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The Haunting of Her House: How Virginia Law Punishes Women Who Become Mothers Through Rape

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Abstract

If a rape victim becomes pregnant following the attack, she has three options: abort the pregnancy, place the child for adoption, or keep and raise the child. However, by requiring proof of conviction of rape to terminate the parental rights of the man who fathered that child through his rape, the Commonwealth of Virginia imposes a substantial burden on a victim weighing those options. To obtain a conviction under the current scheme, a victim, through her local prosecutor, has to prove to a jury that the accused committed the rape beyond a reasonable doubt. The Commonwealth requires proof of conviction in custody proceedings and adoption proceedings, punishing both the victim mother who chooses to carry the pregnancy to term and the child born of rape. Although termination of parental rights is a civil matter, the Commonwealth currently imposes a criminal standard of proof on victim mothers.

Thus, this Note urges the adoption of the clear and convincing evidence standard in such termination proceedings. The current scheme debilitates a victim mother unable to secure

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a conviction against her rapist due to the unique and complex nature of the crime. The Commonwealth leaves the victim with no real choice in the matter: either abort the pregnancy and be free of her attacker forever, or carry the pregnancy to term and live in fear that her rapist will assert his parental rights over the child. The adoption of the clear and convincing evidence standard will help alleviate the life-altering harm facing a mother and child, and will ensure that all parties are given equal treatment under the law.

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I. INTRODUCTION

Every sixty-eight seconds someone is raped in the United States,[1] resulting in approximately 25,000 to 32,000 unintended pregnancies each year.[2] In 2003, Analyn Megison was twenty-nine years old when she was brutally raped in her home.[3] Following the attack, she discovered she was pregnant[4]

1. *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/J5MC-HYBS (applying a five-year rolling average to adjust for changes in the year-to-year National Crime Victimization Survey data). For more information, see RACHEL E. MORGAN & ALEXANDRA THOMPSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2020, (2021), https://perma.cc/L4SN-6Z4V (PDF).

2. H.R. 1257, 114th Cong. (2015) (enacted).

3. *See* Liz Fields, *These Women Became Pregnant From Rape, Then Fought Their Attackers for Custody*, VICE NEWS (Dec. 1, 2014, 3:35 PM), https://perma.cc/6RG4-AHEY (explaining that Megison, a law school graduate, was beaten and raped until she fell unconscious in her home in Baton Rouge, Louisiana).

4. *Id.*

and decided to carry the pregnancy to term.[5] She then spent two years in court fighting her rapist for custody of her daughter.[6] In 2008, Tiffany was twelve years old when Christopher Mirasolo kidnapped and raped her.[7] She became pregnant as a result of the rape and chose to keep and raise the child as her own.[8] Her rapist pled guilty to third-degree criminal sexual assault, but when Tiffany applied for state medical assistance, a Michigan state trial court judge signed an order granting her rapist joint legal custody of the child.[9] Although the order has since been rescinded, Tiffany was forced to cope with a situation in which her son would be placed in the care of her rapist.[10] In 2011, eighteen-year-old Noemi Martinez was raped by her coworker.[11] In the aftermath, she realized she was pregnant.[12] Her rapist was charged with first-degree sexual assault but pled down to third-degree sexual assault.[13] Five months after Noemi

5. *See id.* ("People she turned to for help immediately pressured her to abort or put her baby up for adoption. She resisted . . . .").

6. *See id.* (explaining that after two years "in and out of courtrooms, her rapist eventually dropped his custody case").

7. *Woman Whose Rapist Was Granted Joint Custody of Child Speaks Out*, CBS NEWS (Oct. 11, 2017, 10:06 AM), https://perma.cc/AMK5-SC7C (explaining how Tiffany, who asked to be identified only by her first name, was raped by Mirasolo in an "abandoned house near Detroit").

8. *See id.* (quoting Tiffany as saying "I have been taking care of [my son] for eight years. I gave up high school, I gave up prom, I gave up my friends to raise a baby and go to work").

9. *See id.* ("Sanilac County prosecuting attorney James V. Young and Judge Ross signed a paternity order that gives Tiffany's attacker joint legal custody of their son and the right to pursue parenting time.").

10. *See* Mark Martindale, *Judge, Prosecutor Vow Changes Over Custody, Rape Case*, THE DETROIT NEWS, https://perma.cc/L92M-LWYJ (last updated Oct. 17, 2017, 11:15 PM) ("During a brief hearing, Judge Gregory Ross rescinded his . . . decision that granted parental rights to sex offender Christopher Mirasolo, while county [p]rosecutor James Young apologized 'for the manner in which this case was handled.'").

11. *See* Thom Patterson, *'I Have to Text My Rapist': Victims Forced to Parent With Attackers*, CNN HEALTH (Nov. 18, 2016 7:36 AM), https://perma.cc/4VCM-CTL7 (explaining that Noemi was in high school when her coworker invited her over to his house and raped her).

12. *Id.*

13. *See id.* ("Under Nebraska law, Noemi could terminate her attacker's parental rights if he'd been convicted of sexual assault in the first degree. But because he was convicted of third-degree sexual assault, his parental rights were safe.").

gave birth, her rapist demanded visitation with the child.[14] He won unsupervised visits with the child, and Noemi now has to give her child over to her rapist on a regular basis.[15]

Pregnant rape victims[16] have three options: terminate the pregnancy, place the child for adoption, or keep and raise the child. In the Commonwealth of Virginia, if a rape victim chooses to keep and raise a child conceived through rape or place it for adoption, her rapist may, under Virginia law, attempt to assert his parental rights over that child.[17] Unless a court or jury finds the father guilty of the crime of rape beyond a reasonable doubt, Virginia law deems him a viable parent—a person with a legitimate interest[18]—and he has all of the rights associated with that parentage.[19] The Commonwealth's statutory framework forces women who become pregnant through rape to make an extraordinarily difficult decision: abort the pregnancy, removing the risk of her attacker reentering her life or choose to put the child up for adoption or raise the child as her own and face the risk that her unindicted rapist will assert his parental rights over the child.

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14. *Id.*

15. *See id.* ("Setting up visits between her child and her attacker has become an emotionally difficult part of daily life. 'Now I have to text my rapist or email my rapist,' [Noemi] said. 'To leave my daughter with someone I didn't trust.'").

16. This Note uses "victim" instead of "survivor" to refer to those women who endure the crime of rape. The term "victim" in the criminal justice system describes a person that has been subjected to a crime and denotes a legal status, and is not meant to imply weakness, guilt, or blame. *See* VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION, SEXUAL ASSAULT KIT INITIATIVE 1 (2015), https://perma.cc/4V2Q-VGN5 (PDF).

17. VA. CODE ANN. § 20-124.1 (2021)

> "Person with legitimate interest" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. A party with a legitimate interest shall *not* include any person (i) whose parental rights have been terminated, either voluntarily or involuntarily . . . or (iii) who has been *convicted* of a violation of subsection A of § 18.2-61 . . . or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. (emphasis added)

18. *Id.*

19. *See infra* Part III.

This reality is alarming at best and punishing at worst. Decisions regarding a pregnancy via rape should lie solely with the victim mother, without apprehension that she might be required to raise a child alongside her rapist. Requiring proof of a rape conviction in order to establish that rapist father has no legitimate interest in the child is vindictive. Family law proceedings are civil matters; employing the criminal standard of proof of beyond a reasonable doubt in a civil proceeding is particularly severe, given that the standard of proof for all other necessary conditions to terminate parental rights[20] is clear and convincing evidence.[21]

Consequently, this Note urges the adoption of the clear and convincing evidence standard in termination proceedings when the father conceived the child through his rape. The clear and convincing evidence standard survives constitutional challenges while ensuring that the victim can adequately protect herself and her child absent the rare rape conviction.

Part II provides a background on the crime of rape and its physical and psychological effects. Part III explores parental rights and family law procedures controlling issues of child custody in the Commonwealth. Part III further explains the potentially devastating effects that the Commonwealth's family law framework may have on a victim mother and child if her attacker is found not guilty of rape. Part IV explains the legal procedures surrounding abortion, while Part V outlines the procedures for adoption in the Commonwealth. Finally, Part VI argues that the current conviction requirement is unduly punishing and examines the clear and convincing evidence

20. *See* VA. CODE ANN. § 16.1-283 (2021). See *infra* Part III.A.1 for an explanation of termination of parental rights.

21. *See* VA. CODE ANN. § 16.1-283(B) (2021) (explaining the conditions to be proved by clear and convincing evidence for termination surrounding neglect and abuse that led to foster care placement); § 16.1-283(C) (explaining the conditions to be proved by clear and convincing evidence for termination when the parent or parents have failed to maintain contact with the child or have failed to remedy the conditions that led to the foster care placement); § 16.1-283(D) (explaining the conditions to be proved by clear and convincing evidence for termination surrounding abandonment that led to foster care placement); § 16.1-283(E) (explaining that residual parental rights may be terminated for children in the custody of local board or child-placing agencies when the parent has been convicted of listed offenses and the victim was a child). All residual parental rights termination decisions are made after considering the best interests of the child. *See infra* Part III.B.2.

standard and the constitutional considerations that accompany it. Part VI additionally reflects on the federal government's support of the clear and convincing evidence standard in termination proceedings, provides framework examples from two states that employ the clear and convincing evidence standard for terminating a rapist's parental rights, and suggests new statutory language for the Virginia General Assembly to consider and adopt.

The Commonwealth of Virginia should prioritize protecting both parties and is currently failing to protect women who become pregnant as a result of rape. The decision to abort, place for adoption, or keep and raise a child conceived through rape is one that should be left with the victim. As the law currently stands, the Commonwealth of Virginia further violates the victim by inflicting needless and avoidable pain and suffering. This proposed solution ensures that a victim mother has the safe and secure option to do what is best for her and her child.

II. BACKGROUND

A. Defining the Violent Crime of Rape

Rape[22] is defined in Virginia as "sexual intercourse . . . against a complaining witness's will by force, threat or intimidation of or against the complaining witness or another person."[23] With a male perpetrator and a female victim, Virginia courts interpret "sexual intercourse" to mean "actual penetration to some extent of the male sexual organ into the female sexual organ."[24] "Complaining witness" means the

22. This Note analyzes the crime of rape in a stranger- and acquaintance-rape context, in which the rapist and the victim were not in a legally recognized relationship at the time of the attack. Marital rape and the family law presumptions that accompany it are outside the scope of this Note.

23. VA. CODE ANN. § 18.2-61(A) (2021).

> If any person has sexual intercourse with a complaining witness, whether or not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person . . . he or she shall be guilty of rape.

24. Carter v. Commonwealth, 428 S.E.2d 34, 41 (Va. Ct. App. 1993); *see also* Velazquez v. Commonwealth, 543 S.E.2d 631, 637 (Va. Ct. App. 2001) ("Penetration by a penis of a vagina is an essential element of the crime of

person alleged to have been subjected to the crime of rape.[25] Sexual intercourse is "against a complaining witness's will" when there is "some array or show of force in form sufficient to overcome resistance."[26] A victim does not need to have physically fought against her attacker, but some evidence of a lack of consent is necessary.[27]

To satisfy the element of force, the evidence must establish that the act was "effected . . . without the victim's consent."[28] In the absence of force, rape can be effectuated through either threat or intimidation.[29] Threat is understood as "an expression of an intention to do bodily harm."[30] Intimidation does not require an express threat by the attacker to commit bodily harm,[31] but instead requires "putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will."[32]

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rape; proof of penetration, however slight the entry may be, is sufficient." (citation omitted)).

25. *See* VA. CODE ANN. § 18.2-67.10 (2021) ("'Complaining witness' means the person alleged to have been subjected to rape, forcible sodomy, inanimate or animate object sexual penetration, marital sexual assault, aggravated sexual battery, or sexual battery.") While rape is a crime that affects all persons regardless of gender, this Note is limited to the male perpetrator and female victim dynamic due to the focus on pregnancy.

26. Sabol v. Commonwealth, 553 S.E.2d 533, 536 (Va. Ct. App. 2001).

27. *Id.*

28. Gonzales v. Commonwealth, 611 S.E.2d 616, 620 (Va. Ct. App. 2005) (explaining that "the use of force is shown by the act of non-consensual intercourse itself").

29. VA. CODE ANN. § 18.2-61(A) (2021); *see also* Myers v. Commonwealth, 400 S.E.2d 803, 804–06 (Va. Ct. App. 1991) (explaining that submission out of fear on the part of the victim and the lack of force demonstrated by the assailant leading up to and during the sexual intercourse did not mean that the assailant had not raped the victim).

30. Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985).

