8-2022

Unaccommodated: How the ADA Fails Parents

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In 1990, Congress passed the Americans with Disabilities Act (ADA) to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Thirty years after this landmark law, discrimination and ingrained prejudices against individuals with intellectual disabilities—especially poor Black and Brown parents with disabilities—continue. This ongoing discrimination is on stark display in family courts across the country, with devastating consequences for parents with intellectual disabilities and their families. Children who have parents with intellectual disabilities are eighty percent more likely to be removed from their homes and placed in foster care than other children, and, once in care, courts are three times as likely to permanently sever the parent-child relationship. Although technical assistance from the U.S. Departments of Justice and Health and Human Services in 2015 offered some hope of redress for these families, the disparities have not dissipated.

DOI: https://doi.org/10.15779/Z38CR5ND33

* Assistant Professor and Co-Director of the Disability and Civil Rights Clinic at Brooklyn Law School. For their insights and comments, I am thankful to Adam Blumenkrantz, Robert Dinerstein, Susan Hazeldean, Clare Huntington, Katherine Macfarlane, Maya Manian, Jamelia Morgan, and Prianka Nair. I am grateful to participants in the Clinical Law Review Clinical Scholars' Workshop, the Feminist Legal Theory Collaborative Research Network Panel at the Law and Society 2021 Annual Meeting, the AALS Disability Law Works in Progress Session, and the Brooklyn Law School Junior Faculty Workshop for their thoughtful feedback on earlier drafts. I thank Brianna Baker, Sibel Iskender, Tara Mahon, and Mehvish Maqbol for exceptional research assistance.

This Article makes a novel contribution to the literature by presenting a study of the treatment of ADA claims in both family and federal courts since the promulgation of the new technical assistance in 2015. It demonstrates that, despite promising federal intervention, both family and federal courts still fail to vindicate the rights of parents with disabilities by sidestepping responsibility for parents' claims under the ADA. If family courts apply the ADA at all, they tend to offer a diluted application of the statute. Often, they disavow the applicability of the ADA to the family court proceedings or direct parents to federal courts or other ill-suited venues for relief. Families fair no better in federal courts, which often find that the ADA claims have already been decided in family court, sometimes even after the family court has specifically refused to consider an ADA-based claim. Placing these state and federal decisions side-by-side lays bare how ostensibly neutral principles of federalism have the effect of preventing any forum from applying federal anti-discrimination law to parents with disabilities, harming these parents in the family regulation system. This transforms the ADA into an empty vessel for parents with intellectual disabilities.

For the ADA to fulfill its promise, parents with intellectual disabilities must have a viable legal avenue to enforce it. This Article offers concrete avenues to vindicate this promise of the ADA. In federal courts, parents with intellectual disabilities should be able to bring ADA-based claims without running afoul of federal doctrines that prevent review of state court decisions. And, in state courts, advocates and judges should either apply the ADA directly or use the ADA as the benchmark of what services and supports the state must offer to avoid discriminating against parents with disabilities. More broadly, this Article calls for an intersectional reimagining of the disability rights movement and is the first to apply the concept of DisCrit to family regulation.

INTRODUCTION

Between 2002 and 2006, Connecticut's Department of Children and Families (DCF) removed three children—Kristina, Joseph Jr., and Daniel—from the care of their parents Karin Hasemann and Joseph Watley.[1] DCF removed Kristina immediately after her birth when Karin insisted that Kristina was a boy, was having a heart attack, and should be fed in an "unusual and inappropriate pattern."[2] DCF removed Joseph Jr. and Daniel immediately following their births as well, this time based on a theory of "predictive neglect."[3] Ms. Hasemann reported a history of seizures and narcolepsy; she was diagnosed by a court evaluator as having "a schizotypal personality disorder," attention deficit disorder, and other disabilities.[4] Ultimately, the court terminated Ms. Hasemann and Mr. Watley's rights to all three children.

1. Watley v. Dept't of Child. & Fams., 991 F.3d 418, 421 (2d Cir. 2021) ("*Watley II*"). Ms. Hasemann is Kristina's biological mother. Ms. Hasemann and Mr. Watley are the biological parents of Joseph Jr. and Daniel. *Id.*

2. *Id.* at 422 (citing Watley v. Dep't of Child. and Famils., No. 3:13-cv-1858 (RNC), 2019 WL 7067043, at *4 (D. Conn. Dec. 23, 2019).

3. *Watley II*, 991 F.3d at 422 ("Predictive neglect allows a court to terminate a parent's rights if it is 'more likely than not' that the child under their care will be 'denied proper care and attention physically, educationally, emotionally, or morally.'").

4. *In re* Joseph W., Jr., 79 A.3d 155, 170 (Conn. Super. Ct. 2013).

Throughout their appearance in state court, Ms. Hasemann and Mr. Watley attempted to raise discrimination and reasonable accommodation claims under the Americans with Disabilities Act of 1990 (ADA). The Connecticut court admonished the Watley-Hasemann family that claims under the ADA must be raised in "a separate lawsuit against the Department of Children and Families for not accommodating your disability with their services."[5] After the final termination of their rights, Ms. Hasemann and Mr. Watley followed the instructions of the Connecticut court and filed a claim of discrimination in the United States District Court for the District of Connecticut. The district court recognized the "profoundly serious nature of the harm" alleged by the Watley-Hasemann family and "the role and responsibility of the federal district court in ensuring access to a federal trial proceeding for persons whose federal rights have been violated by state officials."[6] Nonetheless, the district court ruled that proceeding under the ADA in federal court was not an option for the parents because the state court had already decided the issues presented in this case.[7]

The predicament faced by the Watley-Hasemann family is not unique. Despite Congress's intention that the ADA "eliminat[e]" discrimination against individuals with disabilities,[8] parents enmeshed in family court proceedings across the country have found scant recourse for disability-based discrimination. Discrimination against parents with disabilities is at its zenith in cases involving parents with intellectual disability (ID).[9] Parents with ID are more than three times as likely to have their parental rights terminated than parents without a disability[10] and their children are removed at rates as much as 80 percent higher

5. Trial Transcript at 19:6–19:11, *In re* Joseph J. W., Jr., 79 A.3d 155 (Conn. Super. Ct. 2012) (Nos. L15-CP05-008 039-A, L15-CP06-008 191-A).

6. *Watley*, 2019 WL 7067043, at *3 (D. Conn. Dec. 23, 2019).

7. *Id.* ("I conclude that the amended complaint must be dismissed. . . .The primary obstacle to adjudication of the claims in the amended complaint is . . . that federal district courts lack subject matter jurisdiction to review state court judgments.").

8. 42 U.S.C. § 12101(b)(1).

9. Parents with any disability face disproportionately higher hurdles within the family system, but the extent to which discrimination of people with intellectual disabilities is implicitly accepted by court systems, lawyers, and broader society makes their treatment in the system an area of particular importance. *See* Robyn M. Powell, *Safeguarding the Rights of Parents in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 141 (2016) ("[C]hild welfare policies, practices, and adjudications are based—implicitly and at times, explicitly—on the postulation that parents with intellectual disabilit[y] are inherently unfit because of their disability.").

10. TRACIE LALIBERTE, ELIZABETH LIGHTFOOT, S. MISHRA & KRISTINE PIESCHER, PARENTAL DISABILITY AND TERMINATION OF PARENTAL RIGHTS IN CHILD WELFARE, MINN-LINK (2015). Available at http://www.cehd.umn.edu/ssw/cascw/research/minnlink/minnlinkpublications.asp [https://perma.cc/G64C-737L].

than are children of non-disabled parents.[11] The rights-based model[12] of disability has failed to penetrate family court, leaving parents with disabilities simultaneously more likely to be separated from their children and less likely to receive meaningful support to reunify with their families once they are involved in the family regulation system.[13]

The failure to provide a legal pathway for parents with disabilities to protect themselves and their children is part of the family regulation system's long history of removing children from parents deemed "undesirable." Removals have long been undertaken under the guise of "protecting" children from the families and communities that love and care for them. Frequently courts remove children and place them into institutional and private foster homes in the name of "safety," but history reveals that child removal often derives from different, darker goals.[14] For parents with ID, caseworkers' desire to "save" children has combined with society's deep distrust of, and discomfort with, disabled people to create the outcome we have today.[15]

For nearly twenty-five years after the passage of the ADA, most family courts found that the law did not apply to, and could not be raised in, family court

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11. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 15 (2015) [hereinafter ROCKING THE CRADLE], https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/8GBM-5B94].

12. For discussion of the rights-based model and its shortcomings, see Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1994); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1983-84).

13. In line with leading scholars in the field, this Article uses the term "family regulation system" to describe what is often described as the "child welfare system." *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (Jun. 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/C77K-PHY9] (describing "the misnamed 'child welfare system'" as "more accurately referred to as the 'family regulation system.'"); Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, THE IMPRINT, https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 (Jul. 28, 2020) [https://perma.cc/Y7XY-XA8M].

14. *See, e.g.*, LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020) (documenting the history of parent-child separation through U.S. history and tendency to invoke "child protection" as a means of social control targeting poor families of color); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (rigorously documenting the disproportionate representation of Black children in the family regulation system and the extent to which it has reinforced racial inequality).

15. Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. TIMES (Jul. 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html [https://perma.cc/G6E9-32NM] (describing history of eugenics and forced sterilization involving people with disabilities, people living in poverty as well as Black, Latino, Asian American or Native American people); Jasmine E. Harris, *Why* Buck v. Bell *Still Matters*, BILL OF HEALTH (Oct. 14, 2020), https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters/ [https://perma.cc/G6E9-32NM]; ADAM COHEN, IMBECILES: THE SUPREME COURT, EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016) (recounting the history of *Buck v. Bell*, the Supreme Court case allowing mass eugenic sterilization of people who were seen as a threat to the gene pool).

proceedings.[16] In 2015, the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) jointly issued technical assistance (TA) acknowledging ongoing discrimination against parents with disabilities within the family regulation system.[17] The guidance followed an investigation spurred by a specific complaint and recognized the continued disproportionate separation of parents with disabilities from their children.[18] The resulting TA is clear, specific, and unequivocal: the ADA applies to the programs, services, and activities conducted by state family regulation agencies and proceedings in family court.[19] HHS has since entered voluntary agreements with Oregon and Washington following complaints that their family regulation agencies were removing children from parents with ID based on stereotypes and discriminatory assumptions about their ability to parent.[20]

Nonetheless, disproportionate family separation continues, and many family courts across the country still refuse to consider meaningfully claims of discrimination under the ADA.[21] Caught in a catch-22, parents then face decisions by federal district courts refusing to hear family regulation-based ADA claims on the basis that they have already been litigated in family court, that

16. *See In re Antony B.*, 735 A.2d 893, 899 (Conn. App. Ct. 1999); *In re B.S.*, 693 A.2d 716, 720-22 (Vt. 1997); *In re Torrance P.*, 522 N. W.2d 243, 245-46 (Wis.App. 1994); *In re Doe*, 60 P.3d 285, 290 (Haw. 2002).

17. *See* U.S. Dep't of Health and Human Servs. & Dep't of Justice, 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 9 (2015) [hereinafter TECHNICAL ASSISTANCE], Available online athttps://www.hhs.gov/sites/default/files/disability.pdf [https://perma.cc/RW7V-CMAK].

18. *Id.* at 2.

19. *See id.* at 9.

20. *HHS OCR Secures Voluntary Resolution and Ensures Child Welfare Programs in the Oregon Department of Human Services Protect Parents with Disabilities from Discrimination*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Dec. 4, 2019), https://www.hhs.gov/about/news/2019/12/04/hhs-ocr-secures-voluntary-resolution-and-ensures-child-welfare-programs-in-the-odhs-protect-parents-with-disabilities-from-discrimination.html [https://perma.cc/735H-MQ4B]; *Department of Justice (DOJ) and Washington Department of Children, Youth and Family Services Settle Claims of Americans with Disabilities (ADA) Violations*, U.S. ATTORNEY'S OFFICE EASTERN DISTRICT OF WASHINGTON (Apr. 19, 2021), https://www.justice.gov/usao-edwa/pr/department-justice-doj-and-washington-department-children-youth-and-family-services [https://perma.cc/74QH-KV8G]. In November 2020, HHS released technical assistance for the state of New Jersey. *HHS OCR Provides Technical Assistance to Ensure New Jersey Department of Children and Families Protect Parents with Disabilities from Discrimination*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 13, 2020), https://www.hhs.gov/about/news/2020/11/13/hhs-ocr-provides-technical-assistance-ensure-new-jersey-department-children-families-protect-parents-disabilities-from-discrimination.html[https://perma.cc/9WV4-7WBL]. A voluntary agreement with Massachusetts followed the 2015 investigation. *HHS Office for Civil Rights Reaches Landmark Agreement with Massachusetts Department of Children and Families to Address Discrimination against Parents with Disabilities*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 19, 2020), https://www.hhs.gov/about/news/2020/11/19/hhs-office-civil-rights-reaches-landmark-agreement-massachusetts-department-children-and-families.html[https://perma.cc/4WS8-8JYD].

21. *See, e.g.*, *In re* Lacee L., 114 N.E.3d 123, 129–30 (N.Y. 2018); *In re* Elijah C., 165 A.3d 1149, 1164–65 (Conn. 2017).

statutes of limitations have been exhausted, and that other—largely procedural—bars preclude relief.[22] In practice, the application of a significantly diluted version of the ADA in family court and the bars on litigation in federal court mean that parents cannot rely on the ADA to seek protection from discrimination or as a means of preventing the agency from using their disability against them in removing their children.

There is a significant body of existing scholarship that challenges and critiques the constitutionality of termination of parental rights statutes based on a parent's diagnosis with intellectual or cognitive disabilities. This scholarship largely focuses on the statutes of states that allow courts to find a parent unfit because of their disability.[23] Likewise, there have been substantial scholarly efforts to encourage more meaningful use of the ADA in family court proceedings. In particular, Professors Joshua B. Kay, Charissa Smith, and Robyn Powell have each assessed and explored the power and potential of the ADA in family court proceedings, generating ideas for use of the ADA and elevating the ADA as a tool for the meaningful generation of rights in family court.[24] Laying critical ground for this Article, Professor Kay has explored the growing use of the ADA in family court proceedings, identifying variations in application of the statute in family courts across the country, the use of the ADA as a defense in certain proceedings, and recent advances in state decisions and statutes.[25]

This Article demonstrates that although the recent Federal TA usefully spotlights the specific needs of marginalized families, neither state nor federal court offers a venue for litigating claims under the ADA, and, as such, the ADA remains an ineffective tool to preserve and protect the rights of parents with ID.

Diverging from prior articles in this field, this Article examines the application of the ADA in family and federal courts in light of the issuance of the DOJ/HHS TA. A close study of both family and federal court decisions since the 2015 TA reveals that both venues remain largely hostile to claims of disability discrimination from parents with ID. A growing number of family courts now acknowledge that the ADA technically applies to family regulation

22. *See, e.g.*,, Watley v. Dep't of Child. and Fams., NO. 3:13-cv-1858, 2019 WL 7067043 (D. Conn. Dec. 23, 2019).

23. *See, e.g.*, Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 L. & PSYCH. REV. 205 (2014); Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535 (2005). *See also* ROCKING THE CRADLE, *supra* note 11, at 16.

24. *See, e.g.*, Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. UNIV. L. REV. 783 (2018); Powell, *supra* note 9; Charisa Smith, *Making Good on Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and The Termination of Parental Rights of Parents with Disabilities*, 18 QUINNIPIAC HEALTH L. 191 (2015). *See also* Dale Margolin Cecka, *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 (2007); Chris Watkins, *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 (1995).

25. Kay, *supra* note 24, at 806–814.

proceedings, and to the services provided by family regulation agencies. Still, the majority continue to hold that family court itself is not the proper venue to bring ADA-based claims or have determined that the ADA does not substantively change state agency burdens under relevant state law. And federal courts find that the substance of ADA claims have already been decided in state court, sometimes even after a family court has explicitly refused to consider an ADA-based claim.

After documenting this problem, this Article offers concrete avenues to vindicate the ADA in family and federal courts. Analyzing federal doctrine, this Article argues that federal courts can hear ADA-based claims without running afoul of federal doctrines that prevent review of state court decisions. Opinions to the contrary have resulted from misunderstandings of the legal meaning of certain family court findings and the reality of how services are provided in family court. In federal courts, judges and the advocates appearing before them must educate themselves about how the family regulation system operates. A correct understanding of the workings of family court will create a pathway for federal courts to hear ADA claims based on discrimination occurring in the family regulation system. Intentional and strategic litigation in state courts will also advance the rights of parents with ID. Advocates should strive to replicate legal standards that directly apply the ADA to family court cases. Where the ADA is not directly applied, advocates should urge the duplication of family court decisions that effectively use the ADA as a benchmark for what services and supports must be offered to avoid discrimination against parents with disabilities.[26]

More broadly, this Article calls for an intersectional reimagining of approaches to disability rights in family court. One necessary response to the failure of the ADA to reach family courts is to look beyond the rights-based model of disability to the more expansive frameworks of disability justice and Dis/ability Critical Race Studies (DisCrit).[27] While scholars have explored the application of DisCrit and Disability Justice to immigration, criminal law, and

26. *See, e.g., In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017); *In re* Xavier Blade Lee Billy Joe S., 131 N.Y.S. 3d 541 (N.Y. App. Div. 2020).

27. Also called DisCrit, Dis/ability Critical Race Studies is a theory developed around the intersection of race and disability in education. *See generally* DISCRIT—DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 9 (David J. Connor, Beth A. Ferri, & Subini A. Annamma eds., 2016) [hereinafter DISCRIT].

other areas,[28] none have applied DisCrit to family regulation.[29] Given the stunning lack of opportunity for parents with ID to protect themselves from discrimination, the need to reimagine how our legal system will protect the rights of parents with disabilities is clear.

Part I of this Article describes the history of discrimination against parents with ID—and in particular those of color—alongside the battery of other challenges facing these parents in the family regulation system. Part II addresses the two primary federal regimes that shape the treatment of parents with disabilities in the family regulation system and introduces the Disability Justice movement, as well as the theoretical frame of DisCrit. Part III closely examines litigation in family and federal courts since the issuance of the 2015 DOJ/HHS TA, demonstrating that state and federal courts largely prevent parents with disabilities from using the ADA to vindicate their right to be free from discrimination and to seek accommodations. Part IV advances concrete avenues of advocacy in federal and state court. Part V suggests that even with the use of these litigation strategies, service providers, scholars, and our society at large must reimagine the family regulation system. Scholars, courts, parents, and advocates should adopt a DisCrit lens to disrupt and reconfigure the ordinary practice of the family regulation system and its treatment of parents with ID.

I.
PARENTS WITH INTELLECTUAL DISABILITIES

A. Notes on Language and Understanding Disability

Within the many and diverse communities of people with disabilities, language and the words that are used to describe people with disabilities make up a vital and ongoing conversation. Indeed, writing about ID inherently requires grappling with complicated—and often disputed—issues of definition.

As a starting point, the American Association on Intellectual and Developmental Disabilities (AAIDD) defines a diagnosis of ID by three criteria:

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28. Natalie M. Chin, *ADA @ 30 — Dismantling the Master's House* (Aug. 24, 2020), https://medium.com/@professornmchin/ada-30-dismantling-the-masters-house-48e6cb1acdd1 [https://perma.cc/8RMZ-8PZ7] (critiquing the "porousness in access to the promises of the ADA for disabled people who live at the intersection of marginalized identities" and arguing that "Disability rights and racial justice must stand together in cross-movement solidarity to dismantle the master's house"); Katherine Perez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy* UCLA L. REV. (Feb. 2, 2019) https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy/#_ftnref28 [https://perma.cc/W3PH-Q5X5]; Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, STAN. L. REV. ONLINE (Oct. 2020) https://www.stanfordlawreview.org/online/reweighing-medical-civil-rights/ [https://perma.cc/2LZL-7CDY]; Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 986 (2018).

