Giving Birth to a “Rapist’s Child”: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape

SHAUNA R. PREWITT*

Approximately 25,000 women become pregnant through rape each year. In response, many states have passed special laws, devised streamlined procedures, or both, to aid pregnant women who seek abortions or wish to place their rape-conceived children for adoption. However, few states have passed laws to aid the large numbers of raped women who choose to raise their rape-conceived children. Without such laws, in most states, a man who fathers through rape has the same custody and visitation privileges to that child as does any other father of a child. Moreover, as a result of this legal void, raped women and their children are left to face substantial and potentially terrible consequences. This Note argues that the absence of these laws stems from the societal images and other rhetoric concerning the pregnant raped woman that depict raped women as hating their unborn children and viewing their rape pregnancies as continuing their rape experience. These societal constructions have created a biased “prototype” of the pregnant raped woman and of the prototypical rape pregnancy experience by which all pregnant raped women are judged. Women who raise their rape-conceived children depart from the prototype and are, as a result, viewed with suspicion. Legal protections, such as alternate custody rights, are then denied to them because, being viewed as “imposter” rape victims, it is thought that there is nothing special about these women or their conceptions requiring any change in the manner in which custody and visitation determinations are made.

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Pregnancy from rape\(^1\) occurs with “significant frequency.”\(^2\) Of the estimated 12% of adult women in the United States that have experienced at least one rape in their lifetime, 4.7% of these rapes result in pregnancy.\(^3\) Therefore, based on a 1990 study estimating that 683,000 women over the age of eighteen were raped in that year,\(^4\) conceivably 32,000 rape-related pregnancies occur annually.\(^5\) A separate study conducted in 2000 estimated that, given the decline in the incidence of rape, 25,000 pregnancies following the rape of adult women occur annually.\(^6\)

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1. For the purposes of this Note, the term “rape” refers to circumstances in which there has been sex without consent as claimed by the assaulted woman; it does not necessarily mean that the perpetrator has been tried and convicted of rape in a court of law.


3. Id. at 320, 322; see also NAT’L VICTIM CTR. & NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 2 (1992) (discussing a 1990 study finding that almost 13% of women have been victims of a rape).


5. Holmes et al., supra note 2, at 322.

6. Felicia H. Stewart & James Trussell, Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure, 19 AM. J. PREVENTIVE MED. 228, 228 (2000). The number of rape pregnancies that occur each year may be substantially higher given that both studies excluded adolescents from their consideration. “Approximately 30% of rapes involve women under age 18. [Although f]ecundity among very young adolescents is not as high as that of adult women . . . , adult
It is difficult to determine with certainty the outcome of the approximately 25,000 to 32,000 rape-related pregnancies that occur in the United States each year. One study found that 50% of women who became pregnant by rape underwent abortions, 5.9% placed their infants for adoptions, and 32.3% of raped women kept their infants.\(^7\) Another study, conducted in a separate year, found markedly different results, concluding that 26% of women pregnant through rape underwent abortions.\(^8\) Of the 73% of women who carried their pregnancies to term, 36% placed their infants for adoption, and 64% raised the children they conceived through rape.\(^9\)

For the women who conceive through rape and seek abortion—who represent approximately 26% to 50% of the women faced with rape-related pregnancies—the law has carved out a “rape exception” for access to abortion, requiring that state and federal funds be used to pay for the abortions of qualifying raped women.\(^10\) Moreover, many states’ laws require hospitals to offer emergency contraceptives to raped women in order to prevent rape pregnancies.\(^11\) In addition to passing special laws to aid pregnant raped women who seek to abort their pregnancies, many states have devised streamlined procedures for the termination of parental rights of the father when the pregnancy was the result of rape and the raped woman wishes to place her child for adoption.\(^12\) However, few states have passed special laws to aid the large number of raped women who choose to raise their rape-conceived children. Without such laws, a man who fathers a child through rape has the same custody and visitation privileges regarding that child as does the father of a child not conceived through rape. Moreover, as a result of this legal absence, raped women and their children are left to face substantial and potentially terrible consequences.\(^13\)

The purpose of this Note is to examine the legal response to women who become pregnant as a result of rape. Specifically, it asks why more than two-thirds of states have failed to pass laws restricting custody and visitation privileges of rapists over their rape-conceived children. Part I discusses the legal and extralegal issues that arise when raped women decide to give birth to and raise their rape-conceived children. It suggests that the failure to pass laws exclusive to this population of women is surprising in light of the significant consequences to these women’s lives.

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\(^7\) Holmes et al., supra note 2, at 322.
\(^8\) Amy Sobie & David C. Reardon, A Survey of Rape and Incest Pregnancies, in VICTIMS AND VICTORS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT 18, 19 (David C. Reardon et al. eds., 2000) [hereinafter VICTIMS AND VICTORS].
\(^9\) Id.
\(^10\) Rachel Benson Gold, After the Hyde Amendment: Public Funding for Abortion in FY 1978, FAM. PLAN. PERSP., May–June 1980, at 131, 131. For further discussion, see infra section III.A.
\(^11\) For further discussion, see infra section III.B.
\(^12\) For further discussion, see infra section V.B.
\(^13\) See, e.g., infra Part I.
Part II begins to answer why few states have passed laws restricting the visitation and custody privileges of rapists over their rape-conceived children by arguing that such legal protections are circumscribed by the images and other societal constructions that depict the prototypical raped woman as hating her unborn child and viewing her rape pregnancy as a continuation of her rape experience. By way of comparison, Part II describes how odious societal rhetoric and images about rape generally have operated to deny a certain class of women protection from the law, namely those women whose nonconsensual sex experiences depart from the stranger-rape prototype.14

Part III suggests that there exists a pregnant-raped-woman prototype, which, like the stranger-rape prototype, has been constructed from invidious stereotypes that have been articulated in public and private discourse. These societal constructions have created a “prototype” of the pregnant raped woman and of the prototypical rape pregnancy experience by which all raped women are judged.

Part IV argues that the pregnant-raped-woman prototype, like the stranger-rape prototype, operates on a normative, rather than a descriptive level, and as a result, limits the law’s reach and protection of women who go against the prototype by deciding to raise their children. Thus, women who betray the prototype by raising their rape-conceived children are viewed with suspicion. These women are viewed as “imposter” rape victims and denied legal protections, such as alternate custody rights, because it is thought that there is nothing special about them or their pregnancies requiring any change in the manner in which custody and visitation determinations are made. They are viewed, not as rape victims, but as liars and subjected to the same visitation and custody presumptions as other women.

Part V tests this theory by comparing the laws that currently exist for raped women who terminate their pregnancies or elect adoption with the laws that exist for raped women who raise their children. It suggests that, like the stranger-rape prototype, the pregnant-raped-woman prototype has created a spectrum of “real” raped women, such that those whose behaviors depart the most from the prototype are entitled to the least protection under the law. As a result, the law affords the greatest protections to raped women who abort, followed by raped women who elect adoption. Raped women who raise their rape-conceived children are given the least protection, such that, even in the few states where the laws restrict the custody, visitation rights, or both, of men who father through rape, these protections are minimal or, at best, illusory.

14. The stranger-rape prototype contends that the prototypical rape occurs when a black stranger attacks a white woman in public using overwhelming force. See Martha Chamallas, Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes, 74 S. CAL. L. REV. 747, 784 (2001). Rape studies indicate that this prototype fails to accurately depict the typical or most common case of nonconsensual sex, and as a result, it restricts legal protections for women whose nonconsensual sex experience departs from this prototype. See infra notes 67–82 and accompanying text.
I. WOmen who choose to raise their rape-conceived children: a lifetime tethered to their rapists

As already noted, a significant percentage of raped women choose to raise the children they conceived through rape.\textsuperscript{15} Under most states’ laws, a man who fathers a child through rape has the same legal rights to custody and visitation in regard to that child as does any other father of a child due to the absence of any laws restricting or terminating such rights; as a result, many raped women face significant consequences following their decisions to raise the children they conceived through rape. They may be forced to share custody privileges of their children with their rapists, to ensure their rapists’ access to their children, to foster their rapists’ relationships with their children, and, in some cases, to make joint decisions about their children’s welfare.

Although there have been no studies analyzing the number of rapists who seek custody of their rape-conceived children, anecdotal evidence demonstrates its occurrence. One raped woman states,

\begin{quote}
I was raped in [North Carolina] and the rapist won “[j]oint” custody. Torment does not come close to describe what I live. . . . [The courts] have not only tied and bound me to a rapist, but also the innocent child that was conceived by VIOLENCE! [The rapist’s] violence has earned him even more control over my life.\textsuperscript{16}
\end{quote}

Another wrote, “I was raped . . . and the rapist has been taking me to court for 5 years for the right to see his son. . . . I am being tormented to death. I just want to die . . . .”\textsuperscript{17}

Moreover, raped women who raise their rape-conceived children may feel fundamentally disrespected as a result of being “forced into . . . legal relationship[s]”\textsuperscript{18} that give rise to “continu[ing] involuntary interraction[s] [sic]”\textsuperscript{19} with the men who terrorized them.\textsuperscript{20} For example, H.H.\textsuperscript{21} is the mother of a child

\textsuperscript{15.} See Holmes et al., supra note 2, at 322; Sobie & Reardon, supra note 8, at 19.
\textsuperscript{20.} Because of the fear that some women suffer when forced to face their rapist, some courts have developed creative solutions to protect a raped woman who is testifying against her attacker from having to see him in the courtroom. For example, in an account given by a raped woman, she stated, “I was so terrified of my attacker that the attorneys worked out an agreement so that he could hide in the witness box while I testified. . . . If I’d had to face him, I wouldn’t have been able to do it.” Lee Madigan & Nancy C. Gamble, The Second Rape: Society’s Continued Betrayal of the Victim 97 (1991). Given that some view it as cruel to force a raped woman to face her attacker for a few hours to
she believes was conceived through rape, although the court found insufficient evidence to reach that conclusion. Because of this adverse ruling, H.H. must share parental responsibilities with her alleged attacker, S.M., via a court order granting him the right to see her son each Tuesday, every other weekend from Friday evening until Sunday evening, on alternating holidays, and three weeks in the summer. Thus, H.H. not only sees S.M. each week when dropping off and picking up her son, but she must also communicate with him by phone or e-mail to reschedule visitation arrangements, discuss parenting concerns, and deal with anything else regarding her son. S.M. also can attend her son’s school functions, such as school plays or sporting activities, which further increases H.H.’s interactions with her alleged rapist. Even in her home, H.H. cannot escape the constant reminders of her rapist when her child, for instance, brings home toys or other items gifted by S.M. Not only must H.H. continually confront these stimuli and situations which remind her of the rape, but she must do so cheerfully so as to not be accused by the court of fostering parental alienation, which, if found, may result in the court stripping her of primary custody of her son. Given her frequent interactions with S.M., it is unsurprising that H.H. feels that she is incapable of dealing with her rape, writing “I . . . struggle to move on with my life and I wonder how . . . to do so when I have to see this man every other day. . . . Our system needs to be revamped but I need help now. I don’t now [sic] where else to go . . . .”

Many raped women who are forced to share custody and visitation privileges give oral testimony, it is perhaps unsurprising that there is strong public criticism of granting parental rights of rape-conceived children to rapists, especially given how frequently a raped woman would be forced to interact with her rapist under such circumstances.

