

# Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach

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**ABSTRACT:** The social uprisings following the police killings of Breonna Taylor, George Floyd, and many other people of color elevated the concept of abolition to the forefront of people's consciousness. Concurrently, there is a burgeoning body of legal scholarship calling for the abolition of the carceral regime. Some scholars also recognize that abolition efforts must include the child welfare system, more accurately termed the family policing system, noting the interdependent relationship between the family policing system and other parts of the carceral regime. Yet, despite the nascent legal scholarship calling for family policing system abolition, parents with disabilities and their children have been mostly disregarded. This Article responds to that scholarly void.

In this Article, I situate the family policing system within the contemporary struggle for the abolition of the carceral regime. My overarching argument is that the family policing system is an unjust social institution for disabled parents and their children. As such, we must work towards abolishing it and replacing it with non-punitive supports and resources for families. First, the Article describes the family policing system and its legal obligations to disabled parents and their children. Drawing on legal scholarship and social science research, it then elucidates the scope of the problem, detailing the injustices and harms that disabled parents and their children experience because of the family policing system. Next, the Article argues that reforms are not sufficient because the family policing system inflicts injustices and harms on disabled parents and their children by design. Thereafter, it limns the tenets of both abolition and disability justice and the ways in which these interconnecting movements, theories, and praxes could advance justice for parents with disabilities through the abolition of the family policing system. Finally, it proposes a novel anti-ableist legal and policy agenda for abolishing the family policing system that is responsive to disabled parents and their children.

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## INTRODUCTION

“Any system built to actually protect children should in no way mimic a system that tortures adults!”

– Joyce McMillan<sup>1</sup>

In Missouri, Erika Johnson and Blake Sinnett had their two-day-old daughter, Mikaela, placed in foster care because both parents were blind.<sup>2</sup> Like many new mothers, Erika had trouble breastfeeding.<sup>3</sup> Rather than assist the mother and daughter, a nurse reported the mother to a hospital social worker, setting into motion the family’s involvement with the state’s child protection services (“CPS”) agency.<sup>4</sup> Thereafter, social workers asked the parents a battery of questions about how they would care for Mikaela, which the parents answered in great detail.<sup>5</sup> However, the one response they could not provide was that someone who was sighted would be with the newborn at all times.<sup>6</sup> The parents could not afford such assistance, nor did they deem it necessary.<sup>7</sup> A social worker subsequently informed the parents they would not be allowed to bring Mikaela home because the social worker could not “in good conscience send this baby home with blind parents.”<sup>8</sup> During Mikaela’s time in foster care, the parents were only granted supervised visits two to three hours per week.<sup>9</sup> Mikaela was ultimately separated from her parents for 57 days.<sup>10</sup>

Similarly, in Oregon, Amy Fabbrini and Eric Ziegler, both of whom have intellectual disabilities, experienced threats to their parenthood.<sup>11</sup> Only days after

1. Molly Schwartz, *Do we Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020) <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/> [<https://perma.cc/2TS5-HSCN>] (quoting Joyce McMillan).

2. This narrative is adapted from Angela Frederick, *Mothering While Disabled*, 13 CONTEXTS 30, 31 (2014); see also Susan Donaldson James, *Baby Sent to Foster Care for 57 Days because Parents are Blind*, ABC NEWS (July 27, 2010), <https://abcnews.go.com/Health/missouri-takes-baby-blind-parents/story?id=11263491> [<https://perma.cc/RP2Y-8MM3>].

3. Frederick, *supra* note 2, at 31.

4. *Id.*

5. *Id.*

6. *Id.*

7. Lee Hill Kavanaugh, *Infant is Returned to Blind Couple After State Places Her in Protective Custody*, KANSAS CITY STAR (July 21, 2010, 12:15 AM), <https://web.archive.org/web/20100724005932/https://www.kansascity.com/2010/07/20/2097290/infant-is-returned-to-blind-couple.html> [<https://perma.cc/6PSG-JMNQ>].

8. Frederick, *supra* note 2, at 31.

9. *Id.*

10. *Id.*

11. This narrative is adapted from Samantha Swindler, *IQ Costs Oregon Parents Their Kids, but is that Fair?*, THE OREGONIAN (July 19, 2017), [https://www.oregonlive.com/pacific-northwest-news/2017/07/parents\\_with\\_intellectual\\_disa.html](https://www.oregonlive.com/pacific-northwest-news/2017/07/parents_with_intellectual_disa.html) [<https://perma.cc/TV22-ED3E>]. See also OFF. FOR CIVIL RIGHTS ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUM. SERVS., VOLUNTARY RESOLUTION AGREEMENT BETWEEN U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND OREGON DEPARTMENT OF HUMAN SERVICES (2019) [hereinafter “VOLUNTARY RESOLUTION AGREEMENT”], <https://www.hhs.gov/sites/default/files/odhs-vra.pdf> [<https://perma.cc/2TKX-AMAH>]; Robyn Powell, *An Oregon Couple Can Get Their Kids Back from*

giving birth, their son, Christopher, was placed in foster care following a family member's report to the state's CPS agency contending that the parents could not care for their newborn because of their disabilities.<sup>12</sup> A few years later, Amy gave birth to the parents' second child, Hunter.<sup>13</sup> This time, the CPS agency placed Hunter in foster care while he and Amy were still in the hospital.<sup>14</sup> Although Amy and Eric complied with their plan, including successfully enrolling in and passing classes on parenting, the CPS agency moved to terminate their parental rights.<sup>15</sup> Without specific allegations of child abuse or neglect, the CPS agency told the court that both parents had "limited cognitive abilities that interfere[d] with [their] ability to safely parent the child."<sup>16</sup> In court, the CPS agency raised several weaknesses they asserted illustrated the parents' inability to care for their sons, including failing to read to their children during visitation sessions, forgetting to apply sunblock on Hunter, and feeding Christopher chicken nuggets as a snack.<sup>17</sup> The parents were also criticized for asking both too many and too few questions about parenting.<sup>18</sup> After a five-year battle, the parents were reunited with Hunter and Christopher.<sup>19</sup>

Tragically, these devastating stories are not isolated incidents but rather illustrate what disabled parents<sup>20</sup> and their children experience every day. In 2019, state CPS agencies investigated over three million families.<sup>21</sup> Nearly 430,000 children remained separated from their families, often living in foster care.<sup>22</sup> Almost 70,000 children had their legal relationship with their parents

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*Foster Care. But Many Disabled Parents Don't Get that Chance*, REWIRE NEWS GROUP (Dec. 11, 2019), <https://rewire.news/article/2019/12/11/discrimination-against-disabled-parents-is-common/> [<https://perma.cc/H6U7-9899>].

12. Powell, *supra* note 11.

13. *Id.*

14. Swindler, *supra* note 11; Powell, *supra* note 11.

15. Swindler, *supra* note 11.

16. *Id.*

17. Powell, *supra* note 11.

18. *Id.*

19. *Id.*

20. Consistent with disability rights and disability justice movements, this Article acknowledges the importance of language in shaping how we think about disability and how ableism can pervade language choices as well as reflect and perpetuate disability-based subordination. Lydia X. Z. Brown, *Ableism/Language*, AUTISTIC HOYA (last updated Feb. 27, 2021), <https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html> [<https://perma.cc/9ANS-EQQG>]. To that end, I use person-first and identity-first language interchangeably (e.g., "parents with disabilities" and "disabled parents") in recognition of the disability community's diverse language preferences. See generally Dana S. Dunn & Erin E. Andrews, *Person-First and Identity-First Language: Developing Psychologists' Cultural Competence using Disability Language*, 70 AM. PSYCHOL. 255 (2015) (exploring the evolving language preferences among people with disabilities).

21. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 (2021) [hereinafter CHILD MALTREATMENT 2019], <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/U4LV-LX5X>].

22. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT (2020) [hereinafter AFCARS REPORT], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [<https://perma.cc/26EP-HWVR>].

permanently severed because they were adopted, and an additional 71,335 children were “legal orphans” waiting to be adopted.<sup>23</sup> In other words, the child welfare system wreaks havoc on millions of families each year.

Notably, poverty is the leading reason that families, especially families with parents with disabilities, become ensnared with the child welfare system.<sup>24</sup> In 2019, nearly two-thirds of the cases in which children were removed from their parents involved allegations of neglect, not physical or sexual abuse.<sup>25</sup> Studies indicate that most child welfare system cases involving disabled parents are based on allegations of neglect.<sup>26</sup> Significantly, for families involved with the child welfare system, neglect is often conflated with poverty, which means that many of these cases could have been avoided if families had access to adequate supports and resources.<sup>27</sup>

Strikingly, nineteen percent of all children in foster care have disabled parents,<sup>28</sup> even though children of parents with disabilities comprise only nine percent of the country’s youth.<sup>29</sup> The National Council on Disability (“NCD”), an independent federal agency that advises the President and Congress on disability policy, described the child welfare system’s bias against disabled parents as “persistent, systemic, and pervasive[.]”<sup>30</sup> and the U.S. Departments of Justice (“DOJ”) and Health and Human Services (“HHS”) opined that the child welfare system’s prejudicial policies and practices concerning parents with disabilities are “long-standing and widespread.”<sup>31</sup> During the 2020 presidential election, now-President Joe Biden acknowledged the injustices that disabled

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23. *Id.* at 1.

24. *See infra* Part V.B.

25. AFCARS REPORT, *supra* note 22, at 2.

26. *See infra* Part V.B.

27. Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SRVS. REV. 5, 6 (2017).

28. Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SRVS. REV. 22, 26 (2016).

29. Through the Looking Glass, *Additional Information on the 2012 National Data on Parents with Disabilities and their Children*, <https://www.lookingglass.org/national-services/research-and-development/127-additional-information-on-the-2012-national-data-on-parents-with-disabilities-and-their-children>. [<https://perma.cc/YX9J-863F>]

30. NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 51 (2012) [hereinafter ROCKING THE CRADLE], [https://www.ncd.gov/sites/default/files/Documents/NCD\\_Parenting\\_508\\_0.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf) [<https://perma.cc/V46Y-MDJL>].

31. OFFICE FOR CIVIL RIGHTS ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUM. SERV. & CIVIL RIGHTS DIV. DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015) [hereinafter TECHNICAL ASSISTANCE], <https://www.hhs.gov/sites/default/files/disability.pdf> [<https://perma.cc/A7KL-AE8U>].

parents are suffering at the hands of the child welfare system, promising to right these wrongs if elected.<sup>32</sup>

Nearly twenty years ago, in her groundbreaking book, *Shattered Bonds: The Color of Child Welfare*, legal scholar Dorothy Roberts argued that we must “finally abolish what we now call child protection and replace it with a system that really promotes children’s welfare.”<sup>33</sup> Establishing the case for abolishing the child welfare system, Professor Roberts meticulously described the myriad of ways in which racism permeates the child welfare system, the devastating harms being done by the family policing system to families of color, and how contemporary child welfare system laws and policies can be traced to slavery.<sup>34</sup> In 2021, Professor Roberts renewed her call for abolishing the child welfare system.<sup>35</sup> Now, however, instead of calling for replacing the child welfare system with another state system, Professor Roberts says that “[w]e need to build a radically reimaged way of caring for children and their families.”<sup>36</sup> In making the argument for abolishing the child welfare system rather than reforming it, Professor Roberts describes the “numerous reform efforts” that have occurred to address the pervasive oppression imposed by the child welfare system on families of color.<sup>37</sup> In particular, families of color experience disproportionately high rates of family policing system involvement and placement in foster care.<sup>38</sup> Yet, despite countless reforms to combat racial disparities, marginalized families continue to be disproportionately surveilled and separated by the child welfare system.<sup>39</sup> Professor Roberts contends that the ongoing subordination of families is entrenched in the design of the child welfare system and, therefore, unavoidable without abolishing the system.<sup>40</sup>

Similarly, activists, scholars, and policymakers, including myself, have worked on child welfare system reforms to address the inequities that disabled parents and their children experience with minimal success. For example, a growing number of states have passed legislation that prohibits discrimination

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32. Joe Biden, *Plan for Full Participation and Equality for People with Disabilities*, BIDEN HARRIS, <https://joebiden.com/disabilities/> (“Biden will ensure that child welfare agencies and family courts do not violate the rights of parents with disabilities and that they have appropriate training to fairly assess parental capacity in a non-discriminatory manner.”).

33. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* x (2002) [hereinafter *SHATTERED BONDS*].

34. See generally *SHATTERED BONDS*, *supra* note 33.

35. Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 *COLUM. J. RACE & L.* 455, 457 (2021).

36. *Id.*

37. *Id.* at 457-60.

38. Strikingly, more than half of Black children are subjected to family policing system involvement by the age of 18. Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 *AM. J. PUB. HEALTH* 274, 277 (2017). See also, Alan Detlaff et al., *It is not a Broken System, It is a System that Needs to be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 *J. PUB. CHILD WELF.* 500, 500-01 (2020).

39. Roberts, *supra* note 35, at 457-60.

40. *Id.* at 426-63.

by the child welfare system against of parents with disabilities.<sup>41</sup> On the federal level, the DOJ and HHS have investigated and enforced multiple cases involving violations of federal disability rights laws by the child welfare system.<sup>42</sup> Nonetheless, it is increasingly evident that reforms are not enough to remedy the panoply of injustices that these families face.<sup>43</sup> In fact, despite the increased legislative attention and greater enforcement by the federal government, the number of disabled parents with termination of parental rights cases appears to be growing.<sup>44</sup> Fixes to the child welfare system will not work because it is not broken. The child welfare system is doing exactly what it was designed to do: pathologize, control, and punish marginalized communities, including disabled parents and their children.<sup>45</sup> Simply put, the child welfare system is not broken; it is harmful by design.

Like Professor Roberts and a growing number of activists and scholars, this Article uses the term “family policing system” when referring to the multi-agency system historically referred to as the “child welfare” or “child protection” system.<sup>46</sup> For purposes of this Article, the family policing system includes state CPS agencies and dependency courts. It also includes private organizations that the state contracts with to provide services to families involved with the system, such as family preservation and reunification services, foster care, mental health care, substance use treatment, parenting skills classes, and domestic violence services. This Article’s use of the term family policing system is deliberate and more accurately reflects the system’s functions. As Professor Roberts explains, the term “child welfare system” suggests “that the system’s purpose is to improve or protect the welfare of children.”<sup>47</sup> Some scholars have adopted the

41. See *infra* Part V.F.

42. *Id.*

43. Roberts, *supra* note 35, at 463 (“[R]eforms that correct problems perceived as aberrational flaws won’t work. They only help to legitimize and strengthen carceral systems.”).

44. Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. 1069, 1095 (2020) (finding more termination of parental rights cases involving disabled mothers between 2011 and 2016, compared to 2006 to 2010). In addition, this study found that the odds of termination of parental rights was higher in cases that were decided between 2011 and 2016, compared to those decided between 2006 and 2010. *Id.* at 1096.

45. See *infra* Part II.A. See also Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 770 (2021) (describing “the fundamental pillars of the family regulation system [as] pathology, control, and punishment, all of which uphold and further white supremacy.”); JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM, PERSPECTIVES ON GENDER* 27 (2005) (“Notwithstanding the charitable motives of the system’s founders, however, the evidence is overwhelming that many of the catastrophic problems in contemporary child protection work in the United States are a direct product of the system’s design.”).

46. See Dorothy Roberts, *Abolish Family Policing, Too*, DISSENT MAGAZINE (Summer 2021), <https://www.dissentmagazine.org/article/abolish-family-policing-too> [https://perma.cc/SKE8-LN4S]. Accordingly, this Article utilizes the term “family policing system,” except when directly quoting others.

47. *‘Abolition Is the Only Answer’: A Conversation with Dorothy Roberts*, RISE MAGAZINE (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [https://perma.cc/7SEZ-Z37C].

term family regulation system, but as Professor Roberts notes, this label “doesn’t quite get at how brutal and destructive these practices and policies are.”<sup>48</sup> Accordingly, the term family policing system “captures what this system does. It polices families with the threat of taking children away. Even when its agents don’t remove children, they can take children and that threat is how they impose their power and terror. It is a form of punishment, harm and oppression.”<sup>49</sup> Thus, “family policing system” more accurately describes the functions of the system historically referred to as the “child welfare” or “child protection” system.

Throughout the summer of 2020, as tens of thousands of protestors took to the streets to protest the police killings of Breonna Taylor, George Floyd, and many other people of color, abolition surfaced as a mainstream concept.<sup>50</sup> Concurrently, there has been a burgeoning body of legal scholarship calling for the abolition of the carceral state.<sup>51</sup> While some scholars have focused on what is traditionally understood as the carceral state, namely policing and the prison industrial complex,<sup>52</sup> others have taken a more expansive approach, recognizing that the carceral state extends to other punitive systems, including the immigration system,<sup>53</sup> courts,<sup>54</sup> and traffic enforcement.<sup>55</sup> Building off of Professor Roberts’ *Shattered Bonds*, emergent scholarship is also beginning to

48. *Id.*

49. *Id.*

50. See, e.g., Peter O’Dowd & Samantha Raphelson, *Black Lives Matter Activist: Abolishing the Police ‘100%’ Means Just That*, WBUR (July 17, 2020), <https://www.wbur.org/hereandnow/2020/07/17/black-lives-matter-activist> [<https://perma.cc/82VB-TPVQ>]; Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/the-abolition-movement> [<https://perma.cc/AKU2-CXXK>]; Sean Illing, *The “Abolish the Police” Movement, Explained by 7 Scholars and Activists*, VOX (June 12, 2020, 11:00 AM), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis> [<https://perma.cc/9HPG-ZA6R>]; see also *Introduction, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568, 1568 (2019) [hereinafter *Introduction*] (noting the “calls for urgent and drastic change” of the carceral state).

51. To be sure, critical race and feminist theory scholars have been writing about abolitionism for decades. At the same time, “it is a fact that legal scholarship completely missed the popular abolitionist moment of the early 1970s—a period when even mainstream newspapers discussed abolition regularly.” Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 216 n.16 (2021). The past few years, however, have witnessed a rapidly growing body of legal scholarship on abolitionism in “elite” journals. *Id.*

52. See, e.g., Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7-8 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1782 (2020).

53. See, e.g., Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISC. 68 (2020); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 98 TENN. L. REV. (forthcoming 2022).

54. See, e.g., Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. (forthcoming 2022); Roediger, *supra* note 51.

55. See, e.g., Jordan Blair Woods, *Traffic Without the Police*, 73 STANFORD L. REV. 1471 (2021).

recognize that abolition efforts must include the family policing system,<sup>56</sup> noting the “symbiotic relationship” between the family policing system and other parts of the carceral state.<sup>57</sup> Yet, despite the nascent legal scholarship concerning abolition, people with disabilities have been largely overlooked. As the heartbreaking stories at the beginning of this Article illustrate, not including disabled parents is a significant omission from an otherwise flourishing body of scholarship.

The significance of this Article, therefore, is twofold. First, it applies abolitionist movement, theory, and praxis to the family policing system, an emergent issue within legal scholarship. Second, and importantly, it does so through the lens of disability justice, an intersectional social movement, theory, and praxis. Disability justice was created in response to the disability rights movement and takes a more comprehensive approach to advancing equity for disabled people by recognizing how people with disabilities are disenfranchised because of ableism and other systems of oppression.<sup>58</sup> The intersectional approach provided by disability justice is critical to family policing system abolition efforts because extensive research has documented the myriad injustices experienced by families of color within the child welfare system, and emergent studies suggest that these disparities are amplified for parents of color with disabilities.<sup>59</sup> Likewise, disability justice’s focus on dismantling oppressive systems is aligned with the family policing system abolition movement.<sup>60</sup> Indeed, disability justice activists promote abolition of all aspects of the carceral regime, understanding that the carceral regime disproportionately targets disabled people.<sup>61</sup> Thus, family policing system abolition must incorporate the tenets of disability justice.

In this Article, I situate the family policing system within the contemporary struggle for the abolition of the carceral regime. My overarching argument is that the family policing system functions as an unjust social institution for disabled parents and their children, and as such, we must work towards abolishing it and replacing it with non-punitive supports and resources for families. Part I describes the family policing system and its legal obligations, including those related to parents with disabilities and their children. Drawing on legal scholarship and social science research, Part II elucidates the scope of the problem, exploring the disproportionality and disparities that disabled parents experience within the family policing system and the harms that are being

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56. See, e.g., Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 11 COLUM. J. RACE & L. \_\_\_ (forthcoming 2022); Leah A. Jacobs et al., *Defund the Police: Moving Towards an Anti-Carceral Social Work*, 32 J. PROG. HUM. SERV. 37 (2021); Detlaff et al., *supra* note 38.

57. Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral System*, 17 STAN. J.C.R. & C.L. 255, 261 (2021).

58. See *infra* Part III.C.

59. See *infra* Part II.A.

60. See *infra* Part IV. C.

61. *Id.*

inflicted on these families by the family policing system. Part III demonstrates that reforms are not sufficient because the injustices and harms that are exacted on families are the result of the family policing system's design. Specifically, it examines the family policing system's unjust treatment of people with disabilities throughout history, the pervasive ableism permeating the family policing system, and the ways in which existing laws are not protecting these families. Part IV then limns the tenets of both abolition and disability justice and the ways in which these interconnecting movements, theories, and praxes could advance justice for parents with disabilities through the abolition of the family policing system. Finally, in Part V, I propose an anti-ableist<sup>62</sup> legal and policy agenda for abolishing the family policing system that is responsive to disabled parents and their children.

Before proceeding further into my argument that the family policing system must be abolished and replaced with non-punitive supports and resources for families, a few notes are in order. First, I believe it is incumbent on me to briefly respond to the question that is inevitably in some readers' minds: "If we abolish the family policing system, how will we protect children from being harmed?" Of course, police and prison industrial complex abolitionists encounter similar critiques.<sup>63</sup> Ruth Wilson Gilmore, abolitionist and co-founder of Critical Resistance, addresses this criticism in the context of policing and the prison industrial complex, explaining that we have been persuaded that there is a group of people who are so abhorrent that they must be locked away so that the rest of society can be protected from these terrible people.<sup>64</sup> Under this logic, incarceration is deemed the only way to keep the everyone else safe. The family policing system similarly casts parents as "good" or "bad" and has convinced us that to protect children, the state must remove them from their "bad" parents. Significantly, as this Article explains, new approaches, such as transformative justice, offer promising ways for responding to violence and interpersonal harm through community-based, non-punitive methods.<sup>65</sup> Additionally, as I demonstrate below, the current system is causing children and their parents far

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62. This Article's concept of anti-ableist laws and policies is inspired by Ibram X. Kendi's groundbreaking book, *How to Be an Anti-Racist*, where Professor Kendi defines racist policies as those policies that create and uphold racial inequity and anti-racist policies are those that create and uphold racial equity. See IBRAM X. KENDI, *HOW TO BE AN ANTI-RACIST* 17-18 (2019). Thus, all policies either create racial inequity or they create racial equity. *Id.* In the context of ableism, then, an anti-ableist approach involves identifying how laws and policies within a system create and uphold inequities based on disability and re-creating those laws and policies in a way that is designed to achieve equity and eradicate harm. An anti-ableist approach, therefore, is not one of reform but instead one of re-creation.

63. Allegra M. McLeod, *Envisioning Abolition Democracy, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1613, 1623 (2019) ("A challenge often posed in response to calls for abolition is whether or how it is possible to react to the most awful forms of violence in a manner consistent with an abolitionist ethic.").

64. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 15 (2007).

65. See *infra* Part IV.B.

more harm than good.<sup>66</sup> In other words, the family policing system is not protecting children like we are led to believe.

