IN THE CHILD'S BEST INTERESTS? RETHINKING CONSIDERATION OF PHYSICAL DISABILITY IN CHILD CUSTODY DISPUTES

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Courts regularly consider a parent's physical disability in child custody disputes. At times, they go as far as to invoke physical disability as a minus factor that weighs against granting custody to that parent. This practice often reflects family court judges' attitudinal biases, which are premised on ill-conceived notions of how physical disability actually affects one's ability to parent. Because child custody adjudication affords judges considerable discretion via the best interests of the child standard, the result is state-sanctioned discrimination against parents with disabilities who are party to child custody disputes. These results predominate despite the fact that recent social science literature concludes that outcomes for children of parents with disabilities are substantially similar, if not identical, to those of parents without disabilities.

As is, neither antidiscrimination law nor family law can remedy this problem. This Note aspirationally advocates eliminating consideration of physical disability in custody disputes altogether, but it recognizes that this goal is unrealistic given entrenchment of the best interests standard and the fact that many states statutorily mandate inquiry into disability in custody disputes. Consequently, it proposes that judges should utilize a nexus test when considering physical disability in custody disputes.

INTRODUCTION

In the spring of 1985, William and Elizabeth Stern decided to have a baby.[1] Mrs. Stern feared that giving birth to a child would pose a danger to her health.[2] Multiple physicians warned her that because she had multiple sclerosis, pregnancy could be hazardous.[3] To alleviate their concerns, the Sterns formed a surrogacy agreement with Richard and Mary Beth Whitehead: Using Mr. Stern's semen and her own egg, Mrs. Whitehead acted as a surrogate for the Sterns in exchange for $10,000.[4] Though Mrs. Whitehead initially adhered to her contractual obligations,

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1. Carol Sanger, Developing Markets in Baby-Making: *In the Matter of Baby M*, 30 Harv. J.L. & Gender 67, 67–68 (2007).

2. In re Baby M, 537 A.2d 1227, 1235 (N.J. 1988).

3. See id.; Sanger, supra note 1, at 91.

4. *Baby M*, 537 A.2d at 1236.

she ultimately fled with the child.[5] What followed was what many commentators have deemed "the custody trial of the twentieth century."[6]

Legal scholars and practitioners most often invoke *Baby M* to support the proposition that courts may invalidate contracts on public policy grounds.[7] But beyond the sensational facts and theories regarding the nature of the contract in *Baby M* is another curious issue: the applicability of Mrs. Stern's condition to the trial court's inquiry into the most suitable custody arrangement. At trial, the parties called four expert witnesses to provide testimony concerning Mrs. Stern's multiple sclerosis, which the Whiteheads alleged bore "directly upon her ability to raise and care for a child and upon her fitness as a parent."[8] The expert witnesses summarily rejected the Whiteheads' allegations and the court followed suit.[9] Though Mrs. Stern's disability essentially became a nonissue in *Baby M*, disability is often a heavily weighed factor in custody disputes.[10]

Consider the more recent—and similarly publicized—case of Kaney O'Neill.[11] In 2009, O'Neill became locked in a bitter custody battle with her ex-boyfriend, David Trais, over their ten-week-old son.[12] O'Neill, a Navy veteran, became paralyzed from the chest down when Hurricane Floyd's gales blew her from a balcony to the pavement below and shattered her vertebrae.[13] Though O'Neill had prepared extensively for motherhood, Trais alleged that her disability "greatly limit[ed] her ability to care for the minor."[14] At the initial emergency custody hearing, the court granted Trais paternity with liberal visitation[15] and appointed a

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5. Id. at 1236–37.

6. See, e.g., Sanger, supra note 1, at 69.

7. See, e.g., Robert E. Scott & Jody S. Kraus, Contract Law and Theory 480–95 (5th ed. 2013) (including *Baby M*, among other cases, in a section on public policy limitations in the law of contract).

8. In re Baby "M", 525 A.2d 1128, 1148, 1162 (N.J. Super. Ct. Ch. Div. 1987) (internal quotation marks omitted), aff'd in part, rev'd in part, 537 A.2d 1227 (N.J. 1988).

9. Id. at 1162.

10. See infra section I.B.2.

11. Kaney O'Neill's story went viral in 2009 after being picked up by publications such as the *Chicago Tribune* and television networks such as ABC and CBS. See Ella Callow & Kaney O'Neill, Issues: Battle for the Rattle, Through the Looking Glass (Nov. 23, 2011), http://web.archive.org/web/20161108022458/http://pwd-legalprogram.org/Battle-for-the-Rattle.html [http://perma.cc/L5WK-3AAN].

12. Id.; Sarah Schulte, Disabled, Single Mom Talks About Challenges of Raising Son, ABC 7 (May 4, 2011), http://abc7chicago.com/archive/8112269/ [http://perma.cc/Q4LJ-9DER].

13. Callow & O'Neill, supra note 11.

14. Id. O'Neill attended an occupational therapy program designed specifically for expectant mothers, adapted her home for parenting, secured adapted baby-care equipment, and learned how to utilize personal attendants as she cared for the child. Id.

15. Once a court establishes paternity, a child's father may move to seek custody or visitation. Linda D. Elrod, Child Custody Practice and Procedure § 1:3, Westlaw (database updated Mar. 2017). Though liberal visitation arrangements are generally not as intrusive as joint custody arrangements, they may still require one parent to virtually cede custody

guardian ad litem to the child.[16] The custody battle dragged out for more than a year before both parties came to an agreement that Trais would have no more than visitation rights.[17] And although the outcome was largely favorable to O'Neill, she remarked that she was "disappointed that the courts allow for someone to question your ability to have custody based on your disability."[18]

O'Neill's experience was by no means an aberration. Rather, parents with disabilities have reported pervasive disparate treatment in the family law system.[19] Many in the family law system label parents with disabilities presumptively unfit, which reflects widespread attitudinal bias concerning the nature of their abilities.[20] One attorney commenting on O'Neill's case for the *Chicago Tribune*, for example, remarked: "Certainly, I sympathize with the mom, but assuming both parties are equal (in other respects), isn't the child obviously better off with the father?"[21] He continued, "What's the effect on the child—feeling sorry for the mother and becoming the parent?"[22] Statements such as these are at odds with recent empirical and qualitative studies, which demonstrate that parental disability does not adversely affect a child's well-being.[23]

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for as much as almost half a year. See id. § 1:3 & n.9 (listing and describing cases in which courts have granted liberal visitation).

16. See Callow & O'Neill, supra note 11. Guardians ad litem chiefly serve two roles: They act as an arm of the court by investigating, finding facts, and presenting information that may affect the court's decision, and they serve as the ward's attorney. See, e.g., John Bourdeau & Laura Hunter Dietz, 42 Am. Jur. 2d Infants § 565, Westlaw (database updated Feb. 2018).

17. Schulte, supra note 12.

18. Robyn Powell, Can Parents Lose Custody Simply Because They Are Disabled?, Am. Bar Ass'n (internal quotation marks omitted), http://www.americanbar.org/publications/gp_solo/2014/march_april/can_parents_lose_custody_simply_because_they_are_disabled.html [http://perma.cc/QBR5-BUFV] (last visited Oct. 17, 2017).

19. See Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children 140–46 (2012), http://ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf [http://perma.cc/BA42-CUA4] (providing accounts of disparate treatment).

20. See id. at 118 ("Attitudinal bias leads to speculation by neighbors, family members, and medical personnel that a parent with a disability cannot be a safe parent." (internal quotation marks omitted) (quoting Ella Callow et al., Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community, 17 Tex. J. on C.L. & C.R. 9, 17 (2011))).

21. Sara Olkon, Disabled Mom Fighting to Keep Her Son, Chi. Trib. (Dec. 20, 2009) (internal quotation marks omitted), http://articles.chicagotribune.com/2009-12-20/news/0912190290_1_disabled-parents-custody-mom [http://perma.cc/9KGR-PVF2].

22. Id. (internal quotation marks omitted).

23. See infra section II.B.1. The attorney's statement, in particular, is inconsistent with studies that have rejected the notion that the children of parents with disabilities will experience "parentification" (that is, that they will look after the parents rather than the other way around). See Rhoda Olkin, What Psychotherapists Should Know About Disability 132–34 (1999).

While the above-described biases create barriers for parents with disabilities even outside the courtroom, they are particularly problematic in court given the use of the best interests of the child standard in child custody disputes.[24] The best interests standard notoriously endows judges with vast discretion in deciding with whom to place a child.[25] As this Note demonstrates, this discretion increases the likelihood that parents with disabilities will face discriminatory treatment.

To resolve this problem, courts must adopt specialized procedures for handling physical disability objectively within the best interests framework. In the past, courts utilized the best interests standard to deny LGBT parents custody on the grounds that their sexual orientation would be detrimental to the child's well-being.[26] Yet, as with physical disability,[27] sexual orientation has no bearing on one's ability to parent.[28] Recognizing this fact, many courts have utilized a nexus test under which they consider a parent's sexual orientation only if it will demonstrably harm the child.[29] As this Note argues, a nexus test is likewise appropriate

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24. The best interests standard is similarly used in termination of parental rights proceedings. Nine states mandate consideration of parents' mental and physical health in termination proceedings and all other proceedings that require an inquiry into the best interests of the child. See Children's Bureau, Determining the Best Interests of the Child 2 (2016), http://www.childwelfare.gov/pubPDFs/best_interest.pdf [http://perma.cc/542V-UCH5]; see also, e.g., Del. Code. Ann. tit. 13, § 722(a)(5) (2017); Ga. Code Ann. § 15-11-26(9) (2015). State child protective services agents initiate termination proceedings when they have investigated child neglect or abuse and have determined that they must bring a court action to keep the child safe. See Rachel L. Lawless, Comment, When Love Is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability, 37 Cap. U. L. Rev. 491, 495–96 (2008) (outlining the procedure for termination proceedings).

Although both termination proceedings and standard custody proceedings utilize the best interests standard, this Note distinguishes between the two because of the different practices each entails. For example, for the state to succeed in termination proceedings, it typically must meet the statutory grounds for termination by clear and convincing evidence, id. at 495, whereas the burden of proof in standard custody proceedings, no matter the relief sought, is typically preponderance of the evidence, see, e.g., Elrod, supra note 15, § 8:10.

25. See infra section II.A (highlighting critiques of the best interests standard).

26. See, e.g., Immerman v. Immerman, 1 Cal. Rptr. 298, 301–02 (Dist. Ct. App. 1959) (permitting the introduction of evidence as to the mother's sexual activities with another woman, couched as evidence of her "moral character").

27. See infra section II.B.1.

28. See, e.g., David K. Flaks et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian Heterosexual Parents and Their Children, 31 Developmental Psychol. 105, 106 (1995) (finding that "[t]here is no empirical support for the proposition that the children of divorced lesbian and gay parents are different from other children" and that "in every area evaluated, the research revealed no significant differences between the children of lesbian and heterosexual parents"); Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Dev. 1025, 1036 (1992) ("There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents.").

29. See Gargi Sen & Tiffanie Tam eds., Child Custody, Visitation, & Termination of Parental Rights, 16 Geo. J. Gender & L. 41, 56–57 (2015). Whether a court ought to utilize

in the disability context to ensure that parents with physical disabilities do not face arbitrary discrimination.[30]

Part I of this Note provides background on the disability rights movement and the relevant legal standards at issue. It also explains the lack of redress available to parents with disabilities stemming from deficiencies in constitutional doctrine and the Americans with Disabilities Act (ADA). Part II first underscores how the best interests of the child standard—in connection with judicial attitudinal bias—promotes discrimination against parents with disabilities in the family law system. To demonstrate that courts should treat parents with disabilities similarly to parents without disabilities in custody proceedings, it then describes empirical and qualitative social science literature concerning the nature of parenting with

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a nexus test in child custody cases in which the issue of one parent's sexual orientation arises as part of the best interests inquiry is beyond the scope of this Note. For a critique of the nexus test as applied to custody cases in which one parent is a member of the LGBT community, see generally Kim H. Pearson, Sexuality in Child Custody Decisions, 50 Fam. Ct. Rev. 280, 284–86 (2012) (arguing that the current orientation-blind nexus test preserves a bias against LGBT parents because judges never consider whether modeling heterosexuality is in the best interests of the child).

