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

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ARTICLE

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

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ABSTRACT

This Article examines criminal statutes that grade more severely sexual assaults that result in pregnancy. These laws, which define pregnancy as a “substantial bodily injury,” run directly counter to positive constructions of pregnancy within culture. The fact that the criminal law, in this instance, reflects this negative, subversive understanding of pregnancy creates the possibility that this idea may be received within culture as a construction of pregnancy that is as legitimate as positive understandings. In this way, these laws create possibilities for the reimagining of pregnancy within law and society. Moreover, these laws recall the argumentation that proponents of abortion rights once made – argumentation that one no longer hears and sees in the debates surrounding abortion. However, recent developments in antiabortion argumentation – namely the notion accepted in Carhart II that it is abortion that injures women – counsel the retrieval of the argument that unwanted pregnancies are injuries to women. Thus, the sexual assault laws are means to legitimatize a claim that may serve as an effective counterdiscourse to prevailing antiabortion argumentation.

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 and, as such, are wholly at odds with positive constructions of pregnancy. Part II moves the discussion outside of the context of rape. It contends that the definition of pregnancy as an injury does not solely describe women’s experience of pregnancies that result from rape, but generally describes women’s experience of unwanted pregnancy. Indeed, it is the profound unwantedness of the pregnancy that results from rape that makes it an injury. Thus, the

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criminal law gives legitimacy to a subversive phenomenology of unwanted pregnancy, which may have repercussions for how pregnancy – and abortion – is understood within society. Part III looks at representations of pregnancy in other areas of the law, revealing that the law frequently embodies positive constructions of pregnancy even when negative constructions might be expected. The rare times that the law appears to represent pregnancy subversively are 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 subversive nature of the representation is mitigated, as it does not endeavor to describe a bodily experience of pregnancy. A brief conclusion follows.
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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 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. The fact that the criminal law, in this instance, embodies this decidedly negative construction of pregnancy is important because it creates the possibility that this idea about 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? How may that experience and understanding come to be reflected within law? How may that reflection, in turn, influence

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1 “Culture” is an intensely under-defined 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, “Approaches to the Cultural Study of Law: Culture as Law,” 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. This 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 law, and the significance thereof.
experiences and understandings of pregnancy within culture? And the dialectic turns.  

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 and 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, the construction of unwanted pregnancy as an injury disappeared from the language of abortion rights activism. However, recent developments in antiabortion argumentation counsel its retrieval. There has been a shift in antiabortion argumentation away from a focus on the fetus and towards 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. Moreover, the Court in Gonzales v. Carhart [“Carhart II”] accepted this position, upholding a law that restricted access to abortion because it seemed “unexceptionable” for the majority 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.”

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 injury is revealed: unwanted pregnancy also, literally, harms 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; moreover, the sexual assault laws under analysis are means to legitimate this claim.

3 Sociologist Pierre Bourdieu perhaps most eloquently described the dialectical relationship between law and culture 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, 838 – 39 (1987).
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 of the context of rape. It contends that the definition of pregnancy as an injury does not solely describe women’s experience of pregnancies that result from rape, but describes women’s experience 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 of unwanted pregnancy, which may have repercussions for how all unwanted pregnancies – not just those resulting from rape – are understood within 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 and statutory 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, i.e., 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 subversive construction of pregnancy (i.e., one that focuses on a phenomenology of pregnancy as an injury), suggesting the exceptionality of the sexual assault statutes at issue. 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

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5 This Article uses “hegemony” in the sense offered by philosopher Antonio Gramsci, who defined it as an ideological domination of society – where culture and cultural institutions reflect the ideas of those in power and, as a result, the dominated consent to their domination. See Antonio Gramsci, Letters from Prison, vol. 2, 67 (ed. Frank Rosengarten 1994) (defining hegemony as dominance “of a
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? – must certainly have penetrated me, since I have not forgotten it and am recalling it even now, when life can never again bring me plentitude.6

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,

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& I was at peace.

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?7

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 woman’s maternal functions disadvantaged her, especially “when the burdens of motherhood are upon her.” 8 Pregnancy is burdensome, but ultimately is a benefit to her, as well as a “benefit of all.”9 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 and against abortion rights.10 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.”11 Another admitted

7 Erica Jong, “The Protection We Bear,” available at http://www.ericajong.com/poems/protectionwebear.htm (last visited January 31, 2012). See also Musick, supra note 6 at 109, 110 (quoting pregnant teenagers’ descriptions of being pregnant, including the statements “I like when people notice I’m having a baby [because] it gives me a good feeling inside and makes me feel important” and “[b]eing 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, 421 (1908).
9 Id. at 422.
11 Id. at 168 – 69.
that, especially in its earlier stages, pregnancy is unpleasant; but “if you stayed with it a little a longer, you might welcome that trial very much.”\(^{12}\) In these descriptions, pregnancy is bitter, certainly. But, always and in every case, it is more sweet than bitter.

But, 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.\(^{13}\) 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.\(^{14}\) 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.\(^{15}\) When one recognizes the profundity of the fetus within the current sociopolitical moment, one can recognize the profundity of pregnancy: it is state of the body that nurtures fetuses. Therefore, pregnancy, distinct from the baby that it produces, may be idealized in its own right.\(^{16}\)

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

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12 Id. at 169.
13 See supra notes 6 – 7 and accompanying text.
14 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”).
15 See, e.g, Barbara Duden, Disembodying Women: Perspectives on Pregnancy and the Unborn 2 (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.
16 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-quagovernment subsidizes prenatal healthcare and when the public’s interest in protecting and promoting fetal life is not vindicated upon a woman’s choice to terminate a pregnancy. See supra notes 142 – 55 and accompanying text.
the U.S.; moreover, the construction of pregnancy as an injury is subversive only because of the prevalence of the positive construction of pregnancy. Moreover, there should be no doubt that the positive construction of pregnancy is prevalent within U.S. society. One can find it in music, movies, television shows, popular discourse in the form of blogs and social media, and political discourse.

