

The Parental Rights of Rapists

BY KARA N. BITAR*

I. INTRODUCTION

Women in America have the freedom to choose to keep or terminate a pregnancy.¹ They also have the freedom to choose to keep and raise their child or to place their child for adoption.² In America these freedoms are not illusory. Women are not forced to carry their pregnancies to term. Nor are women forced to have abortions or place their children for adoption—or are they?

When a woman becomes pregnant as a result of rape, the rapist, absent legislation to the contrary, has the same parental rights as does any other father. This means that if a rape victim chooses to keep her child, she could be forced to raise her child with the man who raped her. Alternatively, if she places her child for adoption, she may need to give notice to the rapist and possibly obtain his consent. In both instances, the rapist is allowed to assert control over his victim's life and the life of her child.

Rapists have even used their parental rights to coerce their victims to not file charges against them or testify against them during their rape trial. A victim of acquaintance rape in North Carolina became pregnant and carried her child to term.³ The man she accused of raping her threatened to assert his parental rights unless she agreed not to file charges against him.⁴ Another woman from North Carolina became pregnant as a result of rape and placed the baby for adoption.⁵ To complete the adoption, she needed the rapist to terminate his parental rights.⁶

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1. See *Roe v. Wade*, 410 U.S. 113, 151–56 (1973).

2. Women in America have the freedom to place their children for adoption. To finalize an adoption, women may be required to give notice to the birthfather and obtain his consent. See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS*, 1318–19 (5th ed. 2010). In some circumstances, an adoption can be finalized without the consent of the birthfather. See *In re. J.J.J.*, 718 P.2d 948, 949–50 (Alaska 1986). For example, pursuant to some state laws, a birthfather's consent is unnecessary if the birthfather has failed to provide for the care and support of the child as required by law or judicial decree. *Id.* at 950 n.1.

3. Ruth Sheehan, *Rapists Lose Facet of Power*, THE RALEIGH NEWS & OBSERVER, Sept. 6, 2004, at B1.

4. *Id.*

5. *Id.*

6. *Id.*

The rapist, who was in custody awaiting trial, told her that he would terminate his parental rights only if she agreed not to testify against him.⁷

While many states have passed laws to streamline the abortion process for women who abort their rape-conceived children, most states have provided either no protection or inadequate protection to rape victims who carry their pregnancies to term.⁸ Even less protection is provided to women who keep their children instead of placing them for adoption. This lack of protection strips women of real choice. Women are forced to either have an abortion or risk having their rapist assert himself into their lives again. If a woman does carry her pregnancy to term, she is forced to place the child for adoption or risk having to raise her child with the man who raped her.

This Note discusses the difficult situation facing women who become pregnant as a result of rape and how the majority of states are either providing no protection or inadequate protection to such women. It also discusses possible solutions to this problem.

This Note proceeds as follows: Section II addresses parental rights in America; Section III, rape in the United States; Section IV, why legislation must be promulgated to address the problem of rapists having parental rights; and Section V examines existing legislation. In Section VI, possible legislation is proposed, and Section VII discusses potential problems with the proposed legislation. Section VIII concludes that the proposed legislation is necessary and provides needed protection to rape victims.

II. PARENTAL RIGHTS

To understand how a rapist with parental rights can have a profound impact both on his victim and the resulting child, it is important to understand what parental rights entail.

In the United States, the right to have and raise a family is a fundamental right grounded in the 14th Amendment.⁹ Because parental rights are fundamental, parents are not easily deprived of these rights. Rather, courts presume that parents have parental rights to their biological children.¹⁰ To overcome this presumption and deprive a parent of parental rights, there must be “grave and weighty reasons” for such deprivation.¹¹

Parental rights allow for significant involvement in a child’s life. These rights include the right to custody of the child, visitation of the child, and notice and/or consent for adoption.

7. *Id.*

8. 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, 827 (2010) (noting that “many states have passed special laws, devised streamlined procedures, or both, to aid pregnant women who seek abortions”).

9. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

10. See, e.g., *S.J. v. L.T.*, 727 P.2d 789, 795–97 (Alaska 1986).

11. *Id.* (holding that a biological father’s parental rights would not be terminated even though he was convicted of sexually assaulting the mother and there was ample evidence that the child was conceived as a result of that sexual assault).

Two types of custody exist: physical and legal. Physical custody is when a parent has the right and obligation to provide a physical home for the child and make day-to-day decisions concerning the child.¹² Legal custody is when a parent has the right to make important decisions about a child's welfare.¹³ For instance, when a parent has legal custody, he has a say in decisions such as where the child attends school or whether to proceed with certain medical treatments.

Custody can also be sole or joint.¹⁴ For instance, one parent can have sole physical custody, and the parents can then share legal custody. Parents can also have joint physical and legal custody. Joint custody has become more common over the years.¹⁵ Such custody necessarily entails significant contact and communication between parents.¹⁶ For example, parents may have to communicate with each other about the child's health, the child's progress in school, what activities the child is permitted to engage in, and the child's whereabouts. Joint custody can even restrict either parent from relocating if the relocation puts the child too far away from one of the parents.¹⁷

If a parent does not have physical custody, the parent normally has visitation rights.¹⁸ Visitation rights are strong. Absent exceptional circumstances, courts will not deny parents these rights.¹⁹ For instance, even if a father is found to have sexually abused his child, a court may refuse to terminate his visitation rights.²⁰

In addition to rights to custody and visitation, fathers normally must be provided notice if the mother wants to place the child for adoption and, under

12. See *McCarty v. McCarty*, 807 A.2d 1211, 1213–14 (Md. Ct. Spec. App. 2002) (explaining the distinction between legal and physical custody).

13. See *id.*

14. See *id.* See also ELLMAN, *supra* note 2, at 623.

15. See Melissa A. Tracy, *The Equally Shared Parenting Time Presumption – A Cure-All or Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 154–61 (2007). In the past, a presumption existed that it was in the best interest of children, especially young children, to live with their mother. *Id.* at 157. This changed as a result of the gender equality movement and research that showed that joint custody was beneficial for children. *Id.* at 157, 161. Also, father's rights groups have lobbied for a presumption for joint custody. See *Legislative activities*, NAT'L FATHER'S RESOURCE CENTER, <http://www.fathers4kids.com/html/LegislativeActivities.htm> (last visited March 29, 2012) (calling for a presumption of equal physical custody).

16. See *McCarty*, 807 A.2d at 1215 (stressing the need for effective communication between parents sharing custody).

17. See *In re LaMusga*, 88 P.3d 81, 84–85 (Cal. 2004) (holding that a mother would lose primary custody of her children if she moved to a different state because the move would take the children away from their father and this would cause detriment to the children).

18. See ELLMAN, *supra* note 2, at 694.

19. See *id.* (stating: “[a]ccess [to the child] by both parents is strongly favored in the law and visitation will be granted unless the custodial parent shows that visitation is likely to lead to some serious harm or detriment to the child”).

20. See *Arnold v. Naughton*, 486 A.2d 1204, 1208 (Md. Ct. Spec. App. 1985) (determining that even though a noncustodial parent was found to have sexually abused his child, his visitation rights need not be terminated. Rather, the court could order supervised visitation without abusing its discretion).

certain circumstances, must consent to the adoption.²¹ Notice and consent requirements vary by state. For example, in North Carolina, a mother must file special proceedings requesting the court determine whether consent of the biological father is necessary.²² If the mother files such proceedings, the biological father must be served with notice of the mother's intent to place the child for adoption and must be allowed fifteen days after service to assert a claim that his consent is required.²³ Thus, in North Carolina, a rapist father would be alerted that his victim was pregnant and planning on placing the child for adoption, and he would be given a chance to block the adoption.

A biological father's rights to notice and consent for adoption can affect women who want to place their newborn child for adoption as well as women who have raised their child and want their spouse or significant other to adopt the child. For instance, a Nebraska woman was raped by her stepfather, conceived a child, carried the child to term, and raised the child.²⁴ Eleven years after the rape, she wanted her fiancé to adopt the child.²⁵ However, her stepfather would neither sign the papers terminating his parental rights nor consent to the adoption.²⁶

Parental rights can also play a role when one parent is seeking public assistance. For instance, under the current welfare system, a single mother will not receive welfare unless she agrees to cooperate with the state in locating the father and obtaining child support from him.²⁷ If the rapist did not already know his victim became pregnant, the state's actions will alert him that he is a father. This notice will allow him an opportunity to assert his parental rights.

Parental rights do not just extend to biological parents; they can also extend to grandparents.²⁸ Grandparents may have rights to their grandchildren and can petition for visitation rights.²⁹ Therefore, a rapist's parents could also assert themselves into the life of the victim and her child.

21. See, e.g., N.C. GEN. STAT. ANN. § 48-2-206 (West 2010).

22. *Id.*

23. *Id.*

24. *Do Rapists Have Parental Rights?* KETV.COM (Feb. 20, 2007), <http://www.ketv.com/r/11067350/detail.html>. The attorney for the victim was quoted as saying, "[t]he courts have said, you don't have to be a great parent to continue to be a parent." *Id.* The attorney also made clear that courts take parental rights very seriously and that terminating these rights can be "a lengthy and expensive process." *Id.*

25. *Id.*

26. *Id.*

27. Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1030-32 (2007). Hatcher explains that under the current welfare program, parents who have children and apply for benefits must cooperate with the state in establishing child support obligations against the absent parent. *Id.* He notes, "[p]oor mothers are forced to name absent fathers, and then sue them—and sue them again and again." *Id.* at 1031. The government requires this in an attempt to recoup the cost of welfare from the father (or mother) who the government believes should have been providing financial support in the first place. *Id.* at 1032. Thus, to receive welfare, a rape victim would have to agree to cooperate with the state in its quest to find the father and obtain child support from him. See *id.*

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

29. See *id.*

In sum, parental rights give parents the right to a substantial role in their children's lives. These rights are fundamental and courts will not readily terminate them. As such, a rapist who fathers a child, absent legislation to the contrary, has rights to the child. These rights can bind his victim to him until the child turns eighteen, if not for the entire life of the child.

