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THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT TO THE TERMINATION OF THE PARENTAL RIGHTS OF INDIVIDUALS WITH MENTAL DISABILITIES

*Susan Kerr**

INTRODUCTION

Although *Buck v. Bell* continues to be “good” law, its premise is no longer practiced.¹ Gone are the days when the “mentally disabled” or mentally retarded were mandatorily sterilized as a condition of deinstitutionalization because it was believed “three generations of imbeciles [were] enough.”² However, the underlying belief that persons

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

2. *Id.*; As a condition of being released from the State Colony of Epileptics and Feeble Minded, Carrie Buck was to undergo a salpingectomy, a surgical operation performed by opening the abdominal cavity and cutting the fallopian tubes to sterilize an individual. This procedure intends to prohibit reproduction of those “defective” persons, who if discharged, would become a menace, but if incapable of procreating might be discharged with safety and become self-supporting. While this procedure is no longer a condition of deinstitutionalization, the holding of *Buck*, permitting the involuntary sterilization of allegedly feeble-minded or defective persons, has never been explicitly overturned.

In his decision, Justice Holmes opined that the statute in question success-

with mental disabilities should not reproduce and are inherently unable to provide proper parenting to their children survives today.

Although it is not an articulated policy, persons with mental disabilities consistently have their parental rights terminated and routinely lose their appeals. While terminations are often based on the fact that the parent is truly incapable of adequately caring for his children, the courts seldom apply the Americans with Disabilities Act (ADA)³ in determining parental rights. The ADA requires that public entities, such as the courts, the Department of Health and Human Services (HHS) and child protective services, make reasonable modifications to their rules, policies, and practices of the services they provide in accommodating persons with disabilities that utilize their services. The services provided by these entities include individual assessments and reunification programs designed to evaluate and assist persons in developing their parenting skills when their children are removed from their custody.

As a civil rights statute, Congress enacted the ADA to level the playing field and facilitate the transition of the disabled into mainstream society. It aims to remedy ingrained practices of isolating and segregating persons with disabilities. With proper implementation of the ADA, individuals with mental disabilities can acquire adequate parenting skills and will not automatically lose their parental rights. Part I of this paper traces the events leading up to the present day conundrum, a result of the de-institutionalization of the "mentally disabled" without accompanying and appropriate support services. Part II addresses the rights of persons with a mental disability to procreate and to parent, as well as the termination of those parental rights. Part III focuses on active discrimination in the termination process: the court's presumptive terminations based on the label "mentally dis-

fully balanced the interests of the disabled with society's interest in eradicating feeble-mindedness, stating, "It would be strange if [the state] could not call upon those who already sap the strength of the state for these lesser sacrifices . . . in order to prevent our being swamped with incompetence." *Id.* at 207. The statute was upheld and Carrie Buck was sterilized. *See id.* at 208. Given this decision, it is inexcusable that the unfounded, discriminatory stereotypes of the early 20th century remain pervasive at the dawn of the 21st century. *See* Jay Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

3. The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1990).

abled," and reunification services. This section expands on these terminations by exploring the applicability of the common law requirement of individual inquiry and the non-discrimination mandate of Title II of the ADA. Part IV reviews whether the ADA would be effective in altering the practice of preemptively terminating the parental rights of the "mentally disabled." Finally, Part V concludes that although the best interest of the child should be a factor for consideration, it should not be the sole determinative factor. There must also be focus on the adequacy of the individual's parenting abilities. At a minimum, the individual inquiry mandated by the Supreme Court in *Stanley v. Illinois*⁴ and the non-discrimination spirit of the ADA must be implemented to defeat the erroneous presumption that all mental disabilities are the same and that a person with a mental disability translates directly to an inability to adequately parent. The strengths of the ADA should be exercised to demand that child protective services (CPS) or the applicable state or local agency make reasonable modifications to their policies, practices and services, thereby providing "mentally disabled" parents with appropriate services to meet the parenting standards demanded by state statute.

I. THE ROAD TO AND THE RESULT OF DEINSTITUTIONALIZATION FOR PARENTS WITH MENTAL DISABILITIES

The segregation of persons with mental disabilities entertains a long history in the United States. Since early in this country's history, persons with mental disabilities were the responsibility of their family or friends.⁵ Occasionally, localities passed laws requiring towns to pro-

4. *Stanley v. Illinois*, 405 U.S. 645 (1972); *see also Santosky v. Kramer*, 455 U.S. 745 (1982) (holding termination of parental rights must adhere to due process demands).

5. The etiology of insanity was thought to be like that of any other disease, stemming from God's will. As such, the insane received some public attention and sympathy as those whose condition made them permanently dependent on their relatives or the community. However, little effort was made to look beyond the disease to the true nature of the affliction. It was believed that insane people were uncivilized and simply needed to be kept away from civilized society. This notion was accepted by the public without qualification. *See* DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 4, 109-13 (1990); *see also* RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS*

vide for the lunatics and the insane of the community.⁶ For example, a Massachusetts law established that "[w]hen and so often as it shall happen any person to be incapable to provide for him or herself," then the town, in the absence of relatives and personal property, must provide for his relief.⁷ However, in the absence of such a law, communities viewed and treated these individuals more as financial burdens than as ill individuals in need of medical treatment.⁸

Those individuals with mental disabilities who did not have familial support or legal provisions were often banished by their communities.⁹ During colonial times and through the latter half of the 18th century, "madd" persons were sometimes punished as criminals, restrained, or whipped.¹⁰ These individuals were provided no medical treatment because none existed.¹¹ Then, in 1752, at the behest of Benjamin Franklin, the Pennsylvania Assembly established the first hospital that would admit the poverty-stricken mentally ill.¹² Following Franklin's lead, the remaining decades of the 18th century witnessed the building of the first hospital exclusively for the "mentally disabled," as well as various state statutes providing for the institutionalization of the "mentally disabled."¹³ Finally, in 1842, New York enacted sweeping

637 (1999).

6. See ROTHMAN, *supra* note 5, at 4.

7. *Id.*

8. See *id.*

9. See REISNER, *supra* note 5, at 637.

10. See *id.*

11. See *id.*

12. *Id.*

13. For example, in 1773 the first hospital solely for the mentally ill was constructed in Williamsburg, Virginia. See ROTHMAN, *supra* note 5, at 81, 128-29; see also REISNER ET AL., *supra* note 5, at 637. Fifteen years later, the State of New York enacted legislation to lock up the "furiously mad." See *id.* By the 1820s, New York and Pennsylvania began a legislative movement that spread throughout the Northeast, and resulted in more institutions and more incarcerations. These institutions were not focused on healing, but on separating "offenders" from society. It took decades for mental illness to be seen not as result of God's will, but as a result of physiological and sociological factors. With this knowledge, reformers felt obligated to shift the burden to the community and to educate the public. See ROTHMAN, *supra* note 5, at 81, 128-29; see also REISNER ET AL., *supra* note 5, at 637. This enlightenment led to an increased desire to "commit" the mentally ill, to provide them with their own world in institutions that would "isolate them from the dangers loose in the

legislation targeting the "mentally disabled." Unlike previous legislation that was narrow in its coverage, this new legislation utilized less discriminatory methods. It required the confinement of *all* "lunatics."¹⁴ This continuous escalation of "commitment authority" arose from the increase of societal interdependency, governmental ubiquity, and improvements in the care of the "mentally disabled."¹⁵

From the "Packard era"¹⁶ of the 1860s through the 1970s, states en-

community." *Id.*

14. REISNER ET AL., *supra* note 5, at 637-38.

15. *See id.* In 1860, Ms. Packard was committed under a statute that read, "Married women and infants, who in the judgment of the superintendent are evidently insane or distracted, may be received and detained in the hospital at the request of the husband, or [the] guardian of the infants, without the evidence of insanity or distraction required in other cases." *Id.* at 638. Apparently, the primary evidence supporting Packard's commitment under this statute was provided by two doctors, one of whom stated she was rational but was a "religious bigot like Henry Ward Beecher and Horace Greeley," and the second of whom opined that her ideas were "novel." *Id.* After her release three years later, Packard campaigned against laws and practices which permitted hospitalization solely on the basis of a person's opinions with no attempt to gauge moral accountability. *See id.* Her efforts were aided by the publication of "muckraking" books describing pitiful hospital conditions. *See* REISNER ET AL., *supra* note 5, at 638. By the 1890s, many states adopted statutes which required a jury determination of the commitment issue, authorized the presence of counsel at the hearing, and criminally penalized anyone who knowingly sought the illegal commitment of another.

The period from 1860 through the 1890s became known as the "Packard era." It was represented by a movement toward legalizing the commitment process by introducing juries into the process. However, this juristic influence was short lived. By 1971, thirty-one states provided for commitment based solely on the certification of one or more physicians that the individual suffered from mental illness and needed treatment. *See id.*

16. Before 1810, only a few eastern states had private institutions to care for the mentally ill, and only Virginia had a public asylum. But by the 1830s New York, Massachusetts, Vermont, Ohio, Tennessee and Georgia had constructed asylums. *See* ROTHMAN, *supra* note 5, at 130-31; *see also* REISNER ET AL., *supra* note 5, at 637-38. By 1850, almost every northeastern and mid-western legislature supported an asylum. *See* ROTHMAN, *supra* note 5, at 130-31. By 1860, twenty-eight of the thirty-three states had public institutions for the insane. *See id.* By the closing decades of the 19th century the commitment movement was well established. *See id.* This movement was not a product of desperate, frightened communities, but rather it was based on the notion that insanity could be cured if the individual were in the right environment. *See id.*

acted laws aimed at facilitating commitment. These laws were often quite successful. A well-developed culture of paternalism and fear upheld the traditions of segregating and isolating persons with disabilities. At that time, a lack of understanding about the nature of mental disabilities, the needs of the disabled, and effective treatments for disabilities permeated through society. In response, the government provided limited monetary assistance to the disabled, namely worker's compensation and Social Security disability insurance, to allow the disabled to exist, while relegating them to the outer fringes of mainstream society.

