The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required

by
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You're kidding, right?"

No, it's true, despite the incredulous reaction of nearly every non-lawyer to whom I've mentioned the topic of this article. It's true that a man who rapes a woman or otherwise coerces intercourse usually is the legal father of the child.[1] The question for this article is whether the Constitution requires that result or whether states can constitutionally deny the man legal parenthood status.[2]

My non-lawyer friends, it seems to me, are suggesting that reconsidering the constitutionality of paternal entitlement is timely. My lawyer friends, however, are accustomed to associating genetics with paternity. They may also be more protective of due process and therefore reluctant to deny a person a legal entitlement without robust procedures. My argument addresses both

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1 I use gendered terms in this article because the subject is pregnancy under circumstances where a person who can become pregnant has vaginal intercourse with a person who has sperm. What is relevant, then, is what the bodies of the two people can or cannot do in terms of producing a child. Most of the time, one is gendered female and one is gendered male, although that is not universal and not mandatory. By using gendered terms, I am not trying to suggest anything about the sexual or reproductive conduct or preferences of people who do not identify as men or women in terms of gender or sexuality.

2 Coerced sexual intercourse includes criminal acts such as rape, sexual assault, and statutory rape. It also includes intercourse in circumstances that do not give rise to criminal liability, but which occurred without the woman's voluntary participation, as discussed *infra* in text at notes 18-25.

claims. First, sourcing paternity in genetics is not a constitutional requirement. Second, due process is not denied when the man's claim to fatherhood is protected by minimal procedures. Finally, I argue that women are denied equal protection when more than minimal due process is provided to protect a claim of fatherhood after rape or coercive intercourse.

My article considers two scenarios: one easy and one hard. The easy case is "rape": the man is a stranger to the woman before the intercourse, he is convicted of rape or other sexual offense, and he never develops a relationship with the child. All but a few states recognize paternity even in these circumstances, although most empower the woman to seek termination or some limitation on parental rights on the basis of the rape or on proof at a high standard of conduct constituting rape.[3] The hard one is the much more common situation where the child's birth results from the kind of sexual and reproductive coercion that characterizes many abusive intimate relationships and where convictions are even less common than in stranger rapes. In both scenarios, treating the genetic father as having the same parental rights as the birth mother constrains the birth mother's reproductive and parental autonomy. Rather than enjoying the freedom to decide when to have children and with whom, if anyone, to share parenthood, she is subject to continuing control by a man who is willing to override her decision whenever it suits his will.

Enslaved people as well as first-generation feminists understood reproductive and parental autonomy as essential to women's citizenship. Enslaved women were subject to the sexual demands not only of men who enslaved them but of any other man allowed by the enslaver to have sexual access.[4] A child born to an enslaved woman shared her legal status as enslaved.[5] She

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[3] *See* National Conference of State Legislators, *Parental Rights and Sexual Assault* (Mar. 9, 2020), https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx.

[4] *See* Rachel A. Feinstein, When Rape Was Legal: The Untold History of Sexual Violence During Slavery (2018); Annette Gordon-Reed, The Hemingses of Monticello: An American Family (2008)(explaining the complexities of family and sexual experiences involving enslaved black women and enslaving white men in the United States).

[5] *See* Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values 375, 338-49 (1997); Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 Yale

had no control over the child's care or upbringing and the enslaver could separate them at will. As enslaved people freed themselves before and during the Civil War, they demanded the right to control the fates of their children as essential to their own freedom.[6] First-generation feminists understood that the law gave control over their reproduction and parental autonomy to their husbands through a trio of provisions. First, their husbands could rape them without fear of criminal consequences.[7] Second, divorce was only available in limited circumstances. Third, married women were not legal guardians of their children during marriage and could be deprived of custody upon divorce. Their lack of control over reproduction and parenthood, feminists argued, meant they could not control other key aspects of their lives, including participating in public life.

In 2022, men enjoy less legal control over the reproductive autonomy of women in their lives, although they have more control over a woman's parental autonomy in many situations. Here is a brief list of changes: slavery was abolished; the scope of the marital rape exemption has been limited;[8] grounds for divorce have expanded; men and women share parental rights over their children; most women have access to birth control and some to abortion; husbands (at least at the moment) cannot interfere with a wife's decision to use birth control or have an abortion; civil protection orders are available against abusers within families; and women have the right to vote. At the same time, single women, who gained parental rights over their children only in the nineteenth century,[9] have seen those rights erode as the parental rights of single fathers have expanded to be equal to those of the

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J.L. & Feminism 1, 17-20 (2007); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1437-40 (1991) Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 Am. U. J. Gender & L. 1, 8 (1993).

6 *See* Cooper Davis, *supra* note 5, at 354-58.

7 Michael D.A. Freeman, *But If You Can't Rape Your Wife, Whom Can You Rape: The Marital Rape Exemption Reexamined*, 15 Fam. L.Q. 1, 8-9, 16 (1981).

8 *Id.*

9 Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1984).

single mother.[10] What has not changed in all cases is paternity: regardless of the circumstances of conception, men who claim parenthood through the marital presumption, acknowledgement of parenthood, genetic connection, or relationship with the child are usually recognized as the child's father and, for most of the last century, share with the mother all of the rights and responsibilities of parenthood.[11]

In this article, I argue that recognizing paternity in men who rape or otherwise coerce intercourse with a woman reinforces a man's power over the woman's reproductive autonomy with concomitant restrictions on the woman's exercise of her rights as a citizen. Honoring rather than sanctioning the man's behavior by not denying him paternal recognition may encourage further coercive behavior. When rape or coercive intercourse results in a pregnancy that is not terminated by abortion, the woman loses control over whether, when, and with whom she wants a child. If the man's paternity is recognized regardless of the circumstances of conception, the woman's autonomy is restricted even more because she usually can be required to share with him all the usual rights of guardianship. That means that the mother can be required to share physical and legal custody and to facilitate the child's relationship with a man who impregnated her just because he wanted to, and regardless of her views. She may even lose custody to him.[12] She may be unable to place the child for adoption without his consent.[13] If she seeks to terminate the man's paternal rights, a judge may conclude he has raped her but still deny her termination petition on the grounds that it is in the best interests of the child not to terminate the man's rights.[14] If the mother has little or no income, she may be required to help the state establish the man's paternity as a condition of eligibility for health insurance and cash assistance, among other public benefits.[15] If the woman and child are connected to the man by mar-

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10 *See* Marygold S. Melli, *The Changing Legal Status of the Single Parent*, 35 Fam. Relations 31 (1986); *see also* Ira Mark Ellman, Paul M. Kurtz, Lois A. Weithorn, Brian H. Bix, Karen Czapanskiy & Maxine Eichner, Family Law: Cases, Text, Problems 623-25 (5th ed. 2010).

11 *Id*.

12 *See infra* notes 56-58 and 111.

13 *See infra* notes 55 and 74.

14 *See infra* note 142.

15 *See infra* notes 114-119, 149-150.

riage, genetic tie, an acknowledgement of parenthood, or the man's relationship with the child, the man can demonstrate paternal entitlement by a preponderance of the evidence, and the circumstances of conception are irrelevant.[16] The woman can terminate his paternal rights on the basis of the circumstances of the conception only if she can demonstrate rape or sexual offense by clear and convincing evidence, or, in some states, only if he has been convicted of a sexual offense.[17]

My argument attacks the rarely examined assumption that states are constitutionally required to recognize a man's claim of paternity and to provide his claim with robust due process protection regardless of the circumstances of conception. I explore two arguments. First, I argue that states can constitutionally deny paternal recognition when the coerced intercourse constitutes a sexual offense. Second, regardless of whether the conduct was criminal or a conviction was obtained, the Constitution requires only minimal due process to determine whether the man is entitled to be recognized as a parent over the mother's objection. Minimal means that, unless the man has established a relationship with the child early in the child's life or has come forward to claim a relationship, notice is not required in any action involving the custody or adoption of the child. If the man sues to establish parenthood or assert parental rights, the woman is entitled to defeat his claim by showing reasonable grounds to believe that the child's birth was the result of a rape. Entitlement to paternity then turns on whether the man establishes, by a preponderance of the evidence, that the intercourse was not a rape or otherwise coerced.

Part II of the article examines what is known about rape-related or coerced intercourse and the experience of being the mother of the resulting child. Part III considers the common but highly questionable claims that states are subject to a constitutional mandate to recognize paternity in a man regardless of the circumstances of conception and that the man's claim of paternity is entitled to robust due process protections. Part IV concludes with the argument that women are denied equal protection when states impose a higher procedural burden on

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16 *See* UNIF. PARENTAGE ACT §§ 607-614.

17 *See* UNIF. PARENTAGE ACT § 614; *infra* text at notes 74-75.

them to preclude the paternity claim of a man who coerced intercourse than on the man who seeks to claim paternity.

II. Motherhood and Coerced Intercourse

Women who experience pregnancy after coercive intercourse may be described as "raped." The term is limiting and inappropriate when the question is whether a man has a constitutional right to paternity of a child conceived by means of coercion. Better terms are "rape-related" or "coerced intercourse."