III. RAPE IN THE UNITED STATES

To determine how to effectively address the problem of rapists having parental rights, it is important to understand rape in the United States. Overall, studies show that not only is rape prevalent and drastically underreported, but most rape victims are under eighteen, they are raped by someone they know, and they never see their attacker convicted. Further, while rates of some violent crimes have declined, rape rates have stayed constant since 1996.³⁰ Additionally, pregnancies do result from rape, and some women keep their rape-conceived children.

The rate of rape varies among studies based on how rape is defined, what population is studied, and what methodology is used.³¹ According to the National Institute of Justice (NIJ), the most recent and methodologically rigorous studies show that approximately 27.5 percent of college women have been raped.³² A special report conducted by the National Institute of Justice (hereinafter "NIJ report") found that one out of every six women has been raped at some time in her life, and in a single year, more than 300,000 women in the US were raped.³³ The Centers for Disease Control (CDC) reported that 10.6 percent of women have reported experiencing forced sex at some time in their lives.³⁴

Rape is underreported.³⁵ Along with sexual assault, rape is the least likely of all violent crimes to be reported.³⁶ The NIJ report found that only 19.1 percent of women raped since their eighteenth birthday reported the crime to the police.³⁷ Additionally, the NIJ reported that rape notification rates differ based

30. Felicia H. Stewart & James Trussell, Commentary, *Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure*, 19 AM. J. PREVENTIVE MED. 228, 228 (2000).

31. *Rape and Sexual Violence*, NAT'L INST. JUST., <http://nij.gov/topics/crime/rape-sexual-violence/welcome.htm> (last modified October 26, 2010).

32. *Id.* (finding that rape statistics today actually approximate those found more than twenty years ago). See also CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *Sexual Violence: Facts at a Glance* (2008), available at <http://www.cdc.gov/injury>.

33. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INSTITUTE OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (SPECIAL REPORT) 7 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [hereinafter NIJ REPORT]. These two estimates do not include attempted or completed rapes of minors. *Id.* The NIJ report is based on the results of the National Violence Against Women Survey conducted in 1995–1996. *Id.* This survey was a nationally representative phone survey that asked 8,000 women and 8,000 men about their experiences as rape victims. *Id.*

34. CTRS. FOR DISEASE CONTROL & PREVENTION, *Sexual Violence: Facts at a Glance*, *supra* note 32.

35. NIJ REPORT, *supra* note 33, at 33.

36. Stewart & Trussell, *supra* note 30, at 228.

37. NIJ REPORT, *supra* note 33, at 33.

upon whether or not the victim knew her attacker.³⁸ A victim that knew her attacker was less likely to report the crime.³⁹ Underreporting occurs for a variety of reasons. For instance, some women do not perceive themselves as victims of rape, for they may believe they cannot be raped by a boyfriend, husband, or stepfather.⁴⁰ Also, victims—especially young victims—may be too frightened, embarrassed, or ashamed to report what happened.⁴¹

Even if a rape is reported, most rape victims never see their attacker caught, tried, convicted, and imprisoned.⁴² Decades of rape scholarship discuss the difficulty of prosecuting and obtaining convictions in rape cases.⁴³ The NIJ report found that of the rapes reported to the police, only 37 percent resulted in criminal prosecution of the rapist.⁴⁴ Cases where the victim knew her attacker were less likely to be prosecuted, and even if they were prosecuted, it was more difficult to do so successfully.⁴⁵ Of prosecuted rapists, 46.2 percent were convicted, and of those convicted, 76 percent were sent to jail.⁴⁶ The NIJ report found that among all women who were raped since age eighteen, only 7.8 percent reported that the rapist was criminally prosecuted, 3.3 percent reported the rapist was convicted, and 2.2 percent reported the rapist was incarcerated.⁴⁷ Thirteen percent of women who were raped after the age of eighteen said that they obtained a restraining order against the rapist, and 65.9 percent of those women said the rapist violated the order.⁴⁸

Minors are often victims of rape. The CDC reported that 60.4 percent of female victims were raped before the age of eighteen; 25.5 percent were raped before the age of twelve; and 34.9 percent were raped between the ages of 12–17.⁴⁹ A 2005 survey found that 10.8 percent of girls from grades 9–12 were forced to have sexual intercourse at some time in their lives.⁵⁰ The NIJ report determined that more than 50 percent of the females raped were raped before

38. NAT'L INST. OF JUSTICE, *Rape and Sexual Violence*, BUREAU OF JUSTICE STATISTICS, (Oct. 26, 2010), <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=317>.

39. *Id.*

40. See Sandra Mahkorn, *Report of Sandra Mahkorn, M.D., M.P.H., M.S., Regarding Karlin et al. v. Faust et al. August 12, 1996*, 14 ISSUES L. & MED. 433, 435, 437 (1999). Sandra Mahkorn holds an M.D. as well as three masters degrees. *Id.* at 433. She has served as Deputy Assistant Secretary for Public Health and Policy, Associate Director for the President's Council on Competitiveness, and as part of the White House Staff. *Id.* In her practice as a physician, she has worked extensively with women who are victims of sexual assault and incest. *Id.* at 434. Her opinions in this article are based on her research and her accumulated knowledge in the field of medicine, public health, and counseling. *Id.*

41. See *id.* at 437.

42. See, e.g., Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 128–29 (2001) (explaining that 98 percent of rape victims never see their attacker caught, tried, and imprisoned).

43. *Id.* at 129.

44. NIJ REPORT, *supra* note 33, at 33.

45. *Id.* at 35.

46. *Id.* at 33.

47. *Id.*

48. *Id.*

49. CTRS. FOR DISEASE CONTROL & PREVENTION, *Sexual Violence: Facts at a Glance*, *supra* note 34.

50. *Id.*

they were eighteen.⁵¹ Similar to the findings of the CDC, the NIJ report found that 21.6 percent of rape victims were first raped before the age of twelve; 32.4 percent were first raped between 12–17; and 29.4 percent were first raped between 18–24.⁵² Disturbingly, the findings of the NIJ report also suggest the risk of being raped as a child or adolescent has increased steadily for women over the past half century.⁵³

Victims often know their attackers.⁵⁴ Stranger rapes account for no more than 10 percent or less of all rapes.⁵⁵ Rather, the victim usually knows her attacker and may have ongoing social, familial, or sexual relations with him.⁵⁶ The CDC reported that 30.4 percent of rapists are intimate partners with the victim, 23.7 percent are family members, and 20 percent are acquaintances.⁵⁷ Statistics from the National Victim Center and Crime Victims Research and Treatment Center show that over 75 percent of rape victims were raped by someone they know.⁵⁸ Of those raped by someone they know, 9 percent were raped by husbands or ex-husbands, 11 percent by fathers or step-fathers, 10 percent by boyfriends or ex-boyfriends, 16 percent by other relatives, and 29 percent by non-relative acquaintances.⁵⁹

Women do become pregnant as a result of rape. A 1992 study conducted by the Department of Obstetrics and Gynecology at the Medical University of South Carolina found that the national rape-related pregnancy rate is 5 percent per rape among victims of reproductive age (age 12–45).⁶⁰ The study found that, among thirty-four cases of rape-related pregnancy, the majority of rape-related pregnancies occurred among adolescents and were caused by a perpetrator the victim knew.⁶¹ Only 11.7 percent of the victims received immediate medical attention after the rape, and 47.1 percent received no medical attention related to the rape.⁶² Of the women who became pregnant as a result of the rape, 32.2 percent opted to keep the child, 50 percent had an abortion, 5.9 percent placed the child for adoption, and 11.8 percent had a spontaneous abortion.⁶³ The study also found that 32.4 percent of victims did not discover they were pregnant until

51. NIJ REPORT, *supra* note 33, at 18.

52. *Id.*

53. *Id.* at 19.

54. Wells & Motley, *supra* note 42, at 129–30 (noting that feminists have been pointing out for decades that most rapes are not stranger rapes).

55. Mahkorn, *supra* note 40, at 434–35.

56. *Id.*

57. CTRS. FOR DISEASE CONTROL & PREVENTION, *Sexual Violence: Facts at a Glance*, *supra* note 32.

58. NAT'L VICTIM CENT. & CRIME VICTIMS RESEARCH & TREATMENT CTR, RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992).

59. *Id.*

60. Melissa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 AM. J. OBSTET. GYNECOL. 320, 320 (1996). This study, a three-year longitudinal survey comprised of a national sample of 4,008 adult American women, assessed the prevalence and incident of rape and related mental health outcomes. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

63. *Id.*

they had entered their second trimester.⁶⁴ The researchers concluded that “[r]ape-related pregnancy occurs with significant frequency.”⁶⁵ It is estimated that there are about 25,000 rape-related pregnancies in the U.S. each year.⁶⁶

While there are no studies that report how many rapists have parental rights, women have spoken of the torment they are forced to endure as a result of sharing parental rights with the men who raped them.⁶⁷ For instance, one woman relayed her story as follows:

I was raped in [North Carolina] and the rapist won “[j]oint” custody. Torment does not come close to describe what I live [The courts] have not only tied and bound me to a rapist, but also the innocent child that was conceived by VIOLENCE! [The rapist’s] violence has earned him even more control over my life.⁶⁸

In summary, rape is prevalent, rape is underreported, rape occurs often to minors, the majority of rape victims know their attackers, very few victims see their attacker tried, and even fewer see their attacker convicted. Moreover, women do become pregnant as a result of rape, carry their pregnancy to term, and keep and raise the child. To provide adequate protection to rape victims, all of these realities must be taken into account.

IV. LEGISLATION IS NECESSARY

Legislation that addresses the parental rights of rapists is necessary. Without legislation, rape victims are left unprotected and are stripped of real choice. Further, legislation is necessary because abortion does not solve the problem of rapists having parental rights.

