

LEGAL ABLEISM: A SYSTEMATIC REVIEW OF STATE TERMINATION OF PARENTAL RIGHTS LAWS

ROBYN M. POWELL*

ABSTRACT

Although the fundamental right to raise a family is among our most cherished, it is not equally afforded to everyone. Indeed, the United States has an appalling and enduring history of policing parenthood among people with disabilities. In recent years, the rights of parents with disabilities and their children have garnered unprecedented attention from activists, scholars, legal professionals, and policymakers. Nevertheless, the number of disabled parents who have their parental rights terminated is substantial and growing. As such, the roots of these ongoing injustices must be investigated. To that end, because the family policing system, including termination of parental rights, is primarily governed by state statutes, such an interrogation must begin there.

In response, this Article presents findings from a systematic examination of the inclusion of parental disability in state termination of parental rights laws. Strikingly, using established methodological practices from the social sciences, it reveals that parents in forty-two states and the District of Columbia are at risk of having their parental rights terminated because they are disabled. Even worse, as this Article demonstrates, these numbers have remained essentially unchanged for over a decade. Thus, ableism remains entrenched in state termination of parental rights laws. Finally, drawing on the findings from this investigation, this Article considers normative legal and policy solutions for challenging ableist termination of parental rights statutes as well as areas warranting further inquiry. Reckoning with these statutes is essential to finally confront the irreparable harm inflicted on disabled parents and their children by the family policing system.

* Robyn M. Powell, Ph.D., J.D. is an associate professor at the University of Oklahoma College of Law and a Senior Research Associate at the Lurie Institute for Disability Policy. The author extends her appreciation to Ona Colasante, a former student at Stetson University College of Law, for her invaluable research assistance. This Article benefited from a presentation at the American Public Health Association's Annual Conference (November 2022). Support for this project was partially provided by a grant (#90DPCP0012) from the National Institute for Disability, Independent Living, and Rehabilitation Research (NIDILRR), a part of the U.S. Department of Health and Human Services. The opinions and conclusions are solely the author's and should not be construed as representing the sponsor.

TABLE OF CONTENTS

| | |
|---|-----|
| I. TERMINATION OF PARENTAL RIGHTS AND THE LAW..... | 431 |
| A. <i>Overview of the Family Policing System</i> | 431 |
| B. <i>Termination of Parental Rights: Federal and State Laws</i> | 433 |
| II. POLICING PARENTHOOD AMONG DISABLED PEOPLE | 438 |
| A. <i>Historical Roots</i> | 438 |
| B. <i>Contemporary Injustices</i> | 443 |
| III. THE CURRENT STUDY | 448 |
| A. <i>Study Contribution</i> | 448 |
| B. <i>Methodology</i> | 451 |
| 1. <i>Data Source</i> | 452 |
| 2. <i>Analytic Strategy</i> | 452 |
| C. <i>Study Limitations</i> | 454 |
| IV. FINDINGS | 455 |
| A. <i>Frequency of Parental Disability in State Termination of Parental Rights Laws</i> | 455 |
| B. <i>Thematic Findings</i> | 459 |
| 1. <i>Outdated Terminology</i> | 459 |
| 2. <i>Ambiguous and Discriminatory Criteria</i> | 460 |
| 3. <i>Focus on the Future and Arbitrary Time Periods</i> | 463 |
| 4. <i>Inconsistent Statutory Provisions</i> | 464 |
| V. CONFRONTING ABLEISM IN TERMINATION OF PARENTAL RIGHTS LAWS..... | 465 |
| A. <i>Legal Challenges</i> | 465 |
| B. <i>Policy Implications</i> | 470 |
| C. <i>Future Inquiry</i> | 472 |
| CONCLUSION..... | 473 |
| APPENDIX. RELEVANT STATUTORY LANGUAGE..... | 474 |

INTRODUCTION

Alice Goltz gave birth to her daughter on April 13, 2007.¹ The next day, the Vermont Department of Children and Families (DCF) filed a petition with the court alleging that the newborn was “in need of care” after a nurse reported that Alice was having difficulty caring for her daughter because of her disabilities.² Alice has fragile X syndrome, resulting in a “mild cognitive

1. Alice Goltz, *Losing My Daughter*, DISABLED PARENTING PROJECT (Mar. 14, 2017), <https://disabledparenting.com/losing-my-daughter/> [https://perma.cc/HG53-VYGT].

2. *In re A.G.-K.*, 2010 VT 412, 188 Vt. 647; *see also* Ranjani Chakraborty & Christof Putzel, *Parents with Disabilities Fight to Keep Their Kids*, AL JAZEERA AM. (May 29, 2015, 10:30 AM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/29/parents-disabilities->

disability” and dystonia, causing her arms to tremor when under stress.³ DCF told Alice that because of her disabilities, she could not go home with her daughter alone.⁴

As Alice fought to keep her daughter, she lived with various people who were ill-equipped to assist her with caregiving.⁵ Meanwhile, to determine Alice’s “fitness” as a parent, DCF contracted with a psychologist specializing in assessing disabled parents.⁶ After conducting two evaluations with positive results, the psychologist determined that with specialized training and support, Alice could parent her daughter alone.⁷

For a year, DCF purportedly attempted to work with Alice, but none of its employees were trained to support parents with disabilities.⁸ Finally, DCF forced Alice to undergo another parenting assessment—this time by someone who lacked knowledge and training about evaluating disabled parents.⁹ As part of this assessment, Alice was required to walk up a metal staircase while carrying her daughter.¹⁰ During this exercise, Alice’s arms tremored, which, according to the evaluator, proved that Alice could not care for her daughter.¹¹ According to the psychologist who completed the first two evaluations, this “assessment was really set up to try to show where her weaknesses were.”¹² At the same time, this psychologist worked hard to get Alice and her daughter into a residential program for disabled parents and their children.¹³ Unfortunately, by the time the program had accepted Alice, it was too late.¹⁴

discrimination.html [https://perma.cc/8N3D-TXX6]; C.B. Hall, *Parents with Disabilities Facing New Challenges*, VTDIGGER (Aug. 23, 2015, 12:53 PM), https://vtdigger.org/2015/08/23/parents-with-disabilities-facing-new-challenges/ [https://perma.cc/ZV69-8SUK].

3. Chakraborty & Putzel, *supra* note 2.

4. *Id.*

5. Goltz, *supra* note 1.

6. Chakraborty & Putzel, *supra* note 2. Consistent with disability rights and disability justice movements, this Article acknowledges the importance of language in shaping how we think about disability and how ableism can pervade language choices as well as reflect and perpetuate disability-based subordination. Lydia X. Z. Brown, *Ableism/Language*, AUTISTIC HOYA (Sept. 14, 2022), https://www.autistichoya.com/p/ableist-words-and-terms-to-avoid.html [https://perma.cc/RAF7-J4NE]. Accordingly, I use person-first and identity-first language interchangeably (e.g., “parents with disabilities” and “disabled parents”) in recognition of the disability community’s diverse language preferences. See generally Erin E. Andrews, Robyn M. Powell & Kara Ayers, *The Evolution of Disability Language: Choosing Terms to Describe Disability*, 15 DISABILITY & HEALTH J. 101328 (2022) (exploring the evolving language preferences among people with disabilities).

7. Chakraborty & Putzel, *supra* note 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Shortly after the third parenting assessment, in April 2008, Alice's daughter was placed in foster care, and DCF soon petitioned the court to terminate her parental rights.¹⁵ Through a series of appeals, Alice fought for two years to be reunified with her daughter, but was unsuccessful.¹⁶ Each time, the court sided with DCF, holding that the termination of Alice's parental rights was in her daughter's best interest.¹⁷ To this day, Alice, who has worked at a local school as a crossing guard for several years,¹⁸ contends that her parental rights were severed solely because of her disabilities: "The state of Vermont had already made up their minds that they were going to have my daughter. I did not give her up—she was stolen."¹⁹

The right of parents to direct the care, custody, and control of their children is a fundamental liberty interest that is well established under the law. Numerous Supreme Court "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."²⁰ Moreover, this right protects co-existing interests held by both parents and children. It is "the interest of a parent in the companionship, care, custody, and management of his or her children,"²¹ and of the children in not being dislocated from the "emotional attachments that derive from the intimacy of daily association" with the parent.²²

The law's recognition of the importance of the family rests on a belief "that natural bonds of affection lead parents to act in the best interests of their children."²³ Any legal change of these rights and obligations disturbs the fundamental human relationship, so courts have fervently guarded this relationship from needless governmental intrusion, even finding that the fundamental liberty interest "does not evaporate simply because [parents] have not been model parents or have lost temporary custody of their child to the State."²⁴ Indeed, "[e]ven when blood relationships are strained,

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Goltz, *supra* note 1.

20. Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989) (plurality opinion) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

21. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

22. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 844 (1977).

23. Parham v. J.R., 442 U.S. 584, 602 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447); *see also* Troxel, 530 U.S. at 69 (noting the "traditional presumption that a fit parent will act in the best interest of his or her child").

24. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

parents retain a vital interest in preventing the irretrievable destruction of their family life.”²⁵

Notwithstanding the fundamental right to create and maintain families, the United States has an appalling history of policing parenthood among people with disabilities.²⁶ Historically, measures to prevent disabled people from forming families included forced sterilization, institutionalization, and laws restricting marriage.²⁷ Despite this history, today, “[m]ore families are headed by a parent with a disability than ever before.”²⁸ Yet, as Alice’s tragic experience reveals, although the disability rights movement has had many successes, parenthood among disabled people continues to be heavily regulated. Indeed, parents with disabilities encounter pervasive ableism in the child welfare system,²⁹ more accurately termed the family policing system.³⁰ In particular, disabled parents are more likely than nondisabled parents to be involved with the family policing system and have their parental rights permanently and legally severed.³¹

Responding to heart-wrenching stories like Alice’s, in 2012, the National Council on Disability (NCD), an independent federal agency that advises the President and Congress on disability policy, published its seminal report, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*.³² Examining the numerous injustices that disabled parents encounter, NCD asserts that discrimination against parents with disabilities is “persistent, systemic, and pervasive.”³³ Critically, among its many findings, NCD observes, “[t]he child welfare system is ill-equipped to

25. *Id.*

26. *See infra* Part II.A.

27. Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 *YALE J.L. & FEMINISM* 37, 69–73 (2022).

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

29. *See infra* Part II.B.

30. This Article’s use of the term family policing system is deliberate and reflects the system’s functions. As Professor Roberts explains, the term “child welfare system” suggests “that the system’s purpose is to improve or protect the welfare of children.” *Abolition Is the Only Answer’: A Conversation with Dorothy Roberts*, *RISE MAG.* (Oct. 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/J33D-33WF>]. Some scholars have adopted the term family regulation system, but as Professor Roberts notes, this label “doesn’t quite get at how brutal and destructive these practices and policies are.” *Id.* Thus, the term family policing system “captures what this system does. It polices families with the threat of taking children away. Even when its agents don’t remove children, they *can* take children and that threat is how they impose their power and terror. It is a form of punishment, harm and oppression.” *Id.* Accordingly, “family policing system” more accurately describes the functions of the system historically referred to as the “child welfare” or “child protection” system.

31. *See infra* Part II.B.

32. *See* NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* (2012), https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [<https://perma.cc/QFZ5-TSC9>].

33. *Id.* at 51.

support parents with disabilities and their families, resulting in disproportionately high rates of involvement with child welfare services and devastatingly high rates of parents with disabilities losing their parental rights.”³⁴ The report elaborates on the numerous causes for such inequities, including, among others, facially discriminatory state laws that allowed for parental disability as grounds for termination of parental rights.³⁵ Accordingly, NCD concludes, “[c]learly, the legal system is not protecting the rights of parents with disabilities and their children.”³⁶

In the ten years since NCD issued its seminal report, considerable attention has been directed to advancing the rights of disabled parents. For example, nearly thirty states have introduced or passed legislation intended to protect the rights of parents with disabilities and their children.³⁷ In addition, on the federal level, the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) have engaged in numerous efforts to ensure the rights of parents with disabilities, including through conducting investigations, issuing technical assistance and letters of finding, and reaching voluntary resolution agreements and settlements with state family policing system agencies concerning violations of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).³⁸ Moreover, in May 2016, the White House held the first-

34. *Id.* at 18.

35. *Id.* at 84–85 (finding that thirty-seven states and the District of Columbia included parental disability as grounds for termination of parental rights in their statutes).

36. *Id.* at 16.

37. Nat’l Rsch. Ctr. for Parents with Disabilities, *Map of Current State Legislation Supporting Parents with Disabilities*, BRANDEIS UNIV. HELLER SCH. OF SOC. POL’Y & MGMT. (Jan. 11, 2023), <https://heller.brandeis.edu/parents-with-disabilities/map/index.html> [<https://perma.cc/K5ZF-98LD>].

38. *See, e.g.*, LETTER FROM C.R. DIV., U.S. DEP’T. OF JUST. & OFF. FOR C.R., U.S. DEP’T OF HEALTH & HUM. SERVS., TO INTERIM COMM’R ERIN DEVENEY, MASS. DEP’T OF CHILD. & FAMS. (Jan. 29, 2015), http://www.ada.gov/ma_docf_lof.pdf [<https://perma.cc/2QJ3-8FQW>] (joint letter of findings stating that the Massachusetts Department of Children and Families violated the ADA and Section 504 in case involving mother with an intellectual disability); OFF. FOR C.R. ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS. & C.R. DIV. DISABILITY RTS. SECTION, U.S. DEP’T OF JUST., PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015), <https://www.hhs.gov/sites/default/files/disability.pdf> [<https://perma.cc/C3XL-7FPM>] (explaining the child welfare system’s legal mandates vis-à-vis the ADA and Rehabilitation Act in technical guidance); OFF. FOR C.R., U.S. DEP’T OF HEALTH & HUM. SERVS., VOLUNTARY RESOLUTION AGREEMENT BETWEEN U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND OREGON DEPARTMENT OF HUMAN SERVICES (2019), <https://www.hhs.gov/sites/default/files/odhs-vra.pdf> [<https://perma.cc/3C4F-W5G2>] (voluntary resolution agreement with the Oregon Department of Human Services relating to the rights of parents with disabilities after the state’s child welfare agency removed two infant children from a mother and father with disabilities and denied the parents effective and meaningful opportunities to reunite with their children because of their disabilities); C.R. DIV., U.S. DEP’T. OF JUST. & OFF. FOR C.R., U.S. DEP’T OF HEALTH & HUM. SERVS., AGREEMENT BETWEEN UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN

ever Forum on the Civil Rights of Parents with Disabilities, inviting disability rights activists, parents with disabilities, leaders of the child welfare system, scholars, and policymakers to discuss ways to safeguard the rights of disabled parents.³⁹

Yet, despite the unprecedented attention, the number of parents with disabilities facing termination of parental rights appears to be rising,⁴⁰ underscoring the need for further interrogation. As the Supreme Court recognizes, termination of parental rights is a “unique kind of deprivation,”⁴¹ making it “among the most severe forms of state action.”⁴² Indeed, Justice Ruth Bader Ginsberg emphasizes in *M.L.B. v. S.L.J.* that “termination adjudications involve the awesome authority of the State ‘to destroy permanently all legal recognition of the parental relationship.’”⁴³ Given the seriousness of termination of parental rights and the frequency with which it occurs among disabled parents, increased attention to the issue is urgently needed. One such area warranting further inquiry is an analysis

SERVICES AND MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES (2020), https://www.ada.gov/mass_dcf_sa.pdf [<https://perma.cc/E2CJ-PHEX>] (settlement agreement with Massachusetts Department of Children and Families because of the agency’s continued noncompliance with the ADA and Section 504, notwithstanding the 2015 letter of findings); U.S. DEP’T OF JUST., SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND WASHINGTON STATE DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, CHILD WELFARE PROGRAM, USAO #2018V00540 (2021), https://www.ada.gov/dcyf_cwp_sa.html [<https://perma.cc/6TNA-8LVV>] (settlement agreement with the Washington State Department of Children, Youth, and Families concerning failure to provide sign language interpreters to Deaf parents involved with the child welfare system as required by the ADA); OFF. FOR C.R., U.S. DEP’T OF HEALTH & HUM. SERVS., VOLUNTARY RESOLUTION AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND THE STATE OF RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES (2022), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/vra-ri-dcyf/index.html> [<https://perma.cc/K9CG-3GM9>] (voluntary resolution agreement with the Rhode Island Department of Children, Youth, and Families concerning failure to provide sign language interpreters to Deaf parents involved with the child welfare system as required by the ADA); OFF. FOR C.R., U.S. DEP’T OF HEALTH & HUM. SERVS., VOLUNTARY RESOLUTION AGREEMENT BETWEEN THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS AND PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES (2023), <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/vra-pennsylvania-department-human-services/index.html> [<https://perma.cc/6MLA-SQBC>] (voluntary resolution with Pennsylvania Department of Human Services regarding an individual denied the opportunity to apply to be a foster parent based on her treatment of a substance use disorder, which is protected by the ADA).

39. *Forum on the Civil Rights of Parents with Disabilities*, WHITE HOUSE (May 5, 2016), <https://obamawhitehouse.archives.gov/photos-and-video/video/2016/05/05/forum-civil-rights-parents-disabilities?tid=106> [<https://perma.cc/XZM5-TZ97>].

40. Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Waterstone & Stephen Fournier, *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. 1069, 1095 tbl.2 (2020) (finding more termination of parental rights cases involving disabled mothers between 2011 and 2016 compared to 2006 to 2010). In addition, this study found that the odds of termination of parental rights were higher in cases decided between 2011 and 2016 compared to those decided between 2006 and 2010. *Id.* at 1096.

41. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981).

42. *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996).

43. *Id.* (quoting *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

of facially discriminatory state laws that list parental disability as grounds for termination of parental rights. In other words, scholars must investigate how ableism is embedded in state family policing systems statutes.

In response, this Article presents findings from a systematic examination of state termination of parental rights laws and their inclusion of parental disability,⁴⁴ updating NCD's 2012 finding that a staggering thirty-seven states and the District of Columbia listed parental disability as grounds for termination of parental rights.⁴⁵ Notably, this Study also broadens the analysis of parental disability and state termination of parental rights statutes to include parental substance use disorders, offering a more complete picture of the legal context in which disabled parents and their children exist. Prior analyses of such laws were limited to parents with intellectual and developmental disabilities, mental illness, emotional disabilities, and physical disabilities. However, because the ADA protects people with substance use disorders, including parental substance use disorders is essential for providing an accurate and comprehensive examination of state termination of parental rights statutes.⁴⁶

This Article is organized as follows. Part I provides an overview of the family policing system and its legal framework, exploring the bureaucratic and legal design of the system. Further, it elucidates the applicability of federal and state laws to termination of parental rights. Next, Part II examines the historical and contemporary ways laws and policies police parenthood among people with disabilities. Part III then describes the current Study, including the context in which it exists, and the procedures used to identify and analyze applicable statutes. It also discusses the Study's limitations. Thereafter, Part IV discusses the Study's findings on ableism in family policing system statutes. It reports quantitative analysis of the statutes, revealing that forty-two states and the District of Columbia include parental disability within their termination of parental rights laws. It also

44. Preliminary findings from this Study are published online. See Nat'l Rsch. Ctr. for Parents with Disabilities, *Map of State Termination of Parental Rights Laws that Include Parental Disability*, BRANDEIS UNIV. HELLER SCH. OF SOC. POL'Y & MGMT. (Oct. 1, 2022), <https://heller.brandeis.edu/parents-with-disabilities/map-tpr/index.html> [<https://perma.cc/8V3M-AAZD>].

45. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 84. In January 2022, Professor Rabia Belt analyzed state termination of parental rights laws within a broader paper about marriage equality and people with disabilities, which is available on SSRN. Rabia Belt, *Disability: The Last Marriage Equality Frontier* (Stan. Pub. L. Working Paper, Paper No. 2653117, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653117 [<https://perma.cc/J72P-VVR5>]. Professor Belt's analysis revealed that thirty-two states included parental disability in their laws. *Id.* at 4.

46. See 42 U.S.C. § 12210. Nonetheless, the ADA does not protect people currently using substances considered illegal. See 28 C.F.R. § 35.131 (2022); see also C.R. DIV., U.S. DEP'T OF JUST., *THE AMERICANS WITH DISABILITIES ACT AND THE OPIOID CRISIS: COMBATING DISCRIMINATION AGAINST PEOPLE IN TREATMENT OR RECOVERY* (2022), https://archive.ada.gov/opioid_guidance.pdf [<https://perma.cc/TT4V-CV8L>] (describing how the ADA protects people with opioid use disorder, which is a substance use disorder).

reports qualitative analysis of statutory language, finding four overarching themes: (1) outdated terminology; (2) ambiguous and discriminatory criteria; (3) focus on the future and arbitrary time periods; and (4) inconsistent statutory provisions. Finally, drawing on the Study's findings, Part V considers normative legal and policy solutions for challenging ableist termination of parental rights statutes as well as areas warranting further inquiry. Critically, the legal and policy implications described in this Article must be part of broader efforts to abolish the family policing system entirely so that marginalized families, such as disabled parents and their children, are no longer pathologized, controlled, and punished.⁴⁷

I. TERMINATION OF PARENTAL RIGHTS AND THE LAW

The injustices disabled parents and their children experience at the hands of the modern family policing system, including the devastatingly high termination of parental rights rate, are by design. Accordingly, it is essential to understand how ableism undergirds the family policing system's structure and legal framework. To that end, this Part first provides a brief overview of the family policing system, explaining the processes of family policing system intervention. Thereafter, it describes the federal and state laws and policies governing the termination of parental rights. This foundational understanding is essential to appreciate the ways in which ableism is entrenched in the bureaucratic and legal design of the system, including state termination of parental rights laws.

A. Overview of the Family Policing System

The family policing system is a complex network of public and private entities that police families for actual, perceived, and future child maltreatment.⁴⁸ Families usually become involved with the system after an allegation of child abuse or neglect is made against them, often by mandated reporters, such as teachers, childcare providers, healthcare professionals, social service providers, and professionals working with children, who are legally required to report suspicions of child maltreatment.⁴⁹ In some states,

47. See generally Powell, *supra* note 27 (proposing an agenda for abolishing the family policing system based on disability justice).

48. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 1 (2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/RM3G-5R99>].

49. See generally CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/LWX7-ZZKC>] (surveying mandatory reporting rules in U.S. states and territories).

community members are also obligated to report suspicions of child abuse or neglect.⁵⁰

After receiving an allegation of child maltreatment, the family policing system reviews the accusations to determine if the report is credible.⁵¹ A report is screened in if the family policing system determines that there is sufficient evidence to indicate an investigation is required.⁵² Conversely, a report is screened out if there is insufficient evidence or if the alleged incident does not meet the state's legal definition of child abuse or neglect.⁵³ The family policing system then investigates cases that have been screened in to decide whether the child is safe, whether the child was maltreated, and whether there is a risk of future child maltreatment.⁵⁴ Following this investigation, the family policing system determines whether the allegations are substantiated and need further action or unsubstantiated and not worthy of additional investigation or action.⁵⁵

Family policing system agencies begin court actions if they determine a dependency proceeding is required to keep the child safe.⁵⁶ Courts may issue temporary orders placing the child in the foster care system throughout the investigation, mandate services for the parent or child, or rule that certain people have no contact with the child.⁵⁷ At an adjudicatory hearing, courts review evidence, determine if child maltreatment occurred, and decide if the child should remain under the court's continuing jurisdiction.⁵⁸ Courts then enter a disposition, either at that hearing or a separate hearing, resulting in the court mandating a parent to comply with services necessary to remedy the alleged child abuse or neglect.⁵⁹ Court orders may also include provisions about visitation between the parent and the child, agency obligations to provide the parent with services, and services needed for the child.⁶⁰ Suppose a court finds that a child has been maltreated. In that case, the decision whether to reunify a family or keep them apart depends on state

50. *Id.* at 3 (states with universal mandatory reporting laws include Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming).

51. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 48, at 3.

52. *Id.*

53. *Id.*

54. *Id.* at 4.

55. *Id.*

56. *See id.* at 4–7. A dependency proceeding is a legal process initiated to determine whether intervention by the family policing system is needed. *Id.* at 4.

57. *Id.*

58. *Id.* An adjudicatory hearing is a legal proceeding in which the court reviews the evidence and testimony presented to determine whether the allegations of child maltreatment are substantiated and establish the child's need for ongoing intervention and protective measures.

59. *Id.* at 5.

60. *Id.*

law, the severity of the abuse or neglect, an evaluation of the child's immediate safety, the risk of continued or future maltreatment, the services available to address the family's needs, and whether the child was removed from the home and a court action to protect the child was initiated.⁶¹

Family policing system agencies may petition the court to terminate a parent's rights if they believe reunification should not occur. For a family policing system agency to succeed, there must be clear and convincing evidence to prove that the grounds for termination have been met and it is in the child's best interest.⁶² If a court terminates a parent's rights, the legal parent-child relationship is permanently severed, and the family policing system may immediately adopt the child to a new family. As the next Section explains, federal and state laws govern the termination of parental rights process.

B. Termination of Parental Rights: Federal and State Laws

The Supreme Court deems the right of parents to raise their children "as essential to the orderly pursuit of happiness,"⁶³ repeatedly affirming that the Constitution's Fourteenth Amendment ensures parents the right to the care, custody, and control of their children.⁶⁴ Accordingly, this right, generally, may not be infringed upon by the government, even where parents have not been "model parents" and "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."⁶⁵ In other words, the Constitution does not require perfect parenting. At the same time, parents' liberty interests in their children's care, custody, and control are neither absolute nor impregnable. As the Court observes in *Wisconsin v. Yoder*,⁶⁶ "the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant

61. *Id.*

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

63. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

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

65. *Santosky*, 455 U.S. at 753.

66. 406 U.S. 205 (1972).

social burdens.”⁶⁷ Under states’ *parens patriae*⁶⁸ interest in promoting the wellbeing of children, states may permanently sever parental rights in the course of protecting children.⁶⁹ Accordingly, through the family policing system, states have the legal authority to investigate allegations of child abuse and neglect and act as perceived necessary to protect children, including legally severing the parent-child relationship through termination of parental rights. Although a comprehensive account of family policing system laws and policies is beyond the scope of this Article,⁷⁰ this Section examines the termination of parental rights process, focusing on key federal and state laws governing the contemporary family policing system.

Termination of parental rights, considered the “death penalty” of civil cases,⁷¹ is “severe,” “grave,” “irretrievably destructive,” and “irreversible.”⁷² As Professor Charisa Smith explains, termination of parental rights involves “the process whereby biological parents are forced to sever their legal ties to their children, in favor of upholding the ‘child’s best interests’ by imbuing other, allegedly more well-suited individuals with those parental rights.”⁷³ As such, it is undoubtedly one of the most egregious and devastating forms of state action.⁷⁴ Although the family policing system, including termination of parental rights proceedings, is administered by states, both federal and state laws apply.

On the federal level, the Adoption and Safe Families Act of 1997 (ASFA) is the primary governing statute related to termination of parental rights.⁷⁵ Congress passed ASFA in response to the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which required, among other things,

67. *Id.* at 233–34.

68. Latin for “ultimate parent or parent of the country,” *parens patriae* refers to the power of the state to assume the legal rights of the natural parent and to serve as the parent of any child who is believed to need protection. Mical Raz, *History of Child Protection Law*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 33 (Josh Gupta-Kagan, LaShanda Taylor Adams, Melissa Dorris Carter, Kristen Pisani-Jacques & Vivek S. Sankaran eds., 4th ed. 2022); *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

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

70. For an in-depth exploration of the history of family policing system laws and policies in the United States, see JENNIFER M. GEIGER & LISA SCHELBE, *THE HANDBOOK ON CHILD WELFARE PRACTICE* 1–28 (2021).

71. *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (“The termination of parental rights has been characterized as tantamount to a ‘civil death penalty.’” (quoting *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002))).

72. *M.L.B. v. S.L.J.*, 519 U.S. 102, 118–21 (1996) (holding that the state may not deny the right to appeal a termination of parental rights based on the appellee’s inability to pay).

73. Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCH. REV. 205, 206 (2015).

74. *Santosky*, 455 U.S. at 759 (“Few forms of state action are both so severe and so irreversible.”).

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

that states make reasonable efforts to reunify children with their families.⁷⁶ Congress was concerned that “[s]tates were too focused on efforts to return abused and neglected children to their homes, thus endangering children in the name of family preservation.”⁷⁷ Accordingly, through the enactment of ASFA, Congress sought to permit states to modify their practices “to move more efficiently toward terminating parental rights and placing children for adoption.”⁷⁸

The passage of ASFA marked a paradigm shift in focus from family preservation to permanency for children.⁷⁹ To that end, ASFA provides two specific provisions related to the termination of parental rights. First, ASFA requires states to petition courts for termination of parental rights in cases where a child has been in the foster care system for fifteen of the most recent twenty-two months (commonly known as the “15/22 rule”).⁸⁰ Second, ASFA allows family policing system agencies to bypass the provision of reasonable efforts and instead terminate parental rights in limited circumstances.⁸¹ Moreover, even when states provide reunification services to families, ASFA allows states to also engage in concurrent planning toward adoption.⁸² Because of ASFA’s shift from family preservation to permanency, terminating parental rights has become easier and more common.⁸³

Because states are required to comply with ASFA mandates to receive federal funding, all states and the District of Columbia have adopted the statute’s requirements into their laws.⁸⁴ Accordingly, state statutes play a critical role in the administration of the family policing system, including termination of parental rights proceedings.⁸⁵ Indeed, as Justice Rehnquist observes in *Santosky v. Kramer*, laws concerning the family policing

76. See H.R. REP. NO. 105-77, at 7–11 (1997); Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 223–24 (2009).

77. Bean, *supra* note 76, at 224.

78. H.R. REP. NO. 105-77, at 8.

79. See Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 454 (2002).

80. 42 U.S.C. § 675(5)(E).

81. 42 U.S.C. § 671(a)(15)(D)(i)–(iii). In addition to egregious acts such as manslaughter or murder, some states include a parent’s disability as justification for bypassing reasonable efforts and “fast-tracking” termination of parental rights. See NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 90–92 (explaining the bypass provision and its effect on parents with disabilities).

82. 42 U.S.C. § 671(a)(15)(F); see also CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., CONCURRENT PLANNING FOR TIMELY PERMANENCE (2018), https://www.childwelfare.gov/pubPDFs/concurrent_planning.pdf [<https://perma.cc/D3WX-KSKH>].

83. See Powell, *supra* note 27, at 57.

84. William Vesneski, *State Law and the Termination of Parental Rights*, 49 FAM. CT. REV. 364, 365 (2011).

85. Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1434 (1995) (“The entire parental rights termination process, from initial intervention to final adjudication, is driven by statute.”).

system, like other areas of family law, have been within the purview of the states from “time immemorial.”⁸⁶ Through three critical cases, *Stanley v. Illinois*,⁸⁷ *Santosky v. Kramer*,⁸⁸ and *Quilloin v. Walcott*,⁸⁹ the Supreme Court has set forth constitutional requirements that must be met before a state can permanently terminate a parent’s rights.

First, in *Stanley*, the Court prohibited a state from terminating parental rights absent a finding of actual unfitness.⁹⁰ According to the Court, “the State registers no gain towards its declared goals when it separates children from the custody of fit parents.”⁹¹ Thus, although creating an irrebuttable presumption of unfitness would always be “cheaper and easier than [an] individualized determination,” the Court still required the state to prove a father’s unfitness before severing his right to care for his child.⁹² Further, it professed that the Constitution has “higher values than speed and efficiency.”⁹³

Next, in *Santosky*, the Court held that a state must prove parental unfitness by clear and convincing evidence to terminate parental rights.⁹⁴ In termination of parental rights cases, the state “seeks not merely to infringe that fundamental liberty interest, but to end it.”⁹⁵ The “parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.”⁹⁶ Finally, the Court wrote that “until the State proves parental unfitness, the child and his parents share a vital interest in preventing [the] erroneous termination of their natural relationship.”⁹⁷

Lastly, in *Quilloin*, the Court—in a private adoption case—held that a state may not permanently separate the ties between a father and his child based solely on a finding that terminating parental rights was in the child’s best interest.⁹⁸ The Court reasoned:

We have little doubt that the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without

86. 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting); see also *United States v. Windsor*, 570 U.S. 744, 766 (2013) (noting that subject to constitutional guarantees, “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States’” (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))).

87. 405 U.S. 645 (1972).

88. 455 U.S. 745 (1982).

89. 434 U.S. 246 (1978).

90. *Stanley*, 405 U.S. at 658.

91. *Id.* at 652.

92. *Id.* at 656–57.

93. *Id.* at 656.

94. *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982).

95. *Id.* at 759.

96. *Id.*

97. *Id.* at 760.

98. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."⁹⁹

This declaration aligns with the Court's observations in other cases that "the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."¹⁰⁰ For example, in *Troxel v. Granville*, the Court invalidated a state's visitation law that allowed a court to infringe upon a parent's rights and order grandparent visitation—over a parent's objection—based only on its finding that visitation would be in the child's best interest.¹⁰¹

Because of these aforementioned decisions, most state termination of parental rights laws require a two-step determination. First, there must be specific findings demonstrating the "unfitness" of the parent.¹⁰² Critically, states are supposed to prove parental unfitness by an individualized inquiry rather than a mere presumption based on a parent's ascribed status.¹⁰³ Nonetheless, as this Article demonstrates, many state statutes list parental disability as grounds for termination of parental rights. Second, courts must make a specific finding that the termination of that parent's rights is in the child's best interest.¹⁰⁴ Unfortunately, these two standards—"unfitness" and "best interest of the child"—are often conflated by courts, who find that if a parent is determined to be unfit under the first step in the analysis, termination would be in the child's best interest.¹⁰⁵ If a court determines that

99. *Id.* (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

100. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting).

101. 530 U.S. 57, 72–73 (2000).

102. *See, e.g.*, FLA. STAT. § 39.806 (2022) (listing several different grounds for termination of parental rights).

103. *Stanley v. Illinois*, 405 U.S. 645, 654–55 (1972) ("It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring." (footnotes omitted)); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 47–48.

104. *See, e.g., In re A.U.D.*, 832 S.E.2d 698, 700 (N.C. 2019) ("Our Juvenile Code provides for a two-stage process for the termination of parental rights—an adjudicatory stage and a dispositional stage. . . . If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage. N.C.G.S. § 7B-1110(a) states, in pertinent part, as follows: 'After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest'; *In re Adoption of Tobias D.*, 2012 ME 45, ¶ 16, 40 A.3d 990, 996 ("[T]he court may not even contemplate the child's best interest until it has found at least one ground of parental unfitness").

105. *See, e.g., Janet L. Dolgin, Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 2 (1996) ("[I]nvolving children's interests as the guiding principle in such cases can disguise other agendas that serve neither the particular children at issue nor children in general."); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 38–40

both steps have been satisfied, the legal parent-child relationship is permanently dissolved, and the family policing system can immediately adopt the child to a new family.

Tragically, termination of parental rights is not only devastating but also more common than often thought. Strikingly, one in 100 children will have their legal parent-child relationship severed by age eighteen.¹⁰⁶ Moreover, for children from marginalized communities,¹⁰⁷ including children of disabled parents,¹⁰⁸ termination of parental rights is even more common.

II. POLICING PARENTHOOD AMONG DISABLED PEOPLE

Alice's heartbreaking experiences reveal that termination of parental rights is shattering and long-lasting. Moreover, for disabled people, such as Alice, it is part of the Nation's enduring history of policing parenthood among people with disabilities. Accordingly, this Part examines how laws and policies have been enacted over time to prevent disabled people from raising children. First, it considers the historical roots of such oppression, focusing primarily on how the family policing system has policed parenthood among disabled people. Thereafter, it explores contemporary mechanisms for policing parenthood among people with disabilities through ableist family policing system laws and policies. Inevitably, as this Part reveals, the United States has a history of forestalling people with disabilities from creating and maintaining families, built into the fabric of our laws and policies.

A. *Historical Roots*

Scholars often posit that laws and policies governing the family policing system have occurred on a “pendulum” that swings between a focus on keeping families together and achieving permanency for children through

(2005) (“A best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise. . . . The best interest standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best.”).

106. Christopher Wildeman, Frank R. Edwards & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 32 (2020).

107. Emily Putnam-Hornstein et al., *Cumulative Rates of Child Protection Involvement and Terminations of Parental Rights in a California Birth Cohort, 1999–2017*, 111 AM. J. PUB. HEALTH 1157, 1159 (2021) (finding that Black children and Native American children are more likely than white children to be separated from their parents). See generally DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (demonstrating increased involvement with the family policing system and child removal among Black families).

108. See *infra* Part II.B.

adoption.¹⁰⁹ And while this observation is generally accurate, for parents with disabilities and their children, laws and policies have continuously swung away from family preservation and toward removal of their children, guided by the idea that disabled people are unfit to raise children. Accordingly, this Section examines how laws and policies have policed parenthood among disabled people. Regrettably, the injustices perpetrated on parents with disabilities and their children by the family policing system are, in part, the product of a long and dreadful history.

