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Rape is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury

Lauren Hoyson

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RAPE IS TOUGH ENOUGH WITHOUT HAVING SOMEONE KICK YOU FROM THE INSIDE: THE CASE FOR INCLUDING PREGNANCY AS SUBSTANTIAL BODILY INJURY

I. INTRODUCTION

In reading the following scenarios, consider the realities, both physical and emotional, faced by these women. First, imagine a thirteen-year-old girl who is often left at home with her stepfather and younger siblings in the evening.¹ One night, her stepfather wakes her up, takes her into his bedroom, and rapes her.² This continues for several months until the thirteen-year-old girl tells her stepfather she may be pregnant.³ Her stepfather then takes her to get an abortion, which is performed without complications.⁴

Next, consider an adult woman raped by a family member.⁵ A Planned Parenthood counselor helps her reach the decision to have an abortion.⁶ Over the next five years, the adult woman attempts suicide five times and begins to abuse drugs to deal with the mental anguish from her experience.⁷ Consider an eighteen-year-old woman who was

¹ *People v. Cross*, 190 P.3d 706, 708-09 (Cal. 2008). In the evening, K.'s mother left her at home alone with her stepfather and siblings. *Id.*

² *Id.* at 709. Her stepfather would wait until her siblings were asleep and then would take her to his bedroom. *Id.* The defendant raped the victim regularly. *Id.*

³ *Id.* Although K. occasionally objected to these acts, she feared that her stepfather would take her cell phone away and not let her see her friends if she persisted. *Id.*

⁴ *Id.* K. underwent a surgical abortion twenty-two weeks into her pregnancy. *Id.* The doctor gave K. anesthesia and dilated her cervix. *Id.* The abortion lasted 13.1 minutes. *Id.* K. did not have any medical complications from the abortion. *Id.* The DNA analysis revealed a 99.9% probability that her stepfather fathered the fetus. *Id.* The state prosecuted K.'s stepfather for statutory rape. *Id.* The jury returned a verdict sentencing the girl's stepfather, Gary W. Cross, to twenty-one years to life imprisonment. Steven Ertelt, *California Planned Parenthood Made Abortion Referral, Didn't Report Abuse*, LIFENEWS.COM, Sept. 8, 2008, <http://www.lifenews.com/state3469.html>. The Court found that the girl suffered great bodily injury from the pregnancy. *Cross*, 190 P.3d at 712.

⁵ Anne Morse, *Telling the Rape Victim's Story*, NATIONAL REVIEW ONLINE, May 17, 2007, <http://article.nationalreview.com/?q=ITY1MTdkYmM1NDAYNjEyNGRIYTQ3ODgwOWFiNTRkOGI=>. Janet Warriner was an accounting clerk for a Fortune 500 company. *Id.* In 1981, a family member raped and impregnated her. *Id.*

⁶ *Id.*

⁷ *Id.* The rape and abortion devastated Warriner. *Id.* She felt that she punished an innocent child for the acts of the child's father. *Id.* This is a common feeling among impregnated raped women who select to have an abortion. *Id.*

raped by a stranger and carries the child to term.⁸ The woman delivers the child and decides to give the child up for adoption.⁹

Each of these women faced a substantial hardship although their pregnancies ended differently.¹⁰ Whether pregnancy results in childbirth, miscarriage, or abortion, the pregnancy negatively affects a woman's physical and emotional state.¹¹ Courts disagree, however, on whether the physical alterations caused by pregnancy should serve as an aggravating factor to rape, thereby extending the rapist's sentence.¹² The physical and mental effects of pregnancy are arguably consistent with the injuries courts currently consider substantial bodily injury.¹³ Thus, pregnancy should serve as an aggravating factor under this doctrine.¹⁴ But, courts inconsistently apply the legal principle of substantial bodily injury to pregnancy.¹⁵ Nevertheless, states should consider adopting pregnancy as an aggravating factor by statute.¹⁶ In turn, this will deter crime and promote justice.¹⁷ However, given the troubling history of rape laws, it does not appear that states will quickly reform their laws.¹⁸

This Note analyzes the history of rape laws with a focus on the aggravating factor of substantial bodily injury.¹⁹ Part II provides background information about the injuries caused by pregnancy, miscarriage, and abortion, and discusses how states treat evidence of such injuries.²⁰ Part III analyzes whether pregnancy should be considered substantial bodily injury by determining whether the physical effects of pregnancy, abortion, and miscarriage satisfy the

⁸ *Id.* Lee Ezell was raped in 1964 when she was eighteen years old. *Id.*

⁹ *Id.*

¹⁰ *See infra* Part II.F (discussing state treatment of pregnancy as substantial bodily injury).

¹¹ *See infra* Part II.E (discussing the mental and physical effects of pregnancy).

¹² *See infra* Part II.F (discussing how states treat rape-related pregnancy differently).

¹³ *See infra* Part III.C (discussing how some states consider pregnancy an aggravating factor in rape cases while others consider pregnancy an aggravating factor on a case-by-case basis or do not consider evidence of pregnancy relevant to proving rape).

¹⁴ *See infra* Parts III.B–C (arguing that pregnancy should be considered substantial bodily injury in rape cases).

¹⁵ *See infra* Part III.C (discussing how courts treat rape-related pregnancy differently).

¹⁶ *See infra* Part IV (suggesting that states adopt pregnancy within their definition of substantial bodily injury).

¹⁷ *See infra* Part III.D (discussing how uniform laws deter crime, promote fairness, and reduce local prejudice).

¹⁸ *See infra* Part II.A (discussing the struggle women have faced prosecuting rape and the slow evolution of rape laws).

¹⁹ *See infra* Part II.A–D (discussing the history of rape, current rape laws, differences between rape and statutory rape, and the definition of substantial bodily injury).

²⁰ *See infra* Part II.E–F (discussing the complications of pregnancy, miscarriage, and abortion and how states differ in applying pregnancy as substantial bodily injury).

definition of substantial bodily injury as defined by states.²¹ Part IV proposes that states rectify this problem by including pregnancy in the definition of substantial bodily injury.²² Because pregnancy causes a substantial physical change beyond what the ordinary rape victim suffers, each state's definition of substantial bodily injury should include pregnancy, which provides the rape victim the justice she deserves, overcomes the history of inadequate prosecution of rape, and clarifies the courts' current confusion over whether pregnancy should be considered an aggravating factor.²³

II. BACKGROUND

Men have raped women throughout history, although it has not always been looked upon unfavorably.²⁴ Rape laws have evolved from treating rape as a crime against the female's owner to providing rights and justice for women.²⁵ With the evolution of victims' rights comes the question of whether pregnancy resulting from rape should be considered an aggravating factor to the rape, regardless of the outcome of that pregnancy.²⁶ Part II.A first explores the evolution of rape laws.²⁷ This section focuses on how rape laws evolved from protecting the rapist from false accusations to protecting the victim and treating rape similarly to other crimes.²⁸ Part II.B discusses the differences between

²¹ See *infra* Part III (comparing the definition of substantial bodily injury to the physical effects of pregnancy and looking at the strengths and weakness of the approaches courts take).

²² See *infra* Part IV (proposing that states either adopt a uniform definition of substantial bodily injury, include pregnancy in their definition of substantial bodily injury, or adopt pregnancy as an aggravating factor in their first degree rape statute).

²³ See *infra* Part II.E-F (discussing the physical and mental effects pregnancy has on a woman and the approaches states take in determining whether pregnancy is an aggravating factor).

²⁴ Office of Victims of Crimes, *Summary of the History of Rape Crisis Centers*, http://www.ovcttac.gov/saact/files/summ_of_history.pdf (last visited Oct. 1, 2008); Susan N. Herman, *Rape (Law)*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA (2008), [http://encarta.msn.com/text_761564013___10/Rape_\(law\).html](http://encarta.msn.com/text_761564013___10/Rape_(law).html).

²⁵ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 621 (2006). Earlier societies considered the woman the property of her father or husband, so rape was treated as a property crime against the male. *Id.* Today, rape laws provide rights for the victims. *Id.*

²⁶ See *infra* Part III.B (analyzing whether the mental and physical effects of pregnancy satisfy the definition of substantial bodily injury).

²⁷ See *infra* Part II.A (discussing the history of rape laws from early societal acceptance of rape up through the current state of rape laws).

²⁸ See *infra* Part II.A (discussing how rape laws have evolved from being considered a crime against the woman's father or husband to a crime committed against her).

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rape and statutory rape.²⁹ This section defines the elements of each offense and explores what the state must prove to succeed in a suit.³⁰ Next, Part II.C discusses the specific elements required to prove rape across the states.³¹ This section focuses on the factors that allow for an increase in the rapist's sentence.³² Part II.D explores one of the factors that commonly increases a rapist's sentence: substantial bodily injury.³³ This section looks at the definition of substantial bodily injury across the states as well as examines the analysis courts traditionally use when interpreting the definition.³⁴ The focus of this section is injuries that courts commonly consider substantial bodily injury.³⁵ Because courts are inconsistent in finding that pregnancy is substantial bodily injury, Part II.E explores the impact that pregnancy, abortion, and miscarriage have on a female's body.³⁶ Finally, Part II.F provides background on how courts treat evidence of pregnancy for purposes of increasing the rapist's sentence.³⁷

A. *History of Rape Laws*

Throughout history society has greatly changed its views toward rape.³⁸ In ancient societies, men obtained their wives by kidnapping a woman, raping her, and then marrying her.³⁹ As the values of societies evolved, rape laws were established to punish the assailant and the victim.⁴⁰ Societies justified the punishment of the victim on the theory

²⁹ See *infra* Part II.B (discussing the elements of rape and statutory rape and the differences between them).

³⁰ See *infra* Part II.B (discussing the elements of rape and statutory rape).

³¹ See *infra* Part II.C (discussing the elements states require to prove rape).

³² See *infra* Part II.C (discussing the aggravating factors applied by states focusing on substantial bodily injury).

³³ See *infra* Part II.D (discussing how states vary in interpreting substantial bodily injury liberally, commonly, and strictly).

³⁴ See *infra* Part II.D (defining substantial bodily injury across the states).

³⁵ See *infra* Part II.D (defining substantial bodily injury across the states).

³⁶ See *infra* Part II.E (discussing the impact pregnancy, miscarriage, and abortion have on a female's body).

³⁷ See *infra* Part II.F (discussing court decisions that have considered whether pregnancy is substantial bodily injury).

³⁸ Herman, *supra* note 24. Rape laws greatly reflect a culture's attitudes toward sex and gender. *Id.*

³⁹ *Id.* "In these societies, what we would now call rape was socially acceptable, especially in times of war." *Id.* Some societies considered this ritual, known as bride capture, to be heroic. *Id.*

⁴⁰ B.J. CLING, SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN 13-14 (Guilford Press 2004). The first known rape law was written in the ancient Babylonian Code of Hammurabi in 2250 B.C. *Id.* at 13. This Code considered a woman to be property of her father or husband. *Id.* at 14. The Code punished a man who raped a virgin by death while considering the virgin blameless. *Id.* On the other hand, a married woman who was raped

that she was the property of either her father, to whom she was less valuable after rape, or her husband, against whom she committed the crime of adultery.⁴¹

It was not until the eleventh and twelfth centuries that the common law crime of rape developed, and women were no longer punished for being victims of rape.⁴² The statutes of Westminster greatly reformed

committed adultery against her husband and was punished by being drowned. *Id.* However, the woman's husband could save her from this fate by excusing her. *Id.* The king could also excuse the rapist. *Id.* See also Herman, *supra* note 24. Punishment of rape victims arguably is supported by the Bible. Johnny Miles, *Re-reading the Power of Satire: Isaiah's 'Daughters of Zion', Pope's 'Belinda', and the Rhetoric of Rape*, 31.2 J. FOR THE STUDY OF THE OLD TESTAMENT 193 (2006). This article suggests that the Bible passage concerning the raping of the daughters of Zion promoted their punishment. *Id.* Hebrews also punished rape by stoning the victim. CLING, *supra*, at 13–14. If the woman was within the walls of the village and failed to call for help, she was stoned to death. *Id.* Shakespeare also wrote about the “mercy killing” of a rape victim in *Titus Andronicus*. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* (Simon & Schuster 2005). In this play, the father killed his daughter, who was raped, in what he believed was a mercy killing for her sins. *Id.* In addition, punishment of rape victims is not confined to history and literature, as some countries continue to punish rape victims. See CNN, *Saudi: Why We Punished Rape Victim*, <http://www.cnn.com/2007/WORLD/meast/11/20/saudi.rape.victim/index.html> (last visited Sept. 25, 2008); The Independent Word, *The Afghan Women Jailed for Being Victims of Rape*, <http://www.independent.co.uk/news/world/asia/the-afghan-women-jailed-for-being-victims-of-rape-900658.html> (last visited Sept. 25, 2008) (discussing Afghan women who are serving jail time for being rape victims). See also DRESSLER, *supra* note 25, at 623. People tend to attribute blame to the victim, regardless of whether the circumstances suggest any responsibility on her part. *Id.*

⁴¹ DRESSLER, *supra* note 25, at 621. Fathers considered their virgin daughters valuable since they could receive a greater dowry for their virginity. *Id.* Once women were married, they were considered the property of their husband. *Id.* Therefore, rape was originally a property offense against the male. *Id.* This concept also relates back to the Bible, in which virginity was highly prized. Michelle Oberman, *Symposium: Statutory Rape Realities: Scholarship and Practice*, 50 DEPAUL L. REV. 799, 802 n.13 (2001). Deuteronomy states that:

If a man find a damsel *that is* a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; Then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days.

Deuteronomy 22:28–29 (King James). Roman law also viewed rape as a property crime. CLING, *supra* note 40, at 14. Under Roman law, the woman was not punished for the crime unless she consented to the abduction. *Id.* However, rape was punishable by death. *Id.* It was not until the sixth century that Rome revised its law to make rape a crime against the woman. *Id.*

⁴² CLING, *supra* note 40, at 13–14. England first permitted female victims to bring a civil suit against the assailant during the twelfth century. Herman, *supra* note 24. Nevertheless, the laws at that time required the woman to show the physical results of the rape immediately after its occurrence. CLING, *supra* note 40, at 15. At that time canon law also began to view rape as a crime of violence. *Id.* Four elements had to be established to prove rape: violence, abduction, intercourse, and lack of consent. *Id.* at 15. The assailant could

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rape laws in 1275.⁴³ These statutes provided that all women could be victims of rape and allowed the Crown to prosecute rape if the victim's family did not.⁴⁴ This statute also first criminalized statutory rape.⁴⁵ However, women had a challenging time proving rape.⁴⁶ In order to establish a rape, the woman had to promptly report the rape and had to show that she used force to stop its occurrence.⁴⁷ Unless a woman could show substantial injury, she was likely to lose.⁴⁸ At trial, the court also forced the victim to answer detailed questions about her sex life.⁴⁹

By the end of the sixteenth century, the common law definition of rape in England was the "carnal knowledge of a woman ten years or older, forcibly and against her will."⁵⁰ The United States originally

raise the defense that the victim had slept with him before or that she consented to the act. *Id.* The man could also avoid punishment by marrying the victim. Herman, *supra* note 24.

⁴³ CLING, *supra* note 40, at 13-14. "[T]he King prohibiteth that none do ravish or take away by force, any maiden within age, neither by her consent, nor without her consent, nor any wife or maiden of full age, nor any other woman, against her will." GREAT BRITAIN COURTS, THE JURIST 327 (1866), available at http://books.google.com/books?id=41AwAAAAIAAJ&pg=PA327&lpg=PA327&dq=the+King+prohibiteth+that+none+do+ravish,+nor+take+away+by+Force,+any+Maiden+within+Age&source=web&ots=BwKbKAOBd&sig=r4ilJ07t-ibr9jH7L5gCIW-69SI&hl=en&sa=X&oi=book_result&resnum=5&ct=result (last visited September 26, 2008) (quoting Statute of Westminster I, 1275, 3 Edw. 1, c. 13 (Eng.)).

⁴⁴ CLING, *supra* note 40, at 15. Under this statute, virgins, married women, prostitutes, and concubines could be victims of rape. *Id.*

⁴⁵ The Statute of Westminster I, 1275, 3 Edw. 1, c. 13 (Eng.) made it a felony to have carnal knowledge with a child under twelve years of age. Oberman, *supra* note 41, at 800-01. The English law aimed to protect children from exploitation and harm. *Id.* at 801. When America adopted this statutory rape law, the age of consent was established at ten years old. *Id.*

⁴⁶ Herman, *supra* note 24. "[R]ape victims were viewed with suspicion: Their reputations were examined; they had to have third-party support to their claim; they had to report the rape right away; they had to have cried out for help, and so on." CLING, *supra* note 40, at 15.

⁴⁷ See Herman, *supra* note 24. This statute focused on the victim's response to rape. CLING, *supra* note 40, at 16. Furthermore, it required the woman to show that she used the "utmost resistance" throughout the entire act of rape. *Id.* at 16.

