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## The Real American Horror Story: Overcoming the Hurdles to Terminate a Rapist's Parental Rights

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# THE REAL AMERICAN HORROR STORY: OVERCOMING THE HURDLES TO TERMINATE A RAPIST'S PARENTAL RIGHTS

## I. INTRODUCTION

Every 6.6 minutes someone is raped in the United States, and an estimated 25,000 to 32,000 women become pregnant every year as a result.<sup>1</sup> Analyn, a twenty-nine-year-old law school graduate, became one of those victims when her rapist brutally assaulted her.<sup>2</sup> For Analyn, the crime launched the beginning of a long journey as she faced the decision of whether to abort her baby, place her child up for adoption, or raise her child on her own.<sup>3</sup> Everywhere Analyn turned, she felt pressured by others to abort her child.<sup>4</sup> In the end, Analyn ultimately made the difficult decision to carry and raise her rapist's child.<sup>5</sup>

After her child was born, Analyn's rapist tracked her down in Florida and filed for joint custody of the child.<sup>6</sup> Her rapist took advantage of

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<sup>1</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) (listing Congress's findings, including how many women become pregnant each year through rape and giving the decision each of these women has to make); Shauna R. Prewitt, *Giving Birth To a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers through Rape*, 98 GEO. L.J. 827, 829 (2010) (compiling statistics concerning women who conceived during rape in the United States and presenting the need for statutory protections); Ed Payne & Ted Rowlands, *Child Custody Rights for Rapists? Most States Have Them*, CNN (Aug. 1, 2013), <http://www.cnn.com/2013/08/01/us/rapist-child-custody/> [<https://perma.cc/3EVV-Q6LT>] (reporting the results of the American Journal of Obstetrics and Gynecology study); *Crime in the United States 2013*, FBI (Oct. 27, 2015), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/browse-by/national-data> [<https://perma.cc/EW36-T3ZC>] (showing how frequently rape occurs in the United States). One in five women will be raped during their lifetime. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR. (2015), [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media\\_packet\\_statistics-about-sexual-violence\\_0.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/E6NR-LZMG>]. The author acknowledges men can be victims of rape, but for the purposes of this Note, the author is focusing on acts of rape and sexual assault involving women as victims.

<sup>2</sup> See Liz Fields, *These Women Became Pregnant from Rape, Then Fought Their Attackers for Custody*, VICE NEWS (Dec. 1, 2014), <https://news.vice.com/article/these-women-became-pregnant-from-rape-then-fought-their-attackers-for-custody> [<https://perma.cc/BLD5-JDFB>] (stating Analyn was raped in Louisiana in 2003 and she discovered she was pregnant days later). Analyn's story is a true account of her struggles to raise her child conceived through rape. *Id.*

<sup>3</sup> See *id.* (relaying the difficult decisions that rape victims face when they become pregnant).

<sup>4</sup> See *id.* (discussing the attitudes Analyn faced when she asked others for help).

<sup>5</sup> See *id.* (deciding to resist the advice to abort the baby like a seemingly "real" rape victim).

<sup>6</sup> See *id.* (deciding to leave after Hurricane Katrina destroyed Louisiana, after which Analyn's rapist followed her and requested custody).

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Florida's legal system, because Florida, like several other states, did not have any law in place that prevented rapists from asserting their parental rights.<sup>7</sup> Analyn spent the next two years fighting her rapist in court.<sup>8</sup> She feared she may have to share her child with her rapist for the rest of her life.<sup>9</sup> Fortunately, Analyn's rapist eventually dropped his custody battle, but other victims are still fighting their own custody battles under similar circumstances.<sup>10</sup>

Indiana recently passed legislation to try to help victims of rape, but it fails to fully protect victims, like Analyn, who keep their child.<sup>11</sup> Indiana's failure to provide necessary protections for rape victims allows rapists to use the one moment of control they had over their victims to torment them for years.<sup>12</sup> Rape victims do not choose to be raped.<sup>13</sup> They do not choose to conceive a child in that moment.<sup>14</sup> However, when a victim of rape faces the decision to keep and raise a child that is the product of rape, states must provide statutory protections to prevent the rapist from interfering.<sup>15</sup> This Note's proposed legislation prevents rapists

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<sup>7</sup> See Fields, *supra* note 2 (suggesting legislation that would have allowed Analyn to circumvent her rapist's custody request).

<sup>8</sup> See *id.* (discussing Analyn's various court proceedings in which she had to face her attacker to keep custody of her child).

<sup>9</sup> See *id.* ("This is not a family, it's a felony. It's barbaric to force a rape victim to be in court with her perpetrator. It's bad enough for one day, let alone years.").

<sup>10</sup> See Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014) (describing one victim's experience in which her rapist continued to assert his parental rights even after he was convicted of rape); Fields, *supra* note 2 (advocating as an attorney and co-founder of a non-profit organization called Hope After Rape Conception). Analyn helped Florida change its laws in 2014, and she continues to support the passage of legislation in other states that will allow rape victims to retain full custody of their children. *Id.*

<sup>11</sup> See *infra* Part II.D (illustrating the inadequacies of current state legislation).

<sup>12</sup> See *supra* Part I (relaying a rape victim's account that includes a two-year-long custody battle with her rapist).

<sup>13</sup> See *The Effects of Trauma Do Not Have to Last a Lifetime*, AM. PSYCHOL. ASS'N (Jan. 16, 2004), <http://www.apa.org/research/action/ptsd.aspx> [<https://perma.cc/A57P-4XL5>] (explaining how rape is a traumatic event that can trigger post-traumatic stress disorder ("PTSD")). Rape victims suffering from PTSD can experience difficulties performing basic daily functions, and women are twice as likely to suffer from PTSD as men. *Id.* PTSD not only affects victims personally, it cripples the United States economy with the United States spending \$46.6 billion dollars in 1990 alone combating PTSD. *Id.* If PTSD goes untreated, victims can suffer chronic pain, substance abuse, and other mental and physical problems that interfere with a person's ability to hold jobs and socialize with others. *Id.*

<sup>14</sup> See Fields, *supra* note 2 ("A man's biology should not determine his fatherhood. Fatherhood should mean more than ejaculation.").

<sup>15</sup> See *infra* Part IV (suggesting a statutory solution to give mothers the option to terminate their rapists' parental rights).

from asserting these rights even if the criminal justice system fails to convict them for their heinous crime.<sup>16</sup>

This Note examines the differences between current laws among states and how these differences affect the lives of rape victims when they have to share their child with their rapist.<sup>17</sup> First, Part II discusses statistics involving rape, the constitutional rights of parents, and current state and federal legislation.<sup>18</sup> Next, Part III analyzes the need for legislation that protects rape victims, the limitations of current legislation, and the father's financial obligation to his child.<sup>19</sup> Then, Part IV proposes legislation for Indiana that protects victims from rapists asserting their parental rights.<sup>20</sup> Finally, Part V concludes by summarizing the proposed legislation and showing how Analyn continues to lobby states to protect rape victims.<sup>21</sup>

## II. BACKGROUND

Before discussing the importance of terminating the parental rights of rapists, it is necessary to explore the pervasiveness of rape in society along with the development of parental rights.<sup>22</sup> It is also essential to clarify the

<sup>16</sup> See *infra* Part IV (recommending legislation that terminates the parent-child relationship when the child was conceived through rape).

<sup>17</sup> See *infra* Part II (examining current state legislation and the outcomes in different states regarding rapists who assert their parental rights).

<sup>18</sup> See *infra* Part II.A-E (providing an understanding of the problem of rapists seeking custody based on the fundamental rights of parents and current legislation among the states, after a detailed look at how rape impacts women mentally, physically, and emotionally).

<sup>19</sup> See *infra* Part III (analyzing why legislation is necessary to protect rape victims and explaining why the current legislation is insufficient).

<sup>20</sup> See *infra* Part IV (proposing new legislation that Indiana should adopt, which allows rape victims to terminate the parental rights of their rapists).

<sup>21</sup> See *infra* Part V (concluding this Note by returning to Analyn's story and restating the importance of Indiana's proactive role in protecting rape victims).

<sup>22</sup> See *infra* Part II.A-B (exploring statistical studies involving rape and the basic foundations of a parent's due process rights). In Indiana, rape is defined as:

[A] person who knowingly or intentionally has sexual intercourse with another person . . . or knowingly or intentionally causes another person to perform or submit to other sexual conduct when: (1) the other person is compelled by force or imminent threat of force; (2) the other person is unaware that the sexual intercourse or other sexual conduct is occurring; or (3) the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given[.]

IND. CODE § 35-42-4-1 (2016). Rape charges in Indiana, and in six other states, must be filed before the five-year statute of limitations runs out. Tim Evans, *When Rape is Not a Crime: Indiana Case Spotlights Statute of Limitations*, INDY STAR (Feb. 16, 2016), <http://www.indystar.com/story/news/2014/02/16/when-rape-is-not-a-crime-indiana-case-spotlights-statute-of-limitations/5522625/> [https://perma.cc/Q578-69N8]. Twenty states do not have any time limit. *Id.* Rape victims have lobbied to eliminate Indiana's statute of limitations. Kara Kenney, *Rape Victims: Indiana is Failing*, INDY CHANNEL (Mar. 27, 2014),

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differences between state statutes that address the parental rights of rapists.<sup>23</sup> First, Part II.A begins by explaining the impact that rape and pregnancies have on women.<sup>24</sup> Second, Part II.B describes the historical development of the fundamental rights of parents.<sup>25</sup> Third, Part II.C presents the legal challenges courts must overcome before terminating a parent-child relationship.<sup>26</sup> Fourth, Part II.D highlights the current legislation among the states aimed at protecting rape victims along with the federal response to a lack of state legislation.<sup>27</sup> Finally, Part II.E focuses on Indiana's failure to pass legislation that protects rape victims.<sup>28</sup>

### A. *The Prevalence of Rape in the United States and Its Results*

Almost twenty percent of women fall victim to rape during their lifetime.<sup>29</sup> Most of these victims will never see their attacker imprisoned.<sup>30</sup>

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<http://www.theindychannel.com/news/call-6-investigators/rape-victims-indiana-is-failing> [https://perma.cc/X3AZ-NT5U]. Indiana passed a law in 2016 that allows prosecutors to file charges after the statute of limitations period has run if new evidence is discovered. Dan Carden, *Many New Indiana Laws Take Effect Today*, NWI TIMES (July 1, 2016), [http://www.nwitimes.com/news/local/govt-and-politics/many-new-indiana-laws-take-effect-today/article\\_fd945994-9690-5896-b341-f2e8cf6ef164.html](http://www.nwitimes.com/news/local/govt-and-politics/many-new-indiana-laws-take-effect-today/article_fd945994-9690-5896-b341-f2e8cf6ef164.html) [https://perma.cc/NBK7-HVPU].

<sup>23</sup> See *infra* Part II.D (examining the differences between current state legislation and how these differences result in varying outcomes in child custody disputes).

<sup>24</sup> See *infra* Part II.A (giving a broad overview of how thousands of women become pregnant each year through rape and the consequences related to the parental rights of rapist fathers).

<sup>25</sup> See *infra* Part II.B (showing how courts have developed and interpreted the rights of parents over time and how this right prevents courts from arbitrarily terminating parental rights).

<sup>26</sup> See *infra* Part II.C (demonstrating how courts approach the rights of parents along with the state's reluctance to terminate a parent-child relationship).

<sup>27</sup> See *infra* Part II.D (describing the differences between state legislation which prompted a response by the federal government to encourage states to adopt consistent legislation).

<sup>28</sup> See *infra* Part II.E (calling attention to Indiana's failed proposals and its numerous attempts to pass comprehensive legislation that would prevent rapists from using their child as a pawn).

<sup>29</sup> See Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization*, CTR. FOR DISEASE CONTROL (Sept. 5, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm> [https://perma.cc/GGG6-LES3] (examining sexual violence victimization data along with the negative repercussions victims experience after sexual violence). One out of every ten women will be raped by someone they knew intimately before the rape. *Statistics about Sexual Violence*, *supra* note 1. Among reported rapes, 98.6% of the alleged rapists are male, and the majority of rapists are older than twenty-four years old. LAURA J. ZILNEY & LISA ANNE ZILNEY, *PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS* 109 (2009). Sixty-five percent of rapists know their victims before raping them. *Id.*

<sup>30</sup> See Dana Liebelson & Sydney Brownstone, *Imagine You Were Raped. Got Pregnant. Then Your Rapist Sought Custody*, MOTHERJONES (Aug. 24, 2012), <http://www.motherjones.com/politics/2012/08/rapist-seeks-child-custody-shauna-prewitt> [https://perma.cc/G6HH-

Ninety-eight percent of rape victims will not see their attacker charged and convicted because rape is the most underreported violent crime in the United States.<sup>31</sup> One reason rape victims never see their attacker charged is because they feel embarrassed and do not want to tell anyone about being violated.<sup>32</sup> Furthermore, rape victims typically do not wish to face

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5XV4] (discovering nine out of every one hundred rapes are actually prosecuted and only five out of every one hundred rapes lead to a felony conviction among reported and unreported rapes); *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence against Women Survey*, U.S. DEP'T OF JUST. 33 (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [https://perma.cc/7RT5-Y937] [hereinafter *Rape Victimization*] (finding that among reported rapes, 37% were prosecuted, and of those that were prosecuted, 46.2% resulted in a conviction). One reason for this low percentage of prosecution and conviction is police action or inaction after assessing an alleged rape victim. ZILNEY & ZILNEY, *supra* note 29, at 149. Police have the discretion to not report their findings to the prosecutor's office. *Id.* After the police's initial assessment, a police officer determines the extent to which the alleged rape will be investigated. *Id.* Police overwhelmingly determine that acquaintance rape is unfounded in comparison to stranger rape, with one police officer noting:

[M]otive is always a point. Generally speaking, I believe something happened, I believe what the lady is saying happened to her. But I'm also aware that someone else looking at the incident may see it a little differently, and that's what the jury's going to be doing — examining the whole picture. There are times, we joke, that the rape occurred *after* the sexual intercourse.

*Id.* (emphasis in original).

<sup>31</sup> See Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 128-29, 151-52 (2001) (highlighting the disparity between the number of rape reports versus convictions); *Statistics about Sexual Violence*, *supra* note 1 (finding sixty-three percent of all sexual assaults are never reported to the police). The rate is even lower for victims on college campuses where one in five women is sexually assaulted. *Statistics about Sexual Violence*, *supra* note 1. Over ninety percent of these victims do not report the assault. *Id.* See also ZILNEY & ZILNEY, *supra* note 29, at 148 (claiming women can feel re-victimized during the reporting process); Lauren Hoyson, Note, *Rape Is Tough Enough without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VAL. U. L. REV. 565, 568 (2010) (demonstrating society's evolving attitude towards rape and rape victims). Originally, rape was a common way for men to obtain wives. Hoyson, *supra* note 31, at 568. A man would kidnap the woman, rape her, and then marry her. *Id.* In the 1970s, rape laws changed after women fought back against laws that were focused on preventing false accusations instead of protecting the victim. *Id.* at 571. See also Lauren Deitrich, Comment, *Say Aah! Maryland v. King Defines Reasonable Standard for DNA Searches*, 49 VAL. U. L. REV. 1095, 1096-97 (discussing a previously unsolved rape case where a woman underwent a sexual assault exam after she reported being raped). A certain rape victim's rapist was only convicted when police took a DNA sample from a man arrested for first and second-degree assault six years after the rape. *Id.* The rape victim was finally able to see her rapist brought to justice years after she reported her rape. *Id.* at 1096-97. Some states have laws that protect rape victims and their children if the rapist is convicted, but overall, rape is still an under-prosecuted crime. Liebelson & Brownstone, *supra* note 30.

<sup>32</sup> See ZILNEY & ZILNEY, *supra* note 29, at 146 (reporting rates are lower because victims are embarrassed and ashamed). Another barrier that explains why women do not report rape



their attackers again, because they do not want to relive the fear of being raped.<sup>33</sup> However, facing their attackers becomes a greater possibility if the victims become pregnant with their rapist's child.<sup>34</sup>

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is the portrayal of rape by the media. *Id.* Not all cases in the media mirror what a victim has been through. *Id.* Zilney described how the public wrongfully generalizes cases of rape by stating:

In the[se] cases . . . the man is not the armed stranger jumping from the bushes—nor the black man jumping the white woman, the case that was most likely to result in the death penalty prior to 1997, and the stereotype that may explain in part the seriousness with which a white male criminal justice system has addressed “stranger” rape. Instead the man is a neighbor, an acquaintance, or a date. The man and woman are both white, or both black, or both Hispanic. He is a respected bachelor, a student, a businessman, or a professional. He may have been offered a ride home or invited in. He does not have a weapon. He acted alone. It is, in short, a simple rape.

*Id.* See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1195 (1997) (claiming victims do not report rape because they fear “vicious attacks on their character”). Victims are often reluctant to testify in court, which often results in the defense calling into question their character or morality. Katherine E. Wendt, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child through the Termination of Parental Rights*, 2013 MICH. ST. L. REV. 1763, 1768 (2013).

<sup>33</sup> See Fields, *supra* note 2 (showing how one rape victim was terrified to share her child with her attacker, and how this encouraged her to lobby states to prevent other rape victims from facing a similar situation); Emma Gray, *Confused Why Women Don't Report Sexual Assault? Ask Kesha.*, HUFFINGTON POST (Feb. 19, 2016), [http://www.huffingtonpost.com/entry/kesha-sexual-assault-why-women-dont-come-forward\\_us\\_56c77579e4b0928f5a6bcd51](http://www.huffingtonpost.com/entry/kesha-sexual-assault-why-women-dont-come-forward_us_56c77579e4b0928f5a6bcd51) [<https://perma.cc/T356-XTNE>] (reiterating why rape victims often wait years or even decades to report being raped). Women have several reasons to not come forward after being raped, one of them being that doing so means having to relive the trauma over and over again in front of people who may react skeptically. Gray, *supra* note 33. “It means facing the judgments of those closest to you. . . . It means being picked apart, as people try to find just how ‘perfect’ a victim you are.” *Id.*

<sup>34</sup> See, e.g., Nina Bahadur, “*The Daily Show*” Reminds Us That in Some States, Rapists Can Sue Their Victims for Custody of a Child, HUFFINGTON POST (Apr. 10, 2015), [http://www.huffingtonpost.com/2015/04/10/the-daily-show-parental-rights-rapists\\_n\\_7041588.html](http://www.huffingtonpost.com/2015/04/10/the-daily-show-parental-rights-rapists_n_7041588.html) [<https://perma.cc/DV7R-LXC2>] (stating Shauna Prewitt fought her rapist in court for two years over custody of her child conceived during a rape). Shauna Prewitt was a senior in college when she was raped. Liebelson & Brownstone, *supra* note 30. Nine months later, she gave birth to a girl, who she decided to keep and raise. *Id.* Prewitt pursued criminal charges against her rapist until one day he served her with papers requesting custody of their daughter. *Id.* She did not take the papers seriously because she did not think the court would actually award her rapist custody of her child. *Id.* Soon, Prewitt realized that due to a lack of proper legislation in Missouri, her rapist could legally assert his parental rights. *Id.* “I was struck with terror, not only with the idea of letting my child be around him, but also having to spend the next [eighteen] years of my life tied to him.” *Id.* As Prewitt, now an attorney in Chicago stated, “I got really lucky because the court terminated [my alleged attacker’s] parental rights anyway . . . [.] but I know a lot of women who aren’t so lucky.” Liebelson & Brownstone, *supra* note 30.

