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THE WAGES OF GENETIC ENTITLEMENT: THE GOOD, THE BAD, AND THE UGLY IN THE RAPE SURVIVOR CHILD CUSTODY ACT

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ABSTRACT—This Essay analyzes flaws and assumptions in the recently enacted Rape Survivor Child Custody Act. The RSCCA offers a window into the problems with defining parenthood in terms of genes instead of caretaking relationships, which is what led to the problem of rapists being able to claim parental rights in the first place. Rather than address that underlying defect in family law, the statute attempts a solution that might work if all rapists were strangers, all rapists were men, and all rape victims were women, but glosses over complicated problems of violence and coercion in relationships. Despite this failure to grapple with hard cases, the RSCCA helps us see how the biological processes of reproduction are necessarily intertwined with the definition of legal parenthood.

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INTRODUCTION

Should rapists have parental rights?

As society and law have increasingly equated genetic parenthood with parental rights, this question has become surprisingly difficult, so difficult that it eventually merited a response from Congress. That response—the Rape Survivor Child Custody Act (RSCCA)[1]—has serious flaws but sheds revealing light on what women's and men's different roles in reproduction should mean for law.

The U.S. Supreme Court has held that constitutionally protected parental rights to a child do not spring solely from genetic parenthood—"[t]hey require relationships more enduring."[2] Taking the birth mother as its archetypal parent, the Court saw in her two key elements of legal parenthood: genetic parenthood, yes, but also physical care and nurturance. The pregnant woman provides that care through the process of gestation. Since men cannot do the same, the Court accommodated them by fashioning a different test: genetic fatherhood plus caretaking of the sort men can perform. "Genetics plus relationship" is thus the test for when men acquire constitutionally protected parental rights.[3]

Despite the Supreme Court's inclusion of caretaking as part of the test, every state gives men some form of genetic entitlement to their offspring, even when "relationships more enduring" do not exist.[4] That is, in a broad range of circumstances, a man who is a genetic father, but has no other connection to the child, can claim parental rights.

Perhaps the most extreme manifestation of this regime of genetic entitlement is the ability of male rapists to obtain parental rights to the

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[1] 34 U.S.C.A. §§ 21301–08 (West 2017) (formerly cited as 42 U.S.C.A. §§ 14043h–1403h-7).

[2] Lehr v. Robertson, 463 U.S. 248, 260 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

[3] For a more detailed explication of the development of this test, see Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 433 (2007).

[4] I discuss this disconnect between the Supreme Court's definition of constitutional parenthood and the broad substantive rights afforded to genetic fathers by the states in Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 485–90 (2017). States allow a man to petition for paternity "and will grant the petition under most circumstances so long as genetic fatherhood is shown." *Id.* at 487; *see* Paula Roberts, *Truth and Consequences: Part I, Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35 (2003) (noting that paternity proceedings driven by genetic testing are required for receipt of certain federal funds all states have enacted laws to comply with that requirement).

children that result from their crimes. In one of the more egregious cases, a Massachusetts judge *ordered* a convicted rapist to establish paternity, apparently in the belief that suing his victim for parental rights would be a good way for him to take responsibility for his crime.[5] The ability to sue for paternity can also serve as a tool for rapists to continue controlling their victims, such as by offering to drop the paternity suit in exchange for the victim dropping her criminal complaint.[6] A successful paternity suit lays the groundwork for seeking custody or visitation, as well as the right to participate in making important decisions on behalf of the child.[7]

Legal scholarship on this problem has so far been limited to student papers, including one by Shauna Prewitt, an activist who championed legislative restrictions on rapists' rights after her own experience of being sued by her rapist for visitation rights to her child.[8] Responding to this activism, Congress enacted the Rape Survivor Child Custody Act, which offers modest grants to states that have 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.[9]

Although a few states had such laws before the RSCCA was enacted, others required a criminal conviction of rape to trigger termination of parental rights, and most had only generic rules for parental "unfitness."[10] The RSCCA encourages all states to make conception-by-rape an explicit, statutory basis for termination of a father's parental rights, under the clear-and-convincing standard rather than proof beyond a reasonable doubt.

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[5] Liz Fields, *These Women Became Pregnant From Rape, Then Fought Their Attackers for Custody*, VICE NEWS (Dec. 1, 2014, 2:35 PM), https://news.vice.com/article/these-women-became-pregnant-from-rape-then-fought-their-attackers-for-custody [https://perma.cc/KM24-ZPHA].