By the late nineteenth century, disabled people were increasingly forced into institutions because no support was available to them in the community.¹¹⁰ At the same time, eugenics was emerging, and institutions served as an essential mechanism of “social control and coercion.”¹¹¹ Throughout this time, eugenicists endorsed policies that encouraged procreation among favored groups of people while constraining procreation—through forcible sterilization and institutionalization—of those believed to have “hereditary defects.”¹¹² As historian Adam Cohen observes, eugenicists’ “greatest target was the ‘feebleminded,’ a loose designation that included people who were mentally [disabled], women considered to be excessively interested in sex, and various other categories of individuals who offended the middle-class sensibilities of judges and social workers.”¹¹³ Consequently, eugenics-based laws and policies focused on preventing people whom society deemed “unfit for parenthood” from reproducing,¹¹⁴ based on the belief that their offspring would be harmful and burdensome to society.¹¹⁵

109. JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* 27 (2005).

110. Claudia Malacrida, *Mothering and Disability: From Eugenics to Newgenics*, in *ROUTLEDGE HANDBOOK OF DISABILITY STUDIES* 467, 467–68 (Nick Watson, Alan Roulstone & Carol Thomas eds., 2d ed. 2020); David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in *HANDBOOK OF DISABILITY STUDIES* 31–43 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001).

111. Braddock & Parish, *supra* note 110, at 34.

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

113. COHEN, *supra* note 112, at 6.

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

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

In 1927, the Supreme Court endorsed this line of reasoning in its *Buck v. Bell* decision.¹¹⁶ Carrie Buck, considered “feeble-minded,” was raised in a foster home, where she lived until she became pregnant after being sexually assaulted by her foster parents’ relative.¹¹⁷ To seemingly conceal the sexual assault and resultant pregnancy, Carrie was involuntarily institutionalized at the Virginia State Colony for Epileptics and Feeble-minded, where her mother was also committed.¹¹⁸ While institutionalized, Carrie gave birth to her daughter, Vivian, who was immediately taken from Carrie and adopted by Carrie’s foster parents.¹¹⁹ Carrie never saw Vivian again.¹²⁰ The institution subsequently sought to sterilize Carrie per the state’s compulsory sterilization law. Ultimately, the Court upheld Virginia’s law authorizing state institutions to condition release upon sterilization. In doing so, Justice Oliver Wendell Holmes, Jr., writing for the majority, found that “[i]t would be strange if [the State] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.”¹²¹ The Court avowed that “[t]hree generations of imbeciles are enough.”¹²² Like other compulsory sterilization laws at the time, Virginia’s statute was premised on the notion that “many defective persons . . . would likely become by the propagation of their kind a menace to society.”¹²³ Regrettably, by the end of the twentieth century, an estimated 70,000 Americans, many of whom were disabled, poor, or people of color, were subjected to forced sterilization.¹²⁴

Meanwhile, efforts to purportedly “protect” children also proliferated during the eugenics era, with a significant emphasis on “good” parents versus “bad” parents. For example, in 1909, President Theodore Roosevelt held the first White House Conference on the Care of Dependent Children, where family policing system reformers passed multiple resolutions concerning the government’s role in caring for children.¹²⁵ Although the delegates differed on the types of support that should be provided, they all agreed that “[h]ome life is the highest and finest product of civilization” and

116. 274 U.S. 200 (1927).

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

118. *Id.*

119. *Id.* at 338.

120. *Id.*

121. *Buck*, 274 U.S. at 207.

122. *Id.*

123. See Virginia Sterilization Act, ch. 394, 1924 Va. Acts 569, 569 (repealed 1974).

124. *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016, 1:22 PM), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations> [<https://perma.cc/MXS6-2X55>].

125. See PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN, S. DOC. NO. 60-721 (2d Sess. 1909).

that dependent mothers and their children should be deemed to be “deserving” poor.¹²⁶ Accordingly,

[c]hildren of parents of worthy character . . . and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner, should, as a rule, be kept with their parents Except in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality.¹²⁷

Thus, as historian Molly Ladd-Taylor observes, “[t]he White House Conference . . . defined most dependent children as innocent and worthy of aid but kept those whose mothers were deemed immoral or inefficient—because of race, disability, or poor literacy or English language skills—within the undeserving poor.”¹²⁸ “This two-track system shaped child welfare policies” during the eugenics era and beyond, Ladd-Taylor opines.¹²⁹

Buttressing the belief that certain children would be at risk if they remained with their natural parents, a 1919 manual for social workers declares, “it is not right to leave children with parents regardless of the parents’ character and fitness to rear them. Those who are immoral, positively criminal, *afflicted with contagious or infectious diseases, or decidedly deficient mentally*, are unfit to bear or rear children.”¹³⁰ In these circumstances, the manual clarified that “[t]he state and philanthropic organizations must sometimes step in to save the progeny already in existence, and take measures to prevent further reproduction by these classes.”¹³¹ The manual further claims that “[c]hildren of *very incompetent, really feeble-minded*, viciously cruel, or positively criminal parents . . . should be wholly separated from them and provided for permanently in selected private homes or appropriate institutions.”¹³²

Ableism within the contemporary family policing system can also be traced to Dr. C. Henry Kempe and colleagues’ 1962 article on “battered-children syndrome.”¹³³ This article, which experts believe informed current laws and policies, called for attention to what the authors perceived as an

126. *Id.* at 9.

127. *Id.* at 9–10.

128. MOLLY LADD-TAYLOR, *FIXING THE POOR: EUGENIC STERILIZATION AND CHILD WELFARE IN THE TWENTIETH CENTURY* 14 (2017).

129. *Id.*

130. W. H. SLINGERLAND, *CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* 83 (1919) (emphasis added).

131. *Id.*

132. *Id.* at 65 (emphasis added).

133. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 *J. AM. MED. ASS’N* 17, 17 (1962).

epidemic of child maltreatment.¹³⁴ Among their allegations, Kempe and colleagues argue that psychiatric factors, including “low intelligence,” were predictors of child maltreatment.¹³⁵ In response to public outcry resulting from the article, by 1967, all fifty states and the District of Columbia had enacted laws relating to the family policing system.¹³⁶ As such, the modern family policing system was established with these biased beliefs against parents with disabilities at its core.

Soon after, in 1976, to establish uniformity in state laws, the Neglected Children Committee of the National Council of Juvenile Court Judges proposed model termination of parental rights statutes, which states were encouraged to adopt.¹³⁷ The model language stated, in part, that courts:

[M]ay terminate parental rights when the Court finds the parent unfit or that the conduct or condition of the parent is such as to render him/her unable to properly care for the child and that such conduct or condition is unlikely to change in the foreseeable future. In determining unfitness, conduct or condition, the Court shall consider, but is not limited to the following:

. . . Emotional illness, mental illness or mental deficiency of the parent of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child.¹³⁸

Many states incorporated this language verbatim into their laws.¹³⁹

Even more recently, at the time ASFA was enacted, a national taskforce titled, *Adoption 2002: The President’s Initiative on Adoption and Foster Care* (“Adoption 2002”) was formed. In 1999, Adoption 2002 issued its *Guidelines for Public Policy and State Legislation Governing Permanence*

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

135. Kempe et al., *supra* note 133, at 18–19.

136. OFF. ON CHILD ABUSE & NEGLECT, U.S. DEP’T OF HEALTH & HUM. SERVS., *THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA’S CHILDREN* 4 (2014), https://www.acf.hhs.gov/sites/default/files/documents/cb/capta_40yrs.pdf [<https://perma.cc/GV3P-JKQ7>]; see also Douglas. J. Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 689 (1978).

137. James H. Lincoln, *Model Statute for Termination of Parental Rights*, 27 JUV. JUST. 3, 4 (1976) (“There is a vital need for the statute at this time in nearly every one of the fifty states. Thousands of children and parents are adversely affected by the ‘hodge-podge’ of confusing statutes and case law.”).

138. *Id.* at 7.

139. Elizabeth Lightfoot, Katharine Hill & Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 927, 929 (2010).

for Children.¹⁴⁰ Similar to ASFA, Adoption 2002's Guidelines emphasized the importance of permanency for children.¹⁴¹ Moreover, the Guidelines recommended that states include "parental incapacity" (i.e., parental disability) in their termination of parental rights statutes.¹⁴² Seeming to support termination of parental rights when a parent is disabled, the Guidelines noted: "Most State grounds for termination of parental rights authorize courts to take into account parents' capacity or incapacity to care for the child. However, many do not make it clear that, in some cases, sufficient evidence of parental incapacity is enough to establish grounds for termination."¹⁴³ As Professor Elizabeth Lightfoot and colleagues observe, "these recommendations appear to still promote [termination of parental rights] based either partially or primarily on a disability in instances when parents' incapacity is a disability."¹⁴⁴

As this Section elucidates, laws and policies governing the family policing system have been profoundly and continuously informed by ableism and the belief that some parents, including disabled parents, are inherently undeserving of raising their children. These perceptions have led to the enduring policing of parenthood among people with disabilities.

B. Contemporary Injustices

Notwithstanding the Nation's appalling history of policing parenthood among people with disabilities, an increasing number are choosing to form families.¹⁴⁵ Recent estimates suggest that five to ten percent of parents in the United States have a disability,¹⁴⁶ which is anticipated to grow as people with disabilities enjoy increased opportunities to be integrated into their communities.¹⁴⁷ Nonetheless, the belief that disabled people are inherently

140. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

141. *Id.* at I-1 to I-5.

142. *Id.* at VI-22 to VI-24.

143. *Id.* at VI-23.

144. Lightfoot et al., *supra* note 139, at 930.

145. Kundra & Alexander, *supra* note 28, at 142 ("More families are headed by a parent with a disability than ever before.")

146. See, e.g., Henan Li, Susan L. Parish, Monika Mitra & Joanne Nicholson, *Health of US Parents with and Without Disabilities*, 10 DISABILITY & HEALTH J. 303, 303 (2017) (estimating roughly 6% of parents have a disability); Rajan Anthony Sonik, Susan L. Parish, Monika Mitra & Joanne Nicholson, *Parents with and Without Disabilities: Demographics, Material Hardship, and Program Participation*, REV. DISABILITY STUD., 2018, at 1, 7 (estimating approximately 10% of parents have a disability); NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 15-16 (estimating roughly 6% of parents have a disability).

147. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 45 ("Millions of parents throughout the United States have disabilities, and this number is likely to grow as people with disabilities become

unfit to raise families endures, undergirding modern family policing system laws and policies. Consequently, as people with disabilities continue to become parents, many face the likelihood of involvement with the family policing system—and even more tragically, termination of their parental rights. This Section briefly highlights some of the many inequities disabled parents and their children experience, including termination of parental rights, because of the family policing system.¹⁴⁸ As is demonstrated, policing of parenthood among people with disabilities is omnipresent, manifesting through laws and policies aimed at permanently separating families and causing grave injustices.

Ableism undergirds the entire family policing system, causing pervasive injustices for parents with disabilities and their children in every aspect of their involvement with the system.¹⁴⁹ Disabled parents are more likely to be referred to the family policing system than nondisabled parents.¹⁵⁰ Strikingly, an analysis of national data found that nineteen percent of children were removed from their homes and placed in the foster care system, at least in part, due to parental disability.¹⁵¹ Parents with intellectual or psychiatric disabilities are especially vulnerable to family policing system involvement, according to national and international research.¹⁵²

increasingly independent and integrated into their communities.”); *see also* Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401–02 (John R. Lutzker ed., 1998) (explaining that the number of parents with intellectual disabilities continues to increase because of deinstitutionalization).

148. For an in-depth description of family policing system inequities experienced by parents with disabilities and their children, *see* Powell, *supra* note 27, at 73–79. *See also* Powell et al., *supra* note 40, at 1082–86.

149. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 106 (“Parents with disabilities face multiple layers of discrimination from the moment they enter the child welfare system.”); *see also* Sasha M. Albert & Robyn M. Powell, *Ableism in the Child Welfare System: Findings from a Qualitative Study*, 46 SOC. WORK RSCH. 141, 141 (2022).

150. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 72.

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

152. *See* Tim Booth & Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1 J. POL’Y & PRAC. INTELL. DISABILITIES 179, 180 (2004); Tim Booth, Wendy Booth & David McConnell, *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD & FAM. SOC. WORK 353, 353 (2005); Feldman, *supra* note 147, at 401; Gwynnyth Llewellyn, David McConnell & Luisa Ferronato, *Prevalence and Outcomes for Parents with Disabilities and Their Children in an Australian Court Sample*, 27 CHILD ABUSE & NEGLECT 235, 239 (2003); David McConnell, Maurice Feldman, Marjorie Aunos & Narasimha Prasad, *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 624 (2011); Jill G. Joseph, Shashank V. Joshi, Amy B. Lewin & Madeleine Abrams, *Characteristics and Perceived Needs of Mothers with Serious Mental Illness*, 50 PSYCHIATRIC SERVS. 1357, 1358 (1999); Carol T. Mowbray, Daphna Oyserman, Judith K. Zemencuk & Scott R. Ross, *Motherhood for Women with Serious Mental Illness: Pregnancy, Childbirth, and the Postpartum Period*, 65 AM. J. ORTHOPSYCHIATRY 21, 33 (1995); Roberta G. Sands, Nancy Koppelman & Phyllis Solomon, *Maternal Custody Status and Living Arrangements of Children of*

A recent national survey, for example, revealed that parents with psychiatric disabilities were eight times more likely to have contact with the family policing system compared to parents without psychiatric disabilities.¹⁵³ Another study, analyzing Washington state administrative data, found that twenty-two percent of mothers with intellectual or developmental disabilities were reported to the family policing system within one year of birth and thirty-six percent within four years.¹⁵⁴ Conversely, only six percent of mothers without intellectual disabilities were reported to the family policing system within one year of birth and only ten percent within four years.¹⁵⁵ Like other disabled parents, parents with substance use disorders are also highly vulnerable to involvement with the family policing system.¹⁵⁶ Moreover, research indicates that the risk of family policing system involvement is elevated for parents with disabilities who are female, Black, or have a low income.¹⁵⁷

Once involved with the family policing system, disabled parents experience staggering injustices. For example, parents with disabilities have a higher chance of having allegations of child abuse or neglect substantiated by the family policing system compared to parents without disabilities.¹⁵⁸

Women with Severe Mental Illness, 29 HEALTH & SOC. WORK 317, 318–20 (2004); Jung Min Park, Phyllis Solomon & David S. Mandell, *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 493, 494 (2006).

153. Katy Kaplan, Eugene Brusiloskiy, Amber M. O’Shea & Mark S. Salzer, *Child Protective Service Disparities and Serious Mental Illnesses: Results from a National Survey*, 70 PSYCHIATRIC SERVS. 202, 204 (2019).

154. Rebecca Rebbe, Sharan E. Brown, Rebecca A. Matter & Joseph A. Mienko, *Prevalence of Births and Interactions with Child Protective Services of Children Born to Mothers Diagnosed with an Intellectual and/or Developmental Disability*, 25 MATERNAL & CHILD HEALTH J. 626, 629, 630 tbl.3 (2021).

155. *Id.*

156. LAURA RADEL, MELINDA BALDWIN, GILBERT CROUSE, ROBIN GHERTNER & ANNETTE WATERS, U.S. DEP’T OF HEALTH & HUM. SERVS., SUBSTANCE USE, THE OPIOID EPIDEMIC, AND THE CHILD WELFARE SYSTEM: KEY FINDINGS FROM A MIXED METHODS STUDY 3–5 (2018), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//179966/SubstanceUseChildWelfareOverview.pdf [<https://perma.cc/2QLY-BA7U>].

157. Traci LaLiberte, Kristine Piescher, Nicole Mickelson & Mi Hwa Lee, *Child Protection Services and Parents with Intellectual and Developmental Disabilities*, 30 J. APPLIED RSCH. INTELL. DISABILITIES 521, 527 (2017); Laysha Ostrow et al., *Risk Factors Associated with Child Protective Services Involvement Among Parents with a Serious Mental Illness*, 72 PSYCHIATRIC SERVS. 370, 372 & tbl.1 (2021); Park et al., *supra* note 152, at 496 & tbl.2.

158. Elizabeth Lightfoot, Mingyang Zheng & Sharyn DeZelar, *Substantiation of Child Maltreatment Among Parents with Disabilities in the United States*, 15 J. PUB. CHILD WELFARE 583, 592 (2021) (“The odds were highest for cases including a parent with an emotional disturbance, who had more than 63% higher odds of having maltreatment substantiated after a report to child protection compared to a parent without a disability after a report, followed by those with developmental disabilities (44%), multiple disabilities (38%) and learning disabilities (35%).”). Although substantiation is only one decision-making point, scholars consider it an important mechanism for identifying disparities within the family policing system. *Id.* at 585 (“[T]he child welfare decision point of substantiation has been a key area of research regarding racial disproportionality in child welfare, with some researchers

Substantiation is also high among families with parental substance use disorders.¹⁵⁹ Additionally, disabled parents are less likely to receive family preservation or reunification services,¹⁶⁰ and if they do, the services are often not tailored to their needs.¹⁶¹ Moreover, communities often lack family-based support for people with substance use disorders,¹⁶² and the family policing system often fails to refer families with parental substance use disorders to necessary services.¹⁶³ Thus, although ASFA requires states to make “reasonable efforts” to prevent the removal of children from their homes, as well as “reasonable efforts” to reunify children who have been separated from their parents,¹⁶⁴ it is obvious that disabled parents are often denied these opportunities, which presumably affects the likelihood of the family policing system ultimately terminating their parental rights.

Disabled parents are also more likely than nondisabled parents to have their children taken away by the family policing system.¹⁶⁵ For example, in Washington state, seven percent of mothers with intellectual or developmental disabilities had their child removed by the family policing

finding that substantiation is an important place where disparities occur, and affects later decisions, such as out of home placement or termination of parental rights.” (citation omitted)). Notably, substantiation pertains to an administrative determination rather than a judicial one, focusing on whether there is sufficient evidence to support a finding of child maltreatment. See CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at 16 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/SBK6-NHGU>]. For further information on substantiation in the child welfare system, see Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eshcelbach Hansen, *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333 (2017).

159. Andrea S. Meyer, Lenore M. McWey, Wachell McKendrick & Tammy L. Henderson, *Substance Using Parents, Foster Care, and Termination of Parental Rights: The Importance of Risk Factors for Legal Outcomes*, 32 CHILD. & YOUTH SERVS. REV. 639, 640 (2010); Nancy K. Young, Sharon M. Boles & Cathleen Otero, *Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities*, 12 CHILD MALTREATMENT 137, 141 (2007).

160. See Special Int. Rsch. Grp. on Parents & Parenting with Intell. Disabilities, Int’l Ass’n for the Sci. Study of Intell. Disabilities, *Parents Labelled with Intellectual Disability: Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities*, 21 J. APPLIED RSCH. INTELL. DISABILITIES 296, 296–303 (2008) (explaining the experiences of parents with intellectual disabilities); Robyn M. Powell & Joanne Nicholson, *Disparities in Child Protective Services: Commentary on Kaplan et al.* (2019), 70 PSYCHIATRIC SERVS. 209, 209 (2019) (discussing disparities experienced by parents with psychiatric disabilities when involved with the child welfare system); NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 71–107 (describing the experiences of parents with disabilities as related to the child welfare system).