Five percent of rape victims become pregnant, and as such, every pregnant victim has to make a difficult decision thereafter.<sup>35</sup> When a rape victim becomes pregnant, she is faced with three options: abortion, adoption, or keeping her child.<sup>36</sup> One study discovered 32.3% of pregnant rape victims choose to keep their child.<sup>37</sup> Another study found seventy-

<sup>35</sup> See James Hamblin, *How Often Does Rape Lead to Pregnancy?*, ATLANTIC (Aug. 20, 2012), <http://www.theatlantic.com/health/archive/2012/08/how-often-does-rape-lead-to-pregnancy/261307/> [https://perma.cc/H5F3-BTZ3] (discovering this percentage is even higher in countries, like Rwanda, where rapists commit mass rape during genocide); see also Dan Carden, *State Senator Seeks Termination of Rapists' Parental Rights*, NWI TIMES (Sept. 7, 2013), [http://www.nwitimes.com/news/local/govt-and-politics/state-senator-seeks-termination-of-rapists-parental-rights/article\\_e0e884c6-b3cf-5c46-9d81-0bac22323c3e.html](http://www.nwitimes.com/news/local/govt-and-politics/state-senator-seeks-termination-of-rapists-parental-rights/article_e0e884c6-b3cf-5c46-9d81-0bac22323c3e.html) [https://perma.cc/V6LS-9ER7] [hereinafter Carden, *State Senator*] (claiming up to 36,000 women become pregnant from rape each year in the United States).

<sup>36</sup> See Prewitt, *supra* note 1, at 829 (highlighting how many women choose to abort, adopt, or keep their child, and the discrepancies among the different studies); see also RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) (finding a significant amount of women keep their children conceived during rape, which might result in future custody battles with their rapists); Payne & Rowlands, *supra* note 1 (claiming “as many as a third of the women [who are raped and conceive a child] give birth” instead of aborting their child); *Religious Groups' Official Positions on Abortion*, PEW RES. CTR. (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/religious-groups-official-positions-on-abortion/> [https://perma.cc/38SY-KYKC] (listing the major world religions and their view on abortion). Rape victims can choose to abort their child, but this choice often conflicts with the religious or moral beliefs of the victim. *Religious Groups' Official Positions on Abortion*, *supra* note 36. Even if a rape victim chooses abortion, some states, including Indiana, have narrowed this option to the point it is not always feasible. *Indiana Abortion Law*, WOMEN'S MED (2016), <http://www.womensmed.com/laws/new-indiana-abortion-law/> [https://perma.cc/DC3S-QP2S]. These restrictions include requiring abortions after the first trimester be performed in a licensed surgical center or in a hospital. *Id.* As a result, abortions after the first trimester are extremely expensive, and most women travel out of state for these abortions. *Id.* In 2013, a state representative from New Mexico tried to make it harder for rape victims to abort their child by classifying these abortions as “tampering with evidence.” Katy Hall & Chris Spurlock, *Worst States for Pregnant Rape Victims*, HUFFINGTON POST (Jan. 26, 2013), [http://www.huffingtonpost.com/2013/01/26/pregnant-rape-abortion\\_n\\_2552183.html](http://www.huffingtonpost.com/2013/01/26/pregnant-rape-abortion_n_2552183.html) [https://perma.cc/R2WR-9ANL]. This bill required rape victims to carry their pregnancy to term so the state could use the victim's child as evidence in the criminal trial. *Id.* This bill did not pass, but other states, including Indiana, require a waiting period for women seeking abortions. *Id.* Indiana does not offer an exception for rape victims. *Id.*

<sup>37</sup> See Prewitt, *supra* note 1, at 829 (compiling the results of several studies involving rape victims to prove that many women choose to raise their child regardless of the choice society expects these victims to make). A family lawyer, Rebecca Kiessling, discussed how society assumes a “real” rape victim would act, and how this has led to rape victims losing partial custody to their rapists. See Fields, *supra* note 2 (discussing how people perceive rape victims who become pregnant and keep their child). Kiessling, who was conceived through rape, stated:

Most people assume that a ‘real’ rape victim would have had an abortion. . . . I dealt with so many women who chose life for their child, but then they weren’t protected. . . . I know that I wouldn’t have wanted to have anything to do with my biological father.

*Id.*



three percent of women carry the baby to term, and of that percentage, sixty-four percent decide to raise their child.<sup>38</sup> Overall, statistical studies vary considerably because most rapes go unreported.<sup>39</sup>

Rape victims often experience severe mental and emotional trauma that can lead to serious disorders if left untreated.<sup>40</sup> This trauma can take the form of post-traumatic stress disorder (“PTSD”) or rape trauma

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<sup>38</sup> See Prewitt, *supra* note 1, at 829 (describing a study that found even more rape victims choose to raise their baby).

<sup>39</sup> See ZILNEY & ZILNEY, *supra* note 29, at 146 (demonstrating multiple reasons why victims are often unwilling to come forward, including the private nature of the crime).

<sup>40</sup> See PTSD: A Growing Epidemic, 4 NIH MEDLINE PLUS 10 (2009), <http://www.nlm.nih.gov/medlineplus/magazine/issues/winter09/articles/winter09pg10-14.html> [<https://perma.cc/Q682-MDCF>] (highlighting how women who have been raped can suffer from PTSD). One victim recalled the traumatic results of being raped when she was twenty-five by stating, “I can’t relax, can’t sleep, don’t want to be with anyone. I wonder whether I’ll ever be free of this terrible problem.” *Id.* Fortunately, rape victims can experience a sixty- to eighty-percent reduction in PTSD symptoms through cognitive-behavioral therapy (“CBT”). *The Effects of Trauma Do Not Have to Last a Lifetime*, *supra* note 13. CBT helps victims suffering from PTSD comprehend and cope with their anxiety and fear. *Id.* In a CBT session, a therapist exposes the rape victim to memories and reminders of the traumatic event in a safe environment. Debra Kaysen, *Cognitive-Behavioral Treatment for Post-Traumatic Stress Disorder*, HERE TO HELP (2007), <http://www.heretohelp.bc.ca/visions/trauma-and-victimization-vol3/the-aftermath-of-rape> [<https://perma.cc/ZBM9-2EQB>]. In these sessions, victims are able to face their feelings of anger, fear, or guilt and learn how to resolve or cope with these feelings without getting overwhelmed. *Id.* Therapists might also include breathing and group communication exercises. *Id.*

syndrome (“RTS”).<sup>41</sup> Symptoms of these disorders develop over time.<sup>42</sup> In addition to these disorders, rape victims face a higher risk of developing

<sup>41</sup> See Dean G. Kilpatrick, *The Mental Health Impact of Rape*, NAT’L VIOLENCE AGAINST WOMEN PREVENTION RES. CTR. (2000), <https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml> [<https://perma.cc/N6M5-J5M5>] (estimating 1.3 million women in the United States currently have rape-related post-traumatic stress disorder (“RR-PTSD”), and 211,000 women will develop RR-PTSD each year); see also Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 592, 602 (2000) (discussing how rape trauma syndrome (“RTS”) is considered a type of PTSD and that it is “an explanation of rape victim behavior” while PTSD is a “description of general behaviors and reactions to stressful events”); Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91, 107 (2010) (listing the initial reactions of RTS, including feeling shocked, humiliated, degraded, and showing shame, anger, and guilt). Findings regarding rape victims’ acute, initial reactions to the trauma can be described as:

[D]uring an attack, 90.5% of victims felt dehumanized and 94% felt a threat to their sense of control. In addition, 96% of victims reported feeling scared; 92% claimed to be ‘terrified and confused’; and most suffered physical manifestations of their emotional injury.

Kendall, *supra* note 41, at 107. In the 1980s, psychologists categorized RTS as a form of PTSD, and the American Psychiatric Association developed criteria that have to be met before an individual is diagnosed with PTSD. *Id.* at 109. First, an individual must suffer from a stressor, in which the victim both “‘experienced, witnessed, or [was] confronted with an event or events that involve[ed] actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others’ and responded with ‘intense fear, helplessness, or horror.’” *Id.* Rape victims meet these criteria. *Id.* In addition to this stressor, a victim must continually recall the rape through thoughts, images, dreams, or feelings of reliving the experience through hallucinations and dissociative flashbacks. *Id.* at 109–10. The victim might also experience severe psychological distress when exposed to experiences that remind them of the traumatic event. *Id.* at 110. Next, the individual will begin to avoid things and people around them and feel numb after the traumatic event. Kendall, *supra* note 41, at 110. Then, a victim has to show at least three of the following: (1) avoiding anything that reminds the victim of the trauma; (2) avoiding people, places, or activities that allows the victim to recall the trauma; (3) lacking the ability to remember specific aspects of the trauma; (4) demonstrating a decreased interest in significant life activities; (5) feeling detached from others; (6) showing a lack of affection for others; or (7) sensing a bleak future, which includes the unlikelihood of having a career, marriage, children, or achieving a normal life expectancy. *Id.* at 110–11. Fourth, the victim must experience anxiety after the event shown by two or more of the following symptoms: (1) problems falling or staying asleep; (2) outward manifestations of anger; (3) problems concentrating; (4) exhibiting high levels of caution; and (5) startling easily. *Id.* at 111–12. Fifth, the symptoms listed in criteria two through four must last longer than one month. *Id.* Finally, the “disturbance [must] cause[] clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.*

<sup>42</sup> See Kendall, *supra* note 41, at 106–09 (describing how after the initial onset of psychological harm, victims experience a second stage of psychological reorganization where they withdraw from society and begin to shun the world). Victims in this stage develop phobias and problems going about their daily functions. *Id.* at 107. Rape victims can become afraid to go out in public, talk with certain people, or lie down in their own beds. *Id.* Some victims develop compulsive behaviors where they feel compelled to take long showers and repeatedly check to make sure all the doors and windows are locked. *Id.* at 108.

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substance abuse, depression, anxiety, and obsessive-compulsive disorder (“OCD”).<sup>43</sup> As a result, victims often use coping mechanisms to distance themselves from the trauma and their attacker.<sup>44</sup>

Rape victims utilize coping strategies to reduce the fear their rapist will track them down by either changing their phone number or even moving, hoping to restore their sense of safety.<sup>45</sup> However, a father can prevent his child’s mother from moving if the court awards him custody or visitation rights.<sup>46</sup> Rape victims, like other mothers, have to file a notice

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One study showed twenty-five percent of all rape victims who experienced symptoms of PTSD or RTS did not fully recover after several years, and some victims may never recover. *Id.* at 109.

<sup>43</sup> See Prewitt, *supra* note 1, at 827, 833–34 (highlighting the prevalence of several disorders among rape victims).

<sup>44</sup> See *id.* at 834 (claiming rape victims are likely to abuse drugs and alcohol to cope with the symptoms of PTSD after being raped). Without legislation preventing a rapist from seeking parental rights, rape victims can be forced to include their rapists when making decisions about their child’s daily life, such as where the child will go to school or what religion he or she will be brought up in. *Id.* at 835–36. After being raped, giving birth to her rapist’s child, and deciding to keep her child, the rape victim now faces having to hand her child off to the rapist that abused her, and she may fear the same abuse for her child. *Id.* at 835. See also Gray, *supra* note 33 (discussing how a judge denied one famous pop star’s injunction to record with another studio after the singer claimed her producer had sexually assaulted her). In a different instance, Kesha claimed her producer, Dr. Luke, had abused her physically and sexually for years. *Id.* She stated that Dr. Luke gave her date rape pills, then raped her on one occasion. *Id.* Because of this repeated abuse, Kesha filed a lawsuit in 2014 requesting that she be released from her contract with Sony, her production company. *Id.* Under the contract, she is required to make six more albums with Sony. *Id.* In February 2016, the judge ruled in favor of Kesha’s alleged rapist, locking Kesha into the contract. *Id.* After hearing that the producer had invested \$60 million in Kesha’s career, the judge stated, “My instinct is to do the commercially reasonable thing.” *Kesha Not Freed from Dr. Luke Contract*, DAILY BEAST (Feb. 19, 2016), <http://www.thedailybeast.com/cheats/2016/02/19/kesha-released-from-dr-luke-contract.html?via=newsletter&source=Culturebeast> [<https://perma.cc/79YM-56WA>].

<sup>45</sup> See Garrison, *supra* note 41, at 597 (claiming rape victims move “to a new address [to] increase[] feelings of safety from a second attack”). An episode of *Law & Order: Special Victims Unit* focused on a pregnant rape victim and her decision to escape her rapist. Jason Hughes, ‘Law & Order: SVU’: ‘Legitimate Rape’ Argument Used against Pregnant Rape Victim, HUFFINGTON POST (Mar. 28, 2013), [http://www.huffingtonpost.com/2013/03/28/law-and-order-svu-legitimate-rape-video\\_n\\_2969173.html](http://www.huffingtonpost.com/2013/03/28/law-and-order-svu-legitimate-rape-video_n_2969173.html) [<https://perma.cc/AUR9-75SR>]. The episode aired shortly after a Republican Senatorial candidate claimed that during a “legitimate rape,” victims are able to biologically shut down their reproductive system to prevent becoming pregnant. *Id.* The defense lawyer on *Law & Order* used this “legitimate rape” defense, and the rapist went free. *Id.* In the end, the rapist sued for custody of his victim’s child, and the judge awarded him limited visitation. *Id.* The mother was unable to handle this dire outcome, and she fled with her child. *Id.* As a result, the mother became a fugitive and a wanted criminal. *Id.* This episode illustrates how rapists can terrorize their victims, assert their parental rights, and potentially have the rape victim face criminal charges. Hughes, *supra* note 45.

<sup>46</sup> See, e.g., *D.C. v. J.A.C.*, 977 N.E.2d 951, 954–55 (Ind. 2012) (affirming the trial courts finding that even though the “[m]other met the initial burden of showing legitimate reason

of intent to move, and the court has the discretion to decide if the relocation is in the child's best interests.<sup>47</sup> Courts can then award custody to the father if the mother relocates against the court's order regardless of her motives for relocating.<sup>48</sup> To understand a rape victim's plight to terminate her rapist's parental rights, it is crucial to understand how courts interpret the rights of parents.<sup>49</sup>

*B. Historical Background of Parental Rights, Custody Arrangements, and Child Support*

The Supreme Court recognizes that the Due Process Clause of the Fourteenth Amendment provides individuals with the fundamental right to raise a family.<sup>50</sup> As a result of this right, courts are reluctant to terminate parental rights.<sup>51</sup> If a parent is capable of providing his or her child with

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and good faith in relocating . . . [; however,] relocation would not be in the [c]hild's best interests"). As a result, the mother was unable to relocate with her child. *Id.* See also IND. CODE § 31-17-2.2-5 (2016) (allowing the non-relocating parent to request a temporary or permanent order to prevent the relocation of the child). The relocating parent has the burden of proving the requested relocation "is made in good faith and for a legitimate reason." *Id.*

<sup>47</sup> See § 31-17-2.2-1 (listing the factors the court considers when "determining whether to modify a custody order, parenting time order, grandparent visitation order, or child support order").

<sup>48</sup> See *Baxendale v. Raich*, 878 N.E.2d 1252, 1254, 1260 (Ind. 2008) (denying the mother's request to relocate, while rewarding the father physical custody if the mother did not return). Valerie Baxendale and Sam Raich lived in Valparaiso, Indiana when they divorced in 2000. *Id.* Valerie had to relocate to Minnesota for a job, so she filed the proper notice with the court regarding her intent to relocate. *Id.* The trial court denied her request to relocate and stated that Sam would be awarded physical custody of their child if Valerie did not return to Indiana. *Id.* The trial court's order granting custody to Sam was eventually affirmed by the Supreme Court of Indiana. *Id.* at 1260.

<sup>49</sup> See *infra* Part II.B (discussing the evolving fundamental right of parents to the care, custody, and control of their children).

<sup>50</sup> See U.S. CONST. amend. XIV, § 1 (2012) ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (examining precedent to conclude that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (finding that parents have a liberty interest in the upbringing of their child); *In re I.P.*, 5 N.E.3d 750, 751 (Ind. 2014) (holding the state has to meet certain due process requirements before terminating a parent-child relationship); *J.P. v. G.M.*, 14 N.E.3d 786, 790 (Ind. Ct. App. 2014) (claiming the right of parents to have and raise children is one of the first fundamental liberty interests); see also *In re Adoption of M.P.S., Jr.*, 963 N.E.2d 625, 629 (Ind. Ct. App. 2012) (suggesting a parent's right to raise his or her child is more important than property rights, and it falls under the protection of the Fourteenth Amendment).

<sup>51</sup> See *Silver*, *supra* note 10, at 522 (highlighting judicial hesitancy to terminate the rights of parents because it is a fundamental right protected by the Due Process Clause); see also Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 276 (2012) (realizing courts cannot easily deprive a parent of the right to raise their biological children).

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the basic necessities and the parent is not a threat to the child's survival, a court will not terminate a parent-child relationship.<sup>52</sup> However, this right is not unlimited, as it can be subject to the best interests of the child.<sup>53</sup> The right to raise a child is also subject to regulation through legislative action.<sup>54</sup>

In custody proceedings, the welfare and the best interests of the child are considered above the interests and wishes of the parents.<sup>55</sup> There is a

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<sup>52</sup> See *Bester v. Lake Cty. Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005) (stating that the Office of Family and Children Services ("OFC") had the burden to prove the allegations, but this burden did not require proof that awarding custody to the parents would be completely inadequate for the survival of the child); *Combs v. Gilley*, 36 N.E.2d 776, 779 (Ind. 1941) (concluding that common law and Indiana statutes find that natural parents are entitled to the custody of their children unless the parents are unsuitable and cannot be trusted with the minor's care, control, and education); *Hunter v. State*, 950 N.E.2d 317, 319 (Ind. Ct. App. 2011) (illustrating the state's powerful interest in protecting the child from mistreatment at the hands of their parents).

<sup>53</sup> See IND. CODE § 31-14-13-2 (2016) (listing the factors used in custody proceedings to determine what is in the best interests of the child). In Indiana, courts consider several factors to determine what is in the best interests of the child, some of which include:

- (1) The age and sex of the child.
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with: (A) the child's parents; (B) the child's siblings; and (C) any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.

