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# BOOK REVIEW

## MOMMY HAS A BLUE WHEELCHAIR: RECOGNIZING THE PARENTAL RIGHTS OF INDIVIDUALS WITH DISABILITIES\*

*Michael Ashley Stein*<sup>†</sup>

A MOTHER'S TOUCH: THE TIFFANY CALLO STORY, Jay Mathews,  
New York: Henry Holt & Co. (1992). 265 pp.

A five-year-old [able-bodied child] told her paraplegic mother:  
"When I grow up I want to be a mommy, and have a van and a blue  
wheelchair." "Oh, you won't need *that*," the mother said. "But I *like*  
blue," the child insisted.<sup>1</sup>

### INTRODUCTION

In 1979, a Los Angeles Superior Court judge transferred the custody of quadriplegic William Carney's two sons, who had been living with him for three years, to their absentee able-bodied mother.<sup>2</sup> The court held that, because William was not able to play Little League baseball with his sons or take

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<sup>1</sup> JAY MATHEWS, A MOTHER'S TOUCH: THE TIFFANY CALLO STORY at vii (1992) (quoting psychologist Megan Kirshbaum).

<sup>2</sup> *In re Marriage of Carney*, 598 P.2d 36, 37 (Cal. 1979).

them fishing, William's custody "wouldn't be a normal relationship between father and boys," and therefore "it would be detrimental for the boys to grow up until age 18 in the custody of their father."<sup>3</sup> The California Supreme Court reversed the superior court on the ground that the decision "was affected by serious misconceptions as to the importance of the involvement of parents in the purely physical aspects of their children's lives."<sup>4</sup> Those "serious misconceptions," the supreme court reasoned, had led the superior court to "stereotype[ ] William as a person deemed forever unable to be a good parent simply because he is physically handicapped."<sup>5</sup>

Less than a decade after the *Carney* decision, the Santa Clara County Department of Social Services removed David and Jesse Callo from the custody of their disabled<sup>6</sup> mother,

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<sup>3</sup> *Id.* at 41 (emphasis omitted).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 42.

<sup>6</sup> The term "disabled" and phrase "individuals with disabilities," as used in this Book Review, refer only to individuals with a motor- or sensory-related impairment and specifically do not relate to individuals who are developmentally disabled. For analysis of the familial and procreative rights of the developmentally disabled, which raise different legal and social issues than those of individuals with physical disabilities, see generally SARAH F. HAAVIK & KARL A. MENNINGER II, *SEXUALITY, LAW AND THE DEVELOPMENTALLY DISABLED PERSON: LEGAL AND CLINICAL ASPECTS OF MARRIAGE, PARENTHOOD AND STERILIZATION* (1981); Robert L. Burgdorf, Jr. & Marcia P. Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 *TEMPLE L.Q.* 995 (1977); Martha A. Field, *Honest Differences in Discerning the Constitution's Meaning—The Task of Defining Constitutional Rights for Persons Who Are Retarded*, 72 *IOWA L. REV.* 1301 (1987); Robert L. Hayman Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 *HARV. L. REV.* 1202 (1990).

In addition, the term "disabled" and phrase "individuals with disabilities" will not always include people who have been tested positive for the Human Immunodeficiency Virus ("HIV"). The reason for this semi-inclusion bears noting. Following the inclusive interpretation by courts of § 504 of the Rehabilitation Act of 1973, as amended 29 U.S.C. § 794 (1988 & Supp. IV 1992) ("No otherwise qualified individual with a disability in the United States, . . . shall, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving a Federal financial assistance . . ."), the Americans with Disabilities Act ("ADA") committee reports explicitly recognized HIV-positivity as a disability. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333; H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989); see also *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988) (finding that HIV-positive teacher transferred to an administrative job had strong possibility of success on the merits under the Rehabilitation Act); Local 1812, American Fed'n of

Tiffany Callo. Callo's struggle to regain custody of her children is recounted in journalist Jay Mathews's<sup>7</sup> sensitive and engrossing book, *A Mother's Touch: The Tiffany Callo Story*.<sup>8</sup>

## I. MYTHS AND MISCONCEPTIONS

In 1980, Professor Robert Burgdorf,<sup>9</sup> a prominent disabled, disability rights advocate, wrote that mainstream society's historical treatment of individuals with disabilities "can be summed up in two words: segregation and inequality."<sup>10</sup> Studies on the status of disabled Americans conducted

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Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (finding that HIV-positive foreign service employees were likely to prevail in their suit under the Rehabilitation Act). This recognition is especially laudable—and unfortunately necessary as well—because of continuing prejudice against HIV-infected people, particularly when they also are gay.

The issues raised in custodial disputes involving HIV-positive parents are not always the same as those involving parents with other physical disabilities. Both groups, however, must rebut misconceptions about the "abnormality" of their parenting relationships, and debilitated HIV-infected parents may be questioned about their ability to physically care for their children. See, e.g., *Jane W. v. John W.*, 137 Misc. 2d 24, 519 N.Y.S.2d 603 (Sup. Ct. Kings County 1987). Similarly, the parental rights of HIV-positive people are most often challenged on the basis of either alleged shortened life expectancy or risk of transmission. See, e.g., *Steven L. v. Dawn J.*, 148 Misc. 2d 779, 561 N.Y.S.2d 322 (Fam. Ct. Kings County 1990); *Doe v. Roe*, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (Sup. Ct. N.Y. County 1988). The custodial concerns of HIV-infected parents are addressed in a number of fine articles. See generally Nancy B. Mahon, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092 (1988); Carol Sanger, *M Is for Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15 (1992).

<sup>7</sup> Mathews is a correspondent for *Newsweek* and a former Los Angeles Bureau Chief of the *Washington Post*. Mathews's previous publications include *Escalante: The Best Teacher in America*, published in 1988, which formed the basis for the film *Lean on Me*.

<sup>8</sup> MATHEWS, *supra* note 1.

<sup>9</sup> Professor Burgdorf was one of the central authors and proponents of the Americans With Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (Supp. IV 1992) [hereinafter ADA]. See JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 106-16 (1993). For Burgdorf's own analysis of the ADA, see Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

<sup>10</sup> ROBERT L. BURGDORF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT 51 (1980). Many studies have been conducted of the historical treatment of disabled people. See, e.g., DISABLED PEOPLE AS SECOND-CLASS CITIZENS (Myron G. Eisenberg et al. eds., 1982); JOHN B. FRIEDMAN, THE MONSTROUS RACES IN MEDIEVAL ART AND THOUGHT (1981); ELIOT FRIEDSON, DIS-

by non-disability-related (and thus presumably more objective) organizations have confirmed Professor Burgdorf's analysis. For example, the United States Commission on Civil Rights echoed Professor Burgdorf's statement, finding that "[h]istorically, society has tended to isolate and segregate handicapped people."<sup>11</sup> Congress used almost identical language in its legislative findings and purposes for the Americans with Disabilities Act ("ADA").<sup>12</sup>

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ABILITY AS SOCIAL DEVIANC IN SOCIOLOGY AND REHABILITATION (Martin B. Sussman ed., 1965); FREDERICK WATSON, CIVILIZATION AND THE CRIPPLE (1930); Nettie Bartel & Samuel Guskin, *A Handicap as a Social Phenomenon*, in PSYCHOLOGY OF EXCEPTIONAL CHILDREN AND YOUTH 75 (William M. Cruickshank ed., 4th ed. 1971); Gustav F. Schultz, *The Cripple in Primitive Society*, 8 AM. J. CARE FOR CRIPPLES 335 (1920). The sensitivity of these studies generally corresponds with the nomenclature used to describe their subjects.

<sup>11</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983). Graphic examples of how severely people with physical disabilities are segregated from mainstream society were provided by the findings of an independent nationwide poll of disabled Americans conducted in 1986 by Louis Harris and Associates ("Harris Poll"). INTERNATIONAL CTR. FOR THE DISABLED, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986). The survey found that two-thirds of all working-age people with disabilities are unemployed. *Id.* at 47. In addition, the survey found that during the one-year period prior to the poll, nearly two-thirds of the disabled did not attend movies, three-fourths did not see live theater or music performances, two-thirds of disabled people did not attend sporting events, 17% did not eat in restaurants, and 13% did not shop in grocery stores. *Id.* at 37-40; see also NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 5 (1986) (more than 20% of working-age individuals with disabilities are below the poverty level). The results of the Harris Poll are cited often by disability rights groups. See, e.g., NATIONAL COUNCIL ON DISABILITY, IMPLICATIONS FOR FEDERAL POLICY OF THE 1986 HARRIS SURVEY OF AMERICANS WITH DISABILITIES (1988); NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (1988). The results of the Harris Poll were cited also by Congress during hearings on the ADA. See *Guaranteed Job Opportunity Act: Joint Hearing on S. 777 Before the Subcomm. on Employment and Productivity and the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess., pt. 2, at 9 (1987) (statement of Humphrey Taylor), quoted in S. REP. NO. 116, 101st Cong., 1st Sess. 8 (1989) & H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 313; see also H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 447.

