services for the family “because you just don’t take their kids away because... they’re disabled.”²⁵⁴ Notwithstanding this colloquy, the state moved forward with the adoption of baby Doe several months later.²⁵⁵

248. *Id.* at 82 (quotation marks omitted). The Court further states that the parents exhibit a “genuine love of [Daughter and] a willingness to work with the system and follow through with recommendations” and that the Mother “proved to be quite resourceful in finding resources in the community[, which] seems to be the result of the many efforts made by previous service providers, . . . indicat[ing] that [Mother] has the ability to learn new skills.” *Id.* (quotation marks omitted).

249. *Id.* at 83. The parents later put forward the names of possible resources who could have supported them, but they were disqualified from accessing these resources because of their criminal histories. *Id.* at 83-84.

250. *Id.* at 80. Courts are prone to acknowledge that disabled parents love their children at the same moment that they find disability inconsistent with the lived reality of parenting. *See, e.g., In re Elijah C.*, 165 A.3d 1149, 1155 (Conn. 2017) (noting that there is “no doubt” that the mother loves her son but “[t]he sad fact is there is a difference between parental love and parental competence” (first quoting *In re Elijah C.*, No. W10CP14016591, 2015 WL 6246101, at *18 (Conn. Super. Ct. Sept. 18, 2015); then quoting *In re Christina M.*, 877 A.2d 941, 948 (Conn. App. Ct. 2005))).

251. Isolation and poverty also played a significant role in this outcome. If the parents had family resources or the financial resources to hire adult support, federal law would have required the court to reunify these parents with their daughter. *See* DOJ/HHS Letter of Findings, *supra* note 2, at 1-3 (Jan. 29, 2015).

252. *In re Doe*, 58 P.3d at 84.

253. *Id.* at 89-90.

254. *Id.* at 84.

255. *Id.* Ultimately, the trial court terminated the parents’ rights, and the appellate court found no violation of the ADA. *Id.* at 84, 86, 89-90 (finding that the parents were not “[q]ualified [i]ndividuals” under the ADA because of the “substantial evidence in the record . . . to support the family court’s determination that neither Mother nor Father

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Where a court accepts that termination is appropriate because of a disability combined with a lack of social supports, courts actively reinscribe disability status and the notion that parents with disabilities cannot maintain healthy relationships with their children. Indeed, the failure of the court—and the law—to insist on the provision of such resources all but guarantees that certain parents with disabilities will never be allowed to raise their own children. This is true regardless of the parent’s potential abilities if provided appropriate supports.

In *In re H.C.*, the District of Columbia Court of Appeals made a similar finding. A state-retained expert psychiatrist diagnosed K.C., H.C.’s mother, with “moderate intellectual disability as well as a major depressive disorder with a history of psychotic symptoms and post-traumatic stress disorder.”²⁵⁶ The state’s expert found that K.C. would face significant challenges if she attempted to parent independently.²⁵⁷ The Court acknowledged the connection between mother and child but did not require the state to offer supportive housing for K.C. and her daughter: “[W]e are not without empathy for K.C. and her maternal desire to keep H.C. in her life, but the evidence supported a conclusion that K.C.’s cognitive limitations make it impossible for her to do so without endangering the child she loves.”²⁵⁸

While supportive housing for disabled parents is not widely available, it does exist for other populations, including adults with disabilities living without children²⁵⁹ and families who require supportive housing because of a parent’s prior drug dependence.²⁶⁰ Instead of blaming a lack of resources, the *In re Doe* and *In re H.C.* courts framed the parents’ need for support as a *personal* failure and proceeded to terminate their parental rights in response.

This is more than a rhetorical failing. The courts’ logic reinscribes the ableist norm that if a parent cannot care for her child independently, then she cannot be a parent at all. And it reifies the concept that disabled adults are a

was capable, even with the assistance of a reasonable service plan, of providing Daughter with a safe family home within a reasonable amount of time”).

256. *In re H.C.*, 187 A.3d 1254, 1257 (D.C. 2018).

257. *Id.* at 1258.

258. *Id.* at 1267.

259. K.C. herself received round-the-clock support before and after giving birth to H.C., but her home did not accept children. *Id.* at 1256-57; see also Div. of Youth & Fam. Servs. v. D.S., No. A-4947-05T4, 2007 WL 92511, at *1, *2 (N.J. Super. Ct. App. Div. Jan. 4, 2007) (noting that a mother with multiple disabilities lived in a “twenty-four hour placement home” provided by the state before her children were born but that she could not return with her children).

260. See, e.g., *Adult Substance Use Women with Children Residential Treatment*, TEX. HEALTH & HUM. SERVS. COMM’N, <https://perma.cc/C3LU-MW9C> (archived Apr. 22, 2024); *Treatment Programs for Women with Children*, ODYSSEY HOUSE, <https://perma.cc/37VY-CARC> (archived Apr. 22, 2024).

category of people who cannot be parents. This is true even in a case like *H.C.* where many appropriate efforts *were* made to support K.C.'s parenting.²⁶¹ Because the court blamed K.C.'s disability—not the failure of the state to sufficiently support her—the court participated in the reinscription of disability. If the courts had acknowledged the state's failure to appropriately support the mothers in *In re Doe* and *In re H.C.*, then the decisions would be less punitive from a rhetorical perspective, but they would not be cured; the court's termination of the parent-child relationship because of a failure to provide services does the true work of reinscription here.

In the most egregious cases, courts actively refuse accommodations and use requests for accommodations as a basis for termination. A Michigan Court of Appeals, for example, observed that the "[r]espondent's contention that she needed even more assistance from [the] petitioner to properly care for her children merely provides additional support for the family court's decision to terminate her parental rights."²⁶² By identifying the need for additional support as a basis for TPR, courts take an affirmative role in crafting the category of disability as unworthy of parenthood. The role of courts is especially glaring in family regulation cases where, outside of the disability context, courts might see a parent's ability to identify her need for support as "insight." Insight is a term of art in family regulation cases encompassing "acknowledgment of parental shortcomings in the way that the family regulation system wants them acknowledged."²⁶³ In contrast, a parent's request for support in the disability context can lead to parental disqualification.