31. *Sabol*, 553 S.E.2d at 537 (explaining that this "fear of bodily harm must derive from some conduct or statement of the accused"); Lunceford v. Commonwealth, No. 1234-15-1, 2016 WL 6208632, at *2 (Va. Ct. App. Oct. 25, 2016) (stating that intimidation is distinct from threat because "the fear of bodily harm can arise from the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure" (citation omitted)).

32. *See Sutton*, 324 S.E.2d at 670 (explaining that the evidence presented in the case supported a finding of intimidation, given the threat by the defendant to return the victim to her father, who physically abused her); Breeden v. Commonwealth, 596 S.E.2d 563, 568 (Va. Ct. App. 2004) (stating

Rape is an abominable crime, "both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are established."[33] Short of homicide, it is the "ultimate violation of self."[34] Even though rape is understood to be a uniquely violent[35] and punishable crime,[36] it is one of the few crimes where justice is rarely served.[37]

B. Systematic Underreporting, Under-Prosecution, and Under-Conviction

In contrast with other violent crimes, the majority of rapes are not reported to the police.[38] There are various reasons[39] that

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that intimidation was established in addition to force because the accused was in possession of a firearm throughout the assault, threatened to kill himself with the firearm, and created "the implicit threat that he would use more force and violence if she did not comply with his wishes").

33. Coker v. Georgia, 433 U.S. 584, 597 (1977).

34. *Id.*

35. *See* Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HARV. HUM. RTS. J. 205, 239 (2015) ("Rape is a unique crime in that the impact of rape extends beyond the physical trauma associated with the initial assault." (citation omitted)); Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 44 (1995) ("To label rape as merely assault denies the reality of what rape, as opposed to other physical assaults, does—rape is an objectification and denial of the basic humanity of the victim.").

36. *See Coker*, 433 U.S. at 598 ("Rape is without doubt deserving of serious punishment . . . ."); Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 146 (2001) ("[M]ost state laws currently impose substantial penalties for rape, and most citizens consider it second only to homicide in terms of its heinousness.").

37. *See The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/M56D-N8CQ ("Out of every 1,000 sexual assaults, 975 perpetrators will walk free.").

38. *See id.* ("Only 310 out of every 1,000 sexual assaults are reported to the police. That means more than 2 out of 3 go unreported."); *see also* MORGAN & THOMPSON, *supra* note 1, at 7 (noting that in 2019, 33.9 percent of rapes or sexual assaults were reported to the police, while in 2020, that figure dropped to 22.9 percent).

39. *See* MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 7 (2013), https://perma.cc/M5Z7-JSQ2 (PDF) (providing multiple reasons for

may influence a victim's decision to forego reporting the rape to law enforcement, such as the fear of reprisal,[40] the belief that the police will not do anything to help,[41] or the fear of not being believed.[42] Moreover, myths about rape and women who are raped—that the victim was asking to be raped because of the way she was dressed,[43] that she is making it up,[44] or that she is otherwise to blame for the rape because of her conduct[45]—are still widely expressed and accepted in modern society.[46] Consequently, a victim might choose not to report due to the harmful rhetoric that accompanies those myths.[47] Victims also

non-reporting, including the victim believing the rape to be a personal matter, believing the incident to not be important enough to report to police, and not wanting to get the offender in trouble).

40. *See id.* (explaining that the most common reason victims gave for not reporting the crime during 2005–2010 was fear of reprisal).

41. MORGAN & THOMPSON, *supra* note 1, at 7 (including rape with other violent crimes that were not reported to the police out of a fear that law enforcement "would not or could not" provide assistance).

42. *See* Malinda L. Seymore, *Attorney-Client Sex: A Feminist Critique of the Absence of Regulation*, 15 YALE J.L. & FEMINISM 175, 182 (2003) ("When asked why she did not report the attorney, she indicated that no one would believe her, as it was her word against his, and that if anyone believed her, no one would care . . . .").

43. Holly Boux, *"If You Wouldn't Have Been There That Night, None of This Would Have Happened to You": Rape Myth Usage in the American Judiciary*, 40 WOMEN'S RTS. L. REP. 237, 253 (2019).

44. *See, e.g.*, Kimberly Peterson, Note, *Victim or Villain?: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims*, 53 VAL. U. L. REV. 467, 475 (2019) (identifying the myth that "victims often lie about being raped" as one of the most prominent misconceptions about rape, and stating that in fact, "the percentage of false rape allegations is no higher than the percentage of false reports of other felonies").

45. *See* Carol L. Zeiner, *A Therapeutic Jurisprudence Analysis of Government's Directives on Student to Student Campus Rape*, 47 J.L. & EDUC. 427, 450 (2018) ("What did she expect if she went into a bedroom with him alone? She should not have gone to [a bar alone, that particular party, that neighborhood, that parking garage]." (citation omitted)).

46. *See* Boux, *supra* note 43, at 244 (explaining that the rape myth frame has "dominated public discourse on violence against women for decades"); Donald A. Dripps, *Why Rape Should Be a Federal Crime*, 60 WM. & MARY L. REV. 1685, 1690 (2019) (describing rape myths as "deeply embedded social attitudes").

47. *See* Peterson, *supra* note 44, at 490 ("Rape culture is also the cause of the low reporting rate because it makes the victim feel as if she is to blame, which leads her to forego reporting her rape.").

choose not to report out of fear of vilification by defense counsel—a fear that is not unfounded.[48]

When rape is reported to law enforcement, the incident is seldom referred to a prosecutor.[49] Because police officers are generally skeptical when presented with a rape complaint,[50] they may fail to adequately investigate the complaint.[51] In the rare instance that a rape is referred for prosecution, a police officer's skepticism directly affects a prosecutor's decision as to whether or not to pursue the case: if there is no investigation, there is nothing for the prosecutor to work with.[52] The decision to prosecute or not "generally rests entirely in his discretion,"[53] which may be influenced by a variety of outside factors.[54]

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48. *See* CHANEL MILLER, KNOW MY NAME 341–42 (2019).

> Instead of his attorney saying, Did you notice any abrasions? He said, You didn't notice any abrasions, right? This was a game of strategy, as if I could be tricked out of my own worth. . . . I was pummeled with narrowed, pointed questions that dissected my personal life, love life, past life, family life, inane questions accumulating trivial details to try and find an excuse for this guy who had me half naked before even bothering to ask for my name.

49. Victoria Brown et al., *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 375 (2020) ("Less than ten percent of rapes reported to police will be referred to a prosecutor.").

50. *See* Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 8 (2016) (stating that there are "unduly high levels of skepticism toward rape complainants" seen among police officers and that rape complainants "were regularly disbelieved").

51. *See Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the S. Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 13 (2010) ("[I]t is clear that we are seeing chronic and systematic patterns of police refusing to accept cases for investigation, misclassifying cases to non-criminal categories so that investigations do not occur, and 'unfounding' complaints by determining that women are lying about being sexually assaulted.").

52. *See, e.g.*, Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 42 (2015) ("[P]olice have increasingly acted as gatekeepers to inhibit rape victims from pushing their cases forward.").

53. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (explaining that as long as the prosecutor has probable cause to believe "that the accused committed an offense defined by statute," the decision is then subject to his or her discretion).

54. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 3-4.4 (4th ed. 2015) (listing proper considerations in exercising discretion to "initiate, decline, or dismiss a criminal charge" as the strength of the evidence, the nature of the crime, the extent or absence of harm caused by the offense, and the views and motives of the victim).

Prosecutors' reservations about the convictability of rape often lead them to file charges only when the evidence is strong, the suspect is at fault, and the victim is blameless.[55] However, the reality of rape is much more complex than the standard it is held to by the criminal justice system. As a result, the evidentiary issues that often accompany the crime[56] lead prosecutors to decline taking on cases that are not as clear.[57] Relying on evidence that is founded in a "he said, she said" context to prove the offense of rape to a judge or jury is a lofty task. Moreover, high conviction rates are important to prosecutors and many are loath to take a case that may jeopardize their success.[58] Finally, the myths and stereotypes surrounding rape and rape victims influence prosecutors as much as they do society, directly impacting their assessment of the viability of the complaint.[59]

Due to the overall under-prosecution of rape, rape convictions are infrequent.[60] Even if a prosecutor does decide to prosecute a rape case, a conviction is still hard to achieve.

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55. CASSIA C. SPOHN ET AL., NAT'L CRIM. JUST. REF. SERV., PROSECUTORS' CHARGING DECISION IN SEXUAL ASSAULT CASES: A MULTI-SITE STUDY 42 (2002), https://perma.cc/3DRD-6AHJ (PDF).

56. *See* Heather R. Hlavka & Sameena Mulla, *"That's How She Talks": Animating Text Message Evidence in the Sexual Assault Trial*, 52 LAW & SOC'Y REV. 401, 401–02 (2018) ("An oft invoked trope in cases of sexual violence, 'he said, she said,' suggests that without third-party witness testimony or material evidence, sexual assault allegations rest on conflicting reports provided by victims and alleged perpetrators."); Yung, *supra* note 52, at 37 ("Rape cases, whether prosecuted or not, usually amount to competing narratives about events for which there is no documentary evidence.").

57. *See* SPOHN ET AL., *supra* note 55, at 54–66 (outlining the reasons behind a prosecutor's decision not to file charges, including inferences about the victim, typifications of "rape-relevant" behavior, and a determination that ulterior motives were at play).

58. Yung, *supra* note 52, at 42.

59. *See* Bradley A. Muhs, *Fighting the Unfair Fight: Post-Traumatic Stress Disorder and the Need for Neuroimaging Evidence in Rape Trials*, 35 WOMEN'S RTS. L. REP. 215, 219 (2014) ("Prosecutors will often misapply these myths when deciding on whether to bring a case against a suspected rapist, thereby leading to prosecutorial hesitance to file charges when the alleged victim does not conform to society's misplaced perception of the 'innocent' victim.").

60. *See The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/M56D-N8CQ (stating that twenty-eight out of every 1,000 sexual assaults cases will lead to a felony conviction).

Because rape is a criminal offense, it is subject to the most stringent standard of proof: beyond a reasonable doubt.[61] In order to obtain a rape conviction at trial in Virginia, the prosecution must prove each element of the crime to the required standard.[62] Due to the complexities of rape, this is often challenging,[63] especially if the only two witnesses to the assault were the victim and the accused rapist. When a rape case results in a question of who is more believable—him or her—the task of proving that the accused rapist committed the crime beyond a reasonable doubt is incredibly arduous.

Convictions at trial are less likely in rape cases than any other violent crime.[64] Juries are often suspicious of victims who do not immediately report the rape or seem emotionally unbothered at trial.[65] Jurors are also less likely to believe the victim if she was intoxicated at the time of the assault.[66] These factors and others influence the jury's understanding and analysis of the case and can lead to reasonable doubt as to the accused's guilt.[67] As a result, a jury may find the accused not

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61. *See* Crawford v. Commonwealth, 704 S.E.2d 107, 120 (Va. 2011) ("Because of the stringent standard of proof the law imposes upon the prosecution, juries must acquit unless they find each of the crime charged to have been proved beyond a reasonable doubt.").

62. *See id.* ("[T]he Commonwealth must prove beyond a reasonable doubt: (1) that the defendant had sexual intercourse with the victim; (2) that it was against her will and without her consent; and (3) that it was by force, threat or intimidation.").

63. *See* Rachael Kessler, Note, *Due Process and Legislation Designed to Restrict the Rights of Rapist Fathers*, 10 NW. J.L. & SOC. POL'Y 199, 218 (2015) ("In many rape cases, it is difficult for a prosecutor to present enough evidence to support a jury finding that the rape occurred beyond a reasonable doubt.").

64. *See* Yung, *supra* note 52, at 42 (explaining that "[a] typical rape case can fall apart at any stage through the criminal justice system," contributing to low conviction rates).

65. Emily Pedersen, *The New Rape: Proposal of a Comprehensive Rape Law Reform to Increase Convictions in Cases of Acquaintance Rape*, 84 UMKC L. REV. 1111, 1118–19 (2016).

66. *See* Kellie Rose Lynch et al., *Who Bought the Drinks? Juror Perceptions of Intoxication in a Rape Trial*, 28 J. INTERPERSONAL VIOLENCE 3205, 3207 (2013) ("[I]f a sexual assault case with an intoxicated victim reaches court, research has shown that mock jurors and jurors view the victim as less credible and more responsible for the assault compared with a nonintoxicated victim.").

67. *See* Pedersen, *supra* note 65, at 1119 (stating that jurors exhibited bias against victims who did not physically resist the assault, who put

guilty, and leave the victim with no further recourse in the criminal justice system.

Understanding that rape is underreported, under-prosecuted, and vastly under-convicted, it is alarming that Virginia conditions the termination of an alleged rapist's parental rights on a criminal conviction. With the reality of devastatingly low conviction rates for rape, employing a criminal burden of proof in a civil family law proceeding results in a near-impossible barrier for a victim mother to overcome when seeking to protect herself and her child from her rapist.