Second, this Article aims to complement existing and emerging revolutionary work by abolition and disability justice activists and scholars. Law and policy must be driven by the lived experiences of marginalized communities, and those of us who shape these fields must be committed to lifting the voices of those who are far too often disregarded. As a white, disabled woman, I approach this work with affection and admiration for the long fight for justice, in which I am implicated but not centered. Therefore, it is my hope that this Article will assist the critical work being done by abolition and disability justice activists and scholars.

## I. THE FAMILY POLICING SYSTEM AND ITS LEGAL OBLIGATIONS

The origins of the contemporary family policing system can be traced to Dr. Henry Kempe and colleagues' 1962 article, *The Battered-Child Syndrome*,<sup>67</sup> which depicted child maltreatment as a widespread problem warranting immediate attention. Prior to this article, CPS agencies were primarily administered by non-governmental organizations and lacked authority to intervene in child abuse and neglect cases.<sup>68</sup> However, "in the wake of the outcry over Kempe's 'discovery' of battered child syndrome, lawmakers and others made addressing brutal abuse of children by their pathologically dangerous parents an urgent national priority."<sup>69</sup> Thus, by sparking significant attention from state and federal policymakers, the article informed the establishment of the modern family policing system, which continues to pathologize marginalized parents, including parents with intellectual or psychiatric disabilities.<sup>70</sup>

The injustices that marginalized families, including disabled parents and their children, experience at the hands of the contemporary family policing system is by design. Therefore, it is essential to understand how racism, ableism, and classism undergird the family policing system's structure and legal framework. To that end, this Part begins with a brief overview of the family policing system, detailing the processes of family policing system intervention and highlighting how parents with disabilities are treated at different stages. Next, it explores federal laws that govern the contemporary family policing system and reinforce the inequities experienced by disabled parents. Finally, this

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66. See *infra* Part II.B.

67. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

68. JENNIFER M. GEIGER & LISA SCHELBE, *THE HANDBOOK ON CHILD WELFARE PRACTICE* 5 (2021).

69. Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. L. & RACE 639, 665 (2021).

70. See *infra* Part III.A.

Part describes how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act apply to the family policing system. Ultimately, as this Part demonstrates, the oppression experienced by disabled people's families is rooted in the bureaucratic and legal design of the system and, therefore, cannot be remedied through reforms.

#### A. Overview of the Family Policing System

The family policing system is a convoluted bureaucratic apparatus of public and private agencies that surveils parents for actual, perceived, and future child abuse and neglect.<sup>71</sup> For disabled parents and their children, “[b]ias pervades the child welfare system at every step.”<sup>72</sup> Indeed, the injustices experienced by parents with disabilities typically begins with the initial report of suspected child maltreatment.<sup>73</sup> Families generally become involved with the family policing system following an allegation of child abuse or neglect. State mandatory reporting statutes obligate teachers, childcare providers, health care professionals, social service providers, and others to report suspicions of child abuse or neglect.<sup>74</sup> Importantly, parents with disabilities often have frequent contact with social service providers and other mandated reporters, which experts believe increases the likelihood that they will be reported to the family policing system.<sup>75</sup> Members of the community can also report suspicions of child maltreatment.<sup>76</sup>

Once a report of suspected child maltreatment is made to the family policing system, opportunities for bias and speculation against disabled parents abound.<sup>77</sup> Specifically, upon receiving a report of possible child abuse or neglect, a CPS worker screens the allegations to determine if the report is credible.<sup>78</sup> A report is screened in if the CPS worker finds that there is sufficient evidence to suggest that an investigation is necessitated, and a report is screened out if there is insufficient evidence or if the alleged incident does not meet the state's legal definition of child maltreatment.<sup>79</sup> CPS workers then investigate cases that have been screened in to determine whether the child is safe, whether the child was

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71. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS (2020) [hereinafter HOW THE CHILD WELFARE SYSTEM WORKS], <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [https://perma.cc/9GGR-RNZV].

72. ROCKING THE CRADLE, *supra* note 30, at 80.

73. *Id.*

74. *See generally* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019) [hereinafter MANDATORY REPORTERS], <https://www.childwelfare.gov/pubPDFs/manda.pdf> [https://perma.cc/4FHX-CSRQ].

75. ROCKING THE CRADLE, *supra* note 30, at 80-81.

76. MANDATORY REPORTERS, *supra* note 74, at 3.

77. ROCKING THE CRADLE, *supra* note 30, at 82.

78. HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 71, at 3.

79. *Id.*

maltreated, and whether there is a risk of future child maltreatment.<sup>80</sup> At the end of an investigation, CPS workers determine that the allegations are substantiated and need further action or unsubstantiated and not worthy of additional investigation or action.<sup>81</sup> Notably, extant studies suggest that claims concerning parents with disabilities are more likely to be substantiated.<sup>82</sup>

Family policing system agencies initiate juvenile court actions if they decide that a dependency proceeding is necessary to keep the child safe.<sup>83</sup> Courts may issue temporary orders placing the child in care during the investigation, order services for the child or parent, or mandate that certain people have no contact with the child.<sup>84</sup> At an adjudicatory hearing, courts hear evidence, decide if child abuse or neglect occurred, and determine if the child should remain under the court's continuing jurisdiction.<sup>85</sup> Courts then enter a disposition, either at that hearing or at a separate hearing, resulting in the court ordering a parent to comply with services necessary to remedy the alleged child maltreatment.<sup>86</sup> Court orders can also include provisions about visitation between the parent and the child, agency obligations to provide the parent with services, and services needed for the child.<sup>87</sup> If a court determines that a child has been maltreated, the decision whether to reunify a family or keep them apart depends on state law, the severity of the maltreatment, an evaluation of the child's immediate safety, the risk of continued or future maltreatment, the services available to address the family's needs, and whether the child was removed from the home and a court action to protect the child was initiated.<sup>88</sup> Unfortunately, judges often lack training about parents with disabilities, including an understanding about how federal disability rights laws apply to the family policing system.<sup>89</sup> Moreover, judges may harbor stereotypes about parents with disabilities, which can affect case outcomes.<sup>90</sup> In other words, the biases of judges and other actors within the family policing system can deeply impact dependency proceedings, which can lead to devastating consequences for disabled parents and their children.

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80. *Id.* at 4.

81. *Id.*

82. *See infra* Part II.A.

83. HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 71, at 4-7.

84. *Id.* at 4.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See* Stephanie N. Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 343 (2009) (“[I]nsufficient judicial education of family court judges may contribute to unequal or ineffective treatment of parents with mental disabilities in the court system); *see also* ROCKING THE CRADLE, *supra* note 30, at 98-101 (discussing issues related to lack of knowledge by judges); Robyn M. Powell & Sasha M. Albert, *Barriers and Facilitators to Compliance with the Americans with Disabilities Act by the Child Welfare System: Insights from Interviews with Disabled Parents, Child Welfare Workers, and Attorneys*, 32 STAN. L. & POL’Y REV. 119, 152-54 (2021).

90. ROCKING THE CRADLE, *supra* note 30, at 125.

Should the family policing system determine that family reunification should not occur, they can move forward with termination of parental rights. For a family policing system agency to succeed in termination of parental rights proceedings, clear and convincing evidence must establish that statutory grounds for termination have been satisfied and that termination is in the child's best interest.<sup>91</sup> Termination of parental rights is coined the "death penalty" of civil cases<sup>92</sup> because it is permanent and devastating. Once a parent's rights are terminated, the legal parent-child relationship is permanently severed. At that point, a family policing agency can immediately adopt the child to a new family. Tragically, extensive research demonstrates that parents with disabilities, especially parents with intellectual or psychiatric disabilities, experience staggeringly high rates of termination of parental rights.<sup>93</sup> Hence, disabled parents and their children are significantly more likely than others to endure the trauma of being permanently separated.

### B. Legal Framework of the Family Policing System

In the United States, parenting is considered a fundamental right and, therefore, should generally not be infringed upon by the government. Specifically, the Supreme Court has repeatedly affirmed that the Fourteenth Amendment of the Constitution ensures a parent's right to raise their children.<sup>94</sup> Nonetheless, that right is balanced by states' *parens patriae*<sup>95</sup> interest in promoting the wellbeing of children, and states may interfere with parental rights in the course of protecting children.<sup>96</sup> Consequently, through the family policing system, states have the legal authority to investigate allegations of child abuse and neglect and act as necessary to protect children, including terminating

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91. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (requiring "clear and convincing evidence" before termination of parental rights while establishing the fundamentality of parental rights in the Supreme Court's purview); see also Josephine Fiore, *Constitutional Law: Burden of Proof – Clear and Convincing Evidence Required to Terminate Parental Rights*, 22 WASHBURN L.J. 140, 145 (1982) ("Clear and convincing evidence is commonly defined as proof which produces in the factfinder's mind the belief that the truth of the facts asserted is highly probable. Proof by clear and convincing evidence is not as demanding as proof beyond a reasonable doubt. It does, however, require a greater degree of persuasion than proof by a preponderance of the evidence.").

92. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc).

93. See *infra* Section II.A.

94. See generally *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky*, 455 U.S. at 747-53; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Org. of Foster Fams.*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

95. Latin for "ultimate parent or parent of the country," *parens patriae* refers to the power of the state to assume the legal rights of the natural parent and to serve as the parent of any child who is believed to need protection. Marvin Ventrell, *The History of Child Welfare Law*, in *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* 113, 126-27 (Marvin Ventrell & Donald N. Duquette eds., 2005); *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. *Santosky*, 455 U.S. at 766.

parental rights. Although the family policing system is administered primarily by states, the federal government has played an increasing role in overseeing the family policing system by enacting laws and funding programs.<sup>97</sup> While a comprehensive account of the history of family policing system laws and policies in the United States is beyond the scope of this Article,<sup>98</sup> this Section describes four federal laws that affect the interaction of marginalized families with the contemporary family policing system: the Child Welfare Prevention and Treatment Act, the Adoption Assistance and Child Welfare Act, the Personal Responsibility and Work Opportunity Reconciliation Act, and the Adoption and Safe Families Act.<sup>99</sup> These statutes are critical to the family policing system's design and administration. Moreover, as this brief overview of the family policing system's legal framework demonstrates, the laws have increasingly favored family separation over preservation, especially for cases involving marginalized families.

In 1974, Congress enacted the Child Abuse Prevention and Treatment Act ("CAPTA"),<sup>100</sup> signaling the "birth of the modern child welfare system."<sup>101</sup> As the federal government's first significant effort "to lay the foundation for the modern child welfare system,"<sup>102</sup> CAPTA was enacted to provide federal funding to states to establish a system for receiving and responding to allegations

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97. Frank E. Vandervort, *Federal Child Welfare Legislation*, in *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 199-200* (Donald N. Duquette & Ann M. Haralambie eds., 2d. ed. 2010) (describing the ways in which federal laws govern the child welfare system primarily through funding rather than substantive law).

98. For an in-depth exploration of the history of family policing system laws and policies in the United States, see GEIGER & SCHELBE, *supra* note 68, at 1-28.

99. Other federal laws also apply to certain subgroups of disabled parents and their children involved with the family policing system. *See e.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963) (establishing standards for the placement of Native American children in foster and adoptive homes and to avert the breakup of Indian families); Interethnic Placement Act of 1996, Pub. L. 104-188, 110 Stat. 1903 (codified at 42 U.S.C. § 1996(b)) (prohibiting considerations of race, culture, or ethnicity in foster care and adoption placement decision-making). These statutes were intended to respond to the disparities that BIPOC families experience within the family policing system. GEIGER & SCHELBE, *supra* note 68, at 10-13. Most recently, Congress enacted the Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 232 (codified at 42 U.S.C. § 50711(b)) (allocating Social Security Title IV-E funds for twelve months of in-home parenting skills programs, substance use treatment, and mental health services to keep families intact and children out of foster care). While potentially useful for some families, the statute has two significant limitations. First, the law does not force states to provide services using Social Security Title IV-E funds; they must "elect" to do so, and the federal government will match a state's contribution 50% up until 2026). *Id.* Second, the statute still requires that families be involved with the family policing system to receive such services. *Id.* Thus, families are subjected to the punitive nature of the system and the trauma that involvement causes if they receive services funded under the law.

100. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5106).

101. GEIGER & SCHELBE, *supra* note 68, at 5.

102. Sara J. Klein, *Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611, 2618-19 (2005).

of child maltreatment.<sup>103</sup> Specifically, with the enactment of CAPTA, Congress codified and expanded mandatory reporting of child maltreatment, into a nationwide system of reporting, investigating, and prosecuting both child abuse and poverty under the guise of neglect.<sup>104</sup> In particular, CAPTA formalized mandatory reporting laws that had burgeoned across the country following Kempe and colleagues' previously mentioned article.<sup>105</sup>

CAPTA also set forth a broad and imprecise definition of "child abuse and neglect," which combined intentional acts and acts of omission into a singular phenomenon.<sup>106</sup> In the original version of CAPTA, "child abuse and neglect" was defined as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of any child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate the child's health or welfare is harmed or threatened thereby."<sup>107</sup> Similarly broad and questionably more vague, CAPTA presently defines "child abuse and neglect" as "any recent act or set of acts or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act, which presents an imminent risk of serious harm."<sup>108</sup> Further, CAPTA permits states to establish their own definitions of child abuse and neglect so long as the definitions conform to the federal standard.<sup>109</sup> Consistent with CAPTA's definitions, states generally define "abuse" as intentional acts, such as physical assault beyond legally permitted corporal punishment, sexual abuse, or emotional abuse, while "neglect" is defined in relation to a parent's omission to provide for a child's basic needs.<sup>110</sup> As Professor Roberts explains, by defining child abuse and neglect as a singular phenomenon, policymakers established a false equivalence between intentional acts by parents to harm children and conditions of poverty, thereby transforming child poverty from a societal issue into a problem of individual parental

103. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., ABOUT CAPTA: A LEGISLATIVE HISTORY (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf> [https://perma.cc/HMX6-8YVK].

104. BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 13-14 (1984).

105. 42 U.S.C. § 5106a(b)(2)(B)(i).

106. HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 71, at 2-3.

107. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 3, Pub. L. No. 93-247, 88 Stat. 4.

108. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 3, Pub. L. No. 93-247, 88 Stat. 4 (as amended through Pub. L. 115-424, § 3(2), (2019)).

109. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf> [https://perma.cc/S83B-NUZK] (compiling definitions of child abuse and neglect from all fifty states as well as territories).

110. *Id.* at 2-3. See also N.Y. Fam. Ct. Act § 1012 (2021) (defining a "neglected child" as "a child less than eighteen years of age" whose "condition has been impaired . . . as a result of the failure of his or her parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter, or education . . . or medical . . . care" or "in providing the child with proper supervision").

pathology.<sup>111</sup> Ultimately, by combining child abuse and neglect, policymakers have been able to avoid responding to the entrenched structural inequities that impact child wellbeing, such as poverty. For disabled parents, who are significantly more likely than others to be poor, the framing of poverty as neglect has led to many families being unnecessarily subjected to the family policing system.<sup>112</sup>

Since 1974, CAPTA has been amended several times, increasing the federal government's expansive financial support for state family policing systems investigation and prosecution infrastructures.<sup>113</sup> Hence, as activists Angela Olivia Burton and Angeline Montauban explain, “[w]ith the creation of the CPS apparatus of reporting, investigation, and prosecution organized around the principle of parental dangerousness, Congress thus criminalized poverty and set in motion a nationwide family policing system focused on proving parental deviance and wrongdoing rather than on addressing children’s needs.”<sup>114</sup> Indeed, as this Article will show, the punitive nature of CAPTA continues to harm marginalized families, including those with disabled parents.

Six years after the passage of CAPTA, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”),<sup>115</sup> further developing the reach of the family policing system. In particular, AACWA created a federal adoption assistance program as well as “strengthen[ed] the program of foster care assistance for needy and dependent children.”<sup>116</sup> AACWA was also ostensibly intended to ensure that the family policing system kept families together whenever possible.<sup>117</sup>

Throughout the 1970s, a growing number of children were separated from their parents and placed in foster care, raising concerns among policymakers about the increasingly burdened foster care system.<sup>118</sup> Facing pressure to address

111. SHATTERED BONDS, *supra* note 33, at 14-15.

112. *See infra* Part V.B.

113. *See generally* CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION (2019) [hereinafter MAJOR LEGISLATION], <https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf> [https://perma.cc/MQY9-DPFJ].

114. Burton & Montauban, *supra* note 69, at 667.

115. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in various sections of 42 U.S.C.).

116. MAJOR LEGISLATION, *supra* note 113, at 27.

117. GEIGER & SCHELBE, *supra* note 98, at 6.

118. *Id.* The staggering increase in children being separated from their families and placed in foster care was due, in part, to responses to Dr. Kempe and colleagues’ article on “battered child syndrome” and the subsequent outcry which led to all fifty states establishing child abuse “hotlines” and other systems that allowed people to report suspected child maltreatment. *See* TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM 28 (2016). Additionally, Professor Roberts opines that the medicalization of child maltreatment served another purpose. Specifically, unable to garner bipartisan support for legislation focused on poverty-related harms to children, Congress, instead, promoted “a medical model of child abuse—a distinguishable pathological agent attacking the individual or family that could be treated in a prescribed manner and would disappear.” SHATTERED BONDS, *supra* note 33, at 14.

the ways that existing policies, like CAPTA, incentivized family separation and the foster care system, Congress passed AACWA, with the purported intent of decreasing foster care placements and promoting efforts to keep families together.<sup>119</sup> To that end, AACWA required states to make “reasonable efforts” to prevent the removal of children from their home, as well as “reasonable efforts” to reunify children who have been separated from their parents.<sup>120</sup> Nonetheless, despite AACWA’s “reasonable efforts” mandate, the statute failed to define what “reasonable efforts” entailed.<sup>121</sup>

While, on its face, AACWA may have looked like a repudiation to the increasing separation of children from their parents, the law resolutely supported the foster care system by allocating “[f]unding for foster care and adoption assistance,” as a “permanent entitlement for assistance to eligible children” under the newly established Title IV-E of the Social Security Act.<sup>122</sup> Indeed, federal spending following passage of AACWA demonstrated a clear interest in funding foster care over services to keep families together. For example, between 1981 and 1990, federal spending on the family policing system went from \$0.5 billion to \$1.6 billion, with the majority going towards foster care rather than family preservation services.<sup>123</sup> Simultaneously, the number of children in foster care grew exponentially through the 1980s and 1990s, with more children entering foster care, staying longer, and experiencing numerous placements.<sup>124</sup>

Rather than respond to the growing number of families involved with the family policing system by providing meaningful supports to assist struggling families, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) in 1996, which resulted in higher rates of poverty among families and increased involvement with the system.<sup>125</sup> Although not a family policing system law, *per se*, PRWORA substantially and detrimentally impacted families involved with the family policing system. Coined “welfare reform,” PRWORA replaced Aid to Families with Dependent

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119. Hillary Baldwin, *Legislative Reform: Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 252 (2002) (quoting S. Rep. No. 96-336 (1997) reprinted in 1980 U.S.C.C.A.N. 1448, 1461)).

120. Adoption Assistance and Child Welfare Act of 1980, *supra* note 115.

121. Will L. Crossley, *Defining Reasonable Efforts. Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259 (2003).

122. STAFF OF THE COMM. ON WAYS & MEANS, GREEN BOOK, CHILD WELFARE LEGISLATIVE HISTORY (Comm. Print 2012), <https://greenbook-waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history> [<https://perma.cc/D3PE-RYTB>].

123. SHATTERED BONDS, *supra* note 33, at 142, 175.

124. See STAFF OF THE H. COMM. ON WAYS & MEANS, 112TH CONG., 2012 GREEN BOOK: BACKGROUND DATA AND MATERIAL WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS tbl.11-4 (Comm. Print 2012), [https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/CW%20Table11-4\\_FC-Entering\\_Served\\_Exiting\\_Incare\\_82-11%20RM-ES.pdf](https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/CW%20Table11-4_FC-Entering_Served_Exiting_Incare_82-11%20RM-ES.pdf) [<https://perma.cc/UZ5Y-BC9Y>] (tracking foster care rates); see also MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS? 188 (2005).

125. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of U.S. Code); SHATTERED BONDS, *supra* note 33, at vii.

Children (“AFDC”) with Transitional Assistance to Needy Families (“TANF”), which significantly reduced eligibility for income assistance.<sup>126</sup> Specifically, PRWORA took away economic support from poor families by decreasing benefits for families, eliminating benefits for some families entirely, and imposing work requirements for parents that were often impossible to comply with because these families could not afford childcare.<sup>127</sup> Parents with disabilities were especially affected by PRWORA’s stringent work requirements, leading to significant economic insecurity.<sup>128</sup> Ultimately, PRWORA increased the number of families living in poverty, thereby leaving some parents unable to afford basic necessities for their children and making many families more vulnerable to family policing system involvement.<sup>129</sup>

Continuing to ignore the staggering rates of poverty experienced by families, especially marginalized families, and the simultaneous harm exacted on families by the family policing system largely because of poverty, Congress passed the Adoption and Safe Families Act of 1997 (“ASFA”), which further promoted the separation of children and parents.<sup>130</sup> Enacted in response to the record number of children who languished in foster care,<sup>131</sup> ASFA reaffirmed the family policing system’s goal of permanency, originally established by AACWA, but also declared that the adoption of children in foster care would best achieve permanence rather than family preservation or reunification.<sup>132</sup> Notably, ASFA continues to control all aspects of the family policing system today.

In furtherance of its promotion of permanence, ASFA established a definitive time limit on family reunification efforts. Specifically, to receive federal funds, ASFA required states to commence proceedings to terminate parental rights for children who had been in foster care for fifteen of the most recent twenty-two months (commonly known as the “15/22 rule”).<sup>133</sup> For disabled parents, these stringent timelines are often difficult—if not impossible—to comply with because supports and services for parents with disabilities are limited and often take extensive time to secure.<sup>134</sup> Further, some

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126. 42 U.S.C. §§ 601-619. Unlike AFDC, which was a federal entitlement, TANF is time-limited assistance not guaranteed by federal right. In eliminating AFDC, PRWORA also eliminated the Job Opportunities and Basic Skills Training Program (JOBS), which provided categorical exemptions to individuals meeting the program criteria for disability or who were caring for disabled children. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2112.

127. SHATTERED BONDS, *supra* note 33, at 173-74.

128. *See infra* Part V.B.

129. SHATTERED BONDS, *supra* note 33, at 173-74.

130. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

131. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 649 (2006) (explaining that the Adoption and Safe Families Act was enacted in response to the “foster care drift,” which referred to children remaining in foster care for extended periods of time).

132. 42 U.S.C. § 671.

133. 42 U.S.C. § 675(5)(E).

134. ROCKING THE CRADLE, *supra* note 30, at 87-88.

disabled parents are unable to comply with ASFA's timelines because certain supports and services, like mental health interventions, often take longer than fifteen months to achieve their goals.<sup>135</sup> Thus, parents with disabilities are at significant risk of having their parental rights terminated because of ASFA's time limits.<sup>136</sup>

ASFA also permitted states to forgo providing reasonable efforts to reunify families in some situations, thereby allowing states to achieve permanence more swiftly for children through adoption. Specifically, ASFA authorized family policing system agencies to bypass the provision of reasonable efforts and instead terminate parental rights if the child has been "subjected . . . to aggravated circumstances."<sup>137</sup> Notably, ASFA lacked a definition of "aggravated circumstances," which has resulted in differing interpretations by states.<sup>138</sup> In fact, some states have included a parent's disability alongside egregious acts such as manslaughter or murder as reasons for bypassing reasonable efforts and "fast-tracking" termination of parental rights.<sup>139</sup> In these "fast-tracking" cases, the state is expected to hold a permanency hearing within thirty days.<sup>140</sup>

Further promoting the goal of permanence through adoption, ASFA introduced the concept of concurrent planning, which required states to provide reunification services for families with whom it hoped children could be reunited while concomitantly searching for appropriate adoptive families in case reunification efforts were determined to have failed.<sup>141</sup> In other words, ASFA placed children in foster care on two tracks simultaneously: one that reunited them with their family and one that aimed to find them a permanent home with another family. Although concurrent planning was intended to reduce the time children were held in foster care, some experts believe it created difficulties for both family policing system agencies (who have limited resources) and parents (expected to trust and cooperate with the same CPS workers who were promoting an alternative plan to terminate their parental rights).<sup>142</sup> Moreover, some experts posit that concurrent planning may adversely affect disabled parents because some CPS workers are biased against them, and, therefore, may focus more efforts on adoption than reunification.<sup>143</sup>

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135. *Id.*

136. *Id.*

137. 42 U.S.C. § 671(a)(15)(D)(i); ROCKING THE CRADLE, *supra* note 30, at 90-92.