Using the word "rape" creates a misleading and distracting framing of the paternity question as if it were an issue of the criminal law. The crime of rape comes with a definition that includes some types of coercive conduct and excludes others. As a crime, rape comes with a set of procedural protections for the accused. Recognition of a man as a father is a civil issue, however, and civil liability can be broader as well as easier to prove. Further, identifying the conduct as rape rhetorically appears to limit the category of women who experience coerced pregnancy to those who have experienced a specific criminal act. Women who experience coerced pregnancy may have been raped in the technical sense, but they also experience behaviors sanctioned civilly but which criminal law does not yet reach.

Rather than identify the experience as rape, therefore, I use the term "coercive intercourse." Coercive intercourse includes conduct that is subject to criminal sanctions, such as rape, sexual assault, and statutory rape. It also covers conduct that may be criminally sanctioned as a formal matter but which is punished infrequently. Further, coercive intercourse includes conduct that is not subject to a criminal sanction, such as some kinds of marital rape, sexual coercion, and reproductive coercion.[18] Coercive intercourse is distinguished from other forms of intercourse by the power relationship between the parties: the person imposing the sexual contact can impose sexual contact on a partner who does not welcome the contact because gender-based and other

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18 *See* Kathleen C. Basile, Sharon G. Smith, Yang Liu, Marci-jo Kresnow, Amy M. Fasula, Leah Gilbert & Jieru Chen, *Rape-Related Pregnancy and Association with Reproductive Coercion in the U.S.*, 55 Am. J. Prev. Med. 770, 774 (2018) ("women may not identify with the term rape in the context of forced sex by an [intimate partner], particularly in the context of other violence.") (citations omitted).

discriminatory contexts make the woman vulnerable to the man's power.[19]

While the criminal law, unfortunately, does not yet recognize the full range of discriminatory sexual imposition as a form of rape or sexual assault,[20] criminal law is also not designed to do the same things as the civil law. The civil law is about the relationships of individuals to each other, including questions such as whether a woman whose pregnancy is coerced should have to parent with the man who coerced the pregnancy.[21] For the civil law, the paternity question should take into account the impact of the intercourse on the survivor. Does she experience the intercourse as something she welcomed, which is the standard for acceptable conduct in the context of sexual harassment law?[22] Alternatively, does she experience the intercourse as something imposed on her regardless of her reproductive autonomy and personal dignity?[23] When it is the latter, recognizing the man who imposed the intercourse as the legal father of the child is a way to convince the man and the society that sexual imposition is good or at least acceptable conduct.[24] Refusing legal recognition of his paternity, despite the genetic tie to the child, is at least a

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19 Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 432-35 (2016).

20 *Id.* (critiquing the criminal law of rape and sexual assault for failing to adhere to equality principles); Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 AIR FORCE L. REV. 19, 20-21 (1996)(describing changes in rape law to reduce or eliminate a problematic focus on whether the woman consented); Ashley Van Fleet, *The Rapist's Second Attack: Terminating Rapists' Parental Rights*, 35 W. MICH. U. COOLEY L. REV. 243 (2019)(describing an expanding definition of rape in legal and political contexts to include "forced sexual intercourse including both psychological as well as physical force").

21 *See also* MARTHA C. NUSSBAUM, CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION (2021).

22 *See* MacKinnon, *supra* note 19, at 450-51 (distinguishing the inequality issue associated with the consent standard in rape law with the welcomeness standard in the law of sexual harassment).

23 *See* Robin West, *Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 69 (1990) (describing sacrifice of "self-sovereignty" of married woman in the face of routinized rape within the marriage).

24 MacKinnon argues that rape should be redefined to take inequality into account as follows: "a physical invasion of a sexual nature under circumstances of threat or use of force, coercion, abduction, or of the abuse of power,

symbolic expression that the conduct is an unacceptable exploitation of gendered hierarchical power.

In taking this path, I am following the lead of multiple scholars who have produced both theoretical and empirical research about gender relationships and about women's varied experiences of intercourse and pregnancy. For these scholars, the key is whether the man used the power of gender hierarchy (with or without additional sources of social power, such as economic status and/or race) to coerce sex from a woman who did not welcome the sexual contact.

How law and society empower men to exploit and control women's sexuality, reproduction, and caregiving has long been a central question for feminist legal theoreticians from many perspectives.[25] Numerous legal reforms inspired by feminist theory have focused on empowering women's control over their reproduction in terms of contraception and abortion, of enhancing criminal remedies against sexual imposition by intimate partners and spouses,[26] and advancing equality in the labor force by addressing sexual harassment as a civil rights violation. Denying paternal recognition to men who coerce a pregnancy is consistent with these theoretical claims and legal changes.

Rather than importing the criminal law of rape into the question of paternity, the better route is importing the civil standard of welcomeness from sexual harassment law.[27] Sexual harassment, like rape, is an expression of gender inequality.[28] Unlike the crime of rape, however, sexual harassment law is not restricted by a history of privileging the perspective of men over the experience of women.[29] Instead, in sexual harassment law, the woman's experience of sexual imposition is central to the question of whether sex discrimination occurred. In the context

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trust, or a position of dependency or vulnerability." MacKinnon, *supra* note 19, at 474.

25 *See* Robin West, *Introduction,* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Robin West & Cynthia Grant Bowman, eds. 2019).

26 Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399 (2019).

27 *See generally* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); NUSSBAUM, *supra* note 21.

28 *See* MacKinnon, *supra* note 19, at 474.

29 *Id.*

of sexual harassment, the right of a woman to be free of sex discrimination in the workplace is violated when her employment is conditioned on acceding to the unwelcome sexual demands of a supervisor, including rape.[30] Liability turns on whether the supervisor's conduct was "unwelcome," not whether the employee's conduct was "voluntary."[31]

How many mothers are raising children who were conceived coercively is not known. Nearly 2.9 million women in the United States have experienced a "rape-related pregnancy."[32] The statistics are blurry, in part because researchers may include conduct that would not satisfy the definition of rape of any degree in the state where the conduct occurred. The Centers for Disease Control divides sexual violence against women that could result in a pregnancy into two categories, both of which should be viewed as coercive intercourse. The first category, rape, includes completed forced penetration and has been experienced by approximately 13.5% of women.[33] The category also includes completed alcohol/drug-facilitated penetration, which has been experienced by approximately 11% of women.[34] The second category is sexual coercion, which includes behaviors such as "being worn down by someone who repeatedly asked for sex, sexual pressure due to someone using their influence or authority."[35] Approximately 16% of women report experiencing sexual coercion.[36] Reproductive coercion occurs when an intimate partner exerts "power and control over reproduction through interference with contraception, pregnancy pressure, and pregnancy coercion."[37] As

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30 *See, e.g.,* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

31 *Id*. at 68; *see* NUSSBAUM, *supra* note 21, at 99 (describing sexual harassment as the "extortionate use of power").

32 Basile et al., *supra* note 18, at 772.

33 SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 2 (Centers for Disease Control, 2018).

34 *Id.*

35 *Id.*

36 *Id.*

37 Basile, et al., *supra* note 18, at 771; *see* Jeanna Park, Sherry K. Nordstrom, Kathleen M. Weber & Tracy Irwin, *Reproductive Coercion: Uncloaking an Imbalance of Social Power*, 214 AM. J. OBSTETRICS & GYNECOLOGY (Aug. 24, 2015), https://www.ajog-org/article/s0002-9378(15)00927-8/pdf.

many as a quarter of women may experience reproductive coercion,[38] and it "commonly occurs" in abusive relationships.[39]

A much-cited study published in 1996 concluded that more than 30,000 rape-related pregnancies may occur each year.[40] Approximately a third of the women in the study who experienced a rape-related pregnancy gave birth to a baby which they kept.[41] Other studies indicate that the percentage may be much higher – as much as 64%.[42]

Rape-related and other coercive intercourse resulting in pregnancy is not random. As one author put it, "gender-based violence frequently encompasses women's reproductive functions; men's control over this dimension is an essential corollary to intimate partner abuse and sexual assault."[43] A study from 2010 to 2012 found that more than 75% of women who experienced rape-related pregnancy reported that the perpetrator was a current or former intimate partner.[44] A more recent study

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38 Basile et al., supra note 18, at 771 n.15; Lindsay E. Clark, Rebecca H. Allen, Vinita Goyal, Christina Raker & Amy S. Gottlieb, *Reproductive Coercion and Co-Occurring Intimate Partner Violence in Obstetrics and Gynecology Patients*, 210 Am. J. Obstetrics & Gynecology 42.e1, e5-e6 (2014) (noting that 16% of respondents reported reproductive coercion and a third of those also experienced intimate partner violence).

39 Fuqin Liu, Judith McFarlane, John A. Maddoux, Sandra Cesario, Heidi Gilroy & Angeles Nava, *Perceived Fertility Control and Pregnancy Outcomes Among Abused Women*, 45 J. Obstetric, Gynecologic, & Neonatal Nursing 592, 593 (2016).

40 Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick, & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women,* 175 Am. J. Obstetrics & Gynecology 320, 322 (1996).

41 *Id.* Another 50% underwent an abortion and about 6% placed the infant for adoption. *Id.* The remaining pregnancies ended in spontaneous abortion. *Id.*

42 Connie J. Beck, Laila Alshami, Melissa M. de la Luz, Andrea N. Camacho de Anda, Heather J. Kendall & Elizabeth S. Rosati, *Children Conceived from Rape: Legislation, Parental Rights and Outcomes for Victims,* 15 J. Child Custody 193 (2019).