29. In *Achieving Justice For Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM (forthcoming 2022), Robyn M. Powell applies an abolitionist approach to the family regulation system, using the lens of disability justice. Professor Powell offers a six-pronged agenda for advancing justice for parents with disabilities and their families. *Id.*

(1) Significant intellectual limitations, typically an IQ score at least two standard deviations below the mean.

(2) Significant limitations in adaptive behavior.[30]

(3) Limitations begin before the age of 18.[31]

This definition is not offered as absolute but provides some idea of how the legal, psychiatric, and medical communities understand and define the diverse population of adults who might be identified as adults with ID. There is also a relatively straightforward definition of ID in the Fifth Edition of the Diagnostic and Statistics Manual,[32] and there are numerous other competing definitions provided by legal statutes that relate to public benefits,[33] guardianship laws[34] and other areas.

Importantly, the diagnosis-driven understanding of disability, often described as the "medical model" of disability, has been rejected by many people with disabilities and their advocates. Instead, many within the disability community use the "social model" of disability. Whereas the medical model understands and explains disability by whether a person has certain characteristics and carries a specific diagnosis, the social model understands that disability exists within—and often because of—norms defined by broader society.[35]

The social model of disability asserts that disability is not explained by a specific diagnosis but rather as a failure of society to support specific people in specific ways. Under the social model, a person with an ID is understood not by

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30. Adaptive behavior encompasses three areas of "skills": "conceptual skills (*e.g.*, language, writing, reading, money concepts), social skills (*e.g.*, self-esteem, respect of rules, vulnerability), or practical skills (*e.g.*, daily living, vocational, safety)." American Association on Intellectual and Developmental Disabilities, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 3–12, 44 (2010) [hereinafter AAIDD MANUAL].

31. *Id.*

32. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33–36 (5th ed. 2013).

33. *See, e.g.*, Gina A. Livermore, Maura Bardos & Karen Katz, *Supplemental Security Income and Social Security Insurance Beneficiaries with Intellectual Disability*, OFF. RETIREMENT & DISABILITY POL'Y (2017) https://www.ssa.gov/policy/docs/ssb/v77n1/v77n1p17.html [https://perma.cc/5J88-KBR6] (offering extensive definition of ID).

34. *See, e.g.*, N.Y. Surr. Ct. Proc. Act Law § 1750 (McKinney 2016) (defining a person who is intellectually disabled as a person who has been certified by one licensed physician and one licensed psychologist or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an ID).

35. Michael Arehart 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."). *See* Michael Arehart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 188 (2008) (defining the social model of disability and noting that "given the expanse of its supporters, no one restatement of the social model will cover every interpretation"). *See also* Shirley Lin, *The Law & Political Economy of Disability Accommodations*, LPE PROJECT (Apr. 5, 2021), https://lpeproject.org/blog/the-law-political-economy-of-disability-accommodations/ [https://perma.cc/4CHL-8APU] ("Under this 'social model,' whether a condition makes someone unable to perform a certain task is largely a matter of how society sets up the task.").

their diagnosis but by society's willingness, ability, or failure to support them.[36] When viewed through a social lens, the focus naturally expands beyond a set of physical, neurological, or physiological deficits and, instead, underscores the "relational, contingent, fluid, and subjective nature" of disability.[37] Notably, the social model does not discount the existence of difference—whether in body, hearing, mind, or otherwise—but shifts the emphasis to the consequences of the impairment and how such consequences are shaped by social and environmental norms.[38] This shift, in turn, can lead more readily to identifying what specific forms of support a person might need to thrive in our society.

In the context of ID, the pitfalls of relying on a medical definition go beyond merely the typical limits of the medical model, in that the broad diversity of who is included by the medical definition is not well expressed by rigid listings from a medical manual. The group is a heterogenous one with members having very different strengths and needs for supports. As the AAIDD has explained, while IQ "might be appropriate for a research study in which measured intelligence is a relevant variable," it is not meaningful when assessing how and where a person will best live and learn.[39] This same observation may be applied to parenting skills and the building of family relationships.[40]

The medical model of disability is also fraught because of the extent to which dominant groups have, historically, used diagnosis or the naming of specific "conditions" as a means of pathologizing individuals and justifying societal norms. This extends beyond people with disabilities and has included people from marginalized communities, including Black, Indigenous, and other people of color. "The most common disability argument for slavery was simply that African Americans lacked sufficient intelligence to participate or compete on an equal basis in society with [W]hite Americans."[41] An additional line of argument held that "inherent physical and mental weaknesses" would make

36. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1401 ("Even if one accepts some impairments as inherently undesirable, the social model shifts the focus from whatever physical or mental variation an individual might bear, to the ways that the environment renders that variation disabling.").

37. Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1407 (2021) (citing Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 2–3 (2013)).

38. *Id.* 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." (citation omitted)).

39. AAIDD MANUAL, *supra* note 30, at 22.

40. MAURICE FELDMAN & MARJORIE AUNOS, COMPREHENSIVE, COMPETENCE-BASED PARENTING ASSESSMENT FOR PARENTS WITH LEARNING DIFFICULTIES AND THEIR CHILDREN 13 (2011) ("Often an IQ test is used as an (inappropriate) substitute for parenting capacity assessment" (citations omitted)).

41. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, *in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 37 (Paul K. Longmore & Lauri Umansky eds., 2001).

Black people more likely to become disabled under the conditions of freedom.[42] Drapetomania was one such theoretical condition that caused slaves to run away because of a mistaken belief that they were equal to their masters.[43] Another condition was thought to "result[] in a desire to avoid work and generally cause mischief."[44] These examples illustrate the extent to which medical diagnosis has been used to pathologize individuals and their behaviors rather than laying blame on conditions or systems external to the individual.[45]

B. Disproportionality in the Family Regulation System

Numerous studies have established the disproportionate representation of parents with ID in the family regulation system. Parents with ID are more than three times as likely to have their parental rights terminated as compared to parents without a disability,[46] and their children are removed at rates as much as 80 percent higher than children of non-disabled parents.[47] One recent study also revealed disparities in the likelihood that authorities will substantiate a report of potential abuse or neglect: reports relating to caregivers with any disability are 70 percent more likely to be substantiated and parents with ID had 58 percent higher odds of substantiation.[48] 19 percent of children in foster care are placed there, at least in part, because of parental disability, and 5 percent are in foster care solely because of parental disability.[49]

The treatment of parents in the modern family regulation system cannot be understood in a vacuum. As scholar Robyn Powell has suggested, the family regulation system exists and functions in such close connection to the history of

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42. *Id.* at 37. *See also* Chris Chapman, *Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination*, *in* DISABILITY INCARCERATED 33 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) (following emancipation from slavery, Black Americans "were first among those massively deemed 'in need' of incarceration and institutionalization").

43. Baynton, *supra* note 41, at 38.

44. *Id.*

45. Many prison abolitionists trace the pathology of Black people—and people with disabilities or those who are otherwise marginalized—to slavery through "the lineage of oppression and segregation based on race and color in the United States. . . ." LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 18 (2020). *See also* Jennifer Pokempner & Dorothy Roberts, *Poverty, Welfare Reform and the Meaning of Disability*, 62 OHIO ST. L.J. 425–26 (2001) (stressing the salience of disability as the consequence of injuries and deprivations rooted in racial and class oppressions).

46. TRACIE LALIBERTE ET AL., *supra* note 10.

47. ROCKING THE CRADLE, *supra* note 11, at 15.

48. Sharyn DeZelar & Elizabeth Lightfoot, *Who Refers Parents with Intellectual Disabilities to the Child Welfare System? An Analysis of Referral Sources and Substantiation*, 119 CHILD. & YOUTH SERVS. REV. 105, 639 (2020). DeZelar & Lightfoot found that the likelihood of substantiation also increased depending upon the source of the report. *Id.* at 643 ("[F]or cases involving caregivers with ID, cases are more likely to be substantiated, indicated or otherwise determined if they entered the system based on a report from a social service worker rather than from any other type of professional reporter.").

49. 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).

discriminatory and dehumanizing treatment of people with disabilities that it can be understood as a "backdoor" for the eugenics movement.[50]

The abhorrent treatment of adults and people with disabilities of all kinds, and especially ID, is well documented. The roots can be traced through the Supreme Court's 1927 decision *Buck v. Bell*. In *Buck*, the Supreme Court approved of the involuntary sterilization of a woman with an ID based on the loathsome reasoning that "three generations of imbeciles are enough."[51] Forced sterilization continued through the 1990s.[52] This history is bound up inextricably with the history and tools of scientific racism and efforts to prove that Black people are subhuman and inherently less evolved than their White counterparts.[53] It is also bound up with the law: there is a history of statutes discouraging the reproduction of people of color and the poor on the belief that these groups are inferior and must be limited.[54]

Alongside the disproportionate representation of parents with disabilities, the disproportionality of parents and guardians of color in the family regulation

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50. Powell, *supra* note 9, at 132. *See also* Nicole Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75, 88–89 (2018) (describing recent history of disabled women being forcibly sterilized or "pressured or coerced by doctors to undergo sterilization").

51. Buck v. Bell, 274 U.S. 200, 207 (1927). The story of Carrie Buck has been the subject of much historical inquiry. *See, e.g.*, ADAM COHEN, *supra* note 15; PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL (2008). *See also* Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246 (2021) (connecting Buck v. Bell to contemporary "reproductive oppression" of individuals with actual and perceived disabilities); Harris, *supra* note 15. Carrie Buck was living in foster care when she became pregnant. *See Hidden Brain, Emma, Carrie, Vivian: How a Family Became a Test Case For Forced Sterilizations*, NPR (Apr. 23, 2018), https://www.npr.org/transcripts/604926914 [https://perma.cc/5JAU-ZEJZ]. In later interviews, Ms. Buck consistently maintained that her pregnancy was the result of rape by the nephew of her foster mother. *Id.* It appears likely that the rape and Ms. Buck's subsequent pregnancy—not her IQ or cognitive ability—were the reason that her foster mother sent her to the institution. *Id.*

52. ROCKING THE CRADLE, *supra* note 11. *See also* Paul Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. OF HEALTH L. & POL'Y 57, 62 (2009) (describing *Buck* as applying "the theory that poverty, disease, and unruly sexuality could be wiped out by state mandated surgery"); MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN (1999).

53. Lombardo, *supra* note 52, at 59; Cohen, *supra* note 15; Baynton, *supra* note 41, at 33–57; Laura T. Kessler, *"A Sordid Case":* Stump v. Sparkman, *Judicial Immunity, and the Other Side of Reproductive Rights*, 74 MD. L. REV. 833, 874 (2015) ("Beginning in the late 1960s, the medical profession and government systematically targeted poor women for 'family planning' services as part of an anti-poverty and population control agenda.").

54. As Paul Lombardo has written, "[t]he energies devoted to negative eugenics have often found an expression in the law," including immigration restrictions based on genetic superiority of some ethnic and racial groups, and "racial integrity" laws which prevented interracial marriage. Lombardo, *supra* note 52, 60–61. *See also* Kessler, *supra* note 53, at 840 (examining contemporary public law and public policy through the lens of eugenic ideology); DISCRIT, *supra* note 27 at 22 (citing Martha Menchaca, *Early Racist Discourses: Roots of Deficit Thinking*, *in*, RICHARD R. VALENCIA, THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE113–131 (1997).

system is well documented.[55] Understanding the causes and effects of these two phenomena require us to grapple with the forces of racism and ableism.[56] School disability labels—including which, and how, students are labeled—are a concrete example of how racism and ableism impact the family regulation system. How a child is labeled in school connects to the eventual treatment of parents in the family regulation system: parents who received special education in high school are at greater risk of termination and system involvement than other parents. One study estimated that parents who had a disability label in their school records are more than three times as likely to face termination of parental rights and more than twice as likely to become involved in the family regulation system than peers without a disability label.[57] This is significant because of documented disproportionality in education: compared to White peers, Black students are three times as likely to be labeled "mentally retarded," two times as likely to be identified as emotionally disturbed, and one and one half times as likely to be labeled learning disabled.[58] Thus, the disproportionate inclusion of Black children in special education portends their eventual treatment in the family regulation system. In these numbers, there is evidence of the cocreation

55. The issue of racial disproportionality in the family regulation and foster systems has received growing attention in recent years, and for good reason. *See, e.g.*, BRIGGS, *supra* note 14; ROBERTS, *supra* note 14. *See also Disproportionality and Race Equity in Child Welfare,* NAT'L CONF. STATE LEGISLATURES (Jan. 26, 2021), https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx [https://perma.cc/JY9T-T595]. Black children and families are disproportionately involved in the family regulation system: nearly 25 percent of children in foster care in 2019 were Black and 21 percent were Hispanic. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT NO. 27 (2020). Available at https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/L7G5-E567]. 53 percent of Black children experience a child protective investigation by the age of eighteen. 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).

56. 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 ability to satisfactorily [re]produce, excel and "behave."
>
> You do not have to be disabled to experience ableism.

Talila A. Lewis, January 2021 Working Definition of Ableism, https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism [https://perma.cc/UCF4-4G6Y].

57. ROCKING THE CRADLE, *supra* note 11, at 77-78.

58. DISCRIT, *supra* note 27, at 11 (citation omitted) (pointing out that over-representation of students of color is much less likely in categories relating to physical or sensory disabilities and arguing that "this fact alone is evidence that race and perceived ability (or lack thereof) are still connected within educational structures and practices today albeit in much more subtle ways"). *See* Smith, *supra* note 24, at 18.

of race and disability and its relationship to family regulation: Black children who are more likely to be given a disability label, and therefore placed in special education, then grow up and are more likely to have their families forcibly separated.

C. *Explanations for Disproportionality*

Outside of the stigma-stained history, how can we account for the continued disproportionality of parents with ID in the family regulation system and the systemic failure to support these parents? One long-debunked but still pervasive explanation is that parents with ID are inherently unfit or unable to learn the skills required to parent.[59] While these beliefs and stigmas still exist—and may help to explain overinclusion and bias in the family regulation system[60]—the social science is clear that parents with ID can and do parent successfully.[61] Ample evidence that there is no clear relationship between intelligence and parenting ability underscores this point.[62]

Other explanations for overrepresentation, many related to the failure to provide comprehensive support for adults with ID, also exist. Adults with ID are less likely to have appropriate social supports and more likely to be isolated.[63] Adults with ID are more likely to be victims of intimate partner violence and those who require mental health counseling or substance abuse treatment are considerably less likely to find appropriate, tailored supports in their communities.[64] Moreover, parents with ID are more likely to be in contact with the service providers who are very often mandatory reporters and, it is

59. *See* Powell, *supra* note 9. *See also* Kate Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 559–61 (May 8, 2020) (listing contemporary examples of continued stigma, bias and discrimination faced by people with disabilities).

60. DeZelar & Lightfoot, *supra* note 48, at 639 (collecting studies and pointing to international studies which suggest parents with ID face different types of disparities than parents with other types of disability).

61. *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 ID to learn parenting skills and the most effective interventions); Elizabeth Lightfoot & Mingyang Zheng, *Promising Practices to Support Parents with Intellectual Disabilities*, PRACTICE NOTES, Fall 2019, https://cascw.umn.edu/wp-content/uploads/2019/11/PN34_WEB508.pdf [https://perma.cc/DVB3-F3CQ].

62. *See, e.g.*, Tim Booth & Wendy Booth, *Parenting with Learning Disabilities*, 23 BRIT. J. SOC. WORK 459, 461–63 (1993) ("On this point, however, the research evidence is consistent and persuasive. There is no clear relationship between parental competency and intelligence."); Katie MacLean & Marjorie Aunos, *Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Policy Project*, 16 J. DEVELOP. DISABILITIES 18, 18-19 (2010) (summarizing the initial group of studies that "discredited the idea that one's IQ was the sole predictor of child outcomes").

63. *See, e.g.*, Elspeth M. Slayter & Jordan Jensen, *Parents with Intellectual Disabilities in the Child Protection System*, 98 CHILD. & YOUTH SERVS. REV. 298 (Jan. 2019) (citations omitted). Note that in advancing arguments for specialized and individualized services for parents with ID, there is the problematic potential for reification of the able/disabled binary. *See* DISCRIT, *supra* note 27. Indeed, to the extent that services specifically tailored for parents with ID are offered within the current child welfare system, reification of this false binary is the likely result.

64. *See* Slayter & Jensen, *supra* note 57, at 298.

hypothesized, are more likely to be reported than those parents without ID.[65] Parents with disabilities are more likely to live in poverty than the general population,[66] a salient difference because "poverty itself is a prominent risk factor for involvement with the child protection system."[67] These factors, not the disability itself, place parents with ID at higher risk of system involvement.[68]

The reasons that parents with ID are more likely to be caught in the family regulation system are only amplified once they actually enter the system. For example, a parent who was unable to take full advantage of existing forms of social support because of their learning style—such as pre-birth parenting classes—is unlikely to be able to take advantage of routine parenting services designed for neurotypical parents offered as part of a family regulation intervention.[69] Research supports the need for one-on-one training, offered in the environment in which it will be practiced, and tailored to the specific parent involved in the class.[70] Unfortunately, specific services designed to support parents with ID are largely unavailable.[71] This lack of meaningful support is exacerbated by the biased notion that parents with disabilities are themselves inherently dangerous to their children.[72] As Professor Charisa Smith has posited, "parents with [mental] disabilities . . . are often typecast as perpetrators of child maltreatment and not offered the opportunity to find the root of the alleged maltreatment and reunify their famil[ies]."[73]

D. Problems of Identification and Definition

One fundamental barrier to serving parents with disabilities in the family regulation system is that it is unknown how many there are; this gap in data exists both because few are counting and because there is not strong agreement about who exactly counts. Indeed, disability itself can be difficult to define, and the

65. DeZelar & Lightfoot, *supra* note 4853, at 5–6. *See also* FIELD & SANCHEZ, *supra* note 52.

66. Kay, *supra* note 24, at 787-88 (parents with disabilities are twice as likely to be living in poverty). *See also* Slayter & Jensen, *supra* note 63, at 298 (collecting case studies).

67. Kay, *supra* note 24, at 788.

68. The experiences of parents with ID "show more similarities than differences with other . . . families from the same social background, and the problems they encounter or present tend to mirror those of other 'at risk' groups." Booth & Booth, *supra* note 62, at 476.

69. *See* Maurice A Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning*, 24 J. INTELL. & DEVELOP. DISABILITY 27, 28 (1999) (describing the specific teaching modalities best suited for teaching parents with ID).

70. *See, e.g.*, Lightfoot & Zheng, *supra* note 61 (best practice for working with parents with ID is to provide tailored services designed for the specific parent in question, to teach in the environment will skills will be used, and to offer teaching in one-on-one environment); *Parents with Intellectual Disabilities*,), THE ARC (Mar. 1, 2011), https://thearc.org/wp-content/uploads/forchapters/Parents%20with%20I_DD.pdf [https://perma.cc/6AKS-ADAK].