A. Abortion Does Not Solve the Problem of Rapists Having Parental Rights

Women who become pregnant as a result of rape have two options: they can carry the pregnancy to term, or they can have an abortion. Opting for an abortion eliminates the possibility of the victim being forced to raise her child with the rapist or of the victim having to give the rapist notice and obtain his consent before placing the child for adoption. While abortion may seem to solve the problem of rapists having parental rights, it is not a feasible option for all rape victims.

Rape victims may face delays in obtaining an abortion; thus, their only

64. *Id.*

65. *Id.*

66. Stewart & Trussell, *supra* note 30, at 228. This estimate is based on the assumption that there has been a decline in the prevalence of rape since 1992. *Id.*

67. See Prewitt, *supra* note 8, at 831–32. One woman wrote, “I was raped . . . and the rapist has been taking me to court for 5 years for the right to see his son I am being tormented to death. I just want to die.” *Id.* at 831. In another case, the court found insufficient evidence that the woman had been raped and ruled that she must share parental responsibilities with the alleged rapist. *Id.* at 832. She wrote, “I struggle . . . to move on with my life and wonder how . . . to do so when I have to see this man every other day Our system needs to be revamped but I need help now.” *Id.* at 832.

68. *Id.* at 831.

option for an abortion may be a second trimester abortion. As discussed *supra*, many rape victims are under eighteen years old.⁶⁹ Consequently, they are not always aware of the signs of pregnancy,⁷⁰ or they may be embarrassed or ashamed about what happened and may not tell anyone about the rape until the pregnancy has progressed. A rape victim relayed the following story:

When she was sixteen she disobeyed her parents and went to a drive-in movie with a guy. He raped her. She thought it was not a “real” rape because he was not a stranger. Further, because she disobeyed her parents, she thought it was her fault. The rapist threatened her not to tell anyone. No one found out about the rape until she was six months along in her pregnancy.⁷¹

Delays in obtaining an abortion also occur with older women. A woman may be conflicted about whether or not to have an abortion and may delay the procedure.⁷² Also, some rape victims may know early on they are pregnant but not know if the pregnancy is a result of the rape or other consensual sexual acts.⁷³ Most paternity testing cannot be done until at least the tenth week of pregnancy.⁷⁴ Even then, the testing must be approved by a doctor, and it carries the risk of miscarriage and can be expensive.⁷⁵ Thus, by the time a woman learns who the baby’s father is, she may be in her second trimester.

While women do have second trimester abortions, there are challenges to obtaining them. Fewer doctors offer these procedures, they are substantially more expensive than first trimester abortions, they carry more medical risk, and they can be more physically and emotionally difficult for women because they often last two days.⁷⁶ Given the challenges surrounding second trimester abortions, it is not surprising that Sandra Mahkorn, a doctor who has worked

69. See *supra* Section III.

70. See *Second-Trimester Abortion Overview*, THE PRO-CHOICE PUB. EDUC. PROJECT, REPROD. HEALTH TECHS. PROJECT, <http://www.rhnp.org/abortion/documents/Second-TrimesterAbortionFactSheetExternal.pdf> (last visited Mar. 30, 2012).

71. VICTIMS AND VICTORS, SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT 74–75 (David C. Reardon et al. eds., 2000) [hereinafter VICTIMS AND VICTORS]. Another victim told the following story: When she was fifteen she was raped by the father of a family she was staying with while her family was away on vacation. The families knew each other because they went to the same church. She told no one because she did not want anyone to know how she had been “defiled” and she was embarrassed. She was four months into her pregnancy before she told anyone. *Id.* at 89–91.

72. See *Second-Trimester Abortion Overview*, *supra* note 70.

73. Mahkorn, *supra* note 40, at 435–36.

74. *Paternity Testing*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/prenataltesting/paternitytesting.html> (last visited Mar. 30, 2012).

75. *Id.*

76. See *Second-Trimester Abortion Overview*, *supra* note 70 (noting that “[a]bortions after thirteen weeks are much harder to obtain, as there are fewer providers. After sixteen weeks, the number gets smaller still, and still smaller for providers after twenty weeks.”). See also *Types of Abortion Procedures*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/unplannedpregnancy/abortionprocedures.html> (last visited March 30, 2012) (explaining that during the first nine weeks of pregnancy women have the option of a medical abortion; after week nine, the only options are surgical abortions); Mahkorn, *supra* note 40, at 436 (noting that second trimester abortions are more psychologically traumatic).

extensively with rape victims, found that 25 percent of women chose to continue pregnancies that resulted from sexual assault because they were in denial about being pregnant or did not realize they were pregnant until after the first trimester.⁷⁷

In addition, abortion may not be a feasible option for rape victims because some victims are morally opposed to abortion and do not make an exception for rape-related pregnancy. Dr. Mahkorn found that 37.5 percent of women carried a pregnancy resulting from sexual assault to term because they viewed abortion as killing, immoral, or an act of violence.⁷⁸

It is understandable why women who are opposed to abortion would not make an exception for rape-related pregnancies. If these women view abortion as an act of violence or killing, why would the method of conception make a difference? A rape-conceived baby is independent of the act of violence that created it. Further, if a woman believes abortion is wrong and she has an abortion, she will likely suffer mental anguish as a result. Rape counselor Joan Kemp reported that, in her experience, women who terminated their rape-conceived pregnancies suffered the trauma of the abortion longer than the trauma of the rape.⁷⁹ Consequently, she refers to the abortion of rape-related pregnancies the "second rape."⁸⁰

Regardless of the reason, not all women who are raped have abortions. Dr. Mahkorn, in a study of thirty-seven women reporting to have become pregnant as a result of sexual assault, found that twenty-eight chose to continue their pregnancy.⁸¹ David Reardon, in a study of 164 pregnant rape victims, found that 73 percent chose to carry their pregnancies to term.⁸²

Abortion is not the answer to the problem of rapists having parental rights. If a woman does not have an abortion, she is at the mercy of the courts and the legislature to prevent the man who raped her from having parental rights over her child.

B. Lack of Legislation Strips Women of Real Choice

Because women are at the mercy of the courts and the legislature to protect them if they carry their rape-conceived pregnancies to term, one or both of these

77. Sandra Kathleen Mahkorn, *Pregnancy and Sexual Assault*, in THE PSYCHOLOGICAL ASPECTS OF ABORTION 53, 58 (David Mall & Walter F. Watts eds., 1979) [hereinafter PSYCHOLOGICAL ASPECTS OF ABORTION]. This study was comprised of 37 women reporting to have become pregnant as a result of sexual assault. *Id.*

78. *Id.*

79. Joan Kemp, *Abortion: The Second Rape*, FEMINISTSFORLIFE.ORG (2008), http://www.feministsforlife.org/FFL_topics/victory/2ndrape.htm.

80. *Id.*

81. PSYCHOLOGICAL ASPECTS OF ABORTION, *supra* note 77, at 58.

82. VICTIMS AND VICTORS, *supra* note 71, at 14. David C. Reardon, the editor of this book and the conductor of the referenced study, is the founder and director of the Elliot institute (a pro-life institute), and he advocates in favor of legislating strict barriers to abortion. As such, his study may be slanted in favor of the pro-life movement. While there are very few studies that explore rape victims' decisions about and views on abortion, Reardon's findings are similar to those of Sandra Mahkorn. See PSYCHOLOGICAL ASPECTS OF ABORTION, *supra* note 77.

branches need to provide some protection. Courts, however, are not likely to provide such protection.

Absent legislation to the contrary, rapist fathers have the same rights as any other fathers. Because parental rights are fundamental rights, courts are not likely to terminate these rights of their own discretion. Further, parental rights can be substantial. Some states have enacted a presumption for joint custody.⁸³ Even if a father does not have joint physical or legal custody, he is almost certain to have visitation rights.⁸⁴ Therefore, absent legislation, a rapist will most likely have parental rights, and these rights could entail significant involvement with the child and the rape victim.⁸⁵

Two cases provide excellent examples of the strength of parental rights and the need for legislation. In *S.J. v. L.T.*, substantial evidence supported that the victim was raped and a child was conceived as a result.⁸⁶ However, the Alaska Supreme Court determined that “[i]nvoluntary termination of parental rights may not be accomplished absent some statutorily mandated procedure.”⁸⁷ The court stressed that the areas where criminal law and family law overlap are best left to the legislature, and it urged the legislature provide courts with guidance on the issue of a rapist’s parental rights.⁸⁸ In *Bobbitt v. Eizenga*, a man was convicted of attempted statutory rape that resulted in the birth of a child.⁸⁹ A North Carolina statute denied the right to custody and visitation for persons convicted of first and second degree rape resulting in pregnancy and a child.⁹⁰ Regardless, the court made clear that without legislation specific to attempted statutory rape, the court would not deny visitation.⁹¹

Absent legislation, if a rape victim carries her pregnancy to term, the determination as to whether the rapist maintains his parental rights, as well as the extent of those rights, rests entirely within a judge’s discretion. Because parental rights are fundamental, a judge will likely allow the rapist to maintain all, or at least some, of his parental rights. Consequently, if a woman carries her pregnancy to term and keeps her child, she takes the real risk that she will have

83. See Tracy, *supra* note 15, at 155.

84. See Ellman, *supra* note 2, at 694.

85. See Prewitt, *supra* note 8, at 832–34. For a woman who has been raped, sharing parental responsibilities and having contact with the man responsible for the rape is far from a minor inconvenience. See *id.* Rather, “raped women who are forced to share custody and visitation with their rapists may never overcome their rapes. By being tethered to their rapists they are continually forced ‘to experience over and over the victimization that occurred at the time of the rape.’” *Id.* at 832–33. This lack of healing may also affect the woman’s parenting abilities. *Id.* at 833. Thus, these women are caught in an impossible situation. *Id.* at 834. “To effectively parent their children, these raped women must adequately overcome their victimization; however, in order to do that, these women must be able to escape from the ‘triggers’ that make healing from their victimization impossible.” *Id.*

86. *S.J. v. L.T.*, 727 P.2d 789, 800 (Alaska 1986) (Burke, J., dissenting).

