PLANNED FAILURE: CALIFORNIA'S DENIAL OF REUNIFICATION SERVICES TO PARENTS WITH MENTAL DISABILITIES

NINA WASOW*

I. INTRODUCTION

California's use of mental disability as a proxy for permanent inability to parent safely lacks both practical and theoretical justification. The mental disability provision of the "reunification bypass" law[1] allows the state to deny the normal twelve months of casework, visitation and social services to a parent whose child has been removed due to abuse or neglect when, in the opinion of two experts, the parent has a mental disability which renders her[2] incapable of utilizing such services or parenting adequately in the near future. The reunification bypass law went into effect in 1986,[3] and since then the courts have endorsed and expanded the law's reach, while demonstrating either inability or unwillingness to meaningfully weigh the psychological evidence it requires. The statute places decisions of enormous legal significance almost entirely in the hands of mental health professionals, whose opinions may be based on inadequate information and erroneous assumptions. Consequently, the law may not

* J.D., New York University School of Law, 2005. Thanks to Professor Martin Guggenheim for his advice and inspiration.

1. CAL. WELF. & INST. CODE § 361.5 (West 1998 & Supp. 2006). The mental disability exception is a subset of the reunification bypass law, which contains many other exceptions. *Id.* § 361.5(b)(2). *See infra* Part II. Unless otherwise indicated, for the purposes of this article "reunification bypass law" refers only to the mental disability exception. The statute uses the term "mental disability" and applies to parents with developmental disabilities. The cases, for the most part, use the term "mental illness," as the state appears to rarely use the bypass with parents with developmental disabilities. I use "mental disability" to connote the broader reach of the law, but I do not generally focus on parents with developmental disabilities.

2. Throughout this article, I use the feminine pronoun to refer to parents because "the vast majority of the parents involved in the child protective system are mothers." Annette R. Appell, Essay, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997).

3. 1986 Cal. Stat. 3984–5. The reunification bypass law as enacted in 1986 contained the mental disability exception. There is no publicly available legislative history for the original statute. The legislative trend since its enactment has been to add exceptions, expand the scope of the original exceptions, shift the burden onto parents to prove that reunification services are appropriate, and create more stringent evidentiary standards to rebut the new presumption. *See* Amy D'Andrade, Legislative History of California Welfare and Institutions Code 361.5(b), at 1, (2000) (describing changes to the statute after 1986) (unpublished manuscript, on file with the author).

benefit children and it labels parents as failures before they have had a chance to prove otherwise.

Certainly some parents are not capable of utilizing services or reunifying with their children because of mental disabilities. Furthermore, concern for children's welfare undoubtedly drives the social workers, judges and psychologists who use the reunification bypass statute. My purpose is to critique the law's assumptions and show that it lacks sufficient safeguards to prevent its unnecessary and unjust use.

In Part II of this article, I describe the reunification bypass statute in detail, and discuss the definition and importance of reunification services. I also summarize the results of the single empirical study on the use of the reunification bypass law. In Part III, I review the entire publicly available body of cases in which a parent appealed the denial of reunification services based on parental mental disability. These cases reveal that the courts have serious difficulties coping with expert evidence, tend to ignore the substantive requirements of the law, and fail to take seriously the constitutional issues that the law involves. In Part IV, I discuss social science evidence tending to undermine the basis for the mental disability exception and to throw doubt on the validity of prognosis and psychological prediction of parental competence. I explore reasons why psychologists and courts often find a parent who *is* capable of utilizing services and may be capable of reunifying to be within the mental disability exception. In Part V, I articulate legal and normative reasons that the reunification bypass law generally, and the mental disability exception specifically, harms both children and parents. Denying reunification services increases the likelihood of unnecessary termination of parental rights, and threatens the parent's liberty interests.[4] In this part, I also contend that the law is driven by, and reproduces, stigma against people with mental disabilities. Finally, in Part VI, I suggest several responses to the mental disability exception that attorneys for parents as well as the mental health law community should adopt.

II.
THE CALIFORNIA REUNIFICATION BYPASS LAW

Section 361.5 of the California Welfare and Institutions Code deals with the provision of services to both child and parent after a child has been involuntarily removed from a parent's custody because of abuse or neglect. The statute sets out a general rule that six to eighteen months of services shall be provided to the child and the parent.[5] However, subsection (b)—the reunification bypass pro-

4. Although I focus on the constitutional rights of parents, the reunification bypass law also implicates the child's liberty interests. The precise nature and weight of a child's interest in familial relationships is unclear. Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (opining that to the extent that parents have a fundamental liberty interest in preserving intimate relationships, so do children).

5. For a child who was under the age of three on the date of initial removal from parental

vision—goes on to list fifteen circumstances under which the court need not order reunification services for the parent.[6] Generally these circumstances must be shown to exist by clear and convincing evidence.[7] Many of the exceptions rest on the severity or character of the abuse, or the parent's past history of abuse or neglect (of either the child in question or another child). Others focus on a particular characteristic of the parent that may or may not be directly related to an actual instance of abuse or neglect. For example, a chronic substance abuse problem or past conviction for a violent felony triggers a presumption against ordering services, which the parent can only rebut by clear and convincing evidence that reunification would be in the child's best interests.[8]

The mental disability exception falls in the latter category of exceptions, but it is worded as a presumption in favor of giving reunification services which may be rebutted by evidence that doing so would be useless. Section 361.5(b)(2) provides that the state need not provide reunification services when the court finds, by clear and convincing evidence, "that the parent or guardian is suffering from a mental disability . . . that renders him or her incapable of utilizing those services." The statute incorporates the Family Code's definition of mental disability as "a mental incapacity or disorder that renders the parent or parents unable to care for and control the child adequately" as determined by two certified physicians or licensed psychologists with at least five years of experience.[9]

---

custody, the court may order no more than six months of services. For a child age three or older, a court may order no more than twelve months of services. However, the court may extend services up to a maximum of eighteen months when there is a "substantial probability" of return to the parent within that period, or if the state has not provided reasonable services to the parent. CAL. WELF. & INST. CODE § 361.5(a) (West 1998 & Supp. 2006). For more detail on what services are typically offered, see *infra* Part II.A.

6. The following is a complete list of the reunification exceptions: (1) whereabouts of parent unknown; (2) parent suffers from a mental disability that renders her incapable of utilizing services; (3) child or sibling previously removed due to abuse and returned, now being removed due to additional abuse; (4) parent caused death of another child through abuse or neglect; (5) child under age five adjudicated a dependent due to severe physical or sexual abuse; (6) child or sibling suffered severe physical or sexual abuse; (7) sibling did not receive reunification services pursuant to exceptions three, five or six; (8) child conceived by rape (only applies to the perpetrator); (9) child willfully abandoned or endangered; (10) reunification services terminated for sibling because parent failed to reunify; (11) parent had rights to sibling terminated and has not subsequently made a reasonable effort to treat the problems that led to removal of sibling; (12) parent has been convicted of a violent felony; (13) parent has history of extensive, abusive, and chronic use of drugs or alcohol and has not adequately addressed her substance abuse problem; (14) parent not interested in receiving reunification services or having child returned; (15) parent on one or more occasions willfully abducted child or sibling from placement and refused to disclose child's whereabouts or return child. CAL. WELF. & INST. CODE § 361.5(b) (West 1998 & Supp. 2006).

7. *Id.*

8. CAL. WELF. & INST. CODE § 361.5(c) (West 1998 & Supp. 2006).

9. CAL. FAM. CODE § 7827 (West 2004). Welfare and Institutions Code section 361.5(b)(2) incorporates by reference the description of mental disability in Chapter 2 (starting with section 7820) of Part 4, Division 12 of the Family Code. This chapter of the Family Code sets out the grounds for termination of parental rights. The relevant sections are 7826 and 7827; section 7826 allows termination of parental rights when the parent has been declared mentally ill or developmentally disabled by a court (i.e. has been involuntarily committed) and the state director

Section 361.5(c) qualifies subsection (b): when it is alleged that the parent is incapable of utilizing services due to mental disability, "the court shall order reunifcation services unless competent evidence from mental health professsionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within the time limits specified in subdivision (a)."

As interpreted by the courts, these bypass provisions represent the Legislature's recognition that "it may be fruitless to provide reunification services under certain circumstances. . . . Once it is determined one of the [exceptions] applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources."[10]

A. Reunification Services Defined

When none of the reunification exceptions apply, a state social worker will create, and the court will order, a service plan for a parent whose child has been placed in foster care. The reunification services typically offered include case management, counseling, drug and alcohol treatment, transportation, parenting classes, and housing assistance.[11] Part of the social worker's role is to assist the parent in following the service plan and thus move the family toward reunifying as quickly and smoothly as possible. A key component of most reunification service plans is visitation. Under California law, "any order placing a child in foster care, and ordering reunification services, shall provide . . . [f]or visitation between the parent or guardian and the minor . . . "as frequent[ly] as possible, consistent with the well-being of the minor."[12] Many in the field view visitation as more than just a part of the parent's service plan; it is central to sustaining the parent-child relationship.[13] If the court terminates or decides not to order reunification services, visitation may be cut off, particularly if supervised visitation is needed.[14]

Courts have interpreted section 361.5 to require a reunification service plan that is "well-defined, specific," and "designed to remedy the problems [leading to the loss of custody]."[15] An individualized set of services which draws on the

---

of mental health and the hospital superintendent certify that the parent "will not be capable of supporting or controlling the child in a proper manner." CAL. FAM. CODE § 7826 (West 2004).

10. *In re* Baby Boy H., 73 Cal. Rptr. 2d 793, 799 (Cal. Ct. App. 1998).

11. Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20, 26–27 (1997).

12. CAL. WELF. & INST. CODE § 362.1(a) (West 1998 & Supp. 2006).

13. *See infra* Part V.A.

14. *See, e.g.*, *In re* Elizabeth R., 42 Cal. Rptr. 2d 200, 208 (Cal. Ct. App. 1995) (noting that "for all practical purposes, the tie between parent and child is severed by [reunification services being terminated], because the court has terminated efforts to reunify the family," but the court may allow continued visitation unless it would be detrimental to the child (quoting *In re* Taya C., 2 Cal. Rptr. 2d 810 (1991)).

15. Klein, *supra* note 11, at 35 (internal quotations omitted).

strengths and addresses the needs of both parent and child is critical to lasting, safe reunification.[16] However, scholars and practitioners note that courts often order a standard menu of services.[17] Even so, courts seem more willing to inquire into the reasonableness of services ordered than into whether it was appropriate to deny services altogether, particularly for parents with mental disabilities. In *In re Elizabeth R.*, the Court of Appeals reversed the lower court's finding that the Department of Social Services had made reasonable efforts when visitation was not provided while the parent was hospitalized due to mental illness. The court refused to draw any inferences about dangerousness or parenting ability from her diagnosis and said that "[i]f mental illness is the starting point, then the reunification plan, including the social services to be provided, must accommodate the family's unique hardship."[18] The court pointed out that the state could have moved to deny reunification services altogether under section 361.5(b), but since it had not done so, it had to obtain appropriate services for the family. The careful sympathetic tone of this case stands in marked contrast to the mental disability exception cases, which I will discuss in detail in Part III.

The governmental provision of reunification services reflects a judgment about the importance of family integrity and a concern about protecting parental rights.[19] Such priorities, along with a particular concern for the child's need for a safe, permanent home compete to animate child welfare policy. State and federal laws attempt to balance these values; the California reunification bypass law is part of a broader trend of favoring fast resolution of cases (through termination of parental rights and adoption), ostensibly to promote the child's interests.[20] However, many argue that the proper emphasis should be on family

16. Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 333 (1996).

17. Interview with Margaret Copenhagen, Attorney, in Redwood City, Cal. (Feb. 16, 2004). *See also* Beyer, *supra* note 16, at 312 ("[F]amily preservation has come to mean small, short-term programs emanating out of business-as-usual human services departments. Many families do not get services to assist them in meeting their children's needs; the family support necessary . . . to achieve reunification is simply not in place.").

18. *Elizabeth R.*, 42 Cal. Rptr. 2d at 209.

19. *See In re* Baby Boy H., 73 Cal. Rptr. 2d 793, 798–99 (Cal. Ct. App. 1998) (noting that reunification services "further[] the goal of preservation of family, whenever possible").

20. Federal child welfare policy is expressed in the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter ASFA]. Because it was enacted pursuant to Congress's spending power, ASFA is not binding on the states; however, states must file a plan complying with the law in order to receive foster care funding. *See* 42 U.S.C. § 670 (2000). Congress passed ASFA in part in response to calls for reform of the child welfare system to emphasize child safety and "permanency planning," which would prevent children from languishing in foster care indefinitely. David J. Herring, *The Adoption and Safe Families Act—Hope and its Subversion*, 34 FAM. L.Q. 329, 336 (2000); Theodore J. Stein, *The Adoption and Safe Families Act: How Congress Overlooks Available Data and Ignores Systemic Obstacles in its Pursuit of Political Goals*, 25 CHILD. & YOUTH SERVS. REV. 669, 669 (2003). Under ASFA, reasonable efforts to enable the child to return home need not be made if "the parent has subjected the child to aggravated circumstances (as defined in State law,

preservation which, when successful, benefits both children and parents.[21] Whatever balance is struck, reunification services are important because they are all that stand between an initial act of abuse or neglect and the irrevocable break-up of the family. Services often fail, but without them, there is no chance of the family being preserved.