[6] *See* 34 U.S.C.A, § 21302 (West 2017) (formerly cited as 42 U.S.C.A. § 14043h-1) (congressional findings stating this reason for enacting the RSCCA).

[7] Santosky v. Kramer, 455 U.S. 745, 753 (1982) (describing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child").

[8] Shauna R. Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827 (2010); *see also* Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275 (2012); Rachael Kessler, *Due Process and Legislation Designed to Restrict the Rights of Rapist Fathers*, 10 NW. J.L. & SOC. POL'Y 199 (2015); Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515 (2014); Margot E. H. Stevens, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865 (2014); Katherine E. Wendt, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 MICH. ST. L. REV. 1763 (2013).

[9] 34 U.S.C.A. § 21303 (West 2017).

[10] Prewitt, *supra* note 8, at 853–59.

The RSCCA offers a window into the problems with defining parenthood in terms of genes instead of caretaking relationships. As I have argued elsewhere, the genetic definition of parenthood is patriarchal: it degrades female-specific experiences of parenthood and grounds parental rights in property-like entitlements rather than in actual, lived relationships with children.[11] Rejecting it entails recognizing that women and men are differently situated with respect to their newborn offspring, a proposition that the Supreme Court has acknowledged as self-evident but which many feminists resist for fear of reinforcing stereotypes.[12] To those feminists, I offer the RSCCA as a test case for whether the parental rights that attach to giving birth to a child ought to differ from the rights that attach to contributing the sperm. The gaps and implicit assumptions of the RSCCA show that sex differences matter in the definition of parenthood.

This Essay discusses the good, the bad, and the ugly of the RSCCA. Altering the usual order, it starts with the bad, which is that the RSCCA accepts the premise of genetic entitlement to children. Then, the good: Despite its failure to grapple with the underlying problem of genetic entitlement, the RSCCA helps us see how the biological processes of reproduction are necessarily intertwined with the definition of legal parenthood. Congress's treatment of the relationship between rape and parenthood provides a starting point for reassessing the genetic entitlement regime, and, hopefully, moving to a different regime based on caretaking relationships. Finally, the Essay turns to an ugly reality that the RSCCA elides: even in a regime in which rights are based on caretaking rather than on genetic entitlement, sometimes rapists have—and should have—parental rights.

I. THE BAD: ACCEPTING THE PREMISE OF GENETIC ENTITLEMENT

The RSCCA responds to a problem that should not exist in the first place. The Supreme Court has rejected the claim that genetic paternity alone gives rise to constitutionally protected parental rights.[13] States have nonetheless created regimes of genetic entitlement, which open the door to rapists' paternity claims. The RSCCA, unfortunately, implicitly accepts this regime by treating genetic fathers as presumptively entitled to parental rights.[14]

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[11] *See, e.g.*, Jennifer S. Hendricks, *Genetic Essentialism in Family Law*, 26 HEALTH MATRIX 109 (2016) (discussing other ways the biological facts of reproduction could be interpreted through law and culture).

[12] *See, e.g.*, Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U.L. REV. 645, 690–92 (2014) (discussing feminist concerns about the "new maternalism" that constructs "motherhood as a source of pride and moral authority for women") (quoting Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 233 (2012)).

[13] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983).

[14] Karen Czapanskiy discusses this problem in the context of analyzing a failed mini-RSCCA in Maryland. Karen Czapanskiy, Stanley v. Illinois*: Terminating a Rapist's Paternal 'Rights' in Maryland*, CONCURRING OPINIONS (June 2, 2017), https://concurringopinions.com/archives/2017/06/

Consider how the RSCCA applies to cases of "real rape," or as we might call it today, "legitimate rape": the stranger-with-a-knife scenario.[15] In this scenario, the pregnant victim who decides to bear and keep the baby will have sole custody from birth.[16] The rapist will have no opportunity to form a relationship with the child; therefore, under Supreme Court precedent, he will have no constitutional parental rights. Rather than reaffirming the Supreme Court's test for fathers' rights, the RSCCA assumes that, absent special legislation, genes alone entitle the rapist to sue for paternity. Although the RSCCA seeks to provide the mother with a defense to that paternity suit, it confirms and thereby strengthens the background assumption of genetic entitlement.

Only because the states have adopted a shallow and patriarchal theory of parental "equality" based on genes is there even a question of the rapist being able to claim parental rights. These are the wages of genetic entitlement: the clearest problem with the RSCCA is that it takes genetic entitlement as a given. Rather than take advantage of Supreme Court precedent, which would prevent a rapist from gaining parental rights due to the absence of a relationship with the child, the RSCCA requires a woman to prove by clear and convincing evidence that her child was conceived from rape, all to obtain the custody to which she should be constitutionally entitled.

