

“The Second Rape”: Legal Options for Rape Survivors to Terminate Parental Rights

I. Introduction

In 2009, Jaime Melendez raped Jane,¹ a fourteen year old high school student, in Massachusetts.² Jane became pregnant as a result of the rape and gave birth to a child.³ Melendez pled guilty to rape charges in 2011 and was sentenced to sixteen years of probation and was ordered to family court for a child support hearing.⁴ The Family Court ordered Melendez to pay \$110 per week in child support to Jane.⁵ The process seemed to be going unusually smoothly, until Melendez filed a petition with the Family Court arguing that if he was to pay child support he wanted visitation rights.⁶

Jane’s attorney filed a complaint in federal court, arguing that the court order that sent the child support case to family court forced Jane into an unwanted relationship with her rapist.⁷ Jane’s complaint argued that the court-ordered child support “violates her federal rights by binding her to an unwanted 16-year legal relationship with her rapist.”⁸ Jane’s attorney argued that Jane’s case should be sent back to criminal court where Melendez should be ordered to pay restitution in the amount that would be awarded for child support.⁹

Few words can describe the horror Jane experienced at the hands of her rapist. Yet, even after Melendez was arrested, prosecuted, and convicted of rape, he continued to torment his victim using

¹ This is a pseudonym.

² Colleen Curry, *Rapist Wants Visitation Rights With Child Conceived During Rape*, Abcnews.com (Sept. 29 2012), <http://abcnews.go.com/US/massachusetts-rapist-seeks-visitation-victims-child/story?id=17349095>; *Woman Accuses Court Of Forcing Her Into Relationship With Her Rapist*, Huffington Post (Aug. 21 2013), http://www.huffingtonpost.com/2013/08/21/woman-rapist_n_3792751.html.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Colleen Curry, *Rapist Wants Visitation Rights With Child Conceived During Rape*, Abcnews.com (Sept. 29 2012), <http://abcnews.go.com/US/massachusetts-rapist-seeks-visitation-victims-child/story?id=17349095>.

⁹ *Id.*; *Woman Accuses Court Of Forcing Her Into Relationship With Her Rapist*, Huffington Post (Aug. 21 2013), http://www.huffingtonpost.com/2013/08/21/woman-rapist_n_3792751.html.

the legal tool of parental rights, rights that he gained solely and directly as a result of his violent acts against Jane. Massachusetts does not permit a rape victim who conceives a child to terminate the parental rights of her rapist, and Massachusetts is not alone. Nineteen states, including the District of Columbia, have no protections for rape victims who become pregnant as a result of the assault.¹⁰ The omission of protective laws by these states leaves rape victims vulnerable to a “second rape” by the legal system.

The phrase the “second rape”¹¹ describes the experience of rape survivors who are denied protections and support from their communities, leaving them feeling “blamed, doubted and re-victimized.”¹² If a rape survivor’s needs are not addressed, the impact can be devastating.¹³ Victims’ negative experiences when they turn to various systems, institutions, and agencies for assistance following an assault can result in secondary trauma “which futher[s] the rape event.”¹⁴ Thus, survivors are affected by not just the rape, but the interactions they may have following the assault.

Research indicates that this secondary trauma or re-victimization takes the form of “victim-blaming attitudes, behaviors, and practices”¹⁵ engaged in by community service providers, police, prosecutors, judges, and doctors.¹⁶ Importantly, secondary victimization can “occur not only because of what ... [service providers and others] do but also because of what they do not do.”¹⁷ Therefore, omissions are just as harmful to survivors as commissions.

This article will expand the concept of the “second rape” to include the harm and secondary trauma caused by state laws, legislation, and policy that by omission allow abusers to use their parental rights to continue to abuse their victims. Specifically, this paper examines the existing law

¹⁰ See Rape Abuse Incest National Network (RAINN), *Termination of Rapists' Parental Rights Laws*, RAINN (Dec. 13, 2013) <http://apps.rainn.org/state-laws/landing-page/export.cfm> (these states include Alabama, Arizona, District of Columbia, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Dakota, Ohio, Rhode Island, Vermont, Virginia, West Virginia, Wyoming) [hereinafter RAINN].

¹¹ Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefel, and Holly E. Barns, *Preventing the “Second Rape”: Rape Survivors’ Experiences With Community Service Providers*, 16 *Journal of Interpersonal Violence* 12, 1240 (Dec. 2001).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1241.

for termination of parental rights of rapists whose assaults result in pregnancy, and the need for new legislation where there is none.¹⁸ Section II examines the consequences and trends of rape in the U.S. Section III discusses rape and pregnancy, including an examination of the unique circumstances of pregnant rape victims in their intimate relationships. Section IV provides an overview of parental rights and the resulting legal benefits that flow from them. Section V surveys current federal and state legislation that terminates, either in part or in full, the parental rights of rapists. Section VI analyzes the need for exceptions to the termination of all parental rights of rapists, specifically through the lens of statutory rape. Finally, Section VII articulates the ways in which custody laws legally bind pregnant survivors to their rapists, resulting in a “second rape.” This last section argues that pregnant rape survivors need laws that fully protect them by allowing termination of all parental rights, regardless of conviction.

II. Rape in the United States: Facts, Figures, and Consequences

The Centers for Disease Control and Prevention (CDC) defines sexual violence as “any sexual act that is perpetrated against someone's will.”¹⁹ In the United States, nearly one in five women will be raped in her lifetime.²⁰ Approximately one in seventy-one men in the U.S have been raped in his lifetime.²¹ The U.S. Department of Justice estimates that 90% of rape victims are female.²² Of the women surveyed by the CDC’s National Intimate Partner and Sexual Violence Survey (NISVS), more than three-quarters of female victims of completed rape (79.6%) were first raped before their 25th birthday.²³

¹⁸ The documentation of state laws herein is based on information and data available at the time of writing.

¹⁹ Centers for Disease Control and Prevention, *Sexual Violence: Definitions*, Centers for Disease Control and Prevention (Jan. 2, 2014), <http://www.cdc.gov/violenceprevention/sexualviolence/definitions.html>.

²⁰ Michele C. Black, Kathleen C. Basile, Matthew J. Breiding, Sharon G. Smith, Mikel L. Walters, Melissa T. Merrick, Jieru Chen, & Mark R. Stevens, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, Centers for Disease Control and Prevention (Nov. 2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [hereinafter NISVS].

²¹ *Id.*

²² Shannan Catalano, *Intimate Partner Violence in the United States*, Bureau of Justice Statistics (1994), <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>.

²³ NISVS, *supra* note 20.

Rape and sexual assault²⁴ result in many mental health and physical consequences. Rape survivors experience both immediate and long term mental health consequences, including depression, post-traumatic stress disorder, and attempted or completed suicide.²⁵ Survivors also experience many long-lasting symptoms and illness including chronic pelvic pain; premenstrual syndrome; gastrointestinal disorders; and a variety of chronic pain disorders including headache, back pain, and facial pain.²⁶ Additionally, gynecological problems, such as bladder infection, pelvic pain, and vaginal bleeding, are common.²⁷ Sexual violence has also been linked to life-threatening illnesses such as high-cholesterol, stroke, heart attacks, and heart disease.²⁸

The mental and physical consequences of rape are compounded by economic costs to victims. A 1996 National Institute of Justice (NIJ) study categorizes the cost of sexual violence as follows: (1) out- of-pocket expenses such as medical bills and property losses, (2) reduced productivity at work, home, and school, and (3) nonmonetary losses—such as fear, pain, suffering, and lost quality of life.²⁹ The NIJ found that, of violent crime, rape has the highest overall annual costs to victims at \$127 billion per year, and this is excluding costs for victims of child sex abuse.³⁰ The average cost of rape and sexual assault per criminal victimization, excluding child sexual assault, is \$87,000 per year.³¹ These costs include medical costs, lost earnings, pain, suffering, and lost quality of life.³² In fact, rape costs its victims more than the overall individual costs for victims of assault, murder, and drunk driving, making it the most costly crime to its victims.³³

²⁴ Sexual assault is defined as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault are sexual activities as forced sexual intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape.” See Office on Violence Against Women, *Sexual Assault*, U.S. Department of Justice, <http://www.ovw.usdoj.gov/sexassault.htm> (last updated April 2014).