30. This Note primarily highlights and provides solutions to these problems in the context of physical disability rather than developmental or psychiatric disability. Legal commentators have extensively chronicled the problems that parents with developmental and psychiatric disabilities face in navigating the family law system. See, e.g., Anat S. Geva, Judicial Determination of Child Custody When a Parent Is Mentally Ill: A Little Bit of Law, a Little Bit of Pop Psychology, and a Little Bit of Common Sense, 16 U.C. Davis J. Juv. L. & Pol'y 1, 60–80 (2012) (providing a detailed discussion of potential problems that parents with mental illness face in child custody determinations); Charisa Smith, Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges, 5 Charlotte L. Rev. 377, 399–401 (2014) (detailing the discrimination that mentally challenged parents face in the child welfare system). Literature describing the experiences of parents with physical disabilities, however, is sparse, perhaps because such parents experience discrimination at lower rates than parents with psychiatric or developmental disabilities. See Nat'l Council on Disability, supra note 19, at 14 (describing rates of discriminatory treatment and removal rates among parents with psychiatric, intellectual, and physical disabilities). Because of this disparity and because nonlegislative solutions are likely more readily available in the context of physical disability, the focal point of this Note is physical disability. Solutions to the problem of discrimination in the family law system are more difficult to develop for parents with mental illnesses in part because of the stigma associated with mental illness. See Joanne Nicholson et al., Ctr. for Mental Health Servs. Research, Critical Issues for Parents with Mental Illness and Their Families 1 (2001), http://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1142&context=psych_pp [http://perma.cc/BW9H-SG3W] ("What distinguishes mental illness from heart disease, diabetes or cancer is stigma, and the impact of being labeled with a psychiatric diagnosis on the experiences of parents and family members."); cf. Nicolas Rüsch et al., Mental Illness Stigma: Concepts, Consequences, and Initiatives to Reduce Stigma, 20 Eur. Psychiatry 529, 530–31 (2005) (describing why and how people with mental illnesses experience stigma). Furthermore, physical disability more often manifests itself in a tangible form, whereas symptoms of mental illness are less obvious; experts accordingly claim to require more training and opportunities for interaction when working with individuals with mental illness. See Geva, supra, at 61–62 (emphasizing the objectively verifiable nature of physical variables and the difficulty of assessing psychological well-being).

disability. Part II concludes by highlighting the inadequacy of other means by which courts have attempted to limit bias in this context. Finally, Part III proposes several solutions to the underlying problem relating to how judges should consider disability as part of the best interests framework. At most, recognizing that many states overtly require inquiry into parental disability, judges should consider physical disability only when the party asserting it as grounds for a change in custody can demonstrate that there is a nexus between a parent's disability and harm to the child.

I. PARENTING WITH DISABILITY, THE LAW, AND THE BEST INTERESTS OF THE CHILD STANDARD

This Part explores the relevant intersection between disability law and family law and further provides background knowledge on the operation of custody disputes both generally and as applied to parents with disabilities. Section I.A highlights disability law developments and their applicability to the problems this Note discusses. Section I.B hones in more specifically on custody law, with an emphasis on the best interests of the child standard.

A. *Where Disability Law Meets Parenting with Disabilities: The ADA and Constitutional Law*

Presumptions of parental unfitness against persons with disabilities are rooted deeply in American history. These presumptions, at their most extreme, prompted the eugenics movement; through the first half of the twentieth century, more than thirty states passed legislation that permitted involuntary sterilization.[31] One prominent figure pushing the eugenics agenda called for the sterilization of 203,255 Americans annually via the application of a model statute that sought to sterilize epileptics, addicts, alcoholics, the blind, the deaf, the "diseased," the "insane," the "deformed," and more.[32] Such statutes reflected a widespread belief that people with disabilities—whether physical or psychiatric—would produce inferior offspring.[33] This tragic logic, as one commentator noted, would have rid the world "of the likes of Beethoven, Mozart, Milton, Poe, and Napoleon."[34]

The Supreme Court endorsed eugenics in *Buck v. Bell*, in which a Virginia statute authorized the state to sterilize a woman purely because she had a developmental disability.[35] Not only did the Court find, eight

31. See Nat'l Council on Disability, supra note 19, at 13.

32. Walter Berns, *Buck v. Bell*: Due Process of Law?, 6 W. Pol. Q. 762, 765–66 & n.12 (1953) (detailing the controversial work of Dr. H. H. Laughlin, "one of the leaders of the sterilization movement").

33. Id. at 766.

34. Id.

35. See 274 U.S. 200, 205–06 (1927).

to one, that the statute was constitutional, but also, in his opinion for the Court, Justice Holmes overtly subscribed to the eugenics agenda, noting that "[t]hree generations of imbeciles are enough" in arguing for the statute's constitutionality and advocating the claimant's sterilization.[36]

Constitutional law and federal legislative reform have since caught up to the eugenics movement. But while lawmakers have demonstrated their interest in protecting people with disabilities and have made enormous strides in promoting parity,[37] their efforts do not reach child custody disputes. This section describes the extent to which reform protects parents—and potential parents—with disabilities to demonstrate that solutions to the problems that this Note highlights must arise out of the family law context and, likely, the best interests standard itself. Section I.A.1 provides a brief overview of disability constitutional law while section I.A.2 briefly describes the applicability of federal legislative reform—namely the Americans with Disabilities Act—to parents facing discrimination in the family law system.

1. *Disability Constitutional Law.* — The Fourteenth Amendment's Equal Protection Clause provides some protections for parents with disabilities. Courts analyze state action pertaining to disability under rational basis review.[38] But further analysis of the Supreme Court's disability jurisprudence reveals that it has, in practice, utilized a slightly more exacting standard than mere rational basis. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court nominally applied rational basis review in assessing whether a city validly denied a permit that would have facilitated the construction of a group home for individuals with intellectual disabilities.[39] Nonetheless, it found that the permit denial was invalid because it was based on an "irrational prejudice" against persons with disabilities.[40] The Court's analysis in *Cleburne* "differed from traditional rational basis review because it forced the government to justify its discrimination. Moreover, the Court did not simply defer to the government; it scrutinized the justifications that the government offered in order to determine whether they were rational."[41] Commentators have

36. Id. at 207.

37. See infra section I.A.2 (highlighting the passage of the Americans with Disabilities Act).

38. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (holding that the lower court erred in finding that a developmental disability was a "quasi-suspect classification calling for a more exacting standard of judicial review").

39. Id. at 448–50.

40. Id. at 450. In his concurrence, Justice Marshall extensively argued that the Court, in practice, employed heightened scrutiny, noting that the ordinance "surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation." Id. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).

41. Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998).

routinely characterized the slightly heightened standard employed as "rational basis with bite."[42]

Yet the rational basis with bite standard may be available only in cases in which state actors are motivated by an overtly illegitimate discriminatory purpose (that is, animus toward a group).[43] It is unlikely that parents with disabilities would be able to identify such purposes in bringing a claim against state actors in the family law system: As this Note argues, the discrimination that parents with disabilities face today is no longer the product of an overtly discriminatory eugenics movement but rather the aggregation of biases that have been normalized over time.[44] Constitutional recourse is thus likely unavailable.

2. *The Americans with Disabilities Act and Child Custody Proceedings.* — Congress has enacted several laws to limit discrimination against people with disabilities. The Rehabilitation Act, the first federal law designed to protect people with disabilities, seeks to "[e]mpower [such] individuals . . . to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity."[45] The most salient feature of the Act is section 504, which prohibits programs that receive federal financial assistance from discriminating against individuals "solely by reason of her or his disability."[46] Similarly, the Americans with Disabilities Act and the Americans with Disabilities Amendments Act seek to reduce the stigma experienced by—and limit discrimination against—people with disabilities by prohibiting employers from discriminating on the basis of disability[47] and requiring public accommodations.[48]

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42. See, e.g., Susannah W. Pollvogt, Unconstitutional Animus, 81 Fordham L. Rev. 887, 898–900 (2012).

43. See id. at 900 ("[T]he real concern in many of these cases was with ends and not means—that insufficient tailoring was merely symptomatic of an improper purpose: animus."). But see Raphael Holoszyc-Pimentel, Note, Reconciling Rational-Basis Review: When Does Rational Basis Bite?, 90 N.Y.U. L. Rev. 2070, 2072–73 (2015) (arguing that animus is not the critical factor that triggers rational basis "with bite" but is rather one among nine factors that the Court takes into consideration when using the slightly heightened standard). Aside from *Cleburne*, the Court has on numerous occasions invalidated state action under a rational basis standard of review because the action was born of animosity toward a class of individuals. See, e.g., Romer v. Evans, 517 U.S. 620, 634–35 (1996) (striking down, on rational basis review, a Colorado provision that discriminated against members of the LGBT community); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.").

44. See infra section II.B.2 (highlighting misapplication of the best interests standard).

45. 29 U.S.C. § 701(b) (2012).

46. Id. § 794.

47. See 42 U.S.C. §§ 12111–12117 (2012).

48. See id. §§ 12181–12189.

Title II of the ADA notably protects individuals with disabilities from being subjected to discrimination by public entities.[49] Regulations promulgated under the ADA prohibit public entities from utilizing "criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or] . . . [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities."[50]

Still, parents with disabilities that face discrimination in the family law system are largely without redress under the ADA. Numerous state courts have found that parents may not invoke Title II in child custody proceedings because such proceedings do not constitute "services, programs, or activities" under the provisions of the Act.[51]

In the termination of parental rights (TPR) context, courts that reject the availability of the ADA as a defense to termination have suggested that Title II of the ADA might provide a separate independent federal cause of action to parents with disabilities who allege that the state has subjected them to discriminatory treatment.[52] Such an independent cause

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49. See id. § 12132.

50. 28 C.F.R. § 35.130(b)(3) (2016).

51. E.g., Curry v. McDaniel, 37 So. 3d 1225, 1233 (Miss. Ct. App. 2010); Arneson v. Arneson, 670 N.W.2d 904, 911 (S.D. 2003). Courts have been similarly reluctant to permit parents to invoke the ADA in termination of parental rights proceedings because termination proceedings are not "services, programs or activities" under the ADA. See, e.g., In re Adoption of Gregory, 747 N.E.2d 120, 124 (Mass. 2001); see also In re Doe, 60 P.3d 285, 290–91 (Haw. 2002). Still, the Department of Health and Human Services and the Department of Justice recently copublished guidance materials that indicate termination proceedings should be considered "services, programs, or activities" within the meaning of the Act. See U.S. Dep't of Health and Human Servs. & U.S. Dep't of Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html [http://perma.cc/J4BF-UX7V] ("Title II covers *all* of the programs, services, and activities of state and local governments, their agencies, and departments. . . . Therefore, all . . . child welfare agencies and courts are covered, including . . . family court proceedings."). The guidance materials further note that "[a]gencies should take steps to ensure . . . that investigators, social workers, supervisors, and others base their assessments of and decisions regarding individuals with disabilities on actual facts that pertain to the individual person, and not on assumptions, generalizations, fears, or stereotypes about disabilities and how they might manifest." Id. Whether these protections extend beyond termination proceedings and to custody disputes remains to be seen.

52. See *Doe*, 60 P.3d at 291 ("We hold that allegations of an ADA violation are not a defense to a termination proceeding because any purported violation may be remedied *only in a separate proceeding* brought under the provisions of the ADA." (emphasis added)); In re B.S., 693 A.2d 716, 721–22 (Vt. 1997) (holding that the ADA is not a defense to a TPR proceeding but noting that redress might be available in the form of an independent cause of action under Title II of the ADA).

of action may also be available to claimants alleging discriminatory treatment in child custody disputes.[53]

But in practice, Title II claims are difficult to bring for those who have faced discriminatory treatment in custody proceedings. Because claimants will inevitably name state officials and agencies as defendants to make out claims, they must overcome the barriers presented by state sovereign immunity.[54] And though the ADA abrogates state sovereign immunity when a violation of the Act has taken place,[55] the Supreme Court has substantially narrowed the potential application of this provision. In *Tennessee v. Lane*, the Court interpreted the provision to apply to cases that implicate a plaintiff's "fundamental right of access to the courts."[56] Two years later in *United States v. Georgia*, the Court held that Title II abrogates state sovereign immunity in cases in which plaintiffs allege state conduct that violates the Fourteenth Amendment.[57] Whether Title II may validly abrogate sovereign immunity with respect to misconduct that violates the ADA, but not the Constitution, remains open to question.[58] And whether Title II may validly abrogate sovereign immunity with respect to state court misconduct in child custody proceedings has not been resolved. While the right to parent is a constitutionally protected right,[59] child custody cases involve two parents whose rights conflict with one another and a child whose rights trump.[60]

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53. See Theodora D. Economou, The Plight of the Disabled Parent in Contested Child Custody Cases: Is There Federal Redress Under the Americans with Disabilities Act (Nearly) Twenty-Five Years Hence?, 10 Charleston L. Rev. 71, 100–01 (2016) ("Aside from modifying state law, there is the theoretically-possible avenue for redress under Title II of the ADA, itself, via a separate lawsuit in federal court, in which one seeks money damages against court personnel if there should be demonstrable evidence of bias based on disability . . . .").

54. See McKnight v. Middleton, 699 F. Supp. 2d 507, 521–23 (E.D.N.Y. 2010) (dismissing ADA claims against a state government for discrimination in a child custody proceeding on state sovereign immunity grounds).

55. 42 U.S.C. § 12202 (2012).

56. 541 U.S. 509, 533–34 (2004).

57. 546 U.S. 151, 159 (2006).

58. In *Georgia*, the Court instructed lower courts to determine: "(1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity . . . is nevertheless valid." Id. at 159. The Court did not discuss how lower courts should determine whether one can bring suit against a state actor as a result of misconduct of the third class described above. Id. Numerous circuit courts have applied a "congruence and proportionality" abrogation test to determine whether suits of this character may overcome state sovereign immunity and have subsequently found that they may. See, e.g., Bowers v. NCAA, 475 F.3d 524, 555–56 (3d Cir. 2007); Toledo v. Sanchez, 454 F.3d 24, 34–35 (1st Cir. 2006).