B. How Has the Reunification Bypass Law Been Used?

Even though section 361.5(b) has been in force for twenty years, there is little public information about the implementation of the law on the ground because it contains no reporting requirements. Professor Jill Duerr Berrick of the School of Social Welfare at the University of California, Berkeley led a study seeking to establish, among other things, "what proportion of cases entering care are eligible for reunification exceptions," how often the state recommends and the courts approve reunification bypass, and "what parental characteristics are associated with reunification exception."[22] The study involved a review of 2,314 case files in six California counties, as well as interviews and focus groups with social workers, judges, attorneys, foster parents and birth parents. The researchers divided cases into two cohorts: one entering foster care in 1993–1994, the other entering foster care in 1998–1999.[23] In both groups, about thirty-eight percent of parents were eligible for at least one reunification exception.[24] Approximately one percent of parents were eligible for the mental disability exception.[25]

The state[26] recommended bypass in only thirteen percent of eligible cases.[27]

---

which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)." 42 U.S.C. § 671(a)(15)(D)(i) (2000). Aggravated circumstances may also include: committing, aiding or attempting the murder or voluntary manslaughter of another child of the parent; felony assault causing "serious bodily injury" to any child; and prior involuntary termination of parental rights." 42 U.S.C. §§ 671(a)(15)(D)(ii)–(iii) (2000). ASFA also provides that the state must file a petition to terminate parental rights when the child has been in foster care for fifteen of the last twenty-two months. Social Security Act, 42 U.S.C. §§ 675(5)(E), 673b (2000). Although the California law goes further, by specifying numerous additional aggravated circumstances which justify not making reasonable efforts, the political and philosophical orientation is consistent with ASFA. The law emphasizes the child's interest in permanence rather than family preservation or the parent's interest in regaining custody. *See* Stein, *supra*, at 669–70 (noting that national child welfare reformers focused in part on "discontinuing . . . the system of always putting the needs and rights of the biological parent first").

21. *See infra* Part V.A.

22. Laura Frame, Jill Duerr Berrick, Amy D'Andrade & Young Choi, Considerations in the Utilization of Reunification Bypass (Jan. 18, 2004) (unpublished presentation given at the Center for Social Services Research, U.C. Berkeley, on file with the author).

23. *Id.*

24. *Id.* The exceptions for which the highest number of parents were eligible were: parent convicted of a violent felony (6.6%), parent's rights to a sibling terminated (7.6%), and chronic history of substance abuse (14.4%). *Id.*

25. *Id.*

26. Child welfare cases are prosecuted at the county level, and the county agencies go by various names. I use "the state" to mean the government, or the county agency that is responsible

The mental disability exception was among the most likely to be recommended where the parent was eligible (twenty-nine percent). For all exceptions, certain family characteristics appeared to affect agency decisions. When the parent was younger, in good general health, and had a support system, the agency was less likely to recommend bypass. When the parent had a child removed previously or a sibling of the child was in foster care, the agency was more likely to recommend bypass. Overall, when the state recommended bypass, the court ordered it eighty-two percent of the time.[28]

Among the most interesting findings of Professor Berrick's project is that approximately thirty-five percent of parents who fit into one or more reunification exception do reunify with their children (compared to approximately fifty-five percent of parents who fit into no reunification exceptions). In other words, actual ability to reunify was only weakly correlated with eligibility for a reunification exception.

Professor Berrick's research raises several concerns. The high percentage of cases eligible for bypass suggests that the exceptions have the ability to swallow the default rule of providing services. At the same time, the relatively low percentage of cases in which the state recommends bypass (and the tendency of courts to approve that recommendation) indicates that social workers and state attorneys have enormous discretion in deciding when to bypass services. Although some discretion is necessary to prevent over-application of the bypass law and to allow for decision-making based on the individual circumstances of the family, such broad discretion allows for unfair and arbitrary application of the law. Finally, the fact that eligibility for bypass is not strongly associated with inability to reunify shows that the legislature's assumption—that providing services to these parents would be fruitless—is often incorrect.

III.
REVIEW OF APPELLATE CASE LAW ON THE MENTAL ILLNESS EXCEPTION

The mental disability exception case law shows that courts are neither mindful of the drastic consequences of denying services to parents, nor rigorous in applying the statute's substantive requirements. Judges, reluctant to question the opinions of psychologists and psychiatrists, tend to accept automatically the experts' recommendations to bypass services. These problems manifest themselves in several specific ways. Courts often fail to articulate the connection between the parent's disability and her inability to utilize services, disregard the

for ensuring child welfare.

27. *Id.* However, there was a great deal of variability across counties: the percentage of eligible cases where bypass was recommended varied from twenty percent to two percent. There was also variability across exceptions—the agency was much more likely to recommend bypass for certain exceptions, including parent's whereabouts unknown (48%), parent's rights terminated to another child (38%), and parent caused another child's death (33%). *Id.*

28. *Id.*

problematic nature of the diagnosis offered by the expert as the basis for a recommendation to deny services (or decline to inquire into diagnosis at all), and conflate issues of substance abuse and mental disability (which ought to be treated separately).

A. Frequency and Success of Appellate Review

Appellate review of denial of reunification services based on mental disability is rare. No case decided under section 361.5(b)(2) has reached the California Supreme Court or the federal courts. The California appellate courts have decided fewer than thirty mental disability exception cases since the legislature added the exception in 1986.[29] This may be due in part to the special and demanding requirements for obtaining review of reunification bypass. When the juvenile court denies reunification services at the dispositional hearing, the state essentially has commenced a motion to terminate parental rights.[30] Accordingly, section 361.5 requires the court to schedule a "section 366.26 permanency planning/implementation hearing or a section 366.25 permanency planning hear-

29. The exact number of cases depends on how one views the procedural posture of several cases, in which the appeal is ostensibly from a termination of parental rights, but the parent raises the denial of reunification services. As long as there was substantial discussion of the merits of the decision to deny services, I considered the case to be an appeal from denial of reunification services. *In re* Chloe C., No. E035851, 2004 WL 2959242 (Cal. Ct. App. Dec. 22, 2004); *In re* Codie J., No. F045055, 2004 WL 1889927 (Cal. Ct. App. Aug. 25, 2004); M.S. v. Superior Court, No. B172807, 2004 WL 1080170 (Cal. Ct. App. May 14, 2004); *In re* C.C., 3 Cal. Rptr. 3d 354 (Cal. Ct. App. 2003); *In re* Ollie B., No. A101061, 2003 WL 22026624 (Cal. Ct. App. Aug. 29, 2003); *In re* David F., No. H024604, 2003 WL 21995470 (Cal. Ct. App. Aug. 21, 2003); Jessica D. v. Superior Court, No. F042465, 2003 WL 21019234 (Cal. Ct. App. May 6, 2003); Anna Q. v. Superior Court, No. B164760, 2003 WL 1386944 (Cal. Ct. App. Mar. 20, 2003); Guillermo L. v. Superior Court, No. D041098, 2003 WL 356717 (Cal. Ct. App. Feb. 19, 2003); Jesse B. v. Superior Court, No. H024925, 2002 WL 31781134 (Cal. Ct. App. Dec. 11, 2002); T.P. v. Superior Court, No. F040765, 2002 WL 31151196 (Cal. Ct. App. Sept. 26, 2002); *In re* Steven G., No. H022960, 2002 Cal. App. Unpub. LEXIS 6557 (Cal. Ct. App. July 12, 2002); Sergio S. v. Superior Court, No. H024358, 2002 WL 1303413 (Cal. Ct. App. June 14, 2002); Wendy P. v. Superior Court, No. B156432, 2002 WL 1271848 (Cal. Ct. App. June 10, 2002); *In re* Michael E., No. H023087, 2002 WL 382856 (Cal. Ct. App. Mar. 12, 2002); *In re* Aleathea J., No. H023020, 2002 WL 68011 (Cal. Ct. App. Jan. 17, 2002); *In re* Joy M., 120 Cal. Rptr. 2d 714 (Cal. Ct. App. 2002); *In re* William F., No. G029692, 2001 WL 1660075 (Cal. Ct. App. Dec. 28, 2001); Serena M. v. Superior Court, No. A096883, 2001 WL 1647186 (Cal. Ct. App. Dec. 26, 2001); Lureen K. v. Superior Court, No. B153531, 2001 Cal. App. Unpub. LEXIS 438 (Cal. Ct. App. Dec. 26, 2001); Linda B. v. Superior Court, 111 Cal. Rptr. 2d 559 (Cal. Ct. App. 2001); Sheila S. v. Superior Court, 101 Cal. Rptr. 2d 187 (Cal. Ct. App. 2001); Curtis F. v. Superior Court, 95 Cal. Rptr. 2d 232 (Cal. Ct. App. 2000); Wanda B. v. Superior Court, 49 Cal. Rptr. 2d 175 (Cal. Ct. App. 1996); *In re* Jennilee T., 4 Cal. Rptr. 2d 101 (Cal. Ct. App. 1992); *In re* Catherine S., 281 Cal. Rptr. 746 (Cal. Ct. App. 1991); *In re* Rebecca H., 278 Cal. Rptr. 185 (Cal. Ct. App. 1991); *In re* Jesse C., 263 Cal. Rptr. 811 (Cal. Ct. App. 1989); *In re* Christina A., 261 Cal. Rptr. 903 (Cal. Ct. App. 1989).

30. *But see In re* Codie J., No. F045055, 2004 WL 1889927, at *5 (Cal. Ct. App. Aug. 25, 2004) (upholding decision to deny reunification services but return the child to his parent anyway in "unusual" circumstance that inability to benefit from services did not correlate with inability to parent).

ing" within 120 days.[31] The appellate courts have held that a parent will not "as a practical matter have enough time to secure [appellate review] by way of a direct appeal" from the dispositional order denying services.[32] Instead, the parent must file a petition for an "extraordinary writ" in order to obtain appellate review prior to the permanency hearing.[33] The timeline for this procedure is very short,[34] which puts parents at risk for missing deadlines.[35]

Perhaps parents rarely appeal the mental disability exception because the state rarely invokes it in the first place. Perhaps parents and their attorneys decide to focus their energies on resisting the termination of parental rights. In any case, it is clear that appellate review is seldom successful for the parent.

If there is "substantial evidence" supporting the trial court's decision, the appellate court will not disturb it.[36] There are only two cases in which the court reversed a denial of reunification services. In *In re Rebecca H.*, the first expert diagnosed the father as suffering from a narcissistic personality disorder and stated that he was a "danger to his children."[37] The second expert stated that the parent was "paranoid and antisocial" but found that he "did not have any mental incapacity or disorder which rendered him unable to adequately care for or control his children nor did he have a mental disability which would render him incapable of utilizing the services of a reunification plan."[38] This expert said that the father's "prognosis for change . . . [was] fair," because the father was "highly motivated to become involved in treatment."[39] The Court of Appeal concluded that there was insufficient evidence that the seriousness of the mental

31. *In re* Rebecca H., 278 Cal. Rptr. 185, 190 (Cal. Ct. App. 1991); CAL. WELF. & INST. CODE § 361.5(f) (West 1998 & Supp. 2006). In some cases, the permanent plan will be guardianship or long-term foster care rather than adoption, in which case the state will not pursue termination of parental rights. *See* CAL. WELF. & INST. CODE §§ 366.26(b)(3)–(4) (West 1998 & Supp. 2006).

32. *Rebecca H.*, 278 Cal. Rptr. at 190.

33. *Id.*; CAL. WELF. & INST. CODE § 366.26(l) (West 1998 & Supp. 2006).

34. The California Rules of Court require that notice of intent to petition for extraordinary writ be filed within seven days of the order setting the permanency hearing. CAL. R. CT. 38.1(e)(4) (rev. ed. West 2006). *See, e.g.*, *In re* Michael E., Nos. H023087, H023815, 2002 WL 382856, at *9 (Cal. Ct. App. Mar. 12, 2002) (using old rule 39.1B, which provides same timeframe). Once the record is assembled, the parties have just ten days to file the petition, which like any other brief includes a summary of the facts as well as applicable points and authorities. CAL. R. CT. 38.1(c) (rev. ed. West 2006).

35. It should be pointed out that the appellate court has discretion to treat an appeal as a petition for extraordinary writ, thus reaching the merits, when the juvenile court gave defective notice. *See Rebecca H.*, 278 Cal. Rptr. at 190.

36. *E.g.* Sergio S. v. Superior Court, No. H024358, 2002 WL 1303413, at *4 (Cal. Ct. App. June 14, 2002) (articulating "substantial evidence" standard as applied to denial of reunification services).

37. *In re* Rebecca H. 278 Cal. Rptr. 185, 189 (Cal Ct. App. 1991) (noting first expert's conclusion that father was dangerous to others "given . . . the specific dynamics of his self-absorption and inability to perceive the actual basic needs of his infant children").

38. *Id.*

39. *Id.*

disability warranted denying services under section 361.5(b)(2).[40] In the second case, *In re Catherine S.*,[41] the court remanded the case for determination of evidence of mental disability after reversing on a technicality.[42] The court held that the statute requires testimony by two physicians or licensed psychologists to support a finding of mental disability pursuant to section 361.5(b)(2).[43] Since one expert was an unlicensed psychologist, the court held that the state had not properly established the father's status as a person with a mental disability.[44]

The infrequency of appellate review raises two interrelated concerns. First, inequitable or arbitrary application of the law by the juvenile courts likely goes unchecked. Additionally, appellate courts may not be providing appropriate guidance to juvenile courts on how to apply the mental disability exception appropriately.

B. Statutory Interpretation of the Mental Disability Exception

The *Rebecca H.* opinion offers the most thorough interpretation of section 361.5(b)(2). This case provided the lower courts with a framework for deciding whether a parent should come under the aegis of the mental disability exception, and highlighted the need for a connection between the parent's mental disability and her inability to utilize services. *Rebecca H.* clarified that the recommendation of both of the two experts with particular qualifications is required both to find that there is a mental disability and in order to deny services, "in view of [the] potentially far-reaching and traumatic consequences" of the decision.[45] Further, the court formulated a three-step test for applying the statute. First, does the parent suffer from a mental disability? If not, the reunification bypass

40. *Id.* at 193–94.

41. *In re* Catherine S., 281 Cal. Rptr. 746 (Cal. Ct. App. 1991).

42. *Id.* at 750.