21. Due to the personal nature of this case and its events, the parties’ names have been concealed to protect their identities.
24. Id.
25. Id.
26. Id.
27. See Richard A. Gardner, The Judiciary’s Role in the Etiology, Symptom Development, and Treatment of the Parental Alienation Syndrome (PAS), 21 AM. J. FORENSIC PSYCHOL. 39, 40 (2003) (“[P]arental alienation syndrome (PAS) is a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child’s campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent.”); see also PasKids.com, Parental Alienation Syndrome-PAS, http://www.paskids.com (last visited Jan. 2, 2010) (stating that “through verbal and non verbal thoughts, actions and mannerisms, a child is emotionally abused (brainwashed) into thinking the other parent is the enemy,” which may be caused by “bad mouthing the other parent infron [sic] of the children . . . withholding visits, [and] pre-arranging the activities for the children while visiting with the other parent”).
28. See, e.g., McAdams v. McAdams, 530 N.W.2d 647, 650 (N.D. 1995) (holding that custody may not be awarded to a parent who willfully alienates a child from the other parent and stating that a parent has both a “duty to not turn a child away from the other parent by ‘poisoning the well’” and to “nurture the children’s relationship with the noncustodial parent” (quoting Johnson v. Schlotman, 502 N.W.2d 831, 834 (N.D. 1993))).
with their rapists may never overcome their rapes. By being tethered to their rapists, they are continually forced “to experience over and over the victimization that occurred at the time of the rape.”\textsuperscript{30} Although the psychological after-effects of rape are numerous, including “fears, phobias, anxieties[,] . . . somatic symptoms, obsessions, depressive symptoms, and even suicidal ideation,”\textsuperscript{31} most raped women sufficiently recover from rape within a year.\textsuperscript{32} However, in order to recover from rape, “[women] must work on two fronts—coming to terms with the past and alleviating stress in the present.”\textsuperscript{33} Both of these are difficult for raped women, whose prosecution of their attackers takes months or even years. Because “[m]any survivors report that they put their lives on hold until it’s all over, at which time they can go on living,”\textsuperscript{34} those women who prosecute may not begin the recovery process until after the trial is concluded.

Although no studies document the mental health impact on raped women who continue to have contact with their rapists, by analogy to the delayed recovery of women who prosecute, it seems likely that women whose child-custody arrangements force continued interaction with their rapists also would experience delays in healing. Furthermore, given that 66\% of raped adult women—when asked within one week of the incident—fear offender retaliation and being raped again,\textsuperscript{35} forcing a woman to repeatedly face her rapist, or reminders of him, is likely to impede her recovery process. Moreover, raped women who are required to share custody and visitation privileges may be unable to undertake some of the steps raped women have found necessary to move forward and heal. For example, many raped women seek recovery by changing residences,\textsuperscript{36} and such a step is one of many important components of raped women’s healing processes.\textsuperscript{37} However, women enjoying primary custody privileges often are required to go before a judge to request permission to move and may be denied altogether the ability to both retain primary custody of their children and to relocate to other cities.\textsuperscript{38}

The forced interaction with their rapists, and the consequent inability to heal, also may affect raped women’s parenting abilities. Most raped women suffer from symptoms of one of the various forms of Post-Traumatic Stress Disorder

\textsuperscript{30} Family Law, supra note 18 (statement of Women’s Law Center of Maryland).


\textsuperscript{32} Id. at 229.


\textsuperscript{34} Madigan & Gamble, supra note 20, at 99.

\textsuperscript{35} Katz & Mazur, supra note 31, at 218.

\textsuperscript{36} See id. at 223 (identifying studies that indicate at least 48\% of women “change residences shortly after the rape”).

\textsuperscript{37} See id.

\textsuperscript{38} See, e.g., Baxendale v. Raich, 878 N.E.2d 1252 (Ind. 2008) (affirming a family court’s decision denying a mother’s request to relocate with her child, over whom she enjoyed physical custody, to another state and further affirming that if the mother relocated, the child’s father would become the child’s custodial parent).
(PTSD), and nearly one-third of all raped women develop rape-related post-traumatic stress disorder (RR-PTSD). In order to treat PTSD and RR-PTSD, women must alleviate stress, which may “involve avoid[ing] any thoughts, feelings, or cues which could bring up the catastrophic and most traumatizing elements of the rape.” Women who suffer from PTSD and who are unable to adequately treat their illness may “experience uncontrollable intrusive thoughts about the rape” and “may relive the event through flashbacks, during which [they] experience the traumatic event as if it was happening now.” Moreover, they may suffer from social withdrawal, have “no interest in their children” or “in their jobs,” engage in “general unresponsiveness, detachment or estrangement from others,” and may “exhibit a kind of irritability, hostility, rage and anger, particularly when the original trauma is . . . re-enacted.”

Women with PTSD and RR-PTSD who cannot effectively treat their illness are likely to abuse drugs and alcohol in an attempt to cope with these symptoms. Lack of effective treatment also “can often lead to . . . diagnoses such as anxiety attacks, social phobias, depression, obsessive-compulsive disorders, suicidal ideation, self-mutilation, . . . manic activity bouts, chronic fatigue syndrome and personality disorders.” Raped women who choose to raise their rape-conceived children, then, may be put in a Catch-22 if their rapists assert custody and visitation privileges. To effectively parent their children, these raped women must adequately overcome their victimization; however, in order to do that, these women must be able to escape from the “triggers” that make healing from their victimization impossible. Unfortunately, escaping from

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40. Id.; see also NAT’L VICTIM CTR. & NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., supra note 3, at 7 (stating that “[a]lmost one third . . . of all rape victims develop[] PTSD”).
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Morison, supra note 39.
48. NAT’L CTR. FOR VICTIMS OF CRIME, supra note 41.
49. Morison, supra note 39. Morison notes that “[d]istress and anxiety reminiscent of the original trauma may be triggered . . . for example, by . . . the approach of a stranger.” Id. If the approach of a stranger triggers PTSD symptoms, it may be true that the approach of the woman’s perpetrator would also trigger these symptoms and may even magnify them. Moreover, even women who have recovered from PTSD can suffer from reactivated PTSD, which can be triggered “if the victim experiences additional trauma, is unsympathetically treated, [or] is unfairly blamed or stigmatized.” Id. Even “[a]n unsympathetic or unskilled therapist can inadvertently re-activate trauma—a situation which must be avoided at all costs.” Id.
49. See NAT’L CTR. FOR VICTIMS OF CRIME, supra note 41.
50. Morison, supra note 39.
51. A related argument is that rapists ought to be denied parental rights because, given the threat of forced interaction between raped women and their attackers, raped women may feel pressured into
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.

Raped women also may fear for their children’s safety and health. Although no studies address the parenting abilities of rapists over their rape-conceived children, men who rape often have “serious psychological difficulties which handicap [them] in [their] relationships to other people,” resulting in “the absence of any close, emotionally intimate relationship with other persons, male or female” and “little capacity for warmth, trust, compassion, or empathy.” Moreover, men who rape often develop relationships that “are devoid of mutuality, reciprocity, and a genuine sense of sharing.” In addition, they engage in bad behavior and are “not deterred by such logical considerations as punishment, disgrace to . . . family, injury to [the] victim” or others. Given these characteristics, raped women, already having been victimized by their attackers, may fear for the safety of their children, as well as “the shame, fear, and possible abuse” their children may suffer in conjunction with the rapist-fathers’ visitation or custody.

Aside from fearing the frequent access of their rapists to them or their children, raped women also may suffer from their rapists having greater control over the criminal case against them. Some rapists may capitalize on these women’s fear of sharing custody or visitation rights by manipulating them into dropping or failing to initiate criminal charges in exchange for an agreement to voluntarily terminate parental rights. In addition to avoiding prosecution, “[s]ome men who commit sex crimes have an inordinate need to control their female victims and may use visitation [or] custody . . . to punish the mother.” Thus, even those rapists who do not wish to exercise custody privileges may use that right to exert control over their victims, resulting in the “child . . . becom[ing] a pawn in the predator’s power game.” State Representative Sam Ellis, who

aborting their rape-conceived children. During the 2007 session of the Maryland General Assembly, Planned Parenthood of Maryland and Maryland Right to Life joined together in arguing that the parental rights of rapist fathers ought to be restricted. Maryland Right to Life testified that “women who choose to carry their pregnancies to term ought to be supported and protected from unnecessary burdens . . . [and] women who choose to carry their pregnancies to term should never feel coerced into abortion because of social concerns.” Family Law, supra note 18 (statement of Cathy McLeod, Maryland Right to Life). Planned Parenthood agreed and testified that a woman pregnant through rape should be given the opportunity “to make the choice that is right for them [sic], without having to worry about how that choice may force her to interact at a later date with her perpetrator. If a woman chooses to carry her child to term it is important for her to feel supported and safe in her choice.” Id. (statement of Kate Canada, Director of Communications & Public Policy, Planned Parenthood of Maryland).

52. Id.
53. Id.
54. Family Law, supra note 18 (statement of Patricia Ranney, State Board Member, and Charlie Cooper, Administrator, Citizens’ Review Board for Children).
55. Id.
56. Id. Another criticism of the granting of visitation and custody privileges under these circumstances may derive from the maxim that “a wrongdoer shall not profit from his wrong,” which is
introduced a bill in North Carolina to prevent rapists from using custody and visitation privileges to intimidate witnesses.\textsuperscript{57} stated that his interest in proposing such a bill stemmed from the stories of three women who had been intimidated by their rapists.\textsuperscript{58} In each case, the rapist said he would terminate his parental rights in exchange for the victim’s agreement to not press charges or to not testify.\textsuperscript{59} One of the women asked, “What do I do? . . . Protect society or protect the [child]?\textsuperscript{60}

Finally, these raped women may be forced to do any number of things associated with joint custody, including sharing decision making about schooling, healthcare, and religious upbringing, and may even be required to give their children the surnames of the rapist fathers.\textsuperscript{61} Thus, raped women and their children face substantial and terrible consequences as a result of these women’s decisions to give birth to and raise their children. Yet, despite these severe consequences, only sixteen states have determined that custody and visitation laws ought to be different for men who father through rape.\textsuperscript{62}

II. \textbf{THE EFFECT OF RHETORIC ON LIMITING LEGAL PROTECTIONS}

This Note argues that the widespread absence of legal protections prohibiting rapists from exercising visitation and custody privileges over their rape-conceived children stems from the images and other societal rhetoric that depict the prototypical raped woman as hating her unborn child and as viewing her rape pregnancy as continuing her rape trauma. Societal rhetoric historically has played a strong role in limiting the scope of the protections afforded to various individuals under the law, particularly to raped women. For example, despite the widespread condemnation of rape, the conviction rate for rape is remarkably lower than the conviction rate for other serious crimes: \textquote{\textquotedblleft}[n]\text{inety-eight percent deeply inscribed in the Anglo-American legal tradition.\textquoteright} Peña v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996) (citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)). In Peña, the court denied parental rights to a statutory rapist, arguing that \textquote{\textquoteright}[t]he criminal should not be rewarded for having committed the . . . offense by receiving parental rights.” Id. Moreover, \textquote{\textquoteright}[t]he criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants,” and thus \textquote{\textquoteright}[t]he Constitution does not forbid the states to penalize the father’s illicit and harmful conduct by refusing to grant him parental rights that he can . . . enjoy as the fruit of his crime.” Id.