C. The Statistical Reality of Rape and its Impact

Rape is an insidious and pervasive crime. Hundreds of thousands of people are raped in the United States every year.[68] One out of every six women is the victim of an attempted or completed rape in her lifetime.[69] Young women are particularly vulnerable to rape, experiencing the crime at troublingly high rates when compared to the general population.[70]

In addition to the physical harm that accompanies rape,[71] victims of the crime often suffer considerable emotional and mental trauma.[72] Rape victims are "particularly vulnerable" to

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themselves in a vulnerable position, were around "dangerous" people, and who had had consensual sexual histories).

68. *See* MORGAN & THOMPSON, *supra* note 1, at 2 (reporting that the number of rapes and sexual assaults was 734,630 in 2018, 459,310 in 2019, and 319,950 in 2020).

69. *Scope of the Problem: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/2RGZ-7SNX.

70. *See Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/J5MC-HYBS (stating that women between the ages of sixteen and nineteen are four times more likely than the general population to be victims of sexual violence and women ages eighteen to twenty-four who are college students are three times more likely to experience sexual violence than women in general).

71. *See* Terri Weaver & Heidi Resnick, *Impact of Violence Against Women on Their Physical Health*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RSCH. CTR. (2000), https://perma.cc/S6AN-T5SA (listing genital tearing, bruising, lacerations, and abrasions among the reported physical harms suffered during rape); *Sexually Transmitted Infections*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/7X6Q-49LU (explaining that sexually transmitted infections may be transmitted through nonconsensual sexual contact).

72. *See* Christopher C. Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 L. & PSYCH. REV. 91, 106 (2010) (stating that the

developing post-traumatic stress disorder (PTSD) in the wake of their attack.[73] Victims who suffer from PTSD often relive the rape in their minds, exhibit detachment from others to create distance between themselves and the attack, and feel restricted in their ability to express positive emotions.[74] In addition to the likely onset of PTSD, a rape victim may suffer from additional phobias, anxieties, depressive symptoms, and obsessive-compulsive tendencies.[75] Moreover, rape victims are more likely to have suicidal ideations and abuse drugs and alcohol following the attack.[76]

Stemming from the fact that rape is a high-frequency crime, rape-related pregnancy is a problematic possibility.[77] While some have posited that "legitimate" rape[78] does not result in the conception of a child,[79] a basic understanding of the crime

harm that victims endure is physical, in addition to the equally painful psychological and emotional harm).

73. 12 AM. JUR. 3D *Proof of Facts* § 401 (2021) (explaining that rape victims often suffer from post-traumatic stress disorder because the assault is often sudden and leaves the victim defenseless, the assault may be intentionally cruel, the victim may feel trapped, and the assault often involves physical harm).

74. *See* Kendall, *supra* note 72, at 109–11.

75. 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, 834 (2010).

76. *See* Dean G. Kilpatrick, *The Mental Health Impact of Rape*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RSCH. CTR. (2000), https://perma.cc/MZ76-7G42 (finding that 33 percent of rape victims said yes when asked if they ever thought seriously about committing suicide, and are twenty-six times more likely to have two or more serious drug problems than women who had never been victims of a crime).

77. KATHLEEN C. BASILE ET AL., HEALTH & HUM. SERVS., RAPE-RELATED PREGNANCY AND ASSOCIATION WITH REPRODUCTIVE COERCION IN THE U.S. 5 (2019), https://perma.cc/W8YH-YRWN (PDF) (noting that among the approximately eighteen million women that had experienced vaginal rape in their lifetime, 2.9 million reported rape-related pregnancy).

78. *See* Charlotte Alter, *Todd Akin Still Doesn't Get What's Wrong With Saying Legitimate Rape*, TIME (July 17, 2014, 4:07 PM), https://perma.cc/QSB2-NT8C (reporting the harmful position put forth by former Representative Todd Akin that "legitimate rape" encompasses only those cases in which "[a] woman calls a police station, the police investigate, she says 'I've been raped,' [and] they investigate that").

79. *See* Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 20, 2012), https://perma.cc/5T9L-WFJE (reporting former Representative Todd Akin, Republican from Missouri, as saying "[i]f it's a

refutes that claim.[80] Because the incident of rape is typically unreported, calculations of how many women become pregnant as a result of rape are likely incomplete.[81] A frequently cited study has estimated that the rate of rape-related pregnancy is approximately five percent per rape victim.[82] According to the American College of Obstetricians and Gynecologists, this percentage rate amounts to "approximately 32,000 pregnancies resulting from rape each year."[83]

Because it is difficult to calculate how many rape-related pregnancies occur each year, it is even harder to accurately track the outcomes of such pregnancies.[84] Though many women who become pregnant from rape choose to terminate the pregnancy,[85] it is estimated that anywhere from 32.3 percent[86] to 73 percent of women choose to carry their pregnancies to

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legitimate rape, the female body has ways to try to shut the whole thing down"); Associated Press, *Lawmaker Says Rape Can't Cause Pregnancy*, SFGATE, https://perma.cc/NEE9-A2DQ (last updated Feb. 4, 2012, 4:57 PM) (reporting Henry Aldridge, Republican member of the North Carolina House of Representatives, as saying "[t]he facts show that people who are raped—who are truly raped—the juices don't flow, the body functions don't work and they don't get pregnant" during a House debate on abortion funding in 1995).

80. *See supra* Part II.A; *see also* Sharon Begley & Susan Heavey, *Rape Trauma as Barrier to Pregnancy has No Scientific Basis*, REUTERS (Aug. 20, 2012, 7:58 PM), https://perma.cc/8WLE-BRQJ (quoting Dr. Barbara Levy as saying "[a] woman who is raped at a vulnerable time in her menstrual cycle is as likely to conceive and retain a pregnancy as a woman who was voluntarily attempting pregnancy").

81. *See* Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 520 (2014) ("Unfortunately, due to the severe underreporting of rape . . . these statistics are likely drastic underestimates of the number of women who experience a rape-induced pregnancy.").

82. *See* Melissa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 178 AM. J. OBSTETRICS & GYNECOLOGY 320, 323 (1996) (explaining that this rate applies to women of reproductive age, which is between the ages of twelve and forty-five years old).

83. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, SEXUAL ASSAULT 297 (2019), https://perma.cc/CG29-4RW5 (PDF).

84. *See* Prewitt, *supra* note 75, at 829.

85. *See id.* (stating that approximately 26 percent to 50 percent of "women faced with rape-related pregnancies" seek abortions).

86. *See* Holmes et al., *supra* note 82, at 322.

term.[87] From there, somewhere between 32.3 percent and 64 percent of women decide to keep and raise the child.[88]

III. PARENTAL RIGHTS AND FAMILY LAW IMPLICATIONS

A. An Explanation of Parental Rights

Parental rights are a person's authority to make all decisions concerning his or her child. This includes the right to determine the child's care and custody,[89] the right to educate the child,[90] to raise the child in a certain religion,[91] and other general decisions influencing the upbringing of children.[92] Parental rights are constitutionally protected under the Due Process Clause of the Fourteenth Amendment,[93] and are among the oldest fundamental liberty interests recognized by the courts.[94] Accordingly, courts are hesitant to intervene in what is frequently understood to be a uniquely private realm.[95]

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87. AMY SOBIE & DAVID C. REARDON, VICTIMS AND VICTORS 19 (2000).

88. *See* Brown et al., *supra* note 49, at 430.

89. *See* Santosky v. Kramer, 455 U.S. 745, 755 (1982) (stating the "interest of natural parents in the care, custody, and management of their child" is vital).

90. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) (finding that an Oregon statute requiring children to attend public schools for primary education "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

91. *See* Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) ("[T]he values of parental direction of the religious upbringing . . . in their early and formative years have a high place in our society.").

92. *See id.* at 232 ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Parham v. J.R., 442 U.S. 583, 602 (1979) ("Our jurisprudence historically reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.").

93. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish a home and bring up children").

94. Troxel v. Granville, 530 U.S. 57, 65 (2000).

95. *See id.* at 58 ("[T]here is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children.").

However, parental rights are not absolute. The United States Supreme Court addressed this issue in *Prince v. Massachusetts*,[96] a seminal parental rights case:

> Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.[97]

Thus, the state retains an interest as *parens patriae*[98] in the children that reside within its borders. This interest often manifests itself when the state seeks to "guard the general interest in the youth's well-being."[99] In addition to other factors that can trigger a state's power as *parens patriae*,[100] in termination proceedings, the state's goal centers around ensuring the child is as stable as possible. If there is a "reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds."[101] In Virginia, "[t]he common law doctrine of *parens patriae* is defined as that power of the Commonwealth to watch over the interests of those who are incapable of protecting themselves."[102] This concept informs a Virginia court's understanding and analysis of any child custody issue that may come before it.

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96. 321 U.S. 158 (1944).

97. *Id.* at 165.

98. *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (explaining that the state's *parens patriae* interest concerning children lies in "preserving and promoting the welfare of the child"). A state's *parens patriae* interest most obviously culminates in the maintenance of state-run child-care institutions. *See* Reno v. Flores, 507 U.S. 292, 305 (1993).

99. *Prince*, 321 U.S. at 166.

100. *See id.* (listing required school attendance and regulated or prohibited child labor as ways the state can restrict the parent's control over the child when the child's wellbeing is at stake).

101. *Santosky*, 455 U.S. at 766–67.

102. Verrocchio v. Verrocchio, 429 S.E.2d 482, 485 (Va. Ct. App. 1993).

1. Termination of Parental Rights in Virginia

Parental rights may be terminated. In the Commonwealth of Virginia, termination of parental rights is termination of *residual* parental rights, which is understood as the rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship.[103] Simply put, a parent retains residual parental rights even when the child is not physically in the custody of the parent and the parent has no control over the day-to-day decisions impacting the child's life, unless the juvenile and domestic relations general district court terminates those rights.[104]

Termination of parental rights is an irreversible[105] and grave action, and thus must be conditioned on more "than a difference in values, morality, or parental philosophy."[106] If a court orders termination, the connection between the parent and child is severed forever, and the parent in effect becomes a legal stranger to the child.[107]

Section 16.1-283 provides for the termination of residual parental rights under carefully defined, but broad, circumstances.[108] Circumstances warranting termination include child abuse or neglect or the risk of abuse or neglect, abandonment, if the parent or custodian is unable to provide parental care or guardianship by reason of physical or mental incapacity, or if the parent or custodian has been convicted of a listed offense and the victim of the offense was a child.[109] In order to terminate residual parental rights, there must be clear and convincing evidence of both a qualifying circumstance and that termination is in the best interests of the child.[110] While

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103. VA. CODE ANN. § 16.1-228 (2021) (explaining that the rights include, but are not limited to, "the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support").

104. See *infra* Part III.B.1 for an explanation of child custody definitions and determinations.

105. Ange v. York/Poquoson Dep't of Soc. Servs., 560 S.E.2d 474, 482 (Va. Ct. App. 2002).

106. PETER N. SWISHER ET AL., VA. PRAC. FAMILY LAW § 14.3 (2020 ed.).

107. *Ange*, 569 S.E.2d at 482.

108. VA. CODE ANN. § 16.1-283 (2021).

109. *See id.* §§ 16.1-283(B)–(E).

110. *Id.*

termination of residual rights occurs most frequently in foster care placements and adoptions,[111] a court may terminate the residual parental rights of one parent without affecting the rights of the other parent.[112]

B. Child Custody and Custody Proceedings in Virginia

1. Forms of Custody Recognized in Virginia

When faced with a dispute concerning the custody of a child, a Virginia court will consider and decide legal and physical custody, and whether such custody will be joint or sole.[113] Legal custody is the responsibility for the care and control of the child and the authority to make decisions concerning the child.[114] This includes healthcare, education, and any other decisions that would majorly impact the child's upbringing.[115] Physical custody is the responsibility for the physical and custodial care of the child.[116]

Joint legal custody is defined as both parents having a shared responsibility for the care and control of the child, and shared authority to make decisions concerning the child, even if the child primarily resides with just one parent.[117] If joint legal custody is awarded and the child is placed in the primary physical care of one parent, the noncustodial parent is typically awarded visitation.[118] Joint physical custody means both

111. See *infra* Part V for an explanation of the legal procedures controlling adoption.

112. VA. CODE ANN. § 16.1-283(A) (2021).

113. *Id.* § 20-124.2(B).

114. *See* In re O'Neil, 446 S.E.2d 475, 478 (Va. Ct. App. 1994).

