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The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers

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The right to parent has long been regarded as one of our most treasured fundamental rights. Despite the disability rights movement's many achievements, especially the passage of the Americans with Disabilities Act ("ADA") in 1990, the right to parenthood remains inaccessible to many people with disabilities. Scholars and advocates have posited that the ADA has not adequately protected the rights of parents with disabilities involved with the child welfare system, particularly at the termination of parental rights phase. This Article develops this critique as applied to an original

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empirical study of 2,064 appellate termination of parental rights decisions adjudicated between 2006 and 2016 that involved mothers with disabilities. This is the first study to conduct quantitative analyses to identify factors that predict whether the ADA is raised or applied in these cases. In particular, we aimed to understand if a mother's disability type predicts whether courts raise or apply the ADA.

This study found that the ADA was only raised in six percent of the decisions and only applied in two percent of the opinions. After controlling for parent, family, court, case, and policy characteristics, courts had a decreased likelihood of raising the ADA in cases involving mothers with psychiatric disabilities. Likewise, after controlling for parent, family, court, case, and policy characteristics, courts had lower odds of applying the ADA in cases involving mothers with multiple disabilities. Other factors were also associated with courts raising or applying the ADA, including criminal history, substance use history, prior child welfare system involvement, the presence of a disabled child, when the case was decided, geographical location, negative expert testimony, provision of family preservation or reunification services, and state dependency statutes that included parental disability as grounds for termination of parental rights. The Article concludes by discussing the policy and practice implications of the study's findings and identifying directions for future research.

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INTRODUCTION

In a 2017 groundbreaking opinion, the Michigan Supreme Court reversed a termination of parental rights decision, finding that the state’s child welfare agency violated the Americans with Disabilities Act (ADA) in a case involving a mother with an intellectual disability.¹ The mother’s fight to regain custody of her children began nearly five years earlier, in April 2012, when the mother brought her daughter to the state’s child welfare agency because the family was homeless and urgently in need of assistance.² The state child welfare agency took custody of the infant and placed her in foster care.³ In January 2013, the state child welfare agency developed a treatment plan for the mother, which required her to attend parenting classes, participate in counseling, visit her daughter in a supervised setting, complete high school or obtain a GED, secure housing and income, and undergo a parenting evaluation.⁴ The treatment plan also stated that the mother must “obtain the intellectual capacity to fully be

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

2. *Id.*

3. *Id.*

4. *Id.* at 638 n.1.

able to care for herself and her daughter.”⁵ A month later, in February 2013, the mother gave birth to her son, who was immediately removed from the mother and placed in foster care.⁶

The battle to be reunited with her children endured. Despite difficulties, the mother participated in services required by the treatment plan for most of 2013.⁷ At a January 2014 hearing, the mother’s attorney requested individualized services tailored to meet the mother’s disability-related needs.⁸ Over the next year and a half, the mother’s attorney inquired at least five times about the state child welfare agency’s efforts to provide the mother services through a local organization that supports disabled parents.⁹ However, the mother never received these services, and in January 2015, the state child welfare agency filed a petition to terminate the mother’s parental rights to both children.¹⁰ Seven months later, in July 2015, the court terminated the mother’s parental rights.¹¹

On appeal, the mother argued that the state child welfare agency failed to provide her reasonable efforts because it did not accommodate her disability as required by the ADA.¹² She contended that if she had received reasonable modifications, then the termination of her parental rights could have been avoided.¹³ In turn, the state child welfare agency asserted that the mother had waived an ADA claim because she had not raised the issue previously.¹⁴ The Court of Appeals disagreed and held that the mother had adequately preserved her claim, pointing to her attorney’s many objections prior to the termination proceedings concerning the inadequate services she was being provided.¹⁵ Specifically, the Court opined that because the mother’s treatment plan did not include reasonable modifications, as required by the ADA, she was not provided an

5. *Id.*

6. *Id.* at 638.

7. *Id.*

8. *Id.* at 639.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

opportunity to benefit from the treatment plan.¹⁶ As such, the Court found that the termination was premature.¹⁷ The Michigan Supreme Court affirmed the Court of Appeals decision, finding that the state child welfare agency must make reasonable efforts in most child welfare system cases, and its duties under Title II of the ADA “dovetail.”¹⁸ In other words, “efforts at reunification cannot be reasonable . . . unless the [state child welfare agency] modifies its services as reasonably necessary to accommodate a parent’s disability. And termination is improper without a finding of reasonable efforts.”¹⁹

Unfortunately, this mother’s battle is neither unique nor uncommon. The right to parent has long been regarded as one of our most treasured rights.²⁰ Indeed, the United States Supreme Court has repeatedly affirmed that the right to raise a family is protected by the Fourteenth Amendment of the Constitution, balanced against the judicially recognized power of the state to interfere to safeguard the wellbeing of its children.²¹ Nonetheless, discrimination against parents with disabilities—including physical, intellectual, psychiatric, and sensory disabilities—is deeply rooted in the history of the United States and remains a substantial obstacle to achieving full equality for people with disabilities in the present. Until the fundamental right to parent is fully realized for people with disabilities, freedom cannot be entirely achieved.

16. *Id.*

17. *Id.*

18. *Id.* at 639–40.

19. *Id.* at 642.

20. Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 *LAW & INEQ.* 153, 153 (1998) (“The right to establish a home and raise children is among the most basic of civil rights, long recognized as essential to the orderly pursuit of happiness.”) (footnote omitted).

21. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Org. of Foster Families for Equal. & Reform*, 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).

The United States has a history of restricting people with disabilities from creating and maintaining families.²² As esteem for eugenics grew through the first half of the twentieth century, negative eugenics were used as a way to control procreation by people with disabilities and others deemed “socially inadequate.”²³ Based on the belief that people considered inferior would produce offspring who would be disastrous to society, more than thirty states legalized compulsory sterilization.²⁴ In 1927, involuntary sterilization, a popular aspect of negative eugenics, gained the approval of the United States Supreme Court in the infamous *Buck v. Bell* decision.²⁵ Upholding Virginia’s sterilization law on the supposition that it advanced “the best interests of the patient[] and of society,”²⁶ Justice Oliver Wendell Holmes, Jr., declared, “Three generations of imbeciles are enough.”²⁷ Because of these state statutes, more than 65,000 Americans, many of whom had disabilities, were forcibly sterilized by 1970.²⁸

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22. See generally Robyn M. Powell & Michael A. Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 FRONTIERS L. CHINA 53 (2016) (analyzing the evolution of restrictions on sexual, reproductive, and parenting rights for people with disabilities over time and across jurisdictions).
 23. J.H. Landman, *The Human Sterilization Movement*, 24 AM. INST. CRIM. L. & CRIMINOLOGY 400, 400 (1934). “Negative eugenics” focused on preventing those considered socially inferior from reproducing, including through restrictive marriage laws, institutionalization and sexual segregation, and involuntary sterilization. EDWARD J. LARSON, *SEX, RACE, AND SCIENCE* 22 (1995). Conversely, “positive eugenics” involved policies and programs that incentivized the procreation of those considered superior (e.g., those of the upper-class or those having high intelligence), such as through tax rebates and contests. DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 91 (1995).
 24. 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); 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).
 25. 274 U.S. 200 (1927).
 26. *Id.* at 206.
 27. *Id.* at 207.
 28. PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 294 (2008).

Laws restricting marriage for people with disabilities, another form of negative eugenics, were also enacted as a way to limit disabled people from creating and maintaining families.²⁹ Undeniably, “[m]arriage prohibitions were a major advance for the eugenics movement: they were the first laws to endorse the goal of reducing reproduction by the ‘unfit.’”³⁰ By the mid-1930s, forty-one states had eugenic marriage laws.³¹ In 1974, a study revealed that nearly forty states still had statutes preventing people with intellectual or psychiatric disabilities from marrying.³² More recently, a 1997 study found that thirty-three states still had laws restricting people with intellectual or psychiatric disabilities from marrying.³³ Even today, laws preventing people with certain disabilities from marrying still exist in some states.³⁴

Despite this history, “[m]ore families are headed by a parent with a disability than ever before.”³⁵ The estimated prevalence of parents with disabilities differs by the data source. Current estimates of parents in the United States with a disability range from approximately five to ten percent.³⁶ Although the estimates vary, the number of parents with

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29. Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 DEV. MENTAL HEALTH L. 1, 35 (1997).
 30. ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 63 (2016).
 31. *Id.*
 32. PRESIDENT’S COMM. ON MENTAL RETARDATION, OHD-74-21002, SILENT MINORITY 33 (1974).
 33. Pietrzak, *supra* note 29, at 1–2.
 34. Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 548–49 (2014) (discussing state laws that restrict people with disabilities from marrying). Furthermore, government policies that reduce or terminate disability benefits if people with disabilities get married result in continuing marriage restrictions for many. *Id.* at 549 n.132.
 35. 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 REHABILITATION J. 142, 142 (2009) (footnote omitted).
 36. Henan Li et al., *Health of US Parents with and Without Disabilities*, 10 DISABILITY & HEALTH J. 303, 305 (2017) (estimating that nearly five percent of parents have a disability); Rajan Sonik et al., *Parents with and Without Disabilities: Demographics, Material Hardship, and Program Participation*, 14

disabilities in the United States is undoubtedly substantial and is expected to increase as more and more disabled people enjoy opportunities to be integrated into their communities.³⁷

Although parents with disabilities exist in large numbers, longstanding research indicates disabled parents and their families experience heightened levels of child welfare system involvement and termination of parental rights.³⁸ Studies have found that parents with intellectual disabilities have increased child welfare system involvement and have their children permanently removed at rates ranging from 30% to 50%.³⁹

REV. DISABILITY STUD.: INT'L J. 1 (2018) (estimating that approximately ten percent 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/J9LX-KL2Y>] (estimating that roughly six percent of parents have a disability).

37. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 45 (2012) [hereinafter ROCKING THE CRADLE], https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [<https://perma.cc/TE4G-6NBA>] ("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) (asserting that the number of parents with intellectual disabilities continues to grow partly due to deinstitutionalization).
38. ROCKING THE CRADLE, *supra* note 37, 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.").
39. See 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, Wendy Booth & David McConnell, *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD & FAM. SOC. WORK 353, 355 (2005); Feldman, *supra* note 37, at 401; Maurice Feldman et al., *Effectiveness of Home-Based Early Intervention on the Language Development of Children of Mothers with Mental Retardation*, 14 RES. DEVELOPMENTAL 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,

The rates of child welfare system involvement and child removal from parents with psychiatric disabilities are also high, with some researchers reporting rates of termination of parental rights as high as 80%.⁴⁰ A recent study found that 19% of children in the foster care system were placed there, at least in part, because of parental disability, and 5% were in foster care solely because of parental disability.⁴¹ That same study found that children of parents with disabilities were less likely to be returned to their parents than children of nondisabled parents, and the odds of termination of parental rights were 22% higher.⁴² In sum, parents with disabilities and their families experience staggering inequities within the child welfare system, underscoring an urgent need for attention from policymakers, the legal profession, and scholars.

Notably, longstanding research indicates that discrimination against parents with disabilities by the child welfare system is entirely unjustified. In fact, according to the National Council on Disability, “high-quality studies indicate that disability alone is not a predictor of problems or difficulties in children and that predictors of problem parenting are often

239 (2003); David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 624 (2011).

40. See 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 21, 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); see also Katy Kaplan et al., *Child Protective Service Disparities and Serious Mental Illnesses: Results from a National Survey*, 70 PSYCHIATRIC SERVICES 202, 204 (2019) (finding that parents with psychiatric disabilities were eight times more likely than other parents to be involved with the child welfare system); Jung Min Park et al., *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 493, 494 (2006) (finding mothers with psychiatric disabilities were three times more likely than other mothers to have had child welfare system involvement or had their children removed).
41. Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22, 26 (2016).
42. *Id.*

found to be the same for disabled and nondisabled parents.”⁴³ For example, researchers have consistently found no relationship between parenting abilities and intelligence.⁴⁴ Likewise, many studies have shown that parents with psychiatric disabilities are not more likely to abuse or neglect their children than other parents.⁴⁵ Nonetheless, parents with disabilities and their children are at heightened risk of multiple disadvantages, such as poor health, social isolation, and low socioeconomic status, as well as poor developmental outcomes, cognitive delays, and behavioral challenges, which can increase their vulnerability to child welfare system involvement.⁴⁶ Hence, the focus should be on supporting these families instead of separating them.

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43. ROCKING THE CRADLE, *supra* note 37, at 186; *see also* 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, 148 (2016) (“Thus, I contend that we must urgently move beyond deciding the fate of families vis-à-vis broad-based presumptions about categories of families and instead act to ensure that decisions are based on sound evidence.”).
 44. *See, e.g.*, Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRIT. 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).
 45. Krista A. Gallager, *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).
 46. 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 RES. INTELL. DISABILITIES 296 (2008) [hereinafter IASSID SIRG] (reviewing state of knowledge about parents with intellectual disabilities and their children); 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, 169 (2002).