⁴⁸ See Herman, *supra* note 24; CLING, *supra* note 40, at 13. Early American law required a showing of the utmost resistance. *Id.* at 16. Eventually courts changed this standard to earnest resistance, followed by reasonable resistance under the circumstances. *Id.* Today the standard is generally lack of consent. *Id.*

⁴⁹ See Herman, *supra* note 24; CLING, *supra* note 40, at 15. Herman writes:

For example, the victim could be extensively cross-examined by the accused rapist's attorney to show that (1) she had consented to sexual intercourse with the defendant (accused rapist) on that or another occasion, (2) she had consented to sexual intercourse with another man or men, or (3) she did not have a good reputation for chastity.

Herman, *supra* note 24.

⁵⁰ CLING, *supra* note 40, at 16. This is the definition of rape originally adopted in the United States. *Id.*

adopted this definition of rape, but included additional protections to prevent false accusations.⁵¹ Rape laws remained unchanged for centuries.⁵² However, the Women's Movement in the 1970s rapidly changed the rape laws in the United States.⁵³ Women fought for rape laws that focused on the crime committed against the woman, as opposed to the common law statutes that were concerned with protecting the assailant from false accusations.⁵⁴ Women successfully argued that they should not have to receive substantial injury in order to prosecute an assailant.⁵⁵ In reaction to the Women's Movement, most states redefined rape and made it easier to prosecute rapists.⁵⁶ States also developed rape shield laws to protect a woman's privacy and encourage the reporting of rape.⁵⁷ Some states even went so far as to adopt the death penalty as punishment for rape.⁵⁸

⁵¹ Herman, *supra* note 24. Although the common-law definition of rape provided women with some protection, rape was difficult to prove. CLING, *supra* note 40, at 16. Sir Mathew Hale, Lord Chief Justice of the King's Bench, stated that rape "is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though ever so innocent". *Id.* at 16. Under early American law, the crime was considered rape only if the woman resisted throughout the entire rape. *Id.* The United States added additional safeguards such as a special corroboration rule for rape prosecutions and a prohibition against women claiming rape by their husband. Herman, *supra* note 24. Under this rule, if the woman could not show any evidence, such as semen or bruises, to corroborate her testimony, the court deemed her evidence insufficient to convict the assailant. *Id.*

⁵² Oberman, *supra* note 41, at 803. For centuries, states focused on whether the woman used the "utmost resistance" during the course of the rape. CLING, *supra* note 40, at 16. It was not until the 1950s that rape laws began to change. *Id.* The first version of the Model Penal Code was released in the 1950s, which focused on the assailant's behavior, not the victim's response. *Id.* Throughout the 1970s states continued to reform their rape statutes. Herman, *supra* note 24.

⁵³ Herman, *supra* note 24. The Women's Movement fought to change the focus from the victim's resistance to the assailant's actions because women who resisted rapists were more likely to suffer injury. *Id.* The identification of Rape Trauma Syndrome also played a role in reforming the rape statutes. *Id.* Rape Trauma Syndrome consists of "specific behavioral, somatic, and psychological reactions caused by a rape or sexual assault." 12 AM. JUR. PROOF OF FACTS 3D *Rape Trauma Syndrome* 401 § 1 (2008).

⁵⁴ Herman, *supra* note 24. Women also criticized rape laws for being focused on protecting men from false accusations rather than protecting women. *Id.* "According to these activists, the laws not only failed to adequately protect women, they often did women harm." *Id.* Early women's rights activists viewed rape laws as a sign of a woman's lack of autonomy and male dominance. MARIA BEVACQUA, *RAPE ON THE PUBLIC AGENDA* 18 (UPNE 2000).

⁵⁵ CLING, *supra* note 40, at 16. The Model Penal Code, first introduced in the 1950s, focused on the assailant's behavior, not the victim's. *Id.* Some states, such as New York and Michigan, repealed the corroboration requirement for rape in the 1970s. *Id.* Michigan also eliminated the resistance requirement. *Id.* at 17.

⁵⁶ *Id.*

⁵⁷ *Id.*; Herman, *supra* note 24. A rape shield statute is a "statute that restricts or prohibits the use, in rape or sexual-assault cases, of evidence about the victim's past sexual conduct."

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The Women's Movement also spurred reform of statutory rape law.⁵⁹ Prior to the Women's Movement, states seldom prosecuted statutory rape.⁶⁰ However, following this movement, enforcement of statutory rape laws increased drastically, driven by the rise in teenage pregnancy and the problems in enforcing the conventional rape laws.⁶¹ In particular, many states began to prosecute rape more rigorously when an older man impregnated a minor.⁶² States justified the rigorous

BLACK'S LAW DICTIONARY 1502 (9th ed. 2009). Previous to rape shield statutes, defendants could introduce evidence that the woman was unchaste to show the possibility of consent by the victim. Joe E. Smith, Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283 (1980). However, the admission of such evidence was criticized as being humiliating and prejudicial against the woman. *Id.* There was also a lack of consensus on whether a woman who engaged in non-marital intercourse was more likely to consent. *Id.*

Apparently in response to increasing attacks on the traditional rules of evidence as to chastity, a number of state legislatures, as well as Congress, have enacted rape shield laws which are designed to restrict or even prohibit the use of evidence respecting the chastity of the victim of rape or other sexual offense.

Id.

⁵⁸ Herman, *supra* note 24. See also *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty was grossly disproportionate to the crime of rape and in violation of the Eighth Amendment). This case shows that some states, such as Georgia, adopted the death penalty as a form of punishment for rape. *Id.* However, the Supreme Court did not uphold this method of punishment. *Id.* Louisiana's death penalty statute for statutory rape was recently struck down as unconstitutional. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008).

⁵⁹ Oberman, *supra* note 41, at 803. The Women's Christian Temperance Union and various feminist leaders led the charge to increase the age of consent. *Id.* Various feminist leaders also fought to increase the prosecution of statutory rape. *Id.*

⁶⁰ *Id.* States also had a difficult time prosecuting rape due to the barriers established by the common law rape statutes that states originally adopted. *Id.* at 808. Social views on statutory rape also impede the state's ability to prosecute a defendant indicted for statutory rape. *Id.* Society tends to view rape victims with skepticism and to excuse the defendant's behavior as normal. *Id.* at 816-17. For example, in *Michael M. v. Sonoma County*, the underage rape victim fit within California's statutory rape law and presented evidence that force was used against her. 450 U.S. 464, 482 (1980). However, Justice Blackmun seemed apologetic and defensive about enforcing the statutory rape law. *Id.* at 481-88 (Blackmun, J., concurring); Oberman, *supra* note 41, at 808 n.33.

⁶¹ Oberman, *supra* note 41, at 808. "In the 1990s, a series of studies indicated that adult men fathered a startling high number of babies born to young teen mothers." *Id.*

⁶² *Id.* Approximately eight percent of minor rape victims are impregnated from the rape and are abandoned by the father. Jim Rendon, *Jail Bated*, METROACTIVE, Dec. 18-24, 1997, <http://www.metroactive.com/papers/metro/12.18.97/cover/teensex-9751.html>. This puts a burden on states that often bear the cost of supporting these victims and their children through welfare. Oberman, *supra* note 41, at 811. In some states, prosecutors acknowledge that their top priority is to prosecute assailants who impregnate young teenage girls. *Id.* at 813. See also Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 483 n.151 (2000) (discussing the increased financial burden placed on states from rape-related teenage pregnancy).

prosecution of rape that resulted in pregnancy to teenagers on the grounds that impregnated teenagers had diminished life options and the state's need to regulate teenage pregnancy.⁶³ States also drastically increased the age of consent from ten years of age to sixteen in most states.⁶⁴

Today rape and statutory rape laws are intended to protect the victims, which is clear by the evolution of laws that have made it easier to prosecute a rapist.⁶⁵ However, rape remains a widespread problem throughout our country, every year affecting nearly 191,670 women over the age of twelve and another fifteen percent of children under the age of twelve.⁶⁶ Today's rape laws are more effective than in the past, but there is still room for improvement.⁶⁷

B. *Differences Between Rape and Statutory Rape Laws*

Today, states recognize rape and statutory rape as independent offenses comprising different elements.⁶⁸ Statutory rape is commonly

⁶³ Oberman, *supra* note 41, at 810. Twenty-eight percent of teenage mothers remain poor throughout their twenties and thirties. Medical Institute, *What Happens to Teen Mothers*, <http://www.medinstitute.org/public/118.cfm> (last visited Sept. 26, 2008). Seven percent will remain poor for the remainder of their lives. *Id.* Only seventy percent of teenage mothers finish high school or receive their GED. *Id.* Teen mothers are more likely to remain single parents and to suffer serious health and emotional problems. *Id.*

⁶⁴ Oberman, *supra* note 41, at 803. This was driven by the Women's Christian Temperance Union to protect females from laws and values that threatened their well-being. *Id.*

⁶⁵ See *supra* notes 51-56 and accompanying text (discussing how the Women's Movement reformed rape laws, inducing harsher punishment).

⁶⁶ Shannon M. Catalano, *Criminal Victimization, 2005*, BUREAU OF JUSTICE STATISTICS, Sept. 2006, <http://www.ojp.gov/bjs/pub/pdf/cv05.pdf>. In 2005, 191,670 people over the age of twelve were raped. *Id.* While reported rapes have decreased since 1973, an estimated 14.8% of all women are victims of rape at some point in their lives. Rape, Abuse & Incest National Network, *Who Are the Victims?*, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Sept. 26, 2008). In 1992, fifty-one percent of all rape victims were under the age of eighteen. Patrick A. Langan and Carolyn Wolf Harlow, *Child Rape Victims, 1992*, U.S. DEPT. OF JUSTICE, June 1994, <http://www.ojp.usdoj.gov/bjs/pub/ascii/chilrape.txt>.

⁶⁷ See *infra* Part II.B (discussing rape and statutory rape laws).

⁶⁸ The federal statutory rape statute states anyone commits statutory rape if he: knowingly engages in a sexual act with another person who—

- (1) has attained the age of 12 years but has not attained the age of 16 years; and
- (2) is at least four years younger than the person so engaging; or attempts to do so

18 U.S.C. § 2243 (2000). In the Model Penal Code rape is defined as:

A male who has sexual intercourse with a female not his wife is guilty of rape if:

defined as the “carnal knowledge of a juvenile under a stated age, with or without her consent.”⁶⁹ On the other hand, states define rape as the “unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will.”⁷⁰ The important difference between these crimes is that rape requires a showing of lack of consent, whereas statutory rape simply requires proof of penetration.⁷¹ States justify the differences between rape and statutory rape on the purposes behind these laws.⁷²

Legislatures enacted statutory rape laws to protect minors from their inexperience, vulnerability, and unawareness of the consequences that may result from engaging in sexual activities.⁷³ For these reasons,

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- (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
 - (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
 - (c) the female is unconscious; or
 - (d) the female is less than 10 years old.

MODEL PENAL CODE § 213.1.

⁶⁹ 65 AM. JUR. 2D *Rape* § 11 (2008). See also *Deen v. State*, 11 S.E.2d 595 (Ga. 1960) (stating that consent is not material in a statutory rape case); *Garnett v. State*, 632 A.2d 797 (Md. 1993) (holding that a twenty-year-old male who had an IQ of fifty-two and who engaged in consensual intercourse with a minor was guilty of statutory rape because mistake of age was immaterial).

⁷⁰ BLACK’S LAW DICTIONARY 1288 (8th ed. 2004). Many jurisdictions altered this definition to protect women. DRESSLER, *supra* note 25, at 631. States recognize that force may not always be necessary to prove rape. *Id.* Instead, most courts merge the concepts of force and non-consent, so that a woman who does not consent and is not subject to force may prosecute an assailant. *Id.* at 632–33. States no longer require women to use force against the assailant. *Id.* Furthermore, many states now find that a husband can rape his wife. 65 AM. JUR. 2D *Rape* § 30 (2008). Specifically, twenty-four states and the District of Columbia altered their statutes so that husbands can now be prosecuted for the rape of their wives. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468–70 (2003).

⁷¹ Juveniles are legally incapable of consenting to rape, so proof of penetration and age is all that is required for a conviction. 65 AM. JUR. 2D *Rape* § 11 (2008). Statutory rape is a strict liability offense. DRESSLER, *supra* note 25, at 166. Any defendant’s “erroneous belief, no matter how reasonable, that the female with whom he is having intercourse is old enough to consent, will not exculpate him.” *Id.* Rape, however, requires proof of lack of consent. *Id.* at 626. See also Sherry F. Colb, *The Pros and Cons of Statutory Rape Laws*, CNN, <http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html>.

⁷² See *infra* notes 73–77 and accompanying text (discussing the purpose of rape and statutory rape laws and the differences between the two types of laws).

⁷³ Oberman, *supra* note 41, at 818. Sherry Colb writes for CNN:

Though a statutory rape charge would not require proof of force or coercion, feminists observed, young girls were (and may continue to be) especially vulnerable to being raped by the adults in their lives. In

minors cannot legally give consent.⁷⁴ Therefore, a showing of mere penetration satisfies state and federal statutory rape laws.⁷⁵

On the other hand, an adult woman can give consent because she is of the legal age to make the decision to engage in sexual intercourse.⁷⁶ Since adult women can consent, rape requires proof that the victim did not consent to the sexual intercourse.⁷⁷ Therefore, the victim must show

one study, for example, seventy-four percent of women who had intercourse before age fourteen and sixty percent of those who had sex before age fifteen report having had a forced sexual experience.

Sherry F. Colb, *The Pros and Cons of Statutory Rape Laws*, CNN, Feb. 13, 2004, <http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html>.

⁷⁴ 65 AM. JUR. 2D *Rape* § 11. See, e.g., FLA. STAT. § 794.011(2)(a) (2002); GA. CODE ANN. § 16-6-1(a)(1) (2006); MICH. COMP. LAWS § 750.520d(1)(a) (2004); MISS. CODE ANN. § 97-3-65(1998); 18 PA. CONS. STAT. ANN. § 3122.1 (West 2000); *Stevens v. State*, 332 S.W.2d 482, 482 (Ark. 1960) (finding that it was legally impossible for the eleven-year-old victim to give consent); *Khianthalat v. State*, 935 So. 2d 583, 584 (Fla. Dist. Ct. App. 2006) (finding that the sixteen-year-old victim was legally incapable of giving consent); *Wightman v. State*, 656 S.E.2d 563, 566 (Ga. Ct. App. 2008) (“The fact that a victim is under the age of consent may supply the ‘against her will’ element in a forcible rape case since it shows that the victim is incapable of giving legal consent.”) (internal quotation omitted); *People v. Starks*, 701 N.W.2d 136, 141 (Mich. 2005) (holding that complainant, who was under the age of thirteen, could not give valid consent); *Phillipson v. State*, 943 So. 2d 670, 672 (Miss. 2006) (holding that a minor who fits within the state’s statutory rape statute does not have the legal power to give consent); *C.C.H. v. Philadelphia Phillies, Inc.*, 940 A.2d 336, 350 (Pa. 2008) (holding that the trial court erred by failing to instruct the jury that a person under the age of thirteen is legally incapable of giving consent); *Lewis v. State*, 191 S.W.3d 225, 228 (Tex. Crim. App. 2005) (finding that consent was not at issue in the charged offense because a victim under the age of seventeen is legally incapable of consenting); *State v. Deyo*, 915 A.2d 249, 253 (Vt. 2006) (holding that sexual intercourse is nonconsensual as a matter of law since the victim was under the age of sixteen); *Christensen v. Royal School Dist. No. 160*, 124 P.3d 283, 286 (Wash. 2005) (finding that a minor lacks the capacity to consent). The term “minor” is defined by state law, so the age of consent varies by state. See, e.g., ALA. CODE § 13A-6-70 (2000) (defining the age of consent as sixteen); ARIZ. REV. STAT. ANN. § 13-1405(a) (2004) (defining the age of consent as eighteen years of age); COLO. REV. STAT § 18-3-402 (2008) (defining the age of consent as seventeen years old).

⁷⁵ See 18 U.S.C. § 2243 (2006).

⁷⁶ RICHARD G. SINGER & JOHN Q. LA FOND, *EXAMPLES & EXPLANATIONS CRIMINAL LAW* 223–24 (Wolters Kluwer 2007). “If the woman consented to sexual relations, then the defendant could not be convicted of rape.” *Id.* at 223. However, an adult woman with a low IQ who is unable to understand the potential consequences of sexual intercourse is legally incapable of giving consent. *Id.* at 224. See *State v. Soura*, 796 P.2d 109 (Idaho 1990); 65 AM. JUR. 2D *Rape* § 7.