59. The Supreme Court has repeatedly stressed that a parent's right to care for and enjoy custody of their children is ingrained within the Fourteenth Amendment's substantive due process doctrine. The first decision to explore this right was *Meyer v. Nebraska*, in which the Court found that parents have a substantive due process right to "establish a

Sovereign immunity is not the only barrier to Title II claims in this context. Courts may also dismiss Title II claims for damages on absolute or qualified immunity grounds.[61] When child custody proceedings are ongoing, federal courts may abstain from entertaining Title II claims.[62] Thus, even when one can make out a claim that a federal court will ultimately hear, claimants may not be successful. Even still, as a practical matter, Title II may be ineffective in this context simply because the parent may already have lost custody of her child. Neither prospective injunction nor damages can remedy a parent for the loss of her time raising a child during a potentially protracted legal battle.

B. *Child Custody Disputes and Parents with Disabilities*

Many persons with disabilities resist the stereotypes that society imposes upon them and choose to become parents. Many other parents develop disabilities during their child's formative years. Today, over four million parents with disabilities—approximately six percent of all Americans who have children under the age of eighteen—live in the United States.[63]

In addition to facing pressure to undergo sterilization or abortion,[64] parents with disabilities often struggle to retain custody of their children. Removal[65] rates in cases in which parents have a psychiatric or intellectual

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home and bring up children." 262 U.S. 390, 399 (1923). The Court reaffirmed the right in *Pierce v. Society of Sisters*, holding that parents have the right to "direct the upbringing and education of children under their control." 268 U.S. 510, 534–35 (1925). Notably, the Court's most recent foray into parental rights, *Troxel v. Granville*, leaves the weight of Fourteenth Amendment protection in limbo. 530 U.S. 57 (2000) (plurality opinion). While Justice O'Connor's plurality opinion acknowledged that the right of parents to direct the upbringing of their children is a fundamental right within the purview of the Fourteenth Amendment, see id. at 66, only Justice Thomas found that strict scrutiny was the appropriate standard to apply when that right is violated, see id. at 80 (Thomas, J., concurring in the judgment).

60. See Bartell v. Lohiser, 215 F.3d 550, 558 (6th Cir. 2000) (finding that the State did not violate the plaintiff's constitutional right to raise her child because the State's interest in the well-being of the child superseded the mother's parental interest).

61. Judges and other court personnel are often afforded some form of official immunity to suit. See, e.g., id. at 556–57 (holding that foster care contractors and social workers could assert qualified immunity as a defense to Title II claims alleging discrimination in termination proceedings).

62. See Sobel v. Prudenti, 25 F. Supp. 3d 340, 354–57 (E.D.N.Y. 2014) (finding that the court should abstain and dismiss because state proceedings were ongoing).

63. Nat'l Council on Disability, supra note 19, at 14.

64. Id. at 13–14.

65. Should a court find prior to the culmination of a termination proceeding that a parent is unfit to take care of her child, the state may remove the child from her home and place her in the foster care system. See Jennifer Ayres Hand, Note, Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights, 71 N.Y.U. L. Rev. 1251, 1253–55 (1996) (providing an overview of TPR in the context of foster care). If the child's parents have adhered to the child welfare agents' lifestyle recommendations, the child welfare agency will return the

disability may be as high as eighty percent.[66] Thirteen percent of parents with physical disabilities have reported discriminatory treatment in custody cases.[67]

Part II describes how prevailing legal standards promote this kind of treatment. This section, however, broadly explains the legal standards courts use in child custody cases. Primarily at issue in such cases is whether a change in custody would be in the child's best interests. This inquiry, commonly referred to as the best interests of the child standard, is applicable to custody disputes in all fifty states.[68] Section I.B.1 describes the standard and how it operates while section I.B.2 explains how courts apply it when one parent has a disability.

1. *The Family Law System and the Best Interests of the Child Standard.* — Though the statutory regimes that govern custody law vary from state to state, sufficient commonality exists across the nation to consider such issues en masse.[69] In general, custody disputes demand that a judge, acting as parens patriae, decide the rights of the parties.[70] In this capacity, judges have the authority to decide with whom a child ought to be placed, largely based on what they believe are the child's best interests. In accordance with this role, judges have historically invoked the best interests of the child standard to decide custody cases.[71] The best interests

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child to the parents' custody; otherwise, a court will move to terminate the parent's rights to the child to free her for adoption. See id. at 1255–57 (describing the foster care system and the state's desire for permanency for the child).

66. Nat'l Council on Disability, supra note 19, at 14.

67. Id.

68. See infra note 73.

69. In the context of custody disputes stemming from dissolutions of marriage, numerous states have overtly adopted provisions from the Uniform Marriage and Divorce Act, a model statute that the American Bar Association approved in 1974. Unif. Marriage & Divorce Act § 402 (Unif. Law Comm'n 1974); see also Elrod, supra note 15, § 4:2 & n.1 (describing the Uniform Marriage and Divorce Act and its application across the states). Colorado, for example, has adopted numerous provisions from the Act. Id.; see also Colo. Rev. Stat. § 14-10-124(1.5)(a) (2017) (incorporating portions of several provisions from the Uniform Marriage and Divorce Act concerning the best interests of the child standard). In total, eight states have enacted the Uniform Act in its entirety. Elrod, supra note 15, § 4:2. Others have merely used the Uniform Act as a starting point for similar legislation. Id. § 4:2 & n.1.

70. See Lynne Marie Kohm, Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence, 10 J.L. & Fam. Stud. 337, 346 (2008); see also, e.g., Santosky v. Kramer, 455 U.S. 745, 766 (1982) (noting that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child").

71. The content of the standard has historically varied, at least in the context of divorce proceedings; in the eighteenth century, the standard reflected more of a presumption that vesting custody in the father was always in the best interests of the child. Kohm, supra note 70, at 345–46. By the nineteenth century, the patriarchal presumption gave way to the Tender Years doctrine, which supposed that younger children would be best off with the mother. Id. Today, the standard is significantly more discretionary—and more child focused—in that it requires consideration of many more factors than the sex of the parent seeking custody. See id. at 372–73 & n.234 (listing factors).

standard is perhaps the most salient component of custody law today.[72] Courts invoke the standard not only in custody disputes[73] but also in TPR[74] and adoption proceedings.[75]

The overarching inquiry is, in many respects, one of pure judicial discretion: Judges must consider whether modification of the current custody arrangement would be in the best interests of the child. While courts across the country face statutory mandates to consider a child's best interests in all child custody proceedings,[76] some states explicitly provide a range of considerations that courts must take into account.[77]

Though enumerated considerations vary from state to state, numerous commonalities dominate the custody landscape. The Uniform Marriage and Divorce Act calls for consideration of the parent's wishes as to placement; the child's wishes as to placement; parent–child interaction; the child's adjustment to her home, school, and community; and, finally, the mental and physical health of all individuals involved.[78] In the TPR context, statutes frequently require consideration of the emotional ties between parent and child; the capacity of the parents to provide a safe and adequate home and upbringing; the mental and physical needs

72. See Elrod, supra note 15, § 4:1 (characterizing the best interests standard as the "sine qua non of the family law process governing custody disputes").

73. All fifty states utilize the best interests standard in such disputes. See id. ("[A]ll states mandate that the judge place the physical residency and legal custody of the child according to the 'best interests' of the child."); Economou, supra note 53, at 76 ("The 'best interest of the child' is the legal standard used in most, if not all, states in resolving custody disputes . . . .").

74. See Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases § 13:3, Westlaw (database updated Dec. 2017) (reciting standards of proof for TPR proceedings). Child protective services' burden exceeds demonstrating that termination would be in the best interests of the child. See id. § 13:7; see also, e.g., In re Welfare of Children of R.W., 678 N.W.2d 49, 54–55 (Minn. 2004) (holding that the lower court "erred in affirming the termination of appellant's parental rights solely on the basis that termination would be in the children's best interests"). Rather, agencies must demonstrate substantive grounds for termination, notably a detriment to the child in the absence of termination, by clear and convincing evidence—or some higher standard—*and* "proof that the termination would be in the child's best interests." Haralambie, supra, § 13:7; see also *Children of R.W.*, 678 N.W.2d at 55 (requiring at least one statutory ground for termination to be met by clear and convincing evidence).

75. See Haralambie, supra note 74, § 14:1 ("The fact that an adoption is in the child's best interests is a necessary, but not sufficient, prerequisite."). As with TPR proceedings, adoption proceedings require more than a finding that adoption would be in the child's best interests; traditionally, courts must further ensure that the legal rights of all parties involved are not infringed upon. See, e.g., In re Adoption of Doe, 923 N.E.2d 1129, 1136–37 (N.Y. 2010).

76. Kohm, supra note 70, at 370 ("Today, every state has a statute requiring that the child's best interests be considered whenever decisions regarding a child's placement are made.").

77. According to one source, twenty-two states and the District of Columbia enumerate specific factors for courts to consider while making best interests determinations. Children's Bureau, supra note 24, at 2.

78. Unif. Marriage & Divorce Act § 402 (Unif. Law Comm'n 1974).

of the child; the presence of domestic violence in the home; and the parents' mental and physical health.[79] Even across custody-dispute contexts, then, the considerations that courts use to determine a child's best interests are analogous. And even in the absence of explicit statutory guidelines, courts tend to invoke similar considerations.[80]

2. *The Best Interests Standard as Applied to Disability.* — Most states and state courts have found that disability may not constitute a per se bar to custody; they instead consider disability only with reference to the best interests standard.[81] Numerous states *require* that judges consider parental health in custody proceedings under the best interests standard.[82] In most, if not all, of the remaining states, courts consider disability and parental health at their discretion.[83]

Of the states that mandate consideration of disability, only a handful explicitly define or limit the definition of disability to provide further guidance for the courts.[84] When state legislatures do not provide statutory definitions, state courts are left to their own devices to determine how to weigh disability on a case-by-case basis.

Several state courts have adopted frameworks for inquiring into parents' disabilities in child custody disputes,[85] all of which essentially follow the California Supreme Court's ruling in *In re Marriage of Carney*.[86] *Carney* marked the culmination of a custody dispute between William and Ellen

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79. See Children's Bureau, supra note 24, at 2 (listing common considerations).

80. See, e.g., Pettinato v. Pettinato, 582 A.2d 909, 913–14 (R.I. 1990) (acknowledging that the legislature had not defined a best interests standard and developing criteria based on the Uniform Marriage and Divorce Act and legislation from other states).

81. See, e.g., Colo. Rev. Stat. § 14-10-124(1.5)(a)(V) (2017) (requiring consideration of the health of all parties to the case, "except that a disability alone shall not be a basis to deny or restrict parenting time"); Curry v. McDaniel, 37 So. 3d 1225, 1233 (Miss. Ct. App. 2010) ("A parent's physical or mental disability does not in itself determine the outcome of a child-custody dispute; rather, it is the best interest and the welfare of the child that controls the chancellor's decision."); see also infra notes 86–96 and accompanying text (discussing the *Carney* case).

82. Megan Kirshbaum et al., Parents with Disabilities: Problems in Family Court Practice, 4 J. Ctr. for Families Child. & Cts. 27, 28 (2003); see also, e.g., Fla. Stat. § 61.13(3)(g) (2017) (requiring consideration of the mental and physical health of the parents); Mich. Comp. Laws Ann. § 722.23(g) (West 2011) (same).

83. See, e.g., La. Civ. Code Ann. art. 134 (2013) (enumerating that relevant factors relevant to determining the best interests of the child "*may* include . . . [t]he mental and physical health of each party" (emphasis added)); *Curry*, 37 So. 3d at 1233–34 (permitting evidence to be presented as to how a disability affected one of the parents' decisionmaking ability).

84. See Idaho Code § 32-717(4)–(5) (2017) (defining disability as "any mental or physical impairment which substantially limits one (1) or more major life activities of the individual"); Minn. Stat. § 363A.03 (2017) (defining a person with disability as one who "has a physical, sensory, or mental impairment which materially limits one or more major life activities").

85. See infra note 97 (listing court decisions that have adopted the *Carney* approach).

86. 598 P.2d 36 (Cal. 1979).

Carney.[87] Ellen originally relinquished custody of the children to William prior to their divorce.[88] A short time thereafter, a car accident left William paralyzed from the legs down.[89] William then filed for divorce, and Ellen launched a custody action alleging that it was impossible for William to care for the children in his state.[90]

The trial court gave great weight to Ellen's allegation,[91] despite the fact that her interactions with, and support for, the children had been limited for five years.[92] In finding for Ellen, the trial court insisted that "it would be detrimental to the boys to grow up until age 18 in the custody of their father . . . [because] [i]t wouldn't be a normal relationship between father and boys."[93] Though William was remarkably bright, had an excellent relationship with his children, and had adapted well to his disability—and though Ellen simply was not there for the children—the trial court found for Ellen.[94]

The Supreme Court of California reversed, acknowledging that the trial court "premised its ruling on outdated stereotypes of both the parental role and the ability of the handicapped to fill that role."[95] In placing custody with William, the court held that best interests inquiries involving parents with disabilities should turn on the following factors: (1) the person's "actual and potential physical capabilities," (2) how the person "has adapted to the disability and manages its problems," (3) how "other members of the household have adjusted thereto," and (4) the "special contributions the person makes to the family despite—or even because of—the handicap."[96]

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87. Id. at 37.