2. Courts reinscribe disability by adopting subjective, varying definitions of "reasonable time" that disadvantage disabled parents

Courts and caseworkers also reinscribe disability when they determine that parents with disabilities will not be able to safely reunify with their children in a "reasonable time." Case law offers no clear or consistent definition of "reasonable time," but one court described how "reasonable time" is conceptualized in termination cases this way: "[T]he parent is permitted a reasonable period of time to show compliance or ability, all of which then gets

261. *In re H.C.*, 187 A.3d at 1257 (noting that K.C. has a case worker with a background in working with parents with IDD and other appropriately tailored services).

262. *In re Terry*, 610 N.W.2d 563, 571 (Mich. Ct. App. 2000).

263. "Insight," after all, is something often demanded by family regulation caseworkers and courts alike. For critical work conceptualizing the use of "insight" in the family regulation context, and for the pitfalls of requiring "insight" in the context of domestic violence cases, see Washington, *Survived & Coerced*, note 29 above, at 1149-1160, 1150 n.324 (noting that lack of insight can be a particular barrier for parents facing neglect allegations based on their mental health and collecting cases).

weighed by the trial court if the State decides to proceed to termination.”²⁶⁴ Despite the lack of clear definition, judges use a parent’s purported failure to learn skills in “reasonable time” to predict that parents are unable to learn them at all. For example, in *Idaho Department of Health and Welfare v. Doe*, “[t]he court found that [a mother’s] intellectual functioning cannot be improved with medication or education because it is simply a function of her lower intellect and is not expected to change in the future.”²⁶⁵ Additionally, where parents with disabilities have requested additional time to complete state-designed plans outlining services and classes, courts have found that such extensions would exceed a “reasonable time.”²⁶⁶

Whether parents can reunify in a “reasonable time” is a subjective measure that varies across courts. Even within the same state, courts use different methods to determine whether a timeframe is “reasonable” for reunification. In Colorado, for example, courts use at least two different approaches. One court, in *People ex rel. S.K.*, adopted a fact-intensive, multi-factor test to determine whether a parent could become fit within a reasonable time.²⁶⁷ This fact-specific inquiry contrasts sharply with the use of “reasonable time” in another Colorado case, *People ex rel. T.M.S.*²⁶⁸ There, the Court simply determined, without reference to a standard or definition, that the “[m]other was unfit, and her conduct or condition was unlikely to change within a reasonable time.”²⁶⁹ Many jurisdictions take the latter approach and refer to “reasonable time” without as much as suggesting what that might entail.²⁷⁰

264. See *In re I.W.*, 115 N.E.3d 955, 970 (Ill. App. Ct. 2018) (DeArmond, J., concurring).

265. *Idaho Dep’t of Health & Welfare v. Doe*, 233 P.3d 96, 100 (Idaho 2010); see also *Adoption of Yolane*, No. 16-P-1525, 2017 WL 5985018, at *1 (Mass. App. Ct. Dec. 4, 2017) (“[H]er unfitness was likely to continue indefinitely”); *Adoption of Ugo*, No. 17-P-715, 2018 WL 1612274, at *2 (Mass. App. Ct. Apr. 4, 2018) (“[T]here was sufficient evidence to clearly and convincingly establish that the mother was unfit and that her unfitness would continue into the indefinite future to a near certitude.”).

266. For example, a mother in a Kentucky case asked for more time to complete her case plan because her leg was injured in a motorcycle accident, and the court did not permit this as reasonable. See *C.C. v. Cabinet for Health & Fam. Servs.*, No. 2015-CA-001941-ME, 2016 WL 4410080 at *13 (Ky. Ct. App. Aug. 19, 2016); see also *N.J. Div. of Child Prot. & Permanency v. F.B.*, 2019 WL 2097199, at *2 (N.J. Super. Ct. App. Div. May 14, 2019) (rejecting defendant’s contention that “she should have been given more time to demonstrate that she would now finally comply with taking her medication”).

267. *People ex rel. S.K.*, 440 P.3d 1240, 1254 (Colo. App. 2019) (“In determining whether a parent can become fit within a reasonable time, the court may consider whether the parent made any changes during the dependency and neglect proceeding, the parent’s social history, and the chronic or long-term nature of the parent’s conduct or condition.”).

268. *People ex rel. T.M.S.*, 454 P.3d 375 (Colo. App. 2019).

269. *Id.* at 382.

270. See, e.g., *Jessica P. v. Dep’t of Child Safety*, 471 P.3d 672, 683 (Ariz. Ct. App. 2020) (affirming the juvenile court’s finding that the “[m]other would not be capable of exercising proper and effective parental care and control in the near future”), *vacated in footnote continued on next page*

Despite this lack of consistency, courts across jurisdictions use the term as a basis to find that a TPR is warranted.²⁷¹ These cases demonstrate how a judge’s subjective (and potentially inconsistent) definition of “reasonable” can reinscribe a disabled parent’s status as beyond help. Because there is no clear length of time that will be considered “reasonable,” in any case, it is difficult to ascertain if courts are assuming a baseline time period based on a normative, ideal nondisabled parent or whether they are simply invoking a parent’s failure as justification in cases of disability. Still, what constitutes a “reasonable time” should be determined in light of the individual parent before the court and in light of any disability-related support needs. The use of a subjective and changing standard of “reasonable time” is especially alarming given that parents with disabilities are so often denied appropriately tailored and individualized services required by the ADA.²⁷² With appropriate services, a parent can at least hope to build the skills and make the changes that the state alleges are necessary. If state-provided services are insufficient or inadequately tailored such that compliance or progress with the state-designed plan is impossible, however, then the government’s failure to furnish tailored services in the past becomes the basis to prevent family reunification in the present.

III. Disrupting Disablement

If, as I have argued in Part II, the family regulation system is the site of disability construction, creation, and reinscription, then how parents, advocates, and other actors might resist the production of disability becomes an important question. Recognizing the power and potential of disabled parents themselves, this Part considers how voices of parents can be used to shift the dynamic in these proceedings and push back on the pathologized notion of the disabled parent. Until now, this Article might be read to suggest that parents with disabilities are solely victims of the family regulation system.

part, No. CV-20-0241-PR, 2020 WL 8766053 (Ariz. Dec. 15, 2020); N.J. Div. of Child Prot. & Permanency v. K.J.L., No. A-1619-16T4, 2018 WL 316876, at *4 (N.J. Super. Ct. App. Div. Jan. 8, 2018) (“Despite defendant’s progress, Ricky has waited far beyond a reasonable period for his mother to succeed.”); State *ex rel.* B.K.F., 704 So. 2d 314, 316 (La. Ct. App. 1997) (concluding that “it seemed unlikely” that the mother “would develop the skills to care for her child any time in the near future” (emphasis omitted)).

