

## MAKING PRO-ABORTION LAWS PRO-CHOICE FOR FEMALE RAPE VICTIMS

*By Anna K. Martin\**

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### I. INTRODUCTION<sup>2</sup>

In America, sexual assault or rape occurs every ninety-eight seconds.<sup>3</sup> Approximately 25,000-32,000 of those rapes result in a child’s conception per year.<sup>4</sup> Nevertheless, only one state<sup>5</sup> adequately protects a woman who wishes to

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\* JD Candidate 2018. I would like to thank Professor Mary Beck who helped guide me through the process of writing this article and pushed me to work towards policy that I truly care about.

2. Please note, because of the situations described in this article, the focus will be on female victims and male assailants and is not intended to diminish the importance of male victims, female assailants, or LGBTQ rape.

3. Statistics, RAINN, <https://www.rainn.org/statistics> [<https://perma.cc/XP9A-LAR6>].

4. Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL’Y 275, 282 (2012); 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, 828 (2010).

5. Illinois passed Ill. Rev. Stat. ch. 750, § 46/622 in 2016 and became the one state that adequately protects women who become pregnant through rape.

give birth to a rape-conceived child.<sup>6</sup> The lack of legislation protecting these women pressures victims into abortion clinics to avoid years of being legally bound to the men who raped them.

That fear is fueled by stories such as Noemi's. Noemi was an eighteen-year-old girl when she was raped in Nebraska.<sup>7</sup> Years later, she requested welfare from the state for her and her daughter, and the state contacted her rapist to make him pay child support.<sup>8</sup> In response, the attacker demanded to be a part of her daughter's life.<sup>9</sup> Now, Noemi must give her daughter to her attacker for longer and longer periods of time, making her worry about her daughter's safety and re-traumatizing her by forcing her to repeatedly face her rapist.<sup>10</sup>

Women often feel forced to terminate their rape-conceived pregnancies, and suffer from the trauma of that abortion longer than from the rape itself.<sup>11</sup> Nevertheless, doctors "advise *all* rape victims that if they miss their next regular period by more than one week, [to] return for *menstrual extraction or suction curettage*" and suggest abortion as the only remedy if pregnancy results from the attack.<sup>12</sup> The fifty percent of women who give birth to their rape-conceived children risk being tethered to their rapists.<sup>13</sup> Other victims are driven to the abortionist by the uncertainty of whether the courts will terminate their rapist's parental rights.<sup>14</sup>

This paper will first analyze the inadequate laws in forty-nine states and the District of Columbia regarding rape and parental rights. Then, it will discuss the political and cultural explanations for that landscape. Finally, this paper will explain the changes that must take place using current legislation, analyze what makes Illinois statute 750 ICLS 46/622 an adequate law, and create a model law for state legislators.

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6. *Parental Rights and Sexual Assault*, NAT'L CONF. ST. LEGISLATURES (Apr. 17, 2017), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#Table> [https://perma.cc/4KTL-3LVK].

7. Thom Patterson, 'I Have to Text my Rapist': Victims Forced to Parent with Attackers, CNN (Nov. 18, 2016), <http://www.cnn.com/2016/11/17/health/rape-parental-rights/index.html> [https://perma.cc/73LE-4CW5] ("Eventually, Noemi's attacker won unsupervised visits with his daughter for a few hours every other weekend and two Tuesdays each month. Though horrified, Noemi really didn't have much choice.").

8. *Id.*

9. *Id.*

10. *Id.*

11. Bitar, *supra* note 4, at 284.

12. Prewitt, *supra* note 4, at 847.

13. *Id.* at 829.

14. Interview with Mary Beck, Clinical Law Professor Emeritus, Fellow Am. Acad. of Adoption Attorneys, in Columbia, Mo. (Sept. 26, 2017).

## II.            THE LEGAL LANDSCAPE FOR PARENTS OF RAPE-CONCEIVED CHILDREN

A. *Terminating Parental Rights*<sup>7</sup>

In the 1982 case, *Santosky v. Kramer*, the Supreme Court held that a parent has a fundamental liberty interest in the care and custody of his or her child, and parents are only denied visitation under extraordinary circumstances.<sup>15</sup> Several states interpret the *Santosky* decision to mean that a father's notice and consent is necessary for adoption, even if the child was conceived through rape.<sup>16</sup> However, in 1992, the Supreme Court did not extend the notice and consent requirement to husbands<sup>17</sup> of women who desired to get an abortion.<sup>18</sup> These holdings, along with ineffective state legislation, operate to force impregnated-rape-victims to get abortions, as they have a limited time to keep their autonomy away from the courts and their rapists.

As soon as a woman becomes pregnant, she is in a race against the clock to decide what she will do. Seventeen states prohibit abortion at fetal viability, two states prohibit abortion in the third trimester, and seventeen states ban abortions at about twenty-two weeks after the woman's last menstrual cycle.<sup>19</sup> In 2013, the Supreme Court found that an unmarried father must not protect his rights while the mother is pregnant under prenatal abandonment theory<sup>20</sup> to back up claims of paternity.<sup>21</sup> Prenatal abandonment theory is the idea that a parent must provide support and/or assistance during pregnancy in order to preserve parental rights.<sup>22</sup> Thus, an abuser may provide some support when abortion is no longer an option, then demand parental rights when the child is born. When abortion stops being an option, a pregnant woman has little to no protection against a rapist choosing to exert his parental power in the court system. Knowing this vulnerability, and having a limited period to decide, an impregnated-rape-victim may choose ensured safety in abortion over her personal beliefs.

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

16. *See infra* note 53.

17. I.e. Not all states require a woman to inform a biological father of a pregnancy particularly in instances where they are not married. *See* MO. REV. STAT. § 453.061 (2017).

18. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992).

19. *State Policies on Later Abortions*, GUTTMACHER INST. (Jan. 1, 2018), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/Z25T-G8DS>].

20. Though the *prenatal* aspect of the abandonment theory is relatively new, the correlation between a father's involvement in their "illegitimate" child's life and the protection of any parental rights has been discussed before. *See* *Quilloin v. Walcott*, 434 U.S. 246 (1978); *see also* *Lehr v. Robertson* 463 U.S. 248 (1983).

21. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); *see also* Mary M. Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirty-Four States*, 24 MICH. J. GENDER & L. 53, 77 (2017).