⁷⁷ SINGER & LA FOND, *supra* note 76, at 234. Many states are moving towards eliminating non-consent as an element of rape. *Id.* This is because states are recognizing the reality that some women submit to rape to protect themselves from physical harm. See Dr. Gail Reekie and Paul Wilson, *Rape, Resistance, and Women’s Rights of Self-Defense*, AUSTRALIAN INSTITUTE OF CRIMINOLOGY, <http://www.aic.gov.au/publications/proceedings/20/reekie.pdf>. Consent, however, is still a definitional component or affirmative defense in most states. *Id.* See also CAL. PENAL CODE § 261.6 (West 2008); TEX. PENAL CODE ANN. § 22.021 (Vernon 2003).

more than mere penetration.⁷⁸ Although states agree on the definition of rape and statutory rape, states treat rape differently.⁷⁹

C. Current Rape Laws

States punish rape more harshly than any crime except homicide.⁸⁰ The Model Penal Code and several states treat basic rape as a second-degree felony.⁸¹ However, these states elevate rape to a first-degree felony when aggravating factors are present.⁸² Aggravating factors generally include the commission of another felony, use of a deadly weapon, or infliction of serious injury on the victim.⁸³ Some states apply a more liberal standard, providing that evidence of substantial pain is sufficient to increase the rapist's sentence.⁸⁴ These states consider aggravating factors as an element of the crime.⁸⁵ Other states treat rape

⁷⁸ SINGER & LA FOND, *supra* note 76, at 220. "Generally the prosecution [must] prove: (1) The defendant had sexual intercourse (penetration by the penis of the vulva), (2) with a woman not his wife, (3) using physical force or the threat of force, and (4) without her consent." *Id.* at 220-21.

⁷⁹ *See infra*, Part II.C (discussing current rape laws). Statutory rape is committed with or without the consent of the victim. 65 AM. JUR. 2D *Rape* § 11. But, rape requires the act to be non-consensual. SINGER & LA FOND, *supra* note 76, at 234-35.

⁸⁰ DRESSLER, *supra* note 25, at 619. The maximum penalty in most states for rape is life imprisonment or a substantial number of years. *Id.* *See also* MICH. COMP. LAWS § 750.520b (2004) (setting life imprisonment as the maximum penalty); LA. REV. STAT. ANN. § 14:42.1 (2007) (setting the penalty for forcible rape to not less than five years, but not greater than forty years); OKLA. STAT. tit. 21, § 1115 (2007) ("Rape in the first degree is a felony punishable by death or imprisonment in the custody of the Department of Corrections, for a term of not less than five (5) years, life or life without parole.").

⁸¹ *See, e.g.*, ALA. CODE § 13A-6-62 (2000) (rape is a felony in the second degree if the assailant engages in sexual intercourse with a victim who is legally incapable of giving consent); ALASKA STAT. § 11.41.420 (2006); MODEL PENAL CODE § 213.1(1) (2008). For purposes of this Note, basic rape means rape without any aggravating or mitigating factors.

⁸² DRESSLER, *supra* note 25, at 647. *See also* ALA. CODE § 13A-6-62 (2000) (stating that rape is a crime in the first degree if the assailant uses force or engages in relations with someone who is physically helpless or incapacitated or younger than twelve); ALASKA STAT. § 11.41.410 (2006); MODEL PENAL CODE § 213.1(1) (2008).

⁸³ SINGER & LA FOND, *supra* note 76, at 235. *See also* MODEL PENAL CODE § 213.1(1)(d) (2008), which specifically states:

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

⁸⁴ *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 2 (2008) (defining substantial bodily injury as an injuries requiring extended convalescence to recover); WYO. STAT. ANN. § 6-2-302(a)(ii) (2008) (stating that extreme pain is enough to aggravate the rapist's sentence).

⁸⁵ *See* COLO. REV. STAT. § 18-3-402 (2004) (stating that sexual assault is a class four felony, unless the crime involved any of the factors listed in subsections (3), (3.5), (4), or (5) of the

as a felony and allow aggravating and mitigating factors to affect the sentencing of the crime within a pre-defined range.⁸⁶ In these states,

section, which may alter the class of felony the crime falls into); CONN. GEN. STAT. §§ 53a-70 to -73a (2007) (listing the elements of first through fourth degree sexual assault); DEL. CODE ANN. tit. 11, § 769 (2009) (stating that rape is a felony in the third degree, unless the assailant causes substantial bodily injury or engages in relations with a child under sixteen); HAW. REV. STAT. §§ 707-730 to -733 (2008) (defining sexual assault in the first, second, third, and fourth degrees); 720 ILL. COMP. STAT. 5/12-14, 14.1, 15, 16 (2008) (listing the elements for the degrees of rape); IND. CODE § 35-42-4-1 (2004) (defining the elements of rape as a class B and class A felony); IOWA CODE §§ 709.2-.4 (2003) (defining sexual abuse in the first, second, and third degrees); KY. REV. STAT. ANN. §§ 510.040, 510.050, 510.060 (West 2008) (listing the elements for first, second, and third degree rape); ME. REV. STAT. ANN. tit. 17, § 253 (2004) (defining the elements to determine if gross sexual assault is a Class B or C felony.); MD. CODE ANN., CRIMINAL LAW §§ 3-303, 304 (West 2006) (defining rape in the first and second degrees); MICH. COMP. LAWS §§ 750.520b-e (2004) (defining the elements of first through fourth degree criminal sexual conduct); MINN. STAT. ANN. §§ 609.342 to -.345, 609.3451 (2004) (defining criminal sexual conduct in the first through fifth degree); NEB. REV. STAT. § 28-320 (2008) (defining sexual assault in the second degree as one that results in bodily injury to the victim and sexual assault in the third degree as an assault that does not result in physical injury to the victim); NEV. REV. STAT. § 200.366 (2008) (defining the elements and exceptions for determining if sexual assault is a Class A felony); N.J. STAT. ANN. § 2C:14-2 (West 2006) (defining the elements of aggravated sexual assault, a first-degree felony, and sexual assault, a second-degree felony); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35 (McKinney 2008) (setting forth the elements of rape in the third, second, and first degrees respectively); N.C. GEN. STAT. §§ 14-27.2 to -27.5 (2008) (listing the elements of first and second degree rape and first and second degree sexual offense); N.D. CENT. CODE, § 12.1-20-07(2) (2004) (defining the elements of rape as a Class C felony, Class A misdemeanor, and Class B misdemeanor); OKLA. STAT. tit. 21, §§ 1114, 1116 (2008) (defining rape in the first and second degrees); R.I. GEN. LAWS §§ 11-37-2, 11-37-4, 11-37-6 (2004) (stating the elements of first, second, and third degree sexual assault); S.C. CODE ANN. §§ 16-3-652 to -654 (2004); S.D. CODIFIED LAWS § 22-22-1 (2004) (defining the elements of first, second, third, and fourth degree rape); TENN. CODE ANN. §§ 39-13-502 to -505 (2004) (stating the elements of aggravated rape, rape, aggravated sexual battery, and sexual battery); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon 2008) (defining the elements of sexual assault and aggravated sexual assault); VT. STAT. ANN. tit. 13, §§ 3252, 3253 (2006) (stating the elements of sexual assault and aggravated sexual assault); WASH. REV. CODE §§ 9A.44.040, 9A.44.050, 9A.44.060 (2009) (defining rape in the first, second, and third degrees respectively); W. VA. CODE §§ 61-8B-3 to -5 (2004) (listing the elements of sexual assault in the first, second, and third degrees); WIS. STAT. § 940.225 (2008) (defining the elements of first, second, third, and fourth degree sexual assault); WYO. STAT. ANN. §§ 6-2-302 to -304 (2004) (defining first, second, and third degree sexual assault).

⁸⁶ See ARIZ. REV. STAT. ANN. § 13-702.01 (2004); ARK. CODE ANN. § 5-14-103 (2004); CAL. PENAL CODE §§ 261, 264 (West 2006); Cal. R. of Ct. 4.421 (2006) (discussing aggravating factors); D.C. CODE § 22-3020 (2008) (permitting a victim to be punished up to one and a half times the maximum penalty for the crime committed if aggravating factors are present); FLA. STAT. § 794.011 (2)-(4) (2006); GA. CODE ANN., § 16-6-1 (2006); IDAHO CODE ANN. §§ 18-6101, 18-6109 (2004); KAN. STAT. ANN. §§ 21-3502, 21-4625 (2004) (defining rape and the aggravating factors); LA. REV. STAT. ANN. §§ 14:41 to -43 (2004); LA. CODE CRIM. PROC. ANN. art. 905.4-905.5 (2004) (defining the elements of the offense and the events that aggravate or mitigate the punishment within the given offense). MASS. GEN. LAWS ch. 265, § 22 (2006) (defining rape and the circumstances that can lengthen the sentence); MISS.

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aggravating factors are not an element of the crime.⁸⁷ In any case, aggravating circumstances increase the offender's sentence.⁸⁸ Although aggravating factors have the effect of increasing an assailant's sentence, states apply these factors differently, specifically the substantial bodily injury factor. Therefore, it is necessary to first analyze how states define substantial bodily injury.⁸⁹

D. Substantial Bodily Injury Defined

In most states, substantial bodily injury is an aggravating factor that increases the length of time a rapist can be punished by increasing the sentence or raising the degree of the felony for which the rapist is prosecuted.⁹⁰ States differ in how they define substantial or serious bodily injury.⁹¹ Overall, "[i]t is apparent . . . that something more than the physical injury normally associated with crimes of sexual abuse is

CODE ANN. §§ 99-19-355, 97-3-95 (2006); MO. ANN. STAT. § 566.030 (West 2006) (defining rape and the circumstances that enhance the sentence); MONT. CODE ANN. § 45-5-502 (2008) (defining sexual assault and the factors that increase or decrease the punishment); N.H. REV. STAT. ANN. § 632-A:2 (stating that aggravated sexual assault is a felony, but not a specific degree of felony); OHIO REV. CODE ANN. § 2907.02 (West 2008) (defining rape as first degree felony that is punishable according to the aggravating and mitigating factors that are present); OR. REV. STAT. § 137.080 (2004) (stating that the maximum penalty that can be imposed is determined by the aggravating circumstances); UTAH CODE ANN. § 76-5-402 (2006) (defining rape as a felony in the first degree and including elements the court can consider when imposing a sentence); VA. CODE ANN. § 18.2-61 (2008) (stating the elements of rape and that punishment can be imposed at the discretion of the court or jury). See also Tracy A. Bateman, Annotation, *Sufficiency of Bodily Injury to Support Charge of Aggravated Assault*, 5 A.L.R. 5th 243 (1992).

⁸⁷ *Aggravating and Mitigating Factors for Sex Crimes*, WESTLAW, available at 0030 SURVEYS 31.

⁸⁸ BLACK'S LAW DICTIONARY 259-60 (8th ed. 2004).

⁸⁹ See *infra* Part II.D. (defining substantial bodily injury among the states).

⁹⁰ See, e.g., ALASKA STAT. § 11.41.410 (2006) (serious physical injury elevates rape to a first degree felony); D.C. CODE § 22-3020 (2008) (listing the aggravating factors, including the infliction of serious bodily injury to the victim); FLA. STAT. ANN. § 921.0016 (2006) (elevating the punishment for crimes that cause physical injury to the victim); MICH. CODE ANN. § 46-18-303(4) (2004) (listing substantial bodily injury as an aggravating factor); TEX. PENAL CODE ANN. § 22.021(2)(a)(i) (Vernon 2004) (requiring serious bodily injury to support a finding of aggravated sexual assault).

⁹¹ Compare *Payne v. Unites States*, 932 A.2d 1095 (D.C. 2007) ("‘Serious bodily injury,’ which is required to be shown to prove aggravated assault while armed, is bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."), with TENN. CODE ANN. § 39-11-106 (2006) ("‘Bodily injury’ includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

required to establish this aggravating element.”⁹² State statutes generally define the severity of the injury required to increase a sentence.⁹³

⁹² Francis M. Dougherty, Annotation, *Sufficiency of Allegations or Evidence of Serious Bodily Injury to Support Charge of Aggravated Degree of Rape, Sodomy, or Other Sexual Abuse*, 25 A.L.R. 4th 1213 (1983).

⁹³ See, e.g., CAL. PENAL CODE § 12022.7(f) (West 2008) (“‘great bodily injury’ means a significant or substantial physical injury”); COLO. REV. STAT. §18-1-901(p) (2008) (specifically stating:

“Serious bodily injury” means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.)

; D.C. CODE § 22-3001 (2006) (“‘Bodily injury’ means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.”); HAW. REV. STAT. § 707-700 (2006) (“‘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.”); IND. CODE § 35-41-1-25 (2004) (“‘Serious bodily injury’ means bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus.”); IOWA CODE § 702.18 (2008) (specifically stating:

“Serious injury” means any of the following: a. Disabling mental illness. b. Bodily injury which does any of the following: (1) Creates a substantial risk of death. (2) Causes serious permanent disfigurement. (3) Causes protracted loss or impairment of the function of any bodily member or organ. c. Any injury to a child that requires surgical repair and necessitates the administration of general anesthesia. 2. “Serious injury” includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the age of four years.)

; 17-A ME. REV. STAT. ANN. tit. 17-A, § 2.23 (2006) (“‘Serious bodily injury’ means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health.”); MINN. STAT. ANN. § 609.02 (7a) (2004) (“‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.”); MONT. CODE ANN. § 45-2-101(66)(a) (2008) (specifically stating:

“Serious bodily injury” means bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment.)

; N.J. STAT. ANN. § 2C:11-1 (West 2004) (“‘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”); 30 PA.

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Some states apply a liberal construction of substantial bodily injury.⁹⁴ For example, Illinois considers any evidence of bodily harm sufficient to support a conviction of aggravated sexual assault.⁹⁵ Other states do not require proof of physical injury.⁹⁶ In those states, fear or mental injuries may constitute substantial bodily injury.⁹⁷

Other states strictly define substantial bodily injury for means of increasing a defendant's sentence.⁹⁸ For example, Texas defines

STAT. ANN. § 5502.3(b) (West 2006) (“[S]erious bodily injury’ means any bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.”); TENN. CODE ANN. § 39-11-106 (2006) (“Bodily injury’ includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty); TEX. CODE ANN. § 1.07(46) (Vernon 2004) (“Serious bodily injury’ means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”); UTAH CODE ANN. § 76-1-601 (2005) (“Substantial bodily injury’ means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.”); VT. STAT. ANN. tit. 13, § 1021 (2006) (“Serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes substantial loss or impairment of the function of any bodily member or organ or substantial impairment of health, or substantial disfigurement”); WASH. REV. CODE § 9A.04.110(4)(b) (2006) (“Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part”); WYO. STAT. ANN. § 6-1-104(x) (2004) (“Serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes miscarriage, severe disfigurement or protracted loss or impairment of the function of any bodily member or organ”).

⁹⁴ See *infra* notes 95–97 and accompanying text (discussing states that liberally construe their definition of substantial bodily injury).

⁹⁵ See, e.g., *People v. Wallace*, 495 N.E.2d 665, 667–68 (Ill. App. Ct. 1986). See *supra* Part II.E (discussing the hardships of pregnancy); *March of Dimes, Prenatal Care*, http://www.marchofdimes.com/hbhb_syndication/18622_513.asp (last visited Oct. 30, 2008) (discussing the side effects resulting from failure to seek prenatal care).

⁹⁶ *State v. Ingram*, 688 So. 2d 657, 665 (La. Ct. App. 1997) (finding that the victims’ fear that the assailant would harm them if they refused was sufficient to support a finding of aggravated rape); *Jackson v. State*, 968 S.W.2d 495, 501 (Tex. Ct. App. 1998) (finding that the victim’s fear of bodily injury was sufficient evidence to aggravate the assailant’s sentence); *State v. Baker*, 441 S.E.2d 551, 555 (N.C. 1994) (finding that the rape victim’s mental injuries, which included weight loss, depression, trouble sleeping, and a difficult time interacting with others to be serious personal injury); *Mata v. State*, 952 S.W.2d 30, 33 (Tex. Ct. App. 1997) (finding that threats of bodily injury were sufficient to aggravate the rapist’s sentence).

⁹⁷ See *Ingram*, 688 So. 2d at 665; *Baker*, 441 S.E.2d at 555; *Jackson*, 968 S.W.2d at 501; *Mata*, 952 S.W.2d at 33.

⁹⁸ See, e.g., MODEL PENAL CODE § 210.0 (2)–(3) (“[B]odily injury’ means physical pain, illness or any impairment of physical condition; [. . .] ‘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

substantial bodily injury as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”⁹⁹ However, even states with a strict definition of substantial bodily injury apply the term liberally.¹⁰⁰ Some states that fall within this category do not consider injuries that occur after the act of intercourse to be substantial bodily injury.¹⁰¹

Furthermore, most states do not require evidence of permanent injury to satisfy their definition of substantial bodily injury.¹⁰² Traditionally, states include broken bones, lacerations, torn hymen, and the like as substantial bodily injury.¹⁰³ States also generally consider injuries that must be treated by surgery as substantial bodily injury.¹⁰⁴

organ”); TEX. PENAL CODE ANN. § 1.07(46); WYO. STAT. ANN. §§ 6-1-104, 6-2-302(a)(ii) (2004) (“‘Serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes miscarriage, severe disfigurement or protracted loss or impairment of the function of any bodily member or organ.”).

