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## Due Process And Legislation Designed To Restrict The Rights Of Rapist Fathers

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# DUE PROCESS AND LEGISLATION DESIGNED TO RESTRICT THE RIGHTS OF RAPIST FATHERS

*Rachael Kessler\**

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## INTRODUCTION

“I did not altogether hate the life growing inside of me. Instead, I felt a sort of kinship, a partnership—perhaps the kind that only develops between those who have suffered together—but, nevertheless, I felt a bond.”<sup>1</sup> These words come from a woman who was the victim of a rape that resulted in pregnancy.<sup>2</sup> Like a number of women who become pregnant through rape, this woman rejected the notion that abortion and adoption were her only available options.<sup>3</sup> Instead, she made the difficult decision to keep and raise the baby conceived by her rape.<sup>4</sup>

A substantial number of incidents of rape occur in the United States every year.<sup>5</sup> According to data from the National Women’s Study, as many as 683,000 incidences of rape occur among adult women in the United States over the course of one year.<sup>6</sup> Of these incidences, approximately 5% result in pregnancy.<sup>7</sup> Thus, approximately 32,101 pregnancies result from rape every year.<sup>8</sup>

Society at large and many state legislatures commonly assume that women who become pregnant through rape will inevitably and automatically reject their pregnancies.<sup>9</sup> Society assumes rape victims will view their babies as extensions of their rapists and reminders of

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<sup>1</sup> Shauna Prewitt, *An Open Letter to Rep. Akin from a Woman Who Got Pregnant from Rape*, XOJANE.COM (Aug. 20, 2012), <http://www.xojane.com/it-happened-to-me/dear-representative-todd-akin-i-got-pregnant-from-rape>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *Facts About Sexual Assault*, N.Y. CITY ALLIANCE AGAINST SEXUAL ASSAULT, [listen.nycagainstrape.org/learn.html](http://listen.nycagainstrape.org/learn.html) (last visited Nov. 7, 2012).

<sup>6</sup> Melisa M. Holmes, et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 320 (1996).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Shauna R. Prewitt, Note, *Giving Birth to a “Rapist’s Child”: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 840-41 (2010).

the trauma associated with their rapes.<sup>10</sup> Thus, the expected and socially appropriate courses of action are limited to abortion or adoption.<sup>11</sup> In sharp contrast to these societal expectations, however, statistical studies demonstrate that a substantial number of women who become pregnant through rape do not choose to abort or put their babies up for adoption.<sup>12</sup> Instead, they opt to keep and raise their babies.<sup>13</sup>

In making the decision to keep their babies, however, these victim mothers face the possibility of psychologically painful and damaging prolonged contact with their rapists. In most states, rapist fathers enjoy the same parental rights as any other biological parent.<sup>14</sup> The existence of these parental rights means that the rapist father may seek physical custody, legal custody, or visitation with the child.<sup>15</sup> If granted any of these rights, he is subsequently able to assert a significant level of control over the victim mother's life through his control over the child's life and upbringing.<sup>16</sup>

Unfortunately, victim mothers are currently provided very little legal protection.<sup>17</sup> While many states have legislation designed to make it easier for raped women to have abortions or put their babies up for adoption, only a small number of states have passed legislation specifically designed to restrict the rapist father's parental rights when the victim mother decides to keep her baby.<sup>18</sup>

Victims' rights advocates have begun pushing state legislatures to pass laws that would restrict rapist fathers' parental rights in these

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Holmes, et al., *supra* note 6, at 320.

<sup>13</sup> *Id.*

<sup>14</sup> For the purposes of this Comment, I will refer to the biological fathers as rapist fathers and biological mothers as victim mothers even in instances where the father has not been prosecuted or convicted of sexual assault.

<sup>15</sup> See Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 276-77 (2012).

<sup>16</sup> Prewitt, *supra* note 9, at 831.

<sup>17</sup> Bitar, *supra* note 15, at 276.

<sup>18</sup> *Id.*

circumstances.<sup>19</sup> Such legislation, however, faces the possibility of due process challenges since it seeks to limit the rapist father's constitutionally protected right to a family.<sup>20</sup> In order to avoid such challenges, this legislation must first, as a threshold issue, require the victim mother to establish that the rape did in fact occur and result in the pregnancy. Further, the evidentiary standard for establishing the fact of the rape must be clear and convincing evidence, pursuant to the United States Supreme Court's decision in *Santosky v. Kramer*.<sup>21</sup> Additionally, since the Supreme Court held in *Meyer v. Nebraska* that the right to a family is a fundamental right,<sup>22</sup> such legislation must stand up to strict scrutiny.<sup>23</sup> Thus it must be shown that there is a compelling state interest,<sup>24</sup> the legislation is narrowly tailored to

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<sup>19</sup> See Debra Cassens Weiss, *Skadden Associate Tells of Her Rape and Pregnancy in Open Letter to Todd Akin*, ABA J. (Aug. 23, 2012, 11:37 AM), [http://www.abajournal.com/news/article/skadden\\_associate\\_tells\\_of\\_her\\_rape\\_and\\_pregnancy\\_in\\_open\\_letter\\_to\\_todd\\_ak/](http://www.abajournal.com/news/article/skadden_associate_tells_of_her_rape_and_pregnancy_in_open_letter_to_todd_ak/).

<sup>20</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: ‘No state...shall deprive any person of life, liberty or property without due process of law.’” (quoting Const. Amend. XIV)).

<sup>21</sup> 455 U.S. 745, 747-48 (1982) (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

<sup>22</sup> 262 U.S. 390, 399 (1923).

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: ‘No State shall . . . deprive any person of life, liberty, or property without due process of law.’ While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes . . . the right of the individual to . . . bring up children.

*Id.*

<sup>23</sup> *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 265 (1957).

<sup>24</sup> *Id.* (“For a citizen to be made to forego even apart of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.”).

achieve that compelling interest,<sup>25</sup> and the legislation is the least restrictive means for achieving the compelling interest.<sup>26</sup>

In passing effective legislation aimed at restricting rapists' parental rights, the primary strict scrutiny hurdle the legislation must overcome is the demonstration of a compelling state interest. The state interest in these cases is the best interests of the child, as well as the welfare of the victim mother. Legislation that seeks to restrict the parental rights of rapists must show that it is not in the best interests of the child for the rapist to have parental rights.<sup>27</sup>

Part I of this Comment will discuss the prevalence of pregnancy resulting from rape, the scope of parental rights in the United States, and the damaging effects on victim mothers whose attackers seek to enforce their parental rights. Part II of this Comment will discuss case law, the current state of legislation, problems with the current legislation, and potential reasons for the absence of effective legislation. Part III of this Comment will discuss how future legislation can be designed to restrict rapist fathers' parental rights without violating due process.

## I. LEGISLATION DESIGNED TO PROTECT WOMEN WHO KEEP THEIR BABIES CONCEIVED BY RAPE IS NECESSARY BECAUSE PROLONGED CONTACT WITH THEIR ATTACKERS IS DETRIMENTAL TO VICTIM MOTHERS

Multiple studies have shown that a significant portion of the approximately 32,101 women who get pregnant as a result of being raped each year decide to keep their babies.<sup>28</sup> As one such study found,

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<sup>25</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>26</sup> *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

<sup>27</sup> See Wanda Ellen Wakefield, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R. 4th 774 (1983).

