NOTE

RESPECTING INTELLECTUALLY DISABLED PARENTS: A CALL FOR CHANGE IN STATE TERMINATION OF PARENTAL RIGHTS STATUTES

I. INTRODUCTION

"Mentally retarded persons . . . are individuals whose abilities and behavioral deficits can vary greatly depending on the degree of their retardation, their life experience, and the ameliorative effects of education and habilitation."[1] So spoke the Supreme Court in upholding the death penalty for individuals who share the single commonality of a low IQ.[2] Yet, despite this recognition by our country's highest court, that the term "mentally retarded"[3] does not define a distinct class, states continue to view intellectually disabled people as a homogenous group for the purpose of terminating parental rights. They are, in fact, a group of people whose abilities may differ widely, especially in the area of parental abilities.

Before an adjudication of termination of parental rights can be made,[4] most state statutes require an initial showing that the parent is "unfit."[5] Although termination statutes do not offer a single definition of

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1. Penry v. Lynaugh, 492 U.S. 302, 306 (1989).

2. This decision was later overturned by *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id*. at 317.

3. This Note will use a variety of terms to describe what has historically been referred to as "mentally retarded." Although there is not a consensus in either the social science or legal community about which term best describes this group, the literature reflects a move away from the negative connotations associated with the term "mentally retarded." *See, e.g.*, AM. ASS'N ON MENTAL RETARDATION, MISSION STATEMENT, *at* http://www.aamr.org/About_AAMR /mission_statement.shtml (last visited Feb. 7, 2006) (intellectually disabled); Bette R. Keltner et al., *Mothers with Intellectual Limitations and Their 2-Year-Old Children's Developmental Outcomes*, 24 J. INTELL. & DEV. DISABILITY 45, 45 (1999) (intellectual limitations). "Intellectually disabled" is a better descriptive phrase because it focuses on intellectual capabilities instead of all mental functions and properly categorizes the condition as a disability. *Id*.

4. *See, e.g.*, MISS. CODE ANN. § 93-15-103 (2005). Entitled "Termination of Rights of Unfit Parents," this statute states that once it has been determined that adoption is in the child's best interests, the grounds listed in the statutes' subsections are the grounds for a termination of parental rights. Presumably, if none of them are met, then the parent is not unfit and may not have her parental rights terminated. *Id*.

5. Individual state statutes may use different terms to refer to this initial finding, although, broadly categorized, all operate as synonyms of "unfit." *See, e.g.*, GA. CODE ANN. § 15-11-94(a) (2005) ("parental misconduct or inability"); ALA. CODE § 26-18-7(a)(2) (2004) ("unable to care for the needs of the child").

unfitness, they often narrow the focus by listing the parental characteristics or behaviors that are grounds for termination. Included in these lists are parents who have murdered the child's other parent, parents who have abandoned their child, and, in many jurisdictions, parents who are mentally deficient, delayed, or retarded.[6] While parents who have murdered the child's other parent are likely categorically unfit by any societal standard, intellectually disabled parents should not be treated the same. Intellectually disabled parents should only be grouped in such a category if they cannot care for their children and if their disability is an immutable characteristic with an inherent connection to child abuse and neglect. In fact, studies and cases have demonstrated that neither of these assumptions is true.[7] Both have shown that cognitively delayed individuals can be good parents.[8] Good parents should not have their parental rights terminated.

Part II of this Note will describe and define intellectual disability, looking at both the evolving understanding of it through time as well as what remains less clear. This Part will also discuss the utility of an "intellectually disabled" label versus the potentially prejudicial effects it may have on an individual: specifically, a parent. Part III will discuss the effects of mental disabilities on parenting, concluding that there is not a clear link between a low IQ and an inability to parent. Part IV will compare a sampling of state statutes detailing the requirements for a termination of parental rights, concluding that mental deficiency should not be a separate characteristic upon which a termination of parental rights may be based. At most, it should be a factor in determining an outcome that will most benefit the family as a whole. In accordance with studies demonstrating that, where there are gaps in knowledge, developmentally delayed parents have been successfully taught how to remedy these deficiencies, the statutes and the judges applying them should promote rehabilitation. Part V will describe the potentially unconstitutional aspects of termination of parental rights statutes as to intellectually disabled parents, both under the Americans with

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6. *See, e.g.*, N.H. REV. STAT. ANN. § 170-C:5 (2004) ("Grounds for Termination of the Parent-Child Relationship . . . . The petition may be granted where the court finds that . . . because of mental deficiency or mental illness, the parent is and will continue to be incapable of giving the child proper parental care."); *see also* 750 ILL. COMP. STAT. ANN. 50/1 (2004) ("mental impairment . . . or mentally retarded"); HAW. REV. STAT. § 571-61 (LexisNexis 2005) (mentally retarded).

7. *See, e.g.*, Maurice A. Feldman & Laurie Case, *Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning*, 24 J. INTELL. & DEV. DISABILITY 27, 42 (1999).

8. *See, e.g.*, *In re* Loraida G., 701 N.Y.S.2d 822, 825 (N.Y. Fam. Ct. 1999).

Disabilities Act ("ADA") and the United States Constitution.[9] This Part concludes that neither offers adequate protection against a termination of parental rights, underscoring the need for change in the statutes.

II. DEFINITION AND DESCRIPTION OF INTELLECTUAL DISABILITY

A. Description of Intellectual Disability

There are an estimated seven to eight million people in the United States who come under the broad category of "intellectually disabled."[10] It is important to recognize that, although the following generalizations suggest that this term has scientific support, there are also detractors who argue against the use of such terms, warning that they are little more than labels.[11] A number of scholars have repeatedly challenged a narrow interpretation of intelligence.[12]

The characteristics that all people labeled "intellectually disabled" share are: significant limitations in intelligence, which occurred during the person's major developmental period (ending around age eighteen to twenty-one), and deficits in adaptive skills.[13] Intelligence is usually defined using an IQ test.[14] With a mean score of 100, any score under

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9. Although this Note does not examine the parental rights of intellectually disabled parents in an international human rights context, it is informative to note that the European Court has interpreted Article 8 of the European Convention of Human Rights as protecting the right of mentally disabled parents to have a continuing relationship with their children. *See* Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20, 95 (2004).

10. *See* PRESIDENT'S COMMITTEE FOR PEOPLE WITH INTELL. DISABILITIES, U.S. DEP'T OF HEALTH AND HUM. SERVS., FACT SHEET, *available at* http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html (last visited Feb. 7, 2006).

11. *See, e.g.*, BURTON BLATT, IN AND OUT OF MENTAL RETARDATION 27 (1981) (stating that mental retardation is an "administrative term" with "little, if any, scientific integrity").

12. Dr. Howard Gardner, a professor of education at Harvard, is a notable detractor. In his book on the subject, he posits that that there are actually multiple intelligences and the definition of "smart" should be expanded to include bodily-kinesthetic and interpersonal intelligences, among others. *See* HOWARD GARDNER, INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY 34, 42-43 (1999).

13. *See* ANTHONY M. GRAZIANO, DEVELOPMENTAL DISABILITIES: INTRODUCTION TO A DIVERSE FIELD 200-01 (2002).

14. There are a number of questions raised in reference to both the validity and use of IQ tests. People who are in the lower ranges of the intelligence scale test inconsistently, sometimes meeting the threshold for mild mental retardation and sometimes not. *See* Donald L. Macmillan et al., *A Challenge to the Viability of Mild Mental Retardation as a Diagnostic Category*, 62 EXCEPTIONAL CHILD. 356, 360 (1996). The score may change depending upon who administered the test, when, and under what conditions. This is troubling because an upward increase of only a few points, for example, from a seventy to a seventy-three, can mean the difference between a label of "intellectual disability" and no diagnosis. This has especial potential for harm in applying statutes

seventy is defined as low IQ.[15] "Adaptive skills" refers to what people exhibit as they go about their daily lives,[16] taking care of themselves and relating to their environment.[17] The American Association on Mental Retardation lists the following as specific examples of adaptive behavior skills: "receptive and expressive language . . . money concepts . . . gullibility (likelihood of bring tricked or manipulated) . . . using transportation and doing housekeeping activities."[18] People who share these traits are further subdivided into Mildly, Moderately, and Severely Disabled.[19]

Severe intellectual disability is marked by an IQ of thirty-five or lower and is also characterized by high rates of organically based retardation, which refers to genetic, chromosomal, and other biological etiologies.[20] A high proportion of people in this group also have serious birth defects and physical impairments.[21] People with severe intellectual disabilities will need lifelong support, likely in an institution, a residential facility, or at home, and account for about five to ten percent of people with intellectual disabilities.[22]

People with moderate intellectual disabilities comprise about ten percent of the population and have IQ levels of about thirty-five to forty-nine.[23] It is common to find developmental delays across many functions, but children can develop basic reading and math skills.[24] With

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that require a "diagnosable" condition. *See, e.g.*, MISS. CODE ANN. § 93-15-103 (2005). The IQ test is also problematic because it has been used to support social injustices, both historically and currently. During the early 1900s, proponents of the eugenics movement used IQ tests to support and effect the isolation and sterilization of people labeled "moron" or "idiot." *See* MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 43 (1999). IQ tests continue to be used to track minority children into special education classes, which some scholars argue is a subversive mode of maintaining segregated schools. *See* Beth A. Ferri & David J. Connor, *Special Education and the Subverting of* Brown, 8 J. GENDER RACE & JUST. 57, 59-61 (2004).

