

Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded

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Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded

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Over the past quarter century, people with developmental disabilities have gradually moved out of institutions and into the mainstream of society. One result of this movement has been a dramatic increase in the number of developmentally disabled parents. Additionally, there has been a corresponding increase in the number of parental rights termination cases involving parents with developmental disabilities. This Comment suggests that state courts have implemented parental rights statutes in such a way as to treat developmental disability as a primary indicator of parental inadequacy. For instance, courts have used the labels of "developmental disability" and "mental retardation" to justify everything from an initial intervention in the parent-child relationship to the final termination of parental rights. The author examines whether such treatment violates either the Equal Protection Clause of the Fourteenth Amendment or Title II of the Americans with Disabilities Act (ADA). He argues that states violate both the Equal Protection Clause and the ADA when they use a parent's ascribed status as developmentally disabled or mentally retarded as a determinant of parental fitness. Instead, the author argues, the states should examine parental behavior to determine parental adequacy. The Comment concludes by suggesting that states alter their current treatment of parents with developmental disabilities in order to comply with the ADA's non-discrimination mandate, and to best serve the interests of children, parents, and society.

INTRODUCTION

Two related trends have pushed the issue of the parental rights of adults labeled mentally retarded or developmentally disabled¹ into the foreground of both law and social policy. First, the once routine practice of

1. At the risk of awkwardness, this Comment primarily uses the terms "parents labeled mentally retarded" and "parents labeled developmentally disabled" rather than "mentally retarded parents" or "developmentally disabled parents." Both "mental retardation" and "developmental disability" are broad, imprecise terms that say very little about the persons to whom they are affixed. See *infra* note 18 for their respective definitions. Thus, this Comment employs somewhat awkward phraseology to

sterilizing persons labeled developmentally disabled or mentally retarded has gradually subsided over the past two decades. Second, over that same period, persons labeled developmentally disabled or mentally retarded have moved in large numbers from segregated institutions toward mainstream society. Predictably, this process of integration has expanded the range of social roles available to persons labeled developmentally disabled, who now seek that which has for so long been denied to them: a chance to work, to live where they choose, to vote, to engage in sexual and romantic relationships, and to parent.

My own interest in this issue stems from my former life as a counselor working with adults labeled mentally retarded. I was assigned to work with a young woman named Gloria, who, I was told, wanted assistance in finding housing, maintaining her finances, and most especially in regaining custody of her infant daughter (who had been removed from her care shortly after birth).² This woman was described to me as poor, mentally retarded, mentally ill, with a severe speech disorder, and a severe distrust of people from the social services system, which would include me. Based on this description, I was not optimistic that this mother would regain custody of her younger daughter, or retain custody of her older daughter.

When I first met Gloria, my optimism increased only slightly. It was obvious that she faced many real challenges as a parent, due both to social circumstance and to her multiple disabilities. My first meeting with Gloria was spent discussing her imminent eviction from her apartment due to non-payment of rent. The eviction threatened to thrust both Gloria and her nine-year-old daughter into a state of homelessness.

Over the course of the next two and one-half years, however, Gloria's strengths as a parent gradually became apparent to me. She was a strong and loving mother, with a quick sense of humor, and an ardent concern for her children's interests. Nonetheless, I continued to view Gloria as a parent who faced sometimes staggering challenges. She was physically abused by a drop-in boyfriend and financially abused by family members. As the State of California systematically slashed funding to poor people and people with disabilities, her tight finances grew even tighter. Her social circumstances, and the physical and financial abuse she endured, undermined Gloria's confidence as a mother, and made it difficult for her to focus on the day-to-day needs of her children. In addition, her communication disorder and her extreme distrust of anyone from the social service system made it difficult to assist Gloria in effecting positive change.

Fortunately for Gloria and her children, the Juvenile Court judge in her case was able to separate out the many issues confronting Gloria as a parent. The judge conditioned reunification on Gloria obtaining counseling to

remind the reader that these terms are merely labels, and have no real explanatory or predictive value. See *infra* notes 19-21 and accompanying text.

2. The mother had an older daughter, aged nine, who was still in her custody.

enable her to deal with her abusive relationships, a restraining order against her violent boyfriend, and specialized parenting services through the Department of Social Services. After two and one-half years of foster care, Gloria's three-year-old daughter was finally returned to Gloria's care. Today, Gloria continues to face many challenges as a parent. Her poverty continues to make it difficult for her to meet the needs of her children; her family members continue to seek her out for money and favors; her ex-boyfriend continues to attempt to exert control over her and her daughters; her limited communication skills continue to make it difficult for her to be understood by those seeking to help her; and Gloria continues to distrust a Byzantine, and often hostile, social services system. Nonetheless, Gloria's two daughters are currently thriving in school and have a loving, affectionate relationship with their mother.

Gloria's case presents an extreme example of the various issues other than mental retardation — domestic violence, poverty, lack of familial support, psychiatric disability — that are sometimes involved when a parent labeled mentally retarded is facing termination of her parental rights.³ It also presents the scenario of a judge who was able to recognize that a parent labeled mentally retarded may have many nonobvious strengths, and that her child's best interests could be served by reinforcing those strengths, and by addressing parental challenges both distinct from and connected to her cognitive disability. Unfortunately for other parents labeled mentally retarded, even parents confronted by challenges much less severe than Gloria's, her case appears to be the exception to the rule. Too often, in the realm of parental rights, legislators, social workers, psychologists, and judges have been unable to look beyond a parent's label. The result is a legal system that is uncomfortable with the idea that persons labeled as mentally retarded can be parents. This discomfort is reflected in statutes governing the termination of parental rights and in the entire process of parental rights termination.

This Comment will argue that these statutes, which are intended to protect children, unnecessarily discriminate against parents with developmental disabilities. Further, the various state processes implementing these statutes perpetuate the discrimination. Title II of the Americans with Disabilities Act (ADA)⁴ prohibits states from discriminating against people with disabilities based solely on their status as disabled. Thus, this Comment will further argue that Title II of the ADA should be applied, either directly or through the Equal Protection Clause of the Fourteenth Amendment, to stop the current discriminatory treatment of parents labeled mentally retarded or developmentally disabled.⁵

3. See *infra* Part IV.A.

4. 42 U.S.C. §§ 12101-12213 (Supp. 1993).

5. This Comment addresses discrimination against parents with developmental disabilities. Although some parents labeled developmentally disabled also have physical or psychiatric disabilities,

Many readers of early drafts of this Comment expressed concern that if the Comment's suggestions were taken seriously, the best interests of children might be sacrificed for the sake of advancing the rights of parents with developmental disabilities. Such concerns are of course valid, but the reader should keep in mind that this Comment does not advocate keeping children with parents who are physically abusive or unable or unwilling to provide adequate care. Courts that remove children from the homes of parents labeled mentally retarded undoubtedly make the correct decision in many cases. This Comment primarily takes issue with the means that those courts use to reach their decisions. Quite simply, this Comment advocates that the label of disability be removed as a means of separating children from parents.

Part I of this Comment discusses the social and legal status of persons labeled developmentally disabled or mentally retarded. Part II examines the nature of parental rights and the parental rights termination process. Part III looks at the layers of discrimination faced by parents labeled developmentally disabled in the termination process. Part IV analyzes the impact on parent, child and societal interests when parental rights are terminated based on developmental disability. Part V argues that the ADA, either applied directly or through the Equal Protection Clause, may be an adequate means to remedy the discrimination.

I

THE SOCIAL AND LEGAL STATUS OF PERSONS LABELED DEVELOPMENTALLY DISABLED

A. *The Meaning of Developmental Disability*

1. *A Brief History*

Those who are referred to today as "developmentally disabled" or "mentally retarded" have always lived outside the mainstream of western societies. For example, in medieval Europe, mentally retarded persons were "sometimes tolerated as fools, favored as 'innocents,' or persecuted as witches."⁶ Until recently, the same sort of treatment had been typical in the United States. For example, in colonial New England, mental retardation

or both, the issues raised by those disabilities are distinct, and beyond the scope of this Comment. At the same time, many of this Comment's observations about the need for individualized inquiry regardless of a parent's label apply to all parents with disabilities. For a discussion of the ADA and parents with physical disabilities, see Julie Odegard, Comment, *The Americans with Disabilities Act: Creating "Family Values" For Physically Disabled Parents*, 11 LAW & INEQ. J. 533 (1993). For a discussion of California's treatment of parents with psychiatric disabilities, see Paul Bernstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation*, 22 PAC. L.J. 1155 (1991).

6. AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 8 (Herbert J. Grossman ed., 1983) [hereinafter CLASSIFICATION IN MENTAL RETARDATION]. In many ways, these three archetypes—"fool," "innocent," and "witch"—continue to influence cultural mythology and societal perceptions of persons labeled mentally retarded.

was considered a reflection of moral depravity, and many of the persons burned, tortured and hanged by the New England Puritans were apparently mentally retarded.⁷ Up through the mid-nineteenth century, Americans with developmental disabilities were frequently placed in "lunatic hospitals," where they were kept in cages, restrained by chains, and subjected to such "treatment" as being doused with cold water, isolated in cubicles, and starved.⁸ After first-hand accounts publicized these atrocities, attempts were made to reform institutional living. As part of this reform movement, many new institutions were built during the latter half of the nineteenth century specifically for persons regarded as "feeble-minded,"⁹ and safeguards were incorporated to reduce inhumane treatment.¹⁰ However, these attempts at reform failed, and people living in the institutions continued to experience horrid living conditions, brutal staff, and treatment that often resembled torture.¹¹

In part, attempts to reform institutions for the feeble-minded failed because at the turn of the century new "scientific" views emerged about intelligence that linked feeble-mindedness to moral inferiority.¹² Scientists asserted that ridding society of "mental defectives" would result in "the elimination of an enormous amount of crime, pauperism, and industrial inefficiency."¹³ As the theory of eugenics began to hold sway with public policymakers,¹⁴ institutions housing persons identified as feeble-minded became even more overcrowded and dangerous.¹⁵ Efforts at institutional reform were abandoned as government officials grew less concerned with

7. Patricia Werner, Comment, *Terminating the Rights of Mentally Retarded Parents: Severing the Ties That Bind*, 22 J. MARSHALL L. REV. 133, 135-36 (1988).

8. DICK SOBSEY, VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE? 94 (1994).

9. "Feeble-minded" was the label given to persons who are today labeled mentally retarded or developmentally disabled. *Id.* at 135-36. Just as there are categories of retardation, there were categories of feeble-mindedness. From most disabled to least, the categories of feeble-mindedness were as follows: idiot, imbecile, and moron. *Id.* at 136. Many states adopted laws providing for the mandatory lifelong institutionalization of people labeled feeble-minded. *See, e.g.*, Act of Sept. 29, 1919, No. 704, § 6, 1919 Ala. Acts 1023, 1024; Act of Mar. 9, 1887, ch. 57, 1887 Cal. Stat. 69; Act of Aug. 19, 1919, No. 373, § 3, 1919 Ga. Laws 377, 379; Act of Apr. 15, 1919, ch. 150, § 3, 1919 Tenn. Pub. Acts 561, 562.

10. SOBSEY, *supra* note 8, at 94. Such safeguards included superintendents housed on the grounds; boards of visitors who made regular inspections; policies and procedures aimed at humane treatment; and the introduction of employee training. *Id.* at 95.

11. *Id.*

12. *See id.* at 95-96.

13. *Id.* at 96.

14. Beginning in the last decades of the nineteenth century, eugenics, or selective breeding, began to develop as an offshoot of Charles Darwin's and Gregor Mendel's discoveries in evolution and genetics. *See, e.g.*, Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 997 (1977). Social Darwinism reached its peak in the 1920s, before the onset of the eugenicist atrocities committed by Hitler's Nazi Germany. *Id.*

15. SOBSEY, *supra* note 8, at 95-96.

"curing" the feeble-minded than with keeping them away from the rest of society, and preventing their propagation.¹⁶

2. *The Disability Construct*

Disability may be viewed as a biological construct, a social construct, or both. However defined, disability is a relativistic concept. As a biological construct, disability is defined by individual characteristics that are somehow "less than" normal. For example, a woman whose legs are paralyzed, and who uses a wheelchair, is considered to be disabled because it is *normal* to be able to walk. As a social construct, disability is defined by the effect of environment on an individual. Thus, a woman whose legs are paralyzed and who uses a wheelchair is disabled, or handicapped, by her environment. Remove or modify the physical barriers to accessibility—the stairs, the narrow aisles, the unreachable faucets—and her disability diminishes. Under the social construct view, social attitudes, policies, and practices can have the same disabling effect on individuals as physical barriers. While neither of these definitions of disability is wholly satisfying, most commentators currently view disability as primarily a "social" construct,¹⁷ and that is the view of disability this Comment adopts.

If the meaning of disability is elusive, the meaning of developmental disability or mental retardation is downright ephemeral.¹⁸ Neither developmental disability nor mental retardation is a disease or a disorder; they are simply descriptive labels and administrative terms "used to identify those

16. Werner, *supra* note 7, at 141-42.

17. See, e.g., CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* 2 (1988); Abraham Maslow & Bela Mittelmann, *The Meaning of "Healthy" ("Normal") and of "Sick" ("Abnormal")*, in *CONCEPTS OF HEALTH AND DISEASE: INTERDISCIPLINARY PERSPECTIVES* 47 (Arthur L. Caplan et al. eds., 1981); Amartya Sen, *Capability and Well Being*, in *THE QUALITY OF LIFE* 30 (Martha Nussbaum & Amartya Sen eds., 1993).

18. The term "developmental disability" is defined relative to adaptive functioning. It describes any "severe, chronic disability" that begins before the age of twenty-two, and results in "substantial functional limitations" in three or more of the following "major life activit[ies]": self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. 42 U.S.C. § 6001(5) (1988).

The term "mental retardation" is currently defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *CLASSIFICATION IN MENTAL RETARDATION*, *supra* note 6, at 1. Recently, "developmental disability" has emerged as the term of choice for many health-care professionals, courts, and legislatures, presumably because of the stigma and imprecision associated with the term "mental retardation." Certainly, the term "mental retardation" has been used in a stigmatizing manner, and has a history of imprecision. For example, the definition for mental retardation has been changed twice in the past thirty-five years, each time significantly reducing the number of persons classified as mentally retarded. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1203 n.2 (1990). However, it remains to be seen whether "developmental disability" will be used in a less stigmatizing and more precise manner than is "mental retardation." For a discussion of the positive and negative effects of labeling on self-image, performance, and social perception, see Richard P. Hastings, *On "Good" Terms: Labeling People with Mental Retardation*, 32 MENTAL RETARDATION 363 (1994).

persons who seem to exhibit subnormal intellectual abilities.”¹⁹ The only trait shared by persons labeled mentally retarded or developmentally disabled is their inability to perform at a certain level on various measurements of intellectual capacity.²⁰ The term “mental retardation” in particular, with its roots in the Binet Intelligence Quotient (“IQ”) test, has been derided as having “little scientific integrity and minimal predictive or explanatory potential.”²¹ Nor does the term refer to a fixed level of ability: as new tests and standards have emerged to determine mental retardation or developmental disability, individuals have moved in and out of the class so labeled. The degree to which one is considered impaired may depend on the specific measurement used, as well as on the examiner conducting the test.²² Thus, it is not unusual for an individual to be classified as severely mentally retarded in one examination and mildly mentally retarded in another.²³

Currently, there are over 250 known causes of mental retardation or developmental disability, and there are thought to be more unknown than known causes.²⁴ Persons sharing the label share no common symptomatology. They may exhibit deficits in a variety of perceptual or communicative skills, but the extent and nature of the specific deficit varies from individual to individual.²⁵ Moreover, intelligence does not remain static; like all persons, individuals labeled mentally retarded or developmentally disabled can

19. Hayman, *supra* note 18, at 1213.

20. *Id.* at 1214. Of course, they also share the label itself, which perhaps has some unifying effect. See Hastings, *supra* note 18, at 363 (identifying political, economic and clinical groupings and applications of labels).

21. Hayman, *supra* note 18, at 1213. However, the term has been reified within the behavioral sciences, and especially within the law, as having diagnostic and predictive significance. See *id.* at 1248-57; see also ROBERT BOGDAN & STEVEN J. TAYLOR, *INSIDE OUT: THE SOCIAL MEANING OF MENTAL RETARDATION* 7 (1982) (“[M]ental retardation [is] . . . a socially created category which is assumed to have an existence independent of its creators’ minds.”) (citing PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967)).

22. Currently, the following four categories are used to divide persons labeled mentally retarded, based upon their scores on IQ tests: (1) “Mild” Retardation—IQ 50-55 to approximately 70 (including approximately 85% of people labeled mentally retarded); (2) “Moderate” Retardation—IQ 35-40 to 50-55; (3) “Severe” Retardation—IQ 20-25 to 35-40; and (4) “Profound” Retardation—IQ below 20 or 25. AMERICAN PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 32 (3d rev. ed. 1987).

23. See, e.g., *In re C.N.G.*, 531 So. 2d 345, 345 n.1 (Fla. Dist. Ct. App. 1988) (Coward, J., dissenting) (noting that a mother was diagnosed by one psychological report as “mildly retarded” and by another as not mentally retarded at all).

24. [R]etardation may be inherited, that is, attributable to ‘polygenetic isolates’; it may be organic, that is, the result of a physiological disorder, disease, or trauma; it may be environmental, that is, the result of sociocultural deprivation; or it may be familial, that is, linked to the presence of a mentally retarded parent, through an as yet undetermined interplay between nature and nurture.

Hayman, *supra* note 18, at 1213-14.

25. See EDWARD ZIGLER & ROBERT M. HODAPP, *UNDERSTANDING MENTAL RETARDATION* 86-88 (1986) (proposing a four-group classification system for the mentally retarded while also admitting that a large number of mentally retarded people exist for whom no category in their system is appropriate).

learn to improve such things as comprehension and memory. In other words, they can learn how to learn.²⁶

The one thing shared by persons labeled mentally retarded or developmentally disabled is the label itself and the diminished expectations and outright discrimination that so often accompany the label. Parents of children who have been identified as developmentally disabled are currently fighting school districts to allow their children to learn in integrated classrooms;²⁷ just a few decades ago they were fighting simply to get their children into public schools.²⁸ Adults labeled mentally retarded have battled with community after community for the opportunity to live in their own homes.²⁹ In their struggles for independence and dignity, they have sought to have their voices heard by their own families, by the disabled community, and by society in general. Their requests have been relatively modest, and yet have so often been ignored or dismissed primarily because of the labels these individuals wear: the explicit one that says "mentally retarded," and the implicit one that says "defective, not to be taken seriously."