<sup>28</sup> See, e.g., Holmes, et al., *supra* note 6, at 320; accord *Prewitt*, *supra* note 9, at 829 (citing Amy Sobie & David C. Reardon, *A Survey of Rape and Incest Pregnancies*, in *VICTIMS AND VICTORS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT* 18, 19 (David C. Reardon, et al. eds., 2000)).

of women who did not discover they were pregnant until the second trimester, 32.2% of women who became pregnant as a result of rape decided to keep their babies, while 50% underwent abortions and 5.9% chose adoption.<sup>29</sup> Another study found that 26% underwent abortion.<sup>30</sup> Of the remaining 73% who did not choose abortion, 64% chose to keep their babies, and 36% opted for adoption.<sup>31</sup> In the majority of these situations, the rapist fathers have the same parental rights to the child as any other biological father.<sup>32</sup> Thus, these women face the possibility of prolonged contact with their attackers. If the attacker decides to pursue his parental rights, the victim mother will have to remain in contact with her rapist in order to coordinate custody or visitation. Such prolonged contact may have a damaging effect on both the woman and her child.<sup>33</sup>

There is very little legal protection for these women. Federal legislation as well as the legislative structure of many states is largely reflective of the incorrect assumption that all rape victims will only choose adoption or abortion. The federal government, for instance, provides funding for abortions for women who become pregnant through rape.<sup>34</sup> Furthermore, many states have legislation designed to streamline the adoption process for rape victims by waiving the requirement that the rapist father approve the adoption before it can be finalized, making it easier for the victim mother to place the baby up for adoption.<sup>35</sup> Many states also require hospitals to offer emergency contraceptives to rape victims.<sup>36</sup> While these laws are effective in assisting those rape victims who become pregnant and opt

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<sup>29</sup> Holmes, et al., *supra* note 6, at 322.

<sup>30</sup> Prewitt, *supra* note 9, at 829 (citing Amy Sobie & David C. Reardon, *A Survey of Rape and Incest Pregnancies, in VICTIMS AND VICTORS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT* 18, 19 (David C. Reardon, et al. eds., 2000)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 832-33.

<sup>34</sup> *Id.* at 842-43.

<sup>35</sup> *Id.* at 829.

<sup>36</sup> *Id.*

for abortion or adoption, these laws ultimately fall short of protecting women who choose to keep their child.<sup>37</sup>

### A. A Brief Note on Statutory Rape

This Comment centers on a discussion of forcible rape where the victim is over the age of eighteen. Pregnancies resulting from incidences of statutory rape result in their own set of legal quandaries, as demonstrated by the Seventh Circuit's 1996 decision, *Pena v. Mattox*.<sup>38</sup> In that case, a biological father was denied his parental rights because he was four years older than his then fifteen-year-old girlfriend when their child was conceived.<sup>39</sup> A substantial amount of controversy surrounds this decision. It has often been viewed as exceedingly harsh, particularly since courts have refused to terminate parental rights in cases where a parent was convicted of murder, an arguably worse crime than statutory rape.<sup>40</sup> Along the same lines, the termination of parental rights in statutory rape cases must be viewed under a different lens than the termination of parental rights in forcible rape cases since statutory rape is commonly perceived as a less serious crime.<sup>41</sup>

Another problem affecting parental rights in statutory rape cases is the fact that statutory rape is a strict liability offense;<sup>42</sup> thus, a person may commit statutory rape without even being aware that he or she was committing a crime.<sup>43</sup> As such, the analysis regarding the termination of a statutory rapist father's rights differs from a forcible rapist father's because in many cases the statutory rapist "does not even fit the composite of a criminal who should not profit from his wrong. Therefore, application of the maxim that a criminal should not

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<sup>37</sup> *Id.*

<sup>38</sup> 84 F.3d 894 (7th Cir. 1996).

<sup>39</sup> *Id.* at 900.

<sup>40</sup> Angela D. Lucchese, *Notes: Pena v. Mattox: The Parental Rights of a Statutory Rapist*, 36 BRANDEIS J. FAM. L. 285, 295-96 (1998).

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 285.

<sup>43</sup> *Id.*



profit from his crime would be illogical, because the criminal did not intend the wrong.”<sup>44</sup> The circumstances in some statutory rape cases may, of course, be more analogous to forcible rape. However, since in many statutory rape cases the offender does not have the intent to commit a crime, the analysis for statutory rape cases must be viewed separately from forcible rape cases. As such, the termination of parental rights in cases of statutory rape is outside the scope of this Comment.

### *B. The Scope of Parental Rights in the United States*

If a rapist father is granted parental rights to a child conceived through rape, he receives a significant amount of control over both the victim mother and the child. In the United States, parental rights allow a biological parent a significant amount of control over both their child and their co-parent.<sup>45</sup> There are four primary forms of parental rights in the United States: physical custody, legal custody, visitation, and consent to adoption.<sup>46</sup>

Physical custody allows a parent to actively participate in the child’s life and upbringing by providing direct care to the child.<sup>47</sup> Physical custody can be shared between the two parents.<sup>48</sup> Legal custody allows a parent who does not provide direct care to the child to have a legally enforceable say in all parenting decisions made by the parent with physical custody,<sup>49</sup> such as where the child lives, where the child attends school, and the child’s religious upbringing.<sup>50</sup> Visitation allows a parent without physical custody to have scheduled times to visit a child.<sup>51</sup> Visitation rights are overseen by courts, which

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<sup>44</sup> *Id.* at 300.

<sup>45</sup> See Bitar, *supra* note 15, at 276-77.

<sup>46</sup> See *id.* at 277.

<sup>47</sup> See *McCarty v. McCarty*, 807 A.2d 1211, 1213-14 (2002).

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> Prewitt, *supra* note 9, at 836.

<sup>51</sup> Bitar, *supra* note 15, at 277.

tend to protect a parent's visitation rights.<sup>52</sup> Finally, consent to adoption requires that a biological parent be given the opportunity to approve of an adoption of his or her biological child before it is finalized.<sup>53</sup>

These forms of parental rights, particularly physical custody, legal custody, and visitation, allow a parent to exert a significant level of control over a co-parent.<sup>54</sup> Consequently, rapist fathers who seek to enforce their parental rights are able to exert a significant level of control over their victims.<sup>55</sup> The rapist father has control over where the victim mother lives, how the victim mother raises her child, and the victim mother's schedule.<sup>56</sup> The victim mother must also contact and see her rapist when dropping off or picking up the child or discussing parenting decisions.<sup>57</sup> While in some cases direct contact between the victim and her attacker may be able to be avoided through the use of family members or other agents who could facilitate transporting the child between the two parents, the attacker would still have significant control over parenting decisions.<sup>58</sup> Thus, even if the victim does not have to face her attacker directly, she still must deal with the control he exerts over her life as well as the fact that her child is spending time with her attacker.<sup>59</sup> Even without direct contact between the victim and her attacker, this prolonged contact and continued exertion of control by their rapists may have a seriously damaging effect on victim mothers as they attempt to recover from their rapes.<sup>60</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 277-78.