The ADA was passed thirty years ago to ensure “equality of opportunity” for people with disabilities.⁴⁷ Nonetheless, despite many successes in achieving disability rights, disabled people are still fighting for their right to parenthood.⁴⁸ Scholars and advocates have asserted that child welfare agencies and courts frequently disregard the ADA, particularly at the termination of parental rights phase.⁴⁹ To the best of our knowledge, however, no empirical studies have investigated this phenomenon from a national, cross-disability perspective. This Article begins to fill that void through quantitative analyses of 2,064 termination of parental rights appellate decisions issued between January 1, 2006, and December 31, 2016, involving mothers with disabilities.⁵⁰

This study offers novel information about factors that predict whether the ADA is raised or applied. That is, we wanted to elucidate factors that predict when the ADA is mentioned in an appellate termination of parental

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47. Americans with Disabilities Act § 12101(a)(7), 42 U.S.C. §§ 12131–34 (1990).
 48. Shade, *supra* note 20, at 153–54 (“Although persons with disabilities have made significant gains in recent years in overcoming the invidious discrimination with which they have long been burdened, the legal rights of parents with disabilities remain in question.”) (footnotes omitted).
 49. See, e.g., Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL’Y 387 (2000); Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa’s Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165 (2011); Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J. 191 (2015); Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 135 (2008); Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535 (2005); Chris Watkins, Note, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415 (1995).
 50. Researchers analyzed forty-two appellate termination of parental rights opinions involving parents with intellectual disabilities to show the prevalence of judicial consideration of parental IQ test evidence. See Ella Callow et al., *Judicial Reliance on Parental IQ in Appellate-Level Child Welfare Cases Involving Parents with Intellectual and Developmental Disabilities*, 30 J. APPLIED RES. INTELLECTUAL DISABILITIES 553 (2017).

rights opinion (hereinafter “raised”) and when courts determine that the ADA is applicable to the case or governs the child welfare system (hereinafter “applied”). Understanding the predictors of both when the ADA is raised and when the ADA is applied is important for advancing the rights of parents with disabilities. While the ADA ostensibly can only be applied if it is raised, it is essential to ascertain how often judges or attorneys even raise the law. Such findings can shed light on the extent to which judges and attorneys understand the law. Thus, we sought to understand if maternal disability type was associated with courts raising or applying the ADA. We also examined how, if at all, parent, family, court, case, and policy characteristics predicted whether the ADA was raised or applied in these decisions. Furthermore, the Article discusses implications for policy and practice as well as directions for future research. Accordingly, this study has two overarching research questions. First, does a mother’s disability type predict if the ADA is raised or applied in termination of parental rights appellate decisions? Second, are other factors, such as parent, family, case, legal, and policy characteristics, associated with courts raising or applying the ADA?

This Article is organized as follows. Part I provides an overview of the legal framework that governs the child welfare system’s interactions with disabled parents and their families. Specifically, this Part begins by describing how the child welfare system is administered, focusing primarily on federal statutes. It then explains the ADA and its applicability to the child welfare system, including current barriers and observations. Next, Part II discusses the study’s methodology and data, including the procedures used to select, code, and analyze appellate decisions. Part III presents the findings of the quantitative analysis. This Part explains the characteristics of the sample, stratified by maternal disability type, and shows the association between characteristics and courts raising or applying the ADA. Then, based on logistic regression models, it explains the factors that predicted whether the ADA was raised or applied in termination of parental rights appellate decisions involving mothers with disabilities. Finally, drawing on the study’s findings, Part IV concludes by exploring implications for policy and practice as well as areas warranting further inquiry.

I. LEGAL FRAMEWORK

This study exists in the context of a growing body of scholarship about parents with disabilities and their families’ involvement with the child welfare system. To date, legal scholarship on these families has been relatively narrow, focused primarily on parents with intellectual or

psychiatric disabilities.⁵¹ It has also been mainly theoretical or doctrinal⁵² and concentrated on specific jurisdictions.⁵³ Above all, legal scholarship has lacked empirical analysis of the intersection between the ADA and the child welfare system. Therefore, the value of this study lies in providing the first-ever systematic analyses of termination of parental rights appeals decisions involving mothers with disabilities over several years to determine predictors of when courts raise or apply the ADA in these cases. Elucidating how the ADA is utilized in termination of parental rights proceedings is imperative in determining its effectiveness.

Before exploring these crucial questions, however, it is essential to understand the legal framework that governs the child welfare system's interactions with disabled parents and their families. To that end, this Part begins with a brief discussion about how the child welfare system is administered, focusing primarily on federal statutes. Next, it explains the child welfare system's legal obligations vis-à-vis the ADA. Finally, it describes current barriers and observations related to the child welfare system's compliance with the ADA.

A. *The Child Welfare System*

Although the right to parent free from state interference is a constitutional right, it is balanced against the right of the state to protect children from harm. Under the legal doctrine of *parens patriae*, therefore, states have an important interest in protecting children and may terminate

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51. See, e.g., Pannell, *supra* note 49; Powell, *supra* note 43; Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307 (2015); Collentine, *supra* note 49; Rachel L. Lawless, Note, *When Love Is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability*, 37 CAP. U. L. REV. 491 (2008). *But 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. 9 (2011) (analyzing issues facing parents with a range of disabilities).
 52. Smith, *supra* note 49; Stefan, *supra* note 49; Watkins, *supra* note 49.
 53. See, e.g., Pannell, *supra* note 49; Rachel N. Shute, Note, *Disabling the Presumption of Unfitness: Utilizing the Americans with Disabilities Act to Equally Protect Massachusetts Parents Facing Termination of Their Parental Rights*, 50 SUFFOLK U. L. REV. 493 (2017).

parental rights if necessary.⁵⁴ Termination of parental rights, coined the “death penalty” of civil cases,⁵⁵ is the legal mechanism whereby parental rights are permanently severed.⁵⁶ To best understand the contemporary child welfare system, it is important to appreciate the legal framework that governs it. For brevity, this section is limited to the three most relevant federal child welfare laws: the Child Welfare Prevention and Treatment Act, the Adoption Assistance and Child Welfare Act, and the Adoption and Safe Families Act.

Although the child welfare system is administered primarily by states, the federal government has played an ever-increasing role in governing the child welfare system through the enactment of laws and the funding of programs.⁵⁷ In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), which was the first federal effort to address child maltreatment.⁵⁸ Specifically, CAPTA allocates federal funding to states for prevention, assessment, investigation, prosecution, and treatment activities, as well as grants to state and local government agencies and nonprofit organizations for demonstration programs and projects.⁵⁹

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54. *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982).
 55. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (“The termination of parental rights has been characterized as tantamount to a ‘civil death penalty.’”) (quoting *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002)).
 56. Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCHOL. REV. 205, 206 (2014–2015) (describing termination of parental rights as “the process whereby biological parents are forced to sever their legal ties to their children, in favor of upholding the ‘child’s best interests’ by imbuing other, allegedly more well-suited individuals with those parental rights.”).
 57. *Id.* at 206–09; see also 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, 199–200 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) (describing how federal laws govern the child welfare system primarily through funding rather than substantive law).
 58. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–06 (1994)).
 59. Child Welfare Info. Gateway, Children’s Bureau, *How the Child Welfare System Works*, U.S. DEP’T OF HEALTH & HUMAN SERVICES, 2–3 (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/PXW3-WAXF>].

CAPTA also sets forth a minimum definition of child abuse and neglect.⁶⁰ Since it was signed into law, CAPTA has been amended several times,⁶¹ most recently by the CAPTA Reauthorization Act of 2010.⁶² In short, CAPTA was the federal government’s first significant effort “to lay the foundation for the modern child welfare system.”⁶³

In an attempt to substantially reform the child welfare system, Congress passed the Adoption Assistance and Child Welfare Act (AACWA) in 1980.⁶⁴ Specifically, AACWA was enacted because of growing concerns from policymakers about the number of children entering the foster care system, as well as the length of time they remained subject to placement instability. AACWA requires child welfare agencies to make “reasonable efforts” to keep children with their parents, both to prevent or eliminate the need for removal of children from their families and to make it possible for children to be reunified with their families following removal.⁶⁵ Nonetheless, scholars have criticized AACWA for its vagueness in explaining the “reasonable efforts” standard.⁶⁶ In sum, the primary objective of AACWA was to rehabilitate and reunify families rather than to sever parental rights.⁶⁷

60. *Id.*

61. *Id.*

62. Child Abuse and Prevention Treatment Act Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (codified at 42 U.S.C. §§ 5001-17).

63. 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).

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

65. *Id.* § 471 (codified as amended at 42 U.S.C. § 671); *see also* David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAM. L.Q. 329, 330, 331-36 (2000) (describing the Adoption Assistance and Child Welfare Act).

66. 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).

67. *See* Cristine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 199 U. ILL. L. REV. 287, 293 (1999) (“Moreover, AACWA financially rewarded states for keeping children in foster care, so that the states had no incentive to plan for a child’s permanency. So while state child welfare agencies attempted to rehabilitate parents—which usually continued for years—children languished in foster care and remained in limbo as to their permanency.”) (citations omitted);

Nearly twenty years later, in 1997, Congress passed the Adoption and Safe Families Act (ASFA),⁶⁸ in response to the growing number of children who were lingering in foster care.⁶⁹ In furtherance of ASFA's aim of ensuring the welfare of children,⁷⁰ the statute has three overarching goals: (1) decrease the length of time children spend in foster care,⁷¹ (2) prevent future abuse from biological parents by promoting adoption,⁷² and (3) make timely permanency decisions.⁷³ Thus, to promote permanency, ASFA reduced the time frames for conducting permanency hearings, established a requirement for child welfare agencies to make reasonable efforts to finalize a permanent placement, and created time frames for filing petitions to terminate the parental rights for children in foster care. Similar to AACWA, ASFA mandates that state child welfare agencies exert reasonable efforts to avoid removing children from their homes and to reunite them with their families if they have been removed.⁷⁴ Nonetheless,

Theodore J. Stein, *The Adoption and Safe Families Act: Creating a False Dichotomy Between Parents' and Childrens' Rights*, 81 FAMS. SOC'Y 586, 586 (2000) ("AACWA was crafted to overcome deficiencies in the child welfare system, including [the fact that] . . . services to help biological parents resolve the problems that necessitated placement of their children were rarely provided . . .").

68. 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.).
69. 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).
70. 42 U.S.C. § 671(a)(15)(A) (2018) ("[T]he child's health and safety shall be the paramount concern . . .").
71. John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 59 (2014); see also Olivia Golden & Jennifer Macomber, *Framework Paper*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 11-12 (Susan Notkin et al. eds., 2009) (explaining the goal of creating permanency for children).
72. Golden & Macomber, *supra* note 71, at 11-13 (describing adoption incentives).
73. *Id.* at 14 (describing the importance of timely decision-making to advance the goal of permanency).
74. 42 U.S.C. § 671(a)(15)(B) (2018).

ASFA did not define reasonable efforts, so states have been left to define the term on their own, leading to variation.⁷⁵

ASFA provides two specific provisions related to the termination of parental rights. First, ASFA requires states to petition courts for termination of parental rights in cases where a child has been in foster care for fifteen of the most recent twenty-two months (commonly known as the “15/22 rule”).⁷⁶ Second, ASFA permits child welfare agencies to bypass the provision of reasonable efforts and instead terminate parental rights in limited circumstances.⁷⁷ In addition, ASFA authorizes concurrent planning, which allows child welfare agencies to provide reunification services to families while simultaneously planning for permanency for the child (i.e., adoption) if reunification efforts fail.⁷⁸ Today, ASFA and its focus on permanency continue to provide the framework for child welfare practice and judicial decision-making in termination of parental rights cases.

B. Overview of the ADA

On July 26, 1990, President George H. W. Bush signed the ADA into law, declaring, “Let the shameful wall of exclusion finally come tumbling down.”⁷⁹ The goal of the ADA is to eliminate discrimination and stigma

75. Jeanne M. Kaiser, *Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness*, 11 WHITTIER J. CHILD & FAM. ADVOC. 3, 14–15 (2011); see also Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 325 (2005); Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL’Y 100, 111–25 (2009).

76. 42 U.S.C. § 675(5)(E) (2018).

77. 42 U.S.C. § 671(a)(15)(D)(i)–(iii) (2018). In addition to egregious acts such as manslaughter or murder, some states include a parent’s disability as justification for bypassing reasonable efforts and “fast tracking” termination of parental rights. See ROCKING THE CRADLE, *supra* note 37, at 90–92 (explaining the bypass provision and its effect on parents with disabilities).

78. 42 U.S.C. § 671(a)(15)(F) (2018).

79. George H. W. Bush, U.S. President, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), <https://bush41library.tamu.edu/archives/public-papers/2108> [<https://perma.cc/2D5R-YVTN>].

experienced by people with disabilities.⁸⁰ In enacting the ADA, Congress documented that people with disabilities had experienced pervasive isolation, segregation, and discrimination for far too long.⁸¹ In furtherance of the aim of eradicating disability-based discrimination, Congress vowed that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁸²

The ADA and its predecessor, the Rehabilitation Act of 1973 (Rehabilitation Act),⁸³ established a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁸⁴ In passing the ADA, Congress intended to protect people with disabilities from discrimination as it had previously done with other protected classes, such as race, color, sex, national origin, religion, and age.⁸⁵ The ADA proscribes “discrimination against disabled individuals in major areas of public life.”⁸⁶ Therefore, the ADA is sweeping in scope, and its “breadth” necessitates that it applies to nearly all facets of life, including “in situations not expressly anticipated by Congress.”⁸⁷ The ADA is comprised of five distinct titles: employment (Title I); public services (Title II); places of public accommodation (Title III); telecommunications (Title IV); and miscellaneous provisions (Title V).⁸⁸

According to the ADA, a person is defined as having a disability if she (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such impairment, or (3) is regarded as having such impairment.⁸⁹ Major life activities include, inter alia, caring for oneself, performing manual tasks, seeing, hearing, walking, speaking,

80. 42 U.S.C. § 12101(b)(1) (2018).

81. 42 U.S.C. § 12101(a) (2018).

82. 42 U.S.C. § 12101(a)(7) (2018).

83. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–96 (2018).

84. 42 U.S.C. § 12101(b)(1) (2018).

85. 42 U.S.C. § 12101(a)(4) (2018).

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

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

88. 42 U.S.C. § 12101–213 (2018).

89. 42 U.S.C. § 12102(1) (2018).

breathing, learning, communicating, and working.⁹⁰ In 2008, Congress amended the ADA 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”⁹¹ 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.”⁹² Thus, the definition of disability should be construed broadly.⁹³

For the purposes of the child welfare system, Title II is the most relevant because it governs access to state and local government agencies and instrumentalities, including child welfare agencies and courts.⁹⁴ Pursuant to Title II of the ADA, “no 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 to discrimination by any such entity.”⁹⁵

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.⁹⁶

Under Title II of the ADA, child welfare agencies and courts, must, *inter alia*: (1) provide people with disabilities an equal opportunity to participate in services, programs, and activities;⁹⁷ (2) administer services, programs, and activities in the most integrated setting appropriate to the needs of people with disabilities;⁹⁸ (3) not impose or apply eligibility

90. 42 U.S.C. § 12102(2)(A) (2018).

