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Mothers with Disabilities

Nicole Buonocore Porter[†]

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INTRODUCTION

For the past several decades, feminist theorists have focused on the intersection of sex and other identities: race, primarily, but also religion, sexual orientation, gender identity, and ethnicity. More recently, a few scholars have begun exploring the intersection of sex and disability, highlighting the unique obstacles facing women with disabilities. This Article advances the intersectionality literature by exposing and exploring the marginalization experienced by mothers with disabilities.¹ Specifically, this Article will explore

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1. Normally when I discuss mothers, I use the term “caregivers” and define it broadly, to include men who have caregiving responsibilities for their children, as well as men and women who have caregiving responsibilities for adult loved ones: parents, spouses, partners, etc. See, e.g. Nicole Buonocore Porter, “Why Care? Using Communitarian Theory to Justify Protection for

how the stereotypes that apply to women, mothers, and individuals with disabilities, intersect to produce a particularly precarious position for mothers with disabilities in the workplace (employment law) and in the areas of marriage, reproduction, divorce, and custody (family law).

Mothers with disabilities are doubly marginalized in the workplace—they are marginalized because they have disabilities, and because they very likely have caregiving responsibilities for their children. Some of this marginalization is based on the stereotypes attributed to these various identities, other parts of it stem from the fact that workplaces are structured around an able-bodied, masculine norm. This makes it difficult for mothers with disabilities to manage their disabilities, their workplace responsibilities, and their caregiving obligations.

Stereotypes also cause difficulties for mothers with disabilities in the areas of marriage, reproduction, divorce, and custody. Women with disabilities are less likely to get married or be in a long-term committed relationship than their nondisabled counterparts.² Women who become disabled after marriage are also more likely to get divorced. Upon divorce, mothers with disabilities are more likely to experience difficulty maintaining custody of their children.³

Employment law and family law intersect for mothers with disabilities in especially tricky ways. Women (in some workplaces), mothers (in most workplaces), and individuals with disabilities (in virtually all workplaces) experience bias in the workplace.⁴ This bias is compounded for mothers with disabilities. Because gender norms dictate that women take on the primary caregiving responsibilities, a mother with a disability might be forced to seek accommodations for both her disability and her caregiving responsibilities. Having to do so may cause these mothers with disabilities to experience workplace marginalization in the form of reduced opportunities for advancement and lower pay.

This economic marginalization, in turn, may cause a mother with a disability to stay in an unhealthy or abusive relationship for fear of being unable to support herself and her kids financially without her spouse. If a mother with a disability and her spouse get divorced, her reduced earning potential, along with negative assumptions made about a disabled mother's ability to properly care for her children, may impair her ability to maintain custody of her children. Finally, a single mother with a disability will find managing work, her disability, and her childcare responsibilities even more difficult. Balancing her many responsibilities could cause her to lose her job, likely leading to greater economic instability,

"Real" Workers," 58 *Kansas Law Review* 355, 356 n.8 (2010), <https://perma.cc/F9MY-F7DQ> (hereinafter Porter, "Why Care?"). However, in this Article my focus is on the unique stereotypes of (cisgender) women who have disabilities and who want to become or already are mothers. Although it is certainly possible a woman with a disability might also be caring for an adult loved one who also has a disability (especially if the woman has a relatively minor disability), that situation is not the primary focus of this Article.

2. See Part III. A.
3. See Part III. B.
4. See Part II.

potentially resulting in the loss of custody of her children or even the termination of her parental rights.

While all mothers with disabilities do not experience some or all of these challenges, the unique difficulties experienced by this group of women deserve a closer look. Thus, this Article will expose and explore how the realities of work and family, along with two seemingly divergent areas of law, employment law and family law, intersect to cause a unique form of marginalization for this sub-group of women—mothers with disabilities.

This Article will proceed in four additional parts. Part II focuses on the challenges mothers with disabilities face in the employment realm. Specifically, I explore the stigma and bias experienced by individuals with disabilities, the stereotypes and burdens faced by mothers in the workplace, and the unique subordinated status of women with disabilities. Part III focuses on the challenges facing mothers with disabilities in the family realm. This includes a discussion of the stereotypes about women with disabilities as asexual, undesirable, and unlikely candidates for motherhood. It also explores how family law contributes to the difficulties facing mothers with disabilities. Part IV brings the family and the workplace together to explore how the intersection of these three identities (woman, disabled, and mother) creates a unique form of marginalization. Part V briefly concludes.

I. MOTHERS WITH DISABILITIES IN THE WORKPLACE

This Part explores the bias against mothers with disabilities in the workplace. In order to understand the magnitude of this issue, it is important to dissect the various parts that make up the marginalization experienced by this group. Thus, this Part first explores the stereotypes and difficulties faced by individuals with disabilities in the workplace, and then turns to working mothers. Finally, this Part discusses some of the interesting work that is being done on the subordinated status of women with disabilities.

A. Individuals with Disabilities in the Workplace

Although a voluminous body of literature has been written about the difficulties facing individuals with disabilities in the workplace, this Article provides only a snapshot of the reality for individuals with disabilities in the workplace. First, individuals with disabilities are employed at a much lower rate than nondisabled individuals.⁵ According to the Bureau of Labor Statistics,

5. Sharona Hoffman, “Settling the Matter: Does Title I of the ADA Work?,” 59 *Alabama Law Review* 305, 329 (2008), <https://perma.cc/A3F5-S9R2>; see United States Senate Committee on Health, Education, Labor & Pensions, *Fulfilling the Promise: Overcoming Persistent Barriers to Economic Self-Sufficiency for People with Disabilities*, 3 (18 Sept. 2014), <https://perma.cc/8N2F-P6QA> (hereinafter “*Fulfilling the Promise*”) (“Less than 30 percent of working-age Americans with disabilities participate in the workforce. Of the over 20 million Americans with disabilities who are of working age, less than 30 percent work, compared to over 78 percent of non-disabled Americans.”).

workforce participation for individuals with disabilities ages sixteen to sixty-four was 30.2 percent, compared to 77.2 percent for individuals without disabilities.⁶ Even when individuals with disabilities are working, the 2012 Disability Status Report states that American households with an adult member with a disability earn 38.4 percent less than households without an adult member with a disability⁷ and they are more likely to be living in poverty.⁸ To make matters worse, there are often increased costs associated with having a disability, and government benefits rarely cover all of these additional costs.⁹

One reason for the lower employment rate is that employers frequently assume that hiring individuals with disabilities is going to be very costly, because employers vastly overestimate the costs of accommodating individuals with disabilities. In fact, there is evidence that the employment rate of individuals with disabilities *decreased* after the passage of the Americans with Disabilities Act (ADA), in part because employers perceived that the costs of accommodating individuals with disabilities would be very high.¹⁰

Another reason individuals with disabilities are not hired at the same rate as their nondisabled peers is because of misperceptions about their ability to perform the job in question.¹¹ Time and again, society has challenged the competency of individuals with disabilities and has assumed they are incapable of performing certain types of work. For instance, a report by the United States Committee on Health, Education, Labor & Pensions (HELP), explains “attitudes and behaviors toward those with disabilities often remain paternalistic and lack the understanding that people with disabilities want to be contributing members of society. Persistently low expectations and lack of opportunity remain some of the greatest barriers to economic self-sufficiency and full participation in society.”¹² One individual with a disability stated this societal perception succinctly: “People with disabilities have trouble finding employment due to enduring stigma and misconceptions about the cost of workplace accommodations.”¹³ Several respondents specifically identified “outright prejudice regarding their disabilities.”¹⁴

6. *Fulfilling the Promise*, see note 5, at 6.

7. *Id.* at 3.

8. *Id.* at 2, 7-8 (describing the lower pay that individuals with disabilities receive and stating 28 percent of non-institutionalized adults ages twenty-one to sixty-four with a disability in the United States live in poverty).

9. *Id.* at 9.

10. Hoffman, see note 5, at 329-31 (describing that the employment rate for individuals with disabilities has fallen since the passage of the ADA and stating that there are “several potential explanations,” one of them being that employers perceive the costs of accommodating individuals with disabilities to be high).

11. See, e.g. *Fulfilling the Promise*, see note 5, at 3 (“Almost all [individuals with disabilities who responded to the survey] reported experiencing employment discrimination, persistently low expectations, inaccessible workplaces, and discriminatory pay.”).

12. *Id.* at 25.

13. *Id.*

14. *Id.*

As just one example, one woman who used a wheelchair reported that there are “many misconceptions about people who use wheelchairs. . . . They assume we have . . . poor cognitive functioning or intellectual disabilities just because we use wheelchairs or they think none of us in wheelchairs can hear, so they scream at us.”¹⁵ The HELP report cites many instances revealing that persons with mental disabilities also suffer from stigma and discrimination.¹⁶ The report argues that the negative attitudes of nondisabled people are a large part of the problem facing individuals with disabilities. The report states: “These beliefs include the paternal[istic] attitude that people with disabilities need to be cared for and they are unskilled and lack intelligence.”¹⁷ Despite the robust protections of the ADA, plaintiff-employees are often unsuccessful in their attempts to remedy the discrimination they suffer at the hands of their employers.¹⁸ Although the reasons for this are complex, many scholars have blamed the low success rates of ADA cases on courts engaging in a “backlash” against the ADA.¹⁹ While the ADA Amendments Act of 2008 arguably addresses this backlash,²⁰ it is still too early to tell whether the ADA will finally live up to its full potential.

B. The “Maternal Wall”²¹

The “maternal wall” refers to all employment policies and practices that either discriminate against or make life more difficult for women with children. In prior work, I identified three primary aspects of the maternal wall: lack of time, lack of money, and discrimination based on stereotypes.²² These three problems

15. Id. at 26 (internal quotations omitted).

16. Id.

17. Id. at 28.

18. See Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* (NYU Press, 2005).

19. See Colker, see note 18, at 71-84; Nicole Buonocore Porter, “The New ADA Backlash,” 82 *Tennessee Law Review* 1, 13-14 (2014); see also Melanie D. Winegar, “Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers,” 34 (3) *Hofstra Law Review* 1267, 1267-68 (2006), <https://perma.cc/UH6C-GCJ9>; Matthew Diller, “Judicial Backlash, the ADA, and the Civil Rights Model of Disability,” in *Backlash Against the ADA: Reinterpreting Disability Rights*, 62, 62-65 (ed. Linda Hamilton Krieger, University of Michigan Press, 2003), <https://perma.cc/UDK3-4HEF>; Nicole Buonocore Porter, “Reasonable Burdens: Resolving the Conflict Between the Disabled Employees and their Coworkers,” 34 *Florida State University Law Review* 313, 356-57 (2007), <https://perma.cc/82VA-ZJ48>.

20. See Porter, “The New ADA Backlash,” see note 19.

21. This term was coined by Professor Joan Williams. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 69-70 (Oxford University Press, 2000). In more recent years, in order to be more inclusive, other terms have replaced the “maternal wall” to reflect the fact men are caregivers too, and that both men and women are often called upon to take care of other loved ones, not just their own children. Thus, “caregiver” discrimination or “family responsibilities discrimination” has become more widely used. See, e.g. Joan C. Williams and Stephanie Bornstein, “Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination,” 41 *University of San Francisco Law Review* 171, 171 (2006), <https://perma.cc/6QNY-EW56>. But for my purposes, because I am specifically focusing on mothers with disabilities, the “maternal wall” is apt.

