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THE STABILITY PARADOX: THE TWO-PARENT PARADIGM AND THE PERPETUATION OF VIOLENCE AGAINST WOMEN IN TERMINATION OF PARENTAL RIGHTS AND CUSTODY CASES

Judith Lewis

Abstract

Despite changing family compositions, entrenched in family law is the antiquated idea that a two-parent household, or its approximation vis-à-vis a shared custody arrangement, promotes stability and integrity and, thus, is in the best interest of the child. Yet, the concept that the two-parent household (or shared involvement of both parents in the child's life if the parents separate) promotes stability for the family and is best for the child is a dangerous fallacy. When rape or intimate partner violence (IPV) is present, or the re-occurrence of violence remains a threat, the family unit is far from stable.

This Article explores the legal system's glorification of the nuclear family, its resistance to shifting away from the two-parent paradigm, and how this resistance creates a stability paradox and perpetuates violence against women and children. The harmful impact that the nuclear family paradigm has on families is further explored by an examination of the statutory constructs and judicial interpretations of termination of parental rights (TPR) and custody statutes in cases where a child is conceived as a result of rape or exposed to ongoing IPV.

Cases are utilized to examine how courts have interpreted parental rights statutes where a child is conceived as a result of rape. Additionally, a hypothetical case is discussed to explore arguments that may be advanced in TPR cases where children are exposed to ongoing IPV. The Article finds that although there are inherent problems in enacting statutes to terminate parental rights in cases involving rape or IPV, legislation is also a necessary tool for survivors. Model legislation is proposed for termination of parental rights in cases where a child is conceived as a result of a sexual offense or when a child is exposed to ongoing IPV.

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Introduction

Entrenched within the legal system[1] is the antiquated assumption that a two-parent (often heterosexual) household[2] promotes family stability and integrity, and thus is in the best interest of minor children. Enacted statutes codify this concept while judges' interpretation and application of laws reinforce it. In a recent case, for example, a mother's boyfriend was granted *in loco parentis* standing[3] even though he physically and sexually abused, stalked, and financially exploited the mother.[4] The presiding judge highlighted the importance of having two parental figures in the child's life "[e]specially given the fact that the child had already lost a father and [the mother's boyfriend] was stepping in to that role, which seems to me to be something very important in a young child's life to have a parental father figure."[5]

In the family law context, the two-parent paradigm is most often observed in termination of parental rights (TPR) and custody cases. Legislators have enacted statutes to terminate parental rights when the parent is unfit or engaging in behaviors that place a child at risk of harm.[6] Parental rights and custody cases come to the attention of the

1. This Article will focus on family law.
2. The terms "nuclear family" and "two-parent family" are used interchangeably throughout this Article.
3. A third party has standing to file an action for custody if the person stands "*in loco parentis* to the child." 23 PA. CONS. STAT. § 5324(2) (2018). "The term *in loco parentis* literally means 'in the place of a parent.' A person stands *in loco parentis* with respect to a child when he or she 'assum[es] the obligations incident to the parental relationship without going through the formality of a legal adoption.'" A.J.B. v. A.G.B., 180 A.3d 1263, 1275 (Pa. Super. Ct. 2018) (alteration in original) (citations omitted) (quoting Peters v. Costello, 891 A.2d 705, 710 (Pa. Super. Ct. 2005)).
4. *See* Custody Complaint at ¶ 8, Hessler v. Goodrich, No. 2018-1508-CP (Susquehanna Cty. Ct. Com. Pl.); Petition to Dismiss Plaintiff's Complaint for Custody and Subsequent Court Order Due to Lack of Standing as to Minor Child A.G. at ¶¶ 14, 17-19, 21, Hessler v. Goodrich, No. 2018-1508-CP (Susquehanna Cty. Ct. Com. Pl.) (detailing boyfriend's abuse); Order, Hessler v. Goodrich, No. 2018-1508-CP (Susquehanna Cty. Ct. Com. Pl.) (denying defendant mother's Motion to Dismiss for Lack of Standing).
5. Transcript of Jan. 8, 2019 Custody Hearing at 66, Hessler v. Goodrich, No. 2018-1508-CP (Susquehanna Cty. Ct. Com. Pl.). Though this case involved separated parties, it illustrates the pervasiveness of the notion in the family court system that children's developmental, emotional, and physical well-beings are enhanced when two "parents" have custodial rights to the children.
6. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533 (2018); DEL. CODE ANN. tit. 13, § 1103 (2009); FLA. STAT. § 39.806 (2020); KAN. STAT. ANN. § 38-2269 (Supp. 2019); KY. REV. STAT. ANN. § 625.090 (West 2014); MINN. STAT. § 260C.301 (2015); MISS. CODE ANN. § 93-15-119 (2018); 23 PA. CONS. STAT. § 2511 (2010).

court in different ways. In some states, only state actors such as the Attorney General's Office may petition for termination of parental rights of one or both biological parents, while in other states, a biological parent or third party may petition to terminate the biological parent's (or parents') parental rights.[7] Grounds for terminating a parent's rights include abuse, neglect, abandonment, and substance abuse disorders.[8] In order to terminate parental rights, the petitioning party must prove the grounds for TPR by clear and convincing evidence.[9] Most statutes also require that the petitioner prove that TPR is in the best interest of the child.[10] This means that the decision to terminate parents' rights must provide for the child's emotional and physical well-being and individual needs.[11] Although legislators enact TPR statutes, judges ultimately de-

7. For states that do not allow private litigants to file for TPR, see, e.g., ARK. CODE ANN. § 9-27-341(a)(1)(B) (2015 & Supp. 2019) (stating that termination of parental rights is not a remedy available to "private litigants"); S.J.G. v. A.A.G., 970 So. 2d 1022, 1027 (La. Ct. App. 2007) (holding that "there are no circumstances under which one parent may file a petition to terminate the parental rights of another parent"); OR. REV. STAT. § 419B.500 (2019) (stating that a petition to terminate parental rights may only be "filed by the state or the ward for purpose of freeing the ward for adoption"); *In re* John, 605 A.2d 486, 488-89 (R.I. 1992) (holding there is no "private right to terminate parental rights" under 15 R.I. GEN. LAWS § 15-7-7 (2003)). For states that do, see ARIZ. REV. STAT. ANN. § 8-533(A) (stating that any person who "has a legitimate interest" in the well-being of the child may file for termination of parental rights); MISS. CODE. ANN. § 93-15-107(1)(a) (stating that "any interested person" may file); S.C. CODE ANN. § 63-7-2530(A) (2010) (same); UTAH CODE ANN. § 78A-6-504(1) (LexisNexis 2018) (same); *In re* Adoption of Liam O., 138 A.3d 485, 488 (Me. 2016) ("Although the process is unusual, the Legislature has given a parent the right to adopt her own child, even when her parenthood is not questioned, so that in conjunction with that adoption proceeding, she may seek the termination of the other parent's parental rights."); N.C. GEN. STAT. § 7B-1103(a)(1) (2019) (stating that either parent may file when seeking termination of the other parent's rights); WYO. STAT. ANN. § 14-2-310(a)(i) (2019) (same). Some states limit standing to certain circumstances. *See, e.g.*, TENN. CODE ANN. § 36-1-113 (2017 & Supp. 2020) (limiting parental standing to circumstances in which the other parent was convicted of certain enumerated crimes whereas other persons such as adoptive parents, extended family members caring for the child, and the child's guardian ad litem have standing to terminate the biological parent's rights on more expansive grounds such as abuse and neglect).

8. *See e.g.,* ARIZ. REV. STAT. ANN. § 8-533; DEL. CODE ANN. tit. 13, § 1103; FLA. STAT. § 39.806; KAN. STAT. ANN. § 38-2269; KY. REV. STAT. ANN. § 625.090; MINN. STAT. § 260C.301; MISS. CODE ANN. § 93-15-119; 23 PA. CONS. STAT. § 2511.

9. Santosky v. Kramer, 455 U.S. 745, 748-49 (1982).

10. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1103; KY. REV. STAT. ANN. § 625.090; MINN. STAT. § 260C.301; NEV. REV. STAT. § 128.105 (2018); 23 PA. CONS. STAT. § 2511.

11. *Focusing on the "Best Interests" of the Child*, FINDLAW (Nov. 26, 2018), https://www.findlaw.com/ (click "search legal topics," then search "focusing on the

cide whether a parent's right will be terminated. Both the state and judges, then, determine whether a parent may terminate the parental rights of the other biological parent.

Despite these statutory efforts to protect children, judges often fail to sever parental rights of abusive fathers because judges rely on a nuclear family paradigm, leaving mothers and children in dangerous situations. Mothers are more impacted by intimate partner violence (IPV)[12] and non-intimate partner rape[13] because IPV and rape are gendered crimes, affecting women more often than men; thus, these crimes have a greater impact on mothers' rights than fathers' rights.[14] Resistance to shifting away from the nuclear family paradigm in IPV or non-intimate partner rape cases stems from the compounding factors of judicial neutrality,[15] the discounting of women's statements of IPV and rape,[16] and

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best interests of the child") [https://perma.cc/BR75-8W72]; *see also* 23 PA. CONS. STAT. § 2511.

12. Intimate partner violence is when a person engages in a course of coercive and controlling behaviors such as physical and sexual violence, financial exploitation and control, psychological and emotional abuse, and the use of threats and intimidation. Women who have been abused

> have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, friends; and work. Sporadic, even severe, violence makes this strategy of control effective. But the unique profile of 'the battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.

Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995).

13. Though rape often occurs in IPV, *see* LUNDY BANCROFT, JAY G. SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 4-5 (2d ed. 2012), the terms are used separately in this Article for purposes of analyzing how IPV and non-intimate partner rape are addressed differently in TPR and custody statutes. The terms rape, sexual violence, and sexual offenses will be used interchangeably and, for purposes of this Article, will mean rape by a non-intimate partner. The term IPV includes sexual assault by an intimate partner. *See id.* at 5.
14. *See id.* at 5.
15. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 671-87 (2003) (discussing how and why the courts resist crediting domestic violence claims in custody court).
16. *Id.* at 666-81; *see* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3, 14-21 (2017) (discussing the pervasiveness of credibility discounting in the legal system's response to rape).

gender bias.[17] All of these factors preserve (and often heighten) abusive fathers' parental rights. Yet, the notion that two-parent households (or shared involvement of separated parents in the children's lives) promote family stability and are best for children is a dangerous fallacy. When IPV or rape is present in intact families or re-occurrence of the violence remains a threat when parties separate, the family unit is far from stable.[18] Moreover, enacted legislation or judicial decisions that force a two-parent household or shared custody arrangements perpetuate family violence—both at an individual and systemic level—by restricting mothers' legal options, remedies, and fundamental rights.

The legal system's entrenched perceptions of what is good for families is failing mothers who experience IPV and rape; limited legal protections for mothers and their children are evidence of that. Consider the case of M.E.[19] M.E. was adopted by her stepfather, who began raping her at the age of four.[20] He repeatedly raped her until she was twenty-three years old, resulting in M.E. conceiving three children from rape.[21] M.E. disclosed the rapes to law enforcement when her daughter turned four years old, fearing her stepfather would begin raping M.E.'s daughter.[22] Her stepfather was charged with and convicted on multiple counts of sexual offenses.[23] M.E. sought to terminate the parental rights of her stepfather to prevent him from having any parental rights to their children.[24] Yet, until the August 2019 Pennsylvania Superior Court decision

17. See discussion *infra* Part II. Although outside the scope of this Article, the nuclear family paradigm also reinforces white dominance given that "the traditional nuclear family is not the reality for many in the black community." Angela Mae Kupenda, Angelia L. M. Wallace, Jamie Deon Travis, & Brandon Isaac Dorsey, *Aren't Two Parents Better than None: Contractual and Statutory Basics for a "New" African American Coparenting Joint Adoption Model,* 9 TEMP. POL. & CIV. RTS. L. REV. 59, 62 (1999). *See also generally* MASS. SUP. JUD. CT., GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, *reprinted in* 24 NEW ENG. L. REV. 745, 831-48 (1990) [hereinafter GENDER BIAS STUDY].
18. See discussion *infra* Part I.B.
19. *In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711 (Pa. Super. Ct. Aug. 12, 2019). The Barbara J. Hart Justice Center, a project of the Women's Resource Center, and the law firm of Drinker, Biddle & Reath represented M.E. *Id.* at *2. The law firm of Jenner & Block and intern Alicia G. Solow-Niederman provided research assistance and analysis of the legal arguments for the case. Memorandum from Alicia G. Solow-Niederman to Paul M. Smith (July 26, 2016) (on file with author). Discussions with Joan Meier, Founder of the Domestic Violence Legal Empowerment and Appeals Project, also informed the case.
20. *In re Z.E.*, 2019 WL 3779711, at *1.
21. *In re Z.E.*, 2019 WL 3779711, at *2-3.
22. *In re Z.E.*, 2019 WL 3779711, at *2-3.
23. *In re Z.E.*, 2019 WL 3779711, at *3.
24. *In re Z.E.*, 2019 WL 3779711, at *1.

in *In the Interest of Z.E.*,[25] M.E. was unable to terminate the parental rights of the man who repeatedly raped her.[26] Prior to the 2019 decision, judicial interpretation of Pennsylvania's TPR statute created an absurd and horrific predicament for M.E: In order to terminate the parental rights of the man who raped M.E., judges' interpreted the statute to mean that M.E. was required to have someone else adopt her children even though she herself was repeatedly raped by an adoptive parent.[27] Alternatively, if M.E. did not seek termination of the parental rights of her stepfather, she lived in fear that the man who violently raped her might seek visitation and contact with their children.[28] Under these circumstances, M.E. was psychologically and physically tethered to her rapist.[29]

This Article explores the impact that the entrenched legal notion that two-parent households are in a child's best interest has on families experiencing IPV and sexual violence. It does so by examining the statutory construction and judicial interpretation of TPR and custody statutes in cases where a child is conceived as a result of rape or exposed to ongoing IPV. Two cases will be examined to explore Pennsylvania's TPR statute in the contexts of rape and IPV and to demonstrate how the analyses of these cases can have broader implications for other states. Model legislation for TPR in cases where a child is conceived as a result of a sexual offense or when a child is exposed to ongoing IPV will also be proposed.

This Article will discuss both IPV and rape by a non-intimate partner. Articles often address one or the other of these types of violence against women because there are differences between the two with, at times, different legal analyses and outcomes within the family court sys-

25. *In re Z.E.*, 2019 WL 3779711, at *1. H.B. 1984 was passed during the production of this Article. *See* Table B, "Pennsylvania."
26. *In re Z.E.*, 2019 WL 3779711, at *1-2.
27. 23 PA. CONS. STAT. § 2511 (2010).
28. *In re Z.E.*, 2019 WL 3779711, at *1.
29. Shauna R. Prewitt, Note, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 830-33 (2010). "Many raped women who are forced to share custody and visitation privileges 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.'" *Id.* at 832-33. Prewitt provides a description of prototypes for rape victims and how these prototypes impact legislation. *Id.* at 836-40, 848-54. She also provides a comparative analysis of two types of laws that exist for women whose children are conceived as a result of rape. *Id.* at 853-60. These laws are for women who elect to place their children up for adoption and women who choose to raise their children. *Id.*

tem. In most non-intimate partner rape cases, the only connection between the child and the person who committed the rape is purely biological. In these cases, the male committing the rape is nothing more than a "violent sperm donor."[30] Conversely, in cases of IPV, there is usually an established relationship between the child and the parent who is engaging in abusive and controlling behaviors beyond the biological relationship. As discussed in Parts III and IV, enacted laws, absence of laws, and legal analysis in custody and TPR cases may differ between IPV and non-intimate partner rape cases based on the biological parent's relationship with the child.

Even though these differences exist, there are advantages to addressing both here because together they provide a richer contextual view of TPR and custody laws. Overall, whether a custody or TPR case involves IPV or non-intimate partner rape, that case is being litigated within the broader legal context. This context glorifies the two-parent paradigm, discounts allegations of rape and IPV, and dismisses the effects of sexual violence and IPV on a mother's parenting ability and on children. As such, a comparison as to how the legal system treats IPV and non-intimate partner rape not only explains the existence or absence of TPR and custody laws but also the resistance to paradigm shifts that threaten the two-parent model and fathers' rights.

Part I begins with an examination of the legal system's glorification of the nuclear family. Although the legal system and society have begun to acknowledge changing family demographics,[31] there is resistance to enacting laws and issuing judicial decisions that undermine a two-parent household paradigm. Even when parents separate, the legal system seeks to approximate the nuclear family through shared custody arrangements.[32] Part I also documents the "stability paradox." Laws and judicial decisions espouse "permanency" and "stability" as the main reasons for privileging the nuclear family or its close approximation.[33] In cases where IPV and rape are present, however, there is little stability or permanency for minor children under this paradigm.

30. Wendy Murphy, *Impregnation Rapists, Parental Rights, and the Often Ignored Constitutional Rights of Victims: An Important Case Study from Massachusetts*, 15 J. CHILD CUSTODY 169, 181-82 (2019).

31. See discussion *infra* Part I.

32. In this Article, "shared custody arrangement" means an arrangement where the mother and the father are awarded equal or close to equal parenting time with the minor children.

33. *See* Rutledge v. Rutledge, 487 So. 2d 218, 219 (Miss. 1986) (citing David Miller, *Joint Custody*, 13 FAM. L.Q. 345, 360 (1979)).

Part II explores why the nuclear family paradigm persists in cases involving IPV and rape. The main factors permitting the glorification of the two-parent family to continue are the judicially created notion of parental equality,[34] the discounting of women's allegations of rape[35] and IPV,[36] and gender bias[37] within the legal system. Tragically, in cases involving IPV and rape, the factors that reinforce this paradigm do so at the cost of perpetuating violence against women and children.

Part III illustrates how the nuclear family paradigm and the factors reinforcing it have resulted in laws that afford mothers limited ability to deny the parentage of the person who raped them or terminate the parental rights of biological fathers who expose children to ongoing IPV. This section also explores the limited rights of mothers to prevent their rapist from having custodial visitation with the child who was conceived as a result of the sexual offense.

Part IV situates the nuclear family paradigm and the factors reinforcing it within the context of several cases challenging the constitutionality of TPR statutes that permit terminating the parental rights of a person who committed rape when the child is conceived as a result of the sexual assault. One of the cases, *In the Interest of Z.E.*, challenged the constitutionality of Pennsylvania's Adoption Act.[38] Arguments made in that case, the Superior Court's decision on appeal, and arguments brought forth in other state cases are discussed to provide a broader contextual analysis beyond Pennsylvania law. The case of *M.P. v. M.P.*[39] is then used to explore arguments that may be advanced to terminate a parent's rights in cases where children are exposed to ongoing IPV.

Part V discusses the disadvantages and advantages of enacting TPR statutes specifically to address cases where a child is conceived as a result of a sexual offense or a child is exposed to ongoing IPV. Part V argues that statutes should be enacted or amended despite the disadvantages to states having TPR statutes. Part V also proposes model TPR legislation based on existing state laws, prior articles on the topic, and practical experience.

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34. Meier, *supra* note 15, at 666-81 (discussing how and why the courts resist crediting domestic violence claims in custody court).
35. Tuerkheimer, *supra* note 16, at 3, 14-21 (discussing the pervasiveness of credibility discounting in the legal system's response to rape).
36. Meier, *supra* note 15, at 681-86.
37. GENDER BIAS STUDY, *supra* note 17, at 833.
38. 23 PA. CONST. STAT. § 2101 (2020).
39. M.P. v. M.P., 54 A.3d 950 (Pa. Super. Ct. 2012). Although this was not a TPR case, the case facts are discussed in Part IV to illustrate arguments that could be made to terminate a parent's rights in cases where a child is exposed to IPV.

I. The Legal System's Glorification of the Two-Parent Household

The legal response to IPV and rape within families has been shaped by the entrenched rhetoric that children fare better when both parents are involved in their lives and that both parents will act in their best interest. This presupposition results in statutes, or an absence of them, and judicial decisions that either glorify nuclear "intact" family structures[40] or, if the parents have separated, extol co-parenting and shared custody arrangements.

The legal system's two-parent paradigm, however, is problematic in family law for two reasons. First, it is not reflective of modern family compositions in the United States. In 1960, the two-parent household was the dominant family form with 73% of all children living in nuclear families.[41] By 1980, a societal shift away from the nuclear family was emerging with the number of children living with two married parents in their first marriage decreasing to 61%.[42] By 2015, this number had decreased significantly to a mere 46% of children.[43] Additionally, the societal shift away from the two-parent household resulted in a substantial increase in the percentage of woman-headed households.[44] In 2018, 31% of families in the United States were one-parent families, with 77% being woman-headed households.[45] In 2016, 23% of children lived with only their mothers, almost triple the 8% that lived with only their mother in 1960.[46] Thus, a significant number of households, par-

40. *See, e.g.*, Martha Albertson Fineman, *Our Scared Institution: The Ideal of Family in American Law and Society*, 1993 UTAH L. REV. 387, 388-89 ("People live in a wide diversity of intimate arrangements . . . but they do so at risk. Historically only the nuclear family has been protected and promoted by legal and cultural institutions.").

41. *Parenting in America*, PEW RESCH. CTR. (Dec. 17, 2015), https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ [https://perma.cc/69QC-USPW]. This statistic reflects children living in families with two married parents in their first marriage.

42. *Id.*

43. *Id.*

44. *Id.*

45. HISTORICAL FAMILIES TABLES, U.S. CENSUS BUREAU, Table FM-1 (Nov. 2019), https://www.census.gov/data/tables/time-series/demo/families/families.html [https://perma.cc/MZ44-AR8X]. According to Table FM-1, in 2018, there were a total of 34,452,000 families with children (biological, step, or adopted) under 18 living in the United States. Of this number, 23,812,000 were married couples, 8,156,000 were mother-only, and 2,484,000 were father-only. *Id.*

46. *The Majority of Children Live with Two Parents, Census Bureau Reports*, U.S. CENSUS BUREAU (Nov. 17, 2016), https://www.census.gov/newsroom/press-releases/2016/cb16-192.html [https://perma.cc/PLK7-74CA].

ticularly woman-headed households, do not "fit" the two-parent paradigm. Despite woman-headed families not fitting into the nuclear family paradigm, the family court system attempts to recreate the two-parent household by favoring parents who co-parent and ordering shared custody arrangements.[47] Many woman-headed one-parent households, particularly low-income households, however, have experienced IPV or rape by the child's father.[48] The approximation of the nuclear family, then, increases the risk of ongoing violence to mothers and their children.

Second, the glorification of the nuclear family or its approximation via a shared custody arrangement perpetuates violence against women and children, placing them at risk of harm. Most cases litigated in the family court system involve IPV or sexual violence.[49] As discussed in Part II, however, the legal system discounts women's accounts of violence. By discounting the violence, the legal system continues to adhere to the two-parent paradigm even when this creates a "stability paradox": a situation where the legal system upholds the nuclear family or its approximation on the grounds that it provides more permanency and stability for children when, in fact, the paradigm creates more instability in family units where violence has occurred. Before Part B further discusses the stability paradox and the perpetuation of violence against women and children, Part A will explore the glorification of the nuclear family in enacted statutes and judicial opinions. Part A will show how pervasive the glorification of the two-parent household is throughout family law, with the discussion not limited to cases involving IPV and rape.

A. *Legislative and Judicial Language Reinforcing the Nuclear Family*

The legal system has largely resisted shifting away from framing statutes and issuing judicial decisions based on a nuclear family paradigm. This is the case despite the "ever-changing landscape of the family

47. Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INST. L.J. 403, 427 (2018).

48. Núria Vergés Bosch, Anna Morero Beltran, Joaquina Erviti Erice, & Elisabet Almeda Samaranch, *Intimate Partner Violence in Female-Headed One-Parent Households: Generating Data on Prevalence, Consequences, and Support*, 72 WOMEN'S STUD. INT'L F. 95, 97-98 (2019).

49. *See* BANCROFT ET AL., *supra* note 13, at 3 (noting that fathers who are abusive "are more likely than nonbattering men to seek custody of their children in cases of divorce or separation").

unit"[50] and the harm this paradigm can cause to children in cases involving sexual assault or IPV. Pennsylvania's Adoption Act and how the courts have interpreted it are illustrative of the extent to which the two-parent paradigm permeates the law. Pursuant to the Act, either parent of a minor child has standing to file a petition for involuntary termination of the parental rights of the other parent.[51] One of the enumerated grounds for termination is when "the parent is the father of a child conceived as a result of rape or incest."[52]

At first glance, the Act appears to provide M.E. and other rape survivors with the ability to terminate the parental rights of the biological parent to her children.[53] Prior to the 2019 decision in *In the Interest of Z.E.*, however, trial courts had limited the ability of mothers to petition for TPR. Courts had held that a parent could only petition to terminate the parental rights of the other parent when there was an averment of adoption[54] and a new parent-child relationship was being established.[55] In *In re Adoption of M.R.D.*, for example, the father whose TPR was sought failed to perform parental duties, including providing financial support for the minor child, for approximately seven years.[56] The maternal grandfather had played a significant role in the child's life co-

50. *In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711, at *8 n.26 (Pa. Super. Ct. Aug. 12, 2019).

51. 23 PA. CONS. STAT. § 2512(a) (2010). A petition to terminate parental rights may also be filed by an agency, an individual having custody or *in loco parentis* standing, or an attorney or guardian ad litem representing a child who has been adjudicated dependent. *Id.*

52. *Id.* § 2511(a)(7).

