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## Mommy, Baby and Rapist Makes Three? Amid Abortion Bans, the Pressing Need for a Nationwide Lower Standard to Strip Parental Rights, Regardless of a Rape Conviction

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MOMMY, BABY, AND RAPIST MAKES THREE? AMID  
ABORTION BANS, THE PRESSING NEED FOR A  
NATIONWIDE LOWER STANDARD TO STRIP PARENTAL  
RIGHTS, REGARDLESS OF A RAPE CONVICTION

*[A] parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.<sup>1</sup>*

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1. Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983).

## INTRODUCTION

Jessica Stallings was twelve years old when she was first raped by her uncle.<sup>2</sup> By the time she was an adult in the eyes of the law, she had been pregnant by her uncle four times.<sup>3</sup> Two of her pregnancies survived, while the other two died from miscarriage and complications related to incest.<sup>4</sup> Nearly twenty years after she fled her “Uncle Lenny” and built a home for her two boys, Jessica’s attacker remains present in her life.<sup>5</sup> Her uncle sought custody of the children, and after years of legal battles, an Alabama judge ordered Jessica to allow her rapist visitation time with the children during the holidays.<sup>6</sup>

Among the fundamental rights recognized in the Constitution are the rights of parents to raise their children.<sup>7</sup> While never interpreted as an absolute legal privilege,<sup>8</sup> courts have exercised wide discretion in preserving this right and historically ignored the reality that not all parents are deserving of this right.<sup>9</sup> Even though the family law system has protections in place to terminate parental rights for atrocities like abuse, it largely neglects an uncomfortable area of parental origin: parental rights regarding children conceived by rape.<sup>10</sup> This is not only to the detriment of children, but, as this Note argues, at the peril of some mothers.<sup>11</sup>

2. See Emily Wax-Thibodeaux, *In Alabama—Where Lawmakers Banned Abortion for Rape Victims—Rapists’ Parental Rights Are Protected*, WASH. POST (June 9, 2019, 12:10 PM), [https://www.washingtonpost.com/national/in-alabama--where-lawmakers-banned-abortion-for-rape-victims--rapists-parental-rights-are-protected/2019/06/09/6d2aa5de-831b-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/national/in-alabama--where-lawmakers-banned-abortion-for-rape-victims--rapists-parental-rights-are-protected/2019/06/09/6d2aa5de-831b-11e9-933d-7501070ee669_story.html) [<https://perma.cc/TN6A-KHSG>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the right to raise children is inherent in the 14th Amendment).

8. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that “the family itself is not beyond regulation in the public interest” and that “rights of parenthood are [not] beyond limitation”).

9. For example, in 2016, seven states lacked legislation regarding the intersection of parental rights and rape. Of those forty-three states with legislation in place, twenty states, as well as the District of Columbia, required the high threshold of a rape conviction before a victim could request termination of parental rights against her rapist. See *Parental Rights and Sexual Assault*, NAT’L CONF. STATE LEGISLATURES (Mar. 9, 2020), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#Table> [<https://perma.cc/9VQS-T32R>]; see also Breeanna Hare & Lisa Rose, *Where Rapists Can Gain Parental Rights*, CNN (Nov. 17, 2016, 1:06 PM), <https://www.cnn.com/2016/11/17/health/parental-rights-rapists-explainer/index.html> [<https://perma.cc/5HWE-UYU6>].

10. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); see also Hare & Rose, *supra* note 9.

11. This Note recognizes that when rape occurs, it is not discriminatory and affects women, men, and the LGBTQ+ community. However, because of the argument this Note makes, it will focus on rape survivors who experience pregnancy as a result of their sexual

Before passage of the federal Rape Survivor Child Custody Act in 2015, only six states even had laws in place to pave the way for survivors to petition a court to strip their rapists' parental rights.<sup>12</sup> By 2019, however, severe backlash from women—heightened after a wave of proposed restrictive abortion measures—pushed six of the seven remaining hold-out states to enact legislation on the matter.<sup>13</sup> While forty-nine states now have *some* form of restrictions in place to terminate the parental rights of those who have conceived a child through rape, victim protection remains drastically inadequate.<sup>14</sup>

When Jessica's story became public, it swept the internet into shock and uproar.<sup>15</sup> More importantly, it didn't fade into the ether of fleeting viral stories.<sup>16</sup> Instead, her cautionary tale unraveled during the Me Too movement, and took place in Alabama, which until 2019 was one of only two hold-out states that lacked any protection for rape survivors who choose to keep their rape-conceived child—a legal failure catapulted to the spotlight when the Southern state kicked off a strategic plot to bring the abortion debate back to the Supreme

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attack. Further, in its attempts to argue for rape survivor protection in the context of parenthood, this Note recognizes that the terms fathers and mothers are not gender specific. When genders are used in this Note, it refers to the biological connotations placed on these terms by the legal system.

12. See Camille Workman, Comment, *The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family*, 32 J. AM. ACAD. MATRIM. LAWS. 233, 246 (2019).

13. These states were Alabama, Maryland, North Dakota, Missouri, New Mexico, and Wyoming. See ALA. CODE § 12-15-319(b) (2020); MD. CODE ANN., FAM. LAW § 5-1402(a)(2)(i)–(ii) (LexisNexis 2018) (effective Nov. 6, 2020); N.D. CENT. CODE § 27-20-44(1)(e) (2019); MO. REV. STAT. § 211.447(5)(4) (2018); N.M. STAT. ANN. § 32A-5-19(C) (LexisNexis 1993); WYO. STAT. ANN. § 14-2-309(a)(ix)(A)–(C) (2019); see Workman, *supra* note 12, at 246; see also Wax-Thibodeaux, *supra* note 2 (discussing how after a number of states passed restrictive abortion measures, pro-life activists began pushing for rape-victim legislation because “[m]aybe they wouldn't abort or give the child up for adoption if they knew they were protected”).

14. See, e.g., VA. CODE ANN. § 20-124.1 (2020) (requiring a conviction of rape; carnal knowledge of a child; or incest); N.Y. DOM. REL. LAW § 240(1-c)(b)(A)(1)–(4) (Consol. 2020) (stating that there is a rebuttable presumption regarding the child's best interest if the parent was convicted of first or second-degree rape; first-degree sexual conduct against a child; predatory sexual assault; and predatory sexual assault against a child); CAL. FAM. CODE § 3030(b) (Deering 2007); MASS. GEN. LAWS ch. 209C, § 3(a) (2020) (requiring a conviction of rape).

15. During this time, other stories like that of Analyn Megison gained traction. Gina Tron, *The Scariest Part of New Movie You Can't Take My Daughter? It's Based On A True Story*, OXYGEN (Feb. 13, 2020, 1:04 PM), <http://oxygen.com/true-crime-buzz/lifetime-you-cant-take-my-daughter-based-true-story-analyn-megison> [https://perma.cc/S6N2-SWEF]. Due to her own rape-conceived pregnancy, Megison, a lawyer, spent two years pushing Florida to enact her proposed bill, which would strip a rapist's parental rights based on clear & convincing evidence. *Id.* Megison's story was adapted into a movie in February of 2020. *Id.*

16. See, e.g., Jennifer Smith, *Alabama Woman Claims Court Is Letting Her Rapist Uncle See Their Kids*, DAILY MAIL (June 14, 2019, 5:29 PM), <https://www.dailymail.co.uk/news/article-7142079/Alabama-woman-claims-court-letting-rapist-uncle-kids.html>.

Court.<sup>17</sup> The Southern state, which was quickly joined by several others during the summer of 2019, passed one of the nation's strictest abortions bans.<sup>18</sup>

These aggressive restrictions, known colloquially as the “heartbeat bills,” would ban abortion the moment a fetal heartbeat is detected—often as early as six weeks into the pregnancy—and fail to offer any of the traditional exceptions for survivors of rape and incest.<sup>19</sup> These restrictive bans stirred even anti-abortion activists, like Stallings, to push states to create parental rights protection for rape survivors.<sup>20</sup>

In June of 2019, Alabama responded.<sup>21</sup> The state finally passed a law limiting parental rights, but offering survivors only minimal protections.<sup>22</sup> In Alabama, a court “shall” terminate a rapists’ parental rights, but only for those with convictions of incest or first-degree rape or sodomy.<sup>23</sup> The partial win in Alabama leaves only one state remaining without any legislation in place to protect those who become pregnant from their assault.<sup>24</sup>

Alabama, however, is hardly alone in offering minimal protection.<sup>25</sup> Twenty-four other states similarly rely on a rape conviction.<sup>26</sup>

17. See ALA. CODE § 12-15-319(b) (2020); see also Anna North, *All of the 6-Week Abortion Bans Passed This Year Have Now Been Blocked in Court*, VOX (Oct. 29, 2019, 1:34 PM), <https://www.vox.com/2019/10/2/20895034/georgia-abortion-ban-blocked-six-weeks-law>.

