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# When Pregnancy is an Injury: Rape, Law, and Culture

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**WHEN PREGNANCY IS AN INJURY:  
RAPE, LAW, AND CULTURE**

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# WHEN PREGNANCY IS AN INJURY: RAPE, LAW, AND CULTURE

Khiara M. Bridges\*

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## INTRODUCTION

In several jurisdictions in the United States, a rapist who causes his victim to become pregnant commits an aggravated sexual assault. Having committed an aggravated crime, he will be subjected to a longer prison sentence relative to

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his counterpart whose victim does not become pregnant consequent to the rape. The rapist who causes a woman to become pregnant will be treated as if he broke his victim's leg, gave her severe head trauma, or shot her with a gun. That is, *the victim's pregnancy is treated the same as a broken bone, a concussion, or a gunshot wound*. This intriguing result is the product of sexual assault statutes that provide that pregnancy is a "substantial bodily injury" that can aggravate a crime. These laws, which function to construct pregnancy as an injury, are interesting for many reasons, two of which this Article explores in depth.

First, the construction of pregnancy as an injury runs directly counter to positive constructions of pregnancy within culture.<sup>1</sup> The fact that the criminal law embodies this decidedly negative construction of pregnancy is important: it creates the possibility that this conception of pregnancy may be received within culture as a construction of pregnancy that is *as legitimate* as positive constructions. In this way, these laws create possibilities for the reimagining of pregnancy within other areas of law and, ultimately, society more generally. Essentially, this Article uses the event of pregnancy to analyze the dialectical relationship between law and culture. How is pregnancy experienced and understood within culture?<sup>2</sup> How may that experience and understanding come to be reflected within law? How may that reflection, in turn, influence experiences and understandings of pregnancy within culture? And the dialectic turns.<sup>3</sup>

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1. "Culture" is an intensely underdefined concept. See Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 579 (1998) ("Constructing a definition for anthropology's core concept has always been difficult, but at no time more so than the present. Culture is everywhere a topic of concern and analysis from cultural studies to literature to all the social sciences[,] . . . suggesting both its significance and its elusiveness as a category of analysis."). Nevertheless, this Article uses "culture" to refer to an unbounded system in which meanings are created and disputed. See Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 42 (2001) (defining culture as a "set of shared, signifying practices—practices by which meaning is produced, performed, contested, or transformed").

2. Of course, there is no single answer to this question. Pregnancy is experienced and understood in multiple and contradictory ways. The purpose of this Article is to interrogate how pregnancy may be experienced by women whose pregnancies are unwanted, how that experience may come to be reflected in the law, and the significance thereof.

3. This conceptualization of the dialectic between law and culture differs from scholarship that theorizes the two phenomena as having a unidirectional relationship. The "mirror theory" offers law as no more than a reflection of the norms that originate in culture; as such, culture produces law. See Berta Esperanza Hernández-Truyol, *Glocalizing Law and Culture: Towards a Cross-Constitutive Paradigm*, 67 ALB. L. REV. 617, 619 (2003) (noting the "mirror thesis," which theorizes law as derivative of culture, with the law being "a mirror of society that operates to maintain social order"); see also Menachem Mautner, *Essay, Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841 (2011) (noting an approach to the study of law that holds that "statutes are not meant to create law; rather, their function is to reflect existing social practices"); Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486 (2003) (noting the highly influential and still pervasive thought of jurist Patrick Devlin, who considered the law as "the arm of a coherent antecedent culture that is the ultimate source of society's identity and authority"). The "constitutive theory," in

Second, in constructing pregnancy as an injury, these laws recall the argumentation that proponents of abortion rights once made—argumentation that one no longer hears or sees in the debates surrounding abortion. In decades past, advocates for the abortion right made their case in the language of injury: unwanted pregnancies were injuries to the women forced to bear them. Abortion figured as a healing modality, serving to heal a woman of her injury. This advocacy never quite made it into abortion jurisprudence. As a consequence, perhaps, the construction of unwanted pregnancy as an injury disappeared from the language of abortion rights activism. However, recent developments in *anti-abortion* argumentation counsel its retrieval. There has been a shift in anti-abortion argumentation away from a focus on the fetus and toward a focus on the woman. In this shift, abortion is wrong, not because it harms the fetus, but rather because it harms the pregnant woman. The Court in *Gonzales v. Carhart* (*Carhart II*) accepted this position, upholding a law that restricted access to abortion because it seemed “unexceptionable” to conclude that “some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”<sup>4</sup> Because the Court accepted as true that abortion harms women, it is reasonable to expect that opponents of abortion rights will continue to advocate in this register. In light of this, the incredible significance of constructing unwanted pregnancy as an inju-

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comparison, offers a more agentive representation of the law, with the law standing apart from culture and functioning to create the culture upon which it acts; as such, law produces culture. See Mautner, *supra*, at 841 (noting the “constitutive” approach to the study of law, which “views law as participating in the constitution of culture and thereby in the constitution of people’s minds, practices, and social relations”); see also Post, *supra*, at 488–89 (noting that “law is sometimes used to revise and reshape culture” and “[o]n this account, the law does not merely reflect the norms of a pre-existing culture, but is instead itself a medium that both instantiates and establishes culture”). A theory of the dialectical relationship between law and culture recognizes the aptness—and the simultaneity—of both the mirror theory and the constitutive theory. Accordingly, while culture invariably produces law, law invariably produces culture. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 987 (2004) (“There is a symbiotic relationship between culture and law. Culture shapes the law, and law is a product of culture.”); Mautner, *supra*, at 856 (“[A] comprehensive understanding of the relations between law and society would have to be circular—viewing society as creative of law, which in turn acts upon society, . . . and so forth.”); Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1129 (2002) (book review) (noting the “important relationship between law and culture: how legal institutions construct social reality, how ‘law talk’ gets dispersed throughout society, . . . and how law symbolically reflects and reinforces deep cultural attitudes, fears, or beliefs”); see also Mezey, *supra* note 1, at 47 (“[L]aw’s power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it.”). Sociologist Pierre Bourdieu perhaps stated it most eloquently when he observed, “It would not be excessive to say that [law] creates the social world, but only if we remember that it is this world which first creates the law.” Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 839 (Richard Terdiman trans., 1987).

4. 550 U.S. 124, 159 (2007) (citation omitted).

ry is revealed: unwanted pregnancies *also*, literally, harm women. If true, then women bearing unwanted pregnancies are faced with two injuries—the pregnancy itself and the abortion that would end it. Antiabortion activists, and the Court, would need to articulate a basis for compelling women to remain injured (that is, pregnant) in order to protect them from a harm (that is, abortion). Moreover, if unwanted pregnancy is an injury, then perhaps abortion does not harm women but rather *heals* them. Which is to say, recent developments in antiabortion argumentation counsel the retrieval of the claim that unwanted pregnancies are injuries to women; the sexual assault laws under analysis are a means to legitimize this claim.

The exploration proceeds in three Parts. Part I provides an overview of sexual assault statutes that punish more severely perpetrators who cause their victims to become pregnant and suggests that these laws are worthy of cultural analysis because they define pregnancy as an injury—a definition that is wholly at odds with positive constructions of pregnancy. Part II moves the discussion outside the context of rape. It contends that the definition of pregnancy as an injury does not solely describe women’s experiences of pregnancies that result from rape, but describes women’s experiences of unwanted pregnancy as a general matter. Indeed, it is the profound unwantedness of the pregnancy that results from rape that makes it an injury. Thus, the criminal law gives legitimacy to a subversive phenomenology<sup>5</sup> of unwanted pregnancy, which may have repercussions for how all unwanted pregnancies—not just those resulting from rape—are understood in society. Part II also notes the significance of this argument in light of recent claims made by antiabortion activists that abortion harms women.

Part III looks at representations of pregnancy in other areas of the law, including constitutional law, statutory law, and common law. While this canvass of the law is not meant to be exhaustive, it reveals that the law frequently embodies positive constructions of pregnancy. This is true even when negative constructions might be expected—as when the Court interprets the Constitution to provide for a woman’s right to terminate a pregnancy. The rare times that the law represents pregnancy subversively are when laws index the social effects of pregnancies—for instance, the taxing of government coffers to support the children and the families produced by pregnancy. Accordingly, while the law in these instances represents pregnancy as an injury, the injury is to *the body politic*. Thus, the subversive nature of the representation is mitigated, as it does not endeavor to describe a bodily experience of pregnancy as an injury. This Part’s canvass demonstrates that it is a rarity for the law to embody a strictly subver-

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5. In this Article, “phenomenology” is used to refer to an individual’s subjective, conscious, usually bodily experience. See HERBERT SPIEGELBERG, *DOING PHENOMENOLOGY: ESSAYS ON AND IN PHENOMENOLOGY* 3 (1975) (defining phenomenology as “a philosophical movement whose primary objective is the direct investigation and description of phenomena as consciously experienced”).

sive construction of pregnancy (that is, one that focuses on a phenomenology of pregnancy as an injury), suggesting the exceptionality of the sexual assault statutes at issue. Moreover, this Part's canvass shows that the law, as a general matter, fails to reflect the reality of this experience, which is unique to women; in so doing, the law has silenced women. Nevertheless, there remains the possibility that, as women gain access to positions of power in the public sphere, their experiences will come to be reflected in law. This Part serves to itemize several areas of the law that may be rewritten, and radically so, should the law actually listen to women. A brief Conclusion follows.

Before beginning the exploration, however, it is necessary to lay out in some detail just what is meant by the phrase "positive construction of pregnancy." The positive construction of pregnancy may be described as hegemonic, insofar as it is a persuasive understanding of the event that has achieved its persuasiveness through cultural institutions such as law, religion, and the media. This construction holds pregnancy to be a wonderful, life-affirming, overwhelmingly good event in the life of the woman (and her family, nation, and, ultimately, species). The beautiful—almost beatific—aspects of pregnancy are captured in a passage from the French novelist Colette's *L'Etoile Vesper*: "Insidiously, unhurriedly, the beatitude of pregnant females spread through me . . . . This purring contentment, this euphoria—how give a name either scientific or familiar to this state of preservation?"<sup>6</sup>

Indeed, positive constructions of pregnancy recognize the magnificence of *pregnancy* as distinct from the magnificence that infants may represent and embody:

Pregnant, we know god,  
this presence inside us  
which protects us  
yet makes us  
vulnerable.

My baby  
flowed out around me  
protecting me  
in her own radiance  
for nine whole months.

I was never alone.  
I did not fear death.  
The baby within  
& the spirit without  
were one,  
& I was at peace.

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6. Colette, *L'Etoile Vesper*, quoted in JUDITH S. MUSICK, YOUNG, POOR, AND PREGNANT: THE PSYCHOLOGY OF TEENAGE MOTHERHOOD 107 (1993) (omission in original).

Then she was born,  
& fear reclaimed me.

Erica, Erica,  
don't you know  
that if you can create  
a baby, you can also create god?  
& if god can bloom  
a baby in your belly  
then She  
must be  
with you always?<sup>7</sup>

Which is not to say that positive constructions cannot recognize that pregnancy is physically taxing, occasionally painful, and frequently burdensome. These undesirable aspects of pregnancy are not denied within positive constructions of pregnancy. Nevertheless, the experience of pregnancy remains, at the end of the day, a *good* thing. The negative parts of the experience make it bittersweet; but it is always, and in every case, more sweet than bitter. Consider the oft-quoted description of pregnancy offered in *Muller v. Oregon* (upholding a law that limited the number of hours women could work in laundries), which emphasized that a woman's maternal functions disadvantaged her, especially "when the burdens of motherhood are upon her."<sup>8</sup> Pregnancy is burdensome, but ultimately is a benefit to her, as well as a "benefit of all."<sup>9</sup> Consider as well descriptions of pregnancy documented in Kristin Luker's classic analysis of the abortion debate and the worldviews of activists both in favor of and against abortion rights.<sup>10</sup> Antiabortion activists might have the most incentive to obfuscate the bitter parts of the bittersweet experience of pregnancy. Nevertheless, they did not appear to hesitate to acknowledge the bitter that comes with the sweet: one opponent of abortion rights offered that "it's a normal thing [not to enjoy pregnancy] . . . [because] very often you're sick."<sup>11</sup> Another admitted that, especially in its earlier stages, pregnancy is unpleasant; but "if you just stayed with it a little longer, you might welcome that trial very much."<sup>12</sup> In

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7. ERICA JONG, *The Protection We Bear*, in *ORDINARY MIRACLES* 16, 16 (1983) Copyright © 1983, 1991, Erica Mann Jong. Used by permission of the poet. *See also* MUSICK, *supra* note 6, at 109-10 (quoting pregnant teenagers' descriptions of being pregnant, including the statements "I like it when people notice I'm having a baby [because i]t gives me a good feeling inside and makes me feel important" and "Being pregnant is great. I feel sorry for men because they can never feel what a woman does when she's pregnant").

8. 208 U.S. 412, 416, 421 (1908).

9. *Id.* at 422 (justifying such legislation for "the well-being of the race").

10. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

11. *Id.* at 168-69 (first alteration in original).

12. *Id.* at 169.

these descriptions, pregnancy is bitter, certainly. But, always and in every case, it is more sweet than bitter.

What exactly is it about pregnancy that makes it positive? Of what does the “sweet” of the bittersweet consist? If pregnancy is sweet only because it results in a baby, perhaps pregnancy is not positive at all; perhaps it is babies that are positive. However, this answer ignores the importance that culture gives to pregnancy as an independent state of the body. The poem and the novel excerpted above make this clear. Moreover, it would be an understatement of the highest degree to describe fetuses within the current sociopolitical context as “meaningful.” On one side of the spectrum of meaningfulness, the fetus is an “innocent” biological organism.<sup>13</sup> On the other side of the spectrum, the fetus is “a life”—a value that is distinct from biological life; as “a life,” the fetus is a precious, almost sacred, venerated entity.<sup>14</sup> When one recognizes the profundity of the fetus within the current sociopolitical moment, one can recognize the profundity of pregnancy: it is the state of the body that nurtures fetuses. Therefore, pregnancy, distinct from the baby that it produces, may be idealized in its own right.<sup>15</sup>

It is worth underscoring the particularity of this Article’s argument. It does not argue that the positive construction of pregnancy is transhistorical or transcultural. Nor does it contend that the construction of pregnancy as an injury will be properly understood as subversive always and in every sociopolitical context. Rather, it offers the positive construction of pregnancy as an idea that exists with a certain persuasiveness in the present sociopolitical moment in the United States. Moreover, the construction of pregnancy as an injury is subversive only because of the prevalence of the positive construction of pregnancy. And there should be no doubt that the positive construction of pregnancy is

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13. See, e.g., Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1099 (1999) (noting the commonly held view that the fetus is “innocent”).

14. See, e.g., BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN 2* (Lee Hoinacki trans., 1993) (“[T]he term *life* (and *a life*) has become an idol, and controversy has attached a halo to this idol that precludes its dispassionate use in ordinary discourse.”). Indeed, Duden endeavors to write a history of the “conditions under which, in the course of one generation, technology along with a new discourse has transformed . . . the unborn into a life, and life into a supreme value.” *Id.*

15. Analogously, when pregnancy is an injury to the body politic, the injury is not simply the costs that the *baby* imposes on public coffers. The pregnancy has costs independent of the baby that it produces—when the public qua government subsidizes prenatal healthcare as well as when the public’s interest in protecting and promoting fetal life is not vindicated when a woman chooses to terminate a pregnancy. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (interpreting the fact that many teenage pregnancies end in abortion as a social problem); OFFICE OF MEDICAID MGMT., N.Y. STATE DEP’T OF HEALTH, *PRENATAL CARE ASSISTANCE PROGRAM (PCAP): MEDICAID POLICY GUIDELINES MANUAL 3* (2006), available at [https://www.emedny.org/providermanuals/prenatal/pdfs/prenatal-policy\\_section2006-1.pdf](https://www.emedny.org/providermanuals/prenatal/pdfs/prenatal-policy_section2006-1.pdf) (describing New York State’s Prenatal Care Assistance Program, which is a Medicaid program that provides comprehensive prenatal healthcare to otherwise uninsured or underinsured women).

prevalent within U.S. society. One can find it in music,<sup>16</sup> movies,<sup>17</sup> television shows,<sup>18</sup> and political discourse.

With respect to political discourse, positive constructions of pregnancy tend to be summoned during conversations about abortion. It is important to note, however, that a political stance in favor of abortion rights does not necessarily align with subscription to negative constructions of pregnancy—to the notion that pregnancy is an injury. In fact, political figures in favor of abortion rights typically publicly subscribe to, or simply use for political advantage, positive constructions of pregnancy.<sup>19</sup> Consider the argumentation used by then-Senator Barack Obama in the final debate against Senator John McCain during the 2008 presidential election. In justifying his support for abortion rights, Obama invoked a positive construction of pregnancy:

But there surely is some common ground when both those who believe in choice and those who are opposed to abortion can come together and say, “We should try to prevent unintended pregnancies by providing appropriate education to our youth, communicating that sexuality is sacred and that they

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16. See, e.g., PAUL ANKA, *(You're) Having My Baby*, on ANKA (Capitol Records 1974) (“The need inside you/ I see it showin’/ Oh/ The seed inside you/ Baby/ Do you feel it growin’/ . . . / I’m a woman in love and I love/ What it’s doin’ to me./ . . . / I’m a woman in love and I love/ What’s goin’ though me.”); CREED, *With Arms Wide Open*, on HUMAN CLAY (Wind-Up Records 1999) (“Well I don’t know if I’m ready/ To be the man I have to be/ I’ll take a breath, I’ll take her by my side/ We stand in awe, we’ve created life . . .”). But see, e.g., DIANA ROSS & THE SUPREMES, *Love Child*, on LOVE CHILD (Motown Records 2004) (1968) (“Love child, never meant to be./ Love child, born in poverty./ . . . / This love we’re contemplating, is worth the pain of waiting./ We’ll only end up hating the child we may be creating./ Love child, never meant to be./ Love child, scorned by society . . .”).

17. The most obvious and most recent example may be *Juno*, which was nominated for an Oscar for Best Picture. JUNO (Fox Searchlight Pictures 2007). In the film, a quirky, lovable teenager’s unplanned pregnancy ends well for all parties involved after she foregoes her initial decision to have an abortion, instead carrying the baby to term and arranging for the baby to be adopted.

18. Examples include the widely popular MTV shows *Teen Mom* and *16 and Pregnant*, which chronicle the lives of teenagers who become pregnant. All the teenagers featured on the shows decide against abortion; most avow at some point that, while becoming pregnant at a young age was difficult and changed the courses of their lives, they do not regret the choices that they have made. Cf. Melissa Henson, Op-Ed., *MTV’s ‘Teen Mom’ Glamorizes Getting Pregnant*, CNN (May 4, 2011), [http://articles.cnn.com/2011-05-04/opinion/henson.teen.mom.show\\_1\\_amber-portwood-teen-mom-mtv](http://articles.cnn.com/2011-05-04/opinion/henson.teen.mom.show_1_amber-portwood-teen-mom-mtv).

19. The reverse is also true; that is, a political stance against abortion rights may not be based on a subscription to a positive construction of pregnancy. It may be based on the belief that the fetus is a person in the constitutional sense, and abortion is a deprivation of the fetus’s constitutional rights. Former Pennsylvania Senator Rick Santorum expressed this position simply: “It became very clear to me that life begins at conception and persons are covered by the constitution, and because human life is the same as a person, to me it was a pretty simple deduction to make that that’s what the constitution clearly intended to protect.” Peter Walker, *Rick Santorum ‘Would Urge Daughter Not to Have Abortion Even After Rape’*, GUARDIAN (Jan. 24, 2012), <http://www.guardian.co.uk/world/2012/jan/24/rick-santorum-daughter-abortion-rape>.

should not be engaged in cavalier activity, and providing options for adoption, and helping single mothers if they want to choose to keep the baby.”