43 Laura A. McCloskey, *The Effects of Gender-based Violence on Women's Unwanted Pregnancy and Abortion*, 89 Yale J. Bio. & Med. 153, 165 (2016).

44 Basile et al., *supra* note 18, at 772. Nearly half of the respondents in the 1996 study on rape-related pregnancy identified the rapist as their boyfriend or husband. Holmes et al., *supra* note 40, at 322 Tabl. III.

found that rape-related pregnancy involving an intimate partner has been experienced by approximately 2 million women.[45] Another study found that nearly 70% of the women who reported physical abuse by an intimate partner also experienced "some form of sexual assault" by that partner, and about a fifth experienced a rape-related pregnancy.[46] About one-third of the women experienced reproductive coercion by the same partner, such as interfering with birth control or refusing to use a condom.[47] The frequency of reproductive coercion by an intimate partner may explain the significantly higher incidence of pregnancy following a rape by an intimate partner as compared to rape by an acquaintance or a stranger.[48]

By definition, a pregnancy begun in coerced intercourse is unintended from the mother's perspective.[49] In the context of intimate partner violence, the pregnancy may be the result of the woman trying to avoid another physical assault. The man may threaten murder if she leaves him after she bears a child.[50] The man may demonstrate through his behavior that his is the only opinion that counts about whether she should have a child.[51]

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45 Basile et al., *supra* note 18, at 773.

46 *Id.* at 773; Judith McFarlane*, Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 TRAUMA, VIOLENCE & ABUSE 127 (2007).

47 Basile et al., *supra* note 18, at 773; *see also* Charvonne N. Holliday, Elizabeth Miller, Michele Decker, Jessica G. Burke, Patricia I. Documet, Sonya B. Borrero, Jay G. Silverman, Daniel J. Tancredi, Edmund Ricci and Heather L. McCauley*, Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration,* 28 WOMEN'S HEALTH ISSUES 205 (2018); Liu et al., *supra* note 39.

48 Basile et al., *supra* note 18, at 773.

49 *See generally* Christina C. Pallitto, Jacquelyn C. Campbell & Patricia O'Campo, *Is Intimate Partner Violence Associated with Unintended Pregnancy? A Review of the Literature*, 6 TRAUMA, VIOLENCE & ABUSE 217 (2005); McFarlane*, supra* note 46.

50 Jacquelyn Campbell, Sabrina Matoff-Stepp, Martha L. Velez, Helen Hunter Cox & Kathryn Laughon, *Pregnancy-Associated Deaths from Homicide, Suicide, and Drug Overdose: Review of Research and the Intersection with Intimate Partner Violence*, 30 J. WOMEN'S HEALTH 236, 238 (2021)("When the perpetrator is known, the largest proportion of homicide cases during or around pregnancy occurs at the hands of an intimate partner"); Holliday et al., *supra* note 47, at 208.

51 Holliday, et al., *supra* note 47, at 208.

Where coercive intercourse results in the birth of a child, a birth mother may attempt to place the child for adoption or the birth mother may decide to raise the child. The birth father may be involved in both situations. When the mother seeks to have the child adopted, the consent of the biological father may be required under state law. The child may be born when the mother is living with or married to the biological father. He may be in a position to coerce her into remaining in the household with the child. If the mother is living separately from the biological father, she may still be subject to his control because the biological father may be empowered to exercise parental rights equivalent to those of the mother.

Detailed accounts of the experience of mothering a child when the coercive biological father is or may become involved are not abundant, but they are telling. Some women report significant problems around being a good mother to a child that reminds them of the abuse and coercion they suffered.[52] Others, and it may be a majority, report having a positive experience of mothering the child, regardless of the circumstances of conception,[53] although achieving a good relationship may pose a challenge.[54]

Dealing with the man is another story, however. Women report being pressured into dropping criminal charges related to the rape or sexual assault in exchange for the man's consent to the child's adoption.[55] When the biological father is awarded custody or visitation rights, the mother must interact with him frequently, allow him to make decisions about the child, and turn the child over to him for periods of visitation.[56] He may threaten to take full custody of the child, and he may succeed.[57] He may

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52 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, 849 (2010).

53 ANDREW SOLOMON, FAR FROM THE TREE 497-99 (2012); Prewitt, *supra* note 52, at 849-50.

54 SOLOMON, *supra* note 53, at 524-26.

55 Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L & POL'Y 275, 275-76 (2012).

56 Prewitt, *supra* note 52, at 831-32.

57 *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Exper-*

be empowered to deny her opportunities to move to a new location with the child.[58]

Since intimate partner violence and coercive intercourse are frequently associated with one another,[59] it is not surprising to find women describing their experiences of dealing with the father of a child conceived coercively as reflecting abuse. Mothers describe experiencing the involvement of the biological father as a "second rape,"[60] a "torment,"[61] a "loss of control," and a continuing reminder of the rape which may interfere with their capacity to move on and recover.[62] For some women, the sexual abuse they experience is part of the man's system of control. If he kept her "pregnant all the time," he was confident she wouldn't leave him because "he knew I wouldn't leave the kids."[63]

After learning they are pregnant or after delivering the child, some women conclude that what is best for the child and, perhaps, for them is to treat the man as a father to the child despite the coerced intercourse. Other women come to the opposite conclusion. In either case, the decision may be influenced by the legal reality that, if the man is entitled to paternal recognition, he is likely to have the legal right to be equally involved as the woman in decisions about the child. I now turn to what the Constitution has to say about three interrelated issues affecting the woman's reproductive and parental autonomy:

1) whether states must recognize paternal claims based solely on the genetic tie between the man and the child;

2) whether minimal process is sufficient protection for paternity claims in cases involving coercive intercourse where the man has not developed a relationship with the child, and

3) whether states that provide additional procedural protections to a man's claim of paternity are denying the woman equal protection.

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iences, 167 U. PA. L. REV. 399, 431-32 (2019) ("[S]urvivor-mothers often leave family court having been wrongly denied custody of their children").

58 ELLMAN ET AL., *supra* note 10, at 708-23.

59 *See* Freeman, *supra* note 7, at 4-8, 29.

60 Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014).

61 Bitar, *supra* note 55, at 282.

62 Prewitt, *supra* note 52, at 833-35.

63 SOLOMON, *supra* note 53, at 516.

III. The Constitution Requires Little to No Protection for Paternity Claims Following Coerced Intercourse

Most states provide ample procedural protection to the paternity claim of a man who coerced the intercourse that resulted in the birth of the child. In this section, I argue that recognition of the claim is not required in every case and that the customary robust procedural protection of paternity claims is more than what is due.

The state decides who is a legal parent.[64] Generally, once a person is entitled to be recognized as a parent, the status can be terminated only with the process which is due.[65] These two rules mean that a person who coerces intercourse can be denied parenthood in either of two ways: deny that person parental recognition or recognize the person's parental status and terminate that status.

Eligibility for parental status in a person other than the birth mother usually arises out of the marital connection of the child's birth mother to the claimant, the acknowledgement of parenthood by a claimant who is accepted as such by the child's mother, a parental relationship between a claimant and the child, or proof of a genetic connection of a claimant with the child.[66] Where the coercive intercourse constitutes criminal conduct, the Uniform Parentage Act of 2017, some state laws, and a small line of cases conclude that parental recognition may be denied in some circumstances.[67] Most states, however, provide for recognition of paternity regardless of whether the pregnancy was coerced, which means that a woman who gives birth after coerced intercourse usually must share parental rights unless she prevails in a termination proceeding. The U.S. Supreme Court has never determined, however, that parental recognition is constitutionally required when the pregnancy is coerced or what process a paternity claimant is due under these circumstances.

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64 Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020).

65 *See* Santosky v. Kramer, 455 U.S. 745 (1982); *see also infra* text at notes 172-73.

66 UNIF. PARENTAGE ACT §201 (UNIF. L. COMM'N 2017).

67 *See infra* notes 73-81 and 122.

A. *No Paternal Recognition Is Required Where the Sole Connection Is Genetic*

Contrary to increasing reliance on genetics to establish paternity, particularly in the realm of child support enforcement,[68] the Constitution does not require states to recognize paternity in the genetic father of a child over the mother's objection in every case. Three situations are well-established: where the birth mother is married to someone else when the child is born, where the man never steps forward to establish a relationship with the child, and where conception resulted from a sexual offense for which the man was convicted. While these three situations address some situations where coercive intercourse has occurred, the protection they offer covers only a minority of cases.

The Supreme Court addressed the first situation in *Michael H. v. Gerald D.*, where it held that the Constitution did not require California to recognize paternity in a man whose genetic tie to the child was beyond dispute so long as the child was born to a married woman.[69] Where the woman and her husband both wanted the child's father to be the woman's husband, according to the Court, the paramour, who was the biological father, had no claim which the state must enforce.

A second situation in which a man's genetic tie to a child provides no basis for the state to be required to recognize his paternity is found *in Lehr v. Robertson*.[70] There, the Court pointed to the man's failure to establish a parent-child relationship with the child of any kind, including the minimal effort of registering himself as the child's father with the state. In *Quilloin v. Walcott*, the Court similarly rejected the claim of the child's genetic father to a constitutionally protected right to be heard on the question of whether the child should be adopted by a stepfather.[71]

Michael H., *Lehr*, and *Quilloin* support a degree of reproductive and parental autonomy in that the decision of the mother about who to parent with is respected over that of the genetic father, but only in the situation where the mother has a substitute

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68 Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. Rev. 2037 (2016).

