

Fall 1988

Terminating the Rights of Mentally Retarded Parents: Severing the Ties That Bind, 22 J. Marshall L. Rev. 133 (1988)

Patricia Werner

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Disability Law Commons](#), [Family Law Commons](#), [Juvenile Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Patricia Werner, Terminating the Rights of Mentally Retarded Parents: Severing the Ties That Bind, 22 J. Marshall L. Rev. 133 (1988)

<https://repository.law.uic.edu/lawreview/vol22/iss1/5>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

COMMENTS

TERMINATING THE RIGHTS OF MENTALLY RETARDED PARENTS: SEVERING THE TIES THAT BIND

INTRODUCTION

What should the state have to show to terminate the parental rights of people who are mentally retarded?¹ Until a few years ago, Illinois law² allowed the state to strip a mentally retarded parent³ of

1. Mental retardation is characterized by below-average intellectual functioning with impaired adaptive abilities before age eighteen. Approximately 1% of the population is mentally retarded. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37-38 (3d ed. 1984) [hereinafter DSM III]. There are four subtypes of mental retardation based on the Wechsler Intelligence Quotient (IQ) ascribed to the person. The four subtypes are: (1) Mild — IQ 50-70. People within this range of retardation are often not distinguishable from normal children until later in life. They can generally learn academic skills to approximately the sixth-grade level and can usually achieve vocational and social skills sufficient for self-support. About 80% of mentally retarded people fall within this category; (2) Moderate — IQ 35-49. People falling within this range of retardation are likely to progress to, but not beyond, the second-grade level. They may be able to perform unskilled or semiskilled work when closely supervised. When under stress, they may need supervision and guidance; (3) Severe — IQ 20-34. Approximately 7% of the mentally retarded population falls within this range. They are generally unable to profit from vocational training and often have poor motor development; (4) Profound — IQ below 20. Less than 1% of the mentally retarded fall within this category. There may be impaired motor development. A person in this category may develop minimal self-care skills but requires a highly structured and well-supervised environment. *Id.*

For a collection of essays discussing the relative merits of intelligence testing, see *THE IQ CONTROVERSY* (N. Block & G. Dworkin, eds. 1976).

2. The Adoption Act, ILL. REV. STAT. ch. 40, § 1510(8)(e) (1977). Section 1510(8)(e) provided:

Sec. 8. Consents to adoption. Except as hereinafter provided in this Section, consents shall be required in all cases . . . Where consents are required in the case of an adoption of a child, the consents of the following persons shall be sufficient: (a) The parents; or . . .

(e) If the court finds that either parent of the child sought to be adopted has been adjudicated an incompetent by reason of mental impairment, or adjudicated subject to involuntary admission or mentally retarded, and if the court further finds from the evidence by 2 qualified physicians selected by the court that such parent continues to be subject to involuntary admission or mentally retarded, and will not recover from such condition in the foreseeable future,

her rights simply by showing that she was mentally retarded, without regard to her capacity to serve as a parent. In 1980, an Illinois appellate court declared that statutory provision unconstitutional.⁴ Subsequently, the legislature amended the Illinois parental termination statute.⁵ The statute now requires the state to conduct a fitness hearing⁶ before it can sever the parent-child relationship, regardless of the parent's intelligence.⁷ Unfortunately, the Illinois General Assembly did not go far enough to ensure that the relics of prejudices against people who are mentally retarded do not permeate parental

then the court may . . . appoint [a] licensed attorney as guardian ad litem, to represent such parent who is subject to involuntary admission or who is mentally retarded in the adoption proceedings, and he shall have authority to consent to the adoption; and it shall not be necessary to obtain the consent of any person other than such guardian ad litem on behalf of such parent who is subject to involuntary admission or who is mentally retarded to authorize the court to enter a proper order or judgment of adoption.

Id.

3. This article uses the feminine pronoun to refer to the mentally retarded parent. The analysis, however, applies to males as well as females, and no disrespect to the role of fathers is intended.

4. See *Helvey v. Rednour*, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980). The *Helvey* court found that section 8(e) of the Adoption Act violated the equal protection and due process clauses of the United States Constitution and article I section 2 of the Illinois Constitution. *Id.* at 158, 408 N.E.2d at 23. The *Helvey* court, relying on *Meyer v. Nebraska*, 262 U.S. 390 (1923), found a liberty interest in a retarded person's parental rights. *Helvey*, 86 Ill. App. 3d at 160, 408 N.E.2d at 21. The court then considered whether section 8(e) of the Adoption Act needlessly infringed on parental rights in light of the state's goal of promoting children's welfare. *Id.* The court concluded that before a parent could lose her right to raise her child, the state must provide a hearing to determine whether she is a fit parent. *Id.* at 160, 408 N.E.2d at 22. The court also weighed the factors to be considered in determining what due process protections should be afforded as set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 332-49. The *Helvey* court found that, until a state proves a parent unfit, the state's interest is minimal and the risk that a parent could wrongfully lose her child could be eliminated by a fitness hearing. *Helvey*, 86 Ill. App. 3d at 157, 408 N.E.2d at 22.

5. ILL. REV. STAT. ch. 40, § 1510 § (8)(e) (1977), as amended by Pub. Act No. 83-870 (1983).

6. See ILL. REV. STAT. ch. 40, § 1510 § 8 (1985). See also *Stanley v. Illinois*, 405 U.S. 645 (1971) (holding that all parents are entitled to a hearing on their fitness before the state can remove their children from their custody).

7. See ILL. REV. STAT. ch. 40, § 1510 § 8 (1985). Section 8 provides that unless a parent is found unfit by clear and convincing evidence the state must obtain her consent to the adoption before it may terminate her parental rights.

See also ILL. ANN. STAT. ch. 37, § 804-27(2) (Smith-Hurd 1988). This section allows a court to terminate parental rights if it finds, by clear and convincing evidence, that a non-consenting parent is unfit as defined in chapter 40, paragraph 1501 (D) of the Illinois Revised Statutes. See also *infra* notes 86-93 and accompanying text for a discussion of how these statutes together regulate termination of parental rights.

rights termination proceedings. Too often, courts take children from homes where the parents are mentally retarded while declining to do so in more serious situations where the parents are not retarded.⁸

This comment will examine the historical prejudice against people with mental retardation. It will also briefly survey changes in the law designed to eliminate discrimination against people with mental retardation. It will then focus on how prejudices against mentally retarded people continue to be manifested in parental rights termination proceedings in Illinois. Finally, this comment will suggest a change in the current Illinois statute to provide a more rational approach to terminating parental rights where the parent happens to be mentally retarded.

I. HISTORICAL PERSPECTIVE ON DISCRIMINATION AGAINST THE RETARDED

There are approximately two million citizens in this country who are mentally retarded.⁹ Until fairly recently, the rights of the mentally retarded were not considered serious legal issues.¹⁰ The magnitude of the prejudices in the Illinois parental termination statute cannot be appreciated without examining the history of discrimination against mentally retarded people.

Mental retardation is a label¹¹ only recently given to people

8. Compare *In re Enis*, No. 63986, slip op. at 3 (Ill. Sup. Ct. May, 8, 1987) (non-mentally retarded parents whose rights not terminated where minor's thighs, buttocks and genital area burned) and *In re A.C.B.*, 153 Ill. App. 3d 704, 506 N.E.2d 360 (1987) (reversing order terminating parental rights of non-mentally retarded mother who allowed young children to engage in sexual behavior with one another) with *In re Stilley*, 66 Ill. 2d 515, 363 N.E.2d 820 (1977) (parental rights terminated where child found outside at night and where mother had been a patient in a mental health center) and *Ensign v. Illinois*, 147 Ill. App. 3d 1164, 512 N.E.2d 140 (1988) (mentally retarded parents' rights terminated where father once accidentally dropped child), cert. denied, 108 S. Ct. 449 (1987).

9. See S. HERR, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* 3 (1983); see also DSM III, *supra* note 1, at 38 (at any point in time approximately 1% of the population meets the criteria for mental retardation).