²⁵ Centers for Disease Control and Prevention, *Sexual Violence: Consequences*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/sexualviolence/consequences.html> (last updated Jan. 2, 2014).

²⁶ Mary P. Koss & L. Heslet, *Somatic Consequences of Violence against Women*, 1, Archives of Family Medicine, 53 (1992).

²⁷ Kimberly K. Eby, Jacquelyn C. Campbell, Cris M. Sullivan, & William S. Davidson, *Health Effects of Experiences of Sexual Violence for Women with Abusive Partners*, 16, Health Care for Women International, 563 (1995).

²⁸ Matthew J. Breiding & George W. Ryan, *Chronic disease and health behaviours linked to experiences of non-consensual sex among women and men*, 125 Public Health 9, 653-659 (2011).

²⁹ Ted R. Miller, Mark A. Cohen, & Brian Wiersema. *Victim Costs and Consequences: A New Look*, National Institute of Justice (Jan. 1996), <https://www.ncjrs.gov/pdffiles/victcost.pdf>.

³⁰ *Id.* If these 1996 figures were updated to 2014 dollars the estimates would likely be much higher.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Rape is the most underreported violent crime in the country.³⁴ Only between 16% and 19% of rapes are reported to law enforcement.³⁵ Once it is reported, rape is rarely prosecuted. Therefore, federal data does not provide a complete picture of prosecution rates and results.³⁶ Social science research has found that 7% to 27% of rapes reported to law enforcement are prosecuted; and 3% to 26% of these prosecutions yield a conviction.³⁷ When these estimates are combined, researchers estimate that of 100 forcible rapes that are committed, approximately five to twenty will be reported, 0.4 to 5.4 will be prosecuted, and 0.2 to 5.2 will result in a conviction.³⁸ In other words, of the small number of rapes that are reported and prosecuted, at most 5% of perpetrators will be convicted.³⁹

Sexual violence is a significant economic, public health, and criminal justice issue that devastates individuals and communities. Survivors of rape suffer severe mental and physical health consequences. Rape and sexual assault are extremely costly to both individual victims and to society. Further, rape continues to be underreported and under-prosecuted. The next section examines one of the consequences of rape, pregnancy, which carries unique legal barriers for survivors.

III. Rape and Pregnancy

1. What We Know About Rape and Pregnancy

Tens of thousands of rape-induced pregnancies occur in the U.S. each year. The most frequently cited research is that of Melissa Holmes and her colleagues, who in 1996 estimated a 5%

³⁴ Dean G. Kilpatrick, *Rape and Sexual Violence*, National Violence Against Women Prevention Research Center (2000), <http://www.soc.iastate.edu/sapp/rape1.pdf>; Clifford Krauss, *Crime Survey; Rape Was Underreported Because No One Asked*, New York Times (1995), <http://www.nytimes.com/1995/08/20/weekinreview/august-13-19-crime-survey-rape-was-underreported-because-no-one-asked.html?scp=1&sq=rape%20underreported&st=cse>.

³⁵ Dean J. Kilpatrick, Christine N. Edmunds, & Anne Seymour, *Rape in America: A Report to the Nation*, National Victim Center (1992), <http://www.victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0>; Patricia Tjaden & Nancy Thoennes. *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, National Institute of Justice (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>; Kathleen C. Basile, Jieru Chen, Michele C. Black, & Linda E. Saltzman, *Prevalence and Characteristics of Sexual Violence Victimization Among U.S. Adults, 2001-2003*, 22 *Violence and Victims* 4 (2007); Dean G. Kilpatrick, Heidi S. Resnick, Kenneth J. Ruggiero, Lauren M. Conoscenti, & Jenna McCauley, *Drug-facilitated, Incapacitated, and Forcible Rape: A National Study*, National Crime Victims Research & Treatment Center (Feb. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>.

³⁶ Kimberly A. Lonsway & Joan Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 *Violence Against Women* 2 (2012). These researchers conclude that federal data suggests that 62% of all defendants who are arrested and prosecuted for rape will be convicted, with 54% of these convictions for a felony and 8% for a misdemeanor. Of these convictions, the data suggest that 95% will ultimately lead to a sentence of incarceration. Keep in mind, however, the Bureau of Justice Statistics found that only about one in four forcible rapes, a mere 26%, reported to police in 2008 resulted in an arrest.

³⁷ *Id.* at 156.

³⁸ *Id.* at 157.

³⁹ *Id.*

rate of rape-related pregnancy.⁴⁰ Holmes' study concludes that there are around 32,101 rape-related pregnancies annually among American adult women.⁴¹ Dean Kilpatrick, one of the researchers in the Holmes' 1996 study, updated the 1996 figure and calculates that when a 5% rape-related pregnancy rate is applied to the approximately one million women raped in the past twelve months⁴² (a figure based on the CDC's 2010 NISVS), the result is 50,000 rape-related pregnancies annually.⁴³

Unfortunately, due to the severe underreporting of rape described in Section II, these statistics are likely drastic underestimates of the number of women who experience a rape-induced pregnancy. Notably, the above data does not include non-intimate partner rape-related pregnancy data, which if included would increase numbers further.

Not all women who are raped and become pregnant will carry the fetus to term, but research indicates that most will give birth to the child. One study reveals that 73% of women who are raped carry the child to term, 36% place the child up for adoption, and 64% raised the child conceived from the rape.⁴⁴ Another study found that 50% of women who had a rape-induced pregnancy underwent abortions, 5.9% placed the child up for adoptions, and 32.3% kept their child.⁴⁵

2. Rape-related Pregnancy in Intimate Partner and Dating Relationships

Most rape victims know their attackers,⁴⁶ as research has long indicated. The National

⁴⁰ Melissa M. Holmes, Heidi Resnick, Dean K. Kilpatrick, & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 *American Journal of Obstetrics and Gynecology* 2, 320-325 (1995).

⁴¹ *Id.*

⁴² NISVS *supra*, note 20.

⁴³ Glen Kessler, *The Claim that the Incidence of Rape Resulting in Pregnancy Is 'Very Low'*, *The Washington Post* (June 13, 2013), http://www.washingtonpost.com/blogs/fact-checker/post/the-claim-that-the-incidence-of-rape-resulting-in-pregnancy-is-very-low/2013/06/12/936bc45e-d3ad-11e2-8cbe-1bcbee06f8f8_blog.html (reviewing studies that show that the incidence of rape resulting in pregnancy is not low); Sue Owen, *Surveys show wide disagreement on number of rape-related pregnancies per year*, *Politifact.com* (Aug. 15, 2013), <http://www.politifact.com/texas/statements/2013/aug/15/wendy-davis/surveys-show-wide-disagreement-number-rape-related/>.

⁴⁴ AMY SOBIE & DAVID C. REARDON, VICTIMS AND VICTIMS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT, A SURVEY OF RAPE AND INCEST PREGNANCIES 18, 19 (David C. Reardon et al. eds., 2000).

⁴⁵ Holmes et al., *supra* note 40, at 321-22.

⁴⁶ NISVS, *supra* note 20, at 21; Bureau of Justice Statistics, *2005 National Crime Victimization Study*, U.S. Department of Justice (2005), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=766>; Bureau of Justice Statistics, *Sex Offenses and Offenders*, U.S. Department of Justice (1997), <http://bjs.gov/content/pub/pdf/SOO.PDF>; Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women* 43, National Institute of Justice (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [hereinafter NVAWS].

