

# THE CONUNDRUM OF FAMILY REUNIFICATION: A THEORETICAL, LEGAL, AND PRACTICAL APPROACH TO REUNIFICATION SERVICES FOR PARENTS WITH MENTAL DISABILITIES

Charisa Smith\*

*The termination of parental rights in parents with mental disabilities is a growing and crucial issue. In 2010, an estimated 45.9 million adults in the United States had experienced a mental illness in the past year. This represents twenty percent of the adult population. More than five million children in the United States have a parent with a serious mental illness such as schizophrenia, bipolar disorder, or major depression. Courts and child-welfare systems too often assume that a parent is not amenable to treatment and is a danger to his or her child when strong symptoms of mental turmoil surface. Some studies report that as many as seventy to eighty percent of mentally ill parents have lost custody. Public systems are overwhelmed by this matter in an era of shrinking resources. However, often parents with mental health needs are willing to accept treatment and are worthy of regaining custody.*

*There are many gaps in the law on this issue. The federal Adoption and Safe Families Act (ASFA) requires that state child welfare agencies and courts make “reasonable efforts” toward family reunification before the termination of parental rights (TPR) can take place. However, federal statutes and case law provide little guidance to states about what “reasonable efforts” means, and states have been left to interpret this concept individually. Many state statutes even enable a “bypass” of the “reasonable efforts” standard due to a parent’s mental condition. Many states likewise place unjust time limits on family-reunification efforts in TPR cases.*

*Gaps in the legal scholarship are also evident. Discussions by legal scholars lack a sound theoretical basis and a thorough, practical application of solutions. As is featured in previous work of this author, a new theoretical framework of family systems theory—which is utilized in clinical and social work arenas—must first be applied. Under this theoretical framework, the vague and outdated “best interests of the child” standard, which is a legal standard used exclusively in*

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\* Charisa Smith, Esq. Substitute Assistant Professor, Brooklyn College, City University of New York (CUNY). This Article and the series that contains it stem from over nine years of legal practice with over 200 families featuring parents with mental disabilities.

family law cases, must be replaced with a more sound standard of “holistic family wellbeing.” Vulnerability Theory can provide additional insight in this matter.

The discussion of reunification services for families featuring parents with mental disabilities should be conducted utilizing family systems theory and a legal standard of “holistic family wellbeing.” Under these circumstances, the “family integrity” defended by our highest courts through the “reasonable efforts” provision should be upheld through the delivery of highly effective family-reunification services. State and federal legislators must revisit the “reasonable efforts” standard, to include more specific statutory language. Courts, child welfare agencies, and service providers need to deliver the most proven types of reunification services and coordinated mental health treatment available. In specific court cases, attorneys should focus on “holistic family wellbeing” utilizing alternative dispute resolution and promoting the enhanced agency of their clients. Nonlegal professionals likewise require training in the most advanced methods of conflict resolution and clinical practice. These recommendations will ensure more successful family law practice and more successful family-serving systems.

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## INTRODUCTION

Scholars writing about family reunification for parents with mental disabilities facing termination of parental rights (TPR) proceedings have made several missteps. The matter remains a conundrum for scholars, legislators, courts, practitioners, and families alike. There is a need for a new approach to this issue.

TPR is the process whereby courts force biological parents to sever their legal ties with their children in favor of upholding the “child’s best interests” by imbuing other, allegedly more well-suited individuals with those parental rights. At the point when a court is considering TPR, a child would have been removed from his parents’ home for many months, and possibly even several years, due to charges of neglect or abuse. “Reunification” services are offered during the period between a child’s removal from his biological home and the social service agency’s filing for TPR, to try to help the biological family reunite and remedy the maltreatment. Termination proceedings are more formal than other family-court proceedings, and they are typically required before adoption can occur. A termination order requires a higher standard of proof than that required for foster care placement: “clear and convincing evidence” in termination proceedings compared to “a preponderance of the evidence” in foster care placements.<sup>1</sup> Although the federal Adoption and Safe Families Act (ASFA) of 1997 requires that state child welfare agencies and courts make “reasonable efforts” toward family reunification before TPR can take place,<sup>2</sup> federal statutes and case law provide little guidance to states about what “reasonable efforts” means. States have been left to interpret the concept of “rea-

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1. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); William Michael Vesneski, *Judging Parents: Courts, Child Welfare, and Criteria for Terminating Parental Rights* (2012) (unpublished Ph.D. dissertation, University of Washington) (on file with University of Washington).

2. 42 U.S.C. § 671(15)(b) (2013).

sonable efforts” toward reunification individually—too often to the detriment of families.

There are numerous ways that parents with mental disabilities can treat and manage their illnesses, improve their parenting skills, function successfully in society, and create safe and loving homes in which to regain and raise their children. Yet the care with which reunification services are statutorily and financially prioritized, publicly and privately administered, and interdisciplinarily designed is highly determinant of any family’s fate. Scholars addressing this issue have failed to provide a solid theoretical framework to explain why reunification is so crucial. They also have failed to provide a thorough, interdisciplinary range of solutions to achieve successful family reunification.

TPR in parents with mental disabilities is a growing and crucial issue. In 2010, an estimated 45.9 million adults aged eighteen or older in the United States had some type of mental illness in the past year. This represents twenty percent of all adults in this country.<sup>3</sup> More than five million children in the United States have a parent with a serious mental illness such as schizophrenia, bipolar disorder, or major depression, and at least one million parents of children under eighteen have a serious psychiatric disorder.<sup>4</sup> Courts and child welfare systems too often assume that a parent is not amenable to treatment and is a danger to his or her child when strong symptoms of mental turmoil surface. Some studies report that as many as seventy to eighty percent of mentally ill parents have lost custody.<sup>5</sup>

In the last several decades, mentally disabled populations have become more integrated into society and have piqued the interest of multidisciplinary groups. Increasingly, the mentally disabled have moved from segregated institutions to mainstream living situations and multifaceted integration with mainstream society.<sup>6</sup> Today, many mental conditions are extremely treatable and do

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3. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., NSDUH SERIES H-42, HHS PUBLICATION NO. (SMA) 11-4667, RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS 1 (2012).

4. Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 273 (2003); Joanne Nicholson et al., *Prevalence of Parenthood in Adults with Mental Illness: Implications for State and Federal Policy, Programs, and Providers*, in MENTAL HEALTH, UNITED STATES, 2002, at 121 (Ronald W. Manderscheid & Marilyn J. Henderson eds., 2004).

5. Carolyn Mason et al., *Clients with Mental Illness and Their Children: Implications for Clinical Practice*, 28 ISSUES MENTAL HEALTH NURSING 1105, 1106 (2007); see also MENTAL HEALTH AM., WHEN A PARENT HAS A MENTAL ILLNESS: CHILD CUSTODY ISSUES (citing Joanne Nicholson et al., *Mothers with Mental Illness: II. Family Relationships and the Context of Parenting*, 49 PSYCHIATRIC SERVICES 643 (1998)), available at <http://mhalec.org/wp-content/uploads/2013/01/When-a-Parent-Has-a-Mental-Illness-Child-Custody-Issues.pdf> (last visited Mar. 1, 2015).

6. See Chris Watkins, *The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1418 (1995).

not permanently cause a parent to neglect or mistreat a child. Often, poor parenting behaviors can be unlearned by even developmentally delayed individuals. This matter has become a significant concern for health care providers and health care law experts, social service professionals in all jurisdictions, family courts, juvenile courts, criminal courts, problem-solving courts such as drug courts and domestic violence courts, unified family courts, and other courts dealing with this population. Evidence will show that conducting unnecessary and premature TPR proceedings only harms families, communities, and public systems. In fact, public systems are increasingly overwhelmed by this matter in an era of shrinking resources. Research from multiple disciplines reveals that communities across the nation should provide additional services and support to help parents with mental disabilities become equipped to care for their own children and reunite with them.

This Article provides a theoretical, legal, and practical approach to the matter of family-reunification services for parents with mental disabilities facing TPR. Part I describes the basic problem of TPR in parents with mental disabilities, explaining the mental disabilities that many parents face and the impact of mental illness on parenting ability. Part II builds upon previous work by this author and reviews an original theoretical framework of family systems theory—which is utilized in clinical and social work arenas and in the human rights community—to be applied to these issues going forward. Vulnerability theory and the harm caused by TPR also will be discussed. Under this theoretical framework, the vague and outdated “best interests of the child” standard, which is a legal standard used exclusively in family law cases, must be replaced with a sounder standard of “holistic family wellbeing.” This necessary theoretical framework helps to explain why TPR should be avoided whenever possible and why family reunification is so crucial.

Part III discusses the significant gaps in federal and state law in defining, discerning, and providing reasonable efforts towards family reunification. Part IV discusses the gaps in scholarship on the matter of family-reunification services for parents with mental disabilities. Legal scholars have begun to discuss the inadequacy of reunification services for mentally challenged parents, the tenuous link between mental health services and child welfare agency action, the need for enhanced attorney and child welfare worker preparation in this arena, and a need for cultural competence in reunification services. A few have reviewed select reunification programs that work, while others have even suggested that there be a legal presumption in favor of family reunification. However, those discussions lack a sound theoretical basis and a thorough, practical, interdisciplinary application of solutions. Piecemeal approaches are insufficient. It is paramount to engage in a theoretically sound, well-rounded discussion about what services are actually effective, what statutory reforms are necessary, and what both legal and nonlegal actors can do in practice.

Part V applies the lens of family systems theory and the proposed legal standard of “holistic family wellbeing” to discuss how reunification services for families featuring parents with mental disabilities should be viewed and practi-

cally implemented. Under these circumstances, the “family integrity” defended by our highest courts through the “reasonable efforts” provision should be upheld through the delivery of individually applied, highly effective, comprehensive family-reunification services. The types of reunification services that actually prove successful in reuniting families will be highlighted. Recommendations for federal and state statutory reform will be provided, including shifting funding incentives. A focus on “holistic family wellbeing” would mean that in specific court cases, attorneys for the parent(s), the child(ren), and the state should utilize collaborative family law and alternative dispute resolution. Whenever possible, attorneys should promote the express agency of their clients, receive in-depth training, and consider previously underutilized claims. Nonlegal actors in the child welfare system and its partnering service organizations likewise require training in the most advanced methods of treatment, casework, communication, planning, and conflict resolution. Higher levels of collaboration between and among public and private agencies are also required to implement successful reunification services.

## I. THE PROBLEM OF TPR IN PARENTS WITH MENTAL DISABILITIES<sup>7</sup>

### A. *The Nature of Mental Disabilities Faced by Many Parents*

Various types of parental mental disabilities, including substance dependency and other types of developmental or mental challenge, can make caring for biological children difficult. Each mental disability may influence parenting ability to a differing degree and may be ameliorated by state, family, and private services in different ways. For the purposes of this paper, “mental disability” includes any “mental disorder” included in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-V).<sup>8</sup> Someone manifests a mental disorder where she is in the top ten percent of externalizing or internalizing symptoms of a subset of chronic misbehaviors for the relevant disorder in the DSM. The DSM-V conceptualizes a “mental disorder” as:

a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other im-

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7. For a more thorough discussion of particular mental disabilities faced by many parents, and the impact of these disabilities on parenting ability, see Charisa Smith, *Unfit through Unfairness: The Termination of Parental Rights Due to A Parent’s Mental Challenges*, CHARLOTTE L. REV. (forthcoming 2015); Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, LAW & PSYCHOL. REV. (forthcoming 2015).

8. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-V (5th ed. 2013).

portant 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 or conflict results from a dysfunction in the individual, as described above.<sup>9</sup>

For purposes of this paper, “mental illness” will be included in the broad category of “mental disabilities” and includes all DSM classifications of psychotic disorders, mood disorders, anxiety disorders, somatoform disorders, factitious disorders, eating and sleeping disorders, substance use disorders, sexual disorders, adjustment disorders, personality disorders, dissociative disorders, and impulse-control disorders.<sup>10</sup> According to the National Institute of Mental Health, diagnosable mental disorders may be caused by a variety of factors, including chemical imbalances, social environment, heredity, and trauma.<sup>11</sup> Mental retardation (hereinafter referred to as Intellectual Disability (ID)), pervasive developmental disorders, motor skills disorders, communication disorders, elimination disorders, attention-deficit and disruptive behavior disorders, and learning disorders are different from other mental illnesses, but they are “mental disorders” grouped together as “disorders usually first diagnosed in infancy, childhood, or adolescence” in the DSM. These types of disorder therefore will be included in the category of “mental disabilities” in this Article. These conditions are more easily diagnosed early in life; however, the DSM notes that there is no clear distinction between “childhood” and “adult” disorders.<sup>12</sup>

States of developmental disability and ID tend to abruptly limit life choices for mentally challenged parents far more severely than would a learning disability and particularly more than would a mental illness evinced in adulthood.

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9. *Id.* at 20. As does the DSM, this Article acknowledges that no category of mental disorder is necessarily “a completely discrete entity with absolute boundaries dividing it from other mental disorders or from no mental disorder” and that co-occurrences and co-pathologies of mental challenges can and often do exist.

