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Notes

Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child

MARGOT E.H. STEVENS*

About one in six women in the United States will be a victim of rape. For many of these women, the rape does not end there—this crime against their body will result in an unplanned pregnancy. In recent years, rape awareness has increased both in the government and among the public: a new federal definition of rape encompasses a broader spectrum of victims and pregnancy resulting from rape was splashed across national headlines. But this is not enough. Most states lack sufficient legal protections for a pregnant rape victim: criminal prosecutions and convictions for rape are rare, and many states lack an efficient means through which a victim could terminate her rapist's parental rights over the child. This Note illuminates this legislative omissions by discussing the current statutory schemes in effect and illustrates how judicial applications of these statutes leave many victims and their children without sufficient legal processes. To resolve this inadequacy, this Note suggests changes to the parental rights termination statutes, particularly concerning pregnancies resulting from rape, to create a more predictable outcome and protect the choices a rape victim must make.

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INTRODUCTION

Rape is a serious concern in the United States, but its negative reach extends well beyond the criminal system into the civil system and deteriorates one of the building blocks of our nation: the family. A notable

percentage of U.S. citizens believe, however, that pregnancy will not, or cannot, result from rape, so that rape and families do not belong in the same discussion. "Legitimate rape" made national headlines during the 2012 election campaigns, beginning with Representative Todd Akin's declaration that "[i]f it's a legitimate rape, the female body has ways to try to shut the whole thing down."[1] Akin was not the only candidate to publicly disclose his views on rape. Fellow Republican candidate Richard Mourdock also spoke out about the legitimacy of rape-related pregnancies.[2] These remarks were followed by a marked decrease in the public's approval of these candidates,[3] indicating that the general population is both sensitive and reactive to the issue of rape and rape-related pregnancies. These statements reignited the passion behind public discourse on rape and reproductive rights.[4] Given the social climate surrounding these issues, now is the perfect time to change the legal and social treatment of these issues. This Note hopes builds on this receptive social atmosphere and advocates for a change in the treatment of rape-related pregnancies, specifically concerning the assignment of parental rights to the rapist fathers.[5]

Part I addresses the complexities within the term "rape" itself. The variety and range of definitions provided for the word inevitably results in inconsistencies in identifying the instances and perpetrators thereof. Part II discusses how the variations in defining rape contributes to the inconsistencies in the reporting rates of rape. Part III then identifies the parties involved in instances of rape-related pregnancies: the father, the mother, the child, and the State. Each of these groups has policy interests at stake surrounding the treatment of rape in the civil system for rape-related pregnancies. These interests must be balanced when constructing statutory schemes, and this Note proposes that this balance should be redistributed to more strongly protect the interests of the victim and her child, thereby matching society's policy goals.

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1. Lori Moore, *The Statement and the Reaction*, N.Y. TIMES, Aug. 21, 2012, at A13 (reporting former Representative Todd Akin's belief that there can be no rape-related pregnancies because the female body is capable of preventing conception if it was truly a rape).

2. Michael McAuliff, *Richard Mourdock on Abortion: Pregnancy From Rape is 'Something God Intended'*, HUFFINGTON POST (Oct. 23, 2012, 9:10 PM), http://www.huffingtonpost.com/2012/10/23/richard-mourdock-abortion_n_2007482.html (quoting Mourdock as saying rape-related pregnancies are "something that God intended to happen").

3. *See* Moore, *supra* note 1 (outlining public reaction following Akin's comments).

4. *See, e.g.*, Jeff Black, *Rape Remarks Sink Two Republican Senate Hopefuls*, NBC NEWS (Nov. 7, 2012, 6:08 PM), http://nbcpolitics.nbcnews.com/_news/2012/11/07/14980822-rape-remarks-sink-two-republican-senate-hopefuls (stating that the projected failures of these two candidates can be attributed to the rape comments).

5. This Note often refers to the biological fathers of these children as rapists, but the United States does have a presumption of innocence until proven guilty, so using this terminology prior to a criminal adjudication is not entirely proper. This Note uses the term, however, to keep the reader in the frame of mind of the circumstance to which this discussion applies.

Part IV addresses the reproductive decisions that may face a victim upon becoming pregnant: adoption, abortion, or keeping the child. With each available decision, different parental rights attach to the biological father, arguably exceeding acceptable societal norms. Part V outlines the progression of parental rights in the courts, providing the framework upon which current laws are based. Part VI describes some of the methods by which states have confronted this overextension of rights through state law—by restricting decisionmaking abilities or limiting custody rights, for example—but notes that there are no consistent legal protections for the mother or child. Following the discussion of the different types of state law, Part VII reviews examples from case law to further highlight some of the strengths and weaknesses of different legal mechanisms as applied to rape-related pregnancies.

Finally, this Note proposes stronger protections for the rape victim and her child that would still protect some interests of the biological father and effectuate the goals of the State. These legislative enactments are part of the larger goal of this Note: to advocate for more consistent treatment of parental rights throughout all the jurisdictions in this country of rape-related pregnancies and greater predictability for the outcome of parental rights challenges. Implementation of a stronger standard for the treatment of parental rights of children conceived by rape will better protect victims and their children.

I. Defining Rape

Throughout history, rape has had a fluid definition, undergoing many changes resulting from shifting social norms.[6] The definition of rape is still not consistent across the United States; most states, as well as the federal government, have distinct definitions of the word.[7] Different legal

6. For a comprehensive look at the changing definition of rape throughout American history, see generally Estelle B. Freedman, Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation (2013).

7. In 2012, the United States federal government issued a new official definition of "rape," to be used by all federal agencies, including the Federal Bureau of Investigation and the Department of Justice, in conjunction with the Uniform Crime Report System. *See* Criminal Justice Info. Servs. Division, Fed. Bureau of Investigation, UCR Program Changes Definition of Rape (2012), *available at* http://www.fbi.gov/about-us/cjis/cjis-link/march-2012/ucr-program-changes-definition-of-rape.

This new definition of "rape" is now the "[p]enetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *Id*. This new definition is more expansive because it removes gender references and increases the categories of invalid consent to include additional forms of incapacitation and age. *Id.* Arguably, the most important improvement is the removal of the physical resistance requirement as connected with denial of consent. *Id.*

The previous definition used in the Uniform Crime Reporting System was "the carnal knowledge of a female forcibly and against her will." Criminal Justice Info. Servs., Fed. Bureau of Investigation, Crime in the United States, 2011: Forcible Rape (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/violent-crime/ forcible-rape. When applying this

definitions of rape contribute to the inconsistent protections victims receive, as certain acts may not be criminalized in all jurisdictions.

The inconsistency exhibits the broadness of the term, which can include different acts performed by different people. Thus, it is difficult to ascertain an all-encompassing definition of the term. For example, the California Penal Code defines rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances," including but not limited to lack of consent, against the victim's will, by means of intoxication, or when a person is unconscious.[8] California also criminalizes the rape of a spouse in a separate statute, listing similar elements of an act of sexual intercourse against a person's will, without consent, including intoxication and unconsciousness.[9] Similarly, Idaho defines rape as "the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female."[10] The Idaho statute also includes elements of age, lack of consent, resistance, unconsciousness, and false beliefs.[11] Comparing the language of these two statutes emphasizes how the use of different language for certain acts can encompass the same underlying idea. This difference illustrates the importance of adopting inclusive, rather than exclusive, statutory language to ensure that arguments of "legitimate rape" do not preclude some women from receiving equal treatment in the courts.

Legal terms undergo further variation in how the court applies them. Judges often interpret statutory language by applying the particular facts of the case at hand and determining which actions satisfy the elements of the crime without clearly defining the underlying concept. A good example of the evolving nature of rape can be found in the seminal case criminalizing marital rape. *People v. Liberta* redefined the element of consent (central to the determination of rape)[12] by applying a victim-protective understanding of consent to married couples, eliminating the defense that marriage creates eternal consent to sexual activity between

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definition, an estimated 83,425 forcible rapes were reported to law enforcement in 2011. *Id.* Following the implementation of the updated definition, more rapes will be included in the data, returning more accurate estimates of the occurrence of rape in the United States. *Id.*

8. CAL. PENAL CODE § 261 (West 2014).

9. *Id*. § 262. It is important to note that marital rape has been illegal in every state and Washington D.C. since 1993. *Marital Rape*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://www.rainn.org/public-policy/sexual-assault-issues/marital-rape (last visited Mar. 12, 2012). States have criminalized marital rape either by repealing marital rape exemptions or by codifying marital rape as a separate crime. *See* Steven A. Morley & Jay Shapiro, *1-7 The Prosecution and Defense of Sex Crimes § 7.03 Marital Rape* (Lexis 2012).

10. IDAHO CODE ANN. § 18-6101 (2013).

11. *Id.*

12. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1095 (1986).

spouses.[13] The New York Court of Appeals found the idea of implied consent to unwanted sexual activity absurd, and came down strongly against the notion of implied consent in any context:

> Any argument based on a supposed consent, however, is untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand. . . . A married woman has the same right to control her own body as does an unmarried woman.[14]

The *Liberta* court redirected the focus from the relationship between the parties to the act itself, nullifying arguments of implied consent stemming from a preexisting intimate relationship. Its language is a powerful example of how the operative definition of rape can preclude certain groups of victims by the underlying social perspectives. This concern is relevant again in light of the above-mentioned "legitimate rape" perception. Like *Liberta*, this Note advocates for a more inclusive definition to better protect the victims of the crime. A woman in an intimate relationship with her abuser often has a difficult time proving that a rape occurred, but focusing on the act itself—rather than the relationship between the parties—will eliminate any potential "implied" consent and help the victim prove her case.[15] Defining rape by the act, and consent to those particular acts, would be more protective of the victims and help clarify some issues confronting rape-related pregnancies—such as proving a rape occurred or removing the rapist's parental rights over the child—and thereby provide consistency in treatment across all jurisdictions.[16]

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13. People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (finding the marital rape exception in New York to be unconstitutional under equal protection, and that only consensual acts are protected by the fundamental right to marital privacy). However, some legal theories still preclude rape from including a man having intercourse with his wife. *See, e.g.*, MODEL PENAL CODE § 213.1 (2012).