115. *See id*. at 478

> In this Commonwealth, "legal custody" is defined as the right to have physical [charge] of the child, to determine and redetermine where and with whom [the child] shall live, the right and duty to protect, train and discipline [the child] and to provide [the child] food, shelter, education and ordinary medical care. (citation omitted)

116. VA. CODE ANN. § 20-124.1 (2021).

117. *Id.*

118. *See* Vissicchio v. Vissicchio, 498 S.E.2d 425, 431–32 (Va. Ct. App. 1998) (stating that ordering visitation to the father for one-quarter of the child's time in addition to alternate holidays was within the discretion of the trial court, and that the arrangement was beneficial to the child having a primary residence or base).

parents share physical and custodial care of the child.[119] Joint physical custody often results in the child spending approximately half of their time physically with both parents—alternating weeks between each parent's home, for example.[120] With sole custody, one parent retains responsibility for the care and control of a child, and has primary decision-making authority.[121]

While there is a controlling statutory mandate that a court is not to prefer one form of custody over another,[122] joint legal custody arrangements are awarded with relative frequency and ease.[123] The Virginia General Assembly has expressed support of joint custody, encouraging courts to "assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children."[124]

2. Best Interests of the Child Standard

In determining custody, the court must give primary consideration to the best interests of the child.[125] The best interests of the child standard is the "lodestar" for the court in child custody decisions involving conflicting parental

119. VA. CODE ANN. § 20-124.1 (2021).

120. *See* In re Long, No. CJ05CH-1743, 2006 WL 2022000, at *1 (Va. Cir. Ct. May 31, 2006) (awarding joint physical custody based on an "alternate week schedule," which would "include weekends by the parent taking the child on Friday sometime after school until the following Friday after school, when the other parent would take charge for the ensuing week").

121. VA. CODE ANN. § 20-124.1 (2021).

122. *See id.* § 20-124.2(A) ("The court shall consider and may award joint legal, joint physical, or sole custody, and there shall be *no presumption* in favor of any form of custody." (emphasis added)).

123. *See* Armstrong v. Armstrong, 834 S.E.2d 473, 475–76 (Va. Ct. App. 2019) (upholding an award of joint legal custody with visitation rights for mother in light of the parties' complete inability to communicate and the presence of a protective order barring contact); Thomas v. Thomas, No. 2421-97-4, 1998 WL 201562, at *1 (Va. Ct. App. Apr. 28, 1998) (upholding an award of joint legal custody despite past physical altercations between the parents, an acknowledged inability to effectively communicate, and a history of alcohol and drug abuse on the part of the father).

124. VA. CODE ANN. § 20-124.2(B) (2021).

125. *Id.*

interests,[126] and the concerns and rights of the parents must be tempered by this standard.[127] However, "[p]arental rights of custody are founded upon the strong presumption that the best interests of the child will be served by placing it in the custody of its natural parents."[128]

The best interests of the child standard controls in every decision concerning the custody of a child, including legal custody, physical custody, visitation, termination of parental rights, and potential modification claims. In Virginia, there are ten statutory factors that a court must consider when analyzing the "best interests of the child" in a given custody proceeding:[129]

> 1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
> 2. The age and physical and mental condition of each parent;
> 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child;
> 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members;
> 5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
> 6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
> 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
> 8. The reasonably preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference;

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126. Roberts v. Roberts, 586 S.E.2d 290, 295 (2003) (Va. Ct. App. 2003).

127. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) ("[W]hile the legal rights of a parent should be respected in a custody proceeding, those technical rights may be disregarded if demanded by the interests of the child.").

128. Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 336 (Va. Ct. App. 2006).

129. VA. CODE ANN. § 20-124.3 (2021).

> 9. Any history of (i) family abuse as that term is defined in § 16.1-228; (ii) sexual abuse; (iii) child abuse; or (iv) an act of violence, force, or threat as defined in § 19.2-152.7:1 that occurred no earlier than 10 years prior to the date a petition is filed. If the court finds such history or act, the court may disregard the factors in subdivision 6; and
> 10. Such other factors as the court deems necessary and proper to the determination.

Failure to consider all of the statutory factors for determining the best interests of the child in a child custody proceeding is reversible error.[130] A court presented with a custody case between a victim mother and rapist father will likely give the most weight to those factors that focus on the relationship between the parties[131] and their relative parental abilities.[132] The sixth[133] and seventh[134] factors present the most concern with a victim mother, who would likely seek to place as much distance as possible between her and her rapist.

3. Modification of Child Custody Decrees: Material Change in Circumstances

Child custody and visitation rulings are never final,[135] and are subject to judicial review upon a showing of a material change of circumstances.[136] The Supreme Court of Virginia established a two-part test for modification of child custody decrees in *Keel v. Keel*.[137] The test asks whether there has been a change in circumstances since the most recent custody award, and whether a change in custody would be in the best interests

130. Piatt v. Piatt, 499 S.E.2d 567, 571 (Va. Ct. App. 1998).

131. VA. CODE. ANN. §§ 20-124.3(6), (7) (2021).

132. *Id.* §§ 20-124.3(2), (3), (5), (9).

133. *See id.* § 20-124.3(6) ("The propensity of each parent to actively support the child's contact and relationship *with the other parent*, including whether a parent has unreasonably denied the other parent access to or visitation with the child") (emphasis added).

134. *See id.* § 20-124.3(7) ("The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the *ability of each parent to cooperate in and resolve disputes* regarding matters affecting the child" (emphasis added)).

135. *Roberts*, 586 S.E.2d at 295.

136. *Id.*

137. 303 S.E.2d 917 (Va. 1983).

of the child.[138] This two-part test is the relied upon standard for modification in the Commonwealth.[139]

The first prong of the test—whether there has been a change in circumstances—is not limited to "whether negative events have arisen at the home of the custodial parent."[140] A change in circumstances that could warrant the modification of a custody decree is "broad," and can include a myriad of considerations, including positive ones.[141] The second prong invokes the aforementioned best interests of the child standard, which remains paramount.[142] Because the child's best interests are vital, this second prong is "clearly the most important part of the two-part test."[143]

In a custody modification case, the court's primary goal is to determine which home will be best for the child.[144] The Supreme Court of Virginia has expressed its understanding of "best" to be:

> [N]ot necessarily . . . the most expensive home, or the one with the prettiest furnishings, or the one with the greatest number of "creature comforts." For we are firmly of the view that a house is not a home, that a home is more than bricks and mortar. "Best" to us is the home that will provide the

138. *Id.* at 921.

139. *See* Rhodes v. Lang, 791 S.E.2d 744, 747 (Va. Ct. App. 2016) ("When a party has filed a petition to modify an existing visitation order, the courts must apply the [Virginia] Supreme Court's two-prong test enunciated in *Keel v. Keel* to determine whether modification of that order is proper." (citation omitted)); *see also* Sizov v. Sizov, No. 1704-19-4, 2020 WL 7222171, at *6 (Va. Ct. App. Dec. 8, 2020) (relying on the two-part test in determining whether a change in custody was warranted); Munoz v. Quinones, No. 1834-18-4, 2019 WL 1441228, at *2 (Va. Ct. App. Apr. 2, 2019) (same).

140. *See Keel*, 303 S.E.2d at 921.

141. *See id.* (explaining that a change in circumstances can include changes "involving the children themselves," and is broad enough to include positive changes, "such as remarriage, and the creation of a stable home environment, increased ability to provide emotional and financial support for the children").

142. *See id.* ("[D]espite changes in circumstances, there can be no change in custody unless such change will be in the best interests of the children.").

143. *Id.*

144. *See id.* ("The overall aim of a court in a change of custody case must be to determine which home is 'best' for the children.").

> children the greatest opportunity to fulfill their potential as individuals and as members of society.[145]

Because modification is a fact-oriented inquiry, "there is no simple, mechanical, 'cut and dried' way" to determine whether there has been a change in circumstances or whether that change will be in the best interests of the child.[146] Thus, the trial court should consider the "broadest range of evidence" available in order to make the best rational comparison between the circumstances of each parent.[147]

C. Third-Party Interests in Child Custody

There are third-party claims that can arise in any custody proceeding, including those involving a child conceived through rape. Third parties in child custody claims need to establish that they qualify as a "person with a legitimate interest."[148] While the court is required to give "due regard to the primacy of the parent-child relationship," persons with a legitimate interest may prove through clear and convincing evidence that custody or visitation with themselves is in the best interests of the child.[149] Third-party custody and visitation interests are independent from that of the natural parents.[150]

In *Williams v. Williams*,[151] the Supreme Court of Virginia confirmed that third-party statutory custody claims[152] implicate the constitutional right of parental autonomy in child rearing,

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145. *Id.*

146. *Id.*

147. *Id.*

148. *See* VA. CODE ANN. § 20-124.1 (2021) (explaining this classification is broad, including grandparents, step-relations, blood relatives, and family members as long as they have properly intervened in the suit or are otherwise properly before the court).

149. *Id.* § 20-124.2(B).

150. *See* Dotson v. Hylton, 513 S.E.2d 635, 640 (Va. Ct. App. 1999) (explaining that the paternal grandmother's visitation rights were to be considered independent of the visitation status of the incarcerated father).

151. 501 S.E.2d 417 (Va. 1998).

152. *See id.* at 418 (explaining that while the right of parents to raise their child as they so choose is protected under the Fourteenth Amendment, Section 20-124.2(B), which permits grandparents and other to seek visitation, presents no constitutional problem).

and thus must be justified by a compelling state interest.[153] The court then established the following standard: if both parents object to a third party's visitation, the court must find that denial of visitation with the petitioning third-party would be detrimental—resulting in actual harm—to the child's health or welfare.[154]

This test was clarified by the Virginia Court of Appeals in *Griffin v. Griffin*.[155] In *Griffin*, the mother objected to her former husband, who was not the father of the child, having visitation with the child.[156] The natural father took no position with respect to the former husband's visitation.[157] Relying heavily on *Troxel v. Granville*,[158] the *Griffin* court held that a singular parent has the same constitutionally protected liberty interest to object to contact between the child and a third party, regardless of the parent's marital status.[159] The court further explained that the opposition of one parent is sufficient as a matter of liberty under the Fourteenth Amendment to deny visitation with a non-parent, absent a showing of actual harm to the child if such visitation is denied.[160] Finally, the *Griffin* court clarified that "actual harm" requires more than "the obvious observation that the child would benefit from the

153. *See id.* (stating that to "constitute a compelling interest, state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare").

154. *See id.* (explaining that the articulated standard is founded in the "General Assembly's intent" to give due primacy to the parent-child relationship, and thus must be satisfied before "the court may interfere with the constitutionally protected parental rights").

155. 581 S.E.2d 899 (Va. Ct. App. 2003).

156. *See id.* at 900 (explaining that the wife appealed the trial court's grant of visitation to her former husband and argued that as a non-parent, he "could not obtain visitation rights over her son on a mere showing of best interests").

157. *See id.* at 901 ("[T]he other [natural] parent in our case . . . did not request that visitation be awarded to husband.").

158. 530 U.S. 57 (2000).

159. *See Griffin*, 581 S.E.2d at 902 ("Nothing in *Troxel* implies that the legal superiority of a fit parent's rights over those of a non-parent turns on whether the parent is married, separated, divorced, or widowed. A single mother has no less constitutional right to parent her son than a married mother.") (citation omitted).

160. *See id.* at 903 ("Absent a showing of actual harm to the child, the constitutional liberty interests of fit parents take precedence over the best interests of the child.") (citation omitted).

continuing emotional attachment with the non-parent."[161] A potential emotional loss was not enough to satisfy actual harm.[162]

While single parents have equal constitutional footing in third-party custody claims, *Dotson v. Hylton*[163] established an important exception to the *Williams* test.[164] If the natural parents are at odds concerning a third party's claim of visitation, the statutory mandate of whether such visitation would be in the best interest of the child controls.[165]

Virginia law grants no custody or visitation right to a third party whose interest in the child derives from a person whose parental rights have been terminated.[166] However, in the case of a victim mother who is faced with a custody dispute with her rapist, the current conviction requirement[167] renders this condition largely inconsequential.

D. Potential Consequences of Virginia's Family Law Scheme on a Victim Mother and Child

A victim mother and the child she chose to keep are left vulnerable to Virginia's family law framework should her rapist assert his rights to the child. Most rape victims recover from the

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161. *Id.*

162. *Id.*

163. 513 S.E.2d 901 (Va. Ct. App. 1999).

164. Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998) ("[B]efore visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation.") (citing Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)).

165. Dotson v. Hylton, 513 S.E.2d 901, 903 (Va. Ct. App. 1999) (explaining that when "only one parent objects to a grandparent's visitation and the other parent requests it, the trial court is not required" to follow the more stringent *Williams* standard because the family is not "intact" (citation omitted)).

166. *See* VA. CODE ANN. § 20-124.1 (2021) ("A party with a legitimate interest shall *not* include any person . . . whose interest in the child derives from or through a person whose parental rights have been terminated, either voluntarily or involuntarily . . . ." (emphasis added)).