<sup>54</sup> *See id.* at 276-78.

<sup>55</sup> Prewitt, *supra* note 9, at 831.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 831-32.

<sup>60</sup> *Id.* at 832-34.

*C. The Effect on Rape Victims of Prolonged Contact with their Attackers*

“During my final year of college, I experienced an event that was so absolute in its effects that, since it occurred, it has figured as the point of reference from which all understandings and meanings of my life now stem: I was raped.”<sup>61</sup> This is how one rape victim described the effect of her rape on her psychological state.<sup>62</sup> Aside from the physical harm perpetrated during an incidence of rape, these attacks, more often than not, also have a severe psychological impact on the victim.<sup>63</sup>

Rape victims are likely to suffer from post-traumatic stress disorder (“PTSD”) and rape-related post-traumatic stress disorder following their rapes.<sup>64</sup> One study found that 94% of rape victims suffer from rape-related post-traumatic stress disorder in the period immediately following the attack.<sup>65</sup> According to the National Institutes of Health (“NIH”), PTSD sufferers experience “symptoms of distress.”<sup>66</sup> They also “may become emotionally numb . . . lose interest in things they used to enjoy . . . startle easily or be irritable, [or] become aggressive.”<sup>67</sup> Other studies found that rape victims suffer from “disturbances in general functioning. . . .”<sup>68</sup> Such disturbances may include “a general withdrawal from the outside world.”<sup>69</sup> The NIH report also noted, “PTSD symptoms seem to be

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<sup>61</sup> Prewitt, *supra* note 1.

<sup>62</sup> *See id.*

<sup>63</sup> Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91, 102 (2010).

<sup>64</sup> Prewitt, *supra* note 9, at 833-34.

<sup>65</sup> Edna B. Foa, et al., *Treatment of Posttraumatic Stress Disorder in Rape Victims: A Comparison Between Cognitive-Behavioral Procedures and Counseling*, 59 J. CONSULTING & CLINICAL PSYCHOL. 715, 715 (1991).

<sup>66</sup> NIH & the Friends of the Nat'l Library of Medicine, *PTSD: A Growing Epidemic*, 4 NIH MEDLINE PLUS 10 (2009), available at <http://www.nlm.nih.gov/medlineplus/magazine/issues/winter09/articles/winter09pg10-14.html>.

<sup>67</sup> *Id.*

<sup>68</sup> Kendall, *supra* note 63, at 108.

<sup>69</sup> *Id.*

worse if they were triggered deliberately by another person, as in a mugging or rape.”<sup>70</sup>

For most rape victims, these symptoms begin to abate in the months following the attack.<sup>71</sup> A recent study found that three months after the attack, the percentage of rape victims still found to be suffering from rape-related post-traumatic stress disorder dropped from 94% to 47%.<sup>72</sup> Most rape victims will “sufficiently recover” within a year of the attack.<sup>73</sup>

Rape victims who press charges against their attackers, however, have been shown to have slower recoveries.<sup>74</sup> Repeated contact with their attackers and lengthy court proceedings delay their ability to move past the rape.<sup>75</sup> Many of these women “may not begin the recovery process until after the trial is concluded.”<sup>76</sup> A victim that must continue to interact with a rapist father who chooses to exercise his parental rights will face a similar delay in her recovery process and will be subject to exacerbated symptoms of post-traumatic stress disorder or rape-related post traumatic stress disorder.<sup>77</sup>

Victim mothers whose rapists have sought to exercise their parental rights have expressed the psychological effects resulting from prolonged contact with their rapists.<sup>78</sup> One victim mother stated:

I was raped in [North Carolina] and the rapist won “[j]oint” custody. Torment does not come close to describe what I live. . . . [The courts] have not only tied and bound me to a rapist, but also the innocent child that was conceived by VIOLENCE! [The

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<sup>70</sup> NIH, *supra* note 66.

<sup>71</sup> Foa, *supra* note 65, at 715.

<sup>72</sup> *Id.*

<sup>73</sup> Prewitt, *supra* note 9, at 833 (citing SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 229 (1979)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 831.

rapist's] violence has earned him even more control over my life.<sup>79</sup>

In addition to being psychologically damaging to the victim, the presence of these PTSD symptoms also affect the victim mother's ability to effectively parent. The "domino effect" demonstrates that allowing a rapist father to assert his parental rights is not in the best interests of the child.

Some rapist fathers have used the existence of their parental rights to manipulate and blackmail their victims.<sup>80</sup> For example, rapist fathers convince their victims to not press charges in return for the rapist father's agreement not to exercise his parental rights.<sup>81</sup> This too may have a damaging effect on the victim mother's recovery from the rape as she is not able to see justice served and her attacker punished.

Continued contact with their rapists is seriously damaging to rape victims who become pregnant and keep their babies. Women need the protection of legislation designed to terminate their rapists' parental rights.

## II. CURRENT LEGISLATION IS INEFFECTIVE IN PROTECTING VICTIM MOTHERS

### A. *Cases Regarding the Termination of Parental Rights*

There is a limited amount of case law related to the issue of terminating or restricting the parental rights of rapist fathers. The existing cases, however, demonstrate the differing approaches in states with legislation designed to protect victim mothers and those states with no such legislation.

In *Hilliker v. Miller*, the plaintiff victim mother sought to prevent her rapist from receiving parenting time because their "child

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<sup>79</sup> *Id.* (alterations in original) (quoting Posting of Not avail. to RoguePundit: Rapists' Rights Over Their Children, [http://roguepundit.typepad.com/roguepundit/2004/10/rapists\\_rights\\_.html](http://roguepundit.typepad.com/roguepundit/2004/10/rapists_rights_.html) (Nov. 28, 2004)).

<sup>80</sup> *Id.* at 835.

<sup>81</sup> *Id.* at 836.

was conceived through a nonconsensual sexual act.”<sup>82</sup> The court held that “[e]ven given the circumstances surrounding the child’s conception, there is adequate evidence to permit the district court’s ultimate finding that liberal visitation is in the best interests of the child.”<sup>83</sup> The court reached this conclusion despite the plaintiff victim mother’s assertion that “the child’s best interests are not served by granting parenting time to appellant because of the circumstances of the conception and the risks to the child’s identity, stability, and development. . . .”<sup>84</sup>

Following this decision, the victim mother was forced to come in contact with her attacker several times a week when dropping off or picking up her child, as well as at her child’s school and sporting activities.<sup>85</sup> In a later interview, the victim mother expressed the ill effects of this continued contact with her rapist, stating, “I . . . struggle to move on with my life and I wonder how . . . to do so when I have to see this man every other day. . . . Our system needs to be revamped but I need help now. . . .”<sup>86</sup> In this case, the prolonged contact with the rapist father caused by the court’s refusal to limit his parental rights clearly had a significant and negative effect on the victim mother.<sup>87</sup>

*Hilliker* was decided in Minnesota. Minnesota does not have legislation designed to restrict or terminate the parental rights of rapist fathers.<sup>88</sup> Consequently, the decision against the victim mother was inevitable. Conversely, in states with legislation aimed at terminating the parental rights of rapist fathers, cases come out more favorably for victim mothers.<sup>89</sup>

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<sup>82</sup> *Hilliker v. Miller*, No. A05-1538, 2006 WL 1229633, at \*3 (Minn. Ct. App. May 9, 2006).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Prewitt, *supra* note 9, at 832.