53. Pennsylvania has often been erroneously cited as a state that affords expansive protections for survivors of rape. In fact, until the decision in *In re Z.E.*, mothers had been denied the ability to terminate the parental rights of fathers at the trial court level if a contemplated adoption was not averred. In one Pennsylvania county, the clerk's office would not even permit a litigant to file a Petition to Involuntarily Terminate the Parental Rights because it did not contain a contemplated adoption averment. These assertions are based on conversations with family law attorneys practicing in Pennsylvania.

54. The legal term "averment" means a positive statement of fact, particularly in a pleading. *Averment*, BLACK'S LAW DICTIONARY (11th ed. 2019). In Pennsylvania, then, a Petition to Involuntarily Terminate the Parental Rights must contain a statement that another person intends to adopt the minor child when a parent seeks to terminate the parental rights of the other biological parent. *In re* Adoption of M.R.D., 145 A.3d 1117, 1120 (Pa. 2016).

55. *Adoption of M.R.D.*, 145 A.3d at 1120 ("Thus, where 'no new parent-child relationship is contemplated . . . the involuntary termination of . . . parental rights . . . is not permitted under the Adoption Act.'" (quoting *In re* Male Infant B.E., 377 A.2d 153, 156 (Pa. 1977))).

56. *Adoption of M.R.D.*, 145 A.3d at 1118.

parenting with the mother, disciplining the child, attending functions, and providing financial support.[57] Though the mother's petition to terminate contained an averment that the maternal grandfather would adopt the child, the Superior Court held that her petition failed because the mother and the maternal grandfather were not "part of an intact family unit."[58] Thus, even in cases where a third party is willing to adopt the child and create the approximation of a nuclear family, the court still considers the structure unacceptable when an "intact family" is feasible vis-à-vis a custody arrangement between the natural parents. The court holds this view even when a shared custody arrangement between the natural parents is the less stable arrangement for the child.

The reasoning in *In re Adoption of M.R.D.* demonstrates how ingrained the belief is that a two-parent household best serves a child's well-being. Noting that the Act requires a parent seeking termination to relinquish their own parental rights, the court analyzed two exceptions to this requirement.[59] First, a parent need not relinquish their own parental rights when filing to terminate the rights of the other parent in second-parent adoption cases—cases where the adopting party is the *spouse* of the party seeking termination.[60] Second, a court may determine that a parent need not relinquish their own parental rights when seeking to terminate the rights of the other parent if the court determines that it is "unnecessary under the particular circumstances of [their case]."[61] The court found that neither of these requirements was met in *In re Adoption of M.R.D.* because the purpose of the Act, which was to "protect the integrity and stability of the new family unit,"[62] would not be served by the maternal grandfather adopting the child. Notice how the court differentiates second-parent adoption cases from the facts of *In re Adoption of M.R.D.*, further reinforcing the nuclear family paradigm:

> [I]n second-parent adoption cases in which the relinquishment of the parent's right's is not required—i.e. stepparent

57. *Adoption of M.R.D.*, 145 A.3d at 1118-19.
58. *Adoption of M.R.D.*, 145 A.3d at 1128.
59. *Adoption of M.R.D.*, 145 A.3d at 1120-21.
60. *Adoption of M.R.D.*, 145 A.3d at 1121 (noting that "whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding" (quoting 23 PA. CONS. STAT § 2903 (2010))).
61. *Adoption of M.R.D.*, 145 A.3d at 1127-28; *see also* 23 PA. CONS. STAT. § 2901 (2010) ("Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated . . . and all other legal requirements have been met.").
62. *Adoption of M.R.D.*, 145 A.3d at 1128.

> adoptions and adoptions by same-sex couples—relinquishment of the parent's rights is unnecessary, and indeed damaging. In such cases, the parent and the prospective adoptive parent are committed partners . . . . Adoption in such circumstances allows the prospective adoptive parent to create a new parent-child relationship with the legal parent's child and a family unit together with the co-parent to whom he or she is committed. Thus, because the legal parent and prospective parent in second-parent adoption cases are part of the same family unit, the relinquishment requirement undermines, rather than promotes family stability. The same cannot be said for the instant case, however, because Mother and Grandfather are not similarly part of an intact family unit.[63]

Justice Bear's concurring opinion not only blatantly states what the majority signals but also overtly glorifies two-parent households: "We should acknowledge and applaud the wise public policy adopted by our legislature in the Adoption Act: the ideal family for children is two parents together in an intact marriage. This may be a traditional notion, but it is rooted in the belief that children benefit from permanency."[64]

Justice Bear further contends that "*even in this modern age where non-traditional families may exist, marriage is the best legal proxy of permanency for children*" and "*the law is loath to leave children with only one parent*, as children derive no benefit from having a parent's rights terminated, unless a new, committed parent is ready, willing and able to take that terminated parent's place."[65]

Cases pre- and post-*In re Adoption of M.R.D.* also illustrate the extent to which the legal system upholds the nuclear family paradigm.[66] In *In re Adoption of J.D.S.*, for instance, the court denied the mother's petition to terminate the father's parental rights when the mother and the stepfather, the contemplated adoptive parent, separated and were considering divorce during the pendency of the appeal.[67] Notice again how the court glorifies the intact two-parent household: "Because the primary function of government and law is to preserve and perpetuate society,

63. *Adoption of M.R.D.*, 145 A.3d at 1128.
64. *Adoption of M.R.D.*, 145 A.3d at 1131 (Bear, J., concurring).
65. *Adoption of M.R.D.*, 145 A.3d at 1132 (Bear, J., concurring) (emphasis added).
66. *See, e.g.*, *In re* E.M.I., 57 A.3d 1278 (Pa. Super. Ct. 2018); *In re* C.F.G., 194 A.3d 718 (Pa. Super. Ct. 2018) (unpublished table decision); *In re* I.S.R., 169 A.3d 1181 (Pa. Super. Ct. 2017).
67. *In re* Adoption of J.D.S., 763 A.2d 867, 871-72 (Pa. Super. Ct. 2000).

the traditional family structure is given every reasonable presumption in its favor. This comprehends an intact and subsisting family including a stepparent."[68] Even with an averred adoption by the stepfather, the mother's petition failed because her potential divorce from him did not create an intact enough family to overcome the two-parent paradigm.

Judicial decisions relying on language and reasoning that favor the two-parent paradigm are present in other jurisdictions as well. Some examples include: "[T]he child's best interest will be better served by being exposed to a more traditional family environment composed of two parents;"[69] awarding custody to the foster family, in part, because they were a "more traditional family;"[70] awarding primary custody to mother because, although, "[e]ach parent offers a permanent family unit for the child[, t]he mother offers the more traditional family unit;"[71] and awarding primary custody to the father because "the child would be in a stable, traditional, family setting."[72] In all of these cases, the "traditional family" was a two-parent household because one of the child's biological parents had remarried, was engaged to be married, or the prospective foster parents were married.

Even when judicial opinions recognize the changing demographics in family compositions, concurring or dissenting opinions often contain language to counter this recognition. Illustrative of this phenomenon is the case *Clark v. Wade*.[73] In *Clark v. Wade*, the maternal grandmother, a third party, sought custody of her grandchild over the child's biological father's objection.[74] Pursuant to Georgia law, there is a presumption that it is in the best interest of the child to remain in the custody of his

68. *Adoption of J.D.S.*, 763 A.2d at 871; *see also In re* Adoption of K.M.W., 718 A.2d 332, 334 (Pa. Super. Ct. 1998) (noting that when a parent retains her rights, "the other party must be the spouse of the parent retaining custodial rights").
69. Pounders v. Rouse, 582 So.2d 672, 676 (La. Ct. App. 1988).
70. Edwards v. Ark. Dep't of Hum. Servs., 480 S.W.3d 215, 218 (Ark. Ct. App. 2016).
71. Hanisch v. Osvold, 758 N.W.2d 421, 425 (N.D. 2008) (noting that mother was engaged to be married).
72. S.B. v. L.W, 793 So. 2d 656, 658 (Miss. Ct. App. 2001) (affirming lower court decision awarding custody to father because he was married to his wife and thus had a stable environment). This decision also highlights how the legal system favors heterosexual family units. The mother was bisexual and the court specifically noted that it was disturbed by "mother's bisexual lifestyle" and that the "morality of" a parent's lifestyle was one factor the court could consider. *Id.* at 661.
73. Clark v. Wade, 544 S.E.2d 99 (Ga. 2001).
74. *Clark*, 544 S.E.2d at 101. The minor child had resided with the maternal grandparents since his birth in 1994 with father exercising regular visitation rights. *Id.* In 1999, father sought custody of his son. *Id.* The trial court awarded father temporary custody. *Id.*

or her parents.[75] To overcome this presumption, the *Clark* court—showing extreme deference to biological parents—determined that a third party (in this case, the grandparent) must demonstrate that there would be physical or emotional harm to the child if the child's parents were awarded custody (the harm standard).[76] If a third party overcomes this presumption, "the third party must show that an award of custody to him or her will best promote the child's health, welfare, and happiness" (the best interest of the child standard).[77]

In a special concurring opinion, Justice Hunstein acknowledged that, in modern society, it is no longer a reality that all biological parents raise children in nuclear families.[78] She, therefore, asserted that less deference should be afforded to the natural parents in family law cases when a third party seeks custody of the minor child.[79] In response, Justice Sears lamented the decline of the traditional family and sought to stem its erosion:

> I take issue with the assertion in Justice Hunstein's special concurrence that the changing face of the American family justifies the application of a best-interest-of-the-child standard when a third party seeks to obtain custody of a parent's child. To the contrary, I find that the lamentable decline in the traditional family supports the harm standard adopted in the majority opinion . . . . [T]he harm standard would stem

75. *Clark*, 544 S.E.2d at 101
76. *Clark*, 544 S.E.2d at 107.
77. *Clark*, 544 S.E.2d at 107.
78. *Clark*, 544 S.E.2d at 110 (Hunstein, J., concurring).
79. *See Clark*, 544 S.E.2d at 110-12 (Hunstein, J., concurring).

> Parental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families, consisting of a married couple and their children . . . . The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded . . . . More varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families; as remarriages create step-families; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children.

Id. (Hunstein, J., concurring) (some omissions in original) (quoting Brooks v. Parkerson, 454 S.E.2d 769, 778-79 (Ga. 1995) (Benham, J., dissenting)).

> the decline of the nuclear family by fostering the reunification of parent and child.[80]

Enacted statutes also reinforce the concept of the nuclear family. Utah provides one such example. Utah's statutes contain preambles that declare that it is the public policy of the legislature to preserve the family unit.[81] Utah also has a strong preference for placing a child for adoption with a "married couple."[82]

This glorification of the idea that a two-parent household best provides stability and permanence for children also impacts laws and judicial decisions regarding parties who separate or divorce. Post-separation parents are expected to co-parent and promote frequent and continuing contact with the other parent.[83] In addition, decisions awarding shared

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80. *Clark*, 544 S.E.2d at 109 (Sears, J., concurring).

81. *E.g.*, UTAH CODE ANN. § 30-3-11.1 (LexisNexis 2019) ("It is the public policy of the state of Utah to strengthen the family life foundation of our society . . . and to take reasonable measures to preserve marriages, particularly where minor children are involved."); *see also* WASH. REV. CODE § 13.34.020 (2020) ("The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact . . . .").

82. UTAH CODE ANN. § 78B-6-117(4) (2018 & Supp. 2020).

83. *See, e.g.*, ALASKA STAT. § 25.20.090(6)(E) (2018); ARIZ. REV. STAT. ANN. § 25-403 (A)(6) (2017); COLO. REV. STAT. § 14-10-124(1.5)(a)(VI) (2020); KAN. STAT. ANN. § 23-3203(a)(8) (Supp. 2019); MICH. COMP. LAWS § 722.23(j) (2019); MINN. STAT. § 518.17(a)(11) (2019); MO. REV. STAT. § 452.375.2(2)(4) (2016); NEV. REV. STAT. § 125C.0035(4)(c) (2018); N.H. REV. STAT. ANN. § 461-A:6(I)(e) (2018); N.M. STAT. ANN. § 40-4-9.1(B)(8) (2020); N.D. CENT. CODE. § 14-09-06.2(1)(e) (2009); OR. REV. STAT. § 107.137(1)(f) (2019); 23 PA. CONS. STAT. § 5238(a)(1) (2018); UTAH CODE ANN. § 30-3-10(2)(c)(ii) (LexisNexis 2019); VT. STAT. ANN. tit. 15, § 665(b)(5) (2019); WIS. STAT. § 767.41(5)(11) (2017-18). Though many of these statutes provide an exception for when there is a history of past or present IPV, mothers may not be able to sufficiently prove the IPV or judges may discount the IPV and then condemn the mother when she does not promote frequent contact with the father who has been abusive and controlling. *See* Meier, *supra* note 15, at 678-79; Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 257 n.142 (noting that a mother's "legitimate concern[s] about the batterer's ability to parent can be used as a justification for denying her custody" when she cannot prove the IPV). Judges not only frequently inform litigants that they need to co-parent but also issue orders that attempt to enforce co-parenting. In one county in Pennsylvania, for example, I have observed a judge routinely tell parents during any proceeding that involves custody that they must learn to co-parent *even when there is a history of IPV and rape and when there is an active protection order in place*. This same judge frequently issues custody court orders that contain language that the custodial/visitation times will be by agreement of the parties. In cases involving IPV, this

legal and physical custody continue to be the norm because it "approximates . . . an intact nuclear family."[84]

Statutes and judicial opinions highlight how pervasive the glorification of the traditional family is in the legal system. Part B will address how this is problematic in many family cases because it fails to address IPV and rape to the detriment of mothers and children. Part B will also show how the nuclear family paradigm counter productively creates the stability paradox.

B. *The Stability Paradox*

Though the purported intent of the nuclear family paradigm is to provide stability and permanency for children,[85] it does the exact oppo-

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vague language results in more opportunities for the controlling party continue their abuse.

84. Rutledge v. Rutledge, 487 So. 2d 218, 219 (Miss. 1986). Shared custody orders continue to be the norm despite an abundance of research demonstrating that exposure to IPV negatively affects children and that post-separation contact results in on-going abuse. *See* Meier, *supra* note 15, at 678-80. In fact, a number of states have codified shared custody presumptions. *See, e.g.*, CONN. GEN. STAT. § 46b-56a(b) (2019) (stating a presumption that joint custody is in best interest of child when parents have agreed to it); IDAHO CODE § 32-717B(4) (2019) (stating that "absent preponderance of evidence to the contrary," there is a presumption that joint custody is in best interest of the child); KY. REV. STAT. ANN. § 403.270(2) (West 2018) (stating a presumption, rebuttable by preponderance of evidence, that joint custody and equally shared parenting time is in best interest of child); MINN. STAT. § 518.17(b)(9) (2019) (stating a rebuttable presumption that joint custody is in best interest of child when one or both parties request it); MISS. CODE ANN. § 93-5-24(4) (2018) (stating a presumption that joint custody is in best interest of child when parents have agreed to it); N.H. REV. STAT. ANN. § 461-A:5 (2018) (presuming that joint decision making is in the best interest of the child); N.M. STAT. ANN. § 40-4-9.1(A) (2020) (stating a presumption that joint custody is in the best interest of the child); TENN. CODE ANN. § 36-6-101(a)(2)(A)(i) (2017 & Supp. 2020) (stating a presumption that joint custody is in best interest of child when parents have agreed to it); TEX. FAM. CODE ANN. § 153.131(b) (West 2014) (stating a rebuttable presumption that parents acting as joint managing conservators is in the best interest of the child); UTAH CODE ANN. § 30-3-10(3) (LexisNexis 2019) (stating a rebuttable presumption that joint legal custody is in best interest of child); WIS. STAT. § 767.41(2)(am) (2009) (stating a presumption that joint legal custody is in best interest of child). Though many of these statutes provide an exception to the presumption when there is a history of past or present IPV, the abuse is often dismissed or discredited resulting in shared custody arrangements. *See infra* Part I.B.

85. The legal system's glorification of the two-parent household, which is a proxy for fathers' involvement in children's lives, results from concepts of parental equality, societal discounting of mothers' accounts of IPV and rape and gender bias. See discussion *infra* Part II.

site in cases involving IPV or rape. Violence against women and children's exposure to this violence is a global epidemic.[86] The 2015 National Intimate Partner and Sexual Violence Survey conducted by the Centers for Disease Control and Prevention found that one in five women experienced completed or attempted rape during her lifetime.[87] It is estimated that there are between 25,000 and 32,000 rape-related pregnancies annually in the United States.[88] Though it is difficult to determine the number of children conceived from rape, one study found that approximately 32% of women who have been raped kept their children.[89] Another study found that 64% of women raised their children conceived from rape.[90]

When children are conceived as a result of a sexual offense, they are often harmed because the rape affects a mother's ability to parent.[91] Forced interaction between a mother and the person who raped her is likely to impede her recovery process.[92] "Most raped women suffer from symptoms of one of the various forms of Post-Traumatic Stress Disorder (PTSD), and nearly one-third of all raped women develop rape-related post-traumatic stress disorder (RR-PTSD)."[93] In order to recover, women who experience PTSD "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.'"[94] Women

86. The 2012 National Task Force on Children Exposed to Violence found that "of the 76 million children currently residing in the United States, an estimated 46 million can expect to have their lives touched by violence, crime, abuse, and psychological trauma this year." REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 3 (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf [https://perma.cc/K9A8-NVCS]. Exposure to domestic violence was one of the forms of violence highlighted in the report. *See, e.g.*, *id*. at 32.

87. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW, & JIERU CHEN, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF 1 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf [https://perma.cc/F4AL-RPYH].

88. Rape Survivor Child Custody Act, H.R. 1257, 114th Cong. § 2(2) (2015); *see also* Prewitt, *supra* note 29, at 828 ("[B]ased on a 1990 study estimating that 683,000 women over the age of eighteen were raped in that year, conceivably 32,000 rape-related pregnancies occur annually.").

89. H.R. 1257, *supra* note 88, §2(4); *see also* Prewitt, *supra* note 29, at 829 ("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.").

90. H.R. 1257, *supra* note 88, § 2(5).

91. *Id.* § 2(11).

92. *Id.* § 2(10).

93. Prewitt, *supra* note 29, at 833-34.

94. *Id*. at 834.

who are continuously forced into contact with their rapist in custody matters, however, cannot escape the triggers of their trauma:

> [W]omen 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 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.[95]

IPV is just as prevalent as sexual violence against women. One in four women in the United States has "experienced contact sexual violence, physical violence, and/or stalking by an intimate partner and reported an IPV-related impact during their lifetime."[96] Studies estimate that over three million children are exposed to IPV each year.[97] Examples of how children are exposed to IPV include directly observing vio-

95. *Id*. at 834-35. Indirect contact with the rapist, such as the rapist giving the child gifts that are brought back to the mother's house or telephone contact with the child in which the mother overhears the rapist, can also be triggers for the victim. *See id*. at 832; *see also* H.R. 1257, *supra* note 88, § 2(12). ("Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.") In many cases, however, the person who committed the rape often does not even want custody of the child but will exercise custody or visitation privileges to exert control over the victim, resulting "'in the child . . . becoming a pawn in the predator's power game.'" Prewitt, *supra*, at 835.

96. SMITH ET AL., *supra* note 87, at 7. "Contact sexual violence" is defined as "a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact." *Id*. "Intimate partner violence-related impact includes experiencing any of the following: being fearful, concerned for safety, injury, need for medical care, needed help from law enforcement, missed at least one day of work, missed at least one day of school." *Id*. Note that IPV is the leading cause of injury for women, even more common than car accidents, muggings, and rapes combined and that an estimated 41 percent of murdered women are killed by their intimate partner. Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 WM. MITCHELL L. REV. 775, 778, 779 (2000).

97. Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence Through Statutory Termination of Parental Rights*, 84 CALIF. L. REV. 757, 760 (1996). Haddix argues that evidence of a parent committing IPV in the presence of minor children should be admissible in TPR proceedings to demonstrate the parent's unfitness. *See id*.

lence; hearing their mother screaming for help or crying; observing the aftermath of the violence such as their mother's injuries, torn clothing, or broken or damaged items; or hearing their father degrade, belittle, or threaten their mother.[98] Exposure to IPV can continue post-separation as children are used as pawns in the abusive parent's fight for control.[99]

Survivors of IPV also experience PTSD. Again, PTSD has a direct impact on children because mothers' ability to effectively parent is hindered by repeated and forced contact with fathers who have been (and often continue to be) abusive and controlling.[100] Unlike in cases where a mother is raped by a non-intimate partner, however, IPV has additional negative and harmful effects on children because the abusive partner is part of the family unit prior to the parties separating.[101] Post-separation, children's exposure to IPV continues because fathers frequently disparage the mother in the presence of the minor children, physically and mentally abuse her in front of the minor children, interrogate the children about their mother, use the children to investigate and stalk her, and generally use the children as pawns.[102] Thus, in cases involving IPV,

98. Ver Steegh, *supra* note 96, at 784; *see also* Leslie D. Johnson, Comment, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 L. & PSYCHOL. REV. 271, 273-74 (1998) (noting that many children hear or see the physical abuse and observe the aftermath of the physically abuse such as bruising and broken bones).

99. For example, one commentator has observed that "survivors are at increased risk for physical violence when they take steps to leave abusers" and that "the risk of violence, including sexual assault, is highest immediately following separation and when victims attempt permanent separation through legal or other action." Deborah Goelman & Darren Mitchell, *Protecting Victims of Domestic Violence Under the UCCJEA*, 61 JUV. & FAM. CT. J. 1, 2-3 (2010). Goelman and Mitchell further note:

> In addition to the risks of separation violence, perpetrators often pursue protracted custody or visitation litigation as a means of controlling their former partners. Batterers may manipulate custody proceedings to obtain information about their former victims, to continue monitoring them, or to create opportunities for contact in order to perpetrate additional violence. Many batterers repeatedly file for modification of custody orders to harass or punish victims for leaving.

Id. at 3.

100. Peter G. Jaffe & Claire V. Crooks, *Understanding Women's Experiences Parenting in the Context of Domestic Violence: Implications for Community and Court-Related Services Providers*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (Feb. 2005), http://safeandtogetherinstitute.com/wp-content/uploads/2014/10/parentingindv-11.pdf [https://perma.cc/H7GV-VE5K].

101. *See generally* BANCROFT ET AL., *supra* note 13, at 33-107 (describing typical parenting characteristics of parents who engage in IPV and how these parenting characteristics affect the family unit).

102. *See id*. at 136.

children are continuously exposed to violence resulting in various short- and long-term harms to them.[103] Children exposed to IPV often develop PTSD resulting in "above-average risk for self-destructive behavior, such as suicide, alcohol and drug abuse, and sexual promiscuity."[104] They also have higher levels of learning difficulties, anxiety, hyperactivity, and behavior problems.[105] Moreover, children exposed to IPV are "twice as likely to have juvenile court involvement and three times as likely to be in juvenile court for a violent offense."[106] Further, approximately half of children living in households where their mothers experience ongoing abuse by their father are also physically assaulted by their fathers.[107]

The effects are ongoing: "Negative emotional effects from exposure to domestic violence can persist into adulthood, leading to higher rates of emotional distress and lower rates of successful social connection . . . and to higher rates of depressive symptoms."[108] Female children exposed to IPV are more likely to become victims of violence; male children exposed to IPV are more likely to become violent towards a partner.[109] Studies have also found that exposure to intimate partner violence results in alterations in children's brain structures.[110]

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103. *See generally id*. at 42-54 (providing an overview how exposure to IPV effects children).

104. Johnson, *supra* note 98, at 274-75. "Children from violent homes are more likely to run away, use drugs and alcohol, attempt suicide, and exhibit assaultive behavior." Ver Steegh, *supra* note 96, at 786.

105. BANCROFT ET AL., *supra* note 13, at 44. Children exposed to IPV are more frequently absent from school and more often suspended from school for behavioral problems. *Id.*

106. *Id*. at 45.

107. Ver Steegh, *supra* note 96, at 779.

108. BANCROFT ET AL., *supra* note 13, at 45.

109. Johnson, *supra* note 98, at 275.

110. *See, e.g.*, Areti Tsavoussis, Stanislaw P.A. Stawicki, Nicoleta Stoicea & Thomas J. Papadimos, *Child-Witnessed Domestic Violence and Adverse Effects on Brain Development: A Call for Societal Self-Examination and Awareness*, 2 FRONTIERS PUB. HEALTH 1, 4 (2014).

> The impact on the community at large is of importance and concern; the effects on child witnesses of DV extend beyond the families and children. These children have impaired learning skills, poor school performance, poor life developmental skills, and lose their ability to self-regulate. As these children age, they will have different existential memories and respond in a different manner than they would have otherwise. Consequently, society may have difficulty preserving individual safety through an inability to decrease violence, while at the same time it has to support unproductive or underproductive members of society. Cumulatively, these findings support the presence of neuro-biological-developmental alterations in children witnessing DV, their ensuing PTSD, and the im-

Paradoxically, then, the enacted laws, or their absence, and judicial decisions that extol the nuclear family or its approximation often undermine the purported state interests in stability and permanency for the child. Whether the two-parent household is "intact" or approximated via a forced shared custody arrangement, family stability is undermined and children are harmed by ongoing IPV, fear of contact with the rapist, and/or triggers that reinforce trauma. The current legal paradigm forces the mother into an impossible position where leaving her violent partner does little to protect her or her children by requiring continued harmful contact through shared custody arrangements.[111] Similarly, in cases where a child is conceived as a result of rape, the inability to deny parentage or terminate the parental rights of the person who committed the rape results in harmful and absurd situations where the man who committed a violent crime—and had no intention to have a child—may attempt to, and in some cases actually does, gain custodial rights.[112] These court-imposed custodial arrangements result in less stability for the family because children are harmed when continued contact between the parties negatively impacts a mother's ability to parent and affords opportunities for a father to continue his abuse.