Those are all things that we put in the Democratic platform for the first time this year, and I think that’s where we can find some common ground, because nobody’s pro-abortion. I think it’s always a tragic situation.<sup>20</sup>

Here, then-Senator Obama may be read to reason that abortion is “always a tragic situation” because, consistent with positive constructions, pregnancy is a wonderful, life-affirming, overwhelmingly good event that life circumstances, tragically, prevent a woman from appreciating as such. Abortion rights are supported not because abortion can heal a woman from an event—an unwanted pregnancy—that is experienced as a physical injury. Instead, abortion rights are supported because a woman’s pregnancy may occur during a time when she is incapable of taking pleasure in its inherently wondrous nature. Although arising in an argument in support of abortion rights, this conceptualization of pregnancy is decidedly positive.

It may be important to rebut the notion that pregnancy is constructed negatively in a context that typically is not understood to be subversive: Christianity. The idea that some strands of Christianity conceptualize pregnancy negatively, that is, as an injury or punishment, may rest upon a particular, problematic understanding of the parable of original sin. After Adam and Eve ate from the tree of knowledge, God cast them out of the Garden of Eden with a message: “To the woman he said: ‘I will increase your labour and your groaning, and in labour you shall bear children.’”<sup>21</sup> Thus, the punishment for original sin is *painful childbirth*—not pregnancy itself.<sup>22</sup> Which is to say, pregnancy is

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20. *Final Presidential Debate* (CBS television broadcast Oct. 15, 2008) (transcript available at <http://www.cbsnews.com/stories/2008/10/16/politics/2008debates/main4525254.shtml>). Nevertheless, while it is true that those who support abortion rights may subscribe to and invoke positive constructions of pregnancy, it may also be true that those against abortion rights are *more likely* to subscribe to and invoke positive constructions of pregnancy: during his bid for the Republican presidential nomination in 2012, former Pennsylvania Senator Rick Santorum invoked a positive construction of pregnancy par excellence when describing the depth of his conviction that abortion is wrong. When asked whether his opposition to abortion encompassed the circumstance of a woman becoming pregnant after a rape, he answered:

I believe and I think the right approach is to accept this horribly created—in the sense of rape—but nevertheless a gift in a very broken way, the gift of human life, and accept what God has given to you. As you know, we have to, in lots of different aspects of our life. We have horrible things happen. I can’t think of anything more horrible. But, nevertheless, we have to make the best out of a bad situation.

*Piers Morgan Tonight: Interview with Rick Santorum* (CNN television broadcast Jan. 20, 2012) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1201/20/pmt.01.html>).

21. *Genesis* 3:16 (New English Bible).

22. 1 GORDON J. WENHAM, *WORD BIBLICAL COMMENTARY* 81 (David A. Hubbard et al. eds., 1987) (“‘To be a joyful mother of children,’ preferably a large family, was a sure sign of God’s blessing. Yet the pain of childbirth, unrelieved by modern medicine, was the most bitter known then.” (citations omitted)).

not fairly constructed as a punishment or injury. Rather, in most strands of Christianity, pregnancy is constructed as a good thing—a blessing.<sup>23</sup>

It is safe to conclude that positive constructions of pregnancy are ubiquitous and powerful in society; negative constructions of pregnancy exist, enfeebled, in the shadows. Sexual assault statutes that define pregnancy as an injury, however, have the potential to change this dynamic.

## I. DEFINING RAPE

Modern jurisdictions vary greatly in the way that they define rape. However, most include some mixture of the elements of sexual intercourse, victim nonconsent, and use of force by the perpetrator.<sup>24</sup> Moreover, many jurisdictions divide rape into categories that impose different sentences based on the presence or absence of aggravating factors. The infliction of a “substantial bodily injury,” “serious bodily injury,” “great bodily harm,” “serious personal injury,”<sup>25</sup> or similar category of harm during the course of a rape is one aggravat-

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23. See ATHALYA BRENNER, *THE INTERCOURSE OF KNOWLEDGE: ON GENDERING DESIRE AND ‘SEXUALITY’ IN THE HEBREW BIBLE* 52 (R. Alan Culpepper et al. eds., 1997) (“Procreation is introduced in the Bible’s first chapter as a blessing. . . . [B]e fruitful and multiply’ is the divine gift and blessing meted out to creatures of the higher orders—animals and humankind—upon their creation . . . .” (citations omitted)). Moreover, there is the notion that, within some religious or ethical traditions, pregnancy is a punishment for female sexuality; that is, women’s punishment for having sex is pregnancy. See, e.g., Deborah D. Rogers, *Rockabye Lady: Pregnancy as Punishment in Popular Culture*, 26 J. AM. STUD. 81, 81 (1992) (noting the idea that female sexuality is punished by pregnancy, which may be fatal—or, at the very least, excruciating). However, pregnancy within these traditions is the *natural consequence* of sex, not a punishment for it. When a woman intends to engage in nonprocreative sex, yet pregnancy results nevertheless, she is not being punished; she is simply experiencing the expected, ordinary result of sexual activity. See Anthony Esolen, Editorial, *Notre Madame et le President: There Was No Moral Common Ground*, TOUCHSTONE, July/Aug. 2009, at 3, 3 (“There are plenty of women who do not want to be pregnant, and plenty of men who do not want them to be pregnant, but in all those cases the pregnancies are the results of intentional actions that have pregnancy as their perfectly natural and perfectly predictable consequence.”).

24. See 75 C.J.S. *Rape* § 1 (West 2012). Several jurisdictions have eliminated the requirement that the perpetrator use physical force. This elimination has occurred either via statute or via judicial interpretation of the term “force.” See 18 PA. CONS. STAT. § 3101 (2012) (defining “forcible compulsion” as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied”); *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (holding that the “physical force” element of the sexual assault statute was satisfied by the physical force required to accomplish sexual penetration in the absence of victim consent); cf. MODEL PENAL CODE § 213.1(2)(a) (1962) (defining the crime of “gross sexual imposition” as occurring when a man “compels [a woman] to submit [to sexual intercourse] by any threat that would prevent resistance by a woman of ordinary resolution”).

25. When a sexual assault statute provides that a serious “personal” injury, as opposed to a serious “bodily” injury, is an aggravating factor, it usually means that the statute endeavors to include serious nonphysical harms (like posttraumatic stress disorder, mental anguish, or depression) as cognizable injuries, which may not be readily understood as

ing factor<sup>26</sup> that can elevate a “basic” rape to a more seriously graded offense.<sup>27</sup> However, that which constitutes a “substantial bodily injury” is not self-evident, and jurisdictions vary in how they define the term.

Most definitions of “substantial bodily injury” closely track the one contained in the Model Penal Code, providing that “‘serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ . . . .”<sup>28</sup> As such, it is not intuitive that pregnancy should be understood as a “substantial bodily injury.” Again, jurisdictions have taken different approaches to this question. Wisconsin, for one, has expressly included pregnancy in its definition of the aggravated crime of first-degree sexual assault, requiring that pregnancy be treated *like* a “great bodily harm.”<sup>29</sup> Other jurisdictions allow the factfinder to determine whether pregnancy is a substantial bodily injury on a case-by-case basis.<sup>30</sup> Courts in these jurisdictions have suggested that some factors that would warrant a finding that a pregnancy

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“bodily” injuries in the alternative formulation. For a discussion of the significance of this, see *infra* note 48 and accompanying text.

26. Other aggravating factors include the commission of another felony during the rape and the use of a deadly weapon. See RICHARD G. SINGER & JOHN Q. LA FOND, CRIMINAL LAW: EXAMPLES AND EXPLANATIONS 235 (4th ed. 2007).

27. For instance, Washington divides rape into three degrees, with first-degree rape involving sexual intercourse “by forcible compulsion” and where the defendant “[i]nflicts serious physical injury.” WASH. REV. CODE § 9A.44.040(1), (1)(c) (2012). First-degree rape requires a minimum of three years confinement and does not allow for a suspended sentence. *Id.* § 9A.44.045. Second-degree rape, though, which lacks a requirement that the perpetrator inflict a “serious physical injury,” does not carry a minimum sentence and does not remove the possibility of a suspended sentence. See *id.* § 9A.44.050. Some states do not differentiate rape in this way. See, e.g., ARK. CODE ANN. § 5-14-103(a) (2012) (establishing one class of rape that, among other possibilities, can require only “forcible compulsion” or some type of incapacity by the victim).

28. MODEL PENAL CODE § 210.0(3); see, e.g., COLO. REV. STAT. § 18-1-901(3)(p) (2012) (“‘Serious bodily injury’ means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.”); WYO. STAT. ANN. § 6-1-104(x) (2012) (“‘Serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes miscarriage, severe disfigurement or protracted loss or impairment of the function of any bodily member or organ . . . .”).

29. WIS. STAT. § 940.225(1)(a) (2012) (defining first-degree sexual assault as “sexual contact or sexual intercourse with another person without consent of that person” that “causes pregnancy or great bodily harm to that person”).

30. See, e.g., *United States v. Shannon*, 110 F.3d 382, 386, 388 (7th Cir. 1997) (en banc) (arguing that rape cases in which the victim becomes pregnant “must be considered one by one to see whether the conduct punished by the particular law under which the defendant was convicted involves a serious risk of physical injury” and concluding that when a defendant has sex with a thirteen-year-old minor, a resulting pregnancy “could well be considered . . . a physical injury even if the pregnancy is normal”), *abrogated in part on other grounds by Begay v. United States*, 553 U.S. 137 (2008).

constitutes a substantial bodily injury in an individual case include the age of the victim and whether the victim experienced any complications during the pregnancy or its termination.<sup>31</sup> For example, in *United States v. Guy*, the Eighth Circuit found that the fourteen-year-old victim's pregnancy was a "serious bodily injury" because of the excruciating pain that she endured during labor.<sup>32</sup> The court referred to testimony stating that the victim experienced extreme pain during her labor "because her young age and small body frame made her physically unable to cope with the stress of childbirth."<sup>33</sup> Moreover, the court noted "that the pain of labor was increased because [the victim] suffered a complete tear of the wall between the rectum and vagina, she suffered from facial petechia or broken blood vessels on her face, and she suffered severe hemorrhaging from which she would have died without medical intervention."<sup>34</sup>

It is uncommon for jurisdictions to explicitly *exclude* pregnancy as a substantial bodily injury—although, in the past, some courts have done exactly that, reasoning that there is always a close connection between rape and pregnancy and, as such, a pregnancy cannot constitute a separate injury from the rape and thus cannot warrant additional punishment.<sup>35</sup> The prevailing view,

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31. *See, e.g.*, *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008) (Corrigan, J., concurring) ("Factors such as the age of the victim, as well as the outcome, duration, or problems associated with a pregnancy may make its impact even *more* substantial.").

32. 340 F.3d 655, 656, 658 (8th Cir. 2003).

33. *Id.* at 658.

34. *Id.* Bolstering the court's conclusion that the victim's pregnancy was a "substantial bodily injury" was evidence that the victim experienced mental impairment because of the trauma of the rape and pregnancy. *Id.* (referring to a doctor's testimony that the victim suffered from depression and posttraumatic stress disorder, with symptoms including "insomnia, hyper vigilance, slow psychomotor retardation, crying, dysphoric mood, and lack of verbal and physical communication"). The implication of *United States v. Guy* is that pregnancy may not be a substantial bodily injury for those women whose bodies are better able to cope with childbirth (or who undergo an abortion or suffer a miscarriage and, therefore, avoid the necessity of childbirth altogether), or who are more capable of coping with the mental and emotional fallout from a rape that results in pregnancy. This implication—that a judge or jury may evaluate the difficulty of a woman's labor and the extent of a woman's sadness and/or anger after being raped—may be a bit disquieting, and some scholars have expressed their displeasure with it. *See* Lauren Hoyson, Note, *Rape is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VAL. U. L. REV. 565, 591 (2010) ("Pregnancy has a substantial effect on all women, whether it involves complications or not. Furthermore, the effect of pregnancy on adult women is no less severe than on minors. Therefore, pregnancy provides grounds for increasing an assailant's sentence in all cases . . ." (footnotes omitted)).

35. *See, e.g.*, *United States v. Yankton*, 986 F.2d 1225, 1230 (8th Cir. 1993) (rejecting the lower court's finding that pregnancies resulting from rape could never constitute serious bodily injuries because of the belief that pregnancy is "a pretty common, commonly understood but unfortunate result" of rape (internal quotation marks omitted)). The court in *Yankton*, while holding that pregnancy was not a de facto "serious bodily injury" that would warrant an increased punishment in every instance, held that on the facts of the case before it, the victim's pregnancy could be a "serious bodily injury" and remanded for a determination by the lower court whether the perpetrator ought to be punished more severely

however, appears to be that pregnancy and the resulting consequences are not injuries necessarily incidental to an act of rape and, consequently, can warrant an increased punishment if caused by a sexual assault.<sup>36</sup>

Some jurisdictions have replaced the language of “substantial *bodily* injury” with “substantial *personal* injury,” which specifically allows for increased punishment for the infliction of nonphysical (that is, mental or emotional) injuries. For example, the definition of “personal injury” in Michigan’s sexual assault statute includes “mental anguish.”<sup>37</sup> Similarly, the definition of “serious personal injury” in Nebraska’s sexual assault statute includes “extreme mental anguish or mental trauma.”<sup>38</sup> Notably, the sexual assault statutes of both states explicitly define pregnancy as a species of “personal injury.”

Whether pregnancy constitutes a substantial injury warranting an increased punishment for a person convicted of sexual assault raises many interesting doctrinal<sup>39</sup> and practical<sup>40</sup> issues. From an anthropological perspective, these

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because of it. *Id.* In so holding, the court rejected the lower court’s finding that pregnancy could never constitute a “serious bodily injury” because it was always incidental to rape. *See id.*

36. *See* Hoyson, *supra* note 34, at 586-91 (surveying jurisdictions’ rape laws and showing that while a minority of jurisdictions never treat pregnancy as an aggravating factor when grading rape, a sizeable number of jurisdictions take the alternative approach).

37. MICH. COMP. LAWS § 750.520a(n) (2012).

38. NEB. REV. STAT. § 28-318(4) (2012).

39. For one, enhancements for sexual assaults resulting in pregnancy raise issues concerning the fairness of strict liability in grading. *See generally* Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUD. 445 (2012) (articulating the possibility that strict criminal liability in grading may result in excessively and unjustly punishing perpetrators of crimes). The sexual assault statutes under discussion exemplify this concern, as they do not require proof that a defendant had the specific intent to cause pregnancy in order to convict him of an aggravated sexual assault. *See, e.g.*, Hagenkord v. State, 302 N.W.2d 421, 437 n.9 (Wis. 1981) (noting that the sexual assault statute “creat[es] a type of ‘strict liability’” as to “specific intent to have intercourse”).

Further, these statutes may be challenged on the grounds that moral luck should play no role in the punishment of convicted rapists: the argument is that, to the extent that two individuals both intend to rape their victims, they share the same culpability. However, if one of those individuals has the “bad luck” to cause his victim to become pregnant, he will be punished more harshly than his “lucky” counterpart whose victim does not become pregnant. The concept of “moral luck,” raised by Kant and made a topic of intense academic discussion by the writings of philosophers Thomas Nagel and Bernard Williams, refers to the idea of judging the moral quality of individuals by the consequences of the individual’s actions, although those consequences may be beyond his or her control. *See* THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24, 26 (1979) (“Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.”). It remains an open philosophical question whether consequences over which we have no control should speak to our moral character; nevertheless, it is patent that the criminal law frequently considers “moral luck” to be highly relevant. *See id.* at 29 (“[T]he penalty for attempted murder is less than that for successful murder—however similar the intentions and motives of the assailant may be in the two cases.”); Steven Sverdlik, *Crime and Moral Luck*, in MORAL LUCK 181,

statutes are fascinating because of the cultural work that they do. To be precise, they construct pregnancy and injury as equivalents and, in so doing, create possibilities for reimagining pregnancy.

Consider Wisconsin's approach to grading sexual assaults. The statute defines first-degree sexual assault as "sexual contact or sexual intercourse with another person without consent of that person" which "causes pregnancy or great bodily harm to that person."<sup>41</sup> In grading sexual assaults that result in "pregnancy" or "great bodily harm" more severely, the statute can be read to link the two phenomena as equivalents. That is, the statute can be reasonably read as asserting that pregnancy, subsequent to a rape, is *like* a great bodily harm. Pregnancy and great bodily harm are posited as analogous entities, sharing some fundamental similarity.

Other states' approaches do this work more directly. Consider Nebraska, which defines "serious personal injury" as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, *pregnancy*, disease, or loss or impairment of a sexual or reproductive organ."<sup>42</sup> Nebraska's statute can be read as stating not simply that pregnancy is *like* a serious personal injury, but rather that pregnancy *is* a serious personal injury. Michigan's statute similarly defines "personal injury" as "bodily injury, disfigurement, mental anguish, chronic pain, *pregnancy*, disease, or loss or impairment of a sexual or reproductive organ."<sup>43</sup> Moreover, case law establishing that pregnancy could be considered a "substantial bodily injury" that aggravates the sexual assault and increases the sentence imposed performs the same work as statutes that explicitly define pregnancy as a substantial bodily injury.<sup>44</sup>

Before turning to the significance of this definition of pregnancy, two notes—one on this Article's focus on pregnancy as a *physical* injury, the other on the legal construction of injury—are warranted.

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182 (Daniel Statman ed., 1993) ("[T]he law typically punishes success more severely, and . . . it punishes the unlucky negligent person more severely, as well.").

40. Nationally, an estimated five percent of rapes involving victims between the ages of twelve and forty-five lead to pregnancy. See Melisa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 320-22 & tbl.2 (1996). This amounts to approximately 32,000 pregnancies per annum in women over eighteen. *Id.* at 322. The sexual assault statutes at issue result in tens of thousands of perpetrators potentially being punished more severely for the crimes that they have committed each year.

41. WIS. STAT. § 940.225(1)(a) (2012).

42. NEB. REV. STAT. § 28-318(4) (2012) (emphasis added).

43. MICH. COMP. LAWS § 750.520a(n) (2012) (emphasis added).

44. See, e.g., *People v. Cross*, 190 P.3d 706, 712 (Cal. 2008) (holding that a pregnancy could be considered a "great bodily injury" for the purposes of a statute providing for longer sentences for defendants convicted of certain felonies that result in "great bodily injury").

### A. *The Focus on Physical Injury*

If, as this Article contends, the sexual assault statutes under discussion construct pregnancy as an injury, it is not entirely clear what type of injury is being constructed. That is, the statutes might be interpreted as constructing pregnancy as a mental or emotional injury;<sup>45</sup> alternatively, they might be interpreted as constructing pregnancy as a physical injury. In truth, pregnancy is a multifaceted event that affects a woman mentally, emotionally, and physically.<sup>46</sup> Accordingly, a pregnancy resulting from rape—that is, a pregnancy that may be profoundly unwanted—may be both a mental/emotional injury *and* a physical injury.<sup>47</sup> While acknowledging the nonphysical nature of the injury

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45. It is worth noting that it is more typical for lawyers to speak of mental or emotional *harms*, as opposed to mental or emotional injuries. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 (2010). Nevertheless, it is also true that the language of mental or emotional *injury* is not unheard of within the law. *See, e.g.*, *Minnecci v. Pollard*, 132 S. Ct. 617, 625 (2012) (noting that “[p]risoners bringing federal lawsuits . . . ordinarily may not seek damages for *mental or emotional injury* unconnected with physical injury” (emphasis added)). Although the more common parlance among lawyers may be that of mental or emotional “harms,” this Article insists upon using the language of mental or emotional “injuries.” This is primarily because the sexual assault statutes under analysis generally use the language of “injury”; accordingly, if what they recognize are the devastating mental and emotional effects of unwanted pregnancy, then they construct pregnancy as a mental or emotional “injury,” not a mental or emotional “harm.”