⁹⁹ TEX. PENAL CODE ANN. § 1.07(46) (Vernon 2004). *See also* Webb v. State, 801 S.W.2d 529, 531 (Tex. Crim. App. 1990) (holding that an injury that results in surgery to repair a broken bone did not amount to serious bodily injury); Moore v. State, 802 S.W.2d 367, 369–70 (Tex. Ct. App. 1990) (holding that the victim’s injury which required reconstructive surgery was serious bodily injury because the victim would have suffered permanent disfigurement if he did not undergo surgery); Dougherty, *supra* note 92.

¹⁰⁰ *See, e.g.*, Camarillo v. State, 82 S.W.3d 529 (Tex. Ct. App. 2002) (holding that the victim suffered substantial bodily injury where she suffered a broken nose that impaired her ability to breathe); Moore, 802 S.W.2d at 369–70 (holding that injury still exists although surgery corrected disfigurement); Abadie v. State, 101 S.W.2d 238, 239 (Tex. Crim. App. 1937) (finding that evidence that the victim was weak, unable to work, and had to remain in the hospital for fourteen days was sufficient to support a finding of substantial bodily injury).

¹⁰¹ Dougherty, *supra* note 92. *Compare* State v. Blackstock, 333 S.E.2d 245, 251 (N.C. 1985) (finding that evidence of serious personal injury inflicted after the assault was sufficient to support a conviction of aggravated assault because the injury was inflicted for the purpose of concealing the rapist’s criminal acts and aiding his escape), *with* State v. Gray, 233 S.E.2d 905, 919–20 (N.C. 1977) (finding that evidence of stabbing that occurred after rape was not evidence of substantial bodily injury for the rape case).

¹⁰² Dougherty, *supra* note 92. *See, e.g.*, State v. Mace, 665 S.W.2d 655 (Mo. Ct. App. 1984) (holding that victim who suffered no permanent injury to her vaginal area or disfiguring injury of any kind suffered substantial bodily injury).

¹⁰³ *See* People v. Williams, 115 Cal. App. 3d 446, 454 (1981) (finding that evidence of a torn hymen and accumulation of blood was sufficient to support a finding of substantial bodily injury); People v. Culton, 92 Cal. App. 3d 113, 117 (1979) (finding evidence of bruises, abrasions, and broken bones to support a conviction of substantial bodily injury); State v. Roberts, 235 S.E.2d 203, 213 (N.C. 1977) (holding that injuries constituted serious bodily injury where the victim’s teeth would eventually fall out and there was pain and impairment in the function of the jaw).

¹⁰⁴ Dougherty, *supra* note 92. *E.g.*, State v. Lilly, 450 S.E.2d 546, 548–49 (N.C. Ct. App. 1994) (holding that victim sustained serious personal injuries where she had to have surgery that required three days’ recovery time).

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When minors are rape victims, all states tend to broaden the definition of substantial bodily injury.¹⁰⁵ Whereas adult rape victims usually have to prove injury beyond that which normally results from rape, minors who suffer pain and bleeding have been successful at arguing that they suffered substantial bodily injury.¹⁰⁶ In addition, states willingly recognize pregnancy as substantial bodily injury in cases involving minors.¹⁰⁷

E. Complications of Pregnancy, Abortion, and Miscarriage

Pregnancy shares many characteristics with injuries that are traditionally considered substantial bodily injury.¹⁰⁸ All pregnancies end in one of three ways: childbirth, abortion, or miscarriage.¹⁰⁹ Every pregnancy, however, has significant physical and psychological effects.¹¹⁰

1. Childbirth

“Childbirth is an agonizing experience.”¹¹¹ When labor begins, the woman feels pain in her abdomen.¹¹² Powerful uterine contractions and

¹⁰⁵ See, e.g., *People v. Robinson*, 642 N.E.2d 1317, 1321 (Ill. App. Ct. 1994) (finding aggravated assault where there was medical evidence of a perforated hymen and two bruises on the vagina of a ten-year-old victim); *McCoy v. State*, 856 N.E.2d 1259 (Ind. Ct. App. 2006) (finding pregnancy of a minor was sufficient to elevate statutory rape to a Class A felony although Indiana has never found such in an adult rape case).

¹⁰⁶ See, e.g., *U.S. v. Buckley*, 195 F.3d 1034 (8th Cir. 1999) (finding that evidence of pain and bleeding was sufficient to support a finding of serious bodily injury).

¹⁰⁷ See, e.g., *People v. Cross*, 190 P. 3d 706, 709 (Cal. 2008) (arguing that “‘carrying a baby for 22 weeks . . . in a 13-year-old body’ was significant or substantial”).

¹⁰⁸ See *infra* Part III.B (comparing the physical and mental effects of pregnancy, miscarriage, and abortion to other injuries courts commonly consider to be substantial bodily injury).

¹⁰⁹ *Cross*, 190 P.3d at 717. “Pregnancy can have one of the three results—childbirth, abortion or miscarriage. Childbirth is an agonizing experience. An abortion by whatever method used constitutes a severe intrusion into a woman's body. A miscarriage speaks for itself.” *Id.* (internal quotations omitted). Each year over 32,000 women become pregnant in the U.S. as the result of rape and approximately fifty percent of these pregnancies end in abortion. Illinois General Assembly, Sexual Assault Survivors Emergency Treatment Act Amendments Sec. 2.2(a)(2), www.ilga.gov/legislation/95/SB/09500SB16161enr.htm (last visited Sept. 29, 2008).

¹¹⁰ “Pregnancy is a sui generis condition that cannot fairly be described as trivial or insignificant.” *Cross*, 190 P.3d at 717. See also *State v. Jones*, 889 S.W.2d 225, 231 (Tenn. Crim. App. 1994) (“The physical discomfort [of pregnancy] is apparent. Obviously, there would be a need for medical care.”).

¹¹¹ *Cross*, 190 P.3d at 717.

¹¹² Ezine Articles, *What Do Labor Contraction and Labor Pains Feel Like?*, <http://ezinearticles.com/?What-Do-Labor-Contraction-and-Labor-Pains-Feel-Like?&id=492295> (last visited Sept. 29, 2008).

stretching of the cervix, vagina, and perineum produce pressure on the abdomen and pelvic area, causing severe pain.¹¹³ The woman's cervix dilates, and as the baby approaches, the perineum stretches, causing a burning sensation.¹¹⁴ As the baby progresses, most women tear.¹¹⁵ Furthermore, other complications may arise from the pregnancy.¹¹⁶

"Every organ system in a woman's body changes during pregnancy in order to meet the needs of the developing fetus and to prepare the woman for delivery."¹¹⁷ Many pregnant women feel faint, feel tired, hyperventilate, suffer lower back pain, have severe personality changes, and experience pain and discomfort.¹¹⁸ The cardiac system increases output during pregnancy by approximately one-third.¹¹⁹ A pregnant woman's heart rate increases by fifteen to twenty beats per minute.¹²⁰ The developing fetus displaces organs in order to make room to grow.¹²¹ Pregnancy also causes increased congestion, and breathing through the nose may become more difficult.¹²² Furthermore, in the later stages of

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See American Pregnancy Association, *Pregnancy Complications*, <http://americanpregnancy.org/pregnancycomplications/index.htm> (last visited Sept. 29, 2008). Such complications as bacteria build-ups and infections may result from pregnancy. *Id.* "Pregnant adolescents are at increased risk for complications including low birth weight, infant mortality, preterm delivery, urinary tract infections, pyelonephritis, preeclampsia, and abortion. Unmarried teens (but not married teens) who become mothers are at increased risk for depressive symptoms later in life." (Footnotes omitted.) See also The Medical Institute, *What Happens to Teen Mothers?*, <http://www.medinstitute.org/public/118.cfm> (last visited Sept. 29, 2008).

¹¹⁷ 41 AM JUR. PROOF OF FACTS 2D § 3 (2008). A pregnant woman experiences changes to her cardiovascular system, abdominal organs, and endocrine system. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* The woman's heart rate increases during the first few months of pregnancy and remains elevated throughout the course of the pregnancy. *Id.*

¹²⁰ *Id.* Other changes to the cardiovascular system include an increased risk of hemorrhage, a drop in cardiac output, increased blood volume, and increased coagulation of blood. *Id.*

¹²¹ *Id.* The bladder is displaced upward and forward as the uterus enlarges, the kidneys and uterus become dilated due to the compression of the uterus, the woman's intestines compress, and her diaphragm is raised approximately four centimeters. *Id.* The uterus enlarges to about three times its normal size. Teenwire.com, *How a Woman's Body Changes During Pregnancy*, [http://www.plannedparenthood.org/teen-talk/teen-pregnancy/healthy-pregnancy/how-womans-body-changes-during-pregnancy-25336.htm?-utma=1.1040638891.1264613946.1264613946.1264613946.1&_utmb=1.6.10.1264613946&utmcc=1&utmcr=-&_utmz=1.1264613946.1.1.utmcsr=\(direct\)|utmccn=\(direct\)|utmcmd=\(none\)&_utmv=-&_utmk=58079530](http://www.plannedparenthood.org/teen-talk/teen-pregnancy/healthy-pregnancy/how-womans-body-changes-during-pregnancy-25336.htm?-utma=1.1040638891.1264613946.1264613946.1264613946.1&_utmb=1.6.10.1264613946&utmcc=1&utmcr=-&_utmz=1.1264613946.1.1.utmcsr=(direct)|utmccn=(direct)|utmcmd=(none)&_utmv=-&_utmk=58079530) (last visited Sept. 29, 2008).

¹²² 41 AM JUR. PROOF OF FACTS 2D § 3 (2008). Other changes to the respiratory system include the diaphragm having greater movement when the woman is breathing, an increased rate of breathing, and she is likely to suffer increased congestion of respiratory tract. *Id.*

pregnancy, the woman's mobility is reduced and her gait unsteady.¹²³ Permanent changes to the woman's body may include stretch marks, change in breast shape, varicose veins, increased weight, loss of calcium, and increased proclivity for hemorrhoids.¹²⁴ Therefore, the woman experiences significant injuries, many of which a woman experiencing an abortion or miscarriage will also suffer.¹²⁵

2. Abortion

"An abortion by whatever method used constitutes a severe intrusion into a woman's body."¹²⁶ Fifty percent of all rape-related pregnancies end in abortion.¹²⁷ There are two types of abortion procedures used: surgical abortions and medical abortions.¹²⁸ During a surgical abortion, the physician dilates the cervix, scrapes the uterus, and suctions the fetus and placenta.¹²⁹ This procedure commonly results in

¹²³ *Id.* Because of this, the woman is more susceptible to falls. *Id.* Since the woman's calcium level decreases until the thirty-fourth through thirty-sixth week, this may lead to greater injuries. *Id.*

¹²⁴ Revolution Health, *How to Counter the Effects of 5 Common Post-Pregnancy Problems*, <http://www.revolutionhealth.com/healthy-living/pregnancy/postpartum-care-mom/recovery-healing/post-pregnancy-problems> (last visited Oct. 1, 2008).

¹²⁵ See *infra* Part II.E.2-3 (discussing the mental and physical effects of abortion and miscarriage).

¹²⁶ *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008).

¹²⁷ Illinois General Assembly, *Sexual Assault Survivors Emergency Treatment Act Amendments Sec. 2.2(a)(2)*, www.ilga.gov/legislation/95/SB/09500SB1618enr.htm (last visited Sept. 29, 2008) (discussing in section 2.2(a)(2) the extent of rape-related pregnancy).

¹²⁸ MARIA COSTA, *ABORTION*, 174-75 (ABC-CLIO 1996).

¹²⁹ The type of surgical procedure used depends upon the state of pregnancy the woman is in. American Pregnancy Association, *Surgical Abortion Procedures*, <http://www.americanpregnancy.org/unplannedpregnancy/surgicalabortions.html> (last visited Sept. 29, 2008). Suction aspiration is the surgical abortion performed during the first six to twelve weeks. *Id.* This procedure is administered by placing the patient under anesthesia, using a tenaculum to hold the cervix in place, dilating the cervix with cone shaped rods, and then inserting a long plastic suction device to suck out the fetus and placenta. *Id.* While the procedure only lasts ten to fifteen minutes, recovery can take hours. *Id.* A pregnancy within its twelfth to fifteenth week is typically aborted by a dilation and curettage procedure. *Id.* A looped shaped knife scrapes the lining of the uterus, removing the placenta and fetus. *Id.* A cannula may be inserted for a final suctioning. *Id.* A surgical procedure known as dilation and evacuation is administered during weeks fifteen through twenty-one of the pregnancy. *Id.* This procedure is performed by physically inserting a laminaria or a dilator inside the cervix. *Id.* The next day, the doctor will clamp a tenaculum to the cervix to keep the cervix in shape and insert cone shaped rods to keep the cervix dilated. *Id.* Next, the lining will be removed by a looped shaped knife and scraped to remove any residue. *Id.* Finally, any remains will be suctioned out. *Id.* This procedure is generally performed at the hospital since there are greater risks of complications. *Id.*

cramping and soreness.¹³⁰ More severe complications, such as bleeding, damage to the uterus, and infection, may arise depending on the age and health of the patient.¹³¹ Medical abortions are available only during the first few weeks of pregnancy and are conducted by digesting or injecting a drug into the woman's body.¹³² The side effects typically include bleeding, fatigue, nausea, weakness, and morning sickness.¹³³ The long-term effects of both types of abortions typically include fertility and psychological problems.¹³⁴ In either case, the woman experiences another unwanted physical invasion of her body, as is also the case with miscarriage and childbirth.¹³⁵

3. Miscarriage

"A miscarriage speaks for itself."¹³⁶ Women who have a miscarriage may experience symptoms for a few weeks up to a month afterwards.¹³⁷ Frequent side-effects include bleeding, abdominal pain, breast discomfort, and infection.¹³⁸ Roughly half of all women who experience a miscarriage undergo a dilation and curettage (D&C) procedure to

¹³⁰ COSTA, *supra* note 128, at 174–75. *See also Surgical Abortion Procedures, supra* note 129. Most women will feel faint and experience cramping, nausea, and sweating. *Id.* Other side effects include heavy or prolonged bleeding, blood clots, damage to the cervix, perforation of the uterus, infection due to retained products of conception, and infection caused by a sexually transmitted disease or bacteria being introduced to the uterus. *Id.* A dilation and curettage abortion increases the risk of perforation of the uterus. *Id.* A dilation and evacuation abortion also poses an increased risk of blood clots, perforation of the uterus, infection, and damage to the uterus lining or cervix. *Id.*

¹³¹ COSTA, *supra* note 128, at 174–75. *See also Surgical Abortion Procedures, supra* note 129.

¹³² COSTA, *supra* note 128, at 175. Drugs, such as Mifepristone or Methotrexate are administered. *Id.* *See also Surgical Abortion Procedures, supra* note 129. After the drugs are administered, contractions will expel the fetus. *Surgical Abortion Procedures, supra* note 129. This will last anywhere from a few hours to a few days. *Id.* However, this procedure is available only during the first few weeks of the first trimester. *Id.* Additionally, the procedure is unsuccessful ten percent of the time, requiring further surgical procedures. *Id.*

¹³³ COSTA, *supra* note 128, at 175.

¹³⁴ COSTA, *supra* note 128, at 177.

¹³⁵ *See People v. Cross*, 190 P.3d 706, 709 (Cal. 2008) (comparing the invasiveness of an abortion to that of a heart transplant because it is an operation requiring anesthesia and drugs to control the bleeding).

¹³⁶ *Id.* at 717. Approximately ten to twenty-five percent of all pregnancies result in miscarriage. American Pregnancy Association, *Miscarriage*, <http://www.americanpregnancy.org/pregnancycomplications/miscarriage.html> (last visited Sept. 29, 2008).

¹³⁷ American Pregnancy Association, *After a Miscarriage: Physical Recovery*, <http://www.americanpregnancy.org/pregnancyloss/mcphysicalrecovery.html> (last visited Sept. 29, 2008) [hereinafter *After a Miscarriage*]. The length of recovery depends on how far the pregnancy was advanced. *Id.*

¹³⁸ *Id.*

remove excess tissue that her body did not release.¹³⁹ A D&C procedure is a surgery that involves dilating the uterus and removing the tissue that was not expelled.¹⁴⁰ Despite the obvious physical effects, as well as those caused by pregnancy and abortion, states continue to treat rape-related pregnancy differently.¹⁴¹

F. State Treatment of Rape-Related Pregnancy

States do not treat rape-related pregnancy uniformly when determining an assailant's sentence.¹⁴² States addressing the issue fall into four categories: (1) include pregnancy in a state statute to aggravate the assailant's sentence;¹⁴³ (2) exclude evidence of rape-related pregnancy;¹⁴⁴ (3) always include pregnancy as substantial bodily injury;¹⁴⁵ or (4) include pregnancy as an aggravating factor on a case-by-case basis, depending on the outcome and circumstances surrounding the pregnancy.¹⁴⁶ These approaches are further discussed below.