<sup>86</sup> *Id.* (citation omitted).

<sup>87</sup> *See id.* at 832-33.

<sup>88</sup> *See id.*

<sup>89</sup> *See, e.g., In re Adoption of C.A.T.*, 273 P.3d 813, 819-21 (Kan. Ct. App. 2012).

Kansas has a statute that states: “[T]he court may order that parental rights be terminated, upon a finding by clear and convincing evidence . . . the birth of the child was the result of the rape of the mother.”<sup>90</sup> In *In re Adoption of C.A.T.*, the court applied this statute to terminate the rapist father’s parental rights after the victim mother showed he raped her, resulting in conception.<sup>91</sup> In stark contrast to the Minnesota case, the court succinctly and efficiently terminated the rapist father’s parental rights upon a showing that he raped the victim mother:

Under K.S.A. 2010 Supp. 59-2136(h)(1)(f), the consent of a natural father to an adoption is not required if it is found by clear and convincing evidence that the child was conceived as a result of rape. Here, the district court heard testimony from several witnesses regarding the circumstances surrounding the conceptions of [the victim mother’s two children]. Ultimately, the district court found the testimony of [the victim and two third party witnesses] to be more credible than that of [the rapist father], and we cannot replace our judgment for that of the district court regarding questions of fact.<sup>92</sup>

The existence of legislation in Kansas prevented this victim mother from having to endure the “struggle to move on with [her] life”<sup>93</sup> experienced by victim mothers whose rapists successfully exercise their parental rights.

The disparity in outcomes between these two cases demonstrates the necessity of legislation to protect these victim mothers. Unfortunately, such legislation does not exist in most states.

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<sup>90</sup> Kan. Stat. Ann. § 59-2136(h)(1)(F) (2005).

<sup>91</sup> 273 P.3d at 819-21.

<sup>92</sup> *Id.* at 819.

<sup>93</sup> See Prewitt, *supra* note 9, at 832.

### B. The Current State of Legislation

Currently, forty states have some form of legislation aimed at limiting the parental rights of rapists.<sup>94</sup> Many state laws allow for a streamlined adoption process for rape victims by waiving the requirement that the rapist approve the adoption before it can be finalized, through explicit wording or termination of all parental rights.<sup>95</sup> Thirty-four states have passed laws designed for this purpose.<sup>96</sup>

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<sup>94</sup> See Alaska Stat. § 25.23.180(c)(3) (2010); Ark. Code Ann. § 9-10-121 (Westlaw 2013); Cal. Fam. Code § 3030(b) (West 2004); Colo. Rev. Stat. § 19-5-105.5 (West Supp. 2012); Conn. Gen. Stat. Ann. § 45(a)-717(g)(2)(G) (West 2004); Del. Code Ann. tit. 13, § 724A(e) (2013); Fla. Stat. § 39.806(1)(m) (2013); Haw. Rev. Stat. § 571-61(b)(5) (2013); Idaho Code Ann. § 16-2005(2)(a) (2009); 750 Ill. Comp. Stat. Ann. 50/8 (1993); Ind. Code § 31-19-9-8(4) (2005); Kan. Stat. Ann. § 59-2136(h)(1)(F) (2005); Iowa Code § 606A.6(1) (2011); 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.H. Rev. Stat. Ann. § 170-C:5(VII)(d) (2012); N.M. Stat. Ann. § 32A-5-19 (LexisNexis 2010); N.Y. Dom. Rel. Law § 111-a (McKinny 2010); N.C. Gen. Stat. Ann. §§ 14-27.3(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. Ann. § 419B.502 (West 2011); 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); Vt. Stat. Ann. tit. 15 § 665(f)(1) (2013); Va. Code Ann. § 63.2-1233(6) (2007); Wash. Rev. Code Ann. § 26.33.170(2)(b) (West 2005); W. Va. Code § 48-9-209a (2014); Wis. Stat. Ann. § 48.415(9) (West 2009); Wis. Stat. Ann. § 48.42 (West 2009); Wyo. Stat. Ann. § 1-22-110(a)(viii) (2011).

<sup>95</sup> See Prewitt, *supra* note 9, at 829.

<sup>96</sup> See Alaska Stat. § 25.23.180(c)(3); Ark. Code Ann. § 9-10-121 (Westlaw 2013); Colo. Rev. Stat. § 19-5-105.5 (2013); Conn. Gen. Stat. Ann. § 45(a)-717(g)(2)(G); Fla. Stat. § 39.806(1)(m) (2007); Haw. Rev. Stat. § 571-61(b)(5) (2013); Idaho Code Ann. § 16-2005(2)(a); 750 Ill. Comp. Stat. Ann. 50/8; Ind. Code § 31-19-9-8(a)(4); Iowa Code § 606A.6(1) (2011); 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-



Alaska's statute limiting a rapist father's right to approve of an adoption states:

The rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated in or before an adoption proceeding. . . . The relationship of parent and child may be terminated by a court order issued in connection with a proceeding . . . that the parent committed an act constituting sexual assault . . . under the laws of this state or a comparable offense under the laws of the state where the act occurred that resulted in conception of the child and that termination of the parental rights of the biological parent is in the best interests of the child.<sup>97</sup>

This statute allows the victim mother to place her baby up for adoption without the rapist father's consent so long as she can show that the child was conceived through rape and that the adoption is in the best interests of the child.<sup>98</sup> This effectively prevents the rapist father from exercising control over the victim mother by refusing to consent to the adoption.

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27.2(c)-14-27.3(c); N.H. Rev. Stat. Ann. § 170-C:5(VII)(d) (2012); Ohio Rev. Code Ann. § 3107.07(F); Okla. Stat. Ann. tit. 10A § 1-4-904(B)(11); Or. Rev. Stat. Ann. § 419B.502; 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; Vt. Stat. Ann. tit. 15 § 665(f)(1) (2013); Va. Code Ann. § 63.2-1233(6); Wash. Rev. Code Ann. § 26.33.170(2)(b); W. Va. Code § 48-9-209a (2014); Wis. Stat. Ann. § 48.415(9); Wyo. Stat. Ann. § 1-22-110(a)(viii).

<sup>97</sup> Alaska Stat. § 25.23.180(a)-(c).

<sup>98</sup> *Id.*

In other states, laws restrict a rapist father's parental rights to varying degrees—denying him visitation alone,<sup>99</sup> denying him visitation and custody,<sup>100</sup> terminating his rights if he is convicted of rape,<sup>101</sup> or, in a small number of states, terminating his rights without a conviction of rape.<sup>102</sup>

Three states, Delaware, South Dakota, and Louisiana, have laws that limit a rapist father's visitation rights.<sup>103</sup> The Louisiana Civil Code provides:

In a proceeding in which visitation of a child is being sought by a natural parent, if the child was conceived through the commission of a felony rape, the natural parent who committed the felony rape shall be denied visitation rights and contact with the child.<sup>104</sup>

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<sup>99</sup> Three states—Delaware, Louisiana, and South Dakota—have legislation designed to restrict visitation alone. *See* Del. Code Ann. tit. 13, § 724A(e) (2013); La. Civ. Code Ann. art. 137 (2012); S.D. Codified Laws § 25-4A-20.