Moreover, lawyers sometimes distinguish between harms and injuries by using the former to refer to a hurt or loss of some sort while using the latter to refer to an event that is cognizable and remediable by law. *See, e.g.*, BLACK’S LAW DICTIONARY 393 (6th ed. 1990) (defining “*damnum absque injuria*” as “[l]oss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by a legal action”). Nevertheless, when criminal statutes speak of “substantial bodily injury” or the like, they are not referring to “injury” in this narrow, technical sense—as a legal injury; rather, they are speaking of “injury” as a layperson speaks of injury—as a literal injury. Thus, if the relevant sexual assault statutes will have an effect on cultural understandings of pregnancy, it will not be because they have constructed pregnancy as a *legal* injury. (However, it is possible that they could have cultural effects even if they constructed pregnancy as a legal injury, insofar as legal understandings influence culture in unexpected ways.) Rather, it will be because they have constructed pregnancy as a literal injury. *See* discussion *supra* text accompanying notes 42–43.

46. Because of the physical and nonphysical effects that pregnancy has on women, the Supreme Court in *Doe v. Bolton*, the companion case to *Roe v. Wade*, interpreted the term “health” in a Georgia statute that prohibited abortions except those endangering a woman’s life or “health” as implicating both physical and mental health. *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (holding that, when deciding whether a pregnancy endangers a woman’s health, a physician’s “medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient,” as “[a]ll these factors may relate to health”).

47. In other contexts, commentators have criticized laws and arguments that focus on the physical aspects of pregnancy to the exclusion of its nonphysical effects. *See, e.g.*, Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323, 345–47 (2008) (observing that “[p]regnancy implicates women’s identities, life courses, and relationships to others in ways that knee injuries and ankle sprains do not,”

occasioned by such a pregnancy, this Article's focus is on pregnancy as a physical injury—namely because it might represent the more radical reimagination of pregnancy.<sup>48</sup>

This Article is interested in how the law might affect cultural understandings of pregnancy and might work to legitimize women's experiences of unwanted pregnancies as injuries that have happened to/in/by their bodies. In the formulation in which pregnancy is a mental or emotional injury, it is easier to disconnect the event of pregnancy from the injury. That is, it is easier to conceptualize the pregnancy and the mental/emotional injury as distinct. In this formulation, the pregnancy *causes* the mental/emotional injury; it is not, itself, the mental/emotional injury. In so doing, this formulation may not sufficiently destabilize the positive construction of pregnancy. It allows for the possibility that pregnancy, consistent with the positive notions, may actually be a beautiful, life-affirming, overwhelmingly good event that is, lamentably, misrecognized by the woman—thereby causing her mental/emotional injury.

In the alternate formulation, in which the statutes are interpreted to construct pregnancy as a physical injury, it is much more difficult to distinguish the event of pregnancy and the injury. It would be nonsensical to say that pregnancy causes the physical injury. Rather, the formulation forces the conclusion that pregnancy *is* the physical injury. If pregnancy *is* the injury, it becomes much more difficult to claim that it is beautiful, life-affirming, overwhelmingly good, and so forth. In this way, the formulation represents a profound rejection of the positive construction of pregnancy. Further, it may better resonate with the phenomenology of unwanted pregnancy, which, not uncommonly, is experienced by the woman bearing it as a betrayal of the body.<sup>49</sup>

In focusing on pregnancy as a physical injury, this Article might be accused of continuing the problematized privileging of physical over emotional injuries in the civil and criminal law.<sup>50</sup> Accordingly, this Article's focus may

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and arguing that when pregnancy is analogized to other disabilities in judicial or legislative efforts to determine what precisely “equal,” nondiscriminatory treatment is, the analogy obfuscates the “social and relational aspects of pregnancy”); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 364 (2010) (“Pregnancy itself, when unwanted, involves both a bodily invasion and a forced social relationship of caretaking.”).

48. It is likely that the legislators and judges who are open to treating pregnancy as a substantial bodily injury that can aggravate a rape conceptualize pregnancy as a species of mental or emotional injury—as a harm to a woman's identity or dignity. See discussion *infra* Part II.B. However, this conceptualization of pregnancy is likely accepted precisely because it does not trouble positive constructions of pregnancy as profoundly as an alternative construction in which pregnancy is understood as a physical injury. The aim of this Article is to destabilize, as deeply as possible, positive constructions of pregnancy. Accordingly, it foregrounds pregnancy as a physical injury and explores the implications thereof.

49. See discussion *infra* Part II.B.

50. See, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010) (analyzing the historical privileging of physical injuries in tort law). Chamallas and Wriggins observe that courts were reluctant to

not challenge the male norm of what counts as a “real” injury, thereby submerging the mental/emotional injury that forced pregnancy can inflict.<sup>51</sup> Moreover, it may deny the gendered uniqueness of unwanted pregnancy; by conceptualizing it as a physical injury, we may recognize unwanted pregnancy as a legitimate harm, but only through stripping it of its gendered specificity and treating it as an experience that men can understand.<sup>52</sup> Nevertheless, because of the potential of the physical injury construction to unsettle positive constructions, this privileging is accepted.<sup>53</sup>

### B. *The Construction of Legal Injury Versus the Legal Construction of Injury*

In its simplest formulation, the laws at issue construct pregnancy as a legal injury. As such, they are a small demonstration of the larger phenomenon of the construction of legal injury. It is beyond the scope of this Article to examine the construction of legal injury generally. This is due, in large part, to the breadth of the inquiry. To name just a handful of the large number of legal inju-

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recognize emotional injuries that were independent of a physical injury (or the narrow escape of a physical injury), due to the purported difficulty in verifying the genuineness of emotional injuries, as well as the belief that emotional injuries were not as serious as physical injuries. *Id.* at 90. The refusal to recognize emotional injuries had the effect of ignoring harms of the types often suffered by women. *See id. passim.*

While the Third Restatement of Torts, the most recent revision, recognizes purely emotional injuries, it is notable that the drafters, after debate, decided to maintain the distinction between emotional and physical injuries. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010).

51. As Jennifer Hendricks notes, most unwanted pregnancies are unwanted primarily because of their nonphysical implications rather than physical burden. *See* Hendricks, *supra* note 47, at 351-52 (“[T]he physical burden of normal pregnancy, while substantial, is not what prompts most abortions. . . . Women’s reasons for having abortions have much more to do with the life-altering arrival of a(nother) baby than with morning sickness or the risk of eclampsia.” (footnote omitted)).

52. Analogues of this argument were made in the debates surrounding how pregnancy should be treated within antidiscrimination law. *See, e.g.,* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1147 (1986) (presenting the view of many special treatment proponents that “pregnancy is indeed distinct from any other human condition, and that it is neither necessary, desirable, nor possible to eliminate this biologically rooted sex difference”); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326-27 (1984-1985) (noting that critics of the argument that pregnancy should not be afforded special, or preferential, treatment, but should be afforded the same treatment as other disabilities, believe that such a paradigm “precludes recognition of pregnancy’s uniqueness, and thus creates for women a Procrustean bed—pregnancy will be treated as if it were comparable to male conditions when it is not, thus forcing pregnant women into a workplace structure designed for men”).

53. Relatedly, Hendricks writes that “feminists should avoid bifurcating pregnancy into physical and social components. Any . . . analysis should include both aspects, or, if focused on only one aspect, should acknowledge its incompleteness.” Hendricks, *supra* note 47, at 373. This should serve as this Article’s acknowledgment.

ries, there are “constitutional injuries,”<sup>54</sup> “injuries to property,”<sup>55</sup> “injuries to the market,”<sup>56</sup> and “environmental injuries.”<sup>57</sup> Criminal law and tort law add physical and mental/emotional injuries<sup>58</sup> as legal injuries.<sup>59</sup> Moreover, much energy is spent, in practice and in academia, advocating for the recognition of certain phenomena as legal injuries.<sup>60</sup> One could argue that, as a general matter, identifying legal injuries and providing remedies for them are primary functions of the law. Thus, there is nothing exceptional insofar as the sexual assault statutes at issue are involved in the work of constructing a legal injury. What may be exceptional, however, is that the law in this instance constructs *pregnancy* as a legal injury.

However, the claim in this Article is much broader: the purpose is not simply to note that the statutes under discussion construct pregnancy as a *legal* injury, but rather to argue that these laws construct pregnancy as a *literal* injury.<sup>61</sup> The concern lies not with the *construction of legal injury*, but instead with the *legal construction of injury*.

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54. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306, 313-14 (2000) (holding that a Texas school district’s policy that allowed the delivery of an “invocation and/or message” at football games violated the First Amendment’s Establishment Clause, and arguing that the Court is not only concerned “with the serious *constitutional injury* that occurs when a student is forced to participate in an act of religious worship,” but is also concerned with “other different, yet equally important, *constitutional injuries*” (emphases added) (internal quotation mark omitted)).

55. *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (establishing the oft-quoted principle that “not every destruction or *injury to property* by governmental action” is a “‘taking’ in the constitutional sense” (emphasis added)).

56. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 328 (1996) (noting the concept of “injury to the market” in the context of copyright infringement and the harm that a copyright holder suffers).

57. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (making the oft-quoted observation that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration” (emphasis added)).

58. See *supra* note 45 and accompanying text.

59. It bears noting that the criminal law recognizes a species of mental injury insofar as it provides that the perpetrator of an assault need only have intended to cause *fear* of causing serious bodily harm. See, e.g., MODEL PENAL CODE § 211.1(1)(c) (1962) (defining simple assault as “attempts by physical menace to put another in fear of imminent serious bodily injury”).

60. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 457-76 (arguing that racist speech should be recognized as a legal injury, undeserving of protection under the First Amendment); Catharine A. MacKinnon, *Commentary, Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321, 325 (1984) (arguing that pornography should be recognized as a legal injury to women inasmuch as it is a “form of forced sex, a practice of sexual politics, an institution of gender inequality”).

61. It appears to be quite counterintuitive to conceptualize pregnancy as a literal injury: at the beginning of a yoga class that the author attended recently, the instructor asked if anyone preparing to take the class had any injuries about which she should know. One man offered that he was suffering from a pulled hamstring muscle. One woman offered that

To elaborate: that which may be regarded as an injury is not independent of social and cultural context. An injury is not an objective fact that exists “out there” in the world; rather, it is a social construction.<sup>62</sup> Accordingly, what may be understood as an injury, and commonsensically so, in one sociocultural context may be apprehended as a non-event in another sociocultural context.<sup>63</sup> Additionally, individuals may have different understandings of injury in the same sociocultural context. Nevertheless, the point is that injuries have to be socially constructed. Moreover, the law, as a social institution, is a mechanism for that social construction. In the instant case, the law constructs pregnancy as an injury. The law constructs pregnancy such that it occupies the same ontological category as a broken bone, or a concussion, or a gunshot wound.

When a phenomenon, whatever it may be, is constructed as an “injury,” a set of meanings for understanding that phenomenon closely follows. Everyone knows what it is like to have been injured. We know how injuries look (when they are physical) and feel. We know that we may justifiably feel anger toward the injurer—even when we are the ones who have injured ourselves. We know that physical and mental pain frequently coexist; sadness commonly and reasonably accompanies the bodily pain. We know that injury is something from which we must heal. Moreover, we know that while we may learn from injuries, we may comfortably place them in the category of “bad” things that happen to us; they are negative things that we may profitably avoid.

When *pregnancy* is constructed as an injury, we may conjure up our experiences with injury to understand pregnancy. We may understand the justifiable feelings of anger toward her “injurer” that the pregnant woman may experience. We may appreciate the physical and mental pain that accompanies the pregnancy; we may expect the pregnant woman to be sad as she “heals” from the pregnancy-qua-injury. And most radically, perhaps, we may understand the pregnancy as a “bad” thing that happened to the pregnant woman. This is a profoundly negative, subversive understanding of pregnancy.

The construction of pregnancy as a “bad” thing stands in direct opposition to constructions of pregnancy as an inherently positive, life-affirming occurrence in a woman’s life. Because of the definition that these sexual assault stat-

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she was recovering from knee surgery. Then, a woman raised her hand and said, “I’m pregnant . . . Well, I guess that’s not an injury.” The room erupted in laughter. After the laughter died down, the instructor clarified her initial question by asking, “Is anyone else injured . . . or pregnant?”

62. See David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 *LOY. L.A. L. REV.* 33, 53 (2010) (“[T]he very concept of an ‘injury’ is a cultural construct . . .”).

63. As David Engel writes,

[I]njuries are not clearly defined social facts about which everyone would agree. An outside observer might conclude that a person had suffered an injury, but the individual in question might not share that perception. The reverse might also be true—an outsider might not perceive an injury when the individual in question is certain that he or she has suffered harm.

*Id.* at 46.

utes offer, and because of the work that they do to deny pregnancy as an intrinsically and inevitably “good” event, they are, as one commentator argues, “incompatible with views on pregnancy and the birth of happy and healthy children.”<sup>64</sup> Moreover, the *pregnancy-as-injury* definition may justify certain approaches to pregnancy—for example, “healing” the woman of her pregnancy-qua-injury through an abortion. In this regard, it is worth noting that even those who are opposed to abortion as a general matter are often sympathetic to women who seek to terminate pregnancies resulting from rape.<sup>65</sup> Indeed, even in the statutes that are most restrictive of abortion and abortion rights, abortions are generally allowed for pregnancies following a sexual assault.<sup>66</sup> These exceptions reflect the same ontology of pregnancy contained in the sexual assault statutes under discussion: a pregnancy produced by a rape is an injury. Accordingly, the woman may justifiably experience the pregnancy as such and may justifiably heal herself of her injury by terminating the pregnancy.

## II. MOVING OUT OF THE CONTEXT OF RAPE

### A. *On Wantedness*

The sexual assault statutes under discussion could reflect two possible formulations of when pregnancy is an injury. In one formulation, pregnancy is an injury when it is the result of nonconsensual sex; accordingly, consensual sex produces pregnancies that are not injuries while nonconsensual sex—rape—produces pregnancies that are injuries. In the other formulation, pregnancy is an

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64. Sabrina Bonanno, Comment, *Pregnancy as a Result of Unlawful but Non-Forcible Sexual Conduct Is Not a Form of Great Bodily Injury*, 44 NEW ENG. L. REV. 193, 204 (2009). While this commentator rests her disapproval of such laws on the grounds that the term “injury” is not typically understood as indexing a healthy pregnancy, her insistence upon referring to pregnancy as “one of life’s greatest gifts” demonstrates that the crux of her hostility toward the laws lies in an unwillingness to accept the laws’ betrayal of the positive construction of pregnancy. Cf. *id.* at 204-05 (“Pregnancy does not fall within the plain and ordinary meaning of the term ‘bodily injury.’ . . . Pregnancy cannot be considered harmful or damaging to the body since it is ‘one of life’s greatest gifts.’” (footnotes omitted)).

65. Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 581 (2009) (noting that many advocates of abortion restrictions favor exceptions for pregnancies caused by rape).

66. See, e.g., Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, §§ 507, 508(a)(1), 123 Stat. 524, 803 (prohibiting the use of federal Medicaid money to fund abortion except “if the pregnancy is the result of an act of rape or incest,” an amendment routinely added to annual appropriations bills popularly known as the Hyde Amendment). *But see* Women’s Health and Human Life Protection Act, H.B. No. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006) (banning abortions in South Dakota and providing no exception for abortions sought subsequent to rape); cf. Hendricks, *supra* note 47, at 336 (arguing that abortion bans that make exceptions for pregnancies that are the result of rape cannot be justified on the moral status of the fetus, as the “fetus produced by a rape is no less alive than any other, suggesting that the real concern may be the woman’s culpability for voluntary sex”).

injury whenever it is unwanted; accordingly, wanted pregnancies are not injuries while unwanted pregnancies are injuries. The latter formulation is the better of the two *because it accurately describes how unwanted pregnancies are experienced*.<sup>67</sup>

1. *Unwantedness as the stuff of injury, or abortion rights advocacy: past and present*

A woman bearing an unwanted pregnancy, whether that pregnancy is due to rape or not, frequently experiences it as an injury that is happening to/in/by her body.<sup>68</sup> Indeed, it is the profound unwantedness of the pregnancy that results from rape that makes it an injury and that makes abortion a healing modality for that injury. Because it is wantedness that determines the phenomenology of a pregnancy,<sup>69</sup> wantedness determines, or ought to determine, the ontological status of a pregnancy.

Now, some will contend that the unwanted pregnancy that is the product of rape is just *different* from the unwanted pregnancy that is the result of consensual sex. In the former case, a woman's body has been invaded twice—by the rape and then again by the pregnancy. She must wrestle with whether to carry the child of her *rapist* to term and experience the emotional and physical fallout from that choice, or to undergo an abortion and experience the emotional and physical fallout from that choice. Admittedly, in the case of an unwanted pregnancy that is the result of consensual sex, the woman's body has not been invaded twice. However, the fact that she may love and be loved by her sexual partner—*indeed, the very fact that the father of her fetus is not a rapist, but rather her boyfriend or husband*—may make the experience of the pregnancy torturous. She must wrestle with whether or not to carry to term the child of the man with whom she may be in love. The pain may be qualitatively different in the case of unwanted pregnancies that are the products of consensual sex. But it is still excruciating.

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67. This is not an assertion that all pregnancies should be understood as injuries, as some radical feminists once championed. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 29 (1988) (describing radical feminists' argument that "[p]regnancy itself, independent of male contempt, is invasive, dangerous and oppressive; it is an assault on the physical integrity and privacy of the body"). This Article asserts, quite differently, that only unwanted pregnancy should be understood as an injury.

68. Quite evocatively, Eileen McDonagh describes the feeling of bearing an unwanted pregnancy as "excruciating." See EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 193 (1996).

69. Cf. Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127689, at \*10 n.22 ("[A] woman *desiring* to carry her pregnancy to term perceives the growing fetus as a welcome presence within her body rather than an invasion of her privacy.").

Moreover, the argument that pregnancies resulting from rape are simply different from pregnancies resulting from consensual sex problematically privileges men's acts over women's experiences. A woman bearing an unwanted pregnancy after a rape and a woman bearing an unwanted pregnancy after consensual sex may both experience their pregnancies as injuries. To say that only the former woman has been injured is to give determinative significance to the man who forced, compelled, or coerced her into sex and to deny significance to the woman who experiences her pregnancy. If the former woman's pregnancy is simply different from the latter woman's, it is not because of differing phenomenologies; rather, it is because of the derogation of their phenomenologies and the privileging of men's actions.

Phenomenological accounts of unwanted pregnancies, told by women who have borne them, leave no doubt that many women experience and understand such pregnancies as bodily injuries even when they do not result from rape. Indeed, providing these phenomenological accounts was the precise legal strategy of the National Abortion Rights Action League (NARAL) in *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>70</sup> in which the Court reaffirmed *Roe v. Wade*.<sup>71</sup> In an amicus brief, NARAL attempted to demonstrate the fundamentality of the abortion right not by recourse to constitutional text or history, but rather through women's experience.<sup>72</sup> The brief quoted letters of women who described what it felt like to bear an unwanted pregnancy. Women described themselves as "terrified,"<sup>73</sup> as feeling like "the helpless pawn of nature."<sup>74</sup> One woman stated, "It is difficult to adequately describe the difference between a wanted and an unwanted pregnancy. It is sometimes like the difference between darkness and despair, and light and joy."<sup>75</sup> Another woman expressed her experience of an unwanted pregnancy as follows:

Today I am a little more than two months pregnant. My husband and I are thrilled about it. Almost exactly a decade ago, however, I learned I was pregnant, and my response was diametrically opposite. I was sick in my heart

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70. 476 U.S. 747 (1986).

71. *Id.* at 759. The power of NARAL's brief underscores the need for more phenomenological accounts of unwanted pregnancy. See West, *supra* note 67, at 66 ("[W]e need to explain . . . the harms and dangers of invasive pregnancy. We need to explain that this harm has nothing to do with invading the privacy of the doctor-patient relationship, or the privacy of the family, or the privacy of the marriage; but that rather, it has to do with invading the physical boundaries of the body and the psychic boundaries of a life."). See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000) (articulating the need for a phenomenology of women's lives). Indeed, it suggests that an *ethnography* of unwanted pregnancy is necessary.

72. See Brief for the National Abortion Rights Action League et al. as Amici Curiae in Support of Appellees, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (Nos. 84-495, 84-1379), 1985 WL 669630.