167. *See id.*

> A party with a legitimate interest shall *not* include any person . . . (iii) who has been *convicted* of a violation of subsection A of § 18.2-61 . . . or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. (emphasis added)

psychological after-effects of rape within a year of the attack.[168] However, if a victim is forced to continue to interact with her rapist through a court-mandated custody arrangement, recovery is put at substantial risk.[169]

This is true for any custody arrangement: if a victim's rapist is awarded joint physical and legal custody, she is trapped in an alternating physical custody arrangement and compelled to coordinate with her attacker on all major decisions concerning the child.[170] If the court orders joint legal custody with the right of visitation for the rapist father, she will have to coordinate visitation time with her rapist and consult with him on major decisions.[171] Even if the victim mother is awarded sole custody[172] over the child, that does not mean that the father is a legal stranger to the child—the father still has a legal connection to the child because his parental rights remain intact.[173] That connection to the child as a legal parent, though it does not materialize in any meaningful legal or physical custody, is harmful.

A victim may wish to move out of her home to somewhere new, change her phone number, and undertake other actions to try to move on from the attack.[174] But a victim with a court-mandated custody arrangement with her rapist cannot

168. Prewitt, *supra* note 75, at 833.

169. *See id.* at 833 (explaining that forcing a victim to repeatedly interact with her attacker is "likely to impede her recovery process").

170. *See* Wynnycky v. Kozel, 834 S.E.2d 512, 522 (Va. Ct. App. 2019) (upholding a joint physical custody arrangement that would consist of "weekly transitions between custodians" until the child entered the first grade).

171. *See, e.g.*, Armstrong v. Armstrong, 834 S.E.2d 473, 476 (Va. Ct. App. 2019) (explaining that parties with a protective order in place can communicate through "agreed-upon third parties" for the purpose "of making decisions essential to joint legal custody," and that visitation for the noncustodial parent was proper).

172. *See* VA. CODE ANN. § 20-124.1 (2021) (defining sole custody as one person retaining responsibility for the care and control of a child, and has primary decision-making authority concerning the child).

173. *See* Rodgers v. Rodgers, No. 0404-07-3, 2008 WL 4386879, at *3 (Va. Ct. App. Sept. 30, 2008) ("Father's rights as a parent were not terminated when the circuit court awarded sole custody to the mother.").

174. *See* Patricia A. Frazier & Jeffery W. Burnett, *Immediate Coping Strategies Among Rape Victims*, 72 J. COUNSELING & DEV. 633, 636 (1994) (listing moving and taking other home safety precautions as common coping behaviors).

take those healing steps without seeking judicial permission to change the custody order.[175] Moreover, if the mother is forced into a legal relationship with her rapist, her mental health may deteriorate as a result of his continual presence in her life.[176] This mental deterioration may affect her parenting and cause the child to suffer, [177] which is contrary to the best interests standard.[178] Children are intuitive,[179] and can internalize and negatively react to the stress of their parents.[180] If the victim mother's mental distress reaches a flashpoint, the rapist father would then have the means to file for a modification of custody based on the material change of circumstances standard.[181] Ultimately, unless a victim mother can put forth proof that her rapist was convicted of the offense, a court-mandated custody arrangement is a possibility with potentially devastating effects for both mother and child.

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175. *See* Wheeler v. Wheeler, 591 S.E.2d 698, 701 (Va. Ct. App. 2002) ("A court may forbid a custodial parent from removing children from the state without the court's permission . . . .").

176. *See* Prewitt, *supra* note 75, at 833 ("[I]t seems likely that women whose child-custody arrangements force continued interaction with their rapists would also experience delays in healing.").

177. *See* Lene Symes et al., *Physical and Sexual Intimate Partner Violence, Women's Health and Children's Behavioural Functioning: Entry Analysis of a Seven-Year Prospective Study*, 23 J. CLINICAL NURSING 2909, 2912 (2014) ("Maternal mental health symptoms . . . positively correlated with child depressive symptoms . . . .").

178. *See supra* Part III.B.2.

179. *See* Jackie A. Nelson et al., *Family Stress and Parental Responses to Children's Negative Emotions: Tests of the Spillover, Crossover, and Compensatory Hypotheses*, 23 J. FAM. PSYCH. 671, 672 (2009) ("Each individual or subsystem in the family is influenced by the others." (citation omitted)).

180. *See* Connie J. Beck et al., *Children Conceived From Rape: Legislation, Parental Rights and Outcomes for Victims*, 15 J. CHILD CUSTODY 193, 200–01 (2018) (explaining that a child's exposure to their mother's stress and "re-traumatization" can lead to behaviors such as "breaking the law, lying, cheating and stealing . . . depression and other mental health problems").

181. *See, e.g.*, Bostick v. Bostick-Bennett, 478 S.E.2d 319, 323 (Va. Ct. App. 1996) (explaining that before determining whether or not to modify a custody order, the court must find "a material change in circumstance" and "whether a change in custody would be in the best interests of the child").

IV. LEGAL PROCEDURES WITH RAPE-RELATED PREGNANCY: ABORTION

A woman's decision to terminate her pregnancy is protected under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[182] In the Commonwealth of Virginia, a board-certified physician or nurse practitioner may legally terminate or aid in terminating a pregnancy by performing an abortion or causing a miscarriage on "any woman during the first trimester of pregnancy."[183] During the second trimester of pregnancy, a board-certified physician may legally terminate or aid in terminating a pregnancy by performing an abortion or causing a miscarriage on any woman, provided that the procedure is performed in a licensed hospital.[184] Following the second trimester, it is lawful for any board-certified physician to terminate a pregnancy by performing an abortion or causing a miscarriage on any woman so long as particular conditions are met.[185]

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182. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (explaining that abortion is among precedents that involve the private realm of family life and "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment").

183. VA. CODE ANN. § 18.2-72 (2021).

184. *See id.* § 18.2-73 (stating that the procedure must be performed in a hospital licensed by "the State Department of Health or operated by the Department of Behavioral Health and Developmental Services"). This provision of the Code was ruled unconstitutional as applied in *Falls Church Medical Center, LLC v. Oliver*, 412 F. Supp. 3d 668 (E.D. Va. 2019). The court held that requiring the performance of second-trimester abortions to be in licensed hospitals was and "unduly burdensome in violation of the Due Process Clause." *Id.* at 687–88. The General Assembly has yet to amend the Code provision following the *Falls Church* decision.

185. *See id.* § 18.2-74

> Said operation is performed in a hospital licensed by the Virginia State Department of Health or operated by the Department of Behavioral Health and Developmental Services. The physician and two consulting physicians certify and so enter in the hospital record of the woman, that in their medical opinion, based upon their best clinical judgment, the continuation of the pregnancy is likely to result in the death of the woman or substantially and irremediably impair the mental or physical health of the woman. Measures for life support for the product of such abortion or miscarriage must be available and utilized if there is any clearly visible evidence of viability.

A woman seeking to terminate her pregnancy must give informed written consent before the procedure is undertaken.[186] With the exception of minors in certain cases,[187] there is no third-party notice provided concerning a woman's decision to terminate a pregnancy. Finally, Virginia permits state funding for abortions of pregnancies that are the result of rape or incest, provided that the victim reports the attack to law enforcement or a public health facility.[188]

Accordingly, a biological father—rapist or not—is not awarded any right to notice or consent if a woman chooses to get an abortion at any stage of the pregnancy. For pregnant rape victims who choose abortion, this is critical: there is no legal requirement that a victim's rapist know that she has decided to terminate the pregnancy.

V. LEGAL PROCEDURES WITH RAPE-RELATED PREGNANCY: ADOPTION

In Virginia, a child may be placed for adoption through parental placement[189] or by way of a child-placing agency.[190] As with custody determinations, the best interests of the child

186. *See id.* § 18.2-76 (stating that if the woman seeking the abortion is deemed by a court of competent jurisdiction to be incapacitated, permission in writing must be given by a "parent, guardian, committee, or other person standing in loco parentis to the woman").

187. *See id.* § 16.1-241(W) (stating that an authorized physician shall expressly provide notice of the anticipated abortion to an "authorized person," meaning a parent, duly appointed guardian or custodian, or a person standing in loco parentis, unless the notice is not in the "best interest of the minor").

188. *See id.* § 32.1-92.1 (explaining that public funds are available "for women who otherwise meet the financial eligibility criteria of the State Medical Assistance Plan in any case in which a pregnancy occurs as a result of rape or incest and which is reported to a law-enforcement or public health agency").

189. *See id.* § 63.2-100 (defining parental placement as "locating or effecting the placement of a child or the placing of a child in a family home by the child's parent or legal guardian for the purpose of foster care or adoption"). For more information on parental placement adoptions, see *id.* §§ 16.2-1230 to -1240.

190. *See id.* § 63.2-1221 (defining adoption by child-placing agency or local board). For more information on agency adoptions, see *id.* §§ 63.2-1222 to -1229.

standard is controlling in adoption cases.[191] In Virginia, "[a]ny man who has engaged in sexual intercourse with a woman is deemed to be on legal notice that a child may be conceived and that the man is entitled to all legal rights and obligations resulting therefrom."[192] The legal rights of notice and consent accompany all adoptions, barring explicit and limited exceptions.

While lack of knowledge of a pregnancy does not excuse failure to timely register with the Virginia Birth Father Registry,[193] if the identity and whereabouts of the birth father are "reasonably ascertainable," the child-placing agency or adoptive parents must give written notice concerning the adoption plan and the option to register with the Birth Father Registry.[194] With an agency adoption, if a birth father is required to be given notice pursuant to Section 63.2-1250,[195] he may be given notice of the entrustment agreement[196] by registered or certified mail to his last known address.[197] If a birth father is required to be given notice in a parental

191. *See id.* § 63.2-1205 (explaining that the court may consider the birth parents' relative ability as parents, their efforts to maintain custody over the child, and other relevant factors in determining the best interests of the child in the adoption context).

192. *Id.* § 63.2-1250(A).

193. *Id.*

194. *Id.* § 63.2-1250(F)

> Such written notice shall be provided by personal service or by certified mailing to the birth father's last known address. Registration is timely if the signed registration form is received by the Department within ten days of personal service of the written notice or within thirteen days of the certified mailing date of the written notice.

195. *See id.* §§ 63.2-1250(F)–(G) (describing the notification procedures for the adoption plan and the availability of registration with the Virginia Birth Father Registry, and the requirement of notice of placement with a local board and proceedings concerning adoptions and termination of parental rights for registrants that have timely registered).

196. *See id.* § 63.2-1221 (explaining that entrustment agreements divest birth parents "of all legal rights and obligations with respect to the child, and the child shall be free from all legal obligations of obedience and maintenance with respect to them").

197. *See id.* §§ 63.2-1222(A)–(B) (explaining the requirements of validity for entrustment agreements and the procedures concerning notice).

placement adoption, that notice may be given by registered or certified mail to his last known address.[198]

Generally, consent of both birth parents is necessary for an adoption in Virginia.[199] Written consent must be filed in conjunction with the adoption petition.[200] A court may not accept consent until it determines that the birth parents are aware of alternatives to adoption, a child-placing agency has counseled the adoptive parents about adoption procedures, and the adoptive parents are made aware of the rights of the birth parents and the termination of those rights.[201] The consent of both the birth parents and the adoptive parents must be informed and uncoerced,[202] and all parties must exchange pertinent identifying information unless the parties agree to waive that exchange.[203]

There are limited and explicit exceptions to the parental notification and consent requirements. Consent is not required if the birth parent has neither visited nor contacted the child for six months immediately following the filing of the petition for adoption or the filing of a petition to consent to an adoption.[204] The prospective adoptive parents must establish the lack of contact by clear and convincing evidence.[205] Further, a birth parent is not entitled to notice or required to give consent if their parental rights have been previously terminated[206] or if a birth

198. *Id.* § 63.2-1233(1)(c).

199. *See id.* § 63.2-1202 (stating that consent must be executed by the birth mother and by any man who is (a) an acknowledged father, (b) an adjudicated father, (c) a presumed father by way of marriage to the mother, or (d) has registered with the Virginia Father Birth Registry).

200. *Id.* § 63.2-1202(A).

201. *Id.* §§ 63.2-1232(A)(1)–(2).

202. *Id.*

203. *See id.* § 63.2-1232(A)(3) (explaining that such information includes but is not limited to "full names, addresses, physical, mental, social and psychological information and any other information necessary to promote the welfare of the child, unless both parties agree in writing to waive the disclosure of full names and addresses").

204. *See id.* § 63.2-1202(H) (stating that the lack of visitation and contact must be "without just cause").