During the second half of the 20th century, minds opened and attitudes slowly changed. This shift fostered the realization that all people have worth and potential, including the institutionalized and people with disabilities, who many believed would only demonstrate their worth and potential by being included in everyday activities of mainstream society. Two significant factors signified this trend. First, in the 1960s the tentacles of the civil rights movement reached far and wide to embrace the disabled, providing an impetus for the deinstitutionalization of those with mental disabilities. Subsequently, the 1970s ushered in an increase in the recognition of the legal rights of minorities, witnessing specific achievements for children and adults with mental disabilities in both education and services.¹⁷ Other significant factors contributing to the receding of paternalistic isolation and segregation during this time included the advent of inexpensive psychotropic medication, which offered quick and successful treatment to large numbers of persons, and the passage of the Community Mental Health Centers Act, which provided funding for outpatient treatment centers.¹⁸ Following these advancements, the 1970s and 1980s exposed many loopholes and gaps in disability rights and legislation. After much research, debate, and consideration, President George Bush signed the most comprehensive and complete law concerning Americans with disabilities in 1990: the ADA.

Despite ubiquitous disability legislation and the transition to community-based facilities and outpatient treatment, the revolving door of the mental health hospital continues to spin. With the strangling con-

17. See The Rehabilitation Act, 29 U.S.C. §§ 706, 791-95 (1973); Education for All Handicapped Children Act (IDEA), 20 U.S.C. §1400 *et seq.* (1975).

18. See REISNER ET AL., *supra* note 5, at 642.

straints of managed care, subpar insurance coverage and access, inadequate and insufficient aftercare programs for discharged patients are sadly the standard. Without continued care, many individuals spend a lifetime in the revolving door. Thus, those with mental disabilities often receive effective cursory care, but no quality long-term maintenance programs or skills training.

The trend toward de-institutionalization, coupled with the abandonment of the premise of *Bell*, at least in practice, yielded a significant increase in persons with mental disabilities parenting children.¹⁹ This increase has met with a paralleled increase in the termination of the parental rights of those individuals labeled "mentally disabled."²⁰ This action and reaction pushes the issue of the parental rights of persons with mental disabilities back under the microscope, the likes of which have not been seen since the Supreme Court's review of *Bell* almost seventy-five years ago.

II. THE RIGHTS OF INDIVIDUALS WITH MENTAL DISABILITIES TO PROCREATE AND TO PARENT AND THE TERMINATION OF THOSE PARENTAL RIGHTS

As the "mentally disabled" acclimate themselves to mainstream modern society, the desire for the same attributes which most "normal" humans wish for grows. They want independence to choose where they live, work, earn a living, to engage in relationships both social and romantic, and to have children.²¹ While society has lowered and eliminated some of the fortifications to these achievements, it has strengthened or complicated others.²² The domain of parental rights is one notable example of the latter.

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

20. See *id.*

21. See *id.*

22. See *id.* See generally JAY MATTHEWS, *A MOTHER'S TOUCH: THE TIFFANY CALLO STORY* (1992). In *A MOTHER'S TOUCH*, the question of whether it is fair and legal for a society to tell some of its members that they cannot look forward to raising children because they are disabled, is posed and explored through the poignant story of one mother. See *id.*

A. The Right of Individuals with Mental Disabilities to Procreate

All too frequently lawyers, judges, social workers, and psychologists, equate "mentally disabled" with the inability to adequately parent, thus terminating rights unjustly. Because there have been few attempts by government to limit procreation by individuals with or without mental disabilities, almost no guidance exists concerning the right to procreate.²³ Yet on several occasions, the Supreme Court indicates strong support for a married couple's right to procreate,²⁴ with lower court judges referring to such a right in dicta.²⁵ Although these cases did not involve a state's attempt to prevent married couples from procreating, they suggest that if confronted with a direct limitation on a married couple's desire to reproduce by sexual intercourse, the Court would explicitly recognize such a right.²⁶ A series of cases allude to this unwritten right to procreate, recognizing a potential right that would equally extend to persons with mental disabilities.²⁷ Given the dismissive attitude toward *Bell* and the increasingly progressive attitude regarding the "mentally disabled", proving a compelling government interest would be extremely difficult for state legislation.

In *Skinner v. Oklahoma*,²⁸ the Court struck down a mandatory sterilization law for thieves, but not embezzlers.²⁹ The Court resolved the issue on equal protection grounds, stressing the importance of marriage and procreation as among "the basic civil rights of man."³⁰ In reaching this conclusion, the Court noted that "marriage and procreation are fundamental to the very existence and survival of the race."³¹

23. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 35 (1994).

24. See JOHN A. ROBERTSON, 62 FERTILITY & STERILITY 3S (1994).

25. See ROBERTSON, *supra* note 23, at 35.

26. See ROBERTSON, *supra* note 24, at 3S.

27. If the Supreme Court was to specifically announce a right to procreate it would undoubtedly fall under the Fourteenth Amendment, requiring a compelling governmental interest to limit the right of the "mentally disabled" to bear and beget children. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (suggesting that the standard for restricting coital reproduction, even for "mentally disabled" persons, would be one of strict constitutional scrutiny).

28. See *id.*

29. See *id.*

30. *Id.*

31. *Id.*

Such statements suggest that laws restricting coital reproduction must pass strict constitutional scrutiny by articulating a compelling state interest that could not be met in any other manner.³²

The sentiment eschewing the value of procreation and parenting finds support in other Supreme Court decisions as well. In *Meyer v. Nebraska*,³³ the Court affirmed the right of parents to permit their children to learn a foreign language in school, stating that constitutional liberty encompassed "the right of an individual to marry, establish a home and bring up children."³⁴ In *Stanley*, the Court resolved questions surrounding an unmarried father's right to rear his child, in favor of the father, finding that "the rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man', and 'rights far more precious than property rights'.³⁵ When a pregnant teacher wished to continue teaching, the Court in *Cleveland Board of Education v. LaFleur*³⁶ supported her decision, holding that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment."³⁷ Furthermore, John Robertson suggests that *Eisenstadt v. Baird* provided the most "ringing endorsement" of the right to procreate, extending the right to obtain contraceptives to unmarried persons.³⁸ This ringing endorsement emanated from Justice Brennan when he penned, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."³⁹ More recently, Justice O'Connor, in *Casey v. Planned Parenthood*, wrote,

Our law affords constitutional protection to personal decisions relating to marriage, *procreation*, contraception, family relationships, childrearing and education. [T]hese matters, involving the most intimate and personal choices a *person* may make in a lifetime, choices central to personal dignity and autonomy, are central to

32. See ROBERTSON, *supra* note 23, at 36.

33. 262 U.S. 390 (1923).

34. *Id.* at 399.

35. *Stanley*, 405 U.S. at 651.

36. 414 U.S. 632 (1973).

37. *Id.* at 639-40.

38. See 405 U.S. 438, 453 (1972); ROBERTSON, *supra* note 23, at 36.

39. 405 U.S. at 453.

the liberty protected by the Fourteenth Amendment.⁴⁰

Although dicta, these strong statements appear to include individuals with mental disabilities among those to whom "our law affords constitutional protection."

Such statements suggest that a married couple's right to procreate is recognized even by conservative justices because coital reproduction is traditionally recognized as one of the main functions of marriage and family.⁴¹ The holding's singular language suggests that this liberty interest would apply to all persons: "mentally disabled," physically disabled, and married and unmarried alike. Although most of the Supreme Court dicta cited above pertains to married couples, a strong argument can parlay this right to all persons, specifically persons with mental disabilities.⁴² Individuals with mental disabilities may have the same or similar needs and desires to have and rear biological descendants as do married persons.⁴³ They may also be excellent childrears and supportive parents. To ban procreation by persons with mental disabilities seems inconsistent given that these persons cannot be forced to use contraception, abort, or relinquish an illegitimate child, unless other extenuating circumstances exist.⁴⁴

Most recently, in *Davis v. Davis*, the Tennessee Supreme Court announced that "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation."⁴⁵ In *Davis*, the court attempted to balance the desire of Mary Sue Davis to either use the cryopreserved pre-embryos of her and her

40. 505 U.S. 833, 851 (1992) (emphasis added); see also ROBERTSON, *supra* note 23, at 37, n.46. Additionally, it is often thought that the government takes a very passive role in child rearing. See *Wisconsin v. Yoder*, 405 U.S. 205 (1972) (permitting Amish families to home school their children because of their religious belief). However, other cases demonstrate the contrary position. See e.g., *Curtis v. School Committee of Falmouth*, 625 N.E.2d 580 (Mass. 1995) (holding condom availability in public schools does not infringe on a parent's right to familial privacy, parental liberty or the free exercise of religion); *Hodgson v. Minnesota*, 497 U.S. 344 (1990) (upholding parental notification requirement for minors seeking an abortion).

41. See generally *Casey*, 505 U.S. 833.

42. See ROBERTSON, *supra* note 24, at 4S; *Eisenstadt*, 405 U.S. at 453; *Carey v. Population Services*, 431 U.S. 678 (1977).

43. See ROBERTSON, *supra* note 24, at 4S.

44. See *id.*

45. 842 S.W.2d 598, 601 (1992).

then husband to procreate, or to donate them for others to use to procreate, against Junior Davis' right to avoid any such procreation.⁴⁶ The court acknowledged that the scale tipped in favor of the woman's right to procreate quoting *Planned Parenthood v. Danforth* which said, "[i]n as much as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."⁴⁷

Ultimately, the court found in favor of Junior Davis' right not to procreate because Mary Sue Davis wished to donate the pre-embryos to another couple as opposed to having them implanted in her uterus.⁴⁸ Despite this ultimate outcome, the court believed "the case would be closer if Mary Sue Davis were seeking to use the pre-embryos herself, but only if she could not achieve parenthood by any other means."⁴⁹ This statement provides strong evidence that if directly challenged, courts may recognize a right to procreate for *all* women alike, suggesting that under certain circumstances the right to procreate might outweigh the right to avoid procreation.