10. Postpartum mental illness is one of the many mental challenges addressed in this Article. While there are virtually no reported decisions that analyze the meaning and the impact of postpartum mental illness on a mother’s treatment of her infant, there are many cases whose facts suggest that the mothers temporarily lost or relinquished custody when suffering from postpartum mental illness, and that it was extremely difficult to regain custody even after the mothers had recovered from their postpartum illness and worked to comply with reunification plans. See Michelle Oberman, *Lady Madonna, Children at Your Feet: Tragedies at the Intersection of Motherhood, Mental Illness and the Law*, 10 WM. & MARY J. WOMEN & L. 33 (2003), for a fuller discussion of this issue.

11. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <http://www.icpsr.umich.edu/icpsrweb/SAMHDA> (last visited Nov. 18, 2014); NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/statistics/index.shtml> (last visited Nov. 18, 2014). See generally DSM-V, *supra* note 8. The DSM-V describes a variety of mental disabilities and conditions, organized dimensionally on axes. Each particular disability or condition itself can have a variety of origins. For example, a congenital chemical imbalance, a traumatic brain or bodily injury, a traumatic life event, a chemical imbalance developed later in life, a hereditary condition or imbalance, or a combination of those elements.

12. *Id.*

Some scholars assert that ID “is not a disease, disorder or disability” but rather a “label” for a very diverse group of individuals who seem to exhibit subnormal intellectual abilities. They note that racial and ethnic minorities and lower-income individuals are more likely to be *classified* as ID.<sup>13</sup> Since individuals with these diagnoses can “learn how to learn,” this categorization is not always as determinative of low achievement or social functioning as people may think.<sup>14</sup> Despite their differences from others, the ID and developmentally disabled have not qualified as members of a suspect classification according to the U.S. Supreme Court.<sup>15</sup> Further work by this author will explore the utility of ADA claims among parents with many types of mental disabilities.<sup>16</sup> For example, Autism Spectrum Disorder (ASD) is a mental condition that spans a range of different mental states, characteristics, and behaviors and can be ameliorated by a range of interventions.<sup>17</sup>

### B. *The Effect of Mental Disabilities on Parenting Ability*

Studies of mentally disabled parents reveal that there is a huge spectrum of parenting skills in this group. However, support and assistance for these parents can often lead to successful parenting. For example, studies of ID parents reveal that at best, some are “fit” to parent without special assistance, others are “fit” to parent if given assistance, and others are not “fit” to parent with or without assistance.<sup>18</sup> While ID and developmental disabilities can lead to many

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13. See Robert L. Hayman, Jr., *Law, Justice, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1213-14 (1990); Chris Watkins, *The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1418, 1422 (1995).

14. See generally Alexis Palfreyman & Rachel Weisenbach, *Experiences of Parents with Mental Retardation* (2007) (unpublished thesis, Hanover College) (on file with Hanover College).

15. See *City of Cleburne v. Cleburne Living Ctr.*, 472 U.S. 432, 439, 442-48, 450, 465 (1985). The Court held that a municipal zoning ordinance violated the equal protection clause of the Fourteenth Amendment by irrationally discriminating against the developmentally disabled. While striking down the ordinance as unfairly distinguishing between boarding houses for the developmentally disabled and those for the elderly, the Court was careful to note that heightened constitutional scrutiny did not apply and that deferential rational basis review was the appropriate standard for the ordinance. The majority chose to forego distinction as a suspect class “absent controlling congressional direction” to do so. *Id.* at 439.

16. See Charisa Smith, *Americans with Disabilities Act (ADA) Claims by Parents with Mental Challenges in Termination of Parental Rights Proceedings*, QUINNIPIAC HEALTH L.J. (forthcoming 2015).

17. Am. Psychiatric Ass’n, *Autism Spectrum Disorder*, DSM-5 DEVELOPMENT (2013), [www.dsm5.org/documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf](http://www.dsm5.org/documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf).

18. Watkins, *supra* note 6, at 1449 (citing Joyce Coleman, *Parents Learning Together III: The Second Generation*, in *WHEN A PARENT IS MENTALLY RETARDED* 111, 120 (Barbara Y. Whitman & Pasquale J. Accardo eds., 1990)); see also Maurice A. Feldman et al., *Parent Education Project III: Increasing Affection and Responsivity in Developmentally Handicapped Mothers: Component Analysis, Generalization, and the Effects on Child Language*, 22 J. ON APPLIED BEHAV. ANALYSIS 211, 222 (1989). The Feldman piece cites strong evidence that training and support can help developmentally disabled parents improve skills



subpar and even endangering parenting behaviors due to parents' judgment deficits and low IQs, many improper parenting behaviors can be unlearned.<sup>19</sup> ID parents do tend to "under-protect" their children, but this deficiency in parenting is not immutable.<sup>20</sup> Almost all studies of ID parents have found that a good percentage of them are functioning within or near normal limits; and many ID and developmentally delayed individuals are extremely loving parents.<sup>21</sup>

Most importantly, researchers have been unable to establish causal links between cognitive disability and parental violence or abuse, while IQ and social functioning tests are not adequate predictors of parenting ability. Researchers often find that ID and developmentally disabled parents exhibit "unexpected strengths" in parenting tests.<sup>22</sup> Studies consistently show that developmentally disabled parents provide their children more intellectually stimulating environments than those in which they were raised and that they emphasize education a great deal.<sup>23</sup> In addition to having varying, often limited effects on parenting ability, developmental disabilities and ID in parents often have a limited effect on a child's behavior and development. Having developmentally disabled parents has been shown not to have any correlation to criminal behavior.<sup>24</sup> Ultimately, ID and developmentally disabled parents are most likely to succeed when they can "enjoy the virtues of interdependence and communality."<sup>25</sup> When provided with peer, family, and often external support, wonderful parent-child relationships—and safe children—tend to develop. Studies of parents with other mental illnesses reveal that although there are numerous challenges to parenting, many parents manage their symptoms with cognitive therapies, medication, and social support and raise healthy, well-adjusted children.<sup>26</sup>

Nevertheless, the symptoms of a mental illness "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. Additionally, children of mentally ill parents have "genetic and environmental

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such as giving affection, while the Coleman piece discusses developmental improvement in children whose retarded parents receive training and support.

19. See generally Hayman, *supra* note 13; Watkins, *supra* note 6.

20. Hayman, *supra* note 13, at 1220.

21. See Watkins, *supra* note 6, at 1450 (citing Stephen Greenspan & Karen S. Budd, *Research on Mentally Retarded Parents*, in *FAMILIES OF HANDICAPPED PERSONS* 115, 121 (James J. Gallagher & Peter M. Vietze eds., 1986)).

22. *Id.* at 1450-51.

23. See Hayman, *supra* note 13, at 1222 n.75; see also Andrea Reupert & Darryl Maybery, *Families Affected by Parental Mental Illness: A Multiperspective Account of Issues and Interventions*, 77 *AM. J. ORTHOPSYCHIATRY* 362, 367 (2007).

24. See Watkins, *supra* note 6, at 1456 (citing EDWARD ZIGLER & ROBERT M. HODAPP, *UNDERSTANDING MENTAL RETARDATION* 86-88, 92 (1986)).

25. Hayman, *supra* note 13, at 1256; Reupert & Maybery, *supra* note 23.

26. Carolyn Mason et al., *Clients with Mental Illness and Their Children: Implications for Clinical Practice*, 28 *ISSUES MENTAL HEALTH NURSING* 1105, 1106-07 (2007); see also *MENTAL HEALTH AM.*, *supra* note 5; *Am. Acad. of Child & Adolescent Psychiatry, Children of Parents with Mental Illness*, *FACTS FOR FAMILIES*, Dec. 2008, at 1, 1.

vulnerability” making them susceptible to extensive responsibilities at home, guilt and isolation, poor school performance, anti-social behaviors, and various mental disorders.<sup>27</sup> Clinicians state that an inconsistent or unpredictable family and home environment can make a child more likely to develop a mental illness of her own.<sup>28</sup> Likewise, children of substance abusers are almost three times more likely to be physically or sexually assaulted than other children, more than four times more likely to be neglected than other children, and generally more likely to be substance abusers than other children.<sup>29</sup>

### 1. More Often Neglect Than Abuse

It also is critical to acknowledge that most parents with mental disabilities involved in TPR proceedings are the subject of neglect inquiries, rather than inquiries about affirmative abuse.<sup>30</sup> While scholars, the media and policy-makers often focus on heinous stories of physical or sexual abuse and even child fatalities, most maltreatment cases are about neglect alone. Neglect is defined as a failure to provide for a child’s basic human needs and a failure to provide the child with life’s necessities. Neglect typically depends on a pattern of deprivation, and it is much more difficult to detect than abuse.<sup>31</sup> Two-thirds of children in the U.S. child-welfare system are the subject of an inquiry about neglect.<sup>32</sup> Far too often, neglect charges are precipitated by the underlying condition of family poverty.<sup>33</sup> In some states, such as New York, neglect statutes clarify that neglect is only present when a parent actually possesses the financial ability to provide life’s necessities and still fails to provide them. New York’s child welfare system thus offers disadvantaged families “preventive services,” such as vouchers for heating assistance or clothing assistance, before

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27. MENTAL HEALTH AM., *supra* note 5.

28. Am. Acad. of Child & Adolescent Psychiatry, *supra* note 26.

29. Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL’Y 1, 9 (1999) (citing THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING Parents ii (1999); PRAKASH L. GROVER, U.S. DEP’T OF HEALTH & HUMAN SERVS., PREVENTING SUBSTANCE ABUSE AMONG CHILDREN AND ADOLESCENTS: FAMILY CENTERED APPROACHES 8 (1989)).

30. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2012 39 (2013); *see also* MONICA MCCOY & STEPHANIE KEEN, CHILD ABUSE AND NEGLECT 90-122 (2014).

31. MCCOY & KEEN, *supra* note 30, at 95.

32. ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006 (2008).

33. Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 NW. J. L. & SOC. POL’Y 300 (2011); Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495 (2013); Cynthia R. Mabry, *Second Chances: Insuring That Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607 (2002).

removing a child from the home, to separate conditions of poverty from willful neglect by a parent.<sup>34</sup>

The Child Abuse Prevention and Treatment Act (CAPTA) of 1974<sup>35</sup> failed to provide a sufficiently narrow definition of neglect. In general, state definitions assert different guidelines about “the dividing line between responsible or minimal but adequate parental care.”<sup>36</sup> As of 2011, thirty-five states allowed for TPR because of neglect alone. In most states, statutory distinctions are not made about the difference between situational poverty and neglectful parenting.<sup>37</sup> While parents with mental disabilities may have significant difficulty determining how much and what type of care is required for their child, this ability can be learned and bolstered with social, medical, educational, economic, and emotional support.

## 2. Research Reveals the Potential Progress of Mentally Disabled Parents

Ultimately, “the severity of” a mental illness is typically the most important predictor of parenting success, and treatment and intervention services for both parents and families routinely ensure that parenting with a mental illness does not mean bad parenting. Many children of mentally disabled parents “thrive” when the appropriate services provide their families with support. Advocates for the mentally disabled assert that when multiple systems work together (such as the school system, the mental health system, and the child welfare system), treatment can lead to family cohesion and excellent parenting.<sup>38</sup> Support services for mentally disabled parents often empower them to excel independently at home, while help from relatives and friends in child care and other daily activities also can improve the home environment and free up time for both treatment and parent-child interaction. The American Academy of Child and Adolescent Psychiatry states that a strengths-based approach is most effective. In other words, professionals must accentuate the positive aspects of the home and the strengths of both parents and children in order to create a healthy and nurturing family.<sup>39</sup> Once a mentally disabled parent can manage his or her illness’s symptoms, accentuate positive qualities, and draw on community support, their parenting skills typically show great progress.<sup>40</sup>

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34. N.Y. SOC. SERV. LAW § 371 (McKinney, Westlaw through 2014).

35. Pub. L. No. 93-247, 88 Stat. 4.

36. William Vesneski, *State Law and the Termination of Parental Rights*, 49 FAM. CT. REV. 364, 371 (2011).

37. MCCOY & KEEN, *supra* note 30, at 91-92; Veneski, *supra* note 36, at 371.

38. *See* MCCOY & KEEN, *supra* note 30.

39. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *supra* note 26.

40. *See* Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 J. CONST. L. 785, 792-93, 796 (2010); MENTAL HEALTH AM., WHEN A PARENT HAS A MENTAL ILLNESS: SERIOUS MENTAL ILLNESS AND PARENTING, available at <http://www.mhawisconsin.org>.

Evidence therefore reveals that mental disabilities in parents do not necessarily make for perpetually bad parents. While every case is different, parenting classes, mental health treatment, and other support services can drastically improve such family situations. The juxtaposition of the child's best interests and the parent's rights is therefore a necessary one when approaching TPR proceedings because parental mental challenges do not cause de facto abuse, family systems are intertwined, and TPR can be abusive to both children and parents, as will be shown herein. Absent that juxtaposition, courts would unnecessarily harm healthy families, or families on the path towards greater health and solutions. Professionals then must ask what can be done to maintain family bonds and provide reunification services when neglect, and sometimes abuse, surface. A new theoretical framework in which to view and alter family law cases will provide a means for implementing change.