Violence Against Women Survey (NVAWS)⁴⁷ found that 62% of female victims aged eighteen or older were raped by a current or former spouse, cohabiting partner, boyfriend, or date.⁴⁸ Similarly, NISVS found that more than half (51.1%) of female victims of rape reported that at least one of their perpetrators was a current or former intimate partner.⁴⁹

Given that a large portion of rapes are perpetrated by a current or former intimate partner, a discussion of the intersection of domestic violence and rape is central to providing context to rape-induced pregnancy. The few studies that separate physical assault from sexual violence consistently find that 40% to 50% of battered women are also raped by their partners.⁵⁰ The majority of marital rape occurs in the context of physically abusive relationships.⁵¹ Importantly, women who experience sexual violence in their intimate relationships suffer the highest frequency of multiple rapes.⁵²

Rape in the context of an abusive relationship is particularly dangerous for women. Men may rape to impregnate their partners in order to force them to remain in or return to the relationship.⁵³ Research has found that women who are being raped as well as physically abused are in greater danger of being killed than women who are battered but not raped.⁵⁴

Furthermore, women in abusive relationships are at greater risk for rape-induced pregnancies. A 2005 study found that 26% of abused pregnant women reported their pregnancy as a result of rape.⁵⁵ Notably, this rape-related pregnancy rate is five times the national rape-related pregnancy rate found by Holmes in 1996.⁵⁶ Further analysis of this study finds that of abused women who are also

⁴⁷ This study was conducted jointly by the Department of Justice's National Institute for Justice and the Centers for Disease Control and Prevention.

⁴⁸ NVAWS, *supra* note 46, at 43.

⁴⁹ NISVS, *supra* note 20, at 21.

⁵⁰ Judith McFarlane, *Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 *Trauma, Violence, & Abuse* 2, 128 (2007); RAQUEL K. BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSES OF SURVIVORS AND SERVICE PROVIDERS (1996); Jackie Campbell & Karen L. Soeken, *Forced sex and intimate partner violence: effects on women's risk and women's health*, 51 *Violence Against Women*, 1017-1035 (1999).

⁵¹ Jennifer A. Bennice, Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 *Trauma, Violence & Abuse* 3, 234 (July 2003).

⁵² Andy Myhill & Jonathan Allen, *Rape and Sexual Assault of Women: Findings from the British Crime Survey*, Home Office (2002), <http://www.wdvw.org.uk/RapeHO.pdf>.

⁵³ PATRICIA EASTEAL & LOUISE MCORMOND-PLUMMER, REAL RAPE, REAL PAIN: HELP FOR WOMEN SEXUALLY ASSAULTED BY MALE PARTNERS 121 (2006).

⁵⁴ Bergen, *supra* note 50, at 104.

⁵⁵ Judith McFarlane, Ann Malecha, Kathy Watson, Julia Gist, Elizabeth Batten, Iva Hall, & Sheila Smith, *Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences, and Treatment Outcomes*, 105 *Obstetrics & Gynecology* 1, 99-108 (2005).

⁵⁶ McFarlane, *supra* note 50, at 129; Holmes et al., *supra* note 40, at 320-4.

raped by their partner, one in four experience a rape-induced pregnancy and thousands of pregnancies each year result from rape in intimate partner relationships.⁵⁷ In addition, women who report rape-related pregnancy are more likely to carry the pregnancy to term as compared to women who do not report rape-related pregnancy.⁵⁸ Rape-induced pregnancies often occur within the context of abusive relationships, which creates an environment with increased legal and safety barriers for survivors.

IV. Overview of Parental Rights

1. Equal Parenting at All Costs

Women who choose to give birth to a child conceived from rape will spend a lifetime “tethered” to their rapist.⁵⁹ Rape that results in a child is one of the only violent crimes that legally binds victims to their attackers, through the consequences of that violent act. This legal binding results from current parental rights, custody, and visitation laws.

The right to have and raise a family is a fundamental right grounded in the Due Process Clause of the Fourteenth Amendment.⁶⁰ Therefore, courts are reluctant to terminate parental rights, even in cases in which the child was conceived from rape.⁶¹ These courts reason that “[p]arents should not be deprived of the fundamental rights and duties inherent in the parent-child relationship except for ‘grave and weighty reasons.’”⁶² Additionally, many state laws place a high value on the “frequent and continuing contact” of a child with both parents.⁶³

Parental rights afford parents significant involvement in the child’s life but also result in interaction with the other parent’s life through the child. Of particular interest to this discussion are

⁵⁷ McFarlane, *supra* note 50, at 129.

⁵⁸ *Id.* at 130.

⁵⁹ 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 *Georgetown Law Journal* 3, 831 (2010).

⁶⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁶¹ See *S.J. v. L.T.*, 272 P.2d 789 (Alaska 1986).

⁶² *Id.*, (quoting *Matter of Adoption of K.M.M.*, 611 P.2d 84, 87 (Alaska 1980)).

⁶³ *Felton v. Felton*, 418 N.E.2d 606, 607, (Mass. 1981) (quoting *In re Marriage of Murga*, 103 Cal.App.3d 498, 503 (Cal. App Ct. App. 1980)).

parental rights to custody of the child, visitation rights, and notice and/or consent for adoption.

When parents face custody proceedings, they can be awarded physical custody, legal custody, or both. Legal custody of a child grants responsibility in making the major decisions involving the child's welfare, for example, medical care, education, extracurricular activities, and religious practices.⁶⁴ Legal custody serves as somewhat of an equalizer. When both parents have legal custody, "neither parent has legal custodial rights superior to those of the other parent."⁶⁵ A parent who has physical custody is responsible for providing a home and routine care for the child.⁶⁶ Physical custody gives the custodial parent control over what the child wears, when the child goes to bed, and with whom the child associates.⁶⁷

Custody is further delineated by various combinations of joint or sole custody. Courts often view contact with both parents as furthering the best interests of the child; thus, courts often prefer joint custody.⁶⁸ Parents can share both legal and physical custody, i.e. joint physical and legal custody. Alternatively, one parent could have physical custody and could share legal custody with the other parent. In either case, joint custody can require significant communication between the parents.⁶⁹ This communication is often necessitated by the dynamics of decisions around, for example, medical care and education.

In 1982, the Supreme Court articulated that a parent has a fundamental liberty interest in the care and custody of his or her child.⁷⁰ If a parent does not have custody of the child, then the parent may be granted visitation. Disrupting this fundamental right to visitation is viewed as harmful to the

⁶⁴ See *McCarty v. McCarty*, 807 A.2d 1211, 1213-14 (Md. Ct. Spec. App. 2002); see also *Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990); see also *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007); see also *McCarty 807 A.2d* at 1213.

⁶⁵ *Marriage of Hansen*, 733 N.W.2d at 690 (citing Iowa Code § 598.1(3) (2005)).

⁶⁶ *Id.* at 690-91 (citing Iowa Code § 598.1(7) (2005)).

⁶⁷ *Id.* at 691.

⁶⁸ See *id.*; see also *Ferrell v. Ferrell*, 819 P.2d 896, 898 (Alaska 1991).

⁶⁹ *McCarty 807 A.2d* at 1215.