138. 42 U.S.C. § 671(a)(15)(D)(i); ROCKING THE CRADLE, *supra* note 30, at 90-92.

139. ROCKING THE CRADLE, *supra* note 30, at 90-92.

140. 42 U.S.C. § 671(a)(15)(E)(i).

141. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN (2017) <https://www.childwelfare.gov/pubPDFs/concurrent.pdf> [<https://perma.cc/Q4RR-WK2Q>].

142. Fred Wulczyn, *Family Reunification*, 14 THE FUTURE OF CHILDREN 94, 98 (2004) (reviewing the inherent tensions associated with concurrent planning).

143. ROCKING THE CRADLE, *supra* note 30, at 92-93.

ASFA, coupled with the passage of PRWORA, significantly altered the administration of the family policing system. Indeed, the convergence of the end of the welfare safety net and the subsequent passage of ASFA, according to Professor Roberts, “marked the first time the federal government mandated that states protect children from abuse and neglect without a corresponding mandate to provide basic economic support to poor families.”<sup>144</sup> Notably, by providing states with financial incentives to promote adoption, the number of children adopted out of the family policing system, rather than returned to their families, has grown exponentially. In the first four years immediately following passage of ASFA, the number of children in foster care who were adopted grew from 28,000 to nearly 50,000 per year.<sup>145</sup> In 2019, 66,035 children in foster care were adopted.<sup>146</sup>

### C. *Application of Disability Law to the Family Policing System*

In addition to the aforementioned statutes, the family policing system is governed by the Americans with Disabilities Act of 1990 (ADA),<sup>147</sup> and its predecessor, Section 504 of the Rehabilitation Act of 1973 (Section 504).<sup>148</sup> The ADA was passed more than thirty years ago to ensure “equality of opportunity” for people with disabilities.<sup>149</sup> Together, the ADA and Section 504 established “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>150</sup>

The ADA prohibits “discrimination against disabled individuals in major areas of life.”<sup>151</sup> Accordingly, the ADA is sweeping in its scope, and its “breadth” requires that the law applies to nearly all facets of life, including “in situations not expressly anticipated by Congress.”<sup>152</sup> Notably, the ADA’s legislative history suggests that Congress contemplated discrimination against disabled parents when it enacted the landmark law. For example, during Congressional hearings, a witness testified that “historically, child-custody suits almost always have ended with custody being awarded to the non-disabled

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144. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474, 1485 (2012).

145. CHILDREN’S BUREAU EXPRESS, U.S. DEP’T OF HEALTH & HUM. SERVS., HHS AWARDS ADOPTION BONUSES AND GRANTS (2000), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=11&sectionid=1&articleid=178> [https://perma.cc/HG4T-7UM2].

146. AFCARS REPORT, *supra* note 22, at 1.

147. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134.

148. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96.

149. 42 U.S.C. § 12101(a)(7).

150. 42 U.S.C. § 12101(b)(1).

151. *PGA Tour v. Martin*, 532 U.S. 661, 675 (2001).

152. *Penn. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

parent.”<sup>153</sup> Another witness testified that people with disabilities experienced discrimination in all facets of life, including in “securing custody of their children.”<sup>154</sup> Yet another witness commented that “being paralyzed has meant far more than being unable to walk—it has meant . . . being deemed an ‘unfit parent.’”<sup>155</sup> Likewise, in 1983, the U.S. Commission on Civil Rights found that many parents with disabilities have had their parental rights terminated by the family policing system and family courts.<sup>156</sup>

According to the ADA and Section 504, a person is defined as having a disability if they (1) have “a physical or mental impairment that substantially limits one or more major life activities;” (2) have “a record of such an impairment;” or (3) are “being regarded as having such an impairment.”<sup>157</sup> Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, walking, speaking, breathing, learning, communicating, and working.<sup>158</sup> In 2008, Congress passed the ADA Amendments Act to clarify that (1) “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active<sup>159</sup> and (2) a “[d]etermination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”<sup>160</sup> Hence, courts should interpret the definition of disability broadly.<sup>161</sup>

The ADA includes five separate titles: employment (Title I), public services (Title II), places of public accommodation (Title III), telecommunications (Title IV), and miscellaneous provisions (Title V).<sup>162</sup> For purposes of the family policing system, Title II of the ADA applies because it governs access to local and state governments and agencies, including family policing agencies and courts.<sup>163</sup> Title II provides: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected

153. *Americans with Disabilities Act of 1988: J. Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong. (1988) (statement of Arlene Mayerson), *reprinted in* 2 *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess., at 1611 n.10 (1990).

154. H.R. REP. NO. 101-485, at 41 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 448.

155. H.R. REP. NO. 485, pt. 2, at 41 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 323.

156. U.S. COMM’N ON C.R., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 40 (1983).

157. 42 U.S.C. § 12102(1).

158. 42 U.S.C. § 12102(2)(A).

159. 42 U.S.C. § 12102(4)(D).

160. 42 U.S.C. § 12102(4)(E)(i).

161. 42 U.S.C. § 12102(4)(A).

162. 42 U.S.C. § 12101-12213.

163. 28 C.F.R. pt. 35, App. B (2019) (“Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance.”).

to discrimination by any such entity.”<sup>164</sup> A “qualified individual” is a disabled person who “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity” with or without “reasonable modifications,” “auxiliary aids and services,” or the removal of architectural or communication barriers.<sup>165</sup>

Further, Congress enacted the ADA to expand the coverage of the Rehabilitation Act of 1973, which proscribes discrimination against people with disabilities by recipients of federal financial assistance.<sup>166</sup> Section 504 provides: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”<sup>167</sup> Section 504 considers a “qualified individual” to be a person with a disability “who meets the essential eligibility requirements for the receipt of such services.”<sup>168</sup>

Section 504 governs all activities of federally funded entities and, generally, violations of Section 504 also represent violations of Title II.<sup>169</sup> Therefore, according to DOJ and HHS, Title II and Section 504 apply to everything the family policing system does, including “investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.”<sup>170</sup>

Under Title II and Section 504, family policing system agencies, must, among other things, (1) provide people with disabilities an equal opportunity to participate in services, programs, and activities;<sup>171</sup> (2) administer services, programs, and activities in the most integrated setting appropriate to the needs of people with disabilities;<sup>172</sup> (3) not impose or apply eligibility criteria that screen out or tend to screen out people with disabilities;<sup>173</sup> (4) provide auxiliary

164. 42 U.S.C. § 12132.

165. *Id.* § 12131(2).

166. 29 U.S.C. § 794.

167. 29 U.S.C. § 794(a).

168. 45 C.F.R. § 84.3(I)((4)).

169. Section 504 defines “program or activity” to include “all of the operations of a department, agency . . . or other instrumentality of a State or of a local government” and “the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.” 29 U.S.C. § 794(b)(1)(A), (B). Accordingly, all operations of a state government agency are covered by Section 504 if any part of it receives federal financial assistance. Title IV-B and Title IV-E of the Social Security Act are the primary sources of federal child welfare funding, which all states accept.

170. LETTER FROM CIVIL RIGHTS DIVISION, U.S. DEP’T. OF JUSTICE & OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUM. SERV., TO INTERIM COMM’R ERIN DEVENEY, MASS. DEP’T OF CHILDREN & FAMILIES 10 (Jan. 29, 2015) [hereinafter LETTER OF FINDINGS], [http://www.ada.gov/ma\\_docf\\_lof.pdf](http://www.ada.gov/ma_docf_lof.pdf) [<https://perma.cc/69FT-9PWX>].

171. 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii).

172. 28 C.F.R. § 35.130(d); 45 C.F.R. § 84.4(b)(2).

173. 28 C.F.R. § 35.130(b)(3)(i-ii); 45 C.F.R. § 84.4(b)(4)(i-ii).

aids and services;<sup>174</sup> (5) not place surcharges on people with disabilities to cover the costs of measures to ensure nondiscriminatory treatment;<sup>175</sup> and (6) not deny benefits, activities, and services to people with disabilities because an entities' facilities are inaccessible.<sup>176</sup> Further, all entities of the family policing system must comply with regulations related to physical accessibility.<sup>177</sup> In addition, the family policing system must provide "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."<sup>178</sup>

Importantly, a central principle of the ADA and Section 504 is the individualized treatment requirement. Specifically, public and private entities, including the family policing system, must treat people with disabilities on a case-by-case basis, consistent with facts and objectives, and may not act based on stereotypes and generalizations about disabled people.<sup>179</sup> Individualized treatment is especially important when considering matters of accessibility and reasonable modifications. As such, "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it."<sup>180</sup>

Pursuant to Title II and Section 504, family policing system entities are not required to provide reasonable modifications or take actions that would result in (1) a fundamental alteration of the nature of the activities, programs, or services offered;<sup>181</sup> (2) an undue financial and administrative burden;<sup>182</sup> or (3) a significant risk to the 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.<sup>183</sup>

In sum, the ADA and Section 504 are far-reaching laws that provide people with disabilities strong protections against discrimination in nearly all aspects of

174. 28 C.F.R. § 35.160(a)(1), (b)(1); 28C.F.R. § 35.164; 45 C.F.R. § 84.52(d).

175. 28 C.F.R. § 35.130(f).

176. 28 C.F.R. § 35.130(b)(1)(i); 45 C.F.R. § 84.21.

177. 28 C.F.R. §§ 35.150, 35.151; 45 C.F.R. §§ 84.22, 84.23.

178. 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.4(a); U.S. DEP'T OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-6.1000, Illustration 2 (1993) (clarifying that public entities may need to make modifications to programs, such as individualized assistance, to permit people with disabilities to benefit).

179. *See, e.g.*, 28 C.F.R. § 35.130(b); *see also id.* pt. 35, app. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that, "[t]aken together, the [] provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do").

180. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 153 (2d Cir. 2013) (quoting *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995)).

181. 28 C.F.R. §§ 35.150, 35.164.

182. *Id.*

183. 28 C.F.R. §§ 36.302, 36.303.

life, including parenting. At the same time, these statutes have limitations. First, the family policing system often does not comply with its legal obligations pursuant to the ADA and Section 504, and courts often fail to correctly apply these statutes in termination of parental rights proceedings involving parents with disabilities.<sup>184</sup> Thus, because of inadequate compliance and enforcement, these laws often provide little protection to disabled parents involved with the system. Second, while the ADA and Section 504 ostensibly should safeguard disabled parents once involved with the family policing system, the statutes cannot prevent these families from becoming subjected to the system. Being involved with the family policing system, even for a short period of time, can cause long-lasting harms to children and parents and federal disability rights laws cannot stop these harms from occurring.<sup>185</sup> Third, the ADA and Section 504 do not address racism, classism, and other types of oppression commonly experienced by multiply marginalized parents with disabilities involved with the family policing system.<sup>186</sup> Hence, although federal disability rights laws are certainly important, they cannot entirely respond to the inequities endured by parents with disabilities within the family policing system because this system is oppressive by design. Indeed, only abolition, guided by disability justice, can fully address the subjugation experienced by disabled parents.

## II. THE SCOPE OF THE PROBLEM

As the cases at the beginning of this Article illustrate, parents with disabilities and their children contend with wide-ranging injustices and harms because of the family policing system. This Part describes the experiences of disabled parents and their children within the family policing system. First, it explores the existing research on the disproportionalities and disparities that disabled parents face within the family policing system. Thereafter, it describes the harms that the family policing system inflicts on disabled parents and their children. Tragically, the injustices and harms inflicted on parents with disabilities and their children are fundamentally consistent with the family policing system's logic of pathologizing, controlling, and punishing marginalized families. For this reason, I call for abolishing rather than reforming the family policing system.

### *A. Disproportionalities and Disparities*

Parents with disabilities and their children experience marked disproportionalities and disparities at every step of their involvement with the

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184. *See infra* Part III.C.

185. *See infra* Part II.B.

186. *See infra* Parts II.A., IV.C.

family policing system.<sup>187</sup> Research has consistently found that disabled parents are more likely than nondisabled parents to be referred to the family policing system.<sup>188</sup> Analyzing national data, a study recently found that nineteen percent of children were placed in foster care, at least in part, because of parental disability.<sup>189</sup> Significantly, extant research shows that parents with intellectual or psychiatric disabilities are particularly vulnerable to involvement with the family policing system.<sup>190</sup> For example, a recent national survey revealed that parents with psychiatric disabilities were eight times more likely to have contact with the family policing system, compared to parents without psychiatric disabilities.<sup>191</sup> Another study, which analyzed administrative data from Washington state, found that twenty-two percent of mothers with intellectual or developmental disabilities were the subject of a report to the family policing system within one year of birth and thirty-seven percent within four years.<sup>192</sup> In comparison, only six percent of mothers without intellectual disabilities were the subject of a report to the family policing system within one year of birth and only ten percent within four years.<sup>193</sup> Thus, research demonstrates staggeringly high

187. ROCKING THE CRADLE, *supra* note 30, at 106 (“Parents with disabilities face multiple layers of discrimination from the moment they enter the child welfare system.”). Although disproportionalities and disparities are often used interchangeably in child welfare research, each term has a distinct definition. FRED WULCZYN, RESEARCH IS ACTION: DISPARITY, POVERTY, AND THE NEED FOR NEW KNOWLEDGE 2 (2011), [https://fcda.chapinhall.org/wp-content/uploads/2012/10/2011\\_research-is-action\\_disparity.pdf](https://fcda.chapinhall.org/wp-content/uploads/2012/10/2011_research-is-action_disparity.pdf) [<https://perma.cc/3CS3-QD8T>]. Disproportionalities are defined as the overrepresentation or underrepresentation of a marginalized community, compared to their numbers in the general population. *Id.* In contrast, disparities refer to an absence of equality experienced by a marginalized community. *Id.*

188. ROCKING THE CRADLE, *supra* note 30, at 72 (“Parents with disabilities and their families are frequently, and often unnecessarily, forced into the system...at disproportionately high rates.”).

189. Lightfoot & DeZelar, *supra* note 28, at 26.

190. See, e.g., Tim Booth & Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1 J. POL’Y & PRAC. INTELL. DISABILITIES 179, 180 (2004); Tim Booth et al., *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD & FAM. SOC. WORK 353, 353 (2005); Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401 (John R. Lutzker ed., 1998); Maurice Feldman et al., *Effectiveness of Home-Based Early Intervention on the Language Development of Children of Mothers with Mental Retardation*, 14 RSCH. DEV. DISABILITIES 387 (1993); Gwynnyth Llewellyn et al., *Prevalence and Outcomes for Parents with Disabilities and their Children in an Australian Court Sample*, 27 CHILD ABUSE & NEGLECT 235, 239 (2003); David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 624 (2011); Jill G. Joseph et al., *Characteristics and Perceived Needs of Mothers with Serious Mental Illness*, 50 PSYCHIATRIC SERVS. 1357, 1358 (1999); Carol Mowbray et al., *Motherhood for Women with Serious Mental Illness: Pregnancy, Childbirth, and the Postpartum Period*, 65 AM. J. ORTHOPSYCHIATRY 33 (1995); Roberta G. Sands et al., *Maternal Custody Status and Living Arrangements of Children of Women with Severe Mental Illness*, 29 HEALTH & SOC. WORK 317, 320 (2004); Jung Min Park et al., *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 493, 494 (2006).

191. Katy Kaplan et al., *Child Protective Service Disparities and Serious Mental Illnesses: Results from a National Survey*, 70 PSYCHIATRIC SERVICES 202, 204 (2019).

192. Rebecca Rebbe et al., *Prevalence of Births and Interactions with Child Protective Services of Children Born to Mothers Diagnosed with an Intellectual and/or Developmental Disability*, 25 MATERNAL CHILD HEALTH J. 626, 629 (2021).

193. *Id.*

rates of involvement with the family policing system among disabled parents and their children.

Once referred to the family policing system, parents with disabilities experience a range of disparities. For example, a study found that disabled parents had higher odds of having allegations of child maltreatment substantiated—an investigatory finding that the allegation of child abuse or neglect or risk of such maltreatment was supported—than nondisabled parents.<sup>194</sup> Although substantiation is only one decision-making point, scholars consider it important to understanding disparities within the family policing system.<sup>195</sup> Moreover, disabled parents are less likely than nondisabled parents to receive family preservation or reunification services,<sup>196</sup> and when they do receive services, they are often not tailored to meet the individual needs of parents with disabilities.<sup>197</sup> In summary, the family policing system is more likely to substantiate referrals involving disabled parents and their children than nondisabled parents and their children and less likely to provide these families services so that they can stay together.

Studies also show that disabled parents are significantly more likely than nondisabled parents to have their children removed from their homes by the family policing system.<sup>198</sup> For example, analysis of Washington state administrative data revealed that seven percent of infants of mothers with intellectual or developmental disabilities had their child removed by the family

194. Elizabeth Lightfoot et al., *Substantiation of Child Maltreatment Among Parents with Disabilities in the United States*, 15 J. PUB. CHILD WELFARE 583, 592 (2021) (“The odds were highest for cases including a parent with an emotional disturbance, who had more than 63% higher odds of having maltreatment substantiated after a report to child protection compared to a parent without a disability after a report, followed by those with developmental disabilities (44%), multiple disabilities (38%) and learning disabilities (35%).”). Substantiation is an administrative determination, not a judicial one. CHILD MALTREATMENT 2019, *supra* note 21, at 16. For further information on substantiation in the child welfare system, see Nicholas E. Kahn et al., *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333 (2017).

195. Lightfoot et al., *supra* note 194, at 585 (“[T]he child welfare decision point of substantiation has been a key area of research regarding racial disproportionality in child welfare, with some researchers finding that substantiation is an important place where disparities occur, and affects later decisions, such as out of home placement or termination of parental rights.”) (internal citations omitted).

196. Int’l Ass’n for the Sci. Study of Intellectual Disabilities Special Interest Research Grp. on Parents and Parenting with Intellectual Disabilities Parents Labelled with Intellectual Disability, *Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities*, 21 J. APPLIED RSCH. INTELLECTUAL DISABILITIES 296 (2008) [hereinafter “IASSID SIRG”] (explaining the experiences of parents with intellectual disabilities); Robyn M. Powell & Joanne Nicholson, *Disparities in Child Protective Services: Commentary on Kaplan et al. (2019)*, 70 PSYCHIATRIC SERVS. 209, 209 (2019) (discussing disparities experienced by parents with psychiatric disabilities when involved with the child welfare system); ROCKING THE CRADLE, *supra* note 30, at 71-107 (describing the experiences of parents with disabilities as related to the child welfare system).

197. Phillip A. Swain & Nadine Cameron, “Good Enough Parenting,” *Parental Disability and Child Protection*, 18 DISABILITY & SOC’Y 165, 170 (2003).

198. ROCKING THE CRADLE, *supra* note 30, at 72 (“Parents with disabilities and their families are frequently, and often unnecessarily, forced into the system and, once involved, lose their children at disproportionately high rates.”).

policing system by one year and nine percent by four years.<sup>199</sup> Conversely, less than one percent of infants born to mothers without intellectual or developmental disabilities experienced removals by one year and only two percent by four years.<sup>200</sup> Another recent study, analyzing national survey data, found that parents with psychiatric disabilities were twenty-six times more likely to have their child removed by the family policing system, compared to other parents.<sup>201</sup> In fact, according to NCD, studies have found removal rates as high as eighty percent in cases where the parent had an intellectual or psychiatric disability.<sup>202</sup>

Once children are removed, research reveals striking differences in placements and reunification goals for families with and without parents with disabilities. For example, analyzing national data, a study showed that children of disabled parents were more likely to be placed in non-relative foster care and more likely to have a case plan goal of long-term foster care than children of parents without disabilities.<sup>203</sup> Further, that study found that cases involving children of parents with disabilities were less likely than children of nondisabled parents to have a case plan goal of reunification.<sup>204</sup> Cases involving disabled parents also had higher odds of having a case plan goal of long-term foster care than cases involving nondisabled parents.<sup>205</sup> Additionally, children of parents with disabilities had longer foster care stays than children of parents without disabilities and had thirty-two percent lower odds of being discharged from foster care to their parents.<sup>206</sup>

Furthermore, parents with disabilities, especially parents with intellectual or psychiatric disabilities, face devastatingly high rates of termination of parental rights.<sup>207</sup> For example, analysis of national data found that disabled parents had twenty-two percent higher odds of termination of parental rights than nondisabled parents.<sup>208</sup> Moreover, among 2,064 appellate cases involving disabled mothers, ninety-three percent of the cases resulted in the termination of parental rights.<sup>209</sup> The staggeringly high rates of termination of parental rights experienced by disabled parents and their children is alarming and, unfortunately, demonstrative of the pervasive injustices faced by these families because of the family policing system.

Importantly, multiply marginalized parents with disabilities and their children are subjected to heightened levels of scrutiny and discrimination in the

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199. Rebbe et al., *supra* note 192, at 629.

200. *Id.*

201. Kaplan et al., *supra* note 191, at 202.

202. ROCKING THE CRADLE, *supra* note 30, at 16.

203. Lightfoot & DeZelar, *supra* note 28, at 27.

204. *Id.*

205. *Id.*

206. *Id.*

207. ROCKING THE CRADLE, *supra* note 30, at 77-78.

208. Lightfoot & DeZelar, *supra* note 28, at 26.

209. Powell et al., *supra* note 44, at 1094.

family policing system.<sup>210</sup> Longstanding research establishes that Black mothers are “especially likely to be monitored, regulated, and punished by the child welfare system” and have their children removed—often permanently—at disproportionately high rates.<sup>211</sup> Indigenous parents are also especially vulnerable to being separated from their children by the family policing system.<sup>212</sup> Emergent research, while limited, similarly suggests that in cases involving multiply marginalized disabled parents there are heightened disproportionalities and disparities. For example, studies found that parents with disabilities were more likely to have family policing system involvement if they were female, Black, or lived at or below the federal poverty level.<sup>213</sup> Further, a recent study of parents with psychiatric disabilities found that those whom had family policing system involvement had lower educational attainment and were more likely to be non-white than parents who did not have family policing system involvement.<sup>214</sup> The compounded disproportionalities and disparities endured by multiply marginalized parents with disabilities underscores the importance of using an intersectional approach to address the injustices the family policing system imposes on families. Accordingly, disability justice—an intersectional movement, theory, and praxis—is crucial to family policing system abolition efforts.

### B. *Children and Parents are Being Harmed*

The injustices experienced by disabled parents and their children often lead to substantial and long-lasting harm for both children and their parents. Scholars describe the “harm of removal” as a blanket term used to depict how children are detrimentally affected when separated from their families by the family policing system.<sup>215</sup> It conveys recognition that “[r]emoval and placement in foster care may have a worse impact on the child than neglect.”<sup>216</sup> Mere involvement with the family policing system can harm children and their parents by disrupting

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210. NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, & DIGNITY: PEOPLE WITH DISABILITIES AND THE RIGHT TO PARENT 11 (September 2021), <https://www.nationalpartnership.org/our-work/resources/repro/repro-disability-parenting.pdf> [<https://perma.cc/2T46-X6T9>].

211. *Id.* at 12 (citing studies).