II. Perpetuating the Nuclear Family or Its Approximation

When the overarching standard in family court is the best interest of the child, how can the system continue to glorify the nuclear family while blatantly ignoring research demonstrating that violence against mothers harms children? On the one hand, it is hardly surprising that there has not been a paradigm shift. Despite changing family composi-

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> pression that cumulative childhood trauma (and not adulthood trauma) may predict the overall symptom complexity in adults.

Id. (citations omitted).

111. I do not suggest that all custody court cases result in shared custody arrangements or that every court discounts the impact that exposure to IPV has on children. However, courts often discount IPV and rape, hold that fathers should be involved in children's lives, and hold that a shared custody arrangement is in the child's best interest. *See* Barry Goldstein & Elizabeth Liu, Representing the Domestic Violence Survivor 16-18 (2d ed. 2019); Joan Meier, *#Childrentoo in Family Court: The Culture of Denial* 19 (G.W. L. Sch. Pub. L. & Legal Theory Paper No. 2020-24, 2020) [hereinafter Meier, #Childrentoo] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589328 [perma.cc/UL5R-N5YW]. Alternatively, if fathers are not afforded shared custody, fathers who engage in abusive and controlling behaviors often obtain significant unsupervised custodial time. *Id.*

112. *See infra* Parts III-IV.

tions and increased public awareness about violence against women, societal attitudes towards families and violence remain largely unchanged when it comes to parenting: "According to a 2010 Pew Report, 69% of Americans say single mothers without male partners to help raise their children are bad for society and 61% agree that a child needs a mother and father to grow up happily."[113] The passage of time has done little to change the view that both parents need to be involved in children's lives for children to succeed.[114] A 2015 Pew Research Center survey found comparable results to the 2010 report: "[T]wo-thirds of adults said that more single women raising children on their own was bad for society, and 48% said the same about unmarried couples raising children."[115]

Like the rest of society, the legal realm has steadfastly resisted a paradigm shift, despite documented harm to children. Perpetuating the two-parent household or its approximation in the family court system are three independent but interrelated factors: concepts of parental equality,[116] discounting of violence against women,[117] and gender bias.[118] All three of these factors together provide justification for the system disregarding violence against mothers and the harm this violence has on children: If, from the onset of a case, women litigants are viewed as less credible than male litigants and allegations of IPV and sexual assault are presumed false or unimportant, then the legal system's default premise that both mother and father are fit and on equal footing when entering

113. *See* Sara Shoener, Op-Ed, *Two-Parent Households Can Be Lethal*, N.Y. TIMES (June 21, 2014), https://www.nytimes.com/2014/06/22/opinion/sunday/domestic-violence-and-two-parent-households.html [https://perma.cc/W4FB-TG8M] ("Women experiencing domestic abuse are told by our culture that being a good mother means marrying the father of her children and supporting a relationship between them.").

> Mental health professionals, law enforcement officials, judges and members of the clergy often showed greater concern for the maintenance of a two-parent family than for the safety of the mother and her children. Women who left abusive men were frequently perceived at best as mothers who had not successfully kept their children out of harm's way and at worst as liars who were alienating children from their fathers.

Id.

114. I do not suggest that shared custody is never in a child's best interest. Rather, when IPV or rape has occurred, shared custody is usually not in the best interest of the child for reasons mentioned throughout this Article.

115. GRETCHEN LIVINGSTON, PEW RSCH. CTR., THE CHANGING PROFILE OF UNMARRIED PARENTS 4 (Apr. 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/E92U-NR9C].

116. *See* Meier, *supra* note 15, at 676-78.

117. *See* Tuerkheimer, *supra* note 16, 3-6.

118. *See* GENDER BIAS STUDY, *supra* note 17, at 834-47.

court need not be challenged.[119] This in turn enables the legal system to approximate the two-parent household through laws and judicial decisions that resist terminating the parental rights of fathers whose violent conduct has shown they are unfit and to award shared custody arrangements.

A. *Factors Perpetuating the Two-Parent Paradigm*

It is presumed that parents enter the family court system as equals,[120] thus, shared custody arrangements are in children's best interests. Statutory presumptions reinforce the notion of parental equality, including the presumption that custody not be awarded to a particular parent every time (i.e., preferring mothers over fathers)[121] and presumptions in favor of shared custody.[122] Although both presumptions are facially gender neutral and appear to treat parents similarly, in practice they favor fathers and the approximate nuclear family in cases involving IPV and rape. A father who has exposed (and continues to expose) a child to his ongoing abuse has already demonstrated a degree of parental unfitness that should cause the court to question its assumption of equality. Similarly unfit is the person who has committed rape against the biological mother where the child was conceived as a result of his criminal conduct. As such, any statutory or judicial presumptions of pa-

119. *See* Meier, *supra* note 15, at 676-80, 682-84.

120. *See id*. at 675-76.

121. *See, e.g.*, FLA. STAT. § 61.13(c)(1) (2019) ("There is no presumption for or against the father or mother of the child"); GA. CODE ANN. § 19-9-3 (2018) ("In all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent."); IND. CODE § 31-17-2-8 (2018) ("In determining the best interests of the child, there is no presumption favoring either parent."); KAN. STAT. ANN. § 23-3204 (2019) ("[T]here shall be no presumption that it is in the best interests of any infant or young child to give custody or residency to the mother."); 23 PA. CONS. STAT. § 5327(a) (2018) ("In any action regarding the custody of the child between the parents of the child, there shall be no presumption that custody should be awarded to a particular parent.").

122. *See In re* Adoption of M.R.D., 145 A.3d 1117, 1128 (Pa. 2016) (providing examples of codified shared custody presumptions). For a discussion of the dangers of joint custody presumptions in custody cases involving domestic violence, see GABRIELLE DAVIS, KRISTINE LIZDAS, SANDRA TIBBETTS MURPHY, & JENNA YAUCH, THE DANGERS OF PRESUMPTIVE JOINT PHYSICAL CUSTODY (2010), https://www.bwjp.org/assets/dangers-presumptive-joint-physical-custody.pdf [https://perma.cc/4RCU-MK42]; *see also generally* Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403 (2005).

rental equality obfuscate violence against mothers and the effect it has on children.

Overcoming statutory presumptions of parental equality is arduous for mothers experiencing violence because the court is "obligated to adjudicate cases from a stance of judicial neutrality."[123] Adjudicating custody cases from a judicial neutrality stance means that the court views "both parties as starting with equal rights to custody"[124] when they enter the courtroom. In cases involving allegations of IPV or rape, however, parents begin on unequal footing.[125] The presence of these allegations frames the parties as "innocent victim v. evil perpetrator"[126] before testimony is even heard; thus:

> Courts may resist such allegations because to accept them can have the effect of replacing the exercise of the court's unconstrained discretion under the 'best interest of the child' test with an implicit presumption of one party's unfitness (effectively erasing judicial discretion). Courts are reluctant to cede their discretion and judgement in this manner.[127]

Theoretically, concepts of parental equality should not even arise in cases involving non-intimate partner rape because the only connection between the child and person committing the rape is biological.[128] Thus, there are no grounds to presume that the "parents" are equals or for judges to engage in a best interest of the child analysis because the person who committed the rape never developed a relationship with the child.[129] Parentage, then, is nonexistent.[130] Statutes and judicial decisions, however, create parental rights for the person who committed the sexual offense.[131]

The full extent to which parental equality and judicial neutrality affect parental rights and custody-arrangement outcomes in cases involving non-intimate partner rape is difficult to assess. News coverage of cases and judicial decisions reported in legal reporters, however, signal

123. Meier, *supra* note 15, at 676.
124. *Id.*
125. *Id.*
126. *Id.* ("This makes such allegations appear almost unfair, tilting the scales before the court hears and shifts all the evidence.").
127. *Id.* at 676-77.
128. *See* Murphy, *supra* note 30, at 181-82. For further discussion, see *infra* Parts III-IV.
129. Murphy, *supra* note 30, at 181-82.
130. *Id.*
131. *Id.*

that notions of parental equality and judicial neutrality do affect judicial decisions even when the only connection between the child and the person who committed the rape is biological.[132] This result is hardly surprising given the legal system's adherence to the two-parent paradigm.

On the other hand, research suggests that the parental-equality and judicial-neutrality frameworks do impact outcomes in custody cases involving IPV. Wisconsin enacted a statute that created a rebuttable presumption that granting joint or sole custody to an abusive parent is not in the child's best interest when the parent has engaged in a pattern of IPV or there has been a serious incident of abuse.[133] Despite this statutory presumption, research found that 50% of cases where one parent had been convicted of IPV against the other parent resulted in court orders awarding joint legal custody *even though there was a documented history of IPV evidenced by criminal convictions for felony or misdemeanor battery*.[134] Court orders for joint legal custody increased to 62% when the parent who was abusive was not incarcerated.[135] Notwithstanding evi-

132. *Id.*; *see, e.g.*, *Alabama Court Forces Rape Survivor to Allow Rapist to Have Visitation With Children*, KNOE NEWS 8 (June 12, 2019), https://www.knoe.com/content/news/Alabama-court-forces-rape-survivor-to-allow-rapist-to-have-visitation-with-children-511195642.html [https://perma.cc/8QHH-HWEL]; Tim Stelloh, *Michigan Judge Gives Convicted Rapist Parental Rights for Victims Sons*, NBC NEWS (Oct. 9, 2017), https://www.nbcnews.com/news/us-news/michigan-judge-gives-convicted-rapist-parental-rights-victim-s-son-n809196 [https://perma.cc/QCJ7-MGSU].

133. WIS. STAT. § 767.41(2)(d) (2009); Teresa E. Meuer, Tony Gibart, & Adrienne Roach, *Domestic Abuse: Little Impact on Child Custody and Placement*, 91 WIS. LAW. 16, 16 (2018).

134. Meuer et al., *supra* note 133, at 18-19.

135. *Id.* at 19. Researchers also found that even though there was a history of IPV between the parties, it was frequently *not* noted in the family court file. *Id.* at 20. This suggests that the legal system and legal professionals were discounting the abuse and dismissing its relevance in making custody determinations.

> First, only 27.4 percent of all cases include a reference to domestic abuse. In 15 cases, documentation was inaccessible or missing. Therefore, data on the references to domestic violence in those cases is incomplete. While our file reviewers did not have access to sealed documents, nor could they access many transcripts, the lack of written references to domestic abuse appears significant. Institutions, especially courts, "are organized and coordinated, for the most part, by means of standardized texts or standardized protocols for producing texts." If acts of domestic abuse within a family are not routinely noted in family law case files, it suggests that Wisconsin family law case processing does not systematically account for abuse.
>
> Second, even when a [guardian ad litem] or parties' lawyers are involved, written references to domestic abuse are absent in more than one-half of cases. When the victim had a lawyer or a [guardian ad litem] was ap-

dence of parental unfitness based on a documented history of violence and a presumption against shared custody, courts still adhered to the nuclear family paradigm because of the power of the parental equality presumption.

By analyzing cases through a parental-equality and judicial-neutrality framework, the legal system reinforces the two-parent paradigm. Unfortunately, this framework and paradigm perpetuate violence against women and risk to children because fathers' rights are not only preserved but even heightened in cases involving IPV or rape, where the fathers have demonstrated parental unfitness. Paradoxically, the legal system creates more instability and harm for children by fallaciously viewing parents as "equals" even in light of evidence to the contrary.

B. *Discounting of IPV and Rape*

The legal system's blatant discounting of IPV and sexual assault further strengthens the nuclear family paradigm and parental-equality framework. If the family court system discounts the violence outright or believes it impacts the mother but not the child, then it can continue to view parents as equals[136] and justify results that approximate a two-parent household. In addition to the legal system discounting the violence outright, women's testimony on IPV and rape—and the effects on children—is frequently disbelieved in family court and in society. This doubt stems primarily from three differing false narratives: Women fabricate violence to obtain custody of their children; women who do not resemble the prototypical IPV or rape victim are lying; and even if allegations of IPV or rape are credible, there is no consequence or harm to the child.

> pointed, 39 percent and 42 percent of cases referenced domestic violence. Formal domestic abuse findings were much less frequent. Domestic abuse findings were made in only 17 percent (23) of cases with a [guardian ad litem]. In over 60 percent of cases in which the victim had representation, the lawyer did not reference domestic violence. These statistics suggest that legal professionals tend to see histories of domestic abuse as irrelevant, unimportant, or unnecessary for courts to make decisions.

Id. at 20-21 (citations omitted).

136. Meier, *supra* note 15, at 680-81.

1. Fabricating Abuse to Gain Custody

Despite increased public awareness regarding IPV and rape,[137] a commonly held societal assumption that allegations of IPV and rape are false permeates the family court system.[138] Compounding the effects of this assumption is the added belief that mothers make up these false allegations of abuse as a means to gain custody.

Violence against women, however, is far more likely to be underreported than falsely reported. Research has frequently relied on police reports to study the prevalence of false reporting in cases involving sexual assault.[139] The problem with this approach is that such studies often fail to account for how law enforcement officials frequently believe that allegations of rape are false from the outset of the investigation: "[I]nvestigators start from the proposition that the complainant is lying

137. Media attention continues to raise discussions and public awareness about IPV and rape, as seen with the Brett Kavanaugh Senate confirmation hearings. *See* Sherly Gay Stolberg, & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Duel With Tears and Fury*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html [https://perma.cc/C49T-46VD]; *see also* Domenico Montanaro, *Poll: More Believe Ford than Kavanaugh, a Cultural Shift from 1991*, NPR (Oct. 3, 2018), https://www.npr.org/2018/10/03/654054108/poll-more-believe-ford-than-kavanaugh-a-cultural-shift-from-1991 [https://perma.cc/ZBp7-VM4P]. Even with increased public attention, however, the public still questions women's credibility, as evidenced by the varying reactions to Dr. Christine Blasey Ford's testimony, including President Donald Trump's mocking of her and her testimony. *Id.*; *see also* Allie Malloy, Kate Sullivan, & Jeff Zeleny, *Trump Mocks Christine Blasey Ford's Testimony, Tells People to 'Think of Your Son*,*'* CNN (Oct. 3, 2018), https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html [https://perma.cc/ALQ3-N8RJ]; Mary Grace Hebert, *Media Narratives of Sexual Violence of Sexual Violence During the Ford and Kavanaugh Testimonies*, NAT'L COMMC'N ASSOC. (Jan. 2, 2020), https://www.natcom.org/communication-currents/media-narratives-sexual-violence-during-ford-and-kavanaugh-testimonies [https://perma.cc/TES6-J32V]. Discounting women's allegations of sexual violence occurs globally as well. *See, e.g.*, Li Yuan, *In China, a Viral Video Sets Off a Challenge to Rape Culture*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/business/china-richard-liu-rape-video-metoo.html [https://perma.cc/Z6MD-UESR]. In China, the release of a heavily edited video discrediting a woman who accused a Chinese businessman of raping her went viral. The video, titled "Proof of a Gold Digger Trap?" used subtitles to blame the woman and suggested that she could not have been raped because she "showed the man the elevator," she "pushed the floor button voluntarily," and she "gestured an invitation." *Id.* Missing from the edited video was what happened after the woman and the businessman exited the elevator. *Id.*

138. Meier, *supra* note 15, at 682-85; *see* Tuerkhiemer, *supra* note 16, at 3.

139. Tuerkheimer, *supra* note 16, at 17.

and act to confirm this belief."[140] Acting to confirm their presupposition that rape allegations are not credible, police "promptly disregard[ ], [and] short-circuit[ ] sexual assault investigations well before the opportunity to gather available corroborative evidence is exhausted."[141] Thus law enforcement's preconceived belief that rape allegations are not true from the start of the investigation results in inflated numbers of false reports as cases are deemed false before being fully investigated.[142]

Researchers have treated victims' recantations of sexual assault as evidence that they lied, which has also inflated the number of false reports.[143] But victims may recant truthful allegations of rape for myriad reasons including fear of retaliation, belief that law enforcement will not act, or embarrassment.[144] Thus, "[s]ince many factors may cause a truthful complainant to recant her allegation, a failure to independently assess the underlying accusations tends to result in findings of false reporting rates that are misleadingly high."[145] "Independent evaluations of [rape] reports deemed unfounded by the police," however, provide more accurate assessments of the rate of false reporting.[146] Studies utilizing this method—which involves "researchers review[ing] the complete police file"—found that false reporting rates were significantly lower than believed by law enforcement and society.[147]

The rate of false reporting in cases involving IPV is similarly lower than societal assumptions suggest. Indeed, "the rate of false reports in

140. *Id.* at 33.
141. *Id*. at 11.
142. *Id.* at 17.
143. *Id.* at 17.
144. HEATHER HUHTANEN, ATT'Y GEN.'S SEXUAL ASSAULT TASK FORCE, FALSE ALLEGATIONS, CASE UNFOUNDING AND VICTIM RECANTATIONS IN THE CONTEXT OF SEXUAL ASSAULT 1-3 (2008), https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=618 [https://perma.cc/C549-29YY].
145. Tuerkheimer, *supra* note 16, at 17.
146. *Id*. at 18-20.
147. *Id*. at 19-20 n.96. Studies found that the rate of false reporting was between 4.5% and 6.8%. Others argue that the rate of false reporting is anywhere from 2% to 10%. *E.g.* Cameron Kimble & Inimai Chettiar, *Sexual Assault Remains Dramatically Unreported*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2018), https://www.brennancenter.org/blog/sexual-assault-remains-dramatically-underreported [https://perma.cc/DZJ4-NYJ8]. As an example of the disparity between actual rates of false reporting and perceived reporting rates, one study found that "more than half of the detectives interviewed believed that 40 to 80 percent of sexual assaults complaint were false." Tuerkheimer, *supra* note 16, at 16.

custody disputes is no greater than for any other crimes."[148] The legal system, however, consistently discredits IPV because it assumes that mothers fabricate claims of abuse at a high rate.[149]

Speaking the truth about violence, then, can backfire in the family legal system to the detriment of the child. When a mother discloses IPV or rape to the court in an effort to show that a father is unfit and that exposure to him through custody arrangements will be harmful to the child, she risks the court assuming that she fabricated the abuse based on these inaccurate assumptions about false reporting. In turn, this can (and often does[150]) result in the court viewing her as a vindictive and, therefore, unfit parent. This results in unfit fathers gaining even more or significant custodial time with the children.[151]

2. The Reinforcement of Unbelievable Mothers: Victim Prototypes

Measuring women against prototypes of victims based on societal stereotypes also heightens fathers' rights and the two-parent paradigm.[152] Prototypes help people "process[] information, draw[] conclusions, and . . . make[] sense of the world."[153] By defining both what is typical and atypical, prototypes "set the standard by which others are

148. Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence and Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 306 n.151 (2004).

149. Meier, *supra* note 15, at 684-85.

150. *See* April M. Zeoli Echo A. Rivera, Cris M. Sullivan & Sheryl Kubiak, *Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization Among Victimized Mothers,* 28(6) J. FAM. VIOLENCE 547, 547-50 (2013). ("When women make allegations of IPV or express concerns that fathers will harm children, the court often views them as obstructing the court process and the father's right to have a relationship with their children"); *see also* Meier, *#Childrentoo*, *supra* note 111, at 1-2. I have also witnessed this firsthand.

151. I am not suggesting that mothers should not inform the court of the IPV. In fact, it is imperative that litigants provide the court with the full contextual history of the violence. I raise this point to illustrate the barriers that mothers encounter in the court system and the absurdity that results when the court discredits mothers' allegations of IPV and rape.

152. *See* Prewitt, *supra* note 29 (providing a description of prototypes for rape victims and the rights of fathers).

153. *Id*. at 837(quotation marks omitted) (quoting Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory,* 77 S. CAL. L. REV. 1103, 1125 (2004)).

judged."[154] Victim prototypes are problematic because they fail to account for the full range of victim experiences and they are not "statistically or descriptively accurate."[155] When a victim does not "fit" the prototype she is not believed to be credible.

In cases involving rape, the prevailing cultural script is that of the *stranger-rape prototype*—"a black stranger attacking a white woman in public using overwhelming force."[156] Statistics reveal that in contrast to this stereotype, most rapes are actually committed by a known assailant of the same race as the victim and the victim does not sustain physical injuries from the rape.[157] As such, this prototype actually describes the atypical rape case.[158] Yet:

> 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, the [stranger-]rape prototype . . . "distorts decisions about whether specific instances belong in the [rape] category" 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."[159]

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154. *Id.* (quotation marks omitted) (quoting Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 787 (2001)).
155. *Id.*
156. *Id.* at 838.
157. *Id.*
158. *Id.*
159. *Id.* (emphasis in original) (quoting Chamallas, *supra* note 154, at 779-80).

> 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 interpretations, 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 . . . .

Id. at 839 (quotation marks omitted) (quoting Susan Estrich, *Rape,* 95 YALE L.J. 1087, 1092 (1986)).

When rape results in pregnancy, a *pregnant-raped-woman prototype* emerges.[160] This prototype 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; and whose hatred toward her unborn child is so natural that extraordinary measures are needed.[161]

The *pregnant-raped-woman prototype,* similar to the *stranger-rape prototype*, describes how pregnant rape victims *ought* to behave: She must abort her baby because her baby symbolizes the person who raped her.[162] Where a victim behaves differently, i.e., choosing to keep and love the child, her allegations of rape and conception as a result of rape are less believable.[163] Acting inconsistently with the *pregnant-raped-woman prototype* results in society "labeling . . . these women as 'impostor rape victims'—that is, women who are likely falsifying their rape allegations and the facts about the conceptions of their children."[164]

Cultural prototypes concerning rape are no less persistent in the law. A family court judge recently questioned whether a rape had occurred because the woman had not been held at gunpoint and attacked by strangers.[165] Similarly, numerous legislators have opined that certain rapes that do not fit this narrative are illegitimate or unbelievable: Missouri Representative Todd Akin suggested that a woman cannot get pregnant from a "legitimate rape;"[166] Missouri Representative Barry

160. *Id*. at 840.
161. *Id*. at 848.
162. *Id*. at 851.
163. *Id*. at 858.
164. *Id*.
165. Luis Ferré-Sadurní, *Teenager Accused of Rape Deserves Leniency Because He's from a 'Good Family,' Judge Says,* N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/nyregion/judge-james-troiano-rape.html?searchResultPosition=3 [https://perma.cc/FRQ4-E5YM].
166. Charlotte Alter, *Todd Akin Still Doesn't Get What's Wrong with Saying 'Legitimate Rape*,' TIME (July 17, 2014, 4:07 PM), https://time.com/3001785/todd-akin-legitimate-rape-msnbc-child-of-rape/ [https://perma.cc/7MWJ-BNH7].

Hovis used the phrase "consensual rape" during a debate;[167] Wisconsin State Assembly member Roger Rivard stated that "some girls rape easily;"[168] and Pennsylvania Senate candidate Tom Smith commented that his daughter's out-of-wedlock conception, which resulted from consensual sex, was the same as conception as a result of rape.[169]

Reliance on the *stranger-rape* and *pregnant-raped-woman prototypes* permits the legal system to dismiss women's allegations of rape and therefore justifies granting persons who committed sexual assault parenting rights when children are conceived as a result of the criminal offense. If rape does not occur according to the cultural script, the legal system can conclude that parenting rights should exist and that terminating parental rights should not occur or only occur in limited contexts.

Similar to cases involving rape, a prevailing cultural script emerges for cases of IPV. In IPV cases, the prototype is that of the *helpless-woman*—a cowering badly bruised woman who is in denial about the violence she experiences and never reacts to it.[170] Physical violence, however, is only one tactic that men who engage in abusive behaviors use to control their partners,[171] and physical abuse may or may not result in observable injury.[172] Moreover, women usually do react to violence in

167. Orion Donovan-Smith, *A GOP Lawmaker Used the Phrase 'Consensual Rape' During Abortion Debate. He Says He Misspoke*, WASH. POST (May 17, 2019, 7:29 PM), https://www.washingtonpost.com/politics/2019/05/17/gop-lawmaker-used-phrase-consensual-rape-during-abortion-debate-he-says-he-misspoke/?utm [https://perma.cc/L6ZB-LJYE].

168. Molly Reilly, *Roger Rivard, Wisconsin Legislator, Criticized Over 'Some Girls Rape Easy' Remark,* HUFFPOST (Oct. 11, 2012, 10:22 PM), https://www.huffpost.com/entry/roger-rivard-rape_n_1956491 [https://perma.cc/6SSU-A3BU].

169. Gregory J. Krieg, *Pa. Senate Candidate Backs Off Unplanned Pregnancy-Rape Comparison*, ABC NEWS (Aug. 27, 2012), https://abcnews.go.com/blogs/politics/2012/08/pa-senate-candidate-backs-off-unplanned-pregnancy-rape-comparison/ [https://perma.cc/6E6W-LGEU].

170. SHERRY HAMBY, BATTERED WOMEN'S PROTECTIVE STRATEGIES: STRONGER THAN YOU KNOW 1-2 (2014).

171. Men who engage in coercive behaviors employ a range of tactics to control their partner including physical, sexual, psychological, and economic abuse; threats; intimidation; sleep deprivation; and isolation. *See* Stark, *supra* note 12, at 986.