⁷⁰ See *Santosky*, 455 U.S. at 753 (holding that before a State can terminate parental rights of a parent over their natural child, "due process requires that the State support its allegations by at least clear and convincing evidence").

parent-child relationship.⁷¹ Parents are only denied visitation rights only under extraordinary circumstances.⁷²

In *Arnold v. Naughton*, the Maryland trial court found William Naughton to have sexually abused his youngest daughter.⁷³ The Court ordered that Naughton's interactions with his children be limited to supervised visitation.⁷⁴ The children's mother sought to appeal the visitation order.⁷⁵ The Appeals Court held that "a finding of child abuse does not preclude *all* visitation as a matter of law."⁷⁶ Thus, despite having sexually abused his daughter, Naughton was permitted visitation rights. As this case illustrates, the high value placed on parent-child relationships sometimes results in courts refusing to deny visitation rights to parents who have sexually abused their child(ren).⁷⁷

Lastly, parental rights laws in many states require that the mother provide notice and/or consent if she wants to place the child for adoption.⁷⁸ Attorney and activist Sara Ainsworth illustrates the issues faced by rape victims who are trying to place a child conceived from rape for adoption.⁷⁹ Ainsworth describes the case of a fourteen year old girl who was raped and forced to notify her attacker, an older man, when she wanted to place the baby conceived from the rape for adoption.⁸⁰ The Court permitted her to give up her own rights to the child, however the rapist retained his parental rights and then sought child support payments from the girl he raped.⁸¹

Adoption laws can create a harmful legal bind between a rapist and the rape victim. Laws that force a rape victim to notify her attacker and receive his consent before she places the child for adoption serves only to further the harm and hinder the healing of the victim.

⁷¹ See *In re D.B.*, 947 A.2d 443, 448 (D.C. 2008) (finding that a parent has a fundamental liberty interest in the care and custody of their child, and prohibiting visitation certainly disrupts and, if the ban is prolonged, may destroy, the parent-child relationship).

⁷² See generally, *In re Two Minor Children*, 173 A.2d 876 (Del. Ch. 1961); *Taylor v. Taylor*, 646 S.E.2d 238 (Ga. 2007).

⁷³ See *Arnold v. Naughton*, 486 A.2d 1204 (Md. Spec. App. 1985) (finding that a noncustodial parent who was found to have sexually abused the child need not have his visitation rights terminated).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1207.

⁷⁶ *Id.* at 1208.

⁷⁷ *Id.*

⁷⁸ Kara N. Bitar, *The Parental Rights of Rapists*, 19 Duke Journal of Gender Law & Policy 275-302, 277-78 (2012), see e.g., N.C. Gen.Stat. Ann. § 48-2-206 (West 2010).

⁷⁹ Sara Ainsworth, *Parental Rights for Rapists*, RH Reality Check (April 10, 2008), <http://rhrealitycheck.org/article/2008/04/10/parental-rights-for-rapists/>.

⁸⁰ *Id.*

⁸¹ *Id.*

2. An Overview of Parental Rights in the Context of Domestic Violence

Battered women, many of whom may have had children under coercive or violent circumstances, face significant barriers when they encounter the family court system. Family courts most commonly decide custody matters. Thus, the experiences of abused women in the family court system is an important consideration in understanding what rape victims who conceive may face when trying to terminate parental rights.

The preference for parental equality, and in turn, joint custody, is driven by both process and by substantive norms.⁸² In regards to process, courts are obligated to approach cases with neutrality. In custody cases, this neutrality “is linked to [courts’] unquestionable obligation to treat both parties as starting with equal rights to custody, and not to presume, for example, that children need their mothers more than their fathers.”⁸³ In custody cases involving domestic violence, the emphasis on parental equality persists even when there is clear evidence, either criminally, civilly, or from child protective services investigations, that one parent is violent towards another.⁸⁴ Thus, indicating that courts treat the parental equality ideal as not just the starting point, but as the requisite outcome even when it overrides contradictory information.⁸⁵

This principle of parental equality is also driven by substantive norms and values.⁸⁶ Many of these values were formed in the late 1970s and early 1980s coming on the heels of the 1960s and the “women’s liberation” movement.⁸⁷ These time periods fostered notions of gender equality that meant mothers were no longer considered the “pre-eminent parent.”⁸⁸ By the late 1970s and early 1980s

⁸² Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 American Univ. Journal of Gender, Social Policy & the Law 2, 676 (2003).

⁸³ *Id.*

⁸⁴ *Id.* at 677.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

these ideas were taking a strong hold in the form of joint custody.⁸⁹ This period saw an increase in policy analysis, courts, and legislation requiring the presumption of joint custody.⁹⁰

Understandably, a presumption of joint custody helps maintain judicial neutrality by putting both parents on equal footing. It also supports important notions of gender equality and counteracts negative societal stereotypes regarding fatherhood. However, the preference for joint custody, no matter the costs, can be dangerous in the context of domestic violence. Specifically, “providing a batterer with maximum access to his children may only further his abuse by increasing his control over and harassment of the mother, and significant physical and emotional risks to both the children and the mother.”⁹¹

Though many states have statutes that create exceptions for joint custody in cases of domestic violence, the practical application in family courts indicates a different experience for battered mothers and their children. Family courts are increasingly viewing access to children as an inalienable right of fathers.⁹² Consequently, joint and legal custody frequently is ordered despite the mother’s claims of domestic violence.⁹³

V. The Legal Landscape: Current Legislation

1. The Federal Landscape

In July of 2013, members of Congress introduced a bill to address the custody needs of rape victims. The Rape Survivor Child Custody Act incentivizes states to adopt laws that allow mothers of children conceived through rape to terminate the parental rights of their rapists. The proposed bill notes that when a rapist pursues parental or custody rights, the victim is forced to “have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, making it

⁸⁹ *Id.*

⁹⁰ *Id.* at 677-78

⁹¹ *Id.* at 678.

⁹² *Id.*

⁹³ *Id.*

more difficult for her to recover.”⁹⁴ The legislation would earmark \$5 million in grant funds over four years to distribute to states that have laws “that allow the mother of any child that was conceived through rape to seek court-ordered termination of the parental rights of her rapist.”⁹⁵ The bill highlights that courts shall grant termination of parental rights “upon clear and convincing evidence of rape.”⁹⁶ The grants would be authorized under the STOP Violence Against Women Formula Grant Program and the Sexual Assault Services Program of the Violence Against Women Act.⁹⁷

The Rape Survivor Child Custody Act appears to have stalled in the House Judiciary Committee.⁹⁸ However, significant movement has been made at the state level, with thirty-one states allowing partial or complete termination of rapists’ parental rights. The next section will review these state laws.

2. State Laws Limiting the Parental Rights of Rapists: The Five Categories⁹⁹

Thirty-one states have protected women who conceive a child through rape by partially restricting or completely terminating parental rights for rapists.¹⁰⁰ However, nineteen states, including the District of Columbia, allow rapists to assert parental rights over children conceived through rape.¹⁰¹ The thirty-one states that provide either partial restrictions or complete termination

⁹⁴ Rape Survivor Child Custody Act, H.R. 2772, 113th Cong. § 2 (2013)

⁹⁵ *Id.* at § 3.

⁹⁶ *See generally* Rape Survivor Child Custody Act, *supra* note 94.

⁹⁷ *Id.* at § 5.

⁹⁸ The Rape Survivor Child Custody Act was sent to the House Judiciary Committee on July 22, 2013.

⁹⁹ *Supra*, note 18. For the purposes of this paper I have divided the state laws into five categories that I think help structure the state-based landscape. Others, such as RAINN, *supra* note 10, and Bitar, *supra* note 78, use different categories.