71. Kay, *supra* note 24, at 812.

72. Smith, *supra* note 24, at 200.

73. *Id.*

definition varies depending on context.[74] The statistics cited above are largely based on extrapolations from small, often localized, data.[75] In fact, "a national-level study on the prevalence and characteristics of [parents with ID] in the child protection system does not exist in the United States."[76]

The Adoption and Foster Care Analysis and Reporting System (AFCARS), a database maintained by HHS's Children's Bureau, includes case-level information from state family regulation agencies on all children in foster care. Though AFCARS collects information twice annually, and agencies are required to submit data, it does not track the disability status of parents.[77] While the National Child Abuse and Neglect Data System (NCANDS) does track this data, compliance with NCANDS reporting is voluntary and, for states who do report, there is no indication of how disability should be identified for reporting. Within NCANDS, there are variations in reporting across states that prevent accurate accounting and meaningful comparisons across states.[78] Importantly, NCANDS data is generated from the records maintained by caseworkers and is therefore susceptible to variations in decision-making by caseworkers in individual cases.[79] There are many reasons that a caseworker may not report an existing ID: it may be a perceived ID as opposed to a diagnosed one, the parent may seek to hide it from the caseworker, the parent may disagree with or resist the ID label outright, the disability may be so mild as to go undetected, or it may not be the primary issue in the case.[80]

Adding to the confusion about identification and reporting, parents themselves may not self-identify as having a disability for many reasons. As scholar Jasmine Harris has pointed out, to "avail yourself of protection from disability discrimination," you must first prove the legitimacy of your disability

74. *See* Samuel Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 830 (2003). *See also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 399 (2000) (noting, in the employment context, that the "ambiguity of that definition 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."). *See also* DISCRIT, *supra* note 27 (pointing out that changing definitions of disability over time reveals the subjective nature of the label).

75. "National estimates of the number of parents with disabilities are usually based on projections from much fewer data or estimated by complex extrapolations." ROCKING THE CRADLE, *supra* note 11, at 43 (discussing the lack of data in this area and asserting that "[b]ecause of the scarcity of substantive data at the local and national levels, parents with disabilities remain mostly invisible").

76. Slayter & Jensen, *supra* note 63, at 297. *See generally* Robyn 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 Stanford L. & Pol'y Rev. 119 (2020).

77. *See* Kay, *supra* note 24, at 208.

78. *See, e.g.*, Slayter & Jensen, *supra* note 63, at 299.

79. *Id.* (hypothesizing various possible explanations for the underreporting of parents with disabilities in the family regulation system).

80. *Id.*

which requires "direct contention with social norms."[81] In the family regulation system this "direct contention with social norms" requires parents to choose between asking for greater and more specific forms of assistance but risking discrimination, and forgoing the potential for greater assistance. "[L]ong-standing conceptions of disability as . . . functional limitation and the inability to work" persist, making self-identification of ID a significant risk in any social context.[82] This choice is only exacerbated by the adversarial system in which parents are fighting the legal battle for the right to raise their children.[83]

For some, the decision to hide or avoid a diagnosis may come from perceived or actual stigma.[84] Others may have never been diagnosed or may have been misdiagnosed. Still others will be deterred by the laws in many states that list ID as a ground for termination of parental rights.[85] The combination of the fear of the legal threat of termination of parental rights based on ID, the stigma of identifying as having ID, and well-grounded fears of bias and discrimination, may prompt parents with ID to make the decision to avoid seeking assistance altogether.

II.
FEDERAL LEGAL REGIMES AND THEORETICAL FRAMEWORKS

A. The ADA

The 1990 passage of the ADA involved years of organization and a broad coalition of congressional support, activists, and national nonprofits like The National Council on Disability, then called The National Council on the

81. Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 49-50 (2020).

82. Eyer, *supra* note 59 (thoroughly exploring the challenges and choices involved in self-identification as a person with a disability).

83. Mandatory reporting "establishes an adversarial relationship between the State and the parent at the outset of the relationship." Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. L. REFORM, 281, 295 (2007). For further discussion of the adversarial relationships that can develop, and one parent's account of how a disability label impacted her case, see generally L. Frunel and Sarah Lorr, *Lived Experience and Disability Justice in the Foster System*, 11 COLUMBIA J. OF RACE & L. _ (forthcoming 2021). *See also* Erin Miles Cloud, *Toward the Abolition of the Foster Care System*, 15 S&F Online 3 (2019), http://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/#identifier_48_4262 [https://perma.cc/Z4Z7-U4FN].

84. Parents with disabilities who rely on public assistance face an especially profound stigma as they may encounter both what Doron Dorfman has called "fear of the disability con" and the deep suspicion of women on welfare. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051 (2019); ROBERTS, *supra* note 14, at 16–17 (describing history of suspicion and distrust of parents seeking welfare assistance, especially Black mothers).

85. ROCKING THE CRADLE, *supra* note 11, at 15 (two-thirds of states have laws allowing disability as a basis for TPR; nearly all allow disability to be considered as a factor in determining whether TPR is in the "best interest" of a child).

Handicapped.[86] Adults with disabilities across the nation played a pivotal role in educating others—and themselves—about the bill's potential.[87] Alongside this nationwide effort, adults with disabilities led a fierce movement complete with sit-ins and demonstrations.[88]

Once passed, the ADA offered the unprecedented promise of protection from discrimination in the realms of private employment, public services, public accommodations offered by private entities, telecommunication, and transportation.[89] Within these broad realms, the ADA prohibits discrimination against any "qualified individual with a disability,"[90] including those with "physical or mental impairment[s] that substantially limit[] one or more major life activit[y]."[91] To be a qualified individual with a disability, one must have such an impairment, have a record of having such an impairment, or be regarded as having such an impairment.[92]

Title II of the ADA forbids discrimination by state and local government, including in the provision of services, programs, or activities of the state.[93] The

86. For a history of the legislative and strategic efforts that led to the passage of the ADA see Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/ [https://perma.cc/GY8D-7YCF]. *See also* Joe Ability, *A Brief History of Disability Rights & the Americans with Disabilities Act*, LIVABILITY MAG. (Jul. 14, 2015), https://ability360.org/livability/advocacy-livability/history-disability-rights-ada/ [https://perma.cc/TFE9-649E] (describing the role of American Disabled for Attendant Programs Today); *ADA History – In Their Own Words: Part One*, ADMIN. FOR CMTY. LIVING (Jul. 27, 2020), https://acl.gov/ada/origins-of-the-ada [https://perma.cc/TL46-5ZEF] (describing the role of The National Council on Disability in drafting the first versions of the ADA).

87. People with disabilities were asked to create "diaries" highlighting instances of disability discrimination faced in their daily lives. Using these testimonials, Justin Dart, Chair of the Congressional Task Force on the Rights and Empowerment of People with Disabilities, held public hearings across the country, attended by thousands of people. *The ADA Diaries*, IT'S OUR STORY, http://www.itsourstory.com [https://perma.cc/UVJ5-LRE4]. This record was delivered to Congress and served as an evidentiary basis for the ADA.

88. When the ADA's progress stalled in Congress, ADAPT led a march to the Capitol, during which sixty disability advocates abandoned their assistive devices and crawled up the Capitol steps. This event, known as the Capitol Crawl, is credited with eventually pushing the ADA out of committee and to its signing by President Bush on July 26, 1990. Joe Ability, *supra* note 86.

89. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101. *See also* Philip Pauli, *29 Years Later, the Fight to Fulfill the Promise of the ADA Continues*, RESPECT ABILITY (Jul. 26, 2019), https://www.respectability.org/2019/07/ada-29-years-later/ [https://perma.cc/7A57-39MP]; *ADA at 30: The Unmet Promises*, CSH (Jul. 30, 2020), https://www.csh.org/2020/07/ada-at-30-the-unmet-promises/ [https://perma.cc/5R4X-KAPJ].

90. 42 U.S.C. §§ 12131(2), 12132.

91. 42 U.S.C. § 12102(1)(A).

92. There are several defenses available to ADA-covered entities that seek to push back against a request for a reasonable accommodation or a claim of discrimination under the ADA. For example, public entities do not need to make modifications that would fundamentally alter the nature of the service, program, or activity. 42 U.S.C. § 12201(f). Likewise, ADA-covered entities are not required to include individuals with disabilities in their programs or services if doing so would be a "direct threat to the health and safety of others." 28 CFR 35.139(a). A direct threat is a significant risk to health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. *Id.*

93. 42 U.S.C. § 12134.

Supreme Court, in *Tennessee v. Lane*, acknowledged that Title II is meant to address the long history of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[94] In ruling that Title II applies to the "class of cases implicating the fundamental right of access to the courts," the Supreme Court focused on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services."[95] Though "the Supreme Court has not . . . directly addressed whether the substance of state court proceedings . . . constitutes a state 'activity' or 'service,'"[96] the legislative history of the ADA suggests that Congress was aware of the plight of parents with disabilities.[97] For example, Justin Dart, Jr., an activist often described at the "Father of the ADA," testified before Congress, "We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"[98] Moreover, in *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court made clear the breadth and reach of the ADA in deciding that "state prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'"[99]

The ADA provides a legal vehicle for those seeking freedom from discrimination and integration into the broader community but not without reservation. The structure of the statute puts the onus on individuals with a disability to identify themselves as such and to prove "qualification."[100] Thus, even given the broad goals of the ADA, individuals with disabilities—the class of individuals meant to be protected by the law—bear the burden of ensuring its enforcement.[101] The requirement that a government service provider or employer

94. Tennessee v. Lane, 541 U.S. 509, 524-525 (2004) (describing categorical bars on voting, prohibitions on marriage, refusal to allow juror service, and the unwarranted commitment of individuals with disabilities, without regard to assessment of individual capacity).

95. *Id.* at 533–534, 528. In contrast, the Supreme Court's holding that the Eleventh Amendment bars private money damages actions for state violations of Title I, which prohibits employment discrimination against the disabled, was based on what the Court thought was thin Congressional record with respect to discrimination against people with disabilities in public employment. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368, 374 (2001).

96. Cecka, *supra* note 24, at 117 & n. 23 (citation omitted).

97. *See* Porter, *supra* note 50, at 99–100.

98. *Id.* at 100 & n. 205 (citing ROCKING THE CRADLE, *supra* note 11, at 74).

99. Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 209 (1998) (quoting 42 U.S.C. § 12131(1)(B)). *See id.* ("Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.").

100. 42 U.S.C. § 12131(2).

101. The need for plaintiffs to prove disability causes accommodations claims to focus on "demonstrating deep dysfunction," a dynamic that scholars have observed leads to a "binary view" of whether one is capable of working or has a disability. *See* Michael Ashley Stein, Anita Silvers, Bradley

provide a "reasonable accommodation" or "reasonable modification" is another challenge for those seeking to enforce the ADA.[102] "Reasonable accommodation" is a diffuse term that does not present a clear, specific mandate.[103] What is "reasonable" depends on the facts and circumstances of each case and on the needs of each individual involved.[104] This leaves open the possibility of reaching ideal, individualized results for people seeking accommodations, but specific requests can easily be portrayed as so unique as to be unreasonable. Individuals requesting reasonable accommodations can also be seen as ungrateful, self-absorbed, or otherwise disconnected from reality. As Lennard Davis has described, when individuals seek specific accommodations "it almost seems that, in some cases, the claimant is biting the hand that feeds her, is unappreciative of what has been done for her, or is acting in a paranoid

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A. Archcart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. Chi. L. Rev. 690, 691–92, 744 (2014) (proposing that the ability to seek accommodations should be extended to "all work-capable" people as means of "integrating" determinations of disability and ability to perform essential job functions). While all beneficiaries of rights-granting legislation, for example those seeking vindication of rights under the Civil Rights Act of 1964, bear the burden of enforcing the law, those seeking protection for the ADA must prove—and courts must spend time deciding whether—they are within the class of people the ADA is supposed to protect. *Id.* Likewise, as Katherine A. Macfarlane has chronicled, the need to prove disability with medical documentation can be incredibly arduous. *See* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 70–81 (2021) (laying bare, through case analysis, the centrality of medical documentation to the process of obtaining accommodations in the context of employment and revealing the difficulty of the process).

The passage of the Americans with Disabilities Amendments Act of 2008 clarified that the ADA's definition of disability should be construed broadly, Pub L No 110-325, 122 Stat 3553, codified in various sections of Title 42, but litigation of this kind continues. Samuel Bagenstos and Christine Jolls, among others, have engaged in significant analysis on the overlap between the requirements of the ADA, even including the accommodation requirements, and other anti-discrimination legislation. *See* Christine Jolls, *Accommodation and Antidiscrimination*, 115 HARV. L. REV. 642, 645, 684-697 (2001) (citing Bagenstos, *supra* note 74, at 456-57 & n. 223).

102. 42 U.S.C. § 12111(9) (defining reasonable accommodation in the context of employment discrimination); 28 CFR 35.139(b)(7) (outlining the requirement that public entities make "reasonable modifications" to avoid discrimination on the basis of disability).

103. People with disabilities and advocates are not the only groups concerned with the vagueness of the ADA's requirements. *See, e.g.*, Stephen B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391 n.226 (1995) ("With insufficient guidelines as to how much accommodation is enough, there is the possibility that overall cost, both to employers and to the judicial system, may eventually outweigh the considerable social benefits of the ADA. The problem of quantifying reasonable accommodation-delineating the standard beyond the law's vague generalizations-persists."). For an assessment of the challenges in enforcing accommodations through the "interactive process" required by the EEOC in employment discrimination claims, and a critique of the extent to which the process disempowers employees, see Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. (forthcoming 2022).

104. *See, e.g.*, LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS 126 (2002) ("To claim that an employer did not provide reasonable accommodation because it installed ramps and provided many other structural changes, but did not lower a sink, is to make a strident claim about a subtle thing.").

manner. In other words, the claimant is being self-centered and narcissistic."[105] The ADA also provides little clarity with respect to how it should apply when it seemingly conflicts with other, competing laws—an issue that is specifically difficult in the context of our nation's byzantine family regulation system described more completely below.

B. Federal Technical Assistance

In 2015, the U.S. Departments of Justice and Health and Human Services issued technical assistance clarifying that Title II applies to all aspects of the family regulation system.[106] The TA—born out of the case of Sara Gordon—makes clear that discrimination against parents with disabilities is "long-standing and widespread" and "can result in long-term negative consequences to both parents and their children."[107]

Ms. Gordon is a mother from Massachusetts who, in November 2012, gave birth to a baby girl, Dana.[108] While Ms. Gordon was still in the hospital and recovering from child birth, Massachusetts Department of Children and Families (DCF) received a call alleging concerns that Ms. Gordon "was not able to comprehend how to handle or care for the child due to the mother's mental retardation."[109] DCF opened a case and observed Ms. Gordon at the hospital, documenting that she had difficulty feeding and holding Dana, and that she required reminders to burp Dana and clean spit out of Dana's mouth.[110] The investigators observed that Ms. Gordon appeared uncomfortable changing Dana's diaper and had trouble remembering when to feed her daughter because she could not read an analog clock.[111] Two days after Dana's birth, DCF removed

105. *Id.* Underpinning the view described by Davis is the belief accommodations benefit individuals while forcing government agencies, service providers, and employers to bear the cost associated with these benefits. In practice, however, there is a wide array of accommodations which benefit third parties. *See generally* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

106. TECHNICAL ASSISTANCE, *supra* note 17, at 1 (stating that the ADA protects "parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services"). Though this Article focuses principally on the ADA, the Technical Assistance issued by DOJ/HHS applies with equal force to Section 504 of the Rehabilitation Act (RA). *Id.* The RA, passed in 1973, provides essentially the same coverage as ADA but covers only federal agencies, contractors. actors who receive federal funding. 29 U.S.C. § 794.

107. *See* TECHNICAL ASSISTANCE, *supra* note 17, at 2 & n. 5.

108. Both Sara and Dana are pseudonyms used in the DOJ-HHS investigation. Letter from U.S. Dep't of Justice, Civ. Rts. Div. & U.S. Dep't of Health and Human Servs., Off. for Civ. Rts., to Erin Deveney, Interim Comm'r, Mass. Dep't of Child. & Fams., 1–2 (Jan. 29, 2015), https://www.ada.gov/ma_docf_lof.pdf [https://perma.cc/E6MK-CFSZ] [hereinafter "Investigation of Massachusetts DCF].

109. *Id.* at 5.

110. *Id.*

111. *Id.*

Dana from her mother's care.[112] DCF removed Dana despite Ms. Gordon's intention to care for Dana in collaboration with her own mother.[113]

The joint investigation found that DCF's removal of Dana violated the ADA and Section 504 of the Rehabilitation Act (RA).[114] DCF staff erred by assuming that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability and denying her the opportunity to receive meaningful assistance from her mother and other service providers during visits.[115] The resulting TA is unequivocal: the ADA applies to termination of parental rights proceedings, "investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services."[116]

The TA identifies two principles of the ADA that are central to the administration of services for parents involved in the family regulation system: firstly, parents with disabilities have the right to individualized treatment; secondly, parents with disabilities are entitled to the full and equal opportunity to benefit from offered services.[117] The TA advises that any assessment of capacity should be based specifically on the "strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities."[118] Alongside individualization, the TA explicitly recognizes that providing the same resources to an individual with a disability that are provided to individuals without disabilities will not necessarily be sufficient to provide an equal opportunity to an individual with a disability.[119]

When the TA was promulgated, it was heralded as "groundbreaking," and scholars believed that the TA would transform the ADA into a more useful tool in family regulation proceedings.[120] And in many respects, the emphasis on the importance of individual assessments and equal opportunity can be regarded as a sea change—at least in terms of recognizing what is required. Unfortunately, as this Article explores in Part III, the TA has led to only limited change.

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112. *Id.* at 2.

113. *Id.*

114. *Id.* at 1. The Rehabilitation Act of 1973 prohibits discrimination against disabled people by recipients of federal funding. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a).

115. *Id.* at 2.

116. TECHNICAL ASSISTANCE, *supra* note 17, at 3.

117. *Id.* at 4.

118. *Id.* at 14. Requirements for "individualized assessments appl[y] at the outset and throughout any involvement that an individual with a disability has with the child welfare system." *Id.* at 12–13.

119. *Id.* at 14. The requirement that parents have an equal opportunity to benefit from, and participate in, services "applies throughout the continuum of a child welfare case, including case planning activities." *Id.*

120. *See* Smith, *supra* note 24, at 201. *See generally* Kay, *supra* note 24.

C. ASFA and the Role of Federal Statutes

Family regulation law and policy in the United States can be seen as a pendulum, swinging between an emphasis on family support and reunification on one hand, and a push to move children to new, permanent homes on the other.[121] Until 1997, the Adoption Assistance and Child Welfare Act of 1980 (AACWA) required agencies and states to make "reasonable efforts" to reunify a family before a child could be adopted.[122] The Adoption and Safe Families Act (ASFA), passed in 1997, shifted the focus from family reunification to achieving "permanency" for children.[123] Under ASFA, the overarching goal is to identify and establish a permanent home for children.[124] There are strict timelines for children separated from their parents to be either reunified or placed in new homes.[125] Parental rights can be terminated because of the length of time a child is in foster care, regardless of whether rights could otherwise be terminated or the family otherwise could be supported.[126] Though the timelines in ASFA are not immutable, the statute "effectively shifts the presumption in favor of termination when children have spent a long time in state custody."[127]

While many advocates and scholars initially understood ASFA as "pro-child," or putting the value of a child's safety above the biological family, this mistakenly assumes that an interest in family integrity belongs to parents alone.[128] In fact, social science and the lived experience of individuals who have been separated from their parents tell a different story, one where family integrity is pivotal to both parents and children. A child's trauma of permanent and total separation from their birth parents can leave a long-lasting effect on children and parents alike.[129] Likewise, children placed in foster care are more likely to

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121. ROBERTS, *supra* note 14, at 104.

122. 42 U.S.C.A. § 670 et seq. Understanding ASFA—and the other federal statutes that govern public family law—is pivotal because while family law is largely determined by individual states, receipt of federal child welfare spending is conditioned upon adherence to federal law. By 1999, all states had passed laws that either mirrored ASFA's timelines for permanency or created timelines that were even shorter. ROBERTS, *supra* note 14, at 110.

