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Comment*

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I. INTRODUCTION

The decision to terminate parental rights is a serious one. Parents have a constitutional right to raise and rear their children—a right that is limited by the welfare of the child.[1] Striking an appropriate balance between these two rights is a delicate task. On the one hand, the law cannot be such that children are constitutionally required to grow up with parents who will not or cannot provide them with adequate support and care.[2] On the other hand, the constitution does not require perfect parenting. Parents are provided wide latitude to make mistakes and raise their children in ways that others in society may find questionable.[3]

The question of what constitutes "good enough" parenting is complicated further by the fact that many parents live with mental challenges of varying severity. For the purposes of this Comment, the term "mental challenge" will refer to any "mental disorder" listed in the Fifth Edition of the Diagnostic and Statistics Manual of Mental Disorders (DSM-5 or DSM). The DSM-5 defines mental disorder as "a syndrome characterized by a clinically significant disturbance in an

1. *See* Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); *see also* B.K. v. Dep't of Children & Families, 166 So. 3d 866, 872 (Fla. Dist. Ct. App. 2015) ("A parent has a fundamental liberty interest in the care, custody, and companionship of his child . . . . The only limitation on this right is 'the ultimate welfare of the child itself.'" (quoting Padgett v. Dep't of Health Rehab. Servs., 577 So. 2d 565, 570 (Fla. 1991))).
2. *See generally* Stanley v. Illinois, 405 U.S. 645. The Court notes that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" while simultaneously acknowledging the State's duty to protect minor children, refusing to "question the assertion that neglectful parents may be separated from their parents." *Id*. at 649, 651–52. *See also* Parham v. J.R., 442 U.S. 584, 603 (1979) ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").
3. *Santosky*, 455 U.S. at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning."[4] The DSM-5 groups mental illnesses, intellectual disabilities, "pervasive developmental disorders, motor skills disorders, communication disorders, elimination disorders, attention-deficit and disruptive behavior disorders, and learning disorders" together as mental disorders.[5]

Twenty percent of adults in the United States report suffering from some type of mental illness, including one million parents of minor children suffering from a serious psychiatric disorder.[6] Over five million children in the United States have a parent with a serious mental illness (e.g., schizophrenia, bipolar disorder, or major depressive disorder).[7] Although judges cannot terminate parental rights simply because a parent has been *diagnosed* with a mental disorder,[8] parents with mental challenges are at an increased risk of losing custody or, worse, parental rights to their children.[9] Some researchers

4. Charisa Smith, *Mental Health and the Law: The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 312–13 (2015) [hereinafter *Mental Health and the Law*] (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-V (5th ed. 2013) [hereinafter DSM-5]):

> Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance of conflict results from a dysfunction in the individual.

Id.

5. *Id.*; DSM-5.

6. Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 L. & PSYCHOL. REV. 205, 209–10 (2014–2015) [hereinafter *Finding Solutions*].

7. *Id.* at 210.

8. *See* State v. Tammie S., 14 Neb. App. 202, 211–12 (2005) ("By itself, this prognosis [i.e., diagnoses of schizophrenia and borderline intellectual functioning], does not preclude a parent from parenting a child"). See also NEB. REV. STAT. § 43-292(5) (Reissue 2009), which specifies that termination is only appropriate when a parent's mental illness renders them "unable to discharge parental responsibilities because of mental illness." *Id*. Additionally, the "individual inquiry" required by *Stanley v. Illinois*, 405 U.S. 645 (1972), suggests that courts must individually determine the parental fitness of each parent. Termination based on the fact of a DSM diagnosis precludes this individual inquiry requirement.

9. Traci LaLiberte et al., *Child Protection Services and Parents with Intellectual and Developmental Disabilities*, 30 J. APPLIED RES. INTELL. DISABILITIES 521 (2017); Elizabeth Lightfoot & Sharyn Dezelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERV. REV. 22, 22 (2016).

estimate that up to 80% of parents with mental illnesses have lost custody of their children.[10]

This Comment will argue that the parental rights termination statutes that list "mental illness or mental deficiency" as a ground for termination promote the stigmatization of parents with mental challenges. As Nebraska is one of the states with this language included in its statute,[11] this Comment will specifically emphasize Nebraska statutes and cases. Part II of this Comment will provide information about the history and nature of parental rights termination statutes and the process of parental rights termination hearings. It will then discuss empirical evidence documenting the stigma against people with mental challenges as well as evidence that mental challenges do not equate with unfit parenting. Part III will argue that including mental illness or mental deficiency as a ground for termination promotes the stigmatization of parents with mental challenges without providing any additional protections for their children. Part III will conclude with a discussion of some alternatives to termination when attempting to strike the delicate balance between protecting the rights of both the parents and their children.

II. BACKGROUND

A. Parental Rights Termination Statutes

Since the mid-nineteenth century, state statutes have allowed courts to "withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere . . . when the morals, or safety, or interests of the children strongly require it."[12] These separations range in severity from the child's temporary removal from the parent's custody to the termination of the parent's parental rights.[13] In these proceedings to terminate parental rights, the legal ties between parents and their biological children are severed in order to allow other, allegedly "better," individuals to exercise those parental rights.[14]

10. *Finding Solutions*, *supra* note 6, at 210.
11. NEB. REV. STAT. § 43-292(5) (Reissue 2009) ("The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that . . . . The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.").
12. Elizabeth Lightfoot et al., *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 927, 929 (2010) (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 211 (7th ed., New York: William Kent)) [hereinafter *Inclusion of Disability*].
13. *Id.*
14. *Finding Solutions*, *supra* note 6, at 206.

In an attempt to avoid termination and instead promote the reunification of biological families, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[15] When a child was removed from his or her home, the AACWA required reasonable efforts to prevent removal or make it possible for the child to return home.[16] However, the statute provided no guidance as to what constituted reasonable efforts.[17] Additionally, as children were removed from their homes, they often got lost in "foster care drift."[18] Because the parents retained their parental rights, new families could not adopt the children. But it would often take the parents months, if not years, to improve their parenting capabilities—assuming they could at all. Thus, the children were stuck in legal limbo. They could not be adopted, but they also could not return to their parents.[19]

In order to resolve this problem of foster care drift, Congress passed the Adoption and Safe Families Act (ASFA) of 1997 in order to shift the focus from reunification to adoption.[20] The ASFA's most important modification of the AACWA was the inclusion of the 15/22 provision. The ASFA requires states to begin a parental rights termination hearing if a child has been in foster care for fifteen of the last twenty-two months.[21] However, because the ASFA is a federal statute, states have the liberty to adopt their own variations of these provisions. Twenty-nine states have adopted the 15/22 provision, and some, like Alabama, Iowa, and New Hampshire, have adopted even stricter timelines.[22] In one study, Elizabeth Lightfoot and her col-

15. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C. (1994)).
16. 42 U.S.C. § 671 (1994).
17. *See id*. Nowhere in the AACWA are the reasonable effort requirements described or defined.
18. Emily K. Nicholson, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More than Freedom*, 45 DUQ. L. REV. 83, 84 n.11 (2006) (citing Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO J. POVERTY L. & POL'Y 137, 142 (2004)). "Foster care drift" refers to the problem of children entering the foster care system without the opportunity for permanent placement. The children cannot be adopted because their parents have retained their parental rights. However, because the parents are presently unfit to provide the requisite care and support, the children cannot return to their parents' custody. Thus, foster care drift refers to the experience of children growing up in a slew of foster homes because they can neither return to the care of their biological parents nor be adopted by a different family. *See id*.
19. *Id.* at 84.
20. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2118 (codified in scattered sections of 42 U.S.C. (2000)).
21. CHILD WELFARE INFORMATION GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 3 (2016), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/groundtermin/ [https://perma.unl.edu/9BU5-D3NW] (provides list of state termination statutes).
22. *Id.*

leagues found that 61.3% of their sample of parents with mental disabilities had a petition for termination of parental rights filed within twelve months of opening their case.[23]

In addition, the ASFA amended the AACWA to allow for concurrent planning. Under the ASFA, courts can explore reunification and termination at the same time.[24] Thus, with some exceptions, the ASFA still requires reasonable efforts before parental rights can be terminated.[25] However, the newly amended statute failed to provide any further guidance on what constituted reasonable efforts or who was entitled to them. Thirty states, including Nebraska, require reunification services.[26] In eight states and Puerto Rico, "mental illness of such duration or severity that there is little likelihood that the parent will be able to resume care for the child within a reasonable time" is an aggravating circumstance that warrants the waiver of reasonable efforts.[27]

B. Parental Rights Termination Proceedings

Although there are no standard rules as to how these proceedings should occur, most states follow a two-step process to terminate parental rights.[28] First, the court must determine if a statutory ground for termination exists.[29] Once the court determines that at least one statutory ground exists, the court can only terminate parental rights if doing so is in the best interests of the child.[30] It is presumed that

23. Elizabeth Lightfoot et al., *A Case Record Review of Termination of Parental Rights Cases Involving Parents with a Disability*, 79 CHILD. & YOUTH SERV. REV. 399, 405 (2017) [hereinafter *Review of Termination of Rights Cases*].

24. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C. (2000)).

25. 42 U.S.C.A. § 671(15)(D)(i)–(ii) (2010). Reasonable efforts are not required if the parent has subjected the child to "aggravated circumstances" (e.g., abandonment, torture, chronic abuse, and/or sexual abuse); committed murder, voluntary manslaughter, or a felony assault against the child; or if the individual has involuntarily lost parental rights to another child. *Id.*

26. Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112 app. B at 179–82 (2007).

27. *Mental Health and the Law*, *supra* note 4, at 325–26 (citing CHILD WELFARE INFORMATION GATEWAY, *supra* note 21).

28. *See, e.g.*, ARK. CODE ANN. § 9-27-341; DEL. CODE ANN. tit 13, § 1103; GA. CODE ANN. § 15-11-310; NEB. REV. STAT. § 43-292 (Reissue 2016); TENN. CODE ANN. § 36-1-113.

29. *In re* R.C., 886 N.W.2d 619 (Iowa Ct. App. 2016).

30. *In re* M.L.G.J., No. 14-14-00800-CV, 2015 Tex. App. LEXIS 2750 (App. Mar. 24, 2015); Wayne G. v. Jacqueline W., 21 Neb. App 551, 842 N.W.2d 125 (2013).

remaining with the biological parent is in the child's best interests.[31] However, showing parental unfitness rebuts that presumption.[32]

Parental unfitness is found when there is "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's wellbeing."[33] In other words, the presumption that it is in the child's best interests to remain with his or her biological parents can be overcome by showing that it is *not* in the child's best interests to remain with his or her biological parents. This presumption therefore provides very little protection for the biological parent whose parental fitness is in question.[34] Even so, termination cannot occur unless the State shows by clear and convincing evidence that termination of parental rights is in the child's best interests.[35]

1. Mental Illness or Mental Deficiency as a Ground to Terminate Parental Rights

Mental illness or deficiency is a ground for termination of parental rights in approximately 75% of states (including Nebraska) when it allegedly makes an individual unable to perform his or her parental responsibilities.[36] However, exactly what constitutes mental illness or deficiency is often unclear.[37] The statutory language used to refer to mental impairment is often outdated, which makes it difficult to compare to legal, medical, and social definitions of mental illness and disability.[38] Many of these statutes do not define these outdated terms, making it more difficult to identify exactly which kinds of impair-

31. State v. Victoria R. (*In re* Mitoria R.), No. A-15-1049, 2016 Neb. App. LEXIS 130, at *28 (Ct. App. June 21, 2016).
32. *Id.*
33. *Id.* at *29.
34. *See id.* Parental "unfitness" is based on a determination of the best interests of the child. And though the best-interest analysis and the parental fitness analysis are technically separate inquiries, they examine the same facts. *Id.* Thus, it is difficult to see how the two inquiries could lead to conflicting results. *But see* Matter of R.D.D.-G v. T.M.D., 365 Or. 143 (2019) (termination of mother's parental rights was not in the child's best interest, even after the mother was found to be unfit, because a petition for permanent guardianship could be granted). However, Nebraska courts rarely, if ever, rule in this manner. *See In re* C.A.A., 229 Neb. 135, 138, 425 N.W.2d 621, 623 (1988) (court terminated parental rights despite mother's request to establish a guardianship for the children so as to preserve the bond between mother and child).
35. Santosky v. Kramer, 455 U.S. 745 (1982); *Finding Solutions*, *supra* note 6, at 206.
36. NEB. REV. STAT. § 43-292(5) (Reissue 2016); *Finding Solutions*, *supra* note 6, at 207.
37. *See Inclusion of Disability*, *supra* note 12.
38. *Id.* at 932. Twenty-one states refer to intellectual disabilities and developmental disabilities as a "mental deficiency," which was the term commonly used in the 1940s through the 1960s. Beginning in the 1970s, the term was replaced with

ments constitute grounds for termination.[39] For example, twenty-one state statutes include mental deficiency as a ground for termination but do not define the term anywhere in the statute.[40] Nor do these statutes define "mental illness."[41]

Without a statutory definition of mental illness or mental deficiency, courts generally look for a DSM diagnosis of a mental disorder.[42] For example, in *State v. Tracy G.*, the court terminated Tracy's parental rights under NEB. REV. STAT. § 43-292(5) without ever defining "mental illness or mental deficiency."[43] Instead, the court merely stated that "Tracy suffers from mental illness and mental deficiency that have plagued her since at least high school."[44] Rather than applying a statutory definition, the court looked to the results of a psychological evaluation which ultimately diagnosed Tracy with "depressive disorder, mild mental retardation, and mild cognitive impairment."[45] This court used the results of the psychological evaluation (which presumably used the DSM diagnostic criteria) to define a mental illness or deficiency as laid out in the statute. This analytical process is not uncommon in court opinions.[46]

2. The Best Interests of the Child Standard

All family law disputes involving children (including custody and parental rights termination decisions) use the best interests of the child standard.[47] Section 402 of the Uniform Marriage and Divorce

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"mental retardation." However, "intellectual disability" is currently used in order to promote dignity and respect for people with these mental challenges. *Id.*

39. *Id.*
40. *Id.*
41. *Id.*
42. *See, e.g.*, State v. Brandy S. (*In re* Nicole M.), 287 Neb. 685, 844 N.W.2d 65 (2014); State v. Tracy G. (*In re* Interest of Ashe G.), No. A-12-748, 2013 WL 2106759 (Neb. App. Apr. 23, 2013).
43. NEB. REV. STAT. § 43-292(5) (Reissue 2016) (stating parental rights may be terminated if it shown that the parent is "unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period"); *Tracy G.*, 2013 WL 2106759.
44. *Tracy G.*, 2013 WL 2106759, at *5.
45. *Id.* at *1.
46. *See, e.g.*, *Brandy S.*, 287 Neb. at 706, 844 N.W.2d at 81 (court terminated parental rights after determining, in part, that Brandy's diagnosis of "sufficient mood variability of both depressive and hypomanic symptoms" suggested parental unfitness); *In re* Interest of C.A.A., 229 Neb. 135, 425 N.W. 2d 621 (1988) (court terminated parental rights after concluding that the mother's "problems" resulted from psychiatric diagnoses of "borderline intellectual ability" and "dependent personality disorder"); *In re* Interest of T.E., 235 Neb. 420, 423, 455 N.W.2d 562, 564 (1990) (used mother's schizophrenia diagnosis as evidence of her mental illness or deficiency).
47. Hon. Edmund M. Dane & Jamie A. Rosen, *View from the Bench: Parental Mental Health and Child Custody*, 54 FAM. CT. REV. 10, 11 (2016).