Despite this seemingly rational argument, it remains unclear how the Supreme Court would resolve a challenge to an unmarried person, or an unmarried disabled person's right to procreate. The right to procure contraceptives and continue a pregnancy does not necessarily implicate a single person's right to conceive.⁵⁰ This is notable because all actions that may lead to procreation are not protected by a constitutional right. For example, the Court has never acknowledged a right to engage in fornication, adultery, rape or incest, even though such activity could lead to procreation.⁵¹ Moreover, the Court might be extremely reluctant to strike down fornication laws on the ground that they interfere with non-marital procreation, much less recognize the right to engage in adulterous, polygamous, or incestuous sex.⁵² Similarly, they certainly would not strike down rape statutes as an infringement on procreative liberty.⁵³ However, the dicta in *Davis*, coupled with the fact that more than thirty-one percent of births in 1993

46. *See id.*

47. *Id.*

48. *See id.*

49. *Id.* at 604.

50. *See Davis*, 842 S.W.2d at 604.

51. *See ROBERTSON, supra* note 23 at 38.

52. *See id.*

53. *See id.*

occurred out of wedlock, could influence the Court in effectuating laws prohibiting non-marital sex or penalizing procreation by persons with mental disabilities.⁵⁴

B. The Right of Individuals with Mental Disabilities to Parent

Whether the courts specifically articulate a right to reproduce does not affect the parental rights that vest once a child is born.⁵⁵ The freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.⁵⁶ "It is cardinal that the custody, care and nurture of a child reside first in the parents."⁵⁷ The right to parent and exercise control over the upbringing of one's child emanates from many of the same cases used to argue for a right to reproduce.⁵⁸

As early as 1923, the Court in *Meyer* defined parental rights as a constitutional liberty encompassing "the right of an individual to . . . bring up children."⁵⁹ However, parental rights differ from the right to procreate in that they are not absolute – they have long been balanced against the best interest of the child.⁶⁰ The courts may say little about

54. See *id.*; Robert J. Samuelson, *The Politics of Ignorance*, NEWSWEEK, Dec. 18, 1995, at 45.

55. Under English common law a father possessed ultimate parental rights. His rights encompassed the custody, labor and service of his children, as if the children were his property. In the United States, this doctrine metamorphosed over the years to afford both mother and father parental rights and to consider the interest of the child. See Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975 (1988).

56. See *Santosky*, 455 U.S. at 752; see also *Stanley*, 405 U.S. at 651-52; see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); see *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); see *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); see *LaFleur*, 414 U.S. at 639-40 (1974); see *Meyer*, 262 U.S. at 399.

57. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *In re Sego*, 82 Wash. 2d 736 (1973) (stating that permanent deprivation of parental rights should only be allowed for the most powerful reasons).

58. See *infra* Part III(A).

59. *Meyer*, 262 U.S. at 399 (affirming a parent's right to have their child learn a foreign language).

60. See *id.*; *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1939) (holding that the "right of parental control is a natural, but not inalienable one."); *Shaw v. Shelby County Dep't of Pub. Welfare*, 584 N.E.2d 595 (1992) ("parental inter-

the right to conceive a child, however once the child is born, via the legal doctrine of *parens patriae*,⁶¹ the state assumes an overriding interest in protecting the health, safety, and welfare of its children to where it may regulate the parent-child relationship.⁶²

This tension between parental rights and the state's interest in protecting children is amplified in the area of termination of parental rights.⁶³ For example, a state may completely terminate parents' rights without their consent if the parent fails to adequately care for his child and the court accedes to due process demands.⁶⁴ The burden on the state is to prove by clear and convincing evidence the unfitness of the parent, while remaining mindful that the parents' "fundamental liberty

ests are not absolute and must be subordinated to the child's interest in determining the appropriate disposition of a petition to terminate parental rights.").

61. BLACK'S LAW DICTIONARY 1114 (6th ed. 1991). *Parens patriae* literally means "parent of the country" and is used to describe a state acting as a guardian for persons with legal disabilities such as children and incompetents. Under *parens patriae*, the state's goal is to provide children with permanent homes and therefore the state's interest favors preservation not dismantling of natural familial bonds. See Soc. Serv. Law § 384-b.1.(a)(i-ii).

62. See e.g., *Yoder*, 406 U.S. at 205 (holding compulsory school attendance statute facially valid except as applied to Amish); *Meyer*, 262 U.S. at 399 (affirming the right of parents to allow their children to learn a foreign language because constitutional liberty encompasses "the right of any individual to bring up children.").

63. See *Watkins*, *supra* note 19, at 1432.

64. Tina, John III, Jed, Jeremy, and James Santosky are the biological children of John and Annie Santosky. See *Santosky*, 455 U.S. at 751. In November, Tina was removed from her home by Mr. Kramer, the commissioner of the Ulster County Department of Social Services, on the basis of parental neglect. See *id.* Ten months later, John III was also removed. See *id.* Jed was born on the day of John III's removal, and three days later was taken from his parents to avoid imminent danger to his life or health. See *id.* In the years following these removals, Jeremy and James were born but never removed from their parent's care. See *id.* at 752, n.5.

John and Annie Santosky challenged the preponderance of the evidence standard. See *Santosky*, 455 U.S. at 752. In addressing the issue, the Supreme Court held that parental rights are fundamental rights subject to due process, and that "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753; *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 37 (1981) (Blackmun J., dissenting) (stating "state intervention to terminate the relationship between [a parent] and [a] child must be accomplished by procedures meeting the requisites of the Due Process Clause").

interest in the care, custody, and management of their child is protected by the 14th Amendment and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.”⁶⁵ While *Santosky* clarified that parental interest in the care and management of their child is a fundamental liberty interest, the state must implement fundamentally fair procedures in the termination process. In applying the tripartite balancing test, the state must support any allegation arising in the process with clear and convincing evidence. The tripartite test requires the balancing of three distinct factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the states chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.⁶⁶

However, *Santosky* did not provide guidance as to the substantive aspects of parental rights termination. Each state may uniquely define “unfit parent,” with the only stipulation being that no state can establish unfitness based solely on an ascribed status such as marital status or race.⁶⁷ Assuming *in arguendo*, that persons with mental disabilities, like all other citizens, have the right to parent, courts must enforce this proclamation with respect to parents with mental disabilities to defeat the unarticulated, but practiced presumption, that “mentally disabled” is synonymous with the inability to adequately parent. Procedure by presumption is always cheaper and easier than individual inquiry, however, when the procedure forecloses the determinative issues of competence and care and explicitly disdains present realities in deference to past formalities, it needlessly risks “running roughshod over the important interests of both parent and child.”⁶⁸ Having de-

65. *Santosky*, 455 U.S. at 752-54, 769.

66. See *Mathews v. Eldridge*, 424 US 319, 335 (1976); see also *Lassiter*, 452 U.S. at 27-31, 37-48 (affirming the use of the tripartite test articulated in *Mathews v. Eldridge*).

67. This stipulation can easily be extrapolated to include “mentally disabled” as an ascribed status. See *Stanley*, 405 U.S. at 658 (requiring states to prove parental unfitness through “individual inquiry” in overturning a lower courts decision to terminate an unwed father’s parental rights simply because he was not married); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reaffirming *Stanley* by declaring it unconstitutional to change the custody of a child based solely on the fact that the custodial white mother was cohabiting with a black male).

68. *Stanley*, 405 U.S. at 658.

tailed the procedural *sine qua non* the state courts must follow, the next section tackles the substantive aspect of parental unfitness and states actions to impeding parental rights.

*C. The Termination of Parental Rights of
Individuals with Mental Disabilities*

1. Termination Requirements

The *Santosky* Court acknowledged that "permanent neglect proceedings [parental rights termination proceedings] employ imprecise standards that leave the determination unusually open to the subjective values of the judge."⁶⁹ As a consequence, the Court bestowed complete discretion upon state statutes to describe the requirements for the termination of parental rights and to outline the orchestration of the termination procedure. From this discretion, some states exercise a multi-statute scheme providing for intervention and termination within one statute.⁷⁰ However, whether by a single or multiple statutes, termination of parental rights is generally predicated on the parental "unfitness" standard. Some states, such as Illinois, detail eighteen factors to consider in determining unfitness, any one of which is sufficient to terminate parental rights,⁷¹ while other states provide broader parameters for the courts by not attempting to define unfitness.⁷² Despite the spectrum, almost every statute routinely includes mental or psychiatric disability and developmental disability – under various pseudonyms – as factors for courts to consider.⁷³

Whether specifically articulated or not, courts regularly sweep a label of "mental deficiency" under the "unfitness" or "incapacitated"

69. *Santosky*, 455 U.S. at 762.

70. See e.g., CAL. FAM. CODE §§ 7800-7895 (West 1994 & Supp. 1995); CAL. WELF. & INST. CODE §§ 300-395 (West 1994 & Supp. 1995); S.C. CODE ANN. §§ 20-7-1572 (Law. Co-op. 1976 & Supp. 1994).

71. 750 ILL. COMP. STAT. ANN. § 50/1 D (Smith-Hurd Supp. 1995) (specifically citing mental impairment, mental illness or mental retardation).

72. See e.g., IND. CODE § 31-6-5-4(c) (1995); IOWA CODE § 232.116 (1)(e) (1987 Cum. Supp.); MINN. STAT. § 260.221(b) (1986); 23 PA. CONS. STAT. ANN. § 2511 (a)(5) (Supp. 1995).

73. See e.g., IND. CODE § 31-6-5-4(c)(1995); IOWA CODE § 232.116(1)(e) (1987 Cum. Supp.); MINN. STAT. § 260.221(b) (1986); 23 PA. CONS. STAT. ANN. § 2511(a)(5) (Supp. 1995); see also *Watkins*, *supra* note 19, at 1435.

umbrella when determining termination of parental rights.⁷⁴ All too often there appears a presumption that "mentally disabled" means an inability to adequately parent, without proving a nexus between the disability and its manifestations, or an individualized inquiry.