22. Porter, “Why care?,” see note 1, at 361. This sub-part borrows generously from this prior work.

create what I have referred to as the “caregiver conundrum.”²³

The time required to raise children and work a regular, full-time job presents challenges and conflicts. Mothers often need time off for their kids’ medical appointments, for school functions, when their kids are sick, and for all of the other demands of being a mom.²⁴ Moreover, some women simply find it difficult to work the demanding hours of many jobs while raising children. Many employers have very inflexible work schedules, premised on the model of the ideal (male) worker, who can work full time and overtime, year-round, without any time off for caregiving.²⁵ The law provides very few protections for the mothers who are struggling with the challenge of balancing work and family. Other than a limited right to leave under the Family & Medical Leave Act (FMLA),²⁶ employers are not obligated to accommodate an employee’s routine caregiving obligations.²⁷

Some mothers struggle not only, or even primarily, with insufficient time, but also with insufficient money to raise their children. These women often work in low-paying positions with no job security, no guarantee of full-time work, or even enough hours to pay the bills.²⁸ Lower-income mothers, who are often single mothers, are less likely to be covered by the FMLA.²⁹ Even if they are covered, they often cannot afford to take leave because FMLA leave does not have to be paid leave, and many employers hiring low-income women do not voluntarily offer any type of paid leave.³⁰ Furthermore, lower-income workers often lack reliable, affordable, and safe childcare.³¹ Thus, they are most at risk of losing their

23. Id.

24. Peggie Smith, “Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations,” 2001 *Wisconsin Law Review* 1443, 1446 (2001).

25. Williams & Bornstein, see note 21, at 173-74.

26. Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-54 (2009). The FMLA allows covered employees to take twelve weeks of unpaid leave per year for the birth of a baby, an employee’s own serious health condition, or the serious health condition of an employee’s child, spouse, or parent. However, the FMLA only applies to employers with fifty or more employees and it only covers employees who have been working for their employer for at least one year.

27. Porter, “Why Care?,” see note 1, at 379 (citing Smith, see note 24, at 1444; Pamela Gershuny, “Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Employment-At-Will Doctrine Based Upon Mandatory Parenting Duty,” 21 *Wisconsin Women’s Law Journal* 195, 201 (2006), <https://perma.cc/Y6EL-DV5X>; Laura Kessler, “The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Theory,” 34 *University of Michigan Journal of Law Reform* 371, 424 (2001)).

28. Porter, “Why Care?,” see note 1, at 366.

29. Ann O’Leary, “How Family Leave Laws Left Out Low-Income Workers,” 28 *Berkeley Journal of Employment & Labor Law* 1, 39-46 (2007). See Lisa Bornstein, “Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act,” 10 *Columbia Journal of Gender and Law* 77, 87 (2000) (“Employees in households with low family income levels, low levels of education, and those from Latino backgrounds are the least likely employees to work for covered employers.”).

30. Porter, “Why Care?,” see note 1, at 366 (citing O’Leary, “How Family Leave Laws Left Out Low-Income Workers,” see note 28, at 39-46).

31. Porter, “Why Care?,” see note 1, at 407-08.

jobs because their childcare arrangements are more likely to fall through.

In addition to the practical burdens of balancing work and family, mothers often face discrimination based on employers' stereotypical assumptions about the commitment and competency of working mothers. Managers often assume that women, upon their return from maternity leave, will not be as productive as they were before having children.³² Many mothers have claimed that when they returned from maternity leave, they were given less important work and were taken off of high-profile projects they had previously worked on.³³ Some managers do this because they assume that new mothers do not want to work as hard as they had before they had children or because the managers believe that the mother should be home caring for her family rather than working.³⁴ Often, managers simply do not think women will be as committed to the workplace after having children.³⁵ These stereotypes sometimes lead to employers not giving mothers promotions or fulfilling assignments.

The stereotypes discussed above affect women with children even when they are acting as "ideal workers:" workers who are miraculously able to work full time and overtime without missing work for normal caregiving responsibilities.³⁶ Instead, most working mothers are what I call "real workers:" workers who get the job done well but "either do not put in as many hours as their non-caregiver counterparts, or violate their employers' attendance policies because they have children . . . who need care."³⁷ These are the "parents to whom 'life happens,' and they are left juggling without a lesson, which inevitably leads to one or more balls falling to the ground."³⁸ Whether a mother is a "real worker" or an "ideal worker" who is perceived to be less than ideal because of stereotypes surrounding motherhood, the marginalization facing working mothers is real and significant.

32. See, e.g. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 51 (1st Cir. 2000) (a male vice president told a mother who had recently had a baby that he "preferred unmarried, childless women because they would give 150% to the job."); *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004) (plaintiff was repeatedly told by her supervisors that they worried her role as a mother made her unfit for her job).

33. See, e.g. Deborah L. Rhode, *Myths of Meritocracy*, 65 *Fordham Law Review* 585, 588 (1996) ("[F]emale lawyers consistently report receiving fewer opportunities for mentoring, business development, and desirable assignments than their male colleagues. Those inequalities often reflect sex-based stereotypes, such as the assumption that women with children are less committed to their careers than are other attorneys. Mothers repeatedly told New York and Harvard researchers that they received less desirable assignments than they had received "BC" (before children). One Boston lawyer reported that "since I came back from maternity leave, I get the work of a paralegal . . . I want to say, 'look, I had a baby, not a lobotomy!'"

34. See, e.g. *Moore v. Alabama State University*, 980 F.Supp. 426, 431 (M.D. Alabama 1997); *Trezza v. Hartford, Inc.*, 1998 WL 912101 (S.D. New York 30 Dec. 1998); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

35. Porter, "Why Care?," see note 1, at 367.

36. See Williams & Bornstein, see note 21, at 173-74 (coining the phrase "ideal worker").

37. Porter, "Why Care?," see note 1, at 357 (coining and describing the phrase "real workers").

38. *Id.*

C. Stereotypes Surrounding Women with Disabilities

Although, for many years, scholars have been exploring the intersection of gender with race,³⁹ sexual orientation,⁴⁰ and class,⁴¹ they have only recently begun to explore the intersection of gender and disability, especially in the legal field.⁴²

Professor Michelle Travis's recent research in the *California Law Review* delves into the under-explored intersection of gender and disability.⁴³ In her article, Travis argues disability has become a "master status," the identity that trumps all of an individual's other identities.⁴⁴ She states that "[t]he degendering of disability is the process by which individuals with disabilities are perceived neither as men nor as women but solely as disabled."⁴⁵ In fact, most of the research on individuals with disabilities assumes that gender, race, ethnicity, sexual orientation, and class are irrelevant.⁴⁶ Accordingly, Travis explains that individuals with multiple subordinate identities are often seen as atypical members of their respective identity groups.⁴⁷

Because the image of a disabled person is usually a white, heterosexual man with a mobility impairment, women with disabilities are rendered atypical members of the disability community.⁴⁸ Travis argues women therefore experience a great sense of exclusion from the disability rights movement.⁴⁹ Considering that women have a higher incidence of disability than men, and are more prone to develop disabilities because they are "last in line to access food, education, and health care," their exclusion from the disability rights movement is

39. See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race & Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 139 (1989); Angela P. Harris, "Race & Essentialism in Feminist Legal Theory," 42 *Stanford Law Review* 581 (1990).

40. See Patricia A. Cain, "Feminist Jurisprudence: Grounding the Theories," 4 *Berkeley Women's Law Journal* 191 (1989-90).

41. See Kristin Kalsem & Verna L. Williams, "Social Justice Feminism," 18 *UCLA Women's Law Journal* 131 (2010).

42. There has been more of an attempt to address women with disabilities in other disciplines. See generally, Michelle Fine & Adrienne Asch, *Women with Disabilities: Essays in Psychology, Culture, and Politics* (Temple University Press, 1st ed., 1988).

43. Michelle A. Travis, "Gendering Disability to Enable Disability Rights Law," 105 *California Law Review* 837 (2017). In a related argument, Michelle Travis also argues that the fact that disability law has "degendered" disability has allowed masculine norms to become embedded in the ADA's substantive and procedural rules. *Id.* at 850-82. Though interesting, this is not the focus of this Article.

44. *Id.* at 840.

45. *Id.*

46. Adrienne Asch & Michelle Fine, *Introduction: Beyond Pedestals*, in *Women with Disabilities: Essays in Psychology, Culture, and Politics*, 1, 3 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988).

47. Travis, see note 43, at 841.

48. *Id.* at 842.

49. *Id.* at 843. Of course, apropos of this Article, I wonder if part of the reason women with disabilities felt excluded from the disability rights movement was because they did not have as much time to get involved in the movement, due to their caregiving responsibilities.

particularly inequitable.⁵⁰

Travis also argues that women with disabilities have been invisible within the feminist movement.⁵¹ As she explains: “[w]ithout a strong voice in either the disability rights movement or the feminist movement, women with disabilities have been unable to draw attention to their unique forms of multiple oppression: to what it means to be both female in a male-dominated society and disabled in a society designed for the able-bodied.”⁵² Some scholars note that disabled women experience the same oppression as nondisabled women, but without the “ostensible rewards of the ‘pedestal’ upon which some (white) women traditionally have been placed.”⁵³ Thus, disabled women are more disadvantaged than both nondisabled women and disabled men.⁵⁴

In the employment context, the compounding of sexism and ableism means women with disabilities are less likely to be employed than either men with disabilities or nondisabled women.⁵⁵ They are also less likely to be employed in secure positions and they earn significantly less money than disabled men.⁵⁶ Overall, having a disability has a stronger negative impact on women’s labor force participation than it does on men’s.⁵⁷ Other scholars have stated disabled women suffer dual discrimination in the workplace and on a variety of economic and social measures. As such, the disability identity and the female identity interact in a “profoundly discriminatory and disadvantaging way.”⁵⁸

II. CHALLENGES FACING WOMEN WITH DISABILITIES IN THE FAMILY REALM

This Part explores the obstacles facing women with disabilities in the family realm, including personal and legal challenges. Specifically, I will first explore the

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50. Kathleen Cornelsen, “Doubly Protected and Doubly Discriminated: The Paradox of Women with Disabilities After Conflict,” 19 *William & Mary Journal of Women & the Law* 105, 106 (2012) (citing Rangita de Silva de Alwis, “Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights,” 18 *Pacific Rim Law & Policy Journal* 293, 295-96 (2009)).
 51. See Asch & Fine, see note 46, at 3-4 (stating that studying women with disabilities has been perceived as bad for feminism because these studies reinforce traditional stereotypes of women that feminists have been trying to shed).
 52. Travis, see note 43, at 844.
 53. Asch & Fine, see note 46, at 2.
 54. *Id.* at 6.
 55. *Id.* at 10 (stating that disabled men participate in work at almost twice the rate of disabled women and fewer than 25 percent of women with disabilities participate in the labor force).
 56. Travis, see note 43, at 846-47; see Cornelsen, see note 50, at 110 (“Women with disabilities contend with significantly more difficulties than any other group in almost every field, including employment, education, and health care.”).
 57. Nancy Felipe Russo & Mary A. Jansen, “Women, Work and Disability: Opportunities and Challenges,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics*, 229, 234 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988).
 58. Adrienne Harris & Dana Wideman, “The Construction of Gender and Disability in Early Attachment,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics*, 115, 131 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988).

stereotypes about women with disabilities as asexual, undesirable, and unlikely candidates for motherhood. I will then analyze how family law contributes to the difficulties that mothers with disabilities face.