91. 42 U.S.C. § 12102(4)(D) (2018).

92. *Id.* § 12102(4)(E)(i) (2018).

93. *Id.* § 12102(4)(A) (2018).

94. 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.”).

95. 42 U.S.C. § 12132 (2018).

96. 42 U.S.C. § 12131(2) (2018).

97. 28 C.F.R. § 35.130(b)(1)(ii) (2019).

98. 28 C.F.R. § 35.130(d) (2019).

criteria that screen out or tend to screen out people with disabilities;⁹⁹ (4) provide auxiliary aids and services;¹⁰⁰ (5) not place surcharges on people with disabilities to cover the costs of measures to ensure nondiscriminatory treatment;¹⁰¹ and (6) not deny benefits, activities, and services to people with disabilities because entities' facilities are inaccessible.¹⁰² Additionally, child welfare agencies and courts must comply with regulations related to physical accessibility.¹⁰³ Finally, Title II of the ADA requires child welfare agencies and courts to provide "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability."¹⁰⁴

One of the most central principles of the ADA is the individualized treatment requirement. Specifically, public and private entities, including child welfare agencies and courts, must treat disabled people on a case-by-case basis, consistent with facts and objectives, and may not act based on stereotypes and generalizations about people with disabilities.¹⁰⁵ Individualized treatment is particularly germane when considering issues of accessibility and reasonable modifications. Access is meaningful when it considers a person's specific disabilities and needs.¹⁰⁶ Consequently, "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors,

99. 28 C.F.R. § 35.130(b)(8) (2019).

100. 28 C.F.R. § 35.160(a)(1), (b)(1); 28 C.F.R. § 35.164 (2019).

101. 28 C.F.R. § 35.130(f) (2019).

102. 28 C.F.R. § 35.130(b)(1)(i) (2019).

103. 28 C.F.R. §§ 35.150, 35.151 (2019).

104. 28 C.F.R. § 35.130(b)(7)(i) (2019).

105. *See, e.g., id.* § 35.130(b) (2018); *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.").

106. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 691 (2001) (deeming an individualized inquiry to be among the ADA's most "basic requirement[s]").

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.”¹⁰⁷

Pursuant to Title II of the ADA, child welfare agencies and courts 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;¹⁰⁸ (2) an undue financial and administrative burden;¹⁰⁹ 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.¹¹⁰

Hence, the ADA is a far-reaching federal statute that offers people with disabilities strong protections against discrimination in nearly all aspects of life. Nonetheless, as described next, the ADA has not met its full potential in terms of safeguarding the rights of disabled parents involved with the child welfare system.

C. The ADA and the Child Welfare System: Barriers and Observations

Surely, the ADA should protect the rights of parents with disabilities. The ADA’s legislative history demonstrates that Congress considered discrimination against disabled parents when it enacted the law. During Congressional hearings, for example, a witness testified that “historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent.”¹¹¹ Another witness described discriminatory policies and practices that affected disabled people in all aspects of life, including in “securing custody of their children.”¹¹² Yet another witness

107. *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)).

108. 28 C.F.R. §§ 35.150, 35.164 (2019).

109. *Id.*

110. 28 C.F.R. §§ 36.302, 36.303 (2019).

111. *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).

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

remarked that “being paralyzed has meant far more than being unable to walk—it has meant . . . being deemed an ‘unfit parent.’”¹¹³ Similarly, the U.S. Commission on Civil Rights found that numerous parents with disabilities “have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce.”¹¹⁴ Nevertheless, to date, scholars and advocates contend that the ADA has not prevented discrimination against disabled parents involved with the child welfare system, particularly in termination of parental rights proceedings, in which courts often misapply the statute.¹¹⁵

Notwithstanding the ADA’s obvious application to the child welfare system, most courts have prohibited the law from serving as a defense in termination of parental rights proceedings.¹¹⁶ Indeed, case law concerning the ADA and termination of parental rights has overwhelmingly favored child welfare agencies.¹¹⁷ Some courts have refused to apply the ADA, asserting termination of parental rights proceedings are not a “service, program, or activity” within the meaning of the ADA.¹¹⁸ Other courts have said applying the ADA in termination of parental rights proceedings would

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

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

115. Collentine, *supra* note 49, at 562 (“It follows that the ADA should apply and that delayed parents who have had their rights terminated on basis of their delays should have a strong cause of action. However, actions appealing a termination of parental rights under the ADA have not been successful.”); see also Smith, *supra* note 49, at 192 (“Previously, courts were extremely split on whether the ADA could be utilized by parents with mental disabilities in the child welfare context.”).

116. ROCKING THE CRADLE, *supra* note 37, at 93.

117. *Id.*

118. See, e.g., *In re Anthony P.*, 101 Cal. Rptr. 2d 423, 425 (Cal. Ct. App. 2000); *In re Antony B.*, 735 A.2d 893, 899 (Conn. App. Ct. 1999); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997); *Adoption of Gregory*, 747 N.E.2d 120, 121 (Mass. 2001); *In re Chance Jahmel B.*, 723 N.Y.S.2d 634, 640 (N.Y. Fam. Ct. 2001); *In re La’Asia S.*, 739 N.Y.S.2d 898, 908–09 (N.Y. Fam. Ct. 2002); *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006), *cert. denied*, 549 U.S. 1252 (2007); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997).

circumvent children's rights in the interest of parents' rights.¹¹⁹ Meanwhile, other courts have contended the ADA does not supersede the obligations of dissimilar laws.¹²⁰ Further, others 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.¹²¹ Hence, the vast majority of courts have rejected ADA claims in termination of parental rights proceedings.¹²²

Although courts have traditionally resisted applying the ADA in termination of parental rights proceedings, recent changes to state laws suggest the tides may be shifting.¹²³ According to the National Research Center for Parents with Disabilities, eighteen states have passed legislation aimed at ensuring the rights of disabled parents, and an additional ten states currently have legislation pending.¹²⁴ For example, in 2017, South Carolina passed the Persons with Disabilities Right to Parent Act.¹²⁵ This

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119. See, e.g., *J.T. v. Ark. Dep't Human Servs.*, 947 S.W.2d 761, 768 (Ark. 1997); *In re Anthony P.*, 101 Cal. Rptr. 2d at 425; *People v. T.B.*, 12 P.3d 1221, 1224 (Colo. App. 2000); *Gregory*, 747 N.E.2d at 121; *In re Guardianship of R.G.L.*, 782 A.2d 458, 472–73 (N.J. Super. Ct. App. Div. 2001).
120. See, e.g., *T.B.*, 12 P.3d at 1224; *In re Antony B.*, 735 A.2d at 899; *In re Doe*, 60 P.3d 285, 291 (Haw. 2002); *State v. Raymond C.*, 522 N.W.2d 243, 246 (Wis. Ct. App. 1994).
121. See, e.g., *In re Anthony P.*, 101 Cal. Rptr. 2d at 425; *In re Antony B.*, 735 A.2d at 899 n.9; *In re Doe*, 60 P.3d at 291, 293; *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *In re B.K.F.*, 704 So. 2d at 318; *In re Chance Jahmel B.*, 723 N.Y.S.2d at 640; *In re Harmon*, No. 00CA2693, 2000 WL 1424822, *54 (Ohio Ct. App. Sept. 25, 2000); *In re B.S.*, 693 A.2d at 721; *Raymond C.*, 522 N.W.2d at 246.
122. Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 809 (2018).
123. *Id.* at 812 (“While the ADA has had a rocky history in child protection courts, particularly as a defense to termination of parental rights, there are signs of progress in state statutes and court decisions.”).
124. Nat'l Research Ctr. for Parents with Disabilities, *Map of Current State Legislation Supporting Parents with Disabilities*, HELLER SCHOOL OF SOC. POL'Y & MGMT. (Oct. 22, 2019), <https://heller.brandeis.edu/parents-with-disabilities/map/index.html> [<https://perma.cc/2MNA-YFMF>] [hereinafter *Map of Current State Legislation Supporting Parents with Disabilities*].
125. Persons with Disabilities Right to Parent Act, S.C. CODE ANN. § 63-21-10 (2017).

legislation adopts the ADA's definitions of covered entities and disability; defines adaptive parenting equipment, adaptive parenting techniques, and supportive services; requires the child welfare agency and courts to comply with the ADA and ensure that reasonable efforts to prevent removal and reunify a family be individualized and based on a parent's specific disability; and mandates that child welfare agencies make reasonable modifications.¹²⁶ Further, the Act amends the state's termination of parental rights statute to require a clear nexus between a parent's disability and their ability to care for the child, and prohibits termination of parental rights based solely on disability.¹²⁷

More recently, in 2018, Colorado passed the Family Preservation for Parents with Disability Act.¹²⁸ This legislation prohibits a parent's disability from serving as the basis for denying or restricting custody, visitation, adoption, foster care, or guardianship; requires courts to consider the benefits of providing supportive parenting services when determining custody, visitation, adoption, foster care, and guardianship; and compels the state's child welfare agency to provide reasonable modifications to parents with disabilities and their families based on individual need.¹²⁹

Recent termination of parental rights decisions also suggest that courts may be shifting with respect to applying the ADA in these cases. As previously described, in a 2017 unanimous opinion, the Michigan Supreme Court reversed a termination of parental rights decision, finding ADA violations in a case involving a mother with an intellectual disability.¹³⁰ More recently, in 2019, the Colorado Court of Appeals ruled 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 offered to disabled parents.¹³¹ Here, the parents had intellectual and psychiatric disabilities and were referred to the child welfare agency because their infant experienced failure to thrive.¹³² The

126. S.C. CODE ANN. §§ 63-21-10, 63-21-20 (2017).

127. S.C. CODE ANN. § 63-21-20 (2017).

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

129. *Id.*

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

131. *People ex rel. S.K.*, 440 P.3d 1240, 1249 (Colo. App. 2019).

132. *Id.* at 1245–48.

lower court concluded that the parents' disabilities severely limited their ability to care for the child.¹³³ While the appeal was ultimately unsuccessful, the holding about the ADA's application was notable.

The United States Department of Justice (DOJ) and the United States Department of Health and Human Services (HHS) have also affirmed that the child welfare system has clear mandates pursuant to the ADA. In January 2015, the Departments issued a joint letter of findings, holding that the Massachusetts Department of Children and Families violated the ADA and the Rehabilitation Act by acting on the basis of presumptions about the capabilities of a mother with an intellectual disability and failing to provide that mother and her daughter appropriate services.¹³⁴ Later that year, DOJ and HHS issued technical guidance to all state child welfare agencies and courts reaffirming their obligations under the ADA and the Rehabilitation Act.¹³⁵ Most recently, in November 2019, the Office for Civil Rights at HHS entered into a voluntary resolution agreement with the Oregon Department of Human Services concerning 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.¹³⁶ While the agreement did not explicitly state

133. *Id.* at 1248.

134. Letter from U.S. Dep't of Justice, Civil Rights Div., & U.S. Dep't of Health & Human Servs., Office for Civil Rights, to Erin Deveney, Interim Comm'r, Mass. Dep't of Children & Families (Jan. 29, 2015) [hereinafter Letter of Findings], http://www.ada.gov/ma_docf_lof.pdf [<https://perma.cc/ZM5U-JCNJ>].

135. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, ADMIN. FOR CHILDREN & FAMILIES & U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. DISABILITY RTS. SECTION, 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 (Aug. 2015) [hereinafter TECHNICAL ASSISTANCE], <https://www.hhs.gov/sites/default/files/disability.pdf> [<https://perma.cc/XX36-T9XT>].

136. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, VOLUNTARY RESOLUTION AGREEMENT BETWEEN U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS, AND OREGON DEPARTMENT OF HUMAN SERVICES (Nov. 18, 2019) [hereinafter VOLUNTARY RESOLUTION AGREEMENT], <https://www.hhs.gov/sites/default/files/odhs-vra.pdf> [<https://perma.cc/U9CK-JATJ>].

that Oregon violated the ADA and Rehabilitation Act, it confirmed that the child welfare system must comply with these laws.

II. METHODOLOGY AND DATA

This study is part of a broader empirical legal analysis project investigating termination of parental rights appeals decisions involving parents with disabilities.¹³⁷ This Article builds on the existing scholarship about parents with disabilities who are involved with the child welfare system by analyzing empirical data to identify predictors of whether the ADA is raised or applied in appeals termination of parental rights cases involving disabled mothers and their families. This Part describes the present study's methodology and data. First, it briefly explains quantitative research methodology and how it has been employed to answer important legal and policy questions. Next, it describes the study's data source, including details about how the data were selected and coded. Then, it explains the measures used in the study. Thereafter, it discusses the study's analytic strategy. Finally, it describes the study's limitations.

A. Quantitative Methodology

This study's methodology is consistent with an emerging body of legal scholarship that has analyzed judicial decisions to understand how cases are decided.¹³⁸ Indeed, the desire for a comprehensive understanding of

137. See Robyn M. Powell et al., *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. (forthcoming 2021) (on file with authors) (analyzing 2,064 appellate decisions to identify predictors of termination of parental rights in cases involving mothers with disabilities).

138. Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016) (discussing the evolution of theoretical and empirical studies of judicial decision-making in various disciplines); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 477 (2009) ("The legal academy has recently experienced a surge of interest in quantitative empirical analysis."); Gregory C. Sisk, *The Quantitative Movement and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 874 (2008) ("Within just a few short years, empirical study of the law in general, and in particular of the courts, has risen to a level of prominence in American law schools.").

the legal system¹³⁹ has led to an influx of empirical legal scholarship.¹⁴⁰ To that end, legal scholars have called for quantitative analyses of decisions that go beyond simply studying outcomes but also investigate the content of opinions.¹⁴¹ Empirical analysis is necessary to understand why decisions are made the way they are and can inform policymaking and practice and improve how the legal system works.¹⁴²

B. Data Source

This study draws from termination of parental rights appellate opinions involving mothers with disabilities and their families. This study includes both published and unpublished decisions. This Section explains the dataset that was analyzed in this study. First, it provides information about how the data were selected. Next, it describes the process that was used to code the data.

139. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1743 (2004).

140. Sisk, *supra* note 138, at 874–75 (describing “the thirst for systematic knowledge of the legal system”).

141. See Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1926 (2009) (“A final, and perhaps the most troubling, problem with coding decisions—and one well recognized by many scholars who undertake empirical legal scholarship—is that only the outcomes of the decisions are coded, not the content.”); Lee Epstein et al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL’Y 305, 320–23 (2003) (advocating an approach that codes both outcomes and content); Sisk, *supra* note 138, at 885 (concluding that empirical legal scholarship must “move beyond asking which litigant prevailed in a case and now also ask how the advocates and the court framed the question presented and how the legal analysis unfolded in the opinion”).

142. Eisenberg, *supra* note 139, at 1741 (concluding that empirical legal studies can “help[] inform litigants, policymakers, and society as a whole about how the legal system works”); see also Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 85 (2008) (noting that empirical analysis “may not eliminate all disagreement, but at least it sharpens the issues”).

1. Data Selection

This study's dataset consists of termination of parental rights appellate cases decided between January 1, 2006, and December 31, 2016. Appellate decisions play a unique role in policymaking as they often clarify ambiguity in existing laws. In termination of parental rights cases involving disabled parents, appellate decisions are often mixed, meaning that some are decisions on a matter of law decided de novo while others are decisions of fact that are decided based on clear errors by the lower court. Despite the limitations of appellate decisions, however, judges' ideologies can influence their decision-making even during appeals cases.¹⁴³

Appeals of termination of parental rights cases were selected for this study due to availability and resources. Because termination of parental rights cases are typically confidential, lower court decisions are mostly inaccessible to the public or even to legal database subscribers without considerable costs.¹⁴⁴ Conversely, however, once such cases are appealed, the decisions typically become available through legal databases. Confidentiality, nevertheless, is maintained by abbreviating names.

To identify the sample for this study, a comprehensive Boolean search of termination of parental rights case decisions that involved parents with disabilities in each of the fifty states and the District of Columbia¹⁴⁵ was conducted using LexisNexis Advance. The following search terms were used: "termination of parental rights" AND "Americans with Disabilities Act" OR "disab!" OR "mental illness" OR "mental retard!" OR "handicap!" OR "blind" OR "deaf".

These search terms were expansive to capture as many cases involving parents with a range of disabilities as possible. The search generated 4,136 state appellate decisions. Nevertheless, 1,751 decisions were subsequently

143. See, e.g., Paul Brace et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000) (developing a measure to study decisions in light of the party affiliation of judges).

144. Callow et al., *supra* note 50, at 559 (Analyzing appellate-level termination of parental rights cases, the authors explain, "Our reasoning for using appellate-level cases was that in the USA, trial-level cases are not published, meaning that they are not available to the public or even to subscribers to private database systems without the incurrence of significant costs.").

145. In this study, cases represented forty-seven states and the District of Columbia. There were no cases from Nevada, South Dakota, or Wyoming.

eliminated upon review since they were unrelated to this study. For example, several of the excluded cases involved children with disabilities rather than parents with disabilities. Other decisions were excluded because they involved a private party seeking to terminate a parent's rights rather than the state initiating the case. Once the irrelevant cases were omitted, 2,385 decisions remained. For this study, the sample was further restricted to only cases involving mothers with disabilities.¹⁴⁶ Therefore, after excluding 321 cases where only the father was disabled, the final analytic sample included 2,064 cases, involving mothers with physical or sensory disabilities ($N = 29$), intellectual disabilities ($N = 124$), psychiatric disabilities ($N = 1,598$), and multiple disabilities ($N = 313$).¹⁴⁷

2. Coding and Review of Coding

Once the relevant decisions were identified, a process was developed and implemented to ensure reliable coding. To that end, the first author developed a form that captured the variables of interest, based on a comprehensive review of the relevant literature. Those variables included case caption information (e.g., name of case, jurisdiction, year), procedural posture (i.e., intermediate court of appeal or highest court of appeal), information about the family (e.g., type of disability, socioeconomic factors, family composition), factual information (e.g., if the ADA was raised or applied, expert testimony, type of alleged child maltreatment, state dependency statutes), information about the family's interactions with the child welfare system (e.g., history, services provided), and outcome (i.e., whether the court terminated the parental rights). The form contained twenty-seven questions to be completed by the coder for each decision. Most questions were closed-ended, except for the name of the case, the year the case was decided, the state the case was decided in, and the number of children involved in the case. Comprehensive instructions that

146. For this study, we elected to limit our analysis to only cases involving mothers with disabilities. Research suggests that most parents with disabilities who are involved with the child welfare system are single mothers. See Elizabeth Lightfoot et al., *A Case Record Review of Termination of Parental Rights Cases Involving Parents with a Disability*, 79 CHILD. & YOUTH SERVS. REV. 399, 401 (2017); McConnell et al., *supra* note 39, at 627. Future studies will analyze the entire dataset.

147. In some circumstances, the second parent was also disabled. None of the cases in this study listed two same-sex parents.

provided detailed information about each question accompanied the survey. The first author and three trained individuals coded the data, putting in place measures to ensure accuracy and reliability.¹⁴⁸

C. Measures

This Section describes the measures that were used in this study's analyses. First, the study's dependent variables are described, followed by the study's key independent variable. Thereafter, a description of the covariates that were used is provided.

1. Dependent Variables

This study included two outcome variables. The first dependent variable of interest was whether the ADA was raised in the decision. In other words, was the ADA mentioned in the appellate opinion? This was measured as a binary variable. The second outcome of interest, which was also measured as a binary variable, was whether the court determined that the ADA applied to the case.

148. As part of the training process, each coder was assigned ten decisions to code based on a line-by-line reading of the opinion. The first author reviewed the coder's work to ensure accuracy and verify reliability. If any discrepancies were identified, the first author and coder met individually to discuss. This process continued until the coder was reliably coding the opinions without issue. Thereafter, the first author assigned coders decisions in batches of 250. Throughout the coding process, the first author remained in close contact with the coders and was available to answer questions as they arose. Each coder read and coded between 500 and 1,000 cases. The first author also read and coded approximately 1,500 decisions. To ensure accuracy and reliability, the first author randomly reviewed 100 decisions coded by each of the three trained coders. Any concerns were discussed and resolved. Additionally, once all coding was complete, the first author conducted a thorough line-by-line review of the dataset to ensure the data were accurate and free of typographical errors. For example, the first author sorted the data by state to ensure that the state statute information was consistent. Any irregularities were corrected.

2. Independent Variable

The study's key independent variable of interest was maternal disability type, measured as a categorical variable (physical or sensory disability, intellectual disability, psychiatric disability, or multiple disabilities). The multiple disabilities category includes mothers who had both intellectual and psychiatric disabilities, intellectual and physical or sensory disabilities, or psychiatric and physical or sensory disabilities.

3. Covariates

Several covariates related to parent, family, court, case, and policy characteristics were included in the analyses as control variables.

Parent and family characteristics. Parent and family covariates included (1) the mother's marital status (divorced, separated, widowed, or single versus married); (2) whether the other parent was also disabled; (3) criminal history (criminal conviction, jail, or criminal background of one or both parents was mentioned versus no criminal history mentioned); (4) substance use history (decision mentioned concerns related to use of alcohol or drugs by either parent versus no substance use history mentioned);¹⁴⁹ (5) household income in relationship to 200% of the federal poverty level (considered below 200% of the federal poverty level if the court mentioned the parents' lack of economic means, receipt of Supplemental Security Income ("SSI"), Social Security Disability Insurance ("SSDI"), or Temporary Assistance for Needy Families ("TANF"), or one or both of parents were unemployed); (6) if any of the children had disabilities; and (7) the family's prior involvement, if any, with the child welfare system (no prior involvement; yes, but not termination of parental rights; or yes, termination of parental rights).¹⁵⁰ Additionally, there was a continuous variable measuring the number of children in the case.¹⁵¹

149. Substance use is considered a disability under the ADA. *See* 42 U.S.C. § 12210 (2018). Nonetheless, the ADA does not protect people currently using illegal drugs. *See* 28 C.F.R. pt. 35, App. A, 35.131 (2019).

150. For each of the binary variables, we took a conservative approach whereby unknown was collapsed into "no."

151. For bivariate and multivariate analysis, the number of children was constructed into a binary measure (2 or more children versus 1 child).

Court, case, and policy characteristics. Court and case covariates included (1) the year the case was decided, measured as a dichotomous variable (2006-2010 versus 2011-2016); (2) whether the case was decided in an intermediate court of appeals or the state's highest court of appeals; and (3) geographic region of the case based on the United States Census-designated regions (Midwest, Northeast, Southeast, Southwest, or West). Bivariate variables¹⁵² also measured whether an expert's testimony, such as that of a psychologist, was described in the court decision. One variable measured if an expert testified that the mother could raise the child and one variable measured if an expert testified that the mother could not raise the child.¹⁵³ Other dichotomous variables¹⁵⁴ included (1) whether the child welfare agency provided the mother with family preservation or reunification services¹⁵⁵ and (2) whether the child welfare agency provided the mother with family preservation or reunification services specifically for parents with disabilities.¹⁵⁶ Categorical variables measured (1) the child's placement at the time of the

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152. For each of the binary variables, we took a conservative approach whereby unknown was collapsed into "no."
153. Experts often play a critical role in termination of parental rights cases, and judges often rely heavily on their testimony. Corina Benjet & Sandra T. Azar, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238, 239 (2003). Nevertheless, many experts lack the necessary training to appropriately evaluate parents with disabilities, which in turn can negatively impact cases. See Joshua B. Kay, *Representing Parents with Disabilities in Child Protection Proceedings*, 13 MICH. CHILD WELFARE L.J. 27, 32-33 (2009).
154. For each of the binary variables, we took a conservative approach whereby unknown was collapsed into "no."
155. Research indicates that parents with disabilities are often not provided family preservation or reunification services. See, e.g., Elspeth M. Slayter & Jordan Jensen, *Parents with Intellectual Disabilities in the Child Protection System*, 98 CHILD. & YOUTH SERVS. REV. 297, 300-01 (2019) (finding parents with intellectual disabilities were less likely than nondisabled parents to be provided services).
156. Parents with disabilities are often denied services tailored to meet their individual needs. See Phillip A. Swain & Nadine Cameron, *"Good Enough Parenting": Parental Disability and Child Protection*, 18 DISABILITY & SOC'Y 165, 170 (2003).

case (foster care, kinship care, or “other”);¹⁵⁷ and (2) the alleged type of maltreatment (abuse, neglect, or both abuse and neglect).¹⁵⁸ Further, a covariate variable was included that measured whether the mothers’ parental rights were terminated (yes, including if based on curing a procedural defect by the lower court, versus no). Finally, a binary covariate was constructed to measure if the state termination of parental rights law governing the case allowed for consideration of parental disability.¹⁵⁹

D. Analytic Strategy¹⁶⁰

Descriptive statistics characterize the study’s sample, stratified by maternal disability type. For categorical variables, chi-square tests¹⁶¹ were employed to measure the statistical significance of differences between groups. For continuous variables, *t*-tests¹⁶² were employed to compare

157. Research has found children of parents with disabilities in these cases were more likely to be placed in nonrelative foster care rather than with relatives. See Lightfoot & DeZelar, *supra* note 41, at 27. “Other” placements include any placement that was not foster care or kinship care, such as group homes and other residential settings.

158. For this study, we included cases coded as neglect if there were presumptions about the possibility of neglect due to a mother’s disability. In some states, this is termed “predictive neglect.” See Alissa Bang, Note, *What Do Judges and Fortune Tellers Have in Common? Connecticut’s Predictive Neglect Doctrine as a Basis for Premature Suspension of Parental Rights*, 32 QUINNIPIAC PROB. L.J., 410, 428 (2019). Also, notably, most parents with disabilities involved with the child welfare system are the subject of neglect allegations rather than abuse. MONICA MCCOY & STEPHANIE KEEN, CHILD ABUSE AND NEGLECT 63–87 (Taylor & Francis 2009).

159. The presence or absence of a statute was determined based on the National Council on Disability’s chart, which found that two-thirds of state dependency statutes included parental disability as grounds for termination of parental rights. ROCKING THE CRADLE, *supra* note 37, at 265–300.

160. All statistical analyses were conducted using Stata/SE 15.1 for Mac.

161. See DAVID KREMELBERG, PRACTICAL STATISTICS 120 (2011) (“The chi-square statistic is used to show whether or not there is a relationship between two categorical variables.”).

162. See THE T-TEST, WEB CTR. FOR SOC. RESEARCH METHODS, https://www.socialresearchmethods.net/kb/stat_t.php [<https://perma.cc/4PUH-BMF6>] (“The *t*-test assesses whether the means of two groups are

each group using the means of independent variables. Next, odds ratio tests¹⁶³ were conducted to estimate associations between each variable and the study's two dependent variables: (1) whether the ADA was raised in the case and (2) whether the court held that the ADA applied. If the *p*-value of the chi-square test, odds ratio, or *t*-test was .05 or less, there was a statistically significant difference between the groups.

Since the dependent variables were binary, logistic regression models were estimated. Logistic regression modeling permitted the testing of multiple variables simultaneously to assess whether a characteristic had a statistically significant relationship with the dependent variables, while controlling for all others.¹⁶⁴ In other words, regression analysis is a statistical technique used to understand the relationship between independent variables that are "thought to produce or be associated with changes in [a] dependent variable."¹⁶⁵ Only variables that indicated a statistical significance during bivariate analysis were included. Odds ratios (OR) and 95% confidence intervals (CI) are reported for ease of interpretation.