123. 42 U.S.C. §§ 671 et seq.

124. ROBERTS, *supra* note 14, at 107–11; 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 [AACWA]" to a "legislatively mandated preference for adoption").

125. 42 U.S.C. §§ 671 et seq.; ROBERTS, *supra* note 14, at 106–07 (describing the time pressures of ASFA).

126. 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 must be met. ROBERTS, *supra* note 14, at 109–10.

127. *Id.* at 150.

128. *See id.* at 108.

129. *See, e.g.*, *Children with Traumatic Separation: Information for Professionals*, NAT'L CHILD TRAUMATIC STRESS NETWORK (last visited Jul. 21, 2021) http://fsustress.org/pdfs/TraumaticSeparation_forProfessionals.pdf [https://perma.cc/H4XK-5G92]; Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*,

experience diminished physical and mental health, poor educational outcomes, lower employment prospects, inconsistent housing arrangements, and unstable family relations.[130]

ASFA did not do away with the requirement that agencies make "reasonable efforts" to reunite families.[131] In fact, ASFA requires family courts to assess whether state agencies are making reasonable reunification efforts at various points throughout a child protective proceeding.[132] Individual states have followed suit by requiring these efforts as well.[133] While there are variations among courts as to what the "reasonable efforts" requirement actually entails, it has largely been interpreted to require individualized efforts to reunify families and many states have made clear that efforts cannot be "cookie cutter."[134]

Both AACWA and AFSA mandate reasonable efforts to reunify families except in three specific situations, including if the parent's rights to another child have been involuntarily terminated.[135] Parents with ID are more likely to have had a prior child removed, and hence those who bear subsequent children are more likely to be among those for whom reasonable efforts are not required. Likewise, ASFA's emphasis on "quickly moving children through temporary (usually foster) care to a permanent home"[136] can have a disproportionate impact on parents with ID who may require additional time to learn and process information, or additional services that take additional time and attention to procure.[137]

NOVA NEXT (June 20, 2018), http://www.pbs.org/wgbh/nova/next/body/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/ [https://perma.cc/LSC5-GUFY].

130. *See In re* Jamie J., 30 N.Y.3d 275, 280 n.1 (2017) (citing Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007)); Vaidya Gullapelli, *The Damage Done by Foster Care Systems*, THE APPEAL (Dec. 18, 2019), https://theappeal.org/the-damage-done-by-foster-care-systems/ [https://perma.cc/PY8X-RK2V]; Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, THE MARSHALL PROJECT (Feb. 11, 2020), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care [https://perma.cc/C9E2-5KP9].

131. 42 U.S.C. § 671(a)(15)(B)(i)–(ii).

132. *Id.* (requiring "reasonable efforts . . . to preserve and reunify families . . . 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).

133. *See, e.g.*, N.Y. Fam. Ct. Act §§ 1027, 1028, 1055(c), 1089; NMRA § 10-345 (2009); V.T.C.A. Family Code § 263.305 (1998).

134. *See, e.g.*, *In re* Sheila G., 462 N.E.2d 1139, 1148 (N.Y. 1984) (the "agency must always determine the particular problems facing a parent with respect to the return of [the] child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps."); *In re C.F.*, 862 N.E.2d 816, 820 (Ohio 2007); *In re* C.P., 71 A.3d 1142, 1153 (Vt. 2012).

135. 42 U.S.C. § 671(a)(15)(D).

136. Porter, *supra* note 50, at 93.

137. *See* ROCKING THE CRADLE, *supra* note 11. Additional time to put services in place can result from slowness on the part of caseworkers to identify the needs of a parent or, more generally, the lack of services for parents with disabilities. *See* Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 327 (2015) (stating "[r]eunification plans often call for fast and decisive action by parents, which can be difficult with a mental disability").

D. Theoretical Frames: Disability Justice and DisCrit

The Disability Rights Movement was pivotal to the passage of the ADA.[138] Relying primarily on the passage of legislation and litigation to advance the rights of individuals, the movement spurred the creation of civil rights for people with disabilities. Activists and people with disabilities played a significant role in the passage of the ADA, but scholars Rabia Belt and Doron Dorfman have observed that older models of disability rights activism were nonetheless led primarily by individuals without disabilities on behalf of those with disabilities.[139] Moreover, many of the actors in the movement tended to focus on rehabilitating disabled individuals with the intent that they might function more similarly to the nondisabled.[140] As Belt & Dorfman noted, this model provides resources and social infrastructure for the movement, but organizations and advocacy groups doing this work can inadvertently promote the view that people with disabilities are dependent on others or require charity.[141]

The Disability Justice Movement understands itself as the "next stage in movement evolution."[142] Whereas Disability Rights can be said to have focused on disability "at the expense of other intersections," centering White individuals with physical disabilities,[143] Disability Justice recognizes that "all bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them."[144] A Disability Justice lens demands an inherently intersectional analysis, urging 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."[145] This view recognizes that whether and how a person may be privileged or oppressed depends upon context,[146] and that intersectional

138. *See supra* notes 81–83 and accompanying text.

139. Belt & Dorfman, *supra* note 28, at 177–78 & nn. 7–8.

140. *Id.*

141. *Id.* at 178 (citing Thomas P. Dirth & Michelle R. Nario-Redmond, *Disability Advocacy for a New Era: Leveraging Social Psychology and a Sociopolitical Approach to Change*, *in* UNDERSTANDING THE EXPERIENCE OF DISABILITY: PERSPECTIVES FROM SOCIAL AND REHABILITATION PSYCHOLOGY 349, 350–51 (Dana S. Dunn ed., 2019)).

142. SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 11 (2d. ed. 2019); Powell, *supra* note 29 ("Disability justice . . .was developed in reaction to the disability rights movement and underscores that addressing problems of disability-based discrimination requires attending to disparities created by race, immigration status, gender identity sexual orientation, class, and other systems of oppression.").

143. SINS INVALID, *supra* note 142, at 13. *See also* Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, *in*, DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES 3 (Subini A. Annamma, David J. Connor, Beth A. Ferri eds., 2021) ("An intersectional approach to, and examination of, disability law reveals how the ADA, despite its broad protections, leaves disabled people of color, in particular, under-protected.").

144. SINS INVALID, *supra* note 142, at 19.

145. *Id.* at 23.

146. *Id.*

identities shape both how a person perceives, and is perceived by, others.[147] Rather than looking to academics and experts to guide the movement, Disability Justice looks to "those who are most impacted by the systems we fight against."[148]

DisCrit is a theoretical approach combining Disability Studies and Critical Race Theory, originally in the field of education.[149] Subini Ancy Annamma, David J. Connor, and Beth A. Ferri first proposed DisCrit as a framework that "incorporates a dual analysis of race and ability."[150] Annamma, Connor and Ferri offered seven primary tenets of DisCrit that, they suggested, can be used to "operationalize" the framework.[151] Though this framework has not yet been applied to family law, there is an emerging understanding of the power that it might play in the legal context more generally.[152] Indeed, as Jamelia Morgan has urged, "[a] DisCrit intervention into American law can explain why over thirty years after the passage of the ADA, with clear exceptions for those with privilege, disabled people remain a subordinated group within society."[153]

Three tenets of DisCrit have particularly strong relevance to the practice, study, and application of family law and the family regulation system.[154] First, DisCrit "focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy."[155] This tenet urges examination of the standards and structures within

147. *See id.* This is connected to Lennard J. Davis's idea of the "dismodern" body, which begins from the premise that we are all disabled and need assistance and interdependence in order to survive—ranging from legislation to technology. *See* Davis, *supra* note 104 at 30. Under this framework, it is not unnecessary or unusual to require assistance or support from the state, and notions like independence are exposed as being artificial. *Id.*

148. SINS INVALID, *supra* note 142, at 23. Ben-Moshe, like other scholars and activists in this field, also acknowledges the value of centering the experience of the most disabled and shaping law and policy accordingly. *See* BEN-MOSHE, *supra* note 45.

149. DISCRIT, *supra* note 27, at 1 (describing the origin of DisCrit as "traced through an academic lineage of boundary pushing" and listing James Baldwin, Bayard Rustin and others as "academic ancestors" to the framework).

150. *Id.* at 9.

151. *See id.* at 19. The seven tenets: (1) focus on the ways racism and ableism "circulate interdependently . . . to uphold notions of normalcy"; (2) "value[] multidimensional identities"; (3) "emphasize[] the social constructions of race and ability", while acknowledging the "material and psychological impacts" of being labeled by race or dis/ability; (4) "privilege[] voices of marginalized populations"; (5) consider "legal and historical aspects of dis/ability and race and how both have been used . . . to deny the rights of some citizens"; (6) recognize "Whiteness and Ability as Property"; and (7) "require[] activism and support[] all forms of resistance." DISCRIT, *supra* note 27, at 19.

152. *See, e.g.*, Morgan, *supra* note 143, at 7 (exploring how "some of DisCrit's central tenets offer a basis for critical and intersectional approaches to American law" and calling for subsequent engagements); 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 (David J. Connor, Beth A. Ferri, & Subini A. Annamma eds., 2016) (analyzing the case and the harmful combined impacts of ableism and racism on youth).

153. *See, e.g.*, Morgan, *supra* note 143 , at 20–21.

154. DISCRIT, *supra* note 27, at 19 (listing tenets).

155. *Id.*

the law that purport to be neutral. Second, "DisCrit values multidimensional identities and troubles singular notions of identity such as race or dis/ability or class or gender or sexuality, and so on."[156] Like Disability Justice, this tenet of DisCrit calls upon scholars and practitioners to "embrace the nuance" of lived experience and to surface areas of the family regulation system where such nuance is excluded or made invisible. Third, "DisCrit emphasizes social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms."[157] With this tenet, DisCrit invites scholars and advocates to unearth the impacts of labeling a person by their race or inability and to envision new paradigms with which to understand and support people with disabilities.

In Part V, this Article will explore more fully how a Disability Justice lens and the DisCrit framework can be applied to family court.

III.
APPLICATION OF THE ADA IN FAMILY REGULATION CASES

This study is the first to review family court decisions from all fifty states issued since the 2015 TA, alongside decisions from federal courts during the same period. A review of these decisions shows where and how the Federal TA has made an impact, and the limitations of the Federal TA as a tool to change outcomes for parents in the family regulation system. The results reveal how, if at all, the federal clarity about the ADA's application to the family regulation system has changed the way courts handle ADA-based claims. Looking at decisions from both family and federal courts allows a complete picture of how courts treat parents' claims of disability discrimination and requests for accommodation. The study itself involved a review of all fifty states and an extensive review of federal court cases issued since 2015. This Part will briefly discuss prominent, pre-TA trends and then present the results of the study. Rather than presenting case information from each of the fifty states, some of whom do not appear to have addressed the application of the ADA at all, this Part presents cases and trends that are representative of how courts handle these claims.

A. Historic Failure to Apply the ADA

Prior to the DOJ/HHS TA in 2015, family courts across the country held that ADA violations may only be remedied in separate proceedings brought under the ADA and could not be pursued in family court.[158] These courts endeavored to make clear that the "ADA does not provide a defense, but rather

156. *Id.* (emphasis omitted).

157. *Id.*

158. Kay, *supra* note 24, at 807 & n. 175 (citing ANN HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 8.16 (3d ed. 2009) and cases in Wisconsin, Vermont, Louisiana, Connecticut, California, Indiana, Ohio, New York, Hawaii).

a separate cause of action addressing the discriminatory provision of services and not termination of parental rights."[159]

For example, in 1999, Connecticut courts ruled that parents with disabilities may not litigate ADA issues in termination of parental rights proceedings, because such proceedings purportedly are not a "service, program or activity" under the ADA.[160] Instead, Connecticut courts required that such claims be pursued as a separate cause of action under the ADA in a separate proceeding.[161]

Other courts found that accommodating parental disability—or even discrimination against a parent—was not the proper subject of a family court proceeding.[162] For example, the Vermont Supreme Court held that a termination of parental rights proceeding must focus on the "welfare of the child" rather than question whether the parents' treatment was "consistent with the requirements of the ADA."[163]

B. Emerging State Court Consensus: Limited Application of the ADA

There is no overarching rule for how state family courts have handled allegations of disability discrimination or application of the ADA following the promulgation of the DOJ/HHS TA. Still, state courts are moving toward acknowledgment—if not actual application of—the ADA. At least nine state courts that have addressed the ADA since the issuance of the DOJ/HHS TA have cited the TA[164] and many more appear to have become more sensitive to the law's requirement that service providers and state agencies comply with the

159. *Id.*

160. *In re* Antony B., 735 A.2d 893, 899 (Conn. App. Ct. 1999) ("[T]he ADA neither provides a defense to nor creates special obligations in a termination proceeding.").

161. *Id.* at n. 9 (a failure to provide adequate services because of the parent's mental condition "would give rise to a separate cause of action under the ADA"); *In re* B.S., 693 A.2d 716, 721 (Vt. 1997) ("The ADA provides for a private right of action for Title II violations. . . . Pursuant to these provisions, the mother could have filed a complaint or brought a civil action to obtain relief.").

162. For a fifty-state survey of state court decisions regarding the applicability of the ADA to termination of parental rights cases and the use of the ADA as a defense to TPRs published in 2007—8 years before the issuance of the HHS/DOJ TA, see Cecka, *supra* note 24, at 178.

163. *In re* B.S., 693 A.2d at 720–22.

164. *See In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017); *In re* H.C., 187 A.3d 1254, 1265 (D.C. 2018); Commonwealth v. K.S., 585 S.W.3d 202, 228 (Ky. 2019); State *ex rel.* K.C. *v.* State, 362 P.3d 1248, 1252 (Utah 2015); *In re* Adoption of Beatrix, No. 15-P-933, 2016 WL 3912083, at *5 (Mass. App. Ct. July 20, 2016); N.J. Div. of Child Prot. & Permanency v. L.M.W., No. A-2580-15T4, 2017 N.J. Super. Unpub. LEXIS 2679 (Super. Ct. App. Div. Oct. 25, 2017, No. A-2850-15T4); *In re* Child.'s Aid Soc'y for Guardianship of Xavier Blade Lee Billy Joe S., No. B-XXXXX-XX-14, 2019 WL 348385 (N.Y. Fam. Ct., Jan. 9, 2019), *aff'd*, *In re* Xavier Blade Lee Billy Joel S., 187 A.D.3d 659 (N.Y. App. Div. 2020); *In re* A.L., 2018 WL 722521, at *3 (Vt. 2018); N.C. v. Ind. Dep't of Child Servs., 56 N.E.3d 65, 70 (Ind. Ct. App. 2016).

ADA.[165] Three state courts have articulated clear and robust application of the ADA.[166]

State court decisions about the applicability of the ADA can vary even within individual states, making generalizations on a state-by-state basis difficult. Nonetheless, the decisions themselves can be grouped in four general categories: (1) decisions that actually apply the ADA; (2) decisions that "encourage" consultation with the ADA but do not require strict application of the statute; (3) decisions that find actual application of the ADA unnecessary because the requirements of the ADA are already incorporated in state anti-discrimination statutes or state laws requiring reasonable efforts; and (4) decisions that find the ADA is not a defense to a termination of parental rights (TPR) or that otherwise fail to apply the ADA to family regulation proceedings. The last category is the largest, containing decisions from at least seventeen states.[167]

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165. *See, e.g.*, Jessica P. v. Dep't of Child Safety, 471 P.3d 672, 679–680 (Ariz. Ct. App. 2020); *In re* Elijah C., 165 A.3d 1149, 1166 (Conn. 2017); *In re* K.L.N., 482 P.3d 650, 658–60 (Mont. 2021); *In re* S.K., 440 P.3d 1240, 1247-50 (Colo. App. 2019), *cert. denied sub nom.* C.K. v. People, 19SC287, 2019 WL 2266493 (Colo. May 28, 2019); *In re* Parental Rights to M.A., 2016 Wash. App. LEXIS 1208, at *9–10 (Ct. App. May 24, 2016, Nos. 32948-8-III, 32949-6-III, 32950-0-III, 32951-8-III).

Other courts that already applied the ADA before the TA continue to do so. *See, e.g.*, Ronald H. v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs., 490 P.3d 357, 369 (Alaska 2021); *In re* J.L., 868 N.W.2d 462, 467–68 (Iowa Ct. App. 2015); *In re* Child of Rebecca R., 221 A.3d 540, 548 (Me. 2019); *In re* S.A., No. COA17-387, 2017 WL 5147347 (N.C. Ct. App. Nov. 7, 2017). Still other states that initially applied the ADA have not had an occasion to address the issue since the TA. *See, e.g.*, S.C. Dep't of Soc. Servs. v. Mother, 651 S.E.2d 622, 627–29 (S.C. Ct. App. 2007); *In re* Welfare of K.D.W., No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994).

166. *See In re* Hicks/Brown, 893 N.W.2d 637, 640 (Mich. 2017); State *ex rel.* K.C., 362 P.3d 1248 (Utah 2015); *In re* S.K., 440 P.3d 1240, 1249 (Colo. App. 2019).

167. Note that, as with many of the decisions about the applicability of the ADA, decisions refusing to apply the ADA are not necessarily controlling state law. Nonetheless, the following decisions reveal a refusal to apply the ADA to family court proceedings. *See In re* A.E., No. A149302, 2017 WL 2537236, at *8 (Cal. Ct. App., 1st Dist., 4th Div. 2017) (unpublished); *In re* Jeanette L., 69 N.E.3d. 918, 922 (Ill. App. Ct. 2017); *In re* Guardianship of J.R., No. A-2850-15T4, 2017 N.J. Super. Unpub. LEXIS 2679, at *22; *In re* A.L., No. 2017-319 2018 WL 722521, at *4; N.C. v. Ind. Dept. of Child Servs., 56 N.E.3d at 69–70 (Ind. Ct. App. 2016); Adoption of Yolane, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017); *In re* D.A.B., 570 S.W.3d 606, 610–22 (Mo. Ct. App. 2019); *In re* B.A., 73 N.E.3d 1156, 1159 (Ohio. Ct. App. 2016) (reiterating that the ADA is not a valid defense to TPR and referencing numerous decisions from other states reaching the "same conclusion."); *In re* J.J.L., 150 A.3d 475, 481–82 (Pa. Super. Ct. 2016); *In re* Hailey S., No. M2016-00387-COA-R3-JV, 2016 WL 7048840, at *11 (Tenn. Ct. App. Dec. 5, 2016). *See also In re* D.M.S., No. 11-16-00101-CV, 2016 WL 5853263, at *1 (Tex. App. Oct. 5, 2016) (reasoning that, to the extent noncompliance was a defense at all, "it would be an affirmative defense for which the parent has the burden to plead, prove, and secure findings.").

The number cited in the text includes states that appear not to have had the occasion to revisit the issue since 2015 TA. *See, e.g.*, S.G. v. Barbour Cnty. Dep't of Hum. Res., 148 So. 3d 439, 446–448 (Ala. Civ. App. 2013); M.C. v. Dep't of Child. and Fams., 750 So. 2d 705, 706 (Fla. Dist. Ct. App. 2000); *In re* Doe, 60 P.3d 285, 290–91 (Haw. 2002); Curry v. McDaniel, 37 So. 3d 1225, 1233 (Miss. Ct. App. 2010); *In re* Kayla N., 900 A.2d 1202, 1208 (R.I. 2006); *In re* Torrance P., 522 N.W.2d 243, 244–46 (Wis. Ct. App. 1994).