2. The Termination Process

In many cases, the parental rights termination process is initiated by an anonymous neighbor, physician, or teacher who reports suspected abuse.⁷⁵ However, those with mental disabilities often have regular contact with various governmental professionals who are familiar with child protection services. In this situation, it is most often from these professionals that a report resonates. When a report stems from such a source, there is a high probability of intervention, great weight given to the validity of the report, and discretion given to the "mentally disabled" or perceived "mentally disabled" parents.⁷⁶ After an investigation, if immediate termination of parental rights is neither adjudicated nor are the charges dismissed, a child may be temporarily removed from his parents' home.

Throughout the removal period, there are usually a series of hearings to determine the status and ultimate resolution of the situation.⁷⁷ During this period of removal, most statutes require the state to formulate and implement a family reunification plan. Reunification plans most often implemented include drug or alcohol treatment, parenting classes and other skills training. To supersede this reunification requirement, the state must provide sufficient evidence that reunification is not, and never will be, in the best interest of the child.⁷⁸

At any step in the process, societal prejudices, myths, and misconceptions may rear their heads, thus terminating the parental right of parents with mental disabilities. In most instances, during the period of removal, the court meets every six months to weigh whether the parents should regain custody of the child, or whether the situation

74. See *In re Elijah R.*, 620 A.2d 282 (Me. 1993); *In re K.F.*, 437 N.W.2d 559 (Iowa 1989); *R. G. v. Marion County Office, Dep't of Family & Children*, 647 N.E.2d 326 (Ind. Ct. App. 1995).

75. See *Watkins*, *supra* note 19, at 1435.

76. See *id.* at 1436.

77. See generally *Watkins*, *supra* note 19 (detailing the termination requirements and process); *Santosky*, 455 U.S. at 745 (describing the termination process).

78. See generally *Watkins*, *supra* note 19. *Santosky*, 455 U.S. at 745.

should be maintained.⁷⁹ If a preponderance of the evidence establishes that a child can be safely returned to his parents, reunification will occur.⁸⁰ If it is determined that the parents are making progress and reunification is possible in the future, removal and reunification plans will be maintained. If it is determined that it is not possible for the parents to regain custody of the child, a foster placement will be extended, parental rights terminated, and the child made eligible for adoption.

III. FOCAL POINTS OF DISCRIMINATION IN THE TERMINATION OF THE RIGHTS OF INDIVIDUALS WITH MENTAL DISABILITIES

Discrimination can occur at any point in the parental rights termination process. This discrimination is evident in two distinct focal points. First, statutes which permit mental disability as a factor, but not the only factor for terminating parental rights, and statutes that require a nexus between mental disability and inadequate parenting ability are interpreted such that the mere label of mental disability constitutes grounds for parental rights termination. Thus, parental rights can terminate on the single presumption that mental disability translates to an inability to parent. As a result, there is often no individual inquiry or individual assessment conducted to determine the person ability to parent. Second, the label of being "mentally disabled" may preclude an individual from receiving appropriately modified reunification services or from receiving any services at all.

A. Discrimination by Presumption: Mental Disability Translates Directly to Inability to Adequately Parent

While great strides have occurred in assimilating many disabled persons into mainstream society, long held prejudices do not fade quickly. Courts continue to perceive a parental relationship involving a person with a mental disability as less than normal.⁸¹ The presump-

79. *See id.*

80. Of note is that the preponderance of the evidence standard is different than the clear and convincing evidence standard requirement used to terminate parental rights.

81. *See In re Marriage of Carney*, 598 P.2d 36, 37 (Cal. 1979). William and Ellen Carney were married in 1968 and separated in 1973. *See id.* At that time, Ellen relinquished custody of their two sons to William. *See id.* William and his boys moved to California where William met and began living with a

tion that all persons with mental disabilities are similar and unable to be fit parents remains pervasive.⁸²

Persons sharing the label of "mentally disabled" often share no common symptomology.⁸³ This broad label of "mentally disabled" covers developmental difficulties such as mental retardation, manic depression and schizophrenia. These persons can exhibit a spectrum of perceptual and communicative deficits, but the extent and nature of these deficits are individually endemic.⁸⁴ Additionally, illness and intelligence do not remain static.⁸⁵ Some "mentally disabled" persons can be cured, while others maintain their disability with medication or therapy.⁸⁶ Moreover, those specifically labeled "mentally retarded" or "mentally disabled" can increase their memory and comprehensive ca-

female named Lori. *See id.* One year later, William and Lori had a daughter and Lori raised all the children as her own. *See id.*

An accident in 1976 left William a quadriplegic. *See Carney*, 598 P.2d at 37. During his rehabilitation and recovery William's children visited him several times a week and William came home in a modified van which enabled him to drive. *See id.* In 1977, William filed for divorce from Ellen. *See id.* at 38. Ellen in return filed for full custody despite the undisputed fact that Ellen had not visited her sons nor contributed to their support during the previous five years. *See id.* The court awarded custody to Ellen finding that because William was not able to play sports with his sons or take them fishing, William's custody "wouldn't be a normal relationship between father and boys." *Id.* at 41.

The decision was eventually overturned but illustrates how disabled parents are presumptively labeled unable to parent. *See Carney*, 598 P.2d at 42 (declaring that, "if a person has a physical handicap it is impermissible for the court to simply rely on the condition of *prima facie* evidence of the person's unfitness as a parent or of probable detriment to the child."); *In re B.W.*, 629 P.2d 742, 743 (Colo. Ct. App. 1981) ("the removal of a child from the legal custody of a parent who suffers from a handicap cannot be presumed to be in the best interest of the child based on the fact of the handicap alone."); *See generally* Michael Ashley Stein, *Book Review: Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals With Disabilities*, 60 BROOK. L. REV. 1069 (1994).

82. *See generally supra* note 81 and accompanying text.

83. *See Watkins, supra* note 19, at 1423. What they do share, however, is a stigmatizing label and the diminished expectations that accompany that label. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

pabilities – in essence they can learn how to learn – contrary to many erroneously held prejudices.⁸⁷

Although some courts acknowledge “mentally disabled” persons 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,”⁸⁸ traditional myths and stereotypes perpetuate the judicial presumption of unfitness.⁸⁹ This presumption of unfitness is not reserved only for parents with mental disabilities. In *Carney v. Carney*, the court found a parent with a physical disability unable to “do anything for [his] boys . . . except maybe talk to them and teach them, [and] be a tutor, which is good but not good enough.”⁹⁰ On appeal, the California Supreme Court reprimanded the superior court for “stereotyp[ing] William as a person deemed forever unable to be a good parent simply because he was physically handicapped.”⁹¹ Similarly, this rationale from *Carney* emanates into other perceived disabilities as well. In other instances, parents who are deaf are viewed as incapable of effectively stimulating language skills,⁹² while parents who are blind are thought to be unable to provide their children necessary attention or discipline.⁹³ And, as in *Carney*, courts routinely find parents with spinal cord injuries and other physical impairments unequipped to adequately supervise their children.⁹⁴ The holdings in these cases, against the interests of the parents, evidence the fact that the presump-

87. It is important for a judge to be able to assess a disabled person's non-obvious strengths, and to reinforce these strengths to serve both the parent, child, and states' interests in preserving familial bonds. *See Watkins, supra* note 19, at 1423; *Stone v. Daviess County Div. of Children and Family Serv.*, 656 N.E.2d 824 (Ind. 1995) (reporting that expert testimony has established that there is no correlation between a low I.Q. and the ability to parent); *see also* EDWARD ZIGLER & ROBERT M. HODAPP, UNDERSTANDING MENTAL RETARDATION 86-88 (1986).

88. *City of Cleburn v. Cleburn Living Ctr.*, 473 U.S. 432, 442 (1985).

89. ABRAHAM MASLOW & BETA 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).

90. *Carney*, 598 P.2d at 40.

91. *Id.* at 42.

92. *Christensen v. L.A. County Bureau of Adoptions*, 59 Cal. Rptr. 323, 327-28 (1967).

93. *See In re B.W.*, 626 P.2d at 743.

94. *See Carney*, 598 P.2d at 39-41.

tion of unfitness is shallow, discriminatory, and inaccurate.

1. The Laws Prohibiting Discrimination by Presumption: The Supreme Court, Professor Laura Rothstein and the Model Marriage and Divorce Act All Concur

It is impermissible and discriminatory for courts to presume unfitness and terminate parental rights solely on the basis of the attributed label "disabled," according to the Supreme Court, scholars, statutes, and commentators. First, the Supreme Court explicitly requires that states prove unfitness through individual inquiry and not by presumptions based solely on ascribed status.⁹⁵ Any proof of unfitness must be achieved by clear and convincing evidence because the ultimate termination of the fundamental right to parent is irrevocable.⁹⁶ Second, Professor Laura Rothstein, a preeminent disabilities scholar, argues that "in all cases . . . the standard should be to determine the best interest of the child, with the handicap of the parents being only a factor for consideration, rather than as establishing any kind of presumption of unfitness."⁹⁷ A similar standard to Professor Rothstein's is announced in the Uniform Marriage and Divorce Act, a standard adopted in eight states.⁹⁸ Section 402 of the Uniform Marriage and Divorce Act provides that the following factors be balanced in determining custody decisions:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community;
- (5) the mental and physical health of all individuals involved.⁹⁹

95. See *Stanley*, 405 U.S. at 658 (holding a state must prove unfitness through individual inquiry rather than through presumptions based on ascribed status); *Sidoti*, 466 U.S. at 429.

96. See *Santosky*, 455 U.S. at 747.

97. LAURA ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* 186 (1984).

98. Unif. Marriage & Divorce Act § 402, 9A U.L.A. 561 (1992). The eight states that have adopted the Act are: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington.