17 See, e.g., Creed, With Arms Wide Open (Human Clay, 2009) (“Well I just heard the news today/Seems my life is gonna change/I close my eyes, begin to pray/Then tears of joy stream down my face/...Well I don’t know if I’m ready/To be the man I have to be/I take a breath, I take her by my side/We stand in awe, we’ve created life”) Colbie Caillat, Capri (Coco, 2007) (“She’s got a baby inside/And holds her belly tight/All through the night/Just so she knows she’s sleeping so/Safely to keep her growing/And oh when she’ll open her eyes/There’ll be no surprise/That she’ll grow to be/So beautifully/Just like her mother/That’s carrying/Oh Capri/She’s beauty/Baby inside she’s loving/Oh Capri/She’s beauty/There is an angel growing peacefully”); Madonna, Papa Don’t Preach (True Blue, 1986) (“But my friends keep telling me to give it up/Saying I’m too young, I ought to live it up/What I need right now is some good advice, please/Papa don’t preach, I’m in trouble deep/Papa don’t preach, I’ve been losing sleep/But I made up my mind, I’m keeping my baby, oh/I’m gonna keep my baby”); and Paul Anka, You’re Having My Baby (The Best of the United Artists Years 1973 – 1977, 1996) (“The need inside you/I see it showing/Whoa, the seed inside ya/Baby, do you feel it growing/.../I’m a woman in love/And I love what it’s doing to me/.../I’m a woman in love/And I love what’s going through me/Didn’t have to keep it/Wouldn’t put you through it/You could have swept it from your life/But, you wouldn’t do it/No, you wouldn’t do it”); but see Ani DiFranco, Tiptoe (Not a Pretty Girl, 1995) (“Tiptoeing thought the used condoms strewn on the piers of the Westside Highway.../walking towards the water with a fetus holding court in my gut/my body highjacked/my tits swollen and sore/.../I could wake up screaming sometimes/But I don’t/I could step off the end of this pier/But I’ve got shit to do/And an appointment on Tuesday to shed uninvited blood and tissue/I’m miss you I say to the river/To the water/To the son or daughter/We’ll only end up hating the child we may be creating/Love child, never meant to be/Love child, scorned by society”).

18 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 and carries the baby to term: the baby is adopted by an (ultimately) likable woman who had been struggling for many years with her inability to become pregnant. Moreover, the titular protagonist and the father of the baby realize that they may love one another; the audience is left to imagine that they end up in a loving relationship, as the movie ends with the two singing an endearing duet together.

Another example is Knocked Up, which has grossed close to a quarter-million dollars since its release. Knocked Up (Universal Pictures 2007). The film tells the story of a woman who becomes pregnant after a would-be one-night stand with a quirky, but lovable, guy. The audience is left to imagine that the unlikely pair lives happily ever after, as the movie ends with the two driving their newborn daughter home.
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.\(^{21}\)

Consider the argumentation used by

\(^{19}\) 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 show 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. Typical are the tweets made by Maci Bookout, one of the show’s featured teenage mothers. On January 25, 2012, she tweeted, “[H]ave u ever been so lost in life but been so in love with where u are .. #thatsme.” Available at https://twitter.com/macibookoutmtv (last visited January 30, 2012); see also id. “[I] don’t do things ill regret and I don’t regret anything I do.. do what I want”). Cf. Melissa Henson, “MTV’s ‘Teen Mom’ Glamourizes Getting Pregnant,” available at http://articles.cnn.com/2011-05-04/opinion/henson.teen.mom.show_1_amber-portwood-teen-mom-mtv?_s=PM:OPINION (last visited February 1, 2012). Also notable is TLC’s *A Conception Story*, which the channel describes as a series that “follow[s] the lives of six couples on the path to conceive. A Conception Story offers an intimate portrait of one of life’s great moments, exploring the trials and triumphs of couples on the way to the baby carriage. See *A Conception Story: Six Journeys to Pregnancy*, at http://blogs.discovery.com/a-conception-story/ (last visited January 30, 2012) (emphasis added).

A counterexample may be the hugely popular television show, *Glee*. During the first season, the captain of the cheerleading squad becomes pregnant and decides to carry the pregnancy to term. Her parents kick her out of their home, her boyfriend breaks up with her, she is kicked off of the cheerleading squad, and she is the subject of gossip and insensitivity at her high school. It is only after she gives birth that she is allowed to move back into her mother’s home, she finds a new boyfriend, her old boyfriend wants her back, she regains her spot on the cheerleading squad, and she becomes “popular” again. See http://www.imdb.com/title/tt1327801/episodes?season=1 (last visited February 1, 2012).

\(^{20}\) Representative is a blog on Parenting.com called “Project Pregnancy,” which tracks the stories of pregnant women over the course of their pregnancies. See “Project Pregnancy,” available at http://www.parenting.com/blogs/project-pregnancy (last visited January 30, 2012). Entries discuss the “bitter” aspects of pregnancy (like exhaustion, physical discomfort, and uncontrollable emotional reactions to banalities) alongside the “sweet” aspects (like planning a nursery, prenatal yoga, choosing the baby’s name, and allowing family members to feel the baby kick).

\(^{21}\) 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’ Constitutional rights. During his bid for the nomination as the Republican candidate to challenge incumbent Barack Obama in the 2012
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 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.”

Presidential election, 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 After Rape,’” available at http://www.guardian.co.uk/world/2012/jan/24/rick-santorum-daughter-abortion-rape (last visited January 31, 2012).

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.” See The Fifth Column, “Santorum to Rape Victims: ‘Make the Best Out of a Bad Situation,’” available at http://kaystreet.wordpress.com/2012/01/24/santorum-to-rape-victims-make-the-best-out-of-a-bad-situation/ (last visited January 31, 2012).
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 eat from the tree of knowledge, God casts 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.’”  

Thus, the punishment for original sin is painful childbirth—not pregnancy itself. In some translations, this same passage reads: “To the woman he said, ‘I shall greatly multiply your pains and your pregnancies; in pain you will bear children.’” Accordingly, this translation may be interpreted to provide that pregnancies, now multiplied, are Eve’s (and womankind’s) punishment for original sin. However, many interpret this latter translation consistently with the former translation in which it is clear that childbirth, not pregnancy, is punishment: “The first part of her judgment is that maternity will be accompanied by suffering. ‘Your pain and your pregnancies’ is probably hendiadys for ‘your pains of pregnancy.’ ‘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.”

Thus, pregnancy is not fairly constructed as punishment or injury. Rather, it may be safe to say that, in most strands of Christianity, pregnancy is constructed as a good thing—a blessing.

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23 Genesis 3:16 (New English Bible).
25 Id. at 81 (citations omitted).
26 See Athalya Brenner, The Intercourse of Knowledge: On Gendering Desire and ‘Sexuality’ in the Hebrew Bible 52 (1997) (“Procreation is introduced in the Bible’s
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. However, pregnancy within these traditions is the *natural consequence* of sex, not a punishment for it. When a woman intends to engage in non-procreative sex, yet pregnancy results nevertheless, she is not being punished; she is simply experiencing the expected, ordinary result of sexual activity:

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.

Contraception does not change the nature of the act itself; indeed, it makes the actors more keenly aware that they are doing what makes babies, since otherwise they would not go so far out of their way (donning or inserting into the body uncomfortable devices, or flooding the system with pregnancy-mimicking hormones) to thwart the body’s natural functions. The ‘problem’ in the case of Sexual Roulette is not that the body fails, but that it succeeds.

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.
**DEфинING RAPE**

first chapter as a blessing: ‘be fruitful and multiply’ is the divine gift and blessing meted out to creatures of the higher orders – animals and humankind – upon their creation ….”