\textsuperscript{57} The bill passed in an expanded form that terminates the parental rights of rapists who are found guilty of first- or second-degree rape. See N.C. GEN. STAT. §§ 14-27.2 to .3 (2007).


\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Karen Czapanskiy, \textit{Volunteers and Draftees: The Struggle for Parental Equality}, 38 UCLA L. REV. 1415, 1427 (1991) (“If [the father] does not consent to giving the child his surname at the time the birth certificate is prepared, he is not estopped from imposing his surname at some later date. This is true throughout the child’s minority, no matter how often the biological father may deny the child, so long as the child is not adopted.”).

\textsuperscript{62} See infra section V.A.

\textsuperscript{63} See Chamallas, supra note 14, at 782.
of the victims of rape never see their attacker caught, tried and imprisoned.”

Moreover, rape is the most underreported violent crime.

In explaining the disparity between the high condemnation of rape and the low incidence of rape reporting, arrests, and convictions, many scholars fault the “invidious societal stereotypes regarding rape victims,” which have constructed a prototype of the rape experience and of the prototypical raped woman and offender that frequently fails to reflect reality. People use prototypes to “process[] information, draw[] conclusions, and . . . mak[e] sense of the world.”

According to Martha Chamallas,

"Persons use prototypes as “cognitive shortcuts” to help them categorize new cases and situations. When a person “reasons” from a prototype, whether by conjuring up a prototypical victim, offender, or event, he or she searches for a family resemblance between the new case and the prototypical case. The more the new case looks like the prototype (for example, by sharing common features of the prototype), the more likely it will be classified as falling within the category."

Because all prototypes—by defining what is typical or normal—also implicitly suggest what is atypical, they “set the standard by which others are judged.” Thus, the criticism of the rape prototype is not limited to its failure to capture the full range of rape experiences. The rape prototype also is problematic because it is not statistically or descriptively accurate, and consequently it is biased.

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65. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES: NATIONAL CRIME VICTIMIZATION SURVEY (2008), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus06.pdf; see also NAT’L VICTIM CTR. & NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., supra note 3, at 5 (finding that only 16% of rape cases were reported to the police or other authorities). Part of the reason for the low incidence of rape reporting may stem from the pervasive societal notion that raped women often cry rape falsely. However, only 2% of rape reports are false, which is the same as the false reporting rate of other crimes. See HOPE FOR HEALING.ORG, MYTHS AND FACTS ABOUT SEXUAL ASSAULT (2004), http://www.hopeforhealing.org/myths.pdf. Moreover, women who become pregnant through rape may be less likely to report their rape. See Amy R. Sobie, Finding Real Answers for Pregnant Sexual Assault Victims, in VICTIMS AND VICTORS, supra note 8, at 164 (“Eighty to ninety percent of the women . . . who are pregnant from sexual assault have never reported the rape.” (quoting Kay Zibolsky, founder, Life After Assault League)).

66. Wells & Motley, supra note 64, at 129 (citation omitted); see also Chamallas, supra note 14, at 783.


68. Chamallas, supra note 14, at 778 (citation omitted).

69. Id. at 787.

70. Id. at 783–84.

71. Id. at 783.
schemas, or cultural scripts”72 concerning rape depict the prototypical rape as a black stranger attacking a white woman in public using overwhelming force.73 Rape studies indicate that this prototype, known as the stranger-rape prototype, fails to accurately depict the typical or most common case of nonconsensual sex.74 Instead, nearly eight out of ten rapes are committed by someone the raped woman knows,75 and nearly six out of ten rapes occur in the raped woman’s home or the home of a friend, relative, or neighbor.76 Seventy percent of raped women report no physical injuries stemming from their rapes,77 and in violent crimes against women, the woman and the perpetrator are of the same race 80% of the time for white women and 90% of the time for black women.78

As the statistics demonstrate, the rape prototype depicts the statistically atypical rape case—stranger-rape—as the prototypical, or most typical, rape case.79 Because it depicts what societal rhetoric argues ought to constitute “real rape,” instead of what typically and statistically constitutes the majority of nonconsensual sex experiences,80 the rape prototype “constructs a line between normalcy and deviancy, between the acceptable and the unacceptable”81 and “distort[s] decisions about whether specific instances belong in the [rape] category”82 in a biased way. Moreover, it conveys that nonconsensual sexual experiences differing from the stranger-rape prototype constitute harm that is not merely different but that ought to be treated as less “real,” less “substantial,” and less “worthy of legal redress.”83

72. See SUSAN ESTRICH, REAL RAPE 4 (1987) (identifying the many different rape contexts and noting that only violent stranger rapes consistently result in criminal charges); Chamallas, supra note 14, at 784.
73. Chamallas, supra note 14, at 783.
76. NAT’L VICTIM CTR. & NAT’L CRIME VICTIMS RESEARCH & TREATMENT CTR., supra note 3, at 4.
77. Ronet Bachman, U.S. DEP’T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (1994). However, where interracial rapes do occur, “the black offender/white victim rape produces the strongest legal response, perhaps because it is the prototype.” Chamallas, supra note 14, at 784. White victims are more likely to report interracial rapes, Council on Sexual Assault & Domestic Violence, Sexual Assault: Myths and Facts, http://www.safefromabuse.com/assault_myths.html (last visited on Jan. 2, 2010), and “[w]hen the offender is black and the victim is white, the rape is more likely to result in conviction, and black men convicted of rape tend to receive harsher penalties than do other assault defendants,” Chamallas, supra note 14, at 784; see also Council on Sexual Assault & Domestic Violence, supra (reporting that a disproportionate number of black offenders are convicted).
79. See Chamallas, supra note 14, at 783.
80. Id. at 778.
81. Id. at 780–81.
82. Id. at 779.
83 Id. at 779–80; see also LYNDA LYTLE HOLMSTROM & ANN WOLBERT BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 43–44 (1978) (describing police officers’ reactions to rape cases and commenting that the rape is more often treated as real when the offender is a stranger).
As a result of legislators and courts applying the stranger-rape prototype in making their decisions, rape laws are crafted, interpreted, and enforced in a way that fails to criminalize the majority of nonconsensual sexual experiences, resulting in the legalization of most acts that should be regarded as rape. Susan Estrich explains:

At one end of the spectrum is the “real” rape . . . : A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors and all—generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place . . . .

Thus, the stranger-rape prototype both initially and continuously “infect[s] legal judgments about criminality and victimization[,] . . . prevent[ing] many date and acquaintance rapes from being classified as ‘real rapes.’” As a result, it has “transform[ed] rape from a pervasive phenomenon into an isolated one.”

Chamallas suggests that the reason why the rape prototype is a biased, normative prototype rather than a descriptive prototype is because the stranger-rape prototype serves a functional goal: “to reinforce certain social hierarchies.” Chamallas first argues that, by operating to decriminalize some nonconsensual sexual experiences, the stranger-rape prototype “reinforces male dominance and female powerlessness by giving (some) men sexual access to women they know.” She suggests that the “balance of power in marriage[s],”

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84. See Chamallas, supra note 14, at 778, 803.
85. See id. at 779–80, 783–84.
86. Susan Estrich, Rape, 95 YALE L.J. 1087, 1092 (1986). Explained another way:

Police and others are more likely to believe a case is genuine: (1) if violence occurred and bodily harm resulted; (2) if the offender was a stranger; (3) if the event reported involved more than one assailant; (4) if the victim showed signs of resistance and cried out; (5) if the victim reported the crime promptly; (6) if weapons were involved; (7) if the victim was emotionally upset afterwards; (8) if the victim had a reputation for chastity, did not voluntarily participate, and behaved in an acceptable, reputable manner prior to the assault; and (9) if witnesses were present to corroborate the claim of rape or abduction.

KATZ & MAZUR, supra note 31, at 210 (citations omitted).
87. Chamallas, supra note 14, at 778.
88. Id. at 784.
89. Id. at 785–86.
90. Id. at 786.
employment settings, and other relationships are “skewed” against women if they believe that others will view their rape claims skeptically.91 Second, the stranger-rape prototype strengthens patriarchal norms concerning the way women should behave.92 Even though the vast majority of women are raped by an acquaintance in their home or the home of a friend, relative, or neighbor, one study found that many women apparently believe they can avoid rape by dressing modestly, “avoid[ing] preferred public activities if alone,” and “going out at night with[] a male protector.”93 Thus, the prototype reinforces “patriarchal norms” by dictating that a woman should be “passive, modest, and under male protection.”94 Finally, Chamallas argues that the racialized prototype “reinforces white domination by using the threat of a charge of rape against black men to limit their freedom.”95

Having demonstrated how the stranger-rape prototype and the societal rhetoric, images, and stereotypes underpinning it limit the legal protections afforded to many raped women, Part III will identify and analyze the stereotypes and rhetoric underpinning the pregnant-raped-woman prototype. Part III also will lay the foundation for a discussion in Part IV of how these images ultimately limit the legal protections afforded to raped women who choose to raise the children they conceive through rape.

III. CONSTRUCTING THE PREGNANT-RAPED-WOMAN PROTOTYPE: THE “NECESSITY” OF PREVENTING THE BIRTH OF A RAPE-CONCEIVED CHILD

Societal rhetoric and images concerning the plight of the pregnant raped woman began during the 1960s as the result of what some describe as a strategic attempt by proponents of abortion rights to create inroads on the path to the legalization of abortion.96 Long before Roe v. Wade, a series of exposés were utilized to argue for the need for safe, legal abortions “without engaging the powerful value sets that surrounded it.”97 Primarily, proponents of abortion rights were battling against the view that women who sought abortions were making a choice against motherhood.98 So, despite the fact that the motivating force behind the “uncountable thousands of illegal abortions” in the 1960s primarily was “the desire to control one’s family, life-style, and economic status,”99 many of the women in these exposés were cast as women who “had been raped” and whose pregnancies were depicted as exacerbating the grievous-

91. Id.
92. Id.
93. Id. (citing MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 15–22 (1989)).
94. Id.
95. Id.
96. See VICTIMS AND VICTORS, supra note 8, at ix.
98. See id. at 25–26.
99. Id. at 33.
ness of rape. Proponents of abortion rights used the image of the raped woman to challenge the public opinion that all women who sought abortions were making a choice “against motherhood.” They did this by depicting raped women as having no choice or personal agency in seeking their abortions. Instead, raped women were depicted as “unfortunates who, through no fault of their own, were forced into an abortion”—forced by the necessity of stopping the continuing violence of the rape against them.

Depicting abortion in the case of rape as a matter of necessity rather than of choice continues, and this is the motivating force behind how the plight of the pregnant raped woman is articulated today. This conception may be the reason why it has long been held, both “at law and in principle,” that abortion is acceptable when a woman becomes pregnant as the result of rape. Moreover, it also may be responsible for the limited use of what this Note refers to as the nonconsensual-act justification in the modern-day abortion-exception rhetoric.

