



NEW JERSEY'S FAILURE TO PROVIDE ADEQUATE  
PROTECTION TO SURVIVORS OF SEXUAL ASSAULT WHO  
GIVE BIRTH TO CHILDREN CONCEIVED THROUGH THEIR  
ATTACK

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## I. INTRODUCTION

Sexual assault, though vastly under-reported by survivors, occurs with alarming frequency in the United States. Despite the prevalence of sexual assault, most perpetrators are never caught, arrested, tried, or convicted for their crimes.<sup>1</sup> In addition to enduring the initial trauma of the assault, many survivors are also left to deal with a variety of lasting psychological, emotional, social, and physical effects.<sup>2</sup> Some survivors are even left to deal with the unthinkable — carrying the child of their attacker. Survivors who become pregnant as a result of sexual assault and make the decision to raise the child, may be forced to allow their attackers to share in the benefits of raising that child. Many states can require survivors to allow their attackers to share custody of and visitation rights to children conceived through an assault. New Jersey is among the states that allow for such a possibility.

This Note analyzes New Jersey's statute, N.J.S.A. 9:2-4.1, which establishes the parameters under which a court may grant an individual with custody to and visitation rights over a child born as the result of a sexual assault, and identifies the ways in which it fails to provide adequate protection to sexual assault survivors. Part I of this Note examines the nature of sexual offenses criminalized under New Jersey law and the occurrence of sexual assault generally in the United States, with a particular focus on the challenges associated with compiling accurate statistics due to the under-reporting of rape. Part I also identifies how sexual assault may produce lasting psychological, emotional, social, and physical effects in survivors.

Part II of this Note identifies the variation in legislation throughout the states regarding children born through sexual assault and the parental rights of the perpetrators of those assaults. Part II also includes an overview of N.J.S.A. 9:2-4.1, New Jersey's law on this issue.<sup>3</sup> Part II examines the inadequacies of N.J.S.A. 9:2-4.1 and the many ways in which it fails to uphold the rights of sexual assault survivors who give birth to children conceived through assault.

The New Jersey Legislature has introduced several bills to amend N.J.S.A. 9:2-4.1. Part III of this Note analyzes each proposed amendment and evaluates whether the bill would offer more meaningful protections to survivors of sexual assault than N.J.S.A. 9:2-4.1 currently does. Part IV of this Note identifies which of the proposed amendments provides the strongest protections to survivors of sexual assault and, as a result, should be enacted by the New Jersey Legislature.

### a. SEXUAL OFFENSES PROHIBITED UNDER NEW JERSEY LAW

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<sup>1</sup> *Reporting Sexual Assault: Why Survivors Often Don't*, MD. COAL. AGAINST SEXUAL ASSAULT, <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf> (last visited Nov. 21, 2017).

<sup>2</sup> *Effects of Sexual Violence*, RESILIENCE, <https://www.rapevictimadvocates.org/what-you-need-to-know/effects-of-sexual-violence/> (last visited Nov. 21, 2017).

<sup>3</sup> N.J. STAT. ANN. § 9:2-4.1 (West 2017).

Chapter 14 of the New Jersey Criminal Code establishes the sexual offenses that are criminalized in New Jersey. The sexual offenses prohibited under this Chapter include sexual assault, sexual contact, and lewdness. For the purposes of this Note, only the offenses of sexual assault and sexual contact will be addressed.

### **i. SEXUAL ASSAULT**

In New Jersey, the crime commonly referred to as rape is encompassed in the state's sexual assault statute and is referred to as "sexual assault."<sup>4</sup> According to the New Jersey State Police, sexual assault is generally defined as "the penetration, no matter how slight, in which physical force or coercion is used or in which the victim is physically or mentally incapacitated."<sup>5</sup> Pursuant to New Jersey's sexual assault statute, a person can commit sexual assault through sexual penetration and sexual contact.<sup>6</sup> The New Jersey Code defines sexual penetration as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons, or insertion of the hand, finger, or object into the anus or vagina either by the actor or upon the actor's instruction."<sup>7</sup>

New Jersey's sexual assault statute categorizes aggravated sexual assault as a crime of the first degree.<sup>8</sup> According to the statute, aggravated sexual assault occurs when a person commits an act of sexual penetration with another person under any one of the following circumstances:

- (1) The victim is less than 13 years old;
- (2) The victim is at least 13 but less than 16 years old; and
  - (a) The actor is related to the victim by blood or affinity to the third degree, or
  - (b) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or
  - (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;
- (3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape;

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<sup>4</sup> *Id.*

<sup>5</sup> *Sexual Violence Information*, N.J. STATE POLICE, <http://www.njsp.org/division/operations/sexual-violence-info.shtml> (last visited Nov. 21, 2017).

<sup>6</sup> *Id.*

<sup>7</sup> N.J. STAT. ANN. § 2C:14-1 (West 2017).

<sup>8</sup> N.J. STAT. ANN. § 2C:14-2 (West 2017).

- (4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;
- (5) The actor is aided or abetted by one or more other persons and the actor uses physical force or coercion;
- (6) The actor uses physical force or coercion and severe personal injury is sustained by the victim;
- (7) The victim is one whom the actor knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.<sup>9</sup>

Under New Jersey's sexual assault statute, sexual assault committed through sexual contact occurs when a victim is less than 13-years-old and the actor is at least four years older than the victim.<sup>10</sup> Sexual assault committed through sexual penetration occurs under any one of the following circumstances:

- (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
- (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;
- (3) The victim is at least 16 but less than 18 years old and:
  - (a) The actor is related to the victim by blood or affinity to the third degree; or
  - (b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
  - (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;
- (4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.<sup>11</sup>

Under the statute, sexual assault is categorized as a crime of the second degree.<sup>12</sup>

## **ii. SEXUAL CONTACT**

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

New Jersey’s criminal sexual contact statute, N.J.S.A. 2C:14-3, establishes the elements of sexual contact, defined as an “intentional touching by the victim or actor, either directly or through clothing, of the victim’s or actor’s intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor.”<sup>13</sup> Intimate parts are further defined to include an individual’s “sexual organ, genital area, anal area, inner thigh, groin, buttocks, or breast.”<sup>14</sup> This statute cross references the sexual assault statute, providing: “An actor is guilty of aggravated criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in 2C:14-2a. (2) through (7).”<sup>15</sup>