88. Id.

89. Id.

90. Id. at 40.

91. Id. at 39–40 ("The record discloses . . . that the court gave great weight to another factor—William's physical handicap and its presumed adverse effect on his capacity to be a good father to the boys.").

92. Id. at 37 ("Ellen did not once visit her young sons or make any contribution to their support. Throughout this period of almost five years her sole contact with the boys consisted of some telephone calls and a few letters and packages.").

93. Id. at 41 (emphasis omitted) (internal quotation marks omitted) (quoting the trial court's opinion). The trial court record is rife with examples of such treatment from the judge. Over the contestations of an expert witness, the judge "persisted in stressing that William '[was] limited in what he [could] do for the boys.'" Id. at 40 (quoting the trial court's opinion). Similarly, when probing William's girlfriend on the stand, the judge asked only about William's disability, and despite the fact that "William testified at length about his present family life and his future plans, the judge inquired only where he sat when he got out of his wheelchair, whether he had lost the use of his arms, and what his medical prognosis was." Id.

94. See id. at 37–40.

95. Id. at 37.

96. Id. at 42.

Numerous state courts have expressly adopted the *Carney* approach in custody proceedings.[97] In denying one father's petition seeking modification of an order that granted custody to a mother who had become a paraplegic, for example, a New York family court noted that the *Carney* standard "is appropriate and keeps in mind the fact that we are dealing with a *person* . . . with a physical condition which must be adjusted to and not a non-functioning being."[98] Other states continue to utilize an approach that views disability as one factor among others.[99]

II. PROBLEMS IN CONSIDERING DISABILITY AS PART OF THE BEST INTERESTS CALCULUS

In child custody disputes, parents with disabilities often encounter pervasive discrimination stemming from attitudinal biases. In one case, a judge asserted that a mother with physical disabilities was unfit despite findings in psychological and occupational therapy evaluations indicating that she would be able to care for her children.[100] The judge was particularly concerned with how quickly she could get up and down the stairs.[101] When she demonstrated her ability to do so, the judge then demanded that she test her speed with a stopwatch.[102] In another case, a mother in North Carolina with stage IV breast cancer lost custody of her children in part because of her diagnosis.[103] In coming to her decision, the judge reportedly cited a psychologist's testimony: "The more contact [the children] have with the non-ill parent, the better they do. They divide their world into the cancer world and a free of cancer world. Children want a normal childhood, and it is not normal with an ill parent."[104] This

97. See, e.g., People in the Interest of B.W., 626 P.2d 742, 743–44 (Colo. App. 1981); Clark v. Madden, 725 N.E.2d 100, 105 (Ind. Ct. App. 2000); In re Marriage of Shook, No. 00-1806, 2002 WL 984491, at *2 (Iowa Ct. App. May 15, 2002); Arneson v. Arneson, 670 N.W.2d 904, 912 (S.D. 2003); Alston v. Rains, 589 S.W.2d 481, 485–86 (Tex. Civ. App. 1979).

98. Hatz v. Hatz, 455 N.Y.S.2d 535, 536–37 (Fam. Ct. 1982). Applying the standard, the court found that the mother sufficiently adapted to her disability to avoid modification of the custody arrangement. Id. at 537.

99. See, e.g., White v. White, 93 So. 3d 33, 35–36 (Miss. Ct. App. 2011) (considering physical disability with other factors, such as moral fitness and home stability, under the best interests standard).

100. Kirshbaum et al., supra note 82, at 38 (listing discriminatory experiences in custody cases).

101. Id.

102. Id.

103. Nat'l Council on Disability, supra note 19, at 142; Courtney Hutchison & ABC News Med. Unit, Judge Cites Mom's Breast Cancer in Denying Custody of Children, ABC News (May 10, 2011), http://abcnews.go.com/Health/BreastCancerCenter/north-carolina-mom-breast-cancer-loses-custody/story?id=13546870 [http://perma.cc/6LDQ-RMAT] (describing Alaina Giordano's child custody experience).

104. Hutchison & ABC News Med. Unit, supra note 103 (alteration in original) (internal quotation marks omitted) (quoting Judge Nancy Gordon's ruling).

notion of a "normal" childhood is of the kind that the California Supreme Court, in *Carney*, found to be per se discriminatory.[105] Parental disability is a proper indicator of neither parental ability nor the relationship between parent and child.[106]

If disability has little to no effect on one's ability to parent, then why should it constitute a factor in best interests inquiries? The continued consideration of disability in custody disputes perpetuates two real concerns for individuals with disabilities in that it: (1) permits discrimination against what should be a lawfully protected class[107] and (2) reinforces stereotypes against that class. Section II.A describes some of the general critiques of the best interests standard as a means to lay the foundation for the standard's shortcomings when applied to parents with disabilities. Section II.B presents social science literature establishing that parental physical disability does not adversely affect childhood development, thereby demonstrating that disability is not an appropriate factor for courts to consider in best interests analyses. It subsequently critiques application of the best interests standard in the context of custody disputes. Section II.C develops the notion that *Carney*, as praised as it is in family law circles, did not create an ideal solution to these problems. In fact, legal consideration of disability in the best interests calculus intrinsically perpetuates attitudinal biases against persons with disabilities across communities.

A. *Critiques of the Best Interests Standard*

The academic community has widely criticized the best interests standard since its inception. Professor Robert H. Mnookin voiced one of the earliest prominent critiques of the standard; his 1975 article *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* sought to "expose the inherent indeterminacy of the best-interests standard."[108] According to Mnookin, custody decisions are fundamentally an exploration of alternatives—that is, they are inquiries into the ideal placement for the child at the center of the dispute.[109] In that vein, judges must predict the most desirable outcome among the alternatives before them. Yet, how are judges to predict what is best for a child when even social science provides "no reliable guide for predictions about what is likely to happen to

105. See In re Marriage of Carney, 598 P.2d 36, 41–45 (Cal. 1979) (rejecting the trial court's characterization of a "normal" childhood and finding the characterization to be improperly mired in stereotype).

106. See infra section II.B.1.

107. Normative discussion as to whether the law ought to afford persons with disabilities some measure of legal protection as a class extends well beyond the scope of this Note. As discussed above, constitutional law affords people with disabilities some measure of protection. See supra section I.A.1 (highlighting disability constitutional law).

108. Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law & Contemp. Probs., Summer 1975, at 226, 256 [hereinafter Mnookin, Child-Custody Adjudication].

109. Id. at 255.

a particular child"?[110] Making positively accurate predictions about the child's future is impossible; the reality is that a judge cannot account for all of the possible contingencies that might arise over the course of that child's life.

Similarly, a judge must collect all pertinent information incident to her choice. But, as Mnookin argues, "One can question how often, if ever, any judge will have the necessary information."[111] In many circumstances, judges do not have enough information as to "even the most rudimentary aspects of a child's life with his parents and [have] still less information available about what either parent plans in the future."[112]

Furthermore, custody statutes generally do not provide relative weights to the considerations pertinent to the child's best interests, and this lack of guidance complicates the decisionmaking process for the decisionmaker.[113] Ultimately, whose values is the judge to use in coming to a final determination? A judge cannot look to society at large for those values, for there is "neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values."[114] Nor can she look to the child's values: Not only may a child lack the maturity and capacity to appropriately determine her own best interests, but also the responsibility for the choice may jeopardize her relationship with her parents.[115] Judges are therefore forced to use their own values.[116]

Mnookin's critique of the standard's indeterminacy has held weight for the past several decades. Professor Jon Elster argues that "in many cases, perhaps most, [the standard] simply does not yield a decision."[117] Like Mnookin, Elster notes that a determinate resolution to a custody case requires that each of the following conditions be known quantities: all of the possible outcomes of each option, the probabilities of each outcome, and the values attached to each outcome.[118] Yet, none of these considerations can be dispositively identified.[119] Elster further opines

110. Id. at 258–59.

111. Id. at 257.

112. Id.

113. See id. at 260.

114. Id. at 260–61.

115. Id. at 260. Nevertheless, the best interests inquiry often does give weight to the child's wishes. See, e.g., Unif. Marriage & Divorce Act § 402(2) (Unif. Law Comm'n 1974) (calling for courts to consider "the wishes of the child as to his custodian").

116. See supra notes 91–94 and accompanying text (describing the *Carney* trial judge's use of personal value judgments).

117. Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. Chi. L. Rev. 1, 11 (1987).

118. Id. at 12.

119. See id. at 12–16 (evaluating the determinacy of best standards judgments). The potential outcomes for the child's welfare in a custody inquiry are virtually innumerable. See id. at 12–13 (noting that most decisions involve numerous unknowable probabilities and that judges may justifiably focus on the smaller number of plausible outcomes). And the probabilities of these outcomes are equally incalculable. See id. at 13 (noting that it

both that the standard is unjust because it ignores the relative rights of the parents[120] and that it is self-defeating.[121] Further in line with Mnookin, Professor Robert J. Levy argues that the indeterminacy of the best interests standard encourages judges to "award custody to those litigants whose attributes and values most resemble their own."[122] Over the past several decades, academics have frequently highlighted the standard's indeterminacy in critiquing it.[123]

The critique most relevant to this Note, however, is that practical application of the standard is marred by personal and cultural bias.[124] The vagueness of the statutory criteria and uncertainty over the relative weights they are to be given in the analysis invite judges to utilize their own experience as a foundational reference.[125] And that experience is as prone to bias as any. In the past, courts often utilized the standard to deny potential LGBT parents the right to adopt on the grounds that their sexual orientation would be detrimental to the child's well-being.[126] And

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may not be possible to attach possibilities to outcomes). While the natural response would be to "play it safe" by vesting custody in the parent with whom the child's worst plausible future will be least likely, the same could be said for vesting custody in the parent with whom the child's best plausible future will be most likely. Id. at 13–14. And even if one is able to attach probabilities to determinate outcomes, values attached to outcomes remain indeterminate; that is, informed choices on behalf of the child will generally demand that a judge or psychologist interject with preferences of their own. See id. at 14.

120. See id. at 16–21.

121. See id. at 21–26. The standard may be self-defeating at least insofar as it may not actually protect the child's best interests. Id.

122. Robert J. Levy, Rights and Responsibilities for Extended Family Members?, 27 Fam. L.Q. 191, 197 (1993).

123. See, e.g., Kohm, supra note 70, at 370–76 (highlighting critiques of the best interests standard); Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard, 77 Law & Contemp. Probs., no. 1, 2014, at 69, 69–70 (characterizing indeterminacy as one of the deficiencies of the best interests standard and citing Mnookin's critique).

124. See, e.g., David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 491 (1984) (acknowledging the difficulties in developing "a state-prescribed view of children's interests that does not mindlessly refer to the majority's (or the judge's) preferences"); Andrea Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, 5 Yale L. & Pol'y Rev. 267, 269–73 (1987) (highlighting cases in which the standard's vagueness invites unbridled judicial discretion); see also Kohm, supra note 70, at 337 (describing the best interests standard as "surrounded by a muddled legal haze of judicial confusion over just how to determine what 'the best' really is").

125. See supra notes 113–116 and accompanying text.

126. See Heather J. Langemak, Comment, The "Best Interest of the Child": Is a Categorical Ban on Homosexual Adoption an Appropriate Means to this End?, 83 Marq. L. Rev. 825, 842 (2000) (noting that courts would "disregard favorable research and empirical evidence that the adoption is in the 'best interest of the child' and nevertheless deny the adoption petition"). As part of the best interests inquiry, courts focused on "the alleged 'mental instability' of gay men and lesbians, the influence they allegedly assert on the sexual development of their children, and on the peer harassment and sexual exploitation which courts expect their children to experience." Steve Susoeff, Comment,

prior to that, courts used the standard to make custody decisions based on race.[127] The cultural biases that prevented LGBT parents and parents from diverse or racially mixed households from attaining and retaining custody of their children similarly affect parents with disabilities struggling to retain custody of their children.

B. *The Best Interests Standard, Judicial Bias, and Parenting with Disability*

Much like social science researchers have debunked the notion that LGBT parents' sexual orientation adversely impacts the development of their children, so too have they called into question the notion that disabilities adversely affect one's ability to parent.[128] Yet while courts have largely done away with considering sexual orientation unless it is somehow found to harm the child,[129] they continue to consider physical disability as an important factor in best interests inquiries.[130] This section sheds light on findings that disability has little to no effect on one's ability to parent and on how courts have accordingly adopted a misguided approach to considering disability in best interests analyses. Section II.B.1 explores the social science literature on parenting with disability. Section II.B.2 then highlights how consideration of disability in best interests analyses invites judicial attitudinal bias that allows for discrimination against parents with disabilities.