The few who use the nonconsensual-act justification in public discourse justify the rape exception by arguing that a raped woman should not be forced to bear the responsibility of rape-induced pregnancy or rape-induced motherhood because the woman did not consensually engage in the intercourse that gave rise to that responsibility. Because this justification derives from the notion that a woman should not be held “maternally” accountable for her nonconsensual sexual acts, this Note refers to this explanation as the nonconsensual-act justification. Under the nonconsensual-act justification, the focal point is choice. Having been denied a choice over her reproductive freedom by being forced to engage in a sexual act against her will, the raped woman must be given the choice over her reproductive freedom by having the option to end the pregnancy.

Despite the apparent fondness of the nonconsensual-act justification in much
academic literature, it is the rape-product justification that has been most widely adopted in the abortion rhetoric. This justification derives from the notion that it is cruel to force, through the absence of abortion laws or other protections, a pregnant woman to carry the “product of such [a] violent, vicious and terrible act as that of rape.” Proponents of the rape-product justification advocate their views by describing the unborn child in terms that suggest the child is a mere extension of the rapist (that is, by labeling the unborn child as the “rapist’s baby”) with the unborn child continuing the rapist’s violence against the woman, this time from within the raped woman’s own womb. By vilifying the rape-conceived child, these proponents depict abortion as a raped woman’s self-defense tool, necessary to enable a raped woman to stop the continuing violence of the rape and its aftermath. Thus, unlike the nonconsensual-act justification and like the raped woman narratives of the 1960s, the rape-product justification’s focal point is necessity: a raped woman does not choose abortion; instead, she needs it to end the rapist’s terrorization.

A variation of the rape-product justification superficially blends the nonconsensual-act and rape-product justifications and argues that a raped woman should be given choice over her reproductive freedom by being given the option of not carrying the wicked product of her rape. This Note refers to this variation as the quasi-rape-product justification. Despite the appearance of “choice” in this variation, the rhetoric used by those who advocate this justification—rhetoric that vilifies the unborn child in the same way as the rhetoric adopted by the advocates of the rape-product justification—betrays any sense that those who advocate this variation grant a raped woman any real choice: after all, what raped woman would willingly choose to give birth to her “rapist’s child”? What raped woman would choose to continue the victimization of her rape?

As in the 1960s, this discursive rhetoric, as well as other images concerning the plight of the pregnant raped woman, continues to be articulated primarily in the context of preventing rape births—for example, in discourse concerning abortion and emergency contraception laws. The following subsections will identify and analyze how the raped woman narratives from the 1960s survive through the modern-day rape-product and quasi-rape-product justifications, thereby crafting a pregnant-raped-woman prototype underpinned by necessity rather than choice.

A. PUBLIC AND PRIVATE DISCOURSE SURROUNDING THE HYDE AMENDMENT

In 1976, Congress passed the Hyde Amendment, a rider to the annual Labor Health and Human Services Appropriation Act, which prohibited the use of

federal funds for abortion services except in certain cases where abortion was justified by an exceptional circumstance as enumerated by Congress.\textsuperscript{111} The Hyde Amendment predominantly affected Medicaid,\textsuperscript{112} “the program under which the federal and state governments share the cost of necessary medical . . . care” for qualifying poor Americans.\textsuperscript{113} Prior to 1976, Medicaid funded nearly 300,000 abortions annually—33\% of all legal abortions.\textsuperscript{114} The ban created by the Hyde Amendment “represent[ed] one of the most effective means of reducing the number of abortions short of overturning \textit{Roe}.”\textsuperscript{115} The list of exceptional circumstances permitting the use of federal Medicaid money for abortion has varied over the years, but it has often included pregnancies which result from rape or incest.\textsuperscript{116} In 1993, Congress sought to reintroduce the rape exception into the Hyde Amendment, garnering support by means of the \textit{rape-product} or \textit{quasi-rape-product} justifications.\textsuperscript{117} For example, in arguing that federal money should be used to fund abortions in the case of rape, Senator Murray stated:

My personal awakening on the abortion issue came when I was in college. A friend of mine was what we today would call date raped. Abortion was not legal at the time. However, those with enough money had the option to go abroad or were able to find a doctor who could provide them with a safe procedure. My friend did not have money. She was \textit{forced} to obtain a back-alley abortion. The damage done during that procedure prevented her from ever having children. . . . \textit{Because of the laws of this country, my friend was never able to be a mother}.\textsuperscript{118}

Senator Murray’s raped woman narrative exploits the \textit{rape-product} justification to garner support, thereby reifying the 1960s view of abortion as necessary for raped women. Senator Murray’s friend was \textit{forced} to obtain a back-alley

\begin{footnotes}
\footnotetext{111}{\$ 209, 90 Stat. at 1434.}
\footnotetext{112}{The Medicaid Act exists to help low-income individuals pay for medical procedures. See 42 U.S.C. \$ 1396 (2000) (describing the purpose of the Medicaid Act as making it possible for each state to provide medical care to low-income individuals).}
\footnotetext{113}{Gold, \textit{supra} note 10, at 131.}
\footnotetext{114}{\textit{Tribe}, \textit{supra} note 107, at 151.}
\footnotetext{115}{Id.}
\footnotetext{116}{See Pub. L. No. 103-333, \$ 509, 108 Stat. 2539, 2573 (1994) (providing abortion funding for the termination of pregnancies resulting from “an act of rape or incest”); Pub. L. No. 103-112, \$ 509, 107 Stat. 1082, 1113 (1993) (same); Pub. L. No. 96-536, \$ 109, 94 Stat. 3166, 3170 (1980) (providing funding in cases where a woman was raped or made pregnant through incest, as long as she reported the crime to the proper authorities “within seventy-two hours”); Pub. L. No. 96-123, \$ 109, 93 Stat. 923, 926 (1979) (funding abortions in cases where a woman was raped or made pregnant through incest and “promptly” reported the crime); Pub. L. No. 95-480, \$ 210, 92 Stat. 1567, 1586 (1978) (same); Pub. L. No. 95-205, \$ 101, 91 Stat. 1460, 1460 (1977) (same).}
\footnotetext{117}{Many members of Congress supported this exception to the Hyde Amendment by utilizing the \textit{rape-product} exception. One Senator said in response to his colleagues’ apparent use of the exception, “I [feel] that life conceived through rape or incest [is] no less deserving of protection because of the circumstances under which it [is] conceived.” 139 \textit{CONG. REC.} 22,638 (1993) (statement of Sen. Hatfield).}
\footnotetext{118}{139 \textit{CONG. REC.} 22,627 (1993) (statement of Sen. Murray) (emphasis added).}
\end{footnotes}
abortion,” underscoring the necessity of abortion for raped women and denying any agency on the part of the raped woman. Moreover, by stating that the laws of this country prevented her friend from ever being a mother, Senator Murray implied that pregnancy from rape does not result in authentic or “real” motherhood and ignores that her friend could have become a mother had she declined to undergo an abortion. Her logic that an abortion ban, a ban designed to facilitate births, could somehow prevent a woman from giving birth goes unquestioned, however, because the notion that any child conceived through rape is not her mother’s own child has become seemingly self-evident: pregnancy by rape does not result in “real” motherhood.

Having sought to enable pregnant raped women to get the abortions they desperately need, Congress fought to ensure in 1995 that no state could prohibit these abortions by refusing to contribute state Medicaid funds to rape abortions. Because “[f]ederal contributions to abortion funding under the Medicaid program range from 50 percent to 90 percent of the total subsidy, with state funds making up the remainder,” some in Congress were concerned that pregnant raped women would be unable to afford their rape abortions without the states’ Medicaid contribution. As a result, the Kolbe-Lowey-Morella Amendment to the Hyde Amendment was proposed, clarifying that any state receiving federal Medicaid money must provide state Medicaid money for abortions in the case of rape or incest. Like support for the rape exception to the Hyde Amendment generally, support for the Kolbe-Lowey-Morella Amendment involved use of the rape-product justification.

In debating the amendment, many representatives underscored its necessity by depicting the unborn child as being solely an extension of the rapist father. Representative Lowey referred to the unborn child as the “rapist’s baby.” Representative Hastings asked, “Should [raped women] be forced to bear the child of a rapist?” Beyond defining the unborn child as exclusively a product of the rapist father, others stripped the unborn child of any personhood, referring to the unborn child as merely an extension or after-growth of the rape itself. Representative Johnson stated:

Think. Rape is someone grabbing you, assaulting you, overwhelming you with fear for your life and then violating you in the most deeply personal and destructive way. Please, leave to the victim the decision as to whether to carry or not to carry any possible product of such violent, vicious and terrible act as that of rape.

119. Id.
120. Gold, supra note 10, at 131.
122. Id.
123. Id.
Representative Maloney, instead of describing the unborn child as a product of the rapist father, argued for the amendment by condemning the rape-induced pregnancy for its perpetuation of the raped woman’s suffering. She advocated that the amendment was necessary to save the raped woman from “spend[ing] 9 months reliving the crime.”\textsuperscript{126} By placing the child exclusively in the rapist’s genetic pool or by depicting the unborn child as an after-product of the rape that prolongs the rape terrorization, this public discourse underscores the necessity of abortion as a self-defense tool for the raped woman. Thus, the pregnant raped woman is depicted as needing an abortion, not to restore the reproductive choice denied to her, but to enable her to heal from the rape. Should any doubt linger as to whether necessity, and not choice, was the driving force behind the amendment, Representative Slaughter’s comments foreclose such doubt. Representative Slaughter appealed for support by describing abortion in the case of rape as the most important medically necessary service provided by Medicaid.\textsuperscript{127} She argued, “When this Medicaid statute was written, it was clear that Congress intended the program to cover all medically necessary ... services. ... Is it possible to imagine a service more important ... if you are a poor woman, or a girl, who has been raped . . . ?”\textsuperscript{128}

B. PUBLIC AND PRIVATE DISCOURSE SURROUNDING THE AVAILABILITY OF EMERGENCY CONTRACEPTIVES

In the United States, “emergency contraceptive options to prevent pregnancy after intercourse have been available ... for more than 25 years;”\textsuperscript{129} however, despite this, not all hospitals provide emergency contraceptives.\textsuperscript{130} On April 9, 2002, Representative Constance Morella introduced the Compassionate Care for Female Sexual Assault Survivors Act,\textsuperscript{131} which requires hospitals, as a condition of receiving federal funds, to provide emergency contraception to raped women.\textsuperscript{132} Almost 37,000 proponents of the 2007 version of the Compassionate Care for Female Sexual Assault Survivors Act signed a petition drafted by NARAL Pro-Choice America entitled, “Protect Survivors of Rape Against Unwanted Pregnancy.”\textsuperscript{133} Beyond showing their support for the Act by signing their names, many petitioners also attached their comments as to why the proposed Act was necessary.