¹⁰⁰ *See* ALASKA STAT. § 25.23.180(c)(3) (2010); CAL. FAM. CODE § 3030(b) (West 2004); CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G) (West 2004); IDAHO CODE ANN. § 16-2005(2)(a) (2009); 750 ILL. COMP. STAT. ANN. 50/8 (West 1993); IND. CODE § 31-19-9-8(4) (2007); KAN. STAT. ANN. § 59-2136(h)(1)(F) (2005); LA. CIV. CODE ANN. art. 137 (2012); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MICH. COMP. LAWS ANN. § 722.25(2) (West 2011); MO. ANN. STAT. § 211.447.5(5) (West 2011); MONT. CODE ANN. § 41-3-609(1)(c) (2011); NEB. REV. STAT. ANN. § 43-104.15 (LexisNexis 2011); NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2010); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002); N.M. STAT. ANN. § 32A-5-19 (LexisNexis 2010); N.Y. DOM. REL. LAW § 111-a (McKinny 2010); N.C. GEN. STAT. ANN. §§ 14-27.2(c)-14-27.3(c) (West 2010); OHIO REV. CODE ANN. § 3107.07(F) (West 2011); OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1, 2012, ch. 438; 23 PA. CONS. STAT. ANN. § 2511(a)(7) (West 2010); S.C. CODE ANN. § 63-9-320(3) (2008); S.D. CODIFIED LAWS §25-6-4(6A) (2011); TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2007); UTAH CODE ANN. § 78B-6-111 (2008); VA. CODE ANN. § 63.2-1233(6) (2007); WASH. REV. CODE ANN. § 26.33.170(2)(b) (West 2005); WIS. STAT. ANN. § 48.415(9) (West 2009); WIS. STAT. ANN. §48.42 (West 2009); WYO. STAT. ANN. § 1-22-110(a)(viii) (2011). *See also* RAINN, *supra* note 10; *see also* Bitar, *supra* note 78, at 286-87.

¹⁰¹ *See* RAINN, *supra* note 10 (these states include Alabama, Arizona, District of Columbia, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Dakota, Ohio, Rhode Island, Vermont, Virginia, West Virginia, Wyoming).

of parental rights over children conceived through rape¹⁰² fall generally into five categories: states that limit the adoption rights of rapists; states that limit visitation; states that limit both visitation and custody; states that permit the termination of all parental rights; and states that require the rapist to pay child support even after parental rights have been terminated.

The Five Categories and Subsections of State Laws Limiting the Parental Rights of Rapists¹⁰³	
	Number of States
States Permitting Rapists to Assert Parental Rights (including D.C.)	19
a. Legislation Limiting Adoption Rights	21
b. Legislation Limiting Visitation Rights	1
c. Legislation Limiting Both the Right to Visitation and Custody	4
d. Legislation Permitting the Termination of All Parental Rights	
i. Legislation that Terminates All Parental Rights When There is a Conviction	13
ii. Legislation that Terminates All Parental Rights Without a Conviction	9
e. Legislation Requiring Payment of Child Support After Parental Rights Have Been Terminated	4

a. Legislation that Limits Adoption Rights for a Rapist Father

All thirty-one states with relevant protections permit rape victims to place resulting children for adoption without the consent of the rapist father.¹⁰⁴ However, of these thirty-one states, eight states' statutes are limited to this one area of protection,¹⁰⁵ allowing rapists to seek other parental rights when mothers choose to keep their children.¹⁰⁶ Twenty-two of the thirty-one states with adoption placement protections allow for the termination of a rapist's other parental rights, such as custody or visitation, or for the termination of all of the rapist's parental rights.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Supra*, note 18.

¹⁰⁴ See ALASKA STAT. § 25.23.180(c)(3); CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G); IDAHO CODE ANN. § 16-2005(2)(a); 750 ILL. COMP. STAT. ANN. 50/8; IND. CODE § 31-19-9-8(4); KAN. STAT. ANN. § 59-2136(h)(1)(F); ME. REV. STAT. ANN. tit. 19-A § 1658; MO. ANN. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; N.Y. DOM. REL. LAW § 111-a; N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); OHIO REV. CODE ANN. § 3107.07(F); OKLA. STAT. ANN. tit. 10A § 1-4904(B)(11); Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws; 23 PA. CONS. STAT. ANN. § 2511(a)(7); S.C. CODE ANN. § 63-9-320(3); S.D. CODIFIED LAWS § 25-6-4(6A); TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; UTAH CODE ANN. § 78B-6-111; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WIS. STAT. ANN. § 48.415(9); WYO. STAT. ANN. § 1-22-110(a)(viii). See also Bitar, *supra* note 78, at 287.

¹⁰⁵ See IND. CODE § 31-19-9-8(4); N.M. STAT. ANN. § 32A-5-19; N.Y. DOM. REL. LAW § 111-a; OHIO REV. CODE ANN. § 3107.07(F); UTAH CODE ANN. § 78B-6-111; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

¹⁰⁶ See Bitar, *supra* note 78, at 287.

¹⁰⁷ *Id.* at 288; See S.D. CODIFIED LAWS §§ 25-6-4(6A), 25-4A-20 (2011). The remainder of the statutes allow for the termination of all parental rights. See ALASKA STAT. § 25.23.180(c)(3); CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G); Col. Rev. Stat. § 19-5-105.5; Fla. Stat. § 39.806; IDAHO CODE ANN. § 16-2005(2)(a); 750 Ill. Comp. Stat. Ann. 50/8; KAN. STAT. ANN. § 59-2136(h)(1)(F); La. Child Code Ann. Art. 1015; ME. REV. STAT. ANN. tit. 19-A § 1658; MO. REV. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); NEB. REV. STAT. ANN. § 43-104.15; N.H. Rev. Stat. Ann. § 170-C:5; OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11); Or. Rev. Stat. § 107.137(5); 23 PA. CONS. STAT. ANN. § 2511(a)(7); S.C. CODE ANN. § 63-9-320(3); TENN. CODE ANN.

States providing adoption protections use different requirements before a mother can out a child conceived through rape up for adoption. More than half (18) of the thirty-one states that provide adoption protections for rape victims who conceive a child require the rapist be convicted in order for her to put the child up for adoption without notification or consent.¹⁰⁸ Women who conceive a child through rape have stronger protections in the remaining thirteen states. These thirteen states do not require a conviction in order to be protected by statutes addressing adoption.¹⁰⁹

b. Legislation that Limits the Visitation Rights for a Rapist Father

Only one state has legislation that impacts visitation rights when the child is conceived from a rape. South Dakota permits courts to prohibit, revoke, or restrict “visitation rights of person causing conception by rape or incest.”¹¹⁰ The South Dakota statute notes that these prohibitions, revocations, or restrictions can be permitted if it is in the best interest of the child.¹¹¹ Notably, the interests of the mother are removed from this calculation.

c. Legislation that Limits Both the Right to Visitation and Custody

A limited number of states (4) provide both visitation and custody limitations on a rapist father’s parental rights.¹¹² When a child is conceived of a rape and the parent is convicted, both Michigan and California mandate that custody or visitation not be awarded to the rapist parent.¹¹³ Only two other states, Nevada and New Jersey, have statutes on the visitation and custody rights of a parent found to

§§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; WIS. STAT. § 48.415(9).

¹⁰⁸ See CONN. GEN. STAT. § 45(a)-717(g)(2)(G); Col. Rev. Stat. § 19-5-105.5; Ind. Code Ann. § 31-19-9-8; Kan. Stat. Ann. § 59-2136; ME. REV. STAT. ANN. tit. 19-A § 1658; MO. ANN. STAT. § 211.447.5(5) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c); N.H. Rev. Stat. Ann. § 170-C:5; N.Y. DOM. REL. LAW § 111-a; N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); ND. CODE § 31-19-9-8(4); OHIO REV. CODE ANN. § 3107.07(F); Or. Rev. Stat. § 107.137(5); TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007; VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii). See Bitar *supra* note 78, at 288;

¹⁰⁹ See ALASKA STAT. § 25.23.180(c)(3); Fla. Stat. § 39.806; IDAHO CODE ANN. § 16-2005(2)(a); 750 ILL. COMP. STAT. ANN. 50/8(a)(5); La. Child Code Ann. Art. 1015; NEB. REV. STAT. ANN. § 43-104.15; N.M. STAT. ANN. § 32A-5-19; OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11); 23 PA. CONS. STAT. ANN. § 2511(a)(7); S.D. CODIFIED LAWS § 25-6-4(6A); S.C. CODE ANN. § 63-9-320(3); UTAH CODE ANN. § 78B-6-111; WIS. STAT. § 48.415(9). See also Bitar *supra* note 78, at 288;

¹¹⁰ S.D. CODIFIED LAWS § 25-4A-20.