1. State Statutes

Wisconsin, Michigan, and Nebraska have adopted statutes that include pregnancy as an aggravating factor to rape.¹⁴⁷ Wisconsin's statute aggravates sexual assault to a first-degree felony when pregnancy results, whereas Nebraska and Michigan include pregnancy in their

¹³⁹ American Pregnancy Association, *D&C Procedure After a Miscarriage*, <http://www.americanpregnancy.org/pregnancycomplications/dandc.html> (last visited Sept. 29, 2008) [hereinafter *D&C Procedure*]. Most miscarriages occur within the first thirteen weeks of pregnancy. *Id.* Treatment is often necessary to prevent hemorrhaging and infection. *Id.* A D&C procedure removes fetal tissue that the woman's body does not expel on its own. *Id.*

¹⁴⁰ *Id.* The tissue is either removed by suction or by scraping the uterus wall with a curette instrument. *Id.*

¹⁴¹ See *infra* Part II.F. (discussing how some states exclude evidence of rape-related pregnancy while others consider it an aggravating factor).

¹⁴² See *infra* Parts II.F.1-4 (discussing how states treat evidence of rape-related pregnancy). Uniform laws help deter crime because severity and certainty are the greatest predictors of crime rate. JAMES W. BURFEIND & DAWN JEGNUM BARTUSCH, *JUVENILE DELINQUENCY* 260 (Jones & Bartlett Publishers 2006).

¹⁴³ See *infra* Part II.F.1 (discussing Wisconsin's, Michigan's, Nebraska's, and Florida's statutes).

¹⁴⁴ See *infra* Part II.F.2 (discussing how some states do not allow evidence of rape-related pregnancy to be introduced at trial).

¹⁴⁵ See *infra* Part II.F.3 (discussing Tennessee's approach of always considering pregnancy to be substantial bodily injury absent a statute).

¹⁴⁶ See *infra* Part II.F.4 (discussing states that look at extraneous factors to determine if pregnancy is substantial bodily injury).

¹⁴⁷ MICH. COMP. LAWS § 750.520a(n) (2004); NEB. REV. STAT. § 28-318(4) (2008); WISC. STAT. § 940.225(1)(a) (2008).

definitions of bodily injury.¹⁴⁸ Despite this difference, all three statutes increase the assailant's sentence in all cases that result in pregnancy.¹⁴⁹

Florida is the only state that has adopted a statute that applies solely to minors who are impregnated as a result of rape.¹⁵⁰ Florida's statute makes it an independent felony offense to impregnate a minor.¹⁵¹ Consent and lack of chastity are not a defense to this crime.¹⁵² However, not all states recognize pregnancy as substantial bodily injury.¹⁵³

2. States That Do Not Treat Pregnancy as Substantial Bodily Injury

According to other courts, pregnancy is not substantial bodily injury.¹⁵⁴ The *United States v. Yankton* court defined substantial bodily

¹⁴⁸ MICH. COMP. LAWS § 750.520a(l) (2004) ("Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."); NEB. REV. STAT. § 28-318(4) (2008) ("Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."); WIS. STAT. § 940.225(1)(a) (2008) (defines the Class B felony of 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"). "These types of physical manifestations to a woman's body during pregnancy and delivery clearly fall within the definition of 'bodily injury,' for the manifestations can and do cause damage to the body." *People v. Cathey*, 681 N.W.2d 661, 666 (Mich. App. 2004).

¹⁴⁹ MICH. COMP. LAWS § 750.520b(1)(f) (2004) ("A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists: . . . (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration."); NEB. REV. STAT. § 28-319(2) (2008) ("Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence."). In *State v. Beyer*, 422 N.W.2d 462, 462 (Wis. App. 1988), the court stated that the sentence could be aggravated under Wisconsin's statute even though the pregnancy ended in a miscarriage. However, in this case, the evidence of the pregnancy was unpermitted since it was only introduced to uphold the credibility of the victim. *Id.*

¹⁵⁰ FLA. STAT. § 827.04(3) (2006).

¹⁵¹ *Id.* ("A person 21 years of age or older who impregnates a child under 16 years of age commits an act of child abuse which constitutes a felony of the third degree.").

¹⁵² FLA. STAT. § 827.04(3) (2006). See also *Galindez v. State*, 955 So. 2d 517 (Fla. 2007) (applying FLA. STAT. § 827.04(3)).

¹⁵³ See *infra* Part II.F.2 (discussing states that fail to recognize pregnancy as substantial bodily injury).

¹⁵⁴ *United States v. Yankton*, 986 F.2d 1225, 1229-30 (8th Cir. 1993). However, the Eighth Circuit subsequently held that bodily injury resulting from a pregnancy was sufficient to aggravate a sentence, although the pregnancy itself was not substantial bodily injury. *United States v. Guy*, 340 F.3d 655, 658 (8th Cir. 2003). The Court found substantial bodily injury because of the factors accompanying that pregnancy, such as the complete tear between the victim's vagina and rectum that resulted from the rape. *Id.* See also *State v. Moore*, 585 A.2d 864, 886-87 (N.J. 1991) (finding that pregnancy and its termination are not aggravating factors); *Hynes v. Bd. of Educ. of Bloomfield Twp., Essex County*, 461 A.2d

injury as “injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”¹⁵⁵ The *Yankton* court reasoned that including pregnancy within this definition would stretch the language of the statute too far.¹⁵⁶ The court noted that serious bodily injury should include only the immediate trauma resulting from rape.¹⁵⁷

Although states are nearly unanimous in admitting evidence of pregnancy in statutory rape cases because it proves penetration,¹⁵⁸ some states exclude evidence of rape-related pregnancy in rape trials with adult victims.¹⁵⁹ This determination depends on the nature of the offense

1184, 1186 (N.J. Super. Ct. 1983) (finding that pregnancy was not injury in a disability discrimination case).

¹⁵⁵ *Yankton*, 986 F.2d at 1229.

¹⁵⁶ *Id.* “Given the guideline language used and the absence of any record, Sentencing Commission history, or commentary to the contrary, we find that the Sentencing Commission did not intend the situation presented by the facts in this case to be addressed by the specific offense characteristic adjustment in § 2A3.1(b)(4).” *Id.* In this case, T.L., a minor, was impregnated by her rapist. *Id.* at 1230. Whether her pregnancy could be considered substantial bodily injury was an issue of first impression for the court. *Id.* at 1229. Substantial bodily injury is defined in that jurisdiction as “injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” *Id.* Relying on the sentencing guidelines, the court found that including pregnancy in the definition of substantial bodily injury would stretch the definition too far because only immediate physical trauma was supposed to be considered. *Id.*

¹⁵⁷ *Id.* “[S]erious bodily injury easily includes any immediate serious physical trauma resulting from a rape.” *Id.*

¹⁵⁸ See *Martin v. Commonwealth*, 476 S.W.2d 834, 835 (Ky. 1972) (admitting evidence of the impregnation of a teenage girl into the defendant’s trial for rape); *State v. Henderson*, 139 A.2d 515, 518 (Me. 1958) (permitting the introduction of evidence of thirteen-year-old victim’s pregnancy to corroborate her testimony); J.A. Bock, Annotation, *Admissibility, in Nonstatutory Rape Prosecution, of Evidence of Pregnancy of Prosecutrix*, 62 A.L.R.2d 1083 (1958).

¹⁵⁹ Bock, *supra* note 158; 65 AM. JUR. 2D *Rape* § 43 (2008) (“In prosecutions for forcible rape, some courts have determined that evidence of the prosecutrix’s subsequent pregnancy is properly admitted, but other courts have taken the view that evidence of the pregnancy of the prosecutrix is irrelevant and inadmissible in prosecutions for forcible rape.”). Compare *State v. Chambers*, 309 P.2d 1055, 1057 (Wash. 1957) (holding that evidence of rape-related pregnancy was irrelevant and inadmissible), and *People v. Loftus*, 11 N.Y.S. 905, 907 (1890) (holding that evidence that the victim became pregnant as a result of rape is irrelevant and should not be admitted), with *Hall v. State*, 378 So. 2d 1193, 1194 (Ala. Crim. App. 1979) (holding that evidence of pregnancy after forcible rape was admissible), and *People v. Seeley*, 75 N.Y.S.2d 833, 835 (Rockland Co. Ct. 1948) (holding that birth of child is evidence that intercourse occurred, but is not sufficient to establish that the defendant was the assailant). See also 35A N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* § 713 (“The timely pregnancy of any female, or birth of a child, is evidence that sexual intercourse was performed.”).

and the state's rape shield statute.¹⁶⁰ The courts that draw this distinction between rape and statutory rape validate it on the grounds that pregnancy establishes that the crime has been committed in statutory rape cases.¹⁶¹ Yet, in adult rape cases, pregnancy merely establishes that intercourse occurred; it does not prove lack of consent.¹⁶² Therefore, proof of pregnancy does not prove the commission of a crime in adult rape cases as it does in statutory rape cases.¹⁶³

Courts that exclude the admission of pregnancy as evidence in forcible rape cases base their decision on the prejudicial effect that introducing such evidence might have on jurors.¹⁶⁴ In *State v. Chambers*, the Washington Supreme Court determined that evidence of rape-related pregnancy was irrelevant to the trial.¹⁶⁵ The court reasoned that the admission of rape-related pregnancy did not establish the *corpus delicti* of the crime and was highly prejudicial.¹⁶⁶ Conversely, not all courts are this stringent when applying the definition of substantial bodily injury to pregnancy.¹⁶⁷

3. States That Always Treat Pregnancy as Substantial Bodily Injury

Tennessee is the only state that always considers pregnancy to be substantial bodily injury without reference to a statute.¹⁶⁸ In Tennessee, the age of the victim does not affect how the courts determine whether

¹⁶⁰ See *Stallings v. State*, 508 N.E.2d 550, 553 (Ind. 1987) ("Any evidence of the victim's past sexual conduct, including the fact of the victim's pregnancy, is inadmissible under the rape shield act."); *Moore v. State*, 393 N.E.2d 175, 177 (Ind. 1979) (holding that evidence of the victim's rape-related pregnancy was inadmissible under the rape shield statute). See also Bock, *supra* note 158. Courts allow evidence of rape-related pregnancy to be admitted in statutory rape cases. *Id.*

¹⁶¹ *Chambers*, 309 P.2d at 1057. See *supra* Part II.B (discussing the elements of rape and statutory rape).

¹⁶² See DRESSLER, *supra* note 25, at 166; 35A N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* § 713; 65 AM. JUR. 2D *Rape* § 11 (2008).

¹⁶³ See generally 65 AM. JUR. 2D *Rape* § 11 (2008) (discussing the difference between statutory rape and ordinary rape and how each law views consent).

¹⁶⁴ *Loftus*, 11 N.Y.S. at 907 (finding that pregnancy was not relevant to the alleged crime of rape); *Chambers*, 309 P.2d at 1057 (holding that evidence of rape-related pregnancy was inadmissible because it had a prejudicial effect and had no bearing on the element of consent).

¹⁶⁵ 309 P.2d at 1056.

¹⁶⁶ *Id.* The corpus delicti is the "fact of a transgression; ACTUS REUS." BLACK'S LAW DICTIONARY 395 (9th ed. 2009).

¹⁶⁷ See *infra* Part II.F.3 (discussing states that always treat pregnancy as substantial bodily injury).

¹⁶⁸ See *State v. Smith*, 910 S.W.2d 457, 461 (Tenn. 1995) (finding that pregnancy was substantial bodily injury sufficient to aggravate the rapist's sentence); *State v. Jones*, 889 S.W.2d 225, 231 (Tenn. Crim. App. 1994).

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the rapist receives an aggravated sentence.¹⁶⁹ This is because “[t]he physical discomfort [of pregnancy] is apparent. Obviously, there would be a need for medical care.”¹⁷⁰ For these reasons, pregnancy fits within the state’s definition of substantial bodily injury.¹⁷¹

4. States That Find Pregnancy to be Substantial Bodily Injury on a Case-by-Case Basis

Other courts instruct the jury that an assailant’s sentence can be increased when the rape results in pregnancy, on a case-by-case basis.¹⁷² Courts consider such elements as the victim’s age, the outcome of the pregnancy, and the complications that arise throughout the course of the pregnancy when determining whether the punishment should be aggravated.¹⁷³

A recent California decision found that the rape of a thirteen-year-old girl resulting in an abortion was substantial bodily injury, sufficient to support enhancement of the assailant’s sentence.¹⁷⁴ Prior to this

¹⁶⁹ See *Jones*, 889 S.W.2d at 231 (finding that a pregnancy is substantial bodily injury, independent of the age of the victim).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Tennessee defines bodily injury as “a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty” TENN. CODE ANN. § 39-11-106(2) (2006).

¹⁷² *United States v. Shannon*, 110 F.3d 382, 396–87 (7th Cir. 1997) (holding that sexual intercourse with a thirteen-year-old girl that resulted in pregnancy was a crime of violence increasing the base offense level); *People v. Cross*, 190 P.3d 706, 712 (Cal. 2008) (finding that it was proper to instruct the jury that uncomplicated pregnancy of a minor was substantial bodily injury, but determining that this instruction does not need to be given in all rape cases in which pregnancy results); *Smith*, 910 S.W.2d at 461 (finding that pregnancy of fourteen-year-old sexual assault victim satisfied the enhancement requirements of the state’s statutory rape law). Courts have been more willing to find that pregnancy is substantial bodily injury when the pregnancy is accompanied by other aggravating factors. See *People v. Sargent*, 86 Cal. App. 3d 148, 152 (1978) (finding that pregnancy can constitute substantial bodily injury in the forcible rape of a minor).

¹⁷³ *Cross*, 190 P. 3d at 717. “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.” *Id.* (Corrigan, J., concurring). See also *Shannon*, 110 F.3d at 396–97; *Sargent*, 86 Cal. App. 3d at 152.

¹⁷⁴ *Cross*, 190 P.3d at 708. In this case, a thirteen-year-old girl was repeatedly raped by her stepfather. *Id.* at 708–709. The victim occasionally rejected these acts, but was reluctant to do so for fear that her cell phone would be taken away. *Id.* at 709. The victim’s stepfather took her to the hospital where they learned she was twenty-two weeks pregnant and near the end of the second trimester. *Id.* The next day the victim’s stepfather took her back to the hospital for an abortion. *Id.* The abortion had to be performed surgically since the victim was in a late stage of pregnancy. *Id.* At trial, the jury was instructed that they could consider “either the pregnancy or the abortion, or both, as a basis for the allegation of personal infliction of great bodily injury.” *Id.* In California, great bodily injury is defined as “a significant or substantial physical injury.” CAL. PENAL CODE § 12022.7(f) (West 2003).

decision, the court had found substantial bodily injury only when the pregnancy was accompanied by other injuries or the pregnancy involved complications.¹⁷⁵ However, the court split on whether the jury should be instructed that pregnancy is substantial bodily injury in all cases.¹⁷⁶ Although the majority determined that the issue did not need to be decided in that case, the concurring opinion reasoned that, regardless of the outcome, pregnancy has a substantial effect on the woman's body and her right to privacy.¹⁷⁷

The concurring opinion noted that "[b]ecause the impact of any pregnancy is so great, it is illogical to treat some pregnancies as trivial, or to suggest that juries could, somehow, determine that any criminally imposed pregnancy can be considered minor."¹⁷⁸ On the other hand, the California Supreme Court and other court systems elect to make this determination on a case-by-case basis.¹⁷⁹ Therefore, it is not clear here, or in other courts that apply this standard, whether uncomplicated pregnancies or pregnancies that result in abortion or miscarriage will always qualify as substantial bodily injury.¹⁸⁰

By instructing the jury that pregnancy is substantial bodily injury on a case-by-case basis, courts risk being inconsistent in the application of substantial bodily injury.¹⁸¹ Pregnancy has a substantial effect on all women, whether it involves complications or not.¹⁸² Furthermore, the effect of pregnancy on adult women is no less severe than on minors.¹⁸³ Therefore, pregnancy provides grounds for increasing an assailant's sentence in all cases, as analyzed below.¹⁸⁴

¹⁷⁵ *Cross*, 190 P.3d at 717; *Sargent*, 86 Cal. App. 3d at 152 (finding pregnancy was substantial bodily injury in a forcible rape case).

¹⁷⁶ *Cross*, 190 P.3d at 717 ("Because the impact of any pregnancy is so great, it is illogical to treat some pregnancies as trivial, or to suggest that juries could, somehow, determine that any criminally imposed pregnancy can be considered minor.").

¹⁷⁷ *Id.* The opinion reasoned that pregnancy by its very nature will always satisfy the state's definition of substantial bodily injury. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (determining that the court did not need to decide whether the jury should always be instructed that pregnancy constitutes substantial bodily injury). See *United States v. Shannon*, 110 F.3d 382, 396-97 (7th Cir. 1997) (instructing the jury that pregnancy is substantial bodily injury on a case-by-case basis).

¹⁸⁰ See *Cross*, 190 P.3d at 717.

¹⁸¹ *Id.* (discussing how rapists could receive different sentences depending upon the outcome of the pregnancy).

¹⁸² See *supra* Part I.E (discussing the physical and psychological effects of pregnancy, miscarriage, and abortion on a woman).

¹⁸³ See *infra* Part III.A (discussing how pregnancy affects women and minors equally).