Two million may be a conservative estimate, and there may be as many as five million people in the United States with mental retardation. J. ROTHSTEIN, *MENTAL RETARDATION, READINGS AND RESOURCES* (1971).

10. See HALPERN, *Introduction to Symposium on Mentally Retarded People and the Law*, 31 STAN. L. REV. 545 (1979), reprinted in PRACTISING LAW INSTITUTE, *THE MENTAL HEALTH LAW PROJECT, 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS* 21 (1979) [hereinafter *LEGAL RIGHTS*] ("from the . . . view of the legal system, mentally retarded people did not exist"). See also S. HERR, *supra* note 9, at 9. ("Before the nineteenth century, there was little specific legal . . . interest in mentally retarded persons").

11. See J. MERCER, *LABELING THE MENTALLY RETARDED* (1973). Mercer suggests that the term mental retardation signifies a position held in society rather than describing the "pathology" of the person. *Id.* at 27-28. According to Mercer, labelling a person as mentally retarded is a "social process" which is applied to individuals who fail to live up to the expectations of society. *Id.* at 30-31.

with lesser intellectual development and adaptive capabilities.¹² Even before psychologists attempted to measure or define intelligence,¹³ society generally acknowledged that some people were not as "intelligent" as others.¹⁴ Under the general label of "feeble-mindedness," people with deficiencies in intelligence were known as idiots,¹⁵ imbeciles,¹⁶ and morons.¹⁷ There were gradations, but society considered mentally retarded people deviant and viewed them with suspicion.¹⁸

Society's views toward people with mental retardation have changed throughout history. Generally, however, society has devalued people with mental retardation.¹⁹ They have been viewed as a menace to society,²⁰ and thus avoided, or as "eternal children."²¹

12. Limitations in adaptive capabilities are reflected by a delay in the development of basic motor skills and self care skills, a reduced ability to gain knowledge from past experiences and a reduced ability to adjust to the standards of society. J. ROTHSTEIN, *supra* note 9, at 8.

13. A person's intelligence is inferred from his performance on a standardized test. DSM III, *supra* note 1, at 36. The first intelligence test was developed by Alfred Binet, who died in 1911 before the test was fully refined. R. WOODWORTH, *PSYCHOLOGY* 100-01 (1940).

The significance of Binet's scale is that it was the first test of individual differences to incorporate the concept of mental age. J. MATARAZZO, *WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE* 40 (1979). This now universally used concept involves comparing the scores of a child of a given chronological age with the average scores of a large sample of children of the same chronological age as well as other ages. *Id.* at 95-96. This results in the now familiar comparisons, such as a twelve-year-old child reading at a thirteen-year-old level. *Id.*

The examiner obtains the intelligence quotient by dividing the mental age by the chronological age. *Id.* at 96. The IQ merely reflects the fact that a person's intelligence test score is defined by his relative standing among his age-peers. *Id.* at 95-96.

14. R. WOODWORTH, *supra* note 13, at 98.

15. Idiots demonstrated the greatest deficiencies. *Id.* People in this classification were considered "too stupid . . . to avoid the common dangers of life . . . [or to] care for their bodily needs." *Id.*

16. Imbeciles in the upper level of this class were considered able to "learn to wash, dress and feed themselves." *Id.* They were not considered trustworthy to do any complex tasks, however, without constant supervision. *Id.*

17. Morons were able to do simple work without the need for constant supervision. *Id.* Without some supervision, however, morons were considered likely to squander their money and waste their time. *Id.* at 99. More people fell into the moron category than in the idiot and imbecile categories. *Id.* at 98-99.

18. W. WOLFENBERGER, *NORMALIZATION, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES* 12-25 (1972).

19. S. HERR, *supra* note 9, at 37 ("for too long, mentally retarded people have been treated as if they were less than human"); W. WOLFENBERGER, *supra* note 18, at 16 (people with mental retardation are likely to be viewed as subhuman).

20. S. HERR, *supra* note 9, at 23. The view that mentally retarded people were a menace to society was most pronounced in the early 1900's. W. WOLFENBERGER, *supra* note 18, at 19-20. During this time, society generally believed that mental retardation was inherited and that retardation led to criminal behavior, prostitution and pauperism. S. HERR, *supra* note 9, at 23 (citing . KERLIN, *PROVISION FOR IDIOTIC AND FEEBLEMINDED CHILDREN*, 11th CONFERENCE OF CHARITIES AND CORRECTIONS 246, 258 (1884) and A. MOORE, *THE FEEBLE-MINDED IN NEW YORK* 3, 89-92 (1911)). People with mental retardation were viewed as a danger to society and a social burden. *Id.* The solutions to this menace included total segregation from society and between the sexes so that the mentally retarded would not reproduce. *Id.* See also *infra* text accompanying notes 31-45 for a discussion of official policy during this era.

21. P. FRIEDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS* 16 (1976), and

The eternal child concept involves treating the mentally retarded person as always younger than his years.²²

Once society adopts a view that the mentally retarded are eternal children or a menace to society, it is easy for society to rationalize treating them as children or as objects of ridicule.²³ In medieval times, the mentally retarded served as fools or court jesters to royalty.²⁴ The living quarters provided to them resembled a modern-day zoo.²⁵ In Spain in the 1400s, mentally retarded people were often considered "holy innocents" incapable of performing simple tasks.²⁶ Many people believed that mentally retarded people were deep in religious thought.²⁷ Because of this belief, the retarded were isolated from society and placed in large religious institutions.²⁸

In colonial New England, society viewed mental retardation as God's way of punishing the person for her sins.²⁹ The Puritans viewed the mentally retarded as possessing evil powers, and it has been reported that many of the people burned, tortured and hanged during that era may have been mentally retarded.³⁰

By the turn of the century, people with mental retardation were considered a menace to society.³¹ This view was reflected in official

W. WOLFENBERGER, *supra* note 18, at 23-24.

22. P. FRIEDMAN, *supra* note 21, at 15. The clearest manifestation of this view is the child-like decor in the facilities where many retarded adults live. W. WOLFENBERGER, *supra* note 18, at 71.

23. All social systems impose role expectations on their members. J. MERCER, *supra* note 11, at 25. When a person's behavior fails to conform to these role expectations or norms, society must cope or its normative underpinnings will be weakened. *Id.* at 25-26. Mercer suggests that there are three coping mechanisms society may use to cope with deviant behavior: (1) "Normalize" the deviant person's behavior by sanctions, rewards or increased education; (2) If that fails, society may "assign the deviant member to a devalued status in the system"; or (3) Finally, it may deny the deviant any status in the social system by "estrangement."

Id. at 26.

24. W. WOLFENBERGER, *supra* note 18, at 23.

25. *Id.*

26. *Id.* at 21.

27. *Id.*

28. Father Juan Gilabert Jofré founded the first institution in the Western world for mentally disabled people in 1410. W. WOLFENBERGER, *supra* note 18, at 23. Wolfensberger points out that the holy innocent role perception, while somewhat "benign," is still objectionable because it connotes a notion of mentally retarded people as non-human. *Id.* at 22.

29. W. WOLFENBERGER, *supra* note 18, at 20.

30. S. HERR, *supra* note 9, at 17.

31. This view coincided with the "eugenic alarm period" during which time society viewed mental retardation as causing illness, poverty, vagrancy, sex offenses and other societal problems. W. WOLFENBERGER, *supra* note 18, at 15.