<sup>12</sup> "[H]istorically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12,101(a)(2) (Supp. IV 1992). It was perhaps for these reasons that Senator Edward M. Kennedy (D-Mass.) described the legislation's enactment as "an emancipation proclamation" for disabled Americans. 135 CONG. REC. S10,789 (daily ed. Sept. 7, 1989); see also Nathaniel C. Nash, *Bush and Senate Leaders Support Sweeping Protection for Disabled*, N.Y. TIMES, Aug. 3, 1989, at A1 (quoting Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, who labeled the legislation as "the most comprehensive civil rights

Underlying and reinforcing the segregation of people with disabilities are a series of myths arising from misconceptions about the disabled.<sup>13</sup> The most ubiquitous of those myths (and one that I have discussed at length elsewhere<sup>14</sup>) casts physically disabled people in alternative, albeit dichotomous roles: as pitiable poster children or inspirational "supercrips." The paradigmatic poster child is, of course, any one of the children paraded on television during the annual Labor Day Muscular Dystrophy Telethon. A model "supercrip" is paraplegic park ranger Mark Wellman, who climbed a granite peak in Yosemite National Park.<sup>15</sup> Because the burden of achieving "supercrip" status is beyond the power of most *people*—let alone those with physical impairments—the result of this dual mythology has been to associate physically disabled people with pity.<sup>16</sup>

Another particularly pervasive myth about physically disabled people is that they either are sexually unwilling or unable (the "disabled non-sexuality myth").<sup>17</sup> Nationally syn-

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measure in the past two and a half decades").

<sup>13</sup> Psychologist Carol Gill has correctly noted society's emphasis on "the needs and interests of men with disabilities to the virtual neglect of women." Carol Gill, *Getting Ready: Six Trends That Will Challenge People with Disabilities Through 1994—And Beyond*, MAINSTREAM: MAG. OF THE ABLE-DISABLED, Dec. 1993/Jan. 1994, at 27, 28. Accordingly, this Book Review will attempt to address the needs and concerns raised by women with disabilities. See generally JO CAMPLING, *IMAGES OF OURSELVES: WOMEN WITH DISABILITIES TALKING* (1981); ANN C. CARRILLO ET AL., *NO MORE STARES* (1982); *WITH THE POWER OF EACH BREATH: A DISABLED WOMEN'S ANTHOLOGY* (Susan E. Browne et al. eds., 1985); *WITH WINGS: AN ANTHOLOGY OF LITERATURE BY AND ABOUT WOMEN WITH DISABILITIES* (Marsha Saxton & Florence Howe eds., 1987); *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE AND POLITICS* (Michelle Fine & Adrienne Asch eds., 1988).

<sup>14</sup> Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 249-51 (1994).

<sup>15</sup> See *id.* at 250.

<sup>16</sup> A survey of non-disabled people on their feelings toward individuals with disabilities indicates that some 74% of non-disabled Americans feel pity for the disabled. LOUIS HARRIS & ASSOCIATES INC., *PUBLIC ATTITUDES TOWARD PEOPLE WITH DISABILITIES* 13 (1991) [hereinafter *PUBLIC ATTITUDES*]. The result is what disability rights advocate and ADA proponent Justin Dart, Jr. terms a "subhuman perception" of the disabled. See SHAPIRO, *supra* note 9, at 109.

<sup>17</sup> LAURA F. ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* 184 (1984) (noting "a sociological/psychological obstacle regarding human sexuality and special problems of physically handicapped persons involving sexual relationships"); see also Cricket Potash, *Sex: Pure and Not So Simple*, DISABILITY RAG RESOURCE, May/June 1993, at 30 ("It is not uncommon for people in wheelchairs to be seen as asexual.").

icated columnist Diane Piastro, whose feature, "Living With a Disability," receives several dozen letters a year with questions about disabled sexuality from non-disabled people, writes that "[o]ne of the most common misconceptions about people with disabilities is that they can't have sex, don't want sex or are not interested in sex. People seem to think a disability neuters you sexually."<sup>18</sup>

Mainstream society's discomfort with the notion of disabled people's relational intimacy is well documented. For example, the Louis Harris Public Attitudes Poll found that forty-six percent of able-bodied people stated they "would be concerned" if their teenage son or daughter dated a disabled person, and thirty-four percent "would be concerned" if a friend or relative married a person with a disability.<sup>19</sup> Mainstream discomfort has also been discussed in personal accounts of both disabled and non-disabled women. Photographer Angelina Hekking, who has multiple sclerosis, notes that she returned to Holland during the fifth month of her pregnancy to "be treated as a normal pregnant woman," because she felt that in the United States she "was treated as a diseased person."<sup>20</sup> During the courtship of able-bodied writer Erica Levy Klein and her disabled husband-to-be Ken Kroll,<sup>21</sup> Klein's friends and family advised her to "stay away from damaged goods" and not to "put a healthy body in a sick bed."<sup>22</sup> Klein slowly lost patience. Finally, when she was told "You can't be serious, Erica! What if his condition gets worse and he turns into a

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<sup>18</sup> KEN KROLL & ERICA L. KLEIN, *ENABLING ROMANCE: A GUIDE TO LOVE, SEX, AND RELATIONSHIPS FOR THE DISABLED (AND THE PEOPLE WHO CARE ABOUT THEM)* 16 (1992) (quoting Diane Piastro) (emphasis omitted).

<sup>19</sup> PUBLIC ATTITUDES, *supra* note 16, at 15. Last year I received quite a few mortified looks from a non-disabled audience when, in response to the question "What's your take on disabled sexuality?," I replied "Overwhelmingly in favor and as frequently as possible!"

<sup>20</sup> Angelina M.A. Hekking, *Seeds of Light: Images of Healing*, KALEIDOSCOPE: INT'L MAG. LITERATURE, FINE ARTS & DISABILITY, Summer/Fall 1993, at 19, 21.

<sup>21</sup> Kroll and Klein are the authors of an exceptionally good book on disabled sexuality. See KROLL & KLEIN, *supra* note 18. The only shortfall of this book is that although it is comprehensive in scope—addressing disabled/non-disabled and disabled/disabled sexuality, self-loving, adaptive aides and innovative techniques—no same-sex or cross-ethnic couples responded to Kroll and Klein's questionnaire. Their absence detracts from the inclusive focus of this otherwise outstanding book.

<sup>22</sup> KROLL & KLEIN, *supra* note 18, at 12.

vegetable?," Klein "replied through clenched teeth: "Then I'll just have to throw some butter and garlic on him and sauté him.""<sup>23</sup>

The main consequences of the disabled non-sexuality myth are (1) difficulty in the formation of intimate interpersonal relationships between disabled and non-disabled people; (2) limited awareness and availability of health care services to women with disabilities; and (3) as a corollary to the myth, severe misperceptions about and often prejudices against individuals with disabilities acting in parental or guardianship capacities.

First, the disabled non-sexuality myth and its attendant discomfort lead to a strong reluctance among the able-bodied to acknowledge or enter into romantic relationships with the disabled.<sup>24</sup> The painful effects of mainstream aversion were made poignantly obvious by many of the individuals featured in Ken Kroll and Erica Levy Klein's book *Enabling Romance: A Guide to Love, Sex and Relationships for the Disabled*.<sup>25</sup> Marilyn, a woman who had had polio, told Kroll and Klein that:

Right after becoming disabled, I discovered that . . . men[ ] reacted

<sup>23</sup> KROLL & KLEIN, *supra* note 18, at 13.

<sup>24</sup> This attitude formed one of the tenets of the eugenics movement, started in the late nineteenth century, which, among other things, fought to prevent intermarriage between disabled and "normal" people on the theory that disabled people's "defects" were hereditary. See JOHN V. VAN CLEVE & BARRY A. CROUCH, *A PLACE OF THEIR OWN: CREATING THE DEAF COMMUNITY IN AMERICA* 148-50 (1989). One leading expert on disabled sexuality has argued that "[t]he 'politics of eugenics' is the underpinning of social policy restricting disabled people's freedom of intimate association. . . . Eugenics has as its assumption that the child born to a disabled mother will inevitably be defective, not only in its physical characteristics, but as a social, emotional and moral being." *The Testimony: The Politics of Eugenics*, DISABILITY RAG RESOURCE, May/June 1993, at 6 (testimony of Barbara Faye Waxman); see also HIRAM P. ARMS, *THE INTERMARRIAGE OF THE DEAF: ITS MENTAL, MORAL, AND SOCIAL TENDENCIES* (1887) (advocating against deaf/hearing marriages), cited in Edward A. Fay, *Notices of Publications*, 32 AM. ANNALS DEAF 250-51 (1887). In fact, a 1922 proposed Model Eugenic Sterilization Law advanced sterilizing, among others, the following "categories" of people: "(4) Epileptic; . . . (6) Diseased (including the tuberculous, the syphilitics, the leprous, and others with chronic, infectious and legally segregable diseases); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled)." Burgdorf, Jr. & Burgdorf, *supra* note 6, at 1000 n.41 (quoting HARRY H. LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* 466-77 (1922)).