1. *Parenting with Physical Disability.* — The problem with considering disability as part of the best interests calculus is that disability, on its own, bears neither on one's ability to parent nor on outcomes for children. While many early studies on parents with disabilities found a correlation between adverse outcomes for children and parental disability, more recently published studies and literature reviews have concluded that children raised by parents with disabilities face outcomes similar to children

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Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. Rev. 852, 858 (1985) (footnotes omitted). Beyond these factors, judges "rel[ied] on 'community standards' of morality to dictate the outcome." Id. at 858–59. Some courts also permitted consideration of sexual orientation in custody cases in which one parent was gay or lesbian. See, e.g., Immerman v. Immerman, 1 Cal. Rptr. 298, 301–02 (Dist. Ct. App. 1959) (permitting the introduction of evidence as to the mother's sexual activities with another woman, couched as evidence of her "moral character").

127. See Palmore v. Sidoti, 466 U.S. 429, 431–34 (1984) (holding unconstitutional a Florida trial court determination that awarded custody to one parent without reference to parental qualifications, but only with reference to the alleged negative effects of the child living in a racially mixed household).

128. See infra section II.B.1.

129. See Sen & Tam, supra note 29, at 56–57 (describing the harm-nexus approach that courts have adopted in child custody cases involving LGBT parents).

130. See infra section II.B.2 (highlighting consideration of disability in best interests analyses).

raised by parents without disabilities.[131] In some circumstances, these studies concluded or noted that children of parents with disabilities are often better situated than their counterparts.[132] This section does not purport to be a comprehensive assessment on the literature detailing parenting with disability. The literature is still, in some respects, in its infancy and mostly details outcomes associated with parenting with intellectual, as opposed to physical, disabilities.[133] Rather, this section aims to shed light on some of the literature as a means to highlight agreement among academics that disability does not reflect parenting capabilities and to underscore the academic community's skepticism about earlier findings of the potential negative impacts associated with parenting with disability.

Some early studies concluded that parental disability produces negative outcomes for children. Many of them, for example, concluded that children raised by parents with disabilities are more likely to experience behavioral problems.[134] Others voiced concerns about the child's psychological development.[135]

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131. See, e.g., Julia A. Rivera Drew, Disability and the Self-Reliant Family: Revisiting the Literature on Parents with Disabilities, 45 Marriage & Fam. Rev. 431, 433 (2009) ("The tenor of scholarship published in the past ten years is . . . substantially different from that of earlier literature. Much of the recent literature demonstrates a strong motivation to rebut the clinical nature and deeply negative appraisals of parents with disabilities . . . .").

132. See, e.g., Adam Cureton, Some Advantages to Having a Parent with a Disability, 42 J. Med. Ethics 31, 32 (2016) (arguing that disability might be advantageous to childrearing in some respects).

133. See Drew, supra note 131, at 433 (noting that over half the studies center on parents with intellectual disabilities).

134. See, e.g., Felicia B. LeClere & Brenda Marsteller Kowalewski, Disability in the Family: The Effects on Children's Well-Being, 56 J. Marriage & Fam. 457, 465–66 (1994); N.J. Smith, R. Bland & C. Grey, Handicapped Parents with Non-Handicapped Dependents, 16 Int'l J. Rehabilitation Res. 157, 158 (1993) (noting the prevalence of studies that examine the effect of parental disability on child behavior). The former of these two articles does not distinguish between families in which the parent is physically disabled and families in which the parent is intellectually disabled or mentally ill. See LeClere & Kowalewski, supra, at 459. The latter qualifies its findings such that it identified no general trend throughout the publications it surveyed for parents with physical disability. Smith, Bland & Grey, supra, at 158. Still, more recent works have also recognized this concern among children of one or more parents with disabilities or chronic illnesses. One case study of fifty-six families in which one parent had multiple sclerosis concluded that the children of parents with the disease have more behavioral problems than their peers of similar age and gender whose parents have no physical disability. Stavroula Diareme et al., Emotional and Behavioral Difficulties in Children of Parents with Multiple Sclerosis, 15 Eur. Child & Adolescent Psychiatry 309, 315–16 (2006).

135. See Helen Stochen Wagenheim, Aspects of the Analysis of an Adult Son of Deaf-Mute Parents, 33 J. Am. Psychoanalytic Ass'n 413, 434 (1985) (summarizing findings in a case study of one child of deaf-mute parents). Other studies of children of parents with multiple sclerosis concluded that such children were more likely to develop psychological problems than those with "healthy" parents. See Kenneth I. Pakenham & Samantha Bursnall, Relations Between Social Support, Appraisal and Coping and Both Positive and Negative Outcomes for Children of a Parent with Multiple Sclerosis and Comparisons with Children of Healthy Parents, 20 Clinical Rehabilitation 709, 719 (2006) ("[C]aring for a

Some literature reviews have outright rejected findings of adverse outcomes for children stemming from parental disability, citing widespread methodological concerns. The problems with the studies finding adverse effects include: (1) their pathological methods, which are driven by a search for problems in these families rather than a search for objective truth; (2) failure to consider fundamental distinctions among disabilities; (3) overgeneralization from a singular case study; and (4) confusion of correlation with causation.[136] Such studies often do not even distinguish between physical and developmental or psychological disability.[137]

The theory that has been most widely disputed is that children of parents with disabilities are likely to experience parentification.[138] Parentification is defined as the phenomenon by which a child is "forced to attend to parents' physical and emotional needs at too young an age."[139] Some have found, though, that parents with disabilities are actually more likely to shield their children from assuming the burden of care rather than require them to act as caretakers.[140] Parentification is distinct from family responsibility.[141] And even though a child may take on additional tasks, the performance of tasks does not transform child into parent so long as the parent has primary responsibility and authority.[142] Ultimately, parentification is a theory "for which little, if any, empirical verification exists."[143]

Outcomes for children of parents with physical disabilities are remarkably similar to those for children with parents without disabilities. One study, which surveyed hundreds of parents with disabilities (who primarily had physical disabilities) and their children, for example, concluded that "in many ways families with and without disabilities were

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parent with multiple sclerosis not only impacts on psychological distress but also affects the cognitive and affective dimensions of well-being."); see also Margaret A. De Judicibus & Marita P. McCabe, The Impact of Parental Multiple Sclerosis on the Adjustment of Children and Adolescents, 39 Adolescence 551, 562 (2004) (finding that children of a parent with multiple sclerosis were "over three times more likely than a community sample to be perceived by parents as having difficulties indicative of clinical status").

136. See Megan Kirshbaum & Rhoda Olkin, Parents with Physical, Systemic, or Visual Disabilities, 20 Sexuality & Disability 65, 66–67 (2002).

137. See, e.g., LeClere & Kowalewski, supra note 134, at 459.

138. Kirshbaum & Olkin, supra note 136, at 74.

139. Id.

140. See Nat'l Council on Disability, supra note 19, at 236 (citing Ora Prilleltensky, My Child Is Not My Carer: Mothers with Physical Disabilities and the Well-Being of Children, 19 Disability & Soc'y 210, 219–21 (2004)); see also id. at 235 (highlighting another study, which found that "mothers reported using vigorous caution when assigning tasks to their children").

141. See Olkin, supra note 23, at 134; Nat'l Council on Disability, supra note 19, at 235.

142. See Cureton, supra note 132, at 33–34.

143. Kirshbaum et al., supra note 82, at 33–34.

remarkably alike in daily life" and the groups are "more alike than not."[144] Similarly, an early study—perhaps the first that counteracted the prevailing negative research—found that children whose fathers had spinal cord disabilities developed normally in all areas examined.[145] One recent literature review found that most investigations that utilize nonpathological frameworks have concluded that there is "average to better-than-average development and functioning among children of disabled parents."[146] The review further highlighted studies that have found that children of parents with disabilities have developed "enhanced coping and problem-solving skills; greater acceptance of difference; and more positive attitudes towards disability."[147] And many of those studies that conclude that parental disability might increase the likelihood that children experience psychological distress note that such effects might be offset by whatever benefits may exist, such as being endowed with the ability to take on more responsibility or being more attuned to the needs of others.[148]

Disability may even *enhance* certain parenting tasks. One study found that parents with disabilities who took more time diapering their baby developed a positive parent–child relationship by virtue of spending additional time interacting with their child.[149] Similarly, parental disability might promote a stronger bond between parent and child and facilitate greater trust and communication.[150] Children of parents with disabilities

144. Rhoda Olkin et al., Comparison of Parents with and Without Disabilities Raising Teens: Information from the NHIS and Two National Surveys, 51 Rehabilitation Psychol. 43, 48 (2006). The study could not find much empirical support, however, "for the contention that children of parents with disabilities accrue positive benefits from their parents' disabilities." Id.

145. See Nat'l Council on Disability, supra note 19, at 234 (citing F.M. Buck & G.W. Hohmann, Personality, Behavior, Values, and Family Relations of Children of Fathers with Spinal Cord Injury, 62 Archives Physical Med. & Rehabilitation 432 (1981)).

146. Paul Preston, Ctr. for Int'l Rehabilitation Res. Info. & Exchange, Parents with Disabilities 9 (2010), http://cirrie.buffalo.edu/encyclopedia/en/pdf/parents_with_disabilities.pdf (on file with the *Columbia Law Review*).

147. Id.

148. See Yolanda G. Korneluk & Catherine M. Lee, Children's Adjustment to Parental Physical Illness, 1 Clinical Child & Fam. Psychol. Rev. 179, 189 (1998) (finding that "the mere presence of parent illness per se does not inevitably lead to child adjustment difficulties" but also noting evidence of distress); Pakenham & Bursnall, supra note 135, at 719 ("[T]hese adverse effects may be offset by the wide range of benefits associated with caring for a parent with multiple sclerosis.").

149. See Preston, supra note 146, at 5; see also Cureton, supra note 132, at 32 ("When we eliminate illegitimate biases we may have about disability, take into account . . . accommodations that are available to parents with disabilities, and widen our understanding of the valuable roles that parents can play in the lives of their children . . . having a disability can significantly *enhance* a person's parenting abilities." (emphasis added)).

150. See Cureton, supra note 132, at 33. At the very least, parental disability leaves family dynamics relatively unaffected. See Dennis P. Hogan et al., Family Developmental Risk Factors Among Adolescents with Disabilities and Children of Parents with Disabilities, 30 J. Adolescence 1001, 1015 (2007) ("[F]amily dynamics are unaffected as mothers with

may even tend to express more positive feelings toward their parents than do those with parents without disabilities.[151]

Ultimately, disability is not a good predictor of parental functioning or needs,[152] or parental performance.[153] Given the lack of a correlation between parental disability and capabilities, courts ought not to frequently invoke disability as a minus factor when inquiring into the best interests of the child.

2. *Misapplication of Disability as Part of the Best Interests Calculus.* — Despite the lack of a correlation between disability and parenting ability, courts often invoke disability in best interests analyses. This section will discuss how the best interests standard invites judicial attitudinal bias that negatively impacts parents with disabilities. As expressed in section II.A, the standard has been met with considerable criticism over the course of the past several decades, largely because it has the potential to force judges to resort to their own values in coming to a determination as to with whom the child ought to be placed. These criticisms are particularly noteworthy in the context of disability. Court opinions too often reflect presumptions that it may not be in a child's best interests to live with or have extensive, continued contact with a parent with disabilities.[154] Judges often invoke negative speculation about the future based on stereotypes rather than on hard evidence.[155]

Judges continue to consider physical disability as part of the best interests calculus. While they are often statutorily mandated to do so,[156] their analyses do not give proper deference to the notion that inquiries into disability may be less relevant than those into considerations like

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disabilities monitor their children and maintain strong positive relationships just as well as mothers without disabilities.").

151. Ilana Duvdevany, Rivka Yahav & Victor Moin, Children's Feelings Toward Parents in the Context of Parental Disability, 28 Int'l J. Rehabilitation Res. 259, 261 (2005) (showing that children of parents with disabilities express more positive and ambivalent feelings toward their parents than children of parents without disabilities).

152. See, e.g., Connie Conley-Jung & Rhoda Olkin, Mothers with Visual Impairments Who Are Raising Young Children, 95 J. Visual Impairment & Blindness 14, 26 (2001) (noting that a blindness diagnosis is not a good predictor of parental functioning and even that "[t]he degree of visual impairment was found not to be predictive of many aspects of parenting experiences").

153. See Hogan et al., supra note 150, at 1015–16 (concluding "mothers with disabilities in [households without a residential father] do about as well as mothers without disability" and "[p]aternal disability has little impact on fathers' monitoring or relationship with their children in two-parent households").

154. See Nat'l Council on Disability, supra note 19, at 147.

155. Kirshbaum et al., supra note 82, at 38. A common stereotype that courts invoke is parentification of the child, which stems from an assumption that children will be forced to provide care to their parents with physical disabilities. Id. The invocation of a parentification justification is particularly troubling because experts and academics have steadily challenged it over the course of the past two decades. See supra notes 138–143 and accompanying text.