Society considered mental retardation, or idiocy as it was then called, "one of the most humiliating infirmities of the human race" for which there may be "no immediate measures for . . . the relief of the State" from this burden. COMMISSION ON LUNACY,

policy, which declared that retarded people were "unfit for citizenship."³² The laws of many states³³ included provisions for segregating the mentally retarded in institutions where they were kept and held for life.³⁴ Segregation was considered the appropriate official response, because mentally retarded people were a menace to the "happiness . . . of others in the community"³⁵ and not much above the animal. Indeed, the first institutions for the mentally retarded generally did not even provide heat.³⁶

Some state laws required doctors, teachers and social workers to report to the government all persons they believed to be feeble-minded, so that they could be institutionalized.³⁷ While not every state had a formal reporting requirement,³⁸ many states officially encouraged health and welfare workers to look for potential cases to be institutionalized. The state of Washington, for example, went so far as to make it a criminal offense for those parents refusing to perform their "duty" to segregate their feeble-minded son or daughter in the state institution.³⁹ Once segregated in these impersonal state institutions, people with mental retardation were subjected to involuntary sterilization,⁴⁰ abusive and harmful experimentation,⁴¹ physical abuse and neglect.⁴²

In 1907, the Indiana legislature enacted the nation's first involuntary sterilization law.⁴³ Its passage reaffirmed the view that men-

REPORT ON INSANITY AND IDIOCY IN MASSACHUSETTS 79 (1855), *reprinted in* E. JARVIS, INSANITY AND IDIOCY IN MASSACHUSETTS: REPORT OF THE COMMISSION ON LUNACY 1855 (1971).

32. 1920 Miss. Laws ch. 210 § 17.

33. *See, e.g.*, 1919 Fla. Laws 231 ch. 7887, preamble and § 1 (establishing institution where feeble-minded "can be segregated"); 1921 Neb. Laws 843 ch. 241 § 1 (establishing institution to "segregate them from society"); 1904 N.H. Laws 413 ch. 23 § 1 (providing for segregation if it is in the "best interest of the community"); 1911 Pa. Laws 927 § 1 ("proper regard for the public welfare requires . . . segregation").

34. 1886 Cal. Stat. 69 ch. 57.

35. 1919 Ala. Acts 1024 No. 704 § 6; 1919 Ga. Laws No. 373 § 3; 1919 Tenn. Pub. Acts 561 ch. 150 § 2.

36. W. WOLFENBERGER, *supra* note 18, at 18.

37. *See, e.g.*, 1931 S.D. Laws 200 ch. 153 § 3(b), (c) § 4 (duty to report to state commission which had power to maintain custody of any feeble-minded person); 1917 Or. Laws 740 ch. 354 § 5 (superintendents of schools must report all "mentally defective" school children).

38. *See, e.g.*, 1919 Tenn. Pub. Acts 564 ch. 150 § 5 (county health officials should apply for commitment of feeble-minded children to institutions in cases where the parents have failed to do so).

39. 1905 Wash. Laws 135 ch. 70 § 9.

40. Sterilization is "any procedure by which an individual is made incapable of reproduction, as by castration, vasectomy or salpingectomy [tubal ligation]." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1472 (25th ed. 1974).

41. For a discussion of experimentation, see *infra* notes 50-56 and accompanying text.

42. For a discussion of institutional abuse, see *infra* notes 57-60 and accompanying text.

43. 1907 Ind. Act. ch. 25 § 377 (repealed 1963). Both Michigan and Pennsylva-

tally retarded people were a menace to society,⁴⁴ and coincided with the "genetic scare" era.⁴⁵ In 1927, the United States Supreme Court upheld the involuntary sterilization of mentally retarded people in a state institution.⁴⁶ By 1971, almost 70,000 people had been sterilized under state eugenic sterilization laws.⁴⁷ Involuntary sterilization was a means by which the state believed it could prevent further generations of defective offspring.⁴⁸ As recently as 1985, fourteen states

nia introduced sterilization bills prior to 1907. S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* 522-23 (1985) [hereinafter *THE MENTALLY DISABLED*]. The Michigan bill was defeated and the Governor of Pennsylvania vetoed that state's "prevention of idiocy" bill. *Id.*

44. See 1920 Miss. Laws 289 ch. 210 § 2 ("the greatest danger of the feeble-minded to the community lies in the frequency of the passing on of mental deficiency from one generation to another, and in the consequent propagation of criminals and paupers"); 1919 Ala. Acts No. 704 § 6 ("he is a menace to the happiness . . . of others in the community . . . It is specifically recognized that the greatest danger . . . lies in the frequency of the passing on of mental defect[s]. . .").

45. W. WOLFENBERGER, *supra* note 18, at 20. Wolfensberger characterizes this era as a time when the majority of society's problems were considered to be caused by inherited defects. *Id.* Eugenic sterilization is defined as "rendering a person incapable of reproduction" in the belief that the offspring would be "undesirable." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1472 (25th ed. 1974).

For a brief discussion of genetics and eugenic theory, see E. BALTHAZAR & H. STEVENS, *THE EMOTIONALLY DISTURBED, MENTALLY RETARDED: AN HISTORICAL AND CONTEMPORARY PERSPECTIVE* 128-30, 218-19 (1975).

46. *Buck v. Bell*, 274 U.S. 200 (1927). In *Bell*, Justice Holmes made his often quoted statement, "[t]hree generations of imbeciles are enough." *Id.* at 207. *Bell* involved the sterilization of a 17-year-old woman who was committed to a state institution for the "feeble-minded" after giving birth to an illegitimate child. *Id.* at 205. As a condition of release, Virginia law required that she be sterilized for eugenic reasons. *Id.* at 206-07. On the issue of compulsory sterilization laws, see generally Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977). For a discussion of the rights of a mentally disabled person to choose sterilization see Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806 (1986).

47. S. HERR, *supra* note 9, at 27 (citing N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 325 (1971)).

48. See *supra* notes 43-46 and accompanying text for a discussion of officially sanctioned sterilization. The number of sterilizations performed in this country has declined dramatically. Allen, *Law and the Mentally Retarded* in *PSYCHIATRIC APPROACHES TO MENTAL RETARDATION* 595 (F. Menolascino ed. 1970). The decrease is a result of society's rejection of the view that mental retardation is hereditary. *Id.* This does not mean that intelligence does not have a hereditary component. J. MATARAZZO, *WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE* 298-312 (1979). Experts have engaged, however, in considerable debate on whether measured intelligence is related more to environmental factors as opposed to heredity. *Id.*

Experts have identified over 250 causes of mental retardation, *LEGAL RIGHTS*, *supra* note 10, at 131, but no known specific biological factor accounts for the mental retardation in 75% of the cases. *DSM III*, *supra* note 1, at 38. Several environmental factors cause mental retardation. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 33 (1976) [hereinafter *MENTALLY RETARDED CITIZENS*]. Among the environmental factors are malnutrition, lack of adequate medical care both during and after pregnancy, and environmental poisoning from lead and other sources. *Id.*

still had involuntary sterilization laws in place.⁴⁹

Residents of institutions for the "feble-minded" were also subjected to harmful experimentation.⁵⁰ In New York, for example, residents of a state institution were deliberately exposed to hepatitis.⁵¹ Female residents in a Tennessee institution were routinely given Depo-Provera,⁵² an experimental medication with potentially harmful side-effects.⁵³ Electroconvulsive therapy⁵⁴ and psychosurgery⁵⁵ were routinely performed at the whim of the professionals responsible for the care of the residents.⁵⁶ Physical abuse and neglect have been an almost constant occurrence in the lives of mentally retarded people in institutions.⁵⁷ Abuses involving the use of mechanical restraints⁵⁸ and seclusion⁵⁹ have also been documented.⁶⁰

49. *THE MENTALLY DISABLED*, *supra* note 43, at 523, 552-558. The absence of a law governing sterilization does not necessarily mean that people with mental retardation are not being sterilized. Allen, *supra* note 48, at 596. One study indicated that an institution official admitted performing "fifty to sixty" sterilizations in a two-year period in a state without a sterilization law. *Id.* The same study indicated that a doctor in the same state would, on occasion, let his knife "slip" while performing surgery and "cut the tubes." *Id.*

50. *MENTAL HEALTH AND HUMAN RIGHTS: REPORT OF THE TASK PANEL ON LEGAL AND ETHICAL ISSUES*, PRESIDENT'S COMMISSION ON MENTAL HEALTH, *reprinted* in *LEGAL RIGHTS*, *supra* note 10, at 73.