¹¹¹ S.D. CODIFIED LAWS § 25-4A-20.

¹¹² See CAL. FAM. CODE § 3030(b) (West 2004); MICH. COMP. LAWS ANN. §§ 722.25(2), 722.27(a)(4) (West 2011); NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011) (prohibiting custody or visitation unless the natural mother consents or it is in the best interest of the child); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002).

¹¹³ CAL. FAM. CODE § 3030(b) (West 2004); MICH. COMP. LAWS ANN. §§ 722.25(2), 722.27(a)(4) (West 2011).

have committed a sexual assault that resulted in the conception of the child in question.¹¹⁴ In New Jersey, there is a rebuttable presumption that a person convicted of rape resulting in a child shall not have custody or visitation rights to that child.¹¹⁵ However, in New Jersey, a rapist father can rebut this presumption with a “showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded.”¹¹⁶ Conversely, the Nevada statute requires a sexual assault conviction, in order for there to be termination of custody and visitation rights, unless the mother consents and in the best interest of the child.¹¹⁷

d. Legislation that Permits the Termination of All Parental Rights

i. Legislation that Terminates All Parental Rights When There is a Conviction

There are thirteen states that mandate or permit termination of all parental rights to a child conceived of rape when the rapist father has been convicted.¹¹⁸ Maine and North Carolina are the only two states of the thirteen that mandate termination of all parental rights when the child is conceived through rape.¹¹⁹

The remaining eleven states permit termination, on a discretionary basis, of all parental rights to a child conceived from rape. Colorado, Connecticut, Kansas, Nebraska, Missouri, Montana, Nebraska, New Hampshire, Oregon, South Carolina, Tennessee, and Texas all permit courts the discretion to terminate a rapist father’s right to notice and consent of adoption, to visitation, and to custody.¹²⁰ These states, however, require a conviction or guilty plea. For instance, the Missouri

¹¹⁴ NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011) (prohibiting custody or visitation unless the natural mother consents or it is in the best interest of the child); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002).

¹¹⁵ N.J. STAT. ANN. § 9:2-4.1(a) (West 2002).

¹¹⁶ N.J. STAT. ANN. § 9:2-4.1(a) (West 2002).

¹¹⁷ NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011).

¹¹⁸ See Col. Rev. Stat. § 19-5-105.5; CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G) (West 2004); Kan. Stat. Ann. § 38-2269; Neb. Rev. Stat. § 43-292; N.H. Rev. Stat. Ann. § 170-C:5; ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MO. ANN. STAT. § 211.447.5(5) (West 2011) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c) (2011); N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c) (West 2010); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1, 2012, ch. 438; S.C. Code Ann. § 63-7-2560(11); TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2002).

¹¹⁹ See ME. REV. STAT. ANN. tit. 19-A § 1658; N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2010).

¹²⁰ Col. Rev. Stat. § 19-5-105.5; CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G); Kan. Stat. Ann. § 38-2269; MO. ANN. STAT. § 211.447.5(5); MONT. CODE ANN. § 41-3-609(1)(c); OR. REV. STAT. § 419B.502 (2011), *amended by* Act effective Jan. 1, 2012, ch. 438; Neb. Rev. Stat. § 43-292; N.H. Rev. Stat. Ann. § 170-C:5; S.C. Code Ann. § 63-7-2560(11); TENN. CODE ANN. §§ 36-1-113(c), (g)(10); TEX. FAM. CODE ANN. § 161.007.

statute explains that termination is only permitted if the “father has pled guilty to, or is convicted of, the forcible rape or rape in the first degree of the birth mother.”¹²¹

ii. Legislation that Terminates All Parental Rights Without a Conviction

Nine states (Alaska, Florida, Idaho, Illinois, Louisiana, Oklahoma, Kansas,¹²² Pennsylvania, and Wisconsin) permit (but do not mandate) courts to terminate all parental rights of the rapist father without a conviction when the child was conceived through a rape.¹²³ Of those nine states, three require a showing of clear and convincing evidence in cases seeking to terminate all parental rights.¹²⁴ The remaining states, however, do not stipulate a standard of proof.¹²⁵ Importantly, states that do not stipulate a standard of proof are still bound by the U.S. Supreme Court’s decision in *Santosky v. Kramer*, which articulates that the standard of proof for terminating parental rights is clear and convincing evidence.¹²⁶ According to the Supreme Court, a standard of proof lower than clear and convincing evidence would be a violation of the parents’ due process rights under the Fourteenth Amendment.¹²⁷

Wisconsin’s statute is particularly notable. In Wisconsin, a hearing before a judge or jury is conducted to determine whether “the child was conceived as a result of a sexual assault.”¹²⁸ A finding that the child was conceived from rape can be proved “by a final judgment of conviction or other evidence produced at a fact-finding hearing” (emphasis added).¹²⁹ Therefore, a mother who conceived a child through rape could present evidence other than a conviction at a hearing before a judge. Thus, rape victims who never saw their perpetrator convicted can still access the justice

¹²¹ MO. ANN. STAT. § 211.447.5(5).

¹²² In order for the Kansas statute to apply the child must be considered “in need of care.” See KAN. STAT. ANN. § 38-2269.

¹²³ Ak. Stat. 25.23.180(c)(3); Fla. Stat. § 39.806; IDAHO CODE ANN. § 16-2005(2)(a) (2009); 750 Ill. Comp. Stat. 45/6.5; KAN. STAT. ANN. § 59-2136(h)(1)(F); La. Child Code Ann. Art. 1015; OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (West 2009); 23 PA. CONS. STAT. ANN. § 2511(a)(7) (West 2010); WIS. STAT. ANN. § 48.415(9)(b) (West 2009).

¹²⁴ Fla. Stat. § 39.806; Ill. Comp. Stat. 45/6.5; La. Child Code Ann. Art. 1015; WIS. STAT. ANN. § 48.42 (Notes of Decs. On Presumptions and Burden of Proof).

¹²⁵ Ak. Stat. 25.23.180(c)(3); IDAHO CODE ANN. § 16-2005(2)(a) (Statutory Notes on Standard of Proof); 750 Ill. Comp. Stat. 45/6.5; La. Child Code Ann. Art. 1015; La. Child Code Ann. Art. 1015; OKLA. STAT. ANN. tit. 10A § 1-4-904(B)(11) (Notes of Decs. on Burden of Proof); 23 PA. CONS. STAT. ANN. § 2511 (Notes of Decs. on Clear and Convincing Evidence).

¹²⁶ See *Santosky*, 455 U.S. at 747-8

¹²⁷ See generally *Santosky*, 455 U.S.

¹²⁸ WIS. STAT. ANN. § 48.415(9).

¹²⁹ *Id.*

system and terminate parental rights. Furthermore, a mother in Wisconsin is not required to provide the father with notice that she is attempting to terminate his parental rights if that child was conceived through sexual assault.¹³⁰

e. Legislation that Requires Rapists to Pay Child Support Even After Parental Rights Have Been Terminated

Four states (Arkansas, Colorado, Illinois and Oregon) require that rapists pay child support even after parental rights are terminated.¹³¹ West Virginia has a limited statutory requirement for rapists to pay child support after the termination of parental rights.¹³² This is because the West Virginia statute states that incarceration for rape is not a reason for not paying child support.¹³³ Thus, if an individual is incarcerated for a rape where a child was conceived they are still required to pay child support, whether or not parental rights are terminated.¹³⁴

f. Burden of Proof for Termination of Parental Rights

Each state that has protections for victims who conceive a child through rape uses different burdens of proof before the protections are triggered. Twenty-two of the states discussed above require a conviction before protections for women who have a rape-conceived child attach.¹³⁵ There are nine states that do not require a conviction and permit a mother to petition the court to terminate all parental rights.¹³⁶

States that terminate parental rights using a standard lower than clear and convincing evidence likely will be found to have violated the Due Process Clause of the Fourteenth

¹³⁰ *Id.* at § 48.42(2m).