Together, these decisions reflect an important pattern. Although an increasing number of courts accept the ADA's general application to family regulation proceedings, very few have adopted rigorous, clear standards by which the ADA is applied. A scant but significant minority of cases find that the ADA applies, and that state service providers must at minimum meet the standards of the ADA. The majority of courts find that a state's proffered services are adequate regardless of whether or how the ADA is applied. Even among the decisions that at least engage with a surface application of the ADA—explored in detail in Parts 2 and 3 of this Section—many courts appear to conclude that the ADA is satisfied by the application of existing state law. One can argue that this surface engagement with the ADA is an improvement upon the historical refusal to recognize the basic application of the ADA. Undercutting this vision of progress, however, is the difference between two sets of decisions. Cases that require application of the ADA as a threshold matter demand courts, attorneys, and caseworkers use, consider, and comply with federal anti-discrimination law. Cases that find state law itself to satisfy the ADA allow federal anti-discrimination law to be subsumed within state law standards and, as a consequence, arguably permit courts, attorneys, and caseworkers to avoid genuine engagement with federal standards. An analysis of these decisions makes a strong argument for the idea that parents with ID (and other disabilities) are still largely unprotected by the ADA and, therefore, still risk facing unchecked discrimination in state family courts.

1. The ADA Actually Applies

Three state courts have engaged in robust and clear application of the ADA.[168] This Article identifies these cases as those that "actually apply" the ADA. This category includes those cases that have made it clear that an agency's efforts to reunify a family cannot be considered "reasonable" under state law if parents were not provided appropriate accommodations pursuant to the ADA. In other words, these few decisions consider compliance with the ADA as a threshold question for a finding that the state has complied with its legal duty under ASFA to make efforts to reunify a family.

Perhaps the most robust application of the ADA following this logic comes out of Michigan's Supreme Court.[169] The court, in *Hicks/Brown*, reversed a termination decision due to ADA violations in a case where a mother with intellectual and psychiatric disabilities had repeatedly requested specific services, which the State never provided.[170] The trial court eventually ordered the agency to refer the mother to another agency focused on serving individuals

168. *See In re* Hicks/Brown, 893 N.W.2d at 637; *K.C.*, 362 P.3d 1248; *In re* S.K., 440 P.3d at 1249.

169. *In re* Hicks/Brown, 893 N.W.2d at 637–39.

170. Prior to the termination proceeding, the mother made requests for specific services to accommodate her disability. *Id.* at 639.

with disabilities but the originally assigned foster care agency failed to do so and her rights were terminated.[171] The *Hicks/Brown* court reversed the termination and remanded the case to the family court with the instruction that it "consider whether the Department reasonably accommodated Brown's disability as part of its reunification efforts" given that she never received court-ordered, disability-specific services.[172] In making this ruling, the court made clear that "efforts at reunification cannot be reasonable . . . if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA."[173]

A close reading of the *Hicks/Brown* decision makes clear that Michigan's highest court has gone further than most other courts in its application of the ADA. The court's decision that reasonable efforts "dovetail" with obligations under Title II of the ADA may initially appear comparable to those decisions that have found the ADA either incorporated into, or coextensive with, state law. The standard announced by Michigan's Supreme Court goes further, however: under Michigan's analysis, if reasonable accommodations are not made, the State's obligation to make reasonable efforts cannot have been met and the termination was improper.[174] By applying the ADA as a threshold matter, *Hicks/Brown* requires courts, attorneys, and caseworkers to consider and comply with federal anti-discrimination law in the first instance.

A court in Colorado, citing *Hicks/Brown*, articulated a similar standard in a 2018 case, *In re S.K.* Like *Hicks/Brown*, the Colorado court made clear that efforts to reunify cannot be reasonable unless they accommodate a parent's disability under the ADA.[175] The *S.K.* court was also clear that lower family courts should make a specific finding as to whether an accommodation was made.[176] The *S.K.* court reiterated the reasoning of prior Colorado court decisions in finding that the ADA is not a "defense" to a termination petition but clarified that the ADA "applies to the provision of assessments, treatment, and other services that the Department makes available to parents through a dependency and neglect proceeding before termination."[177]

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171. *Id.*

172. *Id.* at 642.

173. *Id.* at 640.

174. "Absent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability. In turn, the Department has failed in its duty under the Probate Code to offer services designed to facilitate the child's return to his or her home." *Id. See also* Kay, *supra* note 24, at 812–14 (describing that *Hicks/Brown* goes further than decisions that find reasonable efforts inherently include compliance with the ADA).

175. *In re* S.K., 440 P.3d at 1249. "[A]bsent reasonable modifications to the treatment plan and rehabilitative services offered to a disabled parent, a department has failed to perform its duty under the ADA to reasonably accommodate a disability and, in turn, its obligation to make reasonable efforts to rehabilitate the parent." *Id.*

176. *Id.* at 1250 & n. 4. *See also id.* at 1248.

177. *Id.* at 1248. *See In re* B.A., 407 P.3d 1053, 1056 (Utah Ct. App. 2017) (stating "[t]here is no doubt that the ADA applies to the government's provision of reunification services.").

2. The ADA Generally Applies

The second set of family court cases are those that acknowledge the application of the ADA to family court proceedings and the services provided by the family regulation system but do not strictly apply the ADA. Cases from twelve states fit into this category.[178] These decisions focus on the question of whether or not the state has made reasonable efforts to reunify the family, as required by ASFA.[179] The most robust among them encourage courts to consult with the requirements of the ADA as part of assessing whether an agency has made the required efforts.

In 2018, in *Lacee L.*, the New York Court of Appeals ruled unambiguously that the New York City Administration for Children's Services (ACS) must comply with the ADA.[180] Prior to the Federal TA, numerous family courts in New York had previously ruled that the ADA did not apply to family court proceedings.[181] Despite the court's clarity on the question of ACS's obligation, the court declined to require application of the ADA within the family regulation proceeding.[182] The court reasoned that "[t]he ADA's 'reasonable accommodations' test is often a time- and fact-intensive process with multiple layers of inquiry" that "is best left to separate administrative or judicial proceedings, if required."[183]

In lieu of the actual application of the ADA, the New York Court of Appeals advised that "Family Court should not blind itself to the ADA's requirements placed on ACS and like agencies" and that "courts may look at the accommodations that have been ordered in ADA cases to provide guidance as to

178. *See, e.g.*, *In re* Lacee L., 114 N.E.3d 123, 129–30 (N.Y. 2018); Ronald H. v. State, Dep't of Health & Soc. Servs., Off. Of Child.'s Servs., 490 P.3d 357, 369 (Alaska 2021); Jessica P. v. Dep't of Child Safety, 471 P.3d 672, 679–680 (Ariz. Ct. App. 2020); *In re* Elijah C., 165 A.3d 1149, 1166 (Conn. 2017); *In re* J.L., 868 N.W.2d 462, 467–68 (Iowa Ct. App. 2015); *In re* K.L.N., 482 P.3d 650, 658–60 (Mont. 2021); *In re* Parental Rights to M.A., No. 32948-8-III, 2016 Wash. App. LEXIS 1208, *9–10 (Ct. App. May 24, 2016); S.C. Dep't of Soc. Servs. V. Mother, 651 S.E.2d 622, 627–29 (S.C. Ct. App. 2007); *In re* Welfare of K.D.W., No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994); *In re* Child of Rebecca R., 221 A.3d 540, 548 (Me. 2019); *In re* S.A., No. COA17-387, 2017 WL 5147347 (N.C. Ct. App. Nov. 7, 2017); Commonwealth v. K.S., 585 S.W.3d 202, 228 (Ky. 2019).

179. *See supra* note 122–125.

180. *In re* Lacee L., 114 N.E.3d at 129–130 ("To be sure, ACS must comply with the ADA.").

181. *In re La'Asia Lanae*, 803 N.Y.S.2d 568, 569 (N.Y. App. Div. 2005); *In re Chance Jahmel B.*, 723 N.Y.S.2d 634 (N.Y. Fam. Ct. 2001).

182. *Lacee L.*, 114 N.E. 3d at 129–130. Other courts continue to reach a similar conclusion, reasoning that violations of the ADA should be litigated in alternative settings. *See, e.g.*, Adoption of Vicky, No. 18-P-62, 2018 WL 3554138, at *3 (Mass. App. Ct. July 25, 2018). *See also In re* Doe, 60 P.3d 285, 290–93 (rejecting the ADA as a defense in termination proceedings but considering a parent's disabilities in evaluating reunification efforts); *In re* Moore, No. CA99-09-153, 2000 WL 1252028, at *8–9 (Ohio Ct. App. Sept. 5, 2000) (holding that ADA violations "by a public entity" do not provide "a defense against a legal action by the public entity."); *In re* Torrance P., 522 N.W.2d 243, 245–46 (Wis. Ct. App. 1994) (finding that ADA violations do not provide grounds to set aside TPR proceedings but holding that evaluation of efforts to provide court-ordered services to a parent must consider that parent's disabilities).

183. *Lacee L.*, 114 N.E.3d at 130.

what courts have determined in other contexts to be feasible or appropriate with respect to a given disability."[184]

In *Elijah C.*, the Supreme Court of Connecticut decided a case involving a mother with ID who placed in the bottom one percentile of the population for IQ. A psychologist also concluded that her social skills, adaptive behavior, and ability to perform daily living skills were in the one percent range.[185] The family court rejected the department's claim that the ADA does not apply to child protection cases,[186] but nonetheless concluded that the department had provided services that amounted to reasonable efforts toward reunification in this case.[187] After a full evidentiary hearing, the court concluded that despite providing services appropriate under both the ADA and reasonable efforts standards, the mother was unable to benefit from such services and reunification efforts were found to be in compliance with the ADA.[188]

In its ruling affirming the outcome, the Connecticut Supreme Court noted that there was "nothing in the record before us to suggest that the trial court deviated in any way from ADA principles, which, as we have explained, are incorporated by reference into our state's own stringent antidiscrimination statutes, in adjudicating the neglect and termination petitions in the present case."[189] The court also advised that it "continue[s] to encourage trial courts to look to the ADA for guidance in fashioning appropriate services for parents with disabilities."[190] In this decision, the Connecticut Supreme Court appears to have applied the ADA not as a law but as a set of "principles" that are "incorporated by reference" into the State's antidiscrimination laws. Like New York, Connecticut clarified the general application of the ADA but failed to articulate a standard by which to apply it.

Some lower courts have made use of the general applicability of the ADA to hold state agencies to higher standards. For example, in *Xavier Blade Lee Billy Joe S.*, the Bronx Family Court reasoned that by the time of a TPR, the agency "should be able to demonstrate that appropriate, adapted services consistent with the reasonable accommodation requirements of the ADA were offered and that the parent refused or was unable to plan in spite of them."[191] In reaching the conclusion that the State had not offered appropriate services, the court looked

184. *Id.* at 129.
185. *In re* Elijah C., 165 A.3d 1149, 1154–55 (Conn. 2017).
186. *Id.* at 1164.
187. *Id.* at 1149, 1153–56.
188. *Id.* at 1153–56.
189. *Id.* at 1167.
190. *Id.*
191. *In re* Child.'s Aid Soc'y for Guardianship of Xavier Blade Lee Billy Joe S., No. B-XXXXX-XX-14, 2019 WL 348385, at *13 (N.Y. Fam. Ct., Jan. 9, 2019).

not only to the ADA but also to guidance from EEOC.[192] In affirming this decision, New York's Appellate Division makes no mention of the ADA but does make clear that the efforts of the State were inadequate because of a failure to make reasonable accommodations and provide tailored services in light of the mother's disability.[193] Cases in Washington State and Massachusetts, though not relying specifically on the ADA, have also explicitly held agencies to a higher standard when cases involved parents with ID.[194]

3. The ADA is Already Incorporated in Existing State Law

The third set of family court cases are those that acknowledge the application of the ADA but find explicitly that it is already incorporated into existing state law. Connecticut is an example both of a state that "encourages" family courts to look to the ADA for guidance and one which has determined that the ADA is "incorporated by reference" into its antidiscrimination statutes. Similarly, the highest courts of Montana and Alaska have determined that their states' respective reasonable efforts requirements generally encompass "the ADA's reasonable accommodation requirement."[195] As Alaska's Supreme Court articulated, "[T]he question whether reunification services reasonably accommodated a parent's disability is . . . included within the question whether active or reasonable efforts were made to reunite the family."[196] Courts in Montana, Iowa, North Carolina, and California have reached similar conclusions.[197] Courts that follow this approach elide stringent application of the

192. After the passage of the ADA, the EEOC created the interactive process through which an accommodation can be identified and implemented in the employment setting. *See* Lin, *supra* note 103, at 10. In this case, the Family Court apparently looked to EEOC for possible accommodations. *See In re* Children's Aid Soc'y., 2019 WL 348385, at *14.

193. *In re* Xavier Blade Lee Billy Joe S., 131 N.Y.S.3d 541, 542 (N.Y. App. Div. 2020) (stating specifically that "people with intellectual disabilities possess the ability to be successful parents and should receive services and support appropriately tailored to their needs.").

194. *In re* M.A.S.C., 486 P.3d 886, 893–94 (Wash. 2021); *In re* Adoption of Beatrix, No. 15-P-933, 2016 WL 3912083, at *5 (Mass. App. Ct. Jul. 20, 2016) ("Where, as here, a parent has cognitive limitations, the department's duty includes a requirement that it provide services that accommodate the special needs of a parent." (quotation marks and citation omitted)).

195. *In re* K.L.N., 482 P.3d 650, 659–60 (Mont. 2021) (holding that "ADA requirements [. . .] are consistent with —and generally subsumed within" the state's "reasonable efforts" requirement); Lucy J. v. State, Dept. of Health & Soc. Servs., Off. of Child.'s Servs., 244 P.3d 1099, 1116 (Alaska 2010) (reiterating that the state's "reasonable efforts" requirement is "essentially identical to the ADA's reasonable accommodation requirement.").

196. *Lucy J.*, 244 P.3d at 1116. Alaska was one of a few states that settled on the applicability of the ADA before the 2015 TA was issued. It continues to be cited by other states with approval.

197. *In re* K.L.N., 482 P.3d at 660; *In re* J.L., 868 N.W.2d 462, 467; *In re* S.A., No. COA17-387, 2017 WL 5147347, at *2 (N.C. Ct. App. Nov. 7, 2017).; *In re S.A.*, 256 N.C. App. 398 at *2; *In re L.W.*, No. H043712, 2017 WL 1318453 at *12 (Cal. Ct. App. Apr. 10, 2017). In West Virginia, a court found no violation of the ADA where the state engaged in "reasonable efforts . . . as well as any expectations that would be added for a person with a mental health diagnosis under the [ADA]." *In re* N.H., No. 19-1127, 2020 WL 3447580 at *2 (W. Va. June 24, 2020). Though this decision leaves open the possibility that the ADA goes beyond reasonable efforts, the decision fails to grapple with what application of the ADA would mean or how it would differ from the application of reasonable efforts.

ADA requirements in favor of a wholistic finding that, as a legal matter, the ADA's reasonable accommodations requirement has been met. This approach rests on the equation of the individualized treatment plans and reasonable efforts often required by state law with the reasonable accommodations requirement of the ADA. This analysis avoids grappling with case law interpreting the ADA's reasonable modifications requirement and related inquiries.[198] While it offers family courts the benefit of efficiency, it appears to flout congressional intent to provide specific protections for people with disabilities.[199]

4. The ADA is Not a Defense or Does Not Otherwise Apply

The largest set of decisions come from family courts that remain completely hostile to parents raising discrimination-based claims under the ADA.[200] Among these states exist different rationales for finding the general inapplicability of the ADA to family court proceedings: (1) the ADA is not a defense to a termination of parental rights proceeding; (2) termination proceedings are held for the benefit of children and should focus on their best interests, not services for parents; (3) termination proceedings are not a state-provided "service"; and (4) ADA claims can and should be brought in separate, federal or administrative, proceedings. This Section will explore these rationales in turn.

Numerous family courts across the country have held that the ADA is not a "defense" to a TPR.[201] On February 2, 2018, the Vermont Supreme Court decided *The Matter of A.L.* There, the mother's cognitive, intellectual, or learning deficits were the motivating factor in the termination of rights with all of her children. The court found that the department complied with the ADA by offering the extra assistance that could have provided the parenting skills needed by the parents, though it did not comport exactly with what was recommended by an expert retained by the parents. Even while finding general compliance with

198. *See, e.g.*, Mershon v. St. Louis Univ., 442 F.3d 1069 (8th Cir. 2006) (placing the initial burden of requesting accommodations on the individual seeking accommodation and holding that the university did not fail to reasonably accommodate the student absent a showing that he was denied specific, requested reasonable accommodations). *See generally* 42 U.S.C. § 12131(2) (prohibiting discrimination by public entities).

199. 42 U.S.C. § 12101.

200. *See supra* text accompanying note 167 (collecting cases).

201. *See, e.g.*, N.J. Div. of Child Prot. & Permanency v. L.M.W., No. A-2850-15T4, 2017 N.J. Super. Unpub. LEXIS 2679, at *22; *In re* A.L., No. 2017-319, 2018 WL 722521, at *4; Adoption of Yolanc, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017); *In re* D.A.B., 570 S.W.3d 606,622 (Mo. Ct. App. 2019); *In re* B.A., 73 N.E.3d 1156, 1159 (Ohio Ct. App. 2016). Still other states have held that even if it is a defense or viable claim, it must be raised in the first instance or it is waived. State *ex rel.* Children v. Jacqueline P., No. A-1-CA-38068, 2020 N.M. App. Unpub. LEXIS 42, at *3 (Ct. App. Jan. 29, 2020); *In re* L.M., 111 N.E.3d 1242, 1252–53 (Ohio Ct. App. 2018); *In re* A.E., No. A149302, 2017 WL 2537236, at *8 (Cal. Ct. App. 2017); *In re* Jeanette L., 69 N.E.3d 918, 921 (Ill. App. Ct. 2017); Adoption of Yolanc, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017); *In re* A.A., No. 112,254, 2014 WL 7575375, at *7 (Kan. Ct. App. Dec. 19, 2014).

the ADA, the court noted that "ADA noncompliance is not a defense" to a petition to terminate parental rights.[202]

The court's reasoning in *A.L.* is also an example of those decisions that assert termination proceedings are held for the benefit of children and should not, therefore, focus too much attention on the needs of the parent. According to *A.L.*, in a TPR, "the court must focus on the best interests of a child, including whether the parents will be able to resume parental duties within a reasonable period of time."[203] The court framed the question of assessing the parents' needs under the ADA as one that "ignores the needs of the child and diverts the attention of the court" to disagreements between the agency and the parents.[204] Courts in several other states have expressed similar views.[205]

A different, but often overlapping, strain of decisions has held that TPRs are not a service so the ADA does not apply.[206] This finding is in direct contravention to the DOJ/HHS TA, which articulated specifically that termination of parental rights proceedings are covered by the ADA.[207] These decisions point to the frailty of the Federal TA as a mechanism for legal change.

Finally, there are those decisions that refuse to hear ADA claims in family court because of a view that these claims can and should be raised in a federal

202. *In re.* A.L., 2018 WL 722521, at *4 (Vt. Feb. 2, 2018) (citing *In re* B.S., 693 A.2d 716, 720 (Vt. 1997)).

203. *Id.*

204. *Id.* (quoting *In re* B.S., 693 A.2d at 720).