14. *Liberta*, 474 N.E.2d at 573 (citations omitted).

15. Marital rape is often associated with domestic violence; however, there is a split between scholars and activists about whether marital rape should be treated under the heading of domestic violence or considered its own crime. *See, e.g.*, Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure To Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1823–24 (2011).

16. Statutory rape is beyond the scope of this Note because there are additional issues and policy concerns unique to this crime. Statutory rape is the sexual intercourse with any person under a predetermined age, thereby implying lack of consent. For example, Georgia defines statutory rape to be "when [a person] engages in sexual intercourse with any person under the age of 16 years." GA. CODE ANN. § 16-6-3(a) (2012). Additional considerations when discussing statutory rape are that one party is a minor and that there may have been consent to the sexual acts (despite the age restrictions—although age, like intoxication, is a bar to legal consent). *See generally* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006).

II. Occurrence of Rape in the United States

In 2006, approximately one in six women in the United States had been a victim of completed or attempted rape.[17] This frequency highlights the importance of rape as a public policy concern. The National Crime Victimization Survey of 2010, released by the Department of Justice, estimated the number of rapes and sexual assaults that occurred in 2010 to be 188,380, a noticeable increase from 2009.[18] The survey further reported that 73% of female rape victims knew their rapist prior to the rape, and of those, 17% were in an intimate relationship with their assailant.[19] These figures closely match those from another survey that found that 17.6% of rapists were husbands of their victims, 29.4% were boyfriends, and only 8.8% were strangers.[20] This data uncovers that rape is not only committed by strangers, but is often a crime of interrelationship abuse. This Note proposes solutions to reflect the reality that many women know the man who raped them, whereas most statutes presume that rape is a crime committed only by strangers.

It is estimated that 4.7% of rapes (32,101) result in pregnancy, when looking at victims of reproductive age—twelve to forty-five.[21] Due to the high number of rapes that result in pregnancies, current legal remedies that fail to address these circumstances are inadequate and must be restructured to be more consistent and predictable.

III. Rape-Related Pregnancies and the Related Policy Interests

Rape-related pregnancies involve many competing interests: the penal and public welfare interests of the state, interests of the fathers, interests of the women as both mother and victim, and interests of children. Due to the significant conflicts between these concerns, any legislation or judicial doctrine should conduct a balancing of interests test. The following Subparts address the different interests of each group that should be considered when discussing rape-related pregnancies.

A. Interests of the Biological Fathers

When considering the interests of various groups, it is important to remember that even within one classification, the interests may not be

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17. *See generally* Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice, Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey at iii (2006), *available at* https://www.ncjrs.gov/pdffiles1/nij/210346.pdf.

18. Jennifer L. Truman, U.S. Dep't of Justice, National Crime Victimization Survey: Criminal Victimization, 2010 at 9 (2011). This data included victims of both sexes. *Id.*

19. *Id.*

20. Melisa M. Holmes et al., *Rape-related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 Am. J. Obstetrics & Gynecology 320, 322 (1996).

21. *Id.* at 321–22.

consistent among all members. This is particularly apparent when considering the interests of fathers of rape-related pregnancies. The two extremes of the spectrum are (1) the stranger-rapist who selects a victim at random, does not get arrested, and is never seen or heard from again, and (2) a husband who commits marital rape and is in a legal relationship with both mother and his child. An example of a mid-spectrum offense is a boyfriend who forces his girlfriend to have sex despite her explicitly stating she does not want to. Additionally, some of these men may be attempting to avoid any paternal obligations or a stigma of a rape accusation and disappear, but others may attempt to secure custody or visitation rights.[22]

The interests of fathers weigh heavily when applied to the civil law-based parenting rights and are applicable in any paternity issue, not just in rape-related pregnancies. Parental rights take many forms, including the right to refuse consent to the adoption of the child, visitation rights, custody rights, and decisionmaking rights.[23] Attached to these rights are obligations, the most important of which is child support payment.[24] Fathers who pursue parental rights are viewed more favorably by the courts because they have expressed an interest in their children.[25] For these interested fathers, there is a strong policy goal in providing ample due process and permitting a demonstration of a sincere interest in establishing a relationship with the child, as well as providing a forum to show reasons why the rape accusation or conviction should not affect parental rights.

The biology-plus standard (requiring a father establish more than a mere biological relationship with a child to warrant parental rights),[26] as

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22. The interests of the fathers are complex, as it is likely all fathers by way of rape are attempting to avoid criminal liability. There are different considerations when looking to the civil liabilities of parenting, such as a support obligation and the rights to custody and visitation, which the father may want to pursue despite the potentially criminal associations of the conception.

23. As seen frequently in child custody cases, there are different rights and obligations a parent may obtain. Legal custody of a child includes the authority to make significant decisions on behalf of the child in areas like religion, education, and medical decisions. McCarty v. McCarty, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002). Physical custody involves day-to-day decisionmaking, as well as an obligation to provide housing, food, and other such daily care to the child. *Id.* When a court determines the recommended custody determination, the focus is on the best interest of the child. *Id.* at 1215.

24. *See* CAL. FAM. CODE § 4053 (West 2012) ("(a) A parent's first and principle obligation is to support his or her minor children according to the parent's circumstances and station in life[;] (b) Both parents are mutually responsible for the support of their children."); *see also infra* note 38 (discussing the costs of raising a child in a single family home and how child support payments from a second parent may be necessary to permit a single parent to raise a child).

25. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("If [the father] grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.").

26. *See infra* Part VI (discussing the development of this standard). This standard has been established by the Supreme Court to evaluate the parental rights of unwed fathers. "[T]he Court found

well as any statutes directing the termination of parental rights, runs the risk of blocking the legitimate rights of an interested father. "Thwarted fathers" are those who have attempted to develop a relationship with their child, or have an honest interest in doing so, but have been unable to do so due to external factors such as actions by the mother, adoption proceedings, or not being aware of the pregnancy until after the child's birth.[27] Without being able to prove more than just a biological link, these men risk losing their rights under the biology-plus standard.[28] The concern about thwarting is significant because the State does not want to discourage interested fathers from attempting to establish a legitimate relationship with their child under proper circumstances. However, the potential risk of awarding parental rights to a rapist, contrary to the interests of the mother and child, must also factor in to the overall balancing of interests.

The father is still entitled to due process protections, whether he is a rapist or not, during the parental rights hearing. These protections include notice of the hearing (if he can be located) and the opportunity to present his case. This protection sufficiently recognizes the due process rights of the men by providing a platform from which innocent, interested fathers may express their views, thereby minimizing thwarting. Fathers are also protected by automatic deprivation of rights built into the statutes or applicable legal standards. This would avoid abuses in the system by requiring a hearing or some other fact-finding determination that rape had occurred. This Note suggests mechanisms for judicial hearings to protect against overbroad granting of parental rights to the detriment of the mother and child, whether those hearings occur in the criminal courts for an adjudication of rape or in the civil courts for a termination of parental rights.

In order to appropriately balance the entire spectrum of men who have committed rape (be it a stranger, a friend, or a husband), this protection should not be too broad. A criminal act should not be rewarded with parental rights to any child conceived by rape.[29] For those innocent fathers or complicated factual situations, a courtroom hearing in which evidence is presented to a judge or jury panel may be the best

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that something more was necessary in personally association cases, i.e., 'biology plus.'" Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 48 (2004). A man must "prove the biological link *plus* some kind of an existing relationship" with the child. *Id.*

27. Laura Oren, *Thwarted Fathers or Pop-up Pops?: How To Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 154 (2006).

28. *Id*. at 159. For a more detailed discussion of these cases and the "biology-plus" standard, and how they relate to the parental rights assigned to a father, see *infra* Part VI.

29. Steven A. v. Rickie M., 823 P.2d 1216, 1237 n.14 (Cal. 1992) (finding that fathers through rape do not deserve the same protections because the sex was only voluntary for the father but not the mother).

protection of due process without overpowering the rights of other involved parties, most importantly the rights of the victim.

B. Interests of the Victim-Mothers

The vesting of a mother's parental rights is difficult to dispute because she is both the genetic and gestational mother in a rape-related pregnancy.[30] As both the victim of the rape and the legal parent of the child, the mother's interests are undisputedly strong in both the treatment of rape-related pregnancies and the assignment of rights to the biological father, and as such, should be given primary consideration. Shared legal custody, for example, requires the father to be able to see the child but also permits him to share in the decisionmaking, often requiring the parents to continue communicating and interacting. For a mother attempting to recover from the trauma of rape, this continued contact with her abuser can be detrimental to her physical and mental health.

In addition to a mother's interests on behalf of her child, the woman also has a separate interest in her own physical and mental health arising from victimization. Rape can cause bodily trauma, sexually transmitted diseases, and other physical injuries inflicted during the assault.[31] Numerous psychological effects can also develop, including anxiety, depression, suicidal tendencies, and phobias.[32] Pregnancy can increase both the mental and physical trauma experienced by the victim when she undergoes further physical and psychological changes during her pregnancy.

The stress of having to make a decision concerning the continuation of the pregnancy, often within a short time span, can magnify the pressures and symptoms of the mother's condition, and this stress can be intensified by the unpredictability of her legal situation. Should the woman decide to carry the pregnancy to term, the possibility of sharing parental rights with her attacker may further enhance or prolong the psychological effects of her situation.[33] Stronger standards with greater

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30. *See, e.g.*, Cal. Fam. Code § 7610(a) (West 2012) ("The parent and child relationship may be established as follows: (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child.").