## II. REVIEWING THE RATIONALE FOR SALVAGING BIOLOGICAL FAMILIES: APPLYING FAMILY SYSTEMS THEORY TO EMPLOY A HOLISTIC FAMILY WELLBEING STANDARD

Previous work by this author asserts that an application of family systems theory, combined with evidence about the detriment that TPR does to the entire family, requires the rethinking of a central legal standard used in family-court cases.<sup>41</sup> Regardless of what standards of proof are applied, family-court cases that deal with children consistently utilize a standard of "the best interests of the child" rather than considering the intricate interrelationships within the family or the critical interpersonal dynamics at play.

Family systems theory sheds light upon deep clinical psychiatric, psychological, and social work knowledge about the ways that families actually operate. Family systems theory has been adopted by international human rights organizations and is applied to the international humanitarian and legal treatment of families. With family systems theory in mind, family courts should question the "best interests of the child" standard and recognize the need to see families in more appropriate ways. In fact, family courts should more aptly apply a "holistic family wellbeing" standard rather than a "best interests of the child" standard in all family-court cases such as TPR. Research reveals that TPR is highly damaging to families, communities, and public systems. When the holistic family wellbeing standard is applied, it becomes necessary for legal actors to employ wide-ranging tactics to reunify mentally challenged parents with their children after a removal from the home takes place. When mental illnesses are treatable and parents can show the ability to remedy further abuse or neglect, family reunification should occur.

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org/Data/Sites/1/media/fact-sheets/parenting-serious-mental-illness[2].pdf (last visited Mar. 1, 2015).

41. For a more thorough discussion of family systems theory, see Charisa Smith, *Unfit Through Unfairness*, *supra* note 7; Charisa Smith, *Finding Solutions*, *supra* note 7.

The “best interests of the child” standard is outdated. But both ASFA and state laws emphasize the child’s best interest as a guiding factor.<sup>42</sup> The “best interests of the child” standard is individualized and context-based and often has been criticized for being too vague. Too often, *guardians ad litem* are charged with making recommendations about the child’s best interests, with scarce resources for investigation and little expertise about making such a determination.<sup>43</sup> Instead, legal actors can learn from clinicians, family therapists, social workers, and international human rights sources which assert that to truly understand the way that individuals function, one must consider family systems theory. Family systems theory states that in the case of the family system, children are inextricably embedded in families or kin, which live in communities, which exist within a wider societal system.<sup>44</sup>

Family systems theory asserts that families function by the Composition Law: the whole is more than the sum of its parts. Every family system, even though made up of individual elements, results in an organic whole.<sup>45</sup> Family systems theory finds that individuals in a family cannot be emotionally or socially understood in isolation from one another. On the contrary, family members need to be understood as a part of their family as the essential societal and emotional unit. Individual interests in families cannot be easily, singly parsed out if we seek to maintain optimal emotional health for all members over time. As a societal and emotional system, the family affects most human activity, drives clinical inquiries for mental health professionals, and drives numerous human rights policies and practices. Proponents of this theory state that understanding the emotional family system can create more effective ways of solving individual, family, and societal problems.<sup>46</sup>

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42. ASFA prioritizes the child’s “health and safety.” 42 U.S.C. § 671(a)(15) (2013).

43. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 38-39 (2005); see, e.g., Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL’Y 29, 35-36 (2001); Rachmilovitz, *supra* note 40, at 814; see also DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 125-26 (2002); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61 (1994); Shani King, *The Family Law Cannon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 629-30 (2011); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975).

44. SARA E. COOPER, THE TIES THAT BIND: QUESTIONING FAMILY DYNAMICS AND FAMILY DISCOURSE 13 (2004); UNICEF E. ASIA & PAC. REG’L OFFICE, EAST ASIA AND PACIFIC CHILD PROTECTION PROGRAMME STRATEGY TOOLKIT (2009); E.A. Mulroy, *Theoretical Perspectives on the Social Environment to Guide Management and Community Practice: An Organization-in-Environment Approach*, 28 ADMIN. SOC. WORK 77 (2004); Irene Stevens & Pat Cox, *Complexity Theory: Developing New Understandings of Child Protection in Field Settings and in Residential Child Care*, 38 BRITISH J. SOC. WORK 1320 (2007); Carol Morgaine, *Family System Theory* (2001) (unpublished course materials for Portland State University, Course CFS 410U), available at <http://web.pdx.edu/~cbcm/CFS410U/FamilySystemsTheory.pdf>.

45. Morgaine, *supra* note 44.

46. VICTORIAN GOV’T DEP’T OF HUMAN SERVS., THE BEST INTERESTS FRAMEWORK FOR VULNERABLE CHILDREN AND YOUTH 19 (2007); Jessica Dixon Weaver, *The Principle of Sub-*

Critics of family systems theory often assert exactly what critics of parents with mental disabilities assert—that the nested, interdependent structure of the family creates a precarious situation where one member’s dysfunction can cause the entire system to transform in a negative manner.<sup>47</sup> However, research and casework reveal that the damage inflicted by TPR is far greater than the difficulty that comes from treating a parent’s mental illness and repairing broken biological relationships with therapeutic services and extensive supports.<sup>48</sup>

Some may argue that despite the growing and largely pervasive acceptance of family systems theory among mental health professionals since the 1960s, family law practitioners can disregard these scientific discoveries and maintain the status quo of legal practice. However, family courts already consistently lean on mental health professionals and social service workers in everyday casework, investigation, decision-making, and particularly in expert witness testimony. An application of family systems theory to bring the practice of family law up to date is merely an extension of current custom and best practices. Previous work by the author has examined New Jersey as a case study while surveying national studies of TPR among parents with disabilities. This previous work found that decisions about what services to provide to a family, whether to reunify a family, or whether to separate a family permanently often specifically depend upon the testimony of a psychiatrist or other mental health clinician who has worked with the family, conducted evaluations, and applied the theories commonly learned in that realm of practice.<sup>49</sup> Judges and attorneys understand that mental health professionals can provide decisive information to answer their legal inquiries. Logic follows that the therapeutic context, bolstered by support from human rights sources, can help reform family law even further than it already has when current practice is faltering.

#### A. *Insights from Vulnerability Theory*

Human vulnerability theory (vulnerability theory) can also add credence to the matter of applying family systems theory to family law and revising the

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*sidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247, 291 (2011); Fred Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations* 26-27 (UNICEF Working Paper, 2010), available at [http://www.unicef.org/protection/files/Adapting\\_Systems\\_Child\\_Protection\\_Jan\\_2010.pdf](http://www.unicef.org/protection/files/Adapting_Systems_Child_Protection_Jan_2010.pdf); *Family Systems Theory*, GENOPRO (2013), <http://www.genopro.com/genogram/family-systems-theory>.

47. Angelina Clay, *Rescuing Dependent Children From the Perils of Attachment Disorder: Analyzing the Legislative Intent of California Welfare and Institutions Code Section 361.5*, 25 HASTINGS WOMEN’S L.J. 305 (2014); Vasili K., *General Systems Theory: A Critique*, SOCIAL WORK AT THE EDGE OF CHAOS? (Dec. 4, 2010, 9:33 PM), <http://social-working.blogspot.com/2010/12/systems-theory-critique.html>.

48. Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 560 (2009).

49. See Charisa Smith, *Finding Solutions*, *supra* note 7.

standard of “the best interests of the child.” Increasingly, legal academics are becoming aware of the insights that can be gleaned from vulnerability theory. Vulnerability theory examines the most basic elements of human existence, such as fear, shame, and lack of connection. Researchers in this arena, many of them social workers, assert that deepening societal understandings of the human condition can hold the key to helping individuals overcome struggle. Legal scholar Martha Albertson Fineman and many others at Emory University School of Law further these concepts. In *The Vulnerable Subject and the Responsive State*, Fineman describes the lack of a “U.S. constitutional guarantee to basic social goods, such as housing, education, or health care” and the anti-discrimination, sameness-of-treatment approach, coupled with Supreme Court resistance to adopting human rights principles.<sup>50</sup> She asserts that the concept of the vulnerability of human nature brings societal institutions into “a relationship of responsibility between state and individual” so that the state must be more responsive to that vulnerability and do better at ensuring the “‘All-American’ promise of equality of opportunity.”<sup>51</sup> Acknowledging that everyone has sources of shame and disconnection and drawing from human rights ideals can lead to serious demands for public systems to provide enhanced protection to those populations who need the most assistance.<sup>52</sup> As TPR causes extensive harm to families and systems alike, we must question the legal standards that propel families towards TPR and the failures of public systems to deliver reunification services to avoid TPR.

#### B. *The Harm Caused by TPR*

The various negative impacts of TPR prove that biological bonds require preservation through reunification whenever possible. Firstly, spending extended periods of time in foster care can have serious negative ramifications on children.<sup>53</sup> “Coercive interventions” that force parents to comply with extreme

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50. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 250, 254 (2010).

51. *Id.* at 255, 275.

52. See BRENE BROWN, *DARING GREATLY: HOW THE COURAGE TO BE VULNERABLE TRANSFORMS THE WAY WE LIVE, LOVE, PARENT, AND LEAD* (2012); JUNE PRICE TANGNEY & RONDA L. DEARING, *SHAME AND GUILT (EMOTIONS AND SOCIAL BEHAVIOR)* (2003); Brené Brown, *Feminist Standpoint Theory*, in SUSAN P. ROBBINS ET AL., *CONTEMPORARY HUMAN BEHAVIOR THEORY: A CRITICAL PERSPECTIVE FOR SOCIAL WORK* (2007); Brené Brown, *TEDx Talk: The Power of Vulnerability*, TED (June 2010), [http://www.ted.com/talks/brene\\_brown\\_on\\_vulnerability](http://www.ted.com/talks/brene_brown_on_vulnerability).

53. See, e.g., BETTY J. LIFTON, *LOST & FOUND: THE ADOPTION EXPERIENCE* 5 (1988); Developments in the Law, *The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2099 (2003); Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children in Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 667-68 (1976) (stating that “a child left in foster care without a permanent home may be psychologically damaged by her uncertain status”); Watkins, *supra* note 6, at 259 (citing Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1765 (1987)).

demands and that force families apart abruptly can even place a child in a more detrimental situation than his or her biological family,<sup>54</sup> while TPR does not necessarily ensure adoption or permanency.<sup>55</sup> Furthermore, courts have ruled that there is a fundamental right to family integrity,<sup>56</sup> which helps to determine the “child’s best interests” in a majority of states.<sup>57</sup> In fact, the decision to terminate blood relationships is considered contrary to humankind’s legal history.<sup>58</sup> For these reasons, the Adoption Assistance and Child Welfare Act of 1980<sup>59</sup> originated the “reasonable efforts” towards reunification standard that ASFA also addresses.<sup>60</sup> The Supreme Court in *Santosky v. Kramer*<sup>61</sup> confirmed the need to protect biological bonds despite parental hardships. The Court held that a state must support its allegations in favor of TPR by at least clear and convincing evidence because “the child and his parents share a vital interest in

54. *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002), points out that during the 1970s, nationwide concern grew regarding the large number of children who remained out of the homes of their biological parents throughout their childhood, frequently moved from one foster care situation to another, thereby reaching majority without belonging to a permanent family. This phenomenon became known as foster care drift and resulted in the enactment by Congress of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 610-679 (2013). One of the importance purposes of this law was to eliminate foster care drift by requiring states to adopt statutes to facilitate permanent placement for children as a condition to receiving federal funding for their foster care and adoption assistance programs.

55. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (citing Wald, *supra* note 53, at 993); *see also* *Smith v. Org. of Foster Families*, 431 U.S. 816, 833-38 (1977) (describing the “limbo” of the New York foster care system in the 1970s).

56. *See* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Foster Families*, 431 U.S. at 845; *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Alsager v. Dist. Court of Polk Cnty.*, 406 F. Supp. 10, 16 (S.D. Iowa 1975).

57. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf) (stating that “[t]he importance of family integrity and preference for avoiding removal of the child from his/her home” is an integral factor in determining the child’s best interests in approximately twenty-eight states, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. The twenty-eight states are Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming).

58. *See* Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253 (1991); *see also* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974).

59. 42 U.S.C. § 671(15)(B) (2013).

60. The section states that “reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home.” *Id.*; *see also* *Suter v. Artist M.*, 503 U.S. 347, 360-61 (1992); Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. Pub. Int. L.J. 259 (2003). Notably, scholars have criticized this federal law for its vagueness in explaining the “reasonable efforts” standard.