22. Beck, *supra* note 21, at 130.

The interplay between common rape misconceptions and legislation is most obvious regarding the parental rights of rape-conceived children. Terminating a father's parental rights when the child was conceived during the attack splits the states into five categories.<sup>23</sup> Six states have no legislative protection for a victim from a rapist seeking parental rights.<sup>24</sup> Maryland, where the bill has been introduced every session for the last nine years, is the most recent of these states to try, and fail, to pass a bill providing for the termination of a rapist's parental rights.<sup>25</sup> However, this bill followed the path of prior bills terminating the parental rights of rapists, and died in committee.<sup>26</sup>

Fifteen states require a rape conviction to terminate parental rights, and take the decision to terminate parental rights out of the court's hands.<sup>27</sup> Another six states require a conviction and provide court discretion, using "may" or require that termination be in the "best interest of the child."<sup>28</sup> This type of legislation is problematic because the conviction rate of rape is so low,<sup>29</sup> and even a conviction does not remove the rapist from the rape victim's life. In some states, such as Missouri, courts require a conviction of "forcible rape or

23. *Parental Rights and Sexual Assault*, *supra* note 6.

24. These states are: Alabama, Maryland, Minnesota, North Dakota, New Mexico, and Wyoming. See Breanna Hare & Lisa Rose, *Where Rapists Can Gain Parental Rights*, CNN (Nov. 17, 2016, 1:06 PM), <http://www.cnn.com/2016/11/17/health/parental-rights-rapists-explainer/index.html> [<https://perma.cc/9WER-G3MZ>].

25. Ovetta Wiggins, *Top Md. Democrats Vow to Push Through Bill Terminating Parental Rights for Rapists*, WASH. POST (Oct. 30, 2017), [https://www.washingtonpost.com/local/md-politics/top-md-democrats-vow-to-push-through-bill-terminating-parental-rights-for-rapists/2017/10/30/4ba1deb4-bd79-11e7-97d9-bdab5a0ab381\\_story.html?utm\\_term=.8ad8914d1c2e](https://www.washingtonpost.com/local/md-politics/top-md-democrats-vow-to-push-through-bill-terminating-parental-rights-for-rapists/2017/10/30/4ba1deb4-bd79-11e7-97d9-bdab5a0ab381_story.html?utm_term=.8ad8914d1c2e) [<https://perma.cc/HSZ4-HQFM>].

26. Catherine Rentz, *All-Male Panel Ruled on Rape Bill During Maryland's Legislative Session*, BALT. SUN (Apr. 17, 2017), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-sun-investigates-0416-20170416-story.html> [<https://perma.cc/RK5D-JG9C>]. Notably, the bill was "killed" by a committee comprised of ten males, which has caused a hailstorm of criticism by the press. *Id.*

27. These states are: Arizona, Arkansas, California, Delaware, Washington D.C., Kentucky, Nevada, North Carolina, Ohio, Oregon, Rhode, Tennessee, Utah, West Virginia (if parents are not together), and Wisconsin. *Parental Rights and Sexual Assault*, *supra* note 6. See, e.g., ARIZ. REV. STAT. § 25-416 (2018); ARK. CODE ANN. § 9-10-121 (2017); CAL. FAM. CODE § 3030 (West 2017); DEL. CODE ANN. tit. 13, § 724A(e) (2018); D.C. CODE § 16-914(k) (2018); KY. REV. STAT. §§ 403.322, 405.028 (2017); N.C. GEN. STAT. §§ 7B-1111, 14-27.21 to 14-27.24 (2017); NEV. REV. STAT. § 125C.210 (2017); OHIO REV. CODE § 3109.504 (2016); OR. REV. STAT. §§ 107.137, 419B.510 (2017); 15 R.I. GEN. LAWS § 15-5-16 (2017); TENN. CODE ANN. §§ 36-1-113, 36-6-102 (2017); UTAH CODE ANN. § 76-5-414 (LexisNexis 2017); W. VA. CODE § 48-9-209a (2017); WIS. STAT. § 48.415 (2016).

28. These states are: Massachusetts, Missouri, Montana, Nebraska, Nevada, New York, Pennsylvania, and South Carolina. *Parental Rights and Sexual Assault*, *supra* note 6. See, e.g., MASS. GEN. LAWS ch. 209C, § 3 (2017); MO. REV. STAT. § 211.477(5) (2017); MONT. CODE ANN. §§ 41-3-609, 45-5-503 (2017); NEB. REV. STAT. § 43-292 (2016); N.Y. DOM. REL. LAW § 240 (McKinney 2017); 23 PA. CONS. STAT. §§ 2511, 5329 (2017); S.C. CODE § 63-7-2570 (2017).

29. Prewitt, *supra* note 4, at 836.

rape in the first degree,”<sup>30</sup> and give the court discretion to terminate parental rights. This is particularly difficult for victims, as it is common for criminal defendants to plea down to get their desired outcomes.<sup>31</sup>

The most common type of legislation regarding the parental rights of rapists gives courts discretion, but does not require a conviction.<sup>32</sup> These statutes often contain phrases such as “the court may,” “best interest of the child,” “rebuttable presumption,” or some mixture of the three.<sup>33</sup> Twenty-one states fall into this category.<sup>34</sup> Giving discretion in these cases to a neutral judicial body sounds reasonable, but is disastrous in practice.

### B. The Adoption Option

Things get more complicated when adoption is added to the mix. In 1979, the Supreme Court declared that a state law permitting a mother to deny consent to adoption, but denying the same right to fathers, violated the Fourteenth Amendment.<sup>35</sup> While this may have a positive impact in most scenarios, it gives rapists power over impregnated victims. Rapists can use their biological parentage to deny adoption consent to a victim who wants to put her child in a loving home, or have her spouse adopt the child.

Further, many states require that a woman write the male spouse’s name on the child’s birth certificate, then use the name written to enforce a notice and consent requirement for adoption.<sup>36</sup> The only time that SCOTUS has directly handled a statute that requires the name of the father on the birth certificate was

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30. MO. REV. STAT. § 211.447.5(5) (2017).

31. Prewitt, *supra* note 4, at 836 (It is common for criminal defendants to agree to terminate their parental rights in exchange for either the victim to not press charges or for the charges to be reduced).

32. *See Parental Rights and Sexual Assault, supra* note 6.