161. See Phillip A. Swain & Nadine Cameron, ‘Good Enough Parenting’: Parental Disability and Child Protection, 18 DISABILITY & SOC’Y 165, 170 (2003).

162. RADEL ET AL., *supra* note 156, at 6.

163. Shelley Steenrod & Rebecca Mirick, *Substance Use Disorders and Referral to Treatment in Substantiated Cases of Child Maltreatment*, 22 CHILD & FAM. SOC. WORK 1141, 1148 (2017) (noting that “only a small proportion” of cases involving families with parental substance use disorder received a referral to treatment).

164. 42 U.S.C. § 671(a)(15)(B).

165. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 72 (“Parents with disabilities and their families are frequently, and often unnecessarily, forced into the system and, once involved, lose their children at disproportionately high rates.”).

system within the first year and nine percent by the fourth year.¹⁶⁶ On the other hand, less than one percent of infants born to mothers without intellectual or developmental disabilities faced removal in the first year and only two percent by the fourth year.¹⁶⁷ Another study, analyzing national survey data, found that parents with psychiatric disabilities were twenty-six times more likely to have their child removed by the family policing system compared to other parents.¹⁶⁸ In fact, studies have found removal rates as high as eighty percent in cases where the parent had an intellectual or psychiatric disability.¹⁶⁹ Parents with substance use disorders also face notably high rates of child removal by the family policing system.¹⁷⁰

Once removed, children of disabled parents face different placement and reunification prospects compared to those with nondisabled parents. A national study revealed that children of disabled parents were more likely than children of parents without disabilities to be placed in the foster care system with non-relatives and to have a case plan goal of long-term foster care.¹⁷¹ Children of disabled parents also have longer stays in the foster care system with lower odds of reunification with their parents.¹⁷²

Lastly, and most troubling, parents with disabilities, especially those with intellectual or psychiatric disabilities, experience alarmingly high rates of termination of parental rights.¹⁷³ A national study, for example, found that disabled parents had twenty-two percent higher odds of having their parental rights severed than nondisabled parents.¹⁷⁴ Furthermore, among 2,064 appellate cases involving mothers with disabilities, ninety-three percent resulted in the termination of their parental rights.¹⁷⁵ Meanwhile, other studies have found elevated rates of termination of parental rights among families with parental substance use disorders.¹⁷⁶ In other words, parents with disabilities and their children are disproportionately more likely than others to endure the trauma of being permanently separated.

166. Rebbe et al., *supra* note 154, at 629.

167. *Id.*

168. Kaplan et al., *supra* note 153, at 202.

169. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 16 ("Removal rates where parents have a psychiatric disability have been found to be as high as 70 percent to 80 percent; where the parent has an intellectual disability, 40 percent to 80 percent.").

170. Young et al., *supra* note 159, at 142.

171. Lightfoot & DeZelar, *supra* note 151, at 27.

172. *Id.*

173. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 77–78 (reporting studies finding high rates of termination of parental rights among disabled parents).

174. Lightfoot & DeZelar, *supra* note 151, at 27.

175. Powell et al., *supra* note 40.

176. Meyer et al., *supra* note 159, at 645; Young et al., *supra* note 159, at 142.

III. THE CURRENT STUDY

As Justice Harry Blackmun poignantly proclaimed in *Lassiter v. Department of Social Services*, “there can be few losses more grievous than the abrogation of parental rights.”¹⁷⁷ It is, indeed, “the ultimate legal infringement on the family.”¹⁷⁸ Tragically, termination of parental rights is shockingly common among disabled parents and their children.¹⁷⁹ In light of the gravity of such judicial action, it is essential to understand the statutes that sanction it. Specifically, it is crucial to elucidate how the law enables the infringement of the fundamental right to family among parents with disabilities. Since the family policing system, including termination of parental rights, is primarily governed by state statutes,¹⁸⁰ such an interrogation must focus there.

This Article adds to the burgeoning body of scholarship concerning family policing system involvement among parents with disabilities and their children by offering a contemporary systematic examination of state termination of parental rights laws and their inclusion of parental disability. This Part describes the significance of the current Study and the methodology employed to conduct it. First, it situates the Study within the broader context that it occurs, highlighting earlier analyses of the inclusion of parental disability in state termination of parental rights statutes and demonstrating the need for an updated examination. Next, it describes the Study’s data source (i.e., state laws), including details about how the data were selected and coded. Thereafter, it discusses how the statutes were analyzed. Lastly, it describes the Study’s limitations.

A. Study Contribution

This Article builds on, incorporates, and extends the existing research concerning the inclusion of parental disability within state termination of parental rights laws. Professor Lightfoot and colleagues conducted the first known systematic investigation of the inclusion of parental disability in termination of parental rights laws, finding that in 2005, a staggering thirty-six states and the District of Columbia included parental disability as grounds for termination of parental rights in their laws.¹⁸¹ Specifically, they

177. 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting).

178. Carol Hewett, *Defending a Termination of Parental Rights Case*, in FOSTER CHILDREN IN THE COURTS 229 (Mark Hardin ed., 1983).

179. See *supra* Part II.B.

180. See *supra* Part I.B.

181. Lightfoot et al., *supra* note 139, at 930–32 (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky,

found that thirty-five states and the District of Columbia listed mental illness,¹⁸² thirty-two states included intellectual or developmental disabilities,¹⁸³ seventeen states and the District of Columbia listed emotional illness,¹⁸⁴ seven states and the District of Columbia included physical disabilities,¹⁸⁵ and four states listed “other” disabilities.¹⁸⁶ Moreover, they observed that the statutes often used “outdated terminology and imprecise definitions” to describe parental disability and focused on disabilities rather than parents’ conduct.¹⁸⁷

Most recently, in 2012, as part of its *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* report, NCD analyzed state termination of parental rights laws and found that thirty-six states and the District of Columbia included parental disability in their termination of parental rights statute.¹⁸⁸ In particular, thirty-five states and the District of Columbia listed mental illness,¹⁸⁹ thirty-four states listed intellectual or developmental disabilities,¹⁹⁰ seventeen states and the District of Columbia listed emotional disability,¹⁹¹ and nine states and the District

Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin).

182. *Id.* (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin).

183. *Id.* (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin).

184. *Id.* (Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Illinois, Kansas, Montana, Nevada, North Dakota, Ohio, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia).

185. *Id.* (District of Columbia, Georgia, Kansas, Mississippi, New Mexico, North Dakota, Ohio, and South Carolina).

186. *Id.* (Missouri, New Mexico, North Carolina, and Wisconsin).

187. *Id.* at 930–33.

188. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 265–300 (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin).

189. *Id.* (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin).

190. *Id.* (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin).

191. *Id.* (Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Kansas,

of Columbia listed physical disabilities as grounds for termination of parental rights.¹⁹² NCD also noted that Utah's statute may be considered to list parental disability, but qualified this because of its vague statutory language.¹⁹³ Moreover, NCD included a category for "other" disabilities, but did not consistently report their findings.¹⁹⁴

In other words, few notable differences occurred in the seven years between these analyses. For example, regarding the number of states that included parental disability as grounds for termination of parental rights, the only difference was that Professor Lightfoot and colleagues included Utah's law in their calculation while NCD did not. For specific parental disability categories, the differences were minor but did suggest an increase, rather than a decrease. In 2005, for instance, seven states and the District of Columbia listed physical disabilities, whereas, in 2012, nine states and the District of Columbia did. Again, some of these differences correspond with how the analyses measured Utah's law. Regardless, the significant number of states that included parental disability, combined with the lack of marked changes over time, is staggering given the many successes the disability rights movement has had in other areas.

Importantly, since NCD released its *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* report in 2012, the rights of parents with disabilities have witnessed unprecedented attention from activists, legal professionals, scholars, and policymakers. For example, nearly thirty states have introduced or passed legislation to ensure the rights of disabled parents.¹⁹⁵ Further, the DOJ and HHS have engaged in numerous investigation and enforcement activities concerning federal disability rights laws violations by the family policing system.¹⁹⁶ Additionally, in 2016, the White House convened an event focused on the rights of parents with disabilities.¹⁹⁷ In other words, in the decade following the publication of *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, there has been an unparalleled focus on this issue.

Therefore, a contemporary examination is necessary to investigate the legal and policy progress that has been achieved and to identify areas

Maryland, Montana, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).

192. *Id.* (District of Columbia, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Dakota, Ohio, Oklahoma, and South Carolina).

193. *Id.* at 297.

194. *Id.* at 265–300. For example, for some states, the "other" category included substance use disorders, while for others, varying disabilities were specified.

195. *See supra* note 37 and accompanying text.

196. *See supra* note 38 and accompanying text.

197. *See supra* note 39 and accompanying text.

needing further focus.¹⁹⁸ In response, this Article presents findings from a contemporary systematic examination of state termination of parental rights laws and their inclusion of parental disability. Moreover, the Study broadens the analysis of parental disability and state termination of parental rights statutes to include parental substance use disorders, offering a complete and more inclusive picture of the legal context in which disabled parents and their children exist. Incorporating parental substance use disorders in this analysis is crucial for three primary reasons. First, because the ADA protects people with substance use disorders, including parental substance use disorders is essential for providing an accurate and comprehensive examination of state termination of parental rights statutes.¹⁹⁹ Second, like other disabled parents, parents with substance use disorders have markedly high rates of involvement with the family policing system,²⁰⁰ and once involved, they often receive inadequate services and support²⁰¹ and are at significant risk of having their parental rights terminated.²⁰² Finally, emerging legal scholarship suggests the law is particularly discriminatory to people with substance use disorders.²⁰³ Thus, by considering parental substance use disorders in relation to other parental disabilities, we can identify common challenges, advocate for improved support systems, and address systemic discrimination within the legal framework affecting disabled parents as a whole.

B. Methodology

This Study's methodology is consistent with a rapidly growing body of empirical legal scholarship.²⁰⁴ Conducting empirical analysis is crucial to gain insight into the reasons behind decision-making and to enhance the

198. In January 2022, Professor Rabia Belt found that thirty-two states included parental disability in their laws as a basis for termination of parental rights. Belt, *supra* note 45, at 8–14.

199. See 42 U.S.C. § 12210. Nonetheless, the ADA does not protect people currently using substances considered illegal. See 28 C.F.R. § 35.131 (2022); see also C.R. DIV., U.S. DEP'T. OF JUST., *supra* note 46 (describing how the ADA protects people with opioid use disorder, which is a substance use disorder).

200. RADEL ET AL., *supra* note 156.

201. *Id.* at 6.

202. Meyer et al., *supra* note 159, at 645; Young et al., *supra* note 159, at 142.

203. See Stacey A. Tovino, *Stigma in the Statute: When the Language of the Law Injures*, 64 WM. & MARY L. REV. 783, 786–89 (2023).

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

effectiveness of policymaking and implementation, ultimately leading to improved functioning of the legal system.²⁰⁵ This Section presents the Study's methodology. First, it describes the Study's data source, including details about how the data were selected and coded. Thereafter, it discusses the analytic approach employed to examine the data.

1. Data Source

This Study draws from state termination of parental rights laws. The statutes analyzed in this study were obtained from Lexis+, an online database containing state and federal laws, caselaw, and other legal sources. Relevant state laws were identified in each of the fifty states and the District of Columbia using a Boolean search with the following term: "termination of parental rights." Once a state's relevant laws were located, an in-depth investigation was conducted to identify all statutes relating to termination of parental rights. State family policing system statutes were also examined to find provisions applicable to parents with disabilities. Statutes were cross-referenced with the compilation of state termination of parental rights laws by the Child Welfare Information Gateway, a service of the Children's Bureau, Administration for Children and Families, at HHS, to ensure all pertinent laws were identified.²⁰⁶ To improve reliability and accuracy, these steps were each conducted independently by a Research Assistant and myself. We then met to review our findings, and any discrepancies were resolved.

2. Analytic Strategy

The data for this Study were analyzed using content analysis, a methodology that allows researchers to systematically examine themes.²⁰⁷ Employing content analysis, scholars assemble relevant documents—such as judicial opinions, statutes, or regulations on a particular subject—and systematically read them, observing themes and drawing inferences about their use and meaning.²⁰⁸ Content analysis is an ideal approach for empirical

205. Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741 (2004) (observing that empirical legal studies can "help[] inform litigants, policymakers, and society as a whole about how the legal system works"); *see also* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 85 (2008) (noting that empirical analysis "may not eliminate all disagreement, but at least it sharpens the issues").

206. *State Statutes Search*, CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/> [<https://perma.cc/X3YA-YLQY>].

207. Meyer et al., *supra* note 159, at 642.

208. KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 18

legal scholarship, such as this Study, because it “aims for a scientific understanding of the law itself as found in judicial opinions and other legal texts, a subject matter that plays to the strengths of legal scholars.”²⁰⁹ Hence, “content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research,” and is an increasingly popular approach utilized in empirical legal scholarship.²¹⁰ Of particular relevance, content analysis has previously been used to investigate state termination of parental rights statutes.²¹¹

Content analysis employs quantitative methods, qualitative methods, or a combination of both approaches.²¹² Quantitative approaches to content analysis calculate the frequency of a set of codes to ascertain what is in the data.²¹³ Quantitative content analysis typically employs a deductive approach, with the codes predetermined and drawn from outside the existing data, often from theory or prior research.²¹⁴ A quantitative approach to content analysis is a suitable method when previous studies on a given phenomenon are incomplete or in need of further elaboration.²¹⁵ In contrast, qualitative content analysis is a method that takes an inductive approach, where researchers develop codes based on the data itself rather than predefined categories.²¹⁶ The process of coding and categorizing the data is iterative, with researchers refining and modifying the codes as they gain

(2d ed. 2004) (defining content analysis as “a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use”); *see also* MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982) (analyzing pleadings and briefs using content analysis); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (studying case file documents using content analysis); Scott F. Norberg, *Consumer Bankruptcy’s New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 418 (1999) (examining case file documents using content analysis); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (coding trial court records using content analysis); Sudha Xirasagar et al., *Small Group Health Insurance: Ranking the States on the Depth of Reform, 1999*, 19 J. HEALTH & SOC. POL’Y 1 (2004) (analyzing statutes using content analysis).

209. Hall & Wright, *supra* note 205, at 64 (emphasis omitted) (“We propose in this Article that one standard social science technique—content analysis—could form the basis for a uniquely legal empirical methodology.”).

210. *Id.* at 65, 70–72.

211. *See, e.g.*, Vesneski, *supra* note 84.

212. Meyer et al., *supra* note 159, at 642.

213. David L. Morgan, *Qualitative Content Analysis: A Guide to Paths Not Taken*, 3 QUALITATIVE HEALTH RSCH. 112, 115 (1993).

214. *See* BRUCE L. BERG, *QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES* 233–52 (3d ed. 1998).

215. Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RSCH. 1277, 1281 (2005).

216. *See* BERG, *supra* note 214; KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* 1, 5–7 (2002).

new insights into the data.²¹⁷ Qualitative content analysis is most useful when the goal of the research is to generate new theories or to explore a phenomenon in a more in-depth and nuanced way.²¹⁸

This Study involved a mixed-methods content analysis of state termination of parental rights laws. Using a mixed-methods approach, quantitative analysis was used to ascertain the frequency of laws that included parental disability and qualitative analysis was used to explore themes within the statutes. Therefore, the analysis of the statutes was both iterative and inductive.²¹⁹ Informed by the initial examination of state termination of parental rights statutes by Professor Lightfoot and colleagues,²²⁰ and NCD's subsequent findings in the *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* report,²²¹ parental disability categories were identified. As previously mentioned, substance use disorders were also added to the present Study. Frequency of the inclusion of parental disability among the laws was then calculated. Thereafter, qualitative analysis was performed. First, a preliminary set of themes were identified. Next, a line-by-line in-depth analysis of the laws was conducted. Then, based on the preliminary themes and themes that emerged from the in-depth analysis, a final set of themes was established. Subsequently, each statute was again analyzed and coded accordingly.

C. Study Limitations

Notwithstanding the advances that this Study brings to a contemporary understanding of the inclusion of parental disability in state termination of parental rights statutes, this Study does have some limitations. First, this point-in-time study does not consider when the statutes were first enacted or any amendments that have been adopted over time. Future scholarship should examine who, how, and when states are revising their termination of parental rights laws with respect to parental disability. Understanding these dynamics may shed light on the drivers of these laws, which is beyond this Article's scope. Second, content analysis is an inherently subjective and interpretive analytical strategy. To increase reliability, the analysis was conducted separately by the author and a research assistant. Any differences were discussed until a consensus was reached. Coding discrepancies were rare due to the coding frame's specificity and the data's overt nature. Third,

217. See BERG, *supra* note 214; NEUENDORF, *supra* note 216.

218. Hsieh & Shannon, *supra* note 215, at 1279–80.

219. See generally *id.* (describing content analysis).

220. Lightfoot et al., *supra* note 139, at 930–34.

221. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 265–300.

the data were limited to state statutes and did not include analysis of court decisions which offer an important lens into how state laws and regulations are interpreted and implemented. Case law on any one law, let alone the numerous laws analyzed in this Study, would be unmanageable and overwhelm the interpretive value of the data. Observing case law, therefore, is inconsistent with this Study's analytical strategy, which aimed to condense information by identifying patterns and trends. Nevertheless, future analyses of the inclusion of parental disability in termination of parental rights statutes should consider a more expansive approach by examining case law in addition to state laws. Future investigations should also study how the laws are implemented, including the experiences and perceptions of attorneys representing parents. Finally, this Study was limited to state termination of parental rights laws and did not include consideration of the many factors besides state statutes affecting disabled parents' involvement with the family policing system. Still, because state laws govern the entire family policing system,²²² this Study offers important insights described in the next Part.

IV. FINDINGS

This Part describes the Study's findings. First, it presents current information about the frequency of inclusion of parental disability in statutes from all fifty states and the District of Columbia. It also reports the incidence of specific parental disability types in the laws—intellectual disabilities, psychiatric or emotional disabilities, physical or sensory disabilities, substance use disorders, and other disabilities. Moreover, it describes any notable differences from previous analyses. Second, this Part offers observations concerning statutory language, including the ongoing use of outdated terminology; ambiguous and discriminatory criteria; focus on the future and arbitrary time periods; and inconsistent statutory provisions.