18. See Emily Wax-Thibodeaux, *Ala. Law Terminates Parental Rights for Anyone Convicted of First-Degree Rape*, WASH. POST (June 25, 2019, 10:25 AM), [https://www.washingtonpost.com/national/ala-law-terminates-parental-rights-for-anyone-convicted-of-first-degree-rape/2019/06/24/0cedb6d2-9132-11e9-b58a-a6a9afaa0e3e\\_story.html](https://www.washingtonpost.com/national/ala-law-terminates-parental-rights-for-anyone-convicted-of-first-degree-rape/2019/06/24/0cedb6d2-9132-11e9-b58a-a6a9afaa0e3e_story.html) [https://perma.cc/D8RE-NKBS].

19. North, *supra* note 17.

20. Wax-Thibodeaux, *supra* note 2.

21. See ALA. CODE § 12-15-319(b) (2020).

22. *Id.*

23. *Id.*

24. See Wax-Thibodeaux, *supra* note 2.

25. As of this writing, these states are: Alabama, Arizona, Arkansas, California, Delaware, Washington D.C., Kentucky, Massachusetts, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin and Wyoming. See ALA. CODE § 12-15-319(b) (2020); ARIZ. REV. STAT. § 25-416 (LexisNexis 2016); ARK. CODE ANN. § 9-10-121(a) (2013); CAL. FAM. CODE § 3030(b) (Deering 2007); DEL. CODE ANN. tit. 13, § 724A(e) (2007); D.C. CODE § 16-914(k) (2020); KY. REV. STAT. ANN. § 403.322(2) (LexisNexis 2014); MASS. GEN. LAWS ch. 209C, § 3(a) (2020); MO. REV. STAT. § 211.447(5)(4) (2018); MONT. CODE ANN. § 40-6-1001(2)(a)–(b) (2017) (but also allowing for a hearing to determine if the child was conceived without consent under a standard of clear and convincing evidence); NEB. REV. STAT. § 43-292(11) (2009); NEV. REV. STAT. § 125C.210(1) (1999); N.Y. DOM. REL. LAW § 240(1-c)(b)(A)(1)–(4) (Consol. 2020); N.C. GEN. STAT. § 7B-1111(a)(11) (2018); OHIO REV. CODE ANN. § 3109.504(A) (LexisNexis 2015); OR. REV. STAT. ANN. § 107.137(6)(a)(A)–(B) (2014); 23 PA. CONS. STAT. § 5329(b.1)(1) (2010) (effective Aug. 4, 2020); 15 R.I. GEN. LAWS § 15-5-16(d)(4) (2013); S.C. CODE ANN. § 63-7-2570(11) (2017); TENN. CODE ANN. § 36-6-102(a) (2015); UTAH CODE ANN. § 76-5-414(1) (LexisNexis 2013); W. VA. CODE ANN. § 48-9-209a(a) (2014); WIS. STAT. § 48.415(9)(a)–(b) (2018).

26. See *supra* note 25 and accompanying text.

Therefore, with no federal law in place, most rape victims who experience a rape-related pregnancy face two decisions: have an abortion or have the child and live with the chance of her rapist being in her life again.<sup>27</sup> With the abortion debate consistently looming over the Supreme Court, there's a chance the only choice could be the latter.<sup>28</sup>

This Note will argue that the renewed attempts to restrict abortion access—amidst the ongoing reliance on targeted restrictions on abortion providers (TRAP) laws—is an impetus for all states to finally adopt a clear and convincing standard in stripping the parental rights of a parent who conceives a child through sexual assault, regardless of a conviction.<sup>29</sup> Part I will cover the fundamental right to parent and the Court's strict adherence to protecting the nuclear family unit. Part II will describe the statutory differences and how most states fail to protect parent survivors of sexual crimes. Part III will argue that along with implementing a lower standard, states must restrict exposing the parent to her rapist in proceedings such as adoptions and child support hearings. Part IV will address concerns in regard to the rights of the father.

## I. TERMINATION OF PARENTAL RIGHTS BACKGROUND

*No bond is so precious and none should be more zealously protected by the law as the bond between parent and child.*<sup>30</sup>

### A. What's in a Family?

Family law jurisprudence reveals a slow and resistant acceptance to the decline of the nuclear family structure that has for so

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27. See, e.g., KAN. STAT. ANN. § 38-2269(e) (2018) (Kansas statute stating that even in the event of a rape conviction, termination of parental rights is not immediate but up to judicial discretion and dependent on the fact that a “finding of unfitness may be made”); ME. STAT. tit. 19, § 1658(3) (2016) (Maine statute granting judicial discretion in that a judge “may terminate the parental rights and responsibilities of the parent” when a rape-related pregnancy is shown by clear and convincing evidence).

28. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–34 (2020) (narrowly overturning a 2014 Louisiana abortion law that required a doctor conducting abortions to have admitting privileges at a hospital within thirty miles). To obtain the plurality in *June Medical*, Justice Roberts concurred but only because of stare decisis. See also Gretchen Borchelt, *Symposium: June Medical Services v. Russo: When a “win” is not a win*, SCOTUSBLOG (June 30, 2020, 12:31 PM), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win> [https://perma.cc/8JRC-5YEL].

29. Hope Silberstein, Comment, *Taking on TRAP Laws: Protecting Abortion Rights through Property Rights*, 2017 U. CHI. LEGAL F. 737, 742 (2017).

30. *Carson v. Elrod*, 411 F. Supp. 645, 649 (E.D. Va. 1976).

long guided courts.<sup>31</sup> Two tenets appear seeped into this case law.<sup>32</sup> First, that family stems from the bonds created between man and wife acting as parents.<sup>33</sup> Second, and moreover, that a child needs his biological father.<sup>34</sup> Gradually, these romanticized notions of a family unit crumbled, chipping away at the idea that a claim to parenthood stems only from marriage.<sup>35</sup>

Notably, the law recognized the increasing number of children born outside of wedlock<sup>36</sup> and those born through assisted reproductive technology,<sup>37</sup> and pressured states to strip gender distinctions from parenting laws following the historic decision in *Obergefell v. Hodges*.<sup>38</sup> Still, revisions in 2017 to the Uniform Parentage Act indicate changes needed to the forgotten areas of parenthood, particularly the ones where women become mothers not from a desire to have a child with their partner but from rape.<sup>39</sup>

### *B. What Rights Can Be Terminated?*

Courts are traditionally reluctant to strip the fundamental right to have and raise a family rooted in the Due Process Clause of the Fourteenth Amendment.<sup>40</sup> While considered “perhaps the oldest of the fundamental liberty interests,”<sup>41</sup> termination of parental rights is possible under extraordinary circumstances.<sup>42</sup> Significantly, in

31. See, e.g., *id.*; *Stanley v. Illinois*, 405 U.S. 645, 654 (1972) (rejecting the argument “that most unmarried fathers are unsuitable and neglectful parents”).

32. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1988) (upholding the traditional marital family); see also James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 408 (2008) (noting that states focus on the biological ties rather than fitness to parent).

33. See *Michael H.*, 491 U.S. at 124 (denying fundamental parental rights to a married woman’s paramour in order to protect the “traditions” of a “marital family”).

34. See Dwyer, *supra* note 32, at 408 (stating that “states continue to confer legal parenthood on biological parents without regard for any history or condition that renders such persons presumptively unfit to parent”).

35. See *Stanley*, 405 U.S. at 654; *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that it is a violation of the Equal Protection Clause for a state to discriminate against illegitimate children); *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (holding that it is not a violation of the Equal Protection Clause for a state to treat parents differently based on the relationship, or lack of relationship, formed with the child).

36. See *Lehr*, 463 U.S. at 251.

37. See UNIF. PUTATIVE AND UNKNOWN FATHERS ACT § 1(2)(i)–(ii) (Nat’l Conf. Comm’rs Unif. State L. 1988).

38. 576 U.S. 644, 681 (2015).