Under the sexual contact statute, aggravated criminal sexual contact is categorized as a crime of the third degree.<sup>16</sup> The sexual contact statute also outlines the elements of criminal sexual contact through cross references to section (c) of the sexual assault statute which pertains to sexual assault through sexual penetration.<sup>17</sup> Thus, in scenarios where a person could be charged with sexual assault, but the act involves only sexual contact, not penetration, the perpetrator is properly charged with criminal sexual contact.<sup>18</sup> Under the statute, criminal sexual contact is categorized as a crime of the fourth degree.<sup>19</sup>

## **b. OCCURRENCE OF SEXUAL ASSAULT IN THE UNITED STATES**

It is challenging to determine exactly how many sexual assaults are committed in the United States, as a vast majority of assaults are never reported to police.<sup>20</sup> The Bureau of Justice Statistics (“BJS”) found that the majority of rapes and sexual assaults perpetrated against women and girls in the United States between the years 1992 and 2000 went unreported.<sup>21</sup> According to the BJS, only 36 percent of completed rapes, 34 percent of attempted rapes, and 26 percent of sexual assaults were reported to the police

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<sup>13</sup> N.J. STAT. ANN. § 2C:14-1 (West 2017).

<sup>14</sup> *Id.*

<sup>15</sup> N.J. STAT. ANN. § 2C:14-3 (West 2017).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> NAT’L INST. OF JUSTICE, REPORTING OF SEXUAL VIOLENCE INCIDENTS (2010), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/rape-notification.aspx> (last modified Oct. 26, 2010).

<sup>21</sup> *Id.*

in that time span.<sup>22</sup> Thus, 63 percent of completed rapes, 65 percent of attempted rapes, and 74 percent of sexual assaults perpetrated against women and girls were unreported to police.<sup>23</sup>

Survivors of sexual assault offer varying explanations for not reporting assaults to police. Some survivors do not report attacks because they fear their attackers will retaliate against them.<sup>24</sup> Others do not report because they worry they lack sufficient evidence to prove the assault occurred, or that they will not be believed by police.<sup>25</sup> Some do not report attacks because they do not believe the police will be able to help them.<sup>26</sup> While the aforementioned explanations do not encompass every reason as to why survivors of sexual assault choose not to report their attacks, they do demonstrate common explanations provided by survivors. No matter what the reason, it is clear that a substantial percentage of survivors choose not to file a report.

Due to the under-reporting of sexual assault in the United States, the vast majority of perpetrators will never be tried, or convicted of committing a sexual assault.<sup>27</sup> According to the Rape, Abuse, and Incest National Network (“RAINN”) – the largest organization in the United States seeking to eradicate sexual violence – out of every 1,000 rapes committed in the United States, only 310 are reported to police.<sup>28</sup> Of the 310 reports made to police officers, only fifty-seven reports lead to an arrest.<sup>29</sup> Of those fifty-seven arrests, only eleven cases will be referred to a prosecutor.<sup>30</sup> Of the eleven cases referred to a prosecutor, only seven cases will result in a conviction.<sup>31</sup> Of those seven convictions, only six rapists will be incarcerated.<sup>32</sup> Thus, according to

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<sup>22</sup> *Id.*

<sup>23</sup> Callie M. Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS (2002), <https://www.bjs.gov/content/pub/pdf/rsarpoo.pdf>.

<sup>24</sup> MD. COAL. AGAINST SEXUAL ASSAULT, *supra* note 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *The Criminal Justice System: Statistics*, RAPE, ABUSE, & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Nov. 21, 2017).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

RAINN's estimates, out of every 1,000 perpetrations of rapes, 994 perpetrators will face little to no criminal consequences for their actions.<sup>33</sup>

Notwithstanding the challenges associated with the under-reporting of rape and sexual assault in the United States, many national organizations and entities have published data demonstrating the occurrences of reported sexual assaults in the United States. RAINN estimates that a person in the United States is sexually assaulted every ninety-eight seconds.<sup>34</sup> RAINN has also estimated that one out of every six American women has been the victim of an attempted or completed rape in her lifetime.<sup>35</sup> Despite the alarming frequency of sexual assault, RAINN has found that only six of every 1,000 perpetrators will be convicted for the commission of the attack.<sup>36</sup>

Through the Uniform Crime Reporting Program ("UCR"), the Federal Bureau of Investigation has collected and produced data demonstrating the occurrence of rape across the United States.<sup>37</sup> The UCR has classified rape as the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.<sup>38</sup> Both attempted and completed assaults are included in the statistics associated with rape presented in the UCR.<sup>39</sup> According to the UCR, 130,603 rapes were reported to police officers throughout the United States in 2016.<sup>40</sup> Of those reported, the UCR estimates that only 23,632 resulted in an arrest.<sup>41</sup> Thus, an estimated 106,971 instances of rape reported to police in 2016 did not result in an arrest. Additionally, the Centers for Disease Control and Prevention has estimated that more than 32,000 pregnancies result from rape every year in the United States.<sup>42</sup>

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<sup>33</sup> *The Criminal Justice System: Statistics*, *supra* note 27.

<sup>34</sup> *Scope of the Problem: Statistics*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/scope-problem> (last visited Nov. 21, 2017).

<sup>35</sup> *Id.*

<sup>36</sup> *Statistics*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics> (last visited Nov. 21, 2017).

<sup>37</sup> U.S. DEP'T. OF JUSTICE, FED. BUREAU OF INVESTIGATION: CRIME IN THE U.S., 2016: RAPE, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/rape> (last visited Nov. 21, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> CRIME IN THE U.S., 2016, *supra* note 37, at tbl. 1.

<sup>41</sup> *Id.* at tbl. 18.

<sup>42</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION: SEXUAL VIOLENCE: CONSEQUENCES (June 6, 2017),

Not only does the UCR provide data demonstrating the occurrence of rape at the national level, it also provides data demonstrating the occurrence of rape within each state. According to the UCR, 1,453 rapes were reported to police officers in New Jersey in 2016.<sup>43</sup> Of those reported rapes, only 396 resulted in an arrest.<sup>44</sup> These figures are strikingly similar to the occurrence of rape reported in New Jersey during the previous year. In 2015, 1,362 occurrences of rape were reported to police officers in New Jersey.<sup>45</sup> Of those reported, only 376 resulted in an arrest.<sup>46</sup>

### **c. EFFECTS EXPERIENCED BY SURVIVORS OF SEXUAL ASSAULT**

Sexual assault is extremely traumatic and can produce lasting effects on survivors. Survivors of sexual assault may experience a variety of psychological, emotional, social, and physical reactions as a result of their attacks. However, every sexual assault survivor responds to their attacks in their own unique ways.<sup>47</sup> The responses experienced by survivors can last for days, weeks, months, or even years after an attack.<sup>48</sup> Whether the assault was completed or attempted, and regardless of whether it happened recently or many years ago, it may still seriously impact the daily life of the survivor.<sup>49</sup> The following psychological, emotional, social, and physical effects discussed below are intended to demonstrate the manner in which sexual assaults impact survivors.