E. Study Limitations

This study has several limitations that must be acknowledged. First, the measure of maternal disability type was imperfect. Identification of a mother's disability type was based on language in the decision and some opinions may not have included all relevant information (e.g., nature and severity of the disability). Decisions may also not have mentioned all of the disabilities that a mother had. Similarly, this study used broad categories

statistically different from each other. This analysis is appropriate whenever you want to compare the means of two groups . . .").

163. See Magdalena Szumilas, *Explaining Odds Ratios*, 19 J. CAN. ACAD. CHILD & ADOLESCENT PSYCHIATRY 227, 227 (2010) ("An odds ratio (OR) is a measure of association between an exposure and an outcome. The OR represents the odds that an outcome will occur given a particular exposure, compared to the odds of the outcome occurring in the absence of that exposure.").
164. See generally DAVID W. HOSMER, JR., ET AL., APPLIED LOGISTIC REGRESSION (3d ed. 2013); SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (3d ed. 2014).
165. For an in-depth explanation of regression analysis, see Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 303–57 (3d ed. 2011).

of disability type and did not account for the varying experiences of disability, or how multiple disabilities intersected. Second, since this study analyzed observational data, causality cannot be inferred. Therefore, outcomes may be attributable to factors not considered in this study. Third, as with all analyses of judicial opinions, numerous relevant variables were absent from the data (e.g., in-depth sociodemographic information, detailed data on disability-related needs and available services and supports, and comprehensive family characteristics).¹⁶⁶ Analyses of these factors would have enriched the investigation by providing a more complete understanding of the cases. Likewise, this study is constrained by the paucity of details provided in appellate decisions. Fourth, because the cases varied across courtrooms and geographic locations, there may be differences in the quality of data. Nonetheless, at least one other study has analyzed appellate termination of parental rights decisions to examine the experiences of parents with disabilities in the United States.¹⁶⁷ Fifth, this study is constrained by selection bias as the data only included appeals cases, meaning cases that were not appealed were not included in the analyses. While parents with low incomes generally have a right to court-appointed legal counsel for appeals, additional costs (e.g., court filing fees, experts) can make it challenging or impossible for some parents to appeal.¹⁶⁸ Further, some parents may feel defeated and not pursue an appeal. As such, future studies should investigate trial-level decisions. Sixth, this study focused

166. Karen A. Jordan, *Empirical Studies of Judicial Decisions Serve an Important Role in the Cumulative Process of Policy Making*, 31 IND. L. REV. 81, 88 (1998) (“[S]tudies of judicial decisions yield useful, albeit narrow information, that moves us toward a greater understanding of the bigger policy questions.”).

167. See Callow et al., *supra* note 50, at 553–62 (analyzing the prevalence of judicial consideration of parental IQ test evidence in appellate cases).

168. Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & C.R.L. REV. 635, 641 (2006) (“Poor people facing the termination of parental rights may be effectively prevented from meaningful access to justice not only by the deprivation of counsel, but also by the imposition of litigation access fees, necessary ongoing litigation expenses, the requirement of advance security or payment for litigation expenses, and the taxation of costs.” (citations omitted)). *But see* M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996) (holding that a parent is entitled to a transcript on appeal of termination of parental rights even if she cannot pay).

only on mothers with disabilities and did not consider the other parent's disability type. As such, future research should include both parents' disability types. Seventh, the number of cases that either raised or applied the ADA was relatively small. While there was enough statistical power to test for differences, findings should be approached with caution. Additional research should use a larger sample by expanding the time period so that more decisions are included that raised or applied the ADA. Lastly, although this study used broad search terms to identify decisions, it is possible that some cases involving mothers with disabilities were excluded. Notwithstanding the above-mentioned limitations, however, this study offers a novel investigation, with important findings described in the next Part.

III. FINDINGS

This study used statistical analyses to accomplish two aims. First, this study describes the cases in the sample, including parent, family, court, case, and policy characteristics. Second, this study identifies variables that predicted whether courts raised or applied the ADA in termination of parental rights appellate decisions involving mothers with disabilities. In particular, this study sought to determine whether maternal disability type predicted if the ADA was raised or applied in these opinions or if other factors (i.e., parent, family, court, case, and policy characteristics) predicted whether the ADA was raised or applied in these cases.

In this Part, the study's findings are presented. First, the study's sample is described, including comparisons across disability type. Next, findings from analyses of the association between characteristics and the dependent variables are presented. Finally, based on logistic regression models, factors that predicted courts raising or applying the ADA are identified.

A. Description of the Sample

In this Section, a summary of the cases in the dataset is presented. A total of 2,064 cases involving mothers with physical or sensory disabilities, intellectual disabilities, psychiatric disabilities, and multiple disabilities were analyzed. Totals across all cases, as well as comparisons stratified by maternal disability type, are reported.

Table 1. Parent and Family Characteristics

Characteristic	Any Disability 2,064	Physical or Sensory 29 (1.4)	Intellectual 124 (6.0)	Psychiatric 1,598 (77.4)	Multiple 313 (15.2)	Statistical Difference
	<i>N (%)</i>	<i>N (%)</i>	<i>N (%)</i>	<i>N (%)</i>	<i>N (%)</i>	χ^2 a b c
Single	1,303 (63)	12 (41)	62 (50)	1,040 (65)	189 (60)	b c
Two disabled parents	249 (46)	7 (47)	28 (64)	158 (40)	56 (65)	-
Criminal history	915 (44)	15 (52)	28 (23)	752 (47)	120 (38)	a
Substance use history	1,119 (54)	13 (45)	31 (25)	916 (57)	159 (51)	a
Income < 200% FPL	1,451 (70)	21 (72)	90 (73)	1,012 (69)	238 (76)	-
Disabled children	712 (35)	12 (41)	62 (50)	493 (31)	145 (46)	-
Prior involvement						
None	1,114 (54)	18 (62)	74 (60)	861 (54)	161 (51)	-
Yes, not TPR	510 (25)	2 (7)	17 (14)	412 (26)	79 (25)	b c
Yes, TPR	440 (21)	9 (31)	33 (27)	325 (20)	73 (23)	-
	<i>Mean (SD)</i>	<i>Mean (SD)</i>	<i>Mean (SD)</i>	<i>Mean (SD)</i>	<i>Mean (SD)</i>	<i>t</i>
Number of children	2.7 (1.8)	3.2 (1.7)	2.7 (1.9)	2.6 (1.8)	2.8 (1.8)	-

Note: FPL = federal poverty level; TPR = termination of parental rights.
a Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and intellectual disabilities.
b Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and psychiatric disabilities.
c Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and multiple disabilities.

Table 1 shows the parent and family characteristics. Compared to mothers with physical or sensory disabilities (41%), those with psychiatric disabilities (65%) or multiple disabilities (60%) were significantly more likely to be single. Cases involving mothers with intellectual disabilities were significantly less likely than those with mothers with physical or sensory disabilities to have criminal (23% vs. 52%) or substance use (25% vs. 45%) histories. Finally, cases involving mothers with psychiatric disabilities (26%) or multiple disabilities (25%) were significantly more likely to have previous child welfare system involvement without prior termination of parental rights, compared to cases with mothers with physical or sensory disabilities (7%). No other statistically significant differences were found.

Table 2. Court, Case, and Policy Characteristics

Characteristic	Any Disability	Physical or Sensory (N = 29)	Intellectual (N = 124)	Psychiatric (N = 1,598)	Multiple Disabilities (N = 313)	Statistical Difference a b c
	N (%)	N (%)	N (%)	N (%)	N (%)	χ^2
Year case was decided						
2006 - 2010	777 (38)	15 (52)	53 (43)	579 (36)	130 (42)	-
2011 - 2016	1,287 (62)	14 (48)	71 (57)	1,019 (64)	183 (59)	-
Type of court						
Intermediate court	1,955 (95)	29 (100)	119 (96)	1,513 (95)	294 (94)	-
Highest court	109 (5)	0 (0)	5 (4)	85 (5)	19 (6)	-
Region						
Midwest	601 (29)	11 (38)	46 (37)	445 (28)	99 (32)	-
Northeast	449 (22)	4 (14)	26 (21)	353 (22)	66 (21)	-
Southeast	373 (18)	6 (21)	27 (22)	269 (17)	71 (23)	-
Southwest	175 (9)	1 (4)	8 (7)	145 (9)	21 (7)	-
West	466 (23)	7 (24)	17 (14)	386 (24)	56 (18)	-
Positive expert testimony	168 (8)	1 (4)	12 (10)	128 (8)	27 (9)	-
Negative expert testimony	831 (43)	10 (31)	63 (51)	588 (37)	170 (54)	c
Parent provided services	1,740 (84)	21 (72)	108 (87)	1,334 (84)	227 (89)	a c
Parent provided services tailored to disabled parents	821 (40)	7 (24)	41 (33)	636 (40)	137 (44)	c
Placement of child						
Foster care	1,695 (82)	27 (93)	114 (92)	1,280 (80)	274 (88)	-
Kinship care	313 (15)	1 (4)	9 (7)	277 (17)	26 (8)	b
Other	56 (3)	1 (4)	1 (1)	41 (3)	13 (4)	-
Alleged type of maltreatment						
Abuse	105 (5)	2 (7)	8 (7)	86 (5)	9 (3)	-
Neglect	1,537 (75)	20 (69)	87 (70)	1,202 (75)	228 (73)	-
Both abuse and neglect	422 (21)	7 (24)	29 (23)	310 (19)	76 (24)	-
TPR	1,915 (93)	24 (83)	112 (90)	1,488 (93)	291 (93)	b c
State TPR law includes						
disability	1,449 (70)	5 (17)	84 (68)	1,116 (70)	244 (78)	a b c
ADA raised in case	125 (6)	7 (24)	35 (28)	53 (3)	30 (10)	b c
ADA applied in case	36 (2)	4 (14)	11 (9)	13 (1)	8 (3)	b c

Note: TPR = termination of parental rights; ADA = Americans with Disabilities Act.

a Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and intellectual disabilities.

b Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and psychiatric disabilities.

c Statistically significant difference at $p < 0.05$ between mothers with physical or sensory disabilities and multiple disabilities.

Table 2 presents the court, case, and policy characteristics. Cases involving mothers with multiple disabilities were significantly more likely than those with mothers with physical or sensory disabilities to have an expert testify that their disability negatively affected their ability to care for their children (54% vs. 31%). Compared to mothers with physical or sensory disabilities (72%), mothers with intellectual disabilities (87%) or multiple disabilities (89%) were significantly more likely to receive family preservation or reunification services. Nonetheless, only parents with multiple disabilities (44%) were significantly more likely to receive services specifically tailored to parents with disabilities. Children who had mothers with psychiatric disabilities were significantly more likely than

those whose mothers had physical or sensory disabilities to be placed in kinship care (17% vs. 4%).

Notably, the vast majority of cases (93%) resulted in the termination of parental rights. Compared to cases involving mothers with physical or sensory disabilities (83%), those with mothers with psychiatric disabilities (93%) or multiple disabilities (93%) were significantly more likely to end in the termination of parental rights. Cases involving mothers with intellectual disabilities (68%), psychiatric disabilities (70%), or multiple disabilities (78%), were significantly more likely than those with mothers with physical or sensory disabilities (17%) to be decided in states that included disability as grounds for termination of parental rights.¹⁶⁹

Very few cases raised the ADA (6%), and even fewer held that the ADA applied (2%). Compared to decisions relating to mothers with physical or sensory disabilities (24%), those that involved mothers with psychiatric disabilities (3%) or multiple disabilities (10%) were significantly less likely to raise the ADA. Further, courts were significantly less likely to apply the ADA in cases involving mothers with psychiatric disabilities (1%) or multiple disabilities (3%), compared to cases with mothers with physical or sensory disabilities (14%). No other statistically significant differences were found.

B. Bivariate Analysis

Table 3 presents the results of the bivariate analysis, showing which characteristics were associated with courts raising or applying the ADA. Compared to decisions involving mothers with physical or sensory disabilities, those that included mothers with psychiatric disabilities had an 89% decreased likelihood of raising the ADA ($OR = 0.11, p < 0.001$) and those with mothers with multiple disabilities had a 67% decreased likelihood of raising the ADA ($OR = 0.33, p < 0.05$). Other parent and family characteristics were also associated with the ADA being raised. Decisions that involved single mothers had a 34% reduced likelihood of raising the ADA ($OR = 0.66, p < 0.05$). Cases with substance use histories had a 55%

169. This finding is not surprising given that it is typically intellectual or psychiatric disabilities that are included in state statutes as grounds for termination of parental rights. *ROCKING THE CRADLE*, *supra* note 37, at 83 (“Currently, 36 states list psychiatric disabilities, 32 list intellectual or developmental disability, 18 list ‘emotional illness,’ and 7 list physical disabilities as grounds for TPR.”) (internal citations omitted).

decreased likelihood of raising the ADA ($OR = 0.45, p < 0.001$), and cases with criminal histories had a 59% reduced likelihood of raising the ADA ($OR = 0.41, p < 0.001$). In addition, cases that included a disabled child had two times higher odds of raising the ADA ($OR = 2.02, p < 0.001$), and those with prior child welfare system involvement without previous termination of parental rights had a 43% decreased likelihood of raising the ADA ($OR = 0.57, p < 0.05$). In comparison to cases decided in the Midwest, those decided in the Northeast ($OR = 0.38, p < 0.001$), Southwest ($OR = 0.31, p < 0.01$), and West ($OR = 0.21, p < 0.001$), had reduced odds of raising the ADA. Cases in which the mother was provided family preservation or reunification services had a two times greater likelihood of raising the ADA ($OR = 2.22, p < 0.05$). Additionally, the odds that the ADA was raised were two times higher for cases in which the child placement was "other," compared to cases where the child was in foster care ($OR = 2.52, p < 0.05$). Further, cases that were decided in states whose dependency statutes included parental disability as grounds for termination of parental rights had a 68% decreased likelihood of raising the ADA ($OR = 0.32, p < 0.001$).