69 Michael H. v. Gerald D., 491 U.S. 110 (1989).

70 Lehr v. Robertson, 463 U.S. 248 (1983).

71 Quilloin v. Walcott, 434 U.S. 246 (1978).

partner, that is, her husband. If she were parenting alone, nothing in the three cases would protect her from having to share parenthood with a man who coerced the intercourse that resulted in the child's birth.[72]

A more direct route to protecting the mother's reproductive and parental autonomy in some cases is found in *Peña v. Maddox*,[73] a decision by Judge Richard Posner in a case where the father was convicted of a sexual offense against the mother. To recognize the man's paternal rights, Judge Posner wrote, would allow the criminal to "profit" from his crime while imposing a burden on the mother if the man chooses to use his legal status to demand that she drop the criminal case, to obstruct an adoption or to "simply enjoy the fruit of his crime."[74] By denying paternity after the conviction, Judge Posner concludes, the state is making a constitutionally acceptable decision to discourage criminal conduct. As the judge explains,

> [N]o court has gone so far as to hold that the mere fact of fatherhood, consequent upon a criminal act that our society does take seriously and that is not cemented (whoever's fault that is) by association with the child, creates an interest that the Constitution protects in the name of liberty. . . . The criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants. Pregnancy is an aggravating circumstance of a sexual offense, not a mitigating circumstance. The criminal should not be rewarded for having committed the aggravated form of the offense by receiving parental rights . . . .[75]

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72 *See* Judith Lewis, *The Stability Paradox: The Two-Parent Paradigm and the Perpetuation of Violence Against Women in Termination of Parental Rights and Custody Cases*, 27 MICH. J. GENDER & L. 311 (2021).

73 Peña v. Mattox, 84 F.3d 894 (7th Cir. 1996). In this case, it was actually the mother's family that thwarted the father, rather than the mother, who was 16 when she gave birth and was apparently persuaded to immediately have the child adopted without notifying the father of the birth or the adoption. The decision has been criticized because the alleged offense was statutory rape rather than a sexual offense involving violence or manipulation. *See, e.g.,* Anna K. Martin, *Making Pro-Abortion Laws Pro-Choice for Female Rape Victims*, 33 WIS. J. L., GENDER & SOC'Y. 63, 79 (2018). In this article, I am not addressing possible distinctions between statutory rape and other forms of criminal sexual assault.

74 *Peña*, 84 F.3d at 899-901.

75 *Id.* at 902.

Judge Posner's argument that parental claims arising out of criminal conduct should be denied has found some support rhetorically and otherwise. In *Michael H*., for example, Justice Scalia argued that recognizing the parental claim of the married mother's paramour because of his genetic connection to the child would open the door to claims by all biological fathers, regardless of whether the conception resulted from rape.[76] A similar parental claim by the paramour of a married woman was rejected by a Michigan appellate court. There, a concurring judge asserted that "[n]o one could seriously argue that the perpetrator of a rape has any protected liberty interest in a relationship with the child."[77] In a California case, a man's biological connection with a child was an insufficient basis for requiring that the child welfare office provide the man with reunification services after the child was taken into care. Otherwise, the court asserted, reunification services could be demanded by a rapist simply based on the biological connection to the child.[78] Under the Uniform Parentage Act of 2017, paternal recognition can be denied when a man is convicted of a sexual assault or comparable crime or the criminal conduct is established by clear and convincing evidence.[79]

Despite Judge Posner's confidence in the broad acceptance of the outcome in *Peña,* however, denial of paternal recognition for rapists is not a common outcome under either statutes or caselaw. Instead, many states authorize the mother to seek the termination of the paternal rights of rapists in some, but not all, circumstances.[80] An action for termination is unnecessary, of

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76 *Michael H.*, 491 U.S. at 124.

77 Hauser v. Riley, 536 N.W.2d 865, 188-89 (Mich. Ct. App. 1995) (Kavanagh, J., concurring in part and dissenting in part). *See also* Shepherd v. Clemens, 752 A.2d 533, 542 (Del. 2000) ("A biological father who commits a criminal act that meets the elements of statutory rape and has managed somehow to establish a relationship with his child *may* have a constitutionally protected claim to parental rights . . . . No court has held that the mere fact of biological fatherhood, that was the result of a conception during a criminal act and that is unaccompanied by a relationship with the child, creates an interest that the United States Constitution protects in the name of liberty.").

78 *In re* Sarah C., 11 Cal. Rptr. 2d 414, 419-20 (1992).

79 Unif. Parentage Act § 614 (Unif. L. Comm'n 2017).

80 *See, e.g.*, Md. Code Ann., Fam. Law § 5-1402 (2020); Mass. Gen. Laws Ann. 209C § 3(a) (2021).

course, if the man has no right to recognition of paternity in the first place.

The *Peña* case involved a conviction for a misdemeanor sexual offense involving two young people who were apparently in an ongoing non-coercive relationship of which the young woman's parents disapproved. If the *Peña* doctrine were followed literally, therefore, it would hold constitutional the denial of parenthood to anyone who is convicted of a sexual offense of any degree. A major limitation to *Peña*, however, is that most coercive intercourse does not result in a conviction, especially in the largest category of cases, which is where the offender is known to the woman.[81] Many women decline to involve the carceral system in their relationships.[82] Where the woman seeks a criminal remedy, the most likely reason for the offender not to be convicted is the failure of police or the prosecutor to believe the woman or to pursue the offender.[83] In some instances, conviction may be precluded by the remaining instances of insulation for a married offender or by definitions of sexual offense which turn on traditional concepts of consent.[84] Further, some types of sexual imposition may be prosecuted as offenses that are not sexual, such as assault or even slavery.[85]

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81 *See supra* notes 31-48, and *infra* 83-85 and accompanying text.

82 *See*, LEIGH S. GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018); Leigh Goodmark, *Restorative Justice as Feminist Practice*, 1 INT'L J. RESTORATIVE JUST. 372, 378-79 (2018).

83 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 297-302 (2007)(examining roles of race and gender on prosecutorial charging decisions, particularly in cases of rape and sexual assault); Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1 (2007) *See Foreword*, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 4 (AM. L. INST. May 4, 2021) (Tentative Draft No. 5) (reporting that despite the failure of police and prosecutors to believe reports of sexual offenses, "recent research suggests that complaints judged incredible or dismissed by law enforcement in fact often later prove to be well-founded" including through analyses of previously untested rape kits).

84 *See* Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 MINN. J. L. & INEQUALITY 335, 342-48 (2017).

85 An example of how coercive sexual imposition might be prosecuted as something non-sexual is found in an article written by then Professor (now President) Joyce McConnell, in which she argues that, at least in some extreme cases, violent and sexual domination by husbands and partners in violent rela-

Limitations of the criminal system would be less of a problem if paternity were denied to men whose conduct is punishable criminally regardless of conviction and to expand the definitions of criminal offenses to cover more kinds of sexual imposition which occur in intimate partner relationships. While promising, these changes do not address other problems with *Peña* from the perspective of a woman who experiences pregnancy because of coercive intercourse. First, the focus is on criminal conduct, and criminalizing conduct in intimate relationships is not always what the woman is seeking.[86] Second, not allowing a rapist to "profit" from his crime is a dreadful metaphor because of the suggestion that a child is property and recognizing parenthood is acknowledging the right to that property.[87]

The metaphor brings to mind two parts of the history of the exclusive power of men in cases of rape-related pregnancy: chattel slavery and marital rape. The law governing both provided that the child born as the result of coerced intercourse was property in fact or property in practice. The property was owned by the man – literally in the case of the enslaver and figuratively but effectively in the case of the husband[88] – and the woman had no say in the child's future. A rape by an enslaver or by someone he permitted to rape an enslaved woman was not punishable as criminal conduct.[89] The child born to the raped woman inherited their mother's status as enslaved, regardless of the father's iden-

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tionships may be prosecuted under the Thirteenth Amendment as slavery. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. LAW & FEMINISM 207 (1992).

86 *See* GOODMARK, *supra* note 82, Goodmark, *supra* note 82.

87 *See* Margaret Jane Radin, *Cloning and Commodification*, 53 HASTINGS L.J. 1123, 1126–27 (2002)(advocating stubborn resistance to "ever thinking about kids as market commodities"); Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992)(arguing that "our attachment to this property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family").

88 Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 815 (1999) ("[C]ustody laws have their root in a social order that established hierarchies of domestic status, treating women, children, and slaves as property of the patriarch.").

89 *See supra* text at note 4.

tity or status and regardless of the circumstances of conception.[90] Marital rape meant that the husband controlled the wife's fertility because she was without remedy in the criminal or the civil law when he had sex with her that she did not want.[91] The husband also held full and exclusive rights of custody and guardianship to any child born to her during the marriage.[92]

While chattel slavery, marital rape, and the consequences of both practices with respect to power over a child, have been rejected in the names of justice, equality, and fairness, seeing paternity as a "prize" continues to feel familiar in modern times, even in a decision like *Peña* which rejects some aspects of those claims. The *Peña* court, for example, is willing to recognize paternity in a rapist if a man is financially supporting a child, because providing the money indicates to the court that the man experiences a sense of responsibility to the child. Connecting money and paternity, however, can disempower a woman who was coerced to have intercourse and does not want to be dependent financially on a man who treats her as an object. Further, the *Peña* court does not question the liberty interest of the husband of the child's mother in paternity, regardless of the circumstances of conception.