Like the members of Congress in the federal abortion funding context, many petitioners referred to the potential unborn child as being solely an extension of

\textsuperscript{128} Id.
\textsuperscript{129} Stewart & Trussell, supra note 6, at 228.
\textsuperscript{130} Id. at 229.
\textsuperscript{131} H.R. 4113, 107th Cong. (2002).
\textsuperscript{132} Id.
\textsuperscript{133} See Petition from NARAL Pro-Choice America to the United States Congress (June 27, 2007), http://www.thepetitionsite.com/takeaction/352749405.
the rapist father, using labels such as the “rapist’s child”134 or the “rapist’s baby.”135 Some proponents stripped the unborn child of all personhood, referring to the child as the “animal’s child,”136 while others went to even greater lengths, referring to the unborn child as the “monstrosity . . . growing in [the mother’s] womb”137 and as the “remnants of a degrading violation.”138 Many petitioners also used language that underscores as self-evident the agony of the rape-induced pregnancy on the raped woman. Petitioner Orly Treitman argued that “[e]very woman has the right to the choice to abort or not, but even more so has the victim of rape, since the physical and mental trauma will be only amplified by the birth of a child caused by such a violent . . . union.”139 Others went further, arguing, as self-evident, the undesirability of the unborn child on the part of the raped woman. They stated that “[t]hese children so often end up in loveless situations”140 and that “any child born of such an occasion would have little chance of being well-loved.”141 Beyond suggesting that it was natural for a raped woman to view the unborn child as undesirable, Petitioner Danielle Dean suggested that it was even perhaps unnatural for a raped woman to feel anything but disregard for her unborn child.142 She asked rhetorically, “Would you want to carry around a reminder of such brutality and evilness that was inflicted upon your body and soul . . . ?”143 Even the petition’s title assumes, as self-evident, the undesirability of a rape-conceived child on the part of the raped woman: “Protect Survivors of Rape Against Unwanted Pregnancy.”144

The adoption of the rape-product and quasi-rape-product justifications is not confined to public discourse. A press release issued from Governor Richard Codey’s office in New Jersey announcing the signing of a new bill that will require New Jersey hospitals to educate sexual assault survivors about emergency contraceptives and to provide contraceptives upon request also reveals the utilization of these justifications.145 Quoted in the press release, Assemblyman Neil Cohen, co-sponsor of the bill, described the “emotional distress of a rape-induced pregnancy” and stated that “[c]hildbirth should be a momentous occasion, not a reminder of a violent crime.”146 Fellow co-sponsor Assemblyman John McKeon also stated that “[e]mergency contraceptives will provide

134. Id. (quoting comments of Petitioner #36,724, Louis Landesman).
135. Id. (quoting comments of Petitioner #36,885, John Deering).
136. Id. (quoting comments of Petitioner #36,833, Michele Peterson).
137. Id. (quoting comments of Petitioner #2, Pat Rued).
138. Id. (quoting comments of Petitioner #36,950, Anonymous).
139. Id. (quoting comments of Petitioner #36,897, Orly Treitman).
140. Id. (quoting comments of Petitioner #36,891, Jennifer Williams).
141. Id. (quoting comments of Petitioner #36,950, Anonymous).
142. Id. (quoting comments of Petitioner #36,932, Danielle Dean).
143. Id.
144. Id. (emphasis added).
146. Id.
victims with peace of mind, allowing them to move on and live life without a daily reminder of that horrible crime.”

Beyond the statements of legislators and public proponents, many medical doctors and institutions charged with treating raped women also engage in discursive rhetoric that highlights how a raped woman needs to prevent the birth of a rape-conceived child. In arguing that the prevention of pregnancy resulting from rape is a neglected preventative health care measure, Stewart and Trussell state that it is “reasonable to assume that in addition to being unintended, many [rape] pregnancies are also unwanted.” They do not provide adequate reasons why it is “reasonable to assume” this. Stewart and Trussell further state that “[i]f all women who were raped used emergency contraception, about 22,000 pregnancies resulting from rape could potentially be prevented annually,” while assuming, as self-evident, that this is a desirable end.

Even the manner in which emergency room physicians dispense emergency contraceptives to raped women reinforces the notion that raped women view their potential unborn children as undesirable. For example, some patients expressed frustration at how the contraceptive pill was offered. One stated, “[The doctor] didn’t explain too much . . . but just gave it. . . . I felt taken advantage of.” Moreover, should pregnancy result from rape, many physicians suggest abortion as the only alternative. In one case, after treating a raped woman, a physician told his patient “what to do if her period did not come—namely, to make an appointment at the [abortion] clinic.” Another woman pregnant from rape stated that her doctor “advised [her] to have an abortion.” And a third who sought assistance from a rape crisis clinic stated that “[t]here was no alternative from . . . the clinic”; “they offered to pay for the abortion.”

Even a doctor in the field stated, “[w]e advise all rape victims that if they miss their next regular period by more than one week, they should return for menstrual extraction or suction curettage.”

Such rhetoric and behavior from medical institutions is especially problematic because of the doctor’s assumed role as a healer. The message is that acting against pregnancy is just a necessary part of the rape protocol for good health. Moreover, by engaging in behavior that suggests prevention of rape pregnancies and births is self-evidently necessary, doctors do not restore reproductive choice; instead, they assume away that choice. Although the institutional con-

147. Id.
148. Stewart & Trussell, supra note 6, at 228 (emphasis added).
149. Id. at 229 (emphasis added).
150. Holmstrom & Burgess, supra note 83, at 96.
151. Id. at 84.
152. Sobie & Reardon, supra note 8, at 21.
153. Id.
cern about raped women’s health and their abilities to be provided with emergency contraceptives may be appropriate, the rhetoric adopted harms raped women by assuming that preventing or terminating a rape pregnancy is the only choice that a raped woman possibly would make. As a result, as noted by Sandra Mahkorn and William Dolan: “Ironically, those purporting to promote respect for the sexual assault victim too often propose a paternalistic attitude when the question of pregnancy arises. A sensitive awareness of the individual is abandoned with many of the so-called quick and easy solutions.” 155

IV. DECONSTRUCTING THE PREGNANT-RAPED-WOMAN PROTOTYPE: ANOTHER NORMATIVE Prototype

As demonstrated in Part III, the images concerning the pregnant-raped woman, as articulated in discourse concerning abortion and emergency contraceptive laws, depicts the typical or prototypical raped woman as someone who views her unborn child as an extension of her rapist and as perpetuating the violence against her from within; whose healing from the rape is so intertwined with her ability to prevent the pregnancy or birth of her rape-conceived child that, even if she self-identifies as strongly pro-life, she supports measures intended to terminate her pregnancy; 156 and whose hatred toward her unborn child is so natural that extraordinary measures are needed.

Although these characteristics have been adopted as the prototypical pregnancy–rape experience, like the stranger-rape prototype, this pregnant-raped-woman prototype operates on a normative, not descriptive, level. First, like the stranger-rape prototype, the pregnant-raped-woman prototype may be biased in its depiction of the rape pregnancy experience by depicting the atypical pregnant raped woman as the typical. Just as the psychological response to rape varies, for example, “from ‘lack of concern’ to ‘major emotional disturbances, including severe depression’ or ‘from fear, restlessness, tears and anger to smiling, calmness and composure,’” 157 the response of women to their rape-induced pregnancies also varies widely.

Perhaps surprisingly, the only study to ever analyze the effects of pregnancy upon raped women found that raped women are, above all, victims of rape, not pregnancy. 158 Thus, contrary to the pregnant-raped-woman prototype, which depicts the pregnant woman as suffering to a greater extent because of the

156. See supra note 105.
157. Katz & Mazur, supra note 31, at 216 (citations omitted). The purpose of this section is not to argue that rape-induced pregnancy is a simple matter free from psychological and emotional impacts. Rather, it is to argue that the societal depiction of the pregnant raped woman has not only been too simplistic because it has entirely ignored the thousands of raped women who, each year, give birth to, raise, and love the children they conceived through rape, but it also may be inaccurate in its depiction of the reaction of the statistically typical pregnant raped woman. Instead, further research is necessary to know how the statistically typical pregnant raped woman views her rape pregnancy.
158. See David C. Reardon, How Abortionists Have Exploited the Victims of Rape, in Victims and Victors, supra note 8, at 27, 41.
“rapist’s child” growing inside her, “it appears that the pregnant victim’s problems stem more from the trauma of rape rather than from the pregnancy itself.” 159 Only 19.2% of raped women stated that they needed to confront feelings of “resentment of the pregnancy” or “hostility towards [the] child.” 160 Moreover, only 14.3% responded that the pregnancy served as a “continual reminder of the rape event.” 161 An analysis of the attitudes of the 21 raped women whose pregnancies resulted in births revealed that 68.75% of the women either had “a positive viewpoint to begin with” or changed, through the course of their pregnancies, “from negative to more positive images, attitudes, beliefs, or feelings about the unborn child,” and none of the raped women changed from a positive to a more negative image or attitude about the unborn child. 162

In describing her feelings toward her rape-conceived child, one raped woman stated:

Do I regret the decision to have and keep my child? NO. I heard stories of how ‘I’d look at her/him and see the rapist,’ or ‘take my anger at the rapist out on him/her.’ Maybe those things do happen for some women, but not to me. I look at my daughter and see [a] gentle, beautiful spirit . . . . 163

Others who choose to raise their children view their “children’s lives [as] hav[ing] some intrinsic meaning or purpose which they do not yet understand,” believing that “[g]ood can come from evil.” 164 Far from viewing the rape-conceived child as exclusively a product of the rapist father, many view their rape-conceived children as partners in their own victimization. One woman stated, “Basically my feelings were, ‘It’s just you and me, kid.’ I considered us both to be victims. Kind of like the bond between hostages.” 165 Another raped woman denied the genetic input of the rapist father altogether. She stated, “I remember thinking . . . I have to take care of my baby. Not that animal’s, but MINE. It was my baby . . . .” 166

Beyond failing to view their rape-conceived children, whether born or un-

159. Mahkorn & Dolan, supra note 154, at 190.
160. Sandra K. Mahkorn, Pregnancy and Sexual Assault, in THE PSYCHOLOGICAL ASPECTS OF ABORTION 53, 59, 61 (David Mall & Walter F. Watts eds., 1979). Thirty-seven individuals participated in this study, and they were asked to participate after self-identifying as pregnant raped women seeking assistance from “various counseling and social welfare agencies that are known for assisting women through problem pregnancies.” Id. at 57.
161. Id. at 60–61.
162. Id. at 63, 68.
163. Testimonies of Rape Victims Who Had Abortions, in VICTIMS AND VICTORS, supra note 8, at 74, 82 (testimony of Mary Murray).
164. David C. Reardon, Rape, Incest and Abortion: Searching Beyond the Myths, in VICTIMS AND VICTORS, supra note 8, at 13, 14.
165. Testimonies of Rape Victims Who Had Abortions, supra note 163, at 86 (testimony of Sharon “Bailey”).
born, as enemies, many raped women do not view the pregnancy or giving birth as exacerbating the grievousness of the rape. Many raped women stated that they found healing through the birth process. Some “may sense, at least at a subconscious level, that if [they] can get through the pregnancy [they] will have conquered the rape.” One raped woman wrote, “as the pregnancy progressed, as I could feel my baby begin to kick and move, my thoughts began to change. The baby itself was a part of the healing.”

Another wrote, “[s]he was the gift that brought me out of fear and darkness.” Lori A. Scriver crafted a poem entitled “The Gift” to her rape-conceived child in which she wrote:

You came to me when I needed you most,
You came to me and brought with you a hope . . . .

You saved me, my precious,
You saved me, my strength . . . .