31. Holmes et al., *supra* note 20, at 320.

32. Shauna R. Prewitt, *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, 832–33 (2010); *see* Holmes et al., *supra* note 20, at 320 (listing rape as a significant factor for post-traumatic stress disorder); Richard O. de Visser et al., *The Impact of Sexual Coercion on Psychological, Physical, and Sexual Well-being in a Representative Sample of Australian Women*, 36 Archives of Sexual Behav. 676, 677 (2007) (listing other effects of rape, including post-traumatic stress disorder, depression, poor physical health, and coping with alcohol and drugs). The effects of rape will vary from victim to victim, but the range of physical and psychological effects is quite broad and a very serious concern.

33. Prewitt, *supra* note 32, at 832–33.

predictability in what rights a biological father may receive, as well as a more guided decisionmaking scheme for the courts, may help reduce the victim's anxiety and other psychological traumas by decreasing some of the unknowns of her future.[34] A mother may be able to more clearly consider her options absent uncertainty of what rights the rapist may retain.

In addition to treating her rape-related health conditions, the mother may also need to protect herself from continued physical and psychological abuse by her rapist. Particularly with intimate partner rapes, a victim may refrain from reporting her abuser to law enforcement out of fear of retaliation.[35] Thus, women in intimate relationships with their abusers are likely to suffer further violence and physical injuries, as well as feelings of vulnerability, loss of control in the relationship, and overall poor mental health.[36] These feelings not only prevent the victim from healing from her trauma, but may later also adversely affect the child. Tools available in civil or family courts—such as restraining orders and restriction of parental rights—are often more approachable than criminal prosecutions.

Rape-related pregnancy discussions often focus on the negative risks of a woman's extended legal connection with a rapist through a determination of parenting,[37] but there are also potential benefits to establishing paternity. A determination of legal paternity attaches additional obligations and duties on a father, including the obligation to provide financial support. Raising a child is expensive and can be a burden on a single mother.[38] A court order for child support can reduce that burden by ensuring that the single mother is not left as the sole provider for her child or children. Recent years have brought a dramatic increase in governmental efforts to enforce and collect child support

34. *See* Ann M.M. v. Rob S., 500 N.W.2d 649, 653 (Wis. 1993) (denying "perpetrators of sexual assault the right to contest termination of their parental rights also comports with public policy. It promotes the policy of protecting victims of crime by assuring that victims of sexual assault will not have to face their assailants" at extended proceedings).

35. Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 279–80 (2012) (listing reasons victims do not report abuse to include fear and embarrassment).

36. N. N. Sarkar, *The Impact of Intimate Partner Violence on Women's Reproductive Health and Pregnancy Outcome*, 28 J. OBSTETRICS & GYNECOLOGY 266, 268–69 (2008).

37. Prewitt, *supra* note 32**,** at 831–36. For example, Prewitt devotes a portion of her discussion to the negative consequences of "A Lifetime Tethered to Their Rapist," highlighting very serious and real concerns that should not be ignored in a discussion of the consequences of rape. *Id.*

38. The yearly cost of raising one child in a single family home, with a household income of less than $59,410, is estimated at $10,010. *Cost of Raising a Child Calculator*, U.S. DEP'T OF AG., CTR. FOR NUTRITION POL'Y & PROMOTION, *available at* www.cnpp.usda.gov/calculator.htm (last visited Mar. 12, 2014). The yearly cost of raising one child in a single family home, with a household income of over $59,410, is estimated to be $21,633. *Id.* Both numbers are based upon a national average and include estimated costs for housing, food, transportation, clothing, healthcare, child care, and other expenses. *Id.*

payments, increasing the likelihood that a rapist's obligation of support may benefit the victim and child.[39]

On the other hand, the establishment of paternity, as well as the termination of the biological father's rights, may also affect the mother's ability to qualify for welfare benefits.[40] A mother in need of additional financial support may have no choice but to seek assistance from the biological father—if not through court-ordered child support payments, then through prerequisites for government-funded welfare. Depending on a woman's particular circumstances, the amount received through welfare programs may be inadequate. Additionally, the biological father may default on his child support obligations. Even in light of a termination of custody or visitation rights, this financial strain may effectively ensure continued contact between a woman and her rapist. A change in the treatment of child support,[41] as well as a potential adjustment in the welfare system, would help alleviate both these financial and emotional burdens.[42]

C. Interests of the Children

The primary interests of the child at stake in these circumstances are physical and emotional health, well-being, and development. In light of a child's age and vulnerability, parents are often granted the decisionmaking powers for their children, under the presumption that the parents will act in the best interest of the children.[43] However, the parents (one or both)

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39. The Child Support program was first established in 1975. Office of Child Support Enforcement, U.S. Dep't. Of Health & Human Servs., OCSE Fact Sheet, http://www.acf.hhs.gov/programs/css/resource/ocse-fact-sheet (last visited Mar. 12, 2014).

The recent change in the treatment of child support obligations began in 1988, with the passage of the Family Support Act. 42 U.S.C. § 666 (1988) (requiring each state to develop mandatory presumptions for child support as well as methods for paternity establishment). In 1994, the Full Faith and Credit for Child Support Orders Act was passed to require states to enforce child support orders from another state. 28 U.S.C. § 1738B (1994). In 1996, Temporary Assistance to Needy Families ("TANF") was passed as a part of the Personal Responsibility and Work Opportunity Reconciliation Act, establishing block grants to states as well as strengthening the legislative force behind the determination of parties responsible to child support and the collection of that support. *See* 42 U.S.C. § 601 (1996). TANF tied child support programs in with welfare reform to ensure that children receive more support from their parents as opposed to the state. Office of Child Support Enforcement, *supra*.

40. Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 Fam. L.Q. 49, 70 (2002) ("Mothers receiving welfare benefits may be denied this choice [of living free of the father's presence] by the relevant public agency, which will require their cooperation in locating the father unless persuaded the mother has 'good cause' to refuse.").

41. *See, e.g.*, Sharpe v. Sharpe, 902 P.2d 210, 215 (Wyo. 1995) (enforcing the support obligations of a non-custodial parent to best promote the welfare of the child).

42. *See infra* Conclusion.

43. Troxel v. Granville, 530 U.S. 57, 58 (2000). *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (concerning the fundamental interest that an unwed father has in his biological children, because he is acting in the best interest of the children, but the same fundamental right applies to the biological mothers as well). This right has been recently reaffirmed by *Troxel*, granting deference to parental determinations concerning their children in the absence of parental unfitness. *Troxel*, 530 U.S. at 66.

are often not fit to make decisions for their child, and in extreme situations, a court will initiate the process in which the State intervenes to protect the child's welfare.

States and courts often make these intervention determinations—often custody, visitation, and other care decisions—using a "best interest of the child" standard, which is prevalent throughout family law.[44] This best interest standard takes into consideration many factors, including the mental and physical health (such as threats of abuse to the child or a parent), continuity and stability of care, developmental needs, and financial support and stability.[45] With both the parents and the State playing a role in protecting the interests of the child, it is rare that the child's interests are taken into consideration independently from those of another party or the State; children's interests are often championed by a parent or a guardian ad litem, but rarely by the child herself.[46] Despite this joined representation of interests, the interests of the child are still important to consider within the framework of the assignment and termination of parental rights.

A primary issue is which parent, if either, will be permitted to retain visitation rights to and/or custody over the child. Which parent retains access and custody impacts many primary caretaking decisions concerning the child, such as where the child lives and attends school. The circumstances of conception (such as being born into a loving versus an abusive home situation, two-parent homes, or contentious rape-related pregnancies) can largely influence the stability of the home and development of the child. Studies have shown that a child's development flourishes in a home with warmth and affection, which leads to higher social competence and lower levels of behavioral problems.[47] Furthermore, exposure to domestic violence, which can include sexual assault, between married, dating, or formerly dating or married couples, has been shown to cause adverse behavioral and psychological effects in children.[48] The

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44. *See* N.D. CENT. CODE § 14-09-06.2 (2013) ("For the purpose of parental rights and responsibilities, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child."); *see also* Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (setting a standard for courts to act "as parens patriae to do what is best for the interest of the child"). Many other states and cases have verified this as the appropriate standard of review for instances concerning children.

45. *See, e.g.*, MONT. CODE ANN. § 40-4-212 (2013) (listing relevant parenting factors to determine the "[b]est interest of child"); TEX. FAM. CODE ANN. § 263.307 (West 2013) (listing factors to consider for the child's best interest).

46. Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (rejecting the dissent's suggestion that more weight be given to the interests of the children).

47. *See generally* Charlotte J. Patterson, *Children of Lesbian and Gay Parents: Psychology, Law, and Policy*, 64 AM. PSYCHOL. 727 (2009) (discussing the needs of children and how they are equally met in gay or lesbian families).

48. *See generally* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1 (2001).

interactions between parents, as well as the likelihood that these conflicts will be resolved, can strongly influence the child and must be considered when making parental rights determinations using the best interest of the child standard.[49] It is also likely that the interests of the child will factor in to the decisions the woman makes concerning her pregnancy.

IV. Options Available to the Pregnant Victim After Rape

The freedom of reproductive choice has long been debated publicly, with current doctrine protecting the right of most women to make any decision she chooses—within certain legal limitations. The Supreme Court has upheld the right to reproductive freedom as a privacy right inherent in due process protections: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[50] Reproductive rights are not restricted to pregnancies resulting from rape or sexual assault, but apply to the decision of *any* pregnant woman.[51] These rights empower women to choose between three options: abortion, adoption, or keeping the child.