A. Frequency of Parental Disability in State Termination of Parental Rights Laws

Table 1 presents information about the frequency of parental disability in state termination of parental rights laws. Strikingly, as of October 1, 2022, forty-two states and the District of Columbia include parental disability as grounds for termination of parental rights in their laws.²²³ When stratified

222. See *supra* Part I.B.

223. Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Florida,

by parental disability types, thirty-three states and the District of Columbia list intellectual disabilities,²²⁴ thirty-five states and the District of Columbia include psychiatric or emotional disabilities,²²⁵ ten states and the District of Columbia list physical or sensory disabilities,²²⁶ thirty-five states and the District of Columbia include substance use disorders,²²⁷ and four states list other disabilities.²²⁸ Eight states do not list parental disabilities.²²⁹

Further analysis shows variation among state laws, with most states listing multiple disability types but a few including only substance use disorders or a narrower set of disabilities. Strikingly, two states include all parental disability types (i.e., intellectual disabilities, psychiatric or emotional disabilities, physical or sensory disabilities, substance use disorders, and other disabilities).²³⁰ Meanwhile, seventeen states include intellectual disabilities, psychiatric disabilities, and substance use disorders.²³¹ Six states and the District of Columbia list intellectual

Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

224. Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

225. Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Notably, this Article uses the term “psychiatric disabilities” to describe severe and persistent mental illnesses, such as severe depression, anxiety disorders, bipolar disorder, post-traumatic stress disorder, and other related mental health conditions, rising to the level of disabilities, unless this Article directly quotes others who use different terminology. I elected to use “psychiatric disabilities” because people with mental illness generally prefer it. See *PRA Language Guidelines*, PSYCHIATRIC REHAB. ASS’N (May 3, 2003), <https://www.psychrehabassociation.org/pralanguageguidelines> [https://perma.cc/D57X-TQMK]. However, I fully recognize that some people with psychiatric disabilities prefer other terminology. Moreover, for this Study’s analysis, I combined psychiatric and emotional disabilities because the disability types overlap in the statutes, and I believe this combination makes the analysis more accurate.

226. District of Columbia, Georgia, Kansas, Louisiana, Maryland, Mississippi, New Mexico, North Dakota, Ohio, Oklahoma, and Wisconsin.

227. Alabama, Alaska, Arizona, California, Colorado, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

228. Those states are North Carolina, North Dakota, Oklahoma, and Wisconsin. See N.C. GEN. STAT. § 7B-1111(a)(6) (2022) (“organic brain syndrome, or any other cause or condition”); N.D. CENT. CODE § 27-20.1-01(3)(d) (2022) (“other illness or disability”); OKLA. STAT. tit. 10A, § 1-4-904(B)(13) (2022) (“medical condition”); WIS. STAT. § 48.415(3)(a) (2022) (“other like incapacities”).

229. Connecticut, Delaware, Idaho, Indiana, Michigan, Pennsylvania, Vermont, and Wyoming.

230. North Dakota and Oklahoma.

231. Alabama, Alaska, Arizona, California, Colorado, Illinois, Massachusetts, Missouri, Montana, Nebraska, New Jersey, Nevada, Tennessee, Texas, Utah, Virginia, and Washington.

disabilities, psychiatric or emotional disabilities, physical or sensory disabilities, and substance use disorders.²³² Seven states only list substance use disorders.²³³ Five states include intellectual disabilities and psychiatric or emotional disabilities.²³⁴ Two states list psychiatric or emotional disabilities and substance use disorders.²³⁵ Further, one state includes intellectual disabilities, psychiatric or emotional disabilities, physical or sensory disabilities, and other disabilities.²³⁶ Likewise, one state lists intellectual disabilities, psychiatric or emotional disabilities, substance use disorders, and other disabilities.²³⁷ Finally, one state includes intellectual disabilities, psychiatric or emotional disabilities, and physical or sensory disabilities.²³⁸

Strikingly, there are few deviations between this Study's findings and NCD's prior analysis. For example, both now and in 2012, laws in thirty-five states and the District of Columbia include parental disability as grounds for termination of parental rights, if substance use disorders are not counted.²³⁹ Indeed, the most notable difference is that physical disabilities are now included in ten states and the District of Columbia, whereas in 2012, it was included in nine states and the District of Columbia.²⁴⁰ Hence, one additional state now lists it. Otherwise, there are no remarkable changes, except this analysis includes parental substance use disorders, which prior analyses did not. Moreover, this Study's findings are nearly akin to the analyses of 2005 state laws conducted by Professor Lightfoot and colleagues.²⁴¹ Thus, despite the unprecedented attention to the rights of disabled parents and their children, ableism persists in state termination of parental rights statutes.

232. District of Columbia, Georgia, Kansas, Louisiana, Maryland, Mississippi, and Ohio.

233. Florida, Maine, Minnesota, Rhode Island, South Carolina, South Dakota, and West Virginia.

234. Arkansas, Hawaii, Kentucky, New Hampshire, and New York.

235. Iowa and Oregon.

236. Wisconsin.

237. North Carolina.

238. New Mexico.

239. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 265–300.

240. *Id.*

241. Lightfoot et al., *supra* note 139, at 930–32.

**TABLE 1. FREQUENCY OF INCLUSION OF PARENTAL DISABILITY IN
TERMINATION OF PARENTAL RIGHTS LAWS**

| State | Parental Disability Included | Intellectual Disability | Psychiatric or Emotional Disability | Physical or Sensory Disability | Substance Use Disorders | Other Disability |
|-------|------------------------------------|----------------------------|--|---|-------------------------------|---------------------|
| AL | Yes | X | X | | X | |
| AK | Yes | X | X | | X | |
| AZ | Yes | X | X | | X | |
| AR | Yes | X | X | | | |
| CA | Yes | X | X | | X | |
| CO | Yes | X | X | | X | |
| CT | No | | | | | |
| DE | No | | | | | |
| DC | Yes | X | X | X | X | |
| FL | Yes | | | | X | |
| GA | Yes | X | X | X | X | |
| HI | Yes | X | X | | | |
| ID | No | | | | | |
| IL | Yes | X | X | | X | |
| IN | No | | | | | |
| IA | Yes | | X | | X | |
| KS | Yes | X | X | X | X | |
| KY | Yes | X | X | | | |
| LA | Yes | X | X | X | X | |
| ME | Yes | | | | X | |
| MD | Yes | X | X | X | X | |
| MA | Yes | X | X | | X | |
| MI | No | | | | | |
| MN | Yes | | | | X | |
| MS | Yes | X | X | X | X | |
| MO | Yes | X | X | | X | |
| MT | Yes | X | X | | X | |
| NE | Yes | X | X | | X | |
| NV | Yes | X | X | | X | |
| NH | Yes | X | X | | | |
| NJ | Yes | X | X | | X | |
| NM | Yes | X | X | X | | |
| NY | Yes | X | X | | | |
| NC | Yes | X | X | | X | X |

| State | Parental Disability Included | Intellectual Disability | Psychiatric or Emotional Disability | Physical or Sensory Disability | Substance Use Disorders | Other Disability |
|---------------|------------------------------|-------------------------|-------------------------------------|--------------------------------|-------------------------|------------------|
| ND | Yes | X | X | X | X | X |
| OH | Yes | X | X | X | X | |
| OK | Yes | X | X | X | X | X |
| OR | Yes | | X | | X | |
| PA | No | | | | | |
| RI | Yes | | | | X | |
| SC | Yes | | | | X | |
| SD | Yes | | | | X | |
| TN | Yes | X | X | | X | |
| TX | Yes | X | X | | X | |
| UT | Yes | X | X | | X | |
| VT | No | | | | | |
| VA | Yes | X | X | | X | |
| WA | Yes | X | X | | X | |
| WV | Yes | | | | X | |
| WI | Yes | X | X | X | | X |
| WY | No | | | | | |
| Totals | 43 | 34 | 36 | 11 | 36 | 4 |

Note: Current through October 1, 2022.

B. Thematic Findings

In addition to the staggeringly high number of states that continue to include parental disability as grounds for termination of parental rights, qualitative analysis of statutory language (see *Appendix*) reveals four overarching themes: (1) outdated terminology; (2) ambiguous and discriminatory criteria; (3) focus on the future and arbitrary time periods; and (4) inconsistent statutory provisions. As these findings demonstrate, ableism is at the foundation of these laws.

1. Outdated Terminology

Numerous state statutes continue to include outdated and offensive terminology to describe parental disabilities. In particular, sixteen state laws use the phrase “mental deficiency” to describe parents with intellectual

disabilities.²⁴² The term “mental deficiency” was commonly used in the period from the 1940s to the 1960s.²⁴³ By the 1970s, the term was replaced with “mental retardation,” which is also now considered pejorative.²⁴⁴ As Professor Lightfoot and colleagues explain, “[t]his archaic language does not easily translate to contemporary legal, medical, or social definitions of disability. Further, many people in the USA consider the type of language contained in the state statutes to be offensive.”²⁴⁵ Accordingly, the use of “mental deficiency” is wholly inappropriate.

2. *Ambiguous and Discriminatory Criteria*

Analysis of state laws also reveals significant ambiguity and the use of discriminatory criteria to determine fitness among disabled parents. Some statutes, for instance, reference a parent’s disability impeding their ability to provide for their children’s “needs,” but do not define what these “needs” are.²⁴⁶ Surely, children’s needs vary significantly. Without a clear definition, the family policing system and courts are likely making arbitrary and biased determinations. For example, what happens if a family policing system worker testifies to the court that a parent with an intellectual disability is not meeting their child’s needs because they cannot assist with their child’s homework? Would this inability to help with homework be enough to prove the parent unfit, even though the parent may be able to meet the child’s other needs? Other statutes allow for even greater opportunities for value judgments to be made because of ambiguous language. For example, Oregon’s statute provides that a parent’s disability must “render the parent incapable of providing proper care for the child.”²⁴⁷ Massachusetts’s, Mississippi’s, and South Carolina’s statutes, meanwhile, offer slightly more guidance, indicating that a parent’s disability must render the parent unable to take “minimally acceptable care” of the child.²⁴⁸ Yet, even with this additional clarification, determinations about what

242. ALA. CODE § 12-15-319(a)(2) (2022); ALASKA STAT. § 47.10.011(11) (2022); ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2022); ARK. CODE ANN. § 9-27-341(b)(3)(B)(vii) (2022); GA. CODE ANN. § 15-11-311(a)(1) (2022); KAN. STAT. ANN. § 38-2269(b)(1) (2022); LA. CHILD. CODE ANN. art. 1036(D)(1) (2022); MASS. GEN. LAWS ch. 210, § 3 (2022); MISS. CODE ANN. § 93-15-121 (2022); MONT. CODE ANN. § 41-3-609 (2021); NEB. REV. STAT. § 43-292 (2022); NEV. REV. STAT. § 128.106 (2021); N.H. REV. STAT. ANN. § 170-C:5 (2022); TEX. FAM. CODE ANN. § 161.003 (West 2021); UTAH CODE ANN. § 80-4-302 (LexisNexis 2022); WASH. REV. CODE § 13.34.180 (2022).

243. Lightfoot et al., *supra* note 139, at 932; Phil Foreman, *Language and Disability*, 30 J. INTELL. & DEVELOPMENTAL DISABILITY 57, 57 (2005).

244. Lightfoot et al., *supra* note 139, at 932.

245. *Id.* at 930.

246. *See, e.g.*, ALA. CODE § 12-15-319(a) (2022).

247. OR. REV. STAT. § 419B.504(f) (2021).

248. MASS. GEN. LAWS ch. 210, § 3(e)(xii) (2022); MISS. CODE ANN. § 93-15-121(b) (2022); S.C. CODE ANN. § 63-7-2570(6)(a)(ii) (2022).

constitutes “minimally acceptable care” are bound to be impacted by ableism and what constitutes suitable parenting.²⁴⁹

Further, state statutes contain highly ambiguous language concerning parental disability, often making it unclear to whom the law applies. For example, most state statutes omit definitions of disability entirely, instead simply listing disability types.²⁵⁰ Other state laws seemingly attempt to narrow the class of people to whom the laws apply by defining the disabilities in terms of severity (e.g., “severe mental illness”).²⁵¹ Oklahoma’s law, for example, includes “extreme physical incapacity” but offers no additional definitional information.²⁵² Mississippi’s statute similarly includes “extreme physical incapacitation.”²⁵³ However, experts suggest avoiding defining disabilities in terms of severity or functioning levels as these distinctions are often arbitrary and discriminatory.²⁵⁴ Moreover, Alaska’s law uses the term “serious emotional disturbance,”²⁵⁵ a term that does not signify a particular diagnosis and is usually only used in reference to children.²⁵⁶ Likewise, a number of state laws include “emotional illness,”²⁵⁷ another phrase that does not have an agreed upon contemporary definition.²⁵⁸ Additionally, some state statutes incorporate current or recent hospitalization or placement in some other type of facility within the description of disability.²⁵⁹ Nonetheless, these qualifications overlook the reality that many disabled people are forced into institutional settings because of a dearth of available home- and community-based

249. In fact, parents with disabilities are often held to heightened standards of parental competence. Powell, *supra* note 27, at 75.

250. See, e.g., ALA. CODE § 12-15-319(a)(2) (2022); ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2022); GA. CODE ANN. § 15-11-26(a)(1) (2022).

251. See, e.g., MISS. CODE ANN. § 93-15-121(a) (2022).

252. OKLA. STAT. tit. 10A, § 1-4-904(B)(13)(a) (2022).

253. MISS. CODE ANN. § 93-15-121(b) (2022).

254. Kristen Bottema-Beutel, Steven K. Kapp, Jessica Nina Lester, Noah J. Sasson & Brittany N. Hand, *Avoiding Ableist Language: Suggestions for Autism Researchers*, 3 AUTISM ADULTHOOD 18, 24 (2021); Dana S. Dunn, *Understanding Ableism and Negative Reactions to Disability*, AM. PSYCH. ASS’N (Dec. 15, 2021), <https://www.apa.org/ed/precollege/psychology-teacher-network/introductory-psychology/ableism-negative-reactions-disability> [<https://perma.cc/4VYQ-9GGJ>].

255. ALASKA STAT. § 47.10.011(11) (2022).

256. Lightfoot et al., *supra* note 139, at 932.

257. See, e.g., ALA. CODE § 12-15-319(a)(2) (2022); ARK. CODE ANN. § 9-27-341(b)(3)(B)(vii)(c) (2022); COLO. REV. STAT. § 19-3-604(1)(b)(1) (2022); KAN. STAT. ANN. § 38-2269(b)(1) (2022); MONT. CODE ANN. § 41-3-609(2)(a) (2021) (amended 2023).

258. Lightfoot et al., *supra* note 139, at 932.

259. N.M. STAT. ANN. § 32A-4-2(G)(4) (2022) (amended 2023); WIS. STAT. § 48.415(3)(a) (2022).

services, which should not impact parental rights.²⁶⁰ Notably, Oregon's statute adopts the ADA's definition of disability.²⁶¹

In addition, some state laws reference the use of experts to determine fitness among parents with disabilities. For example, New York requires only one court-appointed psychiatrist or psychologist to testify that a parent's intellectual, psychiatric, or emotional disability renders them unfit to parent.²⁶² The statute provides no additional information about what qualifications the expert must have, nor does it include requirements on how the expert reaches their determination. In fact, in one New York case, a mere forty-minute examination with a parent with a psychiatric disability was considered sufficient.²⁶³ Illinois similarly requires "competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or an intellectual disability."²⁶⁴ Meanwhile, California requires testimony about parents with psychiatric or emotional disabilities from two experts who specialize "in the diagnosis and treatment of emotional and mental disorders."²⁶⁵ Likewise, New Hampshire's law provides that "[m]ental deficiency or mental illness shall be established by the testimony of either 2 licensed psychiatrists or clinical psychologists or one of each acting together."²⁶⁶ However, none of the statutes require specific assessments to be conducted, nor do they require the expert to specialize in parents with disabilities. These omissions are particularly concerning because parents with disabilities are often evaluated with inaccessible and inappropriate assessment measures.²⁶⁷ For example, determinations about parents with intellectual disabilities are routinely based on IQ scores despite decades of evidence proving that there is no relationship between intelligence and parenting abilities.²⁶⁸ Hence, the ambiguity and discriminatory criteria in these laws are highly problematic.

260. Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020 Election*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 391, 425–26 (2022).

261. OR. REV. STAT. § 419B.504(2) (2021). The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment . . ." 42 U.S.C. § 12102(1).

262. N.Y. SOC. SERV. LAW § 384-b(6)(c) (McKinney 2023).

263. See *In re Loretta C.*, 821 N.Y.S.2d 559, 559–60 (N.Y. App. Div. 2006).

264. 750 ILL. COMP. STAT. 50/1(D)(p) (2022).

265. CAL. FAM. CODE § 7827(c) (West 2022).

266. N.H. REV. STAT. ANN. § 170-C:5(IV) (2022).

267. See NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 129–37.

268. *Id.* at 132–33; see also Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 142 (2016).

3. Focus on the Future and Arbitrary Time Periods

Relatedly, a fundamental issue with some laws is that termination of parental rights is determined by focusing on the future and arbitrary time periods. For example, in some states, termination of parental rights is based not merely on a parent's past actions but instead on predictions about their future ones. Moreover, several state laws reference possible issues rather than actual concerns. Oklahoma's statute, for instance, permits termination of parental rights among disabled parents if "allowing the parent to have custody would cause the child actual harm or harm in the near future."²⁶⁹ Likewise, Tennessee's law provides termination of parental rights if it is "unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future."²⁷⁰ In other words, these laws assume future maltreatment despite research indicating that parental disability is not *per se* an indicator of parenting ability.²⁷¹

Furthermore, some state laws seemingly provide that a parent's inability to overcome their disability indicates their unfitness. For example, some mention disabilities of a "duration" that would render a parent unable to care for their children.²⁷² Other state laws include provisions concerning disabilities that will "continue for a prolonged indeterminate period."²⁷³ In California, a parent may have their parental rights terminated if the "parents are mentally disabled and are likely to remain so in the foreseeable future."²⁷⁴ Other states include provisions relating to disabilities that are "likely to continue or will not likely be remedied in the reasonably foreseeable future."²⁷⁵ Washington's statute includes: "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future."²⁷⁶ In other words, the fact that a parent will remain disabled ostensibly can be used against them in some states.

269. OKLA. STAT. tit. 10A, § 1-4-904(13)(b) (2022).

270. TENN. CODE ANN. § 36-1-113(g)(8)(B)(i) (2022).

271. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 186 ("[H]igh-quality studies indicate that disability alone is not a predictor of problems or difficulties in children and that predictors of problem parenting are often found to be the same for disabled and nondisabled parents.").

272. *See, e.g.*, ALA. CODE § 12-15-319(a)(2) (2022); ALASKA STAT. § 47.10.011(11) (2022); COLO. REV. STAT. § 19-3-604(1)(b)(I) (2022); KAN. STAT. ANN. § 38-2269(b)(1) (2022).

273. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2022); MASS. GEN. LAWS ch. 210, § 3(c)(xii) (2022); NEB. REV. STAT. § 43-292(5) (2022).

274. CAL. FAM. CODE § 7827(b) (West 2022).

275. GA. CODE ANN. § 15-11-310(a)(5) (2022).

276. WASH. REV. CODE § 13.34.180(1)(I) (2022).

4. *Inconsistent Statutory Provisions*

Finally, some statutes include inconsistent provisions whereby they have adopted laws seemingly aimed at prohibiting discrimination against disabled parents while continuing to include parental disability as grounds for termination of parental rights. For example, Colorado requires courts to make findings that reasonable accommodations made pursuant to the ADA “will not remediate the impact of the parent’s disability on the health or welfare of the child” but still includes intellectual disabilities, psychiatric or emotional disabilities, and substance use disorders as a basis for finding a parent unfit.²⁷⁷ Likewise, Arkansas requires the family policing system to make reasonable accommodations to family preservation and reunification services in accordance with the ADA, while continuing to allow for the termination of parental rights based on intellectual disabilities or psychiatric or emotional disabilities.²⁷⁸ West Virginia has adopted a similar provision.²⁷⁹ Hence, even with an apparent interest in protecting the rights of parents with disabilities, several states continue to include parental disability in their termination of parental rights statutes.

Other states ostensibly require courts to find a nexus between a parent’s disability and actual harm to children. For example, Missouri allows termination of parental rights based on intellectual disabilities, psychiatric or emotional disabilities, or substance use disorders, but the statute also provides that there must be “a specific showing that there is a causal relation between the disability or disease and harm to the child.”²⁸⁰ Similarly, in Oregon, the state’s law includes psychiatric or emotional disabilities and substance use disorders but also provides that courts cannot consider a parent’s disability “unless the parent’s conduct related to the disability is of such nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time.”²⁸¹ Tennessee’s statute likewise allows for the termination of parental rights based on intellectual disabilities, psychiatric or emotional disabilities, and substance use disorders but also provides that the “disability of a parent or guardian alone shall not be considered for or against termination of parental or guardian rights unless the disability impacts the parent’s ability to care for the physical or psychological welfare of the child.”²⁸² South Carolina’s law includes “the parent has a diagnosable condition unlikely to change within a reasonable time including, but not limited to, addiction to alcohol

277. COLO. REV. STAT. § 19-3-604(1)(b)(I) (2022).

278. ARK. CODE ANN. § 9-27-341 (2022).

279. W. VA. CODE § 49-4-604 (2022).

280. MO. REV. STAT. § 211.447(10) (2022).

281. OR. REV. STAT. § 419B.504(2) (2022).

282. TENN. CODE ANN. § 36-1-113(r) (2022).

or illegal drugs or prescription medication abuse” as grounds for termination of parental rights but also says that a parent’s rights cannot be terminated “solely on the basis of the disability.”²⁸³ Although these nexus provisions seemingly should prevent disability-based discrimination, these requirements are rarely enforced, meaning courts continue to assume a nexus exists even when it does not.²⁸⁴

V. CONFRONTING ABLEISM IN TERMINATION OF PARENTAL RIGHTS LAWS

As the findings presented in this Article illustrate, ableism in termination of parental rights laws is persistent and widespread. Hence, notwithstanding the disability rights movement’s considerable successes, parenthood among people with disabilities remains insurmountable for many because of oppressive policies and practices. In particular, discriminatory termination of parental rights statutes, which govern the family policing system, allow for legal ableism against disabled parents. Indeed, ableism is at the foundation of these laws. This Part offers normative legal and policy considerations for challenging ableist termination of parental rights laws. It also identifies areas warranting further inquiry. Critically, the continued ableism in state termination of parental rights laws embodies our Nation’s enduring history of policing parenthood among people with disabilities. Accordingly, responding to these oppressive statutes must be part of the broader efforts to abolish the family policing system and instead provide families with adequate support and resources outside of a punitive regime.

A. Legal Challenges

The pervasiveness of ableism in state termination of parental rights laws, combined with the tragic outcomes these laws cause, underscore the need for legal challenges. First, building off Professor Michael Waterstone’s call for increased constitutional challenges to disability-based discrimination at both the federal and state levels,²⁸⁵ this Section considers constitutional challenges to discriminatory termination of parental rights statutes. It then examines opportunities to challenge these laws using the ADA.

A defining moment in constitutional disability law was the 1985 Supreme Court ruling in *City of Cleburne v. Cleburne Living Center, Inc.*²⁸⁶ There, while ultimately striking down a zoning ordinance as violating the Equal Protection rights of people with intellectual disabilities, the Court

283. S.C. CODE ANN. § 63-7-2570 (2022) (amended 2023).

284. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 16.

285. *See generally* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014).

286. 473 U.S. 432 (1985).

held that rational basis was the appropriate level of constitutional scrutiny of state action in cases involving people with intellectual disabilities.²⁸⁷ The Court has since extended rational basis to all people with disabilities.²⁸⁸ As Professor Waterstone aptly writes, the Court's analysis in *Cleburne*, "created and perpetuated a harmful constitutional 'otherness' to the disability classification," which has made cases involving disability-based discrimination incredibly challenging.²⁸⁹ Thus, notwithstanding notable progress in other areas of constitutional law since *Cleburne* was decided in 1985, "it has stayed frozen in time for people with disabilities."²⁹⁰ As such, disability rights attorneys and activists have seemingly chosen not to pursue challenges to *Cleburne*.²⁹¹

Although the hesitancy to pursue constitutional challenges based on disability discrimination in light of *Cleburne* is certainly understandable, I believe that opportunities remain for confronting ableism within the family policing system. As Professor Waterstone notes, "[c]onstitutional law is at least in part about recognizing past injustices and current prejudice against groups."²⁹² Accordingly, "courts should adopt a more contextualized Equal Protection review for state laws that facially discriminate against people with disabilities,"²⁹³ such as termination of parental rights statutes that allow for discrimination against disabled parents based on their status. Using this approach, "[a] contextualized review would acknowledge the history of prejudice and segregation against people with disabilities, as well as recognize the important ways that state classifications operate to their detriment."²⁹⁴

Importantly, there has been successful constitutional litigation concerning people with disabilities and the infringement of fundamental rights. In *Tennessee v. Lane*, while finding "classifications based on disability violate that constitutional command [of congruence and proportionality] if they lack a rational relationship to a legitimate governmental purpose,"²⁹⁵ the Court held that Title II of the ADA did validly abrogate state sovereign immunity insofar as it sought to protect access to the justice system.²⁹⁶ Notably, *Lane* was based on the right to

287. *Id.* at 446.

288. *See* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational.").

289. Waterstone, *supra* note 285, at 541.

290. *Id.* at 529.

291. *Id.* at 529–30.

292. *Id.* at 531.

293. *Id.* at 533.

294. *Id.*

295. 541 U.S. 509, 522 (2004).

296. *Id.* at 533–34.

access the justice system rather than any heightened scrutiny for people with disabilities.²⁹⁷

The family policing system's facially discriminatory termination of parental rights laws is an area where *Cleburne* still operates to disadvantage people with disabilities in their interactions with the state. To date, no known courts have struck down termination of parental rights statutes that include parental disability "despite the fact that the laws cannot be proved to be substantially related to the objective of promoting child welfare as *there is no evidence that child maltreatment is more prevalent among parents with disabilities.*"²⁹⁸ Hence, an approach similar to that in *Lane* could be used to challenge state termination of parental rights laws that enable states to impose on disabled people's fundamental interest in raising families.

Moreover, state termination of parental rights statutes that allow for discrimination against disabled parents likely violate *Stanley* by relieving courts of their constitutional obligation to determine whether a parent is actually unfit before permanently severing her right to care for her child. In doing so, these statutes establish an irrebuttable presumption of unfitness, precisely the type of practice *Stanley* condemned.²⁹⁹ As the Supreme Court unambiguously proclaimed in *Vlandis v. Kline*, "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."³⁰⁰ Thus, laws that include parental disability as grounds for termination of parental rights may violate the Fourteenth Amendment.

Other constitutional challenges should also be considered. For example, as findings presented in this Article reveal, termination of parental rights laws are often vague, which can be detrimental for parents with disabilities. Termination of parental rights statutes are, to some degree, intentionally vague.³⁰¹ At the same time, such ambiguity allows judges broad discretion in deciding cases.³⁰² Termination of parental rights proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."³⁰³ When termination of parental rights proceedings are based on the grounds of parental disability, however, "this discretion opens a conduit for officials to give effect to biases and

297. *Id.* at 533.

298. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 237.

299. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

300. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (quoting *Heiner v. Donnan*, 285 U.S. 312, 329 (1932)).

301. David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 307–08 (2002).

302. *Id.*

303. *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (citing *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977)).

presumptions.”³⁰⁴ State statutes may violate the Constitution if they are ambiguous.³⁰⁵ These laws are also more likely to be misinterpreted.³⁰⁶ Laws that include parental disability as grounds for termination of parental rights often link the disability to an inability to care for the child, without defining precisely what this entails. Therefore, constitutional challenges to these ambiguous provisions must be considered.

Even if constitutional challenges to discriminatory termination of parental rights laws are not immediately successful on the federal level, state constitutional challenges may offer opportunities. As California Supreme Court Justice Stanley Mosk stresses, “[w]hen the Founding Fathers put this one nation together, they recognized the primacy of the states in protecting individual rights.”³⁰⁷ In fact, “[i]n other movements, state constitutions have served as important vehicles to express evolving notions of equality, even in the face of rigid federal doctrine.”³⁰⁸ For example, after experiencing a significant loss in the Supreme Court in *Bowers v. Hardwick*, which upheld Georgia’s sodomy law as not violating the constitutional rights of LGBTQ+ people,³⁰⁹ the LGBTQ+ rights movement “engaged in a deliberate campaign to challenge state sodomy and discriminatory marriage laws.”³¹⁰ Ultimately, these efforts helped pave the way to the Court’s overruling of *Bowers* in *Lawrence v. Texas*,³¹¹ which Justice Anthony Kennedy recognized when he described the evolution of state sodomy law.³¹²

Therefore, challenging termination of parental rights laws that discriminate against parents with disabilities as violating state constitutions may prove beneficial. As Professor Waterstone observes, “state constitutions are a particularly fertile ground for expressing constitutional values.”³¹³ Even with the constricting nature of *Cleburne*, challenges

304. Brandon R. White, Note, *Termination of Parental Rights of Mentally Disabled Parents in New York: Suggestions for Fixing an Overbroad, Outdated Statute*, 34 BUFF. PUB. INT. L.J. 1, 32 (2015).

305. A law must be written so that a person of “common intelligence” would understand its scope, otherwise, it violates the Constitution. See *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

306. Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 552 (2005).

307. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1082 (1985).

308. Waterstone, *supra* note 285, at 559.

309. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

310. Waterstone, *supra* note 285, at 560.

311. 539 U.S. at 578; see also Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 992 (2011).

312. *Lawrence*, 539 U.S. at 573 (“In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

313. Waterstone, *supra* note 285, at 560.

pursuant to state constitutions remain ripe with opportunities.³¹⁴ In fact, “some state courts have been willing to move beyond *Cleburne* and hold that people with disabilities are entitled to heightened scrutiny under their state’s equal protection clause.”³¹⁵ Consider, for example, Nevada. The state’s law provides for termination of parental rights based on intellectual disabilities, psychiatric or emotional disabilities, and substance use disorders.³¹⁶ Nonetheless, in November 2022, the state’s constitution was amended to include: “Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, *disability*, ancestry or national origin.”³¹⁷ Hence, state constitutional challenges may be brought based on the termination of parental rights law discriminating against parents with disabilities.

Moreover, legal challenges concerning state termination of parental rights laws may be brought based on ADA violations. According to NCD, “[s]uch statutes are examples of the oppression ADA proponents sought to eradicate, and they run entirely counter to the letter of the law, which prohibits state and local agencies, such as those in the child welfare system, from categorically discriminating on the basis of disability.”³¹⁸ To be sure, courts have generally resisted finding the ADA is a defense to termination of parental rights.³¹⁹ Nonetheless, an ADA challenge to discriminatory termination of parental rights laws is different and may be more successful. Specifically, the inclusion of parental disability as grounds for termination of parental rights runs afoul of the ADA’s prohibition of disability-based discrimination.³²⁰ Accordingly, these laws should be challenged as violating both the spirit and letter of the ADA. In particular, DOJ and HHS should incorporate challenging ableist termination of parental rights laws into their ongoing efforts to protect the rights of disabled parents and their children.³²¹

314. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 n.73 (2011) (observing that “[i]n some cases, state courts interpreting state constitutions have gone further in their grants of heightened scrutiny than have federal courts interpreting the United States Constitution,” while recognizing that “the slack created by the federal equal protection jurisprudence has not been fully picked up by the states’ equal protection jurisprudence”).

315. Waterstone, *supra* note 285, at 575.

316. NEV. REV. STAT. § 128.106 (2021).

317. NEV. CONST. art. 1, § 24 (emphasis added).

318. NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 84.

319. Powell, *supra* note 27, at 79–81.

320. See 42 U.S.C. § 12132; 28 C.F.R. § 35.130 (2023); see also Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 808 (2018) (“Another assertion by courts is that the ADA was not meant to change obligations imposed by unrelated statutes. Yet nothing in the ADA suggests that actions under such statutes are spared; if they are discriminatory, they must be brought into conformance with the ADA.” (footnotes omitted)).

321. See *supra* note 38 and accompanying text.

B. Policy Implications

Legislative action is also urgently needed to confront discriminatory state termination of parental rights statutes. To that end, states should swiftly amend their statutes to eliminate disability as grounds for termination of parental rights, consistent with a growing trend across the country.³²² As Robert Hayman writes,

[T]he formal classification should be abolished as a basis for state interference with the parent-child relationship. The classification has no empirical foundation, and its political roots are not ones to be proud of. The classification results, meanwhile, in a schematic processing of the labeled parent's claim to family, reducing individualized adjudications to formalities and foregone conclusions. In the end, the scheme makes us all a little less human.³²³

To date, nearly thirty states have introduced or enacted legislation concerning the rights of parents with disabilities and their children.³²⁴ For example, in 2018, Colorado passed the Family Preservation for Parents with Disability Act.³²⁵ This Act prohibits the use of a parent's disability solely as grounds for denying or limiting custody, visitation, adoption, foster care, or guardianship.³²⁶ It also mandates that courts take into account the benefits of providing support and services when making decisions in these areas.³²⁷ Additionally, the Act requires the state's family policing system agency to offer reasonable modifications for parents with disabilities.³²⁸ In many ways, this Act provides substantial protection to disabled parents. On the other hand, despite this important legislation, Colorado's state termination of parental rights law continues to allow for intellectual disabilities, psychiatric or emotional disabilities, and substance use disorders to serve as a basis for finding a parent unfit.³²⁹ Therefore, states should build off legislation like Colorado's, while also entirely removing parental disability from their termination of parental rights statutes.

At the federal level, Congress is considering two bills that could address some of the oppression disabled parents encounter within the family policing system. For example, Congress is contemplating legislation

322. Kay, *supra* note 320, at 812–14.

323. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1268–69 (1990).

324. Nat'l Rsch. Ctr. for Parents with Disabilities, *supra* note 37.

325. Family Preservation for Parents with Disability Act, COLO. REV. STAT. § 24-34-805 (2018) (amended 2021).

326. *Id.*

327. *Id.*

328. *Id.*

329. COLO. REV. STAT. § 19-3-604(1)(b)(I) (2022).

allowing states to extend the timeline for termination of parental rights and exempt parents actively participating in classes, treatment, or other services.³³⁰ This undoubtedly would help parents with disabilities who often have trouble complying with current timelines because suitable supports and services often take time to obtain and must be proffered for a period longer than the mandated timelines.³³¹ Further, Congress should pass the Equality for Families with Disabilities Act, which aims to eliminate discrimination by the family policing system against disabled parents and their children.³³² Collectively, these two bills are important steps toward addressing the ableism that pervades the family policing system.

Notably, legal professionals and scholars play a critical role in advancing legislation to ensure the rights of disabled parents and their children. Indeed, state efforts to amend family policing system laws have been primarily led by disability rights activists and have benefited tremendously from the support of legal professionals.³³³ In particular, legal professionals and scholars should provide insights about the issues faced when representing parents with disabilities and the best ways to confront discriminatory language within existing laws. To facilitate legislative advocacy, in 2020, the National Research Center for Parents with Disabilities published toolkits for advocates and attorneys on strategies for passing legislation concerning parents with disabilities.³³⁴ Based on interviews with advocates and legislators, the Center identified eight “key principles of effective legislation”: *removal of discriminatory language from existing statutes*, definition of disability consistent with the ADA, specific definitions of key terms (e.g., supportive services), affirmation that the ADA applies in family policing system cases, duty to prove nexus between parental disability and

330. Agnel Philip, Eli Hager & Suzy Khimm, *The “Death Penalty” of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, PROPUBLICA (Dec. 20, 2022, 8:30 AM), <https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever> [<https://perma.cc/44F8-2MQF>].

331. See Albert & Powell, *supra* note 149, at 149; 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 TEX. J. ON C.L. & C.R. 9, 22 (2011); Christina Risley-Curtiss, Layne K. Stromwall, Debra Truett Hunt & Jennifer Teska, *Identifying and Reducing Barriers to Reunification for Seriously Mentally Ill Parents Involved in Child Welfare Cases*, 85 FAMS. SOC’Y 107, 112 (2004); Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 FAM. CT. REV. 21, 25 (2019); see also NAT’L COUNCIL ON DISABILITY, *supra* note 32, at 87–88 (detailing the difficulties parents with disabilities experience related to complying with ASFA’s timelines).

332. See Equality for Families with Disabilities Act, H.R. 8335, 117th Cong. (2022).

333. Sasha M. Albert, Robyn M. Powell & Jack Rubinstein, *Barriers and Solutions to Passing State Legislation to Protect the Rights of Parents with Disabilities: Lessons from Interviews with Advocates, Attorneys, and Legislators*, 33 J. DISABILITY POL’Y STUD. 15, 20–21 (2022).

334. Robyn Powell & Jack Rubinstein, *Passing Legislation to Protect the Rights of Parents with Disabilities and Their Children*, BRANDEIS UNIV. HELLER SCH. OF SOC. POL’Y & MGMT. (July 2020), <https://heller.brandeis.edu/parents-with-disabilities/pdfs/legislative-toolkit-advocates-english.pdf> [<https://perma.cc/289H-TGWL>].

alleged harm, written court findings about how a parent's disability affects her parenting capabilities, adaptive parenting assessments of disabled parents, and mandatory training for family policing system employees.³³⁵ These principles can guide disability rights activists, legal professionals, and scholars in challenging ableism within the family policing system through legislative action, including amending discriminatory provisions in termination of parental rights statutes.