Furthermore, it is too simplistic to rely solely on the numbers of raped women who abort or put their children up for adoption to characterize the attitudes of raped women toward their pregnancies and children. Because all rape pregnancies are unintended, many raped women who choose abortion or adoption may be doing so because the pregnancy was unintended, not because of their negative attitudes toward the rape pregnancy or rape-conceived child. For example, one raped teenager, who chose adoption because of her youth, wrote “I had never held such a small baby but it came naturally. I fed him and held him for a very long time. I told him I loved him but couldn’t keep him. . . . I told him to be a good little boy and make some family very happy.” Another raped woman who chose adoption because she was not yet ready to be a mother stated:

[Raped] mothers generally do not love their children any less . . . than mothers whose children were conceived in other circumstances. Mothers whose children were conceived through rape are often angered by society’s perception that their children are, by virtue of the circumstances of their conception, less valuable to them than children conceived in other circumstances and that separating them by adoption will somehow benefit both child and mother.

167. Reardon, supra note 164, at 14.
168. Sobie, supra note 65, at 165.
169. Testimonies of Rape Victims Who Had Abortions, supra note 163, at 97–98 (testimony of Cindy Speltz).
170. Letter from Lori A. Scriver to Hope for Healing.org, supra note 166.
171. Testimonies of Rape Victims Who Had Abortions, supra note 163, at 92 (testimony of Connie Sellers).
Even those who abort may be doing so for reasons that have nothing to do with their feelings toward their rape-induced pregnancy or child. One study found that “[o]pinions, attitudes, and beliefs of others about the rape and pregnancy [were] reasons most commonly mentioned by [pregnant raped women] as conditions or situations which ‘make it most difficult for a woman who is pregnant as a result of sexual assault to continue her pregnancy.’”\textsuperscript{173} Thus, just as public perceptions concerning what constitutes “real” rape have limited women’s reporting of rapes that depart from the stranger-rape prototype,\textsuperscript{174} public perceptions articulating the necessity of abortion for raped women may cause them to choose abortion, even though their attitudes toward their pregnancies or unborn children depart from the prototype.

Even if the pregnant-raped-woman prototype is found to be statistically accurate in its depiction of the response of the typical raped woman toward her rape pregnancy and child, the prototype remains problematic. Society, in its articulation and adoption of the rape-product justification, has chosen a prototype—and, therefore, a view of the pregnant raped woman—that operates on an inherently normative level.\textsuperscript{175} Had society advanced a prototype depicting pregnant raped women as facing, not unwanted, but unintended pregnancies, as with the nonconsensual-act justification, there would be little potential for a raped woman to garner suspicion through her decision to abort, adopt, or raise her rape-conceived child. Under a pregnant-raped-woman prototype informed by the nonconsensual-act justification, both the raped woman who gives birth to her rape-conceived child and the raped woman who aborts have acted consistently with the prototype: they have regained their reproductive freedoms by exercising a choice over whether or not to become mothers. The choice, however, belongs to them. Thus, even if the pregnant-raped-woman prototype is statistically accurate, it still fails to operate on a purely descriptive level because society, in articulating a pregnant-raped-woman prototype that is informed by the rape-product justification, has created a value-laden rather than value-free prototype.

Like the stranger-rape prototype,\textsuperscript{176} the pregnant-raped-woman prototype may have emerged and continues to persist because it reinforces social hierarchies. For example, by describing the unborn children in terms that suggest the children are exclusively extensions of the rapist fathers, proponents of the pregnant-raped-woman prototype—underpinned by the rape-product justification—reify many sexist and patriarchal ideas. Sandra Mahkorn argues that rhetoric which portrays the unborn child as “being the property of the rapist” derives from a “sexist mentality.”\textsuperscript{177} It is the mentality that views a woman as

\textsuperscript{173} Mahkorn, supra note 160, at 66.

\textsuperscript{174} See supra Part II.

\textsuperscript{175} See Chamallas, supra note 14, at 780 (describing prototypes as working at a normative rather than descriptive level).

\textsuperscript{176} See supra Part II.

\textsuperscript{177} Mahkorn & Dolan, supra note 154, at 191–92.
“merchandise to which a man can claim ownership,” such that any offspring of that relationship are viewed as “the property of the owner, the father.”\footnote{Id. at 192.} As a result, through use of the pregnant- raped-woman prototype, “chauvinistic pre-dispositions are tolerated and succumbed to.”\footnote{Id.} This “property” view not only allows for the illogic that a child conceived through rape is exclusively a genetic product of the rapist father, but also “de-legitimiz[es] [the] maternal genetic link,”\footnote{R. Charli Carpenter, \textit{Surfacing Children: Limitations of Genocidal Rape Discourse}, 22 Hum. RTS. Q. 428, 457 (2000).} and thereby, “erase[s] all identity characteristics of the mother other than that as a sexual container.”\footnote{BEVERLY ALLEN, \textit{RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA} 87 (1996).} In doing so, it “reifies the patriarchal notion of patrilineal descent,”\footnote{Carpenter, \textit{supra} note 180, at 457.} as well as the sexist ideology that “promote[s] the concept that a woman is a mere receptacle.”\footnote{Mahkorn & Dolan, \textit{supra} note 154, at 191.} Finally, the depiction of an unborn child as being “‘worthless’ or ‘valueless’” derives from the notion that pregnancy from rape is “symbolic of ‘damage’ to male property.”\footnote{Id. at 192.}

Moreover, because the raped woman is often unmarried\footnote{See \textit{BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, supra note 65, tbl.12 (showing statistics for rape and sexual assault by gender and marital status of victims).} and poor,\footnote{Id. at tbl.14 (showing statistics for rape and sexual assault by annual family income of victims).} a prototype that adopts language which minimizes the reproductive choice of such women is likely to be promoted because it reinforces “sacred” motherhood. Adrienne Rich argues that “[m]otherhood is ‘sacred’ so long as its offspring are ‘legitimate.’”\footnote{ADRIENNE RICH, \textit{OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION} 42 (1976).} Therefore, a prototype which normatively discourages the births of these children—children who will likely be born to unwed and poor mothers—is likely to be favored and may further explain why “motherhood created by rape is . . . degraded.”\footnote{Id. at 35.}

V. HOW THE \textit{PREGNANT-RAPED-WOMAN PROTOTYPE} LIMITS THE LEGAL PROTECTIONS AFFORDED TO PREGNANT RAPED WOMEN

As discussed in Part II, all prototypes, by defining what is typical or normal, “set the standard by which others are judged.”\footnote{Chamallas, \textit{supra} note 14, at 787.} However, adopting prototypes that are either biased or inherently normative can be highly “influential in constructing a class of ‘true’ or ‘real’ or ‘worthy’ victims, making it harder for those who are injured or affected in ways that do not fit the prototype”—like those who are victims of “date” rape—“to have their interests understood or
redressed in law.” Just as the stranger-rape prototype has limited the legal protections afforded to many raped women, the pregnant-raped-woman prototype, as this Note argues, is responsible for the widespread absence of a legal response to the needs of pregnant raped women who seek to raise their rape-conceived children. If the argument is accurate, just as women whose nonconsensual sex experiences depart from the stranger-rape prototype receive less protection from the law, those women whose rape pregnancy experiences depart from the pregnant-raped-woman prototype would receive less protection from the law as well. Thus, women who behave most consistently with the prototype—by demonstrating their disdain for their unborn children and the rape pregnancy by aborting—would receive the greatest protection from the law. Those who act least consistently with the prototype—by raising their rape-conceived children and purporting to love them—would be viewed most suspiciously and, as a result, would receive the least protection from the law. Finally, those raped women whose behavior falls in between these two extremes—by giving birth to their rape-conceived children but choosing adoption—would receive some protection, but not as much as is enjoyed by those whose behavior perfectly matches the prototype. The following two subsections test this argument.

A. IMPOSTORS: WOMEN WHO RAISE THEIR “RAPE”-CONCEIVED CHILDREN

Sixteen states have enacted statutes to protect a raped woman who chooses

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190. Id. at 781.
191. See supra notes 79–95 and accompanying text.
192. It may be argued that such laws are rare because rapists are unlikely to exercise parental rights. First, I have not found any research to substantiate this claim. Second, regardless of how many rapist fathers exercise these rights, the mere ability of rapists to exercise these rights may affect a woman’s choice in how she proceeds with her rape pregnancy. See supra Part I. Next, such an explanation fails to account for why the laws, when they do exist, differ so drastically in their protections from laws that exist to facilitate an easy adoption for women who conceive through rape. See infra section V.B. Finally, such an explanation does not reflect why states that have been confronted with these laws have decided not to adopt them. For example, in Maryland, legislators were presented in 2007 with a bill that would deny “custody, visitation and other parental rights to rapists whose victims conceive and have a child.” Lisa Rein, Comments on Rape Law Elicit Outrage: Doctrine from the 1600s Cited by MD Delegate, WASH. POST, Apr. 6, 2007, at B01; see also H.B. 648, 2007 Leg., 422d Sess. (Md. 2007); S.B. 679, 2007 Leg., 422d Sess. (Md. 2007) (introduced in senate and adopted). Although it passed unanimously in the senate, it was held up in the House Judiciary Committee and failed to pass. See Rein, supra. Although no reason was given for its failure to pass, the chairman of the House Judiciary Committee, Del. Joseph F. Vallario Jr., drew outrage from the press when he expressed the concern that “women could abuse the law by saying they were raped to punish a man from whom they were estranged.” Id. Vallario then invoked Sir Matthew Hale’s seventeenth century instruction to juries to be skeptical of rape claims: “Rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused.” Id. Thus, the true reason for denying the protection of these laws seems to center around concerns of “imposter” rape victims, not around concerns that these laws are unnecessary because the problem of rapists seeking parental rights is rare.
193. See Chamallas, supra note 14, at 784–85.
194. See supra section III.A for a discussion of the protections afforded by the Hyde Amendment to raped women who opt to abort their fetuses under the Hyde Amendment.
to raise her child from the efforts of a rapist father who seeks to exercise custody or visitation privileges. The remaining thirty-four states have failed to address the issue. Of those sixteen states providing legal redress, nine states allow or require the termination of the parental rights of the rapist father while seven states allow or require merely stripping custody or visitation privileges, leaving parental obligations intact. By extinguishing custody or visitation rights as opposed to terminating parental rights altogether, rapist fathers in these five states may be required to pay child or other economic support for their children.

Although sixteen states have laws purportedly designed to protect raped

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195. For the purposes of this discussion, the concern is with the parental rights of the putative, not presumed, father. For example, Alabama defines the putative father as any “man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined.” See Ala. Code § 26-17-102(3), (19) (LexisNexis Supp. 2008). Alternatively, in Illinois,

A man is presumed to be the natural father of a child if: (1) he and the child’s natural mother are or have been married to each other . . . and the child is born or conceived during such marriage; (2) after the child’s birth, he and the child’s natural mother have married each other . . . and he is named . . . as the child’s father on the child’s birth certificate; (3) he and the child’s natural mother have signed an acknowledgment of parentage . . . or (4) he and the child’s natural mother have signed an acknowledgment of parentage.

750 Ill. Comp. Stat. Ann. 45/5(a)(1)–(4) (2008). The married woman who is raped by someone other than her husband may not have the same parental rights concerns as an unmarried raped woman since the “presumed” father may be her husband.