A. Abortion

The most common choice among women with a rape-related pregnancy is abortion; fifty percent of women choose to abort their rape-related pregnancy.[52] Since *Roe v. Wade*, a woman's right to abortion has been both judicially and legislatively recognized and affirmed as a fundamental personal privacy right that is protected by the Fourteenth Amendment, but this right remains actively contested and frequently challenged.[53] *Planned Parenthood v. Casey* explicitly articulated the right of a married woman to terminate a pregnancy without needing to notify

49. *See* McCarty v. McCarty, 807 A.2d 1211, 1215–17 (Md. Ct. Spec. App. 2002) (considering the relationship between the parents in determining custody of a child); *see also In re* C.S., No. 11-0233, 2011 WL 8199178 at *2 (W.Va. Sept. 26, 2011) ("The record below shows that the child at issue is totally unaware of petitioner and the circumstances of her conception. . . . As such, the circuit court found that 'it would be a travesty of justice to force an association between this child and the [petitioner], when this child has no knowledge that she is the product of sexual assault.' Based upon this finding, it is clear that the circuit court made its decision based upon the child's best interests.").

50. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

51. *Id.* at 440 (addressing the provision of contraceptives to unmarried women in order to prevent pregnancies rather than the termination of an unwanted pregnancy).

52. Holmes et al., *supra* note 20, at 322 (reporting results from a study conducted over a three-year period from 1990 until 1992).

53. Roe v. Wade, 410 U.S. 113, 153–54 (1973). The Supreme Court reaffirmed constitutional protection of the right to terminate a pregnancy under the Due Process Clause of the Fourteenth Amendment in *Casey*. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992).

or obtain the consent of her husband.[54] Abortions are still subject to certain limitations absent a medical necessity to protect the health of the mother, such as the prohibition on abortion after the viability[55] of the fetus, mandatory waiting and counseling requirements, and parental consent requirements.[56]

In the face of varying statutory schemes concerning the parental rights assigned to biological fathers, even in the instance of rape, "the only sure way a victim can avoid the possibility of a rapist having parental rights is to have an abortion."[57] However, this option is not always available to all victims because of delays in awareness of the pregnancy, medical risks, and personal moral opposition.[58] Of women included in a 1995 survey on pregnancy, more than thirty-two percent did not discover they were pregnant until the second trimester (twelve to twenty-six weeks after the rape).[59] Such delays vastly reduce the availability of abortion. Outside of medical delays, culture, religion, and location can also be barriers to pursuing abortion.[60] The Supreme Court assured, however, that should a woman opt for an abortion, she may do so without requiring the consent of the biological father, making this decision entirely her own.[61]

This Note proposes expanded legal protections because abortion as the only option through which a victim can ensure her rapist not retain any parental rights is quite limiting, to say the least.

B. Adoption

A second option is to put the child up for adoption. Choosing adoption requires the woman carry the child to term, then voluntarily relinquish her rights to the child. Adoption is the least common selection

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54. *Casey*, 505 U.S. at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.").

55. In the context of pregnancy, viability refers to the point in time at which a fetus could be "capable of living . . . [or] having attained such form and development as to be normally capable of surviving outside the mother's womb." *See Viable*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/viable (last visited Mar. 12, 2014).

56. The limitations on abortion are typically time restrictions, as abortions may constitutionally be restricted after fetal liability, as well as requirements to make a fully informed choice. *Id.* at 872. The restriction on abortions after viability can, in fact, restrict women with a rape-related pregnancy, should the mother not realize that she is pregnant until past the point of viability or know she is pregnant but wait for paternity testing on the fetus prior to making her decision. Bitar, *supra* note 35, at 283. *Compare* Tenn. Code Ann. § 39-15-202 (2013) (requiring a two-day waiting period after consulting a physician), *with* La. Rev. Stat. Ann. § 1299.35.7 (2013) (waiving the twenty-four hour waiting period for pregnant victims of rape and incest).

57. Bitar, *supra* note 35, at 286.

58. *Id*. at 282–83.

59. Holmes et al., *supra* note 20, at 322.

60. *See, e.g.*, S. 1, 83d Cong. (2d Sess. Texas 2013) (banning abortions after twenty weeks and closing all but five abortion clinics, thereby limiting access to abortions).

61. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (holding that a state cannot constitutionally require the consent of the father of the fetus).

for women with rape-related pregnancies, accounting for six percent of decisions in 1992.[62] Most adoption procedures require efforts to locate or notify the biological father to obtain his consent. Alternatively, they require a hearing for the involuntary termination of the biological father's rights.[63] Complications may arise in meeting these requirements, such as difficulty in locating the biological father or adversarial confrontation in attempts to obtain his consent.[64]

However, twenty-six states have enacted legislation protecting rape victims who decide to give their child up for adoption. Some such protections have eliminated notification or father consent requirements if the child was conceived through rape.[65] Within these states, there is a split between states that require a criminal conviction of the rapist prior to termination of his rights and states that require only a showing that the pregnancy was a result of rape or sexual assault.[66] For situations in which the father has been convicted of rape, there is a lower burden of proof at the adoption stage because the rape has already been proven in criminal court.[67] For states that do not require a conviction, a hearing is necessary to prove that the child was conceived by rape or sexual assault, typically under the clear and convincing standard of proof.[68]

For the notification exception to apply, however, the victim must first initiate, and then endure, the criminal prosecution of her abuser prior to giving her child up for adoption. States that do not require a conviction, hold fact-finding hearings to establish that the pregnancy resulted from rape.[69] Both methods take additional time, preventing the mother from relinquishing her rights shortly after the birth of her child

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62. Holmes et al., *supra* note 20, at 322.

63. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1331–32 (5th ed. 2010).

64. Bitar, *supra* note 35, at 285–86.

65. *Id*. at 287 n.99–101 (listing the different state statutes concerning rape-related pregnancies). Since the publication of Bitar's article, Oregon has revised its statute; it is now codified under section 419B.510 of the Oregon Revised Code.

66. *See* Bitar, *supra* note 35, at 287–90. For example, Washington state permits "[a]n alleged father's, birth parent's, or parent's consent to adoption [to] be dispensed with if the court finds that . . . the alleged father, birth parent, or parent has been found guilty of rape." WASH. REV. CODE § 26.33.170(2) (2013). Alternatively, Wisconsin is one state that does not require a conviction of rape or sexual assault, permitting the termination of parental rights upon evidence at a fact-finding hearing "indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault . . . against the mother of the child." WIS. STAT. § 48.415(9) (2013).

One primary difference between these two options is also the applicable burden of proof that is necessary. For a criminal trial, the standard is beyond a reasonable doubt. However, the civil termination of parental rights requires the lesser standard of clear and convincing evidence (sometimes just a preponderance of evidence), making the civil showing an easier burden for victims to satisfy.

67. *See, e.g.*, NEV. REV. STAT. § 125C.210(2) (West 2013) (creating a rebuttable presumption against custody to a convicted father).

68. Bitar, *supra* note 35, at 291; *see* FLA. STAT. § 39.806(1)(m) (2013) ("The court determines by clear and convincing evidence that the child was conceived as a result of an act of sexual battery.").

69. *See* WIS. STAT. § 48.415(9).

and securing a relatively quick placement. The goal of adoption is to promote the welfare, protection, and best interests of a child, effectuated by providing the child with a stable home that nurtures development.[70] Any delays in the adoption process prolong the time it takes to permanently place the child, preventing the child's readjustment to a new environment and extending the involvement of the mother.

The most frequent form of adoption is second-parent adoption, a process through which the spouse of a legal parent adopts the child.[71] For a woman assaulted by a stranger or a former intimate partner, second-parent adoption often requires the consent of the other biological parent because it falls within the same legal requirements as regular adoptions.[72] A woman in a relationship with a partner who was not her rapist may want her current partner to adopt the child. Without an efficient procedure for the termination of the parental rights of the rapist, the adoption may be delayed or prevented entirely, again prolonging the permanency that is in the best interest of the child and mother.

C. Keeping the Child

More than thirty-two percent of the time, a mother decides to raise the child herself.[73] Keeping a child conceived by marital rape raises some additional concerns for the mother. Many states presume paternity of the husband, automatically vesting parental rights into the man married to the woman who gave birth without requiring further proof. Should a woman seek to terminate the parental rights of her husband, filing for divorce may be a mandatory step, adding further obstacles to a final determination of the father's parental rights.[74]

Only sixteen states currently have legislation that specifically provides any means by which the mother can terminate the parental rights of her rapist.[75] These states vary in their treatment of these rights in

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70. Sharon S. v. Super. Ct., 73 P.3d 554, 568 (Cal. 2003).

71. Child Welfare Info. Gateway, U.S. Dep't of Health & Human Servs., Stepparent Adoption at 1 (May 2013), *available at* http://www.childwelfare.gov/pubs/f_step.cfm; *see* Ellman et al., *supra* note 63, at 1314.

72. *See, e.g.*, Colo. Rev. Stat. § 19-5-203(f) (2013) (requiring "[w]ritten and verified consent of the parent or parents . . . in a stepparent adoption where the child is conceived and born out of wedlock."); *see also In re* the Adoption of M.M.G.C., 785 N.E.2d 267, 271 (Ind. Ct. App. 2003) ("As with other adoptions, a trial court considering a petition for a second-parent adoption must comply with the dictates of [the statute] in finding, *inter alia*, that 'the adoption requested is in the best interest of the child.'").

73. Holmes et al., *supra* note 20, at 320.

74. For example, Nevada creates a rebuttable presumption upon divorce against granting custody with the father if the father has been convicted of sexual assault. Nev. Rev. Stat. § 125C.210(2) (West 2013).

75. Prewitt, *supra* note 32, at 853–54. One example is California Family Code section 3030(b), which mandates that "[n]o person shall be granted custody of, or visitation with, a child if the person

circumstances of alleged or proven rape, ranging from full termination of the father's rights to a denial of custody or visitation privileges.[76] Similar to adoption statutes, many states first require a conviction for rape prior to the termination of any rights, thereby limiting the instances in which these protections are exercised.[77]

A broad spectrum of options might be available to a pregnant rape victim: abortion, adoption, or keeping the child. Each of these choices is significantly different, and choosing is not easy. It is important to draft legislative protections for rape victims that cover all of these choices so that women are not restricted in legal options. Further, statutory acknowledgement of all of a woman's reproductive rights would send a strong policy message against rewarding rapists with continued access to their victims.