73. *Id.* at \*29.

74. *Id.* at \*19.

75. *Id.* at \*21.

and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong.<sup>76</sup>

Unwanted pregnancies—even when they are not a product of rape, but rather consensual sex with a (perhaps) loved and loving partner—are far from gifts to the women whose bodies sustain them. They are experienced as tragedies—as “cancers.” They are injuries. Consider Robin West’s description:

An unwanted fetus, no less than an unwanted penis, invades my body, violates my physical boundaries, occupies my body and can potentially destroy my sense of self. Although the culture does not recognize them as such, the physical and existential invasions occasioned by unwanted pregnancy and intercourse are real harms. . . . An unwanted pregnancy is disastrous. . . .<sup>77</sup>

Which is to argue that the wantedness of the pregnancy dictates its ontological status. When wanted, pregnancy is a magnificent, wonderful thing;<sup>78</sup> when unwanted, pregnancy is an injury. Of course, a woman may have very conflicted, evolving feelings about whether a pregnancy is wanted, and, accordingly, it may not always be clear whether her pregnancy is an injury at any given point in time. However, it does seem clear that when a woman arrives at the conclusion that a pregnancy is unwanted, the pregnancy crystallizes as an injury.

That advocates in years past made arguments in favor of abortion rights in the register of women’s experience of unwanted pregnancy as an injury is significant in light of the register in which antiabortion argumentation currently is being made. Reva Siegel has done extensive work chronicling the ascension of woman-protective antiabortion argumentation (WPAA)—that is, arguments that restrictions on abortion rights and access protect women from harming themselves.<sup>79</sup> The story she tells is one in which opponents of abortion rights once championed their position by focusing on the effect that abortion had on the fetus. According to this line of argument, abortion was wrong and ought not

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76. *Id.* at \*28.

77. West, *supra* note 67, at 35.

78. Deborah Brake argues that when pregnancy is defined as or analogized to a disability in the context of antidiscrimination law, it “focuses on the disabling rather than the enabling physical features of pregnancy. The wonderment of the pregnant body, the heightened awareness of the body that many pregnant women experience, and the anticipation that accompanies the bodily transformation are lost in the comparison.” See Brake, *supra* note 47, at 345 (footnote omitted). Brake correctly describes women’s experiences of *wanted* pregnancies. However, the “heightened awareness of the body” is not experienced as a “wonderment” when the pregnancy is unwanted.

79. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706-35 (2008) [hereinafter Siegel, *Dignity*] (tracing the origins and spread of woman-protective antiabortion argumentation); see also Reva B. Siegel, Lecture, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (documenting the shift from antiabortion advocacy that focused on the harm to the fetus to advocacy that focused on the harm to the woman); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 993 (analyzing “the state’s claimed interest in protecting women from abortion”).

to be made illegal because it killed the fetus.<sup>80</sup> However, fetal-focused argumentation did not win abortion opponents the result they desired: the sympathies of a majority of Americans<sup>81</sup> and the overturning of *Roe v. Wade*. In response, activists adapted their advocacy in light of the criticism that the antiabortion movement cared too much about fetuses and too little about women: their advocacy would now affirm that the antiabortion movement, like the abortion rights movement, cared about women deeply.<sup>82</sup>

According to the new strategy, abortion should be limited not only because it harms fetuses, but because it harms women. The movement argued that abortion was harmful because it led to postabortion syndrome, mental health problems, increased risk of breast cancer, and a host of other ills.<sup>83</sup> Restricting abortion protected women from these ills. Most importantly, WPAA made it into abortion jurisprudence: when the *Carhart II* majority pronounced that it was “unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained,”<sup>84</sup> it looked to Sandra Cano’s amicus brief, which “provided ninety-six pages of excerpts . . . testifying that ‘abortion in practice hurts women’s health.’”<sup>85</sup> In light of the Court’s acceptance of WPAA in *Carhart II*, it is reasonable to expect that it will become more widespread.<sup>86</sup> Indeed, it has provided the justification for the new wave of abortion regulations that burden abortion access through the informed consent process.<sup>87</sup> Many opponents of abortion hope that WPAA may become the justification for a ban on abortion altogether.<sup>88</sup>

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80. See Siegel, *Dignity*, *supra* note 79, at 1713 (“Without a doubt, the dominant argument of the antiabortion movement over the last several decades has been that abortion wrongfully ends the life of the unborn. Argument over the morality of abortion focused on the ontological status of the embryo/fetus . . .”).

81. See *id.* at 1715 (noting that the antiabortion movement had “found itself unable to persuade a significant portion of the electorate”).

82. See *id.* at 1717 (quoting an architect of WPAA who said the challenge the antiabortion movement faced was “to convince the public that we were compassionate to women”).

83. See *id.* at 1719 nn.80-81 (noting the purported harmful effects of abortion).

84. *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 159 (2007).

85. Siegel, *Dignity*, *supra* note 79, at 1727 n.95; see also *Carhart II*, 550 U.S. at 159 (citing Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Carhart II*, 550 U.S. 124 (No. 05-380)). For a description of *Doe v. Bolton*, 410 U.S. 179, 192 (1973), see *supra* note 46.

86. See Siegel, *Dignity*, *supra* note 79 at 1733-34 (noting the joy with which antiabortion advocates greeted *Carhart II*’s reflection of WPAA and their plans to expand their efforts).

87. See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 261-62 (2009) (connecting the wave of regulations of the informed consent process to abortion with WPAA).

88. See Siegel, *Dignity*, *supra* note 79, at 1734 (observing that some antiabortion activists hope that *Carhart II* signals Justice Kennedy’s willingness to uphold a ban on abortion altogether).

The relationship between WPAA and criminal statutes that treat pregnancy as a substantial bodily injury is one of challenge. Is it fair to say that abortion is harming women when unwanted pregnancy is itself a literal injury to women? That is, is it fair to say that women are being harmed by a modality that is healing them of an injury? If abortion does harm women, then on what principle can one compel women to remain injured (that is, pregnant) in order to protect them from a harm (that is, abortion)? If women are faced with two evils (an injury and a harm), on what principle should they be denied the right to decide which of the two evils they will endure?

The sexual assault statutes under analysis counsel a retrieval of an abortion rights advocacy that has fallen out of use and, to some, memory. The phenomenology of women's experiences of unwanted pregnancy as injuries contained in the NARAL amicus brief, which never managed to make it into abortion jurisprudence, might serve as an effective and powerful counterdiscourse to the phenomenology of (some) women's experiences of abortion as injuries that is contained in Sandra Cano's amicus brief for *Carhart II*, which *did* make it into the jurisprudence. Which is to say: the sexual assault statutes under analysis have been on the books for quite some time now, yet have not managed to influence popular understandings of unwanted pregnancy in the way that this Article suggests that they could and should. The advent and recent legitimization of WPAA indicates that we have entered a cultural moment in which it may be particularly fruitful for abortion rights advocates to leverage the understanding of pregnancy contained in some jurisdictions' criminal law. Perhaps it also indicates a cultural receptivity to this understanding.

Now, this is not to argue that if it became acceptable to understand an unwanted pregnancy as an injury, those who are generally opposed to abortion would, as a matter of course, change their minds and support abortion rights and access. Opponents of abortion hold their ideological and political position for many reasons, the most important of which may be their beliefs in the moral status of the fetus and the deference it deserves as a rights-bearing entity.<sup>89</sup> Accordingly, even if unwanted pregnancy were understood as an actual injury, an opponent of abortion may feel that this does not diminish the fetus's moral status or rights. Consequently, abortion may still be wrong because it wrongly kills the fetus—notwithstanding the fact that the abortion is done to heal an actual injury. However, as noted above, opponents of abortion frequently concede that abortion may be acceptable in cases of rape or incest,<sup>90</sup> moreover, many concede that it may also be acceptable in cases where a pregnancy may endanger the woman's life or health.<sup>91</sup> These concessions show that, for many abor-

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89. See Borgmann, *supra* note 65, at 558-60 (noting that those who are opposed to abortion tend to construct the fetus as a rights-holding "person").

90. See discussion *supra* notes 65-66 and accompanying text.

91. See *Abortion and Birth Control*, POLLING REPORT, <http://www.pollingreport.com/abortion2.htm> (last visited Feb. 24, 2013) (reporting that a majority of those polled in a survey conducted from October 23 to 24, 2007 indicated that an abortion should be legal

tion opponents, there are other considerations that may override the rights or interests of the fetus and may make abortion a tolerable practice. Pregnancy's status as an injury may be one of them.

## 2. *Nonconsent to sex as the stuff of injury*

Nevertheless, it is necessary to contend with the alternative formulation that is possibly embodied in the sexual assault statutes. In this formulation, wantedness of the pregnancy is irrelevant; instead, consent to sex dictates whether or not pregnancy is an injury. Accordingly, nonconsensual sex—rape—produces pregnancies that are injuries; consensual sex, on the other hand, produces pregnancies that occupy another ontological category.<sup>92</sup>

It is undeniable that, in other areas of the criminal and civil law, the absence of consent transforms phenomena into legal injuries.<sup>93</sup> The most obvious comparison is rape: sexual intercourse with consent is, simply, sex. In contrast, sexual intercourse without consent is a legal injury—rape.<sup>94</sup> Other examples are readily available: when a person consents to being punched by another party (in a boxing match, for example), the person suffers no legal injury (although he might suffer a physical injury); however, when consent is absent, a legal in-

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when needed to protect a woman's mental health). As "mental health" is a capacious (and controversial) category, it is likely that even more of those polled would agree that abortion should be legal when needed to protect a woman's *physical* health. Cf. Jim Kuhnenn, *Obama on Late Abortion: Mental Distress Doesn't Justify It*, ASSOCIATED PRESS (July 3, 2008), <http://www.huffingtonpost.com/huff-wires/20080703/obama-abortion>

(noting that health exceptions are "considered a legal loophole by abortion opponents"); *Final Presidential Debate*, *supra* note 20 (quoting Senator McCain's response to Obama's statement during the 2008 presidential debate that he supports abortion access when the "health" of the pregnant woman is jeopardized: "Just again, the example of the eloquence of Senator Obama. He's health for the mother [sic]. You know, that's been stretched by the pro-abortion movement in America to mean almost anything. That's the extreme pro-abortion position, quote, 'health'").

92. Some radical feminists have argued that, given the sexism and unequal power relations between the genders that structure our society, it is impossible for women to consent to sex. See Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427, 475 (1994) (noting the radical feminist view that sexual intercourse "is so inherently coercive, so fraught with domination and submission, that consent to it by a woman is impossible"). If what these radical feminists describe is true, then it collapses the conceptual apparatus in which pregnancies subsequent to rape/nonconsensual sex are injuries while pregnancies subsequent to consensual sex are not injuries. Because pregnancies that result from consensual sex would exist in theory alone, all pregnancies would be actual injuries.

93. See MODEL PENAL CODE § 2.11(1) (1962) ("The consent of the victim to conduct charged to constitute an offense . . . is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.").

94. See, e.g., *id.* § 213.1(1) ("A male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force . . .").

jury—an assault—results.<sup>95</sup> Similarly, when a person consents to have another person paint a mural on his or her home, for example, there is no legal injury; however, in the absence of consent, a legal injury—defacement of property—results.<sup>96</sup> When a person consents to the presence of another in his or her home, there is no legal injury; in the absence of consent, a legal injury—trespass—results.<sup>97</sup>

With respect to pregnancy, it is tempting to phrase the question as whether consenting to the sex that results in pregnancy is tantamount to consenting to the pregnancy such that a woman cannot assert that the resulting pregnancy is a legal injury. However, as noted above, the claim in this Article is much broader.<sup>98</sup> It does not solely claim that the statutes under discussion recognize pregnancy resulting from nonconsensual sex as a legal injury. It claims that the statutes under discussion recognize pregnancy resulting from nonconsensual sex as a *literal* injury.

Thus, the question, when properly formulated, is whether consenting to the sex that results in pregnancy is tantamount to consenting to the pregnancy such that a woman cannot assert that the resulting pregnancy is a literal injury. The question must be answered in the negative.<sup>99</sup> It is more accurate to argue that, unless a woman intends to become pregnant through an act of intercourse, she cannot be said to have consented to becoming pregnant. At most, by consenting to sex, she has consented to exposing herself to the *risk* of becoming pregnant.<sup>100</sup> This is relevant because, in many other contexts, we do not lose the claim of having been injured or harmed by unwanted things that happen to us—

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95. See, e.g., *id.* § 211.1(1) (“A person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . .”).

96. See, e.g., 720 ILL. COMP. STAT. 5/21-1.3(a) (2012) (“A person commits criminal defacement of property when the person knowingly damages the property of another by . . . the use of paint or any other similar substance . . . . It is an affirmative defense to a violation of this Section that the owner of the property damaged consented to such damage.”).

97. See, e.g., MODEL PENAL CODE § 221.2 (“A person commits [criminal trespass] if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure . . .”).

98. See *supra* Part I.B.

99. Should a woman consent to the pregnancy, however, it may be fair to conclude that she cannot claim that the pregnancy is a literal injury. This is consistent with our experience of injuries in other areas of our lives. If a person does not consent to having her nose broken, she may legitimately recognize her broken nose as an injury. However, if this same person consents to having her nose broken, during a rhinoplasty, for example, it may preclude her and others from recognizing the broken nose as an injury. The broken nose may be a postsurgery condition, but it is not an injury. Thanks to Susan Appleton for this example.

100. See MCDONAGH, *supra* note 68, at 66 (“Sexual intercourse merely causes the risk that pregnancy will occur, and consent to engage in sexual intercourse with a man, for any and all fertile women, implies consent to expose oneself to that risk.”).

even when we have exposed ourselves to the risk that those unwanted things will, indeed, happen to us.<sup>101</sup>

Eileen McDonagh, apropos to the topic at hand, gives the example of rape. Simply because a woman wears a short skirt, or walks through a dark alley, or invites a male into her apartment at the end of a date, and thereby exposes herself to the risk of sexual assault, her conduct does not preclude her from having been harmed or injured should the risk be realized and she is the victim of a sexual assault.<sup>102</sup> This is also true in other contexts. For example, if a person exposes herself to the risk of getting hit by a car by walking out into traffic without looking to see if the coast is clear, she is not precluded from identifying any injuries she sustains as injuries should she get hit by a car.<sup>103</sup> Of course, there is recognition of comparative negligence in the civil context.<sup>104</sup> A finding of comparative negligence usually does not preclude an actor from recovering for his injuries; it does, however, frequently preclude an actor from recovering the full extent of his injuries.<sup>105</sup> Nevertheless, the law recognizes that the actor has been legally injured, and, most important to the present Article, *the actor may continue to identify his literal injuries as literal injuries*, although his negligence contributed to those injuries. Similarly, when a woman has exposed herself to the risk that she will become pregnant by consenting to sex with a man, should the risk materialize and she become pregnant, she may justifiably identify her pregnancy as an injury.

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101. In response to the question of whether a woman who consents to sex also consents to pregnancy, Judith Jarvis Thomson famously answered in the negative by giving the example of a person who voluntarily opens a window, thereby exposing herself to the risk of being the victim of a burglary:

If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, "Ah, now he can stay, she's given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle."

Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 58-59 (1971).

102. See MCDONAGH, *supra* note 68, at 176 ("A woman who puts herself at risk by walking down a deserted street alone at night or by behaving or dressing in ways that could be interpreted as sexually provocative, still retains the right to say no to sexual intercourse.").

103. Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *supra* note 69, at \*16 n.5 (arguing that when women's contraception fails, they "no more 'consent' to pregnancy than pedestrians 'consent' to being struck by drunk drivers").

104. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1694 (1995) (exploring the doctrines of contributory and comparative negligence in the civil context).

105. See *id.* (noting that when a plaintiff acts negligently, his recovery against a negligent defendant will likely be reduced or even eliminated).

In sum, because the conceptual apparatus in which only nonconsensual sex produces pregnancies that are injuries is inconsistent with the relationship that consenting to risk exposure has with literal injuries in other areas of our lives, it may be illogical to propose that the sexual assault statutes reflect this conception. Instead, the statutes should be read to reflect the notion that unwantedness produces pregnancies that are injuries.

However, even if the sexual assault statutes embody the formulation in which only nonconsensual sex produces pregnancies that are injuries, they nevertheless make it more likely that it will become legitimate in the future to understand all unwanted pregnancies as injuries. *This is simply because the criminal law has accepted that, at times, pregnancy may, indeed, be an injury.* The sexual assault statutes under discussion legitimize this subversive experience of pregnancy by giving the definition and its meaning the force of law. Accordingly, the statutes create the possibility that other areas of law and society will recognize the legitimacy of this description.

### B. *Defining the Injury*

If pregnancy is an injury, it is interesting to think through precisely what about pregnancy constitutes the injury. There are several possibilities. The first is that *childbirth* is the injury. Indeed, childbirth is widely (and many who have endured it would argue, rightfully) understood as an intensely traumatic physical event. There is pain. There is blood. There is also the possibility of death, even if remote.<sup>106</sup> Accordingly, when a rapist causes his victim to become pregnant, and the victim endures childbirth, the argument is that it is childbirth—and not the pregnancy per se—that is the bodily injury. Indeed, some prosecutors (and judges) have made this argument in individual cases, contending that it was the fact that a rape victim had to suffer through childbirth that warranted an increased punishment for the man who raped her.<sup>107</sup> However, conceptualizing childbirth, and not the pregnancy itself, as the injury produces a somewhat perverse result: it would occasion an increased punishment for only those defendants whose victims choose to carry the pregnancy to term.

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106. In 2006, the maternal mortality rate in the United States was 13.3 deaths per 100,000 live births. See AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA 1 (2010), available at <http://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf>. In the United States, the possibility of death is less remote for black women than for white women. See KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 107-11 (2011) (discussing racial disparities in maternal mortality rates).

107. See *People v. Sargent*, 150 Cal. Rptr. 113, 116 (Ct. App. 1978) (“Pregnancy can have one of three results—childbirth, abortion or miscarriage. Childbirth is an agonizing experience.”); see also Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 763 (2006) (“Labor pain is severe enough for local anesthesia, which comes with attendant risks, and if the doctor delivers the baby through Caesarean section, the mother must undergo the danger and discomfort of a major operation.”).

Those defendants whose victims elect to terminate the pregnancy, or whose pregnancy ends in a spontaneous miscarriage, would escape a harsher punishment. Many—especially those categories of women who become pregnant as a result of rape but who do not give birth to a child—may view this as an unfair result.

The second possibility is to imagine that *abortion* is the injury when a rape results in pregnancy. In order to avoid a similar perversion that results when only childbirth is recognized as an injury (that is, in order to avoid punishing more severely those defendants whose victims elect to terminate a pregnancy, while being more lenient toward those defendants whose victims elect to carry the pregnancy to term), childbirth *and* abortion might be imagined as the injury.<sup>108</sup> But conceptualizing abortion as an injury, even if it is so conceptualized together with childbirth, might disquiet some—namely advocates for abortion rights. This is because the safety and noninvasiveness of abortion relative to childbirth has been constantly underscored by supporters of abortion rights and offered as evidence that the procedure ought to be readily available to those who desire it.<sup>109</sup> Accordingly, abortion rights advocates would challenge the appropriateness of likening abortion to childbirth in terms of the physical effects of the two events. As such, there would have to be something about abortion, independent of its physicality, that would make it as injurious as childbirth. That “something” would have to be its nonphysical effects on the woman or its effects on the fetus. It is fair to say that supporters of abortion rights would find both of these alternatives disconcerting.<sup>110</sup>

The third possibility is to imagine that the physical changes accompanying pregnancy constitute the injury. Under this alternative, the injury is not how the pregnancy ultimately ends, but rather the fact that the woman’s body must un-

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108. Nevertheless, one can imagine a jurisdiction that would not consider it perverse at all to punish more severely those rapists whose victims terminate their pregnancies while punishing less severely those rapists whose victims carry their pregnancies to term. Indeed, a state that considers itself a protector of fetal life might find the result just: the rape is aggravated because it led to the destruction of a fetus. Moreover, the destruction of the fetus may be thought to lead necessarily to the (aggravated) harm to the woman. See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 159 (2007) (contending that abortion harms women by claiming that women may “come to regret their choice to abort the infant life,” which may result in “[s]evere depression and loss of esteem”).