*Id.*

<sup>54</sup> See *Gilmore v. Kitson*, 74 N.E. 1083, 1084 (Ind. 1905) (demonstrating the State can petition the court to terminate a parent's custody of his or her child if the State believes that the parent has abandoned his or her rights by committing a crime of moral turpitude, displaying vicious habits, exhibiting cruel and inhuman treatment, or any other conduct deemed illegal by statute). In *Gilmore*, the mother tried to create a will in which the custody of her child would be given to her sister and her brother-in-law, although her husband was still alive and fully capable of caring for their child after the mother's passing. *Id.* at 1083-84. During the mother's funeral, the sister locked the child in a room and called the police to prevent the husband from taking his own child back. *Id.* at 1084. The sister was appointed guardian of the child without the husband's knowledge or consent. *Id.* The court stepped in to give custody back to the natural father, because he had not abandoned or forfeited his parental rights. *Id.* at 1085. See also *Van Walters v. Bd. of Children's Guardian of Marion Cty.*, 32 N.E. 568, 569 (Ind. 1892) (reasoning that the state, through the judicial and legislative process, is the guardian of its children and it may pass laws that support and confirm the state's interest in protecting children).

<sup>55</sup> See *Marshall v. Reeves*, 311 N.E.2d 807, 809-10 (Ind. 1974) (highlighting the best interests of the child must be the most important concern when determining custody); *Buchanan v. Buchanan*, 267 N.E.2d 155, 158 (Ind. 1971) (holding that because the welfare of a child is more important than the wishes of the parents, custody determinations must be made with regard to the best interests of the child); *Glass v. Bailey*, 118 N.E.2d 800, 801 (Ind. 1954) (finding that although parents have a right to raise a family, a child's welfare and

presumption that parents should have custody of their child, unless a parent's conduct or surrounding circumstances make it necessary to remove the child to protect the child's safety and welfare.<sup>56</sup> For example, before a court can deny custody to a parent due to sexual misconduct, the misconduct itself has to have an adverse effect on the child.<sup>57</sup> After

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happiness takes precedence over this right); *Beach v. Leroy*, 89 N.E.2d 912, 914 (Ind. 1950) (arguing that the legal rights of parents are important, but not absolute, because a child's welfare and happiness comes first); *In re R.H.*, 892 N.E.2d 144, 149 (Ind. Ct. App. 2008) (applying the statute, which states that parental rights can be terminated when doing so is in the best interests of the child); *In re Paternity of K.J.L.*, 725 N.E.2d 155, 157 (Ind. Ct. App. 2000) (finding the best interests of the child principle plays a major role in child custody cases and support or visitation cases); *but see In re Visitation of A.D.*, 18 N.E.3d 304, 308 (Ind. Ct. App. 2014) (regarding grandparent visitation rights, the court stated, "natural parents have a fundamental constitutional right to direct their children's upbringing without undue governmental interference, and . . . a child's best interests do not necessarily override that parental right"). Until the nineteenth century several countries had laws that favored the father over the mother in custody arrangements. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 130 (2004). There were only a few exceptions to this general rule, such as if the father was completely unfit. *Id.* This was generally shown by proving the father was a criminal or a drunkard. *Id.* This general rule regarding custody gradually shifted towards the principle that is used today – the best interests of the child. *Id.*

<sup>56</sup> See *Duckworth v. Duckworth*, 179 N.E. 773, 775-76 (Ind. 1932) (stating the legal rights of parents are an influential factor, and parents should be awarded custody unless their actions make it necessary for the state to step in and remove the child from their custody to protect the child's safety and welfare). After a divorce, Otis, a twelve-year-old boy and the child of a street car conductor, lived with his mother until she became ill. *Id.* at 773-74. Otis then went to live with his uncle. *Id.* at 774. The boy's father tried to take Otis from his uncle's home, and when the uncle refused to let the father take Otis, the father had the uncle arrested for kidnapping. *Id.* During a custody hearing, Otis testified that his father had sent him money to go live with him, but he did not want to live with his father. *Id.* Otis said to the judge, "I want the court to fix it so I can stay [with my uncle]. I don't want to go live with my father because he has not treated us right in the past." *Id.* The only evidence that could be used regarding the father's ability to raise his son was a prior child neglect charge of which he was found guilty and the fact that his first wife claimed he was an unfit person to be trusted with custody of their children, along with testimony that he had not taken care of the children for several years. *Duckworth*, 179 N.E. at 774. The trial court awarded custody to the uncle. *Id.* at 777.

<sup>57</sup> See *McMurrey v. McMurrey*, 4 N.E.2d 540, 541 (Ind. 1936) ("A mother, as well as a father, may . . . sin; she may break the Sixth Commandment, but this fact alone, as a matter of law, does not necessarily make her an unfit and improper person to have the custody of her child."); *Schenk v. Schenk*, 564 N.E.2d 973, 978 (Ind. Ct. App. 1991) (ruling a mother living with her children's molester was having an adverse effect on the welfare of the children); *Dunlap v. Dunlap*, 475 N.E.2d 723, 726 (Ind. Ct. App. 1985) (holding that because the child was not adversely affected by her father's living arrangements with his fiancé, the father could not be deprived custody of his child). The court in *Schenk* awarded Karen custody of her three daughters when she divorced her husband. *Schenk*, 564 N.E.2d at 975. Karen's boyfriend, Hampton, moved into Karen's home, and he molested her two oldest daughters. *Id.* All three girls were taken into protective custody, and the father requested full custody. *Id.* Karen claimed that she would sever her ties with Hampton, and the court gave the children back to her. *Id.* at 975-76. Karen resumed a relationship with Hampton,



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fulfilling due process requirements, courts have the discretion to determine child custody arrangements, and this determination will not be disturbed unless the trial court abused its discretion.<sup>58</sup> Courts cannot award custody to one parent or terminate custody altogether to punish the other parent.<sup>59</sup> Similarly, courts cannot issue child support orders with the intention of punishing the father.<sup>60</sup>

Under common law, parents have a duty to provide child support even when there is no court order requiring them to do so.<sup>61</sup> However, when a court terminates parental rights, the duty to pay child support is usually terminated as well, which places all financial obligations on the

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and he was convicted of molesting the two oldest girls in 1988. *Id.* at 976. He was sentenced to six years in prison, five of which were suspended, and Karen stated at a court hearing that they were going to get married when he was released. *Schenk*, 564 N.E.2d at 976. The trial court awarded custody to the father, but then granted visitation rights to Karen with the restriction that Hampton not be allowed around the children. *Id.* The court held Karen's cohabitation with Hampton, her children's molester, had an adverse effect on the welfare of her children. *Id.* at 978. The court gave Karen an ultimatum, the children or the child molester, and Karen testified that she planned on marrying Hampton as soon as possible. *Id.*

<sup>58</sup> See *In re Guardianship of B.H.*, 770 N.E.2d 283, 288 (Ind. 2002) (reversing the lower court is only appropriate if the court finds that the lower court's decision defies the logic, facts, and circumstances before the court); *Boone v. Boone*, 924 N.E.2d 649, 652 (Ind. Ct. App. 2010) (stating a trial court's decision concerning child support will not be disturbed unless the court abused its discretion or its order conflicts with current laws); *Francies v. Francies*, 759 N.E.2d 1106, 1115-16 (Ind. Ct. App. 2001) (claiming child custody proceedings are within the discretion of the trial court, and its decision must not be disturbed unless an abuse of discretion is shown).

<sup>59</sup> See *Lamb v. Wenning*, 591 N.E.2d 1031, 1033 (Ind. Ct. App. 1992) (concluding a court cannot award or modify child support with the sole purpose of punishing a parent); *Clark v. Clark*, 404 N.E.2d 23, 34 (Ind. Ct. App. 1980) (reiterating that courts cannot award custody to one parent as a means to punish the other parent because the child's welfare is the court's main consideration).

<sup>60</sup> See *Rohn v. Thuma*, 408 N.E.2d 578, 582-83 (Ind. Ct. App. 1980) (reporting child support orders must be fair, not excessive, and intended to provide the child with reasonable support); see also Carmen Solomon-Fears et al., *Child Support Enforcement: Incarceration as the Last Resort Penalty for Nonpayment of Support*, CONG. RES. SERV. 7 (Mar. 6, 2012), <http://www.ncsea.org/documents/CRS-Report-on-CSE-and-Incarceration-for-Non-Payment-March-6-2012.pdf> [<https://perma.cc/BR2A-URVQ>] (suggesting courts can punish a parent that fails to comply with the court's child support order). The state can threaten to send the parent to jail or it can charge the parent with civil or criminal contempt of court. Solomon-Fears et al., *supra*, at 7-8. All fifty states have criminal statutes that apply to parents who fail to pay child support. *Id.* at 8.

<sup>61</sup> See *In re Adoption of M.B.*, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011) (highlighting the duty of a parent to financially support his or her child); *Wilsey v. Wilsey*, 831 P.2d 590, 592 (Mont. 1992) (claiming a parent's duty to pay child support is both a social and moral obligation); see also Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365, 370 (2008) (theorizing that biological parents are strictly liable for child support regardless of the circumstances of the child's conception).

custodial parent.<sup>62</sup> A mother in an economically dire situation can apply for financial assistance, but the government will deny her application unless she first cooperates with the state in finding the father and collecting child support from him.<sup>63</sup> This prerequisite reflects the public policy that a parent has a duty to provide financial support to his or her child, and the parent should fulfill this duty before the government takes over the parent's financial obligation.<sup>64</sup> For a rape victim, this requirement would alert the rapist father – who might not have known his victim had conceived his child – which would then give him the opportunity to assert

<sup>62</sup> See *Beasnett v. Arledge*, 934 So. 2d 345, 347 (Miss. Ct. App. 2006) (holding when the court terminates the parent-child relationship, “not only are the rights of the parent with regard to the child terminated, but the reverse is also true . . . .”); Deborah H. Bell, *Child Support Orders: The Common Law Framework – Part II*, 69 MISS. L.J. 1063, 1078 (2000) (“A parent’s support obligation ceases when parental rights are terminated either by consent or as a result of a termination action.”); *but see* HAW. REV. STAT. § 571-61 (2016) (“The termination of parental rights shall not affect the obligation of the convicted natural parent to support the child.”); 750 ILL. COMP. STAT. § 46/622(c) (2016) (“The child’s mother or guardian may decline support and maintenance obligations from the father.”); OR. REV. STAT. § 419B.510 (2015) (involving the termination of parental rights when the child was conceived during a rape, which does not prevent the court from ordering the rapist to pay child support).

<sup>63</sup> See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1030, 1045, 1067 (2007) (describing the requirements a mother must fulfill when seeking government assistance); *see also* Wendt, *supra* note 32, at 1782 (finding that when a single parent does not receive child support, he or she can be forced below the poverty line); Paul Raeburn, *Welfare and Child Support: Nobody Wins*, PSYCHOL. TODAY (Dec. 5, 2008), <https://www.psychologytoday.com/blog/about-fathers/200812/welfare-and-child-support-nobody-wins> [https://perma.cc/W5CY-2CHU] (demonstrating how this policy has failed parents). Under this program, the government forces mothers to sue the fathers for child support, and the government then collects the money to reimburse itself for welfare costs. Raeburn, *supra*. In 2006, the government collected over \$2 billion in reimbursements, but it spent \$5.6 billion to do so from non-custodial parents, usually fathers. *Id.* In some cases, the government keeps sixty-five percent of the non-custodial parent’s wages. *Id.* As a result, some fathers seek occupations that pay “under-the-table” or they turn to crime. *Id.*

<sup>64</sup> See Hatcher, *supra* note 63, at 1032 (pointing out the government’s purpose in requiring that a parent seek out the other parent before receiving government assistance). However, a mother may not want her child to know who his or her father is or for the father to take part in the child’s life, and complying with the government’s requirements will undermine the mother’s wishes. *Id.* at 1045. A mother may also believe that establishing paternity and requesting child support might result in the father reacting violently. *Id.* Other mothers may have a good relationship with their child’s father, and he might already be providing informal financial support. *Id.* at 1045–46. Forcing the father to go through the process of legally establishing paternity and assigning his child support obligations to the state to reimburse it for welfare costs might cause the parent-child relationship to deteriorate. *Id.* at 1046.

his parental rights.<sup>65</sup> The rape victim would then have to choose between receiving financial support or terminating her rapist's parental rights.<sup>66</sup>

### C. Legal Hurdles When Terminating Parental Rights

Parental rights are not absolute; nonetheless, public policy dictates children are usually better off being raised by two parents.<sup>67</sup> However, if a court chooses to terminate parental rights, the court has to tread carefully to ensure compliance with due process requirements.<sup>68</sup> When addressing the due process requirements, courts look at three factors highlighted in *Mathews v. Eldridge*: “[f]irst the private interest that will be

<sup>65</sup> See Bitar, *supra* note 51, at 278 (mentioning the potential problems a mother might face when trying to meet the government's welfare requirements, while at the same time, preventing the father from seeking custody of his child).

<sup>66</sup> See Hatcher, *supra* note 63, at 1030–32 (discussing the welfare obligation and the process of notifying the father that he has a child); Jill Filipovic, *I'm a Mother, and I Had an Abortion*, COSMOPOLITAN (June 2, 2014), <http://www.cosmopolitan.com/politics/news/a7061/mothers-abortion/> [<https://perma.cc/9CJD-WRE7>] (describing how one young mother chose to abort her child because her partner was unemployed and they were struggling to pay their bills). Already a mother of two children, a woman paid for an abortion with the last of her tax check. Filipovic, *supra*. After ten years passed since her abortion, the mother believes that her life would have been harder financially if she did not have the abortion because she could barely afford diapers for her other children. *Id.* In addition, she claims that she would have had to go on maternity leave, and because she did not have any savings and would be living paycheck to paycheck, she would become dependent on social services. *Id.*

<sup>67</sup> See *In re J.H.*, 911 N.E.2d 69, 74 (Ind. Ct. App. 2009) (classifying the termination of parental rights as a “tool of last resort”). In *In re J.H.*, the court based its decision partially on the public policy consideration that underlies Indiana's termination statutes. *Id.* at 75. This policy involves protecting a child's development and well-being, and deterring instability and uncertainty when parents fail to improve their ability to provide for their child. *Id.* See also Isabel V. Sawhill, *Are Children Raised with Absent Fathers Worse Off?*, BROOKINGS INST. (July 15, 2014), <http://www.brookings.edu/research/opinions/2014/07/15-children-absent-fathers-sawhill> [<https://perma.cc/NJB8-X757>] (discovering children raised by one parent suffer academically, socially, emotionally, and physically); but see *In re B.J.*, 879 N.E.2d 7, 17 (Ind. Ct. App. 2008) (finding that the State has a compelling interest to protect the welfare of a child by intervening, using its power to protect its citizens who are unable to protect themselves). B.J. tested positive for cocaine when she was born. *In re B.J.*, 879 N.E.2d at 11. A child in need of services (“CHINS”) petition was filed for B.J. and her two sisters. *Id.* The mother used cocaine and marijuana during her pregnancy. *Id.* at 11–12. A hearing was held that terminated the father's and mother's parental rights, and at that hearing, the court learned that the father had a warrant for battery charges against the mother. *Id.* at 12–13. The court took this and the fact that the father had failed to complete court-ordered services into consideration when it ruled that termination proceedings could proceed, even though the father was absent. *Id.* at 17.

<sup>68</sup> See *In re B.J.*, 879 N.E.2d at 17 (deciding to terminate the father's parental rights only after a thorough understanding of the whole situation and after complying with the father's due process rights). Courts are especially hesitant to terminate an alleged rapist's rights without a conviction or a statute that mandates the court terminate the parent-child relationship. Bitar, *supra* note 51, at 285.

affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest."<sup>69</sup> The Court in *Lassiter v. Department of Social Services in Durham County, North Carolina*, applied these factors to parental rights termination proceedings.<sup>70</sup> The Court acknowledged precedent, which stated: "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"<sup>71</sup> A parent has a compelling interest in a precise and just decision to terminate his or her parental rights because of this deference and protection.<sup>72</sup> *Santosky v. Kramer* utilized the

<sup>69</sup> 424 U.S. 319, 335 (1976). See *Lassiter v. Dep't of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 27, 31, 33 (1981) (utilizing the *Mathews* factors to find that a mother's due process rights were not violated when the court did not appoint the mother counsel when terminating her parental rights). In *Lassiter*, the court discussed how the mother, Abby, had failed to provide medical care for her child; therefore, her child was deemed neglected. *Id.* at 20. The child was taken to the doctor because he was having problems breathing and was showing signs of malnutrition and scarring from an untreated, severe infection. *Id.* at 22. A year after the mother lost custody of her child, she was charged with first-degree murder and convicted of second-degree murder. *Id.* at 20. While in prison, the Department of Social Services petitioned the court to terminate Abby's parental rights, because she did not have any contact with her child for several years, and because she had failed to show substantial progress in correcting the problems that had initially led to losing custody. *Id.* at 20-21. In the termination hearing, Abby was not represented by counsel. *Id.* at 21-22. Abby did not claim that she was indigent so the court did not appoint an attorney and the court terminated her parental rights. *Lassiter*, 452 U.S. at 22-24. On appeal, Abby argued that she was indigent and the Due Process Clause required that she be appointed an attorney in the termination proceeding. *Id.* at 24. The Supreme Court held that Due Process does not require that the court appoint counsel for indigent parents in all termination proceedings. *Id.* at 31-32.

<sup>70</sup> See *Lassiter*, 452 U.S. at 27 (applying the factors from *Mathews* in a parental rights termination case); see also *In re G.P.*, 4 N.E.3d 1158, 1165-66 (Ind. 2014) (demonstrating that after balancing the *Mathews* factors, a parent is entitled at least to "the opportunity to be heard at a meaningful time and in a meaningful manner").

<sup>71</sup> *Lassiter*, 452 U.S. at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). In *Stanley v. Illinois*, the Court held that an unwed father was entitled to a hearing to determine if he was fit to be a parent. 405 U.S. 645, 649 (1972). The applicable law stated that when a child's mother died and the father was not married to the mother, the children are declared dependents of the state. *Id.* at 646-47. This determination is done without a hearing to determine if the father is unfit to be a parent or has neglected the child. *Id.* at 647, 650. The Illinois Supreme Court found that the children could be automatically separated from the father based solely on the fact that their mother had died and she had not been married to their father. *Id.* at 646-47. The U.S. Supreme Court reversed this ruling claiming that it violated the father's due process rights because the state cannot presume that unmarried fathers are unsuitable parents. *Id.* at 658.

<sup>72</sup> See *Lassiter*, 452 U.S. at 27 (claiming although the state has a compelling interest in protecting a child's well-being, the state also shares the parent's interest in promoting justice by reaching an accurate decision); see also *Kennedy v. Wood*, 439 N.E.2d 1367, 1369-70 (Ind.