33. *Id.*

34. These states are: Alaska, Connecticut, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nevada, Oklahoma, South Dakota, Texas, Vermont, Washington, and West Virginia. *See* ALASKA STAT. § 25.23.180(c)(3) (2017); CONN. GEN. STAT. §§ 17a-111b (2017), 17a-112, 45a-717 (2016); COLO. REV. STAT. §§ 19-5-105.5, 19-5-105.7 (2014); FLA. STAT. § 39.806 (2017); GA. CODE ANN. § 19-8-10(a)(4) (2016), *amended by* 2018 Ga. Laws, H.B. 159; HAW. REV. STAT. §§ 571-46, 571-61 (2017); IDAHO CODE § 16-2005 (2018); IND. CODE § 31-35-3.5-3 (2016); IOWA CODE §§ 232.116, 600A.8 (2018); KAN. STAT. ANN. §§ 38-2269, 38-2271 (2018); LA. CHILD. CODE ANN. arts. 1015, 1004(I) (2017); ME. STAT. tit. 19-A, § 1658 (2016), tit. 22, § 4055 (2016); MICH. COMP. LAWS § 722.25 (2016); MISS. CODE ANN. § 93-15-119 (2017); NEV. REV. STAT. § 125C.210 (2017); OKLA. STAT. tit. 10A, § 1-4-904 (2018); S.D. CODIFIED LAWS § 25-4A-20 (2018); TEX. FAM. CODE ANN. § 161.007 (West 2017); VT. STAT. ANN. tit. 15, § 665 (2017); WASH. REV. CODE § 13.34.132 (2018); W.VA. CODE § 48-9-209a (2018).

35. *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979).

36. It is important to note that many states presume that a husband is the father. *See Legal Definition of “Father” by State*, FINDLAW, <http://family.findlaw.com/paternity/legal-definition-of-father-by-state.html> [<https://perma.cc/YQ43-GWVT>].

in 2017.<sup>37</sup> However, as the Supreme Court is against giving advisory opinions, the discussion was centered around the Arkansas' Department of Health's unwillingness to put a same-sex spouse on the birth certificate rather than the constitutionality of the requirement aspect itself.<sup>38</sup>

The closest the Court has come to directly addressing whether states may require a woman to add a male spouse to a child's birth certificate was in 1983.<sup>39</sup> Here, the Court merely recognized that "a more open-ended notice requirement . . . threaten[ing] the privacy interests of unwed mothers . . ." is not an arbitrary state interest.<sup>40</sup> Thus, while some states, such as Missouri, do not require a woman to add the father's name to a birth certificate,<sup>41</sup> others, like Arkansas,<sup>42</sup> do. Requiring a woman to add a male spouse or husband's name to a birth certificate eliminates a level of protection to an impregnated-rape-victim.<sup>43</sup>

When a father, without complication, is added to their child's birth certificate, they are permitted to notice and consent of that child's adoption. However, when a rapist's name is added to the birth certificate, states have varying degrees of protection for their rights regarding adoption, much like for terminating parental rights. Four states eliminate both the notice and consent requirements for rapist fathers.<sup>44</sup> Another twelve states connect a rapist's right to notice and consent to their child's adoption to other parental rights, so they are both eliminated in tandem.<sup>45</sup>

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37. See *Pavan v. Smith*, 137 S. Ct. 2075, 2075 (2017).

38. *Id.*

39. *Lehr v. Robertson* 463 U.S. 248, 248-50 (1983).

40. *Id.* at 264.

41. MO. REV. STAT. § 453.030, 193.085 (2018).

42. See generally *Pavan*, 137 S. Ct. at 2075.

43. However, because of the link between paternity and child support, many states also require an unmarried biological father's consent before adding him to a birth certificate. See *The Rights of Unmarried Fathers*, CHILD WELFARE INFO. GATEWAY (Jan. 2014), <https://www.childwelfare.gov/pubPDFs/putative.pdf> [<https://perma.cc/JQ2Q-RJUA>].

44. The states are: Florida, Georgia, Illinois, and Nebraska. See; FLA. STAT. § 63.082(1)(d) (2017); GA. CODE ANN. § 19-8-10(a)(4) (2018); 750 ILL. COMP. STAT. 50/8(a)(5) (2016); NEB. REV. STAT. § 43-104.15 (2018). It is important to note that the process of eliminating such protection differs, with some states explicitly removing such requirements within the statute and other states removing the requirement in a different section of the code.

45. These states are: Alaska, Colorado, Connecticut, Hawaii, Idaho, Iowa, Kansas, Montana, New Hampshire, Tennessee, Utah, and Vermont. See AS § 25.23.180( c)(3), COLO. REV. STAT. § 19-5-105.7(13)(a)(III)(2017), CONN. GEN. STAT. § 45a-717(g)(2)(G); HAW. REV. STAT. § 578-2 (2017); IDAHO CODE § 16-1504(7) (2018); IOWA CODE § 232.116(1)(p) (2017); KAN. STAT. ANN. § 59-2136 (2018); MONT. CODE ANN. § 42-2-617 (2017); N.H. REV. STAT. ANN. § 170-C:12 (2018); TENN. CODE ANN. § 36-1-117 (2018); UTAH CODE ANN. § 78B-6-110, 78B-6-120 (LexisNexis 2017); VT. STAT. ANN. tit. 15A, § 2-402(a)(2), 3-401(a)(1) (2017).

In fourteen states, a rapist's consent to adoption is no longer required, but nothing is said about the notice requirement.<sup>46</sup> In North Carolina, mothers are required to file pleadings that ask courts to determine whether they need the consent of a biological father to relinquish a child to adoption.<sup>47</sup> The father then gets notified of the proceeding which alerts him to the impregnation of the victim, and can cause the mother to get into a legal battle she was trying to avoid.<sup>48</sup>

Limiting a rapist's adoption rights is just as important as terminating their parental rights. Terminating rapists' adoption rights reduces the number of stories like that of a young victim in Nebraska<sup>49</sup> who was repeatedly raped by her stepfather over many years.<sup>50</sup> One rape led to the girl's pregnancy, and she raised the resulting baby.<sup>51</sup> After eleven years, the woman wanted her fiancé to adopt the child, but her rapist stepfather refused to permit the adoption, or the termination of his parental rights.<sup>52</sup> Thus, this abuser controlled his victim, without even speaking to her.

Nevertheless, nineteen states and the District of Columbia allow rapists to assert parental rights over children conceived through rape.<sup>53</sup> States that force a woman to name her infant's father, notify him of an adoption, and require the rapist's consent,<sup>54</sup> increase the likelihood that victims will feel forced to have an abortion. Therefore, any acceptable law would have to terminate parental rights to notice and consent of an adoption as well as to visitation and custody.

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46. These states are: Indiana, Maine, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, Washington, and Wyoming. *See* IND. CODE § 31-19-9-8 (2018) (no restriction for spousal rape, specifies conviction requirement); ME. REV. STAT. ANN. tit. 18-A, §9-302 (2018); MO. REV. STAT. § 453.040(1) (2016), § 211.447 (2018); N.M. STAT. ANN. § 32A-5-19 (2017); N.Y. DOM. REL. LAW § 111-a (McKinney 2018); N.C. GEN. STAT. § 48-3-603 (2016); OHIO REV. CODE ANN. § 3107.07 (LexisNexis 2016); OKLA. STAT. tit. 10, § 7505-4.2 (2017); 23 PA. CONS. STAT. § 2714 (2017); S.C. CODE ANN. § 63-9-320 (2018); S.D. CODIFIED LAWS § 25-6-4 (2017); VA. CODE ANN. § 63.2-1202 (2017) (specifies conviction); WASH. REV. CODE § 26.33.170 (2017) (specifies conviction); WYO. STAT. ANN. § 1-22-110 (2018).