87. *Id.* at 795.

88. *Id.*

89. *Bobbitt v. Eizenga*, 715 S.E.2d 613, 614 (N.C. Ct. App. 2011).

90. See N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c) (West 2010); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2010).

91. *Bobbitt*, 715 S.E.2d at 616.

to raise her child with the man who raped her. If she opts for an adoption, she takes the risk that she will have to give notice to the rapist father and obtain his consent. Thus, the only sure way a victim can avoid the possibility of a rapist having parental rights is to have an abortion.

A pregnant rape victim, just like any other pregnant woman, should have the choice to carry her pregnancy to term or have an abortion. She should also have the choice to keep her child or place the child for adoption. For rape victims to have real choice, some form of protection must exist that will prevent a rapist from maintaining parental rights. Because courts do not provide this protection, legislation is necessary.

V. EXISTING LEGISLATION

Legislation is necessary to protect rape victims, but the question then becomes: What must legislation include so that it provides adequate protection to rape victims? To answer this question, it is helpful to explore existing legislation.

A. An Overview of Existing Legislation

Problems have emerged as a result of rapists having parental rights and have spurred some states to enact legislation to address this issue. For instance, Sam Ellis, a Republican representative of the 39th district of North Carolina, spearheaded legislation to prevent rapists from asserting parental rights.⁹² Ellis realized the need for such legislation after he heard the story of a woman who became pregnant as a result of rape and needed the consent of the birth father to place the child for adoption.⁹³ The rapist, who was in custody awaiting trial for the rape, told his victim he would consent to the adoption if she agreed not to testify against him.⁹⁴ In Maryland, a fourteen-year-old girl's mother was hospitalized after attempting suicide.⁹⁵ The mother told social workers that her daughter was conceived after she was repeatedly raped by her stepfather.⁹⁶ After the mother's suicide attempt, the state asked the juvenile judge to transfer custody of the girl to relatives, but the judge stated that under Maryland law the father's "rights and wishes need to be considered in planning for this child."⁹⁷ This event sparked a push for legislation in Maryland to prevent rapists from asserting parental rights.⁹⁸

Thirty-one states have enacted some form of legislation to address the

92. Sheehan, *supra* note 3, at B1.

93. *Id.*

94. *Id.*

95. Gadi Dechter, *Rape Suspects' Parental Rights Under Debate*, BALT. SUN, Mar. 5, 2008, at 1A.

96. *Id.*

97. *Id.*

98. *Id.* Ultimately, the proposed bill in Md. (H.D. 648, 2007 Leg., 423rd Sess. (Md. 2007)) did not pass in the state's House of Delegates. Telephone message: Lisae Jordan, legal counsel for Maryland Coalition Against Sexual Assault (Oct. 4, 2011) (on file with author). The bill did pass in the state's Senate. S.B. 679, 2007 Leg., 423rd Sess. (Md. 2007).

problem of rapists having parental rights.⁹⁹ Unfortunately, the vast majority of this legislation fails to provide real protection to rape victims. The legislation can be divided into four categories: 1) legislation that limits a rapist's parental rights as they relate to adoption, 2) legislation that limits a rapist's parental rights to visitation, 3) legislation that limits a rapist's parental rights to custody and visitation, and 4) legislation that terminates all of a rapist's parental rights. Within these categories are two subcategories: 1) states that require the rapist be convicted of rape before the legislation has any effect and states that do not require a conviction, and 2) states that give courts discretion regarding the limitation of the parental rights of rapists and states that mandate the limitation of such rights.

i. Legislation that Limits a Rapist Father's Rights Concerning Adoption

Twenty-six states have enacted legislation permitting courts to allow a rape victim to place her child for adoption without the consent of the father if the child was conceived as a result of rape.¹⁰⁰ Of these states, twelve limit their legislation to adoption.¹⁰¹ In other words, in these twelve states, the rapist father need not be provided notice or give consent for the child to be placed for adoption. However, if a rape victim keeps her child, these states have absolutely no safeguards that will prevent a rapist father from asserting his other parental

99. See ALASKA STAT. § 25.23.180(c)(3) (2010); CAL. FAM. CODE § 3030(b) (West 2004); CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G) (West 2004); IDAHO CODE ANN. § 16-2005(2)(a) (2009); 750 ILL. COMP. STAT. ANN. 50/8 (West 1993); IND. CODE §31-19-9-8(4) (2007); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); LA. CIV. CODE ANN. art. 137 (2012); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MICH. COMP. LAWS ANN. § 722.25(2) (West 2011); MO. ANN. STAT. § 211.447.5(5) (West 2011); MONT. CODE ANN. § 41-3-609(1)(c) (2011); NEB. REV. STAT. ANN. § 43-104.15 (LexisNexis 2011); NEV. STAT. ANN. § 125C.210 (LexisNexis 2010); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002); N.M. STAT. ANN. § 32A-5-19 (LexisNexis 2010); N.Y. DOM. REL. LAW § 111-a (McKinny 2010); N.C. GEN. STAT. ANN. §§ 14-27.2(c) -14-27.3(c) (West 2010); OHIO REV. CODE ANN. § 3107.07(F) (West 2011); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws, *available at* www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf; 23 PA. CONS. STAT. ANN. § 2511(a)(7) (West 2010); S.C. CODE ANN. § 63-9-320(3) (2008); S.D. CODIFIED LAWS § 25-6-4(6A) (2011); TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2007); UTAH CODE ANN. § 78B-6-111 (2008); VA. CODE ANN. § 63.2-1233(6) (2007); WASH. REV. CODE ANN. § 26.33.170(2)(b) (West 2005); WIS. STAT. ANN. § 48.415(9) (West 2009); WIS. STAT. ANN. § 48.42 (West 2009); WYO. STAT. ANN. § 1-22-110(a)(viii) (2011).

100. See ALASKA STAT. § 25.23.180(c)(3); CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G); IDAHO CODE ANN. § 16-2005(2)(a); 750 ILL. COMP. STAT. ANN. 50/8; IND. CODE §31-19-9-8(4); KAN. STAT. ANN. § 59-2136(h)(1)(F); ME. REV. STAT. ANN. tit. 19-A § 1658; MO. ANN. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; N.Y. DOM. REL. LAW § 111-a; N.C. GEN. STAT. ANN. §§ 14-27.2(c) -14-27.3(c); OHIO REV. CODE ANN. § 3107.07(F); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; 23 PA. CONS. STAT. ANN. § 2511(a)(7); S.C. CODE ANN. § 63-9-320(3); S.D. CODIFIED LAWS § 25-6-4(6A); TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; UTAH CODE ANN. § 78B-6-111; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WIS. STAT. ANN. § 48.415(9); WYO. STAT. ANN. § 1-22-110(a)(viii).

101. See ALASKA STAT. § 25.23.180(c)(3); 750 ILL. COMP. STAT. ANN. 50/8(a)(5); IND. CODE §31-19-9-8(4); NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; N.Y. DOM. REL. LAW § 111-a; OHIO REV. CODE ANN. § 3107.07(F); S.C. CODE ANN. § 63-9-320; UTAH CODE ANN. § 78B-6-111; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

rights, such as custody and visitation.¹⁰²

The remaining fourteen states either allow for the termination of other parental rights in addition to the parental rights surrounding adoption, or they allow for the termination of all of a rapist father's parental rights, including the right to notice and consent for adoption.¹⁰³ These states provide more comprehensive protection to rape victims.

Of the twenty-six states that address adoption, fourteen require the rapist be convicted of rape before a rape victim is permitted to place her child for adoption without meeting the state's notification and consent requirements.¹⁰⁴ This is problematic because, as discussed *supra*, only a very small portion of rapes result in a conviction.¹⁰⁵ The remaining twelve states provide more protection because they do not require a conviction before the statutory protections are triggered.¹⁰⁶ For instance, Nebraska does not require that notice of adoption be given to a father "[i]f the information provided in the biological mother's affidavit . . . presents clear evidence that . . . the child . . . was the result of sexual assault."¹⁰⁷

ii. Legislation that Limits a Rapist Father's Rights to Visitation

Two states have enacted legislation that restricts a rapist fathers' visitation rights. South Dakota allows courts to prohibit, revoke, or restrict visitation rights for any person who has caused a child to be conceived as a result of rape.¹⁰⁸ Louisiana mandates if a child is conceived as a result of felony rape, the parent who committed the rape must be denied visitation with the child.¹⁰⁹ These

102. See ALASKA STAT. § 25.23.180(c)(3); 750 ILL. COMP. STAT. ANN. 50/8(a)(5); IND. CODE §31-19-9-8(4); NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; N.Y. DOM. REL. LAW § 111-a; OHIO REV. CODE ANN. § 3107.07(F); S.C. CODE ANN. § 63-9-320; UTAH CODE ANN. § 78B-6-111; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

103. South Dakota restricts rights to custody and visitation. See S.D. CODIFIED LAWS §§ 25-6-4(6A), 25-4A-20 (2011). The remainder of the statutes allow for the termination of all parental rights. See CONN. GEN. STAT. § 45(a)-717(g)(2)(G); IDAHO CODE ANN. § 16-2005(2)(a); KAN. STAT. ANN. § 59-2136(h)(1)(F); ME. REV. STAT. ANN. tit. 19-A § 1658; MO. REV. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); N.C. GEN. STAT. ANN. §§ 14-27.2(c) -14-27.3(c); OKLA. STAT. ANN. tit. 10A §1-4-904(B)(11); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; 23 PA. CONS. STAT. ANN. § 2511(a)(7); TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; WIS. STAT. § 48.415(9).