212. *Id.* at 12 (citing studies).

213. Traci LaLiberte et al., *Child Protection Services and Parents with Intellectual and Developmental Disabilities*, 30 J. APPLIED RSCH. INTELL. DISABILITIES 521, 527 (2017); Park et al., *supra* note 190, at 496.

214. Laysha Ostrow et al., *Risk Factors Associated with Child Protective Services Involvement Among Parents with a Serious Mental Illness*, 72 PSYCHIATRIC SERVS. 370, 372 (2021).

215. Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393, 407 (2007); Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind It Harm Children*, 13 U.D.C. L. REV. 435, 444 (2010).

216. Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 196 (2008).

them without providing the material support that families need.<sup>217</sup> In fact, even the threat of involvement can be detrimental. For example, parents with disabilities often report “living in constant fear that they [will] eventually be reported [to the family policing system] because of their disability.”<sup>218</sup> Thus, the family policing system—a system ostensibly intended to protect children—is often the source of significant and enduring trauma for both children and parents.

As Roberts details, “[r]emoving children from their homes is perhaps the most severe government intrusion into the lives of citizens. It is also one of the most terrifying experiences a child can have.”<sup>219</sup> Extant studies demonstrate that when children’s relationships with their parents are severed, they “often experience a sense of profound deprivation.”<sup>220</sup> In fact, “[l]ong-term separation from a parent can result in a negative impact on the well-being and functioning of both children and parents. Thus, removing a child from his or her parent—in some situations—can ultimately cause more harm than good.”<sup>221</sup>

Removing children from their parents and placing them in foster care can adversely affect their long-term wellbeing. For example, one study found that many individuals who were previously in foster care experienced substantial hardships as adults, including high rates of mental health conditions, low post-secondary educational attainment, high rates of poverty and homelessness, and low rates of health insurance.<sup>222</sup> Significantly, research suggests that children on the “margin” of placement in foster care typically have better outcomes if they remain home.<sup>223</sup> For example, a 2007 study of 15,000 children found that children who remained with their families had lower teen pregnancy rates, involvement with the juvenile justice system, and unemployment compared to those in foster care with similar allegations of child maltreatment.<sup>224</sup> Similarly, a 2008 study of 23,000 children found that “among children on the margin of placement, children placed in foster care have arrest, conviction, and imprisonment rates as adults that are three times higher than those of children

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217. Charlotte Baughman et al., *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 527 (2021) (“Investigations and services demanded by the family regulation system can be highly disruptive to families without providing the material support that could ameliorate the poverty-related concern that first brought the family in contact with the system. Investigations and service requirements can cause loss of housing, employment, and public benefits, which are often exacerbated by court intervention and/or the removal of a child from the household.”).

218. ROCKING THE CRADLE, *supra* note 30, at 82-83.

219. SHATTERED BONDS, *supra* note 33, at 17.

220. Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1458 (1995).

221. Gwillim, *supra* note 89, at 360.

222. CASEY FAMILY PROGRAMS, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 1-2 (2005), [https://caseyfamilypro-wpengine.netdna-ssl.com/media/AlumniStudies\\_NW\\_Report\\_FR.pdf](https://caseyfamilypro-wpengine.netdna-ssl.com/media/AlumniStudies_NW_Report_FR.pdf) [<https://perma.cc/V6W2-SCWN>].

223. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007).

224. *Id.* at 1608.

who remained at home.<sup>225</sup> Moreover, while in foster care, children are at increased risk of abuse and neglect, including sexual abuse.<sup>226</sup> Hence, foster care often causes far greater harm to children than their parents do.

In addition to the harms inflicted on all children involved with the family policing system, those with disabled parents experience unique injuries. Several studies have found that many children of parents with disabilities worry knowing they could be separated from their parents, temporarily or permanently, because their parent is deemed incapable of caring for them.<sup>227</sup> Thus, just the realization that they could be unnecessarily separated from their parents causes harm. Notably, a study of adult children of parents with intellectual disabilities found that those whom the family policing system had removed had subsequently re-established and maintained contact with their parents.<sup>228</sup> Certainly, this finding reinforces the importance of family bonds.

Family policing system involvement, or the looming terror of the family policing system, detrimentally affects disabled parents' parenting. As Michael Stein explains, "[e]ven with the accomplishment of parental tasks through different techniques, mothers with disabilities fear that mainstream society will remove their children because of prevailing misconceptions. The result is the diminishment of parental joy for otherwise able and loving parents."<sup>229</sup> Strikingly, disabled parents often report living in fear that they will eventually be reported to the family policing system by a mandated reporter or stranger simply because of their disabilities.<sup>230</sup> This terror leads to some disabled parents being afraid to be in public with their children.<sup>231</sup> Trepidation about the possibility of being reported to the family policing system also results in some parents with disabilities being afraid to ask for help because they worry someone may view them as unable to adequately care for their children and refer them to the family policing system.<sup>232</sup> In sum, the constant terror of being unnecessarily reported to the family policing system, a system that is known by disabled parents as biased against them, can cause devastating harm to families.

Research has found that family policing system involvement significantly harms the mental health of parents with psychiatric disabilities. For example,

225. Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008).

226. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 662 (2006) (describing increased risk in foster care of abuse and neglect).

227. David McConnell & Lyndsey Hahn, *Growing Up with Parents with Disabilities*, in THE ENCYCLOPEDIA OF CHILD AND ADOLESCENT DEVELOPMENT 7-8 (Stephen Hupp & Jeremy D. Jewell, eds., 2020).

228. TIM BOOTH & WENDY BOOTH, *GROWING UP WITH PARENTS WHO HAVE LEARNING DIFFICULTIES* 1095-96 (1998).

229. Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of People with Disabilities*, 60 BROOK. L. REV. 1069, 1095-96 (1994).

230. ROCKING THE CRADLE, *supra* note 30, at 82-83.

231. *Id.*

232. *Id.*

studies “reveal that the damage inflicted by [termination of parental rights] is far greater than the difficulty that comes from treating a parent’s mental illness, repairing broken biological relationships with therapeutic services, and assisting these families in their journey towards emotional health.”<sup>233</sup> Specifically, involvement with the family policing system may worsen parental mental health, decreasing the likelihood of reunification.<sup>234</sup> Additionally, the stigma associated with parenting with a psychiatric disability and the fear of custody loss can result in parents who resist acknowledging their difficulties or requesting assistance.<sup>235</sup> Agonizing about losing custody of their children can also increase parental stress, which can exacerbate the mental health symptoms in some parents.<sup>236</sup>

Further, family policing system involvement can result in significant financial harm to families. As part of CAPTA, states received funds to create registries to track child abuse and neglect allegations.<sup>237</sup> Although CAPTA did not require states to track alleged perpetrators of child abuse and neglect,<sup>238</sup> all fifty states and the District of Columbia maintain “central registries,” which are centralized databases of child abuse and neglect investigation records.<sup>239</sup> “Originally designed to investigate and process allegations of child maltreatment, registries and the data they contain are now also used by state licensing agencies and public and private employers to identify perpetrators of maltreatment and essentially bar them from employment in occupations that care for children and other vulnerable populations.”<sup>240</sup> Parents whose cases have been substantiated by CPS are often listed on these registries for decades, thereby precluding them from many employment opportunities.<sup>241</sup> Extant research

233. Charisa Smith, *Unfit through Unfairness: The Termination of Parental Rights Due to a Parent’s Mental Challenges*, 5 CHARLOTTE L. REV. 377, 395 (2014).

234. Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 36 CLEARINGHOUSE REV. 295, 295 (2002).

235. Jenny Hearle et al., *A Survey of Contact with Offspring and Assistance with Child Care Among Parents with Psychotic Disorders*, 50 PSYCHIATRIC SERVICES 1354, 1356 (1999); Joanne Nicholson & Kathleen Biebel, *Commentary on “Community Mental Health Care for Women with Severe Mental Illness Who Are Parents”—The Tragedy of Missed Opportunities: What Providers Can Do*, 38 CMTY. MENTAL HEALTH J. 167, 168 (2002).

236. Joanne Nicholson et al., *Mothers with Mental Illness: I. The Competing Demands of Parenting and Living with Mental Illness*, 49 PSYCHIATRIC SERVICES 635, 638-40 (1998).

237. OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., *ASSESSING THE FEASIBILITY OF CREATING AND MAINTAINING A NATIONAL REGISTRY OF CHILD MALTREATMENT PERPETRATORS: RESEARCH REPORT* (2012), <https://aspe.hhs.gov/reports/assessing-feasibility-creating-maintaining-national-registry-child-maltreatment-perpetrators-0> [<https://perma.cc/JHS5-ENLE>].

238. *Id.*

239. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., *ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS 1* (2018), <https://www.childwelfare.gov/pubPDFs/centreg.pdf> [<https://perma.cc/X8K8-CDJN>].

240. Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021).

241. Colleen Henry et al., *The Collateral Consequences of State Central Registries: Child Protection and Barriers to Employment for Low-Income Women and Women of Color*, 64 SOC. WORK 373, 374 (2019).

indicates that parents with disabilities are more likely than nondisabled parents to be unemployed<sup>242</sup> and these registries only add additional employment barriers. Hence, these registries further oppress marginalized families.

### III. STRUCTURAL CAUSES

As was demonstrated in the preceding Part, parents with disabilities and their children experience a panoply of injustices and harms because of the family policing system. This Part establishes that the family policing system does not disproportionately affect disabled parents and their children out of happenstance but by design. It begins with a description of the family policing system's oppressive historical roots and how family policing system laws and policies sought to control parenting among people with disabilities. Next, it illustrates how ableism manifests in the family policing system on multiple levels. Finally, it concludes by arguing that federal disability rights laws are not effectively protecting these families. Ultimately, the insidious reality is that these injustices and harms are inextricable from the family policing system; thus, reforms will not correct them.

#### A. *Oppressive Historical Roots*

“History is instructive, not because it offers us a blueprint for how to act in the present, but because it can help us ask better questions for the future.”

– *Mariame Kaba*<sup>243</sup>

Scholars often opine that family policing system laws and policies have occurred on a “pendulum” that swings between a focus on keeping families together and achieving permanency for children through adoption.<sup>244</sup> However, for disabled parents and their children, laws and policies have always swung away from family preservation and towards removal of their children, guided by the belief that people with disabilities are unfit to raise children. Although a comprehensive account of disability law and policy in the United States is beyond the scope of this Article,<sup>245</sup> this Section explores how disability laws and policies and family policing system laws and policies have been interwoven over time. Tragically, the injustices and harms inflicted on disabled parents and their

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242. ROCKING THE CRADLE, *supra* note 30, at 202.

243. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/CFF5-93VE>].

244. REICH, *supra* note 45, at 27.

245. For an in-depth exploration of the history of disability in Western society, see David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in HANDBOOK OF DISABILITY STUDIES 11-68 (Gary L. Albrecht et al. eds., 2001).

children because of the family policing system are, in part, the product of a long and appalling history.

Before the late nineteenth and early twentieth centuries, most disabled people lived at home, where their families were responsible for their care.<sup>246</sup> People with disabilities were usually isolated from their communities and discouraged from marrying and having families.<sup>247</sup> The treatment of disabled people at that time “foster[ed] and reflect[ed] a common understanding of disabled people as dependent and incapable of filling adult roles of intimacy, sexuality and parenthood.”<sup>248</sup> Hence, the enduring belief that people with disabilities should not have families emerged at this time.

Disabled people were further segregated from their communities during the late nineteenth and twentieth centuries, when the United States experienced the establishment (and later proliferation) of institutions for people with disabilities.<sup>249</sup> Institutions served as a mechanism of “social control and coercion.”<sup>250</sup> During this time, eugenicists promoted policies that encouraged procreation among favored groups of people while restricting procreation—through forcible sterilization and institutionalization—of those deemed to have “hereditary defects.”<sup>251</sup> According to author Adam Cohen, eugenicists’ “greatest target was the ‘feble-minded,’ a loose designation that included people who were mentally [disabled], women considered to be excessively interested in sex, and various other categories of individuals who offended the middle-class sensibilities of judges and social workers.”<sup>252</sup> Accordingly, eugenics concentrated on averting people whom society deemed “unfit for parenthood” from reproducing,<sup>253</sup> based on the idea that their offspring would be dangerous and burdensome to society.<sup>254</sup>

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246. *Id.* at 23 (describing the role of families and communities in caring for disabled people).

247. Claudia Malacrida, *Mothering and Disability: From Eugenics to Newgenics*, in ROUTLEDGE HANDBOOK OF DISABILITY STUDIES 467, 467 (Nick Watson & Simo Vehmas, eds., 2d, 2019).

248. *Id.*

249. *Id.* at 15-16; Braddock & Parish, *supra* note 245, at 31-43.

250. Braddock & Parish, *supra* note 245, at 34.

251. See ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 5 (2016); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 n.6 (2001) (“The record does show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease.”).

252. Cohen, *supra* note 251, at 6.

253. See Eric M. Jaegers, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 948 (1992) (“The purpose of these laws was to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior.”).

254. See generally Robyn M. Powell, *Confronting Eugenics Means Finally Confronting Its Ableist Roots*, 27 WM. & MARY J. RACE, GENDER, & SOC. 607 (2021) (examining the country’s history of eugenics); see also Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 865 (2004); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 1-2 (1996).

The U.S. Supreme Court buoyed this line of reasoning in the 1927 *Buck v. Bell* decision.<sup>255</sup> Carrie Buck, who was considered “feebleminded,” was raised in a foster home, where she lived until she became pregnant after being raped by a relative of her foster parents.<sup>256</sup> To ostensibly hide the rape, Carrie was involuntarily institutionalized at the Virginia State Colony for Epileptics and Feebleminded, where her mother was also committed.<sup>257</sup> Carrie’s daughter, Vivian, was adopted by Carrie’s foster family, and Carrie never saw Vivian again.<sup>258</sup> Thereafter, the institution sought to sterilize Carrie per the state’s compulsory sterilization statute. Following a series of appeals, the Court upheld Virginia’s law sanctioning state institutions to condition release upon sterilization. Justice Oliver Wendell Holmes, Jr., writing for the majority, found that “[i]t would be strange if [the State] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence,” the Court avowed that “[t]hree generations of imbeciles are enough.”<sup>259</sup> Similar to other state sterilization laws, Virginia’s statute was premised on the idea that “many defective persons . . . would likely become by the propagation of their kind a menace to society[.]”<sup>260</sup> By 1970, nearly 70,000 Americans, many of whom were disabled, poor, or people of color, were forcibly sterilized.<sup>261</sup>

Another aspect of eugenics that restricted people with disabilities from creating and maintaining families was the enactment of state laws that barred disabled people from marrying or alternatively permitted marriages only after the age of forty-five.<sup>262</sup> For example, a Connecticut law prohibited “epileptics, imbeciles, and feebleminded persons” from marrying or having extramarital sexual relations before the age of forty-five.<sup>263</sup> By the mid-1930s, forty-one states had eugenic marriage statutes,<sup>264</sup> and a 1974 study found that these laws still existed in approximately forty states.<sup>265</sup> Notably, these laws continue in some states.<sup>266</sup>

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255. 274 U.S. 200 (1927).

256. Stephen Jay Gould, *Carrie Buck’s Daughter*, 2 CONST. COMMENT. 331, 336 (1985).

257. *Id.*

258. *Id.* at 338.

259. 274 U.S. at 207.

260. See Eugenic Sterilization Act, ch. 394, 1924 Va. Acts 569 (repealed 1974).

261. *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, NPR (Mar. 17, 2016, 1:22 PM), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<https://perma.cc/ATY7-TMK2>].

262. Braddock & Parish, *supra* note 245, at 35.

263. Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

264. Braddock & Parish, *supra* note 245, at 30.

265. Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 DEV. MENTAL HEALTH L. 1, 1-2 (1997).

266. See Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 548-49 (2014) (describing state laws that restrict people with disabilities from marrying). Moreover, government policies that reduce or terminate disability benefits if people with disabilities get married results in continuing marriage restrictions for many. *Id.* at 549 n.132.

Efforts to “protect” children also burgeoned during the eugenics era, with a notable focus on “good” parents versus “bad” parents. For example, President Theodore Roosevelt held the first “White House Conference on the Care of Dependent Children” in 1909, where family policing system reformers passed a set of resolutions concerning the government’s role in care for children. Although the delegates varied on the types of assistance that should be provided, they all agreed that “[h]ome life is the highest and finest product of civilization” and that dependent mothers and their children should be considered “deserving” poor.<sup>267</sup> “Children of parents of worthy character . . . and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner should, as a rule, be kept with their parents . . . . Except in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality.”<sup>268</sup> Consequently, as historian Molly Ladd-Taylor notes, “[t]he White House Conference . . . defined most dependent children as innocent and worthy of aid but kept those whose mothers were deemed immoral or inefficient—because of race, disability, or poor literacy or English language skills—within the undeserving poor.”<sup>269</sup> This “two-track system shaped child welfare policies” throughout the eugenics era and beyond, Ladd-Taylor explains.<sup>270</sup>

Affirming the notion that certain children would be harmed by remaining with their biological parents, a 1918 manual for social workers proclaimed, “it is not right to leave children with parents regardless of the parents’ character and fitness to raise them. Those who are immoral, positively criminal, afflicted with contagious or infectious diseases, or decidedly deficient mentally, are unfit to bear or raise children.”<sup>271</sup> In these instances, the manual explained that “the state and philanthropic organizations must sometimes step in to save the progeny already in existence, and take measures to prevent further reproduction by these classes.”<sup>272</sup> The manual further asserted that “[c]hildren of very incompetent, really feeble-minded, viciously cruel, or positively criminal parents, . . . should be wholly separated from them and provided for permanently in selected private homes or appropriate institutions.”<sup>273</sup>

The stigmatization of parents with disabilities, especially parents with intellectual or psychiatric disabilities, can also be traced to Dr. Kempe and colleagues’ article on “battered-children syndrome,” which is considered the

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267. PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN 9 (1909).

268. *Id.* at 192-93.

269. MOLLY LADD-TAYLOR, *FIXING THE POOR: EUGENIC STERILIZATION AND CHILD WELFARE IN THE TWENTIETH CENTURY* 14 (2020).

270. *Id.* at 14.

271. WILLIAM H. SLINGERLAND, *CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* 83 (1918).

272. *Id.*

273. *Id.* at 65.

genesis of the family policing system.<sup>274</sup> In calling for attention to what they perceived as an epidemic of child abuse and neglect, Kempe and colleagues posited that “psychiatric factors,” including “low intelligence,” were predictors of child maltreatment.<sup>275</sup> Thus, the modern family policing system was established with these biased beliefs against parents with disabilities at its core.

Notwithstanding this harrowing history, people with disabilities are increasingly choosing to have families.<sup>276</sup> Recent estimates indicate that five to ten percent of parents in the United States are disabled.<sup>277</sup> Although the estimated prevalence of parents with disabilities differs by the data source, the number of disabled parents is unquestionably substantial and is anticipated to grow as people with disabilities enjoy increased opportunities to be integrated into their communities.<sup>278</sup> Regrettably, although time has passed, the notion that disabled people are inherently unfit to raise families endures, undergirding contemporary family policing system laws and policies. Thus, as disabled people continue to become parents, many face the likelihood of involvement with the family policing system.

### B. Pervasive Ableism

Ableism is deeply entrenched in the family policing system, and at the root of many of the injustices experienced by parents with disabilities and their children. Broadly, ableism is a system of prejudice and discrimination that devalues and excludes disabled people.<sup>279</sup> Ableism results in people with disabilities being perceived as inferior compared to people without disabilities. According to activist and attorney Talila “TL” Lewis, ableism is

274. Kempe et al., *supra* note 67, at 17; Burton & Montauban, *supra* note 69, at 665.

275. Kempe et al., *supra* note 67, at 18, 24.

276. Loran B. Kundra & Leslie B. Alexander, *Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them*, 33 PSYCHIATRIC REHAB. J. 142, 142 (2009) (footnote omitted).

277. Henan Li et al., *Health of US Parents with and without Disabilities*, 10 DISABILITY AND HEALTH J. 303, 305 (2017) (estimating that roughly 5% of parents have a disability); Rajan Sonik et al., *Parents with and without Disabilities: Demographics, Material Hardship, and Program Participation*, 14 REV. OF DISABILITY STUD. 1 (2018) (estimating that approximately 10% of parents have a disability); H. STEPHEN KAYE, CURRENT DEMOGRAPHICS OF PARENTS WITH DISABILITIES IN THE U.S. (2012), <https://www.lookingglass.org/national-services/research-a-development/126-current-demographics-of-parents-with-disabilities-in-the-us> [<https://perma.cc/8YLR-LC9T>] (estimating that roughly 6% of parents have a disability).

278. ROCKING THE CRADLE, *supra* note 30, at 45 (“Millions of parents throughout the United States have disabilities, and this number is likely to grow as people with disabilities become increasingly independent and integrated into their communities.”); *see also* Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401 (John R. Lutzker ed., 1998) (explaining that the number of parents with intellectual disabilities continues to increase because of deinstitutionalization).

279. Fiona Kumari Campbell, *Ableism as Transformative Practice*, in RETHINKING ANTI-DISCRIMINATORY AND ANTI-OPPRESSIVE THEORIES FOR SOCIAL WORK PRACTICE, 78–92 (Christine Cocker & Trish Hafford-Letchfield, eds., 2014).

[a] system that places value on people's bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism. This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's language, appearance, religion and/or their ability to satisfactorily [re]produce, excel and "behave." You do not have to be disabled to experience ableism.<sup>280</sup>

Ableist perceptions embrace the idea that disability is "something that needs to be ameliorated, corrected, or erased in order to come closer to the ideal able-bodied state."<sup>281</sup> In other words, disability is a misfortune that should be avoided whenever possible. As legal scholar Jamelia Morgan explains, "[a]s a social process, ableism involves labeling—or pathologizing—bodies and minds as deviant, abnormal, incapable, incompetent, dependent, or impaired."<sup>282</sup> Like other systems of oppression, ableism operates at multiple levels and is therefore "a complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society."<sup>283</sup> Ultimately, ableism results in the systemic valuing of people without disabilities over people with disabilities and informs every aspect of society.

Ableism permeates the entire family policing system, beginning with its conception of what it means to be a good parent. For example, ableism leads to the family policing system expecting parents with disabilities to care for their children without the assistance of others, and perceive interdependence as a deficit.<sup>284</sup> Consequently, if a disabled parent requires any type of assistance, the family policing system views it as a weakness. Scholar Ora Prilleltensky explains, "[r]ooted in both patriarchy and ableism is the supposedly clear-cut division between dependence and independence, between those who care and those who are cared for . . . . Thus, parents who are unable to independently fulfil all of the physical tasks of child rearing, are often subjected to skepticism regarding their ability to function as parents."<sup>285</sup> These ableist beliefs are reinforced in child welfare laws and policies. According to legal scholar Robert

280. Talila "TL" Lewis, *January 2021 Working Definition of Ableism* (Jan. 1, 2021), <https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism> [<https://perma.cc/J86W-DR3A>].

281. Justine Wu et al., *Looking Back While Moving Forward: A Justice-Based, Intersectional Approach to Research on Contraception and Disability*, 99 *CONTRACEPTION* 267, 268 (2019)

282. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 *DENV. L. REV.* 973, 981 (2019).

283. *Id.* at 980.

284. *See infra*, Part V.E.

285. Ora Prilleltensky, *A Ramp to Motherhood: The Experiences of Mothers with Physical Disabilities*, 21 *SEXUALITY & DISABILITY* 21, 24 (2003).