47. Bitar, *supra* note 4, at 278.

48. *Id.*

49. Nebraska now limits the notice and consent requirements for mothers who put their rape-conceived child up for adoption. NEB. REV. STAT. § 43-104.15 (2017).

50. Bitar, *supra* note 4, at 278.

51. *Id.*

52. *Id.*

53. These states are: Alabama, Arizona, Arkansas, California, Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, North Dakota, Oregon, Rhode Island, Texas, West Virginia, and Wisconsin. *Termination of Rapists' Parental Rights Laws*, RAINN (Mar. 14, 2018, 7:10 PM), <https://apps.rainn.org/policy-state-laws-db/landing-page-parental-rights/export.cfm> [<https://perma.cc/T5HT-LGUK>].

54. Or any mixture of these three requirements.

### C. Other Related Legislation

In 1977, just a few years after SCOTUS decided that abortion was a constitutionally protected right,<sup>55</sup> Congress passed the Hyde Amendment.<sup>56</sup> This legislation prohibits the use of federal funds for abortion services except in exceptional circumstances.<sup>57</sup> In 1994, the bill was amended to have exceptions for rape, incest, or when the mother's life is at stake.<sup>58</sup> In 2010, President Barack Obama ensured that the Hyde Amendment effect, as amended in 1994, applied to the Affordable Care Act.<sup>59</sup> However, rape is not clearly defined anywhere within either the Amendment or the Executive Order, so there is no way to determine whether this exception to the Hyde Amendment has the same inconsistency from state to state as the termination of a rapists' parental rights.<sup>60</sup>

As part of the 2016 Survivor's Bill of Rights Act, Congress permitted the Attorney General and Secretary of Health and Human Services to create a Working Group to help sexual assault and rape survivors deal with their attacks.<sup>61</sup> Notably, subsections (d)(5) and (d)(6) require the group to "collect feedback . . . to inform development of future best practices or clinical guidelines regarding the care and treatment of sexual assault survivors,"<sup>62</sup> and "perform other activities . . . associated with advancing victim-centered care for sexual assault survivors."<sup>63</sup> While the Working Group itself does not expand options for pregnant rape survivors, the enumerated duties increase the likelihood for consideration of real protections for women who become pregnant as the result of rape.

Another sign of possible change is the passage of the Rape Survivor Child Custody Act, which "direct[s] the Attorney General to make grants to states that have in place laws terminating parental rights of men who father children through rape."<sup>64</sup> This funding is then granted to state programs, such as, Stop Violence Against Women (STOP) and Sexual Assault Services Program (SASP).<sup>65</sup> In 2016, the Office on Violence Against Women awarded funds to

55. *Roe v. Wade*, 93 S. Ct. 705 (1973).

56. *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> [<https://perma.cc/LZC8-R76C>].

57. 42 U.S.C. § 18023 (2012).

58. Prewitt, *supra* note 4, at 844.

59. Exec. Order No. 13535 (Mar. 24, 2010), 75 Fed. Reg. 15599 (2010).

60. The only mention of "rape, incest, or a mother's bodily health" in the amended Hyde Amendment and the Executive Order is within parentheses.

61. 34 U.S.C. § 12512 (2016).

62. *Id.* at (d)(5).

63. *Id.* at (d)(6).

64. H.R. Res. 1257, 114th Cong. (2015-2016).

65. OFF. ON VIOLENCE AGAINST WOMEN, FUNDS AWARDED UNDER THE RAPE SURVIVOR CHILD CUSTODY ACT (2016), <https://www.justice.gov/ovw/page/file/1005396/download> [<https://perma.cc/YB7N-E92K>].

twelve “[s]tates that [met] the requirements of the [Rape Survivor Child Custody] Act.”<sup>66</sup>

### III.        POLITICAL AND CULTURAL STEREOTYPES OF RAPE-CONCEIVED PREGNANCIES

One reason that impregnated-rape-victims are not protected by most state legislation, is that a stereotypical “pregnant-raped-woman”<sup>67</sup> has become the basis for rape legislation, and thus is the only victim these laws protect. Political progressives and traditionalists alike use this stereotype<sup>68</sup> to discuss abortion in the United States. In politics, women who conceive through rape are no longer considered “individuals” but, rather, political talking points. Women’s rights advocates and political conservatives have each had a role in creating legislative loopholes found by rapists in protections for women impregnated by rape.

#### *A. Negative Effects of Women’s Rights Advocacy in the 1960s and Now*

During the 1960s, reproductive rights were front and center in the fight for gender equality. Women had been oppressed by the “Cult(ure) of Domesticity”<sup>69</sup> that became the societal norm after WWII; they were tired of being confined to the “private sector” of life (the home), and sexual autonomy was finally a possibility when the FDA approved the oral birth control pill in 1960.<sup>70</sup> However, birth control and abortion advocates faced bad press that sexual autonomy constituted a choice against motherhood.<sup>71</sup> Therefore, activists

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66. *Id.*

67. Discussed in detail, Prewitt, *supra* note 4 at 840-42.

68. The stereotype being that of a woman who cannot love the product of their trauma or are further traumatized for that child’s existence; *Id* at 841-42.

69. JULIE MATTHAEI, *THE READER’S COMPANION TO U.S. WOMEN’S HISTORY*, 264 (Wilma P. Mankiller et al., 1998). The “Cult(ure) of Domesticity” was a mindset that took over in American Society after men returned from fighting in WWII. The concept was that women would only work if their husbands could not take care of them financially, or they were selfish because they were intent on forcing themselves into the “social sphere” which was a man’s realm.

70. See generally *The 1960-70s Am. Feminist Movement: Breaking Down Barriers for Women*, TAVAANA (last visited Nov. 28, 2017), <https://tavaana.org/en/content/1960s-70s-american-feminist-movement-breaking-down-barriers-women> [https://perma.cc/3RUH-BPEU]; Alexandra Nikolchev, *A Brief Hist. of the Birth Control Pill*, PBS (May 7, 2010: 4:59 PM), <http://www.pbs.org/wnet/need-to-know/health/a-brief-history-of-the-birth-control-pill/480/> [https://perma.cc/9JFF-D3LV].