B. *Status and Eugenics: The Legacy of Buck v. Bell*

In *Buck v. Bell*,³⁰ the Supreme Court upheld a Virginia statute that allowed mental health institutions to condition release on involuntary sterilization.³¹ The statute was premised on the idea that "many defective persons . . . would likely become by the propagation of their kind a menace to society."³² Other than minimal procedural safeguards, the statute allowed superintendents of mental institutions to decide whether "the best interests of the patient and of society" would be served by sexual sterilization.³³ In an opinion by Justice Oliver Wendell Holmes, the Court concluded that the statute struck a necessary balance between the individual interests of the patient-inmates in not being sterilized and the interest of society in eradicating feeble-mindedness. The opinion tipped the scale heavily in favor of society's interests: "It would be strange if [the state] could not call upon

26. See Hayman, *supra* note 18, at 1224.

27. See Board of Educ. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd*, 14 F.3d 1398 (9th Cir.), *cert. denied*, 114 S.Ct. 2679 (1994) (holding that under the Individuals with Disabilities Education Act a school district was required to place moderately mentally retarded child in integrated classroom).

28. The federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401-1484a (1994), was enacted in 1976 after Congress found that most handicapped children in the United States were "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R. REP. NO. 332, 94th Cong., 1st Sess. 2 (1975).

29. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369 (Ohio 1980), *cert. denied*, 450 U.S. 911 (1981).

30. 274 U.S. 200 (1927).

31. *Id.* at 200.

32. Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1974).

33. *Id.*

those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."³⁴ Holmes acknowledged that the mandatory sterilization statute involved individual "sacrifice," but he considered this sacrifice slight because he believed that the feeble-minded were incapable of appreciating their loss.³⁵

Holmes' Malthusian vision³⁶ caused him to overlook the individual attributes of Carrie Buck, the woman condemned to be sterilized. Far from being an "imbecile," Carrie Buck was an avid reader and probably not mentally retarded at all.³⁷ Nor was she, as Holmes wrote, "the probable potential parent of socially inadequate offspring, likewise afflicted."³⁸ Buck's daughter, born before the *Buck v. Bell* litigation, earned good grades in school and made the honor roll before dying of an infectious disease at the age of eight.³⁹

The legacy of *Buck v. Bell* has been well documented.⁴⁰ Robert Hayman aptly points out that its underlying premise that "there must be limits to societal tolerance of biological inequities" remains with us today as "the unchallenged premise in the law of the mentally retarded parent."⁴¹ Justice Holmes' opinion can also be viewed as validating the use of ascribed status in legislation to restrict the rights and liberties of persons labeled mentally retarded or feeble-minded.

Despite receiving much criticism, *Buck v. Bell* has never been overruled.⁴² After *Buck*, several states adopted statutes similar to Virginia's, and at least 70,000 men and women have been involuntarily sterilized as a result.⁴³ Many laws remain that attempt to limit the "damage" done to soci-

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

35. *Id.*

36. "Three generations of imbeciles are enough." *Id.*

37. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 52, 60-61 (1985). Even in the court records available to Holmes, Carrie Buck was described as a "middle-grade moron." *Id.* at 32 n.10. This would translate to mildly mentally retarded today, and even then was a far cry from being labeled an "imbecile." *Id.* at 32.

38. *Buck*, 274 U.S. at 207 (quoting the judgment of the Virginia Supreme Court of Appeals).

39. Lombardo, *supra* note 37, at 61.

40. See, e.g., Burgdorf & Burgdorf, *supra* note 14; Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenics Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 848-67 (1986).

41. Hayman, *supra* note 18, at 1207.

42. The Supreme Court backed away from the *Buck* decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Court declared that the right to procreate is fundamental. The Court proceeded to apply strict scrutiny, rather than the balancing test of *Buck*, to strike down a statute mandating sterilization of felons convicted of crimes involving moral turpitude. However, the Court has never expressly overruled *Buck*, and has been exceedingly reluctant to examine statutes restricting the rights of persons with developmental disabilities. In fact, just last term, the Court denied a developmentally disabled woman's petition for certiorari challenging Pennsylvania's involuntary sterilization statute. See *Estate of C.W.*, 640 A.2d 427 (Pa. Super. Ct. 1994), *cert. denied*, 115 S. Ct. 1175 (1995).

43. Werner, *supra* note 7, at 139. Of the states that continue to have statutes allowing for the involuntary sterilization of citizens, only Mississippi balances "the best interests of the patients and of society." MISS. CODE ANN. § 41-45-1 (1993). The other states purport to protect the best interests of the individual to be sterilized. See, e.g., ARK. CODE ANN. §§ 20-49-101, -202, -204 (Michie 1991); ME.

ety by persons labeled mentally retarded, restricting everything from the right to choose a residence to the right to procreate, marry, and raise children.⁴⁴ Despite its inadequacy,⁴⁵ the label "mentally retarded" carries with it profound legal implications. People classified as "mentally retarded" (or "developmentally disabled") simply do not enjoy the same range of freedoms as does the rest of society.

C. *Equal Protection: City of Cleburne v. Cleburne Living Center*

Since *Buck v. Bell*, the Supreme Court has decided few cases involving persons with developmental disabilities.⁴⁶ In the cases the Court has decided, it has struggled to reconcile Holmes' eugenicist vision with the Court's increasing commitment to protecting individual rights. The results have been mixed. While the Court has cast a skeptical eye on restrictive legislation based on other kinds of ascribed status, such as race and gender,⁴⁷ it has not shown the same skepticism toward restrictive legislation based on mental retardation or developmental disability.

In *City of Cleburne v. Cleburne Living Center*, the Court held that a municipal zoning ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it irrationally discriminated against persons with developmental disabilities.⁴⁸ In reaching this decision, however, the Court refused to classify mental retardation as either a suspect or a quasi-suspect classification, and thus did not use a heightened scrutiny test to analyze the ordinance at issue. Rather, the Court applied the normally deferential "rational basis" test to the city of Cleburne's restrictive ordinance.⁴⁹

REV. STAT. ANN. tit. 34-B, § 7010 (West 1988). However, simply because no sterilization law exists does not mean that men and women in other states are not being sterilized involuntarily. Werner, *supra* note 7, at 140 n.49 (citing SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 523, 552-58 (1985)).

44. Hayman, *supra* note 18, at 1210. Professor Hayman calls these restrictive laws "redemptive," in the sense that they represent society's attempt to redeem the biological injustice of mental retardation: "Unable either to make these people biologically whole or to eliminate them, the law 'cures' the injustice by minimizing the damage mentally retarded persons cause to society. Law redeems the state's interests and demeans the individual's." *Id.*

45. See *supra* notes 18-26 and accompanying text.

46. In fact, after *Buck v. Bell*, the Court went nearly fifty years before hearing another case involving persons with developmental disabilities. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

47. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that laws allowing differential treatment of female military personnel regarding "dependent" benefits violate the Fifth Amendment's Due Process Clause); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that laws effecting school segregation based on race violate the Fourteenth Amendment's Equal Protection Clause).

48. 473 U.S. 432 (1985).

49. *Id.* at 446. "Rational basis" is the lowest, or most deferential, tier in the Court's three-tiered equal protection analysis. It requires only that the classification used be rationally related to a legitimate state interest. *Id.* at 440. *Cleburne* represents the rare case in which the Court has applied the "rational basis" test and struck down the legislation at issue.

The middle tier in the Court's equal protection analysis is "heightened scrutiny." Heightened scrutiny examines whether the legislative classification substantially serves an important state interest. *Id.* at 441. Classifications based on gender are reviewed under heightened scrutiny. *Id.* at 440.

Yet in doing so, the Court did not extend to the city's ordinance the presumption of validity usually given to statutes in rational basis cases.⁵⁰ Instead, the Court closely examined the justifications given by the city of Cleburne for its ordinance, ultimately concluding that "the characteristics of the intended occupants of the Featherston home [do not] rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."⁵¹

The *Cleburne* decision sends mixed messages about the Supreme Court's view of persons labeled mentally retarded. On the one hand, the Court insisted that such persons are "different, immutably so," and that their treatment is "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."⁵² In addition, the Court pointed to recently enacted federal legislation that benefited persons labeled mentally retarded as illustrating both that mentally retarded persons do not face continuing prejudice and antipathy, and that they are not politically powerless.⁵³ Thus, the Court found that the mentally retarded, while a distinct class, do not require heightened protection.⁵⁴

On the other hand, the Court acknowledged that although persons labeled mentally retarded are immutably different, they are not "all cut from the same pattern . . . they range from those whose disability is not immediately evident to those who must be constantly cared for."⁵⁵ In addition, the Court acknowledged that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious."⁵⁶ After closely examining the city of Cleburne's ordinance, the Court determined that it was just such an example of "irrational prejudice."⁵⁷

Justice Marshall concurred in the judgment that Cleburne's ordinance violated the Equal Protection Clause, but dissented from the holding that persons labeled mentally retarded should not be afforded heightened scrutiny. He pointed out the paradoxical nature of the majority's opinion: "[T]he Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to pre-

The highest tier of review, "strict scrutiny," requires that the legislative classification be narrowly tailored to serve a compelling state interest. Classifications based on race are reviewed under "strict scrutiny." *Id.*

50. *Id.* at 450.

51. *Id.* The Court found that the city could not distinguish the group home from other group homes such as boarding houses or nursing homes for the elderly, which the city regularly permitted. *Id.* at 447-48.

52. *Id.* at 442-43.

53. *Id.* at 443-46.

54. *Id.* at 445-46. The Court compared mental retardation with advanced age, suggesting that advanced age is a characteristic which, like mental retardation, is only sometimes relevant and does not evoke prejudice or stereotyping that might otherwise make it suspect. *Id.* at 441.

55. *Id.* at 442.

56. *Id.* at 446.

57. *Id.* at 450.

cisely the sort of probing inquiry associated with heightened scrutiny."⁵⁸ Justice Marshall went on to describe this country's history of discriminatory legislation directed at persons labeled mentally retarded,⁵⁹ likening the bigotry to "the worst excesses of Jim Crow."⁶⁰ He argued that this history demonstrated a level of prejudice and political powerlessness that required the Court to consider mental retardation to be at least a quasi-suspect classification.⁶¹

In addition, Justice Marshall warned that the Court's contradictory approach in *Cleburne* would leave lower courts "in the dark" regarding the appropriate level of review of legislation affecting persons labeled mentally retarded.⁶² This prediction has been borne out in a series of muddled cases in which lower courts have attempted to apply *Cleburne's* version of "rationality review."⁶³ Further, as Justice Marshall and others have suggested, the *Cleburne* opinion was an invitation to Congress, acting under its Fourteenth Amendment powers, to clarify the proper constitutional analysis to be applied to legislation containing mental retardation as a classification.⁶⁴ Indeed, the majority expressed concern about recognizing a suspect class "absent controlling congressional direction."⁶⁵

D. Guidance Emerges: *The Americans with Disabilities Act*

Congress announced such direction in 1990 by passing the ADA.⁶⁶ After several years of hearings, studies, debate, and political maneuverings, the ADA was enacted to address the devastating effects of discrimination on

58. *Id.* at 458 (Marshall, J., concurring in part and dissenting in part). Heightened scrutiny is the middle tier in the Court's three-tiered equal protection analysis. *See supra* note 49.

59. *Cleburne*, 473 U.S. at 461-64.

60. *Id.* at 462.

61. *Id.* at 464-73. Marshall expressly compared the plight of persons labeled mentally retarded with that of African-Americans and women:

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.

Id. at 467.

62. *Id.* at 460.

63. *See* Amy S. Lowndes, Note, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 FLA. L. REV. 417, 444-45 (1992).

64. *See Cleburne*, 473 U.S. at 460, 466 (Marshall, J., concurring in part and dissenting in part); Lowndes, *supra* note 63, at 445; William Christian, Note, *Normalization As A Goal: The Americans With Disabilities Act and Individuals With Mental Retardation*, 73 TEX. L. REV. 409, 423 (1994).

65. *Cleburne*, 473 U.S. at 439. Justice Marshall suggested that rather than viewing recently enacted legislation benefitting persons with disabilities as indicative of an absence of prejudice and political powerlessness, the Court should have viewed such legislation as "congressional direction" to the Court that persons with disabilities need heightened protection. *Id.* at 466 (Marshall, J., concurring in part and dissenting in part).

66. 42 U.S.C. §§ 12101-12213 (Supp. 1993).

the lives of the estimated 43 million Americans with disabilities.⁶⁷ Congress learned of some of these effects of discrimination through statistics: nearly two-thirds of individuals with disabilities of working age were not working as of 1990; two-thirds of those not working wanted to work; one in five persons with disabilities was living in poverty as of 1986; two in five persons with disabilities had not finished high school as of 1988; and nearly three in five persons with disabilities were dependent on government benefits for their support as of 1986.⁶⁸ Congress learned of other effects of discrimination through anecdotal evidence: operators of an auction house attempted to remove a woman who used a wheelchair because she was deemed to be "disgusting to look at"; a zookeeper refused to admit children with Down's syndrome into the zoo because he feared they would frighten the chimpanzees; a woman with severe arthritis was denied a job at a college because the college trustees believed that "normal students shouldn't see her"; and a child with cerebral palsy was kept out of public school because his teacher thought his physical appearance "produced a nauseating effect" on his classmates.⁶⁹ These were just a few of the many examples of discrimination reported to Congress by people with disabilities and their family members.

In enacting the ADA, Congress expressly relied on its powers under Section Five of the Fourteenth Amendment: "It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."⁷⁰ Additional evidence of "congressional direction" can be found in the Findings section of the ADA, particularly the seventh finding:

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁷¹

67. This number is taken from the ADA itself. See *id.* § 12101(1).

68. 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, 420-25 (1991).

69. *Id.* at 418-19.

70. 42 U.S.C. § 12101(b)(4).

71. *Id.* § 12101(a). In addition, Congress stated in the Findings section that:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

...

This finding directly invokes the language of *United States v. Carolene Products Co.*,⁷² the first case in which the Supreme Court suggested a standard for identifying when a classification might be suspect.⁷³ Thus, the "direction" the *Cleburne* Court requested was delivered: Congress clearly supports heightened judicial protection for persons with disabilities.

Although it is not truly groundbreaking as legislation, the ADA is enormously important for persons who have a disability or are regarded as having a disability.⁷⁴ The ADA builds upon existing legislation, mainly Section 504 of the 1973 Rehabilitation Act⁷⁵ and lawsuits arising out of that Act.⁷⁶ However, the ADA's legislative scope is much broader than that of Section 504, which only prohibits programs and activities receiving federal funding from discriminating against people with disabilities. The ADA expands Section 504's nondiscrimination mandate to public and private employment, public services and activities (whether or not federal funding is involved), public transportation, public accommodations (by private entities), and telecommunications. Other federal legislation seeks to ensure nondiscrimination in education⁷⁷ and housing.⁷⁸

The ADA's impact reaches far beyond its legislative sweep. As a civil rights statute, the ADA explicitly seeks to alter social and legal thinking about people with disabilities. The ADA rejects the notion that it is permissible to restrict the rights and privileges of persons labeled disabled solely because of that label. Instead, it recognizes that individuals with disabilities should be treated as individuals, based on their individual capabilities. In

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally . . .

Id.

72. 304 U.S. 144 (1938).

73. *Id.* at 152 n.4. The seventh finding of the ADA also incorporates language from two other Supreme Court opinions that discussed when a class might be suspect and therefore in need of elevated judicial protection. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding that age is not a suspect classification because legislation targeted at the elderly is not based on "stereotyped characteristics not truly indicative of their abilities"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting that a suspect class is one "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

74. The ADA protects not only those who have a disability, but those who are regarded as having a disability. See 42 U.S.C. § 12102(2)(c).

75. 29 U.S.C. § 794 (1988).

76. See, e.g., *Alexander v. Choate*, 469 U.S. 287 (1985) (holding that while Section 504 reaches some conduct that has an unjustifiable disparate impact on the handicapped, Tennessee's reduction in annual inpatient hospital coverage is not such conduct); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding that the language of Section 504 suggests that its bar on employment discrimination should not be limited to programs that receive federal aid).

77. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1484(a) (1994) (mandating that every child with a disability receive a public education in the least restrictive environment that can meet the child's educational needs).

78. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1988) (prohibiting housing discrimination against persons with disabilities).

this sense, the ADA is much more than a piece of legislation; it is a hand extended to those classified as disabled, an offer to rejoin the rest of society in its pursuit of happiness and enjoyment of civil liberties.

II

PARENTAL RIGHTS AND THE TERMINATION PROCESS

A. Parenting as a Legally Protected Right

Under English common law, the father's parental rights were superior to the mother's, and they encompassed rights to the custody, labor, and services of his children.⁷⁹ Legally, children were essentially treated as their fathers' chattel.⁸⁰ In the United States, this doctrine has been gradually modified so that today both mothers and fathers possess parental rights that are focused much more closely on the interests of their children.⁸¹ As early as 1839, in upholding the removal of a child from her parents' custody, the Pennsylvania Supreme Court recognized a tension between parental rights and the state's interest in protecting its children's welfare: "The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power."⁸²

For the past sixty-five years, the Supreme Court has maintained that parental rights are "fundamental" and that they should receive heightened protection from state regulation through the Fourteenth Amendment's Due Process Clause.⁸³ However, unlike most other fundamental rights, parental rights involve the interests of a third party: the child. Based on that interest, state regulation of the parent-child relationship has become so common that it is often unquestioned.⁸⁴ Under the legal doctrine of *parens patriae*,

79. Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975 (1988). Men held similar dominion over their wives, and could legally beat both their children and wives into submission. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 36 (1994).

80. Fitzgerald, *supra* note 79, at 35-36.

81. The Supreme Court has described the "interest of natural parents in the care, custody, and management of their [children]" as a "fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

82. *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

83. See *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (holding that an unwed father must be allowed a hearing on his parental fitness before his children can be taken from his custody in a dependency proceeding); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the parental right to place children in religious private schools); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citing the parental right to "establish a home and bring up children" as a constitutionally protected liberty interest).