51. Lasagne, *Special Subjects in Human Experimentation*, in *EXPERIMENTATION WITH HUMAN SUBJECTS* 271 (1970).

52. Depo-Provera is used in treating inoperable cancer and is being used experimentally as a contraceptive. *PHYSICIAN'S DESK REFERENCE* 2043 (1987). Side effects of this drug include pulmonary embolism, cerebrovascular disorders and retinal thrombosis. *Id.*

53. *LEGAL RIGHTS*, *supra* note 10, at 73.

54. Electroconvulsive therapy ("ECT") is a procedure in which electrodes are attached to a patient's temples and an electric current of "between 70 and 150 volts is administered for between .1 and 1.0 seconds." *THE MENTALLY DISABLED*, *supra* note 43, at 330. ECT is used in conjunction with muscle relaxants to prevent thrashing which can result in fractured bones. *Id.* Although currently used primarily in treating depression, when it was first introduced in 1983, professionals used ECT on all types of patients and generally used it without muscle relaxants. *Id.* at 330-31.

55. Psychosurgery is a surgical procedure "to sever fiber connecting one part of the brain with another or to remove, destroy or stimulate brain tissue." *THE MENTALLY DISABLED*, *supra* note 43, at 330. The goal of psychosurgery is to alleviate behavior disturbances or thought content. *Id.* at 331.

56. P. FRIEDMAN, *supra* note 21, at 74.

57. Client abuse is an almost inherent feature of institutional life. In a case involving a New York institution, witnesses reported seeing "wounds infested with maggots, bruised and beaten children, and assembly-line bathing." P. FRIEDMAN, *supra* note 21, at 65 (citing *New York State Ass'n for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975)). The trial court in that case noted that the residents were generally "confined behind locked gates" and that the conditions there resembled more of a prison atmosphere than that of an institution for mentally retarded people. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 764 (E.D.N.Y. 1973).

58. Mechanical restraints or physical restraints physically incapacitate the resident by tying her to a bed or chair, usually with straps or sheets. *THE MENTALLY DISABLED*, *supra* note 43, at 271. Straitjackets, while formerly widely used, are rarely used today. *Id.*

59. Seclusion involves isolating the patient in a confined area where she may be observed. *Id.* at 272. The use of seclusion has been justified as a safety precaution. *Id.* One study suggests, however, that its real justification is staff convenience. *Id.*

60. See *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979) (seclusion

II. MOVING TOWARD EQUALITY

Whether labeled idiot or imbecile, animal-like or vegetable-like, the mentally retarded have not fared well in society. The exposure of abuses of mentally retarded people resulted in an increased awareness of the need for change.⁶¹ The civil rights movements of the 1960s guided people concerned with the rights of the mentally retarded to take action asserting the rights of mentally retarded and other disabled citizens.⁶²

This action was primarily in the form of class action litigation against states for denying retarded citizens their rights to education,⁶³ humane treatment⁶⁴ and liberty.⁶⁵ Advocates for the mentally

inappropriately used to punish residents at state hospital); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979) (institution routinely misused seclusion); *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978) (patients involuntarily placed in seclusion without required procedural safeguards).

61. THE MENTALLY DISABLED, *supra* note 43, at 251. ¶

62. LEGAL RIGHTS, *supra* note 10, at 31.

63. See *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972) (affirming that to deny an education to handicapped persons while providing the same to non-handicapped persons violates equal protection); *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) (finding a right to education for all children on due process and equal protection grounds); *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (enjoining Pennsylvania officials from denying mentally retarded children a free public education).

64. See *Youngberg v. Romeo*, 457 U.S. 307 (1982) (unconstitutional to confine involuntarily committed in unsafe conditions); *Welsh v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) (constitutional and statutory right to treatment), *aff'd*, 525 F.2d 987 (1975); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (constitutional right to receive individual treatment), *aff'd in part and remanded in part*, *Wyatt v. Aderholt*, 503 F.2d 1305 (1974).

65. The least restrictive alternative concept is used to challenge limits placed on individual liberties in cases involving all citizens. See *Shelton v. Tucker*, 364 U.S. 479 (1960) (legislative abridgement of rights must be viewed in light of less drastic means of achieving the same basic purpose). The less restrictive alternative has been relied on by people with disabilities to challenge forced treatment and has served as a basis for challenging institutionalization. See, e.g., *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981) (challenging detention of mentally ill patient in a manner more restrictive than necessary), *vacated*, 458 U.S. 1119 (1982); *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), (state may not subject patient to humiliation of being disrobed and injected with drugs when there are alternative methods of treatment available), *cert. granted*, 451 U.S. 906 (1981), *appeal dismissed*, *Mills v. Rogers*, 454 U.S. 936 (1981); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (habilitation must take place in environment that infringes least on personal liberties), *rev'd in part and remanded*, 451 U.S. 1 (1981); *Welsh v. Likins*, 373 F.Supp. 487 (D. Minn. 1974), (state officials must make good faith attempts to place retarded persons in settings least restrictive of their personal liberty), *aff'd*, 525 F.2d 987 (1975); and *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972) (patients have right to least restrictive conditions necessary to achieve purposes of commitment).

States have historically restricted the right of mentally retarded people to marry. THE MENTALLY DISABLED, *supra* note 43, at 509. Many states continue to restrict this

retarded made significant gains in these areas. The current law reflects some of these gains. Federal legislation incorporates many of the rights announced in earlier cases, and does so systematically rather than on a case-by-case basis. To counter the historical isolation and segregation of mentally retarded people, federal law now reflects the idea that mentally retarded people are full citizens entitled to be treated as such.⁶⁶

In 1974, Congress passed the Education for All Handicapped Children Act ("Education Act").⁶⁷ The Education Act requires that all states receiving federal funding for education provide a free, appropriate education for all handicapped children.⁶⁸ The Education Act also requires the least restrictive individually appropriate educational setting,⁶⁹ enabling many mentally retarded children to avoid institutionalization. Additionally, the Rehabilitation Act of 1973⁷⁰ makes unlawful any discrimination against otherwise qualified handicapped individuals in programs which receive federal assistance.⁷¹ It also requires government entities to develop action plans for the employment of handicapped people.⁷²

In 1982, Congress passed the Developmentally Disabled Assistance and Bill of Rights Act ("Developmental Disabilities Act")⁷³ which aims at reducing the need for institutional care for mentally retarded people.⁷⁴ The Developmental Disabilities Act declares that people with developmental disabilities have a right to appropriate treatment, services and habilitation.⁷⁵ Congress further noted that

liberty interest. In Michigan, for example, any person who marries an "idiot" or insane person can be fined up to \$1,000 or imprisoned for one to five years. *Id.* (citing MICH. COMP. LAWS ANN. § 551.6 (1981 Supp.)).

66. S. HERR, *supra* note 9, at 117. "To counter dependency, resignation and isolation, the laws announced new expectations for disabled persons as full citizens." *Id.*

67. 20 U.S.C. §§ 1400-61 (1982).

68. "Handicapped children" includes mentally retarded, hearing impaired, emotionally disturbed, and visually handicapped children with specific learning disabilities or children with orthopedic or other health impairments who require "special education and related services." 20 U.S.C. § 1401(1) (1982).

69. 20 U.S.C. § 1412(5) (1982). The statute requires state education agencies to develop procedures to insure that, to the extent possible, handicapped children are educated with non-handicapped children. Children with handicapping conditions may only be excluded from the regular educational setting when the degree of the handicap is so severe that education in regular classes cannot be accomplished. *Id.*

70. 29 U.S.C. § 701 (1982).

71. 29 U.S.C. § 794 (1982). This section, known as section 504 of the Rehabilitation Act has been a major tool employed by advocates for people with disabilities. See *Hariston v. Drosick*, 423 F. Supp. 180 (S.D.W.Va. 1976) (deliberate exclusion of a physically disabled child from normal classroom violated the Act). *But see* *Smith v. Robinson*, 468 U.S. 992 (1984) (restricting scope of § 504 remedies).

72. 29 U.S.C. § 793 (1982).

73. 42 U.S.C. § 6000 (1982).