172. The racialized cultural script that has emerged for a black woman is that of an "uncontrollable, promiscuous black woman who is capable of sustaining greater physical abuse than her white counterpart and is herself capable of violence." Erika Sussman & Sara Wee, *Accounting for Survivor's Economic Security: An Atlas for Direct Service Providers*, CTR. FOR SURVIVOR AGENCY & JUSTICE 43 (2016), https://csaj.org/document-library/CSAJ_Atlas_Mapbook_1_FINAL_TO_POST.pdf [https://perma.cc/6QR5-PSFD] (citing Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence,* 8 COLUM. J. GENDER &

some manner at some point in time.[173] When a woman does not have physical injuries or she reacts to the violence, countering the prevailing cultural script, the legal system can conclude that the IPV must not have occurred, so TPR is inappropriate and a shared custody arrangement is in the best interest of the child.

A judge's ruling in a protection order case exemplifies how the *helpless-woman prototype* impacts legal outcomes. Although the judge granted an order of protection against the abusive individual, the order of protection was only for six months because the woman did not have any broken bones or bruises and had once thrown a toy out of frustration in response to the abuse.[174] Here the woman did not conform to the *helpless-woman prototype*—she did not have observable injuries and she reacted to the abuse. The fact that she did not fit the prevailing societal view of how a victim of IPV *ought* to appear and behave resulted in the judge determining that her case *ought* to be treated as less worthy of significant legal redress.

The *helpless-woman prototype,* like the *stranger-rape* and *pregnant-raped-woman prototypes*, provides grounds for states to resist terminating the parental rights of fathers who continually expose children to IPV and to award these fathers significant custodial time. By relying on this prototype, the legal system constantly discounts the violence and treats any violence or behavior that does not fit into the *helpless-women* prototype as less real or less substantial. The legal system can then reasonably conclude that there is no harm to the child. As a result of this discounting, courts place both parents on equal footing when they enter custody court, even though the father has already shown he is unfit, and award custody arrangements that approximate the nuclear family despite the risk of harm to children.

L. 54 (1998)). This racialized gender stereotype provides even more grounds for the legal system to discount IPV against a black woman as the legal system treats the violence against her as inconsequential because she can "sustain" it and/or she herself is "violent" so she "deserves" it. *See id.* (noting that black women experiencing IPV are frequently subjected to dual arrests and prosecution as a result of the IPV).

173. Suzanne C. Swan & David L. Snow, *The Development of a Theory of Women's Use of Violence in Intimate Relationships*, 12 VIOLENCE AGAINST WOMEN 1026, 1027 (2006).

174. I observed this case in open court; as far as I am aware there is no written opinion from the case.

3. Judicial Failure to Recognize Harm to Children

Even when the legal system acknowledges IPV and rape, judicial decisions still afford little weight to that violence in deciding family law matters. Judges choose to disregard the effect violence has on children by suggesting that there is no harm to the child if the child was not the direct object of the abuse and that the child is safe if the parents have separated. Courts credit the abuse against mothers but refuse to recognize how exposure to that violence harms children and affects mothers' ability to parent. In turn, this allows courts to continue to justify presumptions of parental equality, resulting in custody awards that approximate the nuclear family, resistance to terminating the parental rights of men who are violent, and adherence to the two-parent paradigm. Thus, this deliberate judicial failure to recognize the harm to children justifies creating less stable family units, perpetuating violence.

Courts excuse the violence when the child is not the direct object of the abuse and when the parents have separated for myriad reasons. Courts measure women against prototypes of victims based on stereotypes and view the violence as less legitimate whenever a mother behaves differently than the prototype, resulting in the conclusion that the violence was minimal and did not affect the children.[175] Courts further hold mothers "responsible for whatever harm her children suffer from" the parent who is abusive because she remained in the abusive relationship, "'putting up with' the abuse."[176] Courts then conclude that the mother and her children are not deserving of protection from the offending parent because the "mother has already 'tolerated' or 'subjected' the child to the . . . abuse."[177]

A case litigated in Pennsylvania illustrates how a court can credit an account of violence while failing to structure a custody award that accounts for this violence. The woman fled from the relationship after enduring years of physical, emotional, and financial abuse, including her boyfriend strangling her and slamming her head on the floor.[178] After she fled, her boyfriend exploited the court system to further control and abuse her by filing and obtaining a temporary protection order against

175. *See supra* Part II.A.

176. Meier, *supra* note 15, at 701 n.150.

177. *Id.*

178. Guardian Ad Litem's Memorandum to the Court at 1, McCartney v. Moore, No. 2018-FC-40225 (Lackawanna Cty. Ct. Com. Pl.).

her,[179] which provided that she was not allowed any contact with their daughter. At the time, their daughter was still breastfeeding and had never been separated from her mother. The judge appointed a guardian ad litem (GAL) in the case. In her report and recommendation to the court, the GAL reported that the father was very abusive and controlling and that he had a history of abusing prior girlfriends and family members. The GAL, however, *still* recommended a shared custody arrangement. Her recommendation was based on two illogical and disturbing conclusions: 1) It would be confusing for the child to be taken from her father because she had been in his care due to the temporary protection order, even though the father had falsely filed the temporary protection order, and 2) the mother having sole custody would put the mother and the child more at risk because the father would become angry if he lost custody.

Presumably, other unstated factors that contributed to this recommendation were that the child was safe because she was not a direct object of the abuse and the parents were separated. Though the judge acknowledged that the father had engaged in litigation abuse and was also physically abusive, he agreed with the GAL and ordered shared custody. Here the GAL and court credited the violence as it occurred to the mother, but *still* awarded equal parenting.

In cases of non-intimate partner rape in which a child is conceived as a result of the sexual offense, the court may be even more likely to disregard the effects of that violence on a child—even when it acknowledges that violence—when determining parental rights and custodial time. A court may easily conclude that there is no risk of harm to the child if the person who committed the sexual offense is awarded parental rights and custodial time because the assault occurred before the child was born. Courts justify this conclusion because the child was not directly physically or sexually abused, the mother and the person who committed the rape are separated, and the child was not exposed to the violence. A problem with this conclusion, however, is that custody arrangements that expose a mother to the person who violated her may negatively affect the mother's parenting, which in turns impacts the

179. *See* Temporary Order at 1, McCartney v. Moore, No. 2018-FC-40225 (Lackawanna Cty. Ct. Com. Pl.). In Pennsylvania, a temporary order of protection is granted or denied at an *ex parte* proceeding, which is a legal hearing without both parties being present. 23 PA. CONS. STAT. § 6107 (2018). A person seeking a protection order completes a petition, files it with the court, and affirms that all statements contained in the petition are true. The court will grant a temporary protection order without hearing from the party the petition is filed against until the hearing date, which is scheduled within ten days.

child. Thus, the child is still harmed by the violence, even though they are not directly exposed to it.[180] Additionally, the person who committed the rape may use custody as a means to further threaten, intimidate, and abuse the biological mother, which affects the child.[181] Despite these documented issues, courts frequently fail to analyze how violence, and the continuous exposure to a person who is or was violent, impacts parenting and harms children. Courts often erroneously conclude that the mother has poor parenting skills rather than recognizing that her parenting abilities are affected by repeated exposure to the person who violated her.[182]

Decisions crediting the violence as to the mother but discounting its effect on the children permit judges to place both parents on equal footing: If the violence is viewed as impacting only the mother, then both parties can equally parent the child. From this viewpoint, the court preserves the notion of parental equality. This, in turn, upholds the nuclear family paradigm as the legal system concludes that parents are equally fit to care for the child. This mindset has remained steadfast despite research to the contrary.

C. *Gender Bias*

Gender bias further impacts judicial decisions in family law cases to the detriment of mothers and children. Despite the popular misconception that mothers are favored in custody cases, research has found that mothers are "often measured against the standard of ideal motherhood, while fathers are measured against a different and lower standard,"[183] resulting in "courts consistently [holding] mothers to higher standards of proof than fathers."[184] Mothers are also "evaluated on their actual histo-

180. *See supra* Part I.B.

181. H.B. 1257, *supra* note 88.

182. *See* BANCROFT ET AL., *supra* note 13, at 84-89.

183. GENDER BIAS STUDY, *supra* note 17, at 833 ("The courts, as in the rest of society, expect far more from women as caretakers than as men. Any shortcomings the woman has, whether directly relating to her parenting or not, are closely scrutinized. Whereas, if a father does anything by way of caring for his children, this is an indication of his devotion and commitment." (quotation marks omitted) (quoting testimony of Sheera Strick of Greater Boston Legal Services)); *id.* at 832 ("A woman's history of motherhood is subject to intense scrutiny. A father's history of fatherhood is only examined from the time of the petition." (quotation marks omitted) (quoting an unnamed Boston attorney)).

184. Meier, *supra* note 15, at 687 (citing CARRIE CUTHBERT, KIM SLOTE, MONICA GHOSH DRIGGERS, CYNTHIA J. MESH, LUNDY BANCROFT & JAY SILVERMAN,

ry of performance as parents and fathers evaluated on the basis of their expressions of their emotions and their stated intentions for the future."[185] When fathers actively seek custody, they obtain primary or shared custody over 70% of the time.[186]

In addition to being held to a higher parenting standard, "credibility accorded [women] litigants is less than that accorded to [men as] litigants in domestic violence cases."[187] This unfair credibility burden results in mothers having to offer more evidence than fathers in hearings.[188] This burden makes it more difficult for mothers to prove the IPV and its impact on children because IPV is often not witnessed by others or reported to the police.

Mothers are also judged harshly for remaining in an abusive relationship and "failing to protect" their children.[189] One judge in Pennsylvania, for instance, consistently remarks that a mother cannot possibly be concerned for the safety of her children if she leaves them in the care of their father, who she is alleging is abusive.[190] This remark simultaneously discounts the mother's allegations of IPV and blames her for failing to protect her children, even though there are myriad reasons she left the children in the father's care. Reasons that a mother may leave children in the care of a father who is abusive include lack of housing, lack of financial resources to care for the children, and threats from the

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BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (2002)).

185. BANCROFT ET AL., *supra* note 13, at 148.

186. GENDER BIAS STUDY, *supra* note 17, at 748.

187. Meier, *supra* note 15, at 687 (citing Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts,* 27 FAM. L.Q. 247, 255-58 (1993)).

188. *Id*. at 688. ("[I]n rape and domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants.") (citing Czapanskiy, *supra* note 187, at 255-58).

189. BANCROFT ET AL., *supra* note 13, at 149. Many states have "failure to protect" statutes in their Child Protective Services Codes, *see, e.g.*, NEB. REV. STAT. § 28-710(2)(b) (2019); 23 PA. CONS. STAT. § 6303(b.1) (2018)) or Criminal Codes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (2018); ARK. CODE ANN. § 5-27-221(a) (2013); MINN. STAT. § 609.378(b)(1)(2018). These statutes are counterproductive in cases involving IPV because it is often political and societal structures that impede a woman's ability to remain free from violence because she does not have the resources to leave the abusive household. *See generally* Sussman, *supra* note 172, at 4, 34. These can be compounded by broader systemic issues as livable wages and lack of affordable housing. *Id.* at 14, 17, 34.

190. This comes from personal knowledge, as I have practiced in front of this judge frequently.

father.[191] Once parents separate, however, a "societal reversal tends to take place" around mothers protecting their children: Courts "become suspicious of a mother's motives for attempting to protect her children and may attribute children's symptoms [i.e., fear of father] to the mother's alleged anxiety, overprotectiveness, or vindictiveness against the alleged abuser."[192]

Mothers are further scrutinized when they have acted as the primary caretaker for minor children.[193] Theoretically, state statutes and court decisions recognize that, when determining the best interests of the child, consideration should be given "to the parent who has been the primary caretaker and psychological parent."[194] In practice, however, the opposite occurs:

> [I]t appears that as soon as physical custody is contested, any weight given to a history of primary caretaking disappears. Mothers who have been primary caretakers throughout the child's life are subjected to differential and stricter scrutiny, and they may lose custody if the role of primary caretaker has been assumed, however briefly and for whatever reason, by someone else.[195]

Presumptions about parental equality, credibility discounting, and gender bias all operate to justify decisions within the legal system that uphold violent fathers' rights via the two-parent paradigm or its approximation. When women litigants are viewed as less credible and IPV is discounted, judges can and do see both parents as fit, and thus capable of substantial custodial time with the child. As seen, however, when IPV or rape is present, both parents are not fit nor are they on equal footing when they enter the courtroom. Strict adherence to this paradigm is detrimental to children due to the resulting heightening of fathers' parental rights and creation of unstable family units.

Enacted statutes and judicial decisions relating to TPR and custody decisions in cases involving IPV or rape continue to afford mothers and children limited protections against violence. Limited protections exist because most statutes allow judicial discretion in determining whether parental rights should be terminated or what custody arrangement is

191. *See, e.g.*, *Why Do Victims Stay?*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/7G53-94ZF].
192. BANCROFT ET AL., *supra* note 13, at 149.
193. GENDER BIAS STUDY, *supra* note 17, at 748.
194. *Id.*
195. *Id.*

best for the child. As seen, however, judges view both parents as fit from the start of the case and engage in credibility discounting and gender bias, resulting in decisions that are not in the best interest of the children. Adherence to these invidious assumptions perpetuates the erroneous belief that the two-parent paradigm or its approximation is the best family structure for children.

Unfortunately, limited protections vis-à-vis laws and judicial decisions result in a perpetuation of violence. The next section provides an overview of existing TPR and custody statutes and a discussion of how these statutes continue to perpetuate violence against mothers and children. The custody statutes are limited to situations where the child is conceived as a result of rape.

III. In 2020, There's Still Limited Protection

Inscribed in our legal system is "the maxim that a wrongdoer shall not profit from his wrong."[196] In practice, this maxim is codified though legal principles that prevent individuals who have committed offenses from benefiting from their transgressions such as the right to confiscate proceeds of a crime[197] and the right to deny spousal support to a spouse who has engaged in conduct harmful to the innocent spouse.[198] For TPR and custody in cases where a child is conceived as a result of rape or IPV is involved, however, the legal system has overwhelmingly—and blatantly—disregarded this maxim. This is so despite the violent nature of the behavior and the ongoing impact of the IPV and/or rape on both mothers and children. A biological link to a child alone does not grant a constitutional right to parentage; a parent only has a constitutionally protected right to custody and control of a child when they have an established relationship with the child.[199] Yet many states have enacted laws that "create[] [parental] rights for rapists that did not previously ex-

196. Peña v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996); *see also* Prewitt, *supra* note 29, at 835-36 n.56.

197. *See e.g.*, 18 U.S.C. § 981 (2018).

198. *See e.g.*, S.M.C. v. W.P.C., 44 A.3d 1181, 1185 (Pa. Super. Ct. 2012) ("A long recognized exception to the obligation to pay spousal support exists where the recipient spouse conducts him or herself in a manner that would constitute grounds for a fault-based divorce."). Examples of grounds for fault-based divorce include adultery, willful abandonment for a period of one or more years, "cruel and barbarous" treatment to the innocent spouse, and the imposition of a sentence to imprisonment for two or more years. 23 Pa. Cons. Stat. § 3301(a) (2010).

199. Peña, 84 F.3d at 899-900.

ist."[200] The creation of such statutorily created rights has limited protections for mothers seeking to terminate the rights of their attackers or to deny or limit their custodial time. Additionally, most states have failed to even codify exposure to IPV as grounds for TPR,[201] while judicial decisions in custody cases disregard the violence.[202] As discussed, this resistance to denying parentage or to enacting TPR or custody statutes that afford protections for mothers and children stems from the entrenched two-parent paradigm and the presumptions that reinforce it.

The enactment of state statutes *denying* parentage or *permitting* TPR when a child is conceived as a result of rape has frequently involved long, arduous battles. In Maryland, for example, a bill permitting the termination of a rapist's parental rights was not enacted until 2018 despite being introduced in legislative sessions since 2007.[203] Prior attempts to pass the bill had been stalled on more than one occasion by all-male subcommittees.[204] In Pennsylvania, a bill to permit TPR when a

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200. Murphy, *supra* note 30, at 172. Murphy astutely contends that convicted rapists do not have parental rights because biology alone does not create parentage:

> The idea that a convicted rapist has parental rights over the product of his crime assumes that parentage is biological. However, as the United States Supreme Court noted many years ago in a discussion regarding parentage, "[T]he mere existence of a biological link does not merit constitutional protection" (Lehr v. Robertson) . . . More recently, courts have held that biology, while relevant, does not create parental rights. (A.R. v. C.R.; R.R. v. M.H., 1998). In fact, biology alone does not establish even minimal due process rights to notice and a hearing in family court to determine whether parentage exists as a matter of law for the sperm donor or man participating in assistive reproductive technologies. (*In the* Matter of J.S.V., 1998).
>
> If a biological sperm donor "father" who is *not* a rapist has no parental rights in a surrogacy case, or when a court is considering placing his biological offspring up for adoption, then surely a convicted rapist has no *better* rights over a child born from his crime. Simply put, a rapist should be seen as a violent sperm donor, nothing more, because a biological connection to a child caused by rape is as legally distant from nature of fatherhood as a man can get.

Id. at 181-82.

201. *See* Haddix, *supra* note 97, at 760-61.
202. *See supra* Part II.
203. Eric Cox, *Maryland Poised to Let Rape Victims Terminate Parental Rights of Their Assailants,* BALTIMORE SUN (Jan. 30, 2018), https://www.baltimoresun.com/news/maryland/politics/bs-md-parental-rights-rapists-20180130-story.html. (quoting Democrat Kathleen Dumias as saying, "It's been such a long, hard fought battle.").
204. Kelly Weill, *All-Male Panel Fails to End Maryland Law that Forces Women to Share Custody with Their Rapist*, DAILY BEAST (May 5, 2017, 2:30 PM),

child is conceived as a result of a sexual offense without the requirement of a contemplated adoption[205] was finally enacted into law in October of 2020 after being stalled in subcommittees for several years, despite legislators seemingly being appalled that the right did not already exist.[206]

Even where states have enacted TPR statutes addressing rape, the legal protections those statutes afford to mothers are still rather limited in practice. To date, thirty-three states permit TPR or denial of parentage when a child is conceived as a result of a sexual offense.[207] Eleven of those states only permit termination when the other parent is *convicted* of a sexual offense.[208] A conviction requirement renders the statute moot

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https://www.thedailybeast.com/all-male-panel-fails-to-end-maryland-law-that-forces-women-to-share-custody-with-their-rapists [https://perma.cc/6UCZ-4LDF].

> But while the bill passed both Maryland's House and Senate, the bill's text varied between the two legislative bodies. On Monday, the last day of legislative session, a five-person negotiating group was set to decide on the bill's final text, the *Baltimore Sun* reported. Instead, the five-man group let the bill fall by the wayside, running out the legislative session's clock without finalizing the bill's text.

Id.

205. Though I agree with Murphy, *supra* note 30, that biology alone does not create parentage and TPR statutes are problematic because they create this right, several reasons existed for seeking to change Pennsylvania's TPR statute. First, prior to the 2019 Superior Court decision in *In re Z.E.*, Pennsylvania permitted TPR when a child was conceived as a result in rape or incest but only in cases where there was a contemplated adoption. See discussion *supra* Part I. Second, when laws and judicial opinions are continuously granting rights to men who rape, discounting violence against women, and disregarding the notion that biology alone does not equate parentage for the reasons discussed in Part II, statutes that afford TPR at least provide mothers the ability to seek termination. Lastly, in cases involving intimate partner rape or incest, the rapist may have established some type of relationship with the child beyond a biological connection. *See* Peña v. Mattox, 84 F.3d 894, 899-901 (7th Cir. 1996). As such, the rapist would arguably be able to establish due process rights to notice and a hearing and that he has a fundamental right to the care, custody, and control of the child. *Id.*

206. H.B. 1984, 2019 Reg. Sess. (Pa. 2020).

207. *See* Tables A, B, and D.

208. KAN. STAT. ANN. § 38-2271(a)(12) (Supp. 2019); NEB. REV. STAT. § 43-292.02(4) (2019); NEV. REV. STAT. § 128.105(1)(b)(8) (2018); N.H. REV. STAT. ANN. § 170-C:5-a (Supp. 2019); N.C. GEN. STAT. § 7B-1111(a)(11) (2019); N.D. CENT. CODE § 27-20-44(1)(e) (2016); OR. REV. STAT. § 419B.510(1) (2019); S.C. CODE ANN. § 63-7-2570(11) (2010); TENN. CODE ANN. § 36-1-113(g)(10) (2017 & Supp. 2020); WYO. STAT. ANN. § 14-2-309(a)(ix) (2019). See Table A for a condensed summary of relevant statutory language and notes for these statutes. A more detailed version of Table A may be found at jclewisesq.wordpress.com (select the Resource Tab and then The Stability Paradox, Table A). Other resources providing lists of state TPR statutes include *Parental Rights and Sexual Assault*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/human-services/parental-rights-

for most survivors. "Rape is the most underreported violent crime" and few cases are prosecuted, resulting in minimal convictions.[209] "Researchers estimate that of 100 forcible rapes that are committed, approximately five to twenty will be reported, 0.4 to 5.4 will be prosecuted, and 0.2 to 5.2 will result in a conviction."[210] Additionally, these states are silent as to whether the conviction may be for a crime in "which the underlying basis was sexual assault."[211] Under these statutes, it is unclear whether TPR could occur in cases where a woman was sexually assaulted but the person who raped her was convicted of a different crime. Since many cases are pled to lessor offenses, this means that even where a conviction occurs a woman may still not have the option to seek TPR in states where a conviction is required if the offender was not ultimately convicted of sexual assault.

Furthermore, many TPR statutes affirmatively permit judicial discretion in determining whether to terminate parental rights by providing that the judge "may" terminate parental rights and/or the judge must make a finding that termination is in the best interest of the child.[212] Since these statutes allow judicial discretion in deciding whether to terminate a parent's rights, all TPR outcomes are based on a judge's determination of what the judge thinks is best for the child. As discussed in Part II, however, judges often disregard violence in making their best interest of the child determinations because they are influenced by the parental equality framework, credibility discounting, and gender bias.[213] Presumptions about these factors, in turn, uphold the glorified nuclear family paradigm. Most mothers, then, will have no recourse to terminate their offenders' parental rights in these states.

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and-sexual-assault.aspx [https://perma.cc/BP2K-YF8Q] and *Termination of Parental Rights,* RAINN, https://apps.rainn.org/state-laws/landing-page/ [https://perma.cc/T5ZC-P3W6]. Although Alabama law states that TPR shall occur if a parent has been convicted of rape in the 1st degree, sodomy in the 1st degree, or incest, it was not included in Table A or as one of the eleven states because the statute is not specific to terminating parental rights when the child was conceived as a result of a sexual offense. ALA. CODE § 12-15-319(b) (2012).

209. Moriah Silver, *Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 518-19 (2014).

210. *Id.* at 519.

211. COLO. REV. STAT. § 19-5-105.5(3) (2020). Colorado is the only state that provides the statutory language that the conviction may be a crime in which the underlying basis was sexual assault. *See* COLO. REV. STAT. § 19-5-105.7 (2020). Significantly, Colorado also permits TPR using a clear and convincing standard. *Id.* § 11(a).

212. *See* Table A.

213. *See supra* Part II.

Eighteen states permit TPR when the court finds by clear and convincing evidence that the perpetrator committed a sexual offense and the child was conceived as a result of the sexual offense.[214] A majority of the statutes in these states, however, also provide for judicial discretion by providing that the judge "may" terminate parental rights *and* the person seeking termination must prove that it is in the best interest of the child.[215] As discussed above and in Part II, judicial discretion is problematic because judges commence cases with the notion that both parents are equally fit parents due to gender bias and discounting violence.[216] In Alabama, for instance, a woman's uncle began raping her when she was approximately twelve years old, resulting in several children being conceived.[217] Despite these horrific facts, the court awarded her uncle visitation and informed her that *she* would be incarcerated if she denied him visitation with her children.[218] In Pennsylvania, a court awarded parental rights and custody of a child to the person who committed rape even though he was "on trial for his fifth Megan's Law violation [conviction of a sex crime against a child and subsequent failure to notify law enforcement of changes of his address and employment as required by law] and living in the basement of someone's home."[219] This

214. ALASKA STAT. § 25.23.180 (c)(2) (2018); COLO. REV. STAT. § 19-5-105.7 (2020); CONN. GEN. STAT. § 17a-112(j)(3)(G) (2019); LA. CHILD. CODE ANN. art. 1004 (2014); FLA. STAT. § 39.806(1)(m) (2020); HAW. REV. STATE. § 571-61(5) (2018); IDAHO CODE § 16-2005 (b)(2)(A) (2019); IND. CODE § 31-35-3.5-7(a)(1) (2018); IOWA CODE § 232.116(1)(p) (2014); MD. CODE ANN., FAM. LAW § 5-1402(a)(2)(ii) (LexisNexis 2019); ME. STAT. tit. 22 § 4055(1-B) (2019); MICH. COMP. LAWS § 722.1445(2) (2019); MISS. CODE ANN. § 93-15-119(1)(b) (2018); MO. REV. STAT. § 211.447(11) (Supp. 2019); 23 PA. CONS. STAT. § 2511(a)(7) (2010); TEX. FAM. CODE ANN. § 161.007(a) (West 2014); WIS. STAT. § 48.415(9) (2018). See Table B for a condensed summary of relevant statutory language and notes for these statutes. A more detailed version of Table B may be found at jclewisesq.wordpress.com (select the Resource Tab and then The Stability Paradox, Table B). Other resources providing lists of state TPR statutes include *Parental Rights and Sexual Assault*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx [https://perma.cc/BP2K-YF8Q] and *Termination of Parental Rights,* RAINN, https://apps.rainn.org/state-laws/landing-page/ [https://perma.cc/T5ZC-P3W6].