27 See, e.g., Deborah D. Rogers, “Rockabye Lady: Pregnancy as Punishment in Popular Culture” (1992). English Faculty Scholarship. Paper 8., available at http://digitalcommons.library.umaine.edu/eng_facpub/8 (last visited February 1, 2012) (noting the idea that female sexuality is punished by pregnancy, which may be fatal – or, at the very least, excruciating”).

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.\textsuperscript{29} 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,” or similar during the course of a rape is one aggravating factor\textsuperscript{30} that can elevate a “basic” rape to a more seriously graded offense.\textsuperscript{31} 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.”\textsuperscript{32} 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.” Other jurisdictions allow the factfinder to determine whether pregnancy is a substantial bodily injury on a case-by-case basis. Courts in these jurisdictions have suggested that some factors that would warrant a finding that a pregnancy 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.

Still other jurisdictions exclude pregnancy as a substantial bodily injury – reasoning that there is always a close connection between pregnancy and rape and, as such, a pregnancy cannot constitute a separate injury from the rape and, consequently, cannot warrant additional punishment. The prevailing view, 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.

Some jurisdictions have replaced the language of “substantial bodily injury” with “substantial personal injury,” which specifically allows for increased punishment for the infliction of non-physical (i.e., mental or emotional) injuries. For example, the definition of “personal injury” in Michigan’s sexual assault statute includes miscarriage, severe disfigurement or protracted loss or impairment of the function of any bodily member or organ.

33 Wis. Stat. Ann. § 940.225 (West) (defining 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.”).
34 See, e.g., U.S. v. Shannon, 110 F.3d 382, 396 –97 (7th Cir. 1997) (noting that it was proper for the jury to be instructed that it should determine whether, in the victim’s case, her pregnancy constituted a “substantial physical injury”).
35 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.”).
36 See, e.g., People v. Sargent, 150 Cal. Rptr. 113, 115 –16 (Cal. 1978). Cf. U.S. v. Yankton, 986 F.2d 1225, 1230 (1992) (“We are not aware of any facts that indicate a pregnancy commonly results from a single instance of rape.”) 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 was a “serious bodily injury” and the perpetrator ought to be punished more severely 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. (rejecting the district court’s finding that pregnancy is a “pretty common, commonly understood but unfortunate result” of rape).
“mental anguish”37; similarly, the definition of “serious personal injury” in Nebraska’s sexual assault statute includes “extreme mental anguish or mental trauma.”38 Notably, the sexual assault statutes of both states explicitly define pregnancy as a species of “serious personal injury.”39

Whether pregnancy constitutes a substantial injury warranting an increased punishment for a person convicted of sexual assault raises many interesting doctrinal and practical issues.40 From an anthropological perspective, these statutes are fascinating because of the cultural work that they do. To be precise, they construct as equivalents pregnancy and injury 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.”42 In grading more severely sexual assaults that result in “pregnancy” or “great bodily harm,” 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

37 Mich. Comp. Laws Ann. § 750.520a (defining “personal injury” in the context of rape as “bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ”) (emphasis added).
38 Neb. Rev. Stat. § 28-318 (defining “serious personal injury” in the context of rape as “great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ”) (emphasis added).
39 See supra notes 37 – 38.
40 For one, enhancements for sexual assaults resulting in pregnancy raise issues concerning the fairness of strict liability in grading. See generally Ken Simons, “Strict Criminal Liability in Grading: Forfeiture, Change of Normative Position, or Moral Luck?” (articulating the possibility that strict criminal liability in grading may result in excessively and unjustly punishing perpetrators of crimes) (unpublished manuscript on file with author). 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, 100 Wis. 2d 452 (Wis. 1981) (noting that the sexual assault statute “creat[es] a type of ‘strict liability’”).
41 Nationally, an estimated five percent of rapes involving victims between the ages of 12 and 45 lead to pregnancy. See MM Holmes, HS Resnick, DG Kilpatrick, and CL Best, “Rape-related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women, 175 American Journal of Obstetrics and Gynecology 320 – 324 (1996). This amounts to approximately 32,000 pregnancies per annum. Id. 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 every year.
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.” 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: pregnancy is an injury. Michigan’s statute does the same work, defining “personal injury” as “bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” 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.

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.

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 the type of injury that is being constructed. That is, the statutes might be interpreted as constructing pregnancy as a mental or emotional injury; alternately, they might be interpreted as constructing

45 See, e.g., People v. Cross, 190 P.3d 706, 712 (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”).
46 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 (2009). Nevertheless, it is also true that the language of mental or emotional injury is not unheard of within the law. See, e.g., Minneci v. Pollard, 132 S. Ct. 617, 617 (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 “harm,” 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/emotional effects of unwanted pregnancy, then they construct pregnancy as a mental or emotional “injury,” not a mental or emotional “harm.”
pregnancy as a physical injury. In truth, pregnancy is a multifaceted event that affects a woman both mentally/emotionally and physically\(^47\); accordingly, a pregnancy resulting from rape – that is, a profoundly unwanted pregnancy – may be both a mental/emotional injury and a physical injury.\(^{48}\) While acknowledging the nonphysical nature of the injury occasioned by such a pregnancy, this Article’s focus is on pregnancy as a physical injury – namely because it might represent the more radical reimagining of pregnancy.

The general interest in this Article is 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

\(^{47}\) Because of the physical and nonphysical effects that pregnancy has on women, the 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. See Doe v. Bolton, 410 U.S. 170, 192 (1973) (holding that, when deciding whether a pregnancy endangers a woman’s health, a physician’s “medical judgment may be exercised in 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 related to health”).

\(^{48}\) 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 (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” 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.”).
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, it 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, etc. 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.49

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.50 Accordingly, this Article’s focus may not challenge the male norm of what counts as a “real” injury, thereby submerging the mental/emotional injury that forced pregnancy can inflict. 51

49 See infra notes 69 – 77 and accompanying text.
50 See, e.g., Martha Chamallas and 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 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. See id. at 90. The refusal to recognize emotional injuries had the effect of ignoring harms of the types often suffered by women. See id.

While the Third Restatement of Torts, the newest version, 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 (2009).

51 As Hendricks notes, most pregnancies are unwanted because of their nonphysical implications. See Hendricks, supra note 48, 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.”)
Moreover, it may deny the gendered uniqueness of unwanted pregnancy; by conceptualizing it as a physical injury, unwanted pregnancy may be recognized as a legitimate harm, but only through stripping it of its gendered specificity and treating it as an experience that men can understand. Nevertheless, because of the potential that the construction of pregnancy as a physical injury contains to unsettle positive constructions, this privileging is accepted.

B. The Construction of Legal Injury v. 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 that could be named, there are “constitutional injuries,” “injuries to property,”

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52 Analogues of this argument were made in the debates surrounding how pregnancy should be treated within antidiscrimination law. See e.g. 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 it “precludes recognition of pregnancy’s uniqueness, and thus creates for women a Procrustean bed – pregnancy will not be treated as if it were comparable to male conditions when it is not, thus forcing pregnant women into a workplace designed for men”); Lucinda Finley, “Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate,” 86 Colum. L. Rev. 1118, 1147 (1986) (arguing 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”).