99. *Id.*

Finally, commentator Michael Stein suggests a qualification to the Rothstein/Model Act standard. "When courts weigh 'the handicap of parents' as a 'factor for consideration,' they must appreciate that certain parental tasks performed by . . . disabled [individuals] in ways different from those mainstream society considers 'normal,' may nevertheless constitute an equally valid performance of those tasks."¹⁰⁰

2. *The ADA and Its Application*

Another powerful argument prohibiting termination of parental rights based solely on an individual's disability stems from the Americans with Disabilities Act,¹⁰¹ a statute seldom exercised in the context of parental rights termination.

Public policy concerning disabilities arose in the early part of the 20th century with income-maintenance programs such as workers' compensation, vocational rehabilitation programs, and Social Security Disability Insurance (SSDI).¹⁰² Despite these efforts, the predominant attitude toward Americans with disabilities during most of the 20th century remained one of paternalism, an attitude manifested in separatism.¹⁰³ Not until the 1960s, spurred by *Brown v. Board of Education*,¹⁰⁴ did a shift occur away from separation of certain groups toward recognition of the worth and potential of all persons.¹⁰⁵

During the ensuing three decades, great strides occurred with respect to individuals with disabilities in the area of education. Two lower court decisions, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*¹⁰⁶ and *Mills v. Board of Education*¹⁰⁷

100. Stein, *supra* note 78, at 1052.

101. See 42 U.S.C. § 12101 *et seq.*

102. See LAURA ROTHSTEIN, *DISABILITY LAW* 6 (1995); see generally EDWARD D. BERKOWITZ, *DISABLED POLICY* (1987).

103. See ROTHSTEIN, *supra* note 102, at 6.

104. 347 U.S. 438 (1954) (declaring that segregation on the basis of race was inherently unequal).

105. See ROTHSTEIN, *supra* note 102, at 6-7.

106. 334 F. Supp 1257 (E.D. Pa 1971), *reh'g*. 343 F. Supp 279 (E.D. Pa 1972) (where plaintiffs proffered the decision in *Brown v. Board of Education*, and Fifth and Fourteenth Amendment Due Process and Equal Protection arguments to prevent the Pennsylvania school system from continuing to exclude and treat children with disabilities differently).

107. 348 F. Supp 886 (D.D.C. 1972) (approving detailed procedural safeguards to ensure that the substantive rights of children with disabilities, to be treated similarly and equally, were enforced).

proved the catalyst for the passage of the Education for All Handicapped Children Act¹⁰⁸ in 1975, an Act known today as the Individuals with Disabilities Education Act (IDEA). Together, these laws provided that all children with disabilities be educated under an individualized program, in the least restrictive environment, at no cost. At roughly the same time, in 1973, Congress passed the Rehabilitation Act,¹⁰⁹ an offspring of earlier vocational rehabilitation policy. It provided that the federal government, federal contractors, and recipients of federal financial assistance could not discriminate on the basis of a handicap against an otherwise qualified individual.¹¹⁰ Thus by 1973, nondiscrimination policies existed in public education and other areas where the federal government claimed jurisdiction. Additionally, a disconnected, non-comprehensive array of state statutes and common law provided limited protection for individuals with disabilities.¹¹¹

However, these non-discrimination laws were embraced slowly, leaving the largest portion of society, the private sector, without mandate. Not until almost two decades after the enactment of the Rehabilitation Act did Congress pass the ADA to provide blanket protection for otherwise qualified individuals with disabilities.¹¹² As its premise, the ADA prohibits discrimination based on a disability in public and private employment (Title I), public services offered by state and local governments (Title II), and public accommodations provided by private entities (Title III).¹¹³

Initially, Congress perceived discrimination against the disabled to be most often the product not of invidious animus, but rather of thoughtlessness, indifference, and of benign neglect.¹¹⁴ In reaction, Representative Vanik described the treatment of the handicapped as one of the country's "shameful oversights" which caused the handi-

108. Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.* (1975).

109. *See* 29 U.S.C. §§ 791, 793, 794 (1973).

110. *See id.*

111. The Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1968); The Federal Highway Act, 23 U.S.C. § 142 (1972); The Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081; The Air Carrier Access Act, 49 U.S.C. § 1374 (1986); and The Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1988).

112. 42 U.S.C. § 12101 *et seq.*

113. *See id.*

114. *See Alexander v. Choate*, 469 U.S. 287 (1985).

capped to live among society "shunted aside, hidden, and ignored."¹¹⁵ Thus, in passing the ADA, Congress acknowledged that approximately forty-three million Americans have one or more physical or mental disabilities and that historically, society tended to isolate and segregate these individuals without providing ample legal recourse.¹¹⁶ Because of this perceived isolation, two of the primary purposes of the ADA are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,¹¹⁷ and to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and the Commerce Clause, in order to address the major areas of discrimination faced by people with disabilities.¹¹⁸

3. Application of the ADA to the Termination of Parental Rights Process

Title II of the ADA prohibits discrimination on the basis of a disability by public entities.¹¹⁹ For purposes of the Act a public entity is: (1) any state or local government; (2) any department, agency, special purpose district, or other instrumentality of a state or states or local government; or (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).¹²⁰ The regulations addressing the implementation of Title II state that Title II applies to "all services, programs, and ac-

115. *Id.*

116. *See* 42 U.S.C. § 12101(a)(1-4). The reference to 43 million Americans with disabilities does not include the approximately five million persons who suffer from bi-polar disorder and the two million persons who suffer from schizophrenia. *See id.*

117. *See* 28 C.F.R. § 35.102. A public entity shall make a reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. *See* 28 U.S.C. § 12101(b) (1). Additional purposes include: to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals, and; to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities. *See id.*

118. "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101 (a)(8).

119. *See* 28 U.S.C. § 12131.

120. *See* 28 C.F.R. § 35.102.

tivities provided or made available by public entities.”¹²¹ Accordingly, in relation to parental rights termination proceedings, state and local courts, governmental agencies such as Child Protective Services (CPS), Child Welfare Services (CWS), and state or the local HHS are covered under this Title.¹²² Additional pertinent parts of Title II with respect to individual inquiry into the termination of parental rights and the provision of reunification services mandate that “[n]o qualified individual¹²³ with a disability¹²⁴ shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any public entity.”¹²⁵ Furthermore, a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.¹²⁶ Finally, the statute clarifies that reasonable accommo-

121. *Id.*

122. Similarly, section 504 of the Rehabilitation Act would be applicable to federal courts. However, for simplicity this discussion will focus on the ADA with the acknowledgement that a parallel argument could be made at the federal level under the Rehabilitation Act.

123. A qualified individual with a disability is

an individual who, with or without reasonable modifications to the 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 for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12111(8).

124. Disability with respect to an individual includes “[a] physical or mental impairment that substantially limits one or more of the major life activities of that individual; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. § 12102 (2) (A-C). The phrase physical or mental impairment is defined as: A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, reproductive, digestive, genitourinary, hemic and lymphatic, akin and endocrine. 28 C.F.R. § 104 (1999).

125. A public entity, in providing any aid, benefit, or service, may not on the basis of disability “deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service” or “otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.” 28 C.F.R. § 35.130 (b)(i)(vii) (1999).

126. A public entity shall make a reasonable modification in policies,

dations are required unless the public entity can show that modifications would fundamentally alter the nature of the service, program, or activity.¹²⁷

Title II of the ADA applies to the termination of parental rights because the termination process is administered by the courts and state agencies providing the reunification services, programs, and activities.¹²⁸ Specifically, the services that courts and various agencies provide during the termination of parental rights process, subject to ADA scrutiny, and substantive and procedural due process in the termination of parental rights, are the provision and use of reunification services and programs. A person with a mental disability is a qualified individual with a disability for purposes of falling under services provided by the state. Therefore, with an otherwise qualified individual before the court, it is impermissible for the court to remove a child from parental custody or terminate parental rights based solely on the parent's disability without looking past an ascribed label and providing an individual inquiry into the abilities of the parent. It is similarly impermissible for any agency involved in this process not to provide or modify services offered to non-disabled persons, or to provide them in an integrated setting.

The application of the ADA once again brings to the foreground the fundamental rights of a parent to raise their child as they wish, simultaneously competing with the state's interest in protecting children. On closer scrutiny this conflict is easily resolved. A state may not discriminate against a "mentally disabled" parent simply because they are perceived as "mentally disabled." However, the state can and must

practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. See 28 C.F.R. § 35.130 (b)(7) (1999); See, e.g., *Cable v. Dep't of Developmental Serv. of Cal.*, 973 F. Supp. 937 (Cal. Dist. Ct. 1997) (holding that a public entity's failure to provide services to otherwise qualified persons with disabilities in the "most integrated setting appropriate" is actionable under Title II of the ADA).

127. See 28 C.F.R. § 35.104 (b) (7).

128. See *In re Welfare of A.J.R.*, 78 Wash. App. 222, 230 (1995) (holding that the ADA applies to services provided by the state in termination proceedings); *In re Angel B.*, 659 A.2d 277, 279 (Me. 1995); but cf. *In re Antony B.*, 54 Conn. App. 463, 472 (1999) (holding that "the ADA neither provides a defense to nor creates special obligations in a termination proceeding."); *In re B.S.*, 166 Vt. 345, 351-52 (1997) (finding the ADA did not provide a defense to termination proceedings but a separate cause of action for an alleged violation of an individual's civil rights).

remove a child from his parents even if the parent is disabled when, even with modified services, the parent is found unable to adequately provide for the child. Title II of the ADA, the *Stanley* decision, Professor Laura Rothstein's suggestions, and the Model Marriage and Divorce Act all comply in demanding that the state and its agencies make individual inquiries – that it remain blind to labels and societal prejudices to properly serve justice, the parents and the child.