Act (UMDA) summarizes case and statutory law in order to provide a model for the best interests of the child standard.[48] Though not binding authority, the UMDA laid out a five-factor model that "aimed to take the child's wishes into account, determine the most suitable caregiver for the child, and allow the child to maintain a healthy relationship with the non-custodial parent."[49] The best interests of the child standard used in termination proceedings is derived from the UMDA's five-factor model.[50]

The first factor to be considered is "the wishes of the child's parent."[51] As previously noted, there is a presumption that it is in the child's best interests for the biological parents—not a third party—to raise the child.[52] The second factor is "the wishes of the child."[53] This factor recognizes that there may be a good reason why a child does or does not want to live with one particular parent.[54] The third factor is "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 interests."[55] Consideration of this particular factor is important because it ensures the child does not end up in an abusive home.[56]

The fourth factor is "the child's adjustment to his home, school, and community."[57] In considering this factor, the court might look at how a child would cope with the loss of regular contact with one or both parents, the psychological effects of leaving a known community, which parent might be more willing to cooperate with the other, how a move might affect the child, and the reasons and motivations for moving the child.[58] The final consideration—and the one most relevant to this Comment—is "the mental and physical health of all individuals involved."[59] This factor requires a nexus between the impaired health

48. UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1974).
49. Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 315 (2013).
50. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and the Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 394 (2008). Only eight states adopted the entire UMDA, but many legislatures took these five factors and added to them. In some states, the judiciary created the factors. *Id.*
51. UNIF. MARRIAGE & DIVORCE ACT § 402(1).
52. Bajackson, *supra* note 49, at 316. See *supra* notes 31–35 and relevant text.
53. UNIF. MARRIAGE & DIVORCE ACT § 402(2).
54. Bajackson, *supra* note 49, at 317.
55. UNIF. MARRIAGE & DIVORCE ACT § 402(3).
56. Bajackson, *supra* note 49, at 318.
57. UNIF. MARRIAGE & DIVORCE ACT § 402(4).
58. Bajackson, *supra* note 49, at 320.
59. UNIF. MARRIAGE & DIVORCE ACT § 402(4). Five states (Alabama, Indiana, Maine, Tennessee, and Virginia) include drug and/or alcohol addiction in their definitions of mental illness. Bajackson, *supra* note 49, at 320.

of the parent and said parent's parenting abilities.[60] However, the UMDA, and the termination statutes derived from it, provides no guidance as to the point at which the mental health of the parents becomes grounds for termination. Nor does the UMDA articulate how many factors need to weigh in favor of termination or how much weight to give a particular factor.[61]

Clearly, this standard is broad and allows judges to consider a multitude of factors. Proponents of this standard argue that it is a "fact-driven process that most accurately protects a child's physical, psychological, and emotional needs."[62] However, the standard provides very little guidance as to what exactly constitutes the child's best interests.[63] Forty-five states have adopted different versions of the best interests standard, and seven of those states do not list any factors at all.[64] Consequently, critics argue that the lack of clear, consistent factors renders the standard an "egocentric, utilitarian product of the state's design to make children productive members of society rather than burdens upon it later in life."[65] This becomes a problem if the judge, arguably, operates under the assumption that parents with mental challenges do not make as good of parents as those without those mental challenges.[66] As this Comment argues, this lack of guidance allows courts to weigh a parent's mental illness or disability more heavily than they perhaps should.

3. The Use of Parenting Evaluations to Make Parental Rights Termination Decisions

There is a strong argument that judges are unfit to make the best interests of the child decision.[67] Judges are not trained in navigating the complicated, and often hostile, family relationships that arise in courtrooms.[68] Nor do they receive specific training in child development or mental health.[69] As a result, courts may ask for a professional

60. Bajackson, *supra* note 49, at 322.

61. Anat S. Geva, *Judicial Determination of Child Custody When a Parent Is Mentally Ill: A Little Bit of Law, a Little Bit of Pop Psychology, and a Little Bit of Common Sense*, 16 U.C. DAVIS J. JUV. L. & POL'Y 1, 13 (2012).

62. Bajackson, *supra* note 49, at 311.

63. *See* Geva, *supra* note 61, at 13.

64. Bajackson, *supra* note 49, at 348.

65. *Id.* at 311. Other critics have argued that the standard is "indeterminate and unpredictable." *See* Elrod & Dale, *supra* note 50, at 392.

66. Geva, *supra* note 61, at 13–14.

67. *Id.* at 8 (finding that judges "generally do not possess adequate knowledge and training to be able to make sufficiently informed decisions about the best interest of a child where a contesting parent has a mental health problem").

68. *Id.*

69. Bajackson, *supra* note 49, at 384.

psychological or parenting evaluation in order to help guide their best-interests analysis.[70]

When these evaluations occur, judges often substitute the professional's decision for their own.[71] In 2012, Anat Geva conducted semi-structured in-depth interviews with seventeen Illinois district court judges about their consideration of a parent's mental illness when making decisions regarding child custody.[72] Geva found that her sample of judicial participants frequently did not even look at the evaluation itself.[73] They instead looked only at the recommendation and used it to validate their own opinions.[74] When judges substitute the recommendation of the expert for their own best-interests analysis, they may do so in part to confirm personal beliefs that the parent's mental illness has negatively affected the child.[75] This analytical strategy may lead to a confirmation bias in the evaluators.[76] If a judge orders an evaluation because she suspects parental mental illness, the evaluator may be more likely to seek out evidence of mental illness. This may make the evaluator more likely to over-pathologize the parent.[77]

Confirmation bias is only one reason that a minority of judges are distrustful of evaluation results. One judge in the aforementioned study stated that mental health evaluations are "not science."[78] There is much merit to this argument, as evaluators are far from perfect. In fact, "[i]t is well noted that psychologists as a group are particularly inaccurate in making future behavioral predictions and may be even more inaccurate than laypersons."[79]

More to the point, no validated psychological tests directly assess parenting ability.[80] With the knowledge that custody evaluations are

70. Geva, *supra* note 61, at 15–16.

71. *Id.* at 47; *Mental Health and the Law*, *supra* note 4.

72. Geva, *supra* note 61, at 7. The judges in the study oversaw custody determinations. However, as previously indicated, the best interest of the child analysis is the same for custody and termination decisions. Therefore, the analysis and results translate to termination decisions.

73. *Id.* at 47.

74. *Id.*

75. *Id.*

76. *Id.* at 66; *See generally* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (defining confirmation bias as "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand").

77. Geva, *supra* note 61, at 69.

78. *Id.* at 58.

79. *Id.* at 68. *See also* Barefoot v. Estelle, 463 U.S. 880 (1983) (allowing expert testimony regarding the defendant's future dangerousness despite the evidence that suggested that such expert predictions were inaccurate two-thirds of the time).

80. Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135, 144 (2002).

not often relevant or reliable,[81] the fact that many judges depend on expert testimony to make these decisions is particularly problematic. The most popular psychological test used to assess parental fitness as it relates to the best interests of the child was not designed for custody or termination evaluations.[82] Yet a 1997 survey revealed that 92% of the surveyed evaluators used the Minnesota Multiphasic Personality Inventory (MMPI)[83] in custody evaluations.[84]

The issue with this is that the MMPI was developed to assess severe psychopathology—not parental fitness.[85] It includes no scales designed specifically for custody evaluations.[86] The MMPI does not tell the judge or evaluator what constitutes a "good" or "bad" parent and will make no claim regarding which actions are in the best interests of the child.[87] This means that evaluators must necessarily infer parental fitness from the results of the MMPI.[88] Although it is clinically reliable, the MMPI is not relevant to custody or termination proceedings. Despite the fact that the MMPI is commonly used to determine whether keeping the child with a particular parent is in that child's best interest, these relevancy issues are rarely raised or addressed in court.[89]

Two psychological tests were specifically designed for custody evaluations.[90] However, use of the tests may be even more problematic than the inferential use of the MMPI. The Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT) is the most frequently used measure in child custody evaluations.[91] It is a rating instrument used to assess parental fitness via interviews, a questionnaire, and various objective and projective psychological tests.[92] Critics argue that the research on the validity of the ASPECT is unconvincing, confusing, incomplete, and insubstantial.[93]

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81. *Id.*
82. *Id.* at 145. The MMPI assumes that people who answer test questions in ways that are similar to members of a particular group are likely to behave similarly to members of that group. *Id.*
83. JAMES N. BUTCHER ET AL., MMPI-2: MANUAL FOR ADMINISTRATION AND SCORING (rev. ed., 2001).
84. Shuman, *supra* note 80, at 144.
85. *Id.* at 145.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 146.
90. *See* MARC J. ACKERMAN & KATHLEEN SCHOENDORF, ASPECT: ACKERMAN-SCHOENDORF SCALES FOR PARENT EVALUATION OF CUSTODY (1992); BARRY BRICKLIN, THE BRICKLIN PERCEPTUAL SCALES: CHILD-PERCEPTION-OF-PARENTS SERIES (1984).
91. Shuman, *supra* note 80, at 152.
92. *Id.*
93. *Id.* at 153.