43. *Id.* at 748–49. Since section 361.(b)(2) of the Welfare and Institutions Code incorporates the Family Code's procedural definition for "mental disability," the finding of mental disability for purposes of the reunification bypass must also be supported by the opinion of two experts. *See supra* note 9 and accompanying text; *In re* Rebecca H., 278 Cal. Rptr. 185, 195 (Cal Ct. App. 1991). *See also infra* note 45 and accompanying text. Section 361.5(c) of the Welfare and Institutions Code requires that an allegation of mental disability pursuant to section 361.5(b)(2) be made at the dispositional hearing. However, several cases have held that failure of the parent's attorney to object when an expert neglects to state her qualifications for the record does not establish error requiring reversal. *See, e.g.*, *In re* Joy M., 120 Cal. Rptr. 2d 714, 721 (Cal. Ct. App. 2002) (finding proof of [expert's] qualifications unnecessary in the absence of objection); *In re* Jennilee T., 4 Cal. Rptr. 2d 101, 107–108 (Cal. Ct. App. 1992) (finding parent's failure to object to experts' failure to state qualifications precludes parent from raising issue on appeal in absence of claim that experts were not properly qualified).

44. *Catherine S.*, 281 Cal. Rptr. at 748 (explaining also that second psychologist was employed by a state agency which did not provide direct mental health services, and was thus exempt from state licensing requirements).

45. *Rebecca H.*, 278 Cal. Rptr. at 192, 196. *But see Catherine S.*, 281 Cal. Rptr. at 749 (clarifying that a lesser evidentiary burden applies to the finding of inability to parent under section 36.15(c) than to the finding of mental disability under 361.5(b)(2); the former finding requires only "competent mental health professionals").

exception does not apply. If so, second, "does such disability render the parent incapable of utilizing reunification services?" If so, services may be denied. If not, third, does the disability "make it unlikely the parent will be capable of learning from reunification services to adequately care for the child within twelve months?"[46] If so, services may be denied. If not, services must be provided.[47] The proper application of this test clearly requires the psychologist to explain her opinion that the parent should be denied services.[48] Moreover, the second and third prongs of the *Rebecca H.* test articulate the concept that the parent's inability to learn from services must be connected to her mental disability.

Rebecca H. took a fairly narrow, cautious view of the mental disability exception and explicitly recognized that denying services is an extreme measure.[49] However, in contravention of this principle, several cases have since expanded the meaning and reach of the mental disability exception with the result that more parents will be subject to denial of reunification services.[50] Most significant is *Curtis F. v. Superior Court.*[51] In that case, one psychologist found that the father suffered from a "mixed personality disorder" and "asserted unequivocally that there were no reunification services that would assist [him]."[52] The second psychologist stated that the father had "chronic personality disorder issues and problems of impulse control," and he expected the father to have a difficult time benefiting from services because "[he] doesn't really feel that he has a need or that any problem exists." However, this psychologist's opinion was that "the potential for a safe and healthy reconciliation appears to be guarded to fair."[53] With essentially no explanation, the Court of Appeal held that the psychologists need not agree that the parent is unlikely to benefit from services. Instead, the court wrote that "the statute requires a showing only of evidence proffered by both experts regarding a parent's mental disability, evidence from which the court can then make inferences and base its findings."[54] The majority found that there was sufficient evidence to deny services, citing the father's

46. *Rebecca H.*, 278 Cal. Rptr. at 194–95. If the child is under three when he comes into foster care, that time period would be shortened to six months. *See* CAL. WELF. & INST. CODE § 361.5(a)(2) (West 1998 & Supp. 2006).

47. *See Rebecca H.*, 278 Cal. Rptr. at 194 (framing the test as narrowly defining *exceptions* to the "explicit direction to furnish reunification services when the minor is removed from custody").

48. *See id.* at 195–96 (emphasizing that "consistency would seem to warrant" the same expert opinion requirements for finding of inability to parent as for determination of mental disability).

49. *Id.* at 195 (noting that "denial of reunification is a significant and perhaps first step to the termination of parental rights" and calling the denial a "portentous determination").

50. One panel of the California Court of Appeal should hesitate to overrule another absent "compelling reasons." People v. Bolden, 266 Cal. Rptr. 724, 729 (Cal. Ct. App. 1990). *Rebecca H.* is still good law; I point only to the post-*Rebecca H.* trend.

51. 95 Cal. Rptr. 2d 232 (Cal. Ct. App. 2000).

52. *Id.* at 233 (internal quotations omitted).

53. *Id.* at 233–34.

54. *Id.* at 234–35.

extensive history of "defects" mentioned in both psychologists' reports.[55] One judge dissented, noting the seriousness of denying reunification services and arguing that the statute required the court to rest its decision on professional opinions, not just professional fact-finding, because "the question of likelihood of reunification (given the provision of services) seems . . . to be peculiarly one that lends itself to resolution by mental health professionals, not judges."[56]

Curtis F. is an unusual expression of judicial autonomy and lack of deference to psychological experts. Typically, those who seek to *defend* individual rights against subjective decisions by health professionals invoke the argument that judges should defer less to experts.[57] However, although theoretically the holding in *Curtis F.* could either help or harm a parent, no court has cited this case (in a publicly-available opinion) as authority for a decision to grant or maintain services in contravention of the expert's advice. Further, *Curtis F.* is an example of creative statutory interpretation. Welfare and Institutions Code section 361.5(b)(2), as interpreted by *Rebecca H.*, clearly requires a *nexus* between mental illness and inability to benefit from services or care for the child adequately. Cases such as *Curtis F.*, in which the expert makes a diagnosis but disavows any firm conclusions about future ability to parent adequately, invite the judge to ignore the nexus requirement. The nexus is vitally important, as it stands in the way of decisions about parental rights being made purely on the basis of the parent's status as a person with a mental disability. Requiring the expert to explain the nexus could reveal unsupported assumptions about the parent, which, in turn, would aid the parent's attorney in making stronger arguments attacking the basis for denial of reunification services.

Evidentiary rulings have further facilitated the state's use of the mental disability exception. First, under the California Evidence Code there is no psychotherapist-client privilege for court-ordered evaluations,[58] because the purpose is to obtain information rather than to treat the parent.[59] Second, parental noncompliance with an order to be psychologically evaluated has the same effect as a negative evaluation—in other words, if the parent refuses to be evaluated, the court can and should refuse to extend reunification services.[60] In ad-

55. *Id* at 235.

56. *Id.*

57. *See, e.g.*, Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 733 (1974) (arguing that "training and experience do not enable psychiatrists adequately to predict dangerous behavior [because] such predictions are determined by the time and place of diagnosis, the psychiatrist's personal bias, social pressures, the class and cultures of the respective parties, and other extraneous factors. . .[and] there is no correlation between mental illness and dangerous behavior"); *id.* at 752 (concluding that "legislatures and courts, in an attempt to shift responsibility . . . have turned to psychiatry, seeking easy answers where there are none. . . ." and that "the decision to deprive another human of liberty is not a psychiatric judgment but a social judgment").

58. California Evidence Code §§ 1014, 1017(a) (West 1995).

59. *In re* Joshua H., No. A101096, 2003 WL 1784509, at *6 (Cal. Ct. App. Apr. 3, 2003).

60. *In re* C.C., 3 Cal. Rptr. 3d 354, 359 (Cal. Ct. App. 2003) (reasoning under the "disen-

dition, continuances should not be granted to give the parent time to complete a second evaluation if it would be "contrary to the interest of the minor," absent "exceptional circumstances"; likewise, failure to complete the second evaluation constitutes proper grounds for denial of services.[61] Third, a flexible standard governs whether an allegation of mental disability justifies ordering the parent to undergo two evaluations: the parent need not have a documented history of mental health problems or developmental disability,[62] nor need the reason for the child coming into foster care be directly related to the parent's mental disability.[63] Instead, the court "may rightly look to the circumstances underlying the dependency and the evidence of the parent's conduct in deciding whether to order one or more mental health evaluations."[64] In *Rebecca H.*, counsel for both the parent and the children argued for a stricter standard because mental health evaluations invade privacy interests, and the state may request evaluations as a way to "avoid paying the high cost of reunifications."[65] The court dismissed such concerns, holding that if one evaluation does not jeopardize privacy rights (the parent conceded one evaluation was permissible), then two evaluations do not do so, particularly since the allegation of the state's misuse was, on the facts before the court, "pure speculation."[66]

These cases, and those that follow, indicate that California courts are generally not sympathetic to arguments about the threat that the mental disability exception poses to parental rights and family preservation.

C. Constitutional Challenges

There have been three challenges to the constitutionality of the mental disability exception, all of which the Court of Appeal has rejected.[67] In each case, the court underestimated the extent to which a decision to deny reunification services implicates the parent's interest in care and custody of her child. In point of fact, denial of services automatically triggers a hearing on termination of

---

titlement doctrine" that parents who willfully refuse evaluation "bar [themselves] from seeking assistance from the courts" since the parent's conduct precludes the court from making the requisite determination of mental disability, and interferes with the rights of the child).

61. Jesse B. v. Superior Court, No. H024925, 2002 WL 31781134, at *4–5 (Cal. Ct. App. Dec. 11, 2002).

62. *In re* Rebecca H., 278 Cal. Rptr. 185, 193 (Cal. Ct. App. 1991).

63. *See id.* at 187 (decision at jurisdictional hearing that child be taken into custody supported by evidence of emaciation, spoiled food supply, and unsanitary home).

64. *Id.* at 193.

65. *Id.* at 192–93.

66. *Id.*

67. *In re* Christina A., 261 Cal. Rptr. 903 (Cal. Ct. App. 1989); *In re* Jennilee T., 4 Cal. Rptr. 2d 101 (Cal. Ct. App. 1992); *In re* Michael E., Nos. H023087, H023815, 2002 WL 382856 (Cal. Ct. App. Mar. 12, 2002). The opinions in these cases do not make clear whether the arguments and holdings were based on the state or federal constitution—they are discussed generally as "due process," "equal protection" and "vagueness" challenges.

parental rights.[68] Further, as soon as services cease, the parent's interests are no longer balanced against the child's, and there is no longer an independent interest in family preservation; rather, the only relevant considera-tion is permanence for the child.[69] Yet despite the prima facie severity of such decisions, the Courts of Appeal have offered only thin and confused constitutional analyses of the mental disability exception.

In re Christina A. involved three children who came into foster care based on serious physical harm or risk thereof.[70] The first expert diagnosed the mother with episodic alcoholism and borderline personality disorder; he testified that she was likely to drink again and that she was "incapable of empathizing with others." He opined that she would probably need two or three years of treatment in order to parent safely. The second expert diagnosed the mother with episodic alcohol dependence and a mixed personality disorder with histrionic, narcissistic, and borderline features. He too stated that her prognosis was poor, and that she would be unable to parent her children for the next one to three years.[71] The juvenile court denied reunification services pursuant to section 361.5(b)(2).[72]

On appeal, the court addressed three different constitutional claims: that the statute was unconstitutionally vague, that it violated due process, and that it violated equal protection.[73] However, the reasoning of the opinion is quite muddled, and it is difficult to separate the court's treatment of these issues. The court first held that constitutional rights were not implicated because dependency proceedings do not "involve deprivation of parental rights," and there is no constitutionally protected interest in receiving reunification services (or the mother had not carried her burden of showing entitlement to such services—the court's language is not entirely clear).[74] The court appeared to rely on this conclusion to dispose of the vagueness claim, but later stated that vagueness was really equivalent to lack of procedural due process. The court next held that procedural due process was satisfied because the mother was notified of the reunification bypass, she was represented by counsel, and she had the opportunity to present

68. *See supra* notes 30–31 and accompanying text. For discussion of the constitutional rights of parents, see *infra* Part V.B.

69. *See, e.g.*, *In re* Marilyn H., 851 P.2d 826, 833–35 (Cal. 1993) ("Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability."); *In re* Rebecca H., 278 Cal. Rptr.185, 195 (noting that if parent is found to be unable to benefit from reunification services, "child's interest in permanent placement takes preference over interest of parent).

70. *Christina A.*, 261 Cal. Rptr. at 905.

71. *Id.* at 908.

72. *Id.* at 905.

73. *Id.* at 907. The mother seems to have argued only that the statute was unconstitutionally vague, because the meaning of mental disability is inherently subjective. *Id.* at 905–906.

74. *Id.* at 906–907. "Dependency proceedings" refers to all hearings and judicial orders between the child's removal from the parent's custody and resolution of the case (reunification, termination of parental rights, or some other permanent plan). The court's position here was that once the child is taken into foster care, every decision up to termination—such as amount of visitation and what services will be ordered—does not affect parental rights.

evidence and confront adverse witnesses at the hearing.[75] Therefore, the court never really addressed the different question of whether the mental illness exception is so indefinite that those charged with its enforcement would be unable to separate those to whom it should apply from those to whom it should not apply. Finally, the court discussed whether discriminating between parents who receive reunification services and those who do not constitutes a violation of equal protection. It held that the classification was valid, because it is rationally related to the purpose of ensuring the well-being of children by giving them a permanent home within a definite time period.[76] This discussion was apropos of nothing—not only had the parent not raised an equal protection argument, but the court's comparison was flawed. The court did not say whether differentiating between parents with a mental disability and those without, who might still be unable to utilize services, constituted an invidious classification. The *Christina A.* decision does not provide a coherent defense of the statute's constitutionality. The opinion does not deal with the true impact of denying re-unification services—the extinguishing of the parent's interests as a factor to be weighed.