<sup>25</sup> KROLL & KLEIN, *supra* note 18.



differently to me in many ways. There's a lot of avoidance, "shutting me out" of things, seeing me and quickly looking the other way, which never gives me the chance to establish eye contact, smile, or begin to speak.

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Not long after becoming disabled, I became aware that most people assume I no longer have feeling in my legs (I do), am not able to have sex (I can), cannot have an orgasm (I can), and that I cannot have sexual relationships.

....

My sexuality is a part of me. Disability doesn't change it at all.<sup>26</sup>

Similarly, Anne, who became a paraplegic as the result of a skiing accident, reported to Kroll and Klein that:

Right after my accident, I asked my doctor if I could still have sex and get pregnant. Those issues were very important to me and to my self-esteem. His reply was something like "No need to worry yourself about those things," which I then interpreted to mean that, since I was disabled, I might as well forget about sex, romance, or anything like that. I became incredibly depressed and felt like my life was over. . . . Disabled people need to have it reaffirmed to them that they can still function sexually and still be complete human beings.<sup>27</sup>

The experiences of the women interviewed by Kroll and Klein are corroborated by other women with disabilities, most notably those featured in Harilyn Rousso's *Disabled, Female, and Proud!: Stories of Ten Women With Disabilities*.<sup>28</sup> Rousso, a psychotherapist and disability rights activist with cerebral palsy, contributes the following personal account:

When I was growing up, my parents and I accepted [the non-sexuality] myth without question. We simply assumed that because I had a disability, I could not date, find a partner, or have children. As a teenager and young adult, I put aside any hope of a social life and concentrated on my studies. It never occurred to me that I had any alternative, that I could have *both* a career and a romantic life.<sup>29</sup>

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<sup>26</sup> KROLL & KLEIN, *supra* note 18, at 94.

<sup>27</sup> KROLL & KLEIN, *supra* note 18, at 19.

<sup>28</sup> See HARILYN ROUSSO, *DISABLED, FEMALE, AND PROUD!: STORIES OF TEN WOMEN WITH DISABILITIES* (1993). "I am absolutely written off by people at parties, on the street. I'm looked past, ignored." *Id.* at 27 (quoting Adrienne Asch, blind civil rights investigator).

<sup>29</sup> *Id.* at 2. "My father and mother didn't expect much from me. They didn't expect me to go to school and get a job or get married and have children." *Id.* at 101 (quoting Alice Crespo, blind court interpreter). Kroll and Klein correctly note,

In addition to these real-life stories, the discomfort with the notion of relational intimacy with disabled people also is reflected in popular literature.<sup>30</sup> One illustration is offered by the interaction between Leopold Bloom and Gertie McDowell in James Joyce's *Ulysses*. While sitting on the beach, McDowell spots Bloom eyeing her. Aware of his gaze, and hoping that he can overlook her physical shortcomings, she flirts erotically with him. McDowell leans back slowly, drawing her skirt and petticoats farther up her legs as Bloom fantasizes about her. Bloom later discovers that McDowell has a disability—she walks with a limp. For Bloom, McDowell's disability negates her beauty and charm. He tells a friend rather chauvinistically "[t]he defect is ten times worse in a woman. . . . Glad I didn't know it when she was on show."<sup>31</sup>

An even more graphic example of such prejudice appears in Charlton Ogburn's *Winespring Mountain*. Wick Carter admires Letty at a distance and often thinks of her, until he discovers that she is visually impaired. Carter is then:

overwhelmed with embarrassment and with pity, repelled, frightened. From that moment he had been unable to think of the emotions he had nursed about her without an intense desire to hide from himself. He had been duped, not by her, of course—though deep inside he held it against her that, disqualified as she was, she had stirred such thoughts in him—but by fate. He had been made a fool of.<sup>32</sup>

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"[n]owhere is rejection by the non-disabled society more evident than in attitudes about the sexuality of the disabled, and, naturally, these negative feelings have a profound effect on quality of life." KROLL & KLEIN, *supra* note 18, at 36; see also William G. Stothers, *The Smile: It Reminds Us That We Are Outcasts And Tells Us to Keep Our Distance*, MAINSTREAM: MAG. OF THE ABLE-DISABLED, Dec. 1993/Jan. 1994, at 62 ("Millions of people with disabilities are convinced their disability is *their* problem, if not *their* fault.").

<sup>30</sup> The emphasis on popular culture is not overstated. The Louis Harris Public Attitudes Poll found that popular culture was a "critical link" to mainstream understanding of disabled individuals. See PUBLIC ATTITUDES POLL, *supra* note 16, at 3-4. Some of the best discussions on this topic are collected in a single volume of essays on the popular imagery associated with the disabled. See generally Deborah Kent, *Disabled Women: Portraits in Fiction and Drama*, in IMAGES OF THE DISABLED, DISABLING IMAGES 47 (Alan Gartner & Tom Joe eds., 1987) [hereinafter DISABLING IMAGES]; Leonard Kriegel, *The Cripple in Literature*, in DISABLING IMAGES, *supra*, at 31; Paul K. Longmore, *Screening Stereotypes: Images of Disabled People in Television and Motion Pictures*, in DISABLING IMAGES, *supra*, at 65.

<sup>31</sup> JAMES JOYCE, *ULYSSES* 368 (Vintage Int'l 1990) (1934).

<sup>32</sup> CHARLTON OGBURN, *WINESPRING MOUNTAIN* 49 (1973).

When Letty regains her sight, Carter resumes his previous amorous thoughts, this time without guilt.<sup>33</sup>

Women with disabilities have attempted to address the difficult social-integration effect of the disabled non-sexuality myth in different ways.<sup>34</sup> In one highly publicized effort, *Playboy Magazine* published nude photographs of quadriplegic Ellen Stohl in its July 1987 issue. Stohl explained that her reason for posing was that, although she "realized [she] was still a woman[,] . . . the world didn't accept [her] as that."<sup>35</sup> In her letter to *Playboy's* publisher, Stohl asked, "Please don't treat me as an asexual object; treat me as a *sexual* object!"<sup>36</sup>

The benefits enured from publication of Stohl's pictorial were hotly debated among members of the disabled community. The *Disability Rag ReSource*, a progressive disability advocacy magazine, ran three consecutive issues of articles and letters about Stohl's actions, many alluding to the irony of *Playboy's* "breakthrough."<sup>37</sup> Almost certainly, *Playboy* itself was not trying to be progressive. *Playboy's* associate-editor, Kate Nolan, downplayed Stohl's pictorial, explaining that Stohl was featured only because she "looks exactly like everybody else. We're still saying, if you don't look like everybody else

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<sup>33</sup> See *id.* at 173-79.

<sup>34</sup> Conceptions about disabled men were most challenged by the protagonists of the films *Coming Home*, *Born on the Fourth of July*, and *The Waterdance*, all of whom were paraplegics assertive about, and capable in, sexual roles.

<sup>35</sup> Judith Cummings, *Disabled Model Defies Sexual Stereotypes*, N.Y. TIMES, June 8, 1987, at C12.

<sup>36</sup> CHAVA WILLIG LEVY, A PEOPLE'S HISTORY OF THE INDEPENDENT LIVING MOVEMENT 32 (1988). The point was made with more panache (and clothes) by visually impaired entertainer Ray Charles at a July 1993 concert. Following his introduction of his back-up singers as the "beautiful Raylettes" a curious buzz went out of the audience, as if Charles's impaired vision begged the question of how he knew his assistants were "beautiful." Concert held at Radio City Music Hall, New York, N.Y. (July 31, 1993). After a dramatic pause, the singer growled into his microphone "Hell, I may be blind, but I ain't dead!" *Id.* Quadriplegic cartoonist John Callahan debunks the disabled non-sexuality myth in a cartoon captioned "Handicapped people don't have sex." The drawing shows a man in a wheelchair being escorted to the hospital exit by four noticeably pregnant nurses. JOHN CALLAHAN, DON'T WORRY, HE WON'T GET FAR ON FOOT 197 (1989). An entire volume of Callahan cartoons on this subject recently was published. See JOHN CALLAHAN, THE NIGHT, THEY SAY, WAS MADE FOR LOVE PLUS MY SEXUAL SCRAPBOOK (1994).

<sup>37</sup> See WILLIG LEVY, *supra* note 36, at 32.

we're not putting you in the magazine."<sup>38</sup> In other words, Stohl's photographs appeared only because she didn't "look disabled." On the other hand, as disability rights advocate Chava Willig Levy quipped, "[l]ooking on the bright side, one could conclude that Ms. Stohl's feature shattered the myth that disability and [unattractiveness] must go hand-in-hand."<sup>39</sup>

Besides Stohl's photographs, the disabled non-sexuality myth has been countered in the disabled community by the publication of many books and pamphlets on disabled sexuality<sup>40</sup> and by the formation of educational and advocacy networks that address related concerns raised by people with disabilities.<sup>41</sup>

In addition to making intimate interpersonal relationships difficult for disabled persons, another harmful result of the disabled non-sexuality myth is that women with disabilities often are without benefit of adequate and physically accessible health care services. The prevailing presumption is that if women with disabilities will not or cannot engage in sexual activity, then they do not need access to gynecological health care. Disabled writer and civil rights activist Cricket Potash often finds that during her annual OB/GYN examination "the people taking me to the examining room or taking information

<sup>38</sup> See Cummings, *supra* note 35, at C12.

