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Safeguarding the Rights of Parents With Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law

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SAFEGUARDING THE RIGHTS OF PARENTS WITH INTELLECTUAL DISABILITIES IN CHILD WELFARE CASES: THE CONVERGENCE OF SOCIAL SCIENCE AND LAW

Robyn M. Powell, MA, JD†

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INTRODUCTION

In November 2012, Sara Gordon, a then 19-year-old woman with an intellectual disability, gave birth to her daughter, Dana.¹

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¹ This narrative is adapted from Elizabeth Picciuto, *Mom with Disabilities and Daughter Reunited After Two-Year Court Battle*, DAILY BEAST (Mar. 16, 2015, 5:15 AM), <http://www.thedailybeast.com/articles/2015/03/16/mom-with-disabilities-and-daughter-reunited-after-two-year-court-battle.html> [https://perma.cc/9YUE-T5MR]. See Letter from U.S. Dep’t of Justice, Civil Rights Div. & U.S. Dep’t of Health & Human Serv., Office for Civil Rights, to Erin Deveney, Interim Comm’r, Mass. Dep’t

Two days after giving birth, while still in the hospital, the Gordon family was referred to the Massachusetts Department of Children and Families (hereinafter “DCF”) due to allegations of neglect. During an emergency investigation, DCF observed that Sara experienced difficulties with feeding and diapering her newborn. Thereafter, DCF asserted that Sara was not able to adequately care for her daughter owing to Sara’s intellectual disability. Dana was then placed in foster care.

Sara’s battle to be reunited with her daughter ensued for two years, three months, and 12 days. During this time, Sara was only allowed to visit with Dana one time per week for one hour. Trying to demonstrate her fitness to raise her daughter, Sara successfully completed numerous parenting education classes. Sara was also evaluated by a psychologist skilled at assessing the capabilities of parents with intellectual disabilities, who determined that with appropriate supports, including Sara’s family, which was committed to supporting the mother and daughter, Sara could safely care for Dana. Nonetheless, DCF changed the permanency goal, which determines whether the family will be reunited or permanently separated, from reunification to adoption. In January 2015, the Department of Justice and Department of Health and Human Services issued a joint letter of findings, holding that DCF violated both Section 504 of the Rehabilitation Act (hereinafter “Section 504”)² and Title II of the Americans with Disabilities Act (hereinafter “ADA”)³ by (1) acting based on assumptions about Sara’s ability to care for her daughter rather than conducting an individualized assessment of her needs; (2) failing to provide Sara supports and services toward reunification; (3) refusing to recognize Sara’s continued engagement and progress; and (4) failing to develop and implement appropriate policies and practices concerning the agency’s legal obligations vis-à-vis disability civil rights laws.⁴ Two months later, Sara and Dana were reunited.

Tragically, the heartbreaking story of Sara and Dana is not unique or uncommon. Each day, parents with intellectual disabilities contend with prejudicial child welfare policies and practices that are based on the presumption that they are unfit to raise their children.⁵ According to the National Council on Disability, an in-

of Children & Families (Jan. 29, 2015) [hereinafter Letter of Findings], http://www.hhs.gov/sites/default/files/mass_lof.pdf [<https://perma.cc/7GPB-ARUP>].

² Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2014).

³ Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (1990).

⁴ Letter of Findings, *supra* note 1.

⁵ NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF

dependent federal agency that advises the President and Congress on policies affecting people with disabilities, “the rate of removal of children from families with parental disability—particularly psychiatric, intellectual, or developmental disability—is ominously higher than rates for children whose parents are not disabled. And this removal is carried out with far less cause, owing to specific, preventable problems in the child welfare system.”⁶

In his groundbreaking Harvard Law Review article, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, Professor Hayman posited that the presumption that parents with intellectual disabilities are unfit “is both unjust and empirically invalid.”⁷ To argue his assertion, Hayman used the extant scientific studies—which at the time, were scarce—to demonstrate that parents with intellectual disabilities are not inherently unfit.⁸

As Sara Gordon’s story illustrates, more than two decades since Hayman authored his article, little has changed in terms of how the child welfare system or law treats parents with intellectual disabilities. Nonetheless, there now is a sizable and growing body of scientific evidence relative to parents with intellectual disabilities and the wellbeing of their children.⁹ Indeed, today, there are more than 450 published studies examining these families.¹⁰

This article explores how legal scholarship, advocacy, and policymaking can be better informed by social science. Part I provides a brief historical perspective on how the rights of parents with intellectual disabilities have evolved over time. Thereafter, analyzing the language in state dependency statutes and child welfare adjudications, Part II examines the implicit and explicit bias that exists and the need for informed policies and decisions. Part III considers how the law can learn from social science by highlighting findings from contemporary social science research concerning these families. Finally, Part IV concludes by highlighting how decision-

PARENTS WITH DISABILITIES AND THEIR CHILDREN 43 (2012) [hereinafter ROCKING THE CRADLE], http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/R7RB-RTXS].

⁶ *Id.* at 43.

⁷ Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1202 (1990).

⁸ *Id.* at 1204 (“[T]here is no empirical support either for the proposition that mentally retarded parents are definitionally or presumptively unfit, or for the proposition that mentally retarded parents are definitionally or presumptively incapable of remedying deficiencies in their parenting.”).

⁹ See, e.g., *Library of References and Abstracts*, HEALTHY START, <http://www.healthystart.net.au/index.php/for-professionals/explore-the-database> [https://perma.cc/DXJ4-PVBV] (last visited May 12, 2016).

¹⁰ *Id.*

making in dependency cases as well as public policy can and should benefit from social science research.

I. PARENTING WITH AN INTELLECTUAL DISABILITY: A HISTORY OF DISCRIMINATION

“History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again.”

Maya Angelou¹¹

The belief that people with intellectual disabilities are unfit to raise children has persisted over time and across jurisdictions. Forced sterilizations—initially grounded in eugenics ideology—grew in popularity across the United States and provided a legal mechanism by which to restrict people with intellectual disabilities from procreating.¹² As time progressed, and compulsory sterilizations lessened, the curtailment of the rights of people with intellectual disabilities to form families evolved into restrictions on marriage.¹³ Although neither practice has been completely eradicated, today the belief that people with intellectual disabilities should not have children is manifested through discriminatory child welfare practices that presume unfitness.¹⁴ This Part explores how the rights of people with intellectual disabilities to form and maintain families have evolved over time and how eugenics-based ideologies continue to inform contemporary policies and practices.