In re Jennilee T. similarly lacks adequate reasoning. Both of the parents were diagnosed with paranoid schizophrenia and were institutionalized at the time the child was born.[77] Both psychologists reported that neither parent was capable of raising a child or utilizing reunification services, and the juvenile court found that "mother's illness and father's illness are permanent conditions and . . . are not technically treatable," and recommended denying services.[78] The father argued that the mental illness exception deprived him of his liberty interest in the care and custody of his daughter. He reasoned that although protectting the child from harm was a compelling state purpose, so was preserving the family. As summarized by the court, "the gist of his argument is [that] . . . fundamental fairness dictates a parent be afforded every possibility of retaining his or her parental rights. . . . William claims there is a *possibility* he could be reunited with his daughter were he offered reunification services."[79] The court disposed of this argument in one sentence: "[the] argument is entirely speculative, and it is therefore inconsistent with the state's interest in affording children the stability of a permanent home within a definite time period."[80] The court did not acknowledge that the prediction that the father would not be able to reunify was also speculative, and inconsistent with the goal of preserving families. In other words, the court assumed guaranteed stability in the new home and held that such assurance outweighed any degree of uncertainty with the parents

75. *In re* Christina A., 261 Cal. Rptr. 903, 907 (Cal. Ct. App. 1989).

76. *Id.*

77. *In re* Jennilee T., 4 Cal. Rptr. 2d 101, 103 (Cal. Ct. App. 1992).

78. *Id.* at 103 & n.5. The notion that schizophrenia is not treatable is demonstrably false. *See infra* note 148 and accompanying text.

79. *Jennilee T.*, 4 Cal. Rptr. 2d at 106 (emphasis in original).

80. *Id.*

without consideration for their rights and interests as parents (not to mention the child's inherent interest in remaining with his own parents). The court held that the statute was constitutional for the reasons stated in *Christina A.*, and quoted at length from that opinion.[81] Again, the court's failure to explain itself is dissatisfying. There is no reason that the parent's interest should be given so little weight,[82] and the court's distinction between denying reunification services and terminating parental rights is flawed given that one triggers the other.

In re Michael E. presents the most recent constitutional challenge. The mother was illiterate and identified herself as a Gypsy.[83] The children entered foster care after the mother was arrested for a burglary (in which the children served as decoys), and they showed signs of serious neglect.[84] One expert diagnosed the mother with alcohol abuse and a personality disorder with antisocial and histrionic features.[85] He stated that

> Ms. E. would not be a cooperative therapy client. She is neither depressed nor anxious. She is not worried about exposing her children to either a violent boyfriend or a criminal life style. . . . She told me she thinks therapy is 'a waste of time.'. . . Ms. E shows no sign of a willingness to change for the sake of her children's welfare. . . . She would spend the year trying to deceive CPS rather than change her life style.[86]

The other expert did not seem to have made a formal diagnosis, but concluded that the mother was "extremely socially inept and cognitively functioning in the mild mentally retarded range. Providing a safe and secure environment for her children is beyond the scope of Ms. E.'s capabilities."[87] The court denied reunification services. The mother made a facial challenge to the statute on appeal, arguing that including a personality disorder as a qualifying mental disability for the purposes of denying reunification services would violate due process of law, because it would sweep "virtually any parental 'bad conduct' sufficient for jurisdiction" over the child into the mental disability exception.[88] The court declined to consider the facial challenge, and held that the statute was constitutional as applied because there was "substantial evidence" of a mental disability which rendered [the mother] unable to protect and support her children.[89] Whether the court was right to dismiss the facial challenge is debatable, but its refusal to entertain an as-applied challenge seems wrong. The mother

---

81. *Id.* at 104–107.

82. Quite the contrary, there is every reason to give the parent's interests *more* weight. *See infra* Part V.B (discussing constitutional rights of parents).

83. *In re* Michael E., No. H023087, 2002 WL 382856, at *3 (Cal. Ct. App. Mar. 12, 2002).

84. *Id.* at *1.

85. *Id.* at *4.

86. *Id.* at *5.

87. *Id.* at *5.

88. *Id.* at*14. I discuss the problem of personality disorders *infra* in Part III.D.ii.

89. *In re* Michael E., No. H023087, 2002 WL 382856, at *14–15 (Cal. Ct. App. Mar. 12, 2002).

made a novel but serious argument challenging her diagnosis as a basis for denying services, and the court dismissed it by restating the law.

The constitutional challenges to the mental disability exception may have failed because the plaintiffs were not sympathetic enough, or because their doctrinal arguments were not well-reasoned. Perhaps an as-applied challenge could succeed if the parent made a stronger showing that denying reunification services is functionally equivalent to terminating parental rights, or at least has a serious impact on parental rights, and that therefore the parent's liberty interest should be recognized.[90] In any case, it is clear that the California courts have not fully and seriously considered the constitutionality of the statute authorizing the mental disability exception.

D. Common Errors in Application of the Mental Disability Exception

There are several troubling themes running through the section 361.5(b)(2) case law, which suggest that courts are not carrying out their responsibility to ensure that the substantive requirements of the statute are met, and instead are simply deferring to psychologists and social workers. These themes fall into three categories: failure to demand that the nexus between parental mental disability and inability to utilize services be spelled out; unwillingness or inability to probe contested or incomplete diagnoses; and mistakenly equating substance abuse and mental disability.

1. Imprecision about the nexus

Judicial opinions discussing section 361.5(b)(2), as well as the psychological evaluations referred to therein, tend to be very imprecise about the specific connection between the parent's diagnosis and her inability either to utilize services or eventually resume care of the child. Rarely, if ever, does the court spell out why it has come to the conclusion that the parent cannot benefit from services, aside from cataloging the parent's past problems and referencing her diagnosis. *In re William F.*[91] is a good example of this problem. The mother in that case was diagnosed with Munchausen Syndrome by Proxy, an illness which causes a parent to harm her child in order to gain sympathy or attention.[92] After

90. For more discussion of the parent's liberty interest in receiving services, see *infra* Part V.B.

91. *In re William F.*, No. G029692, 2001 WL 1660075 (Cal. Ct. App. Dec. 28, 2001).

92. *Id.* at *1. This definition of Munchausen Syndrome by Proxy was supplied by the court. In fact, one psychologist in *William F.* opined that it is not a distinct disorder but rather a form of child abuse stemming from a personality disorder, and the other argued that it is "not a mental disorder" but "an unlawful act made with a conscious mind." *Id.* at *3. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) originally mentioned the illness by name as a "factitious disorder." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 472 (4th ed. 1994). The 2004 revisions to the DSM-IV do not refer to Munchausen Syndrome by Proxy, although a factitious disorder is still characterized as the "deliberate production or feigning of physical or psychological signs or

a lengthy list of the terrible things the mother did to the children, the court turned to the legal standard:

> Of course, the question arises as to whether Shauna's mental illness renders her incapable of "utilizing" reunification services. On this point there was testi-mony from two experts, each of whom conducted an evaluation under section 730 of the Evidence Code. Both Dr. Smith, a psychologist, and Dr. Nair, a psychiatrist, said that Shauna would need at least a year in therapy before she could be trusted with her children again.[93]

The logical gaps are striking—the only way this opinion makes sense is if the illness itself proves that the mother could not benefit from services. The experts did not even appear to have said that the mother could not utilize services. The court seemed to conclude that needing a year of therapy (which, interestingly, is within the statutory timeframe) is tantamount to being unable to utilize services—or, more likely, the judge simply believed that the illness is so dangerous that the mother ought not to be given a second chance. Even if that were true, the court should have carefully applied the statutory test.

Another interesting example of the imprecision problem is *Sheila S. v. Superior Court.*[94] In that case, the children were taken into foster care on the grounds that the mother failed to protect them from sexual abuse.[95] The juvenile court ordered the mother to undergo two psychological evaluations, with reunification services in the interim.[96] One expert diagnosed the mother with "post-traumatic stress disorder, alcohol abuse and a personality disorder not otherwise specified with borderline, antisocial, and dependent features," and concluded that these "psychiatric problems rendered her . . . incapable of utilizing reunification services."[97] The second expert diagnosed the mother with a bipolar affective disorder and a dependent personality disorder with borderline features, and stated that "it was highly unlikely that reunification services would substantially improve her parenting skills within the next twelve months."[98] On the basis of these evaluations, the state filed a petition to terminate reunification services pursuant to section 361.5(b)(2). The mother was the only person to testify at the

---

symptoms in another person who is under the individual's care. . . . The motivation for the perpetrator's behavior is to assume the sick role by proxy. External incentives for the behavior . . . are absent." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 781–82 (4th ed. Text Revision 2000) [hereinafter DSM-IV-TR].

93. *William F.*, 2001 WL 1660075, at *2.

94. 101 Cal. Rptr. 2d 187 (Cal. Ct. App. 2000).

95. *Sheila S.*, 101 Cal. Rptr. at 189.

96. *Id.*

97. *Id.* "Not otherwise specified" is a term of art used by mental health professionals when the patient has a mental disorder that appears to fall within a larger category but does not meet the criteria of any specific disorder within that category. "Not otherwise specified" is also used when the symptoms are "below the diagnostic threshold," or "there is insufficient opportunity for complete data collection." *See* DSM-IV-TR, *supra* note 92, at 4, 729.

98. *Sheila S.*, 101 Cal. Rptr. 2d at 190.

hearing on this petition, and she talked about the "progress she was making" and her belief that she should continue to receive reunification services.[99] The court terminated services and the Court of Appeal upheld that decision, explaining that the "psychological evaluations were essentially unrebutted."[100] Evidence that the mother was actually utilizing services (her testimony was itself unrebutted) should rebut professional opinion that she was incapable of utilizing services. Again, the parent's diagnosis alone seems to support the denial of services. The court simply fails to articulate any other reason for its decision.

In re Aleathea J.[101] is an example of the court trying, unconvincingly, to explain its finding that the mother was incapable of utilizing reunification services.[102] The first expert found that the mother had a borderline personality disorder and a psychotic disorder that made her "a danger to her children and unlikely to benefit from reunification services;" the second expert diagnosed her with borderline personality disorder and found her mental disability "so severe and fixed that even extensive intervention would be unsuccessful.[103] On appeal, the mother argued that the psychologists' reports were not credible because "they failed to explain why available treatments for borderline personality disorder [would] fail," and thus there was no basis for the conclusion that she was not amenable to treatment.[104] The court held that the juvenile court was entitled to credit the experts' findings because they determined that "due to her psychosis and paranoia . . . *any* treatment would fail."[105] Further, the court noted that

> [E]ven if her trial counsel was deficient in failing to make [the argument that the psychologists' opinions were not supported by an adequate factual basis], it is not reasonably probable that it would have made any difference since the psychologists' reports and the other evidence strongly supported the conclusion that Irene was not amenable to treatment.[106]

This response is unsatisfying on several levels. First, the court bootstrapped, essentially finding that the psychologists' conclusion that the mother was not amenable to treatment was supported and worthy of credence because their evaluations found that she was not amenable to treatment. Also, the court did not explain what "other evidence" it referenced. Finally, the court again declined to

---

99. *Id.*

100. Sheila S. v. Superior Court, 101 Cal. Rptr. 2d 187, 193 (Cal. Ct. App. 2000).

101. Nos. H023020, H023623, 2002 WL 68011 (Cal. Ct. App. Jan. 17, 2002).

102. The children were taken into foster care because the mother made repeated allegations of sexual abuse by the father, which the court ultimately found to be fabricated. *Alethea J.*, WL 68011, at *1. The court notes that the mother had failed to comply with a health inspector's orders to vacate the residence, which had been declared "unsafe." *Id.* at *2.

103. *Id.* at *2.

104. *Id.* at *7.

105. *Id.*

106. *Id.* at *10.

explain the connection between the parent's illness and her inability to utilize services.

These cases illustrate that when the court does not articulate, or ask the expert to articulate, how the nexus requirement is fulfilled, it incorrectly applies the statute and leaves open the possibility that a parent who would benefit from services will be denied access simply because she has a diagnosis.

2. Refusal to probe diagnosis

A second theme running through the case law is that of courts providing inadequate discussion of the mental disability itself, or not questioning diagnoses which are dubious bases on which to deny services. This practice makes the expert's opinion the last word in many cases. Often, the court discusses the basis for denying reunification services so briefly that it does not mention the parent's diagnosis, or it gives a broad category of mental disability with no detail. In one case, the court merely stated that the parents had developmental disabilities;[107] in another, the court relied on the vague opinion of two experts that the father had "significant psychological disturbances and severe behavioral problems."[108] Although it is possible that more detail was provided at the trial level, it seems unlikely given that these courts were addressing challenges to sufficiency of the evidence used to deny services. Likewise, courts have denied reunification services based on generalized conclusions that the parent suffered from "mental disabilities"[109] or "serious emotional problems."[110]

Courts also evince very little understanding of the fact that some diagnoses have contested meaning. Many of the appellate cases involve diagnoses of personality disorders, particularly borderline personality disorder. Although the term had been in use for some forty years, borderline personality disorder was officially added to the Diagnostic and Statistical Manual of Mental Disorders ("DSM") in 1980[111] and now accounts for twenty percent of psychiatric hospitalizations.[112] It is defined as "a pervasive pattern of instability of interpersonal

107. *See* Serena M. v. Superior Court, No. A096883, 2001 WL 1647186, at *1 (Cal. Ct. App. Dec. 26, 2001). Interestingly enough, one of the experts in this case said that it was "just possible" that with help the mother could parent, but gave her a less than 10% chance of success. The court found that this did not rebut his overall conclusion that "the complex kinds of judgments that a parent has to engage in are not easily trained, and her ability to exercise those kinds of judgments are impaired by her disabilities." *Id.* For a discussion of programs that have trained mentally ill parents in parenting skills, see *infra* Part IV.A.

108. *See* Guillermo L. v. Superior Court, No. D041098, 2003 WL 356717, at *2 (Cal. Ct. App. Feb. 19, 2003).

109. *In re* Jose G., No. H025768, 2003 WL 22672233, at *1 (Cal. Ct. App. Nov. 10, 2003).

110. *In re* Jesse C., 263 Cal. Rptr. 811, 811 (Cal. Ct. App. 1989).

111. *See* Kenneth R. Silk, *Borderline Personality Disorder: The Liability of Psychiatric Diagnosis*, 1 CURRENT PSYCHIATRY 25, 25 (2002), *available at* http://www.currentpsychiatry.com/pdf/0111/0111_Borderline.pdf.