B. *The Minimal Process That Is Due*

While some men who coerce intercourse are not entitled to paternity regardless of genetics, a more robust doctrine would look to the civil system to insulate women from claims of paternity based on coerced intercourse by increasing the procedural barriers to establishing paternity. The case of *Lehr v. Robertson* lays the foundation for this approach in both of the pertinent contexts: litigation between the woman and the man over sharing the rights and responsibilities of legal parenthood and a demand by the state that the woman cooperate in the establishment of paternity so that a child support obligation could be imposed on the man.

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90 *See supra* text at note 5.

91 See Freeman, *supra* note 7.

92 Cooper Davis, *supra* note 5, at 330-31 (connecting anti-slavery and women's equality arguments about women's freedom and autonomy); *Michael H.*, 491 U.S. 110.

In 1976, Lorraine Robertson gave birth to Jessica. Jessica's biological father was Jonathan Lehr, to whom Lorraine was not married.[93] The couple lived together before Lorraine delivered the baby, but Lorraine hid herself and the baby after they left the hospital.[94] Lehr's name did not appear on the child's birth certificate.[95] Before the baby's first birthday, Lorraine married Richard Robertson.[96] Together with Robertson, she filed an adoption petition in 1978.[97] On the rare occasions in 1976 and 1977 when he located her, Jonathan visited with Lorraine, Jessica, and Lorraine's other children.[98] In 1978, when a detective agency located Lorraine, Lehr offered financial support for the child, which Lorraine refused.[99] She also threatened arrest unless he stayed away.[100] Lehr's lawyer wrote to Lorraine threatening legal action,[101] and a petition to establish paternity and for visitation was filed in January of 1979.[102] Before the petition was heard, and although the adoption court was aware that the petition had been filed, the adoption was granted without any input from Lehr.[103]

Over a vigorous dissent, the Court concluded that Lehr had not been denied a liberty interest when he was denied a notice and an opportunity to be heard on whether the adoption petition should be granted. According to the Court,

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .
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> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and ac-

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93 *Lehr*, 463 U.S. at 250.
94 *Id*. at 250, 252; *id.* at 269 (White, J., dissenting).
95 *Id.* at 252.
96 *Id*. at 250.
97 *Id*.
98 *Id*.
99 *Id.*
100 *Id*.
101 *Id*.
102 *Id*. at 252.
103 *Id*. at 253.

> cepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[104]

The Court distinguished between protection for the developed paternal relationship, which is a protected liberty interest, and the opportunity to form a relationship, which the state must "adequately" protect.[105] New York's statute provided that notice of an adoption is required for involved fathers, which Lehr was not,[106] and for those who register with the putative father registry, which Lehr had not done. Since the registry was available regardless of the degree of the man's involvement and without the mother's agreement, the Court found that the statutory provision did not arbitrarily exclude from notice many responsible fathers.[107]

The *Lehr* Court posits that whether a particular person enjoys a liberty interest in parenthood turns on whether the "intangible fibers that connect parent and child" are "sufficiently vital to merit constitutional protection."[108] The dissent criticizes this formulation because it wrongly imposes a balancing test in the place of a due process analysis.[109] If the majority is right, coercive intercourse may give rise to a liberty interest only if sufficiently vital "intangible fibers" are developed later between the man and the child. If the dissent is right, coercive intercourse may give rise to a liberty interest in the biological father to claim paternity, but the degree of process that is due must be addressed in a context that includes the mother and the child as well as the biological father.

Under either the majority opinion or the dissent, a person who coerced intercourse and who failed to develop a relationship with the child has, at best, a minimal liberty interest in paternal

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104 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

105 *Lehr,* 463 U.S. at 263.

106 *Id.* at 263-64.

107 *Id.* at 256.

108 *Id.*

109 *Id*. at 270-73 (White, J., dissenting).

recognition.[110] In the relatively less common experience of stranger rape, the *Lehr* case should mean that the mother has nothing to fear in terms of a paternity claim by the rapist. By definition, the mother has no relationship with a stranger who rapes her prior to or following the sexual offense, so he cannot use contact with the mother to establish a relationship with the child. As a practical matter, a rapist is unlikely to register or otherwise demand paternal recognition, because his claim of a genetic connection to the child supplies the evidence of sexual contact with the woman that is needed for the rape conviction. Nonetheless, some convicted rapists have not only asserted paternal rights but were awarded custody or visitation with the child.[111] Their procedural opportunity is provided by states that go beyond the procedural minimums required by *Lehr*. Numerous states, for example, do not require registration for a person to be entitled to notice of a proposed adoption; instead, notice must be given to anyone who can assert paternity on the basis of a genetic connection.[112] Similarly, his entitlement to seek custody and guardianship usually turns on a genetic connection standing alone rather than on a parent-child relationship with the child.[113]

Given that most states do not deny paternal recognition to convicted rapists, it is not surprising that states provide more than minimal due process in the more common situation of coerced intercourse that occurs during a time when the parents are married, living together, or otherwise engaged in an intimate relationship. The issue appears not to have been raised in *Lehr*, although abuse is a plausible explanation for why Lorraine Rob-

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110 *See, e.g.*, Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 482-83 (2017) (reviewing standard interpretations of *Lehr* as requiring the state to provide some due process at some level to the genetic father who has only an inchoate interest in a relationship with the child but not at the same level as the fundamental rights that characterize "full-blown" parenthood)

111 *See, e.g.*, Emily Wax-Thibodeau, Alice Crites & Julie Tate, *Rape Survivor Fighting Rapist for Custody of Child in Alabama*, INDEPENDENT (UK) (June 11, 2019), https://www.independent.co.uk/news/world/americas/alabama-abortion-ban-rape-victims-rapists-parental-rights-a8951751.html.

112 Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1 (2005)

113 Baker, *supra* note 68.

ertson hid herself and the baby from Jonathan Lehr. As often happens in these situations, however, leaving the shared home may not free Robertson of Lehr as a co-parent. In addition to the requirement in many states that the mother inform the man of an adoption action, she may also be subject to a requirement by the state that she cooperate in the establishment of his paternity and child support obligation. Most mothers who need public benefits to provide for the child are required to assign their right to child support from the child's father.[114] To qualify for benefits, the mother is usually required to inform the government of the man's identity even if he has never registered, done anything to establish a relationship with the child, or otherwise identified himself as the child's father.[115] The state then uses the woman's mandatory assignment of child support as the basis for suing the man to establish his paternity and child support obligation. The mother can prevent the suit only if she qualifies for a "good cause" exemption.[116] While rape would seem an obvious basis for a good cause exemption, not every state recognizes it as such.[117] Even in states that recognizes rape as good cause, the proof requirements may be insurmountable.[118] Coerced intercourse may constitute good cause in those states that recognize domestic violence as a basis for exempting applicants from the cooperation requirement, but few applicants appear to know about the exemption and exemptions are rarely granted.[119] In other words, the limited due process required under *Lehr* has not resulted in

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114 42 U.S.C. § 654.

115 ELLMAN ET AL., *supra* note 10, at 576-80

116 42 U.S.C. § 654(29).

117 Aviva Nusbaum, *The High Cost of Child Support in Rape Cases*, 82 FORDHAM L. REV. 1331 (2013).

118 *Id.*; June Gibbs Brown, *Client Cooperation with Child Support Enforcement: Use of Good Cause Exceptions* 4 (Health & Human Services Office of Inspector General Mar. 2000), https://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf (despite general agreement that "most, if not all" client requests for good cause exceptions are legitimate, requests for exceptions are rarely made).

119 Rachel J. Gallagher, *Welfare Reform's Inadequate Implementation of the Family Violence Option: Exploring the Dual Oppression of Poor Domestic Violence Victims*, 19 AM. U. J. GENDER SOC. POL'Y & L. 987 (2011); Daniel L. Hatcher, *Remembering Anti-Essentialism: Relationship Dynamics Study and Resulting Policy Considerations Impacting Low-Income Mothers, Fathers, and Children*, 35 L. & INEQUALITY 239 (2017) States have financial incentives to minimize the number of exceptions that are granted. *See* Candice Hoke, *State*

limited due process in practice when the government wants the man to pay child support.

If Lorraine had been married to Jonathan or if she had returned with the baby to their common home, the *Lehr* case offers less protection by its own terms. The intimate partner or spouse is likely to be cohabiting with the woman before and after the child's birth, so he can claim a relationship with the child, unlike Lehr. In the hospital, she may be too intimidated by the couple's power dynamic or by fear of impoverishment to keep the man's name off the child's birth certificate or an acknowledgment of parenthood. In contrast to Lehr, therefore, the man will have more evidence of his intent to participate in the child's upbringing.