109. Indeed, the trimester framework articulated in *Roe v. Wade* was justified, in part, on the majority’s recognition that abortions performed during the first twelve weeks of pregnancy pose fewer health risks than does childbirth. 410 U.S. 113, 163 (1973) (providing that the state’s interest in the health of the pregnant woman becomes compelling at the end of the first trimester because “of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth” and, accordingly, the state may at that point “regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health”).

110. See, e.g., *Carhart II*, 550 U.S. at 183 (Ginsburg, J., dissenting) (criticizing the majority’s invocation of an “antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem’” (alteration in original)).

dergo substantial changes in order to sustain the fetus. Some scholars arguing in support of sexual assault statutes that define pregnancy as an injury for the purpose of grading rapes have noted the massive physical changes that occur to women during pregnancy, offering these facts as evidence of the similarities joining pregnancy with other physical traumas that are easily recognized as substantial injuries.<sup>111</sup> However, the substantial physical changes that occur during pregnancy do not happen immediately. While some women may experience some effects of pregnancy almost instantly, the more extensive effects take time to develop, usually several months. However, the harsher punishment that is visited upon perpetrators pursuant to the statutes under discussion does not depend upon the victim's physical condition at the time of the sentence. Indeed, the rape is an aggravated one the moment that the woman becomes pregnant, not at some later point in the pregnancy when the woman's body has undergone massive changes. Accordingly, this conceptualization of the injury of pregnancy does not accord with the way that the law treats the phenomenon.

The fourth possibility is to imagine that the *fetus* is the injury when a rape results in pregnancy. The argument is that it is the fetus—and the body's recognition of the fetus, together with its attempt to sustain it—that causes the massive physical changes in a woman's body during pregnancy.<sup>112</sup> However, constructing a fetus as an injury represents an extreme departure from popular constructions of the fetus. This is precisely the pushback that McDonagh encountered to her proposal to ground abortion rights in a woman's right to self-defense against the fetus.<sup>113</sup> Her polemic required analogizing the fetus to an unwelcome intruder threatening the woman with serious bodily harm; the woman would be justified in using deadly force against her intruder—and in

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111. See, e.g., Ramsey, *supra* note 107, at 763 (itemizing physical effects of pregnancy); Hoyson, *supra* note 34, at 583-84 (same). For a remarkable catalogue of the physical effects of a normal pregnancy, see Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1579-82 (1979) (noting common bodily changes that occur during pregnancy, ranging from nausea and insomnia to carpal tunnel syndrome and shortness of breath).

In *In re Union Pacific Railroad Employment Practices Litigation*, the Nebraska District Court supported its argument that pregnancy is a disease that ought to be covered in the defendant's health insurance plan by describing its physical effects on the body and suggesting that if any other condition caused such dramatic changes, it would be readily recognized as a disease. 378 F. Supp. 2d 1139, 1147-48 (D. Neb. 2005). The court acknowledged the contentiousness of referring to pregnancy as a "disease," observing that it could be taken to "disparage the miracle of birth." *Id.* at 1147 n.20. However, the court insisted upon using the terminology because "[p]regnancy, but for its priceless procreative product, however, is a disease." *Id.*

112. See, e.g., MCDONAGH, *supra* note 68, at 70-72 (describing the physiological changes that occur during a normal pregnancy and underscoring that it is the *fetus* that causes those changes).

113. See *id.* at 193 (noting pushback to her proposal to ground abortion rights in a woman's right to self-defense against the fetus).

expecting the state to assist her in defending herself against her intruder.<sup>114</sup> She writes that readers responded negatively to this construction of the fetus: “[A]s another pro-choice advocate once said, ‘I certainly didn’t feel my baby was an aggressor attacking my body. I felt so close to my baby when I was pregnant that it is abhorrent to think of pregnancy the way you propose.’”<sup>115</sup> This sentiment about the fetus reveals what has become a platitude within political and cultural discourse: whatever the fetus is, ontologically speaking, it is innocent.<sup>116</sup> Accordingly, it is counterintuitive, and “abhorrent” within some circles, to conceptualize it as an aggressor, an attacker, or an entity wreaking harm.<sup>117</sup> Similarly, it is expected that it would be counterintuitive, and “abhorrent” within some circles, to conceptualize the fetus as an “injury.”

The fifth possibility is to imagine an abstracted notion of pregnancy as the injury. This possibility does not inquire into the physiology of pregnancy. Moreover, it is not important how the pregnancy ends—or even that it necessarily must end. Nor does it identify the pregnancy with the fetus that is both its cause and its effect. It is entirely conceptual. The injury is the woman’s knowledge that she is pregnant, even when the pregnancy has not produced any substantial, or even noticeable, physical effects. The injury is the alteration of a rape victim’s identity from “woman” to “pregnant woman.” The injury is the fact that the woman thinks of herself differently.

There are some parallels between the argument that an abstracted notion of pregnancy is the injury when a rape results in pregnancy and an argument that the injury occasioned by rape, generally, is abstracted as well. To explain: when prosecuting a defendant, it is not necessary for the state to demonstrate that a rape resulted in a “physical injury” to a woman, although, of course, the

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114. McDonagh’s argument begins with the recognition that it is the fetus that causes the massive changes in a woman’s body during pregnancy. *Id.* at 6 (observing that a woman desiring an abortion “seeks to expel the coercive imposition of the one and only agent capable of making her pregnant: the fetus”). Should any private actor cause these changes to a woman, she would be justified in using deadly force to stop the actor. *See id.* at 7. Moreover, McDonagh argues that not only is the woman justified in acting in self-defense against a fetus that occupies her body without her consent, but she may call upon the state to protect her against the intrusive acts of the fetus—insofar as the state protects citizens from the liberty-restricting, violent acts of other private actors. *Id.* at 19 (“[T]he primary purpose of the state as envisioned by founders of the American nation is to stop intruders on behalf of those they threaten.”). It is upon this ground that McDonagh bases indigent women’s rights to government assistance in obtaining an abortion. *See id.*

115. *Id.* at 193; *see also id.* at 16 (noting that “some may balk at portraying pregnant women as being victimized by a fetus”).

116. *See McDonagh, supra* note 13, at 1099 (describing the popular view of the fetus as “innocent” with “no intention of affecting a woman’s body and no ability to control its effects upon her”).

117. That the fetus is an aggressor runs counter to the construction of the fetus as a “life”—a moral, theological, spiritual notion that exceeds mere biological life. For an exploration of this notion of “life” and its ability to unsettle abortion jurisprudence, see generally Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915 (2010).

requirement that sexual intercourse have taken place refers to a physical act.<sup>118</sup> Indeed, according to certain studies, “between one-half and two-thirds of rape victims sustain no physical injuries.”<sup>119</sup> Accordingly, the physical injuries that may or may not be occasioned by rape cannot account for why rape is considered a serious crime. Thus, it is fair to argue that the injury of rape—that which makes rape a horrific act—is an abstracted identity- or dignity-based injury.<sup>120</sup> To make the parallel more explicit, one can say that the injury of rape, generally, is the woman’s knowledge that she has been raped, even when the rape does not result in any physical effects. The injury is the alteration of a woman’s identity from “woman” to “rape victim” or “rape survivor.”<sup>121</sup> The injury is the fact that the woman thinks of herself differently. The injury of pregnancy is analogous.

This abstracted notion of pregnancy as injury is the safest construction in the sense that it does not depend on the teleology of the pregnancy (that is, a woman is not injured by her pregnancy only at its end) and it does not require somewhat countercultural understandings of the fetus. Consequently, this is likely the notion of pregnancy as injury that has the most traction with the legislators and the jurists whose work produces the sexual assault statutes under analysis. Notably, this conceptualization of the injury sounds a lot like a mental or emotional injury. It is worth interrogating why it is “safest” to construct a mental/emotional injury out of pregnancy. Indeed, if physical injuries (like all injuries) do not exist “out there” in the world and are, instead, socially con-

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118. See, e.g., 75 C.J.S. *Rape* § 15 (West 2012) (“Other than penetration of the female sex organ by the male sex organ, infliction of physical injury is not an element of the offense of rape.”).

119. NAT’L RESEARCH COUNCIL, *UNDERSTANDING VIOLENCE AGAINST WOMEN* 75 (Nancy A. Crowell & Ann W. Burgess eds., 1996).

120. See Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 *LOY. L.A. L. REV.* 845, 851 (2002) (describing rape as a “crime against the spiritual self”); see also *id.* at 893 (quoting descriptions of rape as an injury to the heart and soul); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 *FORDHAM URB. L.J.* 439, 446 (1993) (arguing that “the site of the inner self, the interior body space, is violated” by rape and quoting a description of rape as an “injury to the ‘envelope’ of the self”). An impassioned description of the injury of rape is also contained in Chief Justice Burger’s dissent in *Coker v. Georgia*, in which the Court held that punishing rape with the death penalty was cruel and unusual and, consequently, unconstitutional:

A rapist not only violates a victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim’s life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. . . . Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery.

433 U.S. 584, 611-12 (1977) (Burger, C.J., dissenting).

121. Cf. Pillsbury, *supra* note 120, at 892 (observing that when rape victims describe the injury occasioned by rape, they often speak in terms of a “fundamental loss of identity”).

structed,<sup>122</sup> then an important question is why it has been difficult for pregnancy to be socially constructed as a physical injury. The answer may lie in the subordination of women's experiences, as a general matter, as well as the persuasiveness of positive constructions of pregnancy that are sustained by political, religious, and other powerful institutions.

It deserves some emphasis that the pregnancy-as-injury definition, when embedded in statutes and enacted on the bodies of defendants who endure longer sentences when their victims become pregnant after a sexual assault, has the force of the law behind it. The law imbues this definition with legitimacy and power. Of course, individual women experienced their pregnancies as injuries prior to the appearance of the pregnancy-as-injury definitions in criminal law. However, these experiences of injury gain legitimacy through their representation in the powerful cultural institution that is the law. The significance of the historically male institution of the law reflecting an experience that is profoundly female should not be understated: there arguably is no other area of the law that reflects a phenomenology—an experience of the body—that is singularly female.<sup>123</sup>

While this Part has argued that the representation of pregnancy contained in sexual assault statutes that treat it as a substantial bodily injury accurately reflects women's experience of unwanted pregnancy as a general matter, the next Part looks to other areas of law where pregnancy is represented in order to see whether they, too, accurately reflect women's experience of unwanted pregnancy. The canvass reveals the sexual assault statutes to be exceptional in that regard, as the areas of law canvassed remain committed to representing pregnancy positively. This should be no surprise: the positive construction of pregnancy has remained hegemonic in large part because of its reflection in powerful institutions like the law. The areas of law canvassed have undoubtedly influenced culture. As such, the law, acting in concert with other forces, has produced a culture that now largely accepts as legitimate only those experiences of pregnancy that are consistent with positive constructions of pregnancy; this same culture influences the law such that the law will only reflect positive constructions of pregnancy. And the dialectic turns. The analyzed sexual assault statutes disseminate a subversive construction of pregnancy and, in that way, powerfully interrupt the dialectic.

### III. OTHER CONTEXTS

This Part considers other areas of law in which pregnancy is represented. It reveals that the sexual assault statutes under discussion are somewhat excep-

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122. See *supra* notes 62-63 and accompanying text.

123. See West, *supra* note 67, at 31 (noting that the danger and fear of unwanted pregnancy is “gender-specific” and stating that “[i]t is a fear which grips women, distinctively, and it is a fear about which men, apparently, know practically nothing”).

tional because it is rare for the law to embrace and reflect subversive understandings of pregnancy. The consideration begins with areas of law in which it is surprising that pregnancy is not constructed as an injury: abortion jurisprudence and birth-related torts. This analysis demonstrates that the law frequently embodies positive constructions of pregnancy even when negative constructions might be expected. The Part next considers areas of law in which pregnancy is constructed as an injury. However, this representation of pregnancy as an injury occurs when laws index the social effects of pregnancies. Accordingly, while the law in these instances represents pregnancy as an injury, the injury is to *the body politic*. Thus, the representation's subversiveness is mitigated, as it does not endeavor to describe a *bodily* experience of pregnancy as an injury. It only seeks to represent the societal effects of pregnancies—usually borne by problematized women (that is, minors and the poor).

This Article does not contend that the two conceptualizations are mutually exclusive. It does not argue that when pregnancy is recognized as an injury to the body politic, it is never recognized as an injury to the woman, and vice versa. Instead, the two conceptualizations may be poles on a spectrum, and judicial and legislative treatment of pregnancy may fall in a shade of gray in between. However, it is also true that the *weight* of any particular treatment of pregnancy is usually toward one pole—and usually dramatically so. Thus, the schematization offered in this Article remains valuable, as it demonstrates the uniqueness of the sexual assault laws in their unhedged and unapologetic construction of pregnancy as an injury.

Moreover, it is significant that the law, as a general matter, refuses to recognize that pregnancy can be an injury to women: in so doing, it refuses to reflect a critical, yet common aspect of women's experiences. Indeed, the law has ignored, or silenced, countless women because of its enduring commitment to positive constructions of pregnancy. Perhaps it is inevitable that, as women gain more power in the public sphere, the subversive construction of pregnancy will be reflected in law; as women's voices are heard and respected, the law will come to reflect their truths. Perhaps the reflection of this truth in the sexual assault laws discussed is a foreshadowing of things to come. If so, it will be interesting to observe how the recognition that pregnancy is an injury when unwanted may unsettle bodies of law—like abortion jurisprudence and birth-related torts—that, arguably, remain stunted due to their failure to listen to women.

#### A. *When Pregnancy Is Not an Injury*

##### 1. *The abortion cases*

Intuitively, it would seem like the abortion cases would offer the most subversive understandings of pregnancy. After all, they constitutionalize the right of a woman who experiences her pregnancy as an injury to terminate that same

pregnancy. Undeniably, then, the abortion cases certainly contain some recognition by the law that pregnancy is not always a life-affirming event in the life of the woman; instead, pregnancy may be experienced as a *bad* thing. However, the decisions themselves are reluctant to say as much. They are, at best, ambivalent.

The most ambivalent of all of the abortion cases that remain good law is *Gonzales v. Carhart* (*Carhart II*).<sup>124</sup> In *Carhart II*, the Court upheld the federal Partial-Birth Abortion Ban Act, which prohibited a particular method of performing second- and third-trimester abortions. The Court reasoned that the Act was a legitimate exercise of a government interested in “promot[ing] respect for life, including life of the unborn.”<sup>125</sup>

According to the majority opinion, pregnancy establishes a woman as a mother—an identity a woman occupies even after she has successfully undergone an abortion and has no child.<sup>126</sup> Most importantly, her decision to terminate her pregnancy—motivated as it is by all the reasons of which the majority was surely well aware—is frequently one that she regrets.<sup>127</sup> It is a decision that she all too often bemoans, that hurts her, despite the compelling reasons that led her to undergo an abortion during her second or third trimester of pregnancy.<sup>128</sup> As such, the story that *Carhart II* tells is one in which pregnancy, consistent with positive notions, is a burdensome, painful, and anxiety-producing, but nevertheless *good*, thing for a woman. The opinion suggests that it is the misrecognition of the goodness of the thing—the miscalculation of the bitter versus the sweet—that leads women to choose abortion. Moreover, it is a miscalculation that women realize after the fact, resulting in regret and depression. Nevertheless, as an “abortion case” that applied the principles set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>129</sup> and, in so doing, implicitly affirmed *Casey* as good law and perpetuated the abortion

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124. 550 U.S. 124 (2007).

125. *Id.* at 158.

126. *See id.* at 159-60 (referring to a “mother” who “comes to regret her choice to abort”).

127. *Id.* at 159 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”).

128. Many of the abortions proscribed by the federal Partial-Birth Abortion Ban Act would be sought because of fetal anomalies that are detected during later stages of pregnancy or medical conditions that come to threaten the health of the woman as the pregnancy progresses. *See* Hendricks, *supra* note 47, at 369 (“In [some] pre-viability cases [where the procedure was used], and in all post-viability cases, the need for abortion is triggered by fetal deformities or by a threat to the pregnant woman’s life or health.”). This is interesting because, but for these medical concerns, many of these pregnancies would be *wanted* pregnancies. *See id.* (“[M]any of the abortions to which the federal ban applies involve wanted pregnancies.”). Thus, *Carhart II* functions to make it more difficult for women to terminate pregnancies that are experienced positively, but are nonetheless physical injuries to the woman.

129. 505 U.S. 833 (1992).

right,<sup>130</sup> *Carhart II* could be apprehended as implicitly offering a subversive notion of pregnancy. However, the text and the reasoning of the opinion itself explicitly offer a representation of pregnancy that is consistent with prevailing, positive constructions.

Now, because the concern here is with discourse and culture, the text of the opinion may not matter at all. One may argue that, when the interest is in the dissemination of ideas into and throughout culture, it is more important what the opinion establishes, not what the opinion says. The argument is that culture is not produced by the words that a court or a legislative body uses, but rather by the ideas that the laws produced by the court or legislative body manage to embody. Accordingly, *Carhart II*'s ontology of pregnancy (as a positive event) would be unimportant; most important would be that, because the Court did not use *Carhart II* as an opportunity to overrule *Roe*, *Carhart II* embodies the idea that abortion has some constitutional protection and, in so doing, simultaneously embodies the idea that pregnancy may be a "bad" thing—an injury—for some women. Nevertheless, while this may be true, it is also true that *Carhart II*, in its refusal to afford constitutional protection for a particular method of performing abortion, limits the abortion right and, in so doing, embodies the idea that *abortion* may be a bad thing for women. This is the messiness of culture—where discourses and counterdiscourses exist side by side.

Like *Carhart II*, *Casey* plays a prominent role in the messiness of culture through its perpetuation of a discourse and counterdiscourse simultaneously. Decided nineteen years after *Roe*, *Casey* overturned *Roe*'s much-criticized trimester framework and replaced it with the undue burden standard.<sup>131</sup> While *Roe*'s trimester framework had prevented governments from regulating abortion during the first trimester,<sup>132</sup> *Casey*'s undue burden standard allowed for the government to regulate abortion during all stages of pregnancy in order to promote fetal life.<sup>133</sup> So, on the one hand, *Casey* reaffirmed *Roe*,<sup>134</sup> thus continuing the constitutionalization of the abortion right and, as a result, embodying and disseminating the idea that pregnancy is, at times, an injurious, "bad"

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130. The most dramatic demonstration of *Carhart II*'s ambivalence toward the continuation of *Casey* as good law is the majority's refusal to explicitly say as much, and its decision to instead "assume" the principles that *Casey* stated for the purpose of deciding the case before it. See *Carhart II*, 550 U.S. at 146 (stating that the Court "assume[s] the following principles for the purposes of this opinion" and then outlining the holdings of *Casey*).

131. See *Casey*, 505 U.S. at 876 (plurality opinion) (rejecting the trimester framework and stating that the undue burden standard should be used to adjudicate the constitutionality of abortion regulations).

132. See *id.* at 872 (noting that under the trimester framework, "almost no regulation at all is permitted during the first trimester of pregnancy").

133. See *id.* at 878 (noting that the undue burden standard allows the state, "throughout pregnancy," to regulate abortion in the pursuit of convincing the woman to elect childbirth over abortion).