74. THE MENTALLY DISABLED, *supra* note 43, at 611.

75. 42 U.S.C. § 6012 (1982).

such services should be provided in the setting "least restrictive of the person's personal liberty."⁷⁶

These developments further reflect that the current policy of the United States government is to integrate mentally retarded people into the community.⁷⁷ As a result, more people with mental retardation are living in the community in home-like atmospheres.⁷⁸ Growing up in a lifestyle more typical of the patterns and behaviors of society at large, people with mental retardation now attend school, work, marry and have children.⁷⁹ For all the changes in the law recognizing that people with mental retardation are full citizens, however, current law still reflects a bias against people with retardation as to their capacity to be good parents.

III. TERMINATING PARENTAL RIGHTS IN ILLINOIS

A. Background

Every state has a statutory provision through which it can intervene into the family unit to protect its infant citizens from abuse, neglect or abandonment.⁸⁰ The state derives the authority to intervene through its *parens patriae* power which means, literally, "parent of the country."⁸¹ In Illinois, the Adoption Act⁸² and the Juvenile Court Act of 1987⁸³ together regulate the termination of parental rights.

Proceedings to terminate a parent's rights usually begin with

76. *Id.*

77. This policy is most readily apparent in the context of the Education for All Handicapped Children Act, 20 U.S.C. § 1400-61 (1982), which requires that handicapped children to the fullest extent possible be educated with non-handicapped children. 20 U.S.C. § 1412(5)(b) (1982). This integrative approach is known as mainstreaming. M. BUDOFF and A. ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING* 348 (1982).

78. See generally A. BIRENBAUM & S. SEIFFER, *RESETTLING RETARDED ADULTS IN A MANAGED COMMUNITY* (1976) (describing model program providing transition from institutional to community life); *Home is a Good Place: National Perspective of Community Residential Facilities for Developmentally Disabled Persons*, American Association of Mental Deficiencies Monograph No. 2 (1976) (survey of community residences for people with mental retardation).

79. Telephone interview with Don Moss, Executive Director of the Association for Retarded Citizens - Illinois (Feb. 22, 1988).

80. See Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 628-29 n.19 (1976) (citing Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. (1975) (summary of state laws authorizing intervention)).

81. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). The *parens patriae* power refers to the state's role in acting as guardian for people with legal disabilities such as infants and incompetent persons. *Id.*

82. ILL. REV. STAT. ch. 40, ¶¶ 1501-1652 (1987).

83. ILL. ANN. STAT. ch. 37, ¶¶ 801-1, 807-1 (Smith-Hurd 1988).

someone making a complaint to the Illinois Department of Children and Family Services ("DCFS") that a child is not receiving adequate care.⁸⁴ DCFS then investigates the complaint, and if it finds the complaint has merit, may file a petition in juvenile court.⁸⁵ The court then holds an adjudicatory hearing⁸⁶ to determine whether the child is a "neglected or abused"⁸⁷ or "dependent"⁸⁸ minor. If so, the court may issue a dispositional order appointing a guardian for the child.⁸⁹ This guardian has the power to consent to the child's adoption⁹⁰ if clear and convincing evidence shows the parent is unfit.⁹¹

84. Comment, *The Termination of Parental Rights: Lassiter and the New Illinois Termination Law*, 13 LOY. U. CHI. L.J. 135, 160 n.161 (1981). For a discussion of this process generally, see Wald, *supra* note 79, at 629.

85. ILL. ANN. STAT. ch. 37, ¶¶ 802-13 (Smith-Hurd 1988) provides that any adult, agency or association may file a petition alleging that a minor is neglected or abused or dependent.

86. When the petition alleges that a minor is neglected or abused or dependent, the court must hold a hearing within 120 days of the filing of the petition. ILL. ANN. STAT. ch. 37, ¶¶ 802-814 (Smith-Hurd 1988).

87. A neglected minor is one who is under 18 years of age:
whose parent . . . does not provide the proper or necessary support, education as required by law or medical or other remedial care recognized under state law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter or who is abandoned by his or her parents.

ILL. ANN. STAT. ch. 37 ¶¶ 802-803 (Smith-Hurd 1988).

An abused minor includes any minor under 18 years of age:
(a) whose parent or immediate family member . . . or any individual residing in the same home as the minor . . .
(i) inflicts, causes to be inflicted or allows to be inflicted upon such minor physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;
(ii) creates a substantial risk of physical injury to such minor by other than accidental means . . .
(iii) commits or allows to be committed any sex offense against such minor . . .
(v) inflicts excessive corporal punishment; or
(b) whose environment is injurious to his or her welfare.

ILL. ANN. STAT. ch. 37, ¶¶ 802-803 (Smith-Hurd 1988).

88. A dependent minor is one who is under 18 years of age:
(a) who is without a parent, guardian or legal custodian;
(b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian;
(c) who is without proper medical care . . . or other care necessary for his or her well-being through no fault, neglect or lack of concern by his parents . . . ; or
(d) who has a parent, guardian . . . who with good cause wishes to be relieved of all residual parental rights . . . and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor.

ILL. ANN. STAT. ch. 37, ¶¶ 802-804 (Smith-Hurd 1988).

89. Under the Juvenile Court Act, ILL. ANN. STAT. ch. 37 ¶¶ 802-829 (Smith-Hurd 1988), if the court finds the child is a neglected, abused or dependent minor and declares the child to be a ward of the court, it may appoint a guardian with the power to consent to the child's adoption. This guardian, however, will only be empowered to consent to the adoption if the court finds the parent opposed to the adoption unfit as defined in ILL. REV. STAT. ch. 40, § 1501(D) (1987). See *infra* note 94 for a list of the factors supporting a finding of unfitness.

90. ILL. ANN. STAT. ch. 37, ¶¶ 803-830(2) (Smith-Hurd 1988).

91. In 1981, the Illinois legislature amended the termination statute to require

This type of order completely and permanently severs the parent-child relationship⁹² by stripping the parents and the child of any rights or obligations they have to each other.⁹³

In determining whether a parent is unfit, courts look to sixteen factors listed in the Adoption Act,⁹⁴ any one of which can support a finding of unfitness. Included as grounds for a finding of unfitness are parental abandonment of the child, extreme parental cruelty to the child, and parental failure to provide the child with adequate food, clothing and shelter. These and the other grounds listed in the

proof of unfitness on a preponderance of the evidence. ILL. REV. STAT. ch. 37, ¶¶ 705-709(2) (1979), amended by Pub. Act No. 82-437 (1981). This standard of proof was short-lived, however, in light of the Supreme Court's decision in *Stantosky v. Kramer*, 455 U.S. 745 (1982). The *Stantosky* Court found that terminating parental rights required proof of unfitness by clear and convincing evidence. *Id.* at 767. Following *Stantosky*, the Illinois legislature again amended the standard of proof to that of clear and convincing evidence. ILL. ANN. STAT. ch. 37, ¶¶ 803-830 (Smith-Hurd 1988).

92. ILL. ANN. STAT. ch. 37, ¶¶ 803-830(2) (Smith-Hurd 1988) provides:

An order so empowering the guardian to consent to adoption terminates parental rights, deprives the parents of the minor of all legal rights as respects the minor and relieves them of all parental responsibility from him or her, and frees the minor from all obligations of maintenance and obedience to his or her natural parents.

Id.

93. *Id.*

94. ILL. REV. STAT. ch. 40, § 1501(D) (1987) provides that an "unfit person means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption, the grounds of fitness being any one of the following:" *Id.* The statute lists sixteen grounds which support such a finding:

- (a) abandonment of the child;
- (b) failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare;
- (c) desertion of the child;
- (d) substantial neglect . . . if continuous or repeated;
- (e) extreme or repeated cruelty to the child;
- (f) two or more findings of physical abuse;
- (g) failure to protect the child from [an] environment injurious to the child's welfare;
- (i) depravity;
- (j) open and notorious adultery or fornication;
- (k) habitual drunkenness or addiction to drugs;
- (l) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child;
- (m) failure . . . to make reasonable efforts to correct the conditions which were the basis for the removal of the child . . . or to make reasonable progress toward the return of the child . . . ;
- (o) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter;
- (p) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness or mental retardation as defined [in the] Mental Health and Developmental Disabilities Code . . . and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time.