<sup>39</sup> See WILLIG LEVY, *supra* note 36, at 32. I agree with Levy. Regardless of what is thought of Playboy's moral virtues (or lack thereof), the magazine's subjects generally are considered attractive by mainstream society.

<sup>40</sup> See, e.g., *HELPING THE SEXUALLY OPPRESSED* (Harvey L. & Jean Gochros et al. eds., 1986); K. HESLINGA, *NOT MADE OF STONE: THE SEXUAL PROBLEMS OF HANDICAPPED PEOPLE* (1974); THOMAS O. MOONEY ET AL., *SEXUAL OPTIONS FOR PARAPLEGICS AND QUADRIPLEGICS* (1975); *PERSPECTIVES ON DISABILITY* (Mark Nagler ed., 1990); *REPRODUCTIVE ISSUES FOR PERSONS WITH PHYSICAL DISABILITIES* (Florence P. Haseltine et al. eds., 1993); JUDITH ROGERS & MOLLEEN MATSUMARA, *MOTHER TO BE: A GUIDE TO PREGNANCY AND BIRTH FOR WOMEN WITH DISABILITIES* (1991); *SEXUALITY AND PHYSICAL DISABILITY: PERSONAL PERSPECTIVES* (David H. Bullard & Susan E. Knight eds., 1981); *TASK FORCE ON CONCERNS OF PHYSICALLY DISABLED WOMEN, TOWARD INTIMACY: FAMILY PLANNING AND SEXUALITY CONCERNS OF PHYSICALLY DISABLED WOMEN* (2d ed. 1978). Disability rights publications often devote entire issues to the subject. See, e.g., *MOUTH: THE VOICE OF DISABILITY RIGHTS*, May/June 1994 (issue devoted to "The Trouble With Sex"). In addition, several mail order catalogues offer sexual/erotic aides with special adaptations for individuals with disabilities.

<sup>41</sup> Examples include: Coalition on Sexuality and Disability; Sexuality and Disability Training Center; University of Michigan Sex and Disability Unit; Handicap Introductions; PEOPLENET; *The Disability Rag ReSource*; *Independent Living and Health Care Today*; and, *Mainstream: Magazine of the Able-Disabled*.

seem surprised to see me there. . . . The questions on their faces are loud, though they never say a word."<sup>42</sup> Dr. Carol Gill, a member of the board of a women's health center, regularly has difficulty obtaining OB/GYN care at the offices of her regular health care provider and is instead referred to a nearby rehabilitation hospital. Gill sums up the irony of her situation: "I can't be just a woman who needs a pelvic exam; I must be a trail-blazer."<sup>43</sup>

In the past few years, several projects sponsored and driven by women with disabilities have arisen to address the dearth of health care in the United States for women with disabilities.<sup>44</sup> Among the current efforts under way, Women With Disabilities United is identifying physically accessible women's health service providers. Independent Living Research Utilization is in the midst of a three-year National Institutes of Health ("NIH")-sponsored study into the psychosocial effect of physical disability on the capability of women with disabilities entering into intimate emotional and physical relationships. The NIH also sponsored a conference on "Reproductive Issues for Persons with Physical Disabilities."<sup>45</sup> Other projects include The California Women's Law Center's conference on "Women's Rights: Disabled & Deaf Women in California." Subjects covered included domestic and sexual violence, family law and family issues, and reproductive rights and reproductive health issues, with panelists from Access Living, Disabled Women's Network, the Domestic Violence Project and Planned Parenthood.<sup>46</sup>

Finally, and most closely related to Callo's experiences, as

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<sup>42</sup> See Potash, *supra* note 17, at 30.

<sup>43</sup> See Carol J. Gill, *When Is a Woman Not a Woman*, DISABILITY RAG RESOURCE, May/June 1993, at 26.

<sup>44</sup> Women with disabilities also have begun to organize abroad. One example is DAWN—Dis-Abled Women's Network of Canada.

<sup>45</sup> See Barbara F. Waxman, *The Year of the Disabled Woman, or Girls, It's Time to Flaunt Your Sexuality*, DISABILITY RAG RESOURCE, May/June 1993, at 28; see also Gill, *supra* note 13, at 28-30.

<sup>46</sup> My thanks to Professor Carol Sanger for providing me with this information. In January 1993, a watermark was reached with the publication of the first edition of *Disability, Pregnancy & Parenthood International*. The periodical's stated goal is "to build a strong and lasting bridge across the gulf of ignorance that still exists about people with disabilities becoming or remaining parents." See *New Periodical Focuses on Parenting with a Disability*, DISABILITY RAG RESOURCE, May/June 1993, at 35.

a corollary to the disabled non-sexuality myth, severe misperceptions and prejudices abound regarding the capacity of individuals with disabilities to act in a parental or guardianship capacity. The most striking—and perhaps infamous—example of how the disabled non-sexuality myth has created ignorance and prejudice towards disabled people in their capacities as primary caretakers of children was a decision rendered by the Los Angeles Superior Court in *In re Marriage of Carney*.<sup>47</sup>

In December 1968, William and Ellen Carney were married in New York.<sup>48</sup> After four years and two boys, they separated. By written agreement, Ellen relinquished custody of the children to William who, because of employment reasons, moved with the boys to California. Soon thereafter, William began living with a woman named Lori Rivera who acted as stepmother to the Carney boys. The following year William and Lori had a daughter, and Lori proceeded to raise all three of the children as her own.

In August 1976, while serving as a military reservist, William was injured in a jeep accident that left him a quadriplegic, with severely limited use of both his arms and legs. He spent the following year rehabilitating in a hospital, during which time his children visited him several times each week. In addition, William came home almost every weekend in a van that he had purchased and fitted with special hand controls that allowed him to drive.

In May 1977, William filed an action for the official dissolution of his marriage from Ellen. In response, Ellen moved for an order awarding her custody of their sons. At trial, expert and personal testimony was presented on the solid and loving relationship that William had with his sons.<sup>49</sup> It also was undisputed that Ellen had not visited her sons or contributed in

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<sup>47</sup> See *Carney v. Carney*, 598 P.2d 36 (Cal. 1979). The *Carney* case has been featured three times on the television journalism show "20/20." See Dave Matheis, *A Look Back at the Carney Decision*, DISABILITY RAG RESOURCE, May/June 1993, at 12, 14. *Carney* also is one of the very few cases involving individuals with disabilities to appear in domestic relations casebooks. See, e.g., JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 531 (3d ed. 1992).

<sup>48</sup> The following recitation of facts is taken from the opinion of the California Supreme Court. See *Carney*, 598 P.2d at 37.

<sup>49</sup> For example, an expert psychiatrist testified that William had a "great" relationship with the boys. *Id.* at 41.

any way to their support during the five-year separation.<sup>50</sup> Nevertheless, the superior court ordered that the boys be immediately transferred to their mother's custody in New York, and that William pay child support.<sup>51</sup> Moreover, the court ordered William to pay Ellen's attorney's fees and court costs in addition to her travel and hotel expenses.<sup>52</sup>

In transferring custody, the court based its ruling almost exclusively upon William's physical disability and its presumed adverse effect on his capacity to be a good father.<sup>53</sup> With few exceptions, the questions voiced by the trial judge revolved around William's physical disability and its consequences, real or imaginary. For example, at the end of William's lengthy testimony about his present family life and his future plans, the trial judge asked him questions such as where William sat "when he got out of his wheelchair, whether he had completely lost the use of his arms, and what his medical prognosis was."<sup>54</sup> The trial court reasoned that, because of William's physical disability, he could not "do anything for the boys himself except maybe talk to them and teach them, be a tutor, which is good, but it's not enough."<sup>55</sup> After all, the judge reasoned, wouldn't it be better if the boys had a parent who could "take them places, play Little League baseball, go fishing?"<sup>56</sup> Because William could not, the court transferred custody of the boys from William to Ellen, stating that William's custody "wouldn't be a normal relationship between father and boys."<sup>57</sup>

Although the superior court's decision was reversed by a sensitive and insightful opinion by the California Supreme Court,<sup>58</sup> it cannot, unfortunately, be viewed as an aberration. Instead, the lower court's opinion in *Carney* demonstrates a stereotypical viewpoint that Professor Laura Rothstein has noted, leads to "a judicial presumption of unfitness in many

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<sup>50</sup> *Id.* at 37.

<sup>51</sup> 598 P.2d at 37 n.2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 39-40.

<sup>54</sup> *Id.* at 40.

<sup>55</sup> *Id.* at 41 (emphasis omitted).