205. *Id.*

206. *See id.* § 63.2-1202(G) ("No notice or consent shall be required of any person whose parental rights have been terminated by a court of competent jurisdiction . . . .").

father has been *convicted* of violating the rape statute[207] and the child was conceived as a result of that violation.[208]

Given the statutory framework, a victim mother that is seeking to place her child for adoption must put forth proof of conviction of rape in order to bypass the consent and notice requirements. Without such proof, a victim mother must contend with the possibility that her rapist will object to the adoption and that she will be forced to participate in litigation alongside her attacker concerning the future of a child that she does not wish to keep for herself.

VI. VIRGINIA'S CURRENT CONVICTION REQUIREMENTS AND THE AVAILABLE EVIDENTIARY STANDARD THAT SHOULD REPLACE IT

A. The Fundamental Unfairness of Virginia's Current Conviction Requirement

As presented in the foregoing Parts, Virginia's statutory scheme covering parental rights over a child born of rape features conviction requirements in both the basic custody context and in adoption proceedings.[209] As a result, the Commonwealth leaves a pregnant rape victim with an unnecessarily difficult decision: either exercise her right to an abortion and be free of her attacker forever, or face the risk of having her rapist assert his parental rights over the child, regardless of whether she chooses to keep and raise the child or put it up for adoption.

State legislatures sometimes enact statutes that lack explicit compelling language, but in practice compel private citizens to make choices they otherwise would not have made.[210]

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207. *See id.* § 18.2-61(A) (defining rape); *see also supra* Part II.A.

208. *See id.* § 63.2-1202(F) (stating that with agency adoptions, no consent is required from a birth father that has been *convicted* of a violation of the rape where the child was conceived as a result of the violation and the father is not entitled to notice of the adoption proceedings); *see also* § 63.2-1233(6) (stating that with parental placement adoptions, an identical conviction requirement is in place concerning notice and consent).

209. *See supra* Parts III, V.

210. *See* Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading* Casey, 83 WASH. L. REV. 1, 27 (2008) (noting that the mandatory information given under informed consent statutes may mislead a woman when "it inappropriately takes advantage of emotional influence to bias an individual's decision away

Just as some informed consent statutes implicitly coerce women to decide against aborting a pregnancy,[211] there is an argument that Virginia's current conviction requirements implicitly intimidate women who become pregnant through rape to get an abortion.

Whether or not to require a rape conviction when terminating a rapist's parental rights is an issue that has split states.[212] While this Note focuses on Virginia, it has wider

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from the decision that would be made in a non-emotional, fully informed state"); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 152 (2008) (explaining that the information contained in mandatory printed materials, though not explicit in the informed consent statute mandating the presentation of such materials, "may influence women to take on additional costs and medical risks"); Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women are Disproportionately Compromised*, 16 AM. U. J. GENDER SOC. POL'Y & L. 437, 453 (2008) (explaining that "statutes and laws governing pregnancy behavior unfairly—even if unintentionally—negatively influence the pregnancy decisions and outcomes of minority women").

211. *See* Blumenthal, *supra* note 210, at 31

> [U]nder *Casey's* "truthful and misleading" standard, a communication designed to influence a woman's decision whether to abort may be considered an undue burden when it is inappropriately manipulative (deliberately or not) by inducing fear or anxiety, or when it inappropriately affects her ability to decide, leading to a decision that she would not have made under the influence of such an emotion.

212. In addition to Virginia, the following states and the District of Columbia require proof of conviction before terminating parental rights: Alabama, Arizona, Arkansas, California, Delaware, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wyoming. *See* ALA. CODE § 12-15-319(b) (2021); ARIZ. REV. STAT. ANN. § 25-416 (2021); ARK. CODE ANN. § 9-10-121 (2021); CAL. FAM. CODE § 3030(b) (West 2021); DEL. CODE ANN. tit. 13, § 724A(e) (2021); D.C. CODE ANN. § 16-914(k) (West 2021); KY. REV. STAT. ANN. § 403.322 (West 2021); MASS. GEN. LAWS ANN. ch. 209C, § 3(a) (West 2021); MONT. CODE ANN. § 41-3-609(1)(c) (2021); NEB. REV. STAT. ANN. § 43-292(11) (West 2021); NEV. REV. STAT. ANN. § 128.105(1)(b)(8) (West 2021); N.J. STAT. ANN. § 9:2-4.1(a) (West 2021); N.Y. DOM. REL. LAW § 240(1-c)(b)(A) (McKinney 2021); N.C. GEN. STAT. ANN. § 7B-1111 (West 2021); N.D. CENT. CODE ANN. § 27-20.3-20(1)(e) (West 2021); OHIO REV. CODE ANN. § 3109.501(B)(1) (West 2021); OR. REV. STAT. ANN. § 419B.510(1) (West 2021); 23 PA. STAT. AND CONS. STAT. ANN. §§ 2511(7), 4321(2.1) (West 2021); 15 R.I. GEN. LAWS ANN. § 15-7-7(a)(2)(viii) (West 2021); S.C. CODE ANN. § 63-7-2570(11) (2021); TENN. CODE ANN. § 36-1-113(g)(10)(A) (2021); W. VA. CODE ANN. § 48-9-209a(a) (West 2021); WYO. STAT. ANN. § 14-2-309(a)(ix) (2021).

implications due to the problematic nature of a conviction requirement in a parental rights termination proceeding for a rapist father. In order to secure a conviction against her rapist, the victim, through her local prosecutor, must present evidence that proves beyond a reasonable doubt that the accused committed rape.[213] This is a burdensome requirement to import into a civil family law proceeding, and greatly disadvantages the victim mother who is seeking to sever her and her child's legal connection to the rapist father.[214] Because rape is so rarely convicted,[215] conditioning the termination of parental rights on a conviction decides the matter before it even begins.[216]

A victim who bears a child resulting from rape faces a nearly insurmountable legal burden when seeking to insulate herself and her child from continued contact with her rapist. In the custody and visitation context, the father's ability to repeatedly seek,[217] and perhaps even be awarded, custody or visitation means that the victim mother will be attached to her rapist until her child turns eighteen. This will likely impede a full recovery from the psychological after-effects of her rape.[218] The current conviction requirement leaves the victims that choose to keep their children conceived through rape in purgatory, forcing them to interact with their attacker[219] within

213. *See* Crawford v. Commonwealth, 704 S.E.2d 107, 120 (Va. 2011) (explaining that to obtain a rape conviction, the Commonwealth must prove "beyond a reasonable doubt: (1) that the defendant had sexual intercourse with the victim; (2) that it was against her will and without her consent; and (3) that it was by force, threat or intimidation").

214. *See The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://perma.cc/M56D-N8CQ (stating that out of every 1,000 sexual assaults, only twenty-eight cases will lead to a felony conviction).

215. *See id.*

216. *See* Brown et al., *supra* note 49, at 432 ("[A] requirement for criminal conviction prevents many survivors from realistically accessing these laws designed for their benefit.").

217. *See supra* Part III.B.3.

218. *See* Prewitt, *supra* note 75, at 833 (stating that the psychological effects of rape include "fears, phobias, anxieties, somatic symptoms, obsessions, depressive symptoms, and even suicidal ideation").

219. *See* Patterson, *supra* note 12 (interviewing Noemi Martinez who is now "forced to parent" with her rapist and is left with the emotionally exhausting task of setting up regular visitation between the child and the rapist).

the court-mandated custody relationship, unable to move forward and heal.[220]

The conviction requirement in the adoption context leaves the victim mother putting the child up for adoption in a similar position as the victim mother who chooses to keep her child, rendering adoption an inadequate alternative to abortion. Unless a victim mother can put forth proof of a rape conviction,[221] the consent and notification requirements for adoptions will leave her vulnerable to ongoing contact with her rapist through litigation.[222] This is punitive. Instead of being able to relinquish the child in a safe and straightforward manner without involving her rapist, Virginia imposes an impossible standard on a mother that has already endured the horror of rape[223] and has made the often painful decision to put the child up for adoption.[224] Maintaining a conviction requirement in an adoption context theoretically forces the victim mother to participate in—or at the very least be aware of—legal proceedings in which her rapist may not only fight efforts to terminate his parental rights, but also seek to have the child placed in his care instead of the care of the petitioning adoptive parents. The prospect of a victim mother being compelled to engage in litigation concerning a child she does not

220. *See* Prewitt, *supra* note 75, at 833 ("[F]orcing a woman to repeatedly face her rapist, or reminders of him, is likely to impede her recovery process.").

221. *See* VA. CODE ANN. § 63.2-1202(F) (2021) (stating that in granting a petition for adoption, no consent will be required of the birth father when he has been convicted of a violation of rape, carnal knowledge, or incest statute and the child was conceived as a result of the violation); § 63.2-1233(6) (same).

222. *See id.* § 63.2-1202(A) ("No petition for adoption shall be granted . . . unless written consent to the proposed adoption is filed with the petition. Such consent shall be in writing, signed under oath and acknowledged before an officer authorized by law to acknowledgment."); § 63.2-1233(1)(c) (stating that when a birth father is required to be given notice "he may be given notice of the adoption by registered or certified mail to his last known address").

223. *See* 141 CONG. REC. 21,925 (1995) ("Rape is someone grabbing you, assaulting you, overwhelming you with fear for your life and then violating you in the most deeply personal and destructive way." (statement of Rep. Johnson)).

224. *See* Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 138 (2013) ("During the prerelinquishment period, a mother experiences emotional issues in adjusting to pregnancy, as well as difficulties in making complex decisions about relinquishment.").

wish to keep for herself, but certainly would not want in the care of a man capable of sexual violence, is alarming.

B. The Clear and Convincing Evidence Standard

Twenty states allow for the complete termination of a rapist's parental rights without requiring proof of conviction.[225] This legislative decision has been rationalized by acknowledging an interest in protecting victims of sexual assault,[226] presuming that termination of parental rights is in the best interest of the child when the child is conceived through unlawful sexual battery,[227] and recognizing that a legally enforceable, ongoing relationship with an abuser is damaging.[228] In these jurisdictions, if the victim mother can prove by clear and convincing evidence that her alleged attacker raped her and the child at issue was conceived as a result, the court may terminate the rapist's parental rights.[229]

Virginia courts interpret clear and convincing evidence as "[t]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the

225. These states are Alaska, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, New Mexico, Oklahoma, South Dakota, Texas, Vermont, and Washington. *See* ALASKA STAT. ANN. § 25.23.180(c)(2) (West 2021); COLO. REV. STAT. § 19-5-105.7 (2021); CONN. GEN. STAT. ANN. § 17a-112 (West 2021); FLA. STAT. ANN. § 39.806(m) (West 2021); GA. CODE ANN. §§ 19-8-10(a)(4), 19-8-11(a)(3)(A)(iv) (2021); HAW. REV. STAT. ANN. § 571-61(b)(5) (West 2021); IDAHO CODE ANN. § 16-2005(2)(a) (West 2021); IND. CODE ANN. § 31-35-3.5-7 (West 2021); IOWA CODE ANN. § 232.116(1)(p) (West 2021); LA. CHILD. CODE ANN. art. 1004 (2021); ME. REV. STAT. ANN. tit. 22, § 4055(1-B) (2021); MD. CODE ANN., FAM. LAW § 5-1402(a) (West 2021); MICH. COMP. LAWS ANN. § 722.1445(2) (West 2021); MISS. CODE ANN. § 93-15-119(1)(b) (2021); MO. ANN. STAT. § 211.447(11) (West 2021); N.M. STAT. ANN. § 32A-5-19(C) (2021); OKLA. STAT. ANN. tit. 10A, § 1-4-904(11) (West 2021); S.D. CODIFIED LAWS § 25-4A-20 (2021); TEX. FAM. CODE ANN. § 161.007(a) (West 2021); VT. STAT. ANN. tit. 15, § 665(f) (2021); WASH. REV. CODE ANN. § 26.26A.465 (West 2021).

226. COLO. REV. STAT. § 19-5-105.7(1) (2021).

227. FLA. STAT. ANN. § 39.806(m) (West 2021).

228. VT. STAT. ANN. tit. 15, § 665(f) (2021).

229. *See* Natalie Hoch, Note, *The Real American Horror Story: Overcoming the Hurdles to Terminate a Rapist's Parental Rights*, 51 VAL. U. L. REV. 783, 805 (2017).

allegations sought to be established."[230] Clear and convincing evidence is an intermediate standard, finding a middle ground between more than a "mere preponderance" and the stringent certainty requirements of beyond a reasonable doubt.[231] This standard is more appropriate in termination of parental rights proceedings, which are civil.

1. Constitutional Considerations with the Termination of Parental Rights

a. Due Process

Legislation that permits termination of a rapist father's parental rights upon a showing by clear and convincing evidence that the child was conceived as a result of his rape is essential to ensure that rape victims and their children conceived through rape are adequately protected in the Commonwealth of Virginia. It would also withstand any constitutional challenge.