A. Bias against Mothers with Disabilities

Many women with disabilities are mothers.⁵⁹ Yet the stigma surrounding women with disabilities might make this scenario seem unlikely. Before a woman can become a mother, she will likely be involved in a romantic relationship.⁶⁰ And here is where some disabled women will experience their first hurdle. Some physical disabilities are often seen as incompatible with beauty, attractiveness, and womanhood.⁶¹ For women who have had their disability from birth or an early age, the social stigma surrounding disability in the context of intimate relationships likely started during adolescence.⁶² Research demonstrates that adolescent women with disabilities have on average lower rates of sexual activity and are older when having their first sexual encounter than nondisabled women.⁶³ In contemplating the effects of this stigma, consider this statement by one disabled

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59. Statistics indicate that there are at least 4.1 million parents in the U.S. with reported disabilities who have children under the age of eighteen; thus, at least 6.2 percent of American parents who have children under age eighteen have at least one disability. Stephen H. Kaye, *Current Demographics of Parents with Disabilities in the U.S.*, Through the Looking Glass, (2011), <https://perma.cc/N42P-SCA5> (cited in National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, 44 (27 Sept. 2012) (hereinafter “*Rocking the Cradle*”).
60. Obviously, many women choose to have children without being in an intimate, committed relationship with another adult. And some women have unplanned pregnancies and choose to have and keep the baby while remaining single. But it is still the case that most women would prefer to have a partner before having children. In addition, many see romantic love as being one of the most important contributors to happiness. See Ann Hubbard, “Meaningful Lives and Major Life Activities,” 55 *Alabama Law Review* 997, 1032-33 (2004) (“life-long loving relationships of mutual devotion enhance pleasure, contribute to the welfare of humanity, and create partnerships for raising and educating children.”).
61. Travis, see note 43, at 847-48; see generally Cornelsen, see note 50, at 110 (“Women with disabilities contend with significantly more difficulties than any other group in almost every field, including employment, education, and health care.”).
62. Harilyn Rousso, “Daughters with Disabilities: Defective Women or Minority Women,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics*, 139, 139 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988).
63. Id; see Cynthia Holland-Hall, “Sexuality and Disability in Adolescents,” 64 *The Pediatric Clinics of North America: Adolescent Sexuality* 435, 437 (2017) (demonstrating that adolescents with intellectual disabilities experience lower rates of romantic attraction and vaginal intercourse; adolescents with developmental disabilities on average are older at the time of first having intercourse and generally have lower rates of sexual experience than their neuro-typical counterparts); but see Mariah Mantsun Cheng and Richard J. Udry, “Sexual Behaviors of Physically Disabled Adolescents in the United States,” 31 *Journal of Adolescent Health* 48, 56 (2006) (discussing longitudinal study results about sexuality in disabled adolescents, finding that physically disabled girls were at least as sexually experienced as their nondisabled counterparts, and physically disabled girls were more than twice as likely to have consensual sex than their nondisabled peers); John-Carles Suris, Michael D. Resnick, and Robert Wm. Blum, “Sexual Behavior of Adolescents With Chronic Disease and Disability,” 19 *Journal of Adolescent Health* 124 (1996) (finding that adolescents with chronic diseases or disabilities were at least as sexually active as their peers).

woman:

If you are not a cripple, you cannot possibly imagine the way the world reduces you to that condition. For a woman, especially, normality, acceptability, and marriageability depend on looking whole. I have been in leg and arm braces since I was three. Boys never considered me fair game for dating, even though they liked me a lot to pal around with . . . [T]he world around me saw a woman without—without the use of her limbs, without womanliness, without a man, without children.⁶⁴

Another woman with physical and cognitive disabilities stated that she was first discouraged from becoming a mother by her “family and community’s attitudes toward sex and disability, especially by their belief, which I internalized, that my difference (my scarred face and starfish-shaped hands) made me ugly and therefore less desirable.”⁶⁵

Not only is there a myth that women with disabilities are undesirable romantic partners, there also is a pervasive myth that these women are asexual and without a sexual identity.⁶⁶ Disability studies scholar Tom Shakespeare described the perceived incompatibility of disability with a sexual identity. He stated: “[D]isability is a very powerful identity, and one that has the power to transcend other identities. . . . For example, it has the power to de-sex people, so that people are viewed as disabled, not as men or women, straight or gay.”⁶⁷ Noted disability scholar Michael Stein also discussed the pervasive myth that people with disabilities are “either sexually unwilling or unable.”⁶⁸ He stated that mainstream society is uncomfortable with the relational intimacy of individuals with disabilities.⁶⁹ In fact, one study indicated that 46 percent of nondisabled people would be “concerned” if their teenage child dated a person with a disability, and 34 percent would be “concerned” if a friend or relative married a person with a disability.⁷⁰ Stein argues that this “disabled non-sexuality myth” makes it difficult for individuals with disabilities to form intimate personal relationships with nondisabled individuals.⁷¹ This situation is made worse by the fact that many

64. Barbara Levy Simon, “Never-Married Old Women and Disability: A Majority Experience,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics* 215, 220 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed. 1988).

65. *Rocking the Cradle*, see note 59, 41-42.

66. Rousso, see note 62, at 140.

67. Anita Silvers, “Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights,” 13 *Berkeley Journal of Gender, Law & Justice* 81, 91 (2013) (quoting Tom Shakespeare, “Disability, Identity and Difference,” in *Exploring the Divide: Illness and Disability* 94, 109 (eds. Colin Barnes & Geoff Mercer, The Disability Press, 1996).

68. Michael Ashley Stein, “Mommy has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities,” 60 *Brooklyn Law Review* 1069, 1073 (1994).

69. *Id.* at 1074.

70. *Id.* (referring to the Louis Harris & Associates, Inc., *Public Attitudes Toward People with Disabilities*, Louis Harris Public Attitudes Polls (1991)).

71. *Id.* at 1075.

individuals with disabilities have internalized the non-sexuality myth.⁷²

Women with disabilities have more difficulty with social and intimate relationships than men with disabilities do.⁷³ One scholar noted that women who had “visible impairments and limitations tended to be unmarried whereas visible disabilities in men did not affect marital status.”⁷⁴ Another study noted that blind women internalized negative images more than blind men, seeing themselves as burdensome, unwanted, and unlovable.⁷⁵

One reason for this gendered difference is that societal views assume that disabled women are incapable of fulfilling the roles and responsibilities of a caregiver and a wife, while men are not expected to fulfill similar roles. Some evidence reveals that men often reject disabled women as partners because the women fail to measure up on grounds of appearance and perceived abilities in physical and emotional caregiving.⁷⁶ In one study, when 100 students were asked to describe a disabled woman, students described her in terms of dependence, impairment, and despair and virtually never described her as a wife, mother, or worker.⁷⁷ Thus, men may assume that a disabled woman is unable to contribute to the physical or emotional housekeeping of a husband and children.⁷⁸ Men called into question disabled women’s capacity to be a caretaker: “[h]ow can she minister to [a man’s] needs when a disabled woman epitomized all that is needy herself?”⁷⁹ Statistics reveal that women with disabilities are the group most likely to remain unmarried.⁸⁰ And, as one scholar astutely notes, equal opportunity is harder to legislate in the social arena—the law can require an employer to hire a disabled person but the law cannot require a potential partner to date a disabled woman.⁸¹

Another study revealed that “relatives and friends of disabled women could not envision these women as functional wives and mothers.”⁸² One respondent stated that “[a] disabled husband needs a wife to nurture him, but a disabled wife is not seen by society as capable of nurturing a husband who is not disabled.”⁸³ One study demonstrated that societal narratives construe women with disabilities as incapable of nurturing, and instead in need of nurturing.⁸⁴ Furthermore, it is not

72. *Id.* at 1076 (describing one woman with a disability who had assumed while she was growing up that she could not date or find a partner because she had a disability).

73. Rouso, see note 62, at 163.

74. Beth E. Meyerowitz et al. “Sex Roles & Culture: Social and Personal Reactions to Breast Cancer,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics* 72, 83 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988).

75. Asch & Fine, see note 46, at 23.

76. *Id.* at 17.

77. *Id.* at 15 (describing a survey of nondisabled university students).

78. *Id.* at 17.

79. *Id.*

80. Silvers, see note 67, at 89.

81. Rouso, see note 62, at 140.

82. Silvers, see note 67, at 90.

83. *Id.* (internal quotations and citations omitted).

84. *Id.* (citing William John Hanna & Betsy Rogovsky, “Women with Disabilities: Two Handicaps Plus,” 6 *Disability, Handicap & Society* 49, 55-56 (1991), <https://perma.cc/U9S4-4H9U>).

perceived as the role of husbands to care for their wives, including a disabled wife. A fact sheet for the United Nations Fourth World Conference on Women states:

Women gave testimony as to how their disabilities had ended their marriages, isolated them from their families and communities, and destroyed their futures. Girls recounted how they were no longer regarded as future wives or mothers, but were instead hidden away from society. . . . [U]nlike other women, they have little chance to enter a marriage . . . which can offer a form of economic security. . . .⁸⁵

These studies reveal the stigma disabled women face when trying to navigate love and marriage.

Even if women with disabilities overcome these hurdles and get married, society continues to see them as unsuitable mothers. This stigma stems from a societal belief that individuals with disabilities will give birth to “defective” babies and from “prejudicial assumptions about their capacity to care for children.”⁸⁶ For instance, one woman who had a visible physical disability noted that strangers frequently approached her when she was pregnant and questioned her ability to parent her future child.⁸⁷ Professor Silvers notes: “While other women are expected to become mothers and may even be called upon to defend their choice to remain childless, women with disabilities are criticized for becoming pregnant.”⁸⁸ In addition, women with disabilities are seen as incapable of performing the nurturing roles that women are assumed to play as wives and mothers.⁸⁹ Instead, they are viewed as dependent, passive, and in need of assistance.⁹⁰

The discrimination that individuals with disabilities face often precludes them from participating in the social roles of their peers. Disability scholar Adrienne Asch notes that, much of the discrimination faced by individuals with disabilities is the “experience of being denied the opportunity to play the social roles expected by one’s nondisabled age-peers,” including the social role of motherhood.⁹¹ Professor Silvers also argues that women with disabilities are often precluded from performing the major life functions commonly assigned to women.⁹² Specifically, she argues that being separated from others by “social and physical barriers that threaten family and community connections pervades the

85. Silvers, see note 67, at 90 (internal quotations and citations omitted).

86. *Rocking the Cradle*, see note 59, at 42. See Cornelsen, see note 50, at 119 (“society often incorrectly views women with disabilities as barren and incompetent, unable to bear or raise children”).

87. *Id.*

88. Silvers, see note 67, at 92.

89. See Travis, see note 43, at 848-49.

90. *Id.*

91. Adrienne Asch, “Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity,” 62 *Ohio State Law Journal* 391, 395 (2001).

92. See Silvers, see note 67, at 86.

lifestyle of many people with disabilities.”⁹³ This is why, Silvers argues, cultural feminism’s⁹⁴ focus on women’s caregiving role is so harmful to women with disabilities.⁹⁵ She states: “Because women with disabilities have little access to the relationships and roles cultural feminism celebrates, they may be denied full womanly standing by feminist theories which do not appreciate a disability perspective.”⁹⁶

With that said, the right to parent, and be viewed as a competent parent in broader society, can have a significant impact on a woman’s happiness if she desires children. Everyone should be entitled to “meaningful opportunities to participate in a range of important life activities, including having friends and intimate relationships, parenting, maintaining a home, working and participating in the life of the community.”⁹⁷ In fact, as Professor Hubbard points out, research consistently demonstrates that “close personal relationships—including marriage, family and other primary relationships—are the most powerful determinant of a person’s assessment of her quality of life.”⁹⁸ As the next sub-part explains, not only are women with disabilities stereotyped in society as not being suitable for motherhood, but also, the law often assumes that women with disabilities cannot, or will not, be capable parents.

B. Family Law and Mothers with Disabilities

The discriminatory effects of the law on mothers with disabilities primarily manifest in three different contexts. First, not too long ago, the law permitted forcible sterilization of women with disabilities to prevent pregnancy.⁹⁹ Even when not forced, many women were (and still are in some cases) pressured or coerced by doctors to undergo sterilization, or if they became pregnant, to abort

93. Id.

94. The cultural feminism movement began with Carol Gilligan’s influential book, *In a Different Voice*. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982). In this book, Gilligan critiques prior psychological studies that focused exclusively on male subjects, which allowed male norms to prevail and caused women to be seen as deviant. See id. at 6. She argues that because women place an emphasis on relationships, they appear deficient in developmental studies focused on men, who are usually detached from relationships. See id. at 170. Based on the language used by her subjects, Gilligan constructed a new model of moral development, called the “ethic of care.” Id. at 74. Gilligan argued women place priority on their relationships and identified self-development traits as “selfish.” Id. at 81. Gilligan’s work has led to many feminists embracing what is referred to as “cultural feminism.” See Robin West, “Jurisprudence and Gender,” 55 *University of Chicago Law Review* 1, 15 (1988). Cultural feminists emphasize the nurturing nature of women and their devotion to their caregiving responsibilities. See Nicole Buonocore Porter, “Embracing Caregiving and Respecting Choice: An Essay on the Debate Over Changing Gender Norms,” 41 *Southwestern Law Review* 1, 6-9 (2011).