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 the incompleteness.” Hendricks, supra note 48, at 373. This should serve as this Article’s acknowledgment.

54 See, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290, 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 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”) (emphasis added).

55 Armstrong v. U.S., 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).
“injuries to the market,”\textsuperscript{56} and “environmental injuries”;\textsuperscript{57} criminal law and tort law add physical and mental/emotional injuries\textsuperscript{58} as legal injuries.\textsuperscript{59} Moreover, much energy is spent, in practice and in academia, advocating for the recognition of certain phenomena as legal injuries.\textsuperscript{60} 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. The concern lies not with the construction of legal injury, but instead with the legal construction of injury.

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.\textsuperscript{61} Accordingly, what may be understood as an injury, and commonsensically so, in one sociocultural context may be differently apprehended, as a non-event, in another sociocultural

\textsuperscript{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).

\textsuperscript{57} Amoco Production Co. v. Village 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).

\textsuperscript{58} See supra note 46 and accompanying text.

\textsuperscript{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 s. 211.1 (defining “simple assault” as “attempts by physical menace to put another in fear of imminent serious bodily injury”).

\textsuperscript{60} See, e.g., Catharine A. MacKinnon, “Not a Moral Issue,” 2 Yale L. & Pol’y Rev. 321, 325 (1983 – 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”); Charles R. Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” 1990 Duke L.J. 431, 457 – 76 (1990) (arguing that racist speech should be recognized as a legal injury, undeserving of protection under the First Amendment).

context. 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 towards 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, they may be comfortably placed 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 towards 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 positive constructions of pregnancy as an inherently positive, life-affirming occurrence in a woman’s life. Because of the definition that these sexual assault statutes 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.” Moreover, the definition pregnancy is an injury

62 As 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.
63 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.
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 sympathetic to women who seek to terminate pregnancies resulting from rape. Indeed, even in the statutes that are most restrictive of abortion and abortion rights, abortions are allowed for pregnancies following a sexual assault. 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: 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 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 many women experience unwanted pregnancies.

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 towards the laws lies with an unwillingness to accept the laws’ betrayal of the positive construction of pregnancy. Id. at 204 – 205 (“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.’”).


65 See, e.g., The Hyde Amendment, P.L. 111-8 (2011) (prohibiting federal Medicaid money to fund abortion “except if the pregnancy is the result of an act of rape”); but see H.B. 1115 (2008) (banning abortions in South Dakota and providing no exception for abortions sought subsequent to rape). Cf. Hendricks, supra note 48, at 336 (arguing that abortion bans that make exceptions for pregnancies that are the result of rape can not 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”).

66 This assertion is not 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
A. 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.\(^{67}\) 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,\(^ {68}\) 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 whether 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 tortuous. 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 excruciatingly high.

Moreover, the argument that pregnancies that are the products of rape are simply different from pregnancies that result 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 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 injuries.

\(^{67}\) Quite evocatively, 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).

\(^{68}\) Cf. NARAL Amicus Brief for Webster, supra note 79, at 10 (“[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.”).
significance to the woman who experiences her body. If the former’s 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 actions of men.

Phenomenological accounts of unwanted pregnancy, 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 and Gynecologists*, in which the Court reaffirmed *Roe v. Wade*. In an amicus brief, NARAL attempted to demonstrate the fundamentality of the abortion right not be recourse to constitutional text or history, but rather through women’s experience. The brief quoted letters of women who described what it felt like to bear an unwanted pregnancy. Women described themselves as “terrified,” as feeling like “a helpless pawn of nature.” One woman stated, “It is difficult to adequately describe the difference between an wanted and an unwanted pregnancy. It is sometimes like the difference between darkness and despair, and light and joy.” But, most evocatively, one 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 and I thought I

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70 The power of this brief underscores the need for more phenomenological accounts of unwanted pregnancy. See West, supra note 66, 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 Wisc. 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.

71 Amicus Brief for the National Abortion Rights Action League, et. al., Thornburgh v. American College of Obstetricians and Gynecologists, Nos. 84-495 and 84-1379 (“NARAL Amicus Brief for Thornburgh”).

72 Id. at 29.

73 Id. at 19.

74 Id. at 22.
would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong.\(^75\)

An unwanted pregnancy – even when it is not a product of rape, but rather consensual sex with a, perhaps, loved and loving partner – is far from a gift 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 ….\(^76\)

Which is to argue that the wantedness of the pregnancy dictates its ontological status. When wanted, pregnancy is a magnificent, wonderful thing\(^77\); when unwanted, pregnancy is 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 – that is, arguments that restrictions on abortion rights and access protect women from harming themselves.\(^78\)

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\(^75\) Id. at 28.
\(^76\) Id. at 35.
\(^77\) 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 48, at 345. Brake correctly describes women’s experiences of \textit{wanted} pregnancies. However, the “heightened awareness of the body” is not experienced as a “wonderment” when the pregnancy is unwanted; instead, it may be experienced as a bodily disorder – an injury.

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 to be made illegal because it killed the fetus. However, fetal-focused argumentation did not win them the result that they desired: the sympathies of a majority of Americans 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.

According to the new strategy, abortion should be limited not because it harms fetuses, but because it harms women. The movement argued that abortion was harmful because it led to post-abortion syndrome, mental health problems, increased risk of breast cancer, and a host of other ills; restricting abortion protected women from these ills. Most importantly, this woman protective antiabortion argumentation 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,” it looked to Sandra Cano’s amicus brief, which “provided ninety-six pages of excerpts … testifying that ‘abortion in practice hurts women’s health.’” In light of the Court’s acceptance of woman protective antiabortion argumentation in Carhart II, it is reasonable to expect that it will become more ubiquitous.

Indeed, it has provided the justification for the new wave of abortion regulations that burden abortion access through the
informed consent process.\textsuperscript{86} The hope of the antiabortion movement, and the fear of the abortion rights movement, is that woman protective antiabortion argumentation may become the justification for a ban on abortion altogether.\textsuperscript{87}

The relationship between woman-protective antiabortion argumentation and criminal statutes that treat pregnancy as a substantial bodily injury is one of challenge. Is it possible for abortion to harm women when unwanted pregnancy, itself, is a literal injury to women? That is, is it possible for women to be harmed by the modality that would heal 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 manage to 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 they could and should. The advent and recent legitimation of woman-protective antiabortion argumentation 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


\textsuperscript{87} Siegel, “Dignity,” supra note 78, at 1734 (observing that some antiabortion activists hope that Carhart II signals Justice Kennedy’s willingness to uphold a ban on abortion altogether).
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.\textsuperscript{88} Accordingly, even if unwanted pregnancy were understood as an actual injury, an opponent of abortion may feel that this does not diminish the fetus’ moral status or rights; accordingly, abortion may still be wrong because it wrongfully 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\textsuperscript{89}; moreover, many concede that it may be acceptable in cases where a pregnancy may endanger the woman’s life or health.\textsuperscript{90} These concessions show that, for many abortion 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.