A. *From Sterilization to Marriage Restrictions*

The United States has a dark and shameful history of restricting people with intellectual disabilities from having families. Beginning in the early twentieth century with the eugenics movement, those considered “socially inadequate,”¹⁵ and especially women with intellectual or psychiatric disabilities, were routinely subjected

¹¹ Maya Angelou, Poem Delivered at the Inauguration of President William J. Clinton: On the Pulse of Morning (Jan. 20, 1993), in MAYA ANGELOU, *ON THE PULSE OF MORNING* (1993).

¹² See generally Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11 *FRONTIERS L. CHINA* 53 (2016) (analyzing how restrictions on sexual, reproductive, and parenting rights for people with disabilities have evolved over time and across jurisdictions).

¹³ Brooke Pietrzak, *Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment*, 17 *DEV. MENTAL HEALTH* L. 1, 1-2 (1997).

¹⁴ See generally *ROCKING THE CRADLE*, *supra* note 5, at 71-108.

¹⁵ J.H. Landman, *The Human Sterilization Movement*, 24 *AM. INST. CRIM. L. & CRIMINOLOGY* 400, 400 (1934).

to forced sterilizations.¹⁶ Grounded in the supposition that the “human race [could] be gradually improved and social ills simultaneously eliminated through a program of selective procreation,”¹⁷ eugenics targeted “the mentally defective, the mentally diseased, the physically defective, such as the blind, the deaf, the crippled and those ailing from heart disease, kidney disease, tuberculosis and cancer.”¹⁸

The eugenics movement centered on precluding those who society viewed as “unfit for parenthood” from reproducing¹⁹ and the belief that their offspring would be onerous to society.²⁰ In 1927, involuntary sterilization gained the support of the United States Supreme Court in the infamous *Buck v. Bell* decision.²¹ Carrie Buck was a purportedly “feeble-minded” woman institutionalized in Virginia.²² She was also the daughter of a feebleminded mother committed to the same institution.²³ At age seventeen, Buck became pregnant after being raped; her daughter Vivian ostensibly also had an intellectual disability and was deemed feebleminded as well.²⁴ Following Vivian’s birth, the institution sought to sterilize Buck in accordance with Virginia’s sterilization statute. In upholding Virginia’s statute that permitted institutions to condition release on involuntary sterilization, the Court posited that the law served “the best interest of the patients and of society.”²⁵ Appallingly, in reaching this reprehensible decision, Justice Oliver Wendell Holmes, Jr. declared:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the

¹⁶ See generally PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND Buck v. Bell* 91 (2008).

¹⁷ Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 1 (1996).

¹⁸ Landman, *supra* note 15, at 402.

¹⁹ See Eric M. Jaegers, Note, *Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization*, 31 U. LOUISVILLE J. FAM. L. 947, 948 (1992) (“The purpose of these laws was to protect and streamline society by preventing reproduction by those deemed socially or mentally inferior.”).

²⁰ Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 865 (2004); Lombardo, *supra* note 17, at 1-2.

²¹ *Buck v. Bell*, 274 U.S. 200 (1927).

²² *Id.* at 205; see also Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61 (1985) (asserting that Buck was actually not “feebleminded” but rather institutionalized as a way to hide her rape).

²³ Lombardo, *supra* note 17, at 53.

²⁴ *Buck*, 274 U.S. at 205.

²⁵ *Id.* at 206.

State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, *society can prevent those who are manifestly unfit from continuing their kind*. . . . Three generations of imbeciles are enough.²⁶

Consistent with other compulsory sterilization laws, Virginia's statute was premised on the belief that "many defective persons . . . would likely become by the propagation of their kind a menace to society[.]"²⁷ Disgracefully, the eugenics movement led to the passage of forced sterilization laws in more than 30 states,²⁸ with over 65,000 Americans sterilized by 1970.²⁹

The eugenics movement also inspired a number of states to pass laws that banned people with disabilities from marrying.³⁰ Indeed, the language used in one Connecticut statute was emblematic; it prohibited "epileptics, imbeciles, and feebleminded persons" from marrying or having extramarital sexual relations before the age of forty-five.³¹ In 1974, a study found that nearly 40 states had laws forbidding people with disabilities, mostly intellectual or psychiatric disabilities, from marrying.³² Nearly 20 years later, in 1997, 33 states still had statutes limiting or restricting people with intellectual disabilities from marrying.³³ Three rationalizations, all which are akin to those raised during the eugenics era to support involuntary sterilization of people with intellectual disabilities, have been traditionally advanced to justify these restrictions: "the potential children must be protected; people with mental retardation themselves must be protected; and society at large must be protected."³⁴

B. *Parenting with an Intellectual Disability Today: The Eugenics Movement's Backdoor?*

On July 26, 1990, President George H. W. Bush signed the

²⁶ *Id.* at 207 (emphasis added).

²⁷ See Eugenic Sterilization Act, Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

²⁸ Lombardo, *supra* note 17, at 1-2, n.2.

²⁹ ROCKING THE CRADLE, *supra* note 5, at 15, 39.

³⁰ Pietrzak, *supra* note 13, at 35.

³¹ Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

³² PRESIDENT'S COMM. ON MENTAL RETARDATION, SILENT MINORITY 33 (1974).

³³ Pietrzak, *supra* note 13, at 1-2.

³⁴ *Id.* at 35.

ADA into law, declaring “Let the shameful wall of exclusion finally come tumbling down[!]”³⁵ In passing the ADA, with the goal of reducing stigma and discrimination against people with disabilities, Congress stated that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]”³⁶

Today, 26 years since the passage of the ADA, people with intellectual disabilities are enjoying greater opportunities than ever before to live and work in their communities.³⁷ To that end, many are now choosing to have children—a natural desire for most people. Indeed, as people with intellectual disabilities continue to be increasingly integrated into their communities, the number of parents with intellectual disabilities is expected to grow.³⁸

Notwithstanding many gains in civil rights for people with intellectual disabilities—and the growing number of people with intellectual disabilities who are becoming parents—policies and practices resembling eugenics ideologies endure that restrict them from forming families. Strikingly, although not as popular as previously, coercive sterilization of people with intellectual disabilities persists.³⁹ Moreover, several states still restrict people with disabilities, mostly intellectual or psychiatric disabilities, from marrying.⁴⁰

Most notably, as Sara Gordon’s aforementioned heartbreaking story illustrates, people with intellectual disabilities who become parents face significant discrimination based on pervasive stereotypes that view them as unfit to raise children, particularly within

³⁵ George H.W. Bush, U.S. President, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), <https://bush41library.tamu.edu/archives/public-papers/2108> [<https://perma.cc/6PST-P7FG>].