Id.

statute⁹⁵ are fairly straightforward, providing parents with notice of the type of conduct that will render them unfit.⁹⁶

B. *Unfitness and the Mentally Retarded Parent*

Another ground for finding a parent unfit, however, is not as clear. Subsection p⁹⁷ states that an unfit person is one "who is [unable] to discharge parental responsibilities" due to mental retardation, mental illness or some other mental impairment.⁹⁸ The language in the subsection does not provide an explanation of how the inability to discharge parental responsibilities manifests itself, and indeed, fails to define the scope of those responsibilities.

Arguably, the parental responsibilities to which subsection p refers are the opposite of the grounds in the statute defining unfitness. Parental responsibilities mean protecting the child from extreme cruelty and abandonment, while providing the child with adequate shelter, food and clothing.⁹⁹ They also include providing an environment that is not injurious to the child¹⁰⁰ and requiring parents to demonstrate a reasonable degree of interest in their child.¹⁰¹

Finding a parent unfit because she is unable to discharge parental responsibilities due to mental retardation would then require that she be found unfit under one of the other subsections.¹⁰² Assuming that this is a reasonable interpretation of parental responsibilities, it is difficult to justify a special ground of unfitness relating to the mentally retarded. It is at least arguable that less is required to show a mentally retarded parent unfit than is required to show a non-mentally retarded parent unfit.

In *Ensign v. Illinois*,¹⁰³ for example, an Illinois court found a

95. *Id.*

96. Statutes, in order to comply with the due process clause of the United States Constitution, must convey a sufficiently precise warning as to proscribed conduct. 16A AM. JUR. 2D, *Constitutional Law* § 818 (1979). Statutes must provide guidelines with which people of ordinary intelligence, using ordinary common sense, can comply. *Id.* Failure of a statute to do so renders it void for vagueness. *Id.*

For a case considering and rejecting mother's argument that statutory definition of unfitness was unconstitutionally vague, see *In re Ladewig*, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975).

97. ILL. REV. STAT. ch. 40, § 1501(D) (1987). See *supra* note 94 for the text of this subsection.

98. *Id.*

99. ILL. REV. STAT. ch. 40, § 1501(D)(a),(e),(o) (1987). See *supra* note 94 for the text of these subsections.

100. See *id.* § 1501(D)(g). See *supra* note 94 for the text of this subsection.

101. See *id.* § 1501(D)(l). See *supra* note 94 for the text of this subsection.

102. See *supra* note 94 for the text of all sixteen subsections of ILL. REV. STAT. ch. 40, § 1501(D).

103. Petitioner's Brief for Certiorari, Appendix C at 1c, *Ensign v. Illinois*, 147 Ill. App. 3d 1164, 512 N.E.2d 140 (1986) (No. 4-86-0165), *cert. denied*, 108 S. Ct. 449 (1987).

mentally retarded couple unfit and terminated their parental rights.¹⁰⁴ There was no evidence of abuse or that the baby was not well cared for or any other objective criteria that would give rise to a finding of unfitness.¹⁰⁵ In fact, the only reason the child was taken away was that his parents were mentally retarded.¹⁰⁶

In spite of the lack of evidence, the court found the parents unfit because they *might* not be able to respond to the child's future needs.¹⁰⁷ The court also found the child to be a neglected and dependent minor because the parents "failed to provide proper care for the child,"¹⁰⁸ despite evidence to the contrary. The court noted that, while a finding of unfitness under any of the subsections would be sufficient for finding the Ensigns unfit,¹⁰⁹ the finding of unfitness relating to the parents' retardation was the "most conclusive."¹¹⁰ The court's primary reliance on this subsection as well as its very existence evidences a prejudice against mentally retarded parents.

C. Rationalizations and Equal Protection Concerns

While there is little legislative history¹¹¹ on subsection p, one must consider the impetus for its inclusion. One possible justification for this provision, which singles out the mentally ill and mentally retarded, is based on a notion of culpability. Recognizing that not all unfit parents are "bad" or culpable parents, the legislature may have included subsection p¹¹² as a way to take a child from a mentally retarded parent who, through no fault of her own, simply cannot meet the child's needs. Illinois courts, however, have made clear that any parent, whether or not retarded, can be unfit without fault.¹¹³ If the legislature intended subsection p to provide a no-fault

104. *Id.*, Appendix C, at 16c.

105. *Id.* at 10.

106. *Id.* at 7.

107. *Id.*, Appendix C, at 12c. (emphasis added).

108. *Id.*, Appendix C, at 11c. The court made this finding pursuant to ILL. REV. STAT. ch. 37, ¶¶ 702-704 (Smith-Hurd 1985). This section has now been renumbered and appears at ILL. ANN. STAT. ch. 37, ¶¶ 802-803 (Smith-Hurd 1988). See *supra*, note 88 for the text of this section.

109. Petitioner's Brief for Certiorari, Appendix C, at 14c, *Ensign v. Illinois*, 147 Ill. App.3d 1164, 512 N.E.2d 140 (1986) (No. 4-86-0265), *cert. denied*, 108 S. Ct. 449 (1987).

110. *Id.*

111. H.B. 516, Journal of the House of Representatives 83rd GEN. ASSEMBLY, H.B. 516, (May 20, 1983). The one thing this scant legislative history makes clear is that subsection (p) was in response to the decision in *Helvey v. Rednour*, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980). See *supra* note 4 for a discussion of *Helvey*.

112. ILL. REV. STAT. ch. 40, (p) 1501(D)(p) (1987). See *supra* note 94 for the text of this subsection.

113. See *In re R.M.B.*, 146 Ill. App. 3d, 523, 528-29, 496 N.E.2d 1248, 1251-52 (1986) (parental rights may be terminated regardless of fault of parent); *In re Devine*, 81 Ill. App. 3d 314, 320, 401 N.E.2d 616, 621 (1980) (a parent can be unfit without fault).

factor of unfitness, its existence is at best surplusage.

Cast in its worst light, to single out mentally ill and retarded parents with this "nonculpable" posture is demeaning. It ignores the fact that people with mental retardation are not a homogeneous group,¹¹⁴ but rather, have varying capabilities and emotions.¹¹⁵ It is this dehumanizing and patronizing posture that perpetuates the myths that mentally retarded people are eternal children¹¹⁶ who require this paternalism.

The more likely rationale for this provision is that the legislature enacted it to create an easy way for courts to take children from homes where a parent is mentally retarded. Given the weak evidence in the *Ensign*¹¹⁷ case, it appears that more is expected of mentally retarded parents than non-mentally retarded parents. This raises serious questions of equal protection under the fourteenth amendment.¹¹⁸

The freedoms to marry and procreate are among the most basic needs and rights of men and women.¹¹⁹ The United States Supreme Court, in *Griswold v. Connecticut*,¹²⁰ found that marital privacy is a constitutional right worthy of protection.¹²¹ Furthermore, the Court has held in subsequent cases that absent compelling reasons, the state may not interfere with its citizens' choices regarding marriage¹²² and birth control.¹²³ Nor may the state interfere with the decision of a pregnant woman to have an abortion during the first trimester of her pregnancy.¹²⁴ The Supreme Court has declared these "family rights" fundamental privacy rights under the penumbra of the Bill of Rights.¹²⁵ These rights are no less fundamental to

114. See *Helvey*, 86 Ill. App. 3d at 159, 408 N.E.2d at 21 (noting that mental retardation is not a monolithic disability).

115. People with mental retardation vary in talent, aptitude and personality; thus there is no basis to assume that any mentally retarded person cannot perform any particular task. *MENTALLY RETARDED CITIZEN*, *supra* note 48, at 5. See also *supra* note 1 for generalizations regarding the particular classifications of mental retardation and levels of functioning.