15. *See* GRAZIANO, *supra* note 13, at 204 (citing HELEN BEE, THE DEVELOPING CHILD (6th ed 1992)).

16. Assessments of a person's abilities are made individually as he or she goes through her routine in his or her specific surroundings. Thus, a person with an IQ below seventy may be able to function in his small, rural community, but a person with the same IQ would not be able to cope with the demands of urban living. *See* FIELD & SANCHEZ, *supra* note 14, at 29-30.

17. AM. ASS'N ON MENTAL RETARDATION, FACT SHEET: FREQUENTLY ASKED QUESTIONS ABOUT MENTAL RETARDATION (July 9, 2002), *at* http://www.aamr.org/Policies /mental_retardation.shtml.

18. *Id.*

19. The descriptions of each category of mental retardation are taken from GRAZIANO, *supra* note 13, at 209-13.

20. *Id.* at 212.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

lifelong support and training, people in this group may be able to live on their own. For example, a person with moderate retardation may be able to live in her own apartment while continuing to have regular meetings with a caseworker.[25]

People with mild intellectual disabilities comprise the largest group by far, accounting for seventy-five to eighty percent of people with intellectual disabilities.[26] This Note will primarily focus on this population both because it is the largest[27] and because the often nebulous delineations between this population and the general population bring the discriminatory nature of state statutes into sharpest relief. An IQ of fifty to seventy characterizes mild intellectual disability.[28] Delays are most apparent in people's cognitive abilities, meaning that often they are not diagnosed until they enter school.[29] Out of school, mildly intellectually disabled people can become so integrated into society that they cannot be distinguished from non-disabled people.[30] Although they may benefit from continuing social support and may rely on family or friends for some assistance, people in this group can live independently and work in certain jobs.[31]

B. Validity of Categories

Many researchers have argued that mild intellectual disability is actually not a viable category because people in this group have a different basis for their disability compared to people in the other two categories.[32] In fact, researchers suggest that the three groups be changed into two, based on whether the cause of intellectual disability is "organic" or "familial."[33] Moderate and severe intellectual disabilities are almost always linked to organic causes such as chromosomal abnormalities, birth defects, or brain injury.[34] By contrast, mild mental retardation is rarely caused by these factors.[35] "Familial" retardation is

25. *See, e.g.*, RACHEL SIMON, RIDING THE BUS WITH MY SISTER 3, 16 (2002) (describing the author's moderately developmentally delayed sister who lives on her own but receives government assistance and has a case management team).

26. GRAZIANO, *supra* note 13, at 209.

27. *Id.*

28. *Id.*

29. *Id.* at 209-10.

30. *See* Macmillan et al., *supra* note 14, at 363 (noting that people may still exhibit certain limitations).

31. GRAZIANO, *supra* note 13, at 210.

32. *Id.* at 213.

33. *See* EDWARD ZIGLAR & ROBERT M. HODAPP, UNDERSTANDING MENTAL RETARDATION 51 (1986).

34. *Id.*

35. GRAZIANO, *supra* note 13, at 213.

defined contextually, and it is believed that this type of intellectual disability is caused by a combination of genetics (parental intellectual ability) and risk factors, such as poverty, developmental neglect, and limited stimulation.[36]

For those with organically-based disabilities, impaired functioning is always evident, while for the second group the disability may only be apparent in some situations.[37] This phenomenon has been defined as "6-hour retardation,"[38] based on a study of intellectually disabled children. This study found that children who had been labeled as such behave in a way consistent with being cognitively delayed when they are in school, but that out of school they may interact successfully and not read as "retarded."[39] Thus, while the intellectual disabilities of the first group are more permanent, the second group can improve mental functioning. This has led researchers to suggest new terms to define this group based on the primary distinction.[40] It also demonstrates the fluid nature of intellectual disabilities, which is contrary to its use as a static characteristic in the termination of parental rights statutes.

III. INTELLECTUALLY DISABLED PARENTS

Research suggests that the number of intellectually disabled parents is significant and clearly demonstrates that this population's numbers have been on the rise since changing attitudes have allowed the cognitively delayed to bear children.[41] Once sterilized to prevent procreation,[42] mentally disabled people were historically viewed by the

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36. *See* ZIGLAR & HODAPP, *supra* note 33, at 51, 58.

37. *See* ENCYCLOPEDIA OF SPECIAL EDUCATION: A REFERENCE FOR THE EDUCATION OF THE HANDICAPPED AND OTHER EXCEPTIONAL CHILDREN AND ADULTS 1652 (Cecil R. Reynolds & Elaine Fletcher-Janzen eds., 2000).

38. *Id.*

39. *See id.* There have been more recent studies that have not had the same findings. Instead, these researchers have found that the children continue to exhibit delays outside of the classroom and into adulthood. *See id.* at 1653.

40. The distinction between organic and non-organic mental retardation has been a factor in court decisions in relation to the parent's potential for improvement. *See, e.g.*, *In re* Keiondre S. 2004 WL 2690668 (Ohio Ct. App. 2004) (terminating parental rights of a mother where mental retardation was thought to be the result of an organic brain injury and where experts testified that the retardation was chronic and her parenting abilities were not likely to change).

41. *See* Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRIT. J. SOC. WORK 459, 459 (1993); *see also* Linda Dowdney & David Skuse, *Parenting Provided by Adults with Mental Retardation*, 34 J. CHILD PSYCHOL. & CHILD PSYCHIATRY 25, 25 (1993).

42. In the now infamous case of *Buck v. Bell*, the Supreme Court approved the eugenic sterilization of Carrie Buck, with Justice Holmes declaring that "three generations of imbeciles are enough." Buck v. Bell, 274 U.S. 200, 207 (1927). This decision has never been overruled, although legal scholars have denounced it as a clearly discriminatory decision. *See, e.g.*, Jana Leslie-Miller,

public as a class whose reproduction should be controlled. This remains true to a certain extent,[43] but many intellectually disabled people are making more decisions for themselves and are a more visible part of society today than they traditionally were.

In the past, there have only been two options for a mentally disabled individual, which were either to be institutionalized or to live with one's family.[44] In 1930, state statutes that mandated permanent institutionalization for the "feebleminded" sent 68,035 people to institutions.[45] Advocacy for change in the marginalized status of people with mental delays began in the 1970s, influenced by other civil rights movements of the time.[46] These advocates won a significant victory with the Rehabilitation Act of 1973,[47] a precursor to the Americans with Disabilities Act, which prohibited discrimination by the federal government and by federally funded programs.[48] Based on findings that disabled people continued to face discrimination,[49] Congress passed the Americans with Disabilities Act,[50] extending comprehensive civil rights to disabled people, including those with mental disabilities.[51] Since this important act,[52] disabled people have had increased access to resources, including housing and jobs, which has enabled them to become more integrated into society.[53] Advances in understanding the capabilities of people with mental disabilities have aided in the general move away

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From Bell to Bell: Responsible Reproduction in the Twentieth Century, 8 MD. J. CONTEMP. LEGAL ISSUES 123, 123, 150 (1997).

43. There is a continuing debate among advocates for and the families of the mentally disabled over sterilization and whether a person with mental disabilities should be able to choose it or whether someone else may choose it for her. Courts have held both ways. *Compare In re* Guardianship of Matjski, 419 N.W.2d 576, 576, 580 (Iowa 1988) (holding that the lower court had the authority to hear and decide the parents' petition to have their thirty-three-year-old daughter sterilized) *with In re* Grady, 426 A.2d 467, 483 (N.J. 1981) (setting up a statute-like standard for determining whether someone other than the mentally retarded individual could decide the issue of sterilization, stressing that a best interests determination be made).

44. *See* FIELD & SANCHEZ, *supra* note 14, at 9. An alternative to institutionalization was that the family would pay another family to take the child in. *See id.*

45. *Id.* at 11.

46. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 130 (1998).

47. 29 U.S.C. § 701 (2005) (finding that "individuals with disabilities constitute one of the most disadvantaged groups in society," and "disability is a natural part of the human experience and in no way diminishes the right[s] of individuals").

48. 29 U.S.C. § 794 (2005).

49. 42 U.S.C. § 12101 (2005).

50. *See id.*

51. *See id.*

52. Some reformers actually began training and educational programs in the late 1800s, but these practices did not become widespread until much later. FIELD & SANCHEZ, *supra* note 14, at 10.

53. *Id.* at 333.

from institutionalization and towards normalization.[54] Among its goals, the President's Committee for People with Intellectual Disabilities has listed "increasing employment and economic independence and promoting access and integration into community life"[55] for people with intellectual disabilities. With the move into mainstream society and more control over reproduction have come increases in the number of mentally delayed people who are finding partners and bearing children.[56] Yet, these parents often find themselves the focus of state involvement.

Though there is not a clear correlation between low IQ and parental unfitness,[57] parents with mental disabilities are more likely than the rest of the parental population to have their children removed[58] and their parental rights terminated. One study examined over two hundred consecutive cases that came before the juvenile court in Boston and found that despite greater compliance with court orders, parents with intellectual disabilities had their children removed more often than non-diagnosed parents.[59] These initial removals often lead to a termination of parental rights. A study following sixty-four children of low-functioning parents facing allegations of abuse or neglect found that in over half of those cases parental rights were terminated.[60]

Mentally delayed parents more often face allegations of neglect than allegations of abuse or risk of abuse.[61] Although neglect can be as damaging to children as physical abuse,[62] the general category of neglect

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54. *Id.* at 12.

55. PRESIDENT'S COMM. FOR PEOPLE WITH INTELL. DISABILITIES, U.S. DEP'T OF HEALTH & HUM. SERVS., FACT SHEET, *available at* http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html (last visited Feb. 7, 2006).

56. *See* David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297, 297 (2002).

57. *See* Steven A. Rosenburg & Gay Angel McTate, *Intellectually Handicapped Mothers: Problems and Prospects*, CHILDREN TODAY, Jan.-Feb. 1982, at 24, 24 ("I.Q. is not a good predictor of parenting ability.").

58. Children are removed from their cognitively disabled parents at a rate of forty to sixty percent. *See* McConnell & Llewellyn, *supra* note 56, at 297.

59. Carol G. Taylor et al., *Diagnosed Intellectual and Emotional Impairment Among Parents who Seriously Mistreat Their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 398 (1991).

60. Elizabeth A.W. Seagull & Susan L. Scheurer, *Neglected and Abused Children of Mentally Retarded Parents,* 10 CHILD ABUSE & NEGLECT 493, 496 (1986) (stating that when the report was followed up on, only seventeen percent of the original sixty-four children remained in their parents' care).

61. *See* McConnell & Llewellyn, *supra* note 56, at 301. Additionally, allegations of abuse or neglect are often against someone other than the mentally delayed parent. *See* Daphne E. Glaun & Patricia F. Brown, *Motherhood, Intellectual Disability and Child Protection: Characteristics of a Court Sample*, 24 J. INTELL. & DEV. DISABILITY 95, 98 (1999). However, this is still a cause of action against the parent, called a failure to protect. *Id.*

62. *See* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER

covers a wider range of possible harms.[63] Some of these highlight a need for family services more than a need to remove the child from the parents. For example, a common cause of action against delayed parents is educational neglect, or failing to ensure that the child is attending school. This may be indicative of more pervasive neglect, as it was in the case of *In re Kim C.*,[64] where the mother was also failing to take her children to the doctor and had substance abuse problems, and the children displayed serious emotional problems.[65] Or, the parent may simply need some help in getting her child to school. One mother whose older children had been removed due to general neglect did not want to send her five-year-old to kindergarten. The child said he did not want to go and cried when she took him into the building, so she would take him back home.[66] Her social worker modeled taking the child to school and telling him that they would be back. The child adjusted, the mother realized that he was okay, and he subsequently had a much better attendance record.[67]

Mentally delayed parents are more likely to face a host of issues that make it difficult for people without mental delays to be effective parents.[68] As a group, cognitively delayed parents tend to have low self-esteem, be isolated from their extended families,[69] and struggle with the effects of poverty, including living in substandard housing.[70] Poverty often adversely affects parenting, and certain housing conditions, such as crowding, are more likely to increase familial tension and decrease parental supervision of children.[71] Mentally delayed parents are often ill-equipped to deal with these and other stressors. For example, the quality of parenting by mothers with low IQ may worsen when the mothers have additional children.[72] There is also a high incidence of co-morbidity, the

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DRIFT, AND THE ADOPTION ALTERNATIVE 67 (1999).

63. *See, e.g.*, ALASKA STAT. § 47.17.290 (2005) ("'[N]eglect' means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.").

64. 1997 WL 586454 (Ohio 1997).

65. *Id.* at *3-4.

66. Telephone interview with Naomi Abraham, Esq., L.M.S.W., in Brooklyn, N.Y. (Jan. 18, 2006).

67. *Id.*

68. *See* Rosenburg & McTate, *supra* note 57, at 24.

69. *See* Glaun & Brown, *supra* note 61, at 103.

70. *See* Barbara Y. Whitman et al., *Training in Parenting Skills for Adults with Mental Retardation*, 34 SOC. WORK 431, 431 (1989).

71. *See* Robert H. Bradley, *Environment and Parenting*, *in* 2 HANDBOOK OF PARENTING 235, 250 (Marc H. Bornstein ed., 1995).

72. *See* Leanne Whiteside-Mansell et al., *Patterns of Parenting Behavior in Young Mothers*, 45 FAM. REL. 273, 280 (1996).

presence of more than one disorder, for mentally delayed parents.[73] One study found that eight of the twelve mothers who participated had one or more conditions, including substance abuse, medical conditions, and psychiatric disorders, in addition to mental delays.[74]

With these various adverse conditions, it would not be surprising to find that mentally delayed parents are not meeting their children's needs. Indeed, some parents are not.[75] Yet, although there are definitional difficulties in assessing parenting,[76] it has been repeatedly shown that intellectually disabled individuals have basic parenting skills[77] or can acquire them.[78]

In his article on intellectually disabled parents and the law, Robert Hayman posited that, while there is neither an accepted legal definition nor a clearly articulated social science definition of "good parent," there are four standards that have been repeatedly set out and relied upon.[79] The premises of these standards are that the parents must be able to do the following: protect and maintain the health and safety of the child, meet the child's physical needs, meet the child's emotional needs, and stimulate the child's intellectual growth.[80] In surveying the literature on characteristics of mentally delayed parents and on their parenting skills in general, Hayman found that the bulk of research supports the ability of cognitively disabled parents to protect their children, meet their emotional and physical needs, and provide a healthy home environment.[81] There is nothing inherent in a diagnosis of mental disability that precludes a parent from loving her child or maintaining her child's safety.

However, there continue to be concerns that, even if intellectually disabled parents are not more likely to physically harm or neglect their children, there is a higher probability that they will not provide sufficient

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73. *See* McConnell & Llewellyn, *supra* note 56, at 301.

74. *See* Glaun & Brown, *supra* note 61, at 103.

75. *See, e.g.*, *In re* Michael B., 594 N.W.2d 674, 677-78 (Neb. Ct. App. 1999) (dealing with a mentally delayed mother who used excessive discipline with children, used drugs and alcohol in their presence, and allowed daughter to use alcohol).

76. Instead of attempting to define the characteristics of an adequate parent, the laws tend to focus on what constitutes an unfit parent. *See, e.g.*, MINN. STAT. ANN. § 260C.301 (2005) (finding a parent unfit where "a consistent pattern of specific conduct before the children or of specific conditions directly relating to the parent and child relationship . . . renders the parent unable, for the reasonably foreseeable future, to care appropriately for . . . the child").

77. *See, e.g.*, *In re* Loraida G., 701 N.Y.S.2d 822 (N.Y. Fam. Ct. 1999).

78. *See, e.g.*, Feldman & Case, *supra* note 7, at 28.

79. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1216-17 (1990).

80. *Id.* at 1217.