104. See CONN. GEN. STAT. § 45(a)-717(g)(2)(G); IND. CODE §31-19-9-8(4); ME. REV. STAT. ANN. tit. 19-A § 1658; MO. ANN. STAT. § 211.447.5(5) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c); N.Y. DOM. REL. LAW § 111-a; N.C. GEN. STAT. ANN. §§ 14-27.2(c) -14-27.3(c); OHIO REV. CODE ANN. § 3107.07(F); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

105. See *supra* Section II.

106. See ALASKA STAT. § 25.23.180(c)(3); IDAHO CODE ANN. § 16-2005(2)(a); 750 ILL. COMP. STAT. ANN. 50/8(a)(5); KAN. STAT. ANN. § 59-2136(h)(1)(F); NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; OKLA. STAT. ANN. tit. 10A §1-4-904(B)(11); 23 PA. CONS. STAT. ANN. § 2511(a)(7); S.D. CODIFIED LAWS § 25-6-4(6A); S.C. CODE ANN. § 63-9-320(3); UTAH CODE ANN. § 78B-6-111; WIS. STAT. § 48.415(9).

107. NEB. REV. STAT. ANN. § 43-104.15.

108. S.D. CODIFIED LAWS § 25-4A-20.

109. LA. CIV. CODE ANN. art. 137 (2012).

statutes provide insufficient protection, however, because both leave open the possibility that a rapist father could obtain custody of the rape-conceived child.

iii. Legislation that Limits a Rapist Father's Rights to Visitation and Custody

Four states limit a rapist father's rights to both visitation and custody. California and Michigan mandate that courts not award custody or visitation to a parent convicted of rape if the child is a result of the rape.¹¹⁰ Nevada and New Jersey mandate that the court not award custody or visitation to a parent convicted of sexual assault when the child is a result of said assault unless it is in the best interest of the child.¹¹¹ While these statutes provide more comprehensive protection to a rape victim, they only provide protection when the rapist is convicted. Also, these statutes do not free a woman from notice and consent requirements if she places the child for adoption.

iv. Legislation that Terminates All of a Rapist Father's Parental Rights—Conviction Required

Eight states allow for the termination of all parental rights if the rapist father has been convicted of rape or sexual assault.¹¹² Only two of these states require a court terminate a rapist father's parental rights.¹¹³

Connecticut, Missouri, Montana, Oregon, Tennessee, and Texas give courts the discretion to terminate all parental rights if the child resulted from sexual assault or forcible rape and the father has been convicted of such an offense.¹¹⁴ These statutes allow for termination of a rapist father's right to notice and consent for adoption, visitation, and custody, and so provide more protection for rape victims. These protections, however, are not activated unless the rapist father has been convicted of the rape in question.¹¹⁵ Again, this is problematic because most rapes do not result in a conviction. Moreover, even if a father is

110. CAL. FAM. CODE § 3030(b) (West 2004); MICH. COMP. LAWS ANN. §§ 722.25(2), 722.27(a)(4) (West 2011). In Michigan, visitation is referred to as "parenting time." *See id.*

111. NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011) (prohibiting custody or visitation unless the natural mother consents or it is in the best interest of the child); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002) (prohibiting custody or visitation except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded).

112. *See* CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G) (West 2004); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MO. ANN. STAT. § 211.447.5(5) (West 2011) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c) (2011); N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c) (West 2010); OR. REV. STAT. § 419B.502 (2011), amended by Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws, available at www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf; TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2002).

113. *See* ME. REV. STAT. ANN. tit. 19-A § 1658; N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2010).

114. CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G); MO. ANN. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007.

115. Missouri requires a conviction or a guilty plea. MO. ANN. STAT. § 211.447.5(5). This may provide more protection to rape victims. However, to obtain a guilty plea, a victim has to report the rape, which many victims do not do. *See supra* Section III.

convicted of rape, the court still has the discretion to decide whether or not to terminate his parental rights.

Maine provides stronger protection for rape victims because its statute mandates a court terminate all parental rights if a father is convicted of rape and the conviction involves sexual intercourse that results in conception.¹¹⁶ Similarly, in North Carolina, more protection is provided to rape victims because under the North Carolina statutes a father convicted of rape has no rights to custody, visitation, or adoption when a child is conceived by his rape.¹¹⁷ In these two states, judges' discretion is curtailed, giving the rape victim more certain protection. However, Maine and North Carolina, like the aforementioned states, require a conviction for rape victims to be protected by their statutes.

v. Legislation that Terminates a Rapist Father's Parental Rights—Conviction Not Required

Five states do not require a conviction for judges to terminate all of a rapist father's parental rights.¹¹⁸ Pennsylvania gives courts the discretion to terminate all parental rights "if the parent is the father of a child conceived as a result of rape or incest."¹¹⁹ In Wisconsin, parenthood as a result of sexual assault is grounds for termination of parental rights.¹²⁰ Such parenthood can be proven by a conviction or by evidence produced at a fact-finding hearing.¹²¹ Also, in Wisconsin, a mother does not have to provide a father with notice that she is attempting to terminate his parental rights if the child is a result of sexual assault.¹²² In both Idaho and Oklahoma, courts can terminate parental rights based on a finding that the child was born as a result of rape.¹²³ In Kansas, courts may order that parental rights be terminated if "the birth of the child was the result of the rape of the mother."¹²⁴

116. ME. REV. STAT. ANN. tit. 19-A § 1658. Under the Maine statute, "if petitioner proves the allegations . . . by a preponderance of the evidence, the court shall terminate the parental rights and responsibilities of the parent." *Id.* Exceptions do exist permitting the court to not terminate a rapist father's parental rights. *See id.* These exceptions include if the woman tells the court that even though the father was convicted, the act was consensual, or the woman opposes the termination of such rights. *See id.*

117. *See* N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c) (stating: "[u]pon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48, or Subchapter 1 of Chapter 7B of the General Statutes."); N.C. GEN. STAT. ANN. § 50-13.1(a) (stating "[a]ny person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the minor child may not claim the right to custody of that minor child. Unless, a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both").

118. *See* IDAHO CODE ANN. § 16-2005(2)(a) (2009); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); 23 PA. CONS. STAT. ANN. § 2511(a)(7) (West 2010); WIS. STAT. ANN. § 48.415(9)(b) (West 2009).

119. 23 PA. CONS. STAT. ANN. § 2511(a)(7).

120. WIS. STAT. ANN. § 48.415(9).

121. *Id.*

122. WIS. STAT. ANN. § 48.42(2m).

123. IDAHO CODE ANN. § 16-2005(2)(a); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11).

124. KAN. STAT. ANN. § 59-2136(h)(1)(F).

In the majority of the above states, the burden of proof in cases involving the termination of parental rights is typically clear and convincing evidence, although the statutes do not specify this standard.¹²⁵ Kansas, however, does specify that the burden of proof is clear and convincing evidence.¹²⁶

These statutes provide the most comprehensive protection to rape victims. However, none of these states require the termination of the parental rights of rapist fathers even if there is clear and convincing evidence that the child is the result of a rape perpetrated by the father. Moreover, none of these states mandate the termination of parental rights even if the father was convicted of rape and the child resulted from the rape.

B. Shortcomings of Existing Legislation

While it is commendable that some states have enacted statutes attempting to limit the rights of rapist fathers, most of the current statutes fall short of providing real protection to rape victims.

i. Statutes that Address Adoption

The statutes that only address adoption are far from sufficient, as they do not provide any protection to rape victims who keep their babies.¹²⁷ In states that have such statutes, if a rape victim keeps her baby, the rapist father has parental rights just like any other father. It seems strange that some states recognize that rape victims need protection from rapist fathers asserting parental rights yet only provide protection for women who place their children for adoption. These states are possibly operating under the misconception that women either abort their rape-conceived pregnancies or place their children for adoption. However, studies have shown that more women raise their rape-conceived children than place them for adoption. For instance, one study found that in 32.2 percent of the cases, the woman kept the child, and in only 5.9 percent of the cases did the woman place the child for adoption.¹²⁸ Another study found that in 26 percent of the cases, the woman had an abortion; of the 73 percent that carried their pregnancy to term, only 36 percent placed the child for adoption while the remaining 64 percent raised their child.¹²⁹

125. See IDAHO CODE ANN. § 16-2005(2)(a) (Statutory Notes on Standard of Proof); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (Notes of Decs. on Burden of Proof); 23 PA. CONS. STAT. ANN. § 2511 (Notes of Decs. on Clear and Convincing Evidence); WIS. STAT. ANN. § 48.42 (Notes of Decs. on Presumptions and Burden of Proof).

126. KAN. STAT. ANN. § 59-2136(h)(1)(F).

127. See ALASKA STAT. § 25.23.180 (2010); 750 ILL. COMP. STAT. ANN. 50/8 (West 1993); IND. CODE §31-19-9-8 (2007); NEB. REV. STAT. ANN § 43-104.15 (LexisNexis 2011); N.M. STAT. ANN. § 32A-5-19 (West 1999); N.Y. DOM. REL. LAW § 111-a (McKinny 2010); OHIO REV. CODE ANN. § 3107.07(F) (West 2011); S.C. CODE ANN. § 63-9-320 (2008); UTAH CODE ANN. § 78B-6-111 (2008); VA. CODE ANN. § 63.2-1233(6) (2007); WASH. REV. CODE ANN. § 26.33.170(2)(b) (West 2005); WYO. STAT. ANN. § 1-22-110(a)(viii) (2011).

128. Holmes et al., *supra* note 60, at 320.

129. VICTIMS AND VICTORS, *supra* note 71, at 19.

ii. Statutes that Address Visitation and Custody

Statutes that allow courts to terminate only a rapist's right to visitation do little to protect a woman who becomes pregnant as a result of rape.¹³⁰ Under these statutes, a rapist father can still have legal and/or physical custody. Also, statutes that address only visitation and custody leave open the possibility that if a child is placed for adoption, a rapist father may have to be notified of the adoption and may have to consent to it.¹³¹

iii. Statutes that Require a Conviction

Statutes that require a conviction before empowering courts to restrict or terminate a rapist's parental rights do not provide real protection to rape victims. Of the thirty-one states that have enacted statutes to limit the parental rights of rapists, eighteen require the rapist be convicted before a victim receives statutory protection.¹³² Of those eighteen, six require a conviction just to terminate a rapist father's rights to notice and consent for adoption.¹³³ The remaining twelve states require a conviction to limit a rapist father's right to visitation and custody or to terminate all of the rapist father's parental rights.¹³⁴

As discussed *supra* in Section III, the majority of rape victims never see their attacker convicted. Most rapes are not reported, and of the few that are, only a small percentage are prosecuted; of those prosecuted, less than half result in a conviction.¹³⁵ Thus, for the majority of rape victims, statutes that require a conviction provide absolutely no protection.