95. See Silvers, see note 67, at 86.

96. Id.

97. Hubbard, see note 60, at 1007-08.

98. Id. at 1026-27.

99. See Part III. B. 1.

the baby.¹⁰⁰ Second, if a mother with a disability is married and divorces (which is more likely for mothers with disabilities)¹⁰¹ the woman's disability can and does affect her ability to maintain custody of her children. Third and finally, regardless of whether a mother is married or single, the child welfare system often discriminates by terminating the parental rights of mothers with disabilities. As one commentator summed it up, disabled women "have been sterilized by force or 'choice,' rejected by disabled and non-disabled . . . partners, abandoned by spouses after onset of disability, and thwarted when they seek to mother."¹⁰² The following subsections will explore each of these stages of discrimination.

1. Forced or Coerced to Not Become Mothers

Ninety years ago, the "Supreme Court upheld a Virginia statute that allowed mental health institutions to condition release from the institution on involuntary sterilization" of the patient.¹⁰³ The reasoning of the statute was that "many defective parents . . . would likely become by the propagation of their kind a menace to society."¹⁰⁴ In affirming the statute, the Court held in *Buck v. Bell* that the statute struck a necessary balance between the rights of individuals with disabilities to not be sterilized and the interest of society in eradicating "feeble-mindedness."¹⁰⁵ After *Bell*, several states enacted statutes allowing for involuntary sterilization and at least "70,000 men and women have been involuntarily sterilized as a result."¹⁰⁶ Even as recently as 2012, several states continued to have some form of involuntary sterilization law on their books.¹⁰⁷

Women with disabilities continue to have to deal with "coercive tactics designed to encourage sterilization or abortion because they are not deemed fit for motherhood."¹⁰⁸ Women with disabilities also face barriers when seeking appropriate reproductive health care.¹⁰⁹ And women with disabilities often experience discrimination if they try to adopt children.¹¹⁰

100. See Part III. B. 1.

101. See Silvers, see note 67, at 89. In fact, not too long ago, states had laws forbidding people with certain disabilities (epilepsy, intellectual disabilities, and psychiatric disabilities) from getting married at all. See Asch & Fine, see note 46, at 21.

102. Asch & Fine, see note 46, at 29.

103. Chris Watkins, "Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded," 83 *California Law Review* 1415, 1424 (1995) (discussing *Buck v. Bell*, 274 U.S. 200 (1927)).

104. *Id.* at 1424 (quoting March 20, 1924 Act, ch. 394, Virginia Acts 569 (repealed 1974)).

105. *Id.* at 1424.

106. *Id.* at 1425.

107. See *Rocking the Cradle*, see note 59, at 15. In fact, *Buck v. Bell* has never been overruled and as recently as 1995, the Supreme Court denied the petition for certiorari of a woman with an intellectual disability challenging Pennsylvania's involuntary sterilization statute. *Id.* at 39.

108. *Id.* at 15.

109. *Id.* at 28. See generally Elizabeth Pendo, "Disability, Equipment Barriers, and Women's Health: Using the ADA to Provide Meaningful Access," 2 *St. Louis University Journal of Health Law & Policy* 15 (2008).

110. See *Rocking the Cradle*, see note 59, at 23.

Moreover, this mentality that certain disabled individuals should not get married and have children does not seem to be abating, and in fact its effects seem to have risen. In 1989, twenty-nine states restricted the rights of people with psychiatric disabilities to marry; this number rose to thirty-three states by 1999.¹¹¹ Similarly, in 1989, twenty-three states restricted the parenting rights of people with psychiatric disabilities; this number rose to twenty-seven states by 1999.¹¹² Adoption laws and practices that make it very difficult for parents with disabilities to adopt children reflect this trend as well.¹¹³ With respect to these discriminatory adoption practices across the country, one scholar emphasizes that “[t]he result is devastating: [c]hildren spend many years in deplorable conditions in foster care and orphanages, while people with disabilities are robbed of the opportunity to welcome these children into their homes and hearts.”¹¹⁴

2. Custody Upon Divorce

Parents with disabilities are more likely than their able-bodied counterparts to lose custody of their children after divorce.¹¹⁵ In fact, one of the main findings in a study by the National Council on Disability is that parents with disabilities who are seeking or defending custody or visitation rights “often encounter a family law system that is riddled with practices that discriminate against them.”¹¹⁶ These practices include state laws that are biased, inconsistent, and fail to protect disabled parents from “unsupported allegations that they are unfit. . . .”¹¹⁷

When a couple divorces or separates, the parents often reach an agreement regarding custody and visitation of the minor children. When parents are unable to reach an agreement regarding custody and visitation, family law courts apply the “best interest of the child” standard to determine custody and visitation.¹¹⁸ The “best interest of the child” standard requires the court to consider which parent best meets the physical, emotional, intellectual, and basic health and safety needs of the child; what the child wants (if applicable); the current custody arrangement and how it’s working; any evidence of domestic abuse or substance abuse; and whether either placement involves a history of violence or dependency issues.¹¹⁹

111. *Id.* at 41.

112. *Id.*

113. See generally *id.* at 149-66.

114. *Id.* at 166.

115. *Id.* at 16; Asch & Fine, see note 46, at 22 (noting that regardless of the disability status of partners, disabled mothers face discrimination in getting custody after divorce).

116. See *Rocking the Cradle*, see note 59, at 21.

117. *Id.* at 21.

118. *Id.* at 49-50; see J. Herbie DiFonzo, “From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy,” 52 *Family Court Review* 213, 216-17 (2014) (explaining that nearly every state has established guidelines or factors to guide the court’s determination in arriving at the “best interest of the child”).

119. *Rocking the Cradle*, see note 59, at 50 (citing Ella Callow, Kelly Buckland, & Shannon Jones, “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 *Texas Journal of Civil Liberties & Civil Rights* 9, 13, n.16 (2011); see, e.g. Cal. Fam. Code § 3011

This analysis allows the health of the parent to be considered.¹²⁰ In deciding issues of custody and visitation, “[p]arents with disabilities encounter pervasive discrimination in child custody and visitation disputes.”¹²¹ And yet, as commentators note, the best interest analysis should not lead to a presumption that a disabled parent is “per se the weaker parent.”¹²²

Several parents with disabilities have told stories of the discrimination they faced when trying to maintain custody of their children. In one case, a Native American mother who was intellectually disabled lived with her five-year-old daughter in a supported living facility.¹²³ When the daughter started kindergarten, social workers began questioning how an intellectually disabled mother could provide adequate care for the child. The social workers began encouraging a relationship between the child and her estranged father in order to eventually transfer custody to the father. The social workers worked to transfer custody to the father simply because he was not disabled, despite the fact that the child had never lived with him and the mother had no relationship with him.¹²⁴ This caused further egregious harm: the father sexually abused the daughter during at least one of the visits the social workers forced upon the child.¹²⁵ The father was eventually convicted of sexual abuse and sent to prison.¹²⁶

In a similar story, a mother who was a quadriplegic faced an unexpected battle when her former boyfriend filed for custody of their ten-week-old son, alleging that she was not fit to care for their son because of her disability.¹²⁷ Although she eventually settled with the dad by offering him visitation rights after a lengthy legal battle, she still experienced the trauma and fear of the custody battle and was subjected to biased statements such as this one by an attorney: “[c]ertainly, I sympathize with the mom, but assuming both parties are equal (in other respects), isn’t the child obviously better off with the father?”¹²⁸

Another custody dispute that made headlines involved a mother with stage IV breast cancer.¹²⁹ The judge ruled that the children must live with their father

(2017).

120. 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 Texas Journal of Civil Liberties & Civil Rights* 9, 13, n.17 (2011) (citing *Miller v. Pipia*, 297 A.D.2d 362, 364 (New York Ct. App. 2002)).
121. *Rocking the Cradle*, see note 59, at 116.
122. *Id.* at 123 (quoting Duffy Dillon, “Child Custody and Developmentally Disabled Parent,” 2000 *Wisconsin Law Review* 127, 149 (2000)).
123. *Rocking the Cradle*, see note 59, at 97 (citing vignette from Alison Gemmill, *Summary of the 2008 National Child Abuse and Neglect Data System (NCANDS) Child File: Victims of Maltreatment and their Caregivers’ Disabilities* (Berkeley, California 2011)).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Rocking the Cradle*, see note 59, at 113 (citing Sara Olkon, “Disabled Mom Fighting to Keep Her Son,” *Chicago Tribune*, (20 Dec. 2009), <https://perma.cc/2DGD-EZBU>).
128. *Id.*
129. *Rocking the Cradle*, see note 59, at 116 (citing Alicia Gallegos, “What Should Doctors Do When Ill Caregivers Can’t Perform Their Duties?,” *American Medical News* (24 Oct. 2011),

because of their mother's breast cancer diagnosis.¹³⁰ The judge noted that the mother's "inconsistent management of her cancer" suggested she might not be able to provide "consistent care and . . . support" for her children.¹³¹ In addition, the court cited the mother's reduced energy level as limiting her caregiving capacity.¹³² The court was extremely concerned about the mother's breast cancer because it was unclear "whether and how quickly her health [would] deteriorate."¹³³ The judge cited a psychologist's testimony: "'The more contact [the children] have with the non-ill parent, the better they do. They divide their world into the cancer world and a free-of-cancer world. Children want a normal childhood, and it is not normal with an ill parent.'"¹³⁴

Finally, in another case, the court granted custody to the father who had almost no contact with his seven-year-old daughter before the lawsuit, because the court found the mother incompetent to raise her daughter due to the mother's developmental disability and dyslexia.¹³⁵

Courts are often worried about children having to be too independent at too young of an age or having to "parent" the parent with a disability. For instance, one judge insisted that a mother with a physical disability could not be a good parent because of her disability.¹³⁶ The judge assumed that the children would function as her caregivers, despite evidence that the home was modified, the mother had a personal assistant, and the children did not have more than normal chores.¹³⁷ Similarly, one judge determined that a mother with depression secondary to fibromyalgia should lose custody of her three children to the father, in part because the judge thought that the oldest child was becoming "destructively parentified (that is, assuming adult responsibilities and acting as a care provider for younger siblings)."¹³⁸

A parent's disability "should be irrelevant to the analysis without an evidentiary showing of nexus between the parental disability and a detrimental impact on the child."¹³⁹ And yet, this nexus is often not demonstrated, as bias, stereotypes, and erroneous assumptions control the custody process.

<https://perma.cc/BPW8-HZNS>.

130. *Id.* at 117.

131. *Snyder v. Giordano*, 10 CVD 36, ¶ 65 (25 Apr. 2011), <https://perma.cc/R6GZ-RPU7>.

132. *Id.* at ¶ 66.

133. *Id.* at ¶ 112.

134. *Id.* at ¶ 142 (quoting Courtney Hutchison, "Judge Cites Mom's Breast Cancer in Denying Custody of Children," *ABC News Medical Unit* (10 May 2011), <https://perma.cc/5BD2-J4AC>).

135. *Rocking the Cradle*, see note 59, at 118 (citing *Holtz v. Holtz*, 595 N.W. 2d1 (Supreme Ct. North Dakota 1999)).

136. *Rocking the Cradle*, see note 59, at 117 (citing Megan Kirshbaum et al., "Parents with Disabilities: Problems in Family Court Practice," 4 *Journal of the Center for Families, Children and the Court* 27 (2003)).

137. *Id.* One of the judge's concerns was whether the mother could get upstairs quickly in an emergency. When she demonstrated her ability to get upstairs, the judge demanded to test her speed with a stopwatch.

138. *Id.* at 119 (internal quotation marks omitted).

139. *Rocking the Cradle*, see note 59, at 127.