#### **i. PSYCHOLOGICAL & EMOTIONAL EFFECTS PRODUCED BY SEXUAL ASSAULT**

Enduring a sexual assault can cause a multitude of psychological and emotional effects in survivors. After such traumatic events, it is common for survivors to struggle

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<https://www.cdc.gov/violenceprevention/sexualviolence/consequences.html> [hereinafter Sexual Violence: Consequences].

<sup>43</sup> CRIME IN THE U.S., 2016, *supra* note 37, at tbl. 3.

<sup>44</sup> *Id.* at tbl. 22.

<sup>45</sup> *State Summary and Offense Analysis*, N.J. STATE POLICE, 12, [http://www.njsp.org/ucr/2015/pdf/2015\\_sect\\_2.pdf](http://www.njsp.org/ucr/2015/pdf/2015_sect_2.pdf) (last visited Nov. 21, 2017).

<sup>46</sup> *Id.* at 27.

<sup>47</sup> *Effects of Sexual Violence*, *supra* note 2.

<sup>48</sup> *Victims and Survivors*, RUTGERS U., OFF. FOR VIOLENCE PREVENTION & VICTIM ASSISTANCE, <http://vpva.rutgers.edu/sexual-assault/> (last visited Nov. 21, 2017).

<sup>49</sup> *Effects of Sexual Violence*, *supra* note 2.

with feelings of confusion or disbelief.<sup>50</sup> They may experience difficulty in believing the assault occurred and in understanding why the attack happened to them.<sup>51</sup> Survivors may suffer from feelings of anger, particularly directed towards their attackers for perpetrating the assault.<sup>52</sup> Experiencing a sexual assault may also cause feelings of sadness, fear, or shame.<sup>53</sup> Even though sexual assault is not the survivor's fault, some may feel guilty that they could not prevent the attack from occurring.<sup>54</sup>

Although every psychological or emotional response experienced by a survivor is valid, some survivors may suffer more life-threatening mental reactions such as depression or post-traumatic stress disorder.<sup>55</sup> Depression is a mood disorder that occurs when feelings associated with sadness and hopelessness continue for long periods of time and interrupt regular thought patterns.<sup>56</sup> Depression causes severe symptoms that affect how a person feels, thinks, and handles daily activities.<sup>57</sup> It is common for survivors of sexual assault to experience feelings of sadness, unhappiness, and hopelessness after their attack, but if these feelings persist for an extended period of time, it may be an indication the survivor is suffering from depression.<sup>58</sup>

It is also common for survivors of sexual assault to experience feelings of anxiety, stress, or fear.<sup>59</sup> However, if these feelings become severe, last more than a few weeks, or interrupt daily life functioning, it may be an indication the survivor is suffering from post-traumatic stress disorder ("PTSD").<sup>60</sup> PTSD is an anxiety disorder resulting from the experience of a traumatic event.<sup>61</sup> Symptoms associated with PTSD include flashbacks of the event, intentionally or subconsciously changing behaviors to avoid

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<sup>50</sup> *Possible Reactions to an Assault*, ZUFALL HEALTH, <https://www.zufallhealth.org/services/community-programs/sexual-assault-support-services-sass/#1485208062599-96507642-f703> (last visited Jan. 22, 2018).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> RUTGERS U., *supra* note 48.

<sup>54</sup> *Possible Reactions to an Assault*, *supra* note 50.

<sup>55</sup> *Effects of Sexual Violence*, *supra* note 2.

<sup>56</sup> *Depression*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://www.rainn.org/articles/depression> (last visited Jan. 22, 2018) [hereinafter *Depression*].

<sup>57</sup> *Depression Overview*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/depression/index.shtml> (last visited Jan. 22, 2018).

<sup>58</sup> *Depression*, *supra* note 56.

<sup>59</sup> *Post-Traumatic Stress Disorder*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://www.rainn.org/articles/post-traumatic-stress-disorder> (last visited Jan. 22, 2018).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

scenarios associated with the event, and feelings of hyperarousal.<sup>62</sup> While most people who experience major trauma do not develop PTSD, survivors of sexual assault and rape have particularly high chances of eventually qualifying for a such a diagnosis.<sup>63</sup> In fact, the overwhelming majority of survivors experience at least some symptoms within just two weeks of their assault.<sup>64</sup> According to RAINN, ninety-four percent of women who are sexually assaulted experience PTSD symptoms two weeks following an attack.<sup>65</sup> RAINN also estimates that thirty percent of women who are sexually assaulted report PTSD symptoms nine months after an attack.<sup>66</sup>

## ii. SOCIAL EFFECTS PRODUCED BY SEXUAL ASSAULT

Survivors of sexual assault may experience certain responses to their attack that impact their social functioning. Some survivors find their attack has caused a negative impact on their relationships with family, friends, and intimate partners.<sup>67</sup> Some survivors may experience difficulty in concentrating at work, school, or during other activities following their attack.<sup>68</sup> Other social effects caused by experiencing a sexual assault include isolation<sup>69</sup> and dissociation.<sup>70</sup> Additionally, survivors may find it difficult to trust others.<sup>71</sup> Some survivors may intentionally or subconsciously change social behaviors to avoid scenarios they associate with their assault.<sup>72</sup> Survivors might even lose interest in activities they once enjoyed following the trauma of their assault.<sup>73</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Battling PTSD Triggers: The Effects of Sexual Assault*, THE RANCH (Feb. 26, 2017), <https://www.recoveryranch.com/articles/battling-ptsd-triggers-effects-sexual-assault/> (last visited Jan. 26, 2018).

<sup>64</sup> *Id.*

<sup>65</sup> *Victims of Sexual Assault: Statistics*, RAPE, ABUSE, & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Jan. 22, 2018).

<sup>66</sup> *Id.*

<sup>67</sup> Sexual Violence: Consequences, *supra* note 42.

<sup>68</sup> RUTGERS U., *supra* note 48.

<sup>69</sup> Sexual Violence: Consequences, *supra* note 42.

<sup>70</sup> *Effects of Sexual Assault and Rape*, JOYFUL HEART FOUND., <http://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape> (last visited Dec. 29, 2017).

<sup>71</sup> *Id.*

<sup>72</sup> *Post-Traumatic Stress Disorder*, *supra* note 59.