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*Mathews* factors to determine that to ensure fairness in government-initiated proceedings that threaten to deprive an individual's liberty or stigma, the court should use an "intermediate standard of proof—'clear and convincing evidence.'"<sup>73</sup>

After *Santosky*, the proponent of terminating parental rights has to prove each required allegation by clear and convincing evidence to terminate parental rights.<sup>74</sup> The evidence does not have to show that awarding continued custody to the parent is completely inadequate for the child's survival.<sup>75</sup> Instead, the evidence merely has to demonstrate that the custody arrangement threatens the "child's emotional and physical development."<sup>76</sup> This standard has guided several states in

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Ct. App. 1982) (finding that although paternity actions are civil in nature, the private interests of a parent are substantial).

<sup>73</sup> 455 U.S. 745, 756 (1982). In *Santosky*, the mother and father neglected their two children, which caused the children to be placed in foster care. *Id.* at 751. The mother then gave birth to another child who was placed in a foster home when he was three days old. *Id.* The Department of Social Services petitioned the court to terminate the mother and father's parental rights after conditions did not improve. *Id.* The New York Family Court Act used the fair preponderance of the evidence standard to support a finding that a child is permanently neglected before terminating all parental rights. *Id.* at 747. This is the same level of certainty required before awarding money damages in a simple civil action. *Id.* In a landmark decision, the court stated "[t]oday we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. 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." *Santosky*, 455 U.S. at 747-48. The Court claimed that in termination proceedings: the parent's interest is commanding, the risk of error when using a preponderance standard is significant, and the government's interest favoring that lower standard is small. *Id.* at 758. The Court evaluated the *Eldridge* factors when reaching this conclusion. *Id.* See *Addington v. Texas*, 441 U.S. 418, 424 (1979) (describing the intermediate standard and how it applies to quasi-criminal wrongdoings because in those cases the interests at stake involve more than monetary gains or losses). The Court in *Addington* stated the standard of proof in cases involving individual rights reflects how society values individual liberty. *Id.*

<sup>74</sup> See *In re S.B.*, 896 N.E.2d 1243, 1247-48 (Ind. Ct. App. 2008) (applying the clear and convincing evidence standard in a parental rights termination case); *In re A.J.*, 877 N.E.2d 805, 815-16 (Ind. Ct. App. 2007) (stating courts use the clear and convincing evidence standard to prove each allegation in a parental rights termination proceeding). In Indiana, a petition must be filed to terminate the parent-child relationship. IND. CODE § 31-35-2-4 (2016). Clear and convincing evidence is defined as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>75</sup> See § 31-35-2-4(b)(2) (laying out the requirements of a petition to terminate a parent-child relationship); *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (pointing out that under the clear and convincing evidence standard, the state does not have the burden to prove that parental custody is completely insufficient for the child's survival).

<sup>76</sup> *In re G.Y.*, 904 N.E.2d at 1261. In *In re G.Y.*, the mother was in jail, and she would be on probation for four years upon release. *Id.* at 1259. Before she could be reunited with her child she would have to complete parenting classes and drug treatment classes. *Id.* The mother would also have to secure housing and employment. *Id.* The trial court found that

forming legislation that protects rape victims and their children.<sup>77</sup> However, not all states utilize this standard when considering the unique circumstances of rape victims.<sup>78</sup>

#### D. Current Legislation among the States Regarding Rape Victims and Their Children

In states that have no legislation that protects rape victims who become pregnant, the outcomes of custody and visitation determinations are often left to the discretion of the court.<sup>79</sup> For example, in 2009, a rape victim placed her three-year-old child into foster care.<sup>80</sup> The child was not

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based on these requirements and the mother's pattern of criminal activity, it was likely that the mother would not be able to parent effectively and she was likely to reoffend. *Id.* at 1262. The Supreme Court of Indiana reversed the trial court, because it found that the mother had completed a parenting class, a drug rehabilitation program, college courses, and had been participating in a work program while incarcerated. *Id.* at 1262-63. The actions the mother took made it less likely that she would reoffend; therefore, she would be able to care for her child upon release from prison in a way that would not threaten her child's development. *In re G.Y.*, 904 N.E.2d at 1263.

<sup>77</sup> See *infra* Part II.D (showing some states do not require a criminal conviction and instead use the clear and convincing evidence standard to terminate parental rights).

<sup>78</sup> See Liebelson & Brownstone, *supra* note 30 (illustrating how several states have struggled to pass legislation, which has led some states to pass legislation requiring a conviction, although this requirement does not benefit most rape victims); see, e.g., ARK. CODE ANN. § 9-10-121(a) (2016) (requiring a rape conviction before terminating parental rights).

<sup>79</sup> See, e.g., *Hilliker v. Miller*, No. A05-1538, 2006 WL 1229633, at \*3 (Minn. Ct. App. May 9, 2006) (finding that although the child was born out of a non-consensual sexual encounter, the court determined visitation was in the best interests of the child). In 2009, a rapist chose a Catholic school girl from Massachusetts as his victim. Fields, *supra* note 2. Holly Turner was fourteen years old when she was raped and became pregnant. *Id.* Her rapist was twenty years old and pled guilty. *Id.* The judge ordered him to declare paternity and pay child support. *Id.* In addition, he was told he would have to comply with any family court proceedings involving Turner and her child. *Id.* Here, the court put the rape victim in a position of losing custody if she failed to comply with court orders that forced her and her child to have contact with her rapist. *Id.* Turner found a lawyer who sought to overturn the judge's ruling. Fields, *supra* note 2. When the court ordered Holly's rapist to pay \$110 per week in child support, he filed for visitation rights. *Id.* He told Holly that he would drop his custody claim if she stopped claiming he had raped her. *Id.* Some states currently have legislation designed to limit or terminate the parental rights of rapists to prevent this scenario. See, e.g., CAL. FAM. CODE § 3030(b) (2016) ("No person shall be granted custody of, or visitation with, a child if the person has been convicted [of rape] and the child was conceived as a result of that violation."); 750 ILL. COMP. STAT. 50/8 (2015) (formulating a statute that protects rape victims who choose to place their child up for adoption); N.C. GEN. STAT. § 7B-1111 (2015) (stating the "court may terminate the parental rights" of a parent convicted of the sexual offense that led to the conception of the child).

<sup>80</sup> See Bitar, *supra* note 51, at 294 (claiming the mother became overwhelmed caring for the child whom she had conceived through rape); see also Prewitt, *supra* note 1, at 829 (illustrating several rape victims who choose to place their child up for adoption, and several states have legislative protections for women who make this decision).



speaking and still in diapers when he was sent to a foster home.<sup>81</sup> Two years later, the child had improved enough to attend school, and his foster parents applied to adopt him.<sup>82</sup> However, the child's rapist father—on trial for his fifth Megan's Law violation and living in someone's basement—blocked the adoption and asserted his parental rights.<sup>83</sup> The court awarded the rapist father custody.<sup>84</sup> Under the rapist father's care, the child's physical and emotional development deteriorated.<sup>85</sup> This case was decided in Pennsylvania, a state, like Indiana, that does not have proper legislation to prevent rapists from asserting custody rights.<sup>86</sup>

Indiana is one of several states that have passed legislation that allows rape victims to bypass the consent and notice requirement for adoption.<sup>87</sup> Indiana's statute allows a rape victim to place her child up for adoption

<sup>81</sup> See Bitar, *supra* note 51, at 294 (describing the child's condition after the mother was unable to properly care for the child over three years after she was raped).

<sup>82</sup> See *id.* (celebrating the fact that after two years in foster care, the child was speaking, potty-trained, and attending school).

<sup>83</sup> See *id.* (highlighting the father's living situation and his failure to register as a sex offender with local law enforcement); see also *Megan's Law Website*, PENN. ST. POLICE (2008), <http://www.pameganslaw.state.pa.us/History.aspx?dt=> [https://perma.cc/R2S8-AS7B] (discussing Megan's Law and its conception). Megan's Law is named after the seven-year-old victim of a violent rape and murder. *Megan's Law Website*, *supra* note 83. A two-time convicted pedophile moved in across the street from Megan. *Id.* No one knew at the time he was a registered sex offender. *Id.* He invited Megan to see his puppy. *Id.* When she went with him, he raped her, murdered her, and then dumped her body in a park. *Id.* The law requires sex offenders to register with local law enforcement agencies. *About Megan's Law*, CAL. DEP'T OF JUST. (2009), <http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH> [https://perma.cc/37ES-6E54]. This helps the public know the whereabouts of sex offenders in their community. *Id.* All fifty states have adopted their own versions of Megan's Law. *Id.*

<sup>84</sup> See also Bitar, *supra* note 51, at 294 (demonstrating how the court placed the rapist father's rights ahead of the child's welfare); Fields, *supra* note 2 (showing courts have exercised discretion to award convicted rapists custody of their victim's child).

<sup>85</sup> See Bitar, *supra* note 51, at 294 (providing that the court's ruling to award custody to the rapist father harmed the child's emotional and physical development).

<sup>86</sup> See *id.* (proving the court's decision brought awareness for the need to curtail the parental rights of rapists in Pennsylvania); see also Liebelson & Brownstone, *supra* note 30 (discussing another case involving a rape victim locked in a custody battle that encouraged other states to pass legislation).

<sup>87</sup> See IND. CODE § 31-19-9-8(a)(4)(a) (2016) (listing the statutory protection Indiana offers rape victims who place their child up for adoption); see also N.M. STAT. ANN. § 32A-5-19(c) (2016) (allowing a rape victim to place her child up for adoption without her rapist's consent). The New Mexico statutes states: "The consent to adoption or relinquishment of parental rights required pursuant to the provisions of the Adoption Act shall not be required from: . . . a biological father of an adoptee conceived as a result of rape or incest." *Id.* A similar statute from Oklahoma 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." OKLA. STAT. tit. 10A § 1-4-904(B)(11) (2015).

without obtaining the consent of the biological father.<sup>88</sup> Furthermore, Indiana requires a rape conviction before extending its legislative adoption protections to rape victims.<sup>89</sup> Although approximately 720 women become pregnant from rape each year in Indiana, Indiana legislators have failed on multiple occasions to pass legislative protections for these rape victims.<sup>90</sup> Some states have extended their legislative protections beyond the adoption process to limit the visitation or custody rights of rapists.<sup>91</sup> Only two states mandate that the court not award

<sup>88</sup> See IND. CODE § 31-19-9-8(a)(4)(a) (offering protections only to mothers who choose adoption). The statute allows mothers to bypass the consent requirement if the child was born out of wedlock and conceived during rape for which the father was convicted. *Id.*

<sup>89</sup> See *id.* (narrowing the statutory protections to situations where the rapist father is convicted).

<sup>90</sup> See Marc Chase, *Lawmakers Should End Rapists' Parental Rights*, NWITIMES (Jan. 21, 2016), [http://www.nwitimes.com/news/opinion/editorial/editorial-lawmakers-should-end-rapists-parental-rights/article\\_bd79e79d-a38a-5bf5-9ce2-5cf2e66e4464.html](http://www.nwitimes.com/news/opinion/editorial/editorial-lawmakers-should-end-rapists-parental-rights/article_bd79e79d-a38a-5bf5-9ce2-5cf2e66e4464.html) [<https://perma.cc/ND6K-TPBH>] (suggesting that Indiana gives rapists power over their victims by allowing rapists to assert their parental rights); Carden, *State Senator, supra* note 35 (calculating the number of women in Indiana who conceive through rape each year based on nationwide studies). One victim who became pregnant because of rape was a thirteen-year-old cheerleader and self-proclaimed "social bug" from Indiana. Tim Evans, *Girl's Rape Results in Pregnancy, Reflects Big Problem*, USA TODAY (June 6, 2013), <http://www.usatoday.com/story/news/nation/2013/06/06/girls-rape-pregnancy-reflects-growing-problem/2395515/> [<https://perma.cc/9HUM-Z72V>] [hereinafter Evans, *Girl's Rape*]. A high school boy who lived down the street raped his younger neighbor. *Id.* Soon after she was raped, she learned she was pregnant, and she decided to keep the child. *Id.* The seventeen-year-old boy was later found guilty of molesting the girl and two other victims including a twelve-year-old. *Id.* The girl did not speak about the sexual assault for over a month until she found out she was pregnant. *Id.* After a long conversation with her mother, she decided to keep the child. *Id.* Since the attack, she claims that she cannot leave her house without being called a whore or slut. Evans, *Girl's Rape, supra* note 90. These same words have been scrawled across the family's home in acts of vandalism directed toward the rape victim. *Id.* The attention soon turned to the perpetrator of this crime – who ended up being prosecuted. *Id.* The girl's family spoke out about their concerns about a possible light sentence after they learned that the teenage rapist never spent a day in jail, although he had previously been convicted on three child molesting charges. *Id.* The prosecutor responded, "I don't know how they can be upset about something they don't know." *Id.* In the end, the family's fears were realized when the molester was sentenced to probation three days before the doctors induced labor in his victim. Tim Evans, *Teen Convicted of Molesting Ind. Girls Gets Probation*, USA TODAY (June 25, 2013), <http://www.usatoday.com/story/news/nation/2013/06/25/girl-rape-pregnancy-probation/2458007/> [<https://perma.cc/4UVA-QFKE>]. When the court failed to sentence the teen to jail, the rape victim's mother stated, "[t]his nightmare is not going to end for her [daughter]." *Id.*

<sup>91</sup> See NEV. REV. STAT. § 125C.210 (2016) (requiring a conviction before terminating custody and visitation rights unless the mother consents to awarding her rapist custody or visitation rights and doing so would be in the best interests of the child). However, this protection does not apply if the victim and the attacker are married at the time of the sexual assault. *Id.* See N.J. STAT. ANN. § 9:2-4.1(a) (2016) ("[A] person convicted of sexual assault . . . shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result . . . of the sexual assault . . ."). However,

custody or visitation rights to rapists; however, these states require a criminal conviction.<sup>92</sup> The rest of the states give courts the discretion to limit visitation or custody by considering the best interests of the child.<sup>93</sup>

Some states have enacted legislation that allows the court to fully terminate a rapist's parental rights.<sup>94</sup> In most of these states, before a court can terminate parental rights, the rapist must be convicted of rape.<sup>95</sup> Pleading guilty to a lesser charge gives a rapist the opportunity to assert his parental rights over his victim's child because he was never convicted of rape.<sup>96</sup> To eliminate this loophole, ten states do not require a criminal

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the statute allows a rapist to rebut this presumption by showing that it is in the best interests of the child that he be awarded custody or visitation rights. *Id.* See S.D. CODIFIED LAWS § 25-4A-20 (2016) (stating the courts are allowed to "prohibit, revoke, or restrict visitation rights to a child for any person who has caused the child to be conceived as a result of rape," but the court must also find that doing so is in the best interests of the child). Meanwhile, the court does not consider the interests of the mother, the rape victim. *Id.*

<sup>92</sup> See CAL. FAM. CODE § 3030(b) (2016) ("No person shall be granted custody of, or visitation with, a child if the person has been convicted of [rape] and the child was conceived as a result of that violation."); MICH. COMP. LAWS. § 722.25(2) (2016) (mandating that courts cannot award custody to a parent if the individual has been convicted of rape in which the child was conceived).

<sup>93</sup> See, e.g., TEX. FAM. CODE ANN. § 161.007 (2016) (allowing courts to utilize the best interests of the child standard to determine if a rapist should retain parental rights); *Oberlander v. Handy*, 913 N.E.2d 734, 739 (Ind. Ct. App. 2009) ("The child's best interest is the paramount consideration in custody decisions and necessarily takes precedence over the parents' interests and desires."); *Hilliker v. Miller*, No. A05-1538, 2006 WL 1229633 at \*3 (Minn. Ct. App. May 9, 2006) (determining that awarding visitation to the father was in the best interests of the child, even though the child was conceived during a non-consensual sexual encounter).

<sup>94</sup> See Meghan McCann, *Parental Rights and Sexual Assault*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 28, 2016), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#2> [<https://perma.cc/7P3R-E4DX>] (listing the states that allow termination of parental rights as of January 28, 2016, which include: Alaska, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin).

<sup>95</sup> See Rachael Kessler, *Due Process and Legislation Designed to Restrict the Rights of Rapist Fathers*, 10 NW. J. L. & SOC. POL'Y 199, 217 (2015) (showing that before these statutes can be utilized by rape victims, the rapist must either plead guilty or be found guilty in court).

<sup>96</sup> See, e.g., *Bobbitt v. Eizenga*, 715 S.E.2d 613, 616 (N.C. Ct. App. 2011) (describing how the father could not be denied visitation because of his attempted statutory rape conviction). *Bobbitt* plead guilty to attempted statutory rape, and he had to register as a sex offender. *Id.* at 614. His victim gave birth to a child who was conceived during the rape. *Id.* A DNA test proved that *Bobbitt* was the father, and while incarcerated, *Bobbitt* sought joint custody and visitation rights. *Id.* The court stated, "[o]ur review of North Carolina statutes and case law has revealed no law that would prevent a parent from claiming visitation rights with their child on the basis of their status as a sex offender." *Id.* at 616. A North Carolina statute prevented individuals convicted of first- or second-degree rape from being awarded custody or visitation rights to their child conceived during the rape. *Id.* at 615. However, because *Bobbitt* plead guilty to attempted statutory rape and not first- or second-degree rape, the

conviction before terminating parental rights.<sup>97</sup> In these states, rape victims who can prove by clear and convincing evidence that their alleged attacker raped them and their child was conceived during that rape will be able to terminate their rapist's parental rights.<sup>98</sup> Moreover, the Supreme Court in *Santosky* held states can terminate parental rights using this standard without violating a parent's due process rights.<sup>99</sup>

The lack of uniformity among the states, along with the absence of legislation in other states, resulted in Congress proposing an Act that would encourage states to adopt legislation that uses the clear and convincing evidence standard.<sup>100</sup> In 2015, Congress passed the Rape Survivor Child Custody Act ("Act") in response to the need for legislation

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court stated there was no basis to deny Bobbitt's custody and visitation claims. *Bobbitt*, 715 S.E.2d at 616. See also Prewitt, *supra* note 1, at 856 (discussing that many rapists are given the opportunity to plead guilty to a lesser charge); *N.H. Prep School Graduate Gets a Year in Jail for Sexual Assault*, CHI. TRIB. (Oct. 29, 2015), <http://www.chicagotribune.com/news/nationworld/ct-prep-school-rape-trial-20151029-story.html> [<https://perma.cc/QDG5-SCUM>] (showing a prep-school student, who was originally charged with rape, was eventually sentenced to one year for sexual assault).

<sup>97</sup> See, e.g., IDAHO CODE ANN. § 16-2005(2)(a) (2015) (allowing courts to terminate the parental rights of rapists without a conviction); see also Colleen Curry, *New Federal Law Gives States Incentive to Strip Rapists of Parental Rights*, VICE NEWS (June 4, 2015), <https://news.vice.com/article/new-federal-law-gives-states-incentive-to-strip-rapists-of-parental-rights> [<https://perma.cc/867R-E8T9>] (citing the states that do not require a conviction, which include: Alaska, Colorado, Florida, Idaho, Illinois, Louisiana, Oklahoma, Pennsylvania, Vermont, and Wisconsin).

