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Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act

Dave Shade*

Grief fills the room up of my absent child,
Lies in his bed, walks up and down with me,
Puts on his pretty looks, repeats his words,
Remembers me of all his gracious parts,
Stuffs out his vacant garments with his form . . .
O Lord! My boy, my Arthur, my fair son!
My life, my joy, my food, my all the world!
My widow-comfort, and my sorrows' cure!¹

Introduction

The right to establish a home and raise children is among the most basic of civil rights, long recognized as essential to the orderly pursuit of happiness.² Cherished as this right may be, however, it has been violated, abused or just ignored for people with disabilities.³ Although persons with disabilities have made signifi-

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1. WILLIAM SHAKESPEARE, KING JOHN, act 3, sc. 4 (David Bevington ed., Bantam Books 1988) (1594). Few experiences elicit devastation as universal as that evoked by the loss of parenthood.

2. See Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253, 258 (1991) (citing Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a state law forbidding the teaching of any modern language, other than English, to any child who has not passed the eighth grade, invades the liberty guaranteed by the Fourteenth Amendment); *In re Carmaleta B.*, 579 P.2d 514 (Cal. 1978) (holding that parenting is a fundamental right which may be disturbed only in extreme cases where the parent or parents act in a fashion incompatible with parenthood); *In re B.G.*, 523 P.2d 244 (Cal. 1974) (holding that a juvenile court may award custody of a child to a nonparent only upon a clear showing that such award is essential to avert harm to the child)).

3. Numerous examples will be developed, *infra* Part I.B. There may be no clear preference for the proper language to be used when referring to people with disabilities. In fact, in 1991, a New York foundation sponsored a \$50,000 contest

cant gains in recent years in overcoming the invidious discrimination with which they have long been burdened,⁴ the legal rights of parents⁵ with disabilities remain in question. Because society places so much importance on protecting the children involved in any evaluation of parental fitness,⁶ the tension between parent, child, and government offers fertile ground for the abuse of the family headed by one or more parents with disability.

This Article argues that the Americans with Disabilities Act (ADA),⁷ signed by President Bush on July 26, 1990, offers parents with disabilities significant empowerment with which they may secure this sacred trapping of liberty. Part I of this Article begins by reviewing the basic rights afforded to parents by the Constitution and describes the restrictions imposed on states when they in-

for the "best" phrase to describe the abilities of people with disabilities. See Jane West, *The Evolution of Disability Rights*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 3, 10 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) [hereinafter IMPLEMENTING THE ADA]. The "people first" approach, that is, to refer to any group of individuals by starting with reference to their personhood, before reference to the other characteristics that link them with the group (i.e. "persons with disability" instead of "disabled"), is perhaps most widely accepted. However, one prominent disabled woman, Judith Heumann, has criticized the "people first" approach and argues that the term "disabled" may be preferable. See Judith E. Heumann, *Building Our Own Boats: A Personal Perspective on Disability Policy*, in IMPLEMENTING THE ADA, *supra*, at 251, 262.

This Article will generally use the "person first" approach, except when the context requires otherwise or when the subject or object has expressed a desire for a different reference form. Any reference to the population of persons without disability, however, will generally use the term "nondisabled" as opposed to "person without disability." The nondisabled, as a group, have not been subjected to the long history of discrimination that has been visited upon persons with disabilities, and to the extent that a violation of the "people first" rule serves to highlight this fact, any offense should be well taken.

This Article will also interchange the terms "persons" and "people" and the terms "with disability" and "with disabilities." The occasional use of the construction "persons with disability" instead of "persons with disabilities" is intended to evoke some sense of the condition of disability as separate and distinct from the individual impairments that may create disability. Cancer, alcoholism, and schizophrenia may all be managed or controlled in some people, but the affected individuals may still live "with disability" even when they are free of symptoms for long periods of time.

4. See *infra* Part II (explaining causes of action under the ADA).

5. For purposes of this Article, the terms "parent" and "parents" may be used interchangeably to refer to a single parent or a couple, married or unmarried, with one or more children. In addition, both terms may refer either to one or more persons who already have children, or to a person or persons presently trying to have children via unaided conception, medical intervention, or adoption. Thus, the term "parent" may refer to one or more present parents, prospective parents, or some combination of both (as in the case of a parent who has a child and is attempting to have another).

6. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

7. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

terfere with those rights. In addition, Part I describes the available evidence demonstrating that parents with disabilities can successfully raise their children, despite their many differing abilities. Finally, Part I introduces a framework that may prove helpful in subsequent analyses. Part II presents the ADA and describes its multi-faceted approach to attacking discrimination faced by persons with disabilities. Parts III and IV apply the ADA to some of the contexts in which parents with disabilities may face discrimination. This analysis, however, is limited to those contexts in which the purported discrimination is based on concerns about parental unfitness, as opposed to other forms of discrimination that happen to be directed at a parent with disability. Part III focuses on parenting contexts in which the formation of the family is at issue by analyzing possible applications of the ADA to the areas of assisted reproductive technologies (ARTs) and adoption. Part IV focuses on parenting contexts in which the family has already been formed but is threatened by state action, such as when the state seeks a termination of parental rights (TPR). This Article argues that while the ADA does not foreclose all opportunities for discrimination directed against parents with disabilities, it does offer those parents significant empowerment for the self-protection of their parental rights.

I. Parents' Rights

A. *Constitutional Protections of Parents' Rights*

Perhaps the seminal statement on the Constitution's protections for the rights of parents comes from the United States Supreme Court's description of the Fourteenth Amendment in *Meyer v. Nebraska*:⁸

While this Court has not attempted to define ["liberty"] with exactness . . . the term has received much consideration. . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁹

8. 262 U.S. 390 (1923).

9. *Id.* at 399 (emphasis added).

Subsequent decisions have further defined the contours of the law's protection of parental rights. *Pierce v. Society of Sisters*¹⁰ reaffirmed the liberty interest held by "parents and guardians to direct the upbringing and education of children under their control."¹¹ In *Ginsberg v. New York*,¹² the Court observed that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."¹³ The importance of parents' rights is hard to overstate. As the Court said in *Stanley v. Illinois*:¹⁴ "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.'"¹⁵ In 1972, in *Wisconsin v. Yoder*,¹⁶ the Court invalidated a Wisconsin law that compelled Amish children to attend school, ruling that the strong state interest in the compulsory schooling of children must fail when balanced against "the rights of parents to direct the religious upbringing of their children."¹⁷ Most recently, in 1978, the Court, quoting its opinion in *Prince v. Massachusetts*,¹⁸ said "[i]t is cardinal with us that 'the custody, care and nurture of the child resides first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'"¹⁹

However, it is equally well recognized that parents' tremendous liberty interests in children are neither absolute nor unassailable. "To be sure, the power of the parents . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."²⁰ Under their *parens patriae* power, states claim the authority to protect the "best interests" of children by limiting, and, under extreme circumstances, severing the parents' rights.²¹ Most frequently, "extreme circumstances" involve in-

10. 268 U.S. 510 (1925).

11. *Id.* at 534-35.

12. 390 U.S. 629 (1968).

13. *Id.* at 639.

14. 405 U.S. 645 (1972).

15. *Id.* at 651 (citations omitted).

16. 406 U.S. 205 (1972).

17. *Id.* at 233.

18. 321 U.S. 158 (1944).

19. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

20. *Yoder*, 406 U.S. at 233-34.

21. See ROBERT L. BURGDOFF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT 948 (1980).

stances of child abuse and neglect.²² Balancing the interests of children against the interests of parents in deciding cases of abuse and neglect is difficult and delicate. The Supreme Court has determined that the Constitution calls for the balance to be struck by requiring states, in cases of child neglect, to prove by "clear and convincing evidence" the need for the termination of parental rights (TPR).²³ In most cases, the termination of parental rights on the basis of neglect requires satisfaction of two general elements: one, that the TPR be in the child's "best interests"; and two, that the parents possess a degree of culpability.²⁴ Often, the child is placed in foster care²⁵ until the parents regain custody (assuming there is no TPR), the child reaches the age of majority, or the child is adopted.²⁶

As might be expected, the tension between protecting children and preserving parents' rights results in a great deal of controversy. Children's rights advocates argue that the "clear and convincing" standard does too little to protect children, who may be harmed by staying in a dangerous home any longer than necessary. They support a standard in which the state would be required to demonstrate the need for a TPR only by a "preponderance of the evidence."²⁷ On the other hand, parents' rights advocates argue that the higher "beyond a reasonable

22. *See id.*

23. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

24. *See, e.g., MARK HARDEN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS* 20 (1996). Parental fault need not necessarily be volitional. *See id.* at 11.

25. In this Article foster care refers to the placement of the child in a temporary home. The foster parents, while exercising day-to-day control over the child, do not stand in the place of the child's parents; the state retains that responsibility. Most foster parents receive a monthly payment in return for their service.

The foster care system, in which the state asserts responsibility for the child, has been the subject of growing concern and there have been many calls for its reform. *See Marsha Garrison, Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983) (proposing a new standard for parental rights termination in which a court may not consider termination unless it has first deprived the natural parent of legal custody and appointed a permanent guardian; even then, the court may not terminate other parental rights unless it finds that the child would suffer specific, significant harm which cannot be averted by any less drastic alternative).

26. TPR is not the only process by which children may enter the foster care system. In fact, in many states children are placed into foster care before the initiation of TPR proceedings. *See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-814* (1995). In some states, TPR proceedings are contemporaneous with the adoption of the child. That is, a neglected child may remain in foster care without the termination of the parents' rights until prospective adoptive parents are located. *See, e.g., id.; FAM. LAW § 5-312* (Supp. 1996).

27. *See Catherine B. Gabriels, Santosky v. Kramer: Due Process and the Interest of the Child in Permanent Neglect Proceedings*, 47 ALB. L. REV. 680 (1983).

doubt" standard is needed to protect parents who would lose their children merely because a "better" home is available.²⁸ Moreover, controversy also surrounds the standards by which the courts measure the "need" for a TPR proceeding.²⁹ That is, must the parents commit some affirmative wrong for the state to remove a child? Both these issues, the substantive standards and the degree of proof, remain contentious, and the law in this area continues to evolve.

B. Parents with Disabilities

Data on parents with disabilities are difficult to find.³⁰ People with disabilities have been called America's largest minority group,³¹ but no one knows how many people with disabilities are becoming parents.³² However, it is known that parents with disabilities encounter difficulty and prejudice. Several recent incidents received widespread media attention. In one, Tiffany Callo, a California woman with cerebral palsy³³ who was confined to a wheelchair, agreed to relinquish her two children after local authorities threatened to remove them.³⁴ In another, county social workers in Michigan denied assistance to Leigh Campbell-Earl and Bill Earl, both with cerebral palsy, after the couple called their local social services agency for help in caring for their child.³⁵ County social services told the couple that no financial help exists for nondisabled children.³⁶ Moreover, the social services agency warned the Earls that their baby would be removed if they were unable to provide appropriate care.³⁷

28. See Patricia J. Falk, *Why Not Beyond a Reasonable Doubt?*, 62 NEB. L. REV. 602 (1983).

29. See HARDEN & LANCOUR, *supra* note 24, at 20.

30. See Jay Mathews, *Custody Battle: The Disabled Fight to Raise Their Children*, WASH. POST, Aug. 18, 1992, at Z10.

31. See *id.* In 1990, Congress found that at least 43,000,000 Americans had one or more physical or mental disabilities. See 42 U.S.C. § 12101(a) (1994).

32. See Mathews, *supra* note 30, at Z10.

33. As is common for people with cerebral palsy, Ms. Callo was originally labeled as "mentally retarded," a fact that resurfaced and was used against her during her struggles to keep her children. See *id.*

34. See *id.*

35. See *id.* Even though the agency denied the Earls assistance with their baby, the county provided the couple with sophisticated voice computers, wheelchairs, and other aids and services. See *All Things Considered: Disabled Parents Without Aid for Well Kids* (NPR radio broadcast, July 15, 1992) (transcript available in LEXIS, News Library, Script File).

36. See Mathews, *supra* note 30, at Z10.

37. See *id.*

The prejudices faced by parents with disabilities are severe. In the famous case of *In re Carney*,³⁸ the California Supreme Court reversed the trial court's decision to award custody of a man's children to the man's former wife solely because he had become confined to a wheelchair.³⁹ Although it was overturned, the trial court's decision paints an all-too-familiar picture of the parent with a disability: unable to provide care, unable to provide love, unable to be a parent.⁴⁰ This picture demonstrates "a judicial presumption of unfitness in many cases involving child custody for handicapped parents."⁴¹ This presumption manifests itself differently depending upon the disability: "deaf parents are thought to be incapable of effectively stimulating language skills; blind parents cannot provide adequate attention or discipline; and parents with spinal cord injuries cannot adequately supervise their children."⁴² Parents with mental disability may face even greater prejudice,⁴³ notwithstanding an estimated 20,000 births that occur each year to women who have mental retardation.⁴⁴ In specifying grounds for the termination of parental rights, many states' statutes list mental illness or mental retardation as specific grounds for the termination of the parent's rights,⁴⁵ some include physical disability,⁴⁶ and others simply list "disability" as a grounds for termination without defining or explaining the appropriate use of the term in this context.⁴⁷

38. 598 P.2d 36 (Cal. 1979).

39. See *id.* at 37.

40. The trial judge in *Carney* seemed most concerned with the fact that the father would be unable to participate in sports with his children. See *id.* at 40.

41. Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities*, 60 BROOK. L. REV. 1069, 1082-83 (quoting LAURA A. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS 185 (1984)).

42. *Id.* at 1083.

43. The nation's long and unfortunate history (perhaps not ended) with the involuntary sterilization of individuals (mostly women) with mental disability has been described well elsewhere. See, e.g., MENTAL RETARDATION AND STERILIZATION (Ruth Macklin & Willard Gaylin eds., 1981) (explaining the matter of sterilization, whether voluntary or involuntary, of the mentally incompetent).

44. See *News: Struggle to Be Normal, Part 3 - Retarded Parents* (CNN television broadcast, Sept. 28, 1994) (transcript available in LEXIS, News Library, Script File).

45. See Joseph R. Carrieri, 'Gregory K': A Termination of Parental Rights Case, N.Y. LAW J., Oct. 8, 1992, at 1 (citing ALA. CODE § 26-18-7(a)(2) (1992); COLO. REV. STAT. § 19-3-604 (Supp. 1996); HAWAII REV. STAT. § 571-51 (1993); N.Y. SOC. SERV. L. § 384-b (1992); 23 PA. CONS. STAT. § 2511(a) (1991)).

46. See, e.g., KAN. STAT. ANN. § 38-1583(b)(1) (1994); LA. CH. CODE art. 1003(10)(c) (1995).

47. See, e.g., MD. CODE ANN., FAM. LAW § 5-313(d)(i) (Supp. 1996).

Although there may be legitimate concerns about the abilities of some of these parents, it is useful to begin any study of parenting abilities with the wisdom of the reviewing court in *Carney*:

Contemporary psychology confirms what wise families have perhaps always known—that the essence of parenting is not to be found in the harried rounds of daily carpooling endemic to modern suburban life, or even in the doggedly dutiful acts of “togetherness” committed every weekend by well-meaning fathers and mothers across America. Rather, its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult’s own experience of life; its motive power is parental love and concern for the child’s well-being; and its teachings deal with such fundamental matters as the child’s feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life. . . . [H]owever limited his bodily strength may be, a handicapped parent is a whole person to the child who needs his affection, sympathy, and wisdom to deal with the problems of growing up.⁴⁸

Regrettably, there is far too little research on parenting with a disability. The available evidence suggests that although parents with disabilities may have a very *different* approach to parenting,⁴⁹ the presence of a disability (physical or mental) is a poor correlate of long-term maladjustment in children.⁵⁰ In a study of parents with mental retardation, the single best correlate of “well-adjusted” children⁵¹ was the availability of support services.⁵²

48. *In re Marriage of Carney*, 598 P.2d 36, 44 (Cal. 1979). Note that even this sensitive judge felt it necessary to restrict his comments to parents with physical disabilities, excluding parents with mental disabilities.

49. For example, a parent with limited upper body mobility might take much longer to change her baby’s diaper than a parent with no disability. However, it would be a mistake to conclude that this “difference” was a detriment to the baby. In the case of Tiffany Callo, *see supra* text accompanying notes 33-34, who did require much longer to change her baby, one reviewing expert concluded that the baby adapted extremely well to the difference, and that, in fact, the extra time spent by the mother with her baby could very well be a benefit. *See Mathews, supra* note 30, at Z10.

50. *See* Barbara Y. Whitman et al., *Training in Parenting Skills for Adults with Mental Retardation*, 34 SOC. WORK 431, 433 (1989) (noting that there are many cases where parents with disabilities have been successfully taught how to perform certain tasks for children that they otherwise would not have been able to perform because of their disability); Steven A. Rosenberg & Gay Angel McTate, *Intellectually Handicapped Mothers: Problems and Prospects*, CHILDREN TODAY, Jan.-Feb. 1982, at 24 (explaining that IQ is not a good predictor of parenting ability).

51. The term “well-adjusted child” is difficult to define.

52. *See* Maurice A. Feldman et al., *Parent Education Project I: Development & Nurturance of Children of Mentally Retarded Parents*, 90 J. MENTAL DEFICIENCY 253, 258 (1985) (stating that there is no correlation between mother’s I.Q. and

Thus, although the data are far from clear, it seems safe to conclude that many parents with disabilities previously thought unable to raise a child at all may actually be able to do so, and that many more parents with disabilities may succeed in raising their children if provided appropriate support services.⁵³

C. A Proposed Analytical Framework

To aid in the process of evaluating parental abilities, this Article proposes the following analytical framework. The framework divides parents into three categories: parents who cannot be suitable,⁵⁴ no matter how much help or assistance they receive ("never suitable"); parents who require no assistance to be suitable ("always suitable");⁵⁵ and parents who may be unsuitable without support services, but who can, with the provision of appropriate services, become or remain suitable ("suitable with help").⁵⁶ The task in any parental fitness evaluation is first, to categorize the parent properly; and second, if the parent is found to belong in the "suitable with help" category, to identify the services necessary to keep the parent suitable. The first step may sometimes prove difficult, even for the most open-minded evaluator, when faced with the task of assessing parents with severe disabilities. Our society is only now learning to understand the different approaches and abilities of people with disabilities. Many people would probably feel uncomfortable, for example, concluding that a blind parent could ever be suitable, and many more would resist classifying as suitable a parent with mental illness or retardation. Yet, it is un-

child neglect until mother's I.Q. falls under 60); Audrey Myerson O'Neill, *Normal and Bright Children of Mentally Retarded Parents: The Huck Finn Syndrome*, 15 CHILD PSYCHIATRY & HUM. DEV. 255, 267 (1985) (arguing that the parent's I.Q., or other indices of mental ability, is not a good predictor of a child's adjustment until the parent's I.Q. falls under 60).

53. The ability to procure appropriate support services should increase with the socio-economic status of the individual or the individual's family because wealthy people are able to purchase any needed services that are not provided by the state. For example, parents needing in-home assistance with their children might choose to hire such help if they are financially able.

54. The term "suitable" was chosen instead of the more common term "fit" because a lack of ability to provide appropriate care ("unsuitable") does not automatically point to a lack of love and devotion (which may be implied by the term "unfit").