215. *See* Table B.

216. *See supra* Part II.

217. *Alabama Court Forces Rape Survivor to Allow Rapist to Have Visitation with Children,* KNOE 8 NEWS (June 12, 2019), https://www.knoe.com/content/news/Alabama-court-forces-rape-survivor-to-allow-rapist-to-have-visitation-with-children-511195642.html [https://perma.cc/9P6M-TRHZ].

218. *Id.*

219. Kara Bitar, Note, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 294 (2012).

decision resulted in the minor child regressing to the point that he was wearing diapers again at age five.[220] Judicial discretion in these matters, then, has often resulted in more harm to the child.[221]

Some states have enacted additional requirements for termination even when a clear and convincing standard is met. Indiana requires that the petition for TPR be filed within 180 days after the birth of a child when the victim of rape seeking TPR is eighteen years or older.[222] This is a burdensome and arbitrary time restriction when a mother is recovering from both rape and childbirth, as well as parenting a newborn. Mississippi highlights that the court may exercise its discretion not to terminate parental rights if the child's safety and welfare are not endangered and termination is not in the best interest of the child based on four enumerated factors:

> (a) The Department of Child Protection Services has documented compelling and extraordinary reasons why terminating the parent's parental rights would not be in the child's best interests;
>
> (b) There is a likelihood that continuing reasonable efforts for achieving reunification will be successful;
>
> (c) Terminating the parent's parental rights would inappropriately relieve the parent of the parent's financial or support obligations to the child; or
>
> (d) The child is being cared for by the other parent, or a relative, guardian, or custodian, in a residence not occupied by the abusive or neglectful parent and terminating the par-

220. *Id.*

221. *See also* Bartasavich v. Mitchell, 471 A.2d 833, 834-38 (Pa. Super. Ct. 1984) (holding that a father's parental rights should not be terminated even when he had murdered the child's mother, stabbed himself with a fork, was incarcerated for the crime, and the child had had no contact with the father from ages four to twelve because doing so caused her distress).

222. IND. CODE § 31-35-3.5-4 (2018) ("[A] parent who . . . is at least eighteen (18) years of age at the time the act of rape occurred; may not file a petition for termination of the parent-child relationship under this chapter more than one hundred eighty (180) days after the birth of the child."). When a parent is under 18 at the time of the rape, she has two years after turning 18 to file. *Id.*

> ent's parental rights would not expedite the process for obtaining a satisfactory permanency outcome.[223]

Factors (c) and (d) provide the courts with even more reasons to forgo terminating the parental rights of the father. A judge may be less inclined to terminate the parental rights of the person who committed the rape in cases where the person is capable of paying support, the mother is on public assistance, and/or the judge believes biological parents should not be relieved from paying support. A judge might also not terminate the parental rights of the person who committed the sexual assault if the child is currently residing in a safe home. In Oklahoma, though one ground for terminating the parental rights of fathers is that a child was conceived as a result of rape, only the district attorney or attorney for the child may file a petition or motion to terminate a parent's rights.[224] In Louisiana, the TPR statute is found in the subchapter title "Judicial Certification of Children for Adoption" of the Children's Code suggesting that there must be a contemplated adoption in order to terminate parental rights.[225] These statutory restrictions mean that, in many cases, the mother of a child conceived as a result of rape may not initiate a termination proceeding against the person who raped her or may only do so in the limited context where adoption of her child by another person is contemplated.[226]

Fifteen states restrict the legal custody and/or physical custody rights of the person who committed rape when a child was conceived as a result of a sexual offense, but have failed to enact legislation permitting TPR of the person who committed the sexual assault.[227] The restrictions

223. MISS. CODE ANN. § 93-15-123 (2018).

224. OKLA. STAT. tit. 10A, § 1-4-901(A) (2011).

225. *See* LA. CHILD. CODE ANN. art. 1015 (2014); LA. CHILD. CODE ANN. art. 1004 (2014); *see also* State *ex. rel.* C.E.K., 234 So. 3d 1059, 1066 (La. Ct. App. 2017) (emphasizing that the stated of purpose of art. 1004 is to provide for TPR to allow adoption of the child).

226. *See supra* Part I.A.

227. ARIZ. REV. STAT. ANN. § 25-416 (2017); ARK. CODE ANN. § 9-10-121 (2015); CAL. FAM. CODE § 3030(b) (West 2020); DEL. CODE ANN. tit. 13, § 724A(e) (2009); 750 ILL. COMP. STAT. 46/622 (2018); KY. REV. STAT ANN. § 403.322(2) (LexisNexis 2018); MASS. GEN. LAWS ch. 209C, § 3 (2018); N.J. STAT. ANN. § 9:2-4.1 (West 2013); N.Y. DOM. REL. LAW § 240(1-c)(b) (McKinney 2010); OHIO REV. CODE ANN. § 3109.504(A) (Lexis Nexis 2015); 15 R.I. GEN. LAWS § 15-5-16 (2003); S.D. CODIFIED LAWS § 25-4A-20 (2013); UTAH CODE ANN. § 76-5-414 (LexisNexis 2017); VA. CODE ANN. § 20-124.1 (2019); W.VA. CODE § 48-9-209a(a) (2014). See Table C for a condensed summary of relevant statutory language and notes for these statutes. The Stability Paradox: Table C, https://jclewisesq.com/2020/03/14/tsp-table-c/ [https://perma.cc/R3TQ-WGBP]. Other resources providing lists of state

on custody and visitation afford little protection to mothers because a majority of the states require that the person be convicted of the sexual offense in order for the statute to apply.[228] Additionally, several of these states permit judicial discretion in determining whether custody and visitation should be awarded.[229] Similar to the TPR statutes, affirmatively permitting judicial discretion in determining custody in rape cases often results in judges disregarding the violence and the impact it has on mothers and children.[230] Judges view the person who committed the rape as fit because they either believe that the rape did not occur, or alternatively, they believe that the rape occurred but it does not affect the child. Judges, then, can and do award custodial time to the person who committed the rape, perpetuating the glorification of the two-parent paradigm.[231]

Of the fifteen states that restrict custodial time when conception is due to a sexual offense, thirteen indicate that a *convicted* person shall not be permitted custody of or visitation with the child at all.[232] If legislators have deemed that a person convicted of rape is unfit to have any custodial or visitation rights, then it should follow that the other parent has the right to deny parentage or terminate the parental rights of that person. Yet, most states with these custody restrictions have not enacted statutes denying parentage or permitting TPR.[233]

TPR statutes include *Parental Rights and Sexual Assault*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://perma.cc/6Z5H-5BTC and *Termination of Parental Rights*, RAINN, https://perma.cc/T6SN-DM42.

228. Out of the states that afford restrictions on parental rights of individuals who commit sexual assault through custody statutes alone, only two use a clear and convincing standard: 750 ILL. COMP. STAT. 46/622; S.D. CODIFIED LAWS § 25-4A-20; *see also infra* Table C.

229. MASS. GEN. LAWS ch. 209C, § 3; N.J. STAT. ANN. § 9:2-4.1; N.Y. DOM. REL. LAW § 240(1-c)(a); 15 R.I. GEN. LAWS § 15-5-16(d)(4); W.VA. CODE § 48-9-209a(a); S.D. CODIFIED LAWS § 25-4A-20; VT. STAT. ANN. Tit. 15, § 665(f) (2019); *see also infra* Table C.

230. *See supra* Part II.

231. Some of these states' statutes explicitly state that the restrictions on a father's custodial rights are not applicable when the mother (or legal guardian) consents to the visitation. *See* HAW. REV. STAT. § 571-46(a)(17)(c) (2018); MASS. GEN. LAWS ch. 209C, § 3(a); 15 R.I. GEN. LAWS ANN. § 15-5-16(d)(4); NEV. REV. STAT. § 125C.210(1) (2018); UTAH CODE ANN. § 76-5-414(1)(a). Most of these statutes, however, still provide that visitation will only be granted if it is in the best interest of the child, suggesting that legislators do not believe that a fit parent—more specifically a woman parent—can make sound decisions regarding her children. *Id.*

232. *See* Table C.

233. *Id.*

One further point demonstrates the degree to which the legal system has resisted terminating parental rights in cases of sexual violence against women. In cases in which the only connection between the child and the person who committed the sexual offense is biological, there is not a constitutionally protected right to parentage.[234] As such, courts and states should deny parentage to the rapist. Yet, only four states have codified the right to do so.[235]

TPR statutes look similarly bleak for mothers seeking legal remedies in order to protect their children in cases involving exposure to IPV.[236] TPR statutes are typically codified within adoption codes and/or juvenile (usually dependency) codes. States vary on whether one biological parent even has standing to initiate a TPR proceeding against the other.[237] Many state statutes include abuse or neglect as an enumerated ground for TPR, with some defining abuse as including emotional or psychological injury or exposing minor children to an unsafe environment.[238] To date, however, few states have actually statutorily defined

234. *See* Murphy, *supra* note 30, at 181; *see also* Peña v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996) (noting that the "mere fact of fatherhood . . . that is not cemented . . . by association with the child" does not create a constitutionally created interest).

235. *See* Table D. A more detailed version of Table D may be found at jclewisesq.wordpress.com. The Stability Paradox: Table D, https://jclewisesq.com/2020/03/14/tsp-table-d/ [https://perma.cc/3WHU-P7DW]. In all four states the burden of proof is the clear and convincing standard.

236. *See* Haddix, *supra* note 97, at 761.

237. *See supra* note 6.

238. ARIZ. REV. STAT. ANN. § 8-533(B)(2) (2018); COLO. REV. STAT. § 19-5-105(3.1)(a)(IV) (2020); DEL. CODE ANN. tit. 13, § 1103(a)(5) (2009); FLA. STAT. § 39.806(1)(f) (2020); KAN. STAT. ANN. § 38-2269(b) (Supp. 2019); KY. REV. STAT. ANN. § 625.090(1)(a)(1) (West 2014); KY. REV. STAT. ANN. § 600.020(26) (West 2014); LA. CHILD. CODE ANN. art. 1015(4) (2014); MINN. STAT. § 260C.301(b)(2) (2015); MISS. CODE ANN. §§ 93-15-119(1)(a)(i), 93-15-121(f) (2018); NEV. REV. STAT. § 128.105(1)(b)(5) (2018); N.C. GEN. STAT. § 7B-1111(a) (2019); N.C. GEN. STAT. § 7B-101(1)(e) (2019); OKLA. STAT. tit. 10A, § 1-1-105(2) (2011 & Supp. 2020); OR. REV. STAT. § 419B.504(1)(a) (2019); 15 R.I. GEN. LAWS § 15-7-7(a)(2)(ii) (2003); S.C. CODE ANN. §§ 63-7-2570, 63-7-20(6)(a)(i) (2010); S.D. CODIFIED LAWS § 26-8A-26.1(4) (2016); TENN. CODE ANN. § 36-1-113 (2017 & Supp. 2020); TEX. FAM. CODE ANN. § 161.001 (West 2014); VA. CODE ANN. § 16.1-228(1) (2016); WYO. STAT. ANN. § 14-3-202(a)(ii)(A) (2019); *see also generally* State ex rel. M.R.S., No. 20020608-CA, 2003 WL 21294878 (Utah Ct. App. Apr. 24, 2003); *In re* Stephen Tyler R., 584 S.E.2d 581 (W. Va. 2003). Examples of the definition of abuse including emotional injury or exposing minor children to unsafe environments are: "Risk of serious physical, mental, or emotional injury to the child if the child were returned to, or remains in, the home of his or her parent or parents," NEV. REV. STAT. § 128.105(1)(b)(5) (2018), and "harm or threatened harm to the health, safety, or welfare of the child," which includes mental or emotional injury. OKLA. STAT. tit. 10A § 1-1-105(2) (2011 & Supp. 2020); *see also* The

abuse as including exposure to IPV.[239] Even where states have included language permitting TPR on the basis of exposure to IPV, the statutory definition of IPV is narrow compared to how IPV is experienced and observed by children.[240]

Despite most states' failure to codify exposure to IPV as a ground for TPR, courts have recognized that exposure to IPV is harmful to children and, as such, can be grounds for TPR. A Kansas court, for example, held that children exposed to IPV were emotionally abused.[241] Similarly, Texas courts have held that exposure to domestic violence supports a finding of TPR due to abuse even when the abuse is "not directed at the child[]" because IPV "undermines the safety of the home environment."[242] West Virginia courts have also highlighted that acts of physical and emotional abuse due to IPV are relevant to TPR proceedings because children who witness IPV "may suffer deep and lasting emotional harm."[243]

Stability Paradox: Table E, https://jclewisesq.com/2020/03/14/tsp-table-e/ [https://perma.cc/X3X4-VW58].

239. GA. CODE ANN. § 15-11-2(2)(E) (2020) ("The commission of an act of family violence as defined in Code Section 19-13-1 in the *presence of the child*. An act includes a single act, multiple acts, or a continuing course of conduct. As used in this subparagraph, the term 'presence' means physically present or able to see or hear.") (emphasis added). It is unclear whether this statutory definition would encompass a child seeing the aftermath of the violence, such as bruising to mother, but the child not having been physically "present" during the violent act. *Id.*; ALASKA STAT. § 47.10.011(8)(B)(ii)-(iii) (2018) (including conduct by a parent which places child at substantial risk of mental injury as a result of "*exposure to conduct by a household member* . . . that is a crime [or attempted crime] under AS § 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-432 . . . or repeated exposure to . . . crime[s] under AS § 11.41.230(a)(3) or AS § 11.41.250-11.41.270.") (emphasis added).

240. The definition of IPV in both of these states does not include emotional abuse. GA. CODE § 19-13-1 (2018); ALASKA STAT. § 47.10.011(8)(B)(ii)-(iii). Many children, however, observe fathers' emotional abuse of mothers. *See* ALISON CUNNINGHAM & LINDA BAKER, LITTLE EYES, LITTLE EARS: HOW VIOLENCE AGAINST WOMEN SHAPES CHILDREN AS THEY GROW (2007), https://www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/sfv-avf/sources/fem/fem-2007-lele-pypo/pdf/fem-2007-lele-pypo-eng.pdf [https://perma.cc/9569-WAJ2].

241. *In re* A.H., 334 P.3d 339, 343 (Kan. Ct. App. 2014) (also noting that "'[i]f the trial court observes abuse of one child, the judge should not be forced to refrain from taking action until the next child suffers injury.' Young bodies cannot withstand many savage blows; young psyches, even fewer." (citations omitted) (quoting *In re* A.B., 746 P.2d 96, 97 (Kan. Ct. App. 1987)).

242. *In re* A.M.Y., No. 04-15-00352-CV, 2015 WL 6163212, at *4 (Tex. App. Oct. 21, 2015); *see also* Haddix, *supra* note 97, at 769-70 (citing various Texas cases where TPR of a parent was upheld when child was exposed to IPV).

243. *In re* Stephen Tyler R, 584 S.E.2d 581, 593 (W. Va. 2003) (quoting W. VA. CODE § 48-27-101(a)(2) (2015)); *see also In re* Carlita B., 408 S.E.2d 365, 368 (W. Va.

In sum, most states have afforded limited protection and remedies for mothers experiencing violence by failing to enact protective statutes or enacting statutes that are ineffective. Many enacted statutes require that the person who committed rape be convicted of the crime in order for the court to terminate that person's parental rights or restrict custodial time. In most rape cases, however, the rapist is not convicted of the crime. Also, most statutes permit judicial discretion in deciding whether to terminate parents' rights or restrict custodial time. Judges, however, frequently discount violence, the impact that exposure to violence has on children, and the effect that IPV and rape have on a mother's ability to parent. This results in judges ordering custody arrangements that approximate the two-parent household, creating more instability in the family because of the IPV or rape.

IV. Continued Resistance to a Paradigm Shift

In deciding whether to terminate parents' rights, a court must balance parents' fundamental right to parent their children with the State's *parens patriae* interest in protecting the welfare of children.[244] Courts are reluctant to terminate parental rights because TPR results in a disruption of the nuclear family paradigm. As a result, language in court opinions expresses extreme disdain for terminating parents' rights. TPR is seen as "tantamount to imposition of a civil death penalty."[245] Courts also say of TPR that "few forms of state action are both so severe and so irreversible;"[246] that it is "punishment more severe than many criminal

1991) ("Prior acts of violence, physical abuse, or emotional abuse . . . are relevant in a termination of parental rights proceeding."); Nancy Viola R. v. Randolph W., 356 S.E.2d 464, 468 (W. Va. 1987) ("[S]pousal abuse is a factor to be considered in determining parental fitness for child custody." (citation omitted)); Collins v. Collins, 297 S.E.2d 901, 902 (W. Va. 1982) (*per curiam*) (finding that the child's mother who had committed acts of domestic violence was unfit custodian for child); *In re* Wiltse, No. 318374/318375, 2014 WL 1515777, at *3 (Mich. Ct. App. Apr. 17, 2014) ("Moreover, it is likely the minor children would be harmed if returned to respondents' care because of the domestic violence and unstable living environment. Testimony during the termination hearing supported the conclusion that even if no violence was directed at the children, the children could be 'traumatized' if exposed to domestic violence.") (citations omitted).

244. Katherine E. Wendt, Comment, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 Mich. St. L. Rev. 1763, 1775 (2013).

245. Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989).

246. N.J. Div. of Youth Family Servs. v. P.P., 852 A.2d 1093, 1099 (N.J. 2004) (quoting Santosky v. Kramer, 455 U.S. 745, 759 (1982)).

sanctions;"[247] that "[n]o civil action carries with it graver consequences than a petition to sever family ties irretrievably and forever;"[248] and that termination is a "drastic step that once taken cannot be withdrawn."[249]

Although courts are reluctant to terminate parents' rights, courts still acknowledge that parental rights are not absolute[250] and that a child's interest should prevail over that of an unfit parent.[251] Courts also say of children's rights that "when the interest of the child and the parental rights conflict, the interest of the child shall prevail;"[252] "it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve" the parent-child relationship;[253] "[q]uite beyond and more important than the rights and privileges of the parents is the welfare of these children and their prospects of becoming well-adjusted, self-sustaining individuals;"[254] and "parental rights will not be enforced to the detriment or destruction of the health and well-being of the child."[255] This language suggests that, in cases involving IPV and rape, the child's interest should prevail over that of the offending parent because harm results when the court does not account for IPV and rape.[256]

In actuality, however, parents' rights frequently prevail over children's well-being in cases involving non-intimate partner rape and IPV. The legal system affords limited legal protections to mothers who experience IPV or non-intimate partner rape in the TPR and custody context, which results in a denial of children's right to proper parenting,

247. Matter of Adoption of K.A.S., 499 N.W.2d 558, 563 (N.D. 1993) (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appoint Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R.3d 1141, 1145 (1977), *superseded by* 92 A.L.R.5th 379 (originally published in 2001)).

248. *In re* M.J.B, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004).

249. *Ex Parte* T.V., 971 So. 2d 1, 9 (Ala. 2007).

250. *See, e.g.*, *In re* M.D.C, 39 So. 3d 1117, 1128 (Ala. 2009); *N.J. Div. of Youth Family Servs.*, 852 A.2d at 1099; *In re* Grace H., 335 P.3d 746, 756 (N.M. 2014); *In re* Justice A. F., No. W2011-02520-COA-R3-PT, 2012 WL 4340709, at *10 (Tenn. Ct. App. Sept. 24, 2012).

251. Wendt, *supra* note 244, at 1775.

252. Charleston Dept. of Soc. Servs. v. King, 631 S.E.2d 239, 244 (S.C. 2006).

253. *In re* C.H., 89 S.W. 3d 17, 26 (Tex. 2002).

254. Utah v. Dade, 376 P.2d 948, 949 (Utah 1962).

255. Torres v. Ark. Dep't of Human Servs., No. CA12-150, 2012 WL 2406614, at *4 (Ark. Ct. App. 2012); *see also In re* B.L.W., 843 A.2d 380, 388 (Pa. 2004) ("A parent's basic constitutional right to the custody and rearing of his or her child is converted, upon the failure to fulfill his or her parental duties, to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy safe environment." (quoting *In re* B.L.L, 787 A.2d 1007, 1013 (Pa. Super. Ct. 2001))).

256. *See supra* Part I.B.

emotional and physical well-being, and stability. By emphasizing parental rights over the rights of the child, the legal system maintains the structure of the nuclear family or its approximation. Judicial decisions justify adhering to the two-parent paradigm even though it contradicts the *parens patriae* interest by disregarding violence against mothers and the impact this violence has on children. Judges are able to view the parent who is abusive as being a fit parent when, at the same time, they discredit violence against mothers and the impact that exposure to violence has on children and mothers' ability to parent. The parent's rights, then, prevail over those of the child, preserving the two-parent household or its approximation.

A paradigm shift in the legal system is difficult because the nuclear family paradigm is rooted in societal attitudes about family, women, IPV, and rape. The following section will demonstrate how rooted the two-parent paradigm is in the legal system, even in some cases where the court decision shifts slightly from the paradigm. Current Pennsylvania law regarding TPR and the case of M.E., a case involving rape, will be discussed. The facts from the case of M.P. will then be used as a hypothetical TPR case to illustrate how arguments can be applied to cases involving ongoing exposure to IPV.

A. *The Relationship Matters: Mere Biological Link Versus Established Relationship*

The constitutional analysis in TPR cases differs depending on what type of relationship exists between the child and the person who committed the rape or IPV. Where the only connection between the two is biological, there is no constitutionally protected right to parentage.[257] Conversely, where there is an established relationship between the parent and child, a fundamental liberty interest in the custody and control of the child is at stake.[258] In cases of non-intimate partner rape there is usually only a biological connection between the person who committed the crime and the child,[259] unless the state has created a connection by ordering visitation, custodial rights, or by requiring the offender to pay child support.[260]

257. Murphy, *supra* note 30, at 181.
258. *See* Peña v. Mattox, 84 F.3d 894, 899-900 (7th Cir. 1996).
259. *See* Murphy, *supra* note 30, at 181-82.
260. *Peña*, 84 F.3d at 900 (highlighting two cases where male statutory rapists were granted parenting rights when they had been required to pay support); *see also id.* at 172.

An analysis of whether a person has a constitutional right to the care, custody, and control of their biological child matters because it can change the outcome of TPR cases. A person who has committed rape or IPV has this constitutional right when he has an established relationship with his biological child.[261] He therefore has the due process right to a hearing where the grounds for terminating parental rights must be proved by clear and convincing evidence.[262] Absent clear and convincing evidence showing that the parent is unfit, the court may not terminate a parent's rights.[263] Courts are reluctant to terminate parental rights, especially in cases involving rape and IPV.[264] Thus, it is much more difficult for mothers to terminate the parental rights of the person who committed IPV or rape if that person has an established relationship with the biological child.

Conversely, a person who has committed rape or IPV does not have a constitutional right in the care, custody, or control of his biological child if he has not established a relationship with his biological child.[265] He therefore does not have "even minimal due process rights to notice and hearing in family court to determine whether parentage exists."[266] Theoretically, then, mothers should not even need to argue for a termination of parental rights of the person who committed the rape or IPV, as parental rights never existed.

Actions by the State or the parties can also create parental rights in cases where none previously existed.[267] For example, statutes that permit the termination of parental rights of a person who committed rape in cases where the child is conceived as a result of the sexual offense create parental rights because they assume that there are parental rights to terminate.[268] Similarly, courts may establish parental rights when ordering custody or visitation rights or when requiring the payment of support.[269]

261. *See Peña*, 84 F.3d at 899-900.
262. Santoksy v. Kramer, 455 U.S. 745, 751, 770 (1982).
263. *See Santosky*, 455 U.S. at 751, 770.
264. *See supra* Parts I-II.
265. *See* Murphy, *supra* note 30, at 181.
266. *Id.*
267. *See id.* at 184, 189 n.3.
268. *Id.* at 170.
269. *See* Peña v. Mattox, 84 F.3d 894, 901 (7th Cir. 1996). Based on the language in *Peña*, it can be inferred that mothers may unintentionally create parenting rights for the person who committed rape against them if they file for child support against the offender. *Id.* at 901.

B. *TPR When There is Only a Biological Connection to the Child*

Consider cases that have addressed the constitutionality of terminating the parental rights of a person who commits a sexual offense resulting in conception. In *Peña v. Mattox*, a child was conceived as a result of statutory rape and placed for adoption without the consent or knowledge of the person who committed the rape.[270] The person who committed the sexual offense sought parental rights, asserting his rights were protected under the Fourteenth Amendment.[271] Reasoning that "[i]t is not the brute biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim," the *Peña* court held that the person who committed the rape did not have a constitutionally protected interest in his biological child.[272] The court further found that even though it was not the person's fault that he did not have a relationship with the child because he had not known about the pregnancy or adoption, he still did not have a protected right because of his criminal conduct.[273]

Notably, however, the *Peña* court did suggest that in some circumstances someone who commits a sexual offense may have constitutionally protected parental rights, i.e., when there is an established relationship with the child:

> The maxim that a wrongdoer shall not profit from his wrong is deeply inscribed in the Anglo-American legal tradition. It sometimes clashes with, and is sometimes even overridden by, competing principles. Where the wrong is of a technical, trivial character and the cost of righting it would be great, the maxim yields, as in cases in which a father who has established an enduring relationship with his child seeks constitutional protection for the relationship in the face of an argument that as a fornicator he should have no rights.[274]

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270. *Peña*, 84 F.3d at 895-96.
271. *Peña*, 84 F.3d at 897-98.
272. *Peña*, 84 F.3d at 899.
273. *Peña*, 84 F.3d at 900 ("[N]o court has gone so far as to hold that the mere fact of fatherhood, consequent upon a criminal act that our society does take seriously and that is not cemented (whoever's fault that is) by association with the child, creates an interest that the Constitution protects in the name of liberty.").
274. *Peña*, 84 F.3d at 900 (citation omitted).