The second most frequently used measure designed for custody evaluations is the Bricklin Scales.[94] The Bricklin Scales attempt to measure parent and child attitudes and behaviors.[95] Despite critics' claims that it relies on unfounded assumptions, has not been well validated, and was developed on "inappropriately small, inadequately described, or inappropriate clinical samples," it is allowed unlimited use in court.[96] Nevertheless, the critiques of its validity are serious and make it difficult to believe that the Scales actually measure the constructs they purport to measure—namely parental fitness and the best interests of the child.[97] To be sure, these tests are not measuring parenting skills.[98] Nor do they operationalize the best interests of the child. At best, they attempt to measure parental pathology and the attitudes and behaviors of the parents and children.[99]

C. The Stigmatization of Parents with Mental Challenges

Parents with mental challenges have been stigmatized by society for as long as parents have had mental challenges. Until the 1960s, English physicians advocated for the "complete separation of the mentally ill mother from her newborn" the moment the disorder began to manifest.[100] Researchers worldwide have attributed this horrible practice to the stigmatization of those suffering from mental illness.[101] Parenting while mentally ill was historically so taboo that many women with mental illnesses were forced to secretly and shamefully give up their children for adoption.[102] Many of them never saw their children because the mothers were anesthetized for the birth and the children were taken away before the mothers woke up.[103] As a result, many female hospital patients were not recognized as mothers prior to the 1970s.[104]

1. Empirical Evidence of Stigma Against Parents with Mental Challenges

A score of empirical evidence demonstrates that the stigmatization of mentally challenged parents is not a thing of the past. In a recent survey, 87% of those in a large sample of individuals suffering from

94. *Id.* at 150.
95. *Id.*
96. *Id.* at 151.
97. *Id.*
98. *Id.* at 154.
99. *Id.* at 150.
100. Cathy R. Schen, *When Mothers Leave Their Children Behind*, 13 HARV. REV. PSYCHIATRY 233, 235 (2005).
101. *Id.*
102. *Id.* at 240–41.
103. *Id.*
104. *Id.*

psychosis reported experiencing stigma and discrimination.[105] Mentally ill mothers[106] are stereotyped as "dangerous, potentially violent, and incapable."[107] Further, people view mental illness and mental retardation as being controllable (i.e., the individual is responsible for the onset and continuation of her disorder) and stable (i.e., not likely to change over time).[108] These stereotypes have real consequences for stigmatized parents. People who have been labeled mentally ill are less likely to find housing and employment and more likely to be pressed with charges for violent crimes than those without the label.[109]

For parents, the consequences can be catastrophic because the general public seems to associate mental illness with poor parenting. In fact, mothers with serious mental illnesses tend to fear that the public equates schizophrenia with parental incompetence, neglect, and even violence.[110] This fear of the public's stigmatizing attitudes causes mothers to try to downplay their psychiatric symptoms—demonstrating their normality by describing their symptoms as a "nervous breakdown" in order to be seen as a good parent.[111]

The perception that society stigmatizes parents with mental challenges is not wrong. Nearly 63% of the participants in one study said they would not allow an individual with schizophrenia to care for their children for a couple of hours.[112] Parents who are diagnosed with psychiatric disorders are overrepresented in parental rights termination

105. THE SCHIZOPHRENIA COMM'N, THE ABANDONED ILLNESS: A REPORT BY THE SCHIZOPHRENIA COMMISSION 6 (2012).

106. Most of the empirical research on mentally ill parents focuses solely on mothers. There is limited research about the stigmatization of mentally ill fathers. As a result, most of the studies cited in this Comment focus exclusively on mothers. *See generally* Barry J. Ackerson, *Coping with the Dual Demands of Severe Mental Illness and Parenting: The Parents' Perspective*, 84 FAMS. SOC'Y 109 (2003); Mary V. Seeman, *Intervention to Prevent Child Custody Loss in Mothers with Schizophrenia*, SCHIZOPHRENIA RES. & TREATMENT 1, 2 (2012).

107. Schen, *supra* note 100, at 235; *see generally* Bénédicte Thonon & Frank Larøi, *What Predicts Stigmatisation About Schizophrenia? Results from a General Population Survey Examining Its Underlying Cognitive, Affective and Behavioural Factors*, 9 PSYCHOSIS 99 (2017) (ten percent of participants believed that people with schizophrenia were dangerous, fifty-three percent believed that people with schizophrenia were unpredictable, and fifteen percent believed that people with schizophrenia were incompetent).

108. Patrick W. Corrigan et al., *Stigmatizing Attributions About Mental Illness*, 28 J. CMTY. PSYCHOL. 91 (2000) (showing that the public views people with psychiatric disorders as less likely to overcome their illness than people with physical disorders and illnesses).

109. *Id.* at 92.

110. Seeman, *supra* note 106, at 2.

111. Silvia Krumm et al., *Mental Health Services for Parents Affected by Mental Illness*, 26 CURRENT OP. PSYCHIATRY 362, 363 (2013).

112. Thonon & Larøi, *supra* note 107, at 102.

hearings.[113] Roughly half of mothers with schizophrenia lose either temporary or permanent custody of their children.[114]

Merely labeling an individual as "mentally ill," "psychotic," or "schizophrenic" is enough to trigger these unfortunate outcomes. A leading researcher on stigma, Bruce Link, found that "members of the general public were likely to stigmatize a person labeled mentally ill even in the absence of any aberrant behavior."[115] Additionally, these negative labels have a chilling effect on individuals' willingness to seek treatment.[116] In a qualitative study, researchers found that parents with mental illnesses were reluctant to seek treatment because they were afraid they would lose custody of their children if they were diagnosed with a psychiatric disorder.[117] One individual commented: "I self-diagnosed myself as a schizophrenic . . . I didn't want to go to a psychiatrist because I thought he would lock me up and I wanted to raise my kids."[118] This individual's fears were well-founded. Most of the parents in this study who experienced custody-loss via the child welfare system "felt that their diagnosis was also used against them by child welfare workers."[119] These are the same child welfare workers whose judgments as to the best interests of the child judges are apt to substitute for their own.[120]

2. Judicial Reliance on Mental Illness in Parental Rights Termination Proceedings

Most states include mental illness or mental deficiency as a ground to terminate parental rights.[121] However, the sole fact of mental challenge is not reason enough to terminate parental rights.[122] For example, the Nebraska statute only allows termination because of mental

113. Seeman, *supra* note 106, at 3.
114. *Id.* at 1.
115. Dror Ben-Zeev et al., *DSM-V and the Stigma of Mental Illness*, 19 J. MENTAL HEALTH 318, 321 (2010).
116. Ackerson, *supra* note 106, at 112; *see also* Ben-Zeev et al., *supra* note 115, at 319 (defining "label avoidance" as a phenomenon whereby "people do not seek out or participate in mental health services in order to avoid the egregious impact of a stigmatizing label").
117. Ackerson, *supra* note 106, at 112; *see also* Zach A. Dschaak & Cindy L. Juntunen, *Stigma, Substance Use, and Help-Seeking Attitudes Among Rural and Urban Individuals*, 42 J. RURAL MENTAL HEALTH 184 (2018) (identifying stigma as one of the most common reasons that individuals suffering from mental illness cite to explain their reluctance or refusal to seek treatment).
118. Ackerson, *supra* note 106, at 112.
119. *Id.* at 113.
120. For a discussion of the problems associated with child custody and parenting evaluations, see *supra* subsection II.B.3.
121. *Finding Solutions*, *supra* note 6, at 226. For a discussion of "mental illness or mental deficiency" as grounds for termination of parental rights, see *supra* subsection II.B.1.
122. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

illness or mental deficiency if the mental challenge renders the parent "unable to discharge parental responsibilities."[123] Additionally, there must be "reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."[124] But mental illness or mental deficiency is not defined anywhere in the statute.[125] Likewise, it is unclear exactly what constitutes a prolonged indeterminate period.