3. Termination of Parental Rights (TPR)

i. Process and Bias in TPR Hearings

Even worse than a parent losing primary custody in a divorce is having the parent's parental rights terminated permanently. The constitutional authority of the state to terminate parental rights is now well-settled, because the state is seen as having a fundamental interest in protecting the interest of children.¹⁴⁰ The Supreme Court has affirmed a state's authority to terminate parental rights without the parent's consent as long as the state complies with due process standards.¹⁴¹ Before doing so, however, the state must prove parental unfitness by clear and convincing evidence.¹⁴² This proof must be based on an individualized inquiry rather than group-based assumptions.¹⁴³ Despite the Court's assertions that parental rights are fundamental, the Court has "largely left it up to the states to define the parameters of parental fitness and to decide when, and to what degree, states may regulate parental rights."¹⁴⁴

Although a full exploration of the legal system surrounding termination of parental rights is beyond the scope of this Article, a short history and summary is helpful for understanding the bias that exists in this system. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, which was the first federal attempt to address the issue of child abuse, and which requires states "prevent, identify, and treat child abuse and neglect."¹⁴⁵ In 1980, Congress passed the Adoption Assistance and Child Welfare Act, which was an attempt to "drastically reform the child welfare system in every state."¹⁴⁶ The statute requires that "reasonable efforts" be made to keep children with their parents, both to prevent or eliminate the need for removal of the child from his or her family, and to make it possible for the child to return to his or her family following removal.¹⁴⁷ At the same time it places an emphasis on quickly moving children through temporary (usually foster) care to a permanent home. A key provision in the statute is the "15/22 rule," which requires a state to begin proceedings to terminate a parent's rights to raise her child if that child has been in foster care for fifteen of the past

140. See Watkins, see note 103, at 1431 (stating that as early as 1839, the Pennsylvania Supreme Court upheld the removal of a child from her parents' custody in *Ex parte Crouse*, 4 Whart. 9, 11 (Pennsylvania 1839); *Rocking the Cradle*, see note 59, at 47 (citing Dave Shade, "Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act," 16 *Law & Inequality* 153, 156-57 (1998)).

141. Watkins, see note 103, at 1432 (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)).

142. *Id.* at 1432 (citing *Santosky*, 455 U.S. at 769).

143. *Rocking the Cradle*, see note 59, at 48 (citing *Stanley v. Illinois*, 405 U.S. 645, 658 (1972)).

144. Watkins, see note 103, at 1432.

145. *Rocking the Cradle*, see note 59, at 48 (citing Child Abuse Prevention and Treatment Act of 1974 ("CAPTA"), 42 U.S.C. § 5101 (2012)).

146. *Id.* at 48 (citing the Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 94 Stat. 500).

147. *Id.* at 48.

twenty-two months.¹⁴⁸ This rule has had a disproportionate impact on parents with disabilities because many of them need additional time to comply with the state agency's demands.¹⁴⁹ Parents with disabilities might need additional time to "secure adaptive equipment, [or] secure services that are more involved than those for non-disabled parents. . . ."¹⁵⁰ This time frame is especially difficult for parents with psychiatric disabilities, because even if a mother is making progress in treatment, courts may terminate her rights because she was unable to meet the reunification goals within the short time given.¹⁵¹ Moreover, under the statute, states are able to forgo the "reasonable efforts" requirement if the state has "determined that another reason exists that justifies not using reasonable efforts to reunify the family"—states often use the presence of a disability as a justification for denying families "reasonable efforts."¹⁵²

"Families typically become involved with the child welfare system after an allegation of abuse or neglect . . . is made to child protective services."¹⁵³ State laws require CPS to investigate claims of child abuse or neglect and to determine whether abuse or neglect has taken place.¹⁵⁴ CPS also has an obligation to "ensure that there is a plan in place to keep children safe,"¹⁵⁵ and it will initiate a juvenile court action if it believes there is a risk in the home.¹⁵⁶ A court will determine whether abuse or neglect took place and whether the child should be under the continuing jurisdiction of the court.¹⁵⁷ The court will enter a disposition, which

148. Id. at 87 (citing the Social Security Act, 42 U.S.C. § 675(5)(E) (2012)).

149. Id. at 87; see Charisa Smith, "The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities," 26 *Stanford Law & Policy Review* 307, 327 (2015) (stating "[r]eunification plans often call for fast and decisive action by parents, which can be difficult with a mental disability").

150. Id. at 87 (citing Callow, see note 120, at 22).

151. Id. (citing Barbara J. Friesen et al., "Parents with a Mental Illness and Implementation of the Adoption and Safe Families Act," in *Intentions and Results: A Look Back at the Adoption and Safe Families Act*, 102, 109–10, (eds. Olivia Golden & Jennifer Macomber, Center for the Study of Social Policy, 2009). See, e.g. Lenore McWey et al., "Mental Health Issues and the Foster Care System: An Examination of the Impact of the Adoption and Safe Families Act," 32:2 *Journal of Marital and Family Therapy* 195, 203 (2006); *Dimauro v. Virginia Beach Department of Social Services*, No. 1533-99-1, 2000 Va. App. LEXIS 267 (Virginia Ct. App. 11 Apr. 2000) (judge acknowledged the mother's improvements regarding her mental health, but stated it was "too late" and severed parental rights); *DeJesus v. Richmond Dep't of Soc. Servs.*, No. 1061-01-2, 2001 Va. App. LEXIS 529 (Virginia Ct. App. 25 Sept. 2001) (judge described the mother's improvements as "commendable [but as] she did not make substantial improvements to her situation within the mandated period of time" the judge severed her parental rights).

152. Id. at 86. This is especially true of parents with mental disabilities, as states will shorten the time parents have to address their mental condition under the "bypass" procedure.

153. Id. at 72; see Child Welfare Information Gateway, *How the Child Welfare System Works*, 2, (2013), <https://perma.cc/NEY2-QRMV>.

154. Child Welfare Information Gateway, *Making and Screening Reports of Child Abuse and Neglect*, 4, (2017), <https://perma.cc/ATQ2-KA6H>.

155. *Rocking the Cradle*, see note 59, at 73 (citing Jan McCarthy et al., *A Family's Guide to the Child Welfare System*, National Technical Assistance Partnership for Child and Family Mental Health, (2005), <https://perma.cc/5D3Z-FDAL>).

156. Id. at 73.

157. Id.

may involve ordering a parent to comply with services to address the issue that led to CPS involvement.¹⁵⁸ If the state decides to initiate termination proceedings, the state must prove by clear and convincing evidence that “statutory grounds for termination have been met and termination [is] in the best interest of the child.”¹⁵⁹ States should be very careful in making this determination because termination of parental rights is devastating and irreversible; scholars call it the “death penalty of civil cases.”¹⁶⁰

Many state statutes governing the child welfare system use the presence of a disability as a ground for finding parental unfitness. In fact, twenty-two years after the passage of the ADA, a 2005 study revealed that thirty-seven states “include disability as grounds for TPR. Most of these state statutes use outdated and offensive terminology, [and] have imprecise definitions of disability.”¹⁶¹ These state statutes also list the type of disability that qualifies for a TPR proceeding. For instance, thirty-six states include psychiatric disabilities; thirty-two include intellectual disabilities; eighteen include “emotional illness”; and seven include physical disabilities.¹⁶² Even though a parent’s disability is supposed to be just one factor in determining parental unfitness, it can often become the focus of the TPR proceeding.¹⁶³ Furthermore, while states are usually required to prove a connection between a parent’s disability and her ability to parent, this does not always happen.¹⁶⁴ The presumption of fitness is often not extended to parents with a disability.¹⁶⁵ This is most evident in cases where the child welfare agency intervenes shortly after birth, even though the parents have done nothing to harm the child.¹⁶⁶ As one example, some states have statutes that allow removal of children based primarily on their parent’s IQ.¹⁶⁷

158. Id.

159. Id. (citing Rachel Lawless, “When Love is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability,” 37 *Capital University Law Review* 491, 495 (2008)).

160. Id. (citing Stephanie Gwillim, “The Death Penalty of Civil Cases: The Need for Individualized Assessment and Judicial Education When Terminating Parental Rights of Mentally Ill Individuals,” 29 *Saint Louis University Public Law Review* 341, 344 (2009)). Involuntary separation of parents and their children, even when the parents are not perfect, “can be one of the most traumatic events of a child’s life.”; Susan Stefan, “Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together,” 2 *Saint Louis University Journal of Health Law & Policy* 135, 146 (2008).

161. Id. at 84 (citing Elizabeth Lightfoot et al., “The Inclusion of Disability as a Condition for Termination of Parental Rights,” 34 *Child Abuse & Neglect* 928, 930 (2010)); see discussion in note 151 (discussion on the use of the parental mental health as a reason for bypassing the “reasonable efforts” provision).

162. Id. at 84 (citing Lightfoot, see note 161, at 928).

163. Id. at 84-5 (citing Elizabeth Lightfoot and Traci LaLiberte, “Parental Supports for Parents with Intellectual and Developmental Disabilities,” 49:5 *Intellectual and Developmental Disabilities* 388, 389 (2011)). See Smith, see note 149, at 324 (discussing states’ use of parental mental health as a reason for bypassing the “reasonable efforts” provision).

164. *Rocking the Cradle*, see note 59, at 94 (citing Watkins, see note 103, at 1435); Smith, see note 149, at 369.

165. Id.

166. Id.

167. Id. at 133. See Robert L. Hayman, Jr., “Presumption of Justice: Law, Politics, and the Mentally Retarded Parent,” 103 *Harvard Law Review* 1201, 1215, n.43 (1990) (arguing that not only

In addition to the bias in state statutes, the bias in the courts and social service agencies is well-documented. One of the primary findings in the National Council on Disability's report is that "[p]arents with disabilities and their children are overly, and often inappropriately, referred to child welfare services and, once involved, are permanently separated at disproportionately high rates."¹⁶⁸ Stereotypes permeate the attitudes of child protective services workers and the agencies where they work. These stereotypes include beliefs that "psychiatric disability and symptoms are permanent and unchanging," that "requiring assistance means the person is unfit to parent," and that "being disrespectful to the social workers [equals] unfitness to parent."¹⁶⁹ Many child welfare practices specify that "parental disability is a high risk for abuse."¹⁷⁰

The reasons that decision makers sometimes assume that individuals with disabilities are unfit to parent varies with the disability. For instance, deaf parents are thought to be incapable of effectively stimulating language skills, blind parents are considered unable to provide adequate attention or discipline, and parents with spinal cord injuries presumably cannot adequately supervise their children.¹⁷¹ Many judges and social service agencies do not believe someone who is "blind, deaf, or wheelchair bound could adequately parent a child."¹⁷² The same is true for parents with psychiatric disabilities.¹⁷³

As some courts and social service agencies immediately presume disabled individuals are unfit to parent, they are unwilling to consider that there might be accommodations and adaptive devices which would allow those individuals to parent better as it "flies in the face of the underlying assumption that the disability itself fundamentally precludes parenting at all."¹⁷⁴ Many of the decisions involving the termination of parental rights of individuals with disabilities assume that the role of a parent is primarily one that involves physically doing things for the children.¹⁷⁵ And yet, many scholars note that the most essential elements of parenting are "nurturing, loving, teaching, bonding, giving attention, guiding, communicating and transferring values."¹⁷⁶ These components are usually not hindered by disability.

When considering whether an individual with a disability can be an effective

are IQ tests laden with class, cultural, and racial bias, but they are also not accurate predictors for determining intellectual or developmental disabilities).

168. *Id.* at 18.

169. *Id.* at 98.

170. *Id.* To my knowledge, there is no empirical support for the assertion that individuals with disabilities are more likely to be unfit parents. In fact, there is some (albeit dated) evidence to the contrary. See Hayman, see note 167, at 1219-26 (discussing the lack of evidence that individuals with intellectual disabilities are more likely to be unfit parents).

171. Stein, see note 68, at 1083 (citations omitted).

172. Stefan, see note 160, at 140 (citing Stein, see note 68, at 1083).

173. *Id.*

174. *Id.*

175. Stein, see note 68, at 1084.

176. *Id.*

parent, decision makers often judge her against an able-bodied norm.¹⁷⁷ This point has been made with respect to other protected classes as well. As Professor Minow has pointed out: “Women are compared to the unstated norm of men, ‘minority’ races to whites, [disabled individuals] to the able bodied. . . .”¹⁷⁸ With respect to parents with disabilities, it is a fairly common practice for nannies or family members to care for children of nondisabled parents, and yet, society and the law frowns upon individuals with disabilities needing help with certain parenting tasks (such as food preparation) even though the parent has a loving, emotionally close relationship with her children.¹⁷⁹ In comparison, the decision of an able-bodied parent to care for children with the assistance of a nanny or childcare provider is not questioned.