B. 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 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.\textsuperscript{91}

\textsuperscript{88} 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”).

\textsuperscript{89} See discussion supra notes 64 – 65 and accompanying text.

\textsuperscript{90} See FOX News/Opinion Dynamics Poll. Oct. 23-24, 2007, http://www.pollingreport.com/abortion.htm (last February 12, 2012) (reporting that a majority of those polled indicated that an abortion should be legal when needed to protect a woman’s mental health). As “mental health” is a capacious (and controversial) category – cf. Jim Kuhnenn, \textit{Obama: Mental Distress Can't Justify Late Abortion}, ASSOCIATED PRESS, July 3, 2008, available at http://www.huffingtonpost.com/huff-wires/20080703/obama-abortion/ (noting that health exceptions are "considered a legal loophole by abortion opponents"); CBSNews, supra note 22 (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 women is jeopardized: “Just again, the example of the eloquence of Senator Obama. He’s health for the mother. 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’) – it is likely that even more of those polled would agree that abortion should be legal when needed to protect a woman’s \textit{physical} health.

\textsuperscript{91} 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
It is undeniable that, in other areas of the criminal and civil law, the absence of consent transforms phenomena into legal injuries. The most obvious comparison is rape: sexual intercourse with consent is, simply, sex. In contrast, sexual intercourse without consent is a legal injury – rape. Other examples are readily available: when a person consents to being punched by another actor (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 injury – an assault – results. 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. When a person consents to the presence of another in that home, there is no legal injury; in the absence of consent, a legal injury – trespass – results.

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. It does not solely claim that the statutes under discussion recognize that pregnancy resulting from nonconsensual sex is a legal injury. It claims that the statutes under discussion recognize that pregnancy resulting from nonconsensual sex is a literal injury.

domination and submission, that consent to it by a woman is impossible”). If what these radical feminists describes 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 actual pregnancies would be actual injuries.

92 See generally, Model Penal Code s. 2.11 (“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.”).

93 See, e.g., id., s. 213.1 (“A male who has sexual intercourse with a female not his wife is guilty of rape if he compels her to submit by force…."

94 Cf. id. s. 211.1 (“A person is guilty of assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another …."

95 See, e.g., 720 ILCS 5/21-1.3 (Illinois 2011) (“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.”).

96 See, e.g., id. s. 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 …."

97 See supra Part I.B.
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. 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. 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 – even when we have exposed ourselves to the risk that those unwanted things will, indeed, happen to us.

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, it does not preclude her from having been harmed or injured should the risk be realized and she is the victim of a sexual assault. 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, it does not preclude the identification of any injuries that she sustains as injuries should she get hit by a car. Of course, there is recognition of contributory negligence in the civil context. A finding of contributory negligence usually does not preclude an actor from recovering for his injuries; it does, however,

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98 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 post-surgery condition; but, it is not an injury. Thanks to Susan Appleton for this example.

99 See McDonagh, supra note 67, 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.”).

100 See id. 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.”).

101 Cf. NARAL Amicus Brief for Webster, supra note 68, at 6 n.5 (noting that when women’s contraception fails, they “no more ‘consent’ to pregnancy than pedestrians ‘consent’ to being struck by drunk drivers”).

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frequently preclude an actor from recovering the full extent of his injuries. 103 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 his having been injured. 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.

There are two other interesting avenues of inquiry with respect to the question of consent to sex and its relationship to the ontology of a resulting pregnancy.

1. The Discomfort of Compromise

It bears noting that the conceptual apparatus in which consensual sex produces pregnancies that are not injuries while nonconsensual sex produces pregnancies that are injuries represents a compromise position that commentators on both sides of the issue may find uncomfortable. Those on one side may find disquieting the apparatus’ refusal to recognize that a woman may experience her pregnancy as an injury even when she consented to the sex that resulted in the pregnancy. 104 Those on the other side may find it disquieting any time that pregnancy is constructed as an injury – even when the pregnancy is a consequence of nonconsensual or forced sex. Consider statements made by the defense counsel in People v. Cross, which involved the prosecution of the stepfather of a thirteen year-old girl who had become pregnant after months of non-forcible rapes and who had undergone a second-trimester abortion to terminate the pregnancy: “Great bodily injury results from a knife stab, a gunshot … most people I know who have children did not consider pregnancy an injury.” 105 This attorney appears to assert, based on his experience with people who have been pregnant, that it is always illogical or inappropriate to construct pregnancy as an injury. The reluctance to recognize the logic or appropriateness of understanding some women’s pregnancy as injuries may be due to an attachment to positive constructions of pregnancy.

103 Id. (noting that when a plaintiff acts negligently, his recovery against a negligent defendant will likely be reduced).
104 See supra Part II.A.
105 Taylor Irene Dudley, “Conceiving Injury: An Analysis of People v. Cross,” 30 Whittier L. Rev. 645, 665 (2008 – 2009). Indeed, one commentator has argued that it diminishes the significance of a gunshot or stab wound to consider pregnancy an analogue. See Bonanno, supra note 63, at 191 (“To define pregnancy as a great bodily injury is to reduce the significance of the term as it applies to physical attacks that leave a victim on the verge of being maimed or deformed for life.”).
3. Formulations of Consent

The second interesting point of analysis relating to the conceptual apparatus in which consensual sex results in pregnancies that are not injuries while nonconsensual sex results in pregnancies that are injuries involves defining “consent.” There are two possible formulations. In the first, consent is a mental state that aligns with a woman’s desire to give permission to her sexual partner to engage in sexual intercourse with her; in the second formulation, consent is the actual permission that aligns with the mental state. If consent signifies the former and is understood as a mental state, then not all sexual assaults, as defined by the criminal law, will result in pregnancies that are injuries.

To explain: minor females, who are incapable of giving legally-recognized permission to their sexual partners are raped when they have sex— even when they have the mental state that aligns with a desire to give permission to a partner. Accordingly, if consent signifies this mental state, then when a minor female who has this mental state prior to and during sexual intercourse becomes pregnant, her pregnancy will not be an injury although she was legally (statutorily) raped. In the alternative formulation, in which consent signifies the legally-recognized permission with which the mental state aligns, then although a minor may have the mental state, the law will not recognize the permission that she endeavors to give. The result is that minor females who have been statutorily raped and who become pregnant all bear pregnancies that are injuries, even when the sex was wanted – and even when their pregnancies are wanted and maybe even planned. Thus, it is necessary to determine which conceptual apparatus is more in line with our sensibilities: one in which not all rapes produce pregnancies that are injuries, or an alternative in which even wanted and planned pregnancies are injuries.