Hayman, “[c]urrently, the law insists on measuring [disabled parents] standing alone, and its conception of the ideal parent aggrandizes individualism while it diminishes—and even punishes—interdependence.”<sup>286</sup> Social work professors Elizabeth Lightfoot and Traci LaLiberte similarly note, “[p]arents have often been assessed based on whether they can independently be responsible for all aspects of caring for their child or children, even though most [nondisabled] parents rely on various formal and informal supports for caregiving.”<sup>287</sup> Therefore, to prove their worth, parents with disabilities must conform to the system’s ableist, and often unrealistic, expectations or risk losing their children.

Relatedly, ableist notions about parents with disabilities often result in the family policing system holding parents with disabilities “to a different and higher standard of parental competence than parents without disabilities.”<sup>288</sup> One parent, for example, described feeling held to an unreasonable standard by the family policing standard: “[I]t doesn’t seem like they work with people with disabilities well. . . . [T]hey still expect us to be perfect.”<sup>289</sup> Likewise, disabled mothers have reported being held to a “super-mom” standard, which has been explained by scholars as “a perception that they have to invest more resources in raising their children than non-disabled mothers so the children will grow up to be good and successful adults.”<sup>290</sup> In fact, this heightened standard for disabled parents has made some parents hesitant to explain their needs to the family policing system out of fear their parental competence will be questioned.<sup>291</sup> In the end, as Carol Thomas explains, parents with disabilities are “assumed by professionals and lay people . . . to be incapable unless they can prove otherwise: guilty until proven innocent.”<sup>292</sup>

Unfortunately, examples abound of CPS workers, attorneys, and judges acting based on ableist beliefs about disabled parents. Cases where the family policing system removes infants shortly after birth, such as those described in the beginning of this Article, illustrate how ableism results in misguided presumptions about disabled parents. In these instances, parents with disabilities are subjected to the family policing system despite “any act or omission by the

286. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1205 (1990).

287. Elizabeth Lightfoot & Traci LaLiberte, *Parental Supports for Parents with Intellectual and Developmental Disabilities*, 49 INTELL. DEV. DISABILITIES 388, 390 (2011).

288. Julia A. Rivera Drew, *Disability and the Self-Reliant Family: Revisiting the Literature on Parents with Disabilities*, 45 MARRIAGE & FAM. REV. 431, 432 (2009).

289. Sasha M. Albert & Robyn M. Powell, *Supporting Disabled Parents and Their Families: Perspectives and Recommendations from Parents, Attorneys, and Child Welfare Professionals*, 15 J. PUB. CHILD WELFARE 529, 537 (2021).

290. Carmit-Noa Shpigelman, *How to Support the Needs of Mothers with Physical Disabilities?*, 37 DISABILITY & REHAB. 928, 931 (2015).

291. Ora Prilleltensky, *My Child is Not My Carer: Mothers with Physical Disabilities and the Well-Being of Children*, 19 DISABILITY & SOC’Y. 209, 211 (2004).

292. Carol Thomas, *The Baby and the Bath Water: Disabled Women and Motherhood in Social Context*, 19 SOCIO. HEALTH & ILLNESS 622, 636 (1997).

parent that has harmed or created a threat of harm to the child.”<sup>293</sup> Instead, family policing system involvement in these cases “is premised entirely on the belief that the parent is...incapable of child care; the harm to the child seems simply inevitable.”<sup>294</sup> Tragically, removing children born to disabled parents shortly after birth based on a presumption that they will be unfit is routine.<sup>295</sup>

Surely, ableism pervades the types of incidents that are reported to the family policing system and how those reports are handled. For example, a mother with physical and sensory disabilities was reported to the family policing system by her daughter’s school because her daughter injured herself while doing somersaults, something that would likely not have been reported if she were not disabled.<sup>296</sup> Although the family policing system agency knew that the mother was hard of hearing and needed relay services, they called her to discuss her daughter’s injury without these services, which meant she could not communicate with the agency.<sup>297</sup> Because of the communication barriers, the family policing system agency alleged that the mother was being “uncooperative” and continued their investigation.<sup>298</sup> In this case, ableism informed the family policing system’s treatment of this family.

Ableism also manifests on the interpersonal level, as demonstrated by the actions of employees of the family policing system. “Some agencies encourage workers to act on intuition, hunches, and instinct. . . . These are the perfect conditions for prejudice to influence decision making.”<sup>299</sup> For example, in a case involving a mother with an intellectual disability, a CPS worker said that his presumptions about the mother’s ability to parent was based on his “intuition,” explaining “[w]hen you meet with someone, you get a vibe whether they are going to be able to do it or not.”<sup>300</sup> Notably, in this case, the family policing system agency disregarded experts’ opinions that the mother and her family could care for her daughter.<sup>301</sup>

Ableism also can affect how disabled parents are assessed by the family policing system. For example, during termination of parental rights proceedings, parents with disabilities are routinely subjected to evaluations by mental health professionals who then testify as expert witnesses.<sup>302</sup> Strikingly, “[r]esearch

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293. Hayman, *supra* note 286, at 1229.

294. *Id.*

295. Watkins, *supra* note 220, at 1438 (“[P]resumptions of unfitness are most apparent in cases where the parent has never actually had custody of the child. Intervention in these cases often takes place before birth, even though the parent has not done anything to harm or threaten to harm the child.”).

296. ROCKING THE CRADLE, *supra* note 30, at 81.

297. *Id.*

298. *Id.*

299. SHATTERED BONDS, *supra* note 33, at 56.

300. LETTER OF FINDINGS, *supra* note 170, at 13.

301. *Id.* at 2.

302. Corina Benjet & Sandra T. Azar, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCH. 238, 239 (2003).

studies have consistently illustrated that biases and stereotypes are often embedded in assessments” of disabled parents.<sup>303</sup> Further, the assessments are often inaccessible, fail to accommodate the needs of disabled parents, and rely on pseudoscientific measures, such as IQ scores, which do not accurately measure parenting capability.<sup>304</sup> Nevertheless, judges and attorneys rarely challenge these experts, and judges often base their decisions on whether to terminate a parent’s rights on these experts’ testimony.<sup>305</sup> In other words, parenting evaluations, which are critical in family policing system cases, can be tainted by ableism and often go unchecked.

Indeed, ableism is widespread once cases involving disabled parents and their children reach the courtroom. “Although the statutes generally require evidence of some connection between a parent’s disability and her ability to parent, the level of proof required varies from state to state, and within many states, *from case to case*.”<sup>306</sup> Consequently, a judge’s preconceived notions about a parent’s capabilities can color their judgment in these cases. Thus, “[a]n inherent problem in this group [of cases] is that the termination is not simply based on the parent’s past actions but on predictions about their future ones as well.”<sup>307</sup> In other words, judges across jurisdictions have decided termination of parental rights cases involving disabled parents based on speculation that neglect *may* occur in the future.<sup>308</sup>

Ableism also presents through discriminatory laws and policies that disproportionately harm disabled parents and their children. For example, nearly two-thirds of state family policing system laws explicitly include parental disability, usually intellectual or psychiatric disabilities, as grounds for termination of parental rights.<sup>309</sup> This is particularly troubling because “[t]he

303. Marjorie Aunos & Laura Pacheco, *Able or Unable: How do Professionals Determine the Parenting Capacity of Mothers with Intellectual Disabilities*, 15 J. PUB. CHILD WELFARE 357, 376 (2021) (citing studies).

304. Joshua B. Kay, *Representing Parents with Disabilities in Child Protection Proceedings*, 13 MICH. CHILD WELFARE L.J. 27, 33 (2009). For a discussion on appropriate and accessible parenting assessments, see ROCKING THE CRADLE, *supra* note 30, at 129-38.

305. Hayman, *supra* note 286, at 1237-38.

306. Watkins, *supra* note 220, at 1435 (emphasis added).

307. Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 554 (2005).

308. See, e.g., *In re D.W.*, 791 N.W.2d 703, 708-09 (Iowa 2010) (“As D.W. continues to grow and develop, his need for physical, mental, and emotional guidance will only become more challenging.”); *In re Adoption of Ilona*, 944 N.E.2d 115, 121 (Mass. 2011) (“Two Juvenile Court clinicians issued reports that were considered by the trial judge. In a report dated June 20, 2007, a clinician who had twice interviewed the mother concluded that she had a cognitive impairment, with over-all intellectual ability in the low range. While he did not make a parenting evaluation, he noted that parents with her cognitive limitations ‘often experience significant difficulty in adequately caring for a child, especially as the child becomes older and the developing needs of the child become more complex.’” (citations omitted)); *In re Welfare of A.D.*, 535 N.W.2d 643, 649 (Minn. 1995) (“In a termination case, the court ‘relies not primarily on past history, but ‘to a great extent upon the projected permanency of the parent’s inability to care for his or her child.’ Thus, we consider whether the inability to care for the child will continue indefinitely.” (citations omitted)).

309. ROCKING THE CRADLE, *supra* note 30, at 16.

entire parental rights termination process, from initial intervention to final adjudication, is driven by statute.”<sup>310</sup> For example, Nevada’s dependency statute provides:

In determining neglect by or unfitness of a parent, *the court shall consider, without limitation*, the following conditions which may diminish suitability of a parent:

1. *Emotional illness, mental illness or mental deficiency* of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.<sup>311</sup>

As noted by NCD, “[s]uch statutes are examples of the oppression ADA proponents sought to eradicate, and they run entirely counter to the letter of the law, which forbids local and state government agencies, such as those in the family policing system, from categorically discriminating on the basis of disability.”<sup>312</sup> Thus, “[i]f the label is not used to help, it is inevitably used to hurt.”<sup>313</sup> Further, although most laws require a nexus be shown between the parent’s disability and an actual harm to the child, these statutes are usually construed to allow broad assumptions concerning the abilities of parents with disabilities to inform outcomes in these cases.<sup>314</sup>

Lastly, although ASFA does not reference parents with disabilities, the statute contains ableist provisions that adversely affect disabled parents and their children. As previously explained, parents with disabilities often have difficulty complying with the stringent timelines set forth by ASFA because effective treatment often takes longer than the mandated timelines, and suitable supports and services usually take time to obtain.<sup>315</sup> Additionally, ASFA allows family policing agencies to bypass the provision of reasonable efforts and instead terminate parental rights if the child has been “subjected to aggravated

310. Watkins, *supra* note 220, at 1434.

311. NEV. REV. STAT. § 128.106(1)(a) (emphasis added). For other examples of statutes that allow the state to terminate parental rights based in part on a parent’s disabilities, see ALA. CODE § 12-15-319(a)(2); ARIZ. REV. STAT. ANN. § 8-533(B)(3); N.J. STAT. ANN. § 9:2-19; N.Y. SOC. SERV. LAW § 384-b(4)(c); N.C. GEN. STAT. § 7B-1111(a)(6).

312. ROCKING THE CRADLE, *supra* note 30, at 84.

313. Hayman, *supra* note 286, at 1269.

314. Watkins, *supra* note 220, at 1438 (“[M]any statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of individual parents; beliefs about the parenting abilities of the group labeled developmentally disabled are assumed to hold true for all parents with developmental disabilities.”).

315. See Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 22 (2011); Christina Risley-Curtiss et al., *Identifying and Reducing Barriers to Reunification for Seriously Mentally Ill Parents Involved in Child Welfare Cases*, 85 FAM. SOC’Y 107, 112 (2004); Brunt & Goodmark, *supra* note 234, at 299; Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 FAM. CT. REV. 21, 25 (2019); see also ROCKING THE CRADLE, *supra* note 30, at 87-88 (detailing the difficulties parents with disabilities experience related to complying with ASFA’s timelines).

circumstances,” which some states have interpreted to include parental disability.<sup>316</sup> As such, laws in eight states (Alabama,<sup>317</sup> Alaska,<sup>318</sup> Arizona,<sup>319</sup> California,<sup>320</sup> Kentucky,<sup>321</sup> North Dakota,<sup>322</sup> South Carolina,<sup>323</sup> and Utah<sup>324</sup>) permit dispensing with reasonable efforts based on the proposition that the parent’s disability “renders him or her incapable of utilizing those services...”<sup>325</sup> Therefore, “a parent’s disability often serves as a dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child.”<sup>326</sup>

Notably, activists and scholars are increasingly calling for the repeal of ASFA because of the injuries it has caused to marginalized families.<sup>327</sup> While repealing ASFA is important, the injustices and harms inflicted on disabled parents and their children would persist because they are the result of far more than pervasive ableist laws and policies. Thus, repealing ASFA is only one part of a multifaceted legal and policy response needed to achieve disabled parents and their children.

### C. Limited Legal Protections

As previously explained, the ADA and Section 504 should protect parents with disabilities involved with the family policing system from disability-based discrimination. Nonetheless, as this Section shows, these legal protections have not met their full potential. Moreover, the ADA and Section 504 are only relevant once families have been subjected to the family policing system and the trauma that it causes. In other words, while federal disability rights laws should assist families involved with the system, they cannot prevent disabled parents and their children from becoming involved.

Despite the ADA’s pertinence to the family policing system, courts have been reluctant to apply the law in cases involving disabled parents.<sup>328</sup> Analysis of 2,064 appellate termination of parental rights cases involving disabled

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316. 42 U.S.C. § 671(a)(15)(D)(i)-(iii).

317. ALA. CODE § 12-15-312(c).

318. ALASKA STAT. § 47.10.086(c)(5).

319. ARIZ. REV. STAT. ANN. § 8-846 (D)(1)(b).

320. CAL. WELF. & INST. CODE § 361.5(b)(2).

321. KY. REV. STAT. ANN. § 610.127(6).

322. N.D. CENT. CODE, § 27-20.3-01(3).

323. S.C. CODE ANN. § 63-7-1640(c)(7).

324. UTAH CODE ANN. § 78A-6-312(21)(b).

325. Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 135, 168 (2008) (quoting CAL. WELF. & INST. CODE § 361.5(b)(2)).

326. Watkins, *supra* note 220, at 1444.

327. See e.g., Shanta Trivedi, *Adoption and Safe Families Act is the ‘Crime Bill’ of Child Welfare*, THE IMPRINT (Jan. 28, 2021, 6:44 PM), <https://imprintnews.org/adoption/adoption-safe-families-act-crime-bill-child-welfare/51283> [<https://perma.cc/Y4VH-C7KM>].

328. ROCKING THE CRADLE, *supra* note 30, at 93.

mothers revealed that the ADA was only raised in six percent of the decisions and only applied in less than two percent of the opinions.<sup>329</sup> This finding, of course, is predictable given that courts have overwhelmingly favored family policing system agencies in termination of parental rights cases involving disabled parents.<sup>330</sup> Some courts have declined to apply the ADA, positing that termination of parental rights proceedings are not a “service, program, or activity” within the meaning of the ADA.<sup>331</sup> Other courts have held that applying the ADA in termination of parental rights proceedings would sidestep children’s rights in the interest of parents’ rights.<sup>332</sup> Meanwhile, other courts have claimed the ADA does not supersede the obligations of state dependency laws.<sup>333</sup> Notably, some courts have held that while the ADA is not a defense to termination of parental rights, a parent may bring a separate ADA action related to the provision of services.<sup>334</sup> At the same time, it is unclear that such an approach could be achievable in light of how quickly such an action would need to proceed. As Joshua Kay explains,

Given the realities of the protection system, including the tendency to remove children from parents with disabilities and the short timeline prior to termination proceedings, this approach by the courts has amounted to requiring that parents suffer discrimination, lose their children, and seek a remedy under the ADA in a separate action—which will not include getting their children back—in that order.<sup>335</sup>

In sum, nearly all state courts have rejected ADA claims in termination of parental rights proceedings, significantly limiting the law’s protections.<sup>336</sup>

329. Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone, & Stephen Fournier, *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL’Y REV. 157, 198-202 (2021).

330. ROCKING THE CRADLE, *supra* note 30, at 93.

331. See, e.g., *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997); *In re Antony B.*, 735 A.2d 893, 899 (Conn. App. Ct. 1999); *In re Anthony P.*, 84 Cal. App. 4th 1112, 1116 (2000); *Adoption of Gregory*, 747 N.E.2d 120, 121 (Mass. 2001); *In re Chance Jahmel B.*, 187 Misc. 2d 626, 633 (N.Y. Fam. Ct. 2001); *In re La’Asia S.*, 191 Misc. 2d 28, 41-42 (N.Y. Faro. Ct. 2002); *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006), *cert. denied*, *Irving N. v. R.I. Dep’t of Children, Youth, & Families*, 127 S. Ct. 1372 (2007).

332. See, e.g., *J.T. v. Ark. Dep’t Hum. Servs.*, 947 S.W.2d 761, 768 (Ark. 1997); *People v. T.B.*, 12 P.3d 1221, 1224 (Colo. Ct. App. 2000); *In re Anthony P.*, 84 Cal. App. 4th at 1116; *In re Guardianship of R.G.L.*, 782 A.2d 458, 472-73 (N.J. Super. Ct. App. Div. 2001); *Gregory*, 747 N.E.2d at 121.

333. See, e.g., *Torrance P.*, 522 N.W.2d at 246; *In re Antony B.*, 735 A.2d at 899; *T.B.*, 12 P.3d at 1224; *In re Doe*, 60 P.3d 285, 290 (Haw. 2002).

334. See, e.g., *In re Torrance P.*, 522 N.W.2d 243, 246 (Wisc. Ct. App. 1994); *In re B.S.*, 693 A.2d at 722; *In re B.K.F.*, 704 So. 2d at 318; *In re Antony B.*, 735 A.2d at 899 n.9; *In re Anthony P.*, 84 Cal. App. 4th at 1116; *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *In re Harmon*, No. 00 CA 2693, 2000 WL 1424822, at \*12 (Ohio Ct. App. Sept. 25, 2000); *In re Chance Jahmel B.*, 187 Misc. 2d at 633; *In re Doe*, 60 P.3d at 291, 293.

335. Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 808 (2018).

336. *Id.* at 809.

Legal protections for parents with disabilities—vis-à-vis Section 504 and the ADA—have existed for decades. Nonetheless, these important laws have not effectively safeguarded the rights of disabled parents and their children. Although greater enforcement of these legal protections may, in part, improve outcomes for families already ensnared with the family policing system, it would not prevent these families from being unnecessarily referred.

#### IV. ABOLITION AND DISABILITY JUSTICE

“[C]arceral practices are so deeply embedded in the history of disability that it is effectively impossible to understand incarceration without attending to the confinement of disabled people.”

– *Angela Davis*<sup>337</sup>

The family policing system is adversely and devastatingly hurting parents with disabilities and their children, often causing the unnecessary and permanent separation of children and their parents. As previously explained, the injustices that these families experience is largely because ableism is widespread and deeply entrenched in the family policing system. Indeed, the subjugation of parents with disabilities has occurred throughout the nation’s history and has resulted in heartbreaking tragedies and deprivations of rights. In other words, the harms exacted on disabled parents and their children by the family policing system are by design and, therefore, not correctable through reforms. Accordingly, the family policing system must be entirely dismantled, and we must reimagine a world that provides families with adequate supports and resources. This Part limns the tenets of both abolition and disability justice and how these interconnecting movements, theories, and praxes advance justice for parents with disabilities and their children. First, this Part explains abolition broadly. Next, it describes abolition’s relationship to the family policing system. Finally, it defines disability justice and explains the framework’s applicability to family policing system abolition. As will be elucidated below, family policing system abolition and disability justice are complementary and interlocked.

##### A. Overview of Abolition

Efforts to abolish the prison industrial complex first emerged more than twenty years ago and have grown substantially since then. Specifically, the contemporary prison abolition movement is often traced to the international conference, *Critical Resistance: Beyond the Prison Industrial Complex*, which

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337. Angela Y. Davis, *Foreword*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* vii (Liat Ben-Moshe et al. eds., 2014).

was convened at the University of California at Berkeley in 1998.<sup>338</sup> During the three day conference, nearly 4,000 activists, previously incarcerated individuals, attorneys, and scholars met “to address the alarming growth of the prison system, popularize the idea of the ‘prison industrial complex,’ . . . and make ‘abolition’ a practical theory of change.”<sup>339</sup> Since this groundbreaking convening, the abolition movement has burgeoned tremendously in size and power.<sup>340</sup> Importantly, throughout the summer of 2020, as tens of thousands of protestors took to the streets in response to the police killings of Breonna Taylor, George Floyd, and many other black people, the abolition garnered mainstream recognition and interest.<sup>341</sup>

Activists and scholars have described a range of goals and principles central to the abolition movement. For example, in her 2019 article, *Abolition Constitutionalism*, Roberts explains three overarching tenets common to the formulations of abolitionist movement, theory, and praxis.<sup>342</sup> First, the origins of the contemporary carceral regime are based on the ideologies that undergirded slavery.<sup>343</sup> Second, the growing criminal legal system operates to subjugate marginalized communities to sustain a racial capitalist regime.<sup>344</sup> Finally, a more humane and democratic society that no longer depends on caging people to meet human needs and address societal problems is possible.<sup>345</sup> Ultimately, Roberts posits that these principles lead to the understanding that to transform our society from one that is slavery-based to one that is free we must dismantle the prison industrial complex.<sup>346</sup> Similarly, Critical Resistance—an abolitionist organization founded in 1997 by Angela Davis, Ruth Wilson Gilmore, and others—explains that abolition is based on the belief that “we must build models today that can represent how we want to live in the future.”<sup>347</sup>

Significantly, abolition is not just about dismantling systems. Rather, an essential aspect of abolition is recognition that eliminating the carceral regime must occur alongside creating a society that has no need for such systems.<sup>348</sup> As abolitionist Mariame Kaba explains, abolition involves “the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within

338. Roberts, *supra* note 35, at 460.

339. *Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, CRITICAL RESISTANCE, <http://criticalresistance.org/critical-resistance-beyond-the-prison-industrial-complex-1998-conference/> [<https://perma.cc/HUU6-EQQL>].

340. Roberts, *supra* note 35, at 460.

341. *Id.* at 461 (“This past summer, protests erupted around the nation and the world in response to continued police violence against Black people. The call to defund police and abolish prisons began to make sense to more and more people.”).

342. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7-8 (2019).

343. *Id.*

344. *Id.*

345. *Id.*

346. Roberts, *supra* note 35, at 461.

347. *What is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/93BC-FVG3>].

348. ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 73-74 (2005).

our culture. And it's also the building up of new ways of . . . relating with each other."<sup>349</sup> Likewise, activist Patrisse Cullors says that "[a]bolition must be a cultural intervention. It must produce a new way of being even in the most challenging and difficult moments."<sup>350</sup> In other words, abolition is a vision of radical sanguinity and transformation.

Abolitionists believe that systems intentionally designed to oppress marginalized people cannot merely be reformed. Accordingly, abolition requires "non-reformist reforms," which are those that shrink rather than strengthen "the state's capacity for violence" and work toward the goal of a world without the carceral regime.<sup>351</sup> Describing the distinction between "reformist reforms" and "non-reformist reforms," Ruth Wilson Gilmore writes,

Big problems require big solutions. Nothing happens all at once; big answers are the painstaking accumulation of smaller achievements. But dividing a problem into pieces to solve the whole thing is altogether different from defining a problem solely in terms of the bits that seem easiest to fix. In the first instance, the remedy for each piece must develop in relation to its effect on actual or possible remedies for the other pieces. The other way is to solve a small part without considering whether the outcome strengthens or weakens the big problem's hold on the world. In other words, there is breaking down and then there's breaking down.<sup>352</sup>

Ultimately, abolition demands more than surface-level reforms. Instead, abolitionists want to reimagine the possibilities of law and policy by aiming to shift power into impacted communities.<sup>353</sup>

Importantly, abolitionists contend that people can be held accountable for the troubles they cause without imposing violence on them through incarceration.<sup>354</sup> As legal scholar Allegra McLeod explains, justice for abolitionists requires "paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate,

349. McLeod, *supra* note 63, at 1617 (quoting *Episode 29 — Mariame Kaba*, AIRGO (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> [<https://perma.cc/M5MS-TAWX>]).

350. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1684, 1694 (2019).