³⁶ Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (1990).

³⁷ See generally DAVID L. BRADDOCK ET AL., *THE STATE OF THE STATES IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES* (10th ed. 2015).

³⁸ ROCKING THE CRADLE, *supra* note 5, at 45 (“Millions of parents throughout the United States have disabilities, and this number is likely to grow as people with disabilities become increasingly independent and integrated into their communities.”); see also Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 401 (John R. Lutzker ed., 1998).

³⁹ ROCKING THE CRADLE, *supra* note 5, at 15 (“[S]everal states still have some form of involuntary sterilization law on their books.”).

⁴⁰ See, e.g., KY. REV. STAT. ANN. § 402.990(2) (West 1996) (“Any person who aids or abets the marriage of any person who has been adjudged mentally disabled, or attempts to marry, or aids or abets any attempted marriage with any such person shall be guilty of a . . . misdemeanor.”); TENN. CODE ANN. § 36-3-109 (1950) (“No [marriage] license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.”).

the child welfare system.⁴¹ Indeed, research has found that parents with intellectual disabilities have their children permanently removed by child welfare agencies at rates ranging from 30% to 80%.⁴² Hence, “[w]hile child protection authorities and the courts continue to respond to the stereotypical beliefs suggested by the label of intellectual disability rather than to each parent’s individual abilities and their unique circumstances, parents with intellectual disability are uniquely suffering disadvantage and discrimination.”⁴³

II. IMPLICIT AND EXPLICIT BIAS: THE NEED FOR INFORMED POLICIES AND ADJUDICATION

The child welfare system’s bias against parents with intellectual disabilities is “persistent, systemic, and pervasive[.]”⁴⁴ Commencing with the initial report of child maltreatment, parents with intellectual disabilities encounter prejudicial policies and practices throughout every step of their involvement with the child welfare system.⁴⁵ Indeed, parents with intellectual disabilities and their children “face multiple layers of discrimination throughout the parental rights termination process.”⁴⁶

This Part examines the many ways in which child welfare’s policies and practices perpetuate bias—both implicitly and explicitly—against parents with intellectual disabilities and their children. This Part begins with a discussion of the child welfare system broadly followed by an analysis of state dependency statutes and child welfare adjudications involving parents with intellectual disabilities. By considering the ongoing and pervasive bias against

⁴¹ See *supra* Introduction and note 1 for an overview of Sara Gordon’s story.

⁴² Tim Booth & Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1 J. POL’Y & PRAC. INTELL. DISABILITIES 179, 180 (2004); Tim Booth et al., *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10 CHILD & FAM. SOC. WORK 353, 355 (2005); Feldman, *supra* note 38, at 401; Gwynnyth Llewellyn et al., *Prevalence and Outcomes for Parents with Disabilities and their Children in an Australian Court Sample*, 27 CHILD ABUSE & NEGLECT 235, 239 (2003); David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD & ABUSE NEGLECT 621, 624 (2011).

⁴³ David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 310 (2002). See also Hayman, *supra* note 7, at 1219 (“[T]here is no reason to believe that mentally retarded parents are inherently unable to meet the physical needs of their children.”).

⁴⁴ ROCKING THE CRADLE, *supra* note 5, at 15, 51.

⁴⁵ *Id.* at 71-107.

⁴⁶ Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1438 (1995).

parents with intellectual disabilities involved with the child welfare system, this Part will demonstrate the need for policies and judicial decisions that are reflective of the current state of knowledge concerning these families.

A. *Bias within the Child Welfare System*

The goal of the child welfare system is laudable: “to promote the well-being, permanency, and safety of children and families by helping families care for their children successfully or, when that is not possible, helping children find permanency with kin or adoptive families.”⁴⁷ Nonetheless, substantial empirical research has found these goals are carried out in ways that perpetuate bias against families from marginalized populations. For example, studies have consistently found that minority families are disproportionately involved with the child welfare system and disproportionately have children removed from the home.⁴⁸ Low-income families are also vulnerable to high rates of child welfare involvement.⁴⁹

Comparable to other historically oppressed groups,⁵⁰ parents with intellectual disabilities and their children also experience overrepresentation within the child welfare system. According to the Child Welfare Information Gateway, disproportionality occurs when there is “underrepresentation or overrepresentation of a . . . group compared to its percentage in the total population.”⁵¹ Although the prevalence of parents with intellectual disabilities is difficult to ascertain due to the lack of reliable data, the estimated number of parents with intellectual disabilities is generally re-

⁴⁷ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 7 (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/QR8L-LLRH>].

⁴⁸ See, e.g., Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2001) (“The disproportionate number of black children in America’s child welfare system is staggering.”).

⁴⁹ Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 218 (2013) (“The nation’s poorest children, not surprisingly, make up most of the foster care population.”).

⁵⁰ See Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (1990) (amended 2008) (“[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”).

⁵¹ CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 2 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/4NTF-QV4L>].

ported at approximately 0-3% of the total population.⁵² At the same time, a recent analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003) found that 27.3% of all child welfare court applications involved children of parents with intellectual disabilities.⁵³ Moreover, a recent study in the United States revealed that in 2012 at least 19% of children in the foster care system had a parent with a disability.⁵⁴

As Sara Gordon's story demonstrates,⁵⁵ bias pervades the child welfare system, and "[a]t any step in the process, societal prejudices, myths, and misconceptions may rear their heads[.]"⁵⁶ Indeed, removal of children born to parents with intellectual disabilities shortly after birth based on a presumption they will be unfit is routine.⁵⁷ In Sara's case, this bias first appeared during the intake when the child welfare worker read the hospital's report that she had difficulty feeding and diapering her newborn and decided that Sara "was not able to comprehend how to handle or care for the child due to the mother's mental retardation."⁵⁸ Of course, bias against parents with intellectual disabilities is not limited to

⁵² See, e.g., Susan McGaw, *Parenting Exceptional Children*, in HANDBOOK OF PARENTING: THEORY AND RESEARCH FOR PRACTICE 213, 214 (Masud Houghughy & Nicholas Long eds., 2004) (explaining that estimates across various countries have found that parents with intellectual disabilities comprise between .004% and 1.7% of parent population). According to data from the U.S. American Census Survey (ACS), 2.3% of parents have a cognitive disability. However, ACS data precludes further breakdown of parents with cognitive disabilities (e.g., psychiatric disability, intellectual disability, traumatic brain injury). *Number and Characteristics of Parents with Disabilities Who Have Children Under 18, 2008-09*, THROUGH THE LOOKING GLASS, <https://lookingglass.org/pdf/States-Data/TLG-Parents-with-Disabilities-US-Demographics.pdf> [<https://perma.cc/3PMZ-VQTQ>] (last visited June 5, 2016).