Despite the vague nature of many of these statutes, the fact that mental illness or mental deficiency is a common ground for termination means that judges often rely on it. In one study, judges indicated that they paid the most attention to "*parental mental stability*, sense of responsibility toward the children, moral character, and ability to promote stable community involvement" when making custody determinations.[126] Additionally, the Adoption and Foster Care Reporting and Analysis System found in 2017 that nearly 20% of the children in foster care had been placed there because of a parent's disability.[127]

As Part III of this Comment will discuss, the judicial reliance on mental illness or mental deficiency as grounds to terminate parental rights promotes the assumption that mental challenges prevent parents from being able to improve their parenting abilities.[128] Yet it is a myth that people who suffer from mental illness, even serious psychiatric disorders, cannot or do not recover.[129] This myth directly contradicts the reality that people with mental challenges are capable of becoming loving and supportive parents.[130]

3. Evidence That Parents with Mental Challenges Can Still Be "Fit" Parents

Instead of actual evidence of mental challenge leading to poor parenting, the perception that people with mental challenges are bad parents seems to arise from a lack of evidence of the relationship between mental challenge and positive parenting. This is largely due to the overrepresentation of mentally challenged parents in the child welfare and court systems. Those "families headed by parents with disabilities are overrepresented in the child welfare system, more likely to have their children removed from their home, and more likely to lose their parental rights."[131] The parents with severe mental disor-

123. NEB. REV. STAT. § 43-292(5) (Reissue 2009).
124. *Id.*
125. *See Inclusion of Disability*, *supra* note 12, at 932.
126. Geva, *supra* note 61, at 17–18 (emphasis added).
127. *Review of Termination of Rights Cases*, *supra* note 23, at 399.
128. *Mental Health and the Law*, *supra* note 4, at 327.
129. Ben-Zeev et al., *supra* note 115, at 322.
130. *Mental Health and the Law*, *supra* note 4, at 315.
131. *Review of Termination of Rights Cases*, *supra* note 23, at 399. It is important to note that this data, like the majority of studies examining the child welfare sys-

ders who do successfully raise their children do not get involved with the child welfare system and do not find themselves fighting to protect their parental rights in court. As researchers typically get their samples from court dockets and child welfare databases, court opinions do not reflect, and research tends not to cover, those mentally challenged parents who do succeed.[132]

The limited research that examines successful parenting by mentally challenged parents mostly focuses on parents with intellectual disabilities. However, the small amount of research on parents with other mental disorders provides similar results.[133] This research suggests that, as with all parents, some of those with mental disorders are "'fit' to parent without special assistance," some are "'fit' if given assistance," and some are "not 'fit' to parent with or without assistance."[134] But, this fact—that parenting capabilities differ among people—is no different for those without these mental challenges.

Similarly, it is true that parents with mental challenges face additional barriers when it comes to parenting. These barriers include, among others, problems imposing discipline, maintaining appropriate boundaries, retaining emotional control, as well as impairments caused by illness symptoms or medication side-effects, and feelings of guilt and fear as to how their illness may affect their children.[135] However, this does not mean neurotypical parents do not struggle with these same problems or that these problems cannot be remedied.

Despite the stereotypes that people with mental challenges make poor parents, "scientific evidence . . . does not suggest a meaningful correlation between mental retardation and inadequate parenting."[136] Nor does mental illness necessarily indicate abuse. In fact, one study found that "poverty, stress, history of abuse, and social isolation" were much better predictors of abuse than mental illness.[137]

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tem, represents data collected in Australia, Great Britain and Canada. *Id.* Very little research has examined the involvement of parents with mental disorders in the United States child welfare system. Lightfoot & DeZelar, *supra* note 9. However, the limited research available suggests similar patterns in the United States. *See* LaLiberte et al., *supra* note 9; Lightfoot & DeZelar, *supra* note 9.

132. Ackerson, *supra* note 106, at 109 ("Most of the research on mentally ill parents has focused on their pathology and the potential harm to their children . . . .").

133. Schen, *supra* note 100, at 236.

134. Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1449 (1995) (research focused on parents with mental disabilities, but much of the research on mentally ill parents has similarly concluded that parenting ability differs among individuals); *see* Schen, *supra* note 100, at 236.

135. Krumm et al., *supra* note 111, at 363.

136. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1219 (1990); *see* Schen, *supra* note 100, at 236.

137. *Inclusion of Disability*, *supra* note 12, at 928.

The research ultimately shows that "the severity and treatability of a mental illness," rather than the mere existence of it, are the "most important predictors of parenting success."[138] Fortunately, many mental illnesses are treatable and do not cause permanent neglect or maltreatment of children.[139] Even those parents with mental impairments that are not treatable can learn to improve their parenting abilities.[140] In fact, "parents with disabilities are not more likely to maltreat their children than parents without disabilities."[141] Yet "courts have terminated parental rights based on an emphasis on a parent's disability."[142]

Furthermore, because child welfare protocols tend to view a parent's mental challenges as an indicator that the parent is likely to abuse her child, child protection agencies may scrutinize those parents with mental challenges harder than those without.[143] This is unfortunate because child welfare workers struggle to accurately recognize and support mentally challenged parents. A 2017 case review found that only 75% of the parents in the surveyed cases were correctly identified as having a disability.[144] The caseworkers missed the parent's disability 25% of the time.[145] Nearly half of the surveyed cases lacked an intentional worker assessment of parenting ability and necessary accommodations, and the caseworkers only visited the parent in order to conduct a parenting assessment 20% of the time.[146] This means that child welfare workers were not accurately identifying the parents who needed accommodations, nor were they properly providing services for those parents. Only 12% of the services parents received were designed to address their disabilities.[147] And although 87% of the parents completed their treatment plans, every single one of those 87% lost custody of their children.[148]

This data is alarming. It suggests that the misconceptions about parents with mental challenges are more than misconceptions. They are misconceptions with serious ramifications for the targeted parents. Part III of this Comment argues that the vagueness of the statutes on parental rights termination promotes the stigmatization of mentally challenged parents. It further argues that those statutes

138. *Finding Solutions*, *supra* note 6, at 217.
139. *Mental Health and the Law*, *supra* note 4, at 310–11.
140. *See, e.g.*, Krumm et al., *supra* note 111, at 363; Seeman, *supra* note 106, at 4; *Finding Solutions*, *supra* note 6, at 217–18.
141. *Inclusion of Disability*, *supra* note 12, at 928.
142. *Id.*
143. *Id.*
144. *Review of Termination of Rights Cases*, *supra* note 23, at 405.
145. *Id.*
146. *Id.* at 403.
147. *Id.* at 404.
148. *Id.* at 406.

that list mental illness or mental deficiency as a ground for termination are unnecessary and should be removed from state statutes.

III. ANALYSIS

A. Parental Rights Termination Statutes Promote the Stigmatization of Parents with Mental Challenges

Parents with mental illness are disadvantaged when it comes to the child welfare system and parental rights termination proceedings. Statutes that allow termination of parental rights due to mental illness or mental deficiency promote the stigmatization of those parents with mental challenges. These statutes shift the judicial focus from the parent's behavior to the parent's mental condition, emphasizing the diagnosis rather than the parent's ability to care for his or her child.[149] To illustrate, mental illness or mental deficiency is one of the only reasons for termination that is not based on the parent's behavior but is instead based on a factor that contributes to the parent's behavior.[150] Terminating parental rights due to mental illness or mental deficiency[151] is vastly different than terminating parental rights because a parent "willfully neglected to provide the juvenile with the necessary subsistence, education, or other care."[152] In the first case, "mental illness" is used as a reason for termination, even though it is only a contributing factor to the parent's behavior. But in the later instance, the statute does not allow judges to terminate parental rights because a parent is poor, unemployed, or uneducated—even though all of those factors may have contributed to the failure to provide the child with the "necessary subsistence, education, or other care."[153]

In this way, the diagnosis itself contributes to the stigmatization of people with mental illness. A diagnosis suggests that all people who share such a diagnosis are relatively the same.[154] A diagnostic label separates those *with* mental disorders from those *without* mental disorders, and in the process, increases the salient nature of their "groupness."[155] If a diagnosis increases the perception of groupness, then it widens the barrier between "us" (the non-mentally challenged) and "them" (the mentally challenged). This growing barrier strengthens the stereotype that people with mental challenges are inherently vio-

149. *Inclusion of Disability*, *supra* note 12, at 933.
150. *Id.*
151. NEB. REV. STAT. § 43-292(5) (Reissue 2016).
152. § 43-292(3).
153. *Id.*; *Inclusion of Disability*, *supra* note 12, at 933.
154. Ben-Zeev et al., *supra* note 116, at 320.
155. *Id.* at 321. Groupness is "the degree to which a collection of people is perceived as a unified or meaningful entity." *Id.*

lent or unfit to function in society.[156] In this way, the statutes that include mental disease or mental deficiency as a ground for termination create two groups: mentally challenged parents and "normal" parents. "Normal" becomes equated with "good." And "mentally challenged" becomes equated with "bad."[157]

A judge cannot deny custody or terminate parental rights solely because a parent has a mental disorder.[158] But that does not mean that judges are not weighing the existence of a mental disorder more heavily than they should. Nor does it mean that judges are not equating "mental disorder" with "bad parent." In fact, the evidence supports the argument that they are doing just that, as mentally ill parents are more likely to lose custody of their children than those parents without mental illness.[159] Some studies have even found that "the presumption of incompetence evoked by the diagnosis of intellectual disability is so influential that evidence challenging it may not be readily accepted."[160]