271. *Supra* notes 264-65 (collecting cases).

272. See Lorr, *supra* note 26, at 1350 (noting that many state courts “remain completely hostile to parents raising discrimination-based claims under the ADA”); *id.* at 1330 (“Unfortunately, specific services designed to support parents with [intellectual disabilities] are largely unavailable.”); Powell & Albert, *supra* note 78, at 146-47 (recounting an interview study of case workers, parents, and parents’ attorneys where “most participants found that services and supports for disabled parents were lacking in their agencies and communities”).

In this reading, disabled parents are the object and not the subject: They either have material impairments or are declared to have them; they may also further develop impairments while in the system that can either cause or exacerbate disability over time. This is an important analysis, both because of what it reveals about how the system subordinates disabled parents and how it reveals disability to be produced within the system, but it is not the end of the story. Disabled parents are themselves sources of power and can use their voices and experiences to disrupt the force of the system.

Critical scholarship²⁷³ and lived experience²⁷⁴ alike demonstrate that disrupting subordinating legal processes requires more than recognizing them—it requires active resistance from the people experiencing it. This Part uncovers how embracing disability can be a form of active resistance for parents. Of course, claiming disability can be a fraught and even dangerous choice for parents in the family regulation system.²⁷⁵ Still, there are also benefits to claiming disability. Whereas hiding a disability might allow parents to remain under the radar,²⁷⁶ openly claiming disability can help ensure that they receive tailored, appropriate supports.²⁷⁷ After all, even those who do not proudly embrace disability may be subject to the same stigma and biased

273. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 473-76 (2018) (arguing for the centrality of social movements in legal scholarship not only due to the changes that “they effectuate in law, but in what they imagine and where they fail” in addition to “creat[ing] a benchmark other than the status quo, or law’s current commitments, for measuring social change”); Simonson, *supra* note 44, at 859 (considering, in the context of police reform, the impact of leadership by people with criminal records who can lead “with a faith in the democratic justice that would flow from that leadership by virtue of their marginality”); Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 494-97 (describing and evaluating the “integrated advocacy” involved in various progressive legal victories, including the central role of nonlawyers, political and social movements, and the use of legal and nonlegal tools); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 48-51 (1990); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 511-56 (1990) (cataloguing and exploring the systemic arguments for a model of client-centered lawyering).

274. See, e.g., Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1797-98 (2023); Marcía Hopkins et al., *Youth and Families Matter: Restructuring the System One Youth at a Time from the Expertise of Youth Advocates*, 12 COLUM. J. RACE & L. 459, 471-75 (2022).

275. See *supra* Part I.B.2 (discussing stigmatic harms to disabled parents in the family regulation system); see also *supra* Part II (documenting some of the ways status as a parent with a disability can harm parents’ ability to reunite with their children).

276. See Lorr, *supra* note 26, at 1332 (describing reasons why some parents in family regulation proceedings may decide not to identify as disabled or “to hide or avoid a diagnosis”).

277. See *id.* at 1365-67 (urging attorneys and advocates to embrace the ADA and claim coverage at the outset of family regulation cases).

stereotypes as those who publicly identify as disabled.²⁷⁸ And those same parents who work to hide or disguise disability often foreclose the possibility of receiving potentially significant support services. Perhaps even more powerfully, when a parent openly claims their disability, their life gives lie to the myths and bias suggesting disabled parenting isn't possible.

This Part does not suggest that all or even most disabled parents should publicly identify as such. Whether and when to identify as having a disability is a truly personal decision. Rather, this Part explores the radical possibilities of proudly and openly claiming a disability label for those parents who may choose to do so.²⁷⁹ First, this Part examines how claiming disability can be a source of power and agency in the system. In focusing on the power of the voices of parents, this analysis explores lessons from Sara Gordon's advocacy. By examining Sara's story, I aim to balance the first two Parts of this Article, which "center[ed]... the injustices that those from the margins experience" with celebrations of "the resistance that they engage."²⁸⁰ Second, this Part explains how courts, advocates, and parents can disrupt the production of disability within the family regulation system in terms of both resisting the forces that create impairments and disability and those that construct and reinscribe the social category of disability.²⁸¹ Ultimately, this Part suggests that embracing disability can be a source of power shifting in family court.

A. Disabled Parent Voice as a Source of Power

At its heart, Sara Gordon's case is one of disability pride and resistance. Sara's story—both as an act of resistance and the changes for which she advocated—is fundamentally non-reformist.²⁸² That is to say, though Sara's story is one of challenging existing law and pushing for legal reform, her direct confrontation of the court's judgment inherently challenges the legitimacy of

278. See Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 559-61 (2021) (considering at length the various stigmas facing people with disability).

279. DisCrit and Disability Justice, among other traditions of critical disability thought, have long focused on uplifting disability pride and centering people with lived experience. Among the seven tenets of DisCrit are (2) "value[] multidimensional identities"; (4) "privilege[] voices of marginalized populations"; and (7) "require[] activism and support[] all forms of resistance." Annamma et al., *supra* note 27, at 19.

280. Subini Annamma, Beth A. Ferri & David Connor, *Introduction: Reflecting on DisCrit, in DISCRIT EXPANDED: REVERBERATIONS, RUPTURES, AND INQUIRIES* 20 (Subini A. Annamma, Beth A. Ferri & David J. Connor eds., 2022); *id.* at 4 (describing the "savvy and ingenuity" of multiply marginalized resisters).

281. My prior work has considered specifically how to make the ADA meaningful in family court. See Lorr, *supra* note 26, at 1365-67.