84. See *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding facial validity of compulsory school attendance statute but finding statute unconstitutional as applied to Amish children); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory vaccination law).

the state has a fundamental interest in protecting the interests of children.⁸⁵ Thus, commentators have suggested that the more precise term for rights held by parents is "family rights," because such rights are limited to the extent that they are perceived to conflict with the interests of the children involved.⁸⁶

This tension between parental rights and the state's interest in protecting children is most evident in the area of parental rights termination. The Supreme Court has affirmed that although the state may completely sever the parent-child relationship without the parent's consent, the state must comply with certain standards of due process. In *Santosky v. Kramer*,⁸⁷ the Court declared that the state must overcome a strong presumption against termination because "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."⁸⁸ Thus, the Court held that before terminating a parent's rights, the state must prove parental unfitness by clear and convincing evidence; if this burden cannot be met, the child must remain with his parents.⁸⁹ The Court reaffirmed that, even where the parent-child relationship appears to be strained or problematic, natural parents possess a fundamental liberty interest in rearing their children: "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."⁹⁰

While the Court in *Santosky* set out procedural guidelines for state courts to follow when terminating parental rights, it has not provided similar guidance with respect to substantive standards. In fact, the *Santosky* Court acknowledged that "[p]ermanent neglect proceedings employ imprecise standards that leave determinations unusually open to the subjective values of the judge."⁹¹ Despite the Court's repeated assertions that parental rights are fundamental, the Court has largely left it up to the states to define the parameters of parental fitness and to decide when, and to what degree, states may regulate parental rights.

However, when states have attempted to terminate parental rights based solely on ascribed status, the Court has intervened. In *Stanley v. Illinois*,⁹² the Court held that both due process and equal protection dictated that Illinois could not terminate an unwed father's rights to his children

85. The term *parens patriae* means, literally, "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). In law, it refers to the role of the state as guardian for people with legal disabilities, e.g., infants and incompetent persons. *Id.*

86. See McCarthy, *supra* note 79, at 993.

87. 455 U.S. 745 (1982).

88. *Id.* at 760.

89. *Id.* at 769.

90. *Id.* at 753.

91. *Id.* at 762.

92. 405 U.S. 645, 658 (1972).

before a hearing on his parental fitness. In insisting that Stanley receive an individualized hearing, the Court articulated at least one limitation on the state's power to terminate parental rights: the state must prove unfitness through individual inquiry rather than through presumptions based on ascribed status.⁹³ This rationale must also be applied in decisions concerning parents labeled developmentally disabled.

B. Goals of the Termination Process

While child protection schemes vary greatly from state to state, they all share two common goals. First, they seek to protect and promote the health, safety, and welfare of the state's children. Second, they seek to do so in a manner that respects both individual rights and the integrity of the family unit.⁹⁴ At times, these goals may conflict. However, the Court in *Santosky* made clear that state courts are to presume that children's best interests are in remaining with their natural parents unless clear and convincing evidence suggests otherwise, i.e., the parents have been physically, sexually, or emotionally abusive, or have failed to provide adequate emotional and physical nurturing and care.⁹⁵ This presumption both recognizes the state's interest in preserving family integrity and limits the possibility of judgments based on class and cultural bias.⁹⁶ In addition, most courts will require the state to show that the parents' deficiencies cannot be ameliorated within a reasonable period of time before terminating parental rights.⁹⁷ Like the legal presumption that a child's best interests are in remaining with his natural parents, this requirement reflects a strong tendency in the law to preserve family integrity when doing so will not harm children. However, several states waive this requirement when parents have been identified as mentally retarded.⁹⁸

93. In a post-divorce custody case, the Court reaffirmed its holding in *Stanley* regarding the inappropriateness of state reliance on ascribed status to justify intervention in the parent-child relationship. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (striking down as unconstitutional a Florida court's change of custody based on the fact that the custodial white mother was "co-habiting" with an African-American man).

94. Hayman, *supra* note 18, at 1227.

95. *Santosky*, 455 U.S. at 769. Specific standards for abuse or neglect vary from state to state, some spelled out in statutes and others developed by judges. They usually leave quite a bit of room for judicial discretion.

96. *See id.* at 763 ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.") (citation omitted).

97. The federal Adoption Assistance and Child Welfare Act requires states receiving federal foster care monies to have a plan in which "reasonable efforts" are made to reunite parent and child before terminating parental rights. 42 U.S.C. § 671 (1988). Many states have incorporated a "reasonable efforts" requirement into their parental rights termination statutes. David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 142 (1992) (arguing that states should provide more intensive reunification services for a shorter period of time).

98. *See infra* Part III.

C. Parental Rights Termination Statutes

The entire parental rights termination process, from initial intervention to final adjudication, is driven by statute. These statutes vary in both form and substance from state to state. For example, some states have a multi-statute scheme: one statute will provide for termination as the end of a gradual process, only after efforts to ameliorate the problem that led to state intervention have failed; another statute will provide for immediate termination.⁹⁹ Other states have only one statute, under which termination can occur either immediately or after efforts to ameliorate the problem have failed.¹⁰⁰

The termination of parental rights generally hinges on "unfitness." Most termination statutes identify various factors that the courts should consider when determining "parental unfitness."¹⁰¹ Although these are somewhat imprecise (one statute includes the term "depravity"),¹⁰² they tend to focus on neglect (in providing such necessities as food, shelter, or medical care) and abuse (physical, sexual, or emotional). In addition, these statutes almost uniformly include mental, or psychiatric, disability and

99. See, e.g., CAL. FAM. CODE §§ 7800-7895 (West 1994 & Supp. 1995); CAL. WELF. & INST. CODE §§ 300-395 (West 1984 & Supp. 1995).

100. See, e.g., S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 1976 & Supp. 1994).

101. For example, Illinois' termination statute lists 18 factors, each of which supports a finding of unfitness:

- (a) Abandonment of the child.
- (b) Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare.
- (c) Desertion of the child
- (d) Substantial neglect of the child if continuous or repeated.
- (e) Extreme or repeated cruelty to the child.
- (f) Two or more findings of physical abuse
- (g) Failure to protect the child from conditions within his environment injurious to the child's welfare.
- (h) Other neglect of, or misconduct toward the child
- (i) Depravity.
- (j) Open and notorious adultery or fornication.
- (j-1) Conviction of first degree murder . . . or conviction of second degree murder
- (k) Habitual drunkenness or addiction to drugs
- (l) Failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child
- (m) Failure . . . to make reasonable efforts to correct the conditions that were the basis for the removal of the child . . . or to make reasonable progress toward the return of the child
- (n) Evidence of intent to forego his or her parental rights
- (o) [R]epeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter.
- (p) [I]nability to discharge parental responsibilities supported by competent evidence from a psychiatrist . . . or clinical psychologist of mental impairment, mental illness, or mental retardation as defined [in the] Mental Health and Developmental Disabilities Code . . . and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period. . . .
- (q) [A] finding of physical abuse of the child . . . and a criminal conviction of aggravated battery of the child.

750 ILL. COMP. STAT. ANN. 50/1(D) (Smith-Hurd Supp. 1995) (footnotes omitted).

102. *Id.* § 1(D)(i).

developmental disability—sometimes termed “mental deficiency”—as factors for courts to consider.¹⁰³ Although the statutes generally require evidence of some connection between a parent’s disability and her ability to parent, the level of proof required varies from state to state, and within many states, from case to case. Other statutes are broader in terminology and do not specifically list “mental deficiency” as a ground for termination.¹⁰⁴ However, in interpreting these less specific statutes, courts have generally included “mental deficiency” as a factor to consider in termination proceedings, usually under the rubric of “unfitness” or “incapacity.”¹⁰⁵

D. Initial Intervention

The parental rights termination process usually begins with a report of suspected abuse or neglect, typically either to the police or to a child protective agency. For most non-disabled parents, the original report of suspected abuse or neglect will come anonymously from a neighbor, or perhaps a teacher or physician. However, parents labeled mentally retarded or developmentally disabled have regular contact with state-related professionals such as social workers and therapists, and thus this first report often comes from a state professional with whom the parents have had some previous contact.¹⁰⁶ The investigating agency may be more likely to treat reports from these “professionals” with more deference than it treats other reports of suspected abuse or neglect, even though the report may be no more valid.¹⁰⁷ In addition, these reports may be tainted by the same prejudices regarding mentally retarded parents as are held by many members of society.¹⁰⁸ The results are that, first, the state protective agency may be more likely to become involved in situations where one or both parents are labeled developmentally disabled simply because these parents have a greater amount of contact with social workers or other professionals who are familiar with the child protective agency.¹⁰⁹ Second, once state involvement occurs, investigations are likely to be more probing, and inves-

103. *E.g., id.* § 1(D)(p).

104. *See, e.g.,* IND. CODE ANN. § 31-6-5-4(c) (West Supp. 1995); IOWA CODE ANN. § 232.116 (West 1994 & Supp. 1995) (listing the parent’s “mental capacity,” rather than mental deficiency, as a factor to be considered); 23 PA. CONS. STAT. ANN. § 2511(a)(5) (Supp. 1995).

105. *See, e.g.,* R.G. v. Marion County Office, Dep’t of Family & Children, 647 N.E.2d 326, 330 (Ind. Ct. App. 1995); *In re S.N.*, 500 N.W.2d 32, 36 (Iowa 1993); *In re P.A.B.*, 570 A.2d 522, 526 (Pa. Super. Ct. 1990).

106. Hayman, *supra* note 18, at 1227-28.

107. *Cf.* Stephen Greenspan & Karen S. Budd, *Research on Mentally Retarded Parents, in FAMILIES OF HANDICAPPED PERSONS* 115, 121 (James J. Gallagher & Peter M. Vietze eds., 1986) (noting that mentally retarded parents often live under the “close scrutiny of child protective service agencies,” which “sometimes results in the application of stricter standards of accountability . . . than might be applied to ‘normal’ parents”).

108. *See* Hayman, *supra* note 18, at 1228.

109. *See id.* at 1222-25. Generally, this holds true for all parents receiving some kind of public assistance, such as parents who receive AFDC. *See* Fitzgerald, *supra* note 79, at 46-51. However, the magnitude of state intrusion into the lives of persons labeled developmentally disabled is unparalleled.

tigating professionals are less likely to give these parents any benefit of the doubt.¹¹⁰

E. The Judicial Process

Like the statutes themselves, the judicial processes governing the termination of parental rights vary from state to state. In many respects, the process in California is representative of most state processes, although California arguably offers parents labeled developmentally disabled more procedural protections than most states.¹¹¹ California has two interconnected statutes that govern the parental rights termination process. The first statute provides for the immediate termination of parental rights.¹¹² The second statute, a jurisdictional statute, provides for the temporary removal of children from their parents' homes, followed by a series of hearings, at the end of which children are either reunited with their parents, made eligible for adoption, appointed legal guardians, or placed in long-term foster care.¹¹³ Under the first statute, the state may petition for the termination of parental rights in a variety of situations, including when a parent has abandoned a child,¹¹⁴ when a parent has treated a child cruelly or neglectfully,¹¹⁵ or when a parent has been declared incapable of "supporting or controlling" a child due to the parent's developmental disability.¹¹⁶ This statute also allows for parental rights termination after a child has been declared a dependent of the court at a jurisdictional hearing, and that court has determined that "return of the child to the child's parent . . . would be detrimental to the child."¹¹⁷

Most commonly, the termination process begins at a jurisdictional hearing in Juvenile Court under the dependency statute.¹¹⁸ In this jurisdictional hearing, the court must determine whether one or more statutory factors exist to support the court's assertion of jurisdiction over the child. One such statutory factor is the parent's inability to provide regular care for the minor due to the parent's developmental disability.¹¹⁹ If the court finds that

110. "[I]narticulateness is perceived as stubbornness or stupidity; shyness or uncertainty, as indifference; and fear and insecurity, as aggression." Hayman, *supra* note 18, at 1228.

111. Cf. Odegard, *supra* note 5, at 536-38.

112. CAL. FAM. CODE §§ 7800-7895 (West 1994 & Supp. 1995).

113. CAL. WELF. & INST. CODE §§ 300-395 (West 1984 & Supp. 1995).

114. CAL. FAM. CODE § 7822.

115. *Id.* § 7823.

116. *Id.* § 7826. The state, through the Department of Social Services, must prove that termination is statutorily warranted by clear and convincing evidence. *Id.* § 7821.

117. *Id.* § 7828(a)(2); CAL. WELF. & INST. CODE § 366.25(d)(1).

118. See CAL. WELF. & INST. CODE §§ 300-395.

119. *Id.* § 300(b).

it does have jurisdiction, it may declare the child a dependent of the court and remove the child from the parent's home.¹²⁰

The state must then implement a reunification plan, unless it can show that no such plan is warranted because, for example, the parent has a mental disability that renders him or her incapable of utilizing reunification services.¹²¹ The court meets every six months with the parents and the agency representing the state to determine whether the parents should maintain or regain custody of the child.¹²² At the eighteen-month hearing, the court must order the child returned to the custody of the parents unless it finds by a preponderance of the evidence that doing so would create a substantial risk of detriment to the physical or emotional well-being of the child.¹²³

If the court finds that a substantial risk of detriment exists, it must develop a permanent plan.¹²⁴ This plan might allow foster care placement to be extended without severing the parent's rights if the parent has shown some signs of improvement and if there is no immediate prospect of adoption for the child.¹²⁵ Where these conditions do not exist, the court ordinarily will terminate parental rights permanently, thereby making the child eligible for adoption.¹²⁶ When parental rights are terminated, the parent loses all rights regarding the child, including visitation rights.

Parental rights are usually only severed when the parents have not consented to adoption. At any point during this process, the parents may be able to retain some visitation rights by consenting to adoption.¹²⁷

120. *Id.* § 360. The court may also, without adjudicating the child a dependent of the court, order that services be provided to keep the family together and put the family under the supervision of a probation officer. *Id.*

121. *Id.* § 361.5(b)(2). If this factor is alleged, the court must order reunification services unless competent evidence from mental health professionals establishes that even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within 12 months. *Id.* § 361(c).

122. *Id.* §§ 364, 366.

123. *Id.* § 366.25(d)(1).

124. *Id.* § 366.22.

125. *Id.* § 366.25.

126. *Id.* § 366.26(b)(1). Alternatively, the court may choose not to sever parental rights permanently, and may either appoint a legal guardian for the child or order that the child be placed in long-term foster care. *Id.* § 366.26(b)(3), (4).

127. It is not uncommon for parents with disabilities to consent to adoption in order to retain some parental rights rather than risk losing all their parental rights. For example, perhaps the most famous disabled parent, Tiffany Callo, agreed to allow her two boys to be adopted so that she could retain visitation rights. Jay Mathews, *Custody Battle: The Disabled Fight to Raise Their Children*, WASH. POST, Aug. 18, 1992, at Z10. Callo had cerebral palsy and was diagnosed, apparently incorrectly, as mentally retarded. Her first child was declared a dependent of the court three weeks after the child's birth, and her second child was removed when the child was only two days old. Callo continues to visit both children, who were adopted by different families.

III LAYERS OF DISCRIMINATION

Parents labeled as developmentally disabled face multiple layers of discrimination throughout the parental rights termination process. First, some statutes have been interpreted so that developmental disability alone leads to a presumption of unfitness, justifying both state intervention and judicial action against parents labeled as developmentally disabled. Second, many statutes that seem to explicitly require a connection between developmental disability and parenting ability in order to terminate parental rights have been interpreted in ways that overlook the parenting abilities of *individual* parents; beliefs about the parenting abilities of the group labeled developmentally disabled are assumed to hold true for all parents with developmental disabilities. Third, parents labeled developmentally disabled are often not offered reunification services because they are presumed incapable of learning how to parent. Finally, when reunification services are offered, they often do not take into account the parent's disability, so that the primary condition that led to state intervention is not addressed.

A. Developmental Disability as a Presumption of Parental Unfitness

As persons labeled developmentally disabled have moved toward the mainstream of society, legislatures and courts have generally eliminated naked legal presumptions that equate developmental disability or mental retardation with parental unfitness. Thus, most current statutes and recent cases terminating parental rights on the basis of developmental disability discuss the necessity of establishing a connection between the parent's disability and her behavior as a parent. However, old presumptions do not die easily, and presumptions of unfitness continue to subtly define the law's approach to parents labeled mentally retarded.

These presumptions of unfitness are most apparent in cases where the parent has never actually had custody of the child. Intervention in these cases often takes place before birth, even though the parent has not done anything to harm or threaten to harm the child.¹²⁸ Such cases are relatively common. Nevertheless, parents in these cases often do not contest removal or termination, perhaps because no strong bond has formed between parent and child, or perhaps because of pressure from the social service system.¹²⁹

Florida has used the theory of "prospective neglect" to terminate parental rights based on intellectual functioning where the parent has either not had custody of the child or has not acted abusively or neglectfully

128. See, e.g., *In re Jennilee T.*, 4 Cal. Rptr. 2d 101 (Ct. App. 1992) (involving a six-day-old infant); *R.G. v. Marion County Office, Dep't of Family & Children*, 647 N.E.2d 326 (Ind. Ct. App. 1995) (involving a newborn infant); *Adoption of Abigail*, 499 N.E.2d 1234 (Mass. App. Ct. 1986); (involving a 16-day-old infant); *In re J.Y.*, 502 N.W.2d 860 (S.D. 1993) (involving a newborn).

129. See Mathews, *supra* note 127.

toward the child.¹³⁰ The theory of "prospective neglect" allows termination where "it *appears* a parent will be unable to provide necessary child support in the future," even though no evidence exists that the parent has neglected or abused the child.¹³¹ In the case of *In re C.N.G.*, the State of Florida took custody of a mother's child at birth because the sixteen-year-old mother was herself living in foster care.¹³² The state then required the mother to obtain "gainful employment" by the time of her high school graduation, acquire housing, and learn how to care for her child in order to regain custody.¹³³ When the mother was unable to do so, the state instituted proceedings to terminate her parental rights.¹³⁴ The mother had never had actual custody of her child and had never acted in a way that harmed, or threatened to harm, the child.¹³⁵ The trial court, however, terminated the mother's rights after finding that because the mother was of below average intelligence, it was in her child's best interests to have no relationship with her.¹³⁶ That decision was upheld by Florida's Court of Appeal.¹³⁷

While Florida is the only state to employ the theory of "prospective neglect," cases in other states reveal similar presumptions of unfitness. Pennsylvania's termination statute requires in part that parental rights should be terminated when "the conditions and causes of the incapacity, abuse, [or] neglect . . . cannot or will not be remedied by the parent."¹³⁸ At least one Pennsylvania court has interpreted this statute to mean that the status of being "irremediably" developmentally disabled is sufficient to meet this statutory ground for termination.¹³⁹ In the case *In re P.A.B.*, a Pennsylvania appellate court reversed a lower court's decision to terminate the parental rights of a husband and wife both labeled "mentally incapacitated."¹⁴⁰ However, the appellate court only did so after finding that due to their respective disabilities the parents met the statutory definition of irremediable parental incapacity.¹⁴¹ The court noted that social workers described the parents as "loving," and that since the removal of their children into foster care, they had made considerable effort to maintain a rela-

130. See *In re J.Z.*, 636 So. 2d 726 (Fla. Dist. Ct. App. 1993) (reversing lower court's decision of termination, but affirming use of theory of "prospective neglect" as basis for termination).