156. See supra note 82 and accompanying text.

neglect or the connection between parent and child. The Vermont Supreme Court, for example, once wrote: "[I]t would not serve the best interests of a child to be placed with a parent who is unfit because of severe mental illness, incapacitating physical disability, or persistent neglect, abuse, or abandonment of the child."[157] In so doing, the court placed disability on the same spectrum as neglect, abuse, and abandonment. More alarmingly, the court's language *presumed* unfitness in the case of "severe" mental illness and "incapacitating" physical disability. This case illustrates that judges oftentimes do not know how to weigh disability as part of the calculus.[158] And as part of their own value systems, judges may accord more weight to disability than they otherwise should.[159]

When determining the best interests of the child, courts not only weigh disability inordinately but also fail to give it considerable attention. While this Note would encourage that courts not look to disability at all, the reality of the matter is that state statutes often mandate its consideration.[160] When courts must inquire into disability, they ought to deal with it carefully to ensure that personal biases do not factor into the equation and that the rights of the parent are not infringed upon. As one commentator (though in the context of developmental disability) notes:

> [I]t is *precisely* because the best interest standard allows so much discretion that those who work with it must be meticulous in applying it when a developmentally disabled parent is involved. If they are not, the danger is great that all persons involved—lawyers, judges, and even the parties themselves—could allow personal prejudices to be disguised behind the rubric of the "child's best interest."[161]

This assertion is equally valid in the context of physical disability. Consider *Bethea v. Bethea*, in which a father sought to gain custody of his child after the child's mother suffered an alcohol-and-drug-induced stroke that caused brain damage.[162] Without any discussion, the court merely acknowledged the parent's disability and upheld the trial court's decision with a one-page opinion.[163] The court discussed neither the extent of the mother's disability nor its effect on her parenting behavior and its

157. Paquette v. Paquette, 499 A.2d 23, 29 (Vt. 1985).

158. The notion that judges may not properly weigh disability as part of the best interests inquiry is related to the concern expressed in section II.A that judges are forced to utilize their own values when considering the various factors. See supra notes 113–116 and accompanying text.

159. This Note argues that disability should be accorded extremely little, if any, weight as part of a court's analysis. See infra Part III (arguing for a new standard).

160. See supra note 82 and accompanying text.

161. Duffy Dillon, Comment, Child Custody and the Developmentally Disabled Parent, 2000 Wis. L. Rev. 127, 140.

162. 596 So. 2d 1279, 1280 (Fla. Dist. Ct. App. 1992).

163. See id.

ramifications for her children and her relationship with her children.[164] While the court's ruling could have stemmed from concerns regarding the mother's potential alcoholism or drug abuse, the court instead lumped those concerns together with disability without discerning how it ultimately came to its decision.[165]

Courts may also overtly invoke physical disability as a minus factor in their best interests analysis. In *White v. White*, a Mississippi appeals court refused to find that the lower court inappropriately weighed physical disability when determining primary physical custody of the children, even though the record demonstrated "that the physical health of the parties favored [the father] due to [the mother's] 'significant physical limitations, . . . being crippled from the waist down and legally blind.'"[166] The court merely checked off disability as part of a larger list of considerations that favored one party or the other, like willingness of the parties to modify their employment arrangements or to let the child engage in extracurricular activities.[167] Such an analysis ignores the fact that disability generally neither advantages nor disadvantages the child's development.[168] Rather, it signals a reversion to the biases articulated by the trial court in *Carney*: that a child could not possibly live a "normal" life by being placed in the custody of a disabled parent.[169]

C. *Inadequacy of the* Carney *Standard*

Despite the widespread praise that the *Carney* factors have been met with from commentators,[170] they do not dispositively solve the problems associated with consideration of disability as part of the best interests standard. As section II.C.1 will explore, states that do apply *Carney*-like factors have not been remarkably consistent or comprehensive in doing so. Likewise, section II.C.2 will argue that the standard still effectively puts disability, rather than the parent's relationship with the child, at the center of the analysis.

1. *Inconsistent Application of the* Carney *Factors.* — Though the *Carney* framework theoretically has the potential to vastly reduce biases against parents with disabilities, it has not been consistently applied. As the National Disability Council has noted:

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164. See id.

165. See id.

166. 93 So. 3d 33, 36 (Miss. Ct. App. 2011) (quoting the chancery court opinion). Use of the word "crippled"—a term widely thought to be politically incorrect—in this context is also concerning and may constitute evidence of cultural bias.

167. Id.

168. See supra section II.B.1 (highlighting social science studies that find limited impact on children of parents with disability).

169. See supra notes 91–94 and accompanying text (detailing the trial court's views in *Carney*).

170. See, e.g., Kirshbaum et al., supra note 82, at 32 (characterizing *Carney* as an "important development[] in custody law for parents with disabilities").

> Although the higher court in *Carney* held that a parent's disability should not be a factor in determining custody, this view has not been consistently enforced. Many parents continue to experience discrimination in child custody and visitation cases, and published court opinions reflect an ambivalent approach to deciding custody and visitation disputes in which a parent has a disability.[171]

This section accordingly explores inconsistent application of the *Carney* standard.

A Colorado appellate court adopted the *Carney* framework in *People in Interest of B.W.*, an appeal of a termination proceeding.[172] Yet after spelling out the standard, the court completely dismissed the relevant factors, noting only that "[t]here [was] adequate evidence in the record to establish that the physical and psychological manifestations of [the] disease in this respondent contributed to an environment which was injurious to the welfare of each child" without actually highlighting what those manifestations were and how they were injurious to the welfare of each child.[173] Such an analysis ignores the fact that one must look to the actual *effects* of the condition at issue rather than the condition itself when inquiring into the child's best interests.

An Iowa appellate court similarly misapplied the second *Carney* factor, which calls for an inquiry into how the parent has adapted to her condition,[174] in *In re Marriage of Shook*.[175] In *Shook*, a father sought custody of his children from their mother Kim, who was paralyzed from the arms down after a car accident.[176] Like the Colorado court in *B.W.*, the Iowa appellate court called upon the *Carney* factors to resolve the issue of the mother's disability.[177] And just like the court in *B.W.*, this court completely ignored them. Kim's adaptation plan seemed to be largely reliant on in-home care providers who helped her with both her personal needs and the supervision and care of her children.[178] She also lived with her mother and stepfather, both of whom helped care for the children.[179] And the only social worker to have testified in the case recommended that Kim retain primary care of the children, in part because of her

171. Nat'l Council on Disability, supra note 19, at 142.

172. 626 P.2d 742, 744 (Colo. App. 1981).

173. Id. It is worth noting that there was ample evidence of neglect in the record; for example, the record included evidence that the parent threw hot coffee on her child during the course of an argument, inflicting first and second degree burns. Id. at 743. But the court did not directly tie the parent's disability to such neglectful behavior. See id. at 744 (describing the relevance of the parent's Huntington's chorea).

174. In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979).

175. No. 00-1806, 2002 WL 984491 (Iowa Ct. App. May 15, 2002).

176. Id. at *1.

177. Id. at *2.

178. Id. at *3.

179. Id.

observations that Kim had sufficiently adapted and made the appropriate accommodations.[180]

Yet, the court refused to acknowledge that the presence of her mother and stepfather could factor into the analysis, instead noting that "[a]lthough a loving and supportive extended family is a valuable resource in parenting young children, we must base our physical care determination primarily upon the relative strengths and weaknesses of the parents."[181] This refusal also outright rejected application of the third *Carney* factor, which calls for the court to consider how members of the household have adjusted to the parent's disability.[182] And the court further presumed, without any evidence from the record, that "[w]ithout such assistance she would likely reside in a care facility."[183] Such a presumption is based entirely in stereotype.

These cases reveal precisely how courts have misapplied the *Carney* factors. Courts often do not engage directly with the factors and opt instead to implicate their own values concerning parents with disabilities.[184] Failure to engage meaningfully with the enumerated factors is not limited to these two cases. A California appellate court, for example, analogously invoked the *Carney* factors and, without an in-depth analysis into each of the considerations, merely noted that the trial court properly weighed the mother's testimony concerning her migraine headaches.[185] While the mother admitted that her headaches, when bad, would cause her to become "unresponsive to others," the court did not point to any evidence that she would become unresponsive to or neglectful of *her children* as a result of her condition, nor did it discuss the extent to which the mother may have otherwise adapted to her condition.[186] Though the court acknowledged that it did not modify custody solely on the basis of physical disability,[187] its findings concerning the mother's migraines were effectively utilized as a minus factor in the best interests analysis rather than observed holistically as *Carney* requires.[188]

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180. Id. at *4 (Sackett, C.J., dissenting).

181. Id. at *3 (majority opinion).

182. In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979).

183. *Shook*, 2002 WL 984491, at *3.

184. Notably, the court in *Shook* largely ruled against the mother due to its "concern[] [that her] physical condition seriously impact[ed] her ability to minister effectively to the daily needs of her two children." Id. at *2. Similarly, the court in *B.W.* simply concluded that the evidence supported the notion that the parent's disease was injurious to the child's welfare. People in Interest of B.W., 626 P.2d 742, 744 (Colo. App. 1981).

185. See In re Marriage of Griffith, No. B191269, 2007 WL 1839483, at *7–8 (Cal. Ct. App. June 28, 2007) ("Wendy's migraine headaches were one factor among many that influenced the trial court.").

186. See id.

187. Id.

188. In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979) (noting that courts "must view the handicapped person as an individual and the family as a whole").

2. *Putting Disability at the Center of the Dispute. —* *Shook* and *B.W.* further reveal another shortcoming of the *Carney* approach: It, in effect, makes central to the dispute the parent's physical disability rather than the parent's relationship with the child and the parent's ability to provide a more loving and caring home. Particularly when courts fail to apply the standard correctly, courts tend to evaluate parents not for their parenting abilities but for their disability status.[189] Emphasizing the relevance of disability to the best interests calculus may have the effect of reinforcing the notion that parents with disabilities are inherently less fit than those without disabilities. After all, why would a court inquire into physical disability at all if it did not presume that some parents' physical disabilities would be of detriment to the child?

Many of the best interests standard's common critiques continue to be relevant. Though a court may probe into the *Carney* factors, it may still lack information about potential outcomes and the probability of outcomes, even with expert testimony.[190] The *Carney* standard further provides no guidance as to how courts ought to weigh each factor,[191] thereby resulting in further indeterminacy. How is one to weigh the parent's capabilities with reference to their adaptation? Surely, parents' adaptation strategies, if effective, *should* prevail, but without guidance, courts may still opt to focus primarily on the parent's capabilities, as was the case in *Shook*.[192] Without a sufficient base of knowledge of the parent's circumstances, a judge is more likely to make assumptions drawing from her own values, which may consist of preconceived notions about the parent's condition.[193]

Judicial consideration of disability as part of the best interests analysis creates ample opportunity for discrimination against parents with disabilities. Because of the shortcomings of the ADA in this context,[194] courts must of their own volition fashion frameworks that are aimed at reducing such discrimination and attitudinal bias. Courts have already recognized

189. See supra section II.C.1 (highlighting cases in which parents are evaluated on the basis of their disability).

190. See Manela v. Superior Court, 99 Cal. Rptr. 3d 736, 745 (Ct. App. 2009) ("In order to engage in the analysis called for by *Carney*, it is vitally important that the court have as much information as possible regarding father's alleged tic/seizure disorder and the extent to which, if at all, it will affect his ability to care for [the child]."); supra notes 108–115 and accompanying text (describing Mnookin's critique).

191. See *Carney*, 598 P.2d at 42 (listing the factors).

192. In re Marriage of Shook, No. 00-1806, 2002 WL 984491, at *2 (Iowa Ct. App. May 15, 2002) (evaluating the disabled mother's capabilities).

193. See supra notes 113–116 and accompanying text (noting that the best interests standard, and its lack of determinacy, encourages judges to base their decisions on their own values).

194. See supra section I.A.2 (highlighting the difficulty of bringing ADA claims alleging discrimination in child custody disputes).

disability as a somewhat suspect classification in the constitutional context[195] and should do the same in the custody context.

III. AN IMPROVED STANDARD

Given the ineffectiveness of current approaches to deciding child custody disputes in which one parent has a disability,[196] adopting an alternative to these approaches would increase the likelihood that parents with disabilities are given the treatment they deserve. As a threshold matter, section III.A inquires into two aspirational goals that would likely reduce discrimination against parents with disabilities in the family law system: (1) the elimination of the consideration of disability in best interests inquiries and (2) the elimination of the best interests standard. Recognizing that these goals are difficult to achieve, section III.B advocates for the adoption of a disability–nexus test. Finally, section III.C highlights other means by which states might deter bias in the family law system.

A. *Aspirational Goals to Eradicate Disability Bias in the Family Law System*

The current best interests regime cannot eliminate disability bias.[197] Perhaps *Carney*'s misimplementation[198] reflects an actuality that the approach cannot possibly remedy the core issue. And because disability continues to factor into the best interests equation under such a regime—even in such a markedly diminished capacity—judges are still able to decide cases that reflect attitudinal bias against those with disability.[199] This section inquires into aspirational goals that would reduce discrimination against parents with disabilities in the family law system. First, section III.A.1 advocates the elimination of consideration of disability in best interests inquiries. Second, section III.B.2 highlights how an alternative to the best interests standard might reduce discrimination.