<sup>73</sup> *Id.*

### **iii. PHYSICAL EFFECTS PRODUCED BY SEXUAL ASSAULT**

Survivors of sexual assault may also experience traumatic physical symptoms as a result of their attack. Sexual assault sometimes results in visible bruising or bleeding in and around the vaginal or anal area of the survivor, or even other parts of the body that were affected during the attack.<sup>74</sup> Attacks may cause long-term gynecological complications in survivors.<sup>75</sup> If the assailant exerted force in order to perform the assault, the survivor may suffer from chronic pain, discomfort, or soreness as a result of the trauma.<sup>76</sup> Survivors may also experience changes to sleeping or eating patterns following an attack, which can pose dangerous long term health consequences.<sup>77</sup>

Regrettably, survivors of sexual assault are also at risk of becoming pregnant as a result of their attack. Rape-related pregnancies occur in the United States with significant frequency.<sup>78</sup> The Centers for Disease Control and Prevention has estimated that more than 32,000 pregnancies result from rape every year in the United States.<sup>79</sup> However, the figures associated with rape-related pregnancies tend to vary as sexual assaults are vastly under-reported.<sup>80</sup> According to RAINN, studies suggest the chance of becoming pregnant from one instance of unprotected sex is between 3.1 and 5 percent, depending on a number of factors including the time of month the sex occurs, whether oral contraceptives are used, and the age of the survivor.<sup>81</sup>

## **II. LEGISLATION REGARDING CHILDREN BORN OF SEXUAL ASSAULT**

Although the figures associated with rape-related pregnancies vary, it should come as no surprise that survivors of sexual assault are at risk of being impregnated by their sexual assailant if the assault is perpetrated through unprotected vaginal

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<sup>74</sup> Samantha Gluck, *Effects of Rape: Psychological and Physical Effects of Rape*, HEALTHY PLACE, <https://www.healthyplace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape/> (last updated May 26, 2016).

<sup>75</sup> Sexual Violence: Consequences, *supra* note 42.

<sup>76</sup> Quinn Cummings, *The League of Women Voters of New Jersey Sexual Assault Factsheet Comparing Sexual Assault Policies Between States: What Works and What Doesn't*, LEAGUE OF WOMEN VOTERS OF N.J.

<sup>77</sup> *Effects of Sexual Violence*, *supra* note 2.

<sup>78</sup> 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*, AM. JOURNAL OF OBSTETRICS & GYNECOLOGY, 175.2, 320-325 (Aug. 1996), (<https://www.ncbi.nlm.nih.gov/pubmed/8765248>).

<sup>79</sup> Sexual Violence: Consequences, *supra* note 42.

<sup>80</sup> NAT'L INST. OF JUSTICE, *supra* note 20.

<sup>81</sup> *Victims of Sexual Assault: Statistics*, *supra* note 65.

intercourse. For many survivors, becoming pregnant is not simply a possibility — it is their reality. For those survivors who choose to give birth, they may ultimately be compelled to share parental rights over their child with the attackers who impregnated them.

Approximately forty-five states and the District of Columbia have enacted legislation regulating parental rights over children born through sexual assault.<sup>82</sup> Each jurisdiction differs with respect to whether or not it allows for a termination of parental rights or a restriction on custody or visitation rights.<sup>83</sup> The statutes also differ in regards to whether a conviction for sexual assault is required in order for the court to terminate or restrict parental rights and also in regards to the burden of proof that is required in order to terminate or restrict parental rights.<sup>84</sup>

**a. NEW JERSEY’S LEGISLATION—N.J.S.A. 9:2-4.1**

N.J.S.A. 9:2-4.1, New Jersey’s statute governing the court’s authority to grant or deny custody to and visitation rights over children born as the result of a sexual assault, was enacted in 1995 and was later amended to its current version in 2000.<sup>85</sup> Pursuant to N.J.S.A. 9:2-4.1:

a. Notwithstanding any provision of law to the contrary, a person convicted of sexual assault under N.J.S. 2C:14-2 shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual assault under N.J.S. 2C:14-2 shall stay enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

b. Notwithstanding any provision of law to the contrary, a person convicted of sexual contact under N.J.S. 2C:14-3 or endangering the welfare of a child under N.J.S. 2C:24-4 shall not be awarded the custody of or visitation rights to any minor child, except upon a showing by clear and convincing evidence that it is in the best interest of the child for such custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual contact under N.J.S. 2C:14-3 or endangering the welfare of a child under N.J.S. 2C:24-4 shall stay

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<sup>82</sup> *Parental Rights and Sexual Assault*, NAT’L CONFERENCE OF STATE LEGISLATURES (Apr. 17, 2017), <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> N.J. STAT. ANN. § 9:2-4.1 (West 2017).

enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

c. A denial of custody or visitation under this section shall not by itself terminate the parental rights of the person denied visitation or custody, nor shall it affect the obligation of the person to support the minor child.

d. In any proceeding for establishment or enforcement of such an obligation of support the victim shall not be required to appear in the presence of the obligor and the victim's and child's whereabouts shall be kept confidential.<sup>86</sup>

Thus, N.J.S.A. 9:2-4.1 provides that a person convicted of sexual assault shall not be awarded the custody of or visitation rights to any minor child, including a minor child born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded.<sup>87</sup> The statute provides the same prohibition for people convicted of sexual contact or endangering the welfare of a child.<sup>88</sup> Under the statute, a denial of custody or visitation does not by itself terminate the parental rights of the person denied visitation or custody, and does not affect the obligation of the person to support the minor child.<sup>89</sup>

#### **b. N.J.S.A. 9:2-4.1 INADEQUATELY PROTECTS THE RIGHTS OF SURVIVORS OF SEXUAL ASSAULT**

N.J.S.A. 9:2-4.1 fails to adequately uphold the rights of sexual assault survivors who have become pregnant as a result of their attack. These survivors have not only had their bodily autonomy violated by their attackers, but have been forced to endure the psychological, emotional, social, and physical effects associated with the attack.<sup>90</sup> In addition to dealing with the traumatic effects of the assault itself, these women must also cope with enduring a pregnancy. Given the harrowing consequences associated with surviving a sexual assault, it is disturbing that the New Jersey Legislature has failed to prioritize the rights of sexual assault survivors over the rights of those who have raped and impregnated them.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See supra*, pp. 9-13.