The question, then, is what process is due to a man when the child is the result of coerced intercourse and the mother does not want the man's participation in parenthood. My argument is that the Constitution requires minimal procedural protection. Where the mother shows reasonable grounds to believe that the intercourse was coerced, the man's paternity claim can be denied unless he demonstrates that the intercourse was not coerced or that he has developed a significant parental relationship with the child.[120] Anything more gives the man an undue advantage in terms of controlling the woman's reproductive and parental autonomy, regardless of whether the paternity claim is based on the genetic tie, a marital presumption, an acknowledgement of paternity, or some minimal relationship with the child, and regardless of whether the coerced intercourse was criminal. The minimal process should protect the woman's reproductive and parental autonomy regardless of whether the litigation involves adoption or custody, or whether the state is demanding the woman's cooperation in establishing a man's parental obligation to support the child.

Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge, 9 STAN. L. & POL'Y REV. 115 (1998.

120 Under the minimum due process regime, a man's paternity can be recognized if he acts as a parent to the child for a minimum period of time. The UPA of 2017 suggests two years. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017*); see* Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J. FORUM 589 (2018) (recognizing parenthood in a person who resides with and holds out a child as their own for a minimum of two years regardless of any genetic connection between the adult and the child).

Minimal process means that the man is not entitled to notice in an action involving the custody or adoption of the child unless he has sought to be notified by registering or otherwise making himself known as a paternal claimant before the adoption petition is filed. Also, unless the man has come forward, the state should not be permitted to require child support cooperation when a woman has shown reason to believe that the intercourse was coerced. In the case of a man who has never established a relationship with the child and who sues to establish fatherhood based on a formal connection, such as marriage or an acknowledgment of parenthood, the woman can put his claim in doubt by demonstrating reason to believe that the intercourse was coerced. The burden then shifts to the man to demonstrate, by a preponderance of the evidence, that the child's birth was not the result of coerced intercourse or that he has established a parental relationship with the child. Since his paternity is not established unless he makes the required showing, there is no need to terminate his rights through an action initiated by the mother, as is required under the UPA and multiple state statutes.[121]

The classic test for how much process is due comes from *Mathews v. Eldridge*, which identified three factors that must be considered.[122] As applied in *Turner v. Rogers*, a civil proceeding in which the mother sought child support from the father, the Court identified the three factors as:

> (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."[123]

The "private interest" of the man at issue here is to be recognized as the legal parent of a child born to a person with whom he had sex. As discussed earlier, the key facts are that the man

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121 Unif. Parentage Act § 614; *see* Connie J.A. Beck, Laila Alshami, Melissa de la Luz, Andrea N. Camacho de Anda, Heather J. Kendall, Elizabeth S. Rosati, Margaret C. Rowe, *Children Conceived from Rape: Legislation, Parental Rights and Outcomes for Victims*, 15 J. Child Custody 193 (2019)(survey of state statutes on termination of the parental rights of rapist); Courtney G. Joslin, *Preface to the UPA*, 52 Fam. L.Q. 437, 461-63 (2018); Prewitt, *supra* note 52.

122 424 U.S. 319 (1976).

123 Turner v. Rogers, 564 U.S. 431 (2011).

coerced the intercourse which resulted in the birth of the child and the man has not established a relationship with the child. In *Lehr*, a case where the issue of coercive intercourse was not raised, the Court found no fault with New York law, which required the biological father who had no relationship with the child to take affirmative acts before his paternity claim was recognized. The Court's analysis of the private interest in *Smith v. Organization of Foster Families*[124] helps to understand why. In *Smith*, foster parents who had cared for a child for more than eighteen months demanded a hearing prior to the removal of the child when the child was not being returned to their legal parents but was instead being placed with another foster family. The Court, without deciding on whether the families had a cognizable liberty interest in continuing their family relationship with the child, said that the asserted interest had to be addressed in the context of other interests affecting the decision.[125] Those interests included two competing claims, both of which are pertinent to this analysis. First is the interest of a legal parent to care for their child.[126] That interest might be impeded if foster parents are recognized as having a parent-like liberty interest in continuing their relationship with the child. In a competition with a foster parent, a legal parent is likely to be at a disadvantage in terms of social and economic privilege; adding what amounts to procedural equality could result in legal parents being excluded more readily from their child's life.[127]

The second competing claim is the interests of the government in maintaining and managing the foster care system.[128] The Court emphasized that the relationship between the foster parent and the child originated in a contract with the government, so foster parents know from the beginning that the relationship can be terminated by the government as well.[129] Foster parents, therefore, are not the kind of parents who have the constitutional right to be insulated from governmental interference in most situations. Parents who enjoy that insulation include those whose

124 431 U.S. 816 (1977).
125 *Id.* at 838.
126 *Id.* at 839–40.
127 *Id.* at 846–47.
128 *Id.* at 845–46.
129 *Id.*

parental claims rest in the usual sources of parental rights such as marriage and where biology is coupled with caring for a child.[130]

The origin story that the Court tells in *Smith* can be criticized, of course, because those foster parents entered into the relationship for the purpose of becoming a caring family environment for a child who had no parent able to provide care, and they had done exactly that.[131] Not according caring and nurturing foster parents an opportunity to fully contest a decision to remove a child from their care before that removal could mean that the child is harmed for no good reason. The origin story nonetheless helped to move the Court toward a conclusion that the private interest of the foster families was less than robust.[132]

The private interest of a man asserting a claim of parenthood of a child with whom he has no relationship and who was conceived coercively falls short when compared with the claims of the foster parents in *Smith*. First, giving weight to his claim imposes a burden on the child's other parent, who must either endure sharing parenthood with him or undertake the unpredictable and difficult process of satisfying a high standard of proof to terminate his parenthood. Second, any plausible liberty claim that arises out of his biological tie to the child should be defeated, as it was in *Smith*, by the origin story. Just as the foster parents in *Smith* should not expect to be treated as parents after entering into a contract that denies those expectations, a man who coerces sex should not expect to be treated as a parent of any resulting child unless he persuades the child's mother to allow a relationship to develop after the child is born.

The second *Turner v. Rogers* factor is "the comparative 'risk' of an 'erroneous deprivation' of that interest with and without 'additional or substitute procedural safeguards.'"[133] Some accusations of coerced intercourse are invalid.[134] Given the importance of a person's right to raise their children, a man must have

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130 *Id.* at 843–44.

131 *Id.* at 844.

132 *Id.* at 845.

133 *Turner*, 564 U.S. at 444–45.

134 The claim of coerced intercourse may be found invalid because of insufficient proof, as discussed below. Alternatively, the claim may be found invalid because the evidence demonstrates that the participants agreed to participate in a sexual act that could be viewed as coercive to others but which the participants viewed in a different light. *See* Janet Halley, *The Politics of*

sufficient opportunity to contest the denial of parental recognition. That opportunity need not exceed what is proposed, however, because additional process does not decrease the likelihood of an erroneous deprivation.

One common way to protect a man from losing parental rights in cases involving rape is to impose a heightened standard of proof such as clear and convincing evidence. In my proposal, by contrast, the standard of proof imposed on the woman is lower; she needs to show only "reasonable grounds" that the intercourse occurred because of coercion. The burden then shifts to the man to demonstrate, by a preponderance of the evidence, that intercourse was not coerced. Imposing a higher standard of proof on the woman to demonstrate coerced intercourse increases the likelihood that the man's paternity claim will succeed, but there is no reason to believe that the heightened standard increases the accuracy of the outcome.

The heightened burden of proof found in many termination statutes reinforces old unproven stereotypes that women lie about rape. Skepticism about women's credibility around sexual imposition may be in decline since the inception of the Me Too Movement.[135] No evidence of waning shows up in state laws which address termination of paternity in the case of rape, however. Maryland provides a relatively recent example of the durability of a man's legal parenthood in the face of credible allegations of rape and other sexual offenses. In 2018, which was ten years after the legislation was first proposed by advocates, the legislature passed a bill allowing for the termination of parental rights in some cases where coerced intercourse resulted in the birth of a child.[136] The statute applies regardless of marital status if the man was convicted of an act of nonconsensual sexual conduct.[137] When the parents were not married at the time of conception, the statute applies to nonconsensual sexual conduct which is evidenced by clear and convincing evidence.[138] In the

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Injury: A Review of Robin West's Caring for Justice, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 69-71 (2005).

135 Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 990 (2021).

136 MD. CODE ANN., FAM. LAW § 5-1402.

137 *Id.* § 5-1402(b).

138 *Id.* § 5-1402(a)(2).

absence of a conviction, the statute applies to a married parent only upon conviction or when the parents separated under a protective order and have remained apart since the conception.[139] Even where the nonconsensual sexual conduct is proved, the court must find, by clear and convincing evidence, that it is in the best interest of the child to terminate the paternal rights of an unmarried partner.[140] Further, termination of paternal rights also terminates paternal responsibility, most notably child support.[141] In the absence of a termination order, a woman whose pregnancy resulted from coerced intercourse can be required to share legal and physical custody with the man who coerced the intercourse, and she cannot place the child for adoption without notifying him and obtaining his consent.[142]

Maryland goes to great lengths to test a woman's claim that the child's birth was the result of sexual imposition and to protect men accused of nonconsensual sexual conduct from losing paternal rights. Termination can be denied if the woman cannot get a conviction or produce clear and convincing proof of the conduct, or if she was not prescient enough to obtain a protection order before she was coerced by her husband. It is fair to ask whether the statute reflects the long discredited assertion of two long dead British jurists – Blackstone and Hale – that rape "is an accusation easy to be made, hard to be proved, but 'harder to be defended by the party accused, though innocent.'"[143]

The third *Turner v. Rogers* factor is the nature and magnitude of any countervailing interest in not providing 'additional or substitute procedural requirement[s].'[144] At least three countervailing interests should be considered: the birth mother's repro-

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139 *Id.* § 5-1402(b).