<sup>98</sup> See, e.g., COLO. REV. STAT. § 19-5-105.5 (2015) (allowing courts to terminate a rapist's parental rights if the rapist is convicted or by using the clear and convincing evidence standard to prove that the father sexually assaulted the mother and conceived a child during that assault); WIS. STAT. § 48.415(9) (2015) (granting courts the power to terminate parental rights at a fact finding hearing if the child was conceived as a result of a sexual assault); see also Liebelson & Brownstone, *supra* note 30 (listing one mother's goal to pass a law in her state that utilized the clear and convincing evidence standard). A mother, Angela Crews, witnessed first-hand what can happen when no protective legislation exists for rape victims. Liebelson & Brownstone, *supra* note 30. Angela's daughter conceived a son through rape, and Angela learned that no law existed that would prevent her daughter's attacker from seeking custody of his victim's son. *Id.* As the criminal case was pending, Angela lobbied local lawmakers to protect her daughter from any future harm at the hands of her rapist. *Id.*

<sup>99</sup> See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding a state must support its allegations in a termination proceeding by at least clear and convincing evidence); but see *Stewart v. Stewart*, 521 N.E.2d 956, 961 (Ind. Ct. App. 1988) ("[O]ur supreme court has very recently held that where parental rights are being terminated, and the termination is revocable, the preponderance of the evidence standard is appropriate. . .").

<sup>100</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) (relaying the federal government's findings regarding rape victims who conceive a child and the lack of protections for these rape survivors); see also N.J. STAT. ANN. § 9:2-4.1(a) (2016) (prohibiting the award of custody or visitation to a convicted rapist except upon a showing by clear and convincing evidence that it is in the best interests of the child); WASH. REV. CODE § 13.34.132 (2015) (giving the court discretion to decide whether or not to terminate custody, even when the father is convicted of the rape that resulted in the conception of the child).

to protect rape victims who keep their child.<sup>101</sup> More specifically, the Act grants additional funding to states that comply with its requirements.<sup>102</sup> President Obama signed the bipartisan Act into law on May 29, 2015.<sup>103</sup> This Act helps fund services for rape victims, including counseling under the Violence Against Women Act, which was designed to end violence against women.<sup>104</sup>

E. *Indiana's Attempts to Pass Legislation*

In Indiana, legislation was introduced in 2012 and again in 2014 that applied to rape victims who chose to keep their child.<sup>105</sup> After

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<sup>101</sup> See H.R. 1257 (finding that several women choose to raise their child conceived through rape and the clear and convincing evidence standard is used in most termination proceedings throughout the United States and its territories). The Act also acknowledges that forcing rape victims to interact with their rapists can result in “traumatic psychological effects on the survivor, making it more difficult for her to recover.” *Id.* Based on this finding, Congress concluded that these traumatic effects can negatively influence a rape victim’s ability to raise her child. *Id.*

<sup>102</sup> See *id.* (providing an incentive for states to adopt legislation that utilizes the clear and convincing evidence standard). Indiana does not provide any funding to support programs for sex-crime victims. Kenney, *supra* note 22. Currently forty-three Indiana counties lack sufficient services for victims, and the state as a whole faces a backlog in untested rape kits. *Id.* See Stacy Telcher Khadaroo, *With New US Law, More Funding to Protect Women Who Have Children after Rape*, CHRISTIAN SCI. MONITOR (June 4, 2015), <http://www.csmonitor.com/USA/Politics/2015/0604/With-new-US-law-more-funding-to-protect-women-who-have-children-after-rape> [<https://perma.cc/D6JP-WAH7>] (hoping additional funding will encourage states to adopt or reform current legislation to include the clear and convincing evidence standard).

<sup>103</sup> See Khadaroo, *supra* note 102 (highlighting the Rape Survivor Child Custody Act (“Act”) was included in the Justice for Victims of Trafficking Act, which was passed to help victims of sex trafficking); Curry, *supra* note 97 (declaring a victory for rape victims and victim advocacy groups who now believe this Act will encourage states to strip a rapist of parental rights).

<sup>104</sup> See Khadaroo, *supra* note 102 (claiming additional funding is needed because over one-third of support programs for rape victims have waiting lists). In 1994, Congress passed the Violence Against Women Act (“VAWA”) to hold offenders accountable and to provide services for the victims of domestic and sexual violence. *History of the Violence Against Women Act*, LEGAL MOMENTUM (2015), <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/YA2M-PU9P>]. See *id.* (recognizing the impact that domestic and sexual violence has on its victims after women’s groups claimed that states had failed to provide enough protections for these victims). VAWA strengthened the response to violence with new legislative provisions that ban states from charging victims for their sexual assault examinations and ensure that law enforcement officers are properly trained to handle domestic and sexual violence cases. *Id.*

<sup>105</sup> See S.B. 0190, 117th Gen. Assemb., Reg. Session (Ind. 2012) (ordering the “legislative council to assign the child custody and support advisory committee the task of reviewing and studying the issue of the denial of parenting rights to a person convicted of rape”). This bill went through several versions, including one that required a conviction and one that did not. See *id.* (requiring a conviction to terminate parental rights of rapists); S.B. 0190, 117th Gen. Assemb., Reg. Session, digest (Ind. 2012) (using the clear and convincing evidence



disagreements in 2012 over what standard of proof to use, the bill was sent to a legislative study committee and never resurfaced.<sup>106</sup> The 2014 legislation proposed the termination of parental rights by clear and convincing evidence, but it never came up for a vote.<sup>107</sup> After pushing this legislation for five years and facing several roadblocks, State Senator Ed Charbonnea from Valparaiso, Indiana renewed his efforts to terminate a rapist's parental rights in 2015.<sup>108</sup> Charbonnea's plan utilizes the clear and

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standard to terminate rapists' parental rights). In the end it was reduced to a simple recommendation, which expired on December 31, 2012. S.B. 0190. See also H.B. 1261, 119th Gen. Assemb., Reg. Session (Ind. 2015) (terminating the parent-child relationship upon a showing by clear and convincing evidence that the father raped the mother, and that terminating the parent-child relationship would be in the best interests of the child).

<sup>106</sup> See S.B. 0190 (assigning the committee the task of reviewing and studying legislative options that will terminate the parent-child relationship of a rapist); Dan Carden, *Denying Rapists Parental Rights Snarls Panel*, NWI TIMES (Aug. 22, 2012), [http://www.nwitimes.com/news/local/govt-and-politics/denying-rapists-parental-rights-snarls-panel/article\\_36ce9105-409a-561f-bd7f-c200be5b5e00.html](http://www.nwitimes.com/news/local/govt-and-politics/denying-rapists-parental-rights-snarls-panel/article_36ce9105-409a-561f-bd7f-c200be5b5e00.html) [<https://perma.cc/2CH3-A5UF>] [hereinafter Carden, *Denying Rapists*] (noting the Committee had "more questions than answers" regarding the legislation, which divided the lawmakers and prevented legislation from getting passed). State Senator Ed Charbonneau, R-Valparaiso, persuaded a group of lawmakers that something needed to be done to prevent rape victims from having to fend off custody battles from their rapists. *Id.* The lawmakers could not decide what standard of proof should be utilized, who could actually seek termination of parental rights, and what to do about rape within marriage. *Id.* In addition, questions were raised about whether to require a rapist to pay child support after denying visitation rights, and whether applying the best interests of the child standard might actually call for awarding visitation or custody to the rapist father. *Id.* In the end, the committee found that existing laws "almost always deny contact between a rapist and a child produced by a forced sex act." *Id.* (emphasis added).

<sup>107</sup> See H.B. 1261 (showing the proposed legislation was referred to a committee and never resurfaced). The clear and convincing evidence standard was, and still is, controversial, and disagreements over this standard and uncertainty over how many fathers this legislation would impact prevented this bill from passing. Carden, *Denying Rapists*, *supra* note 106.

<sup>108</sup> See Dan Carden, *Region Lawmakers Will Try Again to Deny Parental Rights to Rapists*, NWI TIMES (Oct. 14, 2015), [http://www.nwitimes.com/news/local/govt-and-politics/region-lawmakers-will-try-again-to-deny-parental-rights-to/article\\_8fa06626-230d-5b9c-8da5-f842be26160e.html](http://www.nwitimes.com/news/local/govt-and-politics/region-lawmakers-will-try-again-to-deny-parental-rights-to/article_8fa06626-230d-5b9c-8da5-f842be26160e.html) [<https://perma.cc/E4Y6-LDCA>] [hereinafter Carden, *Region Lawmakers*] (working with Indiana State Representative Hal Slager, R-Schererville, to propose and pass comprehensive legislation that will prevent rapists from obtaining custody of their child conceived through rape). Senator Charbonneau and Representative Slager have worked for over five years to pass legislation that will deny custody to rapists. *Id.* They both have new hope for the bill's success now that the House Majority Leader Jud McMillin resigned after the release of a sexually explicit cell phone video. *Id.* McMillin and other legislators would often challenge Senator Charbonneau and Representative Slager's plan to use the clear and convincing evidence standard instead of requiring a criminal conviction. *Id.* McMillin claimed it was unfair to deny an accused rapist custody without requiring a conviction. *Id.* In 2012, McMillin prevented a proposal by asserting that an exemption for marital rapes should be included in the legislation. *Id.* In 2016, proposed legislation terminating the parental rights of rapists became public law and it went into effect on July 1, 2016. *House Bill 1064*, IND. GEN. ASSEMB. (2016), <https://iga.in.gov/legislative/2016/bills/house/1064#> [<https://perma.cc/HJ88-DU49>].



convincing evidence standard to terminate the parental rights of rapists.<sup>109</sup> It requires a finding that termination would be in the best interests of the child.<sup>110</sup> In addition, the rape victim must file a petition to terminate her rapist's parental rights within six months of giving birth.<sup>111</sup> If the victim is under eighteen years old, the victim would have two years after turning eighteen to terminate her rapist's parental rights.<sup>112</sup> This timeline aims to encourage women to report their rape and to discourage women from falsely reporting rape in divorce proceedings to gain full custody of their child.<sup>113</sup> Several victims groups oppose this timeline stating it unnecessarily restricts a rape victim's ability terminate her rapist's parental rights.<sup>114</sup> Governor Mike Pence signed this legislation into law, which took effect on July 1, 2016.<sup>115</sup>

<sup>109</sup> See Carden, *Region Lawmakers*, *supra* note 108 (utilizing a standard lower than required in criminal proceedings for parental termination proceedings). Senator Charbonneau and Representative Slager wish to use this lower standard to protect as many rape victims as possible, and requiring a conviction would limit the number of women who could deny their rapist custody. *Id.*

<sup>110</sup> See *id.* (requiring the judge to agree that ceasing the father's contact with the child would be in the child's best interest). Legislators in support of this bill believe that keeping rapists away from their victim's child might prevent additional rapes. *Id.*

<sup>111</sup> See Dan Carden, *House Votes to Deny Parental Rights to Rapists*, NWI TIMES (Jan. 25, 2016), [http://www.nwitimes.com/news/local/govt-and-politics/house-votes-to-deny-parental-rights-to-rapists/article\\_852ff94b-4a19-52b5-8fa5-5a48e1b0da62.html](http://www.nwitimes.com/news/local/govt-and-politics/house-votes-to-deny-parental-rights-to-rapists/article_852ff94b-4a19-52b5-8fa5-5a48e1b0da62.html) [<https://perma.cc/G22F-72KB>] [hereinafter Carden, *House Votes*] (concluding that reporting rapes quicker is beneficial for both parties).

<sup>112</sup> See *id.* (giving a minor an additional two years after reaching the age of majority to petition the court to terminate parental rights). Representative Slager believes this bill is a good compromise between rape victims and parental rights advocates. *Id.* The legislation is co-sponsored by Representative Ed Soliday, R-Valparaiso, and Representative Christina Hale, D-Indianapolis. *Id.*

<sup>113</sup> See *id.* (claiming that in dealing with "this issue" quickly, the state preserves evidence and promotes fairness). However, some women wait years to report their rape because they do not feel safe coming forward right after being raped. Gray, *supra* note 33. In addition, when a woman does not report being raped immediately, people often mistake the victim's hesitancy for dishonesty. *Id.* Similar legislation has stalled in the past because of concerns over false rape reports within marriage. See Michelle Ye Hee Lee, *The Truth about a Viral Graphic on Rape Statistics*, WASH. POST (Dec. 9, 2014), <https://www.washingtonpost.com/news/fact-checker/wp/2014/12/09/the-truth-about-a-viral-graphic-on-rape-statistics/> [<https://perma.cc/YRN6-TJ8A>] (discovering up to seven percent of rape allegations are classified as false).

<sup>114</sup> See Carden, *House Votes*, *supra* note 111 (demonstrating the backlash among victim's advocates groups over this provision of the proposed legislation). However, several legislators believe that the benefits of this provision outweigh the negative consequences some rape victims might face if they do not report their rape immediately. *Id.*

<sup>115</sup> See Dan Carden, *More Than 200 New Laws Win Pence Approval*, NWI TIMES (Mar. 28, 2016), [http://www.nwitimes.com/news/local/govt-and-politics/more-than-new-laws-win-pence-approval/article\\_64cc5e1b-b025-56a0-9e13-a8c1ed7f8f28.html](http://www.nwitimes.com/news/local/govt-and-politics/more-than-new-laws-win-pence-approval/article_64cc5e1b-b025-56a0-9e13-a8c1ed7f8f28.html) [<https://perma.cc/EP23-5AAB>] (indicating a rape victim does not need a conviction to have her rapist's parental rights terminated).

The trauma of rape can be heightened when a rape victim becomes pregnant.<sup>116</sup> This added trauma has led several states to pass legislation that protects rape victims from having to share their child with their rapists.<sup>117</sup> However, Indiana's legislation fails to fully protect the rape victim's ability to raise her child independent from her rapist.<sup>118</sup>

### III. ANALYSIS

Indiana should protect rape victims instead of protecting the parental rights of rapists.<sup>119</sup> Allowing rapists to assert control over their victims interferes with a mother's ability to raise her child.<sup>120</sup> In several states, if a rape victim chooses to raise her child conceived through rape, her rapist may assert his parental rights.<sup>121</sup> Indiana should not give rapists this right.<sup>122</sup> As such, Indiana should amend its statute to prevent courts from focusing primarily on due process requirements instead of the needs of rape victims and their children.<sup>123</sup> While Indiana is one of the few states that have statutory protections in place for rape victims, its legislation

<sup>116</sup> See *supra* Part II.A (illustrating the mental, emotional, and physical side effects of rape and how these symptoms can increase if a victim becomes pregnant).

<sup>117</sup> See *supra* Part II.D (providing a detailed look into the solutions several states have come up with that sever the ties between a rapist and his victim).

<sup>118</sup> See *supra* Part II.E (describing Indiana's failed attempts to follow the lead of other states in passing legislation that terminates a rapist's parental rights).

<sup>119</sup> See *infra* Part III.A (highlighting the need for Indiana to adopt legislation that defends rape victims against harassment at the hands of their rapists, which also protects the children of rape victims).

<sup>120</sup> See Prewitt, *supra* note 1, at 831 (demonstrating how rape affects women; one rape victim stated: "I was raped . . . and the rapist has been taking me to court for [five] years for the right to see his son . . . I am being tormented to death. I just want to die . . .").

<sup>121</sup> See, e.g., Marcia Oddi, *Ind. Law—No Rights for Rapists' Editorial Calls for New Law*, IND. L. BLOG (Sept. 3, 2012), [http://indianalawblog.com/archives/2012/09/ind\\_law\\_no\\_righ.html](http://indianalawblog.com/archives/2012/09/ind_law_no_righ.html) [<https://perma.cc/DV4X-JQFD>] (claiming women in Indiana who become pregnant through rape can be victimized again by their rapists when rapists seek custody of their victim's child). "It's revolting, but rapists retain their rights in [several] states, including Indiana." *Id.*

<sup>122</sup> See *id.* (analyzing Indiana's failed attempt to pass legislation due to lawmakers' inability to reach a perfect solution). In dealing with the problem Indiana lawmakers have in finding a perfect solution, "[the legislature] should not allow the perfect to be the enemy of the good when it comes to better protection of rape victims. Indiana needs a law that at least gives judges the authority to terminate the parental rights of rapists." *Id.*

<sup>123</sup> See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (discussing how a parent's liberty interest in the care and custody of his or her child is one of the oldest liberty interests); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the Court has "not attempted to define with exactness the liberty . . . guaranteed [under the Due Process Clause, that] without doubt it denotes . . . the right of the individual to . . . bring up children"); *Tillotson v. Clay Cty. Dep't of Family & Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002) (examining the private interests in termination cases and stating that the relationship between parent and child is one of the most valued relationships in our society).

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gives judges too much discretion.<sup>124</sup> Moreover, Indiana's current legislation unreasonably limits the amount of time mothers have to file a termination petition.<sup>125</sup> To fully protect rape victims from additional trauma caused by their rapists, Indiana must enact legislation that prevents rapists from asserting any parental rights regardless of whether a mother meets the 180-day deadline.<sup>126</sup> This legislation should not require a criminal conviction to terminate a rapist's parental rights.<sup>127</sup> Instead, it should allow courts to terminate parental rights by using the clear and convincing evidence standard, similar to Indiana's current legislation.<sup>128</sup> Furthermore, the legislation should leave the rapist's financial obligation to his child intact by requiring the rapist to pay child support.<sup>129</sup>

Part III analyzes Indiana's failed attempts to protect rape victims.<sup>130</sup> First, Part III.A argues Indiana needs legislation that fully protects rape

<sup>124</sup> See IND. CODE § 31-19-9-8 (2016) (“[c]onsent to adoption . . . is not required from any of the following . . . the biological father of a child born out of wedlock who was conceived as a result of: a rape for which the father was convicted . . .”). This language is limited to children born out of wedlock; as such, this statute leaves no protection to a child conceived through rape between a husband and wife. *Id.* See also *House Bill 1064*, *supra* note 108 (forcing judges to implement the best interests of the child standard).

<sup>125</sup> See *id.* (imposing an arbitrary deadline a rape victim has to follow before terminating her rapist's parental rights). The deadline requirement becomes a problem because most rape victims do not report their rapes; therefore, most victims may not be able to utilize this legislative protection because if they come forward they may miss the deadline. Prewitt, *supra* note 1, at 837.

<sup>126</sup> See *infra* Part IV (laying out legislation that Indiana should adopt to prevent rapists from asserting any custody of his victim's child or any control over his victim's life).

<sup>127</sup> See *infra* Part IV (proposing legislation that does not require a rape conviction to terminate parental rights).