The state must be cognizant of due process concerns when considering legislation that seeks to limit a rapist father's right to custody of or visitation with the child conceived by his rape.[232] The U.S. Supreme Court has repeatedly confirmed that the interest of a parent in the "care, control and custody of their children" is among the oldest fundamental liberty interests protected by Fourteenth Amendment's Due Process Clause.[233] This Fourteenth Amendment protection "guarantees that a State will treat individuals with 'fundamental fairness' whenever its actions infringe their protected liberty or property interests."[234] However, the rapist father's due process rights can be satisfied by the explicit adoption of the clear and convincing evidence standard in cases involving the termination of parental rights for such fathers.

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230. Edmonds v. Edmonds, 772 S.E.2d 898, 905 (Va. 2015).

231. *Id.*

232. *See, e.g.*, Kessler, *supra* note 63, at 221 ("[L]egislatures must be careful in designing statutes to avoid such [due process] challenges . . . .").

233. Troxel v. Granville, 530 U.S. 57, 65 (2000).

234. Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting).

In *Santosky v. Kramer*,[235] the U.S. Supreme Court affirmatively held that the clear and convincing evidence standard satisfies due process in termination of parental rights proceedings.[236] The Court acknowledged that the issues presented in termination proceedings often struggle to rise to a level of absolute certainty.[237] In the Court's view, the clear and convincing evidence standard was found to sufficiently communicate "to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."[238]

Undoubtedly, rape is a nuanced and complex crime.[239] Employing the clear and convincing evidence standard will protect both the due process rights of the father and the interests of the victim mother in restricting his access to her and the child. A "firm belief or conviction"[240] in the mind of the trier of fact that the rape occurred adequately alleviates concerns that the father will be unduly stripped of his parental rights.[241] Moreover, requiring a victim mother to put forth evidence of rape that engenders "a firm belief or conviction"[242] as to the allegation is a more attainable standard that beyond all reasonable doubt.[243]

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235. 455 U.S. 745 (1982). The issue in *Santosky* involved the termination of parental rights in New York surrounding child abuse and neglect on the part of the natural parents and the due process implications of termination. *Id.* at 745–46.

236. *See id.* at 769 (acknowledging that the states have found that the standard "strikes a fair balance between the rights of the natural parents and the State's legitimate concerns").

237. *Id.*

238. *Id.*

239. *See supra* Parts II.A–B.

240. Edmonds v. Edmonds, 772 S.E.2d 898, 905 (Va. 2015).

241. *See* Kessler, *supra* note 63, at 223 ("The rapist father's rights will be protected because the victim mother will be required to prove that the rape occurred before he can be stripped of his rights.").

242. *Edmonds*, 772 S.E.2d at 905.

243. *See* Kessler, *supra* note 63, at 223 (explaining that the clear and convincing evidence standard allows victim mothers who do not see their attackers convicted under the criminal standard to find respite in civil court).

b. Judicial Scrutiny

A parent's interest in the care, custody, and control of his or her children is constitutionally protected.[244] While such rights are fundamental,[245] the U.S. Supreme Court has yet to articulate the level of scrutiny that courts should apply when considering infringements on parental rights.[246] This lack of clarity has led to uncertainty amongst lower court decisions affecting parental rights.[247] Although there is at present no reliable level of scrutiny that a reviewing court should apply, legislation that terminates the parental rights of rapists by relying on the clear and convincing evidence standard would survive even strict scrutiny. To survive strict scrutiny review, the state "must prove that the challenged law is narrowly tailored to achieve a compelling governmental interest"[248] and that the law achieves this interest by the least restrictive means possible.[249] A termination statute that plainly states that the provision only applies to those fathers who have been found by clear and convincing evidence to have raped the mother, resulting in the conception of the child, is sufficiently narrowly tailored to withstand strict scrutiny because it explicitly states what rights are affected and the class of fathers it will impact.[250]

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244. Troxel v. Granville, 530 U.S. 57, 65 (2000).

245. *Id.*

246. *See id.* at 80 (Thomas, J., concurring) (explaining that while the plurality recognized that the right to rear children is a fundamental constitutional right, "curiously none of them articulates the appropriate standard of review"); Nicole Thieneman Maddox, *Silencing Students' Cell Phones Beyond the Schoolhouse Gate: Do Public Schools' Cell Phone Confiscation and Retention Policies Violate Parents' Due Process Rights?*, 41 J.L. & EDUC. 261, 267 (2012) ("Even after the Supreme Court's announcement of parents' rights to manage their children as fundamental, the question of the appropriate standard of review for a state's justified intrusion remains unclear.").

247. *See* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *After 20 Years*, 38 J.L. & EDUC. 83, 101–02 (2009) (explaining the split between circuit and district courts on whether to invoke strict scrutiny review, rational basis, or some intermediary level of scrutiny).

248. Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017).

249. *See* Mahan v. Nat'l Conservative Pol. Action Comm., 315 S.E.2d 829, 834 (Va. 1984) (stating that a statute implicating a fundamental constitutional right will survive strict scrutiny only if the compelling interest is achieved by "the least burdensome means available").

250. Kessler, *supra* note 63, at 226.

The state has an obvious and compelling interest in ensuring and protecting the best interests of the child[251] and ensuring the welfare of the victim mother.[252] From the standpoint of the child, there is a substantial likelihood of harm because of stigma, fear, anxiety, and isolation.[253] The same, and perhaps worse, holds true for the mother. Although many rape victims typically recover from the psychological effects of their rapes within a year if they are able to place distance between themself and the attack,[254] a victim mother that is forced to interact with her rapist in an ongoing custody relationship will likely experience ongoing psychological harms, including delays in recovery.[255] If the victim mother is continually suffering from PTSD,[256] depression,[257] or other negative mental health conditions[258] as a result of the ongoing legal connection to her rapist, she may not be able to effectively parent her child.[259] Exposing the child to such stress can lead to an increased risk

251. *See, e.g.*, Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 27 (1981) ("[T]he State has an urgent interest in the welfare of the child . . . .").

252. *See* Kessler, *supra* note 63, at 226.

253. *See* Andrew Solomon, *The Legitimate Children of Rape*, NEW YORKER (Aug. 29, 2012), https://perma.cc/U6C2-X9B3 (exploring the "challenging identity" of rape-conceived children and the impact on the mothers that choose to keep them); *see also* Beck et al., *supra* note 180, at 200 (explaining the potential negative physical and mental effects on a child that witnesses and endures continued contact with the mother's rapist).

254. Prewitt, *supra* note 75, at 833.

255. *See id.* (stating that similar to the delay in healing that women who prosecute rape experience, "it seems likely that women whose child-custody arrangements also would experience delays in healing").

256. *See* Kilpatrick, *supra* note 76 (noting that "31 percent of all rape victims developed PTSD in their lifetime").

257. *See* Heidi M. Zinzow et al., *Prevalence and Risk of Psychiatric Disorder as a Function of Variant Rape Histories*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 893, 900 (2011) (finding that rape survivors are 5.46 times more likely to experience a major depressive episode compared to non-sexual assault victims).

258. *See* Prewitt, *supra* note 75, at 833 (stating that the psychological effects of rape include "fears, phobias, anxieties, somatic symptoms, obsessions, depressive symptoms, and even suicidal ideation").

259. *See* Beck et al., *supra* note 180, at 200 (stating that a delayed recovery process in light of continued contact with a victim's attacker can impact a victim's parenting and cause a strained relationship between mother and child).

that the child will endure physical and mental harm,[260] which would conflict with the child's best interests.[261]

Finally, there are no less restrictive means that the state could consider that would sufficiently address the articulated harms.[262] The termination of the rapist father's parental rights is the only option available that protects the victim mother and child from having to litigate, and relitigate,[263] the child's custody and visitation. Termination will ensure that the rapist will never have legally sanctioned contact with the child and guarantee that a mother bearing a child conceived through rape who wishes to place the child for adoption can do so freely.

Statutes that terminate the parental rights of rapists can effectively address due process and judicial scrutiny concerns through careful drafting. Thus, Virginia can set aside any constitutional concerns and enact legislation that effectively addresses both sides of a potential dispute.

2. The Rape Survivor Child Custody Act

The federal government has already addressed this issue. In enacting the Rape Survivor Child Custody Act (RSCCA),[264] Congress recognized that men who father children through rape should be barred from having access to those children,[265] and, in so doing, acknowledged that the possibility of a custody battle with a rapist[266] could traumatize both the victim[267] and the

260. *See id.* ("If the child is exposed to their mother's stress and gains knowledge and gains knowledge of their role in the trauma, the physical and mental well-being of the child can also be negatively affected.").

261. *Supra* Part III.B.2.

262. *See* Ted L. Willis, *Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings, and Least Restrictive Means*, 53 OHIO ST. L.J. 211, 227 (1992) (stating that least restrictive means "forces the government to consider alternate, less burdensome methods to pursue its purposes in regulation").

263. *See supra* Part III.B.3.

264. 34 U.S.C. §§ 21301–21308.

265. *Id.* § 21302(1).

266. *Id.* § 21302(3).

267. *See id.* § 21302(8) ("A rapist pursuing parental or custody rights causes the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover.").

child.[268] In order to incentivize states to enact statutes that advance the goals that animate the RSCCA, the Act provides enhanced federal grant funding[269] for states that have legislation that allows the mothers of children conceived through rape to seek termination of their rapist's parental rights.[270] If Virginia adopts the clear and convincing evidence standard, it will be eligible for funding under the RSCCA.

In order to receive funding under the RSCCA, a state must demonstrate that its law imposes the clear and convincing evidence standard in cases that seek to terminate parental rights by establishing the requisite rape.[271] States with termination laws that rely on the clear and convincing evidence standard are eligible for award increases of up to ten percent of the average amount of funding received under the three most recent awards.[272] This increased funding will be awarded for a two-year period and can be granted up to four times.[273]

As with any other state that has satisfactory legislation, Virginia has the potential to receive considerable additional funds from Congress aimed at protecting the safety and wellbeing of women and children. For example, as of the 2020 fiscal year, the Commonwealth of Virginia could receive approximately $368,000 in additional funding under the STOP Violence Against Women Formula Grant Program[274] and

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268. *See id.* § 21302(9) ("These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.").

269. *See id.* § 10441 (detailing the funding provisions of the STOP Violence Against Women Program Formula Grant Program); § 12511 (detailing the funding provisions of the Sexual Assault Services Program).

270. *See id.* § 21303

> The Attorney General shall increase the amount provided to a State under the covered formula grants in accordance with this chapter if the State has in place a law that allows the mother of any child that was conceived through rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon *clear and convincing evidence* of rape. (emphasis added)

271. *Id.* § 21304.

272. *Id.* § 21305.

273. *Id.* § 21306.

274. *See Awards by State and Program*, DEP'T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, https://perma.cc/27VJ-CPNS (last updated Dec. 7, 2020). This approximation is based on an average of the following data provided by the Justice Department: Virginia received $3,686,105 in 2018, $3,691,882 in

$49,000 under Sexual Assault Services Formula Grant Program[275] if it adopted legislation regarding termination of the parental rights of rapists that included the clear and convincing evidence standard.[276] Thus, the adoption of the clear and convincing evidence standard would be a legislative win-win: it would fiscally benefit the state and protect rape victims who choose to give birth to the children born of their victimization.

C. The Clear and Convincing Evidence Standard in Termination Proceedings

Out of the states that rely on the clear and convincing evidence standard, Colorado and Michigan provide cogent models for Virginia to refer to when amending its existing law.[277]

1. Colorado

Colorado has adopted a provision that is specifically concerned with the termination of the legal parent-child relationship in cases in which there is an allegation that a child was conceived as a result of sexual assault, but no conviction has occurred.[278] The statute begins by declaring that the Colorado General Assembly enacted the provision to protect those victims of sexual assault that were unable to procure a conviction and

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2019, and $3,661,636 in 2020 in funding under the STOP Formula Grant Program. *Id.*

275. *See id.* This approximation is based on an average of the following information found in the data provided by the Justice Department: Virginia received $465,233 in 2018, $498,691 in 2019, and $505,182 in 2020 in funding under the Sexual Assault Services Formula Grant Program. *Id.*

276. 34 U.S.C. § 21303.