55. Thus, for a parent who is "always suitable" but has a disability, any perception of parental unfitness must be attributed to prejudice, stereotyping, or an inability to accept different parenting approaches. The term "always" in this context is meant to suggest that these parents presently require no assistance to provide for the needs of any children.

56. Deciding how many and what kind of services would be required before a "suitable with help" parent would become a "suitable" parent remains a question under this framework.

controverted that most blind parents, many parents with mental illness, and some parents with retardation are, in fact, "always suitable,"⁵⁷ and raise wonderful families despite the dual burdens of disability and discrimination. The key is to categorize each individual family based on the relevant circumstances and to ignore outmoded biases based on prejudice and misconceptions. The categorization will generally be most helpful when determined in reference to a specific child. A parent who is completely paralyzed may be "always suitable" for a sixteen-year-old, but "suitable with help" for an infant, or "never suitable" for a child with extensive special needs.

This framework may be useful because it focuses attention on the objective components of a parent's abilities.⁵⁸ In particular, trying to decide what services, if any, a presumed "suitable with help" parent requires might lead an evaluator to realize that specific services are not needed and that the parent in question is actually "always suitable."⁵⁹ Moreover, the framework allows for segregation of different aspects of a parent's abilities. Parents with disabilities, like all parents, can have negative parenting attributes in combination with their disability, such as a mother with cancer who is also physically abusive to her child. When this parent's abilities are evaluated, she might be found to be "suitable with help" with respect to her disability, but "never suitable" with

57. That is, there have been at least *some* parents with these and other disabilities who have successfully raised their children. The term "always suitable" does not mean that all parents with similar disabilities are suitable, or that the specific parents at issue might not become unsuitable given a change in circumstances. The term "always suitable" instead means that the specific parents at issue are presently capable of raising their children without assistance, and the term is used to equate parents with disability with their nondisabled counterparts (to whom the label "always suitable" would apply with respect to lack of disability).

58. Unfortunately, prejudice will likely remain a part of the categorization process despite any analytical devices.

59. Consider as an example the prospect of evaluating a blind couple with a toddler. Initially, many people might hesitate to call such a couple "always suitable" even with evidence that they have successfully raised the child thus far. "Never suitable," implying that the couple is completely incapable of raising their child despite the provision of extensive support services, also seems an inappropriate choice, because some (actually, nearly all) blind people are fully capable of raising a child without extensive outside assistance. However, if the couple is "suitable with help," what services are necessary to keep them "suitable"? Certainly 24-hour attendant care is unnecessary; daily visits by a social services worker are unlikely to do more than provide momentary peace of mind; and, in fact, in most cases, such a couple needs no special services. The reality is that many blind parents have children, sighted and unsighted, and previously sighted parents become blind due to disease or accident, and most are capable of being successful parents without special support services.

respect to the abuse.⁶⁰ The framework works best when applied together with consideration of support services because proper use of the "suitable with help" category requires information about those services that might offer assistance; the greater the number and diversity of services considered, the more parents can be categorized as "suitable with help" instead of "never suitable." The interplay between available services and parent categorization is necessarily fact-specific and should be considered on a case-by-case basis. Analytically, the categorization should not be limited by the poor availability of support services in a specific community; rather, appropriate categorization should spur improved design of support programs.

The goal of every parental-fitness determination should be *never* to leave children in the care of a "never suitable" parent, *never* to interfere with the family of an "always suitable" parent, and *always* to identify the "suitable with help" parent, identifying also which services will keep that parent "suitable."

II. The Americans with Disabilities Act

Prior to the enactment of the Americans with Disabilities Act (ADA) in 1990, the Rehabilitation Act of 1973 (Rehab Act) was the only major piece of civil rights legislation generally protecting persons with disability.⁶¹ Although an important piece of civil rights legislation, the Rehab Act only applies to employers and other recipients of federal funding⁶² and is therefore severely limited in scope.⁶³ However, several of the key concepts of the ADA are derived from the Rehab Act and judicial interpretations of it. In particular, the Rehab Act gave rise to the ADA's "reasonable accommodation" and "undue burden" concepts, and the Supreme Court

60. The ability to isolate the disability-related aspects of a parent's fitness may become very important in establishing an ADA claim. It is, of course, possible that there would be overlap between characteristics related to disability and characteristics unrelated to disability. In the example of a mother with cancer who abuses her child, the abuse may be related to a mental condition caused by the cancer or its treatment, or it might predate the cancer. Courts (or other evaluators) would need to answer these difficult factual questions when using this analytical framework.

61. Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794 (1994).

62. *See id.* § 794.

63. The Rehab Act also suffers from "weaknesses . . . [that] arise from its statutory language, the limited extent of its coverage, inadequate enforcement mechanisms and erratic judicial interpretations." Helen L. v. DiDario, 46 F.3d 325, 331 (3rd Cir. 1995) (footnote omitted) (quoting Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 431 (1991)).

case *School Board v. Arline*,⁶⁴ in interpreting and applying the Rehab Act, defined the parameters of the ADA's "direct threat" defense.⁶⁵ The ADA specifically adopted certain provisions of the Rehab Act,⁶⁶ and incorporated by reference or language other Rehab Act concepts.⁶⁷ The Rehab Act remains in force and is available in any claim against a recipient of federal funds, but in general, the ADA is a more effective tool in the parenting context given its broader scope and more flexible enforcement provisions.

A. Structure

The ADA is comprised of five titles, devoted to employment (Title I), public services (Title II), public accommodations (Title III), telecommunications (Title IV), and miscellaneous provisions (Title V).⁶⁸ Congressional findings, codified in the Act, describe the extent of discrimination suffered by persons with disability.⁶⁹ The scope of the ADA clearly is meant to be broad: "It is the purpose of this Act . . . to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."⁷⁰

Critical to the ADA is the definition of disability. Congress chose to be inclusive in its definition, extending the ADA to all persons with impairments that substantially limit major life activities, providing protection to all persons with disability.⁷¹ The Act makes no distinctions between physical and mental impairments; thus, the same standards apply to both. Deciding to whom

64. 480 U.S. 273 (1987).

65. For a discussion of these terms, see *infra* Part II.B.

66. For example, under certain circumstances, the ADA explicitly adopts remedies available under the Rehab Act. See 42 U.S.C. § 12132 (1994) (enforcement of ADA against public entities).

67. See, e.g., *id.* § 12102 (auxiliary aids and services); *id.* § 12134 (ADA regulations must be consistent with Rehab Act).

68. See *id.* 42 U.S.C. §§ 12101-12213.

69. See *id.* § 12101(a) (1)-(9). Some of the more notable findings include that 43,000,000 Americans have one or more physical or mental disabilities; that discrimination persists and continues to be a pervasive social problem; and that the Nation's goals are to assure equality of opportunity, full participation, independent living and economic self-sufficiency for individuals with disability. See *id.*

70. *Id.* § 12101(b)(4).

71. "The term 'disability' means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment."

Id. § 12102(2). Moreover, the ADA also prohibits so-called "associational discrimination" based on relationship or association with an individual with disability. See 42 U.S.C. § 12182(b)(1)(E) (1994) (Title III); 28 C.F.R. § 35.130(g) (1995) (Title II).

the ADA applies is an inquiry critical to any ADA analysis, and has been discussed elsewhere.⁷² For the present discussion, however, this threshold question will be considered to have been answered in favor of the parent with the alleged disability. That is, this Article will assume that any potential plaintiffs have met their *prima facie* burden of showing they have a disability and, therefore, are entitled to ADA protection.

The ADA sections that are the most relevant in the present context are Titles II and III. Title II, "Public Entity," applies to any state or local government, and any department, agency, or other instrumentality of such a government.⁷³ The operative language of Title II prohibits, for a "qualified individual with a disability,"⁷⁴ the exclusion from participation in or the denial of the benefits of the services, programs, or activities of a public entity. Regulations implementing Title II are promulgated by the Department of Justice.⁷⁵ The remedies for a violation of Title II are the same as those under the Rehab Act;⁷⁶ these include administrative complaints, litigation leading to equitable relief⁷⁷ and attorney's fees.⁷⁸ Moreover, money damages may be available under a recent Supreme Court decision⁷⁹ permitting such damages under a similar law (Title IX of the Education Amendments of 1972).⁸⁰ In the parenting context, money damages are of little use; parents with disabilities want their children, not money, although the ability to recover at least attorney's fees enables greater access to justice in the face of discriminatory treatment by a public entity.

Title III, "Public Accommodations," applies generally to any private entities engaged in interstate commerce.⁸¹ Like Title II, it

72. For a concise yet excellent introduction to the definition of "disability" under the ADA, see Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, in *IMPLEMENTING THE ADA*, *supra* note 3, at 35, 38-42.

73. See 42 U.S.C. § 12131(1).

74. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

75. See *id.* § 12134.

76. See *id.* § 12133.

77. For example, one type of relevant equitable relief would be an order compelling the public entity to end the discriminatory practice.

78. See Linda Kilb, *Title II-Public Services, Subtitle A: State and Local Government's Role*, in *IMPLEMENTING THE ADA*, *supra* note 3, at 87, 108.

79. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

80. See Kilb, *supra* note 78, at 108.

81. The ADA specifies several dozen entities that are public accommodations, but the list, while long, is not meant to be complete. See 42 U.S.C. § 12181.

prohibits discrimination in broad terms: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation"⁸² The definition of discrimination includes "denial of participation,"⁸³ "participation in unequal benefit,"⁸⁴ "separate benefit,"⁸⁵ *the use of eligibility criteria that have the effect of discriminating*,⁸⁶ and the failure to make reasonable modifications in policies⁸⁷ or to provide auxiliary aids⁸⁸ to prevent any of the above. The Department of Justice also promulgates the regulations implementing Title III.⁸⁹ Remedies for violations of Title III include administrative claims, injunctive relief, attorney's fees, and under certain circumstances, monetary damages.⁹⁰ As noted above, however, injunctive relief, rather than monetary damages, is likely to be the remedy of greatest interest in the parenting context.

B. Defenses⁹¹

The ADA provides for several statutory and regulatory defenses. Both Title II and Title III permit an exception to the "no discrimination" requirements if doing so would "fundamentally alter" the nature of the program or service at issue.⁹² For Title III, the ADA explicitly includes an "undue burden" defense,⁹³ which tends to limit the costs that may be required of an entity to accommodate people with disabilities, but there may be a question as to whether the "undue burden" defense is available to a Title II defendant.⁹⁴ The ADA's implementing regulations specify several factors to be weighed when considering an undue burden claim: "(1) the nature and cost of the action . . . (2) the overall financial

82. *Id.* § 12181(a).

83. *Id.* § 12182(b)(1)(A)(i).

84. *Id.* § 12182(b)(1)(A)(ii).

85. *Id.* § 12182(b)(1)(A)(iii).

86. *See id.* § 12182(b)(2)(A)(i).

87. *See id.* § 12182(b)(2)(A)(ii).

88. *See id.* § 12182(b)(2)(A)(iii).

89. *See id.* § 12186(b).

90. *See id.* § 12188.

91. For detailed discussion of the application of ADA defenses, see *infra* Parts III.B.2, IV.B.1-3. Although not discussed in this text, all of the defenses considered are also available under Title I.

92. 42 U.S.C. § 12182(b)(2)(A)(ii) (Title III); 28 C.F.R. § 35.130(b)(7) (1996) (Title II).

93. 42 U.S.C. § 12182 (b)(2)(A)(iii).

94. *See infra* note 315 (discussing acceptance by some courts of the "undue burden" defense in Title II claims).

resources of the site or sites involved . . . the effect on expenses and resources . . . [and] (4) if applicable, the overall financial resources of any parent corporation or entity"⁹⁵ Although the standards for applying this test will be developed more fully in the context of specific ADA claims, it is worth noting that the term "undue" in the defense should be read as implying a balancing of the interests at stake. That is, a relatively low "cost"⁹⁶ might be an "undue burden" when the deprivation caused by the discrimination at issue is slight, such as might be the case if a person confined to a wheelchair sought an extremely expensive modification to avoid a two block detour to an accessible facility entrance. However, considerably higher costs should be borne, without becoming "undue," when the deprivation is significant. Given the high protections afforded parents by the Constitution, courts should countenance "undue burden" claims that would tend to interfere with parents' rights only under the most extreme circumstances.⁹⁷

In *School Board v. Arline*,⁹⁸ the Supreme Court interpreted the Rehab Act in a case involving a school teacher infected with tuberculosis.⁹⁹ The teacher was dismissed from her position after the third recurrence of the disease. After concluding that tuberculosis did constitute a handicap under the statute, the Court considered whether the Rehab Act's "otherwise qualified" requirement barred recovery because the plaintiff was potentially infectious and therefore might constitute a threat to her students.¹⁰⁰ In its analysis, the Court articulated the standards that were later incorporated into the regulations implementing a "direct threat" defense for Title III of the ADA.¹⁰¹ This defense, adopting the Rehab Act standards of the *Arline* decision, shields an entity from liability when the service or accommodation at issue poses a "significant risk to the health or safety of *others* that cannot be eliminated by modification of policies."¹⁰² The determination of a "direct threat" must include "an individual assessment, based on reasonable

95. 28 C.F.R. § 36.104.

96. The burden need not be financial.

97. On the other hand, the state's interests in protecting children would not be appropriately considered under the "undue burden" standard, even though the state might argue it bears a social burden when children are harmed. Because the "burden" is borne by an identified person or persons, rather than by the state as a whole, and because the burden takes the form of the risk of harm, it is better considered in the "direct threat" context.

98. 480 U.S. 273 (1987).

99. *See id.* at 273.

100. *See id.* at 287.

101. *See* 28 C.F.R. § 36.208 (1996).

102. *Id.* § 36.208(b) (emphasis added).

judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; [and] the probability that the potential injury will actually occur.”¹⁰³ The determination may not be based on generalizations or stereotypes.¹⁰⁴

Although Title II does not explicitly include the “direct threat” defense, it may be read into its mandate that the person with disability meet the “essential eligibility requirements for the receipt of [the] services [at issue]”¹⁰⁵ which may be compared with the Rehab Act’s “otherwise qualified” requirement.

C. Conclusion

The ADA represents a substantial movement toward the elimination of discrimination on the basis of disability. While its strictly legal protections should not be underestimated, of equal or greater importance is its potential for promoting public acceptance of the diversity brought to society by people with disabilities. In the short term, the legal empowerment offered by the ADA in the way of litigation opportunities (and the threat of litigation) offers great hope to people with disabilities. In the long term, however, the greatest benefit provided by the ADA may be its ability to eliminate the need to resort to legal means; its full promise may be realized when those who would discriminate on the basis of disability learn that there is no reason to do so.

III. Parents with Disabilities Forming Families

For the majority of heterosexual couples in which one or both partners has a disability, conceiving a child and starting a family presents no greater difficulty than for the nondisabled population. However, approximately one in six American couples will experience infertility¹⁰⁶ at some point,¹⁰⁷ and nearly fourteen percent of

103. *Id.* § 36.208(c).

104. *See id.*

105. 42 U.S.C. § 12131(2) (1994). It is reasonable to conclude that an “essential” eligibility requirement could include a standard for the safety of third persons. This was the approach the Court used in *Arline*. *See* 480 U.S. at 287. For the purposes of this Article, it will generally be assumed that the “direct threat” defense is available in a Title II claim.

106. Infertility is defined as “the inability of a couple to conceive after twelve months of intercourse without contraception.” OFFICE OF TECH. ASSESSMENT, 100th CONG., INFERTILITY: MEDICAL AND SOCIAL CHOICES 3 (May 1988) [hereinafter OTA INFERTILITY REPORT].

107. *See* Philip Elmer-Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56 (discussing advances in infertility treatments).

married couples who are not surgically sterile are infertile during any given year.¹⁰⁸ Because disability has only a neutral or negative impact on fertility,¹⁰⁹ people with disability who wish to have children are equally or more likely than the nondisabled population to experience infertility. Thus, it would be expected that at least fourteen percent of heterosexual couples trying to conceive, in which at least one partner has a disability, are infertile during any given year, and at least one sixth of such couples will experience infertility sometime during their relationship.

Most couples troubled by infertility respond by seeking a medical evaluation.¹¹⁰ Depending upon the cause of the difficulty in conceiving, the couple may choose to pursue more extensive medical interventions in the form of assisted reproductive technologies (ARTs), they may choose to pursue an adoption, or they may delay or cancel their plans to have a child. For people with disabilities, the decision to pursue one of these family-building alternatives may be more likely, even in the absence of infertility, if the disability is genetic or presents a risk to a child.¹¹¹

A. Assisted Reproductive Technologies (ARTs)

ARTs represent a broad spectrum of medical technologies designed to treat infertility or otherwise aid conception. The most basic ARTs include diet alterations, lifestyle changes, and drug or hormone therapy.¹¹² More sophisticated interventions may include artificial insemination by husband (AIH) or anonymous donor (AID), or any of a family of complex surgical procedures commonly referred to as *in vitro* fertilization (IVF).¹¹³ All but the most basic

108. See OTA INFERTILITY REPORT, *supra* note 106, at 3.

109. That is, a disability does not enhance fertility, but many disabilities may impair fertility. See, e.g., *id.* at 193 (stating that spinal cord injury is associated with poor fertility prognosis in men).

110. OTA INFERTILITY REPORT, *supra* note 106, at 3.

111. Thus, an HIV-infected man and his wife might choose to investigate artificial insemination by donor (AID) or adoption, assuming such choices were available to them, even if neither was infertile.

112. See OTA INFERTILITY REPORT, *supra* note 106, at 117-21.

113. IVF as used in this Article refers to all of the surgical infertility treatments, even though many of these procedures involve neither "*in vitro*" techniques nor "fertilization." Among these procedures are "classic" IVF, in which a woman's egg is harvested and fertilized outside the body, and then implanted in the donor's or another recipient's uterus; GIFT (gamete intra-fallopian transfer), in which eggs and sperm are combined in the fallopian tube; ZIFT (zygote intra-fallopian transfer), in which an egg is fertilized as in classic IVF and then placed in the fallopian tube; and ICCI (intra-cellular cytoplasmic injection), in which a sperm cell is injected directly into an egg, with the resulting zygote then implanted into the uterus or placed in the fallopian tube. For a more thorough discussion of infertil-

of these interventions require the services of a medical professional, most often a reproductive endocrinologist¹¹⁴ or a urologist.¹¹⁵

1. Likelihood of Discrimination

ARTs have been the subject of heated popular debate, but the focus of most of the public attention has been the status of the children resulting from these techniques,¹¹⁶ or the high costs of the treatments. Little attention has been paid to the process by which patients are accepted for treatment, although the medical community has been somewhat concerned with the implications of postmenopausal motherhood¹¹⁷ and some writers have been concerned with the implication of ARTs for homosexual sperm donors.¹¹⁸ The American Fertility Society, in its official guidelines for ARTs, states simply that the "inability to rear children" may be an ethical reason for denying access to ARTs.¹¹⁹

A comprehensive Congressional Office of Technology Assessment (OTA) report issued in 1988 failed to address access from anything but a financial perspective.¹²⁰ Interestingly, a separate

ity treatments, see *id.* at 117-35.