The United States Supreme Court has continuously upheld the principle that parents have a fundamental right to direct the upbringing of their children, as protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>91</sup> In *Troxel v. Granville*, the court articulated that the Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.<sup>92</sup> Although this fundamental right applies to both parents, it is troubling that the rights of mothers who have conceived through a sexual assault are not afforded greater protection. A mother's fundamental right to make decisions concerning the care, custody, and control of a child born from her sexual assault is disregarded by the mandates of N.J.S.A. 9:2-4.1. The right of a sexual assault survivor to make decisions concerning the care, custody, and control of her child is not protected when she can easily be forced to allow her rapist to exercise those very same rights over her child.

Under N.J.S.A. 9:2-4.1, as long as the sexual assault does not result in a conviction, a survivor can be compelled to place her child in the 'care' of her attacker, thus prohibiting her from making autonomous decisions concerning the care, custody, and control of her child. N.J.S.A. 9:2-4.1 runs afoul of principles of justice because it allows for the constitutionally protected parental rights of sexual assault survivors to be denied by stripping them of their ability to raise their children without interference from their rapists.

By forcing sexual assault survivors to share parental rights over the children born of the attacks with their rapist, the New Jersey Legislature subjects survivors to further experience the trauma of their assaults by requiring them to live their lives tethered to their rapists. How can survivors be expected to willingly place their children under the care and supervision of those who have sexually assaulted them?

The conviction requirement in N.J.S.A. 9:2-4.1 is inadequate to protect survivors of sexual assault. Under N.J.S.A. 9:2-4.1, as long as a sexual assault does not result in conviction, the assailant may be permitted to exercise custody and visitation over a child born of the attack.<sup>93</sup> However, as previously discussed, an overwhelming majority of perpetrators are never arrested, let alone convicted, for committing a sexual assault due to the vast under-reporting of rape and sexual assault in the United States.<sup>94</sup> Requiring a conviction in order for the court to deny an award of custody or visitation is overly burdensome on survivors of sexual assault who rarely, if ever, report their attacks to authorities.

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<sup>91</sup> *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

<sup>92</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>93</sup> N.J. STAT. ANN. § 9:2-4.1 (West 2017).

<sup>94</sup> MD. COAL. AGAINST SEXUAL ASSAULT, *supra* note 1.

The statute also fails to protect survivors of sexual assault by establishing that a denial of custody or visitation shall not by itself terminate the parental rights of the person denied visitation or custody.<sup>95</sup> Under N.J.S.A. 9:2-4.1, even if the court exercises its authority to deny an award of custody or visitation to a person convicted of committing a sexual assault, that individual may still be permitted to exercise parental rights over a child born of the assault.<sup>96</sup> The statute requires survivors to do more work to distance themselves and their children from their assailants by requiring survivors to file petitions to terminate parental rights under N.J.S.A. 30:4C-15.<sup>97</sup> N.J.S.A. 9:2-4.1 would more adequately protect survivors of sexual assault who conceive as a result of their attacks by automatically terminating the parental rights of the assailant upon a denial of custody or visitation.

Additionally, N.J.S.A. 9:2-4.1 provides that a person convicted of sexual assault shall not be awarded the custody of or visitation rights to a child born as a result of the sexual assault except upon a showing by clear and convincing evidence that it is in the best interests of the child for custody or visitation rights to be awarded.<sup>98</sup> However, the New Jersey Legislature has failed to require courts to also consider the best interests of the *survivor*. The interests of sexual assault survivors are not even mentioned in N.J.S.A. 9:2-4.1.<sup>99</sup> Sexual assault survivors are the ones who have experienced the trauma of the attack, and, accordingly, the court should be required to consider how an award of custody or visitation would affect them.

The primary inadequacy of New Jersey's statute is the overall message it sends to survivors of sexual assault — the notion that the Legislature has afforded greater protection to the rights of rapists than to the rights of sexual assault survivors. Despite the fact that these women have survived a sexual assault, have had their bodily autonomy violated, and have become impregnated without their consent, the Legislature has permitted their attackers to enjoy parental rights over the child born of the assault as long as they have avoided a conviction. Shouldn't the New Jersey Legislature have a stronger interest in protecting the rights of sexual assault survivors? The New Jersey Legislature must become more concerned with providing adequate protection to sexual assault survivors by implementing a statute that enables them to raise their children without undue influence from their attackers.

### **III. PROPOSED AMENDMENTS TO NEW JERSEY'S CURRENT STATUTE**

New Jersey's 217<sup>th</sup> Legislature introduced four bills, each intended to amend N.J.S.A. 9:2-4.1. All four of the proposed amendments suggest different modifications

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<sup>95</sup> § 9:2-4.1.

<sup>96</sup> *Id.*

<sup>97</sup> N.J. STAT. ANN. § 30:4C-15 (West 2017).

<sup>98</sup> § 9:2-4.1.

<sup>99</sup> *Id.*

to the existing statute, and in turn, produce different effects on the way in which survivors of sexual assault are protected against forced to co-parenting with their assailants.

**a. SENATE BILL 197**

In 2016, the Senate introduced Bill 197 to amend the provisions of N.J.S.A. 9:2-4.1.<sup>100</sup> Bill 197 intends to strengthen the right of sexual assault survivors to make decisions concerning a child born as a result of their sexual assault. The bill proposes to remove the provision of N.J.S.A. 9:2-4.1 that requires a conviction of sexual assault, sexual contact, or endangering the welfare of a child and to add a provision that custody or visitation will not be awarded if such an award would pose a danger to the survivor.<sup>101</sup> Under Bill 197, custody or visitation could not be awarded to any person if the court finds by clear and convincing evidence that the person committed an act of sexual assault, sexual contact, or endangering the welfare of a child, except upon a showing by clear and convincing evidence that custody or visitation is in the best interest of the child and that such an award would not endanger the survivor.<sup>102</sup> Bill 197 intends to declare that a criminal conviction is not a requirement for a finding by the court that a person committed sexual assault, sexual contact, or endangering the welfare of a child.<sup>103</sup> Instead, the court may make such a finding in the absence of a criminal charge, while a criminal charge is pending, or if the individual was charged with sexual assault, sexual contact, or endangering the welfare of a child but pleads guilty to a lesser offense.<sup>104</sup>

In addition to modifying N.J.S.A. 9:2-4.1, Bill 197 also intends to amend two other statutes in an effort to strengthen the rights of sexual assault survivors who give birth to children conceived as the result of a sexual assault. First, Bill 197 seeks to amend N.J.S.A. 9:3-45, which establishes the requirement that notice be given to a parent when the other parent wishes to place a child for adoption.<sup>105</sup> N.J.S.A. 9:3-45 provides that under certain circumstances, notice to the other parent is not required.<sup>106</sup> Bill 197 intends to modify this statute to add an additional circumstance under which notice would not be required.<sup>107</sup> The amendment would provide that notice of adoption

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<sup>100</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> N.J. STAT. ANN. § 9:3-45 (West 2017).