197. Even though other states do not have specific statutes addressing this issue, they may find a perpetrator’s sexually violent act as the basis for terminating that parent’s rights. For example, a sexually violent act or a conviction for sexual assault against the other parent may be considered by a court in determining custody or parenting provisions that are in the “best interest” of a child. However, these measures may provide little protection to a raped woman who may be adverse to playing “Russian Roulette” with her and her child’s safety. For further discussion, see infra note 201. Moreover, given the fundamental right to parent recognized in Troxel v. Granville, 530 U.S. 57, 75 (2000), a statutory measure is necessary to fully protect a rape victim, especially because courts are hesitant to terminate the parent-child relationship absent statutory authorization.


200. It is unclear whether rape victims who conceive would prefer to have economic assistance or not. Some rape victims may feel that the money is tainted or that the money may signify a rapist’s legitimization of the rape. Others may desire the economic assistance.
women and their children from the rapist fathers who seek custody or visitation privileges, these protections are, by and large, illusory because they only provide protection to the raped women who are willing to play “Russian Roulette.” For example, most of the laws have stringent requirements. Ten of the sixteen states require a criminal conviction to trigger these statutes terminating or restricting a perpetrator’s parental rights. In the remaining six states, no criminal conviction is explicitly required. The requirement of a criminal conviction, alone, presents an often insurmountable burden for a raped woman. A 1993 Report found that “[n]inety-eight percent of the victims of rape never see their attacker caught, tried and imprisoned.” However, requiring a criminal conviction is also problematic in many other ways. A statute that requires conviction may be superfluous because many states allow for the termination of parental rights as the result of a parent’s incarceration. More importantly,

201. Russian Roulette is a game in which participants place a single bullet into one of the empty chambers of a gun. After placing the bullet into the chamber, the chamber is closed and spun, concealing the location of the bullet. Participants then place the gun to their own heads and pull the gun’s trigger, risking death if they incorrectly guess the location of the bullet. See Jake Wasikowski, Man Plays Game of Chance With His Life, and Loses, Nebraska TV, Feb. 27, 2008, http://www.nebraska.tv/Global/story.asp?S=7896580. As argued here, these statutory protections resemble the game of Russian Roulette because, like the Russian Roulette player, the raped woman is only protected if she “guesses” correctly about her ability to secure a criminal conviction, delay the child custody proceedings, or make her case convincingly in front of the trial judge. Also, as in the game of Russian Roulette, the consequences of an incorrect assessment by the raped woman are quite serious.

202. See CAL. FAM. CODE § 3030(b) (Deering 2006); CONN. GEN. STAT. § 45a-717(g)(2)(G) (2004); ME. REV. STAT. ANN. tit. 19-A, § 1658 (1998); MICH. COMP. LAWS ANN. § 722.25(2) (West 2002); MONT. CODE ANN. § 41-3-609(1)(c) (2007); NEV. REV. STAT. § 125C.210(1) (2007); N.J. STAT. ANN. § 9:2-4.1(a) (West 2002); N.C. GEN. STAT. §§ 14-27.2(c), .3(c) (2007); TENN. CODE ANN. §§ 36-1-113(c), (g)(10) (2005 & Supp. 2008); TEX. FAM. CODE ANN. § 161.007 (Vernon 2002).

203. See IDAHO CODE ANN. § 16-2005(2)(a) (Supp. 2008) (“The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where: . . . The parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under sixteen (16) years, or sexual abuse of a child under the age of sixteen (16) years . . . .”); LA. CIV. CODE. ANN. art. 137 (2008) (“In a proceeding in which visitation of a child is being sought by a natural parent, if the child was conceived through the commission of a felony rape, the natural parent who committed the felony rape shall be denied visitation rights and contact with the child.”); MO. REV. STAT. § 211.447.5(5) (Supp. 2008) (“When the biological father has pled guilty to, or is convicted of, the forcible rape of the birth mother, such a plea or conviction shall be conclusive evidence supporting the termination . . . .”); OKLA. STAT. ANN. tit. 10A, § 1-4-904(B)(11) (West 2009) (“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.”); S.D. CODIFIED LAWS § 25-4a-20 (2006) (“If it is in the best interests of the child, the court may prohibit, revoke, or restrict visitation rights to a child for any person who has caused the child to be conceived as a result of rape or incest.”); WIS. STAT. § 48.415(9) (2005–2006) (“Conception as a result of sexual assault . . . may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing.”).

204. Wells & Motley, supra note 64, at 128–29 (citing MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103d CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE iii (Comm. Print 1993)).

205. See, e.g., IDAHO CODE ANN. § 16-2005(1)(e) (“The court may grant an order terminating the relationship where . . . the parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child’s minority.”). On the other hand, the frequency and length of
given that few rapes are brought to trial, a conviction requirement fails to provide protection for the majority of raped women. Even where a raped woman reports her rape, she may find it difficult to secure a criminal conviction for the specific sexual act specified in these statutes because many prosecutors allow rapists to “plead[] guilty to a lesser related offense” in order to avoid the lengthy, costly, and uncertain process of trial. Even where a woman is successful in securing a trial on rape charges, she still risks having to share parental rights of her child with her attacker because less than half of those arrested for rape are convicted.

Furthermore, even a woman who secures a criminal conviction may not be altogether protected. Given that “a conservative estimate of the time from the date of the crime to the date of the sentencing is anywhere from six months to two years,” a raped woman may be required to interact and have her child interact with her rapist for months or even years if the custody hearing precedes a conviction. As a result of this time delay and the permissive, rather than mandatory, nature of termination statutes, a court may determine that, despite prison sentences for rapists may mean that imprisonment termination statutes are of little protection. About 21% of convicted rapists are never sentenced to serve time in jail or prison and 24% receive sentences in a local jail, which means they will spend an average of 11 months behind bars. See MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 36 (Comm. Print 1993). These statistics were the culmination of a three-year study conducted by the Majority Staff of the Senate Judiciary Committee involving all fifty “state criminal justice statistical analysis centers.” Id. at 57–60. An updated study has not been conducted.

206. See supra note 204 and accompanying text.

207. See MADIGAN & GAMBLE, supra note 20, at 97–98.

208. Fifty-four percent of all rape prosecutions result in either a dismissal or an acquittal. See MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., supra note 205, at 11.

209. MADIGAN & GAMBLE, supra note 20, at 96.

210. Should a raped woman succeed in securing a criminal conviction, only five of those ten states that require a conviction mandate termination or restriction of parental rights. See CAL. FAM. CODE § 3030(b) (Deering 2006) (“No person shall be granted custody of, or visitation with, a child if the person has been convicted under Section 261 of the Penal Code [which outlaws rape] and the child was conceived as a result of that violation.” (emphasis added)); ME. REV. STAT. ANN. tit. 19-A, § 1658(3) (1998) (“[I]f the petitioner proves the allegations . . . the court shall terminate the parental rights and responsibilities of the parent.” (emphasis added))); MICH. COMP. LAWS ANN. § 722.25(2) (West 2002) (“[I]f a child custody dispute involves a child who is conceived as the result of acts for which 1 of the child’s biological parents is convicted of criminal sexual conduct . . . the court shall not award custody to the convicted biological parent.” (emphasis added)); N.C. GEN. STAT. § 14-27.2(c) (2007) (“Upon conviction, a person convicted . . . has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child . . . .” (emphasis added)). Nevada requires the automatic relinquishment of custody and visitation rights, except where the natural mother or legal guardian consents and where such consent is in the best interest of the child. NEV. REV. STAT. § 125C.210(1) (2007) (“[I]f a child is conceived as the result of a sexual assault and the person convicted of the sexual assault is the natural father of the child, the person has no right to custody of or visitation with the child unless the natural mother or legal guardian consents thereto and it is in the best interest of the child.”).

The remaining five states merely permit a court to act. See CONN. GEN. STAT. §§ 45a-717(g)(1), (2)(G) (2004) (“[T]he court may approve a petition terminating the parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child . . . .” (emphasis added)); MONT. CODE ANN. § 41-3-609(1)(c) (2007) (“The court may order a termination of
the rape conviction, it is not in the best interests of the child to terminate parental rights where the lengthy period of time between the attacker’s arrest and conviction has allowed him to establish a parental presence. Moreover, these barriers may create powerful incentives for a raped woman to “bargain” with her rapist so as to avoid the possibility that a court would grant even temporary custody or visitation privileges. A raped woman may, for example, exchange her right to pursue legal redress in order to procure her rapist’s voluntary relinquishment of his parental rights. Alternatively, a raped woman, faced with the real possibility that she will be unable to secure a rape conviction or “bargain” effectively with her rapist, may abort her child in an effort to spare her and her child from future suffering.211 Such a calculation of risk is compounded because, in most states, a raped woman may have only three months in which to determine her chances of securing a conviction before her ability to legally and routinely seek an abortion expires. Thus, even in the ten states where statutory redress exists, because a raped woman does not have control over the criminal process, she is, in essence, only protected if she is willing to gamble with her and her child’s safety.

Even in the six states that permit termination of parental rights absent a criminal conviction, a raped woman still faces uncertainty about her ability to parent her child without the involvement of her rapist. Five of these six states do not require a court to terminate the perpetrator’s rights, even where the court is

211. The adverse effects of abortion, which are present in most women who seek an abortion, may be compounded for the woman who feels forced to have an abortion because of the failure of adequate legal protections. See Priscilla Coleman, Abortion Mental Health Research: Update and Quality of Evidence, Ass’n for Interdisc. Res. in Values & Soc. Change Res. Bull., at 1, 3 (2008). Women whose first pregnancies end through abortion report abusing substances following the abortion five times more than women whose pregnancies were carried to term and four times more than those women whose first pregnancies ended through miscarriages. David C. Reardon & Philip G. Ney, Abortion and Subsequent Substance Abuse, 26 Am. J. of Drug & Alcohol Abuse 61, 69–70 & tbl.7 (2000). Additionally, suicide rates are nearly six times higher for women after an abortion. See Coleman, supra, at 3. Moreover, abortion has been shown to compound the emotional difficulties for pregnant rape victims. See Sobie & Reardon, supra note 8, at 19–22 (finding that 88% of rape victims who had an abortion regret their decision). These difficulties may be further compounded if a woman feels pressure to abort the child she wishes to raise, especially where, because of the lack of adequate statutory protections, the woman feels forced to choose abortion to ensure her future protection from her perpetrator.
satisfied that the baby was conceived through rape.212 Thus, in these five states, even where the statutory requirement is met and the father is presumed unfit, 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. As a result, even in the states that do not require a criminal conviction, a raped woman must be willing to gamble that the trial judge will exercise discretion in her favor.

Although sixteen states have laws purportedly designed to provide statutory protection for the raped woman who seeks to raise her child, only one state provides statutory action that, at least facially, provides security for a majority of raped women.213 In order for women to avoid being forced into gambling on their future parenting life, they need a statute that requires the termination of parental rights where rape, giving rise to a subsequent birth, is proven by evidence other than a criminal conviction.214 Only one state offers her that security.215

As this Note argues, this result is unsurprising, and even expected, if these women are deemed suspicious as a result of acting inconsistently with the pregnant-raped-woman prototype. Society’s resultant labeling of these women as “impostor rape victims”—that is, women who are likely falsifying their rape allegations and the facts about the conception of their children—not only explains why all but six states require a criminal conviction before a woman can

212. See Idaho Code Ann. § 16-2005(2)(a) (Supp. 2008) (“The court may grant . . . termination of parental rights . . . where [t]he parent caused the child to be conceived as a result of rape . . . .” (emphasis added)); Mo. Ann. Stat. § 211.447(5)(5) (West Supp. 2008) (“The juvenile officer . . . may file a petition to terminate the parental rights of the child’s parent when it appears that . . . [t]he child was conceived and born as a result of an act of forcible rape . . . .” (emphasis added)); Okla. Stat. Ann. tit. 10A, § 1-4-904(B)(11) (West 2009) (“The court may terminate the rights of a parent to a child based upon the following legal grounds: . . . . The child was conceived as a result of rape . . . .” (emphasis added)); S.D. Codified Laws § 25-4a-20 (2006) (“[T]he court may prohibit, revoke, or restrict visitation rights to a child for any person who has caused the child to be conceived as a result of rape or incest.” (emphasis added)); Wis. Stat. § 48.415(9)(b) (2005–2006) (“If the conviction or other evidence . . . indicates that the child was conceived as a result of a sexual assault . . . the mother of the child may be heard on her desire for the termination of the father’s parental rights.” (emphasis added)).