140 *Id.* § 5-1402(a)(3).

141 *Id.* § 5-1402(c), Prewitt, *supra* note 52, at 856-57; Bitar, *supra* note 55, at 289-90.

142 *Id.* § 5-3B-05. The UPA of 2017 comes to the opposite conclusion about the responsibility for child support; the man can be denied paternity but remains responsible for support unless the woman requests otherwise, and the court concludes that her decision is in the best interests of the child. UNIF. PARENTAGE ACT § 614(f)(3)(UNIF. L. COMM'N 2017); *see* Joslin, *supra* note 121, at 463.

143 4 WILLIAM BLACKSTONE, COMMENTARIES Ch. 15; 1 M. HALE, PLEAS OF THE CROWN 635 (1680).

144 *Turner*, 564 U.S. 431.

ductive and parental autonomy, the child's well-being and the state's concerns about getting the cooperation of mothers for the purpose of establishing and collecting child support.

The child's well-being may be implicated in two ways. First, if the birth mother decides to place the child for adoption, possible adoptive parents may be deterred from pursuing adoption when the child's other parent enjoys substantial due process protections.[145] Second, if the birth mother decides to raise the child, she has to contend with sharing parental rights with a man who coerced intercourse and who may use the legal relationship with the child to maintain control over the woman's reproductive and childrearing decisions. Generally, children who are raised in nonconflictual families have an easier time of it, and this situation is no exception.[146] Insulating the mother from sharing parenthood in these circumstances should be beneficial for most children.

The state has an interest in making the establishment of paternity easier rather than harder because legal parents owe child support, and child support may keep some children from needing public benefits. Where a child needs public benefits, further, child support may reimburse the state for providing support. The state's purely financial interest in child support is entitled to a full measure of respect when the risk to the woman and child are insubstantial, but it must yield where a woman can show reasonable grounds to believe that she was subjected to coerced intercourse.

The state's interest in collecting child support from as many men as possible is also an inadequate justification for preferring the man over the woman in a dispute over parentage after a rape-related pregnancy. Over the last half-century, states have been subject to increasing pressure from the federal government to vigorously enforce child support obligations.[147] Child support

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145 This concern surfaced early in the history of Supreme Court cases expanding rights of unwed fathers. *See Caban*, 441 U.S. at 408 (Stevens, J., dissenting); *Lehr*, 463 U.S. at 264.

146 *See* Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 38 (1991); Janet R. Johnston, *High Conflict Divorce*, 4 FUTURE OF CHILDREN 165 (1994); Pamela Laufer-Ukeles, *The Children of Nonmarriage: Towards a Child-First Family Law*, 40 YALE L. & POL'Y REV. 384, 426-30 (2022).

147 The child support reimbursement policy has been subject to criticism by many scholars who argue that it produces little financial benefit for the state

is owed by a child's legal parents, which usually include the child's mother and the child's father or other second parent.[148] Most often, the second parent is a marital partner of the mother, a person who acknowledges parenthood or a person who is proven genetically to be the child's parent. If coercive intercourse means that the second parent is not recognized as a legal parent to a child, the state may not be able to collect child support from him, contrary to federal policy and, in some cases, the state's fiscal interest. Making the circumstances of conception relevant to the child support decision would complicate what has become a highly routinized system for imposing and enforcing child support obligations. Elevating the state's fiscal interest over a woman's reproductive and parental autonomy, however, imposes intolerable costs on her citizenship and bodily and emotional integrity.

The child support enforcement system imposes limits on the parental autonomy of women in poverty because they are often required to assign or cooperate in establishing child support as a condition of eligibility for public benefits for a child such as TANF, Medicaid, and SNAP.[149] While exceptions to the requirement may be allowed in some cases of rape and family violence, those exceptions may not be made available in cases of coerced intercourse, either as a matter of policy or as a matter of caseworker discretion.[150] Where a woman has income or wealth sufficient to support a child without child support and public benefits, however, the state cannot impinge on a woman's decision

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or the child's family and can result in significant detriment to the parent-parent and the parent-child relationships. *See, e.g.*, Margaret F. Brinig & Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521 (2018); Linda Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695; Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007).

148 ELLMAN ET AL., *supra* note 10, at 503-04.

149 *Id.* at 576-80; *see* Katharine K. Baker, *Procreation and Parenting*, OXFORD HANDBOOK CHILDREN & L. 10 (Nov. 2018); Nusbaum, *supra* note 118.

150 *See* Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 (2000); Nusbaum, *supra* note 118; *supra* notes 117-120.

not to establish a child's paternity. Such women, who usually enjoy racial, educational or other social advantages along with some degree of financial security, may be less likely to confront paternal claims after coercive intercourse or may have incentives to litigate the issue in fewer situations.

Where the countervailing interests of the mother are considered, the Court has provided guidance about balancing the interests of a man and a woman in terms of reproductive autonomy in *Planned Parenthood v. Danforth*[151] and in *Planned Parenthood v. Casey*.[152] In both cases, the autonomy of the woman is accorded greater weight than that of the man. In *Danforth*, the Court held that the state cannot require the consent of the husband of a pregnant woman before she gets an abortion during the first trimester.[153] The Court reasoned that, since the state cannot prohibit an abortion during the first trimester, the state cannot delegate that power to a husband.[154] That rationale may be a fragile reed at the moment, however, given the Court's receptivity to attacks on abortion rights.[155] The second part of the Court's reasoning may be more durable. While acknowledging that the abortion decision affects both partners to a marriage, the Court said,

> The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the women who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.[156]

When balanced against that of the husband, the liberty interest of the wife is also found to be of greater moment in *Planned Parenthood v. Casey*, where the Court concludes that a state cannot require the wife to inform her husband of her decision to have an abortion.[157] The Court is concerned about the vulnerability of a wife to reproductive coercion, rape, and physical and

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151 428 U.S. 52 (1976).

152 505 U.S. 803 (1992).

153 *Danforth*, 428 U.S. at 69.

154 *Id.*

155 *See* Jackson Women's Health Organization v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted in part*, Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021).

156 *Danforth*, 428 U.S. at 71.

157 *Casey*, 505 U.S. 803.

emotional abuse and threats at the hands of a husband.[158] The Court also echoes the *Danforth* argument that the experience of the woman of pregnancy, childbirth, and parenthood is different from that of the husband and entitles her to autonomy in respect of her reproductive decisions.[159] To do otherwise, according to Justice O'Connor, unduly burdens her liberty interest in ways that are reminiscent of the now-rejected common law doctrines such as coverture under which the husband controlled the wife's reproductive and parenting decisions.[160]

The *Casey* Court does not assert that the greater authority of wives over parenthood continues indefinitely. Instead, wives and husbands are found to have equivalent liberty interests after a child is born *and* the husband has joined the wife in raising the child.[161] Once the child is born and is being raised by both spouses, the father's interest equals that of the mother, and the state can require that she notify the father about her plans for a child.[162]

Because the Court ties the relative liberty interests to parental conduct before and after the child's birth, reliance is placed both on *Danforth* and on the four early cases in which the Court considered the interests of unmarried men in legal recognition of parenthood of their offspring. The Court concluded that states must recognize the interest when the man is both the genetic father of the child *and* involved in raising the child.[163] States can deny the interest, however, when the genetic father is not involved in raising the child.[164] In the former situation, the Court says that states cannot draw a gender-based distinction under which the mother has greater authority than the father to determine who is recognized as the parent of a child.[165] In the latter situation, the state can treat the parents differently and authorize

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158 *Id.* at 893.

159 *Id.* at 895-96.

160 *Id.* at 896-97.

161 *Id.* at 895-96.

162 *Id.*

163 *Id.* at 895; *see* Stanley v. Illinois, 405 U.S. 645 (1972); *Caban*, 441 U.S. 380.

164 *Casey*, 505 U.S. at 895; *see Quilloin*, 434 U.S. 246; *Lehr*, 463 U.S. 248.

165 *Caban*, 441 U.S. at 394.

the mother to decide whether the child is adopted without consulting the father.[166]

While the Court recognizes that, on balance, the liberty interests of a woman in abortion and parenthood are weightier than those of a man whose only connection to the child is genetic or marital, most states do not follow that path. Instead, most recognize equivalent parental interests in two parents from the moment of the child's birth. According equal weight to the interests of the parents means that the woman cannot determine who she wants to parent with, if anyone. Denying her that autonomy in the context of coerced intercourse is an unacceptable and unfair restriction of her liberty.

In most circumstances, treating the parents equally recognizes and affirms their equal potential to provide a child with support and nurturance.[167] In the case of coerced intercourse, however, recognizing equal liberty interests at the time of birth in effect rewards the coercion by automatically according the rapist the legal status of fatherhood. Equal recognition denies the weightier interest of a woman who bore the child when she wants to parent separately from the rapist; equal recognition means she is subject to his continued control and coercion through his equal parental status. She may even be subject to continued coerced intercourse.