116. See *supra* note 22 and accompanying text regarding the eternal child concept.

117. Petitioner's Brief for Certiorari, Appendix C, *Ensign v. Illinois*, 147 Ill. App. 3d 1164, 512 N.E.2d 140 (1986) (No. 4-86-0265), *cert. denied*, 108 S. Ct. 449 (1987).

118. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See also article 1, section 2 of the Illinois Constitution which provides that "[n]o person shall . . . be denied the equal protection of the laws."

119. *MENTALLY RETARDED CITIZEN*, *supra* note 48, at 6.

120. 381 U.S. 479 (1965).

121. *Id.* at 487.

122. *Loving v. Virginia*, 388 U.S. 1 (1967).

123. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

124. *Roe v. Wade*, 410 U.S. 113 (1973).

125. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

people with mental retardation than to any other citizens.

The Supreme Court has held that people with mental retardation are not a suspect class for equal protection purposes.¹²⁶ The right of parents to raise their children, however, has been deemed a fundamental right by the Supreme Court.¹²⁷ Where a fundamental right is affected by a statute, the statute is subject to strict scrutiny.¹²⁸ Under this standard, the statute's means must be necessary to achieve a compelling state interest.¹²⁹

Courts have not questioned the compelling state interest in protecting a child when there is a substantial threat to the child's welfare.¹³⁰ Illinois, however, does not permit speculation on the likelihood that harm will come to a child unless such speculation is supported by actual past harmful acts of the parents.¹³¹ If the parents have not committed actual harmful acts, the state's interest is minimal.¹³² The Illinois Adoption Act¹³³ in subsection p, however, allows a court to terminate parental rights on the mere speculation of the parents' future ability to care for the child if the parents are mentally retarded.¹³⁴ This kind of speculation is prohibited in cases involving non-mentally retarded parents.¹³⁵ Illinois has thus established a different standard for mentally retarded parents violative of the equal protection clause of the fourteenth amendment.¹³⁶

There is no persuasive evidence that a child born to mentally retarded parents will seriously suffer by being reared by a parent

126. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

127. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court in *Meyer* held that the liberty interest in the fourteenth amendment included the right of the individual to marry, establish a home and bring up children. *Id.* at 399.

128. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (regulations affecting family living arrangements must be carefully examined); *Roe v. Wade*, 410 U.S. 113 (1973) (freedom of choice with respect to childbearing subject to regulation only on showing of compelling state interest).

129. See *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 357 (1976) (government practice or statute which restricts "fundamental rights" is to be subjected to "strict scrutiny" and is justifiable only if it furthers a compelling government purpose, and, if no less restrictive alternative is available).

130. See *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing protection of children as compelling state interest).

131. See, e.g., *In re Nyce*, 131 Ill. App. 2d 481, 487, 268 N.E.2d 233, 237 (1971) (Juvenile Court Act does not extend to children who might be neglected in the future).

132. See *Helvey v. Rednour*, 86 Ill. App. 3d 154, 160, 408 N.E.2d 17, 22 (1980) (state's interest minimal unless parent shown to be unfit).

133. ILL. REV. STAT. ch. 40, ¶¶ 1501-1652 (1987).

134. See Petitioner's Brief for Certiorari, Appendix B. at 15, *Ensign v. Illinois*, 147 Ill. App. 3d 1164, 512 N.E.2d 140 (1986) (No. 4-86-0265), *cert. denied*, 108 S. Ct. 449 (1987). The court focused on the parents' potential disabilities rather than on any present inability to care for their son. *Id.*

135. See, e.g., *In re Nyce*, 131 Ill. App. 2d 481, 268 N.E.2d 233 (1971) (finding of unfitness must be based on actual past acts).

136. U.S. CONST. amend. XIV, § 1.

with mental retardation.¹³⁷ Desirable parental traits simply do not correlate with a high score on an intelligence test any more than undesirable parental traits correlate with a low score.¹³⁸ The Adoption Act¹³⁹ implicitly assumes a correlation between desirable parental traits and intellectual abilities and, in view of the lack of evidence to support such an assumption, rests on irrational prejudice.¹⁴⁰

Equal protection does not deny the government's ability to classify people.¹⁴¹ It does, however, require that classifications not rest on "irrational prejudice."¹⁴² The Adoption Act¹⁴³ violates the equal protection clause of the fourteenth amendment by allowing a different standard to be applied where the parents are mentally retarded. The Adoption Act¹⁴⁴ in subsection p¹⁴⁵ implicitly creates the same presumption as the statute found unconstitutional in *Helvey v. Rednour*.¹⁴⁶

*Helvey*¹⁴⁷ involved a statute which allowed courts to strip a parent of her rights if she was found unfit or if she was mentally retarded, and it did not appear that her condition would improve.¹⁴⁸ The court found that the statute "implicitly create[d] a presumption that all retarded parents are unfit"¹⁴⁹ and held the statute unconstitutional on equal protection and due process grounds.¹⁵⁰

The similarities between the statute in *Helvey*¹⁵¹ and subsection p¹⁵² are striking. Both statutes require evidence from two professionals that the parent's retardation or mental illness will continue into the foreseeable future.¹⁵³ Additionally, both statutes group to-

137. Allen, *supra* note 48, at 596.

138. Shriver, *Foreword to MENTALLY RETARDED CITIZEN*, *supra* note 48, at xx.

139. ILL. REV. STAT. ch. 40, ¶¶ 1501-1652 (1987).

140. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (classifications involving mentally retarded people must not rest on irrational prejudice).

141. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, 852 (1986).

142. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

143. ILL. REV. STAT. ch. 40, ¶¶ 1501-1652 (1987).

144. *Id.*

145. ILL. REV. STAT. ch. 40, ¶ 1501(D)(p) (1987). See *supra* note 94 for the text of subsection p.

146. 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980).

147. *Helvey*, 86 Ill. App. 3d at 159, 408 N.E.2d at 19.

148. See *supra* note 2 for the text of the statute held unconstitutional in *Helvey*.

149. *Helvey*, 86 Ill. App. 3d at 157, 408 N.E.2d at 20.

150. *Id.* at 161, 408 N.E.2d at 22. The *Helvey* court found the statute violated article one, section two of the Illinois Constitution, as well as the equal protection clause of the United States Constitution.

151. 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980).

152. ILL. REV. STAT. ch. 40, ¶ 1501(D)(p) (1987).

153. The statute considered in *Helvey* required evidence supported by two physicians, ILL. REV. STAT. ch. 40, (8)(e) (1977) ("the *Helvey* statute") rather than a psychiatrist or clinical psychologist as allowed under subsection p of the Adoption Act. ILL. REV. STAT. ch. 40, ¶ 1501(D)(p) (1987). The *Helvey* statute requires evidence that

gether mentally retarded, mentally ill and mentally impaired persons despite the vast differences these labels denote.¹⁵⁴ Subsection p,¹⁵⁵ however, even more egregiously discriminates against mentally retarded people. Under the statute found unconstitutional in *Helvey*,¹⁵⁶ a parent must have been adjudicated incompetent or mentally retarded before consent to adoption could be waived.¹⁵⁷ Under the current statute, parents need only meet the statutory definition of mental retardation or mental illness¹⁵⁸ and display potential difficulty in discharging parental responsibilities.¹⁵⁹ This standard is not a necessary or even rational way to achieve the Act's stated goal, protecting the welfare of children.¹⁶⁰

the person will "not recover . . . in the foreseeable future" while subsection p merely requires sufficient evidence that the inability to discharge parental responsibilities will extend beyond a "reasonable time." *Id.*

154. Mental retardation is characterized by limitations in measured intelligence and socially adaptive functioning. DSM III, *supra* note 1, at 36. Mental illness, on the other hand, is a general term used to indicate all non-mental retardation-related mental disorders. M. Süsser, *COMMUNITY PSYCHIATRY: EPIDEMIOLOGIC AND SOCIAL THEMES* 4 (1968). Although DSM III provides a classification of mental disorders, "there is no satisfactory definition that specifies precise boundaries for the concept of mental disorders." DSM III *supra* note 1, at 5.