B. Discrimination in Administration: Lack of, and Unmodified, Reunification Services

When a child is removed from his parent's custody it is presumably because the parents are not adequately caring for their child. Most often the state, in an effort to avoid breaking up families and to expedite reunifications, provides services and programs to assist the parents in eliminating or diminishing the attributes that produce their unfit status. These services may include any of a vast array of programs such as: assisting parents in finding permanent or suitable housing and jobs, teaching money management and parenting skills, offering educational enhancement, providing mental health counseling, and drug or alcohol treatment.¹²⁹ However, all too often where reunification services are at issue, these services are neither offered, nor modified appropriately to accommodate parents with mental disabilities. This practice is more common and more blatant than the discrimination so far discussed.

1. No Services Offered and the Laws Broken by Such Inaction

Almost all parental rights termination statutes require, either explicitly or implicitly, that the state provide reunification services to a parent before the final termination of his rights.¹³⁰ This requirement to provide services is conditioned on the assumption that these services will be beneficial. If the state establishes with clear and convincing evidence that the provision of services would not, or could not, alleviate the circumstances that necessitate custodial removal, services need

129. See e.g., CAL. WELF. & INST. CODE 300-395 (West 1984 & Supp. 1995) (explicitly requiring the provision of renunciation services); N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 1992) (implicitly requiring the provision of renunciation services as a show of "diligent efforts" to preserve the family unit).

130. See *supra* note 129 and accompanying text.

not be provided.¹³¹ Unfortunately, the state easily satisfies the clear and convincing evidence standard by arguing that no services could alleviate the circumstances, i.e., the mental disability of the parent, on which the termination is predicated.

To proffer such causation is erroneous and illegal. First, it is inaccurate to assume that proper services could not, in certain cases, eradicate mental disabilities such as learning disabilities, developmental delay or depression. Second, it is illegal to condition services on the elimination of the circumstances that brought about the termination proceedings if that circumstance is the label of "mental disability."¹³² It is not the disability that must be removed, but rather the inadequacies of the person's parenting skills. To predicate services on the elimination of a parent's disability violates the ADA and the Due Process clause of the Fourteenth Amendment. The key is that the termination must be catalyzed by the parent's inability to care for his child, not merely because he has a disability.

Yet, some states need not provide services to parents with mental disabilities if a court determines that the parent is not likely to receive a benefit from them. This too is an unacceptable scheme. First, a judge, possibly the same judge that wished to remove a child from the home on the presumption that the label of "mental disability" means inability to parent, is rarely properly educated to make determinations about whether a disabled parent would receive benefit from a state-sponsored service program. It would be prudent for the judge to enlist the evaluative assistance of a variety of professionals, namely, psychiatrists, psychologists, social workers, or other appropriately educated professionals to provide an individual, not generalized, assessment in arriving at a fundamentally fair conclusion.

Second, although the ADA prohibits discrimination on the basis of a disability in the provision of services by a public entity, a parent's disability can exacerbate discrimination by acting as a dichotomous detriment. This occurs when a disability initiates the primary intervention and removal of a child, prohibiting the parent from receiving the benefits offered to assist non-disabled parents in regaining custody of their children.¹³³ Two cases exemplify this dichotomy.

131. *See id.*

132. *See Stanley*, 405 U.S. at 658.

133. *See Watkins*, *supra* note 19, at 167.

In *Orangeberg County Dep't of Social Services v. Harley*,¹³⁴ a mother diagnosed as borderline mentally retarded had her parental rights terminated before the state offered any reunification services.¹³⁵ Despite the mother's protests that she did not receive any services to help her meet the goals imposed on her by the state in the initial removal of the children, the trial court terminated her parental rights.¹³⁶ In affirming the trial court's decision, the appellate court relied on the testimony of a clinical psychologist who declared the mother incompetent to parent because she was "immature, displayed poor impulse control, [and] had a low frustration level" due to her "low mental status." The court ignored the issue of whether or not reunification services were offered because the governing statute permitted termination in the absence of such services.¹³⁷ In reaching this conclusion, the court relied on the psychologist's expert testimony even though he only saw Ms. Harley twice, once in 1983 and once 1987.¹³⁸ Thus, the court erred in giving undue deference to one expert's testimony and ignored the possibility that this individual could ameliorate the state's grievances with any state assistance.

Similarly, in *S.T. v. State Dep't of Human Resources*,¹³⁹ the Alabama Court of Appeals upheld the removal of a two-day-old infant from her mother based almost exclusively on testimony of a clinical psychologist that parents with the mother's IQ were incapable of caring for children.¹⁴⁰ Research assessing the abilities of individuals with

134. 393 S.E.2d 597 (S.C. Ct. App. 1990).

135. *See id.* at 598. The court in *Harley* relied upon *Humphrey*, a case whose holding is even more permissive and offensive than *Harley*. *See S. C. Dep't of Soc. Serv. v. Humphreys*, 374 S.E. 2d 922, 925 (S.C. Ct. App. 1988) (permitting termination in the absence of services when the termination is based on a diagnosable mental deficiency).

136. *See Harley*, 393 S.E.2d at 598.

137. *See id.* South Carolina permits termination of parental rights "if the parent has a diagnosable condition unlikely to change within a reasonable time such as . . . mental deficiency, [or] mental illness . . . and the condition makes the parent unlikely to provide minimally acceptable care." *Id.* There is no edict proffered by the state of South Carolina demanding that reunification services be offered, nor any suggestion that the state would modify services if they were offered.

138. *See id.*

139. 579 So. 2d 640 (Ala. Civ. App. 1991).

140. *See id.* at 641 (noting that the mother was diagnosed as mildly to moderately mentally retarded).

mental retardation, developmental disabilities and low IQ status shows that the effectiveness of reunification services has tremendous variance among parents with the same IQ as well as among parents spanning the IQ spectrum.¹⁴¹ The court dismissed this research and waived the requirement of reunification services, noting that S.T. had no reliable support system.¹⁴² "[N]either the social workers nor the psychologists were familiar with any program . . . in which *retarded* parents took care of their children."¹⁴³ Finding for the state, the court never addressed whether *this* mother could or could not care for her child, rather, individual inquiry disappeared in the presence of gross presumptive discriminatory generalizations.

3. *Inadequate or Unmodified Services and the Laws That Demand More*

The failure of courts to look past a label of mental disability, and their willingness to rely on generalized testimony, rather than individual inquiry in assessing the provision of services, results in sweeping termination of parental rights of individuals with mental disabilities. More common than the complete failure to offer reunification services, however, is the failure to offer adequate or reasonably modified services to parents with mental disabilities. In many cases, reunification services are offered *pro forma* with the one size fits all concept. Under these circumstances, failure is projected and expected, not from the parents with the mental disability, but from the judges, social workers and service providers. Despite their efforts, parents are usually found unable to improve.¹⁴⁴

One of the leading cases in the area of ADA application to parental rights is *In re Torrence P.*,¹⁴⁵ where the Wisconsin Court of Appeals upheld the trial court's opinion denying application of the ADA to termination of a father's parental rights.¹⁴⁶ Following the initial termi-

141. See generally Robert L. Hayman Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1215 (1990) (concerning the difference in abilities between classes of disabilities such as mildly and profoundly mentally retarded and within the class of mildly retarded).

142. See *S.T.*, 579 So.2d at 642.

143. See *id.*

144. See Watkins, *supra* note 19, at 168.

145. 522 N.W.2d 243 (Wis. Ct. App. 1994)

146. See *id.* at 244.

nation of Raymond's parental rights, the state established requirements for the father to maintain contact with the children every other week, maintain monthly contact with the children's social worker, inform the county of any changes in status including his address, and a suitable residence, before regaining custody.¹⁴⁷ When the termination of Raymond's parental rights came up for review, Ms. Holbrook, Raymond's social worker, testified she had eight to ten conversations with Raymond concerning his desire for contact with his children, Raymond failed to fulfill the conditions imposed on him by the court, particularly concerning his address, and she wrote several letters to Raymond asking him to contact her.¹⁴⁸ She also testified that there was no case plan to help Raymond meet these conditions.¹⁴⁹

Although Raymond could not read,¹⁵⁰ the court accepted Holbrook's testimony that the father's failure to respond to her letters provided the reason for the state to withhold initiating a reunification plan.¹⁵¹ The court acknowledged the failure to meet the imposed conditions and the unlikelihood of Raymond meeting them in the future, even without a reunification plan or service, provided sufficient evidence to permanently terminate Raymond's parental rights. Furthermore, when Raymond asserted that the county violated the ADA by failing to reasonably accommodate his disabilities in the administration of reunification services, the court rejected the claim in opining that the County had no increased duty to the father.¹⁵² Denying application of the ADA, the Court of Appeals ruled that the ADA formed a separate cause of action unrelated to termination proceedings.¹⁵³ "Raymond may have a separate cause of action under the ADA based on the County's actions or inactions; such a claim, however, is not a

147. *See id.* at 245.

148. *See id.*

149. *See id.* at 245.

150. *See In re Torrence P.*, 522 N.W.2d at 245. Raymond was also mildly "mentally disabled," but he was functional and held a driver's license. *See id.*

151. *See id.*

152. 522 N.W.2d at 246. Inadequate or unmodified services with respect to those "mentally disabled" might include failing to: spread parenting class over a greater than usual amount of time, incorporate creative or proven practices for teaching, provide transportation, place labels on objects or use note-cards to improve memory, etc.