⁵³ David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35 CHILD ABUSE & NEGLECT 621, 627 (2011); see also Carol G. Taylor et al., *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 394-95 (1991) (examining 206 child welfare court cases before Boston Juvenile Court and finding that 31 cases - roughly 15% - involved parents with low IQ).

⁵⁴ Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERV. REV. 22, 26 (2016).

⁵⁵ See *supra* Introduction and note 1.

⁵⁶ Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 402 (2000).

⁵⁷ Watkins, *supra* note 46, at 1438 ("[P]resumptions of unfitness are most apparent in cases where the parent has never actually had custody of the child. Intervention in these cases often takes place before birth, even though the parent has not done anything to harm or threaten to harm the child.")

⁵⁸ Letter of Findings, *supra* note 1, at 5 (quoting DCF's Intake Report in Gordon's case).

the initial investigation into a report of child maltreatment.⁵⁹ For example, parents with intellectual disabilities and their children are routinely denied—or proffered inappropriate—family reunification and preservation services.⁶⁰ Similarly, parents with intellectual disabilities are often denied their rights pursuant to disability civil rights laws, such as the provision of reasonable accommodations.⁶¹ Moreover, child welfare workers lack proper training on working with families that involve parents with intellectual disabilities.⁶² The following two sections examine the ways in which bias against parents with intellectual disabilities and their children is manifested through state dependency statutes and judicial decision-making.

B. Termination of Parental Rights Statutes

The law has a long and shameful history of trying to restrict people with intellectual disabilities from raising children. Today, this curtailment of parental rights is routinely carried out vis-à-vis

⁵⁹ See ROCKING THE CRADLE, *supra* note 5, at 76-84 (discussing the disparate impact of the child welfare system on parents with disabilities and their children). See generally Traci L. LaLiberte, *Are we prepared? Child Welfare Work with Parents with Intellectual and/or Developmental Disabilities*, 7 J. PUB. CHILD WELFARE 633, 635-36 (2013) (discussing how child welfare policies and practices are inherently discriminatory against parents with intellectual disabilities and their children).

⁶⁰ Watkins, *supra* note 46, at 1438 (“[P]arents labeled developmentally disabled are often not offered reunification services because they are presumed incapable of learning how to parent. Finally, when reunification services are offered, they often do not take into account the parent’s disability, so that the primary condition that led to state intervention is not addressed.”). This problem also exists for other populations that face discrimination in the child welfare system. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 16-20, 23, 24, 71 (2002) (asserting that inadequate family reunification services are offered to black children and parents in the child welfare system).

⁶¹ JENIECE SCOTT ET AL., UPENN COLLABORATIVE ON CMTY. INTEGRATION & JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, SUPPORTING PARENTS WITH PSYCHIATRIC DISABILITIES: A MODEL REUNIFICATION STATUTE 5, http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/A_Model_Reunification_Statute.pdf [<https://perma.cc/6UPY-R34F>] (last visited June 6, 2016) (“Although our society has afforded parents with [intellectual] disabilities legal rights to receive accommodations, these rights are routinely given short shrift in the child welfare system.”); ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS. & DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf [<https://perma.cc/D8XD-JEEC>] (describing the legal responsibilities of child welfare agencies and courts).

⁶² See generally LaLiberte, *supra* note 59, 636-37, 647-48, 653 (discussing the lack of training that child welfare workers receive concerning working with families that include parents with intellectual disabilities).

state dependency statutes that unjustly discriminate against parents with intellectual disabilities. This is particularly notable because “[t]he entire parental rights termination process, from initial intervention to final adjudication, is driven by statute.”⁶³

Strikingly, nearly two-thirds of dependency statutes (35 states) include intellectual disabilities as a factor for terminating parental rights.⁶⁴ For example, Nevada’s statute provides,

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

1. Emotional illness, mental illness or *mental deficiency of the parent* which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.⁶⁵

As noted by the National Council on Disability, “[s]uch statutes are examples of the oppression ADA proponents sought to eradicate, and they run entirely counter to the letter of the law, which prohibits state and local agencies, such as those in the child welfare system, from categorically discriminating on the basis of disability.”⁶⁶ Hence, “[i]f the label is not used to help, it is inevitably used to hurt.”⁶⁷ Moreover, while the majority of statutes require a nexus be shown between the parent’s disability and an actual detriment to the child, these statutes are typically interpreted to allow broad assumptions concerning the abilities of parents with intellectual disabilities to inform these cases.⁶⁸

⁶³ Watkins, *supra* note 46, at 1434.

⁶⁴ Elizabeth Lightfoot et al., *The Inclusion of Parental Disability in State Termination of Parental Rights Statutes: A State of the States*, CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, UNIV. OF MINN., <http://cascw.umn.edu/portfolio-items/disability-map/> [<https://perma.cc/J7N5-5V4F>] (last visited Sept. 19, 2016) (providing a state-by-state analysis of state dependency statutes and the inclusion of parental disability).

⁶⁵ NEV. REV. STAT. § 128.106(1)(a) (2015) (emphasis added). For other examples of statutes that allow the state to terminate parental rights based in part on a parent’s intellectual disabilities, see ALA. CODE § 12-15-319(a)(2) (2008); ARIZ. REV. STAT. ANN. § 8-533(B)(3) (2014); N.J. STAT. ANN. § 9:2-19 (West 2013); N.Y. SOC. SERV. LAW § 384-b(4)(c) (McKinney 2016); N.C. GEN. STAT. § 7B-1111(a)(6) (2013).

⁶⁶ ROCKING THE CRADLE, *supra* note 5, at 84; *see also* Americans with Disabilities Act, 42 U.S.C. § 12132 (1990) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

⁶⁷ Hayman, *supra* note 7, at 1269.