<sup>107</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

shall not be served on a parent who is found by the court by clear and convincing evidence, pursuant to the revised version of N.J.S.A. 9:2-4.1, to have committed an act of sexual assault that resulted in the birth of the child.<sup>108</sup> Thus, under Bill 197, a survivor of sexual assault who wishes to place her child up for adoption will not be required to provide notice to her attacker of this intention.

Bill 197 also seeks to amend N.J.S.A. 30:4C-15, which establishes the conditions that must be satisfied in order to properly file a petition to terminate parental rights.<sup>109</sup> Pursuant to N.J.S.A. 30:4C-15, the Division of Child Protection and Permanency (“Division”) must file a petition in family court to terminate parental rights under several circumstances, including where a parent has been convicted of certain serious crimes against the child or against another child of the parent.<sup>110</sup> Bill 197 intends to modify this statute to add an additional circumstance under which the Division could file a petition to terminate parental rights. Bill 197 seeks to amend N.J.S.A. 30:4C-15 to provide that if, pursuant to the revised version of N.J.S.A. 9:2-4.1, the court finds by clear and convincing evidence that the parent committed a sexual assault resulting in the birth of a child, that finding would also constitute grounds for the Division to file a petition to terminate their parental rights.<sup>111</sup>

Bill 197 would dramatically alter the existing provisions of N.J.S.A. 9:2-4.1 and would provide the desperately needed protections to survivors of sexual assault that New Jersey’s current law neglects to provide. Should the New Jersey Legislature choose to enact Bill 197 into law, custody of or visitation rights to a child born as a result of a sexual assault could not be awarded to the sexual assailant if the court finds by clear and convincing evidence that the person committed an act of sexual assault, sexual contact, or endangering the welfare of a child, except upon a showing by clear and convincing evidence that custody or visitation is in the best interest of the child, and that such an award will not endanger the survivor.<sup>112</sup> Thus, a survivor of sexual assault will be protected from being forced to allow her attacker to exercise custody of or visitation to her child even if her sexual assault does not result in a conviction. A survivor of sexual assault will further be protected from being forced to allow her attacker to exercise custody of or visitation to her child through the requirement that the court must consider whether an award of custody or visitation would serve as an endangerment to her.<sup>113</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> N.J. STAT. ANN. § 30:4C-15 (West 2004).

<sup>110</sup> *Id.*

<sup>111</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

In addition to protecting survivors of sexual assault from being forced to share custody or visitation rights to a child born of the sexual assault, enacting Bill 197 would also protect the privacy of survivors and their ability to make independent decisions regarding the upbringing of their children without interference from the individuals who assaulted them. The amendment would provide survivors of sexual assault with the option to place the child born of the assault up for adoption without being obligated to inform their attacker and give their attacker the opportunity to object to their decision.<sup>114</sup> The amendment would also establish that if the court finds by clear and convincing evidence that the assailant committed the sexual assault that resulted in the birth of a child, that finding would constitute grounds for a petition to terminate their parental rights.<sup>115</sup> By allowing such a finding to constitute grounds for a petition to terminate parental rights, the amendment creates the opportunity for survivors of sexual assault to take a step further in severing all ties to their attackers.

#### **b. ASSEMBLY BILLS 929 & 609**

In 2016, the General Assembly also introduced Bill 929 to amend the provisions of N.J.S.A. 9:2-4.1.<sup>116</sup> In 2018 the bill was reintroduced and renamed as Bill 609.<sup>117</sup> Bill 609 would keep the existing provisions of N.J.S.A. 9:2-4.1 in effect, but would add a provision to extend the statute's reach to apply to individuals who were not a participant in the sexual assault.<sup>118</sup> Bill 609 intends to deny an award of visitation rights to or custody of a minor child to a family member of a person convicted of sexual assault under N.J.S.A. 2C:14-2 if the sexual assault resulted in the birth of the child, except upon a showing by clear and convincing evidence that awarding visitation rights or custody is in the best interest of the child.<sup>119</sup> Bill 609 defines "family member" as a person at least eighteen-years-old related to an individual convicted of sexual assault by blood, marriage, or adoption, who resides with the individual convicted of sexual assault on a full-time basis, including a spouse, a sibling, a parent, a stepsibling or stepparent of the person convicted of sexual assault, or their spouse, and a person whose status is preceded by the words "great" or "grand."<sup>120</sup>

Bill 609 would not significantly alter the existing provisions of N.J.S.A. 9:2-4.1 and would not provide meaningful protections to survivors of sexual assault against their assailants. The amended statute would continue to require a conviction of sexual assault to deny an assailant custody or visitation rights to a child born of the sexual

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<sup>114</sup> *Id.*

<sup>115</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>116</sup> A.B. 929, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>117</sup> A.B. 609, 218<sup>th</sup> Leg., 2018 Sess. (N.J. 2018).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

assault. If the sexual assault does not result in a conviction, the court will not deny an award of custody or visitation to the assailant or the assailant's family members under the statute. Thus, a sexual assault survivor's only protection against being forced to share parental rights with her assailant or her assailant's family members will remain contingent upon a conviction.

**c. ASSEMBLY BILLS 3282 & 2860**

In 2016, the General Assembly also introduced Bill 3282 to amend N.J.S.A. 9:2-4.1.<sup>121</sup> In 2018 the bill was reintroduced and renamed as Bill 2860.<sup>122</sup> Bill 2860 would modify the existing provisions of N.J.S.A. 9:2-4.1 by adding additional criminal acts of a sexual nature to the scope of the statute.<sup>123</sup> Bill 2860 would expand the types of crimes for which a conviction would allow the court to deny an award of custody of or visitation rights to a child.<sup>124</sup> Currently, the only offenses included under the purview of N.J.S.A. 9:2-4.1 are sexual assault, sexual contact, and endangering the welfare of a child. Under Bill 2860, the additional crimes for which a conviction would prohibit an award of custody or visitation rights to a child would include: first degree kidnapping; luring or enticing a child (provided the person has also been convicted certain other crimes); human trafficking (when the conviction is based on the person knowingly holding, recruiting, luring, enticing, harboring, transporting, providing, or obtaining, by any means, another, to engage in sexual activity); lewdness; and promoting prostitution of a child or engaging in prostitution with a child.<sup>125</sup>

Bill 2860 would alter the existing provisions of N.J.S.A. 9:2-4.1 and would provide more protections to survivors of sexual assault against their sexual assailants than New Jersey's current law affords. Although the amended statute would continue to require a conviction before the court would be permitted the deny an award of custody or visitation, it would increase the number of offenses under the purview of the statute from three to nine. Thus, the court will be permitted to deny an award of custody or visitation to a greater number of individuals, which will afford more protections to survivors of sexual assault and the children born of their attack.