Even if a rape victim reports the rape, these statutes still do not provide adequate protection. Ultimately, it is the prosecutor who decides to prosecute the rapist, not the rape victim. As such, a rape victim has little to no control over whether her attacker is tried and convicted. The prosecutor also decides whether to offer and accept a plea bargain on the rape charges. If a rapist pleads guilty to

130. LA. CIV. CODE ANN. art. 137 (2008); S.D. CODIFIED LAWS §§ 25-6-4(6A), 25-4A-20 (2011).

131. See CAL. FAM. CODE § 3030(b) (West 2004); MICH. COMP. LAWS ANN. § 722.25 (2) (West 2011); NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002).

132. See CAL. FAM. CODE § 3030(b); CONN. GEN. STAT. § 45(a)-717(g)(2)(G) (2004); IND. CODE § 31-19-9-8 (2007); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MICH. COMP. LAWS ANN. § 722.25(2); MO. ANN. STAT. § 211.447.5(5) (West 2011) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c) (2011); NEV. REV. STAT. ANN. § 125C.210; N.J. STAT. ANN. § 9:2-4.1(a); N.Y. DOM. REL. LAW § 111-a (McKinny 2010); N.C. GEN. STAT. §§ 14-27.2(c) -14-27.3(c); OHIO REV. CODE ANN. § 3107.07(F) (West 2011); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws, *available at* www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf; TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2007); VA. CODE ANN. § 63.2-1233(6) (2007); WASH. REV. CODE ANN. § 26.33.170(2)(b) (West 2005); WYO. STAT. ANN. § 1-22-110(a)(viii) (2011).

133. See IND. CODE § 31-19-9-8; N.Y. DOM. REL. LAW § 111-a; OHIO REV. CODE ANN. § 3107.07(F); VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

134. See CAL. FAM. CODE § 3030(b); CONN. GEN. STAT. § 45(a)-717(g)(2)(G); ME. REV. STAT. ANN. tit. 19-A § 1658; MICH. COMP. LAWS ANN. § 722.25(2); MO. ANN. STAT. § 211.447.5(5) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c); NEV. REV. STAT. ANN. § 125C.210; N.J. STAT. ANN. § 9:2-4.1(a); N.C. GEN. STAT. §§ 14-27.2(c) -14-27.3(c); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; TENN. CODE ANN. §§ 36-1-113(c),(g)(10); TEX. FAM. CODE ANN. § 161.007.

135. See *supra* Section III.

a lesser offense and avoids a conviction, a rape victim will be provided no protection even though she reported the crime and charges were brought against her attacker.

Further, in states where a rapist's parental rights are not restricted unless he is convicted of rape, a rape victim will not know until the rapist is actually convicted if she will receive statutory protection. This is problematic because trials can be lengthy.¹³⁶ During the course of a trial, a rape victim will likely have to make a decision to carry the pregnancy to term, place the child for adoption, or keep the child, all the while not knowing if she will be afforded statutory protection. If she chooses to place the child for adoption while the trial is in progress, because the rapist father has not yet been convicted, he will be able to exercise his right to notice and consent for adoption. This means he could successfully block an adoption even while standing trial.

Even if a rapist is convicted, there is always the possibility that the conviction will be overturned on appeal. Appeals can take years. Thus, a woman will not know until the final appeal whether the statute will protect her.

iv. Statutes that Do Not Require a Conviction

Statutes that allow courts to terminate the parental rights of rapists, even when the accused has not been convicted of rape, provide more protection to rape victims. However, there are only five states that have such statutes, and even these are flawed.¹³⁷

None of these five statutes require a court terminate a rapist's parental rights, even after a woman has met the burden of proving by clear and convincing evidence that she was raped and a child resulted.¹³⁸ Rather, judges have discretion whether or not to terminate these rights. This is problematic because judicial discretion can result in a great deal of uncertainty. This uncertainty prevents rape victims from knowing if they will receive statutory protection and may prevent them from being able to freely choose to keep and raise their rape-conceived children.

Moreover, none of these states require that a judge terminate a father's parental rights, even if the father has been convicted of rape and the child results from this crime.¹³⁹ While it may seem that a judge would deny parental rights to

136. See Brian J. Ostrom & Roger A. Hanson, NAT'L INST. OF JUSTICE, *Efficiency, Timeliness and Quality: A New Perspective From Nine State Criminal Trial Courts* (2000), <http://www.ncjrs.gov/pdffiles1/nij/181942.pdf>. Timeliness of trials has long been an issue. The National Institute of Justice, the National Center for State Courts, and the American Prosecutors Research Institute conducted a study of nine state criminal trial systems. *Id.* at 1. Pursuant to American Bar Association standards, courts should dispose of 98 percent of their cases in 180 days from the date of arrest. *Id.* at 5. This study modified that standard calling for 98 percent of all felonies to be resolved within 180 days of indictment. *Id.* None of the courts in the study met this standard. *Id.*

137. See IDAHO CODE ANN. § 16-2005(2)(a) (2009); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); 23 PA. CONS. STAT. ANN. § 2511 (West 2010); WIS. STAT. ANN. § 48.415(9) (West 2009).

138. See IDAHO CODE ANN. § 16-2005(2)(a); KAN. STAT. ANN. § 59-2136(h)(1)(F); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11); 23 PA. CONS. STAT. ANN. § 2511; WIS. STAT. ANN. § 48.415(9).

139. See IDAHO CODE ANN. § 16-2005(2)(a); KAN. STAT. ANN. § 59-2136(h)(1)(F); OKLA. STAT. ANN.

a convicted rapist who fathered a child as a result of his crime, this is not so, as illustrated by a disturbing case in Pennsylvania.¹⁴⁰ In 2009, a Pennsylvania couple became foster parents of a three-year-old child when his mother became too overwhelmed to care for him.¹⁴¹ The child was conceived through rape.¹⁴² At three years old he was still in diapers and not speaking.¹⁴³ Two years later, after living with the foster parents, he was potty-trained, talking, and attending school.¹⁴⁴ The foster parents decided to adopt him.¹⁴⁵ However, the boy's biological father (and the mother's rapist) asserted his parental rights and blocked the adoption.¹⁴⁶ Even though the father was currently on trial for his fifth Megan's Law violation and living in the basement of someone's home, the judge granted him custody.¹⁴⁷ The little boy regressed, and at five years old he was back to wearing diapers.¹⁴⁸ As a result of this case, a bill was introduced in Pennsylvania that would require a judge to not award custody, partial custody, or visitation to a father of a child conceived through rape.¹⁴⁹

Not only do these statutes provide too little protection to rape victims, but because they apply to all rape, including statutory rape, they also carry the potential of stripping legitimate fathers of their parental rights.¹⁵⁰ Statutory rape, as opposed to first and second degree rape, does not require the use of force or a victim's lack of consent.¹⁵¹ A conviction of statutory rape is not necessarily

tit. 10A § 1-4-904(B)(11); 23 PA. CONS. STAT. ANN. § 2511; WIS. STAT. ANN. § 48.415(9).

140. Maria Merlino, *Young Boy Trapped in Complex Family-Court System*, S. PHILADELPHIA PUB. REC., Jan. 27, 2011, at 3. This story prompted Angela Cruz to introduce Pennsylvania House Bill 1395. *See generally* H.B. 1395, 2011-2012 Gen. Assemb., Reg. Sess. (Pa. 2011).

141. Merlino, *supra* note 140, at 3.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. H.B. 1395, 2011-2012 Gen. Assemb., Reg. Sess. (Pa. 2011) (stating, "[c]onsideration of criminal conviction. (b.1) Rape or incest. – No court shall award custody, partial custody, or visitation to a parent who is the father of a child conceived as a result of rape or incest").

150. *See* IDAHO CODE ANN. § 16-2005(2)(a) (2009); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); 23 PA. CONS. STAT. ANN. § 2511 (West 2010); WIS. STAT. ANN. § 48.415(9) (West 2009).

151. In North Carolina, for example, a defendant is guilty of first or second degree rape if he has intercourse with another person "by force and against the will of the other person." N.C. GEN. STAT. ANN. §§ 14-27.2–14-27.3 (West 2010). In contrast, a defendant is guilty of statutory rape if he engages in intercourse or a sexual act with a person who is thirteen, fourteen, or fifteen, and the defendant is at least six years older than the person. § 14-27.7A. Statutory rape does not require the use of force or the non-consent of the victim. *See id.* If force is used, the criminal act is first or second degree rape, not statutory rape. *See* §§ 14-27.2–14-27.3. However, in North Carolina, first degree rape does include intercourse with a victim under the age of 13 if the perpetrator is at least 12 years old and at least four years older than the victim. § 14-27.2. Second degree rape includes intercourse with a mentally disabled or physically helpless person when the perpetrator knows or should know such person is disabled. § 14-27.3. While these acts may not involve force, they likely involve more than a simple mistake about the victim's age and probably are evidence of some depravity on the part of the defendant.

evidence that an individual is violent or dangerous. Rather, a perpetrator could simply have been mistaken about the age of his sexual partner, or his partner may have been too young to legally consent. Not only may such a father deserve parental rights, but it may be in the child's best interest for him to maintain his parental rights.

The question remains: What is required of legislation so that it provides real protection to rape victims? Moreover, what is required of legislation so that it protects rape victims while not stripping legitimate fathers of their parental rights?