<sup>128</sup> See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that a clear and convincing evidence standard “adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.”); § 31-34-12-2 (mandating that courts use the clear and convincing evidence in termination proceedings); see also *Fields*, *supra* note 2 (illustrating the clear and convincing evidence standard applies to most parental rights termination cases already, so extending that to rape custody cases would be appropriate). Rebecca Kiessling, a family lawyer, has handled several rape custody cases, and she believes that states that require a conviction place an overwhelming burden on rape victims and their children. *Fields*, *supra* note 2. She stated that if a rapist is convicted, his parental rights should be terminated automatically. *Id.* She then suggested that if there is no conviction, states should use the clear and convincing evidence standard, which is already used in all other parental termination proceedings. *Id.*

<sup>129</sup> See Margot E. H. Stevens, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865, 889-90 (2014) (“This may permit a woman to be more financially capable of raising the child without having to share custody with her rapist—making the choice to keep the child possible for more women.”).

<sup>130</sup> See Prewitt, *supra* note 1, at 829 (claiming several states have no protections in place for rape victims who chose to keep their children); Liebelson & Brownstone, *supra* note 30 (suggesting one rape victim believed that “no court on earth would allow her alleged

victims from additional exposure to their attackers.<sup>131</sup> Second, Part III.B examines how current legislation is limited in scope, and as a result, it provides weak and often unusable protections for rape victims.<sup>132</sup> Finally, Part III.C evaluates the possibility of leaving the rapist's financial obligations to his child intact after terminating his parental rights.<sup>133</sup>

A. *There Is a Need for Legislation That Protects Rape Victims and Their Children from Rapists*

Women who become pregnant through rape often choose to keep their child, and Indiana should not allow rapists to take advantage of their victims' decisions.<sup>134</sup> Since rapists can further torment their victims through lengthy custody battles, Indiana must be proactive and enact legislation that prevents rapists from asserting control after their forceful and intrusive criminal acts.<sup>135</sup> Several states do not have any laws that terminate a rapist's parental rights, and the states that do have such laws do not go far enough to protect the rape victim.<sup>136</sup> Therefore, in some states, courts can award convicted rapists joint custody of their children who were conceived through violent crimes.<sup>137</sup> After being raped and

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rapist . . . to have custody rights," but due to the lack of legislation in her state, her lawyer informed her that "her case wasn't a slam dunk").

<sup>131</sup> See *infra* Part III.A (stating the pressing need to pass legislation that allows mothers to petition the court to terminate the parental rights of their rapists to prevent suffering additional trauma); Bahadur, *supra* note 34 (highlighting a rape victim's two-year plight to fight off her attacker's custody battle in court).

<sup>132</sup> See *infra* Part III.B (pointing out the inadequacy of current state legislation by analyzing its basic flaws while proposing simple statutory fixes).

<sup>133</sup> See *infra* Part III.C (examining why most mothers could benefit from additional financial assistance and that rapists should be held financially accountable for their children conceived through their criminal acts).

<sup>134</sup> See Prewitt, *supra* note 1, at 828–29 (discovering rape victims conceive with "significant frequency," but few states have passed laws to prevent rapists from obtaining the same privileges as a man who fathered a child through consensual sex). Several studies found that at least one-third of rape victims choose to keep their child. *Id.*

<sup>135</sup> See *infra* Part IV (proposing legislation that Indiana should adopt to prevent rapists from asserting any custody of their victim's child and further tormenting their victims); Carden, *Denying Rapists*, *supra* note 106 (stating Indiana lawmakers have tried and failed to pass legislation that makes it easier for rape victims to deny their rapists custody or visitation rights).

<sup>136</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) (concluding only six states allow rape victims to terminate their rapist's parental rights by proving that their child was conceived through rape using the clear and convincing evidence standard); Bahadur, *supra* note 34 ("Right now, a woman doesn't have the right—across America—to terminate her rapist's parental rights.").

<sup>137</sup> See, e.g., Fields, *supra* note 2 (discussing the story of a fourteen-year-old rape victim who became pregnant after being raped by a twenty-year-old). The court sentenced her rapist to sixteen years of probation and required him to pay child support and comply with any family court orders. *Id.* After being forced to pay child support, the rapist filed for child

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experiencing the mental and emotional effects of rape, a rape victim should not have to suffer through several years of custody hearings against her rapist.<sup>138</sup>

Indiana should prevent these tortuous custody battles that force rape victims to have significant additional contact with their rapists because these hearings will further traumatize victims.<sup>139</sup> As some rape victims suffer from PTSD or RTS, this preventable distress interferes with the mother's ability to live a normal life.<sup>140</sup> The symptoms of PTSD combined with other trauma-induced disorders can negatively impact the mother's ability to raise her child.<sup>141</sup> If a rape victim does not have access to counseling services, her symptoms could worsen to the point where a court would deem her unfit to raise her child.<sup>142</sup> Indiana should not let a rapist take advantage of a woman, leave her with the decision of whether to raise her child, and then have her child taken away because she continues to suffer from the trauma of her rape.<sup>143</sup> These symptoms are

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visitation rights and told his rape victim he would "ditch his custody request if she abandoned her rape allegations." *Id.*

<sup>138</sup> See Bahadur, *supra* note 34 (finding at least one-third of rape victims who become pregnant go on to raise their children, which could amount to over 10,000 custody battles every year involving rapists asserting their parental rights over their victims); see also S.J. v. L.T., 727 P.2d 789, 791-95 (Alaska 1986) (holding parental rights cannot be terminated if a child is conceived during an illegal sexual relationship because Alaska did not have a statutory procedure that spoke to this issue).

<sup>139</sup> See H.R. 1257 ("A rapist pursuing parental or custody rights forces the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, making it more difficult for her to recover.").

<sup>140</sup> See *id.* (claiming the traumatic effects of rape can negatively impact a rape victim's ability to raise a healthy child); Kilpatrick, *supra* note 41 (finding about one-third of all rape victims develop PTSD); Garrison, *supra* note 41, at 602 (explaining RTS is "the stress response pattern of the victim following forced, non-consenting sexual activity. This rape trauma syndrome of somatic, cognitive, psychological, and behavioral symptoms is an active stress reaction to a life-threatening situation"). RTS cannot be used to diagnose whether a victim was actually raped. Garrison, *supra* note 41, at 602. It is only an explanation of how a woman may act emotionally and psychologically before, during, and after being raped. *Id.*

<sup>141</sup> See *Post-Traumatic Stress Disorder (PTSD)*, RAINN: RAPE, ABUSE, & INCEST NAT'L NETWORK (2009), <https://rainn.org/effects-of-sexual-assault/post-traumatic-stress-disorder> [<https://perma.cc/EW9W-9HAL>] (listing the three main symptoms of PTSD as re-experiencing the traumatic event, avoiding situations associated with the traumatic event or "losing interest in the activities you used to enjoy," and hyper-arousal, which includes "feeling 'on edge' all of the time, having difficulty sleeping, or being prone to sudden outbursts"); see also Kessler, *supra* note 95, at 208 (finding ninety-four percent of rape victims suffer from rape related PTSD immediately after the rape).

<sup>142</sup> See *The Effects of Trauma Do Not Have to Last a Lifetime*, *supra* note 13 and accompanying text (showing how rape victims can suffer from PTSD, which leaves them unable to perform basic functions). However, cognitive-behavioral therapy is very effective at combatting symptoms of PTSD, especially in rape victims. *Id.*

<sup>143</sup> See Prewitt, *supra* note 1, at 833 (demonstrating that forcing a rape victim to interact with her rapist might affect the victim's ability to raise her child). If a woman suffering from

likely to be more prevalent and prolonged when the rape victim is forced to confront her attacker in court and throughout her child's life.<sup>144</sup> Instead of allowing these stressful proceedings to take place, Indiana should prevent a rapist from asserting *any* parental rights that stem from his criminal act.<sup>145</sup>

Giving rapists the right to assert their parental rights gives them the ability to use their own child as a bargaining chip in legal proceedings.<sup>146</sup> If Indiana does nothing to stop rapists from asserting control over their victim's child, rapists will continue to harass their victims indefinitely.<sup>147</sup> When faced with the possibility of joint custody and a lifetime of harassment from their attackers, some women will decide neither to report the rape nor pursue criminal charges with the prosecutor's office.<sup>148</sup> Rape is already the most underreported crime, and the absence of protections for pregnant rape victims may cause this number to decrease further.<sup>149</sup> The outcome of the victim not reporting her rape is a win-win

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RTS or PTSD wants to improve she must avoid anything that reminds her of the rape. *Id.* at 834. This includes avoiding her attacker. *Id.* If a rape victim is unable to get away from her attacker, she may experience the need to withdraw socially, which might lead to her showing no interest in her child. *Id.*

<sup>144</sup> See *id.* (revealing how women may turn to drugs or alcohol to cope with their untreated symptoms, and these symptoms will only increase if rape victims are unable to escape their attacker). "Unfortunately, escaping from these triggers may range from difficult to impossible because, through the exercise of parental rights, most rapists are able to interact frequently with their rape-conceived children and, as a result, their victims." *Id.* at 834-35.

<sup>145</sup> See Fields, *supra* note 2 (stating the "primary goal should be to prevent further harm to the rape survivor and child in these circumstances," but states do not always reach that outcome); Hall & Spurlock, *supra* note 36 (listing Indiana as one of the worst states for rape victims because it restricts access to abortions for all women without offering an exception for rape victims).

<sup>146</sup> See Prewitt, *supra* note 1, at 835 (claiming even rapists who do not actually want custody of their child will seek out these rights to assert control over their victims). Therefore, "the child becom[es] a pawn in the predator's power game." *Id.* See also Chase, *supra* note 90 (suggesting rapists can assert power over their victims by threatening to file a parental rights petition).

<sup>147</sup> See Liebelson & Brownstone, *supra* note 30 (citing the testimony of several women before a Senate committee who all claimed that their rapists continued to harass them when their rapists asserted their parental rights). Testimony of rape victims about further harassment led Maryland State Senator Raskin to state, "I think it's scandalous that we would expose women to the possibility of continued abuse by a sexual aggressor." *Id.*

<sup>148</sup> See Shauna Prewitt, *Raped, Pregnant and Ordeal Not over*, CNN (Aug. 23, 2012), <http://www.cnn.com/2012/08/22/opinion/prewitt-rapist-visitation-rights/index.html> [<https://perma.cc/HVA9-NVRU>] ("When faced with the choice between a lifetime tethered to her rapist or meaningful legal redress, the answer may be easy, but it is not painless."). "For the sake of her child, the woman will sacrifice her need to see her once immensely powerful perpetrator humbled by the court." *Id.*

<sup>149</sup> See Wells & Motley, *supra* note 31, at 128-29 and accompanying text (demonstrating how rape is severely under-prosecuted); see also Payne & Rowlands, *supra* note 1 ("If we knew that this possibility loomed on the horizon, that we could spend the rest of [our] lives



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situation for the rapist, as he not only avoids being financially responsible for his child, but he also evades the possibility of facing criminal charges for his criminal act.<sup>150</sup> This result forces a rape victim to abandon seeking justice to prevent her rapist from asserting any authority over her child.

No state should allow a rapist to have parental rights over his victim's child if the victim chooses to keep her baby.<sup>151</sup> Rape victims should not suffer the consequences of their decision to keep their child – but Indiana entices victims to keep their child by discouraging abortions, while at the same time, providing limited protections to prevent a rapist from asserting his parental rights.<sup>152</sup> Without a statutory solution, rapists are

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tethered to our attackers because of our decision to have our children, would we have made the same choice?”).

<sup>150</sup> See *supra* Part II.B (discussing child support requirements). However, in some situations, the wrongdoer can actually benefit from receiving child support. *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1274–75 (Kan. 1993). Colleen, a sixteen-year-old babysitter began a sexual relationship with Shane, the twelve-year-old child she was watching. *Id.* at 1274. Colleen became pregnant when Shane was thirteen years old. *Id.* Colleen, originally charged with statutory rape, plead down to contributing to a child's misconduct. *Id.* The Kansas Department of Social and Rehabilitation Services (“SRS”) filed a petition claiming that Shane was the father of Colleen's daughter and that he had to reimburse SRS for the assistance it had provided to Colleen. *Id.* at 1274–75. The Court determined that Shane was the father and found that Shane had a duty to support his daughter financially. *Id.* Although Shane was legally too young to consent to sex, the court ruled that Shane's consent was irrelevant and ordered him to pay fifty dollars in child support each month and to reimburse SRS \$7,068 for medical and miscellaneous child care expenses. *State ex rel. Hermesmann*, 847 P.2d at 1275. The court stated that the “State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent.” *Id.* at 1279. Between the father, mother, and the child, the child is “the only truly innocent party,” and the court claimed that the child was entitled to financial support from both parents regardless of the parents' ages. *Id.*

<sup>151</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) (“Men who father children through rape should be prohibited from visiting or having custody of those children.”).

<sup>152</sup> See *id.* (“Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.”); see also Hall & Spurlock, *supra* note 36 (demonstrating how Indiana has restricted access to abortions, even for rape victims). Other states have tried to discourage rape victims from having abortions. Eddie Velosa, ‘Raped’ by the Law: Pregnant Victims Fight for Their Rights, RYOT (Sept. 10, 2013), <http://www.ryot.org/raped-by-the-law/349729> [<https://perma.cc/NV8G-T8C2>]. In 2011, DeGraaf, a pastor and Kansas Congressman, compared women who conceive during rape to getting a flat tire. *Id.* During a debate in the House over whether or not to exclude rape related pregnancies and abortions from a health insurance bill, DeGraaf claimed that women should “plan ahead” for such circumstances. *Id.* He wanted to prevent insurance from covering abortions for rape victims, and he ended his argument by stating that he keeps a spare tire in his car and has life insurance; therefore, women should also have to plan ahead for the unexpected. *Id.* Legislators promoting these restrictions on abortion for rape victims while using harmful rhetoric undermine the rights of rape victims and only highlight society's misconceptions of how “real” rape victims should act. Fields, *supra* note

entitled to the same fundamental parental rights as any other father, which the courts are reluctant to terminate.<sup>153</sup> Proper legislation will prevent a rapist from causing more emotional or physical harm to his victim that would also negatively impact the victim's child.<sup>154</sup> In addition, a rapist father could directly harm his victim's child through the same acts that resulted in the child's conception.<sup>155</sup> When rapists continue to sexually abuse other victims, their abuse becomes more destructive,

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2. See *id.* (discussing how these misconceptions lead legislators to believe that all rape victims would choose to abort their child, making legislation that pertains to victims who keep their child unnecessary).

<sup>153</sup> See *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting) ("Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members."); *Neal v. Dekalb Cty. Div. of Family & Children* 796 N.E.2d 280, 285 (Ind. 2003) (finding the parent-child relationship is one of the most important bonds in our society).

<sup>154</sup> See H.R. 1257 ("These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child."); see also Prewitt, *supra* note 1, at 833-34 (concluding women who have been raped often suffer from PTSD or RR-PTSD, and this might negatively affect a mother's parenting abilities). Some rape victims also withdraw from the world around them, and this might cause them to neglect their children socially. *Id.* See *The Trauma of Victimization*, NAT'L CTR. FOR VICTIMS OF CRIME (2008), <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization#ptsd> [<https://perma.cc/P38A-AW3E>] (listing symptoms of PTSD, including: "extreme tension and anxiety; irritability/outbursts of anger; . . . prolonged feelings of detachment or estrangement of others . . .").

<sup>155</sup> See Rowena Slusser, *My Father Raped His Daughter. And I Am Their Baby. My Story.*, LIFESITE (May 25, 2015), <https://www.lifesitenews.com/opinion/i-was-conceived-when-my-father-raped-his-daughter.-should-i-have-been-abort> [<https://perma.cc/PX93-6JYC>] (recounting the circumstances surrounding a child conceived through rape). Becca's father molested her throughout her childhood, and when she turned fifteen, she gave birth to her father's child. *Id.* Becca's child, Rowena, also fell prey to her father's sexual abuse. *Id.* The same man that raped her mother was now molesting her. *Id.* Rowena was physically and sexually abused throughout her childhood. *Id.* Her mother finally moved out and took Rowena with her. *Id.* However, Rowena's future step-father started sexually abusing Rowena, and when Rowena turned thirteen, she became pregnant by her step-father. Slusser, *supra* note 155. The pregnancy ended in miscarriage, and the step-father spent ten years in prison after Rowena's mother caught him in the act. *Id.* While not all rapists will reoffend, Becca's story demonstrates how some rapists continue to abuse their children in the same way they abused their children's mothers. *Id.*

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especially towards children.<sup>156</sup> Indiana's current legislation permits this additional abuse to occur.<sup>157</sup>

A person who has committed a violent criminal act and is willing to use his own child as a pawn is not acting in his child's best interests.<sup>158</sup> Accordingly, the law should not allow him to assert his parental rights.<sup>159</sup> Some states have come to this same conclusion, and they have acted appropriately to prevent any future harm to a rape victim or her child.<sup>160</sup> However, Indiana's current legislation does not fully carry out the state's objective to defend rape victims from suffering additional harm at the hands of their rapists.<sup>161</sup>

<sup>156</sup> See Wells & Motley, *supra* note 31, at 158 (demonstrating that while rapists do not have unusually high recidivism rates compared to other criminals, rapists are more likely to commit another rape); Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?*, WALL ST. J. (Jan. 24, 2008), <http://blogs.wsj.com/numbers/how-likely-are-sex-offenders-to-repeat-their-crimes-258/> [<https://perma.cc/6972-8JVR>] (finding that convicted rapists are more likely to re-offend immediately after being released, and these rapists are more likely to commit other violent crimes). This led one psychologist to argue "If we're concerned about violence generically, it's rapists we should be concerned about." Bialik, *supra* note 156.

<sup>157</sup> See *The Offenders*, RAINN (2009), <https://rainn.org/get-information/statistics/sexual-assault-offenders> [<https://perma.cc/RQU8-YBBT>] (explaining convicted rapists tend to become serial criminals). A rapist released from prison is 18.6% likely to be rearrested within three years for a violent offense, 14.8% for a property offense, 20.5% for a public-order offense, and 11.2% for a drug offense. *Id.* Granting custody to a rapist knowing that he is likely—46% of the time—to commit another crime is not in the child's best interest. *Id.* See Breiding et al., *supra* note 29 (discovering that several victims of sexual violence are first victimized at a young age). Almost half of women who reported they had been raped were raped before they turned eighteen. *Id.* Therefore, it is important to protect young victims from sexual violence or domestic violence at the hands of their rapist father, who has already committed a violent crime. *Id.*

<sup>158</sup> See Prewitt, *supra* note 1, at 835 (claiming a rapist can use his victim's child as a pawn to control the outcome of his own criminal case).

<sup>159</sup> See *infra* Part IV (discussing the proposed legislation that will prevent a rapist from asserting his parental rights).

<sup>160</sup> See Liebelson & Brownstone, *supra* note 30 (categorizing the states that have acted to prevent rapists from asserting any parental rights, and noting current efforts underway in other states without any protections); *but see* Bahadur, *supra* note 34 (stating Alabama, Maryland, and Kentucky are among the states that do not allow rape victims to terminate the parental rights of their rapists).