114. Reproductive endocrinology is a subspecialty of the medical field obstetrics and gynecology.

115. OTA INFERTILITY REPORT, *supra* note 106, at 3-5.

116. See, e.g., Michael S. Simon, "Honey, I Froze the Kids": Davis v. Davis and the Legal Status of Early Embryos, 23 LOY. U. CHI. L.J. 131 (1991); John Dwight Ingram, *In Vitro Fertilization: Problems and Solution*, 98 DICK. L. REV. 67 (1993). More specifically, much of the public focus has been on whether the union of an egg and sperm is a "child."

117. See, e.g., Eike-Henner Kluge, *Reproductive Technology and Postmenopausal Motherhood*, 151 CAN. MED. ASSOC. J. 353 (1994) (recommending the exclusion of postmenopausal women); Donald Rieger, *Gamete Donation: An Opinion on the Recommendations of the Royal Commission on New Reproductive Technologies*, 151 CAN. MED. ASSOC. J. 1433 (1994) (also recommending the exclusion of postmenopausal women). In fact, the British seem to be far ahead of Americans in considering these kinds of issues, perhaps in part due to the public financing of most or all medical interventions. For an excellent discussion of the British view of ARTs access issues, see Ken Daniels & Karyn Taylor, *Formulating Selection Policies for Assisted Reproduction*, 37 SOC. SCI. MED. 1473 (1993). There has been no comparable discussion by Americans. The British discussion does not address discrimination in the access to ARTs. See *id.*

118. See, e.g., Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1 (1996) (discussing the legal status of a homosexual sperm donor who is involved in his child's life).

119. See Ethics Comm., Am. Fertility Soc'y, *Ethical Considerations of Assisted Reproductive Technologies*, 62 FERTILITY AND STERILITY 18s, 19s (Supp. 1 Nov. 1994). These guidelines are designed to provide a framework for consideration, not to create requirements for ARTs providers. See *id.*

120. See OTA INFERTILITY REPORT, *supra* note 106, at 20.

report on artificial insemination issued by the same body only three months later revealed considerable potential for discrimination during the patient acceptance process.¹²¹ OTA surveyed 1,213 fertility society physicians¹²² during the summer of 1987.¹²³ These doctors reported that one in five patients seeking artificial insemination is rejected.¹²⁴ The most common rejection criteria were non-medical: patient unmarried (52% of rejections), "psychologically immature" (22%), homosexual (15%), or welfare dependent (15%).¹²⁵

When asked "[h]ave you ever rejected or would you be likely to reject a request for artificial insemination from a potential recipient because she was/has: _____", the results indicated a surprising willingness on the part of the physicians to make social judgments.¹²⁶ Sixty-one percent had rejected, or would be likely to reject, an unmarried woman without a partner;¹²⁷ 85% would reject a psychologically immature woman; 79% would reject a woman with a history of a serious genetic disorder;¹²⁸ 95% would reject a woman with HIV infection; 32% would reject a woman with less than average intelligence; and 9% of infertility-specialist physicians reported that they would reject a woman because she had less than a high school degree.¹²⁹

The OTA also reported that about half the cohort (52%) performed a "personality assessment" on their potential recipients, 44% screened for genetic diseases, and 74% screened for "selected diseases."¹³⁰ In at least some cases, the purpose of these screening mechanisms was "to detect diagnosable mental illness or to address more general considerations of fitness for pregnancy *and* motherhood."¹³¹ The physicians surveyed represent the same group that would provide ARTs services other than artificial in-

121. See OFFICE OF TECH. ASSESSMENT, 100th. CONG., ARTIFICIAL INSEMINATION: PRACTICE IN THE U.S. 33 (Aug. 1988) [hereinafter OTA ARTIFICIAL INSEMINATION REPORT].

122. Fertility society physicians were defined as members of either the American Fertility Society or the American Society of Andrology. See *id.* at 3.

123. See *id.*

124. See *id.* at 27.

125. *Id.* Responses total more than 100% because multiple rejection criteria were permitted in the survey. See *id.*

126. See *id.* at 29.

127. Only 49% would reject an unmarried woman with a male partner. See *id.*

128. The question did not distinguish between genetic disorders that were certain, likely, or very unlikely to be inherited by the children of an individual or couple. See *id.*

129. See *id.*

130. See *id.* at 25.

131. *Id.* (emphasis added).

semination;¹³² thus, the results are generally applicable to the experiences of anyone seeking access to ARTs even though the survey focused on artificial insemination practices.

There have been no reported decisions of any kind of discrimination case brought against a provider of ARTs services, nor have there been any newspaper accounts of such discrimination. However, the OTA survey results indicate not only the high likelihood of future discrimination, but that actual treatment decisions have been based on social factors that may well have been discriminatory. Given the discrimination that persons with disabilities have endured in the past, it seems assured that they will encounter discrimination in at least some of their experiences when seeking access to ARTs. However, this Article analyzes only discrimination that is based in whole or in part on the provider's conclusion that the prospective patient *should not be a parent* because of a disability.¹³³ That is, a provider who refuses to treat a woman with mental retardation because the provider is prejudiced against people with developmental disabilities could proceed under an "ordinary" ADA analysis,¹³⁴ but a provider who refuses to treat a woman married to a man with multiple sclerosis because the provider does not think a "handicapped man" can be an effective father will be considered in this discussion.¹³⁵ Furthermore, it is important to distinguish between discrimination against disability and discrimination against other characteristics that may appear in combination with disability. For example, a lesbian quadruple-

132. See OTA INFERTILITY REPORT, *supra* note 106, at 3-5.

133. Thus, the discussion will be limited to what might be termed "parental unsuitability disability discrimination."

134. This is not to imply that this form of discrimination is less repugnant than any other form, but the present discussion is limited to discrimination on the basis of disability in the evaluation of parental fitness. ARTs providers often offer a range of services broader than just reproductive technologies, including, for example, routine gynecological services. If such a provider were to discriminate against a potential patient with disability regardless of the type of service to be provided, then the discrimination will be considered to be unrelated to an evaluation of parental fitness. Even if the particular provider offers only ARTs services, it is possible for him or her to discriminate on the basis of disability without that discrimination being related to parenting. People with disability encounter a great deal of discrimination when trying to gain access to all kinds of medical services. See, e.g., *United States v. Morvant*, 898 F. Supp. 1157 (E.D. La. 1995) (involving a dentist who refused to treat HIV-positive patient despite lack of evidence of risk to dentist or other patients); *Simenson v. Hoffman*, No. 95 C 1401, 1995 WL 631804 (N.D. Ill. Oct. 24, 1995) (concerning a family practitioner who refused to treat child with pneumonia because of unrelated non-contagious skin disorder; doctor yelled repeatedly at parents, in front of the child, after seeing lesions).

135. The ADA's prohibitions include discrimination based on association with a disabled person. See 42 U.S.C. § 12182(b)(1)(E) (1994) (Title III); 28 C.F.R. § 35.130(g) (1996) (Title II).

gic may be refused AID because her physician feels that quadriplegics should not be parents, but the same patient could be denied AID because the physician is opposed to lesbian parenting.¹³⁶ People with disability display the entirety of human behavior, and the same alternative, unusual, and offensive manifestations of character found in the nondisabled are found among those with disability.¹³⁷

2. Anatomy of an ADA Claim

Most facilities offering ARTs services are either hospitals or free-standing medical offices.¹³⁸ If the facility in question is a public entity, such as a state-run hospital, then Title II of the ADA applies; otherwise, Title III applies.¹³⁹ In either case, the presentation of a discrimination claim would begin with the plaintiff establishing (1) membership in the protected class of persons with disability,¹⁴⁰ and (2) his or her exclusion from participation in the services of the ARTs facility.¹⁴¹ At least in the Title II context, establishing membership in the protected class may require the plaintiff to demonstrate that he or she is "qualified" to receive ARTs services. The commentary accompanying the implementing regulations for Title II refers to the absence of valid defenses when defining "qualified."¹⁴² In other words, a "qualified individual" is

136. Again, this is not to suggest that either form of discrimination is tolerable or legal; however, the present analysis is concerned only with the former. Homosexuality is explicitly *not* a disability, see 28 C.F.R. § 35.104(5)(i) (1996); *id.* § 36.104(5)(i), so discrimination against a lesbian, without more, would not violate the ADA.

137. Patients seeking access to ARTs may be more prone to disability discrimination that is unrelated to parenting ability than would parents in the other contexts discussed in this Article, because the provision of services at issue is further removed from the parenting context. In decisions regarding adoption or the termination of parental rights, the ability to parent is directly at issue whereas in decisions regarding ARTs, conception is directly at issue. In other words, the ARTs provider is primarily concerned with the manipulations necessary to achieve pregnancy, not parenthood.

138. See OTA INFERTILITY REPORT, *supra* note 106, at 97 (explaining trends of people seeking infertility services).

139. See 42 U.S.C. § 12131 (1)(B) (Title II); 42 U.S.C. § 12181 (7)(F) (Title III). Because ARTs services are always provided at physical "facilities" (i.e. hospitals or medical clinics), there is no need to consider whether Title III applies to "programs" not offered at fixed "places." See *infra* note 213 and accompanying text.

140. See 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. 35.130(g) (1995); *supra* note 71 and accompanying text (quoting the statutory definition and explaining that associational disability discrimination is also included in the definition according to the regulation).

141. See 42 U.S.C. § 12132 (public entity); *id.* § 12182 (public accommodation).

142. See U.S. E.E.O.C. & U.S. DEPT OF JUSTICE, AMERICANS WITH DISABILITIES

one who does not require a fundamental alteration to the program at issue, who does not present a direct threat to another, and who does not present an undue burden to the program.¹⁴³ In the ARTs context, the "exclusion from participation" element will most likely be the complete refusal by the defendant to provide ARTs services to the patient with disability. It is possible, however, that the provider might agree to provide only some forms of treatment. For example, a doctor might agree to write a prescription for ovulation drugs but refuse to provide more intensive IVF services. To be relevant to the present discussion, the refusal to provide IVF services would have to be based upon the doctor's belief that the patient's disability would prevent proper parenting. While it is unlikely that such a belief would permit the doctor to offer the initial prescription but not the more intensive services, the possibility should be considered.

In the context of parental disability discrimination, the "undue burden" defense,¹⁴⁴ while available, is unlikely to help the defendant because most ARTs programs would not be burdened if compelled to consider all patients with disability as suitable parents.¹⁴⁵ The "fundamental alteration" defense is similarly ineffectual.¹⁴⁶ The "direct threat" defense, however, is both available¹⁴⁷ and likely to be employed.

ACT HANDBOOK II-27 (1992) [hereinafter ADA HANDBOOK] (explaining 28 C.F.R. § 35.104).

143. In short, the "qualified individual" language often seems to be used as a shorthand method of referring to an individual not triggering a valid defense. The "qualified individual" language was drawn from the Rehab Act's "otherwise qualified" language. The Rehab Act, however, did not include the explicit defenses found in the statute and regulations of the ADA. Thus, the courts fashioned these defenses to the Rehab Act using the "otherwise qualified" language. Because the defenses to the ADA are explicit, any additional limitations imposed by the "qualified individual" language are minor.

144. See *supra* notes 93-97 and accompanying text (explaining the undue burden defense).

145. It is possible that the patient with a disability could present a burden, perhaps even an "undue burden," to the ARTs facility, such as a case in which a prospective patient requires extensive physical alterations to the ARTs facility to gain access. However, this burden would be associated with the patient's status as a person with a disability, and not with the patient's ability or inability to parent a child.

146. An ARTs program could claim a "fundamental alteration" if the program includes a philosophical component that would be opposed to child rearing by a certain segment of society. For example, an ARTs program affiliated with a religious organization (ignoring the fact that many religions are opposed to ARTs services) might refuse to treat an HIV-positive former prostitute on the basis of some moral or philosophical objection. This is unlikely, however, to be based on a belief that an HIV-positive former prostitute is an inappropriate parent, distinct from the belief that an HIV-positive former prostitute should not get general medical services. In short, this would be another example of discrimination based on dis-

a. *The "Direct Threat" Defense*

The "direct threat" defense offers limited or total immunity to an appropriately situated ADA defendant. Both Title II and Title III likely require the same standard for the defense,¹⁴⁸ that of a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies."¹⁴⁹ The ARTs provider may seek to employ this defense in two different ways.

First, the provider may argue that the provision of ARTs services, followed by a successful conception and pregnancy, would lead to the birth of a child with one or more parents unable to provide appropriate care. For example, the doctor who has been asked to provide artificial insemination by husband (AIH) services to a paraplegic couple may express doubt that the couple is capable of safely raising a child. Second, the provider may argue that the patient's disability would present a risk to the child during the gestational period. Examples of this concern might include HIV-infection (of the patient or the patient's partner) with risk of transmission to the child, developmental disability interfering with appropriate prenatal care, mental illness manifested as suicidal or violent tendencies, or any genetic disability that might interfere with a healthy pregnancy or be transmitted to the child. In either case, that of gestational concern or child-rearing concern, the provider might argue that protection of the child who would result from the successful provision of the ARTs services requires the treatment refusal.

i. *Gestational Concerns*

"Gestational concerns" may present significant difficulties for a plaintiff if the concerns are based upon a medical risk. The "direct threat" defense requires an "individualized determination."¹⁵⁰ The ARTs provider in most cases is a physician, usually a reproductive endocrinologist with training and experience in obstetrics, the branch of medicine specifically trained to manage

ability, but where the object of the discrimination is not parental unfitness. See *supra* note 134 and accompanying text (discussing people with disabilities' encounters with discrimination).

147. The "direct threat" defense is available to defendants in both Title II and Title III actions. See *supra* notes 101-105 and accompanying text (outlining the direct threat defense).

148. See *supra* notes 101-105 and accompanying text.

149. 42 U.S.C. § 12182(b)(3) (1994); see *supra* notes 101-105 and accompanying text.

150. See 28 C.F.R. § 36.208(c) (1996).

pregnancy.¹⁵¹ Thus, the provider is capable of rendering an individualized expert medical opinion about the potential risks to the child¹⁵² *when those risks are of a medical nature*. Once a physician has rendered a judgment about a matter of medical expertise within that physician's field of competence, a court is unlikely to overrule that opinion if it is based upon scientific evidence.¹⁵³ In *Arline*, the Court stated that an assessment of risk should include facts "based on reasonable medical judgments . . . about (a) the nature of the risk . . . (c) the severity of the risk . . . and (d) the probabilities the [disability] . . . will cause varying degrees of harm."¹⁵⁴ Thus, a physician refusing to provide ARTs services would probably prevail under an ADA claim where the refusal was based upon the *medical risks* to the child presented by the disability.¹⁵⁵ This would be true even if the disability were discovered by a provider who did not routinely screen patients;¹⁵⁶ the ADA requires an individualized determination that a direct threat exists, but not a practice that guarantees the detection of all direct threats.¹⁵⁷ The

151. See *supra* note 114 (explaining reproductive endocrinology).

152. Some may argue that the appropriate term is "fetus" rather than "child." There is a lack of consensus as to when a "fetus" becomes a "child," but this Article does not attempt to address that issue. Rather, this article uses the term "child" to focus on discrimination against parents, which is likely to be unrelated to the specific status of the child.

153. See *School Bd. v. Arline*, 480 U.S. 273, 288 (1987).

154. *Id.* (quoting Brief for American Medical Association as *Amicus Curiae* 19 and referring specifically to "direct threats" posed by infectious diseases). The regulations and the ADA itself clearly indicate adoption of these standards for all forms of disability, not just infectious diseases.

155. This would probably include genetic or infectious risks to the child. Of course, the plaintiff could prevail by presenting evidence that the "direct threat" standards have not been met. This is a difficult but not impossible burden when the defendant is a physician who has conducted an individualized evaluation and concluded that the risk is real. This issue becomes increasingly difficult to resolve when the risks to the child are expressed as well-established probabilities (for example, the risk of an HIV-positive woman passing the virus to her fetus is approximately 15-40%, see Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173 (1994)) because there is probably no consensus as to the level of acceptable risk. All pregnancies are at some quantifiable risk for danger to the child. The question is how much risk should permit an ARTs provider to refuse treatment?

156. This should be contrasted with other types of ADA claims in which a screening mechanism or lack thereof might be discriminatory by itself. The "direct threat" defense permits exclusion whenever the threat exists, regardless of any discriminatory practices that might be employed in detecting the threat. See *Arline*, 480 U.S. at 288. However, a discriminatory screening mechanism might give rise to a separate ADA claim (e.g., an ARTs provider administers IQ tests to patients in wheelchairs and refuses to treat patients with an IQ that is less than 100). See 42 U.S.C. § 12182 (b)(2)(A)(i) (1994); 28 C.F.R. § 35.130 (b)(3) (1996).

157. See *supra* notes 103-04 and accompanying text.

fact that the provider in this scenario might prevail may anger patients who feel that the weighing of the risks to their child should be left to them, but the ADA does not require service providers (whether public entities or public accommodations) to ignore risks to third parties, and it is common for medical professionals to exercise their own judgments when treatment implicates medical risks to third parties.¹⁵⁸

However, as some of the above examples illustrate, many instances of gestational concern could arise in which the risk to the child is not within the scope of expertise of the ARTs provider. In these instances, the provider should be required to seek an appraisal from a qualified expert before being permitted to escape liability for a discriminatory denial of access to ARTs services. Although the ADA may not require a medical (or other expert) opinion in all "direct threat" cases,¹⁵⁹ it does require an individualized determination of the "nature, duration, and severity of the risk" and the "probability that the potential injury will actually occur."¹⁶⁰

Given the medical nature of any threats posed to the unborn child of a pregnant woman, it is reasonable to conclude that most evaluations of such threats will require an advanced degree of knowledge.¹⁶¹ If the ARTs provider does not have such knowledge, he or she will need to seek out expert assistance to satisfy the

158. In fact, physicians have been held to have a duty to consider third party risks in a variety of circumstances. See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (involving a patient who revealed to his psychologist his intention to commit murder); *Wilschinsky v. Medina*, 775 P.2d 713 (N.M. 1989) (concerning a patient who was in a car accident after receiving treatment in doctor's office); *Bradshaw v. Daniel*, 854 S.W.2d 865 (Tenn. 1993) (involving a patient's spouse who contracted an infectious disease). Moreover, it is well settled that obstetricians owe a duty to a developing fetus during the prenatal period. See STEVEN E. PEGALIS & HARVEY E. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE* 2d § 3.13 (1992). It has yet to be determined the scope of the duty, if any, owed to the potential fetus in cases of ARTs.

159. The *Arline* opinion suggests that "courts normally should defer to the reasonable medical judgments of public health officials," 480 U.S. at 288, although it does not explicitly require expert testimony. Likewise, the regulations implementing the ADA require a "reasonable judgment that relies on current medical knowledge." 28 C.F.R. § 36.208(c). In practice, this becomes an evidentiary question, and while it is possible that a defendant could present a valid "direct threat" defense without medical testimony (perhaps with a very obvious threat, as with a disease widely known to be very infectious), most successful "direct threat" defenses probably will require expert testimony.

160. 28 C.F.R. § 36.208(c).