The *Peña* court further reasoned that individuals who commit sexual offenses "have an argument that parental duties imply correlative parental rights" if child support is sought from them.[275] Mothers seeking support, then, can unintentionally establish parental rights for the rapist.

After *Peña,* the Wisconsin Court of Appeals also signaled that a fundamental liberty interest may not be at stake when the only relationship between the offender and the child is biological.[276] In *State v. Otis*, a father appealed the termination of his parental rights by challenging the constitutionality of a Wisconsin statute that permits termination of parental rights when a child is conceived as a result of a sexual assault.[277] The State contended that the statute was constitutional because "biological connection alone does not create a fundamental liberty interest" and the father did not have a substantial relationship with his child.[278] Though the court analyzed the case as though the father had a fundamental liberty interest in the custody of the child, the court noted that the statute was constitutional even if it were analyzed as if a fundamental liberty interest was not at stake.[279] This suggests that the court may well have agreed with the State's contention that a fundamental liberty interest was not at stake because there was no connection between the father and child.

In both *Peña* and *Otis*, the two-parent paradigm arguably factored into the courts' determination that the State had constitutional grounds to terminate the parental rights of the offenders. In *Peña,* for example, the minor child was living in a two-parent household with individuals who sought to adopt him prior to the person who committed the rape seeking to establish his parental rights.[280] The court specifically noted that the person who committed the rape could not block the adoption in order to create a relationship with the child.[281] Here, allowing the offender to have parental rights would have disrupted the existing traditional two-parent family, regardless of the fact that it was created by adoption.[282]

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275. *Peña*, 84 F.3d at 901.

276. State v. Otis G. (*In re* Termination of Parental Rights to Davonta S.), 2008 WI App 135, ¶ 9, 314 Wis. 2d 283, 758 N.W.2d 927 (Wis. 2008).

277. *Otis G.*, 2008 WI App 135U, ¶¶ 3-5. Wisconsin permits TPR when a child is conceived as a result of a sexual assault when there is a "conviction or other evidence produced at a fact-finding hearing." WIS. STAT. § 48.415(9)(a) (2018).

278. *Otis G.*, 2008 WI App 135U, ¶ 9.

279. *See Otis G.*, 2008 WI App 135U, ¶ 10.

280. *Peña*, 84 F.3d at 900-01.

281. *Peña*, 84 F.3d at 901.

282. Though the facts in *Otis G.* do not indicate whether or not the child was going to be adopted, there is a strong likelihood that the State was seeking TPR for adoption

Though the *Peña* and *Otis* courts' apparent reliance on the two-parent paradigm resulted in just outcomes—the TPR of the person who committed the rape—more often than not, the glorification of the nuclear family perpetuates violence against women. But what results in cases where the child has had a relationship with the person who committed the rape?

C. *TPR of Offending Parent When a Relationship Exists*

In *In the Interest of Z.E.*, M.E.'s stepfather repeatedly raped her from the time she was four years old until she was twenty-three years old, resulting in three children conceived from rape.[283] M.E. wanted to terminate her stepfather's parental rights to the children because, even though he was convicted on multiple charges, incarcerated, and did not have contact with M.E. or her children, she feared that he might try to contact her and their children in the future.[284] Unlike in *Peña*, however, M.E.'s stepfather had a relationship with the children: M.E., her stepfather, and the children resided together as a family for approximately four years prior to M.E. and her children leaving her stepfather.[285]

At the time that M.E. wanted to terminate her stepfather's parental rights to their children, Pennsylvania's Adoption Act which contains the state's TPR statute, had been interpreted to require the parent who sought to terminate the parental rights of the other parent to have a partner who would adopt the child and form a new parent-child relationship.[286] M.E. did not want to have a partner adopt her children for two reasons.[287] First, M.E. believed that she should not be required to have a partner adopt her children in order to terminate the parental rights of her stepfather.[288] As a single parent, she had created a stable,

purposes given the ages of the mother and the offender and the fact that the State initiated the proceedings.

283. *In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711 (Pa. Super. Ct. Aug. 12, 2019).

284. *In re Z.E.*, 2019 WL 3779711, at *4-5.

285. Brief for Petitioner-Appellant at 6-7, *In re* Z.E., No. 3577 EDA 2018, 2019 WL 3779711 (Pa. Super. Ct. Aug. 12, 2019). Though the minor children had not had any contact with the stepfather for a long time prior to the TPR proceeding and one of the children did not even remember the stepfather, M.E. did not try to argue that stepfather did not have any parenting rights under the theory that there was not an existing relationship between the stepfather and the children. *Id.*

286. *See supra* text accompanying notes 16-26.

287. Brief for Petitioner-Appellant at 6, 14, *In re Z.E.*, 2019 WL 3779711.

288. Brief for Petitioner-Appellant at 14, *In re Z.E.*, 2019 WL 3779711.

happy environment for her children where they were thriving and free from harm.[289] M.E. felt that single parents like her should not be forced into establishing two-parent households to terminate the parental rights of men who committed rape.[290] Second, M.E. did not want a partner to adopt her children because the person who had adopted her—her stepfather—had raped her.[291]

M.E. challenged the constitutionality of Pennsylvania's TPR statute.[292] When a person challenges the constitutionality of a statute, the court reviews whether the governmental act (e.g., the statute) is lawful.[293] Statutes that affect an individual's fundamental rights, such as the right to the care, custody, and control, of a child, are reviewed using a strict scrutiny analysis.[294] Under this review, the statute is upheld if it serves a compelling governmental interest and is narrowly tailored to serve that interest.[295] M.E. contended that Act was unconstitutional because it did not serve a compelling state interest nor was it narrowly tailored.[296]

One purported purpose of the Act was "to dispense with the need for parental consent to an adoption."[297] This might have served a compelling governmental interest in effectuating adoptions where a parent is deemed unfit. Courts, however, had conflated this with establishing a parent-child relationship with two parents in an intact marriage to protect the stability of the new family unit.[298] This conflation was shown in the case of *In re Adoption M.R.D.* where the TPR petition was denied

289. Brief for Petitioner-Appellant at 8, 17-18, *In re Z.E.*, 2019 WL 3779711.
290. Brief for Petitioner-Appellant at 17-19, *In re Z.E.*, 2019 WL 3779711.
291. Brief for Petitioner-Appellant at 6, *In re Z.E.*, 2019 WL 3779711.
292. Brief for Petitioner-Appellant at 8-9, *In re Z.E.*, 2019 WL 3779711.
293. *Judicial Review*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/judicial_review [https://perma.cc/C8GK-7CFP].
294. Schmehl v. Wegelin, 927 A.2d 183, 185-86 (Pa. Sup. Ct. 2007).
295. *Schmehl*, 927 A.2d at 185-86.
296. Brief for Petitioner-Appellant at 15-19, *In re Z.E.*, 2019 WL 3779711.
297. *See, e.g.*, *In re* Adoption of M.R.D., 145 A.3d 1117, 1120 (Pa. Super. Ct. 2016) (The "adoption requirement is consistent with the rationale behind permitting the involuntary termination of a parent's rights, which we have explained is 'to dispense with the need for parental consent to an adoption when, by choice or neglect, a parent has failed to meet the continuing needs of the child.'" (quoting *In re* B.E., 377A.2d 153, 155 (Pa. Super. Ct. 1977))).
298. *See In re* Adoption of M.R.D., 145 A.3d 1117, 1127-28; *see also In re* Adoption of J.D.S., 763 A.2d 867, 871 (Pa. Super. Ct. 2000) ("Termination of the natural parent's rights prior to adoption and allowance of stepparent adoption is for the purpose of protecting the integrity and stability of the new family unit. Because the primary function of government and law is to preserve and perpetuate society, the traditional family structure is given every reasonable presumption in its favor.").

when the mother sought to have the minor child's grandparent be the adoptive parent.[299] M.E. argued that establishing a two-parent household to provide stability for the family unit was not a compelling (or even legitimate) state interest.[300] M.E. noted that, in today's society, nontraditional families abound with 35% of children living in single parent households.[301] M.E. also argued that research studying children who had not experienced early trauma "found no significant difference in negative behaviors of children raised by dual parents or single parents."[302] Two-parent households, then, do not inherently provide more stability for children than a single-parent household.

Additionally, M.E. argued that a two-parent household did not guarantee stability for a child.[303] For example, exposure to IPV has numerous adverse impacts on children.[304] In households experiencing IPV, the home environment or its approximate vis-à-vis shared custody arrangement is harmful to mothers and children.[305] The state's purpose "of creating a 'stable, new family unit' which preserves the nuclear family is flawed" in cases where there is IPV or rape "as the two-parent household provides no such stability."[306]

The State's stated objective was providing more stability to children, but by suggesting that a fit parent who was already providing a safe, stable environment needed to have someone adopt her children in order to terminate her attacker's parental rights, the State undermined this objective.[307] Paradoxically, the legal system's glorification of the two-parent paradigm was creating more instability and harm for M.E.'s family unit by suggesting that her stepfather could attempt future con-

299. *See, e.g.*, *In re Adoption of M.R.D.*, 145 A.3d 1117 at 1120; *see also supra* Part I.

300. Brief for Petitioner-Appellant at 17, *In re Z.E.*, 2019 WL 3779711. In addition, a two-parent household does not guarantee stability for a child. As discussed *supra* in Part I, exposure to IPV has numerous adverse impacts on children. In households experiencing IPV, the home environment is volatile. The state's purpose of creating a "stable, new family unit" is fundamentally flawed as a two-parent household may provide no such stability.

301. Brief for Petitioner-Appellant at 15-20, *In re Z.E.*, 2019 WL 3779711.

302. Brief for Petitioner-Appellant at 17, *In re Z.E.*, 2019 WL 3779711 (quoting Dominic Schmuck, *Single Parenting: Fewer Negative Effects on Children's Behaviors than Claimed,* 118 MOD. PSYCHOL. STUD. 117, 120 (2013)).

303. Brief for Petitioner-Appellant at 18-19, *In re Z.E.*, 2019 WL 3779711.

304. Brief for Petitioner-Appellant at 18-19, *In re Z.E.*, 2019 WL 3779711; *see also supra* Part I.

305. Brief for Petitioner-Appellant at 18-19, *In re Z.E.*, 2019 WL 3779711; *see also supra* Part I.

306. Brief for Petitioner-Appellant at 19, *In re Z.E.*, 2019 WL 3779711; *see also supra* Part I.

307. Brief for Petitioner-Appellant at 15-19, *In re Z.E.*, 2019 WL 3779711.

tact with her and her children even though his connection as a "parent" was derived from his criminal acts of raping M.E.[308]

Noting that the Act required a contemplated adoption, the trial court denied M.E.'s petition even though it determined that grounds for termination existed and that it would be in the best interest of the minor children to terminate the parental rights of the father.[309] The trial court found that M.E. had not met her burden of establishing that the statute violated the Constitution because the governmental purpose of "effect[ing] a new family unit" was a "rational basis for the requirement of adoption."[310] Although a fundamental right was at issue, the judge's language suggests that he reviewed the legitimacy of the Act under a rational basis test.[311] Under a rational basis test, a law is upheld if it is rationally related to a legitimate government purpose.[312] This is a much less stringent burden for the state to meet in proving a law is constitutional than application of strict scrutiny requires.[313]

Though the court provided no further analysis in this decision, one has to wonder whether the judge was influenced by the nuclear family paradigm. The court emphasized that M.E. proved that grounds to terminate her stepfather's parental rights existed, that her stepfather committed "despicable crimes of abuse" against her, and that M.E. "set forth well-reasoned arguments to sever all connections with an abusive individual."[314] Yet, the trial court still denied M.E.'s petition to terminate her stepfather's parental rights because there was not a contemplated adoption.[315] Unlike the positive outcome in *Peña* and *Otis*, the trial court's adherence to the two-parent paradigm here resulted in M.E. not being able to terminate the parental rights of her stepfather. The different outcome in these cases may well have resulted because in *Peña* and *Otis* the offending parents had no prior relationship with the children at issue. In M.E.'s case, however, the parties had lived together as a family

308. Brief for Petitioner-Appellant at 18, *In re Z.E.*, 2019 WL 3779711. In Pennsylvania, the stated purpose of the adoption requirement was further contradicted by the statute itself. Under the statute, an *unmarried* person may adopt as a *single person* when adopting through an agency. *Id.* at 19.

309. Opinion and Order at 6, *In re* Z.E., No. 64 O.C.A. 2018 (C.P. Monroe Cty. 2018) ("[D]espite the despicable crimes of abuse by Father against Mother, and the facts of this case, we are unable to grant Mother's petition at this time.")

310. Opinion and Order at 6, *In re* Z.E., No. 64 O.C.A. 2018 (C.P. Monroe Cty. 2018).

311. Opinion and Order at 6, *In re* Z.E., No. 64 O.C.A. 2018 (C.P. Monroe Cty. 2018).

312. *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test [https://perma.cc/CY9S-38ZT].

313. *Id.*

314. Opinion and Order at 6, *In re* Z.E., No. 64 O.C.A. 2018 (C.P. Monroe Cty. 2018).

315. Opinion and Order at 6, *In re* Z.E., No. 64 O.C.A. 2018 (C.P. Monroe Cty. 2018).

unit for a period of time prior to M.E. and her children safely separating from her stepfather.[316]

On appeal, the Superior Court of Pennsylvania circumvented the constitutional arguments raised by M.E. Instead, the court *sua sponte* relied on a statutory section found in the Act to reverse the trial court.[317] Under Section 2901 of the Act, the court can determine that all of the legal requirements of the Act, such as averring a contemplated adoption, need not be met for "cause shown."[318] The court noted:

> Applying [the] . . . contemplated adoption requirement to the unique facts of this case creates an absurd result where Mother, a capable and fit single parent who has been the tragic victim of rape committed at Father's hand for decades, cannot remain Children's legal Mother and seek termination of Father's, her rapist's, parental right.[319]

The court held that M.E. had shown cause as to why she should be relieved of the contemplated adoption requirement.[320] In distinguishing M.E.'s case from prior decisions where the court had determined that "cause shown" was not established, the court highlighted two factors.[321] First, there was no need to create a new parent-child relationship because M.E. was a fit parent.[322] Second, M.E. was not attempting to "subvert the adoption process in seeking" TPR of the father.[323] Rather M.E. was "looking to sever Father's parental rights . . . in an effort to put an end to the cycle of abuse, and to provide Children with a chance to grow up in a loving, supportive and caring home with no fear of reprisal from Father."[324]

The court rejected the two-parent paradigm as it applied to M.E.'s specific case. It did not, however, shift away from the paradigm at a broader constitutional level. In fact, the court expressly "limit[ed] the holding of this case to its facts so that '[t]he exercise of such discretion

316. *In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711, at *1 (Pa. Super. Ct. Aug. 12, 2019).
317. *In re Z.E.*, 2019 WL 3779711, at *1.
318. 23 PA. CONS. STAT. § 2901 (2010).
319. *In re Z.E.*, 2019 WL 3779711, at *6.
320. *In re Z.E.*, 2019 WL 3779711, at *6.
321. *In re Z.E.*, 2019 WL 3779711, at *7.
322. *In re Z.E.*, 2019 WL 3779711, at *7.
323. *In re Z.E.*, 2019 WL 3779711, at *7.
324. *In re Z.E.*, 2019 WL 3779711, at *7.

does not open the door' to terminat[ion of] parental rights 'when adoption is not contemplated.'"[325]

At the same time, the court repeatedly signaled that the legal system should shift away from the nuclear family paradigm. The court noted the law should be changed because an absurd result occurs when the State requires a fit parent to have a contemplated adoption in order to terminate the parental rights of the man who raped her.[326] The opinion also highlighted that "societal norms regarding what constitutes a family are constantly evolving" and that M.E., a single parent, was capable of raising her children in a supportive, caring home.[327] All of these statements signal that a paradigm shift should occur to recognize that two-parent households or its approximation are not always the more stable family units—particularly where sexual violence has occurred—because it is harmful to both mothers and children.

State statutes requiring a conviction to terminate parental rights in cases where a child is conceived as a result of the sexual offense could also be challenged using the analysis in *Peña* and *Otis*. As signaled in *Peña* and *Otis*, a fundamental liberty interest is not at stake when there is no relationship between the offending parent and the child other than biology.[328] A person who committed rape does not even have a constitutionally protected right to parent if he does not have a relationship with the child.[329] Any statute that creates this right could be challenged as unconstitutional from the onset. The advantage to this argument is that it eliminates judicial discretion: Since parentage is denied from the onset, judges would not have the opportunity to determine whether TPR is in the best interest of the child. This would prevent judges from upholding the two-parent paradigm and denying TPR of the offending parents.

The dicta in *In the Interest of Z.E.* could be used to challenge state statutes requiring a conviction to terminate parental rights in cases where a child is conceived as a result of the sexual offense—whether there is a relationship between the offending child or not. For most states, the stated purpose of TPR statutes is to protect the child from an

325. *In re Z.E.*, 2019 WL 3779711, at *8 (quoting *In re* Adoption of R.B.F., 569 Pa. 269, 280 (Super. Ct. 2002)).

326. *In re Z.E.*, 2019 WL 3779711, at *6 ("It is doubtful that the legislature would have intended such a result where a fit parent seeks to ensure his or her family's safety and prevent them 'from further exposure to a sexually violent predator.'").

327. *In re Z.E.*, 2019 WL 3779711, at *8.

328. Peña v. Mattox, 84 F.3d 894, 899-901 (7th Cir. 1996); *see* State v. Otis G. (*In re* Termination of Parental Rights to Davonta S.), 2008 WI App 135, ¶ 10, 314 Wis. 2d 283, 758 N.W.2d 927 (Wis. 2008).

329. *See Peña*, 84 F.3d at 899-901.

unfit parent (i.e., from harm, such as abuse and neglect) and promote permanency and stability for the child.[330] A conviction requirement renders the state's purported objective of protecting children from harm and providing stability and permanency in the family unit moot because few mothers will be able to access the legal protections afforded by the TPR statute.

Continued contact with an offending parent has harmful effects on mothers and children.[331] Legislatures have recognized this harm. In Colorado, the preamble to the statute permitting TPR when a child is conceived as a result of a sexual offense notes that the purpose of the statute is to "protect the victim of the sexual assault and to the protect the child . . . by . . . preventing future contact between the parties."[332] The United States House of Representatives has noted that continued contact with a rapist can have "traumatic psychological effects on the survivor" which can "severely negatively impact her ability to raise a healthy child."[333] Despite legislatures recognizing that contact between a mother and the person who raped her creates instability in the family unit and harm to the child, the conviction requirement persists in many states.[334] Paradoxically, this requirement contravenes the stated purposes of promoting permanency for children and protecting them from an unfit parent because most offenders are not convicted of rape.[335] In *In the Interest of Z.E.*, the court noted that the adoption requirement created an "absurd result" because the mother, "a capable and fit single parent who had been the tragic victim of rape," could not terminate the parental rights of the person who raped her.[336] The conviction requirement creates a similar absurd result: Most fit mothers who have experienced sexual assault will not be able to terminate the parental rights of the person who raped them because of low conviction rates in sexual assault cases.

Notably, state statutes do not require a conviction to terminate a parent's right for most other grounds permitting TPR, such as abuse, neglect, substance abuse dependency, and abandonment.[337] Why, then,

330. *See, e.g.*, COLO. REV. STAT. § 19-5-100.2 (2020); KAN. STAT. ANN. § 38-2201 (Supp. 2019); WYO. STAT. ANN. § 14-3-201 (2019).
331. *See supra* Part I.B.
332. COLO. REV. STAT. § 19-5-105.5(1) (2020).
333. Rape Survivor Child Custody Act, H.R. 1257, 114th Cong. § 2 (2015).
334. *See supra* Part III.
335. *See supra* Part III.
336. *In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711, at *6 (Pa. Super. Ct. Aug. 12, 2019).
337. *See, e.g.*, ALASKA STAT. § 47.10.011 (2018); CONN. GEN. STAT. § 17a-112(j) (2019); NEB. REV. STAT. § 43-292.02 (2019); NEV. REV. STAT. § 128.105(b) (2018); N.H. REV. STAT. § 170-C:5 (Supp. 2019); N.C. GEN. STAT. § 7B-1111(a) (2019); N.D.

do many states require a conviction for rape as a prerequisite to terminating the parental rights of the person who committed the rape when a child is conceived as a result of the sexual offense? A conviction requirement is further evidence of how the legal system disbelieves women and discounts allegations of rape.

D. *TPR When There is Exposure to IPV*

In cases involving IPV, a fundamental liberty interest will usually be at stake because the father is likely to have an established relationship with the child. The State, however, has a compelling government interest—protecting a child from the psychological and physical harm—in the TPR of a parent who exposes a child to his ongoing abusive and controlling behavior.[338] The absence of statutes permitting TPR on the basis of children's exposure to IPV—even though a number of statutes recognize that emotional and psychological abuse injures children—further reflects societal belief that permitting TPR in these circumstances will cause the family unit to disintegrate.

Although the holding in *In the Interest of Z.E.* was limited to the facts of that case, the Superior Court's reasoning can be used to support the termination of a father's rights in cases where a relationship exists between the father and the child and the child was or is exposed to IPV. In *M.P. v. M.P.*, though M.P. never sought to terminate the parental rights of her husband, the facts in her case are useful to demonstrate how one could argue for terminating the parental rights of a partner who is abusive.[339] M.P. fled the marital residence due to IPV;[340] M.P.'s husband engaged in a pattern of physical, psychological, and emotional abuse including controlling her finances and threatening her.[341] Examples of the IPV include when M.P.'s husband kicked her in the back

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CENT. CODE § 27-20-44(1) (2016); S.C. CODE. ANN. § 63-7-2570 (2010); WYO. STAT. ANN. § 14-2-309 (2019).

338. *See supra* Part I.B; *see also In re* A.H., 334 P.3d 339, 343 (Kan. Ct. App. 2014); *In re* A.M.Y., No. 04-15-00352-CV, 2015 WL 6163212, at *4 (Tex. App. Oct. 21, 2015); *In re* Stephen Tyler R., 584 S.E.2d 581, 593 (W. Va. 2003); Nancy Viola R. v. Randolph W., 356 S.E.2d 464, 468 (W. Va. 1987); Collins v. Collins, 297 S.E.2d 901, 902 (W. Va. 1982); *In re* Wiltse, No. 318374/318375, 2014 WL 1515777, at *3 (Mich. Ct. App. Apr. 17, 2014).

339. M.P. v. M.P., 54 A.3d 950, 951 (Pa. Super. Ct. 2012). The Barbara J. Hart Justice Center (a project of the Women's Resource Center) represented M.P. on numerous family matters. M.P. provided consent for her case to be shared.

340. *M.P.*, 54 A.3d at 951.

341. Interview with M.P., client, in Scranton, Pa. (2011).

and threw her against a counter while she was holding their daughter.[342] He also threatened to beat her when she insisted they go to the doctor because the baby was sick, threatened that she would never see their daughter again if she left him, and controlled her access to money to the point where she was not even allowed to purchase her own clothing.[343] After M.P. left her husband, he had no contact with their daughter by his own choice and he did not pay any child support.[344]

The right to terminate parental rights based solely on ongoing exposure to IPV does not exist under Pennsylvania law.[345] Hypothetically M.P. could have sought to terminate his rights under two enumerated grounds in the statute:

> 1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.
>
> 2) The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.[346]

Pennsylvania law, however, required that M.P. also show that either she had someone who will adopt her daughter, creating a new family unit, or that the legal requirement of adoption need not be met based on the facts of her case.[347]

Under the decision in *In the Interest of Z.E.*, M.P. could argue that the facts of her case are such that the legal requirement that a contemplated adoption be averred are not necessary. M.P. suffered extreme abuse by her husband and since 2011 she has been the sole financial

342. *Id.*
343. *Id.*; *see also* Petition for Protection from Abuse at 8, Piguave v. Price, No. 2009-FC-40747 (Lackawanna Cty. Ct. Com. Pl. June 22, 2009).
344. Interview with M.P., client, in Scranton, Pa. (2011); *see also* Guardian Ad Litem Report & Recommendation at 1, Piguave v. Price, No. 2009-FC-40747 (Lackawanna Cty. Ct. Com. Pl. Aug. 30, 2011); *M.P.*, 54 A.3d at 951-52.
345. 23 PA. CONS. STAT. § 2511(a) (2010).
346. 23 PA. CONS. STAT. § 2511(a)(1)-(2) (2010).
347. See *supra* Part I.A for a detailed analysis of the relevant Pennsylvania laws.

provider for her daughter and had primary physical and sole legal custody.[348] Further, the father has not seen or contacted their child since 2011.[349] In *In the Interest of Z.E.*, the Superior Court noted these same facts: That M.E. had been the sole financial provider, had primary custody and legal custody of the children, had suffered abuse by father, and that the father had had no contact with the children.[350]

In addition, M.P., like M.E., is a fit parent who has met her daughter's needs, demonstrating that there is no need to establish a new parent-child relationship. M.P. would not be acting to "subvert" the adoption process as she is not seeking to terminate the parental rights of the father for being "ineffective or merely negligent."[351] Rather, she seeks to terminate the parental rights of the father "in an effort to end a cycle of abuse" and to provide her daughter "with a chance to grow up in a loving, supportive and caring home with no reprisal from [the] [f]ather."[352] The requirement of a contemplated adoption would once again be counterproductive to the State's objective of family stability.