¹³¹ *See* RAINN, *supra* note 10 (these states are Arkansas, Colorado, Illinois, and Oregon).

¹³² W. Va. Code Ann. § 48-22-306.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See* CAL. FAM. CODE § 3030(b) (West 2004); Col. Rev. Stat. § 19-5-105.5; CONN. GEN. STAT. ANN. § 45(a)-717(g)(2)(G) (West 2004); Ind. Code Ann. § 31-19-9-8; Kan. Stat. Ann. § 38-2269; MICH. COMP. LAWS ANN. §§ 722.25(2), 722.27(a)(4) (West 2011); ME. REV. STAT. ANN. tit. 19-A § 1658 (1997); MO. ANN. STAT. § 211.447.5(5) (West 2011) (requiring a conviction or a guilty plea); MONT. CODE ANN. § 41-3-609(1)(c) (2011); Neb. Rev. Stat. § 43-292; NEV. REV. STAT. ANN. § 125C.210 (LexisNexis 2011); N.H. Rev. Stat. Ann. § 170-C:5; N.Y. DOM. REL. LAW § 111-a; ND. CODE § 31-19-9-8(4); N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c) (West 2010); OHIO REV. CODE ANN. § 3107.07(F); Or. Rev. Stat. § 107.137(5); S.C. Code Ann. § 63-7-2560(11); TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2010); TEX. FAM. CODE ANN. § 161.007 (Vernon 2002); WASH. REV. CODE ANN. § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

¹³⁵ *See* ME. REV. STAT. ANN. tit. 19-A § 1658; N.C. GEN. STAT. ANN. §§ 14-27.2(c)–14-27.3(c); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2010).

¹³⁶ *Supra* note 123.

Amendment.¹³⁷ In *Santosky v. Kramer*, parents John and Annie Santosky appealed a decision by the Commissioner of the Ulster County Department of Social Services in New York to terminate their parental rights after findings of parental neglect.¹³⁸ At the time, the New York Family Court Act permitted the termination of parental rights of natural child(ren) requiring a “fair preponderance of the evidence” to support a finding that the child(ren) were permanently neglected.¹³⁹ The *Santosky* Court held “that the Due Process Clause of the Fourteenth Amendment demands more than” a finding based on a preponderance of the evidence.¹⁴⁰ When the state seeks to terminate parental rights, “due process requires that the State support its allegations by at least clear and convincing evidence.”¹⁴¹

Most states with strong laws protecting women who conceive a child from rape use the standard laid out in *Santosky v. Kramer*.¹⁴² The clear and convincing standard can be seen both in statutory language as well as in common law. For example, in Illinois’ statute, parental rights are prohibited to a father who is convicted of or pleads guilty to sexually violent crimes resulting in the victim conceiving a child, OR at a fact-finding hearing the father can be “found by clear and convincing evidence to have committed an act of non-consensual sexual penetration for his conduct in fathering that child.”¹⁴³

Some states, such as Alaska, do not stipulate a standard of proof, yet one can be found in common law. The Alaska Supreme Court articulated a standard of clear and convincing evidence in *In re Adoption of A.F.M.*¹⁴⁴ The case surrounded the adoption of A.F.M, a child conceived through rape. The lower courts found that A.F.M was conceived from a rape by the mother’s former

¹³⁷ See generally *Santosky*, 455 U.S.

¹³⁸ *Id.* at 179.

¹³⁹ *Id.* at 747

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 747-8.

¹⁴² *Santosky*, 455 U.S.

¹⁴³ 750 Ill. Comp. Stat. 45/6.5.

¹⁴⁴ *In re Adoption of A.F.M.*, 15 P.3d 258, 260 (Alaska 2001).

partner.¹⁴⁵ Years later the mother married and wanted her husband to adopt A.F.M; however, the child's biological father, the mother's rapist, refused to consent to the adoption.¹⁴⁶ In assessing whether to terminate the rights of the father whose rape conceived A.F.M., which would permit the adoption by the mother's new husband, the Court determined that a clear and convincing evidence standard was necessary.¹⁴⁷

VI. Room for Exceptions?: Statutory Rape

1. Peña v. Mattox

Ruben Peña and Amanda Mattox started dating in 1991.¹⁴⁸ At the time, Ruben was nineteen and Amanda was fifteen.¹⁴⁹ A year after they began dating Amanda became pregnant.¹⁵⁰ Upon discovering her pregnancy, Amanda's parents forbid their daughter to see Ruben.¹⁵¹ Amanda would not comply with her parents' demand and began seeing Ruben in secret.¹⁵²

Ruben visited Amanda on December 8, 1992, when she was well along in her pregnancy.¹⁵³ When Ruben was visiting, Amanda told Ruben she was feeling sick and he urged her to tell her parents.¹⁵⁴ Little did the couple know, Amanda was in labor.¹⁵⁵ Ruben left but called Amanda later that evening to check on her.¹⁵⁶ However, Ruben could not reach her and no one would tell him any information about Amanda or where she was.¹⁵⁷ Ruben even searched local hospitals looking for Amanda, but to no avail.¹⁵⁸

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Peña v. Mattox*, 84 F.3d at 895 (7th Cir. 1996).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 896.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 895-6

¹⁵⁸ *Id.* at 896.

The following night, Amanda's father, Edward Mattox, asked Ruben to meet him at a restaurant.¹⁵⁹ When Ruben arrived at the restaurant he was arrested pursuant to a felony criminal complaint filed by Mr. Mattox charging Ruben with "sexual intercourse with a person who is at least 13 but no older than 16 and at least five years younger than the defendant."¹⁶⁰ Though Mattox knew his daughter was not five years younger than Ruben, he still proceeded with filling the complaint.¹⁶¹ Furthermore, the state prosecutor, who authorized the complaint and procured the arrest warrant, knew the charges against Ruben were false because the age range was not less than five years.¹⁶² Ruben eventually pled guilty to misdemeanor criminal sexual abuse.¹⁶³

The "scheme" to arrest and prosecute Ruben began the night of December 8th, 1992, when Amanda went into labor.¹⁶⁴ That same evening her parents took her to Indiana, where she gave birth and the child was immediately placed for adoption.¹⁶⁵ Ruben did not even know his child had been born let alone placed for adoption, or that Amanda had been removed from the state.¹⁶⁶

In June of 1994, Ruben sued Edward Mattox and the state prosecutor, claiming they had conspired to deprive him of his parental rights.¹⁶⁷ Ruben's claim was not seeking rights to the child but, rather damages for a denial of his substantive due process rights, which he argued he was entitled to before being denied parental rights.¹⁶⁸

The Seventh Circuit held, in part, that "the mere fact of fatherhood, consequent upon a criminal act that our society does take seriously and that is not cemented (whoever's fault that is) by association with the child" does not create "an interest that the Constitution protects in the name of

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 896.

¹⁶⁸ *Id.* at 897.

liberty.”¹⁶⁹ The Court’s reasoning focused heavily on the maxim articulated in *Riggs v. Palmer*, that a wrongdoer should not profit from his wrong.¹⁷⁰ The Court in *Riggs* established the following:

No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries.¹⁷¹

In other words, Ruben should not be rewarded for having committed a crime by receiving parental rights.¹⁷² The *Mattox* Court goes on to express concern that a criminal could use parental rights to pressure the victim's family not to press criminal charges.¹⁷³

Interestingly, the Court explains that the maxim should yield when the wrong is trivial and cost of righting it would be great.¹⁷⁴ For example, when a father “has established an enduring relationship with the child [and] seeks constitutional protection for the relationship in the face of an argument that as a fornicator he should have no rights.”¹⁷⁵ The *Mattox* Court cites two statutory rape cases where the *Riggs* maxim did not apply.¹⁷⁶ Specifically, in *Craig V v. Mia W* the *Riggs* maxim yielded because the father was “not seeking merely to benefit from his wrongdoing but, more importantly, to assume the duties and responsibilities of supporting the child.”¹⁷⁷ In *LaCroix v. Deyo*, the court simply found that the *Riggs* maxim should not be applied “[i]n the field of custody, ‘Amorality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not ipso facto constitute unfitness for custody.’”¹⁷⁸

Mattox demonstrates the need for caution when applying the *Riggs* maxim to statutory rape cases. The Court in *Mattox* concedes that “[t]he offense that Ruben Peña committed was not as

¹⁶⁹ *Id.* at 900.