<sup>56</sup> 598 P.2d at 40.

<sup>57</sup> *Id.* at 41 (emphasis omitted).

<sup>58</sup> 598 P.2d at 45; see *infra* text accompanying note 72.

cases involving child custody for handicapped parents."<sup>59</sup> Professor Rothstein observes that this "judicial presumption of unfitness" often manifests itself in different guises for different types of disabilities:<sup>60</sup> deaf parents are thought to be incapable of effectively stimulating language skills;<sup>61</sup> blind parents cannot provide adequate attention or discipline;<sup>62</sup> and parents with spinal cord injuries cannot adequately supervise their children.<sup>63</sup>

A common theme permeating those cases evincing a stereotypical approach is that the courts perceive a parental relationship involving a disabled individual to be less than normal. For example, in *In re Adoption of Richardson*,<sup>64</sup> a deaf-mute couple who had previously raised hearing children were denied

<sup>59</sup> ROTHSTEIN, *supra* note 17, at 185. *But see Carney*, 598 P.2d at 42 ("if a person has a physical handicap it is impermissible for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child"); *In re B.W.*, 626 P.2d 742, 743 (Colo. Ct. App. 1981) ("the removal of a child from the legal custody of a parent who suffers from a handicap cannot be presumed to be in the best interests of the child based on the fact of the handicap alone"); *Id.* at 744 ("the court must evaluate a handicapped parent's actual and potential physical capabilities"); *Michigan Dep't of Social Servs. v. McDuel*, 369 N.W.2d 912, 914 (Mich. Ct. App. 1985) ("Parental rights may not be terminated on the basis of a parent's physical incapacity in the absence of culpable neglect."), *superseded by*, MICH. COMP. LAWS § 712A.19b(3)(d) (1988), *as stated in*, *In re Jacobs*, 444 N.W.2d 789, 794 (Mich. 1989).

In another context, Professor Martha Field has keenly observed that the reason for judges' prejudice, even while acting totally in good faith, is that "judges will often project onto the [child] their own fear of handicap." See Martha A. Field, *Killing "the Handicapped"—Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 88 (1993). A large part of the advocacy that I have performed on behalf of individuals with disabilities has raised the issue of prejudice among members of the legal profession. See generally Michael Ashley Stein, *Attitudinal Barriers to Hiring Attorneys with Disabilities*, 17 PHYSICAL & MENTAL DISABILITY L. REP. 214 (1993); Michael Ashley Stein, *When Justice Is Blind: Appointing Vision-Impaired Individuals to the Bench*, 1 MINORITY L.J. 5 (1992).

<sup>60</sup> ROTHSTEIN, *supra* note 17, at 185.

<sup>61</sup> See, e.g., *Christensen v. Los Angeles County Bureau of Adoptions*, 59 Cal. Rptr. 323, 327-28 (1967).

<sup>62</sup> See, e.g., *In re B.W.*, 626 P.2d 742, 743 (Colo. Ct. App. 1981) (although the court found that there was adequate evidence to estimate that the physical and psychological manifestation of her disease contributed to an injurious environment for the children, the court also based its decision to place the children in the Department of Social Services' custody on evidence of physical abuse); *In re Kurzawa*, 290 N.W.2d 431 (Mich. Ct. App. 1980).

<sup>63</sup> See, e.g., *Carney*, 598 P.2d at 39-41; see also *supra* text accompanying notes 53-57.

<sup>64</sup> 59 Cal. Rptr. 323 (Ct. App. 1967).



the right to adopt based on their disabilities. After admitting positive evidence on the integrity of the household, the judge posited:

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 all want him to be.<sup>65</sup>

The judge then wrote a letter to the county adoption bureau, admonishing them that "this adoption should be nipped in the bud before these unfortunate people get too attached to the child, as in my opinion, we are not doing right by the youngster in signing and approving an adoption to deaf-mutes."<sup>66</sup>

Similar reasoning was used in *In re Marriage of Levin*.<sup>67</sup> In *Levin*, the lower court awarded custody of a former couple's children to the father based upon the mother's use of a wheelchair following a stroke. The court reasoned that:

Even though we know that children of the poor do as well as children of the rich, maybe better, still a judge can't say to a child, 'You be poor.' I can't do that. . . . because of the limitations that the handicap imposes upon what I conceive to be the most, *normal*, possible life for a child.<sup>68</sup>

Perhaps what is most striking about the lower court decisions in *Carney*, *Richardson* and *Levin* is their fundamental misunderstanding of the role of a parent as one that involves purely physically related skills. On the contrary, among the most essential elements of parenting are nurturing, loving, teaching, bonding, giving attention, guiding, communicating and transferring values. As disabled mother Melissa Walstead notes, "Changing diapers and bathing a child are not as important as [loving], being there, laughing, or educating a child."<sup>69</sup> These elements are not dependent on physical ability. Indeed, one could argue that parents with disabilities are better suited

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<sup>65</sup> *Id.* at 327 (emphasis added).

<sup>66</sup> *Id.* at 328.

<sup>67</sup> 162 Cal. Rptr. 757 (Ct. App. 1980).

<sup>68</sup> *Id.* at 761 (emphasis added).

<sup>69</sup> *More Love To Give Than Anyone: Excerpts from the Testimony of Melissa Walstead*, DISABILITY RAG RESOURCE, May/June 1993, at 9 [hereinafter *More Love To Give*].

than their able-bodied counterparts to help children "broaden[] their perspective on issues of independence, relationships, commitment, problem-solving, life value, diversity, and flexibility."<sup>70</sup> As one co-worker told a disabled mother, "[y]our kids are so terrific. You really did a good job. . . . And I think that's partially because you work at those other kinds of things that sometimes people leave out because they are so into the physical."<sup>71</sup>

Perhaps the best rejoinder to the stereotype of physical parenting was made by the California Supreme Court during its reversal of the lower court in *Carney*, which is worth quoting at length:

[T]he stereotype is false because it fails to reach the heart of the parent-child relationship. 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.<sup>72</sup>

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<sup>70</sup> See *Prejudice, Plain and Simple: Excerpts from the Testimony of Carol Gill*, DISABILITY RAG RESOURCE, May/June 1993, at 8, 8-9.

<sup>71</sup> ROUSSO, *supra* note 28, at 128.

<sup>72</sup> *Carney*, 598 P.2d at 44; see also *Warnick v. Couey*, 359 So. 2d 801, 803 (Ala. Civ. App. 1978) ("Just as clear is the fact that while the husband's physical condition has greatly changed, his love and ability to care for the child has not changed."); *In re Marriage of Levin*, 162 Cal. Rptr. 757, 761 (Cal. Ct. App. 1980) (In determining what is in the best interests of a child "the court must consider the fact that the essence of parenting is ethical, emotional, and intellectual guidance of the child—something which, by and large, is generally unrelated to the physical handicap of a parent."); *In re Eugene W.*, 105 Cal. Rptr. 736, 740-41 (Cal. Ct. App. 1972) ("It requires no detailed discussion to demonstrate that the support and, even more, the control of the child is primarily a mental function . . .").

## II. A MOTHER'S TOUCH: THE TIFFANY CALLO STORY

*A Mother's Touch* is a compassionate and absorbing account of disabled mother Tiffany Callo's struggle to regain custody of her two able-bodied children after they were removed from her care by the Santa Clara County Department of Social Services ("DSS"). The central question addressed in *A Mother's Touch* is whether it was "fair and legal for a society to tell some of its members that they could not look forward to raising children because they were disabled."<sup>73</sup> Mathews raises this issue by chronicling Callo's life from the time of her own childhood through the court hearings that determined her sons' custody.

*A Mother's Touch* recounts Callo's personal history in great detail. It tells the story of how Callo's parents met, conceived her, discovered that Callo had been born with cerebral palsy, and dissolved their marriage. The book then follows Callo as she was raised at various times by her grandmother—with whom she had a very close and loving relationship—and by her emotionally erratic father and a succession of stepmothers, one of whom viciously beat her.<sup>74</sup> Callo was permanently removed from her father's custody and placed into foster care because she did not explain the origin of her physical abuse when discovered by DSS.<sup>75</sup> One of the foster families with whom Callo lived had an especially positive impact upon her because "she found irresistible" their "love and compassion and ease with all the intricacies of family life."<sup>76</sup>

At age sixteen Callo tried living in a group home for disabled young adults, but was raped by the director's fiancé and another staff member. The director refused to believe that Callo had been coerced, "despite her obvious inability to fend off such an attack."<sup>77</sup> Thus, legal action did not occur "for a long time," during which Callo realized that she was pregnant and later miscarried.<sup>78</sup> As a result of her group home experience, Callo "resumed living with foster families, . . . clung to

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<sup>73</sup> MATHEWS, *supra* note 1, at 177.

<sup>74</sup> MATHEWS, *supra* note 1, at 48-51.

<sup>75</sup> MATHEWS, *supra* note 1, at 51-57.

<sup>76</sup> MATHEWS, *supra* note 1, at 58-59.