61. 455 U.S. 745 (1982).



preventing erroneous termination of their natural relationship” and because imperfect parenting alone does not necessitate TPR.<sup>62</sup>

TPR causes extreme harm to both families and communities. Severance of biological ties can be devastating and dehumanizing to a parent—especially one who suffers from mental disabilities. This traumatic sense of loss can impact the entire family’s overall wellbeing.<sup>63</sup> Unnecessary TPR also burdens an already overburdened child welfare system with large dockets, high caseloads, professional burnout, and financial strain.<sup>64</sup> TPR creates anxiety, stress, and trauma in both immediate and extended family relationships and even carries unexpected legal ramifications.<sup>65</sup> Much research has been done regarding damage that lengthy legal proceedings can cause both parents and children. Additionally, no state has a sufficient amount of foster and adoptive families waiting to care for children in the child welfare system.<sup>66</sup> Removal from a biological home often means the opposite of permanency for most children, and “foster care drift” typically results.<sup>67</sup>

With family systems theory in mind, family courts need to cease considering only the “best interests of the child” exclusive of the rest of their family, but instead need to consider the systemic impact of TPR on all family members—a holistic family viewpoint. As a legal standard considering the holistic best interests of the family is applied in family-court cases, it becomes evident that parents with mental disabilities warrant more substantive due process rights and reunification services to maintain holistic family wellbeing.

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62. *Santosky v. Kramer*, 455 U.S. 745, 753, 760 (1982); *see also* *DeBoer* by Darrow v. *DeBoer*, 509 U.S. 1301, 1301 (1993) (affirming the relevant quotation from *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992)).

63. *See* *Watkins*, *supra* note 6, at 1459-60. *See generally* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 11-13 (1996); Evelyn K. Calogero, *Reasonable Efforts to Reunite Families in Child Abuse and Neglect Proceedings: They Aren’t Just for Funding Anymore* *In Re Rood* 763 N.W.2d 587 (Mich. 2009), 12 T.M. COOLEY J. PRAC. & CLINICAL L. 25 (2009); Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 GA. ST. U. L. REV. 639 (2014); Stephanie N. Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341 (2009); Brenton C. Young, *The Role of the Children’s Services Bureau in Family Reunification*, 11 J. CONTEMP. LEGAL ISSUES 570 (2000). *But see* James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407 (2008); Robert C. Fellmeth, *America’s Child Welfare System: The Four Missing Priorities*, 9 WHITTIER J. CHILD & FAM. ADVOC. 115 (2009); John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL’Y 51 (2014); CHILD WELFARE ORGANIZING PROJECT (2013), <http://cwop.org>.

64. *See* *Wald*, *supra* note 53, at 646.

65. *Santosky*, 455 U.S. at 761 (citing *In re K.S.*, 515 P.2d 130, 133 (Colo. 1973)); *see, e.g.*, *The McKinney-Vento Homeless Assistance Act*, 42 U.S.C. § 11431 (2013).

66. Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL’Y 72 (1999).

67. *See, e.g.*, MCCOY & KEEN, *supra* note 30; Rachmilovitz, *supra* note 40.

### III. ADDRESSING THE GAPS IN FEDERAL AND STATE LAW ON FAMILY-REUNIFICATION SERVICES

Implementing proper family-reunification services can provide the due process that parents with mental disabilities require to avoid TPR. However, a survey of the most recent statutory compilations and case law updates on this matter reveals that both federal actors and states are struggling. Federal laws like ASFA link certain minimum statutory standards and service provision requirements to federal child welfare system funding while states are responsible for major implementation of child welfare services and family law matters. Yet most states use too broad or too vague a definition of what constitutes reasonable efforts towards reunification.

Reasonable efforts refer to activities of state social services agencies that aim to provide the assistance needed to preserve and reunify families. This Article will focus on reunification services that come at the back end of the child welfare system, after a child has been initially removed from the home. Generally, these efforts purport to consist of “accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children.” Some commonly used terms associated with reasonable efforts include “family reunification,” “family preservation,” “family support,” and “preventive services.”<sup>68</sup>

While ASFA states that reasonable efforts to preserve and reunify families are required, “the child’s health and safety” constitute the paramount concern in determining the extent to which reasonable efforts towards reunification should be made. This stated priority of “the child’s health and safety” by ASFA makes holistic family wellbeing a lesser priority—contrary to cutting edge research—and persistently leads systems to permanently separate families. Unfortunately, parental mental health can be a key statutory reason for bypassing the reasonable efforts provision.

Yet, ASFA already explicitly accounts for nearly any egregious violations of children’s health, safety, and rights in addition to its stated priority for children’s safety and wellbeing. Under ASFA, reasonable efforts to preserve or reunify the family are not required when the court has determined that aggravating circumstances are relevant, such as abandonment, torture, chronic abuse and sexual abuse, murder of another child of the parent, felony assault by a parent of a child, and TPR to a sibling of the child at issue. In addition, several states and U.S. territories provide one or more additional grounds for foregoing reasonable efforts, including when the parent is a registered sex offender, when the parent has failed to comply with the terms of a reunification plan (seven states, Puerto Rico, and the Virgin Islands), when the parent has been incarcer-

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68. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2012); Rebecca Aviela, *Restoring Equipose to Child Welfare*, 62 HASTINGS L.J. 401 (2010).

ated for a substantial term in relation to the child's age and there is no suitable relative to care for the child (eight states), when the parent suffers from a 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 (eight states, Puerto Rico, and the Virgin Islands), when the parent suffers from chronic abuse of drugs or alcohol and has refused or failed treatment (nine states, Puerto Rico, and the Virgin Islands), and when the parent has subjected the child to prenatal exposure to alcohol or a controlled substance (three states).<sup>69</sup>

#### A. States Presenting Particular Problems

Some states stand out as being particularly unamenable to family reunification—especially when a parent has a mental disability. California may be the worst offender, with fifteen exceptions to the “reasonable efforts” standard and a presumption against reunification services in the case of all but two of these exceptions.<sup>70</sup> Notably, all states feature a disproportionate representation of families of color within their child-welfare systems, and African American children are significantly less likely to reunify with their families than are white children, holding other factors constant.<sup>71</sup> Some scholars point out that Massachusetts appellate courts, by rarely deciding that the state has not met its obligation, have set the bar for complying with the reasonable efforts requirement quite low. Massachusetts appellate cases clarify that social service efforts are “limited to linking parents to existing services and that it is not required to fill the gaps in available services on its own . . . . [Social services are] not even required to look very hard for available services and instead can rely on an expert opinion asserting that there are no services that would fill a particular need of a parent.” In other cases, Massachusetts courts have let a child welfare social worker with potential adverse interests to the parent serve as a “therapist” for

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69. CHILD WELFARE INFO. GATEWAY, *supra* note 67.

70. Konrad S. Leea & Matthew I. Thueaa, *Unpacking the Package Theory: Why California's Statutory Scheme for Terminating Parental Rights in Dependent Child Proceedings Violates the Due Process Rights of Parents as Defined by the United States Supreme Court in Santosky v. Kramer*, 13 U.C. DAVIS J. JUV. L. & POL'Y 143 (2009); Karenina Lines, *Different Isn't Always Better: The Problems With California's Dependency System*, 38 W. ST. U. L. REV. 111 (2010).

71. See, e.g., MCCOY & KEEN, *supra* note 30; Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215 (2013); Amy D'Andrade et. al., *Concurrent Planning in Public Child Welfare Agencies: Oxymoron or Work in Progress?*, 28 CHILD. & YOUTH SERVICES REV. 78 (2006). But see Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323 (2012); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

the parent rather than requiring the use of a trained psychiatrist or psychologist.<sup>72</sup>

In still other cases, Massachusetts courts have focused on the unreasonableness of the parents' efforts as opposed to an evaluation of whether social services has made reasonable efforts towards reunification. Of Massachusetts's inadequate provision and assessment of reunification services, scholar Jeanne Kaiser asserts:

[I]t seems only fair that the reasonable efforts requirement be tailored to meet the propensities of those [challenged] parents, and not those of the average, responsible parent who might be expected to eagerly accept available services. In short, the clientele served by the Department would seem to need extra measures of outreach, patience and aggressiveness to successfully link to services. In view of this dynamic, excusing the Department from any obligation at all if the parents do not show initiative in engaging in services is both counter-intuitive and unfairly shifts the burden to the parents.

This unfairness is particularly problematic when parents suffer from a disability such as mental illness or mental retardation. The decisions of the Massachusetts appellate courts send a contradictory message on what constitutes reasonable efforts in these cases. On the one hand, these decisions have stressed that the Department has an obligation to tailor services in order to accommodate the disabilities of parents. On the other hand, no decision has ever found that the Department failed to fulfill this obligation, no matter what the nature or severity of the disability involved.<sup>73</sup>

Kentucky stands out as another state that is often unforgiving of parental mental disabilities when reunification is at issue. According to Kentucky law, the length of time the child spends in foster care can be the sole determinant of whether the child is neglected or abused, whether social services proves a ground for TPR, and whether TPR is in the child's best interests. Kentucky social service agencies do not need to make reasonable efforts if a mentally disabled parent cannot provide a safe home prior to the permanency hearing. Scholar Jennifer Spreng asserts that this statutory scheme, along with short time frames for parental rehabilitation and proof of fitness, show that "[Kentucky] law stacks the deck against mentally ill mothers' chances of protecting their parental rights."<sup>74</sup> Further, case studies from Rhode Island, South Carolina, and other states reveal similar biases and denials of basic rights.<sup>75</sup>

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72. Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100 (2009).

73. *Id.* at 118-19.

74. Jennifer E. Spreng, *The Private World of Juvenile Court: Mothers, Mental Illness, and the Relentless Machinery of the State*, 17 DUKE J. GENDER L. & POL'Y 189, 212 (2010).

75. Crossley, *supra* note 60; Michelle Dhunjishah, *Legislature Makes Permanency a Priority for Children in Foster Care*, 22 S.C. LAW. 14 (2011); Alexandra C. Hudd, *In Re Steven D.*, 23 A.3D 1138 (R.I. 2011), 17 ROGER WILLIAMS U. L. REV. 571 (2012); Esme Noelle DeVault, *Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother*, 10 ROGER WILLIAMS U. L. REV. 763 (2005); Vesneski, *supra* note 36.

### 1. The Devil Is in the Details

Due to the overbreadth and vagueness of their statutes and due to a lack of federal guidance, states have persistent difficulty defining and delivering reasonable reunification services. Discerning what reunification services are most appropriate to provide, finding funding for reunification services, parsing out agency responsibility for the delivery of reunification services, and defining whether ASFA-mandated “reasonable efforts” towards reunification have been made at the time of TPR and permanency hearings are all difficulties.<sup>76</sup> The vagueness of reasonable efforts statutory provisions can punish parents by adding “boilerplate services” to social work case plans (such as parenting classes) that are often unsuitable for parents with particular disabilities, not tailored to each family’s individual case, and often unlikely to help them avoid TPR.<sup>77</sup>

Too often, states believe that a parent’s mental disability will prevent them from being able to improve their parenting skills; no effort is made to find services that make the right fit; and the underlying causes for neglect or abuse remain unaddressed so that TPR becomes inevitable.<sup>78</sup> Further, mental disabilities can complicate system involvement at a time when any parent would be highly distressed and confused. Reunification plans often call for fast and decisive action by parents, which can be difficult with a mental disability. There also is a huge bias against mentally disabled parents, far more than with the physically disabled. Shame may keep certain parents from requesting the help they need, and when parents do request help, biased evaluators and service providers may propel a case away from reunification.<sup>79</sup>

### 2. Unjust and Unworkable Bypasses, Timelines, and Funding Priorities

The current statutory scheme also enables states to bypass reunification and to shorten the timeline that parents have to improve their mental condition, while monetarily rewarding efforts opposing reunification. Disregarding the extensive research on the necessity of preserving biological families, many

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76. Cynthia R. Mabry, *Second Chances: Insuring That Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607 (2000); Emily W. McGill, *Agency Knows Best? Restricting Judges’ Ability to Place Children in Alternative Planned Permanent Living Arrangements*, 58 CASE W. RES. L. REV. 247 (2007).

77. DeVault, *supra* note 75; Jessica A. Graf, *Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement*, 30 SUFFOLK U. L. REV. 81 (1996); Case Law Update, In re Olivia L., 2007 WL 1652568 (N.Y. App. Div.). *Termination of Parental Rights, Reasonable Efforts*, 26 CHILD L. PRAC. 133, 133 (2008).

78. Rachel L. Lawless, *When Love Is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability*, 37 CAP. U. L. REV. 491 (2008).

79. Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa’s Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165 (2011).

state statutes enable a “bypass” of the “reasonable efforts” standard (otherwise known as “fast-track provisions”) when “clear and convincing” evidence allegedly shows that a parent’s mental condition cannot be changed.