C. Future Inquiry

The ableism that permeates state termination of parental rights laws is undeniable and profoundly troubling. It is also part of an enduring history of policing parenthood among people with disabilities. In addition to challenging these laws through legal and policy efforts, many questions persist for activists, legal professionals, scholars, and policymakers. This Section briefly identifies some areas warranting further inquiry.

First, additional research is needed to understand the specific context in which state laws exist. Specifically, an examination is needed to elucidate when states first included parental disability in their termination of parental rights statutes and any subsequent revisions made concerning parents with disabilities. Information about the impetus of including parental disability in these laws is also important. Understanding these dynamics will shed light on the statutes' drivers and help identify potential barriers to repealing ableist provisions.

Second, future analyses should include a more expansive approach by investigating both state laws and judicial opinions. In particular, scholars must interrogate how courts apply these statutes. This examination must also consider any differences based on disability types. For example, do courts use these laws in specific and biased ways depending on what the parent's disability is? Intersecting oppressions must also be investigated to ascertain whether the statutes affect disabled parents from varying backgrounds differently. To that end, information is needed about how courts apply these laws in cases involving parents who live at the intersection of disability and other marginalized identities or statuses.

Finally, to understand how these laws are implemented, scholars must gather information directly from attorneys representing parents in termination of parental rights cases. What do they see as the challenges related to discriminatory termination of parental rights statutes? How, if at all, does the family policing system embrace these ableist provisions when working with disabled parents and their children? Do they directly impact

335. *Id.* (emphasis added).

case outcomes, and if so, how? Attorneys may also be able to shed light on efforts to remove parental disability from termination of parental rights laws in their states. Further, researchers should glean information about any legal challenges attorneys have made in response to the ableist laws.

Undeniably, further research about the ongoing ableism in state termination of parental rights laws is essential to finally ending the enduring policing of parenthood among people with disabilities. The areas warranting further inquiry described above are only a few of the many topics needing additional study. Indeed, as the legal and policy context evolves, other issues needing investigation will surely arise. As such, the findings presented in this Article should be used as a starting point to inform future work by activists, legal professionals, and scholars.

CONCLUSION

The law is both a driver of equity and a conduit of oppression. It can ensure that all people, regardless of their identity, are treated justly, or it can be used as a tool to discriminate. In the context of the fundamental right to raise a family, the law has been weaponized to subjugate people with disabilities. Specifically, parents in forty-two states and the District of Columbia are at risk of having their parental rights terminated because they are disabled. Even worse, the number of state statutes that include parental disability as grounds for termination of parental rights has largely remained unchanged for over a decade. This Article proposes normative legal and policy solutions to challenge the ableism permeating these laws as well as identifies areas warranting further inquiry. Reckoning with these statutes is crucial to finally end the irreparable harm inflicted on disabled parents and their children by the family policing system because of unjust laws.

APPENDIX. RELEVANT STATUTORY LANGUAGE

| State | Citations and Relevant Disability Language (Emphasis Added) |
|---------|---|
| Alabama | <p>ALA. CODE § 12-15-319 (2022) (a) . . . In determining whether or not the parents are unable or unwilling to discharge their responsibilities to and for the child and to terminate the parental rights, the juvenile court shall consider the following factors including, but not limited to, the following: . . . (2) <i>Emotional illness, mental illness, or mental deficiency of the parent, or excessive use of alcohol or controlled substances</i>, of a duration or nature as to render the parent unable to care for the needs of the child.</p> |
| Alaska | <p>ALASKA STAT. § 47.10.088 (2021) (a) Except as provided in AS 47.10.080(o), the rights and responsibilities of the parent regarding the child may be terminated for purposes of freeing a child for adoption or other permanent placement if the court finds by clear and convincing evidence that (1) the child has been subjected to conduct or conditions described in AS 47.10.011.</p> <p>ALASKA STAT. § 47.10.011 (2022) . . . the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following: . . . (10) the parent, guardian, or custodian's ability to parent has been substantially impaired by <i>the addictive or habitual use of an intoxicant</i>, and the <i>addictive or habitual use of the intoxicant</i> has resulted in a substantial risk of harm to the child; . . . (11) the parent, guardian, or custodian has a <i>mental illness, serious emotional disturbance, or mental deficiency</i> of a nature and duration that places the child at substantial risk of physical harm or mental injury.</p> |
| Arizona | <p>ARIZ. REV. STAT. ANN. § 8-533 (2022) B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the</p> |

| | |
|-------------------|--|
| | <p>following, and in considering any of the following grounds, the court shall also consider the best interests of the child:</p> <p>...</p> <p>3. That the parent is unable to discharge parental responsibilities because of <i>mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol</i> and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.</p> |
| Arkansas | <p>ARK. CODE ANN. § 9-27-341 (2022)</p> <p>(b)(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:</p> <p>...</p> <p>(B) Of one (1) or more of the following grounds:</p> <p>...</p> <p>(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that placement of the juvenile in the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the <i>incapacity or indifference</i> to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent the placement of the juvenile in the custody of the parent.</p> <p>...</p> <p>(c) For purposes of this subdivision (b)(3)(B)(vii), the inability or incapacity to remedy or rehabilitate includes, but is not limited to, <i>mental illness, emotional illness, or mental deficiencies</i>.</p> |
| California | <p>CAL. WELF. & INST. CODE § 361.5 (2022)</p> <p>(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:</p> <p>...</p> <p>(2) That the parent or guardian is suffering from a <i>mental disability</i> that is described in Chapter 2 (commencing with Section 7820) of Part 4 of Division</p> |

| | |
|--|---|
| | <p>12 of the Family Code and that renders the parent or guardian incapable of utilizing those services.</p> <p>...</p> <p>(13) That the parent or guardian of the child has a history of <i>extensive, abusive, and chronic use of drugs or alcohol</i> and has resisted prior court-ordered treatment</p> <p>CAL. FAM. CODE § 7824 (West 2022)</p> <p>(a) “Disability” as used in this section means any <i>physical or mental incapacity</i> which renders the parent or parents unable to care for and control the child adequately.</p> <p>(b) A proceeding under this part may be brought where all of the following requirements are satisfied:</p> <p>(1) The child is one whose parent or parents (A) <i>suffer a disability because of the habitual use of alcohol, or any of the controlled substances</i></p> <p>CAL. FAM. CODE § 7826 (2022)</p> <p>A proceeding under this part may be brought where both of the following requirements are satisfied:</p> <p>(a) The child is one whose parent or parents have been declared by a court of competent jurisdiction, wherever situated, to be <i>developmentally disabled or mentally ill</i>.</p> <p>(b) In the state or country in which the parent or parents reside or are hospitalized, the Director of State Hospitals or the Director of Developmental Services, or their equivalent, if any, and the executive director of the hospital, if any, of which the parent or parents are inmates or patients, certify that the parent or parents so declared to be developmentally disabled or mentally ill will not be capable of supporting or controlling the child in a proper manner.</p> <p>CAL. FAM. CODE § 7827 (2022)</p> <p>(a) “<i>Mentally disabled</i>” as used in this section means that a parent or parents suffer a <i>mental incapacity or disorder</i> that renders the parent or parents unable to care for and control the child adequately.</p> |
|--|---|

| | |
|------------------------|---|
| | <p>(b) A proceeding under this part may be brought if the child is one whose parent or parents are <i>mentally disabled</i> and are likely to remain so in the foreseeable future.</p> <p>(c) Except as provided in subdivision (d), the evidence of any two experts, each of whom shall be a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or under Section 6750 of the Welfare and Institutions Code, a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, is required to support a finding under this section. In addition to this requirement, the court shall have the discretion to call a licensed marriage and family therapist, a licensed professional clinical counselor, or a licensed clinical social worker, either of whom shall have at least five years of relevant postlicensure experience, in circumstances in which the court determines that this testimony is in the best interest of the child and is warranted by the circumstances of the particular family or parenting issues involved. . . .</p> |
| <p>Colorado</p> | <p>COLO. REV. STAT. § 19-3-604 (2022)</p> <p>(1) The court may order a termination of the parent-child legal relationship upon the finding by clear and convincing evidence of any one of the following:</p> <p>. . .</p> <p>(b) That the child is adjudicated dependent or neglected and the court finds that an appropriate treatment plan cannot be devised to address the unfitness of the parent or parents. In making such a determination, the court shall find one of the following as the basis for unfitness:</p> <p>(I) An <i>emotional illness, a behavioral or mental health disorder, or an intellectual and developmental disability</i> of the parent of such duration or nature as to render the parent unlikely within a reasonable time to care for the ongoing physical, mental, and emotional needs and conditions of the child. The court shall make findings that the provision of reasonable accommodations and modifications pursuant to the federal “Americans with Disabilities Act of 1990”,</p> |

| | |
|-----------------------------|--|
| | <p>42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations, will not remediate the impact of the parent's disability on the health or welfare of the child.</p> <p>...</p> <p>(2) In determining unfitness, conduct, or condition for purposes of paragraph (c) of subsection (1) of this section, the court shall find that continuation of the legal relationship between parent and child is likely to result in grave risk of death or serious bodily injury to the child or that the conduct or condition of the parent or parents renders the parent or parents unable or unwilling to give the child reasonable parental care to include, at a minimum, nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions. In making such determinations, the court shall consider, but not be limited to, the following:</p> <p>...</p> <p>(e) <i>Excessive use of intoxicating liquors or controlled substances</i>, as defined in section 18-18-102 (5), C.R.S., which affects the ability to care and provide for the child.</p> |
| Connecticut | CONN. GEN. STAT. §§ 17a-111a, 17a-112(j) (2022) |
| Delaware | DEL. CODE ANN. tit. 13, § 1103 (2022) |
| District of Columbia | <p>D.C. CODE § 16-2353 (2022)</p> <p>(a) A judge may enter an order for the termination of the parent and child relationship when the judge finds from the evidence presented, after giving due consideration to the interests of all parties, that the termination is in the best interests of the child.</p> <p>(b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:</p> <p>...</p> <p>(2) the <i>physical, mental and emotional health</i> of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;</p> <p>...</p> |

| | |
|----------------|--|
| | (5) evidence that <i>drug-related activity</i> continues to exist in a child's home environment after intervention and services have been provided Evidence of continued <i>drug-activity</i> shall be given great weight. |
| Florida | <p>FLA. STAT. § 39.806 (2022)</p> <p>(1) Grounds for the termination of parental rights may be established under any of the following circumstances:</p> <p>...</p> <p>(j) The parent or parents have a <i>history of extensive, abusive, and chronic use of alcohol or a controlled substance</i> which renders them incapable of caring for the child, and have refused or failed to complete available treatment for such use during the 3-year period immediately preceding the filing of the petition for termination of parental rights.</p> |
| Georgia | <p>GA. CODE ANN. § 15-11-26 (2022)</p> <p>Whenever a best interests determination is required, the court shall consider and evaluate all of the factors affecting the best interests of the child in the context of such child's age and developmental needs. Such factors shall include:</p> <p>...</p> <p>(6) The <i>capacity</i> and disposition of each parent or person available to care for such child to give him or her love, affection, and guidance and to continue the education and rearing of such child;</p> <p>...</p> <p>(9) The <i>mental and physical health</i> of all individuals involved; . . .</p> <p>GA. CODE ANN. § 15-11-310 (2022)</p> <p>(a) In considering the termination of parental rights, the court shall first determine whether one of the following statutory grounds for termination of parental rights has been met:</p> <p>...</p> <p>(5) A child is a dependent child due to lack of proper parental care or control by his or her parent, reasonable efforts to remedy the circumstances have been unsuccessful or were not required, such cause of</p> |

| | |
|-----------------|---|
| | <p>dependency is likely to continue or will not likely be remedied in the reasonably foreseeable future</p> <p>GA. CODE ANN. § 15-11-311 (2022) (a) In determining whether a child is without proper parental care and control, the court shall consider, without being limited to, the following: (1) A <i>medically verified deficiency</i> of such child's parent's physical, mental, or emotional health that is of such duration or nature so as to render such parent unable to provide adequately for his or her child; (2) <i>Excessive use of or history of chronic unrehabilitated substance abuse</i> with the effect of rendering a parent of such child incapable of providing adequately for the physical, mental, emotional, or moral condition and needs of his or her child; . . .</p> |
| Hawaii | <p>HAW. REV. STAT. § 571-61 (2022) (b)(1) The family courts may terminate the parental rights in respect to any child as to any legal parent: . . . (F) Who is found by the court to be <i>mentally ill or intellectually disabled</i> and incapacitated from giving consent to the adoption of or from providing now and in the foreseeable future the care necessary for the well-being of the child; . . .</p> |
| Idaho | <p>IDAHO CODE § 16-2005 (2022)</p> |
| Illinois | <p>750 ILL. COMP. STAT. 50/1 (2022) D. . . . The grounds of unfitness are any one or more of the following . . . : . . . (k) <i>Habitual drunkenness or addiction to drugs</i>, . . . , for at least one year immediately prior to the commencement of the unfitness proceeding. . . . (p) Inability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of <i>mental impairment, mental illness or an intellectual disability</i> as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code [405 ILCS 5/1-116], or developmental disability as defined in Section 1-106 of that Code [405 ILCS 5/1-106], and there is sufficient justification to believe that the</p> |

| | |
|----------------|---|
| | <p>inability to discharge parental responsibilities shall extend beyond a reasonable time period. . . .</p> <p>705 ILL. COMP. STAT. 405/1-2 (2022) (1) . . . Provided that a ground for unfitness under the Adoption Act [750 ILCS 50/0.01 et seq.] can be met, it may be appropriate to expedite termination of parental rights: . . . (c) in those extreme cases in which the parent's incapacity to care for the child, combined with an <i>extremely poor prognosis</i> for treatment or rehabilitation, justifies expedited termination of parental rights.</p> |
| Indiana | IND. CODE §§ 31-34-21-5.6, 31-35-2-4.5 (2022) |
| Iowa | <p>IOWA CODE § 232.116 (2022) 1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds: . . . k. The court finds that all of the following have occurred: . . . (2) The parent has a <i>chronic mental illness</i> and has been repeatedly institutionalized for <i>mental illness</i>, and presents a danger to self or others as evidenced by prior acts. . . . l. The court finds that all of the following have occurred: (a) The <i>severe substance-related disorder</i> meets the definition for that term as defined in the most current edition of the diagnostic and statistical manual prepared by the American psychiatric association, and the parent presents a danger to self or others as evidenced by prior acts. . . .</p> |
| Kansas | <p>KAN. STAT. ANN. § 38-2269 (2022) (b) In making a determination of unfitness the court shall consider, but is not limited to, the following, if applicable:</p> |

| | |
|------------------|--|
| | <p>(1) <i>Emotional illness, mental illness, mental deficiency or physical disability</i> of the parent, of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child;</p> <p>...</p> <p>(3) the use of <i>intoxicating liquors or narcotic or dangerous drugs</i> of such duration or nature as to render the parent unable to care for the ongoing physical, mental or emotional needs of the child; . . .</p> |
| Kentucky | <p>KY. REV. STAT. § 625.090 (2022)</p> <p>(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:</p> <p>(a) <i>Mental illness</i> as defined by KRS 202A.011(9), or an <i>intellectual disability</i> as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time; . . .</p> <p>KY. REV. STAT. § 202A.011 (2022)</p> <p>(9) “<i>Mentally ill person</i>” means a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors; . . .</p> <p>KY. REV. STAT. § 202B.010 (2022)</p> <p>(9) “Individual with an <i>intellectual disability</i>” means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period; . . .</p> |
| Louisiana | <p>LA. CHILD. CODE ANN. § art. 1015 (2022)</p> <p>The grounds for termination of parental rights are:</p> <p>...</p> |

| | |
|-----------------|---|
| | <p>(6) Unless sooner permitted by the court, at least one year has elapsed since a child was removed from the parent's custody pursuant to a court order; there has been no substantial parental compliance with a case plan for services . . . there is no reasonable expectation of significant improvement in the parent's condition or conduct in the near future . . .</p> <p>LA. CHILD. CODE ANN. § art. 1036 (2022) D. Under Article 1015 (6), lack of any reasonable expectation of significant improvement in the parent's conduct in the near future may be evidenced by one or more of the following: (1) Any <i>physical or mental illness, mental deficiency, substance abuse, or chemical dependency</i> that renders the parent unable or incapable of exercising parental responsibilities without exposing the child to a substantial risk of serious harm, based upon expert opinion or based upon an established pattern of behavior.</p> |
| Maine | <p>ME. STAT. tit. 22, § 4055 (2022) 1. Grounds. The court may order termination of parental rights if: . . . C. The child has been placed in the legal custody or care of the department, the parent has a <i>chronic substance use disorder</i>, and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. . . .</p> |
| Maryland | <p>MD. CODE ANN., FAM. LAW § 5-323 (LexisNexis 2022) (d) . . . a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including: . . . (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make</p> |

| | |
|----------------------|--|
| | <p>it in the child's best interests for the child to be returned to the parent's home, including:</p> <p>...</p> <p>(iii) the existence of a <i>parental disability</i> that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; . . .</p> <p>(3) whether:</p> <p>(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and</p> <p>2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article; . . .</p> |
| Massachusetts | <p>MASS. GEN. LAWS ch. 210, § 3 (2022)</p> <p>In considering the fitness of the child's parent or other person named in section 2, the court shall consider, without limitation, the following factors:</p> <p>...</p> <p>(xii) a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as <i>alcohol or drug addiction, mental deficiency or mental illness</i>, and the condition makes the parent or other person named in section 2 unlikely to provide minimally acceptable care of the child; . . .</p> |
| Michigan | <p>MICH. COMP. LAWS § 712A.19b (2022)</p> |
| Minnesota | <p>MINN. STAT. § 260C.301 (2022)</p> <p>The juvenile court may upon petition, terminate all rights of a parent to a child:</p> <p>...</p> <p>(b) if it finds that one or more of the following conditions exist: . . .</p> <p>(5)(iv) It is also presumed that reasonable efforts have failed under this clause upon a showing that:</p> <p>(A) the parent has been diagnosed as <i>chemically dependent</i> by a professional certified to make the diagnosis;</p> |