213. Louisiana law provides: “In a proceeding in which visitation of a child is being sought by a natural parent, if the child was conceived through the commission of a felony rape, the natural parent who committed the felony rape shall be denied visitation rights and contact with the child.” La. Civ. Code. Ann. art. 137 (2008). Such a law affords the greatest protection to women who conceive through rape because it requires the denial of visitation rights to the rapist father.

214. Although a criminal conviction of rape should not be required for termination, nothing in this Note should be read to suggest that no proof of rape or minimal proof of rape ought to be sufficient to terminate parental rights. See, e.g., B.F. v. D.M., 15 P.3d 158, 262 (Alaska 2001) (stating that court may terminate parental rights in adoption proceeding if it finds that father committed act constituting sexual assault by clear and convincing evidence and not criminal conviction).

avail herself of the statute’s protections;\(^\text{216}\) it also explains why five of those six states that do not require a conviction permit termination of parental rights rather than require it.\(^\text{217}\)

**B. MORE BELIEVABLE: WOMEN WHO PUT THEIR “RAPE”-CONCEIVED CHILDREN UP FOR ADOPTION**

Twenty states have passed statutes that remove the notification or consent requirements for women who choose adoption for their rape-conceived children.\(^\text{218}\) It is both surprising and unsurprising that more states provide protection for raped women who elect adoption for their rape-conceived children, as opposed to women who raise the children themselves. It is surprising because the statistics indicate that far more raped women who give birth to their rape-conceived children raise their children rather than give them up for adoption.\(^\text{219}\) Thus, in examining the numbers alone, it seems odd to find that states have been more apt to adopt a protection that is less in need among the pregnant-raped-woman population.

However, given the argument advanced in this Note concerning the pregnant-raped-woman prototype, the result is unsurprising. As argued, a raped woman who elects adoption for her rape-conceived child, by acting more consistently with the prototype, is viewed less suspiciously—that is, she is more believable in her claims of rape and rape conception—and, as a result, is more likely to have her harm addressed in the law. In fact, such women are apparently more believable, considering that a majority of these twenty states do not require a rape conviction in order for a raped woman to enjoy statutory protection.\(^\text{220}\)

Moreover, given the argument advanced, it is also unsurprising that the protections given under these laws are more fixed. Under these adoption laws, judges have less discretion to deny protection to a raped woman meeting the

\(^{216}\) There may be other interests driving the requirement of a criminal conviction. However, it should be noted that other grounds for termination of parental rights rarely impose such a high burden of proof.

\(^{217}\) These permissive statutes allow a judge to terminate only where termination is also shown to be in the child’s best interest, despite finding parental unfitness. A better statute would state that, where parental unfitness is established, a presumption attaches that termination is in the child’s best interest.


\(^{219}\) See **supra** notes 7–9 and accompanying text.

\(^{220}\) See **Alaska Stat.** § 25.23.180(c)(3); **Idaho Code Ann.** § 16-1504(3); **750 ILL. COMP. STAT.** 50/8(a)(5); **Kan. Stat. Ann.** § 59-2136(h)(6); **Minn. Stat.** § 259.47(3)(b)(1); **Neb. Rev. Stat.** § 43-104.15; **N.M. Stat.** § 32A-5-19(C); **Pa. Cons. Stat. Ann.** § 2511(a)(7); **S.C. Code Ann.** § 20-7-1734(C); **S.D. Codified Laws** § 25-6-4(6A); **Utah Code Ann.** § 78B-6-111; **Wis. Stat.** § 48.415(9)(a).
requisite burden of proof: of the states not requiring a criminal conviction, a majority mandate that notification or consent requirements be removed for a raped woman who satisfies a judge that her child was conceived through rape.

CONCLUSION

Pregnancy from rape occurs with significant frequency. Recognizing this, many states, as well as the federal government, have passed laws designed to

221. See 750 ILL. COMP. STAT. 50/8(a)(5) (“[C]onsents or surrenders shall be required in all cases, unless the person whose consent or surrender would otherwise be required shall be found by the court . . . to be the father of the child as a result of criminal sexual abuse or assault . . . .”); MINN. STAT. § 259.47(3)(b)(1) (“[T]he birth mother must submit an additional affidavit that describes her good faith efforts or efforts made on her behalf to identify and locate the birth father for purposes of securing his consent. In the following circumstances the birth mother may instead submit an affidavit stating . . . that the child was conceived as the result of incest or rape . . . .”); NEB. REV. STAT. § 43-104.15 (“If the information provided in the biological mother’s affidavit . . . presents clear evidence that providing notice to a biological father or possible biological father . . . would be likely to threaten the safety of the biological mother or the child or that conception was the result of sexual assault or incest, notice is not required to be given.”) (emphasis added)); N.M. STAT. § 32A-5-19(C) (“The consent to adoption or relinquishment of parental rights . . . shall not be required from . . . a biological father of an adoptee conceived as a result of rape or incest . . . .” (emphasis added)); S.C. CODE ANN. § 20-7-1734(C) (“Persons specified in subsection (B) of this section are not entitled to notice if the child who is the subject of the adoption proceeding was conceived as a result of criminal sexual conduct or incest.”) (emphasis added)); UTAH CODE ANN. § 78B-6-111 (“A biological father is not entitled to notice of an adoption proceeding, nor is the consent of a biological father required in connection with an adoption proceeding, in cases where it is shown that the child who is the subject of the proceeding was conceived as a result of conduct which would constitute any sexual offense . . . .” (emphasis added)).

222. Even in the minority of states that require a conviction, the raped woman who elects adoption fares much better. See CAL. FAM. CODE § 7611.5(a); IND. CODE ANN. § 31-19-9-8(a)(4)(A); N.Y. DOM. REL. LAW § 111-a(1); N.C. GEN. STAT. § 48-3-603(a)(9); OHIO REV. CODE ANN. § 3107.07(F); VA. CODE ANN. § 63.2-1233(6); WASH. REV. CODE § 26.33.170(2)(b); WYO. STAT. ANN. § 1-22-110(a)(viii).

In all but two of these states, a raped woman who manages to secure a criminal conviction automatically receives protection from these statutes. See CAL. FAM. CODE § 7611.5(a) (“[A] man shall not be presumed to be the natural father of a child if . . . [t]he child was conceived as a result of an act of rape in violation of Section 261 of the Penal Code and the father was convicted of that violation.”); IND. CODE ANN. § 31-19-9-8(a)(4)(A) (“Consent to adoption . . . is not required from . . . [t]he biological father of a child born out of wedlock who was conceived as a result of . . . a rape for which the father was convicted . . . .”); N.Y. DOM. REL. LAW § 111-a(1) (“For the purpose of determining persons entitled to notice of adoption proceedings initiated pursuant to this article, persons specified . . . shall not include any person who has been convicted of rape in the first degree involving forcible compulsion . . . when the child who is the subject of the proceeding was conceived as a result of such rape.”); N.C. GEN. STAT. § 48-3-603(a)(9) (“Consent to an adoption of a minor is not required of . . . [a]n individual whose actions resulted in a conviction . . . and the conception of the minor to be adopted.”); OHIO REV. CODE ANN. § 3107.07(F) (“Consent to adoption is not required of . . . [t]he father, or putative father, of a minor if the minor is conceived as the result of the commission of rape by the father or putative father and the father or putative father is convicted of or pleads guilty to the commission of that offense.”); VA. CODE ANN. § 63.2-1233(6) (“No consent shall be required from the birth father of a child placed pursuant to this section when such father is convicted . . . and the child was conceived as a result of such violation, nor shall the birth father be entitled to notice of any of the proceedings under this section.”).

223. See Holmes et al., supra note 2, at 320.
streamline the ability of raped women to either abort their pregnancy or have their rape-conceived children adopted. Yet, only sixteen states have passed laws designed specifically to aid the considerable number of women who choose to raise their rape-conceived children. Even in those sixteen states, the protections are sometimes illusory and often only extend to the handful of raped women who manage both to secure speedy rape convictions and to convince a judge that paternal rights termination is in their children’s best interests.

This Note suggests that far from being surprising, this result is entirely expected. This is because of the invidious stereotypes concerning the pregnant raped woman that have been articulated in public and private discourse, which depict raped women as hating their unborn children and as viewing their rape pregnancies as a continuation of their rape experience. These societal constructions have created a biased prototype of the pregnant raped woman and of the prototypical rape pregnancy experience by which all raped women are judged. Because women who raise their rape-conceived children depart heavily from the prototype, they are, as a result, viewed with suspicion. Legal protections, such as statutorily mandated alternative custody or visitation rights, are then denied to them because, being viewed as suspicious in their rape conception claims, it is thought that there is nothing special about their conceptions requiring any change in the manner in which custody and visitation determinations are made. This both explains how the rape act, which is so heinous that even the child growing within the woman is repeatedly demonized in public discourse, can become so minimized that, after the birth of a “rapist’s child,” society’s laws readily tether a raped woman to her attacker and why prevailing law tends only to protect the raped woman in a Russian Roulette fashion.

Combating the effects of the pregnant-raped-woman prototype requires conscious awareness of the way public and private discourse conceives of the pregnant raped woman. Perhaps reenergizing the nonconsensual-act justification in the abortion rhetoric would assist in reversing this trend. By focusing on choice rather than necessity, the nonconsensual-act justification squarely focuses on the raped woman’s autonomy without expressing either an overt or covert opinion as to what her choice ought to be. More importantly, by conceiving of a pregnant raped woman who requires special laws because of the attack against her reproductive freedom rather than of the “enemy” growing within her, adoption of the nonconsensual-act rhetoric restores true choice to the pregnant raped woman by limiting society’s input into what that choice ought to be. In addition, it erases the stigma attached to the raped women who choose to raise their children because there is no longer an articulated understanding of how pregnant-raped women respond to their pregnancies, or, more importantly, how they ought to respond.

Freening a raped woman from the stigma of being viewed as an impostor rape victim solely because of her decision to raise and love her rape-conceived child not only respects reproductive choice but also spurs greater legal protections for
these women. Although the stigma concerning “real” rape remains, a piece of it—which labels “real” rape as occurring only where a woman, pregnant from that rape, hates the rape product growing within her—will be deconstructed. Such deconstruction is not only necessary to further erode the stereotypes underpinning the “real” rape conceptions that continue to handicap rape laws, but it is also essential to address and redress the rights of raped women who conceive and raise their children from rape.