134. *Id.* at 846 (majority opinion) (reaffirming *Roe*'s "essential holding").

thing for some women. On the other hand, *Casey* limited the abortion right<sup>135</sup> and, as a result, embodied and disseminated a competing idea that pregnancy is not an injurious, “bad” thing for as many women as *Roe* allowed.<sup>136</sup>

*Casey* participates in the messiness of culture because it is a profoundly ambiguous decision. It certainly acknowledges that women may experience their pregnancies as injuries.<sup>137</sup> However, it also disbelieves the correctness of that experience in many cases. The thrust of *Casey* is to assert that women would actually experience their bodies differently if given the proper information.<sup>138</sup> Accordingly, it overturns *Roe* to the extent that the trimester framework prohibited the state from providing women with a lens through which they could see that what they thought was an injury was actually a gift.<sup>139</sup> Indeed, *Roe* is overturned because it proscribed states from attempting to refigure, to reconstitute, the phenomenologies that women have of their bodies. As such, *Casey*'s ambiguity is that it simultaneously recognizes women's negative experiences of pregnancy while being profoundly suspicious of them. Nonethe-

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135. It is worth noting that the limitation of the abortion right that *Casey* effected was precisely to allow states to compel women who were experiencing their pregnancies subversively to hear positive descriptions of their pregnancies. See *id.* at 872 (plurality opinion) (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [women] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . .”).

136. *Id.* at 873, 876 (rejecting *Roe*'s trimester framework and replacing it with the undue burden standard, which, unlike the trimester framework, allows the state to place a burden on the woman's right to decide whether to undergo an abortion, as long as the burden is not undue).

137. *Id.* at 852 (majority opinion) (noting the “suffering” that may accompany a pregnancy).

138. Moreover, *Casey* articulates a concern—taken to the extreme in *Carhart II*—that women who experience their pregnancies as injuries would actually be injured by the *abortion* if they were to terminate a pregnancy without having heard information that would reveal their pregnancies to be, in actuality, positive. *Id.* at 882 (plurality opinion) (“In attempting to ensure that a woman apprehend the full consequences of her decision, the State [by mandating that women receive specific information during the informed consent process] furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”); cf. *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 159-60 (2007) (“The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”).

139. See *Casey*, 505 U.S. at 872-73 (plurality opinion) (overturning *Roe*'s trimester framework, thereby enabling states to pass laws that would require women to hear moral perspectives on the fetus, as well as to establish “procedures and institutions to allow adoption of unwanted children” and state assistance programs for women who choose to retain custody).

less, it reaffirms the abortion right because women must “ultimately” determine the ontology of their pregnancy.<sup>140</sup>

Then, there is the text of the opinion. In the course of refashioning the abortion right, the *Casey* majority waxed philosophically about pregnancy:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . [T]hese sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love. . . .<sup>141</sup>

The Court here acknowledges that pregnancy is burdensome and painful—both mentally and physically. However, it is ultimately a blessing, producing an “infant” with whom the woman shares a “bond of love.” Indeed, for the Court, pregnancy is a noble event. The Court in this passage appears to suggest that women suffer, both physically and mentally, during *all* pregnancies—including wanted ones. The Court is loath, however, to interpret the Constitution such that the state may compel women to endure this inherent suffering by proscribing abortion.

Moreover, even when the Court appears to acknowledge discourses that run counter to its positive description, the acknowledgment remains ambivalent:

One view [of abortion] is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.<sup>142</sup>

The Court initially appears to offer the second portrayal of pregnancy as conflicting with the first. However, the two are consistent: in both, pregnancy is a “wonder of creation”—a beautiful, life-affirming event. The difference is that the second portrayal admits that circumstance may prevent women from appreciating the event. A truly destabilizing description of pregnancy would acknowledge that, when a woman finds herself pregnant and is unable “to provide for the nurture and care of the infant”—that is, when a woman bears an unwanted pregnancy—the pregnancy may be as much of a “wonder of creation” as is cancer. The pregnancy is an injury.

Perhaps only *Roe v. Wade*<sup>143</sup> stands unambiguous in its subversive representation of pregnancy as an injury. As a decision that represents the constitutional status of a woman’s right to an abortion, it, like the other abortion cases, certainly represents an idea of pregnancy as an injury to those bearing unwanted pregnancies.

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140. *Id.* at 877 (“What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”).

141. *Id.* at 852 (majority opinion).

142. *Id.* at 853.

143. 410 U.S. 113 (1973).

Moreover, to the extent that text is important where culture is concerned, the text of the decision refrains from embracing positive constructions of pregnancy. Indeed, the decision is relatively austere—performing what appears to be a dispassionate history of thought concerning fetal ontology.<sup>144</sup> Further, when it arrives at the point at which it must balance the state's interest in protecting fetal life against the woman's privacy right, there is no hint of a culture that frequently constructs pregnancy as a "wonder of creation":

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>145</sup>

Here, pregnancy, if not the "specific and direct harm" itself, may certainly produce it. Pregnancy causes distress. It brings "psychological harms" and "difficulties." Indeed, *Roe* represents pregnancy subversively. And indeed, this may explain, at least in part, both its veneration and its condemnation.

Moreover, it is perhaps because *Roe* unambiguously represents pregnancy as an injury that abortion figures as a healing modality in the opinion. Abortion is something that, after a thorough consultation and conversation, a doctor prescribes, like a medicine, to a patient.<sup>146</sup> Further, once effected, abortion "heals" the woman of the mental, emotional, financial, social, and physical burdens that the paragraph quoted above references.

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144. *See id.* at 130-47 (surveying the answers that intellectuals have given to the question of when life begins by examining the approach taken to abortion in "ancient attitudes," "the Hippocratic Oath," "the common law," "the English statutory law," "the American law," "the position of the American Medical Association," "the position of the American Public Health Association," and "the position of the American Bar Association" (italics and capitalization omitted)).

145. *Id.* at 153.

146. *See id.* (noting that "the woman and her responsible physician" will consider the factors suggesting the propriety of abortion "in consultation"). Commentators have criticized *Roe*'s privileging of the doctor's interest in practicing medicine over the woman's interest in being free of an unwanted pregnancy. *See, e.g.,* Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 487 (1995); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 85-86 (1995); Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 178 (2008).

The Court clearly regarded abortion as a treatment that is prescribed to a woman in *Doe v. Bolton*, 410 U.S. 179 (1973), a companion case to *Roe v. Wade*. There, the Court emphasized that it is the physician who must decide whether to recommend an abortion and, when doing so, must consider "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient" as "[a]ll these factors may relate to health." *Id.* at 192.

Interestingly, while *Roe* contemplated abortion as a mechanism for healing women of a myriad of medical *and* nonmedical harms, subsequent jurisprudence perpetuated this contemplation of abortion only insofar as it related to medical harms. Differently stated: the cases that came after *Roe*, in their maintenance of the health exception, recognized abortion as a healing modality only when it functions to heal women of medical harms<sup>147</sup>—a vision of abortion that is fairly described as a retreat from *Roe*'s recognition of the broad range of harms that abortion may heal. To the extent that *Carhart II* retreated from the requirement of a health exception as a limitation on government regulation, it may demonstrate its dramatic denial of pregnancy as an injury in any and all cases.<sup>148</sup>

## 2. *Wrongful birth/life/pregnancy/conception*

Birth-related torts—which include the torts of wrongful birth, wrongful life, wrongful pregnancy, and wrongful conception—capture a wide variety of negligent behavior by doctors that results, in one way or another, in the birth of a child.<sup>149</sup> While states schematize the tort in different ways,<sup>150</sup> “wrongful birth” usually refers to a cause of action brought by a parent against a healthcare provider to recover for the birth of a child who is severely disabled,<sup>151</sup> the claim is that, but for negligently delivered prenatal care, the parent would have been apprised of the fetus's usually catastrophic disability prior to the infant's birth and would have terminated the pregnancy. “Wrongful life” tends to refer to a cause of action brought by a severely disabled child against a healthcare provider to recover for the fact of his or her birth;<sup>152</sup> like “wrongful birth” claims, the child's claim is that, but for the negligently delivered prenatal

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147. See, e.g., *Casey*, 505 U.S. at 846 (confirming “the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health”).

148. See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 165 (2007) (concluding that the federal Partial-Birth Abortion Ban Act “does not require a health exception”).

149. See Kimberly D. Wilcoxon, Casenote, *Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation*, 69 U. CIN. L. REV. 1023, 1025 (2001) (observing that birth-related torts “are used to allege that, but for the negligence of a physician, a baby would not have been born”). In all cases, the physician is not the direct cause of any injuries suffered by the fetus. See Shari S. Weinman, Note, *Birth Related Torts: Can They Fit the Malpractice Mold?*, 56 MO. L. REV. 175, 176 (1991).

150. See Wilcoxon, *supra* note 149, at 1028-30 (noting inconsistencies in the way that states schematize birth-related torts).

151. See Catherine Palo, *Cause of Action for Wrongful Birth or Wrongful Life*, in 23 CAUSES OF ACTION (SECOND) 55, § 4 (West 2012).

152. See *id.* § 10.

care, the child's parents would have learned of the claimant's disability and would have prevented the claimant's birth through abortion.<sup>153</sup>

While most states recognize the tort of wrongful birth, most states refuse to recognize wrongful life claims.<sup>154</sup> The reason that is usually given for this discrepancy is that the damages for wrongful birth are capable of being calculated.<sup>155</sup> For wrongful birth claims, the injury is the denial of the claimant's reproductive rights—that is, her liberty to determine under what conditions she will become a parent,<sup>156</sup> the damages for this injury are usually the extraordinary expenses associated with raising the child.<sup>157</sup> However, for wrongful life claims, the injury is the fact of the child's birth—his or her life itself.<sup>158</sup> Many courts refuse to recognize life as an injury.<sup>159</sup> Moreover, because tort law is designed to compensate claimants for their injuries by putting them in the position they would have been had they not been injured, the calculation of damages involves comparing the value of being alive but severely disabled with the value

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153. See Wilcoxon, *supra* note 149, at 1026-27 (explaining that the injury in wrongful life claims is that “the child was harmed by being born with birth defects, rather than being aborted”).

154. See Palo, *supra* note 151, §§ 4, 11 (detailing the large number of jurisdictions that have recognized the wrongful birth cause of action and the large number of jurisdictions that have refused to recognize the wrongful life cause of action); Wilcoxon, *supra* note 149, at 1032 (making the same observation).

155. Cf. Wilcoxon, *supra* note 149, at 1032 (noting the difficulty that courts have in calculating damages in wrongful life claims).

156. See Katherine Say, Note, *Wrongful Birth: Preserving Justice for Women and Their Families*, 28 OKLA. CITY U. L. REV. 251, 265 (2003) (noting that the injury in wrongful birth litigation is “[i]nterference with the patient’s right to autonomy in the fundamental area of reproduction”); Weinman, *supra* note 149, at 177 (observing that the injury in wrongful birth claims is that “the provider’s negligence deprived the parents of the choice between carrying the pregnancy to term or obtaining an abortion”); Wilcoxon, *supra* note 149, at 1041 (noting that the claimant’s injury in wrongful birth suits is the inability to make a choice about whether to become a parent or not); cf. Julie Gantz, Note, *State Statutory Preclusion of Wrongful Birth Relief: A Troubling Re-Writing of a Woman’s Right to Choose and the Doctor-Patient Relationship*, 4 VA. J. SOC. POL’Y & L. 795, 815 (1997) (noting that, in a wrongful birth suit, the injury may also be conceptualized as “the birth of an impaired child”).

157. See JACOB A. STEIN, 2 STEIN ON PERSONAL INJURY DAMAGES § 12:7 (3d. ed., West 2012) (“The majority of states recognize the cause of action [for wrongful birth] but limit the economic damages to the additional medical, hospital, and supportive expense occasioned by the child’s impairment as contrasted to the expenses incurred with respect to a normal, healthy child.”). As expected, states differ in their approaches to awarding damages for wrongful birth claims. See, e.g., *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979) (awarding damages to compensate the plaintiffs for their “mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down’s Syndrome”); Wilcoxon, *supra* note 149, at 1027 n.50 (noting that states may award damages for the costs associated with the pregnancy and birth; pain, suffering, and emotional distress; and costs of caring for the child even when he has reached adulthood).

158. See Wilcoxon, *supra* note 149, at 1032.

159. See Weinman, *supra* note 149, at 179 (noting this rationale for refusal of recognition by some courts).

of not having existed.<sup>160</sup> This is a calculation that most jurisdictions refuse to attempt, with the reasons for the refusal ranging from the claimed impossibility of the task<sup>161</sup> to the denigration of life that the calculation would effect.<sup>162</sup>

“Wrongful conception” and “wrongful pregnancy” are also birth-related torts, usually referencing actions that are brought by parents of physically able and healthy children whose conceptions or births the parents had attempted to prevent.<sup>163</sup> Again, like claims of wrongful birth, the parents allege that, but for the negligently delivered healthcare, the child never would have been conceived and/or born.<sup>164</sup> Most jurisdictions recognize these torts, usually awarding damages for the costs associated with the pregnancy and birth; very rarely are damages awarded for the ordinary costs of raising the child.<sup>165</sup>

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160. *See id.* at 178 (explaining the compensatory function of tort damages and noting that wrongful life claims involve “measur[ing] monetarily the difference between the child’s existence in an impaired state and non-existence”); Wilcoxon, *supra* note 149, at 1027 (explaining that for wrongful life claims, damages “are the differences in cost between living with birth defects, and not existing at all”). While most jurisdictions refuse to recognize wrongful life claims, those few jurisdictions that do generally decline to make this calculation. For the most part, they award damages for the extraordinary costs of raising a severely disabled child. *See id.* at 1027 n.46 (“Traditional tort principles would suggest that the child recover for all the expenses of living, but courts are hesitant to award these damages. The few courts that have allowed wrongful life [claims] only allow for the extraordinary expenses arising from the birth defects.” (citation omitted)).

161. *See, e.g.,* Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) (“Simply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson’s choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make.”).

162. *See* Palo, *supra* note 151, § 11 (noting that rejections of the claim rest on “doctrinal unwillingness to accept that life, even in an impaired state, is worse than non-existence, or on the metaphysical or the practical inability to measure the value of an impaired life as opposed to utter non-existence”).

163. *See id.* § 3; Wilcoxon, *supra* note 149, at 1027-28 (explaining that for wrongful conception claims, “there is usually no claim that the baby has birth defects, but merely that the baby was born”).

164. Typical cases of wrongful conception involve a physician’s failure to successfully sterilize a man or a woman, or a pharmacist’s failure to competently dispense contraceptives. Wilcoxon, *supra* note 149, at 1027-28 & n.51.

165. *See* A.J. Stone, III, Comment, *Constitution: Tort Law as an End-Run Around Abortion Rights After Planned Parenthood v. Casey*, 8 AM. U. J. GENDER SOC. POL’Y & L. 471, 479 (2000) (noting that courts generally disallow the recovery of damages for the costs of raising a healthy child); Weinman, *supra* note 149, at 179 (noting that most courts “allow recovery for medical expenses, pain and suffering during the pregnancy, and loss of consortium” and observing that some courts offset the damages awarded by the benefits of being a parent). Maine has passed legislation making explicit that damages can only be rewarded for medical costs associated with pregnancy and birth and not for the costs of raising the healthy child:

[I]t is contrary to public policy to award damages for the birth or rearing of a healthy child.

. . . No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses

Birth-related torts are interesting because, like sexual assault statutes in which causing pregnancy is an aggravating factor, they might be understood as constructing pregnancy as an injury—a compensable injury, nevertheless. And this surely explains the waves of protest that caused more than a few states to legislatively<sup>166</sup> and judicially<sup>167</sup> bar such claims. However, if birth-related torts do construct pregnancy as an injury, they do so only imperfectly. This is because courts do not attempt to compensate victorious plaintiffs for having been injured by a pregnancy that they wish they did not have to bear. Instead, in the case of a successful claim of wrongful pregnancy/conception, courts attempt to compensate victorious plaintiffs with damages for the economic costs of bearing a pregnancy that culminates in a healthy child. Alternately, in the case of a successful claim of wrongful birth, courts attempt to compensate plaintiffs with damages either for the exceedingly high costs of raising a disabled child or for the mental or emotional harm that parents suffer from having to raise a disabled child. Importantly, in neither case does the law attempt to compensate plaintiffs for the mental and emotional costs of bearing a pregnancy that is unwanted or would have been unwanted had the mother or parents been provided with full information. This is a vital distinction.

Consider *Berman v. Allan*, in which the parents of a child born with Down's Syndrome sued their obstetricians under a theory of wrongful birth, asserting that the physicians negligently failed to inform them of the availability of amniocentesis, which would have detected the genetic anomaly in their daughter while in utero and would have led them to terminate the pregnancy.<sup>168</sup>

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incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

ME. REV. STAT. tit. 24, § 2931 (2012).

166. See Wilcoxon, *supra* note 149, at 1033 (noting that the reason why many states' legislation prohibiting the recognition of birth-related torts resemble one another is because "national pro-life interest groups lobbied for the legislation"). The claim is generally that recognizing life, even disabled life, as an injury—and, relatedly, recognizing as an injury the deprivation of the right to undergo an abortion to prevent the birth of that life—is an affront to the sanctity of life. As one court asserted,

Make no mistake. These cases are not about birth, or wrongfulness, or negligence, or common law. They are about abortion. . . . For those who cannot accept the premise [that abortion is a legal choice for a woman], no one should ever be compensated for injury just because the choice of abortion has been thwarted.

Schloss v. Miriam Hosp., No. C.A. 98-2076, 1999 WL 41875, at \*4 (R.I. Super. Ct. Jan. 11, 1999).

167. A.J. Stone observes that many courts that have eliminated the wrongful birth tort have made ideological arguments, "present[ing] the birth of a child in terms of wholesome—and ultimately overriding—family values." Stone, *supra* note 165, at 491. Stone contends that these arguments "emanate[] from a judicial contemplation of a society where the birth of a child is always a net benefit" and are grounded in the belief that barring the tort evidences a "respect for life and the benefits proceeding from it." *Id.* (alteration and internal quotation marks omitted).

168. 404 A.2d 8, 10 (N.J. 1979). The plaintiffs had also sued as guardians ad litem on behalf of their daughter under a theory of wrongful life. However, like many other courts, the court held that the daughter failed to state an actionable claim for relief because of its

The court held that the parents had stated a claim for damages both for the “costs that will be incurred in order to properly raise, supervise and educate the child” and for the “emotional anguish that has been and will continue to be experienced on account” of the child’s condition.<sup>169</sup> To the court, the plaintiffs’ injury was the pain that they felt and would continue to feel from having a disabled child. Importantly, to the court, the plaintiffs’ injury was not the pain of bearing an unwanted pregnancy. (Indeed, the mother bore a *wanted* pregnancy. Her claim is that the pregnancy would have been unwanted, and would have been experienced as an injury, had her physicians properly provided prenatal care and informed her of her fetus’s disability.) Thus, the court did not inquire into the phenomenology of an unwanted pregnancy. As such, the law does not reflect a woman’s bodily experience—or a subversive understanding of pregnancy. The potential is there, however. Imagine a case of a woman having an amniocentesis but, because of physician negligence, she is informed of the results revealing a fetal anomaly during her third trimester, when legal abortion is no longer available. Such a woman might experience the balance of her pregnancy, now unwanted, as an injury. Should the law recognize her experience and award damages for her pregnancy-qua-injury, it would accomplish the same cultural work accomplished by sexual assault statutes that define pregnancy as a bodily injury.

In cases of wrongful pregnancy/conception, in which parents sue after a provider’s negligence results in an unwanted pregnancy, courts might recognize that the woman who bears a pregnancy only because of the negligent provision of contraceptives or a negligently performed abortion or sterilization—that is, a woman who bears an unwanted pregnancy—experiences that pregnancy as an injury. As described above, courts do not do this, only recognizing the injury of having been denied one’s reproductive rights and awarding damages to compensate for the economic costs of the pregnancy. In this selective recognition, the law might be read to assert that pregnancy is a positive event. Undeniably, there are monetary costs associated with pregnancy that the law does not mind shifting. But, ultimately, the pregnancy *itself* is a good thing. It may result in some burdens, which the positive idea of pregnancy freely recognizes. But it is not an injury.

#### B. *When Pregnancy Is an Injury . . . to the Body Politic*

*Michael M. v. Superior Court*<sup>170</sup> is a productive place to start an inquiry into areas of the law that construct pregnancy as an injury—namely because the

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refusal to recognize that life, even in an impaired state, could be an injury: “To rule otherwise would require us to disavow the basic assumption upon which our society is based.” *Id.* at 12-13.