39. See UNIF. PARENTAGE ACT, prefatory note (Nat’l Conf. Comm’rs Unif. State L. 2017).

40. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

41. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

42. See *Santosky*, 455 U.S. at 753–54; see also *In re Dependency of M.-A.F.-S.*, 421 P.3d 482, 504 (Wash. Ct. App. 2018) (stripping the parental rights of a mother with a long history of substance abuse); *In re A.S.*, 906 N.W.2d 467, 478 (Iowa 2018) (terminating

*Santosky v. Kramer*, the Supreme Court held that the burden of proof for states seeking to revoke parental rights is clear and convincing evidence, and that this burden of proof does not violate a parent's due process rights.<sup>43</sup>

Most states look to this long-established standard when determining whether to strip parental rights in cases regarding a parent suspected of child abuse, neglect, or drug use.<sup>44</sup> Yet, uniformity of this standard does not exist across the nation for stripping parental rights from rapists.<sup>45</sup> States that require a conviction for termination of a rapists' parental rights demand the much higher standard of "beyond a reasonable doubt," subjecting family law matters to criminal law applications.<sup>46</sup> Even some states guided by *Santosky* have other loopholes in place and so, in nearly half the country, biological fathers who have conceived a child through rape can fight for physical or legal custody, as well as visitation rights with the child.<sup>47</sup> Some states go even further and lack provision of any exceptions for the consent requirement of the biological father in order to commence adoption proceedings.<sup>48</sup>

The long-held refusal to terminate parental rights, and the ensuing disparity it has caused in state family law, highlights the rarely recognized problem in granting parental rights simply because of a biological connection.<sup>49</sup> These archaic ideas of biological parentage turn a blind eye to the modern-day reality that parentage comes in many forms, and moreover, that by placing such an emphasis on genetic links, the law ignores the actual best interest of the mother and the child.<sup>50</sup>

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parental rights to a mother who was found to be intellectually disabled and had left her child with an intoxicated individual); *In re Adoption/Guardianship of H.W.*, 189 A.3d 284, 303 (Md. 2018) (removing parental rights from a father who had never met the child nor met any parental financial obligations).

43. See *Santosky*, 455 U.S. at 747–48.

44. Cf. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2579 (2013) (Sotomayor, J., dissenting).

45. Compare 750 ILL. COMP. STAT. 46/622(a)(2) (2016) (requiring the clear and convincing standard in the absence of a conviction or plea), with N.M. STAT. ANN. § 32A-5-19(C) (LexisNexis 1993) (holding only that consent is not required from a rapist father for adoption proceedings but is wholly silent on his termination of parental rights).

46. See, e.g., VA. CODE ANN. § 16.1-283(E) (2019).

47. See *Tyler v. Sup. Jud. Ct. of Mass.*, 914 F.3d 47, 48–49 (1st Cir. 2019) (where a twenty-year-old man raped a teen and sought visitation rights after pleading guilty to statutory rape); *S.J. v. L.T.*, 727 P.2d 789, 791–92 (Alaska 1986) (where a man who raped his stepdaughter appealed after losing custody of their child conceived through rape).

48. See Kara N. Bitar, Note, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 277–78 (2012).

49. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 323–25 (2004) (discussing how biology is not the determinative factor in parentage and that "fathers" do more than "create life").

50. See *id.*



Still, the American court system is hardly alone in prioritizing the legal rights of rapist fathers at the cost of victim protection.<sup>51</sup> In the past, several countries such as Egypt, Jordan, and Lebanon, enacted legislation forcing a rape victim to marry her rapist as a way to maintain her family's honor.<sup>52</sup> Resistance and uproar by waves of women's rights activists lead to the dissolution of some of these laws, but, in countries like Turkey, the threat of forced marriage between rapist and rape survivor remains on the legislative table.<sup>53</sup> Strikingly, the American legal system stands only slightly in contrast to these countries; American states, of course, stop short of imposing a formal marriage, but are nonetheless forcing a relationship between rape survivor and perpetrator, even when there is a child's life involved.<sup>54</sup>

## II. VARYING TREATMENT TOWARDS RAPE AND PARENTAL RIGHTS

*A rapist pursuing parental or custody rights forces the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, making it more difficult for her to recover. . . . These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.*<sup>55</sup>

### A. The Rape Survivor Child Custody Act

Before Congress passed the Rape Survivor Child Custody Act (RSCCA) in 2015, forty-four states lacked *any* laws regarding parental rights when a child is conceived from rape.<sup>56</sup> The Act's financial incentive for violence-prevention programs is offered to states whose courts terminate parental rights when, under the clear and convincing standard, it is shown that a child was conceived by rape.<sup>57</sup> The text of the Act addresses why this is necessary, recognizing rape as "one of the most under-prosecuted serious crimes."<sup>58</sup> Further, in urging

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51. See Maya Oppenheim, 'Marry-Your-Rapist' Bill Proposed to Be Introduced by Lawmakers in Turkey, INDEP. (Jan. 22, 2020, 5:33 PM), <https://www.independent.co.uk/news/world/europe/turkey-marry-rape-bill-child-marriage-a9296681.html>.

52. See *id.*

53. See *id.*

54. See discussion *supra* Section I.B.

55. H.R. Res. 1257, 114th Cong. § 2(10) (1st Sess. 2015).

56. *Id.* § 2(9).

57. *Id.* § 3.

58. *Id.* § 2(6).

use of the evidentiary standard upheld by the Court in *Santosky*, the Act notes it is the “most common standard for termination of parental rights among the [fifty] States, territories, and the District of Columbia.”<sup>59</sup>

In 2016, twelve states were awarded funds by the Office of Violence Against Women for meeting the requirements of the RSCCA.<sup>60</sup> A year later, the revision of the 2017 Uniform Parentage Act (UPA) included a provision to reflect the RCCSA recommendation of a clear and convincing standard.<sup>61</sup> By 2020, Minnesota stands alone as the only state without any statutes in place to protect individuals who conceive a child through rape.<sup>62</sup> While the RSCCA influenced an overwhelming number of states to tackle this ignored area of parenthood, several states responded by enacting statutes requiring a rape conviction and ignored the clear and convincing standard recommended by both Congress and the Supreme Court.<sup>63</sup>

### *B. Land of No Protection*

Forty-nine states provide some form of legislation to either terminate parental rights of rapists, or more frequently, place limits on custody rights.<sup>64</sup> Additionally, some of these states have multiple statutes on the topic, covering provisions for child support, consent and notice for adoption, and custody and visitation rights.<sup>65</sup> However, despite years of advocacy efforts, Minnesota remains the only state lacking any legislation to terminate, or even limit, parental rights

59. *Id.* § 2(7)–(8).

60. *See Funds Awarded under the Rape Survivor Child Custody Act*, DEPT. OF JUST., OFF. ON VIOLENCE AGAINST WOMEN (2016), <https://www.justice.gov/ovw/page/file/1005396/download> [<https://perma.cc/N4QB-T457>].

61. *See* UNIF. PARENTAGE ACT, § 614(e)(2) (Nat’l Conf. Comm’rs Unif. State L. 2017).

62. *See* discussion *infra* Section II.B.

63. *See* N.D. CENT. CODE § 27-20-44(1)(e) (2019) (passed in 2019 and mandating a conviction or plea to sexual imposition or gross sexual imposition to support the termination of parental rights).

64. *See, e.g.*, DEL. CODE ANN. tit. 13, § 724A(e) (2007) (where legislation mandates a conviction is required to strip visitation rights but is silent on whether notice and/or consent is necessary for adoption proceedings); NEV. REV. STAT. § 125C.210(1)–(2) (1999) (where legislation requires a conviction of sexual assault but at the same time the conviction does not apply as a prohibition on custody or visitation if the convicted was married to the other parent); S.D. CODIFIED LAWS § 25-4A-20 (2019) (where legislation calling for the clear and convincing standard uses language that suggests the court “may” as opposed to the court “must” strip parental rights of a rapist).