131. *In re C.N.G.*, 531 So. 2d 345, 346 (Fla. Dist. Ct. App. 1988) (Coward, J., dissenting) (emphasis added).

132. *Id.* at 345.

133. *Id.*

134. *Id.* at 345-46.

135. *Id.* at 346.

136. *Id.* Various psychological reports were submitted to the trial court, with differing assessments of the mother's IQ. One psychologist scored her at 75, while another scored her at 43 to 54. *Id.* at 345 n.1.

137. *Id.* at 345.

138. 23 PA. CONS. STAT. ANN. § 2511(a)(2) (Supp. 1995).

139. *In re P.A.B.*, 570 A.2d 522 (Pa. Super. Ct. 1990). The court did note, however, that the child's needs and welfare must also be considered. *Id.* at 525.

140. *Id.* at 523.

141. *Id.* at 525.

tionship with their children and cooperated fully with court-directed activities designed to make them better parents.¹⁴² However, the court seemed to disregard the possibility that the parents might become "capable" within the meaning of the statute, even with assistance. The court reasoned that the parents met the statutory grounds for termination because: (1) their children had been removed for six months; (2) the condition that led to removal (the parents' disabilities) persisted; (3) the parents could not remedy the conditions within a reasonable time (they could not become undevelopmentally disabled); and (4) services were not likely to bring about a remedy of the conditions (services could not undo their disabilities).¹⁴³

Nevertheless, the court reversed the decision of termination by considering the best interests of the child as an implied fifth statutory grounds for termination.¹⁴⁴ The three children at issue all had "special needs" that dimmed their prospects for adoption, and the parents obviously had a strong relationship with the children.¹⁴⁵ As a result, these parents were spared: they retained the right to visit their children, although the children remained in foster care. If adoptive parents were found, however, the "best interests" test that the court applied would likely tip toward severing the disabled parents' rights altogether, unless those parents consented to adoption.¹⁴⁶ Pennsylvania cases since *P.A.B.* have adopted the "best interests of the child" as an implied fifth statutory ground for termination.¹⁴⁷

B. Presumptions of Unfitness Continued: The Lack of an Individual Inquiry

As discussed earlier in this Comment, the labels of developmentally disabled and mentally retarded are often misleading because they have little, if any, predictive value regarding *individual* capability. Nonetheless, statutes and courts often use a "diagnosis" of developmental disability or mental retardation both to explain past behavior and to predict future behavior. In light of the individuality of persons labeled mentally retarded, it is

142. *Id.* at 527.

143. *Id.* at 525.

144. *Id.* at 528.

145. *Id.* at 523, 527.

146. Many courts apply a "best interests of the child" analysis after determining that a statutory analysis requires severing parental rights. Apparently, such an analysis, as here, might reveal that although the parents' rights may be legally terminated, some mitigating factors, such as a non-detrimental parent-child bond and no immediate adoption prospects, suggest that parental rights should not yet be terminated. However, the best interests analysis is problematic in several respects. Most pertinently, where the parent has a disability, courts may conflate the best interests test with the initial test of determining parental fitness. In such cases, where the child is healthy and "adoptable," courts will tend to find that the child's best interests are with "normal" adoptive parents, and will make their decision regarding parental fitness accordingly. For a more thorough discussion of the dangers of applying the best interests test in parental rights termination cases, see Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253 (1991).

147. See *In re E.M.*, 584 A.2d 1014, 1021 (Pa. Super. Ct. 1991), *rev'd*, 620 A.2d 481 (Pa. 1993); *In re Adoption of B.J.R.*, 579 A.2d 906, 907-08 (Pa. Super. Ct. 1990).

clearly inappropriate to transpose the characteristics of the class onto the individual parent. Yet, legislatures invite courts to do this by using developmental disability as a general ground for terminating parental rights, and courts often accept this invitation.¹⁴⁸

Louisiana's termination statute exemplifies many statutes' reliance on expert opinion to establish unfitness where a parent has a developmental or mental disability. It refers to an unfit parent as one whose "mental deficiency . . . makes the parent unable or unwilling to provide an adequate permanent home for the child at the present time or in the reasonably near future based upon expert opinion or based upon an established pattern of behavior."¹⁴⁹ Two recent cases demonstrate the pitfalls of substituting expert opinion testimony for evidence of actual behavior or conduct.

One Louisiana court recently upheld the termination of a mother's parental rights based primarily on the reports of two psychologists who had no previous relationship with the mother.¹⁵⁰ The mother had been diagnosed as mildly mentally retarded. After her home was damaged in a fire, her four-month old child was found to be dirty and inadequately clothed, and her housing to be inadequate.¹⁵¹ Due to these factors, and the fact that her husband was terminally ill, the state removed her child from her care.¹⁵²

Four years later, the mother's parental rights were permanently terminated. This decision was based in large part on two psychological evaluations. One psychologist concluded that the mother lacked "social skills"; the other concluded that the mother was "'defensive and suspicious . . . [and] lack[ing] the intellectual and emotional resources to follow through on her commitments.'"¹⁵³ Both evaluations were one-day affairs, but the court accepted the validity of both evaluations without questioning how a psychologist could possibly determine in one day whether someone lacks "social skills" or the "resources to follow through on commitments."¹⁵⁴

As part of her reunification plan, the mother was to attend mental health sessions and parenting skills classes and obtain "suitable" housing.¹⁵⁵ While the court made much of the fact that she stopped attending the mental

148. See, e.g., CAL. FAM. CODE § 7826 (West 1994) (allowing for termination upon sufficient expert testimony that a parent's developmental disability precludes her from being an adequate parent).

149. LA. CH. CODE art. 1003(10)(c) (West 1995).

150. C.L.R. v. Russo, 567 So. 2d 703 (La. Ct. App. 1990).

151. The court noted with obvious distaste that rodents had been observed in the mother's home. *Id.* at 706. The issue of substandard housing conditions comes up frequently in termination cases. In some cases, such conditions may be a result of neglectful housekeeping, but in other cases, these conditions are simply a result of poverty. One state appellate court judge has noted that "[t]he decisionmaker with middle-class standards may well have problems accepting substandard housing as adequate. [She] may criticize the parents for the cockroaches and mice that frequent substandard housing and are reluctant to leave. . . . But substandard housing may be all that is available for persons of the parents' income" Sackett, *supra* note 146, at 271.

152. C.L.R. at 704-05.

153. *Id.* at 705-06.

154. *Id.*

155. *Id.* at 705.

health sessions and parenting classes after a few sessions, it never examined whether she was receiving any assistance in remedying her housing situation—the main cause of her child's removal in the first place. The court simply noted that she was still living in her fire-damaged house, which had not been adequately repaired.¹⁵⁶ Finally, the court relied on a foster care worker's testimony that the mother had not formed a bond with her child during the four years he was in foster care, though the mother testified that she loved her child and had never mistreated or physically abused him.¹⁵⁷

Besides having elements in common with many termination cases—poverty, bad luck, family crisis—this case represents the power given to expert opinions in cases involving parents labeled mentally retarded. The testimony of psychologists, often based on single evaluations, is used to explain past behavior and to predict future behavior of persons unfamiliar to most judges. This mother would probably not have had her rights terminated if she was not mentally retarded. Her main problem seemed to be financial inability, and Louisiana's statute expressly stated that "financial inability alone shall not constitute grounds for termination of parental rights."¹⁵⁸ But the label of mental retardation allowed the court to avoid both the mother's actual conduct as well as the role that financial inability played in her failure to provide adequate housing for her child. Armed with terminology such as "lacking in social skills," "defensive and suspicious" and lacking "resources to follow through," the appellate court confidently upheld the judgment that termination was in the "child's best interests," despite any real evidence showing a lack of parenting ability.¹⁵⁹

*In re I.D.*¹⁶⁰ further evinces the reliance courts place on expert testimony to the exclusion of evidence about the parent's actual conduct. In this Illinois case, the state removed a developmentally delayed daughter¹⁶¹ from the care of a mother labeled developmentally disabled after the mother's husband was accused of engaging in sexual misconduct with two unrelated young girls.¹⁶² Over the two years between removal of the child and final termination, the mother, who was assessed as having an IQ of 53 and a

156. *Id.* at 706. The court was generous enough to note that the mother had testified that she could not make the repairs because she only received \$360 in monthly income.

157. *Id.*

158. *See id.* at 705 (quoting LA. REV. STAT. ANN. § 13: 1600(6)(b), *repealed by* Act of July 2, 1991, No. 235, § 17, 1991 La. Acts 706, 1056). Louisiana's new abuse and neglect statute contains identical language. *See* LA. CH. CODE art. 1003(10)(b).

159. 567 So. 2d at 705-07.

160. 563 N.E.2d 1200 (Ill. App. Ct. 1990).

161. Developmental delay is an "observed disparity between a child's actual development, particularly in language and cognition or motor skills, and the level usually seen in children developing normally." CLASSIFICATION IN MENTAL RETARDATION, *supra* note 6, at 168.

162. *In re I.D.*, 563 N.E.2d at 1202. The abuse took place in the mother's home. Thus, the court theorized that because the two girls had reported their allegations to her, and she had not come forward to authorities, the mother was incapable of protecting her own daughter from abuse.

mental age of five or six years,¹⁶³ had separated from her husband, moved into her own apartment, and learned to cook, clean, monitor her money, tell time, catch a bus, and get to work on time.¹⁶⁴ In addition, she regularly visited her child in foster care and maintained a close relationship with her.¹⁶⁵

However, a clinical psychologist testified that the mother's abilities had remained static over the two years.¹⁶⁶ The court found this testimony persuasive despite evidence indicating the mother's abilities had increased dramatically over the two years. In fact, even the social services department, which had initially intervened to remove the child, recommended against termination.¹⁶⁷ In ignoring this evidence and terminating the mother's rights, the court simply followed the legislature's statutory directive that a parent could be deemed unfit if there was an "inability to discharge parental responsibilities supported by competent evidence from a . . . clinical psychologist of . . . mental retardation . . . [and] sufficient justification to believe that such inability . . . shall extend beyond a reasonable time period."¹⁶⁸

Other cases interpreting statutes like those in force in Illinois and Louisiana have relied on expert testimony that has more to do with presumptions about group characteristics than actual observation of individual behavior or abilities.¹⁶⁹ This reliance on experts' presumptions lightens the burden on the courts: it requires resources and time to evaluate an individual's parenting abilities, and it is much easier to rely on the opinions of experts who need only two or three hours with the parent to reach their conclusions. These conclusions in turn support presumptions about the inadequacy of developmentally disabled parents.¹⁷⁰ According to expert presumptions, the mother in Louisiana had failed to repair her house not due to a lack of money, but because she lacked the ability to follow through on commitments. The mother in Illinois, it was presumed, may have been able to learn to cook and clean, and she may have been able to maintain a close,

163. *Id.* The use of "mental age" is misleading because it discredits a person's actual experiences. A woman of 25 is "mentally" much different from a girl of six simply because she is "physically" much different, and because she has a much greater wealth of life experiences than a six-year-old.

164. *Id.* at 1203.

165. *Id.* at 1206-07.

166. *Id.* at 1203.

167. *Id.* at 1206.

168. 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (Smith-Hurd Supp. 1995).

169. See *In re Karen Y.*, 550 N.Y.S.2d 57 (N.Y. App. Div. 1989) (permitting termination based on expert testimony that mother had mental age of six years, nine months and was "incapable of appropriately responding to stress"); *Orangeburg County Dept. of Social Servs. v. Harley*, 393 S.E.2d 597 (S.C. Ct. App. 1990) (allowing termination based on prognosis of a clinical psychologist that mother was "immature," displayed "poor impulse control," and had "a low frustration level"). But see *South Carolina Dep't of Social Servs. v. Smith*, 429 S.E.2d 807 (S.C. 1993) (reversing termination because of the inadequacy of a clinical psychologist's brief evaluations of parents).

170. Cf. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) ("Procedure by presumption is always cheaper and easier than individualized determination.").

loving relationship with her daughter while the daughter was in foster care, but she could not learn to adjust to "changing circumstances."¹⁷¹ When courts allow presumptions of inadequacy to replace individual inquiry, they erect insurmountable hurdles for parents labeled developmentally disabled or mentally retarded.

C. Lack of Reunification Services

Perhaps the most blatant element of discrimination in the entire termination process is the routine failure to offer reunification services to parents labeled developmentally disabled or mentally retarded solely on the basis of their disability. Almost all termination statutes require either explicitly or implicitly that the state provide reunification services to parents before their parental rights can be terminated.¹⁷² However, most of these statutes create an exception when "clear and convincing" evidence supports a finding that the conditions that led to intervention cannot be ameliorated. As discussed above, courts often presume that parents with developmental disabilities are incapable of ever performing adequately as parents. Consequently, they often deny such parents reunification services because the condition leading to intervention—developmental disability—cannot be ameliorated. In addition, some statutes expressly state that when a parent is developmentally disabled, a court may dispense with reunification services if it finds that the parent is not likely to benefit from them.¹⁷³ Thus, a parent's disability often serves as a dual liability: her disability first leads to initial intervention, and then precludes her from an opportunity to regain custody of her child.

Two recent cases demonstrate this dual-liability effect. In *Orangeburg County Department of Social Services v. Harley*,¹⁷⁴ the court terminated a mother's parental rights before any reunification services were offered. The court's opinion does not state why the parent's two children were removed from her home, but apparently the mother, who had been diagnosed as borderline mentally retarded, had difficulty maintaining a stable residence and needed assistance in managing her money.¹⁷⁵ In upholding the decision to terminate her parental rights, the appellate court noted the testimony of a clinical psychologist that the mother was "immature, displayed poor impulse control, [and] had a low frustration level" due to her "low mental

171. *In re I.D.*, 563 N.E.2d at 1203.

172. See, e.g., CAL. WELF. & INST. CODE §§ 300-395 (West 1984 & Supp. 1995) (explicitly requiring that reunification services be provided); N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 1992) (implicitly requiring that reunification services be provided as part of "diligent efforts" to preserve family unit).

173. See, e.g., CAL. WELF. & INST. CODE § 361.5(b) (directing that "[r]eunification services need not be provided to a parent or guardian . . . when . . . the parent or guardian is suffering from a mental disability . . . that renders him or her incapable of utilizing those services").

174. 393 S.E.2d 597 (S.C. Ct. App. 1990).

175. *Id.* at 598.

status.”¹⁷⁶ The mother contested termination on the ground that she was offered no services to ameliorate any of the defects alleged by the state.¹⁷⁷ But the court, relying on precedent,¹⁷⁸ held that although in most cases termination could not occur before reunification services were offered, the statute in question did allow termination before these services were offered.¹⁷⁹ Not only did the court here give undue deference to expert testimony, it chose to ignore the possibility that the mother’s “defects” could be ameliorated with assistance.

Another recent case reveals similar reliance on expert testimony about disability both to justify intervention and then to withhold reunification services from the parent. In *S.T. v. State Department of Human Resources*,¹⁸⁰ a teenage mother’s two-day-old infant was removed from her care for no reason other than that the mother was diagnosed as mildly to moderately mentally retarded and was without a permanent residence.¹⁸¹ In justifying termination, the court relied almost exclusively on a clinical psychologist’s prognosis that parents with the mother’s IQ were incapable of caring for children independently.¹⁸² Because the mother had no viable family support, and social workers could identify no programs available to assist “retarded parents,” the court dispensed with the usual requirement of reunification services.¹⁸³

D. Inadequate Reunification Services

Even more common than cases in which no reunification services are offered are cases in which the reunification services offered to the parent labeled developmentally disabled are inadequate. This layer of discrimination has two aspects. First, these parents are often offered services *pro forma*, whereby all those involved—judge, social worker, service provider—expect failure. In such cases, despite efforts to comply with what is being offered, parents are inevitably found not to have “improved”—even when there is evidence to the contrary. Second, the services offered usually do not take into consideration the parent’s disability, and consequently fail to address the fundamental problems leading to court intervention in the first place.

176. *Id.*

177. *Id.*

178. *South Carolina Dep’t of Social Servs. v. Humphreys*, 374 S.E.2d 922 (S.C. Ct. App. 1988).

179. *Harley*, 393 S.E. at 598. The statute the court interpreted was S.C. CODE ANN. § 20-7-1572(a)(6) (Law Co-Op 1985), which provides that termination can occur where “[t]he parent has a diagnosable condition unlikely to change within a reasonable time such as . . . mental deficiency.”

180. 579 So. 2d 640 (Ala. Civ. App. 1991).

181. *Id.* at 642. At the time her two-day-old infant was removed from her care, the mother was residing at a Salvation Army shelter for pregnant teenagers.

182. *Id.*

183. *Id.*

The appellate court in the case *In re Torrance P.*¹⁸⁴ upheld the termination of a father's parental rights despite the fact that the father's social worker admitted that there was no case plan to help the father meet the conditions the trial court had imposed upon reunification.¹⁸⁵ The father was developmentally disabled and could not read, yet the social worker was aware only that he was "slow."¹⁸⁶ The social worker's communications with the father were almost exclusively in writing, and she blamed his lack of response to her letters for her failure to draw up a concrete reunification plan.¹⁸⁷ The court found this explanation acceptable, and found that the father was responsible for his failure to meet the court's conditions for reunification.¹⁸⁸

Unfortunately, *Torrance P.* is only one of many cases where developmentally disabled parents pay the price for communication difficulties between themselves and social workers and judges. In a recent California case, the state terminated the parental rights of a mother diagnosed as developmentally delayed after she failed to meet the conditions in her reunification plan.¹⁸⁹ The mother's daughter was originally removed from her care because of unsanitary living conditions.¹⁹⁰ She was ordered to follow a reunification plan that included submitting to a psychological evaluation, participating in parenting classes, and receiving housekeeping instruction.¹⁹¹ The mother explained to the social worker that she only wanted to work on one aspect of this plan at a time, but the social worker felt that she was able to do more.¹⁹² The mother eventually complied substantially with the conditions of her plan,¹⁹³ but the court upheld termination, apparently due to the mother's "uncooperative" attitude in receiving services. In particular, the court noted the mother's "persistent refusal to apply to the regional center for the voluntary services that it provided to developmen-

184. 522 N.W.2d 243 (Wis. Ct. App. 1994).

185. *Id.* at 245. The three conditions imposed on the father were: maintaining contact with his two children "as close as possible to every other week"; maintaining at least monthly contact with the children's social worker; and maintaining a residence "suitable and adequate to meet the needs of those who reside there." *Id.* at 244.