161. For example, it is less likely that most ARTs providers will have knowledge in the area of developmental disability; therefore, they might be incompetent to determine, without advice, whether an individual with mild retardation could properly care for herself during pregnancy.

"individualized determination" requirement and avoid liability for a discriminatory action. To the extent that even expert knowledge does not settle any questions that may arise (for example, when both sides agree there is a significant risk that a child would suffer an injury, but the parents wish to conceive anyway), the fact-specific resolution would turn on the *Arline* factors.¹⁶² However, the intent of the ADA clearly disallows stereotyping as a permissible factor for consideration.¹⁶³ For example, when the risk to the child is that he or she may be at risk for disability, the ADA requires reconsideration of outmoded perceptions that disability is a horrible fate inflicted upon a "victim." If the potential harm is already borne by one or both parents (e.g., infertile deaf parents with a significant risk of having a deaf child), the court would be well-advised to place great weight on the wishes of the parents having experience with the disability in question. Moreover, permitting ARTs providers any significant degree of control in selecting the allowable (desirable?) characteristics in a child raises troubling eugenics concerns and may call for the restriction of the discretion of providers when considering genetic risks.

ii. Child-Rearing Concerns

ARTs treatment refusals based on concern for the future ability of the patient to provide safe parenting may prove more problematic for defendants. In addition to the prospective nature of any such evaluation,¹⁶⁴ the evaluation of the abilities of parents with disabilities to raise their children is not generally within the scope of expertise of ARTs providers. Although the ADA does not *require* expert opinions when assessing third-person threats,¹⁶⁵ the area of parental fitness is sufficiently complex that most plaintiffs will probably succeed in shifting to the defendant the burden to show the risk of harm in all but the most extreme circumstances.¹⁶⁶ The requirement of an individualized determination

162. See *supra* text accompanying note 154 (identifying the factors).

163. See 42 U.S.C. § 12101(a)(7) (1994).

164. This discussion assumes that there are no data based on any past child-rearing experiences of the particular patient. If such data are available, then the analysis would be affected to the extent that such data may aid or hinder the defendant's claims of parental unfitness. However, the requirement of an assessment of an actual risk, and the other specific requirements of the ADA, should still be satisfied, and any changes in circumstance from a previous child-rearing experience should be considered.

165. See *supra* note 159 and accompanying text.

166. Thus, a mildly retarded patient seeking ARTs services may, simply by asserting her ability to parent effectively, compel the service provider to demonstrate a "direct threat" as a basis for a treatment refusal. Such a demonstration would be

may be enough, without more, to dissuade some ARTs providers from refusing treatment.

Many child-rearing deficiencies related to parental disability can be addressed by appropriate services.¹⁶⁷ An ARTs provider who refuses to treat such a patient (that is, a "suitable with help" parent), is, in essence, asking the patient to demonstrate that he or she can procure any services needed to be suitable.¹⁶⁸ The problem with this request is that it necessitates too much prognostication on the part of both the provider and the patient. The ability to procure services is essentially financial,¹⁶⁹ and future financial status (or need) is often difficult to predict. Moreover, any person can become partially or completely disabled at any time, but ARTs providers do not require support-service contingency plans of their nondisabled patients. ARTs providers have no special expertise in evaluating future parenting abilities, or future financial status, and in fact are less able than the patient to evaluate the specific parenting needs and abilities presented by a particular set of circumstances. Thus, the "direct threat" defense should not prevail against a "suitable with help" parent.

The conclusion that the ADA may limit the ability of ARTs providers to evaluate future parenting ability, and to decide how and whether to act based on that evaluation, may be a source of some concern to ARTs providers. The fact that the medical community apparently considers such evaluations both appropriate and necessary¹⁷⁰ evidences the extent to which such social judgments have previously been exercised by ARTs providers. However well-meaning such judgments may have been, they have undoubtedly been at times discriminatory in practice. Couples

likely to require some expert intervention since an adequate individualized determination, as required under the ADA, *see supra* text accompanying note 160, probably cannot be made by a reproductive endocrinologist with no experience in evaluating parental fitness or the abilities of the developmentally disabled. However, most courts would probably not require such an evaluation in more extreme instances, such as that of an individual with profound retardation, in which the parental fitness question is more obvious.

167. Parents with deficiencies that can be addressed by support services are appropriately categorized as "suitable with help." *See supra* note 56 and accompanying text.

168. If the parent in question is not "suitable with help," then the ability to procure support services becomes irrelevant.

169. That is, the wealthy can almost always purchase any necessary parental assistance services that are not available through family, friends or government resources. *See supra* note 53.

170. *See supra* notes 121-32 and accompanying text (demonstrating the prevalent use of evaluations by fertility society physicians and the social judgments they entail).

without infertility problems need satisfy no social criteria¹⁷¹ to implement a decision to have children.¹⁷² To use infertility treatment as a proxy for a parental fitness evaluation is both inappropriate and ineffective. Should society decide that some more thorough evaluation of parental fitness needs to attend the decision to bear a child, it should be directed at all parents, not just those who are infertile,¹⁷³ and it should be conducted by professionals trained to make such evaluations based upon objective evidence of future parenting ability, not bias or prejudice.¹⁷⁴

171. Of course, any person desiring to conceive a child must have the ability to attract a partner or to gain access to ARTs. For some individuals with disability, these criteria alone may be insurmountable obstacles.

172. *But see* Roger W. McIntire, *Parenthood Training or Mandatory Birth Control: Take Your Choice*, *PSYCHOLOGY TODAY* (Oct. 1973), at 33, 39 (arguing that society should prospectively restrict the right to parent by requiring training prior to parenthood).

173. Thus, if parental fitness evaluations are deemed necessary, they should be performed at the time of delivery, or during gestation, and not when an individual seeks treatment for infertility. That this would be both impractical and, arguably, immoral, does not detract from the likelihood that it would promote greater fairness in that it would not segregate classes of prospective parents based upon their biological fertility for an evaluation that is unrelated to the ability to conceive.

174. This could be very similar to the kind of prospective evaluation performed prior to most adoptions. *See infra* notes 220-28 and accompanying text. This is not meant, however, to advocate evaluations of all, or most, prospective parents. On the contrary, this author feels that such evaluations would be ineffective at screening bad parents from good parents. In the adoption context, prospective evaluations serve a significant educational purpose, preparing adoptive parents for the different challenges of raising adoptive children. *See infra* note 290. In addition, ARTs treatments are simply not analogous to adoptions. The primary arguments for requiring prospective evaluations of adoptive parents, but not of all parents, are the differences between raising adoptive children and biological children, and the fact that the state or agency performing the evaluation is acting as the parent until the adoption is completed. There are no data to suggest that raising a child conceived through the use of ARTs is significantly different than raising a child conceived without ARTs (although many ARTs are so new that it may be too soon to determine whether those children who become aware of their status may have some difficulties adjusting). More importantly, there is no need for the state or the ARTs provider to stand in the place of the parent for the purposes of conducting a "pre-placement" evaluation. Adoptions involve real children, who, analytically, always have a parent, whether the "parent" is the state or one or more individuals. These "parents" have a responsibility to evaluate, formally or informally, those to whom they entrust their children. In the case of children conceived with ARTs, there is no child needing the exercise of parental evaluation prior to a placement. In other words, adoption pre-placement evaluations are performed by the child's present "parents" to assure the suitability of future parents. In the ARTs context, as in unaided conception, there are no present "parents" demanding the evaluation of the future parents.

3. ARTs: Conclusions

A treatment refusal by an ARTs provider could involve any of the three analytical categories of parents with disabilities presented above.¹⁷⁵ However, because the evaluation of the "ability to parent" is not within the scope of knowledge of the lay public, or, in most cases, the providers of ARTs services, it is not possible to discern the troublesome "never suitable" category, in the context of child-rearing, without resort to outside expertise. On the other hand, ARTs providers would in many cases be qualified to identify the "never suitable" category in the context of gestational concerns based upon medical dangers. Similarly, in cases of the "suitable with help" category of parents with disabilities, child-rearing concerns should not be permitted to provide the basis for a treatment refusal, although gestational concerns for this group of parents might be a more suitable basis for refusal when based upon a medical danger.¹⁷⁶ Under no circumstances should a treatment refusal for a parent in the "always suitable" category be upheld.

The ADA reserves for the patient with disability the right to participate in treatment decisions to the same extent as the non-disabled patient.¹⁷⁷ Because ARTs services are essentially medical treatments,¹⁷⁸ the decision of whether and how to provide such treatment cannot be made solely by the provider unless based upon relevant medical judgments. Non-medical judgments rendered by ARTs providers, when not essential to the medical treatment, should be subjected to close scrutiny, particularly when they have an impact on rights as fundamental as those exercised by parents and parents-to-be. The ADA provides to patients who have been refused ARTs treatment because of their disability the power to compel an individualized determination of the actual risk posed by their disability, and the possibility of procuring access to previously denied services through legal means.¹⁷⁹ Although ARTs

175. See *supra* notes 54-56 and accompanying text (explaining the three categories of parents).

176. For example, a woman with mild retardation and diabetes who is unable to control her blood sugar level could conceivably be denied access to ARTs in the absence of support services that would permit her to manage her condition. The same woman should not be denied access if she either has no medical condition needing management, or if she can demonstrate the availability of appropriate services.

177. However, an ARTs provider should not be compelled to follow the wishes of an incompetent patient regardless of disability status.

178. ARTs services fit within the definition of "health care" and generally only physicians may offer ARTs services. See, e.g., MD. CODE ANN., HEALTH OCC. § 14-101 (1995).

179. In many instances, merely the threat of legal action may be enough for the

providers may bear additional costs (financial or otherwise) as a result, the costs are inherent in the provider's choice to interfere with the decision¹⁸⁰ to bear children that nature and society have generally left to the mother and her partner. The mere fact that the couple cannot effectuate their decision without medical assistance should not be the trigger for a heightened review of their parenting abilities.

B. Adoption

Adoption is the process through which the law substitutes for the legal rights and duties existing between a child and his or her biological parents¹⁸¹ similar rights and duties between the child and his or her adoptive parents.¹⁸² Once an adoption has been finalized, no legal bond exists between the child and the biological parents, and the adoptive parents become the only legally recognized parents of the child. Approximately three-fifths of all adoptions involve adoption by a step-parent or a relative.¹⁸³ Thus, in only about forty percent of all adoptions are the parties unrelated.

The adoption process is complex, and because it frequently involves personal judgments by parents, social workers, judges, and other adoption professionals, it is fraught with the opportunity for discrimination. The large number of different methods by which an adoption may be completed precludes a thorough discussion of all of them. This Article will address *some* of the steps that are common to many adoption scenarios and the mechanisms by which the ADA offers potential protection for prospective adoptive parents.

1. The Adoption Process

Adoption is a creature of state law. Each of the fifty states, and each of the territories, governs adoptions differently. Moreover, in every jurisdiction there are many ways by which parents may complete an adoption.¹⁸⁴ Within a single jurisdiction there

ARTs provider to "rethink" the decision to refuse treatment. When more than a mere threat is required, a skilled advocate may be able to craft an amicable resolution without resorting to litigation, although court adjudication remains available to the discrimination victim.

180. The decision remains with the patient; the ARTs provider should be viewed as only participating in the means by which that decision is effectuated.

181. Given the complexities of ARTs and surrogacy arrangements available today, there may be less than or more than two biological parents.

182. See BLACK'S LAW DICTIONARY 49 (6th ed. 1990).

183. See Spencer Rich, *Demand for Adoptions Outnumbers the Babies*, WASH. POST, Nov. 20, 1985, at A19.

184. See JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 1.01

may be different adoption scenarios depending upon the relationship between the adoptive parents and the adoptee.¹⁸⁵ Interstate adoptions are, to an extent, governed by the Interstate Compact on the Placement of Children (ICPC).¹⁸⁶ International adoptions are governed, among signatories, by the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.¹⁸⁷ In 1994, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a rewrite of the Uniform Adoption Act (UAA),¹⁸⁸ model legislation designed to provide greater consistency in state approaches to adoption law, and recommended its enactment in all of the states. Although no state has yet enacted the UAA *in toto* or in significant part, it has been introduced in several state legislatures and represents a broad composite of major aspects of the adoption process.

Adoptions may be categorized generally as either "agency" or "independent." Agency adoptions involve, as is implied, an adoption supervised by an adoption agency, and may be either public (state-run agency) or private (independent agency, such as a religiously affiliated agency). Furthermore, agency adoptions may be identified (the adoptive parents have identified the adoptee) or non-identified (at the time of initial contact, the adoptive parents have not identified the prospective adoptee). Independent adoptions may involve an identified placement¹⁸⁹ or some other facilitated match in which the birth parents and adoptive parents find each other, or a third party,¹⁹⁰ often a lawyer, may locate an adoptable child meeting certain characteristics sought by the adoptive parents. Most states have different laws regarding

(1988 & Supp. 1997).

185. Some examples of the different relationships that might exist between the parties would include step-parent and step-child adoptions, uncle-nephew adoptions, interstate adoptions involving strangers, adoption by foster parents, and international adoptions involving strangers or relatives.

186. The ICPC has been enacted in every state. For citations to specific statutes, see 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES* 95, n.192 (1993). Among other requirements, the ICPC mandates pre-placement studies for all interstate non-relative adoptions. See *id.* at 96. For the full text of the ICPC, see *id.* at 110-13. Other acts and statutes which may apply to adoptions include the UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 123 (1968); the federal Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 738A, and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1903, 1911-1923, 1931-1934, 1951, 1952, 1963 (1994).

187. The Hague Conference on Private International Law, Final Act of the Seventeenth Session, May 29, 1993, 32 I.L.M. 1134.

188. UNIF. ADOPTION ACT §§ 1-8, 9 U.L.A. 1 (Supp. 1997).

189. This might occur when a pregnant woman decides to place the child with friends of her family.

190. See HOLLINGER, *supra* note 184, § 1.05[3][b].

agency and independent adoptions, and while the UAA maintains some distinctions between the two, the standards are similar.¹⁹¹ Most jurisdictions have expedited processes for the adoption of a step-child or relative.¹⁹²

a. Agency Adoptions

Most agency adoptions include a pre-placement evaluation of the adoptive home known as a "homestudy."¹⁹³ This may be performed by the agency that will be making the actual placement decision, a separate agency, or an independent "evaluator."¹⁹⁴ Often, the homestudy includes a frank discussion with the adoptive parents about realistic expectations for the adoption process. If the evaluator¹⁹⁵ is from the same agency that will be making the placement decision, then the homestudy may also identify characteristics suitable in an adoptive child.

The agency making the placement decision, generally after the receipt of an approved homestudy, attempts to locate and match a child with characteristics suitable for the adoptive parents. Once a suitable child is located, information about him or her is forwarded to the adoptive parents. If the parents are comfortable with the match, they indicate their acceptance and the process of "assignment" is completed.¹⁹⁶ In all states, the adoption of a child without the consent of either of the birth parents may be accomplished only when a state-approved agency has studied and consented to the placement.¹⁹⁷

Following the child's birth,¹⁹⁸ and any necessary approvals (which may be especially important when the adoptee is an

191. See UNIF. ADOPTION ACT §§ 2-102, 2-103, 9 U.L.A. at 12-14; *id.* § 1.05[3].

192. See UNIF. ADOPTION ACT § 2-104; 9 U.L.A. at 14-15; UNIF. ADOPTION ACT §§ 4-101-4-113, 9 U.L.A. at 67-74; HOLLINGER, *supra* note 184, § 1.05[2][a].

193. See HOLLINGER, *supra* note 184, § 4.12 (1995). Pre-placement evaluations are required under the UAA. See UNIF. ADOPTION ACT § 2-201, 9 U.L.A. at 19-20.

194. "Evaluator" is the term used by the UAA but generally refers to a social worker licensed in the state in which the adoption will occur. A few states (e.g., California) have special standards for "adoption specialists." See UNIF. ADOPTION ACT § 2-202 cmt., 9 U.L.A. at 21.

195. The term "evaluator" will be used to refer both to the individual conducting the actual homestudy and the agency for which that individual works, if any. Thus, an evaluator's standards may actually be those decided upon by the agency, and not the individual whims of a particular social worker.

196. Most often, assignment is accompanied by a payment to the placing agency. The financial aspects of adoption are complex and beyond the scope of this Article.

197. See HOLLINGER, *supra* note 184, § 2.01[1]. Some states license private entities to perform pre-placement studies. See, e.g., MD. CODE ANN., FAM. LAW § 5-312 (1996).

198. It is not uncommon for the assignment to precede the birth of the adoptee,

"international orphan"¹⁹⁹), the child is placed in the adoptive home. Often, there will be a post-placement home visit to ensure the suitability of the adoptive placement and a waiting period.²⁰⁰ Lastly, there will be a judicial finalization, which marks the legal completion of the adoption.

b. Independent Adoptions

Under most circumstances, the UAA and a few states *require* a homestudy prior to an adoptive placement for independent adoptions.²⁰¹ However, the majority of states impose no such requirement.²⁰² In most independent adoptions, the biggest hurdle facing the parents is identifying a potential "match." This is often done through word of mouth, but sometimes via classified advertising or other means.²⁰³ After both the biological and prospective adoptive parents agree that the match is suitable²⁰⁴ and the child is born,²⁰⁵ the child is placed in the adoptive home.²⁰⁶ If there has not been a pre-placement homestudy, there will often be a post-placement home visit.²⁰⁷ After an appropriate waiting period, the adoptive parents obtain a judicial decree finalizing the adoption.

2. Application of the ADA

Although there are a variety of scenarios by which an adoption may be completed, there are common elements that are the most likely to be abused when persons with disability attempt to adopt. This section will analyze the application of the ADA to the homestudy, the primary tool used to assess the fitness of prospec-

particularly in private adoptions.

199. Under current regulations of the Immigration and Naturalization Service, the adoptee need not be an "orphan" in the traditional sense of the word, but rather must be "abandoned" according to the laws of the placing country. See 8 C.F.R. § 204.3 (1995). All international adoptions must be preceded by a homestudy. See *id.*

200. See UNIF. ADOPTION ACT § 3-601, 9 U.L.A. at 57; see also ALA. CODE § 26-10A-19(c) (1975); CAL. FAM. CODE § 226.69 (West 1994); IOWA CODE ANN. § 600.8 (West 1996); N.M. STAT. ANN. § 32A-5-31 (Michie 1978).

201. See, e.g., ALASKA STAT. § 25-23-100 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 8-120, 8-121, 8-129 (West 1993); UNIF. ADOPTION ACT § 2-201, 9 U.L.A. 20 (Supp. 1997).

202. See HOLLINGER, *supra* note 184, § 4.12[2][b].

203. See *id.* § 1.05[3].

204. Sometimes this is accomplished without the birth and adoptive parents meeting.

205. See *supra* note 198.

206. See *supra* note 198 and accompanying text (explaining that it is not uncommon for an adoptive assignment to occur prior to the adoptee's birth).