In sum, M.P. has the same arguments advanced by M.E. M.P. need not have a contemplated adoption in order to terminate the parental rights of her daughter's father because she is a fit parent and the father is not. M.P., like M.E., would also be seeking to end a cycle of violence to prevent future harm to her daughter. In addition, M.P. has the same constitutional arguments that M.E. raised. States do not have a compelling reason for requiring contemplated adoptions when a fit parent seeks to terminate the parental rights of the other parent who is unfit. Conversely, States do have a compelling reason to terminate the rights of a parent who exposes a minor child to his ongoing physical, psychological, sexual, and/or financial abuse because extensive research has demonstrated the harmful impact exposure to IPV has on children.

Although the case of *In the Interest of Z.E.* is limited to Pennsylvania, the Superior Court's opinion and the mother's brief provide persuasive arguments for the legal system to move away from the nuclear family paradigm. In *In the Interest of Z.E.*, the court recognized the stability paradox that results when the court adheres to the traditional family (or

348. Interview with M.P., client, in Scranton, Pa. (2011); *see also* Stipulated Order at 1, Piguave v. Price, No. 2009-FC-40747 ((Lackawanna Cty. Ct. Com. Pl. Oct. 31, 2011); Stipulated Order at 1, Piguave v. Price, N0.2009-FC-40747 (Lackawanna Cty. Ct. Com. Pl. Dec. 7, 2011).

349. Interview with M.P., client, in Scranton, Pa. (2011).

350. *In re* Z.E., No. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711, at *2, *7 (Pa. Super. Ct. Aug. 12, 2019).

351. *In re Z.E.*, 2019 WL 3779711, at *7.

352. *In re Z.E.*, 2019 WL 3779711, at *7.

its approximation) when it noted that there is no need to create a new parent-child relationship because the mother was a fit parent and stepfather was not. The language used for the mother and for the stepfather in the opinion also simultaneously framed the case, addressing the notion of parental equality. Within the opinion, the mother is referred to as the "fit parent" whereas the stepfather is the "rapist."[353] In other words, the stepfather, by nature of his criminal conduct of violence towards the mother, is unfit.

The court, then, did not need to adhere to the judicial notions of parental equality because the mother and the stepfather are not on equal footing. Rather, the stepfather's egregious and criminal conduct made him an unfit parent. Finally, the court not only credited the violence against the mother, but also the harmful impact that future exposure to the stepfather could have on both the mother and the children. Here, the court dismantled the presumptions of parental equality, discounting violence against mothers, and gender bias, thereby signaling a limited (due to the narrow holding of the case) paradigm shift away from the two-parent household. Until the legal system shifts fully from the two-parent paradigm and addresses the factors that perpetuate it and violence against women, an absence of TPR statutes could result in courts continuing to award custodial time and visitation to persons who commit sexual offenses and/or IPV. The next section discusses the advantages and disadvantages of enacting TPR statutes directed at cases involving rape or IPV and provides model legislation.

V. Model Legislation

The goal of enacting statutes permitting TPR and/or restricting visitation in cases where a child was conceived as a result of a sexual offense should be to afford protections for mothers and children. But when lawmakers start with the presumption that parental rights exist, the statutes they enact can have the harmful consequence of making it more difficult to terminate the parental rights or restrict visitation of violent offenders or abusive partners.[354] Statutes that begin with the presumption that a person who has committed the sexual offense has parenting rights have the effect of putting the mother and the person who committed the rape on equal footing when they enter the courtroom.[355]

353. *See In re Z.E.*, 2019 WL 3779711, at *6-7.
354. *See generally* Murphy, *supra* note 30.
355. *Id.* at 182-83.

Thus, the notion that parental rights already exist provides a legal advantage to the person who committed the violent offense.

In the absence of TPR statutes, courts award custodial rights to men who have committed rape. This has often meant long, arduous legal battles for mothers. TPR statutes, then, became a necessary tool in efforts to prevent men who committed rape from obtaining parenting rights even though many provide inadequate protection for mothers because the statutes either require a criminal conviction or permit judicial discretion in determining whether the parental rights will be terminated.[356] And because TPR statutes themselves reinforce the faulty notion that a parent-child relationship exists in cases when it does not—specifically where a child is conceived as a result of a sexual offense—continuing to propose legislation and/or seeking amendments to existing statutes is admittedly risky. Numerous statutes, however, have already been enacted and a lack of statutes continues to result in courts awarding custody to the offending person without remedies for mothers.[357] Amending existing statutes or enacting statutes in states that have not done so, then, can improve protections for mothers and their children.

This section provides recommendations for model legislation on TPR for cases involving rape and IPV. Relevant portions of existing state statutes, prior proposed ideas expressed in articles,[358] and ideas based on practical experience are used to formulate more comprehensive legislation. The model legislation denies parental rights from the onset if the person who committed the rape or IPV does not have an established relationship with the child. This legislation lessens presumptions of parental equality and combats the discounting of violence against women

356. *See supra* Part III.

357. *See, e.g.*, Amanda Woods, *Convicted Rapist Gets Joint Custody of Victim's Child,* N.Y. POST (Oct. 9, 2017), https://nypost.com/2017/10/09/convicted-rapist-gets-joint-custody-of-victims-child/ [https://perma.cc/X4MT-YKKR]; *Alabama Court Forces Rape Survivor to Allow Rapists to Have Visitation with Children*, KNOE 8 NEWS (June 12, 2019), https://www.knoe.com/content/news/Alabama-court-forces-rape-survivor-to-allow-rapist-to-have-visitation-with-children-511195642.html [https://perma.cc/JF4Y-NYH6]; Lynn Smith, *Some States Are Giving Rapists Custody of Children, and That Needs to Stop,* PARENTS (Nov. 15, 2019), https://www.parents.com/parenting/better-parenting/some-states-are-giving-rapists-custody-of-children-and-that-needs-to-stop/ [https://perma.cc/24PF-BWED].

358. *See, e.g.*, Bitar, *supra* note 219; Haddix, *supra* note 97; Natalie Hoch, *The Real American Horror Story: Overcoming the Hurdles to Terminate a Rapist's Parental Rights*, 51 VAL. U.L. REV. 783 (2017); Johnson, *supra* note 98; Rachael Kessler, *Due Process and Legislation Designed to Restrict the Rights of Rapist Fathers*, 10 NW. J.L. & SOC. POL'Y 199, 221-28 (2015); Prewitt, *supra* note 29; Silver, *supra* note 209; Wendt, *supra* note 244.

and gender by limiting judicial discretion and not requiring a conviction in order to terminate parental rights. The proposed legislation seeks to dismantle the two-parent paradigm by addressing these presumptions.

The model legislation involves three sections. States should enact all three sections in order to most effectively prevent instability in the family unit. Section A addresses cases where the person who committed rape or IPV does not have an established relationship with the child. Here, the person who committed the rape or IPV is prohibited from even establishing parentage. In other words, the person is prohibited from even claiming they are legally the child's parent. Section B addresses cases where the person committed rape, the child was conceived as a result of the sexual offense, and there is a relationship between the offender and the child. Section C addresses cases where a person has exposed a child to ongoing IPV and there is an established relationship between the offending parent and the child.

A. *Denial of Parentage*

In cases where a relationship with the child has not formed, the offender should be precluded from even establishing parentage. Georgia, Michigan, Vermont, and Washington have enacted statutes that prohibit parentage from being established or maintained in cases where a child is conceived as a result of rape.[359] All four states require proof by a clear and convincing standard that the person committed a sexual assault which resulted in conception of the child.[360] States should enact statutes similar to these.[361]

The Georgia, Michigan, Vermont, and Washington statutes denying parentage only address cases involving rape.[362] In most cases involving IPV, the offending parent will have an established relationship with the child. There may be some limited cases involving IPV where the offending parent does not have an established relationship with the minor child. States, therefore, should expand the language in these statutes to include IPV.

Statutes that deny parentage when the offending parent has not established a relationship with the child help prevent the creation of parenting rights when none should exist. They also permit less judicial dis-

359. *See* Table D.
360. *See* Table D.
361. *See* Table D.
362. *See* Table D.

cretion. Judges need not place the parents on equal footing when they enter the courtroom because judges are only determining whether the child was conceived as a result of rape. Unfortunately, judicial discounting of allegations of rape and IPV as well as judicial gender bias may still occur when there is not a conviction for the rape, even when one is not required, because judges are still assessing whether the mother's allegations are credible. Overall, however, denial of parentage statutes provide judges with less discretion by limiting the issue before the judge. Additionally, the statutes dismantle the two-parent paradigm by expressly stating that parentage can be denied and, thus, affirming that a single-parent household provides stability for a child.

B. *TPR in Cases Involving Rape and Established Relationship with the Child*

The following model legislation is proposed for cases where the offender committed rape, the child was conceived as a result of the sexual offense, and the offender has an established relationship with the child:

> (a) The court *shall* terminate the parental rights upon a finding of one or more of the following:
>
> 1) The person was convicted, or pled guilty or nolo contendere, to a sexual offense against the petitioner or was convicted, or pled guilty or nolo contendere, to an offense in which the underlying factual basis was a sexual offense against the petitioner, in this state or another state, territory, possession, or jurisdiction, and a child was conceived as the result of the sexual offense.
>
> Termination of the parental relationship must also be in the best interest of the child. There is a rebuttable presumption that terminating the parental rights of the parent who committed the act of sexual violence is in the best interest of the child. The court shall not presume that having only one remaining parent is contrary to the best interest of the child; or
>
> 2) The court finds by clear and convincing evidence, after trial, that

i) The alleged perpetrator committed a sexual offense;[363]

ii) The child was conceived as a result of that sexual offense; and

iii) Termination is in the best interest of the child. There is a rebuttable presumption that terminating the parental rights of the parent who committed the act of sexual violence is in the best interest of the child. The court shall not presume that having only one remaining parent is contrary to the best interest of the child.

(b) Other considerations:

1) In determining whether the termination of parental rights is in the best interest of the child, the court shall presume that continued contact with the person who committed the sexual offense has psychological effects on the victim negatively impacting her ability to raise the child.[364]

2) The parent who is the victim of a sexual offense may file a petition for termination of parental rights. The victim of the sexual offense may file the petition without an averment that there is an adoption, need not relinquish her parental rights, and need not have a prospective adoptive second parent for the child.

3) A petition for termination of parental rights under this section may be filed at any time.

4) Terminating the parental rights of a parent does not relieve that parent of his or her support obligation. The parent whose parental rights are not being terminated has the right to waive said support. No state agency may re-

363. The statute could specifically define sexual offense by enumerating crimes that constitute any offense where a child could be conceived as a result of the conduct. For instance, in Pennsylvania, the statute could read: For purposes of this section "sexual offense" has the same meaning as in 18 Pennsylvania Statute Sections 3121-3126, or Section 4302 or pursuant to comparable law of another state, territory, possession, or jurisdiction or where the offense occurred. 18 PA. CONS. STAT. §§ 3121, 3122.1, 3123, 3124.1, 3124.2, 3124.3, 3125-26, 4302 (2015).

364. *See* Rape Survivor Child Custody Act, H.R. 1257, 114th Cong. § 2 (2015).

> quire the parent whose rights are not being terminated to seek support as a condition of receiving public benefits.

Numerous existing statutes are inadequate because they fail to provide that a guilty plea or nolo contendere plea would provide grounds for TPR,[365] often leaving mothers without legal protection because in the majority of situations few convictions result from sexual assault allegations.[366] Most statutes also fail to state that a conviction, guilty plea, or nolo contendere plea to an offense in which the underlying basis was a sexual offense permits TPR.[367] Given that many prosecuted cases result in pleas to lessor offenses,[368] inclusion of this language (and language that a conviction, guilty plea, or nolo contendere plea in this state or other states) broadens the applicability of the statute in cases where a child was conceived as a result of a sexual offense. Most importantly, this proposed statute provides that TPR can occur in cases where there is a conviction for a sexual offense *or* where clear and convincing evidence demonstrates that a child was conceived as a result of a sexual offense. It is imperative that states permit the ability to terminate the parental rights of a parent who is a sexual offender absent a conviction because few convictions occur in sexual assault cases.[369] Statutory language that explicitly permits TPR in cases of conviction for rape or an underlying offense, or where clear and convincing evidence show that a child was conceived as a result of a sexual offense improves access to legal recourse for mothers.

Notably, the model statute states that the court "shall" rather than "may" terminate parental rights to prevent judicial discretion, which is often used to further the two-parent paradigm regardless of the effect on families. Some judicial discretion remains in the proposed statute because the court must still determine that terminating parental rights is in the best interest of the child. A rebuttable presumption that terminating the rights of the parent who committed a sexual offense is in the best interest of the child is included in the model legislation to limit judicial discretion in the best interest of the child determination. Any form of judicial discretion is not ideal given courts' resistance to shift from the

365. *See supra* Part III.
366. *See supra* Part III.
367. *See supra* Part III.
368. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/56QN-659W] ("97 percent of federal cases and 94 percent of state cases end in plea bargains").
369. *See supra* Part III.

nuclear family paradigm and to afford weight and credibility to accounts of rape. The best interest of the child analysis, however, is included here for two reasons. First, the proposed legislation might be unconstitutional without the best interest of the child analysis because the fundamental right to the custody of one's child is at stake. Second, legislators may be reluctant to enact statutes without inclusion of a best interest determination because states have generally included this analysis in both custody and TPR determinations.[370] Though not ideal, the rebuttable presumption at least provides mothers with better protection (and arguments should she have to appeal the case) than a best interest analysis absent a statutory presumption.

The model legislation also includes language that the court must presume that contact with the person who committed the rape will negatively impact the mother's ability to parent. In determining the best interest of the child, courts frequently fail to consider or understand how trauma impacts parenting. Rather, courts tend to focus on whether the child was directly physically or emotionally harmed by the offending parent when engaging in best interest of the child analysis.[371] However, continued interaction with the person who committed the rape may retraumatize the mother, impacting her ability to parent through no fault of her own. This, in turn, does impact the child.[372] Including this language helps prevent courts from discounting the effect of violence on families and limits courts' ability to revert to the two-parent paradigm.

The proposed statute also expressly allows the victim to file a petition without having to contemplate adoption. This provision emphasizes that mothers in this position still have standing to file. The provision stating that the petition may be filed at any time was added to counter state statutes that restrict the time period for when a petition may be filed. A woman undergoing the trauma of rape recovery and birth of a child should have the time and control to file a petition when she so desires instead of her being restricted to arbitrary filing deadlines that serve no purpose.[373]

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370. *See, e.g.*, MICH. COMP. LAWS § 712A.19b(5) (2013); MINN. STAT. § 260C.301 Subd. 7 (2015); OKLA. STAT. tit. 10A § 1-4-904(A)(2) (2011); 23 PA. CONS. STAT. § 2511(b) (2010); KY. REV. STAT. § 625.090(1)(C) (West 2014).

371. *See* BARRY GOLDSTEIN & ELIZABETH LIU, REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR, 5-8 (Civ. Res. Inst., 2d ed. 2019). Courts also penalize mothers who do not present well in court due to the trauma and/or have taken measures to protect themselves and their children from repeated interactions and exposure to the person who raped them. Meier, *supra* note 15, at 690-93.

372. *See supra* Part I.B.

373. *See supra* Part III.

Finally, the statute includes a provision that TPR does not relieve the parent whose rights are being terminated of his obligation to pay child support. This provision was added because rape and IPV has a significant negative short- and long-term financial impact on survivors.[374] Recognizing that any support payments would be a constant reminder of the person who committed the rape or IPV, the model legislation provides that the victim may waive support if she so chooses. To prevent the legal system from forcing a rape survivor to have constant contact with the person who raped her in order to acquire necessary benefits for family stability, the statute also prevents agencies from forcing a victim to file for support as a condition of receiving public benefits.

C. *TPR in IPV Cases*

In cases where children are exposed to ongoing IPV, the following legislation is proposed:

> (a) The court shall terminate parental rights when: The court finds by clear and convincing evidence, after trial, the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.
>
> 1) "Continued incapacity, abuse, neglect or refusal" includes exposing the minor child(ren) to a history of ongoing domestic violence which includes physical and sexual violence, intimidation, threats, psychological /emotional abuse, financial abuse, using the minor child

374. *See* Sara J. Shoener & Erika A. Sussman, *Economic Ripple Effect of IPV: Building Partnerships for Systemic Change*, DOMESTIC VIOLENCE REP., 83, 83-84 (Aug.-Sept. 2013). Research has shown that 99% of survivors experience economic abuse during the relationship. *Id.* at 83. Economic abuse includes preventing resource acquisition (i.e., preventing a partner from working, acquiring asset ownership, interfering with employment opportunities), preventing resource use (i.e., denying access to money, disabling the person's vehicle), and resource exploitation (i.e., taking out credit cards in partner's name, deliberately failing to pay bills in partner's name). *Id.* "Long after the occurrence of an incident of abuse, survivors experience significant obstacles" to obtaining economic security due to "the interpersonal, physical, and psychological effects of the violence." *Id.*

to gain contact or information about the non-offending parent, and litigation abuse.

2) Exposure includes, but is not limited to, directly observing the violence, hearing the parent being abused screaming for help or crying; observing the aftermath of abuse such as injuries, torn clothing, broken or damaged items such as furniture and telephones; hearing the abusive parent degrade, belittle and/or threaten the other parent; and the abusive parent interrogating the child about the other parent.

3) Exposure to domestic violence may occur during the parent's relationship and/or after the parents have separated.

(b) Other considerations:

1) Termination of the parental relationship must be in the best interest of the child. There is a rebuttable presumption that exposing a child to ongoing IPV is not in the child's best interest. The court shall not presume that having only one remaining parent is contrary to the best interest of the child.

2) In determining whether TPR is in the best interest of the child, the court shall presume that continued contact with the person who is committing IPV may have psychological effects on the non-abusing parent, negatively impacting the parent's ability to raise the child.

3) The parent who is the victim of the IPV may file a petition for termination of parental rights. A victim of IPV may file the petition without an averment that there is an adoption; the filing parent need not relinquish their parental rights and need not have an adoptive parent for the child.

4) The parental rights of the parent who is being abused/victimized shall not be terminated under this section.

5) Parents responding or reacting to violence of another parent in an effort to protect themselves or a child against

that violence does not constitute grounds to terminate parental rights under this section.

6) A petition to terminate parental rights under this section may be filed at any time.

7) Terminating the parental rights of a parent does not relieve that parent of their support obligation. The parent whose parental rights are not being terminating has the right to waive said support. No state agency may require the parent whose rights are not being terminated to seek support as a condition of receiving public benefits.

The model legislation provides that a ground for TPR is ongoing exposure to IPV because few states have explicitly included exposure to IPV as a statutory ground to terminate parental rights, leaving mothers with limited legal recourse. Given that many judges conclude that IPV does not harm children once the parties separate,[375] the proposed statute also states that the exposure to IPV may occur during and after parties have separated. Absent from the model legislation is the requirement that there must be observable impairment in the child's ability to function or that the child is exhibiting symptoms of emotional or psychological damage, such as anxiety, withdrawal, or aggressive behaviors. Though this might seem counterintuitive, while exposure to IPV does harm children, the impact IPV has on a child might not be apparent until months or years later.[376] This language, then, is not included in the statute because the negative impact that exposure to IPV has on children may not be observable to the judge at the time of the hearing.[377] This provision acknowledges that IPV harms children, helping to dismantle the nuclear family paradigm.

375. This is based on observations of judges' decisions in custody cases involving IPV in Pennsylvania. *See also* DANIEL G. SAUNDERS, KATHLEEN C. FALLER & RICHARD M. TOLLMAN, NAT'L INST. OF JUSTICE, CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE, AND CUSTODY-VISITATION RECOMMENDATIONS (Oct. 31, 2011), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf [https://perma.cc/KT2Y-AW6A] (finding that judges had less knowledge about separation violence than other domestic violence topics).

376. *See supra* Part I.B.

377. *See supra* Part I.B.

Provisions (2), (3), (4), (7), and (8) are the same as those found in the proposed legislation for cases involving rape when there is a relationship with the child and are necessary here for the same reasons.[378]

There is always the fear that someone who is abusive and controlling may attempt to use any statute, no matter how carefully crafted, to further terrorize their victim by seeking to terminate her parental rights. As an example, it is not uncommon for a father who has engaged in a pattern of abuse to contact law enforcement about the non-offending mother as another form of abuse. Should law enforcement believe the father's allegations that the mother assaulted him, the mother may be arrested, charged, and convicted of assault even when she was acting in self-defense. This, in turn, could provide the father with grounds to terminate the mother's rights, alleging that she exposed the child to IPV. In an attempt to curtail this behavior, the model statute includes language stating that a victim's parental rights shall not be terminated. Language was also incorporated to ensure that reacting or responding to the violence to protect oneself is not grounds for TPR because many women do react to the violence at some point in time.[379]

Mothers still encounter arduous battles in the legal system, even with statutory reform intended to correct judges' presumptions that cause negative outcomes for mothers and children. This legal battle will continue until there is a shift away from the two-parent paradigm.

Conclusion

In a recent Pennsylvania case, a mother appealed a custody decision that awarded the father of her child primary custody.[380] Prior to the father obtaining primary custody, the mother had been the child's primary caretaker since birth.[381] The father, however, filed for primary custody after the mother's new boyfriend assaulted the mother.[382] Even though the mother testified at trial that she had separated from this boyfriend, the trial court determined that there was "uncertainty surrounding that status" because the mother was in contact with the boyfriend's mother and used the boyfriend's vehicle while he was incarcerated.[383] The trial

378. For discussion as to why these provisions are necessary, see *supra* Part IV.B.
379. Swan, *supra* note 173, at 1027-29.
380. B.S. v. D.M.S., No. 1340 WDA 2018, 2019 WL 2453865, at *1 (Pa. Super. Ct. Jun. 11, 2019).
381. *B.S.*, 2019 WL 2453865, at *1-2.
382. *B.S.*, 2019 WL 2453865, at *2.
383. *B.S.*, 2019 WL 2453865, at *3.

court also referenced more than once that the "[f]ather's home includes a positive female role model, while [m]other's home currently does not include a positive male role model."[384] On appeal, the mother contended that the trial court awarded primary custody to the father because it incorrectly determined that the minor child needed a father figure.[385] The Superior Court affirmed the trial court decision,[386] finding that the trial court did not abuse its discretion in awarding the father primary custody based on the absence of a father figure in mother's household.[387]

Gender bias and the court's adherence to the two-parent paradigm influenced the decision in this case, heightening the father's parental rights even though he had relocated out-of-state and the mother had been the child's primary caretaker since birth. The trial court discounted the mother's testimony that she had separated from her abusive boyfriend, even though there was an absence of testimony that she had been in contact with him.[388] That the trial court discounted the testimony of the mother, a woman litigant, and the Superior Court affirmed the trial court's holding suggests that the nuclear family paradigm influenced both courts deciding this case.

The above case highlights how entrenched the nuclear family paradigm continues to be in the legal system. In cases where a child is conceived as a result of a sexual offense or a child is exposed to ongoing IPV, a paradigm shift away from the nuclear family is necessary to protect both mothers and children from continued risk of harm. Until, however, a broader attitudinal transformation occurs in society—where women's allegations of rape and IPV are believed, and gender bias in courts ends, resulting in judges recognizing that a "parental equality" presumption is not in the best interest of the child in cases involving rape and IPV—courts will adhere to the nuclear family paradigm.

Enacting TPR statutes to address cases where a child is conceived as a result of a sexual offense or the child is exposed to ongoing IPV may lead to some unintended consequences. But not doing so preserves unacceptable barriers to justice and safety for mothers. Existing statutes are too limited in scope to address issues such as conviction requirements and judicial discretion. Statutes should be enacted and existing statutes should be amended to afford comprehensive and attainable protections for mothers and children.

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384. *B.S.*, 2019 WL 2453865, at *4, *16.
385. *B.S.*, 2019 WL 2453865, at *1. The father was living with his girlfriend whereas the mother had recently separated from her boyfriend. *Id.* at *4.
386. *B.S.*, 2019 WL 2453865, at *16.
387. *B.S.*, 2019 WL 2453865, at *16-17.
388. *B.S.*, 2019 WL 2453865, at *3.

The law does not permit a person who has committed a criminal act to reap the benefits of his crime.[389] A person who robs a bank forfeits his right to the money taken. And yet an offender who commits a violent crime and conceives a child or continues to commit violence against the mother of his children and his family is afforded protections by the legal system. Limited protections for mothers in the legal system persist because the two-parent paradigm is entrenched in the legal system. This, in turn, creates the stability paradox as forced contact with the offending parent creates more instability in the family unit and results in harm to the child. Thus, the ramification of not trying to shift this entrenched paradigm is to perpetuate violence against women and children. In order to ensure that children's best interests are truly the driving force in the family court system, society and our legal system must address presumptions of parental equality, the discounting of violence against women, and gender bias. Only then can the stability paradox end.

389. *See* Peña v. Mattox, 84 F.3d 894, 901 (7th Cir. 1996).