282. See Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2562 (2023) (describing that "the non-reformist reform gestures beyond the law and what the state allows").

the court's power and thus looks beyond the law as a site for change.²⁸³ At the same time, this Part assesses Sara's case through a consciously intersectional, power-focused lens, acknowledging the extent to which her whiteness and family support likely influenced the court's response to her resistance.²⁸⁴ Nonetheless, Sara was a poor teenager with an IDD, among the most deeply stigmatized of disabilities.²⁸⁵

Sara has publicly identified as disabled since childhood and was accustomed to being underestimated.²⁸⁶ Growing up, she rarely minimized or shied away from her disability; she brought this same attitude to her parenting plan. Instead of minimizing her disability or trying to parent alone, Sara planned to rely on her parents since before Dana was born, and she did so throughout her case with DCF.²⁸⁷

Sara attended DCF-supervised visits with Dana on time.²⁸⁸ She stayed in school, engaged in individual therapy, and took parenting classes.²⁸⁹ Despite Sara's efforts, the state complained from the beginning: Sara had not "always handled Dana safely," Dana bumped her head during a visit,²⁹⁰ and Sara could not always soothe Dana when she cried.²⁹¹ Seven months into the case, despite regular visits between Sara and Dana, the Massachusetts DCF decided to pursue termination of Sara's parental rights.²⁹² Over time, Sara's visits with her daughter were reduced from once a week to every other week.²⁹³

283. *See id.* at 2563 ("We should proliferate our understanding of where law takes shape and in relation to what, who acts on it, who it acts on, who benefits, who loses, and who resists—and how resistance individual and collective reshapes law.").

284. L. Frunel, for example, offers an example of resistance where she understood her Blackness to play a significant role in how her disability label was interpreted by the court. *See supra* notes 161-68 and accompanying text.

285. *See supra* notes 25-26, 96-99 and accompanying text.

286. Miller, *supra* note 2.

287. *Id.* In this way, Sara exemplified notions of interdependence, care, and support championed by the Disability Justice movement—the very notions of parenting courts often invalidate. *See Sins Invalid*, *supra* note 108, at 25 ("We work to meet each other's needs as we build toward liberation, without always reaching for state solutions which inevitably extend state control further into our lives."). The values of interdependence, "depending on others and being depended upon" are also firmly recognized in Susan Wendell's writings on disability and feminism. *See SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 144-51 (1996).

288. Miller, *supra* note 2.

289. *Id.* (describing that Sara brought food, diapers, toys, and more to visits with Dana).

290. *Id.* (describing how Sara walked away during diaper changes and "let" Dana bump her head).

291. DOJ/HHS Letter of Findings, *supra* note 2, at 21.

292. Miller, *supra* note 2.

293. *Id.*

In 2014, Sara filed a discrimination complaint against Massachusetts DCF.²⁹⁴ Around the same time, Sara began emailing lawyers and politicians to inform them of her case.²⁹⁵ In these emails, she explained that “Dana was stolen,” and that she had “a right to raise [her] daughter.”²⁹⁶ Sara implored: “I have done nothing wrong. I have never hurt her. I want her safe.”²⁹⁷

Beyond filing her complaint with the Department of Justice, Sara also began using her own voice in official proceedings. While doing this was by itself radical—parents are to be seen and not heard in family court, using their court-appointed lawyers to speak—she also relied on an even more radical approach: She refused to accept her disability as a limitation, invoking her own narrative—not that of DCF—when she spoke. After filing the discrimination complaint, Sara spoke up during an external review of her case.²⁹⁸ Sara, her lawyer, the state’s lawyer, and the foster parents were present.

In a later interview with journalist Lisa Miller, Sara explained how she decided to speak up. She shared that she “got tired of hearing: ‘She’s a bad mother.’ ‘She can’t take care of her child.’ ‘She shouldn’t have any more children.’”²⁹⁹ Sara’s memory of what she said that day, explained to Lisa Miller, sheds light on her experience:

“How would you feel?” she began. She talked about how it felt to see her own child, to whom she’d given birth, just twice a month for an hour, to have no say over her life or her future, and to be on the brink of losing her for good. “I forget how I worded it, but I was like, ‘What did I do to deserve my kid being taken away? I did nothing wrong.’” Sara remembers. “And they all just paused for I’d say probably like five minutes. It was quiet in that room. Quiet.”³⁰⁰

That day, the review board recommended that DCF change the case goal to allow Dana to live with Sara and her parents.³⁰¹ Sara’s parents would become the legal guardians, but Sara would still be her mother.³⁰² In March 2015, Dana was returned to her mother and her family.³⁰³

294. DOJ/HHS Letter of Findings, *supra* note 2, at 2, 4. DCF removed Dana from Sara’s care in November 2012. *See id.* at 2.

295. Miller, *supra* note 2 (explaining that in 2014, Sara’s first few emails contained the subject line “Please Help Me Get My Daughter Back”).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. Dana’s grandmother, Sara’s mother, became her legal guardian. *Id.*

303. *Id.*

Sara's story is worth contemplating not just because of its happy outcome, but because it demonstrates how the voices of parents can change the legal narrative and thus act as a form of resistance.³⁰⁴ Whereas so many parents—with and without the disability label, and with and without disabilities—go unheard, Sara was able to effectively use her experience of disability discrimination to remedy the wrongful separation it engendered. Sara's use of her voice to describe the injustice of her situation—and her mobilization of politicians, lawyers, and others to amplify her claims—highlight the power of embracing the disability label.³⁰⁵ Sara's forceful claim that she “did nothing wrong” is also a direct defense of disabled parenting. Indeed, in pointing out her blamelessness, Sara is directly contending with DCF's narrative. For while it is true that she *did* nothing wrong, DCF's narrative relied on her disability itself as the “wrong.”

In centering Sara's story, I do not mean to suggest that parents with disabilities are obligated to self-identify. Parents with disabilities—like all parents—have the right to care for themselves and their families in private, to relish the moments of tender and challenging childrearing among themselves and alongside their families, friends, and supports.³⁰⁶ Rather than suggesting that all parents must, should, or even *can* fight in the ways that Sara did, I aim to shine a light on the pride, power, and possibility that can accompany disabled parenting and how it can be wielded in the family regulation system.

Nor do I mean to imply that Sara's success is universally replicable. Not every parent—nor even most—in the family regulation system will seek to

304. As the cases collected through Part II of this Article suggest, many acts of resistance or claiming disability within family regulation are unsuccessful. *See, e.g., supra* notes 262-63 and accompanying text (recounting how requests for accommodations can be used as a basis to strengthen a claim for TPR). These are no less powerful forms of resistance.

305. Katie Eyer has written about the power and potential of claiming disability outside of the family regulation space. Eyer argues that if even a fraction of those who qualified as disabled under the Americans with Disabilities Act Amendments Act of 2008 identified as disabled, millions of Americans would be self-identifying as disabled for the first time. Eyer, *supra* note 278, at 554, 565. Eyer has argued that the broad claiming of disability in this way would have liberatory potential, not only for the broader culture's understanding of disability but for the individuals who themselves take up the identity. *Id.* at 580-95.