<sup>77</sup> MATHEWS, *supra* note 1, at 60.

<sup>78</sup> MATHEWS, *supra* note 1, at 60.

their order and warmth," and "thought often about how to balance her need for both security and independence."<sup>79</sup>

Despite—or perhaps because of—her lack of a stable familial history, at age eighteen Callo "began to think about what kind of a family she was going to make for herself."<sup>80</sup> Shortly afterwards she fell in love with Tony, a disabled thirty-three-year-old former gang member. Combining their disability payments, they were able to rent a small apartment and began living together. Callo soon discovered that she was pregnant. The thought was particularly exciting because of Callo's conviction that she would be a good mother:

She appreciated the small moments of a relationship with a child, of what she had had with her grandmother—the looks and the promises and the long, soft conversations. God had denied her many things, but He had given her an appreciation of stability and consistency and the wise use of the 86,400 seconds in every day. She could take life slowly, with none of the guilt of the young executives she saw charging up Santa Clara Street with their dress-for-success suits and their thin briefcases. Her baby would get a lot of her time.<sup>81</sup>

Callo's pregnancy broke new ground for many of the people around her. Neither the nurse whom DSS sent each month to check on Callo, nor any of the health care providers at her local hospital had any experience with pregnant women with disabilities. The able-bodied women in Callo's childbirth class often treated her "like a piece of furniture."<sup>82</sup> Callo's pregnancy also engendered hostile responses. One woman who approached her on the street said, "I don't think it's right, a person like you having a baby."<sup>83</sup>

Mathews relates how DSS's response to the birth of Callo's first son David at the local hospital combined ignorance with prejudice. Because of DSS orders, David was bottle-fed against his own mother's express wishes and Callo wasn't allowed to see or hold her child for the first fourteen hours of his life. Although Callo had prepared for weeks for her post-partum experience, thinking through how she would care for her child,

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<sup>79</sup> MATHEWS, *supra* note 1, at 60.

<sup>80</sup> MATHEWS, *supra* note 1, at 60.

<sup>81</sup> MATHEWS, *supra* note 1, at 76.

<sup>82</sup> MATHEWS, *supra* note 1, at 80.

<sup>83</sup> MATHEWS, *supra* note 1, at 81.

she was told, almost immediately after birth by a county social worker, "If you don't cooperate with us, you may never see your son again."<sup>84</sup>

While still in the hospital, Callo was questioned by Daryl E. Auten, a juvenile court officer, who later conducted an intrusive inspection of Callo's home. Although Callo pleaded with Auten—"I'll go to classes. . . . You tell me whatever is necessary. . . . I want my kid at home,"—DSS never provided Callo with instruction or any other form of assistance in caring for her child and, therefore, she often was left to her own devices.<sup>85</sup> For example, because the nurse DSS sent to inspect Callo's child rearing abilities was unfamiliar with cribs for disabled parents, a friend of Callo's engineered a hinge that allowed her to easily reach David by pulling back one side of the crib.

David was consigned to the custody of Callo's father and his new girlfriend, until Tony's sister Irene and her two children moved in with the couple. As an additional condition to Callo regaining some custody of her son, she signed a statement authorizing Irene to keep David with her at all times, even when Irene left Callo's apartment. The living arrangement was short-lived: Callo was forced to flee Tony's physical and emotional abuse—once again pregnant and now alone—and Irene turned David Callo over to DSS.

DSS was less than sympathetic to Callo's plight. The assigned caseworker, Shirley Silvani, "doubted from the start" that Callo could care for David, and before even meeting Callo, Silvani noted in her log entries that Callo "'cannot provide any care . . . or even hold the baby.'"<sup>86</sup> In addition, although Silvani had no experience with disabled parents, she rejected out of hand Callo's assertions that David was both aware of, and developmentally capable of responding to, the physical limitations caused by her disability.

Moreover, when Silvani scheduled visitations for Callo with David it was in the DSS auditorium, a location referred to by DSS's own caseworkers as the "Zoo" because of the noise and confusion. Although Silvani explained in her notes that

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<sup>84</sup> MATHEWS, *supra* note 1, at 87.

<sup>85</sup> MATHEWS, *supra* note 1, at 92.

<sup>86</sup> MATHEWS, *supra* note 1, at 110.

the venue was most convenient for Callo because it was accessible to a person using a motorized wheelchair, Silvani made no account of the noise and confusion. Instead, she related only that "[t]he baby gets very frightened" during visits and therefore "does not have any meaningful interaction with [Callo]." <sup>87</sup>

As the result of her conclusions, Silvani counseled Callo to give up David for adoption. After discovering Callo's new pregnancy a few weeks later, Silvani advised her to consider an abortion. When Callo refused both suggestions, DSS filed a petition to remove David from his mother's custody. The family court judge appointed an attorney, Clay Bedford, to assist Callo. Bedford promptly began a media campaign on Callo's behalf that continued through the birth and removal of her second son, Jesse.

The media—television in particular—found "irresistible" the story of how a "county government had taken a baby away from a bright and beautiful young woman."<sup>88</sup> As they crowded around her in the maternity ward, Callo succinctly summed up the origin of her woes: "If I wasn't handicapped, they would not *dare* to take any of my babies away."<sup>89</sup> Bedford held a similar view of the issues that truly underlaid Callo's situation:

It appalled him that DSS, like nearly every other child-protective agency in the country, paid more than five hundred dollars a month to keep a single child in a foster home but could not spend that same amount on an attendant to help a disabled mother raise her child in her own home. It offended him that [Callo] was in court only because her children were healthy and nondisabled. If they had been born disabled, they would have immediately qualified for attendant care and could have been raised by [Callo]. Of course, if they had been disabled, probably no one but their mother would have wanted them anyway.<sup>90</sup>

During Bedford's engineered media blitz, and prior to the court hearing that would determine custody of Callo's sons, Silvani asked psychologist Megan Kirshbaum to conduct an evaluation of Callo. Kirshbaum, founder of a nonprofit agency

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<sup>87</sup> MATHEWS, *supra* note 1, at 110-11.

<sup>88</sup> MATHEWS, *supra* note 1, at 11.

<sup>89</sup> MATHEWS, *supra* note 1, at 11.

<sup>90</sup> MATHEWS, *supra* note 1, at 22.

called *Through the Looking Glass*, is one of the country's leading authorities on disabled parents and an authority on developing adaptive parenting devices.<sup>91</sup> She also is married to a disabled person and is the mother of a child with a congenital disability.

Kirshbaum's evaluation took Callo's physical limitations in stride. For example, although Callo required more time than an able-bodied mother to accomplish parental tasks—changing diapers might take up to twenty minutes—Kirshbaum recognized that Callo's speaking and cooing to David during diapering were "bridging techniques" that both calmed and reassured him.<sup>92</sup> Instead of being a detrimental activity because of the time involved, the instinctive bridging techniques made for a pleasant experience. David became patient, adapting his behavior in response to his mother's disability. In addition, contrary to Silvani's observation that David feared his mother, Kirshbaum discovered that it was the strangeness and elevation of Callo's motorized wheelchair that had initially made the child uncomfortable. To counter the effect, Kirshbaum sat Callo on the floor opposite David who, now excited, played ball with his mother. To test her theory, Kirshbaum sat Silvani, with whom David was familiar, in Callo's wheelchair. When David was handed to Silvani, he cried.

*A Mother's Touch* chronicles Callo's court battles to regain custody of her children and to reveal where and with whom David and Jesse Callo were assigned to live. The book also tells the story of how Callo finally found a gentle and loving partner. The real strengths of *A Mother's Touch* are Mathews's skills as a writer and his sympathetic viewpoint, which help make Callo's story even more engaging. Mathews also is tender in his portrayal of Callo as a mother, detailing with compassion the interactions between mother and children during their frequently interrupted time together.

If there is a notable shortfall to *A Mother's Touch*, it is that Mathews's use of interweaving flashbacks often confuse the chronology of events. A distaste for such artifice may, however, be no more than this lawyer's bias for first understanding and then telling stories in linear fashion with succeeding be-

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<sup>91</sup> MATHEWS, *supra* note 1, at 146.

<sup>92</sup> MATHEWS, *supra* note 1, at 201.

ginnings, middles and ends. Nevertheless, Mathews's style is bright and vibrant and the story he tells is both relevant and compelling.

### III. THE NEED FOR A DEFINABLE LEGAL STANDARD

*A Mother's Touch* is an important book that raises questions about mainstream society's understanding and treatment of parenting by people with disabilities. Tiffany Callo's story, together with the views reflected in the lower court decisions in *Carney*, *Richardson*, and *Levin*,<sup>93</sup> forces several issues to be addressed. When called upon to determine a child's custody, courts traditionally base their decisions upon what they consider to be "the best interests of the child."<sup>94</sup> This determination of "best interest" is arrived at through the balancing of many factors, including the potential custodial parent's ability to emotionally and financially support the child. When, however, one of the parents—or potential parents in the case of adoption—is physically disabled, there is a question of how heavily a parent's disability should weigh in determining the best interests of the child. Should disability act as a total bar to parenthood or, instead, should the physical abilities of the putative custodian count as only one factor among several that may be considered in custody decisions? Most importantly, if physical ability is to be considered, what weight should it carry and how are the rights of disabled parents to be protected?