Many states likewise place unjust statutory and common law time limits on family-reunification efforts in TPR cases. ASFA itself requires that TPR proceedings begin when a child has been in foster care for fifteen out of the past twenty-two months of the life of a case. Further, many states require “concurrent planning” for foster care and adoption while family-reunification services are being provided. Federal funding streams under ASFA and other laws incentivize local child-welfare systems and courts to prioritize foster care and adoption over reunification, to the point of virtually punishing states for focusing on reunification.<sup>80</sup> Although some states may enable the waiver of ASFA’s fifteen out of twenty-two months in foster care provision months requirement in certain circumstances, social service agencies know that foster care and adoption have a higher value due to ASFA. States report far less innovation in regard to reunification than adoption and alternative guardianship. Further, child welfare staff report nationwide worry that ASFA’s tight timeline could disadvantage families with substantial needs like mental illness and substance abuse.<sup>81</sup> Welfare and public benefits-related timetables also increase the pressure on many mentally disabled parents. Parents often must often meet training and work requirements to retain their benefits and eventually regain custody, although those requirements may conflict with mental health treatment needs and child welfare system demands.<sup>82</sup>

### B. *Constitutional Issues*

Numerous scholars rightfully assert that parents with mental disabilities who are denied sufficient opportunities to avoid TPR are being denied due process under the Fifth and Fourteenth Amendments. This Article’s theoretical framework of family systems theory adds philosophical and scientific credence to the longstanding legal tradition of upholding family integrity as a fundamental right. A due process argument is most viable for several reasons. Firstly, as

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80. DeVault, *supra* note 75.

81. Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act*, in CTR. FOR THE STUDY OF SOC. POLICY, URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 32 (2009), available at [http://www.urban.org/UploadedPDF/1001351\\_safe\\_families\\_act.pdf](http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf); see also Karen S. Budd & Rachael E. Springman, *Empirical Analysis of Referral Issues and “Ultimate Issue” Recommendations for Parents in Child Protection Cases*, 49 FAM. CT. REV. 34 (2011); Stacia Walling Driver & Wright S. Walling, *Examining the Intersection of Chemical Dependency and Mental Health Issues with the Juvenile Protection System Timelines as Related to Concurrent Planning and Termination of Parental Rights*, 40 WM. MITCHELL L. REV. 1008 (2014); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113 (2013).

82. Marc L. McCulloch, *Statutory Limit for Reunification Services*, 28 J. JUV. L. 219 (2007); Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL’Y 72, 78-79 (1999).

previously mentioned, parental rights are considered fundamental by the Supreme Court and Congress. Secondly, ASFA itself requires reasonable efforts towards reunification. Thirdly, discussion herein cites extensive research proving how reasonable efforts are often unmet, how damaging family separations can be, and how mentally disabled parents can often unlearn poor parenting behaviors. Reason and tradition suggest that the state needs an extremely compelling interest to permanently separate biological families.<sup>83</sup>

However, an equal-protection analysis of this issue has not been widely discussed or widely successful in practice. An Illinois circuit court found that because the Illinois Adoption Act defines as “unfit” a parent who cannot fulfill parental responsibilities due to mental retardation, the Act is unconstitutional under the Equal Protection Clause. However, the Illinois Supreme Court overruled the decision, stating that parents with cognitive delays are dissimilarly situated to parents without cognitive delays, so that the Equal Protection Clause did not apply. An Ohio appeals court likewise found that the state TPR statute mentioning parental cognitive delays did not violate equal protection. Cognitively delayed parents found a partial victory in New York, as the Family Court held that a cognitively delayed parent must be treated the same as other allegedly neglectful parents under an equal protection analysis. However, New York’s TPR statute was not found unconstitutional under an equal protection analysis either.<sup>84</sup>

### C. *No Private Right of Action to Remedy Insufficient Reunification Services*

The United States Supreme Court has stated that there is no private (Section 1983) right of action to enforce the reasonable efforts towards reunification requirement. The case *Suter v. Artist*<sup>85</sup> clarifies further that states can implement the reasonable efforts requirement individually, often at the risk of harming families and communities given established research findings. Judicial use of pre-printed forms with a “check box” to denote the fulfillment of the reasonable efforts standard is the norm at this time.<sup>86</sup> The Americans with Disabilities Act (ADA) has rarely proven helpful in these circumstances.<sup>87</sup>

83. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); Theresa D. Legere, *Preventing Judicially Mandated Orphans*, 38 FAM. & CONCILIATION CTS. REV. 260 (2000); Vesneski, *supra* note 1; Michael E. Waterston, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014).

84. Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 542-43 (2005); Waterston, *supra* note 83.

85. 503 U.S. 347, 364 (1992).

86. Kaiser, *supra* note 72, at 110.

87. For a more thorough discussion, see Smith, *supra* note 16; see also, e.g., S.C. Dep’t of Soc. Servs. v. Mother, 651 S.E.2d 622 (S.C. Ct. App. 2007); John Maxwell Greene, In re Kayla N., 900 A.2d 1202 (R.I. 2006), 2006 Survey of Rhode Island Law, Family Law, 12 ROGER WILLIAMS U. L. REV. 610 (2007); Spreng, *supra* note 74.

## IV. ADDRESSING THE GAPS IN SCHOLARSHIP

There are numerous gaps in the legal scholarship on the matter of family-reunification services for parents with mental disabilities. Scholars have admitted that reunification services for mentally disabled parents are often insufficient. Some have raised concerns that mental health service providers, child welfare agencies, and attorneys require enhanced cooperation and preparation. Matters of cultural incompetence in reunification services have been addressed, while some scholars have even recommended a legal presumption in favor of family reunification.<sup>88</sup> However, those discussions have all lacked a sound theoretical basis such as the family systems theory framework proffered herein. It is paramount to ground family law analysis in solid theoretical principles that actually analyze the meaning of the family itself. Those discussions also fail to draw from the nonlegal disciplines and human rights resources necessary to implement successful family law practice. Scholarly approaches to this matter lack an interdisciplinary, thorough, cross-systems, practical application of legal and nonlegal solutions. It is imperative to know what can be done on all fronts. Piecemeal approaches are insufficient. This Article offers an interdisciplinary discussion by explaining the most effective reunification services, the necessary statutory reforms, the needed courtroom techniques or alternative methods of dispute resolution, and the pragmatic recommendations for both legal and non-legal actors alike. This research is critical to progress in the family law arena.

## V. APPLYING A NEW THEORETICAL FRAMEWORK AND IMPLEMENTING SUCCESSFUL REUNIFICATION SERVICES

Reunification services for families featuring parents with mental challenges should be viewed through the theoretical lens of family systems theory, and a legal standard of “holistic family wellbeing” rather than that of “the best interests of the child” should be applied. Family members are inextricably linked, and their emotional, social, and legal wellbeing is continually jeopardized by unnecessary TPR. Family systems theory takes root from clinical psychological and social work practice, as well as human rights norms, and can help the legal community understand why salvaging biological families should take precedence. Under these circumstances, the “family integrity” defended by our highest courts and through the reasonable efforts provision of ASFA should be upheld through the delivery of highly effective, individualized, comprehensive family-reunification services. The types of reunification services that actually prove successful in reuniting families will be highlighted; recommendations for

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88. Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20, 29 (1997) (concluding that “[f]amilies of color are treated differently than white families, and to their disadvantage, at every step of the child dependency process”).



statutory reform will be made; and practical suggestions will be given for how these concepts can be applied to specific court cases, service delivery, and professional practice.

A. *Reunification Services Tailored to Each Family's Needs*

“Reasonable efforts” should be interpreted to incorporate current research regarding the treatment of parental mental illnesses while fully tailoring expansive reunification services to the needs of each family. Families must not be required to adapt to inflexible, pre-existing services in a one-size-fits-all approach—which too often currently occurs.<sup>89</sup> For example, parents with learning disabilities, cognitive delays, Autism Spectrum Disorder, and other mental disabilities may not adapt easily to standard parenting classes. They may require more individualized programs that take their intellectual and social capabilities, personal characteristics, and family attributes into account. When necessary and possible, mental health court and drug court programs can help facilitate this goal. For example, children aided by the individualized programming in Idaho’s Child Protection Drug Court were significantly more likely to be reunified with their parents, with reunification rates up to 50% higher than the rates for comparison children.<sup>90</sup> Other nationally renowned clinical research reveals that substance-abusing parents require services that directly address their risk of relapse and help them identify the coping mechanisms that they utilize when interacting within their family system.<sup>91</sup> Evidence proves that providing adequate, uniquely designed reunification programs to parents with mental health needs facing TPR saves public systems considerable resources in addition to keeping families intact.<sup>92</sup>

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89. Margaret Smarig, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*, 26 CHILD L. PRAC. 113 (2007).

90. Matthew English, *Headaches, Dizziness, and Ringing in the Ears*, 51 ADVOC. (IDAHO) 22, 23 (2008); Felice Glennon Kerr, *Family Court: Protecting the Rights of Indigent Parents*, 31 DEL. LAW. 24 (2013); *In Re Nolan W.*, 45 Cal. 4th 1217 (2009), 37 W. ST. U. L. REV. 295 (2010).

91. Bonnie E. Carlson et al., *A Pilot Study of Reunification Following Drug Abuse Treatment: Recovering the Mother Role*, 36 J. DRUG ISSUES 877 (2006); Sam Choi & Joseph P. Ryan, *Co-Occurring Problems for Substance-Abusing Mothers in Child Welfare: Matching Services to Improve Family Reunification*, 29 CHILD. & YOUTH SERVICES REV. 1395 (2007); Anthony N. Maluccio & Frank Ainsworth, *Family Reunification Practice with Parents Who Abuse Drugs*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 349 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

92. MJ Hannett, *Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights*, 45 FAM. CT. REV. 524 (2007); Jacinta Patterson, *The Massachusetts Care and Protection System: Is a Low Tolerance for Risk Really in the Best Interests of the Children?*, 22 B.U. PUB. INT. L.J. 165 (2013); Rexanah Wyse & Scott Trowbridge, *Hawaiian Father and Caseworker Team Up to Achieve Reunification*, 32 CHILD L. PRAC. 92 (2013); Janet York et al., *Family Drug Treatment Courts and Social Determinants of Health*, 50 FAM. CT. REV. 137 (2012).

A study of all fifty states by the U.S. Department of Health and Human Services revealed that reunification services should ideally have a wraparound quality—meaning that they span a wide range of focus areas and remedy a wide range of life challenges. While this study was not limited to families with parents that had a mental disability, the study consistently mentions parental mental health as an extreme need that is beginning to be met in certain programs. This study also emphasized that reunification services cannot be individualized enough. The most effective efforts included in-home services, “concrete services such as housing and food, mental health and substance-abuse services, individual and group counseling, culturally competent services, comprehensive wraparound services, and coordination and collocation of service providers.”<sup>93</sup> Other necessary services include financial assistance to pay for medications, day care funding, and nutritional and child development education programs.<sup>94</sup>

Numerous other studies cited by the federal government report that the most effective reunification interventions focus on concrete skill-building for parents and examine cross-cutting behaviors. Parental behaviors in the home, at school, and in the community are all potentially involved in child maltreatment, and requires thorough improvement. Parents require instruction in both parenting skills and also in general life competencies such as communication, problem-solving, anger management, accessing community resources and public benefits, and financial competency.<sup>95</sup> Parents may need help with English as a second language, with Head Start resources for their children, and with a plethora of other aspects of life.<sup>96</sup>

Further, social support, expansion of resources, and collaboration between families and communities is imperative for the delivery of effective reunification services. The intimate partner of a parent that has lost custody, the parent’s extended family, community-service providers, community allies, employers, and child-welfare system-case managers all need to play a role in helping the parent build their skills and cultivate their relationship with their children.<sup>97</sup> The 2008 Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections)<sup>98</sup> has assisted this effort by requiring states to identify

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93. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., FAMILY REUNIFICATION: WHAT THE EVIDENCE SHOWS (2011), available at [www.childwelfare.gov/pubs/issue\\_briefs/family\\_reunification](http://www.childwelfare.gov/pubs/issue_briefs/family_reunification); Case Update, *Lucy J. v. Dep’t of Health and Social Servs.*, 244 P.3d 1099 (Alaska 2010). *Termination of Parental Rights, Active Efforts*, 30 CHILD L. PRAC. 2 (2011).

94. *In re Juvenile*, 937 A.2d 297 (N.H. 2007); Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321 (2005).

95. CHILD WELFARE INFO. GATEWAY, *supra* note 93.

96. Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523 (2009).