⁶⁸ Watkins, *supra* note 46, at 1438 (“[M]any statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of individual parents; beliefs about the parenting abilities of the group labeled

In addition to the dozens of state laws that permit the consideration of parental intellectual disability as a factor for terminating parental rights, statutes in six states (Alabama,⁶⁹ Alaska,⁷⁰ Arizona,⁷¹ California,⁷² Kentucky,⁷³ and South Carolina⁷⁴) allow child welfare agencies to bypass the provision of reasonable efforts based on the premise that the parent's intellectual disability "renders him or her incapable of utilizing those services[.]"⁷⁵ Hence, "a parent's disability often serves as a dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child."⁷⁶

C. *Judicial Decision-Making*

Bias against parents with intellectual disabilities is perhaps most rampant once these cases reach the courtroom. Indeed, "[a]lthough the statutes generally require evidence of some connection between a parent's disability and her ability to parent, the level of proof required varies from state to state, and within many states, *from case to case*."⁷⁷ Hence, a judge's own preconceived notions about the ability of people with intellectual disabilities to raise children can color their judgment in these cases.⁷⁸

Analysis of termination of parental rights cases involving parents with intellectual disabilities reveals the great extent to which bias can inform these decisions.⁷⁹ Indeed, "[a]n inherent problem in this group [of cases] is that the termination is not simply based on the parent's past actions but on predictions about their future

developmentally disabled are assumed to hold true for all parents with developmental disabilities.").

⁶⁹ ALA. CODE § 12-15-312(c)(1)(e) (2008).

⁷⁰ ALASKA STAT. § 47.10.086(c)(5) (2013).

⁷¹ ARIZ. REV. STAT. ANN. § 8-846(D)(1)(b) (2014).

⁷² CAL. WELF. & INST. CODE § 361.5(b)(2) (West 2012).

⁷³ KY. REV. STAT. ANN. § 610.127(6) (West 2013).

⁷⁴ S.C. CODE ANN. § 63-7-1640(C)(7) (2010).

⁷⁵ Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 135, 168 (2008) (quoting CAL. WELF. & INST. CODE § 361.5(b)(2) (West 2006)).

⁷⁶ Watkins, *supra* note 46, at 1444.

⁷⁷ *Id.* at 1435 (emphasis added).

⁷⁸ For a thorough analysis of case law involving parents with intellectual disabilities, see generally 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 (2008).

⁷⁹ *But cf. In re Welfare of Children of B.M.*, 845 N.W.2d 558, 560 (Minn. Ct. App. 2014) ("The district court abused its discretion by terminating appellant-father's parental rights when it failed to find that the county undertook reasonable efforts to reunite parent and child.").

ones as well.”⁸⁰ In other words, judges across jurisdictions have based termination of parental rights on the speculation that neglect *may* occur in the future, particularly as the child ages.⁸¹ Another issue raised relates to supports available to the parent and family. Strikingly, some courts have found the availability or efficacy of these supports irrelevant in light of timelines set forth in the Adoption and Safe Families Act (ASFA)⁸² while others have expressed concern regarding reliance on services.⁸³ Moreover, courts may rely on the testimony of inappropriate court-appointed—and at times inconsistent—experts who harbor their own prejudices.⁸⁴ Finally, and perhaps most perplexing and prejudicial, courts have terminated parental rights because the parent’s disability persisted

⁸⁰ Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 554 (2005).

⁸¹ See, e.g., *In re D.W.*, 791 N.W.2d 703, 708-09 (Iowa 2010) (“As D.W. continues to grow and develop, his need for physical, mental, and emotional guidance will only become more challenging.”); *In re Adoption of Ilona*, 944 N.E.2d 115, 121 (Mass. 2011) (citations omitted) (“Two Juvenile Court clinicians issued reports that were considered by the trial judge. In a report dated June 20, 2007, a clinician who had twice interviewed the mother concluded that she had a cognitive impairment, with over-all intellectual ability in the low range. While he did not make a parenting evaluation, he noted that parents with her cognitive limitations ‘often experience significant difficulty in adequately caring for a child, especially as the child becomes older and the developing needs of the child become more complex.’”); *In re Welfare of A.D.*, 535 N.W.2d 643, 649 (Minn. 1995) (internal citations omitted) (“In a termination case, the court ‘relies not primarily on past history, but “to a great extent upon the projected permanency of the parent’s inability to care for his or her child.”’ Thus, we consider whether the inability to care for the child will continue indefinitely.”).

⁸² See, e.g., *In re Shirley B.*, 18 A.3d 40, 43 (Md. 2011) (“In addition to general parenting classes, the Department attempted to connect Ms. B. with services specifically tailored to meet her special needs through various State agencies and outside institutions. Yet, due to economic constraints, funding for these services was non-existent, leaving Ms. B. ineligible to receive them.”); *In re Melissa LL.*, 817 N.Y.S.2d 407, 409 (N.Y. App. Div. 2006) (citations omitted) (“While each respondent’s expert states that it is possible that he or she would be ‘able to properly parent the children in the future,’ it is settled law that ‘[t]he mere possibility that respondent[s]’ condition, with proper treatment, could improve in the future is insufficient to vitiate Family Court’s conclusion”).

⁸³ See, e.g., *In re D.W.*, 791 N.W.2d at 708 (“Furthermore, A.W. was unable to care for D.W. without relying heavily on service providers and her mother.”).

⁸⁴ *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 790 (Md. 2002) (noting that the lower court terminated the parental rights of a father with intellectual disability relying in part on the speculative testimony of a psychologist who was an expert for the state); *In re Melissa LL.*, 817 N.Y.S.2d at 409 (relying on the testimony of a court-appointed psychologist, the court held that clear and convincing evidence established mental retardation “for the foreseeable future,” rendering respondents unable to adequately care for their children). For a discussion on appropriate and accessible parenting assessments, see ROCKING THE CRADLE, *supra* note 5, at 129-38.

(i.e., the parent was not able to become un-disabled).⁸⁵ Thus, although “[a] parent’s right to parent should rarely, if ever, be terminated based upon conjectures and speculation[,]”⁸⁶ the reality for many parents with intellectual disabilities is that they will have their rights terminated based largely on bias and speculation.