Several associations between parent, family, court, case, and policy characteristics and courts applying the ADA were also found. Compared to cases involving mothers with physical or sensory disabilities, those with mothers with psychiatric disabilities had a 95% decreased likelihood of applying the ADA ($OR = 0.05, p < 0.001$), and those with mothers with multiple disabilities had an 84% reduced likelihood of applying the ADA ($OR = 0.16, p < 0.01$). Cases involving single mothers ($OR = 0.36, p < 0.01$) or criminal histories ($OR = 0.35, p < 0.01$) had reduced odds of applying the ADA. Conversely, the likelihood that the ADA was applied was two times greater if there was a disabled child ($OR = 2.15, p < 0.05$). Cases decided between 2011 and 2016 had nearly five times greater likelihood of applying the ADA than those decided between 2006 and 2010 ($OR = 4.93, p < 0.01$). Also, compared to cases decided in the Midwest, those decided in the Northeast ($OR = 0.16, p < 0.01$), Southeast ($OR = 0.26, p < 0.05$), and West ($OR = 0.26, p < 0.01$) had reduced odds of applying the ADA.¹⁷⁰ In addition, the odds that the ADA was applied were increased if there was an expert who testified against the parent ($OR = 3.95, p < 0.001$), the parent was provided services for disabled parents ($OR = 1.91, p < 0.05$), or the child placement was "other" ($OR = 8.83, p < 0.001$). Meanwhile, cases that were decided in states whose dependency statutes listed disability as

170. No cases applied the ADA in the Southwest region.

grounds for termination of parental rights had 82% lower odds of applying the ADA ($OR = 0.18, p < 0.001$).

Table 3. Association Between Characteristics and Courts Raising or Applying the ADA

Variable	ADA raised		ADA applied	
	OR	95% CI	OR	95% CI
Parent and family characteristics				
Maternal disability type				
Physical or sensory	ref	ref	ref	ref
Intellectual	1.24	0.48, 3.15	0.61	0.18, 2.07
Psychiatric	0.11***	0.04, 0.26	0.05***	0.02, 0.17
Multiple	0.33*	0.13, 0.84	0.16**	0.05, 0.58
Single	0.66*	0.46, 0.95	0.36**	0.19, 0.72
Two disabled parents	1.25	0.65, 2.39	0.87	0.30, 2.54
Criminal history	0.45***	0.30, 0.67	0.35**	0.16, 0.78
Substance use history	0.41***	0.28, 0.59	0.60	0.31, 1.17
Income < 200% FPL	1.05	0.70, 1.56	2.14	0.88, 5.16
Disabled children	2.02***	1.40, 2.90	2.15*	1.11, 4.17
Prior child welfare system involvement				
No prior involvement	ref	ref	ref	ref
Yes, not TPR	0.57*	0.34, 0.94	0.54	0.20, 1.45
Yes, TPR	1.01	0.65, 1.57	1.40	0.67, 2.95
2 or more children	0.85	0.58, 1.25	1.27	0.59, 2.71
Court, case, and policy characteristics				
Case decided between 2011 and 2016	1.12	0.77, 1.63	4.93**	1.74, 13.99
Highest court of appeals	1.43	0.70, 2.89	1.06	0.25, 4.45
Region				
Midwest	ref	ref	ref	ref
Northeast	0.38***	0.23, 0.65	0.16**	0.05, 0.54
Southeast	0.68	0.42, 1.09	0.26*	0.09, 0.76
Southwest ^a	0.31**	0.13, 0.73	-	-
West	0.21***	0.11, 0.40	0.26**	0.10, 0.69
Expert testimony in support of parent	0.55	0.24	0.66	0.16, 2.77
Expert testimony against parent	1.40	0.97, 2.01	3.95***	1.89, 8.24
Parent provided services	2.22*	1.15, 4.29	3.21	0.77, 13.42
Parent provided services for disabled parents	1.05	0.72, 1.51	1.91*	0.99, 3.72
Placement of child				
Foster care	ref	ref	ref	ref
Kinship care	0.60	0.33, 1.11	0.40	0.09, 1.68
Other	2.52*	1.16, 5.47	8.83***	3.67, 21.25
Alleged type of maltreatment				
Abuse	ref	ref	ref	ref
Neglect	1.36	0.54, 3.42	1.86	0.25, 13.82
Both abuse and neglect	1.10	0.41, 2.98	2.01	0.25, 16.25
State TPR law includes disability	0.32***	0.22, 0.45	0.18***	0.09, 0.36
TPR	2.44	0.89, 6.72	1.33	0.32, 5.58

Notes: TPR = termination of parental rights; ADA = Americans with Disabilities Act. ref indicates the reference group that was used for analysis. For example, for maternal disability type, physical or sensory disability was the reference group so the other types of disability were compared to physical or sensory disability.

^a No cases applied the ADA in the Southwest.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

C. Logistic Regression Models

Based on findings from the unadjusted comparisons in **Table 3**, two logistic regression models were estimated to determine predictors of whether the ADA was raised or applied in termination of parental rights appeals cases involving mothers with disabilities. In particular, the objective was to determine whether a mother's disability type was associated with courts raising or applying the ADA. The logistic regression models only included characteristics that had statistically significant associations in the unadjusted comparisons. In this Section, we present our findings. We first discuss factors that predicted courts raising the ADA. Next, we describe the predictors of courts applying the ADA in these opinions.

1. Predictors of Courts Raising the ADA

Table 4. Odds Ratios [95% CI] for Logistic Regression Models of Courts Raising the ADA

Variable	N (%)	Model 1	Model 2
		OR [95% CI]	OR [95% CI]
Parent and family characteristics			
Maternal disability type			
Physical or sensory	7 (6)	ref	ref
Intellectual	35 (28)	0.99 [0.38, 2.58]	1.46 [0.53, 4.08]
Psychiatric	53 (42)	0.12 [0.05, 0.31]***	0.19 [0.07, 0.50]**
Multiple	30 (24)	0.33 [0.13, 0.86]*	0.53 [0.19, 1.47]
Single	67 (54)	0.81 [0.55, 1.19]	0.82 [0.55, 1.22]
Criminal history	34 (27)	0.63 [0.41, 0.98]*	0.59 [0.38, 0.93]*
Substance use history	42 (34)	0.62 [0.41, 0.94]*	0.58 [0.37, 0.88]*
Disabled child	63 (50)	1.71 [1.16, 2.52]**	1.63 [1.09, 2.44]*
Prior child welfare system involvement			
No prior involvement	75 (60)	ref	ref
Yes, not TPR	20 (16)	0.67 [0.40, 1.14]	0.58 [0.34, 1.00]*
Yes, TPR	30 (24)	1.03 [0.65, 1.64]	0.94 [0.58, 1.52]
Court, case, and policy characteristics			
Region			
Midwest	62 (50)		ref
Northeast	19 (15)		0.44 [0.25, 0.78]**
Southeast	27 (22)		1.21 [0.70, 2.10]
Southwest	6 (5)		0.69 [0.27, 1.77]
West	11 (9)		0.46 [0.22, 0.94]*
Parent provided services	115 (92)		2.12 [1.02, 4.39]*
Placement of child			
Foster care	105 (84)		ref
Kinship care	12 (10)		0.90 [0.46, 1.75]
Other	8 (6)		3.03 [1.26, 7.31]**
State TPR law includes disability	56 (45)		0.31 [0.20, 0.49]***
Constant		0.43 [0.17, 1.08]	0.41 [0.14, 1.24]
X ²		124.52***	189.10***

Note: TPR = termination of parental rights. ref indicates the reference group that was used for analysis. For example, for maternal disability type, physical or sensory disability was the reference group so the other types of disability were compared to physical or sensory disability.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

As shown in **Table 4**, in the first model, after controlling for parent and family characteristics, maternal disability type was associated with courts raising the ADA. Specifically, compared to cases involving mothers with physical or sensory disabilities, those with psychiatric disabilities had 88% decreased odds of raising the ADA ($OR = 0.12, p < 0.001$) and those with multiple disabilities had a 67% lower likelihood of raising the ADA ($OR = 0.33, p < 0.05$). Furthermore, cases that had criminal histories had a 37% lower likelihood of raising the ADA ($OR = 0.63, p < 0.05$), and those with substance use histories had 38% decreased odds ($OR = 0.62, p < 0.05$). Conversely, cases that included a disabled child had a 71% increased likelihood of raising the ADA ($OR = 1.71, p < 0.01$).

In the second model, we controlled for both parent and family characteristics as well as court, case, and policy characteristics (**Table 4**) and found psychiatric disability was the only maternal disability type that was associated with whether courts raised the ADA. Specifically, in cases involving mothers with psychiatric disabilities, courts had 81% decreased odds of raising the ADA ($OR = 0.19, p < 0.01$). Additionally, cases that had criminal histories had 41% lower odds of raising the ADA ($OR = 0.59, p < 0.05$), and those with substance use histories had 42% decreased odds ($OR = 0.58, p < 0.05$). Cases that included a disabled child had a 63% increased likelihood of raising the ADA ($OR = 1.63, p < 0.05$). If there was prior involvement with the child welfare system without past termination of parental rights, cases had a 42% lower likelihood of raising the ADA ($OR = 0.58, p < 0.05$). Concerning geographic variation, compared to cases decided in the Midwest, those decided in the Northeast ($OR = 0.44, p < 0.01$) or West ($OR = 0.46, p < 0.05$) had lower odds of raising the ADA. If the parent was provided family preservation or reunification services that were not tailored to parents with disabilities, cases had two times greater odds of raising the ADA ($OR = 2.12, p < 0.05$). Cases with kinship care placements had three times greater odds of raising the ADA ($OR = 3.03, p < 0.01$), compared to cases with foster care placements. Finally, cases that were decided in states whose dependency statutes listed disability as grounds for termination of parental rights had a 69% reduced likelihood of raising the ADA ($OR = 0.31, p < 0.001$).

2. Predictors of Courts Applying the ADA

As presented in **Table 5**, in the first model, after controlling for parent and family characteristics, maternal disability type was associated with courts applying the ADA. Specifically, compared to opinions relating to mothers with physical or sensory disabilities, those with psychiatric disabilities had 94% decreased odds of applying the ADA ($OR = 0.06, p < 0.001$) and those with multiple disabilities had 85% lower odds ($OR = 0.15, p < 0.01$). Cases in which the mother was single had a 95% lower likelihood of applying the ADA ($OR = 0.45, p < 0.05$). Additionally, courts had 59% lower odds of applying the ADA in cases in which there was a criminal history ($OR = 0.41, p < 0.05$).

Table 5. Odds Ratios [95% CI] for Logistic Regression Models of Courts Applying the ADA

Variable	N (%)	Model 1	Model 2
		OR [95% CI]	OR [95% CI]
Parent and family characteristics			
Mother's disability type			
Physical or sensory	4 (11)	ref	ref
Intellectual	11 (31)	0.46 [0.13, 1.65]	0.82 [0.19, 3.59]
Psychiatric	13 (36)	0.06 [0.02, 0.19]***	0.06 [0.16, 0.25]***
Multiple	8 (22)	0.15 [0.04, 0.55]**	0.19 [0.04, 0.87]*
Single	14 (39)	0.45 [0.23, 0.91]*	0.51 [0.24, 1.09]
Criminal history	8 (22)	0.41 [0.18, 0.93]*	0.44 [0.18, 1.06]
Disabled child	19 (53)	1.73 [0.87, 3.44]	1.88 [0.90, 3.95]
Court, case, and policy characteristics			
Case decided between 2011 and 2016	32 (89)		4.99 [1.65, 15.10]**
Expert testimony against parent	26 (72)		4.09 [1.82, 9.22]**
Parent provided services for disabled parents	20 (56)		1.49 [0.71, 3.12]
Placement of child			
Foster care	27 (75)		ref
Kinship care	2 (6)		0.49 [0.11, 2.26]
Other	7 (19)		8.77 [2.92, 26.43]***
State TPR law includes disability	11 (31)		0.14 [0.06, 0.33]***
Constant		0.25 [0.08, 0.83]*	0.04 [0.06, 0.33]***
X ²		51.99***	117.78***

Note: TPR = termination of parental rights. ref indicates the reference group that was used for analysis. For example, for maternal disability type, physical or sensory disability was the reference group so the other types of disability were compared to physical or sensory disability.
 * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

In the second model, we controlled for both parent and family characteristics as well as court, case, and policy characteristics (**Table 5**). Again, maternal disability type was associated with courts applying the ADA. Specifically, cases involving mothers with psychiatric disabilities had a 94% decreased likelihood of applying the ADA ($OR = 0.06, p < 0.001$), and cases that included mothers with multiple disabilities had 81% lower odds ($OR = 0.19, p < 0.05$). Courts had nearly five times higher odds of applying the ADA in cases decided between the years 2011 and 2016, compared to those decided between the years 2006 and 2010 ($OR = 4.99, p < 0.01$).

Courts had four times higher odds of applying the ADA if an expert testified against the parent ($OR = 4.19, p < 0.01$). Compared to foster care placement, courts had nearly nine times greater odds of applying the ADA if the child's placement was "other" ($OR = 8.77, p < 0.001$). Conversely, courts had an 86% decreased likelihood of applying the ADA in states where the state dependency law included disability as grounds for termination of parental rights ($OR = 0.14, p < 0.001$).

IV. IMPLICATIONS FOR POLICY, PRACTICE, AND RESEARCH

This Article reports on an empirical study that investigated the predictors of courts raising or applying the ADA in termination of parental rights appellate decisions involving mothers with disabilities. The data were drawn from an analysis of 2,064 appeals cases decided between the years 2006 and 2016. While one study cannot satisfy the many unanswered questions about how to ensure that the ADA is effectively raised and applied in termination of parental rights cases involving parents with disabilities, this study has created new knowledge. First, this study found the ADA was only raised in 6% of the decisions and only applied in 2% of the decisions. Second, after controlling for parent, family, court, case, and policy characteristics, this study showed courts had a lower likelihood of raising the ADA in cases involving mothers with psychiatric disabilities. Third, after controlling for parent, family, court, case, and policy characteristics, this study found courts had lower odds of applying the ADA in cases involving mothers with psychiatric disabilities or multiple disabilities. Other factors were also associated with whether the ADA was raised or applied, including criminal history, substance use history, prior child welfare system involvement, the presence of a disabled child, when the case was decided, geographical location, negative expert testimony, provision of family preservation or reunification services, and state dependency statutes that include disability as grounds for termination of parental rights.