One study compared parents with serious psychiatric disorders (e.g., personality disorders and psychosis) to those parents with less-serious neurotic disorders (e.g., agoraphobia, panic disorder, and mild depression).[161] The parents with severe psychiatric disorders did not pose any higher risk to their children than the parents with neurotic disorders.[162] Diagnosis thus did not predict risk, types of mistreatment, rates of prior agency involvement, or rejection of court-ordered services.[163] However, diagnosis did predict which parents retained custody of their children.[164] Twenty percent of the parents with less-serious neurotic disorders had their children permanently removed.[165] Compare that to *eighty percent* of the parents with severe psychiatric disorders who had their children permanently removed.[166] This difference occurred even though the parents with more severe diagnoses posed no greater risk to their children than those parents with less severe diagnoses.[167]

Though it is unlikely that judges are intentionally and hatefully punishing mentally challenged parents by terminating parental

156. *Id.*; *Finding Solutions*, *supra* note 6, at 225.
157. *See Inclusion of Disability*, *supra* note 12, at 929.
158. Dane & Rosen, *supra* note 47, at 10.
159. *Id.*
160. *Inclusion of Disability*, *supra* note 12, at 929.
161. Carol G. Taylor et al., *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat Their Children: Prevalence, Type, and Outcome in a Court Sample*, 14 CHILD ABUSE & NEGLECT 389 (1991).
162. *Id.* at 398.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

rights, judges may fall prey to the inaccurate stereotypes that parents with mental challenges are "dangerous, potentially violent, and incapable"[168] merely because judges do not have a sufficient understanding of "the nature of mental illness, the state of mental health research, or scientifically valid ways to assess the effect of mental illness on parenting."[169]

In Anat Geva's 2012 examination of Illinois judges, Geva found wide variation in whether and how these judges looked at parental mental illness.[170] For example, one judge said she considered the fact that litigation stress "may exacerbate [a parent's] mental health symptoms," but other judges refused to make a custody determination under the assumption that a parent's mental health status would improve after litigation.[171] Geva's results also suggested that judges "generally do not possess adequate knowledge and training to be able to make sufficiently informed decisions about the best interests of the child where a contesting parent has a mental health problem."[172] For example, most of the judges indicated that they did not care if the parent had depression, arguing that they would not terminate parental rights over such a common illness.[173] This reasoning suggests that the judges operated on preconceived notions of mental illness. Depending on the severity of the illness, a depressed parent could be just as unfit as a parent with schizophrenia. Yet these judges' comments suggest that they would only consider mental illness in the case of a parent with schizophrenia.

The judges drew upon personal knowledge and experience to make these complicated decisions.[174] Yet, the same judges admitted that they were not psychologists.[175] It has been well documented that judges often struggle to understand scientific concepts. For example, one study looked at criteria Finnish judges find most important when evaluating expert testimony.[176] The researchers found that judges fo-

168. Schen, *supra* note 100, at 235.

169. Geva, *supra* note 61, at 8. See subsection II.B.3 *supra* for a discussion of the difficulties of evaluating whether and how mental illness affects parental fitness.

170. *Id.* at 8.

171. *Id.* at 27–28.

172. *Id.* at 8.

173. *Id.* at 33 ("Depression seemed to be perceived as a transitory impairment that does not have permanent implications on parenting."). Most judges indicated that people with mild depression could still function as parents. The judges considered depressive symptoms to be a response to the trauma and stress of the divorce and custody proceedings, ignoring the possibility that the depression may not be a stress response and may therefore continue well beyond the final custody ruling. *Id.*

174. *Id.* at 58.

175. *Id.*

176. Alessandro Tadei et al., *Judges' Capacity to Evaluate Psychological and Psychiatric Expert Testimony*, 68 NORDIC PSYCHOL. 204 (2016).

cused mostly on the expert's work experience—which says nothing about the quality of the data—and the scientific community's acceptance of the evidence.[177] They did not care at all about falsifiability,[178] which suggested that they did not understand the importance of that scientifically central construct.[179] An American study further suggested that receiving conflicting expert opinions validates both opinions, even if only a small minority of experts holds one opinion.[180] Thus, when judges are provided with evidence from multiple experts regarding which course of action is in the child's best interests, conflicting testimony may hinder the judge's ability to distinguish the most accurate testimony (assuming they are able to understand the psychological testimony at all).

Because judges do not know how to distinguish good or valid expert testimony from bad testimony that may conform to the judges' predetermined opinions, judges are likely to simply take a parenting evaluation at face value.[181] This is problematic given the harsh criticism of the measures used in parenting evaluations.[182] The process by which these evaluations occur has been criticized as well. A single psychiatrist typically conducts the evaluations in a single interview, if an interview occurs at all.[183] Arguably, because the psychiatrist has such limited interaction with the mentally challenged parent—and because the measures used over the course of the evaluation have not been constructed to assess parental fitness[184]—the psychiatrist may ultimately come to a conclusion based on presumptions about mentally challenged parents as a group rather than observations about the particular parent at issue.[185] Ultimately, removing mental illness or mental deficiency as grounds for termination from statutory language will protect mentally challenged parents from the stigma that is often

177. *Id.*

178. Falsifiability means that a theory can be tested and proven wrong. Expert testimony is falsifiable if "the expert's statement can principally be proven wrong." *Id.* at 209. This is different than asking if the expert *is* wrong. Falsifiability asks, "If I test this theory or this statement, is it possible that it is false?" Scientific inquiries that are not falsifiable are not testable.

179. Tadei et al., *supra* note 176.

180. Derek J. Koehler, *Can Journalistic "False Balance" Distort Public Perception of Consensus in Expert Opinion?*, 22 J. EXPERIMENTAL PSYCHOL. 24 (2016). In this study, participants who read conflicting comments from disagreeing experts and viewed a count of the number of experts who favored each side were less able to distinguish which issues had strong versus weak expert consensus than those participants who only saw the count information. *Id.*

181. Geva, *supra* note 61, at 47.

182. See *supra* subsection II.B.3 for a discussion of the lack of relevance and reliability associated with common psychological tests used to evaluate parental fitness.

183. Margolin, *supra* note 26, at 156.

184. Shuman, *supra* note 80, at 144.

185. Margolin, *supra* note 26, at 156.

present in the termination process. Furthermore, removing this ground from statutes will not increase the risk of harm to children.

B. Mental Illness or Mental Deficiency as a Ground for Termination Does Not Protect Children

1. Mental Illness or Mental Deficiency is Rarely the Only Ground for Termination

Judges often rely on mental illness to terminate parental rights in cases where there are other, non-stigmatizing reasons to terminate. For example, in *State v. Brandy S.*, the court terminated Brandy's parental rights under Nebraska Revised Statutes sections 43-292(2),[186] (5),[187] (6),[188] and (7).[189] Brandy was physically and verbally abusive.[190] She took no action when she learned that her children had been sexually abused (and, in fact, she took the children to visit their assailant in jail).[191] This abuse and neglect alone should have been enough evidence to demonstrate the parental unfitness necessary to terminate under § 43-292(2).[192] Even though it was unnecessary to achieve the desired outcome, the court still used Brandy's mental illness diagnoses as a reason to terminate her parental rights.[193]

Likewise, in *State v. Tracy G.*,[194] the court terminated Tracy's parental rights under sections 43-292(5),[195] (6),[196] and (7).[197] Again the court focused on mental illness despite sufficient other grounds. The court emphasized Tracy's depressive disorder and "mild mental retardation" diagnoses.[198] Yet the court did not need to focus on Tracy's mental disorders when it had support for two other grounds for termination. These cases demonstrate how judges tend to use a parent's mental challenges as grounds to terminate parental rights even in cases where parental rights could be terminated on other bases.[199]

186. NEB. REV. STAT. § 43-292(2) (Reissue 2016) (emphasizing neglect).
187. § 43-292(5) (emphasizing mental illness or mental deficiency).
188. § 43-292(6) (emphasizing failure of reasonable efforts).
189. § 43-292(7) (stating the 15/22 provision).
190. State v. Brandy S. (*In re* Nicole M.), 287 Neb. 685, 708, 844 N.W.2d 65, 82 (2014).
191. *Id.* at 687–88.
192. § 43-292(2) ("The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.").
193. *Brandy S.*, 287 Neb. at 706, 844 N.W.2d at 81.
194. State v. Tracy G. (*In re* Interest of Ashe G.), No. A-12-748, 2013 WL 2106759 (Neb. App. Apr. 23, 2013).
195. § 43-292(5) (emphasizing mental illness or mental deficiency).
196. § 43-292(6) (emphasizing failure of reasonable efforts).
197. § 43-292(7) (stating the 15/22 provision).
198. *Tracy G.*, 2013 WL 2106759, at *1.
199. *But see, e.g.*, State v. Tammie S., 14 Neb. App. 202, 211 (2005) (after determining that statutory grounds for termination under NEB. REV. STAT. § 43-292(7) had