106 See H.M. Malm, The Ontological Status of Consent and Its Implications for the Law on Rape, 2 Legal Theory 147, 149 (1996) (noting that although consent may be defined as “the signification or a mental state” or “the mental state itself,” the former is the better formulation).

107 Of course, this statement is qualified by some jurisdictions’ recognition of reasonable mistake of fact with respect to age—see, e.g., People v. Hernandez, 393 P.2d 673 (Cal. 1964) (holding that a good faith and reasonable belief that a minor was over the age of consent is a defense to a charge of statutory rape) —as well as requirements of age disparities between the victim and the perpetrator – see, e.g., Md. Crim. Code Ann. s. 3-304(a)(3) (2011) (“A person may not engage in vaginal intercourse with another … if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim”).

108 The phenomenon of teenagers planning pregnancies is usually conceptualized as a social problem. See discussion infra note 186 and accompanying text.
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 embody this conceptual apparatus – as opposed to the alternate one in which 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, more generally, will recognize the legitimacy of the description.

Before turning the focus to other areas of law in which pregnancy is imagined and represented, it deserves some emphasis that the pregnancy is an 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 a legitimacy, ubiquity, and power. Of course, individual women experienced their pregnancies as injuries prior to the appearance of the pregnancy is an injury definition in criminal law. However, these experiences gain legitimacy because of its representation in the powerful (and, historically, male) 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: as the next Part demonstrates, there arguably is no other area of the law that reflects a phenomenology – an experience of the body – that is singularly female. 109

III. OTHER CONTEXTS

This Part considers other areas of law in which pregnancy is represented. It reveals that the sexual assault statues under discussion

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109 See West, supra note 66, at 31 (noting that the danger and fear of unwanted pregnancy is “gender-specific” and stating that “[t] is a fear which grips women, distinctively, and it is a fear about which men, apparently, know practically nothing”).
are somewhat exceptional because it is rare for the law to embrace and reflect subversive understandings of pregnancy. The consideration begins with an area of law in which it is surprising that pregnancy is not constructed as an injury: abortion jurisprudence. 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 (i.e., minors and the poor).

It deserves some underscoring that 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 grey between the two poles. However, it is also true that the weight of any particular treatment of pregnancy is usually towards one pole, and usually dramatically so. Thus, there may be some recognition of the injurious aspects of pregnancy in those areas of law that this Article has characterized as not constructing pregnancy as an injury; the converse is also true. Nevertheless, the schematization offered remains valuable, as it demonstrates the uniqueness of the sexual assault laws in their un-hedged and unapologetic construction of pregnancy as an injury.

I. When Pregnancy is not an Injury: 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”], which upheld the

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federal Partial Birth Abortion Ban Act, prohibiting a particular method of performing second and third trimester abortions. In 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.  

Most importantly, her decision to terminate her pregnancy – motivated as it is by all the reasons of which the majority is surely well aware – is frequently one that she regrets. 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.  

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 Casey and, in so doing, implicitly affirmed Casey as good law and perpetuated the abortion right, 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 exceedingly consistent with prevailing, positive constructions.

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

112 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.”).

113 See id. (noting that women experience “[s]evere depression and loss of esteem” after undergoing an abortion).

114 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 48, at 369 (“In other pre-viability cases, 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, the pregnancies are 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 physical injuries to the woman.

115 The most dramatic demonstration of Carhart II’s ambivalence towards the continuation of Casey as good law is the plurality’s refusal to explicitly say as much, but rather its “assuming” the principles that Casey stated for the purpose of deciding the case before it. See Carhart II, 550 U.S. at 146 (“We assume the following principles for the purposes of this opinion.”).
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, Planned Parenthood v. Casey plays a prominent role in the messiness of culture through its perpetuation of a discourse and its simultaneous perpetuation of a counterdiscourse.116 On the one hand, Casey reaffirmed Roe,117 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” thing for some women. On the other hand, Casey limited the abortion right118 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.119

Casey participates in the messiness of culture because it is a profoundly ambiguous decision. It certainly acknowledges that

117 Id. at 846 (reaffirming Roe’s “essential holding”).
118 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 (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her 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 . . . .”).
119 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).
women may experience their pregnancies as injuries. 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. 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; 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. Nonetheless, it reaffirms the abortion right because women must “ultimately” determine the ontology of their pregnancy.

Then, there is the text of the opinion. In the course of refashioning the abortion right, the Casey plurality 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 …

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.

120 Id. at 852 (noting the “suffering” that may accompany a pregnancy).
121 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.
122 Id. at 872 – 873 (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 the existence of “procedures and institutions to allow adoption of unwanted children” and their entitlement to state assistance if they choose to retain custody).
123 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.”).
124 Id. at 852.
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.125

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 stands unambiguous in its subversive representation of pregnancy as an injury.126 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.

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.127 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

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125 Id. at 853.
126 410 U.S. 113 (1973).
127 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”).
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.128

Here, pregnancy, if not the “specific and direct harm” itself, may certainly bring it. It 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.129 Further, once effected, abortion “heals” the woman of the mental, emotional, financial, social, and physical burdens that the above cited paragraph references.

Interestingly, the abortion jurisprudence that came subsequent to Roe maintained Roe’s establishment of abortion as a healing modality, but only to the extent that abortion healed women of physical harms caused by pregnancy. While Roe contemplated abortion as a mechanism for healing women of a myriad of medical and non-medical harms, subsequent jurisprudence perpetuated this contemplation of abortion only insofar as it related to medical harms.

128 Id. at 153.

The Court clearly treated abortion as an entity that is prescribed to a woman in Doe v. Bolton, 410 U.S. 170, 192 (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 related to health.” Id.
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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 – 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 this 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.131

B. When Pregnancy is an Injury … to the Body Politic

Michael M. v. Superior Court of Sonoma County132 is a productive place to start an inquiry into areas of the law that construct pregnancy as an injury – namely because the 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.133 The law had been justified on the grounds that it, through a purely utilitarian calculus, would “prevent illegitimate teenage pregnancies”134 by raising the costs, via the possibility of a criminal penalty, for males to have sex with minor females135;

130 Roe, 410 U.S. at 163 – 64 (noting that “[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother”); 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”).
131 See Carhart II, 550 U.S. at 165 (concluding that the federal Partial Birth Abortion Ban Act “does not require a health exception”).
133 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.
134 Id. at 470. 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 – 1985) (“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.”).
135 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 controlling sexuality – specifically the sexuality of females. See, e.g., 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 117, 132 – 33 (D. Kairys ed. 1982); Wendy Williams, “The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,” 8 Women’s Rts. L. Rep. 175, 185 (1982).
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.\textsuperscript{136} Thus, the “criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrence on the sexes.”\textsuperscript{137}

Pregnancy in the majority opinion is conceptualized as an “injury” or “harm” that the female endures.\textsuperscript{138} Indeed, it is a \textit{cost} of sex – not a benefit. It is a “profound physical, emotional, and psychological consequence of sexual activity” from which minor females “suffer.”\textsuperscript{139} Moreover, it is something that a man “inflicts” on a woman.\textsuperscript{140}

It should be noted that, although the events that resulted in the prosecution of the defendant in \textit{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,\textsuperscript{141} the statute at issue in the case criminalized all sex – forcible and nonforcible, coerced and un-coerced – 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

\textsuperscript{136} \textit{Michael M.}, 450 U.S. at 473 (“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 more acutely feel the social consequences of teenage pregnancy not because of biological differences, but rather because of social arrangements. See Olsen, supra note 134, at 419 n.152 (1984 – 1985) (“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.”).