A definable legal standard for determining the weight given to physical disability in custodial decisionmaking is necessary. Currently, physical disability is a statutory ground for termination of parental rights in three states.<sup>95</sup> California,

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<sup>93</sup> See *supra* text accompanying notes 47-72.

<sup>94</sup> See generally AREEN, *supra* note 47, at 428; Jonathan A. Weiss, *The Emerging Rights of Minors*, 4 U. TOL. L. REV. 25, 26-36 (1972). Only a handful of cases have applied a "best interests" analysis in the context of disabled parents. See, e.g., *Rains v. Alston*, 576 S.W.2d 505, 507 (Ark. 1979) (en banc) ("The most important matter to be considered by any court in matters of this nature is the best interest of the infant child."); *In re B.W.*, 626 P.2d 742, 744 (Colo. Ct. App. 1981) ("The paramount consideration in this type of proceeding is the best interests of the child."); *Moye v. Moye*, 627 P.2d 799, 801 (Idaho 1981) ("the physical condition of a parent is a valid consideration in a 'best interests' approach").

<sup>95</sup> See ARK. CODE ANN. § 9-920(c)(2) (Michie 1993); MONT. CODE ANN. § 41-3-609(3) (1983); OHIO REV. CODE ANN. § 2151.04(B) (Anderson 1976). Similar pro-



birthplace of the *Carney*, *Richardson*, and *Levin* decisions, repealed a child custody statute containing language that would have protected disabled parents' rights.<sup>96</sup> Professor Laura Rothstein has suggested that "in all cases . . . the standard should be to determine the best interests of the child, with the handicap of parents being only a factor for consideration, rather than as establishing any kind of presumption of unfitness."<sup>97</sup>

Professor Rothstein's standard is similar to that of the Model Uniform Marriage and Divorce Act,<sup>98</sup> which has been adopted by a handful of states.<sup>99</sup> A standard along the lines of the Rothstein/Model Act standard should be adopted, but with one very strong qualification: When courts weigh "the handicap of parents" as a "factor for consideration," they must appreciate that certain parental tasks performed by the physically disabled in ways different from those mainstream society considers "normal," may nevertheless constitute an equally valid performance of those tasks. Binding courts with a clear standard will require individual judges to (presumably) enunciate

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visions have been repealed in Maryland and Wyoming.

<sup>96</sup> See CAL. WELFARE & INST. CODE § 300(a) (Deering 1985) ("No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability.") (repealed 1987). Likewise, Governor Deukmejian vetoed a California State Senate Bill that would have placed disabled parents on equal ground with their able-bodied counterparts. MATHEWS, *supra* note 1, at 238-40. In 1989, the California State Legislature passed a vaguely worded bill, AB558, which may or may not provide the type of assistance Callo sought. *Id.* at 242. The current version of California's child custody statute, CAL. WELFARE & INST. CODE § 300(j) (Deering 1993), contains the following language:

[A] physical disability, such as blindness or deafness, is no bar to the raising of happy and well-adjusted children and that a court's determination pursuant to this section shall center upon whether a parent's disability prevents him or her from exercising care and control.

<sup>97</sup> ROTHSTEIN, *supra* note 17, at 186.

<sup>98</sup> Section 402 of the Uniform Marriage and Divorce Act provides that the following factors be balanced in determining custody decisions: "(1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved." UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1992).

<sup>99</sup> As of this writing, those states include Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington. See UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 147 (1992).

the weight they give to the various factors so that, at the very least, a record may be established to contest their rulings.<sup>100</sup>

Although not yet challenged in court, such a qualification may well be required from a legal perspective under equal protection, procedural due process, and ADA analyses. For instance, under an equal protection analysis, a court strictly scrutinizes state action when the action impacts upon a suspect class of people, or when the state action affects a fundamental right. Although people with disabilities currently are not considered a suspect class,<sup>101</sup> the rights of procreation and parenting repeatedly have been recognized as fundamental.<sup>102</sup> Therefore, procreative and parental rights of disabled people probably would be upheld under strict scrutiny. Additionally, procedural due process requires that a fair adjudicative procedure be afforded to individuals prior to depriving them of life, liberty or property. Judging people with disabilities by able-bodied standards is hardly equitable, and thus an invalid process.<sup>103</sup> Finally, Title II of the ADA prohibits public entities from excluding disabled people from participation in their various benefits and services.<sup>104</sup> While not yet interpreted by any reported decisions in this specific context, Title II conceivably will prevent social service agencies from shunning disabled parents because of their special needs.

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<sup>100</sup> I have used the term "presumably" in deference to the continuing debate among legal scholars over whether judges are knowingly capable of or willing to state their true reasons for reaching any given decision. Compare Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) with David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987). My view on this matter is optimistically fatalistic: I believe in the general integrity of our judges; nevertheless, judges who wish to conceal their true motives always will be able to do so.

<sup>101</sup> See Marcia P. Burgdorf & Robert L. Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975) (positing that the disabled should be regarded as a suspect class). I find most of the Burgdorfs' analysis to be persuasive.

<sup>102</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>103</sup> Judge Devine observed in another context, "[a]ssessing the capability of various individuals to perform . . . without an individualized determination of their strengths and weaknesses would appear to be impossible." *Garrity v. Gallen*, 522 F. Supp. 171, 206 (D.N.H. 1981).

<sup>104</sup> Title II provides, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity." 42 U.S.C. § 12132 (Supp. II 1990).

Qualifying the standard by which disabled parents' disabilities are evaluated by accepting different physical methodology, certainly is crucial from a social perspective because "[t]ypically, the differences that cultures outside of the dominant culture present have been thought of as deficiencies."<sup>105</sup> As Professor Martha Minow has persuasively and eloquently demonstrated, "[d]ifference' is only meaningful as a comparison."<sup>106</sup> To be different requires first that there be an established and known norm from which one can differ, for it is impossible to be out of the mainstream unless a mainstream exists. Professor Minow writes that the

treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, "minority" races to whites, handicapped persons to the able-bodied. . . . Difference may seem salient not because of a trait intrinsic to the person but instead because the dominant institutional arrangements were designed without the trait in mind. Consider the difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs.<sup>107</sup>

In the context of parenting, the disabled non-sexuality myth<sup>108</sup> leads society to envision its children raised by able-bodied people. Parents with physical disabilities exist outside the parameters of this norm, if at all. Modifying Professor Minow's analogy, consider the difference between social service agency evaluations that judge disabled people by able-bodied standards—such as applying a Rorschach test to a person with cerebral palsy who may have perceptual difficulties<sup>109</sup>—and social service agency evaluations like those performed by

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<sup>105</sup> Susan O'Connor, *Culture, Disability and Family Policy*, 2 CTR. ON HUM. POL'Y BULL. 4, 4-5 (1992).

<sup>106</sup> Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13 (1987) [hereinafter Minow, *Justice Engendered*]. Many of my thoughts in this section are drawn from Martha Minow's fine writings on legal sensitivity to difference, and are indebted to her insight. See MARTHA MINOW, *THE MEANING OF DIFFERENCE* (1991); Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992) [hereinafter Minow, *All in the Family*]; Martha Minow, *Redefining Families—Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991) [hereinafter Minow, *Redefining Families*].

<sup>107</sup> Minow, *Justice Engendered*, *supra* note 106, at 13-14.

<sup>108</sup> See *supra* text accompanying notes 17-43.

<sup>109</sup> See MATHEWS, *supra* note 1, at 180-81.

Megan Kirshbaum, which adapt "normal" techniques to the needs of the disabled—for example, seating a wheelchair-using parent on the floor so that she can communicate on an equal plane with her child.<sup>110</sup> Consider also the difference between treating as normal an increasingly common parenting practice in which children of able-bodied parents are raised almost exclusively by nannies, while treating as inadequate an emotionally close and loving parenting relationship in which certain physical tasks, such as food preparation, are performed by an individual assisting disabled parents.

Tiffany Callo's physical differences meant spending more time in performing parental tasks such as changing her children's diapers. She facilitated the task by using velcro fastenings instead of safety pins.<sup>111</sup> For other disabled parents physical difference takes on other manifestations. Dorothy Wainer, who walks with a pronounced limp as the result of childhood polio, utilizes "every single device in terms of transportation" to maintain her balance, including strollers, snugli carriers,<sup>112</sup> sassy seats,<sup>113</sup> backpacks and a cane.<sup>114</sup> Carol Ann Roberson, a post-polio quadriplegic who could hold neither her children nor a book, learned to read upside down so that she could read to her children while they sat in front of her holding their books facing them.<sup>115</sup> Cathy Cates, who is balanced-impaired, learned to improvise her ambulation techniques in order to carry her baby. Indoors, Cates used a stroller and leaned on walls. Outside, Cates used child carriers with front and back straps and trained herself to use one crutch instead of two so that she would have a free hand to carry both purse and diaper bag.<sup>116</sup>

Even with the accomplishment of parental tasks through different techniques, mothers with disabilities fear that main-

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<sup>110</sup> MATHEWS, *supra* note 1, at 137-49.