207. See, e.g., UNIF. ADOPTION ACT § 3-601, 9 U.L.A. at 57.

tive adoptive parents. Although the potential for discrimination against persons with disability exists during other stages of the adoption process, particularly the placement decision²⁰⁸ and the judicial finalization,²⁰⁹ the homestudy analysis is representative of most of the applicable issues and law.²¹⁰

In the case of adoptions in which some of the work is performed by a private adoption agency, any ADA violations would be analyzed under Title III.²¹¹ At least one court has held that Title III's "place of public accommodation"²¹² language limits its appli-

208. Discrimination during the placement process, independent of the homestudy process, raises difficult issues. If the agency works with international placements, the foreign government may impose unusual or irrational restrictions on the agency. (For example, China permits adoptions of "healthy" infants only when both parents are over 35 and the couple is infertile. *FAMILIES ADOPTING CHILDREN EVERYWHERE, THE FACE ADOPTION RESOURCE MANUAL* 57 (Clyde Tolley ed., 6th ed., 1993); Korea permits adoptions of infants only by couples married for at least three years, *see id.* at 43). It is also possible that birthmothers in the United States who might place their babies via an agency might react negatively to adoptive parents with disabilities. The ADA is unlikely to prevent such discriminatory practices because it does not apply to individuals. *See, e.g.,* *Simenson v. Hoffman*, No. 95 C 1401, 1995 WL 631804, at *4 (N.D. Ill., Oct. 24, 1995) (holding that Title III does not support a finding of individual liability, even when the individual exerts considerable control and authority in operating a place of public accommodation). Under these circumstances, adoptive parents might be better served by using separate agencies for the homestudy and the placement. If they obtain an approved homestudy, without limitation, they may succeed in persuading a placement agency to continue working with them (particularly if the placement agency is located in a different state and will have no independent opportunity to assess or evaluate the adoptive parents).

209. In the only reported decision of a claim of disability discrimination during adoption, *In the Matter of Scott J. Richardson*, 59 Cal. Rptr. 323 (Cal. Ct. App. 1967), a judge denied an adoption petition filed by a deaf couple with an approved homestudy. *See id.* at 334. At one point during the proceedings, the judge said the following:

Is this a normally happy home? There is no question about it, it is a happy home, but is it a normal home? I don't think the Court could make a finding that it is a normal home when these poor unfortunate people, they are handicapped, and what can they do in the way of bringing this child up to be the type of citizen we want him to be.

Id. at 327. All the presented evidence indicated that the petitioners were model parents and had successfully raised other children. In short, there was no evidence to support the trial judge's denial. The denial was overturned on appeal, primarily on the grounds of a state statute which prohibited "bias" and "prejudice" in judicial actions. *See id.* Among the many experts who intervened on behalf of the parents was Judge Homer Thornberry, then of the United States Court of Appeals. Thornberry, who was raised by deaf parents, wrote "I have never personally known of a hearing child with deaf parents who did not grow and develop into a worthwhile and fairly successful person." *Id.* at 328.

210. Although other stages of the adoption process might also raise interesting and novel issues concerning the ADA's applications, such issues are beyond the scope of this Article.

211. *See infra* note 214.

212. 42 U.S.C. § 12182 (a) (1994).

cability to physical facilities.²¹³ If followed, this limitation could affect claims against an adoption agency that has no "place of public accommodation," but that instead performs its public services dispersed throughout the community. However, this limitation seems unlikely to persist. First, it seems to circumvent the clear intent of the ADA; Congress surely did not mean to suggest that a public entity could discriminate at will merely by providing services without a "place." More importantly, Congress' inclusion of adoption agencies as a statutorily specified example of a public accommodation²¹⁴ seems to settle the issue in this regard.²¹⁵

A similar concern addresses "independent" evaluators, who are usually licensed social workers not affiliated with agencies. The UAA explicitly anticipates the use of such evaluators.²¹⁶ The commentary accompanying Title II's regulations states that "Title II coverage . . . is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. *All* governmental activities of public entities are covered, even if they are carried out by contractors."²¹⁷ On the other hand, Title III is not likely to apply to individuals, although it may apply to "public accommodations" operated by individuals.²¹⁸ Thus, an individual evaluator might escape liability for discrimination if the court applies a Title III analysis and is persuaded that the individual did not operate a public accommodation. However, the court might also be persuaded that an individual evaluator was an "instrumentality" of the government, if the judiciary is awaiting the results of the evaluation. In such a case, Title II would apply.²¹⁹

213. "[A] plaintiff bringing an ADA claim against an organization must allege and prove sufficient facts to support a conclusion that the organization is in some way connected to a particular place of public accommodation." *Schaaf v. Association of Educ. Therapists*, No. C 94-03315 CW, 1995 WL 381979, at *2 (N.D. Cal. June 13, 1995) (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (interpreting parallel context of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, using the same public accommodations language as the ADA)).

214. "The following private entities are considered public accommodations for purposes of this title . . . (K) a day care center, senior citizen center, homeless shelter, food bank, *adoption agency*, or other social service center establishment" 42 U.S.C. § 12181(7) (1994) (emphasis added).

215. Note that Title II does not include language that could limit its application to particular "places." Instead, all state and local government services are covered under Title II.

216. See UNIF. ADOPTION ACT § 2-202 cmt., 9 U.L.A. 21 (Supp. 1997).

217. ADA HANDBOOK, *supra* note 142, at II-9 (emphasis added).

218. See *Simenson v. Hoffman*, No. 95 C 1401, 1995 WL 631804, at *3 (N.D. Ill. Oct. 24, 1995) (establishing a test to differentiate between individuals and public accommodations owned, leased or operated by individuals).

219. The final status of an individual evaluator under the ADA awaits judicial

a. *The Homestudy*

Most non-relative adoptions are preceded by one or more evaluations of the adoptive home (homestudies).²²⁰ Some states require that a state agency must conduct the pre-placement evaluations,²²¹ but others allow any licensed child placement agency to complete a homestudy.²²² In most cases, the evaluator is a social worker, but the credentials and qualifications of homestudy workers vary widely among jurisdictions.²²³ The homestudy process may also vary widely, even within the same locality, depending upon the attitude and diligence of the individual evaluator.²²⁴ Adoption advocates encourage prospective adoptive parents to be as active as possible in the selection of the evaluator because of this wide variation and because of the importance of the homestudy in the adoption process.²²⁵

The content of a homestudy is also subject to great variation.²²⁶ Most state statutes describe the required content in very general terms, if at all,²²⁷ leaving the form and content of the study to the evaluator. The UAA specifies ten required elements,²²⁸ but

attention.

220. HOLLINGER, *supra* note 184, § 4.12. However, most states and the UAA dispense with this requirement for step-parent adoptions, and many eliminate the homestudy for independent adoptions. *See id.*; *see also* UNIF. ADOPTION ACT § 4-111, 9 U.L.A. at 72.

221. *See, e.g.*, ALA. CODE § 26-10A-19(d)(1) (1996).

222. *See, e.g.*, COLO. REV. STAT. § 19-5-209 (1996).

223. *See* HOLLINGER, *supra* note 184, § 4.12[1][b].

224. "Social studies and investigation reports may be comprehensive and useful, or cursory and useless." *Id.* § 4.12.

225. *See id.* § 4.12[1][a].

226. *See id.* § 4.12[2].

227. *See id.*

228. The section of the Act specifying the elements reads as follows:

(d) A preplacement evaluation must contain the following information about the individual being evaluated:

- (1) age and date of birth, nationality, racial or ethnic background, and any religious affiliation;
- (2) marital status and family history, including the age and location of any child of the individual and the identity of and relationship to anyone else living in the individual's household;
- (3) physical and mental health, and any history of abuse of alcohol and drugs;
- (4) educational and employment history and any special skills;
- (5) property and income, including outstanding financial obligations as indicated in a current credit report or financial statement furnished by the individual;
- (6) any previous request for an evaluation or involvement in an adoptive placement and the outcome of the evaluation or placement;
- (7) whether the individual has been charged with having committed domestic violence or a violation of [the State's child protection statute], and the disposition of the charges, or whether the individual is

also lacks any substantive criteria to be used in making the homestudy evaluation. To summarize, most jurisdictions seem to agree that some sort of prospective evaluation is appropriate before adoption, at least in non-relative adoptions, and there seems to be general agreement as to the kinds of issues to be evaluated. However, there are no standards for evaluating the findings of the homestudy or for the ultimate approval or disapproval of the prospective parents. It seems reasonable to conclude that the individual evaluator will have a tremendous amount of discretion when conducting a homestudy, perhaps making it easier for discrimination to be a part of the process.

A homestudy may discriminate on the basis of disability in two ways. First, the evaluator may simply refuse to approve any adoptive placement, judging the parents unsuitable to raise any child. Second, the evaluator may limit the approval of an adoptive placement to only those children deemed compatible with the disability of the adoptive parent.²²⁹ Thus, an evaluator may conclude that a paraplegic couple is incapable of caring for any child, but that a blind couple is capable of caring only for a blind child,²³⁰ and may approve homestudies accordingly. As previously discussed, the stereotypes and societal attitudes concerning parents with disabilities are pervasive and powerful.²³¹ Even evaluators trained to assess parental fitness are capable of falling victim to these prejudices. Social worker texts, for example, continue to propagate the

subject to a court order restricting the individual's right to custody or visitation with a child;

(8) whether the individual has been convicted of a crime other than a minor traffic violation;

(9) whether the individual has located a parent interested in placing a minor with the individual for adoption and, if so, a brief description of the parent and the minor; and

(10) any other fact or circumstance that may be relevant in determining whether the individual is suited to be an adoptive parent, including the quality of the environment in the individual's home and the functioning of other children in the individual's household.

UNIF. ADOPTION ACT § 2-203, 9 U.L.A. 21 (Supp. 1997) (emphasis added).

229. This second variety of negative homestudy could include an approved homestudy that is less than 100% supportive because of one or both parents' disabilities.

230. A blind couple wrote about such an experience in a recent magazine article. See Nadine Jacobson as told to Bill Holton, *Loving Elizabeth: A Blind Couple's Struggle to Adopt a Baby*, FAMILY CIRCLE, Oct. 10, 1995, at 94. Of particular note is the fact that neither parent's blindness was genetic. See *id.* at 95. Thus, like the vast majority of blind couples, they would probably have had sighted biological children if they were able to conceive. See *id.* at 95.

231. See *supra* Part I.B.

paternalistic tendencies that conclude that disability is an important factor in assessing parental fitness.²³²

What, then, can the hopeful adoptive parents with a negative homestudy do? The UAA permits judicial review of any disapproved homestudy,²³³ but does not specify reviewing standards. It is also silent on the issue of "limited approval" homestudies. As will be developed below, the ADA may offer a remedy, but several non-legal issues limit its usefulness. Situations in which the evaluating agency will also be making the placement decision put the adoptive parents in a terrible quandary: alienating the agency by initiating an ADA claim may jeopardize the placement process, a risk that many adoptive parents may be unwilling to take. Even where two different agencies will be making the homestudy and placement decisions, adoptive parents may fear that expressing dissatisfaction about the homestudy process or outcome could be communicated between the different agencies and might jeopardize the adoption. Finally, parents may be afraid to "cause trouble" during the present adoption out of fear that any future adoptions might be jeopardized. These fears may hinder prospective adoptive parents from seeking legal relief, regardless of the strength of their legal claims and despite specific regulations explicitly designed to protect them from retaliation.²³⁴ Thus, rather than initiating an ADA claim, these parents may be more likely either to re-apply with another agency, or delay their adoption plans in the hopes that they can "rehabilitate" themselves to the agency's satisfaction.²³⁵

When adoptive parents do resort to legal action, they face many difficulties. Almost all homestudies conclude with a written report, including detailed explanation in the case of unapproved

232. "Couples where one mate is physically handicapped may be considered, provided that they meet the foregoing health requirements and are emotionally well adjusted to the handicap." Donald Brieland, *Selection of Adoptive Parents*, in ADOPTION: CURRENT ISSUES AND TRENDS 65, 73 (Paul Sachdev ed., 1984) (quoting the 1978 Standards for Adoption Services promulgated by the Child Welfare League of America) (emphasis added). Presumably, couples where both mates are physically handicapped, or either mate is mentally handicapped, would never be considered.

233. See UNIF. ADOPTION ACT § 2-206, 9 U.L.A. at 23.

234. See 28 C.F.R. § 35.134 (1996); *id.* § 36.206.

235. The situation is similar to that of a medical malpractice plaintiff needing an operation in a one-surgeon town. Few patients would want to undergo an operation performed by a doctor with whom they are engaged in a legal struggle, no matter how competent the physician, or how valid the legal claim. The situation improves only slightly if there are other surgeons in town, especially if the original surgeon was selected for particular characteristics (such as skill), as is often the case in the selection of an adoption agency.

applicants.²³⁶ Assuming the evaluator bases the disapproval (or limited approval)²³⁷ on one or both adoptive parents' disability,²³⁸ the parents should first exhaust any formal or informal appeals process within the evaluator's administrative structure. Should this fail, however, the aggrieved parents can file an ADA claim under Title II or Title III, depending on the nature of the discriminating agency.²³⁹ If, in fact, a negative homestudy is found to be based on the prospective parents' disability, the evaluator may raise several claims in its defense.

b. Defenses

i. Defense: "Fundamental Alteration"

The evaluator may claim that its negative homestudy, although based upon a parent's disability, is necessary to avoid "fundamentally altering"²⁴⁰ the nature of its program. This defense might be raised, for example, by an adoption agency affiliated with a religious entity that is opposed to parenting by HIV-infected individuals because it believes HIV to be "punishment" for misbehavior.²⁴¹ More generally, an evaluator might argue that its "source" of adoptable children could be threatened if it began to approve placements of children with parents with disabilities.²⁴²

236. See, e.g., UNIF. ADOPTION ACT § 2-204(c), 9 U.L.A. at 22.

237. Hereinafter, a limited approval and a disapproval will be considered jointly and will be referred to as a "negative homestudy." Of course, if the prospective parents obtain a limited approval and are comfortable with the limitation, the homestudy should instead be considered approved.

238. This analysis ignores the potential problems in discerning the "true" motivations behind negative homestudy. The difficulty of determining whether "discrimination based upon disability" has in fact occurred is not unique to parental fitness evaluations and is not addressed in this Article.

239. There may be an issue as to whether a private agency acting on the behalf of the state falls within Title II or Title III, but the analysis proceeds generally the same. For information on specific differences between the Titles, see discussion *supra* Part II.

240. See 42 U.S.C. § 12182(2)(b)(2)(A)(ii) (1994) (stating that failure to modify does not constitute discrimination if the modification would fundamentally alter the nature of services).

241. This view of the AIDS epidemic has been linked to, among others, certain religious bodies. See, e.g., Margaret Farnham, *In Farm Country, Few Know How to Deal with Issue of AIDS*, CLEV. PLAIN DEALER, June 4, 1995, at 6B (quoting an AIDS prevention educator as saying "we still have ministers in the rural communities saying HIV and AIDS is God's punishment").

242. For example, an agency dealing with international placements might argue that the foreign government requires it to place children only in households meeting a certain profile. An agency that does not provide placement services would have more difficulty in making such a claim. See generally *supra* note 208 (describing foreign governments' restrictions upon placement and the ADA's inap-

This claim bears some resemblance to the "customer preference" claims sometimes raised in the employment discrimination context. However, the "customer preference" claim has not generally been accepted by the courts.²⁴³ Although there could be merit to such a claim in the adoption context, any legal challenge necessarily would be fact-specific, and would probably require the evaluator to articulate, with particularity, reasons why it could not provide a non-discriminatory homestudy without a fundamental alteration to the nature of the program. The *Arline* Court specifically rejected reasoning that would consider the non-dangerous effects of a disability on others (including fellow employees of a worker with disability, students of a teacher with disability, and fellow students of a student with disability),²⁴⁴ and it seems likely that the customer preference defense will fail under the ADA under all but the most unusual circumstances. The UAA on the other hand, *requires* a placing agency to consider the "characteristics requested by a [birth] parent" when making a placement decision.²⁴⁵ The possibility that an adoption agency might risk "losing" *some* of its adoptable children seems too remote, and too like the conventional "customer preference" situation, to permit the agency to prevail on such a claim, but the wishes of the birth parents of a specific child would, under the UAA, be binding.²⁴⁶

ii. Defense: "No Discrimination"

Perhaps the most obvious defense to an assertion of an ADA violation would be for the evaluator to claim that no discrimination occurred. There is little likelihood that a reviewing court would find that Congress intended that people with disability be assured of an *approved* homestudy. If the evaluator performs a less thor-

plicability to the discriminatory placement preferences of birth mothers).

243. See, e.g., *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993) (purported customer preference for clean-shaven pizza deliverymen not valid business justification defense); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (customer preference for female flight attendants not "bona fide occupational qualification").

244. See *School Bd. v. Arline*, 480 U.S. 273, 282-84 (1987) (explaining that Congress intended to prohibit discrimination against incidental effects of being disabled).

245. UNIF. ADOPTION ACT § 2-104(b)(2), 9 U.L.A. 14 (Supp. 1997).

246. The question of whether an adoption agency might violate the ADA if it refused to approve any prospective parents with disability because of the preferences of the specific placing birth parent is different from an agency's belief or perception that birth parents, in general, would decline to place babies with the agency if the agency approved parents with disability. Although there is no case law on a claim of this type, it seems likely that the individual birth parent's wishes would prevail.

ough homestudy, or in some way distinguishes this homestudy from those performed for the nondisabled, then this defense should fail immediately. However, the evaluator could argue that the "service"²⁴⁷ it provides is the evaluation process, rather than the desired final product, an approved homestudy. This possible defense has some appeal, but ultimately should be discounted, as it masks the true controversy: the fitness of the prospective parents. The actual service offered should be considered to be a *fair and non-discriminatory* homestudy. Since the discriminatory nature of the negative homestudy is at issue, determining whether the parents received a fair homestudy is equivalent to determining whether they are, in fact, suitable parents.²⁴⁸ Moreover, the ADA prohibits the use of "standards or criteria or methods of administration—(i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control."²⁴⁹ Thus, an agency's use of eligibility criteria that are not specifically related to parenting ability, and that are nondiscriminatory on their face but would disproportionately impact parents with disability, would violate the ADA.²⁵⁰

iii. Defense: "Direct Threat"

As could ARTs providers,²⁵¹ evaluators may claim the need for a negative homestudy in order to protect the interests of the prospective adoptee. As noted previously, the "direct threat" defense requires an individualized determination that an actual risk exists.²⁵² Unlike the presentation in the ARTs child-rearing con-

247. See 42 U.S.C. § 12132 (1994); *id.* § 12182(b)(1)(A)(I).

248. The UAA prohibits the use of race for placement purposes unless requested by the birth parent. See UNIF. ADOPTION ACT § 2-104(c), 9 U.L.A. at 15. The UAA, however, does call for consideration of the parent's "racial or ethnic background" in the pre-placement evaluation. See *id.* § 2-203(d)(1), 9 U.L.A. at 21. Thus, the UAA may be read as requiring a non-discriminatory homestudy with regard to race, absent birth parent preference. Extending this notion to disability discrimination would support an ADA claim.

249. 42 U.S.C. § 12182(b)(1)(D).

250. For example, an agency policy that adoptive parents must demonstrate some minimum income might violate the ADA, since people with disabilities have also been subject to employment and economic discrimination and might thereby be disproportionately impacted. The ADA's defenses would remain available. No reported opinion has addressed a claim of this type, so interpretation of the interplay between these ADA provisions is, thus far, speculative.