153. *See id.*

basis to attack the [termination] order."¹⁵⁴

Unfortunately, *In re Torrence P.* is more the rule than the exception.¹⁵⁵ The Vermont Supreme Court reached the same conclusion. In *In re H.S.*,¹⁵⁶ the court upheld the termination of a mother's parental rights because of her limited progress in unmodified parenting classes taught by a counselor who had no experience working with parents who have mental disabilities.¹⁵⁷ H.S.'s mother, S.S., possessed a low IQ, however, she appeared capable of living independently and did not have a legal guardian.¹⁵⁸ In August of 1990, Social and Rehabilitation Services (SRS) for the State of Vermont received two reports, one

154. *Id.*

155. *See In re H.S.*, 632 A.2d 1106 (Vt. 1993) (termination upheld even after acknowledging the absence of any services available in the State of Vermont to assist a parent with developmental disabilities). In *In re Christina L.*, Christina was removed from her mother's care at two and one half years of age after an anonymous call alerted the State to the child's poor living conditions. 4 Cal. Rptr. 2d 680, 682 (Ct. App. 1992). At the outset, the State believed that Christine's mother was "likely to fail" in meeting the conditions for reunification. *See id.*

In an apparent effort to fulfill its obligation, the State failed to provide reunification services for the first eight months of the removal. *See id.* at 684-85. In reality, the State only provided a social worker who testified that she had no expertise in helping people with developmental disabilities. *See id.* at 683. Furthermore, the psychologist who evaluated the mother one year after the removal testified that initiating therapy at that time was too late. *See id.* at 684. The doctor further testified that the social workers did not comply with what the doctor believed were necessary and adequate services. *See id.*, 4 Cal. Rptr. 2d at 684. The mother, after complying with many of the State's mandates for reunification, became distrustful of the service providers because she came to view them as part of the system that took her daughter away and because there was no progress made toward reunification. *See id.* Additionally, because the services were not appropriately modified, she told the social worker that she only wanted to work on one objective at a time. *See id.*

In spite of the State's acknowledged actions, the fact that the initial removal was based on inadequate housing, and the court's concession that this was a tragic case, the court upheld the lower court's decision to terminate the mother's parental rights. *See id.* at 689. The court reached this decision because they believed that the mother lacked an acceptable parent-child relationship and because she was uncooperative, neither of which was related to the initial reason for removal. *See id.*

156. 632 A.2d 1106.

157. *See id.* at 1107.

158. *See id.* at 1106.

stating that H.S. fell off the back of a pick-up truck, while another claimed S.S. grabbed her son and hit him in the chest.¹⁵⁹ Based on these reports, SRS removed H.S. from S.S.'s custody. The disposition order compelled S.S. to participate in a "parent-in-distress" program, vocational rehabilitation, and substance abuse screening.¹⁶⁰

The resolution of the case turned on S.S.'s progress in the parenting program. After examining the evidence, the court concluded that S.S. did not make any progress in her parenting skills even though she exuded a positive attitude.¹⁶¹ Unfortunately, S.S.'s lawyer egregiously failed to make an ADA claim in this case, and the court similarly failed to recognize that the ADA applies to provision of services by a public entity like SRS regardless of state case law.¹⁶² To this conclusion, S.S. proffered that the state failed to provide appropriately modified reunification services required by statute.¹⁶³ S.S. claimed the state's inaction violated her statutory rights in part because the parent educator, while aware of S.S.'s disability, had no training in working with low-IQ adults or parents, nor did any such training exist in Vermont.¹⁶⁴ The court, rejecting S.S.'s argument, claimed that as a matter of law SRS possessed flexibility in developing case plans and given this flexibility, there existed no requirement that SRS must provide counselors trained to work with persons who have mental disabilities.¹⁶⁵

But there is hope. In *In re Victoria M.*, a California court reversed and remanded a trial court's issuance of parental rights' termination because the services provided by the state were not appropriately modified.¹⁶⁶ The case involved Carmen S., a woman in her mid-thirties with limited mental capabilities. Even with special classes she still tested at an IQ level of fifty-eight in 1980 and seventy-two in 1987,¹⁶⁷ translating into labels of mild retardation and borderline intelligence, respectively. Because of inadequate housing, the Depart-

159. See *id.* at 1107.

160. See *id.*

161. See *In re H.S.*, 632 A.2d at 1107.

162. See *In re B.S.*, 166 Vt. At 351 (denying application of the ADA to termination petitions).

163. See *In re H.S.*, 632 A.2d at 1107.

164. See *id.*

165. See *id.*

166. *In re Victoria M. v. Carmen S.*, 207 Cal. App. 3d 1317 (1989).

167. See *id.* at 1322.

ment of Social Services (DSS) removed her three children and instructed Carmen to obtain and maintain adequate housing, acceptable housekeeping standards, a regular visitation schedule demonstrate appropriate parenting skills, keep the social worker abreast of her current address at all times, and participate in a counseling program.¹⁶⁸ Carmen received no assistance in obtaining suitable housing and did not get evaluated by a psychologist because her social worker admittedly did not make the arrangements, but she pleasantly and diligently participated in the parenting skills classes. Carmen also engaged in a child abuse prevention program in a limited manner, attended a community college class designed to assist people who have problems functioning independently in the community, and visited her children regularly.¹⁶⁹ When the psychologist finally evaluated Carmen she found "no signs of bizarre thought or the signs of psychotic symptomology," but that Carmen suffered from an organic syndrome that interferes with her ability to perceive situations and respond appropriately.¹⁷⁰ However, the psychologist provided no information as to whether Carmen's condition could be remedied or controlled with medication. Rather, the final decision to terminate Carmen's parental rights rested on Carmen's poor performance in her parenting skills class that was neither tailored, nor modified, to accommodate her needs.¹⁷¹ Acknowledging DSS's shortcomings, the court stated if "generic reunification services are offered to a parent suffering from a mental incapacity . . . failure is inevitable, as is termination of parental rights."

Reprimanding the lower court for its evaluation of the facts, the appellate court found that "[t]here [was] nothing in the reunification plan itself that appears to be tailored to Carmen's intellectual limitations, and that [the] record [was] clear that no accommodation was made for Carmen's special needs in providing reunification services."¹⁷² In support of its decision to reverse and remand, the court reiterated the holding from *In re Camaleta* which stated that "[t]he right of parents to raise their own children is so fundamental that the termination of

168. *See id.*

169. *See id.* at 1323.

170. *See id.* at 1324.

171. *See In re Victoria M.*, 207 Cal. App. 3d at 1329.

172. *Id.* at 1327, 1329. Note also that this enlightened decision was made one year prior to the enactment of the ADA.

that right by the courts must be viewed as a drastic remedy to be applied only in extreme cases."¹⁷³ Thus, *In re Victoria M.* provides a positive step away from a presumptive inadequacy of parents with mental disabilities and toward individual inquiry and modification of services.

IV. THE EFFECT OF INDIVIDUAL INQUIRY AND THE ADA ON THE TERMINATION OF PARENTAL RIGHTS OF INDIVIDUALS WITH MENTAL DISABILITIES

Whether or not there would be a change in the ultimate outcome, laws must be properly applied to protect parents with mental disabilities, their children, the parent-child bond, and to preserve the integrity of our government and its laws. The following sections review and discuss the potential effect which individual inquiry into parental unfitness and adherence to the ADA's nondiscrimination mandate might have on termination outcomes. While in the majority of cases the termination of parental rights is an unfortunate but necessary action by the state to protect the health, safety and welfare of its children, there are cases where following the law could produce alternate outcomes and abate unacceptable presumptions and discrimination.

A. No Effect

In the majority of cases, the *Stanley* decision and the ADA would have little ultimate effect beyond ensuring fair and equal treatment for the disabled. However, fair and equal treatment alone necessitates and urges appropriate application of *Stanley* and the ADA to these cases. For example, in *In re Elijah R.*,¹⁷⁴ the Maine Supreme Court upheld the termination of a mother's rights where Robin R., Elijah R.'s mother, gave birth while an involuntary patient at the Augusta Mental Health Institute.¹⁷⁵ Just four days following the birth, the Department of Human Services (DHS) petitioned the court to have Elijah removed from his mother's custody, despite the fact that she had not harmed or neglected her child in any way.¹⁷⁶ The court granted the initial removal based on the mother's diagnosis of paranoid schizophrenia and her

173. *In re Camaleta B.*, 579 P. 2d 514 (Cal. 1978).

174. *In re Elijah R.*, 620 A.2d 282 (Me. 1993).

175. *See id.* at 283.

176. *See id.*

past abuse of drugs and alcohol.¹⁷⁷

In order to regain custody, the court recommended that Robin obtain and maintain sobriety, take her medication, attend mental health and substance abuse counseling, demonstrate the ability to maintain a stable lifestyle, and attend scheduled visits with Elijah.¹⁷⁸ Unfortunately, Robin did not successfully comply with any of these recommendations.¹⁷⁹ During the period that Elijah remained in foster care, Robin continued her substance abuse while hospitalized for psychotic and substance abuse treatment. She also signed herself out of the hospital against medical advice and missed appointments with counselors. Furthermore, during this time her doctor refused to continue proscribing anti-psychotic medications because he feared a lethal outcome if she continued her relentless substance abuse while taking prescribed medication.¹⁸⁰

Even if the state provided an initial individualized inquiry and offered modified services, the state probably would have terminated Robin's parental rights. If during an individualized inquiry it is determined that a past or continuing history is likely to jeopardize a child, the child may be removed.¹⁸¹ Clearly Robin's past and continued problems put her child at risk. A court does not, and should not, have to wait until a child is harmed before intervening to protect him. A number of factors point to this eventual outcome of parental rights termination. Robin remained obstinate in refusing to attend any counseling services and continuing to abuse substances, precluding her from getting potentially effective treatment for her mental illness. Robin expressed no desires or intentions to achieve and maintain sobriety. Rather, Robin actions demonstrated with clear and convincing evidence that she could not, in a reasonable amount of time, care for

177. *See id.*

178. *See id.*

179. *See In re Elijah R.*, 620 A.2d at 283.

180. *See id.* at 284. There is no mention of what, if any, services were offered to Robin, nor if any offered services were modified. Although Robin's paranoid schizophrenia would be considered a disability under the ADA, her drug and alcohol addictions would not be covered. She would not be a qualified person with a disability for purposes of ADA application. *See supra* Part III(A)(2). Therefore, the mandates of the ADA would not come into effect until her substance abuse issues were under control given the lethal dangers of combining drugs, alcohol and anti-psychotic medications.