306. A related concept is the extent to which movements can and must center the needs of those central to the movement itself, rather than force a particular agenda. For example, disabled writer and organizer Leah Lakshmi Piepzna-Samarasinha writes about the need for activist movements to “embody” and support the populations that they purport to serve. PIEPZNA-SAMARASINHA, *supra* note 47, at 88 (“I want movements to embody a disabled, working-class, brown sustainability that celebrates femme organizer genius.”).

advance systemic change.³⁰⁷ In many cases, lawyers may advise clients *not* to disclose or publicly embrace a disability for fear that such a disclosure would be treated as an admission of unfitness.³⁰⁸ In many other cases, like so many discussed in Part II, disability is already central to the case and there is no disclosure to be made. In these cases, a parent is not confronted with the question of whether to disclose disability, but rather with the question of whether and how to embrace the identity of a disabled parent. This is often the case for parents like Sara, whose disability label appeared in her medical and family regulation records; in such cases disability is likely be central to the case, regardless of how one identifies. In other words, while it is hard to overstate the risk inherent to a parent embracing their disability in a case where the disability is not central from the outset, there are many cases where the disability label will be the focus of a case regardless of a parent's choice to embrace it. It is in the cases where a disability label is known and central to the prosecution that the embrace of the label may be most liberatory.³⁰⁹

Sara's odds of success were also more favorable because of social factors outside of her disability. For example, she is white in a system that devalues and harms Black people at disproportionate rates.³¹⁰ Though it is difficult to establish the extent to which Sara's race influenced the success of her legal advocacy, there can be no doubt that race shapes disabled people's experiences before courts.³¹¹ Sara also has the support of her parents, whereas many people

307. And even in the subset of cases where parents do identify as having a disability and seek to use the full force of the law to their advantage, the evidence suggests that those who seek accommodations under the ADA are often unsuccessful. *See* Powell et al., *supra* note 80, at 195; Lorr, *supra* note 26, at 1320-21.

308. *See* Lorr, *supra* note 26, at 1331-32 (describing the double-edged nature of claiming disability in family court proceedings); Powell, *Safeguarding*, *supra* note 32, at 128 (explaining that the child welfare system's policies and practices are "prejudicial" to parents with intellectual disabilities and "based on the presumption that they are unfit to raise their children"); *cf.* Miller, *supra* note 2 ("That Dana's own grandparents wanted to care for her, and that they had made concrete arrangements do to so, has always been a contentious fact in the case. Was the family's plan, laid back in the summer of 2012, an admission of Sara's incapacity? Or was it a signal that the Gordon family understood, as so many families do, that parenting is a collective enterprise at heart?").

309. *See* Eyer, *supra* note 278, at 586 ("[G]reater claiming of disability identity holds the potential to have a truly radical impact on disability rights by disrupting disability stigma and by dramatically expanding the pool of potential constituents of the movement for disability rights.").

310. HUM. RTS. WATCH & ACLU, "IF I WASN'T POOR, I WOULDN'T BE UNFIT": THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 39 (2022), <https://perma.cc/ACV7-BDRG>; Jenna Lauter, *Even "Child Welfare" Workers Say Their Agency Is Racist*, N.Y. C.L. UNION (Jan. 23, 2023, 6:15 PM), <https://perma.cc/5DAY-62FN>; Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (updated June 20, 2023), <https://perma.cc/X32V-64HQ>.

311. *See* Charisa Smith, *Over-Privileged: Legal Cannabis, Drug Offending & the Right to Family Integrity*, 67 S.D. L. REV. 569, 608 (2022) (explaining that Disability Justice highlights
footnote continued on next page

with disabilities in the family regulation system do not.³¹² The particularities of Sara’s story—such as her race and her family’s support—signal that disrupting racist notions of parenthood and pushing for the provision of more expansive community support for disabled parents are both necessary to create a more just family regulation system for disabled parents.³¹³ As the discussion of terminations based on a lack of supports suggests, the pervasive lack of community support for disabled parents in the family regulation system is very much a live concern.

Still, Sara’s case demonstrates what might be gained by a parent who demands the provision of specific supports—and who directly challenges discrimination based on disability—with unflinching honesty. Disabled parents in the family regulation system, after all, know best what they need and how they can be profiled as the result of those needs.³¹⁴ Moreover, Sara’s story offers

“the way that racial and institutional barriers play a crucial role in disabling people of color”); Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020 Election*, 15 ST. LOUIS U.J. HEALTH L. & POL’Y 391, 436 (2022) (noting that, in terms of the law, “disability rights laws and policies, such as the ADA, have failed to account for the impact of racism . . . experienced by some people with disabilities”); cf. Kathleen M. Collins, *A DisCrit Perspective on The State of Florida v. George Zimmerman: Racism, Ableism, and Youth Out of Place in Community and School*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 183, 189, 200 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) (analyzing the case against George Zimmerman and the impacts of race and disability on assessing threat, deviance, and impairment).

312. See Elspeth M. Slayter & Jordan Jensen, *Parents with Intellectual Disabilities in the Child Protection System*, 98 CHILD. & YOUTH SERVS. REV. 297, 298 (2019) (noting that parents with IDD are less likely to have appropriate social supports and more likely to be isolated); cf. ROCKING THE CRADLE, *supra* note 22, at 207 (noting “the importance of peer supports” for disabled parents whose families may not support “their quest to become parents”). Those who lack family support may find support from their community or create another system of support. See PIEPZNA-SAMARASINHA, *supra* note 47, at 16-26 (describing “care webs”). Still, family courts may be less likely to honor and recognize such unconventional systems of support. See Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1126-28 (describing the family regulation system’s “rigid” conception of family and how it impedes creativity in the context of finding permanent placements for children).
313. Many of these changes will need to be radical, which is to say that they must go beyond providing tailored services or supports as described in my prior work. See PIEPZNA-SAMARASINHA, *supra* note 47 at 31 (describing how, even when spaces are made more accessible, the world will not meaningfully change for people with disabilities “without changing [the] internal worlds that see disabled people as sad and stupid, or refuse to see those of us already in their lives”). For this kind of change to occur, disabled people must be “loved, needed, and understood as leaders, not just people . . . [to] begrudgingly provide services for.” *Id.*
314. Disabled parents are well-acquainted with the view that their need for support may render them suspect in the eyes of the broader world. See, e.g., Nina Tame, NINA TAME, in WE’VE GOT THIS: ESSAYS BY DISABLED PARENTS 15, 19 (Eliza Hull ed., 2023) (recounting a stereotype “that surely if we need extra care, we can’t possibly give care”).

a crucial counternarrative to the numerous cases that resolve with disabled parents and children separated, unsupported, and more likely to be impaired.