112. National Institute of Mental Health, Borderline Personality Disorder Fact Sheet, *available at* http://www.nimh.nih.gov/publicat/bpd.cfm. Borderline personality disorder is now

relationships, self-image, and affects, and marked impulsivity."[113] Many have argued that borderline personality disorder is not a real illness, or that it is an amalgam of other illnesses.[114] It has been called a "label of denigration for particularly troublesome patients."[115] Feminists have criticized it as being the modern revival of hysteria,[116] since approximately seventy-five percent of those diagnosed with borderline personality disorder are women.[117] There is no medication used to treat personality disorders (though anxiety and depression, either or both of which are often present in the borderline patient, can be treated through medication),[118] and the conventional wisdom is that people with personality disorders, particularly borderline personality disorder, do not improve through talk therapy because they tend to terminate therapeutic relationships prematurely (or their therapists do—there is a very high rate of therapist burnout associated with the diagnosis). In recent years, new strategies for treating borderline personality disorder have emerged, with some success.[119]

The controversy over personality disorders has found its way into the mental disability exception case law. In *Michael E.*,[120] the mother argued that a personality disorder is an insufficient basis for finding a mental disability, because it is

more common than schizophrenia or bipolar disorder. *Id.*

113. DSM-IV-TR, *supra* note 92, at 706. In addition to this definition, five or more of the following criteria must be present to make a diagnosis of borderline personality disorder: frantic efforts to avoid real or imagined abandonment; a pattern of unstable and intense interpersonal relationships characterized by the alternation between extreme idealization and devaluation; identity disturbance in the form of a marked and persistent unstable self-image; self-damaging impassivity; recurrent suicidal or parasuicidal behavior; affective instability due to a marked reactivity of mood; chronic feelings of emptiness; inappropriate and intense anger or difficulty controlling anger; transient stress-related paranoid ideation; or severe dissociative symptoms. *Id.* at 710.

114. *See* Silk, *supra* note 111, at 29.

115. JANET WIRTH-CAUCHON, WOMEN AND BORDERLINE PERSONALITY DISORDER: SYMPTOMS AND STORIES 62 (2001).

116. *Id.* at 70.

117. DSM-IV-TR, *supra* note 92, at 708; WIRTH-CAUCHON, *supra* note 115, at 4 (citing DANA BECKER, THROUGH THE LOOKING GLASS: WOMEN AND BORDERLINE PERSONALITY DISORDER 24 (1997)).

118. JOHN M. OLDHAM, AM. PSYCHIATRIC ASS'N, GUIDELINE WATCH: PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH BORDERLINE PERSONALITY DISORDER 4 (March 2005), *available at* http://www.psych.org/psych_pract/treatg/pg/prac_guide.cfm.

119. Dialectical behavior therapy is one current method for treating borderline personality disorder. This strategy involves weekly individual therapy sessions and group skills training sessions, both focused on enhancing the client's coping ability and reducing behaviors that interfere with the client's quality of life. Clinical trials have shown that, compared with non-specific outpatient treatment, inpatient dialectical behavior therapy reduces suicidal behavior and the need for prolonged hospitalization, and is effective in helping clients stay in therapy. Martin Bohus, Brigitte Haaf, Timothy Simms, Matthias F. Limberger, Christian Schmahl, Christine Unckel, Klaus Lieb & Marsha M. Linehan, *Effectiveness of Inpatient Dialectical Behavior Therapy for Borderline Personality Disorder: A Controlled Trial*, 42 BEHAV. RES. & THERAPY 487 (2003) (noting, however, that further research is needed with respect to stability and duration).

120. Introduced *supra* notes 83–89 and accompanying text.

"merely descriptive of past behavior."[121] She quoted Dr. Thomas Szasz, a well-known but controversial psychologist, as saying "a personality disorder is nothing like a disease at all . . . but is simply a name for how people behave."[122] The mother contended that using derogatory descriptions of the behaviors which led to dependency proceedings as a basis for denying reunification services would allow section 361.5(b)(2) to be "transformed into a thinly veiled, psychological subterfuge to avoid offering services to particularly distasteful parents or to parents with whom the family court and social services no longer wish to struggle toward difficult problem solution."[123] She pointed out that her volition and cognition were not significantly impaired.[124] In response, the court stated that personality disorders are in the DSM, the generally agreed-upon source of psychiatric diagnoses, and that the experts said that the mother's treatment of her children arose from the way she "perceived and interpreted herself, other people, and events" and was therefore not likely to change with services.[125] In other words, this mother's inability to conform to society's moral standards was a disability that rendered her incapable of ever parenting safely. The court made no effort to impose limits on this concept of unfit character. Given the malleability of the personality disorder diagnosis, this outcome is disturbing.

T.P. v. Superior Court[126] lends credence to the arguments made by the mother in *Michael E.* In *T.P.*, the child was taken into foster care because the mother allegedly failed to protect the child from physical abuse by the father.[127] The court ordered services pending completion of two psychological evaluations. The mother participated in services, filed for divorce, and obtained a restraining order against the father.[128] However, both psychologists diagnosed her with depression and dependent personality disorder; one cited her long-standing pattern of involvement in abusive relationships as evidence of certain personality characteristics—"passivity, lack of initiative . . . and co-dependency"—that significantly impaired her ability to function as a parent.[129] Based on these evaluations, the court denied further services and scheduled a hearing on termination

121. *In re* Michael E., Nos. H023087, H023815, 2002 WL 382856, at *11 (Cal. Ct. App. Mar. 12, 2002).

122. *Id.* In fact, Dr. Szasz challenges the entire concept of mental illness. *See generally* THOMAS SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (1961).

123. *Michael E.*, 2002 WL 382856, at *11.

124. *Id.*

125. *Id.* at *12–13. Interestingly, one psychologist in this case said that it would be "a very difficult uphill road" to enable the mother to safely parent within twelve to eighteen months, given her lack of a support system, *id.* at *13, which could be read as confirming the mother's suspicions that the statute was being used to avoid trying to solve tough problems.

126. T.P. v. Superior Court, No. F040765, 2002 WL 31151196 (Cal. Ct. App. Sept. 26, 2002).

127. *Id.* at *1.

128. *Id.* at *4.

129. *Id.* at *1–2.

of parental rights. Thus, the problems which led to the state's intervention were used as the reason to find that services would be fruitless—even in the face of some evidence that the parent could use and benefit from services. This logic has the potential to swallow the general rule of providing services, since by definition every parent involved in the child welfare system has problems which led to such involvement. Although that is unlikely to occur, it certainly gives the state a large loophole in difficult cases.

3. Confusion about substance abuse issues

A third theme in the case law is conflation of mental disability and substance abuse problems. Although the DSM identifies substance abuse as a disorder,[130] it is inappropriate to include it as a mental disability for the purposes of section 361.5(b)(2) because the statute contains a separate reunification exception provision, with its own parameters, for parents who abuse substances.[131] However, in several cases the court used a parent's substance abuse problems as grounds to deny services under the mental disability exception—possibly because the requirements of the substance abuse exception, which are more narrowly defined than the mental disability exception, were not met. A good example is *Wendy P. v. Superior Court*,[132] in which the children were taken into foster care because of the mother's substance abuse problems.[133] The mother was diagnosed with alcohol dependence by one psychologist; and with alcohol dependence, depressive disorder and borderline intellectual functioning by the other.[134] The court denied services, reasoning that habitual use of alcohol is included in the Family Code chapter referenced by section 361.5(b)(2), the mother was a habitual user of alcohol, and two experts had given their opinion that she would not be able to maintain sobriety.[135] This analysis is faulty, because the relevant Family Code chapter contains an exhaustive list of grounds for termination of parental rights, only some of which can be categorized as mental dis-

130. DSM-IV-TR, *supra* note 92, at 191–295.

131. CAL. WELF. & INST. CODE § 361.5(b)(13) (West 1998 & Supp. 2006) (permitting bypass for parents with "a history of extensive, abusive, or chronic use of drugs or alcohol"). Under this exception, the parent must have resisted prior court-ordered treatment during a three-year period immediately prior to the dependency petition being filed, or failed to comply with an available treatment program on at least two prior occasions.

132. Wendy P. v. Superior Court, No. B156432, 2002 WL 1271848 (Cal. Ct. App. June 10, 2002).

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *2. Neither the experts nor the court found that the mother would not be able to maintain sobriety as a result of her mental disability.

abilities.[136] The court seemed to be reaching to find some exception into which the mother could fit.

Likewise, in *In re David F.*,[137] the court brushed aside the distinction between mental illness and substance abuse. One court-appointed psychologist in that case diagnosed the mother with amphetamine and alcohol abuse, paranoid delusional disorder, and partner relational disorder; another court-appointed psychologist diagnosed her with psychotic disorder, anxiety disorder, and methamphetamine dependence.[138] These experts recognized that the mother had both mental illness and substance abuse problems, but they failed to separately analyze mental illness from substance abuse, or what effect one problem might have on the other. In contrast, the mother's own treating psychiatrist testified to his belief that "[the mother's] delusional thinking was drug induced and could be treated."[139] The court decided to deny services, accepting the court-appointed experts' generalized analyses that overlooked this connection.[140]

The conflation of substance abuse and mental disability reveals the reunification bypass law's potential to target certain parents who are unappealing, or who present especially difficult challenges (such as dual diagnosis)[141] to the child welfare system.

* * * * *

Although I will argue that any use of the mental disability exception is unjustified, there are cases in which it seems to make sense—for example, where the parent was acutely psychotic and consistently refused medication. In any case, the scope of application of the exception threatens to extend far beyond such extreme cases. The case law, as it has developed, shows that courts will not

136. In fact, this chapter of the Family Code contains separate provisions for termination of parental rights based on "disability due to alcohol or controlled substances" and mental illness. *Compare* CAL. FAM. CODE § 7824 (West 2004) (requiring one year continuous deprivation of custody for terminations due to alcohol and controlled substance disability), *with id.* §§ 7826, 7827 (allowing immediate termination upon proper finding of inability to parent due to mental illness). This indicates that the legislature views substance abuse and mental disability as different.

137. *In re* David F., No. H024604, 2003 WL 21995470 (Cal. Ct. App. Aug. 21, 2003).

138. *Id.* at *3–4. A third court-appointed expert diagnosed the mother with a "psychosis" that barred her from using reunification services prior to "significant intervention and stabilization." The opinion does not note whether this expert considered the mother's substance abuse. *Id* at *3.

139. *Id.*

140. *Id.* The appeals court explained that the juvenile court discounted the testimony of the mother's own treating psychologist because he "did not have all the factual information before him concerning the patient." It is not clear what was this missing factual information.

141. Co-existing mental health and substance abuse issues, commonly referred to as dual diagnosis, are very common and difficult to treat. *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., REPORT TO CONGRESS ON THE PREVENTION AND TREATMENT OF CO-OCCURRING SUBSTANCE ABUSE DISORDERS AND MENTAL DISORDERS 1–19 (2002), *available at* http://alt.samhsa.gov/reports/congress2002/CoOccuringRpt.pdf.

apply the statute fairly and accurately; the cases do not inspire confidence about courts' thoughtfulness and rigor with respect to the law's substantive requirements. The statute appears on its face to contain standards to prevent arbitrary use—such as the requirement of a nexus between mental disability and inability to utilize services—but the appellate courts often ignore these standards. This sends a clear message to juvenile court judges that they need not take care in applying the mental disability exception. It also suggests that the courts are not particularly concerned about the dire consequences of a decision to deny services for the individual parent and child. Every time the court declines to look closely at whether the parent is *really* incapable of utilizing services in order to reunify within twelve months, it stigmatizes the parent and deprives the family of a chance to heal.

IV.
OBJECTIONS FROM A PRACTICAL PERSPECTIVE

If there is a significant chance that the diagnoses and predictions of psychologists are wrong, or that their opinions lack sufficient factual basis, then it is a problem that judges do not further question the contributions of these professionals. Social science research does not prove that people with mental disabilities cannot use services or reunify with their children; psychologists tend to over-predict dangerousness and lack the tools to assess parental competence accurately; and the social and cultural forces at play in the child welfare system lead experts to focus on certain parental weaknesses. Simply stated, there is good reason to question whether using section 361.5(b)(2) is ever appropriate.

A. Lack of Social Science Evidence Supporting the Mental Disability Exception

Professor Berrick, whose research I discussed in Part II.D, questions why certain conditions were chosen by the legislature for reunification bypass. In her opinion, "no research evidence suggests that parents with these conditions are less able to reunify" and policymakers chose these exceptions at their whim.[142] In light of Professor Berrick's analysis, two distinct questions emerge. First, do people with mental illnesses tend to be incapable of utilizing social services?[143] Second, do people with mental illnesses tend to be incapable of parenting safely?

With respect to the first question, there is very little available information. While the best source for this information would be research on compliance with

142. Telephone interview with Jill Duerr Berrick, Professor, U.C. Berkeley School of Social Welfare (Feb. 11, 2004). Prof. Berrick recommends further research to develop "evidence-based prognosis for reunification." Jill Duerr Berrick, Young Choi, Amy D'Andrade & Laura Frame, Considerations in the Utilization of Reunification Bypass (Jan. 18, 2004) (unpublished presentation given at the Center for Social Services Research, U.C. Berkeley) (on file with the author).