65. Indiana, for example, has one statute in regard to termination of parental rights for a child conceived through rape. *See* IND. CODE ANN. § 31-35-3.5-7(a)(1)–(2) (2016). The state has another statute bypassing the requirement of consent and notice for adoption proceedings if the accused has been convicted. *See* IND. CODE ANN. § 31-19-9-8(4)(A)–(E) (2020).

for a person found to have conceived a child by rape or incest.<sup>66</sup> After being dragged through the headlines along with coverage of Alabama's abortion ban, a Minnesota state senator, joined by activists, revived efforts in 2019 to push for a proposal to terminate parental rights of rapists under the clear and convincing standard.<sup>67</sup>

Until then, with no state or federal legislation in place, decisions on parental rights for rapists fighting for parental rights in Minnesota are left up to the discretion of a judge.<sup>68</sup> For example, in 2006, a Minnesota Court of Appeals judge upheld the visitation rights granted to a man accused of rape by the woman he impregnated, who alleged no memory after drinking with him at a bar.<sup>69</sup> The court found the man's parental rights were in the "best interests of the child" and that there was no evidence of a risk that would come to the child due to the father's presence.<sup>70</sup>

### C. Conviction Requirement

Either complete termination or limits on parental rights of rapists is possible in twenty-five states only through a conviction of rape.<sup>71</sup> This means perpetrators who plead to a lesser crime, and are therefore not convicted of rape, will be able to claim parental rights.<sup>72</sup> This was the case for Tiffany Gordon.<sup>73</sup> Like Jessica Stallings, Gordon became pregnant after being raped at twelve years old by a family friend.<sup>74</sup> Her rapist pleaded guilty to attempted rape with a sentence of only two years in prison.<sup>75</sup>

Gordon raised the baby, and nearly a decade after her rape, applied for state assistance in Michigan.<sup>76</sup> Her application triggered the state to reach out to the child's father.<sup>77</sup> Despite the fact that the

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66. See Stephen Montemayor, *Minnesota Lawmaker Revives Push to Strip Rapists' Parental Rights*, STAR TRIB. (June 11, 2019, 9:05 PM), <http://www.startribune.com/minnesota-one-of-just-2-states-without-a-law-stripping-rapists-parental-rights/511158272>.

67. *Id.*

68. See MINN. STAT. § 260C.301(7) (2013) (where the court must determine the "best interests of the child" when terminating parental rights).

69. See *Hilliker v. Miller*, No. A05-1538, 2006 WL 1229633, at \*1–3 (Minn. Ct. App. May 9, 2006).

70. *Id.* at \*3.

71. See *supra* notes 25–26 and accompanying text.

72. See *supra* notes 25–26 and accompanying text.

73. See Michaela Haas, *When Your Rapist Demands Custody*, MOTHER JONES (Oct. 2019), <https://www.motherjones.com/crime-justice/2019/08/rapist-custody-abortion> [http://perma.cc/9KBP-WP6G].

74. *Id.*

75. *Id.*

76. *Id.*

77. See *id.*

biological father never petitioned for custody, a county probate judge ordered Gordon to share custody with her rapist, live within 100 miles of him, and add his name to the child's birth certificate.<sup>78</sup> Over a year later, intense media backlash led the judge to reverse his decision.<sup>79</sup> The judge claimed that "[he] did not know that the defendant had raped the plaintiff" when he made his earlier decision.<sup>80</sup>

Meanwhile, in Stallings' case, her rapist was granted full custody of the two boys after she became homeless in an attempt to escape her rapist uncle and the marriage to him that was forced upon her by him and her family.<sup>81</sup> Despite eventually regaining custody of her children and obtaining a divorce from him, her uncle continued to fight for visitation, to which Stallings responded by ultimately seeking criminal charges against him.<sup>82</sup> A grand jury declined to press charges.<sup>83</sup>

The fact that neither Stallings nor Gordon were able to obtain convictions against their rapists highlights a larger problem in the criminal justice system ignored by states requiring rape convictions: rape convictions are rare.<sup>84</sup> Only 5 out of every 1,000 rapes committed results in a felony conviction.<sup>85</sup> That is under one percent, and even in that small realm where a rape conviction is obtained, it is still not always enough.<sup>86</sup>

In some states, a rape conviction does not serve as an automatic removal of parental rights but merely as one of many factors used in a judge's determination.<sup>87</sup> For example, the West Virginia statute on termination of parental rights is littered with additional exceptions, despite already requiring the high threshold of a conviction to terminate custody and visitation rights.<sup>88</sup> The statute uses "best interests of the child" language to allow the convicted parent to still

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78. *Id.*

79. Michael Kransz, *Judge Reverses Decision in 'Paternity Case That Went Horribly Wrong'*, MLIVE (Jan. 19, 2019), [https://www.mlive.com/news/saginaw/2017/10/judge\\_reverses\\_decision\\_granti.html](https://www.mlive.com/news/saginaw/2017/10/judge_reverses_decision_granti.html) [<http://perma.cc/NUJ7-C92C>].

80. *Id.*

81. Haas, *supra* note 73.

82. *Id.*

83. *Id.*

84. See *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [<http://perma.cc/HXK4-XS5Y>] (citing BUREAU OF JUST. STAT., U.S. DEPT OF JUST. OFF. OF JUST. PROGRAMS, NATIONAL CRIME VICTIMIZATION SURVEY 2018 (2019)).

85. *Id.*

86. *Id.*

87. See KAN. STAT. ANN. § 38-2269(e)–(f) (2018) (noting that "[t]he existence of any one of the above factors standing alone may, but does not necessarily, establish grounds for termination of parental rights").

88. W. VA. CODE § 48-9-209a (2014).

claim his parental rights instead of automatically terminating his rights upon his rape conviction, and leaves the ultimate decision up to the judge's discretion.<sup>89</sup>

This means that the high threshold of a rape conviction is required for a rape survivor to even petition the court, and yet it is not enough for automatic termination of parental rights.<sup>90</sup> More importantly, a parent who is able to beat the odds and see her rapist convicted will still need to go to court and face her rapist again in order for a judge to determine what is "best" for her child.<sup>91</sup> This revictimizes the rape survivor all over again.<sup>92</sup> The West Virginia statute goes even further, and holds that the conviction requirement does not apply if the rapist and his victim are married.<sup>93</sup> West Virginia is not alone in these requirements.<sup>94</sup> Other states, such as Utah, Virginia, and Massachusetts, have similar provisions despite also mandating a conviction requirement.<sup>95</sup>

#### *D. Clear and Convincing Evidence Requirement*

The greatest protection for mothers of rape-conceived children comes from a small number of states that allow for the removal of the rapist's parental rights regardless of the outcome of the criminal rape proceeding, if there even was one.<sup>96</sup> Ten states differ on how they refer to this evidentiary standard, but they are clear that a conviction is not necessary, let alone a factor.<sup>97</sup>

In Colorado, for example, a woman may file a petition in juvenile court and must show under a standard of clear and convincing evidence that (1) she was raped; (2) her rapist was not convicted; (3) a child was conceived from the rape; and (4) termination of the rapist father's parental rights is in the best interests of the child.<sup>98</sup>

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89. *Id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. *Id.*

94. *See, e.g.*, UTAH CODE ANN. § 76-5-414(1)(a) (LexisNexis 2013).

95. *Id.*; VA. CODE ANN. § 20-124.1 (2020); MASS. GEN. LAWS ch. 209C, § 3(a) (2020).

96. *See, e.g.*, OKLA. STAT. tit. 10A, § 1-4-904(B)(11) (2015); *see also* WIS. STAT. § 48.415(9)(b) (2018).

97. These states are Alaska, Colorado, Florida, Idaho, Illinois, Louisiana, Oklahoma, Pennsylvania, Vermont, and Wisconsin. *See* ALASKA STAT. § 25.23.180(c)(2) (2018); COLO. REV. STAT. § 19-5-105.7(4)(a)–(d) (2014); FLA. STAT. § 39.806(1)(m) (2019); IDAHO CODE § 16-2005(2)(a) (2016); 750 ILL. COMP. STAT. 46/622 (2017); LA. CHILD. CODE ANN. § art. 1015 (2018); OKLA. STAT. tit. 10A, § 1-4-904(B) (2015); 23 PA. CONS. STAT. § 2514 (2020); VT. STAT. ANN. tit. 15A, § 3-504(a)(4) (2019); WIS. STAT. ANN. § 48.415(9) (2018).