¹⁸⁴ See *infra* Part III.B (arguing that pregnancy is always substantial bodily injury). See also *Cross*, 190 P.3d at 717 (arguing that pregnancy should be considered substantial bodily injury in all cases).

III. ANALYSIS

As rape laws evolved, women garnered greater protection and opportunities to find justice.¹⁸⁵ The next step in the development of rape laws is the application of substantial bodily injury to rape-related pregnancy.¹⁸⁶ Many states fail to fairly apply the principles of substantial bodily injury when determining a rapist's sentence.¹⁸⁷ Part III.A determines whether the differences between rape and statutory rape warrant different treatment for finding that pregnancy is substantial bodily injury. Then, Part III.B considers whether the mental and physical effects of pregnancy satisfy the definition of substantial bodily injury as it is defined liberally, commonly, and strictly. Part III.C analyzes the methods states apply to determine whether pregnancy is substantial bodily injury. Some states exclude evidence of pregnancy from a rape trial, some always consider pregnancy to be substantial bodily injury by statute, and others consider it on a case-by-case basis. Finally, Part III.D discusses the benefits of states adopting a uniform approach for considering pregnancy as substantial bodily injury.

A. Comparison of Rape to Statutory Rape for Purposes of Considering Pregnancy as an Aggravating Factor

States are generally more willing to find that pregnancy is substantial bodily injury in cases involving minors.¹⁸⁸ Courts justify this difference on the grounds that pregnancy has a severe effect on a minor's body.¹⁸⁹ But pregnancy may affect older women more severely than minors.¹⁹⁰ For example, adult women are more likely to have

¹⁸⁵ See *supra* Part II.A. Originally rape was difficult to prosecute because the laws were designed to protect rapists from false accusations. CLING, *supra* note 40, at 15. However, the Women's Movement spurred the evolution of laws so that rape was given the same treatment as other crimes. Herman, *supra* note 24.

¹⁸⁶ Treating rape-related pregnancy as substantial bodily injury would secure equal justice for rape victims that are impregnated by treating their injury the same as other similar injuries. See *infra* Parts II.B.-E.

¹⁸⁷ See *infra* Parts III.B-D (discussing how the effects from childbirth, abortion, and miscarriage satisfy the definition of substantial bodily injury).

¹⁸⁸ Dougherty, *supra* note 92. See, e.g., Cross, 190 P.3d at 709.

¹⁸⁹ See, e.g., Cross, 190 P.3d at 709 (stating that carrying a baby in a teenager's body was significant and substantial).

¹⁹⁰ Cedars-Sinai Health Sys., *Quality Measures*, <http://www.csmc.edu/11154.html> (last visited Oct. 30, 2008). The maternal age of the mother increases the likelihood of miscarriage and complicated pregnancies. American Pregnancy Institute, *Miscarriage*, <http://www.americanpregnancy.org/pregnancycomplications/miscarriage.html>.

miscarriages and pregnancy complications.¹⁹¹ Furthermore, pregnancy is not a trivial matter for any woman, regardless of her age.¹⁹²

Although the crimes of rape and statutory rape are independent offenses, these differences do not provide grounds for treating evidence of rape-related pregnancy differently. Statutory rape laws protect a minor from her lack of knowledge and experience.¹⁹³ This does not mean, however, that pregnancy affects minors more severely.¹⁹⁴ Since a woman suffers substantial harm no matter what age she is, these crimes should be treated the same for purposes of applying substantial bodily injury to rape-related pregnancy.¹⁹⁵ However, states must first recognize that pregnancy is substantial bodily injury under the liberal, common, and strict definitions of substantial bodily injury.¹⁹⁶

B. Comparison of Childbirth, Miscarriage, and Abortion to the Definition of Substantial Bodily Injury

When courts consider treating rape-related pregnancy as substantial bodily injury for rape or statutory rape, they must first analyze the state's definition of substantial bodily injury, which is usually defined by

¹⁹¹ Am. Pregnancy Ass'n, *supra* note 136. Women between thirty-five and forty-five years old have a twenty to thirty percent chance of miscarriage, but women under the age of thirty-five face a fifteen percent chance. *Id.* For women over the age of forty-five, the odds increase to fifty percent. *Id.* See also Nat'l Infertility Ass'n, *Resolve*, <http://www.resolve.org/site/DocServer/Miscarriage-The-HiddenLoss.pdf?docID=221> (last visited Oct. 30, 2008). Women over the age of thirty-five are also more likely to have complicated pregnancies. Cedars-Sinai Health System, *supra* note 190. For example, certain problems during labor are more common for older women, such as placenta disruption, which causes a premature separation of the placenta from the fetus, requiring the mother to undergo a cesarean section. Elizabeth Eden, *A Guide to Pregnancy Complications*, <http://health.howstuffworks.com/a-guide-to-pregnancy-complications-ga1.htm>.

¹⁹² See *supra* Part II.E. (discussing the hardships of pregnancy).

¹⁹³ Oberman, *supra* note 41, at 818.

¹⁹⁴ Under statutory law, rapists are punished for engaging in sexual relations with a minor who is legally incapable of giving consent. 65 AM. JUR. 2D *Rape* § 11 (2008). Rape requires proof that the act was committed against the woman's will since she is legally capable of consenting. DRESSLER, *supra* note 25, at 166. However, this distinction does not speak to the effect pregnancy has on a minor's body. Although there may be some risks associated with teenage pregnancy that are not as common with adult pregnancies, most of these effects are associated with the minor's reluctance to seek the necessary prenatal care. Elizabeth Eden, *supra* note 191. However, these effects can occur with anyone who does not seek prenatal care. March of Dimes, *Prenatal Care*, http://www.marchofdimes.com/hhbb_syndication/18622_513.asp (last visited Oct. 30, 2008). Therefore, the victim's status as a minor should not be a deciding factor in determining the assailant's punishment.

¹⁹⁵ *Id.*

¹⁹⁶ See *infra* Part III.B (arguing that states should always consider pregnancy to be substantial bodily injury).

statute.¹⁹⁷ Therefore, the definition varies by state.¹⁹⁸ Thus, it is necessary to compare the effects of childbirth, miscarriage, and abortion on a woman's body to substantial bodily injury under the liberal, common, and strict definitions that states employ.¹⁹⁹

1. Liberal Definition of Substantial Bodily Injury

As previously noted, the liberal definition of substantial bodily injury includes any proof of bodily injury, fear, or mental injury as evidence sufficient to support the increase of a rapist's sentence.²⁰⁰ Pregnancy, miscarriage, and abortion significantly affect a woman's mental and physical well-being.²⁰¹ For example, pregnancy causes every organ in a woman's body to change, in addition to cramping, fatigue, nausea, breast tenderness, frequent urination, and difficulty sleeping.²⁰²

¹⁹⁷ See Dougherty, *supra* note 92. See *supra* Part II.D (defining substantial bodily injury by state statute).

¹⁹⁸ See *supra* Part II.D (defining substantial bodily injury by state).

¹⁹⁹ See *supra* Part II.D (defining substantial bodily injury). Under the liberal definition, substantial bodily injury includes fear and any evidence of bodily injury significant enough to warrant an increase in the defendant's sentence. See, e.g., *People v. Wallace*, 495 N.E.2d 665, 667-68 (Ill. App. Ct. 1986); *State v. Ingram*, 688 So.2d 657, 665 (La. Ct. App. 1997); *State v. Baker*, 441 S.E.2d 551, 555 (N.C. 1994). States commonly require proof of broken bones or lacerations to warrant the increase of an assailant's sentence. See *People v. Williams*, 115 Cal. App. 3d 446, 454 (1981) (finding that evidence of a torn hymen and accumulation of blood was sufficient to support a finding of substantial bodily injury); *People v. Culton*, 92 Cal. App. 3d 113, 117 (1979) (finding evidence of bruises, abrasions, and broken bones sufficient to support a finding of substantial bodily injury); *State v. Roberts*, 235 S.E.2d 203, 213 (N.C. 1977) (holding that injuries constituted serious bodily injury where the victim's teeth would eventually fall out and there was pain and impairment in the functioning of her jaw). However, other states require proof of permanent disfigurement or risk of death to satisfy the definition of substantial bodily injury. See, e.g., TEX. PENAL CODE ANN. § 1.07(46) (Vernon 2004); WYO. STAT. ANN. §§ 6-1-104, 6-2-302(a)(ii) (2004); MODEL PENAL CODE § 210.0 (2)-(3).

²⁰⁰ See, e.g., *Wallace*, 145 Ill. App. 3d at 667-68; *Baker*, 441 S.E.2d at 555 (finding that the rape victim's mental injuries, which included weight loss, depression, trouble sleeping, and a difficult time interacting with others, to be serious personal injury); *Ingram*, 688 So. 2d at 665 (finding that fear of two victims who worried the assailant would harm them were they to refuse was sufficient to support a finding of aggravated rape); *Jackson v. State*, 968 S.W.2d 495, 501 (Tex. App. 1998) (finding that the victim's fear of bodily injury was sufficient evidence to increase the assailant's sentence); *Mata v. State*, 952 S.W.2d 20, 33 (Tex. App. 1997) (finding that threats of bodily injury were sufficient to increase the rapist's sentence).

²⁰¹ See *supra* Part II.E (discussing the effects of pregnancy, abortion, and miscarriage on a woman).

²⁰² 41 AM JUR. PROOF OF FACTS 2D § 1 (2008); Women's Health Care Topics, http://www.womenshealthcaretopics.com/pregnancy_week_1_and_2.htm (last visited Jan. 29, 2009).

Furthermore, childbirth causes significant tears in the flesh and severe pain.²⁰³

Similarly, a woman who suffers from a miscarriage has the physical effects of pregnancy until the time of the miscarriage.²⁰⁴ In miscarriage, the woman experiences bleeding and abdominal pain, and may have to undergo a surgical procedure to remove the remaining tissue.²⁰⁵ Accordingly, the woman is physically affected, which is all the liberal definition requires.²⁰⁶

Furthermore, a woman who undergoes an abortion may experience significant side effects.²⁰⁷ A woman electing to have a surgical abortion clearly must undergo surgery, which involves the use of a knife to scrape the uterus lining and remove the placenta and fetus.²⁰⁸ Such a procedure causes bleeding and perforations, which exceed the liberal definition's requirement for evidence of any bodily change.²⁰⁹ Similarly, a medical abortion causes a woman to have cramps and bleed, which indicate that the body is trying to expel unwanted tissue and repair itself.²¹⁰ Thus, pregnancy, miscarriage, and abortion satisfy the liberal definition of substantial bodily injury.²¹¹

Mental effects also accompany pregnancy, abortion, and miscarriage, all of which satisfy the liberal definition.²¹² Postpartum depression is a

²⁰³ Ezine Articles, *What Do Labor Contraction and Labor Pains Feel Like?*, <http://ezinearticles.com/?What-Do-Labor-Contraction-and-Labor-Pains-Feel-Like?&id=492295>.

²⁰⁴ Am. Pregnancy Ass'n, *supra* note 136.

²⁰⁵ Miscarriage also causes bruising, which has been recognized as sufficient to satisfy the liberal definition of substantial bodily injury. *After a Miscarriage*, *supra* note 137.

²⁰⁶ The bleeding caused by miscarriage is also evident of bodily injury. Kid Scientist, *Why Do We Bleed*, <http://kidscientist.com/10/why-do-we-bleed/> (last visited Oct. 31, 2008).

²⁰⁷ See *supra* Part II.E.2 (discussing the side effects of abortion).

²⁰⁸ *Surgical Abortion Procedures*, *supra* note 129. A D&C procedure is performed during the first twelve to fifteen weeks of gestation. *Id.* After the knife is used to scrape out the fetus, the remaining tissue is suctioned out. *Id.* Alternatively, a suction aspiration can be applied during the first six to twelve weeks. *Id.* This procedure involves dilating the cervix and suctioning out the fetus and placenta. *Id.* However, both procedures pose a risk of permanently impairing a woman's reproductive organs. *Id.*

²⁰⁹ *Id.* Suction aspiration also causes cramping, nausea, sweating, feeling faint, and bleeding. *Id.* The side effects of a D&C abortion are the same as a suction abortion, with an increased risk of perforation to the uterus. *Id.*

²¹⁰ COSTA, *supra* note 128, at 175. Bleeding and soreness are evidence of bruising and lacerations. Kid Scientist, *supra* note 206.

²¹¹ Because medical and surgical abortions cause pain, bleeding, and cramping, which indicate physical injuries, the liberal definition, which simply requires proof of some physical injury, is satisfied. *Surgical Abortion Procedures*, *supra* note 129.

²¹² Pregnancy, miscarriage, and abortion can all lead to depression. U.S. Dep't of Health & Human Servs., *Depression During and After Pregnancy*, <http://www.4woman.gov/FAQ/postpartum.htm#2> (last visited Oct. 30, 2008); *Post Abortion Syndrome Symptoms*,

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common side effect of pregnancy and miscarriage.²¹³ The symptoms of postpartum depression include depression, difficulty sleeping, decreased appetite, low self-esteem, and feeling upset, alone, and afraid.²¹⁴ Abortion has also been found to cause depression in women.²¹⁵ Because the liberal definition recognizes such psychological effects as weight loss, depression, and difficulty sleeping as substantial bodily injury, the mental effects of pregnancy, abortion, and miscarriage satisfy the definition.²¹⁶ Thus, courts interpreting the liberal definition of substantial bodily injury should recognize pregnancy as substantial bodily injury, whether it results in childbirth, miscarriage, or abortion.²¹⁷ However, states more commonly require a slightly heightened standard to increase an assailant's sentence under the substantial bodily injury doctrine.²¹⁸

http://postabortionsyndrome.org/post_abortion_syndrome_symptoms.html (last visited Feb. 29, 2009). The liberal definition recognizes depression as substantial bodily injury. *State v. Baker*, 441 S.E.2d 551, 553 (N.C. 1994).

²¹³ Up to eighty percent of women who give birth experience these symptoms. eMedicine Health, *Postpartum Depression*, http://www.emedicinehealth.com/postpartum_depression/article_em.htm.

²¹⁴ U.S. Dep't of Health & Human Servs., *Depression During and After Pregnancy*, <http://www.4woman.gov/FAQ/postpartum.htm#2> (last visited Oct. 30, 2008). Miscarriage also has a psychological impact on a woman, causing such side-effects as depression and anxiety. Frederick R. Jelovsek, *The Emotional Effects of Miscarriage*, <http://www.wdxcyber.com/nmood07.htm> (Oct. 31, 2008).

²¹⁵ *Post Abortion Syndrome Symptoms*, http://postabortionsyndrome.org/post_abortion_syndrome_symptoms.html (last visited Feb. 29, 2009). Many women who have had an abortion feel guilt, anxiety, psychological "numbing", develop eating disorders or drug problems, and suffer from other psychological problems. *Id.*

²¹⁶ See, e.g., *Baker*, 441 S.E.2d at 555 (finding that the rape victim's mental injuries, which included weight loss, depression, trouble sleeping, and a difficult time interacting with others, to be serious personal injury).

²¹⁷ Since the liberal definition recognizes any physical alteration as well as mental side effects as sufficient to satisfy the definition of substantial bodily injury, and pregnancy, miscarriage, and abortion have both physical and mental side effects, courts applying this definition should find that pregnancy is always substantial bodily injury. See *People v. Wallace*, 495 N.E.2d 665, 667-68 (Ill. App. Ct. 1986); *Baker*, 441 S.E.2d at 555 (finding that the rape victim's mental injuries, which included weight loss, depression, trouble sleeping, and a difficult time interacting with others to be serious personal injury); *State v. Ingram*, 688 So. 2d 657, 665 (La. Ct. App. 1997) (finding that the fear of two victims who worried the assailant would harm them were they to refuse was sufficient to support a finding of aggravated rape); *Jackson v. State*, 968 S.W.2d 495, 501 (Tex. App. 1998) (finding that the victim's fear of bodily injury was sufficient evidence to increase the assailant's sentence); *Mata v. State*, 952 S.W.2d 30, 33 (Tex. App. 1997) (finding that threats of bodily injury were sufficient to lengthen the rapist's sentence); *COSTA*, *supra* note 128, at 175; *Surgical Abortion Procedures*, *supra* note 129.

²¹⁸ See *supra* note 93 (providing many state definitions of substantial bodily injury).

2. Common Definition of Substantial Bodily Injury

The common definition of substantial bodily injury recognizes evidence of broken bones, lacerations, and torn hymens as sufficient to support an increase in the rapist's sentence.²¹⁹ The physical effects of pregnancy, miscarriage, and abortion outweigh the injuries that courts applying this standard have commonly found sufficient to support the increase of the rapist's sentence. For example, childbirth results in tears and soreness that may require stitches, similar to lacerations.²²⁰ The tears a woman suffers during childbirth coincide with the injury of a torn hymen that states commonly consider sufficient to increase the rapist's sentence.²²¹ Furthermore, pregnancy involves nine months of pain, discomfort, impaired mobility, and hours of severe pain during labor; whereas broken bones take four weeks to three months to heal.²²² It makes little sense to include an injury that causes pain over a shorter period of time to be substantial bodily injury, while treating pregnancy, which causes pain, injury, and impaired movement over a longer period of time as insufficient to satisfy the definition of substantial bodily injury.²²³ Therefore, the physical effects of pregnancy exceed the requirements set forth by the common definition of substantial bodily injury and should be recognized as an aggravating factor.