205. *See, e.g.*, N.J. Div. of Child Prot. & Permanency v. L.M.W., No. A-2850-15T4, 2017 N.J. Super. Unpub. LEXIS 2679, at *22 (reiterating a prior holding that "to allow the provisions of the ADA to constitute a defense to a termination proceeding would improperly elevate the rights of the parent above those of the child"); *In re* J.J.L., 150 A.3d 475, 481 (Pa. Super. 2016) (emphasizing the centrality of "the child's best interests" in rejecting the ADA as a defense to TPR proceedings); M.C. v. Dep't of Child. And Fams., 750 So. 2d 705, 705 (Fla. Dist. Ct. App. 2000) (rejecting ADA defenses in TPR proceedings on the grounds that "dependency proceedings are held for the benefit of the child, not the parent."); *In re* Kayla N., 900 A.2d 1202, 1208 (R.I. 2006) (quoting and adopting the reasoning of the *M.C.* court in rejecting ADA defenses); *In re John D.*, , 934 P.2d 308, 315 (N.M. Ct. App. 1997) (holding that "the best interests of Child must take precedence over Mother's interest in parenting" and rejecting ADA defenses); *In re* L.W., No. H043712, 2017 WL 1318453, at *17–18 (holding that family courts had authority to bypass typical reunification requirements where such bypass is in "the child's best interests"). *See also In re* B.A., 73 N.E.3d 1156, 1159–60 (Ohio Ct. App. 2016) (determining that the ADA is not a defense to TPR and noting that "the best interests of the child are of paramount concern" in the case).

206. *See, e.g.*, Adoption of Yolane, No. 16-P-1525, 2017 WL 5985018, at *4 (Mass. App. Ct. Dec. 4, 2017) ("[T]he Supreme Judicial Court has held 'that proceedings to terminate parental rights do not constitute 'services, programs, or activities' for the purposes of' the ADA, and that any claimed violations could not be used as a defense."); *In re* Jeanette L., 69 N.E.3d. 918, 922 (Ill. App. Ct. 2017) ("Parental rights termination proceedings are not 'services, programs, or activities' that would subject them to the requirements of the ADA.") (internal quotation marks omitted); S.G. v. Barbour Cnty. Dep't of Hum. Res., 148 So. 3d 439, 447 (Ala. Civ. App. 2013) ("[W]e hold that a termination-of parental-rights proceeding is not a service, program, or activity within the meaning of the ADA and that, therefore, the ADA does not apply to such a proceeding.").

207. TECHNICAL ASSISTANCE, *supra* note 19, at 3.

court or a different forum.[208] For example, a California court reasoned that Congress's intent in adopting the ADA was not to change obligations imposed by unrelated statutes. Therefore, even where a parent may have a separate cause of action under the ADA, such a claim should be brought elsewhere and is not a basis to attack a state order.[209] As explored in Part III.C., reliance on federal courts to seek vindication of rights under the ADA offers parents only a marginal path forward.

C. *Use of Federal Courts to Vindicate ADA Rights*

A study of federal decisions issued since the 2015 Technical Assistance reveals many barriers facing parents who file ADA claims in federal courts. These barriers persist despite the many states that have encouraged parents to file ADA claims outside of family court, and despite the strong Federal TA addressing the application of the ADA to family regulation proceedings.[210]

1. Rooker-Feldman Doctrine

Often, federal courts find ADA-based discrimination claims foreclosed by the *Rooker-Feldman* doctrine. A doctrine of subject matter jurisdiction, *Rooker-Feldman* bars federal review of cases (1) brought by the party that lost in state court; (2) complaining of injuries caused by state court judgments; (3) rendered before the district court proceedings commenced; and (4) inviting district court review and rejection of those judgments.[211] In deciding that *Rooker-Feldman* bars ADA claims based on discrimination experienced in family courts, federal courts reason that a ruling against the defendants would require the court to reject a previous state court judgment.[212] The failure of federal courts to move past

208. *In re* Lacee L., 114 N.E.3d 123, 130 (N.Y. 2018); Adoption of Vicky, No. 18-P-62, 2018 WL 3554138, at *2 (Mass. App. Ct. July 25, 2018). *See also In re Doe*, 60 P.3d at 290-91 ("[A]ny purported violation may be remedied only in a separate proceeding brought under the provisions of the ADA."); *In re* Moore, No. CA99-09-153, 2000 WL 1252028, at *7 (Ohio Ct. App. Sept. 5, 2000) ("All of the remedies and procedures provided by the ADA contemplate affirmative action on the part of the injured party"); *In re* Torrance P., 522 N.W.2d 243, 246 (Wis. Ct. App. 1994) ("[The parent] may have a separate cause of action under the ADA . . . such a claim, however, is not a basis to attack the TPR order."); *In re* Diamond H., 98 Cal.Rptr.2d. 715, 722 (Cal. Ct. App. 2000) ("Although a parent may have a separate cause of action under the ADA based on a public entity's action or inaction, such a claim is not a basis to attack a state court order.").

209. *Diamond H.*, 98 Cal.Rptr. at 722; *In re* Ivan M., No. E039029, 2006 WL 1487173, at *6 (Cal. Ct. App. May 30, 2006).

210. Federal lawsuits in this area are relatively new. *See* Watkins, *supra* note 24, at 1473, n.346 (1995) (stating that, at the time, no parent had yet sought to apply the ADA to child welfare proceedings in federal court).

211. *See* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291–92 (2005).

212. *See, e.g.*, Skipp v. Brigham, No. 3:17-CV-01224 (MPS), 2017 WL 4870907, at *5 (D. Conn. Oct. 26, 2017) (applying *Rooker-Feldman* to dismiss ADA claims arising out of state court custody proceedings, reasoning that "in requesting redress against defendants for accepting the dictates of the state court, [plaintiff] invites the Court to reject those judgments"); Watley v. Dep't of Child. And Fams., No. 3:13-cv-1858 (RNC), 2019 WL 7067043, at *19–20 (D. Conn. Dec. 23, 2019) (applying *Rooker-Feldman* to dismiss ADA claims arising from state court child welfare proceeding).

Rooker-Feldman—even when there may have been manifest failures to apply the ADA in the process of terminating a person's fundamental right to parent—creates a disturbing vacuum for families seeking to vindicate their rights under the ADA. At least some parents have tried in vain to raise claims of disability discrimination or requests for accommodations in family court, only to be told that family court is not the proper venue for such a claim. When a federal court subsequently bars these same parents from pursuing a claim under the ADA, the parents and their children are left without recourse. This lacuna is especially notable given the long and continuing history of family courts directing parents and families to pursue such claims in other fora.[213]

In *Watley v. Hasemann*, parents whose rights were terminated sued under the ADA in federal court alleging that their caseworkers discriminated against them.[214] Despite the family court's affirmative statement that claims under the ADA must be brought in a separate, distinct proceeding, the U.S. District Court for the District of Connecticut ruled that the court lacked jurisdiction to hear the claims.[215] The court found that a claim of discrimination under the ADA was, inherently, a challenge to a state court judgment and therefore barred by *Rooker-Feldman*.[216] In finding that *Rooker-Feldman* barred discrimination claims brought under the ADA, the *Watley* court determined that because the state law reasonable efforts requirement mandated DCF to consider a parent's disabilities, a federal proceeding under the ADA would be an inappropriate review of the state court judgement.[217] The consequences of this decision are manifold for parents seeking to protect their rights.

Perhaps most glaringly, *Watley* demonstrates the extent to which parents who seek to raise claims under the ADA may face a catch-22. The family court specifically told the *Watley* parents that they could not raise the ADA in family court. Likewise, the *Watley* parents were careful not to seek the return of their children in federal court. Instead, the parents sought damages and injunctive relief.[218] Nonetheless, the District Court of Connecticut ruled that their claims could not be heard in federal court because they had already been heard and decided in the family court.[219]

A more technical set of issues also arises from the *Watley* court's interpretation that a claim of discrimination under the ADA in federal court inherently requires the inappropriate review of a state court finding that

213. *See supra* text accompanying note and note 208 (citing cases that foreclose raising the ADA in family court but suggest raising the claim in federal court or another separate proceeding).

214. *Watley*, 2019 WL 7067043. Initially, the District of Connecticut dismissed for failure to state a claim but the Second Circuit reversed and reinstated the case. Plaintiffs—two parents, one with ID—filed an amended complaint that was dismissed again in December of 2019. *Id.* at *1.

215. *Id.* at *10.

216. *Id.*

217. *Id.* at *2, *10.

218. *Id.* at *19–23.

219. *Id.* at *19–25.

reasonable efforts were made. By making such a finding, the court implicitly rejected the argument that the harm inflicted on the parents began before any order of the court or could be understood as stemming from nonjudicial action, such as behavior of the caseworkers. Caseworkers are charged with providing services to parents and families, often outside of court or before a court case has even been initiated. Caseworkers and their counsel are charged with informing the court about their efforts but such reports are often minimal, sparse, or based on form documents. The details of their efforts—or lack thereof—are often entirely unknown to the court. The District of Connecticut's ruling misconstrues the role that family regulation agencies and caseworkers play in the lives of parents and families—though their work is meant to be reviewed by courts, it often begins months and sometimes years before a case comes to court.[220]

The case *Johnson v. Missouri* illustrates this second set of issues presented by *Watley*. In *Johnson*, a state agency asked the hospital to delay the release of a newborn baby. Both baby and mother were healthy, and the mother had been discharged from the hospital. This intervention effected a separation that began before court intervention and arguably influenced the judge who later oversaw the case.[221] When the state finally approached the family court, they came to make an official request for separation that had already occurred. By interpreting this removal as one "stem[ming] from" a court order, the *Johnson* decision insulates the state agencies from any claims of ADA-based discrimination. As the facts of *Johnson* show, however, discriminatory harms often occur before court orders are issued and subsequent court orders often flow from those harms.

In cases where harm occurs before a family arrives in state court, the harm often influences the proceeding itself. When federal courts nonetheless dismiss these harms under *Rooker-Feldman* because the family court judge ratified the decision to remove, any claim of disability discrimination—or any related harm—goes unaddressed in both courts. The result of applying *Rooker-Feldman* to these claims is that discrimination outside of the court proceeding is not redressable where a family court judge ultimately determines that the children should have been removed.

The *Watley* decision also presents a third problem with federal court handling of ADA claims. While *Watley* finds the claims technically precluded or subject to abstention, the family court never made a thorough assessment of a claim of discrimination or the wrongful denial of accommodations. Indeed, because both the federal and family courts refused to hear the claim, *no court* will ever review the ADA-based claim for discrimination. This problem will

220. *See* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV 841, 843 (2020); Roxanna Asgarian, *Hidden Foster Care: All of the Responsibility, None of the Resources*, THE APPEAL (Dec. 21, 2020), https://theappeal.org/hidden-foster-care/ [https://perma.cc/WE34-UTKX] (describing the phenomenon of "shadow foster care" where children are removed from their parents without the opportunity to speak with a lawyer or go before a court).

221. *Johnson v. Mo. Dep't of Soc. Servs.*, No. 15-CV-00391-DGK, 2016 WL 6542722, at *2–3 (W.D. Mo. Nov. 2, 2016).

likely also arise for parents seeking federal redress in the many states where courts have found reasonable efforts and the ADA to be coextensive.

The *Watley* court reasoned that "the requirements of state and federal antidiscrimination law are substantially the same" and therefore a federal ADA claim will generally be precluded when reasonable efforts are found.[222] This holding both flies in the face of findings by state courts that hold reasonable efforts are affirmatively not meant to gauge or assess discrimination under the ADA,[223] and fails to reckon with the reality that family courts are not meaningfully assessing these claims.

At least one court initially interpreted *Rooker-Feldman* as a less than absolute bar. In *Wilson v. The New Jersey Division of Child Protection and Permanency* (*"Wilson I"*), the court reasoned that a suit under the ADA based on a child protective matter that led to a TPR "does not complain explicitly about injuries caused by the state court judgment or ask this Court to overturn that judgment."[224] The court recognized that Ms. Wilson's "claims, if granted, might tend to undermine the state court's conclusions, but would not require that they be overruled."[225]

2. *Abstention Doctrines*

Federal courts have relied on doctrines of abstention to avoid review of ADA claims based on discrimination that occurred during a family court proceeding. "The *Younger* doctrine applies where: (1) there is an ongoing state proceeding; (2) an important state interest is involved; and (3) the plaintiff has an adequate opportunity for judicial review of his or her constitutional claims during or after the proceeding."[226] In cases where parents with disabilities face loss of parental rights due to discrimination, *Younger* has been found to prevent federal courts from interfering in state court proceedings absent "extraordinary circumstances."[227] *O'Shea v. Littleton* expanded the kind of abstention

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222. *Watley*, 2019 WL 7067043, at *12.

223. *See, e.g.*, *In re* Lacee L., 114 N.E.3d 123, 129–30 (N.Y. 2018) (holding that the "time- and fact-intensive process" of fully applying ADA standards would be inappropriate for family court permanency proceedings); *In re* Elijah C., 165 A.3d. 1149, 1164–65 (Conn. 2017) (explaining that ADA defenses are improper in termination and neglect proceedings in which "the parties and the court should not allow themselves to be distracted by arguments regarding the parent's rights under the ADA").

224. Wilson v. N.J. Div. of Child Prot. & Permanency, No. 13-cv-3346, 2016 WL 316800, at *4 (D.N.J. Jan. 25, 2016).

225. *Id.* at *4. Ultimately, however, the District of New Jersey dismissed Ms. Wilson's claims on summary judgment. *See* Wilson v. N.J. Div. of Child Prot. & Permanency, 2019 U.S. Dist. LEXIS 144839, at *2 (D.N.J. Aug. 23, 2019).

226. *See* Thurston v. Cotton, No. 5:15-cv-138, 2015 US Dist. LEXIS 92195, at *4 (D. Vt. July 10, 2015) (citation omitted) (barring the plaintiffs' claims for injunctive relief under the *Younger* Doctrine); Younger v. Harris, 401 U.S. 37 (1971).

227. *Watley*, 2019 WL 7067043, at *25 (noting that "the federal court will have to abstain from interfering in what will then be an ongoing state proceeding" and that "the plaintiff's allegations do not support a finding that he or she faces an 'imminent' injury"); Rosenbaum v. Kissee, No. 1:16-cv-00056

conceived in *Younger*, prohibiting federal courts from deciding claims that seek review of ongoing state court proceedings.[228]

The District Court of New Jersey's decision to dismiss the claims brought in *Wilson I* at a later stage of review exemplifies how the abstention doctrine acts as a barrier for parents seeking federal intervention. The court reasoned that the entry of injunctive relief in this case "would almost certainly result in a flurry of federal suits that the rulings in state court family law matters ignored or circumvented the federal order."[229] Expanding upon that, the court observed that "a federal district court is not to appoint itself a de facto supervisor of state court proceedings . . . a scenario which would inevitably ensue given the frequent interplay between the New Jersey state courts and the [Department of Child Protection and Permanency] regarding family law matters."[230] Unlike *Rooker-Feldman*, these barriers do not forbid federal courts from hearing claims after the conclusion of a family court case but are likely to prohibit litigation during a proceeding.

3. *Collateral Estoppel and Preclusion*

Federal courts have found collateral estoppel, also referred to as issue preclusion, to be a barrier to the handling of ADA claims arising from a parent's treatment in family court. Issue preclusion forbids courts from reassessing issues and facts that a party already litigated and another court actually decided.[231] When a court considers whether issue preclusion will bar relitigation of a

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KGB, 2018 WL 10399000, at *4–6 (E.D. Ark. Feb. 22, 2018); Amato v. McGinty, No. 1:17-CV-00593, 2017 WL 4083575, at *6 (N.D.N.Y. Sept. 15, 2017) (holding that "to the extent that any issues in this litigation are still pending in family court, this Court is barred from exercising such jurisdiction pursuant to *Younger*"); Duke v. Or. DOJ, No. 6:16-cv-01038-TC, 2016 U.S. Dist. LEXIS 144132, at *1 (D. Or., July 19, 2016); Thurston v. Cotton, No. 5:15-cv-138, 2015 WL 4251191, at *4 (barring the plaintiffs' claims for injunctive relief under the *Younger* Doctrine) (citing *Moore v. Sims*, 442 U.S. 415, 430 (1979) (holding that the district court should have abstained while state-court proceedings, regarding welfare of children, took place).

228. O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (characterizing Respondents' effort to seek an injunction "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" as "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent") (citation omitted).

229. Wilson v. N.J. Div. of Child Prot. & Permanency, 2019 U.S. Dist. LEXIS 144839, at *29 (D.N.J. Aug. 23, 2019).

230. *Id. See also* Karkanen v. California, No. 17-cv-06967-YGR, 2018 WL 3820916, at *5 (N.D. Cal. Aug. 10, 2018) (addressing an alleged failure to provide reasonable accommodations and representation in a private custody case and reasoning that the court lacked "the authority to provide federal oversight over state courts' appointment of legal representation in custody cases").

231. *Watley*, 2019 WL 7067043, at *10 (stating "[c]ollateral estoppel precludes re-litigation of the issue at the heart of plaintiffs' complaint . . ."). Under the full faith and credit statute, 28 U.S.C. § 1738, federal courts are generally required "to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State," and must look to a state's preclusion laws when evaluating state judgements. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373-375 (1995). *See also* 28 U.S.C. § 1738.

particular issue, the court assesses whether (1) the underlying factual issues were already addressed by a state court decision and (2) plaintiffs had a "fair opportunity" to litigate as defined by state law.[232] Even when plaintiffs allege a variety of claims in federal court, issue preclusion can take effect when the "theme" of the claims briefed to each court overlap.[233]

In *Miller v. Nichols*, Janine Miller and James Mahood sought injunctive and declaratory relief to prevent the adoption of their daughter, as well as damages under the ADA.[234] Ms. Miller alleged that her caseworker made no effort to accommodate her possible mental illness and was consistently biased in favor of the foster parents.[235] The First Circuit determined that "the failure to accommodate the parents' needs in the context of the reunification obligation" was an overlapping "theme" between the federal ADA and the family court case. The First Circuit also held that the ADA claims depend on an "identical factual issue" litigated in the family court case.[236]

In *Watley,* the Second Circuit affirmed the District of Connecticut's dismissal of the ADA claims, finding them barred by collateral estoppel.[237] The *Watley* parents argued that the issues of whether DCF complied with the ADA and RA and whether DCF made reasonable efforts to reunify them with their children were not identical to the issues litigated in state court. They further argued that DCF's compliance with the ADA and RA was not actually litigated.[238] The Court of Appeals disagreed, reasoning that under both federal and Connecticut law, the core issue in the parties' dispute was whether DCF reasonably accommodated the parents actual or perceived disabilities in providing services and programs to assist their reunification with their children.[239] The court ruled that this issue was actually litigated and necessarily determined by the Connecticut state courts.[240]

4. Statutes of Limitations

State statutes of limitations can create time-bars to otherwise valid claims under the ADA. For example, in *Chitester v. Department of Child Protection and Permanency*, the district court found that Congress had validly abrogated Eleventh Amendment immunity under the ADA and RA but, nonetheless, found

232. The preclusive effect of an issue raised in a state proceeding is determined by the law of the state in question. Miller v. Nichols, 586 F.3d 53 at 60-63 (1st Cir. 2009). Note that issue preclusion depends on an interpretation of state law and therefore varies somewhat across the nation.

233. *Id.* at 61.

234. *Id.* at 56.

235. *Id.* at 58.

236. *Id.* at 61.

237. Watley v. Dep't of Child. & Fams., 991 F.3d 418, 421 (2d Cir. 2021).

238. *Id.* at. 421.

239. *Id.* at 426-27.