98. COLO. REV. STAT. § 19-5-105.7(4)(a)–(d) (2014).

The Colorado statute succeeds in protecting rape survivor parents by using the *Santosky* standard, but still subjects the mother to a court analysis of what's best for the child even after showing the child was conceived by rape.<sup>99</sup> In contrast, a state like Illinois stands out for offering heightened survivor protection.<sup>100</sup> First, the state's statute provides three ways to find an individual is a rapist father: by conviction, by plea, or at a hearing where the victim mother shows by clear and convincing evidence that the individual raped her and she conceived a child as a result of the rape.<sup>101</sup> Once the rapist father is identified, the court "shall" strip him of all parental responsibilities and parenting time with the child.<sup>102</sup>

By steering clear of language such as "may," the statute clearly dictates what the judge must do, and it avoids a proven rape constituting a mere factor in the judge's decision.<sup>103</sup> Further, after the termination of parental rights, the Illinois statute specifies that the rapist-father is still on the hook for his financial obligations to the child, unless the mother declines such support.<sup>104</sup> This is among the most ideal legislation in place, but like all the other statutes, it fails in one major area: it still requires the victim to face her rapist once again.<sup>105</sup>

### *E. Adoptions, Abortions, and Consent*

Another way a rapist continues to exert control over the child's mother is through state laws that require consent and notice in adoption proceedings.<sup>106</sup> Again, rape and statistics hardly go together in telling an accurate picture, but the numbers that are available indicate that thirty-six percent of women who choose to carry their rape-conceived child will place the baby up for adoption.<sup>107</sup> These are most likely women who either want to place the baby in a loving home or often want to raise the child along with a partner who will adopt the child.<sup>108</sup>

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99. *Id.*

100. See 750 ILL. COMP. STAT. 46/622(a)–(b) (2017).

101. *Id.*

102. See *id.* § 46/622(c).

103. *Id.*

104. *Id.*

105. See *id.*

106. See, e.g., UTAH CODE ANN. § 78B-6-111 (LexisNexis 2015).

107. See AMY SOBIE & DAVID C. REARDON, *A Survey of Rape and Incest Pregnancies, in VICTIMS AND VICTORS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT* 18, 19 (David C. Reardon, Julie Makimaa & Amy Sobie eds., 2000).

108. See *id.* at 22.

In *Nevares v. M.L.S.*, the mom alleged her baby was conceived as a result of a rape that occurred in Colorado, and she sought to place the baby up for adoption in Utah.<sup>109</sup> M.L.S. said she was fifteen years old when she was raped by Nevares, who was twenty years old at the time.<sup>110</sup> Utah's Adoption Act does not allow a biological father to contest an adoption when the child was conceived from rape, regardless of whether the man was convicted or even charged.<sup>111</sup> Despite this seemingly ideal statutory language, the court preserved the father's parental right to object to the adoption because the alleged statutory rape occurred in Colorado, not Utah.<sup>112</sup>

In its decision, the *Nevares* court noted a momentarily held concern for the possibility which "could allow a man who fathers a child in another state as a result of a rape to assert his parental rights in an adoption taking place in Utah."<sup>113</sup> The court reconciled this fleeting fear by citing other recourses available to rape victim mothers, such as arguing against the biological father's fitness as a parent.<sup>114</sup> However, battles on the unfitness of a parent take the narrative away from the victim.<sup>115</sup> Instead of a system that protects the victim, the woman must now argue how her rapist, beyond the crime he committed against her, would be an unfit parent to the child he merely shares a forced biological connection.<sup>116</sup> Further, these are lengthy proceedings and hinge on a court's ability to bypass the legal system's long-held resistance to terminating fundamental biological parental rights.<sup>117</sup> In the time it takes for a victim mother to attempt to prove her rapist's parental unfitness, a willing adoptive parent may back out of the proceeding.

Another option, and the most common one for rape victims who become pregnant, is abortion.<sup>118</sup> As it stands, abortions are the only

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109. See *Nevares v. M.L.S.*, 345 P.3d 719, 720 (Utah 2015).

110. *Id.* at 725.

111. See UTAH CODE ANN. § 78B-6-111 (LexisNexis 2015).

112. *Nevares*, 345 P.3d at 730.

113. *Id.*

114. *Id.*

115. See *id.*

116. See *Determining the Best Interest of the Child: Summary of State Laws*, CHILD WELFARE (2020), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest> [<http://perma.cc/2G6L-MT3S>] (listing the numerous factors considered to determine a child's best interests which are centered on the child's ultimate safety—as opposed to the safety of both the child and mother, who will both have a relationship with the father).

117. See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

118. See Shauna R. Prewitt, Note, *Giving Birth to a Rapist's Child: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 829 (2010).

way for a pregnant rape survivor to ensure protection of her parental rights, while distancing herself and her child from her rapist.<sup>119</sup> While women are not required to notify the father when deciding to have an abortion, the right to an abortion is under great threat through various strict limitations enacted by states, causing confusion and restricting access to those seeking abortions.<sup>120</sup> In the writing of this Note alone, access to abortion not only remains under threat, but is increasingly in jeopardy.<sup>121</sup> As just one example, the United States had roughly 2,600 pregnancy centers in 2017.<sup>122</sup> These centers are staffed by anti-abortion activists and urge visitors to maintain their pregnancies.<sup>123</sup> In contrast, the United States had only 808 abortion clinics the same year.<sup>124</sup>

### III. ERADICATING THE CONVICTION STANDARD

*I was raped several times. . . . Once by my rapist,  
and twice by the courts.*

—Tiffany Gordon<sup>125</sup>

#### *A. How Do You Convict an Underreported, Under-Prosecuted Crime?*

A pivotal argument against enacting partial or complete legal restrictions on the parental rights of rapists has centered on the assumed minor occurrence of rape-related pregnancies.<sup>126</sup> Combating this standpoint requires an examination of the prevalence of rape. Ninety percent of adult rape victims are female.<sup>127</sup> The crime is notoriously underreported, with three out of four sexual assaults

119. See North, *supra* note 17.

120. See *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992); North, *supra* note 17; see also discussion *supra* Introduction.

121. See Kate Smith, *These Are the Abortion Cases Amy Coney Barrett Might Hear on the Supreme Court*, CBS (Oct. 15, 2020, 2:55 PM), <https://www.cbsnews.com/news/supreme-court-abortion-cases-review-amy-coney-barrett>.

122. See Carter Sherman, *Hundreds of U.S. 'Pregnancy Centers' Are Now Offering Unproven 'Abortion Reversal' Method*, VICE (Oct. 22, 2020, 12:50 PM), <https://www.vice.com/en/article/epd4n7/hundreds-of-us-pregnancy-centers-are-now-offering-unproven-abortion-reversals> [<http://perma.cc/TMT7-BQJC>].

123. *Id.*

124. *Id.*

125. Haas, *supra* note 73.

126. See Mary Ziegler, *The End of the Rape and Incest Exception*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/opinion/abortion-rape-incest-exception.html>.

127. See *Victims of Sexual Violence: Statistics*, *supra* note 84.



going unreported to police.<sup>128</sup> From those that are reported, roughly half of one percent lead to a felony conviction.<sup>129</sup>

Due to the underreported nature of the crime, statistics do not tell the whole story, especially in regards to the number of children conceived from rape.<sup>130</sup> However, a recent study estimated about five percent of women who are victims of rape become pregnant and thirty-two percent of these women choose to raise the child, indicating about 32,101 women not only forgo abortion in these cases but also do not place the child up for adoption.<sup>131</sup> These individuals desperately need legal protection so that their forced sexual encounter does not lead to a forced family with their rapist.

Twenty percent of victims reported they didn't speak out to police because they feared retaliation from their perpetrators.<sup>132</sup> This concern becomes only greater for victims who become pregnant with their rapist's child and must then face the very real possibility of continued contact with their attacker, who will have a say over the child's upbringing. This binds the victim to her rapist. Beyond having to see her attacker in court, life-changing decisions like relocation and ultimately where the victim will live and raise the child may require notice to the rapist father.<sup>133</sup> This once again places the woman under the rapist's control.

The reasons for not reporting are myriad and complex, stemming largely from the systematic societal stigma that has long surrounded survivors of sexual assault.<sup>134</sup> Perhaps the most well-known display of the misconceptions surrounding rape survivors came in 2012 when former Missouri congressman Todd Akin famously claimed women had control over their body's ability to reject pregnancy if it

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128. See *Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<http://perma.cc/PKH7-9FPA>] (citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, NATIONAL CRIME VICTIMIZATION SURVEY 2010–2016 (2017)).