V. THE JUDICIAL TREATMENT OF PATERNAL RIGHTS: FROM PRESUMPTION TO BIOLOGY-PLUS

Different rights are assigned to a biological father depending on the mother's reproductive choice. As previously discussed, a biological father has no right to prevent a woman from choosing abortion.[78] However, the biological father may have a right to prevent the mother from giving the child up for adoption. The rights assigned to the father can depend on external factors, the most influential of these being marriage. The development of rights has induced the "biology-plus" common law standard that is often used to review parental rights cases, including rape-related pregnancies. The development of such rights also exemplifies how common law at the Supreme Court level has the ability to shape family law doctrine, albeit slowly.

Over the past fifty years, the treatment of unwed fathers has undergone a dramatic shift. Traditionally, common law only recognized the relationship between a man and a child born to his wife, granting no legal recognition to a non-marital child.[79] This treatment—and accompanying social attitudes—created a stigma against "illegitimate" children, precluding most paternal obligations outside of a marital home.[80]

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has been convicted [of rape] and the child was conceived as a result of that violation." CAL. FAM. CODE § 3030(b) (West 2013).

76. *See, e.g.*, CAL. FAM. CODE § 3030(b). Custody rights entail decisionmaking authority over the child, so the termination of custody rights over a child—both legal and physical—works to limit the control a biological father may have over the child; *see also supra* note 26.

77. *Id.*

78. *See supra* Part V (discussing the option of abortion).

79. Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67 (1995).

80. The differential treatment of illegitimate children was widespread in different areas of law, including family law and estate (inheritance) laws. *See, e.g.*, 14 WITKIN, SUMMARY 10TH *Out of Wedlock Children*, § 90 (2005); 41 AM. JUR. 2D *Illegitimate Children* § 144 (2014).

Additionally, it was presumed that a man not married to the mother had no interest in parenting or otherwise supporting that child.

The Supreme Court initiated a change in the judicial and legislative treatment of unmarried families in 1972.[81] In *Stanley v. Illinois*, a father intermittently lived with and helped raise his three children, all born out of wedlock to the same woman, for eighteen years.[82] Following the death of the mother, the children were declared wards of the state and Stanley was denied a custody hearing, prompting him to challenge the state's actions.[83] The Court found that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[84] This decision redefined the rights of a father by recognizing a fundamental constitutional interest in parenting rooted in the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[85]

Subsequent rulings distinguished *Stanley* by clarifying that a father must establish a relationship beyond mere biology to receive parental protections. In 1978, the Supreme Court recognized the "biology-plus" standard in *Quilloin v. Walcott*.[86] In *Quilloin*, the Court refused to extend these fundamental protections to a father who did not undertake any significant responsibilities in caring for the child and had done no more than acknowledge that the child was biologically his.[87] In light of those circumstances, the Court held that the foundation for a father's liberty interest was lacking.[88] The following year, the Court reaffirmed the liberty interest of a father who had formed a relationship with his child, emphasizing the importance of active efforts to be a parent.[89]

The Court further delineated the contours of the biology-plus standard in *Lehr v. Robertson* in 1983.[90] The Court again held that a mere biological relationship with a child does not in itself create a constitutionally protected relationship, but noted that it does create a unique opportunity for a biological father to establish such a relationship.[91]

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81. Stanley v. Illinois, 405 U.S. 645 (1972).

82. *Id.* at 646.

83. *Id.*

84. *Id.* at 651.

85. *Id.* at 658; U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

86. 434 U.S. 246, 256 (1978).

87. *Id.* at 255–56.

88. *Id.*

89. Caban v. Mohammed, 441 U.S. 380, 393 (1979) (reaffirming that the father should be treated like the mother in terms of requiring due process prior to the termination of his parental rights when it can be shown that he demonstrated significant parental interest in the child).

90. 463 U.S. 248 (1983).

91. *Id.* at 261–62.

To properly determine a father's interest in his relationship with his child, courts must assess the quality of the relationship between the father and his child to determine whether he has met the biology-plus standard.[92]

In 1989, however, the biology-plus standard lost some footing in *Michael H. v. Gerald D.*[93] Marital presumptions appear in many state statutes because they were adopted from the Uniform Parentage Act ("UPA").[94] The UPA applies a traditional marital presumption, rebuttable only by voluntary acknowledgment of paternity or a judicial ruling.[95] In *Michael H.*, the Court upheld California's presumption that a woman's husband is the legal father of a child born during their marriage, even in a situation where the biological father attempted to establish a meaningful relationship with his daughter.[96] The application of a marital presumption depends on the jurisdiction, but *Michael H.* reaffirmed the validity of such presumptions, limiting the influence of a biology-plus relationship in certain contexts. Despite these presumptions, the biology-plus standard is still the applicable judicial doctrine for determining the parental rights of fathers and could be employed to restrict the rights of rapist fathers.

VI. The Pros and Cons of the Current Legislative Regime

Any statutory scheme that is developed concerning rape-related pregnancies must consider the interests of fathers, mothers, children, and the State.[97] In part because of the variety of interests at play, as well as other influential factors, there is no consistent statutory scheme controlling the parental rights for rape-related pregnancies; statutes

92. *Id.* at 266–67 ("[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."). The Court recently reaffirmed these principles in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). *Adoptive Couple* requires additional consideration of the Indian Child Welfare Act, but the opinion still recognized as a factor that "Biological Father 'made no meaningful attempts to assume his responsibility of parenthood.'" *Id.* at 2558.

93. 491 U.S. 110 (1989).

94. Unif. Parentage Act § 204 (2000) (amended 2002) ("A man is presumed to be the father of a child if: (1) he and the mother are married to each other and the child is born during the marriage.").

95. *See id.*; s*ee also* Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 Fam. L.Q. 55, 65 (2003); Unif. Law Comm'n, Nat'l Conference of Comm'rs on Unif. State Laws, Parentage Act Summary, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Mar. 12, 2014). The 2002 amended version of the UPA has been adopted by nine states, while nineteen states adopted the original 1973 version of the UPA. *See Acts: Parentage Act*, Unif. Law Comm'n, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Mar. 12, 2014); *Uniform Matrimonial and Family Laws Locator*, Legal Info. Inst., Cornell U. L. Sch., http://www.law.cornell.edu/uniform/vol9 (last visited Mar. 12, 2014). For a summary of Uniform Parentage Act, see *Parentage Act Summary*, Unif. Law Comm'n, www.uniformlaws.org/ActSummary.aspx?title=Parentage+Act (last visited Mar. 12, 2014).

96. *Michael H.*, 491 U.S. at 111. For another description of the relevant cases, see generally Shanley, *supra* note 79.

97. *See supra* Part III (discussing the various policy interests relating to rape-related pregnancies).

range from no special considerations at all to permitting full termination of parental rights upon a civil finding of sexual assault.[98]

A. States that Explicitly Limit Protections to "Out-of-Wedlock" Children

All fifty states have criminalized marital rape, but this advancement is not always reflected in the parental rights at issue in this Note. Of the thirty-one states providing some form of legislative protection for rape-related pregnancies, five—Indiana, Nebraska, Nevada, New York, and Wyoming—expressly limit their provisions to "out-of-wedlock" children.[99] Having language limiting the law's application to out-of-wedlock children conceived by rape precludes any claims by victims of marital rape. The selective wording may reflect the reality that adoptions in the instance of marital rape will be more difficult. The husband will likely be aware of both the pregnancy and the birth; therefore, a husband will be more readily available to withhold his consent should he so choose. With the "out-of-wedlock" language, these statutes may operate against the mother should she leave her abusive husband and attempt to limit the rights of the father.[100]

However, there is a mechanism to keep this out-of-wedlock language and still provide some protection to a woman who was raped by her husband. Nevada has created a presumption against granting custody to a convicted abuser.[101] Notwithstanding the conviction requirement, Nevada's presumption is an effective protection for dealing with marital rape, granting the survivor of domestic violence some certainty of custody of her child upon divorce. Although there is no perfect solution when dealing with marital rape, presumptions against paternal custody

98. *See generally* Bitar, *supra* note 35 (discussing in full the variations in state statutory treatment of rape-related pregnancies).

99. *See* Ind. Code § 31-19-9-8(a)(4)(a) (2013) (establishing that consent to adoption not required from a father of a child born out of wedlock conceived by rape for which the father is convicted); Neb. Rev. Stat. § 43-104.15 (2013) (permitting adoptions of out-of-wedlock children born of sexual assault without required notification); Nev. Rev. Stat. Ann. § 125C.210(2) (West 2013) (limiting effect of spousal rape to creation of a rebuttable presumption against custody to a convicted abuser upon divorce); N.Y. Dom. Rel. Law § 111-a(1) (McKinney 2013) (not requiring notice for adoption proceedings of out-of-wedlock children conceived as a result of rape); Wyo. Stat. Ann. § 1-22-110(a)(viii) (2013) (requiring that adoption may be ordered without consent if the child was born out of wedlock as a result of sexual assault or incest for which the father is convicted).

100. This would apply in two separate situations: (1) a divorce followed by the mother attempting to free her child for adoption to third parties, which would require the consent of the father, and (2) second-parent adoption (when a parent wants her spouse to legally adopt the child), which is much more frequent and accounts for about half of adoptions.

101. Nev. Rev. Stat. Ann. § 215C.210(2). Other states have similar presumptions against custody or visitation to a perpetrator of domestic violence (without the out-of-wedlock wording). *See, e.g.*, Cal. Fam. Code § 3044 (West 2013) ("[T]here is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child.").

upon divorce for convicted abusers are a step in the right direction to protect the interests of the victim and her child.