186. *Id.* at 245.

187. *Id.* The social worker partially attributed the father's lack of response to his failure to keep the court apprised of his current address and telephone number.

188. *Id.* at 246. The father asserted that the County had violated the ADA by failing to reasonably accommodate his developmental disability, but the court held that the ADA did not increase the county's responsibilities under its reunification statute, nor require that they be discharged in a certain manner. *Id.* at 244-45. For a discussion of the ADA and the state's obligations regarding reunification services, see *infra* Part V.

189. *In re Christina L.*, 4 Cal. Rptr. 2d 680 (Ct. App. 1992).

190. *Id.* at 682.

191. *Id.* at 683.

192. *Id.*

193. Although the court stated that the mother "did make some efforts to comply," *id.*, the facts indicate substantial compliance with the terms of the reunification plan. *Id.* at 682-84. The court characterized a year-long delay in attaining housekeeping services as the mother's fault, although the social worker had failed to make a timely referral. *Id.* at 683.

tally disabled persons," although this was not part of the mother's reunification plan.¹⁹⁴ The court seemed taken aback by the mother's distrust of her social worker and the many psychologists who examined her at the court's behest,¹⁹⁵ although for the mother these people represented the system that had taken her child away.

In another recent case, the Vermont Supreme Court upheld termination even after acknowledging the lack of any services available in Vermont to assist a parent with developmental disabilities.¹⁹⁶ The appellate court had pointed to the lack of any evidence that, if available, such services would be of any benefit.¹⁹⁷ The Vermont Supreme Court found that the available parenting skills training, provided by a counselor with no experience working with parents with disabilities, was a reasonable attempt to ameliorate the parent's alleged deficiencies.¹⁹⁸ The court referred to a supposedly telling observation by the trial court: "[The mother] had great difficulty retaining information and would ask questions about a particular issue as though for the first time, even though the topic had arisen before."¹⁹⁹ For the court, this observation apparently justified its conclusion that no amount of specialized training could help this mother. It was an easy step from there to conclude that the state was not required to provide specialized services.

Some courts, however, have recently begun to require states to be more diligent in providing adequate services to parents with developmental disabilities before terminating their parental rights. A California court reversed a termination decision because of the inadequacy of the reunification services offered. The court noted that "[i]f . . . generic reunification services are offered to a parent suffering from a mental incapacity such as retardation, failure is inevitable, as is termination of parental rights."²⁰⁰ Yet today such cases represent the exception to the rule. Most courts operate under the assumption that parents labeled mentally retarded stand little chance of being rehabilitated no matter what services are offered, and so they tend to focus not on the adequacy of the services, but rather on the inadequacy of the parent.

194. *Id.* at 689.

195. *Id.* at 683.

196. *In re H.S.*, 632 A.2d 1106 (Vt. 1993).

197. *Id.* at 1107. *See also In re Karen Y.*, 550 N.Y.S.2d 67, 69 (N.Y. App. Div. 1989) (asserting that the mentally retarded could only learn rote tasks, and there had been no success in teaching parenting skills). For a discussion of the effectiveness of specialized parenting services, *see infra* Part IV.A.1.

198. *In re H.S.*, 632 A.2d at 1108.

199. *Id.* at 1106.

200. *In re Victoria M.*, 255 Cal. Rptr. 498, 507 (Ct. App. 1989).

IV

CHILDREN, PARENTS, AND SOCIETY: WEIGHING THEIR
INTERESTS*A. Underlying Rationales for the Differential Treatment*

The presumption that children's best interests are in remaining with their natural parents who wish to raise them underlies the law of parental rights termination. However, for parents labeled mentally retarded or developmentally disabled, this presumption is often reversed: they must prove their competence in the face of myriad presumptions of inadequacy. There are essentially two rationales for the law to treat parents labeled developmentally disabled differently from other parents: to protect children and to protect society.

1. Protecting Children

The "protecting children" rationale rests on the premise that the state must protect a child more than usual when that child's parents are labeled mentally retarded or developmentally disabled. On its face, this appears to be the most commonly articulated and compelling rationale for treating parents with developmental disabilities differently from other parents. But this rationale depends entirely on the premise that developmentally disabled or mentally retarded parents, as a class, are less fit than other parents. Three critical flaws emerge when we examine this premise. First, any law or judgment based upon a classification as amorphous as developmental disability or mental retardation is suspect. Second, little research exists regarding the parenting capabilities of such parents as a group, and what evidence does exist strongly suggests that cognitive disability *per se* does not make a parent inadequate. Finally, as *Stanley v. Illinois* underscores, status-based presumptions have no place in the realm of parental rights termination.²⁰¹

As previously noted, the term mental retardation has little predictive or explanatory utility; as a label, it is "not just less than useful, it is actually seriously misleading."²⁰² However, even if we accept "mental retardation" or its younger cousin "developmental disability" as a valid classifying label, we still must account for the tremendous variance within the class in terms of functional ability. The subclass labels that the behavioral sciences have constructed (mild retardation and severe developmental disability, for example) reflect an understanding that the class is diverse.²⁰³ Yet parental rights termination statutes and adjudications rarely take this diversity into account. Legislatures and judges, as well as many clinical psychologists,

201. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

202. BOGDAN & TAYLOR, *supra* note 21, at 6.

203. "The difference between a mildly and profoundly mentally retarded person may be roughly the same as the difference between an intellectually average twelve-year-old and a two-year-old, while differences within the subclass of mildly mentally retarded persons may be as much as four intellectual years." Hayman, *supra* note 18, at 1215.

tend to view the "mentally retarded" or "developmentally disabled" as monolithic. As inappropriate as it is to use IQ to predict or explain behavior, when enacting and implementing restrictive laws based on "group characteristics," it is equally inappropriate not to distinguish, at a group level, between people with widely varying cognitive abilities.²⁰⁴

In addition, one would expect that if the state is going to impose group-based restrictions on a relationship as fundamental as that between parent and child, the state would have some compelling evidence to support its differential treatment. Until quite recently, however, opportunity for social-scientific research was limited because forced sterilization, laws restricting marriage, and institutionalization generally conspired to deny people labeled mentally retarded the opportunity to parent children.²⁰⁵ The most that can be said for the relatively sparse evidence that does exist is that some parents labeled mentally retarded are "fit" parents²⁰⁶ without any special assistance; other parents labeled mentally retarded are "fit" parents if provided assistance; and still other parents labeled mentally retarded are not "fit," with or without assistance.²⁰⁷

A variety of issues plague the limited available research involving parents labeled mentally retarded. First, researchers have not agreed on a fixed definition of adequate parenting.²⁰⁸ Second, very few parents have actually been assessed, making it difficult to draw generalized conclusions.²⁰⁹ Third, several studies have involved parents who were selected because

204. The most significant characteristic of the group known as "developmentally disabled" or "mentally retarded" is its diversity. Cognitively, those persons identified as "mildly mentally retarded" share as much in common with persons identified as "normal" as they do with persons identified as "moderately mentally retarded." *Id.* at 1213-15. Legislatures and courts rarely acknowledge this diversity of abilities within the class.

205. See Greenspan & Budd, *supra* note 107, at 115-16.

206. They provide their children with adequate physical, emotional, and intellectual nurturing, and they preserve their children's health and safety. Hayman, *supra* note 18, at 1219-22.

207. See Joyce Coleman, *Parents Learning Together III: The Second Generation*, in *WHEN A PARENT IS MENTALLY RETARDED* 111, 120 (Barbara Y. Whitman & Pasquale J. Accardo eds., 1990) (discussing improvement in development of children whose mentally retarded parents received parenting training and support); Maurice A. Feldman et al., *Parent Education Project III: Increasing Affection and Responsivity in Developmentally Handicapped Mothers: Component Analysis, Generalization, and Effects on Child Language*, 22 J. ON APPLIED BEHAV. ANALYSIS 211, 222 (1989) [hereinafter *Parent Education Project III*] (citing strong evidence that training and support can help parents labeled mentally retarded improve such vital parenting skills as giving affection); Greenspan & Budd, *supra* note 107, at 116 ("[V]irtually all studies have found a sizeable percentage of mentally retarded parents to be functioning either within, or close to, normal limits, especially when compared to parents with similar demographic characteristics.").

208. Alexander J. Tymchuk & Linda Andron, *Mothers With Mental Retardation Who Do or Do Not Abuse or Neglect Their Children*, 14 CHILD ABUSE & NEGLECT 313, 313-14 (1990).

209. See *id.* at 314 (observing that several studies examining the adequacy of child care provided by parents labeled mentally retarded "are merely case studies in which a single mother is described"); Maurice A. Feldman et al., *Parent Education Project II: Increasing Stimulating Interactions of Developmentally Handicapped Mothers*, 19 J. ON APPLIED BEHAV. ANALYSIS 23, 23 (1986) [hereinafter *Parent Education Project II*] ("To date, only a few reports, mostly nonexperimental, have described behavioral parent training for mentally retarded mothers.").

they had previously been identified as being abusive or neglectful.²¹⁰ Fourth, in assessing the impact of cognitive disability on parenting behavior, researchers have been unable to distinguish the impact of the social factors surrounding mental retardation (i.e., a common history of institutionalization, isolation, abused and neglected childhoods, expectations of failure, and lack of parental education and role modeling) from the clinical factors of mental retardation (i.e., significantly below average intellectual and social functioning).²¹¹

Despite the many flaws in the research, a few very tentative conclusions can be drawn about parents labeled mentally retarded. Significantly, almost all studies have found a sizeable percentage of such parents to be functioning within or near normal limits.²¹² In addition, many studies have found that parents labeled mentally retarded can and do benefit from training and support.²¹³ Even researchers and commentators who have reached the most negative conclusions about cognitively disabled parents caution that such parents must be evaluated as individuals before reaching conclusions about their parental adequacy, or their ability to benefit from training and support.²¹⁴

At the same time, the research indicates that, as a group, parents labeled mentally retarded may be more likely to provide inadequate supervision, developmental environments, and physical care than parents not labeled mentally retarded.²¹⁵ However, researchers have been unable to demonstrate that such tendencies are caused by cognitive impairment rather than social circumstance.²¹⁶ In addition, researchers have been unable to

210. Tymchuk & Andron, *supra* note 208, at 314.

211. Telephone Interview with Dr. Megan Kirschbaum, Director, Through The Looking Glass (Feb. 20, 1995). Through The Looking Glass provides specialized parenting training and support services to parents with developmental, or cognitive, disabilities. Dr. Kirschbaum prefers the term "cognitive disability" to "developmental disability" when discussing persons labeled mentally retarded because developmental disability often encompasses characteristics, such as cerebral palsy, that have no effect on cognitive functioning or intelligence. See also SOBSEY, *supra* note 8, at 228 (discussing the negative impact of a history of abuse, and expectations of failure, on many parents labeled mentally retarded).

212. Greenspan & Budd, *supra* note 107, at 116.

213. *Id.*

214. See, e.g., Ann Gath, Annotation, *Mentally Handicapped People as Parents*, 29 J. CHILD PSYCHOL. & PSYCHIATRY 739, 741-42 (1988) (suggesting that an individual's "track record" is the best predictor of future performance as a parent).

215. See, e.g., *Parent Education Project II*, *supra* note 209, at 24 (noting that "the failure of many developmentally handicapped parents to provide an adequately stimulating home environment is considered one of their most obvious and serious shortcomings"); Tymchuk & Andron, *supra* note 208, at 319 (listing reasons why the parents labeled mentally retarded that they studied had their children removed).

216. In fact, a study of non-disabled mothers raised in institutional "group care" situations found that the vast majority displayed significant parenting deficits. SOBSEY, *supra* note 8, at 228-29. This suggests that the impact of a history of institutionalization on a parent cannot be overestimated.

establish any causal link between cognitive disability and parental violence or abuse.²¹⁷

Most importantly, researchers have found that the impact of cognitive disability on parenting varies from parent to parent. Parents with the same scores on standardized intelligence and social functioning tests do not "score" equally when their parenting skills are evaluated.²¹⁸ Researchers and experts on parents with cognitive disabilities find that parents often display unexpected strengths in parent-child interactions that cannot be predicted from standardized testing or psychological evaluations.²¹⁹ Most fundamentally, researchers and experts point out that because "mental retardation" is an imprecise, umbrella label, findings from research on a group of parents labeled mentally retarded should not be used to make predictions about individual parents.²²⁰

As noted, parents labeled mentally retarded are often more affected by social and personal circumstance than by disability. Four factors other than disability have been identified as having an influence on parenting behavior: personal history, social context, parental challenges, and self-identity.²²¹ Many parents with cognitive disabilities have experienced trauma as children, such as institutionalization, multiple residential placements, abuse or neglect, and a lack of familial connection.²²² Those who themselves have had good parenting and familial support while growing up are generally able to form positive relationships with their own children and to acquire the necessary parenting skills.²²³ Parents with cognitive disabilities often have heightened difficulty in limit-setting and behavior management as their children get older, which may stem from a lack of role modeling as well as cognitive disability.²²⁴ Like all parents, those labeled mentally

217. See Hayman, *supra* note 18, at 1220-21 (observing that the link between mental retardation in parents and maltreatment of children is inconclusive at best, and criticizing studies that have allegedly found such a connection); see also, Tymchuk & Andron, *supra* note 208, at 315 (suggesting that no credible link exists between mental retardation and parental abuse).

218. See, e.g., Tymchuk & Andron, *supra* note 208, at 316, 321 (finding that mothers with the same standardized test scores differed greatly in terms of parental adequacy).

219. Telephone Interview with Dr. Megan Kirschbaum, Director, Through The Looking Glass (Oct. 11, 1995). Based on her own experiences providing services to parents with cognitive disabilities, Dr. Kirschbaum suggests that extended, in-home, observational assessments must occur before informed judgments about parental adequacy can be made because parents with cognitive disabilities often display unexpected strengths that cannot be revealed in standardized tests or brief psychological evaluations. *Id.*

220. See, e.g., *id.* (suggesting that behavior is the only true indicator of whether a parent is harming, or will harm, her children); Gath, *supra* note 214, at 741-42 (also suggesting that behavior is the only true indicator of a person's parenting skills).

221. Sherrie Hansen, *Serving Parents With Cognitive Disabilities*, PARENTING WITH A DISABILITY (Through The Looking Glass, Berkeley, Cal.) Nov. 1994, at 4, 5-6.

222. See *id.* at 5.

223. *Id.*

224. *Id.* at 6. See also Andrea G. Zetlin & Jim L. Turner, *Self Perspectives on Being Handicapped: Stigma and Adjustment*, in LIVES IN PROCESS: MILDLY RETARDED ADULTS IN A LARGE CITY 93, 113 (Robert B. Edgerton ed., 1984) (suggesting that children labeled mentally retarded are often overprotected by their parents); SOBSEY, *supra* note 8, at 90-110 (cataloguing the forms of

retarded often face heightened parental challenges when they are single parents,²²⁵ care for more than one child,²²⁶ and/or are poor.²²⁷ Finally, parents labeled mentally retarded often have been told throughout their lives that they are incompetent, and consequently, when they become parents, they may be quite invested in proving their competency,²²⁸ which may take the form of suspicion of outsiders, such as social workers, who scrutinize their parenting.

Research suggests that parents labeled mentally retarded or developmentally disabled may face more challenges than prototypical parents due to shared social experiences rather than shared cognitive disabilities. This finding is significant because it suggests that many parental shortcomings do not result from innate inadequacy, and thus can be redressed through parental training and support. Moreover, while several social factors, including poverty and single parenthood,²²⁹ may present heightened challenges for parents, we do not look at these factors as creating presumptions of parental unfitness. Instead, we look at individual *behavior*. The same should hold true for parents labeled mentally retarded.

Individual behavior should also determine whether parents will receive reunification services.²³⁰ Like the presumption that parents labeled developmentally disabled are less fit than other parents, the presumption that they are less likely to benefit from reunification services is not supported by the available evidence. Yet legislatures and courts often use this presumption either to justify denying services to parents altogether or to justify inadequate services.

institutionalized abuse and neglect experienced by children and adults living in group care institutionalized settings).

225. It is not surprising that a high incidence of single parenthood exists among parents labeled mentally retarded in light of the history of laws restricting marriage, and the continued discouragement of romantic involvement, directed at adults labeled mentally retarded. See Kathleen Marafino, *The Right To Marry For Persons With Mental Retardation*, in *WHEN A PARENT IS MENTALLY RETARDED*, *supra* note 207, at 149.

226. The fertility rate for parents labeled mentally retarded appears to be slightly higher than the general population. However, the percentage of women labeled mentally retarded having children is much lower than the percentage of all women having children. Barbara Y. Whitman & Pasquale J. Accardo, *Epidemiological Probes*, in *WHEN A PARENT IS MENTALLY RETARDED*, *supra* note 207, at 13, 28-29.

227. The poverty rate for all persons with disabilities is quite high. See S. REP. NO. 116, 101st Cong., 1st Sess. 9 (1989) (citing the high incidence of poverty among persons with disabilities).

228. Hansen, *supra* note 221, at 6; see also Zetlin & Turner, *supra* note 224, at 93 (chronicling the feelings of social inferiority experienced by many persons labeled mentally retarded).

229. See *Single Disabled Parent*, *ACCENT ON LIVING*, Dec. 22, 1993, at 34 (reporting that two parents with physical disabilities felt that single parenthood presented a larger challenge than parenting with a disability).

230. Many commentators have pointed out the benefits of providing preventive services to families before they reach the judicial system. While such services are often dismissed as too costly, they may actually save the government money. See *infra* note 277. More fundamentally, they spare children and parents from the trauma associated with the parental rights termination process.

While research in this area is problematic,²³¹ it suggests that parents labeled mentally retarded "can learn to overcome virtually any deficiency in parenting abilities" resulting from their cognitive disabilities.²³² With assistance, they can overcome deficits in social skills, communication skills, information processing, decision-making skills, and even such parent-child interaction skills as affection, praise, and language enhancement.²³³ Of course, this is not true of all parents labeled mentally retarded. Some parents and potential parents pose too much of a threat to children to entrust them with their care. But this determination should be made on the basis of individual behavior rather than IQ score or one-day psychological evaluations. Dr. Kirschbaum, of *Through The Looking Glass*, suggests that if a person's history of behavior involves violence toward children, or if a person has demonstrated through behavior (not test scores) that she cannot form any relationship with her child, then that would indicate possible grounds for denial of custody.²³⁴ Dr. Kirschbaum points out that this same standard should apply to parents not labeled mentally retarded or developmentally disabled.²³⁵

The type of services provided to parents with cognitive disabilities has a profound impact on whether they are successful. Unfortunately, when offered, the services provided to parents labeled mentally retarded are usually "generic" parenting services,²³⁶ which do not account for differences in individual learning processes, and are typically provided by people without any experience around parents labeled mentally retarded.²³⁷ Even services

231. One of the leading reviews of the literature speculated whether the reported findings "are so biased and confounded that they should be entirely discounted." Robert F. Schilling et. al, *Child Maltreatment and Mentally Retarded Parents: Is There a Relationship?*, 20 MENTAL RETARDATION 201, 206 (1982).