143. In this part, I focus on mental illness; a discussion of whether parents with developmental disabilities are capable of utilizing services and/or parenting safely is beyond the scope of this article.

court-ordered service plans by parents with mental illnesses, researchers have not explored in depth overall rates of noncompliance and parental characteristics that predict noncompliance.[144] One study found that the strongest predictors of parental noncompliance were substance abuse and the combination of physical and sexual abuse of the child (as opposed to one or the other alone, or neglect).[145] The highest rate of compliance was among parents referred for psychiatric hospitalization.[146] However, the author did not directly compare compliance rates of parents with a psychiatric diagnosis and parents with no diagnosis. No such research seems to have been conducted.[147]

Another source of information on the ability of parents with mental illness to utilize services is general treatment success rates for various psychiatric disorders. These are not terribly useful, since they do not tell us much about whether a particular individual is amenable to treatment, nor do they shed light on whether that individual will be capable of engaging in other services besides mental health treatment. However, they do rebut the assumption that more often than not, mental illnesses are untreatable. In fact, one integrative study estimates initial treatment success rates at sixty percent for both schizophrenia and obsessive-compulsive disorder, and at eighty percent for manic-depressive disorder, panic disorder, and major depression.[148]

There is also a dearth of research on the second question: the ability of people with mental illnesses to be fit parents. It is clear that children of parents

144. However, the connection between parental noncompliance with service plans and permanent loss of custody has been explored; it appears that noncompliance is very closely linked to the state's decision to move for termination of parental rights. *See, e.g.*, Eve M. Brank, Angela L. Williams, Victoria Weisz & Robert E. Ray, *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEB. L. REV. 335, 343 (2001).

145. Richard Famularo, Robert Kinscherff, Doris Bunshaft, Gayl Spivak & Terrence Fenton, *Parental Compliance to Court-Ordered Treatment Interventions in Cases of Child Maltreatment*, 13 CHILD ABUSE & NEGLECT 507, 511–12 (1989). This study only dealt with parental compliance with court-ordered psychotherapy (individual and/or family) and alcohol and drug treatment—it was "impossible to reliably discern noncompliance with [other services such as housing assistance, child care, financial stabilization and medical assistance] based upon case review." *Id.* at 511.

146. *Id.* at 510.

147. I was not able to find any studies comparing the rate of compliance with court-ordered treatment plans of parents with and without mental illnesses after a search of multiple databases of psychological literature.

148. *Health Care Reform for Americans With Severe Mental Illness: Report of the National Advisory Mental Health Council*, 150 AM. J. PSYCHIATRY 1447, 1451–53 (1993). Treatment success is defined differently for different disorders. For schizophrenia, treatment success is defined as reduction in psychotic symptoms and hospitalizations. For bipolar disorder it is defined as prevention of manic and depressive episodes, and for depression it is defined as improvement in mood and reduction of suicidal behavior. Overall, when medication and therapy are combined and integrated with other services such as education and skills training, the result is successes such as lower hospitalization rates and increased rates of independent living, better social interactions, and increased satisfaction. *Id.* at 1453–54. This study does not include treatment success rates for personality disorders. There do not appear to be generally-agreed upon rates of overall treatment success, likely due to the diversity of treatments. *See* AM. PSYCH. ASS'N, PRACTICE GUIDELINES FOR THE TREATMENT OF PATIENTS WITH BORDERLINE PERSONALITY DISORDER 44–67 (2001).

with mental illnesses have an increased risk of developing mental illnesses, as well as learning disabilities and behavior problems.[149] However, genetic transmission may account for some of this risk,[150] and factors such as poverty, marital conflict, and level of stress and social support (such that it is difficult to isolate the specific risk posed by the illness).[151] Studies of the parenting capabilities of individuals with mental illnesses have found deficits compared to parents without diagnosed disorders, such as overreaction to mild stressors and decreased consistency and warmth for mothers with depression.[152] However, as one psychologist points out, "it must be kept in mind that this work has been designed primarily to evaluate optimal parenting responses. . . . [I]t is yet to be determined whether the levels of parenting difficulties experienced by mentally ill parents indicate the kind of below-standard parenting required to terminate rights."[153] Social science researchers have found that mental illness as a predictor of child abuse and neglect has low specificity—in other words, there are too many confounding factors to say that mental illness causes or is directly linked to child abuse and neglect.[154] One study examined a group of parents involved in abuse and neglect proceedings and found that a very high percentage had been diagnosed with mental illnesses, but concluded that neither serious emotional disorder nor low IQ were significant predictors of type of mistreatment, higher risk of being a repeat case, or greater likelihood of having their children permanently removed by the court (which, for the purposes of the study, was essentially the same as failing to comply with a service plan).[155] Further, given the infrequency with which the parent's mental illness seems to be the reason why the child enters into foster care,[156] and the regularity with which parents are psychologically evaluated, one wonders whether the parents in this study neglected their children because they had mental illnesses or were diagnosed with mental illnesses because they neglected their children.

149. Corina Benjet, Sandra T. Azar & Regina Kuersten-Hogan, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238, 242 (2003).

150. *Id.*

151. *See* Krista A. Gallager, *Parents in Distress: A State's Duty to Provide Reunification Services to Mentally Ill Parents*, 38 FAM. & CONCILIATION CTS. REV. 234, 238–39 (2000). *See also* Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 242–43.

152. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 242 (citing Daphna Oyserman, Carol T. Mowbray, Paula Allen Meares & Kirsten B. Firminger, *Parenting Among Mothers With a Serious Mental Illness*, 70 AM. J. ORTHOPSYCHIATRY 296 (2000)).

153. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 242–43. For an explanation of the concept of optimality, see *infra* note 166.

154. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 240–41.

155. Carol G. Taylor, Dennis K. Norman, J. Michael Murphy, Michael Jellinek, Dorothy Quinn, Francis G. Poitrast & Marilyn Goshko, *Diagnosed Intellectual and Emotional Impairment Among Parents Who Seriously Mistreat Their Children: Prevalence, Type, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 396–98 (1991).

156. *See supra* note 63 and accompanying text.

Even if parents with mental illness are no more likely to abuse or neglect their children and are often amenable to general treatment, the practical question remains whether there are ways of successfully helping individuals with mental illnesses who *have* abused or neglected their children become safe and competent parents. This question is difficult to answer, because very few states have attempted to develop and implement such services. Parenting has tended to be ignored as a treatment issue in state mental health systems. California is only one among many states that do not provide outpatient services to improve parenting skills for people with mental illnesses; most states do not provide residential programs for women with mental illnesses and their children.[157] As one attorney has put it, "many parents fall into a gap between the mental health system, which treats the individual without focusing on his or her parenting role, and the child welfare system, which judges the individual's capacity to quickly meet the needs of his or her children."[158]

On the other hand, tailored interventions for parents with mental illnesses do exist and have been shown to be successful. One researcher looked at twenty-five programs specifically designed for parents with mental illnesses, and found that common features of successful programs included a commitment to support the ability of adults with mental illnesses to function as parents, and comprehensive, family-centered services.[159] Although few of these programs collected objective outcome data, most reported high levels of parent and child satisfaction.[160] Another study looked at the effectiveness of two programs, one consisting of home visits by a psychiatric nurse or social worker who worked intensively on parenting issues, the other consisting of a four-day-a-week outpatient program for mothers and children which integrated teaching groups, individual therapy, a therapeutic nursery for the children, supervised interaction between mothers and children, and an array of other activities.[161] The study found that for both programs, "[o]verall maternal social adjustment, including adjustment to work and parenting roles, and cognitive performance both showed significant

157. *See* Joanne Nicholson, Jeffrey L. Geller, William H. Fisher & George L. Dion, *State Policies and Programs That Address the Needs of Mentally Ill Mothers in the Public Sector*, 44 HOSP. & COMMUNITY PSYCHIATRY 484, 486 (1993). California is one of the states providing residential programs.

158. Theresa Glennon, *Walking With Them: Advocating for Parents With Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 296 (2003).

159. Comprehensiveness refers to the program's ability to deal with multiple needs, and family-centeredness refers to the "degree to which the program was . . . designed to serve the family as a unit, rather than the parent or child as an individual." JOANNE NICHOLSON, KATHLEEN BIEBEL, BETH HINDEN, ALEXIS HENRY & LAWRENCE STIER, CTR. FOR MENTAL HEALTH SERVICES RES., DEP'T OF PSYCHIATRY, UNIV. OF MASS. MED. SCH., CRITICAL ISSUES FOR PARENTS WITH MENTAL ILLNESS AND THEIR FAMILIES 44–45 (2001), *available at* http://www.parentingwell.org/critical.pdf.

160. *Id.* at 46.

161. Frances M. Stott, Judith S. Musick, Bertram J. Cohler, Katherine Klehr Spencer, Judith Goldman, Roseanne Clark & Jerry Dincin, *Intervention for the Severely Disturbed Mother*, 24 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 7, 11–12 (1984).

improvement over time.... [B]oth groups of children [showed] improvement over time on DQ/IQ measures, social competence, and adaptive skills."[162] A program in Denver using small group meetings for mothers diagnosed with schizophrenia and children together, a therapeutic nursery, and parenting teaching effectively "decreased the number of children in temporary foster care and improved interactions between mothers and their children as judged by social workers and therapists," and "eighty-three percent of the mothers had improved treatment compliance."[163]

These results suggest that use of the mental disability exception deprives some parents of an opportunity to engage in services which—particularly if they are tailored to the parent's needs—could be successful. It begs the question, which I will explore further in Part V.C., of whether the mental disability exception rests more on stereotypes and unfounded assumptions about the capabilities of people with mental disabilities than on acceptable research data.

B. Unreliability of Psychological Diagnosis, Prognosis and Prediction

Mental health lawyers and some psychologists have long argued that psychological prediction of long-term behavior is insufficiently reliable to form the basis for major legal decisions.[164] Although they have made this claim explicitly in the debate over standards for civil commitment,[165] it applies with equal force in the context of parental rights. Psychological assessment of parental adequacy and child mistreatment risk is a very new science, and one that suffers from a variety of flaws—not the least of which is the fact that the tools psychologists are using often measure either parental optimality,[166] or criteria which may not be relevant to parenting at all. As a result, the opinions offered by psychologists in mental disability exception cases are inherently suspect. The case

---

162. *Id.* at 19.

163. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 244.

164. *See, e.g.*, Ennis & Litwack, *supra* note 57, at 737–38 (arguing that, "psychiatrists should not be permitted to testify as expert witnesses until they can prove through empirical studies that their judgments are reliable and valid"); Brief of American Psychiatric Association as Amici Curiae at 8–9, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter APA Brief] (arguing that psychiatric testimony on future dangerousness in capital cases offers no reliable predicttive expertise and distorts factfinding process).

165. In the civil commitment context, the specific argument is that psychologists cannot accurately predict whether an individual will be dangerous to herself or others. *See, e.g.*, Ennis & Litwack, *supra* note 57, at 735 ("there is good reason to believe that psychiatric judgments are not particularly reliable or valid, and that psychiatric diagnoses and predictions convey more erroneous than accurate information"); *see also The Clinical Prediction of Dangerousness: An Interview With John Monahan, PhD*, 10 CURRENTS IN AFFECTIVE ILLNESS 5, 11–12 (1991) (suggesting that the legal system exaggerates ability of mental health professionals to predict future dangerousness).

166. Parental "optimality" refers to characteristics such as "warmth, nurturance and responsivity [which] are widely seen as positive child rearing qualities," but do not form a baseline for minimally competent parenting. Karen S. Budd, LaShaunda M. Poindexter, Erika D. Felix & Anjali T. Niak-Polan, *Clinical Assessment of Parents in Child Protection* Cases*: An Empirical Analysis*, 25 L. & HUM. BEHAV. 93, 94 (2001).

law shows that judges are prone to accept expert opinion as to parental ability unquestioningly,[167] yet such opinions may be little more than conjecture.

Judges also tend to place great weight on the diagnosis[168] even though both diagnosis and prognosis are inexact. In a seminal article, attorney Bruce Ennis and psychologist Thomas Litwack surveyed a large body of psychological literature and found that psychiatrists agree on diagnosis of a particular patient only half the time,[169] a poor correlation exists between prognosis and actual outcome of treatment,[170] and perceived lower socio-economic status correlates directly with more severe diagnosis and poorer prognosis (controlling for the patient's actual symptoms).[171]

Ennis and Litwack also documented that psychologists have a significant tendency towards over-prediction of violent behavior in civil commitments,[172] which is a problem in child welfare cases. Available data suggests that risk prediction rates for child abuse and neglect cases fail to meet current professional standards.[173] Predictions of child abuse have high false-positive rates,[174] and predictions about the long-term development of children are wrong about two-thirds of the time.[175] Because there is often a small group of psychologists willing to provide court-ordered evaluations, these experts see many cases of abusive parents and may have strong expectations of outcome based on prior cases.[176] Further, psychologists are likely prone to over-predict risk out of concern for the child's safety and fear about the consequences of a false negative that results in a "safe" parent injuring or even killing her reunited child. Nothing can disprove an expert's false-positive prediction that results in a child's permanent removal from a parent's care.[177]

Methodological faults also hamper psychological prediction of child abuse. Psychologists often use tests which measure the wrong variables, or they use unstructured clinical interviews in which the psychologists' impressions of the individual may be colored by the circumstances which led to state intervention or assumptions about the parenting ability of people with mental illnesses generally. Forensic parenting assessments usually rely on traditional models such as the Rorschach Inkblot Test, the Thematic Apperception Test, and the Wechsler

167. *See supra* Part III.D.2.

168. Although courts do not probe diagnosis sufficiently, prognosis is largely omitted from the decisions altogether. *See id.*

169. Ennis & Litwack, *supra* note 57, at 701.

170. *Id.* at 719.

171. *Id.* at 725.

172. *Id.* at 712–13.

173. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 240.

174. Gary B. Melton & Susan Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise*, 44 AM. PSYCHOLOGIST 1225, 1231 (1989).

175. Appell, *supra* note 2, at 609 n.151 (discussing risk prediction in neglect cases).

176. George J. Alexander, *Big Mother: The State's Use of Mental Health Experts in Dependency Cases*, 24 PAC. L. J. 1465, 1487–88 (1993).

177. *See id.* at 1488.