B. States that Require Criminal Conviction

Many states provide for the termination of the father's parental rights following a conviction for rape. Oregon, for example, terminates parental rights if the court finds that the child was conceived by an act resulting in a conviction for rape.[102] Other states leave the discretion with the judge, permitting but not requiring a judge to terminate parental rights following a rape conviction.[103]

Requiring a conviction is a significant burden and can establish a barrier for a victim eliminating her rapist's parental rights. Reporting rates for rape are low; the Department of Justice approximates that from 1992 to 2000, sixty-three percent (83,700) of the 131,950 rapes per year went unreported to the police.[104] In a single year (2011), the Federal Bureau of Investigation ("FBI") estimates the total number of rapes was 83,425.[105] Other sources provide lower numbers, with estimates of unreported rapes closer to sixty percent.[106] The majority of rapes go unreported and are therefore not prosecuted.

Of one hundred rapes, about forty will be reported to police, with ten leading to an arrest, eight ending in prosecution, and only four resulting in a felony conviction.[107] The FBI determined that the arrest rate for rape in 2010 was only twenty-four percent and the conviction rate even lower.[108] These rates decrease even more when contrasted with the total number of estimated rapes, rather than just reported rapes; an estimated 7.8% of

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102. Or. Rev. Stat. § 419B.510 (2013). The definition of rape in Oregon includes sexual intercourse by forcible compulsion with a victim under various ages (twelve, fourteen, and sixteen, depending on the circumstances), or who is incapable of consent. *Id.* §§ 163.365, 163.375. For a complete list of the states requiring convictions, see Bitar, *supra* note 35, at 292 n.132.

103. This discretion is indicated by the use of "may" rather than "must" or "shall," making the termination of rights not a guaranteed protection. *See, e.g.*, Fla. Stat. § 39.806(1)(m) (2013) ("Grounds for termination of parental rights *may* be established under any of the following circumstances: . . . the child was conceived as a result of an act of sexual battery." (emphasis added)).

104. Callie Marie Rennison, Bureau of Justice Statistics, U.S. Dep't of Justice, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000 at 2 tbl.3 (2002). A 2012 survey of victimization reported to police found that only twenty-eight percent of rape or sexual assault victims filed police reports. *See* Jennifer Truman et al., U.S. Dep't of Justice, National Crime Victimization Survey: Criminal Victimization, 2012 at 4 (2013). Rape and sexual assault are still the lowest reported crimes compared to other types of violent victimization. *Id.* at 6 fig. 3.

105. Criminal Justice Info. Servs., *supra* note 7 (excluding consensual statutory rape).

106. Rape, Abuse & Incest Nat'l Network, Reporting Rates, http://www.rainn.org/get-information/statistics/reporting-rates (last visited Mar. 12, 2013).

107. *Id.*

108. Sarah Tofte, *A Needed Revolution: Testing Rape Kits and U.S. Justice*, *in* The Unfinished Revolution: Voices From the Global Fight for Women's Rights 199, 203–04 (Minky Worden ed., 2012).

rapes are prosecuted, with only 3.3% resulting in a conviction.[109] Thus, the conviction requirement for the termination of parental rights of rapists only provides protections to a small subset of victims.[110] The law should provide protections to victims regardless of whether they officially report the sexual assault. Further, the law should provide protections for women who can prove that a rape occurred under the civil law clear and convincing standard, but are unable to obtain a conviction under the higher beyond a reasonable doubt criminal standard.

When looking only at the estimated incidents of intimate partner rape, the percentage of unreported rapes increases to seventy-seven percent.[111] Intimate rapes are less likely to be prosecuted and even less likely to result in a conviction.[112] Rape victims often decide not to report or request prosecution because of their relationships with the rapist.[113] Reasons provided for not reporting the abuse include not wanting to see a loved one punished, emotional bonds, financial dependency on her abuser, fear of future physical or psychological retaliation, and insensitivity in the criminal justice system.[114] Should a woman report the crime in the hopes of pursuing prosecution, other barriers to convictions still exist, including shorter reporting periods, reduced or non-mandatory sentences, and social stigma—which may influence the jury.[115] Notwithstanding the other hurdles in terminating a husband's parental rights, requiring a conviction makes it even more improbable that a victim will receive legal protections.[116]

C. States that Only Provide Protections for Adoption

Given the low number of women who opt to give their child up for adoption,[117] adoption-specific protections should not be the sole remedy

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109. Tjaden & Thoennes, *supra* note 17, at 33.

110. It is important to note that the above statistics represent all rapes, not just rapes resulting in pregnancies.

111. Rennison, *supra* note 104, at 3 (including rapes committed by current or former husbands and boyfriends).

112. Tjaden & Thoennes, *supra* note 17, at 35.

113. Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 St. John's J. Legal Comment, 535, 557 (2010) (citing Patricia Tjaden & Nancy Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey 49 (2000)) ("The National Violence Against Women Survey found that less than one-fifth (17.2%) of those women raped by an intimate partner said they reported the most recent rape to police.").

114. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893 (1992); *see also* Sack, *supra* note 113, at 557.

115. Klarfeld, *supra* note 15, at 1833–36.

116. Sack, *supra* note 113, at 557 ("[P]rosecution remains infrequent and conviction rates are low. Ultimately, only about 7.5% of all intimate partner rapes are prosecuted and, of those, 58.1% do not result in a conviction.").

117. *See* Holmes et al., *supra* note 20, at 322; *see also* Anjani Chandra & Penelope Maza, *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 Advance Data, May 11,

available to rape victims. These adoption rates show how laws should not be limited to adoption consent and notification because they reflect the low number of women receiving protections. These statutes effectively ignore the plight of women who choose to raise the child as their own by exposing them to further complications such as custody and visitation scheduling or child support hearings and payment enforcement.

However, just because adoption is not frequently chosen does not make the protections through which consent and notification requirements for adoption can be removed any less important to include in the statutory schemes. Recognizing the need for statutory protections is an important step, and adoption protections should be included as one part of a larger statutory scheme to protect all the options available to a pregnant rape victim.

D. States Without Any Statutory Protections

Many states do not have any legislation in place concerning rape-related pregnancies.[118] Some of these states have adopted indirect methods by which a mother could seek to terminate the parental rights of her rapist that are built into the more general termination statutes.[119] Many statutes include "conviction of and imprisonment for a felony" as one consideration in parental rights terminations.[120] Convictions for rape are difficult to obtain, but even with a conviction, this factor is just one of many to be balanced in the overall ruling.[121]

Another indirect protection applies only to stranger rapists because failure to locate an unknown father is another factor considered by some states.[122] Requiring a victim to locate her attacker is emotionally distressing, especially if she reported the crime and the police have already attempted and failed to locate the rapist. Again, this consideration of failed attempts to locate the biological father is not determinative on its own and is only an indirect protection.

1999, at 9 (reporting that from 1989 to 1995, about one percent of children born to all unmarried women were voluntarily relinquished for adoption); Child Welfare Info. Gateway, U.S. Dep't of Health & Human Servs., Voluntary Relinquishment for Adoption, at 2 (Mar. 2005) (reporting that even fewer married or formerly married women will voluntarily relinquish a child for adoption).

118. Bitar, *supra* note 35, at 286–87 (stating that only "[t]hirty-one states have enacted some form of legislation to address the problem of rapists having parental rights").

119. *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-533(B)(4) (2013) (permitting the termination of parental rights upon a conviction of a felony, including a rape conviction).

120. *See, e.g.*, Ala. Code § 12-15-319(a)(4) (2013); *see also* Ariz. Rev. Stat. Ann. § 8-533(B)(4) (including conviction of and incarceration for a felony as an indication of parental unfitness).

121. *See supra* Part III.A.

122. *See, e.g.*, Colo. Rev. Stat. § 19-3-604(1)(a)(II) (2013) ("That the identity of the parent of the child is unknown and has been unknown for three months or more and that reasonable efforts to identify and locate the parent . . . have failed.").

There are two standards often applied in family law that may preclude some rapists from obtaining or enforcing parental rights in the absence of specific state laws. First, the biology-plus standard would disfavor any rapist who is unable to prove he is an interested father;[123] in particular, this standard would exclude stranger rapists from exercising parental rights. Second, is the best interest of the child standard.[124] If a court finds that granting custody, visitation, or other rights to a rapist is not in the best interest of the child (when considering the whole of a child's welfare), the father may lose his parental rights. These standards can indirectly prevent a rapist who is also an unfit father from keeping his parental rights if challenged by the mother.

E. States with Positive Statutory Components

Very few statutes mandate the termination of parental rights in light of a criminal rape conviction.[125] Nevada's statute provides that a person convicted of sexual assault "has no right to custody of or visitation with the child unless the natural mother or legal guardian consents."[126] Nevada finds a criminal conviction for rape to be clear and convincing evidence of a valid reason to terminate parental rights should the mother or guardian challenge the father's rights.[127] This requirement makes it easier to obtain a conclusive determination of the parental rights of the rapist without having to endure another civil proceeding, and increases predictability in the outcome.

A recent amendment to the Oregon statute regarding termination of parental rights provides another beneficial protection of the mother's interests because, unlike other states, it expressly maintains the obligation to pay child support.[128] The current statute now provides that a judicial

123. *See supra* Part V (discussing the origins and application of the biology-plus standard).

124. For example, Delaware (a state without a rape-related pregnancy statute) requires that a termination of parental rights must appear "to be in the child's best interest." Del. Code Ann. tit. 13, § 1103(a) (2013).

125. The states that do *require* a termination of rights are Maine and North Carolina. *See* Me. Rev. Stat. § 1658 (2013); N.C. Gen. Stat. § 14-27.2(c) (2013); *see also* Bitar, *supra* note 35, at 289.

126. Nev. Rev. Stat. § 125C.210(1) (West 2013); s*ee* N.J. Stat. Ann. § 9:2-4.1 (West 2013) (establishing that a person convicted of sexual assault "shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result" of the criminal assault); N.C. Gen. Stat. § 14-27.2(c) (mandating that "a person convicted under this section [first-degree rape] has no rights to custody of or right of inheritance from any child born as a result of the commission of the rape.").