VI. PROPOSED LEGISLATION

For legislation to provide real protection to rape victims, the legislation must take into account the realities of rape. Specifically, legislation must recognize that rape is underreported, that rapists are rarely tried for their crimes, and that even more rarely are rapists convicted. Legislation must also take into account the realities of parental rights—parental rights are strong, they are not likely to be denied absent legislation, and any parental rights will allow the rapist to assert some level of control over his victim. Further, legislation must take into account the realities of the family law system. Family law judges have significant discretion, and if they are allowed to exercise this discretion, rape victims may not be afforded consistent and dependable protection.

Taking into account these realities, the following are clear: 1) legislation must not require a conviction before it provides protection; 2) if there is a conviction, it should weigh heavily in favor of the rape victim; 3) legislation must completely terminate all parental rights; 4) legislation must cabin judicial discretion; and 5) legislation must properly balance protection of rape victims with protection of the parental rights of non-rapist fathers.

In order to provide comprehensive protection to rape victims while not stripping legitimate fathers of their parental rights, legislation should separately address cases where the rapist has been convicted and those where he has not.¹⁵²

A. Proposed Legislation—Conviction

When a father has been convicted of rape, legislation could take the following form:

The court shall terminate all of the parental rights and responsibilities of the parent if the parent was convicted of raping the petitioner, the rape was in the first or second degree, and the petitioner proves by a preponderance of the evidence that the rape resulted in the conception of the child.¹⁵³

152. Currently, states that have legislation do not divide the legislation into two segments—one to address when a rapist is convicted and one to address when he is not convicted. Convictions are reliable evidence that the accused committed the crime; thus, cases where a rapist has been convicted should be treated differently than those where he has not been convicted. When statutes do not split these up, it is harder to provide effective protection to both the victim and the accused.

153. This proposed legislation is based on existing legislation in Maine. *See* ME. REV. STAT. ANN. tit.19-A §1658 (1997). However, pursuant to the legislation in Maine, a court must terminate the

This proposed legislation protects rape victims because it recognizes that a conviction is reliable evidence that the accused did commit the crime and, as such, lessens a rape victim's burden of proof. Here, a rape victim's burden is a preponderance of the evidence. To meet this burden, a rape victim only has to prove that it is more likely than not that the rape resulted in the conception of the child. The proposed legislation also protects rape victims because it terminates all of the parental rights of the rapist father, and it cabins the discretion of judges by requiring them to terminate such rights once the mother has met her burden.

In addition to protecting rape victims, the proposed legislation protects the rights of accused fathers. Under this legislation, a father's rights are not automatically terminated even if he is convicted of rape.¹⁵⁴ Rather, the legislation requires that the father be convicted of raping the victim and the victim prove the child was a result of this criminal act, as opposed to some other consensual act. Furthermore, the proposed legislation protects the rights of the accused because it is limited to a conviction for first or second degree rape.

B. Proposed Legislation—No Conviction

When a father has not been convicted of rape, legislation could take the following form:

The court shall terminate all of the parental rights and responsibilities of the parent if the petitioner proves by clear and convincing evidence that the parent raped the petitioner, such rape was in the first or second degree, and the child was conceived as a result of that act.¹⁵⁵

Such legislation provides meaningful protection to a rape victim. First, it does not require a conviction. Rather, it allows the victim to prove by clear and convincing evidence that the rape occurred and the child was a result of that rape. "Clear and convincing evidence" has been defined as "testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue."¹⁵⁶

parental rights of anyone who is convicted of "a crime involving sexual intercourse" if the petitioner shows by a preponderance of the evidence that the sexual intercourse resulted in the child. §1658(2), (3). This is problematic because it requires a judge to terminate the parental rights of even a statutory rapist. The Maine statute does contain an exception whereby the petitioner can inform the court that the sexual act was consensual and the court is then not required to terminate the rapist father's parental rights. §1658 (4)(C). While this does help protect a father, it does not provide sufficient protection. Instead of allowing the father to prove the act was consensual, the legislation relies completely on the mother to testify that the act was consensual before empowering a judge to use his discretion.

154. See OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11). Under this statute, if a man is convicted of rape, the judge can terminate all of his parental rights. OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(8)(b). However, this statute does not require that the man be convicted of raping the petitioner or that the child be a result of the rape. *Id.*

155. This proposed legislation is similar to legislation that was proposed in Maryland. See H.D. 648, 2007 Leg., 423rd Sess. (Md. 2007). Such legislation could also provide for a procedural mechanism by which the petitioner could prove her case, such as through a fact-finding hearing.

156. *In re A.R.M.F.*, 837 A.2d 1231, 1234 (Pa. Super. Ct. 2003). While rape can be hard to prove and, without a conviction, there may be little evidence for the victim to use, judges will be able to

While “clear and convincing evidence” is a significant burden to meet, it is not as difficult as the burden of “beyond a reasonable doubt,” which is required for a criminal conviction. Further, allowing the victim to prove her case by clear and convincing evidence gives the victim greater control. Even if a prosecutor chooses not to prosecute the case or agrees to a plea, under the proposed legislation the victim can still prove to a family court judge that she was raped and the child resulted from such rape.

Second, the proposed legislation terminates all parental rights and cabins the discretion of judges by mandating that a father’s parental rights be terminated if the judge finds by clear and convincing evidence that the father raped the mother and the child resulted from the rape. This protects a rape victim by providing her with certainty that once she meets her burden, she will be afforded comprehensive protection.

Third, the proposed legislation protects the accused. Clear and convincing evidence is a substantial burden. While it is not as onerous as proving a case beyond a reasonable doubt, the “beyond a reasonable doubt” burden is reserved for criminal trials where an accused faces incarceration and a criminal record. Losing parental rights is significant, but it is not as severe as losing one’s physical liberty through incarceration or having a permanent criminal record. Additionally, the proposed legislation protects the rights of the accused because it is limited to first or second degree rape, most notably excluding statutory rape.

It should be noted that the proposed legislation should set forth, possibly in a comment, that if a rapist is acquitted of criminal charges or agrees to a plea, the victim is not foreclosed from proving by clear and convincing evidence that the rape occurred and the child resulted. Just because a father is not convicted or accepts a plea does not mean he did not rape the mother. Rather, it could simply mean that the state did not meet the burden necessary to convict him of a crime. The state bears an onerous burden for criminal convictions, and the failure to meet this burden is not always indicative of innocence.

VII. POTENTIAL PROBLEMS WITH PROPOSED LEGISLATION

There are two main objections the proposed legislation may face: 1) rapists asserting parental rights over their rape-conceived children is not a great enough problem to warrant such legislation, and 2) the legislation does not protect the rights of the accused. In Maryland, legislation similar to the legislation proffered in this note was proposed and did not pass.¹⁵⁷ Both of the above objections were raised in conjunction with the non-passage of the Maryland bill.¹⁵⁸

consider the totality of the circumstances, including the credibility of the accused and the victim, the likelihood of their stories, and other factors like the age of the victim. *See id.* at 1241 (explaining that “[i]t is well established that a court must examine the individual circumstances of each and every case and consider all explanations offered by the parent to determine if the evidence in light of the totality of the circumstances clearly warrants termination”).

157. *See* Md. H.D. 648; Telephone message: Lisae Jordan, legal counsel for Maryland Coalition Against Sexual Assault (Oct. 4, 2011) (on file with author).

158. *See* Dechter, *supra* note 95.

A. Rapists Asserting Parental Rights is Not That Big of a Problem

A concern surrounding the Maryland bill was the idea that rape victims do not often keep their rape-conceived children and, thus, rapists asserting parental rights is not a problem that warrants legislation.¹⁵⁹

Because of the vast underreporting of rape, it is uncertain how many pregnancies result from rape.¹⁶⁰ However, it has been estimated that there are about 25,000 rape-related pregnancies a year.¹⁶¹ Because women do become pregnant as a result of rape and do keep their rape-conceived children, it is possible that a rapist could assert and maintain his parental rights.¹⁶² No studies have determined how many rapists actually have parental rights over their rape-conceived children. Nonetheless, a rapist should never have parental rights over a child conceived by his criminal act. That a lack of proper legislation allows this to happen at all shows the necessity of having legislation in place.

Moreover, in the absence of effective legislation, it is unknown how many women have an abortion because they believe an abortion is the only sure way to protect themselves from sharing parental rights with the man who raped them. Thus, regardless of how many rapists assert and maintain parental rights, legislation must exist to protect women's freedom of choice.

B. Lack of Protection for the Accused

The proposed legislation may also face the objection that it could allow an innocent father to lose his parental rights. This objection will be easier to overcome for the proposed legislation that requires a conviction. However, even the proposed legislation that does not require a conviction has safeguards to prevent an innocent father from losing his parental rights.

i. Legislation Requiring a Conviction

Convictions for rape are difficult to obtain and constitute reliable evidence that the accused committed the crime.¹⁶³ It is shocking that only thirteen states have legislation that allows for the termination of all of a convicted rapist's parental rights.¹⁶⁴ This lack of legislation probably stems from the misconception

159. *See id.* At the bill's hearing a public defender asked advocates how many cases have recently occurred in Maryland that are similar to the case of the 27-year-old mother becoming unfit to care for her child and the courts turning to the alleged rapist father. *Id.* An advocate of the bill said she did not know but said that about 5 percent of rapes result in pregnancy, half of those are aborted, and of those carried to term, 6 percent are placed for adoption. *Id.*

160. *See supra* Section III.

161. Stewart & Trussell, *supra* note 30.

162. *See supra* Section III.

163. The Maryland bill did not differentiate between a convicted rapist and an accused rapist. *See* Md. H.D. 648. If it did make such a distinction, then at least part of the legislation may have passed because a conviction would ease the fear that an innocent father could lose his parental rights. *See* Dechter, *supra* note 95.