169. *Id.* at 13, 15.

170. 450 U.S. 464 (1981).

opinion is so clear in this construction. In *Michael M.*, the Supreme Court upheld against an equal protection challenge a California law that made it a crime for men, but not women, to have sexual intercourse with a person under the age of eighteen.<sup>171</sup> The law had been justified on the grounds that it, through a purely utilitarian calculus, would “prevent illegitimate teenage pregnancies”<sup>172</sup> by raising the costs, via the possibility of a criminal penalty, for males to have sex with minor females.<sup>173</sup> Females, it was argued, did not need the possibility of a criminal penalty to increase the costs of sex because their ability to become pregnant was a cost that most females would appreciate as such.<sup>174</sup> Thus, the “criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes.”<sup>175</sup>

Pregnancy in the plurality opinion is conceptualized as an injury or harm that the female endures.<sup>176</sup> Indeed, it is a *cost* of sex—not a benefit. It is a “pro-

171. The law criminalized “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.” *Id.* at 466 (plurality opinion) (internal quotation marks omitted).

172. *Id.* at 470. Frances Olsen has provocatively argued that teenage pregnancies might be prevented by changing the conditions under which sex is had—conditions marked by the socially-produced inability of women to protect themselves from pregnancy through the use of contraceptives. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 425 n.181 (1984) (“Young women believe—perhaps correctly—that using birth control will damage their reputations. . . . The ‘conduct leading to pregnancy’ is not just sexual intercourse, but sexual intercourse conducted under conditions of pervasive inequality of power and status.” (citation omitted)).

173. Many commentators have disputed the claim that statutory rape laws are designed to reduce the rate of teenage pregnancy, insisting that they are really about protecting females from males as sexual aggressors. See, e.g., Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 932-33 (1983); Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women’s Subordination and the Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117, 132-33 (David Kairys ed., 1982); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 185 (1982).

174. *Michael M.*, 450 U.S. at 473 (plurality opinion) (“Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences. . . . [T]he risk of pregnancy itself constitutes a substantial deterrence to young females.”). Olsen has helpfully pointed out that the minor females who bear pregnancies feel the social consequences of teenage pregnancy more acutely not because of biological differences, but rather because of social arrangements. See Olsen, *supra* note 172, at 419 n.152 (“It is empirically true that in our present society these burdens generally fall upon the female rather than upon the male, but it is important to realize that this is a social rather than biological fact. . . . Social arrangements rather than biological necessities cause the consequences of unplanned conception to fall mainly on the female.”).

175. *Michael M.*, 450 U.S. at 473.

176. It is important to note that the harm or injury of *abortion* is embedded within the Court’s construction of pregnancy. The Court noted (quoting the California Supreme Court) the “tragic human costs of illegitimate teenage pregnancy” and later observed that “approximately half of all teenage pregnancies end in abortion.” *Id.* at 467, 471 (internal quotation marks omitted). Thus, while the Court understood pregnancy as “bad” because of

found physical, emotional, and psychological consequence[] of sexual activity” from which minor females “suffer.”<sup>177</sup> Moreover, it is something that a man “inflicts” on a woman.<sup>178</sup>

It should be noted that, although the events that resulted in the prosecution of the defendant in *Michael M.* may be described accurately as forcible rape, insofar as the defendant punched the victim several times in the face before she “agreed” to have sex with him,<sup>179</sup> the statute at issue in the case criminalized *all* sex—forcible *and* nonforcible, coerced *and* uncoerced—that any minor female had with a male. Which is to say, even wanted sex that would be accurately described as consensual if the female were legally capable of consent would cause the male involved to be subject to criminal prosecution under the statute that the Court upheld in *Michael M.* According to the *Michael M.* plurality, it is not just pregnancies that are produced by violent or abusive sexual relationships that are “injuries” that are “inflicted” on females. Instead, all pregnancies, if carried by an unmarried female under the age of eighteen, are “injuries” that the female “suffers.” It deserves underscoring that these pregnancies are “injuries” that are “inflicted” *even if they are planned or wanted pregnancies*. It may be stating the obvious to note that this is far from a positive understanding of pregnancy.

However, a closer reading reveals that the plurality in *Michael M.* is not offering such a negative idea of pregnancy at all. Indeed, it is more consistent with the Court’s jurisprudence on pregnancy, as the balance of this Part shows, to interpret the opinion as not conceptualizing the pregnancy itself as the “injury,” but rather offering the negative consequences that flow from it as “injuries.” That is, the Court, in line with positive notions of pregnancy, understands the pregnancy itself as always already beautiful and life-affirming. However, when the inherently positive pregnancy occurs to an unmarried minor female, it has “bad” consequences *to the body politic*—such as economic instability and ultimately dependence<sup>180</sup> and abortion (construed as a social problem).<sup>181</sup> This

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the detrimental effects that it tends to have on the minor, it is also “bad,” at least in part, because it frequently leads to “bad” abortions.

177. *Id.* at 471; *see also id.* at 479 (Stewart, J., concurring) (“She alone *endures* the medical risks of pregnancy or abortion. She *suffers* disproportionately the social, educational, and emotional consequences of pregnancy.” (emphases added) (footnote omitted)); *id.* at 482 (Blackmun, J., concurring in the judgment) (describing pregnancy as a “problem” that women must “confront[]”).

178. *See id.* at 475 (plurality opinion) (“The age of the man is irrelevant since young men are as capable of older men of *inflicting the harm* sought to be prevented.” (emphasis added)).

179. *See id.* at 467; *id.* at 483 & n.\* (Blackmun, J., concurring in the judgment).

180. *See id.* at 471 n.5 (plurality opinion) (citing statistics that warn that many teenage mothers “face a bleak economic future”).

181. The Court undeniably appreciates the noneconomic impacts associated with abortion as impacting the state. *Id.* at 471 (“Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.”); *cf.* Planned Parenthood of

is not to deny that a minor who finds herself unexpectedly and unwantedly pregnant will experience that pregnancy as an injury; nor is it to deny that the Court was likely aware that a minor who finds herself unexpectedly and unwantedly pregnant will find it hard to conceptualize the event positively. Rather, this is to assert that the minor's experience of her pregnancy as an injury is not the Court's primary concern and does not motivate the Court's decision. It is telling that after the plurality observed that teenage pregnancies "have significant social, medical, and economic consequences for both the mother and her child, *and the State*," it emphasized that "of those children who are born, their illegitimacy makes them likely candidates to become wards of the State."<sup>182</sup> For the plurality, teenage pregnancies are injuries not because the minor females who do not want them experience them as wounds that are happening to their bodies. Instead, pregnancies are injuries because the pregnancies negatively impact the body politic.

It is probable that the Court would conceptualize the minor's pregnancy as an injury to the body politic *even if the minor experienced it positively*—that is, even if the pregnancy was planned and/or wanted. Indeed, activists and scholars addressing teenage pregnancy often have to deal with the complexities involved with minors believing that a pregnancy at a young age would be positive while society believes that that same pregnancy would be an injury. The reality is that, at least some of these teenage pregnancies that, in the aggregate, constitute a "social problem," may be wanted. One need only recall the so-called, and later-discredited, "pregnancy pact" that a group of teenagers made at a Massachusetts high school, resulting in seventeen seemingly planned and wanted teenage pregnancies.<sup>183</sup> Not only were the pregnancies of the minors considered injuries to the body politic, but the desire to become pregnant was taken to indicate that the minor had already been injured in some capacity—that something had gone terribly wrong in the minor's life.<sup>184</sup>

Similarly, minors' experiences of unplanned, unwanted pregnancies do not motivate Congress's problematization of these pregnancies in the legislative findings that precede the Personal Responsibility and Work Opportunity Rec-

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Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion) (noting the state's "profound interest in potential life").

182. *Michael M.*, 450 U.S. at 470-71 (plurality opinion) (emphasis added).

183. See *Teens May Have Made Pact to Get Pregnant*, NPR (June 20, 2008), <http://www.npr.org/templates/story/story.php?storyId=91748721>.

184. See *id.* (noting the opinion of the principal of the school that the pregnancies resulted from the fact that "the girls were lonely, and they didn't have strong families behind them," and the opinion of a reporter that "the girls didn't have restrictions in their lives [and] they live in a town that has been hit hard by the loss of its fishing industry"). Moreover, the reporter is quoted as saying, "So these are girls who didn't have a strong life plan, and they decided, essentially, to make their own life plan and take control of the situation. . . . They decided if they needed an identity, being a mother would be their identity." *Id.* (internal quotation marks omitted).

conciliation Act (PRWORA).<sup>185</sup> Rather, minors' pregnancies, and statutory rape more generally, were relevant to Congress only to the extent that they ultimately come to impact government coffers—that is, because they injure the body politic. PRWORA is the legislation that enacted Temporary Assistance for Needy Families (TANF), which replaced Aid for Families with Dependent Children (AFDC) as the program that provides monetary assistance to indigent families in the United States.<sup>186</sup> PRWORA demonstrates what the analysis of *Michael M.* suggests: the law is wholly capable of representing pregnancy as an injury when it represents pregnancy as an injury to the body politic.<sup>187</sup> Thus, the representation, ultimately, is not subversive—failing to represent a phenomenology of pregnancy in which it is an injury that happens to/in/by a woman's body.

In justifying the end of “welfare as we kn[e]w it,”<sup>188</sup> Congress found that:

[8](B) Children born out-of-wedlock have a substantially higher risk of being born at a very low or moderately low birth weight.

.....

(D) Children born out-of-wedlock were more likely to have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.

(E) Being born out-of-wedlock significantly reduces the chances of the child growing up to have an intact marriage.

(F) Children born out-of-wedlock are 3 times more likely to be on welfare when they grow up.

.....

[9](C) Children born into families receiving welfare assistance are 3 times more likely to be on welfare when they reach adulthood than children not born into families receiving welfare.

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185. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 102, 110 Stat. 2105, 2110-12 (codified at 42 U.S.C. § 601 note (2011)).

186. AFDC, which *Goldberg v. Kelly*, 397 U.S. 254, 256, 262 (1970), established as a statutory entitlement, was superseded by TANF, a fixed block grant program. Moreover, the legislation enacting TANF expressly provided that the program was not to be considered an individual entitlement. See 42 U.S.C. § 601(b) (noting that TANF “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part”).

187. Indeed, one would not be mistaken in arguing that all of the laws surrounding state assistance for indigent families represent the pregnancies of the poor as injuries to the body politic. See Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1, 33-43 (2007) (arguing that TANF implicitly condemns the fertility of poor women because the women will need to turn to the state for assistance in supporting their families).

188. In his 1992 campaign, former President Clinton vowed to end “welfare as we know it.” See Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 494 (1997) (book review). The replacement of Aid for Families of Dependent Children with TANF is widely recognized as a fulfillment of that campaign promise. See, e.g., Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1673 (2005).

(J) Children of single-parent homes are 3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families.

(K) Children from single-parent homes are almost 4 times more likely to be expelled or suspended from school.

(L) Neighborhoods with larger percentages of youth aged 12 through 20 and areas with higher percentages of single-parent households have higher rates of violent crime.

(M) Of those youth held for criminal offenses within the State juvenile justice system, only 29.8 percent lived primarily in a home with both parents. In contrast to these incarcerated youth, 73.9 percent of the 62,800,000 children in the Nation's resident population were living with both parents.<sup>189</sup>

Essentially, Congress traced the origin of various types of social malaise (including poor health, crime, child abuse and neglect, and poverty itself) to poor, unmarried women's pregnancies.

The PRWORA asserts that pregnancy is an injury. But, like *Michael M.*, the PRWORA asserts that pregnancy is an injury not to the woman carrying the pregnancy. Rather, pregnancy, when carried by specific, poor, unmarried bodies, is an injury to society. Again, the radical nature of the sexual assault statutes that have been under discussion relates to the fact that it states, quite subversively, that pregnancy may be experienced as a bodily injury to the woman, the would-be mother, who bears the pregnancy.

Further, the PRWORA helps to make sense of the abortion funding cases. *Maher v. Roe* and *Harris v. McRae* together establish the principle that it violates neither poor women's due process rights nor their equal protection guarantees for a state to prohibit the use of Medicaid funds for abortion<sup>190</sup>—even those that are medically necessary.<sup>191</sup> While, in essentially compelling poor women to carry their unwanted pregnancies to term and to bear children that they do not want to have,<sup>192</sup> *Maher* and *Harris* might be taken to assert that the pregnancies of these poor women are actually valuable; they are beautiful things that the women should recognize as such—positive things that the government may constitutionally refuse to have a part in destroying. However, at

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189. 42 U.S.C. § 601 note (Congressional Findings).

190. *Maher v. Roe*, 432 U.S. 464, 470, 474 (1977) (holding that a state prohibition on the use of Medicaid funds for abortion does not violate the Equal Protection Clause nor “impinge upon the fundamental right recognized in *Roe*”).

191. *Harris v. McRae*, 448 U.S. 297, 317 (1980) (concluding that the proscription of the use of federal Medicaid funds for even medically necessary abortions does not impinge “on the constitutionally protected freedom of choice recognized in [*Roe v. Wade*]”).

192. There is a strong argument that the Court did not contemplate that the indigent women affected by its decision will actually be unable to obtain abortions. The Court asserted, “An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the proscription on the use of Medicaid funds for abortion]; *she continues as before to be dependent on private sources for the services she desires.*” *Id.* at 314 (emphasis added) (quoting *Maher*, 432 U.S. at 474). So, to the question of whether the Court thinks that, in the face of the proscription, poor women are going to access the abortion anyway, the answer must be in the affirmative.

the same time that the abortion funding cases assert this positive construction of pregnancy, PRWORA and the relatively begrudging approach that the government has taken to assisting indigent families<sup>193</sup> assert that these same pregnancies, while positive to the women, are injuries to the nation.

Something similar is at work in the Pregnancy Discrimination Act and the Family Medical Leave Act, the proper exploration of which begins with the Court's decision in *Geduldig v. Aiello*.<sup>194</sup> *Geduldig* upheld against an equal protection challenge the constitutionality of a California disability insurance program that excluded coverage of disabilities related to normal pregnancy.<sup>195</sup> The Court held that there were no gender classifications in the statute, reasoning that the state was not discriminating against women to the benefit of men. Instead, the state was discriminating against pregnant women to the benefit of "nonpregnant persons"—a category that includes both men and women.<sup>196</sup> Because the majority found that the statute did not discriminate on the basis of sex, the Court used rational basis scrutiny in reviewing the plan.<sup>197</sup> Under rational basis review, the Court reasoned that the state had a legitimate interest in maintaining the structure of the program in its current form, which managed to provide benefits to all who needed them (except for pregnant women, of

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193. Examples of the begrudging approach that TANF has taken are many. First, there is the requirement that women receiving funds from the program must "work" at least thirty hours per week; however, TANF refuses to define the labor involved in raising a child as "work." See 42 U.S.C. § 607(c)(1)(A), (c)(1)(B)(i), (d). Secondly, TANF prohibits families from receiving funds for more than five years (subject to limited exceptions), even if the family has not managed to lift itself out of poverty during that time. See *id.* § 608(a)(7). Finally, TANF implicitly authorizes states to implement "family caps," which "cap" the amount of money a family may receive, even though the size of the family may increase upon the birth of an additional child. See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 153-54 (2006) ("The final version of TANF, signed into law by President Clinton in August 1996, did not require states to implement caps, but instead, by remaining silent, allowed states to continue utilizing existing family cap policies [that they were using under AFDC] or enact new caps without federal oversight.").

194. 417 U.S. 484 (1974).

195. Accordingly, should a pregnant woman be hospitalized and unable to return to her job subsequent to a normal delivery during which there were no medical complications, she would not be eligible to receive disability benefits from the plan to which she was obliged to contribute. See *id.* at 491 (explaining that, as construed by a California court, the plan excluded "maternity benefits"—*i.e.*, hospitalization and disability benefits for normal delivery and recuperation"); see also *id.* at 487 (describing participation in the disability program as "mandatory" absent comparable coverage under a private plan).

196. *Id.* at 497 n.20 ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.").

197. *Id.* at 495 (indicating that the Court would use the same level of review that it uses for "social welfare programs" and thus requiring that the basis for the classification that the law uses be "rationally supportable").

course) without requiring funding from outside sources.<sup>198</sup> The Court held that the Constitution did not prohibit the state from deciding to exclude coverage of disabilities as costly as those precipitated by pregnancy in order to maintain the self-sufficiency of the program.<sup>199</sup>

So, what kind of idea of pregnancy informs the *Geduldig* decision? What are the discursive effects of embodying this idea in law? While *Geduldig* is rightfully criticized by those who are concerned with the practical effects of the decision (i.e., it makes it harder for women, respective to their male counterparts, to be both labor force participants and parents), it may be rightfully commended by those who are interested in the discursive effects of the case. Quite simply, *Geduldig* stands for the proposition that a healthy pregnancy is not a disability.<sup>200</sup> As one commentator describes it, “Pregnancy is not a rare occurrence, and in one sense could be considered ‘normal’ . . . .”<sup>201</sup> This is a position that, in other contexts, feminists have championed in order to challenge the idea, steeped in paternalism, that pregnant women need to be treated as if infirm or in need of protection.<sup>202</sup> As one scholar notes on this point,

Although many feminists wish to secure tangible benefits for pregnant workers, they fear the characterization of pregnancy as a disability. Some are reticent to admit that some women, particularly pregnant women, may not be able to conform to the demands of the traditional workplace nor to fit the mold of the idealized worker.<sup>203</sup>

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198. *Id.* at 496 (noting that California has a “legitimate interest in maintaining the self-supporting nature” of the disability program and, consequently, has considerable latitude in determining how much employees could be required to contribute and matching that level of contribution to a menu of disabilities that would be covered by the plan).

199. *Id.* at 495-96 (observing that a program that covered the costs of pregnancy-related disabilities “would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering from insured disabilities, or some combination of these measures”).

200. See, e.g., Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1563 (1974) (“The notion that pregnancy is different from other disabilities with respect to a state disability insurance program suggests the familiar set of stereotypes— . . . that pregnancy, though it keeps women from working, is not a ‘disability’ but a blessing which fulfills every woman’s deepest wish . . . .”); cf. Diane L. Zimmerman, Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 444 (1975) (“[The state] insisted that pregnancy and birth were not disabilities at all but ‘a normal physiological function’— despite the fact that most births in the United States occur in hospitals, require minor surgery (an episiotomy), can lead to death, and, at the very least, leave most women physically unable to work for a period of several weeks.” (footnote omitted)).

201. Bartlett, *supra* note 200, at 1561.

202. See Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 195 (1993) (“Feminists’ refusal to describe pregnancy as ‘disability’ is understandable in light of the negative connotations of permanence and misfortune.”).

203. *Id.* at 194.

*Geduldig* holds, and sediments as law, that a pregnancy without medical complications is a state of health, not a state of disease. Pregnant women are not damaged members of the body politic requiring special consideration. Instead, like their nonpregnant male and female counterparts, they are full, capably self-sufficient participants. The reality, of course, is that the two paradigms of pregnancy are not mutually exclusive. That is, pregnancy may be both a state of health *and* a condition that, at some points—and definitely at the very end of it, when the pregnant woman transforms back into a “nonpregnant person”—requires a different set of considerations.

It is not unreasonable to assert that the Court’s decision in *Geduldig* was, at least partially, a product of the inability of the Justices who signed onto the majority opinion to accept an idea of pregnancy as a *disability*.<sup>204</sup> “Disability” has connotations of sickness, a state of ill health, and, importantly, having been harmed or injured in some way.<sup>205</sup> To understand a healthy pregnancy without any medical complications as a disability is to challenge positive constructions of pregnancy as a necessarily “good” thing that happens to women; it is to understand a pregnancy as being an injury. This is not to say that positive constructions of pregnancy were singularly responsible for the *Geduldig* majority opinion and its refusal to align pregnancy with disability. However, it is to say that the Justices who signed on to the majority opinion could be assured that their decision was the “right” one because, among other things, it was discursively consistent with cultural constructions of pregnancy as distinct from an injury.