277. *See* VA. CODE ANN. § 20-124.1 (2021)

> "Person with legitimate interest" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. A party with a legitimate interest shall *not* include any person (i) whose parental rights have been terminated, either voluntarily or involuntarily . . . or (iii) who has been *convicted* of a violation of subsection A of § 18.2-61 . . . or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. (emphasis added)

278. COLO. REV. STAT. § 19-5-105.7 (2021).

to protect the child conceived as a result of that sexual assault.[279] The statute plainly states that the provision was created to protect the interests of the victim petitioning the court and the child in question, not to punish the perpetrator.[280]

Procedurally, under the Colorado scheme, a victim mother may file a petition in juvenile court to prevent future contact by the parent who allegedly committed the sexual assault that resulted in the conception of the child at issue and to terminate the parental rights of the parent who allegedly committed the assault.[281] The petition must allege the following: that the respondent father committed an act of sexual assault against the petitioner, that the respondent father has not been convicted of the sexual assault, that a child was conceived as a result of the sexual assault, and that termination of the parent-child legal relationship of the respondent father with the child is in the best interests of the child.[282] The respondent father is then personally served[283] and a guardian ad litem is appointed to represent the child's best interests.[284] Both parties have the right to be represented by counsel during proceedings[285] and the petitioner's and the child's whereabouts must be kept confidential.[286]

Under the Colorado framework, the court shall terminate the parent-child relationship of the respondent if the court finds by clear and convincing evidence each element of the petition. Termination of the legal parent-child relationship relieves the respondent father of all parental rights including parenting time, the right to make decisions concerning the child, the right of inheritance, and the right to notification of or objection to the adoption of the child.[287] Termination does not relieve the

279. *Id.* § 19-5-105.7(1).

280. *Id.*

281. *Id.* § 19-5-105.7(3).

282. *Id.* §§ 19-5-105.7(4)(a)–(d).

283. *See id.* § 19-5-105.7(5)(a). This section of the statute also states that during the service stage, the petitioner may request that she and the child be identified by initials in the summons in order to further privacy interests. *Id.*

284. *Id.* § 19-5-105.7(6).

285. *Id.*

286. *Id.* § 19-5-105.7(7).

287. *Id.* §§ 19-5-105.7(13)(a)(I)–(III).

respondent father of any child support obligations, though the petitioner can waive this obligation if she so chooses.[288]

2. Michigan

Michigan's scheme[289] provides that a victim mother may bring an action for termination of parental rights following a fact-finding hearing that proved by clear and convincing evidence that the child was conceived through nonconsensual sexual penetration.[290] Following the establishment of these facts by the required standard of proof, the Michigan scheme requires the court to undertake one of the following actions: revoke an acknowledgment of parentage for a previously acknowledged father, determine that a genetic father is not the child's father, set aside an order of filiation,[291] or make a determination of paternity regarding an alleged father and enter an order of revocation of paternity for that father.[292]

D. Proposed Termination of Parental Rights Statute for Virginia

Virginia's adoption of a clear and convincing evidence standard in a distinct termination statute would greatly alleviate the potential horror of a legally enforceable relationship with one's rapist. This Note provides a suggested statute that the Virginia General Assembly should consider and adopt.[293]

The proposed statute begins by stating the Virginia General Assembly's reasoning behind the adoption of the statute. This mirrors the Colorado statute's introduction[294] and provides a foundational explanation for the rationale behind the legislation. The proposed statute features a definition section and identifies where the victim must file her petition and the

288. *Id.* § 19-5-105.7(13)(b).

289. MICH. COMP. LAWS ANN. § 722.1445 (West 2021).

290. *Id.* § 722.1445(2).

291. *See id.* § 722.1433 (defining an order of filiation as "a judicial order establishing an affiliated father").

292. *Id.* §§ 722.1445(2)(a)–(d).

293. *See infra* Appendix I.

294. COLO. REV. STAT. § 19-5-105.7(1) (2021).

necessary elements that must be alleged. Further, the proposed statute outlines the procedures for proper notice and summons, the appointment of a guardian ad litem, and the process for genetic testing if requested. The proposed statute also states that both the petitioner and the respondent to have right to counsel and provides privacy protections for the petitioner if requested.

The proposed statute employs "shall" when dictating the court's action concerning termination when it has been proven by clear and convincing evidence that the father committed rape and the child was conceived as a result. This mirrors the language in both the Colorado and Michigan schemes.[295] As long as the evidence presented meets the standard, the judge must terminate the parental rights of the father as stated in the statute. The choice of language is critical: judicial discretion in such a proceeding can at times work against the victim mother,[296] and the removal of such discretion by employing the word "shall" promotes uniformity and strips the judge of any opportunity to rule in favor of the father when the evidence has established him as a rapist.[297]

Finally, the proposed statute articulates the parental rights that the respondent father will be deprived of if the child is proven to be a product of his rape by clear and convincing evidence. The proposed statute concludes with a note on the continuing obligation of child support, unless such support is waived by the petitioner.

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295. *See id.* § 19-5-105.7(11)(a) ("The court *shall* terminate the parent-child legal relationship of the respondent if the court finds [the elements of the petition] by clear and convincing evidence. . . . ") (emphasis added); MICH. COMP. LAWS ANN. § 722.1445(2) (West 2021) (explaining that "[i]f an action is brought by a mother who, after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration, the court *shall*" take one of the listed actions (emphasis added)).

296. *See* Prewitt, *supra* note 75, at 858 (stating that in states that reserve judicial discretion in termination proceedings that employ the clear and convincing evidence standard, "a raped woman must be willing to gamble that the trial judge will exercise discretion in her favor" and not in favor of her rapist).

297. *See id.* ("[A] raped woman may face the real possibility of a trial judge determining that a father's sexual misconduct has no bearing on his ability to effectively parent and using the best interest standard to counsel in favor of denying termination.").

Because this is a question of terminating parental rights, there will have to be a fact-finding hearing over whether or not the rape occurred. This hearing is not meant to punish the father or hold him criminally liable. This hearing exists for the purpose of establishing the fact that the rape happened, and that the child was conceived as a result.

The U.S. Supreme Court has articulated that the clear and convincing evidence standard is constitutional in termination proceedings.[298] Even though the legal system cannot be avoided, if the clear and convincing evidence standard is employed, then the victim mother need only deal with the legal system once, avoiding unnecessary relitigation and re-traumatization.

VII. CONCLUSION

Rape-related pregnancy is a horrific potential consequence[299] of a uniquely devastating crime.[300] A rape victim has endured an intentional, malicious, and violative attack,[301] and if she conceives a child as a result, she is faced with a difficult decision regarding the outcome of that conception. The decision to abort, place for adoption, or keep and raise a child conceived through rape should be left with the victim. The Commonwealth of Virginia frustrates that decision by requiring proof of conviction in the adoption[302] and basic custody contexts,[303] especially given the fact that rape is not often convicted.[304] These conviction requirements further violate her

298. Santosky v. Kramer, 455 U.S. 745, 769 (1982).

299. *See supra* notes 77–83 and accompanying text.

300. *See supra* Part II.A.

301. *Id.*

302. *See supra* note 208 and accompanying text.

303. *See* VA. CODE ANN. § 20-124.1 (2021)

> "Person with legitimate interest" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. A party with a legitimate interest shall *not* include any person . . . (iii) who has been *convicted* of a violation of subsection A of § 18.2-61 . . . or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. (emphasis added)

304. *See supra* notes 60–67 and accompanying text.

safety and security by depriving her of choice in a life-altering decision.

However, the adoption of the clear and convincing evidence standard in termination of parental rights proceedings enhances her capacity to make that difficult decision. This standard addresses the due process rights[305] of the father and survives judicial scrutiny,[306] while providing adequate protection for the victim mother and child.[307]

Termination of parental rights is a civil matter,[308] and thus should be subject to a civil standard of proof. To employ the criminal standard of proof of beyond a reasonable doubt[309] in a civil matter intended to protect those victims that become pregnant through rape renders that protection completely illegitimate. This is a complicated issue that has divided states,[310] but the Commonwealth of Virginia should strive to protect, not punish, victim mothers and the children born of rape, and can do so by enacting appropriate legislation that achieves that goal.

APPENDIX I

Termination of Parental Rights in a Case of an Allegation That a Child was Conceived as a Result of Rape.

(1) The General Assembly recognizes that certain victims of rape may conceive a child as a result of rape and choose to bear and raise the child. The General Assembly also recognizes that victims of rape who have elected to raise a child born as a result of that rape, as well as the child, may suffer serious emotional or physical harm if the perpetrator is granted parental rights over that child. The General Assembly hereby declares that the purpose of this statute is to protect such persons where it is determined that the petitioner is a victim of rape but in which no conviction occurred and to protect a child conceived as a

305. *See supra* Part VI.B.1.a.

306. *See supra* Part VI.B.1.b.

307. *See supra* Parts VI.B.1.a– VI.B.1.b.

308. *See supra* Part III.A.1.

309. *See supra* notes 61–63 and accompanying text.

310. *Compare supra* note 212 (identifying states that require proof of conviction to terminate parental rights) *with supra* note 225 (identifying states that do not require proof of conviction to terminate parental rights).

result of that rape. The General Assembly further declares that the purpose of this statute is to create a process to seek termination of the parental rights of the perpetrator and prevent future contact between the parties through use of protective orders. The General Assembly further declares that this section creates civil remedies aimed at protecting the interests of the petitioner and the child and is not created to punish the perpetrator.

(2) As used in this section:

a. "Parental rights" has the same meaning as defined in Section 20-124.1.[311]

b. "Petitioner" means a person who alleges that they are a victim of sexual assault and who files a petition for termination of the parental rights of the other parent as provided in this section.

c."Respondent" means a person against whom a petition for termination of parental rights is filed as provided in this section.

d. "Rape" has the same meaning as defined in Section 18.2-61.[312]

(3) The person who alleges that they are a victim of rape and who alleges that a child was conceived as a result of that rape in which a conviction did not occur may file a petition at any time in the Juvenile and Domestic Relations District Court to prevent future contact with the parent who allegedly committed the rape and to terminate the parental rights of the parent who allegedly committed the rape.

(4) The verified petition filed under this section must allege that:

a. The respondent committed an act of rape against the petitioner;

b. The respondent has not been convicted of rape;

c. A child was conceived as a result of the act of rape as described under paragraph (a) of this subsection (4); and

d. Termination of the parental rights of the respondent is in the best interests of the child.

(5) After a petition has been filed pursuant to this section, the court shall issue a summons that briefly recites the

311. *See* VA. CODE ANN. § 20-124.1 (2021) (defining legal and physical custody).

312. *See id.* § 18.2-61 (defining rape).

substance of the petition and contains a statement that the purpose of the proceeding is to determine whether to terminate the parental rights of the respondent.

(6) The petitioner shall have the respondent personally served with a copy of the summons or notified through substitute service pursuant to Section 8.01-296,[313] unless the respondent appears voluntarily or waives service pursuant to Section 8.01-286.[314] Upon request, the court shall protect the whereabouts of the petitioner and the child and must identify the petitioner and the child in the summons by initials.

(7) After a petition has been filed, the court shall appoint a guardian ad litem, who must be an attorney, to represent the child's best interests in the proceeding. If at any time the court determines that the guardian ad litem is no longer necessary, the court may discharge the guardian ad litem.

(8) The petitioner and the respondent have a right to be represented by legal counsel in proceedings conducted under this section.

(9) In any proceeding held under this section, the court may grant protective measures as requested by the petitioner so long as these measures do not violate due process. The petitioner's and the child's whereabouts must be kept confidential.

(10) A respondent may admit parentage or may request genetic testing to confirm paternity. The results of genetic testing must conform to the admissibility provisions of Section 20-49.3.[315]

(11) The court shall terminate the parental rights of the respondent if the court finds by clear and convincing evidence that:

a. A rape against the petitioner occurred;

b. The rape was perpetrated by the respondent;

c. A child was conceived as a result of that act of rape as evidenced by the respondent admitting parentage or genetic testing establishing the paternity; and

d. Termination of the parental rights of the respondent is in the best interests of the child. The court shall not presume

313. *See id.* § 8.01-296(2) (stating the alternative means of service upon natural persons).

314. *See id.* § 8.01-286 (outlining how a respondent may waive service).

315. *See id.* § 20-493 (outlining the procedures required when using genetic tests to determine parentage).

that having only one remaining parent is contrary to the child's best interests.

(12) A respondent whose parental rights are terminated in accordance with this section has:

a. No right to allocation of parental responsibilities, including visitation and decision-making responsibilities for the child, which includes medical treatment, religious, educational, or any other decisions on behalf of the child;

b. No right of inheritance from the child; and

c. No right to notification of, or standing to object to, the adoption of the child.

Termination of parental rights under subsection (11) of this section does not relieve the respondent of any obligation to pay child support or birth-related costs unless waived by the petitioner. In cases where child support obligations are not waived, the court, as informed by the wishes of the petitioner, shall determine if entering an order to pay child support is in the best interests of the child. If the court orders the respondent to pay child support, the court shall order the payments to be made through the Department of Social Security to avoid the need for any contact between the parties and to protect the whereabouts and privacy of the petitioner and the child.