Adult Intelligence Scale, which assess intelligence and personality, not parenting skills.[178] In one study, a traditional assessment of a young woman found that she had poor reasoning and irrational thinking, lacked connection to her children, and was not competent to parent; a comprehensive parenting assessment, which included a videotaped interaction of the mother and children and several parenting-specific tests, found that the same woman had a good relationship with her children who were developing normally.[179] However, despite their potential utility, observations of parent-child interaction are rarely used in assessments for abuse and neglect cases.[180]

When psychologists use direct measures of parenting ability, they arguably hold the parent to an inappropriate standard. There is no consensus among psychologists—or anyone else, for that matter—about exactly where to draw the line between inadequate and adequate parenting. As mentioned at the outset of this part, parenting ability tests (which were generally developed for custody cases) commonly measure parental qualities such as warmth, nurturance and responsiveness, and may identify parents as abusive or neglectful when they are simply less than ideal.[181] Some researchers have begun to create new assessment tools to measure parental adequacy. One model looks at skill areas required for parenting—such as problem-solving ability, physical care and hygiene skills, safety and emergency response skills, and self-control and stress management skills—in addition to capacity for warmth and nurturance and social skills.[182] This model would take into account cultural diversity in parenting practices and "ecological factors" such as the parent's social networks and the child's needs.[183] But psychologists have not fully developed these tools and no known jurisdiction uses them in child abuse and neglect cases.

There are other reasons to be skeptical about the validity of psychological evaluations of parents in abuse cases. One empirical study found that evaluations of parents were usually completed in a single session, did not include a home visit, and used few sources of information other than the parent's own statements.[184] Evaluators frequently left out information about assessment pur-

178. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 246–47; Budd, Poindexter, Felix & Niak-Polan, *supra* note 166, at 95 (emphasizing that these tests "were not designed to evaluate competence in caring for and interacting with children, yet examiners interpret the test findings as directly relevant to parenting").

179. Teresa Jacobsen, Laura J. Miller & Kathleen Pesek Kirkwood, *Assessing Parenting Competency in Individuals with Severe Mental Illness: A Comprehensive Service*, 24 J. MENTAL HEALTH ADMIN. 189, 190–91 (1997). This study also describes the case of a woman who was found to be a competent parent in a traditional psychiatric evaluation, whose comprehensive parenting evaluation revealed serious deficits. *Id.* at 191.

180. *See infra* notes 184–96 and accompanying text.

181. *Id.* at 94. *See supra* note 166 and accompanying text.

182. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 246.

183. *Id.*

184. Budd, Poindexter, Felix & Niak-Polan, *supra* note 166, at 105.

poses and limitations in presenting their conclusions.[185] "Evaluation findings emphasized parents' personal weaknesses over strengths, and clinicians often neglected to describe the parents' child-rearing qualities or the children's relationship with their parents. Together, these shortcomings render many clinical assessments of parents inadequate to serve as a basis for child protection decisions."[186] Finally, psychologists often are not given specific referral questions by social workers, do not fully understand or appreciate the legal issues at play, or are not trained in forensic methods.[187] Thus, the type of prediction required for section 361.5(b)(2) may violate the professional standards governing psychologists who perform forensic evaluations and serve as expert witnesses.[188] Indeed, some psychologists urge their colleagues to "state the limitations in their information-gathering methods and temper their findings accordingly"[189]; others call to "suspend predictive determinations of unfitness unless there are data to support it."[190]

In addition to being unreliable and possibly unethical, psychological predictions of ability to parent safely tend to be essentially uncontested in court. "Because most psychiatrists do not believe that they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do."[191] This creates a prejudice that cannot be adequately removed by rebuttal witnesses; moreover, in cross-examination of the state's psychologists, the parent's lawyer will tend to focus on the expert's qualifycations rather than the substance of her opinion.[192] As a result, especially since courts give expert opinions greater respect and weight than lay opinions,[193] it is particularly important that individuals have their own psychological expert testify.[194] However, in the child welfare system, the attorney's ability to obtain an expert for her client is often limited. For instance, in Santa Clara County,

185. *Id.*

186. *Id.*

187. Budd, Poindexter, Felix & Niak-Polan, *supra* note 166, at 95; Gary B. Melton, *Expert Opinions: "Not for Cosmic Understanding," in* PSYCHOLOGY IN LITIGATION AND LEGISLATION 59, 86 (Bruce D. Sales & Gary R. VandenBos, eds., American Psychological Association 1994) [hereinafter Melton, *Expert Opinions*].

188. "Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings." American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCHOLOGIST 1060, 1071, Standard 9.01(a) (2002) [hereinafter APA *Ethical Principles*].

189. Budd, Poindexter, Felix & Niak-Polan, *supra* note 166, at 106.

190. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 248. *See also* Melton, *Expert Opinions*, *supra* note 187, at 70 (conceding that opinions based on slim data can be described as "researched based" but emphasizing that clinicians should acknowledge such an opinion as "essentially a best guess").

191. APA Brief, *supra* note 164, at 17.

192. *Id.* at 17–18.

193. *Id.* at 17.

194. *See* Ennis & Litwack, *supra* note 57, at 746.

although attorneys appointed by the bar association receive some funding to pay for independent experts, the availability of funding is such that each attorney can hire an expert in only two or three cases per year; meanwhile, experts may be needed in many cases that do not involve reunification bypass, particularly terminations of parental rights.[195]

Further, where the parent does have her own expert, the cases indicate that judges often refuse to credit that expert. For instance, in *Lureen K. v. Superior Court*,[196] the two court-appointed psychologists found that the mother had dementia and a personality disorder, or "a serious cognitive and emotional disturbance of an organic nature," respectively.[197] An independent psychologist evaluated the mother, concluded that she had learning disabilities but normal intelligence, and attributed her mood and behavioral problems to a seizure disorder and the medication she took to control it. He recommended that she be evaluated by neurologists at a seizure clinic.[198] The juvenile court praised this expert's thoroughness, but, noting that a court-appointed expert had rebutted the independent expert, found that the independent expert's findings were less convincing than those of the other experts.[199] Even when the parent's attorney fails to present evidence tending to rebut the expert's opinion or fails to cross-examine the expert, the Courts of Appeal have held that ineffective assistance of counsel claims have not met the high burden of proving deficiency of performance resulting in a prejudicial outcome to the parent.[200] This underscores the fact that judges treat the experts hired to make out the requirements of section 361.5(b)(2) as almost separate from the adversary process, or above rebuttal. Precisely because psychological prediction of child abuse is so unreliable, courts should instead subject expert opinion to close scrutiny.

C. Setting Parents Up for Failure

Studies have shown that an individual's insight into her mental illness leads to increased ability to accept treatment and overall improved outcome. More specifically, "lack of insight into mental illness is associated with directly observed problematic parenting behavior . . . [and] child mistreatment."[201] The

195. Interview with Margaret Copenhagen, Attorney, in Redwood City, Cal. (Feb. 16, 2004).

196. Lureen K. v. Superior Court, No. B153531, 2001 Cal. App. Unpub. LEXIS 438 (Cal. Ct. App. Dec. 26, 2001).

197. *Id.* at *4–5.

198. *Id.* at *5–6.

199. *Id.* at *10–11. For another example of a court rejecting the parent's expert, see *In re* David F., No. H024604, 2003 WL 21995470, at *4 (Cal. Ct. App. Aug. 21, 2003).

200. *See, e.g.*, *In re* Michael E., Nos H023087, H023815 2002 WL 382856, at *20–22 (Cal. Ct. App. Mar. 12, 2002).

201. Mrinal Mullick, Laura J. Miller & Teresa Jacobsen, *Insight Into Mental Illness and Child Maltreatment Risk Among Mothers With Major Psychiatric Disorders*, 52 PSYCHIATRIC SERVS. 488, 491 (2001). Insight refers to the parent's recognition and acceptance of having a mental illness. *See generally* Anthony S. David, *Insight and Psychosis*, 156 BRIT. J. PSYCH. 798 (1990).

case law confirms that psychologists evaluating parents for the purposes of section 361.5(b)(2) tend to use lack of insight as a dominant factor in drawing conclusions about the parent's ability to utilize services and/or reunify. The state routes parents who deny having a mental illness or say they do not think they need therapy into the mental disability exception.[202]

Assuming that insight is a valid criterion for predicting and evaluating child abuse and neglect, one must question whether it is possible to measure insight appropriately through a mandatory evaluation conducted for the purpose of an adversarial proceeding. In this context, it seems almost inevitable that parents will "fail" their psychological evaluations by displaying lack of insight. Evaluators may not be able to accurately assess the parent because, as one scholar put it, "the subject of the evaluation cannot place in the evaluator the trust one often places in a therapist . . . . [E]veryone involved, including [the] parent, knows that whatever the client tells the therapist will come out in court . . . . The state mental health evaluator may become the chief witness against the parent."[203] The amount of self-disclosure in an interview differs significantly based on the stated purpose of the interview.[204] Forensic interviews, in which the psychologist is ethically obligated to inform the client that there is no privilege,[205] are often confrontational and focus quickly on events about which the parent has a strong incentive to lie.[206] No doubt many parents involved in the child welfare system are angry and mistrustful, and they may believe that the best way to get their children back is to minimize their problems. Although defensiveness can be seen by courts as evidence that a parent cannot put her child's needs before her own, it is also a predictable response to the situation. By telling the parent that she must submit to two evaluations and that the results of those evaluations determine whether she will have a chance to reunify, the law sets up many parents for failure. This is especially sad given that parents with mental illnesses report that a main barrier to utilization of services or acknowledgment of problems is fear of custody loss, and "a view of the 'helping' relationship as adversarial."[207]

---

202. *See, e.g.*, Jesse B. v. Superior Court, No. H024925, 2002 WL 31781134, at *2 (Cal. Ct. App. Dec. 11, 2002) (noting observation from psychological evaluation that "father did not appear to have any insight into his own emotions or behaviors"); *Michael E.*, 2002 WL 382856, at *13–14 (noting conclusions from psychological evaluations that mother has no appreciation of "magnitude of change" required for her children's return because "she sees nothing wrong with the way she is raising her children" and "thinks therapy is a waste of time").

203. Paul Bernstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation*, 22 PAC. L.J. 1155, 1174 (1991).

204. *Id.* at 1174–75 (citing EDELMEN & SNEAD, *Self-Disclosure in a Simulated Psychiatric Interview*, 38 J. CONSULITNG AND CLINICAL PSYCH. 354–58 (1972)). Adversarial setting also bears on the reliability of diagnosis: a patient who is hostile to the evaluator stands a greater chance of being diagnosed with a serious mental disorder. *Id.* at 1175.

205. *See* APA *Ethical Principles*, *supra* note 188, at 1066, Standard 4.02.

206. Melton, *Expert Opinions*, *supra* note 187, at 82.

207. NICHOLSON, BIEBEL, HINDEN, HENRY & STIER, *supra* note 159, at 14.

Compounding this problem is the fact that many evaluators are not culturally competent—that is, they lack the "capacity, skills, and knowledge to respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American."[208] Families involved in child welfare systems are "overwhelmingly poor and disproportionately of color,"[209] and systemic race and class bias has been documented in enforcement of child welfare laws.[210] This bias may be reproduced through the mental disability exception, since failure to conform to community norms—often middle class norms—can inform diagnosis.[211] *Michael E.* provides one example of the cultural competence problem. The mother's first language, and the language she used to speak to the children, was Romani (although the court stated that she functioned well in English).[212] She argued that the evaluations should not form the basis for denying services because the evaluators did not speak her language or have knowledge of Gypsy culture and child-rearing practices.[213] The court held that the evaluations were adequate,[214] but did not address how the evaluators' inability to understand the mother might have affected the substance of the evaluations. The experts' and the court's conclusion that the mother was incapable of utilizing services because she lacked insight and refused to admit wrongdoing might have been different if they had taken into account her cultural norms and expectations.

* * * * *

Many judges and legislators would likely maintain that the reunification bypass is necessary, the above arguments notwithstanding, because the child welfare system is so overburdened. However, as Professor Berrick suggests, the resource-saving rationale for section 361.5(b)(2) may not make sense, because the cost of two psychological evaluations might exceed that of providing some services.[215] Professor Berrick also questions whether the law is meeting its goal of promoting fast resolution of cases to the benefit of children, and recommends

208. Klein, *supra* note 11, at 21 (quoting Terry Cross, *Developing a Knowledge Base to Support Cultural Competence*, 14 FAM. RESOURCE COALITION REP. 2, 5 (1995–1996)).

209. Appell, *supra* note 2, at 584.

210. *See* Klein, *supra* note 11, at 29–30 (discussing institutionalized racism and class bias in child welfare system).

211. *See* Ennis & Litwack, *supra* note 57, at 725; Alexander, *supra* note 176, at 1490. Further, psychologists from different cultures tend to interpret symptoms differently. American psychologists have been shown to diagnose patients with more severe psychopathology than psychologists from other countries. Ennis & Litwack, *supra* note 57, at 726.

212. *In re* Michael E., Nos H023087, H023815 2002 WL 382856, at *15–16 (Cal. Ct. App. Mar. 12, 2002).

213. *Id.* at *15.

214. *Id.* at *16.

215. Telephone interview with Jill Duerr Berrick, Professor, U.C. Berkeley School of Social Welfare (Feb. 11, 2004). I was unable to find any data either supporting or refuting the hypothesis that the reunification bypass law does not save money.

further study on whether orders for reunification bypass are associated with more court continuances.[216] In any case, these goals are certainly less important than preventing unnecessary breakup of families. This is a significant risk when reunification services are denied based on shaky and unfounded beliefs about the parenting ability of people with mental disabilities and unreliable psychological testimony.

V.
OBJECTIONS FROM A THEORETICAL PERSPECTIVE

Even if mental disability were a good proxy for parental unfitness, there are compelling reasons why parents with mental disabilities should still be offered services and the chance to reunify with their children. It is unclear that denial of reunification services delivers any real benefit to children; if it does not, then the primary justification for the reunification bypass law is administrative convenience and cost-saving. These state interests pale in comparison to the interest at stake for the parent. And if the true force and impact of section 361.5(b)(2) is animus towards people with mental disabilities, the law cannot withstand scrutiny.