164. Once a rapist has been convicted, these statutes allow for the termination of all of his parental rights: CONN. GEN. STAT. § 45(a)-717(g)(2)(G) (West 2004); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MO. ANN. STAT. § 211.447.5(5) (West 2011); MONT. CODE ANN. § 41-3-609(1)(c) (2011); N.C. GEN. STAT. ANN. §§ 14-27.2-14-27.3 (West 2010); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1,

that women do not keep their rape-conceived children as opposed to an objection to the termination of a convicted rapist's parental rights.

In addition to requiring a conviction, this portion of the proposed legislation mandates that a judge terminate a rapist father's parental rights once the victim meets her burden. Of the states with legislation that allows for the termination of the parental rights of convicted rapists, only two states require judges terminate such rights.¹⁶⁵ It is not clear why more states do not cabin the discretion of judges and require them to terminate the parental rights of convicted rapists. It is possible that some states do not mandate the termination of a convicted rapist's parental rights because their legislation is not limited to convicted rapists.¹⁶⁶ It may be more uncertain, therefore, whether or not the accused committed the crime and so it may be beneficial for judges to exercise some discretion. Other states that limit their legislation to convicted rapists may not mandate the termination of parental rights because their legislation encompasses both forcible and non-forcible rape.¹⁶⁷ If these states mandated the termination of the parental rights of convicted rapists, a father convicted of statutory rape would lose his parental rights. Since the proposed legislation requires a conviction and is limited to first and second degree rape, these risks are alleviated.

If states are still hesitant to pass such legislation, the legislation could provide exceptions so that, if it was in the best interest of the child to visit the father, the court could allow visitation rights. For instance, in legislation proposed in Maryland, if good cause for custody or visitation is shown by clear and convincing evidence, the court can order such custody or visitation.¹⁶⁸ However, any exception like this carries the risk that a rape victim will have to raise her child with the man who raped her.

ii. Legislation Not Requiring a Conviction

The proposed legislation not requiring a conviction may face objections that it does not protect the rights of the accused. For example, an objection may be that a man can be accused of rape and acquitted, yet a judge can still terminate his parental rights if the judge finds by clear and convincing evidence that the rape occurred and a child resulted. This was an issue surrounding the non-

2012, ch. 438, 2011 Or. Laws, *available at* www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf; TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2007). The following statutes do not require a conviction, but they do allow for the termination of all of a rapist's parental rights: IDAHO CODE ANN. § 16-2005(2)(a) (2009); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); 23 PA. CONS. STAT. ANN. § 2511(a)(7) (West 2010); WIS. STAT. ANN. § 48.415(9)(b) (West 2009).

165. See ME. REV. STAT. ANN. tit. 19-A § 1658; N.C. GEN. STAT. ANN. §§ 14-27.2-14-27.3.

166. See IDAHO CODE ANN. § 16-2005(2)(a); KAN. STAT. ANN. § 59-2136(h)(1)(F); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11); 23 PA. CONS. STAT. ANN. § 2511(a)(7); WIS. STAT. ANN. § 48.415(9)(b). These statutes allow courts to terminate all of the parental rights of rapists, but the statutes do not specify that the rapist be convicted, nor do they provide different treatment for convicted rapists as opposed to those not convicted.

167. See CONN. GEN. STAT. § 45(a)-717(g)(2)(G); MO. ANN. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws.; TEX. FAM. CODE ANN. § 161.007.

168. Md. H.D. 648.

passage of the Maryland bill.¹⁶⁹ However, as discussed *supra* in Section VI. B., the burden of proof in a criminal trial is onerous because the resulting penalty is severe.¹⁷⁰ If a person is acquitted in a criminal trial, he is not unquestionably innocent. Therefore, just because the accused is acquitted of criminal charges does not mean that he should automatically receive parental rights, especially when evidence exists that he did commit rape and a child was conceived as a result.

Another objection may be that the proposed legislation could allow a woman to fabricate a claim that she was raped, resulting in the termination of an innocent father's rights.¹⁷¹ While this is a legitimate concern, two considerations should ease this fear.

First, and most importantly, a woman has to prove by clear and convincing evidence that she was raped and the child is a result of that rape. This is a heavy burden to bear. Rape is notoriously hard to prove, and because many women do not even report the rape, they may have little evidence available to meet their burden.¹⁷² Nonetheless, this burden exists to protect the accused.¹⁷³

Second, under the proposed legislation, women have a disincentive to have a father's parental rights terminated because if these rights are terminated, the father is not required to pay child support.¹⁷⁴ Raising a child is expensive and is an especially large burden for a single parent.¹⁷⁵ While a woman may not want a

169. See Dechter, *supra* note 95.

170. See *supra* Section VI.B.

171. See Lisa Rein, *Comments on Rape Law Elicit Outrage*, WASH. POST, Apr. 6, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/05/AR2007040502278.html>.

At a hearing on Maryland House Bill 648 the chairman of the House Judiciary Committee recalled the words of a 17th century English jurist who instructed juries to be suspicious of women's claims of rape. *Id.* He further suggested that women could abuse the law by saying they were raped when they were not. *Id.*

172. See *supra* Section III.

173. While this burden is substantial and does protect the accused, it should not be an impossible burden for a rape victim to meet. Even if a rapist is not convicted, a rape victim may still have some evidence available, including evidence resulting from whether she reported the rape, whether she told doctors, nurses, social workers, or family members that she was raped, whether she received medical treatment after the attack, and whether her testimony and depiction of events seems credible.

174. In New Jersey, even if a father is denied custody and visitation, the father's other parental rights are not automatically terminated and the father may still have support obligations. N.J. STAT. ANN. § 9:2-4.1(c) (West 2002). Also, under the proposed Maryland bill, if the court excludes the man as father of the child, the court still may order the man to pay child support. H.D. 648, 2007 Leg., 423rd Sess. (Md. 2007). The legislation proposed in this note does not include such provisions. If a woman knows that she will not receive child support if she succeeds in terminating the rights of the father, she has a disincentive to go forward with fabricated claims. As such, the lack of child support is another safeguard for the accused. Also, the receipt of child support from a rapist is a continual tie between a rapist and his victim. Victims struggle to recover when their rapist continues to be part of their lives. See Prewitt, *supra* note 8. While rape victims in need of money to support their rape-conceived children should receive it, it is questionable whether this money should come from the rapist in the form of child support.

175. MARK LINO, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2009, 32 (2010) (finding that single parent homes with before-tax incomes of \$56,670 or less spend an average of \$25,130 annually on a child and single parent homes with before-tax incomes of \$56,670 or more spend an average of \$102,830 annually on a child).

man to be part of her child's life, she will likely want and need his financial support. However, if a father does not have the money to pay child support, the woman does not need it, or she just wants the father out of her life so badly that she does not care if she receives child support, then she might have incentive to falsely accuse the father of rape in the hopes of terminating his parental rights. Even if a woman brings false allegations, she still has to meet her burden of clear and convincing evidence, which should prevent her from succeeding on a fabricated claim.

While the proposed legislation contains safeguards to protect legitimate fathers, there is always the possibility that an innocent father could lose his parental rights. Given the burden that women must meet, such an occurrence will likely be rare. Further, there are some instances where an injustice to one must be risked because an injustice to another is greater.

Women are in a unique position when it comes to pregnancy, childbirth, and child rearing. In these areas, laws should be, and typically are, promulgated to take the unique circumstances of women into account, even if it means giving rights to women that are denied to men. For instance, a woman can have an abortion without the consent of the biological father, even if he is her husband.¹⁷⁶ In the realm of rape and rape-related pregnancies, women are the ones who must carry the pregnancy or the ones who undergo an abortion. They are also the ones who form a biological connection with their unborn child and, yet, may place their child for adoption. These are burdens only women bear. Women should never feel forced to have an abortion, forced to place their child for adoption, or forced to raise their child with the man who raped them. Such things are appalling. If legislation is not promulgated to protect women, they are forced to do these things.

C. Concluding Remarks on Proposed Legislation

Our system does not function with perfection; not in the realm of criminal law, family law, or any other type of law. The risk that the innocent will be punished and the guilty will go free always exists. Legislation cannot be formulated to ensure that an innocent father always maintains his parental rights. Legislation also cannot be formulated to ensure that a rape victim never has to raise her child with the man who raped her. As a society, we live with this imperfection, but it should not stop the law from searching for the optimal level of justice. Further, having legislation in place to terminate a rapist's parental rights recognizes a woman's right in our society to choose to keep her baby, even if it is a result of rape. Moreover, such legislation demonstrates that we recognize rape as the heinous crime it is and if a woman is raped we will do what we can to protect her from further torment at the hands of her attacker. Such legislation is possible; while it may not be perfect, the proposed legislation properly balances the interests of the accused while providing protection to rape victims.

176. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896–98 (1992).

VIII. CONCLUSION

Women do become pregnant as a result of rape. These women, just like other women, must have the real choice to carry their pregnancy to term, place their child for adoption, or keep and raise their child. Absent some form of protection, a rape victim is stripped of such choice—she must either have an abortion or take the risk that the rapist will become part of her life again. If she places the child for adoption, she risks that she will have to give notice to the rapist and obtain his consent. If she keeps the child, she faces the possibility that she will have to raise her child with the man who raped her.

Courts are not likely to independently terminate a rapist father's parental rights and provide needed protection to rape victims. Thus, for a woman to feel free to keep and raise her rape-conceived child, legislation must be enacted. For legislation to be effective, it must not require the rapist be convicted of rape, it must terminate all of a rapist's parental rights, and it must cabin the discretion of judges.

Some states have promulgated legislation that attempts to protect rape victims; unfortunately, the majority of this legislation does not provide true protection to rape victims. Therefore, as of now, the majority of women who become pregnant as a result of rape are faced with the possibility that, if they carry their pregnancy to term and keep their child, they may have to raise their child with the man who raped them.

Not only should a woman feel free to keep and raise her rape-conceived child, but no man should have rights to a child conceived by his heinous, criminal, and violent act. While parental rights are fundamental, they are not absolute. In the majority of states, if a rape victim keeps and raises her child, the rapist father has all of the same rights as any other father. This is unacceptable and even uncivilized.