III. OVERVIEW OF THE SOCIAL SCIENCE ON PARENTS WITH INTELLECTUAL DISABILITIES AND THEIR CHILDREN

Discrimination against parents with intellectual disabilities is predicated on two overarching assumptions. First, child welfare policies, practices, and adjudications are based—implicitly and at times, explicitly—on the postulation that parents with intellectual disabilities are inherently unfit because of their disability.⁸⁷ Second, parents with intellectual disabilities are often deprived access to adequate—or at times, any—reunification services owing to an assumption that they cannot benefit from supports and services.⁸⁸ As the science shows, however, both presumptions are factually incorrect and dangerous to families.⁸⁹

This Part considers how the law can learn from social science by highlighting findings from contemporary social science research concerning these families. In doing so, this Part examines two central questions: 1) Does a parent’s intellectual disability preclude them from parenting? and 2) Can parents with intellectual

⁸⁵ See, e.g., *In re D.W.*, 791 N.W.2d at 708 (“The case progress reports and DHS service providers’ testimony indicate A.W. has difficulty overcoming her intellectual impairment to adequately provide a safe and reliable home for D.W.”); *In re Adoption of Carlos*, 596 N.E.2d 1383, 1389 (Mass. 1992) (“A judge may properly be guided by evidence demonstrating reason to believe that a parent will correct a condition or weakness that currently disables the parent from serving his or her child’s best interests.”).

⁸⁶ *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d at 789 (Md. 2002).

⁸⁷ Watkins, *supra* note 46, at 1440 (“[T]he labels of developmentally disabled and mentally retarded are often misleading because they have little, if any, predictive value regarding individual capability. Nonetheless, statutes and courts often use a ‘diagnosis’ of developmental disability or mental retardation both to explain past behavior and to predict future behavior.”).

⁸⁸ *Id.* at 1444 (“Perhaps the most blatant element of discrimination in the entire termination process is the routine failure to offer reunification services to parents labeled developmentally disabled or mentally retarded solely on the basis of their disability.”).

⁸⁹ These discriminatory practices also run afoul of the ADA. See Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 275 (“The ADA’s unequivocal rejection of prejudicial stereotypes and inflexible policies that harm people with disabilities could provide an important basis for rethinking child welfare policy toward families in which at least one or more parent has a [disability].”).

disabilities benefit from supports and services? This Part concludes with a brief discussion on the limitations of existing research on these families.

A. *The Effect of Intellectual Disabilities on Parenting*

Despite the longstanding and far-reaching notion that people with intellectual disabilities are categorically unfit to care for their children, science says otherwise. Indeed, studies have consistently found no relationship between intelligence and parenting capabilities.⁹⁰ Nevertheless, some parents with intellectual disabilities and their children, particularly those without appropriate support, are vulnerable to multiple disadvantages, including deleterious health, social isolation, and low socioeconomic status as well as poor developmental outcomes, cognitive delays, and behavioral challenges.⁹¹ Parents with intellectual disabilities, especially mothers (upon whom the majority of studies have focused), are at increased risk of living in poverty, experiencing high parenting stress, and having histories of trauma and abuse.⁹² Yet, many children of parents with intellectual disabilities do not display any delays or worse outcomes than children of parents without intellectual disabilities.⁹³

In an effort to better understand how children of parents with intellectual disabilities are faring, researchers have increasingly sought to ascertain the extent to which contextual characteristics

⁹⁰ See, e.g., Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRIT. J. SOC. WORK 459, 463 (1993) (internal citations omitted) (“There is no clear relationship between parental competency and intelligence A fixed level of intellectual functioning is neither necessary nor sufficient for adequate parenting[,] . . . and the ability of a parent to provide good-enough child care is not predictable on the basis of intelligence alone”).

⁹¹ See generally Int’l Ass’n for the Sci. Study of Intellectual Disabilities Special Interest Research Grp. on Parents and Parenting with Intellectual Disabilities, *Parents Labeled with Intellectual Disability: Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities*, 21 J. APPLIED RES. INTELL. DISABILITIES 296 (2008) [hereinafter IASSID SIRG] (reviewing state of knowledge on parents with intellectual disabilities and their children).

⁹² See Marjorie Aunos et al., *Mothering with Intellectual Disabilities: Relationship Between Social Support, Health and Well-Being, Parenting and Child Behaviour Outcomes*, 21 J. APPLIED RES. INTELL. DISABILITIES 320, 327 (2008); Eric Emerson & Philip Brigham, *The Developmental Health of Children of Parents with Intellectual Disabilities: Cross Sectional Study*, 35 RES. DEV. DISABILITIES 917, 920 (2014); M. Meppelder et al., *Parenting Stress and Child Behaviour Problems Among Parents with Intellectual Disabilities: The Buffering Role of Resources*, 59 J. INTELL. DISABILITY RES. 664, 665 (2014).

⁹³ See generally MAURICE FELDMAN & MARJORIE AUNOS, COMPREHENSIVE COMPETENCE-BASED PARENTING ASSESSMENT FOR PARENTS WITH LEARNING DIFFICULTIES AND THEIR CHILDREN (2010); see also David McConnell et al., *Developmental Profiles of Children Born to Mothers with Intellectual Disability*, 28 J. INTELL. & DEV. DISABILITY 122, 131-32 (2003).

rather than parental disability has predicted child outcomes. For example, studies have shown that children of parents with intellectual disabilities are more likely to have behavioral and social challenges if the parents also have histories of childhood trauma or mental health diagnoses.⁹⁴ Moreover, children are more likely to have emotional, behavioral, learning, or physical disabilities if their parent has mental illness in addition to an intellectual disability.⁹⁵ Another study found that low socioeconomic status rather than a parent's intellectual disability predicted child behavior problems or frequent accidents and injuries.⁹⁶ Decreased social support for parents can also lead to worse intellectual, academic, and behavioral outcomes for children of parents with intellectual disabilities.⁹⁷ Notably, a recent study compared health and developmental outcomes of 9-month-old infants of mothers with and without intellectual disabilities and found no differences.⁹⁸ Hence,

[t]he practice implications of these findings are clear-cut. When working with parents, [child welfare workers and judges] must beware *the presumption of incompetence*; approach each case with an *open mind*; and avoid what might be called *the mistake of false attribution* or seeing all the problems parents may be having entirely in terms of their learning difficulties.⁹⁹

B. *Supports and Services for Parents with Intellectual Disabilities and their Children*

In addition to the misconception that parents with intellectual disabilities cannot care for their children, child welfare agencies and courts also often presume that they are unable to benefit from family preservation and reunification supports and services. In other words, there is a belief that parents with intellectual disabilities are unable to learn the necessary skills to safely parent. How-

⁹⁴ See, e.g., Sue McGaw et al., *Prevalence of Psychopathology Across a Service Population of Parents with Intellectual Disabilities and Their Children*, 4 J. POL'Y & PRAC. INTELL. DISABILITIES 11, 18-19 (2007); Sue McGaw et al., *Predicting the Unpredictable? Identifying High-Risk Versus Low-Risk Parents with Intellectual Disabilities*, 34 CHILD ABUSE & NEGLECT 699, 705-08 (2010).