The effect of all of this normative bias in the system is reflected in removal statistics. Removal rates are 70-80 percent where the parent has a psychiatric disability and 40-50 percent where the parent has an intellectual disability.¹⁸⁰ This means that in approximately seven to eight out of ten cases where the state has initiated a termination of parental rights against a parent with a psychiatric disability, that parent will lose rights. In one study designed to understand the prevalence of parental disability in TPR cases, the study found the “risk ratio for TPR for a parent with a disability in . . . her education records to be 3.26. In other words, parents who had a disability label in their school records are more than three times more likely to have TPR than parents without a disability label.”¹⁸¹

Of course, even when child welfare involvement does not lead to the removal of the children, it still has negative consequences. Even the initiation of proceedings can cause “anxiety, stress, and trauma in both immediate and extended family relationships. . . .”¹⁸² Parents who had a disability label in their educational records were more than twice as likely to have child welfare involvement than their peers who did not have the disability label in their school records.¹⁸³ Both parents and children are damaged by lengthy legal proceedings.¹⁸⁴ Thus, even if a parent “wins” in the TPR proceeding, the process is certainly not costless or painless. For instance, “Christina,” who had significant physical and

177. For instance, because most able-bodied parents think food preparation is a large part of our jobs as parents, a decision maker might frown upon the fact that a parent with a disability needs help with the task of food preparation.

178. Stein, see note 68, at 1094 (quoting Martha Minow, “The Supreme Court, 1986 Term—Foreword: Justice Engendered,” 101 *Harvard Law Review* 10, 13-14 (1987)).

179. Stein, see note 68, at 1095.

180. *Rocking the Cradle*, see note 59, at 77 (citing Loran B. Kundra and 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 Journal* 144-45 (2009)).

181. *Rocking the Cradle*, see note 59, at 77 (citing S. Singh, et al., “Parental Disability and Termination of Parental Rights in Child Welfare, Minn-Link Brief” 12, *Center for Advance Studies in Child Welfare*, (2012), <https://perma.cc/ZU3Z-Y83H>).

182. Smith, see note 149, at 323.

183. *Rocking the Cradle*, see note 59, at 78 (citing Singh, see note 180).

184. Smith, see note 149, at 323.

sensory (vision and hearing) disabilities, was “inappropriately referred to CPS on various occasions.”¹⁸⁵

In one instance, her daughter’s school reported maltreatment after her daughter injured herself doing summersaults. Although the CPS staff knew that Christina is hard of hearing and requires accessible relay services, they called her without the needed services, with the result that she could not effectively communicate. CPS alleged that she was being uncooperative and continued the investigation. The situation was ultimately resolved in Christina’s favor, but it is doubtful that it would have progressed to this level if she did not have a disability.¹⁸⁶

Many mothers with disabilities feel vulnerable and live in constant fear of being reported because of their disability.¹⁸⁷ In one heart-wrenching and well-known story,¹⁸⁸ Tiffany Callo was a wheelchair user with cerebral palsy. When she became pregnant, her pregnancy received hostile responses, such as one woman approaching her on the street and saying: “I don’t think it’s right, a person like you having a baby.”¹⁸⁹ When her baby was born, Tiffany wasn’t allowed to see or hold her child for the first fourteen hours of his life. She was also told that if she didn’t cooperate with social services, she may never see her son again.¹⁹⁰

After Tiffany gave birth to her first child, her relationship with her boyfriend, the father of the child, began to deteriorate and her son was removed to foster care by child welfare workers.¹⁹¹ Meanwhile, Tiffany learned she was pregnant again and immediately after she gave birth to her second son, child welfare workers removed him from her care.¹⁹² While Tiffany was fighting for custody of her sons, she realized she would need assistance to care for them, so she requested attendant care to help with some parenting tasks.¹⁹³ The county refused her request.¹⁹⁴ At the custody hearing, the county presented a videotape of Tiffany slowly diapering her son (David) during a supervised home visit, asserting that the tape demonstrated that Tiffany couldn’t take care of her son because of how slowly she changed his diaper.¹⁹⁵ The county’s argument ignored the fact that Tiffany accommodated her own disability by cooing and talking to David while she diapered him, encouraging him to be patient. And in fact, he *was* patient. Experts

185. *Rocking the Cradle*, see note 59, at 81.

186. *Id.*

187. *Rocking the Cradle*, see note 59, at 82.

188. This story is well-known in part because a book was written about it, and then that book was reviewed by a very prominent disability scholar. Jay Mathews, *A Mother’s Touch: The Tiffany Callo Story* (Henry Holt & Co., 1st Edition 1992); Stein, see note 68, at 1086.

189. Stein, see note 68, at 1087.

190. *Id.* at 1087-88.

191. *Rocking the Cradle*, see note 59, at 71.

192. *Id.*

193. *Id.*

194. *Id.* Tiffany Callo’s attorney was appalled that the child protection agency would pay more than \$500 per month to keep a child in foster care but would not spend the same amount on an attendant that would allow a disabled mother to raise her child in her own home.

195. *Rocking the Cradle*, see note 59, at 71.

testified that infants will learn to hold still during long diapering sessions when parents support their patience.¹⁹⁶ As Professor Stein argues, judging people with disabilities by able-bodied standards is hardly equitable and should not be the standard.¹⁹⁷ As he states: “Even with the accomplishment of parental tasks though different techniques, mothers with disabilities fear that mainstream society will remove their children because of prevailing misconceptions. The result is the diminishment of parental joy for otherwise able and loving parents and the reinforcing of able-bodied norms of parenting.”¹⁹⁸

Parents with other types of disabilities have also experienced the consequences of the presumption that they are unfit parents because of their disability. For instance, in 2010, parents who were blind had their two-day-old daughter taken into custody by the state.¹⁹⁹ The removal was not based on any allegations of abuse or neglect; rather, it was based on simply a fear that the parents would be unable to care for their daughter because they were blind.²⁰⁰ As summed up in the National Council on Disability’s report, “The child welfare system is fraught with bias and speculation concerning the parenting abilities of people with disabilities.”²⁰¹

While not all disabled parents will be good parents (as neither are all able-bodied parents) the assumptions made by courts, social service workers, and society that individuals with disabilities *cannot* be good parents is often inaccurate and is based on outdated and uninformed beliefs about the negative effects of a parent’s disability on his or her children.²⁰² Instead, “parental disability in and of itself need not present a significant risk factor” considering the availability of “internal and external resources and supports” for parents with disabilities.²⁰³

ii. The ADA and Legal Response to Bias in TPR Proceedings

Recognizing that the system is fraught with bias, the next logical question is whether the law provides any assistance to individuals with disabilities who experience this bias. The obvious place to start is the Americans with Disabilities Act (ADA). Although not explicitly stated in the ADA, most scholars agree that the ADA does or should apply to disability-based discrimination in the child welfare system and family courts.²⁰⁴ Legislative history suggests that the ADA

196. *Id.* at 71, 144 (discussing a one-month old baby who would hold still and curl up “like a kitten” when getting lifted by her mother with a disability).

197. Stein, see note 68, at 1093.

198. *Id.* at 1095-96.

199. *Rocking the Cradle*, see note 59, at 95.

200. *Id.*

201. *Id.* at 97.

202. *Id.* at 185.

203. *Id.* at 192; see Smith, see note 149, at 318 (“Evidence therefore reveals mental disabilities in parents do not necessarily make for perpetually bad parents. While every case is different, parenting classes, mental health treatment, and other support services can drastically improve such family situations.”).

204. *Rocking the Cradle*, see note 59, at 74.

was intended to cover these issues and would allow a parent to raise the ADA as an affirmative defense during a termination of parental rights proceeding (TPR). During one congressional hearing on the ADA, a witness stated: “We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?”²⁰⁵ Another witness testified that discrimination against individuals with disabilities affects them in every aspect of their lives, including “securing custody of their children.”²⁰⁶ Child welfare systems generally include state and local agencies; accordingly, Title II of the ADA, which prohibits discrimination by state and local governments, should apply.²⁰⁷ And yet, this issue is continuously disputed, with disabled parents often losing.²⁰⁸

Although it seems clear that social service agencies are covered by Title II of the ADA because they are departments or agencies of the state government, the resistance of state and federal courts to allow ADA arguments in termination proceedings is “legendary.”²⁰⁹ Some courts have held that the ADA does not apply to TPR proceedings because the TPR proceeding is not a service benefitting the parents;²¹⁰ but rather a proceeding for the benefit of the child.²¹¹ Some courts have held that the ADA does not apply to TPR proceedings because the court’s jurisdiction is limited to interpreting the state child welfare law rather than conducting an open-ended inquiry into whether the parents received sufficient services as required by the ADA.²¹² Other courts have held that Title II can only be used to bring a separate action against the child services agency for failure to provide the disabled parent with an accommodation and cannot be used as a defense in a TPR proceeding.²¹³

As a practical matter, the parent with a disability is in an unenviable position. Often, disabled parents need accommodations to help them in their parenting roles. But this puts a mother in the “anomalous and paradoxical role of asserting that . . . she can parent adequately, and simultaneously requesting what may well be perceived as ‘special’ and ‘additional’ services.”²¹⁴ As stated by one commentator: “[u]ltimately, the perspective in most of these cases distills down to the view that the federal ADA rights of the parents must be subordinated to the rights of the

205. Id. at 74 (quoting Justin Dart, Jr., disability rights advocate known as the “Father of the ADA”).

206. Id.

207. *Rocking the Cradle*, see note 59, at 74.

208. Stefan, see note 160, at 161-62 (citing *In re C.M.S.*, 646 S.E.2d 592, 595 (North Carolina Ct. App. 2007); *In re Torrance P.*, 522 N.W.2d 243, 246 (Wisconsin Ct. App. 1994)).

209. Stefan, see note 160, at 162.

210. *Rocking the Cradle*, see note 59, at 93; see *In re Kayla N.*, 900 A.2d 1202, 1208 (Supreme Ct. Rhode Island 2006).

211. See, e.g. *New Jersey Div. of Youth & Family Services v. A.G.*, 344, 418 (New Jersey Superior Ct. 2001); *People ex. rel. T.B.*, 12 P.3d 1221 (Colorado Ct. App. 2000); *In re B.S.*, 693 A.2d 716, 721 (Supreme Ct. Vermont 1997).

212. *Rocking the Cradle*, see note 59, at 93.

213. See, e.g. *In re Doe*, 60 P.3d 285, 292 (Supreme Ct. Hawaii 2002).

214. Stefan, see note 160, at 163.

child, a view which explicitly frames the parent and child as adversaries.”²¹⁵

This concern—that the child’s rights will be compromised if the disabled parent is allowed to raise an ADA claim—is unwarranted.²¹⁶ First, the child is always the focus of a TPR hearing, even when the court simultaneously examines whether a parent’s ADA rights have been violated.²¹⁷ Second, the parent’s evidence of the ADA violation should not be viewed as contrary to the rights of the child, because if the parent has been discriminated against and the parent-child relationship is severed, this would have drastic and often harmful consequences on the child.²¹⁸ In fact, even for infants and very young children, the evidence reveals severe emotional and psychological damage when they are separated from their primary caregivers.²¹⁹ One study indicates that even when children are adopted after removal from their parents (rather than staying in foster care), the children experience a sense of “profound deprivation.”²²⁰ Commentators criticize the decision by some social welfare agencies to spend more money terminating parental rights and paying for foster care than investing in services to help disabled parents learn to better parent.²²¹

A few courts have held that the ADA applies to TPR proceedings, even if the ADA claim or defense was ultimately unsuccessful.²²² For instance, *In Matter of M.H. and G.H.*, the father claimed that his mental impairment was not reasonably accommodated under the ADA.²²³ The court held that the accommodations the father would need would be too onerous for the social service agency and therefore were not required.²²⁴ In another case, *In re T.M.*, the court held that an intellectually disabled mother could argue that the state’s treatment of her was discriminatory under the ADA at a TPR proceeding but such a claim

215. *Id.* at 162.