¹⁷⁰ *Id.* (citing *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889)).

¹⁷¹ *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 190 (1889).

¹⁷² See *Mattox*, 84 F.3d at 900.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 898.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (citing *Craig V v. Mia W*, 116 A.D.2d 130 (N.Y. App. Div. 1986); *LaCroix v. Deyo*, 437 N.Y.S.2d 517 (N.Y. Family Ct. 1981)).

¹⁷⁷ *Craig V*, 116 A.D.2d at 131.

¹⁷⁸ *LaCroix*, 437 N.Y.S.2d at 522 (quoting *Matter of Feldman v. Feldman*, 45 A.D.2d 320, 322 (N.Y. App. Div. 1974)).

serious as “a violent rape or if Ruben was 25 years older than Amanda.”¹⁷⁹ In fact, Judge Posner notes that the “sexual act was consensual, Ruben was 19 rather than 40, . . . Amanda was 15 rather than 12[, and t]he offense was a misdemeanor rather than a felony.”¹⁸⁰ As states begin to adopt laws that terminate the parental rights of rapists whose assault results in a child, they must consider appropriate exceptions or promulgate guidelines that adequately address the potentially unique circumstances of statutory rape cases.

One voice has been entirely usurped by the Court, by Edward Mattox’s desire to seek revenge on young Ruben, and by Ruben’s suit for damages. Amanda Mattox is rendered voiceless. We hear Amanda’s voice only once when we are told that she defied her parent’s orders not to date Ruben and continued to see him in secret.¹⁸¹ The silencing of Amanda Mattox has left many unanswered questions. It is likely she not did want Ruben arrested, but did anyone ask her? Did she want to give birth in Indiana? Did she want to put the child up for adoption or did she want to keep the child? Did she want to raise the child with Ruben? We will never know the answer to these valuable questions because one of the most important voices, if not the most important, was never heard.

VII. The Second Rape: When the Law Forcibly Binds Victims to their Rapist

When proper legal protections for women who conceive a child through rape do not exist, the state must create options for the termination of parental rights, or else the state will become an agent in a secondary victimization, a “second rape,” of the victim. As discussed, the legal system and state legislatures have bound the rape victim through the child to the rapist, thereby becoming complicit in what can be viewed as a “second rape.” This secondary victimization occurs when the rapist manipulates the omission of legal protections and asserts parental rights in order to control and traumatize his victim for a second time.

¹⁷⁹ *Mattox*, 84 F.3d at 900.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 895.

Fortunately, nine states serve as models¹⁸² for strong laws that protect women who give birth to a child conceived through rape.¹⁸³ These states have protections that allow for the termination of all parental rights of a rapist whose sexual assault results in a child.¹⁸⁴ These laws create options, protections, and opportunities for pregnant rape victims to regain some control over their circumstances. Further, protective state laws empower pregnant rape victims to make their own choices regarding their reproductive health and motherhood.

Of critical importance is that these nine states do not require a conviction for a mother to petition the court to terminate the parental rights of her rapist.¹⁸⁵ As has been demonstrated, rape is the most underreported crime in the country, and the majority of rapists are not ever prosecuted.¹⁸⁶ Thus, state laws that rely on convictions in order to trigger statutory protections for women who conceive a child through rape will fail victims, the majority of whom will never report¹⁸⁷ and will never see their perpetrator convicted.¹⁸⁸

Valuing a child's relationship with both their parents is important, but must be balanced against the need to protect pregnant victims of rape. Parental rights are constitutionally protected,¹⁸⁹ and thus should not be abridged without a standard of proof that protects the due process rights of parents. As discussed, the Supreme Court in *Santosky* clearly articulates that due process demands that parental rights not be terminated without clear and convincing evidence.¹⁹⁰ In order to terminate a rapist's parental rights it must be shown through clear and convincing evidence that the child in question was conceived through rape. This constitutionally provided standard, used by each of the aforementioned nine model states, creates a burden of proof, other than conviction, for courts to

¹⁸² This article does not include a discussion of state abortions laws. However, restrictive abortions laws, particularly abortion bans with no exception for rape, will limit the options for pregnant rape victims. Therefore, the nine model states are only models for laws on terminating rapists' parental rights. If these states have abortion laws that ban or limit access to abortion for pregnant rape victims then the choices of pregnant survivors will be once again limited by state law.

¹⁸³ See *supra*, note 123.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Lonsway *supra*, note 34, 35, 37, & 38.

¹⁸⁷ *Supra*, note 34 & 35.

¹⁸⁸ See Lonsway *Supra*, note 34, 37, 38, & 39.

¹⁸⁹ See *Santosky* 455 U.S.

¹⁹⁰ *Id.*

utilize when considering termination of a rapist's parental rights. Due to the dramatically low rates of conviction for rape,¹⁹¹ using convictions (i.e. a beyond a reasonable doubt standard) as the standard to terminate parental rights for rapist fathers will not provide adequate protection for the 95% of victims whose rapist is not convicted.¹⁹²

States have yet to address cases of statutory rape where, as was seen with Ruben Peña, the child was conceived through consensual sexual intercourse.¹⁹³ These unique types of cases must be addressed either in legislative language, judicial guidelines, or other mechanisms that allow for a closer examination of the termination of parental rights for a father charged with or convicted of statutory rape where the facts illustrate the sexual intercourse was consensual and was among youth with a small age gap. Though the *Riggs* maxim holds true, that the wrongdoer should not benefit from his wrong, it should not be applied blindly without consideration for the context of the social or legal "wrong." In other words, the wrong from which the court seeks to prevent a rapist from benefitting is nonconsensual intercourse; yet the maxim will fail to serve its purpose if applied with unyielding rigidity in statutory rape cases where the facts illustrate that the intercourse was consensual and the age gap small.

Alaska, Florida, Idaho, Illinois, Louisiana, Oklahoma, Pennsylvania, Kansas, and Wisconsin have taken affirmative steps to protect women who conceive a child through rape from rapists who seek to perpetrate a "second rape" under the guise of asserting parental rights. These states serve as models to others seeking to create comprehensive legislation that ensures rape victims have choices that do not legally bind them to their rapists.

VIII. Conclusion

When a woman is raped and conceives a child, the product of her attacker's violence, the child, legally binds her through parental rights to the perpetrator. Rape can devastate and derail an

¹⁹¹ See Lonsway *supra*, note 37 & 38.

¹⁹² See Lonsway *supra*, note 39.

¹⁹³ See *Mattox*, 84 F.3d.

individual's life, and if the consequence of such violence is a child, this fact should never afford a perpetrator the opportunity to use the law to perpetrate a "second rape." Rapists, like Jaime Melendez, can and do use their parental rights to continue to torment and traumatize their victims. The legally created parental rights which rapists use to harm their victims a second time can and should be severed when mothers request it. Importantly, the tools rapists can use to re-traumatize the mother are legal tools that require action on the part of the legislature and the courts if those tools are to be taken away. Rapists take away control and choice from their victims, and nine states have given these mothers back the ability to choose, through comprehensive legislation that protects victims' ability to terminate the parental rights that forcibly bind them to their attackers. A woman who is raped and conceives a child faces uniquely vulnerable circumstances whereby the initial act of violence results in an opportunity, created by law, for the rapists to continue to torment her. The law has created this opportunity; thus the law must end it.