⁹⁵ See Maurice Feldman et al., *Parental Cognitive Impairment, Mental Health, and Child Outcomes in a Child Protection Population*, 5 J. MENTAL HEALTH RES. INTELL. DISABILITIES 66, 83 (2012).

⁹⁶ See Emerson & Brigham, *supra* note 92.

⁹⁷ See Maurice A. Feldman & Nicole Walton-Allen, *Effects of Maternal Mental Retardation and Poverty on Intellectual, Academic, and Behavioral Status of School-Age Children*, 101 AM. J. MENTAL RETARDATION 352, 361 (1997).

⁹⁸ See G. Hindmarsh et al., *Mothers with Intellectual Impairment and Their 9-Month-Old Infants*, 59 J. INTELL. DISABILITY RES. 541, 548 (2014).

⁹⁹ Booth & Booth, *supra* note 90, at 463.

ever, “a number of studies have documented programs that have successfully taught parenting skills to cognitively delayed parents.”¹⁰⁰ Indeed, “[a] consistent research finding is that many parents labelled with intellectual disability can learn, apply new knowledge and maintain new skills[.]”¹⁰¹ For instance, studies have found that if provided appropriate and accessible training, many parents with intellectual disabilities can learn how to complete a variety of tasks related to care for babies, such as bathing, diaper changing, and cleaning baby bottles.¹⁰² Parents with intellectual disabilities can also gain skills related to child health and home safety,¹⁰³ appropriate child interaction and play,¹⁰⁴ and completing household chores, such as menu planning and grocery shopping.¹⁰⁵

According to the International Association for the Scientific Study of Intellectual Disabilities, “[p]arents labelled with intellectual disability acquire parenting knowledge and skills when appropriate teaching methods are used[.]”¹⁰⁶ Such programs must be individually tailored to meet the parent’s learning styles, taught in the home, and adapted to meet the needs of parents with intellectual disabilities.¹⁰⁷ Further, research indicates that training shall “incorporate modelling and simplified verbal and visual techniques and allow opportunities for practice with feedback and positive reinforcement” and additional training may be required periodically.¹⁰⁸

C. *Limitations of Research*

Surely, social science can and should be used to advance the rights of parents with intellectual disabilities. That said, the legal profession must understand the studies’ limitations. Although there is a substantial base of knowledge, many of the earlier studies

¹⁰⁰ Collentine, *supra* note 80, at 555.

¹⁰¹ IASSID SIRG, *supra* note 91, at 301.

¹⁰² See, e.g., Maurice A. Feldman et al., *Effectiveness of a Child-Care Training Program for Parents At-Risk for Child Neglect*, 24 CAN. J. BEHAV. SCI. 14 (1992).

¹⁰³ See, e.g., Gwynnyth Llewellyn et al., *Promoting Health and Home Safety for Children of Parents with Intellectual Disability: A Randomized Controlled Trial*, 24 RES. DEV. DISABILITIES 405, 407, 425-27 (2003).

¹⁰⁴ See, e.g., Bette Keltner et al., *Effects of Family Intervention on Maternal-Child Interaction for Mothers with Developmental Disabilities*, 17 FAM. & COMMUNITY HEALTH 35 (1995).

¹⁰⁵ Richard E. Sarber et al., *Teaching Menu Planning and Grocery Shopping Skills to a Mentally Retarded Mother*, 21 MENTAL RETARDATION 101, 105-106 (1983).

¹⁰⁶ IASSID SIRG, *supra* note 91, at 301.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

used small samples, therefore limiting generalizability.¹⁰⁹ Even some extant studies with larger sample sizes may be skewed because they were drawn from clinical settings or families already involved with the child welfare system.¹¹⁰ In response, there has been a call for studies that use large, population-based data that allow for more robust analysis, greater generalizability, and comparisons between disabled and nondisabled parents.¹¹¹

IV. USING SOCIAL SCIENCE TO ADVANCE FAMILY DEFENSE

As this article demonstrates, the notion that people with intellectual disabilities are innately unfit to parent did not happen in a vacuum. Indeed, bias and speculation about the parenting capabilities of people with intellectual disabilities has driven law and policy for more than a century. Hence, in order to undo decades of prejudicial policies, practices, and adjudications, the legal profession must take a multi-pronged approach.

This Part considers how social science can be leveraged by the legal profession to advance parental rights for individuals with intellectual disabilities. Specifically, this Part suggests ways social science can be utilized both inside and outside of the courtroom. Finally, this Part concludes with recommendations for areas needing further inquiry. Collectively, this multidisciplinary approach can result in significant changes for families headed by parents with intellectual disabilities.

A. *Leveraging Social Science Inside and Outside of the Courtroom*

As attorneys, we have an ethical responsibility to be zealous advocates for clients.¹¹² In order to carry out this important mandate, we must use every “tool” in our “toolbox.” I contend that this toolbox must include social science research to advance the rights of parents with intellectual disabilities and their children.