Sara's individual success in galvanizing broader legal action outside of the family courtroom suggests that the voices of parents, when combined with activism outside of the courtroom, can be particularly powerful. In recent years, parent-led organizations have begun to make legislative and practical change for parents in the family regulation system. For example, the Parents Legislative Action Network (PLAN) in New York was instrumental in helping to pass statewide legislation raising legal standards for finding child maltreatment and lessening the harsh employment impacts for parents previously involved in the family regulation system.³¹⁵ PLAN has pushed for legislation requiring "Family Miranda" and other significant legal changes.³¹⁶ Similarly, Repeal CAPTA, "a coalition of impacted families, social workers, attorneys, and other advocates," has come together on a national scale "to end the devastating effects of the Child Abuse Prevention and Treatment Act (CAPTA) of 1974 on children, families, and communities."³¹⁷ I suggest that the collective action by parents outside of the courtroom, when combined with active, clear, resistance inside of the courtroom, is one significant route to change. Indeed, PLAN's success in changing the law—though not specifically for parents with disabilities—suggests the successes that can be found.³¹⁸

Parents with disabilities are increasingly represented in external policy advocacy groups like these. For example, Rise Magazine is "led by parents impacted by the family policing system"³¹⁹ and has featured content by and for disabled parents.³²⁰ Likewise, PLAN played a crucial role in connecting parents to academics and writers for a recent symposium on family regulation

315. See Keyna Franklin & Sara Werner, *New Law Reforming NY State Central Registry Will Provide Justice and Relief to Families*, RISE MAG. (Apr. 16, 2020), <https://perma.cc/QT3E-AHG5> (interviewing PLAN's founder, Joyce McMillan, and describing the role of PLAN in the passage of the new law); Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register*, N.Y. L.J. (May 26, 2020), <https://perma.cc/V9SU-NBFQ> (describing changes to New York state law).

316. *Active Campaigns*, JMACFORFAMILIES, <https://perma.cc/6F3W-PRZC> (archived Apr. 22, 2024) (describing PLAN's active campaigns).

317. *The Campaign*, REPEAL CAPTA, <https://perma.cc/A4XW-XELV> (archived Apr. 22, 2024).

318. See *supra* notes 315-17 and accompanying text (describing recent legislative victory in which PLAN was engaged).

319. *About Rise*, RISE MAG., <https://perma.cc/6M9D-V4XA> (archived Apr. 22, 2024).

320. See, e.g., 'Everybody Can See that I Came a Long Way' — Despite My Disability and Painful Childhood, I'm Keeping Myself and My Daughter Safe, RISE MAG. (Mar. 8, 2014), <https://perma.cc/VX27-DPRY>.

abolition, including parents with disabilities.³²¹ Continued connections between disabled parents and groups like PLAN and Repeal CAPTA and the continued funding of these groups are critical. Such organizations not only promote change of the family regulation system but also help expand the reach of the individual stories that they tell. Centering the experience of parents with disabilities helps ensure that Sara’s story is not a one-off but instead the beginning of broader, more universal change for disabled parents in the family regulation system.

B. The Role of Affirmative and Celebratory Support

I’ve stopped believing the ableist fantasy of mothers as the sole support for their child and realised there is no correct way to be a good parent.

—Liel K. Bridgford³²²

In a world where the act of disabled parenting is “rebellious,”³²³ becoming a parent with a disability is an act of resistance and agency. Attorneys, judges, and advocates can disrupt the disabling and ableist forces of the family regulation system as part of their daily work. By embracing disability as a potential strength, courts, lawyers, and advocates in the family regulation system can reframe the concerns that courts and state agencies have with disabled parenting as benefits and strengths.³²⁴

Consider, for example, a parent’s need for support in raising their child. While nearly all parents, with or without disability, require various means of support, disabled parents are often discriminated against or seen as unworthy of parenthood based on those support needs. Support needs can run the gamut from childcare while a parent engages in their own medical or mental health

321. For example, though not referenced explicitly in the Article, my collaboration with Ms. Frunel was the result of a connection made by PLAN. See Frunel & Lorr, *supra* note 116, at 477 n.*.

322. Bridgford, *supra* note 24, at 245.

323. Hull, *supra* note 1, at 13 (“Parenting with a disability doesn’t look like following a textbook; it looks like love, connection, pride, innovation and adaptability. We’re rebellious, not in a brave, heroic way — more in a bad-arse way!”); *id.* (describing the stories of disabled parents as “stories of resistance and rebellion, courage and creativity”).

324. A crucial question for lawyers and advocates is how advocacy can empower disability rather than reify ableist tropes to reassure courts that their client can safely parent. Jamelia Morgan has written about this challenge in contemporary prison litigation. See Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 986-88 (2019). Attorneys and advocates should decide whether to strategically rely on ableist legal frames in consultation with their clients. When litigants believe that such advocacy is necessary to win an argument, lawyers and clients should consider the power of naming the ableism of the argument for the court.

care, to supportive housing, mentor support, or parenting coaching as one's child reaches different stages of development. Courts and state agencies have often understood the need for support as evidence that someone is unqualified to parent, especially when it comes to parents with disabilities.³²⁵ When a parent requests help or identifies a support need, caseworkers do not understand this as a signal of strength, indicating a parent's insight or self-knowledge. Instead, caseworkers and judges demand that parents prove that they can parent without assistance.³²⁶ This interrogation ignores the reality that all parents, of all abilities, require tremendous support in childrearing.³²⁷ It also ignores the systems of support that a disabled parent might already have in place.³²⁸

Courts, attorneys, and advocates can rebut the myth of independence by identifying that the need for support is evidence of a parent's humanity, not their unfitness.³²⁹ Advocates will be more successful in vindicating the interests of disabled parents by describing their clients' rich, nuanced, and often unrecognized webs of support. For clients who lack the webs of support

325. Sara's story is a particularly strong illustration of this, as she had always planned to raise Dana with her parents' support but was denied this opportunity for years based on the notion that she should be able to raise her child alone. See DOJ/HHS Letter of Findings, *supra* note 2, at 2 ("DCF staff assumed that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability, and, therefore, denied her the opportunity to receive meaningful assistance from her mother and other service providers during visits."); cf. Baughman, et al., *supra* note 93, at 510-11 (detailing the story of Leslie, a mother who came to the family regulation system for support but received surveillance and punishment instead).