232. Hayman, *supra* note 18, at 1222-23.

233. See *Parent Education Project III*, *supra* note 207, at 217 (reporting that mothers with developmental disabilities can learn such parental behaviors as "maternal affection, praise, and imitation of child vocalization"); *Parent Education Project II*, *supra* note 209, at 33 ("Training results indicated that relatively brief behavioral instruction, consisting of discussion, modeling, feedback, social reinforcement, and self-recording, was effective in increasing and maintaining the positive interactional skills of low-IQ mothers when playing with their children at home.").

234. Telephone Interview with Dr. Megan Kirschbaum, *supra* note 219.

235. *Id.*

236. "Generic" reunification services range from large monthly parenting classes to more individualized in-home parenting training. When alcohol or drug abuse is present, efforts are generally made to provide substance abuse counseling. Often parents receive psychological or therapeutic counseling as well. Given the adversarial nature of the termination process, these services are often viewed with suspicion by parents. See *In re Christina L.*, 4 Cal. Rptr. 2d 680, 684 (Ct. App. 1992). In fact, service-provider reports, including reports by psychiatrists and therapists, are often used against parents in termination proceedings. See Marafino, *supra* note 225, at 163, 181.

237. Successful parenting services for parents labeled mentally retarded and their children build on existing strengths in the parent-child relationship. This is particularly important because parents with cognitive disabilities tend to have damaged self-esteem after years of being treated without respect. In addition, such parents are often not receptive to didactic or directive teaching approaches; those providing services need to develop trusting relationships with the parent, and not appear to be undermining a parent's relationship with her child. Hansen *supra* note 221, at 4.

designed specifically for parents with cognitive disabilities, provided by people experienced with parents labeled mentally retarded, are often inappropriately "knowledge-based" rather than functioning—and relationship—focused.²³⁸ In other words, such services often do not involve "hands-on" interaction between parent and child and fail to address the parent's often traumatic history. However, generic services are better than no services, and "knowledge-based" specialized services are better than generic services. Unfortunately, most parents labeled mentally retarded receive either generic services or no services at all.

In sum, the available research suggests that factors unrelated to disability often have a more significant impact on parental fitness than does disability itself. The research also suggests a tremendous variance in the impact that disability has on parental fitness. Importantly, parenting services have been shown to make a difference for many parents with insufficient parenting skills. While few conclusions can be drawn about the parenting abilities of developmentally disabled parents as a group, it is clear that individual inquiry is required before decisions are made to remove children from parents.

2. *Protecting Society*

The "protecting society" rationale has three components, designed to protect society from: (1) parents who drain the state's financial resources; (2) parents who will produce defective offspring; and (3) parents who make us uncomfortable because they do not conform to our idea of what parents should be.

a. *Economics*

The gradual opening up of job opportunities for adults with developmental disabilities, due in part to the enactment of the ADA, has assisted many persons traditionally considered "unemployable," to work and become financially self-sufficient.²³⁹ However, most adults labeled mentally retarded or developmentally disabled still receive some form of public assistance. Consequently, the widespread economic dependence of devel-

238. Telephone Interview with Dr. Megan Kirschbaum, *supra* note 211. Dr. Kirschbaum suggests that services for parents with cognitive disabilities should be hands-on, functioning-based services, and that they should be "relationship" focused, addressing issues unrelated to disability, such as childhood trauma, that often affect parenting behavior more than disability. Dr. Kirschbaum points out that no matter what their focus, specialized parenting programs for persons with cognitive disabilities are relatively rare throughout the country. See also Joel Bakken et al., *Teaching Parents With Mental Retardation: Knowledge Versus Skills*, 97 AM. J. ON MENTAL RETARDATION 405, 416 (1993) (suggesting that parent training should be skills-based rather than knowledge- and curricular-based).

239. See Wade Lambert, *Law Helps Mentally Disabled Job Outlook*, WALL ST. J., Feb. 2, 1995, at B11 (reporting that job opportunities for and income levels of the mentally disabled have climbed significantly since passage of the ADA).

opmentally disabled parents has been urged as a rationale for treating them differently from others.

Those concerned about the expenditure of public funds suggest that persons receiving public assistance should not be raising children because they are ill-prepared to contribute financially to their children's upbringing.²⁴⁰ Moreover, the economic argument suggests that parents with developmental disabilities will require more services than non-disabled parents and thus will further drain the state's resources.

One response to this argument is that financial self-sufficiency is increasing among persons labeled mentally retarded because of nondiscrimination laws such as the ADA. An additional justification for not specially restricting parental rights is that keeping families out of the judicial system and children out of the foster care system will actually save the state money. This response is ultimately unsatisfying, however, because the state could save money by simply preventing parents labeled developmentally disabled from having children, thereby eliminating the need for additional financial assistance and support services.²⁴¹

Robert Hayman suggests a more compelling response to the economic argument for differential treatment of mentally retarded parents: "Those who seek justice for mentally retarded persons should emphasize that equality comes from a recognition that the human being has worth and that any rationalistic effort to take his measure standing alone ultimately denies him his humanity."²⁴² Public policy demands more than a reductionist economic analysis that obscures the essential dignity of the individual. We cannot remain true to democratic principles by protecting the public purse at the expense of citizens' humanity. Thus, we must make some difficult choices. This Comment suggests that we have already decided, through laws such as the ADA, to work toward a society in which human worth is determined by something other than ascribed status.

b. Eugenics

Another justification for the differential treatment of parents labeled developmentally disabled is based on eugenics, a theory that has enjoyed something of a resurgence in recent years.²⁴³ Though rarely acknowledged

240. This parallels the argument that welfare assistance should be limited for parents who have more than one child while receiving welfare.

241. As previously noted, some states still have involuntary sterilization statutes. However, all but one are based on the "best interests" of the person to be sterilized, not on economics or eugenics. See *supra* note 43.

242. Hayman, *supra* note 18, at 1267-68.

243. See, e.g., RICHARD J. HERNNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (correlating low IQ with social and moral inferiority); Richard Lynn, *Is Man Breeding Himself Back to the Age of the Apes?*, *THE TIMES* (LONDON), Oct. 24, 1994, at 16 (same); J. David Smith, *Reflections on Mental Retardation and Eugenics, Old & New: Mensa and the Human Genome Project*, 32 *MENTAL RETARDATION* 234, 235 (1994) (suggesting that academic interest in genetic determinism has persisted since World War II).

by judges or legislators, eugenics plays a role in the parental rights termination process: we erect barriers to parenthood in part to prevent "defective" parents from raising "defective" offspring.

Although defining the role of eugenics in the termination process is difficult, tracing its history is not. In addition to involuntary sterilization laws, persons labeled developmentally disabled have been subject to a range of restrictive legislation²⁴⁴ and treatment aimed at protecting society from any possible damage that they might inflict were they treated as whole citizens. These restrictions were designed at least in part to reduce the numbers of "defective" or "feeble-minded" Americans.²⁴⁵ While couched in more palatable terms, much of this restrictive legislation and treatment exists in some form today. In addition, one need not be an alarmist to notice a similarity between the rhetoric of the eugenicists and some of the current political debate surrounding welfare reform and parental rights.²⁴⁶

What is ignored by proponents of the eugenics argument is that parents with developmental disabilities are likely to give birth to children with average or above-average intelligence.²⁴⁷ Studies have consistently found that parents with developmental disabilities provide their children with more intellectually stimulating environments than they themselves experienced as children.²⁴⁸ In addition, having parents with developmental disabilities has been shown to have no correlation to criminal activity or other behaviors once lumped under the heading of "moral depravity."²⁴⁹ Aside from the ethical problems involved in using eugenicist theory as a guide for social policy, the eugenicist premise that "defective" parents produce "defective" offspring lacks a sound basis in scientific fact.

c. *Stereotype and Fear*

Restrictive treatment protects us from our discomfort with people labeled mentally retarded. The labels we use to describe these people—"mentally retarded," "mentally deficient," "mentally handicapped," or

244. See, e.g., Marafino, *supra* note 225, at 149 (reporting that as recently as 1978, 37 states and the District of Columbia had statutes restricting or prohibiting persons labeled mentally retarded from marrying).

245. See George P. Smith, II, *Genetics, Eugenics, and Public Policy*, 1985 S. ILL. U. L.J. 435, 439 (noting that eugenics reformers projected that, by 1980, only 1,500 out of every 100,000 citizens would be "feeble-minded").

246. See H.R. 4, 104th Cong., 1st Sess. (1995) (proposing the "Personal Responsibility Act of 1995" which would eliminate welfare benefits to newborn children if a sibling in the same household is already receiving benefits, in order to discourage parents on welfare from having additional children). Similar resentful attitudes toward parents receiving public benefits extend to parents with developmental disabilities, who often receive Supplemental Security Income (S.S.I.) payments or other public benefits.

247. Noreen D'Souza, *Genetics and Mental Retardation*, in *WHEN A PARENT IS MENTALLY RETARDED*, *supra* note 207, at 31, 45.

248. See, e.g., Hayman, *supra* note 18, at 1222 n.75. In addition, parents with developmental disabilities generally attach a high degree of importance to the education of their children, perhaps in part because they have experienced educational deprivation. See *id.*

249. See ZIGLER & HODAPP, *supra* note 25, at 92.

"developmentally disabled"—evoke vivid stereotypes that shape our interactions with them.²⁵⁰ Some commentators suggest that disabilities in general provoke existential anxiety in non-disabled people, due to their fear of losing some functional capabilities.²⁵¹ In an intellect-centered society such as ours, this anxiety is heightened when the disability is cognitive.²⁵²

Our anxiety and stereotypes translate easily into restrictive legislation and treatment. We rationalize this treatment by claiming it is "for their own good," to "protect children," or to save money, without honestly scrutinizing our discomfort. For example, communities that have challenged group homes for the developmentally disabled have claimed that their opposition springs from concern for their children, property values, or the disabled residents' own safety.²⁵³ These communities have not said that they are made uncomfortable by the prospect of having mentally retarded neighbors. Yet one suspects that this has played at least some role in eliciting the vigorous opposition to community-based group homes.²⁵⁴ One also suspects that this discomfort underlies, at least in part, the differential treatment of parents labeled developmentally disabled.

B. The Resulting Damage

Differential treatment of parents labeled mentally retarded injures all parties concerned. First and foremost, children are harmed when they are unnecessarily separated from their parents and family and forced into an unfamiliar environment. Second, parents are deprived of the parenting relationship and the opportunities for self and social expression it affords. Finally, when public resources are misdirected and democratic ideals undermined by treating such parents differently, society as a whole is harmed.

250. This occurs, in part, because people labeled mentally retarded or developmentally disabled generally do not announce their disability, and often do not behave in a way that would identify them as having a disability. Consequently, "normal" people may not know they are interacting with someone identified as developmentally disabled. Thus, people often identify the group known as mentally retarded or developmentally disabled with those individuals whose disabilities are most apparent.

251. See, e.g., Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J SOC ISSUES 39, 43-44 (1988); Hayman, *supra* note 18, at 1245.

252. Cf. Hayman, *supra* note 18, at 1245 ("To legitimate their status and to project their psychological security, those who define themselves by their mental capacity may subconsciously demand that mental disability be recognized—and formally reproved—as a threat.").

253. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985) (recounting City Council's concerns about harassment of occupants by students).

254. In fact, with the rise in supported and independent living for persons with developmental disabilities, group homes are now seen as almost anachronistic. See e.g., Plaintiffs' Memorandum of Points and Authorities in Support of Final Approval of Settlement Agreement at 23, *Coffelt v. Department of Developmental Servs.* (Cal. Super. Ct., County of San Francisco, 1994) (No. 916401) (describing class action settlement whereby the State of California agreed to move approximately 2,300 persons with disabilities out of State Developmental Centers and into the community through individualized support services, and observing that the current model of the group home was inappropriate and outmoded).

1. *Damage to Children*

Although aspects of a family law system in which children were viewed as the property of their parents still persist,²⁵⁵ courts making custody and termination decisions now focus on ascertaining and serving the "best interests of the child."²⁵⁶ However, courts often overlook the actual value children place on their relationships with their parents.²⁵⁷ In addition, when a child's parents are labeled mentally retarded, courts often presume that the child's best interests are served by placement in an adoptive home.

This presumption overlooks the excessive demand for adoptive homes as well as the fundamental attachment that children of parents labeled developmentally disabled, like other children, form with their natural parents.²⁵⁸ Moreover, this presumption is unnecessary to effectuate the protection of children, since the determinative factor should be parental behavior, not ascribed status. When parental behavior is found to endanger children, courts may still remove children from their parents' homes.

The detrimental effects of spending long periods of time in foster care have been well documented.²⁵⁹ Less is known about how children are affected by the termination of their relationship with their parents. Parental rights termination in large numbers is a relatively new phenomenon,²⁶⁰ and little research has been done with the children affected. However, one study indicates that adopted children cut off completely from their biological parents often experience a sense of profound deprivation.²⁶¹ Of course, each situation is unique; thus, there will be times when children are better off having no relationship with their biological parents. As a result, each child's case should be *individually* scrutinized, avoiding presumption and stereotype based upon the parent's status if the child's best interest is to be served.

255. See Fitzgerald, *supra* note 79, at 36-37 (explaining that parental provision of support to a child was treated as an exchange which "manifested the parent's ownership of the child" and that, despite the recognition of children's personhood, their status has not materially changed).

256. For a critique of current "best interests" analysis, see *id.* at 53, 59-65 (arguing that, as applied, the "best interests" analysis usually completely disregards the individual child's perspective).

257. See *id.* at 67 (arguing that "[b]y treating the case as a conflict only between the parents and the state . . . the Supreme Court [in *Santosky v. Kramer*] also assured that no court would consider the actual and particular interests of these individual children").

258. See Sackett, *supra* note 146, at 281-84.

259. See Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1765 (1987) (noting that "commentators tend to agree with the conclusion that foster care is extremely damaging to children"); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 667-68 (1976) (observing that "a child left in foster care without a permanent home may be psychologically damaged by her uncertain status").

260. See Sackett, *supra* note 146, at 253.

261. See, e.g., BETTY J. LIFTON, *LOST & FOUND: THE ADOPTION EXPERIENCE* 5 (Harper & Row 1988).

At least one court has recognized that considering the bond between parent and child is an essential ingredient in deciding whether to terminate parental rights.²⁶² Often, for children of parents labeled developmentally disabled, this bond is strong. When the law fails to recognize this bond, or undervalues it, children may be irreparably harmed.²⁶³

2. *Damage to Parents*

For parents labeled mentally retarded or developmentally disabled, the most fundamental damage caused by differential treatment in the termination process is the damage to their relationships with their children. Termination of parental rights completely severs the parent-child relationship. In this sense, it is as if one's child has died. Cases abound in which courts have terminated parental rights after acknowledging that the parents obviously loved their children.²⁶⁴ However, these courts found that love was outweighed by a consideration of the "best interests of the child," a consideration often based on unsupported presumption and stereotype.²⁶⁵

Whether deemed a right, responsibility, or something else, parenting represents a form of self-expression.²⁶⁶ As a parent, one acts in a way that expresses a "particular set of internalized limits and constraints that define the person."²⁶⁷ The accountability and responsibility that is a natural component of parenting fosters moral growth and strengthens one's sense of self.²⁶⁸ To recognize this fact does not require the conclusion that parenting should be afforded First Amendment protections. The relational nature of parenting precludes affording such protections—children must be protected

262. *In re E.M.*, 620 A.2d 481, 484 (Pa. 1993) (noting that "[w]here there has not been adequate consideration of the emotional needs of the children, a termination of parental rights cannot be sustained").

263. "No child should be endangered by the foolhardy suggestion that he can thrive solely on the love of a parent, but neither should that parent's love be diminished by an insensitive, mechanistic process that singlemindedly extols the virtues of rationality." Hayman, *supra* note 18, at 1257.

264. See, e.g., *In re I.D.*, 563 N.E.2d 1200, 1206 (Ill. App. Ct. 1990) (observing that "I.D. and her mother are affectionate and closely bonded together"); *In re S.N.*, 500 N.W.2d 32, 35 (Iowa 1993) (noting that "[t]he court of appeals decision heavily stressed the love and bonding that S.W.N. has without question for his children"); *In re J.W.D.*, 456 N.W.2d 214, 218 (Iowa 1990) (observing that "A.D. . . . showed a loving interest for J.W.D.").

265. See *supra* notes 255-263 and accompanying text. Evidence of a loving parent-child relationship might not always be enough to determine the child's "best interests" and prevent termination. See *supra* note 264 and accompanying text. But courts tend to accord it the least consideration when the parent has a disability.

266. The debate over the adequacy of the concept of "rights" is beyond the scope of this Comment; for a more thorough discussion, see generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (questioning the utility of current discourse, largely focused on "rights," about social and political issues); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (examining the strengths and weaknesses of a rights-based approach to analyzing the liberties of those considered mentally incompetent); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 164-65 (1991) (arguing for a more expansive definition of rights than currently recognized by the American legal system).

267. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988).

268. *Id.* at 300-02.

from parental expression that is "harmful," however that term is defined. Nonetheless, parenting does have an aspect of expressive value that should not be overlooked when determining who can be a parent.²⁶⁹ By restricting the parental rights of persons labeled developmentally disabled, we reinforce feelings of diminished self-worth and stifle opportunities for moral growth.

Similarly, parenting is a form of social expression or inclusion. More than any other social role, the role of parent gives an adult a place within society. State intervention in the realm of parenting is perhaps the strongest expression of censure short of criminal sanction.²⁷⁰ Indeed, in *In re Marriage of Carney*,²⁷¹ the California Supreme Court explicitly recognized the connection between state regulation of parenting and social status. In *Carney*, the court held that physical disability was not *per se* evidence of parental unfitness and reversed a lower court's award of primary child custody to the mother based on the father's disability.²⁷² After discussing the government's goal of "total integration of handicapped persons into the mainstream of society," the court declared that "[n]o less important to this policy is the integration of the handicapped into the responsibilities and satisfactions of family life, cornerstone of our social system."²⁷³

3. *Damage to Society*

In addition to the negative impact on individual parents and children, differential treatment of developmentally disabled parents has a negative impact on society. First, it burdens an already overburdened,²⁷⁴ costly,²⁷⁵ and often harmful foster care system.²⁷⁶ Studies suggest that efforts to preserve families that can be preserved without harm to children are less expensive than removing children from their homes and placing them in the foster care system.²⁷⁷ Taking children from parents who love them because

269. John Robertson has asserted that child rearing should be considered part of what he calls "procreative liberty" and that this liberty should be restricted only when the state can show a compelling interest and no less restrictive alternative. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 410 (1983).