| | |
|--------------------|--|
| | <p>(B) the parent has been required by a case plan to participate in a <i>chemical dependency</i> treatment program;</p> <p>(C) the treatment programs offered to the parent were culturally, linguistically, and clinically appropriate;</p> <p>(D) the parent has either failed two or more times to successfully complete a treatment program or has refused at two or more separate meetings with a caseworker to participate in a treatment program; and</p> <p>(E) the parent continues to <i>abuse chemicals</i>.</p> |
| Mississippi | <p>MISS. CODE ANN. § 93-15-121 (2022)</p> <p>Any of the following, if established by clear and convincing evidence, may be grounds for termination of the parent's parental rights if reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome:</p> <p>(a) The parent has been medically diagnosed by a qualified mental health professional with a <i>severe mental illness</i> or <i>deficiency</i> that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, makes the parent unable or unwilling to provide an adequate permanent home for the child;</p> <p>(b) The parent has been medically diagnosed by a qualified health professional with an <i>extreme physical incapacitation</i> that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, prevents the parent, despite reasonable accommodations, from providing minimally acceptable care for the child;</p> <p>(c) The parent is suffering from <i>habitual alcoholism</i> or <i>other drug addiction</i> and has failed to successfully complete alcohol or drug treatment; . . .</p> |
| Missouri | <p>MO. REV. STAT. § 211.447 (2022)</p> <p>(2) . . . In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the following conditions or acts of the parent:</p> <p>(a) A <i>mental condition</i> which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be</p> |

| | |
|----------------|---|
| | <p>reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;</p> <p>(b) <i>Chemical dependency</i> which prevents the parent from consistently providing the necessary care, custody and control of the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control;</p> <p>...</p> <p>(3)(c) A <i>mental condition</i> which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;</p> <p>(d) <i>Chemical dependency</i> which prevents the parent from consistently providing the necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control; . . .</p> <p>Nothing in this subdivision shall be construed to permit discrimination on the basis of disability or disease;</p> <p>...</p> <p>10. The <i>disability</i> or <i>disease</i> of a parent shall not constitute a basis for a determination that a child is a child in need of care, for the removal of custody of a child from the parent, or for the termination of parental rights without a specific showing that there is a causal relation between the disability or disease and harm to the child.</p> |
| Montana | <p>MONT. CODE ANN. § 41-3-609 (2021)</p> <p>(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider but is not limited to the following:</p> |

| | |
|-----------------|--|
| | <p>(a) <i>emotional illness, mental illness, or mental deficiency</i> of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;</p> <p>...</p> <p>(c) <i>excessive use of intoxicating liquor or of a narcotic or dangerous drug</i> that affects the parent's ability to care and provide for the child.</p> |
| Nebraska | <p>NEB. REV. STAT. § 43-292 (2022)</p> <p>The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:</p> <p>...</p> <p>(4) The parents are unfit by reason of debauchery, <i>habitual use of intoxicating liquor or narcotic drugs</i>, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;</p> <p>(5) The parents are unable to discharge parental responsibilities because of <i>mental illness or mental deficiency</i> and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; . . .</p> |
| Nevada | <p>NEV. REV. STAT. § 128.106 (2021)</p> <p>1. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:</p> <p>(a) <i>Emotional illness, mental illness or mental deficiency</i> of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time</p> <p>...</p> <p>(d) <i>Excessive use of intoxicating liquors, controlled substances or dangerous drugs</i> which renders the parent consistently unable to care for the child.</p> |

| | |
|-----------------------------|--|
| <p>New Hampshire</p> | <p>N.H. REV. STAT. ANN. § 170-C:5 (2022) The petition may be granted where the court finds that one or more of the following conditions exist: . . . IV. Because of <i>mental deficiency or mental illness</i>, the parent is and will continue to be incapable of giving the child proper parental care and protection for a longer period of time than would be wise or prudent to leave the child in an unstable or impermanent environment. <i>Mental deficiency or mental illness</i> shall be established by the testimony of either 2 licensed psychiatrists or clinical psychologists or one of each acting together.</p> |
| <p>New Jersey</p> | <p>N.J. STAT. ANN. § 9:2-19 (West 2022) If the court shall determine that custody of the child has been surrendered as provided in Article II of P.L.1955, c.232 (C.9:2-13 et seq.), the court may declare that the person making such surrender shall have no further right to custody of the child. If the court shall determine that a parent of the child is dead, or <i>mentally incapacitated</i> as defined in section 1 of P.L.1955, c.232 (C.9:2-13), . . .</p> <p>N.J. STAT. ANN. § 9:2-13 (West 2022) (e) The phrase “<i>mentally incapacitated</i>” means inability to understand and discharge the natural and regular obligations of care and support of a child by reason of <i>mental disease, intellectual disability, or the effects of drug, alcohol, or substance abuse</i>.</p> |
| <p>New Mexico</p> | <p>N.M. STAT. ANN. § 32A-4-28 (2022) B. The court shall terminate parental rights with respect to a child when: . . . (2) the child has been a neglected or abused child as defined in the Abuse and Neglect Act [Chapter 32A, Article 4 NMSA 1978] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the</p> |

| | |
|------------------------|---|
| | <p>conditions that render the parent unable to properly care for the child. . . .</p> <p>N.M. STAT. ANN. § 32A-4-2 (2022) G. “neglected child” means a child: . . . (4) whose parent, guardian or custodian is unable to discharge that person’s responsibilities to and for the child because of incarceration, hospitalization or <i>physical or mental disorder or incapacity</i>; . . .</p> |
| <p>New York</p> | <p>N.Y. SOC. SERVS. LAW § 384-b (Consol. 2022) 4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds: . . . (c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of <i>mental illness or intellectual disability</i>, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed in the court; . . . 6. (a) For the purposes of this section, “<i>mental illness</i>” means an affliction with a <i>mental disease or mental condition</i> which is manifested by a <i>disorder or disturbance</i> in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act. (b) For the purposes of this section, “<i>intellectual disability</i>” means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act; provided, however, that case law regarding use of the phrase “mental retardation”</p> |

| | |
|------------------------------|--|
| | <p>under this section shall be applicable to the term “intellectual disability”.</p> <p>(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.</p> |
| <p>North Carolina</p> | <p>N.C. GEN. STAT. § 7B-1111 (2022)</p> <p>(a) The court may terminate the parental rights upon a finding of one or more of the following:</p> <p>...</p> <p>(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the <i>incapability</i> will continue for the foreseeable future. <i>Incapability</i> under this subdivision may be the result of <i>substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition</i> that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.</p> |
| <p>North Dakota</p> | <p>N.D. CENT. CODE § 27-20.1-01 (2021)</p> <p>3. “Child in need of protection” means a child who:</p> <p>...</p> <p>d. Is without proper parental care, control, or education as required by law, or other care and control necessary for the child’s well-being because of the <i>physical, mental, emotional, or other illness or disability</i> of the child’s parent or parents, and that such lack of care is not due to a willful act of commission or act of omission by the child’s parents, and care is requested by a parent;</p> <p>...</p> <p>g. Is present in an environment subjecting the child to exposure to a <i>controlled substance, chemical substance, or drug paraphernalia</i> as prohibited by section 19-03.1-22.2; . . .</p> |

| | |
|----------|--|
| | <p>N.D. CENT. CODE § 27-20.3-20 (2021) 1. The court by order may terminate the parental rights of a parent with respect to the parent’s child if: . . . c. The child is in need of protection and the court finds: (1) The conditions and causes of the need for protection are likely to continue or will not be remedied and for that reason the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; . . .</p> |
| Ohio | <p>OHIO REV. CODE ANN. § 2151.414 (LexisNexis 2022) (E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child’s parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent: . . . (2) <i>Chronic mental illness, chronic emotional illness, intellectual disability, physical disability, or chemical dependency</i> of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code; . . .</p> |
| Oklahoma | <p>OKLA. STAT. tit. 10A, § 1-4-904 (2022) B. The court may terminate the rights of a parent to a child based upon the following legal grounds: . . . 13. A finding that all of the following exist:</p> |

| | |
|----------------------|--|
| | <p>a. the parent has a <i>diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, including behavioral health</i>, which renders the parent incapable of adequately and appropriately exercising parental rights, duties, and responsibilities within a reasonable time considering the age of the child, and</p> <p>b. allowing the parent to have custody would cause the child actual harm or harm in the near future.</p> <p>A parent's refusal or pattern of noncompliance with treatment, therapy, medication, or assistance from outside the home can be used as evidence that the parent is incapable of adequately and appropriately exercising parental rights, duties, and responsibilities. A finding that a parent has a <i>diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, including behavioral health or substance dependency</i>, shall not in and of itself deprive the parent of parental rights; . . .</p> |
| <p>Oregon</p> | <p>OR. REV. STAT. § 419B.504 (2022)</p> <p>The rights of the parent or parents may be terminated as provided in ORS 419B.500 if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change. In determining such conduct and conditions:</p> <p>(1) The court shall consider but is not limited to the following:</p> <p>. . .</p> <p>(b) <i>Addictive or habitual use of intoxicating liquors, cannabis or controlled substances</i> to the extent that parental ability has been substantially impaired.</p> <p>. . .</p> <p>(f) A <i>mental health condition</i> of the parent of such nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time.</p> <p>(2) The court may not consider a parent's disability, as that term is defined in the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), unless the parent's conduct related to the disability is of such</p> |

| | |
|---------------------|--|
| | nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time. |
| Pennsylvania | 23 PA. CONS. STAT. § 2511 (2022) |
| Rhode Island | <p>R.I. GEN. LAWS § 15-7-7 (2022)</p> <p>(a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency, or by the birthmother or guardian of a child born under circumstances referenced in subsection (a)(2)(viii) of this section, after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:</p> <p>...</p> <p>(2) The parent is unfit by reason of conduct or <i>conditions</i> seriously detrimental to the child; such as, but not limited to, the following:</p> <p>(i) <i>Institutionalization</i> of the parent, including imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time;</p> <p>...</p> <p>(iii) The child has been placed in the legal custody or care of the department of children, youth and families and the parent has a <i>chronic substance abuse</i> problem and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. <i>The fact that a parent has been unable to provide care for a child for a period of twelve (12) months due to substance abuse shall constitute prima facie evidence of a chronic substance abuse problem;</i></p> <p>...</p> <p>(e) Nothing in this section shall be construed to prohibit the introduction of expert testimony with respect to any illness, medical or psychological condition, trauma, <i>incompetency, addiction to drugs, or alcoholism</i> of any parent who has exhibited behavior or conduct that is seriously detrimental to a</p> |

| | |
|-----------------------|---|
| | child, to assist the court in evaluating the reason for the conduct or its probable duration. |
| South Carolina | <p>S.C. CODE ANN. § 63-7-2570 (2022)</p> <p>The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child:</p> <p>...</p> <p>(6) (a) The following circumstances exist, subject to the requirements set forth in Section 63-21-20:</p> <p>(i) the parent has a <i>diagnosable condition</i> unlikely to change within a reasonable time including, but not limited to, <i>addiction to alcohol or illegal drugs or prescription medication abuse</i>; and</p> <p>(ii) the condition makes the parent unlikely to provide minimally acceptable care of the child.</p> <p>(b) It is presumed that the parent's condition is unlikely to change within a reasonable time upon proof that the parent has been required by the department or the family court to participate in a treatment program for <i>alcohol or drug addiction</i>, and the parent has failed two or more times to complete the program successfully or has refused at two or more separate meetings with the department to participate in a treatment program.</p> <p>(c) The department, and any other covered entity, must not terminate the rights of a parent or legal guardian with a disability solely on the basis of the <i>disability</i>.</p> |
| South Dakota | <p>S.D. CODIFIED LAWS § 26-8A-26.1 (2022)</p> <p>In addition to the provisions of § 26-8A-26, the court may find that good cause exists for termination of parental rights of a parent who:</p> <p>...</p> <p>(7) Has a documented history of abuse and neglect associated with <i>chronic alcohol or drug abuse</i>.</p> |
| Tennessee | <p>TENN. CODE ANN. § 36-1-113 (2022)</p> <p>(g) (8) (B) The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:</p> <p>(i) The parent or guardian of the child is <i>incompetent</i> to adequately provide for the further care and supervision of the child because the parent's or</p> |

| | |
|--------------|--|
| | <p>guardian's <i>mental condition</i> is presently so <i>impaired</i> and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and</p> <p>(ii) That termination of parental or guardian rights is in the best interest of the child;</p> <p>...</p> <p>(i) (1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court. Those factors may include, but are not limited to, the following:</p> <p>...</p> <p>(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the <i>use of alcohol, controlled substances, or controlled substance analogues</i> which may render the parent unable to consistently care for the child in a safe and stable manner;</p> <p>...</p> <p>(r) The <i>disability</i> of a parent or guardian alone shall not be considered for or against termination of parental or guardian rights unless the disability impacts the parent's ability to care for the physical or psychological welfare of the child.</p> |
| Texas | <p>TEX. FAM. CODE ANN. § 161.003 (West 2021)</p> <p>(a) The court may order termination of the parent-child relationship in a suit filed by the Department of Family and Protective Services if the court finds that:</p> <p>(1) the parent has a <i>mental or emotional illness or a mental deficiency</i> that renders the parent unable to provide for the physical, emotional, and mental needs of the child;</p> <p>(2) the <i>illness or deficiency</i>, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for</p> |

| | |
|----------------|---|
| | <p>the child's needs until the 18th birthday of the child; . . .</p> <p>TEX. FAM. CODE ANN. § 161.001 (West 2021) (b) The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:</p> <p>(1) that the parent has:</p> <p>. . .</p> <p>(P) <i>used a controlled substance</i>, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:</p> <p>(i) failed to complete a court-ordered substance abuse treatment program; or</p> <p>(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance; . . .</p> |
| Utah | <p>UTAH CODE ANN. § 80-4-301 (LexisNexis 2022) (1) Subject to the protections and requirements of Section 80-4-104, and if the juvenile court finds termination of parental rights, from the child's point of view, is strictly necessary, the juvenile court may terminate all parental rights with respect to the parent if the juvenile court finds any one of the following:</p> <p>. . .</p> <p>(c) that the parent is <i>unfit or incompetent</i>; . . .</p> <p>UTAH CODE ANN. § 80-4-302 (LexisNexis 2022) (2) In determining whether a parent or parents are unfit or have neglected a child the juvenile court shall consider:</p> <p>(a) <i>emotional illness, mental illness, or mental deficiency</i> of the parent that renders the parent unable to care for the immediate and continuing physical or emotional needs of the child for extended periods of time;</p> <p>. . .</p> <p>(c) <i>habitual or excessive use of intoxicating liquors, controlled substances, or dangerous drugs</i> that render the parent unable to care for the child; . . .</p> |
| Vermont | VT. STAT. ANN. tit. 15A, § 3-504 (2021) |

| | |
|------------------------|---|
| <p>Virginia</p> | <p>VA. CODE ANN. § 16.1-283 (2022)</p> <p>B. The residual parental rights of a parent or parents of a child found by the court to be neglected or abused and placed in foster care as a result of (i) court commitment; (ii) an entrustment agreement entered into by the parent or parents; or (iii) other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:</p> <ol style="list-style-type: none"> 1. The neglect or abuse suffered by such child presented a serious and substantial threat to his life, health or development; and 2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time. In making this determination, the court shall take into consideration the efforts made to rehabilitate the parent or parents by any public or private social, medical, mental health or other rehabilitative agencies prior to the child's initial placement in foster care. <p>Proof of any of the following shall constitute prima facie evidence of the conditions set forth in subdivision B 2:</p> <ol style="list-style-type: none"> a. The parent or parents have a <i>mental or emotional illness or intellectual disability</i> of such severity that there is no reasonable expectation that such parent will be able to undertake responsibility for the care needed by the child in accordance with his age and stage of development; b. The parent or parents have <i>habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs</i> to the extent that proper parental ability has been seriously impaired and the parent, without good cause, has not responded to or followed through with recommended and available treatment which could have improved the capacity for adequate parental functioning; . . . |
|------------------------|---|

| | |
|--------------------------|--|
| <p>Washington</p> | <p>WASH. REV. CODE § 13.34.180 (2022)</p> <p>(1) A petition seeking termination of a parent and child relationship may be filed in juvenile court by any party to the dependency proceedings concerning that child. Such petition shall conform to the requirements of RCW 13.34.040, shall be served upon the parties as provided in RCW 13.34.070(8), and shall allege all of the following unless subsection (3) or (4) of this section applies:</p> <p>...</p> <p>(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within 12 months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided. In determining whether the conditions will be remedied the court may consider, but is not limited to, the following factors:</p> <p>(i) Use of <i>intoxicating or controlled substances</i> so as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documented multiple failed treatment attempts;</p> <p>(ii) <i>Psychological incapacity or mental deficiency</i> of the parent that is so severe and chronic as to render the parent incapable of providing proper care for the child for extended periods of time or for periods of time that present a risk of imminent harm to the child, and documented unwillingness of the parent to receive and complete treatment or documentation that there is no treatment that can render the parent capable of providing proper care for the child in the near future; . . .</p> |
|--------------------------|--|

| | |
|----------------------|---|
| West Virginia | <p>W. VA. CODE § 49-4-604 (2022)</p> <p>(d) As used in this section, “No reasonable likelihood that conditions of neglect or abuse can be substantially corrected” means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Those conditions exist in the following circumstances, which are not exclusive:</p> <p>(1) The abusing parent or parents have <i>habitually abused or are addicted to alcohol, controlled substances or drugs</i>, to the extent that proper parenting skills have been seriously impaired and the person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning; . . .</p> |
| Wisconsin | <p>WIS. STAT. § 48.415 (2022)</p> <p>At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. If the child is an Indian child, the court or jury shall also determine at the fact-finding hearing whether continued custody of the Indian child by the Indian child’s parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the breakup of the Indian child’s family and whether those efforts have proved unsuccessful, unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing. Grounds for termination of parental rights shall be one of the following:</p> <p>. . .</p> <p>(3) <i>Continuing parental disability. Continuing parental disability</i>, which shall be established by proving that:</p> <p>(a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s.</p> |

| | |
|----------------|--|
| | <p>50.33 (2) (a), (b) or (c), licensed treatment facilities as defined in s. 51.01 (2) or state treatment facilities as defined in s. 51.01 (15) on account of <i>mental illness</i> as defined in s. 51.01 (13) (a) or (b), <i>developmental disability</i> as defined in s. 55.01 (2), or other like <i>incapacities</i>, as defined in s. 55.01 (5);</p> <p>(b) The condition of the parent is likely to continue indefinitely; and</p> <p>(c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.</p> <p>Wis. Stat. § 55.01 (2022) In this chapter:</p> <p>...</p> <p>(2) “<i>Developmental disability</i>” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely, substantially impairs an individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.</p> <p>...</p> <p>(4m) “<i>Mental illness</i>” means mental disease to the extent that an afflicted person requires care, treatment or custody for his or her own welfare or the welfare of others or of the community.</p> <p>...</p> <p>(5) “<i>Other like incapacities</i>” means those conditions incurred at any age which are the result of <i>accident, organic brain damage, mental or physical disability or continued consumption or absorption of substances</i>, producing a condition which substantially impairs an individual from adequately providing for his or her care or custody.</p> |
| Wyoming | WYO. STAT. ANN. § 14-2-309 (2022) |