TABLE A
TPR: STATUTES REQUIRING CONVICTION

STATE	STATUTE(S)	RELEVANT STATUTORY LANGUAGE	NOTES
Kansas	KAN. STAT. ANN. § 38-2271(a)(12) (Supp. 2019). "Presumption of unfitness when; burden of proof" KAN. STAT. ANN. § 38-2269(e) (Supp. 2019). "Factors to be considered in termination of parental rights; appointment of permanent custodian"	Presumed that a parent is unfit when the parent is convicted of rape and the child was conceived as a result of the offense. A finding of unfitness may be found when a person is convicted of a felony sexual offense and the child was conceived as a result of the offense.	The burden of proof is on the parent to rebut presumption of unfitness by a preponderance of the evidence. KAN. STAT. ANN. § 38-2271(b) (Supp. 2019).
Nebraska	NEB. REV. STAT. § 43-292.02(4) (2019). "Termination of parental rights; state; duty to file; when"	TPR shall be granted if a person has been convicted, pled guilty or nolo contendere to a sexual assault and the child was conceived as a result of the offense.	TPR must be in best interest of child.
Nevada	NEV. REV. STAT. § 128.105(1)(b)(8) (2018). "Grounds for terminating parental rights: Considerations; required findings" NEV. REV. STAT. § 125C.210 (2018). "Child conceived as a result of sexual assault"	A ground for TPR includes that the natural parent was convicted of a sexual assault and the child was conceived as a result of the offense. Natural father has no rights to custody or visitation if he is convicted of sexual assault.	TPR must be in best interest of child. Court may order custody or visitation if the natural mother consents and it is in the best interest of the child.
New Hampshire	N.H. REV. STAT. ANN. § 170-C:5-a (Supp. 2019). "Termination of the Parent-Child Relationship in Cases of Sexual Assault"	Shall TPR when father has been convicted of or pled guilty or nolo contendere to sexual assault and the child was conceived as a result of the offense or "at a fact-finding hearing, is found beyond a reasonable doubt to have fathered the child through an act of non-consensual sexual penetration."	TPR must be in best interest of child. Rebuttable presumption that TPR is in the best interest of the child when there is a showing, beyond a reasonable doubt, that the child's birth was a result of a sexual assault of the mother.
New Mexico	N.M. STAT. ANN. § 40-16-1(A) (2020). "Termination of parental rights; conception resulting from criminal sexual penetration"	TPR shall be granted if court "determines by clear and convincing evidence that the child was conceived as a result of a criminal sexual penetration for which the other biological parent was convicted."	Biological parent may petition to TPR. Presumption that TPR is in the best interest of the child.

STATE	STATUTE(S)	RELEVANT STATUTORY LANGUAGE	NOTES
North Carolina	N.C. GEN. STAT. § 7B-1111(a)(11) (2019). "Grounds for terminating parental rights"	May TPR when the parent is convicted of a sexually related offense and the child was conceived as a result of the offense.	Burden on the petitioner "to prove facts justifying the termination by clear and convincing evidence." Court shall determine whether termination is in best interest of child. N.C. GEN. STAT. § 7B-1110 (2019). ("Determination of best interests of the juvenile").
	N.C. GEN. STAT. § 14-27.21-.24 (2019), "First-degree forcible rape, Second-degree forcible rape, Statutory rape of a child by an adult, First-degree statutory rape."	Person convicted of 1st or 2nd degree forcible rape, statutory rape of a child, or 1st degree rape "has no rights to custody . . . ."	
North Dakota	N.D. CENT. CODE § 27-20-44(1)(e) (2016). "Termination of parental rights"	May TPR if "[t]he parent has pled guilty or nolo contendere to, or has been found guilty of engaging in a sexual act" and the child was conceived as a result of the offense.	TPR must be in the best interest of the child.
Oregon	OR. REV. STAT. § 419B.510(1) (2019). "Termination upon finding child conceived as result of rape"	May TPR when the parent has been convicted of rape and the child was conceived as a result the of rape.	TPR under this section is an independent ground for TPR.
	OR. REV. STAT. § 107.137(6) (2019). "Factors considered in determining custody of child"	When determining custody, the court "shall not award sole or joint custody of child to a parent if" the parent has been convicted of rape and the child was conceived as a result of the rape.	
South Carolina	S.C. CODE ANN. § 63-7-2570(11) (2010). "Grounds."	May TPR when the child was conceived as a result of criminal sexual conduct as "found by a court of competent jurisdiction."	TPR must be in the best interest of the child. Statute references "sentencing court" suggesting that a conviction is required.
Tennessee	TENN. CODE ANN. § 36-1-113(g)(10)(A) (2017 & Supp. 2020). "Termination of parental rights"	May TPR if the parent is convicted of aggravated rape, rape, or rape of a child and the child was conceived as a result of the rape.	TPR must be in the best interest of the child.
	TENN. CODE ANN. § 36-6-102 (2017). "Rape; child conceived; custody or visitation rights; rights of inheritance."	Any person convicted of aggravated rape, rape, or rape of child shall not have custody or visitation rights when the child was conceived as a result of the offense.	The other parent may request that the court grant reasonable visitation if paternity has been acknowledged.

STATE	STATUTE(S)	RELEVANT STATUTORY LANGUAGE	NOTES
Wyoming	WYO. STAT. ANN. § 14-2-309(a)(ix) (2019). "Grounds for termination of parent-child relationship; clear and convincing evidence."	May TPR when the parent is convicted of 1st or 2nd degree sexual assault or 1st, 2nd, or 3rd degree sexual abuse of minor and the child was conceived as a result of the offense.	Facts must be established by clear and convincing evidence.

TABLE B
TPR: STATES REQUIRING CLEAR AND CONVINCING EVIDENCE

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Alaska	ALASKA STAT. § 25.23.180(c)(2) (2018). "Relinquishment and termination of parent and child relationships"	May TPR when the parent committed an act of sexual assault, sexual abuse of a minor, or incest and the child was conceived as a result of the offense.	TPR must be in best interest of child. Case law suggests that TPR must be shown by clear and convincing evidence. *See e.g.* Casey K. v. State, 311 P.3d 637, 643 (Alaska 2013).
Colorado	COLO. REV. STAT. § 19-5-105.7 (2020). "Termination of parent-child legal relationship in a case of an allegation that a child was conceived as a result of sexual assault but in which no conviction occurred—legislative declaration—definitions"	A victim may file to TPR when the "child was conceived as a result of a sexual offense in which a conviction did not occur."	Must show that TPR is in best interest of child.
	COLO. REV. STAT. § 19-5-105.5(3) (2020). "Termination of parent-child legal relationship upon a finding that the child was conceived as a result of sexual assault – legislative declaration – definitions"	A victim may file to terminate the parent-child legal relationship when the "child was conceived as a result of an act that led to the parent's conviction for sexual assault or for a conviction in which the underlying factual basis was sexual assault."	Conviction must have occurred on or after July 1, 2013. TPR must be in best interest of child.
Connecticut	CONN. GEN. STAT. § 17a-112(j)(3)(G) (2019). "Termination of parental rights of child committed to commissioner."	Court may grant a petition to TPR if it finds by clear and convincing evidence that "the parent committed an act that constitutes sexual assault" and child was conceived as a result of the offense.	TPR must be in the best interest of the child. Statute applicable to any child in the custody of the Commissioner of Children and Families.

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Florida	FLA. STAT. § 39.806(1)(m) (2020). "Grounds for termination of parental rights."	Grounds for TPR include "when the court determines by clear and convincing evidence that the child was conceived as a result of an act of sexual battery . . . ."	Presumed that TPR is in the best interest of the child. Petition to TPR may be filed at any time.
Hawaii	HAW. REV. STAT. § 571-61(5) (2018). "Termination of parental rights; petition." HAW. REV. STAT. § 571-46(a)(17) (2018). "Criteria and procedure in awarding custody and visitation; best interest of the child."	May TPR when clear and convincing evidence demonstrates that the parent committed a sexual assault and the child was conceived as a result of the sexual assault. Natural parent shall not be granted custody or visitation with a child if the parent was convicted of rape or sexual assault and the child was conceived as a result of that offense.	Presumed that TPR is in the best interest of the child.
Idaho	IDAHO CODE § 16-2005(2)(a) (2019). "Conditions under which termination may be granted."	Court may grant an order terminating the relationship when "[t]he parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child under age sixteen (16) . . . ."	Court may rebuttably presume that TPR is in the best interest of the child. Case law states that grounds for TPR must be shown by clear and convincing evidence. *See, e.g.*, Idaho Dep't of Health & Welfare v. Doe, 260 P.3d 1169, 1171 (Idaho 2011).
Indiana	IND. CODE § 31-35-3.5-7(a)(1) (2018). "Court termination of parent-child relationship; findings."	Shall TPR if court finds by clear and convincing evidence that the parent committed an act of rape and the child was conceived as a result of the rape.	TPR must be in the best interest of the child.
Iowa	IOWA CODE §§ 232.116(1)(p) (2014), 600A.8 (2020). "Grounds for termination."	May TPR if the court finds by "clear and convincing evidence that child was conceived as a result of sexual abuse" and the victim requests TPR.	Best interest of child "shall be the paramount consideration." IOWA CODE § 600A.1 (2020).

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Louisiana	LA. CHILD. CODE ANN. art. 1004(l) (2014). "Petition for termination of parental rights; authorization to file."	Victim may file petition to TPR of the perpetrator of the sex offense when child was conceived as a result of a sex offense defined in R.S. 15:541.	"Termination shall result in the loss of custody, visitation, contact, and other parental rights of the perpetrator regarding the child."
	LA. CHILD. CODE ANN. art. 1015(3), 1015(9) (2014). "Grounds; Termination of parental rights."	Ground for TPR includes "conviction of a sex offense as defined in R.S. 15:541 by the natural parent which resulted in the conception of the child."	Sections 1015(3) and (9) suggest that TPR is permissible when there is either a conviction of a sexual offense or there is clear and convincing evidence.
	LA. CHILD. CODE ANN. art. 137 (2014). "Denial of visitation; felony rape; death of a parent."	When the child "was conceived through the commission of a felony rape, the parent who committed the felony rape shall be denied visitation rights and contact with the child."	Case law establishes that TPR must be proved by clear and convincing evidence and must be in the best interest of the child. *See*, *e.g.*, *In re* J.A., 752 So. 2d 806, 811 (La. 2000).
Maine	ME. STAT. tit. 22, § 4055 1-B (2019). "Grounds for termination."	May TPR if court finds by clear and convincing evidence that the child was conceived as a result of sexual assault.	The court shall consider the best interest of the child.
	ME. STAT. tit. 19-A, § 1658 (West, Westlaw through 2019 Second Reg. Sess. of the 129th Leg.). "Termination of parental rights and responsibilities in cases involving sexual assault."	Court shall TPR when petitioner proves by preponderance of evidence that a parent was convicted of a crime involving sexual assault, and the child was conceived as a result of the sexual offense. Court may TPR when petitioner proves by clear and convincing evidence that child was conceived as a result of a sexual assault.	Victim may file petition Court is not required to TPR if a parent is convicted of gross sexual assault, the other parent states that the sexual act was consensual, and the other parent opposes the TPR.
Maryland	MD. CODE ANN., FAM. LAW § 5-1402(a) (LexisNexis 2019). "Termination of parental rights after conviction of nonconsensual sexual conduct that resulted in conception of child."	May TPR when the court finds that the person "has been convicted of an act of nonconsensual sexual conduct" or finds by clear and convincing evidence that the person committed an act of nonconsensual sexual conduct resulting in the conception of the child.	Must find by clear and convincing evidence that TPR is in the best interest of the child.

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Mississippi	MISS. CODE § 93-15-119(1)(b) (2018). "Grounds for involuntary termination of parental rights; standard of proof; rebuttal of allegations of desertion; inquiry as to military status."	May TPR when the court finds by clear and convincing evidence that a parent committed a sexual act and that the child was conceived as a result of the unlawful sexual act.	Court may exercise its discretion not to TPR "if the child's safety and welfare will not be compromised or endangered and terminating the parent's parental right is not in the child's best interests." MISS. CODE. § 93-15-123 (2017), "Court discretion not to terminate."
Missouri	MO. REV. STAT. § 211.447(11) (Supp. 2019). "Juvenile officer preliminary inquiry, when—petition to terminate parental rights filed, when—juvenile court may terminate parental rights, when—investigation to be made—grounds for termination."	May TPR if "the court finds that by clear, cogent, and convincing evidence that the biological father committed the act of forcible rape or rape in first degree against the biological mother" and the child was conceived as a result of the act.	Victim of rape may file petition to TPR of the biological father. Court must find by preponderance of evidence that TPR is in the best interest of child.
Montana	MONT. CODE ANN. §§ 41-3-609, -801(2) (2019). "Termination of parental rights where a child was conceived without consent;" "Criteria for termination."	May TPR when the parent "is convicted of a felony in which sexual intercourse occurred" or "at a fact-finding hearing is found by clear and convincing evidence . . . to have committed an act of sexual intercourse without consent, sexual assault, or incest that caused the child to be conceived."	Victim may file.
	MONT. CODE ANN. § 45-5-503(8) (2019). "Sexual intercourse without consent."	Person convicted of 45-5-503 ("Sexual intercourse without consent") forfeits all parental and custodial rights to the child.	Provision contained within Criminal Code. Provisions of Penalty Enhancement (Section 41-1-401) must be followed for section to apply.
Oklahoma	OKLA. STAT. tit. 10A, § 1-4-904(B)(11) (2011). "Termination of parental rights in certain situations."	May TPR upon "a finding that the child was conceived as a result of rape perpetrated by the parent whose rights are sought to be terminated."	Court shall not TPR unless it is in the best interest of the child. Case law suggests that TPR must be established by clear and convincing evidence. *See, e.g.*, *In re* E.H., 429 P.3d 1003, 1007 (Okla. Civ. App. 2018).

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Pennsylvania	23 PA. CONS. STAT. § 2511(a)(7) (2010). "Grounds for involuntary termination."	May TPR if "the parent is the father of a child conceived as a result of rape or incest."	TPR must be in the best interest of the child. Pursuant to case law grounds for TPR must be established by clear and convincing evidence. *See*, *e.g.*, *In re* Y.A., No. 1059 EDA 2018, 2018 WL 4270291, at *3-4 (Pa. Super. Ct. Sept. 7, 2018). Provision contained in Adoption Act Victim need not have a contemplated adoption. H.B. 1984, 2019-20 Gen. Assemb., Reg. Sess. (Pa. 2019). Prior to H.B. 1984 passing, the PA Superior Court held that victim need not have a contemplated adoption if for cause shown. *See In re* Z.E., Nos. 3577 EDA 2018 & 3624 EDA 2018, 2019 WL 3779711 (Pa. Super. Ct. Aug. 12, 2019).
	23 PA. CONS. STAT. § 5329(b.1) (2018). "Consideration of criminal conviction."	If the parent who is the victim objects, the court shall not award any type of custody to a parent convicted of a sexual offense when the child was conceived as a result of the sexual offense.	A court may award any type of custody if the victim has opportunity to be heard; child consents; and court finds it is in the best interest of the child.
Texas	TEX. FAM. CODE ANN. § 161.007(a) (West 2014). "Termination When Pregnancy Results From Criminal Act."	The court shall TPR if the court finds by clear and convincing evidence that the parent committed sexual assault and the child was conceived as a result of the offense.	TPR must be in the best interest of the child.
Wisconsin	WIS. STAT. § 48.415(9) (2018). "Grounds for involuntary termination of parental rights."	Ground for TPR includes "[p]arenthood as a result of sexual assault . . . Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgement of conviction *or* other evidence produced at a fact-finding hearing."	Burden of proof is not specified for "other evidence produced at a fact- finding hearing." Case law suggests it would be a clear and convincing standard. *See*, *e.g.*, *In re* Kyle S.-G, 533 N.W.2d 794, 799 (Wis. 1995).

TABLE C
STATE STATUTES: CUSTODY/VISITATION

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Arizona	ARIZ. REV. STAT. ANN. § 25-416 (2017). "Sexual assault conviction; effects on rights."	Person convicted of sexual assault does not have legal decision-making or parenting-time rights with regard to the child if the child was conceived as a result of the assault.	
Arkansas	ARK. CODE ANN. § 9-10-121 (2015). "Termination of certain parental rights for putative fathers convicted of rape."	"All rights of a putative father to custody, visitation, or contact with a child conceived as a result of a rape shall be terminated immediately upon conviction of the rape in which the child was conceived . . ."	The biological mother may petition the court to reinstate the parental rights.
California	CAL. FAM. CODE § 3030(b) (West 2020). "Sex offenders; murderers; custody and visitation; child support; disclosure of information relating to custodial parent."	"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 (rape) and the child was conceived as a result of that violation."	
Delaware	DEL. CODE ANN. tit. 13, § 724A(e) (2009). "Rebuttable presumption against unsupervised visitation, custody or residence of a child to a sex offender."	When the biological father of a child is convicted, pleads guilty or nolo contendere to any degree of rape or unlawful sexual intercourse in the 1st or 2nd degree and the child was conceived as a result of the offense, he "shall not be permitted visitation privileges."	
Illinois	750 ILL. COMP. STAT. 46 /622 (2018). "Allocation of parental responsibilities or parenting time prohibited to men who father through sexual assault or sexual abuse."	A father, who was convicted, pled guilty or nolo contendere to a sexual offense or, at a fact-finding hearing, "is found by clear and convincing evidence to have committed an act of non-consensual sexual penetration" and the child was conceived as a result of the offense, is "not entitled to" parenting time with the child without the mother's consent.	Petition may be filed by the mother or the child's guardian as an affirmative petition or an affirmative defense.
Kentucky	KY. REV. STAT. ANN. §§ 403.322, 405.028 (West 2018). "Custody, visitation, and inheritance rights denied parent convicted of felony sexual offense from which victim delivered a child; waiver; child support obligation."	"[A]ny person who has been convicted of a felony offense under KRS Chapter 510, in which the victim of that offense has conceived and delivered a child, shall not have custody or visitation rights . . . . "	

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Massachusetts	MASS. GEN. LAWS ch. 209C, § 3 (2018). "Paternity and support actions; jurisdiction; enforcement of prior orders or judgments; juvenile court commitment proceedings; parents convicted of first degree murder."	The court shall not award visitation rights to a parent who is convicted of rape, and the child was conceived as a result of the offense, "unless the judge determines that such child is of suitable age to signify the child's assent and the child assents to such order and that assent is in the best interest of the child."	The court may award visitation to a parent convicted of rape under MASS. GEN. LAWS, ch. 265, § 23 (2018), if visitation is in the best interest of the child and the other parent of the child has turned 18 and consents to visitation or the judge determines that visitation is in the best interest of the child.
New Jersey	N.J. STAT. ANN. § 9:2-4.1 (West 2013). "Custody and visitation denied to person fathering a child through rape; obligation to support minor child unaffected."	"A person convicted of sexual assault under N.J.S. 2C:14-2 shall not be awarded custody or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded."	A denial of custody or visitation shall not by itself TPR of the person denied visitation or custody. An order awarding custody or visitation must be stayed for 10 days to allow appeal.
New York	N.Y. DOM. REL. LAW § 240 (McKinney 2010). "Custody and child support; orders of protection."	"[R]ebuttable presumption that it is not in the best interest of the child to be placed in the custody of or to visit with a person who has been convicted of" rape and child was conceived as a result of the offense.	The court may order visitation or custody if the child is of suitable age and consents to an order or, if the child is not of suitable age, the child's parent of custodian consents to an order.
Ohio	OHIO REV. CODE ANN. § 3109.504 (LexisNexis 2015). "Prohibition against order granting parental rights to offender; termination of order upon notice."	The court shall not "issue an order granting parental rights to a person who has been convicted of or plead guilty to rape or sexual battery and has been declared . . . to be the parent of the child conceived as a result of rape or sexual battery committed by the person."	If the court issued an order granting parental rights, the court shall terminate the order upon receipt of a notice under OHIO REV. CODE ANN. § 3109.503 (LexisNexis 2015).
Rhode Island	15 R.I. GEN. LAWS § 15-5-16(d)(4) (2003). "Alimony and counsel fees—Custody of children."	"No person shall be granted custody of or visitation with a child if that person has been convicted" or pled nolo contendere to a sexual assault and child was conceived as a result of the that act.	Court may order supervised visitation and counseling if the biological mother consents and the court determines that visitation is in the best interest of the child.

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
South Dakota	S.D. CODIFIED LAWS § 25-4A-20 (2013). "Presumption that granting custody or visitation rights to person causing conception by rape or incest not in best interest of child."	Rebuttable presumption that "it is not in the best interest of the child" to have visitation with a person that the court has found by clear and convincing evidence to have committed an act of rape or incest that resulted in the conception of the child.	The court may revoke visitation rights if it finds by clear and convincing evidence that the person committed an act of rape or incest that resulted in the conception of the child.
Utah	UTAH CODE ANN. § 76-5-414 (LexisNexis 2017). "Child conceived as result of a sexual offense—Custody and parent-time."	A person convicted of a sexual offense that results in conception of a child may not be granted custody or parent-time rights.	The court may award custody or parenting time if the non-offending parent consents and the court finds it is in the best interest of the child.
Virginia	VA. CODE ANN. § 20-124.1 (2019). "Definitions."	A person with a legitimate interest (in a custody proceeding) does not include a person convicted of rape when the child was conceived as a result of the rape.	
West Virginia	W. VA. CODE § 48-9-209a (2015). "Child conceived as result of sexual assault or sexual abuse by a parent; rights of a biological parent convicted of sexual assault or abuse; post-conviction cohabitation; rebuttable presumption upon separation or divorce."	The court shall not allocate custodial rights or time with the child to the biological parent convicted of sexual assault when the child was conceived as a result of the rape.	Court may order custodial rights or time with the child if it finds by "clear and convincing evidence that it is in the best interest of the child, adequately protects the child and the victim," and that the person(s) with custody consent. A denial of custodial responsibility or parenting time does not by itself TPR.

TABLE D: PARENTAGE

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Georgia	GA. CODE ANN. § 19-7-22(d)(2) (2018). "Petition to legitimatize child."	There is a presumption against legitimation when the court "determines by clear or convincing evidence that the father caused his child to be conceived as a result of having nonconsensual intercourse with the mother of his child."	

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Michigan	MICH. COMP. LAWS § 722.1445(2) (2019). "Determinations and orders; powers and duties of court."	When the mother "proves by clear and convincing evidence that the child was conceived as result of nonconsensual sexual penetration the court shall do one of the following: (a) Revoke an acknowledgement of parentage for an acknowledged father. (b) Determine that the genetic father is not the child's father. (c) Set aside an order of filiation for an affiliated father. (d) Make a determination of paternity regarding an alleged father and enter an order of revocation of paternity of that alleged father."	
	MICH. COMP. LAWS § 722.25 (2019). "Child custody disputes; controlling interests, presumption; award of custody to parent convicted of criminal sexual conduct or acts of nonconsensual sexual penetration"	The court shall not award custody when a parent is convicted of criminal sexual conduct or if found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration and the child is conceived as a result of the acts.	

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Vermont	VT. STAT. ANN. tit. 15C, § 616 (2019). "Precluding establishment of parentage by perpetrator of sexual assault."	"In a proceeding in which a person is alleged to have committed a sexual assault that resulted in the birth of a child, the person giving birth may seek to preclude the establishment of the other person's parentage."	Section does not apply if the person has already been adjudicated to be the parent of the child. Must show by clear and convincing evidence that the person was convicted of a sexual assault and the child was conceived as a result of the conduct or clear and convincing evidence that the person committed the sexual assault and the child was conceived as a result of the sexual assault. If court finds that the burden has been met, it "shall enter an order (1) adjudicating that the person alleged to have committed a sexual assault is not the parent of the child; 2) requiring that the Department of Health amend the birth certificate to delete the name of the person precluded as a parent; and 3) requiring that the person alleged to have committed a sexual offense to pay child support or birth-related costs, or both, unless the person giving birth requests otherwise."
	VT. STAT. ANN. tit. 15, § 665(f)(1)-(2) (2019). "Rights and responsibilities order; best interests of the child."	"The court may enter an order awarding sole parental rights and responsibilities to parent and denying all parent-child contact with the other parent if the court finds . . . that the nonmoving parent was convicted of sexually assaulting the moving parent and the child was conceived as a result of the sexual assault" or the court "finds by clear and convincing evidence that the child was conceived as a result of the nonmoving parent sexually assaulting or sexually exploiting the moving parent."	The court may also award sole parental rights to the moving party when the moving party was trafficked by the nonmoving party.

STATE	STATUTE	RELEVANT STATUTORY LANGUAGE	NOTES
Washington	WASH. REV. CODE § 26.26A.465 (2020). "Precluding establishment of parentage by perpetrator of sexual assault."	Parent may seek to preclude the person who committed a sexual assault that resulted in conception of the child from establishing or maintaining parentage of the child. An allegation that child was conceived as a result of sexual assault may be proved by a conviction or guilty plea or by clear, cogent, and convincing evidence that the person committed the sexual assault.	Section does not apply if the person who committed the sexual assault "has previously been adjudicated in a proceeding . . . to be a parent of the child." If the court determines allegations have been proved "the court shall: (a) Adjudicate that the person . . . is not the parent of the child . . . (b) Require the state registrar of vital statistics to amend the birth record if requested by the parent and the court determines that the amendment is in the best interest of the child . . . ."

More detailed versions of Tables A-D may be found at jclewisesq.wordpress.com. Click the Resources Tab then select "The Stability Paradox." ♣