II. THE GOOD: RECOGNIZING MOTHERS' RIGHTS

There is nonetheless one type of rapist who nearly always has constitutionally protected parental rights. Indeed, even under an RSCCA regime, there will still be one way for a rapist to ensure parental rights to a child conceived through rape: by giving birth to the child.

The RSCCA is conspicuously sex-specific. It protects only women and protects them only from paternity claims by men.[17] Yet women sometimes commit rape, of both the statutory and the forcible kind, and

stanley-v-illinois-terminating-a-rapists-paternal-rights-in-maryland.html [https://perma.cc/BVT2-G7JS].

[15] The phrase "real rape" is sarcastic and comes from SUSAN ESTRICH, REAL RAPE (1987), in which Estrich argues that this archetypal form of rape is used to trivialize and discount the experiences of marital rape, date rape, and other non-archetypal rapes. "Legitimate rape" became famous after it was used (unsarcastically) by Representative Todd Akin to claim that women could not become pregnant through "legitimate rape." Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES (Aug. 20, 2012), http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html [https://perma.cc/VD98-NJN4].

[16] If she is married, state law may automatically presume her spouse to be the child's other legal parent. If she is single, she will be the only legal parent until there is a successful paternity suit, an adoption, or a Voluntary Acknowledgement of Paternity signed by her and another person.

[17] 34 U.S.C.A. § 21303 (West 2017).

they sometimes become pregnant as a result. If the point of the RSCCA were that all rapists are unfit to parent, it would apply to mothers as well as fathers. And if the point of the RSCCA were that all rape victims should be able to keep and rear their resulting children without interference from their rapists, it would apply to fathers as well as mothers.

What, then, is the point? The sex-specificity of the RSCCA is clearly related to its focus on protecting the woman, rather than on serving the child's best interests. While I will argue below that it is wrong to ignore best interests when a relationship exists between the father and the child, when no such relationship exists, the mother's rights are both paramount and sorely neglected in the current parenthood regimes in the states. The focus on the mother's rights is a feature, not a bug of the RSCCA. It recognizes that awarding parental rights to a genetic father *inherently diminishes* the preexisting parental rights of the woman who gave birth to the child. As the Supreme Court recognized in *Troxel v. Granville*,[18] a single parent has the same right as married parents to avoid having the state impose an unwelcome adult on her family.

Male and female rapists' parental rights are, and should be, asymmetric because biological parenthood is asymmetric.[19] Consider, as illustration, the difference between the RSCCA and the law's treatment of male victims who become fathers by rape. Debate over the latter comes up mostly in the context of statutory rape and focuses exclusively on whether the male victim should be required to pay child support.[20] In this literature, I cannot find a single commenter proposing that the father should instead receive automatic custody of the child. On the contrary, female rapists routinely retain custody of the resulting children.[21]

Imagine if the RSCCA took this approach, reassuring a pregnant rape victim that her rapist will take custody of the child immediately after birth, and that she will not have to pay child support. That, of course, is absurd. Why? One could argue that the asymmetry here is purely the result of stereotypes. We essentialize women as mothers, so when we see the female

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[18] 530 U.S. 57 (2000).

[19] *See* Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting From Their Victimization?* 36 GA. L. REV. 411, 443 (2002) ("The law treats mothers and fathers differently, not because of intentional discrimination, but rather due to the reality of sex and gender differences that cannot be eradicated by gender-neutral laws.").

[20] *See, e.g.*, *id.*; Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407 (2012).

[21] *See* Jones, *supra* note 19, at 435 ("It is unlikely that a female offender will lose custody or have to prove that she is a fit parent of any child resulting from statutory rape . . . . Unlike male offenders, the age of the mother does not alert authorities that this might be a case of statutory rape, and their role in the birth process means the state must act to remove physical custody from the mother."). Jones describes cases in which women gave birth from statutory rape and received welfare benefits; the states sought reimbursement of the welfare payments from the fathers but apparently took no action challenging the mothers' custody. Higdon, *supra* note 20, at 409–10 describes a similar scenario involving an adult man who alleged he was raped while unconscious.

teacher who became pregnant by her fourteen-year-old pupil, her motherness trumps her criminality. Those stereotypes almost certainly explain, at least in part, why courts have traditionally been willing to impose child support obligations on male victims of statutory rape: courts did not see those boys as victims.[22]

But in a world of perfect sex equality, would we have to treat male and female victims and perpetrators of rape identically when it comes to custody of the resulting children? If so, which rule should apply? Should female rape victims hand their babies over to their rapists, or should male victims be expected to take custody by default? I submit that either option is absurd because the two situations remain crucially different. Regardless of who raped whom, the mother's parental relationship *exists* at the time of birth in a way that a man's does not, at least if his only involvement was the early transmission of genetic material. Imposing a rapist father on his victim and child is a clear wrong in a way that allowing a female rapist to keep her child is not.