\textsuperscript{137} \textit{Michael M.}, 450 U.S. at 473.

\textsuperscript{138} It is important to note that the “harm” or “injury” of \textit{abortion} is embedded within the Court’s construction of pregnancy. The Court notes the “tragic human costs of illegitimate teenage pregnancy” and later observes that “half of all teenage pregnancies end in abortion.” Id. at 467, 471. Thus, while the Court understands pregnancy as “bad” because of 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.

\textsuperscript{139} Id. at 471. See also id. at 479 (Stewart J., concurring) (“She alone \textit{endures} the medical risks of pregnancy or abortion. She \textit{suffers} disproportionately the social, educational, and emotional consequences of pregnancy.”) (emphasis added); id. at 482 (Blackmun, J., concurring) (describing pregnancy as a “problem” that women must “confront”).

\textsuperscript{140} See id. at 475 (“The age of the man is irrelevant since young men are as capable of older men of \textit{inflicting the harm} sought to be prevented.”) (emphasis added).

\textsuperscript{141} See id. at 483.
of consent would be subject to criminal prosecution under the statute that the Court upholds in Michael M. According to the Michael M. majority, 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 Court 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 Court 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 entity occurs to an unmarried minor female, it has “bad” consequences to the body politic – like economic instability and ultimately dependence142 and abortion (construed as a social problem).143 This 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 is 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 Court observes that teenage pregnancies “have significant social, medical, and economic consequences for both the mother and her child and the State,” it emphasizes that “of those children who are born, their illegitimacy makes them likely candidates to become wards of the State.”144 For the Court, teenage pregnancies are injuries not because the minor females who do not want them experience them as wounds

142 See id. at 471 nn. 4–5 (citing statistics that counsel that many teenage mothers “face a bleak economic future”).

143 The Court undeniably appreciates the non-economic impacts associated with abortion as impacting the state. Id. at 472 (“Of particular concern to the State is that approximately half of all teenage pregnancies end in abortion.”); cf. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (noting the state’s “profound interest in potential life”)

144 Michael M., 450 U.S. at 471–72.
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 planned and wanted teenage pregnancies.145 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.146

Similarly, minors’ experiences of unplanned, unwanted pregnancies do not motivate Congress’ problematization of these pregnancies in the legislative findings that precede the Personal Responsibility and Work Opportunity Reconciliation Act[“PRWORA”]147; 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. To begin: 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 U.S.148 The PRWORA demonstrates what the analysis of Michael M.

146 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 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 principal 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.
148 AFDC, which Goldberg v. Kelly, 397 U.S. 254, 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
suggests: the law is wholly capable of representing pregnancy as an injury when it represents pregnancy as an injury to the body politic. 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[е]w it,” Congress found:

(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.

(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.

(J) Children of single-parent homes are 3 times

not to be considered an individual entitlement. See 42 U.S.C. § 601(b) (2007) (noting that TANF “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part”).

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).

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) (noting Clinton’s campaign promise to do just that). The replacement of Aid for Families of Dependent Children with TANF is widely recognized as a fulfillment of that campaign promise.
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.\textsuperscript{151}

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. \textit{Maher v. Roe} and \textit{Harris v. McRae} together establish the principle that it violates neither poor women’s due process rights nor equal protection guarantees for the state to prohibit the use of Medicaid funds for abortion\textsuperscript{152} – even those that are medically necessary.\textsuperscript{153} While, in essentially compelling poor women to carry their unwanted pregnancies to term and to bear children that they do not want.
not want to have,\textsuperscript{154} \textit{Maher} and \textit{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 the same time that the abortion funding cases assert this positive construction of pregnancy, the PRWORA and the relatively begrudging approach that the government has taken to assisting indigent families\textsuperscript{155} 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, the proper exploration of which begins with the Court’s decision in \textit{Geduldig v. Aiello}.\textsuperscript{156} \textit{Geduldig} upheld against an equal protection challenge the constitutionality of a California disability insurance program that excluded coverage of disabilities related to normal

\textsuperscript{154} There is a strong argument that the Court does not contemplate that the indigent women affected by its decision will actually be unable to obtain abortions. When arguing that the proscription of Medicaid funding for abortions does not constitute a government-authored burden on the abortion right, but rather merely fails to remove a burden that is not authored by the government (i.e., indigence), the Court asserts that poverty “may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions.” \textit{Maher}, 432 U.S. at 474 (emphasis added). The Court’s use of “perhaps” is significant; it indexes an incredulity that poor women will not be able to access abortion.

However, the most telling demonstration of the Court’s disbelief that its decision will make abortion impossible for poor women comes when the Court asserts, “An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the proscription on the use of Medicaid funds for abortion]; \textit{she continues as before to be dependent on private sources for the services she desires}.” Id. (emphasis added). 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. This is the paradigmatic image of the “welfare queen” – the woman who does not need the government’s assistance, but who takes it anyway, simply because it is there; when the government closes its purse, she will simply turn to the “private sources” that have always been available. For an exploration of the trope of the welfare queen and its role in reproducing race and racial inequality, see Khiara M. Bridges, \textit{Reproducing Race}, supra note 1, 201 – 49.

\textsuperscript{155} Examples of the begrudging approach that TANF has taken are many. First, there is the requirement that women receiving funds from the program “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.S. § 607(c)(1)(B)(i) (LexisNexis 2011); 42 U.S.C.S. § 607(d) (LexisNexis 2011). Secondly, TANF prohibits families from receiving funds for more than five years, even if the family has not managed to lift itself out of poverty during that time. See 42 U.S.C.S. § 608(a)(7). Finally, TANF authorizes states to implement “family caps,” which “caps” the amount of money a family may receive, even though the size of the family may increase upon the birth of an additional child. Id.

\textsuperscript{156} 418 U.S. 484 (1974).
The Court found 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. Because the majority found that the statute did not discriminate on the basis of sex, the Court used rational-based scrutiny in reviewing the plan. 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 course) without requiring funding from outside sources. 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.

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

157 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).

158 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.”).

159 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”).

160 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).