<sup>100</sup> Four states—California, Michigan, Nevada, and New Jersey—have legislation designed to restrict visitation and custody. *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); N.J. Stat. Ann. § 9:2-4.1(a) (West 2002).

<sup>101</sup> Eight states—Connecticut, Maine, Missouri, Montana, North Carolina, Oregon, Tennessee, and Texas—have legislation designed to terminate parental rights if the father is convicted of rape. *See* Conn. Gen. Stat. Ann. § 45(a)-717(g)(2)(G) (West 2004); Me. Rev. Stat. Ann. tit. 19-A § 1658 (1997); Mo. Ann. Stat. § 211.447.5(5) (West 2011); Mont. Code Ann. § 41-3-609(1)(c) (2011); N.C. Gen. Stat. Ann. §§ 14-27.2(c)-14.27.3(c) (West 2010); Or. Rev. Stat. § 419B.502 (2011), amended by Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws, available at [www.leg.stat.or.us/11orlaws/sess0400.dir/0438.pdf](http://www.leg.stat.or.us/11orlaws/sess0400.dir/0438.pdf); Tenn. Code Ann. §§ 36-1-113(c), (g)(10) (2010); Tex. Fam. Code Ann. § 161.007 (Vernon 2002).

<sup>102</sup> Five states—Idaho, Kansas, Oklahoma, Pennsylvania, and Wisconsin—have legislation designed to terminate parental rights without a conviction for rape. *See* Idaho Code Ann. § 16-2005(2)(a); Okla. Stat. Ann. tit. 10A § 1-4-904(B)(11) (West 2009); 23 Pa. Cons. Stat. Ann. § 2511; Wis. Stat. Ann. § 48.42.

<sup>103</sup> Del. Code Ann. tit. 13, § 724A(e) (2013); La. Civ. Code Ann. art. 137 (2012); S.D. Codified Laws § 25-4A-20.

<sup>104</sup> La. Civ. Code Ann. art. 137 (2012).

Similarly, South Dakota's law states: "If it is in the best interest of the child, the court may prohibit, revoke, or restrict visitation rights to a child for any person who has caused the child to be conceived as the result of rape or incest."<sup>105</sup> These laws provide a limited amount of protection to victim mothers by allowing them to bar their rapists from seeking visitation. However, the laws in these states only restrict a rapist father's rights with respect to visitation.<sup>106</sup> Since legislation in these states only involves visitation and makes no mention of the issue of custody, rapist fathers in these states are still able to seek custody of the child.<sup>107</sup>

Four states—California, Michigan, Nevada, and New Jersey—have laws that limit both a rapist father's visitation and custody rights.<sup>108</sup> For example, the California Family Code provides: "No person shall be granted custody of, or visitation with, a child if the person has been convicted under [California's criminal rape statute] and the child was conceived as a result of that violation."<sup>109</sup> In all four states, the application of these laws is contingent upon the rapist father's being prosecuted and convicted of the rape.<sup>110</sup> Additionally, these laws do not waive the rapist father's right to approve of an adoption.

Fifteen states—Arkansas, Colorado, Connecticut, Hawaii, Iowa, Maine, Missouri, Montana, New Hampshire, North Carolina, Oregon, Tennessee, Texas, Vermont, West Virginia—have laws that allow for the termination of all of a rapist's parental rights.<sup>111</sup> For example,

<sup>105</sup> S.D. Codified Laws § 25-4A-20.

<sup>106</sup> Bitar, *supra* note 15, at 288-89.

<sup>107</sup> *Id.*

<sup>108</sup> 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); N.J. Stat. Ann. § 9:2-4.1(a) (West 2002).

<sup>109</sup> Cal. Fam. Code § 3030(b) (West 2004).

<sup>110</sup> *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); N.J. Stat. Ann. § 9:2-4.1(a) (West 2002).

<sup>111</sup> *See* Ark. Code Ann. § 9-10-121 (Westlaw 2013); Colo. Rev. Stat. § 19-5-105.5 (2013); Conn. Gen. Stat. Ann. § 45(a)-717(g)(2)(G) (West 2004); Haw. Rev. Stat. § 571-61(b)(5) (2013); Iowa Code § 606A.6(1) (2011); Me. Rev. Stat. Ann. tit. 19-A

Maine's law states: "The parental rights and responsibilities with respect to a specific child of a parent convicted of a crime involving the sexual intercourse that resulted in the conception of that child may be terminated in accordance with this section."<sup>112</sup> As with the states that allow a father's custody and visitation rights to be restricted, termination of parental rights in these states is contingent upon the rapist pleading guilty or being convicted of the rape.<sup>113</sup>

Six states—Florida, Idaho, Kansas, Oklahoma, Pennsylvania, and Wisconsin—allow a rapist father's rights to be terminated without a conviction of rape.<sup>114</sup> Oklahoma's statute, for instance, states: "The court may terminate the rights of a parent to a child based upon the following legal grounds: . . . a finding that the child was conceived as a result of rape perpetrated by the parent whose rights are sought to be terminated."<sup>115</sup> A similar statute in Wisconsin provides that parental rights can be terminated "by proving that the child was conceived as a result of a sexual assault" which "may be proved by final judgment of conviction or other evidence produced at a fact-finding hearing."<sup>116</sup>

In these states, the victim mother must simply prove at trial that the rape occurred and resulted in the conception of the child in order to move to terminate the rapist father's parental rights. Thus, these laws provide the highest level of protection to victim mothers. Since a higher evidentiary standard is required in criminal rape proceedings,

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§ 1658 (1997); Mo. Ann. Stat. § 211.447.5(5) (West 2011); Mont. Code Ann. § 41-3-609(1)(c) (2011); N.H. Rev. Stat. Ann. § 170-C:5(VII)(d) (2012); N.C. Gen. Stat. Ann. §§ 14-27.2(c)-14-27.3(c) (West 2010); Or. Rev. Stat. § 419B.502 (2011), amended by Act effective Jan. 1, 2012, ch. 438, 2011 Or. Laws, *available at* [www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf](http://www.leg.state.or.us/11orlaws/sess0400.dir/0438.pdf); Tenn. Code Ann. §§ 36-1-113(c), (g)(10) (2010); Tex. Fam. Code Ann. § 161.007 (Vernon 2002); Vt. Stat. Ann. tit. 15 § 665(f)(1) (2013); W. Va. Code § 48-9-209a (2014).

<sup>112</sup> Me. Rev. Stat. Ann. tit. 19-A § 1658 (1997).