97. CHILD WELFARE INFO. GATEWAY, *supra* note 93; Hayman, *supra* note 13, at 1256; Reupert & Maybery, *supra* note 23.

98. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008).

and notify relatives when a child is at risk of removal from the home. Whenever possible, mental health and substance abuse programs should provide special resources for parenting individuals while keeping in mind the timetables, requirements, and complications of court and child welfare system involvement. All states reported a dearth of specific services for parents with mental disabilities, persistent transportation challenges, long waiting lists for a variety of programming, and inconsistent service accessibility. For all the aforementioned reasons, much improvement is needed to change the status quo.<sup>99</sup>

### B. *Culturally Competent Reunification Programs*

Given the diversity of parental mental disabilities at issue and the overrepresentation of impoverished families of color in child welfare systems, reunification services need to be developmentally appropriate, culturally competent, well-conceived, and flexibly delivered. Family courts have historically been accused of imposing white, upper-middle class values upon disadvantaged, minority populations when offering services and deciding cases. At times, the staff of courts and child welfare systems have deep-seated assumptions about the disabilities, behavior, race, socioeconomic background, and personal characteristics of the families that they serve. Reunification services therefore must be able to meet a family where they are, in true cultural competence. Services need to honor the cultural and linguistic traditions of the family, give family members a seat at the decision-making table, and address feelings of distance and first impression directly.<sup>100</sup>

### C. *Comprehensive and Effective Visitation Programs*

Visitation, or scheduled face-to-face contact between parents and children, is essential for enabling a family to eventually reunite. Experts from the National Resource Center for Permanency and Family Connections—an agency which assists both the federal government and states in creating permanency for families—assert that visitation is the single “most important factor contributing toward timely family reunification.” While these experts did not limit

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99. CHILD WELFARE INFO. GATEWAY, *supra* note 93; Collentine, *supra* note 84; Steven M. Cytryn, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81 (2010); Betsy Gwin, *Housing Resources for Families at Risk of Separation*, 30 CHILD L. PRAC. 1 (2011); Robert M. Spataro, *Nipping It in the Bud: Adopting a Family Drug Court Approach to Fighting the Cycle of Alcohol Addiction for Children When Parents Are Convicted of DUI*, 49 FAM. CT. REV. 190 (2011); Rose Marie Wentz & Kelly Lynn Beck, *Maintaining Family Relationships for Children in the Child Welfare System*, 31 CHILD L. PRAC. 97 (2012); Richard Wexl, *Take the Child and Run: How ASFA and the Mentality Behind It Harm Children*, 13 UDC/DCSL L. REV. 435 (2010). *But see* J. Danielle McAfee & David R. Leggansa, *Protecting the Interests of Abused and Neglected Children: Is Court-Ordered Family Reunification Always the Best Policy?*, 9 WHITTIER J. CHILD & FAM. ADVOC. 3 (2009).

100. *See* Klein, *supra* note 88; *see also* CHILD WELFARE INFO. GATEWAY, *supra* note 93.

their scope to families where a parent had a mental disability, the mentally disabled population is represented in the programs that they highlight. Families with the most frequent visitations were more likely to be reunified, to experience shorter exposure to foster care, and to have children cared for more aptly during foster care stays. In typical “supervised” visitations, social workers observe parent-child interaction, parents are evaluated for their ability to observe child safety, and emotional bonds are strengthened.<sup>101</sup> The previously cited Department of Health and Human Services study found that many states additionally succeeded when relying on the enhanced use of trial home visits, during which time the social-service agency continues to provide support and supervision. Enabling families to make new attempts to bond within their own homes can become critical for achieving reunification.

The most promising programs highlighted by the National Resource Center for Permanency and Family Connections include programs that provide parents consistent feedback on their communication skills, parenting skills, and parent-child dynamics while providing continued opportunities for improvement. Families Together is a Rhode Island program that facilitates a series of therapeutic visits for children aged one to eleven to a museum, where there is supervised playing and learning with their parents, under the watch of family therapists. Not only are parents provided with transportation in Families Together, but they also receive immediate feedback about their communication and parenting skills, which enables them to continually apply the clinicians’ advice. California’s Family Visitation Center provides regular supervised visitation, supportive supervised visitation, intermittent supervised visitation, therapeutic supervised visitation, and off-site visitation, where trained staff monitor all parent-child interactions, provide parents feedback, and report back to the court per court order.<sup>102</sup> Given the previously mentioned challenges that both Rhode Island and California have in creating statutes amenable to family reunification, more widespread legislative awareness about the success of these two visitation programs may be of particular importance.

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101. DEBORAH WILSON GADSDEN, UNIV. OF PITTSBURGH SCH. OF SOC. WORK, FAMILY REUNIFICATION THROUGH VISITATION: A TRAINING OUTLINE (2006), available at <http://www.pacwrc.pitt.edu/curriculum/209FmlyRnfctnThrhVsttn/Cntnt/Cntnt.pdf>; NAT’L RES. CTR. FOR PERMANENCY AND FAMILY CONNECTIONS, PROGRAMS THAT PROVIDE SERVICES TO SUPPORT FAMILY VISITING OF CHILDREN IN FOSTER CARE (2008), available at <http://www.hunter.cuny.edu/socwork/nrefcpp/downloads/PHProgramsvisiting.pdf>; UNIV. OF ILL. CHILDREN & FAMILY RESEARCH CTR., MAKING VISITS BETTER: THE PERSPECTIVES OF PARENTS, FOSTER PARENTS, AND CHILD WELFARE WORKERS (2001), available at <http://centerforchildwelfare2.fmhi.usf.edu/kb/trpost/Making%20Visits%20Better--The%20Perspectives%20of%20Parents,%20FP,%20and%20Case%20Workers.pdf>; *The Core Components of Concurrent Planning*, NAT’L RES. CTR. FOR PERMANENCY & FAMILY CONNECTIONS, <http://www.nrepfc.org/cpt/component-five.htm> (last visited Mar. 1. 2015); *Supervised Visitation Programs*, CAL. EVIDENCE-BASED CLEARINGHOUSE FOR CHILD WELFARE, <http://www.cebc4cw.org/topic/supervised-visitacion> (last visited Mar. 1. 2015).

102. *Supervised Visitation Programs*, *supra* note 101.

Ultimately, the courts use visitation results to make decisions about whether parents have been able to significantly improve their parenting behaviors, other life skills, and bonds with their children.<sup>103</sup> Many states are successfully keeping families together by instituting strong visitation programs. Depending on the parent's disability and the age and needs of the child, the nature of the visitation programs should vary significantly.<sup>104</sup>

#### D. *Extended Timelines*

Typically, parents with mental disabilities require extended court and child welfare system timelines in order to prove themselves mentally, financially, and socially capable of regaining their children. As previously mentioned, the ability to ameliorate symptoms of a mental illness, to garner public benefits, to obtain housing, to receive child care, and to improve a parent-child emotional dynamic, in addition to many other elements of successful parenting, all take varying amounts of time. These elements may not coincide directly with child welfare system deadlines, nor may the child welfare system be keeping external deadlines in mind. Cross-system collaboration and communication thus is essential for reunification. ASFA's fifteen out of twenty-two months in foster care provision should be extended to enable families to receive sufficient services for permanent reunification. State deadlines also should be examined and extended whenever possible. "Fast-track provisions" and bypass provisions that enable states to forego reunification efforts under circumstances of parental mental disability require particular reconsideration.

Reason may follow that the federal government and states must set a more workable limit on the amount of time parents have to prove themselves fit to regain custody. However, best practices in mental health and substance abuse treatment, and in holistic family development—as viewed through the lens of family systems theory—must dictate these deadlines if they are to exist. Currently, isolated ideas about the desired length of a child's stay in foster care dictate most deadlines for reunification opportunities. Yet family systems theory reveals that children cannot be viewed in a vacuum and that families are permanently intertwined regardless of their challenges. Further, if foster care were a mostly helpful endeavor, or if states were overburdened with a plethora of foster and adoptive families, perhaps a different conclusion could be drawn. However, children and parents alike suffer with foster care system exposure; all jurisdictions lack sufficient foster homes and adoptive families; coercive inter-

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103. Jennifer K. Smith, *Putting Children Last: How Washington Has Failed to Protect the Dependent Child's Best Interest in Visitation*, 32 SEATTLE U. L. REV. 769 (2009). See generally Cory J. Hill, *State Ex Rel. B.R.: A Guide to Properly Considering Rehabilitation Evidence in Parental Rights Termination Proceedings*, 9 J.L. & FAM. STUD. 341 (2007).

104. Smarig, *supra* note 89.

ventions do more harm than good; and reunification is often the safest and most economically viable option.<sup>105</sup>

#### E. *Consistent Aftercare*

The fifty-state study conducted by the U.S. Department of Health and Human Services has further revealed that in many cases, timelines are not necessarily relevant. Post-reunification aftercare services for families are a key to reducing the risk of harm to children, repeated maltreatment, and reentries to foster care. Whether aftercare services are delivered for several months subsequent to family reunification or indefinitely after reunification, continued monitoring and assistance for families helps to assure their viability. Aftercare services that have proven successful include in-home services, mental health treatment or family counseling services, substance abuse services, parenting support, child care, and concrete services such as housing assistance, financial assistance, and transportation. On the contrary, when services are discontinued or disrupted preliminarily, or when they are too expensive to be utilized, parents often lose custody again and are propelled further into TPR.<sup>106</sup>

#### F. *Addressing the Critics of Improved Reunification Services*

Some scholars argue that providing extensive, wraparound reunification services to parents with mental disabilities facing TPR promotes too much dependence on the part of the parents. At times, even social workers and child advocates assert that parents who exhibit strong symptoms of mental illness do not deserve continued opportunities to rectify their maltreating behaviors. Much legislation discussed herein actually denies these parents multiple opportunities for improvement. However, the aforementioned federal and state research by governmental agencies, private researchers, and clinical experts shows that individualized, wraparound, continued reunification services are in fact changing the course of history. These reunification programs are significantly treating parental mental disabilities, reducing child maltreatment, strengthening family systems and troubled communities, and saving public systems money. Expansion and enhanced implementation of best practices is necessary.<sup>107</sup>

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105. See generally Dhunjishah, *supra* note 75; Christopher R. Foley, *Making Wisconsin's Child Welfare Law Work*, 85 WIS. LAW. 16 (2012); Lines, *supra* note 70; Paruch, *supra* note 48.

106. CHILD WELFARE INFO. GATEWAY, *supra* note 93.

107. *Id.*; Kaiser, *supra* note 72; Smith, *supra* note 16.

### G. Recommendations for Statutory Reform

An application of family systems theory requires the creation of an effective reunification service delivery system for parents with mental disabilities, and it also requires numerous reforms in federal and state law. State and federal legislators must revisit the “reasonable efforts” standard to include specific statutory language about the specific types of reunification services required and the need for flexible timelines. Legislators must alter the incentives set by current funding streams and statutory priorities to better prioritize reunification as the preferable goal. While some may argue that more specific statutes and revised priorities will coddle at-risk parents, the research in favor of improving reunification services suggests that statutory guidance will improve outcomes for all involved.<sup>108</sup>

#### 1. More Specific Statutes Are Needed, Legislators Should Utilize Model Guidelines

As evidence shows that the vague “reasonable efforts” requirement of ASFA has not enabled states to successfully reunify families or to create effective statutes of their own, states should follow federal administrative guidelines. The Federal Children's Bureau, which is part of the U.S. Department of Health and Human Services, issued Guidelines for Public Policy and State Legislation Governing Permanence for Children (Guidelines) in 1999. These Guidelines do not have the force of either federal legislation or federal administrative guidance but were created in hopes that states would choose to adopt them. The Guidelines suggest that state laws require courts to consider a variety of factors in making “reasonable efforts” determinations, mention a thorough array of available services, create administrative and judicial policies that define reasonable efforts, emphasize the individualized nature of reunification services, assess whether system officials have been diligent in arranging services, assess the timeliness and appropriateness of services, and ultimately assess the success of the reunification services before moving towards TPR.<sup>109</sup>

Minnesota and Colorado remain two of the few states that have effectively implemented the Guidelines. Minnesota's detailed statute concerning reasonable efforts explains:

(d) “Reasonable efforts to prevent placement” means:

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108. See generally Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspective, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9 (2011); Council of State Gov'ts Justice Ctr., Am. Bar Ass'n, *Foster Care and Permanence*, 30 CHILD L. PRAC. 61 (2011).

109. See DONALD N. DUQUETTE ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

- (1) the agency has made reasonable efforts to prevent the placement of the child in foster care by working with the family to develop and implement a safety plan; or
  - (2) given the particular circumstances of the child and family at the time of the child's removal, there are no services or efforts available which could allow the child to safely remain in the home.
- (e) "Reasonable efforts to finalize a permanent plan for the child" means due diligence by the responsible social services agency to:
- (1) reunify the child with the parent or guardian from whom the child was removed;
  - (2) assess a noncustodial parent's ability to provide day-to-day care for the child and, where appropriate, provide services necessary to enable the noncustodial parent to safely provide the care, as required by section 260C.219;
  - (3) conduct a relative search to identify and provide notice to adult relatives . . . .
- . . . .
- (f) Reasonable efforts are made upon the exercise of due diligence by the responsible social services agency to use culturally appropriate and available services to meet the needs of the child and the child's family. Services may include those provided by the responsible social services agency and other culturally appropriate services available in the community. At each stage of the proceedings where the court is required to review the appropriateness of the responsible social services agency's reasonable efforts as described . . . the social services agency has the burden of demonstrating that:
- (1) it has made reasonable efforts to prevent placement of the child in foster care;
  - (2) it has made reasonable efforts to eliminate the need for removal of the child from the child's home and to reunify the child with the child's family at the earliest possible time;
  - (3) it has made reasonable efforts to finalize an alternative permanent home for the child, and considers permanent alternative homes for the child inside or outside of the state . . . .
- . . . .
- (h) The juvenile court . . . shall make findings and conclusions as to the provision of reasonable efforts. When determining whether reasonable efforts have been made, the court shall consider whether services to the child and family were:
- (1) relevant to the safety and protection of the child;
  - (2) adequate to meet the needs of the child and family;
  - (3) culturally appropriate;
  - (4) available and accessible;
  - (5) consistent and timely; and
  - (6) realistic under the circumstances.<sup>110</sup>

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110. MINN. STAT. ANN. § 260.012 (West, Westlaw through 2014 Sess.); *see also* ANN AHLSTROM, MINN. CHILDREN'S JUSTICE INITIATIVE, SIX MONTH PERMANENCY PROGRESS REVIEW HEARING: MAKING CONCURRENT PERMANENCY PLANNING WORK (2013), *available at* [http://www.mncourts.gov/Documents/0/Public/Childrens\\_Justice\\_Initiative/2013\\_Conference\\_-\\_Breakout\\_-\\_PPRH\\_\(Ahlstrom\).pdf](http://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/2013_Conference_-_Breakout_-_PPRH_(Ahlstrom).pdf); JULIA HILLEL & AMY RYAN, CHILDREN'S LAW CTR. OF MINN., UNDERSTANDING AND UTILIZING THE REASONABLE EFFORTS STANDARD



Minnesota law likewise accounts for circumstances where reunification may not be appropriate and contains numerous provisions for rejecting reunification services when parents have committed egregious abuses or have proven persistently unwilling to improve their behavior.