A. Detriment to Children

The reunification bypass law is supposed to achieve permanence for the child by allowing the state to move directly to termination of parental rights. However, many child development theorists and practitioners argue that despite the need for permanence, children are harmed by termination of parental rights.[217] They challenge the idea that moving directly to a new permanent relationship is better than any amount of time in foster care. Children can, and do, develop attachments to multiple caregivers[218]; severing the relationship with a

---

216. Frame, Berrick, D'Andrade & Choi, *supra* note 22.

217. A driving force behind child welfare policy over the last thirty years has been psychological parent theory. *See generally* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). A full discussion of this or alternative theories of child welfare is beyond the scope of this article; suffice to say that Goldstein, Freud and Solnit posited that children are harmed by any separation from a single primary caregiver or interference with that caregiver's authority. *Id.* at 31–34. Although Goldstein, Freud and Solnit urged a policy of non-intervention in families, except where intervention was absolutely necessary because of abuse or neglect, their theories have been used to justify laws which accelerate the termination of parental rights. *See* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 348 (1996) (citing Martin Guggenheim's empirical analysis of Michigan and New York, *infra* note 223, that found an increase in the number of terminations of parental rights since publication of *Beyond the Best Interest of the Child*). Child welfare theorists have since pointed out the harm to children which is caused by termination of parental rights. *See, e.g.*, Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 414 (1996) (citing psychological research showing that terminations of parental rights creates for children more problems than it solves).

218. Davis, *supra* note 217, at 350.

biological parent is deeply traumatic, even when that parent has been neglectful.[219] Visitation can cease once a California court decides to deny services because visitation is considered a reunification service, particularly when the state's involvement is necessary.[220] Yet there is substantial evidence that children suffer when contact with the original family is cut off. Children in foster care benefit from contact with their biological parent in terms of greater emotional security and self-esteem and improved ability to form relationships.[221] "Avoiding visitation due to worries that it will further traumatize the child encourages the child to avoid the feelings associated with separation and extends mourning and associated behaviors."[222] The reunification bypass law may compound trauma for children because separation, ceasing of contact and extinguishment of the legal relationship follow each other without much time for adjustment.

Further, it is not certain that denying services and terminating parental rights will lead to permanence. Many children who are "freed" for adoption do not end up being adopted. These children become legal orphans, often for a significant period of time and sometimes until they reach majority.[223] Clearly, this poses a particular problem for children with special needs, and many children of parents with mental disabilities fall into this category.[224] Finally, as a practical matter, the period in which the child is in foster care and the parent is receiving services has a valuable function. Social workers and judges use that time to evaluate how well the child is coping with separation from the parent and to address any special needs, both of which play a strong role in determining whether adoption is possible or in the child's best interests. The parties can also assess the potential for successful reunification based on the parent's response to services. The "reasonable efforts" phase of dependency cases is vitally important to prevent erroneous or undue terminations—those where the family could have safely reunified or the child was harmed more by the state's intervention than by the original abuse or neglect.[225] When the state moves immediately to termination, the court cannot make a fully informed decision about whether the least detri-

219. *See* Johnson, *supra* note 217, at 414.

220. The child welfare agency is often involved in facilitating visitation, either because transportation assistance is needed or because the court has ordered that visitation must be supervised. *See supra* note 11 and accompanying text.

221. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461–65 (1983).

222. Beyer, *supra* note 16, at 336.

223. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 133 (1995).

224. *See* Gallager, *supra* note 151, at 249 (arguing that although placement in foster care may trigger mental illness in a genetically predisposed child, "[r]emoving a child from the home of a mentally ill parent does not reduce the risk of that child developing a mental illness").

225. Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1278–79 (1996).

mental alternative for the child would be life with a mentally disabled parent or foster care and adoption.

B. Trenching on the Constitutional Rights of Parents

In addition to posing a substantial risk of harm to children, the mental disability exception does not take parental rights seriously. The Supreme Court has recognized in numerous cases that there is a liberty interest in conceiving, caring for, and directing the upbringing of one's own children.[226] The Court has called procreation one of the "basic civil rights of man."[227] The fundamentality of the right to parent, and the permanent and severe nature of termination of parental rights, has led the high court to require at least clear and convincing evidence in such proceedings[228] and to hold that indigent parents are entitled to a waiver of court costs so that they can appeal terminations.[229]

The California courts have held that there is no constitutional right to reunification services,[230] and the United States Supreme Court has not spoken on the issue. Whether the mental disability bypass law is invalid because of a federal (or state) constitutional right to receive services prior to termination of parental rights is beyond the scope of this article, but the connection between denial of reunification services and termination of parental rights should be recognized. Given that a decision to deny services generally means that visitation ceases, and any chance of regaining custody is extinguished, denial of services clearly implicates liberty interests of enormous magnitude. The strong, constitutionally protected interest at stake for the parent should militate in favor of giving her an opportunity to try to address the circumstances that led to the child being taken into foster care.

C. Stigmatization of People with Mental Disabilities

Prejudice against people with mental disabilities is widespread. Americans' response to mental disability is characterized by "distrust, stereotyping, fear, em -barrassment, anger, and/or avoidance."[231] Professor Michael Perlin, a leading scholar of mental disability law, notes:

---

226. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Parham v. J.R., 442 U.S. 584 (1979); Santosky v. Kramer, 455 U.S. 745 (1982).

227. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

228. Santosky v. Kramer, 455 U.S. at 748.

229. M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (calling termination of parental rights a "quasi-criminal" proceeding).

230. *See, e.g.*, *In re* Baby Boy H., 73 Cal. Rptr. 2d 793, 797 (Cal. Ct. App. 1998) (calling reunification services a "benefit" and rejecting parent's argument for constitutional "entitlement" to those services).

231. Glennon, *supra* note 158, at 292 (quoting U.S. DEPT OF HEALTH AND HUM. SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 6 (1999), *available at* http://www .surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html).

> [A] popular . . . myth is that mentally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint. We assume that mentally ill individuals are presumptively incompetent to participate in "normal" activities and to make autonomous decisions about their lives.[232]

Perlin argues that "sanism," or irrational prejudice against people with mental illnesses, "is largely invisible and largely socially acceptable."[233] A central and enduring aspect of stigmatization of people with mental disabilities is the belief that they are violent.[234] This belief prompts a particularly negative response to parents with mental illnesses, who are "the quintessential other. . . . We shudder at images of deranged parents who endanger or kill their children, imagining Susan Smith and Andrea Yates."[235] As one group of researchers puts it, "[p]eople who abuse or neglect their children must be 'crazy,' according to common logic. Therefore, the general public assumes parents who are 'crazy' . . . probably abuse or neglect their children."[236] Such biases even affect mental health professionals, and may influence their judgments about parental fitness and amenability to intervention.[237]

Perlin further contends that bias against people with mental disabilities infects the legal process and "reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying."[238] The cases decided under section 361.5(b)(2) bear out this theory. Many judges, in denying services or terminating rights, simply point to the diagnosis as if it were evidence enough of inability to parent,[239] and evaluators and judges speak about parents with mental disabilities in pejorative, conclusory terms. One psychologist explained his recommendation to deny services by saying that "people with histrionic personality disorder attach emotionally to people who can be destructive to their children."[240] In another case: "[Mother is] emotionally unstable. . . . [N]o matter how well she learned to manage her anger, she would not be able to manage a child on her own. She has little insight, her judgment is impaired, and she lacks the intellectual resources necessary for child rearing."[241] And yet another:

---

232. Michael Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 15 (1999) (internal quotations and alterations omitted).

233. *Id.* at 4.

234. *See* Jean Campbell, Susan Stefan & Ann Loder, *Taking Issue: Putting Violence in Context*, 45 HOSP. & COMMUNITY PSYCHIATRY 633 (1994).

235. Glennon, *supra* note 158, at 273. Susan Smith and Andrea Yates are recent and highly publicized cases of infanticide by mentally ill mothers.

236. NICHOLSON, BIEBEL, HINDEN, HENRY & STIER, *supra* note 159, at 7.

237. Benjet, Azar & Kuersten-Hogan, *supra* note 149, at 239.

238. Perlin, *supra* note 232, at 5.

239. *See supra* Part III.D.

240. Jessica D. v. Superior Court, No. F042465, 2003 WL 21019234, at *2 (Cal. Ct. App. May 6, 2003).

241. Lureen K. v. Superior Court, No. B153531, 2001 Cal. App. Unpub LEXIS 438, at *3–4

"[Mother] needs to understand her contribution to the current situation. She needs to understand how her mental health issues contribute to her chaotic and dangerous lifestyle and that she is not just a victim of 'stupid mistakes' and other people."[242]

These examples indicate that section 361.5(b)(2) perpetuates negative social construction of mental disability. The scarcity of hard evidence to justify treating parents with mental disabilities who have abused or neglected their children differently from parents without mental disabilities who have done so strongly suggests that stereotypes and assumptions fill in the gaps left by science. Animus alone cannot be a legitimate driving force behind denying services.[243]

VI.
CONCLUSION: LOOKING AHEAD

The mental disability exception raises concerns that affect practitioners and parents in and outside of California. Many states allow termination of parental rights on the ground that the parent has a mental disability; psychologists testify in termination trials around the country. It is very common for the state to use results of psychological evaluations to shape the service plan to which the parent must adhere. In short, parents enmeshed in the child welfare system contend with the same untested ideas and preconceptions about mental disability with or without a reunification bypass law. In many child welfare cases, courts put psychologists in the untenable position of having to make impossible predictions.

The mental disability exception and the underlying problem of reliance on psychological evaluation of parental competence underscore the importance of good lawyering.[244] When the parent's attorney does not cross-examine the psychologists or present contrary evidence about the parent's ability to utilize services or eventually parent safely, judges appear to be more inclined to deny services, and appellate courts are left with no choice but to affirm that decision.[245]

(Cal. Ct. App. Dec. 26, 2001).

242. *In re* Joshua H., No. A101096, 2003 WL 1784509, at *5 (Cal. Ct. App. Apr. 3, 2003).

243. *See* Romer v. Evans, 517 U.S. 620, 634 (1995).

244. There is not a right to counsel in every dependency proceeding; the state may decline to provide counsel for indigent parents even in a termination of parental rights case. Lassiter v. Dept. of Social Services, 452 U.S. 18, 31 (1981). High-quality specialized representation for parents is rare. Parents' lawyers tend to carry very large caseloads, receive inadequate compensation, and have little opportunity to meet with clients before the first court appearance. Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2305–09 (1998). And yet lawyers play a crucial role in protecting parents and families from overreaching by child welfare agencies. *Id.* at 2310–13.

245. Appellate courts frequently point out that the parent failed to cross-examine the evaluators at the hearing. *See, e.g.*, Sergio S. v. Superior Court, No. H024358, 2002 WL 1303413, at *4 (Cal. Ct. App. June 14, 2002); Anna Q. v. Superior Court, No. B164760, 2003 WL 1386944, at *3 (Cal. Ct. App. Mar. 20, 2003).

Even when funds are not available for an independent expert, an attorney can put on evidence that the parent wants to utilize services, and that she has done so in the past or is doing so at present. It may give the judge pause if the parent's attorney simply penetrates the surface of the psychologist's opinion. Effective strategies might include: exposing that the expert only spoke to the parent briefly, relied on psychological tests not directly related to parenting, or used an interview technique that implicitly encouraged the parent to deny her problems; questioning the expert's cultural competence; or challenging the assumptions underlying the expert's opinion. Attorneys should also consider exploring whether the parent's alleged inability to benefit from services reflects the fact that the services the psychologist has in mind are not appropriate to the parent's needs. If the lawyer is familiar with local service providers that offer programs specifically for parents with mental disabilities, she should question the psychologist about such programs and try to elicit an explanation of why exactly this parent would not be capable of utilizing them; unfamiliarity with such programs would make the psychologist's predictions seem uninformed. Since child welfare agencies have "mixed motives"—they are charged with protecting the child and allocating scarce resources at the same time as trying to re-unify the family—the lawyer is an important watchdog over decisions that affect parental rights.[246]

At the systemic level, the reunification bypass law generally, and the mental disability exception specifically, are surprisingly under-litigated. More challenges to their use would attract attention by the media, which would in turn draw advocacy organizations and the legislature. Better legal arguments used in conjunction with better fact situations could change judicial interpretation of the statute, or deter the state from using it in all but the most extreme cases. Impact litigation groups seeking to test the theory of a constitutional right to some reunification services should consider bringing a challenge to the reunification bypass law in federal court.[247]

More broadly, both mental disability and child welfare law reformers ought to consider making parental rights a bigger part of their agenda. The need is pressing: approximately thirty percent of American adults report having at least one psychiatric disorder in the previous year, and among people with mental disabilities, two-thirds of women and over half of men are parents.[248] Custody loss rates for parents with mental illnesses have been estimated at seventy to eighty percent.[249] The problems with section 361.5(b)(2) bear strong resemblance to the problems with civil commitment and compelled treatment—particularly reliance on experts—which have long been the focus of civil libertarians. In ad-

246. Hand, *supra* note 225, at 1296.

247. Although private enforcement of the reasonable efforts requirement appears to be foreclosed by Suter v. Artist M., 503 U.S. 347, 363 (1992) (holding that there is no implied private right of action under the predecessor statute to ASFA), a right to services which exists independent of the statute could be recognized through litigation.

248. NICHOLSON, BIEBEL, HINDEN, HENRY & STIER, *supra* note 159, at iii.

249. *Id.*

dition to simply raising awareness of the problems of psychological evaluation and prediction, advocates should push for more empirical evidence to support legislation that affects parents with mental disabilities, as well as for services to assist these parents and their children. Mental disability and inadequate parenting tend to be seen as one and the same. To the extent that this issue affects a small, hidden, disliked group, it demands the energies of progressive lawyers.