127. Nev. Rev. Stat. § 125C.210(1) ("[I]f a child is conceived as the result of sexual assault and the person convicted of the sexual assault is the natural father of the child, the person has no right to custody of or visitation with the child unless the natural mother or legal guardian consents thereto and it is in the best interest of the child.").

128. Or. Rev. Stat. § 419B.510 (2013) ("The rights of the parent may be terminated . . . if the court finds that the child or ward was conceived as the result of an act that led to the parent's conviction for rape. . . . [T]his section does not relieve the parent of any obligation to pay child support.").

termination of parental rights "does not relieve the parent of any obligation to pay child support."[129] This may permit a woman to be more financially capable of raising the child without having to share custody with her rapist—making the choice to keep the child possible for more women. These variations in statutory constructions are steps in the right direction and should be incorporated into statutory schemes across the country.

F. Application of the Statutes by the Courts

The previous Subpart highlights some of the key variations in statutes that address rape-related pregnancies, which then undergo further transformation upon being interpreted by judges. The following examples of statutory application illustrate the shortcomings and strengths of some of the current laws.

One version of a statutory scheme permits the termination of both adoption rights and legal parental rights. A total of thirteen states have provisions permitting the court to terminate the parental rights of a rapist, with or without convictions for the sexual assault.[130] Granting courts the discretion to terminate all parental rights without a criminal conviction for rape facilitates family stability by providing a lower evidentiary burden for procedures such as stepparent adoption, as demonstrated by *In re the Adoption of C.A.T.*[131] In *Adoption of C.A.T.*, a mother sought termination of her rapist's parental rights in order to free her children (both fathered by her rapist) from adoption by her

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129. *Id.* Other states terminate custody and visitation rights expressly, without an additional clause clarifying that the obligation of support remains. *See, e.g.*, Cal. Fam. Code § 3030(b) (West 2013) ("No person shall be granted custody of, or visitation with, a child if the person has been convicted [of rape] and the child was conceived as a result of that violation."); La. Civ. Code Ann. art. 137 (2012) (terminating visitation rights of a parent who conceived the child through the commission of rape); S.D. Codified Laws § 25-4A-20 (2013) ("If it is in the best interest of the child, the court may prohibit, revoke, or restrict visitation rights to a child for any person who has caused the child to be conceived as a result of rape or incest.").

130. Eight states require a conviction of rape or sexual assault prior to the termination of parental rights. *See* Bitar, *supra* note 35, at 289. The remaining five states do not require a conviction, but rather require clear and convincing evidence that the child was conceived of rape or sexual assault. *Id.* at 290–91. "A parent's parental rights can be involuntarily terminated only by a showing of clear and convincing evidence," requiring more than a preponderance of evidence but below the criminal standard of beyond a reasonable doubt. *In re* A.J.B., No. 14-02-00794, 2003 WL 21403480, at *2 (Tex. App. June 19, 2003) (discussing the evidentiary standard required for termination of parental rights in cases involving rape-related pregnancies); *see also* Kan. Stat. Ann. § 59-2136(h)(1)(F) (2013) (using "may" rather than "shall" to indicate judicial discretion but not requiring a conviction).

131. 273 P.3d 813 (Kan. Ct. App. 2012). Another example of a state not requiring convictions for the termination of parental rights concerning adoption of rape-conceived children is Alaska. *See* Alaska Stat. § 25.23.180(c)(3) (2013). A good application of the Alaskan statute is *In re Adoption of A.F.M.*, 15 P.3d 258 (Alaska 2001). *In Re Adoption of A.F.M.* confronts issues of proof as the mother did not report her assailant to the police (he was a former boyfriend and she "did not want to get him in trouble"). *Id.* at 263. The Alaska court found that termination was warranted on public policy grounds, as the child was conceived through a criminal relationship and thus the father did not deserve the same protections as other biological fathers. *Id.* at 264–67.

husband.[132] The mother contested the father's claims of consensual activity, insisting that she had verbally expressed that she was not interested in having sex with him and that she was unable to consent by reason of intoxication on both occasions.[133] A witness testified that she heard the mother's protestations during the first incident, providing additional evidence that the mother was raped.[134] The court explained that such instances of sexual assault are sufficient grounds to terminate the father's parental rights, but supported its findings by showing that the father had failed to properly assume the duties of a parent, using the best interest of the child standard as an additional factor upon which to terminate the rapist's parental rights.[135]

Despite the correct outcome, cases such as *Adoption of C.A.T.* illustrate many of the problems surrounding the termination of parental rights of alleged rapists. The court or jury is often required to make a credibility determination by weighing the conflicting versions of the facts in the absence of any supporting evidence beyond the testimony of the parties. This can be further complicated when a woman does not report the rape to the police, and thereby lacks an official complaint against the rapist.[136] Like the mother in *Adoption of C.A.T.*, many women do not report rape to the police because they do not want to have their rapist face criminal charges and instead use the family or civil court to obtain an order to remove the abuser from her life.[137] This type of internal conflict involves competing desires—wanting to report her abuse and a crime, protect herself and her child, and protect the perpetrator—and further demonstrates how statutes with conviction requirements are unable to properly protect rape victims.[138] Finally, the court's unwillingness to base its determination solely on a finding of sexual assault, providing alternative explanations rooted in the best interest of the child standard, shows how specifically incorporating these standards into this determination can help guide a court and increase the predictability of the outcome.

New Mexico's approach is different; its law permits the termination of a rapist's right to refuse consent to adoption without first requiring a

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132. *In re* Adoption of C.A.T., 273 P.3d at 815.

133. *Id.* at 816.

134. *Id.* at 820.

135. *Id.* at 820–21.

136. *See supra* note 104 (discussing reporting rates).

137. The reasons that women do not file police reports are very personal and fact-driven, but there are trends. Some victims "fear reprisal" at the hands of their abuser. *Reporting Rape*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://www.rainn.org/get-information/legal-information/reporting-rape (last visited Mar. 12, 2014); Maggie O'Cala, *Why Women Don't Always Report Rape*, YAHOO! VOICES (Sept. 28, 2010), http://voices.yahoo.com/why-women-dont-always-report-rape-6839510.html.

138. This is particularly an issue in any form of intimate rape because the emotional connection between the victim and her abuser provides disincentives for initiating police involvement.

conviction.[139] *Christian Child Placement Service of the New Mexico Christian Children's Home v. Vestal* provides a strong analysis of the constitutionality of this type of statute.[140] The father in question raised substantive due process claims, relying on *Lehr v. Robinson* as a basis for constitutional protection of his parent-child relationship.[141] However, the court rejected this claim in light of the criminal nature of the conception, quoting Judge Richard Posner: "The criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants. Pregnancy is an aggravating circumstance of a sexual offense, not a mitigating circumstance."[142] No fundamental right to a parent-child relationship is established through a criminal act, precluding a successful substantive due process challenge to this statute. Nor should a rapist be rewarded for his criminal act by acquiring additional rights, such as custody of a child.[143] Furthermore, this type of statute withstands constitutional scrutiny by being "rationally related to the State's legitimate interest in protecting children and preventing their exploitation," again successfully incorporating the best interest of the child standard.[144]

These statutes also survive procedural due process and equal protection scrutiny.[145] Procedural due process is not violated by terminating the father's rights without a hearing on his fitness to parent following a judicial finding that the child was conceived by rape.[146] Although *Stanley v. Illinois* established the requirement for a fitness hearing—an evaluation of the person's ability to be a parent—prior to terminating an unwed father's parental rights,[147] this need not apply to a rapist father because he may be presumed unfit.[148] Similarly, an unwed father may be treated differently than a rapist father without offending the Equal Protection Clause because the latter "is not similarly situated to an unmarried man who has fathered a child by a consenting adult woman."[149] In light of the constitutional permission for statutes of this nature, though falling short of official Supreme Court approval, specific and separate treatment of the parental rights of rapists should be implemented in all states, under either a controlling standard or rule.

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139. N.M. STAT. ANN. § 32A-5-19(C) (2001) ("[C]onsent to adoption . . . shall not be required: (C) a biological father of an adoptee conceived as a result of rape or incest.").

140. 962 P.2d 1261 (N.M. Ct. App. 1998).

141. *Id.* at 1265.

142. *Id.* (quoting Peña v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996)).

143. *Vestal*, 962 P.2d at 1265–66.

144. *Id.* at 1266.

145. *Id.* at 1266–67.

146. *Id.* at 1266.

147. Stanley v. Illinois, 405 U.S. 645, 658 (1972).

148. *See generally* Shanley, *supra* note 79.

149. *Vestal*, 962 P.2d at 1267.

VII. Proposal: Increasing the Legislative Protections for Rape Victims

Like the court in *Liberta*, one method for altering the treatment of a crime is changing precedent through case law. Cases concerning the termination of parental rights typically fall within the jurisdiction of the state courts; it is rare for cases to be heard before the Supreme Court.[150] In light of the limited federal jurisdiction over family law cases, pursuing a doctrinal shift through the courts would be inefficient (given that each state has its own judicial system), and would fall short of establishing a more nationally consistent legislative scheme for rape-related pregnancies. Because of these limitations, a more feasible solution is to change the laws themselves. Given that state legislatures can more quickly change laws and balance the various policy interests involved, this Note proposes the adoption of statutory measures to protect rape victims and their children.[151]

This Note proposes that these changes be implemented into civil statutes, rather than criminal because the interaction between the criminal and civil aspects of rape can cause conflicting policy interests. The State has an interest in prosecuting criminals and upholding the law, but these criminal law-based goals do not always match the goals of the civil justice system. The criminal nature of rape-related pregnancies often blurs the distinction between criminal and civil laws, but judges have been quick to reiterate that it is improper "to characterize termination of parental rights as a criminal proceeding."[152] This overlap is complex because the criminal nature of rape is one of the primary justifications for terminating the father's parental rights. In making these determinations, courts must focus on the standards applicable to civil situations. Better articulation of the standards and increased guidance within the rules for their application will help keep the criminal and civil aspects independent.