216. *Rocking the Cradle*, see note 59, at 76.

217. *Id.*

218. *Id.* at 76, 101 (“When family integrity is broken or weakened by state intrusion, [the child’s] needs are thwarted and . . . [t]he effect on the child’s developmental progress is invariably detrimental.”). See Stefan, see note 160, at 146 (stating that “involuntary separation from parents, even imperfect parents, can be one of the most traumatic events of a child’s life”).

219. *Rocking the Cradle*, see note 59, at 102 (quoting 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 *Texas Journal on Civil Liberties and Civil Rights* 9, 23 (2011)). See *id.* at 103 (holding that this is true “even when the parent has been neglectful”).

220. *Id.* at 105 (quoting Watkins, see note 103, at 1458).

221. *Id.* at 106 (quoting Watkins, see note 103, at 1475).

222. See Dale Margolin, “No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act,” 15 *Virginia Journal of Social Policy & the Law* 112, 122 (2007) (“Even if a state acknowledges that Title II applies to a TPR, it still has been difficult for parents actually to raise the ADA as a defense to the termination of their rights.”).

223. 143 P.3d 103, 107 (Supreme Ct. Montana 2006) (holding that accommodations provided to parents with disabilities were beyond the scope of the ADA if they “fundamentally altered” the services provided by an agency).

224. *Id.*

should have been made at the first hearing.²²⁵

In addition to the few positive cases, the Department of Justice (DOJ) and Department of Health and Human Services (HHS) recently weighed in on the issue of the applicability of the ADA in TPR proceedings. In the recent DOJ and HHS investigation²²⁶ of the Massachusetts Department of Children and Families (DCF), the agencies found that DCF had violated Title II of the ADA and Section 504 of the Rehabilitation Act by discriminating against a parent in a custodial proceeding on the basis of her disability, “and denying her opportunities to benefit from supports and services numerous times over the past two years, including her existing family supports.”²²⁷

The story is a sad one, and quite lengthy. In short, Sara Gordon was a twenty-one-year-old woman with a developmental disability. Two days after she gave birth to her daughter in November 2012, Massachusetts DCF removed the baby from Sara’s custody despite the fact that Sara lived with her parents, who had promised to provide support to Sara and her baby (Sara’s mother even quit her job to care for Sara and her baby full-time).²²⁸ During a two-year period, multiple assessors all agreed that Sara could properly care for her child with a family-supported parenting plan, which involved Sara’s mother helping raise the child.²²⁹ In spite of that assessment, Massachusetts DCF refused to provide Sara with appropriate services and modifications to their services to accommodate Sara’s disability.²³⁰

Most relevant to our purposes here, the DOJ and HHS letter makes clear that Title II should and does cover proceedings by an agency such as the Massachusetts DCF.²³¹ As stated in the joint letter of findings, “Title II and Section 504 apply to everything DCF does, including its investigations, assessments, removals, family preservations, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.”²³² DOJ and HHS rejected DCF’s argument that the ADA may not be raised as a defense to proceedings to terminate parental rights because such proceedings do not constitute a “service” under the ADA,

225. 715 N.W.2d 771 (Iowa Ct. App. 2006) (holding that “[n]ot only the sufficiency of services, but also the issue of reasonable accommodation, should be raised at the removal or review hearing or when services are offered”). See generally Margolin, see note 222, at 178, Appendix A (summarizing “State Court Decisions Regarding the Applicability of the ADA to TPRs and the Use of the ADA as a Defense at TPRs”).

226. See U.S. Department of Justice & U.S. Department of Health and Human Services, “Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act (DJ No. 204-36-216 and HHS No. 14-182176),” (29 Jan. 2015), <https://perma.cc/UD7J-D5Y8>.

227. *Id.* at 1-2.

228. *Id.* at 2.

229. *Id.*

230. *Id.*

231. *Id.* at 10.

232. *Id.*

responding that:

[t]he Justice Department has long taken the position in its regulatory guidance, technical assistance, and enforcement actions that Title II applies to everything a public entity does—all of the child welfare services it provides, including recommendations and petitions related to child welfare matters and proceedings to terminate parental rights. The legal conclusion that termination proceedings are not covered by the ADA similarly cannot be squared with the U.S. Supreme Court’s unanimous pronouncement in [*Pa. Dept. of Corrs v.*] *Yeskey*, 524 U.S. [206], 209-12 [(1998)] (finding, beyond question, that a non-voluntary motivational boot camp in state prison was covered for participation by inmates with disabilities).²³³

Of course, this letter and the legal conclusion that the ADA applies to termination of parental rights proceedings is not binding on courts.²³⁴ But I do think (and hope) that it will be persuasive evidence that will hopefully convince courts that the ADA should apply in these proceedings.

III. EFFECTS OF CUMULATIVE MARGINALIZATION

This Part brings together the workplace and the family to explore how the marginalization suffered because of each identity (being disabled and a mother) intersect to create a particularly precarious position for mothers with disabilities.

A. Importance of Intersectionality

The theory of intersectionality originated from the notion that everyone has multiple identities and that a “multitude of varied characteristics and experiences shapes every individual.”²³⁵ As explained by Professor Martha Chamallas, intersectional feminism began in the late 1980s from “incisive critiques from women of color dissatisfied with the lack of inclusiveness in feminist legal theory.”²³⁶ Black feminist scholar Kimberlé Crenshaw called for a “reexamination

233. *Id.* at 10, n.11.

234. A claimant who believes she has been discriminated against by a public entity may file a complaint with an appropriate federal agency. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.170(a) (11 Aug. 2016) (“Complaints.”). The agency receiving the complaint is charged with investigating the claim of discrimination and, when deemed appropriate, attempting to negotiate a voluntary settlement with the public entity. See *id.*, 28 C.F.R. § 35.172 (11 Aug. 2016) (“Investigations and Compliance Reviews”). The DOJ letter discussed above was such an attempt. If the Massachusetts DCF does not comply with the remedies requested in the DOJ letter, the Attorney General could initiate litigation. See Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12131-34 (2012) (“Prohibition Against Discrimination and Other Generally Applicable Provisions”) (describing enforcement mechanism).

235. Cornelsen, see note 50, at 115 (citing Rangita de Silva de Alwis, “Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights,” 18 *Pacific Rim Law and Policy Journal* 293, 294 (2009)).

236. Martha Chamallas, “The Generation of Complex Identities (1990s and Beyond),” in

of the assumptions about women's behavior, experiences, interests, and desires to see if those assumptions were partial and biased toward the experience of only some subgroups of women."²³⁷ Intersectional feminists critique what is known as "gender essentialism," which refers to the idea that "there is some common, underlying attribute or experience shared by all women, independent of race, ethnicity, class, religion, language, disability, sexual orientation, or other aspects of their particular situation."²³⁸ Since the beginning of the intersectional movement, intersectional inquiry has expanded to explore other intersections in addition to race, "including sexual orientation, ethnicity, and religion. . . ."²³⁹

In discussing the intersectional identities of women with disabilities, Anita Silvers argues that it is not possible to dissect how women with disabilities experience oppression into "gender-specific and disability-specific elements."²⁴⁰ In other words, it is not possible to compartmentalize "multiple sources of bias."²⁴¹ To highlight this bias, Silvers points to statistics comparing disabled women with both disabled men and nondisabled women. First, census data²⁴² reveals that disabled women have a much lower "socio-cultural participation rate than their non-disabled female and disabled male counterparts."²⁴³ With regard to employment, more than half of nondisabled women and disabled men are employed, but less than half of disabled women are employed.²⁴⁴ With respect to marriage, of those who were married and not widowed, 25 percent of women with disabilities were divorced or separated, compared to only 15 percent of nondisabled women and 11 percent of disabled men.²⁴⁵ This suggests, according to Silvers, that, "combined, the two stigmas have a more than additive negative effect."²⁴⁶ Another scholar noted that women with disabilities are less likely than nondisabled women or disabled men to fulfill the traditional binary gender roles because they are often exempted from the male productive role or the female nurturing role, "having the glory of neither, disabled women are arguably 'doubly oppressed.'"²⁴⁷

Silvers also explains that this unique form of oppression is rarely explored.

Introduction to Feminist Legal Theory 91, 93 (Aspen, 3d Ed., 2013).

237. Id. at 95 (citing Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 139, 155 (1989)).

238. Id. at 93.

239. Id.

240. Silvers, see note 67, at 87.

241. Id.

242. Although this census data is from 1984, I do not think there is any reason to believe that the percentages would be significantly different today. See Travis, see note 43, at 846 (arguing that women with disabilities have lower rates of labor force participation than men with disabilities and individuals without disabilities).

243. Silvers, see note 67, at 89.

244. Id.

245. Id.

246. Id.

247. Asch & Fine, see note 46, at 13.

Specifically, she is critical of a feminist movement that has, in large part, ignored disability. One explanation of why this has happened “is that non-disabled women simply haven’t had the chance to get to know women with disabilities because the latter are made *invisible* in the general culture.”²⁴⁸ Another issue that keeps nondisabled feminists from exploring this intersection is that some nondisabled women fear finding themselves part of the “disability” class—“part of what makes disability so threatening to the nondisabled . . . may be precisely the indistinctness and permeability of its boundaries; the border is patrolled vigilantly by ‘normals’ more out of fear that they may stray over it than out of fear of transgression by those on the other side.”²⁴⁹ One of the purposes of this Article is to address this intersection head-on.

B. Effects of Cumulative Marginalization

The biases against mothers and against individuals with disabilities, in both the domestic sphere and the workplace, come together to create a uniquely marginalizing experience for mothers with disabilities. This Sub-part explores those experiences.

How these identities intersect depends on many factors—such as how severe²⁵⁰ the disability is, when the woman became disabled, her work history, and her family status. I have chosen to use the severity of the disability and the age at which the woman became disabled as the variable factors, and hold all other factors constant. Thus, I will first explore the situation from the perspective of a woman who was severely disabled from birth. I will then move on to the perspective of a woman who was disabled from birth but with a less severe disability. Finally, I will explore the situation from the perspective of a woman who became disabled later in life, likely after she had established a career and a family.

If the individual was disabled from birth (or from a young age), she will likely identify more with her disability than with her gender.²⁵¹ And if her

248. Silvers, see note 67, at 95.

249. Id. at 95-96 (quoting G. Thomas Couser, *Recovering Bodies: Illness, Disability, and Life Writing*, 178 (University of Wisconsin Press, 1st ed., 1997).

250. I recognize “severe” is a subjective word. When used in the disability law and literature, people seem to refer to “severe” as relating to “biological severity,” which in turn is usually referring to the limitations on daily activities. For instance, when looking at biological severity, courts would likely consider someone who is blind or has a mobility impairment and uses a wheelchair as having a more “severe” disability than someone who has a mental illness. Of course, as I and others have argued, biological severity does not necessarily correlate with stigma. Some disabilities, e.g., bipolar disorder or schizophrenia, are more stigmatized than many physical disabilities. See Nicole Buonocore Porter, “Cumulative Hardship,” 25 *George Mason Law Review*, *36-40 (forthcoming 2018), <https://perma.cc/68GE-RX6T>.