To date, research about parents with disabilities and their families has had notable limitations. Specifically, existing legal scholarship has been mostly theoretical or doctrinal, often concentrated on specific jurisdictions or limited to parents with intellectual or psychiatric disabilities, and has lacked empirical analysis of the intersection between the ADA and the child welfare system. Consequently, the significance of this study lies in providing the first-ever empirical analysis of termination of parental rights appeals decisions involving mothers with disabilities and their families over a ten-year period to identify predictors of courts raising or applying the ADA.

Based on this study alone, we do not presume to identify all of the factors that predict if the ADA is raised or applied in appellate termination of parental rights cases involving mothers with disabilities, nor can we explain the exact causes of certain disparities. Instead, we offer insights into factors that may increase the likelihood of the ADA being raised and applied. Second, we attempt to elucidate how this study's findings can inform legal advocacy for parents with disabilities involved with the child welfare system. Finally, we suggest implications for policymaking and practice as well as directions for future research. In this Part, we consider areas deserving further attention by policymakers, the legal profession, and scholars.

A. *Policy and Practice Implications*

As knowledge about child welfare system involvement among parents with disabilities and their families continues to grow, areas of potential policy and practice interventions will become more salient. This Article provides a better understanding of factors that predict whether the ADA is raised or applied in appellate termination of parental rights decisions involving mothers with disabilities. In turn, findings from this study can inform both the development and implementation of policies and practices that address some of the issues facing these families as well as strategies for representing parents with disabilities in termination of parental rights proceedings. While a complete agenda for policy and practice proposals is beyond the scope of this Article, this Subpart offers four policy and practice implications worthy of consideration: (1) training and information for judges and attorneys; (2) oversight and enforcement by the federal government; (3) development and implementation of community-based services and supports; and (4) legislative advocacy.

1. Training and Information for Judges and Attorneys

First, our study confirmed the long-held position of scholars and advocates that the ADA is not being effectively utilized during termination of parental rights proceedings involving disabled parents,¹⁷¹ and indicates

171. See, e.g., Smith, *supra* note 49, at 193 (“Previously, courts were extremely split on whether the ADA could be utilized by parents with mental disabilities in the child welfare context.”); Collentine, *supra* note 49, at 562 (“It follows that the ADA should apply and that delayed parents who have

an urgent need for training and information for judges and attorneys about the ADA.¹⁷² In this study, we found that among termination of parental rights appeals cases involving mothers with disabilities, the ADA was only raised in 6% of the decisions and only applied in 2% of the decisions. We also found courts had lower odds of raising the ADA in cases with mothers with psychiatric disabilities as well as decreased odds of applying the ADA in cases involving mothers with psychiatric disabilities or multiple disabilities.

While it is well-established that the ADA pertains to all aspects of the child welfare system, including termination of parental rights proceedings,¹⁷³ the decreased odds that the ADA was raised or applied in the cases analyzed for this study may reflect a lack of knowledge or training by judges and attorneys about disability rights law.¹⁷⁴ This study only examined appellate decisions, which makes its findings especially insightful. Generally, parents may only seek review by a higher court if they believe that the lower court erred in analyzing the facts of the case or applying the law. That is, appellate courts usually only consider issues related to disability laws that were raised at the trial level. Scholars have noted that attorneys often fail to raise the ADA until the appellate level,

had their rights terminated on the basis of their delays should have a strong cause of action. However, actions appealing a termination of parental rights under the ADA have not been successful.”).

172. See Smith, *supra* note 49, at 194 (recommending “widespread training of all legal system actors and resource personnel in child welfare, which would include education on the ADA and disabilities, but would also more broadly include information about racial bias, class bias, and interagency collaboration”).
173. The child welfare system has clear mandates vis-à-vis the ADA. See *supra* Section I.B. Nonetheless, courts have demonstrated a reluctance to apply the ADA in termination of parental rights proceedings. See *supra* Section I.C.
174. See ROCKING THE CRADLE, *supra* note 37, at 31 (“Many attorneys lack the skills and experience to meet the needs of parents with disabilities.”); Stephanie N. Gwillim, Comment, *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.R. 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 37, at 98–101 (discussing issues related to lack of knowledge by judges); Kay, *supra* note 153, at 31.

when it is usually too late.¹⁷⁵ Hence, trial attorneys must preserve the record for subsequent appeals, and that must include raising the ADA early and often.¹⁷⁶ In this study, the ADA was rarely raised, indicating possible failures by both trial and appellate attorneys. Specifically, it is unclear if the limited discussion of the ADA in appeals decisions reflect trial attorneys not previously raising the ADA, appellate attorneys failing to pursue it, or a combination of both. It is even more troubling that the ADA was seldom applied, suggesting that both judges and attorneys are misinformed about the law's purpose in these cases. Similar to attorneys, judges rarely receive training about disabled parents or the ADA.¹⁷⁷ Therefore, judges may fail to apply the ADA in these cases because they do not understand how it is relevant. Further, attorneys must understand the ADA so that they can better advocate for it during appellate proceedings.

To be sure, training for judges and attorneys should be required in all states, regardless of existing legal precedent that has determined that the ADA does not apply in termination of parental rights cases or state statutes that include parental disability as grounds for parental rights. As DOJ and HHS noted in their 2015 technical assistance,

all child welfare-related activities and programs of child welfare agencies and courts are covered [by the ADA], including, but not limited to, investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings.¹⁷⁸

175. Kay, *supra* note 122, at 816.

176. *Id.* at 818 (“[Attorneys] must be comfortable with discussing disability with their clients and others involved in the case, and advocate early and often for reasonable accommodations.”).

177. See *ROCKING THE CRADLE*, *supra* note 37, at 98–101 (discussing issues related to lack of knowledge by judges); Gwillim *supra* note 174, at 343 (“[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 Robyn M. Powell et al., *Responding to the Legal Needs of Parents with Psychiatric Disabilities: Insights from Interviews with Parents*, 38 *LAW & INEQ.* 1, 31 (2020) (reporting on interviews with parents with psychiatric disabilities who described instances in which they felt the judge in their case lacked understanding of their disabilities and that this paucity of knowledge affected the outcome in their custody case).

178. TECHNICAL ASSISTANCE, *supra* note 135, at 8.

Furthermore, state statutes that are discriminatory toward people with disabilities (e.g., those that list parental disability as grounds for termination of parental rights)¹⁷⁹ violate the ADA and must become congruent with federal law.¹⁸⁰ Accordingly, precedent that says the ADA does not apply should be challenged. State laws that run afoul of the ADA should similarly be challenged. At the same time, to understand these details, judges and attorneys must be adequately trained.

Findings from this study underscore the importance of judge and attorney training and information about the ADA and its legal mandates for the child welfare system, especially obligations related to reasonable modifications and individualized treatment.¹⁸¹ Further, judges and attorneys need to understand how the ADA protects certain populations, namely people with psychiatric disabilities or substance use disorders. In the present study, cases involving mothers with psychiatric disabilities or substance use histories had lower odds of raising the ADA. Moreover, cases involving mothers with psychiatric disabilities or multiple disabilities had decreased odds of applying the ADA.¹⁸² These findings are notable because the ADA protects people with both psychiatric disabilities and substance use disorders.¹⁸³ Hence, these findings may indicate that

179. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2020) (“The parent or parents . . . are presently and for the foreseeable future unable, by reason of mental illness or intellectual disability to provide proper and adequate care for a child . . .”).

180. *See* 42 U.S.C. § 12201(b); 28 C.F.R. § 35.103(b); *see also* Kay, *supra* note 122, at 808 (“Another assertion by courts is that the ADA was not meant to change obligations imposed by unrelated statutes. Yet nothing in the ADA suggests that actions under such statutes are spared; if they are discriminatory, they must be brought into conformance with the ADA.”) (internal citations omitted).

181. *See supra* Section I.B (describing the child welfare system’s legal mandates vis-à-vis the ADA).

182. Among mothers with multiple disabilities, 298 (95%) had a psychiatric disability in addition to another disability.

183. According to the ADA, a person is defined as having a disability if she (1) has a physical or *mental impairment* that substantially limits a major life activity, (2) has a record of such impairment, or (3) is regarded as having such impairment. 42 U.S.C. § 12102(1) (emphasis added). Further, substance use is considered a disability under the ADA. 42 U.S.C. § 12210. Nevertheless, the ADA does not protect people currently using illegal drugs. 28 C.F.R. Pt. 35, App. A, 35.131.

judges and attorneys lack knowledge about how the ADA relates to these disabilities.

Training for judges and attorneys can be provided through a variety of avenues. For example, continuing legal education training may be an appropriate mechanism to educate judges and attorneys about application of the ADA in termination of parental rights proceedings, especially since legal professionals in nearly all states are required to complete annual continuing legal education training to maintain their law licenses.¹⁸⁴ Through continuing legal education, this training could be widely available to all legal professionals. The National Council of Juvenile and Family Court Judges as well as the National Judicial College¹⁸⁵ could also make ongoing training and information about the ADA and parents with disabilities available to judges. Notably, a study found that implicit bias training coupled with a judicial “benchcard” used during hearings from the National Council of Juvenile and Family Court Judges led to fewer out-of-home placements in child welfare cases.¹⁸⁶ An approach focused on disabled parents may have similar results.

Further, it is crucial to recognize that attorneys who represent disabled parents in termination of parental rights proceedings are often court-appointed.¹⁸⁷ In this study, the majority of mothers had household incomes below 200% of the federal poverty level, which is consistent with prior research showing that poverty is a pervasive issue for many parents

184. Continuing legal education training is not required of legal professionals in Maryland, Massachusetts, Michigan, South Dakota, and the District of Columbia. See American Bar Association, *MCLE Information by Jurisdiction*, https://www.americanbar.org/cle/mandatory_cle/mcle_states.html [<https://perma.cc/WLW4-FR5H>].

185. Natalie Anne Knowlton, *The Modern Family Court Judge: Knowledge, Qualities, and Skills for Success*, 53 FAM. CT. REV. 203, 210 (2015) (“Since 1937, the National Council of Juvenile and Family Court Judges (NCJFCJ) has supported family courts and family court judges across the country through cutting-edge training, wide-ranging technical assistance, research, and unique advanced training. Similarly, the National Judicial College (NJC) has long recognized the need for holistic and interdisciplinary training for family court judges, serving as a resource for state courts for over fifty years.”).

186. Jesse Russell & Alicia Summers, *Reflective Decision-Making and Foster Care Placements*, 19 PSYCHOL. PUB. POL’Y & L. 127, 131–33 (2013).

187. ROCKING THE CRADLE, *supra* note 37, at 100.

with disabilities.¹⁸⁸ Consequently, most of the attorneys who represented the mothers in this study were likely court-appointed with sizable caseloads and limited knowledge about how the ADA applies in these cases or best practices for representing these families.¹⁸⁹ It is essential, then, that the entities overseeing these attorneys provide ongoing training about disabled parents, particularly the ADA. Moreover, parents' attorneys should develop partnerships with disability rights attorneys who can advise them on strategies for effectively using the ADA in these cases.¹⁹⁰

2. Oversight and Enforcement by the Federal Government

Second, increased oversight and enforcement by the federal government is essential. In 2012, the National Council on Disability (NCD), an independent federal agency, issued its groundbreaking report, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their*

188. *Id.* at 202 (“[T]he most significant difference between parents with disabilities and parents without disabilities is economic”); see also Li et al., *supra* note 36, at 305; Susan L. Parish et al., *It’s Just That Much Harder: Multilayered Hardship Experiences of Low-Income Mothers with Disabilities*, 23 AFFILIA 51, 51–58 (2008); Sonik et al., *supra* note 36, at 1.

189. ROCKING THE CRADLE, *supra* note 37, at 100.

190. 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 37, at 215. Nonetheless, in light of 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. As the National Council on Disability noted, “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.*

Children.¹⁹¹ In recommending that DOJ and HHS vigorously investigate and enforce ADA violations by the child welfare system, NCD affirmed: “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.”¹⁹²

Since then, the federal government has directed unprecedented attention toward protecting the rights of parents with disabilities. In 2015, DOJ and HHS jointly issued a letter of findings stating that the Massachusetts Department of Children and Families violated the ADA and the Rehabilitation Act by acting on the basis of presumptions about the capabilities of a mother with an intellectual disability and failing to provide that mother and her daughter appropriate services.¹⁹³ Later that year, DOJ and HHS issued technical guidance to all state child welfare agencies and courts reaffirming their obligations under the ADA and the Rehabilitation Act.¹⁹⁴ In May 2016, the White House held its first-ever Forum on the Civil Rights of Parents with Disabilities, inviting disability rights advocates, parents with disabilities, leaders of the child welfare system, and policymakers to discuss ways to safeguard the rights of disabled parents.¹⁹⁵ Most recently, in November 2019, the Office for Civil Rights at HHS entered into a voluntary resolution agreement with the Oregon Department of Human Services, finding that the agency removed two infant children from a mother and father with disabilities and denied the parents meaningful opportunities to reunite with their children due in significant part to their disabilities.¹⁹⁶

191. ROCKING THE CRADLE, *supra* note 37. The first author of this article was an attorney-advisor at the NCD at the time this report was issued and served as the report’s principal author.

192. *Id.* at 85–86.

193. Letter of Findings, *supra* note 134.

194. TECHNICAL ASSISTANCE, *supra* note 135.

195. White House, *Forum on the Civil Rights of Parents with Disabilities* (May 5, 2016), <https://obamawhitehouse.archives.gov/photos-and-video/video/2016/05/05/forum-civil-rights-parents-disabilities> [<https://perma.cc/478E-QGU4>].