<sup>161</sup> See Liebelson & Brownstone, *supra* note 30 (listing the problems with current state legislation, including requiring a criminal conviction and legislation that only applies when the victim is a minor); Kessler, *supra* note 95, at 219 (detailing how criminal convictions are unlikely, especially in date rape cases because there are usually no witnesses, and DNA samples alone cannot prove that the sex was nonconsensual). This forces the prosecutor to rely on the testimony of the victim, who is often unable to recall the events if her rapist gave her date rape drugs. Kessler, *supra* note 95, at 219. As a result, a conviction is unlikely, even though DNA evidence may be available at trial. *Id.*

B. *Current Legislation is Inadequate to Properly Protect Rape Victims and Their Children*

Although some states have acted on the federal government's invitation to terminate the parental rights of rapists, most of the current legislation is flawed.<sup>162</sup> Legislation requiring a rape conviction is not feasible because most rapists are never convicted, so Indiana's legislation should not be limited in this way.<sup>163</sup> Statutes that give courts discretion in deciding when to limit or terminate parental rights can undermine the needs of rape victims and their children.<sup>164</sup> Meanwhile, most states have failed to carve out a child support exception, and thus, a court will dismiss the rapist's child support obligation when it terminates his parental rights.<sup>165</sup> Omitting this exception leaves the rape victim in a financially precarious situation, which might cause her to put her child's financial needs above her own needs to be free from her rapist's control by allowing her rapist to have parental rights.<sup>166</sup> In addition, some states do not allow a parent to petition the court directly to terminate her rapist's parental rights.<sup>167</sup> This hurdle places further restrictions on the rights of rape victims who wish to prevent their rapists from asserting their parental

<sup>162</sup> See Bitar, *supra* note 51, at 287 (asserting most of the current legislation failed to "provide real protection to rape victims" mainly due to conviction requirements, statutes limited to adoption, and statutes that do not completely terminate parental rights).

<sup>163</sup> See Liebelson & Brownstone, *supra* note 30 (showing legislation that requires a conviction is not feasible, and this led to one senator trying to pass legislation that utilized the standard used in civil proceedings—preponderance of the evidence). Even when a rapist is convicted, the proceedings can take years, or like in one case, the perpetrator may not be arrested until six years after committing rape. Deitrich, *supra* note 31, at 1096–97.

<sup>164</sup> See Prewitt, *supra* note 1, at 858 (claiming that unless provisions are in place in states that do not require a criminal conviction, a rape victim "must be willing to gamble that the trial judge will exercise discretion in her favor").

<sup>165</sup> See also ROSEMARIE SKAINE, *PATERNITY AND AMERICAN LAW* 14 (2003) (demonstrating most single mothers do not receive child support); *but see* OR. REV. STAT. § 419B.510(2) (2016) (illustrating how Oregon made an exception to the general rule by requiring a rapist father to pay child support even after a court terminates his parental rights).

<sup>166</sup> See Eric Berkowitz, *Parental Rights for Rapists? You'd Be Surprised How Cruel the Law Can Be*, SALON (Oct. 4, 2015), [http://www.salon.com/2015/10/04/parental\\_rights\\_for\\_rapists\\_you\\_d\\_be\\_surprised\\_how\\_cruel\\_the\\_law\\_can\\_be/](http://www.salon.com/2015/10/04/parental_rights_for_rapists_you_d_be_surprised_how_cruel_the_law_can_be/) [<https://perma.cc/32Y8-B7WL>] (highlighting the circumstances under which a rape victim was forced to choose between collecting child support and allowing her rapist to have custody of her child or terminating his parental rights and not receiving any financial support from the father).

<sup>167</sup> See H.B. 1261, 119th Gen. Assemb., Reg. Session (Ind. 2015), FISCAL IMPACT STATEMENT (pointing out how a rape victim is generally powerless to initiate a termination proceeding). Generally, only an attorney from the Department of Child Services ("DCS"), a Guardian Ad Litem ("GAL"), or a Court Appointed Special Advocate ("CASA") can petition the court to terminate a parent-child relationship. *Id.*

rights.<sup>168</sup> While any protective legislation is better than nothing at all, most statutes do not preclude rapists from asserting parental rights over their children against their victims' wishes.<sup>169</sup>

Indiana must recognize that many rape victims are choosing to keep their children, and as such, this decision should be protected from the outside influence of rapists.<sup>170</sup> Overall, society assumes that rape victims will choose to abort their child or place their child up for adoption.<sup>171</sup> Based on this misconception, for a long time Indiana only offered protections that applied to rape victims who placed their child up for adoption.<sup>172</sup> Regardless, even Indiana's legislation for victims who choose adoption is limited, because it requires a rape conviction *and* the child has to be born out of wedlock.<sup>173</sup>

Legislation that requires a rape conviction before terminating parental rights prevents most rape victims from using the law to shield themselves from additional contact with their rapists.<sup>174</sup> Rape victims have little to no

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<sup>168</sup> See Liebelson & Brownstone, *supra* note 30 (describing one case where the mother was not allowed to petition the court directly, and this left her dependent on the state to file a petition). The mother may be put in a situation where her future, and the future of her child, is left up to the court. *Id.*

<sup>169</sup> See Berkowitz, *supra* note 166 (claiming current legislation is inadequate to the point that "these laws might just as well not exist").

<sup>170</sup> See, e.g., Oddi, *supra* note 121 (finding that, at the time the blog post was published, Indiana was one of several states that allowed rapists to retain parental rights, and the blog post argued Indiana needs to follow the lead of other states that have prevented a rapist from asserting parental rights over a child he conceived through rape).

<sup>171</sup> See Fields, *supra* note 2 (discussing how the lack of legislation fails the children when people assume that a "real" rape victim would choose to abort her child). This misconception leads individuals to believe that rape victims only view their child as an "extension of [their] rapist and as perpetuating the violence against her from within." Prewitt, *supra* note 1, at 848. Based on this thinking, even pro-life individuals are willing to carve out an exception to allow rape victims to abort their child. *Id.* Other legislatures are willing to extend legislative protections for women who choose to place their child up for adoption based on the unfounded belief that this is more believable than a rape victim raising her child. *Id.* at 859. This stereotype ignores the possibility that a rape victim might want to keep her child; therefore, she needs legislative protections if she makes that choice. *Id.* at 848.

<sup>172</sup> See IND. CODE § 31-19-9-8(a)(4)(A) (2016) (requiring the child to be born out of wedlock and a criminal conviction for rape before the mother can bypass the notice requirement for adoption).

<sup>173</sup> See *id.* (limiting the extent of this statute's reach by ruling out children born within a marriage, even if the father and husband is convicted of raping his wife); Kessler, *supra* note 95, at 214, 220, 228 (explaining the limitations of adoption only legislation in that it does not protect mothers who decide to keep their child).

<sup>174</sup> See Wells & Motley, *supra* note 31, at 128-29 (highlighting the minute percentage of rape victims who actually see their rapists tried and convicted); see also Fields, *supra* note 2 (explaining how court proceedings made one rape victim feel, who stated, "It's a horrible feeling I can't really describe . . . [t]he proceedings are traumatic. It brings up memories of the crime every time we have to go to court. I'm scared that the justice system is not protecting me or my child.").

control over the criminal charge and conviction process; therefore, allowing mothers to use the clear and convincing evidence standard means that rape victims do not have to rely on the justice system to convict their rapists.<sup>175</sup> Furthermore, prosecutors have the discretion to provide rapists with the option to plead guilty to a lesser charge, thereby escaping the limited statutory protections.<sup>176</sup> If a court terminates a rapist's parental rights, the rapist will not be able to use his child as a bargaining chip throughout the conviction process.<sup>177</sup> When the court terminates the parental rights of a rapist, the rape victim no longer has to fight for sole custody of her child or dread when her rapist will come knocking on her door to pick up her child.<sup>178</sup> A rape victim also will not have to depend on the criminal justice system to convict her rapist before being able to prevent him from asserting any control over her child.<sup>179</sup> To prevent this injustice, any new proposals Indiana considers should not focus on obtaining a rape conviction before terminating a rapist's parental rights.<sup>180</sup>

<sup>175</sup> See Prewitt, *supra* note 1, at 856 (discussing how prosecutors often allow a criminal offender to plead guilty to a lesser charge, and if the statute requires a rape conviction, a lesser charge would mean that the rapist could still pursue his parental rights); see also *Rape Victimization*, *supra* note 30, at 33 (finding that among reported rapes, only 46.2% resulted in conviction).

<sup>176</sup> See, e.g., *N.H. Prep School Graduate Gets a Year in Jail for Sexual Assault*, *supra* note 96 (revealing that a twenty-year-old prep school student, who was originally charged with rape, was eventually sentenced to one year for sexual assault). A student assaulted a fifteen-year-old female who was a freshman at the same school. *Id.* He did this as part of a tradition where students compete "to rack up sexual conquests." *Id.* The student would have been sentenced up to eleven years in prison if his charge was not dropped down to sexual assault. *Id.* If the student had become pregnant, any legislation that required a rape conviction would have been insufficient to terminate her rapist's parental rights because her rapist was only convicted of sexual assault. *Id.*

<sup>177</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, H.R. 1257, 114th Cong. (2015) ("Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.").

<sup>178</sup> See, e.g., Oddi, *supra* note 121 (quoting Glick, a former LaGrange County prosecutor, "a victim should not have to spend the next [eighteen] or [nineteen] years looking over their shoulder.").

<sup>179</sup> See, e.g., WIS. STAT. § 48.415(9) (2015) (allowing a rape victim to bypass the criminal conviction process by allowing her to present evidence at a fact-finding hearing to terminate her rapist's parental rights). This allows rape victims – whose rapist escaped a conviction – to personally access the justice system to deny her rapist any control over her child. Silver, *supra* note 10, at 531. In addition, the Wisconsin statute allows a mother to petition the court to terminate her rapist's parental rights without requiring her to give her rapist notice of her intentions. *Id.*

<sup>180</sup> See *infra* Part IV (taking into account the small percentage of rapes that end in a conviction to propose legislation that bypasses this predicament by not requiring a conviction before terminating a rapist's parental rights); see also Kessler, *supra* note 95, at 217–18 (stating laws that do not require a criminal conviction "allow victim mothers to seek protection even if there is not sufficient evidence to prove that the rape occurred beyond a reasonable doubt").



States that do not require a criminal conviction before terminating parental rights understand the impracticality of requiring a rape conviction and are promoting the well-being of rape victims.<sup>181</sup> States that choose to lower their standard to clear and convincing evidence will not violate any due process rights, but they will encourage rape victims to take a proactive role in preventing rapists from using their child against the victims.<sup>182</sup> If a state, such as Indiana, expands protections for rape victims who choose to keep their child, it should adopt this constitutionally approved standard of proof.<sup>183</sup> In doing so, the law will be available to protect more rape victims who never see their rapists tried and convicted.<sup>184</sup>

Because courts can be reluctant to terminate parental rights, legislation that mandates courts terminate the parental rights of a rapist will guide the courts in placing importance on the victim and her child, not the rapist father.<sup>185</sup> Indiana should seek to circumvent the court's discretion when it comes to sensitive parental rights cases involving a rapist and his victim, because its current legislation fails to do so.<sup>186</sup> Unfortunately, even if a rapist is convicted or the victim proves she was raped by clear and convincing evidence, some states, including Indiana,

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<sup>181</sup> See Fields, *supra* note 2 (claiming rape victims are protected by legislation that does not require a conviction because the standard is lower; therefore, more rape victims will be able to meet that standard); see also Doug Ross, *Rapists Shouldn't Have Parental Rights*, NWI TIMES (Oct. 23, 2015), [http://www.nwitimes.com/news/opinion/editorial/editorial-rapists-shouldn-t-have-parental-rights/article\\_c5ed7461-28d3-5f8d-8d2c-2cfd7833f367.html](http://www.nwitimes.com/news/opinion/editorial/editorial-rapists-shouldn-t-have-parental-rights/article_c5ed7461-28d3-5f8d-8d2c-2cfd7833f367.html) [<https://perma.cc/VV2C-6R6S>] (understanding rapists "are using the threat of asserting their parental rights to compel [their] victims to refuse to testify, or to accept plea bargains for shorter sentences," and all this does is submit the victim to continued contact with her rapist).

<sup>182</sup> See *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (holding "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process"). "We further hold that determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts." *Id.* See, e.g., WIS. STAT. § 48.415(9) (2015) (granting courts the power to terminate parental rights at a fact finding hearing if the child was conceived as a result of a sexual assault).

<sup>183</sup> See *Santosky*, 455 U.S. at 756 (mandating clear and convincing evidence as the standard of proof to use when the interests at stake in a proceeding are important and will result in more than the loss of money).

<sup>184</sup> See *supra* Part II.A (discussing how most women never see their rapists convicted, and this impacts how useful legislation is that requires a rape conviction).

<sup>185</sup> See Prewitt, *supra* note 1, at 857-58 (claiming that removing judicial discretion prevents courts from finding that a father's "sexual misconduct has no bearing on his ability to effectively parent and using the best interest standard to counsel in favor of denying termination").

<sup>186</sup> See *infra* Part IV (explaining how to eliminate judicial discretion by not including the best interests of the child standard in the proposed statute and mandating that courts terminate parental rights).

leave the ultimate decision to terminate custody to the courts.<sup>187</sup> If courts are allowed to exercise their discretion by refusing to terminate custody, then the rape victim once again faces the possibility of raising her child with her rapist.<sup>188</sup> By enacting a statute that mandate courts terminate a rapist's parental rights, rape victims will not worry about courts exercising their discretion and possibly awarding custody to a rapist because the courts believe that it is in the best interests of the child to be raised by two parents.<sup>189</sup>

Indiana's current legislation is a step in the right direction, but it does not protect rape victims who are hesitant about coming forward about the rape immediately.<sup>190</sup> The built-in deadline, meant to protect men from false rape allegations, forces victims to rush to court and face their attacker

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<sup>187</sup> See *Oberlander v. Handy*, 913 N.E.2d 734, 739 (Ind. Ct. App. 2009) ("The child's best interest is the paramount consideration in custody decisions and necessarily takes precedence over the parents' interests and desires."); see also N.J. STAT. ANN. § 9:2-4.1(a) (2016) (prohibiting custody or visitation except upon a showing by clear and convincing evidence that it is in the best interests of the child for custody or visitation rights to be awarded); WASH. REV. CODE § 13.34.132(4)(a) (2015) (giving the court discretion to decide whether to terminate custody even when the father is convicted of the rape that resulted in the conception of the child); but see *Fields*, *supra* note 2 (finding some courts overlook the best interests of the child when awarding custody to rapists). Some courts have "'gifted' the privilege of fatherhood to someone who was not only initially allergic to the idea, but was also . . . undeserving of the title." *Fields*, *supra* note 2. Such decisions involving the parental rights of rapists do not always take into account the wishes of the rape victim and the best interests of the child. *Id.*

<sup>188</sup> See *Prewitt*, *supra* note 1, at 858 (highlighting the importance courts place on the best interests of the child and the fact that courts can use this standard to award custody to a rapist).

<sup>189</sup> See IND. CODE § 31-14-13-2 (2016) (using the best interests of the child standard); *Prewitt*, *supra* note 1, at 858 ("A raped woman may face the real possibility of a trial judge determining that a father's sexual misconduct has no bearing on his ability to effectively parent and using the best interest standard to counsel in favor of denying termination."). If a state allows courts to take into account the best interests of the child, a rape victim has to face the possibility that the judge might decide to award custody to her rapist—even if her rapist is convicted. *Prewitt*, *supra* note 1, at 858. See also *Sawhill*, *supra* note 67 (suggesting children raised in a single-parent household suffer emotionally and physically more than children raised by two parents, which means that courts should seek to keep families united). However, *Sawhill* did not take into account children who were conceived through rape. *Id.* She did find that children raised by one parent are at greater risk of abuse, but children raised by two parents with one parent being a rapist would undoubtedly put a child at a higher risk of suffering abuse and neglect. *Id.* See also *Bialik*, *supra* note 156 (exploring the possibility that rapists are likely to reoffend); *Silver*, *supra* note 10, at 523 (finding courts believe that the best interests of the child usually include contact with both parents; therefore, courts prefer to award joint custody).

<sup>190</sup> See *ZILNEY & ZILNEY*, *supra* note 29, at 146 (reporting some victims feel embarrassed and ashamed after being raped, and therefore may not report their rape to authorities).

before their children are able to walk.<sup>191</sup> Heading to court to terminate her rapist's parental rights is typically not the first thought a victim has after making the decision to raise her rapist's child.<sup>192</sup> This arbitrary deadline will prevent rape victims from terminating their rapist's parental rights simply because Indiana may deem a rape victim as not being *proactive* enough.<sup>193</sup> Indiana cannot expect rape victims to be proactive, when its own criminal justice system fails to be proactive in prosecuting rapists.<sup>194</sup>

Under the proposed legislation, women still have to prove their case by clear and convincing evidence without the deadline to file; therefore, false allegations are unlikely to result in the termination of parental rights.<sup>195</sup> Eliminating the deadline will allow victims to come forward when they are ready, not just during the period of time Indiana deems women trustworthy.<sup>196</sup> At the same time, if a rapist does assert his parental rights later on, a victim will not be precluded from challenging her rapist's claim due to an arbitrary, state imposed deadline.<sup>197</sup>

Indiana's past legislative attempts and current legislation enacted to protect rape victims have failed to provide all of the protections that rape victims need and deserve.<sup>198</sup> Rape victims should have the right to fully exclude their rapists from their life.<sup>199</sup> By allowing rape victims to directly

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<sup>191</sup> See *House Bill 1064*, *supra* note 108 (forcing rape victims to declare they have been raped and file a petition to terminate their rapists' parental rights before their child is six-months old).

<sup>192</sup> See Kenney, *supra* note 22 (reporting some victims in Indiana come forward after the statute of limitations period expires, which is five years). One victim reported she had "so much self-blame [that she] didn't say anything for [sixteen] years." *Id.*

<sup>193</sup> See *House Bill 1064*, *supra* note 108 (preventing rape victims from petitioning the court to terminate their rapists' custody if they do not meet the 180-day deadline).

<sup>194</sup> See Kenney, *supra* note 22 (discussing Indiana's failures to protect rape victims, including not funding services for victims of sex crimes, having a statute of limitations for rape, and failing to prevent a backlog in testing rape kits). If Indiana fails to convict a rapist by the time his child is six months old, the rape victim might have to present clear and convincing evidence of the rape to terminate her rapist's parental rights. See *House Bill 1064*, *supra* note 108 (indicating a rapist's relationship with his child may be terminated upon a petition filed within 180 days of the child's birth).

<sup>195</sup> See *id.* (requiring a rape victim to prove she has been raped and the child was a result of that rape by clear and convincing evidence before a court can terminate a father's parental rights).