251. Simon, see note 64, at 219 (stating that disability that has occurred before or during adolescence trumps other statuses); Asch & Fine, see note 46, at 28 (stating that for disabled women, disability trumped gender); Moreover, some argue that growing up with a disability is more devastating than acquiring it later in life. Fine & Asch, “Epilogue: Research and Politics to Come,” in *Women with Disabilities: Essays in Psychology, Culture, and Politics* 333 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1988).

disability is very severe, she might be unable to find gainful employment.²⁵² Even if there is a job she is qualified to perform with a reasonable accommodation,²⁵³ the stigma and stereotypes surrounding her disability might mean that no one will hire her.²⁵⁴ Instead, she might be forced to rely on public support, which is often inadequate for maintaining a reasonable standard of living.²⁵⁵

In this situation, she will likely suffer from all of the difficulties surrounding women with disabilities in the family realm.²⁵⁶ Thus, she might never have an intimate sexual relationship because of the stereotypes that suggest that women with disabilities are asexual and undesirable.²⁵⁷ If she does enter into such a relationship and even if she gets married, she might be discouraged or even forbidden from becoming a mother.²⁵⁸ If she does become a mother, she might have to deal with child protective services investigating her parenting skills and attempting to take away her children.²⁵⁹ If she is married to the father of her child(ren), at some point, she might be required to fight for custody of her children because studies indicate that women with disabilities are more likely to get divorced.²⁶⁰ And because she possibly lives in poverty²⁶¹ (if her disability is severe enough to prevent her from working), her poverty along with her disability might mean that she will lose custody of her children.²⁶²

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252. But see, Nancy Henderson Wurst, *Able! How One Company's Extraordinary Workforce Changed the Way We Look at Disability Today*, 15 (BenBella Books, 2008) (discussing one rug company who agreed to host a small number of individuals with intellectual disabilities, which eventually led to a workforce where *most* of the employees have either a physical or mental disability, or both: "David [the owner], who balked at the idea when a friend approached him about hosting the first enclave two decades ago, is convinced his company has flourished not *in spite of*, but *because of* his employees with disabilities.").
253. See Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12111(8) (defining a qualified individual with a disability as a person with a disability who is able to perform the essential functions of the job with or without reasonable accommodations).
254. See Russo & Jansen, see note 57, at 234 (arguing that employment, poverty, and disability are related in complex ways).
255. See generally Nancy R. Mudrick, "Disabled Women and Public Policies for Income Support," in *Women with Disabilities: Essays in Psychology, Culture, and Politics* 245, 266 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1st ed., 1988) (stating that despite the crucial role of public income support, this support is often less accessible and smaller for disabled women than for disabled men).
256. See Part III.
257. See Part III. A; Asch & Fine, see note 46, at 21 (stating that disabled women are often considered unfit as sexual partners).
258. See note 59, at 42, and accompanying text.
259. See Part III. B. 3.
260. See Part III. B; Marian Blackwell-Stratton, et al., "Smashing Icons: Disabled Women and the Disability and Women's Movements," in *Women with Disabilities: Essays in Psychology, Culture, and Politics* 306, 307 (eds. Michelle Fine & Adrienne Asch, Temple University Press, 1988) (stating that disabled women are more likely to be divorced than nondisabled women).
261. Blackwell-Stratton, et al., see note 260, at 326 (stating that the double dose of discrimination is reflected in the economic disparity of disabled women compared to disabled men or nondisabled women, where almost 30 percent of all disabled women live below the poverty line).
262. See Part III. B; Blackwell-Stratton, et al., see note 260, at 317 (stating that, historically, child custody suits almost always end up with custody being awarded to the nondisabled parent).

Now let's imagine a woman has a disability from birth (or a young age) but not severe enough to preclude employment.²⁶³ A woman who is disabled from birth is less likely to get married and have children.²⁶⁴ As a child, this woman will likely be told to focus on her education and career, because she is unlikely to have normal intimate relationships; thus, she needs to learn to support herself.²⁶⁵ Many parents of girls with disabilities have a difficult time seeing their daughters as sexual persons and may even worry that sex is dangerous for their daughters.²⁶⁶ Thus, research reveals that "many parents have low heterosexual expectations for their disabled teenage daughters because they view them as unable to fulfill the typical female role of marriage and childrearing."²⁶⁷ Ironically, if they live up to the expectations of their parents and society by never marrying, disabled women might be slightly better off financially because they will only be dealing with the stigma surrounding their disability and not the additional stigma attached to being a working mother.²⁶⁸ Of course, if a woman with a disability does enter into an intimate relationship and does have children, she might be marginalized both for having a disability as well as for having caregiving responsibilities that might require occasional accommodations.²⁶⁹ A woman who does have children is likely to suffer from bias based on the intersection of her identities as a person with a disability and a woman with caregiving responsibilities.

Now let's imagine that a woman has a job (or career) and a family before she becomes disabled. Her developing disability might be a disease (such as cancer, diabetes, multiple sclerosis, heart disease) or it might be related to an accident (that could cause a mild intellectual disability or a musculoskeletal impairment).²⁷⁰ Assuming she is able and wants to continue to work, she is likely to experience many of the biases discussed in this Article. A woman who becomes disabled later in life might also suffer from stereotypes and difficulties in her home life after she becomes disabled. Depending on the severity of her disability, she might not be able to engage in the nurturing role to which her family had grown

263. As discussed earlier, I am using "severity" to refer to biological severity, or the limitations on activities of daily living. Thus, someone with a less "severe" disability might be someone with partial hearing or vision loss, or someone with musculoskeletal impairments that might cause some limitations on the person's mobility. See note 250.

264. See Blackwell-Stratton et al., see note 260, at 307 (arguing that, unlike a nondisabled woman who has socially sanctioned roles as mother and wife, a disabled woman has no adult roles, and this sense of "rolelessness" is "reinforced by a public assumption that disabled women are inappropriate as mothers or sexual beings") (citing statistics that disabled women are less likely to be married than nondisabled women).

265. Rousso, see note 62, at 158 (noting that some parents of girls with disabilities told them to put their time into school because they won't get a man and won't get to have a family).

266. *Id.* at 161.

267. *Id.* at 162.

268. But see Russo & Jansen, see note 57, at 241 (stating that disabled women have higher living costs and must assume the financial burden of attendant care).

269. See notes 275-283 and accompanying text.

270. For instance, chapter five in Fine & Asch addressed women who developed breast cancer in their middle years. Meyerowitz et. al, see note 74, at 72.

accustomed.²⁷¹ Or, depending on the disability, her husband might not find her attractive anymore.²⁷² Alternatively, the workplace marginalization might cause a mother with a disability to stay in an unhealthy or abusive relationship, for fear of not being able to support herself and her kids financially without her spouse. Studies show that a woman is more likely to get divorced after becoming disabled.²⁷³ If a mother with a disability and her spouse do get divorced, her reduced earning potential,²⁷⁴ along with stereotypes surrounding a disabled mother's ability to properly care for her children²⁷⁵ might have negative consequences for her ability to maintain custody of her children.²⁷⁶ Finally, a single mother with a disability will find managing work, her disability, and the caregiving of her children to be even more difficult. This could cause her to lose her job, which in turn, might lead her to lose custody of her children.²⁷⁷

Whether a woman is born with a disability and / or develops a disability later in life, she may be forced to seek accommodations for both her disability and for her caregiving responsibilities in the workplace.²⁷⁸ She might need schedule changes or modified job duties to accommodate her disability;²⁷⁹ and, because most women are the primary caregivers of their children even when they are married,²⁸⁰ she might need schedule changes or leaves of absence to take care of her children.²⁸¹ Having to seek those accommodations will likely cause her marginalization in the workplace. As I have discussed elsewhere, seeking accommodations in the workplace causes what I refer to as "special treatment

271. *Id.* at 77 (stating that mothers who develop a disability mid-life (such as breast cancer) may be unable to maintain the level of nurturing she used to, which may lead to her children becoming fearful, withdrawn, and hostile); *id.* at 74 (noting that the disruption of the traditional female role (childrearing) may cause a dramatic impact on women who take their nurturing role seriously).

272. *Id.* at 73 (stating that some women who become disabled in mid-life have exacerbated feelings of being sexually unappealing); *id.* at 77 (stating that women who developed a disability mid-life suffered from marital difficulties); *id.* at 77 (reporting changes in sexual relationships of some women who had mastectomies).

273. Blackwell-Stratton et al., see note 260, at 307.

274. See Meyerowitz et al., see note 74, at 77-78 (stating that discrimination against cancer patients in conjunction with the need for assistance at home and the expense of treatment can cause serious financial difficulties).

275. See Part III. A.

276. See Part III. B.; Blackwell-Stratton et al., see note 260, at 317.

277. Asch & Fine, see note 46, at 20 (noting that women getting the least help are those who need it the most, those who are single parents and thus have to combine the stress of single parenthood and disability); Russo & Jansen, see note 57, at 236 (stating that a large proportion of disabled women are likely to become single heads of households and in one 1982 study more than one-third of disabled women divorced, separated, or never married).

278. See generally Nicole Buonocore Porter, "Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities," 66 *Florida Law Review* 1099 (2015).

279. *Id.* at 1106-08; see Meyerowitz et al., see note 74, at 76 (stating that cancer survivors who were questioned four months after breast cancer treatment reported changes in their job status).

280. Porter, "Why Care?," see note 1, at 359.

281. Nicole Buonocore Porter, "Special Treatment Stigma After the ADA Amendments Act," 43 *Pepperdine Law Review* 213, 236-39 (2016).

stigma.”²⁸² This stigma causes employers to be less willing to hire or promote individuals who need special accommodations in the workplace.²⁸³ And it also causes resentment by coworkers, who either resent having to do extra work to accommodate the employee with the disability, or resent the employee receiving the accommodation because it’s something the coworkers covet.²⁸⁴ All of this means that mothers with disabilities are likely to be marginalized in the workplace because of either their status as caregivers or their status as individuals with disabilities, or both. This stigma often leads to lower pay, lower advancement opportunities,²⁸⁵ and possibly, termination.²⁸⁶

Interestingly, unmarried women who develop disabilities later in life do not seem to be as disadvantaged as women who had sought the traditional roles of marriage and motherhood.²⁸⁷ As one scholar explained, never married women over sixty-five years of age view their disabilities (cataracts, diabetes, muscular degeneration, hearing loss, etc.) as predictable, unexceptional difficulties that are simply part of old age.²⁸⁸ Some of this is just a numbers issue. In one study, 46 percent of individuals over the age of sixty-five have a chronic disability.²⁸⁹ In fact, old age has served to integrate the never-married women into the general population of women who are older than sixty-five where chronic disease and disability is something they share in common or is simply considered a rite of passage.²⁹⁰ For this cohort of women with disabilities, their disabilities were a “less significant source of alienation or marginality compared to their many years of spinster status.”²⁹¹ This is not to say that their disabilities do not disrupt their lives, but rather that they seem to deal with the disruptions fairly easily.²⁹² Some of this might be because, during their younger years, they did not have the workplace marginalization caused by motherhood or disability, so if nothing else, they are in better financial shape than women who might have experienced career marginalization because of motherhood or an earlier-in-life disability.²⁹³

These are just some of the ways disability, gender, and motherhood intersect

282. *Id.* at 1108-15.

283. *Id.* at 1109-11.

284. Porter, see note 281, at 236-39.

285. Russo & Jansen, see note 57, at 240 (stating that disabled women are less likely to be afforded the opportunity to acquire skills that will bring access to the higher paying male dominated occupations).

286. *Id.* at 235 (stating that disabled women are much more likely to face unemployment than are other women).

287. See generally Simon, see note 64.

288. *Id.* at 215.

289. *Id.* at 217.

290. *Id.* at 218, 219.

291. *Id.* at 219.

292. *Id.* at 221.

293. *Id.* at 222 (stating that because single women have had to take responsibility for their own social and economic existence, this prepares them to face the physical, emotional, and economic challenges faced by disability). It has also been hypothesized that never-married women who develop disabilities later in life handle it well because they have experience taking care of their own aging parents. *Id.* at 222-23.

to cause marginalization for mothers with disabilities. I am not suggesting that *all* mothers with disabilities experience some or all of these challenges. But I am suggesting that the ways sexism and ableism intersect and impact this group of women deserve a closer look. The consequences of this marginalization on disabled mothers can be profound, affecting their happiness and career success, as well as the well-being of their families and children.

CONCLUSION

This Article has explored a unique form of marginalization experienced at the intersection of gender, disability, and motherhood. I have attempted to highlight all of the ways in which women with disabilities who want to or do become mothers are marginalized—both in the workplace and in their family lives. Although I do not offer any specific solutions to this marginalization, I hope my attempt to explore this intersection will lead to further fruitful discussions. Specifically, further research and discussions should consider what solutions might be available to ameliorate the marginalization facing mothers with disabilities.