Removing the "mental illness and mental deficiency" language from these statutes would still allow courts to terminate the parental rights of parents whose mental challenges are so severe that they are unable to care for their children. Removing the statutory language merely prevents courts from relying on a parent's mental challenge when it is unnecessary to do so. For example, Utah's parental rights termination statute does not list mental illness or mental deficiency as a statutory condition for termination.[200] However, parental rights may be terminated if it is found that "the parent is unfit or incompetent."[201] Mental illness may then be used as evidence of parental unfitness or incompetence.[202]

In *A.E. v. State*, the Utah Court of Appeals held that "mental illness that is so extreme as to render a parent unable to care for the needs of her children or . . . to comply with the requirements of [the] service plan . . . may actually be evidence of unfitness."[203] The Utah court thus found a way to rely on mental illness without a statute providing for reliance on mental illness. The fact that states that do not list "mental illness or mental deficiency" as a ground for termination still manage to terminate parental rights when parents abuse or neglect their children suggests that there is no reason to specifically allow for termination *because of* a parent's mental status.[204]

2. Termination Does Not Ensure Stability for the Children

The ASFA and state statutes that allow for termination when the parent is unfit because of mental illness or mental deficiency are well-intentioned. They are intended to protect children—to ensure that children are not being raised in homes where they are abused or neglected, to provide children with stability, and to ensure that kids are not spending their childhoods drifting from foster home to foster home.[205] After all, "spending extended periods of time in foster care can have serious negative ramifications on children."[206] Likewise, terminating parental rights increases stress, anxiety, and trauma for both children and parents.[207]

However, termination does not ensure stability for the child any more than it ensures the child will soon be removed from foster care. In *Tracy G.*, the court terminated Tracy's parental rights in part to

been met, the court refused to evaluate Tammie's mental illness as an additional ground for termination).

200. UTAH CODE ANN. § 78A-6-507 (2019).
201. § 78A-6-507(1)(c).
202. A.E. v. State (State *ex rel.* G.R.), 191 P.3d 1241 (Utah Ct. App. 2008).
203. *Id.* at 1241.
204. *Inclusion of Disability*, *supra* note 12, at 927.
205. *See* Nicholson, *supra* note 18.
206. *Finding Solutions*, *supra* note 6, at 220.
207. *Id.* at 224.

promote stability for her son, Ashe.[208] The court emphasized the importance of providing Ashe with "routine, structure, and predictability."[209] However, while the court noted that Ashe was doing well in foster care, it never described an adoption plan for Ashe.[210] It is therefore possible that the court terminated Tracy's parental rights in order to provide stability for Ashe, with no plan for how to provide Ashe with a stable life.

Statistics provide additional support for the argument that terminating parental rights does not ensure adoption.[211] At the end of 2015, the United States had 428,000 children in foster care.[212] 112,000 of these children were "waiting for adoption."[213] Fifty-six percent of these children (62,400 children) came from families whose parental rights had been terminated.[214] In fact, "the number of children waiting for adoption from 2011 to 2015 almost consistently exceeded the number of children adopted in all states."[215] The pattern is the same in Nebraska. In 2016, Nebraska had 715 children still waiting for adoption, 463 of which came from families whose parental rights had been terminated.[216] These numbers suggest no reason "to terminate the parental rights of a child who lacks a concrete adoption plan, even if reunification seems far-fetched at the time the agency contemplates filing a [petition to terminate parental rights]."[217]

C. Alternatives to Termination

Including the phrase "mental illness or mental deficiency" in parental rights termination statutes promotes the stigmatization of parents with mental challenges,[218] fails to protect children from "foster care drift,"[219] and will not prevent judges from terminating parental rights when absolutely necessary.[220] Thus, there is no reason to continue including this language in parental rights termination statutes.

208. State v. Tracy G. (*In re* Interest of Ashe G.), No. A-12-748, 2013 WL 2106759, at *4 (Neb. Ct. App. Apr. 23, 2013).
209. *Id.* at *3.
210. *Id.*
211. Margolin, *supra* note 26, at 164–65.
212. CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES: REPORT TO CONGRESS 16–18 (2015), https://www.acf.hhs.gov/cb/resource/cwo-2015 [https://perma.unl.edu/KU8C-QCMM].
213. *Id.*
214. *Id.*
215. *Id.*
216. *Children Waiting for Adoption*, CHILDREN'S BUREAU, https://cwoutcomes.acf.hhs.gov/cwodatasite/waiting/index [https://perma.unl.edu/47FP-Y7MD] (last visited Aug. 19, 2019).
217. Margolin, *supra* note 26, at 167–68.
218. *See supra* section III.A.
219. *See supra* subsection III.B.2.
220. *See supra* subsection III.B.1.

It simply makes it too easy for judges to terminate the parental rights of mentally challenged parents. Alternatives to termination should therefore be considered to help reduce the high proportion of mentally challenged parents who have lost parental rights to their children.[221]

1. Provide Parents with More Time for Treatment

Ultimately, it is the symptoms of mental illness—rather than the diagnosis itself—that makes it more difficult for people with mental challenges to become adequate parents. Evidence suggests that these symptoms "may inhibit parents' ability to maintain a good balance at home and make parents less communicative, less emotionally involved in their children's [daily] lives, and less reliable."[222] However, it is also true that parenting stress decreases and parental nurturing increases as a mentally ill parent's clinical symptoms are reduced.[223] Thus, a family's situation can greatly improve through the effective use of "parenting classes, clinical treatment, capacity-building programs, and other support services."[224]

Because the 15/22 provision of the ASFA (and the various state statutes that have adopted this provision) requires the state to file for a parental rights termination hearing if the child has been in foster care for fifteen of the previous twenty-two months, parents with mental challenges are forced to be treated on a nearly-impossibly fast timeline.[225] Even assuming that the parents are provided with the necessary services immediately after the child is removed from the home, fifteen months is often not enough time for mentally challenged parents to make enough progress to return to their parental responsibilities.[226]

For example, in *State v. Amber*, Amber's children had been removed from Amber's "cluttered and unsanitary" home.[227] Amber had been diagnosed with a series of mental illnesses, including "ADHD, major depressive disorder, anxiety, posttraumatic stress disorder, obsessive compulsive disorder . . . hoarding disorder and borderline per-

221. *Review of Termination of Rights Cases*, *supra* note 23, at 399.
222. *Finding Solutions*, *supra* note 6, at 218 (internal quotations and punctuation removed).
223. Geva, *supra* note 61, at 84.
224. *Finding Solutions*, *supra* note 6, at 220.
225. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (codified in scattered sections of 42 U.S.C. (2000)).
226. *See* Seeman, *supra* note 106, at 4 ("Policies intended to promote a speedy resolution for children in out-of-home care may unintentionally discriminate against parents with mental illness because they fast-track the termination of parental rights, allowing only a brief time period for new parents to meet the goals set by child protection agencies."); *Mental Health and the Law*, *supra* note 4, at 335.
227. State v. Amber (*In re* Interest of Hunter L.), Nos. A-17-652, A-17-653, 2018 WL 332941, at *1 (Neb. Ct. App. Jan. 9, 2018).

sonality disorder."[228] The court terminated Amber's parental rights because Amber's mental illnesses made her unable to maintain a house that was safe for her children to live.[229]

Nevertheless, it is noteworthy that the court terminated Amber's parental rights despite her attempts to resolve the issues that led to her children's removal. For example, Amber began attending therapy.[230] Prior to the termination, she had completed twelve individual sessions, and it was noted that she "had been engaged and participating in the sessions and had achieved the first set of goals set for her."[231] However, the court still terminated her parental rights because it felt she had not progressed fast enough.[232] Had Amber been given more time, she may have progressed to a point where it was safe for her children to return home. The fifteen-month timeline was just too short for her.

Similarly, in *State v. Deeada N.*,[233] Deeada's parental rights were terminated under § 43-292(5) of Nebraska Revised Statues.[234] Deeada had been diagnosed with paranoid schizophrenia, an anxiety disorder, a personality disorder, and a cognitive disorder.[235] Despite Deeada's willingness to participate in therapy, evaluations, and occupational training in order to learn how to become a more fit parent, the court still terminated her parental rights.[236] The proposed treatment plan could have taken up to eighteen months to complete, and the court was not willing to allow Deeada the additional time.[237]

It is important to note that Deeada's parental rights were terminated with seemingly no adoption plan in place.[238] The court terminated Deeada's parental rights in order to keep Bruce from "[spending] his early years suspended in foster care."[239] However, with no adoption plan in place, Bruce may well have spent the next eighteen months in foster care anyway.