81. *See id*. at 1219-22 (discussing application of studies on intellectually disabled parents to each of the four parenting categories outlined).

stimulation and will cause developmental delays in their children.[82] In their interviews with child protection workers, researchers found that the workers presumed that children remaining in the home with their cognitively delayed parent would inevitably become developmentally delayed.[83] Caseworkers assumed that the parent would not be able to adapt to their children's changes and would not provide the stimulation necessary for normal development.[84] Seeming to substantiate what the case workers and others have assumed, studies have demonstrated that that there is a higher incidence of developmental delays in children born to parents with low IQs.[85] Due to concerns that other factors were affecting the data, one study controlled for poverty and still found a higher incidence of delays among children raised by mentally delayed parents.[86]

Attempting to further isolate the causes of these developmental difficulties, another groups of researchers examined thirty-seven children born to intellectually disabled mothers.[87] The study confirmed earlier findings, with a substantial number of the children showing delays. The most prevalent delays were in motor and communication development.[88] Yet, interestingly, the researchers did not find any statistically significant correlation between the mother's IQ level and the child's developmental level.[89] Also, on average, the quality of the home environment did not vary from norms, and no significant correlation was found between the home environment and the children's development.[90] The study offered other potential reasons for the children's delays, such as organic causes,[91] and concluded that presuming a lack of stimulation based merely upon the parent's mental delays is prejudicial against these parents.[92] Thus, this demonstrates the lack of a rational basis for statutes correlating parental mental deficiencies with ill effects on the child,

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82. DAVID MCCONNELL ET AL., UNIV. OF SYDNEY, PARENTS WITH A DISABILITY AND THE NSW CHILDREN'S COURT 34 (2000).

83. *Id*.

84. *Id*.

85. *See, e.g.*, Maurice A. Feldman & Nicole Walton-Allen, *Effects of Maternal Mental Retardation and Poverty on Intellectual, Academic and Behavioral Status of School-Age Children*, 101 AMER. J. MENTAL RETARDATION 352, 360 (1997).

86. *See* Keltner et al., *supra* note 3, at 54.

87. David McConnell et al., *Developmental Profiles of Children Born to Mothers with Intellectual Disability*, 28 J. INTELL. & DEV. DISABILITY 122, 125 (2003).

88. *Id.* at 131.

89. *Id*.

90. *Id.* at 132.

91. *Id.* at 127 (finding evidence of possible organic pathology in forty-six percent of the children studied).

92. *Id.* at 132.

despite higher incidences of mental delays among these children.

Mentally delayed parents are more likely to have mentally disabled children. In offspring of two retarded parents, the incidence of child retardation is forty percent. For one retarded parent, the incidence is twenty percent.[93] However, it is unclear how much of this correlation is due to genetics and how much is environmentally based.[94] As discussed above, researchers believe that environmental factors are especially likely to come into play where the individual has been diagnosed mildly intellectually disabled.[95] If this is the case, it speaks to the inherent problems in labeling people "retarded" who may simply need more educational assistance; it also supports creating better social support for all children growing up in environments that are not intellectually stimulating.[96] If the causes are genetic, it is as if these parents are predestined to lose any children that they have. Society may feel that this population's reproduction should be controlled—making a move back to the days of forced sterilization a more humane means to the same end.[97]

IV. INTELLECTUALLY DISABLED PARENTS AND TERMINATION OF PARENTAL RIGHTS STATUTES

Statutes govern every aspect of a child welfare proceeding, including: who may determine when an investigation must be made into allegations of child abuse or neglect,[98] what types of services the family may receive to promote reunification,[99] and when the parent-child relationship may be severed by a termination of parental rights.[100] It is this last type of action, which Justice Ginsburg stated is "among the most severe forms of state action,"[101] that is the focus of this Note.

The termination of parental rights of the intellectually disabled is an area where the tension between the state's interests in a child and a parent's interests in a child is pronounced,[102] involving "the degree of

93. *See* FIELD & SANCHEZ, *supra* note 14.

94. *Id.* at 76; *see also* McConnell and Llewellyn study discussed *supra* note 87, at 132 (suggesting that organic causes offer a better empirical explanation than environmental ones).

95. *See* Edward Zigler & David Balla, *Motivational and Personality Factors in the Performance of the Retarded*, *in* MENTAL RETARDATION: THE DEVELOPMENTAL-DIFFERENCE CONTROVERSY 9 (Edward Zigler & David Balla eds., 1982).

96. *See* BARTHOLET, *supra* note 62, at 102 (discussing the importance of intellectual and environmental stimulation to children's development).

97. *See supra* notes 41-42 and accompanying text.

98. *See, e.g.*, FLA. STAT. ANN. § 39.301 (2005).

99. *See, e.g.*, MONT. CODE ANN. § 41-3-423 (2005).

100. *See, e.g.*, GA. CODE ANN. § 15-11-94 (2005).

101. M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996).

102. *See* Catherine Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 177

risk to children that society is willing to take, relative to its interpretation of the rights of the parents."[103] Primarily promulgated by the states, the individual statutes take diverse approaches to balancing these two competing interests, though they tend to favor the state interest in protecting children. Federal law has also affected state legislation regarding termination of parental rights, most notably with the Adoption and Safe Families Act ("ASFA").

A. Adoption and Safe Families Act

In 1997, Congress passed ASFA, enacting a number of changes to the federal government's approach regarding child welfare.[104] Lawmakers were concerned by the high rates of children in foster care[105] and by reports of these children remaining in foster care limbo for three or more years while the state attempted to reunite them with their natural parents.[106] Extended stays in foster care created less adoptable children, both because they tended to be older[107] and because they began to demonstrate the ill-effects of what scholars called "foster drift,"[108] or a lack of permanency.

The changes created by ASFA were based on a shift in focus from preservation of the family to permanency for children.[109] The federal government mandated that states move children through foster care more quickly, either towards adoption or family reunification.[110] Under this new rubric, terminating parental rights has become easier and more common.[111] The state may begin termination of parental rights proceedings after the child has been in foster care for fifteen of the last

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(2004).

103. THOMAS GRISSO, EVALUATING COMPETENCIES 206 (1986).

104. 42 U.S.C. § 1305 (2005).

105. In 1995 there were an estimated 486,000 children in foster care, a seventy percent increase since 1986. *See* MICHAEL R. PETIT & PATRICK A. CURTIS, CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES 72 (1997).

106. Cheryl Wetzstein, *Fewer Foster Care Youths Await Adoption*, WASH. TIMES, Dec. 27, 2004, at A3.

107. *See* James A. Rosenthal, *Outcomes of Adoption of Children with Special Needs*, 3 FUTURE CHILD.: ADOPTION 79 (1993).

108. *See* Libby S. Adler, *The Meaning of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 2 (2001); *see also* BARTHOLET, *supra* note 62, at 179.

109. Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 454 (2002).

110. *Id.*

111. However, an important limitation on the ease of adjudicating a termination of parental rights was created with the holding in *Santosky v. Kramer* 455 U.S. 745, 769 (1982), that, before a state can sever the parent-child relationship, the allegations of abuse or neglect must be supported by clear and convincing evidence, at the least.

twenty-two months. The state receives financial incentives for successful adoptions. Under certain circumstances, the state is not mandated to provide reunification services to the family, and parental rights may be terminated even if there is not an adoptive resource for the child.[112] Where the state agency is providing reunification services, with a goal of returning the child to the parent, ASFA mandates that the agency engage in "concurrent planning" towards adoption.[113]

Despite the laudable goals of ASFA, it can create special problems for mentally delayed parents and their children, especially when they are not provided with appropriate reunification services. For example, parent education programs that specialize in teaching cognitively delayed parents are still rare.[114] Thus, a mentally delayed parent who needed to learn basic parenting skills would likely be assigned with higher functioning parents to a class which focused on more rehabilitative needs.[115] Although the parent would likely not benefit from this nor be able to utilize the skills taught, the state agency would not have an obligation to provide further services. As long as the agency places the children in a pre-adoptive home, the default plan of adoption continues to be pursued and the agency would satisfy all federal requirements.[116] Yet, it is not only federal requirements that must be met. The power of ASFA can be either increased or diminished by the individual state statutes which govern child welfare proceedings.

B. State Termination of Parental Rights Statutes

A mentally delayed parent's experience with the child protective system will, in large part, be determined by where that parent lives. State statutes vary widely, both in terms of the grounds included for a termination and in the specificity with which those grounds are defined. Because mental delays have no direct correlation to parental unfitness,

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112. *See* Richard P. Barth et al., *From Anticipation to Evidence; Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 371 (2005).

113. Brooks & Roberts, *supra* note 109, at 454.

114. *See* Feldman & Case, *supra* note 7, at 28.

115. The court in *In re Loraida G* noted that the mother's case was unusual because "parents generally know, or should know, the skills necessary to adequately meet their child's needs and fail to employ them . . . [while] this respondent actively seeks to learn and utilize the requisite skills." 701 N.Y.S.2d 822, 824 (N.Y. Fam. Ct. 1999). Individuals have asserted that the failure to appropriately modify services is a violation of the ADA, but these cases have mostly been unsuccessful. *See* Susan Kerr, *The Application of the Americans with Disabilities Act to Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 415-20 (2000).

116. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 45 (2002) (arguing that inadequate family reunification services will act as a fast track towards adoption).

the best statutes are those that do not deem intellectually disabled parents categorically unfit, and the most problematic statutes are those that tie these two unrelated characteristics together.

1. The Best State Termination of Parental Rights Statutes

A number of states do not have any direct reference to mentally delayed parents in their termination statutes. Instead, these states give the court the discretion to decide whether the parent is able to take care of the child based on the facts presented.

Vermont's statute is representative of this group, because it lists grounds for a termination of parental rights[117] while still allowing a judge a fair amount of discretion. It states that the court should "consider all relevant factors," and the court "*may* include"[118] such factors as providing financial support,[119] being in regular communication,[120] meeting the child's physical and emotional needs,[121] and providing a safe environment.[122] The issue of a parent's mental delays would most likely be raised in reference to the parent's ability to meet the children's needs but would not need to be discussed if those factors were not at issue. It is noteworthy that this statute also suggests that a judge consider the parent's ability to "provide the child with love."[123] Including this factor would likely help tip the balance in favor of a loving mentally delayed parent who is not providing, for example, the safest environment.[124]

Other states simply list the characteristics of an unfit parent, as opposed to tying those traits to a source.[125] For example, Minnesota[126] allows for a termination of parental rights if the court finds that a parent is unfit:

> [B]ecause of a consistent pattern of specific conduct before the children or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a

117. VT. STAT. ANN. tit. 15A, § 3-504 (2004).
118. *Id.* § 3-504(a)(2) (emphasis added).
119. *Id.* § 3-504(a)(2)(A).
120. *Id.* § 3-504(a)(2)(B).
121. *Id.* § 3-504(b)(2)(B).
122. *Id.* § 3-504(b)(2)(C).
123. *Id.* § 3-504(b)(2)(A).
124. Factoring in the parents' love for their child could have brought about a different outcome in *In re Adoption of Lenore* where the court affirmed the finding that the mother and father's cognitive delays and dirty home were reason enough to terminate parental rights despite finding that respondents "care deeply for their daughter." 770 N.E.2d 498, 498, 504 (Mass. App. Ct. 2002).
125. For other states using a similar system of categorization, see UTAH CODE ANN. § 78-3a-407 (2004). *See also* N.M. STAT ANN. § 32A-5-15 (2005).
126. *See* MINN. STAT. ANN. § 260C.301 (2005).

> duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for . . . the child.[127]

It is interesting that this language is similar to that used by other state statutes, except these other state statutes substitute "mental deficiency" for "consistent pattern" or "specific conditions."[128]

These statutes follow the logic that, when a parent with intellectual disabilities is incapable of parenting, it is highly likely that there are problems in the parent-child relationship that are sufficiently covered by other statutory categories of unfitness. Even states that allow for a termination based on cognitive delays may not need to use this provision when there are other reasons for terminating. For example, in *B.S. v. Cullman County Department of Human Resources*,[129] Judge Murdock wrote in the concurrence that, while the majority focused upon the mother's intellectual disability as a reason for termination, the mother had also abandoned her children by failing to visit them.[130] This alone would have warranted a termination of parental rights according to Alabama Code section 26-18-7(a)(1).[131] In another case, *In re B.L.*,[132] the mentally delayed mother initially had her children removed for general neglect.[133] The mother then moved to another state to be with her boyfriend,[134] leaving her children in the care of the state and visiting them only three times over a six-month period.[135] Although the state statute includes mental disability as a ground for termination,[136] the Tennessee Court of Appeals upheld the termination of her parental rights based on abandonment.[137] Since the state statute only requires that one statutory ground for termination be established by clear and convincing evidence,[138] there was no need to adjudicate the issue of the mother's mental delays.

A third example of this is a Delaware case, *Division of Family Services v. B. W.*[139] Delaware state law[140] allows for a termination based

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127. *Id.*

128. *See, e.g.*, ALA. CODE § 26-18-7 (LexisNexis 2004) ("[M]ental deficiency of the parent . . . of such duration or nature as to render the parent unable to care for the needs of the child.").

129. 865 So. 2d 1188 (Ala. Civ. App. 2003).

130. *Id.* at 1198.

131. *Id.*

132. No. M2003-01877-COA-R3-PT, 2004 WL 2451355, at *1 (Tenn. Ct. App. Nov. 1, 2004).

133. *Id.* at *7.

134. *Id.* at *8.

135. *Id.* at *4.

136. *See* TENN. CODE ANN. § 36-1-113 (2005).

137. *In re B.L.*, 2004 WL 2451355, at *10.

138. *See* TENN. CODE ANN. § 36-1-113 (2005).

139. No. 03-05-02TN, 2004 DEL. FAM. CT. LEXIS 46, at *1 (Del. Fam Ct. 2004).

on a parent's mental incompetence and concomitant inability to provide care for the child.[141] It also allows for a termination if the parent has failed to plan for the child.[142] In making this determination, the court considers such relevant factors as the respondent's efforts and abilities, the effect of a change in custody, and the effect on the child of a delay in termination.[143] The case involved a young mother who was herself in foster care when her child was born. The child was placed with a relative, then in the custody of the state.[144] In the course of the permanency hearing, a psychological evaluation revealed that the mother's cognitive functioning was below average,[145] yet this was not the basis upon which her rights were terminated. Instead, the judge found that the mother failed to make and follow a plan for reunification with her child, and terminated on that basis.[146] The mother's mental delays were only one of a number of factors[147] that would evidence continued instability if the child were returned to the mother.

2. Problematic State Statutes

The state statutes categorically defining mental disabilities as a basis for a termination of parental rights should be revised because there is insufficient reason for basing one on the other. Though there has been some improvement in state statutes as far as terminating the rights of intellectually disabled parents, they are past due for further changes.

Historically, these statutes allowed for the removal of the child and a termination of rights upon a showing of retardation, without a requirement of any adverse effects to the child or inability to parent.[148] Today, this would be recognized as blatantly discriminatory. Thus, those state statutes that continue to include mental deficiency in their termination of parental rights statutes require a connection between the disability and the parental failings.

Yet, even with these advances, certain statutes in this group negatively stand out because of their potential to be misapplied and misused, perhaps unwittingly, to break up functioning families. Their common problems are: ambiguities in language concerning both the

140. DEL. CODE ANN. tit. 13, § 1103 (2004).
141. *Id.*
142. *See id.*
143. *See id.*
144. *B.W.*, 2004 DEL. FAM. CT. LEXIS, at *6.
145. *Id.* at *11-12.
146. *See id.* at *42.
147. *See id.* at *35-36, *42-43. The court also considered the mother's homelessness, the termination of her parental rights as to her first child, and her incarceration.
148. *See* FIELD & SANCHEZ, *supra* note 14, at 243.

needs of a child and the nature of a parent's disability, and allowing for judgments made on speculation as opposed to fact.

a. Ambiguities

Although statutes may be found unconstitutionally vague,[149] a vaguely worded statute is less likely to violate the Constitution than to lead to confusion in its application. The statutes that list mental disability as grounds for termination of parental rights typically tie the disability to an inability to care for the child, without defining exactly what this entails.

Alabama's statute is a prime example of this because it requires that the disability "render the parent unable to care for needs of the child."[150] Though this narrows the class of mentally delayed parents who meet the criteria, the limitation is vague in its use of the words "needs" and "care." Children's needs vary widely, from love, to homework help, to food. A mentally delayed parent may be able to fulfill some of these needs and may need assistance in providing others.[151] It is not hyperbole to suggest that, without a clear delineation of which needs are at stake, a social worker may validly testify that the parent is not meeting the child's needs because she cannot help with homework.

The Oregon statute is even more vague, stating only that the mental deficiency must "render the parent incapable of providing proper care for the child."[152] Mississippi's statute presents more guidance, stating that the mental deficiency must render the parent unable to take "minimally, acceptable care of the child."[153] Even with this further elucidation, a decision on what constitutes "proper care" or "need" is bound to be a value judgment.[154]

Improper judgments may result from an ambiguous definition of the level of the parent's mental delay. The parent's delays may not be severe and may not even be at the root of the abuse or neglect allegations. If the legislature feels compelled to retain mental disability as a ground, it should ensure that the disability is sufficiently defined.

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149. A statute must be written so that a person of average intelligence would understand its scope, otherwise, it is unconstitutionally vague. Smith v. Goguen, 415 U.S. 566, 574 (1974).