129. *Id.*

130. See Rachel E. Morgan & Grace Kena, *Criminal Victimization, 2016: Revised*, U.S. DEP'T OF JUST., <https://www.bjs.gov/content/pub/pdf/cv16re.pdf> [<http://perma.cc/U5DN-9VUF>] (noting that in 2016, twenty-three percent of rapes were reported to police).

131. Margot E. H. Stevens, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865, 871 (2014) (citing Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1996)); see also Prewitt, *supra* note 118.

132. See *Criminal Justice System: Statistics*, *supra* note 128 (citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, FEMALE VICTIMS OF SEXUAL VIOLENCE 1994–2010(2013)).

133. See, e.g., IND. CODE ANN. § 31-17-2.2-1 (2020).

134. See Morgan Namian, *Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process*, 40 WOMEN'S RTS. L. REP. 80, 82 (2018).

was a “legitimate rape”<sup>135</sup> because “the female body has ways to try to shut the whole thing down.”<sup>136</sup>

Akin was not alone in this thinking, and his reasoning, despite repeatedly being debunked, has continued to be echoed by politicians throughout the years.<sup>137</sup> In 2016, for example, Illinois Representative Pete Nielsen doubled down on his comments that rape-related pregnancies do not “happen as often as it does with consensual sex, because of the trauma involved.”<sup>138</sup> Three years later as restrictive abortion measures began to sweep across the nation, Representative Barry Hovis echoed Akin’s statement.<sup>139</sup> Hovis argued that in his former police experience, most rapes weren’t violent stranger attacks but “consensual rapes.”<sup>140</sup>

The myths Akin, Nielsen, and Hovis promote can be dated back to an article written by lawyer and pro-life advocate Eugene Quay in 1961.<sup>141</sup> Under the guise of science, Quay wrote it was nearly impossible for a woman who was raped to become pregnant.<sup>142</sup> Over fifty years later, Quay’s suggestion that women cry rape in order to have an abortion without public shame continues in part to drive the anti-abortion movement, especially now that states are attempting to remove long-held exceptions for rape and incest.<sup>143</sup>

### *B. Why This Matters: Busting the Myths on Rape-Conceived Children*

It is a common assumption that women who do become pregnant from rape will despise the child.<sup>144</sup> Shauna Prewitt, a lawyer who became pregnant after being raped and then fought her rapist for

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135. See Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 16, 2012), <https://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html> [http://perma.cc/XNV8-QU9Y].

136. *Id.*

137. Hal Herzog, *Rape Victims Are More—Not Less—Likely To Become Pregnant*, PSYCH. TODAY (Aug. 22, 2012), <https://www.psychologytoday.com/us/blog/animals-and-us/201208/rape-victims-are-more-not-less-likely-become-pregnant> [http://perma.cc/P59W-FX8S].

138. See Betsy Z. Russell, *Idaho Legislator Says Trauma Prevents Pregnancy in Rape, Incest Victims*, SPOKESMAN-REV. (Feb. 25, 2016), <https://www.spokesman.com/stories/2016/feb/25/abortion-debate-heats-up-in-idaho-statehouse> [http://perma.cc/HF26-FGDN].

139. See Orion Donovan-Smith, *A GOP Lawmaker Used the Phrase ‘Consensual Rape’ During Abortion Debate. He Says He Misspoke*, WASH. POST (May 17, 2019, 7:29 PM), <https://www.washingtonpost.com/politics/2019/05/17/gop-lawmaker-used-phrase-consensual-rape-during-abortion-debate-he-says-he-misspoke> [http://perma.cc/9CDJ-LXGV].

140. *Id.*

141. See Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 399 (1961).

142. *Id.*

143. Ziegler, *supra* note 126.

144. See Prewitt, *supra* note 118, at 840–41.

custody, wrote to Akin, explaining the bond she formed with her baby and stressing that she “did not altogether hate the life growing inside of me.”<sup>145</sup> In Massachusetts, a girl raped when she was in the eighth grade by Jamie Melendez, a nineteen-year-old family friend, has fought since 2013 for her rapist to be stripped of visitation rights.<sup>146</sup> These women not only dispel the myth that rape victims do not want to keep their child born from rape, but show that women—with no other choice—will repeatedly face their rapists in court in order to gain sole custody of children, that they do in fact, clearly love.<sup>147</sup>

Conversely, there is the assumption that a rapist will want nothing to do with his rape-conceived child and so parental rights of rapists is a minor problem unworthy of federal legislation.<sup>148</sup> Yet, Prewitt’s years of fighting her rapist for sole custody of her rape-conceived child proves otherwise.<sup>149</sup> The stories of Jessica Stallings and Tiffany Gordon prove otherwise.<sup>150</sup> Aside from any personal desire these men may have to be in the child’s life, there is the very real possibility that a rapist will leverage parental rights in a ploy to force a victim to not press charges, request financial assistance, or testify against him.<sup>151</sup>

In the Massachusetts case, Melendez pleaded guilty to statutory rape of a child and was sentenced to probation, which included paternity acknowledgment and court-mandated child support.<sup>152</sup> Only then did Melendez request visitation with the child.<sup>153</sup> The victim wanted to move the case from family court to criminal court, and she sought criminal restitution instead of child support in order to avoid the legal binding between her and Melendez until their child reaches the age of eighteen.<sup>154</sup> During an evidentiary hearing, a judge denied Melendez’s request, finding it was “insincere and asserted solely as a ‘bargaining chip’ in an effort to reduce or eliminate his child support obligation.”<sup>155</sup> In 2019, the case against Melendez continued.<sup>156</sup>

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145. Emine Sinmaz, *‘How I Learned to Love my Rapist’s Baby and How the Attack Made Me Stronger’: Attorney Rape Victim Pens Open Letter to Todd Akin*, DAILY MAIL (Aug. 22, 2012, 3:13 PM), <https://www.dailymail.co.uk/news/article-2191804/Shaina-Prewitt-Attorney-rape-victim-pens-open-letter-Todd-Akin.html> [<http://perma.cc/9T28-WJLE>].

146. Tyler v. Sup. Jud. Ct. of Mass., 914 F.3d 47, 48 (1st Cir. 2019).

147. See *id.*

148. See discussion *infra* Part IV.

149. See Sinmaz, *supra* note 145.

150. See Wax-Thibodeaux, *supra* note 2; Haas, *supra* note 73.

151. See Prewitt, *supra* note 118, at 836.

152. Tyler v. Sup. Jud. Ct. of Mass., 292 F. Supp. 3d 555, 557 (D. Mass. 2018).

153. *Id.*

154. *Id.* at 557–58.

155. H.T. v. J.M., No. 15-P-1042, 2016 Mass. App. Unpub. LEXIS 1159, at \*3–4 (Mass. App. Ct. Dec. 5, 2016).

156. Tyler v. Sup. Jud. Ct. of Mass., 914 F.3d 47, 52 (1st Cir. 2019) (holding the court did not have jurisdiction to change Melendez’s probation).

### C. Proposed Solutions

#### 1. Using the Standard Laid out in Santosky

By blurring the family law matter of terminating parental rights into a criminal matter, states diminish the protection they offer rape victims and fail to follow the long-established standard introduced in *Santosky*.<sup>157</sup> The overlap between criminal and family law in terminating parental rights—simply because a criminal act has resulted in the very existence of those parental rights—should not in any way mean that the *Santosky* standard should be tossed aside.

It is essential that the laws concerning termination of these parental rights do not require the high threshold of a conviction. That is not to say that the many rapes that do not result in convictions but lead to rape-conceived children should automatically ignore substantive due process. It is simply a call to use the clear and convincing standard, as required by *Santosky*, to show if in fact the child was conceived from rape.<sup>158</sup> This standard is not an easy hurdle to jump; it is an intermediate standard of proof and is defined as evidence “indicating that the thing to be proved is highly probable or reasonably certain.”<sup>159</sup>

#### 2. Automatic Termination When a Conviction or Guilty Plea Has Occurred

First, the inquiry into parental rights should be simple when a conviction has resulted from the alleged rape: there should be no inquiry. Legislation should mandate that courts “must” strip parental rights of an individual convicted of rape or sexual assault-related crimes against a woman who becomes pregnant as a result of his sexual crimes. When that so rare conviction has actually been obtained, there is no need for a judicial hearing that revictimizes the woman and forces her to explain why her rapist should not have parental rights. Second, the same should be true when an individual, who produced a child from a forcible sexual encounter, pleads guilty to a lesser related crime stemming from the same alleged incident.