71. Prewitt, *supra* note 4, at 840.

created the image of the “pregnant-raped-woman prototype” to challenge public opinion.<sup>72</sup>

Two justifications exist for legalizing abortion when a woman is impregnated by rape. The “nonconsensual-act justification,” is based on the idea that no one should be held “maternally” accountable for nonconsensual sexual acts.<sup>73</sup> The “rape-product justification,” posits that forcing a pregnant woman to carry the “product of such [a] violent, vicious and terrible act as that of rape” is inhumane.<sup>74</sup> The first justification has a basis in choice and the second in necessity, but both reason that a woman should not be “held responsible” for a situation that she never volitionally assumed. Moreover, both assert that “any child born of such an occasion would have little chance of being well-loved,<sup>75</sup> which is damaging to impregnated-rape-victims.

The “Pregnant-raped-woman” is still used in political arguments today and has fed into the myth that rape-conceived children do not affect enough citizens for any action to occur.<sup>76</sup> In reality, only about 50% of pregnant-raped-women get an abortion, while 5.9% place their newborns for adoption, and, most importantly, 32.2% parent them.<sup>77</sup> Many rape victims do not feel any ill will towards their rape-conceived children and are more likely to believe that children conceived in such a manner are victims just as they are.<sup>78</sup> Women who choose to give birth to their rape-conceived children and women who choose to abort their rape-conceived children both regain their sexual autonomy because *they* have ultimately decided whether to be mothers.<sup>79</sup>

In direct contrast to the “Rape-Product Justification,” data shows that only about one-fifth of all raped women feel resentment towards the pregnancy and the child, and even less feel the pregnancy is a “continual reminder of the rape . . . .”<sup>80</sup> A study analyzing emotional effects of women who conceived through rape showed that they experienced trauma from the rape event itself rather than the resulting pregnancy,<sup>81</sup> possibly because many women feel forced to terminate their pregnancies. Once again, they are being controlled by their rapists. This time, it is the fear of co-parenting that drives their actions, rather than the force, intoxicant, or coercion used in the rape event.

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72. *Id.* at 841-42.

73. *Id.* at 841.

74. *Id.* at 842.

75. *Id.* at 846.

76. *See* Bitar, *supra* note 4, at 298-99.

77. *Id.* at 281.

78. Prewitt, *supra* note 4, at 849.

79. *Id.* at 851.

80. *Id.* at 849.

81. *Id.* at 848-49.

*B. Negative Effects of Right-Wing Politics and Ignorance*

While the political left has done its fair share of damage, the ignorance of the political right is no better. Parental rights laws in the United States, are often driven by inaccurate ideas that legislatures believe about rape victims and rape-conceived children. An extreme example of this ignorance was demonstrated by Todd Akin, a Republican candidate for Senate in Missouri, who said, “From what I understand from doctors, [pregnancy from rape] is really rare. If it’s a legitimate rape, the female body has ways to try to shut the whole thing down.”<sup>82</sup>

Other common myths are just as damaging to women who have been raped. One such myth is that no rapist will want anything to do with a resulting child. However, stories such as Noemi’s<sup>83</sup> are common. Even when the rapist is not interested in co-parenting their offspring, they will often avoid conviction for rape and/or paying child support by threatening to demand parental rights for their children if the victims testify against them, demand child support, or request welfare.<sup>84</sup> Moreover, a rapist’s parents may seek grand-parental custody in some form, even if their son is uninterested.<sup>85</sup>

Jamie Melendez dispels the myth that rapists are uninterested in the product of their attack. Melendez raped a fourteen-year-old high school student in Massachusetts.<sup>86</sup> The victim, referred to as Jane for anonymity, became pregnant as a result and gave birth to the child.<sup>87</sup> In 2011, Melendez pled guilty, was sentenced to 16 years’ probation, and ordered to pay \$110/week in child support.<sup>88</sup> Melendez said if he had to pay child support, he wanted visitation.<sup>89</sup> Jane argued the court-ordered child support “violate[d] her federal rights by binding her to an unwanted 16-year legal relationship with her rapist.”<sup>90</sup> While Melendez did not win parental rights, the Court stated that he was able to apply for parental rights as many times as he wanted.<sup>91</sup> This decision allows Mr.

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82. Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, NEW YORK TIMES (Aug 20, 2012), <http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html?mcubz=3>.

83. Noemi’s tale was told in the introduction of this paper. Patterson, *supra* note 7.

84. Prewitt, *supra* note 4, at 836.

85. Bitar, *supra* note 4, at 278.

86. Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L. Q. 515, 515 (2014).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Jennifer Smith, *Attack Victim, 22, Who Was Impregnated at 14, Fights to Keep Her Daughter as He Wins Right to Apply for Visitation Seven Years Later*, Daily Mail (Dec. 7, 2016, 11:36 PM), <http://www.dailymail.co.uk/news/article-4009996/Rape-victim-impregnated-attack-14-forced-face-man-court-seven-years-later-wants-visitation-rights-child.html>.

Melendez to repeatedly apply for rights and force his victim into year-long legal battles.<sup>92</sup>

Another legend found in American culture is the myth of the “women who cry rape.”<sup>93</sup> This prototypical woman is reputedly motivated by dominating her sexual partner or escaping embarrassment over having had sex with him.<sup>94</sup> However, research has indicated that the false report rate for rape is equal to or less than the false report rate of other crimes.<sup>95</sup> The significance of the “woman who cries rape” myth shows in the ease with which the public labels victims of sexual assault and rape as ‘liars.’<sup>96</sup>

Even though terminating parental rights is a civil issue, many states require a rape conviction to terminate a rapist’s parental rights. This is a problem because only 2% of rapist are caught, tried, and imprisoned.<sup>97</sup> From 2005 to 2010, approximately 300,000 instances of rape occurred per year.<sup>98</sup> About 36% of those instances were reported, and 12% resulted in arrests,<sup>99</sup> and even less in convictions. Further, a criminal defendant who pleads down often does not have the requisite conviction to trigger victim protection.<sup>100</sup> Therefore, a conviction requirement may not result in any protection for a victim who gives birth.

Also, criminal convictions require a “beyond a reasonable doubt” standard of evidence,<sup>101</sup> which is the strictest evidentiary standard. However, terminating parental rights demands only “clear and convincing” evidence, which, while still strict, is easier than a criminal conviction requirement.<sup>102</sup> Moreover, courts in several states may still permit the assailant to keep parental rights, even with a conviction,<sup>103</sup> and it is not uncommon for courts to use their discretion to grant a rapist custody or visitation because they decide it is “in the best interest of the child.”<sup>104</sup> While the best interest of the child is important, this judicial

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92. See generally *Id.*

93. Analyn Megison, *How I Stopped my State from Giving Parental Rights to Rapists*, CNN: THIS IS LIFE WITH LISA LING (last updated Nov. 21, 2016, 1:22 PM), <http://www.cnn.com/2016/11/16/opinions/opinion-rapist-parental-rights/index.html>.