150. *See, e.g.*, ALA. CODE § 26-18-7(a)(2) (2004).

151. *See* McConnell & Llewellyn, *supra* note 56, at 297.

152. OR. REV. STAT. § 419B.504 (2005).

153. MISS. CODE ANN. § 93-15-103 (2005).

154. Social definitions of what constitutes good care work against intellectually disabled parents because they are often socially constructed to conform to middle class standards. *See* TIM BOOTH & WENDY BOOTH, PARENTING UNDER PRESSURE: MOTHERS AND FATHERS WITH LEARNING DIFFICULTIES 12 (1994).

For example, New Hampshire's statute[155] requires that the mental deficiency be "established by the testimony of either 2 licensed psychiatrists or clinical psychologists or one of each acting together."[156] Compare this with Montana's statute,[157] where the court may primarily consider the emotional illness or mental deficiency of the parent in a termination of parental rights proceeding, but neither in this section nor any other section of the code is either term defined.

Other statutes narrow the term by defining the mental delay in terms of its severity: "severe mental deficiency,"[158] "mental deficiency of the parent that is so severe and chronic,"[159] or requiring that the parent has been a patient at either a hospital or licensed treatment facility because of a developmental disability for at least two of the past five years.[160] Though still problematic because they include mental delays, these statutes effectively narrow the class, making them less likely to be over-inclusive in their scope.

b. Termination Based upon Future Rather than Past Actions

An inherent problem in this group of statutes is that the termination is not simply based on the parent's past actions but on predictions about their future ones as well. The statutes typically require that the mental deficiency "render the parent unlikely within a reasonable time to care for the . . . child,"[161] or that the mentally disabled parent be "unable to discharge parental responsibilities . . . for a prolonged indeterminate time."[162] Another allows for termination if "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."[163] The problems with this scheme are twofold: (1) it leads to decisions based on conjecture rather than wholly on facts; and (2) it does not allow for the possibility that a parent will improve his or her skills despite the continuing mental disability.

This method is counter-intuitive because it encourages judges to

155. N.H. REV. STAT. ANN. § 170-C:5 (2004).

156. *Id.* Georgia and Kentucky have similar, albeit less specific, statutory requirements that the mental deficiency or retardation be "medically verifiable," GA. CODE ANN. § 15-11-94 (2005), or "attested to by a qualified mental health professional," KY. REV. STAT. ANN. § 620.023 (West 2004).

157. MONT. CODE ANN. § 41-3-609 (2004).

158. MISS. CODE ANN. § 93-15-103 (2005).

159. WASH. REV. CODE ANN. § 13.34.180 (West 2004).

160. WIS. STAT. ANN. § 48.415 (West 2004).

161. COLO. REV. STAT. ANN. § 19-3-604 (2005).

162. NEB. REV. STAT. § 43-292 (LexisNexis 2005).

163. MICH. COMP. LAWS SERV. § 712A.19b (LexisNexis 2005).

speculate as to how the parent might act in the future. The decision in *In re Children of L.S. and J.A.*,[164] determining the parental fitness of a mildly intellectually disabled mother, quotes language from an earlier case[165] stating that, when considering termination of parental rights, the court relies "to a great extent upon the projected permanency of the parent's inability to care for his or her child."[166] The court then goes on to find that, although the county had not made a visit to the mother's home in the four months prior to trial,[167] county workers visiting the year before found that the house was "cluttered" and filthy.[168] The court found that this evidence was enough to conclude that the mother's house would become unsanitary again in the future, even if it was not at the time of trial.[169]

In another case involving a mildly intellectually disabled mother, *Jessica L. v. Orange County Social Services Agency*,[170] the child was taken from her mother when she was four days old because of the mother's mental delays[171] and a lack of parenting skills.[172] A social worker subsequently reported that the mother's limitations were less severe than reported and that her interactions with her child improved through supervision and classes,[173] although the mother did not know what to do in certain safety situations.[174] Based upon this information, the court upheld the lower court's ruling that the mother did not have the mental capacity to develop basic parenting skills in the future and that returning the child to the mother "would create a substantial risk of detriment to the physical or emotional wellbeing of the [child]."[175] The termination of her parental rights was deemed appropriate.[176] While the mother in this case may have lacked the ability to develop parenting skills, studies have demonstrated that other delayed parents have that

164. No. A04-453, 2004 WL 2521378, at *1 (Minn. Ct. App. Jan. 20, 2005).

165. *In re* Welfare of A.D., 535 N.W.2d 643 (Minn. 1995).

166. *Id.* at 649.

167. *In re Children of L.S.*, 2004 WL 2521378, at *5.

168. *Id.* at *1.

169. *Id.* at *5.

170. No. G031771, 2003 Cal. App. Unpub. LEXIS 4371 (Cal. Ct. App. Apr. 30, 2003).

171. *Id.* at *2.

172. *Id.* at *2 (discussing how the mother tried to feed her child too much milk and did not change the child's diaper correctly).

173. *Id.* at *5.

174. *Id.* at *7. The mother did not know how to give a correct dose of medicine to her child and said that if the child was throwing up she would call 911, but if the child was choking she would go to the doctor. *Id.* In his study on learned skills, Maurice Feldman found that intellectually disabled parents can be taught medical skills. *See* Feldman & Case, *supra* note 7.

175. *Jessica L.*, 2003 Cal. App. Unpub. LEXIS 4371, at *8. Notice that this language is very similar to the requirements discussed in other state statutes governing termination of parental rights.

176. *Id.* at *14.

ability. This potential to improve makes future-based predictions especially unjust.

Although parenting classes will not work for every delayed parent,[177] a number of studies have documented programs that have successfully taught parenting skills to cognitively delayed parents.[178] These studies have determined that parental fitness is not dependent on IQ but instead on the relationship between the parent and child.[179] In one study of parents with mild intellectual disability, the researchers focused on teaching child care, safety, and health and found that the parents were not only able to learn the skills, but also to maintain them over eighty percent of the follow-up period.[180] This study purposely focused on self-learning, a relatively inexpensive method demonstrating that teaching is a viable option for state agencies.[181] Another study developed training in an area where mentally delayed parents often demonstrate insufficiency: child interaction.[182] After training, the mothers were more likely to make imitative sounds with their children, sit and play with them, and praise motor development.[183] Ideally, such parenting services would be provided before the parents come into contact with the child welfare system. But even if they are not, skilled training that is tailored to the needs of mentally delayed parents must be recognized as, "more humane, more effective and cheaper than taking children into care."[184]

Two recent New York cases illustrate the potential for intellectually disabled parents to learn how to care for their children. In *In re Loraida G.*,[185] the court was asked to terminate parental rights based solely on the mother's intellectual disability, without any allegations of abuse or neglect.[186] The Department of Social Services had removed the child

177. *See, e.g.*, A.M. v. Lamar County Dep't of Human Res., 848 So. 2d 258, 260-61 (Ala. Civ. App. 2002). A mentally delayed mother was given classes in basic house keeping and child care after son's birth. Despite this training, on a later visit a caseworker found dirty diapers and clothes on the floor, live roaches, and observed the parent feeding the baby with a dirty bottle. *Id*.

178. *See, e.g.*, Whitman et al., *supra* note 70, at 433.

179. *See id.*

180. *See* Feldman & Case, *supra* note 7, at 42.

181. *See id*.

182. Maurice A. Feldman et al., *Parent Education Project II: Increasing Stimulating Interactions of Developmentally Handicapped Mothers*, 19 J. APPLIED BEHAV. ANALYSIS 23, 33 (1986).

183. *Id*. This study confirmed the results of another 1986 study that found parental training successfully increased the quality and frequency of interactions between mothers and children. *See* Mary A. Slater, *Modification of Mother-Child Interaction Processes in Families with Children At-Risk for Mental Retardation*, 91 AM. J. MENTAL DEFICIENCY 257, 264 (1986).

184. *See* MUKTI JAIN CAMPION, WHO'S FIT TO BE A PARENT? 163 (1995).

185. 701 N.Y.S.2d 822 (N.Y. Fam. Ct. 1999).