351. Dan Berger, Mariame Kaba, & David Stein, What Abolitionists Do, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/A686-FQZ6>].

352. Ruth Wilson Gilmore, *Foreword to DAN BERGER, THE STRUGGLE WITHIN: PRISONS, POLITICAL PRISONERS, AND MASS MOVEMENTS IN THE UNITED STATES* viii (2014).

353. *Toward a Radical Imagination of Law*, *supra* note 52, at 408.

354. Durrell M. Washington, Toyan Harper, Alizé B. Hill, & Lester J. Kern, *Achieving Juvenile Justice through Abolition: A Critical Review of Social Work's Role in Shaping the Juvenile Legal System and Steps toward Achieving an Antiracist Future*, 10 SOC. SCI. 211, 212 (2021).

while understanding the root causes of wrongdoing and working to address them.”<sup>355</sup> In the end, abolitionists assert that achieving justice requires directing attention and resources to address the needs of those who experienced harm while simultaneously supporting those who caused the harm with the goal of reducing the likelihood of future harm.

### B. Family Policing System Abolition

Family policing system critics have long posited that the family policing system “is a carceral institution masquerading as a social service.”<sup>356</sup> Yet, dissimilar to policing and the prison industrial complex, the family policing system has traditionally been relieved from rigorous critique, mainly because it is perceived as helpful, supportive, and well-intentioned rather than punitive. Increasingly, however, activists and scholars are calling for the dismantling of the family policing system as part of broader efforts to abolish the carceral regime.<sup>357</sup>

The relation of the broader carceral regime to the family policing system cannot be overstated. Both the criminal legal system and the family policing system share white supremacist and ableist histories rooted in family separation.<sup>358</sup> Both systems are permeated with cultures reflecting that history,<sup>359</sup> and both systems disproportionately harm people of color and people with disabilities.<sup>360</sup> Indeed, “‘child welfare’ and policing are not just parallel, mirrored

355. McLeod, *supra* note 63, at 1646.

356. Schwartz, *supra* note 1.

357. The Movement for Family Power, for example, aims to end the foster care system. See Movement for Family Power, *Our Vision and Values*, <https://www.movementforfamilypower.org/indexa> [<https://perma.cc/YL53-R37D>]. The Red Nation includes the child welfare system and Border Patrol within its call to defund police. See THE RED NATION, THE RED DEAL, PART ONE: END THE OCCUPATION 19–21 (2020), [http://therednation.org/wp-content/uploads/2020/04/Red-Deal\\_Part-I\\_End-The-Occupation-1.pdf](http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf) [<https://perma.cc/6AN4-58JB>]. Similarly, the Movement for Black Lives policy platform includes eliminating termination of parental rights. See Movement for Black Lives, *End the War on Black Women*, <https://m4bl.org/policy-platforms/end-the-war-black-women/> [<https://perma.cc/6UPK-M92H>]. See also Chris Gottlieb, *Black Families are Outraged about Family Separation within the U.S. It’s Time to Listen to Them*, TIME (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families/> [<https://perma.cc/24HV-S2TU>].

358. Rachel Johnson-Farias, *Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States*, 14 HARV. L. & POL’Y REV. 531, 541-46 (2020) (examining the *Dred Scott* and *Lassiter* decisions in which the Supreme Court denied Abby Lassiter the right to counsel in her termination of parental rights case and calling attention to the ways in which white supremacy and the history of slavery undergird the practice of legalized family separation for families of color held in bondage).

359. Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons from Modern Reform*, 32 FLA. STATE U. L. REV. 957, 957-58 (2005).

360. Roberts, *supra* note 144, at 1492. (“Stereotypes of maternal irresponsibility created and enforced by the child welfare system’s disproportionate supervision of black children help to sustain mass incarceration, and stereotypes of black female criminality help to sustain foster care. As Angela Davis observes, the prison-industrial complex ‘relies on racialized assumptions of criminality—such as images of black welfare mothers reproducing criminal children—and on racist practices in arrest, conviction, and sentencing patterns.’”); Elliott Oberholtzer, *Police, Courts, Jails, and Prisons All Fail Disabled People*, PRISON POLICE INITIATIVE (Aug. 23, 2017), <https://www.prisonpolicy.org/blog/2017/08/23/disability/>

realities. The two systems are connected and feed one another[.]” Legal scholar Lisa Kelly explains.<sup>361</sup> “Children enter the system when their parents are incarcerated. Police accompany child welfare workers when they remove children. Child welfare workers may accompany police officers or be contacted by them when they are making an arrest of adults with children.”<sup>362</sup>

Understanding how activists and scholars define the carceral regime helps elucidate why the family policing is indeed an integral part of it. For example, the Underground Scholars Initiative—a student organization at the University of California at Berkeley that works to create a pathway for incarcerated, formerly incarcerated and system impacted individuals into higher education—defines the carceral system “as a comprehensive network of systems that rely, at least in part, on the exercise of state sanctioned physical, emotional, spatial, economic and political violence to preserve the interests of the state.”<sup>363</sup> Likewise, Critical Resistance defines the prison industrial complex as an expansive system of “overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social, and political problems.”<sup>364</sup> Ultimately, these broad definitions reflect a growing understanding that the carceral regime extends beyond the criminal legal system and includes the family policing system.

Relatedly, several critical and feminist scholars emphasize that the family policing system’s propagation of harm and separation of families reflects the carceral logic employed by other parts of the carceral regime. For example, scholars Beth Richie and Kayla Martensen, explain “social services are adopting the logics of the Prison Nation and progressively building a relationship with the carceral state. Appropriately, we identify these services as carceral services that replicate control, surveillance, and punishment[.]”<sup>365</sup> Child welfare system expert Maya Pendleton similarly says, “[e]ven when children are not separated from their families, the family policing system turns families’ communities and homes into open-air sites of policing and punishment, and wonders why the services they try to offer are not trusted.”<sup>366</sup> Likewise, scholar Erica Meiners

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[<https://perma.cc/E2K7-WUUF>] (“Disabled people are overrepresented in all interactions with the criminal justice system, and at all points, the system is failing them.”).

361. Kelly, *supra* note 57, at 263 (internal footnotes omitted).

362. *Id.* (internal footnotes omitted).

363. MICHAEL CERDA-JARA, STEVEN CZIFRA, ABEL GALINDO, JOSHUA MASON, CHRISTINA RICKS, & AZADEH ZHRABI, LANGUAGE GUIDE FOR COMMUNICATING ABOUT THOSE INVOLVED IN THE CARCERAL SYSTEM, UNDERGROUND SCHOLARS INITIATIVE (2019), <https://undergroundscholars.berkeley.edu/blog/2019/3/6/language-guide-for-communicating-about-those-involved-in-the-carceral-system> [<https://perma.cc/JM95-CNB9>].

364. *What is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/BR93-UFQB>].

365. Beth E. Richie & Kayla M. Martensen, *Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice*, 35 J. WOMEN & SOC. WORK 12, 14 (2019).

366. Maya Pendleton, *Making Possible the Impossible: A Black Feminist Perspective on Child Welfare Abolition*, COLUM. J. L. & RACE BLOG (Feb. 20, 2021),

argues that abolition efforts must extend beyond the criminal legal system to other systems that purport to keep us safe, explaining, “[t]he prevailing contemporary carceral logic recycles the false notion that safety can be achieved through essentially more of the same: more guards, fences, surveillance, suspensions, punishment, etc. . . . We must reclaim definitions of safety.”<sup>367</sup> Thus, her analysis requires us to consider how systems that purport to keep us safe, healthy, and educated control behavior by instantiating a binary of “acceptable” versus “unacceptable” and “good” versus “bad.” To that end, the family policing system parallels this logic by casting people into capricious categories, through its advancement that we must keep children “safe” from the “bad” people who harm children.

Notably, like other efforts to reform the carceral regime, efforts to reform the family policing system have proven ineffective, underscoring why reforms simply are not enough to improve outcomes for families.<sup>368</sup> Indeed, despite substantial legislative, regulatory, and funding reforms to improve the family policing system over the past several years, the number of marginalized families subjected to the family policing system has continued to grow.<sup>369</sup> Reforms do not work because the family policing system is not broken. Rather, the family policing system continues to oppress marginalized families by design. Therefore, the only way to end the harm imposed on families is “through abolition of the family policing system as we know it and a fundamental reimagining of the meaning of child welfare[.]”<sup>370</sup> Hence, the laws and policies that govern the family policing system as it is now must be radically transformed from the roots on upward. We must create ways to support families that are responsive and accountable to those who have been harmed the most by the system as it is. Indeed, our path forward must cater to those who have the most to lose from any changes to come.

To be sure, family policing system abolition does not mean abandoning children. Indeed, abolitionists recognize the importance of accountability and some endorse transformative justice as a community-based approach to responding to violence and interpersonal harm. As journalist Kelly Hayes and abolitionist Mariame Kaba explain, the purpose of transformative justice is to “build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed

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<https://journals.library.columbia.edu/index.php/cjrl/blog/view/311> [https://perma.cc/YB5D-SGDF] (internal citations omitted).

367. Erica R. Meiners, *Ending the School-to-Prison Pipeline/Building Abolition Futures*, 43 URBAN REV. 547, 559 (2011).

368. Vivek Sankaran & Christopher Church, *Rethinking Foster Care: Why our Current Approach to Child Welfare has Failed*, 73 SMU L. REV. F. 123, 126, 128 (2020); Roberts, *supra* note 35, at 457-60.

369. Sankaran & Church, *supra* note 368, at 130-31; Roberts, *supra* note 35, at 457-60.

370. Alan Dettlaff et al., *supra* note 38, at 500.

so that this harm is less likely to happen again.”<sup>371</sup> For example, generationFIVE, a volunteer collaborative dedicated to using transforming justice to “interrupt and mend the intergenerational impact of child sexual abuse on individuals, families, and communities,” provides an alternative approach to addressing the harms of child sexual abuse that rejects both community and family policing.<sup>372</sup> generationFIVE explains that transformative justice approaches prioritize safety, healing, and agency for survivors; maximize accountability and transformation for those who abuse; pursue community response and accountability for abuse; and seek the “transformation of community [and] social conditions that create and perpetuate violence.”<sup>373</sup> Hence, “[t]ransformative justice is an approach for how we—as individuals, families, communities, and society—can prevent, respond to, and transform the harms that we see happening in our world.”<sup>374</sup> In the end, transformative justice offers opportunities to keep both children and parents safe while also holding those who cause harm accountable.

Family policing system abolition means inventing new ways to protect and support families while also dismantling systems that pathologize, control, and punish marginalized communities. It invites us to envisage a world where harm is effectively addressed, fewer families are system-involved, and communities are strong and accountable. Ultimately, family policing system abolition imagines a society that centers family wellbeing, is community-driven, and is embedded in a commitment to keeping families together whenever possible.

### C. *Disability Justice*

Disability justice is complementary to family policing system abolition. Disability justice is an intersectional social movement, theory, and praxis conceived in 2005 by the Disability Justice Collaborative, a group of queer, trans, and/or racialized disabled people.<sup>375</sup> Disability justice encompasses ten principles needed to achieve justice for people with disabilities, including: intersectionality, leadership by those most impacted, anti-capitalist politics, cross-movement solidarity, interdependence, collective access and collective liberation.<sup>376</sup> Disability justice understands that “all bodies are unique and

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371. Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not “Transformative Justice.” Here’s Why*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/> [<https://perma.cc/9KDH-LP3E>].

372. GENERATIONFIVE, *About Us*, <http://www.generationfive.org/about-us/> [<https://perma.cc/T4AQ-QXJJ>].

373. GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK 45, 59 (2017), <http://www.generationfive.org/wp-content/uploads/2017/06/Transformative-Justice-Handbook.pdf> [<https://perma.cc/BB96-78RJ>].

374. *Id.* at 37.

375. LEAH LAKSHMI PIEPZNA-SAMARASINHA, CARE WORK: DREAMING DISABILITY JUSTICE 10 (2018).

376. SINS INVALID, SKIN, TOOTH, AND BONE – THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 22-26 (2d ed., 2019).

essential” and, simultaneously, that “all bodies are confined by ability, race, gender, sexuality, class, nation state, religion, and more, and we cannot separate them.”<sup>377</sup> Although a growing body of legal scholarship is actively engaging the tenets of disability justice,<sup>378</sup> this is the first Article to do so in the context of family policing system abolition.

Fundamental to disability justice is the recognition that individualist approaches to disparities are inevitably limited and inadequate. Disability justice, therefore, 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.<sup>379</sup> Specifically, in response to the disability rights movement, which has been overwhelmingly white, disability justice activists and scholars emphasize the importance of moving activism beyond the traditional legislative efforts. As Mia Mingus writes, “I want us to tap into the transformative powers of disability, instead of only gaining access to the current system . . . . We don’t simply want to join the ranks of the privileged, we want to challenge and dismantle those ranks and question why some people are consistently at the bottom.”<sup>380</sup> In other words, while “[t]he disability rights movement has been crucial to the liberation of people with disabilities,”<sup>381</sup> disability justice activists and scholars alternatively attend to the necessity of thinking beyond “gaining access to the current system[.]”<sup>382</sup> Instead, disability justice aims to dismantle structural oppression and address the needs of multiply marginalized people with disabilities.<sup>383</sup> Thus, “[w]here disability rights seeks to change social conditions for some disabled people via law and policy, disability justice moves beyond law and policy: It seeks to radically transform social conditions and norms in order to affirm and support all people’s inherent right to live and thrive.”<sup>384</sup> This understanding is critical, as existing laws are ineffective at protecting the rights

377. *Id.* at 19.

378. See, e.g., Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 584, 549 (2021) (using disability justice as a lens for understanding disability identity); Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 931-35 (considering how disability justice has informed intersectional scholarship on people with disabilities); Powell, *supra* note 254, at 629-30 (applying a disability justice lens for disrupting eugenics); Morgan, *supra* note 282, at 989 (employing disability justice as a framework for developing multidimensional consciousness).

379. SINS INVALID, *supra* note 376, at 13-15; see also PIEPZNA-SAMARASINHA, *supra* note 375, at 15.

380. Mia Mingus, *Access Intimacy, Interdependence and Disability Justice*, LEAVING EVIDENCE (Apr. 12, 2017), <https://leavingevidence.wordpress.com/2017/04/12/access-intimacy-interdependence-and-disability-justice/> [<https://perma.cc/3H6Z-T9LR>].

381. Nomy Lamm, *This is Disability Justice*, THE BODY IS NOT AN APOLOGY (Sept. 2, 2015), <https://thebodyisnotanapology.com/magazine/this-is-disability-justice/> [<https://perma.cc/2T3E-MNYC>].

382. Mingus, *supra* note 380.

383. Lamm, *supra* note 381.

384. Talila “TL” Lewis, *Disability Justice is an Essential Part of Abolishing Police and Prisons*, LEVEL (Oct. 7, 2020), <https://level.medium.com/disability-justice-is-an-essential-part-of-abolishing-police-and-prisons-2b4a019b5730> [<https://perma.cc/UZJ3-3SDA>].

of disabled parents and their children, and some statutes are causing the very injustices that these families are experiencing.

Disability justice is rooted in intersectionality<sup>385</sup> and was developed as a “movement-building framework that would center the lives, needs, and organizing strategies of disabled queer and trans and/or Black and brown people marginalized from mainstream disability rights organizing’s white-dominated, single-issue focus.”<sup>386</sup> An intersectional approach “recognizes that people with disabilities have diverse lived experiences and possess multiple identity traits that may intersect and overlap to compound the forms of marginalization and oppression they experience while incarcerated.”<sup>387</sup> Intersectionality is critical to examining family policing system injustices. For example, throughout *Shattered Bonds*, Roberts provides examples of families of color who were subjected to the family policing system because of perceived or actual psychiatric disabilities.<sup>388</sup> Other studies have similarly documented heightened family policing system inequities for disabled parents of color.<sup>389</sup> Recently, Jasmine Harris described the dearth of legal scholarship studying the intersection of race and disability, noting, “discussions of race and disability do not use a critical-intersectional lens to interrogate inequities or a central subject of legal inquiry.”<sup>390</sup> Thus, disability justice provides an essential lens for responding to this void in legal scholarship.

Abolition of the carceral regime is an important goal of disability justice because disabled people, especially disabled people of color, are disproportionately harmed by policing and the prison industrial complex.<sup>391</sup> Nearly four in ten state prisoners and three in ten federal prisoners are disabled.<sup>392</sup> Between 2013 and 2015, nearly half of the people killed by police had disabilities.<sup>393</sup> Further, between twenty-five and forty percent of people with psychiatric disabilities will be jailed or incarcerated at some point in their life,

385. In 1989, Kimberlé Crenshaw coined the term “intersectionality” to help explain the oppression of Black women. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 140 (1989). Since then, intersectionality has been used to examine how people with multiple marginalized identities or statuses, including multiply marginalized people with disabilities, experience subordination. See, e.g., Beth Ribet, *Surfacing Disability Through a Critical Race Theoretical Paradigm*, 2 GEO. J. L. & MOD. CRIT. RACE PERSP. 209, 211-22 (2010).

386. PIEPZNA-SAMARASINHA, *supra* note 375, at 15.

387. Morgan, *supra* note 282, at 988-89.

388. SHATTERED BONDS, *supra* note 33, at 40-42 (explaining how perceived or actual psychiatric disabilities were often used as justification for child welfare system intervention in families of color).

389. See, e.g., LaLiberte et al., *supra* note 213, at 527; Park et al., *supra* note 190, at 496.

390. Harris, *supra* note 378, 926-27.

391. SINS INVALID, *supra* note 376, at 52-53.

392. U.S. DEP’T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SURVEY OF PRISON INMATES, 2016: DISABILITIES REPORTED BY PRISONERS 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf> [<https://perma.cc/4VUK-AJAJ>].

393. Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016), <https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371> [<https://perma.cc/WRS9-38QD>].

and the largest mental health facility is a jail.<sup>394</sup> The relationship, therefore, between disability and policing and the prison industrial complex is unmistakable and underscores the need for abolition to include people with disabilities. As such, “[d]isability justice is a requisite for abolition because carceral systems medicalize, pathologize, criminalize, and commodify survival, divergence, and resistance. The past and present connections between disability and all forms of carceral violence are overt and overwhelming.”<sup>395</sup> To that end, activist and attorney Talila “TL” Lewis explains that “[a]bolitionist movements must contend with how disability and ableism interact with carceral systems, and be committed to abolishing all spaces to which marginalized people are disappeared.”<sup>396</sup>

Ultimately, disability justice is essential to all abolition efforts, including family policing system abolition. The intersectional approach provided by disability justice is essential to addressing the compounded discrimination experienced by multiply marginalized parents with disabilities within the family policing system. Furthermore, as demonstrated throughout this Article, the oppression experienced by disabled parents is the result of ableism that is deeply entrenched in the bureaucratic and legal design of the family policing system. Accordingly, disability justice’s focus on dismantling oppressive systems is essential to remedying the harms exacted on parents with disabilities and their children by the family policing system. Hence, family policing system abolition must incorporate the tenets of disability justice.

#### V. A WAY FORWARD: AN AGENDA FOR ACHIEVING JUSTICE THROUGH ABOLITION

The powers of abolition and disability justice are their combination of far-reaching critiques and buoyant outlooks, as well as their resolve for multiple strategies to move us towards that outlook. Although there is unquestionably a range of ways abolitionists strategies could be schematized, I delineate six areas that I believe warrant attention to successfully achieve justice for disabled parents and their children: (1) center disabled parents as leaders; (2) eradicate poverty; (3) invest in families; (4) end surveillance of families; (5) disrupt narratives; and (6) implement immediate protections. This legal and policy agenda of non-reformist reforms is undoubtedly far from a comprehensive picture in a rapidly evolving field. Nonetheless, I offer it now in broad strokes to assist activists, scholars, and policymakers in conceiving of and articulating the

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394. Matt Ford, *America’s Largest Mental Health Hospital is a Jail*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> [<https://perma.cc/7LH8-VBRP>].

395. Lewis, *supra* note 384.

396. *Id.*

basic contours of a paradigm shift that supports family policing system abolition through the lens of disability justice.

### A. Center Disabled Parents as Leaders

“People closest to the problems are closest to the solutions, but often furthest from the resources needed to implement them. We need to invest in those people.”

—Halimah Washington<sup>397</sup>

The existing family policing system was created without the perspectives of impacted families and has had devastating results. Hence, centering the insights of impacted individuals and building interdisciplinary, cross-movement approaches are both essential to addressing the roots of injustice within the family policing system.<sup>398</sup> Indeed, an essential aspect of justice-based approaches is “listening to, engaging, and developing affected communities.”<sup>399</sup> Centering parents with disabilities as leaders is also consistent with the disability community’s ethos, “nothing about us without us,” which emphasizes actively involving disabled people in legal and policy efforts that impact them.<sup>400</sup> Undeniably, when the voices of marginalized communities, including parents with disabilities, are centered, solutions that benefit all families are conceived. In other words, all families can benefit from non-punitive supports and resources that were developed by marginalized families who are acutely and intimately aware of the current system’s deficiencies.

Accordingly, the first step to achieving justice for disabled parents and their children is centering marginalized parents, including parents with disabilities, in all family policing system abolition efforts, especially reimaging supports and resources for families. The recognition that professional expertise is necessary but insufficient to end subordination is critical to both disability justice and the family policing system abolition movement’s commitment to centering impacted parents as experts and leaders.<sup>401</sup> Disability justice teaches that, “[b]y centering

397. *Columbia Journal of Race and Law’s 11<sup>th</sup> Annual Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, YOUTUBE (June 17, 2021) <https://www.youtube.com/watch?v=GD-4k8IT0iA> [<https://perma.cc/Q696-EPHG>].

398. Dorothy Roberts, *Complicating the Triangle of Race, Class and State: The Insights of Black Feminists*, 37 ETHNIC & RACIAL STUD. 1776, 1779-80 (2014).

399. Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 338 (2015) (describing the importance of actively engaging socially marginalized communities to address inequities).

400. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3-4 (1998).

401. See, e.g., *Our Vision and Values*, MOVEMENT FOR FAM. POWER, <https://www.movementforfamilypower.org/indexa> [<https://perma.cc/BTR2-PRX4>] (“We use movement lawyering principles to center directly impacted people and grassroots activism.”); *Parent Legislative Action Network (PLAN)*, JMACFORFAMILIES, <https://jmacforfamilies.org/plan> [<https://perma.cc/P8W2->

the leadership of those most impacted, we keep ourselves grounded in real-world problems and find creative strategies for resistance.”<sup>402</sup>

Specifically, activists, scholars, and policymakers should intentionally engage disabled parents, especially those with multiple marginalized identities or statuses, in leading legal and policy responses to address the oppression that they experience. This engagement will necessitate an understanding of and respect for disabled people sharing their lived experiences and include elevating disabled parents to leadership positions within the family policing system abolition movement. As the experts of their lives, centering the perspectives of parents with disabilities, especially multiply marginalized disabled parents, will lead to legal and policy responses that are anti-ableist and aligned with the principles of disability justice. Additionally, centering disabled parents as leaders must include cross-movement organizing and a broader effort to foster alliances and grow partnerships among the impacted communities. Cross-movement solidarity will produce progress towards specific policy goals and increase and enhance the dignity of people who can appreciate one another’s shared humanity. Practically, this means that family policing system abolition activists should make rigorous efforts to include disabled parents in their advocacy and elevate them within organizations and movements. It also means devoting resources to build leadership opportunities for impacted families.

In the end, reimaging a world where families, including those with disabled parents, have access to adequate supports and resources outside of a punitive system cannot happen without the intentional inclusion of those who have been subjugated for far too long. We must listen to parents and act in accordance with their recommendations.

### *B. Eradicate Poverty*

“I am now convinced that the simplest approach will prove to be the most effective—the solution to poverty is to abolish it . . . .”