94. *Myths About False Accusation*, MEN AGAINST ABUSE NOW (last visited Apr. 30, 2018), [https://web.stanford.edu/group/maan/cgi-bin/?page\\_id=297](https://web.stanford.edu/group/maan/cgi-bin/?page_id=297).

95. Megison, *supra* note 93.

96. See Debra Birnbuam, *Lena Dunham Apologizes for Defending ‘Girls’ Writer Accused of Sexual Assault*, VARIETY (NOV. 18, 2017, 5:39 P.M.), <http://variety.com/2017/tv/news/lena-dunham-apology-girls-writer-murray-miller-1202618404/> [<https://perma.cc/58RD-TXYF>] (having received hefty, international backlash for claiming the victim was lying, Dunham has since apologized).

97. Prewitt, *supra* note 4, at 836-37.

98. Breanna Hare & Lisa Rose, *supra* note 24.

99. *Id.*

100. Prewitt, *supra* note 4, at 856.

101. *Patterson v. New York*, 432 U.S. 197, 208 (1977).

102. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

103. Barbara Hart, *DV and the Law*, 23 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION (Thomson Reuters/Quinlan NL 4), Mar. 2017.

104. *Id.*

determination ignores the effects repeatedly facing her attacker has on the impregnated-rape-victim. Further, the uncertainty of court discretion can and does often cause victims to get abortions to avoid having to see their attackers again or chance any kind of court battle with them.

#### IV. ANALYSIS—FINDING A SOLUTION

Creating a model law that stops the factors driving rape impregnated mother into abortion clinics requires a three-part process. First, the process requires an analysis of already-existing legal options to help protect raped-impregnated-victims, and how to increase the benefits of these laws. Second, the process calls for evaluating 750 ICLS 46/622, the Illinois state law that protects all raped women, including those who wish to give birth to their rape-conceived child. Finally, this paper suggests a model law that addresses and fixes the pitfalls in the current U.S. legal landscape as it relates to rape-conceived children.

To make “pro-abortion” laws “pro-choice,” five things must happen. First, all states need to both implement the Family Violence Option (FVO) and ensure that it applies to strangers and acquaintances. Second, states should require only a “clear and convincing” evidentiary standard to terminate parental rights. Third, states should not permit court discretion, in the “best interests of the child” or otherwise. Fourth, the law needs to enumerate that it only applies to rape wherein the perpetrator uses substances or manipulation, to avoid situations like the one in *Peña v. Mattox*.<sup>105</sup> Finally, legislation needs to transfer the power to control any rights provided to the rapist-father from the courts to the victim to avoid abusive assailants repeatedly taking victims to court.

##### A. *The Family Violence Option*

The “Family Violence Option,” provides, in pertinent part, that an individual may “waive, pursuant to a determination of good cause . . . child support cooperation requirements . . . .”<sup>106</sup> Presently, all but three states<sup>107</sup> have

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105. The parents of a fifteen-year-old girl who is impregnated through consensual sex with a nineteen-year-old boy, he was imprisoned after the girl’s parents filed a statutory rape charge against him. When he was in prison, the parents took the girl to Indiana, where she gave birth and the parents put the child up for adoption. See *Infra* p. 77.

106. 42 U.S.C. § 602(a)(7)(A)(iii) (2012).

107. The states without FVO are: Idaho, Oklahoma, Virginia.; The states with some FVO: Connecticut, South Dakota. *Family Violence Option: State by State Summary*, LEGAL MOMENTUM, Jul. 2004, at 1, [http://www.ncdsv.org/images/LM\\_FamilyViolenceOptionStateByStateSummary\\_updated-7-2004.pdf](http://www.ncdsv.org/images/LM_FamilyViolenceOptionStateByStateSummary_updated-7-2004.pdf) [https://perma.cc/27GR-RYAL].

FVO or equivalent measures.<sup>108</sup> Nevertheless, only eighteen states and D.C. apply FVO to protection against strangers or acquaintances.<sup>109</sup> This is dangerous because states can, and do, inform a rapist that his assault impregnated his victim.<sup>110</sup> The father may have no interests in his parental rights,<sup>111</sup> but may be granted them by the state to the great distress of his victim because she does not want to co-parent or associate with her attacker.

An example of a judge granting parental rights as a matter of mindless administrative work is Judge Gregory Ross. Judge Ross granted parenting time and joint custody of a child conceived in rape to a convicted sex offender who had raped the child's mother nine years earlier.<sup>112</sup> This rapist kidnapped the mother for two days, threatened to kill her and her sister, and repeatedly raped her.<sup>113</sup> The attacker was later arrested and pled guilty to "attempted third-degree criminal sexual conduct."<sup>114</sup> He was sentenced to one year in county jail, but only served 6.5 months before he was released to care for his sick mother.<sup>115</sup> Two years later, he sexually assaulted another victim and served four years.<sup>116</sup>

Judge Ross, not only disclosed the victim's address to her rapist but also added his name to the child's birth certificate without the victim's consent, a hearing, or talking to the perpetrator.<sup>117</sup> These actions made the victim "[unable] to move 100 miles from where she had been living without the court's consent" or she would be held in contempt.<sup>118</sup> The rapist "never initiated this. It was something routinely done by the prosecutor's office when a party makes application for state assistance."<sup>119</sup>

About two weeks later, Judge Ross rescinded the order saying, "I did not know that the defendant had raped the plaintiff, which lead to the child's conception."<sup>120</sup> Demonstrably, trauma can result from administrative negligence when a state does have measures equivalent to FVO, but no stranger or acquaintance protection.<sup>121</sup> Thus, states must enact an FVO of their own, or

108. *Id.*

109. *Id.*

110. Bitar, *supra* note 4, at 278.

111. The father may also use his parental rights to regain control over his victim.

112. Mike Martindale, *Mich. Rapist Gets Joint Custody*, THE DETROIT NEWS (Oct 6, 2017), <http://www.detroitnews.com/story/news/local/michigan/2017/10/06/rape-victim-attacker-joint-child-custody/106374256/> [<https://perma.cc/LHE6-Y3FE>].

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. AP Wire Service, "Did not Know" he Raped her: Judge Rescinds Order in Sex Offender Custody Case, FOX 6 NOW (Oct. 17, 2017, 6:31 PM), <http://fox6now.com/2017/10/17/did-not-know-he-raped-her-judge-rescinds-order-in-sex-offender-custody-case/> [<https://perma.cc/7UYT-QH5A>].