240. *Id.*

the claims barred by statutes of limitation.[241] One potential reaction to these cases, and indeed to those that are dismissed under *Rooker-Feldman*, is to suggest bringing a claim at the outset of a child protective matter. Such claims, however, are likely barred under *Younger/O'Shea* abstention doctrines, which prevent federal courts from overseeing ongoing state litigation or the state administration of their courts.[242] Alternatively, courts could stay the federal proceedings pending the outcome of the underlying state suit.[243]

5. Immunity

Eleventh Amendment immunity is another hurdle for claimants raising ADA claims against family regulation actors in federal court.[244] The Eleventh Amendment protects nonconsenting states from suits in federal court brought by citizens of other states. The Supreme Court has interpreted it to also bar suits brought by a state's own citizens. The Eleventh Amendment can be overcome by Congressional abrogation.[245] Eleventh Amendment immunity "encompasses not just actions in which the state is actually named as a defendant, but also certain actions against state agents and instrumentalities," including actions "for the recovery of money from the state."[246] The Eleventh Amendment prevents state officials from being liable in federal court for damages regarding actions done within their "official capacity,"[247] essentially barring recovery that would be paid out of state coffers.

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241. Chitester v. Dep't of Child Prot. Permanency, CV No. 17-12650 (FLW), 2018 WL 6600099, at *6 (D.N.J. Dec. 17, 2018). The *Chitester* court looked to state tort law and found that the statute of limitations began running at the time of initial removal. *Id. See also* Wilson v. N.J. Div. of Child Prot. & Permanency, 2019 U.S. Dist. LEXIS 144839, at *65 (D.N.J. Aug. 23, 2019) ("Section 1983 does not contain its own statute of limitations and instead borrows the limitations period from the law of the forum state.").

242. *See supra* notes 226–228 and accompanying text.

243. Courts do this occasionally in the context of civil rights suits raised pursuant to 42 U.S.C. § 1983 where there is an underlying, related, and ongoing suit in criminal court. *See, e.g.*, Stoddard-Nunez v. City of Hayward, No. 3:13-cv-4490 KAW, 2013 U.S. Dist. LEXIS 179969 (N.D. Cal. Dec. 23, 2013) (staying plaintiff's § 1983 claims and allowing limited discovery, in lieu of dismissal, where all the elements of *Younger* abstention had been me); Gresham v. Carson, No. 3:12-cv-00008-SLG, 2012 U.S. Dist. LEXIS 127781 (D. Alaska Sept. 7, 2012) (staying plaintiff's § 1983 claims based on allegations of *Miranda v. Arizona* until the conclusion of pending criminal proceedings).

244. Ruth Colker's seminal work on the issues presented by the ADA and its interaction with Eleventh Amendment immunity describes this hurdle, and potential solutions, in a broader context. *See The Section Five Quagmire*, 47 UCLA L. REV. 653, 701 (2000) (arguing that Congress's abrogation of Eleventh Amendment immunity under Title II of the ADA was valid and constitutional).

245. Kimel v. Fla. Board of Regents, 528 US 62, 73 (2000); Seminole Tribe of Fla. V. Florida, 517 U.S. 44, 54–55 (1996). *See also* U.S. CONST. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

246. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997); *accord* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984); Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 401 (1979).

247. Wilson v. N.J. Div. of Child Prot. & Permanency, 2019 U.S. Dist. LEXIS 144839, at *41 (D.N.J. Aug. 23, 2019).

In one case, the District Court for the District of New Jersey dismissed pending ADA claims against individuals in their official capacity as well as those sued under their individual capacity.[248] The court applied a three-part test to determine whether Eleventh Amendment immunity would bar the ADA claim: "(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has."[249] The court determined that child welfare agencies are "an arm of the state for purposes of the sovereign immunity analysis" and, from there, determined that those defendants sued in their official capacity were covered by Eleventh Amendment immunity.[250] As to defendants sued in their individual capacity only, the court determined that Title II extends to public entities only.[251]

Still, Eleventh Amendment immunity is not absolute. *Ex parte Young* created an exception allowing pursuit of injunctive relief against state officials so long as the suit is not for damages.[252] In addition, a state can waive its immunity. Congress can also abrogate Eleventh Amendment immunity when it "(1) unequivocally express[es] its intent to abrogate that immunity; and (2) act[s] pursuant to a valid grant of constitutional authority."[253] To satisfy the second factor, Congress must act pursuant to its Fourteenth Amendment section 5 power. In accordance with the Court's decision in *City of Boerne v. Flores*, any law Congress passes pursuant to its authority under section 5 must prevent or remedy Fourteenth Amendment violations already recognized by the courts, and the law must be proportional and congruent to those violations.[254] In the context of disability, the Fourteenth Amendment prohibits only irrational discrimination.[255] Laws prohibiting discrimination that would survive a rational basis review cannot abrogate Eleventh Amendment immunity.

In the context of the ADA, the Court's willingness to find abrogation of the Eleventh Amendment has depended much upon the congressional record documenting a history of discrimination. In *Board of Trustees of University of Alabama v. Garrett*, the Court held that Title I of the ADA, which permitted suits for damages against state employers, was not a valid exercise of Congress's section 5 power.[256] The Court found insufficient evidence of a history of public employment discrimination in the congressional record, noting that the "overwhelming majority" of that evidence of discrimination related to "the provision of public services and public accommodations."[257]

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248. *Id.*
249. *Id.*
250. *Id.* at *42.
251. *Wilson*, 2019 U.S. Dist. LEXIS 144839, at *40–41.
252. Ex parte *Young*, 209 U.S. 123 (1908).
253. Bowers v. NCAA, 475 F.3d 524, 550 (3d Cir. 2007) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).
254. City of Boerne v. Flores, 521 U.S. 507 (1997).
255. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
256. 531 U.S. 356, 368, 374 (2001). *See supra* note 94.
257. *Id.*

In *Tennessee v. Lane*, however, the Court reached a different conclusion with respect to Title II. In *Lane*, the Court faced the question of whether the ADA properly allowed suit against a state where two adults with paraplegia were denied access to the court system by reason of their disability.[258] George Lane—a defendant who used a wheelchair for mobility—was unable to access the courtroom where his case was being heard.[259] The courthouse lacked an elevator and, though Mr. Lane crawled up two flights of stairs for his first appearance, he refused to do so on a future occasion.[260] The question before the Court was whether Title II exceeded Congress's power under section 5 of the Fourteenth Amendment.[261] Bolstered by Lane's novel presentation of a Title II claim intertwined with a claim alleging a violation of his fundamental right to access the courts, and by the long history of state discrimination against people with disabilities resulting in deprivations of fundamental rights, the Court concluded that Congress was within its authority to abrogate Eleventh Amendment immunity pursuant to Title II.[262]

In the context of family regulation, at least one court has found that Congress validly abrogated immunity under the ADA.[263] In assessing the question of valid abrogation in the context of family regulation proceedings, *Lane* offers a compelling basis to argue that Congress acted well within its authority.[264] As the *Lane* Court found, "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[265] The *Lane* Court specifically considered the Congressional record on barriers to marriage for people with disabilities, among denials of fundamental rights.[266] Given this precedent, there are strong arguments to be made that Title II is a valid abrogation of Eleventh Amendment immunity in the context of family regulation cases, which impede directly on the fundamental right to parent. Nonetheless, many courts avoid the constitutional morass completely by determining that Congress's abrogation of immunity under the RA was valid and, because rights

258. *Lane*, 541 U.S. 509, 513.

259. *Id.* at 513–14.

260. *Id.*

261. *Id.*

262. *Id.* at 524–28 (concluding that Congress was within its authority to abrogate Eleventh Amendment immunity pursuant to Title II "as it applies to the class of cases implicating the fundamental right of access to the courts").

263. Chitester v. Dep't of Child Prot. Permanency, No. 17-12650 (FLW), 2018 WL 6600099, at *3–5 (D.N.J. Dec. 17, 2018) (finding "clear intent" to abrogate Eleventh Amendment immunity in both the ADA and the RA).

264. Cecka, *supra* note 24, at 144 (citing Tennessee v. Lane, 541 U.S. 509, 532). *See also* Santosky v. Kramer, 455 U.S. 745 (1982).

265. *Lane*, 541 U.S. at 524.

266. *Id.* at 524–25 (finding in court decisions a "pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.").

and remedies of the RA are coextensive with the ADA, they need not decide at the early stages of a case.[267]

The Eleventh Amendment does not bar suits for damages brought against state officials acting in their individual capacity on the grounds that any judgment against them is not a judgment against the state that should be paid by the state. However, officials sued in their individual capacity can raise individual immunity defenses, and at least one court has determined that they are not subject to Title II when sued in their individual capacity.[268]

Courts have also granted qualified immunity to the individual-capacity state defendants in these cases.[269] The doctrine of qualified immunity insulates government officials who are performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[270] As the *Watley* court reasoned, "[q]ualified immunity applies because it was not 'clearly established at the time of the alleged misdeeds that a state officer violated a parent's substantive due process rights by failing to direct the implementation of ADA policies and programs in child custody, neglect, and TPR proceedings.'"[271]

Watley reveals how parents in these cases are hamstrung by the lack of controlling precedent or persuasive authority suggesting that failure to implement the ADA is a violation of substantive due process. Because courts rely on controlling authority or a significant volume of persuasive authority to determine whether an act was a "clearly established" violation of law,[272] and

267. *See, e.g.*, Watley v. Dep't of Child. And Fams., No. 3:13-cv-1858(RNC), 2019 WL 7067043, at *18 (D. Conn. Dec. 23, 2019); T.W. v. N.Y. State Bd. of L. Examiners, No. 16CV3029RJDRLM, 2019 WL 4468081 (E.D.N.Y. Sept. 18, 2019), *reconsideration denied*, No. 16CV3029RJDRLM, 2019 WL 6034987 (E.D.N.Y. Nov. 14, 2019). *See also* Marble v. Tennessee, 767 F. App'x 647, 655 (6th Cir. 2019) (finding that if there were a genuine question of fact as to whether DCS's conduct violated Title II, the district court would need to determine whether their conduct violated the Fourteenth Amendment or, if it did not, whether Congress validly, "prophylactically abrogated sovereign immunity for that class of conduct").

268. *See supra* note 251 and accompanying text.

269. Watley v. Dept't of Child. & Fams., 991 F.3d 418 (2d Cir. 2021); Wilson v. N.J. Div. of Child Prot. & Permanency, 2019 U.S. Dist. LEXIS 144839, at *2 (D.N.J. Aug. 23, 2019); Mazzetti v. N.J. Div. of Child Prot. and Permanency, No. CV14-8134KMMAH, 2017 WL 1159726, at *28–30 (D.N.J. Mar. 27, 2017).

270. James v. City of Wilkes-Barre, 700 F.3d 675, 679 (3d Cir. 2012) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The U.S. Supreme Court has established a two-part analysis that governs whether an official is entitled to qualified immunity. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001). That two-part analysis inquires as to (1) whether the facts put forward by the plaintiff show a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the alleged misconduct. *Id.*

271. *Watley*, 2019 WL 7067043, at *15.

272. *See, e.g.*, *id.* at *50–51 (D. Conn. Dec. 23, 2019) ("Plaintiffs need not point to 'a case directly on point,' but must nonetheless find either 'cases of controlling authority in their jurisdiction at the time of the incident' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'").

because claims involving ADA violations in the public family regulation system are overwhelmingly dismissed, rulings on qualified immunity can become a recurring block to ADA claims against state employees.

6. The Need to Embrace Disability

Federal decisions dismissing ADA claims stemming from family court cases also reveal the unique challenges facing parents in the family regulation system: parents must "claim" disability even where it can be harmful to their pursuit of parenthood and lead to greater discrimination. While this is inherent to making use of the ADA in many contexts,[273] it can be particularly fraught for parents with disabilities facing the punitive removal of their children.

In *Marble v. Tennessee,* the Sixth Circuit affirmed the dismissal of ADA claims where it was undisputed that Mr. Marble had a disability, and he had made a specific request for a deviation from policy.[274] The problem for Mr. Marble was that he had not specifically connected his disability with his request for accommodation: "Marble's testimony shows that he never told DCS his disabilities kept him from meeting the requirements of the permanency plan."[275] The Sixth Circuit looked to cases arising from the employment context to support their reasoning that, without Mr. Marble's identification and "claim" of disability, the caseworker would not have known about disability.[276]

In making this ruling, the court focused on the fact that Mr. Marble lived far from the child welfare agency and that the caseworkers would not have known about his disability.[277] Even though Mr. Marble requested an accommodation, the agency could not have connected it to his disability unless he told them. While compelling, this logic ignores the very real differences between employers and caseworkers; caseworkers, unlike employers, have a federal obligation to engage in tailored, reasonable efforts to reunite an individual with their children. Arguably, this relationship contemplates a much higher degree of knowledge and awareness about a parent's particularized needs and individualized disability than an employer would have about an employee.

IV.
THE WAY FORWARD

This Part offers potential solutions to the current crisis facing parents with disabilities, focusing on both local and federal reforms. In both state and federal

273. Eyer, *supra* note 59; Bagenstos, *supra* note 74.

274. Marble v. Tennessee, 767 F. App'x 647,650 (6th Cir. 2019).

275. *Id.* Mr. Marble's claim specifically was that he had been wrongly denied a reasonable accommodation, *i.e.*, that his children be placed with a willing and available relative. *Id.* In denying the claim, the court cited to the DOJ/HHS TA and acknowledged specifically that placement with a family resource can be an accommodation under the ADA. Nonetheless, the court found that it was not clear enough that Plaintiff's request for placement with a relative was an accommodation.

276. *Id.* at 651–52.

277. *Id.* at 653.

venues, parents face a tremendous power imbalance when compared to the state: they are, by-and-large, poor, working with court-appointed counsel, and radically disempowered following the removal of their children.[278] In this sense, the ADA offers a potential means to shift power from courts and the state to parents with disabilities and their advocates. The time-sensitive nature of family court cases, especially family regulation cases that proceed according to the federal timelines identified in the ASFA, means that parties must invoke the ADA early and immediately at the local level. Families and their advocates require mechanisms to raise claims of disability-related discrimination and seek disability-related supports in a timely fashion before the local family court. Nonetheless, given that the ADA is a federal statute which purports to protect an entire group from discrimination, some active form of federal judicial oversight of state actors is appropriate. The jurisdictional and often haphazard way that family law develops across the country, with differences emerging at a state- and even county-wide level, underscores the need for a federal avenue of enforcement. Indeed, as the current state of ADA application in state court suggests, state and local family courts are destined to disagree about their interpretation of what the ADA requires and how it should be enforced. The below Section suggests federal and local approaches to alleviate the current barriers facing parents, offered as tools for parents and their advocates to shift power in the courtroom and the family regulation system more broadly.

A. Correcting Federal Doctrine

Federal enforcement of the ADA is necessary to address the very real predicament facing parents who might seek intervention from federal courts—as family courts have directed them to do for decades, and that many courts continue to do today.[279] As a first step toward federal-level enforcement, federal courts must contend with the actual practice of the family courts. Federal decisions that find discrimination claims are barred by *Rooker-Feldman* or are precluded because of prior findings of reasonable efforts or a termination of parental rights appear to have only a superficial understanding of how services and supports are provided in the family regulation system. These decisions conflate interventions that take place outside of court, which are distinct acts by a social services agency and therefore covered by the ADA, with actual court

278. *See supra* Part I.B–D and accompanying notes. *See also* S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1097 (2022) (describing the family regulation system as an "intrusive, disempowering surveillance system"); L. Frunel and Sarah Lorr, *Lived Experience and Disability Justice in the Foster System*, 11 COLUMBIA J. RACE & L. _(forthcoming 2022) ("In the family regulation system, the label of disability is used to strip parents of rights and credibility, and the system itself—along with the actors within it—fails to understand the nature of disability while simultaneously espousing and adopting harmful stereotypes of disability to conclude that disabled parents cannot parent.").

279. *See supra* note 193 (collecting cases which continue to direct parents to file claims in federal court).

proceedings and findings, which might be more easily subject to the doctrines of *Rooker-Feldman*, abstention, and preclusion.

As the review of state court decisions reveals, a thorough assessment of whether and how a caseworker might have discriminated against a given set of parents while conducting a removal often does not regularly take place in family court. This is especially likely to be true given the high volume of cases before a judge and the particular issues—the immediate safety of a newborn in the situation presented to the court, the fear that the result of their decision will end up in a newspaper—on which family courts are focused. As the New York Court of Appeals observed, the question of whether accommodations are reasonable under the ADA requires "a time- and fact-intensive process with multiple layers of inquiry."[280] With the notable exception of Michigan, Colorado, and Utah, state court laws do not require that courts engage in deep, careful assessments of whether or not reasonable accommodations or modifications to policies exist for parents with ID.

Federal courts should look to the logic employed by the District of New Jersey in *Wilson*, which correctly comprehends that a claim under the ADA "asserts claims for damages based on alleged abuses by state officials" or injunctive relief seeking policy changes.[281] As the court reflected, such claims "might tend to undermine the state court's conclusions" but do not require that they be overruled.[282] Moreover, federal courts should take heed of *Rooker-Feldman*'s diminishing power in recent years.[283] Cases in other areas of law have made clear that *Rooker-Feldman* is not a bar when the injury complained of is caused by the defendant's actions, rather than the state court judgment.[284]

Federal courts must grapple with the watered-down approach utilized in family courts. Where a family court has refused to hear arguments about violations under the ADA, it is disingenuous for federal courts to allow states to invoke issue preclusion as a defense. The argument that issue preclusion should block litigation of ADA claims in such cases fails to meaningfully contend with the requirement that for a claim to be precluded, the issues must have been "actually litigated" in the underlying proceeding.[285] In service of these goals, federal courts and the advocates who appear before them must educate

280. *In re* Lacee L., 114 N.E.3d 123, 130 (N.Y. 2018).

281. Wilson v. N.J. Div. of Child Prot. & Permanency, No. 13-cv-3346, 2016 WL 316800, at *4 (D.N.J. Jan. 25, 2016).

282. *Id.*

283. *See, e.g.*, Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 282 (2005) (observing that *Rooker-Feldman* "has sometimes been construed to extend far beyond the contours" of the initial cases creating the doctrine, "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion"). For an entertaining and informative history of how *Rooker-Feldman* has weakened over the years, see Samuel Bray, *Rooker Feldman (1923-2006)*, 9 GREEN BAG 2D, 317 (2006).

284. *See, e.g.*, In re Razzi, 533 B.R. 469, 478 (Bankr. E.D. Pa. 2015); Centres, Inc. v. Town of Brookfield, Wis., 148 F.3d 699, 702 (7th Cir. 1998).

285. *See supra* notes 229–236.

themselves about the mechanisms of service provision. Specifically, courts and advocates must contend with the extent to which services are provided outside of family court proceedings and beyond the watchful eyes of the family court judges. Advocates and scholars should train federal practitioners and judges, many of whom have very limited familiarity with the details of family court practice or service provision to parents and families.

Finally, parents and their advocates should take seriously DOJ and HHS's joint interest in these issues and file federal civil rights complaints. DOJ has a division of civil rights and HHS has an office of civil rights, and both have staff dedicated to investigation and enforcement of ADA claims.[286] Recent settlements with Oregon and Washington,[287] plus technical assistance directed to New Jersey,[288] suggest that the Sara Gordon case in Massachusetts is more than a passing interest to the departments.[289] Even better, these claims can be filed without access to an attorney and require no prescribed form of complaint.[290] Both agencies offer online forms as well as physical addresses where complaints can be sent by mail.[291] Institutional providers in state family courts should begin filing these complaints whenever appropriate.

B. Family Court-Based Solutions

Family courts and advocates appearing in them must insist that state agencies make "reasonable efforts" meaningful. Both the Michigan Court of Appeals decision in *Hicks/Brown* and the Bronx County Court decision in *Xavier Blade* provide a strong and replicable path forward for both judges and advocates.