DSM III classifies mental disorders without a clearly defined clinical cause under several headings. Included as headings are schizophrenic disorders, affective disorders and anxiety disorders. There is no relationship between measured intelligence and these disorders. DSM III, *supra* note 1, at 181, 205, 225.

155. ILL. REV. STAT. ch. 40, § 1501(D)(p) (1987). See *supra* note 94 for the text of subsection p.

156. 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980).

157. See *supra* note 2 for the text of the statute.

158. ILL. REV. STAT. ch. 91½, § 1-116 (1987) defines mental retardation as "significantly subaverage general intellectual functioning which exists concurrently with impairment in adaptive behavior and which originates before the age of 18 years." *Id.*

Subsection p also applies to people with a developmental disability. ILL. REV. STAT. ch. 40, § 1501(D)(p) (1987). Illinois law defines developmental disability as "a disability

. . . attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b) any other condition which results in impairment similar to that caused by mental retardation. . . ." ILL. REV. STAT. ch. 91½, § 1-106 (1987).

The statute does not define mental illness or other mental impairment. See *supra* note 153 for a discussion of the differences between mental illness and retardation.

159. See *supra* notes 103-109 and accompanying text for discussion of case where parents showed potential for parenting difficulty.

160. ILL. REV. STAT. ch. 40, § 1525(20)(a) (1987) provides that "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." Courts, however, may only consider the best interests of the child after finding the parents unfit. *Perkins v. Breitbarth*, 99 Ill. App. 3d 135, 424 N.E.2d 1361 (1981).

For a discussion of the "best interests" standard generally, see Wald, *supra* note 80, at 649-50. See also Comment, *Minnesota Adopts a Best Interest Standard in Parental Rights Termination Proceedings; In re J.J.B.*, 71 MINN. L. REV. 1263 (1987) (discussing the best interest standard in a case involving a mentally disabled parent).

IV. RATIONAL SOLUTIONS

Legislators, like most people, have misconceptions about mental retardation.¹⁶¹ Unfortunately, they bring these misconceptions to the law-making process. Because of their misconceptions, experts in the field of mental retardation need to provide legislators with empirical evidence to dispel myths that mentally retarded people are inherently unable to parent.¹⁶²

The most obvious solution to a subsection as offensive as subsection p¹⁶³ is to simply excise it from the other unfitness factors. This does not mean that a mentally retarded parent's rights should never be terminated. A court would still have the power to terminate parental rights if it found by clear and convincing evidence that the parent's behavior satisfied any of the other fifteen factors supporting a finding of unfitness.¹⁶⁴ These standards can easily be applied to all parents. Mentally retarded parents can and should be held to the same standards as parents of average intelligence. This approach protects the rights of mentally retarded parents as well as the child involved.

This is not to suggest that the other fifteen factors defining unfitness¹⁶⁵ reflect the pinnacle of reason. They tend to focus on the behavior of the parent rather than on whether the parent's behavior actually harms the child.¹⁶⁶ Under this current approach, courts are more likely to sever the parent-child relationship.¹⁶⁷ Unfortunately, most children adjudicated court wards due to the termination of their parent's right do not get adopted.¹⁶⁸ Rather, they are subject to multiple placements, resulting in the phenomenon known as "foster

161. MENTALLY RETARDED CITIZEN, *supra* note 48, at xxv.

162. *Id.* at 15.

163. ILL. REV. STAT. ch. 40, § 1501(D)(p) (1987). See *supra* note 94 for the text of subsection p.

164. ILL. REV. STAT. ch. 40, § 1501(D) (1987). See *supra* note 94 for a list of these factors.

165. *Id.*

166. Wald, *supra* note 80, at 650-662. Wald proposes allowing a court to remove a child only if it can be shown that the child cannot be protected from a specific harm if she remains in the home. *Id.*

167. Wald suggests that decisions to remove children from their homes often "merely reflect each judge's own folk psychology." *Id.* at 650. Current parental termination statutes too often allow removal because in the judge's opinion, the child might be better off living elsewhere. *Id.* at 650-51. Nowhere is this more apparent than in cases involving mentally ill or retarded parents. Dickens, *Legal Responses to Child Abuse*, 12 FAM. L.Q. 1, 6 n.9 (1978) (citing Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 888-89 (1975)). The most prevalent characteristic of parents charged with neglecting their children, however, is poverty.

168. Note, *Termination of Parental Rights: Putting Love in Its Place*, 63 N.C.L. REV. 1177, 1182 (1985).

care drift."¹⁶⁹

Taking children from homes where they receive marginal care cannot be reconciled with the purported purpose of parental termination statutes, promoting the best interests of the child.¹⁷⁰ Because the best interests of the child are at stake, courts should look to less drastic alternatives before terminating parental rights. In the case of parents who are mentally retarded, as with all parents, a reasonable effort should be made to protect children in their own homes. This view is reflected in federal law¹⁷¹ and in fact often occurs in Illinois in cases involving non-retarded parents.¹⁷² The same approach should be taken with mentally retarded parents. For example, the statute could require a court to determine whether there are services available to assist the parent. Such services could include visiting nurses, casework services, day care services or temporary foster care. Such services do exist in Illinois¹⁷³ and courts should be required to consider them as alternatives before terminating parental rights. The current failure of courts to do so reflects the callous disregard

169. *Id.* at 1183 (citing Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423, 426 (1983)). For a thorough discussion of foster care from the child's perspective, see Wald, *supra* note 80, at 643-649.

170. ILL. REV. STAT. ch. 40, § 1525(20)(a) (1987). See *supra* note 159 for the text of this section.

171. See, e.g., 45 C.F.R. § 1357.15(e)(1)(2) (1986). These regulations require that states attempt to reunify families. They do not require a particular array of services, but suggest the following:

- (1) twenty-four hour emergency caretakers and homemaker services;
- (2) day care;
- (3) crisis counseling;
- (4) individual and family counseling;
- (5) emergency shelters;
- (6) procedures and arrangements for access to available emergency financial assistance;
- (7) arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing removal from home.

Id.

172. See, e.g., *In Re Enis*, No. 63986 slip op. at 2 (Ill. Sup. Ct. 1988) (child returned home despite adjudication child was abused minor).

173. See ILL. REV. STAT. ch. 23, § 3434 (3)(g) (1987). To prevent unnecessary institutionalization, the Illinois Department of Rehabilitation Services must establish a program of services for disabled people. Such services include but are not limited to:

- (1) home health services;
- (2) home nursing services;
- (3) homemaker services; and
- (4) chore and housekeeping services.

Id.

The Illinois Department of Public Aid has established a program through which public assistance recipients provide services to disabled people. ILL. REV. STAT. ch. 23, §§ 4-13 (1987). Services available include home management, housekeeping, shopping, personal care and diet assistance. *Id.* See also, Department of Children and Family Services ("DCFS") Manual, Rules and Procedures §§ 302.320-.370 (1987) (describing types of services DCFS provides to families).

for parents with mental retardation, sanctioned by a legislature with nineteenth-century views.

V. CONCLUSION

People with mental retardation have struggled for centuries to be entitled to all the privileges and responsibilities of citizenship. While Illinois law purports to recognize that people with mental retardation are valuable human beings,¹⁷⁴ relics of prejudice are readily apparent in the parental termination statute. Regardless of the impetus for its inclusion, a finding of unfitness based on mental retardation violates the equal protection guarantees of the United States and Illinois Constitutions.¹⁷⁵

It is incumbent on the Illinois General Assembly to eradicate the officially sanctioned prejudice against Illinois' mentally retarded citizens. It should begin this task by eliminating the different standard for mentally retarded parents in parental termination proceedings. Only when the rights of the mentally retarded and other formerly devalued groups are recognized can the rights of all citizens be truly safeguarded.

Patricia Werner

174. ILL. CONST. art. 1, § 19 provides:

All persons with a physical or mental handicap shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer. *Id.*

175. See *supra* note 118 for the relevant provisions of the United States and Illinois Constitutions.