It is unarguable that these statutory changes are improving reunification services and that the outcomes for children who remain with their biological families are better than the outcomes for children placed in foster care. In a 2014 judicial guide to implementing Colorado's reasonable efforts statute, the Colorado judiciary cites a study comparing such children's outcomes. This 2007 study found that children who went into foster care were significantly more likely to get arrested, to become teen parents, or to be unable to hold a steady job.<sup>111</sup> Further, Judge Leonard Edwards states that Colorado continues to work towards progress in implementing their statute.

The few scholars who have mentioned legislative solutions to the matter of reunification services are moving in the right direction by recommending that states create a legislative amendment to their child welfare act or that the federal government include the Guidelines in the Code of Federal Regulations so that states must follow them when implementing federal law. More realistic statutory timelines that correspond to parents' treatment goals and needs, external deadlines for housing, public benefits, and social services, carefully crafted visitation programs, and extensive aftercare are also required both federally and locally. Any reunification services described in reasonable efforts statutes need to be governed by clinical and social science best practices while rejecting the majority of bypasses and fast-track provisions that avoid attempts at reunification without good cause.<sup>112</sup> Further research by this author will examine the progress of statutory reforms in this area of law.

## 2. Legislators Need to Shift Funding Incentives

One area in which legal scholars have been more vocal is in the promotion of revised funding incentives and priorities to increase reunification efforts. In 2010, the American Bar Association (ABA) called for reform of the child welfare system's federal financing structure, to de-incentivize foster care placement and "encourage keeping or reunifying children safely with their birth families, including programs focused on antipoverty supports, housing, substance abuse and mental health treatment, and providing quality parent legal representa-

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IN CHILD PROTECTION MATTERS (2014), available at [http://www.clcmn.org/wp-content/uploads/2012/09/February-2014\\_Practice\\_Point.pdf](http://www.clcmn.org/wp-content/uploads/2012/09/February-2014_Practice_Point.pdf).

111. Joseph Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007).

112. See DUQUETTE ET AL., *supra* note 109; Boyer & Halbrook, *supra* note 33; Crossley, *supra* note 60; DeVault, *supra* note 75; Kaiser, *supra* note 72; Lawless, *supra* note 78; Wendy S. Ross, *Family Law—Wyoming Courts Continue to Struggle with Termination of Parental Rights Cases: The Problem with "Reasonable Efforts,"* In Re FM, 163 P.3D 844 (Wyo. 2007), 9 WYO. L. REV. 697.

tion. . . . [F]ederal foster care funds should be available for reinvestment in services to reduce the need for such care.”<sup>113</sup> Other scholars have suggested that the federal government shift some funding that is currently devoted to urban renewal into funding streams for family-reunification efforts in the child welfare system. These scholars reason that such a specific shift would enhance the safety, wellbeing, and economic viability of troubled inner city communities.<sup>114</sup>

Additional improvements can be made in funding administration and provision. There also has been a call for a reversal of the administration of Title IV-E funding because such funding is currently reduced when jurisdictions decrease their foster care populations—which encourages states to keep a larger number of children in foster care rather than to return them to their homes of origin. States also are traditionally denied the ability to keep federal dollars saved by preventing foster care placements or reducing foster care stays. For that reason, the 2008 federal Fostering Connections to Success and Increasing Adoptions Act,<sup>115</sup> which fiscally incentivizes increased placements with non-parental, biological relatives, does not go far enough.<sup>116</sup> Further, federal studies have shown that states reporting success in reunification efforts thus far cited increased funding for reunification, dedicated reunification funds, flexibility in the use of funds, blended funding streams, and financial incentives for contractors as greatly aiding their success.<sup>117</sup>

### 3. A Rebuttable Presumption in Favor of Reunification May Be Necessary

An application of family systems theory to child protection cases featuring parents with mental disabilities certainly lends itself toward honoring reunification as the de facto status quo. Upholding holistic family wellbeing in light of clinical, human rights, and social scientific best practices means that the dangers of lengthy family separations should be avoided at most costs. Scholars

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113. Howard Davidson, *ABA House of Delegates Passes Nine Policy Resolutions with Child/Youth Impact*, 29 CHILD L. PRAC. 27 (2010); Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42 FAM. L.Q. 481 (2008); Mary Eschelbach Hansen & Daniel Pollack, *Trade-Offs in Formulating A Consistent National Policy on Adoption*, 46 FAM. CT. REV. 366 (2008).

114. James G. Dwyer & Michele Estrin Gilman, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and “Adult-Only” Residential Zoning*, 62 ALA. L. REV. 887 (2011). See generally Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495 (2013).

115. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008).

116. Shardé Armstrong, *The Foster Care System Looking Forward: The Growing Fiscal and Policy Rationale for the Elimination of the “AFDC Look-Back,”* 17 N.Y.U. J. LEGIS. & PUB. POL’Y 193 (2014); Wentz and Beck, *supra* note 99.

117. CHILD WELFARE INFO. GATEWAY, *supra* note 93.

Martin Guggenheim and Andrew Hoffman have correctly raised the issue of having a presumption in favor of family reunification in child welfare statutes and family courts. Such a presumption may be necessary at this time.

Hoffman approaches the matter from the standpoint of the child's attorney, describing "a poorly defined role of child's counsel, susceptible to various interpretations based on attorneys' personal biases and opinions, that evades extensive efforts at clarification."<sup>118</sup> Arguing that the maintenance of biological family ties is typically in the best interests of the child and the parent, while children are often unable to adequately express themselves, Hoffman states that an attorney "must remain true to reunification unless presented with clear, credible evidence supporting abandonment of the presumption."<sup>119</sup> Guggenheim even rejects the idea of the rebuttal of such a presumption.<sup>120</sup> A rebuttable presumption could prevent many of the unnecessary failures of courts to reunify families while protecting family wellbeing and saving money otherwise devoted to foster care and extended court processing.

While a potential presumption in favor of reunification should be rebuttable to protect family safety, existing laws provide extensive guidance on ways to rebut the presumption. Counsel would require the state to bear its burden of proof, and the presumption could be rebutted when aggravated circumstances of heinous abuse or parental rejection, such as those listed in ASFA and most state statutes, are present. Hoffman additionally considers the possibility of assigning an attorney "to act as a quasi-guardian ad litem for the family's due process rights, forcing the State to meet its burden of proof in every case." An application of family systems theory supports this possibility, although alternative dispute resolution and collaborative law solutions—which will be explored herein—hold more promise than an addition of attorneys and interests to the adversarial litigation model.<sup>121</sup>

#### 4. Cross-Agency Collaboration and Information Sharing Are Required

Successful delivery of reunification services and extended timelines also will require the need for cross-agency collaboration and information-sharing. Interagency memoranda of understanding (MOU), cross-agency policies and regulations, and multi-disciplinary case planning and treatment teams are part of the growing research in best practices.<sup>122</sup> Many such advances will require

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118. Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 341 (2004).

119. *Id.*

120. Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 87 (1984); Andrew Hoffman, *supra* note 118, at 341 (2004).

121. Hoffman, *supra* note 118, at 348-49.

122. CHILD WELFARE INFO. GATEWAY, *supra* note 93.

statutory and administrative law revisions and additions. Currently, too many divergent governmental and non-governmental agencies are requiring mentally disabled parents to achieve progress haphazardly while child advocates involved in these matters pit themselves against parent advocates. In order for parents with mental disabilities to ameliorate their illnesses, create adequate parenting environments, and foster stronger bonds with their children, they will need wraparound services drawing from multiple aspects of life and from multiple systems that coordinate for optimal care. The U.S. Department of Health and Human Services' fifty-state study mentions the systemic improvements made thus far through enhanced interagency cooperation. The study enumerates levels of coordination and information-sharing between the courts, child welfare agencies, mental health treatment providers, community service agencies, housing and public benefits administrators, court tracking of permanency timeframes, and court monitoring of families after reunification.<sup>123</sup>

#### H. *Improving the Deliberative Processes Utilized Within Systems*

The application of family systems theory to the matter of family-reunification services for parents with mental disabilities also requires reform in the deliberative processes that are utilized within courts and child welfare systems. In specific court cases, attorneys for the parent(s), the child(ren), and the state should focus on "holistic family wellbeing" rather than "the child's best interests," utilizing alternatives to the adversarial litigation model. Whenever possible, attorneys should emphasize and facilitate their clients' agency and explore new types of claims when litigation does occur. Family law is unique in its extension into the most intimate human relationships and fundamental, private rights. Research shows that deliberative techniques that preserve interdependence, dignity, agency, and collaboration among family members lead to the best outcomes.

##### 1. Promoting Family Group Decision-Making

The use of family group decision-making (FGDM) is growing and proving to reunify families at a time when family courts experience excessive case-loads, cause extensive family traumas, and undergo financial strain. For parents with mental disabilities, FGDM can provide a well-needed sense of empowerment and purpose, and the process critically acknowledges parents' ability to change. The U.S. Department of Health and Human Services reports that the most successful efforts at reunification feature some type of "family group decision-making" (FGDM) or alternative case conferencing. FGDM is a generic term that includes approaches in which family members involved in child wel-

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123. *Id.*; Jeanne Kaiser, *Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness*, 11 WHITTIER J. CHILD & FAM. ADVOC. 3 (2011).

fare cases communally make decisions about child care and service planning. Such interventions include family team conferencing, family team meetings, family group conferencing, family team decision-making, family unity meetings, and team decision-making. While these approaches vary, most include a multi-phased schedule and employ an impartial, trained facilitator or coordinator.<sup>124</sup>

As a participatory and inclusive process that began gaining popularity in the U.S. in the early 1990s, FGDM recognizes the concepts of family systems theory and holistic family wellbeing described herein. In the words of FGDM experts, “children have a right to maintain their kinship and cultural connections throughout their lives. Children and their parents belong to a wider family system that both nurtures them and is responsible for them.” According to FGDM guiding principles, “those who are poor, socially excluded, marginalized or lacking power or access to resources and services” require the state’s respect. The state serves to support and build the family group’s leadership and capacity to protect and care for its children because “family groups know their own histories, and they use that information to construct thorough plans.”

Leading experts in FGDM assert that “FGDM processes are not conflict-resolution approaches, therapeutic interventions or forums for ratifying professionally crafted decisions.” Instead, FGDM is considered to be a process that actively seeks the collaboration and leadership of family groups in creating and implementing plans that meet a child’s needs. Power imbalances and cultural conflicts between family groups and child protection agency personnel are addressed directly, and the end goal is to prevent unnecessary intrusion into family relationships. FGDM is typically initiated by service providers or community organizations and includes social services agencies and governmental authorities who assure that any plans created adequately address agency concerns.<sup>125</sup> There have been extensive studies showing the success and cost effectiveness of FGDM. FGDM has reduced the number of children in foster care, decreased instances of maltreatment, kept biological families intact, and improved holistic family wellbeing.<sup>126</sup>

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124. *Family Group Decision-Making*, CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.childwelfare.gov/famcentered/decisions> (last visited Mar. 1, 2015).

125. *Family Group Decision Making*, NAT’L CTR. ON FAMILY GRP. DECISION-MAKING, <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Pages/FGDM.aspx> (last visited Mar. 1, 2015).

126. See AM. HUMANE ASS’N & FGDM GUIDELINES COMM., GUIDELINES FOR FAMILY GROUP DECISION-MAKING IN CHILD WELFARE (2010), available at <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Documents/FGDM%20Guidelines.pdf>; GALE BURFORD ET AL., ANNOTATED BIBLIOGRAPHY: FAMILY GROUP DECISION-MAKING, available at <http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Documents/Research%20Annotated%20Bibliography%202012%20Printable%20Version.pdf>; Dana E. Prescott, *Child Protection: Kinship and Family Group Conferencing*, 19 ME. B.J. 140 (2004). But see Barholet, *supra* note 71; Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008) (proposing

## 2. Promoting Other Forms of Alternative Dispute Resolution

Experts from various backgrounds are increasingly promoting the benefits of child protection mediation (CPM) in reunifying families, upholding the dignity of mentally challenged parents, and saving beleaguered child welfare systems. Judges, attorneys, clinicians, mediators, other child welfare professionals, and national professional organizations have collaborated to create guidelines for CPM which should be more commonly utilized. CPM fosters open communication and information sharing, enabling a consensual decision making process. A neutral, highly trained mediator facilitates the process, and all mediation is confidential. CPM has produced an extraordinary amount of settlements, with sixty to eighty percent of mediated cases reaching full agreements and another ten to twenty percent reaching partial agreements. CPM engages distressed parents and provides them with a much-needed voice and sense of value. It has been proven to save states' money, has reduced judicial caseloads significantly, and has decreased child maltreatment and foster care stays. Mediation typically produces longer-lasting, more mutually agreeable results than litigated cases do. Parents with mental disabilities thus are able to engage their problem-solving skills, and CPM creates buy-in from all parties.