— *Martin Luther King, Jr.*<sup>403</sup>

Poverty is a prominent risk factor for family policing system involvement, which means that disabled parents—who are disproportionately poor—are at heightened jeopardy because of both their disabilities and socioeconomic status.<sup>404</sup> Roberts writes, “[p]overty—not the type or severity of maltreatment—

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S9XX] (“PLAN was founded by JMAcforFamilies and is a coalition of parents directly impacted by the child welfare system, attorneys, social workers and academia that are committed to reducing and eventually ending the child welfare system harms and transforming the way society supports families.”).

402. SINS INVALID, *supra* note 376, at 23.

403. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE* 171 (1967).

404. Sarah H. Ramsey, *Children in Poverty: Reconciling Children’s Interests with Child Protective and Welfare Policies*, 61 MD. L. REV. 437, 437-38 (2002) (“The majority of families involved with [the

is the single most important predictor of placement in foster care and the amount of time spent there.”<sup>405</sup> Consequently, extant studies indicate that poverty among disabled parents is associated with higher rates of family policing system involvement, substantiation of investigations, removal of children, and termination of parental rights.<sup>406</sup>

Notably, most family policing system cases involving disabled parents are based on allegations of child neglect rather than abuse.<sup>407</sup> In fact, a recent study found that seventy-five percent of termination of parental rights cases involving disabled mothers concerned only allegations of child neglect,<sup>408</sup> conversely, in 2019, sixty-three percent of all family policing system cases involved allegations of child neglect.<sup>409</sup> Neglect, to be sure, can be serious when it involves parents intentionally withholding necessities from their children. However, as legal scholar Khiara Bridges explains in her book, *The Poverty of Privacy Rights*, neglect is “a description of what it means to be poor.”<sup>410</sup> Roberts argues that neglect is best classified as “*defined* by poverty rather than . . . *caused* by poverty.”<sup>411</sup> Hence, when parents are found to be neglectful, “it usually has to do with [them] being poor.”<sup>412</sup> The family policing system is, therefore, “designed to detect and punish neglect on the part of poor parents and to ignore most middle-class and wealthy parents’ failings.”<sup>413</sup> Accordingly, addressing families’ basic needs—such as housing, food, employment, and childcare—could prevent both child abuse and neglect.<sup>414</sup>

The relationship between disability and poverty is unmistakable. Research has consistently shown a bidirectional relationship between disability and

child welfare system] are low-income families.”); see also Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 614 n.31 (2000); ROCKING THE CRADLE, *supra* note 30, at 80 (“Poverty plays a significant role in bringing parents with disabilities into contact with service providers who end up being the source of a CPS referral, and poverty itself is the most consistent characteristic in families in which child neglect is found.”).

405. SHATTERED BONDS, *supra* note 33, at 27.

406. See, e.g., Traci LaLiberte et al., *Child Protection Services and Parents with Intellectual and Developmental Disabilities*, 30 J. APPLIED RSCH. INTELL. DISABILITIES 521, 521-22 (2017); Elspeth Slayter & Jordan Jensen, *Parents with Intellectual Disabilities in the Child Protection System*, 98 CHILD. & YOUTH SERVS. REV. 297, 297-98 (2019); Lightfoot et al., *supra* note 194; Leslie Doty Hollingsworth, *Child Custody Loss Among Women with Persistent Severe Mental Illness*, 28 SOC. WORK RSCH. 199, 204-07 (2004); Laysha Ostrow et al., *Risk Factors Associated with Child Protective Services Involvement Among Parents with a Serious Mental Illness*, 72 PSYCHIATRIC SERVS. 370, 372 (2021); Powell et al., *supra* note 44, at 1069; Rebbe et al., *supra* note 192, at 631.

407. Smith, *supra* note 233, at 389; ROCKING THE CRADLE, *supra* note 30, at 78 (“[P]arents with disabilities who are involved with the child protection system are more likely to be facing allegations of neglect than of abuse or risk of abuse.”).

408. Powell et al., *supra* note 44, at 1094.

409. AFCARS REPORT, *supra* note 22, at 2.

410. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 116 (2017).

411. SHATTERED BONDS, *supra* note 33, at 33.

412. *Id.* at 34.

413. *Id.* at 33.

414. Katharine Briar-Lawson et al., *Family-Centered Anti-Poverty Strategies to Address Child Neglect*, 98 CHILD WELFARE 145, 147 (2021).

poverty.<sup>415</sup> Disability is a cause of poverty because disability “can lead to job loss and reduced earnings, barriers to education and skills development, significant additional expenses, and many other challenges that can lead to economic hardship.”<sup>416</sup> Disability is also a consequence of poverty because “poverty can limit access to health care and preventive services, and increase the likelihood that a person lives and works in an environment that may adversely affect health.”<sup>417</sup> Data from the U.S. Census Bureau, for example, shows that people with disabilities have low rates of employment, low median annual earnings, and high rates of poverty.<sup>418</sup> According to the U.S. Department of Labor’s Bureau of Labor Statistics, in 2020, only eighteen percent of people with disabilities were employed, compared with sixty-two percent of people without disabilities.<sup>419</sup>

For disabled parents, poverty is a persistent issue that directly affects access to housing, food, and other necessities.<sup>420</sup> In addition to the everyday expenses associated with parenthood, parents with disabilities often have high disability-related expenses, such as personal assistant services and adaptive equipment.<sup>421</sup> In other words, disabled parents often earn less than nondisabled parents and have more significant costs. Notably, a 2020 report found that a household that includes a disabled adult would need twenty-eight percent more income to achieve a similar standard of living as a household without a disabled person.<sup>422</sup> Not surprisingly, then, a study of low-income mothers with disabilities found that the hardships they faced were primarily due to the poverty they experienced rather than their disabilities.<sup>423</sup> The financial status of disabled parents and their children is bleak.

Many disabled parents receive government benefits, such as Supplemental Security Income (“SSI”) or Social Security Disability Insurance (“SSDI”), which

415. Rebecca Vallas, *Disability is a Cause and Consequence of Poverty*, TALK POVERTY (Sept. 19, 2014), <https://talkpoverty.org/2014/09/19/disability-cause-consequence-poverty/> [https://perma.cc/WL6R-UR4P].

416. *Id.*

417. *Id.*

418. *Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?t=Disability&tid=ACSST1Y2019.S1811&hidePreview=true&vintage=2018> [https://perma.cc/9AY7-AD2P].

419. U.S. DEP’T. OF LAB., BUREAU OF LAB. STAT., PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS — 2021 (Feb. 24, 2021), <https://www.bls.gov/news.release/pdf/disabl.pdf> [https://perma.cc/HW7Y-XW3T].

420. ROCKING THE CRADLE, *supra* note 30, at 202 (“[T]he most significant difference between parents with disabilities and parents without disabilities is economic . . .”).

421. *Id.*

422. Nanette Goodman et al., *The Extra Costs of Living with a Disability in the U.S.—Resetting the Policy Table*, NAT’L DISABILITY INST. (2020), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf> [https://perma.cc/FC3R-RQ8A].

423. Susan L. Parish, Sandra Magaña, & Shawn A. Cassiman, *It’s Just that Much Harder: Multilayered Hardship Experiences of Low-Income Mothers with Disabilities*, 23 AFFILIA: J. WOMEN & SOC. WORK 51, 63 (2008).

provide income assistance.<sup>424</sup> Nevertheless, financial hardships for these families persist, primarily because of how the benefits programs are administered.<sup>425</sup> Benefit amounts do not increase if a person with a disability has children.<sup>426</sup> Practically, this means that a disabled parent who receives SSI is expected to support themselves and their children with \$841 per month.<sup>427</sup> A disabled parent receiving SSDI earns, on average, \$1,479 per month.<sup>428</sup> Neither benefit is nearly enough to raise families on. Further, some government benefits programs punish disabled people if they get married by decreasing monthly benefit amounts.<sup>429</sup> These draconian restrictions force some people with disabilities to choose between forming families and receiving necessary income assistance.<sup>430</sup> Further, even with benefits, financial hardships often endure for families.<sup>431</sup>

Moreover, as previously explained, many parents, especially those with disabilities, have been detrimentally harmed by PRWORA's work requirements and lifetime limits to benefits.<sup>432</sup> Passage of PRWORA led to the drastic reduction of benefits to families and a resultant rise in the number of families living in poverty.<sup>433</sup> NCD contends that PRWORA has disproportionately impacted parents with disabilities, explaining that "[w]ithout appropriate family and work supports to overcome barriers to employment, parents with disabilities, especially single mothers, may be unable to comply with the PRWORA/TANF regulations, resulting in a loss of benefits to their families."<sup>434</sup>

Therefore, the second step to achieving justice for parents with disabilities and their children is the eradication of poverty. Specifically, instead of investigating and blaming families for causing staggering rates of poverty, we must confront poverty's societal roots. Undeniably, providing adequate income supports can help address the underlying problems that drive the family policing

424. *Id.* at 52; ROCKING THE CRADLE, *supra* note 30, at 202; Sonik et al., *supra* note 277, at 1.

425. ROCKING THE CRADLE, *supra* note 30, at 203; Parish et al., *supra* note 423, at 52.

426. ROCKING THE CRADLE, *supra* note 30, at 203; Parish et al., *supra* note 423, at 52.

427. SOC. SEC. ADMIN., *SSI Federal Payment Amounts for 2022*, <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/6CLF-GQRA>].

428. SOC. SEC. ADMIN., *Selected Data from Social Security's Disability Program, Graphs of Disabled Worker Data*, <https://www.ssa.gov/oact/STATS/dibGraphs.html#3> [<https://perma.cc/J8DV-4JQR>].

429. Waterstone, *supra* note 266, at 549 n.132.

430. Although marriage is not necessary for creating families, it should be available to people with disabilities in the same way that it is for people without disabilities.

431. See Subharati Ghosh & Susan L. Parish, *Prevalence and Economic Well-Being of Families Raising Children with Disabilities*, 35 CHILD. & YOUTH SERVS. REV. 1431, 1438 (2013); Rajan Sonik et al., *Food Insecurity in U.S. Households that Include Children with Disabilities*, 83 EXCEPTIONAL CHILD. 42, 48–51 (2016).

432. Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 428 (2001).

433. Kathryn J. Edin & H. Luke Shaefer, *20 Years Since Welfare 'Reform,'* THE ATLANTIC (Aug. 22, 2016), <https://www.theatlantic.com/business/archive/2016/08/20-years-welfare-reform/496730/> [<https://perma.cc/4PQH-Y4BY>].

434. ROCKING THE CRADLE, *supra* note 30, at 202.

system. Such financial supports can also further family policing system abolition.

One such approach would be to provide a universal basic income for families. The concept of universal basic income has gained momentum over the past few years, as more people perceive it as a feasible policy response to the nation's "chronic economic insecurity."<sup>435</sup> Central to a universal basic income is the concept that every person regularly receives financial assistance "that can be used to meet their needs, with no strings attached."<sup>436</sup> Certainly, "[t]his approach represents a radically different and more controversial approach than traditional means-tested programs to promoting the welfare of citizens."<sup>437</sup> Other countries, such as Canada, Finland, and India, have experimented with universal basic income programs.<sup>438</sup> Further, emergent research suggests that universal basic income can help to prevent child maltreatment.<sup>439</sup> Experts contend that providing a universal basic income in lieu of the existing benefit programs would enable people to receive the assistance they need without having to navigate many levels of bureaucracy.<sup>440</sup> Moreover, replacing existing financial supports with universal basic income would streamline the administration of benefits and reduce government spending.<sup>441</sup> Although universal basic income has historically been viewed as impossible, the rapid disbursement of COVID-19 relief payments demonstrates the potential to implement these types of support when there is political will.<sup>442</sup>

In addition, the economic challenges that disabled parents and their children experience could be lessened through the expansion of existing government assistance programs, such as SSI. Increasing benefit amounts and repealing draconian program rules that impose stringent asset and income limitations could improve the economic wellbeing of these families and lower their risk of family policing system involvement. Although universal basic income would eliminate the need for such programs, implementing it could take time, and changes to program rules would help address these families' needs in the short term. Furthermore, policymakers must consider ways to ensure disabled parents receive livable wages, increased employment and education opportunities, accessible and affordable housing, childcare, and universal health insurance.

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435. Anupama Jacob & Reiko Boyd, *Addressing Economic Vulnerability Among Low-Income Families in America: Is the Basic Income Approach a Viable Policy Option?*, 26 J. CHILD. & POVERTY 85, 86 (2020).

436. *Id.*

437. *Id.*

438. *Id.* at 88.

439. *Id.* at 90-91.

440. *Id.*

441. *Id.* at 92.

442. See generally, Andrew F. Johnson & Katherine J. Roberto, *The COVID-19 Pandemic: Time for a Universal Basic Income?*, 40 PUB. ADMIN. & DEV. 232 (2020) (arguing that COVID-19 relief payments reinforce the importance of universal basic income).

Ultimately, strengthening household economic security can reduce child abuse and neglect by improving the opportunity for parents to meet their children's basic needs.

### C. *Invest in Families*

Current spending on the family policing system demonstrates a lack of commitment to keeping families together. The federal government spends nearly ten times more on foster care and adoption than it does on family preservation or reunification services.<sup>443</sup> In 2018, \$33 billion of local, state, and federal funds went to the family policing system.<sup>444</sup> Over half of that funding went towards foster care, adoption, and guardianships, and only fifteen percent was used to fund preventive services.<sup>445</sup> If we truly care about the wellbeing of children, we must prioritize spending on keeping families together.

Parents with disabilities and their children need support that is non-adversarial and non-punitive, an approach aligned with the Movement for Black Lives' call to "invest-divest."<sup>446</sup> Specifically, supports and resources must be available to the family unit, recognizing that "[e]vidence shows that it is in the state's best interest to view families as interconnected systems, and to protect families from harm—both the prospective harm of parental maltreatment and that of filial separation and involvement with damaging public systems."<sup>447</sup> Thus, we must divert funds from the family policing system and instead prioritize creating and sustaining community-based programs that are better equipped to meet the needs of families in their communities.<sup>448</sup>

Keeping disabled parents and their children together is not only the just thing to do, but also the most fiscally responsible approach. Research consistently shows that supporting disabled parents and their children through family

443. Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption than Reuniting Families*, TALK POVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/> [<https://perma.cc/ZSN3-KXA2>].

444. Kristina Rosinsky et al., *Child Welfare Financing SFY 2018: A Survey of Federal, State, and Local Expenditures*, CHILD TRENDS 1 (Mar. 2021), [https://www.childtrends.org/wp-content/uploads/2021/05/ChildWelfareFinancing\\_ChildTrends\\_March2021.pdf](https://www.childtrends.org/wp-content/uploads/2021/05/ChildWelfareFinancing_ChildTrends_March2021.pdf) [<https://perma.cc/23EJ-H4TL>].

445. *Id.* at 3.

446. M4BL, *Invest-Divest*, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/7TVW-8BJ2>] ("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."); see also Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/K349-ALYT>] ("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.").

447. Smith, *supra* note 233, at 402.

448. Briar-Lawson et al., *supra* note 414, at 164-165 (internal citations omitted).

preservation services rather than removing their children and placing them in foster care is cost-effective.<sup>449</sup> Nevertheless, appropriate supports and services for parents with disabilities and their children remain limited. Furthermore, when disabled parents are provided family preservation or reunification services, they are provided “one-size-fits-all” supports and services that are not individually tailored to meet their disability-specific needs.<sup>450</sup> Such an approach inevitably sets many parents with disabilities up for failure.<sup>451</sup> By not providing families with appropriate and accessible supports and services, we are harming both children and parents.

Therefore, the third step to achieving justice for disabled parents and their children requires an investment in keeping families together. Fortunately, there are programs that are operational and provide parents with disabilities and their children comprehensive supports to improve their wellbeing.<sup>452</sup> For example, the United Arc’s Positive Parenting program in Massachusetts supports parents with intellectual disabilities and their children through various services, such as transitional supported living, peer education and support groups, and parenting skills training.<sup>453</sup> These programs, however, are small, underfunded, and not widely available. Yet, “[w]ith more funding, programs like these can grow and develop nationwide to serve a currently underserved segment of the American people: parents with disabilities and their families.”<sup>454</sup>

A key focus of investing in parents with disabilities and their children should be allocating substantial funding for organizations led by and for people with disabilities, such as centers for independent living.<sup>455</sup> Centers for Independent Living “have the potential to support parents with disabilities, especially to advocate regarding transportation, housing, financial advocacy, and assistive technology issues, and to offer parent support groups.”<sup>456</sup> Funding organizations led by and for disabled people is consistent with a model of family policing system abolition that shifts funding from family policing agencies to community-

449. Julie Odegard, *The Americans with Disabilities Act: Creating “Family Values” For Physically Disabled Parents*, 11 LAW & INEQ. 533, 550 (1993) (citing a Santa Clara County, California report that every dollar spent on individualized “preventive” services to parents in crisis situations saved \$1.72 that would have been spent on foster care); ROCKING THE CRADLE, *supra* note 30, at 196.

450. Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 146 (2016).

451. *Id.*

452. ROCKING THE CRADLE, *supra* note 30, at 217-27 (describing existing supports and services available to disabled parents and their children).

453. *Positive Parenting*, THE UNITED ARC, <https://theunitedarc.org/positive-parenting/> [https://perma.cc/UF9S-JHEC].

454. ROCKING THE CRADLE, *supra* note 30, at 217.

455. “Centers for Independent Living are community-based, cross-disability, non-profit organizations that are designed and operated by people with disabilities. CILs are unique in that they operate according to a strict philosophy of consumer control, wherein people with all types of disabilities directly govern and staff the organization.” *About Independent Living*, NAT’L COUNCIL ON INDEP. LIVING, <https://ncil.org/about/aboutil/> [https://perma.cc/YT2X-NQZW]. There are over 400 CILs across the United States. *Id.*

456. ROCKING THE CRADLE, *supra* note 30, at 32.

based organizations.<sup>457</sup> More importantly, these programs are best equipped to support disabled parents and their children, which is notable because the type of services provided to disabled parents “has a profound impact on whether they are successful.”<sup>458</sup>

Other existing services must also be expanded to support disabled parents and their children. For example, personal assistance services that are government-funded and provide in-home supports for disabled people have the potential to assist parents with disabilities and their children significantly.<sup>459</sup> Nonetheless, personal assistants are not permitted to help parents with disabilities complete any parenting tasks because of government regulations.<sup>460</sup> Accordingly, federal regulations should be amended to enable parents with disabilities to utilize their personal assistants to supporting their parenting roles.

Ultimately, investing in families will shrink the family policing system by transforming its funding structure. Dismantling funding streams that do not strengthen family bonds will also improve outcomes for parents and children. In the end, this approach will ensure that social support no longer comes at the cost of punitive controls of marginalized communities, including disabled parents and their children.

#### D. End Surveillance of Families

Surveillance, primarily carried out by mandated reporters, is a prominent component of the family policing system and a source of substantial and unnecessary harm for disabled parents and their children who necessarily interact with mandatory reporters at much higher rates than nondisabled people.<sup>461</sup> As scholars Lisa Goodman and Jennifer Fauci explain, “[s]urveillance—broadly defined as oversight, monitoring, or tracking by an authoritative body—has long been a feature of health and social service systems, particularly those designed for the poor.”<sup>462</sup> The overrepresentation of marginalized families in the family policing system is primarily a result of widespread surveillance.<sup>463</sup> Surveillance also causes some parents to be afraid to seek assistance when needed because they worry that they will be reported to the family policing system by a mandated

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457. Briar-Lawson et al., *supra* note 414, at 164-65.

458. Watkins, *supra* note 220, at 1453.

459. ROCKING THE CRADLE, *supra* note 30, at 194-97.

460. *Id.*; see also Robyn Powell, *Using Medicaid to Support Parents with Disabilities*, CMTY. LIVING POL'Y CTR. (2020), <https://heller.brandeis.edu/community-living-policy/docs/powell-ltss-medicaid-parents.pdf> [<https://perma.cc/6VVJ-KAFM>].

461. ROCKING THE CRADLE, *supra* note 30, at 80-81 (explaining that parents with disabilities interact more often than nondisabled parents with social services providers, who are mandatory reporters).

462. Lisa A. Goodman & Jennifer E. Fauci, *The Long Shadow of Family Separation: A Structural and Historical Introduction to Mandated Reporting in the Domestic Violence Context*, 35 J. FAM. VIOLENCE 217, 219 (2020) (internal citations omitted).

463. Roberts, *supra* note 35, at 459-60.

reporter.<sup>464</sup> In other words, the family policing system's surveillance of families is often detrimental to families.

Family policing system surveillance, primarily carried out by mandated reporters, is rooted in decades of history. In fact, the origins of the modern child policing system can be traced to Dr. Kempe and colleagues' article about "battered child syndrome," which described child maltreatment as a widespread problem warranting immediate attention.<sup>465</sup> In response to public outcry and the call for mandatory reporting, states enacted laws that created systems to collect and track child abuse and neglect.<sup>466</sup> By 1967, all 50 states and the District of Columbia had adopted child abuse and neglect reporting laws.<sup>467</sup> While the statutes were initially narrow, over the past five decades, most states have substantially expanded their mandatory reporting statutes regarding both what is reportable and who is mandated to report child maltreatment.<sup>468</sup> As of 2019, 18 states now have "universal mandatory reporting" laws, which means everyone is obligated to report suspicions of child maltreatment.<sup>469</sup> Strikingly, family policing system experts have long regarded mandatory reporting as "a policy without a reason."<sup>470</sup> As child welfare system scholar Gary Melton explains, "[t]he assumptions on which the system was built are now known to be plainly erroneous."<sup>471</sup> Rather than protect children, which the laws ostensibly were intended to do, Melton contends that mandatory reporting laws have had paradoxical effects, including adversely affecting children's wellbeing.<sup>472</sup> Nevertheless, mandatory reporting laws have burgeoned over the past five decades.

Indeed, extant studies have consistently found that mandatory reporting does not prevent child abuse and neglect and often causes more harm than good. Recently, researchers compared rates of total and confirmed reports of physical abuse by states or territories with and without universal mandatory reporting laws and found that false reports increased in states with universal mandatory

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464. *Id.*

465. Kempe et al., *supra* note 67, at 17.

466. Douglas. J. Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 689 (1978).

467. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN 4 (2014), [https://www.acf.hhs.gov/sites/default/files/documents/cb/capta\\_40yrs.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/capta_40yrs.pdf) [https://perma.cc/G3X4-KYUF].

468. Goodman & Fauci, *supra* note 462, at 218.

469. MANDATORY REPORTERS, *supra* note 74, at 2 (states with universal mandatory reporting laws include Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming).

470. Gary B. Melton, *Mandatory Reporting: A Policy Without a Reason*, 9 CHILD ABUSE & NEGLECT 9 (2005).

471. *Id.* at 15.

472. *Id.*

reporting laws.<sup>473</sup> Based on these findings, the researchers conclude that mandatory reporting “does not appear to be achieving its intended goal of improving identification of children victimized by physical abuse . . . [and may] potentially lead to poorer outcomes.”<sup>474</sup> Justifying their conclusion, the researchers explained that unsubstantiated reports of child maltreatment “can divert valuable but limited resources from endangered children who are actually in need of protection.”<sup>475</sup> Similarly, another study found that mandatory reporting laws drove many survivors of intimate partner violence away from seeking assistance out of fear that the family policing system would remove their children.<sup>476</sup> These findings are particularly notable because research shows that people with disabilities are at greater risk of intimate partner violence than nondisabled people.<sup>477</sup>

Moreover, disabled parents and their children are often subjected to heightened surveillance because they regularly interact with mandated reporters, such as disability services providers.<sup>478</sup> For example, many disabled parents receive in-home supports to help them with activities of daily living. However, having people constantly in their homes comes along with increased scrutiny. As sociology scholar Claudia Malacrida explains,

The insertion of public institutions into women’s private lives through the avenue of home care services permits professionals to observe, judge and act upon individuals who are deemed to be ‘lacking’ or ‘problematic.’ For mothers with disabilities, these public–private intersections are both frequent and ambivalent. Mothers with disabilities depend on the services and programmes that professionals provide, but they are also likely to be prone to negative judgements by service providers because they fall short of ideal mothering standards.<sup>479</sup>

Thus, Professor Malacrida contends that paid caregivers of disabled parents “can and do operate as agents of discipline and surveillance . . . .”<sup>480</sup> Recent

473. Grace W. K. Ho et al., *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 AM. J. PUB. HEALTH 709, 709 (2017).

474. *Id.* at 713.