326. See, e.g., DOJ/HHS Letter of Findings, *supra* note 2, at 2, 19.

327. See, e.g., Hilary F. Byrnes & Brenda A. Miller, *The Relationship Between Neighborhood Characteristics and Effective Parenting Behaviors: The Role of Social Support*, 33 J. FAM. ISSUES, 1658, 1676 (2012) ("[M]others who reported greater availability of social support were . . . more likely to use more effective parenting styles . . . [and] were also more likely to have higher levels of parent-child communication and parental monitoring."); see also Claire Cain Miller, *Working Moms are Struggling. Here's What Would Help*, N.Y. TIMES (updated Oct. 30, 2021), <https://perma.cc/9CCW-P6JG> (describing how, after almost a year into the pandemic, "mothers need[ed] more support than ever — in the form of government policies, employer assistance or, closer to home, partners who share in more of the work").

328. See AKEMI NISHIDA, JUST CARE: MESSY ENTANGLEMENTS OF DISABILITY, DEPENDENCY, AND DESIRE 128, 131-34 (2022) (describing how the emphasis on independence as a value is dehumanizing to people with disabilities who rely on support systems); PIEPZNA-SAMARASINHA, *supra* note 47, at 18 (describing care collectives and webs of support).

329. See Doron Dorfman, *The Inaccessible Road to Motherhood—The Tragic Consequence of Not Having Reproductive Policies for Israelis with Disabilities*, 30 COLUM. J. GENDER & L. 49, 66 (2015) ("Integrating the universal need for assistance as part of every human experience will help in the process of countering the shaming and devaluation of those in need of some help or care and will promote a better, more tolerant society, one that accepts human diversity and accommodates it.").

they require, advocates should be specific and clear about client needs and,

where possible, provide concrete routes for courts to order the provision of such support. Courts and state agencies can intervene even earlier in the system's process by interpreting a parent's request for help, acceptance of support, and willingness to rely on community as an indication of their *ability* to be loving, caring parents, rather than as a dangerous weakness.

As part of normalizing and reframing the need for support, courts and legal advocates must look beyond professionalized notions of support for parents with disabilities.³³⁰ This includes not only looking to natural supports already existing in parents' lives, like Sara's parents, but also to accommodations or individualized treatment that might be low-cost, free, or simply involve the court or society changing their expectations.³³¹ For example, for a parent with IDD who has persistent challenges in maintaining a clean home, one such support could include providing clearly labeled cleaning materials and a caseworker to work with the parent to schedule future cleanings. This form of support is time-intensive but otherwise free. Attorneys might demonstrate the robustness of a client's support network by calling nontraditional witnesses or encouraging their clients to testify.

By embracing the reality that parents require support, advocates also lay the groundwork for demanding tailored and specialized supports for parents with disabilities.³³² This is especially important for those parents who may lack the web of support described above. When needs are normalized, stigma and bias against those needs are weakened. By insisting upon the

330. PIEPZNA-SAMARASINHA, *supra* note 47, at 25-26 ("We're so used to disabled care being professionalized, to assuming that medical and therapeutic professionals are the only ones qualified to intersect with our terrifying bodies. . . . Collective care, like transformative justice, can be so many things . . .").

331. *See* Eyer, *supra* note 278, at 604 (noting that "the presumption that disability universally and inherently entails claims to extra resources is itself a form of ableism"); *see also* LIGHTFOOT & ZHENG, *supra* note 23, at 3 (describing accommodations for parents with disabilities, many of which self-evidently would not incur financial costs).

332. That the dearth of services is a primary obstacle for representing disabled parents in the legal system is well established. *See, e.g.*, Robyn M. Powell, Susan L. Parish, Monika Mitra & Joanne Nicholson, *Responding to the Legal Needs of Parents with Psychiatric Disabilities: Insights from Parent Interviews*, 38 LAW & INEQUALITY, Winter 2020, at 69, 83 (explaining that "legal services organizations have limited resources and are often unable to represent parents who have psychiatric disabilities," and noting that such parents may experience cost hardships, such as being unable to pay for attorneys' fees and child evaluations).

interdependent nature of parenting, parents and advocates can pressure state agencies to provide supportive housing opportunities specifically for disabled

adults and their children³³³ and peer mentors.³³⁴ Courts can—and must—hold state actors and agencies accountable for funding systems of support.

Lawyers, advocates, activists, and courts can also counter ableism by naming and highlighting the multiple oppressive forces in the family regulation system. As Sami Schalk argues, focusing on the violent harms and oppressive forces of a system is pivotal to fighting “disabling violence without being ableist.”³³⁵ In individual cases, attorneys and advocates should state early—and forcefully—that disability is not a lawful basis to remove a child.³³⁶ They should call out any pernicious or stigmatic bias within the court or state agency’s decision to remove a child, including the stereotypical association of certain diagnoses with particular racial or economic identities. Courts should require an actual finding of wrongdoing—not merely anxiety about disability—before

333. See *supra* Part II.C.1; notes 245, 261 and accompanying text (describing cases where termination is justified by the lack of existing services). One underutilized option for support is for states to denominate “parenting” an available service pursuant to the Medicaid-funded Home and Community Based Services (“HBCS”) waiver. 42 U.S.C. § 1396n(c)(4)(B) (allowing funds made available through the HBCS waiver to provide habilitation services); *id.* § 1396n(c)(5) (defining habilitation services as “services designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings”). The HBCS waiver allows states to provide community-based services as an alternative to institutional living. *Home & Community-Based Services 1915(c)*, MEDICAID, <https://perma.cc/7XEW-VFCQ> (archived Apr. 22, 2024). For example, Vermont’s HCBS waiver program lists “parenting” as a funding priority. DEVELOPMENTAL DISABILITIES SERVS. DIV., VERMONT STATE SYSTEM OF CARE PLAN FY 2023-FY 2025, at 32 (2023), <https://perma.cc/W6Z3-WCMW>.

334. Best practices for supporting parents with disabilities involves the use of peer mentors. See ROCKING THE CRADLE, *supra* note 22, at 207-09; cf. Bridgford, *supra* note 24, at 245 (“Through trial and error, listening to my body, and through finding *diverse, disabled role models*, we’re figuring out what this best way is.” (emphasis added)).