186. *Id.* at 823.

days after birth.[187] Previously, the mother had been adjudicated unfit to care for her first-born child due to her mental disabilities, and the Department sought to revoke parental rights for this child on the same grounds.[188] However, the mother remained in close contact with the child, participated in parenting classes, and was able to apply what she had learned and to care appropriately for her child.[189] The court noted that the parenting classes and support of agency personnel were essential to her growth, finding that, "with the supportive services in place and respondent's openness to the instruction, the Court [did] not deem her different than any new parent who must learn and adapt along with the stages of their developing child."[190]

In another case, *In re W.W. Children*,[191] the court found that a mother with a low IQ[192] had demonstrated the potential for learning to be a responsible parent.[193] The court found this despite two psychologists opining that the mother would not be able to care for her children in the "foreseeable future" due to her mental retardation, warranting state custody over the children under the New York statute.[194] The judge dismissed the petition for a termination of parental rights based on his factual findings and granted the mother custody of her children.[195]

Yet, the facts of this case also demonstrate the potential for misapplying statutes that allow for categorical findings of unfitness when the parent is intellectually disabled. The mother had previously had her parental rights terminated as to her other children upon no more than a showing of intellectual disability,[196] despite the statutory requirement that there be a demonstrated unfitness to parent.[197] As discussed above, another common statutory safeguard against wrongful termination is that more than one expert must testify as to the parent's

187. *Id.* at 824.
188. *Id.*
189. *Id.* at 825.
190. *Id.* at 826.
191. 736 N.Y.S.2d 567 (N.Y. Fam. Ct. 2001).
192. Note that three psychologists ranked the mother in this case at three different IQ levels, ranging from fifty to sixty-three. This fact points to both the non-static nature of IQ and to fundamental problems with the IQ test. *See supra* note 14.
193. *In re W.W. Children*, 736 N.Y.S.2d at 571.
194. N.Y. SOC. SERV. LAW § 384-b(4)(c) (Consol. 2005).
195. *In re W.W. Children*, 736 N.Y.S.2d at 581.
196. *Id.* at 569.
197. N.Y. SOC. SERV. LAW § 384-b(4)(c) (2005) ("[P]arent or parents . . . are presently and for the foreseeable future unable, by reason of mental illness or mental retardation to provide proper and adequate care for a child.").

unfitness by reason of intellectual disability.[198] Yet here, there were three psychologists who were evidently wrong in deeming this mother unfit. Because there is the potential for such interpretations, these statutes must be changed.

3. Comparing the Statutes' Effect on Children

The states that include mental deficiency as a ground for termination of parental rights are not doing a better job of protecting children than those that do not include such an allowance. Although difficult to quantify, one measure of this is the number of child fatalities due to child maltreatment in states where the statutes specifically factor in mental delays compared with those that do not. The assumption would be that, if leaving children in the care of their delayed parents (absent other showings of abuse or neglect) is harmful, then there would be a higher rate of child fatalities in those states. This is not the case.

The states discussed above which do not include mental delays in their statutes are Vermont, Utah, Minnesota and New Mexico.[199] Their respective rates of child fatalities in 2002 were 0, 1.68, 1.28, and 0.60 per 100,000 children.[200] As for some of the states that do specify mental deficiency in defining parental unfitness, Alabama, Oregon, Colorado, Nebraska, Washington, New Hampshire, and Montana have respective rates of child fatalities of 2.62, 2.46, 2.17, 2.96, 0.99, 0, and 1.85 per 100,000 children.[201] Almost across the board, the numbers of child fatalities from maltreatment were lower in state statutes that do not include mental disabilities. This could be explained by a number of conjectures. One possibility is that not adjudicating cases where the primary issue is a parent's mental disabilities frees time to pursue parents who are actually harming their children.

C. Effect of Terminating Parental Rights

Though it is tempting to err on the side of removing children from potentially harmful parents, it must be understood that terminating parental rights does not alone solve all of a child's problems. The issues must be framed practically by examining the reality of what happens to

198. *See, e.g.*, N.H. REV. STAT § 170-C:5 (2004) ("Mental deficiency or mental illness shall be established by the testimony of either 2 licensed psychiatrists or clinical psychologists or one of each acting together.").

199. *See supra* Part.B.1-2.

200. ADMIN. CHILD. & FAM., DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2002: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEMS: NATIONAL STATISTICS ON CHILD ABUSE AND NEGLECT (2002).

201. *Id.*

children once parental rights are terminated. Children may be harmed by the termination process itself, within the foster care system, or by the disruption of an adoption.

A termination of parental rights is a profound experience for most children and may be especially so for children of mentally delayed parents who feel an increased sense of responsibility to their parents.[202] One study found that the children of parents whose rights were terminated experienced a deep sense of loss.[203] Often the bond between the parent and child is especially strong.[204] There is also the potential for a negative impact on the child's self-esteem and identity. Where parental rights are involuntarily terminated due to some "defect" in the parent, the child must either disconnect from the parent and lose part of his identity or maintain identification with the family and the concomitant identification with the defect, resulting in injury to his self-esteem.[205]

Also, leading to less permanency rather than more, parental rights may be terminated without having an adoptive family ready to take the child.[206] Children in this situation have been termed "legal orphans" because they have no connection to a family, neither adoptive nor biological.[207] Because of this, a child may continue to live with various foster parents even though legally free and available for a permanent placement.[208] This is of special concern where the children themselves have special needs, making them less adoptable.

Special-needs children have lower rates of adoption and, once adopted, have higher rates of disruption, which is the termination of an adoption proceeding before it is legally finalized.[209] "Special needs" is most commonly used to refer to children with mental or physical disabilities,[210] including children with intellectual disabilities.[211] This is

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202. *See* TIM BOOTH & WENDY BOOTH, GROWING UP WITH PARENTS WHO HAVE LEARNING DIFFICULTIES 82 (1998).

203. *See* Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1458 (1995).

204. *Id.*

205. *See* Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 414-15 (1996).

206. Some experts argue that, because there is the potential for this outcome, the law should be changed and parental rights only terminated where there is a prospective adoptive family available. *See* ROBERTS, *supra* note 116, at 61.

207. *See id*. at 45.

208. Although this may not seem facially different from a child who remains in foster care with a continuing connection to a parent, studies have found otherwise. Research demonstrates that children who maintain ties to their families while in foster care do better as adults. *See id.* at 61.

209. *See* Rosenthal, *supra* note 107, at 78.

210. Some researchers have expanded the definition of "special needs." For example, James Rosenthal defines the term broadly to include an older age at adoption, disabilities, and minority

noteworthy because, as discussed further below, parents with intellectual disabilities are more likely to have children with intellectual disabilities.[212] Thus, high rates of termination within the delayed parent population will lead to more special-needs children entering the adoption pool, where they have a strong likelihood of remaining parentless.

However, ASFA may provide some safeguard against termination in these cases. This is due to its requirement that the termination of parental rights be in the best interest of the child.[213] For example, in *In re Michael E.,*[214] the New York Supreme Court affirmed the Family Court's finding that it was not in the child's best interests to sever the parent-child relationship where both the mother and her seventeen-year-old son were intellectually disabled.[215] The decision stated, "[G]iven the likelihood of Michael never being adopted and the loving relationship between him and respondent . . . depriving him of contact with respondent would serve no legitimate purpose or be in his best interest."[216] Yet, the presence of cognitive disabilities in both parent and child has led some courts to terminate parental rights, based on a finding that the mentally delayed parent is especially ill equipped to care for a mentally delayed child.[217]

D. Effect of Not Terminating Parental Rights

Failing to make a timely termination of parental rights or to sever an abusive parent-child relationship may also harm children. After being removed, children are put into some form of foster care to await a court determination. Fifteen months[218] is a short time for a mentally delayed parent to overcome the difficulties that led to the removal, but this is a long time for children to be in a system that can cause physical and emotional harm.

The foster care system is meant to offer security to children, but it

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ethnicity, which are all factors that may prevent adoption or lead to a disrupted adoption. *See id.* at 77.

211. LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, THE COMPLETE ADOPTION BOOK: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD 256 (2005).

212. *See* FIELD & SANCHEZ, *supra* note 14.

213. *See* 42 U.S.C. § 675(4)(C) (2005).

214. 659 N.Y.S.2d 578 (N.Y. App. Div. 1997).

215. *Id.* at 579, 591.

216. *Id.* at 579.

217. *See, e.g.*, *In re* Curry, No. 03CA51, 2004 WL 307476, at *7 (Ohio Ct. App. Feb. 11, 2004) (finding that the mother's mental disabilities prevented her from appropriately addressing her children's developmental delays).