251. See *supra* Part III.A.2.a.ii (describing how ARTs providers might substitute their own social judgments for a parental fitness evaluation under the pretext of protecting the child as a third party).

252. See *supra* notes 101-105 and accompanying text (explaining the standards for a "direct threat" defense under the ADA).

text, however, in the case of a negative homestudy, the evaluator who argues the existence of the threat is, presumably, well-qualified to offer such an opinion.²⁵³ Just as in the case of the "no discrimination" defense, this defense ultimately devolves into a determination of whether the prospective parents do, in fact, represent a threat to an adoptee. In other words, are they suitable parents?²⁵⁴

c. *The Real Issues: The Standard of Review and the Burden of Proof*

In most instances of a legal dispute over a negative homestudy in which the prospective parents claim disability discrimination, the true issue in controversy is the "suitability" of the parents. In this context, it is assumed that an evaluator, with training and expertise in the area, has considered this issue and has concluded that the parents are not suitable.²⁵⁵ From the perspective of a legal challenge to this determination, then, the court must determine whether the evaluator's decision is to be upheld or reversed in reviewing a claim under a state statute unrelated to a discrimination charge²⁵⁶ or the ADA. However, the questions remain as to what standard of review and what burden of proof the

253. At least, an evaluator is as well-qualified as is possible. Given that there is no serious movement toward completely eliminating pre-placement evaluations, social workers trained to make such evaluations would appear to be the best experts available. Because the agencies involved in an adoption have the responsibility for acting as surrogates of the child's parents, pre-placement evaluations offer the best opportunity available for protecting the children, despite their limitations and reliance on uncertain prognostication.

254. In the case of a limited approval homestudy, this issue is simplified to whether approval without the limitation poses a "direct threat" to the adoptee. In practice, the limited approval may be beneficial to the prospective parents, because they could use the limited approval to demonstrate that, at least under the circumstances of the limitation, they are fit parents. The burden would then shift to the evaluator to demonstrate, under the "actual risk" standards, why the limitation offers protection to the adoptee. In short, the parents can compel the evaluator to justify the *limitation* using the same standards that would apply under a total disapproval. This is likely to be difficult given the *Arline* Court's rigorous standards. See *supra* note 154 and accompanying text.

255. This Article does not attempt to address the important question of the appropriate standard for determining the suitability of a parent for an adoptive placement as compared to the suitability of a parent for continued custody where the state tries to remove a child. Whether the standards should be the same for adoption and TPR proceedings remains unresolved, although presently, in most cases adoption standards are more stringent. This Article will use the terms "suitable" and "unsuitable" in the adoption context, and the terms "fit" and "unfit" in the TPR context, without implying any relative comparisons between them.

256. For example, any person receiving a negative homestudy may obtain judicial review under the UAA. See UNIF. ADOPTION ACT § 2-206, 9 U.L.A. 23-24 (Supp. 1997) (setting forth procedure for review of evaluation).

court should employ. In theory, the court could conduct a *de novo* review of all available evidence, employing any burden of proof, or it could accept the evaluator's decision as correct, overturning it only upon a finding of some degree of error.

The UAA places the burden of proving parenting suitability "by a preponderance of the evidence" upon the prospective parent challenging a homestudy conclusion.²⁵⁷ Presumably, the court under these circumstances would conduct a *de novo* review. The prospective parent would then have two ways to prove suitability: lay testimony by family members and acquaintances or expert testimony by qualified professionals. The first option presumes that the ability to evaluate parental suitability is within the general knowledge of the lay public. If this is true, then the parent might be able to prove suitability without resort to some sort of expert testimony. For the parent to prevail *without* the need for expert testimony, however, the reviewing judge would have to be persuaded that lay knowledge of what constitutes suitability outweighs the more learned knowledge of the defendant evaluator. If this is possible, there would seem to be no need for trained evaluators. The second way of proving suitability requires the parent to obtain expert testimony to rebut the evaluator's negative report. This option seems more reasonable, and perhaps makes sense in the context of the UAA's goals, which do not focus on discrimination. However, requiring the prospective parent to obtain favorable expert testimony under these circumstances is equivalent to obtaining an approved homestudy after initial failure. Where the challenged homestudy was prey to prejudice and discrimination, this may be a difficult or impossible task.²⁵⁸ Moreover, the fact that the victim of discrimination may be able to procure goods or services after a search for a less biased source does not ameliorate the initial discrimination or diminish the applicability of the ADA.

The ADA, however, differs from the UAA in its allocation of the burden of proof. When a court is asked to review an evaluation of parental suitability rendered during a negative adoption homestudy, the *evaluator* should have to prove, by a preponderance of the evidence,²⁵⁹ the unsuitability of the prospective parent.

257. See *id.* § 2-206(b), 9 U.L.A. at 24.

258. See *supra* Part I.B (giving examples of discrimination against parents with disabilities). If at least one evaluator providing the negative homestudy harbors these prejudices, it is possible that some, many, or all other evaluators may harbor the same prejudices.

259. This Article argues for a preponderance of the evidence burden, rather than the clear and convincing evidence burden employed in the TPR context. In the adoption context, the rights of the *prospective* parents, while significant, do not

That is, once the prospective parent has proven that a disability not only exists but was the basis for the negative homestudy,²⁶⁰ the evaluator should be required to show, by a preponderance of the evidence, that the prospective parent is unsuitable. This standard more closely parallels the standards inherent in the ADA for the "direct threat" defense.²⁶¹ Congress, when enacting the ADA, recognized that the "direct threat" defense might be employed as a pretext for discrimination, and decided to place upon defendants the initial burden of conducting an individualized determination.²⁶² Thus when hearing an ADA claim, the trial court should conduct a *de novo* review,²⁶³ with the defendant carrying the burden of proving, by a preponderance of the evidence, the existence of a direct threat. The test under this standard has remained essentially unchanged since enunciated by the Supreme Court in *School Board vs. Arline*²⁶⁴ and was incorporated into the ADA almost verbatim.²⁶⁵

Any concern that this places unreasonable demands upon defendants should be tempered by the realization that the plaintiff (in this case the prospective adoptive parent) must first establish a *prima facie* case by showing discrimination on the basis of disability. Moreover, because the defendant should possess expert

rise to the level of those of the parents involved in a TPR proceeding, who have a pre-existing relationship that is threatened (although the risk of harm to the child may be greater in the TPR context, in that there is some past record indicating a reason for the child's removal, barring the possible effects of prejudice and discrimination).

260. See *supra* Part II (discussing the ADA and basic elements of an ADA claim).

261. See *supra* notes 101-105 and accompanying text.

262. See H.R. REP. NO. 101-485(III) at 62, (1990), reprinted in 1990 U.S.C.C.A.N. 445, stating that the standards to be applied to a Title III "direct threat" claim are identical to those for a Title I claim; see also H.R. CONF. REP. NO. 101-596, (1990), reprinted in 1990 U.S.C.C.A.N. 565, 569 (placing burden for "direct threat" claims on employer, not employee).

263. "Review" may be an inappropriate term under circumstances in which the initial determination of a threat was cursory or informal.

264. *School Bd. v. Arline*, 480 U.S. 273 (1987), (defining the parameters of a "direct threat" defense under the Rehab Act); see *supra* notes 65, 101 and accompanying text.

265. See *supra* notes 101-105 and accompanying text. *Arline* might be interpreted as placing greater weight on the "individualized determination" conducted by the defendant before the court proceeding than ordinarily suggested by a *de novo* review, particularly when there is evidence of some degree of medical risk. However, the Court in *Arline* actually remanded the case, directing the district court to "conduct an individualized inquiry and make appropriate findings of fact." 480 U.S. at 287. Thus, there is no suggestion that courts owe any particular deference to the findings of any pre-court individualized determination even when offered by a competent expert.

knowledge in the field of determining parental suitability determinations, this is a reasonable allocation of the burdens.

3. Adoption: Conclusions

In terms of the analytical categories of parents with disabilities described above,²⁶⁶ the purpose of the homestudy should be to identify to which category the prospective parents belong. Parents who are evaluated as suitable presumably have received an approved homestudy by the evaluator and thus need not resort to litigation. If an evaluator concludes that the parents are unsuitable and the prospective parents wish to dispute the conclusion, the presiding court should require the evaluator to substantiate the unsuitable determination by a preponderance of the evidence, if the parents can first demonstrate disability discrimination. In conducting its *de novo* review, the court should uphold the evaluator's decision only if the evaluator has demonstrated that the prospective parents fit into the "never suitable" category of parents, or if the prospective parents fit into the "suitable with help" category but are unable to demonstrate the availability of the required assistance.²⁶⁷

IV. Parents with Disabilities Maintaining Families

Once a family is formed, whether by biology, science, or law, the Constitution offers significant protection against state encroachment.²⁶⁸ However, under appropriate circumstances, the government may interfere with, or even destroy, the parent-child relationship. This section of the Article will discuss the steps taken when the state wishes to remove a child from his or her parent's home, or to seek a termination of parental rights (TPR) of a parent with disability by reason of parental neglect,²⁶⁹ and will ex-

266. See *supra* notes 54-56 and accompanying text.

267. See *supra* notes 54-58 and accompanying text (explaining the analytical categories of parents and their utility depending on the specific circumstances). The reasons for not rejecting "suitable with help" parents are similar to those in the ARTs context, see *supra* notes 167-169 and accompanying text, although the argument is less compelling in the adoption context. Assuming that a prospective parent does in fact need help to remain suitable, requiring the parent to demonstrate the availability of that help prior to approving a homestudy seems warranted because, again, the evaluator bears the "parental" responsibility for assuring the adequacy of a placement. See *supra* note 174 (comparing determinations of necessary assistance for those "suitable with help" with usual pre-adoption evaluations).

268. See *supra* Part I.A (citing decisions protecting parents' rights).

269. Although there are other grounds for terminating parental rights, the neglect context provides the clearest analysis for disability discrimination because it

amine the extent to which the ADA may impose additional obligations on states before they initiate or finalize these proceedings.

A. *Intervention in the Parent-Child Relationship*

Although the procedures for interfering with the parent-child relationship are governed largely by varying state laws, there are some generalities that are widely applicable.²⁷⁰ In most cases in which parental neglect is to be employed as the basis for a removal or TPR order, the process consists of several distinct stages. The first stage, sometimes referred to as the "jurisdictional" stage,²⁷¹ usually focuses on the condition of the child, and is often subject to the jurisdiction of a juvenile court.²⁷² After a child's condition is brought to the attention of a local social-services agency,²⁷³ the agency conducts a preliminary investigation. Based on its findings, the agency determines whether continued intervention is necessary. Many states refer to a child in these circumstances as a "child in need of assistance" (often abbreviated as CINA or CHINA).²⁷⁴ If the preliminary investigation substantiates the need for intervention, a fact-finder²⁷⁵ hears evidence and, if appro-

does not necessarily require volitional fault. For example, in the case of an abusive parent with a disability, separating the weight placed on the abuse from that placed on the disability may be difficult, but the analysis would be similar to that in the neglect context.

270. When necessary, Maryland law will be used for purposes of illustration, with appropriate commentary to describe areas of significant interstate variation.

271. See Julie Odegard, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 LAW & INEQ. J. 533, 538 (1993).

272. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-801(i) (1995).

273. This may occur in several ways, from reports by school officials to anonymous phone calls by prejudiced, or even malicious, neighbors. Most local service agencies are obligated to investigate *all* complaints, see, e.g., MD. CODE ANN., FAM. LAW § 5-706 (1995), but resource limitations almost certainly affect the diligence with which they conduct such investigations. As is common with most states, certain categories of citizens are obligated to report suspected abuse or neglect. *Id.* § 5-704 (requiring reports by health practitioners, police officers, educators, and human service workers). Maryland also includes a reporting requirement that all Maryland citizens have a duty to report suspected child abuse. *Id.* § 5-705. For a review of state reporting laws and state investigative efforts, see DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN*, §§16.14-16.22 (1994).

The widely-reported case of Leigh Campbell-Earl and Bill Earl, see *supra* notes 35-37 and accompanying text, started with an anonymous phone call to the Ingham County, Michigan, Department of Social Services, prior to the birth of their child. "There is a woman in East Lansing, Mich., about to have a baby, the caller said, and she is far too disabled to care for it. Her husband uses a wheelchair, too. Shouldn't the county investigate . . .?" Mathews, *supra* note 30, at Z10.

274. Other popular labels include "child in need of services" (CHINS) or "child in need of protective services" (CHIPS). This Article will refer to such a child as a "child in need of assistance" (CINA).

275. In Maryland, CINA proceedings are brought by local departments of social services. See MD. CODE ANN., CTS. & JUD. PROC. § 3-810 (1995). Simultaneously,

pritate, adjudicates the child as a CINA. At this first stage, the local social services agency must demonstrate the need for intervention by a preponderance of the evidence.²⁷⁶ After the child is adjudicated a CINA, the court determines whether removal of the child from the home is necessary for the child's protection; if not, the court may order services to be provided to the family to address the needs of the child.²⁷⁷ If the court concludes that the CINA is in danger of future harm,²⁷⁸ it may order the removal of the child, usually into a group home or to foster care. If the court removes the child from his or her home at this second stage, sometimes referred to as the "dispositional" stage,²⁷⁹ it usually must make "specific findings of fact as to the circumstances that caused the need for the removal."²⁸⁰ The state also assumes an obligation to formulate a plan for family reunification, or, if the state is convinced that this family will never be successfully reunited, a plan for TPR.²⁸¹ The federal Adoption Assistance and Child Welfare Act of 1980 (AA&CWA), as amended, provides states with substantial federal monies for child welfare programs conditioned on the provision of family preservation services in an attempt to avoid TPR proceedings.²⁸² Most states (perhaps all), additionally require the court to find that the local social services agency offered reason-

social services departments may pursue administrative investigations, which are stayed pending the outcome of a CINA proceeding. See MD. CODE ANN., FAM. LAW § 5-706.1 (1995). The fact-finder in a CINA proceeding will generally be a circuit court judge, although Maryland does permit a "Master" to conduct CINA hearings under certain circumstances. See *id.*, CTS. & JUD. PROC. § 3-813.

276. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-819; see also Odegard, *supra* note 271, at 538.

277. See MD. CODE ANN., CTS. & JUD. PROC. § 3-820.

278. The standards for proceeding at this stage vary widely by state, and are usually specified by statute. In Maryland, a CINA disposition including the removal of the child from the home may lead to the filing of a petition for the termination of parental rights if the parents fail to make "significant progress to remedy the circumstances" causing the CINA removal, and the "parents are unwilling or unable to give the child proper care and attention within a reasonable period of time." *Id.* § 3-820(k) (Supp. 1995).

279. See Odegard, *supra* note 271, at 539.

280. MD. CODE ANN., CTS. & JUD. PROC. § 3-820(k).

281. See *id.*

282. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.). The federal law conditions payment of at least 75% of a state's costs for family preservation services and family support services on the maintenance of programs acceptable to the federal government. See 42 U.S.C. § 629a (1995). The state is obligated to create programs for family preservation services (services designed to prevent out-of-home placements for children at risk, services designed to facilitate the return to the home of children already in foster care and services designed to improve parenting skills in at-risk families) and family support services (services designed to increase the strength and stability of families in the community). See *id.*

able services to the family in an attempt to avoid the necessity of seeking a TPR order.²⁸³ If and when the state finally concludes that family reunification is no longer realistic, it may petition for a TPR order. The court may grant the TPR order if it finds by clear and convincing evidence²⁸⁴ that the child's best interests require the TPR and it finds, again by clear and convincing evidence, some degree of parental unfitness.²⁸⁵ Thus, the TPR proceeding, when viewed in its entirety, is best seen as the intersection of varied requirements imposed by state and federal statutes and constitutions. Following the issuance of a TPR order, the child is placed either in an adoptive home, or remains in foster care or some other form of state care until the child is adopted or reaches the age of majority.²⁸⁶

B. TPR, Parents with Disabilities, and the ADA

In a neglect proceeding involving parents with disabilities, an ADA claim is unlikely to arise until the dispositional stage.²⁸⁷ At this point, the court has already found in the precedent CINA adjudicatory hearing that the child has suffered neglect. The evaluation of parental fitness at the disposition hearing will be colored by the finding of past neglect. The determination of the parent's fitness²⁸⁸ proceeds similarly to that described previously for adoption homestudies,²⁸⁹ except that there will be actual data for the par-

283. All states receive federal monies under the AA&CWA, which requires agencies to make reasonable efforts to maintain a child in his or her parental home. See Sackett, *supra* note 2, at 285. However, at least one court has held that its state laws do not require any efforts to preserve the family prior to a TPR order. See *Stone v. Daviess*, 656 N.E.2d 824 (Ind. Ct. App. 1995). This apparent contradiction will be developed more fully *infra* Part IV.B.3.

284. See *supra* note 23 and accompanying text (discussing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

285. The standards for this stage vary according to statute.

286. The staggering problems with America's foster care system are well described elsewhere. See, e.g., Garrison, *supra* note 25.

287. The urgent and expedited nature of the jurisdictional hearing is unlikely to permit a thorough examination of an ADA claim. This is not to suggest that discrimination could not occur at the jurisdictional stage, or that significant harm does not attend this discrimination; rather, this is only to point out that most CINA proceedings are likely poor candidates for successful ADA claims. However, disability discrimination should be raised at this stage and again in any subsequent court actions. Additionally, an aggrieved parent could bring a separate ADA claim (which might seek money damages), see *supra* notes 76-80 and accompanying text, but relief under a separate claim may be "too little too late" if one or more children have already been removed from the home, temporarily or permanently.

288. See *supra* notes 54-56 and accompanying text (discussing whether the parent is "always suitable," "suitable with help," or "never suitable").

289. See *supra* Part III.B.2.a.

ents' relationship with this child, and there is a mandatory court review of the caseworker's evaluation.²⁹⁰ The ADA is unlikely to change significantly the agency's determination, since Constitutional and statutory requirements have already placed a high burden on the state to prove the actual risk of harm.²⁹¹ In other words, determining to which category²⁹² parents with disability appropriately belong follows the same process as for parents without disability. The potential for discrimination during this evaluation process, while high because of pervasive prejudice, is supposed to be mitigated by the requirement of judicial review and the high evidentiary burden placed on the state to show (by clear and convincing evidence at the TPR stage) that the statutory requirements for the child's removal have been met.²⁹³ Because the court already conducts an individualized review in each removal or TPR hearing, an aggrieved parent would not benefit from an additional hearing to consider an ADA-based claim that the action is discriminatory.²⁹⁴ Although the court's focus in a TPR hearing would not be the same as in an ADA claim, both require an individualized determination, and as will be developed below, the goals of

290. The caseworker's investigation is similar to an adoption homestudy in some respects. Both attempt to evaluate future parenting abilities. There are several differences, however. Homestudies tend to be more relaxed and more thorough, perhaps owing to the fact that the parents being evaluated pay the expenses; in most cases, there is no adversarial nature to the adoption homestudy. In fact, most adoption professionals view the homestudy more as an educational tool for the prospective parents than as an evaluation mechanism. See *FAMILIES ADOPTING CHILDREN EVERYWHERE*, *supra* note 208, at xv. Social services caseworkers tend to have very heavy workloads which may prevent them from devoting as much time as they would like to each investigation. Also, in the present context, a caseworker's investigation is likely to be influenced negatively by the fact that the child has already been identified as "at-risk."