Reproductive and parental autonomy is essential to women's full participation in society, economic activity, and parenthood.[168] Legal recognition of a parental partner does not, in general, interfere with a woman's exercise of reproductive autonomy. Coerced intercourse is the opposite of reproductive and parental autonomy. Instead, the man has control over whether a woman will get pregnant, whether she will bear the child,

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166 *Quilloin*, 434 U.S. 246; *Lehr*, 463 U.S. 248.

167 *See Caban*, 441 U.S 380. Feminists are far from taking a uniform position on this issue. *See* Susan Frelich Appleton, *Gender and Parentage: Family Law's Equality Project in Our Empirical Age*, *in* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 237, 237-38 (Linda C. McClain & Daniel Cere eds., 2013); Hendricks, *supra* note 110; Serena Mayeri, *Foundling Fathers: (Non)Marriage and Parental Rights in the Age of Equality*, 126 YALE L.J. 2292 (2016); NeJaime *supra* note 64, at 290.

168 *See, e.g.*, *Casey*, 505 U.S. at 860; ("An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . .").

whether she will raise the child or place the child for adoption, whether he will be part of the child's life, and so forth. If the perpetrator suffers no sanction, he has no incentive to respect the woman's reproductive or parental autonomy.

Criminal sanctioning would, of course, be welcome in many cases. In the absence of criminal sanction or in addition to it, the state can also give the perpetrator an incentive to respect the woman's reproductive autonomy by denying him recognition of a legal connection to the child. From a legal perspective, and hopefully from a functional perspective as well, denying recognition is an effective sanction because it interrupts the exercise of the power of the perpetrator over the woman's reproductive autonomy. When her liberty interest is recognized as weightier than his, she gains the possibility of parenting the child without his control or placing the child for adoption without his veto; she can exercise exclusive parental authority.

C. *Equal Protection Requires Minimal Due Process*

When state law provides more process than is due to men who coerce intercourse and then claim parenthood, the result is that women are denied equal protection in terms of reproductive and parental autonomy. The man's interests are elevated unequally over those of the woman. Although states are not mandated to provide robust procedural protections to a man's claim of paternity, the usual procedures give the man an advantage when he seeks to establish paternity as compared to a woman who is seeking to deny or terminate paternity. A man must meet the usual civil standard of preponderance of the evidence; if his evidence of presumed or genetic parentage meets that standard, his paternity is recognized regardless of whether an allegation of coerced intercourse is made. A woman must meet a heightened standard before she can deny or terminate a man's paternity claim on the basis of coerced intercourse: beyond a reasonable doubt if the state requires conviction of a sexual offense, or clear and convincing evidence if the state allows denial or termination without a conviction.

The gendered procedural differences cannot be sustained unless the classification serves important governmental objectives and is substantially related to the achievement of those

objectives.[169] Three possible interests may be involved. First is protecting parents from state intervention. Second is facilitating the collection of child support. Third is historical skepticism about the validity of women's claims about sexual imposition. None of the three is sufficient to support the imposition of heavier procedural burdens on mothers who want to deny paternity to a man who coerced the intercourse that resulted in the birth of the child.

The first interest, protecting parents from state intervention, is based in the long tradition in the United States of entrusting the care and raising of children to parents rather than the state.[170] The state is constrained from intervening in parental decision-making because of the presumption that parents act in the best interests of their children and because constraint supports parental incentives to do so.[171]

The state is not required to recognize every claim of paternity.[172] Once a person is recognized as a legal parent, however, the state cannot use its greater power and resources to terminate parental status without showing by clear and convincing evidence that termination is required.[173] A man seeking to establish paternity needs to meet the lower standard of preponderance of the evidence. The difference between the state's burden for termination of paternity and the man's burden for establishment of paternity is the same as the difference between the woman's burden for termination of paternity and the man's burden for establishment of paternity. Carrying the standard from one context to the other may seem appropriate in a formal sense, but placing the same burden on the mother as on the state does not advance the objective of restricting the state's capacity to intervene in parental authority.

The power the state can exert over parents is the opposite of the experience of a woman who gives birth as the result of co-

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169 United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976); Reva Siegel, *Gender and the United States Constitution: Equal Protection, Privacy, and Federalism, in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 313-14, 316-17 (Beverley Baines & Ruth Rubio-Marin, eds. 2004).

170 *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000); NeJaime, *supra* note 64.

171 *Troxel*, 530 U.S. 57.

172 *Michael H.*, 491 U.S. 110; *Lehr*, 463 U.S. 248.

173 *Santosky*, 455 U.S. 745.

erced intercourse.[174] A man used social, physical, and emotional power to accomplish his goals about sex and reproduction and to deny the woman the right to decide about whether, when, and with whom she wanted to reproduce and parent. The imbalance of power does not evaporate when the child is born, and it is reinforced by the heightened standard of proof which protects his parental status. Assuming that she could make her case if the standard of proof were the usual standard of preponderance of the evidence, the heightened standard gives him a relatively better chance to continue to control her reproductive and parental choices through his legal connection to the child. Unlike the mother who is subjected to coercive intercourse, the state can assert its power to deny a person autonomy with respect to reproduction and parenting in a variety of ways. Using procedural burdens to protect a person's parenthood against the power of the state helps to limit the exercise of the state's power. Using the same differentiated procedural burdens to protect a person's parenthood against the power of a subjugated partner only advances the private agenda of a man to control a woman with whom he has had sex and, in many cases, been in an abusive relationship.

The second and third interests — facilitating the collection of child support and skepticism about the validity of women's claims about sexual imposition – wee discussed earlier in terms of terms of balancing the interests of men, women, children and the state when considering the process which is due to a man asserting paternity facing opposition by a woman on the basis of

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174 Notice that, of course, I am not arguing here that the man is entitled to assert a constitutional claim against the woman, since the Fourteenth Amendment runs against the state, not against private parties. What the woman experiences, however, is a deprivation of her autonomy when the state supports the man's assertion of paternity over her interest in autonomy with respect to reproduction and parenthood. It has been argued that her parental autonomy is entitled to the same degree of constitutional protection under *Troxel* against an unmarried putative father as it is against any other third party. *See* Hendricks, *supra* note 111, at 512-13. That is different from the argument I am making here, but it leads to similar results where the man is married to the woman and uninvolved with the child. Hendricks does not appear to be making the *Troxel* argument to protect the parental autonomy of a married woman when her spouse is similarly uninvolved with the child.

coerced intercourse.[175] Collecting child support is undeniably an important government interest, but, as was explained earlier, that interest cannot be allowed to take precedence over the interests of the woman and child to be safe, or over the reproductive and parenting autonomy of the woman.[176] Reinforcing skepticism about women's truthfulness with respect to sexual conduct is not a valid governmental interest at all, because, as discussed earlier, the skepticism is grounded in historically unfounded stereotypes about women. Further, the skepticism serves to deny women protection against sexual imposition in ways that "create or perpetuate the legal, social, and economic inferiority of women,"[177] exactly the type of status inferiority that "offends the Equal Protection Clause."[178]

Decisions by the Court in a number of cases where it has upheld gender-based distinctions have been criticized for relying on stereotypes about mothers having stronger "natural" connections to their children. Upholding the differential treatment of men and women in terms of paternal recognition in the case of coerced intercourse does not reinforce a stereotype. Instead, it is a specific response to a particular harm inflicted by conduct: the subjection of a woman to a man's will about her reproductive life. The expressive message of cases that turn on stereotypes is that all women are mothers;[179] the expressive message of denying parenthood to a man after coercive intercourse is that a woman's freedom to control her reproductive and parental life matters.

Conclusion

Sharing a pregnancy, giving birth and raising a child together with a partner can be one of life's peak experiences. When a man is willing to disregard a woman's reproductive and parental autonomy, however, and impose his will on her about when and whether she should bear a child and whether and how she should raise a child, her experience can be one of danger, fear, and depression. Paternal recognition provides the man with the force of

175 *See supra* notes 157-166.
176 *See supra* notes 147-150.
177 United States v. Virginia, 518 U.S. 515, 534 (1996).
178 Siegel, *supra* note 170, at 317.
179 *Id*.

law to continue to impose his will, regardless of the woman's vision for herself and the child.

People who are recognized as parents enjoy strong legal and Constitutional protection. The categories of people who are entitled to parenthood, however, need not include a man who commits rape or coerces intercourse. Indeed, as my incredulous friends are indicating, thinking of rapists and abusers as parents demeans a person who enters into parenthood by respectfully engaging in reproduction and parenthood with a partner who shares the same goals. As a factual matter, who belongs in which category may not be crystal clear in every case, but minimal due process is sufficient to sort out who belongs in one category and who belongs in the other.

Providing greater procedural protections for a man's claim of paternity over a woman's assertion of coerced intercourse means that he retains an unfair and unjustifiable advantage over a woman who has already been subject to gendered power and abuse. Denying a man paternal status when he has coerced intercourse is consistent with other trends in gender and family law toward greater equality of men and women in the realms of reproduction and parenthood. No husband can rape his wife without the possibility of criminal sanction. No "master" can own the child born to the enslaved woman whom he raped. And no parental privilege should come to a man who decides, without regard to the woman's will or wish, that it is time for her to get pregnant and to parent a child with him.