In addition to the physical effects that result from carrying a child, a woman who suffers a miscarriage experiences bleeding, abdominal pain, discomfort, lacerations, and possibly infection, which is consistent with the lacerations and torn hymens that courts find sufficient to satisfy the

²¹⁹ Dougherty, *supra* note 92.

²²⁰ See Ezine Articles, *What Do Labor Contraction and Labor Pains Feel Like?*, <http://ezinearticles.com/?What-Do-Labor-Contraction-and-Labor-Pains-Feel-Like?&id=492295>. The tears and lacerations that result from childbirth may be severe enough to require stitches. *Id.* In the average woman, stretching and tearing during childbirth reduces the perineum from two to three inches of skin and tissue before pregnancy to a few millimeters. Teri Brown, *The Perineum and Pregnancy*, <http://www.pregnancytoday.com/articles/labor-preparation/the-perineum-and-pregnancy-4878/>.

²²¹ Brown, *supra* note 220. Women suffer tears in their perineum as a direct result of pregnancy. *Id.* The perineum is the skin and tissue between the vagina and rectum. *Id.* The hymen is a sheet of tissue over the vaginal pass. NEW WORLD DICTIONARY 663 (3d ed. 1988). The hymen generally tears during sexual intercourse or may tear from engaging in sporting activities. Negative or Positive, Terminology, <http://www.negativeorpositive.com/negative/terminology.html> (last visited Oct. 31, 2008). While a torn hymen can cause bleeding, a torn perineum is more severe, as it may require stitches. Teri Brown, *The Perineum and Pregnancy*, <http://www.pregnancytoday.com/articles/labor-preparation/the-perineum-and-pregnancy-4878/>.

²²² Wise Geek, *How Long Do Broken Bones Take to Heal*, <http://www.wisegeek.com/how-long-do-broken-bones-take-to-heal.htm>.

²²³ *Id.*

common definition because both cause bleeding and pain and can lead to infection.²²⁴ Additionally, over fifty percent of women who suffer a miscarriage must undergo a surgical D&C procedure, which involves scraping out the uterus.²²⁵ Abortions use this same procedure.²²⁶ Because states commonly consider injuries that require surgery to be substantial bodily injury, miscarriage and surgical abortion satisfy the definition.²²⁷

Although the side effects of a medical abortion are less severe than a surgical abortion, they are similar to the lacerations and broken bones that courts recognize as substantial bodily injury.²²⁸ In both situations, the victim requires substantial recovery time while the body is trying to repair itself from injury.²²⁹ Thus, medical abortion also satisfies the common definition.

Most states apply a version of this definition to injuries to determine whether the crime should be aggravated.²³⁰ So although it appears that pregnancy easily satisfies the definition of substantial bodily injury in most states, it may be harder to find that it meets the definition's requirements in states that apply a stricter definition.²³¹

3. Strict Definition of Substantial Bodily Injury

It is more difficult to find that the effects of pregnancy, miscarriage, and abortion fit within the strict definition of substantial bodily injury.²³² Courts applying the strict definition of substantial bodily injury interpret it liberally to provide greater relief to the victim.²³³ For example, Texas

²²⁴ *After a Miscarriage*, *supra* note 137.

²²⁵ *D&C Procedure*, *supra* note 139.

²²⁶ *Surgical Abortion Procedures*, *supra* note 129.

²²⁷ *See, e.g.,* *People v. Rodriguez*, No. B203609, 2009 WL 201412, at *1 (Cal. App. 2009) (discussing the jury's finding of bodily injury when the victim had to undergo two surgeries); *State v. Lilly*, 450 S.E.2d 546, 548-49 (N.C. App. 1994) (holding that victim sustained serious personal injuries where she had to have surgery that took three days to recover from). *Dougherty*, *supra* note 92.

²²⁸ *COSTA*, *supra* note 128, at 175. Bleeding and soreness are evidence of bruising and lacerations. *Kid Scientist*, *supra* note 206.

²²⁹ *Kid Scientist*, *supra* note 206.

²³⁰ *Dougherty*, *supra* note 92. *See also supra* note 93 (defining substantial bodily injury among states).

²³¹ *See infra* Part III.C.3.

²³² The strict definition of substantial bodily injury requires a showing of permanent disfigurement, substantial risk of death, or loss or impairment to a bodily organ. *See, e.g.,* TEX. PENAL CODE ANN. § 1.07(46) (Vernon 2008).

²³³ *See, e.g.,* *Camarillo v. State*, 82 S.W.3d 529, 537-38 (Tex. App. 2002) (holding that the plaintiff suffered substantial bodily injury where she suffered a broken nose that impaired her ability to breathe); *Moore v. State*, 802 S.W.2d 367, 369-70 (Tex. App. 1990) (holding that injury still exists although surgery corrected disfigurement); *Abadie v. State*, 101

courts have recognized that a broken nose that was corrected through surgery and evidence that a victim was hit in the head with a metal rod causing physical pain were sufficient to satisfy its definition of substantial bodily injury.²³⁴ This interpretation is consistent with the liberal and common definitions of substantial bodily injury and encompasses the effects of pregnancy, miscarriage, and abortion resulting from rape.²³⁵

Under a literal reading of the strict definition of substantial bodily injury, it is more difficult to find that the effects of an uncomplicated pregnancy, miscarriage, or abortion satisfy the definition of substantial bodily injury because pregnancy is not typically thought of as causing permanent disfigurement or loss of a bodily organ.²³⁶ However, the strict definition of substantial bodily injury recognizes evidence of impairment of a bodily organ as sufficient to increase a rapist's sentence.²³⁷ Consistent with this definition, pregnancy causes changes in every organ of the body, including the cardiovascular system, abdominal organs, and endocrine system.²³⁸ In particular, the uterus increases to one thousand times its initial capacity and ascends into the abdomen and liver.²³⁹ Pregnancy also temporarily impairs the reproductive organs.²⁴⁰ Similarly, miscarriage causes short-term impairments to the reproductive organs, and poses a risk of long-term impairment if the woman is forced to undergo a D&C procedure, which may weaken the woman's uterus and impair her ability to conceive.²⁴¹ Because a surgical abortion

S.W.2d 238, 239 (Tex. Crim. App. 1937) (finding that evidence that the victim was weak, unable to work, and had to remain in the hospital for fourteen days was sufficient to support a finding of substantial bodily injury).

²³⁴ See *supra* note 99 (discussing Texas court interpretations of substantial bodily injury).

²³⁵ See *supra* notes 23–29 and accompanying text (discussing whether pregnancy satisfies the liberal and common definition of substantial bodily injury).

²³⁶ A case-by-case analysis would still be warranted under a literal interpretation, because some pregnancies may have more severe effects than others. Am. Pregnancy Ass'n, *supra* note 116. However, to determine if pregnancy satisfies the definition, a common pregnancy should be analyzed.

²³⁷ TEX. PENAL CODE ANN. § 1.07(46) (Vernon 2008). Texas defines serious bodily injury as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.*

²³⁸ 41 AM JUR. PROOF OF FACTS 2D § 1 (2008).

²³⁹ Elizabeth Eden, *Understanding Pregnancy Symptoms*, HOW STUFF WORKS, <http://health.howstuffworks.com/understanding-pregnancy-symptoms1.htm>.

²⁴⁰ See *supra* Part II.E (discussing the physical and mental effects of pregnancy).

²⁴¹ American Pregnancy Association, *supra* note 116. Am. Pregnancy Ass'n, *Getting Pregnant Again*, <http://www.americanpregnancy.org/pregnancyloss/mcgettingpregnantagain.html>. Women are advised to wait approximately three months to try to conceive again. *Id.* Following a miscarriage a woman must generally wait several months to conceive. *Id.*

requires a procedure similar to a D&C, the same risks of long-term impairment exist.²⁴² Abortion can also cause impairment to the reproductive organs and poses a risk of death to the female.²⁴³ Thus, the strict definition of substantial bodily injury is arguably satisfied even under a literal reading.

Despite pregnancy's severe effects on women, no matter what the outcome of that pregnancy may be, and pregnancy's clear place under the substantial bodily injury doctrine, states continue to treat rape-related pregnancy differently.²⁴⁴

C. State Treatment of Rape-Related Pregnancy

As analyzed above, the effects of rape-related pregnancy satisfy the definition of substantial bodily injury.²⁴⁵ Nevertheless, states continue to treat rape-related pregnancy differently.²⁴⁶ While some states exclude evidence of rape-related pregnancy, others apply substantial bodily injury on a case-by-case basis.²⁴⁷ In either case, states ignore the substantial effects that uncomplicated pregnancies can have on a woman.²⁴⁸ Thus, states that always consider rape-related pregnancy to be substantial bodily injury avoid these controversies and fairly apply the principles of substantial bodily injury.²⁴⁹ This section analyzes the approaches courts undertake when considering whether pregnancy is substantial bodily injury.²⁵⁰

1. States that Exclude Evidence of Rape-Related Pregnancy

By excluding evidence of rape-related pregnancy, courts maintain the traditional view that assailants need to be protected from false

²⁴² *Surgical Abortion Procedures*, *supra* note 129.

²⁴³ Pregnancy Ctrs., *Considering Abortion*, <http://www.pregnancycenters.org/abortion.html> (last visited Nov. 1, 2008). There is a risk of death in abortion procedures. *Id.* Abortion can damage the uterus or cause infection, which can require further surgical procedures, including a hysterectomy. *Id.*

²⁴⁴ *See infra* Part III.C (analyzing state treatment of rape-related pregnancy).

²⁴⁵ *See supra* Part III.B (discussing whether the effects of pregnancy, miscarriage, and abortion satisfy the definition of substantial bodily injury).

²⁴⁶ *See supra* Part II.F (discussing state treatment of evidence of rape-related pregnancy).

²⁴⁷ *See supra* Parts II.F.2, 4 (discussing states that exclude evidence and states that find substantial bodily injury on a case-by-case basis, respectively).

²⁴⁸ *See supra* Part II.E (discussing the effects of pregnancy on a woman's body).

²⁴⁹ Cornell Univ. Law Sch., *Aggravating factor*, http://topics.law.cornell.edu/wex/aggravating_factor (last visited Jan. 12, 2009).

²⁵⁰ *See infra* Parts III.C.1-3.

accusations by women.²⁵¹ States that do not consider rape-related pregnancy to be substantial bodily injury base their reasoning on the theory that evidence of rape-related pregnancy is prejudicial or irrelevant.²⁵² By excluding the evidence, the state protects the rapist and denies the jury the opportunity to hear the extent of the injury the rapist caused.²⁵³ Therefore, states treat injuries from rape less favorably than injuries in other crimes, maintaining the historic disregard for rape.²⁵⁴

Proof of rape-related pregnancy does not pose a greater risk of prejudice than evidence of other injuries. The purpose of applying substantial bodily injury principles is to punish the defendant for the harm he causes.²⁵⁵ Because impregnated victims experience harm beyond that of other victims, the defendant should be punished accordingly to fulfill this purpose.²⁵⁶ Given that courts have traditionally used evidence of injury to impose sentences and determine damages, evidence of rape-related pregnancy should be treated no differently.²⁵⁷ The condition is inflicted on the female through no choice of her own.²⁵⁸ Furthermore, it cannot be denied that the pregnancy has a physical effect on the female's body, just as other injuries do.²⁵⁹ Therefore, states should treat pregnancy the same as other injuries.²⁶⁰

²⁵¹ Exclusion of the evidence protects the rapist from evidence being introduced showing the consequences of his actions. By excluding this evidence, the rapist is protected from having the jury know the extent of the injury he caused. In this way courts treat the effects of rape differently from other injuries, just as rape has been treated differently from other crimes throughout history. See *supra* Part II.A (discussing the history of rape).

²⁵² *People v. Loftus*, 11 N.Y.S. 905 (1890) (finding that pregnancy was not relevant to the alleged crime of rape); *State v. Chambers*, 309 P.2d 1055, 1057 (Wash. 1957) (holding that evidence of rape-related pregnancy was inadmissible because it had a prejudicial effect and had no bearing on the element of consent); 65 AM. JUR. 2D, *Rape* § 43 (some courts have determined that evidence of rape-related pregnancy is irrelevant and inadmissible in prosecutions for forcible rape). Courts have also reasoned that including rape-related pregnancy as substantial bodily injury would stretch the meaning too far. See *supra* Part II.B-D.

²⁵³ ORRIN G. HATCH, *JURY AND THE SEARCH FOR TRUTH* 187-88 (1995). Excluding relevant evidence "provides nothing for the innocent, but freedom for the guilty." *Id.* at 187.

²⁵⁴ See *supra* Part II.A (discussing the history of rape laws that have historically failed to sufficiently punish the rapist).

²⁵⁵ Cornell Univ. Law Sch., *supra* note 249.

²⁵⁶ See *supra* Part II.E (discussing the mental and physical alterations of pregnancy, abortion, and miscarriage).

²⁵⁷ CYNDI BANKS, *PUNISHMENT IN AMERICA* 2-3 (2005).

²⁵⁸ *People v. Cross*, 190 P. 3d 706, 717 (Cal. 2008).

²⁵⁹ See *supra* Part II.E.

²⁶⁰ Pregnancy has a substantial effect on a woman's body. See *supra* Part II.E. Many of the effects are consistent with injuries that are considered substantial bodily injury. See *supra* Part III.B.

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Rape-related pregnancy is also relevant to the trial.²⁶¹ Although some courts discarded its relevance in adult rape cases because pregnancy was not proof that rape had occurred, as it is in statutory rape cases, this provides no grounds for undermining its relevance.²⁶² Because many courts do not consider injuries that occur after the criminal act to be substantial bodily injury, courts that find pregnancy irrelevant to a rape trial may follow the principle that pregnancy is an injury that occurs after the act.²⁶³ However, pregnancy is a direct result of the criminal act of rape and begins to develop at the time of the act, regardless of the fact that the full effect of pregnancy is not realized until afterward.²⁶⁴ Rape-related pregnancy is not only proof that intercourse occurred, it also shows the extent of harm inflicted on the victim.²⁶⁵ Therefore, courts that exclude evidence of rape-related pregnancy are excluding evidence of injury that has always been pertinent to trials.

2. States that Find Pregnancy to be Substantial Bodily Injury on a Case-by-Case Basis

Other courts consider pregnancy to be substantial bodily injury on a case-by-case basis.²⁶⁶ Courts that instruct the jury that pregnancy is a substantial bodily injury on a case-by-case basis consider the age, pregnancy complications, and the circumstances surrounding the pregnancy.²⁶⁷ This ignores the fact that the pregnancy itself has a substantial effect on the woman's body.²⁶⁸ Instead, the court should always instruct the jury that pregnancy is substantial bodily injury.²⁶⁹

²⁶¹ Courts often hold defendants accountable for the injuries they cause, even if the extent of the outcome is unforeseeable. Keith A. Rowley, *To Err is Human*, 104 MICH. L. REV. 1407, 1433 (2006) ("In criminal and tort law, the role of risk is often expressed in the form of a notion that wrongdoers . . . take the risk of their conduct turning out worse than they expected.") (internal quotations omitted). Furthermore, subsequent injuries that courts exclude are injuries that were not inflicted by the defendant during the course of the act in question. Roy C. Dripps, *Exclusion of Damage-Reducing Evidence in Injury Litigation*, 87 ILL. B.J. 368, 369 (1999). Thus the irrelevance argument is unpersuasive.

²⁶² Although the evidence does not prove that the act occurred, this is not necessary for evidence to be relevant. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Relevant evidence is defined as "that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 587 (internal quotations omitted).

²⁶³ Dripps, *supra* note 261, at 369.

²⁶⁴ See *supra* Part II.E (discussing the effects of pregnancy).

²⁶⁵ See 35A N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* § 713; 65 AM. JUR. 2D *Rape* § 11 (2008); DRESSLER, *supra* note 25, at 166.

²⁶⁶ See, e.g., *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008).

²⁶⁷ *Id.*

²⁶⁸ *Id.* "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." *Id.* See

Juries must evaluate the severity of the injury's impact to determine whether it satisfies the state's definition of substantial bodily injury.²⁷⁰ For example, when a victim suffers a broken bone, the injury could vary from a small hairline fracture to a compound fracture requiring surgery.²⁷¹ Therefore, it is necessary for the jury to determine whether the fracture satisfies the definition of substantial bodily injury.²⁷² But a female is either pregnant or she is not.²⁷³ There is no continuum of injury for the jury to evaluate.²⁷⁴ Therefore, a case-by-case analysis is inappropriate.²⁷⁵

Furthermore, it makes little sense to punish one rapist more than another simply because the pregnancies of the victims have different outcomes.²⁷⁶ If two rapists each impregnate a victim and one victim's pregnancy results in a miscarriage while the other pregnancy is carried to term, the defendants should not be punished differently because of the outcome.²⁷⁷ The court cannot consider either outcome trivial when determining a defendant's sentence.²⁷⁸ Furthermore, the injury from pregnancy, regardless of the outcome, extends beyond that which is normally associated with rape, so the defendant should be punished accordingly.²⁷⁹ Therefore, courts that have already found that pregnancy constitutes substantial bodily injury should always instruct the jury that pregnancy is substantial bodily injury.²⁸⁰

also *United States v. Shannon*, 110 F.3d 382, 396–97 (7th Cir. 1997); *People v. Sargent*, 86 Cal. App. 3d 148, 152 (1978). See also *supra* Parts II.B–D.