1. *Eliminating the Consideration of Disability in Best Interests Inquiries.* — One could best limit discrimination by prohibiting inquiries into disability altogether. Elimination of judicial consideration of disability as part of best interests analyses would reduce speculation as to the effects of a parent's disability on her child, particularly in cases in which the parent's

195. See supra section I.A (outlining, briefly, disability constitutional rights and noting that disabled persons are entitled to a somewhat heightened rational basis standard of review in constitutional disputes).

196. See supra sections II.B–.C (describing the inadequacy of the current custody regime as applied to parents with disability).

197. See Kirshbaum et al., supra note 82, at 31–32 (highlighting how judicial approaches have led to discriminatory treatment); see also Kirshbaum & Olkin, supra note 136, at 67 (detailing studies that consider disability bias); supra sections II.B–.C.

198. See supra section II.C.1 (highlighting inconsistent application of the *Carney* factors).

199. See supra notes 113–116, 190–191 and accompanying text (noting that without sufficient guidance as to how to weigh the *Carney* factors, judges are still likely to use their own values in coming to a decision).

disability is not readily apparent.[200] And without such speculation, which is often the product of attitudinal bias,[201] courts would be less likely to discriminate against parents with disabilities.

Under a regime that would bar consideration of physical health and disability, courts would still be able to look at the ancillary effects of a disability but would not be able to inquire into the nature of the disability itself. For example, courts often look to a parent's employment status and means—both of which frequently relate to a parent's health status—when inquiring into the best interests of the child.[202] While courts would still be free to observe those factors, regardless of whether or not they are related to the individual's disability, they would not be able to consider the individual's disability on its own.

However, the fact that a number of states mandate the consideration of disability in inquiries into a child's best interests[203] indicates that this is an implausible goal. Without the repeal of statutory frameworks that require inquiry into disability, courts will continue to be forced to look into parental disability and health when evaluating a child's best interests.

2. *Eliminating the Best Interests of the Child Standard.* — The adoption of a framework alternative to the best interests standard might also serve the interests of parents with disabilities. One standard that has gained traction in the academic community is the approximation standard,[204] which generally assigns custody to the parent who assumed primary caretaking responsibilities prior to separation.[205] Inquiry into other evaluative criteria under this standard is, for the most part, limited to cases in which there is reason to believe that the child's primary caretaker has been abusive or neglectful.[206] There is no inquiry directly into a parent's health

200. Cf. Kirshbaum et al., supra note 82, at 38 (noting that courts, when inquiring into disability, often engage in "[n]egative speculations about the future [that] are . . . based on stereotypes rather than on evidence").

201. See id. (arguing that personal assumptions reflect patterns of attitudinal bias).

202. See, e.g., Arneson v. Arneson, 670 N.W.2d 904, 909 (S.D. 2003) (highlighting the parents' income and employment status and the father's sizable annual disability-related expenses).

203. See supra note 82 and accompanying text.

204. Professor Elizabeth S. Scott first recommended this concept in 1992. See Elizabeth S. Scott, Pluralism, Parental Preferences, and Child Custody, 80 Calif. L. Rev. 615, 617 (1992). The American Law Institute has since espoused it. See Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.08 (Am. Law Inst. 2002). For a critique of the approximation rule, see generally Shelley A. Riggs, Is the Approximation Rule in the Child's Best Interests? A Critique from the Perspective of Attachment Theory, 43 Fam. Ct. Rev. 481 (2005).

205. See Scott, supra note 204, at 630 ("The optimal legal framework is one that focuses (almost) exclusively on the past relationship between parents and child and seeks to approximate as closely as possible the predivorce patterns of parental responsibility in the custody arrangement.").

206. Id. at 639 ("To be sure, if parenting has been so deficient that justification exists for state intervention on grounds of abuse or neglect, then a restructuring of family responsibilities is desirable.").

status. Family law judges logically cannot project attitudinal bias and thereby discriminate against parents with disabilities when the legal framework they apply does not inquire into disability in the first place.

Take the trial court's decision in *Carney* as an example of how the adoption of this standard might reduce discrimination. In that case, the parent with the disability would clearly have obtained custody under the approximation rule since he had taken care of the children on his own for a period of five years while his wife's "sole contact with the boys consisted of some telephone calls and a few letters and packages."[207] Similarly, the trial court would not have had room to make discriminatory assumptions against the father,[208] as its inquiry would have been limited to the father's caretaking role.[209]

As with the elimination of consideration into disability, though, widespread adoption of the approximation standard in lieu of the best interests standard is unlikely given the entrenchment of the best interests standard.[210] Consequently, in the next section, this Note proposes an alternative that can be implemented as part of a best interests inquiry.

B. *A Pragmatic Alternative: A Harm–Nexus Test*

A framework that provides a set of defined criteria for judges to consider could reduce the likelihood that parents with disabilities will face discrimination in custody disputes.[211] Courts have already adopted such a narrow and defined inquiry for custody cases in which one parent is a member of the LGBT community: the nexus test.[212] Under the nexus test, courts consider a parent's sexual orientation relevant to the best

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207. In re Marriage of Carney, 598 P.2d 36, 37 (Cal. 1979).

208. Id. at 41–43 (rejecting the trial court's characterization of a "normal" childhood).

209. See Scott, supra note 204, at 637–38 ("The approximation inquiry, like the primary caretaker preference, focuses on the amount of time spent with the child, the extent to which the parent engaged in tasks that contributed to the child's basic care and development, and the parent's participation in decisions relevant to the child.").

210. The best interests standard, as noted, has been adopted in all fifty states. See supra notes 72–73 and accompanying text. Repealing the standard across the nation would be vastly unrealistic, though an updated model code could be of assistance. That said, repeal of the best interests standard at large is well beyond the scope of this Note and has been the subject of considerable literature. See supra section II.A (describing critiques of the best interests standard).

211. As Dr. Megan Kirshbaum, Professor Daniel J. Taube, and Rosalinda Lasian Baer note, "The near absence of explicit rules addressing bias . . . gives few grounds upon which appellate courts can address . . . common problems of bias against parents with disabilities . . . ." Kirshbaum et al., supra note 82, at 31. As this Note has already discussed, the best interests standard's brevity invites attitudinal bias. See supra section II.A. Narrowing the inquiry to a set of defined considerations would thus have the effect of reducing bias and, consequently, reducing discrimination. Cf. Mnookin, Child-Custody Adjudication, supra note 108, at 260–61 (questioning the set of values judges use to inform their determinations of what is in a child's best interests in child custody disputes).

212. See Sen & Tam, supra note 29, at 56–57 (highlighting the methods that courts use in such cases and describing the nexus test).

interests inquiry only if the opposing party can demonstrate that it will harm the child.[213] Courts should adopt a similar standard in custody cases in which one parent has a disability.

As with disability, many states formerly utilized an approach that viewed homosexual behavior as per se evidence of parental unfitness.[214] Pushing back on this approach, LGBT-rights advocates promoted a nexus test that banned consideration of a parent's sexual orientation if a claimant could produce no evidence of its adverse impact on the child.[215]

The nexus test would apply similarly to parental disability. Decisionmakers would be required to find a nexus between a parent's disability and harm to the child as a threshold matter in considering disability under the best interests standard. If the opposing party can demonstrate by clear and convincing evidence that the other parent's disability will harm the child, then the court can further inquire into the disability when inquiring into best interests.[216]

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213. See id.; Julie Shapiro, Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children, 71 Ind. L.J. 623, 635–36 (1996) ("A nexus test requires that some connection or nexus between an individual parent's homosexuality and harm to the particular child in question be established before the parent's homosexuality is considered relevant to the custody determination.").

214. See, e.g., Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."); see also Sen & Tam, supra note 29, at 56 (describing the per se approach); Shapiro, supra note 213, at 637–39 (same).

215. Nancy D. Polikoff, Custody Rights of Lesbian and Gay Parents Redux, 60 UCLA L. Rev. Discourse 226, 237–39 (2013).

216. One problem that has persisted in applying the nexus test is determining which party bears the burden of proof. See Darryl Robin Wishard, Out of the Closet and into the Courts: Homosexual Fathers and Child Custody, 93 Dick. L. Rev. 401, 419–20 (1989) (highlighting the burden-of-proof problem). Many courts require LGBT parents to demonstrate that there will be no adverse effects on the child even though in typical modification proceedings, the burden of proof usually lies with the parent seeking a change in custody. Id. at 420.

This Note recommends requiring the party raising disability as an issue to prove by clear and convincing evidence that it would be relevant to the dispute for reasons advanced below. Requiring the parent who has raised disability as grounds for a change in custody to prove by clear and convincing evidence that there is a nexus between the other parent's disability and harm to the child is necessary to the effectiveness of this approach. Parents with disabilities, like all parents, have a fundamental interest in preserving their families while staving off arbitrary discrimination. See Sen & Tam, supra note 29, at 75–76 (explaining that a higher burden of proof is necessary in termination of parental rights proceedings based in part on parents' fundamental interest in preserving their families). Under the current regime, disabled parents regularly face such arbitrary discrimination. See supra sections II.B–.C; see also Nat'l Council on Disability, supra note 19, at 142–43 (highlighting pervasive discrimination against parents with disabilities in child custody disputes). With the protection of a more searching burden of proof, these parents would face a proportionally lower risk of obtaining an erroneous and discriminatory decision. See Sen & Tam, supra note 29, at 75. Requiring a more searching burden of proof is also consistent with what legislatures have attempted to do in states like California: In moving to codify *Carney*, the California state legislature initially sought to further shift the burden of

If the court deems disability relevant to the inquiry, it would then consider the *Carney* factors, as it ordinarily might,[217] so as to ensure further protection against arbitrary decisionmaking.[218] While this approach would still largely make disability a focal point of dispute, the strict considerations to which the approach demands attention could at least reduce the likelihood that judges will make decisions purely on the basis of their own values.

This solution is not ideal, but it improves upon the *Carney* framework by requiring courts to further consider the effect of the parent's disability on the child. Early scholarship that called for adoption of the nexus approach in the context of sexual orientation recognized that it presented the potential for abuse insofar as homosexuality was at the time "often viewed as immoral or unhealthy."[219] But early proponents of the requirement further recognized that "[t]he only effective control against a decision based on prejudice, *sub rosa*, is a requirement that harm to the child be demonstrated before any factor . . . can be considered."[220] Society similarly stigmatizes disability to the extent that it finds disability undesirable.[221] But those in the family law system cannot check prejudicial attitudes about disability in the parenting context unless they ponder whether disability might actually result in a tangible harm to the child.[222] In other words, what is key to altering prejudicial attitudes in the disability-custody context is that judges, as part of the best interests inquiry, think about the tangible effects of a disability rather than view it merely as another checklist demerit, like the child's preferences or the parent's means.

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proof on the party invoking disability, as this Note suggests here. An early version of the California bill forbade the courts from using a parent's disability as the basis of an award of custody or visitation orders unless the opposing "party establishes by clear and convincing evidence that a grant of custody or visitation to the disabled parent would be detrimental to the health, safety, and welfare of the child." Nat'l Council on Disability, supra note 19, at 151. The bill, as codified, does not shift the burden of proof. See Cal. Fam. Code § 3049 (2016).

217. See supra note 97 (listing jurisdictions that utilize the *Carney* factors).

218. See Kirshbaum et al., supra note 82, at 31–32 (describing *Carney*'s legacy as "depart[ing] from previous, often explicit assumptions that parents with disabilities were 'unfit' and recogniz[ing] the civil rights of parents with disabilities to be coextensive with nondisabled parents").

219. Nan D. Hunter & Nancy D. Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 Buff. L. Rev. 691, 694–95 (1976).

220. Id. at 695.

221. See Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1390 ("Outside views of disability typically predict that significant disabilities would lead to substantial unhappiness; by contrast, people with a range of disabilities frequently report similar levels of happiness to people without the disabilities.").

222. See Kirshbaum et al., supra note 82, at 32 (noting that the development of judicial doctrine is necessary "to recognize and admonish legal and mental health professionals to avoid bias" and suggesting that the *Carney* framework has not been sufficient on its own to combat disability bias).

Application of the facts of *Curry v. McDaniel*[223] to the standard proposed here sheds light on how the standard would work in practice. This case provides an ideal example because it involved a physically disabled mother whose actions directly endangered the well-being of her child.[224] Curry, the mother in custody of the child, had been in a car accident with her child in the car; she chose to drive despite having a vision impairment that severely impacted her ability to drive and failing to possess a driver's license in the first place.[225] The trial court awarded custody to McDaniel, the father, and the appeals court affirmed.[226]

Under the proposed framework, a judge would first inquire into whether the claimant could demonstrate a nexus between Curry's disability and harm to the child. If Curry had not been in a car accident or did not drive, the inquiry would end there. But because Curry chose to drive, despite her condition and lack of a driver's license, and was in a car accident, the claimant can demonstrate a nexus between Curry's disability and harm to the child. And though Curry averred that she was able to accommodate the detriment her disability caused,[227] she still opted to drive and therefore had essentially waived the availability of those accommodations. On these facts, a court could conclude that the father had met the burden of proving by clear and convincing evidence that there was a nexus between Curry's disability and harm to her child.