<sup>113</sup> *Id.*

<sup>114</sup> See Fla. Stat. § 39.806(1)(m) (2007); Idaho Code Ann. § 16-2005(2)(a)(2009); Kan. Stat. Ann. § 59-2136(h)(1)(F)(2005); Okla. Stat. Ann. tit. 10A § 1-4-904(B)(11) (West 2009); 23 Pa. Cons. Stat. Ann. § 2511(a)(7) (West 2010); Wis. Stat. Ann. § 48.415(9)(b)(West 2009).

<sup>115</sup> Okla. Stat. Ann. tit. 10A § 1-4-904(B)(11).

<sup>116</sup> Wis. Stat. Ann. § 48.415(9)(b).

these laws allow victim mothers to seek protection even if there is not sufficient evidence to prove that the rape occurred beyond a reasonable doubt.<sup>117</sup>

### C. Problems with Existing Legislation

While the existing laws aid in protecting a victim mother from her rapist, they are riddled with shortcomings that prevent the laws from being as effective as possible. In particular, the requirement of a conviction is a major impediment to laws that are designed to restrict a rapist's parental rights.<sup>118</sup> Rape is one of the most underreported violent crimes perpetrated in the United States.<sup>119</sup> In a study conducted by the National Institute of Justice, only 19.1% of raped women over the age of eighteen reported their rape to police.<sup>120</sup> This same report also found that of reported rapes, only 37% resulted in a criminal prosecution.<sup>121</sup> Of those prosecuted, only 46.2% resulted in a conviction.<sup>122</sup> Additionally, a survey of rape victims indicated that only 7.8% reported that their rapists were criminally prosecuted and a mere 3.3% reported that their rapists were ultimately convicted.<sup>123</sup> Another study found that 10% of rapes were reported and 20% of those resulted in convictions.<sup>124</sup> These numbers would indicate that 98% of rapists are never convicted for their crimes.<sup>125</sup> Thus, not only are instances of rape considerably underreported, the rate of prosecution among reported rapes is low, and the majority of prosecuted rapes do not result in convictions.

<sup>117</sup> See Bitar, *supra* note 15, at 293.

<sup>118</sup> *Id.* at 292.

<sup>119</sup> NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 33.

<sup>124</sup> Kendall, *supra* note 63, at 91 (citation omitted).

<sup>125</sup> *Id.* at 91-92 (citation omitted).

There are several reasons for this low level of convictions in tried cases, but the primary problems are evidentiary in nature. In many rape cases, it is difficult for a prosecutor to present enough evidence to support a jury finding that the rape occurred beyond a reasonable doubt. In date rape cases, for instance, there is often little evidence that can be presented to prove that the rape occurred.<sup>126</sup> If a sperm sample is collected, it does not prove that the intercourse was forced.<sup>127</sup> A urine sample would prove the presence of the date rape drug in the victim's system, but many victims are unaware "of the necessity to obtain a urine sample quickly" after the attack.<sup>128</sup> The best evidence in such cases would be the victim's recollection of the attack. However, date rape victims often have no memory of what occurred while under the influence of date rape drugs.<sup>129</sup> Furthermore, there are often no witnesses to the attack.<sup>130</sup> These evidentiary issues contribute to the low level of convictions in criminal cases that go to trial. This, combined with the low number of criminal charges, results in an exceedingly small number of rapes ultimately ending in convictions.

Therefore, in states where a conviction is required to limit a rapist's parental rights, these laws designed to protect rape victims from prolonged contact with their attackers provide little or no actual protection. Since so few rape victims see their attackers convicted, only a marginal number of women experience the protection offered by these laws.

Accordingly, in order to be most effective, legislation aimed at restricting the parental rights of rapists should not require a criminal conviction; instead, the victim should only be required to prove that the rape occurred through clear and convincing evidence in civil court.

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<sup>126</sup> R. Fichenberg, *The Date Rape Drug: The Difficulty of Obtaining Convictions*, PROSECUTOR, Mar./Apr. 1997, at 40.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

*D. Why Is Legislation Restricting the Parental Rights of Rapists Largely Absent in the United States?*

As stated previously, it has been suggested that the absence of legislation aimed at protecting pregnant rape victims from their attackers is based on incorrect assumptions and social attitudes about rape.<sup>131</sup> Shauna Prewitt, a woman who got pregnant from rape,<sup>132</sup> sets forth the idea of a “pregnant-raped woman prototype.”<sup>133</sup> She argues that there persists throughout American society the idea that a woman who becomes pregnant through rape will automatically hate her baby as an ever-present reminder of her rape and her rapist.<sup>134</sup> Due to this assumption, society and, as a result, many legislatures, come to the conclusion that a pregnant woman will automatically choose either abortion or adoption.<sup>135</sup> However, as discussed previously, a significant portion of women who become pregnant through rape decide to keep their babies.

Prewitt argues that women who chose to keep their babies break with the “pregnant-raped woman prototype” and are thus “viewed with suspicion.”<sup>136</sup> She compares these assumptions regarding the choices of pregnant rape victims to other common misconceptions about rape, most notably the idea that most rapes are committed by a “black stranger attacking a white woman in public using overwhelming force.”<sup>137</sup> In reality, almost 80% of rapes are not committed by strangers to the victim.<sup>138</sup> Additionally, almost 60% of rapes occur in the victim’s home or the home of someone the victim knows.<sup>139</sup> Prewitt argues that these disparities between common

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<sup>131</sup> Prewitt, *supra* note 9, at 836-37.

<sup>132</sup> Prewitt, *supra* note 1.

<sup>133</sup> Prewitt, *supra* note 9, at 840-41.

<sup>134</sup> *Id.* at 846-47.

<sup>135</sup> *Id.* at 844-45.

<sup>136</sup> *Id.* at 830.

<sup>137</sup> *Id.* at 838 (citation omitted).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

understandings of rape and the realities of rape result in legislation that provides ineffective protection to rape victims.<sup>140</sup>

### III. LEGISLATION DESIGNED TO RESTRICT THE PARENTAL RIGHTS OF RAPISTS MUST BE CRAFTED TO AVOID DUE PROCESS CHALLENGES

Legislation designed to restrict the parental rights of rapists is necessary to protect the welfare of rape victims and serve the best interests of children conceived in rape. Such legislation, however, faces the possibility of due process challenges because it is aimed at limiting rapists' constitutionally protected right to a family.<sup>141</sup> Thus, legislatures must be careful in designing statutes in order to avoid such challenges by first requiring that the victim prove through clear and convincing evidence that the rape occurred and resulted in conception. As such, legislation aimed at limiting or wholly excising the rights of a rapist father must include a provision that requires a showing that the rapist father's involvement in the child's life is adverse to the welfare of the victim mother and to the best interests of the child.

Since the foundational basis for restricting the rapist father's parental rights is the fact that he raped the mother victim, establishing that the rape did indeed occur is a necessary first step in restricting his rights within the bounds of the constitution. The fact of the rape, must be proven to the evidentiary standard of clear and convincing evidence. In *Santosky v. Kramer*, the Supreme Court of the United States held that "freedom of personal choice in matters of family life is a fundamental liberty interest"<sup>142</sup> and thus, in order to satisfy due process, any law seeking to restrict parental rights must be proven through clear and convincing evidence.<sup>143</sup> Currently, only one state, Kansas, explicitly states that this is the applicable standard in its law designed to restrict the parental rights of rapist fathers.<sup>144</sup>

<sup>140</sup> *Id.* at 839.