**d. ASSEMBLY BILLS 5160 & 270**

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<sup>121</sup> A.B. 3282, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>122</sup> A.B. 2860, 218<sup>th</sup> Leg., 2018 Sess. (N.J. 2018).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> A.B. 2860, 218<sup>th</sup> Leg., 2018 Sess. (N.J. 2018).

In 2017, the General Assembly introduced Bill 5160 to amend the provisions of N.J.S.A. 9:2-4.1.<sup>126</sup> In 2018 the bill was reintroduced and renamed as Bill 270.<sup>127</sup> Bill 270 seeks to provide that any person convicted of either aggravated sexual assault or sexual assault against a victim thirteen-years-old or younger at the time of the offense shall be denied custody of or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault.<sup>128</sup> Bill 270 would amend Section (a) of N.J.S.A. 9:2-4.1 to establish:

Notwithstanding any provision of law to the contrary, a person convicted of aggravated sexual assault or sexual assault under N.J.S. 2C:14-2 against a victim who was at least 13 years old at the time of the offense shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded.<sup>129</sup>

Bill 270 would also amend Section (a) of N.J.S.A. 9:2-4.1 to add the following provision:

Notwithstanding any provision of law to the contrary, a person convicted of aggravated sexual assault under N.J.S. 2C:14-2 against a victim who was less than 13 years old at the time of the offense shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the aggravated sexual assault. A court that awards such custody or visitation rights to a person convicted of aggravated sexual assault under N.J.S. 2C:14-2 shall stay enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the rules of court.<sup>130</sup>

Bill 270 would also eliminate the opportunity for a sexual offender to try to demonstrate that custody or visitation is in a child's best interest in any case where the offender has been convicted for the aggravated sexual assault of a child thirteen-years-

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<sup>126</sup> A.B. 5160, 217<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. (N.J. 2016).

<sup>127</sup> A.B. 270, 218<sup>th</sup> Leg., 2018 Sess. (N.J. 2018).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

old or younger.<sup>131</sup> Under Bill 270, such an individual could not be awarded the custody of or visitation rights to any child under any circumstance.<sup>132</sup>

Bill 270 seeks to preserve the provision of N.J.S.A. 9:2-4.1 which provides that a person convicted of sexual contact or endangering the welfare of a child shall not be awarded the custody of or visitation rights to any minor child, except upon a showing by clear and convincing evidence that it is in the best interest of the child for such custody or visitation rights to be awarded.<sup>133</sup> The Bill would also continue to provide that a denial of custody or visitation shall not by itself terminate the parental rights of the person denied visitation or custody, nor shall it affect the obligation of the person to support the minor child.<sup>134</sup>

Although Bill 270 would alter the existing provisions of N.J.S.A. 9:2-4.1, it would not provide adequate protection for all survivors of sexual assault against their sexual assailants. Should the New Jersey Legislature choose to enact Bill 270 into law, the amended statute would only protect survivors of sexual assault or aggravated sexual assault who were thirteen-years-old or younger when the assault occurred by prohibiting an award of custody or visitation to their attacker.<sup>135</sup> The amended statute would not prohibit an award of custody or visitation for an individual convicted of sexual assault or aggravated sexual assault as long as the survivor was at least fourteen-years-old at the time of the assault.<sup>136</sup> Thus, the amended statute would neglect to afford protection to all survivors of sexual assault or aggravated sexual assault. However, for those survivors of aggravated sexual assault or sexual assault thirteen-years-old or younger, custody of and visitation to the child born of the attack will automatically be denied to the attacker regardless of the child's best interests.<sup>137</sup> Like New Jersey's current statute, this amended statute would still require a conviction before the court would be permitted the deny an award of custody or visitation.

#### **IV. THE NEW JERSEY LEGISLATURE SHOULD AMEND N.J.S.A. 9:2-4.1 BY ADOPTING SENATE BILL 197**

New Jersey's current version of N.J.S.A. 9:2-4.1 fails to adequately uphold the rights of sexual assault survivors by neglecting to provide meaningful protections. Each of the four proposed amendments introduced by the New Jersey Legislature to alter N.J.S.A. 9:2-4.1 suggest different modifications to its existing provisions, and in turn,

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> A.B. 270, 218<sup>th</sup> Leg., 2018 Sess.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

produce different effects on the ways in which survivors of sexual assault are protected against being forced to co-parent with those who have sexually assaulted them.

Of the four proposed amendments, Assembly Bill 609 and Assembly Bill 270 offer the least protections to survivors of sexual assault, while Senate Bill 197 and Assembly Bill 2860 offer more meaningful protections. Between Senate Bill 197 and Assembly Bill 2860, Senate Bill 197 seeks to provide the strongest protections for survivors of sexual assault who give birth to children conceived as the result of a sexual assault in New Jersey. As such, the New Jersey Legislature should amend N.J.S.A. 9:2-4.1 by adopting the proposed provisions of Senate Bill 197 in order to adequately uphold the rights of sexual assault survivors in New Jersey.

**a. CONVICTION NO LONGER REQUIRED FOR THE COURT TO DENY AN AWARD OF CUSTODY OR VISITATION**

By enacting Senate Bill 197 into law, the New Jersey Legislature will remove the provision of N.J.S.A. 9:2-4.1 that requires a conviction of sexual assault, sexual contact, or endangering the welfare of a child in order for the court to deny custody of or visitation rights to a child born as the result of a sexual assault. Under the amended statute, a criminal conviction will no longer be a requirement for a finding by the court that a person committed sexual assault, sexual contact, or endangering the welfare of a child.<sup>138</sup> The amended statute will provide that custody of or visitation rights to a child born as a result of a sexual assault will not be awarded to a sexual assailant if the court finds by clear and convincing evidence that the person committed an act of sexual assault, sexual contact, or endangering the welfare of a child.<sup>139</sup>

Removing the conviction requirement of N.J.S.A. 9:2-4.1 will strengthen the rights of sexual assault survivors by allowing the court to deny an award of custody or visitation even if the sexual assault does not result in a conviction. An overwhelming majority of perpetrators are never convicted, let alone arrested, for committing a sexual assault due to the vast under-reporting of rape and sexual assault in the United States.<sup>140</sup> Requiring a conviction in order for the court to deny an award of custody or visitation is overly burdensome on survivors of sexual assault who rarely, if ever, report their attack to the authorities. By removing the conviction requirement, the New Jersey Legislature would no longer condition an award of custody or visitation on a conviction that will likely never even occur. Given that an overwhelming number of sexual assault survivors do not report their attacks, this amended statute would better serve survivors by making a denial of custody or visitation a more realistic possibility.