In 2015 in Nebraska, only 3% of children waiting for adoption were adopted in under one year.[240] Just under 30% of children waiting for adoption were adopted between one and two years.[241] That means

228. *Id.* at *2.
229. *Id.* at *5.
230. *Id.* at *3.
231. *Id.*
232. *Id.* at *5.
233. State v. Deaada N. (*In re* Interest of Bruce N.), No. A-11-256, 2011 WL 4028267 (Neb. Ct. App. Sep. 6, 2011).
234. NEB. REV. STAT. § 43-292(5) (Reissue 2009) (mental illness or deficiency).
235. *Deaada N.*, 2011 WL 4028267, at *3.
236. *Id.* at *5.
237. *Id.* at *6.
238. *Id.*
239. *Id.*
240. CHILDREN'S BUREAU, *supra* note 212, at 55–56.
241. *Id.*

that over 67% of the children awaiting adoption were waiting for more than two years.[242] Bruce may have been one of those children, and Deaada may have been able to become a court-approved parent in that amount of time.

2. It Takes a Village—Parenting Does Not Have to Be All or Nothing

The termination of parental rights has been described as the "civil death penalty."[243] Termination therefore must be the very last resort to protect the welfare of the children. Parents have a fundamental right to raise and rear their children,[244] but that fundamental right does not equate to a fundamental requirement to parent alone. Many of these cases fail to consider community options that may allow the biological family to remain together while the parents work to improve their parental fitness.

For example, Nebraska allows the juvenile court to enter orders following termination of parental rights that permit continued contact with the biological parent if it is in the best interests of the child.[245] Although parental rights are terminated, "an adoption that offers a way to maintain a relationship with her child can motivate the mother toward recovery and health."[246] However, it is unclear how often these orders are permitted, as Nebraska courts seem hesitant to allow the parent–child relationship to continue after parental rights have been terminated.[247]

Similarly, subsidized guardianship allows relatives or other caregivers to become legal guardians for children who cannot return to a biological parent's home or be adopted.[248] Thirty-nine states allow for this alternative to termination.[249] Some states even allow for a judge to order subsidized guardianship in lieu of parental rights ter-

242. *Id.*
243. *Overview of Terminating Parental Rights*, FAMILY LAW SELF-HELP CENTER, https://www.familylawselfhelpcenter.org/self-help/adoption-termination-of-parental-rights/overview-of-termination-of-parental-rights [https://perma.unl.edu/HP44-MQG8] (last visited Dec. 12, 2018).
244. Margolin, *supra* note 26, at 134–35, 153.
245. *See* State v. Pam N. (*In re* Interest of Stacey D.), 684 N.W.2d 594 (Neb. Ct. App. 2004).
246. Schen, *supra* note 100, at 241.
247. *See In re* Interest of R.H., T.H., & J.H., 219 Neb. 904, 907, 367 N.W.2d 145, 147 (1985) ("The law is not unmindful of a mother's love, of the crippling effects of a history of child abuse and alcoholic parents, and of the grinding effects of an inferior education and habitual poverty, but the law is also not so cruel that punishment for these apparently unchangeable conditions should be imposed on the children. If the only way to break the chain is termination, the law and this court will not flinch.").
248. Margolin, *supra* note 26, at 175.
249. *Id.*

mination, even if grounds for termination have been proven.[250] This option allows parents to retain their parental rights while still ensuring that their children are cared for—in fact, ensuring that their children will not languish in foster care.[251]

Another alternative to termination is a community residence. Take, for example, a parent like Amber who suffers from such severe mental challenges that she cannot maintain a safe and sanitary home for her children.[252] Amber loved and bonded with her children, and she wanted to take steps to improve her parenting capabilities.[253] However, the court said it was not enough that Amber got help cleaning her house because she could not do it herself.[254] Termination may not have been necessary had the court allowed Amber and her children to move into a community residence where Amber could receive clinical treatment while her children grew up in a sanitary environment. Termination may also not have been necessary had the court allowed Amber to live with somebody who would help keep her house clean. Amber's situation is not uncommon. One common need expressed by mothers with mental challenges is the "need for long-term support in their homes by someone visiting to provide practical help with parenting."[255]

There is no constitutional requirement that parents must raise and rear their children alone. There is even court precedent of accommodating parents who struggle with physical disabilities.[256] In *Helen L. v. DiDario*, the Third Circuit Court of Appeals found that Pennsylvania had violated the Americans with Disabilities Act because it did not provide in-home services to a mother who used a wheelchair.[257] Thus, courts have supported community aid for parents who cannot physically care for their children.[258] The fact that physically challenged parents, but not mentally challenged parents, can receive these services prior to termination of parental rights suggests that termination is not always used as a last resort when it comes to parents with mental challenges. It also adds credence to the argument that the high rates of termination for parents with mental challenges

250. *Id. But see In re* Interest of C.A.A., 229 Neb. 135, 138–39, 425 N.W.2d 621, 621 (1988) (refusing to establish a guardianship and foster care placement in lieu of parental rights termination when "the parent cannot assume the role of the parent.").

251. *See* CHILDREN'S BUREAU, *supra* note 212.

252. State v. Amber (*In re* Interest of Hunter L.), Nos. A-17-652, A-17-653, 2018 WL 332941, at *1 (Neb. Ct. App. Jan. 9, 2018).

253. *Id.*

254. *Id.* at *7–8.

255. Krumm, *supra* note 111, at 364.

256. Margolin, *supra* note 26, at 137.

257. Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995).

258. Margolin, *supra* note 26, at 137.

are driven, at least in part, by stigma.[259] Removing the statutory language that explicitly allows judges to consider the parent's mental challenges may help reduce some of that stigma.

IV. CONCLUSION

Parents with mental challenges are disproportionately at risk of losing their parental rights to their children.[260] However, they are no more likely to abuse or mistreat their children than those parents without mental challenges.[261] These parents are often unfairly evaluated in court, where they are asked to display unfair, or even unfeasible, standards of independence.[262] When the evaluations and court hearings focus on what a mentally challenged parent *cannot* do, the court overlooks what the parent *can* do.[263] Because the tools used in parental evaluations are not valid assessments of parenting abilities,[264] and because judges are susceptible to the stereotype that mentally challenged parents are "dangerous, potentially violent, and incapable,"[265] courts do not take notice of the large amount of variability in the nature and severity of these mental disorders.[266]

Statutory language that allows courts to terminate parental rights when they find parental unfitness due to mental illness or mental deficiency allows courts to focus on the parent's clinical diagnosis rather than his or her actual parenting ability.[267] This allows judges to, implicitly or explicitly, promote the stigmatization of mentally challenged parents. This statutory language is unnecessary, as courts without this statutory language are still able to terminate the parental rights of those mentally challenged parents who are not willing to or capable of caring for their children.[268] In fact, termination often causes more problems than it solves because the children of parents who lose their parental rights often end up languishing in foster care.[269] In these cases, everybody loses. The parents lose constitutionally protected rights and the children are not provided with loving and stable homes.

Rather than terminate parental rights under the assumption that parents with mental challenges cannot or will not improve their pa-

259. *See Review of Termination Cases*, *supra* note 23.
260. Dane & Rosen, *supra* note 47, at 10.
261. Taylor et al., *supra* note 161, at 398.
262. *Finding Solutions*, *supra* note 6, at 225.
263. *Id.*
264. *See supra* subsection II.B.3.
265. Thonon & Larøi, *supra* note 107; Schen, *supra* note 100, at 235.
266. *Finding Solutions*, *supra* note 6, at 223.
267. *Inclusion of Disability*, *supra* note 12, at 933.
268. *Id.* at 934.
269. CHILDREN'S BUREAU, *supra* note 212, at 16–18; CHILDREN'S BUREAU, *supra* note 216.

rental fitness, courts should promote the reunification of biological families by allowing parents with mental challenges to parent to the best of their abilities—even if that means receiving parenting assistance from the local community.[270] Removing statutory language that allows judges to rely on the existence of these mental challenges when terminating parental rights is one step closer to reducing the stigmatization of mentally challenged parents without putting the welfare of their children at risk.

270. For a discussion of alternatives to termination, see *supra* subsection III.C.2.