<sup>141</sup> *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>142</sup> 455 U.S. 745, 753 (1982).

<sup>143</sup> *Id.* at 769.

<sup>144</sup> Kan. Stat. Ann. § 59-2136(h)(1)(F) (2005).



The above-mentioned Kansas case, *In re Adoption of C.A.T.*, demonstrates how the clear and convincing evidence standard operates in cases where a victim mother seeks to restrict the parental rights of a rapist father:

Here, [a third party witness] testified that on the night of [the child's] conception, she heard A.S.[the mother victim] telling J.R. [the rapist father] “no, no, no” and “stop” from behind the locked bathroom door. This evidence supports a finding that A.S. did not consent to having sex with J.R. There is also evidence in the record that A.S. was under the influence at the time of the sexual encounter that resulted in [the child's] conception and that A.S. was therefore incapable of giving her consent. In fact, A.S. testified that it was not until a paternity test conclusively established that J.R. was the father of [the child] that she realized that she had been raped. Furthermore, [another third party witness] testified that J.R. later admitted to him that he had raped A.S. in the bathroom. This testimony alone, if believed, is clear and convincing evidence that [the child] was conceived as a result of rape. Thus, we find substantial evidence in the record upon which a rational factfinder could find it highly probable that [the child's] conception was the result of rape. . . .<sup>145</sup>

In this case, the victim mother was able to satisfy the clear and convincing evidence standard through her own testimony and the testimony of several witnesses who could corroborate her claim that her child was conceived through rape. By requiring this showing and using this intermediate standard of evidence, the legislation will effectively strike a balance between protecting the interests of both the rapist father and victim mother. The rapist father's rights will be protected because the victim mother will be required to prove that the

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<sup>145</sup> *In re Adoption of C.A.T.*, 273 P.3d 813, 820 (Kan. Ct. App. 2012).

rape occurred before he can be stripped of his rights. The victim mother can more easily obtain protection since she will not have to wait on a conviction that may or may not happen to receive the benefits of the legislation.

Explicitly establishing this evidentiary standard will also assist in assuaging potential legislative fears about allowing a rapist father's rights to be restricted without also requiring a conviction for sexual assault. Despite the absence of a conviction, the mother victim would nonetheless have to establish that the rape did in fact occur to an intermediate standard of evidence. As courts have noted, "[c]lear and convincing' evidence requires a finding of high probability . . . that the evidence be 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.'"<sup>146</sup> While certainly not equal to the proof beyond a reasonable doubt standard required for a criminal conviction and subsequent incarceration, this standard sufficiently establishes that the rape occurred in order to satisfy due process with regard to restricting the rapist father's parental rights.

This standard of proof, in conjunction with the absence of a requirement for a criminal conviction, will also allow more victim mothers to benefit from laws designed to protect them and their children. As noted previously, an alarmingly small number of rapes are reported, even fewer are prosecuted, and an even smaller number ultimately result in convictions.<sup>147</sup> By not requiring a conviction, a victim mother who do not wish to go through the ordeal of pressing charges and enduring a criminal trial may nonetheless seek protection in civil court by blocking her attacker from claiming his parental rights. Additionally, those victim mothers who do press charges or whose attackers are not ultimately convicted under the more stringent criminal evidentiary standard will still be able to seek protection in civil court. Thus, the clear and convincing evidence standard not only fulfills a threshold due process issue before the rapist father's rights

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<sup>146</sup> *In re Angelia P.*, 623 P.2d 198, 204 (Cal. 1981) (quoting *Sheehan v. Sullivan*, 58 P. 543 (Cal. 1899)).

<sup>147</sup> NAT'L INST. OF JUSTICE, *supra* note 119, at 33.

can be restricted, but also assists in achieving a balance between the rights of the rapist father and victim mother by allowing the victim to prove that the rape occurred to a lower, but still intermediate, evidentiary standard.

Proving through clear and convincing evidence that the rape occurred, however, alone may still be insufficient to wholly satisfy due process. Courts are split on whether or not a felony conviction is sufficient to restrict parental rights.<sup>148</sup> Thus, they would likely split on whether proving rape by clear and convincing evidence would be sufficient for the same purpose. Even courts within the same jurisdiction may differ on this issue. In California, for instance, a state appellate court held that a mother's felony conviction for torture and sexual offenses committed against her lover's ex-wife was insufficient to justify restricting her parental rights.<sup>149</sup> Conversely, in another California appellate court decision, the court held that a father's felony conviction for stabbing his children's mother was sufficient to terminate his parental rights.<sup>150</sup>

Of course, the major difference between these two cases is that one felony was perpetrated against the mother whereas the other crime was perpetrated against someone outside the family unit. It has been noted, however, that "[t]he commission of the felony need not include the participation of the children, nor does it have to be completed in their presence. The circumstances need only be those which, in the trial court's discretion, prove the unfitness of the parent."<sup>151</sup> Thus, the primary concern is the nature of the crime and its relation to the parenting of the child as opposed to the party against whom the crime was perpetrated.

Although courts appear to be conflicted on this issue, jurisprudence clearly indicates that a showing beyond the fact of a felony conviction or proof of a crime through clear and convincing

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<sup>148</sup> See Jana Micek, *Termination of Parental Rights Based on a Felony Conviction*, 11 J. CONTEMP. LEGAL ISSUES 565, 567 (1999).

<sup>149</sup> *In re Terry E.*, 225 Cal. Rptr. 803, 814 (Cal. Ct. App. 1986).

<sup>150</sup> *In re Arthur C.*, 176 Cal. App. 3d 442, 446-47 (1985).

<sup>151</sup> *Id.* at 446.

evidence is necessary in order to satisfy due process. In an American Law Reports article, Wanda Ellen Wakefield states:

[I]t has been held to be inconsistent with due process protection to provide for the termination of parental rights without requiring the proof of a potential substantial harm to the child should it remain with its parents, or without affording a hearing, on the question of the fitness to continue to care for their child, of the parents whose rights were sought to be terminated.<sup>152</sup>

Thus it may be necessary for legislation that seeks to restrict a rapist's parental rights to require a showing that the rapist father would pose harm to the child.

Additionally, Wakefield writes, “[i]n order to satisfy due process guaranties, it has been held that any fact presumed in a statute providing for the termination of parental rights, such as a presumption that a parent is unfit if he or she is incarcerated, must bear a substantial relationship to the fact shown. . . .”<sup>153</sup> Thus, in legislation that seeks to restrict the parental rights of rapist fathers, it must be shown that the fact that the father raped the mother, resulting in conception of the child, is the reason behind restricting the rapist father's rights. This should not be a difficult hurdle since it can easily be made clear in the text of the legislation. Additionally, a majority of courts have found that the presumptions in statutes attempting to terminate parental rights bear a sufficient relationship to the facts being proven.<sup>154</sup>

Finally, Wakefield asserts, “a parent must be offered an opportunity to rebut any presumption contained in the statute by presenting his or her own evidence on the issue of fitness.”<sup>155</sup> Thus, the rapist father must be given a chance at trial to demonstrate that

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<sup>152</sup> Wakefield, *supra* note 27.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

exercising his parental rights and involvement in the child's life would not have a negative impact on the child.