During CPM, professionals collaboratively work together for the benefit of the family system. Attorneys for the parents, the child's representative, the child protection agency representative, and agency attorneys typically participate in CPM. While attorneys are not necessary, they can assist in ensuring the protection of each participant's rights and in explaining complicated terminology and concepts. At times, extended family, foster parents, clinicians, other service providers, cultural liaisons, spiritual advisors, and friends may attend. Children can participate when appropriate if there is no safety risk and if they can understand the process. Mediators typically report news of a settlement to the court but are advised by experts not to make specific recommendations to the court to protect confidentiality. In some instances, mediated agreements will be subject to the approval of the court.<sup>127</sup>

Judges across the nation have reported that CPM has created much-needed reform. CPM has reduced court time and produced higher rates of satisfaction from all participants. Some judges thoroughly tout the benefits of mediation over the adversarial process, with higher rates of family reunification, costs savings, enhanced permanency for children, and positive feedback from the professionals involved. Some may assert that child welfare cases should not be mediated due to the levels of maltreatment involved. However, CPM has been successfully practiced for over twenty years; numerous best practices have been promulgated; and the presence of attorneys and judicial review of agreements

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"Reparative Model" of family law, which the Article states will not necessarily increase reunification or restore relationships and proffers "emotional theory" of relationships).

127. Sarah Clark Bowers, *Dependency Cases—Litigate or Mediate?*, 70 ALA. LAW. 428 (2009); Marilou Giovannucci & Karen Largent, *Association of Family and Conciliation Court Guidelines for Child Protection Mediation*, 51 FAM. CT. REV. 605 (2013).

can assure that safety remains a priority. CPM is one of several types of alternative dispute resolution that can be used in family law cases. Collaborative Family Law and other methods are also gaining popularity.<sup>128</sup>

### 3. Further Promoting the Agency of All Family Members

For successful reunifications to occur, parents with mental disabilities and their children all need meaningful opportunities to participate in the life of their child welfare case. One of the best ways to ensure that such parents can prevent further maltreatment is to enable them to practice decision-making, problem-solving, and continued responsibility while they receive appropriate treatment and services. All states that reported additional success in reunification efforts to the federal government as of June 2011 featured comparatively strong programs of parent engagement, foster-to-birth-parent collaboration, and peer-parent mentorship arrangements. These common elements required attorneys, child welfare systems, and courts to prioritize the voice of parents who typically feel helpless and ashamed, giving them a crucial role in the processes that unfolded.<sup>129</sup>

New York City features two notable programs that foster enhanced agency among parents facing TPR. The Child Welfare Organizing Project (CWOP) has been nationally recognized for its intricate system of parent peer advocacy, where parents who have previously experienced the removal of their child walk newcomers through the process help represent them at court proceedings and mediations and work with system officials on systemic reform. CWOP also involves parents who have experienced the removal of their children in the process of recertifying and re-evaluating foster homes. During the process of their own child-welfare case, CWOP parents continue to play an integral role in caring for their children, whether or not they currently have custody. The Center for Family Representation likewise employs parent advocates who mentor other parents facing the loss of their children and work alongside attorneys and social workers in family court.<sup>130</sup>

Successful programs enabling the enhanced agency of children also require duplication. Such programs encourage children in foster care to participate more effectively in case planning and mediation, and help them to play more

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128. Leonard Edwards, *Child Protection Mediation: A 25-Year Perspective*, 47 FAM. CT. REV. 69 (2009); Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913 (2013); *The Collaborative Family Law Center*, N.Y. STATE COURTS, <http://www.nycourts.gov/ip/collablaw> (last visited Mar. 1, 2015); *Collaborative Practice*, COLLABORATIVE LAW ASS'N OF THE ROCHESTER AREA, INC., <http://www.nycollaborativelaw.com> (last visited Mar. 1, 2015). *But see* Glenna Goldis, *When Family Courts Shun Adversarialism*, 18 U.C. DAVIS J. JUV. L. & POL'Y 195 (2014).

129. CHILD WELFARE INFO. GATEWAY, *supra* note 93.

130. CTR. FOR FAMILY REPRESENTATION, <http://www.cfrny.org> (last visited Aug. 31, 2014); CHILD WELFARE ORGANIZING PROJECT, <http://cwop.org> (last visited Nov. 21, 2014).

active roles with their attorneys. Raising the voices of children who have survived maltreatment in these ways has produced high levels of family reunification, child wellbeing, and general system reform. At times, committees of children even advise system officials about potential reforms and in assessing the success of current programs.<sup>131</sup>

Attorneys also can bolster the agency of their clients by making better use of previously under-utilized claims in litigation and by giving their clients a seat at the table when decisions about treatment and reunification services are being made. For example, Americans with Disabilities Act (ADA) claims can be raised more effectively and more often for mentally disabled parents facing TPR. Future research by this author will address the potential of these claims. Whenever possible, disabled parents themselves can play an active role in raising the claims and also in deciding which reunification services will best create family permanence. Parents with mental disabilities in the child welfare system often know the precise needs of their family and can speak aptly for themselves in treatment planning situations. Finally, attorneys must stay informed of research on the needs of their clients, on culturally and clinically sound methods of communication, and on the legal and scientific advances being made. It is not enough to know the basic law in these cases. Sensitivity, interdisciplinary thinking, and collaboration are required.<sup>132</sup>

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131. See, e.g., Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (2010); Cary Bloodworth, *Judge or Jury? How Best to Preserve Due Process in Wisconsin Termination of Parental Rights Cases*, 2013 WIS. L. REV. 1039 (2013); Richard Cozzola & Andrya Soprych, *Representing Parents in Civil Child Protection Cases*, 31 FAM. ADVOC. 22 (2009); Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87 (2012); Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 U. DAYTON L. REV. 307 (2011); Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL'Y 97 (2012); Sarah Freeman, *Ensuring Effective Counsel for Parents: Extending Padilla to Termination of Parental Rights Proceedings*, 42 HOFSTRA L. REV. 303 (2013); Anne Tyler Gueinzusd & Julia Hillel, *A Critical Look at Child Protection Permanency Best Practices for Minnesota's Foster Care Youth*, 40 WM. MITCHELL L. REV. 1083 (2014); Miriam C. Meyer-Thompson, *Wanted: Forever Home, Achieving Permanent Outcomes for Nevada's Foster Children*, 14 NEV. L.J. 268 (2013); Noonan et al., *supra* note 96; Clark Peters & John Walsh, *Fiscal Returns on Improved Representation of Children in Dependency Court: The State of the Evidence*, 36 NOVA L. REV. 435 (2012); Anne Reigner & Cindi Wood, *Guidelines for Representing Parents in Child Welfare Proceedings*, 36 WYO. LAW. 20 (2013); Vivek S. Sankaran, *No Harm, No Foul? Why Harmless Error Analysis Should Not be Used to Review Wrongful Denials of Counsel to Parents in Child Welfare Cases*, 63 S.C.L. REV. 13 (2011); Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97 (2009); Spreng, *supra* note 74; Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013); Elizabeth Thornton, *Michigan Judge Leads Project to Improve Parent Representation*, 31 CHILD L. PRAC. 60 (2012); see also Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A.L. REV. 1087 (2009).

132. See, e.g., Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13 (2010) ("A



#### 4. Finding Funding for Effective Programming

Although it remains challenging to find funding for social services and court innovation, and although most states are reducing their budget allocations to this end, the type of programming supported herein saves significant money in the long term. Systems that increase the use of alternative dispute resolution are saving considerable resources already by shrinking their dockets and other court costs. More widespread use of alternative deliberative approaches will undoubtedly save more money in difficult economic times. Further, social science and economics research reveals that public systems and taxpayers ultimately save money when keeping biological families together, providing supportive programming, reducing future costs of untreated mental health issues, reducing future incarceration and public benefits costs, and preventing further child maltreatment.<sup>133</sup>

#### 5. Improving the Role of Nonlegal Actors—A Need for Enhanced Training

Child welfare workers, clinicians, and other service providers likewise require training in the most advanced methods of mental health treatment, family therapy, conflict resolution, case planning, case management, and wraparound service provision to implement successful reunification services. As enhanced collaboration grows among all participants in family-reunification efforts, so will interdisciplinary sharing of best practices and problem solving. Above all, professionals who work with mentally disabled parents require extensive train-

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significant and unsurprising overlap exists between those states that do not provide parents an absolute right to counsel in abuse and neglect cases and those whose statutes do not require judges to base permanency hearing decisions on evidence.”); Pannell, *supra* note 78; Smith, *supra* note 16; Spreng, *supra* note 74; Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 135 (2008). *But see* Jennifer Wright Burke, *Americans with Disabilities Act: An Alleged Violation of the ADA Should Not Be a Defense in A Termination of Parental Rights Proceeding*, 29 U. BALT. L. REV. 347 (2000).

133. *See, e.g.*, RICHARD P. BARTH & RON HASKINS, PRINCETON/BROOKINGS, WILL PARENT TRAINING REDUCE ABUSE, ENHANCE DEVELOPMENT, AND SAVE MONEY? LET’S FIND OUT (2009), available at [http://futureofchildren.org/futureofchildren/publications/docs/19\\_02\\_PolicyBrief\\_2.pdf](http://futureofchildren.org/futureofchildren/publications/docs/19_02_PolicyBrief_2.pdf); S. LYONS & N. WALSH, JUSTICE POLICY INSTITUTE, MONEY WELL SPENT: HOW POSITIVE SOCIAL INVESTMENTS WILL REDUCE INCARCERATION RATES, IMPROVE PUBLIC SAFETY, AND PROMOTE THE WELL-BEING OF COMMUNITIES (2010), available at [http://www.justicepolicy.org/images/upload/10-09\\_REP\\_MoneyWellSpent\\_PS-DC-AC-JJ.pdf](http://www.justicepolicy.org/images/upload/10-09_REP_MoneyWellSpent_PS-DC-AC-JJ.pdf); DOUG MCVAY ET AL., JUSTICE POLICY INSTITUTE, TREATMENT OR INCARCERATION? (2004), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01\\_rep\\_mdreatmentorincarceration\\_ac-dp.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdreatmentorincarceration_ac-dp.pdf); Abel, *supra* note 131; Edwards, *supra* note 128; Fraidin, *supra* note 128; Laticia Boone, *CHHS Study Demonstrates Housing Program Helps Save Lives, Money*, UNC CHARLOTTE (Mar. 24, 2014), <http://inside.unc.edu/news/item/chhs-study-demonstrates-housing-program-helps-save-lives-money>. *See generally* Collaborative Family Law Center, *supra* note 125; COLLABORATIVE PRACTICE, COLLABORATIVE LAW ASS’N OF THE ROCHESTER AREA, *supra* note 125.

ing about the experience of such parents, their unique needs, their cultural traditions, and their rights. Extensive research has provided guidance thus far, but there is a serious need for reform.<sup>134</sup>

#### CONCLUSION

While family reunification for parents with mental disabilities facing TPR may be a conundrum, the conundrum is far from intractable. The challenges these parents face are significant, but their potential to successfully parent is high. The theoretical framework of family systems theory justifies reunification in a majority of circumstances in order to prevent unnecessary violations of fundamental rights and to protect all members of an inextricably linked family. While scholars have not gone far enough in identifying a theoretical basis for reunification or in setting forth thorough, interdisciplinary solutions to TPR, the aforementioned discussion serves to improve the discourse. Evidence has begun to show that scholars, professionals, families, and communities need to collaborate and employ wide-ranging solutions. Service enhancement, statutory reform, and innovative deliberative processes can result in both family preservation and systemic reform. An innovative, interdisciplinary focus essentially creates the difference between system failures and effective family law practice.

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134. See, e.g., CHILD WELFARE INFO. GATEWAY, *supra* note 93; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., LEARNING CENTER, <https://www.childwelfare.gov/learningcenter>; NAT'L ALLIANCE OF CHILDREN'S TRUST & PREVENTION FUNDS, BRINGING THE PROTECTIVE FACTORS FRAMEWORK TO LIFE IN YOUR WORK—A RESOURCE FOR ACTION, <http://www.ctfalliance.org/onlinetraining.htm> (last visited Aug. 31, 2014). *But see* Kelli M. Mulder-Westrate, *Waiting for the Justice League: Motivating Child Welfare Agencies to Save Children*, 88 NOTRE DAME L. REV. 523 (2012).