475. *Id.*

476. Carrie Lippy et al., *The Impact of Mandatory Reporting Laws on Survivors of Intimate Partner Violence: Intersectionality, Help-Seeking and the Need for Change*, 35 J. FAM. VIOLENCE 255, 260-64 (2019). Notably, these fears were heightened for people of color and transgender people, which is likely to the ongoing oppression experienced by these communities. *Id.* at 265.

477. Matthew J. Breiding & Brian S. Armour, *The Association Between Disability and Intimate Partner Violence in the United States*, 25 ANN. EPIDEMIOL. 455, 457 (2015).

478. ROCKING THE CRADLE, *supra* note 30, at 80-81 (explaining that parents with disabilities interact more often than nondisabled parents with social services providers, who are mandatory reporters).

479. Claudia Malacrida, *Gendered Ironies in Home Care: Surveillance, Gender Struggles and Infantilisation*, 13 INT’L J. INCLUSIVE EDUC. 741, 747 (2009).

480. *Id.*

analysis of national data further demonstrates the extent to which disabled parents' regular interactions with mandated reporters increases the likelihood of family policing system involvement. Specifically, researchers found that parents with disabilities, especially parents with intellectual disabilities, had higher odds of referral by social worker than nondisabled parents.<sup>481</sup> In addition, this study found that cases involving parents with intellectual disabilities were more likely to be substantiated if they were based on a referral from a social service worker rather than from any other type of mandated reporter.<sup>482</sup> Situating their recent findings within the extensive research on parents with disabilities impacted by the family policing system, Sharyn DeZelar and Elizabeth Lightfoot posit that "the higher reporting rates from social service personnel, combined with higher substantiation rates among cases referred by social service personnel, could contribute together to some of the disparate outcomes of children of caregivers with disabilities found in earlier studies."<sup>483</sup> Thus, disabled parents and their children are at substantial risk of being subjected to the family policing system simply because they receive supports and services for their disabilities.

Importantly, decreasing surveillance of families does not increase child abuse or neglect. For example, despite predictions that the COVID-19 pandemic would lead to high rates of child maltreatment because children were out of school and, therefore, not regularly exposed to mandated reporters, early research shows that child abuse and neglect did not increase.<sup>484</sup> Children were not harmed because they had less contact with mandated reporters, illustrating that surveillance by mandated reporters is not necessary to protect children.

Accordingly, the fourth step to achieving justice for disabled parents and their children is to end the surveillance of families by abolishing mandatory reporting laws. Ending the surveillance of families will help to ensure that disabled parents and their children can access necessary supports and resources without fearing that they will be reported to the family policing system. Repealing mandatory reporting laws will also reduce the number of people involved with the family policing system significantly. In fact, over eighty percent of reports to the family policing system are deemed unsubstantiated after investigation, meaning that there was no evidence to support the allegation of abuse or neglect.<sup>485</sup> In the end, a world without surveillance means a world where

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481. 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. 5 (2020).

482. *Id.*

483. *Id.*

484. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 11 COLUM. J. RACE & L. (forthcoming 2021); see generally Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 FORDHAM URB. L.J. 95 (2021) (examining the ways in which COVID-19 impacted Florida's child welfare system and finding that children did not experience increased maltreatment).

485. CHILD MALTREATMENT 2019, *supra* note 21, at 18.

there will be more significant support for families and less undue trauma to children and their parents.

### E. Disrupt Narratives

Disabled parents involved with the family policing system contend with dueling false narratives. First, they face the narrative that the family policing system saves children from their abusive and neglectful parents, including disabled parents. Second, they endure beliefs that they are inherently incompetent, dangerous, and unfit because of their disabilities. These narratives are incredibly damaging and result in substantial injustice.

The media has played a considerable role in legitimizing false narratives about families impacted by the family policing system. One study, for example, found that over ninety percent of news stories about children concerned violence by and against children,<sup>486</sup> and most of these stories focused on discrete incidents, disregarding larger public policy questions.<sup>487</sup> Another study revealed that seventy to ninety-five percent of news stories about the family policing system involved “horror stories.”<sup>488</sup> In both studies, researchers described stories about ghastly, vicious injuries perpetrated on children by vile parents. Ultimately, stories “construct social reality,”<sup>489</sup> and dangerous narratives about the family policing system can create substantial harm to the families who are subjected to it. In particular, these stories perpetuate the idea that the family policing system is saving children from their terrible parents. They also advance the notion that parents impacted by the family policing system have committed egregious acts or are otherwise inferior. Of course, as demonstrated throughout this Article, neither scenario is usually true.

Disabled parents also face the false narrative that they are inherently unfit to raise children, a narrative that guided the eugenics era and endures today. Although disabled parents have greater involvement with the family policing system, this involvement does not mean that they are more likely to maltreat their children or that their children have worse outcomes than other children.<sup>490</sup> In

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486. DALE KUNKEL, ET AL., COVERAGE IN CONTEXT. HOW THOROUGHLY THE NEWS MEDIA REPORT FIVE KEY CHILDREN’S ISSUES, CASEY JOURNALISM CTR. ON CHILD. & FAMS. 7 (2002), <https://files.eric.ed.gov/fulltext/ED468276.pdf> [<https://perma.cc/TJ6H-5FFR>].

487. *Id.* at 9.

488. See John M. Johnson, *Horror Stories and the Construction of Child Abuse*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 5 (Joel Best ed., 1989).

489. Richard Delgado, *Storytelling for Oppositionalists*, 87 MICH. L. REV. 2411, 2415 (1989).

490. Powell & Nicholson, *supra* note 196, at 209 (“CPS involvement is not necessarily a proxy for child maltreatment. In other words, it is not clear that the disproportionately high rate of CPS involvement necessarily reflects a more significant risk of child maltreatment among parents with serious mental illness.”); Elizabeth Lightfoot & Elspeth Slayter, *Disentangling the Over-Representation of Parents with Disabilities in the Child Welfare System: Exploring Child Maltreatment Risk Factors of Parents with Disabilities*, 47 CHILD. & YOUTH SERVS. REV. 283, 284 (2014) (“Although parents with disabilities may have a higher level of child welfare involvement, it does not necessarily follow that parents with

fact, “high-quality studies indicate that [parental] disability alone is not a predictor of problems or difficulties in children and that predictors of problem parenting are often found to be the same for disabled and nondisabled parents.”<sup>491</sup> For example, decades of research show no relationship between parenting capabilities and intelligence, disputing presumptions that parents with intellectual disabilities are intrinsically unfit.<sup>492</sup> Similarly, studies have found that parents with psychiatric disabilities are not inherently more likely to abuse or neglect their children than other parents.<sup>493</sup> Ultimately, false narratives about parents with disabilities have endured for centuries, propagating the dangerous belief that they are incapable of raising children simply because they are disabled.

Therefore, the fifth step to achieving justice for disabled parents and their children is to disrupt false narratives about parents with disabilities that depict them in unfavorable ways. Importantly, challenging harmful narratives through “educating, sharing, [and] communicating” is a fundamental aspect of abolitionism.<sup>494</sup> Through abolition efforts, we can contest stigma and negative public perceptions about impacted people that result from stereotypes, media portrayals, and misinformation.<sup>495</sup> Indeed, “[m]ovements often start with disrupting ideas and telling new stories about what is possible.”<sup>496</sup> For example, Initiate Justice, an abolitionist organization, is led by people affected by incarceration and aims to achieve its goals by prioritizing the leadership and voices of those most directly impacted.<sup>497</sup> The organization provides resources for political education for incarcerated people; trains members inside and outside of prison about policy and legislative change processes; works in the community and behind bars to develop concrete legal change; and publishes reports, surveys, and media that seeks to change the narrative about people impacted by

disabilities are more likely to maltreat their children or that children of parents with disabilities have worse outcomes than children of parents without disabilities.”)

491. ROCKING THE CRADLE, *supra* note 30, at 186; *see also* Powell, *supra* note 450, at 148 (“[W]e must urgently move beyond deciding the fate of families vis-a-vis broad-based presumptions about categories of families and instead act to ensure that decisions are based on sound evidence.”).

492. *See, e.g.*, Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRITISH J. SOC. WORK 459, 463 (1993) (“There is no clear relationship between parental competency and intelligence . . . A fixed level of intellectual functioning is neither necessary nor sufficient for adequate parenting[.] . . . and the ability of a parent to provide good-enough child care is not predictable on the basis of intelligence alone. . . .” (citations omitted)).

493. ROCKING THE CRADLE, *supra* note 30, at 186-87; *see also* Krista A. Gallagher, *Parents in Distress: A State’s Duty to Provide Reunification Services to Mentally Ill Parents*, 38 FAM. & CONCILIATION CTS. REV. 234, 239-44 (2000) (reviewing past studies).

494. John Washington, *What is Prison Abolition?*, THE NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [<https://perma.cc/2SLS-S3Q7>].

495. *See* Marina Ball, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 35 (2021).

496. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 829 (2021).

497. *Story and Strategy*, INITIATE JUST., <https://www.initiatejustice.org/story-and-strategy/> [<https://perma.cc/99MQ-EXJ2>].

incarceration and positions impacted people as leaders in the criminal justice reform movements.<sup>498</sup> Similar efforts should be employed to counter the narratives concerning families impacted by the family policing system.

False narratives affect impacted people's ability to engage in their communities as well as influence policymaking. In fact, most socio-legal scholars submit that "law is a product of social interaction."<sup>499</sup> History shows us that change at the governmental level—through legislation and policy—often follows changes in public attitudes at the personal and organizational levels. For example, laws permitting same-sex marriage in the United States followed growing public approval of homosexuality between 1988 and 2010, reflecting a "cultural shift."<sup>500</sup> A recently administered online public opinion poll revealed that while most participants were "very supportive" of the rights of people with intellectual disabilities, fewer were supportive of people with intellectual disabilities raising children.<sup>501</sup> This study underscores the urgent need to change public opinion concerning disabled parents. Thus, disrupting the prevailing narrative is essential to effectuating change, including family policing system abolition.

Attorneys must also play a role in disrupting narratives through their representation of disabled parents and their children. Legal scholar Matthew Fraidin contends that "[t]o challenge the narrative of child welfare, we will have to start by challenging our approach to legal services."<sup>502</sup> That is, attorneys must take a strengths-based approach when representing parents, focusing on parents' "abilities . . . strengths . . . [and] assets . . ."<sup>503</sup> When interacting with the family policing system and courts, attorneys must "tell stories of competence."<sup>504</sup> Legal scholar Lindsey Webb has made similar arguments in the context of the criminal legal system and abolition, suggesting that during sentencing hearings, criminal defense attorneys should draw from narratives by enslaved people and "consider the persuasive power of juxtaposing the humanity of their clients with the poor or even dire conditions of confinement in our jails and prisons—not only to influence the court's decision about the client's sentence, but to impact

498. *Id.*

499. Marina Kurkchyan, *Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness*, 29 WIS. INT'L L.J. 366, 366-67 (2011-2012).

500. See also Jonathan E. Cook et al., *Intervening Within and Across Levels: A Multilevel Approach to Stigma and Public Health*, 103 SOC. SCI. MED. 101, 106 (2014) ("[R]esearch on same-sex marriage in the United States suggests public opinion affects legislation more than the reverse . . . As American society has adopted more positive attitudes toward homosexuality, . . . laws allowing same-sex marriage have followed."). See generally Dawn Michelle Baunach, *Changing Same-Sex Marriage Attitudes in America from 1988 Through 2010*, 76 PUB. OP. Q. 364 (2012) (tracing the evolution of public opinion same-sex marriage).

501. Roy McConkey et al., *Perceptions of the Rights and Capabilities of People with Intellectual Disability in the United States*, 34 J. APPLIED RSCH. INTELLECTUAL DISABILITIES 537, 543 (2021).

502. Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL'Y 97, 104 (2012).

503. *Id.*

504. *Id.* at 105.

the court's view of our systems of incarceration."<sup>505</sup> Webb says, "[l]ike the descriptions of enslavement in slave narratives, discussions of conditions and confinement can serve to shock and inform participants in the justice system who have failed to formally consider prison conditions even as they participated in the growth of mass incarceration."<sup>506</sup> Hence, attorneys representing parents should take opportunities to demonstrate to courts the carceral role of the family policing system and the detrimental effects it has had on marginalized communities, including disabled parents and their children.

#### *F. Implement Immediate Protections*

As we move towards the complete abolition of the family policing system, legal protections must be immediately implemented to safeguard families already entangled in the system.<sup>507</sup> Such an approach is consistent with the abolitionist movement's non-reformist reforms. To that end, the sixth step to achieving justice for disabled parents and their children involves implementing immediate protections. In particular, the elimination of disability from termination of parental rights laws, the provision of high-quality legal representation, and increased enforcement of federal protections for disabled parents will reduce the number of families subjected to the family policing system, an important step in achieving family policing system abolition.

First, states must immediately amend their family policing statutes to eliminate disability as grounds for termination of parental rights, consistent with a growing trend across the country.<sup>508</sup> According to the National Research Center for Parents with Disabilities, nearly 30 states have introduced or passed legislation aimed at safeguarding the rights of these families.<sup>509</sup> For example, in 2018, Colorado passed the Family Preservation for Parents with Disability Act.<sup>510</sup> This law barred a parent's disability from serving as the basis for denying or restricting custody, visitation, adoption, foster care, or guardianship; required courts to consider the benefits of providing supports and services when determining custody, visitation, adoption, foster care, and guardianship; and mandated the state's family policing agency to provide reasonable modifications

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505. Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 168 (2018).

506. *Id.*

507. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 101 (2020) ("[A]bolitionist campaigns have produced rubrics demarcating an approach to reform focused on reducing the scale, power, tools, and legitimacy of the carceral state.").

508. Kay, *supra* note 335, at 812.

509. National Research Center for Parents with Disabilities, *Map of Current State Legislation Supporting Parents with Disabilities*, BRANDEIS UNIV. (last updated Oct. 9, 2020), <https://heller.brandeis.edu/parents-with-disabilities/map/index.html> [<https://perma.cc/7JAF-ZP5P>].

510. Family Preservation for Parents with Disability Act, COLO. REV. STAT. § 24-34-805 (2018).

for parents with disabilities.<sup>511</sup> Accordingly, other states should pass similar laws to safeguard the rights of disabled parents and their children.

Second, parents with disabilities must receive high-quality legal representation beginning at the outset of a family's involvement with the family policing system. In *Lassiter v. Department of Social Services*,<sup>512</sup> the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not automatically confer the right to counsel for parents with low incomes in termination of parental rights proceedings. However, in 45 states and Washington, D.C., parents have an absolute statutory right to counsel in state-initiated termination of parental rights hearings, while in the remaining five states, it is left to the judge's discretion, or there is only a right in certain circumstances.<sup>513</sup> Nonetheless, even with this right, parents are generally not appointed legal representation until after their first hearing.

Fortunately, there are indications that states may begin to provide pre-trial legal representation. Specifically, a 2020 Executive Order requires the issuance of federal guidance to states "regarding flexibility in the use of Federal funds to support and encourage high-quality legal representation for parents and children, including pre-petition representation . . . ."<sup>514</sup> This Executive Order emphasizes that such measures would prevent unnecessary removals of children from their families, enable reunification of children separated from their families, and "ensure that [parents' and children's] voices are heard and their rights are protected."<sup>515</sup>

High-quality legal representation is especially crucial for disabled parents who are usually appointed attorneys with limited knowledge about how the ADA applies to family policing system cases or best practices for representing these families.<sup>516</sup> Although courts have generally resisted finding the ADA a defense to termination of parental rights, the law remains an important tool for disabled parents involved with the family policing system. Specifically, there is

511. *Id.*

512. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981).

513. Vivek Sankaran & John Pollock, *A National Survey on a Parent's Right to Counsel in State-Initiated Dependency and Termination of Parental Rights Cases* 1 (2016), [http://civilrighttocounsel.org/uploaded\\_files/219/Table\\_of\\_parents\\_RTC\\_in\\_dependency\\_and\\_TPR\\_cases\\_FINAL.pdf](http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents_RTC_in_dependency_and_TPR_cases_FINAL.pdf) [<https://perma.cc/JJF4-MSJC>].

514. Exec. Order No. 13930, 85 Fed. Reg. 38,741 (June 24, 2020); *see also* CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., LOG NO: ACYF-CB-IM-21-06, UTILIZING TITLE IV-E FUNDING TO SUPPORT HIGH QUALITY LEGAL REPRESENTATION FOR CHILDREN AND YOUTH WHO ARE IN FOSTER CARE, CANDIDATES FOR FOSTER CARE AND THEIR PARENTS AND TO PROMOTE CHILD AND FAMILY WELL-BEING 7, 10-11 (Jan. 14, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf> [<https://perma.cc/9C6M-D545>].

515. Exec. Order No. 13930, 85 Fed. Reg. 38,741 (June 24, 2020).

516. Powell & Albert, *supra* note 89, at 152 ("Some parents' attorneys described having no knowledge about the ADA's application to the child welfare system or strategies for working with parents with disabilities."); *see also* ROCKING THE CRADLE, *supra* note 30, at 98 ("Once involved with child welfare services and facing termination of parental rights, parents with disabilities face numerous and significant obstacles to meaningful participation and representation.").

agreement that the ADA requires family policing agencies to reasonably accommodate disabled parents in providing family preservation and reunification services.<sup>517</sup> However, it is critical for attorneys to be “comfortable with discussing disability with their clients and others involved in the case, and advocate early and often for reasonable accommodations,” Joshua Kay explains.<sup>518</sup> “The protections of the ADA are most potent not as a last-ditch defense but as an affirmative, ongoing requirement that the agency not engage in disability discrimination.”<sup>519</sup> Hence, high-quality pre-trial legal representation from attorneys skilled in representing disabled parents can ensure that disabled parents and their children are fully afforded their rights. In addition to receiving training on disability law, attorneys representing these families should develop partnerships with disability rights attorneys who can advise them on strategies for effectively using the ADA in these cases.<sup>520</sup>

Third, the federal government must increase its oversight and enforcement efforts. In 2012, NCD recommended that DOJ and HHS vigorously investigate and enforce ADA violations by the family policing system: “The full promise of the ADA will not be achieved until DOJ, in collaboration with HHS as appropriate, actively enforces the ADA in child welfare matters and states stop denying parents with disabilities their fundamental right to create and maintain families.”<sup>521</sup> Since then, DOJ and HHS has directed unprecedented attention to safeguarding the rights of disabled parents and their children through conducting investigations, issuing technical assistance and letters of finding, and reaching voluntary resolution agreements and settlements with state family policing

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517. See, e.g., *In re Hicks/Brown*, 893 N.W.2d 637, 642 (Mich. 2017) (requiring the child protection agency to modify its services to accommodate a parent’s disability for reunification efforts to be found reasonable); *People ex rel. S.K.*, 440 P.3d 1240, 1249 (Colo. 2019) (holding that a child welfare agency fails to comply with its duties under the ADA, as well as its reasonable efforts mandates, if it does not make reasonable modifications to case plans and services provided to parents with disabilities); *J.H. v. State Dep’t of Health & Soc. Servs.*, 30 P.3d 79, 86 n.11 (Alaska 2001) (noting that the “reasonable efforts” requirement in state law is identical to the ADA reasonable accommodation requirement).

518. Kay, *supra* note 335, at 818.

519. *Id.*

520. One such opportunity for attorneys to partner with disability rights organizations is through the Protection and Advocacy (P&A) system. P&As are federally mandated agencies that provide legal representation and advocacy on behalf of people with disabilities. Gary P. Gross, *Protection and Advocacy System Standing—To Vindicate the Rights of Persons with Disabilities*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 674, 674–76 (1998). P&As are located in every state and have a broad mandate to advance the rights of people with disabilities in all areas of life. *Id.* Historically, P&As have not played a substantial role in advocating on behalf of parents with disabilities. ROCKING THE CRADLE, *supra* note 30, at 215. Nonetheless, considering P&As’ strong knowledge about the ADA and other disability rights laws, it would be beneficial for parents’ attorneys to partner with these agencies in some capacity, such as co-counsel or providing technical assistance. *Id.* As the NCD notes, “Given the P&As’ extensive experience representing people with disabilities, a stronger collaboration between P&As and the attorneys who represent parents in termination and custody proceedings would undoubtedly generate more positive results for these parents.” *Id.*

521. ROCKING THE CRADLE, *supra* note 30, at 85-86.

agencies concerning ADA violations.<sup>522</sup> Nonetheless, given the family policing system's ongoing noncompliance with federal disability rights laws,<sup>523</sup> DOJ and HHS should forcefully and swiftly investigate all allegations of noncompliance and enforce these cases as appropriate. Increased oversight and enforcement by DOJ and HHS will hopefully put the family policing system on notice of their legal obligations and ultimately decrease their mistreatment of parents with disabilities, including unnecessary involvement.

## CONCLUSION

Each year, the family policing system wreaks havoc on millions of marginalized families, including those with disabled parents. Unquestionably, the laws and policies that govern the family policing system must be radically transformed from the roots on upward. Simply reforming the system is not enough. In response, this Article proposes an anti-ableist legal and policy agenda for achieving justice for parents with disabilities and their children that is based on the tenets of abolition and disability justice. It is comprehensive and will ensure that we create ways to support families that are responsive and accountable to those who have been harmed the most by the system as it is and who have the most to lose from any changes to come. Achieving justice for parents with disabilities and their children demands nothing less.

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522. LETTER OF FINDINGS, *supra* note 170 (finding joint letters that hold that the Massachusetts Department of Children and Families violated the ADA and Section 504 in case involving mother with an intellectual disability); TECHNICAL ASSISTANCE, *supra* note 31 (explaining the child welfare system's legal mandates vis-à-vis the ADA and Rehabilitation Act in a technical guidance); VOLUNTARY RESOLUTION AGREEMENT, *supra* note 11 (showing a voluntary resolution agreement with the Oregon Department of Human Services relating to the rights of parents with disabilities after the state's child welfare agency removed two infant children from a mother and father with disabilities and denied the parents effective and meaningful opportunities to reunite with their children because of their disabilities); U.S. DEP'T. OF JUST., CIV. RTS. DIV. & U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. FOR CIV. RTS. AGREEMENT BETWEEN UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES (2020), [https://www.ada.gov/mass\\_def\\_sa.pdf](https://www.ada.gov/mass_def_sa.pdf) [<https://perma.cc/ASP3-ZZ24>] (stipulating the terms of a settlement agreement with Massachusetts Department of Children and Families because of the agency's continued noncompliance with the ADA and Section 504, notwithstanding the 2015 letter of findings); U.S. DEP'T OF JUST., USAO #2018V00540, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, CHILD WELFARE PROGRAM (2021), [https://www.ada.gov/dcyf\\_cwp\\_sa.html](https://www.ada.gov/dcyf_cwp_sa.html) [<https://perma.cc/C6MC-R4VV>] (showing the terms of a settlement with Washington State Department of Children, Youth, and Families concerning failure to provide sign language interpreters to Deaf parents involved with the child welfare system as required by the ADA).

523. *See supra*, Section I.C.