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157. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Compare S.D. CODIFIED LAWS § 25-4A-20 (2019) (restricting visitation rights of one found under clear and convincing evidence to have “committed an act of rape or incest against the other parent that resulted in the conception of the child”), with TENN. CODE ANN. § 36-1-113 (2020) (holding that a parent does not have standing to file a petition to terminate another parent’s parental rights unless the other parent was convicted of rape).

158. See *Santosky*, 455 U.S. at 756.

159. *Clear and Convincing Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014); see *Santosky*, 455 U.S. at 756.

Plea deals are constitutional and crucial to the criminal justice system.<sup>160</sup> Therefore, it is impossible that an argument would ever stand to eliminate the plea option for an individual proven to have conceived a child out of rape.<sup>161</sup> Even those accused of the worst crimes have the right to weigh a deal from the government.<sup>162</sup> In the rape context, plea deals are often essential when the crime is lacking in evidence and prosecutors fear a he-said/she-said in court.<sup>163</sup> Still, a guilty plea is an admission of guilt.<sup>164</sup> Yet, none of the states that require a conviction of rape for termination of a rapist's parental rights make stipulations for how to proceed if the accused pleaded down but still admitted to a forcible sexual interaction.<sup>165</sup> Accordingly, rapists who plead to lesser crimes related to the rape are not automatically terminated of their parental rights.<sup>166</sup>

In North Carolina, a man who pleaded guilty to statutory rape sought joint custody of his rape-conceived child while incarcerated for the crime.<sup>167</sup> Timothy Bobbitt's plea took him out of the purview of the state's statute, which strips parental rights only from those convicted of first- or second-degree rape.<sup>168</sup> As a result, the court allowed Bobbitt to have visitation with the child.<sup>169</sup> A plea should not open the door to judicial tethering between victim and assailant when the assailant has specifically admitted his guilt. Therefore, in both convictions and plea deals related to the rape that resulted in pregnancy, termination of the rapist's parental rights should be automatic. Language regarding the "best interest" of the child should not be present in these automatic terminations as it would allow a judge the discretion to consider other factors. When a rape conviction is obtained, there is no room for judicial discretion to consider any other factors.

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160. See *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (noting the importance of plea deals in the criminal justice system and how guilty pleas "are factually justified, desired by defendants, and help to secure the efficient administration").

161. *Id.*

162. See, e.g., *United States v. Kaczynski*, 239 F.3d 1108, 1113 (9th Cir. 2001) (affirming the guilty plea of Theodore Kaczynski, most commonly known as "the Unabomber").

163. See Lili Loofbourow, *See Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html> [<http://perma.cc/3RED-C9QW>] (discussing a massive rape kit backlog and failure to interview witnesses).

164. See *N.C. v. Alford*, 400 U.S. 25, 32 (1970) (noting that "a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind").

165. See, e.g., DEL. CODE ANN. tit. 13, § 724A (2007); see also OHIO REV. CODE ANN. § 3109.504(A) (LexisNexis 2015).

166. See, e.g., *Bobbitt v. Eizenga*, 715 S.E.2d 613, 616 (N.C. Ct. App. 2011).

167. *Id.* at 614.

168. *Id.* at 615.

169. *Id.*

### 3. *Implementing the Clear and Convincing Standard*

The legal failures across the nation in protecting rape victims allow a rapist to further torment the rape survivor.<sup>170</sup> The rape is no longer a singular traumatic incident but an event with the power to seemingly affect every aspect of the woman's life, down to her ability to mother.<sup>171</sup> As it stands, the system is equally reluctant to believe a woman in her rape accusation as it is to believe she can mother alone, even if that means her co-parent will be her rapist.

The clear and convincing standard is the appropriate one for termination of parental rights and should be adopted nationwide.<sup>172</sup> The standard is not to be used to determine if a criminal charge is applicable. Therefore, the judicial hearing should not demand any burden of proof higher than clear and convincing evidence to show (1) the man accused committed a forced sexual act, and (2) that forced act resulted in the conception of a child. Upon a finding of both those elements, a full termination of the rapist's parental rights must be granted. Lastly, any future appeal by the father must minimize the contact between the rapist and rape survivor.

### 4. *Requiring Child Support and Exempting the Victim from Attending Child Support Hearings*

There is no question that rape comes at a cost; the unmeasurable price reaped on the emotional and physical well-being of the victim as well as the economic losses tied with rape survivors.<sup>173</sup> For survivors who become pregnant from their rape, the cost of their attack now includes the price tag of raising a child.<sup>174</sup> Therefore, legislation must terminate parental rights of a rapist while preserving the obligation to pay child support. Severing the physical parental relationship and ability to have choices in the upbringing of the child should not sever the father's financial obligations.

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170. See Prewitt, *supra* note 118, at 831.

171. See *id.* at 832 (discussing the effect of seeing her rapist for the first five years of raising her son).

172. See discussion *supra* Section III.C.1.

173. See Sarah DeGue, *The Cost of Rape*, NAT'L SEXUAL VIOLENCE RES. CTR. (Dec. 4, 2018), <https://www.nsvrc.org/blogs/cost-rape> [<https://perma.cc/HT2V-8BLN>] (quoting a study by the Centers for Disease Control and Prevention as estimating that "the per-victim lifetime cost of rape is \$122,461").

174. See Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T OF AGRIC., <http://www.usda.gov/media/blog/2017/01/13/cost-raising-child> [<https://perma.cc/926W-PTQ4>] (A 2017 study by the Department of Agriculture estimated the cost at \$233,610 for middle-income parents raising a child through the age of seventeen, meaning the cost of a college education is not included in this price).

Once the rapist's parental rights are terminated, either through a conviction, a plea related to the rape, or a showing of clear and convincing evidence, the requirement of child support should be automatic unless the mother does not desire the father to provide child support. Next, legislation must continue to protect the mother by removing the need for her to attend child support hearings. New Jersey is an example of one of the few states doing this.<sup>175</sup> The state's statute on termination of parental rights removes the mother from the child support proceedings and requires that her and the "child[s] whereabouts shall be kept confidential."<sup>176</sup>

*5. Recognizing a Unique Approach Is Needed to Address Parental Rights and Statutory Rape*

In 1992, Ruben Pena aimlessly searched local hospitals, wondering about the status of his pregnant girlfriend, Amanda Mattox.<sup>177</sup> By the time Pena learned about Mattox's whereabouts, she had given birth to their child, a daughter who was immediately placed into adoption.<sup>178</sup> Amanda was sixteen years old and Ruben was nineteen years old.<sup>179</sup> The two had been dating for over a year, seeing each other in secret after Amanda's parents discovered the pregnancy.<sup>180</sup> Pena, who later pleaded guilty to misdemeanor criminal sexual abuse, sued for violation of his Due Process rights.<sup>181</sup> The Seventh Circuit, in a decision by Judge Posner, refused to allow the "wrongdoer to benefit from his wrongdoing" and held that biology alone does not entitle a father to parental rights.<sup>182</sup>

*Pena v. Mattox* was the first time a federal court tackled the issue of statutory rape in the context of parental rights.<sup>183</sup> The case spotlights how the law cannot treat the area of rape-conceived children as black-and-white, and that while the clear and convincing standard should be adopted nationwide, courts should not disregard the distinct differences that statutory rape cases present.<sup>184</sup> The few

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175. N.J. STAT. ANN. § 9:2-4.1(d) (West 2000). Colorado is another state with a similar provision stipulating that a court order for child support should be "made through the child support registry to avoid the need for any contact between the parties." See COLO. REV. STAT. § 19-5-105.5(8)(b) (2014).

176. N.J. STAT. ANN. § 9:2-4.1(d) (West 2000).

177. *Pena v. Mattox*, 84 F.3d 894, 895-96 (7th Cir. 1996).

178. *Id.* at 896.

179. *Id.* at 895.

180. *Id.*

181. *Id.* at 897.

182. *Id.* at 901.

183. See Angela D. Lucchese, Note, *Pena v. Mattox: The Parental Rights of a Statutory Rapist*, 36 BRANDEIS J. FAM. L. 285, 304 (1998).