<sup>111</sup> MATHEWS, *supra* note 1, at 194, 215.

<sup>112</sup> A "snugli carrier" is a pouch that straps around a person's neck and back so that a young child can sit against his or her parent's chest while leaving the parent's arms free.

<sup>113</sup> A "sassy seat" latches onto a table, making it easier to feed a baby if a parent has weak upper extremities.

<sup>114</sup> ROUSSO, *supra* note 28, at 78-79.

<sup>115</sup> ROUSSO, *supra* note 28, at 127-28.

<sup>116</sup> Cathy Cates, *One Mother's Experience*, DISABILITY RAG RESOURCE, May/June 1993, at 25.

stream society will remove their children because of prevailing misconceptions. The result is the diminishment of parental joy for otherwise able and loving parents. Roberson admits that "[w]hen my kids were younger, I can remember always being afraid [that] . . . someone would possibly take my kids away from me because the expectation might be that I couldn't do it alone."<sup>117</sup> Similarly, Cates concedes that "[o]ne of my biggest fears has been that my children would be taken away because some bureaucrats decided that my physical limitations made me an inadequate parent."<sup>118</sup>

Mainstream society is slowly developing a broader recognition of family and parenthood than the model presented in the television show "Father Knows Best," which featured a household headed by a same-race, heterosexual couple raising their own biological children.<sup>119</sup> It is increasingly common for interracial<sup>120</sup> or gay couples<sup>121</sup> or single parents<sup>122</sup> to raise

<sup>117</sup> See ROUSSO, *supra* note 28, at 127.

<sup>118</sup> Cates, *supra* note 116, at 25; see also *More Love To Give*, *supra* note 69, at 9 ("If something happened to my husband, would my child be taken away from me?").

<sup>119</sup> See generally Elizabeth Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Minow, *Redefining Families*, *supra* note 106; Note, *Looking for a Family Resemblance: Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991).

<sup>120</sup> "In 1992, the U.S. Census reported more than a million interracial marriages in this country." Lise Funderburg, *Looking For a Legacy Beyond Black and White*, N.Y. NEWSDAY, Dec. 16, 1993, at 125; see also LISE FUNDERBURG, *BLACK, WHITE, OTHER: BIRACIAL AMERICANS TALK ABOUT RACE AND RACIAL IDENTITY* (1994); David Jacobson, *Does "Pelican Brief" Practice Abstinence for Racial Reasons?*, GANNETT NEWS SERVICE, Dec. 20, 1993, available in LEXIS, Nexis Library, GNS File, at \*4 ("The number of black-white marriages is growing 'exponentially' . . . . There were only 65,000 interracial married couples in 1970 . . . . But in 1992, there were almost a quarter million such marriages.") (quoting Carlos Fernandez, president of the Association of MultiEthnic Americans). My thanks to Scott Geddes of Mead Data Central for providing me with these citations.

<sup>121</sup> See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Mary P. Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91 (1991). But see *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (denying visitation rights to lesbian ex-lover of natural mother) see also Kimberly P. Carr, Comment, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021, 1025 (1992) (arguing that courts should determine the best interests of a child by "analyzing the nature of the relationship between the petitioner and the child").

<sup>122</sup> See NATIONAL COMM'N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN*

traditionally or openly adopted children<sup>123</sup> of their own or different races<sup>124</sup> in "blended," multi-generational, or extended family arrangements.<sup>125</sup> Nor should it be uncommon for people with disabilities to raise children. The social construct of being disabled<sup>126</sup> is no more removed from the "Father Knows Best" model than are other social constructs. Many of the rationales that have been used to argue for parental rights<sup>127</sup> of these groups apply equally to the disabled.

One example of a parallel rationale is the Supreme Court's treatment of interracial marriage and step-parentage in *Palmore v. Sidoti*.<sup>128</sup> Rejecting a divorced white father's claim to custody based solely on his white ex-wife cohabiting with and later marrying an African American, the Court reasoned that:

It would ignore reality to suggest that racial and ethnic prejudices do not exist . . . . There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them.<sup>129</sup>

Another example is the recognition of homosexual parental

AGENDA FOR CHILDREN AND FAMILIES 18 (1991) (almost one-quarter of all American children live in single-parent households).

<sup>123</sup> See Minow, *All in the Family*, *supra* note 106, at 287.

<sup>124</sup> See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

<sup>125</sup> "[T]he 'family' is not one entity but a multitude of unique interpersonal relationships bound by complicated mixtures of biology, culture, love, and dependence, and threatened by complicated internal and external pressures." Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 989 (1985); see also Minow, *All In the Family*, *supra* note 106, at 284-86.

<sup>126</sup> See generally CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988); see also NORA E. GROCE, *EVERYONE HERE SPOKE SIGN LANGUAGE: HEREDITARY DEAFNESS ON MARTHA'S VINEYARD* (1985) (account of nineteenth-century community comprised mostly of hearing-impaired people).

<sup>127</sup> See generally Elizabeth Bartlett, *supra* note 119; Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

<sup>128</sup> 466 U.S. 429 (1984).

<sup>129</sup> *Id.* at 433.

rights by a New York State court in *In re Adoption of Evan*.<sup>130</sup> The *Evan* court explained that:

this is not a matter which arises in a vacuum. Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that cannot be solved by idealizing the past. Today a child who . . . receives the love and nurture of even a single parent can be counted among the blessed.<sup>131</sup>

By recognizing the equality of physical difference in performing parenting tasks, either of the above quotations can be re-read with the disabled in mind.

The recognition of difference for disabled parents currently is under attack in a case involving a Michigan couple.<sup>132</sup> Bill Earl and Leigh Campbell Earl, a married couple with cerebral palsy, are engaged in a fight with the Ingham County Department of Social Services over the care of their non-disabled child Natalie. Current state regulations provide that personal care assistants hired to care for disabled people may not touch their clients' children during paid working hours. Without assistance from their attendant, the Earls cannot attend to all of Natalie's physical needs and may lose custody of their daughter.

The Earls' plight garnered enough attention to warrant a joint hearing of the Michigan legislature, at which many disability rights advocates testified.<sup>133</sup> One of those witnesses

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<sup>130</sup> 153 Misc.2d 844, 583 N.Y.S.2d 997 (Sur. Ct. N.Y. County 1992).

<sup>131</sup> *Id.* at 852, 583 N.Y.S.2d at 1002. Professor Sylvia Law wrote the report upon which the court based its findings. See *id.* at 845, 583 N.Y.S.2d at 998.

<sup>132</sup> The discussion that follows is drawn from the May/June 1993 issue of the *Disability Rag ReSource*, which featured the topic "Parenting With a Disability."

<sup>133</sup> Among those testifying were Barbara Faye Waxman, Carol Gill, Cecily Cagle and Alan Bergman. Bergman noted that while "home maintenance and minor repairs, yard work" were allowable activities for personal health care attendants, child care was not. See *Yard Work, Yes. Child Care, No: Excerpts from the Testimony of Alan Bergman*, DISABILITY RAG RESOURCE, May/June 1993, at 7-8. Bergman's point has wider and more ironic implications. In an effort to keep children with their (non-disabled) parents, social service agencies often are required by state statute to provide drug and alcohol rehabilitation, job training and housing placements, see, e.g., *In re Sheila G.*, 61 N.Y.2d 368, 385, 462 N.E.2d 1139, 1147, 474 N.Y.S.2d 421, 430-32 (1984); *In re Gyvon Lamar P.*, 190 A.D.2d 592, 593 N.Y.S.2d 791 (App. Div., 1st Dep't 1993); *In re Custody of Courtney L.*, 188 A.D.2d 265, 590 N.Y.S.2d 456 (App. Div., 1st Dep't 1992) (Michael A. Stein and Barbara H. Dildine on the briefs for the respective children), yet nothing specifically requires these agencies to undertake similar efforts at maintaining disabled parent/non-disabled children family arrangements. For a scathing analysis of one

was Tiffany Callo. Addressing the joint houses, Callo asked:

How many of you legislators are parents? How would you like it if someone legally kidnapped your little boy or little girl? Would you miss them? It's the same with us. We have the same needs to have children, but not the same rights to keep them. . . . [W]hy should parents with disabilities still be discriminated against in our basic rights to be parents?<sup>134</sup>

Just as she did in *A Mother's Touch*, Callo continues to raise some serious, unanswered questions.

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state's termination procedures, see Jonathan Weiss & Oscar Chase, *The Case for Repeal of Section 383 of the New York Social Services Law*, 4 COLUM. HUM. RTS. L. REV. 325 (1972).

<sup>134</sup> "Unfit" Because of My Disability: Excerpts from the Testimony of Tiffany Callo Brazil, DISABILITY RAG RESOURCE, May/June 1993, at 9.