According to the International Association for the Scientific Study of Intellectual Disabilities, “[s]tatutes and ‘expert opinion’ give legitimacy to the widespread, prejudicial and empirically invalid assumption that parents labelled with intellectual disability do

¹⁰⁹ Gwynnyth Llewellyn & Gabrielle Hindmarsh, *Parents with Intellectual Disability in a Population Context*, 2 CURRENT DEV. DISORDER REP., 119, 120 (2015).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2015) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

not have the capacity to raise children[.]”¹¹³ Indeed, “[i]gnoring methodologically sound social science research, the Court has based its opinions on such unreliable sources as the ‘pages of human experience.’”¹¹⁴

As this article demonstrates, child welfare decisions, whether at the agency or trial level, are driven by two overarching presumptions. First, policies, practices, and adjudications are based on the supposition that parents with intellectual disabilities are categorically unfit to raise children. Second, parents with intellectual disabilities are either denied family reunification and preservation supports and services because they are assumed unable to learn or are proffered one-size-fits-all supports and services that do not meet their individual needs, thereby setting the parents up for failure. In the courtroom, attorneys can combat bias and speculation about the capabilities of parents with intellectual disabilities through the use of longstanding research. Some judges appear more inclined to base decisions on “intuition” rather than scientific fact. However, as aptly stated by Dale Larson,

whether or not judges endorse the use of empirical social science, they nearly always apply social psychology in their decisions. However, the psychology actually applied is generally based on intuitive or common sense theories. The problem with this approach is that common sense theories “often turn out to be wrong” in behavioral science.¹¹⁵

Hence, “[s]ocial science research can make a valuable contribution . . . [by helping to] define problems, identify possible solutions, and challenge underlying normative assumptions.”¹¹⁶

Practically speaking, attorneys must leverage social science research throughout their representation of parents with intellectual disabilities. Attorneys should cite to empirical evidence, along with legal authorities, in every motion and brief filed. Research on parents with intellectual disabilities can also be used to bolster re-

¹¹³ IASSID SIRG, *supra* note 91, at 303.

¹¹⁴ Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court’s Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1594 n.137 (1992) (citations omitted).

¹¹⁵ Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 468 (2008) (footnotes omitted).

¹¹⁶ Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L.J. 631, 632 (1994); see also John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 L. & HUM. BEHAV. 571, 571 (1991) (“American courts use social science research in three distinct ways: to make law, to determine facts, and to provide context.”).

quests for reasonable accommodations by child welfare agencies. Although social science in and of itself cannot determine the fate of cases, it can be used to strengthen cases by combating categorical assumptions about the capabilities of parents with intellectual disabilities as well as inform appropriate and effective supports and services aimed at keeping families together while ensuring parents have the necessary skills.

Furthermore, the legal profession must take a more prominent role in advocating for systemic change in child welfare policies and practices that unjustly separate families led by parents with intellectual disabilities based on antiquated and biased notions.¹¹⁷ I contend that our experiences litigating cases involving these families coupled with social science can be used to inform changes in policy, such as dependency statutes that currently allow for discrimination against parents with intellectual disabilities and their children. “Although the ultimate choice of a policy is a normative decision, and as such, not something any of these studies could determine, research can inform and improve the quality of the policy debate and public discourse that leads up to law reform.”¹¹⁸

B. Areas of Future Research and the Need for Collaboration

As this article demonstrates, there is an urgent need for collaboration between the fields of law and social science. “As more legal scholars use social science and more social scientists become familiar with legal issues, it will become easier for the disciplines to interact.”¹¹⁹ More importantly, I believe a multidisciplinary effort is vital to advancing the rights of parents with intellectual disabilities and their children.

First, a partnership between the disciplines can inform future social science. For example, according to Drs. Megan Kirshbaum and Rhoda Olkin,

Much of the research on parents with disabilities has been driven by a search for problems in these families. The pathologizing assumptions framing such research presuppose negative effects of the parents’ disabilities on their children. The perennial pairing of parents with disabilities and problems in children perpetuates the belief in deleterious effects of parental

¹¹⁷ Kevin R. Johnson, *Lawyering for Social Change: What’s a Lawyer to do?*, 5 MICH. J. RACE & L. 201, 206 (1999) (“History reveals . . . that the most penetrating changes in society have occurred when litigation complemented a mass political movement . . .”).

¹¹⁸ Ramsey & Kelly, *supra* note 116, at 632.

¹¹⁹ *Id.* at 684.

disability on children.¹²⁰

Although greater elucidation of the challenges these families face, particularly using population-based data, is needed to inform interventions to support these families, social science must be expanded to better understand other important topics. Indeed, research related to outcomes of older children of parents with intellectual disabilities would be useful to address concerns that parents with intellectual disabilities will eventually be unable to care for their children. Moreover, research on the strengths of these families is desperately needed. A collaboration will allow the legal field to play an important role in advising research on other areas that would help advance family defense, including further studies on effective family supports. Additionally, future research must examine strategies for preventing child welfare involvement by supporting parents with intellectual disabilities and their children earlier on.

Second, legal scholars and social scientists must collaborate to conduct empirical research related to the interaction between child welfare agencies and courts and parents with intellectual disabilities and their families. Such research should analyze case law to determine barriers to reunification for families headed by parents with intellectual disabilities. Research must also seek to quantify the effect of bias in these cases.

CONCLUSION

Not all parents with intellectual disabilities can safely care for their children; however, nor can all nondisabled parents. Strikingly, disability is the only instance in which it is acceptable—and legal—to terminate the parental rights of a group of people based on a condition rather than a behavior. Thus, I contend that we must urgently move beyond deciding the fate of families vis-à-vis broad-based presumptions about categories of families and instead act to ensure that decisions are based on sound evidence.

Representing parents with intellectual disabilities is unquestionably challenging work. In addition to the normal demands of representing parents in child welfare disputes, representing parents with intellectual disabilities often requires attorneys to dedicate further time to understanding disability law, interacting with numerous providers, and taking extra time to accommodate the

¹²⁰ Megan Kirshbaum & Rhoda Olkin, *Parents with Physical, Systemic, or Visual Disabilities*, 20 *SEXUALITY & DISABILITY* 65, 66 (2002).

client's disability-related needs. Nonetheless, if we are to truly carry out our duty to be zealous advocates, we must expand our work by constantly seeking and employing new ways to advance family defense, including leveraging social science research.

For far too long, parents with intellectual disabilities have had their rights to raise children restricted under the supposition that they are simply incapable. Indeed, "[t]oo often, in the realm of parental rights, legislators, social workers, psychologists, and judges have been unable to look beyond a parent's label."¹²¹ As this article demonstrates, by leveraging social science, the legal field can transform decision-making in dependency cases as well as public policy concerning parents with intellectual disabilities.

In the end, we need to shift the presumption that people with intellectual disabilities are unfit to raise families and instead we must assume they are capable and we need to support them. Although this will not hold true for all parents, it will for many. As research shows, this is a more logical viewpoint. Most importantly, it is more humane.

¹²¹ Watkins, *supra* note 46, at 1419.