III. THE UGLY: SOMETIMES, RAPISTS (SHOULD) HAVE PARENTAL RIGHTS

The flip side of distinguishing between the mother's existing relationship with the child and the father's mere contribution of genes is that we must also distinguish between the father who has only contributed genes and the father who has, in fact, established a caretaking relationship with the child. Unfortunately, the RSCCA ignores the possibility of such a relationship, implicitly assuming the "real rape" scenario. The statute fails to grapple with the complications that arise when the father is a rapist but not a stranger.[23]

Consider a non-"real rape" scenario: An opposite-sex couple has an ongoing sexual relationship. Sometimes the mother consents to sex and sometimes she does not. They have a child, whom they proceed to raise

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[22] Jones, *supra* note 19, at 412 ("[S]tatutory rape laws are being enforced according to cultural stereotypes of women as sexual victims and men as sexual aggressors.").

[23] In its findings, Congress declared:

> (8) A rapist pursuing parental or custody rights forces the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover.
>
> (9) These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.
>
> (10) Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.

34 U.S.C.A. § 21302 (West 2017). All of these concerns seem to contemplate a dispute over a recently born child who has been in the sole custody of her mother. Nowhere does Congress appear to expressly contemplate allegations of rape within an ongoing family.

together. Years later, they separate and a custody fight ensues. The judge finds, by clear and convincing evidence, that the child was conceived in an instance of rape and terminates the father's rights.

Is that a good outcome? Is it a constitutional one? The father in this scenario has a constitutionally protected relationship with the child. Traditionally, that relationship can only be terminated if clear and convincing evidence shows him to be an unfit parent.[24] While the congressional findings in the RSCCA argue that the law is constitutional because it adopts the clear-and-convincing standard,[25] that argument ignores the critical question: clear and convincing evidence *of what*? A state cannot just declare that anyone who jaywalks must lose parental rights, as long as jaywalking is shown by clear and convincing evidence.

Of course, having committed rape is more relevant to parental fitness than jaywalking.[26] Perhaps the RSCCA takes the rape to be conclusive evidence of unfitness. If so, the Act would be a significant expansion of the grounds for automatic or near-automatic termination of parental rights. In defining unfitness, termination law focuses on the parent's conduct toward his own children.[27] Courts have overwhelmingly held that the bare fact of having committed a crime is not enough to find unfitness; a court must always inquire into the particular facts of the incident.[28] Under this approach, courts have declined to find unfit a father who murdered his children's mother, a father who engaged in lewd and lascivious conduct with a minor not his child, and a mother who sexually tortured the father's ex-wife.[29] In a case terminating the rights of a father who stabbed the mother, another court nonetheless emphasized that termination was not based on the mere fact of that crime's presence on the rap sheet, because "the murder of one parent by the other is not necessarily a felony showing the felonious parent to be unfit to have custody and control."[30]

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[24] Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982) (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978)).

[25] 34 U.S.C.A. § 21302 (West 2017) (citing Santosky v. Kramer, 455 U.S. 745 (1982)).

[26] My point in using jaywalking as my example is not to minimize the relevance of rape but to illustrate the inadequacy of Congress's legal reasoning on this point.

It is also notable that the RSCCA fails to provide a definition of "rape." Anecdotally, based on Colorado's version of the RSCCA, it appears that a large portion of the cases in which the rule is invoked are cases of statutory rape. It is not clear that the bare fact of having committed statutory rape makes a man an unfit parent, or makes termination of any existing parental relationship in the best interests of the child.

[27] *See* Jana Micek, *Termination of Parental Rights Based on a Felony Conviction*, 1 J. CONTEMP. LEGAL ISSUES 565, 566–68 (2000) (collecting cases); Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737 (2000) (arguing against making loss of child custody a collateral consequence of conviction when the underlying crime does not indicate a threat to the child).

[28] *See* Micek, *supra* note 27, at 566–68.

[29] *Id.*

[30] *In re* Arthur C., 176 Cal. App. 3d 442, 446 (Cal. Ct. App. 1985); Micek, *supra* note 27, at 567.