²⁶⁹ *Cross*, 190 P.3d at 717–18.

²⁷⁰ *Id.* at 717.

²⁷¹ Pain Health Info, *Different Types of Painful Fractures*, <http://pain.health-info.org/different-types-painful-fractures>.

²⁷² *Cross*, 190 P.3d at 717.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Since there is no continuum on which the jury can decide, the jury cannot play its normal role in deciding whether the injury is substantial bodily injury. *Id.* Thus, pregnancy cannot be decided on a case-by-case basis.

²⁷⁶ *Id.*

²⁷⁷ *Id.* See also, *supra* Part II.E. Under either outcome, pregnancy affects the woman and her body in a substantial way. *Id.* Therefore, these outcomes should not be given different treatment.

²⁷⁸ See *supra* Part II.E (discussing the effects of pregnancy on a woman's body).

²⁷⁹ See *supra* Part II.E (discussing the effects of pregnancy on a woman's body). Since pregnancy has an additional effect on a woman's body, and pregnancy occurs in only approximately two hundred rape cases each year, it is injury beyond what is normally associated with rape. Dr. John C. Willke, *Rape Pregnancies are Rare*, CHRISTIAN LIFE RESOURCES, Apr. 1999, <http://www.christianliferesources.com/?library/view.php&articleid=461>.

²⁸⁰ See *infra* Part III.C.3.

3. States that Always Consider Pregnancy to be Substantial Bodily Injury

The remainder of states addressing the issue of whether pregnancy should aggravate a defendant's sentence always include pregnancy within the definition of substantial bodily injury through statute or case law.²⁸¹ This approach correctly punishes the victim for the harm he causes because pregnancy, no matter what the outcome, has a severe effect on victims.²⁸² It is clear that impregnated victims face challenges beyond those that victims who do not become impregnated experience.²⁸³ Therefore, the courts that consider pregnancy to be substantial bodily injury provide justice to the victim by punishing the assailant according to the extent of the victim's injuries, rather than returning to the common roots of rape laws and protecting the defendant from his own actions.

Also, in these states, each defendant who impregnates a victim would receive uniform punishment regardless of the outcome of those pregnancies.²⁸⁴ Therefore, the judgments from these courts are consistent and benefit the state.

D. Benefits of Adopting a Uniform Law

States would benefit from adopting a uniform law providing for pregnancy to be considered substantial bodily injury.²⁸⁵ Having a uniform law would promote fairness across the states.²⁸⁶ Defendants in rape cases across the states would receive the same punishment for the harm that they caused.²⁸⁷ A uniform law would also serve to deter crime because severity and certainty of punishment have been linked to decreased crime rates.²⁸⁸ Furthermore, "[u]niform rules would also help

²⁸¹ See MICH. COMP. LAWS § 750.520a(n) (2004); NEB. REV. STAT. § 28-318(4) (2008); WIS. STAT. § 940.225(1)(a) (2008); *Smith*, 910 S.W.2d at 461 (finding that pregnancy was substantial bodily injury, sufficient to aggravate the rapist's sentence); *Jones*, 889 S.W.2d at 231.

²⁸² See *supra* Part II.E (discussing the effects of pregnancy on a woman's body).

²⁸³ See *supra* Part II.E (discussing the effects of pregnancy on a woman's body).

²⁸⁴ See *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008).

²⁸⁵ Besides punishing the victim for the actual harm he causes, a uniform punishment would deter crime. BURFEIND & BARTUSCH, *supra* note 142, at 260. When certainty and severity of punishment are high, crime rates are low. *Id.* Since a uniform law would increase the certainty, it would serve to deter rape. *Id.*

²⁸⁶ Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for Criminal Trials*, 84 MICH. L. REV. 475, 507 (1985).

²⁸⁷ *Id.*

²⁸⁸ BURFEIND & BARTUSCH, *supra* note 142, at 260. Since studies show that certainty and severity affect the crime rate, and a uniform law providing for pregnancy to be substantial

prevent favoritism, corruption, and local prejudice.”²⁸⁹ Thus, states stand to benefit from adopting a uniform law providing for pregnancy to be considered substantial bodily injury.²⁹⁰

IV. CONTRIBUTION

States differ greatly in how they treat evidence of rape-related pregnancy. To promote consistency and to fully punish the rapist for his actions, states should uniformly adopt pregnancy as an aggravating factor to the definition of rape. There are three alternative ways to accomplish this: (1) adopt a uniform definition of substantial bodily injury; (2) add the term pregnancy to each state’s already existing definition of substantial bodily injury; or (3) adopt pregnancy as an aggravating factor within the state’s definition of first degree rape.

A. *Uniform Definition of Substantial Bodily Injury*

Although states differ greatly in how they define substantial bodily injury, a uniform statute has the potential to benefit all states. Under this approach, states would first have to determine whether the strict, common, or liberal definition of substantial bodily injury is most appropriate. Despite differences in the definition of substantial bodily injury, an ideal statute would state:

Substantial bodily injury includes cuts, abrasions, bruises, burns, disfigurement, physical pain, temporary illness, *pregnancy*, impairment of a bodily organ, or injury that requires surgical correction.

This statute, which is most consistent with the common definition of substantial bodily injury, provides protection to victims, while also balancing the criminal’s interest in being fairly punished.²⁹¹ Adding pregnancy to a uniform substantial bodily injury statute would rectify the core problem of states ignoring pregnancy as an aggravating

bodily injury would increase both the severity of punishment and the certainty that the punishment would be applied, crime would be deterred. *Id.*

²⁸⁹ Gardner, *supra* note 286, at 507 (internal quotations omitted).

²⁹⁰ States will benefit from deterrence of crime. BURFEIND & BARTUSCH, *supra* note 142, at 260.

²⁹¹ Because most states have adopted the common approach, it would be easiest for the remaining states to convert to this definition. See *supra* note 86 (defining substantial bodily injury among states). Furthermore, the common approach provides the best balance between punishing the actor and preventing crime since it is not overly harsh or seemingly liberal. See Part II.D (discussing the differences between the liberal, common, and strict definitions of substantial bodily injury).

factor.²⁹² Because the physical effects of pregnancy are under-recognized, such a statute would ensure that states treat pregnancy the same as other injuries recognized as substantial bodily injury, which generally have physical effects that are similar to pregnancy.²⁹³ This would also solve the problems of states applying pregnancy as substantial bodily injury on a case-by-case basis and of states excluding pregnancy as irrelevant. This is because pregnancy would aggravate the sentence in all cases, thereby making the pregnancy relevant and rendering the factors used in a case-by-case analysis irrelevant.²⁹⁴ This is the desired outcome because there is no continuum on which to judge pregnancy and no pregnancy can be considered trivial.²⁹⁵ A uniform definition would ensure that pregnancy is always considered an aggravating factor to rape in all states and would fully punish the rapist for the harm he inflicts. Furthermore, a uniform definition of substantial bodily injury would serve the added benefit of deterring crime because it would increase the severity and certainty of punishment.²⁹⁶

On the other hand, each state's definition of substantial bodily injury is applied to other crimes.²⁹⁷ Thus, states may be reluctant to entirely alter their definition of substantial bodily injury. Moreover, other alternatives require less effort on the part of the legislature and the courts and would solve the current problem of failing to consider pregnancy as an aggravating factor.

B. Adding Pregnancy to the Existing Definition of Substantial Bodily Injury

Adding pregnancy to the existing definition of substantial bodily injury is perhaps the easiest and most viable method for states to adopt. Under this approach, states employing the strict definition of substantial

²⁹² See *supra* Parts III.B-C (discussing how pregnancy satisfies the definition of substantial bodily injury, courts' failure to recognize it as an aggravating factor, and the errors in the current approaches courts take to analyzing pregnancy as substantial bodily injury).

²⁹³ See *supra* Part III.B. Since the injuries commonly recognized as substantial bodily injury are consistent with other injuries considered substantial bodily injury, adding pregnancy to the definition would eliminate the courts' reluctance to adopt pregnancy as an aggravating factor.

²⁹⁴ See *supra* Part II.F.2, 4 (discussing how some courts exclude evidence of rape-related pregnancy while others consider it on a case-by-case basis, considering such factors as the victim's age and complications of pregnancy).

²⁹⁵ See *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008).

²⁹⁶ Severity and certainty of punishment are the best indicators of crime rate. BURFIEND & BARTUSCH, *supra* note 142, at 260. Therefore, a uniform statute would create certainty, thereby decreasing the crime rate of not only rape, but also other crimes to which it applies. See *id.*

²⁹⁷ See *supra* note 83 and accompanying text (discussing the aggravating factors to rape). See also *supra* note 93 (defining substantial bodily injury among states).

bodily injury should alter their statutes to state that substantial bodily injury is:

Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, pregnancy, or protracted loss or impairment of the function of any bodily member or organ.²⁹⁸

Whereas a state that liberally defines substantial bodily injury should adapt their statute to state:

Substantial bodily injury results when the assailant inflicts physical pain, mental anguish, or pregnancy on anyone, or causes submission by threat.²⁹⁹

Because states disagree greatly on how to define substantial bodily injury, adding pregnancy to the existing definition would be beneficial because it does not alter the state's current application of the term.³⁰⁰ Specifically, states that already define substantial bodily injury by listing injuries could easily add one more injury to their definition.³⁰¹ Additionally, this method would not force courts to apply a new definition of substantial bodily injury to other crimes or require legislatures to entirely rework an existing definition.

Besides being a more viable option, adding pregnancy to the existing definition of substantial bodily injury would rectify the problem of courts failing to consider pregnancy an aggravating factor. Under this approach, assailants would be fairly punished according to the harm they cause.³⁰² Also, the trier of fact would not have to weigh arbitrary factors to determine whether substantial bodily injury should be

²⁹⁸ See *supra* notes 102–04 and accompanying text (discussing injuries that courts commonly find to be substantial bodily injury). This proposed statute was adapted from statutes and court opinions that include injuries commonly considered substantial bodily injury.

²⁹⁹ See *supra* notes 94–97 and accompanying text (discussing the liberal definition of substantial bodily injury, which includes any proof of bodily harm, fear, or mental injuries). This statute was adapted from case law and statutes that apply a liberal definition.

³⁰⁰ See *supra* note 93 (defining substantial bodily injury among states). See also Part III.C (discussing the three approaches to defining substantial bodily injury and their application to pregnancy).

³⁰¹ See *supra* note 93 (defining substantial bodily injury among states).

³⁰² Because pregnancy causes effects similar to injuries recognized as substantial bodily injury, it should be recognized as substantial bodily injury. See Part III.B. Since assailants receive a greater sentence for causing other injuries, they should also receive one for impregnating their victim.

applied.³⁰³ Rather, pregnancy would always be considered a substantial bodily injury in all states. Thus, states would obtain some of the benefits of a uniform statute, such as deterrence and fairness, so long as legislatures do not create exceptions for applying pregnancy as an aggravating factor.³⁰⁴ Due to the ease with which this method could be adopted and the benefits it produces, this method may be preferred.

Conversely, not all states list impairments within their definition of substantial bodily injury.³⁰⁵ Therefore, it may be easier for some states, if they do not wish to adjust their statutory scheme, to add pregnancy to their definition of first degree rape.

C. Adding Pregnancy to the Definition of First Degree Rape

Adding pregnancy to the definition of first degree rape would also be an easy method to adopt. This option would be most beneficial for states that do not list specific impairments under their definition of substantial bodily injury. Under this approach, states should adopt the following language for first degree sexual assault:

Any person who has sexual contact or sexual intercourse with another, absent their consent and causes substantial bodily injury or pregnancy is guilty of first degree assault.³⁰⁶

Under this approach, states that do not currently list impairments within their definition of substantial bodily injury would not be required

³⁰³ *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008) (discussing the factors courts consider when determining whether pregnancy is substantial bodily injury, including age and complications of pregnancy).

³⁰⁴ By adding pregnancy to the definition of substantial bodily injury in every state, the increase in punishment and increased awareness would likely lead to a decrease in the crime rate because severity and certainty are the leading indicators of crime rate. BURFIEND & BARTUSCH, *supra* note 142, at 260. To promote awareness and certainty, states would have to treat pregnancy as an aggravating factor without exceptions. While legislatures might be inclined to exclude uncomplicated pregnancies or pregnancies that end in abortion as substantial bodily injury, this would detract from its deterrent factor. *See Cross*, 190 P.3d at 717. While this method will also deter crime, it may not be as effective as all states applying a uniform definition of substantial bodily injury. A uniform statute would produce the greatest certainty because states would be applying the same standard. *See BURFIEND & BARTUSCH*, *supra* note 142, at 260. However, given the minimal differences between these two approaches, the difference in the rape rate would likely be miniscule. However, adopting a uniform method may also help to deter other crime since the definition is applied to all crimes.

³⁰⁵ *See supra* note 93 (defining substantial bodily injury among states).

³⁰⁶ *See* WIS. STAT. § 940.225(1)(a) (2008). This model statute is based on Wisconsin's definition of first-degree assault. *Id.*

to add an impairment to their definition. Nor would legislatures have to redraft the current definition of substantial bodily injury. Furthermore, this approach is consistent with the other two methods in that it adequately punishes the rapist for the injury he causes and it eliminates the need to look at extraneous factors to determine whether to increase the sentence, because pregnancy would be an aggravating factor in all rape cases. Therefore, this would be a simple solution for states that do not list impairments within their definitions of substantial bodily injury.

D. Choosing the Best Alternative

Ideally, states should adopt a uniform definition of substantial bodily injury because it would promote uniformity, deter crime, and correct the courts' current reluctance to apply pregnancy as an aggravating factor.³⁰⁷ Nevertheless, all three approaches would resolve the problem of courts failing to recognize pregnancy as an aggravating factor. Thus, the second and third approaches may be more viable since other criminal laws would not be affected and states would not have to redevelop their entire definition of substantial bodily injury. Depending on the state's statutory scheme, it may be more beneficial for a state to add pregnancy to its existing definition of substantial bodily injury or to its first degree rape statute. Irrespective of the approach taken, rapists would receive appropriate punishment and women would receive justice. Thus, states can adopt whichever method is easiest and most beneficial, because all three approaches rectify the problem of states failing to recognize pregnancy as substantial bodily injury.

V. CONCLUSION

Throughout history rape has been under-recognized and under-prosecuted. The evolution of rape laws brought great change, to the point that states almost treat rape the same as other crimes. However, the current rape laws do not adequately punish the assailant under all circumstances. Although other criminal laws punish an assailant according to the injury he inflicts, rape laws fail to adequately punish the rapist when he impregnates his victim. Since the impregnated victim

³⁰⁷ A uniform statute creates the most certainty because states would apply it the same. BURFEIND & BARTUSCH, *supra* note 142, at 260. Since the severity of punishment would be the same under all three approaches, certainty is the variable factor. A uniform statute adopted by all states would clearly give the actors the best idea of what to expect. *Id.* Because the definition of substantial bodily injury applies to other crimes, greater certainty of punishment may also decrease the incidence of these crimes.

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experiences physical effects beyond those of the ordinary victim, extended punishment is warranted.

Currently, the physical effects of pregnancy are consistent with the definition of substantial bodily injury, and should be applied as such. Courts commonly recognize more trivial injuries, such as bruises and lacerations, as substantial bodily injury. Furthermore, the case-by-case analysis applied by some courts ignores the fact that every pregnancy has significant physical and mental effects. To resolve this issue, as well as the courts' reluctance to apply principles of substantial bodily injury to rape-related pregnancy, states should adopt a uniform statute including pregnancy in the definition of substantial bodily injury. The adoption of such a law would create deterrence and uniformity among the states. Thus, a man who rapes his stepdaughter, causing her to have an uncomplicated abortion would receive punishment identical to that of the rapist of an adult woman who suffers five years of mental anguish after having an abortion, and that of the rapist of an adult woman who carries the child to term and undergoes the physical pain of childbirth. The outcome of pregnancy cannot be considered trivial in any of these circumstances, this is the desired outcome to fully and fairly punish the rapist, and can easily be achieved by the addition of a single term to pre-existing laws.

Lauren Hoyson*

* J.D. Candidate, Valparaiso University School of Law (2010); M.B.A. Valparaiso University (2010); B.A. Business Administration, Baldwin-Wallace College (2006). Thanks to my parents, Steve and Deb, for your support and encouragement.