218. Referring to the ASFA requirement adopted by each state that termination proceedings be initiated if a child has been in care for fifteen of the past twenty-two months. *See, e.g.*, MONT. CODE ANN. § 41-3-604 (2005).

often does the opposite. While there are many excellent foster parents, there is also abuse of children in care by both foster parents and other foster children.[219] A national report on child fatalities found that a child in foster care is twice as likely to die from abuse as is a child in the general population of children.[220] New Jersey parents whose children were removed due to inadequate housing sued because their children returned from foster care with clear signs of physical abuse.[221] Long stints in foster care often involve moving between multiple foster homes, with children experiencing disruptions in schooling and relationships.[222] These constant changes make it difficult to develop and maintain connections that are crucial to a child's growth.[223]

In making and enforcing child welfare legislation, there is always the fear that a child may be hurt because the law was not stringent enough. Legislators face accusations that children are slipping through holes in the law and are being returned to abusive homes to face further harm or death.[224] Yet, this should not be a concern in relation to removing mental retardation or deficiency as grounds for removing children. As discussed above,[225] statutes have sufficient nets to catch parents who are mistreating their children, whether or not the parent has a mental delay. If a mentally delayed parent has abandoned, neglected, or abused her child, state statutes allow for termination on that basis alone.[226] More is not necessary or useful.

V. CONSTITUTIONALITY OF STATUTES

Targeting parents with mental disabilities in termination of parental rights statutes is potentially unconstitutional under both the Americans

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219. Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW. ENG. L. REV. 129, 138 (2001).

220. *See* U.S. DEP'T OF HEALTH & HUM. SER., ADMIN. ON CHILD., YOUTH AND FAMILIES: CHILD MALTREATMENT 1999 at VIII, 41 (2001).

221. *See* Jennifer V. Hughes, *Lawsuit Says DYFS Ordered False Reports-Caseworker Claims He Was Fired for Refusing*, THE RECORD (Bergen County, N.J.), May 4, 2001, at L3.

222. *See* GLORIA HOCHMAN ET AL., PEW COMM'N ON FOSTER CARE, VOICES FROM THE INSIDE, 5-6 (Feb. 2004).

223. *See id.* at 7.

224. *See Child Protection: Talk Is Way Too Cheap*, THE SEATTLE POST-INTELLIGENCER, Apr. 3, 2005, at D2 ("Current law lets many children slip through the cracks repeatedly before the state takes strong action.").

225. *See supra* notes 117-47 and accompanying text.

226. *See, e.g.*, NEB. REV STAT. § 43-292 (LexisNexis 2004) ("The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when . . . it appears by the evidence that one or more of the following conditions exist . . . parents have abandoned . . . neglected . . . neglected to provide the juvenile with the necessary subsistence, education, or other care.").

with Disabilities Act and substantive due process. Yet, in practice, neither of these have afforded disabled parents protection from the misuse of termination of parental rights or have successfully overturned a state statute. Although this does not preclude their effective use in the future, it does demonstrate the need to change the statutes and prevent discrimination, rather than force parents to attempt to remedy it on the back end.

The Americans with Disabilities Act prohibits public entities from discriminating on the basis of a disability,[227] and many of the parties involved in a termination of parental rights proceeding would be included under this umbrella: Child Protective Services, state and local courts, and state child welfare agencies.[228] It follows that the ADA should apply and that delayed parents who have had their rights terminated on basis of their delays should have a strong cause of action.

However, actions appealing a termination of parental rights under the ADA have not been successful. In *Bartell v. Lohiser*,[229] the court found that the ADA does not require a state to ignore a parent's disability in assessing her ability to raise her child[230] and that the defendants were immune from suit.[231] On appeal, the Court of Appeals for the Sixth Circuit affirmed the lower court's holding, finding that the state did not violate the mother's constitutional right to raise her child because the state's interest in the child was greater than the mother's.[232] In *Morrison v. Commissioner of Special Services*,[233] involving a mentally ill mother's claim that her rights had been unfairly terminated, the court laid out a four-part test to assess an alleged ADA violation.[234] The parent failed under the second prong of this test, requiring that the plaintiff be "otherwise qualified" for the benefit, because the court found that she was not qualified to be a parent.[235]

Another potential route to finding the termination statutes unconstitutional is under the Equal Protection Clause, using intellectual

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227. *See* 42 U.S.C. § 12131 (2005).

228. *See* Kerr, *supra* note 115, at 410.

229. 12 F. Supp. 2d 640 (E.D. Mich. 1998).

230. *Id.* at 650.

231. *Id.* at 645-46.

232. 215 F.3d 550, 558, 559 (6th Cir. 2000).

233. No. CV 94-5796, 1996 WL 684426, at *1 (E.D.N.Y. Nov. 18, 1996).

234. The plaintiff must show: "(1) that she has a disability, (2) that she is 'otherwise qualified' for the benefit . . . (3) that she was either excluded from participation . . . or was otherwise discriminated against . . . and (4) that such discrimination was by reason of plaintiff's disability." *Id.* at *4.

235. *Id.*

disability as a suspect class.[236] In a leading case, *City of Cleburne v. Cleburne Living Center*,[237] the United States Supreme Court found that it was a violation of equal protection to deny a permit to a residential center for people with mental retardation.[238] The court defined the clause as "a direction that all persons similarly situated should be treated alike"[239] and found that there was no rational basis[240] for requiring a special permit for the residence. Instead the requirement was used for the impermissible reason of discriminating against the mentally delayed.[241] Yet, despite this case's potential to provide support for cognitively delayed parents claiming discrimination and differential treatment under the termination statutes, equal protection claims have failed on the state level.

Although a circuit court found that Illinois' Adoption Act, defining as "unfit" a parent who cannot fulfill parental responsibilities due to retardation was unconstitutional under the Equal Protection Clause,[242] the Illinois Supreme Court overruled the decision in *In re R.C.*[243] The court found that parents with cognitive delays are not similarly situated to parents who do not have mental delays and so the Equal Protection Clause did not apply.[244] Similarly, an Ohio appeals court found that the state statute allowing for termination of parental rights on the basis of parental delays did not violate equal protection.[245] In New York, the Family Court did find that a cognitively delayed parent must be treated the same as other allegedly neglectful parents under an equal protection analysis, but did not go so far as to find the state's termination statute unconstitutional under equal protection.[246]

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236. Scholars have called disability a racial issue, raising the potential for this classification to be used in equal protection cases. *See, e.g.*, Ferri & Connor, *supra* note 14, at 74. However, it does not appear that this connection has been highlighted in the case law, though the implications are especially troubling in termination of parental rights cases because racial minorities are already over-represented in the child welfare sector. *See* Dorothy E. Roberts, *Racial Disproportionality in the U.S. Child Welfare System: Documentation, Research on Causes, and Promising Practices*, at 3 (Northwestern U. Sch. of Law, Inst. for Pol'y Research, Working Paper No. 4), *available at* http://www.aecf.org/tarc/priority/respect/working_paper_4.pdf.

237. 473 U.S. 432 (1985).

238. *Id.* at 432.

239. *Id.* at 439.

240. The Court did not find that the mentally retarded are a quasi-suspect class and so applied a rational basis test. *See id.* at 446-47.

241. *Id.* at 450.

242. 745 N.E.2d 1233, 1237 (Ill. 2001).

243. *Id.* at 1246.

244. *Id.* at 1245.

245. *See In re* Moore, No. CA99-09-153, 2000 WL 1252028, *7-8 (Ohio Ct. App. Sept. 5, 2000).

246. *See In re* W.W. Children, 736 N.Y.S.2d 567, 577 (N.Y. Fam. Ct. 2001).

VI. CONCLUSION

As the Supreme Court stated in *Penry v. Lynaugh*, intellectually disabled people are individuals.[247] Parents with mental delays comprise a diverse group with differing abilities, but many share the ability to be an effective, loving parent. Thus, each family must be analyzed individually to see what effects the mental disability is having on the children and whether the problems could be remedied by providing services instead of severing the parent-child relationship. The statutes that are most effective are those that look at mental delays as one of many factors in determining the best outcome for the family. Bright-line rules are not as necessary in family court as they are in other areas of law[248] because what makes a "good parent" is not clearly defined. Thus, decisions must be more attentive to the situation. Judges should be given the discretion within outlined guidelines to make a decision that is in the child's true best interests.

The statutes themselves need to evolve further to fit a modern understanding of mentally delayed parents and to effectively meet these statutes' stated goal of protecting children, either in their family of origin or with an adoptive or foster family. By eliminating the classifications of "mental deficiency" and "mental retardation" from their termination of parental rights statutes,[249] the states will be removing a provision that is discriminatory, based on out-moded thinking, and not protective of children. It is not in the best interests of the child, the parent, or the state to define unfitness with a characteristic that has no correlation to the ability to parent.

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247. Penry v. Lynaugh, 492 U.S. 302, 306 (1989).

248. One example is criminal law, where rules serve both to provide warning and to draw the necessary lines between right and wrong.

249. Previous articles have supported removing these classifications. *See, e.g.*, Watkins, *supra* note 203, at 1471.

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