181. *See supra* note 180 and accompanying text.

her child because of her substance abuse and her consequential inability to control her schizophrenia.¹⁸²

Similarly, the outcome would remain unaltered in *In the Matter of the Welfare of N.C.K. and N.J.K.*¹⁸³ Both N.C.K. and N.J.K. were conceived while both parents were involuntary patients at the State Security Hospital.¹⁸⁴ K.K., the twins' mother, remained an inpatient at the State Security Hospital in St. Peter, Minnesota during the first half of 1979 and a permanent resident of the hospital for the year prior to the birth of her twins. She received treatment for both mental illness and mental retardation, illnesses that required treatment for many years. The day after the twins were born, the state filed a petition requesting removal of the children from their mother's custody,¹⁸⁵ which the court granted. Sometime later, a hearing was held and an evaluation of K.K. ordered. As is common, the petition for removal rested on the presumption that a mental disability means an inability to parent, rather than on an individualized fitness assessment.

Even if the state agencies followed the law and conducted an individualized assessment performed prior to removal, K.K.'s long and debilitating history of mental illness and mental retardation detailed in her medical records would have provided sufficient evidence for the initial removal.¹⁸⁶ Furthermore, even with modified services, K.K.'s inability to control her unpredictable mood swings, total disregard for others, antisocial behavior, psychotic episodes, violent and destructive outbursts, suicidal efforts, and threats to kill her children were highly unlikely to be eradicated.¹⁸⁷ Thus, even with the application of indi-

182. See *In re Elijah R.*, 620 A.2d at 283. Robin had a long history of mental illness (paranoid schizophrenia) and substance abuse for which she was hospitalized and treated at various institutions to no avail. See *id.* According to Maine state law, the district court may terminate the parental rights if it finds by clear and convincing evidence that termination is in the best interest of the child and the parent has failed to make a good faith effort to rehabilitate and reunify with the child. See *id.* at 284.

183. *In re N.C.K. and N.J.K.*, 411 N.W.2d 577 (Minn. Ct. App. 1987).

184. See *id.*

185. See *id.* Only K.K. appealed the termination of her parental rights. D.M., the father, permitted the termination of his right by default. See *id.*

186. See *In re N.C.K.*, 411 N.W.2d at 577. K.K. had been an inpatient at the State Security Hospital in St. Peter, Minnesota during the first half of 1979 and a permanent resident of the hospital for the year prior to the birth of N.C.K. and N.J.K. See *id.*

187. See *id.* K.K. had received mental health treatment for the majority of

vidualized inquiry and the ADA, the outcome would remain identical to the holding in *In re Elijah R.*, and properly so.¹⁸⁸

Finally, *Stone v. The Davies County Division of Children and Family Services* is an additional case in which the outcome appeared appropriate, but where the court's rationale is incorrect.¹⁸⁹ In *Stone*, the appellants argued that the ADA applied to the provision of reunification services offered by the state.¹⁹⁰ The state rebutted this claim by stating that because the Supreme Court of Indiana does not require state agencies to prove that it offered services to a parent to assist in fulfilling parental obligations, the ADA does not apply.¹⁹¹ In a case of first impression, the Indiana Court of Appeals agreed with the state. While finding that the state statute does not require that services be provided, the ADA does require that if services are provided, there is no discrimination in the provision of the services and that reasonable modification be made when the person is an "otherwise qualified person with a disability."¹⁹² Here, the court erred in not finding that while the provision of reunification services are not mandatory in the state of Indiana, services were provided on a routine basis and these services were required to be modified in accordance with the ADA.

B. Potential Effect

Finally, there is evidence of productive application of the ADA. In *In re P.A.B.*, a Pennsylvania appellate court displayed admirable in-

her twenty-two years to no avail. Additionally, two psychiatrists testified that she was unable to attain a level at which she would be able to successfully care for her children. The psychiatrists testified that it was likely that she would kill the children if they were relinquished to her care. *See id.*

188. Other cases in which the application of the mandates would not have altered the outcome include *In re David G.*, 659 A.2d 859 (Me. 1995) (examining a case where David G.'s mother had been treated for manic depression and psychotic delusions for more than fifteen years), and *In re J.W.D.*, 456 N.W.2d 214 (Iowa 1990) (observing that J.W.D.'s mother had borderline intellectual functioning with a secondary disability of an adjustment reaction with depressed mood disorder). *See also In re J.J.B.*, 390 N.W.2d 274 (Minn. 1986). Although the ADA had not been passed at the time this case was decided, it would have had little effect on the ultimate disposition because of her mother's epilepsy and blackouts.

189. *See Stone*, 656 N.E.2d at 824.

190. *See id.*

191. *See id.*

192. 28 U.S.C. § 12111 (8).

sight in reversing a lower court's order to terminate the parental rights of a couple who were both "developmentally disabled."¹⁹³ Although the parents met the statutory grounds for termination, the court conducted an individualized inquiry and considered the facts. The parents' social workers described them as loving, as having made considerable efforts to maintain a relationship with their children during the period of removal, fully cooperative with the court's suggestions, and enthusiastically participating in the required programs to make them better parents.¹⁹⁴ The team of social workers, educators and therapists concluded that it was in the best interest of the children to return them to their parents.¹⁹⁵ The appellate court boldly announced its agreement with the team of professionals in reversing the trial court's decision. Similarly, in *In re Welfare of Joshua R.*, the mandates of the ADA were applied in an exemplary manner even though the court ultimately upheld the parental rights termination.¹⁹⁶ On appeal, the parents of Joshua R. argued that the Department of Social Health Services failed to tailor their reunification services to the ADA. In denying the claim, the court detailed in its decision exactly how the services were modified for the couple with mental retardation and a host of developmental problems. For example, pictorial instructions and picture prompts were used to convey various parenting skills and housekeeping techniques.¹⁹⁷ The court also found that the child care instruction employed visual, rather than literary teaching aids, involving repetition,

193. See *In re P.A.B.*, 570 A.2d 522 (Pa. Super. Ct. 1990).

194. See *id.* One reason why the parents met the statutory requirements for termination was because rather than attribute any inability of the parents to the removal of their children, the trial court used the parents label of "mentally disabled" as the condition for removal. The statutory grounds for the termination in question are: (1) their children had been removed for six months; (2) the condition that led to removal (the parents' mental disabilities not their inability to parent) persisted; (3) the parents could not remedy the condition in a reasonable time (they could not become un-mentally disabled, although they could become better parents); and (4) services were not likely to bring about a remedy of the condition (services would not make them un-mentally disabled but they did make them better parents). It is this common misapplication of similar statutes which results in unnecessary terminations.

195. See *id.*

196. See *In re Joshua R.*, Sharon R. and Marty R. v. the Dep't of Soc. and Health Serv., 91 Wash. App. 1073 (1998).

197. See *id.*

routine, and feedback to insure understanding.¹⁹⁸ Additionally, Joshua's prescribed medication was altered to accommodate Sharon's difficulties in remembering to refrigerate and administer the medication.¹⁹⁹ By tendering these details, the court strongly supported its decision with gifted ideas, techniques and strategies for modifying reunification services to agencies and departments that confront these issues.

V. CONCLUSION

This Article is not written to argue that the parental rights of individuals with mental disabilities should never be terminated, nor that the best interest of the children be sacrificed in the name of disability rights. There are many times when the rights of parents under the Fourteenth Amendment and the ADA must be subordinated to protect the rights and safety of children.²⁰⁰ Rather, this Article exposes the lack of individual inquiry and discriminatory practices in the termination of the parental rights of persons with mental disabilities, to bring the ADA to the attention of parents, social workers, therapists and attorneys who are unaware of the statute, its power, and its application to the termination process. Furthermore, it suggests that states look beyond labels, presumptions and IQ scores, and eliminate their use as the sole deciding factors in determining a parent's assets and abilities.²⁰¹

198. *See id.*

199. *See id.*

200. *See Yoder*, 406 U.S. at 233-34 (announcing a parent's constitutional rights may be overcome if the health or safety of their child is in jeopardy); *Stone*, 656 N.E.2d. at 287; *Stanley*, 405 U.S. at 651 (stating that, "the rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man', and 'rights far more precious than property rights.'"); *Casey*, 505 U.S. at 851 (announcing that "our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education. [T]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

201. *In re L.L., C.L. and C.L.*, 1997 Wash. App. LEXIS 1815 (1997). *In re L.L.* provides a perfect example of the need to familiarize parents and attorneys with the ADA. Here, the court dismissed the appellant's claim that the state failed to appropriately modify the services to accommodate his disabilities stating, "Lawrence [the appellant] offers no argument or discussion regarding

Very often, parents with mental disabilities cannot adequately care for their children. Yet, regardless of their inabilities, these individuals deserve to have the laws equally applied and enforced. Their rights may be subordinated to the interest of the child, but should not be disregarded or violated. These individuals are owed an individual inquiry into their alleged unfitness and adherence to nondiscrimination principles.

However, it is without question that even if these two fundamental mandates are consistently employed, the result will often be the same – the termination of the parent's rights. But more importantly, if these mandates are practiced, there will be judicial fairness and equity for all parents. Parenting ability would increase for those who could succeed if programs were modified and ultimately some families preserved. This should be the future focus in cases involving the ADA – affirming the triad of justice, non-discrimination and familial bonds.

why the ADA applies in this situation or how it was violated. We do not address issues not adequately briefed and argued by the parties." *Id.*; see also generally *In re Antony B.*, 54 Conn. App. 463; *In re W.G. and P.G.*, 597 N.W. 2d 430 (S.D. 1999); *In re T.A.G.*, 1999 Mt. 142 (1999); *In re C.M., S.M., D.M. and J.M.*, 996 S.W. 2d 269, (Tex. 1999); *Knudson v. Hess*, 1996 S.D. 137, 556 N.W. 2d 73 (S.D. 1996); *Klinker v. Beach*, 547 N.W. 2d 572 (S.D. 1996); *In re Shawn W.*, 1996 Ohio App. LEXIS 4226 (1996).