121. See, e.g., Bitar, *supra* note 4, at 278 (explaining how trauma can occur when states do not adopt stranger or acquaintance protections. In some states, when mothers apply

the equivalent measures for strangers and acquaintances, and need a means to indicate when a child has been conceived via rape.

*B. The Illinois Patronage Act, 750 ICLS 46/622*

Only one legislative system in the United States effectively protects rape victims, who keep their rape-conceived children, from their attacker. The law, entitled 750 ILCS 46/622, was introduced on January 14, 2016, by Representative Kelly M. Burke from Springfield, Illinois.<sup>122</sup> On May 29, 2016, both state congressional houses<sup>123</sup> passed 750 ILCS 46/622.<sup>124</sup> The Governor signed it two weeks later, and it became effective January 1, 2017.<sup>125</sup> It is therefore a recent development, which could lead the way for other states.

This statute takes a slightly different approach to many others by focusing the action on the assailant rather than the court, beginning by stating that it

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for public assistance, the fathers are notified of their fatherhood in an attempt to obtain child support from them. This allows the rapist father to assert parental rights over the child, which can cause significant trauma for victims).

122. 98TH ILL. GEN. ASSEMB., BILL STATUS OF HB4447 (2016), <http://www.ilga.gov/legislation/BillStatus.asp?GA=98&DocTypeID=HB&DocNum=4447&GAID=13&SessionID=88&LegID=93351> [<https://perma.cc/8494-Z9PM>].

123. *Id.*

124. § 622: (a) [A]ppplies to a person who has been found to be the father of a child . . . and who (1) [Was] convicted of . . . pled guilty[/]nolo contendere to [criminal sexual assault], [aggravated criminal sexual assault], [predatory criminal sexual assault of a child], [criminal sexual abuse], [aggravated criminal sexual abuse],[sexual relations within families], [criminal sexual assault], [aggravated criminal sexual assault], [predatory criminal sexual assault of a child], [criminal sexual abuse], or [aggravated criminal sexual abuse] . . . for his conduct in fathering that child; or (2) at a fact-finding hearing, is found by clear and convincing evidence to have committed an act of non-consensual sexual penetration for his conduct in fathering that child.

(b) [The father] shall not be entitled to an allocation of any parental responsibilities or parenting time with that child without the consent of the child's mother[/]guardian. If [the father] is also the guardian of the child, he does not have the authority to consent to parenting time or the allocation of parental responsibilities. . . . If the mother. . . is a minor, and [the father] is also the father or guardian of the mother, then he does not have the authority to consent to the allocation of parental responsibilities or parenting time.

(c) [N]othing in this Section shall be construed to relieve [the father] of any support and maintenance obligations to the child under this Act. The child's mother . . . may decline support and maintenance . . .

(d) [T]he father . . . is not entitled to any inheritance or other rights from the child without the consent of the child's mother or guardian.

(e) [T]he parent, grandparent, great-grandparent, or sibling of the [father] does not have standing to bring an action [for father] . . . without the consent of the child's mother or guardian.

(f) A petition . . . may be filed by the child's mother . . . either as an affirmative petition in circuit court or as an affirmative defense in any proceeding filed by the [father] regarding the child.

125. 98TH ILL. GEN. ASSEMB., *supra* note 122.

applies “to a person who was found to be a father of a child under this act[.]”<sup>126</sup> The law specifies how an individual can be deemed as an assailant in criminal courts, by conviction or plea.<sup>127</sup> The statute further provides for a civil hearing wherein the victim demonstrates, by clear and convincing evidence, that the father raped her and she conceived a child.<sup>128</sup>

Subsection (b) states that a rapist-father “shall not be entitled to an allocation of any parental responsibilities or parenting time with that child without the consent of the child’s mother or guardian.”<sup>129</sup> The law enumerates and closes possible loopholes<sup>130</sup> that the rapist father might use.<sup>131</sup> This facet of Illinois’ law prevents a rapist-father from repeatedly taking the mother to courts and using the justice system as a weapon. The state does not authorize Courts to give rapists parenting time without the mother’s consent, so no viable remedy exists for the rapist-father to pursue in court.

One major difference between the Illinois law and the model law proposed here is that the model law eliminates the responsibility of a rapist father to pay child support. Subsection (c) of 750 ICLS 46/622 still obligates the child support payment, while permitting the mother to “decline support and maintenance obligations” from the father.<sup>132</sup> However, the rate at which men pay child support is very low.<sup>133</sup> Getting rid of the child support obligation destroys the argument that a woman will try to demand payment from a man whose parental rights she terminated in court.

Section (e) of 750 ICLS 46/622 protects a victim from the rapist’s family attempting to get rights without the mother’s consent.<sup>134</sup> This law is both long and complicated, but it also covers every possibility that the Illinois legislature deemed reasonable, when considering issues related to rape-conceived children.

### C. A Model Law

The basic law should read “The court *shall* terminate all of the parental rights and responsibilities of the parent if the petitioner [shows the court] *by clear and convincing evidence* that the parent raped the petitioner, such rape was [forced] or [coerced by threat or intoxicant], and the child was conceived

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126. 750 ILL. COMP. STAT. 46/622(a) (West 2017).

127. *Id.* at § (a)(1).

128. *Id.* at § (a)(2).

129. *Id.* at §(b).

130. Specifically, if the father is also the child’s guardian, or if the father is also the parent or guardian of the rape victim.

131. *See* 750 ILL. COMP. STAT. 46/622(b) (West 2017).

132. *Id.* at §(c).

133. Beck, *supra* note 21, at 66 (“5.6 million mothers were due child support in 2011, but only three-quarters received any of the amount due”).

134. 750 ILL. COMP. STAT. 46/622(e) (West 2017).

as a result of that act.”<sup>135</sup> Codifying the use of the “clear and convincing” evidence standard fulfills the *Santosky*’s strict constitutional requirement, while being slightly easier than the “beyond a reasonable doubt” criminal conviction requirement.<sup>136</sup> Further, besides destroying both rights and responsibilities, one addition to this law that could give it a wider appeal is a statute of limitations. The mother would be given five years after her child’s conception, or two years after the father demands custody or parental time, to provide “clear and convincing” evidence that the child was conceived by rape.

In a situation where uncertainty drives a pregnant, scared rape victim to the abortion clinic, codifying the burden of proof standard would create consistency among state courts.<sup>137</sup> Further, prosecutors could still make a plea deal with an assailant in a criminal case, without treading upon the victims’ abilities to protect themselves in future civil cases. Finally, victims gain the ability to confront their attackers, if they so desire, and still have their lawyers to act as buffers for the confrontation.