Similarly, one cannot argue that positive constructions of pregnancy as intrinsically good were singularly responsible for the Court’s decision in *General Electric Co. v. Gilbert*,<sup>206</sup> which upheld against a Title VII<sup>207</sup> challenge a private employer’s disability insurance program that excluded coverage of disabilities related to normal pregnancy. However, such positive constructions might have informed the Court’s approving reference to the lower court’s finding that pregnancy is “significantly different from the typical covered disease or disabil-

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204. Indeed, this was the precise argument that the plaintiffs made during the litigation. See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 9 (2010) (“According to the plaintiffs [in *Geduldig*], normal pregnancy was ‘functionally indistinguishable’ from other disabilities because it required medical care, hospitalization, anesthesia, surgical procedures, and genuine risk to life.”).

205. See Matzzie, *supra* note 202, at 194 (“[P]regnancy is presumed to be natural and good, whereas disabilities are presumed to be unnatural and bad. Pregnancy is described as a matter of individual choice, whereas disabilities are described as immutable and unfortunate, an accident of birth or circumstance that one would never choose.”).

206. 429 U.S. 125 (1976).

207. “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Civil Rights Act of 1964, tit. VII, § 703(a), 42 U.S.C. § 2000e-2(a) (2011).

ity. . . . [I]t is not a ‘disease’ at all, and is often a voluntarily undertaken and desired condition.”<sup>208</sup> The *Geduldig* and *Gilbert* Courts might have held that pregnancy was an injury, but it was an injury sufficiently distinct from the injuries covered by the employer. Accordingly, it was an injury, the costs of which were rightfully and fairly borne by the “injured” woman. But the Court did not choose this line of argumentation, instead denying that pregnancy was an injury in all respects.<sup>209</sup>

Congress responded to the Court’s decision in *Gilbert* by passing the Pregnancy Discrimination Act (PDA), which amended Title VII to make clear that discrimination on the basis of pregnancy is sex-based discrimination in violation of the statute<sup>210</sup> absent a showing of a bona fide occupational qualification.<sup>211</sup> The immediate effect of the PDA was to signal that the ruling in *Gilbert* was erroneous, thus leading to the Court’s holding in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* that private employers were required to extend the same disability benefits to pregnant employees as they do to other employees who are incapable of working due to a disability of some kind.<sup>212</sup>

208. *Gilbert*, 429 U.S. at 136; see also Finley, *supra* note 52, at 1136 (noting that “[b]y emphasizing the normalcy of pregnancy,” the Court in *Gilbert* was able to contrast coverage for pregnancy and related conditions “to the very idea of a disability plan”).

209. Using reasoning similar to that of *Geduldig* and *Gilbert*, most courts have interpreted the Americans with Disabilities Act (ADA) to exclude pregnancy within the term “disability.” See Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1371 n.38 (2009) (citing a case collecting authorities for the proposition that “[p]regnancy generally is not considered a ‘disability’ for ADA purposes”); see also EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. (2012) (interpretive guidance to 29 C.F.R. § 1630.2(h)) (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments.”). However, regulations promulgated under the ADA include as “disabilities” those that result from or are exacerbated by pregnancy. *Id.* § 1604.10(b) (“Disabilities caused by or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions . . . .”). Some have argued that pregnancy, in and of itself, should be understood as a “disability” within the ADA. See, e.g., Matzzie, *supra* note 202, at 218-24.

210. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)) (providing that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions” and requiring that pregnant women “be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”).

211. 42 U.S.C. § 2000e-2(e) (“[I]t shall not be an unlawful employment practice . . . [to discriminate] on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

212. See 462 U.S. 669, 683-84 (1983) (striking down the disability plan at issue because “the husbands of female employees receive a specified level of hospitalization coverage for all conditions [while] the wives of male employees receive such coverage except for pregnancy-related conditions”).

The protections provided by the amendment, however, were broader. Generally speaking, the PDA gives pregnant employees “the right not to be treated adversely because of pregnancy; and . . . the right to be treated the same as other employees . . . similar in their ability or inability to work with respect to all aspects of employment, including benefits such as leave and insurance.”<sup>213</sup>

As such, the question becomes: does the PDA, like the criminal statutes that provide that causing pregnancy is an aggravating factor in grading sexual assaults, challenge the positive construction of pregnancy by compelling employers, and courts reviewing employers’ decisions, to treat pregnancy as a bodily injury? The answer, as it turns out, is complicated. On the one hand, the purpose of the statute is to *prohibit* employers from treating pregnant women as injured employees. As Joanna Grossman and Gillian Thomas note, in granting pregnant employees the right not to be treated adversely because of pregnancy, the PDA prevents employers from making “stereotyped assumptions about a pregnant woman’s inability to carry out certain tasks.”<sup>214</sup> Thus, an employer cannot merely assume that because a woman is pregnant, she suffers from an incapacity that makes her unable to do the job that she was hired to do.<sup>215</sup>

On the other hand, the statute forces the equation of pregnancy with injury and disability<sup>216</sup>: first, in overruling the logic of *Gilbert*, it requires employers to treat pregnancy as a disability with respect to the provision of disability benefits.<sup>217</sup> Second, in the analysis of whether a pregnant employee has been treat-

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213. Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15, 24 (2009) (internal quotation mark omitted).

214. *Id.* at 18.

215. The Due Process Clause has been interpreted to provide an equivalent right against such assumptions. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974) (striking down a school board’s policy of prohibiting women from working once they had reached a specific stage in their pregnancies).

216. Christine Littleton observes that the PDA denies the uniqueness of pregnancy by simply analogizing it to an injury, which is an experience that employers and men can understand: “[P]regnancy renders a woman unable to work for a few days to a few months, just like illness and injury do for men.” Christine A. Littleton, *Reconstructing Sexual Equality*, 75 *CALIF. L. REV.* 1279, 1306 (1987). However, she goes on to note that the analogy is inappropriate. Pregnant women and women recovering from pregnancy are only “injured” to the extent that they cannot labor at their jobs. However, they are not “injured” such that they cannot labor at all; indeed, during the period of time in which they cannot work at their place of employment, they are working at the production of another human being. As Littleton explains, “Normal pregnancy may make a woman unable to ‘work’ for days, weeks or months, but it also makes her able to reproduce. From whose viewpoint is the work that she cannot do ‘work,’ and the work that she is doing *not* work? Certainly not from hers.” *Id.*

217. One of the criticisms of the PDA is that, while the statute requires that employers treat pregnant employees as well as other disabled employees, it also allows employers to treat pregnant employees *as badly* as other disabled employees. Thus, if an employer does not provide disability benefits generally, it does not violate Title VII by refusing to provide disability benefits to pregnant employees. *See Williams, supra* note 52, at 375 (“If pregnant workers and others are treated equally badly by the employer, and if the employer’s rule

ed the same as other employees “similar in their ability or inability to work,” it requires courts to compare a pregnant woman with a person suffering from a disability or injury that has made him or her unable to work.<sup>218</sup> Thus, it is fair to argue that, under the PDA, pregnancy is analogized to an injury. However, this representation of pregnancy is not quite as subversive as that effected by the sexual assault statutes under discussion. First, pregnancy within the PDA is only *analogized* to an injury, not defined as one; accordingly, pregnancy remains consistent with positive constructions. Second, and more importantly, unlike the PDA, the sexual assault statutes under discussion reflect a woman’s experience of a pregnancy. They indicate a phenomenology of pregnancy in which the woman *feels* like something has gone terribly wrong in her body. The criminal law embodies, and legitimizes, an experience (shared by countless women) in which pregnancy is a wound of some sort from which the woman struggles to recover. This is an understanding of pregnancy that is inconsistent with positive constructions of the event.

The PDA, however, is consistent with positive constructions of pregnancy. This is primarily because positive constructions of pregnancy embrace the burdensome aspects of the phenomenon. Indeed, the pains and deprivations inherent in pregnancy are, in part, those which ennoble women who become mothers and which make them deserving of society’s esteem. The PDA does a lot inasmuch as it requires that the employer bear some of the costs of these pains and deprivations, and the consequences thereof. But it does no more than that. As such, the PDA does not attempt to embody or reflect a phenomenology of pregnancy. While the statute is progressive insofar as it rejects a traditional framework in which being a mother and being a labor force participant are mutually exclusive, it is not subversive of discourses that assert that pregnancy is, ultimately and always, a positive event for the woman.

What is noteworthy about the PDA is that it compels that all pregnancies, including wanted ones, be constructed as disabilities. Accordingly, even wanted pregnancies, which may be experienced positively by the woman, are cognizable as disabilities under the statute.<sup>219</sup> It would appear, then, that this function

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does not disproportionately harm women, then a non-discrimination law like Title VII is not violated.”). However, Title VII is not violated if an employer provides disability benefits to pregnant employees while denying disability benefits generally. *See* Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285 (1987) (“Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.” (internal quotation marks omitted)).

218. *See* Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 213-14 (2005) (noting that when plaintiffs allege pregnancy discrimination, courts have to determine whether others who were similarly situated received different treatment, thus requiring courts to compare pregnant employees with employees who are disabled or injured).

219. Julie Novkov notes the irony that the PDA forces intensely *wanted* pregnancies to be constructed as disabilities when she writes that “[t]he law equates it with disease or injury

of the PDA shares a logic with the Court's decision in *Michael M.*<sup>220</sup> (and with the Congress whose legislative findings preceded the PRWORA<sup>221</sup>). That is, that which makes a pregnancy an injury (or a disability, or a cost, or a phenomenon that is "inflicted") is not a woman's experience of it. Instead, pregnancies are injuries because of the effect that they have on the community in which the woman is embedded.<sup>222</sup> In *Michael M.*, the relevant community injured by the pregnancy was society, which was compelled either to subsidize the costs of the child that the pregnancy produced or to live with the fact of fetuses destroyed via abortion. With respect to the PDA, the relevant community injured by the pregnancy depends on the structure of the disability benefits. The injured party could be the community of employees, who must contribute at higher rates to their insurance plan because of its coverage of pregnancy-related disabilities. Alternatively, the injured party could be the employer, who must bear some of the costs associated with the pregnancy if paid disability leave is provided as a benefit.<sup>223</sup>

The Family Medical Leave Act (FMLA) does similar work to that performed by the PDA. The FMLA entitles a covered employee to twelve weeks of unpaid leave upon the occurrence of one of several itemized events.<sup>224</sup> The events include the birth of a child and the advent of a "serious health condition

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and does not respect its status as a chosen and desired state of being." Julie Novkov, Note, *A Deconstruction of (M)otherhood and a Reconstruction of Parenthood*, 19 N.Y.U. REV. L. & SOC. CHANGE 155, 181 (1991-1992) (footnote omitted); see also Finley, *supra* note 52, at 1136 (noting the belief that pregnancy should not be covered within employer disability plans because it "is normal and natural for women, and is a voluntary choice that they make. . . . [I]t would be a shame to treat something so natural, that women freely choose, as if it were something unfortunate like a workplace injury"); Manners, *supra* note 218, at 224 ("Should an employer place the same value on pregnancy as it does on an injury . . . ? Presumably, accidents and injuries should be discouraged to the extent that they are a result of carelessness and bad judgment. Should the same value also apply to pregnancy?"). Of course, the thrust of this Article is to argue that there is no irony in constructing intensely *unwanted* pregnancies as injuries (or diseases or disabilities).

220. See *Michael M. v. Superior Court*, 450 U.S. 464 (1981). For a detailed discussion of *Michael M.*, see *supra* notes 170-182 and accompanying text.

221. See *supra* notes 185-189 and accompanying text.

222. Again, Novkov insightfully notes the irony of society valuing (the idea of) pregnancy, but being injured by actual, material pregnancies: "[T]he idea that childbearing is valuable to society, a concept so pervasive in the construction of women as mothers with respect to our role in the family, is utterly invisible in civil society. After all, how can a 'disability' possibly be construed as a benefit to society?" Novkov, *supra* note 219, at 181.

223. Manners observes the cost-sharing function of covering pregnancy within disability insurance programs and providing paid disability leaves. Manners, *supra* note 218, at 229-30 (observing that European countries that provide robust legal protection of pregnant employees "accept[] the necessary costs of pregnant workers and distribute[] the cost among society," as compared to the "the current American standard [which] tends to place the social cost of pregnancy on those female workers who bear children" (alteration and internal quotation marks omitted)).

224. Family and Medical Leave Act of 1993, § 102, Pub. L. No. 103-3, 107 Stat. 6, 9-10 (codified as amended at 29 U.S.C. § 2612 (2011)).

that makes the employee unable to perform the functions of the position of such employee.”<sup>225</sup> Thus, the FMLA couples family leave and medical leave and, in the process, analogizes pregnancy and childbirth to a “serious health condition.”<sup>226</sup> It is not unreasonable to conclude that, as a result of this analogy, pregnancy is likened to a disability, sickness, illness, or injury.<sup>227</sup> But, like the PDA, the injury is not to the woman, who may be experiencing her pregnancy, if wanted, as positive; like the PDA, pregnancy is an injury under the FMLA not because of the law’s recognition of the woman’s phenomenology of the bodily event. Instead, pregnancy is an injury because it is only when it is understood as such that one can justify shifting its costs to third parties, like an employer or society more generally.<sup>228</sup>

But, is it fair to say that the FMLA constructs pregnancy as an injury to the body politic (as do *Michael M.* and the legislative findings that precede the PRWORA)? Alternatively, is it fair to say that the FMLA constructs pregnancy as an injury to the smaller community within which the pregnant woman is embedded (as does the PDA)? Both formulations of the question must be answered in the negative—primarily because the leave guaranteed under the FMLA is unpaid. The reason why it is fair to describe society, the employer, or the community of employees as injured by a woman’s pregnancy in *Michael M.*, the PRWORA, and the PDA is because the costs of the pregnancy were externalized onto these parties. Except for the costs associated with holding open the pregnant employee’s position for the period of time during which she takes her leave and with reintegrating her into the workplace when she returns, accommodating a woman’s pregnancy does not impose any costs on an employer (or on other employees or society) under the FMLA.<sup>229</sup> Because the leave is

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225. 29 U.S.C. § 2612.

226. Julie Suk has done convincing work to argue that part of the success that France and Sweden have achieved in reconciling parenting with labor market participation is due to those countries having decoupled family leave from medical leave. *See* Suk, *supra* note 204, at 24 (arguing that disaggregating family leave and medical leave “would enable family leave to be debated on its own merits, without the cloud of potential abuse and heightened costs associated with medical leave”).

227. *See id.* at 7 (noting that the FMLA “does not distinguish the medical incapacity to work as a result of pregnancy and childbirth from other medical conditions that might require an employee to miss work”).

228. Suk acknowledges the historical contingency of the construction of pregnancy as a disability, noting that it was beneficial to litigants in the 1970s to construct pregnancy in this manner in order to bootstrap maternity benefits onto an already-existing structure of disability benefits. *Id.* at 41 (making this observation in the context of Title VII litigation). The FMLA is an extension of the logic that began in the Title VII setting. *Id.* at 47 (“[T]he PDA and the antidiscrimination framing of the FMLA tend to reinforce the analogy between pregnancy and sickness that was forged in the 1970s.”).

229. Family and Medical Leave Act of 1993, § 104, 29 U.S.C. § 2614 (providing that an employer must restore an employee who has taken leave “to the position of employment held by the employee when the leave commenced; or . . . to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment”).

unpaid, the woman is compelled to bear the costs of the pregnancy herself.<sup>230</sup> Thus, pregnancy is only *mimetic* of an injury under the FMLA. Although it injures neither the woman nor third parties, it must assume the form of an injury in order to be recognized by law.

The analysis would be different if employees were guaranteed a paid maternity leave by statute. If the leave is paid because it is a benefit conferred by the employer, the employer bears (some of) the costs of the pregnancy and, as such, might be conceptualized as being injured by the pregnancy.<sup>231</sup> Of course, it may be inappropriate to conceptualize pregnancy as an injury in such a case, which stands in contrast to a situation in which the employer is compelled, by law, to provide a paid maternity leave. In the former situation, the employer has *voluntarily* conferred the benefit to an employee. Accordingly, there is a *wantedness* associated with the conferral of the benefit. Like the woman who bears a wanted pregnancy, the employer may not be injured by the pregnancy as a consequence.

In summary, *Michael M.*, the PRWORA, and the PDA construct pregnancy as an injury to the body politic. As such, they are to be contrasted to the discussed sexual assault statutes that, reflecting women's phenomenologies of unwanted pregnancy, construct pregnancy as an injury to the woman bearing it. Because *Michael M.*, the PRWORA, and the PDA are uninterested in, or unsuccessful in, reflecting a profoundly subversive experience of pregnancy, they do not have the same potential as do the sexual assault statutes, which give this nonhegemonic construction of pregnancy the force of law, to destabilize positive constructions of pregnancy and to change the culture that inevitably reflects the law.

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230. See Suk, *supra* note 204, at 8-9 (citing a Labor Department study showing that 300,000 parents eligible for unpaid leave under the FMLA were unable to take advantage of the benefit and coming to "the commonsense conclusion that very few families are both able and willing to live for the first six months of a newborn's life without a salary").

231. In the European countries that Suk analyzes in her critique of the approach taken to family leave in the United States, workers are guaranteed a paid parental leave; however, it is the government that bears the costs of providing the paid leave. *Id.* at 27, 36 (noting that in France and Sweden, it is not the employer who is obligated to pay for maternity leave, but rather the government). Accordingly, one may be tempted to argue that society-qua-taxpayers are injured by the woman's pregnancy. However, the thrust of Suk's analysis is to demonstrate the advantages that these countries have achieved by decoupling family leave from medical leave. Because of this decoupling, family leave is not constructed as a species of medical leave; thus, pregnancy is not constructed as a species of injury. *Id.* at 47 (arguing that "[c]ountries that successfully reconcile work-family conflict" do not construct pregnancy as an injury); *cf.* Manners, *supra* note 218, at 227 (citing a pregnancy discrimination case heard by the European Court of Justice in which the court held that "pregnancy is not in any way comparable with a pathological condition" (emphasis omitted)). As a result, it may be inapposite to understand those societies as being injured by a woman's pregnancy, as pregnancy is not constructed as an injury—at all—by these statutory schemes.

## CONCLUSION

This Article has offered that statutes that provide that causing pregnancy is an aggravating factor when grading a sexual assault introduce the *pregnancy-as-injury* definition into law, society, and culture. Further, this introduction is a radical one because it challenges positive, hegemonic understandings of pregnancy and, consequently, is a subversive reimagining of pregnancy that has the sanction of law.

The *pregnancy-as-injury* definition offered by the sexual assault statutes under analysis is powerful because it imputes a far-from-positive meaning to pregnancy, and it embalms this understanding of pregnancy in law. As law influences culture, subversive understandings of pregnancy may become more legitimate. The culture may then influence law, which then may reflect the disruption to hegemony. And the dialectic turns.

It is true that the sexual assault statutes under analysis have been law for many years now. A relevant question, then, is why they have not managed to influence culture in the way that this Article suggests they might. It is difficult to provide a complete answer. But at least part of the answer must be that those who are sensitive to the reality of the subversive understanding of pregnancy—that is, abortion rights advocates who know that women frequently experience unwanted pregnancies as physical injuries that are hurting their bodies and destroying their lives—have failed to leverage the fact that the analyzed sexual assault statutes represent that truth. It might be overly optimistic, and ultimately unrealistic, to expect that, simply because these laws are on the books, they will influence culture. Instead, there might need to be an intentionality behind the dialectical relationship between law and culture. That is to say, abortion rights advocates might need to leverage—consciously and purposefully—the understanding of pregnancy contained in some jurisdictions' criminal law. Advocates need to disseminate it into culture via the same avenues that currently reflect positive constructions of pregnancy: music, movies, television shows, popular discourse in the form of blogs and social media, and political discourse.

If they are successful, they will make possible the day when it will be logical to claim not only that an unwanted pregnancy is like being stabbed in the heart, but that being stabbed in the heart is like an unwanted pregnancy.