In fact, the RSCCA does not itself adopt the view that committing rape is per se proof of parental unfitness, or even that rape of the mother always warrants termination of the father's rights. Rather, under the RSCCA, the only rape that matters is a rape by the father that led to the conception of the child.[31] Rapes by the mother do not matter. Rapes of other people by the father do not matter. Other rapes of the mother by the father do not matter. Rape that led to the conception of one child does not matter as to custody of other children. A woman who proves that she was regularly raped by her husband or boyfriend but cannot prove the instance of conception, for each child, has no recourse under the statute.

The RSCCA's failure to grapple with children conceived within ongoing relationships reveals its implicit adoption of the "real rape" prototype, neglecting complexity in favor of a quick fix for the easiest cases. By ignoring cases in which a man has a long-standing relationship with his child conceived through rape, the RSCCA encourages states to enact laws that will be unconstitutional in many potential applications.

Drafters of the RSCCA may have been aware that the Act was pushing states onto this constitutional thin ice. The original version of the bill required that termination of the father's parental rights be mandatory, once rape is shown by clear and convincing evidence.[32] In the enacted version, "the court *shall*" was changed to "the court *is authorized*," which leaves some unspecified range for judicial discretion.[33] This lack of specificity created confusion in the implementation of the statute: could a court, having found that rape led to conception, consider the child's best interests in deciding whether to terminate the father's rights? The Department of Justice initially took the informal position that the child's best interests could not be considered once rape was shown.[34] A few weeks later, the Department informally backtracked, stating that consideration of the child's best interests "may" be allowed under the RSCCA.[35]

Mandatory termination, as in the earlier draft of the RSCCA, is favored by advocates like Prewitt, who has argued that mandatory termination, with no discretion to consider the child's best interests, is the

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[31] 34 U.S.C.A. § 21303 (West 2017).

[32] *Compare* 34 U.S.C.A. § 21303 (West 2017) (formerly cited as 42 U.S.C.A. § 1403h-2) ("the court is authorized to grant") *with* H.R. 1257, 114th Cong. § 3 (2015) ("the court shall grant").

[33] 34 U.S.C.A. § 21303 (West 2017).

[34] Email from U.S. Department of Justice to state administrators, "Rape Survivor Child Custody Act," (Feb. 18, 2016) (on file with the author).

[35] Office on Violence Against Women, U.S. Department of Justice, PowerPoint: Implementation of the Rape Survivor Child Custody Act of 2015 (Mar. 30, 2016) (on file with the author).

only acceptable rule.[36] In cases where the father and child have a longstanding relationship, this disregard for the child's best interests is in some tension with the pro-life tenor of Prewitt's advocacy,[37] but ruling out a best-interests analysis makes sense in a "real rape" scenario. In that scenario, the rapist does not (yet) have a parental relationship with the child, but judges may believe that an involved genetic father is always in the child's best interests.[38] The statutory mandate serves as a backstop against that attitude. But when an established relationship exists, the father's constitutional rights demand clear and convincing evidence not merely of an enumerated crime but of unfitness, and the child's moral rights demand consideration of her best interests.

CONCLUSION

In summary, the state laws encouraged by the RSCCA are either unnecessary or unconstitutional: Where the genetic father has not yet established a parental relationship with the child, there is no need to terminate what does not exist; rather than reinforce the genetic presumption, Congress should encourage states to use the caretaking prong of the Supreme Court's test for fathers' rights. And where a caretaking relationship already exists, it should be respected according to its merits. Despite those flaws, however, there is good news in the RSCCA's recognition that biological mothers and biological fathers are differently situated in ways that have legitimate consequences for legal determinations about parental rights.

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[36] Prewitt, *supra* note 8, at 854–58 (describing existing protections for rape-victim mothers as "illusory" if they require conviction for the rape or are subject to a judicial best-interests-of-the-child determination).

[37] Prewitt says that rape victims who have abortions are "demonstrat[ing] their disdain for their unborn children." *Id.* at 853.

[38] Judges (and others) may also be skeptical of a woman's rape allegations when she decides to keep the baby. Prewitt argues that society expects rape victims to view their pregnancies as continuations of the rape and judges them harshly if they fail to resort to emergency contraception, abortion, or adoption. *Id.* Similarly, Rebecca Kiesling, a Michigan family lawyer, told *Vice Magazine* that she has been involved in several cases in which rape victims lost partial custody to their rapists, an outcome she attributes to the assumption that "a 'real' rape victim would have had an abortion." Fields, *supra* note 5.