The model law would remove judicial discretion, as well. The word “shall” alerts a court that it must terminate parental rights when a mother proves that her child or fetus was a product of rape by the biological father. The termination of parental rights permits the victim to seek the adoption option, as no need for notice and consent is required when parental rights are terminated.

Moreover, statutory rape, without force or coercion by threat or intoxicant, would not be held to the same standard as forcible or coercive rape, where the act is against a victim’s physical and sexual autonomy. In *Peña v. Mattox*, a nineteen-year-old boy (Peña) and a fifteen-year-old girl (Mattox) began dating. When Mattox got pregnant, the parents forbid her from seeing Peña.<sup>138</sup> Later, the parents found out that the teens were seeing each other in secret, and had charges brought against Peña for felony sexual assault, despite the age difference being smaller by one year than required by statute.<sup>139</sup> While Peña was in jail, Mattox’s parents took her to Iowa to give birth, and the child was placed for adoption without informing Peña.<sup>140</sup> The Seventh Circuit held that Peña did not have a constitutionally protected interest in his offspring with Ms. Mattox.<sup>141</sup>

This 1996 decision has been controversial. Some argue that “[s]tatutory rape, as opposed to [forcible] and [coercive] rape, does not require the use of force or a victim’s lack of consent.”<sup>142</sup> Statutory rape laws derive from the belief that young people “do not have the maturity, experience, or good

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135. Bitar, *supra* note 4, at 296.

136. *See* *Miles v. United States*, 103 U.S. 304, 312 (1880).

137. *See* *Santosky v. Kramer*, 455 U.S. 745, 753, 769-70 (1982).

138. *Peña v. Mattox*, 84 F. 3d 894, 895 (Ct. App. 7<sup>th</sup> Cir. 1996).

139. *Id.* at 896.

140. *Id.*

141. *Id.* at 899.

142. Bitar, *supra* note 4, at 294.

judgement to make such an important decision, or to give informed consent.”<sup>143</sup> Therefore, while forceful or coercive rape should still cause parental right termination, a relationship between two consenting humans should not automatically terminate those rights, with a caveat that the larger the age gap, the more likely coercion came into play.

Currently, three state statutes specifically permit parental rights terminations after impregnation by statutory rape.<sup>144</sup> While Ohio and North Carolina both require a conviction to terminate parental rights, Vermont does not.<sup>145</sup> Thus, individuals who did not coerce or force women to have sex can still lose their abilities to parent their biological children if their sexual partner is under the age of consent in that state.

Finally, to address the ability for rapists to repeatedly sue their victims for parental rights, the model law must parrot 750 ICLS 46/662 § (b)<sup>146</sup> which, as stated above, allows the victim to regain control, and prevents the rapist from abusing the court system.

Child rearing is considered a fundamental right.<sup>147</sup> Thus, analyzing the constitutionality of the proposed law requires the use of the “strict scrutiny test.”<sup>148</sup> This test derives from the implication that fundamental rights are constitutionally protected by the Fifth and Fourteenth amendments.<sup>149</sup> The strict scrutiny test “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>150</sup>

The governmental interest presented by this legislation is granting dignity to rape victims by reducing the re-traumatizations by forced interaction with rapists. The federal government has recognized the prevalence of women giving birth to rape-conceived children and the importance of protecting such victims who have conceived through rape from their assailant.<sup>151</sup> Government interest in protecting women from violence is clear in Congress’s passage of

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143. *Statutory Rape*, LEGAL DICTIONARY, <https://legaldictionary.net/statutory-rape/> [https://perma.cc/3V3K-NF7M] (last visited Nov. 30, 2017).

144. These states are: Ohio (if the woman is under thirteen), North Carolina, and Vermont. *Parental Rights and Sexual Assault*, *supra* note 6.

145. *Id.*

146. 750 ILL. COMP. STAT. ANN. § (b) (West 2016) (“[The father] shall not be entitled to an allocation of any parental responsibilities or parenting time with that child without the consent of the child’s mother or guardian. If [the father] is also the guardian of the child, he does not have the authority to consent to parenting time or the allocation of parental responsibilities. . . . If the mother . . . is a minor, and [the father] is also the father or guardian of the mother, then he does not have the authority to consent to the allocation of parental responsibilities or parenting time.”).

147. *See generally* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

148. *Washington v. Glucksberg*, 521 U.S. 702, 762 (1997) (Souter, J., concurring).

149. *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

150. *Washington*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

151. 34 U.S.C. § 21302 (2018).

acts such as the Violence Against Women Act<sup>152</sup> and the Lautenberg Amendment.<sup>153</sup> Thus, the government interest to protect these victims is established and compelling.

Moreover, the rape victim law must be narrowly tailored. As written, the Illinois law only affects males, who have impregnated their victim via rape, which has been proven by the second strictest evidentiary standard in the legal system. Therefore, the statute specifically protects women from being re-traumatized by their rapists either by co-parenting with them or repeatedly facing them in court.

Terminating parental rights and *responsibilities* both eliminates need to contact the rapist-parent for child support when seeking the acquisition of welfare, effectively expanding FVO, and recognizes the reality that child support owed is rarely paid.<sup>154</sup> While eliminating child support might cause detractors, it is realistically a necessary corollary to eliminating rapists' parental rights. The suggested law preempts legal battles that do not have favorable outcomes for the victim and could also re-traumatize her.

## V. CONCLUSION

Legislation that properly protects rape-victims who opt to give birth to their rape-conceived children is a complicated and emotional issue. No solution will be effective in every case, but the potential for unforeseen extremes should not prevent progress. Politicians and activists have used a fake, conceptualized rape victim for so long that most laws protect the concept instead of real victims. Thus, laws currently protect the exception, not the norm.

Fifty-percent of women who are impregnated through rape give birth to their rape-conceived child. Low conviction rates, uncertainty in holdings by court with discretion, and fear of having to co-parent with the man who raped them drive impregnated-rape-victims to the abortion clinic as the only option to regain control. There is no choice. No life is preserved. Most state laws are effectively although not necessarily intentionally "pro-abortion." While the first step is addressing this reality, the second is to look for ways to rectify and prevent it, and the model law in this paper does just that.

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152. The Act sought to improve criminal justice response to domestic violence and sexual assault in the United States. 42 U.S.C. §§ 13925-14045d (2012).

153. The Lautenberg Amendment amends the Violence Against Women Act to limit gun ownership by individuals who have been convicted of a misdemeanor domestic assault. 18 U.S.C. § 922(g)(9).

154. Beck, *supra* note 21, at 66.