The court would then apply the *Carney* factors as part of the best interests inquiry, calling specific attention to the second factor: how the person has adapted to the disability and manages its problems.[228] Because Curry drove on numerous occasions,[229] one could reach the conclusion that she failed to properly adapt to her disability, which risks harm to the child. In reaching this conclusion, and accordingly weighing the evidence on Curry's disability against her, the court would then consider

223. 37 So. 3d 1225 (Miss. Ct. App. 2010).

224. Id. at 1231 (noting that the child's mother, who had a vision condition and did not have a license to drive, got into a car accident with the child in the car). The court in *Curry* did not apply a harm–nexus standard but rather considered disability as one factor among several others. Id. at 1233 (stressing that disability is an individual factor among others, which carries no lesser or greater weight).

225. Id. at 1231. The child also had been experiencing negative hygiene and academic issues. Id. at 1230. McDaniel, though, often failed to timely and properly pay child support, which may have contributed to the child's state. Id. at 1235.

226. Id. at 1236. On appeal, Curry argued that the trial court erred because it concluded that she was unfit to retain custody purely because of her disability. Id. at 1233. The appeals court rejected Curry's contention, asserting that there was no evidence "that the chancellor grounded his decision solely on the fact that she suffers a severe vision limitation and McDaniel does not." Id. at 1234.

227. Curry averred at trial that her husband typically drove her and her child, and when her husband was not home, a friend who lived fifteen minutes away or a neighbor would often offer to help. Id. at 1232.

228. In re Marriage of Carney, 598 P.2d 36, 42 (Cal. 1979) (listing the factors).

229. *Curry*, 37 So. 3d at 1234.

disability as one factor among the rest that are relevant to the best interests framework. The court would still weigh, on the one hand, Curry's failure to properly keep tabs on her child's hygiene and to monitor her child's academic performance, and on the other, Curry's current custody of the child, the fact that the child lived with a sibling, and McDaniel's failure to pay child support.

C. *Additional Potential Antistigma Measures*

As this Note argues, individuals and professionals involved in custody cases are often prone to exhibiting attitudinal biases regarding parents with disabilities.[230] When courts are unwilling or unable to adopt the above-proposed solutions to this issue, some forms of redress may still be available. This section highlights two additional means by which courts can protect parents with disabilities from arbitrary discrimination in the family law system. Section III.C.1 presents a judicial framework—which can operate under the purview of the best interests standard as a minus factor—that would deter claimants from bringing groundless claims into disability. Section III.C.2 suggests further educating professionals in the family law system.

1. *Penalizing Groundless Inquiries into Disability.* — Family law scholars and custody courts alike often reference the Judgment of Solomon[231] in both developing theories concerning pervasive problems in custody law[232] and critiquing the best interests standard.[233] As recounted in this

230. See Callow et al., supra note 20, at 17–18 (defining attitudinal bias and listing examples of how such bias leads to dependency proceedings and the termination of parental rights).

231. 1 Kings 3:16–28.

232. See, e.g., Robert Mnookin, Child Custody Revisited, 77 Law & Contemp. Probs., no. 1, 2014, at 249, 260 (noting that "ordering joint custody might be very much like carrying out Solomon's threat to cut the child in half" when parents refuse to "agree to it themselves"); Suzanne Reynolds et al., Back to the Future: An Empirical Study of Child Custody Outcomes, 85 N.C. L. Rev. 1629, 1645–47 & n.86 (2007) (describing "Solomon syndrome," which refers to "a mother's willingness to sacrifice for the welfare of her child," in presenting the feminist critique of mandatory mediation in custody disputes); Cynthia Starnes, Swords in the Hands of Babes: Rethinking Custody Interviews After *Troxel*, 2003 Wis. L. Rev. 115, 116 n.6 (highlighting the potential perils of settlement negotiations in custody cases by noting that "one parent may . . . extract[] economic concessions from the other by wielding a Solomonic sword, knowing that 'a parent truly interested in the welfare of a child will give up almost anything to protect the child'" (quoting Taylor v. Taylor, 508 A.2d 964, 974 (Md. 1986))); Note, Natural vs. Adoptive Parents: Divided Children and the Wisdom of Solomon, 57 Iowa L. Rev. 171, 193–95 (1971) (invoking Solomon's approach to custody decisions, in part, to argue for a more expansive judicial role in custody decisions); see also, e.g., *Taylor*, 508 A.2d at 974 & n.13.

233. See, e.g., Elster, supra note 117, at 5–7 (discussing the Solomonic method of using parental behavior in custody proceedings to decide custody in the context of critiquing of the best interests standard); id. at 39–41 (describing Solomon's judgment as representing a perverse form of compromise and analogizing with joint custody orders and other judicially imposed custody remedies); William Louis Tabac, Give Them a Sword: Representing a Parent in a Child Custody Case, 28 Loy. U. Chi. L.J. 267, 279 (1996) ("Like

ancient parable, two women lived under the same roof, and each was the mother of a young infant.[234] One of the children died, and each of the women, standing before Solomon, claimed the other child as her own.[235] Solomon, unsure of the identity of the child's true mother, declared that he would divide the child in two and give half to each mother.[236] One mother welcomed Solomon's remedy while the other, fearing harm to the child, begged him to give the child to the other woman; in hearing this testimony, Solomon ruled that he would vest custody of the child in the mother who would have spared the boy.[237]

Elster notes that in Solomon's case, "[t]he crucial piece of evidence [Solomon] used for giving the child to one woman rather than the other was their behavior in the dispute itself."[238] In making certain claims within the context of a custody dispute, a parent can reveal him- or herself to have character traits that bear directly on the resolution of the dispute.[239] How should judges construe such behavior within the best interests framework, particularly when it could result in adverse outcomes for the child? Elster notes that judges could take such behavior into account:

> [A] Solomon-like judge might refuse custody to a parent whose tactics involve procrastination or derogation of the other parent. Since both tactics can be expected to impose additional pain on the child, the conscious use of them shows a lack of concern for the child that disqualifies the parent for custody.[240]

Elster does not view such judgments as resolving the issues he associates with the best interests standard, but rather sees it as creating a judicial Catch-22: "The more forcefully a parent presses a custody claim, the more he proves himself unfit for custody."[241]

But perhaps this inquiry is worth further consideration in cases in which an offending parent's behavior invades upon the rights of the other parent.[242] A parent's willingness to invoke disability in a custody dispute, for example, may be telling, particularly when such claims are baseless. Recall the case of Kaney O'Neill, described above.[243] Prior to splitting with O'Neill, her ex-boyfriend, Trais, did not doubt her ability to parent

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the threat of King Solomon's sword, the state also uses an artifice, the so-called best interests standard, in an attempt to determine what is inherently unknowable.").

234. 1 Kings 3:16–18.

235. Id. 3:19–22.

236. Id. 3:25.

237. Id. 3:26–28.

238. Elster, supra note 117, at 5.

239. Id.

240. Id.

241. Id. at 7.

242. After all, Elster proposes to resolve his issues with the best interests standard by reducing custody disputes between two fit parents to a mere coin flip. Id. at 40–43.

243. See supra notes 11–18 and accompanying text.

her child, despite her quadriplegia.[244] He was well aware of the extent to which O'Neill had prepared for mothering a child as a quadriplegic and thus likely believed that she would be a fit parent. It was not until after their split that he protested to her acting as the primary caretaker for their child. Given O'Neill's preparations, such a claim had the potential only to deprive the child of a suitable and loving caretaker. A willingness to baselessly invoke disability in custody disputes ultimately demonstrates a lack of concern for the child, whose confidence in the parent may be called into doubt by one parent's distrust of the other on disability-related grounds. Invocation of disability in a custody dispute also sends a message to the child that disability may have a tangible impact on one's capacity to parent.

Similar issues arise when one parent seeks joint custody and the other does not. Many states have adopted "friendly-parent" provisions in order to promote active participation by both parents.[245] These provisions penalize parents who refuse to seek joint custody arrangements because developing relationships with both parents is thought to be, as a general matter, best for the child.[246] Presuming that baselessly calling a parent's disability into question during a custody dispute is not in the best interests of the child, penalizing such claims would have the effect of reducing bias against disability—similarly to how "friendly-parent" provisions have further promoted and perhaps demonstrated the value of joint-custody arrangements.[247]

Consequently, courts should consider penalizing parents who make groundless allegations concerning the impact of the other parent's disability on the child by making such inquiries count against them in the best interests analysis. Consider O'Neill's case once more. O'Neill extensively prepared for motherhood in the face of her disability and had a widespread support network of which her boyfriend was aware.[248] With

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244. See supra notes 11–18 and accompanying text.

245. J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 Fam. Ct. Rev. 213, 225 (2014).

246. See Lisa Bolotin, When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence, 25 Alaska L. Rev. 263, 278 (2008) (describing "friendly-parent" provisions).

247. See Linda D. Elrod & Milfred D. Dale, Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance, 42 Fam. L.Q. 381, 394 (2008) (suggesting that friendly-parent provisions have been effective in promoting joint custody and that they often have a profound impact on custody cases). Some commentators disfavor use of the friendly-parent provision and have argued that it has had the effect of promoting joint custody arrangements that are *not* in the best interests of the child. See, e.g., Bolotin, supra note 246, at 278–80 (highlighting cases in which the court awarded joint custody despite evidence of domestic violence). Still, cases in which courts award joint custody despite the fact that such an arrangement may not be in the child's best interests, though undesirable, demonstrate how effective this provision has been, and thus, are illustrative as to how effective the measure proposed here *could* be.

248. See supra notes 11–18 and accompanying text.

such adaptation measures in mind, O'Neill's disability never should have been central to the dispute. Trais's resort to baseless attacks on her condition, rather, should have been met with condemnation.

2. *Educating Family Law Professionals.* — Social science studies reveal that a considerable source of bias against disability stems from a lack of information or awareness about it.[249] One might reduce bias by providing those who are tasked with making decisions in custody proceedings—that is, family law judges and child custody evaluators—with more exposure to parents with disabilities.[250] For example, states may require family law judges and custody evaluators to undergo disability-related educational training sessions. While evaluators and judges often hear from experts at trial, such experts often do not have experience in strictly assessing the relationship between parental disability and child rearing.[251] Those who work extensively, or even exclusively, with parents with disabilities thus ought to teach decisionmakers.[252]

Training sessions can take an interactive form. Perhaps decisionmakers should be required to observe physically disabled parents' interactions with their children in the home setting. Were decisionmakers to view such interactions, they may better understand how physically disabled parents can successfully raise their children with the aid of accommodations.[253] Both interactive and traditional training exercises would inform decisionmakers about the relevance of disability to parental skills and the child's well-being, all the while reinforcing the notion that disability cannot be a per se minus factor in the best interests calculus.

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249. Denise Thompson et al., Community Attitudes to People with Disability: Scoping Project, at vi (Soc. Policy Research Ctr., Occasional Paper No. 39, 2011), http://melbourneinstitute.unimelb.edu.au/assets/documents/hilda-bibliography/other-publications/2013/Thompson_etal_community_attitudes_to_disability_op39.pdf [http://perma.cc/P4J6-SDWG] ("Familiarity with people with disability—that is, knowing them personally as acquaintances, friends and colleagues—seems the most promising way to increase respect and inclusion, especially if exposure is consistent and recent.").

250. As Kirshbaum, Taube, and Baer note, judges and custody evaluators are often unaware "of the role of adaptations or accommodations for people with disabilities." Kirshbaum et al., supra note 82, at 39. For example, many are unaware of adaptation technologies that parents with physical disabilities may use to care for a baby. Id.

251. See id. at 40–41 (emphasizing that expert assessors often lack adequate training as to disability).

252. Organizations like Through the Looking Glass could provide ideal support. Cf. Nat'l Council on Disability, supra note 19, at 271 ("Through the Looking Glass is a nationally recognized center that has pioneered research, training, and services for families in which a child, parent, or grandparent has a disability.").

253. See Kirshbaum et al., supra note 82, at 40 (noting that courts often "lack . . . awareness about how parents with severe disabilities such as quadriplegia can provide care with the use of baby-care adaptations" and that "[i]t is common for courts to underestimate the potential for parent-child interaction in the presence of significant physical disability").

CONCLUSION

This Note demonstrates that courts must change the manners in which they evaluate custody disputes to prevent discrimination against parents with disabilities. The best interests standard's indeterminacy inherently invites bias and speculation. Utilizing a more certain approach when one party to a custody dispute has a physical disability would reduce the likelihood that such biases will govern and increase the likelihood that parents with disabilities will be treated equitably. Courts would therefore be best equipped to change how they view disability in custody disputes if they reconsider how it factors into best interests analyses. Presumptions of parental unfitness associated with parenting with disability, whether they take the form of a per se rule or mere minus factors, should be eradicated and replaced with a framework that would minimize the inquiry into disability. Ultimately, the law should protect those like Kaney O'Neill, not stigmatize them.