It is difficult to draft the perfect statute because it is nearly impossible to satisfy all interested groups.[153] Implementing a statute containing these ideal components, despite being beneficial for society as a whole, could face challenges by interest groups and prove difficult to implement. However, any changes to these statutes to create better protection for

150. *See, e.g.*, *Stanley*, 405 U.S. 645 (determining an unwed father's parental rights over his biological children).

151. Estrich, *supra* note 12, at 1093. This type of piecemeal approach to changing the treatment of a legal issue has been successfully implemented in some states. For example, Alaska took this type of approach with domestic violence, making adjustments to the laws in all relevant areas to better effectuate the policy goals and outcomes. For a detailed discussion of this type of approach within the Alaskan context, see Weithorn, *supra* note 48, at 1.

152. *In re* Adoption of A.F.M., 15 P.3d 258, 266 (Alaska 2001) ("[P]unitive purpose plays no role in adoption proceedings.").

153. *See* Bitar, *supra* note 35, at 301 (recognizing that the imperfection of the legal system will always create instances where the best situation cannot be protected, "but it should not stop the law from searching for the optimal level of justice").

rape victims and their children is preferable to leaving the statutory scheme as is—inconsistent in content and among the states. The following Subparts propose specific considerations that need to be implemented in rape-related pregnancy statutes to properly protect the interests at hand.

A. States Should Adopt a More Inclusive Definition of Rape

The recent change in the federal definition of rape[154] shows an expanded and contemporary understanding of rape and recognizes the difficulties facing the victims of rape and the need for increased reporting and prosecution. Appropriately absent from this definition are the elements of "force" or "resistance."[155] The definition also encompasses all forms of rape that could result in pregnancy, including marital rape, thereby distinguishing rape-related pregnancies and the associated parental rights challenges for that child. Although the states are independent of the federal government, the federal legislature should encourage them to adopt this or a similar definition to promote consistency in protecting rape victims and increase public awareness of the associated issues. The federal spending powers could provide one such method of encouragement by promoting changes to state legislation by attaching federal funding to the rape-related pregnancy policies. This type of federal influence would be an ideal start toward more uniform treatment of rape and its related civil issues.

B. States Must Implement Laws and Legal Standards for Rape-Related Pregnancies

Another major obstacle preventing protections for rape victims is that not every state has a statute dealing with rape-related pregnancies. Even if the states are unable to adopt matching statutes, all states should provide some statutory guidance for the termination of parental rights for rape-related pregnancies. Given the complexity of these family situations, specific attention and legislative direction is needed. Without specialized attention, the courts run the risk of losing sight of the extensive interests involved for all parties, blurring policy considerations and even allowing the influence of bias into the final determination. States without specific legislation for rape-related pregnancies leave it to the courts' determinations of what the proper treatment is, increasing the inconsistency and unpredictability of the rulings.

The new legislation should blend elements of current statutes. To begin, states should ensure that marital rape is treated like other forms of rape, so that all equal legal remedies are available to all victims. This

154. *See supra* note 7 and accompanying text.
155. *See id.*; *see also* Klarfeld, *supra* note 15, at 1839.

should be accomplished by equalizing statutes of limitation, elements of the crime, and sentencing determinations.[156] The civil court is equipped to make a finding—by clear and convincing evidence—that the child was conceived by an act of rape; this judicial forum is sufficient to safeguard against abuse of the system and allows innocent fathers a chance to state their case.[157] After finding conception by rape, there should be a presumption against parental rights for the biological father to better protect the interests of the mother and child, establishing an obstacle for continued exposure to and potential abuse by the rapist.

Following a finding of rape, the court should apply established legal standards to make the final termination of parental rights. The best interest of the child standard—prevalent in custody determinations—should play a strong role in the findings to properly effectuate the interests of the child and the State. Another standard that may resonate in these determinations is that of intention to become a parent—typically seen in surrogacy cases.[158] Application of the intent to parent standard could help prevent many rapists from being deemed legal parents, particularly stranger rapists. The application of this standard to intimate rapists becomes complicated, as analogies to unintended but consensual pregnancies could be made—just because a pregnancy is unplanned between consenting adults does not mean a parent can avoid legal rights and obligations. Another limiting factor on the use of this standard is that the mother became pregnant through nonconsensual acts, so she arguably did not intend to parent either.[159] This standard would have limited application, and would most likely serve only a limited purpose.

C. Changes to the Prerequisites for Termination of Parental Rights

1. Remove the Conviction Requirement

Current statutes consider a conviction of a parent in the determination of parental rights. This conviction should be removed[160] because requiring a conviction not only prevents a large number of

156. Klarfeld, *supra* note 15, at 1839.

157. This would comport with the due process requirements established by *Stanley,* as well as safeguard against improperly terminating rights by requiring a factual determination on a case-by-case analysis. Stanley v. Illinois, 405 U.S. 645, 649 (1972) (due process protections require a hearing on parental fitness prior to termination of parental rights).

158. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (looking to the intentions of the parties to become parents to help determine the legal parents of a child).

159. A mother's decision to keep the child may be sufficient to establish an intention to parent for the purposes of this standard, at least strongly enough to be applied against a rapist.

160. *See* Bitar, *supra* note 35, at 292 ("statutes that require a conviction provide absolutely no protection").

victims from receiving civil protections,[161] but also effectively imposes a high burden of proof onto the parental rights hearings.

Criminal cases, such as trials for rape, require that findings be made "beyond a reasonable doubt," while the prevailing standard for the termination of parental rights is the less stringent "clear and convincing" standard.[162] The criminal standard of proof, while appropriate in criminal cases, is not proper for civil determinations of parental rights because parental rights hearings are not punitive in nature.[163] The clear and convincing standard is still an effective means by which to not only permit the mothers to be able to prove that they were victims of a crime, but also is sufficient to protect the due process rights of the accused fathers.[164] Because conviction rates are low,[165] this prerequisite does not adequately protect victims of rape and their children; therefore, a court should heavily weigh a prior conviction for rape when determining parental fitness. An effective mechanism for considerations of conviction is a presumption against custody and visitation rights, as seen in Nevada.[166] By creating a presumption rather than a strict requirement, a judicial hearing will still be required to determine if said presumption applies in specific factual situations. These hearings create an accessible forum for mothers to prove why the rights of the rapist should be terminated and, at the same time, protect the due process rights of all parties.

2. Expand Protections Beyond Adoption

The statutes should also not be limited solely to the consent and notification requirements of adoption. More women raise their rape-conceived children than put the child up for adoption, so the states must incorporate this reality in constructing their statutes. Limiting the termination of rights to consent and notification for adoption is too

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161. *See, e.g.*, Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 709 (1996) ("Legislative and prosecutorial efforts to combat marital rape will not succeed until pervasive myths about sex, rape, and marriage are eradicated from our culture.").

162. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 759 (1982) (finding that the interests involved in family law proceedings weigh "heavily against the use of the preponderance standard"); *In re* A.M.D., 648 P.2d 625, 625 (Colo. 1982) ("[I]n proceedings to terminate parental rights . . . the appropriate constitutional standard of proof is clear and convincing evidence."); IND. CODE § 31-37-14-2 (2013) ("A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence.").

163. *See, e.g.*, *In re* Adoption of A.F.M., 15 P.3d at 258, 266 (Alaska 2001).

164. *See, e.g.*, *In re* Adoption of C.A.T., 273 P.3d 813, 819–20 (Kan. Ct. App. 2012). Additionally, the clear and convincing standard has been upheld for proceedings of custody, and other parental rights terminations, so there is no reason why this standard should not apply in the circumstances of rape-related pregnancies as well. *See supra* note 162.

165. *See supra* Part VI.B.

166. *See* Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal, 962 P.2d 1261 (N.M. Ct. App. 1998) (finding that criminal conception is not deserving of parental rights to the rapist father).

restrictive and does not protect the majority of women experiencing a rape-related pregnancy.[167] Provisions terminating notice and consent requirements to adoption are important, however, and should be included in any statute controlling rape-related pregnancies. The statutes must consider all options available to a pregnant rape victim rather than limit protections to adoption.[168] There should be some discretion as to the termination of custody, visitation rights, or full parental rights and obligations, to be determined on a case-by-case basis.

3. Leave the Option for Child-Support Obligations Intact

Courts should also consider be the ability to terminate the parental rights of the rapist father, while still enforcing child support obligations (should the mother request it), as applied in the Oregon statute.[169] Raising a child alone can be prohibitively expensive, so continued child support obligations would provide an opportunity for all women, even those of lesser financial means, to choose the option of raising her child on her own. Similarly, this may enable some women to leave their abusive intimate partners by decreasing the financial dependence between the couple. For marital rape, the statutes should follow Nevada's example and establish a presumption specific to marital rape.[170] Upon divorce, if the mother can show by clear and convincing evidence that the child was conceived by rape, there should be a rebuttable presumption against custody with the abusive father.

CONCLUSION

Despite the beliefs of some persons in our society, rape can and does result in pregnancies. Our legislatures—federal or state—should consider all of the available data on rape and rape-related pregnancies, as well as the interests of the parties involved, and reform the controlling statutes by implementing standards that incorporate the more protective elements. Rape is a serious crime against the bodily integrity, and in the instance of rape-related pregnancies, a presumption should be created in favor of the victims, in the form of strong protections against assigning parental rights to rapists.

167. *See* Bitar, *supra* note 35, at 291 (discussing the shortcomings of adoption-only statutes).

168. As discussed in Part IV.A, the choice of abortion is currently protected by Supreme Court doctrine, and thus does not need the same specific protections as adoption and keeping the child.

169. ORE. REV. STAT. § 419B.510(2) (2011).

170. NEV. REV. STAT. § 125C.210(2) (West 2013).

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