291. This is not to suggest that unwarranted discrimination does not taint this proceeding, but rather that the ADA is unlikely to affect its outcome directly. The increased public education that has accompanied the ADA will hopefully, with time, affect these determinations indirectly. In short, the ADA does not seem to offer a parent with disability much additional leverage during the investigation stages. See *supra* note 232 and accompanying text (discussing current attitudes toward disability within the social work profession).

292. See *supra* notes 54-56 and accompanying text (discussing analytical categories of parents based on parenting abilities).

293. The ADA might be thought to affect this stage if the statute permitted a judge to issue a TPR order based solely on the parents' disability, but the Constitution already requires some greater degree of culpability. See *supra* notes 23-24 and accompanying text. Many states include disability as a factor to be considered. See e.g., MD. CODE ANN., FAM. LAW § 5-313 (d)(i) (1995). Moreover, the statute itself could be challenged under the ADA if it permitted disability to be used improperly as a factor in removing a child from the parents' home.

294. In contrast to the adoption context, in which the ADA may shift the burden of showing unsuitability to the evaluator, the burden to show unsuitability already rests with the state in the TPR context.

both may be considered concurrently. In short, the process by which a state evaluates a parent's fitness is not the most likely source of an ADA violation. Rather, it is what the state does after making an evaluation that will most often determine whether it has violated the ADA.

For those parents who are "suitable with help," the ADA does significantly affect the state's obligations toward the family in the provision of family preservation services (FPS) subsequent to removal but prior to the TPR. Assuming that the determination of the parents' status as "always suitable," "never suitable," or "suitable with help"²⁹⁵ has been made correctly, there should arise a set of secondary questions for "suitable with help" parents: what services will transform them from unsuitable to suitable, and must those "special" services, as opposed to the "standard" services provided to all parents, be provided before the court grants a removal or TPR order?²⁹⁶ These secondary questions should be answered in all cases considering "suitable with help" parents, not just those involving parents with disability. However, the ADA may require services different from or in addition to those provided to nondisabled "suitable with help" parents. In addition, parents with disabilities may require more permanent services than non-disabled parents who require temporary assistance to care for their children. The ADA claim that parents with disability may make is that the state provides FPS, but that those services do not address the needs of parents with disability,²⁹⁷ and, therefore, the state is denying to parents with disability "the benefits of the services"²⁹⁸ that are provided to nondisabled parents, in violation of the ADA. Alternatively, the claim for different or additional services could be viewed as a request for a "reasonable modification"²⁹⁹ that would

295. See *supra* notes 54-56 and accompanying text.

296. Assuming that the categorizations have been made properly, only the "suitable with help" category is of interest. Properly identified "always suitable" parents will not be the target of a TPR proceeding, and properly identified "never suitable" parents should have their rights terminated. If the parents claim that the categorization has not been made properly, the court's role is to review the evaluation, as in the adoption context, but with the heightened "clear and convincing" standard placed on the state.

297. For example, a state might provide skills-training services to parents who need help, teaching them various parenting tasks. These would be of no use to a parent whose only difficulty is limited mobility. If there were no services available to help a parent with limited mobility, that parent would be denied any benefit of the FPS program, no matter how good or how intensive the other services might be.

298. 42 U.S.C. § 12132 (1995).

299. 28 C.F.R. § 35.130(b)(7) (1996).

make the program nondiscriminatory. Both claims, however, proceed along the same analytic path.

Only Title II of the ADA applies to a claim of this type, since it is a government entity (either state or local) that both provides the FPS³⁰⁰ and seeks the removal or TPR order. Under the regulations implementing the ADA, public entities must provide services that are "as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."³⁰¹ The benefit afforded by FPS is the ability to enhance parenting skills and preserve the integrity of the family, and programs must be designed to extend the opportunity to receive this benefit equally to all families, whether headed by parents with disability or by nondisabled parents. A state cannot simply offer a fixed "menu" of family preservation services that ignores the needs of families headed by parents with disability without violating the ADA or qualifying for one of the ADA's defenses.³⁰² The ADA is clear: states must change the way they approach the provision of services, even if it involves expense, unless an ADA defense applies. It is to be expected that states will sometimes resist these changes (particularly if they have negative budgetary effects), but that is the whole point of the ADA.³⁰³ States, employers, and public accommodations were *not*

300. Under the ADA, if a private entity provides services under contract with the state, Title II applies. "A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability (i) deny a qualified individual with a disability the opportunity to participate in or benefit from the aid" *Id.* § 35.130(b)(1).

301. *Id.* § 35.130(b)(1)(iii).

302. Although there is not yet case law to support this assertion, the language of the statute and its implementing regulations is clear.

"[P]ublic entit[ies], in providing *any* aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not *equal* to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not *as effective* in affording *equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

. . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

Id. § 35.130(b)(1) (1996) (emphasis added).

303. "It is the purpose of [the ADA] . . . to invoke the sweep of Congressional authority, including the power to enforce the [F]ourteenth [A]mendment . . . in or-

in the past providing equal services to individuals with disabilities. If states, alone, could be expected to decide for themselves their obligations under the ADA, there would have been no need for its enactment. In response to an ADA claim brought pursuant to the provision of allegedly discriminatory FPS, public entities are most likely to assert the "reasonable modification,"³⁰⁴ "direct threat,"³⁰⁵ and "undue burden"³⁰⁶ defenses.³⁰⁷

1. Defense: Reasonable Modification

ADA claims related to the allegedly discriminatory provision of FPS are likely to focus on one or both of two related characteristics of the preservation efforts: the specific nature of the family preservation services and the duration for which those services must be offered. In the first instance, the parent with disability claims that the services offered do not address his or her disability-

der to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12102(b). Because the Fourteenth Amendment is directed at state action, the explicit reference to its powers clearly indicates Congress' belief that at least some states might need to be compelled, against their will, to end disability discrimination.

304. Title II of the ADA prohibits discrimination against a "qualified individual with a disability." *Id.* § 12132. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131.

305. *See supra* notes 101-105 and accompanying text (articulating standards later incorporated into the regulations implementing a "direct threat" defense for Title III of the ADA, and the likely availability of the defense to a Title II defendant).

306. *See infra* note 315 (discussing the "undue burden" defense under Title II).

307. The "fundamental alteration" defense, *see* 28 C.F.R. § 35.130(b)(7)(1996), devolves into either the "undue burden" or the "direct threat" defense upon analysis. The purpose of FPS programs is to keep families together and to protect children. *See* 42 U.S.C. § 629(a) (1995). To effect a fundamental alteration of such a program would suggest an impediment to that purpose. An argument that providing different, additional, or longer lasting FPS to parents with disability creates such an impediment requires either that the additional or different services divert resources from other aspects of the program thereby preventing other families from being preserved (which is really an undue burden defense), or that the additional or different services somehow threaten the child's safety (which is really a direct threat defense), or that the services threaten the family's stability (which suggests that the determination that the parents at issue are "suitable with help" is incorrect, since the premise is that this is a family for whom services will make a positive difference). A state might argue that its programs provide only temporary assistance and that the need for long-term services by some parents with disability effects a fundamental alteration of its short-term program. However, such an argument must presuppose that the *benefits* of the FPS program are of limited duration, which they are not. *See infra* Part IV.B.3. It is difficult to postulate a set of circumstances in which the provision of FPS would "fundamentally alter" the nature of the program.

related needs. Restated, the parent seeks modification of the state's policies to accommodate the disability.³⁰⁸ In the second instance, the parent most likely claims that he or she requires the provision of services for longer than the state offers them.³⁰⁹ This, too, may be restated as a request for the modification of the state's policies; in this case, the parent seeks modification of the durational component of the state's program.³¹⁰ In either case, the inquiry for the court's consideration is whether the requested modification is "reasonable." Most often, the state opposing the modification will argue that it is either unreasonably expensive (an "undue burden" claim) or unreasonably dangerous to the children (a "direct threat" claim).

2. Defense: Direct Threat

As noted previously, the direct threat defense requires an "individual[ized] assessment" of the "nature, duration, and severity" of a risk.³¹¹ For a social services agency to argue successfully that the provision of FPS in a manner that affords an equal benefit to parents with disabilities would present a risk to any children in the home is, in essence, for it to argue that its initial determination that these parents are "suitable with help" was incorrect. That is, the direct threat defense in this context is the same as arguing that the provision of FPS will not prevent future neglect (assuming the services are of the appropriate type and duration). The difficulty in determining *whether* FPS will make a differ-

308. The most obvious example would be the need for extensive attendant care. See discussion *infra* Part IV.B.4.

309. Or, alternatively, the state seeks the removal of the children or the TPR, claiming that the parental "unfitness" is permanent, even though the "permanent" (until the children become adults) provision of services would address the parent's needs. See discussion *supra* Part IV.B.

310. A third potential posture concerns the "never suitable" parent, wherein the state claims that it would be unreasonable to modify its policies so as to provide FPS to individuals that will not benefit from them. However, this Article does not argue that parents correctly classified as "never suitable" should prevail in any parents' rights ADA claim. The factual question of whether the parent is "never suitable" is a threshold question that should be addressed separately, before the FPS question is addressed. Only if some conceivable FPS would be rehabilitative (which implies that the parent in question is "suitable with help") should the court then consider whether modifications necessary to provide those FPS are "reasonable." See discussion *infra* Part IV.B.4 (discussing attendant care and other long-term services).

311. See *supra* notes 101-105 and accompanying text (articulating standards later incorporated into the regulations implementing a "direct threat" defense for Title III of the ADA, and the likely availability of the defense to a Title II defendant).

ence³¹² necessarily becomes a fact-intensive inquiry relying on the expertise of the evaluator. States and courts must remember, however, that the Constitution requires clear and convincing evidence that a removal or TPR is necessary.³¹³ If the jurisdiction requires the provision of FPS before a court may grant a removal or TPR order,³¹⁴ then the presiding court should not be permitted to grant such an order when the state has not offered reasonable FPS to a parent with disability unless the state shows, by *clear and convincing evidence*, that such services would be futile.

3. Defense: Undue Burden

The public entity's most obvious defense may be that it cannot afford to provide the services necessary to keep a family together, even though such services would prevent future neglect. There may be a question as to whether this defense exists, and, if so, what standards apply,³¹⁵ but a more fundamental issue undermines the premise of this claim in most instances. While the nature of the services needed and the associated costs will vary from

312. This is essentially an "evaluation" question. See *supra* Part III.B.2 (discussing the evaluation of parents with disabilities); *supra* notes 54-56 and accompanying text (discussing categories of parental suitability).

313. See *supra* note 23 and accompanying text (referring to a Supreme Court decision interpreting the Constitution to require clear and convincing evidence of child neglect).

314. See discussion *infra* Part IV.B.3 (discussing the need for FPS prior to a TPR order).

315. There is no specific mention of the "undue burden" defense in Title II or its regulations, save for regulations addressing "Facilities," 28 C.F.R. § 35.150 (1996), and "Communications," *id.* § 35.164, which would not apply to the parenting context. However, courts have proceeded as though the "undue burden" defense exists for all aspects of Title II. See, e.g., *Helen L. v. DiDario*, 46 F.3d 325, 338 (3rd Cir. 1995) (analyzing and rejecting an undue burden claim in a Title II action wherein the plaintiff sought in-home attendant services rather than state's offer of institutional care); *Dennin v. Connecticut Interscholastic Athletic Conf.*, 913 F. Supp. 663 (D.Conn. 1996) (considering undue burden claim in Title II action against a school district for prohibiting a student with disability from participating in after-school sports; court found the burden was not undue); see also *supra* note 307 (discussing the "undue burden" and "fundamental alteration" defenses, which may overlap somewhat in the "parental fitness" context). The *Helen L.* decision also blurs the two claims. See 46 F.3d at 337. Analyzing this section under an "undue burden" label frames the issue most clearly: how much will eliminating the discrimination cost? Whether Congress intended to permit public entities to avoid providing services that were expensive if they did not involve physical facility access, but to require expensive physical access needs, has, apparently, yet to be determined. In any event, if an "undue burden" defense does not exist for non-facility related discrimination, then parents with disability will not face this hurdle.

If the "undue burden" defense does exist in Title II, then it is likely that the measure of the burden would include both the financial and administrative costs; this is how "undue burden" is measured in the context of facilities modifications. See 28 C.F.R. § 35.150 (1996).

family to family, FPS costs should be balanced against the costs incurred when the court grants a removal or TPR order. These latter costs include the extreme financial expense of foster care,³¹⁶ which continue to be incurred until the child reaches majority or becomes adopted,³¹⁷ the social costs of the foster care system,³¹⁸ and the staggering social costs of destroying a loving family simply because parents with disability need help overcoming their disability. Furthermore, the court's balancing analysis should consider the degree of the deprivation caused by withholding of FPS.³¹⁹ One of the most extreme examples of an expensive family preservation service is that of twenty-four hour attendant care, such as might be required by paralyzed parents to provide care to an infant.³²⁰ There is evidence, however, that suggests that even intensive, costly FPS such as this actually save money.³²¹ Ultimately, the question of "undue burden" is a fact-specific inquiry, with a heavy burden on the defendant public entities to assert successfully this defense.³²²

316. See Judy Mann, *Welfare Cuts: Making the Children Pay*, WASH. POST, Dec. 6, 1995, at C26.

317. Adoption becomes increasingly unlikely as the child ages, and is already very unlikely when the child has a special need, a disability or is a minority. See ROBERT S. LASNIK, *A PARENT'S GUIDE TO ADOPTION* 56-66 (1979). Children removed from homes due to neglect or abuse often have significant emotional problems, making them difficult to place into adoptive homes.

318. See Mann, *supra* note 316 (describing evidence that children placed in foster care may have poorer outcomes and consume more public services such as jails, welfare, health care, and other services, than they would if left in the home, although this evidence is difficult to interpret).

319. See *supra* Part II.B (arguing for a balancing test under the "undue burden" defense).

320. This example of expensive FPS has been cited frequently, see, e.g., Odegard, *supra* note 271. However, it is seldom pointed out that the need for full-time attendant care diminishes as the child gets older, and eventually subsides completely well before the child leaves the home. Twenty-four hour attendant care was at issue in the situations of both Tiffany Callo, see *supra* notes 33-34 and accompanying text, and Leigh Campbell-Earl and Bill Earl, see *supra* notes 35-37. Ironically, in most states, a baby or child with disability can qualify for personal attendant services. See Mathews, *supra* note 30, at Z12.

321. See Mathews, *supra* note 30, at Z12. A Santa Clara County, California, program reported a \$1.72 savings for every dollar spent on their intensive FPS program. See *id.* These data may not be directly applicable to the question of 24-hour attendant care for parents with severe disability, but the burden of showing excessive expense is on the public entity. See *infra* note 322 and accompanying text.

322. See 28 C.F.R. § 35.150 (1996). If standards similar to those for "Facilities," see *id.*, are employed, then a high-level official, no lower than a Department head, having budgetary authority, will need to certify in writing that all available funding sources have been investigated without success. See *id.* This provision would likely permit an interested court to exercise considerable discretion in reallocating resources if it believed it necessary to prevent injustice. One need only consider

States may also argue that the family in question will require extremely long-term services, perhaps until the children reach the age of eighteen. However, it must be remembered that the nature of services required is very likely to change as the children mature, with expenses varying accordingly. Moreover, the duration of the provision of necessary services, without more, is an inappropriate criteria for excluding needy parents from the benefits of family preservation programs. First, the government's financial burden might actually be *increased* by the withholding of FPS if the children require support (institutional or foster care) until the age of majority.³²³ When the long term and social costs of family destruction are added, it is not at all clear that limiting FPS to families needing only "temporary" assistance saves anything.

Second, the goal of FPS programs is to provide the permanent benefit of keeping the family together. The fact that certain non-disabled parents might achieve this long-term goal with relatively short-term services (i.e. parenting classes), while certain parents with disability might require services over a longer duration to achieve the exact same long-term goal, is irrelevant. Title II of the ADA requires non-discriminatory access to the *benefits* of government programs,³²⁴ not non-discriminatory access to mere inclusion in those programs when the benefits will necessarily remain out of reach. Sometimes this will force public entities to expend resources for long or indefinite periods of time, but by no means is this requirement limited to the FPS context. There are countless circumstances in which it is uncontroverted that public entities will have to provide permanent, ongoing services to comply with the ADA.³²⁵ Persons with disability deserve more than just the one-time expense of a wheelchair ramp to get into the local courthouse; they are entitled to the ongoing expense of the sign-

the reach of the court in *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), in which District Judge Johnson, refusing to accept Alabama's arguments that it had insufficient funds to provide adequate treatment to the institutionalized mentally ill, compelled the state to provide the services, and for which, in part, Judge Johnson earned the nickname "the real governor of Alabama." Fred Grimm, *Judges Are Unsung Heroes of Rights Era*, MIAMI HERALD, May 24, 1987, at 1A. The significant liberty interests of the institutionalized patients in Alabama should be compared with the arguably comparable liberty interests of parents. See *supra* Part I. Moreover, Judge Johnson acted without the guidance and support of a specific statute such as the ADA.

323. See *supra* note 321.

324. See 42 U.S.C. § 12132; see also U.S. DEPT OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL 10-12 (1993).

325. For example, qualified interpreters will "usually" or "likely" be necessary in such settings as municipal hospital emergency rooms and state and local courts. U.S. DEPT OF JUSTICE, *supra* note 324, at 39.

language interpreter to permit them to participate once they have gained entrance. This is not to suggest that states are subject to all manner of unlimited, permanent expense. They may claim, when supported by the specific factual context, the existence of an "undue burden," or they may redesign their FPS programs to provide equal benefits to parents with and without disability while avoiding such permanent expense. A state does not violate the ADA when it makes public policy decisions based on legitimate non-discriminatory criteria. A state does violate the ADA when it refuses to provide effective assistance to its parents with disability but does provide effective assistance to its nondisabled parents, regardless of the duration that assistance would be required.

4. Note: Attendant Care and Other Long-Term Services

The regulations implementing the ADA specifically exclude "personal services,"³²⁶ which may seem to excuse a public entity when it refuses to provide services, such as attendant care, in a way that discriminates on the basis of disability. However, these regulations should be read as clarifying that the ADA does not *create* a requirement that a public entity provide personal services. If a right to personal services is created by another law or practice, the ADA should be interpreted as requiring that those services be provided in a non-discriminatory way. There is no evidence to support the premise that Congress intended to permit the discriminatory provision of any services, personal or otherwise. Any other interpretation of the rule would allow a state to create a program that includes personal services but permits the program to exclude persons with disability,³²⁷ a result wholly inconsistent with the overall purpose of the ADA: to provide for "the elimination of discrimination against individuals with disabilities."³²⁸ Two student notes have addressed this question and both concluded that the ADA may indeed require the provision of attendant care services to parents with disability.³²⁹

326. "This part does not require a public entity to provide to individuals with disabilities . . . services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135 (1996).

327. For example, a state might create a program to assist its elderly citizens by sending workers to check on them periodically and provide them with personal services, such as help with bathing. Such a program would be beneficial and laudatory, and would not implicate the ADA. However, if the state decided that the same program did not apply to its elderly citizens with mental retardation, because "they take too long to bathe," the program would violate the ADA. A different interpretation of the statute would be illogical.