161 Id. (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”).
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."162 As one commentator describes it, "[P]regnancy is not a rare occurrence, and in one sense could be considered ‘normal.’"163 This is a position that, in other contexts, feminists have championed in order to challenge ideas, steeped in paternalism, that pregnant women need to be treated as if infirm or need to be protected.164 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...."165 *Geduldig* argues, 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 non-pregnant 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 “non-pregnant 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

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162 See, e.g., Katharine T. Bartlett, “Pregnancy and the Constitution: The Uniqueness Trap,” 62 Cal. 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 ....”); Diane L. Zimmerman, “Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,” 75 Colum. L. Rev. 441, 444 (1975) (“[The Court] 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.”).

163 Bartlett, supra note 162, at 1561.


165 Id. at 194.
When Pregnancy is an Injury

pregnancy as a *disability*.\(^{166}\) “Disability” has connotations of sickness, a state of ill health, and, importantly, having been harmed or injured in some way.\(^{167}\) 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.

Neither is it to say that positive constructions of pregnancy as intrinsically good were singularly responsible for the Court’s decision in *General Electric v. Gilbert*,\(^{168}\) which upheld against a Title VII\(^{169}\) challenge a private employer’s disability insurance program that excluded coverage of disabilities related to normal pregnancy. However, they might have informed the Court’s conclusion in the case that pregnancy is “significantly different from the typical covered disease or disability…. [It] is not a ‘disease’ at all, and is often a voluntarily undertaken and desired condition.”\(^{170}\) The Court in *Geduldig* and *Gilbert* might have argued that pregnancy was an injury, but it was an injury sufficiently distinct from the injuries covered by the employer; accordingly, it was injury the costs of which

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\(^{166}\) 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 the Work-Family Conflict,” 110 Colum. L. Rev. 1, 9 (2010) (“According to the plaintiffs, normal pregnancy was ‘functionally indistinguishable’ from other disabilities because it required medical care, hospitalization, anesthesia, surgical procedures, and genuine risk to life”).

\(^{167}\) See Matzzie, supra note 164, at 194 – 195 (“[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.”).

\(^{168}\) 429 U.S. 125 (1976).

\(^{169}\) “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.” Title VII of the Civil Rights Act of 1964 s. 703(a), 42 U.S.C. s. 2000e-2(a) (1982).

\(^{170}\) *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* were able to contrast coverage for pregnancy and related conditions “to the very idea of a disability plan”).
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.\textsuperscript{171}

Congress responded to the Court’s decision in \textit{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\textsuperscript{172} absent a showing of a bona fide occupational qualification.\textsuperscript{173} While the immediate effect of the PDA was to signal that the ruling in \textit{Gilbert} was erroneous, thus leading to the Court’s holding in \textit{Newport News 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,\textsuperscript{174} the protections provided by the amendment 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

\textsuperscript{171} Similar to \textit{Geduldig} and \textit{Gilbert}, most courts have interpreted the Americans with Disabilities Act (“ADA”) to exclude pregnancy within the term “disability.” See Noah D. Katz, “Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent,” 109 Colum. L. Rev. 1357, 1371 n.38 (2009) (“Pregnancy is not considered a ‘disability’ for ADA purposes.”); see also Equal Employment Opportunity Commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 CFR § 1630 (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments.”). However, the ADA includes as “disabilities” those that result from or are exacerbated by pregnancy. See 29 CFR § 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 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., Ruth Colker, “Pregnancy, Parenting, and Capitalism,” 58 Ohio St. L.J. 61 (1997).

\textsuperscript{172} 42 U.S.C. s. 2000e(k) (1978) (providing that “‘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”).

\textsuperscript{173} 42 U.S.C. s. 2000e(e) (1978) (“[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.”)

\textsuperscript{174} 462 U.S. 669 (1983).
inability to work with respect to all aspects of employment, including benefits such as leave and insurance.”

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 Grossman and 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.” 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.

On the other hand, the statute forces the equation of pregnancy with injury and disability: first, in overruling the logic of Gilbert, it requires employers to treat pregnancy as a disability with respect to the provision of disability benefits. Second, in the analysis of

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176 Id. at 18.
177 The Due Process Clause has been interpreted to provide an equivalent right against such assumptions. See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (striking down a school board’s policy of prohibiting women from working once they had reached a specific stage in their pregnancies).
178 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 hers.” Id.
179 One of the criticisms of the PDA is that, while the statute requires that employers treat pregnant employees equally as well as other disabled employees, it also allows employers to treat pregnant employees equally as badly as other disabled employees. Thus, if an employer does not provide disability benefits generally, they do not violate Title VII by refusing to provide disability benefits to pregnant
whether a pregnant employee has been treated 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/her unable to work. 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 that have been 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; it indicates a phenomenology of pregnancy in which the event feels like something has gone terribly wrong in the 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, that 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, 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 progressive, insofar as it rejects a traditional value in which being a mother and being a labor force participant are mutually exclusive, it is not subversive of discourses 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 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. Savings & 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.”).

180 Jessica Carvey Manners, “The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases,” 66 Ohio St. L.J. 209, 213 (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).
that assert that pregnancy is, ultimately and always, a positive event to 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.\textsuperscript{181} It would appear, then, that this function of the PDA shares a logic with the Court’s decision in \textit{Michael M.} (and with the Congress whose legislative findings preceded the PRWORA\textsuperscript{182}). That is, that which makes a pregnancy an injury (or a disability, or a cost, or a phenomena that is “inflicted”) is not women’s experience of it; instead, pregnancies are injuries because of the effect that they have on the community in which the woman is embedded.\textsuperscript{183} In \textit{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

\textsuperscript{181} 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 and does not respect its status as a chosen or desired state of being.” See Julie Novkov, “A Deconstruction of (M)otherhood and a Reconstruction of Parenthood,” 19 N.Y.U. Rev. L. & Soc. Change 155, 181 (1991 – 1992); see also Finley, supra note 37, at 1131 (noting the belief that pregnancy should not be covered within employer disability plans because it “is normal and natural for women, and … a voluntary choice that they make – it 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 221, at 224 (“Should an employer place the same value on pregnancy as it does 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).

\textsuperscript{182} See supra note 147 – 51 and accompanying text.

\textsuperscript{183} 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?” See Novkov, supra note 181, at 181.
associated with the pregnancy if paid disability leave is provided as a benefit.\textsuperscript{184}

\textit{Conclusion}

This Article has offered that statutes that provide that causing pregnancy is an aggravating factor when grading a sexual assault introduce the \textit{pregnancy is an 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 \textit{pregnancy is an 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 makes possible the day when it will be logical not only to claim that an unwanted pregnancy is like being stabbed in the heart, but that being stabbed in the heart is like an unwanted pregnancy.

\begin{footnote}
\textsuperscript{184} Manners observes the cost-sharing function of covering pregnancy within disability insurance programs and providing paid disability leaves. See Manners, supra note 180, at 229 – 30 (observing that European countries that provide robust legal protection of pregnant employees “accept[] the necessary costs of pregnancy 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”).
\end{footnote}