270. "Few forms of state action are both so severe and so irreversible." *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

271. 598 P.2d 36 (Cal. 1979).

272. *Id.* at 42, 45. The father had informal primary custody before an automobile accident that left him with paralyzed legs and impaired use of his arms and hands. *Id.* at 37.

273. *Id.* at 44-45.

274. Federal spending on foster care has skyrocketed since 1981 to keep pace with increasing numbers of children entering and remaining in the system for several years. In contrast, over the same period, federal spending on services to preserve families has barely kept pace with inflation. CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 1992, 64 (1992).

275. See, e.g., Wald, *supra* note 259, at 646 (noting that foster care costs "considerably more than the cost per child of even the best in-home programs").

276. See *id.* (describing the often damaging effects of foster care on children's development).

277. See, e.g., Odegard, *supra* note 5, at 550 (citing a Santa Clara County, California report that every dollar spent on tailored "preventive" services to parents in crisis situations saved \$1.72 that would have been spent on foster care).

of unfounded assumptions about those parents drains the foster care system's resources, making it more difficult for the system to serve effectively those children truly in need of assistance.

More fundamentally, differential treatment based on stereotype and presumption contradicts our notion of democracy.²⁷⁸ As Michael Wald has noted: "Our political commitment to diversity of views, lifestyles, and freedom of religion is promoted by allowing families to raise children in a wide variety of living situations and with diverse childrearing patterns."²⁷⁹ This statement echoes an earlier one by the Supreme Court: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children."²⁸⁰ While it is admittedly difficult to delineate precisely when the state may regulate or terminate the parent-child relationship, these statements about the relationship between democracy and parental rights suggest that stereotypic assumption has no place in the child protection process.

V

REMEDYING THE DISCRIMINATION

Other than state-by-state legislative reform, there are two means available to remedy the layers of discrimination against parents labeled developmentally disabled. The first, reliance on the United States Constitution, has largely been unsuccessful. The second, reliance on the ADA, has largely been untried. This Part examines both the Constitution and the ADA and argues that while equal protection challenges in light of the ADA's enactment may prove successful, the ADA itself is the most appropriate means with which to remedy the current discrimination.

A. Constitutional Challenges

1. A Legacy of Inadequate Protection

Most constitutional challenges by parents labeled developmentally disabled have arisen under the Due Process²⁸¹ and Equal Protection²⁸² Clauses

278. See Greenspan & Budd, *supra* note 107, at 125-26 (noting that "allowing individuals labelled as mentally retarded to exercise their desire to participate in the life-giving process is the ultimate test of living in a free and humane society").

279. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search For Realistic Standards*, 27 STAN. L. REV. 985, 992 (1975).

280. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

281. See e.g., *In re Jennilee T.*, 4 Cal. Rptr. 2d 101, 104-07 (Ct. App. 1992) (holding that statute providing that reunification services need not be offered where parent has a mental disability did not violate due process); *In re Custody & Guardianship of Ursula P.*, 437 N.Y.S.2d 225, 226-27 (Fam. Ct. 1981) (holding that due process was not violated where termination was not based on "fault" of parent); *Wright v. Alexandria Div. of Social Servs.*, 433 S.E.2d 500, 505 (Va. Ct. App. 1993) (holding that due process was not violated by termination of mother's relationship with child where fundamentally fair procedures were followed in determining parental unfitness), *cert. denied*, 115 S. Ct. 651 (1994).

282. See, e.g., *In re I.D.*, 563 N.E.2d 1200, 1204-05 (Ill. App. Ct. 1990) (holding that termination statute using mental retardation classification did not violate Equal Protection Clause because statute

of the Fourteenth Amendment. These have been almost uniformly unsuccessful.²⁸³ Termination statutes employing language such as "mental deficiency" and "incapacity" have been held not to be unconstitutionally vague,²⁸⁴ and courts have consistently ruled that so long as constitutional procedures have been followed (for example, a clear and convincing standard of proof²⁸⁵ and the right to counsel),²⁸⁶ the state's compelling interest in protecting children shields it from constitutional challenges by parents labeled developmentally disabled.

*Helvey v. Rednour*²⁸⁷ is a notable exception to this general trend. *Helvey* involved a statute allowing for the termination of parental rights if a parent was found to be incompetent or mentally retarded and it did not appear that her condition would improve.²⁸⁸ The Illinois court found that the statute violated both the Due Process and Equal Protection Clauses because it "implicitly create[d] a presumption that all retarded parents are unfit."²⁸⁹ Importantly, the court found that the state's interest in termination was not compelling absent a showing that the parents were in fact unfit.²⁹⁰ The Illinois legislature later revised the statute but retained "mental retardation" as a basis for termination if it causes an "inability to discharge parental responsibilities" and it is believed that the condition will "extend beyond a reasonable time."²⁹¹ While commentators have pointed out that this statute continues to allow termination based primarily on status rather than behavior,²⁹² it has withstood constitutional challenge.²⁹³ Although the new statute appears to require more concrete evidence of

was rationally related to advancing state's compelling interest in protecting children); *In re Montgomery*, 316 S.E.2d 246, 255-56 (N.C. 1984).

283. See Anne M. Payne, Annotation, *Parent's Mental Deficiency as Factor In Termination of Parental Rights—Modern Status*, 1 A.L.R.5th 469, 491-92 (1992).

284. See, e.g., *In re Christina A.*, 261 Cal. Rptr. 903 (Ct. App. 1989) (holding that statutory term "mental disability" was not unconstitutionally vague); *State ex. rel. Juvenile Dep't of Multnomah County v. Wade*, 527 P.2d 753, 758 (Or. Ct. App. 1974) (holding that statutory term "mental deficiency" was not unconstitutionally vague), *appeal dismissed*, 423 U.S. 806 (1975), *overruled on other grounds*, *In re D.*, 547 P.2d 175, 178-79 (Or. Ct. App. 1976).

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

286. *But see Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (holding that unlike defendants in criminal cases, parents in termination proceedings do not have an absolute right to the appointment of counsel where they cannot afford one).

287. 408 N.E.2d 17 (Ill. App. Ct. 1980).

288. *Id.* at 19-20.

289. *Id.*

290. *Id.* at 22.

291. 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (Smith-Hurd Supp. 1995).

292. "Under the current statute, parents need only meet the statutory definition of mental retardation or mental illness and display *potential* difficulty in discharging parental responsibilities [to have their parental rights terminated]." Werner, *supra* note 7, at 151 (emphasis added) (footnote deleted).

293. See *id.* at 146-51.

unfitness than the one struck down in *Helvey*, in actuality it allows presumption to influence adjudication as much as did its predecessor.²⁹⁴

Helvey has been a small blip on a very large screen. By and large, courts have held that the Constitution affords parents labeled mentally retarded or developmentally disabled little protection from having their rights terminated based on status.²⁹⁵ Guided by deference to the Supreme Court's opinion in *Cleburne*,²⁹⁶ deference to state legislatures, and their own biases, state court judges have consistently upheld the constitutionality of state statutes and practices allowing for the differential treatment of disabled parents.

Given the "fundamental" nature of parental rights, one might think that courts already apply heightened scrutiny to substantive due process or equal protection challenges in termination proceedings. Ordinarily, when a "fundamental" right is implicated, courts apply strict scrutiny to restrictive legislation. Yet given the uncertain nature of substantive due process—involving "fundamental" rights not enumerated in the Constitution—and the particularly uncertain nature of "parental rights," as well as the state's *parens patriae* interest in protecting children, courts have been exceedingly reluctant to apply heightened scrutiny in parental rights cases, whether or not the parent involved has been labeled disabled.²⁹⁷ In short, courts have been extremely deferential to state legislatures regarding the substance of termination statutes.

2. Applying Equal Protection Analysis After the ADA

a. Congressional Direction Regarding Heightened Scrutiny

As noted *supra* in Part I.C, the Supreme Court held in *Cleburne* that legislation using mental retardation as a classification should be reviewed under the normally deferential "rational basis" test, also known as "rationality review." Yet the Court in *Cleburne* applied what appeared to be heightened scrutiny to *Cleburne*'s ordinance and struck it down as irrational.²⁹⁸ Since *Cleburne*, lower courts have generally, although not uniformly, applied both the traditional as well as the more deferential version of rationality review to legislation affecting persons labeled mentally retarded.²⁹⁹

294. For example, in *In re Ensign*, 512 N.E.2d 140 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 962 (1987), a couple labeled mentally retarded was declared unfit despite a complete lack of evidence of actual abuse or neglect. Werner, *supra* note 7, at 146-47.

295. But see *In re Ana Marie R.*, 414 N.Y.S.2d 982, 987 (Fam. Ct. 1979) (noting that the use of IQ tests as a major factor in terminating the parental rights of a non-English speaking mother could violate her equal protection rights).

296. Although *City of Cleburne v. Cleburne Living Center* represented a victory for the individual plaintiffs, it was a defeat for persons labeled developmentally disabled in that the Court applied the "rational basis" to status-based restrictive legislation. 473 U.S. 432, 442 (1985).

297. See Payne, *supra* note 283, at 492-99.

298. See *supra* notes 48-65 and accompanying text.

299. See Lowndes, *supra* note 63, at 444-45.

However, the Supreme Court itself appears to have abandoned heightened scrutiny in a recent equal protection case involving Kentucky's civil commitment procedures, in which the Court applied a much more deferential version of rationality review than it had in *Cleburne*. In *Heller v. Doe*,³⁰⁰ the Court upheld Kentucky's use of a "clear and convincing" burden of proof for civil commitment of mentally retarded persons as not irrational, although Kentucky applied a "beyond a reasonable doubt" standard for persons with a mental illness. The Court deferred to Kentucky's argument that the difference in the standards of proof was justified because mental retardation is more easily diagnosed than mental illness, and therefore it is less likely that applying a lower standard of proof for mental retardation will result in an erroneous determination.³⁰¹ Without mentioning *Cleburne*, the majority seemed to go out of its way to signal a retreat from *Cleburne's* probing rationality review: "[A] classification 'must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis for the classification.'" ³⁰²

Although the respondents urged the *Heller* Court, in light of the enactment of the ADA, to apply heightened scrutiny to Kentucky's differing standards of proof, the Court declined to consider this argument because it had not been raised in the lower courts and was not adequately briefed.³⁰³ The Court's refusal to consider whether to apply heightened scrutiny may mean that the Court will revisit this question in a case where it is adequately presented, or it may mean that the Court is firmly committed to a deferential review of legislation that uses mental retardation as a classification. Whichever is the case, however, strong support exists that the ADA mandates heightened judicial protection for persons labeled mentally retarded or developmentally disabled.

Congress has the power to substantively influence the Court's equal protection analysis. This was implicitly assumed by Justice White in *Cleburne* when he suggested that there was a lack of "congressional direction" to support heightened protection under the Equal Protection Clause. In other cases, relying on express language in the Fourteenth Amendment, the Court has more directly acknowledged the power of Congress to influence, and even to dictate, judicial enforcement of the Fourteenth Amendment.³⁰⁴ The Fourteenth Amendment reads in part:

300. 113 S. Ct. 2637 (1993).

301. *Id.* at 2643-47.

302. *Id.* at 2642 (quoting *FCC v. Beach Communications*, 113 S. Ct. 2096, 2101 (1993)) (emphasis added).

303. *Id.* In the lower courts, the respondents had argued successfully that the classification was "irrational" under *Cleburne's* rational basis test. *Id.* at 2641-42. At the Supreme Court level, they included a secondary argument that the findings of the ADA and its purpose "amount to a clear indication from Congress 'that all individuals with . . . mental retardation should be treated as a suspect class.'" *Id.* at 2651 n.1 (Souter, J., dissenting). Justice Souter also did not examine this heightened scrutiny argument because he found that the classification was irrational. *Id.*

304. See Lowndes, *supra* note 63, at 421-29.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.³⁰⁵

While the scope of congressional power under Section Five is a matter of considerable debate, touching on issues of both federalism and the separation of powers, Congress has recently used its Section Five powers to expand civil rights for women and African-Americans, with the Court's general approval.³⁰⁶

In over three years of hearings on the ADA, Congress collected extensive information about the experiences of persons with disabilities in this country. The hearings led Congress to find that there was overwhelming evidence that persons with disabilities face persistent discrimination, segregation, and isolation. Americans with disabilities have been "subject[ed] to a history of purposeful unequal treatment," which is the result of "intentional exclusion," "overprotective rules and policies," and "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."³⁰⁷ In addition to these findings, which preface the provisions of the ADA, Congress relied in part on its powers under the Fourteenth Amendment to enact the ADA.³⁰⁸ Thus, the ADA appears to provide the Court with the "congressional direction" it found lacking when it decided *Cleburne*.

While the ADA may require elevated protection for persons with disabilities under the Equal Protection Clause, the Court must still decide what form of heightened scrutiny to apply.³⁰⁹ Because legislation targeted at persons with disabilities is often remedial in nature—remedying the effects of past discrimination and lessening the effects of present discrimination—the

305. U.S. CONST. amend. XIV, §§ 1, 5.

306. See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824-25 (1986); see also *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (opinion of C.J. Burger) (reaffirming an earlier decision that Section Five gave Congress "discretion in determining whether and what legislation is needed to secure the guaranties of the Fourteenth Amendment'") (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

Although the Supreme Court, in *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995), recently cast doubt on the extent of Congress' Section Five powers, the majority opinion never directly addressed Section Five in holding that federal affirmative action plans, like state plans, are subject to strict scrutiny. See *id.* at 2125-26 (Stevens, J., dissenting) (pointing out that the majority opinion, written by Justice O'Connor, "virtually ignores" the difference between federal and state affirmative action and discussing Congressional authority under Section Five of the Fourteenth Amendment).

307. 42 U.S.C. § 12101(a) (Supp. 1993).

308. *Id.* § 12101(b).

309. See *supra* note 49 and accompanying text for an explanation of the Court's three-tiered equal protection analysis.

Court should apply the same level of scrutiny used to examine legislation using gender as a classification.³¹⁰ In an early case applying such protection, the Court formulated its now familiar "intermediate scrutiny" test: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."³¹¹ The Court's subsequent application of this test suggests that gender-based classifications are unconstitutional when they rest on "archaic and stereotypic notions" about the roles and abilities of males and females.³¹²

Similarly, while states should have wide latitude to protect children, they should not attempt to do so by mechanically applying "traditional, often inaccurate, assumptions" about the ability or fitness of persons labeled mentally retarded or developmentally disabled.³¹³ Evidence cited in Part IV of this Comment strongly indicates that parental fitness is not dependent upon having an IQ above a certain score. The labels of mental retardation or developmental disability simply do not say very much about whether a person is a good parent, will be a good parent, or has been a good parent.

b. Applying Heightened Scrutiny

In order to withstand intermediate scrutiny, a state must demonstrate an "exceedingly persuasive justification" for the disparate treatment at issue.³¹⁴ In the termination process, states use classifications in two ways. First, they often use developmental disability or mental retardation as a ground for termination. Although states normally require some connection to be made between a parent's disability and her individual unfitness, we have seen that this connection is often made through expert testimony and judicial presumption rather than evidence of individual harmful behavior.

States have justified this classification as serving the compelling governmental interest of protecting children.³¹⁵ While this interest is certainly compelling, the classification does not substantially serve the governmental interest, as it must to withstand heightened scrutiny. A state can protect children just as much, if not more, by removing the classification, and by examining behavior, regardless of the label attached to the parent, under its statute's general abuse and neglect standards. Because states claim to be examining behavior even when parents have a developmental disability, removing the classification should have no adverse impact on the state's

310. Strict scrutiny of legislation that is often remedial might prove to be too burdensome on legislative powers, as evidenced by the Court's recent weakening of affirmative action legislation. *See supra* note 306.

311. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

312. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (finding that nursing school's policy of not admitting males violated the Equal Protection Clause).

313. *See id.* at 726.

314. *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979).

315. *See Payne, supra* note 283, at 501-03 (listing cases involving constitutional challenges by parents with "mental deficiencies," in which courts have ruled that states' compelling interest in protecting children trumped parents' interests in due process or equal protection).

ability to protect children. In fact, children will be better protected if they are not removed from their parents' homes due to inaccurate assumptions about their parents' abilities.

Second, many states use classifications to deny parents any or adequate reunification services. These states have argued that parents should not be provided with reunification services when, because of disability, they would be unable to regain custody of their children within a reasonable period of time even if services were provided.³¹⁶ This policy protects children, states argue, because the termination of the parent-child relationship will be cleaner, and children will more readily attain some stability in their lives. While courts have generally accepted this justification as rationally relating the use of the classification to a legitimate or compelling state interest, courts have failed to examine the justification closely, as heightened scrutiny would require.

The state's argument here is constitutionally flawed because it presumes that certain parents, because of "mental deficiency," will be unable to benefit substantially from reunification services or to make progress while separated from their children. This presumption relies on stereotype and fails to recognize distinctions between parents labeled developmentally disabled. Usually, findings of "mental incapacity" or "mental deficiency" are based on expert testimony about the capabilities of persons with intelligence test scores that are similar to that of the parent in the proceeding. As noted *supra* Part IV, however, research regarding the effectiveness of parenting services indicates a high variability among parents within the same IQ range, as well as among parents in different IQ ranges. Thus, even if there were some permissible baseline for the states to use as a cutoff, below which parents would not receive services, the baseline as it exists now is set too high to be regarded as "substantially" serving the states' interest in protecting children.

States often do not completely deny services to parents based on their disability, but rather offer parents inadequate services. In addition, state agencies and courts are often quick to presume that the parent is not receiving any benefit from the services provided. An expectation of failure exists when parents are labeled mentally retarded that does not exist when parents are not so labeled. This type of discrimination is perhaps too subtle for equal protection doctrine to redress directly. It manifests itself in visitation plans that do not allow enough time for parent-child bonding;³¹⁷ services

316. See, e.g., *South Carolina Dep't of Social Servs. v. Humphreys*, 374 S.E.2d 922, 925 (S.C. Ct. App. 1988) (allowing services not to be offered when termination is based on a "diagnosable mental deficiency").