**b. INDEPEDNENT FINDING THAT AN AWARD OF CUSTODY OR VISITATION WILL NOT ENDANGER THE SURVIVOR**

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<sup>138</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>139</sup> *Id.*

<sup>140</sup> MD. COAL. AGAINST SEXUAL ASSAULT, *supra* note 1.

By enacting Senate Bill 197 into law, the New Jersey Legislature will establish that the court must consider whether an award of custody or visitation will not only be in the best interests of the child, but whether it will serve as an endangerment to the survivor of the attack.<sup>141</sup> Thus, the court will be statutorily mandated to make an independent determination as to how an award of custody of or visitation to a child born of a sexual assault to the perpetrator of the assault will impact the interests or well-being of the survivor of the assault.

The survivors of sexual assault are the ones who have experienced the trauma of the attack. The survivors of sexual assault are the ones who have had their bodily autonomy violated and have become pregnant without their consent. Sexual assault is traumatic and often produces lasting effects on survivors that may impact their daily functioning in the future. Under the amended statute, the New Jersey Legislature will acknowledge that the interests of sexual assault survivors are valid and are worthy of consideration in determining whether an award of custody or visitation should be granted. Being that it is still possible for a sexual assailant to be granted custody of or visitation to a child born of a sexual assault under the amended statute, the court should at least be required to consider the interests of the survivor before they place her child into the hands of the one who perpetrated the assault.

**c. NOTICE OF ADOPTION SHALL NOT BE SERVED ON A PARENT FOUND TO HAVE COMMITTED AN ACT OF SEXUAL ASSAULT**

By enacting Senate Bill 197 into law, the New Jersey Legislature will establish that notice of adoption shall not be served on a parent who is found by the court by clear and convincing evidence to have committed an act of sexual assault that resulted in the birth of the child.<sup>142</sup> Thus, a survivor of sexual assault who wishes to place her child born of the assault up for adoption will not be required to provide notice to her attacker of her intention. By enacting Senate Bill 197 into law, the New Jersey Legislature will protect both the privacy interests of sexual assault survivors and their ability to make independent, autonomous decisions concerning the upbringing of their children. Survivors of sexual assault will be able to pursue adoption proceedings without the interference of the person who sexually assaulted them and caused their pregnancy.

Providing survivors of sexual assault with the ability to place their children up for adoption without giving notice to their attackers serves as a profound benefit to their personal autonomy. Requiring a sexual assault survivor to notify her attacker about her intention to initiate adoption proceedings implies that she needs her attacker's permission to do so. This amended statute would provide survivors of sexual assault with the option to place their children up for adoption without being required to inform

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<sup>141</sup> S.B. 197, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

<sup>142</sup> *Id.*

their attackers and give their attackers the opportunity to object to their decision. Sexual assailants should not be afforded the opportunity to object to the decisions of survivors.

#### **d. FINDING OF SEXUAL ASSAULT CONSTITUTES GROUNDS FOR TERMINATION OF PARENTAL RIGHTS**

By enacting Senate Bill 197 into law, if the court finds by clear and convincing evidence that the parent committed a sexual assault resulting in the birth of a child, such a finding would constitute grounds for the Division of Child Protection and Permanency to file a petition to terminate that person’s parental rights over the child.<sup>143</sup> In order to effectuate this provision, the New Jersey Legislature will also amend N.J.S.A. 30:4C-15, which establishes the conditions that must be satisfied in order to properly file a petition to terminate parental rights.<sup>144</sup> The amended statute would create an additional circumstance under which a petition may be filed to terminate parental rights — the finding by clear and convincing evidence that the parent committed a sexual assault resulting in the birth of the child.

The amended statute will no longer allow for an individual to be legally permitted to assert parental rights over a child born through a sexual assault even if the court denies an award of custody or visitation. Instead, once the court exercises its authority to deny an award of custody or visitation, such a denial will automatically constitute grounds for a termination of parental rights. The amended statute will better serve survivors of sexual assault by no longer requiring them to pursue additional steps in severing ties with those who impregnated them through an assault.

#### **V. CONCLUSION**

This Note sought to illustrate the inadequacies of N.J.S.A. 9:2-4.1 — a statute enacted in 2000 that neglects to protect the rights of sexual assault survivors who give birth to children conceived as a result of a sexual assault. New Jersey’s current law inadequately protects survivors of sexual assault for several reasons. First, N.J.S.A. 9:2-4.1 requires a conviction in order for the court to deny an award of custody or visitation to the child born of the sexual assault.<sup>145</sup> Second, N.J.S.A. 9:2-4.1 establishes that a denial of custody or visitation shall not by itself terminate the parental rights of the person denied visitation or custody.<sup>146</sup> Finally, the statute neglects to instruct the

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<sup>143</sup> *Id.*

<sup>144</sup> N.J. STAT. ANN. § 30:4C-15 (West 2004).

<sup>145</sup> N.J. STAT. ANN. § 9:2-4.1(West 2017).

<sup>146</sup> *Id.*

court to consider the well-being of the sexual assault survivor in determining whether or not to deny an award of custody or visitation.<sup>147</sup>

A mother's fundamental right to make decisions concerning the care, custody, and control of her child born from her sexual assault is disregarded by the mandates of N.J.S.A. 9:2-4.1. Under the statute, a survivor can easily be compelled to place her child in the 'care' of her attacker, thus prohibiting her from making autonomous decisions concerning the care, custody, and control of her child. The State of New Jersey owes these women more.

Given the harrowing consequences associated with surviving a sexual assault, it is disturbing that the New Jersey Legislature has failed to prioritize the rights of sexual assault survivors over the 'rights' of those who have perpetrated sexual assaults and impregnated their victims. Survivors of sexual assault should not be compelled by the court to live their lives tethered to their rapists. Survivors should not be required to place their children under the care and supervision of individuals who sexually assaulted them. The New Jersey Legislature must amend N.J.S.A. 9:2-4.1 to provide more meaningful protections to survivors of sexual assault who give birth to children born as a result of an assault, and should therefore adopt the proposed provisions of Senate Bill 197.

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<sup>147</sup> *Id.*