328. 42 U.S.C. § 12101(b)(1) (1994).

329. See Odegard, *supra* note 271 (addressing physical disability); Chris Wat-

A court of appeals decision also addressed the question of whether the ADA can ever require the provision of attendant services. In *Helen L. v. DiDario*,³³⁰ residents sued the state of Pennsylvania after the state refused to provide attendant care services in the home (even though it had a program to provide such in-home services) and instead required the plaintiffs to reside in nursing homes to receive care.³³¹ The state conceded that the average yearly cost of caring for a resident of a nursing home was \$45,000, of which \$19,800 was borne by the State, while the average yearly cost of the in-home attendant care sought by the plaintiffs was \$10,500, borne entirely by the state.³³² Still the State claimed "a justification of administrative convenience to resist an accommodation which would save an average of \$34,500 per year, [and] would allow Idell S. to live at home with her children."³³³ Although the State argued that the ADA did not require "deinstitutionalization" rather than arguing that the ADA did not require attendant care services,³³⁴ the court's analysis is relevant to both claims. "Idell S. is not asserting a right to community care or deinstitutionalization per se. She properly concedes that [the state] is under no obligation to provide her with any care at all."³³⁵ However, the court held that, because the state had a program that could provide the plaintiffs with in-home care, it could not operate that program in a discriminatory manner, and vacated the district court's order of summary judgment for the State, taking the unusual step of directing the district court to enter an order of summary judgment for the plaintiffs rather than remanding for additional fact-finding.³³⁶ In other words, the ADA does not require public entities to create attendant care programs, but it may require attendant care if that is a reasonable means of providing to

kins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415 (1995) (addressing mental disability).

330. 46 F.3d 325 (3rd Cir. 1995).

331. See *id.* Tragically, at least one of the plaintiffs, Idell S., was forced to leave her children so that she could receive care in the nursing home. See *id.* She had contracted meningitis which left her paralyzed from the waist down and reduced her ability to care for herself. See *id.* at 328. According to the opinion, "[t]he parties agree that, although Idell S. is not capable of fully independent living, she is not so incapacitated that she needs the custodial care of a nursing home." *Id.*

332. See *id.* at 329.

333. *Id.* at 338.

334. See *id.* at 327-39 (relating that the state did not argue 28 C.F.R. § 35.135 (1996)).

335. *Helen L.*, 46 F.3d at 336.

336. See *id.* The plaintiffs' principal legal claim was that the ADA required the state to provide services in the "most integrated setting appropriate." *Id.* at 336.

persons with disability the benefits of a program created under some other authority.

A primary objection to requiring the provision of attendant care for parents with disability is that such an "entitlement" need make no distinction among the analytical categories of parents.³³⁷ That is, *all* child neglect theoretically could be eliminated if states simply placed attendants with all at-risk families. For example, one state social services spokesman said "[i]f we could provide 24-hour home care for [parents with disability], any parent in trouble would want 24-hour home care, and we can't afford it."³³⁸ However, this concern may be addressed in three ways. First, public entities are free under the ADA to offer to persons with disability programs that are not offered to persons without disability; thus, public entities are free to provide attendant care services exclusively to parents with disability.³³⁹ Second, the "undue burden" defense may be available if the state can demonstrate that it really "cannot afford" to provide attendant care. Third, and most importantly, the courts would still need to consider whether an attendant would merely assist in parenting the child, or whether the attendant would instead become the *de facto* "parent." That is, attendant care is only appropriate for parents in the "suitable with help" category.³⁴⁰ Although an attendant might prevent neglect in the home of a "never suitable" parent, such a parent is still "never suitable." Mandating attendant care for a parent who will never be able to raise his or her child in any meaningful way would not be a "reasonable modification" under the ADA, and should not be required of a state.³⁴¹ Again, proper categorization of a parent

337. See *supra* notes 54-56 and accompanying text (discussing analytical categories of parents based on parental abilities).

338. Mathews, *supra* note 30, at Z12 (quoting a Michigan social services spokesman referring to Leigh Campbell-Earl and Bill Earl).

339. See 28 C.F.R. § 35.130(c) (1996). "Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part." *Id.* "[Public entities] may provide special benefits . . . that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities." ADA HANDBOOK, *supra* note 142, at II-39 (1991) (explaining 28 C.F.R. § 35.130(c)).

340. See *supra* notes 54-56 and accompanying text (discussing analytical categories of parents based on parenting abilities).

341. Thus, a quadriplegic couple who needs help with a child should be provided attendant care before the state moves to remove the children. A profoundly retarded couple, however, needing more than "help" would be ineligible if the attendant, in fact, would actually be raising the child. The obvious difficulties in distinguishing between these extremes in closer cases would need to be considered by courts based on all the facts available at the time of a decision. This is essentially

with disability is crucial to an effective ADA analysis and requires a careful examination of all the pertinent facts.

Finally, the ADA does not simply require states to provide attendant care under all circumstances. This Article argues that the ADA may require such a service when appropriate as part of a comprehensive FPS program (which may itself be required under state law or as part of the AA&CWA). The ADA does not create the requirement for any FPS, but it does create the requirement that any FPS be provided in a non-discriminatory fashion. Attendant care may well be required to avoid discrimination, since it may be the only effective method to provide FPS to parents with disabilities,³⁴² but states are not required by the ADA to provide any FPS unless they so choose.

C. *The Real Issue: How to Effectuate the ADA*

Regardless of how the ADA may affect a state's family preservation obligations, the question of greatest importance for parents with disabilities involved in a TPR proceeding is whether the ADA can be used to attack the TPR proceeding directly. In other words, if the state's FPS programs have discriminated against parents with disabilities in violation of the ADA, can the violation be used as a defense in a TPR hearing? The answer to this question depends on the state's laws, but in most cases should be answered "yes." If the state requires the provision of FPS,³⁴³ or requires that FPS be provided in a particular way,³⁴⁴ then before a court may terminate a parent's rights to a child, it should incorpo-

the same decision as deciding whether a parent is "suitable with help" or "never suitable." See *supra* notes 54-60 and accompanying text (discussing analytical categories of parents based on parenting abilities).

342. When pressed, states may be able to fashion effective FPS that meet the needs of parents with disabilities in ways other than providing attendant care. For example, in the absence of effective FPS, the state will almost always be obligated to remove the children from the home and place them in foster care at considerable expense. One possibility for states would be to create foster family programs that accept parents with disabilities and their children; some states have similar programs for teenage mothers. The burdens on foster parents might be less than if they accepted sole responsibility for the children, and if the parents with disability are able to contribute economically, the financial expenses might also be lessened. It is likely that more creative solutions to the problems faced by parents with disability would be developed if the ADA is interpreted as requiring such efforts.

343. A state might be obligated to provide FPS either under its own laws or in order to become eligible for federal assistance under the AA&CWA. See *supra* note 282 and accompanying text.

344. For example, Wisconsin requires "diligent effort" to provide services. See *In re Torrance P.*, 522 N.W.2d 243, 245 (Wis. Ct. App. 1994) (holding that "diligent effort" means "reasonable, earnest and energetic effort. . .").

rate the ADA's anti-discrimination requirements. Thus, a state requiring the provision of "reasonable" family services prior to issuing a TPR order should find a violation of the ADA in the provision of those services to be *per se* "unreasonable" and refuse to issue the TPR order. The court should issue a TPR order after finding discrimination in the provision of FPS only if the court is permitted to issue a TPR order in the complete absence of any FPS, or if the court is permitted to issue the order under circumstances that amount to a complete absence of FPS.³⁴⁵ Moreover, the court should consider whether the Adoption Assistance and Child Welfare Act (AA&CWA)³⁴⁶ also affects the requirement that services be provided.³⁴⁷ In other words, the court should find that any violation of the ADA in the provision of FPS is a *per se* violation of the AA&CWA, and should address the situation accordingly.³⁴⁸

Several state courts have addressed the discriminatory provision of FPS to TPR proceedings, but those actually considering the effects of an ADA violation³⁴⁹ suffer from problems in their analy-

345. This might be the case under a statute that does not mention FPS, or makes their provision completely within the court's discretion. Even under these circumstances, however, parents could argue that FPS are a requirement if the state receives federal money under the AA&CWA.

346. See *supra* note 282 and accompanying text.

347. The question of whether a violation of the requirements of the AA&CWA can invalidate a TPR order is a matter of state law interpretation, and has been litigated. See, e.g., *Matter of Burns*, 519 A.2d 638 (Del. 1986) (invalidating a TPR order after finding that the Division of Child Protective Services had not complied with the requirements of the AA&CWA); see also *Division of Child Protective Serv. v. Doran*, 529 A.2d 765 (Del. Fam. Ct. 1987) (interpreting *Burns* to require Delaware courts to determine whether Child Protective Services complied with AA&CWA). The AA&CWA requires that state plans "be in effect in all political subdivisions of the State . . . [and] be mandatory upon them." 42 U.S.C. § 671(a)(3) (1995). The "mandatory upon them" language should compel state courts to enforce all elements of the approved FPS plan.

348. If violating the AA&CWA would invalidate a TPR order in that state, then a violation of the ADA in the provision of FPS should also invalidate a TPR order. While the Supreme Court has held that there is no private cause of action under the AA&CWA and 42 U.S.C. § 1983 to enforce the "reasonable effects" provisions, there could be a private cause of action under the "mandatory upon them" language for state actions that contradict their own FPS plans. See generally *Suter v. Artist M.*, 503 U.S. 347 (1992) (suggesting that states may be liable if state actions contradict their own FPS plans, but holding that a state's failure to use "reasonable efforts" to maintain intact families may not give rise to an action under the AA&CWA and 42 U.S.C. § 1983). Also, the ADA and the AA&CWA taken together might create a § 1983 cause of action for discriminatory state action in the FPS context.

349. Some of the decisions found the provision of the FPS not to have been discriminatory; thus, analysis of the effect of an ADA violation was unnecessary. See *In the Interest of C.M.*, 526 N.W.2d 562 (Ia. 1994); *In re Angel B.*, 659 A.2d 277 (Me. 1993); *In re Welfare of A.J.R.*, 896 P.2d 1298 (Wash. 1995) (each holding that

ses. For example, in *In re Torrance P.*,³⁵⁰ the court held that the ADA did not "affect [the] inquiry of whether the County made a diligent effort [as required by state law] to provide [the plaintiff] with court-ordered services."³⁵¹ Instead, the court decided that the discriminatory provision of FPS was "a separate inquiry under the ADA, unrelated to the TPR proceedings."³⁵² This illogical conclusion forces parents with disabilities who seek a remedy, first to suffer discrimination, then to lose their children, then to seek legal representation, and finally, to seek any available remedy under the ADA.³⁵³ No ADA remedy can restore the family following the issuance of a TPR order, and therefore the *In re Torrance P.* court's reasoning would permit the continued destruction of families whose only fault has been to be headed by parents with disability. The plaintiff in *In re Torrance P.*, a father with a developmental disability, had his rights to his two children terminated after he failed to fulfill the conditions imposed upon him by the court for the return of his children.³⁵⁴ Among his most notable offenses was that he "failed to keep the County apprised of his address."³⁵⁵ The caseworker assigned to facilitate the plaintiff's reunion with his children testified that she repeatedly mailed permanency planning and hearing notices to his last known address. However, she was unaware that the plaintiff was unable to read. The court, in making its decision, relied upon the lack of evidence that the plaintiff's inability to read had deprived him of the ability to understand the correspondence.³⁵⁶ According to the court, the Wisconsin law requiring "diligent efforts" to provide court-ordered services prior to a TPR order is unaffected by the ADA.³⁵⁷ Diligence is defined, in Wisconsin, as a "reasonable, earnest and energetic effort such as is customarily exercised by other departments under the same or similar circumstances,"³⁵⁸ and the "ADA does not increase those responsibilities or dictate how . . . [they] must

consideration of the effects of an ADA violation was unnecessary because the FPS programs at issue did not discriminate).

350. *In re Torrance P.* 522 N.W.2d 243 (Wisc. 1994).

351. *Id.* at 246.

352. *Id.*

353. Remedies under Title II are mostly limited to equitable forms of relief, which are totally inadequate in addressing the loss of a child unless they include the invalidation of a TPR order. See *supra* text accompanying notes 76-80.

354. See 522 N.W. 2d at 245.

355. *Id.*

356. See *id.*

357. See *id.* at 246.

358. *Id.*

be discharged.”³⁵⁹ Under this reasoning, then, diligence presumably is unrelated to discrimination or to the making of reasonable accommodations so long as discrimination is “customarily exercised by other departments.”³⁶⁰ Surely, Congress intended no such result. The court in *In re Torrance P.* did not address the issue of whether the caseworker’s ignorance of the plaintiffs’ illiteracy might have had an impact on its finding of “diligent efforts.”

This faulty reasoning³⁶¹ was followed by an Indiana court, in *Stone v. Daviess County Division of Children and Family Services*.³⁶² The court, citing *In re Torrance P.*, agreed that an ADA violation was a separate inquiry from a TPR proceeding.³⁶³ The *Stone* court observed that whereas the Wisconsin TPR scheme at issue in *In re Torrance P.* required the provision of FPS, Indiana laws had no such requirement.³⁶⁴ The court reasoned, therefore, that any alleged ADA violation was irrelevant to an Indiana TPR proceeding.³⁶⁵ The *Stone* court did not address any possible effect of the AA&CWA, which, as noted above, could be interpreted as creating a FPS requirement in Indiana if the state receives federal funds regardless of state law. The *Stone* court also did not reconcile its assertion that the Wisconsin TPR scheme in *In re Torrance P.* did require the provision of FPS with the *In re Torrance P.* court’s own disregard for any discrimination in the provision of FPS. The *Stone* court accepted the *In re Torrance P.* court’s conclusion that a violation of the ADA in the discriminatory provision of FPS is not a barrier to a TPR order.³⁶⁶

No reported opinion has yet accepted the notion that the ADA creates an obligation on the states to provide FPS in a non-discriminatory fashion.³⁶⁷ Ignoring for the present discussion the difficulties in deciding what constitutes non-discriminatory FPS, the question remains what the court should do if it finds that the state has in fact discriminated in its family preservation efforts. The *In re Torrance P.* court, and therefore, presumably, the *Stone*

359. *Id.*

360. *Id.* at 245.

361. This Article argues that the reasoning was incorrect. However, under the facts as presented in *In re Torrance P.*, the final result of terminating the parent’s rights may have been correct.

362. 656 N.E.2d 824 (Ind. Ct. App. 1995).

363. *See id.* at 829.

364. *See id.* at 830.

365. *See id.*

366. *See id.*

367. *But cf. In re C.M.*, 526 N.W.2d 562, 566 (Ia. Ct. App. 1994) (suggesting in dicta that an ADA violation may be applicable to TPR proceedings).

court, based its conclusions on the belief that "Congress did not intend [the ADA] to change the obligations imposed by unrelated statutes."³⁶⁸ The only authority cited in *In re Torrance P.* for this proposition is the ADA "purposes" clause, which states, *inter alia*, that "[i]t is the purpose of this Act . . . to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."³⁶⁹ The "purposes" clause includes no provision sparing state statutes, whether related or unrelated. Moreover, the extremely broad language of the ADA coupled with Congress' imputed knowledge of the Supreme Court's steadfast protection of parents' rights, leads to the conclusion that Congress *did* intend to affect statutes that might permit or promote the discriminatory termination of parents' rights. In fact, the evidence indicates that Congress did intend to impact "unrelated" statutes, and in fact all state actions, judicial, legislative, or otherwise, to eradicate discrimination by state and local governments against persons with disability.³⁷⁰

If Congress had intended the ADA to exempt courts or legislatures from its otherwise very broad scope, it easily could have done so. Nowhere in the legislative history of the Act does it appear that Congress meant to exempt any government activities, save those granted specific defenses within the Act. On the contrary, the commentary accompanying the regulations implementing Title II clearly states that "Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by state and local governments or any of their . . . agencies."³⁷¹ A court faced with a petition to terminate a parent's rights, must, if it finds discrimination in the provision of required FPS, refuse to grant the petition unless one of the statutory defenses applies.

368. *In re Torrance P.*, 522 N.W.2d at 246 (citing 42 U.S.C. § 12101(b) (1994), the "purposes" clause of the ADA).

369. 42 U.S.C. § 12102 (1994).

370. *See School Bd. v. Arline*, 480 U.S. 273, 279 (1987) (interpreting the Rehabilitation Act as reflecting Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from archaic attitudes and laws) (citing S. Rep. No. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.A.N. 6400). The legislative history reflects no intent to limit the ADA more than the Rehab Act. Thus, if the Rehab Act intends to affect "archaic attitudes and laws," so must the ADA.

371. ADA HANDBOOK, *supra* note 142, at II-9 (analyzing 42 C.F.R. § 35.102 (1996)); *see supra* note 217 and accompanying text.

D. Conclusion: TPR, Parents with Disabilities, and the ADA

The impact of the ADA on states' child removal and TPR laws depends, in part, on whether the state requires that FPS be provided before a court may issue a removal or TPR order. This inquiry also implicates provisions of the AA&CWA. States that do provide FPS, whether by mandate or option, must provide those services in a manner that does not violate the ADA.³⁷² In many cases, this may require states to rethink their entire FPS program, because the ADA extends to parents with disability the right to expect parenting assistance that is equally effective as that provided to nondisabled parents. This may include assistance in the form of personal services, attendant care, and other "novel" forms of FPS. Moreover, in those states in which a TPR order must be preceded by FPS, either because of state law or the AA&CWA, social services which discriminate against parents with disabilities violate the ADA and should serve as grounds for a defense against the TPR proceeding.

Conclusion

The ADA empowers persons with disabilities, primarily by expanding their options for legal recourse. Through litigation, or the threat of litigation, the victims of disability discrimination may protect their rights to "full participation"³⁷³ on an "equal basis"³⁷⁴ in society. This empowerment extends to parents and prospective parents whose possibilities to have and raise children are threatened. Still needed, however, are additional data on how parents with disabilities raise their children, how their children adapt to differences in parenting abilities, and how evaluations of parental ability can avoid prejudice and discrimination. Empowered with the added strength of good data, parents with disabilities would be able to expand on the ADA's present promise: the power to persuade—and if necessary, force—doctors and other ARTs providers,

372. This Article accepts the proposition that the ADA does not itself require the provision of FPS. The ADA guarantees nondiscrimination in all state and local services, programs and benefits. It does not require states to create or maintain services, programs or benefits to neutralize the effects of disability. The ADA, for example, may not require the state to provide its citizens with libraries, but if it chooses to do so, the state must make those libraries accessible to all its citizens (except when such accessibility would fall within one of the ADA's defenses).

373. 42 U.S.C. § 12101(a)(8).

374. 42 U.S.C. § 12101(a)(9).

adoption "evaluators," and state social service agencies to concentrate on parenting abilities instead of stereotypical assumptions and prejudices "not truly indicative of . . . individual ability."³⁷⁵ Through this promise, the ADA has brought to parents with disabilities new opportunities for the pursuit of happiness.

375. 42 U.S.C. § 12101(a)(7).