317. See Hayman, *supra* note 18, at 1233. Courts sometimes point to reports that the parent and the child had not bonded during the reunification period as support for the decision to terminate parental rights. However, parents are often allowed minimal contact with their children during the reunification period, and it may be more difficult than usual for some parents with cognitive disabilities to maintain obvious bonds with their children when separated for long periods. Of course, this is not true of all

provided by biased service providers who are unfamiliar with cognitively disabled parents and who tend to expect failure or simply misunderstand parents;³¹⁸ reunification plans lacking definite goals put in concrete terms that parents can understand;³¹⁹ and reunification plans with shifting goals and expectations.³²⁰

Because of the constrictions of equal protection analysis, particularly its search for legislative motive rather than effect, these last subtle forms of discrimination may be better addressed through the ADA. In fact, given the Court's recent retrenchment from *Cleburne* in *Heller*,³²¹ it does not appear that the Court is eager to rule that disability, or mental retardation in particular, is a suspect classification and therefore subject to some version of elevated scrutiny. Thus, the most effective way to remedy discrimination against parents with developmental disabilities may be to apply the ADA directly to states' discriminatory activities and laws.

B. Title II of the ADA

The ADA is not simply a law designed to provide people with disabilities with employment opportunities and access to movie theaters. It is a civil rights statute, "the world's first comprehensive declaration of equality for people with disabilities."³²² Title II of this civil rights statute reads in part:

Subject to the provisions of this subchapter, 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 any such entity.³²³

parents labeled mentally retarded. See *In re E.M.*, 620 A.2d 481, 485 (Pa. 1993) (holding that lower court was in error for failing to consider the exceptionally close relationship between the mother and her children).

318. See *supra* notes 184-200 and accompanying text.

319. See, e.g., *In re Torrance P.* 522 N.W.2d 243, 246 (Wis. Ct. App. 1994). In this case the social worker blamed her failure to draw up any concrete reunification plan on the father's lack of initiative. It is likely, however, that the father did not lack initiative, but simply received inadequate information about his responsibilities from the social worker.

320. See e.g., *In re Christina L.*, 4 Cal. Rptr. 2d 680, 683-84 (Ct. App. 1992) (court continued to add new terms to reunification plan after mother had substantially complied with previous goals).

321. See *supra* notes 300-302 and accompanying text.

322. President George Bush, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990, at 2 (July 26, 1990) (*quoted in* Burgdorf, *supra* note 68, at 413-14).

323. 42 U.S.C. § 12132 (Supp. 1993).

Title II essentially protects all qualified individuals with a disability from discrimination in the programs and activities of all public entities,³²⁴ including state legislatures and courts.³²⁵

Title II and its predecessor, Section 504 of the Rehabilitation Act of 1973,³²⁶ have been applied to ensure that government services and programs do not discriminate on the basis of disability.³²⁷ However, Title II's coverage and language are broader than that of Section 504. Whereas Section 504 covered only those public entities receiving federal funding,³²⁸ Title II covers all public entities, regardless of funding.³²⁹ Additionally, while Title II borrows much of its language from Section 504, it is stronger in that it requires public entities to make "reasonable modifications to rules, policies, or practices" where necessary to ensure nondiscrimination.³³⁰

To date, few parents with developmental disabilities have challenged parental rights terminations through Title II of the ADA, and none has been successful.³³¹ Because Title II only went into effect in 1992, however, more challenges are sure to follow. There are two main problems with applying Title II in the realm of parental rights: novelty and federalism.

The first problem is easily overcome with regard to the provision of reunification services, because Title II explicitly prohibits the discriminatory provision of social services by state agencies.³³² Arguably, however, Title II also applies to discriminatory substantive legislation and judicial

324. A "public entity" is any State or local government and any department, agency, special purpose district, or other instrumentality of a State or local government. 42 U.S.C. § 12131.

325. "Title II coverage, however, is not limited to 'Executive' agencies, but includes activities of the legislative and judicial branches of State and local governments." 56 Fed. Reg. 35,696 (1991) (Section-by-Section Analysis of 28 C.F.R. § 35.102 (1991)).

326. 29 U.S.C. § 794 (1988).

327. Throughout the ADA, disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities; a record of having such an impairment; or being regarded as having such an impairment. See 42 U.S.C. § 12102 (Supp. 1993). Parents who have a developmental disability or are regarded as having a developmental disability would meet this definition.

328. 29 U.S.C. § 794.

329. 42 U.S.C. § 12131 (Supp. 1993).

330. See *id.* Title II specifies that a "qualified individual with a disability" is one who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements" of the program, service, or activity. *Id.*

331. See, e.g., *In re Karlo K. & Tyler K.*, 1994 Conn. Super. LEXIS 2180, *29-*30 (Aug. 3, 1994) (holding that termination of parental rights based on mental disability did not violate ADA where court made an individual determination of mother's parental abilities); *In re C.M.*, 526 N.W.2d 562, 566 (Iowa Ct. App. 1994) (noting that even if reasonable accommodations under the ADA were properly before the court, the state reasonably accommodated a disabled person with a personality disorder by offering services by providers trained to address such disorders); *In re Torrance P.*, 522 N.W.2d 243, 245-46 (Wis. Ct. App. 1994) (holding that the state met its burden of diligence in providing court-ordered reunification services).

332. See 56 Fed. Reg. 35,696 (1991) (Section-by-Section Analysis of 28 C.F.R. § 35.102 (1991)) ("Title II of the ADA extends [Section 504's] prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies . . .").

decisions.³³³ Although nothing in the language or legislative history expressly addresses this question, Title II's spirit and provisions suggest that it should apply to discriminatory legislation and judicial decisions.³³⁴ In fact, the Department of Justice regulations for Title II, which use language drawn from equal protection jurisprudence, suggest that Title II's provisions are to be read broadly:

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.³³⁵

There is nothing in the regulatory language to suggest that this directive should not apply to legislatures enacting laws, or to judges making decisions about parental rights.

The concept of federalism also stands as an obstacle to applying the ADA in the parental rights realm. Traditionally, parental rights has been an area of law over which states have had exclusive control. However, Congress legislated in this area in 1980 when it enacted the Adoption Assistance and Child Welfare Act, obligating states to make reasonable efforts to reunite families as quickly as possible when they have removed children from their biological parents' homes.³³⁶ Thus, parental rights must be viewed as at least partly federal in nature, particularly in light of the Supreme Court's decisions in *Stanley* and *Santosky*.

One court that addressed whether Title II applies to parental rights insisted that the ADA is not intended to change obligations imposed by

333. Arguably, the coverage of the Act may extend even to substantive legislative and judicial actions of state and local governments. A state law . . . that blatantly discriminates against a class of individuals with disabilities presumably would be subject to challenge under the statute. Likewise, a judge whose rulings evince prejudice or malice against litigants on account of their disability would be within the purview of the statute.

Burgdorf, *supra* note 68, at 465 n.266.

334. The legislative history makes clear that the ADA is intended to address unfounded presumptions used to keep people with disabilities disenfranchised: "individuals with disabilities . . . have been . . . subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the ability of such individuals to participate in and contribute to society." S. Rep. No. 116, 101st Cong., 1st Sess. 15 (1989).

The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities and being deemed an "unfit parent."

Id. at 15-16 (testimony of Arlene B. Mayerson, director of the Disabilities Rights Education and Defense Fund).

335. 56 Fed. Reg. 35,703 (1991) (Section-by-Section Analysis of 28 C.F.R. § 35.130 (1991)).

336. 42 U.S.C. § 671(15)(B) (1988).

unrelated statutes.³³⁷ However, even though the regulations to Title II state that it does not "limit the remedies, rights, and procedures of any other Federal laws, or State or local laws,"³³⁸ the regulatory language makes clear that this provision only applies to Federal or state laws that "provide *greater or equal* protection for the rights of individuals with disabilities."³³⁹ Other courts have implicitly acknowledged that the ADA applies to parental rights, at least with regard to the provision of reunification services.³⁴⁰

It simply makes no sense for the ADA to prohibit state and local governments and their instrumentalities from discriminating in their programs, services, and procedural activities, but not in their substantive activities, such as legislation and adjudication. Title II expressly touches on such traditionally localized substantive areas as licensing and certification.³⁴¹ While parenting is not a licensing program, states use licensing-like criteria to determine whether one should continue to be a parent. In this sense, parental rights termination resembles a de-licensing process. For the same reason that the federal government may intrude on states in the area of licensing—to ensure nondiscrimination—so may the federal government intrude on states in the area of parental rights termination. Federalism concerns notwithstanding, no legislation or judge-made common law is invalidated simply by acknowledging that Title II covers proceedings to terminate parental rights. States may continue to legislate and adjudicate with impunity, so long as they comply with the nondiscrimination provisions of Title II.³⁴²

C. *A Plan for Applying Title II of the ADA*

1. *Statutes*

States should remove all classifications using terms such as "mental retardation," "mental deficiency," "mental disability," and "developmental disability" from their parental rights termination statutes. These classifying terms have more to do with stereotype and unfounded presumption than they do with parenting ability. Moreover, they are simply unnecessary. Parental rights decisions should be based on individual behavior. Even if parents with developmental disabilities are more likely to be "unfit" than other parents, the use of such classifications ignores those parents with

337. *In re Torrance P.*, 522 N.W.2d 243, 244 (Wis. Ct. App. 1994).

338. 28 C.F.R. § 35.103(b).

339. *Id.* (emphasis added).

340. *See, e.g., In re C.M.*, 526 N.W.2d 562, 566 (Iowa Ct. App. 1994) (finding that, even if the issue of reasonable accommodations was properly before the court, the state had met its burden under the ADA by providing individualized services to mother with personality disorders).

341. *See* 28 C.F.R. § 35.130(b)(6) ("A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability . . .").

342. *See infra* notes 349-352 and accompanying text for a discussion of defenses states might have under Title II for treating parents with developmental disabilities differently than non-disabled parents.

developmental disabilities who are "fit." Research supports this proposition, since the evidence suggests that the impact developmental or cognitive disability has on parenting ability varies dramatically among individuals.

States have attempted to amend their statutes so that developmental disability does not create a presumption of parental unfitness. To that end, most statutes require some connection between a parent's disability and her parenting behavior. However, this connection is often *pro forma*, and in some cases non-existent. Courts have instead relied upon expert opinion about the abilities, or lack of abilities, of the class of people labeled developmentally disabled. The result is that state statutes discriminate against qualified persons with disabilities on the basis of their disability, in violation of Title II of the ADA.

States do have a possible defense for using disability as a classification in their parental rights statutes. Under Title II, only "qualified" individuals with disabilities are protected against discrimination.³⁴³ States can argue that, by linking disability with behavior, their parental rights statutes do not discriminate against "qualified" individuals with disabilities; only persons "unqualified" to be parents are affected. However, several cases have demonstrated that these statutes affect parents who would otherwise be "qualified" were they not disabled. Most of these cases do not examine the actual behavior of developmentally disabled parents.

Short of removing language concerning disability entirely from parental rights termination statutes, states should at least remove any presumptive language from their statutes. They might retain mental or developmental disability as one factor for courts to consider in determining termination, but not as a dispositive ground for termination.³⁴⁴ Statutes should clearly prohibit courts from using disability to predict future behavior, as well as medical opinions regarding the capabilities of "the disabled" as a class. Further, if they retain some mention of disability in their statutes, states should prohibit the use of IQ scores or mental age as a basis for decision-making. They should insist that courts base their decisions on "facts applicable to individuals and not on presumptions as to what a class of individuals can or cannot do."³⁴⁵

2. Courts

While courts must apply statutes, they should apply them in the least presumptive way possible, particularly where parental or family rights are at stake. First, courts should recognize that the ADA applies to parental

343. To be "qualified," one must meet the "essential eligibility requirements" of the service, program, or activity, with or without "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2).

344. This is how most courts treat physical disabilities when making custody decisions. *See, e.g., In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979); *Moye v. Moye*, 627 P.2d 799, 801-02 (Idaho 1981); *Harper v. Harper*, 559 So. 2d 9, 10 (La. Ct. App. 1990).

345. 56 Fed. Reg. 35,703 (1991) (Section-by-Section Analysis of 28 C.F.R. § 35.130).

rights termination cases and recognize ADA claims in these proceedings. Of course, parents may want to bring separate ADA claims in federal court, challenging state parental rights statutes and practices.³⁴⁶ Second, courts should closely scrutinize expert testimony and be wary of testimony that focuses on characteristics of disabled persons as a class rather than on individual behavior. Third, courts should avoid relying on testimony about past behavior unrelated to parenting. While such testimony might sometimes be relevant, the fact that a parent has had trouble in certain areas of her life does not necessarily mean that she will be an inadequate parent. Finally, courts should not presume that parents with disabilities cannot benefit from parenting services. Often, when services are provided and "fail," the failure is presumed to reside in the parents rather than in the services. Research strongly suggests that parents labeled developmentally disabled can become better parents with the right kind of assistance.³⁴⁷

3. *Reunification Services*

ADA claims regarding reunification services are the most traditional and least controversial that a parent labeled mentally retarded can bring.³⁴⁸ Title II clearly states that persons with disabilities cannot be "excluded from . . . or be denied the benefits of" such services on the basis of disability.³⁴⁹ First, parents should bring claims where, because of their disability, they are denied reunification services altogether. Although most states now provide some form of reunification services regardless of the parent's disability, some states have retained statutes allowing them to bypass their normal statutory obligations where the parent is labeled mentally disabled or mentally deficient.³⁵⁰ Second, parents should bring ADA claims where the reunification services provided are not adequate. Title II requires public entities to make reasonable modifications in "rules, practices, or procedures" where necessary to avoid discrimination on the basis of disability.³⁵¹ In other words, services provided to a parent labeled developmentally disabled must be modified where reasonable if such modification will allow that parent to retain her parental rights.

Under the ADA, states have a very limited defense to the first type of services claim, where no services have been provided. They can assert that parents excluded from receipt of the services are not "qualified," with or without reasonable modification by the state service agency. However,

346. No parent has yet brought an ADA claim in federal court for differential treatment in the parental rights termination process.

347. *See supra* Part IV.A.

348. Of the handful of parental rights cases involving ADA claims, the vast majority have been brought regarding the provision of reunification services. *See supra* note 331.

349. 42 U.S.C. § 12132 (Supp. 1993).

350. *See, e.g.,* CAL. WELF. & INST. CODE § 361.5(b)(2) (West Supp. 1995); S.C. CODE ANN. § 20-7-1572(a)(6) (Law. Co-op 1985).

351. 42 U.S.C. § 12131(2) (Supp. 1993).

such an assertion is nearly impossible to make without relying on assumption. How can one know whether a parent will benefit from services before provision of the services? One might guess based on presumptions about the parent's disability, but that is exactly what Title II prohibits. In addition, the state might argue that the parent is a "direct threat" to her children, and therefore no parenting services should be provided.³⁵² But the use of the "direct threat" defense is limited, and "may not be based on generalizations or stereotypes about the effects of a particular disability."³⁵³ Furthermore, if the agency can eliminate or substantially mitigate the threat through reasonable modifications to its policies, practices, or procedures, then this defense collapses. Unless a parent exhibits violent behavior, service providers should be able to eliminate most threats to children posed by the parent during the provision of services.

States have a more substantial defense to the second type of services claim, where inadequate services have been provided. Under Title II, states generally have no obligation to provide services to persons with disabilities that they do not provide to people without disabilities. Thus, if states did not offer reunification services to non-disabled parents, they would not have to provide reunification services to parents with disabilities. States may argue, and have successfully argued,³⁵⁴ that they do not have to provide parents with developmental disabilities reunification services that differ from what they offer non-disabled parents.

However, Title II requires state agencies to make reasonable modifications in their policies, practices, or procedures where necessary to avoid discrimination based on disability. The termination of parental rights based on presumptions about disability rather than individual inquiry is discrimination based on disability. Thus, state agencies are obligated to reasonably modify their practices and procedures to accommodate parents labeled developmentally disabled.

Usually, this modification will simply entail offering services by providers who have some experience working with parents with developmental and cognitive disabilities. States may counter that this kind of modification will "fundamentally alter the nature of the service" being offered.³⁵⁵ However, most such modifications will not "fundamentally alter" the nature of the services. Such services would simply take into account the different needs of parents labeled developmentally disabled. Most importantly, service providers with experience working with parents labeled developmentally disabled will be less likely to reach conclusions based on presumption

352. "A 'direct threat' is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures." 56 Fed. Reg. 35,701 (1991) (Section-by-Section Analysis of 28 C.F.R. § 35.104).

353. *Id.*

354. See *In re Torrance P.*, 522 N.W.2d 243, 246 (Wis. Ct. App. 1994).

355. 28 C.F.R. § 35.130(b)(7). If the state can demonstrate a "fundamental alteration," then it does not have to offer the modification.

and stereotype. In other words, they will be better equipped to separate the label from the parent.³⁵⁶

CONCLUSION

The law will not easily embrace this Comment's suggestions. As Robert Hayman points out, within the parental rights process, "the specter of an endangered child always lurks in the background, and the decisionmaker rarely fails to note that the child's 'best interests' may make empathy with the parent an unaffordable luxury."³⁵⁷ Social workers, health professionals, legislators, and judges are all legitimately concerned about the welfare of children. I do not suggest that the welfare of children should be sacrificed for lofty principle. But the welfare of children is not served by breaking up families based on fear and stereotype. If we are truly concerned about the welfare of children, we should invest more money and energy in preventive services for families rather than in parental rights termination and foster care.³⁵⁸ Our conception of the parent or parents as individuals, standing alone, without help from the broader community, does children no service.

For parents labeled developmentally disabled, the termination process often reinforces what they have been told all their lives: that they are incompetent and unworthy of basic human experiences. More fundamentally, the process often deprives loving parents of any relationship with their children. Unfortunately, courts have not interpreted the Equal Protection Clause to provide much protection from discrimination against developmentally disabled persons in the termination process. In 1990, Congress acted definitively through the ADA to redress this country's widespread discrimination against people with disabilities. It is now time to apply that Act in such a way that future loving parents will not be deprived of relationships with their children simply because the law has labeled them disabled.

356. Often, the disability *per se* has little effect on the parent's abilities. However, service providers without experience with persons labeled developmentally disabled tend to attribute all of a parent's difficulties to her disability, without addressing areas that need the most attention. *See supra* notes 184-200 and accompanying text.

357. Hayman, *supra* note 18, at 1259.

358. Over 400,000 children are in foster care today as a result of an ever-increasing emphasis on parental rights termination. CHILDREN'S DEFENSE FUND, *supra* note 274, at 62.