The legal standard articulated in *Hicks/Brown*, which identifies compliance with the ADA as a threshold issue for a finding of reasonable efforts, is significantly different from the legal standard in almost every other state. The *Hicks/Brown* decision is unique among family court decisions in that it requires family courts to make an ADA finding, separate from the state law determination about compliance with family law standards of "reasonable efforts" and any existing state anti-discrimination laws. In contrast, decisions that have determined that reasonable efforts automatically presume compliance with the ADA allow courts to skip a detailed application of the ADA and instead simply assume compliance with the finding of reasonable efforts. The difference for

286. *How to File a Civil Rights Complaint*, https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html [https://perma.cc/R42P-HDW2]; *Submit a Complaint*, https://www.justice.gov/actioncenter/submit-complaint. Both the HHS and DOJ websites provide methods for filing a federal civil rights complaint, which includes the option to submit a complaint directly online through the portals linked in this footnote.

287. *See supra* text accompanying note 20.

288. *Id.*

289. *Id.*

290. *See supra* note 255.

291. *In re* Hicks/Brown, 893 N.W.2d 637, 637 (Mich. 2017).

parents can be significant in that the *Hicks/Brown* standard creates an "affirmative duty" to make reasonable accommodations.[292] In states that have not recently addressed the ADA or have not adopted the *Hicks/Brown* standard, advocates should pursue this standard.

An effort to secure clear legal standards applying the ADA should include advocacy that emphasizes the tension between ASFA and the ADA. ASFA, with its bright line rules surrounding TPR and permanency, can appear fundamentally at odds with individuation required by the ADA.[293] And it is ASFA, not the ADA, that family courts most often look to for guidance. After all, it is ASFA that pins federal funding to compliance, and ASFA that speaks directly to the state's obligation to both children and families in the family regulation system. Advocates in family court must insist on the primacy of federal antidiscrimination law and seek extensions on timelines under ASFA as reasonable accommodations where appropriate.

Trial and appellate lawyers working in family courts who seek replication of this standard should be mindful of the possibility that this standard may make litigation in federal court even less plausible. Parents with claims heard by courts that deem the requirements of the ADA and controlling state law to deal with nearly identical core factual issues can expect to face a particularly high hurdle in federal court on *Rooker-Feldman* and preclusion grounds.[294] The great overlap in standards will require parents to decide early on whether they want to file in federal court under the ADA or raise the issue in family court. Though increased attention in family courts may lower the chances of federal engagement in these cases, it will significantly raise the possibility of vindication in family courts. In this way, federal engagement in these cases may become less critical. Moreover, the relatively high number of cases in family courts attempting to resolve issues under the ADA reveals that for many parents, family court is the sole and primary place of legal advocacy.[295]

Xavier Blade, the decision of a Bronx County Family Court Judge and affirmed by New York Appellate Division of the First Judicial Department of the Supreme Court of New York, also offers a path forward for judges and advocates. The family court's decision made significant use of the existing local resources for adults with ID and, while acknowledging the work that the foster care agency had done for this family, demanded that more be done based on the

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292. *Kay*, *supra* note 24, at 813 (describing that *Hicks/Brown* goes further than decisions that find reasonable efforts presumes compliance with the ADA because it clarified that "once the agency is aware of the disability, it has an 'affirmative duty to make reasonable efforts at reunification.'").

293. *See supra* notes 107–126 and accompanying text.

294. *See supra* III.C.1-3.

295. Professor Joshua Kay has also discussed the downsides of pursuing ADA-based claims outside of family courts. Kay, *supra* note 24, at 808 (describing that such claims require parents to "suffer discrimination, lose their children, and seek a remedy under the ADA in a separate action," in that order). As this Article's review of federal decisions reveals, however, even under the less-than-ideal circumstances imagined by Kay, a parent is unlikely to prevail.

specific needs of the parent before the court.[296] In addition, the court looked directly to ADA accommodations recognized by the EEOC in the employment law context.[297] A decision like *Xavier Blade* makes clear that even in those courts that have not adopted the standards outlined in *Hicks/Brown*, there is a route forward involving actual accommodation for parents with disabilities.

In addition to advocating for the application of more robust legal standards, lawyers must regularly raise the growing social science evidence that confirms parents with ID can effectively and safely parent with appropriate supports.[298] There is also specific evidence about what kinds of support will help these parents.[299] At the same time, lawyers, activists, and parents must push for increased support services for parents with disabilities. This cohort must also forge stronger connections between those service providers who regularly work with adults with ID and the parents in the family regulation system who are not often provided with specialized services.[300] As other scholars have also demonstrated, there is a great need for disability-specific training for lawyers, social workers, and other stakeholders in family regulation.[301]

V.
REIMAGINING DISABILITY RIGHTS IN FAMILY COURT

While the ability to pursue ADA-based claims in federal and family courts is critical both in terms of advancing substantive rights and shifting power, the current legal regime is plainly not sufficient to protect and support parents with disabilities. The near universal failure of federal and family courts to reckon with

296. *In re* Xavier Blade Lee Billy Joe S., 131 N.Y.S.3d 541, 542 (N.Y. App. Div. 2020).

297. *Id.*

298. *See* Powell, *supra* note 9; ROCKING THE CRADLE, *supra* note 11. *See also* Elizabeth Lightfoot, Katharine Hill, & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 928 (2010) (showing the detrimental impact of state statutes that include parental ID as grounds for terminating parental rights); Smith, *supra*, note 24.

299. Astraca Augsberger, Wendy Zeitlin, & Trupti Rao, *Examining a Child Welfare Parenting Intervention for Parents with Intellectual Disabilities*, 31 RSCH. ON SOC. WORK PRAC 65 (2020) (evaluating the efficacy of parenting intervention programs and services for parents with ID); Trupti Rao, *Implementation of an Intensive, Home-Based Program for Parents with Intellectual Disabilities*, 7 J. PUB. CHILD WELFARE 691 (2013) (describing successful programming for parents with ID).

300. *See* Sandra T. Azar, Mirella C. Maggi & Stephon N. Proctor, *Practice Changes in the Child Protection System to Address the Needs of Parents with Cognitive Disabilities*, 7 J. PUB. CHILD WELFARE 610, 612 (2013) (describing that for parents with ID "involved in multiple, complicated systems," collaboration between caseworkers involved in their child protective matter and the other, disability-specific service providers and programs are pivotal); Sandra T. Azar & Kristin N. Read, *Parental Cognitive Disabilities and Child Protection Services: The Need for Human Capacity Building*, 36 J. SOCIO. & SOC. WELFARE 127 (2009) (outlining the types of human capacity building and organizational development needed to support parents' needs).

301. *See* Robyn Powell, Susan Parish, Monika Mitra, Michael Waterstone, Stephen Fournier, *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. 1069, 1069 (2021). *See, e.g.*, Powell, *supra* note 9 (discussing the ethical responsibility of lawyers to be zealous advocates for clients and contending that part of this includes social science research to advance the rights of parents with ID and their children).

the rights of parents with disabilities suggests that a broader reimagining of disability rights in the family regulation system must take place. The challenges inherent to robust application of the ADA are on vivid display in the opinions and decisions discussed above. These decisions, which variously water down the ADA to a rough estimate of state antidiscrimination law or "reasonable efforts" required in every single case, regardless of whether the ADA bears relevance, show how unlikely family courts are to begin strenuously applying the ADA. With a growing number of scholars and activists recognizing the power and promise of a Disability Justice Movement and DisCrit in other areas of law,[302] this Article concludes it is time for Disability Justice and DisCrit to come to the family regulation system.[303]

Here, this Article seeks to take seriously Amna Akbar's recent invitation to study social movements that seek change beyond the law.[304] Akbar posited that scholars reaching for meaningful change often "lack alternative frameworks" and are thus hamstrung in our efforts to truly revision or imagine change outside of the status quo.[305] Disability Justice provides a potential framework for thinking through and assessing the problems within the family regulation system and a foundation from which to imagine new solutions to these problems outside of the existing legal framework. As observed by Professor Robyn M. Powell, Disability Justice is "complimentary to child welfare system abolition."[306] The novel application of DisCrit to family regulation opens up similar potential. As abolitionist and scholar Liat Ben-Moshe urged, considering abolition pushes us to go "to the root cause of issues, in both content and form."[307]

The practical legal solutions proposed in Part IV aim to provide a path for parents and their advocates to use the existing legal framework to shift power towards parents.[308] Still, many of these solutions and other scholarship on the

302. *See* Chin, *supra* note 28; Perez, *supra* note 28; SINS INVALID, *supra* note 130; Morgan, *supra* note 142; Morgan, *supra* note 152.

303. Further work by this author will explore the possibilities for reimagining or abolishing family regulation that emerge from the application of Disability Justice and DisCrit to this field. For now, this Article serves to make the case that such a radical reimaging is necessary, and to offer the beginnings of a path towards one such reimagining framed in the movement of Disability Justice and the tenets of DisCrit.

304. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 473 (2018) (considering the creative potential of studying radical social movements through a comparison of the Vision for Black Lives with the DOJ's reports on Ferguson and Baltimore).

305. *Id.* at 412.

306. Powell, *supra* note 29 ("Fundamental to disability justice is the recognition that universalist-individualist approaches to disparities are inevitably limited and inadequate.").

307. Ben-Moshe, *supra* note 45 at 133.

308. Indeed, these interventions are offered as a form of "harm reduction" and, though largely focused on in-court or system-based advocacy, could well be used within a broader framework of "non-reformist reforms" to the family regulation system. As Akbar has explained, "[t]he non-reformist reform does not aim to create policy solutions to discrete problems; rather it aims to unleash people power against the prevailing political, economic, and social arrangements and toward new possibilities." Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 102 (2020) (offering

ADA's role in family regulation[309] are arguably fundamentally "inward facing," focusing more on allowing the system to continue to function than on creating fundamental change.[310] The project of Disability Justice, like other abolitionist movements, is an "agenda for demolishing but also building."[311] While the proposed avenues of relief have the potential to address symptoms—and are critical to helping individual litigants and to shifting the balance of control among a class of routinely disempowered litigants—they are neither deconstructive nor reconstitutive. Moreover, though they are pivotal parts of a law reform project focused on family court, they are limited in important, structural ways. Some place the burden for vindication of rights squarely on individuals with disabilities and their often overwhelmed and underpaid advocates. Likewise, they further entrench the rights-based framework enshrined by the ADA.[312] This framework can be problematic not least because it requires that a person only receive certain benefits and rights if, in fact, they can prove they are worthy.[313]

Together, the application of DisCrit and Disability Justice principles call for a structure of family support that is non-adversarial, support-based, and led by the most impacted.[314] This call for a supportive, rather than punitive, system borrows not only from the Disability Justice movement's recognition of our

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a history of the term "non-reformist reform"). Akbar has identified three "hallmarks" of such reform: "non-reformist reforms advance a radical critique and radical imagination," "advance a critique about how capitalism and the carceral state structure society for the benefit of the few, rather than the many, and "posit a radical imagination for a state or society oriented toward meeting those needs." *Id.* at 103.

309. *See, e.g.*, Kay, *supra* note 24 (suggesting training, increased service provision, and various litigation strategies); Powell et al., *supra* note 301, at 1100 (discussing the need for accessible parenting evaluations, recommendations for policy and practice changes, and areas of further research).

310. Akbar, *supra* note 304, at 467 (describing reforms offered by the DOJ in its reports on policing in Ferguson, MI and Baltimore, MD).

311. Ben-Moshe, *supra* note 45, at 132. *See* Patty Berne, *Disability Justice – A Working Draft,* SINS INVALID (June 9, 2015), https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne [https://perma.cc/JKV7-YWNS]] ("We are in a global system that is incompatible with life. There is no way stop a single gear in motion — we must dismantle this machine.").

312. *See* Akbar, *supra* note 304, at 445–446 (discussing the limits of rights and the extent to which scholars of Critical Legal Studies and Critical Race Theory have disagreed about the role and importance of rights).

313. Morgan, *supra* note 143, at 21 (noting, among other limitations, that the ADA requires individuals to prove "qualification" in order to benefit from its protections).

314. While all of the tenets of DisCrit theory offer meaningful and substantive framing for lawyering in family court, this Article will interrogate and apply three tenets with the goal of assessing how they can be used to disrupt the ordinary practice of the family regulation system, creating space for the human beings ensnared in the system.

interdependence[315] but also from the Movement for Black Lives' call to "invest-divest."[316]

On a more basic level, application of the tenets of DisCrit and Disability Justice encourages changes among attorneys and their relationship to their client, and new approaches to advocacy in family courts. These same tenets can provide courts themselves with new and more active approaches to maintaining family integrity. Scholars who apply these principals will further expose the flawed premise of the family regulation system, shed light on structural problems facing parents with disabilities in family court, and begin to imagine alternatives.

The first tenet of DisCrit "focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy."[317] As applied to family court, this tenet demands—among other requirements—that scholars, practitioners, and participants in the family regulation system examine the substantial impact that racist and ableist ideas have had on the law's interpretation of theoretically objective standards like "reasonable efforts," "best interest," and "unfitness." DisCrit requires examination of the standards and structures within family law that purport to be neutral. Scholars, judges, and advocates must interrogate the extent to which these standards actually perpetuate racism and ableism. Attorneys especially must wrestle with how advocacy on behalf of a parent in family court can render parents with disability invisible or otherwise reinforce notions of ableism.[318]

For example, a parent or an attorney who makes the strategic decision to hide a parent's disability to avoid triggering greater concerns by a visiting caseworker is responding to the pressure to "uphold notions of normalcy" within the system. The decision may have the impact of masking how a particular family functions as an interdependent web, and instead focusing on the strengths and weaknesses of a specific and particular individual. As another example, when a judge or case worker demands that a parent care for children entirely on their own, and not rely on natural supports such as grandparents or cousins, as in the case of Sara Gordon, the system may appear to be neutrally ensuring that the parent can act in an emergency. This standard works to reinforce the vision of a

315. "We work to meet each other's needs as we build toward liberation, without always reaching for state solutions which inevitably extend control further into our lives." SINS INVALID, *supra* note 130, at 25.

316. "We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people. We want investments in Black communities, determined by Black communities, and divestment from exploitative forces including prisons, fossil fuels, police, surveillance and exploitative corporations." M4BL, *Invest-Divest*, https://m4bl.org/policy-platforms/invest-divest/ [https://perma.cc/GD3B-6QUA]. *See also* Roberts, *supra* note 13 ("Rather than divesting one oppressive system to invest in another, we should work toward abolishing all carceral institutions and creating radically different ways of meeting families' needs.").

317. DISCRIT, *supra* note 26, at 19.

318. For a sophisticated analysis of how the forces of race and ableism influence prison litigation, see Morgan, *supra* note 27.

parent as one who can and should act independently and without the community from which they come or other supports.

By examining current laws, standards, and practices in light of the ableism and racism that operate within the system, the various actors within the system will be challenged to reevaluate those standards that have been understood as neutral or objective. Within the system, attorneys will be pushed to offer deeper and more nuanced narratives about their client's lives, contextualizing not only their circumstances and choices, but also their strengths and abilities as parents. This will naturally expose the structural inequality at play in the family regulation system and create a path for counsel to change the vision of parents with disabilities from that of "unworthy" or "inappropriate" parents to a more complicated vision of parents who, with support and opportunity, have the capacity and humanity to parent their children. These same narratives will shift the focus to structural inequality that contributes to the outcomes we see in the system. Moreover, applying a DisCrit lens to the current system will lead scholars and activists to consider alternatives to the system that do not reproduce current harms.

Tied closely to this first tenet is the second: "DisCrit values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on."[319] In this way, DisCrit requires that we see individual parents and their families in their full and entire context. As with the first tenet explored here, this challenges actors in the system—including parents themselves—to see and understand the full context of those individuals who are threatened with permanent separation from their children. DisCrit demands that this becomes a central tenet of family court in general, not merely the province of particularly "woke," client-centered, or disability-focused lawyers.

Current family regulation-focused scholarship does engage with the concept of multidimensional and intersectional identities. For example, Professor Matthew I. Fraidin has observed that "[w]hen the government alleges that [a] client is "unfit," it is an explicit, unabashed attack on her viability as a human being."[320] He urged that, in response, attorneys must tell the stories of clients' lives "as contextualized and connected" and "situate the charges against [a] client realistically, which is to say, as merely one jewel in that infinite net, knowable only by its relation to the entire net of our client's life and the lives around her."[321] Scholar S. Lisa Washington urged moving beyond the creation of an attorney-led "counter-narrative," wherein attorneys and the state often dictate solutions, towards "a movement that centers directly impacted parents"

319. DISCRIT, *supra* note 26, at 19.

320. Matthew I. Fraidin, *The Importance of Family Defense*, N.Y.U. REV. L. & SOC. CHANGE 41, 219–20 (2016).

321. *Id.* at 221 ("It is the attorney's job to place that parent in context and to tell their entire story.").

and their families.[322] DisCrit asks that all actors in the family regulation system access the multiple identities of the human beings before them. To the extent the family regulation system zeroes in, instead, on one particular aspect of a person's identity, scholars and practitioners must interrogate this tendency and begin to imagine alternative ways of supporting parents in their full complexity. Creating a system of support that centers the needs of multidimensional families will allow parents with disabilities to be understood as individuals surviving and striving to raise a family in a society that has failed to support them, as opposed to individuals trapped by their own personal failings.[323]

Finally, the third tenet of DisCrit "emphasizes social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms."[324] This tenet is of particular importance to family courts. As a norm-based area of law, one focused on the subjective standards of "best interest"[325] and "risk," family courts must quite regularly confront the "material and psychological impacts" of labeling race and inability. Yet, despite this familiarity, family courts again and again decline to grapple with the extent to which these markers (race and ability) are socially constructed and, instead, blame those who struggle with the impact of their pervasive marginalization and see those parents and families as failures, labeling them "unfit."

The thorough study of the decisions and policies that have resulted from attempts to apply the ADA in family court reveal the dysfunction of the current system. It is apparent that justice for parents with disabilities and their families has not come by bringing rights-based advocacy through the ADA. Instead of looking within the legal framework to the ADA and attempting to bring the ADA to bear on the heavily racialized and poverty-focused family regulation system, we must radically alter the family regulation system itself, changing its focus from that of a corrective, judgmental force brought upon Black, Brown, poor, and disabled parents to that of a support system led by the very community it seeks to regulate. We must develop systems of support that allow families to seek assistance without fear of repercussions, and which seek input and direction from

322. *See* Washington, *supra* note 278, at 62 (arguing for an "epistemic injustice informed approach" to fight against the state's narrative of "individual blame, rather than abusive power structures" in the family regulation system). Washington points to the June 2021 symposium, "Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being," hosted by the Columbia Journal of Race and the Law as an example of a scholarly conference which centered many parent activists alongside scholars and lawyers. *Id.* at 62.

323. As Amna Akbar has observed, shifting money to social programs defined and directed by impacted people would very likely require a "process through which power is built by and shifted into [impacted] communities." Akbar, *supra* note 304, at 472.

324. DISCRIT, *supra* note 26, at 19.

325. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 346 (2008); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11 (1987).

the families themselves, rather than from outside forces of judgment who have the power to punish and remove.

CONCLUSION

The failure of family and federal courts to protect parents from discrimination based on disability is untenable. Jurists and advocates alike must take heed of this vacuum in rights recognition and how it perpetuates discrimination against parents with ID. At the same time, the near universal failure of federal and family courts to reckon with the rights of parents with disabilities suggests that a broader reimagining of disability rights in the family regulation system must take place. Scholars, activists, and advocates should apply the tenets of DisCrit and the Disability Justice Movement in looking beyond the scope of the ADA and creating a system that works for parents with disabilities.