196. VOLUNTARY RESOLUTION AGREEMENT, *supra* note 136; see Shaun Heasley, *Feds Work to Protect Parents with Intellectual Disabilities*, DISABILITY SCOOP (Dec. 9, 2019), <https://www.disabilityscoop.com/2019/12/09/feds-work-to->

Despite these efforts, however, the low frequency in which the ADA was raised or applied in the cases analyzed for this study may indicate that additional oversight and enforcement by DOJ and HHS is necessary. DOJ and HHS must collect data about parents with disabilities and their experiences with the child welfare system. In particular, this data should track the prevalence of child welfare system involvement among disabled parents, compare outcomes between parents with and without disabilities, and monitor how, and what, if any, policies agencies and courts have developed and implemented to ensure compliance with the ADA. Furthermore, DOJ and HHS should vigorously and swiftly investigate all allegations of noncompliance with the ADA by the child welfare system and enforce these cases as appropriate. To that end, attorneys representing parents should also consider filing complaints concerning ADA violations with both DOJ and HHS. Finally, DOJ and HHS should issue additional guidance for child welfare agencies and courts about their legal obligations, with updated information on recent state court decisions that have found that the ADA applies in these cases. Guidance and technical assistance should also be available for disabled parents and their attorneys. Notably, this study found decisions issued between 2011 and 2016 had increased odds of applying the ADA, compared to those decided between 2006 and 2010, suggesting the aforementioned attention by the federal government may be positively impacting these cases.

3. Development and Implementation of Community-Based Services and Supports

Finally, findings from this study show that consideration must be given toward developing and implementing services and supports for parents with disabilities and their families. While the provision of family preservation or reunification services increased the likelihood that the ADA was raised, it did not predict application of the ADA. Further, although the provision of services tailored to parents with disabilities was not associated with whether the ADA was raised or applied, it is worth noting that such tailored services were provided in less than half of the cases. Moreover, receipt of these services does not mean that they actually met the needs of the parent, as required by the ADA.

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[<https://perma.cc/552C-KS9Q>].

Community-based services and supports are essential reasonable modifications required by the ADA that should be provided to disabled parents as soon as they are involved with the child welfare system. Studies have shown that disabled parents are often not provided family preservation or reunification services by the child welfare system,¹⁹⁷ and even when they are provided services, they are often inadequate because they are not individually tailored to meet the needs of disabled parents.¹⁹⁸ Thus, attention and resources must be allocated to improving services for disabled parents. In some instances, this can be accomplished by modifying existing services, such as providing a sign language interpreter for deaf parents for parenting classes. At other times, child welfare agencies will need to contract with established programs that are designed for parents with disabilities and their families, such as interventions intended for parents with intellectual disabilities. Further, as the findings from this study demonstrate, attorneys need to advocate zealously for their clients to receive individually tailored services and supports.

Courts and child welfare agencies must do more to ensure that the child welfare system is fully complying with the ADA, including providing individually tailored services and supports. For example, child welfare agencies should develop detailed policies and procedures for their employees about providing reasonable modifications, such as community-based services and supports. Such policies and procedures may help lessen uncertainty for child welfare professionals and ensure that families receive appropriate services promptly. Further, courts should require proof from child welfare agencies that they provided individually tailored services and supports to parents with disabilities before an agency petitions for termination of parental rights.

4. Legislative Advocacy

There is an urgent need to reform state child welfare laws so that they conform with the ADA. As previously mentioned, nearly thirty states have

197. *ROCKING THE CRADLE*, *supra* note 37, at 71–107; *IASSID SIRG*, *supra* note 46, at 296; Robyn M. Powell & Joanne Nicholson, *Disparities in Child Protective Services: Commentary on Kaplan et al. (2019)*, 70 *PSYCHIATRIC SERVS.* 209, 209–10 (2019); Slayter & Jensen, *supra* note 155, at 300–01.

198. Swain & Cameron, *supra* note 155, at 170. Examples of services include in-home training for parents, adaptive parenting equipment, respite services, and mental health treatment.

introduced or passed legislation aimed at ensuring the rights of disabled parents.¹⁹⁹ While these efforts have been primarily led by disability rights advocates, they have benefited tremendously from the support of legal professionals.²⁰⁰ In particular, attorneys should provide insights about the issues they face when representing parents with disabilities and the best ways to challenge discriminatory language within existing legislation. The National Research Center for Parents with Disabilities recently released toolkits for advocates and attorneys containing strategies for passing legislation concerning parents with disabilities.²⁰¹ Based on interviews with advocates and legislators, they identified “key principles of effective legislation”: removal of discriminatory language from existing statutes, a definition of disability consistent with the ADA, specific definitions of key terms (e.g., adaptive parenting strategies), affirmation that the ADA applies in child welfare cases, a duty to prove nexus between parental disability and alleged harm, written court findings about how a parent’s disability affects her parenting capabilities, and mandatory training for child welfare workers.²⁰² Undeniably, systems-level change is necessary to comprehensively address the discrimination that parents with disabilities encounter within the child welfare system and ensure that agencies properly comply with the ADA. Legislative advocacy offers an important mechanism for eliminating some of the deeply-rooted causes of bias.

B. Areas of Future Research

This study’s findings provide an important foundation for future scholarship about the intersection of the ADA and the child welfare system. While research related to parents with disabilities and the child

199. *Map of Current State Legislation Supporting Parents with Disabilities*, *supra* note 124.

200. Robyn M. Powell et al., *Barriers and Solutions to Passing State Legislation to Protect the Rights of Parents with Disabilities: Lessons from Interviews with Advocates, Attorneys, and Legislators* (2020) (unpublished manuscript) (on file with author).

201. Nat’l Research Ctr. for Parents with Disabilities, *How to Pass Legislation Protecting Parents with Disabilities and Their Children: Toolkits for Advocates and Legislators*, HELLER SCHOOL OF SOC. POL’Y & MGMT. (July 2020), <https://heller.brandeis.edu/parents-with-disabilities/training/legislation-toolkits.html> [<https://perma.cc/3XAC-MT4C>].

202. *Id.*

welfare system disparities they experience is rapidly burgeoning, the need for additional scholarship related to the ADA is immense. Therefore, the potential for follow-up studies to the present one is considerable. This Section highlights areas warranting further attention by scholars.

First, more knowledge is needed about how a parent's disability is associated with courts raising or applying the ADA in termination of parental rights cases. In this study, we found that even after controlling for a variety of parent, family, court, case, and policy characteristics, cases involving mothers with psychiatric disabilities had a decreased likelihood of raising the ADA. Furthermore, courts had lower odds of applying the ADA in cases involving mothers with psychiatric disabilities or multiple disabilities. Future studies should further investigate disparities based on specific diagnoses rather than broad disability types. In cases involving parents with multiple disabilities, studies should also examine the association between courts raising or applying the ADA and the parents' specific disabilities. In this study, we coded a mother as having multiple disabilities if there was more than one disability discussed in the opinion. We did not analyze, however, the specific disability types, nor did we consider the number of disabilities a mother had. Also, in this study, substance use history decreased the likelihood that the ADA was raised. Future research should consider substance use as a disability, in accordance with the ADA.²⁰³ In addition, we did not stratify our analysis by the other parent's disability type. While having a second parent with a disability was not associated with whether the ADA was raised or applied, future investigations should study if that changes based on their disability type.

Second, additional research is needed to better understand the role of expert testimony in termination of parental rights cases involving parents with disabilities. In our study, negative expert testimony concerning the mother's parenting capabilities increased the odds that the ADA was applied. This is an unexpected finding that necessitates further study. In fact, in another study analyzing the same dataset, we found that positive expert testimony decreased the odds of termination of parental rights while negative expert testimony increased the likelihood of termination of parental rights.²⁰⁴ We also know that in termination of parental rights

203. Substance use is considered a disability under the ADA. *See* 42 U.S.C. § 12210. However, the ADA does not protect people currently using illegal drugs. *See* 28 C.F.R. pt. 35, app. A, 35.131.

204. Powell et al., *supra* note 137.

proceedings, parents with disabilities often undergo assessments by mental health professionals who then testify as expert witnesses,²⁰⁵ and judges tend to rely heavily on this expert testimony.²⁰⁶ Judges and attorneys rarely challenge these experts and the expert testimony often informs a judge's decision on whether to terminate the parent's rights.²⁰⁷ At times, these experts harbor biases about parents with disabilities.²⁰⁸ 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 ability.²⁰⁹ Hence, future scholarship should investigate who is testifying in these trials and their credentials, if parents' attorneys are challenging such testimony, and whether the assessments are consistent with the American Psychological Association's *Guidelines for Assessment of and Intervention with Persons with Disabilities*.²¹⁰

Third, further studies should investigate if the increased attention by policymakers and the federal government to the rights of parents with disabilities is improving outcomes for these families. In this study, cases decided between the years 2011 and 2016 had higher odds of applying the ADA than cases decided between the years 2006 and 2010. Although this study included cases decided up to four years after NCD issued its landmark *Rocking the Cradle* report,²¹¹ it only captured decisions made up to one year after DOJ and HHS issued its letter of findings and technical assistance.²¹² Given the time constraints and the small number of cases that raised or applied the ADA in this study's sample, it is difficult to

205. Benjet & Azar, *supra* note 153, at 239.

206. MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 244 (1999).

207. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1237–38 (1990).

208. Duffy Dillon, *Child Custody and the Developmentally Disabled Parent*, 2000 WIS. L. REV. 127, 149 (2000).

209. Kay, *supra* note 153, at 33. For a discussion of appropriate and accessible parenting assessments, see ROCKING THE CRADLE, *supra* note 37, at 129–38.

210. *Guidelines for Assessment of and Intervention with Persons with Disabilities*, AM. PSYCH. ASS'N (2012), <https://www.apa.org/pi/disability/resources/assessment-disabilities> [<https://perma.cc/3HSR-YPFG>].

211. ROCKING THE CRADLE, *supra* note 37.

212. Letter of Findings, *supra* note 134; TECHNICAL ASSISTANCE, *supra* note 135.

determine whether the federal government's efforts were associated with an increase of courts raising or applying the ADA. Future research should include a bigger sample and analyze more recent case law. In addition to determining if the federal government's efforts are associated with courts raising or applying the ADA, researchers should employ qualitative methodologies to study why and how the federal government's actions are being used in these cases. For example, how is DOJ and HHS's technical assistance being discussed by judges?

Fourth, future research should study geographical differences. Professor Josh Gupta-Kagan called for empirical research analyzing how state child welfare policies and practice differ across jurisdictions and are associated with case outcomes: "Enormous outcome differences exist between jurisdictions at every stage of child protection cases. These differences are so large that varying state laws, administrative agencies, and family courts, rather than demographic or socioeconomic differences, likely explain most of the differences."²¹³

In this study, we found an association between the region the case was decided in and whether the ADA was raised or applied. This finding is thought-provoking, particularly because the ADA is a federal law that covers all locales. Hence, the underlying reasons must be understood on both a regional and state basis. Do certain states have stronger policies related to the ADA and the child welfare system? Are there more services and supports for disabled parents in certain areas? Do child welfare professionals, judges, or attorneys receive training about the ADA in these places? Further, future research should consider the best ways to challenge discriminatory state statutes that violate the ADA.

Interestingly, cases decided in states with dependency laws that included disability as grounds for termination of parental rights had lower odds of raising or applying the ADA. There have been substantial efforts by advocates to amend state child welfare laws to protect the rights of parents with disabilities, and nearly thirty states have introduced or passed such legislation.²¹⁴ This finding necessitates additional inquiry. Indeed, understanding how policies and practices vary across the country is crucial and, in turn, will inform policymaking and advocacy strategies.

213. Josh Gupta-Kagan, *Child Protection Law as an Independent Variable*, 54 FAM. CT. REV. 398, 399 (2016).

214. *Map of Current State Legislation Supporting Parents with Disabilities*, *supra* note 124.

These are just a few of the many important areas for future exploration. As scholarship concerning the intersection of the ADA and the child welfare system increases, we expect these questions and many others to begin to be addressed. Similarly, we anticipate even more issues will arise that will necessitate inquiry.

CONCLUSION

Despite the disability rights movement's many successes, including the passage of the ADA in 1990, the right to parenthood remains inaccessible to many people with disabilities. Indeed, a burgeoning body of scholarship indicates that compared to nondisabled parents, parents with disabilities experience substantial bias, resulting in staggeringly high rates of child welfare system involvement, inadequate family preservation and reunification services, and increased likelihood of termination of parental rights. Nonetheless, existing studies have not empirically analyzed appellate judicial opinions to determine predictors of whether the ADA is raised or applied in termination of parental rights cases involving parents with disabilities. This study, therefore, begins to fill this scholarly void.

The ADA's breadth should be interpreted to safeguard the rights of parents with disabilities involved with the child welfare system. As this Article demonstrates, numerous challenges remain. At the same time, this study provides novel understandings of what predicts whether the ADA is raised or applied in termination of parental rights appeals cases involving mothers with disabilities. First, we learned the ADA was only raised in six percent of the decisions and only applied in two percent of the decisions. Second, we found that after controlling for parent, family, court, case, and policy characteristics, cases involving mothers with psychiatric disabilities had lower odds of raising the ADA. Third, after controlling for parent, family, court, case, and policy characteristics, we found that courts had lower odds of applying the ADA in cases involving mothers with psychiatric disabilities or multiple disabilities. Other factors were also associated with whether the ADA was raised or applied, including criminal history, substance use history, prior child welfare system involvement, the presence of a disabled child, when the case was decided, geographical location, negative expert testimony, provision of family preservation or reunification services, and state dependency statutes that include disability as grounds for termination of parental rights.

Certainly, many challenges remain for policymakers, the legal profession, and scholars to resolve. Our study suggests an urgent need for training and information for judges and attorneys about the ADA, including reasonable modifications. Increased oversight and enforcement

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of the ADA by the federal government is also essential. Further, additional attention must be given to the development and implementation of individually tailored community-based services and supports for parents with disabilities, as required by the ADA. Legislative advocacy is necessary to resolve tensions between state laws and the ADA. Finally, research and consideration must also seek to better understand these families and their interactions with the child welfare and judicial systems, especially related to compliance with the ADA, as well as strategies for effective legal representation.