184. See *id.* at 293-96.

similar cases that have followed since *Pena* adopted a similar bright-line rule that statutory rapists are undeserving of parental rights.<sup>185</sup>

The Court in *Pena* noted the parental rights analysis would be different if *Pena* had created a relationship with the child.<sup>186</sup> This parallels the Court's reasoning in *Michael H. v. Gerald D.*, where the Court looked not just for the biological connection but also for a developed relationship with the child and proven support of the child.<sup>187</sup> However, in statutory rape cases, fathers like *Pena* cannot even attempt to create such a relationship.<sup>188</sup> The law ignores such unique problems but more importantly silences the wishes of the young mother.

In these complicated parental situations, termination should not be automatic even if a statutory conviction is present. Here, judicial discretion should come heavily into play, taking into account whether there was intent to commit a crime, the statistics of adolescents engaged in sexual activity, the difficulties of being a teen parent, and more importantly, the desire and needs of the new mother.

#### IV. ANTICIPATED CRITICISM

*It is not the brute biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim.*<sup>189</sup>

The concern for male parental rights drives the debate over terminating parental rights for rapists.<sup>190</sup> In Maryland, it took nine "failed attempts" before the state was finally able to pass a law creating a path to the termination of parental rights for rapists.<sup>191</sup> The battle started in 2006 and stalled over concerns of cutting a

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185. See, e.g., *Dep't of Servs. for Child. v. L.M.W.*, No. Cn16-06568, 2018 Del. Fam. Ct. LEXIS 3, at \*10 (Del. Fam. Ct. Jan. 29, 2018) (denying the father's parental rights and holding that "[w]hile this may not have been violent in the sense there was not a physically violent assault it was not a consensual act by virtue of Mother's age at the time").

186. *Pena*, 84 F.3d at 901.

187. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1988).

188. Cf. *Pena*, 84 F.3d at 897.

189. *Id.* at 899.

190. See MD. CODE ANN., FAM. LAW § 5-1402(a)(1)–(3) (LexisNexis 2018); see also Ovetta Wiggins, *Gov. Hogan Signs Bill Terminating Parental Rights for Rapists*, WASH. POST (Feb. 12, 2018, 3:23 PM), [https://www.washingtonpost.com/local/md-politics/gov-hogan-to-sign-bill-terminating-parental-rights-for-rapists/2018/02/12/0c51fe5e-102d-11e8-9570-29c9830535e5\\_story.html](https://www.washingtonpost.com/local/md-politics/gov-hogan-to-sign-bill-terminating-parental-rights-for-rapists/2018/02/12/0c51fe5e-102d-11e8-9570-29c9830535e5_story.html) [<https://perma.cc/5GCZ-KUHF>].

191. *Id.*



father's rights and the proper burden of proof to do so.<sup>192</sup> In 2017, during the final hours of the state's legislative session, five male senators were unable to reach an agreement, "balking at the idea of terminating rights if the alleged rapist has not been criminally convicted."<sup>193</sup>

Meanwhile, in Wyoming, it took five failed attempts before the state passed its law in early 2019 regarding the termination of parental rights for rapists.<sup>194</sup> Despite the bill being introduced with the clear and convincing standard, the bill only managed to pass once lawmakers agreed to strip that standard and replace it with a conviction requirement.<sup>195</sup> Explaining the state's decision to forgo the nationally recommended *Santosky* standard, State Representative Mike Greear told the *Washington Post*: "We have a criminal justice system for a reason, and that protects the rights of the accused."<sup>196</sup>

Greear's comments are emblematic of how in an age marked by female empowerment and activism, the legal system is still failing women.<sup>197</sup> Proponents of parental rights for men accused of rape focus solely on whether the man was a *legally convicted* rapist.<sup>198</sup> They ignore the difficulty of convicting rapists,<sup>199</sup> and moreover ignore the fact that a parental rights hearing does not impose criminal sanctions on the father but rather simply seeks to determine, if under a clear and convincing standard, a child was conceived through rape and if so, the rapist should not have any parental rights over that child's life due to the retraumatization of the victim mother.<sup>200</sup>

If, like Greear recommends, a hearing to terminate parental rights of a rapist continues to be conflated with his criminal trial for the underlying rape, rape victims will forever be tied to their perpetrators.<sup>201</sup> Lastly, this Note recognizes that marginalized groups suffer the brunt of rape accusations.<sup>202</sup> While an in-depth discussion

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192. *Id.*

193. Ovetta Wiggins, *In Maryland, One Rape-Law Defeat Threatens to Overshadow Other Victories*, WASH. POST (May 6, 2017), [https://www.washingtonpost.com/local/md-politics/in-maryland-one-rape-law-defeat-threatens-to-overshadow-other-victories/2017/05/06/18cad5d4-2f5f-11e7-9534-00e4656c22aa\\_story.html](https://www.washingtonpost.com/local/md-politics/in-maryland-one-rape-law-defeat-threatens-to-overshadow-other-victories/2017/05/06/18cad5d4-2f5f-11e7-9534-00e4656c22aa_story.html) [<https://perma.cc/JG8S-C2F9>].

194. *See A New Wyoming Law Terminating Parental Rights of Rapists Is Flawed to the Point of Being Nearly Pointless—2019 Legislative Recap*, BETTER WYO. (Mar. 11, 2019), <https://betterwyo.org/2019/03/11/new-wyoming-law-terminating-parental-rights-rapists-flawed-point-nearly-pointless-2019-legislative-recap> [<https://perma.cc/2MGR-QWEZ>].

195. *See* WYO. STAT. ANN. § 14-2-309(a)(ix)(A)–(C) (2019); *see also* Wax-Thibodeaux, *supra* note 2.

196. *See* Wax-Thibodeaux, *supra* note 2.

197. *See id.*

198. *See id.*

199. *See* discussion *supra* Section III.A.

200. *See* Wax-Thibodeaux, *supra* note 2.

201. *See id.*

202. *See* Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till*, AM. BAR ASS'N (July 16, 2019), <https://>

on that intersection is beyond the scope of this Note, the point remains that all men accused of rape should be subjected to the clear and convincing standard to strip their parental rights, not to determine their criminal action.

### CONCLUSION

Currently, individuals who become pregnant from rape have the choice to keep, abort, or place their rape-conceived child up for adoption.<sup>203</sup> That very choice is under threat after a year consumed with anti-abortion laws proposed under a thinly veiled attempt to overturn *Roe v. Wade*, which played out recently at the Supreme Court and provided little guarantee for future access to abortion.<sup>204</sup> This lingering abortion debate gives fresh relevance to the need for legislation that would ensure women and their children are not chained to a rapist for the rest of their lives.<sup>205</sup> It is impossible to hit the right note in legislation that balances the needs of the child with protection for the victim mother and the rights of the accused.<sup>206</sup> Yet, if abortions are to be banned, or if access is made harder, or simply remains as confusing as it is today, then it is clear legislation is needed now more than ever. The state of the abortion landscape has been under threat for decades, and it is imperative to finally create federal legislation recognizing that rapist-fathers should not enjoy the same rights as fathers who did not use sexual force to conceive, and who are able to develop a meaningful relationship with their child without subjecting the child's mother to renewed trauma.<sup>207</sup> This legislation must include automatic termination of parental rights for those convicted of rape or those who pleaded to a lesser crime stemming from the alleged incident. In cases that

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[www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape](http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape) [<https://perma.cc/Y7ZK-MNNL>].

203. See Prewitt, *supra* note 118, at 828 (noting that rape victims conceive with “significant frequency” and discussing the breakdown of a large group of women who had an abortion, a small group who placed the child up for adoption, and a group in between which kept the rape-conceived child).

204. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020).

205. See Ziegler, *supra* note 126 (noting that “what the abandonment of rape and incest exceptions reveal is that some abortion opponents no longer care about what most Americans have to say”).

206. See Prewitt, *supra* note 118, at 853.

207. The parental statutes cited and commentary on the progress still to be made in the intersection of parental rights and rape crimes is current as of this writing, concluded on November 21, 2020. Moreover, this Note is not contingent on the outcome of the renewed abortion debate but holds firmly that all fifty states must enact legislation to protect rape survivors.

lack either, federal legislation must fill the void with a call for a clear and convincing standard to prove the child was conceived from rape and accordingly terminate parental rights. Finally, this legislation must enact provisions that will eliminate, or at least minimize, the contact a victim must have with her rapist in order to secure the termination of his parental rights.

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