In relation to these contingencies, legislation that seeks to terminate the parental rights of rapists must also stand up to strict scrutiny. Courts in the United States are generally reluctant to restrict the parental rights of a biological parent. In *Meyer v. Nebraska*, the Supreme Court of the United States held that the Due Process Clause of the Fourteenth Amendment establishes a fundamental right to "bring up children."<sup>156</sup> Thus, courts determining the constitutionality of legislation designed to limit rapists' parental rights will be required to apply strict scrutiny, the most stringent level of judicial review.<sup>157</sup> In order to overcome strict scrutiny, this legislation must serve a compelling state interest,<sup>158</sup> be narrowly tailored to serve that interest,<sup>159</sup> and be the least restrictive means for serving that interest.<sup>160</sup>

In the case of legislation that seeks to restrict rapists' parental rights, the primary hurdle will be to establish that the legislation serves a compelling state interest. The compelling state interest at hand is the welfare of the mother victim and the best interests of the child. Legislation can be narrowly tailored to serve these interests through explicit limitations on its application to cases where the father forcibly raped the mother resulting in pregnancy, accompanied by an explicit statement of what rights of the rapist father are affected.

As for the least restrictive means standard, this too is fairly easy to overcome. If the compelling interest is proven (i.e., that the mother victim's welfare and the best interests of the child are both damaged by the rapist father's exercise of his parental rights), then restricting the rapist father's parental rights is evidently the least restrictive means of correcting the problem. Other potential solutions for serving the state's interests, for example, removing the child from the custody

<sup>156</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>157</sup> *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 265 (1957).

<sup>158</sup> *Id.*

<sup>159</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

<sup>160</sup> *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

of both parents and placing him or her in foster care, are clearly more burdensome.

The standard requiring proof of a compelling state interest, however, may be a larger hurdle for this kind of legislation to clear. The state has an evident interest in preserving the welfare of the mother-victim and serving the best interests of the child, but in order for legislation that seeks to restrict the parental rights of rapist fathers to clear this hurdle, it must be demonstrated that this interest is compelling.

The compelling nature of the state's interest can be tied directly to the requirement of showing that a rapist father is unfit as a parent or would have a negative effect on the child. As noted above, the rapist father's involvement can have a very serious psychological effect on the mother, slowing her recovery from rape and exacerbating her PTSD symptoms.<sup>161</sup> She may suffer from symptoms of distress, emotional numbness, loss of interest, irritability, and aggression.<sup>162</sup> These symptoms, in turn, affect the victim mother's ability to effectively parent the child, resulting in a negative effect on the child.<sup>163</sup>

The standard for showing the unfitness of the parent in cases of children conceived through rape can be based on existing standards for proving the unfitness of a parent. Again using California as an example, courts in that jurisdiction define unfitness as a "probability that the parent will fail in a substantial degree to discharge duties toward the child."<sup>164</sup> Other states, such as Illinois, have used a finding of parental "depravity" as a basis for a finding of the parent's unfitness.<sup>165</sup> A finding of depravity can be based on a criminal conviction; in Illinois, for instance, a parent can be found to be depraved based on, among other crimes, a conviction for murder of a co-parent, murder of any child, or sexual assault of a child.<sup>166</sup>

<sup>161</sup> Prewitt, *supra* note 9, at 833-34.

<sup>162</sup> NIH, *supra* note 66.

<sup>163</sup> See Prewitt, *supra* note 9, at 833-35.

<sup>164</sup> *In re Christina P.*, 175 Cal.App.3d 115, 133 (1985).

<sup>165</sup> See, e.g., 750 Ill. Comp. Stat. 50/1(D)(i) (2012).

<sup>166</sup> *Id.*

The California definition of unfitness in combination with the use of a finding of depravity will serve as an adequate basis for a method of showing unfitness under legislation designed to restrict the parental rights of rapist fathers. The legislation should, however, make it clear that a finding of depravity can be based on a demonstration through clear and convincing evidence that the rape occurred even in the absence of a criminal conviction.<sup>167</sup> Thus, if a court finds that a victim mother has proven through clear and convincing evidence that the rape occurred, resulting in the conception of the child, the court should subsequently find that the rapist father is depraved and his parental rights should therefore be terminated. Such a finding should be adequate to satisfy the requirements of due process since it demonstrates that the state has a compelling interest in barring the father from having contact with the family in order to serve the best interests of the child.

#### CONCLUSION

Contrary to commonly held assumptions, a substantial number of women who become pregnant through rape opt to keep their babies rather than choosing abortion or adoption.<sup>168</sup> In most states, their rapists enjoy the same parental rights as any other biological parent.<sup>169</sup> Because of this, rapist fathers who seek to exercise their parental rights have the ability to exert a high level of control over their victims' lives.<sup>170</sup> While many states have legislation designed to make it easier for rape victims to obtain abortions or place their children up for adoption,<sup>171</sup> very few states have legislation designed to protect women who choose instead to keep their babies.<sup>172</sup>

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<sup>167</sup> Courts have used clear and convincing evidence as the evidentiary standard for a finding of depravity in cases concerning the restriction of parental rights. *See, e.g., In re J'America B.*, 806 N.E.2d 292, 303-06 (Ill. App. Ct. 2004).

<sup>168</sup> *See, e.g., Prewitt, supra* note 1.

<sup>169</sup> Prewitt, *supra* note 9, at 827.

<sup>170</sup> *See Bitar, supra* note 15, at 276-77.

<sup>171</sup> *Id.* at 276.

<sup>172</sup> *Id.*

Due to the psychological damage that results from continued contact with their attackers, there is a need for legislation designed to protect these victim mothers and their children. The surest way to provide protection to these women is by allowing them to seek termination of the rapist father's parental rights without first pressing criminal charges and getting a conviction, because an exceedingly small number of sexual assaults result in a criminal conviction.<sup>173</sup> Such legislation, however, faces the possibility of due process challenges since it seeks to restrict parental rights, which have been deemed a fundamental right.<sup>174</sup>

In order to overcome such challenges, this legislation must first require the victim mother to prove that the rape occurred and resulted in conception of the child, pursuant to the United States Supreme Court's decision in *Santosky v. Kramer*.<sup>175</sup> Beyond this, the legislation must also stand up to strict scrutiny, which requires that it serve a compelling state interest,<sup>176</sup> which in this case is the welfare of the victim mother and the best interests of the child. In order to fulfill this requirement, this legislation should require that the victim mother also show that the rapist father's involvement in the child's life is not in the best interests of the child because the father is unfit to parent, based on a finding of depravity since the father raped the victim mother.

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<sup>173</sup> NAT'L INST. OF JUSTICE, *supra* note 119, at 33.

<sup>174</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>175</sup> 455 U.S. 745, 747-48 (1982).

<sup>176</sup> *Sweezy v. N.H. by Wyman*, 354 U.S. 234, 265 (1957).