<sup>196</sup> See Kenney, *supra* note 22 (claiming that among the twenty-five percent of rape victims that do come forward, some rape victims take decades before they report being raped).

<sup>197</sup> See *House Bill 1064*, *supra* note 108 (forcing victims to petition the court within 180 days of giving birth before a victim can terminate her rapist's parental rights).

<sup>198</sup> See Carden, *Region Lawmakers*, *supra* note 108 (detailing how Indiana has tried to pass legislation for five years, but each time roadblocks prevented any legislation from passing).

<sup>199</sup> See Silver, *supra* note 10, at 537 (claiming "[r]apists take away control and choice from their victims," and states should give "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").

petition the courts to terminate their rapists' parental rights, Indiana can offer rape victims the power to control their own future and their child's future.<sup>200</sup> These women and children's future will be further improved if rapists are held financially responsible for their children, and Indiana's current legislation fails to hold rapists financially accountable.<sup>201</sup>

### C. Rapists Should Be Held Financially Accountable

Forcing a rapist to pay child support holds him financially accountable for his crime even if he is not held criminally responsible.<sup>202</sup> If a court orders a rapist to pay child support after terminating his parental rights, then the rape victim will be able to raise her child without her rapist's input while receiving financial assistance.<sup>203</sup> In addition, rape victims will be able to meet the government's requirements for welfare without having to fear that her rapist will assert parental rights in the process.<sup>204</sup> Indiana should not let a mother suffer financially because a court terminated her rapist's parental rights.<sup>205</sup> If legislation allows a rape

<sup>200</sup> See Liebelson & Brownstone, *supra* note 30 (discovering that in some states rape victims do not have the power to petition the court directly, and those rape victims become dependent on the court system to terminate their rapists' parental rights).

<sup>201</sup> See Stevens, *supra* note 129, at 875-76 (finding that raising a child is costly, and any financial support from the child's father will help alleviate the burden placed on the mother if she raises the child alone). Even if a mother receives welfare, she may still need additional help to raise her child. *Id.* A mother's decision to seek financial support from the child's father should not allow rapists to assert parental rights. *Id.*

<sup>202</sup> See, e.g., OR. REV. STAT. § 419B.510(2) (2016) (terminating parental rights when the child was conceived during a rape, while holding the rapist financially accountable by requiring him to pay child support). In addition, rape victims will not fear coming forward to request child support, which would alert the rapist that he has a child, because the rape victim will know she can terminate his custody and receive child support. Hatcher, *supra* note 63, at 1031-32. Single mothers suffer the most financially when raising children, so any additional financial support will help single mothers make sure their children receive the basic necessities. SKAINE, *supra* note 165, at 14.

<sup>203</sup> See Stevens, *supra* note 129, at 889-90 (demonstrating how Oregon's statute is superior to other statutes because it requires the father to pay child support, and this option makes "the choice to keep the child possible for more women"). Nevertheless, if a mother wishes to cut off all contact with her rapist, including financial support, Indiana should allow her to waive the child support requirement. See *infra* Part IV.B (allowing mothers to decline child support to terminate every connection she has with her rapist).

<sup>204</sup> See Bitar, *supra* note 51, at 278 (discussing the welfare requirements, which require mothers to locate their child's father and seek child support before receiving any welfare benefits); see also SKAINE, *supra* note 165, at 14 (discussing how single mothers disproportionately suffer more financially compared to single fathers when trying to raise a child).

<sup>205</sup> See Stevens, *supra* note 129, at 897 (showing that even poor women should have the ability to choose to raise their child if they so desire). A woman should not have to stay in an abusive relationship because she does not think she can raise her child on her own financially. *Id.* See State v. Oakley, 629 N.W.2d 200, 204 (Wis. 2001) (listing the consequences

victim to terminate her rapist's parental rights *and* receive child support, then the rape victim may be less likely to waive governmental assistance to prevent notifying her rapist that he has a child.<sup>206</sup>

More mothers might be willing to keep their child if they know they will receive financial support.<sup>207</sup> Without additional financial assistance, a mother may face obstacles when trying to provide for her child, and these difficulties may make her feel she should abort her child.<sup>208</sup> However, because most courts terminate a father's financial obligation to his child when they terminate parental rights, any proposed legislation needs to take this obstacle into account.<sup>209</sup>

Oregon and Hawaii circumvented this legal hurdle by including a clause in their statutes that retain the father's financial obligation, and Indiana should follow suit.<sup>210</sup> Without this clause, rapists can successfully claim that if they have to pay child support, they should also receive additional parental rights, including visitation and custody.<sup>211</sup> Indiana

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of nonpayment of child support on the child, which may include behavioral issues, poor health, and educational problems). The court concluded that payment of child support could raise a child's standard of living; therefore, ordering a rapist father to pay child support would benefit not only single mothers and their children, but also society as a whole. *Id.*

<sup>206</sup> See Bitar, *supra* note 51, at 278 (stating when rapists are sued for child support, they can then assert parental rights); see also Hatcher, *supra* note 63, at 1031 ("Poor mothers are forced to name absent fathers, and then sue them—and sue them again and again."). Because fathers are often poor, a large amount of child support is never paid, and the father is never able to pay off the balance. *Id.*

<sup>207</sup> See Filipovic, *supra* note 66 (showing how one mother felt forced to abort her child based on her economic circumstances); see also Khadaroo, *supra* note 102 (indicating some states have passed legislation hoping it will protect poor victims from being sexually exploited, then having to relive the trauma in child custody hearings).

<sup>208</sup> See SKAINE, *supra* note 165, at 14 (finding single mothers suffer the most financially because in general, women earn less than men, and less than half of men actually pay their full child support obligation). The likelihood of a single mother, who has never been married, receiving child support is less than twenty percent. *Id.*

<sup>209</sup> See Beasnett v. Arledge, 934 So. 2d 345, 347 (Miss. Ct. App. 2006) (holding that when the court terminates the parent-child relationship, the parent's financial obligation to pay child support is also terminated); see also Bell, *supra* note 62, at 1078 (explaining a parent is no longer financially responsible for a child when a court terminates the parent-child relationship).

<sup>210</sup> See, e.g., HAW. REV. STAT. § 571-61 (2016) (giving courts the ability to terminate a convicted rapist's parental rights while ordering him to pay child support); OR. REV. STAT. § 419B.510(2) (2016) (allowing the termination of parental rights when the child was conceived during a rape and finding that this termination "does not relieve the parent of any obligation to pay child support").

<sup>211</sup> See Fields, *supra* note 2 (claiming one rapist, after being ordered to pay child support, filed for visitation rights); see also Wendt, *supra* note 32, at 1764 (demonstrating how one rapist demanded visitation rights when the court ordered him to pay child support after he raped and impregnated his fourteen-year-old victim). As a result, any legislation addressing the needs of rape victims should allow the court to order child support without allowing the rapist to assert his parental rights. Wendt, *supra* note 32, at 1767.

can overcome this financial complication through comprehensive legislation that protects rape victims while holding rapists financially accountable.<sup>212</sup> Indiana must adopt legislation that terminates a rapist's parental rights while keeping the father's financial obligation intact.<sup>213</sup>

#### IV. CONTRIBUTION

Adopting comprehensive legislation would effectively protect rape victims who would otherwise have to face the possibility of raising their children with their rapists.<sup>214</sup> This possibility exists because states have failed to address the needs of rape victims who choose to keep their child.<sup>215</sup> Any legislation must permit a mother to petition the court to terminate her rapist's parental rights, even if her rapist is never convicted, which Indiana's current legislation does. Part IV.A proposes an Indiana statute that combines statutes from different states that have addressed the needs of rape victims and their children.<sup>216</sup> Part IV.B provides commentary regarding the proposed statute and addresses concerns critics may have regarding this proposal.<sup>217</sup>

##### A. Proposed Statute

The proposed statute combines sections of statutes from different states to create comprehensive legislation that will result in stronger protections for rape victims.<sup>218</sup> The primary objective of this legislation is to lower the standard to clear and convincing evidence instead of requiring a conviction to make the statute more feasible for rape victims whose rapists are never convicted. To meet this objective, the statute

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<sup>212</sup> See *infra* Part IV (explaining the comprehensive legislation that will overcome these legal hurdles and protect rape victims and their children).

<sup>213</sup> See *supra* Part III.A (discussing the need to provide statutory protections to rape victims so they can raise their children free from the harassment of their rapists).

<sup>214</sup> See *infra* Part IV.A (proposing the statute Indiana should adopt that will fully protect women who become pregnant through rape and choose to keep their child).

<sup>215</sup> See *supra* Part III.B (demonstrating how legislators have failed to take into account that around one-third of rape victims choose to keep their child, which allows rapists to use their child as a bargaining chip in any criminal proceedings involving the rape that led to the conception of the child).

<sup>216</sup> See *infra* Part IV.A (taking the most advantageous clauses from different state statutes to propose strong legislation that protects a majority of rape victims).

<sup>217</sup> See *infra* Part IV.B (suggesting concerns that may arise from passing legislation that does not require a criminal conviction and requires a father to pay child support after a court terminates his rights).

<sup>218</sup> See *infra* Part IV.A (pulling from several different jurisdictions to compile a statute that affords maximum protections to rape victims raising their children).



combines legislation from North Carolina, Colorado, Oregon, and Indiana House Bill 1261 from 2015. The proposed statute reads as follows:

**Grounds for Terminating Parental Rights for Children Conceived Through Rape<sup>219</sup>**

(1) The court *must* terminate the parental rights upon a finding of one or more of the following:<sup>220</sup>

(a) *The parent has been convicted of rape in the first or second degree or sexual assault and the child was conceived as a result; or*

(b) *At a fact-finding hearing, if the court finds by clear and convincing evidence that (1) the alleged perpetrator committed an act of rape or sexual assault against the parent seeking to terminate parental rights, and (2) the child was conceived as a result of that rape or sexual assault.*<sup>221</sup>

(2) *The parent who is the victim of the act of rape or sexual assault may file a verified petition with the juvenile or probate court to terminate the parent-child relationship between the child and the alleged perpetrator of the act of rape or sexual assault.*<sup>222</sup>

(3) Termination of parental rights under this section does not relieve the parent of any obligation to pay child support.<sup>223</sup>

(a) *The child's mother or guardian may decline the support obligation from the father.*<sup>224</sup>

*B. Commentary*

The proposed statute permits courts to terminate parental rights using the clear and convincing evidence standard under section (1)(b). This standard would allow courts to comply with the father's due process

<sup>219</sup> The proposed amendments are italicized and are the contribution of the author.

<sup>220</sup> See N.C. GEN. STAT. § 7B-1111 (2015) (using North Carolina's language, but changing the "court may" to the "court must" to require courts to terminate parental rights; therefore, removing judicial discretion).

<sup>221</sup> See COLO. REV. STAT. § 19-5-105.5 (2015) (utilizing Colorado's statute that allows courts to terminate a rapist's parental rights if the rapist is convicted or by using the clear and convincing evidence standard to prove that the father sexually assaulted the mother and conceived a child during that assault).

<sup>222</sup> See H.B. 1261, 119th Gen. Assemb., Reg. Session (Ind. 2015) (Dec. 24, 2014), FISCAL IMPACT STATEMENT (claiming that generally, Indiana does not allow parents to petition the court directly). Instead the mother has to go through another agency, which delays and sometimes stalls the process completely). *Id.*

<sup>223</sup> OR. REV. STAT. § 419B.510(2) (2016).

<sup>224</sup> 750 ILL. COMP. STAT. § 46/622(c) (2016).

rights under the Fourteenth Amendment.<sup>225</sup> Under this standard, once a mother proves she was raped and her child was conceived as a result of the rape, the court must terminate the parental rights of her rapist even though he was not convicted of rape. More women will be able to take advantage of this statute to prevent rapists from asserting control over their children because they will not have to rely on a rape conviction before asking the court to terminate their rapists' parental rights.<sup>226</sup> In addition, if the father is convicted of rape or sexual assault, under this statute, courts must automatically terminate the rapist's parental rights. Therefore, the mother does not have to attend several separate court proceedings to terminate her rapist's parental rights.

By mandating that courts terminate parental rights, judicial discretion is eliminated.<sup>227</sup> Without this provision, courts can decide to award custody or visitation to rapists based on what they decide is in the child's best interests regardless of the violent crime committed against the mother. This additional provision will strengthen the protections Indiana currently offers rape victims while eliminating any uncertainty concerning the final outcome.

Indiana should allow mothers to petition the court to terminate the parent-child relationship between her child and her rapist, because this gives rape victims the ability to utilize the justice system if it fails to convict her rapist. Generally, only an attorney from the Department of Child Services, a Guardian Ad Litem, or a Court Appointed Special Advocate, can petition the court to terminate a parent-child relationship.<sup>228</sup> By allowing rape victims to terminate the rights of their rapists, victims do not have to rely on an outside source or agency to petition for termination, which can prolong the process.<sup>229</sup>

This legislation will keep the rapist's financial obligation to his child intact even after terminating his parental rights. Requiring a father to pay child support without awarding parental rights will help rape victims become more financially independent.<sup>230</sup> Rape victims who need additional assistance will be able to comply with welfare requirements

<sup>225</sup> See *supra* Part II.B (exploring due process rights in termination proceedings).

<sup>226</sup> See *supra* Part III.B (highlighting the problems surrounding legislation that requires a rape conviction to terminate parental rights).

<sup>227</sup> See *supra* Part III.B (scrutinizing statutes that allow judges to determine what is in the best interests of the child, which could mean awarding custody to a rapist).

<sup>228</sup> See H.B. 1261, 119th Gen. Assemb., Reg. Session (Ind. 2015), FISCAL IMPACT STATEMENT (stating this bill allows a mother to directly petition the court to deny her rapist custody of her child).

<sup>229</sup> See *id.* (describing the process mothers must follow to terminate a father's parental rights).

<sup>230</sup> See *supra* Part III.C (evaluating the importance of enforcing a father's financial obligation to his child).

without worrying about the possibility of their rapists asserting parental rights after being notified they have a child with their victim.<sup>231</sup> However, if a mother wishes to end all contact with her rapist she will be able to decline financial support from the father. Furthermore, if Indiana passes the proposed legislation, the State will continue to be eligible for additional federal funding.<sup>232</sup> This funding will help support victims of domestic violence, which includes rape victims. Indiana will be able to provide rape victims with additional access to counseling services to help them overcome any lingering mental, physical, or emotional side effects of rape.

Although the proposed legislation shields rape victims from additional contact with their rapists, critics may argue that the courts should not be able to terminate a father's parental rights without a rape conviction.<sup>233</sup> However, requiring a conviction is unrealistic because most rapists are never convicted.<sup>234</sup> Indiana should seek to protect as many rape victims as possible, and requiring a conviction limits the legislation so that it becomes inoperable for most rape victims. In addition, Indiana courts already use the clear and convincing evidence standard in other termination of parental rights proceedings.<sup>235</sup> Clear and convincing evidence is a high standard; therefore, mothers are unlikely to be able to abuse the proposed statute to unjustly terminate the parental rights of innocent fathers. Also, mothers have the burden to prove their case under this statute; therefore, a father's rights will not be terminated until the mother meets this heavy burden.

Critics may also argue a father should not be ordered to pay child support after a court terminates his parental rights, which is permitted

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<sup>231</sup> See Hatcher, *supra* note 63, at 1031–32 (discussing the requirements mothers must comply with before receiving financial assistance from the government to help raise her child).

<sup>232</sup> See RAPE SURVIVOR CHILD CUSTODY ACT, 42 U.S.C. § 14043h-4 (2015) (highlighting the additional federal funding that Indiana is eligible for by passing legislation that utilizes the clear and convincing evidence standard). This federal funding is especially important because Indiana currently does not offer any funding to support sex crime victims. Kenney, *supra* note 22.

<sup>233</sup> See Carden, *Region Lawmakers*, *supra* note 108 (stating several Indiana legislators “challenged the fairness of denying an accused rapist parental rights” without requiring a criminal conviction).

<sup>234</sup> See Liebelson & Brownstone, *supra* note 30 (demonstrating the need to lower the standard from beyond a reasonable doubt, which is used in criminal proceedings, to clear and convincing evidence, because only five percent of rapes lead to a felony conviction).

<sup>235</sup> See IND. CODE § 31-34-12-2 (2016) (“[A] finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence.”).

under the proposed statute.<sup>236</sup> However, requiring a father to support his own child benefits the child more than it harms the father.<sup>237</sup> The proposed statute will allow courts to hold fathers financially accountable to their children even when they are not held criminally responsible. Oregon and Hawaii have both passed legislation that allows courts to fully terminate the parental rights of rapists without terminating the father's financial obligation to his child; therefore, similar language is presented in subsection (3) of the proposed statute to reflect that purpose.<sup>238</sup> Indiana must protect rape victims and their children while making sure they can thrive financially. Overall, this proposed statute offers the protections rape victims deserve, and it prevents Indiana from eliminating accountability for the heinous acts of rapists.<sup>239</sup>

#### V. CONCLUSION

Indiana's legislation protecting rape victims should utilize the clear and convincing evidence standard that the Supreme Court deemed permissible in parental rights termination cases. Courts should not have the opportunity to exercise judicial discretion when the victim was raped and conceived a child. Giving courts too much discretion often results in the wrong decision for the mother and the child. In addition, courts should hold rapists financially accountable for their children by following Oregon and Hawaii's lead of not terminating a father's financial obligation when terminating his parental rights. If Indiana passes the proposed legislation, rape victims will not have to worry about coming into constant contact with their rapists solely because the mother failed to file a termination petition before the arbitrary deadline provided in the current legislation. A rape victim's potential PTSD symptoms will not be exacerbated because of the additional interaction with her rapist. Furthermore, a mother will not have to be concerned that the rapist father will abuse her child in the same way he abused her.

Analyn's daughter is a now teenager, and Analyn became an attorney. Her rapist eventually dropped his custody battle. Today, Analyn

<sup>236</sup> See *supra* Part IV.B (pulling from the Oregon and Hawaii statutes to propose that Indiana courts should enforce a rapist's child support obligation, even after terminating his parental rights).

<sup>237</sup> See *supra* Part III.C (discussing how requiring a father to pay child support will help mothers raise their children and seek additional government assistance).

<sup>238</sup> See, e.g., OR. REV. STAT. § 419B.510(2) (2016) (permitting courts to order a rapist to pay child support after his parental rights are terminated); HAW. REV. STAT. § 571-61 (2016) ("The termination of parental rights shall not affect the obligation of the convicted natural parent to support the child.").

<sup>239</sup> See *Peña v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996) ("[A] wrongdoer shall not profit from his wrong.").

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advocates against domestic and sexual abuse as a co-founder of Hope after Rape Conception. One horrific event led her to fight to change laws to protect rape victims from the same trauma she went through to retain full custody of her child. Victims like Analyn will not have to suffer if Indiana passes the proposed legislation to prevent rapists from asserting their parental rights. This legislation gives rape victims the chance to go on living and raising their children free from the influence of their rapists.

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