335. SCHALK, *supra* note 52, at 75-76 (discussing anti-ableist techniques for opposing disabling violence in the context of police shootings).

336. See Lorr, *supra* note 26, at 1365-67 (describing how attorneys can use scientific evidence to support claims that parents with IDD can effectively parent).

sanctioning removal.³³⁷ Likewise, courts must identify when agencies appear to have acted out of bias, animus, or other unlawful motivation.³³⁸

Courts, attorneys and advocates seeking to disrupt the family regulation system must not lose sight of parents' personhood. Attorneys and advocates must, in their representation, reiterate and support the agency of parents, rather than acting as another person or expert there to assess their abilities. Adjudicating and advocating in family regulation cases with parent agency in mind means listening to and centering parents themselves. For example, when an autistic father tells his lawyer that he refuses to cooperate with unannounced visits from the child protection agency because doing so would exacerbate negative symptoms of his disability, the lawyer's time should be spent *not* on counseling their client out of the decision (which may indeed inflame the state agency, and which the lawyer should advise about) but instead should be spent on presenting to the court not only the refusal but the basis for the refusal.³³⁹ Centering clients' voices forces courts to *listen* to the lived reality of parents rather than simply discounting symptoms of disability as excuses or flaws.

Ultimately, claiming disability in family regulation may be a form of power shifting.³⁴⁰ Openly embracing disability subverts unstated legal rules

337. As evidenced in the cases discussed above, a specific finding of wrongdoing—versus mere concerns about an individual's disability—is not always required. See *supra* Part IIA.2.

338. For a strong example of a court taking on a corrective, clarifying role, see *In re Jose F.*, 2020 WL 8262246, at *3 (N.Y. Fam. Ct. Dec. 21, 2020) (finding a lack of evidence that the foster agency trained a caseworker to work with disabled parents “in and of itself is concerning to the Court as it certainly increased the likelihood that the agency, as a whole, would fail to provide the parents with the individualized support they needed to learn proper parenting techniques and life skills necessary to having the children returned to them”); *id.* at *6 (ordering six different types of “future reasonable efforts,” including that “[t]he agency is to engage a parent coach or locate a dyadic parenting program that is capable of working with parents with cognitive impairments to work directly with the parents”).

339. Social situations “are already challenging for individuals with [autism spectrum disorder] and can increase anxiety in the moment,” especially when those events are “[n]ovel” and unplanned or unannounced. Kim Davis, *What Triggers Anxiety for an Individual with ASD?*, IND. INST. ON DISABILITY AND CMTY: IND. RES. CTR. FOR AUTISM (2012), <https://perma.cc/2LSK-A9WJ>; see also Anonymous, *Guilty of Autism - Child Protective Services Blamed Me for My Condition.*, RISE MAG. (Oct. 9, 2011), <https://perma.cc/KC9W-3VUP> (explaining how unannounced visits can cause the author's autistic son “to have a meltdown, during which he loses control over his actions, and at times engages in self-mutilation”).

340. For example, Jocelyn Simonson, in the context of the criminal legal system, has argued that “state actors should take the bold step of *ceding power*, of deliberately facilitating power shifts down to the marginalized populations who traditionally have the least input into everyday justice.” Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 296 (2019). My vision is that claiming disability can
footnote continued on next page

and can itself be a survival skill. When Sara Gordon spoke directly about the unfairness of her treatment, she acted against the weight of expectation that she sit silently, operating only through her lawyer.³⁴¹ When judges, lawyers, and parents in family court openly discuss a parent's disability—and do so with pride—countering stigma becomes possible.³⁴² In this sense, embracing disability in family regulation can at once build power for disabled parents and redefine disability as a positive identity. As many disabled writers and thinkers have shared, disability—and the care work related to it—can be a source of power, liberation, and joy.³⁴³

Conclusion

The family regulation system—made up of the courts, lawyers, agency staff, and caseworkers who function within it—produces disability. Agency caseworkers who recommend that children be removed based on parental disability and court decisions that enforce these recommendations actively construct disability as a social category—a social category that is inconsistent with parenthood. When courts and caseworkers forcibly separate families, children and their parents experience psychological impairment and trauma. This trauma is a material condition that can itself create disability. When courts and state agencies fail to provide necessary social services and then use

effect a comparable power shift inside and outside of courtrooms. *Cf. id.* at 295 (arguing that criminal procedure can be imagined as “a process of regulating popular intervention on both sides of the ‘v.’” and urging that “[w]e can take account of the voices we include and exclude in proceedings and realize that these are not inevitable choices”). Mari J. Matsuda has also famously suggested “that those who have experienced discrimination speak with a special voice to which we should listen.” Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. REV. 323, 324 (1987).

341. In her quintessential story of her former client Mrs. G, Lucie White describes her client's decision to break several “rules of legal rhetoric” while speaking and how, in so doing, she “claimed a position of equality in the speech community—an equal power to take part in the *making* of language, the making of shared categories, norms, and institutions—as she spoke through that language about her needs.” White, *supra* note 273, at 45, 49-50 (“Mrs. G.’s survival skills were more complex, more subtle, than the lawyer dared to recognize.”).
342. See Eyer, *supra* note 278, at 580-84 (discussing “stigma-eradication”).
343. See, e.g., NISHIDA, *supra* note 328, at 7 (describing the need for disability-related care as “entail[ing] the potential to foster solidarity and mobilize mass”); *id.* at 135 (describing care collectives as “a complex mixture and interweaving of joys, challenges, resistances, and visioning”); SCHALK, *supra* note 52, at 2-3 (sharing her increasingly public identification as a person with a disability “as one part of a much larger conversation about collective liberation”); PIEPZNA-SAMARASINHA, *supra* note 47, at 31 (“Our crip bodies are gifts, brilliant, fierce, skilled, valuable. Assets that teach us things that are relevant and vital to ourselves, our communities, our movements, the whole goddamn planet.”).

that lack of services as a basis to terminate parental rights, disability as a pathological status is reinscribed. Advocates and parents should explore embracing disability as a means of shifting power in family court. Likewise, courts must correct existing doctrine by requiring factual findings of wrongdoing—not merely suggestions of potential risk based on disability status—before removing a child. Though a full-throated embrace of disability in the present family law system is not without challenge and peril, it can also be a powerful act of resistance.